16-0452 16-0647 (XAP)

To be argued by
VINCENT RIVELLESE

United States Court of Appeals

For the Second Circuit

RAPHAEL GOLB,

Petitioner-Appellant-Cross-Appellee,

- against -

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent-Appellee-Cross-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE-CROSS-APPELLANT

JURISDICTIONAL STATEMENT

Raphael Golb appeals from the district court's final order of judgment denying his petition for a writ of habeas corpus as to 17 of his 19 criminal convictions, for which he is in the constructive custody of New York State. The Attorney General cross appeals from the district court's grant of habeas relief as to two counts. The district court had jurisdiction over the habeas petition pursuant to 28 U.S.C. §§ 2241, 2254. On January 25, 2016, the district court granted the petition as to two counts, and it otherwise denied the petition. The district court issued Golb a certificate of appealability, limited to two questions. On February 16, 2016, Golb filed a timely Notice of Appeal, and on March 2, 2016, the Attorney General filed a timely Notice of Cross-Appeal. This Court has jurisdiction pursuant to 28 U.S.C. § 2253(c).

ISSUES PRESENTED FOR REVIEW

(1) Whether *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and its progeny required vacatur of any of Golb's criminal impersonation convictions; and

(2) Whether New York's criminal impersonation statute (N.Y. Penal Law § 190.25) or New York's forgery statute (N.Y. Penal Law § 170.05) are vague or overbroad.

STATEMENT OF THE CASE

THE STATE PROCEEDINGS

On March 5, 2009, New York County District Attorney's Office Investigators arrested Golb at his apartment. By New York County Indictment Number 2721/2009, a grand jury charged Golb with 51 counts of identity theft, criminal impersonation, forgery, aggravated harassment, and unauthorized use of a computer (JA: 7).[1] On September 13, 2010, Golb proceeded to a jury trial before Justice Carol Berkman.

The State's Evidence at Trial

In the mid-2000s, Professor LAWRENCE SCHIFFMAN was the Chairman of the Department of Hebrew and Judaic Studies at New York University. For nearly 40 years, Professor Schiffman had been teaching courses on the Dead Sea Scrolls, a collection of ancient documents found in caves near Qumran on the West Bank of what

[1] Parenthetical page references preceded by "JA" are to the Joint Appendix filed with Golb's brief.

is now Israel. Like most scholars, Schiffman believed that the Scrolls had been deposited in the caves by members of a Jewish sect living in or near Qumran; this is known as the "Qumran-Sectarian" theory. Museums frequently invited Schiffman to speak at exhibits about the Scrolls, and for such engagements he would usually receive an honorarium of from several hundred to over a thousand dollars (JA: 57-70 [Schiffman: 43-56]).

Golb's father, University of Chicago Professor Norman Golb, disagreed with the prevailing view, believing that the Scrolls were rescued from libraries in Jerusalem and brought to the caves for safekeeping. Professor Schiffman had known Norman Golb for decades. Although Schiffman frequently argued with Professor Golb about their differing theories, to his recollection he had "never had any negative experience" with the Golbs and did not know Raphael Golb at all (JA: 70-79, 236 [Schiffman: 56-65, 225]). Schiffman had no idea that, in fact, the entire Golb family fiercely despised him (JA: 165-171, 174 [Schiffman: 151-157, 160]; 1099 [People's Exh. 15, p. 38] [Ruth Golb: "Schiffman is a real snake"]; 1119 [People's Exh. 15, p. 59] [Ruth Golb: "Schiffman is such a sleaze"]).

For some time before the criminal conduct now at issue took place, Golb lawfully used pseudonyms on the internet to promote his father's theory and to attack perceived adversaries. One such adversary was computer-savvy graduate student ROBERT CARGILL, whom Golb had targeted in an effort to prevent Cargill from receiving his doctoral degree (JA: 515-520, 536, 540 [Cargill: 716-721, 737, 741]; 1202-1239 [People's

Exhs. 40A1-40A5]).[2] Cargill became suspicious when he noticed identical IP addresses in some of Golb's postings under different names (JA: 510-534, 545-548, 581-583 [Cargill: 711-728, 746-749, 782-784]).[3]

1. THE RALEIGH EXHIBIT: When the Dead Sea Scrolls are placed on exhibit in Raleigh, North Carolina, Golb's campaign evolves into criminal conduct when he impersonates Frank Cross.

In mid-2008, the Dead Sea Scrolls were placed on exhibit in Raleigh, North Carolina. Doctor STEPHEN GORANSON, a library clerk at nearby Duke University, had published some articles on the Dead Sea Scrolls. Goranson disagreed "vehemently" with Norman Golb's theories, and on many occasions criticized Golb's theories in public internet forums (JA: 455-456, 461-464 [Goranson: 627-628, 633-636]); Golb despised him. In undated draft emails in Golb's personal email account (JA: 1371 [People's Exh. 48-C]), to which Golb and his brother presumably both had access, the Golb brothers discussed the timing of when they should "finish Goranson off." It was agreed that Goranson was a "small fry" and that their goal was to "set him up" for an accusation. From July to December 2008, Golb's aliases lodged complaints

[2] Golb's efforts to derail Cargill's career led to one of the aggravated harassment convictions that were later vacated when the Court of Appeals found New York's aggravated harassment statute unconstitutional.

[3] Once, Golb, anticipating that his identity had been or was about to be discovered, gloated to his mother that such discovery would be "truly maddening" to his targets: Golb fancied himself feared by his father's rivals as "a dedicated, in-the-know adversary who is out to get them, and there's simply nothing they can do about it" (JA: 1077 [People's Exh. 15, p. 16] [July 26, 2008 email]).

(Continued…)

about Goranson with university officials in an unsuccessful effort to get him fired (JA: 453, 456-458 [Goranson: 625, 628-630]; 1183-1193 [People's Exh. 18] [Goranson-related emails]).[4]

Shortly after he began complaining about Goranson in emails to Duke University administrators, Golb turned his attention to scholars at the University of North Carolina, undertaking an elaborate scheme involving Golb's online impersonation of Dead Sea Scrolls scholar Frank Cross. First, perturbed that University of North Carolina Professor Bart Ehrman was slated to lecture at the Raleigh exhibit while his father was not, Golb assumed the pseudonym "Jerome Cooper" to engage Ehrman in an email exchange about the origins of the Scrolls. Then, on July 17, 2008, Golb anonymously published a blog (JA: 1354-1359 [People's Exh. 40C13]) complaining that Ehrman should not have been invited to speak and that experts who disagreed with Ehrman should not have been excluded. Golb reported that "[i]n the hope of clarifying these matters, Mr. Jerome Cooper emailed Dr. Ehrman, and received a lengthy response, which he has been good enough to forward to me." Golb then reprinted his prior email exchange with Ehrman, criticizing Ehrman's arguments therein and promoting his father's theory.

On July 20, 2008, Golb used the email address frank.cross2@gmail.com to send four separate but identical messages to four University of North Carolina scholars (JA:

[4] This conduct led to another of the aggravated harassment convictions that were later vacated when the statute was declared unconstitutional.

1194-1197 [People's Exh. 19]). The sender's name appeared to be "Frank Cross." Writing with a familiar tone as if to someone he knew, Golb suggested that "Bart" had "put his foot in his mouth again." Golb reported that this issue was "crop[ping] up everywhere on the web," and he attached links to his blog entries criticizing Ehrman for his recipients to click. Golb signed the email, "Frank Cross."

2. THE NEW YORK EXHIBIT: Golb impersonates Professor Lawrence Schiffman in an effort to trick NYU into investigating Schiffman for plagiarism, hoping to tarnish Schiffman's reputation so that Professor Golb would be invited to lecture in place of Schiffman.

The Dead Sea Scrolls were slated to be put on exhibit at the Jewish Museum in New York City in September 2008. Dr. SUSAN BRAUNSTEIN, the Museum's Curator of Archaeology and Judaica, was charged with organizing the exhibit and securing any lecturers (JA: 280-281 [Braunstein: 267-268]). Braunstein wanted the exhibit to recognize both the Qumran-Sectarian theory espoused by Schiffman and also the Jerusalem-Libraries theory that Golb embraced. In late March or early April 2008, Braunstein invited Professor Schiffman to give one of two paid lectures at the exhibit on October 30, 2008 (JA: 111-113 [Schiffman: 97-99]).

In late July 2008, after the Jewish Museum's exhibit was publicized, a flurry of emails erupted among Golb, his brother, his mother, and his father (JA: 1070 *et seq.* [People's Exh. 15]). In those emails, the whole Golb family schemed about how to get Norman Golb invited to speak at the upcoming exhibit. They discussed Golb's internet campaign, they strategized over which aliases to use and when (JA: 1070-1075), and

they plotted how they might persuade Braunstein to extend an invitation to Golb's father (JA: 1076-1089).[5]

In a July 30, 2008 email to his mother, Golb mulled emailing Braunstein using his true name to request a meeting to provide her with "some information on recent developments that could be of interest" to her. In reply, Golb's mother wondered whether being approached by Golb's son might lead Braunstein to "recognize something is afoot." Golb ultimately agreed that influencing Braunstein directly would be futile, noting that his friend Dan Friedenberg – a benefactor of the Jewish Museum – said that "there was no way" that Braunstein would meet Golb because she was a "big shot." Thus, the Golbs hoped to enlist the aid of third parties who might persuade Braunstein. But on July 31, 2008, emails reveal, Norman Golb discovered that he could not influence Braunstein through his connections in Israel. And after Friedenberg, too, failed to persuade Braunstein to invite Professor Golb, Golb feared that they were "quickly running out of time" (JA: 287-289, 296-298 [Braunstein: 274-276, 283-285], 1093-1097).

Golb, brainstorming with his mother again by email, suggested that a footnote in one of Schiffman's books was "incriminatory" and that they "should use it." His mother replied that if they were to "use the Schiffman thing," then Golb should find

[5] In a July 24, 2008 email to his mother, Golb suggested that his father refrain from mentioning the scheme in his own emails, so that there would be "no trace of it in his account" (JA: 1087).

the relevant quotes. On July 31, 2008, Golb sent his father an outline of how he should argue that Schiffman had published "misrepresentations" of Golb's ideas, and he also noted that a reporter in Israel had suggested in 1993 that Schiffman had not given Golb sufficient credit for his ideas. Golb urged his father to send these complaints to Braunstein by overnight mail (JA: 1098-1104), but Professor Golb did not send her anything (JA: 287 [Braunstein: 274]).

A few days later, on August 3, 2008, Golb created an email account named larry.schiffman@gmail.com. In opening that account, Golb reported his name to Google as "Larry Schiffman," setting his password as "goranson33" (JA: 30, 744, 824).

The next day, August 4, 2008, Golb used the pseudonym "Peter Kaufman" to publish an article at www.NowPublic.com entitled "Plagiarism and the Dead Sea Scrolls: Did NYU department chairman pilfer from Chicago historian's work?" (JA: 91-92 [Schiffman: 77-78], 1311 [People's Exh. 40B3]). Golb called Professor Schiffman's work "quackery" and blamed his theory's acceptance on "corruption" in the field of Dead Sea Scrolls scholarship. In odd juxtaposition, Golb-as-Kaufman accused Schiffman simultaneously of plagiarizing Norman Golb's work but also of misrepresenting what Golb had said. Golb also published two blog entries similar to the Now Public article (JA: 1247, 1362 [People's Exhs. 40A7, 40C16]).

That same afternoon, Golb-as-Kaufman emailed NYU administrators, claiming to be an NYU faculty member acting under an assumed name in the best interests of

the university, and urged the university to open an investigation into whether Schiffman had committed plagiarism (JA: 1131-1132 [People's Exhs. 16H, 16I]):

> I am writing to ask why it is that the outrageous misconduct of Dr. Lawrence Schiffman, chairman of the Skirball Department of Hebrew and Judaic Studies at NYU, has never been investigated.
>
> This man has in large measure based his career on the plagiarism and misrepresentation of another scholar's work. For the basic facts, see:
>
> http://larryschiffman.wordpress.com/2008/08/03/charges-of-impropriety-surface-against-new-york-university-professor-lawrence-schiffman/
>
> I would appreciate it if you could write back to me with any information on steps you may or may not wish to take concerning this egregious, widely known, and discreetly ignored violation of NYU's code of academic conduct.
>
> With best wishes,
>
> Peter Kaufman
>
> (I am frankly using an alias to write to you, as my own career at NYU could be ruined if it became known that I finally had the nerve to rat on Dr. Schiffman concerning facts that have been generally known to researchers for the past fifteen years, but which everyone has always calmly passed over in silence because of the man's popularity.).

A few hours later, Golb used email account larry.schiffman@gmail.com to send the following message – purportedly from Professor Schiffman – to Schiffman's four graduate students (JA: 1130 [People's Exh. 16G]):

> Miryam, Sara, Cory, Ariel,
>
> Apparently, someone is intent on exposing a minor failing of mine that dates back almost fifteen years ago.

> You are not to mention the name of the scholar in question to any of our students, and every effort must be made to prevent this article from coming to their attention. This is my career at stake. I hope you will all understand.
>
> http://www.nowpublic.com/culture/plagiarism-and-dead-sea-scrolls-did-nyu-professor-snitch-chicagohistorians-work
>
> Lawrence Schiffman

About 25 minutes later, Cory replied to Golb-as-Schiffman, as well as to the other three students, in apparent belief that he was responding to Schiffman himself. Confirming that he had read the blog to which Golb-as-Schiffman's email had directed him, Cory expressed condolences to Schiffman for having to deal with such unjustified "character assassination," and he attached a copy of the article to the email so that the other students could avoid clicking the link to it and thereby raising its search-engine popularity. Golb promptly replied, "Cory, thanks for your kind words. This is definitely ruining my week. I don't know if you can understand how I feel, but it is as if someone had set fire to my beard. The last thing I need now is to be investigated by the dean" – again signing his name as "Lawrence Schiffman." Golb later added in a follow-up email to Cory that the fourth section of the blog was especially outrageous – and once again, Golb signed his name as "Lawrence Schiffman" (JA: 1140 [People's Exh. 16S]).

The next day, Golb – again as Schiffman – emailed every member of Schiffman's department at NYU (JA: 94-95 [Schiffman: 80-81], 1139 [People's Exh. 16R]):

> Dear colleagues,
>
> Apparently, someone is intent on exposing a minor failing of mine that dates back almost fifteen years ago.

> Every effort must be made to prevent this article from coming to students' attention. This is my career at stake. I hope you will all understand.
>
> http://www.nowpublic.coin/culture/plagiarism-and-dead-sea-scrolls-did-nyu-department-chairman-pilferchicago-historian-s-work
>
> Lawrence Schiffman

A few minutes later, from the same address, Golb-as-Schiffman sent an email to the Provost of NYU and another to NYU Graduate School of Arts and Science Dean CATHERINE STIMPSON (JA: 97-98 [Schiffman: 83-84], 245-248 [Stimpson: 232-235]). In those identical emails, Golb-as-Schiffman wrote (JA: 1137-1138 [People's Exhs. 16P, 16Q]):

> I would like to know what action I can take to counter charges of plagiarism that have been raised against me.
>
> Apparently, someone is intent on exposing a failing of mine that dates back almost fifteen years ago. It is true that I should have cited Dr. Golb's articles when using his arguments, and it is true that I misrepresented his ideas. But this is simply the politics of Dead Sea Scrolls studies. If I had given credit to this man I would have been banned from conferences around the world.
>
> I am especially concerned that this affair may come to students' attention. My career is at stake. I hope you will understand.
>
> http://www.nowpublic.com/culture/plagiarism-and-dead-sea-scrolls-did-nyu-department-chairman-pilferchicago-historian-s-work
>
> Lawrence Schiffman, professor[6]

[6] Also on August 5, 2008, Golb emailed the director of the museum hosting the Raleigh exhibit, complaining about Schiffman's scheduled speaking engagement there and calling attention to the plagiarism accusations. In that email, Golb purported to be "Al White" (JA: 11332 [People's Exh. 16J]).

Plagiarism is profoundly serious academic misconduct, and NYU's Code of Ethical Conduct requires an initial "inquiry" into any allegations of plagiarism; if necessary, a formal investigation will ensue. The matter was thus referred to NYU Faculty of Arts and Science Dean RICHARD FOLEY for the required initial inquiry (JA: 101-104, 131, 161-162 [Schiffman: 87-90, 117, 147-148], 258-262 [Stimpson: 245-249], 306-313 [Foley: 293-300]). The next day, on August 6, 2008, NYU's Vice Provost replied to Golb's "larry.schiffman" email address – addressing the email to "Professor Schiffman" – that he had assigned Dean Foley to investigate. Golb-as-Schiffman promptly forwarded the Vice Provost's email to the NYU school newspaper and others with instructions not to "mention this matter" because his "career [wa]s at stake" (JA: 1142-1143 [People's Exhs. 16O, 16V, 16W).

While Golb pretended to be Schiffman in email exchanges with Schiffman's employer and students, Professor Schiffman himself remained unaware of what was happening until Ariel Simon, one of Schiffman's students, remarked to Schiffman, "I got your email" (JA: 76 [Schiffman: 62]). Simon then showed Schiffman the email (JA: 77-78, 83-86 [Schiffman: 63-64, 69-72]). Thereafter, "a number of people" asked Schiffman about the emails, and others forwarded the emails to him (JA: 77-78, 85, 89 [Schiffman: 63-64, 71, 75]). Robert Cargill – the internet-savvy Scrolls scholar on the west coast who had by this time figured out that Golb and his brother were behind the escalating online campaign – saw the plagiarism allegations online, and he contacted Schiffman to explain what was happening (JA: 526-527, 538 [Cargill: 727-728, 739]).

Golb, too, emailed Schiffman about the plagiarism allegations. On August 6, 2008, using the alias "Steven Fishbane," Golb hypothesized to Schiffman that anti-Golb scholar Jeffrey Gibson might have authored the "outrageous" plagiarism accusation in order to "stir further resentment" against Golb. Golb suggested that Schiffman "issue a statement of some sort if he is willing to take down the article and discontinue his efforts." Golb advised Schiffman not to ignore this suggestion, because the author had "skill at using aliases," "contacts … around the country," and "in-depth knowledge of the internet." If Schiffman did not act, Golb warned him, the accusations might "boomerang all over the internet" and reach "mainstream news sources" (JA: 129-130 [Schiffman: 115-116], 1141 [People's Exh. 16U]).

Schiffman felt "attacked," and, for a time, "paralyzed," by the sheer onslaught of emails and the need to respond to the people who were receiving them. For over a month he could "do nothing but respond to people's inquiries" (JA: 79-80, 171-174 [Schiffman: 65-66, 157-160]). Deans Stimpson and Foley interviewed Schiffman, who informed them that he was not the author of the emails that Golb had sent bearing his name, and Schiffman had to prepare an 11-page letter response to the allegations. The deans believed Schiffman's claim that he had not sent the emails, thereby rendering the plagiarism allegation less "credible," given that the false confession by Golb-as-Schiffman was so obviously synchronized with the pseudonymous accusation by Golb-as-Kaufman (JA: 101-104, 131, 162 [Schiffman: 87-90, 117, 148], 251-278 [Stimpson:

238-265], 315-338 [Foley: 302-325]).[7] Thus, on September 17, 2008, Foley concluded that there was "no basis for further inquiry" and the matter was closed (JA: 262 [Stimpson: 249], 331 [Foley: 318], 1038 [People's Exh. 2] [Foley email]).

That same day, Golb's brother emailed Golb that there was a new comment posted in connection with Golb's "Now Public" article. Golb wrote in reply, "which article, the plagiarism thing? let them fight it out, whether someone plagiarized dad isn't my concern. I am focused on the institutional problem" (JA: 1126 [People's Exh. 15, p. 69]).

3. THE TORONTO EXHIBIT: Golb impersonates former Schiffman protégé Doctor Jonathan Seidel in an effort to influence the curator of the Toronto Dead Sea Scrolls exhibit to devote more attention to Golb's father's theory.

In the fall of 2008, the Scrolls exhibit was scheduled to move to the Royal Ontario Museum in Toronto. Doctor JONATHAN SEIDEL, a rabbi in Oregon and a professor of Judaic studies at the University of Oregon, had studied with Professor Schiffman at NYU in the 1980s and had maintained a friendship with Schiffman since then (JA: 434-445 [Seidel: 607-618]). On November 22, 2008, using the email address seidel.jonathan2@gmail.com, Golb sent an email to the Board of Trustees at the Royal Ontario Museum (JA: 1042 [People's Exh. 12B]). Golb-as-Seidel suggested that the

[7] Professor Golb revealed in an August 21, 2008 email to Golb that, when another professor called and asked him point blank about "possible plagiarizing by Lawrence Schiffman," he had answered that he would have to "look into the matter." Golb replied to his father that "the truth" was that Schiffman had plagiarized him and he should be upset about it; Golb drafted a proposed response for his father to adopt that might better support a plagiarism accusation (JA: 1121-1122 [People's Exh. 15, pp. 61, 63]).

public had a "right to know" if Professor Golb, "who is widely considered to have debunked the traditional theory of the Dead Sea Scrolls in his book, will be excluded from participating in the museum's lecture series, as is reported to have been the case in San Diego." Golb signed the email, "Jonathan Seidel."

The following day, in an anonymous blog, Golb maligned the exclusion of his father's theory from the San Diego exhibit, criticized San Diego curator Risa Levitt Kohn for her role in that exhibit, and expressed concern that she was to be curator of the upcoming Toronto exhibit. The next day, Golb-as-Seidel emailed Kohn at the San Diego Museum – blind copying 25 others – to ask whether she would respond to critiques of the San Diego exhibit. Golb referred Kohn to the blog he had posted anonymously the day before, as if it had been written by someone else. He signed the email, "Jonathan Seidel" (JA: 1044 [People's Exh. 12N]).

Also that day, Golb-as-Seidel emailed 79 Dead Sea Scrolls scholars asking whether they would help develop a response to "lies" that were "being spread around the internet" about Golb's theories (JA: 1045-1046 [People's Exh. 12P]). These emails received replies that do not reflect any suspicion that the sender had not been Seidel (*e.g.*, JA: 1047-1062). Golb continued to send similar emails as Seidel at least until December 6, 2008 (JA: 1065).

4. In March 2009, Golb is arrested. His computer, bearing evidence of much of his internet activity, is seized, but Golb denies authorship.

At 7:30 a.m. on March 5, 2009, District Attorney's Office Squad Investigators PATRICK McKENNA and ARIELA FISCH arrived at Golb's apartment at 206 Thompson Street in Manhattan armed with a search warrant. Golb was arrested. Investigator McKenna took Golb to the District Attorney's Office Squad while Fisch and other officers seized Golb's computer for forensic analysis. At the District Attorney's Office, Golb waived his *Miranda* rights and agreed to answer questions. McKenna asked Golb whether he had any aliases and whether he was familiar with the list of email addresses that McKenna had already determined Golb had used in his Dead Sea Scrolls campaign. Golb replied that he "would talk about them with the DA" but that "99 per cent of them I have no idea what they are" (JA: 349-416 [McKenna: 409-474]).

Golb then spoke to an Assistant District Attorney; the interview was videotaped (People's Exh. 46 [video]). For a little over an hour and a half, Golb readily explained his difference of opinion with Schiffman about the origin of the Scrolls, acknowledged that his longstanding hostility toward Schiffman was rooted in a belief that Schiffman had mistreated one of Norman Golb's protégés, and admitted that he had used pseudonyms online in discussing the Dead Sea Scrolls and criticizing the museum exhibits. However, Golb steadfastly denied having sent any emails that were purportedly from Schiffman.

Golb's Case

RAPHAEL GOLB spent a lot of time "blogging about the Dead Sea Scrolls" (JA: 629-632, 652 [Golb: 955-958, 978]). He had written everything the People accused him of writing, and he had opened all the accounts he was accused of opening (JA: 719-757 [Golb: 1046-1084]). In Golb's view, all these online activities concerning the Scrolls generally involved his combating "many different forms of misconduct by members of the academic community and science museums across the United States." In particular, he campaigned against "efforts to silence scholars" like Golb's father, who disagreed with the mainstream theory of the origin of the Scrolls (JA: 651-668, 672-675, 758 [Golb: 977-994, 998-1001, 1085]).

In late 2006, the San Diego Museum announced that it would present a Dead Sea Scrolls exhibit in June 2007 (JA: 683-684 [Golb: 1009-1010]). Golb ascertained that the exhibit would not be paying more than "lip service" to his father's theory, and he learned that a group of predominantly Christian scholars, many of whom worked or had worked for Christian-affiliated universities, had produced a film to be shown at the exhibit. Graduate student Robert Cargill was one of them. Golb and his father obtained the script associated with the film and "demolished it," thus instituting a feud with Cargill, who then began "stalking" Golb. Still, Golb never tried to prevent Cargill from receiving his doctorate; he merely "questioned" whether Cargill should receive the degree without first answering Golb's complaints about his work (JA: 684-692, 787-788 [Golb: 1010-1018, 1112-1113]).

Golb complained that his emails were "yanked from their context" in order to give them a "sinister implication that they did not have" (JA: 668, 818-819 [Golb: 994, 1143-1144]). For example, when Golb emailed his brother to inquire whether they should "finish Goranson off," it was just a colorful way to ask whether he should refute Goranson's arguments with better ones (JA: 668-669 [Golb: 994-995]).

In July 2008, Golb became "very interested" in New York's Jewish Museum exhibit (JA: 778 [Golb: 1113]). He "resented" that Schiffman would be speaking and that his father would not, and Golb and his whole family wanted Norman Golb invited to speak as well (JA: 779-780 [Golb: 1114-1115]). On July 30, 2008, in the midst of family discussions about getting Golb invited to speak, Golb emailed his mother that they were "quickly running out of time" (JA: 785-786 [Golb: 1120-1121]).

In early August 2008, Golb posted the blogs accusing Professor Schiffman of plagiarizing Norman Golb (JA: 637-643, 794-795 [Golb: 963-969, 1129-1130]). In connection with publishing his blog, Golb gave the email address steve.goranson@gmail.com. He did not remember whether he thought that doing so might result in Goranson being blamed for authoring it. It was "possible that in [Golb's] fear of civil suits that it occurred to" him that someone investigating the blog might conclude that Goranson rather than Golb was behind it, but his purpose was "certainly not" to "deflect blame" onto Goranson (JA: 795-796 [Golb: 1130-1131]). And when Golb emailed Schiffman under a pseudonym to suggest to Schiffman that

Jeffrey Gibson might be behind the "outrageous" accusation, he was likewise not trying to "deflect the blame" from himself (JA: 797 [Golb: 1131]).

Golb did not tell his father or his brother that he was using the larry.schiffman@gmail.com account (JA: 789-790 [Golb: 1116-1117]). Golb had created and used that account exclusively on NYU's computers rather than at home, where he had freely used pseudonyms that were not the names of actual Scrolls scholars, but that was not because he was trying to hide that he was doing something wrong – to the contrary, he thought he would be easily traced by anyone who cared (JA: 811-812 [Golb: 1138-1139]). When he sent the emails from the larry.schiffman@gmail.com account, he "never intended anybody to believe that these e-mails were sent by Larry Schiffman" (JA: 676 [Golb: 1002]).

Instead, comparing himself to Voltaire combating dogmatic thought during the Enlightenment, Golb claimed that his emails were nothing more than "satire, irony, parody, and any other form of verbal rhetoric" (JA: 676 [Golb: 1002]). He claimed to have deliberately included "telltale elements" in the emails to alert readers that it was not actually Schiffman authoring them, such as using a lower case "p" in the word "professor" when he signed them (JA: 676-682 [Golb: 1002-1008]). He did not "seek to injure Schiffman," or "to benefit in any way" from his conduct (JA: 680-681 [Golb:

1006-1007]).[8] In fact, he wished only to benefit "the academic community," "the public," and "Schiffman himself" because it is "not good to conceal things" (*id.*). While Golb later wrote to his brother that "whether someone plagiarized dad isn't my concern" (JA: 1126 [People's Exh. 15, p. 69]), that was because he was "focusing" on his belief that NYU was conspiring to cover up the plagiarism, which he believed "went beyond the plagiarism" (JA: 797-798, 817-818 [Golb: 1123-1124, 1143-1144]).

Golb also opened and used the frank.cross2@gmail.com account, but that was likewise merely parody (JA: 810, 812, 819 [Golb: 1136, 1138, 1145]). Regarding the emails about Bart Ehrman putting his foot in his mouth, which criticized Ehrman's Dead Sea Scrolls discussion and purported to be from "Frank Cross," Golb did not intend for anyone to think they were actually from the renowned Scrolls scholar named Frank Cross (JA: 712, 808, 810 [1038, 1134, 1136]). He meant only to engage in parody (JA: 808 [Golb: 1134]). Golb felt that Ehrman should not have been invited to speak at a Dead Sea Scrolls exhibit, and Golb intended the Frank Cross email about Ehrman to have a "humoristic element" because "Ehrman just like Frank Cross participated in fraudulent assertions" about the Scrolls (JA: 712-713, 819 [Golb: 1038-1039, 1145]).

[8] Shortly before Golb opened the Schiffman email account and published the plagiarism allegations, he discussed with his family whether and how to approach Susan Braunstein at the Jewish Museum to inform her about "recent developments." Golb was not referring to informing her of the plagiarism allegations he was about to publish and that he had discussed with his family – the "developments" of which he wished to inform Braunstein were that his father had met some people in Israel who "supported" her handling of the exhibit (JA: 812-815, 823-824 [Golb: 1139-1142, 1149-1150]).

As for the alleged impersonation of Jonathan Seidel, Golb "made the name up"; it was just a coincidence that there happened to be a Jonathan Seidel who was a Schiffman protégé who had attended the same undergraduate school as Golb and had once met Norman Golb (JA: 692-693, 804-807, 819-820 [Golb: 1018-1019, 1131-1134, 1146-1147]). Golb did not use Seidel's name or other pseudonyms in order to benefit himself in any way or to injure Seidel or anyone else (JA: 694 [Golb: 1020]). To the contrary, Golb wished to use pseudonyms for three reasons. First, Golb wished to avoid having Cargill discover his identity. Second, Golb wished to call attention to his father's theory about the Dead Sea Scrolls; but if readers knew that the Golb-favoring comments were coming from Norman Golb's son, then they would probably discount what he was saying. Third, Golb wished to combat the tendency of Dead Sea Scrolls museum exhibits to present the generally accepted Scrolls scholarship as if there were consensus about it; he felt that by using multiple aliases, he could "fabricate a controversy" in order to suggest that there was not a consensus (JA: 695-696 [Golb: 1021-1022]).

In September 2008, Golb obtained "Software CC Cleaner" and "cleaned out [his] computer" – but that had nothing to do with any fear of criminal or civil penalty (JA: 770-772 [Golb: 1097-1099]). Throughout all of Golb's activities, he did not "intend to gain a benefit or injure or defraud" anyone (JA: 716 [Golb: 1043]).

In the morning on March 9, 2009, police officers arrested Golb at his apartment (JA: 632-634 [Golb: 958-960]). The police took Golb to the District Attorney's Office,

where he talked to a prosecutor (JA: 801-802 [Golb: 1128-1129]). Golb "consciously decided" to lie about having authored the Schiffman emails (JA: 774-775 [Golb: 1101-1102]), and he flatly denied responsibility for opening email accounts in other people's names (JA: 782-783 [Golb: 1109-1110]). Indeed, Golb suggested during the interview that Schiffman had falsely accused Golb of opening the larry.schiffman gmail account (JA: 777-778 [Golb: 1104-1105]), opining that Schiffman had many enemies and that "a lot of other suspects" could have created the email account (JA: 782 [Golb: 1109]). Golb did not tell these lies because he realized that what he had done was a crime, but because he was worried that the prosecutor would tell Schiffman, and that Schiffman might then sue him civilly (JA: 643-644 [Golb: 969-970]); because he was frightened of the "people who had arrested" him (JA: 636-638 [Golb: 962-964]); and because he was "acquiescing" to the prosecutor in general (JA: 802 [Golb: 1129]).

The Jury Instructions

The jury instructions that the trial court delivered for criminal impersonation and forgery were at their core consistent with New York's pattern criminal jury instructions ("CJI"),[9] essentially tracking the statutory language (JA: 941-966 [Jury Charge: 1266-1291]). *See* CJI2d[NY] Penal Law §§ 170.05 (Forgery in the Third Degree), 190.25(1) (Criminal Impersonation in the Second Degree). Criminal impersonation is committed

[9] The New York State Unified Court System's Committee on Criminal Jury Instructions publishes recommended jury instructions on the court system's website. The Penal Law pattern instructions are published at http://www.nycourts.gov/judges/cji/2-PenalLaw/cji3.shtml.

when a person "impersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another." N.Y. Penal Law § 190.25(1). Forgery is committed when, "with intent to defraud, deceive or injure another," a person "falsely makes, completes or alters a written instrument." N.Y. Penal Law § 170.05. The Penal Law succinctly defines "benefit" as "any gain or advantage" to the perpetrator or to another person pursuant to the perpetrator's "desire or consent." N.Y. Penal Law § 10.00(17). The terms "defraud," "deceive" and "injure" are not statutorily defined at all. Thus, the CJI instructions do not provide expositions of those terms, and there is no list of benefits, injuries and frauds that are either expressly included or excluded from the meaning of those terms.

Golb lodged six written requests to enhance these standard recommended jury instructions (JA: 1412), and the trial court addressed many of Golb's requests. For example, Golb sought an instruction conveying that "[s]atire, parody and/or pranks" are not criminal (JA: 1414). In response, the trial court instructed the jury that "free academic discussion," "parody" and "satire" were protected by the First Amendment (JA: 955 [Jury Charge: 1280]). The trial court also exhorted the jury to "zealously protect the right to speak freely, whether under one's own name or anonymously, or even under a fake name," and to "zealously protect that right whether the speech is correct or incorrect, truthful or not, derogatory or positive" (JA: 955 [Jury Charge: 1280]). Golb further urged the trial court to instruct the jury that the People had to demonstrate that Golb actually intended for others to believe that the emails he sent in other people's

names came from those other people (JA: 1414). The court did so, using the example of criminal impersonation to instruct that "without the intent to deceive or defraud as to the source of the speech with the intent to reap a benefit from that deceit, there is no crime" (JA: 956 [Jury Charge: 1281]).

Golb also sought jury instructions on the elements of the crimes. For example, with respect to fraudulent intent, Golb asked the court to expand upon the CJI instruction that "a person acts with intent to defraud when his or her conscious objective or purpose is to do so." *See*, *e.g.*, CJI2d(NY) Penal Law § 190.78(1) (citing N.Y. Penal Law § 15.05[1] [intent]). Specifically, Golb asked the court to define "intent to defraud" as "an intention to deceive another person, and induce such person, in reliance on the deception, to assume, create, transfer, alter or terminate a right, obligation, or power" (JA: 1414).

As for the definition of "injury," Golb asked the trial court to instruct the jury that:

> The intended injury that the People must prove is not limited to financial injury. However, not all injuries are the subject of the criminal law. Intending to [sic] another's reputation by disseminating falsehoods is not the type of harm that the criminal law recognizes. That type of injury may be redressed in the civil courts. [2.] Similarly, the injury intended must go beyond intending to have another spend time responding to accusations or criticisms. A defamation does not become criminal simply because the alleged injured party spends time responding to, or countering, what he or she believes to be falsehoods. [3.] Similarly, intending to abuse, deride, provoke, with the use of words, even vulgar words, is not the type of harm that the criminal law recognizes.

(JA: 1412).

And finally, regarding the definition of "benefit," Golb asked for this jury instruction:

> Not all benefits are the subject of the criminal law. The fact that a defendant may gain emotional pleasure from harming another's reputation, from informing the public or the academic community of perceived wrongdoing, from provoking debate, from getting another to respond to criticisms, and/or from irritating another is not the type of benefit that the criminal law recognizes.

(JA: 1413).

The trial court declined Golb's request that it expand the instructions to delineate precisely what injuries or benefits he would have to have intended in order to be guilty of the impersonation and forgery counts. However, while the trial court did not adopt Golb's precise wording regarding the definition of fraud, it defined the word "defraud" as "to practice fraud, to cheat or trick to deprive a person of property or any interest or right by fraud, deceit, or artifice"; it defined the word "fraud" as "a deliberately planned purpose and intent to cheat, or deceive, or unlawfully deprive someone of some advantage, benefit, or property"; and it explained that "[a] person acts with the intent to defraud when his conscious objective or purpose is to deceive or trick another with intent to deprive that person of his or her right or in some manner to do him or her an injury" (JA: 954 [Jury Charge: 1279]). This instruction drew no explanation from Golb as to how it failed to address the issues that his similar proposed instruction would have addressed.

The Verdict and State Post-Conviction Proceedings

On September 30, 2010, 31 counts were submitted for the jury's consideration. That same day, the jury convicted Golb of 30 of those counts – two counts of identity theft, 14 counts of criminal impersonation, 10 counts of forgery, three counts of aggravated harassment, and one count of unauthorized use of a computer – and acquitted him of one count of criminal impersonation. On November 18, 2010, Justice Berkman sentenced Golb to a net term of six months in jail to be followed by five years of probation, and an Appellate Division, First Department judge granted Golb's application for a stay of execution of the judgment.

Golb appealed to the Appellate Division, First Department, and on January 29, 2012, the Appellate Division dismissed one count of identity theft and affirmed the other 29 convictions. *People v. Golb,* 102 A.D.3d 601 (1st Dep't 2013). As to the jury instructions, the Appellate Division noted that the trial court "incorporated many of [Golb]'s requests, fully protected his constitutional rights," and "carefully informed the jury that academic discussion, parody, satire and the use of pseudonyms were protected by the First Amendment." The Appellate Division explained that the trial court properly "advised the jury that 'without the intent to deceive or defraud as to the source of the speech with the intent to reap a benefit from that deceit, there is no crime,'" and that the court "was under no obligation to limit the definitions" of "injure," "defraud" or "benefit." None of the statutes was vague or overbroad. Instead, "[t]he People were required to prove that Golb had the specific fraudulent intent to deceive email recipients

about his identity, and to obtain benefits or cause injuries as a result of the recipients' reliance on that deception." Thus, the statutes properly "criminalized the act of impersonation and its unlawful intent, not the content of speech falsely imputed to the victims." *Golb*, 102 A.D.3d at 601-603.

Golb appealed to the New York Court of Appeals (JA: 1446 [Golb's Brief to the Court of Appeals], 1522 [State's Brief]). With respect to the criminal impersonation and forgery convictions that are the subject of the petition, Golb contended that the trial court's jury instructions "compelled the jury to criminalize" conduct protected by the First Amendment, thereby rendering those statutes unconstitutional absent "a limiting construction from [the Court of Appeals]." Golb further contended that New York's aggravated harassment statute was "unconstitutionally vague and overbroad," and he also challenged the constitutionality of the identity theft and unlawful computer use statutes.

On May 13, 2014, the New York Court of Appeals affirmed 19 of Golb's convictions. *People v. Golb*, 23 N.Y.3d 455 (2014). The court rejected without comment Golb's invitation to reverse the Appellate Division ruling and pronounce the impersonation and forgery statutes unconstitutional.[10] The court did, however, engage in an analysis of the sufficiency of the evidence underlying the impersonation and

[10] In contrast, the court expressly agreed with Golb's argument that the aggravated harassment statute was unconstitutional, and it reversed and dismissed those convictions on that basis. The court dismissed the identity theft and computer use convictions for insufficient evidence without discussing their constitutionality.

forgery convictions. The court agreed with Golb that not every intent to cause *any* intangible benefit or injury would suffice to support an impersonation or forgery conviction under New York law, but it expressly held that an intent to damage reputation would suffice. The court then affirmed nine of the criminal impersonation convictions and all ten forgery convictions because it found that they were based on legally sufficient evidence under its interpretation of the law, and it reversed and dismissed five criminal impersonation convictions because they were not supported by sufficient evidence under that interpretation. The affirmed convictions were remanded to the trial court for resentencing. *Golb*, 23 N.Y.3d at 464-469. The Chief Judge dissented on the ground that the criminal impersonation and forgery convictions were unconstitutional. *Id.* at 470-471.

By motion dated June 11, 2014 (JA: 1661), Golb moved the New York Court of Appeals for reargument, seeking reversal and dismissal of the remanded impersonation and forgery counts. He contended that under *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), a reviewing court could not affirm a conviction obtained under a statute that it had found to be unconstitutionally broad, at least when the trial court had not instructed the jury in accordance with the statute as narrowed by the reviewing court. The People opposed the motion (JA: 1672), arguing that the Court of Appeals had not found the relevant statutes unconstitutionally broad, but rather had merely construed the statutes as it did as a matter of state law. The Court of Appeals denied that motion without opinion. *People v. Golb*, 24 N.Y.3d 932 (2014), *cert. denied*, 135 S. Ct. 1009 (2015).

On July 3, 2014, Golb was resentenced on the affirmed convictions to two months in jail. Golb sought to vacate the affirmed convictions on the same grounds that he had advanced in his Court of Appeals reargument motion; the trial court denied that motion, the Appellate Division affirmed, and the New York Court of Appeals denied leave to appeal. *People v. Golb*, 126 A.D.3d 401 (1st Dep't), *lv. denied*, 26 N.Y.3d 929 (2015).

THE FEDERAL HABEAS PROCEEDINGS

The Petition

Golb filed a petition for a writ of habeas corpus on three grounds: first, that the New York Court of Appeals deprived him of his due process rights by declining to afford Golb a new trial, because he was convicted under a broad construction of a statute that the court had narrowed on appeal contrary to *Shuttlesworth v. City of Birmingham*; second, that the New York Court of Appeals erred by holding that an intent to damage reputation could be a sufficient intent to support a conviction under New York's criminal impersonation and forgery statutes; and third, that the New York Court of Appeals "resurrect[ed] criminal libel and unconstitutionally preclude[d] truth as a defense."

The District Court's Opinion

In an opinion and order filed on January 21, 2016, District Judge Katherine Polk Failla granted the petition as to two counts of criminal impersonation and otherwise denied it. *Golb v. Attorney General*, 2016 U.S. Dist. LEXIS 7774 (S.D.N.Y.) (15-CV-1709

[KPF]) Initially, the district court found that Golb's *Shuttlesworth* arguments had been adjudicated on the merits, thus requiring the district court to give AEDPA deference to the state court determination. *Id.* at *24. The district court then discussed *Shuttlesworth* and later cases, concluding that the narrowing of a statute on appeal would not warrant habeas relief if harmless. *Id.* at *26-*31. The district court did not address the distinction of a narrowing on constitutional grounds as opposed to state law grounds.

As to the criminal impersonation convictions under counts 33 and 37 of the indictment, the district court found that once the New York court had narrowed the criminal impersonation statute, it should have determined whether the overbroad statute had given Golb sufficient notice that his conduct was criminal, and whether the overbroad jury instructions were harmless. The district court held that no reasonable jurist could find the overbreadth harmless as to those two counts, and therefore granted the petition as to those counts. *Id.* at *32-*36. As to the remaining seven criminal impersonation counts, the district court found that reasonable jurists could find that Golb had fair notice that his conduct was criminal and that the overbroad jury instructions were harmless. *Id.* at *36-*43. The district court concluded that the New York Court of Appeals had not narrowed the forgery statute, and thus the *Shuttlesworth* claim did not apply to it. *Id.* at *43-*48.

The district court also afforded AEDPA deference to Golb's vagueness and overbreadth attacks on New York's criminal impersonation and forgery statutes. *Id.* at

*48-*49. With respect to Golb's argument that reputational injury was too vague to be an element of a crime, the court found that "most people understand what a reputation is, and what kinds of conduct are likely to cause reputational injury"; it concluded that it "cannot say that, as a matter of clearly established federal law, a statute is unconstitutionally vague if it criminalizes conduct undertaken with an intent to harm someone's reputation." *Id.* at *50. The court rejected Golb's contention that *Skilling v. United States*, 561 U.S. 358 (2010), was clearly established precedent prohibiting "reputational injuries" from being elements of a fraud statute; *Skilling* confronted the particular vagaries of a federal statute, and it "did not rule out the possibility that another statute … could create a clear prohibition against non-monetary fraud." *Golb*, 2016 U.S. Dist. LEXIS at *50-52.

With respect to overbreadth, the district court rejected Golb's contention that *United States v. Alvarez*, 132 S. Ct. 2537 (2012), precluded states from restricting false speech absent an intent to cause tangible injuries or reap tangible benefits. *Id.* at *52-*55. As to Golb's suggestion that the statutes would chill such protected speech as parody and satire "that can be deemed intentionally 'deceitful' by virtue of its deadpan, imitative nature," the district court disagreed. The court explained that parody by its nature is not intended to be taken as real, because its audience must know it is a parody for it to have its intended "comedic or critical" effect. *Id.* at *55-*57. Thus, "parody is not a genuine form of 'imperson[ation],' as that term is used" in the criminal impersonation statute, and it "does not 'purport[] to be an authentic creation,'" as

forgery requires. *Id.* at *57. Moreover, even if the statutes could conceivably prohibit some parody, they would not prohibit a "substantial" amount of it in relation to their wide "legitimate sweep"; thus, a defendant who was truly engaged in parody and charged with these crimes could still challenge the application of the statutes to protected conduct. *Id.* at *57-*58. Thus, the district court found that no clearly established federal law rendered the statutes facially overbroad. *Id.* at *58.

The district court granted a certificate of appealability as to two issues: (1) whether *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and its progeny required vacatur of any of Golb's criminal impersonation convictions; and (2) whether New York's criminal impersonation or forgery statutes are vague or overbroad.

SUMMARY OF THE ARGUMENT

The district court should not have granted Golb's petition for habeas relief to the extent that it reversed two counts, but it correctly denied relief as to the remaining 17 counts.

Although the district court appropriately applied AEDPA deference, it wrongly concluded that the New York Court of Appeals had unreasonably applied *Shuttlesworth* and its progeny with respect to the nine criminal impersonation counts. *Shuttlesworth* applies when a state court narrows an unconstitutional state statute to save its constitutionality but fails to assure that the defendant was guilty of the conduct even under the narrowed interpretation. Here, although Golb attacked the constitutionality

of New York's criminal impersonation statute, the New York Court of Appeals narrowed the statute on state law grounds to require proof of an intent to injure reputation. The court also expressly found that Golb's conduct established his guilt of criminal impersonation even under that narrowed interpretation.

Because *Shuttlesworth* did not apply, the district court should not have vacated counts 33 and 37, and that portion of the district court's opinion and order should be reversed. Even if this Court were to find *Shuttlesworth* error, however, the district court correctly found such error to be harmless as to the other seven criminal impersonation counts, and those counts should still be affirmed.

As to the second issue, the district court, appropriately applying AEDPA deference, correctly concluded that New York's forgery and criminal impersonation statutes were not overbroad. The court also correctly held that the criminal impersonation statute was not vague.

New York's forgery and criminal impersonation statutes are content-neutral fraud statutes which speak to the actor's fraudulent intent and action in furtherance of that intent, without any reference at all to any topic or issue that is covered. While Golb is correct that some false statements may enjoy constitutional protections, such protections do not extend to fraud. The concrete conduct in both statutes has always required not just a simple falsity, but outright deception as to the identity of the writer or actor as well as a fraudulent intent to accompany the proscribed conduct.

Golb insists that these statutes threaten to chill the efforts of legitimate parodists and satirists. But Golb's own jury was specifically instructed not to convict him if he were engaging in such protected conduct. In any event, those protected endeavors require that the audience recognize the conduct as imitative rather than be deceived by it, and the New York statutes in question require that the actor harbor an intent to deceive or to cause a benefit or injury by the deception. Morover, the statutes are not so broad as to reach a substantial amount of protected conduct.

Finally, the criminal impersonation statute is not vague for permitting a conviction based on an intent to injure reputation. *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896 (2010), does not require that fraud statutes contain an element of tangible harm. A professional's reputation is a significant asset, and an injury to it could have far-reaching implications beyond any immediate financial effect of the fraud. As the district court found, people know what reputations are, so a crime involving an intent to cause reputational harm does not suffer from a vagueness flaw.

ARGUMENT

POINT I

THE DISTRICT COURT WRONGLY DISMISSED THE TWO CRIMINAL IMPERSONATION COUNTS, BECAUSE THE NEW YORK COURTS DID NOT UNREASONABLY APPLY *SHUTTLESWORTH V. CITY OF BIRMINGHAM* (cross appeal and answering Golb's brief, Point I).

In this state habeas case, the district court granted Golb's petition for habeas relief to the extent that it reversed two counts, and it denied relief as to the remaining 17 counts. Specifically, applying AEDPA deference to claims it found to have been adjudicated on the merits in state court, the district court concluded that the New York Court of Appeals unreasonably applied clearly established Supreme Court precedent as stated in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), with respect to nine criminal impersonation counts. As a result, the court granted the Petition as to two criminal impersonation counts on the ground that no reasonable jurist could find the purported *Shuttlesworth* error to have been harmless as to those counts, and it denied the Petition as to the remaining seven criminal impersonation counts on the ground that reasonable jurists could deem the purported error harmless as to those counts. The court then issued a certificate of appealability as to whether it should have reversed all the criminal impersonation counts under *Shuttlesworth*. Because the New York courts did not violate *Shuttlesworth* in the first place, the district court should not have vacated any of the criminal impersonation counts.

A.

This Court reviews a district court's determination of a state habeas petition de novo. *See, e.g.*, *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 120 (2d Cir. 2015); *Wood v. Ercole*, 644 F.3d 83, 90 (2d Cir. 2011). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a writ of habeas corpus shall not issue for a claim that a state court has adjudicated on the merits unless that adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254[d][1]), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" (28 U.S.C. § 2254[d][2]). State court factual determinations "shall be presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *McKinney v. Artuz*, 326 F.3d 87, 101 (2d Cir. 2003).

Federal law is "clearly established" when it is expressed in "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions." *Howes v. Fields*, 565 U.S. 499 (2012) (internal quotation marks omitted). When a habeas litigant raises an issue that the Supreme Court has not "squarely addresse[d]" or "clear[ly] answer[ed]," habeas relief is unavailable. *Wright v. Van Patten*, 552 U.S. 120, 125-126 (2008); *see also Carey v. Musladin*, 549 U.S. 70, 77 (2006).

A state court's decision is "contrary" to clearly established federal law when the state court "applies a rule that contradicts the governing law set forth in" a Supreme

Court opinion or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000).

For a state court application of federal law to be deemed "unreasonable," the decision must be "more than incorrect or erroneous"; it must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). It is a standard that is intentionally "difficult to meet"; habeas relief should be granted only where there is "no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Harrington v. Richter*, 562 U.S. 86 (2011); *see Vega v. Walsh*, 669 F.3d 123, 126 (2d Cir. 2012).

Because the AEDPA's deferential standards of review are "difficult" to overcome, the question whether a claim has been adjudicated on the merits is significant. *Johnson v. Williams*, 133 S. Ct. 1088, 1091 (2013). Fortunately, the answer to that question is relatively simple:

> [W]hen a state court issues an order that summarily rejects without discussion all the claims raised by a defendant, including a federal claim that the defendant subsequently presses in a federal habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits. We see no reason why this same rule should not apply when the state court addresses some of the claims raised by a defendant but not a claim that is later raised in a federal habeas proceeding.

Johnson v. Williams, 133 S. Ct. at 1091; *see Harrison v. Richter*, 562 U.S. at 99. That "presumption is a strong one that may be rebutted only in unusual circumstances."

Johnson v. Williams, 133 S. Ct. at 1096. In other words, if a habeas petitioner pressed his claim in state court and did not prevail, the habeas court generally should presume, as the district court correctly did here, that the state court rejected that claim on the merits.

B.

The district court should not have found that the state courts acted contrary to clearly established precedent. Holding that the New York Court of Appeals ran afoul of *Shuttlesworth* by affirming Golb's convictions "under an overbroad statute that was narrowed after his trial" (JA: 1714), the district court seems to have assumed that *Shuttlesworth* constituted such precedent solely by dint of Golb's having been found guilty under a statute whose scope was then narrowed on appeal. That reading of *Shuttlesworth* is too broad.

Shuttlesworth had been convicted in an Alabama trial court for violating an ordinance that made it unlawful to loiter after having been requested by a police officer to move. *Shuttlesworth*, 382 U.S. at 90. To save the ordinance's constitutionality from a challenge later posed by another defendant, Alabama's highest court interpreted it to require that the person ordered to move had to have been "blocking free passage." *Id.* at 91. Nonetheless, there was no indication of whether the trial court, in finding Shuttlesworth guilty before the ordinance was modified, had found Shuttlesworth to have committed conduct that would still have violated the ordinance under its constitutional interpretation. The Supreme Court held, therefore, that Shuttlesworth's conviction could not stand because the Court was "unable to say that the Alabama

courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance." *Id.* at 92. *Shuttlesworth* thus stands for the proposition that a state court may not uphold a conviction under a statute that the state court has found to be unconstitutional, except where it finds that the evidence still supports his guilt under the corrected reading of the statute.

Later Supreme Court cases confirm that *Shuttlesworth* is in play only when the statute's construction was narrowed due to a perceived constitutional defect in it. Indeed, in *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966), the Supreme Court explained that *Shuttlesworth* held that "where an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act." Likewise, in *Osborne v. Ohio,* 495 U.S. 103, 118 (1990), the Supreme Court declared that *Shuttlesworth* "stands for the proposition that where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written." Thus, the "clearly established" rule from *Shuttlesworth* is that there is cause for habeas relief when a state imposes custody on a defendant under a statute which the state courts have found to be unconstitutionally broad, yet the state has not ensured that the defendant is still guilty under the correct formulation of the law.

In that light, *Osborne v. Ohio* makes plain that even when a state appellate court has narrowed the scope of a statute due to constitutional concerns, that does not necessarily invalidate a conviction obtained prior to that narrowing. In *Osborne*, the Ohio Supreme Court had construed a pornography statute to include a scienter requirement and a lewdness requirement in addition to the element of nudity and, relying on that narrowed construction, it rejected an overbreadth claim. *Osborne v. Ohio,* 495 U.S. at 107-108. In so doing, the Supreme Court approved in principle the appellate upholding of a trial conviction even after a statute has been modified to save its constitutionality, noting that it had "long held that a statute as construed 'may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendan[t].'" 495 U.S. at 115 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 491, n. 7 [1965] [citations omitted]). Accordingly, *Osborne* supports the proposition that no new trial is required, even when a statute's construction is modified due to constitutional defects in it, where the state has assured that the defendant's conduct still plainly would have violated the law as constitutionally construed.

To be sure, the Supreme Court did reverse Osborne's conviction, but not because the statute under which he was convicted was later construed to avoid unconstitutionality. It did so on the much simpler ground that the petitioner's guilt may not actually have been proven at all. Specifically, besides construing the pornography statute to include the two additional elements of scienter and lewdness, the Ohio Supreme Court had also rejected, solely on procedural grounds that the United

States Supreme Court found to have been incorrectly invoked, a challenge to the conviction based on the fact that trial counsel had raised a "failure of proof" issue as to lewdness. 495 U.S. at 124. Thus, the Court concluded, the Ohio courts had failed "to ensure that Osborne's conviction stemmed from a finding that the State had proved each of the elements." 495 U.S. at 125-126 (citing *In re Winship*, 397 U.S. 358, 364 [1970] [the Due Process Clause requires that a criminal defendant not be convicted absent "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"]).

Osborne's dual holdings cannot be reconciled if the gravamen of the latter holding – requiring proof of every element – is that a jury must, at the time of trial, make an express finding as to each element for the conviction to stand. If that were so, then *Osborne*'s former holding – that a statute's elements may be modified after the fact without undermining the conviction – would be impossible. Thus, what must be required is a more general assurance of due process, namely, that a state's appellate court must ensure that the defendant was in fact proved guilty beyond a reasonable doubt of all the elements – whether the jury or other fact finder expressly said so or not. Such an interpretation is the only way for *Osborne* to make sense. *See Mauer v. Minnesota*, 625 F.3d 489, 492 (8th Cir. 2010) (*Shuttlesworth* and *Osborne* did not hold that "that a new trial would be 'the only way to ensure that a defendant is [actually] guilty' of violating a newly construed statute") (citations omitted).

In sum, then, under *Shuttlesworth* and its progeny, there is constitutional error only if (1) state courts have placed a narrowing construction on a state statute as a matter of federal constitutional law; (2) a defendant is tried under the broader construction of the statute; *and* (3) the state appellate courts do not find that the defendant was guilty beyond a reasonable doubt under the narrowed version of the statute, or the defendant does not have fair warning that his conduct is criminal.

C.

Here, Golb is not entitled to any relief based on *Shuttlesworth* and its progeny, for the simple reason that the New York Court of Appeals did not suggest any constitutional infirmity in the way the statutory terms "injury" or "benefit" were explained to Golb's jury. Instead, notwithstanding Golb's federal arguments and his citation to *Ashton v. Kentucky* in his brief, the court resorted only to state statutes and legislative intent in explaining the meaning of the New York statutes: "[W]e conclude that injury to reputation is within the 'injury' contemplated by Penal Law § 190.25" (23 N.Y.3d at 465); "[W]e believe the legislature intended that the scope of the statute be broad enough to capture acts intended to cause injury to reputation" (23 N.Y.3d at 466); "the mere creation of email accounts … does not constitute criminal conduct under Penal Law § 190.25" (*id.*). The court then proceeded to resolve the impersonation counts by stating which were sufficiently proved and which were not. *Id.* at 466. The resolution of Golb's attack on these convictions on state evidentiary sufficiency grounds without declaring the statutes unconstitutional is all the more telling in light of

the court's express declaration that another state statute was unconstitutional. *Id.* at 467-468. Had the court's interpretation of the impersonation statute included a finding that it was unconstitutional – a finding that would have to have been made, for *Shuttlesworth*, *Ashton*, and *Osborne* to be applicable – the court plainly would have said so.

Thus, the New York Court of Appeals must be deemed to have rejected Golb's arguments that both statutes were unconstitutional on the merits, requiring AEDPA deference to those rulings as well as the *Shuttlesworth* ruling that they underlie.[11] Consequently, then, *Shuttlesworth* and its progeny are simply inapplicable here. This is not a case where a state court felt itself constitutionally compelled to narrow the reach of a statute, yet still upheld a conviction obtained under the broader reading of it. Rather, the state court merely concluded that, as a matter of state law, one element should be construed more narrowly than appears to have been suggested by the unadorned statutory language.

But even if it could be concluded that the New York Court of Appeals somehow thought that the term "injury" had to be narrowed as a constitutional matter, there was no violation of the *Shuttlesworth* rule in its upholding of the convictions. After all, quite unlike in *Shuttlesworth* or in *Ashton*, the New York Court of Appeals expressly found that the evidence against Golb *did* support Golb's conviction under the correct

[11] As will be discussed in more detail in Point II, *infra*, both New York's criminal impersonation and forgery statutes are indeed constitutional, with or without any gloss added by the New York Court of Appeals in this case.

(Continued…)

interpretation of the disputed terms, on all 19 counts now at issue. 23 N.Y.2d at 465-466.[12] Notably, the court dismissed other counts precisely because the court found them unsupported under the correct standard. And, Golb's case is unlike *Osborne* because the record contains proof of his guilt of the crimes as constitutionally construed, and the state appellate courts expressly found this proof to be sufficient – a determination that is also entitled to AEDPA deference.

Accordingly, so long as Golb had "fair warning" that his conduct would transgress the statute as understood after the narrowing, no new trial would be required even if the statutory narrowing was constitutionally based. *See Osborne v. Ohio*, 495 U.S. at 116. Here, Golb could not possibly have been surprised that his conduct would run afoul of even the narrowed interpretation. After all, the evidence showed that Golb aggressively sought to damage not just the reputations, but also the livelihoods, of the victims of his impersonation and forgeries. His scheme against Schiffman, in particular, was devious, intricate, and purposefully aimed at branding Schiffman a plagiarist and affecting the Jewish Museum's decision whether to invite Schiffman to paid speaking engagements.

Golb complains that he could not possibly have expected to be liable for impersonation based on his intent to damage reputations, because he would not have anticipated the New York Court of Appeals "would expand" the scope of intended

[12] The district court did not disagree that there was sufficient evidence under these counts; it merely found that the evidence was not overwhelming.

injury to reputation (Golb's brief, p. 40). But Golb most certainly should have expected such intended injury to be criminalized at the time he acted, given that the statute on its face criminalized intent to injure generally, without providing a limited list of intended injuries that would suffice. Golb objected to this undefined term as too broad precisely because he believed that it covered more intents than it should. It would be preposterous for Golb to have thought that the statute he believed placed no limit on the universe of intended injuries would not extend to the injury he actually intended. Nor would Golb's trial have proceeded any differently had the law been explained as the New York Court of Appeals construed it (Golb's brief, p. 36), because all of the evidence that he tried to "irritate, provoke, and annoy his targets" concomitantly illustrated his burning desire to ruin them – which, as noted, was a sentiment he did not keep to himself.

D.

In search of a more forgiving standard of review, Golb apparently equates the absence of an explicit discussion of his constitutional arguments by the New York Court of Appeals as indicative of a failure to adjudicate his current claim on the merits in the first place, thereby obviating the need for AEDPA deference (Golb's brief, pp. 32-34). Of course, absent a clear reason to believe otherwise, this Court must presume just the opposite: that the constitutional claims Golb raised in state court were indeed adjudicated on their merits. *See Johnson v. Williams*, 133 S. Ct. at 1096. Not only is there nothing in the state proceedings to rebut that presumption, but every indication points

to the conclusion that the court roundly rejected Golb's constitutional claims on the merits.

Perhaps most notably, the court issued its decision over the dissent of Chief Judge Lippman, who complained that the criminal impersonation statute under its original interpretation "criminalize[d] a vast amount of speech that the First Amendment protects" and that the "prosecution's use of the statute was not limited in the way the Court now says it should have been." 23 N.Y.3d 455, 469-471. This sounds remarkably like Golb's current position, and plainly indicates that the majority was aware of and rejected it.

Any doubt in this regard would be laid to rest by the fact that Golb brought the exact same claim he presses here to the New York Court of Appeals in a reargument motion, which the court denied. Since the state advanced no procedural bars, and argued simply that the court had made a state-law determination of the elements of the crimes at issue, there is no basis to conclude that reargument was denied for any reason other than a disinclination to revisit a decision that it felt had already been correctly made. Had the court somehow misunderstood or overlooked Golb's initial appellate argument that the definitions given to his jury rendered the impersonation statute unconstitutional, or that Golb might not have been guilty of the crime under the statute as properly construed, the reargument motion gave the court an opportunity to correct that oversight.

Golb now insists that, under New York law, summary rejection of a reargument motion does not constitute a determination of the merits of the issue advanced within it. Thus, in Golb's view, he is entitled to non-deferential review of his *Shuttlesworth* claim (Golb's brief, 32). But Golb misses the point. In its initial opinion, the Court of Appeals had already rejected Golb's constitutional attack on the state statute. As demonstrated, that was enough to render the *Shuttlesworth* claim advanced in the reargument motion inapplicable. In the context of discerning whether the state court had already rejected Golb's constitutional arguments on their merits, the reargument motion does nothing to undermine the presumption that it did.

E.

Because there was no *Shuttlesworth* error, the district court should not have vacated two of the criminal impersonation counts. But even if this Court were to agree with the district court that the New York Court of Appeals ran afoul of *Shuttlesworth*, the seven remaining impersonation convictions should stand. As the district court recognized in denying habeas relief as to those counts, even a constitutional error in instructing a jury on the elements of a crime warrants no relief where the error is harmless beyond a reasonable doubt. *See Pope v. Illinois*, 481 U.S. 497, 502 (1987). In *Pope v. Illinois*, a jury instruction on the definition of obscenity was deemed "unconstitutional" in that it misdescribed obscenity by telling the jury that it had to decide whether the subject material had "value" by reference to "community standards." The First Amendment required instead that the jury apply a reasonable

person standard. The Supreme Court considered whether the conviction could be salvaged by a finding of harmless error, and it concluded that it could, provided that the reviewing court found that "no properly instructed rational juror could find value" in the material. *Pope v. Illinois*, 481 U.S. at 503. The Supreme Court thus remanded the case for that analysis. *See generally McFadden v. United States*, 135 S. Ct. 2298 (2015) (harmless error analysis applies to error in jury instruction on "mental state"); *Neder v. United States*, 527 U.S. 1, 8-10 (1999) (harmless error analysis applies even when a jury instruction entirely omits one element of a crime).

Applying this exacting harmless error standard, the district court concluded that a reasonable jurist could find the error harmless as to seven counts. That conclusion is sound regardless of whether AEDPA deference applies. After all, there was simply no doubt that Golb's intent at least to damage reputations, as the Court of Appeals said would be sufficient to establish intent to injure as required by the criminal impersonation statute, was made out here. For instance, Golb's email to his own mother declared that he was "out to get" his adversaries (JA: 1077 [People's Exh. 15, p. 16] [July 26, 2008 email]). And the Schiffman forgeries in particular involved allegations of plagiarism, an academic offense so grave that it could lead to being fired and did in fact require a tedious investigation (JA: 258-262 [Stimpson: 245-249]), as Golb recognized within those very emails by writing that Schiffman's "career" was "at stake" (JA: 94-95 [Schiffman: 80-81], 1136, 1143 [People's Exhs. 16G, 16R]). Thus, the

New York Court of Appeals understandably had no trouble finding that the evidence of Golb's intent to harm at least reputations was proved.

There is no reason to believe that a jury expressly told that an intent to injure reputation was required, rather than simply a general intent to injure, would have decided differently than Golb's jury. That is especially true since, as already referenced, the evidence powerfully established that Golb intended to cause injuries, or obtain benefits, far beyond injuries to reputation. Indeed, the evidence showed that Golb was seeking to destroy Schiffman's career. And, as the district court pointed out, the evidence showed that Golb sent the Seidel e-mail to the Royal Ontario Museum (count 25) in an effort to have his father hired by the museum. Golb complains that the district court wrongly ignored a purported "finding" by the New York courts that he "sought no financial benefit in any of the emails," and the Court of Appeals' "explicit holding" that it was affirming all the "impersonation convictions solely on a damage to reputation theory" (Golb's brief, p. 39). Here, Golb confuses the inchoate nature of intent with the concrete result intended. In fact, the Court of Appeals recognized only that Golb's conduct did not *cause* any pecuniary harm, 23 N.Y.3d at 465. Then, after listing the three types of *intended* harm that could suffice to support a criminal impersonation conviction, the court found that Golb had indeed "acted with intent to do real harm." *Id.* at 466. In other words, proof of an actual injury was not required, so the court's recognition that certain injuries were not caused did not mean that they were not

intended. And the court did not say that it was affirming all the criminal impersonation counts solely on the intent to injure reputation theory.

Golb believes that *Neder v. United States* precludes a finding of harmlessness when the defendant contests an element that was omitted from the jury charge (Golb's brief, pp. 35-36). Initially, the injury element here was not omitted, but rather misdescribed. In any event, while in *Neder* the omitted element was not contested at trial, that was not the Supreme Court's stated requirement for finding the omission harmless. Instead, the Court held that even where an element is omitted from jury instructions, harmlessness is analyzed under "same" standard as when an element is erroneously described: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder*, 527 U.S. at 18-19.

* * *

In sum, the New York courts did not deem New York's criminal impersonation statute unconstitutional, and they were careful to assure that Golb was properly convicted even of the narrowed crimes. Consequently, *Shuttlesworth* and its progeny entitled Golb to no relief at all on any of the counts, and the district court should not have vacated any of the impersonation counts. Even assuming that the district court was right to find otherwise, it was also right to find that any such error was harmless as to seven of the nine criminal impersonation counts.

POINT II

THE NEW YORK COURT OF APPEALS DID NOT CONTRADICT CLEARLY ESTABLISHED SUPREME COURT PRECEDENT BY DECLINING TO FIND NEW YORK'S CRIMINAL IMPERSONATION AND FORGERY STATUTES OVERBROAD, OR BY DECLINING TO FIND THE IMPERSONATION STATUTE VAGUE (answering Golb's brief, Points II & III).

Golb argued in New York's Court of Appeals that New York's criminal impersonation and forgery statutes were vague and overbroad for containing an unelaborated element of an intent to injure, rather than an intent to cause some defined tangible harm. The state court construed the criminal impersonation statute so as to limit the universe of intended injuries that would suffice to prove the mens rea, and specifically to include an intent to injure reputation, but it held that the evidence still proved Golb's guilt of it under that construction. The court did not purport to construe the intent to injure in the forgery statute in any particular way, and simply noted Golb's guilt of the forgery counts on the theory that he harbored an intent to deceive.

Golb now argues: (1) that the forgery statute is "constitutionally overbroad because it criminalizes false writing made with the intent to deceive regardless of whether the author has any intent to benefit himself or injure another and regardless of whether the communication contains content protected by the first amendment" (Golb's brief, pp. 41-54); and (2) that the criminal impersonation statute is flawed because "criminalizing impersonations intended to cause damage to reputations is

unconstitutionally vague, and authorizes the punishment of protected speech" (Golb's brief, pp. 54-64).

As an initial matter, Golb finds fault with the district court for applying AEDPA deference to both of these claims (Golb's brief, pp. 41-43, 54), as it did with respect to the *Shuttlesworth* claim in Point I, *supra*. For essentially the same reasons that the district court applied AEDPA deference to the other claim, it plainly had to do so for these. As noted, the New York Court of Appeals had Golb's constitutional arguments before it, and nonetheless ruled – over the Chief Judge's dissent that this was constitutional error – that the criminal impersonation statute had simply been misexplained to the jury under state law, and that Golb was plainly guilty of the impersonation crimes as properly construed and of forgery based upon his plain intent to deceive. Obviously, then, the state court did not inadvertently fail to notice or rule on Golb's contentions; it simply rejected them and resolved its concerns without finding constitutional error.

A. The Forgery And Criminal Impersonation Statutes Are Not Overbroad.

Golb argues that, whether applying AEDPA deference or not, New York's forgery statute is unconstitutional because under clearly established Supreme Court precedent, no reasonable jurist could dispute that the forgery statute (1) is a content-based proscription on speech; (2) criminalizes protected speech; and (3) fails the strict scrutiny that would be required for doing so. In furtherance of that assertion, he offers *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015); *United States. v. Alvarez*, 132 S. Ct. 2537 (2012); *United States v. Stevens*, 559 U.S. 460 (2010); *City of Cincinnati v. Discovery*

Network, Inc., 507 U.S. 410, 429 (1993); and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Golb is wrong that reasonable jurists would have to find the forgery statute unconstitutional from these precedents; to the contrary, no reasonable jurist could do so.

To begin, it is hard to conceive of a less content-based statute than this one. As pertinent to Golb's argument, New York can prosecute a person for the misdemeanor of forgery when, "with intent to defraud, deceive or injure another," that person "falsely makes" a "written instrument." N.Y. Penal Law § 170.05. A person "falsely makes" a written instrument when he creates a written instrument "which purports to be an authentic creation of its ostensible maker" even though the purported maker "did not authorize" it. N.Y. Penal Law § 170.00(4). Thus, the forgery statute does not purport to refer to any particular type of speech at all. It speaks to the actor's fraudulent intent, on the one hand, and to the creation of a written instrument on the other hand, without any reference at all to the topic or issue to be discussed or conveyed therein. Golb offers no precedent at all, let alone clearly established United States Supreme Court precedent, to suggest that such a garden variety forgery statute should be seen as content-based.

Golb seeks to spin the content-neutrality argument his way by complaining that the statute targets only speech that is false as distinguished from speech that is true (Golb's brief, pp. 44-45). Here he confuses the content of his actions with the content of his emails. The forgery statute does not refer to the message conveyed in a written

instrument as the basis for a restriction, as in the cases Golb offers. *See City of Cincinnati v. Discovery Network*, 507 U.S. at 429 (Cincinnati "has enacted a sweeping ban on the use of newsracks that distribute 'commercial handbills,' but not 'newspapers.' Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack); *Reed v. Town of Gilbert*, 135 S. Ct. at 2224, 2227 (construing a statute that "prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement"; noting that a statute is not content-neutral if it cannot be "justified without reference to the content of the regulated speech") (quoting *Ward v. Rock Against Racism*, 491 U. S. 781, 791 [1989]). In other words, it was not the content of the emails that got Golb into trouble for forgery; Professor Schiffman could have sent those emails with identical content and he would not have been subject to criminal liability. The problem was Golb's action in falsely creating the emails, and his intent to deceive the recipients.

But even assuming that the emails could somehow be deemed as not content-neutral because one must see them to know they are falsely made, Golb is wrong to look to *Alvarez* as authority for the proposition that reasonable jurists would have no choice but to agree that his falsely made emails would qualify as protected speech. To the contrary, the First Amendment generally leaves speech unprotected when it is not merely false, but fraudulent. *Alvarez*, 132 S. Ct. at 2547 (plurality) ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers

of employment, it is well established that the Government may restrict speech without affronting the First Amendment"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976) (striking down statute prohibiting advertising as to price of prescription drugs, but stressing that there was "no obstacle" to enforcement of statutes such as Va. Code Ann. § 18.2-216, which criminalizes the use of any "method, device or practice which is fraudulent, deceptive or misleading to induce the public to enter into any obligation"). To be sure, a content-based statute expressly prohibiting all false speech about a specified subject may run afoul of the First Amendment. *See*, *e.g.*, *Alvarez*, 132 S. Ct. at 2545-2547 (recognizing the diminished value of false speech, but "reject[ing] the notion that false speech should be in a general category that is presumptively unprotected"). But fraud is worse than mere falsity.

Alvarez makes this distinction between fraud and mere falsehood clear. In *Alvarez*, the United States Supreme Court struck down a federal law making it a crime merely to claim, falsely, to have received a congressional "decoration or medal" for military service. A plurality of four opined that this content-based ban required "the most exacting scrutiny," 132 S. Ct. at 2548, while a concurrence of two would have applied only "intermediate scrutiny," 132 S. Ct. at 2552; all six agreed that the statute was unconstitutional because it failed to withstand the required scrutiny. 132 S. Ct. at 2551, 2556.

In explaining the Court's ruling, the plurality and the concurrence distinguished the offending statute's outright ban on false speech about a particular topic from the

sort of statutory limitation on speech that the Court unanimously agreed does not implicate the First Amendment. For example, the plurality noted that perjury may be banned without implicating the First Amendment "not simply because perjured statements are false," but because a perjured statement can cause a court to act on the statement's falsity, *Alvarez*, 132 S. Ct. at 2546. Likewise, statutes that outlaw "falsely representing that one is speaking on behalf of the Government," "apart from merely restricting false speech," also "protect the integrity of Government processes," *id.* Similarly, the concurrence suggested that such crimes as perjury, fraud, defamation, and impersonation are distinguishable from a simple ban on lying because they require proof of something more than the mere falsity of a statement. 132 S. Ct. at 2553-2554. For example, an impersonation statute might require proof that "someone was deceived" into acting in reliance on the perpetrator's deception. *Id.* Given the dissenters' view that, absent justifications not at issue here, "false statements of fact merit no First Amendment protection" at all, *Alvarez*, 132 S. Ct. at 2562, the divided *Alvarez* Court was unanimous to this extent: there is no First Amendment right to engage in deceptive conduct aimed at duping victims into acting in reliance on the deception.

Accordingly, the forgery statute passes muster under *Alvarez* because it is a content-neutral ban on falsely making a writing, with the intent thereby to defraud, deceive, or injure. New York's criminal impersonation statute, even before the New York Court of Appeals placed state law limitations on the intended injuries that could support a conviction of it, was constitutionally sound for the same reasons: it was a

content-neutral ban on impersonating people with the intent to benefit or injure thereby. The concrete conduct in both statutes has always required not just a simple falsity, but outright deception as to the identity of the actor or writer. And, each required a finding of an intent – whether to deceive, or to injure generally or reputationally – accompanying the proscribed conduct.

Golb seeks to gain First Amendment traction for his argument that the forgery statute is overbroad, and to establish that the criminal impersonation statute is overbroad, by fretting that these statutes will chill the efforts of legitimate parodists and satirists with whom he apparently wishes to identify (*see*, *e.g.*, Golb's brief, pp. 6, 7, 9, 12, 14-16, 40). That was his tack at trial, too, presumably because even Golb realized that forging emails in someone else's name in an effort to ruin his career had crossed the line.

Fortunately for Golb's First Amendment rights, however, his jury was instructed that if he were truly just engaging in parody, then there was no crime (JA: 955-956 [Jury Charge: 1280-1281]). New York's Appellate Division agreed that the trial judge "carefully informed the jury that academic discussion, parody, satire and the use of pseudonyms were protected by the First Amendment." 102 A.D.3d at 602. Obviously, then, the jury found that Golb had not been engaged in mere satire and parody, despite his claims otherwise, and his purported First Amendment concerns on that point are now simply immaterial.

Even ignoring the express First Amendment defense rejected by the jury, though, there is no need to fear for those who are actually engaged in parody and satire. Just as in his own case, the statutorily required intent to defraud, deceive, or injure – laid over the prohibited acts of falsely impersonating another or making a written instrument without the ostensible maker's authorization – ensures that both statutes will not be used to thwart protected speech. As the district court aptly noted, parody and satire in fact require that the intended audience recognize the impersonation, not that they are deceived by it.

Golb disagrees, deeming it significant that, with respect to certain satirical conduct to which he likens his own conduct, such as Tucker Carlson's "impersonation" of Keith Olbermann, some people might have believed that the author of the satire was in fact the person in whose name it was written (Golb's brief, pp. 46-47). But he confuses the result with the intent. The fact that someone may have believed that Carlson's words were written by Olbermann does not mean that Carlson intended that readers remained convinced that Olbermann was the true author. And here, petitioner had requested the trial judge to tell the jury that he could not be convicted unless he sought to dupe the recipients of his messages into believing that they came from the purported authors. The court obliged, instructing the jury that "without the intent to deceive or defraud as to the source of the speech with the intent to reap a benefit from that deceit, there is no crime" (JA: 956 [Jury Charge: 1281]). Thus, petitioner's guilt of the intent element of the crimes he committed turned not on whether anyone believed

his emails emanated from their nominal authors, but on whether petitioner intended them to believe it. This instruction assured that the jury's verdict would not convict petitioner for mere satire or parody that, through no fault of petitioner's, someone mistakenly believed to be serious.

B. The Criminal Impersonation Statute Is Not Vague.

Finally, Golb contends that the New York Court of Appeals ran afoul of clearly established United States Supreme Court precedent in, most specifically, *Skilling v. United States*, 561 U.S. 358 (2010), by holding that an intent to damage reputation could be one of a limited number of permissible intents to support a conviction under New York's criminal impersonation statute (Golb's brief, pp. 58-64). According to Golb, *Skilling* and cases before it have disapproved "prosecutions based upon intangibles that rendered the statutes impermissibly vague and threatened core First Amendment values" (Golb's brief, pp. 59-60). He is wrong, because neither *Skilling* nor any other United States Supreme Court case has clearly established that an intent to damage reputation cannot be one of several elements of a criminal impersonation crime. *Skilling* fails to support even the proposition that a general intent to injure cannot be an element of fraud.

To begin, *Skilling* does not directly implicate the First Amendment at all. *Skilling* involved 18 U.S.C. § 1341, which outlaws using the mail "for the purpose of executing" any "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Federal appellate courts

before 1987 had interpreted the definition of "scheme or artifice to defraud" to include fraudulent schemes to deprive someone of "honest services" by way of "bribes or kickbacks." *See Skilling*, 561 U.S. at 404. In 1987, however, in *McNally v. United States*, 483 U.S. 350, 352 (1987), the United States Supreme Court struck down the "honest services" construction because the federal statute simply did not say anything about "honest services." However, the Court did not find that such an intangible injury was an impermissible element – it merely invited Congress to amend the law. Thus, in 1988, Congress enacted a fix, explaining that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

In *Skilling*, the Supreme Court did not find that all frauds must implicate pecuniary benefits or harms. Instead, it found simply that banning a "scheme or artifice to deprive another of the intangible right of honest services" would encounter "a vagueness shoal" unless the "right of honest services" were construed – consistently with the understanding of that term in the pre-*McNally* federal appellate decisions that Section 1346 sought to revive – to include only the loss of honest services brought about by way of bribes or kickbacks. *Skilling*, 561 U.S. at 405. In other words, *Skilling* did not find some vagueness or overbreadth concern with fraud statutes generally, but was concerned only with the potential for vagueness in the specific language of the particular federal statute construed in that case, in light of past interpretations of that statute. This does not clearly establish that the intent element in the New York statute

at issue here – whether it be the intent to cause any injury at all, or the more specific intent to injure reputation, as now required by New York law – is susceptible to any sort of vagueness challenge.[13]

In any event, a professional's reputation, while certainly not quantifiable to a precise dollar amount, is a rather significant asset whose injury would be far from ephemeral. This Court appears to have recognized that a direct financial effect is not a necessary intent or result to justify a fraud case. In *United States v. Tagliaferri*, 648 Fed. Appx. 99, 103 (2d Cir. 2016), for example, the defendant had requested that his jury be required to find that he caused "an actual financial loss" by his wire fraud. This Court held that "our precedents do not require contemplation of actual financial loss in wire fraud." *Id.* at 103. The Court went on to explain that fraud can be found where "victims were deprived 'of potentially valuable economic information,' such as where the deceit 'affected the victim's economic calculus' or 'exposed the [victim] to unexpected economic risk,'" and that even with regard to the concomitant intent, "'it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss.'" *Id.* (quoting *United States v. Binday*, 804 F.3d 558, 570-571, 579 [2d Cir. 2015], *cert. denied*, 136 S. Ct. 2487 [2016]). Naturally, a person's professional reputation is a major part of his or her "economic calculus," and an injury to it could have far-reaching implications beyond any immediate financial effect of the fraud.

[13] Indeed, even Golb recognizes that the criminal impersonation statute without the reputational injury gloss was "straightforward" (Golb's brief, p. 61).

Golb complains (Golb's brief, pp. 62-63) that "reputation" is too vague a term for an intent to injure it to be an element of a crime, and he argues that the district court wrongly looked to discussions of "reputation" in civil cases in rejecting that claim. The point is that people know what a "reputation" is, so it is not vague to refer to it in setting out the element of a crime. The other elements of a statute may vary depending upon whether it is civil or criminal, but the definition of "reputation" stands on its own and means the same thing in either context.

Golb further protests that New York courts should not be permitted to criminalize the intent to cause damage to reputation, at least without providing that truth is a defense (Golb's brief, pp. 55, 60-61). Of course, if an intent to damage his father's rivals' reputations were the only element of the crimes underlying petitioner's custody, he would be correct – there is nothing criminal about wishing ill on one's adversaries. But that is not what New York criminalized here. Golb was not convicted of mere libel, or for passively hoping to harm someone's reputation. He was convicted of impersonation and forgery for duping others into believing that he was someone else while additionally harboring that intent to damage reputations. Indeed, Golb was convicted for precisely the sort of deceptive conduct that a majority of the court in *Alvarez* made clear *could* be punished consistently with the First Amendment. His intent to injure reputations was just one element of those crimes, and that intent alone was not required independently to be criminal, just as an intent to gratify a prurient interest alone would not be criminal without the concomitant nonconsensual sex act.

Moreover, although Golb continues to insist that his case is the poster child for the right to engage in parody and satire, it bears repeating that he was found guilty of conduct beyond simply wishing to affect the reputations of his victims. The New York Court of Appeals cemented the conclusion that the evidence proved Golb guilty of impersonating actual people and forging actual emails along with his desire to deceive his audience and, at the very least, injure the reputations of the victims. He should not be heard to complain generally about the potential application of these statutes that he clearly transgressed to innocent parodists and satirists. *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness"); *United States v. Halloran*, 2016 U.S. App. LEXIS 18847 (2d Cir. N.Y. Oct. 20, 2016) (same). That is especially true here because, once again, the trial court expressly instructed the jury that Golb could not be convicted if he was engaged in mere satire or parody.

In sum, Golb has not shown that a reasonable jurist would have to agree that clearly established United States Supreme Court precedent renders New York's criminal impersonation and forgery statutes unconstitutionally overbroad and New York's criminal impersonation statute vague. To the contrary, even without deferential AEDPA review, the clear import of precedent is that these statutes are constitutional.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed as to the dismissal of counts 33 and 37, and otherwise affirmed.

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 32(A)(7)

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