No. 10-2487

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

— versus —

SHOLOM RUBASHKIN

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Iowa

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ALBERT ALSCHULER, WILLIAM BASSLER, DOUGLAS A. BERMAN, L. BARRETT BOSS, ROBERT J. CLEARY, NORA V. DEMLEITNER, MONROE H. FREEDMAN, BENNETT L. GERSHMAN, JEFF IFRAH, HAROLD J. KRENT, MARC MILLER, MICHAEL O'HEAR, STEPHEN ORLOFSKY, MARK OSLER, JAMES REYNOLDS, STEPHEN F. SMITH, SANDRA GUERRA THOMPSON, AND RONALD WRIGHT AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, URGING VACATUR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

Page(s)

STATUTORY PROVISIONS:

MISCELLANEOUS:

Page(s)

INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly initiates litigation, files amicus curiae briefs, and publishes monographs and other publications on these and other related topics.

Since the U.S. Sentencing Commission's establishment approximately twenty-five years ago, WLF has submitted comments to and testified before the Commission on several occasions regarding the promulgation and application of its guidelines. WLF has also taken the Commission and its advisory committees to task for failing to operate in an open and transparent manner in the formulation of official Commission policy. See, e.g., *Wash. Legal Found. v. U. S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Wash. Legal Found. v. U. S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994).

In addition, WLF has regularly appeared before this and numerous other

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[1]Pursuant to Federal Rule of Appellate Procedure 29(c), *amici* state that no counsel for any party authored this brief in whole or in part; and than no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Because counsel for the Government refused to consent to the filing of this brief, *amici* have filed a separate motion for leave to file.

federal and state courts to address issues of great importance related to the U.S. Sentencing Commission and the Federal Sentencing Guidelines, and to oppose the application of the Guidelines in cases that would result in the imposition of excessively harsh prison sentences. See, e.g., *Dillon v. United States*, 130 S.Ct. 2683 (2010); *Gall v. United States*, 552 U.S. 38 (2007); *United States v. Rita*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

The remaining *amici* are professors, lawyers, and former jurists who teach, conduct research, and/or have practiced in the fields of criminal law and federal sentencing in the United States. Each has a professional interest in ensuring that federal sentencing statutes are interpreted and applied in a manner that coherently advances their purposes and is consistent with relevant jurisprudential principles and with the contemporary function of the criminal law. *Amici* include Albert Alschuler, Professor of Law, Northwestern University School of Law; William G. Bassler, former United States District Judge, District of New Jersey, from 1991 to 2006; Douglas A. Berman, William B. Saxbe Designated Professor of Law, The Ohio State University Moritz College of Law; L. Barrett Boss, former Assistant Federal Public Defender, Washington, D.C., from 1995 to 2000; Robert J. Cleary, former United States Attorney for the District of New Jersey, from 1999 to 2002; Nora V. Demleitner, Dean and Professor of Law, Hofstra University School of Law; Monroe H. Freedman, Professor of Law, Hofstra University School of Law;

Bennett L. Gershman, Professor of Law, Pace University Law School; Jeff Ifrah, founding partner of Ifrah Law PLLC and co-author of Federal Sentencing for Business Crimes (Lexis, 2002); Harold J. Krent, Dean and Professor of Law, Chicago-Kent College of Law; Marc L. Miller, Vice Dean and Ralph W. Bilby Professor of Law, The University of Arizona James E. Rogers College of Law; Michael O'Hear, Associate Dean for Research and Professor of Law, Marquette University Law School; Stephen M. Orlofsky, former United States District Judge for the District of New Jersey, from 1996 to 2003; Mark Osler, Professor of Law, University of St. Thomas School of Law; James H. Reynolds, former United States Attorney, Northern District of Iowa from 1977 to 1982; Stephen F. Smith, Professor of law, Notre Dame Law School; Sandra Guerra Thompson, Law Foundation Professor of Law and Criminal Justice Institute Director, University of Houston Law Center; and Ronald Wright, Professor of Law, Wake Forest University School of Law.

Amici submit this brief to highlight their deep concerns over substantial flaws they see in the district court's sentencing of defendant Sholom Rubashkin to a functional life sentence in this high-profile case. *Amici* file this brief in the hope of helping federal sentencing law and procedure to evolve sensibly in the wake of *United States v. Booker* and its progeny. *Amici* believe this case raises important procedural and substantive issues that arise in many white-collar sentencings, and

amici fear that the decision below could have a negative impact on modern federal sentencing under advisory guidelines. *Amici* seek to ensure that, as post-*Booker* jurisprudence evolves in lower courts, sound sentencing policies and sensible sentencing practices are preserved. *Amici* also believe it is critical that circuit courts use reasonableness review to correct problematic procedures and unjust outcomes resulting from district court sentencing.

SUMMARY OF ARGUMENT

Congress has instructed district courts to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing set forth in the Sentencing Reform Act, 18 U.S.C. § 3553(a), and appellate courts must review sentencing determinations for "reasonableness." *See Booker*, 543 U.S. at 261-63. The Supreme Court has clarified that reasonableness review has both procedural and substantive dimensions: federal courts of appeals need to ensure (1) that district courts approach the sentencing process with a proper understanding of their statutory sentencing obligations, and (2) that sentencing outcomes comply with the substantive sentencing goals set forth in § 3553(a). Mindful of these principles, this Court should find the district court's sentencing decision-making and the functional life sentence imposed on Sholom Rubashkin to be unreasonable. Reversal of the sentence imposed — and remand (to a new judge) for *de novo* resentencing — is justified for at least three reasons.

First, the district court's calculation of the guideline range was contrary to the Guidelines' instructions and related jurisprudence. Left undisturbed, the district court's loss calculation threatens to undermine even the appearance of proportionate punishment for economic offenses. Despite significant evidence that certain losses suffered by banks cannot be causally linked to Mr. Rubashkin's offense, the district court did not seriously attempt to assess what portion of the alleged losses could and should be justly attributed to Mr. Rubashkin's conduct. Even an accurate calculation of losses attributable to a fraud may result in a Guideline sentencing range divorced from the purposes set forth in § 3553(a)(2); these concerns are compounded if a district court can readily rely on inflated loss calculations to dramatically increase a Guideline range when a careful and conscientious loss assessment would suggest a lower range. Decades of prison time may hinge on loss calculations, and the district court's refusal below to consider properly the distinctive loss factors in this case was a significant procedural error.

Second, the district court largely ignored the Supreme Court's repeated admonition that a district court must not presume reasonable a sentence within the calculated Guidelines range. *See Nelson v. United States*, 129 S. Ct. 890, 892 (2009); *Rita*, 551 U.S. at 351; *Gall*, 552 U.S. at 50. By giving no weight to many of the mitigating facts and 3553(a) factors that justified a below-guideline sentence

for Mr. Rubashkin, the district court disregarded the Supreme Court's clear instruction to treat the Guidelines as only "one factor among several courts must consider in determining an appropriate sentence" as part of "§3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." *Kimbrough v. United States*, 552 U.S. 85, 90, 111 (2007). The Supreme Court in *Gall* and *Rita* emphasized the interplay between the Guidelines and the other sentencing considerations Congress set forth in 18 U.S.C. § 3553(a): *Rita* stresses the need for a sentencing court to "filter the Guidelines' general advice through § 3553(a)'s list of factors," 551 U.S. at 358; *Gall* calls upon a district judge to "consider *all of the § 3553(a) factors* to determine whether they support the sentence requested by a party." 552 U.S. at 49-50 & n.6 (emphasis added). The district court's written sentencing opinion barely acknowledged *any* of the § 3553(a) factors emphasized by Mr. Rubashkin at sentencing; it even ignored the Government's indication that a sentence *below* the calculated guideline range would be sufficient in this case. The district court's failure to address adequately the factors Congress set forth in its instructions to sentencing judges is another significant procedural error that requires a remand.

Third, the functional life sentence given to Mr. Rubashkin — a first offender and father of 10 children, who has led a pious life and whose conduct was part of

efforts to keep afloat a business of great importance to his local and religious communities — is substantively much "greater than necessary" to comply with the purposes of sentencing set forth by Congress in § 3553(a)(2). Indeed, many former senior Justice Department officials — including six former Attorneys General of the United States — wrote directly to the district court to express their view that such a sentence would be excessive in this case and that an extremely long prison term need not and should not be imposed on Mr. Rubashkin. Key considerations Congress set out in § 3553(a) — ranging from the "nature and circumstances of the offense" to the "history and characteristics of the offender" to the "need to avoid unwarranted disparity" —justify a much shorter prison term for Mr. Rubashkin than was imposed by the district court. Despite lip service paid to the governing sentencing regime, the district court actually violated Congress's command in 18 U.S.C. § 3553(a) that Mr. Rubashkin's sentence be "sufficient, but not greater than necessary, to comply with" the purposes of sentencing set forth in the Sentencing Reform Act. Thus, in addition to being the product of an unreasonable sentencing process, the sentence imposed below is substantively unreasonable.

Booker and its progeny call for district courts to engage in reasoned and reasonable decision-making to further Congress's sentencing goals. The district court's sentencing decision-making is not reasonable in light of § 3553(a). *Amici* respectfully suggest that this Court should remand for resentencing in order to

ensure lower courts understand that the sentencing approach adopted below and the extreme sentence imposed on Mr. Rubashkin are unreasonable. And, due in part to the district judge's apparent commitment to imposing an extremely long prison term, remand to a new judge would not only be wise, but may be essential to "promote the perception of fair sentencing." *Gall*, 552 U.S. at 50.

ARGUMENT

I. THE DISTRICT COURT'S LOSS CALCULATION WAS ERRONEOUS AND PROCEDURALLY UNREASONABLE

Despite making no attempt to disentangle other causes of loss, the district court "found" that Mr. Rubashkin should be held responsible for more than $25 million in loss and thus subject to a 22-level sentencing enhancement under the Guidelines. The district court's loss finding is especially troubling given that the Government, which bears the burden of proof on guideline enhancements, offered no substantial evidence to rebut the defense's evidence that actions beyond Mr. Rubashkin's offense conduct enhanced the loss considerably. The record below provides no real substantive analysis of which losses were directly caused by the offense conduct; Chief Judge Reade did not properly apply the causation principles that this Court and other circuit courts have stressed must be applied at sentencing. *See United States v. Lange*, 590 F.3d 902, 906 (8th Cir. 2010) (stressing "basic Guidelines principle" that punishment increases "with the amount of loss *caused* by the criminal conduct") (emphasis added); *see also United States v. Nacchio*, 573

F.3d 1062 (10th Cir. 2009); *United States v. Rutkoske*, 506 F.3d 170 (2d Cir. 2007); *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005).

This Court must demand that district courts properly apply causation principles in criminal cases to ensure sentences for economic offenses have some appearance of rationality and proportionality. The Guidelines place great emphasis on the amount of loss in determining applicable sentencing ranges; in this case, the district court's loss calculations inflated the recommended sentence from only a few years to over 25 years of imprisonment. As commentators have emphasized, allowing loss calculations to be made on the basis of arm-chair economics can unreasonably inflate loss determinations and corresponding Guideline sentencing ranges.[2] Even an accurate loss calculation can sometimes result in extreme sentencing enhancements that may not serve the purposes of § 3553(a). And this problem is dramatically compounded if district courts can rely simply on a prosecutor's (often-inflated) loss estimates to increase the Guidelines' recommended sentence.

Especially because the Guidelines place so much emphasis on loss amounts

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[2] *See, e.g.*, James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 Fed. Sent'g Rep. 138 (2010); Robert G. Morvillo & Robert J. Anello, *Calculating Loss Under the Guidelines*, N.Y.L.J., Oct. 8, 2008; Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 McGeorge L. Rev. 757 (2006); Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 Wm. & Mary L. Rev. 721, 739-40 (2005).

in fraud cases, this Court cannot and should not permit an issue with such dramatic sentencing consequences to be subject to casual or speculative analysis. In this case, decades of imprisonment for a first offender convicted of non-violent offenses hinged on whether the district court undertook a careful and complete loss determinations. Chief Judge Reade's failure to engage properly the loss arguments advanced by the defendant amounts to a significant procedural error requiring a remand.

II. THE DISTRICT COURT'S FAILURE TO ASSESS OR EVEN ADDRESS THE MANY § 3553(a) FACTORS STRESSED BY MR. RUBASHKIN WAS PROCEDURALLY UNREASONABLE

Binding Supreme Court precedent clarifies that a district judge must consider *all* of the § 3553(a) factors and respond on the record to non-frivolous arguments offered by a defendant in support of a lower sentence. *See Gall*, 552 U.S. at 47-51; *Rita*, 551 U.S. at 355-58. Even though she issued a lengthy written opinion, Chief Judge Reade's sentencing order barely even mentioned the extensive § 3553(a) arguments developed by the defendant throughout the sentencing proceedings. As this Court has previously indicated, mitigating factors such as those presented by Mr. Rubashkin below often necessitate a remand for resentencing simply "due to a concern that the sentencing court did not properly consider factors relevant to sentencing under § 3553(a)." *United States v. Wilder*, 597 F.3d 936, 947 (8th Cir. 2010); *see also United States v. Panice*, 598 F.3d 426,

443-44 (7th Cir. 2010) (remanding for resentencing because "it is not clear that the judge gave meaningful consideration to the factors argued by [the fraud offender] — his history and characteristics, including his lack of criminal history, his offense was nonviolent, and other positive characteristics").

Though a judicial inclination to sentence within the Guidelines is not *per se* unreasonable, the Supreme Court has repeatedly stressed that a district court must not presume a sentence to be reasonable simply because it is within the calculated Guidelines range. *See, e.g.*, *Nelson*, 129 S. Ct. at 892. Mindful of this critical touchstone of sentencing law and policy, the Government tellingly conceded at the sentencing hearing that a sentence *below* the calculated guideline range would be sufficient for Mr. Rubashkin, and numerous former senior Justice Department officials — including six former Attorneys General of the United States — wrote directly to the court to express their view that a within-Guideline sentence would be excessive in light of the many mitigating factors in this case. But the district court gave no heed to this consensus view, and so remand in this case is essential because the record below "leaves too much doubt about whether the judge impermissibly started with [a guideline] presumption and whether [she] completed adequate consideration of all the relevant § 3553(a) factors." *Panice*, 598 F.3d at 444.

The cavalier treatment given to Mr. Rubashkin's § 3553(a) arguments in

this case is especially troubling given the consensus that the Guidelines in this setting often suggest sentencing ranges that are much "greater than necessary" to serve the punishment purposes of 18 U.S.C. § 3553(a)(2). *See United States v. Watt*, 707 F. Supp. 2d 149 (D. Mass. 2010); *United States v. Parris*, 573 F. Supp. 2d 744 (S.D.N.Y. 2008); *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006); Felman, *supra* note 1, at 139-40 (explaining why "reliance on loss to drive sentencing outcomes is simply out of control"); Frank Bowman, *Sacrificial Felon*, The American Lawyer (Jan. 2007), at 63 (highlighting that the Guidelines for "federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense"); Andrew Weissmann & Joshua Block, *White-Collar Defendants and White-Collar Crimes*, 116 Yale L.J. Pocket Part 286 (2007) (asserting that "Federal Sentencing Guidelines for fraud and other white-collar offences are too severe" and are greater than "necessary to satisfy the traditional sentencing goals of specific and general deterrence — or even retribution"). Against this backdrop, the district court's imposition of a within-Guideline sentence is inconsistent with the Supreme Court instruction that the Guidelines are but "one factor among several courts must consider in determining an appropriate sentence" and that the "overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." *Kimbrough*, 552 U.S. at 90, 111.

Because the district court neither properly engaged nor fully addressed the mitigating facts and § 3553(a) factors stressed by Mr. Rubashkin, this Court may find it impossible to engage in substantive reasonableness review. Despite the lip service Chief Judge Reade paid to the governing sentencing regime in her written sentencing opinion, it is hard to assess whether or just how she "filter[ed] the Guidelines' general advice through § 3553(a)'s list of factors" as *Rita* requires, and whether or just how she "consider[ed] all of the § 3553(a) factors to determine whether they support the sentence requested by" the Government and the defendants as *Gall* requires. Indeed, because Chief Judge Reade's sentencing opinion barely acknowledges any of the § 3553(a) factors the defendant stressed at his sentencing to support a shorter term of imprisonment — let alone, *all* the § 3553(a) factors as *Gall* demands — remand is essential to enable meaningful appellate review for reasonableness.

Suffice it to say, Chief Judge Reade's sentencing decision-making does not appear to be either reasoned or reasonable in light of the statutory factors found in § 3553(a) and recent post-*Booker* jurisprudence. Accordingly, *amici* respectfully suggest that this Court consider a remand for resentencing to a new district judge so as to ensure that Mr. Rubashkin is sentenced by a judge who will be able to give full and fresh consideration to the many mitigating facts and all the § 3553(a) factors that demonstate that a below-guideline sentence will be "sufficient, but not

greater than necessary, to comply with" the purposes of sentencing set forth in the Sentencing Reform Act, 18 U.S.C. § 3553(a). *Cf. United States v. Paul*, 561 F.3d 970, 975 (9th Cir. 2009) (remanding to new judge for resentencing when record showed sentencing judge could "not put out of his mind his previously expressed view that [a Guideline consideration] trumped all other mitigating factors combined").

III. THE DISTRICT COURT'S IMPOSITION OF A FUNCTIONAL LIFE SENTENCE WAS SUBSTANTIVELY UNREASONABLE

The functional life sentence given to Mr. Rubashkin — a 51-year-old, first offender and father of 10 children, who has led a pious life and whose non-violent offense was part of his efforts to keep afloat a business of great importance to his local and religious communities — is substantively much "greater than necessary" to comply with the purposes of sentencing set forth by Congress in § 3553(a)(2). As noted previously, the Government explicitly acknowledged at the sentencing hearing that a sentence *below* the calculated guideline range would be sufficient in this case, and numerous former senior Justice Department officials wrote directly to the district court to express their view that a within-Guideline sentence would be excessive in light of the many mitigating facts and the application of § 3553(a) factors in this case. Key considerations Congress set out in the provisions of § 3553(a) — ranging from the "nature and circumstances of the offense" to the "history and characteristics of the offender" to the "need to avoid unwarranted

disparity" — call for and justify a much shorter prison term for Mr. Rubashkin than was imposed by the district court. Affirming as reasonable the extreme prison sentence imposed below would directly violate the Supreme Court's clear command that the Guidelines are only "one factor among several courts must consider in determining an appropriate sentence." *Kimbrough*, 552 U.S. at 90.

The substantive unreasonableness of the functional life sentence given to Mr. Rubashkin comes most clearly into focus when considering the significantly lower sentences that have been imposed for offenses whose "nature and circumstances" were much more aggravated than the offense here and that have been imposed upon offenders whose "history and characteristics" were much less sympathetic than Mr. Rubashkin's personal history. For example, high-profile federal fraud defendants ranging from Marc Dreier to Bernie Ebbers to John and Tim Rigas to Jeffrey Skilling — all of whom deprived a large number of persons of their life savings, caused losses many times larger than even the most inflated loss claims in this case, *and* funded lavish lifestyles through their fraudulent behaviors —*each received prison terms below the sentence imposed on Mr. Rubashkin*. It is hard to identify valid substantive bases for concluding that Mr. Rubashkin's offense conduct and personal characteristics demand a longer sentence for him than for *any* of these other more aggravated offenders; it is difficult to fathom how the district court decided that Mr. Rubashkin's offense

conduct and personal characteristics demanded a longer sentence for him than for *all* of these other offenders. *Cf. Panice*, 598 F.3d at 443 (requiring resentencing for fraud defendant in part because the "loss caused by Skilling and Ebbers is much, much greater than that caused by Panice, yet their sentences are significantly shorter than Panice's").

The substantive unreasonableness of the functional life sentence given to Mr. Rubashkin is also revealed by considering the dramatically lower sentences imposed for offenses whose "nature and circumstances" and upon offenders whose "history and characteristics" are comparable to Mr. Rubashkin's. For example, Joseph Nacchio, who inflicted a loss of $28 million (approximately the same alleged by the government here), was ultimately sentenced to serve 70 months' imprisonment, less than 25% of the prison term imposed on Mr. Rubashkin. *See Nacchio*, 573 F.3d at 1062. In a comparable case involving Mark Turkcan, an insider at the First Bank who was convicted of bank fraud involving a loss of approximately $35 million, the district judge concluded that a sentence of just a year and day was sufficient to serve congressional sentencing purposes. *See United States v. Turkcan*, 4:08-CR-428 (DJS) (E.D. Mo. June 11, 2009). In light of the much, much lower sentences given to comparable offenders, affirmance of the lengthy extreme prison term given to Mr. Rubashkin would essentially nullify the important congressional command to consider "the need to avoid unwarranted

sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

CONCLUSION

For the reasons stated above, the sentence imposed below should be vacated and the case remanded for *de novo* resentencing to another district judge.

Respectfully submitted,

/s/ Richard A. Samp

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CERTIFICATE OF COMPLIANCE

As counsel for *amici curiae*, I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is exactly 3,907 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

Pursuant to Circuit Rule 28(h)(3), this electronic version of the brief has been scanned for viruses and is virus-free.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

As counsel for *amici curiae*, I certify that on this 10th day of January, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Richard A. Samp
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