No. 10-1843

Criminal

In the

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

UNITED STATES OF AMERICA,

APPELLEE,

v.

THOMAS JOSEPH PETTERS,

APPELLANT.

Appeal from the United States District Court for the

District of Minnesota

BRIEF OF APPELLEE

B. TODD JONES
United States Attorney

JOSEPH T. DIXON, III
JOHN R. MARTI
TIMOTHY C. RANK
Assistant U.S. Attorneys
District of Minnesota
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600

Attorneys for Appellee

SUMMARY OF THE CASE

Defendant Thomas Joseph Petters was the sole owner and chief executive officer of a small company Petters Company, Inc. ("PCI"). PCI was used to perpetrate a **multi-billion** dollar Ponzi scheme. Petters acknowledged that he furthered the scheme, but claimed he did so unknowingly. His defense: there was a 15-year conspiracy to enrich Tom Petters with hundreds of millions of dollars without Tom Petters knowing. The defense was as brash and unsubstantiated as the Ponzi scheme itself. The evidence against him was overwhelming.

On appeal, defendant argues the district court erred (i) by denying his motion to change venue; (ii) by precluding the defendant in pretrial proceedings from specifically identifying a potential witness as a participant in the WitSec Program and from publishing sensitive WitSec Program files through court filings; (iii) by limiting cross-examination to admissible testimony; (iv) by failing to provide the exact wording of his theory-of-defense instruction and denying an unsupported advice-of-counsel instruction; and (v) by sentencing the defendant to fifty years, when his guideline was life imprisonment.

The arguments are sufficiently covered by the briefs. Fifteen minutes of oral argument is adequate.

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STATEMENT OF THE ISSUES

I. The District Court Did Not Abuse Its Discretion In Denying Defendant's Motion To Change Venue Where The Defendant Failed To Meet His Burden Of Demonstrating The Jury Pool Was Prejudiced.

United States v. Rodriguez, 581 F.3d 775 (8th Cir. 2009)
United States v. Blom, 242 F.3d 799 (8th Cir. 2001)

II. The District Court Did Not Abuse Its Discretion In Requiring The Parties To Refrain From Identifying A Potential Witness As A Participant In The WitSec Program In Pretrial Proceedings And Sealing Inadmissible WitSec Program Records Provided To The Defendant In Discovery.

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III. The District Court Did Not Abuse Its Discretion In Limiting The Cross-Examination Of A Witness To Relevant And Proper Cross-Examination In Accordance With The Federal Rules of Evidence.

United States v. Crump, 934 F.2d 947 (8th Cir. 1991)
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IV. The District Court Did Not Abuse Its Discretion By Providing The Defendant With The Substance Of His Theory of Defense Instruction And Rejecting An Unsupported Advice-Of-Counsel Instruction.

United States v. Gary, 341 F.3d 829 (8th Cir. 2003)
United States v. Rice, 449 F.3d 887 (8th Cir. 2006)

V. The Sentence Imposed By The District Court For An Unrepentant Defendant Who Had Captained One Of The Largest Frauds In United States' History Was Fair And Reasonable.

United States v. Feemster, 572 F.3d 455 (8th Cir. 2009)
United States v. Roberson, 517 F.3d 990 (8th Cir. 2008)
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STATEMENT OF THE CASE

On September 8, 2008, Deanna Coleman, a long-time employee of Petters Company, Inc. ("PCI"), walked into the United States Attorney's Office with her attorney and revealed to law enforcement officers that for more than 10 years she had assisted Thomas Joseph Petters, the owner of PCI, Petters Group Worldwide LLC ("PGW"), Polaroid Corporation and Sun Country Airlines, in executing a **multi-billion** dollar Ponzi scheme. (Dkts. 1–24.)

After law enforcement used Coleman to conduct days of consensual recordings, corroborating her story and capturing defendant Petters (and others) discussing and directing the scheme, U.S. District Judge Ann Montgomery issued search warrants for Petters' business headquarters, Petters' home, and other businesses and residences in Minnesota. (Dkts. 1–24.) On Wednesday, September 24, 2008, the search warrants were executed (along with other warrants executed in Florida, Los Angeles, and Las Vegas).

Immediately following the execution of the search warrants, the defendant went to the media, characterizing the government investigation as an "unnecessary situation." See Liz Fedor and David Phelps, "Tom Petters gets back to business day after raid," Minneapolis-St. Paul Star Tribune (Sept. 25, 2008) (see Gov't Response to Defendant's Pretrial Motions (Dkt. 146), Ex. 1, p. 1); see also

KAALtv.com, "Tom Petters meets with employees after federal raid." (Sept. 26, 2008) (quoting defense counsel, "We want to find out what's going on. We just don't know.") (see i.d., at p. 4).[1]

On Friday, September 26, 2008, in accordance with Rule 41 of the Federal Rules of Criminal Procedure, law enforcement returned the warrants, and the warrants became public with the Clerk of Court. (Dkts. 1–24.) News sources then reported the nature of the allegations as set forth in the search warrants, thereby alerting both current and potential investors.[2]

On October 1, 2008, Robert White, another officer of PCI who had confessed his participation in the defendant's fraud on September 24, 2008, recorded the defendant discussing plans to flee from the jurisdiction. (See Complaint Aff. of Dan Harris (Dkt. 26); Detention Hr'g Gov't Ex. 6 (Petters 10/1/2008 recording).)

[1]The Statement of the Case includes media coverage concurrent with the legal proceedings to provide relevant context for the defendant's arguments relating to pretrial publicity and the district court's rulings.

[2]At trial, the government introduced a fraudulent lulling letter sent by defendant Petters on September 25, 2008 to investors. (Gov't Ex. 171.)

On October 2, 2008, a criminal complaint was issued, charging defendants Petters and Larry Reynolds with conspiracy, mail fraud, wire fraud, money laundering, and obstruction of justice. (Dkt. 26.)

On October 3, 2008, Petters was arrested and made an initial appearance. (Dkts. 28-29.) (Reynolds was also arrested in California.)

On October 7, 2008, a detention hearing was held before Magistrate Judge Jeffrey Keyes. The defendant was ordered detained. (Dkt. 55.)

On October 8, 2008, three of the defendant's co-conspirators, Robert White, Deanna Coleman, and Michael Catain, entered guilty pleas to charges related to their participation in the defendant's scheme and agreed to cooperate.

Coleman and White, both long-time Petters associates and PCI officers, pleaded guilty to assisting defendant Petters execute the massive fraud scheme. Coleman, the woman who had brought the scheme to the attention of law enforcement, pleaded guilty to conspiring to commit mail fraud, in violation of 18 U.S.C. § 371. See United States v. Coleman, Cr. No. 08-304 (RHK). White pleaded guilty to mail fraud and money laundering, in violation of 18 U.S.C. §§ 1341 and 1957. See United States v. White, Cr. No. 08-299 (RHK).

Catain, also a long-time Petters associate, pleaded guilty to conspiring with Petters to launder over $6 billion over just 6 years, in violation of 18 U.S.C. § 1956. See United States v. Catain, Cr. No. 08-302 (RHK).

Days before, on October 3, 2008, a Temporary Restraining Order was issued by Judge Montgomery, in a parallel civil matter that, among other things, precluded Petters and the other defendants from transferring, disbursing or otherwise disposing of funds and assets. See United States v. Thomas Joseph Petters, et al., Civil No. 08-5348 (ADM/JSM).

On October 14, 2008, the United States and defendant Petters entered into a Stipulated Order for Preliminary Injunction, Appointment of a Receiver and Other Equitable Relief, which froze his assets and appointed a receiver over Petters' companies.

After the defendant's arrest, as early as October 16, 2008, Petters' defense began an affirmative campaign of extra-judicial statements to the media. See, e.g., Dave Phelps, "Petters sits in jail 'mortified' yet positive," Minneapolis-St. Paul StarTribune, (Oct. 16, 2008) ("the criminal defense attorney for Tom Petters went on the offensive Wednesday . . .," noting "nothing the government does to him will cause more pain than the loss of his son John four years ago when he was murdered in Italy.") (Gov't Response to Defendant's Pretrial Motions (Dkt. 146),

Ex. 1, p. 5); KSTP.com, "Petters' attorney: "There's been a rush to judgment," (Oct. 15, 2008) (Id. at p. 6); mndaily.com, "Petters donated money to the University" (Oct. 23, 2008) (quoting defense counsel regarding the defendant's "extensive donations to universities") (Id. at p. 10).

On October 23, 2008, a fourth defendant, Larry Reynolds, pleaded guilty. Reynolds, a long-time Petters associate from California, also pleaded guilty to conspiring with Petters to launder over $6 billion (in addition to the $6 billion laundered by Catain) in violation of 18 U.S.C. § 1956. See United States v. Reynolds, Cr. No. 08-320 (RHK).

Defendant's media offensive continued in November when the defendant's girlfriend gave an interview to a WCCO-TV reporter that resulted in a two-part series on the local news. During the interview, the defendant's girlfriend attempted (i) to explain away criminal statements made by the defendant, (ii) to cast doubt on the credibility of those who had pleaded guilty to the fraud, and (iii) to offer her opinion of the defendant's innocence. See WCCO, "Petters' Girlfriend Opens Up About Sons, Jail," (Nov. 18, 2009) (Gov't Response to Defendant's Pretrial Motions (Dkt. 146), Ex. 1 at p. 11); and WCCO, "Girlfriend: Petters Felt Betrayed By Whistleblower," (Nov. 19, 2008) (Id. at p. 15).

On November 16, 2008, the Associated Press ran a story in which defense counsel was quoted as follows:

> It's a spectacular fall from grace. One of the most spectacular falls you will ever see.

Amy Forliti and Steve Karnowski, Post-Bulletin, "Peters' star rose quickly, fell faster," (Nov. 16, 2008) (Id. at p. 17).

On December 1, 2008, a federal grand jury returned an indictment against defendants Thomas Joseph Petters, Petters Company, Inc. and Petters Group Worldwide. The indictment charged Petters with ten counts of aiding and abetting wire fraud, in violation of 18 U.S.C. § 1343; three counts of aiding and abetting mail fraud, in violation of 18 U.S.C. § 1341; one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371; one count of money laundering conspiracy, in violation of 18 U.S.C. § 1956(h); and five counts of aiding and abetting money laundering, in violation of 18 U.S.C. § 1957. (Dkt. 79.)

On December 2, 2008, the defendant was arraigned and entered pleas of not guilty. (Dkt. 82.) Trial was set to commence on February 9, 2009. (Id.)

On December 19, 2008, a fifth defendant, James Carl Wehmhoff, the PGW Executive Vice President - Finance, Tax and Treasury, pleaded guilty to conspiring with Petters to evade over $20 million in Petters' personal income

taxes, in violation of 18 U.S.C. § 371 and 26 U.S.C. § 7206(2). See United States v. Wehmhoff, Cr. No. 08-387 (RHK).

On January 8, 2009, United States District Judge Kyle granted the defendant's request for a continuance of the trial, setting a new trial date for June 9, 2009. (Dkt. 96.)

On February 25, 2009, the defendant filed numerous pretrial motions, including (i) a motion to change venue in which the defendant made a wholly unfounded and unsubstantiated accusation that the government had "leaked" information to the press and (ii) a motion requiring the government to disclose whether any cooperating witnesses were participants in the Witness Protection ("WitSec") Program. The defendant also filed various discovery motions. (Dkts. 108-44.)

On March 3, 2009, based on the defendant's filings and a press release issued by the defense identifying Larry Reynolds as a WitSec Program participant,[3] the media began running stories identifying Larry Reynolds as a participant in the WitSec Program. See, e.g., Dave Phelps, "Sketchy profile emerges for key player in Petters probe," Minneapolis-St. Paul StarTribune, (Mar.

[3]The defense issued a number of press releases, some of which are attached to the Government's Response to Pretrial Motions dated Mar. 15, 2009 (Dkt. 146), as Exhibit 2, and are included in the Government's Appendix at A-247.

3, 2009) (reporting the newspaper had received an anonymous call in October asserting Reynolds was in the WitSec Program.)[4]

On March 16, 2009, Judge Kyle issued an order deferring ruling on the motion to change venue. The district court reviewed the articles and media coverage submitted by the parties, and found that the defendant failed to show "extensive and corrupting" media coverage, the requisite for a presumption of prejudice. (Order dated Mar. 16, 2009 (citing United States v. Nelson, 347 F.3d 701 (8th Cir. 2003).) Judge Kyle then deferred further consideration of the change of venue motion pending information provided by prospective jurors. (Id. at 3.)

On March 16, 2009, the defendant filed a second set of pretrial motions, including two motions to dismiss and a motion for the attorneys to withdraw, in which the defendant complained that the government was "meddling" with payment of defense attorney funds from the receivership assets. (Dkts. 148-56.)

On March 18, 2009, a pretrial motions hearing was held before Magistrate Judge Arthur J. Boylan. Magistrate Judge Boylan denied, from the bench, the two motions to dismiss the indictment and the motion to withdraw as counsel, noting

[4] At trial, after the defense rested, to contradict Petters' testimony he did not know Reynolds was in the WitSec Program until May 2009, the government offered a recording of Petters telling his girlfriend on October 23, 2008 to call a reporter to tell her Reynolds was in the WitSec Program. The defense objected, and the district court did not admit the recording. (Trial Tr. at 3290-92.)

that all attorney fee payments were approved by Judge Montgomery (not the United States Attorney's Office) and had been fully approved to that point. (Motions Hr'g Tr. dated March 18, 2009 at 33-34.) The other motions were taken under advisement.

During the hearing, at a side bar, the government specifically asked that the defense be precluded from identifying any specific person as a participant in the WitSec Program, because the assertion itself, whether true or untrue, puts individuals at risk. (Motions Hr'g Tr. dated Mar. 18, 2009 at 125-26.) Magistrate Judge Boylan ruled that the defense WitSec motion would be argued in open court, but instructed counsel not to identify the specific witness at issue. (Id. at 127 (emphasis added).)

On March 26, 2009, Magistrate Judge Boylan issued an order on the motions addressing various discovery motions. (Dkt. 163.)

On March 30, 2009, the defense renewed the motion to withdraw as counsel, the motion to dismiss the indictment based on the government's purported interference with attorney fees, and the motion to continue the trial. (Dkt. 167.)

On March 31, 2009, notwithstanding Magistrate Judge Boylan's directive to counsel, the defendant filed objections to the discovery order, in which, among

other things, the defense specifically and repeatedly identified Larry Reynolds as a participant in the WitSec Program. (Dkt. 169.)

On April 9, 2009, Judge Kyle held a hearing on the motions and objections. At the hearing, Judge Kyle invited argument in open court on the defendant's WitSec motion but reminded the defense that Judge Boylan had instructed counsel not to identify a specific individual as a participant in the WitSec Program. (Motions Hr'g Tr. dated Apr. 9, 2009 at 5-6.)

On April 13, 2009, the district court issued an order, rejecting the defendant's motions to dismiss the indictment as both factually and legally unfounded, in part, because defense counsel had been fully paid to that point. (Dkt. 177.)

On April 14, 2009, the district court issued an order that, among other things, (i) required the government to make all Brady disclosures 60 days prior to trial, and (ii) rejected the defendant's motion for immediate access to WitSec Program disclosures regarding possible government witnesses. (Dkt. 178.)

On April 17, 2009, the district court granted the defendant's second motion for a continuance and set trial to commence on September 8, 2009. (Dkt. 179.)

On April 28, 2009, Magistrate Judge Boylan issued a Report and Recommendation ("R&R"), recommending, among other things, that Petters'

motions to suppress evidence be denied, with the exception of a few items seized from the Petters' residence, namely a firearm and currency, that were not included in the list of items to be seized. (Dkt. 185.)

On May 11, 2009, the defendant objected to the R&R, arguing, among other things, that the search was unlawful and witness statements should be suppressed. (Dkt. 188.) On June 11, 2009, an order was issued by the district court, adopting the R&R filed by Magistrate Judge Boylan. (Dkt. 201.)

On June 3, 2009, a grand jury returned a slightly modified superseding indictment, again alleging twenty counts of wire fraud, mail fraud, conspiracy to commit mail and wire fraud, conspiracy to commit money laundering, and money laundering. (Dkt. 196.) On June 16, 2009, the defendant was arraigned and entered pleas of not guilty.[5] (Dkt. 203.)

On June 30, 2009, the defendant filed new pretrial motions, that among other things, in direct violation of the district court's order, expressly and repeatedly identified Larry Reynolds as a participant in the WitSec Program, detailing his cooperation in a federal case in the 1980s against the Mafia, attaching numerous documents obtained in discovery (which included personal identifiers),

[5]On September 29, 2010, PCI and PGW entered guilty pleas to Counts 1, 14, and 15, after the pleas had been approved by the bankruptcy court.

and falsely asserting that the government had concealed Reynolds' former name, in violation of Brady. Based on the claimed Brady violation, the defendant sought dismissal anew. The defendant also moved to continue the trial date. (Dkts. 209-20.) The same day, the district court issued an order sealing the filings pending further consideration. The following day, the defendant moved to unseal the motion papers.

On July 10, 2010, noting concerns for witness safety and the governmental interest in protecting the ongoing effectiveness of the WitSec Program (as statutorily recognized and codified by Congress, see 18 U.S.C. § 3521), the government filed a memorandum requesting that the defense motions be unsealed but redacted to comply with the prior court orders, namely redacting any identification of individual WitSec Program participants. The government also provided the court with evidence that, contrary to defense claims, proved that the government provided the defense the former name of Larry Reynolds six months earlier, on December 30, 2008. (Dkt. 236.)

On July 13, 2009, a hearing was held before Magistrate Judge Boylan. At the outset of the hearing, Judge Boylan again affirmed his March 18 ruling, instructing attorneys not to identify in pretrial proceeding that a particular possible witness at trial was a participant in the WitSec Program. (Motions Hr'g Tr. dated

July 13, 2009 at 8-10.) The ruling was expressly limited to pretrial proceedings and did not include trial and provided the grounds for his narrow ruling. (Id.) Notwithstanding the clear instruction, defense counsel then immediately attempted to provide an attorney for the media with a photograph of the specific witness. (Id. at 13.) Magistrate Judge Boylan advised defense counsel he was bordering on contempt. (Id. at 14.)

On July 15, 2009, Judge Kyle issued an order granting the defense motion for a continuance and scheduling the trial to commence on October 26, 2009. (Dkt. 244.)

On July 16, 2009, Magistrate Judge Boylan issued a protective order pursuant to which the government then disclosed documents relating to the WitSec Program. (See Dkt. 245 and Def.'s Motion dated Oct. 8, 2009.)

On July 20, 2009, Magistrate Judge Boylan issued an order that, among other things, held that the defendant's motions asserting a Brady violation were "premature at best." (Order dated July 20, 2009 (Dkt. 246) at 5.) Moreover, the court found "no grounds upon which to conclude that the government has failed to recognize or refused to comply with its general Brady disclosure obligations." (Id. at 6.) The court also ordered that the parties' filings be publicly filed, redacting only the specific identifiers of potential witnesses. (Id. at 3.)

On August 19, 2009, a sixth defendant, Harold Alan Katz, an accountant who worked for the PCI investor Lancelot Investment Management, a hedge fund, pleaded guilty to conspiring with Gregory Malcom Bell, the owner and operator of the fund, to defraud fund investors by misrepresenting the true performance of the fund's investment in PCI, in violation of 18 U.S.C. § 371. See United States v. Katz, Cr. No. 09-243 (RHK).

On August 20, 2009, after receiving the parties' comments, the district court distributed a juror questionnaire to prospective jurors and issued an order establishing the questionnaire process. (Dkt. 264.) Among other things, the questionnaire specifically asked prospective jurors regarding (i) their knowledge of the allegations and (ii) any preconceived opinions of the case. It also required prospective jurors to sign an oath pledging not to undertake any independent investigation and to avoid media coverage of the case.

On September 15, 2009, a newspaper article made plain that the defendant's continued efforts to pressure a potential witness against him, Larry Reynolds, by identifying as a participant in the WitSec Program and a former witness against the Mafia, had, in fact, succeeded at putting Reynolds at risk. See Jon Tevlin, "A schemer's wealth plan: Snitch and grow rich," Minneapolis-St. Paul StarTribune, (Sept. 15, 2009) (noting that the reporter had been encouraged by an unnamed

defense attorney to send Reynolds' picture to the people "who are looking for him" without regard to Reynolds' personal safety and confirming that the reporter received a message that the picture that was sent would be sent along to "the East Coast" so as to "get a snitch.").

On September 23, 2009, a seventh defendant, Gregory Malcom Bell, the owner and operator of the Lancelot hedge fund, pleaded guilty to perpetrating a fraud on his fund's investors in 2008 by misrepresenting the true performance of the fund's investment in PCI, in violation of 18 U.S.C. § 1343. See United States v. Bell, Cr. No. 09-269 (RHK).

On October 7, 2009, the district court held a status conference to discuss jury selection and other trial matters. The district court noted that the parties had been provided an opportunity to review the juror questionnaires and, based on that review, the parties jointly agreed to excuse only four prospective jurors for cause. (Status Conf. Tr. dated Oct. 7, 2009 at 7.)

On October 8, 2009, the defendant filed a motion seeking an order requiring the government to copy and produce certain WitSec Program files that had already been made available to the defense for inspection. (Dkt. 289.)

On October 8, 2009, Magistrate Judge Boylan issued an order requiring the government to submit the unredacted WitSec file to chambers for in camera review. (Dkt. 291.)

On October 14, 2009, motions in limine were filed by both parties.

On October 15, 2009, the defendant filed a new motion for a finding of a presumption of prejudice resulting from adverse pretrial publicity. (Dkt. 306.)

On October 16, 2009, the district court denied the motion, noting the neutrality of the media coverage, which was neither inflammatory nor accusatory. (Order dated Oct. 16, 2009 at 3.) Moreover, the district court noted that (i) questionnaires had been distributed to a venire far larger than that typically summoned in criminal cases, (ii) the responses from potential jurors revealed only a small number of venire members had formed firm opinions regarding the case, thereby undermining any claim of pretrial prejudice, and (iii) venire members who had expressed a firm opinion had already been excused. (Id. at 2-3.)

On October 20, 2009, after reviewing the WitSec file in camera, Magistrate Judge Boylan issued an order, requiring the government to provide the defense certain portions of the WitSec file pursuant to the court's July 16 protective order. (Dkt. 310.)

On October 21, 2009, a pretrial status conference was held to address motions in limine. Among other things, in response to the defendant's motion for a change of venue, the district court ruled, "I have reviewed those questionnaires, I find no bias among the potential jurors so I will deny the motion." (Status Conf. Tr. dated Oct. 21, 2009 at 21.)

On October 23, 2009, citing 18 U.S.C. § 3521, the United States Marshals Service objected to the October 20 magistrate judge's order, seeking certain modifications to the protective order. (Dkt. 315.) On October 26, 2009, Judge Kyle issued an amended protective order. (Dkt. 319.)

On October 27, 2009, the district court ruled on the parties' motions in limine. Among other things, the district court ruled the defense could refer to Larry Reynolds by name at trial as well as his participation in the WitSec Program. The district court also ruled that if Reynolds were called as a witness, the defense could cross-examine Reynolds based on the information obtained from the WitSec Program file. The district court ruled, however, that extrinsic evidence, namely the WitSec Program file itself, would not be admitted to impeach the witness, pursuant to Federal Rule of Evidence 608. (Dkt. 320.)

On October 28, 2009, a jury was selected, and trial commenced. (In an order dated October 23, 2009, the district court continued the trial. (Dkt. 313.))

The government rested its case on November 16, 2009.

On November 20, 2009, the defense rested. The district court conducted a final charging conference. The parties then gave closing arguments.

On November 23, 2009, the court instructed the jury and deliberations began.

On December 2, 2009, after five days of deliberation, the jury returned guilty verdicts on all counts.

On March 8, 2010, the government filed a sentencing memorandum, contending that the life sentence guideline[6] and the facts and circumstances of the case all militated in favor of a statutory maximum sentence of 335 years imprisonment. (A life sentence was not authorized under the counts of conviction.)

On March 24, 2010, the court rejected the defendant's motion to stay the government's preliminary order of forfeiture and granted the forfeiture motion. (Dkt. 394.) In denying the defendant's motion for a stay, the district court noted the following:

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[6]The Presentence Report calculated the offense level as 55. At sentencing, the district court sustained the government's objection and applied an additional enhancement for vulnerable victims, resulting in an offense level of 57.

> [T]he Court believes Defendant is unlikely to succeed on appeal. While the Court, of course, cannot anticipate what issues Defendant will raise on appeal, **the Government's evidence at trial was overwhelming**. Dozens of witnesses testified against Defendant, including high level co-conspirators implicating him in the fraud, and the Government introduced thousands of documents, tape-recorded conversations, and e-mails undermining his contention that he was unaware of what was occurring.

(Order dated Mar. 24, 2010 at 3-4 (emphasis added).)

On April 8, 2010, the defendant appeared for sentencing. After hearing from both parties and considering the submissions, the district court imposed a sentence of 50 years, noting Petters was the "captain" of the massive fraud and would likely re-offend if released. (Sentencing Tr. dated Apr. 8, 2010 at 44-47.)

On April 13, 2010, the defendant filed a notice of appeal.

On September 2, 2010, Deanna Coleman appeared for sentencing. After granting the government's motion for a downward departure based on her critical cooperation, and considering her role in the offense, the district court imposed a sentence of one year and one day.

On September 14, 2010, Michael Catain appeared for sentencing. After granting the government's motion for a downward departure based on his cooperation, and considering his role in the offense, the district court imposed a sentence of 90-months' imprisonment.

On September 14, 2010, Larry Reynolds appeared for sentencing. After considering his role in the offense, his prior criminal history, and his assistance,[7] the district court imposed a sentence of 140-months' imprisonment.

On September 15, 2010, Robert White, age 70, appeared for sentencing. After granting the government's motion for a downward departure based on his cooperation, and considering his role in the offense and his age, the district court imposed a sentence of 60-months' imprisonment.

On September 30, 2010, Gregory Bell appeared for sentencing. After considering his role in the offense, and his assistance to the government,[8] the district court imposed a sentence of 72-months' imprisonment.

On October 1, 2010, Harold Katz appeared for sentencing. After granting the government's motion for a downward departure based on his cooperation, and

[7] The government did not enter into a cooperation agreement with Reynolds, and the government did not move for a downward departure under Section 5K1.1. Pursuant to his plea agreement, however, the government advised the district court of assistance provided by Reynolds, including his testimony at trial, for the district court's consideration under 18 U.S.C. § 3553(a).

[8] The government did not enter into a cooperation agreement with Bell, and the government did not move for a downward departure under Section 5K1.1. Pursuant to his plea agreement, the government advised the district court of assistance provided by Bell, including his testimony at trial, for the district court's consideration under 18 U.S.C. § 3553(a).

considering his role in the offense, the district court imposed a sentence of one year and one day.

On October 18, 2010, James Wehmhoff, age 70, appeared for sentencing. After considering his role in the offense, and his assistance to the government,[9] the district court imposed a sentence of 1 year home confinement, based, in part, on a serious medical condition .

[9]The government did not enter into a cooperation agreement with Wehmhoff, and the government did not move for a downward departure under Section 5K1.1. Pursuant to his plea agreement, the government advised the district court of assistance provided by Wehmhoff, including his testimony at trial, for the district court's consideration under 18 U.S.C. § 3553(a).

STATEMENT OF THE FACTS[10]

A. SEPTEMBER 8, 2008

On September 8, 2008, Thomas Joseph Petters was a well-known Minneapolis businessman and owner of numerous businesses, including Petters Group Worldwide LLC ("PGW"), Sun Country Airlines, Polaroid Corporation and a little-known company, Petters Company, Inc. (or "PCI").

On September 8, 2008, Deanna Coleman walked into the United States Attorney's Office with her attorney and notified law enforcement that she had been assisting Petters to perpetrate a multi-billion fraud through PCI for over ten years. (Trial Tr. at 527.) Coleman provided law enforcement with fabricated purchase orders and other documentation that had been used to defraud investors and a schedule representing over $3.5 billion owed to victim investors. (Id. at 527-28; Gov't Ex. 34.) After about an hour and one-half, agents asked Coleman to return to the Petters' business headquarters to record surreptitiously conversations with Petters and others. (Trial Tr. at 527-28.) She did.

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[10]Defendant claims to provide this Court with a "simplified version of the salient facts." (Def.'s Br. at 5.) The government's Statement of Facts, albeit substantially condensed from what was presented at trial, leaves no doubt regarding the correctness of the district court's post-trial finding that the evidence against the defendant was "overwhelming." (Order dated Mar. 24, 2010 (emphasis added).)

Coleman returned to Petters' headquarters, walked into Petters' office, and, at 5:36 p.m., began a 42-minute conversation with Petters during which he plainly and expressly acknowledged the false purchase orders ("POs") and the crime:

> Coleman: Does Fortress know that all these POs are fake?
>
> Petters: **Fuck (DI) no. They don't know they're fake.**
>
> Coleman: Okay.
>
> Petters: They're not gonna be lookin' at our POs. They're only looking at one thing. They won't fund until I give them the money. So what I've been doin' over in Switzerland is making a deal. Hello. Hello. So what I've been doin' is making a fuckin' deal to get the cash to come to these deals. Which has been nothing short of a fucking miracle. So what I did last week.
>
> . . .
>
> Petters: I know. I know you are, so here's the deal. I called last week. I went to see Girard and I said Girard I'm gonna be outta business. **I'm gonna be probably be going to jail.** I said I'm gonna, I got my hedge funds, they're gonna be going in. We bought a bunch of bad paper, just like people who bought bad mortgages and that's my pitch to people. **See, here's how we're getting out of the crime.**

Gov't Ex. 377 at 1-3 (emphasis added).[11]

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[11] The government's appendix includes a disk with digital copies of most of the government's exhibits admitted at trial, including audio recordings. The disk also contains transcripts of the recordings used at trial. The transcripts are marked with the exhibit number and a letter "A." (The transcript for Exhibit 377 is 377A.)

Later that night, after meeting with hedge fund managers who were invested in PCI, Petters acknowledged the staggering (almost unbelievable) proportions of the fraud, confiding in Coleman, "[s]ee the only thing that makes me believe that there is some divine intervention, seriously, when, when you get to it there's no possibility we could of got away with this for so long." (Gov't Ex. 9 at 3.)

If these admissions were not in themselves sufficient, the next day, Petters admitted, "Ya know, this is one big fucking fraud and that's what it is and that's why I'm dealing with it." (Gov't Ex. 381 at 10.)

Over the course of the next sixteen days, Coleman made numerous recordings of Petters and others, directly and unequivocally implicating Petters in the fraud. (Gov't Exs. 9-10; 11 (Sept. 22, 2008: "We've been tellin' lies to people"); 12; 376-78; 381-83; 389 (Sept. 10, 2008: "Just don't want these fuckin' auditors coming in here."), 391-94; 396; 398; 400; 401–07; 409-10; 412; 414; 416 (Sept. 18, 2008: "its sorta like we all knew they were real fake POs the last five years. All of us. So it's not just me that knew we were committing a crime. . ."); 417-18; 420; 422-23; 425; 427; 429; 430; 437; 439; 442; 444.)

On September 24, 2008, agents from the Federal Bureau of Investigation, the Internal Revenue Service-Criminal Investigation Division, and the Postal

Inspection Service executed search warrants at Petters' business headquarters, Petters' residence and elsewhere. The fraud was over.

B. THE PCI FRAUD

Petters' fraud was a Ponzi scheme. Investors were told their money would be used to purchase electronic goods that would then be resold at a substantial profit to big box retailers, such as Costco, BJ's, and Sam's Club. (See Trial Tr. at 544-45.) In reality, the transactions were fictitious; investors were not paid through profits from real transactions, but were paid with money from other investors, and sometimes, even their own money. (Id. at 558.)

To obtain investors' funds, PCI provided investors with a number of fabricated documents: (i) a record of goods purchased by PCI from a purported vendor; (ii) the purported purchase of the same goods from PCI by retailers, such as Costco and Sam's Club; (iii) a record of PCI wiring funds to the vendor, giving the appearance that PCI was also investing its own funds in the deal; and (iv) PCI financial statements, falsely indicating that retailers owed PCI millions and, at the end, billions of dollars. (Id. at 546-51; 755-59, 1440-41). To induce investors to provide the funds, Petters often personally signed promissory notes (other times, signature-stamped promissory notes were provided). (Id. at 547.) Additionally, certain investors required Petters' personal guarantee. (Id.)

At trial, the government introduced investment documentation, including promissory notes and fabricated purchase orders, used to induce investors to provide PCI with funds purportedly to purchase of billions of dollars in merchandise for immediate resale to Costco, BJ's, Sam's Club and Boscov's. (Gov't Exs. 158, 194, 198, 203, 210, 214-28, 233-34, 243, 248, 253, 286-89.) Forty-four boxes of historical promissory notes and fabricated purchase orders, stretching the tenure of the fraud, were also admitted. (Gov't Ex. 35.)

In reality, representatives from Boscov's, Sam's Club, and BJ's testified that they did no business with PCI after 2000. (Id. at 1333-36 ((Boscov's: No business with PCI); 1422-30 (Sam's: stopped business with PCI after 1997, stopped business with another Petters' company after 2002); 1847-55 (BJ's: no business with PCI, $100,000 business with another Petters' company).) Costco representatives testified that Costco did very little business with PCI, which ended in 2004. (Id. at 183-89.)

Instead of purchasing merchandise, investor funds were simply used (i) to pay off prior investors, (ii) to fund the operations of Petters' companies (including employee salaries and bonuses), and (iii) for Petters' personal use. (Trial Tr. at 688-89; 700-22; Gov't Exs. 6; 94-95; 99-100; 101A; 101B.) Indeed, analysis of the PCI bank records revealed that over $82 million of PCI investor funds were

diverted to Petters personally and in excess of $315 million were diverted to Petters' various businesses. (Gov't Ex. 7 & 7A.)

In September 2008, Petters and PCI owed investors over $3.5 billion. (Gov't Ex. 34; Def's Ex. 200; Trial Tr. at 2735-37 (defense witness Tom Fisher).)

C. PETTERS COMPANY, INC.

The heart of Petters' fraud was his company, PCI. PCI was formed in 1994. (Gov't Ex. 17; Trial Tr. at 646.) Its sole owner, president and chief executive officer was, and always had been, Thomas Joseph Petters. (Trial Tr. at 544, 646-47.) Investors testified that Petters was the consummate salesman, possessing "a gift to, in a very short period of time, have people love and trust him." (Id. at 1685.) According to one investor, Petters was the "heart and soul" of PCI. (Id. at 1882.) The other two officers of PCI were Coleman and Robert White. (Id. at 646.) Petters himself acknowledged demanding transfers of PCI investor funds to himself. (Id. at 3074-75.)

Coleman was hired by Petters in 1993 when she was 26 years-old, after she had graduated from college and had two years' experience at a collection agency.[12] (Id. at 639-41.) Petters hired Coleman to be the office manager, receptionist and

[12] For a time, Deanna Coleman was also known by a married name, Deanna Munson. She is referred to as Coleman in this brief.

his assistant. (Id. at 641.) Coleman reported directly to Petters, who was approximately 10 years older than Coleman. (Id.)

Initially, Petters and PCI were in the business of buying goods wholesale and selling them to retail outlets. At its inception, PCI did some real, modest-sized transactions. (Trial Tr. at 644-45.) Early investors in PCI were individuals who provided tens of thousands of dollars to Petters to finance the goods PCI purchased. (Id. at 645-46.) But from the beginning of Coleman's employment, Petters was already in debt, and he directed Coleman to lie to investors in order to obtain additional funds to pay off prior investors. (Id. at 645, 648.)

According to Coleman, within the first few weeks of working at PCI, Petters was directing Coleman to assist him with fabricating purchase orders. (Id. at 643.) Throughout her tenure at PCI, at the direction of Petters, Coleman lied to investors, prepared false documents, and made lulling wire transfers to victim investors using new investor funds. (Id. at 549, 558, 648.) Coleman and Petters spoke regularly, even daily. (Id. at 551-52.) The government introduced 2,200 emails sent between Petters and Coleman that were recovered from the company email server. (Gov't Ex. 27A.) These emails corroborated Coleman's testimony and proved that Petters was still directing the fabrication of purchase orders up through 2008. For example, in March 2008, when Petters obtained a commitment

of investor funds, he emailed Coleman stating he had obtained a $37 million investment and told her "you will have to fit the pieces together" as he was unable to talk with her on the phone because he was with a PCI investor at the time. (See Gov't Ex. 264.) Within 90 minutes, Coleman provided Petters with a product SKU number, purported pricing and quantity. Petters emailed back, "I love you!!! U r the only one who gets it!" (See Gov't Ex. 266.) Similarly, in April 2008, Coleman again provided Petters with a fabricated purchase order for his review. (Gov't Ex. 160.) Petters replied, instructing her to change the purported cost and to remove his name as the salesperson. (Gov't Ex. 161.)

In 1999, Petters needed false bank statements to provide to investors so they could verify PCI's purported bank transactions with retailers. Coleman was incapable of creating these types of documents, and Petters turned to his friend and associate, Robert White, who agreed to prepare the false bank records. (Trial Tr. at 1140-42.) White described how Petters then asked White to help Coleman to schedule the PCI notes, at which time White learned that there was approximately $100 million of bad debt. (Id. at 1146.) Petters made White PCI's "chief financial officer," and over time gave him millions of dollars in bonuses (see, e.g., Gov't Ex. 101A & 101B), in exchange for which White continued to fabricate purchase orders and other documents. White testified he was hoping

they could bail themselves out of the debt through the successful sale of an investment. (Trial Tr. at 1146-59.)

From time to time, Coleman would tell Petters of her concerns about her involvement in the fraud, but Petters would assure her and White that he would figure a way out and he would suffer any consequences. (Id. at 691-94; 748-50; 1191-93; Gov't Exs. 14, 25.) For example, on April 1, 2006, Petters emailed Coleman:

> The reason I sent you flowers this week is I spent a fair amount of time [c]rying about all I have done wrong in my life (crying inside and out) I ask daily to be able to get up and have God to help me change this company into one we are so proud of instead of full of shame! I am determined and so are you. I am so sorry that I ever got you in this shit. But I am not sorry for the fact that I call you one of my best friends in the whole world! For you have stood by in Pain, I owe you so many apologies, now I need to fix it. I am in [] it with you an[d] Bob and toget[h]er we will take it out. The decisions I make I do not ever try to keep from you.

(See Gov't Ex. 14.)

D. EXPANSION OF THE FRAUD TO INSTITUTIONAL INVESTORS

In early 1998, Petters and PCI made the leap from individual investors to institutional investors. Petters obtained a $50 million credit line through the huge institutional investor, General Electric Credit Corporation ("GECC"). (See Trial Tr. at 92, 115-16.) The line of credit provided PCI with 85 to 95 percent

financing to purchase merchandise, such as electronic goods, which were then purportedly re-sold to retailers, such as Costco, Sam's Club and others. (Id. at 95-106; Gov't Ex. 293.) In 1999, GECC employee Jack Morrone was assigned to "monitor the credit facility and ensure compliance with the credit assignment and the note." (Trial Tr. at 94.)

In the summer of 2000, PCI owed GECC over $40 million, and PCI was lagging in repaying its promissory notes under the credit line. (Id. at 122-25; 250.) GECC officer Paul Feehan testified as to his conversations with Petters, which occurred "with increasing frequency as time kept going and the payments never came in." (Id. at 250-51.) Petters told GECC that Costco owed PCI nearly $60 million for merchandise sold by PCI. (Gov't Ex. 298; Trial Tr. at 128-29.) Among other excuses, Petters told Feehan that he had to extend additional time to Costco to repay. (Id. at 250-52; see also Gov't Ex. 300 (transcript of Petters voicemails).) Petters even claimed that Costco's purported payment delay was due to one of its employees, Bob Pugmire, being out for surgery. (Id. at 252; Gov't Ex. 300 at 1 (transcript of Petters voicemail).) Pugmire testified at trial he had no such surgery. (Trial Tr. at 344-45.) In reality, far from owing PCI $60 million, Costco had only one purchase from PCI in 2000-2001-for $81,419. (Gov't Exs. 313-14; Trial Tr. at 183-88.)

On October 24, 2000, GECC did something new: Morrone sent a purchase order verification directly to Costco rather than via PCI. (Id. at 124-26; Gov't Ex. 298.) Costco employee Erik Hulsey testified about receiving the order verification from GECC. (Trial Tr. at 198-99.) In Hulsey's words, "the only thing valid was the purchase order number"; the transactions had taken place with different vendors, for smaller dollar amounts. (Id.) Hulsey immediately contacted Petters, seeking an explanation. (Id.) Petters went into crisis management mode: he apologized to Hulsey, told Hulsey that someone in the company had been "creative and created these fake transactions." Petters assured Hulsey that the person responsible had been identified and fired[13] and he asked that he be allowed to take care of the situation with GECC. (Id. at 200; Gov't Ex. 305 (Hulsey notes).) To assure Costco the matter had been handled, Petters even sent Costco a signed letter, acknowledging that the purported Costco purchase orders had never been issued. (See Gov't Ex. 299.)

In contrast, Petters did not advise Feehan or GECC the purchase orders were not valid. Instead, within minutes, Petters went on the attack and in a series of phone calls and voicemails, Petters read Feehan the "riot act," screaming at him

[13] Bob White created the false purchase orders. White was not fired. (Trial Tr. at 661.)

for having contacted Costco rather than going through him. Petters was adamant that GECC not contact Costco. (Trial Tr. at 255-56; Gov't Ex. 300 at 3-6 (voicemail transcripts).).

GECC insisted that Petters pay off PCI's credit line. (Trial Tr. at 257.) Trying to buy time, Petters and White sent GECC eight PCI checks totaling, $38.5 million, which bounced. (Trial Tr. at 132-35; Gov't Ex. 301.) In one call with GECC, Petters even placed a person on the phone whom Petters claimed was PCI's banker to assure GECC that Petters had funds in the account to cover the checks. Feehan could only remember the banker's name was the same as the Minnesota Viking's kicker who missed a field goal in the NFC championship game. (Trial Tr. at 260.) At trial, Gary Anderson, who had the same name as the Viking kicker and was a banker who handled the PCI account at the time, testified he was not on the call and PCI's account did not have anything close to sufficient funds to cover the checks. (Id. 314-17.)

Ultimately, by December 2000, Petters repaid GECC in multiple wire transfers. (Trial Tr. at 136.) At trial, the government introduced evidence that GECC was repaid in part with funds obtained by Petters from his father-in-law and a business associate under the false pretense that they were financing new

merchandise purchases rather than repaying a prior lender. (Trial Tr. at 2187-89; 2509-11-90A.)

In December 2000, after repaying GECC, Petters approached GECC to increase the credit line for another Petters' company. (Trial Tr. at 262.) Before increasing the line, Feehan wanted confirmation that Costco had ultimately paid the purchase orders that PCI had provided GECC so that Feehan could know that GECC was not simply repaying the investors that had repaid GECC. (Id. at 263.) Although Petters had personally acknowledged to Costco the purchase orders were fake, Petters told Feehan that Costco had paid PCI for the purchases. Petters even offered to provide Feehan with checks. (Id.) Petters had White fabricate checks to make it seem PCI had been repaid by Costco, which were sent to GECC. (Id. at 1148.) Once Feehan and Morrone received the checks, they called the bank and discovered the check amounts cleared in different amounts than what was on the checks provided to GECC. (Id. at 142-46; 264.) In a series of calls with Morrone and Feehan, Petters first claimed surprise and error, then offered to provide bank records, and ultimately, when GECC asked to deal directly with PCI's bank directly, Petters angrily terminated the GECC relationship because they were "too difficult." (Trial Tr. 142-47; 265-67.)

E. PCI's "BILLION DOLLAR" VENDORS

Ultimately Petters replaced GECC with other hedge fund investors, including the Lancelot Fund managed and operated by Greg Bell. (Gov't Ex. 34.) To protect against fraud, some investors wanted to send their investment funds directly to the vendor that was purportedly supplying PCI with the electronic goods. (See Trial Tr. at 621.) In response, Petters asked two of his business associates, Larry Reynolds and Michael Catain, to assist him with the scheme by falsely representing themselves as suppliers. (Id.)

Larry Reynolds, a businessman from California, had a real wholesale business, Nationwide International Resources, Inc. ("NIR"). (Id. at 1491.) From time to time, Reynolds found modest deals involving shoes and clothes and sold them to retail outlets, including Petters. (Id. at 1491-95.) In late 2001, Petters asked Reynolds to let Petters wire millions of dollars of funds through Reynolds' bank accounts. (Id. at 1495-97.) In exchange, Petters agreed to pay Reynolds a fraction of a percent of the funds moving through Reynolds' account as a "commission." (Id. at 622, 1497.) Between January 2003 and September 2008, PCI investors sent approximately $11.5 billion to NIR (believing NIR to be the electronic good supplier to PCI), and the funds were almost immediately sent on to PCI or other Petters' businesses (less Reynolds' commission). (Gov't Exs. 5,

94, 107-09.) At trial, Reynolds testified that he had committed fraud with Petters as early as April 1998, providing him a false purchase order. (Trial Tr. at 1480-81.) Later, from time to time, Petters called upon Reynolds to find warehouse space to show insurance adjustors under the pretense the warehouse was used for PCI merchandise. (Id. at 1510-14.) In an August 16, 2006 email, Petters told an insurance agent that Reynolds was giving "push back," because further warehouse inspection would not be allowed on "diverting warehouses." (Gov't Ex. 45.) In 2008, Petters got Reynolds even more involved in the fraud, asking him to assist in providing assurances to Greg Bell and other investors. (Trial Tr. at 1521-39.) In September 2008, Petters acknowledged that he had told Reynolds the truth and suggested they use Reynolds as an "outside auditor" to delay and to lull investors. (Gov't Exs. 11, 12 ("I said Larry, I have to make you look like you're the outside auditor, okay. So Dave [outside counsel] and these guys get off my ass . . .") & 382.)

Petters separately made the same proposal he made to Reynolds to Michael Catain. Catain had done liquidation deals with Petters in the late 1990s. (Trial Tr. at 1957-73.) In approximately 2002, Petters approached Catain and asked Catain to set up a company "that acted as though it bought merchandise . . . [and to] tell [people] that I secured the inventory when I actually wasn't." (Id. at 1985.) In

response to Petters, in January 2002, Catain created a sham company, Enchanted Family Buying Company ("EFBC"), and opened a bank account. (Id. at 1988-89; Gov't Ex. 358.) Between January 2003 and September 2008, PCI investors sent over 12 billion to EFBC (believing EFBC to be the electronic goods supplier to PCI), and the funds were almost immediately sent on to PCI, (including $7 million to Petters personally) (Gov't Exs. 94, 112-13.)

F. PROCEEDS OF THE FRAUD

On April 11, 2001, PCI opened a new bank account at M&I Bank. From the account opening until after the search warrants were executed in September 2008, there were only two people who were authorized to use the account – Tom Petters and Deanna Coleman. (See Gov't Ex. 92.) From January 2003 until September 2008, approximately $35 billion was wired into the account. (See Gov't Exs. 5, 94-95.) Although PCI was purportedly selling hundreds of millions of dollars in merchandise to retailers, virtually none of the deposits into the account came from retailers, such as Costco. (Id.) Nearly all of the funds were directly from investors or PCI's purported merchandise suppliers, NIR and EFBC, which themselves received funds from PCI investors. (Id.)

The vast majority of PCI investors' funds went to pay back other PCI investors. (See Gov't Exs. 6, 94-95.) Millions of dollars went to Coleman and

White and bonuses for other Petters employees, most of whom did not even work for PCI. (See Gov't Exs. 5, 94-95, 101A & 101B.) Over $82 million went from PCI to Petters personally and over $315 million went from PCI to fund the purchase and operation of other Petters companies. (See Gov't Exs. 7 & 7A.)

Petters also used the PCI fraud proceeds to purchase and operate other real companies, creating and maintaining a facade of a successful businessman. The companies provided Petters a false air of legitimacy that lulled investors and provided some evidence of real transactions. Petters diverted hundreds of millions of dollars from PCI investor funds to purchase Fingerhut in July 2002, Polaroid in April 2005 and Sun Country Airlines in 2006. (See Trial Tr. at 690 (Polaroid), 695, 1726 (Fingerhut and Sun Country); Gov't Ex. 67E.) Petters used the appearance of substantial personal wealth and corporate holdings to induce investors to provide him with funds. (Trial Tr. 932-34; 1636-37; Gov't Exs. 66A-F.)

Virtually every Petters company operated at a loss and was subsidized by PCI investor funds. (Trial Tr. 1751-55; Gov't Exs. 73-75.) For example, in 2003, the Petters Group posted operating profits of $231 million; PCI purportedly had annual operating profits of $265 million while all of the other subsidiaries posted operating losses, sometimes substantial losses. (See Gov't Ex. 73.)

F. KEEPING THE SCHEME AFLOAT

After 2004, PCI had no real or profitable deals. (Trial Tr. at 689.) By December 2007, PCI was in default on hundreds of millions of dollars of promissory notes held by one investor, the Lancelot Funds, which were operated by Greg Bell and were "virtually 100%" invested with Petters. (Id. at 2055.) Petters told Bell his retailers were late in paying PCI. (Id. at 2087-88.) Bell agreed to sign a 90-day extension on the terms of payments, so that the Petters' promissory notes to Lancelot would not be considered in default. (Id. at 2093.)

By February 2008, at the end of the 90-day extension, Petters still could not repay the promissory notes held by Lancelot, which at that point were worth approximately $1.5 billion. (Id. at 2093.) Petters told Bell that Costco was simply delayed in paying. Bell and Petters met in Las Vegas and agreed that Bell would receive replacement promissory notes and purchase orders from other retailers (the collateral for the notes) to replace the notes and the purported Costco purchase orders already held by Lancelot. (Id.) Bell even suggested to Petters that they also exchange money so that there would be an appearance that the PCI notes were being paid in a timely fashion. (Id. at 2091-93.)

Bell pleaded guilty to defrauding his investors in 2008, fraudulently concealing the problems collecting from PCI. (Id. at 2039.)

G. THE PCI COLLAPSE

On September 24, 2008, agents from the FBI, IRS and the Postal Inspection Service executed simultaneous search warrants at Petters' headquarters, Petters' home and other locations. (Id. at 1386-87.) At Petters' headquarters, the agents found purchase orders that purported to show PCI was owed over $3 billion by Costco, Sam's Club and other retailers. None of the purchase orders were real. PCI owed billions to its investors.

On October 1, 2008, Petters suggested to Robert White and Larry Reynolds that they flee prior to prosecution. (See Gov't Ex. 353A.) During cross-examination, Petters admitted that he had encouraged White to leave the country so White would be easier to blame. (Trial Tr. at 3110-11.)

H. PETTERS' TESTIMONY AT TRIAL

At trial, Petters acknowledged that he had participated in the scheme, but claimed he had only done so unwittingly. (Id. at 3067.) Petters acknowledged taking PCI investor money for himself. (Id. at 3074-76.) Petters acknowledged the documents he signed were totally inconsistent with what he claimed he understood. (Id. at 3102.) Petters even admitted his own (claimed) willful blindness, acknowledging when advised of false purchase orders in 2000 he

"chose not to dig deeper, chose to ignore it, chose to believe what I was told." (Id. at 3154-55.)

SUMMARY OF THE ARGUMENT

The district court properly, and well within its discretion, denied the motion to change venue. The defendant failed to establish the media coverage was inflammatory or accusatory. Indeed, the record demonstrated that the defendant actively promoted media coverage of the case. The district court also took additional precautions such as calling upon a larger-than-normal venire panel and sending them juror questionnaires in advance of voir dire. The prospective jurors, well in advance of trial, signed oaths not to investigate the case or review media coverage. The juror questionnaires reflected either no knowledge of the case or a slight understanding of the nature of the charges. Based upon review of the juror questionnaires, the parties agreed to excuse only four of prospective jurors for cause. The district court also conducted additional in-court voir dire where each of the sitting jurors indicated they had no pre-formed opinions of the case and could be fair.

The district court properly, and well within its discretion, instructed counsel to avoid identifying in pretrial proceedings a specific potential witness as a participant in the WitSec Program, in recognition of safety concerns and the efficacy of the government program (as recognized and codified by Congress). The district court properly required defense counsel to redact filings made in

violation of that order, but also expressly permitted defense counsel to disclose the witness and his participation in the WitSec Program throughout trial, including opening statement. The government provided WitSec Program files regarding the witness pursuant to a protective order. Once the district court ruled the file itself was inadmissible extrinsic evidence, it precluded the defense from publishing the file through court filings, requiring the filing to be made under seal.

The district court properly, and well within its discretion, allowed a full and fair cross-examination of Larry Reynolds, but properly limited the cross-examination to relevant and admissible testimony, limiting questioning of details of decades-old historical events and collateral matters. While the district court allowed defense counsel to cross-examine the witness based on information found in the WitSec file, the district court also properly applied the Rules of Evidence and excluded extrinsic evidence on a collateral matter. Defendant's complaint that the cross-examination was constrained by the Federal Rules of Evidence is without merit.

The district court properly, and well within its discretion, gave the substance of the defendant's theory-of-defense instruction albeit not in the same manner or level of detail as requested by the defendant. The district court properly, and well within its discretion, denied the defendant's request for an

advice-of-counsel jury instruction where the defendant did not assert he advised counsel of all material facts, namely that investors were provided false documentation for non-existent transactions, and did not rely on advice the transactions were legal.

Finally, in light of all relevant sentencing factors, and the undisputed guideline of life imprisonment, the district court imposed a fair and reasonable sentence of fifty years, a sentence that is fully consistent with the sentences imposed on the only two other multi-billion dollar Ponzi scheme kingpins. The district court acknowledged its authority to reject the fraud guidelines, but declined to do so.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Denying Defendant's Motion To Change Venue Where The Defendant Failed To Meet His Burden Of Demonstrating The Jury Pool Was Prejudiced.

Defendant argues the district court erred by failing to grant defendant's motion to change venue based on pretrial publicity. (Def.'s Br. at 51.) This Court reviews the denial of a motion to change venue for abuse of discretion. United States v. Rodriguez, 581 F.3d 775, 784 (8th Cir. 2009).

Citing the Fifth Circuit's opinion in United States v. Skilling, 554 F.3d 529, 558-59 (5th Cir. 2009), aff'd in part and vacated in part, 130 S. Ct. 2896 (2010), defendant contends other circuits have adopted a different standard of review. (Def.'s Br. at 51.) Yet, the Fifth Circuit and other circuits also review for abuse of discretion. United States v. Whitmore, No. 09-60400, 2010 WL 2802393, at *3 (5th Cir. July 15, 2010); see also United States v. Nettles, 476 F.3d 508, 513 (7th Cir. 2007). Defendant also fails to acknowledge the full holding of the Fifth Circuit in Skilling, which held that even if the defendant could demonstrate prejudicial, inflammatory publicity saturating the community, the government may still rebut the presumption and establish an impartial jury based on the actual voir dire. Skilling, 554 F.3d at 558-59.

The Sixth Amendment to the United States Constitution guarantees to criminal defendants the right to be tried by an impartial jury. This concept is embodied in Rule 21(a) of the Federal Rules of Criminal Procedure which provides:

> The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

Fed. R. Crim. P. 21(a).

The standard imputed to Rule 21(a) by this Court is the same as that imposed by the Sixth Amendment. See Pruett v. Norris, 153 F.3d 579, 584-85 (8th Cir. 1998) (stating that a defendant must demonstrate corrupting pretrial publicity to receive a change of venue under the Sixth Amendment).

"In determining whether adverse pretrial publicity precludes a fair trial, the trial judge must consider the totality of the circumstances." Patton v. Yount, 467 U.S. 1025 (1984). However, it is not uncommon when those charged with substantial crimes receive attention in the media. See Dobbert v. Florida, 432 U.S. 282, 303 (1977) ("One who is reasonably suspected of [murder] . . . cannot expect to remain anonymous.") .

At the outset it must be noted, as set forth above in the Statement of the Case, the defendant actively participated and promoted media coverage in the months following the government's execution of the search warrants.[14] Indeed, the defense went so far as to issue press releases to ensure media coverage of the case. See Gov't Response to Defendant's Pretrial Motions (Dkt. 146), Ex. 2 (also Gov't App. at A-247).

In cases where, as in this case, the defendant sought pretrial publicity, this Court has noted:

> An individual's expectations of privacy and media restraint are lessened when he has resolved to invite the very attention and generate the very publicity of which he later complains.

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[14] See, e.g., Liz Fedor and David Phelps, "Tom Petters gets back to business day after raid," Minneapolis-St. Paul Star Tribune (Sept. 25, 2008) (Gov't Response to Defendant's Pretrial Motions (Dkt. 146), Ex. 1, p. 1)); see also KAALtv.com, "Tom Petters meets with employees after federal raid." (Sept. 26, 2008) (quoting defense counsel, "We want to find out what's going on. We just don't know.") (Gov't Ex. 1, p. 4); Minneapolis-St. Paul StarTribune, (Oct. 16, 2008) ("the criminal defense attorney for Tom Petters went on the offensive Wednesday . . .," noting "nothing the government does to him will cause more pain than the loss of his son John four years ago when he was murdered in Italy.") (Gov't Ex. 1, p. 5); WCCO, "Petters' Girlfriend Opens Up About Sons, Jail," (Nov. 18, 2009) (Id. at p. 11); and WCCO, "Girlfriend: Petters Felt Betrayed By Whistleblower," (Nov. 19, 2008) (Id. at p. 15); Amy Forliti and Steve Karnowski, Post-Bulletin, "Petters' star rose quickly, fell faster (Nov. 16, 2008) (quoting defense counsel, "It's a spectacular fall from grace. One of the most spectacular falls you will ever see.") (Gov't Ex. 1, p. 17).

Pruett, 153 F.3d at 585 (noting that the defendant elected to make several statements to newspaper and television reporters).

In United States v. Blom, this Court recognized a two-tiered analysis when assessing pretrial publicity:

> At the first tier, the question is whether 'pretrial publicity was so extensive and corrupting that a reviewing court is required to 'presume unfairness of a constitutional magnitude' . . . in all other cases, the change-of-venue question turns on the second tier of our analysis, whether the voir dire testimony of those who became trial jurors demonstrated such actual prejudice that it was an abuse of discretion to deny a timely change-of-venue motion.

242 F.3d 799, 803 (8th Cir. 2001).

A. The First Tier: There Was No Basis To Presume Prejudice

"Just because . . . there has been widespread or even adverse publicity is not in itself grounds to grant a change of venue." United States v. McNally, 485 F.2d 398, 403 (8th Cir. 1973); see also United States v. Allee, 299 F.3d 996, 1000 (8th Cir. 2002) ("The mere existence of press coverage, however, is not sufficient to create a presumption of inherent prejudice and thus warrant a change of venue."). "Because our democracy tolerates, even encourages, extensive media coverage of crimes such as murder and kidnaping, the presumption of inherent prejudice is reserved for rare and extreme cases." Blom, 242 F.3d at 803. The formation of a tentative impression about the case by some jurors is not enough. United States

v. Bliss, 735 F.2d 294, 298 (8th Cir. 1984) (quoting United States v. Brown, 540 F.2d 364, 378 (8th Cir. 1976)). Typically, a presumption is applicable in the context of small rural communities where inflammatory coverage is pervasive. See CBS v. U.S. Dist. Cent. D. of Cal., 729 F.2d 1174, 1181-1182 (9th Cir. 1984).

To create a presumption of inherent prejudice in the pretrial publicity, the coverage must be inflammatory or accusatory. United States v. Allee, 299 F.3d 996, 1000 (8th Cir. 2002). Isolated incidents of "intemperate commentary" about the crime and the perpetrator are not sufficient to demonstrate that the coverage was inflammatory or accusatory when the majority of the reporting was "objective and unemotional." Id. Objective, straightforward reporting about a criminal case does not tend to arouse lingering ill-will or vindictiveness in the local community. Bliss, 735 F.2d at 299. As long as the reporting is factual and describes the defendant as having "allegedly" committed the crime or refers to him as being "accused" of committing the crime, the publicity is not inflammatory or accusatory. Simmons v. Lockhart, 814 F.2d 504, 509 (8th Cir. 1987).

In support of his argument, defendant points to articles written on or before February 28, 2009 (the date they were filed with the district court) – six months before the trial began. (See Def.'s Br. at 54 (citing Dkt. 154, Appendix B).) A review of the media coverage itself makes plain it was "objective and

unemotional," covering events, but not itself inflammatory. After reviewing the media coverage now cited by the defendant, the district court properly concluded the media coverage was not "extensive and corrupting" or "inflammatory or accusatory" such that the district court would presume prejudice. (Order dated Mar. 16, 2010 at 2 (deferring further consideration based on information from prospective jurors).) At the time of trial, the district court correctly found "[p]ublicity concerning this case has died down substantially." (Order dated Oct. 16, 2009 at 2.) While there was an uptick of media coverage at the time of trial, prospective jurors had already signed an oath in the juror questionnaires (in August) to avoid media coverage of the case. (See Dkt. 264.)

Defendant also points to a few comments made regarding the case in the "blogosphere" as evidence of pretrial prejudice. (Def.'s Br. at 54-55.) As noted by the district court, samplings of public opinion are entitled to little weight. Isolated incidents of intemperate commentary do not establish a presumption of prejudice. Allec, 299 F.3d at 1000. (Order dated Oct. 16, 2009 (citing Rodriguez, 581 F.3d at 785-86).) Moreover, the defendant points to no evidence that the blogosphere was reviewed or seen by prospective jurors. To the contrary, prospective jurors were specifically asked if they ever posted a comment on a blog, and each of the jurors indicated they had not. (See Juror Questionnaires.)

Based upon the record before the district court – and this Court – the district court properly concluded there was no presumption of prejudice. See Rodriguez, 581 F.3d at 785-86; see also United States v. Nelson, 347 F.3d 701, 706-07 (8th Cir. 2003). Given the even-handed reporting of the allegations against the defendant and his own active promotion of media coverage, this is not the rare case where prejudice should be presumed.

B. The Second Tier: There Was No Actual Prejudice

In his appeal, the defendant makes little effort to demonstrate actual prejudice. This is properly so, as there was no actual prejudice.

To the contrary, defendant incorrectly contends that were this Court to reverse the district court's determination that a presumption of prejudice was not warranted, "a new trial is mandatory." (Def.'s Br. at 57.) The opinion cited by defendant, United States v. Skilling, says otherwise. Skilling, 554 F.3d at 558-59 (impartial jury based on actual voir dire rebuts presumption).

In preparation for voir dire, the district court distributed questionnaires to the venire. (Order dated Oct. 16, 2009.) The venire was far larger than that usually summoned in a criminal case. (Id.) Only a small number of venire members indicated they had formed firm opinions, and they were excluded from the jury pool. (Id.)

Subsequently, questionnaires were provided to the parties for review. After that review, the parties jointly agreed to excuse only four prospective jurors for cause. (Status Conf. Tr. dated Oct. 7, 2009 at 7.)

Defendant cites to the record as a basis for establishing prejudice. (Def.'s Br. at 56 (citing Voir Dire Tr. at 29, 31, 67, 79-83, 99-100, 104-05, 117-20, and 128).) Yet, a review of these citations reflects these prospective jurors had heard little of the allegations to the extent they remembered anything, with only two exceptions-who were then excused by the district court. (Voir Dire Tr. at 86 and 129.) Throughout voir dire, the jurors that who actually served maintained they were fair and impartial and without preconceived opinions. (Voir Dire Tr. dated Oct. 28, 2009.)

In an effort to demonstrate prejudice, defendant points to two media pieces following the trial. (Def.'s Br. at 57.) Although it was expressly identified in the article's headline, "Emails Secured Petters Verdict," the defendant simply ignores what the article reported – that jurors carefully considered the abundance of evidence that ultimately proved the defendant guilty.

The record establishes the jury was impartial. Far from rushing to judgment, the jury deliberated for five days before arriving at a verdict that was

fully supported by evidence the district court subsequently characterized as "overwhelming."

II. The District Court Did Not Abuse Its Discretion In Requiring The Parties To Refrain From Identifying A Potential Witness As A Participant In The WitSec Program *In Pretrial Proceedings* And Sealing Inadmissible WitSec Program Records Provided To The Defendant In Discovery.

Defendant contends the Sixth Amendment was violated by the district court in (i) its rulings precluding the parties, in pretrial proceedings only, from identifying a potential witness as a participant in the WitSec Program and (ii) sealing WitSec Program records provided to the defendant in discovery. (Def.'s Br. at 39.) Although the courtroom was not closed at any point during the trial or pretrial proceedings, the defendant incorrectly refers to the redactions required in pretrial proceedings and the sealed filing of inadmissible WitSec Program records as courtroom "closures."

The district court's rulings were reasonable, limited and well within its discretion. See United States v. Graf, 610 F.3d 1148, 1168 (9th Cir. 2010) (rejecting claim of Sixth Amendment violation and reviewing district court's decision to seal government's ex parte submission as a trial management ruling reviewed for abuse of discretion).

The Supreme Court has held that the right to a public trial extends to pretrial hearings, although the right to an open trial "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Waller v. Georgia, 467 U.S. 39, 45 (1984). Notably, the Supreme Court has held that protecting the privacy interests of third parties may justify closing a court under certain circumstances if properly supported by court findings including the absence of alternatives (considered in camera if necessary). Waller, 467 U.S. at 48 (citing Press-Enterprise Co. v. Superior Court of Ca., 464 U.S. 501, 510 (1984)).

That said, courts have also recognized that the right to a public trial does not apply to every moment of a trial. See, e.g., United States v. Ivester, 316 F.3d 955, 959 (9th Cir. 2003) (non-public, mid-trial questioning of juror did not violate Sixth Amendment); United States v. Norris, 780 F.2d 1207, 1210 (5th Cir. 1986) ("Non-public exchanges between counsel and the court on such technical legal issues and routine administrative problems do not hinder the objectives which the Court in Waller observed were fostered by public trials."). Moreover, courts have properly authorized in camera hearings for particular purposes. See United States v. Maso, 2007 WL 3121986 (11th Cir. Oct 26, 2007) (unpublished) (affirming the

use of an in camera hearing, based on the trial court's finding, permitting a cooperating witness to testify regarding threats against him); United States v. Vazquez-Botet, 532 F.3d 37, 51-52 (1st Cir. 2008) (affirming a sealed hearing for the purpose of making an offer of proof); United States v. Valenti, 987 F.2d 708 (11th Cir. 1993) (closed bench conferences); United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir.1977) ("Bench conferences between judge and counsel outside of public hearing are an established practice, ... and protection of their privacy is generally within the court's discretion.... Such conferences are an integral part of the internal management of a trial, and screening them from access by the press is well within a trial judge's broad discretion."), overruled in part on other grounds, Nixon v. Warner Commc'ns, 435 U.S. 589 (1978).

Of course, the issue before this Court is not whether a trial (or even a hearing) was closed, it was not, but whether the district court abused its discretion in ordering counsel to redact pretrial filings to comply with its orders and requiring that an offer of proof, which included inadmissible WitSec Program information, be made under seal. While courts have recognized the public interest in access to judicial records, the Supreme Court has recognized that "[e]very court has supervisory power over its own records and files, and access has been denied where court files might become a vehicle for improper purposes." Nixon v.

Warner Commc'ns, 435 U.S. 589, 598 (1978). In addition, courts have authorized district courts to make redactions to judicial filings or to temporarily seal documents to balance competing interests. See, e.g., United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995); see also Graf, 610 F.3d at 1168 (reviewing decision to seal records as trial management issue).

The pretrial rulings in this case were narrowly tailored and reasonable, permitting the parties to pursue their motions in open court but precluding the parties from identifying a potential witness as a participant in the WitSec Program. (Pretrial Hr'g Tr. dated July 13, 2009 at 8.) The court based its ruling on a compelling interest, protecting the efficacy of the WitSec Program and the safety of a potential witness and his family. (Id. at 8-9.) Notably, the order was limited to pretrial proceedings, and the district court ruled the defendant could expressly identify the witness and his participation in the WitSec Program during trial. (Order dated Oct. 27, 2009.) The redactions that were subsequently required by the court in pretrial filings simply forced the parties to comply with the court's orders. Likewise, the defendant has no Amendment right to publish inadmissible government records through court filings.

Defendant belittles the district court's basis for precluding the defense from using the Court system, through court filings, to promote further identification and

endangerment of a potential witness as a participant in the WitSec Program. (Def.'s Br. at 44.). Simply because the defendant had already recklessly done so in press releases did not require the district court to lend a hand. Defendant essentially argues the Sixth Amendment gives him the right to say anything and file anything. The argument is wholly unsupported by legal precedent or common sense. Indeed, if such an argument were adopted, it would deter the government from providing the broad discovery it did in this case, which included records from the WitSec Program (the sensitivity of which has been recognized and codified by Congress, see 18 U.S.C. § 3521) or relying on protective orders.

As the sequence of events makes plain, as set forth in the Statement of the Case, the defendant was able to make all of his discovery demands and arguments in open court. The district court itself reviewed the WitSec Program file and gave the defendant discovery subject to a protective order. The district court imposed reasonable and limited constraints on the parties that were well within its discretion.

III. The District Court Did Not Abuse Its Discretion In Limiting The Cross-Examination Of A Witness To Relevant And Proper Cross-Examination In Accordance With The Federal Rules of Evidence.

In his first and second arguments, defendant contends the district court violated the defendant's Sixth Amendment rights to present a defense[15] and cross-examine a witness when the district court (i) precluded the defendant from introducing the witness' WitSec program file and (ii) limited the defendant's cross-examination in accordance with the Federal Rules of Evidence. (Def.'s Br. at 26-38.) Although Reynolds was the scapegoat selected by the defendant at trial, Reynolds' testimony was only of incremental import to the governments' case in light of the testimony of the other witnesses, the recordings, the emails and the

[15]One version of the defense at trial was a claim that Larry Reynolds "masterminded the PCI fraud" without Petters' knowledge. (Def.'s Br. at 27.) As set forth below, although the defendant was permitted to advance the defense, it was flatly contradicted by the evidence. Bank records showed that Reynolds received only millions from the scheme compared to the $82 million received by Petters personally and the $315 million received by Petters' companies. (See Gov't Exs. 7A & 110.) Reynolds' role, as reflected in the documents, was akin to Michael Catain, laundering half the proceeds of Petters' fraud. Finally, Petters himself, in recorded statements, established the falsity of his own defense. (Gov't Exs. 382 (Sept. 9, 2008: Petters acknowledges telling Reynolds "the truth"); 11 (Sept. 22, 2008: Petters discussing using Reynolds as a purported outside auditor rather than "tryin' to get him to tell more conspiracy stories with us"); 12 (Sept. 24, 2008: Petters reporting he had asked Reynolds "to make [Reynolds] look like [he was] the outside auditor").

bank records. The district court permitted a full and fair cross-examination and did not err in its evidentiary rulings.

"A trial court's ruling on the admissibility of evidence is to be given great deference and should be reversed only if the court clearly abused its discretion." United States v. Jackson, 914 F.2d 1050, 1053 (8th Cir. 1990). Reversal of a conviction is appropriate only where an improper evidentiary ruling affects substantial rights or where the ruling had more than a slight influence on the verdict. United States v. Ballew, 40 F.3d 936, 941 (8th Cir. 1994). "The Sixth Amendment right to confrontation and the Fifth Amendment right to due process of law require only that the accused be permitted to introduce all relevant and admissible evidence." United States v. Kasto, 584 F.2d 268, 272 (8th Cir. 1978). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." United States v. Crump, 934 F.2d 947, 951 (8th Cir. 1991) (quoting Delaware v. Van Arsdall, 475 U.S. 673 (1986)).

Prior to trial, the district court ruled the defense could refer to Larry Reynolds by name at trial as well as his participation in the WitSec Program. The

district court also ruled that if Reynolds were called as a witness, the defense could cross-examine him based on the information obtained from the WitSec Program file, but the WitSec file itself would not be admitted because it was extrinsic evidence that is not admissible to impeach the witness, pursuant to Federal Rule of Evidence 608. (Order dated Oct. 27, 2009 (Dkt. 320).) The district court's decision was wholly correct. See United States v. Roulette, 75 F.3d 418, 423 (8th Cir. 1996) (explaining that evidence that does not pertain "to the substantive issues of the trial" and that "could not be shown in evidence for any purpose independent of the contradiction" is collateral, and extrinsic evidence on collateral matters is inadmissible under Fed. R. Evid. 608(b)); United States v. Martz, 964 F.2d 787, 789 (8th Cir. 1992) ("The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters.").

In essence, Petters sought to use propensity evidence: Reynolds had a "penchant for criminal enterprises." (Def.'s Br. at 26-34.) While he couches the evidence in terms of modus operendi, in fact, the commonality was the schemes were all fraudulent. In point of fact, the defense fully and fairly, and in some detail, established that Reynolds had committed multiple frauds, had lied and had previously cooperated with the government to reduce his sentence. (Trial Tr. at

1557-1621.) Indeed, a review of the record reveals the cross-examination was permitted to go well beyond the boundaries set forth in Rules 402, 403, 404(b), 608 and 609 of the Federal Rules of Evidence. The defendant was permitted to examine Reynolds in some detail regarding the following topics: Reynolds' scheme in the 1970s to file false lawsuits (Trial Tr. at 1559-64); his association with reputed mobsters in the 1960s and 1970s (id. at 1560-61); his flight abroad from the potential for prosecution and his subsequent extradition (id. at 1564-65); the details of his conviction for larceny and his disbarment (id. at 1570); his participation in a conspiracy to purchase marijuana in the early 1980s and the resulting conviction (id. at 1573-75); the details of his subsequent bank fraud, the resulting conviction, and his efforts to cooperate to reduce his sentence (id. at 1576-84); his participation in the WitSec Program and the payments he received from the program (id. at 1591-97), and his participation in an insurance fraud while in the WitSec Program (id. at 1599).

While the defendant cites portions of the transcript to demonstrate the district court's limitation on cross-examination, a review of the transcript reflects the limitation precluded exhaustive inquiry into details of the decades-old frauds and the cumulative nature of the testimony. (Id. at 1594 (the district court noting "you've established he's a liar. You have established it all over.") Defense

counsel was also permitted to ask what Reynolds told his WitSec evaluator (based on information from the file), but the defense was properly precluding from having a mini-trial regarding what Reynolds told the evaluator, using extrinsic evidence. (Id. at 1591-96.)

It is entirely understandable why the defendant sought to make the Petters trial center around events in Reynolds' life from the 1970s and 1980s. It was also entirely correct for the district court to limit cross-examination to admissible testimony and to preclude the mini-trial defendant desired to pursue regarding what Reynolds may have told WitSec evaluators in the mid-1980s (as set forth in the Defendant's Sealed Offer of Proof (See Def.'s Confidential Appx. At TJP Appx. 2-4)).

Even assuming, arguendo, the district court's limitations were erroneous in some way, alleged Confrontation Clause errors are subject to harmless-error analysis. Crump, 934 F.2d at 951. As the Supreme Court has noted:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the

> extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Crump, 934 F.2d at 951(quoting Van Arsdall, 475 U.S. 673, 684 (1986)).

The defendant had more than a full opportunity to establish Reynolds had perpetrated other frauds and cooperated to reduce his sentence and to impeach Reynolds. He did so. While Reynolds may have been the centerpiece of the defendant's wholly unsubstantiated defense, Reynolds' testimony was merely one snowflake in the avalanche of evidence against defendant Petters. Thus, any error, which there was not, would be harmless.

IV. The District Court Did Not Abuse Its Discretion By Providing The Defendant With The Substance Of His Theory of Defense Instruction And Rejecting An Unsupported Advice-Of-Counsel Instruction.

Defendant also argues the district court erred by failing to provide the exact theory-of-defense instruction he requested. (Def.'s Br. at 47-50.)

This Court reviews a district court's jury instructions for an abuse of discretion, United States v. Turner, 189 F.3d 712, 721 (8th Cir. 1999), and will affirm if the entire charge taken as a whole, fairly and adequately instructs jurors on the law applicable to the case, United States v. Blazek, 431 F.3d 1104, 1109 (8th Cir. 2005). This standard "is highly deferential" to the district court's judgment. United States v. Lynch, 58 F.3d 389, 391 (8th Cir. 1995) (citing United

States v. West, 28 F.3d 748, 750 (8th Cir. 1994)). While the law entitles a defendant to an instruction conveying "the substance" of a properly-requested jury instruction on the defendant's theory of defense, "this entitlement does not guarantee a particular formulation of the proposed instruction." United States v. Gary, 341 F.3d 829, 834 (8th Cir. 2003). Finally, even should this Court find an error, "[r]eversal of a conviction . . . is only warranted if the error causes prejudice." Id.

The first purported flaw with the jury instruction was that the theory-of-defense instruction was not as detailed and argumentative as the one the defendant requested. (Def.'s Br. at 49.) Yet, the district court plainly did convey the substance of the "overarching theory" of the defense in its jury instructions, but declined to instruct on the details of evidence, leaving them for argument. (Trial Tr. at 3300-01; Dkt. 350 at 41, 47.) Indeed, the defendant acknowledges the district court did in fact provide the substance of the requested instruction, which he refers to as the "bare bones," but argues he was entitled to his full request. (Def.'s Br. at 49.) The law does not support the claim.

The second purported flaw in the jury instructions was the district court's refusal to provide an advice-of-counsel instruction. (Def.'s Br. at 49-50.) Such an instruction is only appropriate where a defendant (i) fully discloses all material

facts to his attorney and (ii) relies on the attorney's advice in the good faith belief that the conduct was legal. United States v. Rice, 449 F.3d 887, 897 (8th Cir. 2006). Notably, the defendant did not call any attorneys to support his advice-of-counsel theory. Instead, he relies on his testimony that he consulted with attorneys regarding the transactions. Merely because a defendant consults with an attorney regarding transactions does not entitle him to an advice-of-counsel instruction. Id. at 896. In this case, according to the theory of defense and the defendant's testimony, the defendant could not have disclosed all material facts, namely that transactions were fictitious, because the defendant claimed he did not know it himself. By the same token, he did not act based on fully-informed legal advice that the transactions were lawful. Far from claiming he received concurrent advice on the transactions, at trial, Petters claimed to have advised his attorneys of the fraud in September 2008 when he purportedly first learned of it. (Trial Tr. at 3264-66.)[16]

Indeed, the only issue at trial was the defendant's knowledge and intent. The district court properly concluded the record did not support an

[16]In fact, the government introduced evidence that the defendant was actively hiding information from company counsel. See Gov't Ex. 12 (Sept. 24, 2008: Petters instructing Coleman to clear out White's office because he doesn't "trust" company counsel and discussing using Reynolds as pretend auditor to buy time because Petters was "not letting [company counsel] fucking investigate").

advice-of-counsel instruction. (Trial Tr. at 3304 "I don't recall any specific testimony that [company counsel] was asked to give some opinion as to whether all these transactions were okay or something like that. I mean, apparently [according to the defendant], nobody knew about them including [company counsel].") Therefore, the district court properly and within its discretion rejected the advice-of-counsel instruction.

V. The Sentence Imposed By The District Court For An Unrepentant Defendant Who Had Captained One Of The Largest Frauds in United States' History Was Fair And Reasonable.

Defendant also claims the district court erred in its sentencing, because it purportedly (i) failed to consider the 3553(a) factors without presuming the Guidelines range reasonable, and (ii) failed to make an individualized assessment based on the facts presented. (Def.'s Br. at 58-59.) The claim is without merit.

On appeal, this Court reviews a sentence imposed for reasonableness, first ensuring that the district court "committed no significant procedural error." Gall v. United States, 552 U.S. 38, 51 (2007); see also United States v. Washington, 515 F.3d 861, 865 (8th Cir. 2008). Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen

sentence-including an explanation for any deviation from the Guidelines range." Gall, 552 U.S. at 51.

If the district court's decision is "procedurally sound," this Court next reviews the sentence for substantive reasonableness under a deferential abuse-of-discretion standard. Id. at 41; United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009) (en banc); Washington, 515 F.3d at 865. A sentencing court abuses its discretion under § 3553(a) if "it fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors." United States v. Watson, 480 F.3d 1175, 1177 (8th Cir. 2007). As the case law in the courts of appeals since Gall demonstrates, "it will be the unusual case when [this Court] reverse[s] a district court sentence -- whether within, above, or below the applicable Guidelines range -- as substantively unreasonable." Feemster, 572 F.3d at 464 (quoting United States v. Gardellini, 545 F.3d 1089, 1090 (D.C. Cir. 2008)).

After hearing the trial testimony, including the testimony of the defendant, hearing from the victims of the offense, considering the life sentence called for under the Guidelines, and considering the parties' substantial sentencing pleading, the district court imposed a sentence of 50 years. In doing so, Judge Kyle noted

the following:

> As I go through these various factors that are set forth, this was a massive fraud. And the Defendant's involvement in the fraud was front and center, at least in my mind, at every stage of it. There were others who were involved, obviously. Those who were in the office and ran it. But I would view Mr. Petters as captain of the ship, so to speak, and this would not have happened but for his direction and his concurrence with it.
>
> The loss here is serious. It's massive, as a matter of fact. Whether it's -- I guess Mr. Dixon has indicated it's the largest loss in Minnesota history. I'll take his word for it. It certainly is the largest loss that I have ever been involved in as a judge. It's serious. There are victims here who have been devastated by what occurred here.
>
> [W]hen you read the victims' statements here and you hear what happened here, you know that the devastation that has been imposed upon those who lost money here is almost as serious as losing one's life. We have people who had their life savings, they want to retire. Those are gone.
>
> It has impacted the faith in the financial community. Mr. Petters was a man who held himself out as a financial, if not genius, certainly a success story. And he lived a successful life. And there's nothing wrong with living a successful life. There's nothing wrong with living a successful life. There's nothing wrong with living in big houses or having three houses and airplanes or anything else as long as it's your money. The problem with this particular concept is the money that went into these facilities that allowed him to live the life that he lived came from the fraud that was involved here.
>
> And the donations and the charities that were set up, those were funded in the same way with the money here. So it's hard for me to give credit for those circumstances when the underlying pinnings of all this is the result of the fraud.

> In my mind the sentence here, a high sentence here is necessary. I think it's necessary to deter others from crimes. And I think it's also necessary because of Mr. Petters' own situation. **I'm not satisfied that if he were released at an early sentence that he would not re-offend.** I simply am not.
>
> I listened to his testimony during the course of the trial. I made no determination here as part of the sentencing process that he committed perjury. But I will tell you when I heard him say that he basically did not know what was going on in that office in terms of false invoices, counterfeit checks and the like, I didn't believe it. It just didn't pass the smell test, for lack of a better term. It was -- and I don't think the jury believed it or we would not have gotten the verdict which we got. It's hard to imagine that a man who is in charge of that, and he is a hands-on person -- was a hands-on person in one building, and you've got somebody in that same building in one office who is clipping coupons and forging documents and sending them somewhere, and obviously Deanna Coleman was a major factor here, but she wasn't acting alone in my mind. So I think the testimony was unbelievable. I'll leave it at that.
>
> **I think that a sentence here has to be high and I'll get right to it. In my judgment, taking into account all of those factors in the statute, and not relying upon the guidelines but taking them into account, it's my judgment that a sentence of 50 years in prison is the appropriate sentence under all the circumstances here.**

(Sentencing Tr. dated Apr. 8, 2010 at 44-47 (emphasis added).)

Essentially, the defendant argues that the district court erred because it did not accept his various sentencing arguments. "Normally, a district court that is aware of an argument does not abuse its discretion by not considering it." United States v. Roberson, 517 F.3d 990, 995 (8th Cir. 2008). While the district court is

required to consider the relevant factors, it has wide discretion as to what weight to accord each of them "in deciding whether the 3553(a) factors, on a whole, justify . . . [a] variance." United States v. Kane, 552 F.3d 748, 755 (8th Cir. 2009).

The defendant's argument is premised on the claim that the district court did not give sufficient weight to his argument, namely the lack of empirical data to support the fraud guidelines. (Def.'s Br. at 59-60.) A review of the record, however, makes clear that the district court did consider the § 3553(a) factors and the defendant's argument. The defendant points to the district court's statement "What do you want me to do with that objection?" as evidence that he failed to address his argument (id.), but the defendant fails to advise this Court that the district court then went on immediately following that statement to acknowledge the Guidelines were advisory and even agreed with defense counsel he had the authority to sentence as if the offense level were less than the calculation. (Sent. Hr'g Tr. at 6-7.) Thus, the district court expressly noted his authority to "disregard the guidelines entirely and still have the authority to impose a sentence almost as large with or without them" (Id. at 9.) Cognizant of its full authority and discretion, the district court imposed a sentence of 50 years, a sentence it

found to be "fully supported by the evidence and is fully compliant with 3553(a) and the various factors which I outlined there." (Sent. Hr'g Tr. at 48-49.)

In effect, the defendant is arguing not that the district court may reject the guideline range but rather it must reject it. The freedom to disagree with the Sentencing Commission does not require the district court to do so. See, e.g., United States v. Barron, 557 F.3d 866, 871 (8th Cir. 2009) ("[A]ssuming that a sentencing court may disregard section 2K2.1(a)(4)(B) on pure policy grounds, Kimbrough and Spears do not hold that a district court must disagree with any sentencing guidelines, whether it reflects a policy judgment of Congress or the Commission's 'characteristic empirical approach'."); United States v. Jones, 563 F.3d 725, 730 (8th Cir. 2009) (in context of child pornography guidelines, rejecting defense argument that guidelines were the product of a Congressional policy directive and not the product of the Commission's analysis based upon research or experience).

Perhaps most important, the defendant's argument is not properly made to this Court. In United States v. Shuler, 598 F.3d 444, 448 (8th Cir. 2010), the defendant also argued that the child pornography guidelines warrant downward variances because the Commission issued them at the urging of Congress and not as a result of exercising its traditional role of empirical analysis. This Court noted

that while the argument was appropriately made to the district court, it was not properly made to the Eighth Circuit:

> It is not properly made to this Court; our appellate role is limited to determining the substantive reasonableness of the specific sentence where the advisory guidelines range was determined in accordance with section 2G2.2.

598 F.3d at 448. For the same reason, the defendant's argument here is not properly before this Court.

Unlike his co-conspirators, who only assisted the defendant perpetrate his fraud (receiving only a fraction of the benefit obtained by the defendant) and then accepted responsibility for their actions, assisting law enforcement to the extent possible, the defendant initiated and led the fraud, was its principal beneficiary, obstructed justice and refused to accept responsibility and was, to the end, unrepentant. As noted by the district court, Petters will remain a threat to the community. The 50-year sentence fairly reflects these considerations. It is also in line with similarly situated defendants, namely the only two other kingpins of multi-billion dollar ponzi scheme frauds. See United States v. Madoff, Cr. No. 09-213 (DC) (S.D.N.Y. June 29, 2009) (district court imposed 150-year sentence following plea to multi-billion fraud); United States v. Scott Rothstein, Cr. No. 09-

60331-CR-COHN (S.D. Fla. June 8, 2010) (district court imposed 50-year sentence following plea to multi-billion fraud).

CONCLUSION

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

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the United States certifies this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32. The brief has 15978 words of 14-point, proportionally-spaced type. The brief was prepared using WordPerfect X4. The undersigned attorney also certifies that the computer diskette containing the full text of the Brief of Appellee has been scanned for viruses and to the best of our ability and technology, believes it is virus-free.

Dated: November 1, 2010

Respectfully submitted,

B. TODD JONES
United States Attorney

s/ Joseph Dixon, III

BY: JOSEPH T. DIXON, III
Assistant U.S. Attorney
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
Attorneys for Appellee