# 03-1415-cr

*To be Argued By*:
STEPHEN B. REYNOLDS

==========

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 03-1415-cr**

---

UNITED STATES OF AMERICA ,

*Appellee,*

-vs-

WAYNE L. SINCLAIR,

*Defendant -Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

==========

## BRIEF FOR THE UNITED STATES OF AMERICA

==========

KEVIN J. O'CONNOR
*United States Attorney*
*District of Connecticut*

STEPHEN B. REYNOLDS
WILLIAM J. NARDINI
*Assistant United States Attorneys*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

## STATUTES



## RULES

## STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant timely filed a notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over his challenge to his conviction and sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the Court have jurisdiction to consider the defendant's requests for a new trial, made for the first time on appeal?

2. Did the district court err in its evidentiary rulings, namely:

a. Was the district court's admission of a logbook entry showing the defendant's arrival in Jamaica following his deportation on December 9, 1997, plain error, such that it affected the outcome of the trial and seriously affected the fairness, integrity or public reputation of judicial proceedings?

b. Did the district court abuse its discretion when it excluded a number of financial documents for the defendant on the grounds that they were not properly authenticated, contained inadmissible hearsay, and were not germane to the only issue at trial -- whether the defendant had been deported on December 9, 1997?

c. Did the district court commit plain error when it admitted evidence of the defendant's flight from a state courtroom after being advised of an immigration detainer, and, absent objection, gave the standard instruction on consciousness of guilt from evidence of flight?

d. Did the district court abuse its discretion when it excluded a March 8, 2003, letter from a Jamaican

detective stating that "Mr. Sinclair is a Computer Consultant and is residing in Spanish Town, St. Catherine" on the grounds that the defendant had failed to establish any hearsay exception for its admission?

3. Did the district court err in denying the defendant's motion to dismiss?

4. Viewing the evidence in the light most favorable to the prosecution, was there sufficient evidence to provide a reasonable basis for the jury to conclude that Sinclair was deported from the United States on December 9, 1997?

5. Did the district court err in enhancing the defendant's sentence based on his prior convictions, and his false testimony at trial?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

## Docket No. 03-1415-cr

UNITED STATES OF AMERICA,

*Appellee,*

-vs-

WAYNE L. SINCLAIR,

*Defendant-Appellant.*

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

## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

The defendant, Wayne Sinclair, was convicted of being in the United States after having been previously deported. The only disputed issue at trial was whether the defendant had, in fact, been deported in 1997. The government offered overwhelming evidence, including two eyewitnesses and abundant documentary evidence, that the defendant had, in fact, been deported from the United

States to Jamaica on December 9, 1997, aboard a non-stop American Airlines flight from JFK International Airport to Kingston, Jamaica. The defendant, who testified at trial, claimed that he had never been deported; that he had never been put on a plane; and indeed, that he had been in the United States all along.

On appeal, the defendant claims that the district court either abused its discretion or committed plain error on a number of evidentiary rulings; that the district court erred in denying his motion to dismiss the indictment on his claims that he was deprived of due process in the underlying, fully litigated deportation proceedings; that the evidence was insufficient to establish that he ever left the United States at all; and that the district court erred in enhancing his sentence on the basis of his prior convictions. The defendant also claims that the district court erred when it found his testimony "incredible" and enhanced his sentence for obstruction of justice. This Court should reject each of these challenges and affirm the conviction and sentence.

## Statement of the Case

This appeal follows a two-day jury trial before United States District Judge Janet C. Hall of the United States District Court for the District of Connecticut.

On October 29, 2002, a federal grand jury returned a one-count indictment charging the defendant with being found in the United States after having been previously deported, in violation of 8 U.S.C. §§ 1326(a) and

1326(b)(2). (DA 8-9).[1] The defendant pleaded not guilty and was tried before a jury on April 1 and 2, 2003.

At the close of the government's case, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, the defendant orally moved for a judgment of acquittal, on the grounds of insufficiency of the evidence. (GA 231). The court denied the motion.

Following the jury's guilty verdict and its discharge, the defendant renewed his oral motion for judgment of acquittal. The court reserved decision and requested a written submission from the defendant particularizing his claims. (GA 446). On April 8, 2003, the defendant filed a written motion for judgment of acquittal and a memorandum in support, again challenging only the sufficiency of the evidence. (DA 6; GA 499-500; 507). The defendant never moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. (DA 1-7).

At sentencing on June 23, 2003, in an oral ruling, the district court denied the defendant's motion, noting that "the evidence was quite strong," (GA 500) and that the "jury had before it *more than sufficient evidence* to reasonably conclude that this defendant had indeed been previously deported from the United States." (GA 512) (emphasis added). The Court then sentenced Sinclair

---

[1] References are as follows:

Government Appendix . . . . . ("GA _____.")
Defendant's Appendix . . . . . ("DA _____.")

principally to 92 months of imprisonment. Sinclair filed a timely notice of appeal on June 27, 2003. He is presently serving his sentence.

## Statement of Facts and Proceedings Relevant to this Appeal

On December 9, 1997, the defendant, Wayne Leopold Sinclair, was deported from the United States at JFK International Airport, aboard American Airlines Flight #645 to Kingston, Jamaica. In August 2002, the defendant was found back in the United States without permission, when he appeared for a proceeding in Superior Court in Hartford, Connecticut.

### 1. The Government's Trial Evidence

During a two-day trial in April 2003, the jury heard the following evidence: On May 17, 1995, an immigration judge ordered the defendant deported to Jamaica. (GA 150-53; 540). After exhausting appeals to the Board of Immigration Appeals and this Court, the defendant became available for deportation in late 1997. (GA 150-53; 190-91; 540). Accordingly, the Immigration and Naturalization Service ("INS") began to arrange for travel to effect the defendant's deportation. (GA 44-45; 57; 540).

Specifically, the INS had a travel agency book a flight for the defendant. (GA 45-46). Documents showed a scheduled flight for Wayne Sinclair on December 9, 1997, aboard American Airlines Flight #645, which had a scheduled departure time of 10:00 a.m. and a scheduled

arrival time at Kingston Manley Airport in Jamaica of 3:46 p.m. (GA 46-48; 526). The documents set forth additional information, including the alien file number for the defendant. (GA 46-48; 526).

The INS also arranged for an emergency passport for the defendant through the Jamaican Consulate General. (GA 48-51). Specifically, on December 4, 1997, that office issued an "Emergency Certificate of Travel" for Sinclair, on which he was described as "under deportation." (GA 52-53; 528-29). The Emergency Certificate was issued specifically for "Wayne Leopold Sinclair," bore his picture and date of birth, and specifically indicated that it was valid only for the December 9 flight. (GA 52-53; 528-29). The jury heard testimony from INS Officer James Brown that the Emergency Certificate was tantamount to a one-way, one-time passport. (GA 50-51; 53).

In anticipation of his removal, the defendant was taken into custody at the Hartford County Correctional Center ("HCC") on November 13, 1997, and remained there until December 8, 1997, when he was released into the custody of the INS and held overnight for his deportation the following morning. *(See*, *e.g.*, GA 53-55; 86-87; 530-31; 557; 560).

On the morning of December 9, 1997, INS Officers James Brown and David Ostrobinski picked the defendant up in Hartford and drove him to JFK Airport. (GA 61-62; 87; 129; 135-36). At the airport, the officers took the defendant's fingerprint, which appears on his Warrant of Deportation. (GA 129-30; 142; 145-46). The officers

escorted the defendant through check-in and all the way to the gate. The officers escorted Sinclair onto the flight, took him to his assigned seat; buckled him in, and thereafter made sure all exits of the plane other than the front exit were secured. (GA 60-63; 88-90; 129-30; 133; 135-36). Officer Brown testified that all such flights, including Sinclair's flight to Jamaica, were non-stop flights that go directly to their destination. (GA 90; 94).

The officers then stood at the one and only available exit to the plane and ensured that the defendant did not disembark. (GA 63-65; 135-36; 139). Prior to the door closing, the officers stepped back into the plane, made "eye contact" with Sinclair to ensure that he was still sitting in his seat, then exited the plane shortly before the door was closed. (GA 63; 90). The officers continued to watch the plane leave for as long as they could maintain visual contact and then confirmed with American Airlines personnel that the flight had, in fact, departed. (GA 63-65; 90; 139). After confirming that the flight was airborne, both officers then completed the execution of the Warrant of Deportation. (GA 59-60, 66, 139-40; 532-33).

At approximately 3:46 p.m. on that day, Flight #645 arrived as scheduled in Jamaica with Wayne Sinclair on board. (GA 71-72; 535). Jamaican immigration authorities entered Sinclair's arrival in a logbook they regularly maintain for all deportees who arrive on the island from various countries. (GA 68). A copy of a page from the logbook for the relevant time period, listed an entry on December 9, 1997, at "15:46 hours" aboard "AA645" (American Airlines Flight #645) for a "Wayne Leopold Sinclair." (GA 71-72; 535). In addition, in

response to a question from defense counsel, Officer Brown testified that all people entering Jamaica must complete a Jamaican customs immigration declaration form, and that he had personally seen, in Jamaica, such a declaration form that had been completed by Sinclair during his flight to Jamaica. (GA 83-84).

The jury heard evidence confirming that it was the Wayne Sinclair sitting in the courtroom during the trial who was deported to Jamaica on December 9, 1997. First, the jury heard the eyewitness testimony of the two deportation officers who escorted Sinclair to his deportation flight. Officer Brown identified the defendant in court and testified that he specifically remembered escorting the defendant to JFK Airport. (GA 42-43; 72-73; 122-23; 129-30) ("[T]he Wayne Sinclair I deported is right there at the table . . . ."). Trooper Ostrobinski testified that, although he could not specifically identify the defendant given the lapse of time and the number of deportations in which he participated, his signature on the Warrant of Deportation meant that the individual in the photograph was the one whom he deported. Trooper Ostrobinski further testified that the individual in the photograph on the Warrant of Deportation resembled the defendant sitting in court on April 1, 2003. (GA 134).

The government introduced a wealth of documentary evidence relating to the defendant's deportation, which contained specific identifying information for Wayne Leopold Sinclair. Those documents included, among other things, his full name; his date of birth; his social security number; his alien registration number; and his picture. (*See*, *e.g.*, GA 527-33; 535; 540; 554 and 559).

The government's evidence included two independent fingerprint analyses of the right index fingerprint that appeared on the December 9, 1997, Warrant of Deportation. Specifically, the results of an FBI fingerprint analysis confirmed that the print on the Warrant of Deportation matched a print for Sinclair already on file. (GA 171; 553). In addition, Gene Redmond, an Identification Technician with the Connecticut State Police Bureau of Identification, testified that the print on the Warrant of Deportation matched a print for Sinclair already on file as well. (GA 225-28).

Finally, the government's evidence regarding the December 9, 1997, deportation included Government Exhibit 22 -- a warning of rights given to Sinclair on the date of his deportation. (GA 192-93; 559). The completed form indicated that it was served on Wayne Sinclair on December 9, 1997; that Sinclair signed it on that date; and that Sinclair's signature was witnessed by Officer Brown. (GA 192-94; 559).

The evidence also showed that, approximately five years later, on August 13, 2002, INS Special Agent Mike Loser received a phone call from the State's Attorney's Office in Hartford, informing him that the defendant was scheduled to appear in Hartford Superior Court on August 19, 2002. (GA 149-50; 153-54). Special Agent Loser testified that INS records confirmed that Wayne Leopold Sinclair had been previously deported to Jamaica on December 9, 1997. (GA 156-58; 202-03; 554). INS Special Agent Stephen Back testified that he prepared an INS detainer and faxed it to the Connecticut Judicial

Marshals so that the defendant would be detained if he showed up for his court appearance. (GA 203-06; 212; 555-56).

Connecticut Judicial Marshal Sam Minella testified that, when Sinclair showed up for court on August 19, 2002, and the judge informed him of the INS detainer, Sinclair tried to flee. (GA 216-17). Specifically, Sinclair pushed a Judicial Marshal out of the way and ran out of the courtroom until Marshal Minella and others were able to restrain him. (GA 216-19).

Sinclair spent a number of days in custody, after which he was taken into custody and processed by the INS on or about August 30, 2002. (GA 189; 212-13; 557). The jury heard testimony that, during processing, Sinclair's fingerprints were taken again. (GA 164-67; 189; 191-92; 544). The FBI fingerprint analysis and testimony from Gene Redmond established that the fingerprints taken from the defendant in August 2002 also matched those of the defendant. (GA 169-71; 228-29; 553).

The jury also heard evidence that a diligent search by both INS Special Agent Mike Loser and Ruth Jones, Chief of the Records Services Branch for the INS, failed to yield any indication that Wayne Sinclair had received permission to either be back in the United States or to apply for readmission. (GA 158-61; 163; 538-39; 541-43).

## 2. The Defendant's Trial Testimony

On April 2, 2003, after a full canvas by the Court on the risks of testifying (GA 262-67), the defendant chose to

take the stand. The defendant's version of the events stood in stark contrast to the Government's version.

The crux of the defendant's testimony was that he had never been deported; that he had never been put on a plane at all; and that he had been in the United States all along. (*See*, *e.g.*, GA 294) ("[e]ver since I've been living here from Jamaica, I've never left the United States.").

With respect to whether he had previously been deported, the defendant claimed that, in November 1997, he was picked up by the INS and held for a week at the Hartford Correctional Center, after which he was simply released, without any further action. (GA 302-04; *see also* GA 339) ("I got picked up like the 12th or the 13th and I spent a week in detention and I was released thereafter.").

The defendant also testified that he had never before seen the Emergency Certificate of Travel issued for "Wayne Leopold Sinclair" for the December 9, 1997, flight; and claimed that the picture affixed thereon "does not look like me." (GA 308-09). On December 9, he claimed, "I was at work." (GA 311).

Similarly, Sinclair testified that he had never before seen the Warrant of Deportation dated December 9, 1997, which contained his flight information; his picture; his signature; his right index fingerprint; and the verifying signatures of Officers Brown and Ostrobinski. (GA 314). Sinclair claimed that neither the fingerprint nor the signature on the Warrant of Deportation was his. (GA 314-15). Sinclair went on to claim that he had not seen

any INS officers on December 8 or 9, 1997, and that he was not at JFK Airport on December 9. (GA 317-18).

Sinclair also claimed that, when he showed up for court on August 19, 2002, and he heard a reference to immigration, he never attempted to flee, but rather "walked" towards the door, at which point a marshal spontaneously tackled him and threw him down. (GA 320-22; *see also* GA 344). Although not introduced at trial, the defendant then avoided the fact that he had been held in criminal contempt by the judge and detained for ten days before his transfer to INS custody, claiming that, after he apologized to the court, that was the end of the matter. (GA 323-25).

Sinclair then testified that he had never before seen the advice of rights upon deportation form given to him on December 9, 1997. (GA 325). He claimed that he was not incarcerated at Thanksgiving time in 1997 but rather attended dinner at a relative's house. Indeed, he testified in exquisite detail about, among other things, how he got there, who was there; what he ate for dinner and how long he stayed. (GA 340-41). Sinclair also claimed that he was not incarcerated, but rather, working, on December 8, 1997; that he was living with his girlfriend, Pauline, at the time; and that he was not, and had never been, deported from the United States. (GA 329-31). He vehemently denied that his girlfriend, Pauline Davis, came to visit him at the Hartford Correctional Center on December 1, 1997. (GA 341-42). The defendant went so far as to deny that he was subject to the Order of Deportation. (GA 337-38; 540).

### 3. The Government's Rebuttal Case

During its rebuttal case, the Government elicited the testimony of State of Connecticut Department of Corrections ("DOC") Records Custodian Lucien Carrier, and introduced several DOC documents establishing that, contrary to the defendant's testimony, the defendant had, in fact, been in custody at Hartford Correctional Center for the entire period of time from November 13, 1997, until December 8, 1997, when he was released into INS custody for his deportation the following day. (*See*, *e.g.*, GA 358-59; 530 (INS Detainer lodged with HCC on November 13, 1997 indicating "do not release or transfer"); GA 359-61; 560 (defendant's HCC inmate identification card issued November 13, 1997); GA 531 (INS Release lodged with HCC on December 8, 1997); and GA 361-66; 557 (DOC report showing no movements, transfers, releases, furloughs, etc. for the defendant between November 13 and December 8, 1997)).

In addition, contrary to the defendant's testimony that he was not in custody at HCC on December 1, 1997, and had not received a visit by his girlfriend on that date, the Government introduced a DOC list of visitors for the defendant, which included a December 1, 1997, visit at HCC by Pauline Davis -- who Sinclair had admitted was his girlfriend at the time. (GA 366-68; 561; 341-42).

### 4. The Sentencing Proceeding

On June 23, 2003, the district court held a sentencing hearing. Ruling from the bench, the court denied the defendant's post-trial motion for judgment of acquittal,

finding that "the evidence was quite strong." (GA 500). It ultimately sentenced the defendant to 92 months of imprisonment, the bottom of the applicable Guidelines range.

## SUMMARY OF ARGUMENT

I. During the entire proceedings below, the defendant never made a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The defendant's appeal marks the first time he has requested a new trial on any ground. Accordingly, he has failed to preserve those arguments and the court lacks jurisdiction to consider those claims.

II. The district court's evidentiary rulings did not deprive the defendant of a fair trial. The district court did not commit plain error when it admitted evidence of Sinclair's flight; and did not abuse its discretion when it excluded certain financial documents and a letter offered by the defendant. Although the district court's evidentiary analysis regarding the logbook entry was correct at the time of trial in April 2003, it now appears that admission of the logbook based upon a foreign certification pursuant to 18 U.S.C. § 3505 violated the defendant's Confrontation Clause rights under the Supreme Court's subsequent decision in *Crawford v. Washington*, -- U.S. --, 124 S. Ct. 1354 (2004). Because the defendant failed to make a Confrontation Clause claim; because there was overwhelming evidence of the defendant's guilt; and because the logbook was cumulative of other, properly admitted evidence, the defendant cannot show that the admission of the logbook affected the outcome of the trial

or seriously affected the fairness, integrity or public reputation of judicial proceedings.

III. The district court did not err in denying the defendant's motion to dismiss the indictment, which claimed that Sinclair had been deprived of due process in his deportation proceedings. The district court also did not plainly err by failing to hold an evidentiary hearing on that motion, because such a hearing was never requested and because the information on which the district court relied was included in the parties' submissions. The district court did not err by relying in part on information that was provided at its request by the Bureau of Prisons and the Probation Office, because the court found that it would have reached the same result based exclusively on the information provided by the parties.

IV. The evidence easily sufficed to demonstrate that Sinclair was unlawfully found in the United States after having been previously deported, in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2). Eyewitnesses testified that Sinclair had been placed on a plane that left JFK Airport bound for Jamaica, and abundant documentary evidence corroborated that account.

V. The district court did not plainly err in enhancing the defendant's sentence based on his prior conviction and his perjury at trial. This Court's recent decision in *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (per curiam), precludes any argument that full application of the Sentencing Guidelines violates the Sixth Amendment. Moreover, undisturbed precedent of the Supreme Court and this Court establishes that a prior conviction does not

constitute an element of the offense of illegal re-entry, and that a sentencing judge may determine facts relating to such a conviction by a preponderance of the evidence.

## ARGUMENT

### I. THE COURT LACKS JURISDICTION TO CONSIDER THE DEFENDANT'S REQUESTS FOR A NEW TRIAL

#### A. Relevant Facts

During the entire proceedings below, the defendant never moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. (*See*, *e.g.*, DA 1-7). The defendant's appeal marks the first time he has requested a new trial on any basis. Def. Br. at 52 (asking, "if the Court finds merit to arguments 1, 3, 4, 5, or 6, that it reverse the judgment of conviction and remand for a new trial."). Because the defendant never moved for a new trial in the district court, he has failed to preserve this claim and the court lacks jurisdiction to consider his request.

#### B. Governing Law and Standard of Review

Under Fed. R. Crim. P. 33, a district court, "[o]n a defendant's motion," may grant a defendant a new trial if one is required in the interests of justice. If a defendant makes a Rule 33 motion based on newly discovered evidence, he must do so within three years of the verdict. *See* Fed. R. Crim. P. 33. If a defendant seeks to make the motion on any other grounds, however, "he must do so seven days after the verdict or within such further time as

the district court sets." *United States v. McCarthy*, 271 F.3d 387, 399 (2d Cir. 2001); *see also* Fed. R. Crim. P. 33.

Where , as here, "a motion for a new trial is not timely, and 'there is no suggestion that the motion is based on newly discovered evidence,' the motion is deemed untimely, and [the Court] lack[s] jurisdiction to consider it." *McCarthy*, 271 F.3d at 399 (citing *United States v. Moreno*, 181 F.3d 206, 212 (2d Cir. 1999)).

### C. Discussion

Although the defendant made certain objections during the trial to some of the district court's evidentiary rulings, and made a motion for a judgment of acquittal both at the close of the government's case and following the jury's verdict, the defendant never made a motion for a new trial pursuant to Rule 33. On appeal, the defendant for the first time requests a new trial on various grounds. *See* Def. Br. at 52. Because there is nothing in the record to suggest that Sinclair made a motion for a new trial within seven days after the verdict and because none of the grounds advanced involve newly discovered evidence, those claims are barred and this Court lacks jurisdiction to consider any of the defendant's claims for which the requested relief is a new trial. *See*, *e.g.*, Fed. R. Crim. P. 33; *McCarthy*, 271 F.3d at 399-400; *Moreno*, 181 F.3d at 212 (citing *United States v. Bramlett*, 116 F.3d 1403, 1405 (11th Cir. 1997) ("The time limits imposed by Rule 33 are jurisdictional.").

## II. THE DISTRICT COURT'S EVIDENTIARY RULINGS DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL

### A. Relevant Facts

The facts pertinent to consideration of these issues are set forth in the "Statement of Facts" above as well as in the discussion sections specific to each claim below.

### B. Governing Law and Standard of Review

A district court has broad discretion in its decisions to admit or exclude evidence and testimony. When a defendant's evidentiary challenges on appeal mirror his objections to that evidence at trial, the Court reviews the district court's decision to admit the evidence for abuse of discretion. *See*, *e.g.*, *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004); *United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002); *United States v. Williams*, 205 F.3d 23, 33 (2d Cir. 2000). Its rulings in this regard are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *See United States v. Yousef,* 327 F.3d 56, 156 (2d Cir. 2003) (manifestly erroneous); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 83 (2d Cir. 1999) ("[e]videntiary rulings are reversed only if they are 'manifestly erroneous'"); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

Where, however, a defendant raises new objections to the admission of evidence for the first time on appeal, the Court reviews those claims for plain error under Fed. R.

Crim. P. 52(b). *See*, *e.g.*, *United States v. Inserra*, 34 F. 3d 83, 91 n.1 (2d Cir. 1994) (citing *United States v. Mendoza -Salgado*, 964 F.2d 993, 1008 (10th Cir. 1992); *United States v. Manso-Portes*, 867 F.2d 422, 426 (7th Cir. 1989)); *see also* Fed. R. Evid. 103(a)(1) (requiring litigants to "stat[e] the specific ground of objection" to preserve a claim of error).

A trilogy of decisions by the Supreme Court interpreting Rule 52(b) has established a four-part plain error standard. *See United States v. Cotton*, 535 U.S. 635 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant's substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67.[2]

---

[2] Under the third ("substantial rights") prong of the plain-error standard, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734 (1993). This Court has held that in cases where, as with this defendant's Confrontation Clause claim, the error sought to be noticed arises from an intervening judicial decision, the burden shifts to the government to prove the absence of prejudice to

(continued...)

## C. Discussion

### 1. The Jamaican Logbook Entry

The defendant argues that the admission of the logbook page recording his return to Jamaica violated the evidentiary rules governing authentication, the prohibition against hearsay and his Sixth Amendment right of confrontation. During argument that took place before

---

[2] (...continued)
the defendant. *See United States v. Viola*, 35 F.3d 37 (2d Cir. 1994); *United States v. Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996); *Napoli v. United States*, 45 F.3d 680 (2d Cir. 1995).

*Viola*'s modified plain-error standard is, we submit, inconsistent with *Olano*'s facially unqualified allocation of the burden of persuasion in all cases involving a forfeited error. *Viola*'s reasoning, moreover, has been effectively superseded by the Supreme Court's later decision in *Johnson*. *Johnson* actually involved an intervening change in the law on appeal, and the Supreme Court emphasized that *Olano*'s standards -- including the requirement that the defendant prove prejudice -- apply in those circumstances. This Court has had no occasion to resolve the continued viability of *Viola*'s modified plain-error approach after *Johnson*. *See, e.g., United States v. McLean*, 287 F.3d 127, 135 & n.6 (2d Cir. 2002); *United States v. Thomas*, 274 F.3d 655, 668 n.15 (2d Cir. 2001) (en banc); *United States v. Knoll*, 116 F.3d 994, 1001 (2d Cir. 1997); *United States v. Santiago*, 238 F.3d 213, 215 (2d Cir. 2001). No other court of appeals has adopted a modified burden-shifting approach before or after *Johnson.*

In the present case, the abundant record evidence demonstrates the absence of any prejudice to Sinclair, regardless of where the burden lies.

trial, however, the basis for the defendant's objections to the admission of the logbook were: (1) that the document was a copy, not a duplicate, (GA 4-6); (2) that the document should be excluded under Rule 403 of the Federal Rules of Evidence, (GA 15); and (3) that the document was not properly authenticated pursuant to Rule 902 of the Federal Rules of Evidence. (GA 6-7). As discussed below, the preserved claims are meritless. And while the defendant's new Confrontation Clause claim has some merit in light of an intervening Supreme Court decision, he cannot demonstrate "plain error" that warrants reversal.

The government argued that 18 U.S.C. § 3505, entitled "foreign records of regularly conducted activity," authorized admission of the logbook, because it was an item that was regularly maintained by immigration authorities in Jamaica, in which they would note -- as a regular practice during processing -- a deportee's arrival in their country. The government argued that Rule 901(b)(10) of the Federal Rules of Evidence permitted authentication through means provided by an Act of Congress; the certification at issue tracked the language of 18 U.S.C. § 3505(a)(1); and the document was self-authenticating under the express terms of 18 U.S.C. § 3505(a)(2).

The district court ultimately agreed, stating "it appears to be what it purports to be," (GA 14), and concluding, "I think the combination of the statute and the certification and what the statute directs as a matter of law is to be accepted with respect to that certification and the Court

will admit it and conclude that under the 403 analysis, it is admissible." (GA 19).

At trial, Officer Brown testified regarding the procurement of the logbook entry and the regular practice of the Jamaican authorities of documenting deportees in the logbook during processing upon their arrival. (GA 66-69). Officer Brown testified that he had witnessed this practice first-hand, having taken to Jamaica deportees requiring a personal escort. (GA 69; *see also* GA 123 ("Those entries, I know from past experience, are made the day that the individual's processed in by the Jamaican authorities.")). The government was then permitted to read into the record the certification pursuant to 18 U.S.C. § 3505, (GA 69-70; 534). The trial court then admitted the page from the logbook evidencing Sinclair's arrival in Jamaica on December 9, 1997, over the "same objection" made by defense counsel during the earlier argument outside the presence of the jury. (GA 70).

The district court did not abuse its discretion in finding that the logbook entry was properly authenticated pursuant to Rule 901(b)(10) and 18 U.S.C. § 3505(a)(2), nor did it err in its analysis that the prerequisites set forth in the hearsay exception of 18 U.S.C. § 3505(a)(1) had been met. Although the defendant argues that the logbook was a foreign public record only, potentially admissible only pursuant to Rules 902(3) and 803(8) of the Federal Rules of Evidence, at the time of trial in April 2003, the logbook also qualified for admission as a foreign record of a regularly conducted activity pursuant to 18 U.S.C. § 3505.

"[T]he burden of authentication does not require the proponent of the evidence to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be. Rather, the standard for authentication, and hence for admissibility, is one of reasonable likelihood." *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999) (internal quotation marks omitted). Under Fed. R. Evid. 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Such evidence may be based on "[a]ny method of authentication or identification provided by an Act of Congress . . . ." Fed. R. Evid. 901(b)(10).

18 U.S.C. § 3505(a)(2) provides that a foreign record of regularly conducted activity shall be self-authenticating if the record is accompanied by a "foreign certification." 18 U.S.C. § 3505(a)(2). A foreign certification is a written declaration that is "made and signed in a foreign country; by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country." 18 U.S.C. § 3505(c)(2).

The certification of the logbook page tracked the language for authentication required by 18 U.S.C. § 3505. The affiant, Corporal Glenroy Smythe, declared, with the understanding that he was subject to criminal penalty under the laws of Jamaica for an intentionally false declaration, that he was employed by the Jamaican

Constabulary Force, and by reason of his position, he was authorized to make the declaration. (GA 534).

Similarly, the testimony at trial and the foreign certification established the necessary prerequisites for the hearsay exception set forth at 18 U.S.C. § 3505(a)(1). Section 3505 of Title 18, governing "foreign records of regularly conducted activity," provides, in pertinent part:

> (a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that--
>
> > (A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
> >
> > (B) such record was kept in the course of a regularly conducted business activity;
> >
> > (C) the business activity made such a record as a regular practice; and
> >
> > (D) if such record is not the original, such record is a duplicate of the original;
>
> unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

18 U.S.C. § 3505. Section 3505(c)(3) defines "business" in the broadest possible terms, stating that it includes any "business, institution, association, profession, occupation, and calling of every kind, whether not conducted for profit."

The evidence at trial established that the immigration authorities at the Jamaican Constabulary Force's Special Branch -- an "institution, association, profession, occupation [or] calling of [any] kind" -- made the logbook as a regular practice and kept the logbook in the course of that regularly conducted activity. (GA 69; 123). In addition, Smythe's certification provided that the copy of the logbook page attached thereto was: (1) a true copy of that record; (2) that was made at or near the time of Sinclair's arrival in Jamaica by a person with knowledge of those matters; (3) that was kept in the course of regularly conducted activity; and (4) was made by the Jamaican Constabulary Force's Special Branch as a regular practice. (GA 534). On this record, the district court did not err in its analysis of the admissibility of the logbook entry pursuant to 18 U.S.C. § 3505. (GA 14 ("it deals with the hearsay problem, 3505"); ("In other words, (a)(1) dealt with the hearsay problem, (a)(2) goes on to deal with the authentication problem and doesn't suggest any further authentication . . . because here, Congress has, by specific act, credited such certification as, in effect, authenticating.")).

On March 8, 2004, however, the Supreme Court decided *Crawford v. Washington*, 124 S. Ct. 1354, which "substantially alter[ed] the Court's existing Confrontation Clause jurisprudence." *United States v. McClain*, 377 F.3d

219, 221 (2d Cir. 2004); *see also United States v. Saget*, 377 F.3d 223, 226 (2d Cir. 2004). *Crawford* held that no prior testimonial statement made by a declarant who does not testify at trial may be admitted against a defendant unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him or her. *See Crawford*, 124 S. Ct. at 1369; *McClain*, 377 F.3d at 221 ("*Crawford* departs from prior Confrontation Clause jurisprudence by establishing a *per se* bar on the admission of out-of-court testimonial statements made by unavailable declarants where there was no prior opportunity for cross-examination."); *Saget*, 377 F.3d at 226 (same).

Until *Crawford*, "[a]ny out-of-court statement was constitutionally admissible so long as it fell within an exception to the hearsay rule or, if that exception was not firmly rooted, the court found that the statement was likely to be reliable." *Saget*, 377 F.3d at 226 (citing *White v. Illinois*, 502 U.S. 346, 366 (1992)). *Crawford* abrogated that jurisprudence, "by holding that such statements may never be introduced against the defendant unless he or she had an opportunity to cross-examine the declarant, regardless of whether the statement falls within a firmly rooted hearsay exception or has particularized guarantees of trustworthiness." *Saget*, 377 F.3d at 226 (citing *Crawford,* 124 S. Ct. at 1370, 1374).

*Crawford* conditions its bar on the admission of prior out-of-court statements that were not subject to cross-examination on whether the statements are "testimonial." *See Crawford*, 124 S. Ct. at 1364 (defining a witness as someone who "bear[s] testimony."). Although *Crawford*

declined to "spell out a comprehensive definition of 'testimonial,'" *id.* at 1374, its logic strongly implies that materials such as affidavits (such as a certification pursuant to 18 U.S.C. § 3505) are testimonial, as they are materially indistinguishable from the types of materials which the *Crawford* decision identified as comprising the core class of "testimonial" hearsay. *See id*. at 1364, 1374; *see also McClain*, 377 F.3d at 221 (defining testimony as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."). Moreover, as this Court has observed, *Crawford* "suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may be later used at a trial." *Saget*, 377 F.3d at 228; *see also id.* at 229 n.2 (noting Justice Thomas' concurrence in *White*, 502 U.S. at 365, defining testimonial statements to include "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.") Because Corporal Smythe's certification was prepared specifically for trial, and introduced absent a showing that he was unavailable and without a prior opportunity for cross-examination, under *Crawford*, the admission of his testimony setting forth the evidentiary requirements under 18 U.S.C. § 3505 for the admission of the logbook appears to have violated the defendant's Confrontation Clause rights.

"It is well established that violations of the Confrontation Clause, if preserved for appellate review, are subject to harmless error review, however, and *Crawford* does not suggest otherwise." *McClain*, 377 F.3d at 222. Here, the defendant did not object to Corporal

Smythe's certification, and failed to raise a Confrontation Clause claim. Accordingly, the defendant bears the burden of demonstrating plain error. *See*, *e.g.*, *United States v. Dukagjini*, 326 F.3d 45, 60-61 (2d Cir. 2003) ("We adhere to the principle that, as a general matter, a hearsay objection by itself does not automatically preserve a Confrontation Clause claim.") (collecting cases), *cert. denied,* 124 S. Ct. 2832 (2004); *see also California v. Green*, 399 U.S. 149, 156 (1970).

Under *Crawford*, it appears that the admission of the logbook was constitutional error and "plain," in the sense that it is now "clear" or "obvious." *See Johnson*, 520 U.S. at 467-68 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."). The defendant, however, has not shown, and cannot show that the error affected his substantial rights, because he cannot demonstrate prejudice -- i.e., that it "affected the outcome of the district court proceedings," *Olano*, 507 U.S. at 734. In addition, the defendant cannot show that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," because there was overwhelming evidence of guilt. *Cotton*, 535 U.S. at 634; *Johnson*, 520 U.S. at 470.

The evidence at trial overwhelmingly showed that the defendant had been deported from the United States to Jamaica on December 9, 1997. The evidence included, among other things, the Emergency Certificate of Travel for Sinclair, on which he was described as "under deportation," and which bore his picture and date of birth, and specifically indicated that it was "valid only for the

journey to Kingston, Jamaica via AA flight #645 leaving JFK at 10:00 a.m. on 9th December, 1997"; the advice of rights form given to the defendant on December 9, 1997, which contained his signature and the signature of Officer Brown; and the December 9, 1997, Warrant of Deportation for Sinclair, which contained his flight information, his picture, his signature, his right index fingerprint and the verifying signatures of the escorting officers. The evidence at trial also included the eyewitness testimony of the two INS officers who personally escorted Sinclair to the flight and then watched the flight depart to Jamaica. (GA 90; 94). In addition, defense counsel elicited the fact that Officer Brown had personally seen a Jamaican customs declaration form that had been completed by Sinclair during his flight to Jamaica. (GA 83-84). Thus, the admission of the logbook entry was relatively unimportant to the case because it was not central to the determination of guilt and because it was cumulative of other, unchallenged evidence that was properly admitted.

In light of the overwhelming evidence of guilt, the defendant cannot demonstrate that the admission of the logbook entry affected the outcome of the trial, *Olano*, 507 U.S. at 734; or that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 634; *Johnson*, 520 U.S. at 470; *United States v. Aulicino*, 44 F.3d 1102, 1110 (2d Cir. 1995) (finding no plain error where vast majority of improperly admitted hearsay statements were cumulative of other, properly admitted evidence).

### 2. The Defendant's Financial Documents

The defendant argues that the trial court abused its discretion when it excluded a number of financial documents for the defendant for the time period from 1997 through 2003 on the grounds that they were not properly authenticated, contained hearsay, and in any event, were not germane to the only issue at trial -- whether Sinclair had been deported on December 9, 1997. *See* (GA 268-71). The defendant argues that these documents should have been admitted to show that the defendant had dutifully filed his tax returns and had lived without subterfuge after 1997, calling into question the government's contention that he had been deported in December 1997.

The defendant had sought to introduce a packet of financial and employment documents including various W-2's, tax returns, a social security earnings record and a student loan bill in his name. Most of the documents related to the time period from 1998 through 2003; and the only documents relating to 1997 reflected information for the entire year, rather than information specific to the relevant time period of December 1997.

The government did not claim that the defendant was not in the United States at all in 1997, or that he was absent for a significant period thereafter. Rather, the government's theory was that the defendant was taken into custody in November 1997 and deported on December 9, 1997. Moreover, there was testimony from Special Agent Loser that it was possible for a deportee to return to the United States very quickly -- indeed, as soon as the very

next day. (GA 195; 197). Because the records did not show that the defendant, for example, earned income on a particular date, or even at any specific time in or around November or December 1997, the district court did not abuse its discretion when it concluded that the records were not probative of any issue in the case. (GA 269-70).

Moreover, although the documents were not admitted into evidence, the defendant was nevertheless permitted to testify that he had been working continuously in 1997; that he had been working in November 1997 and specifically, on December 8 and 9, 1997; that he had continuously paid taxes from 1997 through 2001; and that he had lived openly under his name and social security number from 1997 to the present. (*See*, *e.g.*, GA 304-06; 311). Accordingly, although the documents were excluded, the purpose of the offer was nevertheless satisfied by other evidence in the record. *See United States v. Weiss*, 930 F.2d 185, 199 (2d Cir. 1991) (holding that because excluded documents were cumulative of other evidence in record, any error was harmless).

### 3. Evidence of, and Instruction on, Sinclair's Flight

The defendant claims that the district court erred by allowing into evidence the testimony regarding Sinclair's flight from the state courtroom. For much the same reasons, the defendant claims that the district court erred by giving the standard jury instruction on consciousness of guilt from evidence of flight.

A district court's evaluation of the potential prejudice of evidence of flight and the court's ultimate decision to admit it are generally reviewed for abuse of discretion. *See United States v. Amuso*, 21 F.3d 1251, 1258 (2d Cir. 1994). Because the defendant did not object to this testimony at trial, however, this claim is reviewed for plain error.

Similarly, the defendant's claim that the court should not have given an instruction on flight is reviewed for plain error. The defendant did not formally object to the inclusion of the instruction by the court, *see* GA 259 ("The only issue in my mind has to do with the charge, consciousness of guilt from the defendant's flight. I don't think the defendant technically objected to it . . . ."); *see also* (GA 259-62); and certainly did not preserve it by taking an exception following the charge. (GA 439; *see also* Def. Br. at 45 ("the defendant took no exception.")).

Where, as here, a party fails to object to an alleged instructional error, the Supreme Court and the Second Circuit alike have applied "plain error" review. *See Johnson*, 520 U.S. at 469 (1997); *United States v. Knoll*, 116 F.3d 994, 999 (2d Cir. 1997). Moreover, Rule 30 of the Federal Rules of Criminal Procedure provides: "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto *before the jury retires to consider its verdict*, stating distinctly the matter to which that party objects and the grounds of the objection." *See United States v. Rossomando*, 144 F.3d 197, 200 (2d Cir. 1998) ("Under Rule 30, the objection 'must direct the trial court's attention to the contention that is to be raised on appeal,' and must 'provide the trial court

with an opportunity to correct any error in the jury instructions before the jury begins deliberating.") (quoting *United States v. Masotto*, 73 F.3d 1233, 1237 (2d Cir.1996)). If a challenge to the district court's jury instructions is not lodged "at trial," the challenge is subject to plain error review. *United States v. Schultz*, 333 F.3d 393, 413 (2d Cir. 2003).

The trial court did not commit plain error in allowing the evidence of Sinclair's flight. "It is well settled that flight can evidence consciousness of guilt." *United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002); *see also*, *e.g.*, *United States v. Salameh*, 152 F.3d 88, 157 (2d Cir. 1998). Indeed, this Court has noted that "[f]rom the very infancy of criminal litigation, juries have been permitted to consider flight as evidence of consciousness of guilt and thus of guilt itself." *United States v. Harley*, 682 F.2d 398, 401 (2d Cir. 1982) (citations and internal quotation marks omitted).

A review of the record reveals that there was a sufficient basis for the district court to properly admit this evidence. As set forth above, State of Connecticut Judicial Marshal Sam Minella testified that, when Sinclair showed up for court on August 19, 2002 and the judge informed him of the INS detainer, Sinclair tried to flee, pushing a Judicial Marshal out of the way and running out of the courtroom until the marshals were able to restrain him. (GA 216-19; GA). Sinclair himself admitted that he left the courtroom in response to hearing a reference to immigration. (GA 320-22 ("I heard "immigration" and I'm, like, oh no, not immigration again. . . . I was somewhat concerned. Immigration. I kept saying to

myself, why? You know, why now? You know, I thought I was done with them back in '97. So now, I'm like, you know, what do they want with me again?. . . ."); *see also* GA 344)).

The defendant claims that absent evidence that Sinclair knew that the specific reason for the INS detainer was his illegal reentry, "Sinclair's flight established nothing about whether he previously had been deported: Sinclair was as likely to flee because of an unexecuted deportation order as he was to flee because he had re-entered after deportation." (Def. Br. at 47). The defendant's argument, however, is without merit, as it goes to the weight, rather than the admissibility, of the evidence.

"The fact that a defendant's flight is subject to varying interpretations does not lead inevitably to the conclusion that the district court abused its discretion in admitting flight evidence." *Amuso*, 21 F.3d at 1258 (citing *United States v. Ayala*, 307 F.2d 574, 576 (2d Cir. 1962)). "Where the evidence passes the threshold inquiry of relevance, '[t]he accepted technique is for the judge to receive the evidence and permit the defendant to bring in evidence in denial or explanation.'" *Id*. That is precisely what occurred here. It was a fair inference from the record that, after being informed of the INS detainer, Sinclair fled because he knew that he had been previously deported in December 1997 and that he was back in the United States unlawfully. Moreover, the defendant was permitted to introduce evidence in denial or explanation -- indeed, during his testimony the defendant denied that he fled at all. (DA 176 ) ("No, I never attempted escape . . . someone mentioned something about immigration and I turned and

walked a little speedily towards the door."). In light of this record, the district court did not abuse its discretion or commit plain error in admitting the evidence of Sinclair's flight.

The district court also did not commit plain error by giving the standard instruction on consciousness of guilt from evidence of flight. Indeed, the court labored to ensure that the instruction was balanced and consistent with the state of the evidence (GA 261-62), ultimately giving the following instruction:

> You have heard evidence that the defendant fled after he was told that the INS intended to detain him. *If proven,* the flight of a defendant after he thinks he is to be accused of a crime may, *but does not necessarily*, tend to prove that the defendant believed that he was guilty. It may be weighed by you in this section, together with all the other evidence before you.
>
> Flight may not always reflect feelings of guilt. Moreover, feelings of guilt which are present in many innocent people do not necessarily reflect guilt. You are specifically cautioned that evidence of flight of a defendant may not be used by you as a substitute for proof of guilt. Flight does not create a presumption of guilt.
>
> Whether or not evidence of flight does show that the defendant believed that he was guilty, and the significance, *if any*, to be given to the

defendant's feelings on this matter, *are for you to determine*.

(GA 426-27) (emphasis added). Because the evidence at trial supported an inference of consciousness of guilt from evidence of flight and because the trial court properly gave an instruction that accurately referenced the evidence and then left it to the jury to decide both whether flight was proven and what significance, if any, they would draw from it, the district court did not commit plain error.

### 4. The Letter from the Jamaican Detective

The defendant argues that the district court abused its discretion in excluding, on hearsay grounds, a March 18, 2003, letter from a Jamaican police officer to a United States immigration officer located in Kingston, Jamaica, stating that "Mr. SINCLAIR is a Computer Consultant and is residing in Spanish Town, St. Catherine." (GA 562). The defendant tried to offer the letter through INS Detention Officer Brown. The district court properly ruled, in response to several claims, that the defendant had not established a basis on which to overcome a hearsay objection. (GA 120-24; 252-56)

On appeal, the defendant argues that the document should have been admitted as non-hearsay, "not so much to prove that as of March 18, 2003, Mr. Sinclair was, in fact, 'a Computer Consultant residing in Spanish Town, St. Catherine,' but rather to demonstrate that the Jamaican system of recording the whereabouts of returned deportees was not infallible . . . impeach[ing] the accuracy of the

makers of the logbook (whoever they might be) and DEO Brown himself." (Def. Br. at 50).

At trial, however, the defendant's claim that the document could be admitted as non-hearsay was based on the claim that it was an admission by a party opponent under Rule 801(d)(2), which the Court properly rejected because there was nothing to suggest that the Jamaican detective was or became an agent of the United States. In addition, the express purpose of the offer was to "cast serious doubt upon . . . Wayne Sinclair having been deported because he's still in Kingston, Jamaica, or Spanishtown, as the letter indicates." (GA 255). Because the express purpose of the proffered evidence was to establish the truth of the matter asserted, and the defendant could not establish a hearsay exception, the district court did not commit plain error by excluding the letter.

## III. THE DISTRICT COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO DISMISS

### A. Relevant Facts

The defendant argues that the district court erred in denying his motion to dismiss the indictment, which claimed that Sinclair had been deprived of due process in his deportation proceedings. Sinclair also argues that the district court erred by failing to hold an evidentiary hearing; and by relying, in part, on evidence provided to the Court by the Bureau of Prisons and the Probation Office.

Sinclair, a native and citizen of Jamaica, entered the United States as an immigrant on or about February 1, 1986. (Ruling at 1; GA 672). On August 26, 1988, after a jury trial, the defendant was convicted in United States District Court for the District of Connecticut of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and possession with intent to distribute and distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1). (GA 673). The defendant was sentenced to eight years in prison on each count. *Id.*

As a result of these convictions, the INS instituted deportation proceedings against the defendant on May 17, 1993. *Id.* Proceedings were held before an immigration judge and, on May 17, 1995, the defendant was found deportable and ineligible for relief under INA § 212(c), 8 U.S.C. § 1182(c)(1994) (repealed), because he had served longer than five years in prison for an aggravated felony conviction. *Id.* The defendant appealed the immigration judge's decision to the Board of Immigration Appeals ("BIA") and, on April 30, 1997, the BIA dismissed the appeal on the ground that the defendant was ineligible for Section 212(c) relief. *Id.* The defendant thereafter filed a motion to reopen his immigration proceedings. *Id.* at 2-3; GA 673-74). In that motion, the defendant claimed that he was provided ineffective assistance of counsel in the earlier proceedings before the immigration judge. *Id.* On August 22, 1997, the BIA denied that motion on the ground the defendant failed to provide certain evidence required, and because the ineffective assistance claim would not have affected the outcome of the deportation proceedings. *Id.*

On June 9, 1997, the defendant filed a petition for review of the BIA's first decision and a motion to stay deportation pending review in this Court. *Id*. On June 30, 1997, the Court dismissed that petition as untimely. *Id*. On September 10, 1997, the defendant filed a petition for review of the BIA's decision on his motion to reopen and a motion for stay of deportation pending review of that decision. *Id*. On October 29, 1997, this Court dismissed the petition for failure to raise a constitutional claim and denied the motion for stay of deportation. *Id*. The Court also ordered the defendant to surrender to the INS. *Id*. On November 14, 1997, the defendant filed a motion to reconsider the Court's October 29, 1997 decision. The motion to reconsider was denied on December 23, 1997. *Id*.

In this case, on or about November 18, 2002, the defendant filed a motion to dismiss, in which he claimed, in relevant part, that he had been denied due process in his deportation proceeding because the Immigration Judge (IJ) had held that Sinclair, having served a sentence of five years or more, was ineligible for INA §212(c) relief. The defendant's motion marked the fifth time he had sought judicial review of his deportation order.

The government filed a detailed response, attaching several exhibits and records from the immigration proceedings. (GA 563-671). On February 25, 2003, the district court denied the motion, finding Sinclair's argument that he had served less than five years to be without merit. The court stated:

The defendant also made this argument before the IJ judge. On May 17, 1995, however, Judge Leonard Shapiro, the judge presiding over the defendant's deportation proceedings, found that the defendant had served five years and fourteen days of his sentence, and therefore was ineligible for relief under section 212(c). Judge Shapiro based his decision on the fact that the defendant was convicted and sentenced on August 26, 1988, and that upon his release on September 9, 1993, he was credited with time served starting on August 26, 1988. At the IJ level, and in his current motion, the defendant argues that he was being held in lieu of bond pending his appeal from August 26, 1988 to November 1, 1988, and therefore his sentence should be computed as having started on November 1, 1988. The defendant cites to the district court docket entry for August 26, 1988, which contains a notation "Bond to be Continued."

This court finds the argument of the defendant to be without merit. The court Judgment, unlike the docket minute entry, was signed by the presiding judge on August 26, 1988. That court judgment states that: "It is the judgment of this court that: defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment of eight (8) years on Count One. It is further ORDERED and ADJUDGED that the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for

> eight (8) years on Count Two." There is no reference anywhere in the Judgment to the defendant being held in lieu of bond or being released on bond.

(GA 678-79). As an additional, independent ground, the district court found that, based on information supplied at its request by the Federal Bureau of Prisons and the United States Probation Office, "the defendant was officially credited . . . for his sentence beginning on June 30, 1988, the day he entered federal custody, and was given an additional four days credit for the time he served in February 1988 at the time of his initial arrest." (GA 679 & n.1). The court concluded that, in sum:

> This evidence is sufficient to refute the defendant's contention that he served only four years and ten days on his sentence. According to the Bureau of Prisons and the United States Probation Office, the defendant served a total of five years and seventy-six days, and was therefore ineligible for section 212(c) relief.

(GA 679).

The court also went on to find that the defendant could not meet two of the elements required by 8 U.S.C. § 1326(d) to sustain a collateral attack on his order of deportation -- deprivation of the opportunity for judicial review and that the order was fundamentally unfair. The court noted that, "[g]iven the fact that the defendant appealed his IJ decision twice to the BIA and twice to the Second Circuit, it cannot be said that he was denied the

opportunity for judicial review. On four separate occasions, the defendant was given review of his deportation order." (GA 681). Because, the court found, the defendant was convicted of a deportable offense and was not entitled to discretionary relief, the court also found that the defendant could not show either a fundamental procedural error or prejudice in the sense that, absent procedural errors, he would not have been removed. (GA 682-83).

The defendant never requested a hearing on the motion to dismiss; never objected to the district court's reliance on the information supplied to the Court by the Probation Office; nor filed a motion for reconsideration or requested an evidentiary hearing in light of the district court's ruling.

### B. Governing Law and Standard of Review

A defendant may collaterally attack an order of deportation on due process grounds where, as here, the order becomes an element of a criminal offense. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 838-39 (1987). A collateral attack on a prior deportation order in a subsequent criminal proceeding for illegal reentry, however, is very limited in nature, both under Supreme Court precedent and 8 U.S.C. § 1326(d). To do so successfully, the defendant must satisfy each of the three requirements of § 1326(d), which provides that:

> [A]n alien may not challenge the validity of [a] deportation order . . . unless the alien demonstrates that (1) the alien exhausted any administrative remedies that may have been

> available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.

*United States v. Gonzalez-Roque*, 301 F.3d 39, 45 (2d Cir. 2002). "The requirements are conjunctive, and thus [an alien] must establish all three in order to succeed in his challenge to his removal order." *United States v. Fernandez-Antonia*, 278 F.3d 150, 157 (2d Cir. 2002).

Because it involves mixed questions of law and fact, the Court reviews a district court's denial of an alien's motion to dismiss an indictment brought pursuant to 8 U.S.C. § 1326 *de novo*. *See*, *e.g.*, *Fernandez-Antonia*, 278 F.3d at 156.

### C. Discussion

The district court did not err when it denied Sinclair's motion to dismiss.

Here, the district court properly found that the defendant had failed to satisfy at least two of the requirements of § 1326(d). First, the defendant could not meet the second requirement of a collateral attack under § 1326(d) -- that he was deprived of the opportunity for judicial review. In the context of collateral attacks on previous deportation orders in criminal proceedings, "meaningful review" of an administrative deportation has been construed to require only that an alien be informed of his right to a direct appeal to the BIA. *See United States*

*v. Fares*, 978 F.2d 52, 56 (2d Cir. 1992); *see also United States v. Paredes-Batista*, 140 F.3d 367, 376 (2d Cir. 1998) ("To be permitted to attack his deportation collaterally, [defendant] must first demonstrate that defects in the deportation proceedings effectively deprived him of this right to direct appeal of the IJ's decision.").

Here, there can be no doubt that the defendant had an adequate opportunity for meaningful review, both at the administrative level and the federal judicial level. Indeed, not only was he informed of his right to appeal the deportation order, but he actually pursued numerous levels of review. The defendant (1) administratively appealed the deportation order, (2) received a decision on his appeal, (3) filed a motion to reopen that decision, (4) received a decision on that motion to reopen, (5) filed a petition for review of the original deportation order, (6) received a decision on that petition, (7) filed a petition for review of the administrative order denying his motion to reopen, (8) received a decision on that petition for review, (9) filed a motion to reconsider the decision on the motion to reopen, and (10) received a decision on that motion to reconsider. In addition to the administrative review, the defendant also filed two petitions for review in this Court. In short, there is nothing to suggest that the defendant was deprived of the opportunity for judicial review -- to the contrary, the defendant received extraordinary review.

The court's conclusion that the defendant could not meet the third prong of Section 1326(d) -- that his deportation proceedings were "fundamentally unfair," *Fernandez-Antonia*, 278 F.3d at 157 -- was also correct.

In this case, the defendant was found ineligible because he served longer than five years in prison for an aggravated felony conviction. The district court properly relied upon the Judgment from the defendant's 1988 federal narcotics convictions, which contained no reference to Sinclair being held in lieu of bond or being released on bond. In that regard, the record clearly indicates that Sinclair was incarcerated from at least August 26, 1988, until September 9, 1993 -- a total of five years and fourteen days. *See Buitrago-Cuesta*, 7 F.3d 291, 296 (2d Cir. 1993) (immigration judge "properly considered all the time Buitrago spent in prison"); *Mezrioui v. INS*, 154 F. Supp.2d 274, 277 (D. Conn. 2001). Moreover, the defendant's claim that he was only incarcerated for four years and ten months is belied by his own admission at his deportation proceedings:

Q. Were you out on bond?

A. Yes, sir.

Q. How much bond?

A. $15,000.

Q. So you were out on bond until August 26, 1988.

A. Yes, sir.

Q. What happened on August 26, 1988?

A. That was when I got convicted, Your Honor.

Q. Okay. So you were convicted on that date and they took you into custody.

A. Yes, sir.

(GA 626).

The defendant argues that the district court erred by not conducting an evidentiary hearing on the question whether Sinclair had served five years or more, and further complains that the district court "undertook to gather facts on its own," relying upon information provided at its request by the Probation Office and the Bureau of Prisons. The defendant, however, never requested a hearing on the motion to dismiss -- whether before or after the court's ruling -- and never objected to the district court's reliance on the information supplied by the Probation Office at any point during the proceedings below. Even were there a valid concern about a district court relying upon information provided to it by the Probation Office -- an arm of the Court -- the district court here expressly stated that it would find that the defendant had served more than five years, even without relying on the information about which the defendant now complains:

> Even if the court were to rely exclusively on the court judgment from August 26, 1988, it is clear that the defendant would have still be[en] ineligible for section 212(c) relief. According to the court judgment, the defendant was ordered

> into the custody of the Attorney General as of August 26, 1988, five years and fourteen days before he was released into INS custody on September 9, 1993.

(GA 679). In light of the district court's finding that it would reach the same conclusion, even if it ignored the information from the Bureau of Prisons and the Probation Office, it is clear that the district court did not err in its ruling on the defendant's motion to dismiss, and the defendant's challenge thereto should be rejected.

## IV. THE EVIDENCE WAS SUFFICIENT TO DEMONSTRATE THAT SINCLAIR WAS GUILTY OF UNLAWFUL REENTRY

### A. Relevant Facts

The evidence pertinent to consideration of this issue is set forth in the Statement of Facts above.

During the proceeding, the district court denied the defendant's post-trial motion for judgment of acquittal. In an oral ruling, the district court observed that "the evidence was quite strong." (GA 500). After a detailed review of the evidence, the court concluded that the "jury had before it more than sufficient evidence to reasonably conclude that this defendant had indeed been previously deported from the United States." (GA 507-12). When the defendant himself began to argue with the ruling (GA 512), the court responded:

> Sir, I'm not going to reargue the trial. All of that was developed at trial. There was argument made to the jury about what to believe and not believe. As I've indicated, the jury can accept some testimony, reject other parts of the same person's testimony, the same portion of evidence.
>
> My conclusion is that there was more than sufficient evidence before the jury, which the jury, if it credited it, could reasonably have concluded that you, in fact, were deported, removed from the United States, on December 9th, 1997, taken from custody in a state facility in Hartford, Connecticut that morning and placed on a plane in New York bound for Jamaica.

(GA 512-13).

### B. Governing Law and Standard of Review

"The defendant has requested that [defense] counsel argue that the evidence was insufficient to establish that he ever left United States soil." (Def. Br. at 51). A defendant claiming that a jury verdict is unsupported by sufficient evidence bears a heavy burden subject to well-established rules of appellate review. The Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for reversal on appeal. The task of choosing among competing,

permissible inferences is for the fact-finder, not the reviewing court. *See*, *e.g.*, *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir.), *cert. denied*, 124 S. Ct. 272 (2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002); *United States v. Downing*, 297 F.3d 52, 56 (2d Cir. 2002). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original).

### C. Discussion

Viewed in the light most favorable to the government, the evidence was unequivocally sufficient to support Sinclair's conviction.

The evidence at trial provided a reasonable basis for the jury to conclude that Sinclair was deported from the United States on December 9, 1997. As set forth above, the evidence at trial included the Emergency Certificate of Travel for Sinclair; the advice of rights upon deportation form given to the defendant on December 9, 1997; and the December 9, 1997 Warrant of Deportation for Sinclair, which contained his flight information, his picture, his signature, his right index fingerprint and the verifying signatures of the escorting officers. The evidence at trial also included the eyewitness testimony of Officers Brown and Ostrobinski, who personally escorted Sinclair to the flight, ensured that he remained on board, and then watched the flight depart for Jamaica. The evidence

further established that Sinclair's flight to Jamaica was a non-stop flight that proceeded directly to its destination. In addition, defense counsel elicited from Officer Brown that all people entering Jamaica must complete a Jamaican customs immigration declaration form, and that he had personally seen, in Jamaica, such a declaration form that had been completed by Sinclair during his flight.

As aptly noted by the district court, "the evidence was quite strong." (GA 500). In light of what the district court referred to as "more than sufficient evidence to reasonably conclude that this defendant had indeed been previously deported from the United States," (GA 512), the Court should reject Sinclair's sufficiency challenge.

## V. THE DISTRICT COURT DID NOT PLAINLY ERR IN ENHANCING THE DEFENDANT'S SENTENCE BASED ON HIS PRIOR CONVICTION AND HIS PERJURY AT TRIAL

### A. Relevant Facts

As described in the Statement of Facts above, the defendant testified that he had never been deported from the United States, and specifically had not been placed aboard the American Airlines flight to Jamaica on December 9, 1997.

At sentencing, the court heard argument about whether to impose a two-level enhancement for obstruction of justice, based on the falsity of the defendant's trial testimony. During argument, counsel for the defendant recognized that the jury must have concluded that the

defendant lied, and conceded that such a finding was made by the jury, beyond a reasonable doubt. (GA 454). In ruling that the defendant had committed perjury and thereby obstructed justice, the court made an "independent assessment of the defendant's testimony" and found it "incredible":

> The Court finds that he did indeed lie concerning the issue of his deportation in 1997, and that his testimony, which was rejected by the jury, was not a result of confusion, mistake or faulty memory. It is *inconceivabl*e to this Court that one would be placed against his will upon an airplane, even five-and-a-half years ago, and not be able to remember that fact or be mistaken about it, particularly to the extent that the defendant testified he was never deported. It wasn't an issue of a mistake about the date; but that he had never been deported.

(GA 457-58 (emphasis added); *see also* GA 511-12) ("there was evidence before the jury that showed that Mr. Sinclair was in the custody of the state authorities pursuant to the INS detainer in December, in advance of his removal from the United States, which the defendant denied"). When imposing sentence, the court reviewed other false aspects of the defendant's testimony: his denail that there had been any consequence to his attempt to flee the courtroom after hearing mention of the INS; his denial that he was in state custody in December 1997; and his denial that he was subject to an order of deportation. (GA 520-22).

The district court relied on the defendant's prior convictions in two ways to arrive at the appropriate Guidelines range. In calculating the offense level, the court added 16 levels pursuant to U.S.S.G. § 2L1.2(b)(1)(A) because he had re-entered the United States after having been convicted of a drug trafficking offense for which the sentence exceeded 13 months. A 183. Further, in determining that the defendant fell within criminal history category IV, the court considered four prior convictions of the defendant.

## B. Discussion

The defendant claims that the district court's sentence violated his Sixth Amendment rights because it was based partially on facts not found by the jury beyond a reasonable doubt. Specifically, he relies on the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and argues that the district court improperly (1) applied a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1, (2) applied a 16-level enhancement based on his prior drug conviction under U.S.S.G. § 2L1.2(b)(1)(A), and (3) placed him in criminal history category IV. The defendant claims that, under *Blakely*, he has a constitutional right to have these enhancements and the criminal history score established by facts which are proven to a jury under the reasonable doubt standard. *See* Def. Br. at 26-29.

This Court's recent decision in *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (per curiam), is directly on point. In *Mincey*, this Court decided that it would not apply *Blakely* to the federal sentencing

guidelines, so that enhancements and departures provided for under the guidelines need not be proven to a jury beyond a reasonable doubt. Specifically, the Court stated:

> We therefore reject appellants' arguments that, in this Circuit, the Sixth Amendment now requires every enhancement factor that increases a Guidelines range to be pleaded and proved to a jury beyond a reasonable doubt. Unless and until the Supreme Court rules otherwise, the law in this Circuit remains as stated in *Garcia, Thomas,* and our other related case law. We conclude that the district court did not err in sentencing defendants in accordance with the Guidelines as previously interpreted by this Court.
>
> In so holding, we expect that, until the Supreme Court rules otherwise, the courts of this Circuit will continue fully to apply the Guidelines.

The Supreme Court will address the issue squarely when it considers the appeals in *United States v. Booker*, 04-104, and *United States v. Fanfan*, 04-105 during the October 2004 term. This Court, therefore, in accordance with its August 6, 2004 memorandum, should withhold the mandate in this case until after the Court's decision in the *Booker/Fanfan* cases and, depending on the outcome of those cases, permit either party to file supplemental petitions for rehearing in this case with appropriate briefing at that time.

It bears note, however, that a portion of the defendant's argument is directly undermined by the Court's decision in

*Blakely*, even assuming *arguendo* that the holding applies to the federal sentencing guidelines. The defendant claims that the district court's determination of his criminal history points and application of the 16-level enhancement based on his prior drug conviction violated the principles set forth in *Blakely* because the facts giving rise to these criminal history points were not found by a jury beyond a reasonable doubt. *See* Def. Br. 26-29; Def. *Pro Se* Br. at 12-16. The Court's decision in *Blakely*, however, continues to apply the principle set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 124 S. Ct. at 2536. (emphasis added); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (holding that defendant's recidivism need not be treated as element of offense and can be determined by court at sentencing); *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) ("[W]e read *Apprendi* as leaving to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related [factual] issues . . . [including] the 'who, what, when, and where' of a prior conviction"), *cert. denied*, 535 U.S. 1070 (2002).

The defendant's *pro se* brief further argues, for the first time on appeal, that his indictment was "amended" because it did not expressly allege that he had been convicted of an aggravated felony. Instead, the indictment cited 8 U.S.C. § 1326(b)(2), which sets a 20-year maximum prison term for aliens who illegally re-enter the United States after such a conviction. His argument is squarely foreclosed by

*Almendarez-Torres*, in which the Supreme Court held that § 1326 does *not* establish two separate offenses, and that a sentencing judge may impose a sentence within the 20-year maximum established by § 1326(b) based on judicial factfinding. *See* 523 U.S. at 247. As noted above, *Blakely* reiterated *Apprendi*'s holding that "the fact of a prior conviction" need not be decided by a jury beyond a reasonable doubt. *See* 124 S. Ct. at 2536.

Even if *Almendarez-Torres* had been decided the other way, this defendant still could not demonstrate plain error. *See* Fed. R. Crim. P. 52(b). As this Court has held, a defendant's substantial rights are not violated by an indictment's failure to recite an element except by reference to the statutory provision setting forth that element, where the defendant was otherwise properly notified of his sentencing exposure. *See United States v. Doe,* 297 F.3d 76 (2d Cir. 2002) (finding indictment "error" that was "plain" where drug indictment did not expressly allege quantity involved but merely cited statutory penalty section involving 5 or more kilograms of cocaine; but holding (a) that error was harmless in light of, *inter alia*, hearings during which defendant was alerted to maximum penalties, and (b) that error did not affect fairness, integrity, or public reputation of judicial proceedings). The defendant here concedes that he, like the defendant in *Doe*, was alerted by the district court to the statutory maximum penalty (here, 20 years). Def. *Pro Se* Br. at 2. Furthermore, on November 6, 2002, the Government filed a "Notice of Enhanced Penalty Pursuant to Title 8, United States Code, Section 1326(b)(2)," which, among other things, specifically noted that, "[i]f convicted, the defendant face[d] an enhanced penalty of up to twenty years' imprisonment and a $250,000 fine, or both, because

his removal from the United States was subsequent to convictions for the commission of an aggravated felony pursuant to Title 8, United States Code, Section 1326(b)(2)." Given such notice, the defendant could not demonstrate reversible plain error based on a claimed "constructive amendment" of his indictment.

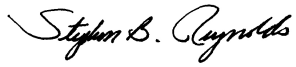
## CONCLUSION

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

Dated: September 20, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

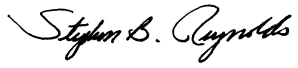


STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

William J. Nardini
Assistant United States Attorney (of counsel)

## CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,942 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

# ADDENDUM OF STATUTES

**8 U.S.C. § 1326. Reentry of Removed Aliens**

(a) In general

Subject to subsection (b) of this section, any alien who--

> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection--

> (1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be

fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[3] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

---

[3] So in original. The period probably should be a semicolon.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

**18 U.S.C. § 3505. Foreign Records of Regularly Conducted Activity.**

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that--

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined

by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term--

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.