

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 09-60331-CR-COHN

UNITED STATES OF AMERICA,

v.

SCOTT W. ROTHSTEIN,

Defendant.

**GOVERNMENT'S RESPONSE TO DEFENDANT'S
SENTENCING MEMORANDUM**

COMES NOW The United States of America, by and through the undersigned Assistant United States Attorney, and hereby files this response to the Defendant's Sentencing Memorandum (DE 272).

GUIDELINES APPLICATION

The defendant herein stands convicted of RICO Conspiracy, in violation of 18 U.S.C. §1962(d); Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. §1956(h); Conspiracy to Commit Mail and Wire Fraud, in violation of 18 U.S.C. §1349; and two counts of Wire Fraud, in violation of 18 U.S.C. §1343, stemming from the operation of a Ponzi scheme in which approximately \$1.2 billion was invested, with a determined loss amount of \$429,275,468.63. After application of all relevant factors, the Pre-Sentence Investigation Report ("PSIR") fixes the defendant's Guidelines calculation at Level 43, Criminal History Category I, yielding an advisory Guidelines sentence of 1,200 months' incarceration.¹ The defendant does not dispute the accuracy

¹As noted in the Defendant's Sentencing Memorandum, at p. 4, the defendant's raw offense level would actually calculate to a Level 52. However, pursuant to USSG Ch. 5, Pt. A n.2, "[a]n offense level of more than 43 is to be treated as a level 43." Further, under USSG §5G1.1(a), the Defendant's Guidelines sentence is limited to his statutory maximum sentence of 100 years rather than his Guidelines maximum of life imprisonment.

of the aforesaid Guidelines determination.

DEFENDANT'S MOTION FOR VARIANCE

Having accepted the aforesaid Guidelines calculations, the defendant seeks a variance from the Guidelines sentence based upon a variety of factors. The Plea Agreement in this case states, in pertinent part, the following:

In the event that the applicable offense level is deemed by the Court to be 43 or above (life), the government agrees to not oppose a variance; however, the Government reserves the right to oppose any sentence recommended by the defendant.

(DE 69, p. 5). Consistent with this provision, the Government does not oppose a variance from the aforesaid Guidelines sentence in this case. However, insofar as the Defendant seeks a sentence of 30 years' incarceration, the Government objects and suggests that a sentence of 40 years' (480 months') imprisonment is appropriate.

The Government concedes that a variance in this case is supported by several salient factors. While the Defendant's criminal activity in this case can only be described as reprehensible, it is beyond dispute that his post-offense conduct has been extraordinary. Having initially absconded from the country, he voluntarily returned from Morocco, with which the United States has no extradition treaty. At the time of his return, he was not yet charged with any offense. No pre-conditions existed in connection with this event. No prior discussions of any type occurred with regard to the charges which he ultimately might face or what his custody status would be once he returned. As set forth in the Defendant's Sentencing Memorandum, at pp. 13-15, the Defendant submitted to extensive debriefings concerning his criminal activity; identified the locations where physical evidence was later obtained by law enforcement agents; identified the location of his assets; and took all available steps to turn over all of those assets to the United States in anticipation of their

being utilized as restitution in this case. Additionally, the Defendant consented to the filing of an Information against him charging serious offenses, obviating the necessity for the government to spend time, effort and money in presenting the case to a grand jury; and pled guilty to that Information, saving the government and the Court the time, resources and expense of what would otherwise have been a very lengthy trial. Apparently, as set forth in Exhibits E and F of the Defendant's Sentencing Memorandum, the Defendant has provided assistance to the creditors of Rothstein, Rosenfeldt & Adler and to its trustee in bankruptcy. Combined, these factors militate in favor of a sentence below the advisory Guidelines sentence.

However, in advocating the appropriate sentence in this case, the government must take issue with some of the defendant's assertions. Insofar as the Defendant, at pp. 3-9 of his Memorandum, launches a general attack on the Sentencing Guidelines calculations utilized in significant fraud cases, he is misguided. It is beyond cavil that the Guidelines calculations in fraud cases are, in large measure, determined by the loss amount. USSG §2B1.1, Background, states the following:

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Defendant's argument that this results in an improper disparity in sentences imposed against defendants convicted in major fraud cases when compared with those convicted in other types of cases finds no support in the law. In fact, the Supreme Court, in holding that federal appellate courts may apply a presumption of reasonableness to district court sentences that are within the properly calculated guidelines range, explained the formulation and application of the Guidelines, and the Congressional mandate that the Sentencing Commission write the Guideline in a manner consistent

with the factors set forth in 18 U.S.C. §3553(a). The Court found as follows:

The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice. Given the difficulties of doing so, the abstract and potentially conflicting nature of § 3553(a)'s general sentencing objectives, and the differences of philosophical view among those who work within the criminal justice community as to how best to apply general sentencing objectives, it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.

Rita v. United States, 551 U.S. 338, 350 (2007). See also, United States v. MacArthur, 209 WL 1079093*3 (11th Cir. 2009) ("Congress enacted the Sentencing Guidelines in large part to eliminate disparities in the sentences meted out to similarly situated defendants."), quoting United States v. Chotas, 968 F.2d 1193, 1197 (11th Cir. 1992). Consequently, while the Defendant may take issue with the propriety and utility of the manner in which the Guidelines are calculated in his case, the Supreme Court does not, and defendant's Memorandum is devoid of any appellate support for his contention that the Guidelines are somehow unfair as applied in his case.²

Equally unavailing is defendant's contention that any sentence above 30 years' incarceration would create an unwarranted sentence disparity given the sentences which previously were imposed by different courts, in different cases, involving different schemes, committed by different defendants. First, in addition to the five cases cited in Exhibit G to the Defendant's Memorandum, in which sentences in excess of thirty years' imprisonment were imposed as punishment for conduct similar to his,³ there are additional reported decisions in which the appellate courts have affirmed

²The two District Court opinions cited by the Defendant in his Memorandum, at p. 9, preceded the Court's decision in Rita by two years.

³United States v. Frederick C. Brandau, Case No. 99-08125-CR-DTKH (S.D.Fla.) (Defendant convicted of selling fraudulent viatical insurance investments, with a determined loss amount of \$117 million, sentenced to 55 years' imprisonment), affirmed, 46 Fed.Appx. 617 (11th

other such sentences. See, United States v. Billman, 86 F.3d 1153, (4th Cir 1996) (affirming 40-year sentence for conspiracy, racketeering and wire and mail fraud following the collapse of a federally chartered bank); United States v. Runnels, 985 F.2d 554, (4th Cir. 1993) (affirming 31- year and 40-year sentences for defendants convicted of wire fraud, RICO, bank fraud, bankruptcy fraud and obstruction of justice). Other similar cases of more recent vintage are set forth below:

a. United States v. Donald Tarnawa, case no. 03-CR-0144-RAS (E.D.Tx.) (Defendant convicted in an investment scheme involving the sale of purported software technology, with a determined loss amount of \$16.6 million, sentenced to 40 years' imprisonment), affirmed, 182 Fed.Appx. 294 (5th Cir. 2006);

b. United States v. Norman Schmidt, case no. 04-CR-00103-REB (D.Colo.) (Defendant convicted of operating a Ponzi scheme involving high-yield investments, with a determined loss figure of \$43 million, sentenced to 330 years' imprisonment), sentence reduced to 310 years' imprisonment, United States v. Lewis, 594 F.3d 1270, 1275 (10th Cir. 2010);

c. United States v. Giuseppe Pileggi, case no. 06-CR-00151-FDW (W.D.N.C.) (Defendant convicted in telemarketing fraud case involving \$8.3 million in gross proceeds sentenced to 50 years' imprisonment);⁴

d. United States v. Richard Harkless, case no. 07-CR-00018-VAP (C.D.Cal.) (Defendant convicted of operating a Ponzi scheme,

Cir. 2002); United States v. Bernard Madoff, Case No. 09-CR-00213-DC (S.D.N.Y.) (Defendant who pled guilty to conducting a Ponzi scheme, with a determined loss amount of approximately \$50 billion, sentenced to 150 years' imprisonment); United States v. Thomas Petters, Case No. 08-CR-00364-RHK (D.Minn.) (Defendant who was convicted of running a \$3.5 billion Ponzi scheme sentenced to 50 years' imprisonment); United States v. Sholam Weiss and Keith Pound, Case. No. 98-CR-00099-PCF (M.D.Fla.) (Defendants who were convicted of RICO, fraud and other charges in connection with the collapse of a life insurance company, with a determined loss amount of \$450 million, sentenced to 835 years' imprisonment and 740 years' imprisonment, respectively).

⁴This case was vacated and remanded with instructions, not because the sentence was excessive, but because its imposition may have violated the treaty under which the defendant was extradited from Costa Rica. United States v. Pileggi, 2010 WL 235144 (4th Cir. 2010).

with a determined loss figure of \$39 million, sentenced to 100 years' imprisonment);

e. United States v. Robert Thompson, case no. 07-CR-00109-001 (M.D.La.) (Defendant who pled guilty to operating an identity theft scheme while he was in prison, with a determined loss amount of \$100,00.00, sentenced to 309 years' imprisonment); and

f. United States v. Edward Okun, case no. 08-CR-00132-01 (E.D.Va.) (Defendant convicted of operating an investment scheme involving tax-deferred investments, with a determined loss amount of \$126 million, sentenced to 100 years' imprisonment).

Thus, the incidence of such sentences being imposed is not quite as rare as Defendant maintains.

Second, such anecdotal claims do not support an argument that the sentence recommended in this case by the government would give rise to any such disparity. In a recent case, the Ninth Circuit specifically rejected this argument, in which the defendant, Treadwell, argued for a more lenient sentence based upon the sentences previously imposed against some of the same defendants identified in Exhibit G to the Defendant's Memorandum herein:

Nor does it matter for purposes of § 3553(a) that Treadwell can point to a specific criminal defendant, like Rigas, who may have received a lighter sentence for a different fraud. A district court considers the § 3553(a) factors to tailor a sentence to the specific characteristics of the offense and the defendant. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." [citing United States v. Gall, 552 U.S. at 52] (quoting Koon v. United States, 518 U.S. 81, 113, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)). The mere fact that Treadwell can point to a defendant convicted at a different time of a different fraud and sentenced to a term of imprisonment shorter than Treadwell's does not create an "unwarranted" sentencing disparity.

* * *

A district court need not, and, as a practical matter, cannot compare a proposed sentence to the sentence of every criminal defendant who has ever been sentenced before. Too many factors dictate the exercise of sound sentencing discretion in a particular case to make the inquiry Treadwell urges helpful or even feasible.

United States v. Treadwell, 593 F.3d 990, 1011-12 (9th Cir. 2010).

The instant case is unique. As the Defendant acknowledges in his letter to the Court, his actions have had a severe impact on this community. He has brought shame on the legal profession. He caused the collapse of a law firm, necessitating those employees who were not part of his unlawful activities to seek new employment in a severely depressed job market. His actions have adversely affected legitimate charitable organizations, which were compelled to return funds upon which they were relying in formulating their yearly budgets. In perpetrating his scheme, he even had the audacity to forge the signatures of three different members of the federal judiciary on bogus court orders. These are some of the factors, in addition to the underlying facts of the case computed within the advisory Guidelines, which warrant a more severe sentence than that advocated by the Defendant.

Lastly, while the government concedes that the sentence urged by the Defendant may likely be sufficient to provide specific deterrent from further crimes by him, it takes issue with his bare assertion, at p. 16 of his Memorandum, that “[t]o suggest that the prospect of a 30-year sentence is not enough to deter others who would consider engaging in such conduct ignores common sense.” As set forth within Exhibit G to the Defendant’s Memorandum, many courts around the country previously have imposed comparatively lengthy sentences in these types of cases, while the incidence of such prosecutions seems to be increasing. As set forth above, of late, the courts have been imposing even more severe sentences in cases of this type, and it will yet to be seen whether this has the desired deterrent effect. “Because economic and fraud-based crimes are ‘more rational, cool, and calculated than sudden crimes of passion or opportunity,’ these crimes are ‘prime candidate[s] for general deterrence.’” United States v. Martin, 455 F.3d 1227, 1240 (11th Cir. 2006), quoting Stephano Bibas, White-Collar Plea Bargaining and Sentencing After Booker, 47 Wm. & Mary L.Rev. 721, 724 (2005).

Therefore, the government respectfully urges that its recommended sentence in this case of 40 years' imprisonment is more likely to serve this purpose than that proposed by the Defendant. See, e.g. United States v. Lewis, 594 F.3d 1270, 1278 (10th Cir. 2010) (affirming 310- year sentence where the trial court found that “[d]eterrence, especially of those similarly situated or inclined, can only be effected through lengthy incarceration, protection of the public through life-long incapacitation, through incarceration for life, is necessary.”).

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: /s/ Lawrence D. LaVecchio
LAWRENCE D. LaVECCHIO
Assistant United States Attorney
Fla Bar No. 305405
500 E. Broward Blvd., Suite 700
Ft. Lauderdale, Florida 33394
Tel: (954) 356-7255, ext. 3588
Fax:(954) 356-7336
lawrence.lavecchio@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on June 7, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Lawrence D. LaVecchio
LAWRENCE D. LaVECCHIO
ASSISTANT UNITED STATES ATTORNEY