No. 12-_____

IN THE
Supreme Court of the United States

MARVIN PEUGH, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The U.S. Sentencing Guidelines Manual directs a court to "use the Guidelines Manual in effect on the date that the defendant is sentenced" unless "the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the United States Constitution." Eight courts of appeals have held that the Ex Post Facto Clause is violated where retroactive application of the Sentencing Guidelines creates a significant risk of a higher sentence. In the decision below, however, the Seventh Circuit has held that the Ex Post Facto Clause is never violated by retroactive application of the Sentencing Guidelines because the Guidelines are advisory, not mandatory.

The question presented is:

> Does a sentencing court violate the Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense, if the newer Guidelines create a significant risk that the defendant will receive a longer sentence?

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PETITION FOR A WRIT OF CERTIORARI

Marvin Peugh respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The judgment of the United States District Court for the Northern District of Illinois is unreported but reprinted at App. 14a-25a, and the oral ruling of the district court is reproduced at App. 28a. The Seventh Circuit's opinion and order, affirming the judgment of the district court, is reported at 675 F.3d 736 and reprinted at App. 1a-13a.

JURISDICTION

The Seventh Circuit entered its opinion and order and its judgment on March 28, 2012. On June 13, 2012, Justice Kagan granted application 11A1188, extending the time within which to file a petition for a writ of certiorari to and including August 10, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Ex Post Facto Clause of the U.S. Constitution provides, "No . . . *ex post facto* Law shall be passed." U.S. Const. art. I, § 9, cl. 3. The relevant provisions of the 1998 U.S. SENTENCING GUIDELINES MANUAL (§§ 2F1.1, 3C1.1, and 5A) and the 2009 U.S. SENTENCING GUIDELINES MANUAL (§§ 1B1.11, 2B1.1, 3C1.1, 5A, and Appendix C, Vol. II, Amendments 617 and 653) are reproduced in appendices D-G to this petition at App. 44a-68a.

STATEMENT OF THE CASE

This case presents an important and recurring constitutional issue on which the federal courts of appeals are intractably divided: whether, in the wake of *United States v. Booker*, 543 U.S. 220 (2005), the retroactive application of the Sentencing Guidelines violates the Ex Post Facto Clause when the newer Guidelines create a significant risk of a harsher sentence than would have been imposed under Guidelines in effect at the time of the crime. The Solicitor General has previously declared that the "courts of appeals are divided" 5-1 on the question. The D.C., Second, Fourth, Sixth and Eleventh Circuits find an *ex post facto* violation in such circumstances. By contrast, only one circuit—the Seventh Circuit, the court below—has held to the contrary that the Ex Post Facto Clause is not implicated because the Guidelines are advisory. Brief for the United States at 8, 10-11, *Sandoval v. United States*, No. 11-9492 (S. Ct. May 2012) ("*Sandoval* BIO"); *accord* Brief for the United States at 16-17, *Gabayzadeh v. United States*, No. 11-1034 (S. Ct. May 2012) ("*Gabayzadeh* BIO"). The circuit split is acknowledged and entrenched. The courts of appeals in the majority have explicitly rejected the Seventh Circuit's analysis, and the Seventh Circuit (despite acknowledging its position as the minority rule) has repeatedly refused to reconsider its precedent. Indeed, the circuit split is broader than the Government suggests, with three other courts of appeals applying *ex post facto* analysis to advisory guidelines after *Booker*.

Resolving the circuit conflict is critical to maintaining the goal of uniform federal sentencing,

and the Solicitor General has acknowledged that this "circuit conflict may warrant this Court's review in an appropriate case." *Sandoval* BIO at 10-11; *Gabayzadeh* BIO at 16-17. This is such a case. Unlike prior cases that have come before this Court, this case is free of defects that would make it an unsuitable vehicle for resolving the question presented. Mr. Peugh raised the issue in both the district court and the court of appeals, and both courts squarely addressed it. The Seventh Circuit's rule materially lengthened his sentence: Mr. Peugh's 70-month sentence, which was at the *bottom* of the range calculated under the 2009 Guidelines in effect at the time of his sentence, was 24 months above the *top* of the range calculated under the 1998 Guidelines in effect at the time of his offense. Finally, given the length of Mr. Peugh's sentence, there is no risk that this case will become moot during the pendency of this Court's review. This Court should grant review and resolve this important constitutional issue that affects large numbers of sentences in the federal courts.

A. Legal Background

The Sentencing Reform Act of 1984, as amended, directs sentencing courts to consider a number of factors in imposing a sentence, including Guidelines issued by the Sentencing Commission. 18 U.S.C. § 3553(a)(4)(A) (2006). The statute directs a court to consider the Guidelines "in effect on the date the defendant is sentenced." *Id.* § 3553(a)(4)(A)(ii). The Guidelines implement that statute with the proviso that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post

Facto Clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b) (2011).

B. Facts and Proceedings Below

In 2010, a jury convicted Mr. Peugh of five counts of bank fraud under 18 U.S.C. § 1344 related to loans received for farming businesses Mr. Peugh ran with his cousin (one count pertaining to allegedly fraudulent loan activity and four counts pertaining to an alleged check-kiting scheme).[1] App. 3a, 5a. Mr. Peugh is currently serving a 70-month prison term for these offenses. *See id.* 6a. He and his cousin, Steven Hollewell, were accused of engaging in a loan fraud and check kiting scheme lasting from January 1999 to August 2000. *Id.* 2a. Mr. Peugh's cousin received a 12-month sentence as a result of a negotiated plea of guilty to one count, and the other counts were dropped in exchange for Mr. Hollewell's testifying for the United States. *Id.* 6a.

At sentencing, Mr. Peugh challenged the court's use of the 2009 Guidelines rather than the 1998 Guidelines in effect at the time of his offenses,[2] asserting that using the newer Guidelines violated

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[1] Mr. Peugh was acquitted on bank fraud counts 1 and 2, convicted of bank fraud count 3, acquitted on check-kiting counts 6 and 7, and convicted of check-kiting counts 4, 5, 8 and 9. App. 3a, 5a.

[2] The court of appeals referred throughout the opinion to the "1999 Guidelines" (*see, e.g.*, App. 5a, 8a), but the Guidelines in effect in 1999 at the time of the offenses were actually published in November 1, 1998, and thus are referred to in this petition as the "1998 Guidelines."

the Ex Post Facto Clause because they resulted in a longer sentence not authorized at the time of the offense. *Id.* 5a, 28a; *see also* Defendant's Objections to Presentence Investigation Report 1–2, *United States v. Peugh*, No. 08-CR-50014 (N.D. Ill. Apr. 2, 2010). The district court, relying on *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), rejected Peugh's argument on the ground that the Guidelines are not mandatory, but merely advisory. App. 28a ("The court is bound by the holding in *Demaree*, and, accordingly, the court overrules the defendant's objection to use of the 2009 guidelines manual.").

Application of the 2009 Guidelines rather than the 1998 Guidelines significantly increased the Guidelines sentencing range. The presentencing report calculated the offense level under the 1998 Guidelines as 19, but the Government argued in the court of appeals that, if the 1998 Guidelines applied, there should be an additional two-level enhancement for obstruction of justice, bringing the total offense level to 21. Brief for the United States, Plaintiff-Appellee, at 11, *United States v. Peugh*, No. 10-2184 (7th Cir. July 5, 2011); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (Nov. 1, 1998) (App. 44a-46a) (for fraud offenses, including bank fraud, the base offense level is 6, and 13 levels are added for losses over $2.5 million); *id.* § 3C1.1 (two-level enhancement for obstruction of justice) (App. 47a). Under the 1998 Guidelines, a total offense level of 21 would result in a sentencing range of 37 to 46 months. *Id.* § 5A (App. 48a). By contrast, the district court calculated a total offense level of 27 under the 2009 Guidelines: a base offense level of 7 (per Amendment 653, to the Sentencing Guidelines, effective November 1, 2003, App. 68a), and

enhancements of 18 levels for losses of at least $2.5 million (per Amendment 617, to the Sentencing Guidelines, effective November 1, 2001, App. 64a-67a), plus 2 levels for obstruction of justice. Sentencing Transcript, *United States v. Peugh*, No. 08 CR 50014, Vol. 2, at 42 (N.D. Ill. May 4, 2010) App. 37a; *see* U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(a)(1), 2B1.1(b)(1)(j), 3C1.1 (Nov. 1, 2009)[3] (App. 52a-59a). The 2009 Guideline range for a total offense level of 27 was 70-87 months. U.S. SENTENCING GUIDELINES MANUAL § 5A (Nov. 1, 2009) (App. 62a). The district court chose to impose the lowest sentence within the 2009 Guidelines range (70 months) on Mr. Peugh. App. 2a; App. 17a; App. 40a-41a. The district court expressed no opinion on the sentence it would have imposed had it applied the 1998 Guidelines instead.

On appeal, Mr. Peugh again argued that his sentencing violated the Ex Post Facto Clause, because the 2009 Guidelines called for a sentence 33 to 41 months longer than called for under the 1998 Guidelines. App. 5a, 8a-9a. Retroactive application of the 2009 Guidelines undeniably resulted in a harsher sentence: Mr. Peugh's 70-month sentence was at the very bottom of the 2009 Guidelines range, but was 24 months longer than even the top of the 1998 Guidelines range. *See* Brief of Marvin Peugh, Defendant-Appellant at 30, *United States v. Peugh*,

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[3] Amendment 617 deleted the fraud-and-deceit guideline of 2F1.1 and consolidated it with the general economic-crimes guideline of 2B1.1. App. 64a-67a.

No. 10-2184 (7th Cir. April 21, 2011)[4]; *compare* App. 47a-51a and App. 59a-63a. The court of appeals, like the district court, relied on *Demaree* in rejecting Peugh's argument. App. 8a.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE QUESTION PRESENTED

The Ex Post Facto Clause "bar[s] enactments which, by retroactive operation, increase the punishment for a crime after its commission." *Garner v. Jones*, 529 U.S. 244, 249 (2000). "[C]entral to the *ex post facto* prohibition is a concern for 'the lack of fair notice and governmental restraint'" when punishment is increased after the fact. *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981)). Even where the increase in punishment may depend on the exercise of discretion, the Ex Post Facto Clause is violated if the later enactment applied to the defendant's sentence "created a significant risk of increasing his punishment." *Garner*, 529 U.S. at 255.

The U.S. Sentencing Guidelines require that a sentencing court "use the Guidelines Manual in effect on the date that the defendant is sentenced," but "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of

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[4] The Seventh Circuit observed that as a result of application of the 2009 Guidelines, "Peugh's advisory range jumped by more than 20 months," App. 8a (*Peugh*, 675 F.3d at 741), but more precisely it increased the upper limit of the range by 41 months, resulting in a sentence 24 months above the top of the 1998 range.

the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 (2009) (App. 52a). In 2005, this Court held that "the federal sentencing statute … makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, …, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Booker*, 543 U.S. at 245–46 (Breyer, J., remedial majority opinion) (citations omitted).

In the wake of *Booker*, an entrenched and acknowledged split has arisen among the federal courts of appeals on whether retroactive application of Sentencing Guidelines adopted after the commission of the offense can violate the Ex Post Facto Clause. *See, e.g.*, *United States v. Ortiz*, 621 F.3d 82, 86 (2d Cir. 2010) (application of Ex Post Facto Clause to sentencing "has divided the courts of appeals"), *cert. denied*, 131 S. Ct. 1813 (2011); *United States v. Wetherald*, 636 F.3d 1315, 1320 (11th Cir. 2010) ("Our sister circuits have split on the impact of Booker in regards to the Ex Post Facto Clause."). In *Demaree*, the Seventh Circuit held categorically that the Ex Post Facto Clause no longer applies to retroactive application of the Sentencing Guidelines, because the Ex Post Facto Clause "appl[ies] only to laws and regulations that bind rather than advise." 459 F.3d at 795.

As the Solicitor General has stated in other cases, five other courts of appeals (the D.C., Second, Fourth, Sixth, and Eleventh Circuits) have expressly "disagreed [with *Demaree*] and concluded that the

Guidelines may implicate the Ex Post Facto Clause even though they are advisory." *Sandoval* BIO at 11. Rejecting "the facial analysis applied in *Demaree*" and relying on *Garner*, the D.C. Circuit held that "the existence of discretion does not foreclose an *ex post facto* claim, as Demaree supposed." *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008). Rather, the proper test is whether, as applied to the defendant's sentence, retroactive application of the Sentencing Guidelines creates a significant risk of increased incarceration. *Id.* at 1098–1100 (citing *Garner*, 529 U.S. at 251, and *Miller*, 482 U.S. at 432, 433, 435). The court reasoned that "practically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences judges impose." *Id.* at 1099. Judges are also more likely to impose sentences within the Guidelines range because such sentences are entitled to a presumption of reasonableness on appeal. *Id.* (citing *Rita v. United States*, 551 U.S. 338 (2007)). The Second, Fourth, Sixth, and Eleventh Circuits have explicitly adopted the reasoning of *Taylor* and rejected that of *Demaree*. *See Ortiz*, 621 F.3d at 86–88; *United States v. Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873, 889–90 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2443 (2011); *Wetherald*, 636 F.3d at 1322.

The disagreement in the circuits is wider than the Government has acknowledged. In *United States v. Wood*, 486 F.3d 781, 789–91 (3d Cir. 2007), the Third Circuit, although not discussing *Booker*, vacated and remanded a sentence because application of a post-offense amendment of the Sentencing Guidelines would violate the Ex Post Facto Clause. And in *United States v. Forrester*, 616 F.3d 929, 946 (9th Cir.

2010), the Ninth Circuit remanded for resentencing because the Ex Post Facto Clause prevented application of Guidelines amended after the end date of the conspiracy that "would impose a harsher punishment than would the version in effect when the offense was committed, [and thus] the court 'shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.'" *Id.* at 946–48 (quoting U.S. SENTENCING GUIDELINES MANUAL §1B1.11, App. 52a); *see also United States v. Reasor*, 418 F.3d 466, 479 & n.12 (5th Cir. 2005) (holding post-*Booker* that on remand the district court should apply the earlier rather than the later advisory guidelines to avoid *ex post facto* violations). Two other circuits have embraced the majority rule in dicta. *See United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007) (noting that the "retrospective application of the Guidelines implicates the ex post facto clause" and rejecting the *Demaree* rule, but finding that the defendant had forfeited the issue) (internal quotation marks omitted); *United States v. Thompson*, 518 F.3d 832, 869–70 (10th Cir. 2008) (acknowledging under plain-error review that the Ex Post Facto Clause was implicated when offender was disadvantaged by application of Guidelines adopted after the offense, but holding that the Guidelines applied by the district court did not post-date the offense). Finally, the First Circuit (while avoiding the constitutional issue) applies a rule in conflict with the Seventh Circuit's. It follows a "commonsense protocol," under which courts "'ordinarily employ the [G]uidelines in effect at sentencing only where they are as lenient as those in effect at the time of the offense; when the [G]uidelines have been made more severe in the interim, the version in effect at the time

of the crime is normally used . . . .'" *United States v. Ricardo-Rodriguez*, 630 F.3d 39, 42 (1st Cir. 2011) (quoting *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001)).

Despite acknowledging the circuit split and its isolation as the minority-rule circuit, the Seventh Circuit has consistently rejected entreaties to reconsider *Demaree*. That court denied petitions for panel rehearing and rehearing en banc in *Demaree* itself. 459 F.3d at 792. In the decision below, the court stated: "We . . . stand by *Demaree's* reasoning—the advisory nature of the guidelines vitiates any *ex post facto* problem—and again decline the invitation to overrule it." App. 8a; *see also United States v. Wasson*, 679 F.3d 938, 951 (7th Cir. 2012) (declaring that "[a]lthough [the defendant] urges us to reconsider our holding and reminds us that ours is a minority view among the circuits, he offers nothing new to convince us that we should change course on this issue now") (internal citations omitted); *United States v. Sandoval*, 668 F.3d 865, 870 (7th Cir. 2011) (noting that the court has "consistently upheld" *Demaree*), *cert. denied*, 132 S. Ct. 1987 (2012); *United States v. Robertson*, 662 F.3d 871, 876 (7th Cir. 2011) (refusing to overrule *Demaree*); *United States v. Favara*, 615 F.3d 824, 829 (7th Cir. 2010) (*Demaree* forecloses challenge to sentence based on Ex Post Facto Clause), *cert. denied*, 131 S. Ct. 1812 (2011). Accordingly, there is an entrenched split of authority on this important constitutional question regarding application of the Ex Post Facto Clause, which only this Court can resolve.

II. THE SEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND DISREGARDS THE SIGNIFICANT RISK THAT APPLYING HARSHER GUIDELINES WILL RESULT IN A LONGER SENTENCE.

Review is also warranted because the categorical *Demaree* rule adopted by the Seventh Circuit is irreconcilable with this Court's precedent. Under the Ex Post Facto Clause, an enactment that affords discretion in determining criminal punishment cannot be constitutionally applied if it "create[s] a significant risk of increased punishment." *Garner*, 529 U.S. at 255. Here, the 2009 Guidelines, even though advisory, created just such a significant risk that Peugh would suffer increased punishment. The sentencing range calculated under the 2009 Guidelines (70-87 months) was nearly twice that calculated under the 1998 Guidelines (37-46 months) and influenced the sentence that the district court imposed.

The significant risk that substantially increased Guidelines ranges will result in increased punishment derives from the very nature of the Sentencing Reform Act post-*Booker*. The Guidelines, even though advisory, are "the starting point and initial benchmark" for sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007). "The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Booker*, 543 U.S. at 264 (Breyer, J., remedial majority opinion). If a district court attempts to impose a sentence outside that range, it "must consider the extent of the deviation [of the

intended sentence from the Guideline range] and ensure that the justification *is sufficiently compelling* to support the degree of the variance." *Gall*, 552 U.S. at 50 (emphasis added). Accordingly, even the advisory Sentencing Guidelines "serve[ ] to cabin the potential sentence that may be imposed," *Wetherald*, 636 F.3d at 1321, and thus "are likely to influence the sentences judges impose," *Turner*, 548 F.3d at 1099; *accord Lewis*, 606 F.3d at 199-203.

Moreover, the Guidelines provide a framework that influences prosecutors' and defendants' plea bargains. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2533 (2004) (discussing the Guidelines as mental anchors that frame plea bargaining "by establishing clear baselines for likely sentences after trial"). The retroactive application of harsher Guidelines affects not only the decision to plead guilty, but also the offenses and conduct that the defendant will admit and the sentence recommended by the prosecutor. Application of the 1998 Guidelines may have affected the Government's strategy with regard to plea offers, as well as Mr. Peugh's decision to plead not guilty to all counts (nearly half of which eventually resulted in acquittals) even in the face of his co-defendant Mr. Hollewell's decision to plead guilty to one count and escape prosecution on the remaining counts. Harsher Guidelines inexorably increase the risk that courts will impose greater sentences of imprisonment than they would have imposed under more lenient Guidelines.

Finally, in *Rita*, this Court determined that "a court of appeals may apply a presumption of reasonableness to a district court sentence that

reflects proper application of the Sentencing Guidelines." *Rita*, 551 U.S. at 347. This presumption provides a clear incentive to sentencing within the Guidelines range: "judges are more likely to sentence within the Guidelines to avoid the increased scrutiny that is likely to result from imposing a sentence that is outside the Guidelines." *Turner*, 548 F.3d at 1099. Not only is a district court more likely to sentence in the Guideline range, but such sentences are more likely to be upheld on appeal.

> [O]nce a sentencing judge correctly applies the Guidelines range, the defendant's relief is limited. [A court of appeals] will disturb the sentence if, but only if, [it] is left with the definite but firm conviction that the district committed a clear error in judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.

Wetherald, 636 F.3d at 1322 (internal quotation marks omitted). Indeed, *Booker*, having excised the constitutionally offensive provisions of the statute, sought to ensure that sentencing under advisory Guidelines would approximate sentencing under the mandatory Guidelines system that Congress initially devised. The critical "features" of the post-*Booker* statute—district court consultation of the Guidelines and appellate review of sentences for substantive unreasonableness—"continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where

necessary." *Booker*, 543 U.S. at 264-65 (Breyer, J., remedial majority opinion).

For all these reasons, and others, the statistical evidence has consistently revealed not much change in sentencing practices post-*Booker*. *Turner*, 548 F.3d at 1099. The vast majority of sentences imposed by federal courts each year fall within the Guidelines range. For example, excluding cases where the government itself sought a departure or variance, 3 out of 4 times a court sentenced a federal offender within the Guidelines range in fiscal year 2011; only 1 in 4 times did a court impose a sentence below the Guidelines range. U.S. SENTENCING COMMISSION, 2011 ANNUAL REPORT 35-37 (2011). In most cases, therefore, the Guidelines exert significant influence over sentencing decisions and form the initial basis for all sentencing.

There can be little doubt that application of the 2009 Guidelines created a significant risk that Mr. Peugh suffered a longer sentence than he would have received under the 1998 Guidelines. The district court's choice to sentence Mr. Peugh to 70 months' imprisonment, at the very bottom of the 2009 Guidelines range, indicated that Mr. Peugh merited the lowest punishment typically imposed for this type of offense and offender. While it is theoretically possible that the district court could have imposed the same sentence under the 1998 Guidelines, an Ex Post Facto Clause violation depends on the likely practical effect on the actual sentence. *Miller*, 482 U.S. at 432; *Turner*, 548 F.3d at 1100. Here, this Court need not speculate on the effect of the 2009 Guidelines because the district court explicitly deferred to them. While acknowledging that it was

free to apply "its own penal philosophy," the district court stated that:

> [T]he Seventh Circuit has cautioned that as a matter of prudence and in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his personal penal philosophy for that of the Commission.
>
> Here the Court does not disagree with the policy implicit in Section 2B1.1 of imposing increasingly stricter punishments on defendants that cause increasingly larger amounts of loss. … I am not convinced this general policy should be disregarded in this particular case.

App. 34a-35a. After rejecting Peugh's arguments for a downward variance, the district court specifically declared that it would defer to the 2009 Guidelines range:

> Here the loss amount exceeded $2.5 million, which resulted in an 18-level enhancement. However, when considering that the base offense level is only seven and considering the particular facts of this case, the court does not disagree with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss. Accordingly, the court will give the *amount of loss calculations and the resulting advisory guidelines range the appropriate amount of deference in this case.*

App. 37a (emphasis added).

The same "general policy" of "imposing increasingly stricter punishments on defendants that cause increasingly larger amounts of loss" in section 2B1.1 of the 2009 Guidelines was also present in section 2F1.1 of the 1998 Guidelines; the only relevant intervening changes were the increase in the base offense levels and the increased enhancement levels for this particular amount of loss, to which the district court deferred without independent analysis. *See supra* at 4-6. The 2009 Guidelines clearly caused the district court to impose a longer sentence upon Mr. Peugh than it would have imposed under the 1998 Guidelines. Having found Mr. Peugh barely to deserve a sentence within the heartland of sentences contemplated by the 2009 Guidelines, it is highly unlikely that the district court (applying the 1998 Guidelines) would have found compelling justifications to impose a sentence that would have been 50% higher (and two years greater) than the upper limit of the Guidelines range. Application of the harsher 2009 Guidelines at a minimum created a significant risk that Mr. Peugh received a longer sentence than otherwise would have been imposed, and thus contravened the Ex Post Facto Clause.

The Seventh Circuit's categorical *Demaree* rule forecloses the as-applied analysis of significant risk required by this Court's Ex Post Facto Clause precedent. Indeed, the Seventh Circuit consciously (and impermissibly) refused to apply the significant-risk standard. The *Demaree* court acknowledged that "[t]he test for an *ex post facto* law has been variously stated by the Supreme Court" to include "whether it poses a significant risk of enhanced punishment," and such a standard would be satisfied by "even voluntary sentencing guidelines, for official guidelines even if

advisory are bound to influence judge's sentencing decisions." 459 F.3d at 794. Nonetheless, the *Demaree* court decided that the touchstone of an *ex post facto* violation should instead be the discretion of the sentencing judge. "His choice of a sentence, whether within or without the Guidelines range, is discretionary"; "the applicable guideline nudges him towards the sentencing range, but his freedom to impose a reasonable sentence outside the range is unfettered." *Id.*[5] The *Demaree* rule is thus a conscious departure from the significant-risk standard and flatly at odds with this Court's precedent. As this Court noted in *Garner*, "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause." *Garner*, 529 U.S. at 253. Rather, "[t]he controlling inquiry" is "whether retroactive application of the change in … law created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Id.* at 250–51 (quoting *Cal. Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995)).

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[5] *Demaree* also involved very different facts, where the district court sentenced the defendant to 30 months—squarely within the 27 to 33 month Guideline sentencing range in effect at the time of sentencing—but stated on the record that the defendant's sentence under the more lenient Guidelines in effect at the time of the offense (18 to 24 months) would have been an upward deviation to 27 months. *Id.* at 792. There is no comparable express determination in this case by the sentencing court that the defendant's sentence should have exceeded the range calculated under the more lenient Guidelines, if those were to apply. Moreover, the minimal difference between Ms. Demaree's sentence under the competing sets of Guidelines at issue—3 months—limited the impact of the court's decision regarding which Guidelines should apply. In Mr. Peugh's case, the choice of which Guidelines to apply results in a sentencing differential of 33-41 months.

This Court should grant review to resolve the circuit split and vindicate the long-standing significant-risk standard under the Ex Post Facto Clause.

III. THE QUESTION PRESENTED AFFECTS THOUSANDS OF SENTENCES.

The question presented is indisputably important. It directly influences potentially thousands of individuals sentenced by federal courts and the federal policy of sentencing uniformity. Federal courts used the Guidelines to sentence 86,201 federal offenders in fiscal year 2011, and the Seventh Circuit alone sentenced 3,064. U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 2. The Sentencing Commission continually amends the Guidelines in light of experience with federal sentencing, adopting 760 amendments to the Guidelines between 1987 and 2011, many of them substantive changes that affect the calculation of sentencing ranges. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, vols. I-III (2011). Accordingly, the question will frequently recur of whether Guidelines amended after the commission of the offense may be applied consistently with the Ex Post Facto Clause.

Furthermore, timely resolution of the circuit conflict furthers the federal policy of sentencing uniformity. *Booker*, 543 U.S. at 253 (Breyer, J., remedial majority opinion) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."). It undermines uniformity if the district courts in the Seventh Circuit apply completely different Guidelines to a given offense than would all the federal district courts in majority-rule circuits.

Because the conflict is about the application of a constitutional provision, the U.S. Sentencing Commission cannot resolve the split but must await this Court's resolution. Moreover, the circuit conflict unfairly invites strategic prosecution by the Government. In cases where there are alternative venues, such as multi-state conspiracies, federal prosecutors can choose to indict a defendant in the Seventh Circuit to ensure harsher punishment (or exert more leverage in plea negotiations). This Court's immediate resolution of the circuit conflict serves the interest of justice and fair sentencing.

IV. THIS CASE IS A CLEAN VEHICLE

The decision below presents the Court with a clean vehicle for resolving the circuit split. As noted above, in opposing other petitions for certiorari on this issue, the government has acknowledged that the "circuit conflict may warrant this Court's review in an appropriate case." *Sandoval* BIO at 11; *Gabayzadeh* BIO at 17. The facts of *Sandoval* and *Gabayzadeh* that were unsuitable for certiorari are not present here, making this case appropriate for review.

Unlike the defendants in *Sandoval* and *Gabayzadeh*, Mr. Peugh preserved this issue for review by raising it at his sentencing hearing in the district court and on appeal, and both courts addressed it. App. 5a; App. 28a; *supra* at 4-7. By contrast, the defendant in *Sandoval* did not raise the issue until her appeal to the Seventh Circuit. Because she had not preserved the issue, it could be reviewed only for plain error. *Sandoval* BIO at 12. The issue was likewise not preserved in Gabayzadeh. *See Gabayzadeh* BIO at 7 ("Petitioner did not address

th[e *ex post facto*] question at any point in the proceedings below, and neither the district court nor the court of appeals addressed it.").

Furthermore, the government argued in its *Sandoval* brief that use of the newer Sentencing Guidelines did not necessarily prejudice the defendant, because her sentence still fell within the range of the older guidelines. *Sandoval* BIO, at 13. Mr. Peugh's sentence under the 2009 Guidelines, in contrast, fell far outside the 1998 Guidelines range, and was indeed almost 50% greater than the upper limit of that range. *See supra* at 5-7. His sentence was at the very bottom of the 2009 range, implying that the district court might well have imposed a lower sentence if the range had been even lower. *See Turner*, 548 F.3d at 1100. There is at least a significant risk that the high 2009 Guidelines may have influenced the district judge to impose a longer sentence than he would have imposed under the 1998 Guidelines. Therefore, the Government cannot raise the same claim of lack of prejudice that it raised in *Sandoval*.

Finally, this Court often forgoes review in sentencing cases when it is likely that a sentence will expire before this Court could reach a decision. There is no such risk of mootness here. Mr. Peugh received his 70-month sentence in 2010, and thus he will remain in custody throughout the October Term 2012 in which this case would be decided. This case is the perfect vehicle for resolving the question presented.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July, 2012

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

MARVIN PEUGH,

Defendant–Appellant.

No. 10–2184.

Argued Sept. 20, 2011.

Decided March 28, 2012.

Appeal from the United States District Court for the Northern District of Illinois, Western Division, Frederick J. Kapala, District Judge, Presiding.
D.C. No. 08-CR-50014-1

Counsel Michael D. Love (argued), Attorney, Office of the United States Attorney, Rockford, IL, for Plaintiff–Appellee.

Allan A. Ackerman (argued), Attorney, Chicago, IL, for Defendant–Appellant.

Before ROVNER, WOOD and WILLIAMS, Circuit Judges.

OPINION

ROVNER, Circuit Judge:

Marvin Peugh was convicted after a jury trial of five counts of bank fraud, sentenced to 70 months' imprisonment, and ordered to pay nearly two million dollars in restitution. He challenges his conviction and sentence on the following grounds: that his indictment was multiplicitous; that the prosecution did not present sufficient evidence to prove his guilt beyond a reasonable doubt; that his sentence violated the ex post facto clause; that the district court miscalculated the loss and restitution amounts; that an enhancement for obstruction of justice should not have been imposed; and that the disparity between his sentence and his co-defendant's was improper. We affirm.

I.

In 1996 Peugh and his first cousin, Steven Hollewell, formed two companies to do business with the farmers of Illinois: the Grainery, Inc., which bought, stored, and sold grain, and Agri–Tech, Inc., which provided custom farming services to landowners and tenants. When the Grainery began to experience cash-flow problems in 1999, the cousins obtained bank loans from the State Bank of Davis

(later known simply as the State Bank) by falsely representing that valuable contracts existed for future grain deliveries from Agri–Tech to the Grainery. They also inflated the balances of bank accounts under their control by writing a series of bad checks between accounts. As a result of these activities, Peugh and Hollewell were charged with two bank-fraud schemes—loan fraud and check kiting—in violation of 18 U.S.C. § 1344.

The indictment alleged that from January 1999 to August 2000 Peugh and Hollewell executed both schemes multiple times. Counts 1–3 charged the two men with defrauding State Bank of more than $2.5 million by supporting loan applications with materially fraudulent and misleading information, specifically, financial reports describing the sham grain-delivery contracts between Agri–Tech and the Grainery. According to the indictment, Peugh and Hollewell applied for the first loan in January 1999 ($2,000,000), the second in February 2000 ($200,000), and the third in June 2000 ($350,000). Counts 4–9 of the indictment charged Peugh and Hollewell with five instances of check kiting by writing a series of bad checks between business and personal accounts. This scheme allowed the cousins to overdraw an account at Savanna Bank by $471,000.

Peugh pleaded not guilty to all charges. Hollewell pleaded guilty to one count of check kiting and agreed to testify against Peugh in exchange for the other counts being dropped.

At trial Hollewell testified that the grain-delivery contracts between Agri–Tech and the Grainery were a sham from the start: he and Peugh had never intended for Agri–Tech to deliver grain to the

Grainery and Agri–Tech had no means to fulfill the contracts. Hollewell's admissions were supported by the testimony of Bernard Reese, who was Agri–Tech's secretary and a member of its board of directors. Reese explained that Agri–Tech did not own any grain, that the board had never approved the buying or selling of grain, and that he had never seen the grain-delivery contracts before the criminal investigation of Peugh and Hollewell began. A representative from State Bank then testified that approval of the Grainery loans depended on the existence of the Agri–Tech grain-delivery contracts, which composed nearly half of the Grainery's assets in contracts.

The jury also heard testimony about the check-kiting scheme. An FBI expert on check kites described his analysis of Peugh and Hollewell's bank records and testified that the cousins had engaged in a check kite from April to August of 2000. Hollewell's father, Harlan Hollewell ("Harlan"), testified that his son and Peugh came to him in August 2000 after officials from Savanna Bank confronted them with an overdraft of approximately $471,000. According to Harlan, Peugh and Hollewell implored him to cover this deficit—they told him that the bank was demanding immediate payment and that they could face jail time if he did not supply the money—and he complied.

Peugh testified in his own defense. As to the grain-delivery contracts between Agri–Tech and the Grainery, he conceded that Agri–Tech had no grain to sell, but he insisted that the contracts were nonetheless made in good faith. Agri–Tech customers were to supply the grain, he claimed, though he

admitted that no Agri–Tech customer had actually agreed to supply grain. Regarding the check kite, Peugh maintained that he had not intended to defraud Savanna Bank; the bank was never in danger of loss, he said, because Harlan had previously promised to cover any overdrafts. (Harlan testified to the contrary.) Peugh could not explain, however, why he and Hollewell risked the check kite if Harlan was willing to supply the funds they needed. The jury found Peugh guilty of the charges in counts 3, 4, 5, 8, and 9 and acquitted him of the rest.

At sentencing Peugh raised a number of objections to the presentence report. He first argued that sentencing him under the 2009 guidelines (then in effect) rather than under the 1999 guidelines (in effect at the time he committed his offenses) would violate the ex post facto clause because it would result in a significantly higher sentencing range. The court rejected this argument based on *United States v. Demaree,* 459 F.3d 791, 795 (7th Cir. 2006), in which we held that using the guidelines in effect at the time of sentencing rather than the time of the offense does not violate the ex post facto clause because the guidelines are merely advisory.

Peugh also challenged the presentence report's loss-amount calculation, contending that the loss amount should have been reduced by the interest he paid on the loans. The court, however, agreed with the government that the interest payments were irrelevant because they did not reduce the loans' outstanding principal balance. Peugh similarly argued that the money Harlan paid to cover the bank overdraft should be subtracted from the loss amount,

but the court explained that Harlan made this payment after the bank had detected the loss, and only money paid to a victim *before* detection of an offense can be deducted.

Peugh next objected to the presentence report's restitution calculation, arguing that he should not have to pay restitution for the loans described in counts 1 and 2 because he was acquitted on those counts. But the court concluded that the Mandatory Victim Restitution Act required restitution to be made for all three loans because a preponderance of the evidence showed all three to have been part of the loan-fraud scheme alleged in count 3, on which Peugh was convicted.

Finally, Peugh contended that he should receive the same prison sentence as Hollewell—12 months—to avoid an unwarranted disparity in sentences. The district court rejected this argument because, unlike Hollewell, Peugh went to trial, did not assist the government, and obstructed justice by perjuring himself.

The court sentenced Peugh within the guidelines to 70 months' imprisonment and three years' supervised release and made Peugh and Hollewell jointly and severally liable for restitution in the amount of $1,967,055.30. This was the total outstanding balance due on the three loans, less what the bank was able to recover by disposing of collateral. The check-kiting money was not included in the restitution amount because it had been repaid by Harlan.

II.

A. *Multiplicity*

On appeal Peugh argues for the first time that the indictment in his case was multiplicitous. An indictment is multiplicitous—and a violation of the Fifth Amendment's double jeopardy clause—if it charges a single offense in more than one count. *See United States v. Hassebrock,* 663 F.3d 906, 916 (7th Cir. 2011); *United States v. Allender,* 62 F.3d 909, 912 (7th Cir. 1995). According to Peugh, counts 1–3 charged him three times with fraudulently obtaining a single loan, and so his loan-fraud conviction should be reversed. Because Peugh did not raise this issue in the district court, we review for plain error. *See Hassebrock,* 663 F.3d at 916.

There was no plain error in the district court's failure to strike counts 1–3 for multiplicity. The indictment did not charge Peugh with fraudulently obtaining just one loan; rather, counts 1–3 charged him with fraudulently obtaining *three* loans in the course of a single bank-fraud scheme. Each loan constituted a separate "execution" of the scheme, and each execution of a bank-fraud scheme can be charged in a separate count. *See, e.g., Allender,* 62 F.3d at 912; *United States v. Longfellow,* 43 F.3d 318, 323 (7th Cir. 1994); *United States v. De La Mata,* 266 F.3d 1275, 1287 (11th Cir. 2001); *United States v. Colton,* 231 F.3d 890, 909 (4th Cir. 2000). Conduct generally qualifies as an "execution" rather than an "act in furtherance" when it is chronologically and substantively distinct and subjects the victim to additional risk of loss. *Longfellow,* 43 F.3d at 323–24. Here, although one bank made all of the loans, Peugh and Hollewell applied for each loan at a different

times with different supporting documents, and each loan put the bank at additional risk of loss.

B. *Sufficiency of Evidence*

Peugh next contends that the prosecution failed to prove one of the elements of his offense beyond a reasonable doubt: his specific intent to defraud State Bank. But intent need not be proved by direct evidence; the jury was free to infer Peugh's intent to defraud from his actions—for instance his submitting on three occasions fraudulent and misleading information to State Bank in support of loan applications—and disbelieve his contrary testimony. *See United States v. Howard,* 619 F.3d 723, 727 (7th Cir. 2010). Because a rational jury could have found beyond a reasonable doubt that Peugh intended to defraud State Bank, the evidence of his intent was sufficient to support his conviction. *See United States v. Durham,* 645 F.3d 883, 892 (7th Cir. 2011).

C. *Ex Post Facto/Demaree*

Peugh renews his argument that the district court violated the ex post facto clause by calculating his sentence under the 2009 rather than the 1999 guidelines, which were in effect at the time he committed his offenses. Under the 2009 guidelines, Peugh's advisory range jumped by more than 20 months. Peugh acknowledges that our holding in *United States v. Demaree,* 459 F.3d 791, 795 (7th Cir. 2006), undercuts his position, but he urges us to reconsider that case and overrule it. We, however, stand by *Demaree*'s reasoning—the advisory nature of the guidelines vitiates any ex post facto problem—and again decline the invitation to overrule it, *see, e.g., United States v. Robertson,* 662 F.3d 871, 876 (7th Cir. 2011); *United States v. Holcomb,* 657 F.3d

445, 448–49 (7th Cir. 2011); *United States v. Favara,* 615 F.3d 824, 829 (7th Cir. 2010).

D. *Loss Amount*

Peugh maintains that the district court should have reduced the loss amount by $213,000—the interest he paid on the loans from State Bank—because he gave this money to his victim before the fraud was discovered. Under the guidelines, "money returned ... to the victim before the offense was detected" is to be credited against loss. U.S.S.G. § 2B1.1, Application Note 3(E)(i); *United States v. Hausmann,* 345 F.3d 952, 960 (7th Cir. 2003).

We have not had occasion to address whether interest payments should be credited against loss in fraudulent loan cases, but we conclude that the district court correctly declined to deduct Peugh's interest payments from the loss amount. These payments were not money "returned" to State Bank: they did not reduce the loans' outstanding principal balance; instead they were exchanged for value in the form of time holding the bank's money. *See United States v. Johnson,* 16 F.3d 166, 171 (7th Cir. 1994) (explaining that in fraudulent loan cases, loss is measured "by the difference in value exchanged rather than simply by the face value of the loan or by the gross amount of money that changes hands"). Moreover, the guidelines specify that "interest of any kind" is to be excluded from the loss amount. *See* U.S.S.G. § 2B1.1, Application Note 3(D)(i). This implies that interest, whether paid or unpaid, is to play no role in the loss calculation. In other words, if interest accrued does not increase the loss amount—and it did not here—then interest paid should not reduce it either. *See United States v. Allen,* 88 F.3d

765, 771 (9th Cir. 1996) ("[T]he district court used only the loan principal to calculate the 'amount of the loan;' it did not consider accrued interest. Therefore, payments made toward interest cannot be considered as repayments made on the loan."); *United States v. Coghill,* 204 Fed.Appx. 328, 330 (4th Cir. 2006) (unpublished) (holding that neither interest accrued nor interest paid should factor into the loss amount). Additionally, money spent to facilitate fraud is not deductible from the loss amount, *see United States v. Spano,* 421 F.3d 599, 607 (7th Cir. 2005), and Peugh's interest payments facilitated his loan-fraud scheme by keeping him in good standing with State Bank while he fraudulently obtained additional loans.

Peugh also contends, as he did in the district court, that the loss amount should have been reduced by the $471,000 that Harlan paid to cover the cousins' check-kiting overdraft. Harlan repaid this money to Savanna Bank years before Peugh and Hollewell were charged with a crime; according to Peugh, this means that the money was returned "before the offense was detected" by the victim. We disagree. A victim can detect an offense without understanding its full scope, and "[t]he time to determine [the] loss in a check-kiting scheme is the moment the loss is detected," *United States v. Mau,* 45 F.3d 212, 216 (7th Cir. 1995). Savanna Bank officials may have been unaware when they demanded repayment that they had uncovered part of a scheme involving at least 275 bad checks, but this does not undermine the district court's conclusion that the bank detected Peugh's offense as soon as it discovered its loss.

E. *Restitution*

Peugh renews his objection to paying restitution in the amount of $1,967,055.30, which is the sum of the outstanding balances of the three loans described in counts 1–3, less collateral. He points out that the jury acquitted him on counts 1 and 2 and that restitution can be assessed only for losses related to a count of conviction; thus, he reasons, he should only have to pay restitution for the $350,000 loan described in count 3.

Peugh is correct that he can be required to pay restitution only for losses caused by crimes of which he was convicted, *see United States v. Frith,* 461 F.3d 914, 920–21 (7th Cir. 2006); *United States v. Belk,* 435 F.3d 817, 819–20 (7th Cir. 2006), but he is wrong that the district court should not have ordered him to pay restitution for all three loans described in the indictment. When a "scheme" is an element of the offense of conviction—as it is in bank fraud, *see* 18 U.S.C. § 1344—the Mandatory Victim Restitution Act requires restitution for the losses caused by the *entire* scheme, even if the defendant is not convicted of all of the conduct that caused loss. *See* 18 U.S.C. § 3663A(a)(2); *Belk,* 435 F.3d at 819–20. Here, Peugh was convicted on count 3—which alleged that he fraudulently obtained a $350,000 loan as part of a broader scheme to defraud State Bank of more than $2.5 million—and the district court found by a preponderance of the evidence that the loans described in counts 1 and 2 were part of that scheme. Because restitution is calculated based on a preponderance of the evidence, *see* 18 U.S.C. § 3664(e); *United States v. Danford,* 435 F.3d 682, 689 (7th Cir. 2006)—a lower standard than beyond a

reasonable doubt—Peugh's acquittals on counts 1 and 2 had no bearing on the amount of restitution to be ordered for his conviction on count 3.

F. *Enhancement for Obstruction of Justice (Perjury)*

Peugh also argues that the district court abused its discretion by raising his offense level by two on the basis that he obstructed justice. We disagree. The district court explained that the obstruction-of-justice enhancement under U.S.S.G. § 3C1.1 was appropriate in this case because Peugh perjured himself at trial. The court cited evidence of Peugh's material, willful, and false statements, *see United States v. Ellis,* 548 F.3d 539, 545 (7th Cir. 2008), by discussing how his statements conflicted with the testimony of Steven Hollewell, Harlan Hollewell, and Bernard Reese. Peugh attributes these conflicts to lies or outdated recollections on the part of the others—noting for instance Harlan's inability to remember all the details of his business dealings with his son and Peugh—but we see no reason to disturb the district court's assessment of the testimony.

G. *Sentencing Disparity*

Finally, Peugh argues that the disparity between his six-year sentence and Hollewell's one-year sentence was improper under 18 U.S.C. § 3553(a)(6), which calls for similar sentences for similarly situated defendants. He points out that neither he nor Hollewell had prior convictions and that both were charged with the same offenses. That, however, is where the similarities end. Only Hollewell pleaded guilty and cooperated with the government. Peugh instead went to trial and obstructed justice by perjuring himself. Such distinctions warrant

disparate sentences. *See United States v. Doe,* 613 F.3d 681, 690–91 (7th Cir. 2010).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,

v.

MARVIN PEUGH,

Defendant.

Case Number: 08 CR 50014-1
USM Number: 30209-424

Daniel J. Cain,
Defendant's Attorney.

Date of Imposition of Judgment May 04, 2010.

Filed May 12, 2010
by
Michael W. Dobbins
Clerk, U.S. District Court.

JUDGMENT IN A CRIMINAL CASE

The Defendant:

☐ Pleaded guilty to count(s)	
☐ pleaded nolo contendere to count(s) which was accepted by the court.	
☒ was found guilty on count(s) after a plea of not guilty.	Three, Four, Five, Eight, & Nine of the Superseding Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1344	Bank fraud	06/05/2000	3s
18 USC § 1344	Bank Fraud	08/2000	4s
18 USC § 1344	Bank Fraud	07/12/2000	5s
18 USC § 1344	Bank Fraud	07/21/2000	8s & 9s

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s)	One, Two, Six, & Seven of the Superseding Indictment
☒ Count(s)	Counts 1-9 of Original Indictment ☐ is ☒ are dismissed.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special

assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

05/04/2010
Date of imposition of Judgment

/s/
Signature of Judge

Frederick J. Kapala, United States District Judge
Name and Title of Judge

Date May 11, 2010

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

70 Months on Counts 3, 4, 5, 8 & 9 of the Superseding Indictment to run concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:
The defendant should be designated to Oxford, Wisconsin.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on_____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on July 12, 2010

☐ as notified by the United States Marshal.

☐ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED
STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 Years on Counts 3, 4, 5, 8, & 9 of the Superseding Indictment to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (*Check, if applicable*.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (*Check, if applicable*.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable*.)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (*Check, if applicable*.)

☐ The defendant shall participate in an approved program for domestic violence. (*Check, if applicable*.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

(1) the defendant shall not leave the judicial district without the permission of the court or

probation officer;

(2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support his or her dependents and meet other family responsibilities;

(5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view of the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

(1) If the special assessment and restitution are not paid in full during the term of incarceration, then, during the term of supervised release, the defendant shall pay to the clerk of court at least ten percent of the defendant's gross earnings minus federal and state income tax withholding to satisfy these obligations.

(2) The defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 500.00	$_____	$ 1,967,055.30

☐ The determination of restitution is deferred until_____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
State Bank 1718 S. Dirck Drive Freeport, IL 61032	1,967,055.30	1,967,055.30	
TOTALS	$ 1,967,055.30	$ 1,967,055.30	

☐ Restitution amount ordered pursuant to plea agreement $ _____.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☒ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or*

years), to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payments to be made through the inmate financial responsibility program.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total

Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Marvin Peugh, 08 CR 50014-1, Total Amount: $1,967,055.30, Joint & Several Amount: $1,967,055.30 Steven Hollewell, 08 CR 50014-2, Total Amount $1,967,055.30, Joint & Several Amount $1,967,055.30

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARVIN PEUGH,

Defendant.

Docket Number: 08 CR 50014

VOLUME 2

TRANSCRIPT OF PROCEEDINGS

(Sentencing Hearing)

BEFORE THE HONORABLE
FREDERICK J. KAPALA

Rockford, Illinois

Tuesday, May 4, 2010

1:30 o'clock p.m.

APPEARANCES:

For the Government:

HON. PATRICK J. FITZGERALD
United States Attorney
(308 West State Street,
Rockford, IL 61101) by
MR. MICHAEL D. LOVE
Assistant U.S. Attorney

For the Defendant:

SREENAN & CAIN
(321 West State Street, Suite 803,
Rockford, IL 61101) by
MR. DANIEL J. CAIN
MR. CHRISTOPHER A. DE RANGO

Also Present:

MR. BRUCE BUHR
Special Agent, FBI

MS. JENNIFER TABORSKI
Probation Office

Court Reporter:

Mary T. Lindbloom
211 South Court Street
Rockford, Illinois 61101
(815) 987-4486

[Excerpt Page 28]

First defendant argues that the application of the 1999 guidelines manual would have resulted in a much lower total offense level than is calculated under the current manual, and, therefore, using the 2009 guidelines manual, quote, imposes a significant risk of enhanced punishment and is violative of the ex post fact clause facto clause of them Constitution. The defendant recognizes that the Seventh Circuit decision in United States v. Demaree, which held that a post-offense change in an advisory guidelines range does not create an ex post facto violation, but nonetheless continues to pursue this argument. The court is bound by the holding in Demaree, and, accordingly, the court overrules the defendant's objection to the use of the 2009 guidelines manual.

[Excerpt Pages 90-107]

I thank everyone for their efforts in helping to resolve these difficult issues. I've considered the presentence report and accompanying materials. I've considered the arguments made by the government and the defendant. I've considered the evidence that's been presented, as well as the defendant's statement. I've considered the sentencing guideline calculations and all of the other sentencing factors contained in Section 3553(a).

The defendant has been found guilty of five counts of bank fraud. With regard to determining an appropriate sentence, the guidelines calculations have taken into account the loss amount, the fact that the defendant obstructed justice, and his lack of criminal history.

I agree with the government that Mr. Peugh is more responsible for the loan fraud. In the count involving loan fraud, the defendant took a leadership role. I hold Mr. Hollewell and Mr. Peugh equally responsible for the check kiting offenses. I think Mr. Cain was right and I can see where he could conclude that during Mr. Hollewell's sentencing I said that Mr. Peugh was more responsible. I think Mr. Love has pointed out that I said that he urged and directed Mr. Hollewell in the check kiting scheme, but as I sit here now, I think they were both equally responsible for that.

I note that the fraud perpetrated by the defendant was an elaborate scheme. This was just not one instance of bad judgment. These offenses occurred over an extended period of time. The defendant literally had years in which to reflect on what he was doing and numerous opportunities to terminate his dishonest conduct.

In mitigation, the defendant has completed his associate's degree and has held steady employment throughout his life. He has had no prior history of arrests. The defendant's family is aware of his arrest and these offenses and remains supportive. He has the support of a great many people who have taken time away from their lives and their jobs and their activities to come here to court and demonstrate their high regard for him.

I note that this offense did not result in any physical harm to another person.

I note that the loss amount is just above the loss calculation that resulted in an offense level increase of 18. The next highest level increase is seven million.

I note, as Kevin Walsh observed, that he has endured much public scrutiny and professional discredit. He's received numerous letters of support. These letters are replete with statements describing the defendant as a kind, hardworking, sincere, generous, caring, and thoughtful person. The witnesses testifying today give the defendant high praise.

Clyde Pitts notes that the defendant is so considerate that he does not plow or plant when the wind is blowing toward Mr. Pitts' house or the clothesline. It's difficult for me to reconcile a person who is so thoughtful with the man who committed these offenses and caused literally millions of dollars in losses. In the eyes of the writers of these letters, Marvin Peugh is a good man, but sometimes people who are otherwise good commit illegal acts.

I tried as hard as I am able to make his trial as fair as possible. He had the assistance of one of the finest trial attorneys I know. Twelve people worked very hard on this case as jurors. They considered all the evidence, and, as we know, there was quite a bit of it. They deliberated sincerely and earnestly and unanimously came to a verdict. I am sure the jury didn't treat this case lightly. In fact, they acquitted Mr. Peugh of four of the nine counts pending against him.

Some people persist in the belief that Mr. Peugh did not commit this crime or these crimes, but they did not, as the jury did, see and hear all of the evidence presented in court. I believe that he did commit these crimes. I don't think that Marvin Peugh is an evil person, but sometimes desperate situations lead people to do desperate things.

Mr. Peugh broke the law, and when a person breaks the law in a small way, he pays a small price, but when a person breaks the law in a serious way, he pays a high price.

Sentencing is a very unpleasant part of my job. I dislike telling people who in other circumstances could be close acquaintances, close friends that he has to go to jail as punishment for committing a crime. I'll tell you what. I'd rather have root canal work than tell Marvin Peugh he has to go to jail, but I am charged with the duty and the obligation to impose the penalty in this case.

I recognize the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. The sentence must afford adequate deterrence to criminal conduct. I believe there is a great and urgent need for the sentence in this case to be a general deterrence to other people that might be in a position to or consider doing these kinds of offenses. I feel there is little need to protect the public from further crimes of the defendant.

In his motion for a downward variance, the defendant argues that a sentence below the advisory guideline range is the most appropriate sentence in this case. In support of this argument, defendant references several considerations under Section 3553(a), such as the nature and circumstances of the offense, including his motives for committing the bank fraud, the history and characteristics of the defendant, including his age and lack of criminal history, and the need to avoid unwarranted sentencing disparities.

The court has carefully considered defendant's arguments, but at the same time it is important to recognize that there are several 3553(a) considerations present in this case that do not favor a sentence below the guideline range. Therefore, the court will be mindful of all the Section 3553(a) factors while considering the defendant's arguments.

First, the defendant argues that this court should consider cases from other district courts within the circuit that have sentenced defendants to below guideline ranges in fraud cases where the defendant was motivated by something other than a desire for profit or for personal financial gain. In support of this argument, defendant cites United States v. Milne, and United States v. Ranum, which somewhat interestingly are both authored by the same judge. I note initially that as district court cases, they would only be persuasive authority, not binding precedent, but after a review of these cases, I am not convinced that a below guideline sentence is warranted in the case.

In Milne the defendant caused a bank to suffer a loss of more than $500,000, but then he voluntarily reported his misconduct and cooperated with the bank in attempting to repay his debt, doing all this well before he was implicated in or charged with criminal activity. In addition to considering other factors, such as the character of the defendant, the court found that a reduced sentence was appropriate because the standard reduction for acceptance of responsibility did not fully account for defendant's voluntary reporting of his misconduct to the bank and his significant early efforts to ameliorate the effects

of such conduct. Those same considerations are not present in this case.

While it is true that the Milne court remarked that it was relevant that the defendant did not spend the bank's money on luxury items, but rather to prop up a failing business, it is unclear how much weight the court gave this consideration, and, in any event, it is evident that it was not the primary reason for the variance.

Moreover, the court rejects defendant's suggestion that his fraud was not driven by desire for profit or for personal gain just because he did not spend the money on luxury items. The fact of the matter is that if the Grainary would have done well, the defendant would have profited by that success.

Similarly, the court finds the opinion in Ranum distinguishable from the facts of this case. In Ranum a bank loan officer exceeded his authority by making repeated loans to a company over an extended period of time. Once the company's business plan failed, it could not repay the loan, thereby causing the bank a loss. The court noted that the defendant's culpability was mitigated in that he did not act for personal gain or for improper personal gain of another.

In this case, as I've said, the court finds that the defendant did act for personal gain, even if indirectly, by defrauding the banks into either giving his business a loan it should not have been given or by putting the banks at risk through the check kiting. Thus the court does not find that the defendant's motive for committing these offenses warrants any significant consideration in terms of mitigation.

Instead the court finds from its consideration of the nature and circumstances of the offenses that defendant committed some serious crimes with some very serious consequences. Through his actions and schemes, the defendant caused a loss of over 2.5 million to the banks that were unfortunate enough to do business with him.

Moreover, rather than owning up to his wrongdoing when the Grainary continued to fail, despite the fraudulently obtained loans, the defendant compounded his criminal activity by employing the check kiting scheme to keep the business afloat. In doing so, the defendant knowingly put various banks at risk of losing substantial amounts of money. Accordingly, on balance, the court finds that the nature and circumstances of the offense indicate the need for a strong sentence, not a more lenient one.

In a similar argument the defendant argues that the fraud guidelines rely too much on the amount of loss in determining the advisory sentencing range, that the Sentencing Commission failed to rely on empirical data when revising these guidelines, and, therefore, that these guidelines are not entitled to any deference.

It is true that after Kimbrough a sentencing judge can have his own penal philosophy at variance with that of the Sentencing Commission, but as noted in United States v. Higdon, 531 F.3d 561, the Seventh Circuit has cautioned that as a matter of prudence and in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his

personal penal philosophy for that of the Commission.

Here the court does not disagree with the policy implicit in Section 2B1.1 of imposing increasingly stricter punishments on defendants that cause increasingly larger amounts of loss. As the background comment to Guideline Section 2B1.1 notes, ordinarily the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability. I am not convinced that this general policy should be disregarded in this particular case. I believe the authority defendant cites in support of his position is distinguishable from the circumstances of this case.

For example, defendant cites to a sentencing memorandum from the Southern District of New York, United States v. Adelson, again a district court decision that does not carry the weight of binding authority. In that case the defendant was a chief operating officer and president of a publicly traded corporation who engaged in a conspiracy to materially overstate his company's financial results and thereby artificially inflating the price of its stock. After the fraud was discovered, the share price declined by 88 percent, resulting in a combined loss, according to the government, of no less than $260 million. This amount, combined with other sentencing enhancements, resulted in a suggested sentence of life imprisonment. Noting that other factors impacted the stock price, the district court

rejected the government's proposed loss amount and found that the defendant's intended loss of between 50 to a hundred million was a more accurate approximation of the harm caused by the offenses.

Nevertheless, the loss amount still results in a 24-level increase that when combined with several other guidelines enhancements resulted in a recommended guideline sentence of life imprisonment, which the court in New York called an absurd guideline result that not even the government seriously defended. After commenting extensively on several Section 3553(a) factors, the judge in Adelson concluded that a sentence of three and a half years' imprisonment, coupled with a $50 million restitution amount, was the most appropriate sentence.

This case is quite different from Adelson in that it does not involve nearly the same amount of loss and certainly does not result in a, quote, absurd guideline recommendation of life imprisonment. Thus I am not persuaded that Adelson requires it to reject the policy behind Section 2B1.1 and in particular the use of loss amount as a determinative factor.

Likewise, the Bowman article that the defendant relies on discusses high profile fraud cases involving officers of public companies and cites as example the Enron case and the WorldCom case. In addition, in order to illustrate his point that the recommended sentences for these types of offenders has grown astronomically high, Bowman demonstrates the changes that have occurred over a period of time in the recommended guidelines range for a hypothetical corporate CEO convicted of securities laws violations that resulted in a loss of over 400 million. Because this article focuses on offenders at the extreme end of

the guidelines loss calculation, I don't believe it is very helpful or persuasive in a case such as this where the loss amount is much smaller.

Here the loss amount exceeded 2.5 million, which resulted in an 18-level enhancement. However, when considering that the base offense level in this case is only seven and considering the particular facts of this case, the court does not disagree with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss. Accordingly, the court will give the amount of loss calculations and the resulting advisory guidelines range the appropriate amount of deference in this case.

In his motion for a downward variance, the defendant also makes several arguments concerning his history and characteristics that are properly considered under Section 3553(a). For instance, the defendant argues that his age of 56 and his lack of criminal history demonstrate that a lengthy term of imprisonment is not needed for deterrence or to protect the public from further crimes of the defendant. The government does not disagree with this assessment, but it does argue that these factors need to be considered in combination with all of the Section 3553(a) factors.

The court agrees that the defendant's age, which is not taken into account by the guidelines, and his lack of criminal history, which is accounted for by the guidelines, make it unlikely that the defendant will commit additional crimes in the future. These factors can sometimes support a variance below the guideline range. For this proposition I'll direct the parties to United States v. Carter, 538 F.3d 784, stating that a district court may properly consider a

defendant's age as it relates to the possibility of him committing crimes in the future, and United States v. Middlebrook, 553 F.3d 572, noting that the district court took into account the defendant's lack of prior criminal record. But these cases do not, of course, mandate a sentence below the guideline range.

I note, for example, United States v. Alday, 542 F.3d 571, in which the district court determined that the defendant's age of 64 did not warrant a lower sentence, and United States v. Hewelt, 295 Fed. Appx. 69, noting that the district court rejected the defendant's request for a below guideline sentence based in part on his age and the fact that he had no prior criminal history.

The court has considered the defendant's age and lack of criminal history, but finds that these factors are insufficient by themselves to support a sentence below the guideline range given the other Section 3553(a) considerations, including the seriousness of the offense and the need for general deterrence, which I said I find is high in a case such as this one.

The defendant also argues that his conduct should be considered aberrant behavior in an otherwise law-abiding life. Defendant cites to the aberrant behavior departure provision in the guidelines, Section 5K1.20, but that departure obviously would not apply because the defendant did not commit, quote, a single criminal occurrence or a single criminal transaction, close quote. These offenses involved significant planning, and the offenses were not of limited duration.

Nevertheless, the defendant argues that the court should reject these requirements because the Sentencing Commission failed to fulfill its

institutional role in promulgating this provision. The court finds no basis to disregard these reasonable restrictions as they merely define the parameters of what the Sentencing Commission felt was aberrant behavior.

In this case there is no question in my mind that the defendant's criminal conduct, which was drawn out over a long period of time, does not qualify as aberrant behavior. Accordingly, the court rejects defendant's request for an aberrant behavior departure or variance.

Another Section 3553(a) factor to consider is the need to provide restitution to any victims of the offense. Defendant argues that this factor warrants a sentence below the guidelines range because if he is imprisoned for an extended period of time, he will not be able to generate income from farming or maintain the leases he has for the land he rents for farming.

As Mr. Love notes, given the defendant's earning capacity and the amount of restitution, it does not appear that a variance would have a significant impact on his ability to satisfy the restitution in this case. Also, it is true that in any case where imprisonment is ordered along with restitution, the imprisonment will make restitution more difficult to pay. In any event, under the facts and circumstances of this case, the court does not deem the ability to pay restitution as a significant factor to support a variance.

Finally, defendant argues that based on the need to avoid unwarranted sentencing disparities, he should be given a sentence consistent with the sentence imposed on Steven Hollewell. I disagree with that proposition and find that any resulting

sentencing disparities are wholly warranted in this case. Mr. Hollewell pled guilty before trial. He showed a willingness to assume responsibility for his conduct, acknowledged his culpability, and assured the swift application of correctional measures to him. He did not obstruct justice by committing perjury during trial. These facts alone constitute a five-level difference in the total offense level calculation under the sentencing guidelines.

In addition to that, Mr. Hollewell also helped with the government's investigation and testified against the defendant at trial, thereby providing substantial assistance to the government. This resulted in a substantial downward departure pursuant to Section 5K1.1, further demonstrating that a difference in sentences among these codefendants is warranted.

Finally, the court recognized at the sentencing hearing for Mr. Hollewell that his role in securing the fraudulent obtained bank loans was minimal in comparison to Mr. Peugh's involvement. This also suggests a wide difference in sentences is proper.

In view of the foregoing, I have determined that a sentence within the guideline range is the most appropriate sentence in this case. I conclude that a sentence sufficient but not greater than necessary to comply with the purpose set forth in paragraph two of Section 3553(a) is as follows. I believe probation would deprecate the seriousness of the offender's conduct and would improperly minimize his culpability and would be inconsistent with the ends of justice.

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 months on each

count, three, four, seven, eight, and nine. This jail sentence is to be served concurrently on all the counts.

Upon release from imprisonment, the defendant shall serve a term of supervised release of three years on each of the counts to be served concurrently. The defendant shall comply with the standard conditions contained in the supervised release order and shall also comply with the following conditions. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall cooperate with the collection of DNA as directed by the probation officer.

In regard to a fine, I have also considered the factors contained in Section 3572. The court declines to impose a fine in this case because the defendant is unable to pay a fine and is not likely to be able to do so. The defendant shall pay a special assessment of $100 on each count, for a total special assessment of $500. That amount is due immediately.

As to restitution, the government argues in its sentencing memorandum that the submission included in the third supplemental report -- I misstated that. The government argues in its sentencing memorandum and the submission included in the third supplemental report that restitution is owed to State Bank based on the entire scheme to defraud, which includes the loans referenced in Counts 1 and 2, for a total amount of $1,967,055.30. The court agrees that this amount is properly included as restitution and will be reflected in the judgment. The restitution obligation will be joint and several with Mr. Peugh's codefendant, Steven Hollewell.

The defendant indicated at the previous sentencing hearing that he objected to the inclusion of the loans referenced in Counts 1 and 2 because he was acquitted of those charges. It is true that restitution generally is limited to the loss caused by the crimes of which the defendant stands convicted. However, as the Seventh Circuit tells us in United States v. Belk, 435 F.3d 817, in a case in which the defendant is convicted of a scheme to defraud, restitution for the whole scheme is in order.

Here defendant in Count 3 of the superseding indictment was convicted of a scheme to defraud State Bank which began in or about January 1999 and continued through August of 2000, the object of which was to acquire loans totaling in excess of 2.5 million. Although each count, including Count 3, alleged a separate execution of the scheme, the defendant nevertheless was convicted of the entire scheme. Accordingly, the entire loss amount to State Bank is properly included in the restitution calculation.

In regard to restitution, I have also considered the factors contained in Sections 3663 and 3664. I will order that the defendant shall pay restitution of $1,967,055.30 to State Bank in Freeport, Illinois. That restitution is joint and several with the restitution obligation of Steven Hollewell. That restitution amount is due immediately.

During the term of incarceration, payment of the special assessment and restitution shall be made in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. If the outstanding special assessment and restitution obligation are not paid in full during the term of incarceration, then

during his term of supervised release and as a condition of that supervised release, the defendant shall pay to the Clerk of the Court at least 10 percent of the defendant's gross earnings minus federal and state income tax withholding to satisfy the special assessment and restitution obligation.

The defendant shall notify the court and Attorney General of any material change in his economic circumstances that might affect the defendant's ability to pay restitution.

APPENDIX D

1998 FEDERAL SENTENCING GUIDELINES MANUAL

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add **1**
(C) More than $5,000	add **2**
(D) More than $10,000	add **3**
(E) More than $20,000	add **4**
(F) More than $40,000	add **5**
(G) More than $70,000	add **6**
(H) More than $120,000	add **7**
(I) More than $200,000	add **8**
(J) More than $350,000	add **9**
(K) More than $500,000	add **10**
(L) More than $800,000	add **11**
(M) More than $1,500,000	add **12**

(N) More than $2,500,000	add **13**
(O) More than $5,000,000	add **14**
(P) More than $10,000,000	add **15**
(Q) More than $20,000,000	add **16**
(R) More than $40,000,000	add **17**
(S) More than $80,000,000	add **18.**

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by **2** levels.

(3) If the offense was committed through mass-marketing, increase by **2** levels.

(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increased by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(5) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(6) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.

(7) If the offense –

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.

(c) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by **2** levels.

CHAPTER FIVE-
DETERMINING THE SENTENCE

PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4,5,6)
	1	0-6	0-6	0-6
	2	0-6	0-6	0-6
	3	0-6	0-6	0-6
	4	0-6	0-6	0-6
Zone A	**5**	0-6	0-6	1-7
	6	0-6	1-7	2-8
	7	0-6	2-8	4-10
	8	0-6	4-10	6-12
	9	4-10	6-12	8-14
Zone B				
	10	6-12	8-14	10-16
	11	8-14	10-16	12-18
Zone C	**12**	10-16	12-18	15-21
	13	12-18	15-21	18-24
	14	15-21	18-24	21-27
	15	18-24	21-27	24-30
	16	21-27	24-30	27-33
	17	24-30	27-33	30-37
	18	27-33	30-37	33-41
	19	30-37	33-41	37-46
	20	33-41	37-46	41-51
	21	37-46	41-51	46-57

	Offense Level	Criminal History Category (Criminal History Points) IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6
Zone A	**2**	0-6	0-6	1-7
	3	0-6	2-8	3-9
	4	2-8	4-10	6-12
Zone B	**5**	4-10	6-12	9-15
	6	6-12	9-15	12-18
Zone C	**7**	8-14	12-18	15-21
	8	10-16	15-21	18-24
	9	12-18	18-24	21-27
	10	15-21	21-27	24-30
	11	18-24	24-30	27-33
	12	21-27	27-33	30-37
	13	24-30	30-37	33-41
	14	27-33	33-41	37-46
	15	30-37	37-46	41-51
	16	33-41	41-51	46-57
	17	37-46	46-57	51-63
	18	41-51	51-63	57-71
	19	46-57	57-71	63-78
	20	51-63	63-78	70-87
	21	57-71	70-87	77-96

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4,5,6)
	22	41-51	46-57	51-63
	23	46-57	51-63	57-71
	24	51-63	57-71	63-78
	25	57-71	63-78	70-87
	26	63-78	70-87	78-97
	27	70-87	78-97	87-108
Zone D				
	28	78-97	87-108	97-121
	29	87-108	97-121	108-135
	30	97-121	108-135	121-151
	31	108-135	121-151	135-168
	32	121-151	135-168	151-188
	33	135-168	151-188	168-210
	34	151-188	168-210	188-235
	35	168-210	188-235	210-262
	36	188-235	210-262	235-293
	37	210-262	235-293	262-327
	38	235-293	262-327	292-365
	39	262-327	292-365	324-405
	40	292-365	324-405	360-life
	41	324-405	360-life	360-life
	42	360-life	360-life	360-life
	43	life	life	life

		Criminal History Category (Criminal History Points)		
	Offense Level	**IV (7, 8, 9)**	**V (10, 11, 12)**	**VI (13 or more)**
	22	63-78	77-96	84-105
	23	70-87	84-105	92-115
	24	77-96	92-115	100-125
	25	84-105	100-125	110-137
	26	92-115	110-137	120-150
	27	100-125	120-150	130-162
Zone D				
	28	110-137	130-162	140-175
	29	121-151	140-175	151-188
	30	135-168	151-188	168-210
	31	151-188	168-210	188-235
	32	168-210	188-235	210-262
	33	188-235	210-262	235-293
	34	210-262	235-293	262-327
	35	235-293	262-327	292-365
	36	262-327	292-365	324-405
	37	292-365	324-405	360-life
	38	324-405	360-life	360-life
	39	360-life	360-life	360-life
	40	360-life	360-life	360-life
	41	360-life	360-life	360-life
	42	360-life	360-life	360-life
	43	life	life	life

APPENDIX E

2009 FEDERAL SENTENCING GUIDELINES MANUAL

§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

§2B1.1. Larceny. Embezzlement, and Other Forms of Theft: Offenses Involving Stolen Property: Property Damage or Destruction: Fraud and Deceit: Forgery: Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(c) Base Offense Level:

(1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(d) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $5,000 or less	no increase
(B) More than $5,000	add **2**
(C) More than $10,000	add **4**
(D) More than $30,000	add **6**
(E) More than $70,000	add **8**
(F) More than $120,000	add **10**
(G) More than $200,000	add **12**
(H) More than $400,000	add **14**
(I) More than $1,000,000	add **16**
(J) More than $2,500,000	add **18**
(K) More than $7,000,000	add **20**

(L) More than $20,000,000	add **22**
(M) More than $50,000,000	add **24**
(N) More than $100,000,000	add **26**
(O) More than $200,000,000	add **28**
(P) More than $400,000,000	add **30.**

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;

(B) involved 50 or more victims, increase by **4** levels; or

(C) involved 250 or more victims, increase by **6** levels.

(3) If the offense involved a theft from the person of another, increase by **2** levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.

(6) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.

(7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense

involved obtaining electronic mail addresses through improper means, increase by **2** levels.

(8) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(9) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(10) If the offense involved (A) the possession or use of any (i) devicemaking equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the

use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(11) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(12) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(13) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(14) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.

(C) The cumulative adjustments from

application of both subsections (b)(2) and (b)(14)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(15) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(16) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(17) If the offense involved —

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a

registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator, increase by **4** levels.

(e) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g. 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by **2** levels.

CHAPTER FIVE-
DETERMINING THE SENTENCE
PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)
	1	0-6	0-6	0-6
	2	0-6	0-6	0-6
	3	0-6	0-6	0-6
	4	0-6	0-6	0-6
Zone A	**5**	0-6	0-6	1-7
	6	0-6	1-7	2-8
	7	0-6	2-8	4-10
	8	0-6	4-10	6-12
	9	4-10	6-12	8-14
Zone B				
	10	6-12	8-14	10-16
	11	8-14	10-16	12-18
Zone C	**12**	10-16	12-18	15-21
	13	12-18	15-21	18-24
	14	15-21	18-24	21-27
	15	18-24	21-27	24-30
	16	21-27	24-30	27-33
	17	24-30	27-33	30-37
	18	27-33	30-37	33-41
	19	30-37	33-41	37-46
	20	33-41	37-46	41-51
	21	37-46	41-51	46-57

	Offense Level	Criminal History Category (Criminal History Points) IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6
Zone A	**2**	0-6	0-6	1-7
	3	0-6	2-8	3-9
	4	2-8	4-10	6-12
Zone B	**5**	4-10	6-12	9-15
	6	6-12	9-15	12-18
Zone C	**7**	8-14	12-18	15-21
	8	10-16	15-21	18-24
	9	12-18	18-24	21-27
	10	15-21	21-27	24-30
	11	18-24	24-30	27-33
	12	21-27	27-33	30-37
	13	24-30	30-37	33-41
	14	27-33	33-41	37-46
	15	30-37	37-46	41-51
	16	33-41	41-51	46-57
	17	37-46	46-57	51-63
	18	41-51	51-63	57-71
	19	46-57	57-71	63-78
	20	51-63	63-78	70-87
	21	57-71	70-87	77-96

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)
	22	41-51	46-57	51-63
	23	46-57	51-63	57-71
	24	51-63	57-71	63-78
	25	57-71	63-78	70-87
	26	63-78	70-87	78-97
	27	70-87	78-97	87-108
Zone D				
	28	78-97	87-108	97-121
	29	87-108	97-121	108-135
	30	97-121	108-135	121-151
	31	108-135	121-151	135-168
	32	121-151	135-168	151-188
	33	135-168	151-188	168-210
	34	151-188	168-210	188-235
	35	168-210	188-235	210-262
	36	188-235	210-262	235-293
	37	210-262	235-293	262-327
	38	235-293	262-327	292-365
	39	262-327	292-365	324-405
	40	292-365	324-405	360-life
	41	324-405	360-life	360-life
	42	360-life	360-life	360-life
	43	life	life	life

		Criminal History Category (Criminal History Points)		
	Offense Level	**IV (7, 8, 9)**	**V (10, 11, 12)**	**VI (13 or more)**
	22	63-78	77-96	84-105
	23	70-87	84-105	92-115
	24	77-96	92-115	100-125
	25	84-105	100-125	110-137
	26	92-115	110-137	120-150
	27	100-125	120-150	130-162
Zone D				
	28	110-137	130-162	140-175
	29	121-151	140-175	151-188
	30	135-168	151-188	168-210
	31	151-188	168-210	188-235
	32	168-210	188-235	210-262
	33	188-235	210-262	235-293
	34	210-262	235-293	262-327
	35	235-293	262-327	292-365
	36	262-327	292-365	324-405
	37	292-365	324-405	360-life
	38	324-405	360-life	360-life
	39	360-life	360-life	360-life
	40	360-life	360-life	360-life
	41	360-life	360-life	360-life
	42	360-life	360-life	360-life
	43	life	life	life

APPENDIX F

2001 FEDERAL SENTENCING GUIDELINES AMENDMENT

617. Amendment:

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A replacement guideline with accompanying commentary is inserted as §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).

…..

Chapter Two is amended by striking Part F in its entirety as follows:

> **"PART F - OFFENSES INVOLVING FRAUD OR DECEIT**
>
> **§2F1.1. <u>Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States</u>**
>
> (a) Base Offense Level: 6
>
> (b) Specific Offense Characteristics
>
> (1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18.

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense was committed through mass-marketing, increase by 2 levels.

(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(5) If the offense involved—

(A) the possession or use of any device-making equipment;

(B) the production or trafficking of any unauthorized access device or counterfeit access device; or

(C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification,

increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(6) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was

committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(7) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(8) If the offense –

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(c) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

…..

Effective Date: The effective date of this amendment is November 1, 2001.

APPENDIX G

2003 FEDERAL SENTENCING GUIDELINES AMENDMENT

653. Amendment: Sections 2B1.1, 2E5.3, 2J1.2, and 2T4.1, effective January 25, 2003 (see USSC Guidelines Manual Appendix C (Volume II), Amendment 647), are repromulgated with the following changes:

Section 2B1.1 is amended by striking subsection (a) as follows:

"(a) Base Offense Level: 6",

and inserting the following:

"(a) Base Offense Level:

(2)7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(3)6, otherwise."….

….

Effective Date: The effective date of this amendment is November 1, 2003.