07-1537-cr

To Be Argued By:
ERIC J. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-1537-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

BLAKE A. PRATER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Arterton, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment was entered on April 12, 2007. AA-278-79.[1] The defendant filed a timely notice of appeal on April 12, 2007, AA-276-77, pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).[2]

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[1] The Appellee's Appendix is cited as "AA-" while the Government's Supplemental Appendix is cited as "GSA-."

[2] The defendant locates this Court's jurisdiction in 28 U.S.C. § 1291. This Court has not yet confirmed that the authority to review sentences lies within that statute, but has confirmed that jurisdiction is appropriate pursuant to 18 U.S.C. § 3742. *See United States v. Fernandez*, 443 F.3d 19, 26 & n.7 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the statement of reasons the district court provided pursuant to 18 U.S.C. § 3553(c) for the sentence imposed, to which the defendant did not object at the sentencing hearing, was so deficient as to constitute plain error.

II. Whether the defendant waived his right to challenge on appeal the district court's grouping under U.S.S.G. § 3D1.2 of the two counts to which he pled guilty, and whether in any event the district court properly grouped the two counts and imposed a reasonable sentence.

III. Whether the district court's decision not to grant a downward departure based on "extraordinary family circumstances" is reviewable on appeal, and whether the district court's decision not to give a non-guidelines sentence on the same grounds was unreasonable.

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Preliminary Statement

The defendant, Blake Prater, defrauded investors out of millions of dollars as the head of an internet-based Ponzi scheme. The defendant pleaded guilty to securities fraud based on fraudulent representations and omissions that he made to investors about the fact that his company had no legitimate source of income other than payments from new investors – *i.e.*, that he was running a Ponzi scheme – and

that he had previously been convicted for fraud. He also pleaded guilty to conspiring to engage in monetary transactions involving the proceeds of securities fraud. Despite stipulating in his plea agreement that the loss from his scheme was at least $400,000, the defendant for the first time at sentencing argued that there was no loss at all from his crime. The district court rejected his loss arguments and found the loss to be over $3.4 million. The district court also refused to depart downward or impose a non-guidelines sentence for extraordinary family circumstances stemming from a then-recent injury to Prater's wife's knee. The defendant's sentencing guidelines range was 151 to 188 months, and the district court sentenced the defendant to the statutory maximum of 60 months on each count to run consecutively, for a total sentence of 120 months.

The defendant now appeals that sentence on three grounds, each of which is without merit. For the reasons below, this Court should affirm the district court's reasoned judgment in sentencing the defendant.

Statement of the Case

On January 5, 2006, the defendant was indicted on eighteen counts related to securities fraud. GSA-1-20. The defendant pleaded guilty to Count One of the Indictment charging him with a violation of 15 U.S.C. §§ 77q(a) and 77x (securities fraud) and to a one-count Information charging him with violating 18 U.S.C. §§ 371 and 1957 (conspiracy to engage in monetary transactions involving the proceeds of securities fraud). GSA-21-22. The district court held a sentencing hearing on March 30,

2007, and judgment was entered on April 12, 2007. The defendant was sentenced to 120 months' imprisonment. The defendant filed his notice of appeal the same day. AA-276-77. The defendant is currently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

1. The Ponzi scheme

From about September 2002 to September 2003, the defendant, who was the founder and Chief Executive Officer of Wellspring Capital Group, Inc. ("Wellspring"), defrauded investors of millions of dollars through the use of false and misleading statements about the nature of Wellspring's operations and his background. Prater enticed investors to send money to him and Wellspring, which employed about 35 people, in a variety of ways. GSA-96. First, Wellspring offered "Right to Receive" agreements, pursuant to which an investor would give a sum of money to Prater in return for promises of exorbitant rates of return. PSR at 3-4; GSA-99. Wellspring also offered a variety of investments where the company agreed to make regularly scheduled payments for car loans and apartment rent. PSR 3, GSA-25. Through the "Payroll Replacement Plan," investors could make an up-front payment in exchange for the promise that nine weeks later, they would begin receiving weekly payments of 25% of the initial investment. The payments were promised to last for 43 weeks, for a total return of almost 1000%. GSA-25-49; GSA-99. Through these various

investment schemes, Prater caused investors to send over $14 million to Wellspring. GSA-50.

Investors were lured into these schemes by a variety of false statements made by the defendant through Wellspring. AA-429. The defendant did not disclose to investors that he was running a Ponzi scheme. AA-19-20; AA-271. The defendant also failed to inform investors of his previous convictions for fraud. AA-19; PSR at 4. The defendant had previously been caught passing bad checks, improperly using company credit cards, and committing forgery and theft. PSR at 7-8. The defendant had also served 42 months in prison for false pretenses. PSR at 8-9. The defendant further failed to disclose the fact that these securities were not registered with the Securities and Exchange Commission. AA-429.

As with every Ponzi scheme, some of the initial investors were paid back in accordance with the terms Prater offered and reaped huge returns. These payments were only able to be made, however, through the use of the continual influx of new investment money. AA-19; AA-271. Wellspring was in fact generating no legitimate revenue; it was just taking in money from new investors looking to make exorbitant annual returns. *Id.* In order to put off the inevitable day of reckoning – that is, the day when new investor money would be insufficient to pay the old investors whom he owed – Prater, through Wellspring, began offering "100% reinvest" and "two-thirds reinvest" programs. PSR at 4. Under these programs, the money an investor was supposed to receive was reinvested in a new contract, which would not mature until a later date. Id.

The defendant could thus postpone the time when these large sums would need to be paid.

2. The SEC action

The government successfully sought to shut down the defendant's fraudulent operations in September 2003. The Securities and Exchange Commission initiated injunctive proceedings against Prater and Wellspring and froze about $2.8 million in Wellspring bank accounts.[3] AA-191. *See SEC v. Prater,* 296 F. Supp. 2d 210 (D. Conn. 2003); *see also SEC v. Prater*, 2003 WL 22937722 (D. Conn. Oct. 17, 2003); *SEC v. Prater*, 289 F. Supp. 2d 39 (D. Conn. 2003). The district court appointed a Receiver to oversee the liquidation of Wellspring's assets, to identify victims of the scheme, and to supervise the return of investor funds to the extent possible. AA-205-211.

"The Receiver began the process of identifying Eligible Claimants promptly upon appointment." AA-194. The Receiver undertook a process pursuant to which he ultimately identified 1,753 victims, to whom in the aggregate Prater owed $7,765,909.[4] GSA-51, GSA-59. In

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[3] The defendant makes much of the fact that at the time the Government stepped in, Wellspring had paid all of its then-due debts. Def. Br. at 5, 7. Even if this were true, it ignores the fact that more and more repayment obligations were becoming due as more and more contracts were maturing, obligations that Prater could never have repaid.

[4] This number is larger than the difference between the amount invested and the amount paid to investors because, as (continued...)

the SEC action, Prater challenged the Receiver's methodology, citing six errors in the Receiver's determinations regarding the 1,753 victims. AA-198. The district judge presiding over the SEC case, Judge Mark R. Kravitz, rejected the defendant's challenges, stating:

> [A] small number of claim errors identified by Defendants [Prater and Wellspring] after months of examination of the Receiver's database and determinations does not undermine the claims determination process, as Defendants hoped it would. To the contrary, the relatively small number of errors – six inaccurate determinations that appear to be mostly minor clerical errors – serves to confirm the reliability of the Receiver's methodology and processes.

AA-198.

In August 2003, just one month before the SEC's lawsuit and the freezing of Wellspring's bank accounts, Prater began to purchase businesses. AA-412. The Receiver took these businesses over pursuant to court order and attempted to sell them. AA-212-214. The defendant had purchased Maple Breeze Amusement Park in Rhode Island in August 2003 for $1.5 million ($1.2 million for the land and $300,000 for the business). AA-37. In liquidating this asset, however, the Receiver was

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[4] (...continued)
with most Ponzi schemes, the initial investors were paid exorbitant rates of return using the funds of later investors, leading to the ever-widening disparity.

unable to identify any potential buyers for the business due to the extreme insurance risks that would accompany this amusement park. AA-213. However, he was able to sell the land for $1.3 million. *Id.*

The defendant also purchased a milk supply company called P.L. Gaetano Transportation, Inc., in August 2003 for $1.1 million – $350,000 in cash and a promissory note for $750,000. AA-214. As part of the sale, the defendant also paid $250,000 of Gaetano's outstanding debt. *Id.* The defendant, however, breached the sales agreement in several ways, including a failure to continue to engage in the same type of business and a failure to comply with all laws and regulations. GSA-55. As a result, Gaetano's previous owner exercised his right under the agreement to reacquire the assets of the company in satisfaction of the promissory note.[5] AA-214. With the district court's permission, the Receiver abandoned efforts to litigate the ownership of Gaetano. GSA-104.

Similarly, the defendant purchased the Connecticut company Elm Electric Supply, Inc., in July 2003 for $400,000 – $150,000 in cash and a promissory note for the remainder. AA-213. After the filing of the SEC case, Wellspring breached its obligations under this purchase agreement as well. *Id.*

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[5] The defendant incorrectly portrays this as a "serious mistake[] in the Receiver's handling of other assets." Def. Br. at 6. As the record reflects, the Receiver had no legal recourse to recover Gaetano after Prater and Wellspring breached its contract.

The last business purchase identified by the Receiver was an inventory of toys for $69,000. AA-37. The Receiver liquidated this inventory at auction for $13,200, which left $4,568.73 after costs. AA-213.

The Receiver did, however, identify another substantial purchase made with fraudulent funds: the defendant's house. *Id.* Despite an agreement by the defendant to cooperate fully with the Receiver, the defendant tried to place the house, which was purchased with over $269,000 in investor funds, outside the Receiver's reach by transferring his share of the home to his wife. GSA-107-09. The Receiver sought the court's permission to begin a quiet title action against the house, GSA-106, but eventually settled with the defendant for a $232,000 cash payment. GSA-52; AA-175.

The sale of all Wellspring assets combined with the money seized yielded $4,286,781.[6] AA-147. With $7,765,909 owed to investors on their original investment (*i.e.*, not counting the interest Prater had promised), a shortfall of $3,479,128 remained. *Id.* The money collected by the Receiver was returned to investors on a percentage basis. *Id.* Each eligible investor who submitted a claim received 55.2% of their original investment with the defendant. *Id.*

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[6] This number is less than the $5.7 million in expenditures, due in large part to the forfeitures of Elm Electric Supply, Inc., and P.L. Gaetano Transportation, Inc., after the defendant breached his purchase agreements with those sellers resulting in substantial losses.

This loss hit many of the victims hard, with some losing their homes. AA-428-29. One of the defendant's victims committed suicide, and many suffered from the financial and emotional trauma caused by Prater's actions. *Id.*

3. The criminal case

In addition to the onset of the SEC case in September 2003, the FBI executed search warrants that same month on Wellspring and various other Prater-related sites, including the house he lived in that was purchased with investor money. A grand jury sitting in the District of Connecticut subsequently returned an eighteen-count indictment against the defendant in January 2006, charging him with, among other things, securities fraud, wire fraud and money laundering. GSA-1-20.

On October 3, 2006, Prater agreed to plead guilty to two charges: one count of violating 15 U.S.C. §§ 77q(a) and 77x (securities fraud) and one count of violating 18 U.S.C. §§ 371 and 1957 (conspiracy to commit money laundering). AA-10. The plea agreement contained a specific admission that "in truth and in fact, [payments to investors] were often simply payment of monies invested by other persons." AA-19. In contrast, the defendant's sentencing memorandum denied that the defendant ever engaged in a Ponzi scheme. AA-256. The plea agreement also contained the stipulation that "[t]he defendant contends that . . . the loss was more than $400,000 and less than $1 million." AA-13. The defendant's sentencing

memorandum claimed that there was no loss from the scheme.[7] AA-26.

At the sentencing hearing, the district court heard argument on these issues, and found that (1) the reasonably foreseeable loss as a result of Prater's scheme was $3,479,128, the shortfall after the Receiver's liquidation of Wellspring,[8] and (2) there were more than 50 victims, despite the defendant's argument that there were no victims. AA-429-430.

The district court also addressed the issue of the defendant's acceptance of responsibility. The plea agreement had included an anticipated three-point reduction in the defendant's sentencing level for

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[7] The defendant claimed then and now that "if 'loss' was attributable to the conduct it could only have resulted from the Government's conduct when it shutdown [*sic*] Wellspring." Def. Br. at 5. However, Ponzi schemes, by their very nature, inevitably collapse under their own weight. *See, e.g.*, *United States v. Frykholm*, 362 F.3d 413, 414 (7th Cir. 2004); *United States v. Munoz*, 233 F.3d 1117, 1126 (9th Cir. 2000) ("A Ponzi scheme, in which new investor funds are used to pay returns to prior investors, creates a situation where the business will inevitably collapse . . . ."). The Government simply stepped in before the defendant, who separated investors from their money based on his promise of annual rates of return of nearly 1000%, victimized even more people. As it was, the actual loss due to the *defendant's* conduct at that point was (at the very least) $3,479,128. AA-429; AA-437.

[8] The defendant notes that the Receiver did not testify at the sentencing. The Receiver was, however, present in the courtroom and available for examination by the defendant.

acceptance of responsibility. AA-12. However, when faced with the facts of the defendant's continued fraudulent acts and lack of compliance with his conditions of release – that is, according to the district court, Prater's "flagrant disregard for the authority of the Court and a flagrant disregard for the laws that hold society together" – the district court found that the defendant had not accepted responsibility and that any reduction in his adjusted offense level would be inappropriate. AA-432.[9]

Without acceptance of responsibility, the defendant's guidelines range was 151 to 188 months, based on a total offense level of 32 and a criminal history category of III. AA-432. This range, however, exceeded the statutory maximum of 10 years, and so that maximum became the

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[9] Prater was released pending trial and, after he pled guilty, released pending sentencing on the condition that he not leave the District of Connecticut without the permission of the court. AA-431; GSA-102-03. At the sentencing hearing, the government presented evidence, and Prater subsequently admitted, that he left the District on numerous occasions without court permission. AA-391. The defendant did so to manage a new company that he started in Massachusetts that he concealed from his probation officer. AA-391-92; AA-431. The government showed that Prater defrauded employees he hired to work for this company by withholding and pocketing their federal and state income taxes from their paychecks instead of reporting them. AA-392-93.

applicable guidelines range. *See* U.S.S.G. § 5G1.1(a). The district court, therefore, sentenced the defendant to 120 months. AA-437.

SUMMARY OF ARGUMENT

I. Prater never objected at the sentencing hearing that the district court's statement of reasons for the sentence it imposed was insufficient. Accordingly, Prater's claim that the district court's statement of reasons was insufficient should be reviewed for plain error. *See United States v. Villafuerte*, No. 06-1292-cr, 2007 WL 2737691, *6 (2d Cir. Sept. 21, 2007). But the district court committed no error, much less plain error, in providing its lengthy statement of reasons for the sentence it imposed, a statement far more detailed and explanatory that the one upheld by the Supreme Court in *Rita v. United States*, 127 S. Ct. 2456, 2468-69 (2007). AA-426-437. The district court more than adequately explained its reasons for relying on the Receiver's methodology in finding the loss amount to be $3,479,128. AA-426-30. It explained why it refused to reduce Prater's adjusted offense level for acceptance of responsibility. AA-430-32. It explained the reason it did not find Prater's family circumstances to be extraordinary. AA-432-33. It explained the reason it viewed the offense as a serious one and the conduct to be a typical Ponzi scheme, contrary to what Prater argued. AA-433-36. It explained why "the public needs protection from any further business ventures by this defendant." AA-436. Thus, contrary to defendant's argument, the district court's statement of reasons was thorough and sufficient.

II. Prater's fundamental argument as to the unreasonableness of his sentence is that the district court improperly grouped the two counts to which he pled guilty. But Prater not only did not object to the district court's grouping of the two counts – he expressly agreed that it was correct to group the two counts. AA-289; AA-332-34. Prater thus waived any argument on appeal that it was error to group the two counts. In any event, even absent waiver, it was not error, much less plain error under forfeiture analysis, to group the two counts. The Guidelines make clear that charges of fraud and engaging in transactions using the proceeds of fraud should be grouped together. Moreover, the Guidelines also dictate that when a defendant's guidelines range exceeds the statutory maximum on the highest charge, sentences on the other charges may be stacked consecutively in order to provide an appropriate term of imprisonment. The defendant's argument that the result of this grouping produced an unreasonable sentence on one of the counts ignores the fact that these counts were correctly grouped and stacked under the Guidelines. The resulting total sentence that the defendant received was both procedurally and substantively reasonable.

III. The district court heard, thoughtfully considered, and rejected Prater's argument for a downward departure or a non-guidelines sentence for "extraordinary family circumstances" based on his wife's recovery from knee surgery. The denial of a downward departure for extraordinary family circumstances is not reviewable on appeal. The district court's rejection of the defendant's argument for a non-guidelines sentence based on the injury to Prater's wife was well within its discretion and

adequately supported by the reasons it provided. AA-432-33. Indeed, this Court has vacated and remanded sentences in cases in which a district court gave a lenient sentence based on family circumstances that were more extraordinary than Prater's.

ARGUMENT

I. The district court provided an adequate statement of reasons under § 3553(c) for the sentence it imposed.

A. Relevant facts

The district court conducted a lengthy sentencing hearing. AA-281-446. The court listened at length to all of defense counsel's arguments, and asked questions about the arguments and positions that defense counsel was advancing on behalf of the defendant. AA-291; AA-298-99; AA-309-10; AA-313-14; AA-332; AA-335. After hearing from two different lawyers for the defendant, from the defendant himself, and from the defendant's wife, as well as from the government, the district court provided a lengthy and thoughtful statement of reasons for the sentence it imposed:

> We have had a lengthy discussion today about the ways in which to view the world of Mr. Prater and his activities. It's two very different views of the world between the government and Mr. Prater.
>
> What is not, however, it seems to me, able to be overlooked is that for whatever reason and

whatever purpose, Mr. Prater put other people's money at risk without telling them the risk that he was putting it at, and took it upon himself to be the decider of how it would be used, when it would be used, whether it would be used for him or whether it will be used for the belated purchase of businesses.

The methodology that has been used by the Receiver for the purpose of ascertaining investors' losses, assets to be marshalled, assets to be liquidated, and a means by which all investors would be reimbursed, at least some as opposed to all, up front with total loss at the end, that methodology, as I read Judge Kravitz's opinions, as I read the submissions to Judge Kravitz from the [R]eceiver, has been contested by Mr. Prater, reviewed by another court, found to be appropriate, the methodology to be sound, and the conclusions to be accepted. While there is a great deal of articulate analysis by defense counsel as to the value of assets, the sequence, I am left struck by the tiny nature of those businesses in relation to what was the looming debt if 1000% was repaid to so many investors, which by the [R]eceiver's tally had invested $7 million.

Whether Elm Electric was or was not worth a million dollars, I would say two things. One, the [R]eceiver is in the business of maximizing recovery to the investors, is under court supervision, is appointed because of his respected

abilities and knowledge, and the value is what someone will pay for it, if they will.

The [R]eceiver, I have no doubt that Judge Kravitz has reviewed all of the aspects to find that what was done by the [R]eceiver was reasonable under the circumstances. Even if it wasn't, a $1 million business seems, to me, in light of the size of this undertaking . . . is pretty small potatoes. Whether a warehouse of toys is worth [$]13,000 or [$]80,000 is pretty small potatoes.

I am struck by two things: The faith that people apparently have in the defendant, whether by virtue of his personal charisma or his false representations as to what his scheme represented and was backed by, or perhaps unreasonable greed by investors. But, nonetheless, it's other people's money, people who didn't know that when they were investing there were no businesses, there was no Elm Electric, there was no trucking company or toys or entertainment park, and as the defendant has admitted, he was paying earlier investors with later money and at some point he would get around to doing what he said he had already done.

The Court received victim impact letters that are really very telling on why the laws -- why the penalties must be appropriate to the harm done. The victim letter from Michael Perell (phonetic spelling), husband of Georgia Perell, wrote on the belief that as a result of their loss of their small investment, his wife was in such extreme stress and

anguish she committed suicide. I don't have any way of knowing whether that is an accurate diagnosis of the cause, one might think it might not be the sole, but the other letters, that talk about -- Mr. Potter who writes about the defendant's schemes promising great wealth and that he made these blind investments which caused him to lose his home and his children's college, he lives out of his daughter's garage, he has lost everything, and Anna Robinson who writes and speaks of their bad financial distress, they were forced to sell their home and car and change their life substantially while paying on loans that were made and not repaid.

Those perhaps represent quite a spectrum of victims, but they nonetheless put a face on what was going on. What was going on, as was admitted when Mr. Prater entered his plea, was that he was making material false representations, taking the money, and apart from whether or not they are registered securities, which strikes me as a straw being grasped to, that the illegality of this was the failure to register securities, it was lying and it was defrauding people, and it was taking their money and using it as you chose to without letting them make an informed decision about the risk you were exposing their money to.

It's for that reason that I think that the calculation of the actual loss computed by the [R]eceiver in the context of this case reflects what is a reasonably foreseeable loss that should be the

calculus for the advisory guidelines enhancement of 18 levels.

Following from that, as we discussed earlier, the enhancement of four more levels for more than 50 victims will follow under 2B1.1(b)(2)(B). It is not disputed that a role enhancement as leader and organizer of the criminal activity involving five or more participants or otherwise extensive is applicable under 3B1.1(a) for an increase of four. There are very few times when I have had to consider whether a person who timely enters a guilty plea to some part of an indictment shouldn't get acceptance of responsibility.

There are very few times when I have had to consider whether a person who timely enters a guilty plea to some part of an indictment shouldn't get acceptance of responsibility. There are very few times when not according that reduction is even before the Court.

I am, however, quite struck by the position taken by the defendant with respect to admitting the conduct comprising the offenses of conviction and the continued justification and rationale and blinders to the fact that it was criminal activity.

That, on top of the rather seemingly willful disregard for the conditions of release on bond, the order on bond is one that says you can only go back to your house and not be locked up if you do all these things, and all these things are to ensure that

criminal activity not take place, that the whereabouts are accounted for, that the defendant is demonstrating a willingness to adhere to authority and court orders, the minimizing of trips out of state, use of the Internet, misrepresentations as to the nature and scope of business, are pretty flagrant.

The distance between East Haven and Springfield is 67 miles. In 67 miles one has time -- and you come back, one has time to think, especially somewhere between six and ten times, that your probation officer needs to be in on that picture. You knew that. You asked permission to go to Oklahoma; you received permission to go to Oklahoma. You never asked for permission to leave the state otherwise.

While your bond was not called at the time when Massachusetts notified Connecticut or the FBI that there was activity afoot coming from Lightening [*sic*] Financial because the magistrate did not believe that that had been shown by clear and convincing evidence, with a suggestion that perhaps there had been some office cleaning before the warrant, search warrant was served, the fact of the matter is that it is undisputed that Judge Margolis ordered no Internet use, ordered no Internet use because it was your vehicle for perpetuating the frauds, and there's no dispute that you flagrantly used the Internet. It was not as if you consulted with the probation officer and said, I need to do this, I need to do that. You have

explained already that you made arrangements for payments by telephone, but nonetheless, seemed to have used the Internet.

It is a flagrant disregard for the authority of the Court and a flagrant disregard for the laws that hold society together, and I am unimpressed. I, therefore, have concluded that your pattern of conduct in violating clear terms on bond, your minimizing of your level of criminality in this case, and your persistence with your view of good works in the face -- good intentions in the face of review by other courts, other witnesses, leads me to conclude that there should not be a reduction for acceptance of responsibility.

That said, the total offense level that is applicable without a reduction for acceptance of responsibility is a 32. There does not seem to be dispute that the Criminal History Category is III. The advisory guidelines, using the '02 guidelines, is 151 to 188 months. As has been previously discussed, that exceeds the statutory maximums for the two offenses.

. . .

There may well have been very fine, outside-the-box theories of business undertakings that originally motivated Mr. Prater, but it got far afield of what was legal, and many people suffered as a result, and they suffered an extreme amount of money.

Counsel argues that because this isn't -- because this is, if any kind of a Ponzi scheme, an atypical Ponzi scheme, and, thus, a nonguideline sentence should be imposed, certainly by Mr. Prater's admission it was a Ponzi scheme in the beginning, new money was used to pay off maturing obligations. Whether that is changed by the advent of several business ventures doesn't seem to me that it materially changes how that money was coming in and the impossibility of it continuing, the in flow of contracts would never suffice or could have reasonably been anticipated to suffice to pay it off.

Lightening [*sic*] might strike, perhaps that's the reason for the name of Lightening [*sic*] Financial, and these businesses might take off like crazy and the dreams that you envisioned of buying up businesses of a certain profile to buy their income flow might have been able to bail out most of this, but that gets back to what a Ponzi scheme in part is, and that is that it's not a sound business plan at the outset, on the representations given, that it uses later money to take care of earlier debts, and while this isn't like others I have read of in the cases, it's not, it doesn't seem to me, to be atypical in its approach or its structure given the disproportion between the amounts of funds and the value of the assets available, or potentially available, to pay 1000% interest, even though they are short-term contracts.

Moreover, I think that there are factors that are considered here that I have touched on under 3553 that teach that a nonguideline sentence, which in a way this must necessarily be since the statutory maximum is beneath the guidelines, the nature and the circumstances of the offense, while I have tried very hard to understand and get my arms around the defendant's theory of why there is no loss, there should not be deemed a loss within the meaning of the statutes, and I have tried to have an open mind in terms of the criticisms given for the [R]eceiver's actions, I am left at the end of the day with a real sense that, to use our children's book imagery of the day, that we had the Wizard of Oz, except at the end of the day the Wizard of Oz accepted that he was nothing but an ordinary mortal. Maybe it's more appropriately that today is the day that the child cries out the emperor has no clothes.

The offense is a serious one. The statutory penalties that are available reflect a congressional view that it's serious, notwithstanding the fact that each individual count may only have a five-year maximum.

The issue of deterrence of course goes hand-in-hand with public protection, and that is a factor considered as well. I suppose it also tracks with the issue of likelihood of recidivism. I suppose that so long as the defendant believes that he can call the shots as he sees them, whether it's compliance with the terms of release on bond, representations made to get people's money,

> withheld income tax not paid over on behalf of employees or otherwise, it would appear that the phenomenon that is written about of aging out, meaning as you get older you get less likely to commit crimes, is probably not going to happen in this case because there is just a different mind set.
>
> This of course implicates public protection and puts at issue whether deterrence other than incarceration, that is, by the process of the prosecution, will be effective. It is clear that the public needs protection from any further business ventures by this defendant.
>
> Having considered these matters and these factors, the Court then must consider what is a sentence that is sufficient but not greater than necessary to comply with the purposes of enhancing respect for the law and providing just punishment, along with the other purposes.
>
> Having given that considerable consideration, particularly because the Court recognizes the impact of every sentence that the Court imposes, and nothing is more serious in the work of the Court, I have nonetheless concluded that the sentence that is appropriate in this case is 60 months on count one of the indictment, 60 months on count one of the information, and they shall run consecutively, for a term of 120 months.

AA-426-37. Prater never objected at any time during the sentencing hearing that the district court had not

adequately explained the reasons for the sentence it was imposing, and indeed did not do so even when the district court asked whether "there [are] any issues that I have not addressed, that I have not been clear in my disposition of issues that we need to clarify at this time?" AA-443.

B. Governing law and standard of review

The Sentencing Reform Act has three provisions regarding a sentencing court's obligation to articulate its reasons for a sentence. First, the court is required in all cases to state "the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). Second, if the sentence falls within a guidelines range that exceeds 24 months, the judge must state "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1). Third, if the judge imposes a sentence outside an applicable guidelines range, he must state "the specific reason for the imposition of a sentence different" from the sentence prescribed by the Guidelines. 18 U.S.C. § 3553(c)(2). The required statements, where applicable, must be made "at the time of sentencing" and "in open court." 18 U.S.C. § 3553(c).

This Court has "ruled that the Supreme Court's decision in Booker left Section 3553(c) 'unimpaired.'" *United States v. Jones*, 460 F.3d 191, 196 (2d Cir. 2006) (citing *United States v. Lewis*, 424 F.3d 239, 244 (2d Cir. 2005), and *United States v. Crosby*, 397 F.3d 103, 116 (2d Cir. 2005)). This Court has "declined to encroach upon the province of district courts by dictating a precise mode or manner in which they must explain the sentences they impose." *United States v. Sindima*, 488 F.3d 81, 85 (2d

Cir. 2007). In *Jones*, for instance, the fact that a judge "had 'the sense' that [the defendant was] capable of doing better and that he had a 'gut feeling' about [him]" was sufficient explanation for the decision to impose a non-guidelines sentence. *Jones*, 460 F.3d at 195.

The Supreme Court recently addressed § 3553(c) in *Rita v. United States*, 127 S. Ct. 2456, 2468-69 (2007). The Court observed that while the "statute does call for the judge to 'state' his 'reasons,'" it did not read the statute "as insisting upon a full opinion in every case." *Id.* at 2468. "The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not . . . ." *Id.* The Court stated that the "sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* (citing *United States v. Taylor*, 487 U.S. 326, 336-37 (1988)). The Court noted that "when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation." *Id.* at 2468.

This Court has recently held that "plain error analysis in full rigor applies to unpreserved claims that a district court failed to comply with § 3553(c)." *United States v. Villafuerte*, No. 06-1292-cr, 2007 WL 2737691, at *6 (2d Cir. Sept. 21, 2007). "Section 3553(c)'s long-standing requirements present no novel or complex issues meriting greater consideration for its violation: A defense counsel can quickly decide whether he is dissatisfied with the

district court's explanation and promptly object." *Id.* (citing *United States v. Keppler*, 2 F.3d 21, 24 (2d Cir. 1993), and *United States v. Romero*, 491 F.3d 1173, 1179 (10th Cir. 2007)).

C. Discussion

The defendant never objected at the sentencing hearing to the district court's statement of reasons for imposing the sentence it did. *See*, *e.g.*, AA-443-44. Accordingly, under *Villafuerte*, this Court should review the district court's compliance with § 3553(c) for plain error only. *Villafuerte*, 2007 WL 2737691, at *6; *see also id.* (citing *United States v. Eversole*, 487 F.3d 1024, 1035 (6th Cir. 2007) ("[C]ompliance with section 3553(c) . . . generally will not amount to plain error because proof that it affects the defendant's substantial rights is difficult.")).

Here, the district court's lengthy and thoughtful explanation for the sentence it imposed fully complied with its obligations under § 3553(c). Thus, there was no error, much less plain error. It is an understatement to say that, as in *Villafuerte*, the district court was "not mute at sentencing," and that "it offered reasons for rejecting [Prater's] arguments for a non-Guidelines sentence." *Villafuerte*, 2007 WL 2737691, at *7. Similarly, as in *Rita*, the district court's statement of reasons here was "legally sufficient." *Rita*, 127 S. Ct. at 2468. As in *Rita*, the record here "makes clear that the sentencing judge listened to each argument" and "considered the supporting evidence." *Id.* The district court simply did not find the arguments sufficient to warrant a sentence lower than the statutory maximum of 120 months, which was already

below the guidelines range of 151 to 188 months. As in *Rita*, the district court specifically stated that it found a sentence of 120 months to be "appropriate." AA-437 ("I have nonetheless concluded that the sentence that is appropriate in this case is 60 months on count one of the indictment, 60 months on count one of the information, and they shall run consecutively, for a term of 120 months."). It is difficult to conceive of what more the district court should have said in this case to explain the reasons for its sentence.

The defendant claims that the district court did not "specifically cite which memoranda or opinions from *SEC v. Prater* it relied upon." Def. Br. at 14. Prater claims that this impaired his "ability to respond to the issues at sentencing, as well as on appeal." *Id.* But Prater's claims are belied by the fact that Prater never once told the district court that his ability to respond was impaired by its failure to cite a specific document in the record. Indeed, one would assume that if Prater's ability to respond to the issues at sentencing had been impaired by the district court's failure to specifically cite memoranda or opinions from *SEC v. Prater*, his counsel would have said as much at sentencing when the district judge asked after she stated the reasons for her sentence whether "there [are] any issues that I have not addressed, that I have not been clear in my disposition of issues that we need to clarify at this time?" AA-443. Prater's counsel raised an issue about his release pending appeal. AA-443. After that issue was dealt with, the district court again asked whether there was "[a]nything further?" AA-444. Prater's counsel stated that there was not. *Id.*

In any event, the district court made clear its familiarity with the Receiver's actions and methodology in that case, as well as the district court's approval of them in *SEC v. Prater*, and specific citations are hardly necessary for an appellate court to engage in adequate review of the district court's findings. Indeed, in this appeal, the defendant does not even challenge the district court's finding that the loss in this case was $3,479,128 – which was one of the primary enhancements driving his guidelines range, and the basis for which was made crystal clear on the record at the sentencing hearing and in the government's sentencing submissions. It was also the primary reason the Receiver's work in *SEC v. Prater* was even relevant at sentencing. The district court's failure to cite the particular documents on which it relied from *SEC v. Prater* was not error, much less plain error that affected a substantial right of the defendant.

This is further underscored by the fact that the Receiver's final report, which was provided by the government to the court and the defendant, outlines both the determination of investor claims, GSA-51, and the liquidation of the seized assets. GSA-52-58.[10] Given that a district court need only find facts at sentencing by a preponderance of the evidence, *United States v. Garcia*, 413 F.3d 201, 205 (2d Cir. 2005); *United States v.*

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[10] The defendant included the Government's Sentencing Memorandum in his Appellant's Appendix, AA-139-63, but not Exhibit E to the document, which is the Receiver's Final Report and Request for Approval of Final Distribution to Claimants. That documents is included in the Government's Supplemental Appendix ("GSA"). GSA-51-95.

Martinez-Rios, 143 F.3d 662, 677 (2d Cir. 1998), this document alone provided a sufficient basis for a finding of the loss by the district court and afforded sufficient basis for appellate review by this Court if the defendant had chosen to challenge the district court's findings, which he did not. To provide further support for the loss amount, the government also provided the court and the defendant with the August 24, 2005, ruling by Judge Kravitz in *SEC v. Prater* rejecting additional challenges by the defendant.[11] AA-191-204.

The defendant also claims in this Court, though he never claimed in the district court, that the district court "did not respond to the particular arguments raised by Mr. Prater with respect to the Receiver's calculations and his criticism of the methodology and processes used in *SEC v. Prater*." Def. Br. at 14-15. This claim is simply false, as an examination of the sentencing transcript reveals.

The defendant raised two main arguments at sentencing challenging the Receiver's findings. First, the defendant argued that because he stopped his lulling payments to investors only after the Government stepped

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[11] The defendant makes the bizarre claim that he "has no way of knowing – and thereby no way of rebutting or appealing – the contents of the documents [from the SEC case] because the district court did not identify the documents that formed the basis of the judge's sentence." Def. Br. at 15. The Government knows of no reason why the defendant would be barred from accessing the contents of documents related to a case in which he was a party, nor why identification of particular documents would alter his right to access them.

in, the loss was not caused by him, but rather by the Government. The district court rejected this argument with its discussion of the impact of the defendant's crimes on his victims. In explaining its reasons for focusing on the loss to the victims, the court discussed the letters it had received from several victims. AA-428-29. These letters describe people who had lost their homes and savings because of the defendant's actions. *Id.* The court stated that the central wrong in the defendant's actions "was lying and it was defrauding people, and it was taking their money and using it as [he] chose to without letting them make an informed decision about the risk [he was] exposing their money to." AA-429. In this light, the court clearly rejected the defendant's argument that the loss was somehow attributable to the Government for putting a stop to his Ponzi scheme before it grew even larger and caused more substantial losses. The district court made clear that the defendant defrauded the investors, and that he was the one responsible for the money they could not get back.

The defendant's second set of arguments in the district court attacked the Receiver's efforts to maximize the amount of money the victims did get back. His sentencing memorandum detailed several criticisms of the Receiver's actions by the defendant, each without merit. The defendant challenged the values received for each of the major assets that were liquidated. He claimed that the Receiver should have sold the Maple Breeze amusement park business as well as the land, AA-293, that the Receiver should have recovered the value of Elm Electric and Gaetano Transport, AA-294-95, and that the value obtained for the toy inventory at auction was insufficient. AA-296.

Although the defendant claims to be baffled as to why the district court rejected these arguments, the court made the reasons quite plain. First, the court noted that "the [R]eceiver is in the business of maximizing recovery to the investors, is under court supervision, [and] is appointed because of his respected abilities and knowledge." AA-427. Given the Receiver's respected abilities and knowledge, as well as the court supervision he was under, the court could properly reject, and in fact did reject, Mr. Prater's challenges to the Receiver's actions.

The decision not to sell the Maple Breeze amusement park was based on the Receiver's discovery that no buyer could be found who would invest in a business with such high insurance risks. AA-212-13. Similarly, the Receiver's legal training and experience demonstrated that a claim against Elm Electric or Gaetano Transportation would have failed in court. Rather than waste additional compensation funds urging a losing legal theory in court, the Receiver appropriately abandoned the claims. GSA-104-05.

Second, the court rejected the defendant's mistaken notion of the value of these assets. The defendant argued that the value of the assets liquidated was higher than the amount obtained for them. AA-297. As the district court explained in rejecting the defendant's arguments, "the value is what someone will pay for it, if they will." AA-427.

The court also explained that, regardless of whether the defendant was right or wrong about the value the Receiver obtained for various assets, the issue concerned amounts

that were too small to make a difference when you have taken millions of dollars and claim to be able to pay back the principal and annual returns of 1000% over thirteen weeks. "Even if [Elm Electric] wasn't[] a $1 million business . . . [it] is pretty small potatoes. Whether a warehouse of toys is worth [$]13,000 or [$]80,000 is pretty small potatoes." *Id.*

In short, the court gave a detailed, clear answer to the question the defendant poses here: "The district court, by virtue of the sentence imposed, rejected Mr. Prater's position, but on what reasoned basis and by what methodology?" Def. Br. at 15. The defendant's position was rejected because (1) the Receiver's expertise allowed him to maximize the return to investors; (2) the defendant clung to an incorrect notion of the value of the assets; and (3) the defendant's valuation arguments, even if accepted, were insufficient to shift the loss amount outside of the guidelines range of $2.5 million to $7 million. The "record makes clear that the sentencing judge considered the evidence and arguments" and imposed a sentence it thought was appropriate. *Rita v. United States*, 127 S. Ct. 2456, 2469 (2007). Nothing more is required. [12]

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[12] The defendant claims that he "simply never had the opportunity to present defenses or fully respond to Judge Kravitz." Def. Br. at 16. This is simply not true, as can be seen by Judge Kravitz's lengthy and thorough Ruling and Order on Prater's various motions to set aside the Receiver's determinations in the SEC case. AA-191-204. The defendant argues that he has no idea "what weight, if any, the Court gave to Mr. Prater's response and objections to the various papers (continued...)

II. The district court properly grouped the charges for the purposes of sentencing the defendant and arrived at a reasonable sentence as a result.

A. Relevant facts

Because of the defendant's repeated claims that, in contradiction to his plea agreement, there was no loss, and hence no victims, as a result of his crimes, the district court began the sentencing hearing with an overview of the parts of the Presentence Report ("PSR") upon which the Government and the defendant agreed. In particular, the district court confirmed that the parties agreed that the two counts to which Prater pled guilty should be grouped:

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[12] (...continued)
filed in *SEC v. Prater*." Def. Br. at 16. But the district court did not need to respond to Prater's argument made in that case because, as set forth above, she made clear on the record the reasons she rejected his challenges to the Receiver's work in making its loss finding in this case. In any event, as Judge Kravitz's Ruling and Order makes clear, the defendant had ample opportunity to present his objections to the Receiver's determinations in that case, and, in fact, he did so. As such, the defendant's claim that Judge Kravitz made his determinations without a "full and fair hearing" is baseless. Def. Br. at 16. Finally, the Receiver was in court throughout the entire sentencing hearing, and if Prater wished to call him to testify in order to cross-examine him about his method and determinations, he surely could have. AA-286-87 (Court: "I understand that the court-appointed [R]eceiver from the SEC's civil action against Mr. Prater is here and available." Mr. Glover: "That is correct, your Honor, Mr. Wise is present in the courtroom.").

THE COURT: There seems to be no disagreement that these two offenses should be grouped for guidelines analysis based on total loss under 3D1.2(d), and there seems to be no dispute that pursuant to 3D1.3(b) we will use 2B1.1, which is a greater guideline than 2S1.1, and under that the base offense level under 2B1.1(a)(1) is a six.
At that point we are all in agreement, correct?

MR. ALTCHILER: That is correct, your Honor.

MR. GLOVER: Correct, your Honor.

AA-289.

Later in the hearing, the defendant argued that the effect of the grouping of the counts was unfair to his client, but he never argued that the counts were incorrectly grouped under the Sentencing Guidelines. The defendant claimed that because the securities fraud charge was the "main evil," AA-329, its statutory maximum should be the maximum for this case. AA-331 ("Congress has said over and over and over again that we've looked at it, and regardless of the harm and regardless of the loss amount, five years is enough.").

The district court then questioned how the defendant explained the Guidelines provision for grouping in the following exchange.

THE COURT: So how do you take grouping into account?

MR. ALTCHILER: First of all, grouping is a guideline scenario.

THE COURT: But it's driven by loss and it takes a variety of crimes and groups them, but all within the contemplation of this idea of intended loss.

MR. ALTCHILER: Right. No, I understand that. But to me the sentencing commission's approach to a case like this is entirely inconsistent with what Congress is saying.

AA-332-33. Prater's counsel then stated, "I understand the grouping laws, and, you know, you need to group this and that, I fully understand that, but I think what I'm telling you is bound in logic, truth and fairness." AA-334.

The district court, however, did not agree with this argument, stating:

> You seem to portray the U.S. sentencing commission as this entity independent of Congress. It seems to me that the Supreme Court has had occasion recently to analyze specifically that that is not the case, that in fact the sentencing commission is only authorized to do that which Congress specifically okays . . . .

AA-335. At this point the defendant acknowledged that he was essentially putting forth an argument for a non-guidelines sentence, not challenging the grouping of the two counts. AA-336 ("I mean, this is a nonguideline argument, your Honor.").

B. Governing law and standard of review

Sentencing Guidelines § 3D1.2(c) states in relevant part:

> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
> . . .
>
> (c) When one of the counts embodies conduct treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

Under this provision, the Guidelines combine multiple counts into a single offense for sentencing purposes. "The Guidelines' multi-count analysis interposed a sensible middle ground between completely concurrent and completely consecutive sentences that uses a combination of concurrent and partially consecutive sentences. Under this analysis, closely related counts are, in effect, treated as a single offense." *United States v. Mizrachi*, 48 F.3d 651, 654 (2d Cir. 1995) (citing § 3D1.2). Each of these offenses receives the same length sentence, equal to the total punishment under U.S.S.G. § 5G1.2(b). "Except as

otherwise required by law (*see* § 5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter." U.S.S.G. § 5G1.2(b).

Sentencing Guideline § 5G1.2(d) covers sentencing on multiple counts where a guidelines range is above the statutory maximum for one count:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment.

C. Discussion

1. Prater waived any argument that the charges were improperly grouped.

Prater agreed when the district court asked the parties to confirm that there was no dispute that the two counts to which Prater pled guilty should be grouped under the Sentencing Guidelines. AA-289. Accordingly, he has affirmatively waived the argument he attempts to make in this Court that the two counts were somehow improperly grouped, resulting in an unreasonable sentence. *See United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995) ("If . . . the party consciously refrains from objecting as a tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error

review.") (citing *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991), and *United States v. Weiss*, 930 F.2d 185, 198 (2d Cir. 1991)), *aff'd*, *Ruotolo v. United States*, 133 F.3d 907 (2d Cir. 1998).

At the very least, Prater's failure to object to the district court's grouping of the two counts mandates that review of his argument that the district court erred in grouping the offenses be only for plain error. *See United States v. Ubiera*, 486 F.3d 71, 74 (2d Cir.) (where defendant raises a substantially different argument concerning sentencing error on appeal, district court's sentencing decision is reviewed only for plain error), *cert. denied* (U.S. Oct. 1, 2007). "Under the plain error standard, there must be (1) error, (2) that is plain, and (3) that affects the defendant's substantial rights." *United States v. Carter*, 489 F.3d 528, 537 (2d Cir. 2007) (citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)), *petition for cert. filed*, (U.S. Sept. 6, 2007) (No. 07-6441). If all three conditions are met, this Court "may exercise [its] discretion to notice the error, provided that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Carter*, 489 F.3d at 537.

Prater's claims fail to satisfy the first or third prongs of plain error review. Although the Government believes that Prater waived his grouping argument, it will nevertheless analyze his argument under the rubric of plain error in the interest of completeness.

2. The charges were properly grouped.

Far from constituting error, much less plain error, the Sentencing Commission addressed the very issue of grouping counts like the two to which Prater pled guilty in amending the Guidelines in 2001, introducing Application Note 6 to § 2S1.1. Application note 6: "Grouping of Multiple Counts.– In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of § 3D1.2." The note accompanying this amendment specifically states:

> [T]his amendment contains an application note expressly providing instructions regarding the grouping of money laundering counts with a count of conviction for the underlying offense. In a case in which the defendant is to be sentenced on a count of conviction for money laundering and a count of conviction for the underlying offense that generated the laundered funds, this application note instructs that such counts shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely-Related Counts), thereby resolving a circuit conflict on this issue.

U.S.S.G § 2S1.1, Reason for 2001 Amendment. Accordingly, because the defendant was sentenced using the 2002 Guidelines, PSR at 6, it is clear that the district court properly grouped the charges under the Guidelines.

3. Prater's sentence was procedurally and substantively reasonable.

To the extent the defendant contests his sentence on grounds of reasonableness apart from the grouping argument, his argument still fails.

This Court reviews sentences for reasonableness. *United States v. Williams*, 475 F.3d 468, 474 (2d Cir.), *petition for cert. filed* (U.S. Jul. 10, 2007) (No. 07-6776). "Reasonableness review is 'akin to review for abuse of discretion.'" *Id.* (quoting *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 192 (Oct. 2, 2006), and *habeas corpus denied*, 2007 WL 2456680 (S.D.N.Y. Aug. 20, 2007)). This review considers "whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (quoting *United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005)). "Reasonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge." *Fernandez*, 443 F.3d at 27 (citing *Crosby*, 397 F.3d at 114); *United States v. Matera*, 489 F.3d 115, 123 (2d Cir.), *petition for cert. filed* (U.S. Sept. 4, 2007) (No. 07-6390)).

"[I]n the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27 (citing *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005)). This is in part because "by the time an appeals court is

considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case." *Rita*, 127 S. Ct. at 2468.

The defendant appears to argue that the combination of the charges allowed the Government to obtain an unreasonably high sentence. Def. Br. at 20. This is simply not true, and the district court's sentence was clearly procedurally and substantively reasonable.

When a defendant is guilty of multiple charges, the Guidelines direct that he should receive the same sentence, the total sentence calculated, on each count. U.S.S.G. § 5G1.2(b). Normally these sentences will then run concurrently. However, where, as here, the count with the highest statutory maximum is below the defendant's guidelines sentence, the court will direct the sentences to run consecutively to the extent necessary to reach the guidelines sentence. U.S.S.G. § 5G1.2(d). This is precisely what the district court did here.

The defendant's guidelines range was 151 to 188 months. AA-432. Because the statutory maximum for each charge was below this range, the court sentenced the defendant to the highest sentence allowed by statute, 5 years. In accordance with the Guidelines, the court then ordered that these sentences be served consecutively, in order to come closer to reaching the advisory guidelines sentence. AA-437.

Prater's argument about the respective loss amounts for the two charges misses the mark by a wide margin. Just as

in drug cases where the total amount of drugs is combined to arrive at one guidelines range, *see, e.g.*, *United States v. Shonubi*,103 F.3d 1085 (2d Cir. 1997), the total amount of loss the defendant's victims suffered was combined.[13] The defendant incorrectly asks that his five-year sentence for the count in which he pled guilty to conspiring to engaging in transactions involving the proceeds of securities fraud be considered in a vacuum, absent his other fraudulent conduct. This is despite the fact that this purchase of Elm Electric was solely "to lend the appearance of legitimacy to Wellspring Capital." PSR at 4. As this claim runs directly contrary to the Sentencing Guidelines, the defendant's only argument is that the application of the Guidelines in this case, and the result it had on his sentence, was unreasonable.

However, the defendant offers no reasons why his case is any different from other instances where § 5G1.2 applies. It certainly does not automatically result in a situation where a non-guidelines sentence is required. Under the defendant's argument, any time one offense is so severe as to require another count to help fulfill the required sentence, the result would be unreasonable.

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[13] The defendant points out that this loss combination renders the stipulated loss on the second charge "irrelevant." Def. Br. at 21. While it is true that this loss did not further impact the defendant's range (the total loss was between $2.5 million and $7 million either way), this again misses the mark. Had the defendant swindled less money from his securities fraud victims, this stipulated loss amount could have impacted his sentence *in an upward fashion*.

The defendant's actual argument is that a non-guidelines sentence should have been imposed that completely divorced the defendant's violation of §§ 371 and 1957 from his other criminal conduct. The defendant's only justification for this claim is that, once separated, a five-year sentence should be considered unreasonable. This separation, however, is in direct conflict with Congress' rejection of purely charge-based sentencing in the Guidelines. *See* U.S.S.G. § 1A1.1(4)(a). He asks this Court to ignore the specifics of his actual offense and to base his sentence on each count solely on the offense conduct involved in that count, without regard to the totality of criminal conduct. This would run contrary to Congress's instruction that a district court may consider all information relating to the background, character and conduct of the defendant when imposing sentence. *See* 18 U.S.C. § 3661; *Williams v. New York*, 337 U.S. 241, 247 (1949) (contrasting the different limitations of the presentation of evidence at trial and at sentencing, and concluding that it is essential to the sentencing judge's selection of an appropriate sentence to have the fullest information available concerning the defendant). Furthermore, the defendant can offer no viable argument for the separation in the first instance, and there is none.

III. The district court's decision not to grant a downward departure for "extraordinary family circumstances" is not appealable, and its decision not to impose a non-guidelines sentence on the same grounds was reasonable.

A. Relevant facts

The defendant also argued for a downward departure or a non-guidelines sentence based on "extraordinary family circumstances." The defendant's wife, who addressed the court at the sentencing hearing, was in a car accident in September 2006, and at the time of sentencing was recovering from a knee injury from that accident. AA-416-22. Prater's wife told the court that her doctor informed her that she could expect recovery to last six to eight months. AA-418. At the sentencing on March 30, 2007, six months subsequent to the surgery, she stated that she had limited mobility, which would cause difficulties in caring for their 8-year-old son. AA-419-20.

The district court stated the following about the defendant's motion for downward departure and request for a non-guidelines sentence based on his wife's injury:

> There has been a request for a downward departure for extraordinary family circumstances. I have no doubt that Mrs. Prater is badly injured, has impaired mobility, sadly she probably will for a long period of time in the future given the extent of her injuries, and that there is an eight-year-old who is perhaps one of the victims, too. There has been repeated reference to the many friends that

> Mr. and Mrs. Prater have, to the solidarity of their family behind them, and to the availability of funds to subsidize assistance while, and because, Mrs. Prater is impaired.
>
> The requirement to show extraordinary family circumstances means that the defendant has to be shown to have had some sort of a unique and nonreplaceable role in that family that cannot -- that is shown not to be able to be served by anyone else. I don't find that burden of proof to have been met. There is undoubtedly hardship that will fall on Mrs. Prater and her son and on the friends and relatives who will now be called upon to help out and take care of them in your absence, but this is not so extraordinarily different from those families where one of the parents chooses to engage in criminal activity as the modus for business and for earning income.

AA-432-33.

B. Governing law and standard of review

The defendant appeared to argue at sentencing for both a downward departure and a non-guidelines sentence based on the knee problems of his wife. This court cannot consider an appeal based on a denial of a downward departure for family circumstances. *United States v. Pollack*, 91 F.3d 331, 336 (2d Cir. 1996) ("[T]he district court's decision not to downwardly depart based on the family circumstances presented to it is not appealable."); *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006)

(per curiam) ("As was true when the Guidelines were mandatory, we have held in the post-*Booker* sentencing regime that 'a refusal to downwardly depart is generally not appealable . . . .'") (quoting *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005)).

As noted above, this Court reviews guidelines and non-guidelines sentences for reasonableness, which is similar to review for abuse of discretion. *Williams*, 475 F.3d at 474. This Court has noted that the "overwhelming majority" of sentences within the guidelines range are reasonable. *Fernandez*, 443 F.3d at 27.

The Sentencing Guidelines provide that "[f]amily ties and responsibilities are not ordinarily relevant in determining whether [a departure may be warranted]." U.S.S.G. § 5H1.6 (Policy Statement). "Because the Guidelines disfavor departure based on family responsibilities, such a departure is not permitted except in extraordinary circumstances." *United States v. Smith*, 331 F.3d 292, 294 (2d Cir. 2003).

This Court has previously vacated sentences where there has been a departure based on family circumstances in a variety of situations, recognizing that they "must be reserved for situations that are truly extraordinary." *United States v. Walker*, 191 F.3d 326, 338 (2d Cir. 1999). In *Smith*, this Court reversed a departure for a defendant who "had a close relationship with his two-year-old son and played a major role in caring for him, including dropping him off at day care, feeding him dinner, bathing him, and putting him to bed." 331 F.3d at 293. The court noted that "[i]t is not unusual . . . for a convicted

defendant's incarceration to cause some hardship in the family." *Id.* at 294.

Similarly, in *United States v. Faria*, 161 F.3d 761 (2d Cir. 1998) (per curiam), this court reversed a departure for a defendant who provided financial support to his wife and three children. In *United States v. Selioutsky*, 409 F.3d 114 (2d Cir. 2005), this Court held that family circumstance departures were "impermissible in less compelling circumstances, especially where other relatives could meet the family's needs." *Id*. at 119 (citing *United States v. Madrigal*, 331 F.3d 258, 260 (2d Cir. 2003) (per curiam)). Most recently, this Court overturned a non-guidelines sentence as unreasonable, even after the district court found that "Defendant's wife [was] sick without financial means or medical insurance or other persons to take care of her." *United States v. Trupin*, 475 F.3d 71, 73 n.2 (2d Cir. 2007), *petition for cert. filed* (U.S. June 22, 2007) (No. 06-12034).

C. Discussion

The district court's decision not to depart downward based on Prater's family circumstances is not reviewable on appeal. The district court's decision not to impose a non-guidelines sentence based on Prater's family circumstances was in no way unreasonable.[14] Prater's

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[14] It should be noted, however, that the district court already viewed the sentence it imposed as "in a way" a non-guideline sentence "since the statutory maximum is beneath the guidelines." AA-435. *But see* U.S.S.G. § 5G1.1(a) (providing (continued...)

wife's recovery was to be completed not long after sentencing, and thus reducing the defendant's sentence even somewhat substantially would not have resulted in his release in enough time to be of assistance to his wife during the short time left before her anticipated recovery. Because virtually any term of incarceration would result in the defendant being in prison beyond the time his wife completed her recovery, imposing a reduced sentence on the basis of her temporary immobility would not have alleviated the defendant's family circumstances.

The defendant also summarily asserts that "[a] significant term of incarceration would likely threaten the financial viability of the Prater family, most likely irreparably." Def. Br. at 24. However, as the district court noted "[t]here has been repeated reference to the many friends that Mr. and Mrs. Prater have, to the solidarity of their family behind them, and to the availability of funds to subsidize assistance while, and because, Mrs. Prater is impaired." AA-433. The court found that while "[t]here is undoubtedly hardship that will fall on Mrs. Prater and her son and on the friends and relatives who will now be called upon to help out and take care of them," the defendant's family circumstances did not rise to the level of extraordinary required for a non-guidelines sentence. *Id.* In this respect, because the defendant's family has a support structure in place, this case presents even less

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[14] (...continued)
that statutory maximum term of imprisonment becomes the guidelines sentence where the guidelines range exceeds that maximum term).

compelling circumstances than those of *Trupin*, where a reduced sentence was overturned by this Court.

Other than his wife's knee surgery and the unsupported assertion of financial difficulty and an inability of his family "to maintain their lifestyle," Def. Br. at 25, the defendant offers no further reasons why the district court's decision not to find his family circumstances extraordinary was an abuse of discretion or in any way unreasonable.

The district court's sentence here was both procedurally and substantively reasonable. The district court discussed the factors listed in 18 U.S.C. § 3553(a) in detail prior to imposing sentence. The court noted that "the public needs protection from any further business ventures by this defendant." AA-436. The district court found that a sentence of ten years was "sufficient but not greater than necessary to comply with the purposes of enhancing respect for the law and providing just punishment." *Id.* This sentence was as close to a guidelines sentence as the statutes allowed and was entirely reasonable, given the defendant's serious offense.

CONCLUSION

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

Dated: October 9, 2007

Respectfully submitted,

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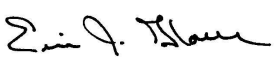

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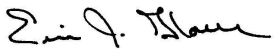
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,192 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

18 U.S.C. § 3553. Imposition of a Sentence.

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

. . .

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the

imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

U.S.S.G. § 3D1.2(c) (2002). Groups of Closely Related Counts.

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
. . .
(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts
. . .

U.S.S.G. §5G1.2 (2002). Sentencing on Multiple Counts of Conviction.

(a) The sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of

imprisonment shall be determined by that statute and imposed independently.

(b) Except as otherwise required by law (see § 5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.
. . .

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

U.S.S.G. § 5H1.6 (2002). Family Ties and Responsibilities, and Community Ties (Policy Statement).

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.