

14-502

To Be Argued By:
MICHAEL S. MCGARRY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-502

—
UNITED STATES OF AMERICA,
Appellee,

-vs-

JUAN JOSE ALVAREZ de LUGO AZPURUA
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

This is an appeal from a final judgment of conviction and sentence entered February 4, 2014, in the United States District Court for the District of Connecticut (Warren W. Eginton, J.) after the defendant entered a plea of guilty to one count of wire fraud in violation of 18 U.S.C. § 1343. Joint Appendix (“JA __”) 7. The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On February 7, 2014, the defendant filed a timely notice of appeal under Fed. R. App. P. 4(b). JA 7; JA 208. This Court has appellate jurisdiction over the defendant’s challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

**Statement of Issue
Presented for Review**

Was the defendant's within Guidelines' sentence of 48 months' incarceration substantively unreasonable, given that he defrauded 28 victims out of more than \$2 million by devising and executing a multi-year Ponzi scheme in which he falsely represented that he was developing affordable low-income residential housing or a senior assisted living facility, when in reality he used the money for his own personal use and benefit?

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JUAN JOSE ALVAREZ de LUGO AZPURUA

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Juan Jose Alvarez de Lugo Azpurua, conceived of and executed a five-year fraud scheme that defrauded 28 victims out of more than \$2 million and was sentenced to 48 months' incarceration. He now appeals his sentence, arguing that it was substantively unreasonable.

The defendant used his reputation in the community to convince 28 victims to invest money with him, in what they thought would be an investment in various housing developments in the City of New Haven, Connecticut. The defendant not only promised high returns from the purported investments but also falsely represented that the real estate development would benefit both needy and elderly residents of New Haven. After receiving the investors' funds, however, the defendant did not invest the money as represented but instead used the money to enrich himself and his family and to make Ponzi-like payments to earlier victim-investors.

After pleading guilty to one count of wire fraud, the defendant was sentenced to 48 months' imprisonment. On appeal, he claims that his sentence was substantively unreasonable arguing that the sentencing court failed to account for his age at the time of the commission of the offense and his prior lawful life. He further argues that the court and prosecutor had suggested—during the plea proceedings—that a sentence of 41 months was reasonable and thus the higher sentence actually imposed was *de facto* unreasonable. For the reasons set forth below, these arguments are without merit. The district court's sentence was reasonable and the judgment should be affirmed.

Statement of the Case

On September 18, 2013, the defendant waived indictment and entered a plea of guilty to an information that charged him with a single count of wire fraud in violation of 18 U.S.C. § 1343. JA 5 (docket entries); JA 29-36; JA 48-96.

On January 28, 2014, the district court (Warren W. Eginton, J.) sentenced the defendant to 48 months' imprisonment and three years of supervised release. JA 7 (docket entry); JA 194. The judgment was entered on February 4, 2014, and the defendant filed a timely notice of appeal on February 7, 2014. JA 7 (docket entry).

A. The offense conduct

The defendant, at the time of sentencing, was a 53-year-old Venezuelan man who devised and executed a multi-year Ponzi scheme through which he enriched himself and his family by defrauding approximately 28 investors out of more than \$2 million. In fact, the district court found the actual loss to be measurably higher and ordered restitution to the victims in the amount of \$5,161,083. JA 204; JA 207. In connection with his plea, the defendant stipulated to the offense conduct that gave rise to his conviction. JA 45-46.

As stipulated to by the defendant and as set forth in the Pre-Sentence Report ("PSR"), the defendant operated an investment fraud scheme in

New Haven from approximately 2005 until 2010. JA 45; PSR ¶ 6. In this scheme, the defendant held himself out as the president of multiple seemingly successful businesses specializing in real estate development programs. JA 45; PSR ¶ 6. The defendant solicited investments from friends and acquaintances, many of whom were family friends, and promised a return on their investments of 20% per year. JA 45; PSR ¶ 6; JA 182. Many of the victim-investors entered into the scheme devoid of any suspicion and without performing any due diligence because they had known the defendant personally for a number of years prior to investing. PSR ¶ 10. The defendant used these long-standing relationships to defraud the victims. JA 177 (explaining that the defendant's and one victim's families were friends); JA 180-82 (explaining how another victim was "hurt by his long time family childhood friend").

The defendant solicited money by falsely representing that the money would be invested in "social housing projects," endorsed and sponsored by the City of New Haven. JA 45; PSR ¶ 7. According to the defendant's pitch to victim-investors, his company would acquire houses from the City and from local banks (the "New Haven Properties") that would be remodeled and sold. Then, those homes would be occupied by low-income families who had or would secure financing from a local Connecticut bank and vari-

ous Connecticut state agencies. JA 45; PSR ¶ 7. Later, the defendant told investors that the money would be used to develop a senior housing facility in New Haven. To further the appearance that the investments would benefit low-income families, the defendant used the name and photograph of the then-sitting Mayor of New Haven, as well as materials taken from the City's website, to create the appearance that he had ties to the City and was helping to finance these philanthropic endeavors. JA 111. These fraudulent representations led the victim-investors to believe not only that they would make a healthy return of 20% per year, but also that their investment would have a positive social impact in New Haven. PSR ¶¶ 7-9; JA 111.

As part of the scheme, the investors who invested with the defendant were provided official looking investment contracts termed "Promissory Notes." PSR ¶ 8. The representations contained in the Promissory Notes were consistent with the oral representations the defendant made to investors. In particular, the Promissory Notes promised to pay interest of 20% per year and further promised a full return of the investment principal in one year's time. PSR ¶ 8. Additionally, the defendant provided investors with a participation table outlining anticipated returns or "interest payments." PSR ¶ 8.

Consistent with the oral representations made as well as those contained in the documen-

tation, the defendant did, at least initially, make interest payments to the investor-victims that appeared to be the promised interest of 20% per year. PSR ¶ 8. However, these purported interest payments were simply Ponzi-like lulling payments. The money came not from any actual real estate venture, but instead from the very same account into which the investment principal had been placed and used the very same investment principal as the source of funds to make the periodic lulling payments. PSR ¶ 8. The defendant furthered the scheme in true Ponzi scheme fashion, by having earlier investors who had received the periodic (yet phony) interest payments recruit additional victim-investors to the investment opportunity. JA 182; PSR ¶ 8. In fact, in one instance the defendant even enticed a victim to recruit his mother and his brother to invest with the defendant. PSR ¶ 11; JA 174; JA 182.

As early as 2006, the defendant's scheme lacked any legitimate substance and simply operated as a Ponzi scheme. JA 45-46; PSR ¶ 19. The records from the defendant's bank accounts revealed that at certain times the defendant had a negative (or below zero) balance in his account and was only able to make payments due to early investors when another investment of principal came into his account. JA 112; PSR ¶¶ 10, 14, 16. For example, funds from investors who invested in February and March of 2006 and in February 2007 were used by the defendant

throughout 2006 and 2007 to pay the promised interest payments that were due to investors. PSR ¶¶ 10, 11, 14; JA 112.

To forestall discovery of the scheme, when the promised interest payments did not materialize as had been represented, the defendant sent fraudulent letters to the victims to lull them into continuing to believe the scheme was a real investment and that there had simply been some type of bureaucratic mix-up. PSR ¶¶ 12-13. For instance, on May 28, 2008, three victims received letters signed by the defendant regarding the status of their investments. In the lulling letters the defendant falsely represented that the investments were safe. The lulling letters stated, in relevant part:

First of all I want to apologize for my delay. In this document you will find an explanation for the current situation The one and only reason for the payment delays was that Arquin Development was required to have any investor/broker license in order to acquire the loan for the units. It was my understanding that this inconvenience would have been resolved by March 28, 2008; however, that date was delayed, and it has taken longer than expected. As of right now, I am unsure when this will be resolved, I [am] informed that it could take anywhere between one week to three months. . . . In this case, I want to

assure you that your capital is completely safe.

PSR ¶ 13. The representations in the letters were, like the investments themselves, entirely fraudulent. PSR ¶¶ 6, 10-13; JA 113-14.

In one instance, when a victim-investor inquired about his investment, the defendant drove the victim-investor around New Haven and showed the victim a number of residential real estate properties that were supposedly part of the defendant's investment portfolio. During this visit, the defendant assured the victim-investor that everything was under control and payments to clients would soon be made. PSR ¶ 17.

The defendant's representations to his victims were false. The defendant did not buy and sell the New Haven Properties as represented, nor did he develop a senior assisted living facility. Neither the defendant nor his companies had a relationship or joint undertaking with New Haven or with the State of Connecticut. PSR ¶ 9. Moreover, the defendant did not invest his victims' money in "social housing projects" or a "senior living community" in New Haven. PSR ¶ 9.

Instead, the defendant spent the investors' money to pay his own personal expenses, to enrich himself and his family, and to perpetuate the scheme through lulling payments. PSR ¶¶ 8-9. The defendant's bank records established that

between September 2006 and December 2009, over \$134,000 was spent on improvements to the defendant's home, including tens of thousands of dollars on a backyard pool and patio and thousands of dollars on plumbing, labor, and landscaping expenses. PSR ¶ 19. Also during that time period, thousands of dollars were paid to Hamden Hall School, a private high school in Hamden, Connecticut, and over \$37,000 was paid to the New School in New York, New York. PSR ¶ 19. Additionally, \$619,000 of investors' funds were transferred to the defendant's personal account; \$51,457 were transferred to a joint account in the name of the defendant and his wife; \$100,000 were wired to TD Ameritrade; \$10,000 paid to FOREX capital markets; \$32,439 spent on expenses for his home; and additional checks were paid to GMAC. PSR ¶ 19. Ultimately, the defendant defrauded 28 victim-investors out of over \$5 million. JA 204; JA 207.

B. The court proceedings

1. The guilty plea hearing

At the change of plea hearing, the court reviewed the plea agreement in considerable detail with the defendant, read significant portions of it and asked the defendant if he understood the agreement and the implications of the agreement. JA 58-85. In the context of explaining how the appellate waiver impacted the defendant's

right to appeal his conviction and sentence, the court made the following remarks:

THE COURT: I said before you would not be able to challenge me, but you have the right to challenge if I go haywire and sentence you to 50 months, and not the 41 months.

You cannot appeal the conviction, but you can appeal if the sentence exceeds 41 months.

You can be assured I won't exceed the 41 months, but if I do exceed it, you will have the right to appeal.

Regarding an appeal, I should tell you that, if you had a trial and were convicted, you would have the right to appeal. If you go to the Second Circuit in New York, and if they found fault with the conviction and set it aside, you could be set free, or they could send it back here for a trial. That is something that you are giving up. Do you understand that?

JA 74.

Shortly thereafter, the prosecutor asked the court to clarify its remarks:

[Assistant U.S. Attorney]: Your Honor, back to one thing while you are commenting on in your notes.

We were talking about the waiver of the right to appeal. You focused on the 41 months, and you said how you intend to give that some weight.

It is important for Mr. Azpurua to know that, in fact, the Court does not know exactly what the sentence will be.

For example, if he were to assault the marshal each and every time he is being brought to court, as a hypothetical, you would give that some weight. Because he had assaulted a United States marshal, you might give that some weight.

THE COURT: Have you been over this with your attorney through the interpreter?

[The Defendant]: Yes.

[Defense Counsel]: Do you want me to read this to him again?

[Assistant U.S. Attorney]: No. He has been over it with counsel. He is an intelligent gentleman, and he can sign the plea agreement again, the original, which has a signature line on it.

* * *

THE COURT: Why don't you do that.

JA 82-84.

At different points throughout the plea colloquy, the court emphasized that prior to the sentencing, neither the parties nor the court could determine what the defendant's ultimate sentence would be, and the defendant acknowledged that he understood this to be the case. For instance, the court and the defendant had the following exchange:

THE COURT: The defendant understands that the Court is required to consider any applicable sentencing guidelines as well as other factors enumerated in 18 U.S.C. § 3553(a) to tailor an appropriate sentence in this case and is not bound by this plea agreement. The defendant agrees that the sentencing guideline determinations will be made by the Court, by a preponderance of the evidence, based upon input from the defendant, the Government, and the United States Probation Office. The defendant further understands that he has no right to withdraw his guilty plea if his sentence or the guideline application is other than what he anticipated, including if the sentence is outside any of the ranges set forth in this agreement.

Are you with me so far?

[The Defendant]: Yes.

THE COURT: Are you pleading guilty as a result of somebody telling you what they thought the sentence would be?

[The Defendant]: No.

THE COURT: Because nobody can tell you what the sentence is going to be. They can give you a range, but they cannot tell you what the sentence is going to turn out to be.

Are you with me so far?

[The Defendant]: Yes.

JA 62-63. *See also* JA 69 (court explaining that it was not bound by the plea agreement or the guidelines range set out in the agreement).

Additionally, counsel for the government reinforced the same point in the context of fines and restitution:

[Assistant U.S. Attorney]: I understand that it is your practice when there is restitution to not impose a fine. Just so he understands that before he enters his plea today, when you said that you would not impose a fine, and that the Court does not know what the ultimate sentence would be, and that would not be until you get the presentence report and evaluate his ability to pay all of the 3553 factors, you cannot state what the sentence will be, because I just want to be sure that that is clear.

JA 63-64.

After these exchanges, and after having the stipulation of offense conduct read to him, the defendant agreed with the government that the stipulation was an accurate description of his conduct. JA 89. The defendant again acknowledged that he had been over all of the aspects of the plea agreement with his counsel. JA 89-90. The defendant was then advised of the implications of the plea with respect to restitution and thereafter entered a plea of guilty. JA 90-94.

Having previously reviewed the plea agreement with his counsel and then having been repeatedly put on notice by the court, and by the comments of the Assistant United States Attorney regarding the terms contained in the agreement, the defendant knowingly signed the plea agreement. JA 83-84.

2. The sentencing memoranda

The defendant, in his sentencing memorandum, did not contest his adjusted offense level of 22, with Criminal History Category of I, resulting in a Guidelines' range of 41-51 months' imprisonment. JA 97-98. The government in its sentencing memorandum and the United States Probation Office in the PSR similarly reached the same result with respect to the Guidelines' range using the same calculations. JA 115-16; PSR ¶¶ 23-37, 52.

The defendant's sentencing memorandum argued: (i) that the majority of the defendant's offense-level points arose from the loss amount, resulting in a total offense level that overstated the seriousness of the offense, and (ii) that the defendant's age, employment history, and otherwise blameless life when he committed the offense indicated both that he was a low recidivism risk, and that "a below-Guidelines sentence [would be] appropriate." JA 98-100.

The government's sentencing memorandum, by contrast, argued that grounding the defendant's offense level in loss did not overstate the seriousness of the offense because the defendant's crime was an economic one, and (i) grounding economic crimes' relative severity in loss calculations provides a measure of uniformity in sentencing; (ii) such a measurement by loss "has deep roots in our common law jurisprudence;" and (iii) loss provides "an effective proxy for both the culpability of an offender's mental state and the harm suffered by his victims" *See* JA 118.

Additionally, the government argued that as to the victim-related adjustments, it is worse to defraud many victims than fewer. JA 119. The government further argued that while the agreed-upon loss amount provided an accurate pecuniary measure of the harm, what the loss amount did not measure was the broken trust, the lost confidence, the sense of betrayal and violation suffered by the victims (many of whom

had known the defendant personally), as well as the lost time and energy spent by the victims and their families in an attempt to recover their lost funds. JA 120.

The government's sentencing memorandum further argued that the defendant's age when he committed his crime did not provide an adequate reason to depart from the Guidelines because such a departure was contrary to the guidance provided by the U.S.S.G. as well as controlling case law. The government also argued that the defendant's age could be seen as a reason why it was *less likely* that the defendant would alter his criminal tendencies upon release. JA 122 (“[S]ince he committed fraud later in life at the approximate age of 46-52 he is even less likely to change his ways after he serves his term of imprisonment.”).

Finally, the government's sentencing memorandum pointed out that, contrary to the defendant's assertion that the defendant's employment history was uninterrupted and praiseworthy, the defendant had in fact been making his living through fraud for approximately ten years prior to his arrest and conviction. JA 123.

3. The sentencing hearing

At the sentencing hearing, the court went step-by-step through the sentencing process and carefully considered all the facts presented and

the controlling law setting forth the goals of sentencing.

First, the court indicated that it had read and had considered all of the arguments raised by the defendant's counsel and government counsel in the written submissions. The court commented on the record that it had read all the papers submitted in advance of the hearing, JA 149, and was impressed with the submission made on behalf of the defendant, JA 148.

Second, the court made clear that it had reviewed the PSR and the findings of the U.S. Probation Officer and, there having been no objections to the factual finding presented in the PSR, the court accepted the PSR and adopted the facts found in it. JA 149.

Third, the court heard from the defendant's counsel. In her presentation, defense counsel asked for time served and made the following arguments: (i) the use of loss as a measure of harm is a rough tool and does not reach a true measure of harm, JA 150-51; (ii) that given the defendant's age and life of good works before the commission of the crime he should receive a lesser sentence, JA 151-53; (iii) the legal process of being arrested, fingerprinted, and photographed caused public humiliation and those experiences alone were sufficient to deter the defendant, JA 152-53; and (iv) the year already spent in prison was sufficient punishment for the crime. JA 154-55.

Fourth, the court also heard from counsel for the government. The prosecutor argued for a sentence in the middle to the top of the Guidelines range. JA 168. In particular, the prosecutor argued that when considering the seriousness of the offense and the history and characteristics of the defendant, the court needed to consider that there was a purported humanitarian and charitable aspect in the defendant's sales pitch. JA 161. Counsel argued that it was particularly deplorable that the scheme, in part, preyed upon the victims' desire to help the less fortunate by representing that their investments would help the elderly and people with special needs. JA 162-64. In support of this point, the prosecutor read from the defendant's own "sales" literature, where he falsely stated to victims that the investments would benefit low-income families, elderly individuals, and special needs individuals. JA 161. As the prosecutor explained, the defendant's use of these arguments to lure investors into his scheme reflected not only the seriousness of the crime but also the nature and characteristics of the defendant. JA 163. This was especially true here, where the defendant—after receiving the money from the victim-investors who believed they were helping the less fortunate of New Haven—used the money to improve his home, his backyard pool and patio, to pay his children's education expenses, and to perpetuate the scheme by making Ponzi-like payments back to the investors. JA 164.

Additionally, counsel argued that during the scheme the defendant filed false tax returns, and while he was not charged with a tax count, it was a fact the court could consider in deciding the defendant's ultimate sentence. JA 165.

Government counsel further argued that the court needed to consider both general and specific deterrence. JA 168-70. Counsel argued that because white collar cases get reported in the media, meaningful sentences can have a general deterrent effect. JA 168-69. The court, too, commented on the media attention on white collar cases by noting the court's own past experience in this respect. *See* JA 168 ([AUSA]: "These type of cases do get reported."; [THE COURT]: "You and I are experts in the Lighthouse case."). Additionally, the court observed how prosecutions, prison sentences, and the inevitable collateral consequences associated with such cases "all of those things are, hopefully, helpful for deterrence." JA 170.

Moreover, as part of its presentation, government counsel read portions of the victims' statements to the court in order to demonstrate and establish the nature and seriousness of the crime, the abuse of the personal trust that the victims had placed in the defendant, and the significance of the impact both financially, emotionally, and otherwise that the crime inflicted on the victims:

- One victim, Christian Peterson, emphasized that the defendant's sales pitch had focused on the funds going towards "social housing projects" that would benefit low-income families. JA 160-61.
- Another victim, the Wallace Family, explained that the defendant had gained their trust initially by depositing payments into their accounts, but that when he stopped making those payments, the family suffered serious financial consequences: "[W]e are going through very trying and sad times. We have been living by selling our clothes, paintings, everything that we have to sell and we are also considering [selling] our apartment to go live with my younger sister. We are surviving. We are not living." JA 172.
- Mr. Fernandez explained that he had invested with the defendant with the goal of saving "for the future of [my] daughters." With the fraud, however, "I lost \$50,000 which has led to psychological and emotional repercussions, as well as an unstable marriage because I no longer have my savings. My dreams to prosper and enjoy the rest of my life have all been destroyed." JA 172-73.
- Mr. Franco Seopena explained that due to the defendant's fraud, he was unable to provide for hospital care for his mother be-

fore she died. In short, the defendant's fraud "affected [his] financial situation in a particularly negative way . . ." JA 173-74.

- Finally, Mr. Thomas Peterson emphasized that "being a victim of a person who's reputation and familiarity preceded himself, but was used in false intents for his own financial benefit, has caused great anxiety to my mother who is of advanced age and my brother who is currently unemployed and to myself." In addition, Mr. Peterson explained that "[t]he impact of not having [the invested] funds available at a given time when they were needed has brought great financial sacrifice to our family as a whole and to each individual. The need to defer or drop all together family projects or coverage of other emergencies has brought strain to our family relations, not to mention to each of our spouses." JA 174-75.

The prosecutor emphasized the financial and emotional impact on the victims in his remarks: "I think it is important that the court when you consider in the guidelines where to go, you consider . . . the collateral consequences on the victims' families is, perhaps, more dramatic in that not only are they victimized financially, but they feel humiliated, the strain is on the family. We hear about possible divorces because money problems can create difficult problems. And I just wanted to try to give a voice to some of those

victims so that the court will consider the impact that Mr. de Lugo has had on these people, some of which previously called him a friend.” JA 175-76.

Finally, counsel for the government also rebutted the arguments made by defense counsel. In response to the argument that the defendant’s age (being 53 at the time of sentencing) made him less likely to recidivate, government counsel argued that “an equally persuasive if not a more persuasive argument could be made that somebody who is engaging in a crime at that stage of his life is, perhaps, like the saying, the zebra is not likely to change his stripes.” JA 167. Government counsel further argued that a defendant who committed a seven-year fraud beginning at the age of 46 and continuing until the age of 53 would be just as likely to commit a similar fraud in his mid-to-late 50’s. JA 167. In response, the court itself commented on this argument and linked it to specific deterrence by stating, “Well, I think if there’s any break, I think the break would be the break in the character would be the experience he’s having now, that may teach him a lesson that, obviously, needed to be taught.” JA 167.

Government counsel also rebutted defense counsel’s arguments that the legal process and humiliation of being arrested would itself be sufficient to deter the defendant, and the argument that the year already spent in prison was suffi-

cient punishment for the crime. Government counsel argued that the arrest and the corresponding humiliation alone were not in and of themselves sufficient for deterrence or punishment. The prosecutor argued that just because someone has achieved, by some measure, a higher status in life, they should not receive a lesser sentence because they are perceived by some members of society to have fallen farther. JA 170. Government counsel argued that such defendants should not be given any such break with respect to incarceration because they have benefited from many of life's advantages and given these advantages, they should have more of a reason to abide by the law. JA 170.

Throughout the government's presentation counsel argued that time served, as advocated by defense counsel, was not sufficient:

I think there does need to be a meaningful sentence. I don't think at all time served [is appropriate]. I think towards the higher end of the guideline range would be appropriate to give the specific deterrence that Mr. Alvarez de Lugo needs so that when he is out, when he does have the capacity to learn his lesson and maybe pay some restitution, that he doesn't decide to turn to another get-rich-quick scheme.

JA 168.

Fifth, after hearing from the government, the court heard from a representative of one of the victims who had lost over \$2 million. JA 177-85. He argued that the defendant should be sentenced at the upper end of the Guidelines. JA 184. He explained that this was not a typical Ponzi scheme because the defendant preyed upon his personal relationships with the victims. JA 177. Indeed, he believed that the victims were vulnerable because of the relationship of trust. JA 177. He further explained to the court that the victims were deeply hurt, they were humiliated by being victimized, and they were further hurt because it was done by a long time family childhood friend. JA 180-81.

In response, the court inquired if the victim-investor who had lost \$2 million also had enlisted other victims into the Ponzi scheme. It was explained to the court that he in fact had done so, further deepening the feelings of humiliation and embarrassment. JA 182. The court specifically stated, “[t]hat is what I was thinking about.” JA 182.

Sixth, after hearing from both counsel, and the victim representative, the court heard from the defendant himself. JA 185-87. The defendant apologized to his victims, indicated that he was ashamed, and promised to “never do anything like this again.” JA 186. Additionally, the defendant told the court that he was going to try to make restitution. JA 186.

Seventh, the court calculated the advisory Guidelines range, concluding that the defendant had an adjusted Guideline level of 22, and thus had a resulting range of 41-51 months. JA 193-94. The court observed that the parties' Guidelines stipulation somewhat underrepresented the scale of the defendant's fraud. Although the court "deemed the loss to be approximately \$2,000,000," it noted that including one additional victim's loss would raise the figure to about \$5,000,000. JA 193. The court, in this regard, ordered restitution in the amount of \$5,161,083. JA 204; JA 207. Furthermore, the court found there to be "about 28 victims." JA 193.

Eighth, after considering all of these arguments and points, the court articulated its consideration of the § 3553(a) factors and its view of the defendant's conduct and his scheme. JA 190-94. In particular, the court considered the Guidelines and directly addressed defense counsel's argument that the Guidelines (using the loss calculations) were draconian and too severe. JA 190. The court rejected this argument, stating:

The guidelines, I think in my view of them, as I compare them with the other type of guidelines, the drug guidelines and the criminal gang, Latin kings type of cases, these white collar guidelines are fairly lenient compared to the others. I

am used to 50, 60, 70 month sentences. I get a lot of five-year sentences in these cases. So, 41 to me, less than four years is a low guideline. I don't regard it as being a severe guideline at all. I think it reflects what Congress had in mind with 35-53(a).

JA 191.

The court also considered the argument that the defendant should be given credit for all the years he lived a law-abiding life prior to committing the multi-year, multi-million dollar Ponzi scheme. In this regard the court stated that it had already considered this factor in its sentencing decision:

When [defense counsel] spoke about the length of time, that he was a law-abiding citizen in Venezuela, So, he's entitled to credit for the good things he's done in his life.

I always tell defendants just as they are being punished for the bad things they've done, they are being rewarded for the good things they have done.

One thing I'm taking into account is the criminal category. The criminal category takes into account these very elements.

He's in Category 1. He's Category 1 because he gets credit for the life he lived until this aberration in his life occurred.

JA 190.

The court next considered the § 3553(a) factors and stated that in a sentencing proceeding, § 3553 is really the court's Bible and that the Guidelines serve as a tool for finding the § 3553(a) factors. JA 191-92. The court specifically addressed various § 3553(a) factors that influenced its sentence, including deterrence. JA 192. *See also* JA 170 (court noting that it hoped the consequences of an arrest and prosecution would serve the purposes of deterrence). The court also noted that the sentenced imposed should consider the welfare of the defendant and stated that the sentence should, consistent with § 3553(a), take into account "the mental, and physical condition of the defendant, the educational needs, and so on. So I am very comfortable with this sentence." JA 192.

Having calculated the defendant's adjusted Guidelines' range, the court considered the advisory range and concluded that "the category is, as I pointed out, very good. That is how you get to 41 to 51 [months]." JA 194. Then, having considered all the arguments, the court concluded that it "agree[s] with the government and I think probation is tougher by accepting the government's recommendation. We go above the bare minimum of 41 [months]. I am comfortable with

sentencing him to the custody of the Attorney General for a period of 48 months.” JA 194.

Summary of Argument

The defendant’s sentence should be affirmed. The record amply demonstrates that the district court imposed a substantively reasonable sentence within the relevant Guidelines range after properly calculating the Guidelines, considering the factors set forth in 18 U.S.C. § 3553(a), considering the arguments by counsel, hearing from the defendant himself, and hearing from victims both in writing and in open court.

The sentence imposed appropriately reflected the nature and circumstances of the investment scheme, including not only the amount of loss and number of victims, but also the impact the scheme had on the victims and the humiliation they suffered by being defrauded by a trusted friend. In addition, the sentence reflected the need for it to reflect the seriousness of the offense, the need to impose just punishment for that offense, and the need to deter both the defendant and others similarly situated from committing the defendant’s crime. On this record, then, the Guidelines sentence was substantively reasonable.

The defendant’s arguments to the contrary do not disturb this conclusion. The court considered the defendant’s arguments about his long years of law-abiding conduct and his employment his-

tory, and gave those factors the weight it deemed appropriate. The fact that the defendant wanted the court to give those factors more weight does not mean that the court erred in failing to do so. Moreover, neither the court's comments nor the prosecutor's comments created any sort of understanding that a 41-month sentence was the only reasonable sentence.

Argument

I. The district court imposed a substantively reasonable sentence in light of the loss amount, the number of victim-investors, and the harm the defendant's conduct caused.

A. Governing law and standard of review

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) “the nature and circumstances of the offense and history and characteristics of the defendant;” (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from 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 sentencing

range set forth in the guidelines; (5) any policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *Id.*

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for “abuse of discretion.” *Gall v. United States*, 552 U.S. 38, 41 (2007); *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (*en banc*). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189. Here, where there is no claim that the sentence imposed was procedurally unreasonable, this Court is left only with the issue of whether the sentence was substantively reasonable.

Review for substantive reasonableness is exceedingly deferential. This Court has stated it will “set aside a district court’s *substantive* determination only in exceptional cases where the trial court’s decision ‘cannot be located within the range of permissible decisions.’” *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Id.* at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can “bear the weight assigned to [them].” *Id.* at 191. However, in mak-

ing this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.*; *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (noting that district courts have “distinct institutional advantages” in the sentencing process, including the ability to “hear evidence, make credibility determinations, and interact directly with the defendant (and, often, with his victims), thereby gaining insights not always conveyed by a cold record”), *cert. denied*, 133 S. Ct. 2786 (2013). In short, “[r]easonableness review does not entail the substitution of [this Court’s] judgment for that of the sentencing judge.” *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also United States v. Savoca*, 596 F.3d 154, 160 (2d Cir. 2010); *United States v. Mi Sun Cho*, 713 F.3d 716, 723 (2d Cir. 2013).

In reviewing for substantive reasonableness, this Court neither presumes that a sentence within the Guidelines range is reasonable nor that a sentence outside this range is unreasonable, but may take the degree of variance from the Guidelines into account. *Cavera*, 550 F.3d at 190. At the same time, this Court recognizes that “in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Fernandez*, 443 F.3d at 27. Indeed, a sentence is substantively

unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupported as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

B. Discussion

- 1. The district court imposed a reasonable sentence that reflected the scope and seriousness of the offense conduct, along with the harm flowing from that conduct, as well as the defendant’s personal characteristics.**

The defendant’s Guidelines sentence, far from being “shockingly high” or “otherwise unsupported as a matter of law,” *Rigas*, 583 F.3d at 123, was an appropriate and well considered application of the Sentencing Guidelines and of the factors set forth in 18 U.S.C. § 3553(a). In particular, the sentence reflected the seriousness of the offense conduct and served multiple purposes of punishment, including the need to inflict a just punishment, to promote respect for the law, and to promote both general and specific deterrence. Moreover, the sentence reflected the defendant’s personal characteristics, including the good things the defendant had done before he committed this crime.

The defendant's sentence of 48 months fell squarely within the Sentencing Guidelines range of 41 to 51 months—a range that was never in dispute. *See* JA 97-98 (defendant's Guidelines calculation); JA 115-16 (government's calculation); PSR ¶ 52 (Probation's calculation); JA 192-94 (district court's calculation). And although this Court does not presume that a Guidelines sentence is reasonable, *see Fernandez*, 443 F.3d at 27, the parties' independent agreement on the Guidelines calculation in this case demonstrates uniform agreement on certain key facts: the defendant's criminal history category, the estimated loss amount involved in his offense, and his acceptance of responsibility for his crime. JA 38-40. This agreement on these key facts, in turn, suggests that a sentence within the Guidelines range was not “shockingly high” or “otherwise unsupportable as a matter of law.” *Rigas*, 583 F.3d at 123.

Furthermore, the § 3553(a) factors which were addressed at length by the parties and carefully considered by the court, support the conclusion that the defendant's sentence was legally reasonable. The sentencing court articulated many of the relevant factors on the record in open court, noting the importance of “deterrence and stating that “[the sentence] does meet the requirements of [§ 3553(a)].” JA 192. And although this Court does not substitute its own evaluation of the § 3553(a) factors for that of the

sentencing court, even a cursory review of the § 3553(a) factors supports the district court's conclusion in this case.

The crime was an extensive fraud scheme that went on for nearly five years. PSR ¶¶ 6-18. The crime was broad in scope and significant in financial harm. The defendant defrauded approximately 28 victims out of well more than \$2 million. JA 193. And this fraud scheme caused significant financial and emotional harm to the defendant's victim-investors, as reflected in the statements read by the prosecutor at sentencing. *See generally supra* at 19-21, 24.

The scheme was also particularly serious because the defendant falsely represented to the victim-investors that the real estate ventures would benefit the under-privileged, the elderly, and those with special needs. PSR ¶¶ 7-8. Instead of benefiting these vulnerable populations, however, the defendant's scheme served to benefit the defendant. He profited directly from the scheme, using his victim-investors' money to improve his own home and send his children to expensive private schools, for example. PSR ¶ 19. Notwithstanding the defendant's use of these funds, he reported none of them as income on his tax returns. JA 165.

Given these facts, the "nature and circumstances of the offense," and the resulting "need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the

law, and to provide just punishment for the offense,” all militated heavily in favor of a significant sentence along the lines imposed by the court. *See* 18 U.S.C. § 3553(a)(1)-(a)(2)(A).

Moreover, the sentence imposed reflected the defendant’s personal characteristics. The district court considered the defendant’s good characteristics, *see* JA 190, as well as the defendant’s willingness to prey on his victims’ charitable impulses, *see* JA 162-64. And while defense counsel argued that the defendant was unlikely to re-offend, the district court was free to come to a different conclusion on how to weigh the need for deterrence in the sentencing calculus. *See* JA 151-53; JA 167; JA 169-70.

In sum, the district court properly considered and weighed the § 3553(a) factors and selected an appropriate and reasonable sentence. The defendant may well disagree with how the court weighed the seriousness of his criminal conduct against the other factors in this case, but the district court’s decision was hardly an abuse of discretion. Accordingly, under the deferential standard of review for substantive reasonableness, the district court’s judgment was well within the wide scope of its discretion. This Court should not substitute its judgment for that of the sentencing court.

2. The defendant's arguments that his age and his employment history render his sentence substantively unreasonable lack merit.

On appeal, to contest the conclusion that his sentence was substantively reasonable, the defendant repeats the arguments he advanced below, *i.e.*, that the period of time during which he committed no crimes (until age 46) and his purported positive employment history should have resulted in a lower sentence. *See* Def.'s Br. at 9-12. In particular, the defendant points to a non-controlling district court case, *United States v. Ward*, 814 F. Supp. 23 (E.D. Va. 1993), to argue that the court should have given more weight to the time he lived his life without committing crime. In a nutshell, though, the defendant's arguments come down to the assertion that the district court failed to give proper weight to his mitigating factors. Def.'s Br. at 11.

But on appeal, the defendant cannot merely argue that this Court should re-weigh the sentencing factors to come to its own conclusion. *See Fernandez*, 443 F.3d at 27; *accord Savoca*, 596 F.3d at 160. Instead the defendant must establish that the sentencing court "exceeded the bounds of allowable discretion" when it selected a sentence that it found sufficient to meet the § 3553(a) factors. *Fernandez*, 443 F.3d at 27 (internal citations omitted); *Mi Sun Cho*, 713 F.3d at 723.

The defendant simply cannot meet this high burden. All of the arguments now advanced were raised below before the district court. *See, e.g.*, JA 151-53. The sentencing court considered these arguments and gave them the weight it deemed appropriate. Thus, in response to the defendant's argument about his age, the court explained as follows:

[W]hen [defendant's counsel] says that those guidelines and the government failed to take into consideration the length of time, and I wrote this down. When [defendant's counsel] spoke about the length of time, that he was a law-abiding citizen in Venezuela, which he was. He had a very good family, came from a very good family. He spoke today about his family and the influence they had on him, the lessons they tried to teach him. So, he's entitled to credit for the good things he's done in his life.

I always tell defendants just as they are being punished for the bad things they've done, they are being rewarded for the good things they have done.

One thing I'm taking into account is the criminal category. The criminal category takes into account these very elements.

He's in Category 1. He's Category 1 because he gets credit for the life he lived until this aberration in his life occurred.

JA 190. In other words, even if *Ward* supports the proposition that a court may consider the length of a defendant's pre-crime life history as a mitigating fact in sentencing, the district court considered that fact here by noting that it was already encompassed by the defendant's criminal history calculation.

The fact that the court may not have given that fact as much weight as the defendant believed it deserved is beside the point. A district court's consideration of a particular factor does not guarantee any particular weight will be assigned to that factor. *See United States v. Thavaraja*, 740 F.3d 253, 260 (2d Cir. 2014) ("The particular weight to be afforded aggravating and mitigating factors 'is a matter firmly committed to the discretion of the sentencing judge.'") (quoting *Broxmeyer*, 699 F.3d at 289)).

This is especially true here given the fact that the defendant's recidivism argument could serve as both a mitigating and aggravating factor. According to the defendant, he was a lower risk of recidivism because he led a largely crime-free life until he was in his mid-40s. But as the government pointed out at sentencing, a defendant's willingness to defraud so many people out of their money so late in his life suggests that he

may be “even less likely to change his ways after he serves his term of imprisonment.” JA 122.

Thus, given the ambiguity of this particular factor in determining recidivism risk and given the fact that the sentencing court gave due consideration to this factor among all of the other considerations and even commented on this factor, the district court’s judgment was not an abuse of discretion.

The same is true for the defendant’s argument regarding his work history. This issue was argued below, JA 100; JA 123, and as with the argument regarding his purported crime-free life, it is not clear that reviewing his work history militates in favor of a more lenient sentence. This Court has held that a defendant’s employment record is not “ordinarily relevant” and “will warrant departure in a relatively few instances.” *United States v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1990) (internal citations omitted). Moreover, there is nothing about the defendant’s employment history that would necessarily support a lesser sentence. Indeed, the record reflects that for the eight or nine years prior to his arrest, the defendant was committing the fraud in this case, was using investor funds to support himself and his family, and was failing to pay taxes. See JA 45; JA 123, JA 165; PSR ¶ 19.

In sum, the sentencing court considered the defendant’s argument on his employment history, gave him credit for “the good things he’s done

in life,” JA 190, and selected an appropriate sentence. Again, the fact that the court may not have given this fact as much weight as the defendant believed it deserved does not demonstrate that the district court’s judgment is unreasonable. *See Thavaraja*, 740 F.3d at 260; *Broxmeyer*, 699 F.3d at 289.

3. Neither the district court nor the government ratified the idea that 41 months was the maximum appropriate sentence.

The defendant’s final argument is that “the district court and the government unconsciously ratified the idea that a sentence of 41 months at most was appropriate at the change of plea hearing.” Def.’s Br. at 12. To support this argument, the defendant points to the sentencing court’s comments at the change-of-plea hearing. JA 74. As described above, during one of these exchanges, while advising the defendant of the implications of the appellate waiver in his plea agreement, the court stated in part, “you have the right to challenge if I go haywire and sentence you to 50 months, and not the 41 months.” JA 74. The court also said, “[y]ou can be assured I won’t exceed the 41 months, but if I do exceed it, you will have the right to appeal.” JA 74. Anticipating that the defendant might mistakenly take these remarks as a representation of a particular sentence, notwithstanding all written language in the plea agreement to the contrary,

the government noted that it was “important for Mr. Azpurua to know that, in fact, the Court does not know exactly what the sentence will be.” JA 83. In fact, government counsel gave a long explanation and an example to underscore the point and the sentencing court inquired of the defendant if he had reviewed “this” subject with his counsel. JA 83. The defendant affirmed that he had done so. JA 83.

Using this exchange, the defendant now argues that the court’s remarks about the appellate waiver indicate that the court unconsciously ratified a 41-months-or-lower sentence. Whether a sentencing court can “unconsciously” ratify an argument is perhaps beside the point, but regardless, the defendant also argues that the example government counsel provided, which was an example involving potential “future misbehavior by [the defendant],” provides further evidence of such unconscious ratification. Def.’s Br. at 13.

This argument lacks merit. First, these comments did not and could not constitute “ratification” of a 41-month sentence for the defendant, particularly since the court repeatedly and explicitly noted that the defendant’s sentence was then unknowable and would remain so until the court had considered all of the appropriate factors at sentencing. *See* JA 62-64; JA 69. Moreover, multiple provisions of the plea agreement made the same point. JA 38 (“The defendant un-

derstands that the Court is required . . . to tailor an appropriate sentence in this case and is not bound by this plea agreement.”); JA 40 (“The defendant expressly understands that the Court is not bound by this agreement on the Guideline ranges specific above.”).

Additionally, the defendant’s argument that the prosecutor “ratified” a 41-month sentence is belied by the record. The plea agreement made clear that the defendant could receive a sentence of up to 20 years, JA 37, and that any amendments, ratifications, or promises would need to be set forth in writing:

NO OTHER PROMISES: The defendant acknowledges that no other promises, agreements, or conditions have been entered into other than those set forth in this plea agreement, and none will be entered into unless set forth in writing, signed by all parties.

JA 44. Moreover, the plea agreement expressly provided that the government “reserve[d] its right to address the Court with respect to an appropriate sentence to be imposed in this case.” JA 41. Consistent with this provision of the plea agreement, the government argued for a sentence “at the middle to the top of the Guidelines’ range of 41 to 51 months.” JA 109. Clearly, neither the government nor the court “unconsciously ratified” a lower sentence.

Furthermore, even if the government had agreed that a sentence of 41 months was one of many sentences that would fall within the realm of an appropriate sentence in this case, that would still be irrelevant to the legal inquiry into the substantive reasonableness of the defendant's ultimate sentence. At most, such a statement by the government would indicate that a sentence of 41 months would have been within a range of reasonable sentences, not that any other sentence would be legally *unreasonable*. A sentence is only unreasonable when it is "shockingly high" or "otherwise unsupportable as a matter of law." *Rigas*, 583 F.3d at 123. Approval by government counsel of a particular sentence would not dictate that any other sentence would be shockingly high or otherwise unsupportable as a matter of law.

In sum, when viewed in context of the entire proceeding, the comments cited by the defendant were not meant to be a preview of a likely sentence, but were part of an example of what circumstances would allow the defendant to exercise his right to appeal his sentence. The government eliminated any possibility that the defendant might mistake the court's phrasing as a representation that he could expect a specific sentence, by clarifying that the defendant's ultimate sentence was unknowable at that time. The defendant's strained reading of the court's and

the prosecutor's comments ignores the context, purpose, and plain meaning of the exchange.

Conclusion

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

Dated: October 10, 2014

Respectfully submitted,

DEIRDRE M. DALY
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A handwritten signature in black ink, appearing to read "Michael McGarry". The signature is fluid and cursive, with a large loop at the end.

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,313 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, appearing to read "Michael McGarry", with a stylized flourish at the end.

MICHAEL McGARRY
ASSISTANT U.S. ATTORNEY