S.J. QUINNEY
COLLEGE OF LAW
THE UNIVERSITY OF UTAH

April 19, 2010

The Honorable Linda R. Reade
Chief U.S. District Court Judge
United States District Court for the Northern District of Iowa
4200 C Street, S.W.
Cedar Rapids, IA 52404

RE: Rabbi Sholom Rubashkin, Case No. 2:08-CR-01324-LRR

Dear Chief Judge Reade:

We are writing to respectfully urge the Court to impose a prison sentence in the neighborhood of six years in this case, as urged by the defendant, rather than in the neighborhood of three decades (or more), as apparently is suggested by the Government. The shorter sentence would more closely reflect the seriousness of the offenses of which the defendant has been convicted than would the draconian sentence implied by the Government. Indeed, remarkably, the Government's guidelines calculations seemingly call for the Court to impose a significantly longer sentence on Mr. Rubashkin than he would receive for second-degree murder, kidnapping, rape of child, or providing weapons to terrorist organizations. In fact, the Government's guidelines calculations are so flawed that they imply that his sentence should be the same as if Mr. Rubashkin had committed first degree murder. Such a lengthy sentence would clearly be disproportionate to his offenses.

We have read the sentencing memoranda filed in this case. Those memoranda must be read against the historical backdrop for this case. Originally, this case began as an investigation of various immigration offenses, for which the punishment would have been (at most) one or two years in prison. Now, however, the case has migrated into a financial fraud case, which the Government believes deserves far more serious penalties.

As we understand the Government's position on the sentencing guidelines, it contends that Mr. Rubashkin's offense level is either a level 41 for bank fraud or a level 45 for money laundering. Gov't Sentencing Memo. at 62-63 (listing base offense levels and subsequent enhancements). The Government then argues for an upward departure from these guideline ranges. *Id.* at 69-71. While the Government does not then spell out what range of imprisonment follows from its calculations, the sentencing table makes clear that the Government's calculation remarkably produces a guideline sentence of more than 405 months; indeed, under the money laundering guideline, the recommended sentencing range is life imprisonment. *See* U.S.S.G., Guidelines Table (range for a level 41 fraud offense is 324 to 405 months; range for a level 43 money laundering offense is life imprisonment; level 45 is beyond the limits of the chart).

The Court, of course, must impose a sentence that reflects "the seriousness of the offense." 18 U.S.C. § 3553(a)(2)(A). The sentence must be one that is "not greater than necessary" to achieve sentencing purposes. 18 U.S.C. § 3553(a). In making this determination, it is useful to look to sentences that are imposed for other crimes to see how Mr. Rubashkin's compares. *See, e.g., United States v. Angelos*, 345 F.Supp.2d 1227, 1245 (D. Utah. 2004) (making comparison between defendant's sentence and other crimes), *aff'd*, 433 F.3d 738 (10th Cir. 2006), *cert. denied*, 549 U.S. 1077 (2006). Here such a comparison provides stark evidence that the Government's guideline calculation produces a sentence that is simply out of proportion to the offenses at issue here. The table below compares Mr. Rubashkin's sentence with some of the most violent offenses in the federal criminal code:

Comparison of the Government's Proposed Guidelines Sentence for Mr. Rubashkin with Federal Guideline Sentences for Other Crimes

Offense and Offense Guideline	Offense Calculation	Maximum Guideline Range
Mr. Rubashkin's guidelines sentence, as calculated by the Government	Base Offense Level 43+ (money laundering guideline)	Life
First-degree murderer U.S.S.G. § 2A1.1	Base Offense Level 43	Life
Second-degree murderer U.S.S.G. § 2A1.2	Base Offense Level 38	293 Months
Kingpin of major drug trafficking ring in which death resulted U.S.S.G. § 2D1.1(a)(2)	Base Offense Level 38	293 Months
Aircraft hijacker U.S.S.G. §2A5.1	Base Offense Level 38	293 Months
Terrorist who detonates a bomb in a public place intending to kill a bystander U.S.S.G. § 2K1.4(a)(1)	Total Level 36 (by cross reference to § 2A2.1(a)(2) and terrorist enhancement in § 3A1.4(a))	235 Months
Racist who attacks a minority with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)(1)	Base Level 28 + 4 for life threatening + 3 for racial selection under § 3A1.1	210 Months
Spy who gathers top secret information U.S.S.G. § 2M3.2(a)(1)	Base Offense Level 35	210 Months
Rapist of a 10-year-old child U.S.S.G. § 2A3.1(a) & (B)(4)(2)(A)	Base Offense Level 30 + 4 for young child = 34	188 Months
Child pornographer who photographs a 12-year-old in sexual positions U.S.S.G. § 2G2.1(a) &(b)	Base Offense Level 32 + 2 for young child = 34	188 Months
Criminal who assaults with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)	Base Offense Level 28 + 4 for intent to kill = 32	151 Months

Kidnapper U.S.S.G. § 2A4.1(a)	Base Offense Level 32	151 Months
Saboteur who destroys military materials U.S.S.G. § 2M2.1(a)	Base Offense Level 32	151 Months
Drug dealer who shoots an innocent person during drug transaction U.S.S.G. § 2D1.1(c)(13) & (b)(2)	Base Offense Level 16 + 1 § 924(c) count	146 Months
Rapist U.S.S.G. § 2A3.1	Base Offense Level 30	121 Months
Criminal who provides weapons to support a foreign terrorist organization U.S.S.G. § 2M5.3(a) & (b)	Base Offense Level 26 +2 for weapons = 28	97 Months

Whatever may be said about Mr. Rubashkin's offenses, it is not logical to say that they are as serious as a first degree murderer. Moreover, it is simply not true to say that they are more serious than second degree murder, rape, kidnapping, or arming foreign terrorist organizations.

The fact that the federal sentencing guidelines for white collar fraud can produce such out-of-proportion sentences has not escaped notice among legal academics and other legal observers. *See, e.g.,* Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 169 (2008) ("While corporate fraud is certainly a serious offense, it is hard to argue that it is more serious than murder and several orders of magnitude more serious than armed robbery."). The basic problem seems to be that the guidelines make "loss" the primary driver of sentences. And the loss table mechanically moves sentences higher and higher based on loss alone, inexorably moving upward regardless of whether the sentence remains proportionate to the crime. *See* Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001 (2010).

The Government's claim that loss is an "appropriate" sentencing factor (see Gov't Sentencing Memo. at 66) is no answer to this problem. It is obvious that the amount of loss involved in a fraud is relevant to the ultimate sentence to be imposed. Clearly a $26 fraud is (other things being equal) a less serious fraud than a $26 million fraud. But it is equally obvious that the question before this Court is not one of whether to consider loss at all, but rather whether to let the loss amount (and related calculations) effectively drive a sentence that equates Mr. Rubashkin's conduct with first degree murder.

The Government, however, maintains that lengthy white collar sentences under the guidelines are justifiable. It cites evidence that, when the guidelines were drafted in the 1980s, Congress was concerned that, without guideline sentences, "'major white collar criminals often [were] sentenced to small fines and little or no imprisonment.'" Gov't Sentencing Memo. at 64-65 (citing S. Rep. No. 98-225, at 76 (1983)). But this is

no answer to the defense position that a six-year prison sentence would provide sufficient punishment. Here again, the issue is not *whether* to punish Mr. Rubashkin, but rather *how much* to punish him. The Government does not explain why he should be punished the same as a first-degree murderer or more than a second-degree murderer.

Moreover, the Sentencing Commission initially calibrated the white-collar Guidelines to produce a "short but definite" period of confinement for white collar criminals. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 22 (1988). The Sentencing Commission concluded that such a brief prison sentence could provide more deterrent value than a sentence without confinement. *Id.* Starting from this justifiable point in 1987, however, the Sentencing Commission has since ratcheted-up the guidelines to the point where the sentences that are recommended for white collar offenses "are generally too harsh." Vollrath, *supra*, at 1020.

To prove this point, one of the nation's leading academic experts (and a former federal prosecutor) has carefully reviewed the various sentencing guidelines for white collar crimes. Professor Frank Bowman[1] concludes that Guidelines are now "pegged to such extreme levels of severity" that they "no longer provide[] a means of distinguishing between more and less culpable defendants." Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 168 (2008). Professor Bowman goes on to explain that the fraud Guidelines fail to distinguish between "[a] defendant who consciously sets out to steal or cause economic loss" and a defendant "who acts dishonestly but without the desire to steal or cause loss." *Id.* at 171. He urges judges to use the new flexibility found in *Booker* to recognize the special case of defendants "who caused financial harms that, while perhaps legally foreseeable, were far larger than those the defendant[] intended or foresaw." *Id.* at 172.

The white collar guidelines are now to the point where, as some courts have recognized, they generate harsh sentencing recommendations that are "literally, off the chart." *United States v. Adelson*, 441 F.Supp.2d 506, 510 (S.D.N.Y. 2006). Here, the Government's calculations actually produce an "off the chart" calculation of a level 45 – supposedly to be followed (in its view) by some sort of upward departure.

The solution to these absurdly high calculations is for the Court to vary its sentence downward to something that makes sense. The Supreme Court recognized in *Kimbrough v. United States*, 552 U.S. 85 (2008), that district judges are best situated to evaluate appropriate sentencing factors in the context of the facts of particular cases and particular defendants. *Id.* at 107-08. The Court recognized, however, that there may be certain areas where the Sentencing Commission is well situated to promulgate Guidelines. For example, the Sentencing Commission "has the capacity courts lack to

[1] Professor Bowman is the Floyd R. Gibson Missouri Endowed Professor of Law at the University of Missouri School of Law. A former federal prosecutor, Bowman has served as Special Counsel to the U.S. Sentencing Commission in Washington, D.C., and as academic advisor to the Criminal Law Committee of the United States Judicial Conference. He is one of the authors of the *Federal Sentencing Guidelines Handbook* and an editor of the *Federal Sentencing Reporter*.

base its determination on empirical data and national experience, guided by a professional staff with appropriate expertise." *Id.* at 108. Consequently, a district court decision to vary from the Guidelines in an area resting on empirical evidence is subject to closer review. *Id.* at 109-10.

The white collar guidelines before the Court are not such an area. Rather than resting on evidence of past, national sentencing practices, the white collar Guidelines "are a product of the political environment in which they were promulgated, the Commission's desire that the Guidelines reflect perceived congressional policy, and the Commission's own independent policy determinations concerning the severity of a particular class of conduct." Vollrath, *supra*, at 1034. As a result, a district judge's decision to deviate from these Guidelines to produce a sentence that is fair and just under the facts of a particular case is "not subject to the 'closer review' alluded to in the Supreme Court's *Kimbrough* opinion." *Id.*

District judges around the country have already varied from the nonsensically harsh sentences recommended by the white collar guidelines. For example, Judge Lake had been forced to impose a 292 month sentence in a white collar fraud case before *Booker*. In reconsidering the sentence after *Booker*, Judge Lake recognized the inappropriate severity of the Guidelines white collar calculations. *United States v. Olis*, No.l H-03-217-01, 2006 WL 2716048 (S.D. Tex. Sept. 22, 2006) ("The court concludes that a sentence within the applicable guideline range would not be reasonable."). Judge Lake therefore varied from the Guidelines and imposed a sentence of seventy-two months. *Id.*

Similarly, Judge Rakoff faced a sentencing for securities fraud where "calculations under the Sentencing Guidelines lead to a result so patently unreasonable as to require the Court to place greater emphasis on other sentencing factors to derive a sentence that comports with federal law." *United States v. Adelson*, 441 F.Supp.2d 506, 506 (S.D.N.Y. 2006). There, the Government's Guidelines calculations produced a sentence in the neighborhood of 85 years. Interestingly, in that case (as, apparently, in this one) the Government refused to state directly that it was advocating the prescribed Guideline sentence. As Judge Rakoff explained, "it is patent that the Government was asking the Court not to impose a guideline sentence or, indeed, a sentencing of anything like 85 years. What this exposed, more broadly, was the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense." *Id.* at 512. Judge Rakoff ultimately imposed a sentence of three-and-a-half years for the $50,000,000 crime before him.

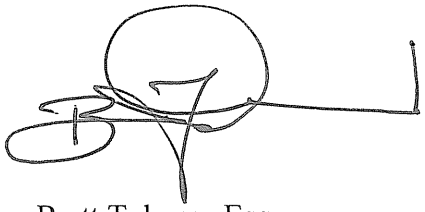
These are hardly isolated examples. Professor Bowman concludes that "since Booker, virtually every judge faced with a top-level corporate defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines for cases like these and the fundamental requirement of

Section 3553(a) that judges impose sentences "sufficient, but not greater than necessary" to comply with its objectives." Bowman, *supra*, at 169.

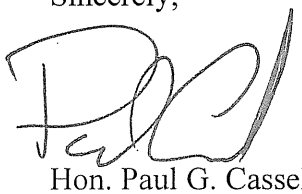
Imposing massively lengthy sentences in white collar cases is not only wasteful of taxpayer dollars, but it is insulting to the victims of violent crimes. It is hard for victims of truly violent crimes to understand why defendants who have violently harmed them should receive a far shorter prison sentence then (if the Government's recommendation is followed) Mr. Rubashkin. As one district judge has explained, "crime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for [a corporate fraud], the implicit message to victims is that their pain and suffering counts for less than some abstract 'war on [corporate fraud].'" *United States v. Angelos*, 345 F.Supp.2d at 1251 (D. Utah. 2004) ("corporate fraud" for "war on drugs").

For all these reasons, we respectfully urge the Court not to follow the Government's sentencing Guidelines calculations and instead to impose a sentence that more closely reflects the actual and relative seriousness of the defendant's offense.

Sincerely,



Brett Tolman, Esq.
Former United States Attorney
District of Utah
Shareholder,
Ray, Quinney & Nebeker P.C.



Hon. Paul G. Cassell
Ronald N. Boyce Presidential
Professor of Criminal Law
S.J. Quiney College of Law
University of Utah[2]

[2] The views expressed in this letter are my own are not intended to imply institutional endorsement of the University of Utah.