# 15-1798-cr

# United States Court of Appeals
## for the
# Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

– v. –

MATTHEW LIBOUS,

*Defendant-Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR DEFENDANT-APPELLANT


MERINGOLO & ASSOCIATES, P.C.
By: JOHN MERINGOLO, ESQ.
375 Greenwich Street, 7th Floor
New York, New York 10013
(212) 941-2077

– and –

CLARA KALHOUS, ESQ.
459 Columbus Avenue, #165
New York, New York 10024
(347) 415-9523

*Attorneys for Defendant-Appellant*

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**United States Sentencing Guidelines**

## JURISDICTIONAL STATEMENT

Appellant Matthew Libous appeals from a final judgment disposing of all charges against him entered by the United States District Court for the Southern District of New York on May 19, 2015. *United States v. Libous*, 14-CR-448 (VB). A-793. Libous filed a timely notice of appeal on June 1, 2015. A-799. The district court had jurisdiction pursuant to 18 U.S.C. §§3231 and 3238. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Libous' conviction on Counts Two, Three, and Four should be overturned because the district court erred in finding that Libous willfully signed federal income tax returns that he knew contained materially false information in violation of 26 U.S.C. § 7206(1).

2. Whether Libous' conviction on Count Two should be overturned because the two main witnesses against him colluded and materially altered their testimony from pre-trial proffer sessions to trial.

## STATEMENT OF THE CASE[1]

Libous is an attorney[2] and the owner of Wireless Construction Solutions ("WCS"), a company founded in 2007 that upgrades cell phone towers. A-156; A-408. From WCS's founding through 2011, Libous owned 25% of WCS and ran the company. A-157-58. Michael Boemio, the owner of Mastercraft Masonry, was the 70% owner and the managing and tax matters partner of WCS.[3] A-157; A-492. During the period of Boemio's involvement in WCS, Boemio's niece[4], Jamie D'Abruzzo, worked as WCS' bookkeeper, although she had no formal training. A-301-303. Robert Marino, a close friend of Boemio, provided CPA services including the preparation of partnership and individual tax returns for WCS and Libous. A-393.

WCS had no corporate credit cards because Boemio did not want to have a business credit card for WCS. A-159; A-328; A-461-62. Therefore, at Boemio's

---

[1] Recognizing that acquitted conduct is not relevant in considering whether the evidence was sufficient to convict Libous on Counts Two, Three, and Four of the Superseding Indictment (*United States v. Jespersen*, 65 F.3d 993, 998 (2d Cir. 1995); *United States v. Acosta*, 17 F.3d 538, 545 (2d Cir. 1994)), evidence as to the years 2010 through 2012 is not summarized below except as relevant to the years of conviction (2007, 2008, and 2009).

[2] Although an ethics case is pending against Libous based on his conviction in this matter, he is currently registered on the New York State Unified Court System as of October 8, 2015.

[3] Louis Tantillo, who did not testify at trial and whose conduct was not at issue, owned the remaining five percent of WCS. A-157.

[4] D'Abruzzo described herself as Boemio's niece and cousin at various times during her testimony. A-299; A-300; A-365.

instruction, Libous made all necessary purchases for WCS using his personal credit cards and was supposed to reimburse himself for the business expenses. A-159-60; A-462-63. D'Abruzzo received Libous' credit card statements and entered them into QuickBooks (the bookkeeping program) before the tax returns were prepared. A-308; A-310-11; A-362; A-358-59. Marino relied on D'Abruzzo's QuickBooks entries when preparing the annual tax returns. A-409; A-418-19; A-465-66.

On June 24, 2010, agents from the FBI and the IRS interviewed Libous twice, first at their initiative and later in response to Libous' offer to provide additional information. A-105; A-118-19. At the first meeting, questions were raised concerning Libous' 2006 and 2007 legal fee income, namely whether he had in fact reported and paid the appropriate tax on all of his income in 2006. A-112.[5] Libous' tax returns for later years were not discussed. A-110-14.

On September 19, 2010, Libous sent an email to D'Abruzzo asking her to assist him in identifying all personal expenses that she had entered into QuickBooks that had been paid by WCS because he would need to claim those amounts as income and pay the appropriate taxes. A-375-78.

On June 30, 2014, Libous was indicted in the Southern District of New York and charged with violations of 26 U.S.C. § 7206(1) (subscribing to false tax

[5] *See also* A-119 (Libous provided contact information for the accountant who did his 2006 tax returns. Agent Mazzuca did not testify that he asked for the contact information for Robert Marino, who did Libous' 2007 tax returns, or that the 2007 returns were at issue.)

returns) and 26 U.S.C. § 7212(a) (obstructing and impeding and endeavoring to obstruct and impede the due administration of the Internal Revenue laws). A-15-22. On January 6, 2015, the government filed a superseding indictment alleging violations of the same statutory provisions but changing various factual allegations and raising the amount of allegedly unreported income in 2007 from $15,000 to $34,500. A-23-30; *compare* A-21 *with* A-29.

Libous pled not guilty and a bench trial was held on January 20 through 22, 2015. On the following Monday, January 26, 2015, the district court convicted Libous of Counts Two, Three, and Four of the superseding indictment—willfully signing a materially false federal income tax return in violation of 26 U.S.C. § 7206(1) for the years 2007, 2008, and 2009. A-703. Libous was acquitted on Count One (violations of 26 U.S.C. § 7212(a) from 2006 through 2013), and Counts Five through Seven (violations of 26 U.S.C. § 7206(1) for the 2010, 2011, and 2011 Amended tax returns). A-703.

On May 18, 2015, the district court sentenced Libous principally to six months of imprisonment and a $25,000 fine. A-774. Libous has paid the fine as well as all taxes owed and is currently serving the sentence imposed.

On appeal, Libous argues first that, based on the testimony of the three main witnesses against him—Boemio, D'Abruzzo, and Marino—his conviction on

Counts Two, Three, and Four should be overturned because the evidence was insufficient to prove beyond a reasonable doubt that he acted willfully.

Second, Libous argues that his conviction on Count Two should be overturned because the government was, or should have been, aware that Boemio caused Marino to alter his testimony concerning the $30,000 personal check from Boemio to Libous and that Boemio himself materially altered his testimony about that check during testimony at trial.

## I. The Evidence At Trial Concerning Underpayment of Taxes from 2006 to 2009[6]

The evidence concerning Libous' alleged underpayment of federal income taxes encompassed two separate types of income: unreported income for legal fees earned in 2007 and 2008 and unreported income in the form of a benefit derived from WCS' payment of the personal expenses charged to his credit cards in 2008 and 2009.

### A. The Evidence As to 2006

In total, Libous received and deposited $31,661 in unreported legal fee income into his bank account in 2006. A-540.

[6] The relevant background evidence concerning 2006, which "informed" the district court's judgment on 2007 (A-704) is included here for context, even though Libous was not charged with a violation of 26 U.S.C. § 7206(1) for that year.

### 1. FBI Special Agent Michael Mazzuca

During the June 24, 2010, interview, Libous stated that he met Boemio while working at the law firm of Santangelo, Randazzo & Mangone, where Libous handled several matters for Boemio satisfactorily. A-107; A-109. Libous said that he had received $5,000 from Boemio in 2006, which represented a legal fee to Santangelo, Randazzo & Mangone that he had been instructed to retain for himself. A-111. He also "said there might have been another $5,000 check and that was it for 2006." A-111. When Mazzuca showed Libous additional checks from Boemio in 2006, Libous "looked at them. He said, oh wow, I didn't realize that he paid me that much. I must have just forgot." A-112. He said that the money was for legal fees. A-112. Libous "didn't recall" whether he had reported that income on his tax returns, which he did not prepare himself. A-112. Mazzuca had the impression that Libous was being "forthright" during the discussion. A-122.

At the end of the meeting, Libous received a subpoena for his tax returns and "financials." A-120-21. Later in the day, Libous voluntarily came to the U.S. Attorney's Office and provided the name and contact information for his accountant, Joan Hayes. A-118-19.[7]

[7] Hayes prepared Libous' 2006 federal income tax return. A-67. Marino prepared Libous' 2007 federal income tax return. A-394.

### 2. Michael Boemio

Boemio met Libous in 2006 through Anthony Mangone. A-145. After Libous left the law firm, he came to work for Boemio's company Mastercraft Masonry. A-146. Boemio agreed that it would "be fair to say" that every check that his companies had given to Libous in 2006 was for work that Libous had done for Mastercraft. A-149-50. *See also* A-149 (discussing a $5,000 check from Boemio's company L&M Caterers); A-149-50 (check for $500 was "[p]robably for work"). In total, Mastercraft wrote $28,000 in checks to Libous in 2006. A-263.

## B. The Evidence As to 2007

In 2007, the total unreported income according to IRS Agent Penland's calculations was $34,500. A-545-47.

### 1. FBI Special Agent Michael Mazzuca

In 2007, Libous received a personal check for $4,750 from Boemio that was a gift. A-113. As Mazzuca recalled the conversation, Libous said that "the other money" that he received from Boemio in 2007 was for legal work. A-113.[8]

### 2. Michael Boemio

In 2007, Boemio gave Libous a check for $30,000 drawn on his personal account. A-150. The check was not "strictly business." A-269. Boemio had paid

[8] Although unclear from the trial testimony, the FBI 302 Report of Interview does not mention the $30,000 check from Boemio, which was not shown to Libous during the interview on June 24, 2010.

Libous for "closings" for the Outlook[9] condo project, which was unrelated to Libous' work for Mastercraft Masonry. A-150-51; A-153. He paid Libous, who was "an incompetent attorney," to sit in on the closings "to make sure that all the closings were done" "in a speedy fashion" and to "make sure everything went smooth." A-191; A-151; A-152, A-154; A-247-48. He had given him the $30,000 check to watch over the closings "[b]ecause I loved him," and "wanted him to succeed in business." A-191; A-265.

Although Boemio "had a company do" the development "[w]ith other partners," he paid Libous from his personal account "because I didn't want anyone else paying for his service." A-153-54. Boemio's testimony about the scope of Libous' activities was confused:

> THE COURT: So you hired an incompetent attorney to –
>
> THE WITNESS: No, no, I –
>
> THE COURT: -- document these loans?
>
> THE WITNESS: He was—he was—he was in—he was in on the closings. There was somebody else doing them. He just made sure all the documents got done properly.
>
> THE COURT: When you say someone else was doing them, you mean some other lawyer was?
>
> THE WITNESS: Yes, yes.
>
> [. . .]

[9] Outlook Point Estates. A-266.

THE COURT: So you're telling me that you had an attorney handle the legal work associated with these closings.

THE WITNESS: Right.

THE COURT: But you also had Mr. Libous sit in on the closings to make sure they all got done.

THE WITNESS: Right.

THE COURT: And for that, you paid him $30,000.

THE WITNESS: Yes.

A-192-93. Boemio insisted, however, that the check was for work that Libous had done for him. A-196.

When he gave Libous the $30,000, it was a "bonus" that Boemio did not expect Libous to repay. A-156. Although he claimed that the check had been "for closings," he also stated vaguely, "I gave him a check for doing something for me." A-183. Boemio was aware of Libous' personal student loan and credit card debts and wanted to help him out. A-265. He did not deny that he had given the check to Libous to use for a particular purpose, but claimed that he did not remember whether the $30,000 check had been for Libous "student loans or it could have been credit cards." A-183.

The handwritten notes from a proffer session with Boemio on January 30, 2013, however, contain an entry indicating that the $30,000 check was given to Libous to pay his student loans and "was never paid back." A-199. At additional

proffer sessions including one in December 2014, just weeks before the start of trial, Boemio stated that the $30,000 check was for Libous' student loan payments.[10] A-193-95. D'Abruzzo confirmed that Boemio would give Libous financial gifts. A-365.

Tellingly, the superseding indictment, which was filed two weeks before trial, increased the amount that Libous was alleged to have improperly failed to report in 2007 from $15,000 to $34,500, indicating that the government was relying on Boemio's $30,000 check for substantially all of the alleged loss. *See* A-8 at Dkt. Entry # 41; A-21; A-29. The government offered no proof at trial that Boemio had claimed the $30,000 check as a legal expense on his own tax return.

---

[10] *See* A-789 (3503-A, proffer session handwritten notes dated Aug. 19, 2014, p. 4). Although not admitted into evidence, the record shows that the district court examined 3503-A and questioned Boemio about its contents. A-193-95.

> THE COURT: So, [defense counsel's] question was . . . I'm showing you 3503A, page 4, six lines down. Does this refresh your recollection about what you told the government in December of 2014 about the $30,000 check? . . .
>
> THE WITNESS: I'm not—I'm not really sure.
>
> [. . .]
>
> THE COURT: What did you tell the government in December about that $30,000 check? Do you remember? Just a month ago, December 2014?
>
> THE WITNESS: It was either for student loans or credit cards. I don't—I don't really remember what I said.
>
> THE COURT: Well, but here in the courtroom today you said it was for student loans or credit cards, right?
>
> Well, you know what you said today, right?
>
> THE WITNESS: I'm so nervous, I don't know—yeah.

A-194-95.

### 3. Robert Marino

Marino prepared Libous' 2007 federal income tax return. A-394. Libous' return was dated June 30, 2008, so Marino estimated that he would have met with Libous "[p]robably before April 15th and we filed an extension." A-395. Libous did not report the $30,000 check from Marino on his 2007 federal income tax return. A-402-03. Shortly before trial, Marino spoke with Boemio, who told him that the $30,000 check had been a bonus. A-483-84.

Libous' bank accounts contained additional deposits of $500, $1,000, $1,500, $400, and $800 that were not reported on his 2007 tax return.[11] A-404-05. Marino would have reported each of the checks, if they represented payments to Libous for legal services and if Marino had been aware of them. A-405-06.

There was no evidence, however, that Libous had willfully withheld information from Marino. Rather, the government asked the district court to infer that Libous had withheld the information based on its absence from the filed tax returns. A-615.

## C. The Evidence As to 2008

The evidence concerning 2008 centered on WCS' payment of Libous' personal expenses that had been charged on Libous' personal credit cards along

[11] Libous' bank account also contained a deposit of a $2,500 check in January 2008 that Marino agreed should have been reported on Libous 2007 federal tax return if it represented payment for legal fees. A-405.

with the business expenses for WCS. By the time of Libous' sentencing, the amounts at issue were $5,158 in unreported legal fee income and $1,339 in personal expenses that had been misclassified in WCS' books and that WCS had paid on Libous' behalf. A-731-33.

As with the unreported legal income in 2007, the government asked the district court to infer willfulness based on the fact that $5,158 in checks for legal fees was unreported on Libous' tax return. A-615-16. There was no evidence that Libous had willfully concealed the income from Marino. In fact, to the contrary, Marino testified that Libous had never asked him for assistance in avoiding his tax liability. A-529.

**1. Michael Boemio**

Boemio affirmed that he was "generally" familiar with WCS's legitimate business expenses in 2008 and "pretty much" "familiar with the types of materials and items that [WCS] would buy as part of its operations" and with the "types of vendors [that WCS] would do business with." A-160-61. Boemio was the managing member of the LLC, but he did not run the day-to-day operations. A-203; A-176 (unaware whether WCS operated on a fiscal year or a calendar year).

But Boemio's unfamiliarity with WCS became evident when he stated that WCS did not do any business with the New York City Marshal in 2008. A-161. After trial, Libous produced a receipt showing that the challenged expense

($3,190.59) had, in fact, been incurred when one of WCS' work vans was towed. The parties agreed that this amount should be deducted from the total amount of Libous' unreported taxable income. A-731-32.

Boemio hired Marino as the accountant for WCS. A-176. At the end of the year, Marino would come to WCS to prepare a tax return and examine WCS' books. A-176.

Boemio hired his niece, Jamie D'Abruzzo, who did the payroll reports and bookkeeping for Mastercraft, to work for WCS as well. A-222. However, he simultaneously claimed that D'Abruzzo couldn't do the bookkeeping for WCS because "she didn't know anything about the company." A-223.[12]

**2. Jamie D'Abruzzo**

Jamie D'Abruzzo had worked for Mastercraft Masonry since the age of 18 in 2008. A-299. "[A]bout five years later" she began doing the payroll for Mastercraft. A-300. When WCS was formed in 2008[13], D'Abruzzo began "[c]utting checks, signing them" for WCS. A-301. She was authorized to sign her

[12] But D'Abruzzo testified that Boemio knew she was the bookkeeper for WCS. A-355. Similarly, Marino knew D'Abruzzo as Boemio's bookkeeper for "pretty much all of" Boemio's businesses. A-408. Her duties included, "Recording the checks, paying bills, receiving . . . checks, making deposits, recording the cash receipts, disbursements in the general ledger." A-408-09. She did that work for both Mastercraft and for WCS. A-409. D'Abruzzo used QuickBooks to do WCS' bookkeeping. A-409.

[13] The New York Department of State Division of Corporations entity information summary for WCS indicates that it was formed on December 21, 2007.

own name on checks for WCS. A-302. In the beginning, she signed each and every check for WCS. A-356.

D'Abruzzo began reconciling WCS' bank statements in March or April of 2009, when WCS' offices moved and the QuickBooks program was put on her computer. A-306-07. She reconciled the December 2008 bank statement "sometime in '09." A-308. D'Abruzzo did not classify anything as a personal expense for Libous "[b]ecause I didn't have an expense account for him. I started it in 2009. So I just used what I seen that was job related to what payments were made." A-311; A-312.[14] WCS' QuickBooks contained no entry indicating payment of personal expenses for Libous in 2008. A-313.

### 3. Robert Marino

Marino prepared the 2008 partnership return for WCS. A-409. He used the QuickBooks program on D'Abruzzo's computer to "do [his] year-end closing and print up a balance sheet and a P & L and prepare the tax return from the balance sheet and P & L after adjusting entries." A-409. *See also* A-417 (Marino would have taken the profit and loss and the balance sheet from the general ledger, but he was not sure who had prepared the general ledger). The K1 partnership returns for WCS for 2008 were incorrect because the QuickBooks program "defaulted based

[14] D'Abruzzo testified that WCS paid Libous' personal credit card bills in 2008, but the record also established that WCS had no business credit card. A-312-13; A-159; A-462-63.

on percentages" of WCS ownership and allocated the capital contributions according to those percentages. A-410-11. In the WCS general ledger for 2008, there was no Matt Libous expense account. A-413-14. At the time he prepared the WCS 2008 tax return, he was unaware of personal expenses on the credit cards. A-415; A-412. However, he knew that WCS had no business credit cards and that Libous used his personal credit cards for WCS' expenses. A-461-63.

Marino explained that the assessment of what amounts and types of expenses should be reported on the partnership tax return was based on the program's automatic classifications which, in turn, were based on the user's identification of the applicable category of expense or income at the time the receipts were entered into the program. A-411-12 ("When you input the receipts as income and the disbursements and expenses, the program will allocate it to various categories such as revenues or expenses, telephone, utilities, rents. It will—you will identify it, and it will automatically classify it as you did."). Marino was aware of the credit card payments and assumed they were for "[b]usiness expenses that were allocated to the applicable accounts." A-412.

Marino also prepared Libous' 2008 individual tax return. A-415. Libous reported $38,382 in partnership income from Libous & Associates, LLC, Wireless Construction Solutions, Inc., and East Coast Wireless Services, LLC. A-416.

Libous did not tell Marino about any deposits of legal fees that he had made into his personal bank account. A-417-18.

#### 4. IRS Agent Deleassa Penland

For 2008, Agent Penland prepared a chart "[b]ased on the testimony that we heard here at trial as well as some of it is common knowledge about certain types of expenses. I also looked at the location, where the expense was charged at." A-554. She had erroneously included items including the telephone service provider for WCS on the chart because, to determine whether an expense was a personal expense, she "did internet searches of a lot of the companies, and maybe, at the time, we felt like it was personal." A-558. On consent, the chart was edited to omit those expenses. A-560.

Libous additionally objected to the inclusion of a payment of $3,190.59 to the New York City Marshal. A-556. After trial, Libous provided proof that this sum had been a business expense incurred when one of WCS' trucks was towed. The total personal expenses for 2008 that WCS paid, therefore, were reduced to $1,339.05. A-731-32.

### D. The Evidence As to 2009

The district court found that Libous had failed to report $24,592 in personal expenses that had been paid by WCS in 2009. A-569-70; A-706-07; A-732. The

district court's finding was based on its understanding of the testimony of Boemio, D'Abruzzo, Marino, and Agent Penland.

**1. Michael Boemio**

As Boemio explained it, WCS was in the business of doing "Cell towers," which meant that, "They would upgrade the cell towers." A-163. Boemio affirmed that he was familiar with what would have been WCS' legitimate business expenses in 2009. A-162. Yet, when asked to explain "what sorts of things were legitimate business expenses," Boemio could only hypothesize: "Buying wire. I don't—I don't—I really don't—anything that had to do with a cell site." A-163.

Boemio learned that Libous "was running his expenses through the company" in 2010 at a meeting with Robert Marino, the accountant for WCS. A-168-69. ("[T]hey told me that he was running the expenses through the company." . . . "I would – I would have learned that from Mr. Marino.").[15] Libous participated in the meeting, but Boemio claimed not to have spoken with him directly. A-170. Instead, Boemio "told Mr. Marino to tell Matt not to do that anymore. [. . .] I just – I told Rob tell Matt to take a raise and pay his personal expenses." A-170. Libous agreed to do so. A-171-72. They did not discuss payment of Libous' taxes or how

[15] But to the question, "were you aware up until the end of 2010 that Mr. Libous was using Wireless funds to pay off his personal credit cards in amounts beyond the [business] expenses that were on there?" Boemio answered, "No." A-167.

to treat Libous' personal expenses. A-172. Boemio "would just tell [Marino] to handle it." A-172.

**2. Jamie D'Abruzzo**

D'Abruzzo was the bookkeeper for WCS in 2009. A-301-02. In that role, she had reconciled Libous' credit card and bank statements and entered items into WCS' QuickBooks. A-302-03. D'Abruzzo learned QuickBooks on the job and made mistakes as she was learning, including mis-posting certain expenses. A-303-04; A-358, A-369-70.[16]

D'Abruzzo was aware, as was "everyone," that Libous used his personal credit cards for WCS' expenses. A-360.[17] In 2009, Libous told her that there were personal expenses on his credit card statement and that he was going to pay it himself. A-311-12; A-332; A-337. The credit card balances were not paid in full. A-332-33. D'Abruzzo believed that, if the credit cards were not paid in full, the amounts that were paid represented job expenses, and the unpaid amounts were for

---

[16] *See also* A-369:

Q: [D]uring the time that you were involved with [WCS], did you ever mis-post by accident certain things?
A: Yes.
Q: And did you tell the government that?
A: Yes.
Q: Did the government ask you specifically what you mis-posted?
A: No.

[17] Similarly, D'Abruzzo wrote checks to Mastercraft from WCS and used Boemio's personal AmEx card to pay for expenses. A-356-57. WCS then paid Boemio's personal AmEx bill. A-357.

personal expenses. A-336-37. As to that unpaid balance, D'Abruzzo "just kept moving forward until it was an issue." A-337.

When D'Abruzzo first saw the credit card payments, she "put them in an exchange account," which is "where you don't know where anything belongs, you just stick it in one account, and then you just reconcile it whenever you get a chance to do it to figure out what it is. Kind of like an empty account." A-306. *See also* A-314. Later, when she received the emailed credit card statements, at the end of 2009 or the beginning of 2010 (A-314-15), she "[s]tarted expensing them into the job—job expenses or personal responses [*sic*]; gas, medical." A-317.

D'Abruzzo had classified the expenses on her own. A-319 ("When I went into the exchange account, I would pull out the payment. I looked at what was job related first before personal. So whatever was job related, I booked into the job expense. And if it was something that moved forward to the next month, it moved forward to the next month and I would apply it like that."); *see also* A-310 (D'Abruzzo would expense the charges on the credit card bills at the time she received them: "I would go back to whatever the payment was and pull out. Whatever was job related, I would put towards job expenses . . . or expenses throughout the company.").

QuickBooks contained a "Matt Libous expense" account for 2009 and for 2010. A-317; A-324. The account recorded a zero balance in 2009 because

D'Abruzzo had entered items incorrectly. A-320; A-327 ("[I]n 2009, when I did it in 2010, I started breaking it out myself because there was a lot of personal expenses. So I was putting in—I was incorrectly putting it in 2009 wrong, so I started correct in 2010 moving forward."); A-325-26 ("in 2009, I booked it that way after the fact. When we were doing our taxes and we noticed that there were personal expenses was when I started putting it into his personal expense account in 2010.").

D'Abruzzo reconciled all of the expenses on the credit card statements into job expense categories in WCS' books. A-310-11. Libous always gave D'Abruzzo the credit card statements when she requested them, and she always had them prior to when the tax returns were due. A-358-59. Before the 2009 tax return was prepared, D'Abruzzo either highlighted or checked every bank statement. A-362.

Libous was "[b]arely ever" in the office because he traveled a lot for the business. A-363-64. Although Libous never offered to sit with D'Abruzzo and go through the statements, he answered any questions that she asked about the expense categorization. A-313; A-320-21. Libous was honest and would "[a]bsolutely" try to answer any questions to the best of his ability. A-362. In her opinion, Libous never tried to deceive her. A-364.

Marino, whose office was in the same office building as Mastercraft and WCS, helped D'Abruzzo with QuickBooks. A-359. In 2010, Marino used the

QuickBooks, which contained all of Libous' 2009 credit card statements, to do the 2009 tax returns. A-361-62; A-371. Marino had access to all of the information about the payments from WCS to Libous' personal credit cards but he did not come to D'Abruzzo to discuss what was personal and what was not personal. A-361. D'Abruzzo did not prepare the tax returns with Marino. A-371.

On September 19, 2010— approximately three months after his interview with Agent Mazzuca, which put him on notice of possible errors in his prior tax filings (*see*, *e.g.*, A-112)—Libous sent an email to D'Abruzzo stating:

> When you have a minute this week, I would like to go over the breakdown of my personal purchases on my credit cards . . . I just want to know how much so I can get receipts for all of that. I need to get caught up on all of this so we don't have to do it last minute. . . . I did make some payments from my bank account. If I had to guess, it was about 20K. But all this is much more than 20K, most likely another 20K on top of that. I need to claim all that as income. If you have it broken out in QuickBooks already, send it to me so I can review it.

A-378-79.

**3. Robert Marino**

Marino prepared the 2009 partnership return for WCS. A-418. He took the information to prepare that return from the QuickBooks general ledger, which he relied on to determine the categories and amounts of expenses to report on the partnership return. A-418-19; A-465-66. If D'Abruzzo's entries incorrectly reflected no personal expenses for Libous in QuickBooks or if the entries were

otherwise incorrect, then the tax returns, including the K1 partnership schedules, would also be incorrect. A-465-66.

In 2009, all of Libous' partnership income, $38,263, came from WCS. A-420-21. It was calculated based on Libous' percentage interest in the business. A-421. Libous did not tell Marino that he had charged personal expenses to the credit cards that WCS had paid for. A-420. But Marino was aware that the credit cards used for WCS were Libous' personal cards. A-461-63.[18] Marino never asked Libous for his bank statements. A-459. Marino did not remember when he learned that the credit cards contained personal expenses, but estimated that it was "sometime in 2010." A-424.[19] At that point, he and D'Abruzzo decided to set up a Matt Libous expense account to separate those expenses from the business expenses. A-424.

Libous never asked Marino to help him avoid reporting personal expenses that were paid by WCS or evade paying taxes on that income. A-528-29.

**4. IRS Agent Deleassa Penland**

Agent Penland had reviewed WCS's QuickBooks and found that there were errors. A-605. She recalled that D'Abruzzo had admitted to entering things

[18] *But see* A-418 (Marino did not know that the credit card statements were in Libous' name or that any charges on the cards were for Libous' personal expenses.).

[19] *But see* A-361-62 (In 2010, Marino used D'Abruzzo's QuickBooks, which contained all of Libous' credit card statements, to prepare the 2009 tax returns.)

incorrectly in 2009 and "then she started to correct it in 2010 moving forward." A-606. She also agreed that a mis-posting by the bookkeeper "could have a domino effect with respect to the corporate tax return and the personal tax return." A-606. In sum:

> Q: So if Ms. D'Abruzzo mis-posted an entry into the QuickBooks, then the Wireless Construction Solutions tax return, what Mr. Marino relied on, would be incorrect?
>
> A: Correct.
>
> Q: And Mr. Marino, who not only was the Wireless Construction Solutions accountant, he was also my client's accountant, right?
>
> A: That's correct.
>
> Q: Then my client—. . . my client's tax returns [would] be incorrect, right?
>
> A: That's correct.

A-606-07.

### E. The District Court's Verdict and Findings of Fact

On January 26, 2015, the parties appeared for the district court's verdict. The district court acquitted Libous of Counts One, Five, Six, and Seven and convicted him of Counts Two, Three, and Four. A-703.

Explaining his verdict as to **Count Two** (violation of 26 U.S.C. § 7206(1) for the 2007 federal income tax return), the district judge began with 2006, stating that 2006 "informs my thinking about 2007." A-704. "According to Agent

Mazzuca, Mr. Libous said all of the checks he received from Michael Boemio in 2006 and 2007 were for legal fees except for one check in the amount of . . . $4,750." A-703.

The district court found that, "In 2007, Mr. Libous did not report four checks he received and deposited into his personal account, totaling $34,500." A-704. The district judge credited Boemio's testimony that "he paid Mr. Libous the $30,000 in return for sitting in on closings and making sure they got done properly. Even if this payment was made partially because Mr. Boemio wanted to help Mr. Libous make some money, so that he could pay off some personal debts, Mr. Boemio credibly testified that he would not have paid Mr. Libous the $30,000 had Libous not done the work." A-704-05. "Mr. Libous told Agent Mazzuca, the money he received from Boemio in 2006 and 2007, save for the one gift, was payment for legal services. Based on this evidence, I conclude that the 2007 tax return was materially false." A-705.

The district court found that Libous "willfully failed to include the $34,500 as income" based on a determination that the unreported monies represented "approximately half of his total income for the year. I do not believe Mr. Libous could have forgotten to report half of his income for the year." A-705. "In addition, there is no possible reliance defense for this year or reliance on accounting advice defense for this year, because Mr. Marino, Robert Marino, who

prepared Mr. Libous' return, could not have known about these legal fees." A-705. For these reasons, the district court found Count Two proved beyond a reasonable doubt. A-705.

Concerning **Count Three** (violation of 26 U.S.C. § 7206(1) for the 2008 federal income tax return), the district court found that Libous failed to report approximately $5,000 in legal fees and approximately $4,500 in personal expenses that WCS paid on his behalf. A-705-06.[20] The district court reasoned, "Given that the unreported income is approximately one-fourth of the total income reported, it's clear that the failure to report these amounts made the 2008 return materially false." A-706. The district court found willfulness proven because "There is no evidence he received or relied on any accounting advice to the effect that he was not required to report these expenses. So, there is no reliance defense. Further, when viewed in conjunction with the 2006 and 2007 tax years, I do see a pattern of known and intentional understatement of income." A-706. Therefore, Count Three was proved beyond a reasonable doubt. A-706.

Explaining its verdict on **Count Four** (violation of 26 U.S.C. § 7206(1) for the 2009 federal income tax return), the district court found that "the defense concede[d] [that] these expenses should have been reflected on Mr. Libous' 2009 return. Because the return did not report this $25,000, it was materially false." A-

[20] Reduced to $1,339 on consent after trial and before sentencing. *See supra*, p. 16.

706-07. The district court found that Libous had "willfully failed to report these expenses as personal income" for several reasons. A-707. First, "WCS paid . . . a substantially higher amount of personal expenses [in 2009] than in 2008." A-707. Second, "the unreported $25,000 represented 40 percent of his total income" of approximately $62,000. A-707.

For 2009, the district court found that Libous had no defense of good faith reliance for two reasons. First, "Mr. Marino was not aware of the personal expenses at this time. He testified that he became aware of them after the 2009 WCS and Libous personal tax returns were prepared and filed." A-707. Second, D'Abruzzo "also testified . . . that she first discussed with Mr. Marino the fact that WCS had paid these expenses after the 2009 WCS return was filed. Thus, Mr. Libous cannot claim he relied on Mr. Marino's advice, because Mr. Marino did not know all of the information or have a full picture." A-707.

The district judge also believed that the email Libous sent to D'Abruzzo in September 2010 stating that he had to report any personal expenses paid by WCS as income on his tax returns indicated that he knew the same information in April 2010. A-707-08. The district judge found that "nothing in the record suggests he didn't also know this a few months earlier, in April 2010, when he filed his 2009 tax return." A-708. Therefore, the district court found Count Four proved beyond a reasonable doubt. A-708.

### F. Sentencing

At sentencing, on May 18, 2015, the district court found that the total unreported income was $97,252, resulting in a total tax loss of $38,843 and a corresponding base offense level of 14 under U.S.S.G. § 2T4.1. A-736-37. Included in this calculation were:

- $31,661 in unreported legal fees from 2006 (considered to be relevant conduct under U.S.S.G. § 1B1.3)
- $34,500 in unreported income in 2007
- $5,158 in unreported legal fees in 2008
- $1,339 in personal expenses paid by WCS in 2008
- $24,594 in personal expenses paid by WCS in 2009

A-729-32.

The district judge noted that the lower number of personal expenses in 2008 might change the element of materiality—"a false return, even a knowingly deliberately false return which is not materially false is not a crime." A-733. But he concluded that the lower amount of personal expenses were still "material in light of the overall amount of reported taxable income." A-734. ("I think it's prudent for me to make a finding that [the lower number] would not change my determination as to materiality." A-735). The district court reasoned that the amount of unreported taxable income was "in the area of 25 percent" of Libous' reportable taxable income, which the court found material. A-735-36.

The district court agreed with the defense's assertion that "the use of personal credit cards caused confusion on multiple levels" and "[r]esulted in incorrect bookkeeping entries," "incorrect attribution on tax returns," and "insufficient payment of taxes." A-763. He noted that information "was available to/presented to the bookkeeper. . . . It was presented to the CPA. . . . Ms. D'Abruzzo is definitely not a CPA-- . . . – but Mr. Marino says he was. He didn't act like one. So, confusion, mistakes, yes, there were lots of them." A-757.[21]

The district court considered and rejected arguments for sentencing enhancements and deductions for acceptance of responsibility and found the total

---

[21] Similarly, during the government's rebuttal summation, the following exchange occurred (A-670-71):

> AUSA: Your Honor, this is not the trial of Michael Boemio. It's not the trial of Robert Marino. It's not the trial of Jamie D'Abruzzo. . . .
>
> THE COURT: You know, I have to stop you right there.
> Of course it's not the trial of those other people, but, you know, one wonders why. I mean, you know, Marino was your own witness and you—you didn't examine him, but, essentially, he admitted to all sorts—of you could call them mistakes. You could call it something worse. You know, Boemio was in on that. Everything that Marino was doing, Boemio was doing.
> So yes, you're right. Technically, you're right. It's not a trial of them. And I'm well aware of that. And I'm not here to make findings about somebody who's not on trial. That's true. But, you know, I wish you hadn't said it quite that way because it kind of made me think of what I've been thinking, which is why Libous? Why not these guys?

offense level to be 14 (A-737-45), with a sentencing range of 15 to 21 months of imprisonment, supervised release of up to one year, and a fine of between $4,000 and $77,686 (twice the amount of the gross loss). A-745. After considering and rejecting arguments for downward departure (A-745-49), hearing from the parties and considering the 3553(a) factors, the district court imposed a sentence of six months of imprisonment, one year of supervised release, a $25,000 fine, and 100 hours of community service. A-774; A-779-81. Mr. Libous is currently serving the sentence imposed.

## II. The Evidence at Trial Concerning Witness Collusion and the $30,000 Check

Boemio, D'Abruzzo, and Marino were represented by the same attorney, and Boemio paid the legal bills for Marino and D'Abruzzo. A-227-28; A-383; A-482-83. Boemio testified that he speaks to Marino "every day." A-227. Before trial, Boemio acknowledged that the $30,000 check—drawn on his personal account—was given to Libous to pay his student loans and "was never paid back," indicating that it was a loan, not a payment of income. A-199; A-196. *See also* A-789. On cross-examination at trial, he claimed that he didn't remember what he had said about the $30,000 check (A-194-95) even as recently as on direct examination, but asserted that it had been a payment for services rendered. A-195-96.

Marino testified that he and Boemio had talked about the allegations in this case. A-483. Just a few days before trial, Boemio told Marino that the $30,000

check was a bonus. A-483-84. They didn't talk about the case often, but Marino was "sure" that they had talked about other allegations in the case. A-484.

FBI Special Agent Michael Mazzuca testified that, during the June 24, 2010, interview, Libous told him that, in 2007, Libous received a personal check for $4,750 from Boemio that was a gift. A-113. As Mazzuca recalled the conversation, Libous said that "the other money" that he received from Boemio in 2007 was for legal work. A-113. But there was no evidence that this $30,000 check had been shown to Libous during the interview with Agent Mazzuca, which centered around 2006. A-111-12.

## SUMMARY OF THE ARGUMENT

Libous did file materially false federal income tax returns in 2007, 2008, and 2009. However, an accurate reading of the testimony at trial demonstrates that he did not do so willfully.

Concerning 2007, the district court erred in finding that Libous had acted willfully. The district court's finding was based in significant part on the fact that the total of unreported income--$34,500—was nearly half of Libous' total income for the year. A-705. However, the district court erred because the $30,000 check from Boemio was not a payment for services rendered. Moreover, even if Boemio thought it was, there was no evidence that Libous was aware that it was not a gift or that his failure to report it as taxable income was anything other than a mistake.

As to the remaining expenses, FBI Special Agent Mazzuca testified that Libous told him he had forgotten that he had received those checks and he believed Libous was forthright during their meeting. A-112; A-122. There was no evidence that he had willfully misled Marino concerning those payments. Therefore, his conviction on Count Two should be overturned.

Concerning 2008, the evidence was likewise insufficient to find that Libous acted willfully with regard to the legal fees or the minimal personal expenses paid by WCS. Although Libous recognizes that even a *de minimis* misstatement may be material under 26 U.S.C. § 7206(1), the district judge's ruling was premised in significant part on the proportion of the total income that the unreported amounts represented each year and on the rationalization that if a significant proportion of the total income was not reported, it could not be an oversight. A-706. Libous respectfully argues that this method of analysis led to an incorrect conclusion. Libous was not involved in D'Abruzzo's bookkeeping decisions, nor did he influence how she entered expenses into QuickBooks. A-313; A-320-21. There was no evidence that he had willfully withheld any information concerning legal fees from Marino or that the exclusion of $5,158 in legal fee income from his tax return was anything by a mistake. Therefore, Libous' conviction on Count Three should be overturned.

Concerning 2009, the district court misunderstood the testimony about when D'Abruzzo and Marino became aware that Libous' personal expenses had been misclassified in WCS' QuickBooks account and that WCS had paid Libous' personal expenses without a corresponding addition to Libous' reported income. If the district court had correctly understood the evidence about 2009—that D'Abruzzo had entered every expense for 2009 into QuickBooks before the 2009 tax returns were prepared (in 2010), classifying the entries without Libous' input or direction, and that Marino had relied on her QuickBooks entries—the district court would have concluded that Libous did not act willfully. Therefore, his conviction on Count Four should be overturned.

Libous' conviction on Count Two should likewise be overturned because Boemio and Marino colluded to present the district court with fabricated testimony concerning the $30,000 personal check from Boemio to Libous in 2007, and the government was, or should have been, aware of the collusion and the materially false testimony that was elicited at trial.

## ARGUMENT

### I. The Evidence Was Insufficient to Find that Libous Willfully Signed A Materially False Tax Return in 2007, 2008, or 2009.

#### A. Standard of Review

A challenge to the sufficiency of the evidence is reviewed *de novo*, drawing all permissible inferences in favor of the government and resolving all issues of

credibility in favor of the verdict. *United States v. McGinn*, 787 F.3d 116, 122 (2d Cir. 2015); *United States v. Cassese*, 428 F.3d 92, 97-98 (2d Cir. 2005); *United States v. Yannotti,* 541 F.3d 112, 120 (2d Cir. 2008). A conviction must be reversed for insufficient evidence where no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008). *See also United States v. Pierce,* 224 F.3d 158, 164 (2d Cir. 2000) (This standard applies irrespective of whether it was a jury or bench trial.).

After a bench trial, this Court "set[s] aside a district court's findings of fact only if they are clearly erroneous, but we review conclusions of law and the application of facts to the law de novo. " *United States v. Harrison*, 175 Fed. Appx. 386, 387 (2d Cir. 2006) (citing *United States v. Coppola,* 85 F.3d 1015, 1019 (2d Cir. 1996)).

**B. Applicable Law**

Section 7206(1) of United States Code Title 26 makes it a crime to "willfully [make and subscribe] any return, statement, or other document which contains or is verified by a written declaration that it is made under the penalties of perjury, and which [the maker] does not believe to be true and correct as to every material

matter." *United States v. Pirro*, 212 F.3d 86, 89 (2d Cir. 2000) (citations omitted). Thus, "[s]ection 7206(1) requires the government to prove:

> (1) that the defendant made or caused to be made an income tax return for the relevant year, which he verified was true;
>
> (2) that the tax return was false as to something material;
>
> (3) that the defendant willfully signed the return knowing it was false; and
>
> (4) that the return stated that it was made under penalty of perjury."

*McGinn*, 787 F.3d at 125 (citing *United States v. LaSpina,* 299 F.3d 165, 179 (2d Cir. 2002)).

**1. Materiality**

Materiality is a question of law. *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984). A matter is material if it is a matter of significance or importance, as distinguished from a minor, significant, or trivial detail, or if it has a natural tendency to influence, or is capable of influencing, the decisions or activities of the Internal Revenue Service. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995) (material statement has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision making body to which it was addressed") (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)). "A false statement is 'material' when it has 'the potential for hindering the IRS's efforts to

monitor and verify the tax liability' of the corporation and the taxpayer." *Pirro*, 212 F.3d at 89 (citations omitted).

**2. Willfulness**

"[T]he standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'" *Cheek v. United States*, 498 U.S. 192, 201, 111 S. Ct. 604, 610, 112 L. Ed. 2d 617 (1991) (citations omitted); *see also id.* at 201-202 ("Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. . . . But carrying this burden requires negating a defendant's claim . . . that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws. . . . In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.").

**3. Good Faith**

Evidence of good faith will defeat a charge under Section 7206(1). *United States v. Pomponio*, 429 U.S. 10, 11 (1976) (per curiam). A good faith belief need not be objectively reasonable. *United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir.

1991) (finding plain error and reversing conviction because "the court did not instruct the jury that defendant's beliefs need not be objectively reasonable if they were actually held in good faith"). This is so because in "our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law," and "'[i]t is not the purpose of the law to penalize . . . innocent errors made despite the exercise of reasonable care.'" *Cheek*, 498 U.S. at 205 (quoting *United States v. Bishop,* 412 U.S. 346, 360-361, 93 S.Ct. 2008, 2017-2018, 36 L.Ed.2d 941 (1973) [quoting *Spies v. United States,* 317 U.S. 492, 496, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943)]). Congress did not intend that a taxpayer "should become a criminal" based on a "bona fide misunderstanding as to his liability." *Lefcourt v. United States*, 125 F.3d 79, 83 (2d Cir. 1997) (citing *Cheek*, 498 U.S. at 200 [quoting *United States v. Murdock,* 290 U.S. 389, 396, 54 S.Ct. 223, 226, 78 L.Ed. 381 (1933)]).

### C. Discussion

#### 1. The Evidence Was Insufficient to Find that Libous Acted Willfully in 2007

The district court erred in finding that Libous had willfully signed a materially false tax return in 2007. The district court based its finding in part on a determination that Libous had acted willfully in 2006. A-703-04. This is incorrect. Libous stated that he "forgot" that he had earned specific legal fees when Mazzuca showed him the checks. He did not deny or dissemble, or otherwise attempt to

justify any underreporting, nor did Mazzuca believe him to be anything but forthright. A-112; A-122. *See also* A-705 (Libous did not deny that the checks represented payments for legal fees). His inaccurate tax return in 2006 was the product of a mistake or accident and not a willful misstatement.

The district court also erred in finding that Libous had willfully misstated his income in 2007 based on the percentage of total income represented by the $34,500 that the court believed was unreported income. A-703-05. As discussed further in Point II, below, Boemio's testimony about the $30,000 personal check was incredible and perjurious. Therefore, the actual unreported income for 2007 was $4,500, a much smaller percentage of Libous' total income than the district court believed it to have been. Libous acknowledges that materiality is not governed by percentages, but willfulness may be evaluated based in part on the likelihood that a failure to report was a mistake rather than a deliberate choice. *See Cheek*, 498 U.S. at 205 ("[i]t is not the purpose of the law to penalize . . . innocent errors made despite the exercise of reasonable care") (internal citation omitted). The district court recognized this when it used percentages as a means to evaluate the likelihood that Libous' conduct had been willful. A-705. When the $30,000 check is properly taken out of the equation, it is clear that Libous' failure to report income from legal fees was an oversight rather than the "voluntary, intentional

violation of a known legal duty," and the government did not meet its burden. *Cheek*, 498 U.S. at 201.

Moreover, even if this Court finds that the district court did not err in finding Boemio's testimony credible, there was no evidence that Libous had willfully misled his accountant or willfully failed to report the income. Nor was there evidence that Libous had known the $30,000 check was for income. To the contrary, there was evidence that he had forgotten about the unreported checks. A-112.[22] Moreover, if Libous believed the $30,000 check was a gift, his failure to report it as income was not willful. Under *Cheek* and *Lefcourt*, the evidence was insufficient to show that Libous was anything other than a taxpayer who had made innocent errors and signed the tax returns prepared by his accountant based on a "bona fide misunderstanding as to his liability." *Lefcourt*, 125 F.3d at 83.

### 2. The Evidence Was Insufficient to Find that Libous Acted Willfully in 2008

The district court erred in finding that Libous willfully signed a materially false tax return in 2008. As with 2007, the district court based its determination largely on the fact the percentage of Libous' income represented by the unreported amounts appeared to be significant. A-706. However, after trial, the dollar figure of the personal expenses was reduced by nearly 75 percent due to numerous

[22] Notably, although the 302 of Mazzuca's interview with Libous was not admitted into evidence, it does not indicate that Libous was shown or questioned about that $30,000 check.

concessions by the government that expenses, which the IRS agent had mistakenly classified as personal, were in fact work related. A-560; A-731-32.

Both D'Abruzzo and Marino testified that they had made mistakes in 2008. A-311; A-312; A-410-11. D'Abruzzo testified that she did not classify any of the expenses as personal because she had no personal expense account for Libous in 2008. A-312. She reconciled all of the expenses into job expense categories. A-310-11. Marino testified that QuickBooks' default settings had led to an incorrect allocation of the partners' capital contributions on the partnership returns. A-410-11. QuickBooks automatically classified the entries. A-411.

The district judge again found that Libous had signed a materially false return based on the percentage of total income that the district court believed had been willfully unreported. A-705-06. The district judge found that the government had proved willfulness because he believed that the government had proved a pattern of conduct from 2006 through 2008. A-706. However, both of these findings are incorrect. The percentage of total income that was unreported was, in fact, minimal. A minimal sum can be material. *Pirro*, 212 F.3d at 89. But the testimony of D'Abruzzo and Marino demonstrate that any errors in Libous' 2008 tax return were due to incorrect bookkeeping entries, QuickBooks default settings, and Marino's reliance on D'Abruzzo's consequently incorrect year-end general ledger. The district court's reasoning that there was "no evidence [Libous]

received or relied on any accounting advice" (A-706) concerning payment of the personal expenses was erroneous because there was substantial evidence that Libous relied on D'Abruzzo and Marino—D'Abruzzo to maintain the records and Marino to prepare the tax returns—and that both of them, as well as Boemio, were aware at all times that Libous was using his personal credit cards for WCS' expenses and had open access to Libous' credit card statements. A-159-60; A-360; A-462-63.

As with the unreported legal income in 2007, the government asked the district court to infer willfulness regarding the unreported legal income of $5,158 in 2008 based solely on the fact that those legal fees were unreported on Libous' tax return. A-615-16. There was no evidence that Libous had willfully concealed the income from Marino. To the contrary, Libous never asked Marino to help him conceal his income or minimize his tax liability. A-529.

Moreover, Libous reported $38,382 in partnership income in 2008. A-416. The $5,158 that the government alleged he had willfully omitted from his income tax return is a small percentage of that total income. Addition of that sum would not have raised Libous' income into a higher tax bracket or otherwise provided him with a tangible benefit worth the risk of the instant prosecution.[23] The record as to

[23] *See*, *e.g.*, 2008 Tax Bracket Table at http://www.bankrate.com/finance/money-guides/2008-tax-bracket-rates.aspx (25% tax bracket covers income for a single filer with between $32,551 and $78,850 in income).

2006 demonstrates that Libous "forgot" checks received for legal services. A-112. The government offered no compelling reason sufficient to prove beyond a reasonable doubt that Libous had not simply forgotten these legal fees as well.

For these reasons, the district court erred in finding that Libous had willfully signed a materially false tax return in 2008, and his conviction on Count Three should be overturned.

### 3. The Evidence Was Insufficient to Find that Libous Acted Willfully in 2009

In June 2010, FBI Agent Mazzuca interviewed Libous and for the first time, raised questions in Libous' mind about whether he had fully and completely complied with his federal income tax obligations for 2006. *See*, *e.g.*, A-112; A-120-21. Agent Mazzuca did not discuss any years after 2007 with Libous. A-110-14. Nonetheless, Libous became concerned that there might be some question about the accuracy of his previously filed tax returns. In September 2010, Libous sent an email asking D'Abruzzo to assist him in making sure that he correctly claimed all personal expenses that WCS had paid for him as income and noted that he would need to pay taxes on that money. A-375-78. Although the district court found that Libous' September 2010 email was more damning than probative of his intent to comply with the tax laws (A-707-08), Libous respectfully suggests that the district court overlooked the significance of the June 2010 meeting and that, read in conjunction with the fact of that meeting, the September email

demonstrates Libous' intention to fully comply with the tax laws and his newfound awareness and conscientiousness concerning his future tax filings.

This reading of the September 2010 email is reinforced by D'Abruzzo's testimony that she knew about the personal expenses before the 2009 tax returns were filed. A-358-59; A-326 ("When we were doing our taxes[24] and we noticed that there were personal expenses was when I started putting it into his personal expense account in 2010."). Marino also knew about the personal expenses "once the credit card statements were turned over at the end of the year." A-424.[25] Although D'Abruzzo "was incorrectly putting [the personal expenses] in[to

[24] That is, the 2009 tax returns, which would have been completed in 2010. Tellingly, the district court acquitted Libous of having acted willfully in 2010 (A-708-11) based on a finding that he had relied on D'Abruzzo and Marino. That finding was equally applicable to 2009, and would have led to Libous' acquittal on Count Four if the district court had properly considered that the 2009 tax returns were prepared in 2010.

[25] The district court mistakenly understood that the 2009 tax returns were filed before Marino learned about D'Abruzzo's incorrect entries and the lack of a Matt Libous personal account. A-707. There is no evidence to support this view, and ample evidence that all relevant parties were aware of the personal expenses before the 2009 tax returns were filed. A-361-62; A-371. There is, however, no indication in the record that Marino ever told Libous that he would need to amend his 2009 tax returns because personal expenses had been incorrectly allocated. If Marino had found out about the personal expenses after the filing of the 2009 tax returns, this would have been a logical step. Because there is no evidence that Marino took it, there is likewise evidence that he believed the 2009 tax returns had been accurate when filed and that nothing subsequently changed his mind—i,e,. he did not learn about the personal expenses after the return was filed. Likewise, if Marino had told Libous that he needed to file an amended 2009 tax return, there is every indication that Libous would have done so. *See* A-715 ("Every time Mr. Marino suggested something or prepared a return, Mr. Libous followed that advice, and signed and filed the return.").

QuickBooks] in 2009 wrong," A-327, her testimony was clear that Libous had told her he was going to pay the personal expenses for 2009. A-311-12; A-332; A-337. The credit cards were not paid in full in 2009. A-333. Libous had nothing to do with D'Abruzzo's allocation of the personal expenses. A-319. There is no evidence that Libous instructed D'Abruzzo to have WCS pay the personal expenses or that he had anything to do with the way D'Abruzzo classified the items on the credit card statements when she entered them into QuickBooks.

D'Abruzzo also testified that the reason the Matt Libous expense account showed a zero balance on the general ledger for 2009 was that she had been entering information in QuickBooks incorrectly. A-320; A-327. She testified that she had put all of the credit card payments in an exchange account—"kind of like an empty account" until she had been able to reconcile the statements. A-306. In 2009, when she had reconciled the credit card statements, she had not broken them down and put personal expenses into a Matt Libous expense account because such an account did not exist until 2010. A-424. D'Abruzzo's testimony, time and again, although confusing, was that she had merely left the personal expenses in the exchange account. A-333 ("[W]hat I was doing was just taking out whatever was job related and moving the balance forward if it was personal."); A-319 ("When I went into the exchange account, I would pull out the payment. I looked at what was job related first before personal. So whatever was job related, I

booked into the job expense. And if it was something that moved forward to the next month, it moved forward to the next month and I would apply it like that."); A-335 (D'Abruzzo didn't enter any personal expenses in the Matt Libous expense account because "I paid what just the job expenses were."); A-337 (D'Abruzzo dealt with the unpaid balance by "just . . .moving [it] forward until it was an issue."); A-310 (I would go back to whatever the payment was and pull out. Whatever was job related, I would put towards job expenses . . . or expenses throughout the company.").

In addition, Marino testified that he relied on the QuickBooks general ledger—i.e., on D'Abruzzo's entries—and agreed that QuickBooks entry errors would have been transferred to the tax returns. A-419-20; A-465-66. Marino did not recall exactly when he learned about the 2009 personal expenses. A-424 ("But, for sure, once the credit card statements were turned over at the end of the year, we knew what it was"); *id.* (the meeting occurred sometime in 2010"); *but see* A-358-59 (D'Abruzzo had all of the credit card statements and had entered them into QuickBooks before the 2009 taxes were prepared). Libous respectfully submits that the district court's finding that "Mr. Libous cannot claim he relied on Mr. Marino's advice, because Mr. Marino did not know all of the information or have a full picture," (A-707) is unsupported by the testimony.

The district court overlooked (1) that Libous told D'Abruzzo that he was going to pay the personal expenses himself, (2) that balances were indeed carried over from month to month on the credit cards (meaning that WCS did not simply pay the entire credit card balance in full each month), (3) that Libous was hardly ever in the office and was not overseeing D'Abruzzo's bookkeeping, and (4) that Libous always answered any questions about whether an expense was for business or personal.

To the extent that Libous *did* exercise any oversight, it was to alert D'Abruzzo to the fact that he intended to pay the personal expenses (A-311-12; A-332; A-337) and to ask her to assist him in breaking down the statements so that he could properly account for the personal expenses and pay the tax (A-378-79).

The use of personal credit cards to pay business expenses was an unwise business strategy. However, it is hardly surprising that an individual using personal credit cards for business expenses would also accrue personal expenses on the same cards. Boemio's strategic employment of Marino and D'Abruzzo as his CPA and Bookkeeper only compounded the confusion and the erroneous accounting and tax preparation practices. But confusion and mistakes do not equate to willfulness. *See Lefcourt*, 125 F.3d at 83 ("Congress did not intend that a taxpayer should become a criminal based on a bona fide misunderstanding as to his liability.").

In sum, Libous gave the credit card statements to D'Abruzzo before the 2009 taxes were prepared. D'Abruzzo entered them into QuickBooks but did so incorrectly because she had no Matt Libous expense account for 2009. She allocated all of the expenses to job-related categories or put them in an "exchange" account. Libous was not in the office often, and although he answered questions when asked, he did not oversee the bookkeeping. Marino took D'Abruzzo's QuickBooks and prepared the 2009 tax returns for WCS and for Libous, relying on her bookkeeping. After the meeting in 2010 at which Libous' personal expenses were discussed, Marino never came to Libous and told him that they should amend his 2009 return. Although Libous acknowledges that, "Knowledge and belief are . . . questions for the factfinder," *Cheek,* 498 U.S. at 203, a determination under these circumstances that Libous acted willfully in signing a materially false tax return in 2009 is simply unsupported by the record.

Because Marino knew "substantially all the facts" and "decide[d] on and then implemente[d] that solution," the district court should have found, as it did for the 2010, 2011, and 2011 amended tax returns, that his conduct "tips the scale from guilty to not guilty" as to 2009. *See* A-715. Libous' conviction on Count Four should be overturned.

## II. The District Court's Verdict on Count Two Should Be Overturned Because the Evidence Showed that the Witnesses Colluded in the Testimony Concerning the $30,000 Check

### A. Standard of Review

"In order to be granted a new trial on the ground that a witness committed perjury, the defendant must show that (i) the witness actually committed perjury; (ii) the alleged perjury was material; (iii) the government knew or should have known of the perjury at [the] time of trial; and (iv) the perjured testimony remained undisclosed during trial." *United States v. Zaky*, 576 Fed. Appx. 50, 51 (2d Cir. 2014) *cert. denied,* 135 S. Ct. 1469, 191 L. Ed. 2d 414 (2015) (quoting *United States v. Josephberg*, 562 F.3d 478, 494 (2d Cir. 2009) (internal quotation marks and ellipses omitted)) (internal footnote omitted). "Where the prosecution knew or should have known of the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic." *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001) (quoting *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (internal citations and quotations marks omitted)).

### B. Applicable Law

A prosecutor's knowing use of perjured testimony violates the due process clause of the Fourteenth Amendment. *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Due process requires not only that the prosecutor avoid soliciting false testimony but that he not sit idly by and allow it to go uncorrected when it is given. *Giglio*, 405 U.S. at 153.

"Few rules are more central to an accurate determination of innocence or guilt than the requirement . . . that one should not be convicted on false testimony." *Ortega v. Duncan*, 333 F.3d 102, 109 (2d Cir. 2003) (quoting *Sanders v. Sullivan,* 900 F.2d 601, 607 (2d Cir. 1990) (internal quotation marks and citations omitted)). Therefore, courts have "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Nix v. Whiteside*, 475 U.S. 157, 185, 106 S. Ct. 988, 994, 89 L. Ed. 2d 123 (1986) (Blackmun, J., concurring) (citing *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)).[26] "[W]hen truthful testimony not only would have cast doubt on the witness' credibility but also would have tended to corroborate the defendant's version of the facts, the perjury

[26] *See also id.*, 475 U.S. at 185 (Blackmun, J., concurring) ("All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial.") (internal citation omitted).

is all the more pernicious." *Taylor v. Lombard*, 606 F.2d 371, 374-75 (2d Cir. 1979), *superseded by statute on other grounds* (citing *Alcorta v. Texas*, 355 U.S. 28, 31-32, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957)).

"A witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory." *Monteleone*, 257 F.3d at 219 (referencing *United States v. Dunnigan,* 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993)). In determining whether perjured testimony was material, this Court "decide[s] whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness" and "consider[s] 'whether there was a significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'" *Ortega*, 333 F.3d at 108-09 (quoting *United States v. Stofsky,* 527 F.2d 237, 246 (2d Cir. 1975); *United States v. Seijo,* 514 F.2d 1357, 1364 (2d Cir. 1975) (internal quotation marks and citations omitted in *Ortega*)).

**C. Discussion**

When Libous was initially indicted, the government alleged that he failed to report $15,000.00 of income from the practice of law for the 2007 tax year. A-21.

However, in the Superseding Indictment filed on January 6, 2015, two weeks prior to the first day of trial, that figure changed to $34,500 in alleged unreported income for 2007.[27] A-29. The modification of the unreported income amount for 2007 was directly correlated to Boemio's allegations that his $30,000.00 personal check to Libous on August 10, 2007, was a payment for Libous' assistance at real estate closings.

Boemio's testimony that the $30,000 personal check to Libous was a payment for services rendered was materially false.[28] Because the government knew that Boemio had stated in proffer sessions that he had given Libous the $30,000 check to help him repay his student loans (A-193-95; A-199), and because the government did not correct Boemio's testimony at trial, Libous' conviction on Count Two should be overturned. *See Giglio*, 405 U.S. at 153 (due process requires not only that the prosecutor avoid soliciting false testimony but that he not sit idly by and allow it to go uncorrected when it is given).

Strikingly, at trial, although he insisted that the check was for services rendered, Boemio described it as a "bonus" and did not disavow any knowledge of how Libous had planned to use the $30,000 payment. *See* A-150-51; A-156; A-183 (the $30,000 check had been for Libous "student loans or it could have been

[27] That is, $30,000 from Boemio and $4,500 in unreported checks for legal fees.
[28] It was also implausible. *See* A-191-93 (Libous was "an incompetent attorney" whom Boemio nonetheless paid $30,000 to "sit in on" closings, even though he had a different attorney handle the actual legal work.).

credit cards."); A-183 ("I gave him a check for doing something for me."). Libous respectfully submits that, had the $30,000 check in fact been for services rendered, Boemio would not have been able to specify how Libous planned to spend the money nor would the issue of Libous' debt concern him. That Boemio was able to offer any opinion concerning Libous' plans for spending it strongly indicates that the check was not a business payment.

In addition, Boemio discussed this case with Marino and told him that the $30,000 check was a bonus. A-483-84. Because Boemio had been his friend since the late '90s (A-393) and was paying Marino's legal bills (A-227-28; A-482-83) and giving him work (A-393) and an office space (A-393-94), Marino had a strong incentive to testify in a manner calculated to agree with Boemio's assertions, whether or not they were accurate. Boemio told Marino that the $30,000 check was a bonus and Marino, who had no independent recollection of the check, testified to that effect at trial. A-483-84.

Based in significant part on a determination that the $30,000 payment had been for services rendered, the district court found that Libous' 2007 tax return had been materially false. A-705. The district court found that the government had proved willfulness based in significant part on the fact that the unreported income--$34,500—represented "approximately half of his total income for the year." A-

705. Yet, because Boemio's testimony about the $30,000 was materially false, Libous' actual unreported income was only $4,500.

The alterations in Boemio's testimony, combined with Marino's admission that Boemio had effectively told him what to say about the $30,000 check, strongly suggests that Boemio's materially false testimony that he had paid Libous $30,000 to "sit in on" closings caused the government's superseding indictment on Count Two, which closely tracked Boemio's revisionist history. Even if it did not know that Boemio's claim about the $30,000 being a payment for services rendered was materially false, the government knew that it was different from Boemio's earlier testimony that the money had been a gift. The government's failure to address this issue at trial allowed the district court to convict Libous on Count Two based on a materially inaccurate understanding of the facts.

Because "the knowing use of perjured testimony is fundamentally unfair," *Nix v. Whiteside*, 475 U.S. at 185, and because the prosecution knew or should have known of the perjury, which clearly affected the district court's judgment, *Monteleone*, 257 F.3d at 219, Libous' conviction on Count Two should be overturned.

## CONCLUSION

WHEREFORE, for the foregoing reasons, Libous' conviction on Counts Two, Three, and Four of the Superseding Indictment should be overturned.

Dated: October 9, 2015
New York, NY

s/ John C. Meringolo
John Meringolo, Esq.
Meringolo & Associates, P.C.
375 Greenwich St., 7th Floor
New York, NY 10013
(212) 941-4077
john@meringololaw.com

s/ Clara Kalhous
Clara Kalhous, Esq.
459 Columbus Ave. #165
New York, NY 10024
(347) 415-9523
clara.kalhous@gmail.com

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,452 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Times New Roman font.

s/ John C. Meringolo
John C. Meringolo

s/ Clara Kalhous
Clara Kalhous

*Attorneys for Appellant*