UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 08-CR-364 (RHK/AJB)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

DEFENDANT'S RESPONSE TO GOVERNMENT'S POSITION WITH RESPECT TO SENTENCING FACTORS

Defendant Thomas Joseph Petters, by and through his undersigned attorneys and in accordance with D. Minn. L.R. 83.10, replies to the Government's absurd request for 335 years.

I. Government's Unreasoned Analysis

The Government's brief disappoints on a number of levels. In its name calling for starters, describing Mr. Petters' conduct and argument "shameless," and "beyond comprehension" and "cynical." The victims and the Government join in same animus. Their argument for life in prison recalls Girard's theory of mimetic rivalry. Their agreed-upon contagion is that Mr. Petters' life become an object of scorn, with one version in competition for the other. See generally Rene Girard, Deceit, Desire and the Novel (Johns Hopkins University Press 1961) & Violence and the Sacred (Johns Hopkins University Press 1972).

The 50-plus letters we submitted paint a far different picture, of a flawed but still virtuous human being. Mr. Petters has a family that loves him dearly. To say, as the

Government does, that his grief for his son is insincere is heartless in a revealing way. Mr. Petters' friends still support him. From the quantum of letters alone his life, Tolstoy would opine, has been a success. Moreover, the Government tellingly omits mention of Mr. Petters' cooperation with the receiver, the kind of cooperation that, in the ordinary case, would result in a 5K1.1 motion which would be granted.

Mr. Petters should get hundreds of years, it is argued, because someone may have higher culpability in the future and there must be a record beyond and above Bernie Madoff's point total. [Docket No. 388 at 6.] If nothing else, the argument is de-humanizing. We are to imprison this man into the 24th Century so the Government will have a favorable citation for its sentencing briefs? So that one of their lawyers can stand up at a future CLE and announce the record? And who will serve all the time? Will it be Mr. Petters' ghost?

To go through each of the enhancements would be a silly exercise. The Government argues as if this Court has no choice but to follow their additive sense of what justice should be. As if the law has only singular voice, the Government proposes a casting aside of discretion. It is a position of arbitrary power that Judges Rakoff, Pratt, Block and many others (discussed below) have rejected.

One enhancement warrants special mention, though—the proposed obstruction points for Mr. Petters' testimony. [Docket No. 388 at 14-17.] The Government wishes to punish Mr. Petters not only for the verdict, but for engaging in the glorious process that is the law. We have trials so that the parties can voice their disagreement in a neutral setting. Mr. Petters had the right to testify, Rock v. Arkansas, 483 U.S. 44, 49-53 (1987),

and the obstruction enhancement may not be used to "punish a defendant for the exercise of a constitutional right." U.S.S.G. § 3C1.1, Application Note 2.

United States v. Dunnigan, 507 U.S. 87, 98 (1993) holds the enhancement is "far from automatic." Our case falls into one of the key exceptions outlined in that case: The defendant's "testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent." Id. at 95. Mr. Petters agreed to the facts, but disagreed as to his mens rea. The Government does not cite Dunnigan. The defense read the case before trial and prepared Mr. Petters' examination to fall under its protection. It applies.

II. A Reasoned Approach

The place to begin is United States v. Booker, 543 U.S. 220, 258-265 (2005) and its holding that the Guidelines are advisory. Booker negatives the strict accounting approach.

The next step is to acknowledge that this court "may vary [from the guideline ranges] based solely on policy considerations, including disagreements with the Guidelines." Kimbrough v. United States, 552 U.S. 85, 101 (2007) (quotations and citations omitted).

And the next is to review the empirical basis of the guidelines suggesting a life sentence and find there is none. Id. at 109; Spears v. United States, 129 S. Ct. 840, 842-843 (2009); Smith & Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts at 56 (1998).

The final step is to re-read Gall v. United States, 552 U.S. 38 (2007) and note its empowerment of a single Judge in Iowa named Robert W. Pratt, who challenged the government as to their pernicious sentencing requests and opened to scrutiny the hollowness of their views.

None of these landmark cases affirm a process whereby additions are made to additions to more additions and in the process a human being is rendered a flat number. All of the cases instead lead this Court to a position of absolute discretion, and that is Judge Pratt's legacy. He is a judicial hero of our modern times. He and Judge Rakoff who cast aside the Guidelines' "fetish for arithmetic." United States v. Adelson, 441 F. Supp. 2d 506, 512 (E.D.N.Y 2006), aff'd, 301 Fed. Appx. 93 (2nd Cir. 2008). And Judge Block who found, in the white collar setting, the Guidelines to be "absurd on their face." United States v. Parris, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (quoting Adelson, 441 F. Supp. 2d at 510). And Judge Sim Lake, who decided a 292-month white collar guidelines sentence should instead become 72 months. United States v. Olis, 2006 WL 2716048 at *13 (S.D. Tex. 2006).

We have addressed the guidelines' counting mechanism in opening briefs. The Commission has never explained its rationale, particularly in a case where the loss is high. Adelson, 441 F. Supp. 2d at 510. It's oddly joyful, the Government's love of counting—beans of years here, beans of years there, beans of years everywhere. It's an approach that misconstrues the sentencing process as an avenue for sheer rage.

But since the Government prefers simple math, we suggest the Court use multiplication and division. The technique is just as arbitrary, but yields a fairer result.

Madoff's paper loss was nearly $65 billion, the actual loss over $21 billion and counting. Diana B. Henriques, "Court Denies Madoff Aide's Request for Bail," N.Y. Times (Oct. 28, 2009), available at <http://www.nytimes.com/2009/10/29/business/29madoff.html>. He received 150 years—about two and one-third years for each billion in paper losses. The loss here, calculated by Pricewaterhouse Coopers, is $1.8 billion (not, as the Government contends over and over again, the $3.8 billion paper loss). Under this application, 1.8 times 2.33 years, Mr. Petters' sentence should be just over four years. Which is near akin to the Greenwood sentence twenty years ago, a case involving a greater loss in real dollars. A judge down the hallway felt that amount of time right and fair. And who is to say now that it was not.

Our multiplication result does not vary too far from the twelve year, seven month sentence imposed in United States v. Forbes, 249 Fed. Appx. 233 (2nd Cir. 2007), where there was over $3 billion in actual loss.

These are ranges grounded in law, fact, and reason, not anger.

A Latin phrase comes to mind, per freta hactenus negata, which means to have negotiated a strait the very existence of which has been denied by the Government here. The phrase "is, simultaneously, an expression of fear and accomplishment, the cusp on which human life finds its richest expression." Lopez, Arctic Dreams, Imagination and Desire in a Northern Landscape at 406 (1986).

The Government fears what this Court should accomplish, which is to approach the cusp of fairness and find what has always been the essence of criminal law—

preserving the dignity of the fallen and imperfect defendant in the face of a request for excessive punishment.

Dated: April 1, 2010

s/ Paul C. Engh

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Defendant.

I hereby certify that on April 1, 2010, I caused the following:

Defendant's Response To Government's Position With Respect To Sentencing Factors

to be electronically filed with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

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Dated: April 1, 2010

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