



## II. Argument

Defendant Parish has objected to the reliance by the presentence investigator, and thus the Court, on the investigation and conclusions of the court-appointed receiver, citing both a violation of due process and separation of powers principles. For the reasons set forth below, the government disagrees.

A sentencing court's consideration of and reliance on information provided by a court-appointed receiver does not violate due process or infringe upon executive branch powers. Even when the Sentencing Guidelines were mandatory, the Fourth Circuit recognized "the broad scope of information that 18 U.S.C. § 3661 permits a sentencing court to consider."

*United States v. Falesbrook*, 5 F.3d 715, 722 (4<sup>th</sup> Cir. 1993). That section declares:

No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

The demise of mandatory guideline sentencing did not alter that fundamental principle. *See United States v. Booker*, 543 U.S. 220, 249 (2005) (emphasizing the breadth of information a court may consider at sentencing in addition to those factors identified by the sentencing guidelines). Due process only limits that principle to the extent that it prohibits the sentencing court from considering unreliable or inaccurate information. *United States v. Nichols*, 438 F.3d 437, 439-40 (4<sup>th</sup> Cir. 2006) (discussing the court's "wide latitude" in considering sentencing information and observing that "[t]his broad discretion has been preserved under the sentencing guidelines"). The Fourth Circuit held that even information

obtained in violation of constitutional safeguards could be considered by the sentencing court, as long as it is deemed reliable. *Id.*, at 442. Thus, for due process purposes, there is no reason for the Court to ignore information provided by the receiver, as long as it is reliable. Here, the receiver conducted a thorough and exhaustive examination and tracing of funds collected by the defendant. Investigation by state and federal law enforcement agencies confirmed the staggering amount of the loss. There is no reason to doubt the reliability of the loss amounts calculated by the receiver.

Defendant's separation of powers challenge is novel but misplaced. *United States v. Mistretta*, 488 U.S. 361, 370 (1989) (sentencing guidelines did not violate separation of powers principle). Although the Supreme Court has invalidated laws that violate the principle, it has "never held that the Constitution requires that the three branches of Government operate with absolute independence." *Morrison v. Olson*, 487 U.S. 654, 693-4 (1988)(upholding judicial appointment of special counsel). The branches need not be "entirely separate and distinct." *Mistretta*, 488 U.S. at 380. In fact, to govern effectively, "our constitutional system imposes upon the Branches a degree of overlapping responsibility." *Id.* at 381. Thus, this Court's reliance on information provided by the receiver is permissible even if "to some degree" it could be considered to "commingle the functions" of the executive and judicial branches, as long as the practice "pose[s] no danger of either aggrandizement or encroachment." *Mistretta*, 488 U.S. at 382.

In a criminal prosecution, the court and executive branch share overlapping responsibilities. Both branches make decisions about the case based on information derived

from many sources. Both branches interpret law and policy and apply the same to the facts as a critical part of their decision-making process.

The probation officer's interactions with the court-appointed receiver does not pose a danger of aggrandizement or encroachment. The defendant has not requested recusal of the district judge based on this claim. Second, in general, United States district judges have the authority to appoint experts or others to assist the court in deciding the cases and controversies before them. In fact, numerous statutes and rules provide such authority. *See* Fed. R. Evid. 706<sup>1</sup> (authorizing court-appointed experts); Fed. R. Civ. Pro. 66 (regarding appointment of receivers); Fed. R. Civ. Pro. 53 (authorizing appointment of masters); 18 U.S.C. § 4247(b) (governing court-appointed psychiatrists or psychologists for the purpose of assisting the court in making competency, insanity, and commitment determinations in criminal cases). These and other statutes and rules underscore the judiciary's traditional authority to appoint others to conduct an investigation and provide the information to the court for consideration and, if appropriate, reliance. *See also United States v. Shaffer Equipment Co.*, 11 F.3d 450, 461-62 (4<sup>th</sup> Cir. 1993) (court has "inherent power ... necessary to exercise all other powers," including the authority to "conduct investigations").

The narrow question, then, is whether the court's use of its well-established, traditional judicial powers *in a criminal case* encroaches upon the executive branch's power. The simple answer is no.

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<sup>1</sup> "The inherent authority of a trial judge to appoint an expert of his own choosing is virtually unquestioned." Fed. R. Evid 706 (1972 Advisory Committee Notes).

Here, the executive branch made the initial decision to seek appointment of the receiver. The prosecution made the decision to seek criminal charges. The executive branch negotiated a plea agreement with the defendant. The executive branch conducted an investigation and in doing so *chose* to substantially rely on the work of the receiver, as well as investigative agencies. The executive branch was not required to do so, and it remains free to accept, reject, or oppose the conclusions of the receiver. It remains free to independently re-investigate the matters examined by the receiver. As long as the executive branch is free to exercise its traditional branch powers, there can be neither “encroachment” nor “aggrandizement” by the court through the court-appointed receiver.

Closely analogous to the court’s use of a receiver in this case is the court’s routine use of and reliance on the probation officer in preparing presentence reports. Like a receiver, the probation officer is an arm of the court. *See Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147 (4th Cir. 1944) (“a receiver is the agent only of the court appointing him; he represents the court rather than the parties”). The Fourth Circuit has specifically rejected a separation of powers challenge to a probation officer’s authority to conduct an independent investigation on behalf of a court. *United States v. Washington*, 146 F.3d 219, 223 (4th Cir. 1998) (probation officer did not act in a prosecutorial capacity in recommending a higher quantity of drugs than that recommended by prosecutor; “[a]ccuracy is the first principle of the sentencing process”).

As noted above, the court’s mission in the sentencing process is to collect accurate and reliable information. In doing so, it has the inherent authority to consider information from

whatever source, and even to conduct its own investigation through the receiver and probation office. As long as the prosecution is neither bound by the conclusions of the receiver, nor prevented from conducting its own criminal investigation, there is no displacement of the executive branch's traditional authority in criminal law enforcement.

### **III. The Sentencing Guidelines**

The Sentencing Guidelines were initially designed to further the basic purposes of criminal punishment - to deter crime, to incapacitate the offender, to provide just punishment, and to rehabilitate the offender. U.S.S.G. § 1A1.1, editorial note (1987).

The guidelines calculation in a fraud case is driven largely by the amount of loss to the victims, as set forth in Section 2B1.1 of the Sentencing Guidelines. However, the Sentencing Commission also set forth a number of enhancements that might be applicable in a fraud case, some of which apply to the defendant's scheme and thus, add additional levels to his guidelines calculations.

The United States Probation Officer has prepared a thorough pre-sentence report outlining the defendant's involvement in the fraud scheme. While the defendant pled guilty to three counts, pursuant to U.S.S.G. § 1B1.3, the Probation Officer has included all relevant conduct of the defendant's scheme in calculating his advisory sentencing guidelines range. Such a calculation is based on the amount of loss to the victims, which exceeds \$50 million, the number of victims, which exceeds 250, the defendant's obstructive conduct, and the fact that the offense also involves a violation of securities laws committed by an investment

counselor. The defendant's current guidelines are calculated at a Level 40, Criminal History category I, resulting in a sentencing range of 292 - 365 months.

However, even those sizable numbers do not adequately convey the damage the defendant's actions have wrought on the lives of the victims in this case. His Ponzi scheme impacted many more victims than the guidelines-threshold of 250 victims. The defendant's victims were young and old, working and retired, healthy and infirm. Parish's scheme reeled in and affected co-workers and colleagues, doctors and lawyers, teachers and students, strangers and friends. Parish defrauded his employer and those he employed and even some of his relatives. While the Sentencing Guidelines direct that the guidelines' calculations should be based on the "loss" numbers, in this case the numerical calculations do not suffice. The Guidelines provide: "Pecuniary harm means harm that is monetary or that otherwise is readily measurable in money. **Accordingly, pecuniary harm does not include emotional distress...or other non-economic harm.**" U.S.S.G. § 2B1.1, appl. note 3A(iii)(emphasis added).

A sampling of comments from the victim impact statements illustrate how emotionally devastating the defendant's fraud was to the well-being of so many:

"When we found out that the retirement funds we had given to Al were gone, we were devastated."

"The pain caused is more than just financial. There is considerable emotional distress on us as a direct result of Al's fraudulent actions. We had known Al as a friend and colleague for 14 years."

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“My wife and I have spent many stress-filled days and nights thinking how we can overcome this major setback.....it has been an emotional roller coaster for us. We have wept and still try to deal with the thought that we have failed our children by investing with Al Parish.”

“We have both asked God, ‘why us?’”

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“I thought that I had made reasonable plans for my mother’s and aunt’s futures, but know all of those plans have been dashed. Instead of looking forward to my family members living out their last days in comfort, I have to live with the fact that my actions and trust in someone so many believed to be honest have caused my mother and aunt great pain and uncertain futures.”

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“This is the time of my life I worked, and scrimped, and saved, and invested for, but the money I invested isn’t there. My oldest grandson is going to college next year, but the money I invested for him isn’t there. My second grandson will be going to college in two years, but the money I invested for him isn’t there. I live in a one room studio apartment slightly larger than a jail cell, because the money I invested for a full size assisted living apartment or cottage isn’t there.”

“My greatest fear is that I will run out of money before I die. I’m not sure that what I have left will last another 10 or 15 years. When I am bedridden and broke, will Al Parish be out of jail, living off hidden millions he stole from people like me?”

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“While my wonderful wife was working Saturday nights in order to save money to invest with him, Mr. Parish was feeding his face in fine restaurants in Charleston and around the world. While I was driving an old car several states away to make a sale, Mr. Parish was flying around in a private jet. While our kids were learning how to succeed in the public school system, Mr. Parish’s kids were going to [private school].”

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“This crime has impacted my life with stress daily. It not only has effected me financial, but emotional, mental and physical. The stress this situation has caused for my wife and me is unspeakable.”

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“I have been depressed ever since I learned of Al Parish’s deception. My investment, while not large, made me feel like I had options; abit of money for every once and a while. I now feel very trapped, just barely able to take care of myself.”

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“We suggested that [my husband’s] father invest as well.... He lost everything. He will be left with no income and no place to live... We feel like snake oil salesmen.”

“We were misled. We were defrauded. We were lied to. We were taken advantage of. Yet, somehow, we must bear the fault for all this as well?”

“No one can say that our investment hasn’t paid off. It just didn’t pay off in the traditional way we expected. We continue to earn high interest on the blame, scorn, ridicule, anger, tears, hurt, guilt and loss. And that’s one investment pool that continues to yield high returns.”

While the guidelines numbers are substantial, they have not taken into account the real tragedy that many victims now face stemming from their dealings with Parish. Based on the amount of loss, but more importantly, based on the substantial impact this crime has had on the numerous victims, the government respectfully requests that the defendant be sentenced at the top of the sentencing guidelines range to a term of imprisonment for 365 months.

Respectfully Submitted,

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