

Client started InvestmentSolutions as a legitimate business. However, once he began to illegally use funds entrusted to him for investment, he simply dug his hole deeper and deeper. Mr. Client was hopeful that the business was going to become profitable enough to eventually repay the funds that he had misappropriated but that did not happen before the time he was charged in this case. Mr. Client made extremely poor judgments in his misappropriation of the investment funds. These misjudgments must, however, be seen in light of the mental illness and personality disorder from which Mr. Client was suffering. A sentence within the advisory guideline range is far in excess of what is fair and just in this case and would not take into account Mr. Client' mental disease. A departure or variance is, therefore, needed to avoid such an unjust result.

Desperate to regain custody of the children, Mr. Client sought to grow his business rapidly, believing that the more successful he became, the more influence he might wield in the custody dispute. Unfortunately, InvestmentSolutions' insurer, AIG, did not inspect the company's securities-related activity, so the fraud went undetected while Mr. Client continued to act in desperation. Since his arrest, Mr. Client has cooperated with civil attorneys representing victims in a suit against AIG, and a settlement has been reached for \$7.2 million. Mr. Client asks the Court to consider not just his criminal acts, but also his lack of a criminal record, the mental illness and personal loss that fueled his crimes, and his genuine desire to make restitution to his victims.

1. The Founding of InvestmentSolutions, LLC

James Client started InvestmentSolutions, LLC in 1999. The company was engaged in the business of managing employee benefit plans, such as 401(k) pension plans and health savings accounts, for other businesses and entities. Prior to establishing InvestmentSolutions, Mr. Client had worked as a sales agent, primarily in the insurance industry, and did not have any experience

managing pension plans or health savings accounts. Despite his lack of experience, however, Mr. Client successfully grew InvestmentSolutions from a very small company with one employee to a large company with approximately eighty employees. And, he was entrusted with millions of dollars in fiduciary funds. As a result of the company's quick growth, Mr. Client was featured in a number of trade publications and news reports and InvestmentSolutions was viewed as a fast-growing and effective company for the management of pension plans and health savings accounts.

2. *The Origins of the Fraud*

In 1994, James Client and his then-wife became foster parents to three children. One of the children was just two-weeks old; the other two were just two and three years old. The children's biological mother suffered from major depression with psychotic features and was deemed unfit to care for her children. The Clients were dedicated foster parents and loved the children with as fierce a love as any biological parent experiences. They had custody of the children for six years and, over time, stopped fearing that the children would ever be returned to their biological mother.

In 1997 – three years after taking the children in – the Clients filed a petition in Local County Chancery Court to terminate the parental rights of the biological mother. The Chancery Court granted the Clients' petition but the ruling was later reversed on appeal by the State Court of Appeals. The State Supreme Court denied permission to appeal. As a result, the children were reunited with their biological mother.

Mr. Client was utterly devastated by the loss of his children. He and his wife spent thousands of dollars in legal fees attempting to keep custody of the children. And, after the courts ruled against him, he became obsessed with trying to get the children back. Mr. Client genuinely felt that it was not in the best interest of the children to live with their biological mother, and he desperately wanted

to convince the authorities to return the children to him and his wife.

Mr. Client suffers from bipolar disorder, narcissistic personality disorder, multiple medical problems and has an obsession with the loss of custody of his foster children.¹ Mr. Client's extreme emotional distress at the loss of his foster children and marriage provoked grandiose and impulsive actions. Fueled by his mental illness, Mr. Client tried to think of a way – any way – to get the children back. He recalled that when he had been very involved in political campaigns for many years, he got a sense of the sort of political favors that politicians do for their financial backers. During the 1990s, Mr. Client had done work with the State Democratic Party and had been especially involved in the campaigns to elect John B. Governor as mayor of Anytown and later governor of Anystate. And, after Governor was elected, Client became a member of the Governor's Roundtable, a quarterly lunch meeting the Governor held with financial contributors. Mr. Client began to view his connections with the Governor as the very sort of political connection that might give him influence in the custody dispute. Specifically, Mr. Client hoped that the Governor might be able to get the Department of Children's Services to revisit the custody issue.

After some initial overtures to the Governor – and two meetings with the then-director of the Department of Children's Services – Mr. Client came to believe that his stature was simply not high enough to garner the political favor he needed. He believed that if he could grow InvestmentSolutions into a bigger, more successful business, he might be able to get the Governor's administration to intervene on his behalf.

3. *The Fraud and Client's Arrest*

In an effort to grow InvestmentSolutins as quickly as possible, Mr. Client made the grave

¹The reports of A. Psychiatrist, M.D. and M. Psychologist, PhD will be filed with the Court before the sentencing hearing.

mistake of beginning to use his clients' investment funds to hire more sales agents and solicit more business. Although he invested a portion of the client funds, an increasing percentage was being illegally funneled back into the business for operating costs. Mr. Client also began using client funds for personal expenses and tangential business expenditures (*e.g.*, fundraising events, a charitable foundation, and political contributions). He viewed many of these expenditures as essential to raising the profile of InvestmentSolutions and enhancing his political leverage.

In 2006, a series of civil lawsuits were filed against Mr. Client by companies seeking the return of monies entrusted to InvestmentSolutions. As it became clear that Mr. Client could not promptly return the investment funds to the suing companies, he was charged with embezzlement from an employee benefit plan. In November 2006, a month after charges were first filed, he was indicted on six counts of embezzlement from an employee benefit plan. On May 9, 2007, the federal government filed a seventy-eight count superseding indictment. Mr. Client has pleaded guilty to a number of charges in the superseding indictment. He has been continuously jailed, without bond, since October 13, 2006.

Mr. Client accepts responsibility for his wrongdoing and is remorseful for his conduct. He knows that his mismanagement of the funds has created a severe hardship on the hardworking individuals who entrusted him with their retirement savings. He is deeply sorry for his actions and looks forward not only to expressing remorse to the victims at the upcoming hearing, but also to dedicating the remainder of his working life to making restitution to them. He recognizes that the desperate love he felt for his children in no way justifies his actions. He does not offer this explanation as an excuse, but only to show that he was motivated by something other than raw greed.

4. *James Client's Insurer Has Agreed to Return Funds to Plan Participants*

James Client held a securities license which enabled him to operate InvestmentSolutions' business of managing fiduciary funds. AIG insured Mr. Client and was supposed to supervise Mr. Client, including conducting an annual inspection of his business. Tragically, given Mr. Client's desperation and mental illness, AIG did not conduct this inspection. Had AIG conducted the inspections, the fraud would have been discovered much earlier and the losses would not have been nearly as great. Fortunately, after the fraud was discovered, a group of victims reached a settlement with AIG for \$7.2 million whereby these funds will be returned to the plan participants who were victimized by the fraud.

5. *Client's Efforts at Cooperation*

Mr. Client very much wants to make restitution to the victims of his crimes. Towards this end, he has met and cooperated with the attorney representing a number of fraud victims in their civil lawsuits against AIG. Partly as result of Mr. Client's cooperation, the civil lawsuits were settled and the victims stand to recover approximately seven million dollars. Although the settlement has not yet been funded and is awaiting final approval by the Bankruptcy Court, numerous victims of Mr. Client's actions will see some of their money returned to them. Their attorney has indicated that Mr. Client's cooperation and provision of information was "very helpful" in the settlement of the lawsuit.

6. *Collateral Consequences Suffered by Client*

Since his arrest in October 2006, Mr. Client has been subject to a very harsh pretrial incarceration. He has experienced a host of medical problems, including repeated staph infections, a worsening of his diabetes, an undiagnosed and thus untreated blood disorder, and even liver damage. In efforts to identify the cause of his blood disorder, he was wrongly diagnosed with

leukemia and then lymphoma, only to be later told that he does not, in fact, have cancer. The initial cancer diagnoses were not ruled out until after he was subject to both a bone marrow biopsy and a lymph node biopsy. Most recently, his treating physicians at the state jail have diagnosed him with autoimmune hepatitis. He also contracted a staph infection at the site of his lymph node biopsy, which led to substantial blood loss and required hospitalization and surgery.

Mr. Client's father passed away in December 2006. Because Mr. Client was incarcerated at the time, he was unable to attend the funeral services. Additionally, his marriage disintegrated under the stress of these charges, and his wife is seeking a divorce. As his own family support system has deteriorated, Mr. Client's human contact has become limited to the state jail inmates with whom he is housed, many of whom are charged with serious violent crimes like rape and murder.

As a result of this offense, Mr. Client has suffered the loss of his business, his professional reputation, and his ability to work in the financial industry. Though he was an extremely successful licensed insurance agent from 1992 to 2006, he has voluntarily surrendered his insurance license and therefore will never again be able to engage in this profession. He has also agreed never to participate in the affairs of any financial institution insured by the Federal Deposit Insurance Corporation (FDIC), never to serve as an officer, director or employee of any institution or agency specified in 12 U.S.C. § 1818(e)(7)(A), and never to serve in any position related to any employee benefit plan.

7. Advisory Guidelines Range

The United States Probation Office has calculated a guideline range of 210 to 262 months. This range is based on an adjusted offense level of 37 and Criminal History Category I. This advisory range should not be heeded because it (1) is the product of a fraud guideline that is not based on empirical data or evidence that it serves the purposes of sentencing, for which it has been

severely criticized; (2) would result in a sentence disparate from similarly situated defendants in other fraud cases; (3) fails to take proper account of Mr. Client's mental illness, age, first offender status, efforts at cooperation, collateral punishment, and especially low risk of recidivism; and (4) is far greater than necessary to promote the goals of sentencing in this case.

II. LAW AND ARGUMENT

The advisory guideline range in this case is far greater than necessary to satisfy the goals of sentencing. The harsh sentencing recommendations of § 2B1.1 are not based on past practice or empirical data and have been increasingly rejected by sentencing courts in high-loss fraud cases. As the sample of cases highlighted below demonstrates, defendants in fraud cases involving less than \$100 million in loss typically receive less than 10 years imprisonment, even when the Guidelines recommend a much higher sentence.

James Client's advisory guideline range is **seven times** longer than the sentencing range he would have faced under the original guidelines adopted in 1987. Over the past twenty years, the Sentencing Commission has dramatically increased the severity of sentences for fraud offenders by raising the number of points imposed for the amount of loss *and* by approving a **five-fold** expansion in the number of specific offense characteristics. Because the Commission failed to rely on empirical data when making these changes – and thus failed to fulfill its institutional role – sentencing courts have tremendous discretion to disagree, on policy grounds, with § 2B1.1's sentencing recommendations. *See Spears v. United States*, 129 S. Ct. 840, 843 (2009) (explaining that when the Commission fails to fulfill its institutional role, a district court can vary from the guidelines “based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case”).

When the Sentencing Commission adopted the original guidelines in 1987, it sought to ensure that white collar offenders faced “**short** but definite period[s] of confinement.” U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 56 (Nov. 2004) [hereinafter *Fifteen Year Report*]. The Commission thus reduced the availability of probation and adopted a fraud guideline that subjected a defendant to no more than 78 months in prison. To justify the increase in the rate of confinement above pre-guidelines practice, the Commission explained that “the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.” USSG, ch. 1, intro., pt. 4(d) (1987).

But, as noted above, the Commission has abandoned its original goal of ensuring “short but definite” sentences, and has instead steadily increased the prison sentences for fraud. Calculating James Client’s guideline range under various versions of the Guidelines provides a stark illustration of the dramatic escalation in the punishment for fraud over the past twenty years.

▶	1987	
	2F1.1(a) – base offense level:	6
	2F1.1(b)(1) – amount of loss over \$5 million	11
	2F1.1(b)(2) – more than minimal planning and/or multiple victims	2
	3B1.3 – abuse of position of trust	<u>2</u>
		21
	3E1.1 – acceptance of responsibility	-2
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	TOTAL OFFENSE LEVEL	19
	GUIDELINE RANGE	30 - 37 months

▶	1989	
	2F1.1(a) – base offense level:	6
	2F1.1(b)(1) – amount of loss between \$10 and 20 million	15
	2F1.1(b)(2) – more than minimal planning and/or multiple victims	2
	2F1.1(b)(3) – violation of judicial or administrative order	2
	3B1.3 – abuse of position of trust	<u>2</u>
		27
	3E1.1 – acceptance of responsibility	-2
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	TOTAL OFFENSE LEVEL	25
	GUIDELINE RANGE	57 - 71 months

▶	2001	
	2B1.1(a) – base offense level:	6
	2B1.1(b)(1) – amount of loss between \$7 and 20 million	20
	2B1.1(b)(2)(B) – more than 50 victims	4
	2B1.1(b)(7) – violation of judicial/administrative order <i>or</i> fraudulent action in bankruptcy proceeding	2
	2S1.1(b)(2)(A) – convicted under 18 U.S.C. § 1957	1
	3B1.3 – abuse of position of trust	<u>2</u>
		35
	3E1.1 – acceptance of responsibility	-3
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	TOTAL OFFENSE LEVEL	32
	GUIDELINE RANGE	121 - 151 months

▶	2008	
	2B1.1(a)(1) – base offense level:	7
	2B1.1(b)(1) – amount of loss between \$7 and 20 million	20
	2B1.1(b)(2)(C) – more than 250 victims	6
	2B1.1(b)(8) – violation of judicial/administrative order <i>or</i> fraudulent action in bankruptcy proceeding	2

2B1.1(b)(9)(C) – offense involved sophisticated means	2
2S1.1(b)(2)(A) – convicted under 18 U.S.C. § 1957	1
3B1.3 – abuse of position of trust	<u>2</u>
	40
3E1.1 – acceptance of responsibility	-3
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TOTAL OFFENSE LEVEL	37
GUIDELINE RANGE	210 - 262 months

In other words, the Commission has increased the sentencing range for a defendant guilty of James Client’s crimes by 700 percent in the twenty years since the Guidelines were first adopted. The Commission has adopted this radical shift in sentencing policy without the support of any empirical data demonstrating the penological value of its substantial increases in sentence severity. *United States v. Aldelson*, 4441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006) (citing Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 69 (1998)) (“[Be]cause of their arithmetic approach and also in an effort to appear ‘objective,’ [the Guidelines] tend to place great weight on putatively measurable quantities, such . . . [the] amount of financial loss in fraud cases, without, however, explaining why it is appropriate to accord such huge weight to such factors.”) Because the Commission failed to cite empirical data – and thus failed to fulfill its institutional role – sentencing courts have tremendous discretion to disagree, on policy grounds, with § 2B1.1’s recommendations. *See Spears v. United States*, 129 S. Ct. 840, 843 (2009) (explaining that when the Commission fails to fulfill its institutional role, a district court can vary from the guidelines “based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case”). And indeed, “since *Booker*, virtually every judge faced with a top-level corporate fraud 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 [in corporate fraud cases] and the fundamental requirement of Section 3553(a) that judges imposes sentences ‘sufficient, but not greater than necessary’ to comply with its objectives.” Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 169, 2008 WL 2201039, at *4 (Feb. 2008).

The chart below highlights a number of the fraud cases in which district court judges have imposed sentences below the advisory guideline range.

Case	Conviction	Guideline Amount	Guideline Range	Sentence
Christian Milton , AIG, Vice President (D. Conn. 2009)	Convicted at trial of various counts of fraud.		LIFE imprisonment	48 months ¹
Ronald Ferguson , CEO, General Reinsurance Corp. (D. Conn. 2008)	Convicted at trial of conspiracy, securities fraud, false statements to SEC, and mail fraud.	\$544 million	LIFE imprisonment	24 months ²
Travis Correll , (N.D. Ga. 2008)	Pled guilty to wire fraud (related to Ponzi scheme).	\$29 million (ordered in restitution)	188-235 months	108 months ³ (Mr. Correll was initially sentenced to 144 months. He later received a further reduction, under Rule 35, based on his cooperation).
Robert Cole , Sales Rep., Diebold (N.D. Ohio 2008)	Pled guilty to securities fraud.	\$509,000	30-37 months	12 months and 1 day ⁴
William Ledee , Founder of fictitious insurance company (N.D. Ga. 2007)	Pled guilty to making false financial statements, engaging in business of insurance as a convicted felon, mail fraud, conspiracy to commit money laundering, etc.	\$21.6 million (ordered in restitution)	The PSR indicated a total offense level of 51, and criminal history category II, resulting in a guideline range of LIFE . ⁵	70 months (Judge varied below C agreement’s sentence cap of 7.5 years) ⁵

<i>John Whittier</i> , Manager, Wood River Partners (S.D.N.Y. 2007)	Pled guilty to securities fraud, failure to disclose ownership in excess of 5% of publicly traded security, and failure to disclose ownership in excess of 10% of publicly traded security.	\$88 million (ordered in restitution)	188-235 months	36 months⁶
<i>Hector Orlansky</i> , President, E.S. Bankest (S.D. Fla. 2007)	Convicted at trial of conspiracy to commit bank fraud and wire fraud, bank fraud, making false statements, wire fraud, conspiracy to commit money laundering, and money laundering.	\$164.5 million (ordered in restitution)	262-327 months	240 months⁷
<i>Richard Adelson</i> , CEO & President, Impath (S.D.N.Y. 2006)	Convicted at trial of conspiracy, securities fraud, and filing false reports with SEC.	\$50 - \$100 million (court ordered restitution of \$50 million)	Guidelines called for life imprisonment ; however, statutory maximum was 85 years .	42 months⁸
<i>Jamie Olis</i> , Tax Lawyer, Dynegy (S.D. Tex. 2006)	Convicted at trial of: (1) conspiracy to commit securities fraud, mail fraud, wire fraud, (2) securities fraud, (3) mail fraud, and (4) wire fraud.	\$79 million	151 -181 months	72 months⁹
<i>E. Kirk Shelton</i> , Vice Chairman, Cendant Corporation (D. Conn. 2005)	Convicted at trial of: (1) conspiracy to commit securities fraud, mail fraud, wire fraud, and false statements to SEC, (2) mail fraud, (3) wire fraud, (4) false statements to SEC, (5) securities fraud.	\$3.275 billion (ordered in restitution)	151-181 months (See explanation above regarding use of 1997 Guidelines)	120 months¹⁰
<i>Bernard Ebbers</i> , CEO, WorldCom (S.D.N.Y. 2005)	Convicted at trial of conspiracy, securities fraud, making false filings with the SEC.	Over \$1 billion	360 months to life	300 months¹¹
<i>Sanjay Kumar</i> , CEO, Computer Associates Int'l (E.D.N.Y. 2006)	Pled guilty to conspiracy to commit securities fraud and wire fraud, securities fraud, false statements to SEC, conspiracy to obstruct justice, obstruction of justice, and false statements.	\$2.2 billion (according to Government's Sentencing Memorandum)	LIFE imprisonment under 2005 Guidelines 188 to 235 under 1998 Guidelines (Unclear how District Court resolved dispute over which version should apply.)	144 months¹²
<i>Stephen Richards</i> , Sr. Vice President, Computer Associates (E.D.N.Y. 2006)	Pled guilty to conspiracy to commit securities fraud and wire fraud, securities fraud, false statements to SEC, conspiracy to obstruct justice, obstruction of justice, and perjury.	\$2.2 billion (according to Government's Sentencing Memorandum)	LIFE imprisonment under 2005 Guidelines 151 to 188 under 1998 Guidelines (Unclear how District Court resolved dispute over which version should apply.)	84 months¹³
<i>Mehdi Gabayzadeh</i> , CEO, American Tissue (E.D.N.Y. 2006)	Convicted at trial of conspiracy to commit securities fraud, conspiracy to commit bank fraud, bank fraud, wire fraud, interstate transport of property obtained by fraud, bankruptcy fraud, conspiracy to commit perjury, and obstruction of justice.	PSR found total loss of \$193 million (Court ordered \$65 million in restitution.)	LIFE imprisonment	180 months¹⁴

<i>John Rigas</i> , Founder, Adelphia (S.D.N.Y. 2004)	Convicted at trial of securities fraud, bank fraud, and conspiracy to: (a) commit securities fraud, (b) commit bank fraud, and (c) make or cause to be made false statements in filings to SEC.	\$2.3 billion	Guideline range was LIFE imprisonment ; however, statutory maximum was 185 years.	144 months ¹⁵
<i>Timothy Rigas</i> , CFO, Adelphia (S.D.N.Y. 2004)	Convicted at trial of securities fraud, bank fraud, and conspiracy to: (a) commit securities fraud, (b) commit bank fraud, and (c) make or cause to be made false statements in filings to SEC.	\$2.3 billion	Guideline range was LIFE imprisonment ; however, statutory maximum was 185 years.	204 months ¹⁶
<i>Jacob Jacobowitz</i> , Executive VP, Allou Healthcare (E.D.N.Y. 2007)	Pled guilty to making false statements in reports to the SEC.	\$30 million (ordered in restitution)	Guideline range was 168-210 months ; however, statutory maximum was 120 months.	84 months ¹⁷
<i>Herman Jacobowitz</i> CEO, Allou Healthcare (E.D.N.Y. 2007)	Pled guilty to conspiracy to commit bank, securities, and mail fraud <i>and</i> making false statements in reports to SEC.	\$176 million (ordered in restitution)	Guideline range would have been LIFE imprisonment ; however, plea agreement was structured to impose statutory maximum of 180 months.	180 months ¹⁸
<i>Aaron Jacobowitz</i> Manager of various companies controlled by Jacobowitz family (E.D.N.Y. 2007)	Pled guilty to money laundering.	\$176 million (ordered in restitution)	Guideline range was LIFE imprisonment ; however, plea agreement was structured to impose statutory maximum of 120 months.	120 months ¹⁹
<i>Carole Argo</i> CFO, SafeNet, Inc. (S.D.N.Y. 2008)	Pled guilty to securities fraud.	\$1 - 2.5 million (stipulated loss amount)	97 - 121 months	6 months ²⁰
<i>Lennox Parris</i> , Director, Queench, Inc. (E.D.N.Y. 2008)	Convicted at trial of conspiracy to commit securities fraud, securities fraud, conspiracy to commit witness tampering, and witness tampering.	Between \$2.5 and \$7 million	360 months to LIFE	60 months ²¹
<i>Lester Parris</i> , Director, Queench, Inc. (E.D.N.Y. 2008)	Convicted at trial of conspiracy to commit securities fraud, securities fraud, conspiracy to commit witness tampering, and witness tampering.	Between \$2.5 and \$4.9 million	360 months to LIFE	60 months ²²
<i>Raquel Kohler</i> , Mutual Benefit Corp. (S.D. Fla. 2007)	Pled guilty to conspiracy to commit securities fraud.	\$471 million (ordered in restitution)	Guideline range was 324- 405 months , but statutory maximum limited sentence to 120 months .	60 months ²³

<i>Marc Dreier</i> , Managing Partner, Dreier LLP (S.D.N.Y. 2009)	Pled guilty to securities fraud, wire fraud, and conspiracy to commit securities and wire fraud.	\$387 million (ordered in restitution)	Guideline range was LIFE , but statutory maximum limited sentence to no more than 145 years .	240 months ²⁴
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In the above-cited cases, courts have substantially varied from the guideline range based on: (1) policy disagreements with § 2B1.1’s sentencing recommendations, (2) concerns about unwarranted disparities *vis-à-vis* the many courts who have declined to impose within-guidelines sentences in fraud cases, and/or (3) mitigating aspects of a particular defendant’s history or the nature and circumstances of his/her offense. As discussed at greater length below, these very same factors weigh in favor of a statutory sentence below the advisory guideline range in Mr. Client’ case.

A. The lengthy sentences, under § 2B1.1, for high-loss fraud defendants do not reflect sound policy.

When the Sentencing Commission fails to fulfill “its characteristic institutional role” of developing a particular guideline, or its later amendments, based upon empirical data or national experience, the district court has the discretion to conclude that the resulting advisory range “yields a sentence ‘greater than necessary’ to achieve §3553(a)’s purposes, even in a mine-run case.” *United States v. Kimbrough*, 128 S. Ct. 558, 575 (2007). Similarly, when the Commission acknowledges problems with a particular guideline but fails to make appropriate modifications to address those problems, a sentencing court has greater latitude to sentence outside the advisory range. *Id.* (upholding below-guidelines sentence based on policy disagreement with crack/powder disparity where Commission itself had reported that the disparity produced disproportionately harsh sanctions).

The Sentencing Commission has dramatically increased sentences for fraud over the past

twenty years. These steady increases have been adopted without empirical support, without adequate consideration of the cumulative effect of overlapping enhancements, and despite continuing research showing that longer prison sentences do not increase deterrence. Accordingly, the resulting guideline ranges should be given minimal weight in this Court's § 3553(a) analysis.

1. *The Commission has dramatically increased sentences for fraud despite consensus in the social science community that increases in sentence severity have little, if any, deterrent effect.*

In promulgating the original fraud guideline, the Sentencing Commission aimed to reduce the availability of probation and ensure “short but definite periods of confinement for a larger proportion of [] white collar cases.” *Fifteen Year Report* at 56. The Commission’s approach was consistent with research, available at the time, showing that the certainty, rather than the length, of a sentence has the greatest deterrent effect. In one widely-regarded study from the pre-guideline era, for example, researchers studied white collar offenders (presumably the most rational of potential offenders) and found no difference in deterrence even between probation and imprisonment. *See* David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 *Criminology* 587 (1995) (“There is generally no significant association between perceptions of punishment levels and actual levels . . . implying that increases in punishment levels do not routinely reduce crime through deterrence mechanisms.”).

In the twenty years since the Guidelines were first adopted, empirical research has continued to show that while certainty has a deterrent effect, “increases in severity of punishments do not yield significant (if any) marginal deterrent effects.” Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 28 (2006). “Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence.” *Id.*; *see also* Zvi D. Gabbay, *Exploring*

the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime, 8 Cardozo J. Conflict Resol. 421, 447-48 (2007) (“[C]ertainty of punishment is empirically known to be a far better deterrent than its severity.”). Typical of the findings on general deterrence are those of the Institute of Criminology at Cambridge University. See Andrew von Hirsch, et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999), summary available at <http://members.lycos.co.uk/lawnet/>

SENTENCE.PDF. The report, commissioned by the British Home Office, examined penalties in the United States as well as several European countries. *Id.* at 1. It examined the effects of changes to both the certainty and severity of punishment. *Id.* While significant correlations were found between the certainty of punishment and crime rates, the “correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance.” *Id.* at 2. The report concluded that “the studies reviewed do not provide a basis for inferring that increasing the severity of sentences is capable of enhancing deterrent effects.” *Id.* at 1; see also Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007) (“[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.”).

In short, the Commission has dramatically increased sentence length for fraud offenders in the face of overwhelming social science research showing that such increases in severity have little, if any, deterrent value. In promulgating the various sentence increases for fraud offenses over the past twenty years, the Commission has offered no empirical data to rebut the virtual consensus in the social science community disputing the deterrent value of such increases. Offenders like James Client thus face sentences seven times greater than called for by the original guidelines even though

they would be equally deterred by much shorter sentences.

2. *The large number of specific offense characteristics under § 2B1.1 are cumulative and fail to accurately reflect the seriousness of the offense.*

When the Guidelines were first adopted in 1987, the fraud guideline, then § 2F1.1, provided just a small number of enhancements for specific offense characteristics. USSG § 2F1.1 (1987). Besides the amount of loss, the original § 2F1.1 imposed enhancements if the offense involved (1) more than minimal planning; (2) more than one victim; (3) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization or government agency, (4) the violation of a judicial or administrative order, or (5) the use of foreign bank accounts/transactions to conceal the nature or extent of the fraudulent conduct. In short, the original fraud guideline provided only six possible enhancements above the base offense level.

Twenty years later, § 2B1.1 – the current fraud guideline – includes nearly thirty different enhancements for specific offense characteristics. USSG § 2B1.1 (2008). And yet, “the [Sentencing] Commission has never explained the rationale underlying *any* of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic.” *United States v. Adelson*, 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006) (quoting Kate Stith & José Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 69 (1998)). Furthermore, the Commission has failed to address the problem that many of these factors replicate or overlap with the loss concept, with one another, and with further upward adjustments in Chapter 3. In its *Fifteen Year Report*, the Commission acknowledged that “as more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense

seriousness.” *Fifteen Year Report* at 137. But the Commission has done nothing more than identify the risk of what it labeled “factor creep”; it has not taken any action to evaluate which factors might be cumulative and whether its ever-expanding scheme of sentencing factors under § 2B1.1 produces sentences greater than necessary to achieve the goals identified in 18 U.S.C. § 3553(a).

Though the Commission itself has failed to remedy the problem of “factor creep,” an increasing number of courts have declined to sentence within guideline ranges that are the product of overlapping specific offense characteristics. *See, e.g., United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004) (subsequently vacated in light of *Booker*) (upholding departure to mitigate effect of “substantially overlapping enhancements” at the high end of the fraud sentencing table); *Adelson*, 441 F. Supp. 2d at 506, 510; *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (complaining that guidelines in security fraud prosecutions “are patently absurd on their face” due to the “piling on of points” under § 2B1.1). In *Adelson*, for example, the district court found that the “calculations under the Sentencing Guidelines lead to a result [*i.e.*, an effective life sentence] 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.” 441 F. Supp. 2d at 506. The *Adelson* court criticized the Commission for failing to explain “the rationale underlying *any* of its identified specific offense characteristics” under the fraud guideline and characterized § 2B1.1’s overlapping enhancements as an irrational “piling on of points.” *Id.* at 510.

Furthermore, a growing chorus of legal scholars have offered their own criticism of the increasingly harsh sentences that result from the large number of specific offense characteristics inevitably present in every high-dollar corporate fraud case. Professor Frank Bowman, for example, explains that “[m]any factors for which loss was already a proxy not only have been given

independent weight but also impose disproportionate increases in prison time because they add offense levels on top of those already imposed for loss itself and do so at the top of the sentencing table where sentencing ranges are wide.” Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 170, 2008 WL 2201039, at *7 (Feb. 2008). As a result, Bowman adds, “[a]ny case involving a corporate officer and a multimillion-dollar fraud will almost always trigger application of multiple offense-level enhancements that have the effect of punishing the defendant over and over for the same basic thing – conducting a big fraud in a corporate setting.” *Id.*

3. *Seven of the twenty levels imposed on James Client under the current loss table were not based on any kind of empirical evidence or policy basis, and do not further any legitimate purpose of sentencing.*

Under the original Guidelines, adopted in 1987, 11 points would have been added to James Client’s offense level for the amount of loss caused by his fraudulent acts. USSG § 2F1.1 (1987). Twenty years later, under the 2008 Guidelines, 20 points are being added for the same amount of loss. USSG § 2B1.1 (2008). Though this 9-point increase subjects Mr. Client to many years of additional imprisonment, the Commission adopted its loss-table amendments without any empirical basis.

Two separate amendments – 154 and 617 – are responsible for the bulk of the increase to the loss table. For an amount of loss between \$7 and \$20 million – as in Mr. Client’s case – Amendment 154 added 4 additional points, while Amendment 617 added 3 points. In support of Amendment 154’s substantial increase to the loss table, the Commission stated only that it sought to conform the fraud loss tables to the tax evasion tables and “increase the offense levels for offenses

with larger losses to provide additional deterrence and better reflect the seriousness of the conduct.” USSG, App. C, Amend. 154 (Nov. 1, 1989). And, in adopting the substantial increases in Amendment 617, the Commission claimed it was responding to “comments received from the Department of Justice, the Criminal Law Committee of the Judicial Conference, and others, that [the fraud guideline] under-punish[es] individuals involved in moderate and high loss amounts, relative to penalty levels for offenses of similar seriousness sentenced under other guidelines.” USSG, App. C, Amend. 617 (Nov. 1, 2001).

The explanations offered by the Commission for the two amendments are both deficient and faulty. In each instance, the Commission failed to provide any empirical data to support higher sentences for fraud offenders who typically have no criminal history and an exceptionally low recidivism rate. The Commission ignored the overwhelming social science research, discussed at length above, demonstrating that increases in sentence severity, as opposed to certainty, have virtually no deterrent value. Second, in adopting Amendment 154, the Commission sought to conform the fraud loss table with the tax loss table without explaining why the tax loss table should itself be a model. Furthermore, though the Commission cited comments from the Justice Department and the Criminal Law Committee in support the higher sentences adopted through Amendment 617, it ignored clear feedback from the district courts. Though the Guidelines explicitly allow for *upward* departures when the amount of loss does not “fully capture the harmfulness and seriousness of the conduct,” *see* USSG § 2F1.1 app. note 11 (2000) *and* USSG § 2B1.1 app. note 14 (2000), the sentencing courts granted upward departures in less than 1 percent of § 2B1.1 cases and only 1.2 percent of cases under § 2F1.1 in the year 2000. *See* U.S. Sentencing Commission, *2000 Sourcebook of Federal Sentencing Statistics*, tbl. 28 (2000). This feedback – from the institutional actor best

suites to make individualized sentencing determinations – completely contradicted the recommendations of entities like the Justice Department. Finally, in adopting Amendment 617, the Commission relied on the argument that the existing loss table resulted in sentences lower than the penalty levels for offenses of similar seriousness. The Commission failed to point out which offenses it deemed to be of comparable seriousness to high-loss fraud. The end result of its increases under § 2B1.1 have, however led to the absurd result that first-time, nonviolent fraud offenders are subject to sentences as high as, and sometimes even higher than, those imposed on the most violent offenders (*e.g.*, sentences for kidnapping, arson, high volume drug trafficking, and voluntary manslaughter). *Compare* USSG § 2B1.1 (2001) (offense level of 26 based only on base offense level and amount of loss over \$7 million) *with* USSG § 2A4.1 (2001) (offense level of 24 for kidnapping), USSG § 2K1.4 (2001) (offense level of 24 for arson creating substantial risk of death or serious bodily injury), USSG § 2D1.1 (2001) (offense level of 24 for trafficking in over 100 kg of marijuana) *and* USSG § 2A1.3 (2001) (offense level of 25 for voluntary manslaughter).

Moreover, though the Commission has made the amount of loss the determinative factor in the offense level calculation for fraud offenders, loss amount is a highly imperfect measure of the seriousness of the offense. *See United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006) (criticizing “the inordinate emphasis that the Sentencing Guidelines place in fraud on the amount of actual or intended financial loss” without any explanation of “why it is appropriate to accord such huge weight to [this] factor[]”). The specific amount of loss is often “a kind of accident” and thus “a relatively weak indicator of [] moral seriousness . . . or the need for deterrence.” *See United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004). Most defendants do not set out to defraud a specific amount of money; rather, the amount of loss is dependent on the security

procedures in place and the point in time when the ongoing fraud happens to be detected. *Id.* As the *Emmenegger* court explained: “Had [the defendant] been caught sooner, he would have stolen less money; had he not been caught until later, he would surely have stolen more.” *Id.*

In short, the Commission failed to fulfill its institutional role of considering empirical evidence when making the amount of loss central to its fraud guideline and then repeatedly increasing the amount of points imposed for specific loss amounts. The resulting fraud guideline is, therefore, entitled to no deference. This Court should look to the all of the § 3553(a) factors, and the empirical data not considered by the Commission, in fashioning a sentence “sufficient, but not greater than necessary” to fulfill the various purposes of sentencing.

4. *The Court should not enhance Client’s offense level under U.S.S.G. § 2B1.1(b)(8).*

Although his position is somewhat different than that taken by the Government when Client pled guilty, the probation officer has proposed that Client’s offense level must be enhanced by two levels under § 2B1.1(b)(8). The officer says there are two distinct grounds for imposing that enhancement:

- Client’s offense allegedly involved a violation of a “prior, specific judicial . . . order,” U.S.S.G. § 2B1.1(b)(8)(C); and,
- Client’s offense allegedly involved “a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding.” U.S.S.G. § 2B1.1(b)(8)(B).

If either ground is valid, or if both grounds are valid, Client’s offense level is increased by two levels. This enhancement would boost his Guidelines range from 168-210 months up to 210-262 months. That is, it would boost his range by about four years, or by more than 20%. The Court should not apply the enhancement.

a. *The alleged violation of a prior, specific judicial order*

Client has pled guilty to four counts of criminal contempt in violation of 18 U.S.C. § 401(3) for violating another District Judge’s temporary restraining order to refrain from transferring or dissipating assets. (Plea Agreement at 19-20.) He admitted he disobeyed that order by cashing some checks for less than \$10,000 from InvestmentSolutions accounts, and by moving his art collection from one house (where the utilities had been shut off) to another house maintained by his wife and her father. (*Id.*) The Probation Officer proposes that this conduct constitutes the violation of a “prior, specific” judicial order, and thus triggers § 2B1.1(b)(8)(B).

When amending the predecessor to § 2B1.1(b)(8)(C) in 2000, the Sentencing Commission added the “prior, specific” language. It did so in order to limit the application of the enhancement so it “will apply only if defendant was given prior notice of *a particular action.*” USSG, App. C, Amendment 597 (Nov. 1, 2000) (italics added). The Commission explained that, in order for the enhancement to apply under subsection (b)(8)(C), “there must be a *false statement* in violation of a specific, prior order.” *Id.* (italics added). As the Commission’s explanation indicates, § 2B1.1(b)(8)(C) does not apply to Client for two reasons. First, District Judge did not prohibit Client from engaging in the “particular” acts of cashing the checks or moving the artwork. *Id.* Second, Client’s misconduct did not involve any “false statement.” *Id.* Therefore, the Court should not apply this enhancement. This conclusion should not be surprising: when entering the plea agreement, the Government did not anticipate that § 2B1.1(b)(8)(B) could possibly apply. (*See* Plea Agreement at 24, ¶ 10.)

Even assuming *arguendo* that the enhancement applies, this Court, under *Booker*, *Gall*, and

Kimbrough, should decline to give that enhancement weight. The enhancement is predicated wholly on the offense conduct that supported Client's guilty plea to the contempt of court charges. That is, the enhancement conduct and offense conduct are one and the same. But whereas the enhancement would boost his sentence by about four years in prison, the maximum punishment permitted by statute for the offense is just six months in prison. (*See* Plea Agreement at 3.) The Guidelines would punish the same conduct with a sentence 8 times longer than the maximum allowed by statute. Looked at in slightly a different way, if the enhancement is applied, the Guidelines would punish Client with about 14 years in prison for stealing \$19 million dollars, and with an additional 4 years in prison for cashing the under-\$10,000 checks and moving his artwork. Due to Client's position towards the upper end of the Sentencing Table, this two-level enhancement is disproportionate and unjust. Therefore, the Court should not give it weight.

b. The alleged bankruptcy fraud

The two-level enhancement applies if Client's "offense" involved "a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding." USSG § 2B1.1(b)(8)(B). In light of the requirement that the defendant's "offense" involve bankruptcy fraud, courts have typically applied this enhancement when the defendant has been convicted of a bankruptcy fraud under 18 U.S.C. § 152, which prohibits fraudulent conduct connected to bankruptcy proceedings. *See United States v. Denmark*, 277 Fed. Appx. 142 (3d Cir. 2008); *United States v. Mumma*, 509 F.3d 1239 (10th Cir. 2007); *United States v. Bey*, 244 Fed. Appx. 57 (7th Cir. 2007), *vacated on other grounds by Bey v. United States*, 128 S. Ct. 2089 (2008); *United States v. Archibald*, 212 Fed. Appx. 788 (11th Cir. 2006); *United States v. Pearson*, 2007 U.S. Dist. LEXIS 84625 (D. Me. Nov. 14, 2007); *United States v. Arthur*, 2006 U.S. Dist. LEXIS 92661 (E.D. Wis. Dec. 21, 2006).

The probation officer proposes that the bankruptcy fraud enhancement should apply because Client, while in bankruptcy proceedings, gave his psychic, Jane Doe, a “paid in full” receipt for a car she had bought from him. At the time, Doe still owed Client about \$6,000 on the car. She relied on it as her sole means of transportation. The bankruptcy trustee evidently indicated to her that he might seize her car. Client, wanting to protect Doe, gave her the “paid in full” receipt to forgive the loan. That collateral, after-the-fact conduct was not part of his “offense.” U.S.S.G. § 2B1.1(b)(8)(B). Nor did it necessarily constitute a bankruptcy fraud since Client may have had an “innocent reason” for giving Doe the receipt. *United States v. Lewis*, 718 F.2d 883, 885 (8th Cir. 1983) (explaining that bankruptcy fraud requires a “specific intent” which is not proven if the defendant has an “innocent reason” for the questioned conduct). For these reasons, the Court should not apply the bankruptcy-fraud enhancement.

Even assuming *arguendo* that the enhancement applies, this Court should decline, under *Booker*, *Gall*, and *Kimbrough*, to give it weight. This conduct – even if wrong or illegal – was collateral and negligible. It involved about \$6,000. Client’s fraud offense involved about \$19 million. Yet as explained above, the two-level enhancement premised on this conduct would boost Client’s Guidelines range from about 14 years to about 18 years. The amount at stake in the bankruptcy fraud conduct is just 0.3% of the amount involved in Client’s fraud offense, yet it boosts his Guidelines range by more than 20%. Again, due to Client’s position towards the upper end of the Sentencing Table, this two-level enhancement is disproportionate and unjust. Moreover, it recommends a sentence enhancement that far exceeds the maximum term allowed by statute. Therefore, the Court should not give the enhancement weight.

B. A variance is needed to avoid unwarranted sentencing disparities between Mr. Client and similarly situated defendants who have received substantial variances from other courts.

Both the Sentencing Commission and the sentencing courts are directed to avoid unwarranted sentencing disparities among the many defendants with similar criminal backgrounds convicted of similar criminal conduct. *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007) (citing 18 U.S.C. § 3553(a) and 28 U.S.C. § 991(b)). The Commission performs its function “at wholesale,” while the district court performs its function “at retail.” *Id.* Ideally, the two entities should have a symbiotic relationship, with the sentencing court taking the guidelines into account in its § 3553(a) analysis and the Commission considering feedback from the courts, in the form of departures and variances, when making its regular revisions to the guidelines. *See* 18 U.S.C. § 3553(a)(4) (requiring that sentencing court consider the guidelines’ recommendation); *see also Rita*, 127 S. Ct. at 2464 (explaining that “[t]he statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and the courts of appeals” with the courts departing or varying in individual cases and the Commission “collect[ing] and examin[ing] the[se] results”).

In making its own effort to avoid unwarranted sentencing disparities – as required by 18 U.S.C. § 3553(a)(6) – the sentencing court is expected to concern itself more with national disparities among similarly situated defendants than with the narrower consideration of equity between defendants charged under the same indictment. *United States v. Simmons*, 501 F.3d 620, 623-24 (6th Cir. 2007). The sizeable chart inserted earlier in this sentencing memorandum is, therefore, of particular importance. The chart highlights a large sample of cases from districts across the country where defendants in high-loss fraud cases have received sentences substantially below

their guideline ranges. None of the defendants included in this chart received any sentencing benefit based on cooperation. As corporate fraud defendants responsible for substantial losses, the defendants are of similar criminal background and have been convicted of similar criminal conduct. The national sentencing trend exemplified by this chart should, therefore, be taken into account by this Court. And, to avoid unwarranted – and unfair – sentencing disparities between Mr. Client and the many defendants highlighted in the chart, this Court should grant a variance/departure of similar magnitude in Mr. Client’s case.

In its recent decision in *United States v. Parris*, the District Court for the Eastern District of New York took a similar collection of cases into account in fashioning an appropriate sentence for two securities fraud offenders. 573 F. Supp. 2d 744 (E.D.N.Y. 2008). At the court’s request, each party submitted a sample group of cases to illustrate the sentences imposed in other securities fraud cases. *Id.* at 752. Based on these samples, the court concluded that “[t]hose [defendants] who were not cooperators and were responsible for enormous losses were sentenced to double-digit terms of imprisonment (in years); [while] those whose losses were less than \$100 million were generally sentenced to single-digit terms.” *Id.* at 753. The court took this national pattern into account in arriving at a sentence of just 60 months for the two defendants who each faced an advisory guideline range of 360 months to life. *Id.* at 745.

C. Several aspects of Mr. Client’s offense and his individual characteristics also support a variance.

A sentencing court “may not presume that the Guidelines range is reasonable,” *Gall*, 128 S. Ct. at 596-97, and cannot “require ‘extraordinary circumstances’ to justify a sentence outside the Guidelines range.” *United States v. Bolds*, 511 F.3d 568, 580-81 (6th Cir. 2007). The district judge

“‘must [instead] make an individualized assessment based on the facts presented’ and upon a thorough consideration of all of the § 3553(a) factors.” *Id.* at 580 (quoting *Gall*, 128 S. Ct. at 597). Although the Sentencing Commission “fills an important institutional role” in promulgating the Guidelines, the sentencing judge “has greater familiarity with the individual case and the individual defendant before him . . . [and] is therefore in a superior position to find facts and judge their import under § 3553(a) in each particular case.” *Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007) (internal quotations and citations omitted).

Though this Court has discretion to deviate from the Guidelines in even a mine-run fraud case, a variance is especially appropriate in Client’s case because of the following mitigating aspects of his individual history and characteristics.

1. Client’s primary motivation was not greed.

A defendant’s motive for committing his crime is relevant at sentencing. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993). Under a court’s mandatory analysis of the § 3553(a) factors, motive is part of the “nature and circumstances of the offense” and must be considered. *United States v. Mahan*, 2007 WL 1430288, at *3 (10th Cir. 2007) (unpublished) (finding sentence procedurally unreasonable where district court refused to consider defendant’s stated motive for possessing unloaded shotgun, *i.e.*, that he had just been violently beaten by three men and sought to defend his wife). Accordingly, a number of courts have granted departures or variances where a fraud defendant was motivated by something other than a desire for profit of personal financial gain. *United States v. Milne*, 384 F. Supp. 2d 1309, 1310-11 (E.D. Wis. 2005) (granting variance below guidelines’ recommendation where “defendant did not take the bank’s money out of greed or a desire to live a

lavish lifestyle, [but in effort] to keep a sinking business afloat); *United States v. Ranum*, 353 F. Supp. 2d 984, 990 (E.D. Wis. 2005) (considering mitigating evidence that defendant in bank fraud case had “not act[ed] for personal gain or for improper personal gain of another”).

Here, James Client began unlawfully withdrawing funds from InvestmentSolutions investment accounts in a desperate effort to grow the company, raise his own profile in the business community, and ultimately wield greater influence in the custody dispute over his three foster children. Having parented one of the children from infancy – and the other two from the time they were just toddlers – Client was in a state of raw pain after the children were returned to their biological mother six years after he first took them in. He understood that the children’s birth mother had a history of serious mental illness (depression with psychotic features) and he was deeply concerned for the welfare of the children. Though his belief that he could better influence the custody dispute if he were a more powerful businessman might seem irrational, the Court must keep in mind that Mr. Client suffers from bipolar disorder. His mental illness not only amplified his feeling of desperation over the loss of his children, but also clouded his ability to discern appropriate responses.

Mr. Client does not dispute the fact that he used some of the misappropriated funds for personal expenditures. Though his initial motive was not one of personal greed, at some point, his own selfish desires entered into the equation. At bottom, though, the bulk of the appropriated funds was used to grow InvestmentSolutions and raise its profile in the business community. Moreover, Mr. Client did not set out to permanently deprive the plan participants of their funds and, even near the end, he was trying to figure out a way to repay all of the money he had misappropriated. Shortly before his arrest, Client was negotiating with American Express to obtain a contract to administer flexible spending accounts (FSAs). He genuinely believed that this new FSA business would

generate enough profits to repay all of the money he had wrongly taken.

In short, Client's case is distinguishable from the run-of-the-mill fraud case in which a defendant misappropriates large sums of money for the sole purpose of supporting a lavish lifestyle. Though Client's fraud got increasingly out of hand as it progressed, his initial motive was to regain custody of his children. He believed, however unrealistically, that he would eventually be able to repay the funds he had taken and, up to the end, was devising ways to do so. The Court should take this entire picture into account in fashioning an appropriate sentence.

2. *As a 51-year-old, first-time offender, James Client has an exceptionally low risk of recidivism.*

Both the age of an offender and his/her first offender status are powerful predictors of the likelihood of recidivism. Indeed, the Sentencing Commission has itself recognized that (1) recidivism rates decline dramatically with age, and (2) first-time offenders are even less likely to reoffend than defendants with a limited criminal history who also fall within Criminal History Category I. See U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at Ex. 9 (May 2004) [hereinafter *Measuring Recidivism Report*]; U.S. Sentencing Commission, *Recidivism and the "First Offender,"* at 13-14 (May 2004) [hereinafter *First Offender Report*]. The Commission's research has, for example, demonstrated that a 20-year-old defendant in Criminal History Category I has a 29.5% chance of reoffending, while a 51-year-old defendant with the same criminal history has only a 6.2% chance of recidivating. *Measuring Recidivism Report* at Ex. 9. With respect to first offenders, the Commission has found that offenders with zero criminal history points have a recidivism rate of just 11.7%, while offenders with just one criminal history point have double the recidivism rate at 22.6%.

First Offender Report at 13-14.

Despite these clear and compelling findings, the Commission has failed to revise the Guidelines to take either age or first-offender status into account. The Commission clearly recognized the advisability of revising the Guidelines to take these factors into account. *See First Offender Report* at 1-2 (identifying goal of “refin[ing] a workable ‘first-offender’ concept within the guideline criminal history structure”); *Measuring Recidivism Report* at 16 (noting that “[o]ffender age is a pertinent characteristic” that would “improve [the] predictive power of the guidelines “if incorporated into the criminal history computation”). But, in the five years since publishing its *Fifteen Year Report*, the Commission has taken no action toward implementing such revisions.

In response to the Commission’s inaction, a growing number of courts have themselves taken both age and first-offender status into account when fashioning an appropriate sentence under 18 U.S.C. § 3553(a). *See, e.g., United States v. Darway*, 255 Fed. Appx. 68, 73 (6th Cir. 2007) (upholding sentence in child pornography case as reasonable where district court granted downward variance on basis of defendant’s first-offender status); *United States v. Hamilton*, 2009 WL 995576, at *3 (2d Cir. Apr. 19, 2009) (holding that “the district court abused its discretion in not taking into account policy considerations with regard to age recidivism not included in the Guidelines”); *United States v. Holt*, 486 F.3d 997, 1004 (7th Cir. 2007) (affirming a below-guidelines sentence where the district court’s only reason for the variance was that the defendant’s age made it unlikely that he would again be involved in another violent crime); *United States v. Cabrera*, 567 F. Supp. 2d 271, 279 (D. Mass. 2008) (granting variance because defendants, like Cabrera, “with zero criminal history points are less likely to recidivate than all other offenders”); *Simon v. United States*, 361 F. Supp. 2d 35, 48 (E.D.N.Y. 2005) (explaining that sentence of 262 months – as opposed to Guidelines sentence

of 324 to 405 months – constituted “sufficient, but not excessive, deterrence” for 44-year-old defendant); *United States v. Nellum*, 2005 WL 300073 at *3 (N.D. Ind. Feb. 3, 2005) (explaining that age of offender is relevant to § 3553(a) analysis, even if not ordinarily relevant under the Guidelines, and granting variance to 57-year-old defendant); *United States v. Ward*, 814 F. Supp. 23, 24 (E.D. Va. 1993) (granting departure based on defendant’s age as first-time offender since guidelines do not “account for the length of time a particular defendant refrains from criminal conduct” before committing his first – *i.e.*, the charged – act).

James Client is 51 years old and has no prior history of criminal behavior. The Sentencing Commission has recognized that an offender within his age range – and with his lack of any criminal record – is extremely unlikely to recidivate. Given Mr. Client’s extraordinarily low risk of recidivism, a within-guidelines sentence of 210 to 262 months is simply greater than necessary to protect the public from the small chance of his committing future crimes. Such a lengthy sentence would only serve to provide “just deserts” at a very high cost to the American taxpayer while hindering Mr. Client’s ability to make restitution to his victims. Moreover, because it is the certainty, not the severity, of punishment that best serves as a general deterrent to the public at large, a sentence substantially below the advisory range would more than adequately fulfill § 3553(a)(2)(B)’s goal of “afford[ing] adequate deterrence to criminal conduct.”

3. *Mr. Client’s criminal conduct was aberrant in light of the many years of his adult life he lived as a law-abiding citizen.*

In the Sentencing Reform Act, Congress directed the Sentencing Commission to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence

or an otherwise serious offense.” 28 U.S.C. § 994(j). In response, the Commission “redefin[ed] ‘serious offense’ in a way that was entirely inconsistent with prior practice, and not at all based on any real data or analysis,” and thereby substantially increased the incarceration rate for non-violent first offenders above pre-guidelines rates. *United States v. Germosen*, 473 F. Supp. 2d 221, 227 (D. Mass. 2007).

The Commission acknowledged that the guidelines failed to address “single acts of aberrant behavior that still may justify probation at higher offense levels through departures.” *See* USSG Ch. 1, Pt. A, intro comment. § 4(d). Seizing on the Commission’s statement, courts stepped in to fill in the gap, creating their own downward departure for offense conduct that constituted aberrant behavior. Though some circuits limited the availability of their aberrant conduct departure to defendants guilty of a “spontaneous, thoughtless, single act involving lack of planning,” *see, e.g., United States v. Marcello*, 13 F.3d 752 (3d Cir. 1994), other courts took a more expansive approach by looking at the totality of the circumstances and not automatically excluding defendants whose uncharacteristic conduct was comprised of more than a single, unplanned criminal act. *See, e.g., United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996).

In 2000, the Commission finally adopted its own aberrant conduct departure. *See* USSG § 5K2.20. In doing so, however, the Commission failed to fulfill its institutional role of considering empirical data or the many policy questions relevant to how first offenders should be sentenced. Instead, the Commission simply reviewed the approaches already being taken by the courts, considered general recommendations from the criminal justice community, and then elected to adopt a restrictive approach that limited eligibility to “single criminal occurrence[s] or single criminal transaction[s].” *Id.* The Commission “*did not* study the relationship between the varying court

definitions or aberrant behavior and the statutory purposes of sentencing,” “evaluate alternatives to incarceration for non-violent first offenders,” or explain why it adopted various exclusions or definitions.” *Germosen*, 473 F. Supp. 2d at 228-29. In a conclusory manner, the Commission merely “announced *what* it had done.” *Id.* at 229.

Because the Commission failed to fulfill its institutional role, this Court has the authority to reject § 5K2.20’s restrictions on the availability of the aberrant conduct departure. *See Spears v. United States*, 129 S. Ct. 840, 843 (2009) (explaining that when the Commission fails to fulfill its institutional role, a district court can vary from the guidelines “based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case”). Mr. Client lived a law-abiding life until he was in his late 40s and engaged in the charged fraud. He was widely regarded as a loving husband and a good person. He did not engage in his fraudulent conduct until he became emotionally distraught over the loss of his foster children, circumstances exacerbated by his bipolar disorder. As a result of his emotional devastation and mental illness, Mr. Client lost his moral compass and engaged in abhorrent criminal conduct. His crimes are, however, completely uncharacteristic when viewed in the context of his entire productive adult life. This Court should, therefore, grant a departure or variance based on the aberrant nature of his conduct.

4. *Due to the loss of his job and various professional licenses, Mr. Client will never be able to commit a future crime of corporate fraud.*

In fashioning a sentence that adequately deters the defendant from future criminal conduct, it is highly relevant to consider whether the defendant will even be able to commit future crimes like the one for which he is being prosecuted. In *United States v. Olis*, for example, the district court

considered that the defendant was substantially incapacitated from committing future crimes of fraud by the loss of his corporate job and professional licenses. 2006 WL 2716048, at *13 (S.D. Tex. Sept. 22, 2006) (unpublished). In granting a substantial variance below the advisory range, the *Olis* court explained: “Once [the defendant] returns to his family, the chastening effect of years in prison, the attendant negative publicity, the loss of his job and accounting and law licenses, and the need to provide support for his family will provide adequate deterrence against any potential future criminal conduct.” *Id.*

Like the defendant in *Olis*, James Client will be unable to commit future crimes of corporate fraud upon his release from custody. As part of his plea agreement, he has agreed never to participate in the affairs of any financial institution insured by the Federal Deposit Insurance Corporation (FDIC), never serve as an officer, director or employee of any institution or agency specified in 12 U.S.C. § 1818(e)(7)(A), and never serve in any position related to any employee benefit plan. Additionally, he has voluntarily surrendered his insurance license and will, therefore, never again be able to engage in the sale of insurance. Because a long sentence is not necessary to incapacitate Mr. Client, the advisory guideline range of 210 to 262 months is simply *much* greater than necessary.

5. *James Client will be better able to make restitution to his victims if he is sentenced to a short term of imprisonment and long term of supervised release.*

In considering the length of a prison sentence, a sentencing court may consider how its sentence will affect the defendant’s ability to make financial restitution. *See* 18 U.S.C. §3553(a)(7) (cataloging “the need to provide restitution to any victims of the offense” as one factor to consider in formulating sentence); *see, e.g., United States v. Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006)

(acknowledging district court's discretion to depart from guidelines to impose probation sentence as the "goal of obtaining restitution for the victims of Defendant's offense . . . is better served by non-incarcerated and employed defendant"). In *United States v. Peterson*, for example, the district court's central justification for varying from the guidelines was to facilitate the defendant's payment of restitution. 363 F. Supp. 2d 1060, 1061-62 (E.D. Wis. 2005). The defendant had stolen checks from his employer, forged signatures on the checks, and deposited them into his sister's bank account. *Id.* at 1061. He pled guilty to bank fraud in the amount of \$81,000. *Id.* The district court elected to grant a variance from the advisory guidelines range of 12 to 18 months imprisonment and instead sentenced the defendant to "one day in prison, followed by a substantial period of community confinement as a condition of five years of supervised release." *Id.* In explaining its variance from the guidelines, the district judge said:

If I had sentenced defendant consistent with the guidelines, he would have lost his job. This would have impaired his ability to repay the money he stole. I do not suggest that a defendant should receive a break just because he owes restitution. But in the present case, where defendant had a reasonably well-paying job and the restitution amount was manageable, § 3553(a)(7) weighed in favor of a sentence that would allow him to remain in the community and working.

Id. at 1062.

James Client is a smart, college-educated, hardworking man and a particularly talented salesperson. Due to his personal charm, likeability, and high energy level, he was extremely successful when he sold insurance for over a decade prior to founding InvestmentSolutions. There is every reason to believe that, even with a criminal conviction, he will be able to get a reasonably well-paying job upon his release and make substantial restitution to his victims. If, however, Client is sentenced within the advisory guideline range, he will not get out of prison until he is well past

retirement age. At that point, his age, likely health issues, and life expectancy will make it nearly impossible for him to make meaningful restitution.

Though many of the victims in this case have called for a long prison sentence, they have also stressed the importance of restitution. Mr. Client is very remorseful and wants to devote the remainder of his working life to making amends to the victims. He has already made efforts to demonstrate his remorse through his cooperation in the civil lawsuit against AIG. In fashioning an appropriate sentence, this Court should seek to maximize, rather than eliminate, Client's ability to make the restitution the victims have demanded.

6. *James Client offered substantial assistance in the civil lawsuit against AIG.*

Mr. Client assisted the attorney representing a number of fraud victims in their civil lawsuits against AIG. Partly as result of Mr. Client's cooperation, the civil lawsuits were settled and the victims stand to recover approximately seven million dollars. Although, the settlement has not yet been funded, and is awaiting final approval the Bankruptcy Court, numerous victims of Mr. Client's actions will see some of their moneys returned to them. Their attorney has indicated that Mr. Client's cooperation and provision of information was "very helpful" in the settlement of the lawsuits.

Mr. Client's efforts to help the victims recover their losses demonstrates his genuine remorse and his acceptance of responsibility. These post-offense steps towards rehabilitation indicate a low risk of recidivism and positive aspects of his character.

7. *James Client has already been punished collaterally through the horrible conditions of his pre-trial confinement, his deteriorating health condition, and the loss of his profession and reputation.*

When a defendant suffers consequences for his criminal conduct – apart from the sentence imposed through the criminal court process – the sentencing court can take this collateral punishment into account in fashioning an appropriate sentence. *See, e.g., United States v. Gaind*, 829 F. Supp. 669, 671 (S.D.N.Y. 1993) (granting downward departure where defendant was already punished by the loss of his business as result of EPA-related charges); *United States v. Vigil*, 476 F. Supp. 2d 1231, 1235 (D.N.M. 2007) (finding variance appropriate where defendant in public corruption case was already collaterally punished by loss of his position, loss of his reputation, widespread media coverage of his case, and the emotional toll of two lengthy, public trials). In *United States v. Samaras*, for example, the district court granted a variance from the Guidelines in part because the defendant had lost a good public sector job as a result of his conviction. 390 F. Supp. 2d 805, 809 (E.D. Wis. 2005). Variances or departures on this basis have been justified because the collateral punishment itself satisfies the specific and general deterrence objectives of 3553(a), without the need for the full range of punishment called for by the Guidelines. *Gaind*, 829 F. Supp. at 671.

Courts also have discretion to vary or depart from the guidelines based on the harsh conditions of a defendant’s pretrial confinement. *See, e.g., United States v. Pressley*, 345 F.3d 1205, 1218-19 (11th Cir. 2003) (finding that district court had discretion to grant downward departure based on defendant having been on 23-hour-a-day lockdown during the five years of his pretrial confinement); *United States v. Carty*, 264 F.3d 191, 196 (2d Cir. 2001) (holding that “pre-sentence confinement conditions may in appropriate cases be a permissible basis for downward departures).

Because unusually harsh conditions of confinement subject a defendant to a degree of punishment not contemplated by the guidelines' recommendation, a reduction in sentence is necessary to preclude unwarranted disparities. *See United States v. Mateo*, 299 F. Supp. 2d 201, 211-12 (S.D.N.Y. 2004). In *Mateo*, the defendant was pregnant, went into labor, and was left unattended in her cell without medical attention for the first 15 hours of her labor. In deciding to grant a departure, the district court explained that "the extraordinary trauma Mateo has already suffered during the time she has served in custody, the full effects of which can never be comprehensively gauged, has inflicted forms of pain and suffering that have effectively enhanced, to a disproportionate degree, the level of punishment contemplated to be experienced by inmates in the typical case during the period of incarceration prescribed by the Guidelines." *Id.* at 212.

Mr. Client has already suffered tremendously in the wake of his arrest and this collateral punishment must be taken into account at sentencing. He has lost his business, his professional reputation, and his ability to work in the financial or insurance industries. He has also experienced particularly harsh conditions of pre-trial confinement. He entered jail a relatively healthy man and now has a host of medical problems which have received inadequate attention. He has contracted repeated staph infections, developed a blood disorder repeatedly misdiagnosed by medical staff, experienced a worsening of his diabetes due to poor diet, and suffered permanent liver damage. When medical staff first confirmed that his blood levels were shockingly low, they told him he had leukemia. When tests disproved their initial diagnosis, he was told that he had lymphoma. After being subjected to two biopsies, doctors finally confirmed that he did not have cancer at all. They have, however, been unable to determine the cause of his serious blood disorder, but have now given a diagnosis of autoimmune hepatitis. All of these medical problems – and misdiagnoses – have

caused Mr. Client not only physical pain and discomfort but also intense emotional anguish.

In short, Mr. Client has suffered as much or more than the defendants, in the above-cited cases, who received variances based on collateral punishment. In fashioning an appropriate sentence, this Court should consider not only Client's professional and reputational loss but also the incredible suffering he has already endured due to inadequate medical care at the county jail.

8. *James Client's experience with the correctional medical system to date shows that he will likely not receive adequate medical care in the Bureau of Prisons.*

Through § 3553(a), Congress has instructed sentencing courts to consider a defendant's need for medical care in fashioning an appropriate sentence. 18 U.S.C. § 3553(a)(2)(D). Historically, courts have granted departures when a defendant suffered from a medical condition the Bureau of Prisons was not well equipped to treat. *See* USSG. § 5H1.4 (allowing departure only in the case of "an extraordinary physical impairment" such as "a seriously infirm defendant"); *United States v. Martin*, 363 F.3d 25, 49-50 (1st Cir. 2004) (finding downward departure under §5H1.4 when BOP had policy of not administering the only medication successful in treating defendant's Crohn's disease). Post-*Booker*, sentencing courts are not limited by restrictions on departures and have substantial discretion to consider a defendant's medical status as part of his history and characteristics. *See United States v. Davis*, 458 F.3d 491, 498 (6th Cir. 2006) (explaining that sentencing court's authority to grant variances is broader than authority to grant departures).

James Client's experience at the county jail has demonstrated that the correctional medical apparatus is ill-equipped to address his unique medical concerns. Though Client has suffered from a serious blood disorder for the bulk of his time in custody, the medical staff at the county jail have not been able to accurately diagnose his condition. They have misdiagnosed him with two different

forms of cancer and, in the process, have subjected him to serious mental anguish. They now speculate that he suffers from auto-immune hepatitis, but have not yet provided treatment for this unusual condition. There is no reason to believe that a similar correctional medical system in the Bureau of Prisons will provide superior care. Mr. Client should be punished for his crimes, but he should not suffer a decreased life expectancy. Given his serious health problems, a long sentence in the Bureau of Prisons is likely to have this very result. A variance or departure is needed to mitigate the serious danger of Mr. Client's health being further compromised by a long sentence.

9. *Mr. Client suffers from bipolar disorder.*

District courts enjoy substantial discretion in considering all aspects of a defendant's history and characteristics in fashioning an appropriate sentence. Consistent with this discretion, a sentencing court can vary or depart below the advisory range based on a defendant's mental health problems. *See, e.g., United States v. Mendez*, 248 Fed. Appx. 653, 661 (11th Cir. 2008) (unpublished) (granting modest reduction in sentence on basis of defendant's "mental problems").

Mr. Client has been evaluated by A. Psychiatrist, M.D., a psychiatrist licensed to practice in the state of Tennessee. In support of his evaluation, Dr. Psychiatrist also had psychological testing conducted by Dr. M. Psychologist, PhD. These reports will be filed with the court prior to the sentencing hearing in this case. According to Dr. Psychiatrist's findings, Mr. Client suffers from bipolar disorder, narcissistic personality disorder, multiple medical problems and has an obsession with the loss of custody of his foster children. Dr. Psychiatrist found that Mr. Client's mental health issues played a role in the commission of his offenses. Dr. Psychiatrist has specifically found that Mr. Client's bipolar disorder and narcissistic personality disorder, combined with the loss of his

foster children and his marriage “combined to result in his criminal behavior in an attempt to recoup what he could of his emotional losses.” Further, Dr. Psychiatrist has found that Mr. Client’s extreme emotional distress at the loss of his foster children and marriage, provoked a “hypomanic episode at which he became grandiose and impulsive as manifestations of an underlying severe mental disease that is treatable with medication and psychotherapy.” Furthermore, Dr. Psychiatrist has found as follows

“While he did not remain hypomanic throughout the entire period of his illegal behavior, he acknowledged feeling trapped by his initial actions and could not figure another way out; thus, he persisted in the plan, hoping to eventually repay all that he had misappropriated. Were it not for the multiple, severe stressors of his several personal losses, which combined to provoke an episode of his severe mental disease, bipolar disorder, it is unlikely that Mr. Client would have engaged in the behavior that he did. He does not have a prior criminal history, indicating this was exceptional behavior for him.”

This Court should consider the fact that Mr. Client undertook his actions while suffering from a mental disease and severe emotional trauma. Mr. Client was devastated by the loss of his children and that loss was further compounded by the breakup of his marriage to Mrs. Client. Once Mr. Client began misappropriating funds, he essentially did not know another way out other than to continue to obtain more clients and misappropriate more funds. Mr. Client started InvestmentSolutions as a legitimate business. However, once he began to illegally use funds entrusted to him for investment, he simply dug his hole deeper and deeper. Mr. Client was hopeful that the business was going to become profitable enough to eventually repay the funds that he had misappropriated but that did not happen before the time he was charged in this case. Mr. Client made extremely poor judgments in his misappropriation of the investment funds. These misjudgments must, however, be seen in light of the mental illness and personality disorder that Mr.

Client was suffering. A sentence within the advisory guideline range is far in excess of what is fair and just in this case and would not take into account Mr. Client' mental disease. A departure or variance is, therefore, needed to avoid such an unjust result.

III. CONCLUSION

For the foregoing reasons, Mr. Client respectfully submits that a sentence far below the advisory guideline range is a sentence that is sufficient, but not greater than necessary.

Respectfully submitted,

Attorney for James B. Client

ENDNOTES

1. *United States v. Milton*, Case No. 3:06-cr-00137, Docket Entry 1216 (D. Conn. Jan. 30, 2009) (Judgment); *United States v. Milton*, No. 3:06-cr-00137, Docket Entry 1164 (D. Conn. Oct. 31, 2008) (Ruling on Loss Calculation, Victim Enhancement, and Restitution).
2. *United States v. Ferguson*, Case No. 3:06-cr-00137, Docket Entry 1199 (D. Conn. Dec. 31, 2008) (Judgment); *United States v. Ferguson*, No. 3:06-cr-00137, Docket Entry 1164 (D. Conn. Oct. 31, 2008) (Ruling on Loss Calculation, Victim Enhancement, and Restitution).
3. *United States v. Correll*, Case No. 1:07-cr-00365, Docket Entry 36 (N.D. Ga. June 9, 2009) (Order Granting Motion for Reduction of Sentence).
4. *United States v. Cole*, 2008 WL 5204441, at *2-3, 9 (N.D. Ohio, Dec. 11, 2008).
5. Neither the Defendant's nor the Government's sentencing memorandum indicated what the Probation Office had found the advisory guideline range to be. Undersigned counsel contacted Marcia Shein, counsel for Mr. Ledee. Ms. Shein reported that the PSR had indicated a total offense level of 51, criminal history category II, and an advisory range of life imprisonment. Ms. Shein also reported that the sentencing court disagreed with some of the PSR's calculation and found a lower guideline range of approximately 20 years. The parties had, however, entered a C agreement, which capped the sentence at 7.5 years. Although this cap was substantially lower than the advisory guideline range, the sentencing court nevertheless varied even further to impose a sentence of just 70 months. *See United States v. Ledee*, Case Nos. 1:04-cr-0623-BBM and 1:05-cr-0015-BBM, Docket Entry 154 (N.D. Ga. May 8, 2007) (Judgment and Commitment).
6. *United States v. Whittier*, Case No. 1:07-cr-0087, Docket Entry 12 (S.D.N.Y. Oct. 18, 2007) (Judgment). *See also, United States v. Whittier*, 1:07-cr-0087, Docket Entry 14 (S.D.N.Y. Nov. 6, 2007) (Transcript of Sentencing Hearing).
7. *United States v. Orlansky*, Case No. 1:03-cr-20951, Docket Entry 1196 (S.D. Fla. Nov. 16, 2007) (Judgment). *See also, United States v. Orlansky*, Case no. 1:03-cr-20951, Docket Entry 1054 (S.D. Fla. July 17, 2007) (Defendant's Sentencing Memorandum).
8. *United States v. Adelson*, 441 F. Supp.2d 506, 514 (S.D.N.Y. 2006), *aff'd* 2008 WL 5155341 (2d Cir. Dec. 9, 2008). *See also United States v. Adelson*, Case No. 1:05-cr-00325, Docket Entry 86 (S.D.N.Y. June 6, 2006) (Judgment).
9. The district court initially imposed a sentence of 292 months (a sentence within the then-mandatory guideline range) after finding an actual loss amount of \$105 million. *United States v. Ollis*, 429 F.3d 540, 542 (5th Cir. 2005). On appeal, the Fifth Circuit vacated the sentence, finding that the district court's "loss calculation did not take into account the impact of extrinsic factors on Dynegy's stock price decline." *Id.* at 548-49. On remand, the district court concluded that the actual loss to shareholders could not be reasonably calculated. *United States v. Ollis*, 2006 WL 2716048, at * 10 (S.D. Tex. Sept. 22, 2006). The court, therefore, relied on the intended loss figure of \$79 million. *Id.* The new loss amount changed the guidelines range to 151-181 months. *Id.* The court then went on to grant a variance below this advisory range to arrive at a final sentence of just 72 months. *Id.* at 11-13.
10. *United States v. Shelton*, Case No. 3:02-cr-00264, Docket Entry 1604 (D. Conn. July 13, 2005) (Government's Sentencing Memorandum). *See also United States v. Shelton*, Case No. 3:02-cr-00264, Docket Entry 1635 (D. Conn. Aug. 4, 2005) (Judgment).
11. *See United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006). Ebbers' sentence has been widely viewed as "one of the most severe given to a first-time offender for a crime that did not involve violence or trafficking in illegal narcotics." *See* Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh I*, 37 MCGEORGE L. REV. 757 (2006).

12. In its Sentencing Memorandum, the Government argued for a loss calculation of \$2.2 billion and set forth the two possible Guideline calculations. *United States v. Kumar*, Case No. 1:04-cr-00846, Docket Entry 223 (E.D.N.Y. Nov. 2, 2006). *See also United States v. Kumar*, Case No. 1:04-cr-00846, Docket Entry 284 (E.D.N.Y. Nov. 27, 2006) (Amended Judgment).
13. In its Sentencing Memorandum, the Government argued for a loss calculation of \$2.2 billion and set forth the two possible Guideline calculations. *United States v. Richards*, Case No. 1:04-cr-00846, Docket Entry 223 (E.D.N.Y. Nov. 2, 2006). *See also United States v. Richards*, Case No. 1:04-cr-00846, Docket Entry 283 (E.D.N.Y. Nov. 22, 2006) (Judgment).
14. In his Sentencing Letter, Mr. Gabayzadeh conceded a total offense level of 48 (an offense level that results in an advisory sentence of life imprisonment regardless of criminal history score). *See United States v. Gabayzadeh*, Case No. 2:03-cr-00162, Docket Entry 180 (E.D.N.Y. Aug. 17, 2006). *See also United States v. Gabayzadeh*, Case No. 2:03-cr-00162, Docket Entry 190 (E.D.N.Y. Nov. 23, 2006) (Judgment).
15. Following their conviction and sentencing, John and Timothy Rigas succeeded in obtaining limited relief on appeal. Specifically, the Second Circuit reversed their convictions on one of the counts, and remanded for an entry of acquittal on that count and for resentencing. *United States v. Rigas*, 490 F.3d 208, 239 (2d Cir. 2007). On remand, the District Court concluded that the elimination of one count of conviction did not change the guideline range (life imprisonment), but did change the aggregate statutory maximum sentence from 215 months to 185 months. *United States v. Rigas*, Case No. 1:02-cr-01236, Docket Entry 428 (S.D.N.Y. June 24, 2008) (Memorandum and Opinion). Though each defendant had already received a substantial variance below the advisory range at the original sentencing, the district court reduced each of the defendants sentences by another three years. *Id.* Accordingly, John Rigas' sentence was reduced from 180 months to 144 months and Timothy Rigas' sentence was reduced from 240 months to 204 months. *Id.*
16. *See* Endnote 17.
17. *United States v. Jacob Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 141 (E.D.N.Y. July 23, 2007) (Government's Sentencing Memorandum). *See also United States v. Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 164 (E.D.N.Y. Aug. 8, 2007) (Judgment).
18. *United States v. Herman Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 141 (E.D.N.Y. July 23, 2007) (Government's Sentencing Memorandum). *See also United States v. Herman Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 158 (E.D.N.Y. Aug. 7, 2007) (Judgment).
19. *United States v. Aaron Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 141 (E.D.N.Y. July 23, 2007) (Government's Sentencing Memorandum). *See also United States v. Aaron Jacobowitz*, Case No. 1:04-cr-00558, Docket Entry 161 (E.D.N.Y. Aug. 8, 2007) (Judgment).
20. *United States v. Argo*, Case No. 1:07-cr-00683, Docket Entry 14 (S.D.N.Y. Jan. 23, 2008) (Government's Sentencing Memorandum). *See also United States v. Argo*, Case No. 1:07-cr-00683, Docket Entry 16 (S.D.N.Y. Jan. 29, 2008) (Judgment).
21. *See United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008).
22. *Id.*
23. *United States v. Kohler*, Case No. 1:07-cr-20446, Docket Entry 65 (S.D. Fla. Sept. 17, 2007) (Defendant's Objections to Presentence Investigation Report). *See also United States v. Kohler*, Case No. 1:07-cr-20446, Docket Entry 84 (S.D. Fla. Oct. 10, 2007) (Amended Judgment).
24. *United States v. Dreier*, Case No. 1:09-cr-085, Docket Entry 84 (S.D.N.Y. July 17, 2009) (Judgment). *See also United States v. Dreier*, Case No. 1:09-cr-085, Docket Entry 76 (S.D.N.Y. July 8, 2009) (Government's Sentencing Memorandum).