

SUMMARY OF THE ARGUMENT

It is a serious matter to request that the results of a month-long trial and 4 years of work on behalf of government officials be entirely overturned, yet that is precisely what this brief intends to not only request, but establish the firm grounds to be so granted.

The convictions that were obtained in this case fall under a "miscarriage of justice" standard. It is inherently impossible for the accused to have been guilty of committing "investment fraud" regarding an investment product the prosecution created after the fact by tampering with the evidence in order to manufacture the means upon which to pursue charges. This can be proven from a pre-existing civil case to that of the instant case.

The accused were charged with crimes known by the prosecution to be false from the start. The Appellee deceitfully claims that the only investment program presented to investors was GX-1, "a prospectus type brochure", which explained the investment as a "prime bank program", but which instead is a "complete fiction" (AB-pgs.14-15, 26). The Brief gives no investor testimony to back the GX-1 claim. GX-1 was not established at trial to be the investment product promoted or sold to the investors, except for "Valley Boyz", a small

diversification in which the accused invested, but were determined by the government to be an "innocent victim". "Valley Boyz" is misrepresented as "Access" by the Appellee (AB-p.42). The trial judge, however, would not permit any evidence or witnesses if they were not "relevant to the charges in the indictment", meaning that if a witness, evidence, or even an investor wasn't there about a "prime bank" investment, it wasn't relevant and could not be presented. This prohibited a meaningful defense in that "prime bank" investments had not been the product marketed; instead the investments had been stocks, such as in the SSBT program and MLC. This permitted the prosecution to mislead the jury on this fundamental issue.

The Appellee further seeks to mislead the Court on the "ponzi scheme" allegation. The record did not establish nor did the jury find that "the defendants were co-conspirators in the charged ponzi scheme". AUSA Gezon clearly withdrew the "ponzi scheme" allegation in his rebuttal closing argument from the jury's consideration. Nowhere in the jury instructions does the court instruct the jury to find the fact of a "ponzi scheme". The government now attempts to assert a "confession" to a "ponzi scheme" by claiming, "Marcusse testified that she was aware that monthly profit checks were being paid by using earlier investors' principal" (AB-p.32). This ignores other material facts, including that Marcusse also testified that the FBI-

endorsed SSBT offshore stock program had represented to her that she had made many millions more in profits than due investors in principal. There is no "accounting" rule which requires an organization's investment accounts to be in the same bank account as its accounts payable.

The underlying bank records, none of which were permitted as defense evidence, would have readily proven many of these issues, but the trial judge prohibited this defense by ruling that "alleged investments" were "irrelevant" to the "ponzi scheme" allegation. This prevented the defense from having any direct witnesses to the investments and any actual bank records as well as virtually all business records from being heard or seen by the jury. Thus, the prosecution was free to merely claim the accused were "liars" to discredit their testimony, which was essentially the only defense left to them.

The accused were so handicapped in this trial that it could be likened to the owners of the Titanic being told ice was "irrelevant" to their belief that the ship was "unsinkable". The government misrepresents the investments, claiming that "an investor could leave the program at any time and receive their principal back, guaranteed", as supposedly noted in GX-38, a 9/00 newsletter. Nowhere in this newsletter is this representation made. All investor contracts, deposit receipts, and the stock investment flyer indicated that the funds were not

liquid. The government further claims that investor funds were not kept in a "safe certificate of deposit account" (AB-p.21). Defense counsel removed the pages discussing SIPC and other insurance on SSBT accounts before submitting the SSBT brochure as evidence. The SSBT Bahamas stock program continues to be misrepresented as a "prime bank" program (AB-p.14-15, 27; R.688, Ex. 1-4).

The government infers there was only one investment and funds were just moved repeatedly from one account to another (AB-p.16-17). The investments were instead diversified, which was clearly disclosed to investors, both orally and in signed contracts. At the same time investor funds were "frozen" by the license revocation at Suisse Security National Bank, there were also funds lodged in the insured trust account of Barrister Sidhu in England. The Appellee Brief claims this "lawyer's trust account" was "in the United States" as represented in a newsletter (GX-50), but nowhere in this newsletter does it state this was in the United States. The government claims that the accused had no one acting as a financial officer for client funds (AB-p.21). Marcusse had barristers, both in the Bahamas and in England, as well as a securities lawyer in the United States (GX-33). Three U.S. based lawyers were denied or prevented as defense witnesses. Marcusse could not present any records from Sidhu's accounts at trial, since all the records

had been seized in a questionable narcotics raid, and the trial judge denied a subpoena for these and other bank records. The existence of Barrister Sidhu was admitted by Agent Flink and established by defense evidence.

The government seeks to mislead the Court on the denial of 14 defense witnesses by claiming that the trial court properly denied the witnesses Marcusse requested because they were "not necessary or relevant", naming examples, such as John Ashcroft, Alan Greenspan, Robert Rubin, and William Richardson (AB-P.7, 82). It should be noted that the defense witness list that was submitted (R.392), from which the trial court denied so many witnesses (R.401), did not include any of these individuals. Vital witnesses, such as Richard Williams, a joint venture partner in MLC, were denied. Williams appeared anyway and proved vital to discrediting Plaster and serving to establish that investments, such as MLC, had been made. This testimony also directly led to AUSA Gezon withdrawing the "ponzi scheme" charge prior to jury deliberations.

The government misrepresents the record by claiming that after the "Access program collapsed in 2001, Marcusse left Michigan, moved to Missouri and began promoting another venture related to a proposed theme park in Branson, Missouri" (AB-p.83). The accused made the first purchase of preferred stock in MLC in 1999. Associate Tom Wilkinson, who was neither charged

nor permitted to testify, had his bank records confiscated by the FBI. This occurred shortly after his former office manager, Dan Hammond, prepared a sworn affidavit filed on the record in November, 2004, which stated that considerable funds were sent directly to MLC on behalf of investors. The record indicates that while very few of the investors had ever seen or heard of GX-1, every investor who was asked about the MLC "Branson Project" was not only aware of it as an investment, but many of them claimed this investment was the only reason why they had gotten involved with the accused (Exh. B-2 & F). Several even indicated that they had gone on to purchase stock directly from MLC themselves. There was no evidence that Marcusse solicited or obtained any funds from any investors past 2001 as confirmed by Agent Flink at trial.

The government makes the new claim on appeal that there was \$1 million in new investor funds taken in after May, 2001 (AB-p.19). This claim was not made at trial and cannot be supported by the underlying bank records. This appears to have been claimed to bolster the new storyline that the funds which went to Plaster from MLC were after the "Access program collapsed".

The government argues that it is "ludicrous" for the defense to claim that there was insufficient evidence to support the verdicts. There may have been plenty of "evidence", but it was not "legitimate" or "reliable" evidence, which "accurately"

represented the organization's affairs, due to the use of selectively screened bank accounts and flawed exhibits over the type of investments made. Agent Flink presented only "summary" exhibits, that referred to "bulk" exhibits, to claim that \$20.7 million was taken in from approximately 577 investors, and of that, \$4.8 million "spent" by the accused on themselves. These assertions, along with countless others, can not be supported by the underlying bank records, making Agent Flink's testimony and exhibits unworthy of any consideration in this matter. As the result, it is a fact that there was "insufficient evidence" to sustain guilty verdicts.

\$2 million in "motive" was manufactured by the IRS for the two alleged "lead defendants", Marcusse and Besser, by claiming that "pass through" funds going into investments were instead "income" to them. Over \$12 million in investments were not counted by IRS "investigators" in their summary exhibits, solely because the investments had not been that of a "prime bank" nature, instead being stocks and other legitimate investments, which did not fit the prosecutions "theory" of the case.

After the trial, the government quietly removed \$147,377 in "pass through" funds which went into the Crawford Ltd. investment from the Boss's unreported income per the PSR and government filings. This was discriminatory against the rest of the accused and establishes that the government knew their

application of tax law at trial was inaccurate and prejudicial.

IRS witnesses were hostile and evasive in their responses to cross examination. Contracts signed by all investors granting discretion over the choice of investments, diversification, and arbitration, were dismissed as "gobbledygook" by the prosecution before the jury.

The Appellee Brief claims that the accused "represented Access to be a legitimate IRA and 401k roll-over institution" (AB-p.17). There were only two recognized means for qualified funds, and they were Mid-Ohio Securities, an IRS-recognized custodian and a self-directed profit sharing plan attached to the investor's own business if applicable. These profit sharing plans were misrepresented by the prosecution as direct transfers to Access as the custodian rather than as transfers to a product choice by a self-directed plan. Marcusse was prejudiced on this issue by not being permitted to use business records showing the copies of these profit sharing plan documents as evidence.

Marcusse and Besser, who requested to proceed pro se from the beginning, were not permitted to do so. Instead, they were silenced behind court-appointed defense counsel put into place to report their case to the prosecution so they could prepare their witnesses. They were also improperly detained pretrial to impede a meaningful defense. Arrest and search warrants were falsified and otherwise invalid.

Once the prima facie evidence of at least one "legitimate" investment was proven at trial, court officials covertly switched the underlying mail fraud scheme from a "ponzi" to that of "failure to file and pay tax" scheme at a jury instruction conference the accused were not permitted to attend. This tactic was readily deployed in prosecution's closing arguments, enabled through an indictment full of duplicitous counts and improperly charged multiple conspiracies, after the defense had rested their case. Defense counsel in their closing arguments, colluded with the variance by claiming that "failure to file" had not been charged, but if it had been charged, their clients would have been "guilty". The judge "altered" the jury instructions to suit this new offense. The prosecution had changed the nature of the "tax" offense from that of a 26 U.S.C. §7202 allegation to that of 26 U.S.C. §7203. They concede after trial that the sales associates had "operated independently". However, after the jury returned guilty verdicts on the revised offense of a "failure to file" scheme, court officials reverted back to calling the offense a "ponzi scheme". The tax offense is being altered yet again on appeal to now that of a "bogus" or "abusive" tax shelter.

The accused were prejudiced by the "ponzi" scheme allegations, of which the words, "ponzi" or "ponzi scheme", were repeated at least 160 times at trial. The word "scheme" was used

at least 320 times at trial. The word, "tax" or a derivative of it, such as "taxes" or "taxable", was used over 920 times at trial revealing the government's true agenda in this case, by stacking unwarranted counts surrounding tax charges to prejudice the accused.

The government asserts that "notice" had been in 9/99 from West Michigan Community Bank "that Sanctuary Ministries appeared to be a bogus tax shelter", that this warning was "ignored", and that new accounts were "immediately opened" elsewhere (AB-pgs.34, 66, 68). This "notice" was manufactured by Agent Flink after the 2004 detention hearing once he learned that this case was doing to trial. Agent Flink tampered with the evidence and misrepresented when bank accounts were opened. This "notice" was made to Discovery Church. The main accounts for Sanctuary Ministries were opened at National City Bank in 1998. The government fails to disclose the material fact that Agent Flink contacted the accused over this matter in late 1999, discussed the issue, and cancelled a scheduled audit. The government further misrepresents Sanctuary Ministries as a "corporate" account. Most importantly, this "notice" is immaterial to the taxability of distributions to investors on a joint venture or private placement. They were already tax-exempt up to their "adjusted basis" under 26 U.S.C. §731 irrespective of a relationship to 26 U.S.C. §501 or §508.

The changing nature of the tax offense or conspiracy on appeal reflects the nature of the audience. Clearly, it was determined that the jury would be more sympathetic to the prosecution crying about the investors being defrauded rather than further attacking individuals who had already lost their funds. Now that the audience is the Sixth Circuit, such considerations are no longer expedient and the true nature of the prosecution is finally revealed.

Ironically, it had been Marcusse who first brought the case to the attention of the government by going to local law enforcement regarding the embezzlement of \$1.5 million of investor funds by Diane and Wesley Boss. Det. Crumb contacted the IRS, who in turn twisted the prosecution back against the original victims, using the unauthorized and unknown criminal acts of the Bosses in conspiracy counts to prejudice the jury against the remaining accused. Six days into trial, Diane Boss was threatened with a 25 year sentence, causing the Bosses to agree to a plea bargain, and with their absence, create further prejudice to the rest of the accused.

Marcusse was prejudiced by Bruton violations. The government baldly attests that "no such statement of a co-defendant casting blame on a co-defendant occurs on the record" (AB-p.80), which not only contradicts an earlier assertion regarding Buffin, who did not testify, but also ignores a

written "confession" of the Bosses, neither of whom testified, which was submitted as evidence blaming Marcusse. The media was also frequently used to prejudice the accused, as demonstrated by the court's competency exam order for Marcusse.

This was one of the largest trials that this U.S. District court has dealt with in recent years. An 83 count indictment infers guilt all by itself, but tax-based prosecutions in this lower court boast a near 100% conviction rate, with such statistics proving that an indictment really means "guilty as charged". The sentences in this case were grossly unreasonable. The government claims that this issue is "absurd", yet it is AUSA Schipper who is quoted in the Grand Rapids Press following sentencing, describing the punishments as "off the charts" and "nothing comes close". The government also claims "the court varied downward significantly for each defendant", which is truly "absurd" considering the PSR initially recommended 14,520 months for the accused, who were all that of a Category I criminal history. The government attests that the district court considered "any and all arguments raised at sentencing". The transcript evidences that the court considered none of Marcusse's arguments in violation of Rule 32 of Fed. Rules of Criminal Procedure. The record even proves that all of Marcusse's legal files were taken from her in order to prevent written objections to the PSR.

The government misrepresents the dates of operation as from "about 1998 to 2002" (AB-p.12). This appears to have been done to support the use of the far harsher November 1, 2001, Guidelines Manual. The last mail fraud count is dated 3/23/01, and Agent Flink admits at trial that the accused "stopped doing business at the end of 2001". AUSA Gezon admits during the jury instruction conference Marcusse was not permitted to attend, that the most recent money laundering count against her was misrepresented in the indictment as 11/02/01 when it would be correctly stated as 11/02/00.

The government even seeks to mislead the Court regarding the remarks of Marcusse at the sentencing hearing. They claim she engaged in a "rambling vitriolic diatribe, aimed at the victims", and that she had a "lack of respect for the victims" (AB-p.94-95). In reality, the transcript reveals that Marcusse objected to the "abuse of authority and conflict of interest" that permitted Plaster to keep investor funds he "stole from my investors" with the fabricated evidence of a \$43 million real estate contract "with no property description". Marcusse objected to the \$31 million from SSBT that was still being kept from her investors over four years later. She objected to the Forrester endorsement letter of SSBT as a "lulling letter designed to scam his victims, which included myself and the investors to which I have steadfastly remained responsible". All

of this was dismissed in conclusion as conspiracy theories that lacked respect for the court.

The improperly obtained convictions have not caused the unfair tactics to cease. Special Investigative Services (SIS) officials at FCI Tallahassee have been repeatedly used to confiscate legal papers and lawbooks and even destroy case law research in order to impede a meaningful appeal as indicated in prior filings in this Court. As soon as the Appellee Brief was delivered to Marcusse, her legal papers were again threatened and legal leave denied (Exh. N-2). Appellant counsel misrepresented the record of the trial court in his Brief by neglecting to mention that the prosecution withdrew the "ponzi scheme" charge in rebuttal closing arguments, instead claiming that Agent Flink's testimony was "damaging to the defense" by his testifying that the "project operated by defendants was, in his opinion, a Ponzi scheme". Permitting this to stand unchallenged on the record would have allowed the government to sustain improperly obtained convictions based on the law of the circuit that the "intent to defraud" in a "ponzi scheme" is "not debatable", rather than establishing that this accusation was so lacking in merit that the prosecution dared not even submit it to the jury.

Prosecutorial misconduct cannot be denied as a major factor in this case. "A three year study by the Center of Public

Integrity, released in June, 2003, found that, since 1970, prosecutorial misconduct was a major factor in the dismissal, reversal or sentence reduction in over 2,000 cases." ¹

Marcusse was prevented from cross-examination at critical parts of the trial. Vital evidence and witnesses were denied by court officials in every imaginable way to prevent a meaningful defense. The government attempts to paint the misleading picture that Marcusse was reluctant to cooperate with the investigation because she had taken all of this money and she went into "hiding" in early 2002 once the investigation went public. Marcusse attended the grand jury on May 22, 2002, and testified. She even went with MLC executives and partners to Congress, including the U.S. Attorney General's Office, on April 8-9, 2002. The Bosses had taken the original bank records when they left and gave them to the government. Court officials limited or denied access to them at trial. Marcusse was even prejudiced by claims that she didn't "produce" the records, with the prosecution acting as if she was "hiding" them out of a "guilty intent", which she could not do because the prosecution already had the records.

The loss of millions of investor funds and profits in an FBI endorsed bank that subsequently failed, which caused Marcusse herself to be a target while publicly being accused of having spent the lost funds on herself, would serve to make

anyone leery of trusting that the grand jury was not being misled when it is a well-known truism that a prosecutor can get a grand jury to "indict a ham sandwich" and even label it as "sushi". All that had to be done was to withhold vital evidence showing wire transfers had indeed been made to stock based investments as allowed by signed agreements from investors.

The right to present evidence and witnesses is a fundamental and basic element of due process rights. "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." United States ex. rel. Williams v. Twomey, 510 F. 2d 634, 640 (7th Cir., 1975).

The government's case was without merit and based upon misleading evidence and testimony. The accused were shackled by pretrial incarceration and court-appointed defense counsel acting as advocates for the government's tax-based prosecution. In the interests of justice, therefore, Janet Marcusse requests to be fully heard on the issues, and that the doctrine of Haines v. Kerner, 404 U.S. 519, be applied to her Brief.

Unfortunately, it appears that the arrogance of some court officials in this District Court has created a policy that any accused asserting their rights or challenging the status quo, are labeled as "anti-government", "goofy" or just plain "crazy".

At first glance, the amounts of misconduct reported herein may seem too amazing to believe, by individuals the public has been taught to trust, having been assured they are constrained by ethics and oaths to uphold the U.S. Constitution, however, this Brief is well supported and reveals in detail just how these tricks were performed.

At 50 years old, with no previous offenses, sentenced to 25 years on underlying tax and political charges, Janet Marcusse certainly appreciates your earnest and open-minded consideration to this matter, trusting her life and freedom in your good hands.

Thank you.

¹ Quote by Joseph F. Lawless, *Prosecutorial Misconduct*, Third Edition, p. xx, from the Lexis Nexis lawbook confiscated by George Williams, SIS, FCI Tallahassee, on 4/13/06.