No. 10-1843

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS JOSEPH PETTERS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF AND ADDENDUM OF APPELLANT THOMAS JOSEPH PETTERS

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

By this appeal Tom Petters seeks vindication not just for himself but for the integrity of our criminal justice system. He was convicted of leading a Ponzi scheme. His accusers, though, were amongst the most prolific liars, forgers, and con artists in recent memory. By their own admission they conned most everyone they contacted for more than a decade. One of them was secretly in the federal witness security program because of his long record of committing similar grandiose frauds and then obtaining leniency via clandestine informant activity. To paraphrase our Supreme Court, the case against Tom Petters was "dirty" at best.

Needed was a cleansing bath of constitutional protections—the right to present a defense, the right to cross-examine "dirty" witnesses, and the right to a public trial. The overwhelming toxic publicity needed to be stemmed by a change in venue. He was denied all of this, which leaves a stain of doubt on the verdict. Then a 50-year sentence was imposed. Given the importance of the issues, the breadth of the record, and high stakes, thirty minutes for Appellant's oral argument is appropriate.

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JURISDICTIONAL STATEMENT

By indictment filed in United States District Court for the District of Minnesota, Appellant Thomas Petters was charged with offenses against the laws of the United States. On April 8, 2010 a judgment was entered disposing of all matters before the District Court. Mr. Petters filed a Notice of Appeal on April 13, 2010. [Docket Nos. 196, 400, 401.] Thus the District Court had jurisdiction, 18 U.S.C. § 3231, this appeal is timely taken from a final judgment, FRAP 4, and this Court has jurisdiction to adjudicate it, 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Issue #1:

Whether the Sixth Amendment right to present a complete defense is violated with the sealing and preclusion from evidence of a secret Witness Security Program ("WITSEC") file containing strong evidence of a cooperator's third-party guilt, dishonesty, and bias.

Chambers v. Mississippi, 410 U.S. 284 (1973)
Crane v. Kentucky, 476 U.S. 683 (1986)
Holmes v. South Carolina, 547 U.S. 319 (2006)
United States v. Bohr, 581 F.2d 1294 (8th Cir. 1978)

Issue #2:

Whether the Sixth Amendment right to confrontation is breached where cross-examination of a key cooperator and WITSEC participant is curtailed thereby interfering with the accused's ability to show a cooperator's third-party guilt, perjury, dishonesty, and bias.

Davis v. Alaska, 415 U.S. 308 (1974)
United States v. Bear Stops, 997 F.2d 451 (8th Cir. 1993)
United States v. Mulinelli-Navas, 111 F.3d 983 (1st Cir. 1997)

Issue #3:

Whether the Sixth Amendment right of a public trial is breached where: (1) the name and identifying information a cooperating "WITSEC witness" is sealed and a gag order imposed at pretrial proceedings; (2) a WITSEC file needed to impeach the cooperator, demonstrate his contemporaneous perjury, and introduce an alternative theory of the case is sealed; and (3) cross-examination of the cooperator is curtailed and an offer of proof based on the WITSEC file is sealed.

In re Oliver, 333 U.S. 257, 270 (1948)
Waller v. Georgia, 467 U.S. 39 (1984)
United States v. Thunder, 438 F.3d 866 (8th Cir. 2006)
United States v. Rosen, 487 F. Supp. 2d 703 (E.D. Va. 2007) (*Rosen VII*)

Issue #4:

Whether an accused is entitled to an appropriate theory-of-defense instruction where there is competent evidence in the record to support the theories that: (1) the accused was not aware of a fraud in his own company because of the numerous past legitimate deals that resembled the fraudulent ones as well as his delegation of duties to executives who appeared competent and responsible; and (2) the accused relied on the advice, oversight, and competency of his in-house and outside attorneys after he developed suspicions of fraud.

Mathews v. United States, 485 U.S. 58 (1988)
United States v. Casperson, 773 F.2d 216 (8th Cir. 1985)
United States v. Lindo, 18 F.3d 353 (6th Cir. 1994)
United States v. Rice, 449 F.3d 887 (8th Cir. 2006)

Issue #5:

Whether a presumption of jury prejudice arises because of the widespread community impact of the accused's alleged conduct and massive, inflammatory publicity.

Estes v. Texas, 381 U.S. 532 (1965)
Rideau v. Louisiana, 373 U.S. 723 (1963)
Sheppard v. Maxwell, 384 U.S. 333 (1966)
United States v. Skilling, 130 S. Ct. 2896 (2010)

Issue #6:

Whether a defendant is entitled to a reasonable sentence, taking into account mitigating circumstances and principal arguments of defense counsel.

Gall v. United States, 552 U.S. 38 (2007)
United States v. Villegas-Miranda, 579 F.3d 798 (7th Cir. 2009)

STATEMENT OF THE CASE

Appellant Thomas Petters was charged with multiple criminal offenses, first by complaint and later by indictment. [Docket Nos. 26, 79, 196.] The case was tried before a jury in United States District Court for the District of Minnesota, the Honorable Richard H. Kyle presiding. Trial began on October 28, 2009 and concluded on November 23, 2009. [Docket Nos. 325-357.] The jury reached its verdict on December 2, 2009 finding Mr. Petters guilty of all counts. [Docket No. 361.] The District Court entered its judgment on April 8, 2010, sentencing Mr. Petters to 600 months in the custody of the Bureau of Prisons. [Docket No. 400.]

STATEMENT OF THE FACTS

The record is formidable. There are more than two dozen volumes of transcripts and hundreds of exhibits, pretrial motions, and submissions. Far less detail is needed to decide the legal issues presented here however. What follows is a simplified version of the salient facts. Because no sufficiency-of-evidence argument is raised the government's evidence is not laid out in detail. Rather, the point is simply both sides submitted substantial evidence such that the result could have gone either way (the jury deliberated over the course of five days).

I. Tom Petters

Tom Petters was the founder and owner of Petters Company, Inc. ("PCI"), the company at the center of this case. PCI was his downfall, though it was but one chapter in his biography. [14 Trial Tr. at 2780-82.]

Mr. Petters grew up the son of a merchant in a small Minnesota town. He was a poor student but a brilliant entrepreneur, a talent that emerged early. While still in high school he started his first business, a retail electronics store. [14 Trial Tr. at 2766-67, 2772-75.]

He was a born salesman—energetic, optimistic, persistent. He held sales positions in Minnesota, Iowa, and Colorado. He tried his hand at opening his own business. Always looking to close the next deal, often succeeding, sometimes not.

His was the ebb and flow of the small business owner. [2 Trial Tr. at 231; 5 Trial Tr. at 771-73; 14 Trial Tr. at 2775-80.]

He returned to Minnesota in the late 1980s and formed Amicus Trading, the entity that would become PCI in 1994. His business was liquidating and diverting merchandise. A liquidation business purchases merchandise from a supplier that can't sell it for one reason or another. A diverting business (sometimes called the gray market) purchases licensed merchandise from designated retailers for resale to non-designated retailers. In either case, Mr. Petters was a broker—buying merchandise from one for re-sale to another. [2 Trial Tr. at 229; 8 Trial Tr. at 1371; 9 Trial Tr. at 1601; 10 Trial Tr. at 1706-07; 13 Trial Tr. at 2466; 14 Trial Tr. at 2780-82, 2792-98.]

Mr. Petters was doing real, legitimate business deals from the 1980s through the 2000s—hundreds of them. He teamed up with other liquidators and diverters to make ever-larger transactions. The corporate treasury financed deals made by other enterprises. [3 Trial Tr. at 398; 4 Trial Tr. at 556-57; 9 Trial Tr. at 1483-84, 1491-95; 10 Trial Tr. at 1688-90, 1696-98; 11 Trial Tr. at 1856-57, 1966, 2011; 13 Trial Tr. at 2411, 2419-47; 14 Trial Tr. at 2792-98; 15 Trial Tr. at 2858, 2871-72, 2895-96, 2904-12, 2972-80.]

By 1995 he had founded Petters Warehouse Direct ("PWD")—bricks-and-mortar stores where customers could purchase the goods he found. In the midst of

the dot-com boom he founded an Internet company called Redtag ("Redtag") which also sold the merchandise he was procuring. He created Petters Consumer Brands ("PCB") which acquired a brand-name license then manufactured and sold consumer electronics merchandise. He purchased Fingerhut ("Fingerhut"), a sizable catalog company, then the iconic Polaroid company ("Polaroid"), then the locally famous Sun Country Airlines ("Sun Country"). [5 Trial Tr. at 781-82, 785, 824; 6 Trial Tr. at 924; 10 Trial Tr. at 1665-67, 1696, 1727; 12 Trial Tr. at 2189; 13 Trial Tr. at 2536; 14 Trial Tr. at 2570, 2706, 2799-800, 2806; 15 Trial Tr. at 2846, 2868, 2874-75.]

He needed a holding company for all these interests so he formed Petters Group Worldwide ("PGW"), an umbrella for literally dozens of businesses. [14 Trial Tr. at 2674-76.] Here is just a sampling:

Company	Year	Business Purpose	Citation
PWD	1995	Bricks-and-mortar stores selling merchandise	5 Trial Tr. at 781
Redtag	1998	Internet company selling merchandise	14 Trial Tr. at 2799-800
Fingerhut	2002	Catalog and Internet company selling merchandise and real estate	10 Trial Tr. at 1727
PCB	2003	Manufacturing and selling consumer electronics using a licensed brand name	10 Trial Tr. at 1665-67
uBid	2003	Selling merchandise via Internet	15 Trial Tr. at 2846-48
SpringWorks	2004	Developing technology companies	13 Trial Tr. at 2523-26
Polaroid	2004	Developing, manufacturing, and selling consumer electronics products	14 Trial Tr. at 2575-76

Sun Country	2006	Minnesota-based passenger airline	15 Trial Tr. at 2874-75

By 2008 Tom Petters headed a corporate behemoth with more than 2000 employees. His associates and employees were in awe that he could juggle it all. His pace was frenetic, "[c]onstant ongoing motion" said a witness. [6 Trial Tr. at 974; 10 Trial Tr. at 1749-50; 13 Trial Tr. at 2507; 14 Trial Tr. at 2575, 2676, 2692, 2706-07.]

He had a family life too. He wed in the 1980s producing two children—a son John and daughter Jennifer. The marriage ended but the children remained the center of his world. He had two more boys with his fiancé in the 2000s. When he wasn't working he was with his family. He counted himself blessed. [14 Trial Tr. at 2769-71.]

His fortunes forever changed on March 13, 2004. His oldest, John, was murdered while vacationing in Italy. Once a wellspring of optimism, after his son's death grief and despair consumed Tom Petters. [15 Trial Tr. at 2879-91.] Said one witness: "He buried himself in his work. I felt his pace picked up from an already torrid pace to even a more torrid pace. I thought that was Tom's major way of dealing with it." [13 Trial Tr. at 2507.] And this: "It was horrible, as anybody can imagine if you're son was murdered. It was horrible for him. He was devastated. . . . During that time he grieved, you know, quite a bit. And then later, just kind of immersed himself in his work and lots of hours at work and that kind

of stuff as he tried to get back integrated into the company." [14 Trial Tr. at 2578-79.]

In his grief Tom Petters accelerated his pace. He started a charitable foundation in his child's honor. He became involved in the lives of young people. He immersed himself in work. He worked harder and longer, gave more, made new deals. He lived his life with a foot on the accelerator, and then he coped with grief by depressing it further. [15 Trial Tr. at 2879-91.]

And make no mistake, his companies were real. They hired real employees, sold real goods and services, and did legitimate business—save one. PCI. PCI crashed to the ground in 2008. *Infra* Statement of Facts § II.

His background is important because it was the bedrock of his defense. He had too much on his plate—too much for ten of him. He stopped paying meaningful attention to PCI. He thought his hand-picked business team was finding and financing real deals, just as he was finding and financing real deals. The death of his son darkened the blind spot, he said. [15 Trial Tr. at 2897-903, 2983-85.]

II. The PCI Fraud

PCI is at the center of this case. There was a huge fraud at the company, which the government said was reminiscent of Charles Ponzi's swindle.

Recall that PCI was a broker of large quantities of consumer merchandise. Like most enterprises it needed financing. Its principal funding mechanism was asset-backed commercial paper. It would borrow money from lenders and pledge collateral, usually the goods purchased but often additional security as well. The loans were short-term, the interest rates high. PCI occasionally used banks as lending sources but more often wealthy individuals, venture capital institutions, and hedge funds. [11 Trial Tr. at 2056-63; 14 Trial Tr. at 2789-90.]

PCI would deal in merchandise of many kinds. Clothing, appliances, consumer electronics, for example. It did a great many legitimate deals—hundreds in fact—but at some point fewer and fewer. By the time of its demise in 2008 it was doing few or no deals at all. [4 Trial Tr. at 544-46; 13 Trial Tr. at 2419-51.]

It was still borrowing money though. Just as before, it would enter into promissory notes and represent the loan money would be used to buy merchandise. But the money was not used for this purpose. Rather, newly-acquired money was used to pay off prior lenders. In simplified form the mechanics were:

Step 1: PCI enters into promissory note with lender;

Step 2: Lender provides money to "supplier";

Step 3: "Supplier" supposedly purchases merchandise with the loan funds but in reality most of the money would be routed to PCI;

Step 4: PCI uses the loan funds to pay off prior lenders plus interest;

Step 5: Additional lenders, lured by large returns PCI was offering, seek to lend money to PCI;

Step 6: Return to Step 1 and repeat.

Lenders lost $1.8 billion excluding interest. [4 Trial Tr. at 544-51; Docket No. 390 at 21.]

The generalized mechanics of the fraud were not in dispute. Rather the controverted part of the case was what Mr. Petters knew, when he knew it, and what was his intent. His former business associates—his former friends—who were running PCI day-to-day admitted key roles in the massive fraud and then cut deals with the government for leniency.

III. The Cooperators

The *post hoc* accounting verified the PCI fraud but the government's cooperators first revealed it. An informant tipped off the United States Attorney's Office in early September 2008 and by the end of the month federal authorities were raiding businesses, homes, and vehicles across the Twin Cities. Within days more cooperators came forward to cut deals. The rest followed suit within weeks. [4 Trial Tr. at 527; 8 Trial Tr. at 1384-86.]

A. Deanna Coleman

Deanna Coleman was hired as an office manager in 1993 but soon rose through the ranks to become Mr. Petters' trusted lieutenant. In her own words:

> My job is to manage the day-to-day operations of PCI, including approximately eight hedge funds that are invested in PCI, and the day-to-day cash flow. When Mr. Petters buys a new company or when an existing company needs funds, my job is to assist in finding the funds for the acquisition.

[4 Trial Tr. at 641-42, 647-48; 5 Trial Tr. at 795, 801.]

It was Coleman who would create false purchase orders so lenders would believe PCI was buying real merchandise. She would look at catalogs and claim PCI was buying hundreds of whatever cameras or televisions or gadgets she could find. She directly lied to lenders too—by phone, email, in-person, any communication medium really. She admitted setting up a shell corporation to steal even more money without Mr. Petters' knowledge. She lied in Minnesota state court to keep her ill-gotten gains. She lied to auditors. She lied after cooperating with federal authorities. She lied, and lied, and lied still more. [5 Trial Tr. at 757, 797-98, 842, 850-59; 6 Trial Tr. at 872-79, 892-93, 899-903.]

Nonetheless she became the government's chief informant and cooperator in early September 2008. She spent the month keeping up appearances, continuing to lie to PCI lenders, lying to Mr. Petters, trying to set up coworkers for prosecution, shredding documents. [5 Trial Tr. at 751-52; 6 Trial Tr. at 843, 893-94, 898-903.]

Looking at a sentence between 24 and 31 years, she bargained it down to a conspiracy count that carries a 5-year cap. On top of that she was promised a 5K motion in return for substantial assistance. What began as a three-decade sentence

could end as probation—but only if she were to satisfy the government. [5 Trial Tr. at 843-49.]

B. Robert White

Robert White associated with Mr. Petters since the 1990s and joined PCI in either 1995 or 1999, depending on which witness one believes. He had been a competitor but, like Coleman, became a trusted lieutenant and executive. [7 Trial Tr. at 1135-40; 10 Trial Tr. at 1710-12.]

The trust was misplaced. It was White who would forge the purchase orders to show retailers ordering Coleman's phantom merchandise. This was necessary so lenders would be tricked into believing there was a buyer for the imaginary wares—a deep pocket to generate the big margins. White did not stop at purchase orders either. He would forge bank statements, checks, tax returns. He joined Coleman to set up the dummy corporation to steal even more money without Mr. Petters' knowledge. He was arrested in his office with a file of bogus documents, scissors and paste nearby. [7 Trial Tr. at 1147-48, 1158, 1160-61, 1164, 1169, 1182, 1188, 1194-96; 8 Trial Tr. at 1270-75, 1286, 1320.]

Like Coleman, White faced a Guidelines sentence of 30 years but signed a cooperation agreement, aiming to get much less. [7 Trial Tr. at 1244-46; 8 Trial Tr. at 1267-69.]

C. Larry Reynolds

Larry Reynolds ran a California company called Nationwide International Resources ("NIR"), a liquidation and diverting business. He was once Mr. Petters' competitor but over time became a trusted business associate. Reynolds was constantly proposing real deals to Mr. Petters right up until PCI's demise in 2008. [9 Trial Tr. at 1477-78, 1491, 1601.]

But Reynolds also used NIR to perpetuate the PCI fraud. He posed as one of PCI's suppliers. Lenders would wire money into NIR's bank account thinking it was to pay for merchandise PCI was brokering. Reynolds just wired most of the money to Coleman at PCI, keeping a "commission." Over time $12 billion ran through Reynolds' bank account earning him "commissions" and other income in excess of $16 million. [9 Trial Tr. at 1495-503; PSR at 17.]

Like Coleman and White before him, Reynolds faced a multi-decade sentence. And like the others he opted to cooperate. The government agreed to inform the sentencing judge about his cooperation. [9 Trial Tr. at 146-61, 1586-87, 1619-20.] That would be the end of his significance but for a dark secret discovered months later. It will be revealed in a moment but first let us round out the cast of cooperators.

D. Michael Catain

Michael Catain was a Minnesota entrepreneur in the liquidation business. He too was originally one of Mr. Petters' competitors but eventually became a close business associate. He too did many real business deals with Mr. Petters. Catain formed Enchanted Family Buying Company ("EFBC") which was supposed to be a PCI supplier, and PCI's lenders would transfer money to it for that purpose. In reality the money would go back to PCI minus a "commission." Like the rest he became a cooperator. He hoped to greatly reduce his potential sentence from a 20-year presumptive term. [11 Trial Tr. at 1957-70, 1985-99, 2031-32.]

E. Greg Bell

Greg Bell was the manager of PCI's largest lender, the hedge fund called Lancelot. Bell would lend billions of dollars to PCI for bogus merchandise deals concocted by Coleman, White and the rest. He pled ignorance of the fraud until 2008. [11 Trial Tr. at 2055, 2075; 12 Trial Tr. at 2131-33.]

When payments became tardy he would extend the due dates. To conceal the delays he orchestrated "round trip" money transfers—sending money to PCI purportedly for new loans but knowing that same money would be sent right back to Lancelot to pay off a prior note. All of this was accounting gimmickry. So he could avoid telling his investors that he was receiving late payments from PCI. [11 Trial Tr. at 2069, 2083-84, 2087, 2092-93.]

Bell stockpiled money in hidden bank accounts in the event of a PCI collapse. When it happened in 2008 Bell's investors lost over $1 billion. He tried to walk away with millions from his secret cache. He was caught however. Bell pled guilty and was looking at a life sentence. He too testified against Mr. Petters hoping for leniency. [12 Trial Tr. at 2131-33, 2181-82.]

IV. The Reynolds Mystery

To this point the facts are unusual only as to the size and duration of the PCI fraud. That changed with the revelation of Reynolds' true identity.

The defense received a lead that Reynolds may have been in the federal Witness Security Program ("WITSEC") and brought a *Brady* motion seeking to discover whether it was true. The prosecution admonished the defense not to imply that anyone was in WITSEC. The prosecutors would send ominous letters, then filed motion papers suggesting imposition of sanctions, all the while playing coy with the truth—that Reynolds was in WITSEC and not because he happened to be in the wrong place at the wrong time. The District Court then ordered the defense not to mention Reynolds' name in connection with WITSEC. [3/18/2009 Tr. at 125-30; Docket Nos. 111, 163 at 2-3, 248 at 5-6.]

As to the substance, though, the prosecution was opaque. It would not say whether or not Reynolds was in WITSEC. It said—hypothetically—if a witness were in the program it would be *Giglio* material which only need be produced in

the event of the witness's testimony at trial. The defense disagreed vehemently but the Court took no further action on the matter. [3/18/2009 Tr. at 125-26; 4/9/2009 Tr. at 7-11; Docket Nos. 163 at 2-3, 178 at 2-3.]

And that was how it stood until June 2009 when the defense culled through thousands and thousand of documents to find one page—a copy of a check made out to a person by the name of Reservitz in Massachusetts. By itself this was innocuous but pieced together with news media accounts and other information the defense determined that Reynolds was actually Larry Reservitz, a con man from Massachusetts. [Docket No. 214.]

Though his birth name is Reservitz for simplicity we will continue to refer to him as Reynolds. His true background makes the PCI fraud seem almost mundane by comparison. Here are the particulars of what the government tried to hide:

Year	Reynolds' Treachery
1967	Graduated from law school and passed Massachusetts bar but soon used his father's law office for an insurance fraud scheme. His associates in the scheme included Boston organized crime figures. His role was to make false legal claims such as inflating the number of persons injured in an automobile accident.
1970	Upon receiving word of possibly being charged with fraud, he fled the United States for several nations in Europe and the Middle East.
1971	After his family left him, he met new wife but was caught by Scotland Yard and extradited to United States. Convicted of fraud and sentenced to 18 months in prison.
1974	Disbarred not just for the insurance fraud but also for taking a legal fee from a prospective client and then failing to provide services due to his flight from the country.
1980	Charged by Secret Service with possession of counterfeit currency.

1980	Conspired with Arcangelo DiFronzo, John Hardy, and Irwin Swartz to forge redemption letters for purpose of defrauding mutual funds out of millions of dollars.
1981	Attempted to pay off accomplice to avoid prosecution.
1982	Conspired with DiFronzo, Hardy and others by developing source in Bank of New England to obtain checking account information of Church of Scientology founder L. Ron Hubbard for purpose of multi-million dollar check fraud. Recruited accomplice to deposit counterfeit checks.
1983	Conspired with a number of individuals to purchase nearly two tons of marijuana.
1983	Conspired with these and other individuals to create $12 million in counterfeit checks drawn on account of EF Hutton.
1984	Conspired with organized crime figures George Kattar and Harvey Brower to extort money from Church of Scientology by supplying bogus information to that organization about the very scheme that he planned, discussed above.
1983-1984	Charged with two of his multiple crimes. Convicted of one and pled guilty to the other. Began cooperating by secretly recording and informing on associates.
1984	Conspired with and informed on Gerard Indelicato, John Gaeta, and others to defraud the federal government of education funds, and later to commit arson.
1980s	Recorded, informed on, and testified against associates as a member of WITSEC program. As a result of his cooperation his fraud cases and drug cases were consolidated, and he received an 18-month sentence (he served 13 months). Relocated courtesy of the WITSEC program.

This is what the defense found in the public domain, all confirmed later. [Docket No. 214.] Tom Petters knew nothing of the malignancy festering inside his company. [15 Trial Tr. at 2977-78.]

The defense informed the prosecutors and District Court of what it found, and in response the latter ordered these matters filed under seal. The defense

complied but objected to the veil of secrecy and gag order due to the right of public trial. Over these objections and those of news media outlets the District Court ordered these filings be published but heavily redacted to remove identifying information about this "WITSEC witness." [7/13/2009 AJB Tr. at 1-13, 21-31; Docket Nos. 207, 208, 225-28, 267.]

That did not solve the *Brady* problem, however. The government continued to resist the defense's efforts to investigate Reynolds, particularly his full WITSEC file from the United States Marshal's Service and Department of Justice. After a motion practice odyssey and a series of *in camera* reviews the defense received a partial, redacted copy, but only under the District Court's order mandating strict non-disclosure. Later the District Court granted the prosecution's motion *in limine* such that the WITSEC file could not be admitted into evidence. [7/13/2009 AJB Tr., *passim*; Docket Nos. 267, 289, 290, 291, 302, 310, 312-316, 319, 320, 332.]

Of note the defense remains bound by the District Court's secrecy orders and therefore cannot, in this public brief, fully lay out its arguments as to why the WITSEC file was so critical to the defense. By motion we have already objected to this state of affairs, and we re-state the objection here. Mr. Petters has a right to a full and public appeal, just as he had a right to a full and fair public trial.

V. The Media Frenzy

From the beginning of the case—September 2008 forward—the Twin Cities media directed a torrent of negative publicity at Mr. Petters. It lasted a full 15 months to the beginning of trial and accelerated just before and during trial. The government had unsealed its search warrant affidavit and publicly disseminated its accusations—including a purported confession and surreptitious recordings. Mr. Petters was arrested and detained prior to trial; photos in the newspapers were of a man in an orange jumpsuit. [Docket Nos. 108, 109, 128, 133-43.]

The media seemed to revel in his downfall. He was vilified as stories recounted the government's version of events. Then the guilty pleas and accusations of the cooperators. Then the complaints of lenders and former employees. Then the stories lauding the cooperators, despite their *tour de force* of deception. Then the opinions of "legal experts" that conviction was a foregone conclusion. All of this against the milieu of the worst American financial crisis since the Great Depression. [Docket Nos. 108, 109, 128, 133-43.]

The defense was rightly concerned about the jury pool's ability to filter out the media storm. The District Court denied an initial motion for change of venue but agreed to send out a juror questionnaire. The responses indicated most people had at least some familiarity with the case, and those that did had a strong negative reaction to Mr. Petters. During *voir dire* a number of jurors said, in open court and

in the presence of each other, they could not be impartial, one going so far as to say "I suspect he is guilty." Yet the District Court denied the defense's renewed motion for change of venue. Rather, a jury was impaneled, many of whom confessed a familiarity with the facts of the case. [Docket Nos. 147, 165, 306-07; *Voir Dire* Tr. at 29, 31, 67, 79-83, 99-100, 104-05, 117-20, 128.]

VI. The Trial

Trial began and the cooperators testified that Mr. Petters was the ring-leader of the PCI fraud. But they also conceded (having little choice) that he kept a frenetic schedule and did a tremendous amount of real business over the years. [*E.g.*, 4 Trial Tr. at 527-28, 556-57; 5 Trial Tr. at 771-73; 7 Trial Tr. at 1140-48.]

Reynolds was among the testifying cooperators. Despite his record of deceit he claimed to tell the truth this time—that Tom Petters was the mastermind and he had little to do with the PCI scheme until 2008 when Mr. Petters asked him to increase his involvement. On cross-examination the defense tried to elicit more details of his background—his penchant for hatching grandiose illicit schemes and, once caught, informing on others and blaming them in return for leniency. This was part of the defense declared in the opening statement. The defense also sought to impeach him about contradictions with his confidential WITSEC file. But the District Court cut off these lines of questioning. [1 Trial Tr. at 63-64; 9 Trial Tr. at 1457-628.] Reynolds' perjuries before the jury stood unexamined and unrebutted.

Mr. Petters put on his own defense. He called his own witnesses to confirm the real business he did, his frenetic schedule, his short attention span, the effect of his son's death. He testified on his own behalf too. He said he took on too much, tried to manage too many businesses at once. He stopped paying close attention to PCI and he trusted the cooperators to run it properly. He had an inkling something was wrong in 2008 but could not figure out what to do even after consulting his own in-house and outside attorneys. He raised money for PCI but thought the money was going to fund real deals procured by the cooperators. [13 Trial Tr. at 2407-558; 14 Trial Tr., *passim*; 15 Trial Tr., *passim*.]

The jurors, we now know, did not agree. They found him guilty and the District Court sentenced him to 50 years in prison. [Docket Nos. 361, 400.] This appeal is not so much about the result, though, as the process. The question is whether it was fair and impartial. It was not.

SUMMARY OF THE ARGUMENT

This case highlights the disturbing problem of false testimony by government cooperators. Cooperators manipulated Tom Petters. Once their scheme fell apart it was the cooperators who reduced their punishments by laying it all at Tom Petters' door. One cooperator in particular—Reynolds—was expert in this black art of defraud-and-blame. Yet the jury did not get this picture. It never saw Reynolds' extensive government fraud file because the District Court would not allow it. It never learned about his perjury before the jury. Nor the full extent of his past record, because the District Court cut off cross-examination. It never got instructions about Mr. Petters' reliance on his lawyers' advice.

Nor did the public get its due when the District Court closed proceedings. It also failed to counteract the overwhelmingly negative pretrial publicity against Mr. Petters. A myopic public picture emerged, at once biasing the minds of prospective jurors and depriving Mr. Petters of a fundamental constitutional safeguard.

Last the sentence imposed was unreasonable, particularly here where the evidence against the accused was tainted so.

A court of law is meant to be a truth-seeking forum, not an instrumentality to exact vengeance and certainly not an arena for unobstructed perjury. The integrity of the criminal justice system is at stake here. A new trial is needed.

ARGUMENT

The central question at trial: What Tom Petters knew and what was his intent. Intent inquiries are inherently subjective, redoubling the necessity for sound process. The trial thus called for a "charge fairly made and fairly tried in a public tribunal free of prejudice." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). A trial where cooperator bias was exposed in public, the accused's theory of defense fully explicated, and juror bias neutralized. This is not the trial he got.

I. Prologue: The Cooperator Problem

For decades the courts have been leery of cooperators. "The use of informers, accessories, accomplices, false friends, or any of the other betrayals are a dirty business which may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952). "By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993).

Despite the risks cooperator testimony is not just permitted but increasingly relied upon by law enforcement. The DOJ has said so. DOJ-OIG, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative*

Guidelines at 63-75 (Sept. 2005). As have researchers. *E.g.*, Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* at 1-13 (2009). And courts as well. *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001).

Too often the bargain is Faustian. "[C]onscienceless sociopaths" many cooperators are called, employing most any tactic to set up a target—"lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact" just for starters. Stephen S. Trott, *The Successful Use of Informants and Criminals as Witnesses for the Prosecution in a Criminal Case*, *in* DOJ, *Prosecution of Public Corruption Cases* at 118 (1988). The lying cooperator is a widely-recognized phenomenon. *E.g.*, Monroe H. Freedman, *The Cooperating Witness Who Lies—A Challenge to Defense Lawyers, Prosecutors, and Judges*, 7 OHIO ST. J. OF CRIM. L. 739 (2010).

Psychological research confirms jurors are not likely to take a cooperator's incentives much into account, though they ought to. Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witness and Jailhouse Informants on Jury Decision Making*, 32 L. & HUM. BEHAV. 137, 147-48 (2008). A study of death row inmates—later exonerated by DNA and other objective evidence—shows 45% of false convictions were caused in large measure by corrupt cooperators.

Northwestern University School of Law—Center on Wrongful Convictions, *The Snitch System* at 3 (2005); *see also* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005) ("Overall, in 43% of all exonerations (146/340) at least one sort of perjury is reported . . . .").

Though the problem has been acknowledged, it is said that traditional constitutional safeguards—public trial, discovery, cross-examination, and jury instructions among them—are a sufficient cure. *Hoffa v. United States*, 385 U.S. 293, 311 (1966); *Bernal-Obeso*, 989 F.2d at 335; *see also* Natapoff, *supra*, at 76-78. Mr. Petters was denied these protections.

II. Argument #1: The Sixth Amendment right to present a complete defense was violated with the sealing and preclusion from evidence of a secret WITSEC file containing strong evidence of a WITSEC cooperator's third-party guilt, dishonesty, and bias.

From the beginning the government enshrouded Reynolds with a veil of secrecy. Even after a specific defense motion the prosecution would not reveal his ignominious past. It took an independent investigation, luck, multiple rounds of motion practice and hearings. Finally the defense was given a partial version of the WITSEC file but its use was sharply circumscribed—it was sealed and to be used only for impeachment. The contents could not to be revealed to anyone, not the jury and certainly not the public. And crucially, it could not be admitted into evidence. [Docket Nos. 210-21, 245, 320.]

The defense told the District Court it needed to use the evidence to advance its theory of defense: "[A]ccording to their theory, [Mr. Petters] is conspiring with this individual to cover up this massive fraud. But if one knows everything about this individual, it's apparent that Mr. Petters has been fooled and himself defrauded, just as everybody else that has touched this individual over time has been defrauded as well." [7/13/2009 AJB Tr. at 36.] The restrictions violated Mr. Petters' Sixth Amendment right to present his defense theory that Reynolds masterminded the PCI fraud through his own manipulation and treachery. Had the WITSEC file been made available the jury would have gotten a complete picture of his *modus operandi*—his track record of schemes as brazen as the PCI fraud followed by striking favorable deals with the government. The jury would have fingered Reynolds as the true culprit, Tom Petters his patsy. The jury should have been made aware of his Machiavellian core. [7/13/2009 AJB Tr. at 34-39.]

A. Standard of Review

The right to present a complete defense is a constitutional one, *infra* Argument § II.B, requiring *de novo* review. *United States v. Rodriguez*, 581 F.3d 775, 796 (8th Cir. 2009). Nonetheless, this Circuit has said it reviews such questions for abuse of discretion, *United States v. Martin*, 369 F.3d 1046, 1058 (8th Cir. 2004), a stance that conflicts with sister circuits, *e.g.*, *United States v. Portela*, 167 F.3d 687, 705 (1st Cir. 1999). Because the inquiry is an application

of a constitutional standard to the facts of a particular case, the correct standard is *de novo* review. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001); *see also Ornelas v. United States*, 517 U.S. 690, 697-99 (1996); *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). The point is not a small one because deference to the District Court would significantly alter the prism through which the Court views the record. To protect the constitutional right to a fair trial no deference to the District Court is owed. *See* 1 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 2.19 (3rd ed. 1999).

B. The Right to Present a Complete Defense

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations and punctuation omitted). The right is "abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

Of note are the "third-party guilt" or "wrong person" cases—the line of cases where the accused wants to present evidence that he did not commit a crime but rather another person did. *Id.*; *Chambers v. Mississippi*, 410 U.S. 284, 298-302

(1973); *see also* Lissa Griffin, *Avoiding Wrongful Convictions: Re-Examining the "Wrong-Person" Defense*, 39 SETON HALL L. REV. 129 (2009). Such a theory of defense can be proved in a number of ways but typically the accused proffers evidence that another had the motive, opportunity, and propensity to commit the crime. Griffin, *supra*, at 131-32.

C. The Violations

It was key to the defense that it establish Reynolds' *modus operandi*. Here is the defense opening statement:

> The evidence is going to be that this man has a long history of concocting aggravated frauds, getting other people involved, and then testifying against them, blaming it all on them. And that is the cancer that Mr. Petters had in the middle of his company for 14 years without knowing about it.
>
> * * *
>
> All the while that Reservitz, as Reynolds, is committing fraud with Deanna Coleman and all the same while Reservitz, as Reynolds, is giving Mr. Petters advice, all that while he's in the Witness Protection Program. Sounds like a novel but it's true.

[1 Trial Tr. at 63, 64.]

Thus the defense wanted to show Tom Petters was not the ringleader of the PCI conspiracy as the government claimed, but rather Reynolds was whispering into Mr. Petters' ear like Iago. Reynolds was telling him that PCI's cash flow problems were due to late payments by retailers. That Reynolds would collect the money. That Reynolds would track the inventory. That Reynolds would handle the auditors. That Reynolds would fix everything. [15 Trial Tr. at 2980-81; 17

Trial Tr. at 3258-59.] In retrospect, Mr. Petters said, Reynolds was conspiring with Coleman and White all the while. [17 Trial Tr. at 3268.]

Some of Reynolds' past came out in the testimony but not nearly enough to drive the theory of defense home, particularly because the trial court choked off cross-examination. *Infra* Argument § III. The WITSEC file, by contrast, goes into great detail about Reynolds' various misdeeds. [Docket No. 343.] Due to the District Court's orders we cannot comment on the specifics of the WITSEC file in this public brief. This is both legally wrong and stylistically awkward, and the defense objects to it. Mr. Petters has the right to make full arguments on appeal, and in a public brief.

The public record does show, however, the defense's arguments that the WITSEC file contains plenty of parallels with the PCI fraud. [9 Trial Tr. at 1623-26.] Absent the sealing and court order precluding admissibility, the defense would have offered portions to prove *modus operandi* pursuant to FRE 404(b)—to show Reynolds was the fraudster and not Mr. Petters. *E.g.*, *United States v. Bohr*, 581 F.2d 1294, 1298-99 (8th Cir. 1978) (in prosecution of fraudulent scheme, evidence that defendant committed prior similar fraudulent scheme admissible to show *modus operandi* and identity); *United States v. Allen*, 76 F.3d 1348, 1364-65 (5th Cir. 1996) (permitting *modus operandi* evidence of prior fraudulent scheme where "the circumstances of the extraneous act were so similar to the offense in

question that they evinced a signature quality marking the extraneous act as the handiwork of the accused.").

The evidence supports the theory. The surreptitious recordings show Coleman and Reynolds saying that Mr. Petters was in "complete denial" and "talks . . . like these are real purchase orders." [GX 417A at 16-17.] Another has Coleman and White wondering aloud: "I think Tom believes that these are real deals half the time." [GX 403A at 13-14.] Then there is Mr. Petters telling Coleman, "Larry's got answers for everything." [16 Trial Tr. at 3229.]

There was evidence that Reynolds, Coleman, and White cooperatively lied to investors all the time. They would lie about warehouse inspections. They would lie about why payments were late. They would lie about auditors. Mr. Petters was not in the room when these lies were told. [3 Trial Tr. at 413-14, 425, 430-31; 5 Trial Tr. at 842; 6 Trial Tr. at 992-97, 1018; 10 Trial Tr. at 1651-52; 12 Trial Tr. at 2144-45; 2149-51.]

The jury could have found that Reynolds, in line with his prior track record, was moving Mr. Petters around like a chess piece. Reynolds was bringing Mr. Petters real deals, indicating he was bringing real deals to Coleman and White too. All the while he was procuring millions just for opening a bank account. What's more he would have plausible deniability if the scheme were to collapse.

The jury can't pass on a theory unless it sees the evidence—evidence that was denied here because of the Court's orders. The jury should have been given the opportunity to see the full extent of Reynolds' past to reach its decision. It should have seen the WITSEC file, accompanied by full cross-examination as put forth in the sealed offer of proof.

D. The Remedy

The error is constitutional and goes to the heart of Mr. Petters' theory of defense. For this reason it cannot be deemed harmless. *See Holmes*, 547 U.S. at 331. A new trial is the only meaningful remedy. *United States v. Veltmann*, 6 F.3d 1483, 1495 (11th Cir. 1993) ("[T]he trial court's discretion does not extent to exclusion of crucial relevant evidence. . . . We find that exclusion of this evidence impaired defendants' right to fully present their defense, requiring reversal and remand for a new trial.").

III. Argument #2: The Sixth Amendment right to confrontation was breached where cross-examination of a WITSEC cooperator was sharply and profanely curtailed, thereby interfering with the accused's ability to show the cooperator's third-party guilt, perjury, dishonesty, and bias.

Cooperator testimony is untrustworthy but nonetheless permitted in our system. The cleansing crucible of rigorous cross-examination is said to remove the stain. *Hoffa*, 385 U.S. at 311. The District Court cut off the defense's cross of Reynolds, thus leaving this trial tainted.

A. Standard of Review

This Circuit reviews evidentiary rulings regarding the scope of a cross-examination for abuse of discretion but "where the Confrontation Clause is implicated, [it will] consider the matter *de novo*." *United States v. Kenyon*, 481 F.3d 1054, 1063 (8th Cir. 2007). A Confrontation Clause violation is shown when a defendant demonstrates "that a reasonable jury might have received a significantly different impression of [a witness's] credibility had counsel been permitted to pursue the proposed line of cross-examination." *United States v. Morton*, 412 F.3d 901, 907 (8th Cir. 2005). But witness bias is not the sole consideration; the Sixth Amendment requires the accused be given an opportunity to present alternative theories of the case in his own defense, for example. *United States v. Mulinelli-Navas*, 111 F.3d 983, 992 (1st Cir. 1997); *United States v. Muhammad*, 928 F.2d 1461, 1467 (7th Cir. 1991).

B. The Right to Confrontation—Cross-Examination

Rigorous cross-examination is the key component to the Sixth Amendment right of confrontation. *Davis v. Alaska*, 415 U.S. 308, 315-17 (1974). Courts have emphasized the importance of broad cross-examination where the witness has had "prior dealings with the prosecutor or other law enforcement officials, so that the possibility exists that his testimony was motivated by a desire to please the prosecution." *United States v. Mayer*, 556 F.2d 245, 248 (5th Cir. 1977); *accord*

United States v. Brooke, 4 F.3d 1480, 1489 (9th Cir. 1993). The Sixth Amendment also requires that the defense be given a full and fair opportunity to flesh out alternative theories through cross-examination. *Mulinelli-Navas*, 111 F.3d at 992 ("The Sixth Amendment, and thus the constitutional minimum that must be allowed a criminal defendant before a trial court's discretion to limit cross-examination adheres, includes the ability to develop and present a defense.").

C. The Violations

The defense needed to cross-examine Reynolds to reveal his bias and penchant for criminal enterprise. The prosecutor fronted his long rap sheet and even threw in two more crimes not previously unearthed—a false insurance claim after the 1990s Los Angeles riots and a false birth certificate for his son. [9 Trial Tr. at 1461-75.] The defense's primary task, then, was to establish a theory of defense—that Reynolds had the guile to run the PCI fraud behind the scene and then lay it at Mr. Petters' door.

1. Contemporaneous Perjury

A key way to accomplish this work was to show Reynolds was conning the jury with bold-faced lies, while playing the part of a kind grandfather. The defense thus needed to call him on the lies he told the jury on direct. There was outright perjury here. Reynolds testified he had never been affiliated with the La Cosa Nostra organized crime organization, nor were his associates involved in any

organized crime. [9 Trial Tr. at 1476, 1560, 1587-88.] But these assertions are flatly contradicted by the WITSEC file, [Docket No. 343], which defense counsel pointed out at the time. [9 Trial Tr. at 1594, 1627.] Yet the District Court did not permit inquiry into it. [9 Trial Tr. at 1592-95.] It was critical that the jury know Reynolds could convincingly lie to the panel's face. That the panel know it had been duped.

2. Grandiose Fraudulent Schemes

The defense also needed to show how Reynolds would organize grand, brazen fraudulent schemes, just like the PCI scheme. The District Court would not allow the inquiry:

> Q. But your involvement predated that. You had a contact at the bank where L. Ron Hubbard had an account; is that correct?
> MR. MARTI: Objection, relevance.
> THE COURT: Sustained.
> MR. ENGH: May we approach?
> THE COURT: No.
> BY MR. ENGH:
> Q. Did you, sir, attempt in this case to defraud the bank holding the account of L. Ron Hubbard?
> A. Yes.
> Q. You did that by obtaining a check to the account; isn't that right?
> MR. MARTI: Objection.
> THE COURT: Sustained.
> BY MR. ENGH:
> Q. Did you ask someone named Phil Kempler to help you?
> MR. MARTI: Objection.
> THE COURT: Sustained.
> BY MR. ENGH:
> Q. Did you attempt, in this case, as a precursor to your cooperation, to establish a bank account in the Grand Cayman Islands?

MR. MARTI: Objection.
THE COURT: Sustained.
BY MR. ENGH:
Q. Who is someone named Tomini (phonetically spelled)?
MR. MARTI: Objection, relevance.
THE COURT: Overruled.
THE WITNESS: I believe Mr. Tomini was a person who tried to cash the L. Ron Hubbard check.
BY MR. ENGH:
Q. And the plan, and I'll be brief with you about this, was that the check would be cashed and taken down to the Cayman Islands, right?
A. I don't know.
Q. You had a plan to fly individuals to the Cayman Islands to protect the check and get the money?
MR. MARTI: Objection, relevance.
THE COURT: Sustained.
BY MR. ENGH:
Q. But what happens is the check doesn't get cashed; is that right?
MR. MARTI: Objection.
THE COURT: Sustained. Mr. Engh, let's go on to a different topic.

[9 Trial Tr. at 1584-86.] This is just one example because the District Court ruled that this sort of inquiry would be out of bounds. [9 Trial Tr. at 1592-95.] It also directed the defense to seal its offer of proof; "File that under seal," it said. [9 Trial Tr. at 1627.] That does nothing to advance the case in the jurors' minds though.

3. Recruitment and Manipulation of Accomplices

The defense also needed to show how Reynolds would use and manipulate accomplices—just as he used and manipulated Tom Petters. The District Court did not allow this either:

> Q. Well, how many people were involved in the $2 million transaction then?
> A. An awful lot.
> MR. MARTI: Objection, relevance.
> THE COURT: Sustained.
> BY MR. ENGH:
> Q. Schwartz was involved; is that right?
> MR. MARTI: Objection. Relevance.
> THE COURT: Sustained.
> BY MR. ENGH:
> Q. Did you, in conjunction with that case, ask Mr. Schwartz to lie about your involvement so that you couldn't be linked to it? Did you?
> A. Yes.
> Q. He was an old friend of yours and he did you a favor?
> A. Yes.
> Q. You thereby obstructed the investigation by having him lie for you?
> MR. MARTI: Objection. Relevance, argumentative.
> THE COURT: Overruled. No, excuse me. Sustained.

[9 Trial Tr. at 1581-82.]

* * *

And this just scratches the surface because the District Court made clear it would not let the defense delve into the details of the Larry Reynolds crimography, nor would it compel production of the WITSEC handler to impeach him. The District Court made its displeasure profanely clear, and the focus was on the amount of time the whole exercise would take: "[W]e're going to be here for a goddamn week if we keep this up." [9 Trial Tr. at 1592-95.] It would only permit an offer of proof, filed under seal. [9 Trial Tr. at 1623-28.] This was done, along with selected pages of the WITSEC file, showing the areas of inquiry that would

have occurred. [Docket No. 343.] Again we can't discuss the specifics in a public brief due to the District Court's orders, even though the law entitles us to make full arguments in a public brief.

The defense needed to delve into his *modus operandi* to show the jury how Reynolds operates. He views people as objects to be manipulated; he lies to their face without blinking; and he is so skilled he can even con WITSEC handlers, the most skeptical of audiences. If he can do all that, the defense tried to show, surely he can con the likes of Tom Petters. He can surely con a panel of jurors. The defense needed to elicit these points on cross-examination of this critical witness but was prevented from doing so. The judge was simply impatient, the worst reason to decide an issue. [9 Trial Tr. at 1592-95.]

D. The Remedy

Confrontation Clause violations are subject to harmless error analysis, *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), but the error cannot be harmless where the jury was prevented from hearing probative evidence as to the defense's alternative theory of the case. *United States v. Bear Stops*, 997 F.2d 451, 456-58 (8th Cir. 1993); *accord Mulinelli-Navas*, 111 F.3d at 992-93. A new trial is required.

IV. Argument #3: The Sixth Amendment right of a public trial was breached where: (1) the name and identifying information a WITSEC cooperator was sealed and a gag order imposed at pretrial proceedings; (2) a WITSEC file needed to impeach the cooperator, demonstrate his contemporaneous perjury, and introduce an alternative theory of the case was sealed; and (3) cross-examination of the cooperator was curtailed and an offer of proof based on the WITSEC file sealed.

Another shield against the cooperator deceit is the Sixth Amendment right to public trial. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (public trial discourages perjury). The defense pointed out violations of the right during a number of stages of the case, including trial. [9 Trial Tr. at 1626.] The District Court did not adhere to the right. Instead it tried this case behind a dark curtain. It closed a number of proceedings to protect the serial criminal and cooperator Reynolds.

A. Standard of Review

This circuit reviews closures for abuse of discretion, *United States v. Lucas*, 932 F.2d 1210, 1217 (8th Cir. 1991), which puts it at odds with other circuits, *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003). The correct standard for reviewing this key constitutional protection is *de novo*. *Id.*; *Supra* Argument § II.A.

B. The Right to a Public Trial

The concept of public trial predates the Republic by at least 700 years. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73 (1980) (plurality opinion). Trial conducted under cloak of secrecy was and is distrusted: "The

knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948). The rule of presumptive openness carried over the Atlantic and became embedded in our Constitution. *United States v. Thunder*, 438 F.3d 866, 867-68 (8th Cir. 2006).

1. Rationales for the Right

"[T]he public trial guarantee was created for the benefit of the defendant." *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). A public trial will:

- Discourage perjury and allow witnesses to come forward;
- Encourage judges, prosecutors, and other public servants to carry out their duties responsibly;
- Enhance public confidence in the justice system; and
- Reduce or eliminate the impulse for private retribution.

Waller, 467 U.S. at 46; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-09 (1984). One can see, then, why the right is so critical to keep cooperators in check—it exposes their acts and those of the government to the light of day, allowing the public to be the ultimate judge of whether the defendant has received a fair shake.

2. Proceedings Subject to the Right

The right extends to proceedings beyond jury trial. There is a right to openness, for example, during jury *voir dire*, *Press-Enterprise*, 464 U.S. at 505-09, suppression hearings, *Waller*, 467 U.S. at 46-47, and other pretrial proceedings, *United States v. Hitt*, 473 F.3d 146, 154 (5th Cir. 2006).

3. Closures

Though the Supreme Court has not squarely addressed the question, *Garcia v. Bertsch*, 470 F.3d 748, 754 (8th Cir. 2006), lower courts have distinguished between "total closures" and "partial closures"—the former denoting complete closure of the press and public from the courtroom, the latter something short of that. *Thunder*, 438 F.3d at 868. The distinction matters because courts generally employ a less-stringent test for partial closures; an "overriding interest" is required to justify a total closure, whereas a "substantial reason" will suffice in a partial closure case. *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994).

It is not always so clear how to distinguish one from the other, however. Partial restrictions may be used so pervasively that they "prevent the public from seeing and hearing the complete body of evidence in the case." *United States v. Rosen*, 520 F. Supp. 2d 786, 797 (E.D. Va. 2007) (*Rosen X*); *see also United States v. Smith*, 426 F.3d 567, 571 (2d Cir. 2005).

C. The Violations

1. Proceedings and Closures

Any time there is a restriction in the information flow during a presumptively-public proceeding, a closure results. *United States v. Rosen*, 487 F. Supp. 2d 703, 715-20 (E.D. Va. 2007) (*Rosen VII*). In *Rosen VII*, for example, the government sought to impose a code-word procedure to protect supposedly sensitive national security information from public disclosure. This was deemed a closure because "[t]he public's physical presence, by itself, does not guarantee that a trial is public; it is also necessary that the trial be reasonably comprehensible to the physically present public." *Id.* at 715 n.20.

Here there were multiple closures: (1) the name and identifying information of a "WITSEC witness" was sealed and a gag order imposed at pretrial proceedings [3/18/2009 Tr. at 127; 4/9/2009 Tr. at 5-6]; (2) the WITSEC file needed to impeach a key government witness and to introduce an alternative theory of the case was sealed and precluded from evidence [Docket No. 320]; and (3) cross-examination of the WITSEC witness was curtailed and offer of proof based on the WITSEC file was ordered sealed [9 Trial Tr. at 1626-27].

We can identify all of these as closures by referring back to the rationales for the public trial—discouragement of perjury, incentivizing public officials to act responsibly, and creating a public-opinion check on our official punishments. Here

a serial liar in the WITSEC program was given free rein to lie, knowing full well he wouldn't have to answer for the prior inconsistent statements in the WITSEC file. The executive branch got a free pass too, putting a dubious witness on the stand with little consequence. The public was and is robbed of its role as the ultimate judge of how well or poorly the system is working.

2. The *Waller* Test

The question left, then, is whether the closures pass constitutional muster. The test:

> [a] [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [b] the closure must be no broader than necessary to protect that interest, [c] the trial court must consider reasonable alternatives to closing the proceedings, and [d] it must make findings adequate to support the closure.

Waller, 467 U.S. at 48. No part of the test was met in this case.

a. Overriding Interest or Substantial Reason

The closures prevented the public from viewing important evidence. Thus there were complete closures requiring an overriding interest. *Rosen VII*, 487 F. Supp. 2d at 715 n.20. Moreover it is the government's burden to proffer a specific interest and the court's obligation to make specific, individualized findings. This is the extent of the District Court's findings:

> The Court would find that a premature revealing of the identity of a particular witness who is a participant in the Witness Protection Program could lead to endangerment of the witness's life, and/or his

> family's life and safety. And that is sufficient reason in the Court's opinion to issue the order that it did and I would continue with that order as we speak.

[7/13/2009 AJB Tr. at 8-9.] And that is all. Nothing about Reynolds' safety in particular is mentioned. Nothing addressing the news media's "outing" of him, which the District Court later acknowledged. [Docket No. 320.] No scrutiny of affidavits from the prosecutor or government agencies, because there were no affidavits. There was only a generalized, conclusory, unsupported finding. This has been found totally insufficient even when national security is supposedly at stake. *Rosen VII*, 487 F. Supp. 2d at 717; *see also United States v. Simone*, 14 F.3d 833, 840-42 (3rd Cir. 1994) (trial court reversed for closure of courtroom; generalized statements about coercive effects of press presence held an insufficient reason); *United States v. Peters*, 754 F.2d 753, 760-61 (7th Cir. 1985) (trial court reversed where it closed *voir dire* without identifying a compelling public interest).

There was no justification for the closures. Reynolds' identity had already been revealed publicly. By his plea, he forfeited any WITSEC privilege. *See* 18 U.S.C. § 3521(d) (WITSEC participants must agree not to commit further crimes). No informant privilege was invoked. *Roviaro v. United States*, 353 U.S. 53, 59-62 (1957). Moreover Mr. Petters' right to put on a defense trumps the government's interest in secrecy about the WITSEC program, particularly here where it did not

even bother to supply evidentiary support for the secrecy. *See United States v. Wilson*, 289 F. Supp. 2d 801, 817 (S.D. Tex. 2003).

b. No Broader Than Necessary / Narrow Tailoring

The second *Waller* factor asks whether the closure is narrowly tailored, no broader than necessary to meet the interest. Here the interest proffer was lacking, which should end the inquiry. *Rosen VII*, 487 F. Supp. 2d at 719. Even if we accept the District Court's reasoning, though, the closures swept too broadly. The WITSEC file is huge—hundreds of pages—and much of it would have been used at trial had the District Court not cut off the questioning. Much of it would have been publicly aired as an offer of proof to show Reynolds' perjury.

It is particularly telling that even now—before this higher court—the District Court's secrecy orders enshroud the proceedings, closing them off to public view. The public will not see, for example, the offer of proof regarding the Reynolds cross-examination. [Docket No. 343.] It was ordered confidential and sealed. How can it be said with any credibility that the information in the offer of proof is necessary to protect Reynolds? Or the integrity of the WITSEC program? Moreover the orders intrude on Mr. Petters' right to make complete arguments on appeal, and in a public brief.

c. Weighing of Alternatives

The District Court did not weigh any alternatives at all. The defense suggested incarceration or perhaps giving Reynolds a new identity after the proceedings ended. [Docket No. 281.] These suggestions were ignored, and were never even really considered.

d. Findings on the Record

As noted the District Court made the above findings on the record but they were woefully insufficient. The defense brought the issue up again at trial, but the District Court gave it little thought, and seemed not to know or appreciate the structural error that would result. [9 Trial Tr. at 1626.] Perhaps this explains why these closures occurred, and why they badly fail the *Waller* test.

D. The Remedy

A violation of the right to a public trial is structural error. *Waller*, 467 U.S. at 49 & n.9. Thus, "the settled rule of the federal courts [is] that a showing of prejudice is not necessary for reversal of a conviction not had in the public proceedings." *Waller*, 467 U.S. at 49 n.9; *United States v. Gonzales-Lopez*, 399 F.3d 924, 934 (8th Cir. 2005). Mr. Petters was *per se* denied a fair trial and so a new one is mandatory.

V. Argument #4: Mr. Petters was entitled to an appropriate theory-of-defense instruction because there was competent evidence to support the theories that: (1) he was not aware of a fraud in his own company because of the numerous past legitimate deals that resembled the fraudulent ones as well as his delegation of duties to executives who appeared competent and responsible; and (2) he relied on the advice, oversight, and competency of his in-house and outside attorneys after he developed suspicions of fraud.

Mr. Petters advanced two salient theories of defense: (1) that he was an unwitting participant in a fraud conceived by Reynolds, Coleman, White and possibly others (discussed throughout this brief); and (2) that he relied on his attorneys' advice with respect to his suspicions of fraud at PCI—which demonstrates good faith and innocent mind. [1 Trial Tr. at 60-70.] The District Court refused an appropriate instruction. This too was reversible error.

A. Standard of Review

This Circuit has said it will review for abuse of discretion a district court's refusal to give a theory-of-defense instruction. *United States v. McCourt*, 468 F.3d 1088, 1093-94 (8th Cir. 2006). This standard conflicts with sister circuits which review such matters *de novo*. *E.g., United States v. Jackson*, 598 F.3d 340, 345 (7th Cir. 2010).

B. Right To Theory-Of-Defense Instruction

A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *accord United States v.*

Casperson, 773 F.2d 216, 223 (8th Cir. 1985). Sister circuits have said this rises to a constitutional right. *United States v. Escobar de Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984).

A reliance-on-counsel defense has two elements: (1) the accused fully disclosed all material facts to his attorney before seeking advice; and (2) he actually relied on his counsel's advice in the good faith belief that his conduct was legal. *United States v. Rice*, 449 F.3d 887, 897 (8th Cir. 2006). "[A] defendant who identifies any evidence supporting the conclusion that he or she has fully disclosed all pertinent facts to counsel, and that he or she has relied in good faith on counsel's advice, is entitled to a reliance jury instruction." *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994).

C. The Violations

Defense counsel asked for appropriate theory-of-defense instructions. The District Court refused to give them, [17 Trial Tr. at 3300-04], which is reversible error.

1. The Overarching Theory of Defense

Mr. Petters needed to inculcate his theory that Reynolds, Coleman, White and possibly others were defrauding PCI lenders, and so too they were defrauding Mr. Petters. The defense wanted to make these critical points in its theory-of-defense instruction:

- Mr. Petters and his companies had done many real, legitimate deals with the very same large retailers Coleman and White claimed were buying the fraudulent PCI deals, which means Mr. Petters would have reasonably believed Coleman and White were procuring or financing real deals with these same retailers;

- He paid less and less attention to PCI as time went on and in particular after his son's death, but rather put executives in charge whom he believed to capable;

- He was unaware of any fraud until deep into 2008, at which time he took steps to discover the extent of the fraud and its perpetrators.

The defense submitted an instruction in this regard, [Docket No. 355 at 2], fully supported by the evidence. *Supra* Statement of the Facts §§ I, VI. But the District Court refused to give it. Instead the District Court gave a cursory instruction. [Docket No. 350 at 47.]

The bare bones did not suffice here, where a man's life was at stake. Mr. Petters needed the District Court to give some context for his theory of defense, an explanation for why this big fraud could go on in his own company undetected. The proposed theory of defense would have done that, and because the District Court refused to give the instruction Mr. Petters was wrongly convicted.

2. The Reliance-on-Counsel Theory of Defense

Similarly the defense needed the District Court to give an appropriate reliance-on-counsel instruction. [Docket No. 355 at 5.] The record supports the instruction. Mr. Petters' testimony was:

- He believed his attorneys and accountants vetted each PCI transaction;
- He informed his attorneys of his suspicions there was some degree of "bad receivables" or possibly fraud at PCI, beginning in 2007 and into 2008;
- His attorneys advised him to perform an internal investigation, and in the near term they advised that Reynolds assist with the investigation.

[15 Trial Tr. at 2898-900; 16 Trial Tr. at 3058-62, 3117-18, 3203; 17 Trial Tr. at 3260-61.]

The record is replete with testimony of his attorneys' involvement in PCI affairs. His counsel were heavily involved in many PCI transactions, including those charged in the indictment. His counsel drew up all the promissory notes. His counsel assured investors that lawsuits against PCI were frivolous. His counsel assured investors all was well at the company. [3 Trial Tr. at 388, 397, 413-14, 448, 457-58, 479-80; 5 Trial Tr. at 830-39; 10 Trial Tr. at 1676, 1828; 11 Trial Tr. at 1937-39; 12 Trial Tr. at 2149-50.] Mr. Petters spent most of his time at work with chief in-house counsel David Baer, who had an office adjacent to his. [14 Trial Tr. at 2707.]

All of this directly contradicts the government's theory that Mr. Petters walled off PCI from the rest of his companies so as to avoid detection. The jury should have been instructed regarding reliance-on-counsel to show Mr. Petters had innocent intent.

D. The Remedy

The accused's theory of defense is a key component of the right to fair trial. A violation cannot be harmless, and particularly not in this case. *Escobar de Bright*, 742 F.2d at 1201-02. A new trial is required. *Id.*

VI. Argument #5: Due to the overwhelming inflammatory publicity a presumption of prejudice arose, such that venue should have been transferred.

The case made national news and the brunt of the media coverage was in the State and District of Minnesota. It was a firestorm. The coverage was inflammatory and pervasive to the point no objective observer could be confident the jury was not tainted by it. [Docket Nos. 108, 109, 306; *Voir Dire* Tr. at 48.]

A. Standard of Review

This Circuit has said it will "review the denial of a change of venue for abuse of discretion." *United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001). This is at odds with sister circuits which "review *de novo* whether presumed prejudice tainted a trial, and this review includes conducting an independent evaluation of the facts." *United States v. Skilling*, 554 F.3d 529, 557-58 (5th Cir. 2009), *aff'd in part and vacated in part*, 130 S. Ct. 2896 (2010). *De novo* is the correct standard in this important constitutional inquiry. *Supra* Argument § II.A.

B. The Right to Impartial Jury—Inflammatory Publicity

More than a century ago Justice Holmes said: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). Widespread inflammatory media coverage will enter the subconscious of prospective jurors, destroying their collective objectivity and with it the defendant's hope for a fair trial. *Irvin v. Dowd*, 366 U.S. 717, 727 (1961) ("The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental process of the average man."); *accord Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In these cases prejudice is presumed, *Estes*, 381 U.S. at 542-44, a wise rule considering subsequent psychological research. Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity*, 3 PSYCH., PUB. POL'Y & L. 428, 437 (1997).

The presence of widespread inflammatory publicity, then, prudentially counsels for change of venue. It is far more than an aspirational ideal, however. Adverse pretrial publicity implicates the accused's right to due process, *Rideau*, 373 U.S. at 729, and Sixth Amendment right to an impartial jury, *United States v. Skilling*, 130 S. Ct. 2896, 2912-13 (2010).

C. The Violations

Writing for the majority in *Skilling*, Justice Ginsburg cited the above precedents and wrote of four factors relevant to a presumption of prejudice: (1) size and characteristics of the community in which the crime occurred; (2) news stories containing "confession[s] or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; (3) trial swiftly following on the heels of high levels of publicity; and (4) jury acquittal or decisions inconsistent with prejudice. 130 S. Ct. at 2915-16. Jeff Skilling could not show presumed prejudice, the High Court held, because there were 3 million in the Houston juror pool, there were no confessions broadcast, the publicity dropped off over the years, and most importantly the jury acquitted him on some counts. *Id.* Here, there were a good number of potential jurors in the pool, so for the sake of argument let us assume that factor does not favor a presumption. The rest do.

1. Publication of Highly Prejudicial Information

The search warrant was executed in late September 2008, an event that was broadcast across the Twin Cities. The search warrant affidavit was unsealed for unexplained reasons. Mr. Petters was arrested in early October of that year and detained pending trial. Inflammatory claims stemming from those events were widely published:

- That he had confessed to a FBI agent at his Las Vegas hotel room;

- That he had been secretly recorded confessing to the PCI fraud;
- That he had attempted to flee to avoid prosecution;
- That he had encouraged White to flee so as to preclude an adverse witness;
- That his associates were all pleading guilty and implicating him;
- That he was the cause of numerous business bankruptcies and loss of jobs;
- That he lived a lavish lifestyle with expensive homes and cars and a $10 million gambling debt; and
- Most every photo depicted him in an orange jumpsuit looking down and away from the camera—an unflattering pose.

These details were published over, and over, and over again in subsequent news stories beginning in 2008 and continuing before, during, and after trial. [Docket No. 128, Appx. B.]

Witness too the public anger, stoked not just by the charges themselves but also the environment of fear and uncertainty of 2008. That was the year the American economy nearly imploded, the year the housing bubble popped. Unemployment and federal bailouts made Wall Street a public enemy. Mr. Petters was lumped in with all of this. [Docket No. 128, Appx. B.] Witness also the crass blogosphere, at once reflecting the public anger and inflaming it:

- "I hope this puke gets life!! He's lived the high life for two decades. F'ing people over.

- "Really, it was divine greed and willful ignorance. I hope we have to build another prison to hold all the scumbags guilty in this mess."

[Docket No. 109 at 7.]

In *Rideau* the court held a public airing of taped confession was prejudicial/ 373 U.S. at 727. The perpetual news cycle of Mr. Petters' arrest and supposed confessions (in person and on recordings) do not present any different scenario.

2. Timing of Publicity and Trial

There was approximately one year from the search warrant to the trial, and the media stories were constant throughout. The stories were more numerous at time of the search warrant and at trial, but that only bolsters the case. The rules of primacy and recency mean publicity heard first and last will make the greatest impact. *E.g.*, Ryan P. Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct*, 59 OKLA. L. REV. 479, 512-16 (2006).

The news media was conspicuously part of the trial rather than a chronicler of it. Reporters clogged the same sidewalks, skyways, and hallways the jurors passed. Television trucks were constantly parked in front of the courthouse. Daily news of the Petters case appeared all over the newspapers, airwaves, cyberspace. This is all well-documented by news organizations. *See, e.g., Special Project: The Tom Petters Fraud Case*, MINNEAPOLIS STAR-TRIBUNE (Supp. 2010), *available at* <www.startribune.com>. Toward the end of the trial a former PCI lender set up a

website to voice his complaints about Mr. Petters and a court-appointed receiver's handling of his affairs. The lender started running daily propaganda stories in the *Star-Tribune*. [Docket No. 354.] It was the same type of atmosphere the Supreme Court found offensive and prejudicial in *Estes*, where the court held "[t]he conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt and innocence." 381 U.S. at 545.

3. Jury's Ultimate Decision

Here the jury convicted Mr. Petters of all 20 counts. These jurors gave Mr. Petters no quarter during trial or after. As in *Sheppard*, there was a total conviction and there is no doubt that at least some of the media firestorm reached the jury. 384 U.S. at 335 n.1, 357. A sampling of juror questionnaire responses:

- "Just that he was charged, arrested, and that he had ownership in multiple companies."
- "Petters was arrested and charged with money scheme, his associates have also been charged and have provided evidence against him. Read about his youth and career."
- "Ponzy [sic] scheme."

Voir dire also revealed exposure to the media deluge. [*Voir Dire* Tr. at 29, 31, 67, 79-83, 99-100, 104-05, 117-20, 128.] And these are just the jurors who admitted to the media exposure or who were consciously aware of it.

The final blow came after verdict and sentencing, when jurors actually granted interviews to the news media. "We never thought he was innocent," said the foreman. David Phelps & Aimee Blanchette, *E-mails Secured Petters Verdict*, MINNEAPOLIS STAR-TRIBUNE (Dec. 21, 2009). "When you do such an extravagant crime, you have to do your time for it is how I feel. . . . You made your bed and now you got to lie in it," proclaimed another. Tim Blotz & Tom Halden, *Tom Petters Gets 50 Years in Prison for Ponzi Scheme* (Apr. 8, 2010), *available at* www.myfoxtwincities.com>. The juror revelry in Mr. Petters' fall is eyebrow-raising to put it mildly. The jurors were fully aware of the spotlight, and unwilling to return to their homes and neighbors with anything other than a guilty verdict.

D. The Remedy

Because of the presumption of prejudice a new trial is mandatory. The District Court must be directed to transfer venue to an appropriate federal district court. *Sheppard*, 384 U.S. at 363.

VII. Argument #6: The sentence imposed was unreasoned and unreasonable, in that the District Court did not take into account mitigating circumstances and the principal arguments of defense counsel.

Last we turn to the Mr. Petters' sentence—50 years. [Docket No. 400.] Standing alone the number gives one pause; it is a barbaric sentence. Even more so when one considers this is a nonviolent, first-time offense. A sentence of this

magnitude calls for a more thoughtful rationale than applied here. We seek remand for resentencing.

A. Standard of Review

Post-*Booker* a district court's sentencing procedures are reviewed *de novo*, *United States v. Mendoza*, 510 F.3d 749, 754 (7th Cir. 2007), but its ultimate sentencing decisions are reviewed for reasonableness under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007).

B. The Post-*Booker* Sentencing Regime

In *Gall* the Supreme Court laid out the appropriate post-*Booker* sentencing procedures:

> Step 1: Correctly calculate the appropriate Guidelines range, which is to be used as the "starting point and the initial benchmark";
>
> Step 2: Give the parties an opportunity to argue for whatever sentence they deem appropriate;
>
> Step 3: Consider all the factors laid out in 18 U.S.C. § 3553(a), taking care not to presume the Guidelines range is reasonable;
>
> Step 4: Make an individualized assessment based on the facts presented, taking care to lay out the justification in some detail "to allow for meaningful appellate review and to promote the perception of fair sentencing."

Gall, 552 U.S. at 49-50.

C. The Violations

We might quarrel with the District Court's performance on Steps 1 and 2 of the *Gall* case except the loss amount drove the Guidelines range so high that a deduction here and there would make no difference. The presentence report put the offense level at 55, [PSR at 24], and the District Court tacked on an additional 2 levels, [Sent. Tr. at 21]. Even a 14-level reduction from the District Court's calculation calls for a life sentence under the Guidelines grid, U.S. Sent. Comm'n, *Guidelines Manual* at 402 (Nov. 2009), a disturbingly common scenario in today's white collar arena. *E.g., United States v. Adelson*, 441 F. Supp. 2d 506, 508-12 (S.D.N.Y. 2006) (reducing presumptive Guidelines sentence of life to 42 months due to the "inordinate emphasis the Sentencing Guidelines place in fraud cases on the amount of actual or intended loss"), *aff'd*, 301 Fed. Appx. 93 (2nd Cir. 2008).

Where the District Court must be faulted, though, lies in Steps 3 and 4, notably its silence as to Mr. Petters' arguments for a reduced sentence. He filed a thorough sentencing memorandum, making clear a reduced sentence was appropriate due to: (1) lack of empirical basis for the harsh sentences meted out to white collar offenders based on loss calculations; and (2) sentencing disparities *vis-à-vis* similarly-situated defendants. [Docket No. 390, *passim*.] The points were repeated at the sentencing hearing. [Sent. Tr. at 5-18, 22-32.]

Gall mandates that a sentencing judge "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." 552 U.S. at 51. The court "must give the reasons for its sentencing decision and address all of a defendant's principal arguments that are not so weak as to not merit discussion." *United States v. Villegas-Miranda*, 579 F.3d 798, 801 (7th Cir. 2009).

The District Court did not to appreciate this duty. In response to defense counsel's lengthy argument regarding the lack of empirical basis for the Guidelines, the court said: "What do you want me to do with that objection?" [Sent. Tr. at 6.] It went to say the argument was really a pre-*Booker* one that had no bearing on the Court's decision. [Sent. Tr. at 7-8.] In its sentencing pronouncement there was no discussion at all regarding the failure of empirical basis for the Guidelines range, nor how to reconcile the huge sentencing disparities this sentence would create. [Sent. Tr. at 41-51.]

This was error, demonstrated by *Gall* and *Villegas-Miranda*. The District Court has a lot of discretion but that discretion does not extend to ignoring valid defense arguments. This is particularly true here, where the sentence is so harsh.

D. The Remedy

The sentence is exorbitant, and for that reason alone it calls for the time and effort to address the defendant's principal arguments. This was not done in

violation of binding Supreme Court directives and sound judicial practice. A remand for resentencing is required. *E.g.*, *Villegas-Miranda*, 579 F.3d at 804.

CONCLUSION

The Court has an opportunity to ensure the accused has a full and fair opportunity to present evidence in his defense, to cross-examine adverse witnesses (particularly cooperators), to a public trial, and to instruct the jury as to his theory of defense. The Court can ensure the trial forum is fair, in the sense that it is not corrupted by the latent bias born of inflammatory publicity. An opinion vindicating these principles will keep the law vibrant. This is what we seek.

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Respectfully submitted,

s/ Eric J. Riensche

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