In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 10-3130

Criminal

UNITED STATES OF AMERICA,

Appellee,

v.

LARRY REYNOLDS,

Appellant.

Appeal from the United States District Court for the
District of Minnesota

# CORRECTED BRIEF OF APPELLANT

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## SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Larry Reynolds was one of eight co-defendants criminally indicted for their involvement in a Ponzi scheme, the details of which make it unique to the District of Minnesota. Specifically, Mr. Reynolds was charged with one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). He pleaded guilty and was sentenced to a term of imprisonment of 130 months.

This sentence, despite falling below the advisory Guidelines range of 210-240 months, is unreasonable. First, the district court's sentencing decision was procedurally flawed because the court failed to give an adequate explanation for the sentence imposed. Second, the sentence is substantively unreasonable because the court afforded undue weight to Mr. Reynolds' criminal history, while discounting mitigating factors such as his age and health, and downplaying his substantial assistance to the prosecution. The resulting sentence is greater than necessary to satisfy the stated purposes of federal sentencing and creates sentencing disparities between Mr. Reynolds and his co-defendants.

Respectfully, Mr. Reynolds believes that his case involves sufficiently distinct characteristics, which warrant oral argument. Mr. Reynolds, therefore, requests oral argument in this case and suggests that 10 minutes for each side would be adequate.

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## JURISDICTIONAL STATEMENT

Larry Reynolds was charged with one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). Because Mr. Reynolds was charged with an offense against the laws of the United States, the district court had jurisdiction pursuant to 18 U.S.C. § 3231.

Mr. Reynolds' guilty plea was entered on October 28, 2008, and accepted by The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota. Sentence was imposed on September 14, 2010, by The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota. Pursuant to the Federal Rule of Appellate Procedure 4(b)(1), Mr. Reynolds filed his timely notice of appeal on September 23, 2010. This Court has jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

### I.

**THE DISTRICT COURT COMMITTED PROCEDURAL ERROR WHEN IT FAILED TO PROVIDE AN ADQUATE EXPLANATION FOR THE SENTENCE IMPOSED.**

Gall v. United States, 552 U.S. 38 (2007).

Rita v. United States, 551 U.S. 338 (2007)

United States v. Linderman, 587 F.3d 896, 899 (8th Cir. 2009).

18 U.S.C. § 3553(c)

### II.

**THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER AND PROPERLY WEIGH ALL RELEVANT FACTORS, WHILE ASSIGNING TOO MUCH SIGNIFICANCE TO IRRELEVANT FACTORS.**

Gall v. United States, 552 U.S. 38 (2007).

Rita v. United States, 551 U.S. 338 (2007)

18 U.S.C. § 3553(a)

## STAMENT OF THE CASE

On October 16, 2008, a one-count Information was filed in the District of Minnesota, charging Larry Reynolds with one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), for his involvement in a Ponzi scheme, involving seven other co-defendants. On October 23, 2008, Mr. Reynolds pleaded guilty to the one-count Information as charged. He was released from custody on November 4, 2008, on a $2.5 million secured bond, ordered to surrender his passport, and placed on electronic home monitoring and supervision for the duration of his presentencing release.

The plea agreement provided for a base offense level of 38 with a 2-level increase for being convicted under 18 U.S.C. 1956(h), and a 3-level reduction for acceptance of responsibility, for a total offense level of 37. Based on an anticipated criminal history category of I, the advisory Guidelines range was 210 to 262 months, although no mandatory prison sentence applies. Because 262 months exceeds the statutory maximum sentence of 20 years, the advisory range was adjusted accordingly to 210-240 months.

Of Mr. Reynolds's seven co-defendants, all but one entered guilty pleas shortly after being charged. Only Tom Petters, the organizer and leader of the fraud scheme, pleaded not guilty and proceeded to trial. (Mr. Reynolds' Presentence Investigation Report, hereinafter "PSR" ¶ 64). On December 2, 2009,

the jury found him guilty on all 20 counts of the Indictment. On April 8, 2010, he was sentenced to 50 years in prison. On April 13, 2010, Mr. Petters filed his notice of appeal of conviction and sentencing.

Mr. Reynolds' remaining six co-defendants were all considered average participants in the scheme, with the exception of Harold Katz, who was considered to have a minor role. (PSR ¶¶ 65-71). All of these co-defendants assisted the government in its prosecution of Mr. Petters and were sentenced as follows:

| Defendant | Attributable Loss Amount | Sentence Imposed |
|---|---|---|
| Deanna Coleman | $1.8 billion | 12 months and 1 day |
| Robert White | $1.8 billion | 60 months |
| Greggory Bell | $243 million | 60 months |
| James Wehmhoff | $20 million | 3 years probation;<br>365 days home detention; and<br>300 hours community service |
| Michael Catain | $11 million | 90 months |
| Harold Katz | Not Stated | 12 months, 1 day |

On September 14, 2010, Mr. Reynolds, who was responsible for a loss amount of $9.9 million (Sentencing Transcript, p. 3-4, hereinafter "T. 3-4"), and who also provided substantial assistance to the government, was sentenced to a term of imprisonment of 130 months. Only Mr. Petters received a higher sentence.

This appeal follows.

## STATEMENT OF THE FACTS

From 1998 to 2008, Larry Reynolds owned Nationwide International Resources, Inc. (NIR), a wholesale business. (PSR ¶ 24). Mr. Reynolds would find modest deals involving shoes and clothes and sell them to retail outlets, including those owned by Mr. Petters, who owned and operated Petters Company Incorporated (PCI). Id. PCI was a purchaser of wholesale goods that were then sold to retail outlets. (PSR ¶ 18). Early PCI investors would provide funds on short-term notes to finance PCI's purchases. Id. Then, as the products were resold to retailers for a profit, the investors' notes would be satisfied. The business turned fraudulent when Mr. Petters started inflating and falsifying purchase orders in order to obtain additional investment funds, which he would then use to support a lavish lifestyle for himself. (PSR ¶ 19). When Mr. Petters failed to timely pay investors, he would buy time until he could find additional investors to fund the fraud. Id. By the mid-1990s, PCI was routinely using overstated purchase orders and by the late 1990s, Mr. Petters was falsely claiming that PCI did millions of dollars of business with big retailers such as Costco and Sam's Club. (PSR ¶ 20).

In 2001, Mr. Petters approached Mr. Reynolds about wiring funds through NIR's bank accounts for which he would pay Mr. Reynolds a fraction of a percent of the funds moved. Mr. Reynolds agreed and the transfers began. PCI investors were directed to wire funds into NIR's account, believing that the money was

being used for PCI's purchase of consumer electronics that would then be resold to retailers. (PSR ¶ 24). Instead, Mr. Reynolds would wire all of the funds, minus his transaction fee, back to PCI. Id. From 2002 to September of 2008, approximately $12 billion was routed through NIR's bank accounts and then back to PCI. Id.

In addition to Mr. Petters and Mr. Reynolds, there were six other individuals, who played critical roles in maintaining the Ponzi scheme: Deanna Coleman, Robert White, James Wehmhoff, Greggory Bell, Harold Katz, and Michael Catain. Ms. Coleman and Mr. White were PCI corporate officers. (PSR ¶ 65-66). Together they fabricated volumes of various documents that were used to induce third parties to provide PCI with billions of dollars in loans. Id. They also prepared financial statements that falsely claimed that PCI was owed million of dollars. They are each deemed to be responsible for loss amounts of $1.8 billion.

Mr. Wehmhoff, a certified public accountant, was an executive vice president at Petters Group Worldwide. (PSR ¶ 69). Mr. Wehmhoff oversaw the tax department and prepared its tax filings along with those for Mr. Petters' other business entities, including PCI. Id. He also prepared fraudulent tax filings for Mr. Petters' personal returns. Mr. Wehmhoff's conduct included impeding the assessment and collection of taxes owed. Id. The tax loss attributable to Mr. Wehmhoff is approximately $20 million dollars. Id.

Greggory Bell founded his own hedge fund, Lancelot Investors Fund. (PSR ¶ 70). Mr. Bell was responsible for all investment decisions, one of which was to loan investor funds to PCI. Id. He defrauded investors by providing materially false and misleading statements and representations concerning delinquent payments due from PCI. Id. It is estimated that Mr. Bell is responsible for $243 million in losses. Id. Harold Katz was a vice president of finance and accounting for Lancelot Investors Fund. (PSR ¶ 70). Because Mr. Katz worked at the direction of Mr. Bell, he is considered a minor participant. Id.

Michael Catain, like Mr. Reynolds, had no fiduciary duties. (PSR ¶ 68). Mr. Catain fulfilled the same role as Mr. Reynolds. He accepted wire transfers from PCI and then returned the funds, minus his transaction fee. Id. One significant difference between Mr. Reynolds and Mr. Catain, is that Mr. Catain created a sham company solely for this purpose, whereas Mr. Reynolds' company, NIR, was a legitimate and profitable business prior to Mr. Reynolds' involvement with this scheme. Mr. Catain realized over $11 million in profits for his role. Id.

On September 8, 2008, the entire Ponzi scheme came to an end when Ms. Coleman walked into the Unite States Attorney's Office for the District of Minnesota, accompanied by her attorney, and disclosed that, for over a decade, she had assisted Tom Petters with the execution of a Ponzi scheme that involved billions of dollars. (PSR ¶ 12-13).

## SUMMARY OF THE ARGUMENT

Larry Reynolds was sentenced to 130 months imprisonment after pleading guilty to conspiracy to commit money laundering. Despite the sentence falling below the range calculated by the Guidelines, the sentence is unreasonable. First, the district court committed procedural error when it failed to provide an adequate explanation for imposing a sentence significantly higher than those imposed on Mr. Reynolds' co-defendants, and neglecting to offer a rational basis for denying Mr. Reynolds' requests (1) that he receive credit for time served on home detention prior to sentencing, and (2) that he be allowed to voluntarily surrender himself after the Bureau of Prisons (BOP) designated a correctional facility.

Second, the sentence is substantively unreasonable because it is far greater than necessary to accomplish federal sentencing goals. The district court failed to assign proper weight to the § 3553(a) sentencing factors by inappropriately affording too much credence to Mr. Reynolds' criminal history and the need to protect the public, while ignoring his age, health concerns, and other mitigating factors. The resulting sentence equates to a life sentence for Mr. Reynolds and creates a sentencing disparity among his co-defendants, several of whom were considerably more culpable, but received sentences of 60 months or less. Accordingly, Mr. Reynolds respectfully implores this Court to vacate his sentence and remand his case to district court for resentencing.

## ARGUMENT

### I. THE DISTRICT COURT COMMITTED PROCEDURAL ERROR WHEN IT FAILED TO PROVIDE AN ADQUATE EXPLANATION FOR THE SENTECE IMPOSED.

Mr. Reynolds was sentenced to 130 months in prison, which represents a downward variance from the advisory Guidelines range of 210-240 months. Nonetheless, Mr. Reynolds contends that the sentencing court committed procedural error when pronouncing his sentence. Although at the sentencing hearing the court offered some explanation for imposing the chosen sentence, the explanation was inadequate because it did not sufficiently substantiate the particular sentence. Further, the court was without any explanation for its denial of Mr. Reynolds' non-frivolous sentencing requests. Finally, despite providing the requisite Statement of Reasons following the hearing, the form was not completed in its entirety pursuant to the instructions, and offered no further written rationale for the court's sentencing decision.

#### A. Standard of Review

Appellate review of a defendant's sentence is limited to determining whether the sentence is "reasonable." United States v. Battiest, 553 F.3d 1132, 1135 (8th Cir. 2009) (citing Gall v. United States, 552 U.S. 38, 51 (2007)). Determining reasonableness includes consideration of any procedural errors made during the sentencing process as well as the substantive reasonableness of the sentence itself.

United States v. Mosby, 543 F.3d 438, 440 (8th Cir. 2008). As relevant in Mr. Reynolds' case, a district court commits procedural error by failing to provide an adequate explanation for the sentence imposed. Gall, 552 U.S. at 51. Where the defendant fails to explicitly object at the sentencing hearing to the lack of explanation provided for the sentence imposed, this Court applies plain error analysis. United States v. Linderman, 587 F.3d 896, 899 (8th Cir. 2009).

**B. Proper Sentencing Procedures**

In Gall, 552 U.S. at 49, the Supreme Court plainly articulated the proper procedure that district courts must follow when sentencing a defendant. The court's first duty is to calculate the applicable advisory range under the Sentencing Guidelines. Id. The court, however, is prohibited from presuming that the calculated range is reasonable. Id. Second, the court is required to "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." Id. at 50. Finally, regardless of the sentence pronounced, the district court must "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." Id. This final step is also mandated by 18 U.S.C. § 3553(c)(2), which provides, in relevant part:

> The court, at the time of sentencing, shall sate in open court the reasons for its imposition of the particular sentence, and if the sentence is not of the kind, or is outside the range, described in subsection (a)(4), the ***specific reason*** for the imposition of a sentence different from that described, which reasons must also be stated with

> specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28 . . ."

(Emphasis added).

Whether the court's stated reason for a particular sentence is considered "adequate" depends on the situation. Rita v. United States, 551 U.S. 338, 357 (2007). While the court is nevertheless required to provide its reasoning when imposing a sentence within the applicable Guidelines range, a particularly lengthy explanation may not be warranted. Id. at 356. By contrast, a more detailed explanation is advisable when the court rejects "non-frivolous" arguments posed by the defendant or the government for imposing a sentence outside the Guidelines. Id. at 357.

This Court has held that "Although a court is not required to recite the § 3553(a) factors mechanically, it must be clear from the record that the district court considered them in sentencing." United States v. Wood, 587 F.3d 882, 884 (8th Cir. 2009). Adequate consideration can be assumed if the court references at least some of the § 3553(a) factors. Id.

### C. The District Court's Sentencing Explanation Was Inadequate.

Mr. Reynolds, who received a sentence below the applicable Guidelines range, did not receive "specific reasons" either in court or in the Statement of Reasons received following the sentencing hearing. Rather, the court only offered a perfunctory explanation for his sentence, painted with broad strokes that equally

applied to all of the defendants in the case, but somehow left Mr. Reynolds with a significantly lengthier sentence than the others.

Although the court quoted some of the phrases from § 3553(a), even repeatedly, the recitation provided little insight into the court's thought process, as the same words could haven been said during the sentencing of any defendant regardless of whether that defendant was facing an upward departure or probationary sentence.

First, the district court began by stating, "[T]here's no question in my mind that you, Mr. Reynolds, are deserving of a lengthy sentence. I think your conduct here was serious and you were a major player . . . I think without you or someone in the role you had, this could have collapsed maybe long ago." (T. 28). The court also broadly declared that the offense in this case was extremely serious and that a high sentence was "necessary to promote respect for the law . . . provide just punishment . . . and afford adequate deterrence to criminal conduct by others, to set an example." (T. 31). While those may all arguably be true statements, they do not justify Mr. Reynolds' sentence because those statements would equally apply to all of the defendant's in this case. Yet, all of the other defendants received far lower sentences. For example, co-defendants Deanna Coleman and Robert White, who had both been corporate officers and considered responsible for total losses of $1.8 *billion* each (PSR ¶¶ 66, 67), received sentences of 12 months and one day,

and 60 months, respectively. Co-defendant Greggory Bell, founder of Lancelot Investors Fund, was deemed responsible for total losses of $243 million, but received a sentence of 60 months. Likewise, co-defendant James Wehmhoff, another corporate officer, responsible for losses of $20 million, received a probationary sentence. Finally, co-defendant Michael Catain, who provided similar money laundering assistance to the scheme as Mr. Reynolds, was deemed responsible for a loss amount of $11 million, and received a 90-month sentence. Therefore, the court's explanation for Mr. Reynolds' 130-month sentence is not specific within the meaning of § 3553(c)(2).

The district court also denied Mr. Reynolds' request to be furloughed and voluntarily surrender after the BOP designates a facility, simply stating that Mr. Reynolds is a flight risk and a danger to the community. (T. 34). Again, the rationale provided is inconsistent with the fact that Mr. Reynolds had been out on a $2.5 million bond since October 2008. The court failed to address exactly why the conditions of release, which had been adequate for the previous two years and included home detention with an ankle bracelet and surrendering his passport and that of his wife's, were suddenly lacking.

Finally, Mr. Reynolds requested that he receive credit for the time he spent on home detention while on pretrial release. The request was simply denied without any reason offered. (T. 37).

**D. Plain Error Analysis**

In order to find plain error, as required to remand this case for resentencing. Linderman, 587 F.3d at 899. This Court must find that an error occurred, which was plain, affected Mr. Reynolds' substantial rights, and "seriously affects the fairness, integrity or public reputation of judicial proceedings."

The district court committed plain error by failing to provide a specific explanation for the sentence imposed, as required by § 3553(c)(2) and mandated by the Supreme Court in Rita, 551 U.S. at 357. With regard to a violation of Mr. Reynolds' substantial rights, this Court seeks a showing that the sentence would have been more favorable had the error not occurred. See, e.g., Linderman, 587 F.3d 896. As is often the case with plain error analysis, there is no way to definitively prove that had an error not occurred the result would have been different. Fortunately, in this case, Mr. Reynolds can point to his co-defendants' sentences where plain error did not occur and much lower sentences were received.

The final requirement of plain error analysis, that the error affects the fairness, integrity or public reputation of the judicial system, is also satisfied in this case. As the Supreme Court stated in Gall, adequate explanation of the sentence imposed is essential for "meaningful appellate review and to promote the perception of fair sentencing." Gall, 552 U.S. 50. Accordingly, the absence of a an explanation makes appellate review impossible and leaves the defendant, his

family, and the public questioning the fairness of the court.

Accordingly, for all of the foregoing reasons Mr. Reynolds respectfully requests that this Court find that procedural error occurred and remand his case to district court for resentencing.

## II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER AND PROPERLY WEIGH ALL RELEVANT FACTORS, WHILE ASSIGNING TOO MUCH SIGNIFICANCE TO IRRELEVANT FACTORS.

Mr. Reynolds proposed a sentence of no more than 48 months, but received a sentence of 130 months, despite presenting legal and factual arguments to the court that would support the lower sentence. Mr. Reynolds contends that his sentence is particularly unreasonable given the far lower sentences received by his co-defendants, some of whom had fiduciary duties, were more culpable given their roles, and were responsible for far greater loss amounts than Mr. Reynolds.

### A. Standard of Review

Appellate review of a defendant's sentence is limited to determining whether the sentence is "reasonable." Battiest, 553 F.3d at 1135 (citing Gall, 552 U.S. at 51. If the reviewing court finds that no procedural error occurred, then the "substantive reasonableness of the sentence" will be reviewed under a deferential abuse of discretion standard, taking the totality of the circumstances into consideration. Gall, 552 U.S. at 51. "If the sentence is outside the Guidelines range . . . [the appellate court] may consider the extent of the deviation, but must give due

deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." Id.

**B. Governing Principles of Sentencing**

It is well settled that the United States Sentencing Guidelines are only advisory. United States v. Booker, 543 U.S. 220 (2005). While Booker requires the sentencing court to consider the Guidelines, the Guidelines comprise only one of the factors that the district court must consider when structuring a sentence. Gall, 552 U.S. 38. The court is also required to consider the factors articulated in § 3553(a), and has discretion to tailor a sentence based on these factors. United States v. Barron, 557 F. 3d 866, 868 (8th Cir. 2009).

In addition, the district court is strictly prohibited from presuming that a sentence within the advisory Guideline range is necessarily appropriate. Rita, 551 U.S. at 351. The sentencing court is further prohibited from requiring a showing of "extraordinary circumstances" or "any mathematical proportionality assessment" in order to justify a sentence outside the Guidelines range. United States v. Austad, 519 F.3 431, 435 (8th Cir. 2008).

Instead, the sentencing court "must make an individualized assessment based on the facts presented and upon a thorough consideration of all of the § 3553(a) factors." Gall, 552 U.S. at 50. The court is afforded latitude so it may formulate a sentence that is sufficient but not greater than necessary to achieve the

four purposes of sentencing. Barron, 557 F. 3d at 868. Specifically, § 3553(a) provides, in relevant part, that when determining a particular sentence, the district court must consider the following:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for . . .the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;
>
> (5) any pertinent policy statement . . . issued by the Sentencing Commission [including the advisory guideline range] ;
>
> (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

While neither this statute nor Booker intimates that any one of these factors should be given greater weight than another, it is important to be mindful that all factors are subservient to § 3553(a)'s mandate to impose a sentence that is "sufficient but not greater than necessary" to comply with the four sentencing purposes of paragraph 2: retribution, deterrence, incapacitation, and rehabilitation.

"The district court abuses its discretion under § 3553(a) when it 'fails to consider a relevant factor that should have received significant weight [,] . . . gives significant weight to an improper or irrelevant factor[,] or . . . considers only the appropriate factors but in weighing those factors commits a clear error of judgment.'" Linderman, 587 F.3d at 899 (quoting Gall, 552 U.S. 38).

**C. Mr. Reynolds' Sentence is Substantively Unreasonable.**

In Mr. Reynolds' case, the sentencing court failed to afford proper significance to many of the requisite sentencing factors under § 3553(a). Several relevant factors were seemingly completely disregarded, including his age, health, and actual role in the scheme. Other factors with less relevancy, such as his long dated criminal history, was made the focal point and assigned far more importance than warranted under the totality of the circumstances. The resulting sentence is far greater than necessary to achieve federal sentencing goals.

### i. The Sentence Fails to Satisfy § 3553(a)'s Parsimony Clause.

Above all else, the sentencing court must adhere to the parsimony clause of § 3553(a), which unequivocally dictates that a sentence be sufficient, but not greater than necessary, to accomplish the four stated purposes of sentencing. This requirement is not just another factor for the court to take under advisement, rather it sets an independent limit on the sentence. It is Mr. Reynolds' contention that his 130-month sentence violates this directive because a lesser sentence would be adequate to achieve these goals.

**Retribution**. The sentence should reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense. § 3553(a)(2)(A). In this case, the sentencing guidelines overstate the seriousness of the actual offense because Mr. Reynolds personally profited by only a fraction of the Ponzi scheme's proceeds, but is being held responsible for more than that amount. This approach results in an inflated Guidelines range.

In United States v. Santos, 553 U.S. 507, 511 (2008), the Supreme Court addressed ambiguity of the term "proceeds" as used in the money laundering statute, 18 U.S.C. § 1956(a)(1), noting that "proceeds" can mean either "receipts" or "profits." The defendant in Santos had operated an illegal lottery under Indiana state law, and his money laundering convictions were based on payments that he made to runners, collectors, and lottery winners – transactions that involve

receipts, but not profits, of the gambling operation. Id. at 509. The Court ultimately found inconclusive support for either statutory interpretation, and applied the rule of lenity to hold that the term "proceeds" means "profits," a definition that is more favorable to defendants. Id. at 514.

This Court considered Santos for the first time only recently in United States v. Spencer, 592 F.3d 866 (8th Cir. 2010). In Spencer, the defendant, who had been convicted of conspiracy to distribute cocaine and money laundering, argued that because the jury instructions in his trial did not distinguish between "profits" and "receipts," his conviction was impermissibly based on receipts rather than profits. Id. at 879. This Court joined other circuits, holding that Santos does not apply in drug cases. Id. This Court's position was reiterated a few months later in United States v. Williams, 605 F.3d 556, 568 (8th Cir. 2010), where the defendant was convicted of conspiracy to possess with intent to distribute MDMA and money laundering. By contrast, Mr. Reynolds was not involved in drug trafficking. Therefore, a Santos analysis is not necessarily barred by Spencer or Williams.

Although Mr. Reynolds did not make a Santos challenge with respect to his guilt, and Santos does not purport to interpret the federal sentencing Guidelines, it is instructive in reaching a just sentence. Indeed, the plea agreement contemplates this argument, stating, "[T]he defendant reserves the right to argue that the base

offense level overstates the seriousness of the offense because the defendant received only a small fraction of the proceeds." (Plea Agreement, ¶ 7(h)).

Shortly prior to sentencing, Mr. Reynolds and the prosecutor agreed to stipulate that the amount of loss for sentencing purposes was $9.9 million, and represented the profit that Mr. Reynolds personally realized. (T. 3). Therefore, under the Santos interpretation of the term "proceeds," Mr. Reynolds' advisory Guidelines sentence would be more appropriately established by his $9.9 million profit. When this amount is used to measure the loss, Mr. Reynolds' base offense level is 28. U.S.S.G. § 2B1.1. After providing for the other sentencing adjustments, Mr. Reynolds would have a total offense level of 27, resulting in a Guidelines range of 70 to 87 months, which is arguably still greater than it needs to be to reflect the seriousness of his offense.

**Deterrence**. The sentence should provide adequate deterrence to criminal conduct. § 3553(a)(2)(B). Empirical studies indicate that the length of the sentence has virtually no effect in achieving this goal, particularly for white collar and regulatory offenses. See, e.g., United States v. Scroggins, 811 F.2d 1204, 1206 (11th Cir. 1989). Accordingly, here again, Mr. Reynolds' 130-month sentence cannot be justified.

**Incapacitation**. The sentence should protect the public from further crimes of the defendant. § 3553(a)(2)(C). In this case, the district court placed far too

much weight on Mr. Reynolds' criminal history dating back to 1972-1984. At sentencing, the government urged the court to consider Mr. Reynolds' criminal history over the past 40 years, claiming that he has repeatedly "used his skills, his intellect, his ability to assist in defrauding other individuals." (T. 23). While it is true that Mr. Reynolds is not a first-time offender, the criminal history to which the government refers occurred over 17 years prior to his involvement in the instant Ponzi scheme.[1] (PSR ¶¶ 92-95).

Due to the age of his prior convictions, Mr. Reynolds has a criminal history score of zero. (PSR ¶ 96); U.S.S.G. § 4A1.2(e). Nonetheless, despite the fact that there is no evidence that Mr. Reynolds engaged in any criminal activity between 1985 and 2001, prior to when Mr. Petters "turned to" Mr. Reynolds for assistance with his scheme (PSR ¶ 23), the government insists "that when left to his own devices, [Mr. Reynolds] has a propensity to engage in fraud, and thus he is a risk to the public." (T. 24). The prosecutor further advises the court that "Mr. Reynolds was deeply involved in the scheme from the beginning to the end." (T. 26). The

[1] In 1972, Mr. Reynolds pled guilty to two counts of larceny more than $100 in Massachusetts. (PSR ¶¶ 92-93). In 1983, he was convicted of conspiracy to posses with intent to distribute in excess of 1,000 pounds of marijuana. (PSR ¶ 94). In 1984, he pled guilty to five counts of wire fraud, conspiracy to commit wire fraud, and interstate transportation of stolen property. (PSR ¶ 95). The 1983 and 1984 matters were handled in U.S. District Court, District of Massachusetts.

scheme, however, began in the early 1990s and Mr. Reynolds involvement did not begin until 2001 after being approached by Tom Petters. (PSR ¶ 23).

The district court accepted the government's assessment of Mr. Reynolds' history despite any evidence to support it and contrary to the findings in the PSR, which the court adopted. (T. 4). The court describes Mr. Reynolds as having led a "life of crime." (T. 30). It fails to acknowledge, however, that from 1985 to 2001, Mr. Reynolds owned and operated various legitimate businesses.[2] It was not until 2001 when Mr. Petters approached him about wiring funds through NIR's bank accounts that Mr. Reynolds' involvement with criminal activity was rekindled. Therefore, given that Mr. Reynolds is clearly capable of leading a life that demonstrates respect for the law, the district court abused its discretion by placing so much significance on offenses committed so long ago.

In a study conducted by the United States Sentencing Commission, it was found that "offenders over age 50 have a recidivism rate of 9.5%." See, United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation Of The Federal Sentencing Guidelines,* at 12, 28 (2004) (www.ussc.gov/publicat.Recidivsim). Mr. Reynolds was 67 years old at the time

[2] From1986-1996, Mr. Reynolds owned and operated Shoe Madness in San Diego; 1990-1996 he owned and operated Alley Oops, a 50s diner, also in San Diego; 1992-1996 he owned and operated Apogee in Mission Valley, California; 1996-1998 chief operating officer of Eurostar in Los Angeles; and from 1998-2001 he started NIR. (PSR ¶¶ 119-23).

of sentencing and will be 76 years old when released from prison. Statistically, the chance that he will re-offend is less than one in ten.

**Rehabilitation**. The sentence should address the defendant's needs concerning education, vocational training, medical care, or other correctional treatment in the most effective manner possible. § 3553(a)(2)(D). At Mr. Reynolds' age, the only need that he has with respect to this sentencing purpose is medical. As discussed below, Mr. Reynolds suffers from a host of medical problems. The most "effective manner" of addressing Mr. Reynolds' medical needs does not involve a lengthy prison sentence of 130 months.

This Court already recognizes that prison is not an ideal setting for addressing a defendant's medical needs in the most effective manner possible. In United States v. Spigner, 416 F.3d 708 (8th Cir. 2005), this Court remanded the case for resentencing, despite the defendant receiving the lowest sentence under the Guidelines for conviction of selling more than 50 grams of crack, and even though he had agreed not to seek a downward departure based on his health. This Court's remand was based on the district court's failure to consider the need to provide medical care in the most effective manner possible as required by § 3553(a)(2)(D). Likewise, in United States v. Wadena, 470 F.3d 735, 739 (8th Cir. 2006), this Court acknowledged that "the effective provision of necessary medical care is an appropriate factor" for the sentencing court's consideration).

Given that the district court did not address Mr. Reynolds' health issues during sentencing, and effectively imposed a life sentence for him, it seems clear that the court either did not consider or did not impart any significance to this requisite sentencing factor. In either case, the court abused its discretion because this sentencing purpose is left wholly unaddressed.

**ii. Nature and Circumstances of the Offense**

Pursuant to § 3553(a)(1), the district court must consider the particular nature and circumstances of the defendant's offense. In this case, the PSR classified Mr. Reynolds as an average participant. (PSR ¶ 67). The government did not object to this assessment and defense counsel argued that his role was only minor. Despite adopting the findings of the PSR (T. 4), the district court ignored the information presented and concluded that Mr. Reynolds was a "major player" in the fraud scheme. (T. 28). The court based its conclusion on its perception that without Mr. Reynolds or someone in his role, the scheme would have collapsed long ago. (T. 28). While this broadly construed analysis could equally apply to all of the defendant's in this case, somehow, other than Tom Petters, only Mr. Reynolds is "deserving of a lengthy sentence" where the others are not. Such an assessment amounts to an abuse of discretion.

**iii. Individual Characteristics of the Defendant**

Pursuant to § 3553(a)(1) sentencing courts are required to give due consideration to a defendant's individual characteristics, which include a defendant's age and health status. Given Mr. Reynolds' age and worrisome medical conditions, a lesser sentence is warranted.

Even prior to Gall, this Court has recognized that a defendant's age and health may support a downward variance. United States v. McFarlin, 535 F.3d 808 (8th Cir. 2008) (holding that probation-only sentence of three years, imposed for conspiracy to distribute cocaine, rather than a 60-month Guidelines term, was reasonable based on 56-year old defendant's health problems).

In this case, Mr. Reynolds is 69 years old with multiple health concerns. His life expectancy is 14.3 years. United States Life Tables, 2006, National Vital Statistic Reports, Vol. 58, No. 21, June 28, 2010. This statistic, however, does not account for the impact that incarceration has on a person's life expectancy or the specific medical conditions from which Mr. Reynolds suffers.

Shortly before sentencing, Mr. Reynolds was seen by his cardiologist, at which time it was determined that his arteries are 78% occluded. This medical revelation was presented to the court during sentencing. (T. 17). In addition, Mr. Reynolds' heart valves do not close properly, and he suffers from mild aortic regurgitation, mitral regurgitation, tricuspid regurgitation, high blood pressure, and anxiety. (PSR ¶¶ 109-10).

Under the best of circumstances, Mr. Reynolds' health is not likely to improve. In fact, relatively speaking, given that his access to medical professionals will be curtailed and his standard of care reduced while incarcerated, it is likely that his health will decline at a more rapid rate than if he were not in prison. Therefore, Mr. Reynolds' life expectancy will be unnecessarily shortened, effectively making the 130-month prison sentence a life sentence, which is most certainly unreasonable under the circumstances of this case.

Whether any of Mr. Reynolds' health concerns were considered by the court is unclear because it made no mention of them when pronouncing sentence.

**iv. The Types of Sentences Available Were Ignored.**

Mr. Reynolds, being a reasonable man and willing to accept responsibility for his part in the Ponzi scheme, did not expect nor request a probationary sentence. He requested, through defense counsel, that he be sentenced to a term of imprisonment not to exceed 48 months. (T. 16). Mr. Reynolds further requested that he be given credit for the time that he spent on home detention during his two-year term of pretrial release. As already discussed, this request was summarily denied without explanation.

In denying Mr. Reynolds' request for credit, the court ignored the types of sentences available and failed to consider that two years of electronic monitoring substantially curtails one's liberties. It was best articulated by the district court

judge in Gall when sentencing the defendant to probation rather than the Guidelines prison sentence. The judge cautioned the defendant that "probation, rather than 'an act of leniency,' is a 'substantial restriction of freedom.'" Gall, 552 U.S. at 44. In his sentencing memorandum, the judge further emphasized:

> [The defendant] will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court. Of course, the defendant always faces the harsh consequences that await if he violates the conditions of his probationary term.

Id. While home detention is certainly preferable to a jail or prison cell, for two years Mr. Reynolds was, in fact, electronically tethered to his home. He was not free to make ordinary decisions about his daily activities. He faced a curfew and strict reporting conditions. All travel outside of a fixed radius required permission from his supervising pretrial agent. While this may sound insignificant, it constituted a restriction on Mr. Reynolds' activities and is deserving of at least some credit towards his prison sentence. Accordingly, the district court abused its discretion in failing to see any merit in Mr. Reynolds' request for credit and summarily denying his request without any explanation.

### v. Sentencing Disparities Among Co-Defendants.

Sentencing disparities among similarly situated co-defendants are to be avoided. § 3553(a)(6). In United States v. Lazenby, 439 F.3d 928, 934 (8th Cir.

2006), this Court recognized that while "[p]erfect parity among sentences imposed on the various members of a criminal conspiracy is no doubt impossible to achieve . . . extreme [disparities]. . . not only fails to serve the legislative intent reflected in § 3553(a)(6), it also suggests an arbitrary level of decision-making that fails to 'promote respect for the law.'" Lazenby, involved two co-defendants, convicted of conspiracy to manufacture and distribute methamphetamine. Id. at 929. One defendant was sentenced to 12 months and one day, representing a substantial downward variance from the advisory Guidelines range. The other defendant was sentenced to a term of imprisonment of 87 months, which was at the bottom of the advisory Guidelines range. Id. Under the circumstances of the case, this Court found both sentences to be unreasonable and remanded the cases to district court for resentencing. Id.

By contrast, in United States v. Watson, 480 F.3d 1175 (8th Cir. 2007), this Court declined to make a finding that the sentences of two co-defendants were unreasonable, where one defendant was sentenced to 305 months and the other to 136 months. The Court distinguished the sentences in Watson from the sentences in Lazenby, finding that the Watson sentences were "derived from different Sentencing Guidelines departures and based upon legitimate distinctions between the two defendants." Id. at 1178. Thus, the sentences were not unreasonable where one defendant "received a downward departure for felony murder, along

with reductions for acceptance of responsibility and substantial government assistance," while the other defendant received enhancements for his use of a handgun, his leadership role, and a finding that he was more culpable. Id.

In Mr. Reynolds' case, it is virtually impossible to view the sentences imposed on each of the defendants as anything but disparate. All of the defendants were part of a Ponzi scheme, involving billions of dollars. In the eyes of the district court, "This offense is as serious . . .. as you can get." (T. 31). Nonetheless, sentences vary among the defendants from probation to 600 months.

The court sentenced defendants with the highest attributable loss amounts, who were company executives, and had fiduciary duties to far lower sentences than Mr. Reynolds, who was deemed responsible for the second lowest loss amount, had no fiduciary duties to any companies or investors, and became involved in the scheme after its operation was already well underway. Mr. Reynolds' defense counsel summarized the situation succinctly during sentencing, stating, "This glaring disparity illustrates the absurd results which may occur based on a pure substantial assistance analysis and application of sentencing jurisprudence which overlooks proportional culpability and equal justice under the law." (T. 16).

**vi. The court downplayed Mr. Reynolds' substantial assistance.**

Despite the government's failure to make a 5K.1 motion, the district court acknowledged that Mr. Reynolds provided substantial assistance to the

prosecution. In the process of doing so, however, the court also downplayed the assistance rendered based on unfounded suppositions. At the sentencing hearing, the court addressed Mr. Reynolds, stating that "In this case you did cooperate. You were a witness. You were a good witness. *No question about it*. I heard your testimony." (T. 29) (emphasis added). The court announced that it deemed Mr. Reynolds' assistance to be substantial and that it would "factor that into the sentence." (T. 30). The court, however, also hypothesized that because Mr. Reynolds was subject to a lot of cross-examination due to his criminal background from decades prior, that "the Government may very well have viewed [him] as less reliable as a witness," and the court did not "know how the jury viewed that or not" or "how they took that into account." (T. 30).

The district court's speculation and concern about the prosecutors and jurors perceptions were groundless. First, the fact that Mr. Petters was convicted on all 20 counts leaves no room to speculate about how the jurors viewed Mr. Reynolds as a witness. Had Mr. Petters been acquitted of even one of the charges, then, perhaps a question could be raised about possible weak links in the government's case. Under the actual circumstances, however, such speculation on the district court's behalf was irrelevant and an abuse of discretion.

Second, the government provided no basis for the court to believe that it viewed Mr. Reynolds as a less reliable witness. To the contrary, at the sentencing

hearing, the prosecutor states that "For many respects . . . he was of *valuable assistance* to the Government." (T. 26) (emphasis added). The prosecutor directs the court that "in fairness to Mr. Reynolds" the court should consider his assistance in determining an appropriate sentence under 18 U.S.C. § 3553(a). (T. 21). The prosecutor further explained:

> But for that cooperation I think I would be standing before you and asking to impose a guideline sentence. But his cooperation was substantial. It did assist. You saw his testimony here at trial . . . he did provide information that was corroborated and that we found to be factually reliable. During the cross-examination his testimony at trial was fully corroborated as well. And you should consider that in determining what is an appropriate sentence in light of his prior history and the nature of the offense in this.

(T. 25). Accordingly, any weight given to the court's supposition that Mr. Reynolds may not have been as valuable as other witnesses, is without basis and amounts to an abuse of discretion.

## CONCLUSION

Based on the foregoing, Larry Reynolds respectfully requests that his sentence be vacated and the case be remanded to district court for resentencing.

Dated: November 9, 2010

Respectfully submitted,

*/s/ Julie Loftus Nelson*

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In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

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United States of America,

Appellee,

v.

Larry Reynolds,

Appellant.

APPEAL NO. 10-3130

**Certificate of Compliance and of Virus-Free Disk.**

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I hereby certify that the Brief of Appellant filed herein contains 6,922 words, excluding the table of contents, table of authorities, statements with respect to oral argument, jurisdictional statement, statement of the issues, addendum and certificates of counsel and service, as counted by the word-processing system, Microsoft Word 2008 for Mac Version 12.2.7, used to generate the brief. The brief otherwise complies with the type-volume limitations of F.R.A.P. 32(a)(7)(B), the typeface requirements of F.R.A.P. 32(a)(5)(A), and the type style requirements of F.R.A.P. 32(a)(6).

I further certify that the disks forwarded to the court and opposing counsel have been scanned for viruses and are virus free to the best of my knowledge.

Dated: November 8, 2010

Respectfully submitted,

BRUNO & NELSON

*/s/ Julie Loftus Nelson*

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# APPELLANT'S ADDENDUM

# INDEX TO ADDENDUM

In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

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UNITED STATES OF AMERICA,

No. 10-3130

Appellee,

**CERTIFICATE OF SERVICE**

v.

LARRY REYNOLDS,

Appellant.

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I hereby certify that on November 9, 2010, I electronically filed the following document: CORRECTED BRIEF OF APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

Larry Reynolds

*s/Julie Loftus Nelson*

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