

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	
)	Case No. 1:08-CR-437
v.)	
)	Hon. James C. Cacheris
PRESTON DAVID PINKETT, II,)	
)	Sentencing Date: September 11, 2009
Defendant.)	

POSITION OF THE UNITED STATES WITH RESPECT TO SENTENCING

The United States of America, through its attorneys, Dana J. Boente, United States Attorney, Timothy D. Belevetz, Assistant United States Attorney, in accord with 18 U.S.C. § 3553(a) and the United States Sentencing Commission, Guidelines Manual (“Guidelines” or “U.S.S.G.”) § 6A1.2 (Nov. 2008), files this Position of the United States With Respect to Sentencing of defendant Preston David Pinkett, II (“Pinkett” or “defendant”).

The United States submits that the Sentencing Guidelines establish a reasonable sentencing range that accounts appropriately for each of the factors set forth in 18 U.S.C. § 3553(a). The Probation Office correctly based its guidelines calculation on a fraud loss of more than \$20,000,000. A four-level enhancement under § 2B1.1(b)(2)(B) for more than 50 victims also applies. Under the Guidelines, the recommended term of incarceration is 97 to 121 months.

In a separate sealed filing, the government has moved for the reasons set forth therein for a 30 percent reduction in the sentence the Court would otherwise impose.

Therefore, the government respectfully recommends that this Court impose a sentence of within the range of 68 to 85 months, which is based upon more than \$20,000,000 in fraud loss, the victim enhancement identified above, a reduction for the timely acceptance of responsibility, and the 30 percent reduction for which the government has moved and order restitution in the amount of \$18,774,989.21.

I. BACKGROUND

As set forth in the Presentence Report and the Statement of Facts, Pinkett was the president and CEO of International Fiduciary Corp. (“IFC”), a Virginia corporation located in Arlington. From approximately January 2004 through approximately December 2006, Pinkett used IFC to operate a massive Ponzi scheme. Through IFC, Pinkett and his co-conspirators solicited investors in the United States and Canada to invest in its fraudulent “Asset Growth Program.” IFC falsely touted exclusive trading opportunities in so-called “1st tier medium bank notes” when in fact no such trading opportunities ever existed. To sustain the fraud, Pinkett and his co-conspirators used funds from newer investors to issue “profit” payments of 4% to 6% per month to earlier investors. The scheme, which began in January 2004 and ended in December 2006, fraudulently raised approximately \$40.2 million from investors, the majority of whom are located in Canada.

On December 2, 2008, Pinkett pled guilty to a one-count criminal information charging him with conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349.

II. THE APPROPRIATE GUIDELINE RANGE

As this Court is aware, following the Supreme Court’s decision in United States v. Booker, the Sentencing Guidelines are now advisory. 543 U.S. 220, 261 (2005). As such, “[i]n

the wake of Booker . . . the discretion of sentencing court is no longer bound by the range prescribed by the guidelines.” United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005) (quoting Booker, 542 U.S. at 264). The Supreme Court has clarified that this means the sentencing court “may not presume that the Guidelines range is reasonable.” Nelson v. United States, 129 S.Ct. 890, 892 (2009). Nevertheless, the sentencing court must first calculate the Guidelines range. Id.; see also Hughes, 401 F.3d at 546 (holding that a sentencing court is still required to “consult [the] Guidelines and take them into account when sentencing”). Thus, “sentencing courts are not left with unguided and unbounded sentencing discretion.” United States v. Green, 436 F.3d 449, 455 (4th Cir. 2006).

For the reasons set forth below, the appropriate Guideline range is 97 to 121 months, which derives from an adjusted offense level of 30.

A. The Fraud Loss Is Over \$20 Million

As set forth in the statement of facts, from January 2004 through December 2006, the defendant engaged in a conspiracy to defraud investors by misrepresenting the use of their funds and the source of the supposed profits. The scheme raised approximately \$40.2 million in fraudulent payments. The parties agree that the defendant’s conduct resulted in a loss of more than \$20 million and less than \$50 million. Under Guidelines §§ 2B1.1(a)(1) and 2B1.1(b)(1)(L), the fraud loss amount yields an adjusted offense level of 29.

B. The Fraud Involved More Than 50 Victims

A four-level enhancement under Guidelines § 2B1.1(b)(2)(B) for more than 50 victims also applies. In fact, Pinkett’s criminal conduct resulted in approximately 180 victims.

Accordingly, the parties agree that the scheme involved more than 50 victims and less than 250 victims for purposes of sentencing.

**III. A SENTENCE WITHIN THE ADVISORY GUIDELINE RANGE
MEETS THE GOALS OF THE FACTORS SET FORTH IN 18 U.S.C. § 3553(a).**

After calculating the appropriate guidelines range, “the court must ‘determine whether a sentence within that range . . . serves the factors set forth in § 3553(a) and, if not, select a sentence [within statutory limits] that does serve those factors.” United States v. Moreland, 437 F.3d 424, 432 (4th Cir. 2006) (quoting Green, 436 F.3d at 455). Section 3553(a) directs the sentencing court to consider various factors including the nature and circumstances of the offense and characteristics of the defendant. In addition, Section 3553(a) states that the court must consider other factors, including the need for the sentence “to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; [and] to afford adequate deterrence to criminal conduct.” 18 U.S.C. § 3553(a)(2)(A) & (B).

The Fourth Circuit has provided the following guidance in the wake of Booker:

A district court shall first calculate (after making the appropriate findings of fact) the range prescribed by the guidelines. Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in [18 U.S.C.] § 3553(a) before imposing the sentence.

United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005). Thus, sentencing courts must take into account the factors outlined in 18 U.S.C. § 3553(a), including the need for the sentence “to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; [and] to afford adequate deterrence to criminal conduct.” 18 U.S.C.

§ 3553(a)(2)(A) and (B); United States v. Biheiri, 356 F.Supp.2d 589, 594 (E.D. Va. 2005).

In general, a sentencing court must “articulate the reasons for selecting the particular sentence, especially explaining why a sentence outside of the Sentencing Guidelines range better serves the relevant sentencing purposes set forth in § 3553(a).” Green, 436 F.3d at 456. See also Hughes, 401 F.3d at 546 (“If the court imposes a sentence outside the guidelines range, it should explain its reason for doing so.”). “A district court’s reasons for not applying the properly calculated Guideline range must be based on the factors listed in § 3553(a).” Green, 463 F.3d at 456.

As such, it is the government’s position that the Sentencing Guidelines establish a reasonable sentencing range that appropriately accounts for each of the factors set forth in 18 U.S.C. § 3553(a).

A. A Sentence Within the Guidelines Range Is Appropriate and Reasonable in Light of the Nature of Defendant’s Criminal Conduct

In formulating a sentence, this Court must take into account the nature and circumstances of the offense and the defendant’s characteristics. 18 U.S.C. § 3553(a)(1). Based on the facts of the matter before the Court, the United States urges the Court to find a sentence within the Guidelines range of 97 to 121 months is appropriate. Pinkett engaged in an extensive scheme with others to defraud scores of investors out of an enormous of money.

The United States believes that a sentence within the advisory Guideline range is appropriate and reasonable to account for the seriousness of the defendant’s crime and to provide just punishment. Such a Guidelines calculation appropriately takes into consideration all of the aggravating and mitigating circumstances in this case. Furthermore, the Guidelines calculation appropriately reflects the significant fraud loss involved in this case and the extensive impact on

the victims. Finally, a sentence within the Guidelines would avoid unwarranted disparities between similarly situated defendants because the defendant would be treated similarly to those defendants with his history and criminal background.

B. A Sentence Within the Guidelines Range Would Provide Appropriate and Reasonable Deterrence

In addition, a sentence within the Guidelines range would be appropriate to provide the requisite level of both specific and general deterrence. 18 U.S.C. § 3553(a)(2)(B). The substantial amount of the fraud loss in this case has far reaching implications for the United States. The United States has a strong interest in preventing criminals from stealing money from innocent investors. This conduct is deterrable. Moreover, the United States has a strong interest in punishing such individuals. The message must be that individuals who defraud others will be punished appropriately. As such, the United States believes that a length of incarceration within the Guidelines range would be appropriate to afford adequate deterrence of the criminal conduct for which Pinkett is now being sentenced.

IV. DOWNWARD DEPARTURE

For the reasons set forth in its September 3, 2009 sealed filing, the United States respectfully requests that this Court to apply a 30 percent downward departure from the sentence that the Court would otherwise impose. The application of such a reduction to the appropriate Guidelines range would result in a range of 68 to 85 months.

V. OTHER SENTENCING ISSUES

The government respectfully requests that as part of its sentence the Court order restitution in the amount of \$18,774,989.21, the most current figure provided by court-appointed

receiver John C. Smith, who has been charged with collecting and analyzing the claims of investors. In a separate filing, the government will provide a proposed restitution order with a list of investor-victims and the losses they suffered. The government further requests that the Court order the defendant to make monthly restitution payments, in whatever amount the Court deems appropriate, as a part of its sentence.

CONCLUSION

For the reasons stated, the United States respectfully requests that this Court find that a total fraud loss of over \$20,000,000 is attributable to the defendant's conduct, and therefore, after the application of the enhancements discussed above and a reduction for the timely acceptance of responsibility, the defendant's total offense level is 30 and Criminal History Category is I, which would result in a sentencing range 97 to 121 months. The government further requests for the reasons set forth in its sealed filing that this Court apply a 30 percent reduction to the sentence it would otherwise impose. The United States submits that such a sentence is appropriate and reasonable and accounts for each of the factors set forth in 18 U.S.C. § 3553(a). Therefore, the government asks this Court to sentence the defendant to a total term of incarceration of 68 to 85 months. Finally, the government requests that the Court order restitution in the amount of \$18,774,989.21.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September 2009, I filed electronically the foregoing Position of the United States with Respect to Sentencing using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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