

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA)

)

vs.

)

Case 2:17-cr-00419-AKK-TMP

)

JOEL IVERSON GILBERT)

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UNITED STATES' SENTENCING MEMORANDUM

Comes now the United States of America, by and through Jay E. Town, United States Attorney for the Northern District of Alabama, and respectfully submits the following sentencing recommendation for Joel Iverson Gilbert, a lawyer who, together with his client's representative, callously and selfishly bribed a state legislator with a \$375,000.00 consulting contract to betray his constituents and neighbors and exclusively represent the interests of Drummond Company. The defendants' conduct harmed the residents of North Birmingham and Tarrant, and brought shame on Balch & Bingham, Drummond Company, and his profession. In

the course of committing these crimes and defending himself, the defendant lied, overtly or through concealment, to the Court, the trial jury, the Grand Jury, the residents of North Birmingham and Tarrant, his client, his partners and co-workers, and members of the Alliance for Jobs and the Economy (“AJE”).

The United States recommends that the Court sentence Gilbert to 97 months imprisonment, impose a fine of \$250,000.00, and order Gilbert to serve three years of supervised release following imprisonment. As a special condition of supervised release, the government requests that the defendant be required to perform 250 hours of community service in the North Birmingham community annually. The recommended sentence fairly reflects Gilbert’s crimes, restitution to the community, his lack of remorse and obstruction of justice, and sends the appropriate messages of deterrence.

THE CRIMES

The evidence presented at trial proved that Gilbert and Roberson conspired to bribe state representative Oliver Robinson with a consulting contract to reward him for using his office to support the defendants’ position opposing the EPA’s actions involving expansion and prioritization of a Superfund site near Robinson’s legislative district. The evidence established that over a two-year period, the

defendants paid Robinson approximately \$375,000 under the contract. In return, Robinson, among other actions, took a variety of official acts to support the defendants' agenda. Robinson advocated for the defendants' positions in a meeting with the EPA, using talking points drafted by Gilbert and secretly recording the meeting; he made comments to the Alabama Environmental Management Commission (AEMC) urging them and the Director of the Alabama Department of Environmental Management (ADEM) to be more involved in North Birmingham and to help narrow the list of parties potentially responsible for the Superfund site cleanup; and he voted in the Alabama House of Representatives Rules Committee on a resolution, drafted by Gilbert, opposing the EPA's efforts in North Birmingham. In performing each of these official acts, Robinson concealed his financial relationship with Balch and Drummond, as the defendants and their contract required him to do.

The evidence established that, at all relevant times, two matters were pending before the EPA that directly implicated the defendants and their interests. First, in July 2014, the EPA began considering a petition to expand the 35th Avenue Superfund Site. Also, in September 2014, the EPA proposed adding the Superfund Site to the National Priorities List. Evidence presented at trial proved the defendants' determination to influence ADEM's position regarding these issues. The EPA's and

ADEM's consideration of these proposed actions, and the defendants' interest in opposing EPA and influencing ADEM, continued into 2016.

The defendants had an interest in ensuring that the EPA decided against both actions. Roberson worked as a lobbyist at Drummond Company, and the EPA had identified ABC Coke, a division of Drummond, as one company potentially responsible for the pollution in North Birmingham. Drummond could potentially be held liable for tens of millions of dollars in cleanup costs and fines. Drummond hired Balch and Bingham ("Balch") to represent Drummond in opposing the EPA's actions. Gilbert was the partner at Balch primarily representing Drummond in responding to the EPA's actions in North Birmingham; he was awarded substantial increases in compensation and partnership stake based largely on the significant attorney's fees collected from Drummond.

The evidence further proved that, as part of their strategy, Roberson exploited his relationship with Oliver Robinson and brought Robinson into the scheme. The defendants paid Representative Robinson to take, among other actions, official action favorable to the defendants' interests in matters related to EPA's efforts in North Birmingham. Beginning in November 2014, the defendants discussed entering into a contract with one of Robinson's entities. Gilbert later (in February 2015) drafted and signed the contract with Robinson's foundation, and ensured that Balch

invoices were sent to Roberson at Drummond to facilitate reimbursement for Balch's payments to Robinson. The defendants' payment scheme was designed to hide Drummond's funding of payments to Oliver Robinson's foundation; it worked differently than the manner in which payments were made to SE&C, the other consultant hired by Balch and Drummond on this project. SE&C billed, and was paid by, Drummond directly.

Emails introduced into evidence at trial proved that on December 11, 2014, Robinson told Gilbert that "we will need \$7000 per month," and that payments should go "to the Oliver Robinson Foundation. It was decided the Foundation is best because all types of corps support [Robinson's] foundation." Oliver Robinson also reminded Gilbert that he was scheduled to meet with the Regional Administrator for EPA Region 4 the following day. A few hours later, Gilbert informed Robinson that Drummond had approved his request. Balch billing records revealed that Gilbert spoke with Roberson about approval for Robinson's request for \$7,000 per month. The next day Robinson met with and advised EPA officials on the issues related to North Birmingham. In preparation for that meeting, Gilbert gave Robinson a list of talking points consistent with the defendants' position and Robinson secretly recorded the meeting, delivering the recording to Gilbert immediately following the meeting.

In early February 2015, Gilbert and Roberson met to discuss the upcoming AEMC meeting they wanted Robinson to attend. Roberson initially approached Robinson about making comments to AEMC in response to GASP's earlier presentation. Roberson lied to the FBI when he minimized his knowledge of and participation in Robinson's AEMC appearance. Gilbert and his associate drafted a letter for Robinson's signature requesting permission to speak at the AEMC meeting. Gilbert specifically added the phrase "as a state legislator" to the letter to make it clear that Robinson would be appearing at AEMC in his official capacity. Gilbert lied to the Grand Jury and trial jury about his intent that Robinson use his office in this manner. Robinson printed the letter on his official letterhead, signed it, and sent it to the AEMC Chairman. The letter included this sentence, drafted by Gilbert: "As a state legislator and representative of a district adjacent to the North Birmingham superfund site, it is my duty to ensure that the North Birmingham community is adequately represented to relevant State organizations such as AEMC."

On February 6, 2015, the day he signed the letter, Robinson expressed reluctance to Gilbert about speaking to the AEMC. Robinson's reluctance was proven by his testimony, the testimony of Balch attorney Irving Jones, and by Gilbert's email to Roberson informing him that Robinson was having second thoughts and that "[Robinson] needed to think about the politics of it before he would

commit to providing comments to the AEMC.” Gilbert asked Roberson to “follow[] up with [Robinson] on this issue.” In the two weeks between February 6th and the AEMC meeting on February 20th, Gilbert had conference calls and meetings with Roberson “regarding AEMC,” “regarding Mr. Oliver Robinson’s activities,” and “various calls with Messrs. Oliver Robinson and David Roberson regarding finalization of engagement agreement and payment.” Also, the defendants held a meeting with Robinson to prepare him for his AEMC comments. The defendants convinced Oliver Robinson to appear at the AEMC meeting, despite his reluctance, with words, money, and a contract.

Gilbert finalized the contract between Balch and Robinson, requested that Balch’s accounting department quickly write a \$14,000 check to the Foundation, and invoiced Roberson at Drummond for the same amount. Roberson ensured a check was immediately delivered to Balch for \$14,000 to fund the payment to Oliver Robinson’s foundation. Gilbert gave Robinson the \$14,000 check, and Gilbert and Robinson executed the contract, which mandated that even its “existence” be kept “confidential” by Robinson.

Four days after execution of the contract and delivery of the \$14,000 check, Robinson appeared at the AEMC meeting. A video recording presented at trial established that Robinson advised the AEMC and ADEM Director to take and

maintain a position on behalf of the State of Alabama favorable to the defendants' interests on the two proposed EPA actions. At the AEMC meeting, Robinson stated that the AEMC should help narrow the list of potentially responsible parties if no reports or tests implicated them. The defendants' general intent in sending Robinson to speak before the AEMC was to get ADEM more involved in the North Birmingham issues. As Gilbert confirmed during his testimony, ADEM was an important state agency, the defendants were not pleased with ADEM's response to the EPA, and they wanted ADEM to more aggressively assert the State's appeal rights.

A few months later, Gilbert wrote a Joint Resolution for consideration by the Alabama Legislature urging "the Attorney General and ADEM to combat the EPA's overreach." Roberson admitted to the FBI that he was involved with SJR-97, and Drummond paid Balch legal fees under the 35th Avenue Superfund Site matter for drafting the resolution. The defendants sent the draft resolution forward, knowing it would be introduced in the legislature and that Robinson would have a vote at a time when Robinson was on retainer to Balch to act in Balch's interests exclusively in relation to the environmental issues pending in North Birmingham. Robinson voted in the House Rules Committee to send the resolution to the floor of the House with the recommendation that the resolution be adopted. The defendants cited the joint

resolution in correspondence sent to public officials and others enlisting support for Drummond's position.

The defendants' strategy included influencing other public officials to adopt Drummond's position opposing EPA's actions in North Birmingham and Tarrant. Gilbert, with Roberson's approval, wrote numerous letters for public officials, including the Alabama Governor and Attorney General, and every member of the federal legislative delegation from Alabama except Representative Terri Sewell. Moreover, the defendants met with representatives of the Governor's and Attorney General's offices. When ADEM Director Lance LeFleur proved unresponsive to the defendants' entreaties, the defendants convinced the Governor to apply pressure on LeFleur.

In mid-2015, in an effort to conceal the arrangement among Balch, Drummond, and the Oliver Robinson Foundation, Gilbert instructed Balch's accounting department to remove references to the Foundation on its past invoices to Drummond and to avoid similar references on future invoices. According to Gilbert, his directive regarding the invoices was motivated by a request from Drummond. Roberson was the primary contact at Drummond for the Robinson contract and payments, and Gilbert sent the consulting invoices related to Oliver Robinson directly to Roberson. These invoices were handled differently than the

other invoices from Balch, which were sent directly to Drummond's General Counsel.

The defendants formed the Alliance for Jobs and the Economy ("AJE") to supplement Drummond's funding of payments to Robinson. Roberson controlled AJE's bank account and decided which entity – Drummond or AJE – would reimburse Balch for the payments to Oliver Robinson's foundation. The defendants concealed from AJE members that Oliver Robinson's foundation was involved in community outreach and that all their contributions were being used to pay Robinson.

Through GetSmart Tarrant, the Oliver Robinson Foundation performed some community outreach work in Tarrant beginning in October 2015, after Amanda Robinson was hired. Gilbert admitted that the community outreach work began with GetSmart. The only work arguably characterized as community outreach prior to the GetSmart campaign in the Fall 2015 was John Powe's collection of signatures on Gilbert's "dumbed down" community letters, for which Powe was paid \$1,000. Between December 2014 and September 2015, when his only actions were the official ones involving the illegal use of his office, Robinson was paid \$49,000. In fact, on February 25, 2015, following Representative Robinson's appearance at the AEMC, Gilbert and Roberson met with Trey Glenn and Scott Phillips from SE&C

regarding their “community outreach strategy.” Neither defendant informed them that Robinson was a paid consultant working on community outreach during discussions about the participants on their community outreach team and the strategy going forward.

THE DEFENDANT’S OBJECTIONS TO THE PSR

The defendant asserts that his crimes were victimless, objects to the calculation of the loss amount, and argues that he did not obstruct justice by committing perjury during trial. Doc. 293. The United States submits the following response to each of these objections.¹

A. Victim Impact

Residents of North Birmingham: Gilbert admits, as he must, that all citizens of Alabama, including those residing in North Birmingham, are victims of his bribery conspiracy with Oliver Robinson in the sense that corrupt politicians and

¹ The Offense Conduct section of the PSR is the Probation Officer’s attempt to summarize the defendant’s criminal conduct. However, because she was not present during the four week trial and did not have the benefit of the trial transcript, her rendition of the facts is not a complete statement of the evidence proving the defendant’s guilt. It is, however, a substantially accurate summary. The testimony and exhibits admitted during trial fully prove the defendant’s crimes. By not objecting to the PSR, the United States is not conceding, for purposes of appellate review, that the PSR’s version of the defendant’s offense conduct is a complete statement of the evidence supporting the jury’s verdicts.

their cohorts harm us all. Doc. 293, *Sharman Letter*, October 2, 2018, at 2. The conspirators' actions also victimized the residents of North Birmingham by potentially adversely affecting their health.

The defendants' broad strategy was to prevent the 35th Avenue Superfund Site from being listed on the National Priorities List, whether Drummond Company was responsible for the pollution found in the yards of North Birmingham residents or not. As part of this strategy, the defendants convinced public officials, Oliver Robinson among them, to insert themselves into the process by submitting letters and/or making comments (written by the defendant) objecting to the NPL listing. This strategy created delay within EPA that prevented a decision within the ordinary timeframe. As Jennifer Wendel from EPA testified: "And if a site is, let's say, proposed in the spring and doesn't receive a significant amount of adverse comments, we usually then go ahead and finalize it in the next rule update, which would be in the fall. If we receive a lot of comments that are going to require a lot of work, sometimes that can be delayed." Tr. at 1589. Anne Heard, Deputy Administrator of EPA Region IV and a participant in the meeting with Oliver Robinson, for which the defendant paid Robinson a bribe, testified that she noticed (to her surprise) Robinson's pro-business slant, Tr. at 2907-08, and that the adverse

opinion of a state legislator such as Robinson would “at least give me pause” and “impact my evaluation of a matter,” Tr. at 2889-90.

At least in part, as a result of the conspirators’ actions, including bribery of Oliver Robinson, the additional federal money that EPA could have used to clean up pollution that had been found in residents’ yards was not available. *See* Tr. at 1507, 1588 (NPL listing allows EPA to access additional funding). The residents’ continued exposure to pollution while EPA considered the comments of Oliver Robinson and other public officials, encouraged and written by Gilbert, carried at least the potential to adversely affect residents’ health. And if the defendants’ overall plan of preventing the listing of the 35th Avenue Superfund Site on the NPL had succeeded, the additional federal money needed to finish the cleanup of polluted yards never would have been available despite the communities’ and residents’ obvious needs.

Alliance for Jobs and the Economy: The members of AJE were also victims of the defendants’ bribery scheme because the defendants concealed from them that all of their contributions were being used to fund payments to the Oliver Robinson Foundation. The evidence proved overwhelmingly that the defendants did not tell any member of AJE that their money was being used to pay Oliver Robinson’s foundation or that Robinson had been asked to perform the official acts. Steve

Messier of Nucor Steel, Mike Thompson of Thompson Tractor, and Van Richey of ACIPCO each testified that the defendants never told them that their contributions were being funneled to Oliver Robinson's foundation. Tr. at 1212, 1218 (Messier); Tr. at 1264-65, 1286, 1314 (Thompson); Tr. at 1340-41, 1346, 1378-79 (Richey). Gilbert lied about what information he shared with these CEOs during his trial testimony. Tr. at 4043. That Roberson buried one Oliver Robinson Foundation invoice to Balch in the middle of a lengthy email attachment containing Balch invoices to AJE is a mistake, not transparency. Neither of the CEOs who received that email testified that they read that lone invoice, and they did not know that the edited Balch invoices concealed monthly payments to the Oliver Robinson Foundation. Tr. at 1287 (Thompson); 1362-63 (Richey).

B. Loss Amount

The loss amount is \$119,000.00, the amount Oliver Robinson received from Balch's payments to the Foundation under the contract given as the bribe. *See* U.S.S.G. § 2C1.1(b)(2)(referring to the "value of the payment" and the "value of anything obtained or to be obtained by the public official" as determining factors of loss). This amount includes money paid to the Oliver Robinson Foundation during the duration of the tainted contract minus the amounts paid to others who worked for the Foundation performing community outreach and expenses. The evidence

produced at trial, including the Balch checks and Oliver Robinson Foundation invoices, supports this loss amount and allows the Court to make a reasonable estimate of loss. *See* U.S.S.G. § 2B1.1, comment. (n.3(C)) (“The court need only make a reasonable estimate of the loss.”).

The Oliver Robinson Foundation invoices, admitted into evidence collectively as GX 93, show that, prior to the creation of GetSmart in October 2015, when community outreach began, the Foundation sent Balch six invoices totaling \$49,000.00. Oliver Robinson paid \$1,000.00 to John Powe for obtaining signatures on Gilbert’s dumb-downed letters, GX 283, leaving \$48,000.00 for Robinson. Beginning in October 2015 and continuing until December 2015, the Foundation sent Balch twenty five invoices that included a \$2,500.00 charge for Oliver Robinson as a program lead (total of \$62,500.00) and one invoice that included a \$1,500.00 charge for Robinson as a program lead. GX 93. Balch paid each of these invoices, as evidenced by their checks to the Foundation that were admitted collectively into evidence as GX 94. Therefore, the value of the payments to Oliver Robinson is calculated as follows: $\$48,000.00 + \$62,500.00 + \$1,500.00 = \$119,000.00$. The remainder of the money paid by Balch and Drummond to the Foundation was used to pay administrative costs and employees of GetSmart, including Amanda Robinson, John Powe, and Hezekiah Jackson. GX 93.

Oliver Robinson admitted that the loss amount was \$123,000.00, and the Court used that loss amount in sentencing him for this same scheme. Oliver Robinson also agreed as part of his plea and sentencing that he would (and he did) personally pay taxes on *all* the money Balch paid to the Foundation.

The defendants' objections to the calculation of the loss amount are unfounded. First, the loss amount correctly reflects that Oliver Robinson received benefits from the contract until at least December 2016. The invoices from the Foundation to Balch, GX 93, and the checks from Balch to the Foundation, GX 94, prove the time frame of the payments. Gilbert's attempt to limit the time frame of the conspiracy by citing the government's summary exhibit, GX 260, mischaracterizes the purpose of that evidence. The summary exhibit was offered to show the lack of community outreach work by Oliver Robinson and John Powe prior to GetSmart and not, as the defendant argues, to prove the relevant parameters of the bribery conspiracy.

The amount received personally by Oliver Robinson is considered loss whether he performed work or not. *See* U.S.S.G. § 2C1.1(b)(2)(referring to the "value of the payment" and the "value of anything obtained or to be obtained by the public official"). Nevertheless, the evidence, including the defendants' own admissions, proved that Robinson did little work under the contract. Gilbert admits

in his objection that the evidence demonstrated that he barely dealt with Oliver Robinson after Fall 2015. Doc. 293, *Sharman Letter*, October 2, 2018, at 3. Gilbert testified during trial that “I’m not sure of any work he did do.” Tr. at 3926. In Grand Jury, when asked about Oliver Robinson’s role under the contract, Gilbert testified that “He really didn’t have any.” Tr. at 3264. Defendant Roberson’s statement similarly reflects that “Robinson was not going to do the work,” Tr. at 3481, and that “Roberson did not expect Robinson to be out in the community. He was the brains behind it. Roberson rarely met with Robinson after the contract was established.” Tr. at 3482. Oliver Robinson’s testimony was consistent with the defendants’ admissions. Robinson testified that he did not meet with the defendants often and was not out in the neighborhoods, Tr. at 1776, and Robinson did not list himself when naming the people at the Foundation who were performing the work, Tr. at 2035. The government’s summary exhibit, cited by Gilbert as a basis for his objection, proves that neither Robinson nor his Foundation did community outreach prior to GetSmart. GX 260.

Gilbert also asserts that the loss amount should only include \$5,000 per month for the first seven payments to the Foundation (before GetSmart) rather than the \$7,000 Balch and Drummond actually paid to the Foundation monthly. Gilbert’s sole support for his argument is that the evidence proved Robinson received only \$5,000

per month as a “program lead” after GetSmart became operational in October 2015. Gilbert’s argument is wrong. First, Oliver Robinson personally received, through his Foundation, each of the \$7,000 payments Balch made in the months prior to October 2015, except for \$1,000 he paid to John Powe for procuring signatures on Gilbert’s dumb-downed letters. The evidence at trial proved there was no one else involved with the contract at the Foundation other than Robinson and Powe (in the very limited capacity related to the letters) prior to the hiring of Amanda Robinson to direct GetSmart. Oliver Robinson confirmed that the \$7,000 payments from Balch had very little to do with John Powe. Tr. at 2031. Second, even if the amount is only \$5,000 per month, as Gilbert argues, the eight level enhancement to the offense level would not change because the loss amount would still fall within the \$95,000.00 to \$150,000.00 range in U.S.S.G. § 2B1.1(b)(1)(E).

C. Obstruction of Justice

The defendant’s offense level should be enhanced by two levels pursuant to U.S.S.G. §3C1.1 because the defendant gave false testimony during trial. As shown by the excerpts of the defendant’s testimony provided by the government, Doc. 291, Exhibit A, the defendant testified on material matters contrary to other witnesses, his own Grand Jury testimony, and/or the common sense interpretation of his own records. The jury necessarily found that the defendant lacked credibility and rejected

his testimony in finding him guilty on all counts. The government has proven, by at least a preponderance of the evidence, that the defendant attempted to obstruct justice through false testimony.

The Sentencing Guidelines provide a two level enhancement to the offense level if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution or sentencing of the offenses of conviction when the obstructive conduct relates to the defendant's offenses of conviction. U.S.S.G. § 3C1.1. An example of obstructive conduct warranting an enhancement is committing, suborning or attempting to suborn perjury. *Id.*, comment. (note 4(B)). The defendant has no constitutional or statutory right to testify falsely under oath, and enhancing his sentence for attempting to obstruct justice by testifying falsely does not infringe upon his right to testify in his defense. *United States v. Dunnigan*, 507 U.S. 87, 96-98 (1993). The government must show obstruction of justice only by a preponderance of the evidence. *United States v. Wallace*, 425 F. Appx. 841 (11th Cir. 2011).

When a defendant's testimony contradicts, on material matters, the testimony of other witnesses the court finds credible, including coconspirators, the enhancement should be applied. *United States v. Dobbs*, 11 F.3d 152, 153-55 (11th Cir. 1994) (enhancement upheld where defendant's blanket denial of the charges and

alternative explanation of his behavior was fundamentally inconsistent with coconspirator's testimony that court found credible). *Accord United States v. Curry*, 679 F. Appx. 781, 788-89 (11th Cir. 2017) (jury and court credited other testimony and determined that defendant lacked credibility); *United States v. Kalu*, 485 F. Appx. 366, 370-71 (11th Cir. 2012) (enhancement applies where court makes determination that defendant's testimony is inconsistent with another witness's testimony that the judge determines is truthful); *United States v. Perez*, 350 F. Appx. 425, 431 (11th Cir. 2009) (defendant's testimony contradicted by other witnesses); *United States v. Fernandez*, 353 F. Appx. 363, 377-78 (11th Cir. 2009) (denial of guilt under oath sufficient to constitute obstruction of justice); *United States v. Ekpo*, 266 F. Appx. 830, 835-36 (11th Cir. 2008) (defendant's testimony directly contradicted by coconspirator); *United States v. Vallejo*, 297 F.3d 1154, 1168-69 (11th Cir. 2002) (same); *United States v. Lewis*, 115 F.3d 1531, 1537-38 (11th Cir. 1997) (inconsistencies in defendant's testimony, as well as contradictions with other witnesses' testimony, supported conclusion that defendant intended to testify falsely); *United States v. Tapia*, 59 F.3d 1137, 1144-45 (11th Cir. 1995) (defendant's testimony inconsistent with that of coconspirator). The enhancement can also apply when the defendant's testimony is inconsistent with his own grand jury testimony. *United States v. Jennings*, 599 F.3d 1241, 1254 (11th Cir. 2010).

A. The defendant's false testimony set forth in the "False Denials of Guilt," "Did Not Intend For Robinson To Use His Office," and "Official Acts Were Unrelated To Contract" sections of the excerpts provided by the government, Doc 291, Exhibit A, proves obstruction of justice. According to the defendant's repeated protestations, he did not bribe Oliver Robinson or conspire to do so, and the contract with Robinson's foundation was legitimate and not a bribe. The defendant also testified falsely under oath that he did not ask or intend for Oliver Robinson to use his elected office and that Oliver Robinson lied when he said otherwise. The defendant even testified that his addition of the "as a state legislator" language to the letter he had Robinson send to the AEMC, GX 1, was not meant to convey that Robinson would be speaking in his official capacity. But the jury necessarily rejected the defendant's testimony and credited Oliver Robinson's testimony that "I was bribed," Tr. at 2031, and that the defendants gave him the contract to influence and reward him for using his office on their behalf, including at the AEMC, Tr. at 1670-71. The Court also found Oliver Robinson's testimony to be truthful in granting him a downward departure for substantial assistance. Robinson Sentencing Transcript at 29. The defendant's false denials of guilt under oath constitutes obstruction of justice, *Fernandez*, 353 F. Appx. at 377-78 (denial of guilt under oath sufficient to constitute obstruction of justice), even when the defendant's false testimony relates

to his intent, *Wallace*, 425 F. Appx. at 842 (defendant falsely testified that he did not knowingly possess firearm); *Ekpo*, 266 F. Appx. at 835-36 (defendant falsely testified that he did not knowingly submit false claims: *Dobbs*, 11 F.3d at 153-55 (enhancement upheld where defendant offered testimony that he had no knowledge of scheme to defraud).

B. The defendant also testified falsely regarding the timing of his meeting with Mike Tracy, during which he told Tracy and other Drummond officials that Balch experts had opined that it was legal and ethical to contract with the Oliver Robinson Foundation for community outreach. Mike Tracy testified that the meeting happened prior to Oliver Robinson's proposal, Tr. at 1404-05, 1407, 1452-53, 1465, which was submitted on November 25, 2014, GX 9. As reflected in the excerpts of the defendant's testimony in the "Meeting With Mike Tracy Did Not Occur When Tracy Said" section of the government's submission, Doc. 291, Exhibit A, the defendant testified that the meeting did not happen until late December or early January. The timing of the meeting was important to the defendant because his alleged consultation with Chad Pilcher, one of Balch's ethics experts, allegedly occurred on December 15, 2014. The defendant needed to convince the jury that the meeting with Mr. Tracy happened after December 15 so that they would not believe he lied to Mr. Tracy during the November meeting about obtaining advice from

experts at Balch. The defendant argues that this testimony was not material; however, the defendant's credibility became a material issue when he chose to testify about his vetting of the contract and the timing of his disclosures to Mr. Tracy as part of his defense.

C. The defendant also lied during his trial testimony about how he and Roberson spent the money contributed to AJE and what information he shared with the CEOs of companies that paid those contributions. Tr. at 3948, 4043. The evidence proved overwhelmingly that the defendants used all of AJE's money to fund the bribe payments to the Oliver Robinson Foundation under the contract but did not tell any member of AJE that their money was being used in this manner. Steve Messier of Nucor Steel, Mike Thompson of Thompson Tractor, and Van Richey of ACIPCO each testified that the defendants never told them that their contributions were being funneled to Oliver Robinson's foundation. Tr. at 1212, 1218 (Messier); Tr. at 1264-65, 1286, 1314 (Thompson); Tr. at 1340-41, 1346, 1378-79 (Richey). The defendant admitted that his testimony differed. Tr. at 4043.

D. The defendant also lied about when community outreach work by the Oliver Robinson Foundation began. According to the defendant's trial testimony, it was not true that the Oliver Robinson Foundation's community outreach work began with the formation of GetSmart in the Fall of 2015. Tr. 4038. But the defendant

testified in Grand Jury that Oliver Robinson Foundation's work "initially started with the formation of GetSmart community group." Tr. at 4039. Because the defendant's trial testimony contradicted his Grand Jury testimony on this material matter, the obstruction of justice enhancement is warranted. *See Jennings*, 599 F.2d at 1254 (enhancement affirmed where defendant's trial testimony directly contradicted his grand jury testimony).

E. Finally, the defendant provided false testimony under oath when he testified that he did not believe Oliver Robinson was getting money from the Balch payments to the Foundation and that Robinson told him he was not receiving money. Tr. at 3972-75, 3977, 4085-86, 4154. The defendant was confronted during cross-examination with documents proving that he knew Oliver Robinson was receiving money. First, the defendant was confronted with the Foundation's invoices, which indicated that the "programs leads" were paid \$5,000 every two weeks. Oliver Robinson had testified earlier that he was a program lead. Tr. at 1784. The defendant testified that he thought the program leads were John Powe and the Foundation itself, not Oliver Robinson. He explained that he thought the Foundation was reimbursing itself for administrative costs, but his testimony was proven false when it was pointed out that the invoice had a separate line item of \$3,000 for "materials and administrative costs." The defendant's response was: "Yeah. Well...." Tr. at 3973.

And the defendant was confronted with GX 265, his handwritten notes indicating that “OR” was being paid \$5,000 per month. Tr. at 3974-75. Undaunted, during redirect the defendant testified falsely that Oliver Robinson told him repeatedly that he would not be receiving any money. Tr. at 4085, 4154. Oliver Robinson testified that he never told the defendants that he would not be receiving money. Tr. at 1744.

APPLICATION OF THE SECTION 3553(a) FACTORS

A. The PSR Correctly Calculates the Guidelines Ranges.

Although the Guidelines are not mandatory, they remain “the starting point and the initial benchmark” in determining the appropriate sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007). The Guidelines as written “reflect the fact that the Sentencing Commission examined tens of thousands of sentences” over many years in an effort to achieve the objectives of 18 U.S.C. § 3553(a). *Rita v. United States*, 551 U.S. 338, 349 (2007). The “result is a set of Guidelines that seek to embody the Section 3553(a) considerations, both in principle and in practice.” *Id.* at 350. Thus, “it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve” those statutory objectives. *Id.*

The presentence report correctly calculates the total offense level as 28 and criminal history category as I, resulting in an advisory Sentencing Guidelines range

of 78-97 months. The United States recommends a sentence of imprisonment of 97 months.

B. The Recommended Sentence Is Fair and Reasonable.

Having correctly calculated the Guidelines range, the Court must impose a sentence “sufficient, but not greater than necessary, to comply with the purposes” of sentencing set forth in 18 U.S.C. § 3553(a). Under the circumstances of this case, the recommended sentence of 97 months imprisonment is fair and reasonable, adequately considers “the nature and circumstances of the offense and the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1), and would achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

The recommended sentence adequately addresses the “nature and circumstances of the offense,” “reflect[s] the seriousness of the offense,” “promote[s] respect for the law,” and “provide[s] just punishment for the offense.” 18 U.S.C. § 3553(a)(1) and (2)(A). The defendants’ crimes undoubtedly were serious and impacted many. Short of some act of violence, the defendants could not have asked Oliver Robinson to commit a more egregious crime than selling his elected office. The defendants’ serious crimes deserve serious punishment.

Corruption of an elected official harms us all. As explained above, residents of North Birmingham were victimized in more than the usual ways as a result of this particular bribery scheme. The defendants' illegal conduct also inflicted lasting damage on our government as an institution, further eroding already waning confidence in our elected officials. The defendant also dishonored our shared profession, breaching several ethical rules of the Alabama Bar Association through his criminal conduct.

The defendants' scheme also damaged his law firm, his law partners, and every Balch employee, all to which Gilbert owed a duty of loyalty and honesty. The dregs of his crimes have apparently caused Balch to expend millions in legal fees defending itself, responding to subpoenas, and funding Gilbert's criminal defense. Gilbert also breached his duties to his client, Drummond Company, by seeking to advance Drummond's interests through illegal means.

These crimes were conceived and set in motion by Roberson and Gilbert. There would have been no bribery scheme if the defendants had not offered the bribe to Roberson. Without regard for Oliver Roberson's constituents or the people of North Birmingham and Tarrant, the defendants tempted Oliver Roberson by offering an enticement to sell his office and betray the trust of his community.

Under the circumstances of this case, the recommended sentence will justly punish Gilbert for his participation in these serious offenses and thereby promote respect for the law.

The recommended sentence will also “afford adequate deterrence to criminal conduct.” 18 U.S.C. § 3553(a)(2)(B). That a lawyer who conspired with a corporate executive/lobbyist and used the client’s money to buy a politician will serve significant time in prison for his crimes sends the appropriate message of deterrence. Other lawyers, corporate executives, and lobbyists surely will heed the sentence and be reminded of the consequences of bribery. The sentence imposed in this case should communicate that paying elected officials to influence and reward the use of their office is not an acceptable business practice. It is especially important that this message be communicated to potential bribe payers sitting in executive suites at corporations and law firm offices who believe bribes can be masked as consulting contracts. The greater term of imprisonment recommended for Gilbert (as compared to the sentence imposed on Oliver Robinson) also rightly communicates that early acceptance of responsibility, genuine remorse for criminal conduct, and truthful cooperation with government investigations of public officials and those with whom they conspire will be duly rewarded.

The recommended sentence also avoids “unwarranted sentence disparities among defendants.” 18 U.S.C. § 3553(a)(6). Gilbert’s sentence should be significantly greater than Oliver Robinson’s sentence because Robinson accepted responsibility, pleaded guilty, and provided timely, substantial, and truthful cooperation. Gilbert lied to the trial jury and Grand Jury, and did not accept responsibility or cooperate. Gilbert’s sentence should be greater than Roberson’s in recognition of Gilbert’s false testimony during trial.

The Court should also consider certain aspects of the defendant’s character, as revealed during the investigation and trial of his crimes. To further his career, increase his income by gaining levels within the Balch partnership, and defeat the EPA, the defendant was willing selfishly to put his partners and firm at risk by crossing the line into criminal conduct. The defendant’s actions have damaged Balch’s reputation and cost it financially. Along the way, the defendant concealed the truth about Oliver Robinson from the attorneys in the environmental section with whom he worked closely on the Drummond matters, Balch’s ethics experts (Greg Butrus and Chad Pilcher), the firm Administrator (David Miceli) and employees of the Balch accounting department, the members of the Balch Compensation Committee, and his partners in general.

The defendant also lied to Mike Tracy, a Drummond executive, about having vetted the legality of a potential agreement with the Oliver Robinson Foundation. The defendant, an officer of the Court, compounded his lie by falsely testifying at trial about the timing of that meeting. This was but one of many examples of perjury by the defendant during trial. The defendant also concealed material facts from the CEOs of the companies who contributed to AJE.

The defendant's poor character was also revealed by his callous disregard for the welfare of students at Tarrant Elementary School. As part of the site inspection it was conducting in Tarrant in response to the GASP petition, the EPA sought to test the soil on the grounds of Tarrant Elementary School at no cost to the school system. The Superintendent of the Tarrant School System agreed to allow the testing. Exhibit A. But the defendant, through the Tarrant City Attorney, convinced her to reverse course, writing a letter for her signature rescinding permission and actually editing the authorization form in his own handwriting. Exhibits B and C.

CONCLUSION

WHEREFORE, the United States respectfully requests that the Court sentence Gilbert to 97 months imprisonment, impose a fine of \$250,000.00, and order Gilbert to serve three years of supervised release following imprisonment. As a special

condition of supervised release, the government requests that the Court require Gilbert to perform 250 hours of community service in the North Birmingham community annually.

Respectfully submitted,

/s/ George Martin

GEORGE A. MARTIN, JR.

ROBIN B. MARK

JOHN B. WARD

Assistant United States Attorneys

CERTIFICATE OF SERVICE

I certify that on October 17, 2018, I filed this document electronically with the United States District Court for the Northern District of Alabama using the CM/ECF system and thereby caused a copy to be served on the defendant's counsel of record.

/s/ George Martin

GEORGE A. MARTIN, JR.

Assistant United States Attorney