IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **18-11248-DD**

United States of America,

Appellee,

- versus -

Gerti Muho,
a.k.a. Gerard Peter Morgan, a.k.a. Enton Pinguli,
a.k.a. Kris Blair,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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Of Counsel

United States v. Gerti Muho, Case No. 18-11248-DD

Certificate of Interested Persons

In compliance with Fed. R. App. P. 26.1 and 11th Circuit Rules 26.1 and 28-1, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included in the CIP included in the appellant's initial brief, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case and were omitted from the appellant's CIP.

Acacius S. LLC

A.F.

A. K.

Alliance Data Systems Corp (ADS)

American Express (AXP)

American Express Travel Related Services Inc.

Asset Holding Company 5

Bank of America (BAC)

Barclays Bank (BCS)

Birks Group (BGI)

Bloom, Hon. Beth

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Certificate of Interested Persons (Cont'd)

Blue 5303 Land Trust

CampusDoor

Capital International Financial Inc.

Capital One (COF)

CEM Investments LLC

C. F.

Charles Schwab Bank (SCHW)

Citibank, N.A. (C)

Comenity Bank

Cross River Bank

Cypers, Michael

Daley, Jennifer

Darrough, Miesha Shonta

De Seram, Alan

Digital Federal Credit Union

D. H.

Fajardo Orshan, Ariana

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Certificate of Interested Persons (Cont'd)

Fels, Adam

Ferrer, Wifredo A.

FI Colbalt Inc.

FI Investments Inc.

Fletcher Asset Management

Fletcher Funds

F. S.

Goodman, Hon. Jonathan

Greenberg, Benjamin G.

G. L.

GM Capital Management Inc. (GM)

Harris, David Scott

Hattier, Jr., Maurice J.

Hoffman, Andrea G.

HSBC Bank USA, N.A (HSBC)

HSBC Private Bank (Monaco) S.A.

Hunt, Hon. Patrick M.

Internal Revenue Service

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Certificate of Interested Persons (Cont'd)

JGB Bank - acquired by Sabadell United Bank (SAB)

JP Morgan Chase Bank (JPM)

J. M.

J. P.

J. T. M.

Kravchenko, Roman A.

Ladner, George

Lampost Blue Chip Fund L.P.

Langley, Matthew John

Lenard, Hon. Joan A.

Leveraged Hawk Inc.

Mayors Jewelers (MYR)

Matzkin, Daniel

McLaughlin, Sean Thomas

M. H. G.

M. J. O.

M. M.

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Certificate of Interested Persons (Cont'd)

Moscow, John W.

M. P. G.

Nautilus Legal Services

Noto, Kenneth

O'Sullivan, Hon. John J.

PenFed Credit Union (PENFED)

Pinera-Vazquez, Silvia Beatriz

PNC Bank (PNC)

R. C.

Read, Alexis Sophia

Renoire, Elaine

RF Services

RG International Dev. LLC

Richcourt Funds

Risavy, Thomas William

Rosen, Jason Eric

Rosen, Michael James

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Certificate of Interested Persons (Cont'd)

Sallie Mae Bank (SLM)

Seltzer, Hon. Barry S.

Sera Group LLC

Silicon Valley Bank (SIVB)

Simonton, Hon. Andrea M.

Smachetti, Emily M.

Sombuntham, Nalina

Soundview Elite Ltd.

Spaccarotella, John C.

Space Coast Credit Union (SCCU)

SunTrust Bank (STI)

TD Bank (TD)

T. D. V.

The Collection

Turnoff, Hon. William C.

UMB Bank (UMBF)

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Certificate of Interested Persons Cont'd)

Upstart Network Inc.

Vanquish Fund Ltd.

Wells Fargo Bank (WFC)

Wilmington Trust Bank (WL)

Wu, Jason

s/*Daniel Matzkin*
Daniel Matzkin
Assistant United States Attorney

Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Southern District of Florida in a criminal case. The district court entered judgment against Gerti Muho on March 12, 2018 (DE:338). The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. § 3231. Muho filed a timely notice of appeal on March 23, 2018 (DE:346); *see* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and authority to examine Muho's challenges to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of the Issues

I. Whether Muho has demonstrated that the district court was required, *sua sponte*, to terminate his self-representation.

II. Whether the district court correctly declined to waive costs for trial subpoenas for two potential defense witnesses, where Muho's testimonial proffer lacked specificity and the witnesses' proposed testimony would have been cumulative.

III. Whether the district court properly enhanced Muho's sentence for deriving over $1 million from a financial institution.

IV. Whether the district court's sentence, which constituted a downward variance from Muho's advisory guidelines range, was substantively reasonable.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

A Southern District of Florida federal grand jury returned a 40-count second superseding indictment that charged Gerti Muho with bank fraud, in violation of 18 U.S.C. § 1344 (Counts 1-17); wire fraud, in violation of 18 U.S.C. § 1343 (Counts 18-19); aggravated identity theft, in violation of 18 U.S.C. § 1028(a)(1) (Counts 20-37); and money laundering, in violation of 18 U.S.C. § 1957 (Counts 38-40) (DE:170). The district court granted Muho's motion to proceed *pro se*, allowing

him to exercise his right to self-representation at trial with the assistance of stand-by counsel (DE:178:38-39, 45-46; DE:369:15-16).

Following an 11-day trial, a jury convicted Muho on all charged offenses (DE:279). The district court subsequently sentenced Muho to a total of 264 months' imprisonment, consisting of 240 months as to Counts 1 through 19 and 120 months as to each of Counts 38 through 40, all to be served concurrently with each other, and 24 months as to each of Counts 20 through 37, to be served concurrently with each other and consecutively to Counts 1 through 19 and 38 through 40, to be followed by five years of supervised release (DE:338). Muho now appeals (DE:346).

2. Statement of the Facts

After his unceremonious firing from a hedge fund in mid-2013, Muho, a 2012 University of California Berkeley law graduate, embarked on an elaborate three-year fraud spree, victimizing individuals, businesses, and financial institutions to the tune of $8.7 million in intended loss. The following facts were adduced at trial, viewed in the light most favorable to the government.[1]

[1] Because Muho does not contest the sufficiency of the evidence supporting his convictions, the government has set forth an illustrative overview of the extensive evidence presented at trial.

A. Government Case

Upon his graduation from law school in May 2012, Muho began working at Fletcher Asset Management, Inc. ("FAM"), a New York City investment advisor run by one Alphonse Fletcher, Jr., that managed a group of hedge funds (DE:304:14, 126). FAM had a series of related entities and subsidiaries, including RF Services, Richcourt Funds, Soundview Elite, Ltd., and Vanquish Fund, Ltd. (DE:304:127-29, 142-43). Between August and November 2012, Muho was appointed to the board of directors of several of these entities, including Soundview Elite (GX2C-4). Muho also eventually began assisting in preparing responses to discovery requests in pending FAM litigation and was granted "admin-level" privileges on FAM's servers (DE:304:14). Such privileges allowed Muho to access personal identifying information - including social security numbers and dates of birth - for current and former FAM employees and interns (*id*.). Muho copied this data onto an external hard drive (DE:304:14-15).

In early 2013, Fletcher recruited Deborah Midanek to serve as an independent director of the Richcourt funds, a collection of offshore investment vehicles domiciled in the Caribbean (DE:304:124-26). Midanek's goal was to "to unravel the complex difficulties the funds were facing and get the money back to the investors in the fastest and least expensive way possible" following years of mismanagement (DE:304:127). She left her only in-person meeting with Muho

"concerned about the condition that he was in at that particular moment" (DE:304:132). Muho arrived late, looked disheveled, and spoke in a "very garrulous and somewhat disjointed" manner (*id.*). Midanek advised Fletcher that "Muho was somewhat erratic and maybe not the best person to have being responsible for other people's money" (DE:304:133). Muho subsequently resigned from all of the funds with which he was associated on April 3, 2013, leaving him with no authority to act in any manner on behalf of the funds or to control the assets of the funds (GX2C-4).

On April 29, 2013, Muho executed a series of fraudulent documents purporting to re-establish his ability to act on behalf of RF Services, including fraudulent resolutions that enabled each fund to be bound by the signature of one director, removed actual directors from each fund, and appointed Leveraged Hawk, a shell company under Muho's control, as a director of each of the funds (GX2C-8). Muho used these fraudulent documents to attempt to obtain monies from RF Services and Soundview Elite's accounts located at Wilmington Trust Bank, but the bank ultimately did not proceed with the requested transfer (GX2C-6). On May 2, 2013, upon learning of the Wilmington Trust fraud, FAM formally terminated Muho, demanded that he no longer hold himself out as having authority over the funds, and insisted that he return all data that he removed from company servers (DE:312:18-19; GX2C-1). Muho ignored the letter (DE:304:15).

On June 3, 2013, Muho filed a false "Certificate of Merger" with the State of Delaware as well as fraudulent documentation with the Securities and Exchange Commission, claiming that a variety of foreign investment funds, including Soundview Elite and Vanquish Fund, had merged with Leveraged Hawk (DE:212:26-27; GX10B-1; GX41B). In the months that followed, Muho materially misrepresented to HSBC-Monaco that he had legal authority to execute financial transactions on behalf of Soundview Elite; he induced the bank to transfer over $2 million from the account of Soundview Elite to a Citibank account ending in 4214 in the name of Leveraged Hawk (GX2C-7, 9A-H; 43). Soundview Elite and Vanquish Fund ultimately obtained a civil judgment against Muho in the U.S. District Court for the Southern District of New York for the fraudulently-transferred sum (GX10A).

In the meantime, Muho distributed his ill-gotten gains to various bank accounts under his control and spent a portion of the transferred funds on the purchase of a Maserati as well as a Miami waterfront condominium in the name of a shell company under his control (GX11A; GX18A). In November 2014, Muho submitted a fraudulent application for a mortgage loan for the condo to CEM and Capital International (GX15A-1; GX15A-2; GX44). On the application, Muho falsely represented that his name was Gerard Morgan; provided a fraudulent Pennsylvania driver's license; utilized a fictitious social security number; and

misrepresented that he lived in San Francisco, California, had worked at GM Capital (a shell company under Muho's control) for three years, and earned $40,000 per month (*id.*). Muho also falsely claimed that he did not intend to use the condo as his primary residence and that the loan proceeds would be utilized for business investment (*id.*). On the strength of these misrepresentations, CEM approved the loan and wired the requested funds to a closing agent, who issued a check for $380,194.32 to Muho (DE:313:25-26; GX12B). Muho used the money on shopping, gambling, and travel (GX17A).

The CEM loan went into default in April 2015 (DE:313:28-29). CEM foreclosed and sold the condominium (DE:309:61), and the purchaser was forced to obtained a writ of possession because Muho refused to leave (DE:309:62). On executing the writ on February 16, 2016, the purchaser discovered that Muho had abandoned the condominium and had left behind "papers and legal documents strewn all over the place," including numerous fraudulent identification documents, checks, paystubs, financial statements, credit cards, casino cards, and a prescription pad in the name of Gerard Morgan, M.D. (DE:309:63-64, 69-70, 74, 79-80; GX8B through 8M-12).

On February 14, 2015, Muho submitted a fraudulent application to Space Coast Credit Union for a $30,407 loan for the purchase of a Jaguar (GX19A; GX45). Muho identified himself as Gerard Morgan; falsely claimed that he earned $220,000

per year as "President and Attorney" of GM Capital; provided a forged Massachusetts driver's license as proof of identification; submitted a fictitious social security number and counterfeit tax documents for GM Capital and Leveraged Hawk (*id.*). Space Coast approved and funded the loan based on these material misrepresentations (DE:311:181-83, 191-94; GX45). Muho eventually defaulted on the loan (DE:311:200). To complete the purchase of the Jaguar, Muho traded in the Maserati that he bought using fraudulently-obtained funds from Soundview Elite's HSBC-Monaco account (DE:311:197).

In the meantime, using the personal identifying information of former FAM personnel, Muho proceeded to apply for a number of loans, open a series of bank accounts, and cash and deposit fraudulent checks. Victims T.D.V., M.H.G., and C.F. did not know Muho and never authorized Muho to use their names or personal identifying information in any manner (e.g., DE:309:208-251; DE:310:8-33, 212-13; DE:311:120, 124-30).

- Wells Fargo opened two accounts in reliance on fraudulent application materials that Muho submitted using the name, forged signature, and personal identifying information of T.D.V. (DE:311:61-68; GX21A; GX21C). A bank employee identified Muho in a photographic lineup as the individual who purported to be T.D.V. (*id.*).

- Muho fraudulently created and deposited with Wells Fargo a $300 check purporting to be from FI Cobalt, Inc. and payable to T.D.V. (GX21A).

- PNC Bank opened an account in reliance on fraudulent application materials that Muho submitted using the name, forged signature, and personal identifying information of T.D.V. (DE:311:163-65; GX23A). A bank employee identified Muho in a photographic lineup as the individual who purported to be T.D.V. (DE:311:153-56; GX23C).

- Muho fraudulently created and deposited with PNC a $50,000 check purporting to be from M.M. and Lampost Blue Chip Fund L.P. and payable to T.D.V., and a $450 check purporting to be from A.F. and payable to T.D.V. (GX23A).

- Bank of America opened a series of accounts in reliance on fraudulent application materials that Muho submitted using the name, forged signature, and personal identifying information of T.D.V. (DE:311:17-36; GX25A; GX25B; GX25C). A bank employee identified Muho in a photographic lineup as the individual who purported to be T.D.V. (DE:311:13-16; GX25F).

- Muho fraudulently created and deposited with Bank of America a series of checks totaling $11,900 (GX25A; GX25B; GX25C).

- TD Bank opened two accounts in reliance on fraudulent application materials that Muho submitted using the name, forged signature, and personal

identifying information of T.D.V. (DE:311:96-106; GX27A). A bank employee identified Muho in a photographic lineup as the individual who purported to be T.D.V. (DE:311:92-96; GX27C).

- Muho fraudulently created and deposited with TD Bank a series of checks totaling $13,790 (GX27A).

- Muho submitted a fraudulent application to Sallie Mae for a $30,000 student loan in the name of J.M.R.; Muho listed M.H.G. as co-signer and fraudulently provided M.H.G.'s personal identifying information (DE:310:170-87; GX37A). The application forms for the alleged borrower and co-signer were submitted within about seven minutes of one another from Muho's IP address (DE:310:140-43, 186). Muho ultimately withdrew this application (DE:310:187).

- Muho then applied to Sallie Mae for a fraudulent $15,000 bar study loan, this time using the alias Kris J. Blair and again listing M.H.G. as co-signer and using M.H.G.'s personal identifying information without authorization (DE:310:187-203; GX37B). Muho falsely represented that Kris Blair had earned a law degree from the University of California Berkeley and provided a fraudulent UC Berkeley Office of the Registrar letter and School Certification Form purporting to reflect this information, each including the forged signature of victim J.P. (DE:310:148-49; GX8M-5; GX37B). The purported borrower and co-signer submitted the application 19 minutes apart from Muho's IP address (DE:310:140-43, 199-200).

Sallie Mae ultimately approved and fully disbursed this loan (DE:310:196).

- Muho submitted a fraudulent application to PenFed Credit Union for a $100,399 auto loan in the name of C.F. and M.H.G., using their personal identifying information without authorization (DE:311:139-45; GX39B). The application was submitted from the IP address associated with Muho's condominium (DE:310:144-45). PenFed ultimately denied the application (DE:311:145-46).

- Muho, using the name and personal identifying information of T.D.V., submitted a fraudulent application to Upstart Network, Inc. and Cross River Bank for a $35,000 loan (DE:309:179-92; GX29). As part of the application package, Muho submitted an altered Wells Fargo account statement in T.D.V.'s name that reflected a balance of $9,000, rather than its actual balance of $20 (DE:309:190-92; GX21A). The loan was submitted from the IP address associated with Muho's condominium (DE:310:137-38). Upstart ultimately declined the application (DE:309:192).

- Muho, again using T.D.V.'s name and personal identifying information, submitted a fraudulent application to Mayors Jewelers in Miami, via Alliance Data, for a $7,700 loan to buy a Rolex watch (DE:310:52-55; GX31). When the loan was declined, Muho submitted an in-house credit application that was also declined (DE:310:59). A Mayors Jewelers employee later identified Muho in a photographic lineup as the individual who posed as T.D.V. (DE:310:47-51; GX34).

On January 26, 2016, Miami-Dade Police Department officers arrested Muho at Amscot Financial in Miami on receiving a tip that Muho was fraudulently attempting to obtain payday loans while posing as M.H.G. (DE:308:226). Officers seized a fictitious Florida driver's license with Muho's picture in the name of M.H.G. and a fraudulent pay stub purporting to be from Balfour Investors, Inc., also in the name of M.H.G. (DE:308:227-28). Following his release from custody, Muho relocated to Ridgewood, New York, where he lived with his mother and continued his fraud scheme; on May 17, 2016, federal authorities arrested Muho and conducted searches of his mother's home and Muho's car (DE:309:11, 14). The searches yielded, among other things, two laptops that contained the personal identifying information of T.D.V. and M.H.G.; a passport in the name of M.H.G.; credit cards in the names of T.D.V., M.H.G., and M.G.; and a series of blank W-2 forms (DE:309:21-41).

B. Defense Case

Muho called attorney John Moscow, who did not remember meeting or corresponding with Muho (DE:314:59).

Muho then called FBI Special Agent Maurice Hattier, who investigated allegations that Muho made to the SEC in 2013 regarding purported misconduct at FAM (DE:314:61-65). Special Agent Hattier met with Muho twice, and Muho announced his intention to effectuate a hostile takeover of the funds that he managed

in light of the alleged misconduct (*id*.). Muho subsequently contacted Special Agent Hattier to provide additional information, but the agent "didn't find it very useful" and recalled that many of their conversations were "incoherent from [Muho's] side" (DE:314:67, 69). Muho was never retained as a confidential informant, nor was he ever authorized to violate the law (DE:314:71).

Muho finally testified in his own defense. He claimed, in essence, that the documents that he executed in the wake of his departure from FAM were legally valid and that his actions during this timeframe were justified in light of Fletcher's illegal conduct (DE:314:114-15, 120-23, 126, 130, 132, 160-63). He purportedly created Leveraged Hawk to investigate the misconduct that occurred at FAM (DE:314:136, 138, 152). He expressed the view that he made no false statements in his loan applications and that any misrepresentations were not material to the lenders' decisions to approve the loans (DE:316:53-61, 83). He acknowledged that he posed as T.D.V., M.H.G., and C.F. but testified that he thought they were fronts that Fletcher invented and did not actually exist (DE:316:65-67). He admitted that he had access to the personal identifying information of former FAM personnel (DE:316:123-24). He believed his use of money from the funds to pay for gambling, his Miami condominium, and a Maserati "was in the benefit of the companies" (DE:317:13-14, 18).

3. Standards of Review

This Court ordinarily reviews whether a defendant validly waived the right to counsel as a mixed question of law and fact. *See United States v. Garey*, 540 F.3d 1253, 1268 (11th Cir. 2008) (*en banc*). When an issue is raised for the first time on appeal, as is the case with Muho's claim that the district court should have terminated his self-representation, it is reviewed for plain error, requiring the defendant to demonstrate that an error occurred, that error was plain, that plain error affected his substantial rights, and that error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Rodriguez*, 398 F.3d 1291, 1297 (11th Cir. 2005).

This Court reviews the denial of a Federal Rule of Criminal Procedure 17(b) motion for a trial subpoena for abuse of discretion. *United States v. Rinchack*, 820 F.2d 1557, 1566 (11th Cir. 1987).

This Court reviews the district court's application of the sentencing guidelines *de novo* and findings of fact at sentencing for clear error. *United States v. Lopez-Garcia*, 565 F.3d 1306, 1323 (11th Cir. 2009).

A claim that a sentence is unreasonable is reviewed under "a deferential abuse of discretion standard." *United States v. Early*, 686 F.3d 1219, 1221 (11th Cir. 2012) (citing *Gall v. United States*, 552 U.S. 38, 46 (2007)).

Summary of the Argument

Muho cannot establish that the district court erred when it declined to terminate his self-representation *sua sponte*. Muho indicated his desire to exercise his right to self-representation numerous times, and none of the discrete instances of confusion, annoyance, or legal ineptitude that he now cites compelled the district court to preclude him from availing himself of this constitutional right.

The district court acted well within its discretion in declining to waive costs for issuing trial subpoenas for two potential defense witnesses who allegedly would have testified that Muho lacked fraudulent intent. Muho's proffer described the witnesses' proposed testimony in overly vague and abstract terms, and the testimony would have been cumulative in light of the extensive testimony that Muho presented in support of this defense. In any event, Muho cannot show that any putative error had a substantial impact on the outcome of the case given the overwhelming evidence against him.

The district court also correctly enhanced Muho's sentence for deriving over $1 million from a financial institution. Muho fraudulently induced HSBC-Monaco to wire over $2 million that was on deposit with the bank and therefore under the bank's custody and control.

Finally, Muho cannot show that the district court, which varied downward from the applicable advisory guidelines range, imposed a substantively unreasonable

sentence. The district court adequately explained its chosen sentence, and, although Muho would have preferred the district court to have varied even lower, the district court's determination that the statutory sentencing factors supported its chosen sentence fell well within its broad discretion given the magnitude of Muho's misconduct.

Argument

I. The District Court Properly Failed To Terminate Muho's Self-Representation *Sua Sponte*.

Muho maintains in vain that the district court was obliged to override his express wishes and preclude him from exercising his constitutional right to self-representation *sua sponte* (Br. at 38).

A. Background

On September 7, 2016, the government requested that the district court order Muho to undergo a psychological and psychiatric evaluation to assess his competency to stand trial (DE:43). The government principally cited Muho's difficulty communicating with his previous and then-current defense counsel, both of whom had moved to withdraw, as well as a district judge's characterization of a *pro se* civil complaint that Muho had filed as "incoherent and incomprehensible" (*id.*). Muho's counsel, whose motion to withdraw remained pending, did not oppose this request (DE:47). The district court granted the government's motion (DE:48). At a status conference held on January 9, 2017, the district court accepted

the findings of the forensic report and determined that Muho was competent to stand trial (DE:365:5).[2] The district court also granted Muho's motion for substitution of counsel, permitting attorney David Harris to represent him (DE:365:3).

On January 31, 2017, Muho filed a motion for leave to appear *pro se* (DE:90). The district court subsequently held a *Faretta* inquiry on February 3, 2017.[3] Muho explained that he wanted to represent himself because he believed that he "would be in a better position than Mr. Harris to present [his] defense" (DE:178:10). Muho reminded the district court that he earned a law degree at the University of California Berkeley (DE:178:17). He also indicated his understanding of the maximum penalties he faced; the consequences of being found guilty of the charged offenses; the elements that the government would need to prove at trial; his constitutional right to counsel and self-representation; the disadvantages of self-representation, including the lack of an objective opinion on the wisdom of accepting a plea offer; the requirement that he follow the rules that apply to counsel; the applicability of the Sentencing Reform Act in the event of a conviction; and his waiver of any ineffective assistance of counsel claim on appeal (DE:178:16, 19-25).

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[2] Both the government and Muho indicated that they did not contest Muho's competency in light of the report's findings (DE:365:4-5).

[3] *Faretta v. California*, 422 U.S. 806 (1975).

Muho told the district court that his physical and mental health were "good" and that he last took medication - a sleep aid - about three months earlier (DE:178:25-26). He represented that he had never been diagnosed with or treated for a mental illness (DE:178:26). He said no one had forced or threatened him into deciding to proceed *pro se* and that he had made the decision of his own free will (DE:178:26-27). He expressed the desire to represent himself even though he had not yet reviewed all of the discovery that the government had produced to his counsel (DE:178:32). Attorney Harris indicated that he knew of no physical or mental health issues that would counsel against allowing self-representation, that he had "no concerns," and that he "wholeheartedly support[ed] [Muho's] desire to represent himself" (DE:178:35, 38). Having received confirmation from Muho four times that he wished to represent himself (DE:178:6, 10, 32, 38), the district court concluded that Muho "voluntarily, knowingly, and intelligently waived the right to be represented by an attorney, with a full understanding of that right," found Muho "competent to represent himself," and granted Muho *pro se* status (DE:178:38-39). The district court permitted attorney Harris to serve as standby counsel "to assist the Defense in this case outside the presence of the jury" (DE:178:45-46).

On February 6, 2017, the district court held an evidentiary hearing on a motion to suppress evidence seized during Muho's court-ordered eviction from his Miami condominium (DE:92), during which the following colloquy ensued:

THE COURT: Is there anything that can be presented to the Court, Mr. Muho? Do you -- do you have access to the premises by way of a key? Is there a written lease? Were any of these orders entered by the circuit court judges set aside? Any evidence, sir, to show that you had a legitimate expectation of privacy in the premises on February 16th, 2016?

THE DEFENDANT: Your Honor, a -- a court proceeding cannot -- cannot end my -- my -- my -- my -- my -- my right to live there.

And unless I'm -- I'm a party to that -- to that proceeding and there's been no proceeding to -- to challenge my -- my -- my right to live there. So for -- for me to be -- and I ask to find a proceeding that did not affect my right to live there before -- so whether that's been set aside, I don't understand. I don't understand the relevancy. I don't understand what documents you're requesting, to be honest. I'm sorry.

(DE:226:61).[4] The district court then restated its question and received a responsive answer:

THE COURT: Is there someone that is going to come forward to provide any evidence that you were permitted to live on the premises?

THE DEFENDANT: Is there someone that's going to come forward to provide that I was not? I mean, why -- yes, I can do.

I can -- I can -- I can provide -- I can provide -- I can provide proof necessary that shows that I still have a -- a legitimate right to live there after February 16th.

THE COURT: All right.

(DE:226:61-62).

[4] The district court ultimately denied this motion (DE:226:117). That ruling is not at issue in this appeal.

> The following colloquy later ensued during the government's cross-examination of Muho:
>
> Q. All right. And do you see here "Tax Identification Number"?
>
> A. That's correct.
>
> Q. That's not your real Social, is it?
>
> A. What does it say? What does it say?
>
> Q. Is that your real Social?
>
> A. What does it say? What did you ask me to that? What did you ask? And what is your exact question? Because you've locked me up for nine months because of this bullshit.
>
> THE COURT: Mr. Muho --
>
> THE DEFENDANT: I'm sorry. I apologize, Your Honor.
>
> THE COURT: -- I'm going ask to that you take a breath because the record may not reflect it, but it's very apparent from the Court that you're becoming very aggressive and your frustration is affecting the dignity of these proceedings.
>
> Let's continue.

(DE:226:85-86).

At a status conference on May 19, 2017, following the grand jury's return of the second superseding indictment, the district court again advised Muho of his right to counsel (DE:369:4-5). Muho initially wavered but ultimately chose to continue proceeding *pro se*:

THE DEFENDANT: Your Honor, I -- I -- I would like to be represented by counsel; however, in the past, counsel that I retained, Michael Rosen, and was appointed to me under the CJA act, Sylvia Vazquez, did not so much -- or as -- as -- as the facts are, did not so much as represent me as more as -- in all delayed my ability to come to trial.

So with that said, I would like to be appointed by counsel. Now, I've retained -- my family retained Mr. Harris; however, my family did not pay Mr. Harris enough of a fee for Mr. Harris to represent me at trial and I would not want to be represented by someone who is not willing to -- to do the job, so to speak.

THE COURT: . . . So if you would like Mr. Harris to represent you as your retained counsel, then I think the next question would be for the Court to ask Mr. Harris as to whether he has the willingness at this time to continue to represent you. So is that what you'd like, Mr. Muho?

THE DEFENDANT: I would not. I would not. I would not. I think in all -- I would -- I would prefer to represent myself, with one exception perhaps. Previously, Your Honor, it was ruled that Mr. Harris could not assist me during the trial. And that is fine to some extent, but one thing that I would perhaps feel Mr. Harris could help me or assist me with would be cross-examination of witnesses, given that I lack the experience in cross-examination of witnesses or even direct examination. Although it's mainly for the cross-examination purposes that I think I would find Mr. Harris's input useful.

THE COURT: Mr. Muho, there is no concept of a hybrid representation. Either you are represented by Mr. Harris or you are representing yourself. And because of the time period that was involved, the Court did require that Mr. Harris remain as standby counsel. So if you have some concerns of your ability to adequately defend the 40 counts that are before the Court, I ask that at this time you make a decision as to whether you'd like Mr. Harris to represent you.

THE DEFENDANT: I'll move forward with representing myself, I think. I've -- I've -- I've made that decision.

(DE:369:5-7).

The district court then engaged in a second *Faretta* inquiry. Muho indicated his understanding of the nature of the charges; the maximum penalties he faced; the consequences of being found guilty of the charged offenses; his constitutional right to counsel and self-representation; the disadvantages of self-representation, including the lack of an objective opinion on the wisdom of accepting a plea offer; the requirement that he follow the rules that apply to counsel; the applicability of the Sentencing Reform Act in the event of a conviction; and his waiver of any ineffective assistance of counsel claim on appeal (DE:369:7-15). At the conclusion of the colloquy, Muho reiterated his desire to proceed *pro se*:

THE COURT: Do you still want to represent yourself, Mr. Muho?

THE DEFENDANT: I do, Your Honor.

(DE:369:15).

The district court again found that Muho "voluntarily, knowingly, and intelligently waived his right to be represented by an attorney, with a full understanding of that right," granted him *pro se* status, and decided to "keep[] Mr. Harris as standby counsel throughout the course of this proceeding" (DE:369:15-16).

On June 26, 2017, the district court confirmed once more that Muho wished to represent himself before jury selection:

> THE COURT: And Mr. Muho, I want to ensure that at this point in time you still wish to exercise your constitutional right to represent yourself; is that correct, sir?
>
> THE DEFENDANT: Your Honor, I do.

(DE:308:10-11).

B. Argument

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." U.S. Const. amend. VI. But the Sixth Amendment also guarantees a criminal defendant the constitutional "right to proceed without counsel when he voluntarily and intelligently elects to do so." *Faretta v. California*, 422 U.S. 806, 807 (1975). Specifically, the Constitution does not allow the government "[t]o thrust counsel upon the accused, against his considered wish," *id*. at 820, in contravention of the "nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so," *id*. at 817.

"Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835. And while "[i]t is undeniable that in most

criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," "[p]ersonal liberties are not rooted in the law of averages." *Id.* at 834. While establishing the principal of a defendant's right to self-representation, the Supreme Court also stated that "[t]he right of self-representation is not a license to abuse the dignity of the courtroom," and that a trial judge may terminate self-representation of a defendant who "deliberately engages in serious and obstructionist misconduct." *Id.* at 834 n.46.

Here, Muho does not dispute the knowing, voluntary, and intelligent nature of his decision to proceed *pro se* in the first instance.[5] He instead faults the district court for failing to terminate his *pro se* status *sua sponte* on the basis of several discrete instances of annoyance, confusion, or lack of legal acumen on his part (Br. at 38-40). These arguments fall far short.

Muho first points to the hearing on his motion to suppress, at which he became frustrated and directed derogatory language at the prosecutor during the government's cross-examination (Br. at 40) (citing DE:226:85). Muho's conduct, though improper and undignified, did not compel the district court to override his

[5] Such challenges would inevitably fail in light of the district court's thorough and extensive *Faretta* inquiries. *See Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986) (setting forth eight-factor test for analyzing whether defendant's choice to represent himself was knowingly, voluntarily, and intelligently made).

"basic right to defend himself." *Faretta*, 422 U.S. at 817. The Supreme Court significantly cast a district court's ability to terminate a vexatious defendant's right to self-representation in purely discretionary terms, instructing that trial courts "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id*. at 834 n.46; *accord United States v. Brugnara*, 856 F.3d 1198, 1213 (9th Cir. 2017) ("*Faretta* means exactly what it says: a trial court is permitted, but not required, to terminate an incorrigible *pro se* defendant's self-representation."). Muho cannot show that the district court reversibly erred by declining to force him to abandon his right to proceed *pro se* on the basis of this single isolated outburst—particularly one that occurred while he was a testifying witness rather than functioning as his own advocate.

Muho also relies in vain on his momentary uncertainty regarding whether he wanted to be represented by counsel at the May 19, 2017 status conference (Br. at 40). After the district court asked if it should inquire into attorney Harris's willingness to represent him, Muho clarified that he wanted hybrid representation; on learning that such an arrangement would not be viable, Muho decided to continue representing himself (DE:369:5-7). Muho unequivocally reaffirmed this desire after the district court's exhaustive second *Faretta* inquiry (DE:369:15), and yet again at the start of trial over a month later (DE:308:10-11). The district court had no reason to question Muho's desire to represent himself simply because Muho

sought hybrid representation, much less any reason to revoke his right to self-representation *sua sponte*. *See United States v. Garey*, 540 F.3d 1253, 1264 (11th Cir. 2008) (*en banc*) ("[I]t is not uncommon for defendants to demand what they cannot have.").

Muho cites his failure to comprehend the district court's question at the suppression hearing about what evidence he could present in support of the notion that he had a legitimate expectation of privacy or that any of the state court eviction orders had been set aside (Br. at 40) (citing DE:226:61). But he responded cogently when the district court asked a simplified version of the same question immediately afterwards (DE:226:61-62). Read in context, the record shows that Muho's initial confusion likely stemmed from his lack of familiarity with the legal terms of art that the district court used.[6]

Similarly, Muho's reliance on his "difficulties getting documents admitted into evidence," "subject[ion] to numerous objections being sustained," and lack of facility with the Federal Rules of Criminal Procedure at trial (Br. at 40), fares no better. Nearly every criminal defendant who opts to represent himself at trial encounters such practical hurdles. If *Faretta* were somehow read to require that every *pro se* defendant be letter-perfect on the law and the rules of procedure, it

[6] Although he graduated from law school, Muho was not licensed to practice law (DE:316:114).

would be the rare defendant indeed who could exercise his constitutional right to self-representation. Here, Muho ably "made opening statements, closing arguments, cross-examined witnesses, argued jury instructions, and testified on [his] own behalf." *United States v. Johnson*, 610 F.3d 1138, 1144 (9th Cir. 2010) (holding district court was not required to terminate self-representation *sua sponte* under such circumstances, where *pro se* defendants "did not make it impossible for the court to administer fair proceedings").[7]

Muho finally cites his sentencing counsel's regret that he had not known of Muho's purported Adderall addiction sooner (Br. at 40). At sentencing, Muho's counsel said that "[y]ou know, I read the trial transcripts. I met with Mr. Muho on numerous occasions. And unfortunately, I didn't learn of the Adderall until very late in this case -- the Adderall addiction. But I can't even, you know, suggest a sentence that's sufficient but not greater than necessary" (DE:355:61).[8] Counsel's comment has no bearing on the district court's decision not to terminate Muho's self-representation. Even if, as Muho claimed, an Adderall addiction fueled his fraud spree, no contemporaneous indication exists that his addiction extended to the

[7] Muho also successfully objected to government questioning in several instances (e.g., DE:304:39; DE:311:212).

[8] Muho's counsel, in fact, went on to recommend a sentence of 96 months' imprisonment (DE:255:63).

pretrial or trial proceedings in this case. Indeed, when asked under oath during his first *Faretta* inquiry, Muho told the district court that his mental health was "good," that he last took medication - which took the form of a sleep aid - about three months previously, and that he had never been diagnosed with or treated for a mental illness (DE:178:25-26). Also significantly, Attorney Harris, who had previously spent time with Muho and would have been well-positioned to observe any apparent mental health abnormalities, told the district court that he knew of no mental health issues that might preclude Muho's self-representation, that he had "no concerns," and that he "wholeheartedly support[ed] [Muho's] desire to represent himself" (DE:178:35, 38). *See United States v. Rodriguez*, 799 F.2d 649, 655 (11th Cir. 1986) (observing that "counsel's failure to raise [a] competency issue is also persuasive evidence that [the defendant's] mental competence was not in doubt"); *United States v. Dantes*, 750 F. App'x 800, 809 (11th Cir. 2018) (rejecting challenge to district court's decision to allow defendant to proceed *pro se* where, "at the time of the *Faretta* hearing, there were no red flags that suggested [the defendant] was mentally incompetent to represent himself"). Thus, absent the benefit of clairvoyance or 20/20 hindsight, the district court could not have been aware of any addiction from which Muho might have suffered during the pendency of his case.

At bottom, Muho had "the right to represent [himself] and go down in flames if [he] wished, a right the district court was required to respect." *Johnson*, 610 F.3d

at 1140; *see also Oscar Wilde*, *Lady Windermere's Fan*, act III (1892) ("In this world there are only two tragedies. One is not getting what one wants, and the other is getting it. The last is much the worst; the last is a real tragedy!"). Indeed, the Constitution affords that right to all defendants, and—unlike Muho—the lion's share of those who exercise that right lack any formal legal training. Muho's belated buyer's remorse presents no basis for finding that the district court abused its broad discretion in declining to terminate Muho's right to self-representation *sua sponte*.

II. The District Court Properly Declined To Waive Costs For Trial Subpoenas For Two Potential Witnesses.

Muho argues that the district court abused its discretion when it declined to waive the costs for trial subpoenas for two potential defense witnesses (Br. at 41-43). This claim is a non-starter.

A. Background

Muho filed a motion for leave to proceed in forma pauperis for purposes of waiving costs for trial subpoenas (DE:182, 192), which the district court granted (DE:193; DE:369:23-24). Muho then moved to waive the cost for issuance of trial subpoenas for eight witnesses (DE:202). Having concluded that Muho "articulate[d] no factual basis upon which the Court may find that any of the proposed witnesses are necessary in the defense of this matter," the district court ordered Muho to "file an *ex parte* application setting for the necessity of each

witness's presence for an adequate defense" (DE:206). Muho consequently renewed his request for the requested subpoenas (DE:211).[9] The district court granted Muho's motion to issue subpoenas as to six witnesses and denied it sub silentio as to two others: Dr. Eli Shalenberger and Justice Vaughn of the Delaware Supreme Court (DE:219). Muho made the following proffer as to these two witnesses:

> Defendant's third witness is Eli Shalenberger, Defendant's psychiatrist between 2012 and 2015. Defendant needs and expects Mr. Shalenberger to testify that Defendant's intentions were not to defraud his hedge funds but to save them from misuse and to comply with the law. This will negate that Defendant perpetrated a fraud scheme and that Defendant used proceeds of fraud to engage in monetary transactions. Defendant also expects Mr. Shalenberger to testify as to Defendant's state of mind from his conversations with the Defendant relating to all counts of the case. Absent Mr. Shalenberger's testimony, Defendant will not be able to prove or show his defense to the jury of the charged counts in this case.
>
> Defendant's fourth witness is Justice Vaughn of the Delaware Supreme Court. Defendant needs and expects Justice Vaughn to testify about the contents of an unrecorded telephone conference on a case arising from the dispute of control of Defendant's hedge funds that Defendant needs to show and prove the jury his intention not to defraud his hedge funds, engage in a fraud scheme, or engage in monetary transactions from criminal funds, and that will establish and support Defendant's defense regarding his intentions and motives for all charged counts of the case. Without Justice Vaughn, Defendant will not be able to show or prove to the jury that Defendant was the victim set up by actors of said conference in their attempt to wrest away

[9] Muho filed his request on the public docket in spite of having been instructed to do so *ex parte*.

> Defendant's control over his hedge funds and that Defendant lacked criminal intent for all the charged counts of this case.

(DE:211).

B. Argument

Under Rule 17(b), the district "court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense." Fed. R. Crim. P. 17(b). This Court will not disturb the exercise of a district court's discretion to deny a Rule 17(b) motion "unless exceptional circumstances compel it." *Taylor v. United States*, 329 F.2d 384, 386 (5th Cir. 1964).[10]

A "defendant making a Rule 17(b) request bears the burden of articulating specific facts that show the relevancy and necessity of the requested witness's testimony." *United States v. Rinchack*, 820 F.2d 1557, 1566 (11th Cir. 1987). If such facts are presented, the court may deny a Rule 17(b) motion if the movant's factual assertions are facially incredible, or if the government can show that the assertions are untrue or the request is frivolous. *United States v. Link*, 921 F.2d 1523, 1528 (11th Cir. 1991). In exercising its discretion, the court "may consider other factors pertaining to the prospective witnesses' testimony as well, including materiality, competency and the timeliness of the request." *Rinchack*, 820 F.2d at

[10] Pre-October 1, 1981 Fifth Circuit decisions are binding precedent in this Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

1566. Accordingly, a district court has discretion to refuse to subpoena "witnesses whose testimony would be cumulative only" or "whose testimony would not be relevant, since irrelevant testimony is per se not 'necessary to an adequate defense,' a prerequisite showing under Rule 17(b)." *United States v. Romano*, 482 F.2d 1183, 1195 (5th Cir. 1973).

As a threshold matter, the district court correctly declined to issue Rule 17(b) subpoenas as to both of these witnesses because Muho's proffer lacked sufficient specificity to put the district court on notice of the expected testimony and why the testimony was necessary to an adequate defense. Muho claimed that Dr. Shalenberger would testify as to "Defendant's intentions" and "Defendant's state of mind from his conversations with the Defendant relating to all counts of the case" (DE:211). But Muho provided no specifics as to the content or substance of these purported conversations, the circumstances under which they arose, or when they occurred in relation to the offense conduct. He did not claim that Dr. Shalenberger would diagnose him with a specific mental disease or defect, much less one that would create such a severe impairment that he was unable to form the requisite intent to defraud.

Muho in turn said Justice Vaughn would "testify about the contents of an unrecorded telephone conference on a case arising from the dispute of control of Defendant's hedge funds" (*id*.). Yet Muho included no particulars about the nature

of the Delaware case itself and how it related to his prosecution, much less the content, substance, or timing of the alleged telephone conference. Muho's paltry proffer left the district court guessing about the substance of these witnesses' testimony and fell far short of satisfying his burden to show its relevancy and necessity. *See United States v. Rigdon*, 459 F.2d 379, 380 (6th Cir. 1972) (affirming district court's refusal to issue Rule 17(b) subpoenas; defendant's proffer that witnesses would "'testify and verify the whereabouts of the defendant at the time this crime was allegedly committed'" amounted to "the broadest of generalities" and was "lacking in particular facts concerning the claimed alibi"); *United States v. Estrada*, 829 F.2d 1127 (6th Cir. 1987) (unpublished) (noting that Rule 17(b) contemplates that defendants must reveal their theory of defense to the district court to show their entitlement to issuance of subpoenas).

The district court's decision was also correct because the proposed testimony would have been cumulative and therefore not necessary to an adequate defense. *Romano*, 482 F.2d at 1195. Muho's proffer indicated that the witnesses for whom the district court issued subpoenas would testify as to his lack of fraudulent intent in relation to FAM: the same subject matter of the putative testimony of Dr. Shalenberger and Justice Vaughn (DE:211), and Muho ultimately made his purported good intentions the centerpiece of his defense case; Muho testified at length that he never intended to defraud FAM and merely sought to unearth the full

extent of the misdeeds that FAM's management had perpetrated (e.g., DE:314:114-15, 120-23, 126, 130, 132, 136, 138, 152, 160-63). Muho also called Special Agent Hattier, who corroborated Muho's story that he told federal authorities that he sought to save FAM from mismanagement and misconduct (DE:314:61-65). Muho therefore had ample opportunity to present his defense to the jury, which duly rejected it.

In addition, to the extent that the district court could have read Muho's proffer to indicate that Dr. Shalenberger intended to opine on Muho's *mens rea*, it also properly excluded his testimony on that basis. Federal Rule of Evidence 704 provides that, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Fed. R. Evid. 704(b). District courts also may exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice. Fed. R. Evid. 403.

This Court has emphasized that, in passing the Insanity Defense Reform Act of 1984, "Congress was concerned about the danger that expert psychiatric testimony regarding inherently malleable psychological concepts can be misused at trial to mislead or confuse the jury." *United States v. Cameron*, 907 F.2d 1051, 1062 (11th Cir. 1990). Consistent with that concern, courts routinely affirm the

exclusion of expert psychological testimony that bears directly on the defendant's *mens rea* to commit the charged offenses. *See United States v. Dupre*, 462 F.3d 131, 138 (2d Cir. 2006) (holding district court properly excluded proffered expert psychological testimony under Rule 403 in wire fraud case, where psychological evaluation report stated that the defendant's "intense, pervasive religious beliefs" precluded her from viewing her involvement in the scheme "in a realistic manner and significantly contribute to her ongoing conviction that she has been involved in a legitimate enterprise with benevolent intentions"); *United States v. Bennett*, 161 F.3d 171, 183 (3d Cir. 1998) (affirming exclusion of line of questioning under Rule 704(b) in bank and wire fraud case, where answering the questions "require[d] the [psychiatric] expert witness to state expressly whether [the defendant] possessed the requisite intent to commit the crimes charged in the indictment"). Here, allowing Dr. Shalenberger to opine on Muho's mental state to commit the charged offenses would have invaded the province of the jury and would have been more prejudicial than probative.

Finally, Muho's argument concerning his Rule 17(b) motion also fails because, even if this Court were to find that the district court abused its discretion, any such error was harmless. Whether framed as a discovery violation or an evidentiary error, the district court's ruling must stand if the alleged error was harmless. *United States v. Hands*, 184 F.3d 1322, 1329 (11th Cir. 1999)

(evidentiary rulings are reviewed for harmless error); *Jones v. White*, 992 F.2d 1548, 1553 (11th Cir. 1993) (discovery violations are reviewed for harmless error).

Here, any error was harmless in view of the overwhelming evidence that the government adduced against Muho. Through the live testimony of more than 20 witnesses, voluminous documentary evidence, and Muho's own self-defeating testimony, the government amply proved Muho's knowing participation in the charged three-year fraud spree beyond a reasonable doubt and overcame Muho's far-fetched defense that he selflessly acted in the best interests of FAM and its personnel. Thus, because the jury would not have reached a different verdict had the district court allowed Dr. Shalenberger and Justice Vaughn to testify, any alleged error was harmless.

III. The District Court Properly Sentenced Muho.

Muho finally takes issue with his sentence, arguing that the district court improperly applied a two-level enhancement for deriving over $1 million from a financial institution and imposed a sentence that was substantively unreasonable (Br. at 43-48). Both arguments lack merit.

A. Sentencing Facts

The Probation Office prepared a Presentence Investigation Report and Revised Presentence Investigation Report ("Revised PSI") to assist the district court at sentencing. Using the 2016 Guidelines Manual, the PSI assigned Muho a base

offense level of six, pursuant to USSG § 2B1.1(a)(2) (Revised PSI ¶ 101). The PSI applied the following enhancements:

- 18 levels because the intended loss amount was more than $3,500,000 but not more than $9,500,000, pursuant to USSG § 2B1.1(b)(1)(J);
- Two levels because the offense involved 10 or more victims, pursuant to § 2B1.1(b)(2)(A);
- Two levels because the offense involved a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding, pursuant to USSG § 2B1.1(b)(9)(B);
- Two levels because the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, pursuant to USSG § 2B1.1(b)(10)(C);
- Two levels because Muho derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, pursuant to USSG § 2B1.1(b)(16)(A);
- Two levels because the offense involved the possession or use of device-making equipment and the production or trafficking of an unauthorized access device or counterfeit access device, pursuant to USSG § 2B1.1(b)(11)(A), (B);
- One level because the offense of conviction is a violation of 18 U.S.C. § 1957, pursuant to USSG § 2S1.1(b)(2)(A);

- Two levels because Muho abused a position of public or private trust and used a special skill in a manner that significantly facilitated the commission or concealment of the offense, pursuant to USSG § 3B1.3; and

- Two levels for obstruction of justice, pursuant to USSG § 3C1.1

(Revised PSI ¶¶ 101-105). These calculations yielded a total offense level of 39 (Revised PSI ¶ 109). Based on a total offense level of 39 and criminal history category of I, Muho's imprisonment range was 262 to 327 months, with at least 24 months for Counts 20 to 37 to run consecutively (Revised PSI ¶ 148).

Court-appointed sentencing counsel filed objections to the PSI on Muho's behalf, challenging, among other things, the two-level enhancement for deriving more than $1,000,000 in gross receipts from a financial institution (DE:331, 332, 335). Muho also filed a sentencing memorandum and accompanying letters, in which he urged the district court to impose a downward variance on the basis of his purported attention deficit hyperactivity disorder ("ADHD") and Adderall addiction (DE:333). The government in turn filed a sentencing memorandum, in which it advocated for a total sentence of at least 316 months' imprisonment (DE:307). As to the gross receipts enhancement, the government explained that "Muho falsely and fraudulently induced HSBC-Monaco to wire him approximately $2,067,377.24 from Soundview Elite's account (GTX 2C-7, 9A-H, 43). Thereafter, Muho quickly

transferred these funds to various other bank accounts for his own use and benefit (GTX 43)" *(id.*).

At sentencing, the district court overruled Muho's objection to the gross receipts enhancement (DE:355:56-57). Muho then allocuted, expressing regret for his conduct (DE:355:60-61). Muho's counsel again urged the district court to consider his ADHD and addiction in fashioning its sentence (DE:355:61-62). He requested that the court impose a total sentence of 96 months' imprisonment and run the 24-month aggravated identification fraud counts concurrently (DE:355:62-63). The government recommended that the court sentence Muho at the low end of his guidelines range, deferring to the court on how many aggravated identification fraud counts it would run consecutively (DE:355:63). Responding to Muho's downward-variance request, the government highlighted the "very serious" nature of Muho's crimes, Muho's lack of tangible remorse prior to sentencing, and the fact that "his conduct qualified him under almost every single enhancement under [USSG §] 2B1.1" (DE:255:64-67).

The district court proceeded to impose sentence. It indicated that it had taken into account "conditions that [Muho] suffered from" as well as "the medication's effect," and proceeded to characterize Muho's misdeeds in withering terms:

> It's hard for a law-abiding individual to understand the depth of your deception unless you see it unfold over the course of 11 days of trial and pleadings and hearings that the Court has been a part of since

> you were indicted in May of 2016. The level of fraud and deceit in this case was massive. The conniving, the theft, the impersonation, the greed, and the contempt for the law, beginning with the massive fraud when you copied the entire company's files from Fletcher Asset Management in May of 2012. As the Court heard over and over at trial, there were real victims' lives that were shattered as a result of your actions. And unfortunately, Mr. Muho, you are not the first and I regret that you will not be the last person who uses his talent and intellect that he's been given for a deceitful and selfish purpose. You used your law degree and your investment experience and knowledge not for good, but for greed.

(DE:355:67-68).

In light of Muho's "personal history and characteristics," however, the district court concluded that "a slight variance is warranted" to arrive at "a sentence . . . not more than is necessary to serve the goals of sentencing, to promote respect for the law, serve as an adequate deterrent to [Muho] and to others that are contemplating this type of behavior, and to take into account the effect that this criminal conduct has had on the public and with regard to these victims" (DE:355:69-70).

Having considered "the parties' statements and arguments, the Presentence Report, which contains the advisory guidelines, and a full consideration of the statutory factors set forth in 18, United States Code, Section 3553(a)," the district court sentenced Muho to a total of 264 months' imprisonment, consisting of 240 months as to Counts 1 through 19 and 120 months as to each of Counts 38 through 40, all to be served concurrently with each other, and 24 months as to each of Counts

20 through 37, to be served concurrently with each other and consecutively to Counts 1 through 19 and 38 through 40, to be followed by five years of supervised release (DE:355:70-72). Muho preserved his previously stated objections (DE:355:73).

B. Argument

a. The District Court Properly Applied The Enhancement For Deriving Over $1 Million From A Financial Institution.

The guidelines provide for a two-level enhancement where "the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense." USSG § 2B1.1(b)(16)(A). "Gross receipts from the offense" include "all property . . . which is obtained directly or indirectly as a result of the offense." USSG § 2B1.1, cmt. n. 12(B).

Muho does not contest the facts underlying the district court's imposition of this enhancement: namely, that he fraudulently induced HSBC-Monaco to wire him $2,067,377.24 from Soundview Elite's account (GX2C-7, 9A-H, 43), after which he quickly transferred these funds to various other bank accounts for his own use and benefit (GX43). Muho instead claims that the government "failed to meet its burden of presenting reliable and specific evidence to support the enhancement" because "the record was not sufficiently developed as whether HSBC had 'unrestrained discretion to alienate the funds'" (Br. at 46).

In support of that argument, Muho principally relies on *United States v. Stinson*, in which the Third Circuit held that this enhancement applies only where a

financial institution is "the source" of the gross receipts. 734 F.3d 180, 186 (3d Cir. 2013). There, the defendant used two financial advisory firms ("financial institutions") to recruit investors for his fraudulent fund. The court remanded for resentencing because it was unclear "whether [the financial advisory firms] invested any money on behalf of their clients." *Id*. at 187. In so doing, the court distinguished cases in which a financial institution exercises "dominion and control over the funds and has unrestrained discretion to alienate the funds" from those in which funds merely "passed through the institution, as might occur during a simple wire transfer." *Id*. at 186. Addressing the latter scenario, the court concluded that "mere tangential effects on financial institutions will not support application of the enhancement." *Id*.

The Second Circuit refined this standard in *United States v. Huggins*, 844 F.3d 118 (2d Cir. 2016). There, the defendant induced investors to deposit money directly into bank accounts for his sham companies. *Id*. at 120. Although the court endorsed the view that the enhancement would not apply where a bank "acted as little more than a conduit of funds as opposed to being the victim who lost funds as a result of the fraud," *id*. at 122, it found the Third Circuit's "unrestrained discretion" standard to be "problematic" because "normally a financial institution exercises dominion and control over funds deposited in customer accounts." *Id*. at 123 n.6. The Second Circuit "focus[ed] on the loss or liability incurred by the financial

institution," *id.*, and hinged its analysis on whether the financial institution suffered "some type of loss or liability." *Id.* at 122-23. Applying those principles, the court held that the bank "did not incur a meaningful loss or liability when [the defendant] withdrew money from his companies' accounts because investors had deposited this money in his companies' accounts." *Id.* at 123. It reasoned that "[a]pplying the enhancement to all cases where a defendant merely withdraws money from his own bank account at a financial institution cuts too broadly and is inconsistent with the primary purpose of the enhancement, i.e., to penalize an individual for placing a financial institution at risk by borrowing or stealing funds to support criminal activity." *Id.* at 123-24.

This case is not one where the government relies on a defendant's mere "control of an account containing [his] own ill-gotten gains." *Huggins*, 844 F.3d at 123 n.6. Here, Muho indisputably stole over $2 million from a bank account over which he had no legal authority and over which HSBC-Monaco exercised dominion and control. As the Supreme Court explained in holding that a defendant "defraud[s] a financial institution" where it steals money over which a bank has property rights even absent a monetary loss to the bank, "[w]hen a customer deposits funds, the bank ordinarily becomes the owner of the funds and consequently has the right to use the funds as a source of loans that help the bank earn profits (though the customer retains the right, for example, to withdraw funds)." *Shaw v. United States*,

137 S. Ct. 462, 466 (2016). Even where "the contract between the customer and the bank provides that the customer retains ownership of the funds and the bank merely assumes possession . . . as bailee, the bank can assert the right to possess the deposited funds against all the world but for the bailor (or, say, the bailor's authorized agent)." *Id.* Muho's theft of HSBC-Monaco's funds in the course of his fraud spree exposed the bank to potential civil liability and financial loss, thus presenting precisely the type of risk to a financial institution in furtherance of criminal activity that the gross receipts enhancement was adopted to penalize. *Huggins*, 844 F.3d at 123-24 ("By stealing or fraudulently borrowing from a financial institution, the criminal is putting that institution's financial safety and soundness at risk.").

For these reasons, the district court's decision to enhance Muho's sentence for deriving more than $1 million from a financial institution should be affirmed.

b. The District Court Imposed A Substantively Reasonable Sentence.

Muho's challenge to the reasonableness of his below-guidelines sentence is also a non-starter.

This Court measures the substantive reasonableness of a sentence against the 18 U.S.C. § 3553(a) factors and "the totality of the circumstances." *Gall*, 552 U.S. at 51; *see also United States v. Irey*, 612 F.3d 1160, 1189-90 (11th Cir. 2010) (*en*

banc). A sentencing court abuses its "considerable discretion" only when it "(1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *United States v. Rosales-Bruno*, 789 F.3d 1249, 1256 (11th Cir. 2015) (quoting *Irey*, 612 F.3d at 1189).

This Court's task is to determine whether the district court pronounced "a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Irey*, 612 F.3d at 1190; *see also United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009). Thus, it is not enough to show that a lesser sentence would also be reasonable or may even be more reasonable to some judges; Muho must show that no reasonable judge could have imposed the sentence that the district court fashioned. *Id.*

Here, the district court conducted a careful and "individualized assessment based on the facts presented." *Gall*, 552 U.S. at 50. Specifically, in fashioning and explaining its sentence, the district court underscored the "massive" scope of Muho's fraud, the "greed" and "contempt for the law" that Muho's scheme put on full display, and the "victims' lives that were shattered" in the wake of Muho's misdeeds (DE:355:67-68).

Muho does not argue that the district court failed to afford consideration to relevant factors that were due significant weight, or gave significant weight to an

improper or irrelevant factor; he merely claims that his sentence "was greater than necessary to achieve the purposes of the guidelines, especially when compared to sentences imposed in similar cases" (Br. at 48). But his argument demonstrates, at most, that some judges have adopted different sentencing practices in arguably analogous cases. Specifically, Muho relies on 300- and 240-month sentences in a fraud case that a district court imposed and the Sixth Circuit affirmed in an unpublished opinion (Br. at 48) (citing *United States v. Coffman*, 574 F. App'x 541 (6th Cir. 2014)).[11] Even if, arguendo, the nature of the offense conduct in that case and the defendants' personal characteristics were comparable in all material respects with those in Muho's case, the practices of one or even a handful of district judges cannot establish an ironclad standard that binds all of their brethren. *Irey*, 612 F.3d at 1189 (noting that the abuse of discretion standard "allows a range of choice for the district court").

[11] In fact, if anything, the Sixth Circuit's decision in *Coffman* supports the reasonableness of the district court's sentence here. The *Coffman* panel rejected the argument that the defendant's "sentence was substantively unreasonable because it was disproportionate when compared to sentences imposed in similar cases," concluding that "18 U.S.C. § 3553(a)(6) concerns national disparities, and the Guidelines themselves represent the best indication of national sentencing practices." *Coffman*, 574 F. App'x at 560 (quotation marks omitted). That rationale applies with equal force to Muho's below-guidelines sentence.

Nor are sentences in the 20-year range for pervasive multi-million dollar fraud schemes unusual. *See, e.g.*, *United States v. Ubieta*, 630 F. App'x 964, 988 (11th Cir. 2015) (affirming a 240-month within-Guidelines sentence for defendant in $8 million mortgage fraud scheme). As panels of this Court have observed, the fact that some courts grant larger downward variances—or sentence within the Guidelines, or even vary upward—"merely demonstrate[s] the broad range of discretion a district court has in imposing a reasonable sentence." *United States v. Juarez-Martinez*, 456 F. App'x 836, 838 (11th Cir. 2012); *see also United States v. Ortiz*, 536 F. App'x 893, 898 (11th Cir. 2013) (same, in an appeal where the defendant argued that he was entitled to a larger downward variance than he received); *United States v. Gonzalez-Alvarado*, 525 F. App'x 906, 908 (11th Cir. 2013) (same). The district court here did not abuse that discretion and, if anything, was generous to Muho in varying downward.

Finally, Muho's sentence fell substantially below the 432-month statutory maximum, another factor that "favor[s] its reasonableness." *Rosales-Bruno*, 789 F.3d at 1256-57; (Revised PSI ¶ 100).

Simply put, Muho bears the burden of establishing that he is the subject of an unreasonable sentence, *United States v. Tome*, 611 F.3d 1371, 1378 (11th Cir. 2010), and he has fallen far short of overcoming that hurdle. This Court should affirm the district court's chosen sentence.

Conclusion

For the foregoing reasons, the district court's decisions and sentence should be affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,777 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Certificate of Service

I hereby certify that seven copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 11th day of July, 2019, and that, on the same day, the foregoing brief was filed using CM/ECF and served via CM/ECF on Jennifer Daley, Esq., counsel for appellant Gerti Muho.

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