

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 6:08-CR-176-ORL-28GJK

FRANK AMODEO,

Defendant.

MAY 19, 2009

**Transcript of Proceedings
HEARING ON SENTENCING
Day 4**

**Before The Honorable JOHN ANTOON II
United States District Judge**

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript
produced with computer-aided transcription.

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P R O C E E D I N G S

THE COURT: Good morning.

MR. GOLD: Good morning, Your Honor.

MR. SANDS: Good morning, Your Honor.

THE COURT: When I left you I indicated that we would use today to try to hear -- I would use today to try to hear from you more specifically on the disputed issues that are framed in the presentence report and to hear your arguments as to what sentence should be imposed pursuant to 3553. It's my understanding that you have an agreement that there is a diminished mental capacity, is that correct? In the presentence report? Does it say that?

MR. GOLD: We agree that it's in there. We don't think that he ought to be given a downward departure. Well, not even a downward -- well, yeah, I guess it is, he should not be given a downward departure for diminished capacity.

THE COURT: Right. But you're not countering the testimony that there is diminished capacity.

MR. GOLD: Well, we're not presenting psychiatric testimony. I mean clearly from the medical testimony he's bipolar, but beyond that, we don't agree that it diminished his capacity and I'll have argument on that point.

THE COURT: Okay. I want to be clear on that. Paragraph U, government and defense counsel have agreed that the defendant may be eligible for a downward

1 departure based on diminished capacity based on 5K2.13.

2 Now, it's further my understanding that there be
3 a -- let me back up. The way I understand this, you have
4 left that open for argument, right?

5 MR. GOLD: Yes, sir.

6 THE COURT: In other words, there is evidence
7 that there's diminished capacity that may be the basis for a
8 downward departure under the guidelines.

9 MR. GOLD: Might be, but it was open for
10 argument.

11 THE COURT: It says may be.

12 MR. GOLD: And especially after hearing what
13 we've heard the last three days, I think my argument may be
14 even stronger now than it was at the time of the PSR in terms
15 of why I don't think he's entitled to it.

16 THE COURT: Okay. The objections are yours, Mr.
17 Slaughter, or Mr. Sands, I don't know which one of you is
18 going to take the lead.

19 MR. GOLD: Your Honor, if I could interrupt for a
20 second. Did you want to get to the final evidentiary issues
21 first? Remember the government had one witness to call, they
22 had some videos.

23 THE COURT: Yes, if you have, if there's more
24 evidence, let's hear it.

25 MR. GOLD: There's a disagreement between us in

1 terms of the evidence to be presented today. When we left
2 the other day I was under the impression that they were going
3 to play an hour and 40 minutes of the videotape of April 18
4 relating to Edie Curry's testimony and the court said that we
5 would do it in open court.

6 THE COURT: Right.

7 MR. GOLD: Yesterday afternoon, I guess about
8 three o'clock or so, Mr. Sands came over and said there's a
9 total of four videotapes they now want to play and gave me
10 another stack of documents which at this point in the game, I
11 don't want to spend tons of time going through more videos,
12 especially now that we've cut Miss Curry loose. At least two
13 of the other videos relate to her where she's on them, she
14 can't explain them, and we agreed to let her loose because
15 the court was just going to see that one tape that related to
16 her testimony.

17 MR. SANDS: If I may be heard, Your Honor.

18 MR. GOLD: And so I mean I don't know where we're
19 going with all of this, but all of a sudden now we're having
20 additional tapes. They even want to play one of the
21 undercover tapes which we're opposed to because they want to
22 play a snippet. First of all, I don't think we should play
23 it at all. But if the court were to rule -- they want to
24 play a snippet. You're going to have to hear the whole hour
25 long conversation in camera because it's part of an ongoing

1 investigation. I had no idea that they were even thinking
2 about doing that until yesterday afternoon.

3 THE COURT: Let's do what we said we were going
4 to do the last time you were here and that is that I was
5 going to allow you to present -- in fact, I insisted that you
6 present in open court the one hour and 40 minutes of
7 videotape that you had suggested that I just receive in
8 evidence.

9 MR. SANDS: And we're still talking about that
10 same one hour and 40 minutes, Your Honor. I mean it's a
11 series of videotapes from a 24 hour period.

12 THE COURT: Are you intending to offer videotapes
13 that were procured undercover that are part of the
14 investigation that Mr. Gold just referred to?

15 MR. SANDS: Well, I certainly don't want to do
16 anything in open court that would jeopardize the government's
17 ongoing investigation. There is one very brief excerpt from
18 one undercover tape that we would like to bring to the
19 court's attention. We could even do it by way of maybe a
20 stipulated proffer with the government as to what was said.

21 THE COURT: The other day when you were here and
22 we were talking about an hour and 40 minutes, were you
23 talking about a series of videos or about one in particular?

24 MR. SANDS: No, I was talking about a series of
25 videos.

1 THE COURT: That wasn't your understanding, Mr.
2 Gold?

3 MR. GOLD: Not at all. Not at all. Because
4 there was one video in question that related to the 144
5 million dollars that Edie Curry testified about, and my
6 understanding was they were going to take that four hours and
7 cut it to an hour and 40 minutes. Now as I understand it
8 there is other tapes. And that was not part of my
9 understanding.

10 MR. SANDS: First of all, Your Honor, certainly
11 it's never been my intention to mislead anybody, Mr. Gold or
12 otherwise. The tapes we're talking about are tapes that are
13 referred to in the sentencing memorandum within that 24 hour
14 period, and the reason that they've become particularly
15 important is my understanding of what the government's
16 presenting as their case is different now that Edie Curry has
17 taken the stand. It had been my understanding going into
18 this that the government was not resting its case on the idea
19 that these other participants somehow had no knowledge of the
20 rapidly escalating payroll taxes, but instead that they just
21 believed that the matter was being handled by Mr. Amodeo.
22 Edie Curry testified completely differently, basically to a
23 lack of knowledge of the escalating payroll taxes. And she
24 specifically, on government examination of Miss Curry,
25 testified to the content of that Mirabilis finance chairman's

1 meeting, which is the first tape that we would show. The
2 other tapes which follow from it, and they include Miss
3 Curry, or at least the next tape does, includes Miss Curry,
4 really just follows from that tape and it's part of the hour
5 and 40 minutes that we had intended to show. Is that
6 correct, hour and 40 minutes total?

7 THE DEFENDANT: Max, yes.

8 MR. SANDS: Yes, max.

9 We think that there is a misapprehension that the
10 court may have as a result of the evidence that's been
11 presented so far that somehow the rest of this entire
12 organization was somehow completely in the dark about the
13 fact that payroll taxes were escalating, you know, from the
14 30 some odd million that were owed in the Sunshine companies
15 plan up to the 190 million at the end of all of this.
16 Somehow --

17 THE COURT: Well, maybe both sides misapprehend
18 the significance that the court will attach to that. I don't
19 know. I haven't seen it. Let's go ahead and start with the
20 tapes. You can raise objections when you see fit and ask to
21 go in camera when you think it's appropriate.

22 MR. GOLD: As to the first one, is this the one
23 that was not shown to her or dealt with the other day?

24 MR. SANDS: This is the finance, the Mirabilis
25 chairman's finance meeting, 4-18-06, attended by Mirabilis

1 CFO Glover, Mirabilis COO Simo, Mirabilis CEO Hailstones,
2 Mirabilis executive vice president Curry, Mirabilis chairman
3 Laurie Holtz, and Mirabilis auditors Khanorkar and Steven
4 Holtz.

5 MR. GOLD: My question is does that relate to the
6 144 million?

7 MR. SANDS: Yes, sir.

8 MR. GOLD: Then I have no objection to them
9 playing that tape.

10 THE COURT: Proceed.

11 MR. SANDS: Thank you, Your Honor.

12 (VIDEO PLAYING.)

13 MR. SANDS: Your Honor, just for your
14 edification, I'd like to have Mr. Amodeo identify the people
15 in clock wise fashion from the lower left-hand corner of the
16 screen who were present at the meeting.

17 THE COURT: What exhibit number is this?

18 MR. SANDS: We'll mark this one as the next in
19 order, Your Honor.

20 THE COURT: What would that be, Miss Darley?

21 THE DEPUTY CLERK: 59.

22 THE COURT: 59 is received in evidence for the
23 defendant. You may have Mr. Amodeo identify the people.

24 MR. SANDS: Mr. Amodeo, proceeding from the lower
25 left-hand side of the screen, can you identify the

1 participants in the meeting to the court?

2 THE DEFENDANT: The lower left-hand corner in the
3 white shirt is Paul Glover, chief financial officer of
4 Mirabilis. Next to him in the jacket and bluish tie is
5 Fernando Simo, he is the chief operating officer of
6 Mirabilis. At the head of the table is Frank Hailstones, he
7 is the chief executive officer of Mirabilis. Next to the
8 gentleman with the white sleeve showing out of the jacket is
9 Laurie Holtz, the chairman of Mirabilis. And next to Mr.
10 Holtz is his son, Steven Holtz, who is the special auditor,
11 independent auditor of Mirabilis.

12 THE COURT: Where is Edie Curry, if you know?

13 THE DEFENDANT: Edie Curry and Sharmila Khanorkar
14 have not yet entered the room. They'll do so in a minute or
15 so. Edie will sit between Laurie and will sit to the left of
16 Laurie Holtz.

17 MR. SLAUGHTER: Your Honor, that square above
18 that is a little picture on the wall which says this is being
19 videotaped and audiotape recorded.

20 THE COURT: And what is the date again?

21 THE DEFENDANT: April 18, 2006.

22 MR. SLAUGHTER: Before it gets to the really big
23 punch line we'll stop it and tell you what to look for.

24 MR. GOLD: Your Honor, I would suggest that we
25 just play the tape. They can make whatever arguments they do

1 later.

2 THE COURT: Please do that. Just play the tape.

3 (VIDEO PLAYING.)

4 THE DEFENDANT: Sharmila sat to the right of
5 Steven Holtz. Edie sat to the right of Laurie Holtz.

6 MR. GOLD: Your Honor, before we play any more
7 tapes, I'd like to know if this is a continuation or if this
8 is a different tape.

9 MR. SANDS: Your Honor, this is, the next tape is
10 a tape involving Laurie Holtz, Sharmila Khanorkar and Edie
11 Curry which takes place on the same day immediately, as I
12 understand it, subsequent to the previous meeting. It's
13 substantially shorter as I understand.

14 MR. GOLD: Your Honor, we are going to object.
15 This is a subsequent meeting. It was not discussed by Miss
16 Curry in testimony. The first I found out about them wanting
17 to do this was yesterday.

18 THE COURT: Do you know what's on it, Mr. Gold?

19 MR. GOLD: I have not reviewed it.

20 MR. SLAUGHTER: Excuse me?

21 MR. GOLD: I haven't reviewed the entire tape.

22 MR. SLAUGHTER: You have seen this tape.

23 MR. GOLD: I have seen snippets.

24 MR. SLAUGHTER: No. You have seen this tape.
25 I've shown it to you many times. It's a very short tape,

1 Your Honor.

2 THE COURT: Why don't you take a look at it, Mr.
3 Gold, and then see if you have any objection?

4 MR. GOLD: Your Honor, without watching it --

5 THE COURT: How long is it?

6 MR. SANDS: I believe it's only about nine
7 minutes, Your Honor.

8 THE COURT: If Mr. Slaughter is right and you
9 have seen it, and you may recognize it, it may not be a
10 problem.

11 MR. GOLD: Well, I guess what we can do is we can
12 play the nine minutes. If there's portions we don't
13 recognize, then we can move to strike those portions.

14 THE COURT: Let's do that.

15 MR. SANDS: Why don't we have Mr. Amodeo identify
16 the speakers again by pausing?

17 THE COURT: Last time he identified it and he
18 wasn't there. Was he present?

19 MR. SANDS: I'm sure that if we ask Mr. Amodeo he
20 could say he knows each of these individuals and can
21 recognize them.

22 THE COURT: He can identify the people if he
23 recognizes them.

24 MR. SANDS: Do you recognize these individuals,
25 Mr. Amodeo?

1 THE DEFENDANT: Yes.

2 MR. SANDS: Can you identify for the court who is
3 who?

4 THE DEFENDANT: Sharmila Khanorkar is on the
5 left-hand side of the table standing up, she's a CPA with
6 Rachlin, Cohen and Holtz. On the other side of the table
7 sitting down is Steven Holtz, he is the son of Laurie Holtz,
8 a CPA, he was an independent auditor for Mirabilis.

9 MR. GOLD: Your Honor, one of my objections is it
10 appears that what they're playing now really is not relevant.
11 If all they're attempting to do is dump on other people, I'm
12 not sure how it goes to any of the issues in this sentencing.
13 Whether other people knew about taxes or didn't know about
14 them, I'm just not sure --

15 THE COURT: Is Miss Curry on this tape?

16 MR. SLAUGHTER: Yes.

17 THE COURT: Where is she?

18 THE DEFENDANT: She enters in just a moment.

19 THE COURT: Well, to the extent Miss Curry has
20 already testified, it seems to me that they could, there's a
21 possibility that they could argue credibility. I don't know
22 what significance the defense attaches to these tapes and I'm
23 probably not going to know until they argue. And I'm
24 reluctant to limit their presentation of anything that they
25 consider mitigating, even if it is that other people in

1 responsible positions within this structure of many companies
2 who may have had privity with Mr. Amodeo are also culpable.

3 You may proceed. Whoever has got the controls.

4 (VIDEO PLAYING.)

5 MR. GOLD: Your Honor, I haven't previously seen
6 it, but I'll withdraw my objection.

7 MR. SLAUGHTER: Your Honor, I may have misspoke.
8 About five minutes after this is where Laurie Holtz comes in
9 and says I'm not going to go to the IRS because I'm too big
10 of a fish and that's, that's this one. How long is this one,
11 Frank?

12 THE DEFENDANT: 14 minutes.

13 MR. SLAUGHTER: Is it the same day?

14 THE DEFENDANT: Yes, same day.

15 MR. SLAUGHTER: And then the next video is Laurie
16 Holtz and Edie Curry telling a guy named Fisher that they're
17 in control of the company now and that they're making all the
18 decisions. And that's how long?

19 THE DEFENDANT: That's a little longer. That's
20 like 20 minutes.

21 MR. SLAUGHTER: I'll play the one with Laurie
22 Holtz saying I'm not going to go down to the IRS --

23 MR. GOLD: I'd like to know who else was in that?

24 MR. SLAUGHTER: Edie Curry, Sharmila and --
25 Frank, is this it?

1 THE DEFENDANT: That's it.

2 (DISCUSSION OFF THE RECORD.)

3 MR. SLAUGHTER: Let me switch these, Judge. This
4 goes to the control one.

5 (VIDEO PLAYING.)

6 THE COURT: Who's the fellow in the yellow shirt?

7 MR. SLAUGHTER: A guy named Brian Fisher and he
8 was worried about getting orders from different people, and
9 Edie Curry and Laurie Holtz are telling him they're in charge
10 now.

11 I have one final one, Your Honor, and this is the
12 same day as the board of directors meeting when Laurie Holtz
13 is told that the taxes are at 144 million and they're not
14 being paid. But Edie Curry is not in the room. But he's
15 telling his son that the next day where he has been
16 negotiating with the IRS, he says he's not going to go down
17 because -- to the meeting because he doesn't want to have any
18 red flags. Frank, how many minutes is this?

19 THE DEFENDANT: The afternoon one is -- the
20 evening one is 14 minutes.

21 MR. SLAUGHTER: And this is on the same day as
22 the board of directors and the last meeting where you saw
23 Sharmila Khanorkar and Edie Curry speaking about pulling the
24 accounting together for the company. My point is Edie is not
25 in this, it's just Laurie Holtz and his son talking, but it's

1 mostly illustrative of what's going on here.

2 MR. GOLD: Your Honor, again, I'm going to object
3 to this one.

4 THE COURT: Do you know what's on the tape?

5 MR. GOLD: I don't know that I've seen the entire
6 tape, but I'll take Mr. Slaughter's representations.

7 THE COURT: What's the objection?

8 MR. GOLD: The objection is to relevance. I mean
9 if the court was letting in the other ones because of Edie
10 Curry and the fact that it might go to her credibility, this
11 certainly doesn't. And if -- it sounds like now they're
12 trying to get to a point where I did it, but all these people
13 did it too, and they didn't stop me, which to me says he's
14 not accepting responsibility. But I don't see the relevance
15 of this tape with Mr. Holtz talking to his son.

16 MR. SLAUGHTER: I can tell you the relevance,
17 Your Honor. This man Holtz was told on 4-18 that 144 million
18 dollars was not being paid over to the IRS, and he made the
19 comment, geez, I'd hate to be negotiating, I know all about
20 the negotiation, I'd hate to be negotiating with the IRS when
21 it's on our watch. That was April 18. If you go to the end
22 of the year, not one thing changed. Another 40 million
23 dollars or 50, who knows, went through this company, not one
24 thing changed, when in this last tape you heard Laurie Holtz
25 and Edie Curry saying that they were chairman and vice

1 chairman of this company. And so here you have Laurie Holtz
2 on the same day as chairman of the board of this company
3 telling his son he's not going to go to the meeting with the
4 IRS because he doesn't want to raise any flags. At 144
5 million I think you'd be raising some flags. And then he
6 makes some comments to his son, and his son is talking about,
7 it's short enough that you'll hear it yourself, but he makes
8 the comment I'm happy if I can shake hands across the table.
9 Frank is happy if he can put his arm halfway around the world
10 and make money. Then he tells his son he's going to make a
11 blank blank bunch of money.

12 THE COURT: I've already heard about that.

13 MR. SLAUGHTER: It's a short tape.

14 THE COURT: I quite frankly don't understand how
15 this is helpful to the defendant, but I'll let you put it on
16 and I'll let you argue how it is.

17 How long is it?

18 MR. SLAUGHTER: I'm told 14 minutes.

19 THE DEFENDANT: Fourteen minutes.

20 MR. SANDS: This one may be 20 minutes.

21 THE COURT: Okay. We're taking a break now.

22 (BRIEF RECESS.)

23 MR. SLAUGHTER: Proceed, Your Honor?

24 THE COURT: Yes.

25 (VIDEO PLAYING.)

1 MR. SLAUGHTER: Your Honor, we'd like to move
2 these four tapes, CDs, into evidence.

3 THE DEPUTY CLERK: 59 through 62.

4 THE COURT: Well, I already admitted 59. Is that
5 one of the four?

6 MS. CREAM: Yes, it was the first one you played.

7 THE COURT: It is. So 60, 61, 62 and 63 are
8 received in evidence.

9 MR. SLAUGHTER: Thank you, Your Honor.

10 MR. GOLD: Your Honor, is the numbering correct,
11 because if there were four, it would start with 59 and go
12 through 62. I'm not sure that the numbering is correct.

13 MR. SLAUGHTER: There's five.

14 THE COURT: Mr. Gold, why don't you come up and
15 look at these and make sure that you agree? I think there
16 were five total.

17 (DISCUSSION OFF THE RECORD.)

18 MR. SLAUGHTER: This should be 59.

19 Then we played this one, the bullet points,
20 that's the next one, 60.

21 MR. SANDS: Then you played 4-19.

22 MR. SLAUGHTER: The control. Sorry.

23 (DISCUSSION OFF THE RECORD.)

24 MR. GOLD: Your Honor, there is only through 62
25 and not through 63. There were four.

1 THE COURT: Four.

2 MR. SANDS: Your Honor, we mentioned one other
3 tape which was the one that was the consensually monitored
4 tape. I talked with Mr. Gold about it during the break.
5 They would object to the playing the snippet of the tape
6 which is the only part we were interested in. The tape as a
7 whole is approximately two hours. We don't want to waste the
8 court's time with regard to playing the entire tape. I could
9 proffer at side-bar to the court, I don't want to disclose
10 any names, I don't want to do anything to compromise the
11 government's investigation, but we would like to at least
12 proffer to the court what the substance of that snippet is so
13 the court could make its own determination about whether the
14 court wants to listen to the snippet or not.

15 THE COURT: I think there are agents in the room,
16 agents who work on this case, there is a former member of an
17 executive from the probation office in the room, and I've got
18 my staff. Everybody else probably should leave the room for
19 just a moment. I'll send somebody out to let you know when
20 we're finished with the in camera portion of this hearing.

21 (PROCEEDINGS HELD IN CAMERA.)

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1 THE COURT: Now, does that conclude the evidence?

2 MR. GOLD: Well, the United States has one
3 witness as we told you.

4 THE COURT: How about from the defense?

5 MR. SANDS: Your Honor, we just have two
6 documents. I think we could proffer them into evidence. I
7 know that the government does not object to one and the other
8 is simply the transcript of the mock deposition which I can't
9 imagine the government has any objection to.

10 MR. GOLD: We don't have objection to those two
11 documents.

12 THE COURT: The deposition will be received as
13 exhibit 63.

14 MR. SANDS: Thank you, Your Honor. May I
15 approach?

16 THE COURT: Yes, sir.

17 MR. SANDS: The second exhibit which the
18 government also has agreed to is the folder that was actually
19 prepared for the chairman's meeting that you just listened to
20 on April 18, 2006 that contains the background material for
21 that meeting.

22 MR. GOLD: I have no objection. The only request
23 I would have is that eventually that book, we have never
24 gotten a copy of it. I don't object to it coming in, but if
25 we could substitute a copy for the original book.

1 MR. SANDS: I don't have a problem with that
2 obviously. And this would be the next in order.

3 THE COURT: That will be received as 64, and the
4 court grants the motion to substitute a copy or to make the
5 government a copy.

6 MR. GOLD: Do you want me to proceed with my
7 witness?

8 THE COURT: Does that conclude the evidence from
9 the defendant?

10 MR. SANDS: May I have just a moment, Your Honor?

11 MR. GOLD: Can we let the people outside know
12 they can come back in?

13 THE COURT: Yes.

14 MR. SANDS: Yes, Your Honor.

15 THE COURT: Mr. Gold, how long will your witness
16 take?

17 MR. GOLD: On direct, 10 to 12 minutes.

18 THE COURT: Okay.

19 MR. GOLD: United States will call Richard Smith.

20 Whereupon:

21 RICHARD SMITH,
22 called as a witness, having been first duly sworn according
23 to law, testified as follows:

24 MR. GOLD: If I could have one second with
25 counsel, Your Honor.

1 THE COURT: Yes.

2 Sir, what is your full name?

3 THE WITNESS: Richard Smith.

4 DIRECT EXAMINATION

5 BY MR. GOLD:

6 Q. By whom are you employed?

7 A. Internal Revenue Service, criminal investigation.

8 Q. In what capacity?

9 A. As a special agent.

10 Q. How long have you been so employed?

11 A. About seven and a half years.

12 Q. Are you one of the lead case agents in the case of
13 United States versus Frank L. Amodeo?

14 A. Yes.

15 Q. In investigating this case, did you come up with a
16 figure for the tax loss?

17 A. Yes.

18 Q. How much did you determine it to be?

19 A. Approximately 181 million, 181.8 million.

20 Q. And in coming to that figure, did you review
21 documents?

22 A. Yes.

23 Q. Did you interview witnesses?

24 A. Yes.

25 Q. Have you examined Mr. Amodeo's claim that the 8.9

1 million was a consulting fee?

2 A. Yes.

3 Q. Did your investigation show that the 8.9 million was a
4 consulting fee or was it something else?

5 A. It was for something else.

6 Q. And what was that?

7 A. It was for the Sunshine companies payroll tax
8 liabilities.

9 Q. Have you discovered any evidence that the 8.9 million
10 was for any purpose other than paying the Sunshine taxes?

11 A. No.

12 Q. In all of your meetings with Mr. Amodeo, did he tell
13 you about a secret agreement with Mr. Vanderburg?

14 A. No.

15 Q. Have you listened to the undercover tapes?

16 A. Why he.

17 Q. In any of them did Mr. Amodeo ever mention a secret
18 agreement with Mr. Vanderburg?

19 A. No.

20 Q. Now, have you been able to determine whether Mr.
21 Amodeo knew that it was a crime not to pay payroll taxes?

22 A. Yes.

23 Q. What was your determination?

24 A. Interview of a witness.

25 Q. I'm sorry.

1 A. Interviewed a witness.

2 Q. In particular, who?

3 A. Mr. Matthew Porter.

4 Q. And what did Mr. Porter tell you about Mr. Amodeo's
5 knowledge of the criminality of not paying the payroll taxes?

6 A. Mr. Porter was a research assistant to Mr. Amodeo who
7 had researched the civil and criminal statutes related to the
8 non-payment of payroll taxes.

9 MR. SANDS: I'll object to the hearsay nature of
10 the question.

11 THE COURT: Overruled.

12 THE WITNESS: Mr. Porter had been present during
13 multiple discussions with Mr. Amodeo, Mr. Craig Vanderburg
14 and Mr. Jim Baiers where Mr. Amodeo expressed concern about
15 keeping Mr. Vanderburg and Mr. Baiers out of jail for the
16 non-payment of payroll taxes. Mr. Porter had discussed with
17 Mr. Amodeo the criminal statutes regarding the non-payment of
18 payroll taxes and in the beginning of 2005 Mr. Porter was
19 writing a legal brief regarding the non-payment of payroll
20 taxes and was instructed by Mr. Amodeo to take out the
21 references to the criminal statutes.

22 Q. Now, I want to talk to you briefly about the
23 substantial assistance. Did you or any of the other folks
24 with the government team tell Mr. Amodeo what specifically
25 you were looking for?

1 A. On multiple occasions --

2 Q. Answer yes or no first.

3 A. Yes. Yes.

4 Q. And what did you tell him you were looking for?

5 A. We told Mr. Amodeo, Mr. Slaughter, and Mr. Sands that
6 in addition to whether or not an individual knew about the
7 non-payment of payroll taxes, that what did they do to cause
8 it. Not so much that they knew about it, but what did they
9 do to cause the payroll taxes not to be remitted.

10 Q. All right. Of the -- I'm sorry. Let me go back a
11 second. When you met with Mr. Amodeo on these numerous
12 occasions, did it seem clear to him what you were looking
13 for?

14 A. No.

15 Q. Why do you say that?

16 A. On multiple occasions, even after discussing what we
17 were looking for, not so much somebody's knowledge but
18 somebody's action, Mr. Amodeo would say something to the
19 effect that I get it, now I understand, I'll get it for you.
20 But if I can elaborate on a previous answer.

21 Q. Okay.

22 A. In addition to asking about somebody's actions, we
23 told Mr. Amodeo, Mr. Slaughter and Mr. Sands that we were
24 having, it was a challenge bridging the gap as it was
25 referred to as between Presidion and Mirabilis. Presidion

1 was the one running up the payroll tax liabilities. People
2 at Mirabilis knew about it, but did they know that payroll
3 tax funds were going to Mirabilis and funding its operations.
4 And again, we asked Mr. Amodeo that, he said something to the
5 effect, now I get it, I get what you're looking for, I'll get
6 it.

7 Q. Did he ever get you that evidence?

8 A. No.

9 Q. Of the undercover meetings that took place, how much
10 useful information did you get?

11 A. Minimal.

12 Q. What do you mean by that?

13 A. There were more incriminating statements made by or
14 against Mr. Amodeo than there were made by the party that Mr.
15 Amodeo was meeting with.

16 Q. And you heard, I believe, Mr. Amodeo discuss the plane
17 in his testimony that was under contract supposedly?

18 A. Yes.

19 Q. When did you first ask him for the plane?

20 A. October 2007.

21 Q. And what did he tell you?

22 A. That it had been sold.

23 Q. Did you attempt to verify that?

24 A. Yes.

25 Q. What did you learn?

1 A. That it had not been sold.

2 Q. Tell us how the plane actually came into the
3 government's possession?

4 A. We seized it.

5 Q. Were you ever shown a contract for sale?

6 A. Yes.

7 Q. And when was that contract dated?

8 A. It was dated April 28, 2008.

9 Q. When was that in relation to the seizure?

10 A. After the seizure.

11 Q. Now, may I approach the witness, Your Honor?

12 THE COURT: Yes.

13 Q. Let me show you what's been marked as government
14 exhibit number 5. Do you recognize that document?

15 A. Yes.

16 MR. GOLD: Your Honor, I've previously spoken
17 with Mr. Sands and I don't believe there is an objection to
18 the introduction of that document.

19 THE COURT: Okay. Five is received in evidence
20 for the government.

21 Q. And if it's -- what is it, first of all?

22 A. It's an e-mail to Edie Curry from Claire Holland.

23 Q. Dated when?

24 A. Thursday, June 8, 2006.

25 Q. And since it's very brief, if you could just read it.

1 A. Can I get some water first?

2 Q. Sure.

3 A. Hi, Edie. Not a problem at all. I got my point
4 across to him and saved your ears at the same time. I know
5 my attitude can be a ginormous spasm, but when the board
6 utility has been hamstrung I find that I am one of the few
7 objective sources of caution for Frank.

8 It is too much responsibility for one person, so
9 I appreciate your ideas and initiative. I would appreciate
10 it even more if Frank allowed you to function as a real
11 board.

12 Call me anytime. Best, Claire.

13 Q. And that was dated?

14 A. June 8, 2006.

15 MR. GOLD: Your Honor, I have no further
16 questions.

17 CROSS EXAMINATION

18 BY MR. SANDS:

19 Q. Agent Smith, you mentioned on direct examination the
20 computation of 181 million dollars, correct?

21 A. Yes.

22 Q. How did you go about arriving at that computation?
23 Where did you get the information?

24 A. From the 941s that had been prepared for Professional
25 Benefit Solutions.

1 Q. So you actually got the information that you're using
2 to come up with criminal computations in this case from the
3 941s that were actually prepared by either Mr. Amodeo or
4 people working with Mr. Amodeo, correct?

5 A. Can I clarify my previous answer?

6 THE COURT: You may answer the question and then
7 you may explain your answer.

8 THE WITNESS: What was the question?

9 Q. The question was you got your information with regard
10 to 181 million simply from looking at the tax returns that
11 had been filed by Mr. Amodeo and his associates, didn't you?

12 A. Yes.

13 Q. And, in fact, the tax returns that were filed
14 correctly showed the amount of tax liability that was due and
15 owing to the IRS, is that right?

16 A. Yes.

17 Q. Now, the 181 million, does that include the Sunshine
18 companies tax liabilities?

19 A. Yes.

20 Q. Does it include all of the Sunshine companies tax
21 liabilities?

22 A. No.

23 Q. What part of the Sunshine companies tax liabilities
24 does it include?

25 A. A third of the fourth quarter of 2004.

1 Q. And under what theory did you include only a third of
2 the fourth quarter of 2004?

3 A. Because Mr. Amodeo was receiving money during December
4 2004.

5 Q. That's right. In this case Mr. Amodeo was neither an
6 officer nor an employee nor an owner of the Sunshine
7 companies prior to December 31 of 2004, correct?

8 A. Correct.

9 Q. And the only basis on which you could impute any funds
10 regarding the Sunshine companies to Mr. Amodeo is on the
11 basis that he actually received 8.9 million dollars in funds
12 from December 10 through the end of December in a series of
13 payments made by Mr. Vanderburg, correct?

14 A. Can I elaborate on my answer?

15 Q. Well, answer first and then elaborate.

16 A. Yes. According to the documents that I reviewed, he
17 was responsible starting around that period of time to remit
18 the payroll taxes.

19 Q. And is the document that you're talking about the
20 power of attorneys that were sent from Mr. Vanderburg to Mr.
21 Amodeo?

22 A. That and I believe the consulting agreement between
23 Presidion and AQMI.

24 Q. Now, the power of attorney that was sent from Mr.
25 Vanderburg to Mr. Amodeo included with it, did it not, a

1 memorandum of instructions on how the monies were to be
2 applied?

3 A. Yes.

4 Q. And that memorandum of instructions actually included
5 a space in which Mr. Amodeo could sign in acknowledgment that
6 he had accepted and was complying with the instructions,
7 correct?

8 A. Yes.

9 Q. In all of your research, looking at all of the
10 documents in this case, have you ever found a signed copy of
11 that memorandum of instructions?

12 A. No.

13 Q. Now, you mentioned that you interviewed a former
14 employee who had discussed criminal statutes with respect to
15 the non-payment of payroll taxes with Mr. Amodeo, correct?

16 A. Yes.

17 Q. And what was his name again?

18 A. Matthew Porter.

19 Q. Now, you mentioned that Mr. Porter had actually
20 prepared some sort of a legal memorandum, is that right?

21 A. Yes.

22 Q. Have you actually reviewed that legal memorandum?

23 A. Yes.

24 Q. Who is the author of that legal memorandum on the
25 memorandum itself?

1 A. Larry Haber.

2 Q. And do you know or have you been given access to the
3 actual language that was supposedly redacted from the Haber
4 memorandum?

5 A. No.

6 Q. But you do know from your own research that there was
7 language with regard to criminal liability for certain acts
8 with regard to payroll taxes that was actually included in
9 the Wildermuth memorandum, correct?

10 A. No.

11 Q. Have you actually ever reviewed the 2006 memorandum by
12 Elena Wildermuth which talks about the various civil and
13 criminal penalties that can apply with regard to payroll
14 taxes?

15 A. Yes. I'm sorry, yes.

16 Q. And isn't it true that that memorandum includes a
17 section about criminal penalties, not just civil penalties,
18 but also criminal penalties with regard to the non-payment --
19 strike that -- with regard to the payroll taxes, correct?

20 A. Yes.

21 Q. And that language actually indicates that there are
22 criminal penalties that apply if you do not comply with an
23 IRS directive, written directive, to segregate payroll tax
24 funds so that the trust fund portion of the payroll tax funds
25 is kept in a segregated account, correct?

1 A. Correct.

2 Q. That memorandum says nothing about there being any
3 criminal liability for the simple non-payment of payroll
4 taxes, does it?

5 A. No.

6 Q. Do you know, as you sit here today, whether it's that
7 language that Mr. Porter was talking about being inserted
8 into a memo and taken out of an early version?

9 A. No.

10 Q. You don't know?

11 A. I never reviewed the language of that memo that was
12 taken out.

13 Q. Do you recall having discussed the matter of who was
14 actually responsible for taking out that language with Brian
15 Phillips and others in the defense team with regard to the
16 question of who actually excised the language in the final
17 draft of the agreement? I'm sorry. In the final draft of
18 the memo.

19 A. Which memo?

20 Q. I'm talking about the language that was excised from
21 the first Wildermuth memorandum where the reference to the
22 criminal penalties doesn't exist.

23 A. Yes.

24 Q. And you did talk to the defense about that issue,
25 correct?

1 A. I'm confused on the memo. The first Wildermuth memo
2 that I'm thinking was January 2006 where there was mention of
3 the criminal statutes, and in the February '06 one there was
4 too. And I remember discussing it with the defense, but it
5 was still in there.

6 Q. Don't you recall that there was actually another
7 Wildermuth memorandum that was prepared back in 2005 that, in
8 fact, was used as a substitute for and a better version of
9 what had previously been contained in the Haber memo which is
10 referred to by Mr. Porter?

11 A. In 2005?

12 Q. Yes.

13 A. No.

14 Q. You don't recall a document which is actually in
15 evidence, a 2005 memorandum written by Elena Wildermuth?

16 A. Can I see it?

17 Q. Certainly. May I approach, Your Honor?

18 THE COURT: Yes, sir.

19 Is it your position, Mr. Sands, that the
20 Wildermuth memos that do refer to criminal liability say that
21 failure to pay withholding taxes is not a crime? Or does it
22 simply say that failure to follow a written directive is a
23 crime?

24 MR. SANDS: What the Wildermuth memoranda do, and
25 again, because I want to be perfectly clear and I'm about to

1 show, I don't want to mislead anybody, I'm about to show the
2 agent the first one. The first Wildermuth memorandum which
3 was prepared in early 2005 provides a whole host of different
4 considerations from a civil perspective of what can happen
5 with regard to people who don't pay payroll taxes. What it's
6 focusing on is the hundred percent penalty for the
7 non-payment of payroll taxes.

8 THE COURT: But my question only deals with the
9 latter two and I want to know if it's your position that a
10 statement that says that it is criminal to disobey or
11 disregard a written directive is mutually exclusive, or is
12 contrary to the premise that it's a crime to fail to pay
13 withholding taxes.

14 MR. SANDS: My answer to that --

15 THE COURT: In other words, by saying the former,
16 are you negating the latter?

17 MR. SANDS: Let me answer that in this way:
18 Logically, no. Absolutely not, Your Honor. As a matter of
19 logic. But what I am saying is it is incredible that in
20 early 2006, in the wake of tens of millions of dollars of
21 unpaid payroll taxes, in the midst of IRS negotiations about
22 those unpaid payroll taxes, that one would not include in a
23 memorandum, which holistically covers the gamut of penalties
24 that can apply to the non-payment of payroll taxes, that one
25 would include a specific admonition or a specific warning

1 about not segregating payroll tax funds if commanded to do so
2 by the IRS and the criminal implications of failing to do it,
3 and not mention, in the context of this case, and in the
4 context of what was going on at Mirabilis, and at AEM more
5 specifically, it's wholly-owned subsidiary, that one would
6 not mention that, in addition to that criminal liability, and
7 under the same statute, 7202, one would face liability for
8 simply not paying the payroll taxes at all. You don't have
9 to ever get to the question of whether the IRS commands you
10 to segregate an account or not. The simple fact is, and
11 we'll get to this in a moment, Your Honor, that once the
12 decision is made not to pay payroll taxes, a crime has been
13 committed. And yet, in all the course of this memo writing,
14 in what we think is an absolutely clear background scenario
15 in which the unpaid taxes are actually being filed and
16 negotiated with the IRS, there's not a single mention of the
17 fact that this is actually not only subject to various civil
18 penalties, but also subject to criminal penalties.

19 THE COURT: Okay. You may proceed.

20 MR. SANDS: May I approach?

21 THE COURT: Yes, sir.

22 BY MR. SANDS:

23 Q. I'm showing you what's been already entered into
24 evidence as defendant's exhibit 17. Do you recognize that?

25 A. Yes.

1 Q. Now, is that, in fact, another Wildermuth memorandum,
2 but this one from 2005?

3 A. The fax is April 2005, but I don't see a date on the
4 memo.

5 Q. Does that refresh your recollection that, in fact,
6 there were two Wildermuth memoranda, one prepared in 2005, in
7 or around April, and another one that you recall prepared
8 later on in 2006?

9 A. Yes.

10 Q. And do you recall that the information with regard to
11 the potential criminal penalty for not segregating a trust
12 account after command by the IRS is contained in the 2006
13 memorandum but it's not contained in the 2005 memorandum?

14 A. It's contained in the 2006, but I don't see it in the
15 2005.

16 Q. And don't you recall, Agent, that the defense
17 presented you with an e-mail stream which indicated that it
18 was Mr. Baiers who actually excluded that information from
19 that version of the memo?

20 A. Yes.

21 Q. And isn't it possible that since -- strike that.

22 Isn't it also true that from your review of the
23 documents the Haber memo was considered to be insufficient
24 for the purposes of the parties and it ultimately was
25 replaced by the Wildermuth memo in 2005?

1 A. I'm sorry. Can you repeat the question?

2 Q. From your review of the documents, would you agree
3 that the Haber memo that had been prepared was considered
4 insufficient for the purposes desired by the parties and was
5 instead replaced, supplanted by the Wildermuth memo in early
6 2005?

7 A. No.

8 Q. You don't recall that?

9 A. I thought you were asking me did I think it was
10 sufficient enough for their purposes.

11 Q. No. What I'm asking you is do you recall if the
12 parties actually indicated a dissatisfaction with the Haber
13 memo and that was the genesis of the Wildermuth memo?

14 A. Yes. There were e-mails to that effect.

15 MR. SANDS: Nothing further.

16 MR. GOLD: Just a couple questions, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. GOLD:

19 Q. You were asked on direct examination about the filing
20 of the 941s.

21 A. Yes.

22 Q. Were they all timely filed?

23 A. No.

24 Q. Can you explain that?

25 A. The fourth quarter 941s for the Sunshine Staff

1 Leasing, Sunshine company three, were timely filed. The
2 second quarter 2005 for Professional Benefit Solutions was
3 timely filed. The third and fourth quarter 2005 941s for
4 Professional Benefit Solutions were not timely filed. The
5 941 for the first quarter 2006 was timely filed, but the
6 third, fourth -- I'm sorry. The second, third and fourth
7 941s for 2006 for PBS were not filed.

8 Q. Until when?

9 A. They were not filed.

10 Q. Now, the Sunshine taxes you were asked about relating
11 to Mr. Amodeo's ownership of the company, were there
12 additional funds after December 10 that were stolen payroll
13 tax monies?

14 A. Yes.

15 Q. Regardless of whether Mr. Amodeo owned the company or
16 not, were they, from your determination, consulting fees?

17 A. They were not consulting fees.

18 Q. And this memo or memos that we're talking about, how
19 many different versions are you aware of that may have been
20 produced over a period of time?

21 A. Multiple.

22 Q. More than just the two we're talking about?

23 A. Yes.

24 MR. GOLD: I have no further questions, Your
25 Honor.

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THE COURT: You may step down, sir.
We will be in recess until 1:15.
(LUNCH RECESS.)

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AFTERNOON SESSION

MR. SANDS: As I understood from your previous admonitions I guess last week, I don't plan on going through a recapitulation of all of the facts of the case. That was certainly one of the objectives of the sentencing memorandum. This is, we believe, an extremely complicated case, and it is a case in which the devil's really in the details in terms of what happened when and why that explains the actions of parties later on. There are some very complicated corporate transactions that take place during the course of this case. They're done for a reason. And they explain subsequent actions of parties. They explain subsequent comments of parties, for example, in the April 18 meeting that Your Honor was viewing today. That meeting has to be really understood within the context of specific agreements that have been drafted and are being acted upon, management agreements, sales agreements, etcetera. And I am going to talk a little bit about that today without going in depth into the evidence in the case, but I want to be able, obviously we thought that this was important and I want to be able to place some of those comments and some of those meetings in context for Your Honor.

THE COURT: Well, you have a difficult task, not only because of the complexity of the facts in this case, and they are about as complex as any I've seen on the criminal

1 side, but also because your argument tends to come close to
2 the line of arguing that Mr. Amodeo is not guilty.

3 MR. SANDS: I'm glad you mentioned that.

4 THE COURT: And that worries me a great deal.
5 And it's further complicated by this, that your argument
6 regarding his being under the influence of others is
7 contradicted in so many ways. And I don't, I just give you
8 that for guidance as to the remarks you're going to make.
9 But before you start with those kinds of things, I really
10 would like you to have the opportunity to address the
11 specific objections that were raised in response to the
12 presentence report. The scoring issues.

13 MR. SANDS: I plan on doing that. If I could
14 just, as a preparatory matter, those are two excellent points
15 and if I could just in a moment address those two issues,
16 which kind of sets the platter for the sentencing guidelines
17 issues as well.

18 How could Mr. Amodeo be guilty in our minds as a
19 part of our presentation of this case if we are at the same
20 time saying he was relying on all these accountants and
21 attorneys and they weren't providing him with adequate
22 information about criminal penalties that he could be facing,
23 etcetera? It is our position, Your Honor, that the crime
24 commenced as soon as individuals, including Mr. Amodeo,
25 started knowingly collecting payroll taxes and not paying

1 them over to the federal government. Cheek, the Supreme
2 Court case that I'm sure you're very familiar with, is very
3 clear on this. The willfulness required for a violation of
4 the criminal tax statutes is the intentional violation of a
5 known legal duty.

6 The defense has never taken the position that Mr.
7 Amodeo, who was a defrocked attorney and had been active in
8 the bankruptcy field and working in this area generally,
9 didn't know that you have an obligation to collect payroll
10 taxes and pay them over to the IRS. It wouldn't take an
11 attorney to know that, as I point out in the sentencing
12 memorandum.

13 THE COURT: I'm so glad you said that.

14 MR. SANDS: Yes. Absolutely. It's one of those
15 things that makes you scratch your head about the entire case
16 because I'm just not talking about Mr. Amodeo, I'm talking
17 about a whole lot of other people, too. It doesn't take an
18 attorney, it doesn't take an accountant, it doesn't take a
19 genius to understand that there is a law out there that says
20 you have to collect taxes and pay them over to the IRS. That
21 is why, Your Honor, in criminal tax cases, I'm sure you've
22 heard them, in criminal tax cases the argument doesn't end up
23 coalescing around whether people knew what the criminal
24 penalties were with regard to lying on their tax returns or
25 not filing returns. The question simply exists, sometimes in

1 tax protester cases, whether the people really knew they had
2 an obligation to file in the first place, or whether they
3 knew they had an obligation to file correctly. The question
4 isn't whether they knew they faced five years or three years
5 or a \$250,000 penalty, whether they faced any particular
6 criminal penalties with regard to their conduct.

7 The objective of Cheek, the object of Cheek in
8 terms of the willfulness is not the criminal statute. The
9 object of Cheek, what you have to have knowledge of and
10 intentionally violate that known legal duty is the underlying
11 requirement to file your tax returns and pay your taxes.

12 Once Mr. Amodeo, and the people around Mr.
13 Amodeo, came up with this idea of taking payroll taxes and
14 not paying them over to the IRS with the brilliant idea of
15 thereby investing the monies in other businesses and creating
16 this international conglomerate that would some day rule the
17 world and be bigger than Microsoft, that's all completely
18 irrelevant to the underlying crime. The underlying crime is
19 intentionally violating the known legal duty of collecting
20 the payroll taxes and paying them over. That is why Mr.
21 Amodeo is flat out guilty of conspiring to violate 7202.
22 Flat out. That is why, Your Honor, we did not contest that
23 Mr. -- and I'll start out with the guidelines here, talk
24 about what we didn't contest.

25 Mr. Amodeo did not contest that he was a leader

1 and organizer of this conspiracy because the one thing Mr.
2 Amodeo absolutely flat out acknowledges is that he was a
3 leader or organizer of a plan to intentionally violate a
4 known legal duty, which was to intentionally withhold those
5 payroll taxes, not pay them over to the IRS, and use them for
6 other purposes.

7 Now, in that respect, that is why, Your Honor,
8 not only did he not contest the leader organizer adjustment,
9 but as you probably have noticed, he hasn't contested being
10 liable for at least 170 of 180 million dollars in taxes.

11 Why, if, for example, we were arguing that Mr.
12 Amodeo really only was culpable of this crime at the very
13 last moment, when Mr. Slaughter comes in and explains to him,
14 you know, this is a crime that you're committing and it's got
15 these penalties, why aren't we simply trying to argue,
16 mealy-mouth our way out of this and argue to Your Honor that,
17 well, he's really only responsible for whatever taxes accrued
18 in that last quarter after Mr. Slaughter told him this in
19 late 2006. We are not doing that. We have never done that.

20 He is accepting responsibility for everything
21 with the exception of the taxes that were accrued in December
22 2006 by the Sunshine companies, the 8.9 million dollars,
23 taxes that he didn't have anything to do with in terms of
24 being a responsible person with regard to the Sunshine
25 companies. He wasn't an officer of the Sunshine companies.

1 He wasn't an owner of the Sunshine companies. He wasn't
2 involved in not paying over the payroll taxes of the Sunshine
3 companies. Subject to the argument that we can have about
4 what goes on between December 10 and December 31.

5 The fact was the Sunshine companies long before
6 Mr. Amodeo became involved with regard to this transfer of
7 ownership of the companies were not paying their payroll
8 taxes and were accruing substantial payroll tax penalties,
9 payroll tax deficiencies along with penalties and interest
10 that he's not being charged with. We agree with the
11 government on that. That is one issue we agree on is that
12 there's no way that Mr. Amodeo's responsible for those taxes
13 that Mr. Vanderburg and Mr. Baiers weren't paying prior to
14 going into this deal in December of 2004.

15 The only real question is, and here's my segue,
16 the only real question is with regard to the 180 versus the
17 170, is whether or not he should also be responsible for the
18 taxes they didn't pay in December of 2004. By everybody's
19 acknowledgment, before he had actually acquired the company,
20 but under the theory that Mr. Amodeo basically became a
21 custodian and a kind of quasi trustee for these funds when
22 the 8.9 million dollars was paid over to him by Mr.
23 Vanderburg.

24 Now, I guess that really gets us to one of the
25 first issues in the case with regard to the scoring of the

1 guidelines which would be the amount of the loss. Completely
2 irrelevant, Your Honor, with regard to --

3 THE COURT: It's not really a scoring level, it's
4 an amount issue that's relevant.

5 MR. SANDS: Yes, Your Honor. It does have some
6 collateral consequences with regard to forfeiture issues as
7 well.

8 THE COURT: Right. Except as it may impact the
9 defendant or his family and with regard to forfeiture and
10 subsequent judgment.

11 MR. SANDS: So I'd like to address that issue now
12 that we can resolve the amount of the loss and I'll work
13 through the same basic format in the guidelines that I have
14 in the sentencing memorandum.

15 THE COURT: Great.

16 MR. SANDS: What we know with regard to December
17 2004 is that they had worked out an agreement whereby
18 ultimately the companies would be transferred over to a
19 company under Mr. Amodeo's control, but not until December 31
20 of 2004. Now, what we also know is that between December 10
21 and December 31 Mr. Vanderburg causes a string of payments to
22 be made totaling the 8.9 million dollars in dribs and drabs,
23 between December 10 and December 31, that are paid over to
24 Wellington, the company that is going to acquire these
25 companies. The question is what is the purpose for the

1 payments.

2 Your Honor has heard evidence and there are
3 documents in the record to the effect that Mr. Vanderburg
4 provided Mr. Amodeo with a power of attorney with regard to
5 the Sunshine companies. Along with that he provided a
6 memorandum of instructions to Mr. Amodeo. In the memorandum
7 of instructions it appears to indicate that there is a
8 contemplation of future payments being made, as were made,
9 and that those future payments would ultimately be moved over
10 to a trust account held by Mr. Holtz and eventually used,
11 held for the payment of taxes. And they would be paid over
12 to Mr. Holtz on a daily basis.

13 We also know because you have an e-mail in the
14 record that almost immediately thereafter Mr. Amodeo fired
15 back an e-mail telling them, in effect, are you trying to
16 squelch the whole deal? You've got to bear with me here.
17 We'll either walk away from this or we'll do it my way.

18 The memorandum of instructions included a line in
19 which Mr. Amodeo was supposed to acknowledge these
20 instructions and act accordingly. Mr. Amodeo refused to
21 acknowledge those instructions, refused to sign the
22 memorandum of instructions. It's Mr. Amodeo's testimony that
23 he talked with Mr. Vanderburg and they reached, I won't call
24 it an agreement, but there was a standoff. Mr. Amodeo said
25 I'm not going to do it. The monies you pay me over are going

1 to be used as fees under the consultant agreement.

2 What we do know, I mean Mr. Vanderburg was never
3 in this courtroom, but what we do know is that memorandum of
4 instructions was never signed by Mr. Amodeo, and
5 notwithstanding that fact, Mr. Vanderburg proceeded on an
6 almost daily basis to transfer over to a convicted felon,
7 disbarred attorney, 8.9 million dollars over the latter part
8 of December.

9 Notwithstanding the fact that he never signed the
10 instructions. That's without dispute. And notwithstanding
11 the fact, we allege, that Mr. Amodeo had made clear to him
12 the only basis on which he would continue to go through the
13 deal was to go ahead and get these monies as fees. And this
14 isn't without any corroboration because we also have the
15 e-mail in the file from Mr. Amodeo in which it's clear that
16 he considers the entire situation a deal breaker unless he
17 gets paid.

18 Why would that be? Why would that make sense?
19 Well, it would make sense because Mr. Amodeo in taking over
20 the Sunshine companies is taking up the accumulated mess that
21 has been created by Mr. Vanderburg and Mr. Baiers, and they
22 are essentially asking him to do it for nothing in the
23 absence of being paid up front. Mr. Amodeo, understandably,
24 is unwilling to do that. Mr. Amodeo was subsequently, as you
25 know, way down the road, given a polygraph with regard to

1 what he told his team, including Mr. Holtz, on December 31 of
2 2004 about the deal and whether he withheld any information,
3 and he passed that polygraph. He said that he didn't
4 withhold any information on this.

5 We also know from the testimony of the
6 government's own witness, Edie Curry, that Mr. Holtz
7 indicated to her at a later point in time that he was aware
8 because of an audit of Mr. Amodeo's records in connection
9 with trying to maintain a bank account for him that Mr.
10 Amodeo had, in fact, received 14 million dollars, the 8.9
11 plus the additional monies paid and due under the consultant
12 agreement from Presidion Corporation. So it's not as if this
13 is being done in the dark. It's not as if it's being done
14 under the table. It appears as if everyone or at least Mr.
15 Holtz, his advisor, is aware of this, and certainly it
16 appears that Vanderburg is aware of it and is at least
17 standing back and refraining from taking any action to
18 prevent it from happening. He's paying the money over and
19 he's not making any qualms down the road about the fact that
20 it wasn't used for taxes.

21 That is an absolutely fundamentally important
22 point you have to remember, Your Honor. The government's
23 explanation of how this all happened is that Mr. Amodeo, in
24 effect, stole the 8.9 million dollars from Mr. Vanderburg,
25 who tried to get him to hold the money for the IRS, but that

1 he had instead used it for his own purposes and not paid it
2 over to the IRS.

3 Well, the problem with the government's account,
4 it is a fundamental problem, is that Mr. Vanderburg continues
5 to do business with Mr. Amodeo. Not only continues to do
6 business with Mr. Amodeo, but seeks Mr. Amodeo out for the
7 next deal which is ultimately the acquisition of PBS, under
8 the PBS plan. Not only does he do that, but Mr. Baiers, his
9 partner, actually appears at the March 2005 Omni conference
10 that you saw and speaks glowingly of Mr. Amodeo.

11 These facts are completely inconsistent with the
12 idea that Mr. Amodeo somehow had absconded with, cheated Mr.
13 Vanderburg out of 8.9 million dollars. Instead, it is
14 completely consistent with the idea that what happened here
15 was a Mexican standoff. Mr. Vanderburg desperately needed
16 Mr. Amodeo to take the Sunshine companies off of his hands,
17 and he was willing to do whatever he needed to do to get it
18 done. And what difference, Your Honor, did it make to Mr.
19 Vanderburg whether at this point in time he owed 10 million
20 dollars or 30 million dollars with regard to the Sunshine
21 companies? He's uncollectable. It doesn't make any
22 difference at that point in time. He's really judgment proof
23 with regard to the excess amount of money. It makes sense
24 from Mr. Vanderburg's perspective to sit back and acquiesce.

25 Now, Mr. Amodeo's perspective, he's actually

1 being paid pursuant to the consultant agreement for doing the
2 things he's going to have to do to wind up the Sunshine
3 companies. And bearing in mind that he hadn't had anything
4 to do before December 31 in terms of ownership or control of
5 the Sunshine companies. That is why we have contested this
6 particular point. It has not so much to do with the real
7 fundamental realities and consequences of whether it's 180 or
8 170 million. Instead, it is important to show the set-up to
9 subsequent relationships that are important in this case
10 between Mr. Vanderburg and Mr. Amodeo, between Mr. Amodeo and
11 Mr. Holtz. This is how everything began. It began with the
12 deal which is seamy in that Mr. Vanderburg is basically
13 agreeing to let this money go knowing that it's not going to
14 be paid over to the IRS. But it is not the way it has been
15 portrayed I think by the government. It wasn't a situation
16 where Mr. Amodeo was stealing money from Mr. Vanderburg.
17 Instead, Mr. Amodeo was basically cutting a hard bargain and
18 saying I'm only going to get involved if you pay me this
19 money and you pay me this money up front.

20 I challenge the government to come up with an
21 alternative explanation that actually makes more sense than
22 that. It's really the only explanation that makes sense in
23 terms of the subsequent facts in the case which involve Mr.
24 Baiers, Mr. Vanderburg, and Mr. Amodeo walking hand in hand
25 thereafter with regard to the negotiations with the IRS and

1 the subsequent involvement with PBS. That is why we've made
2 the one argument with regard to the amount being the 170 some
3 odd million instead of the 180 million.

4 Does it have any effect in terms of any
5 computation of the offense level? No, it does not. But it
6 is an important fact in terms of explaining the rest of the
7 case.

8 Now, I think that those comments would apply with
9 regard to restitution. Would you like me to deal with the
10 forfeiture aspect of that right now or go forward into the
11 guidelines?

12 THE COURT: Well, I would like to get the
13 guidelines issues out of the way.

14 MR. SANDS: Why don't we just move forward? Some
15 of those 3553 issues have already been resolved. We have an
16 agreement with regard to one of the properties and we can
17 present that to Your Honor at the end of all of this with
18 regard to forfeiture.

19 I'll go ahead and, because that's the way you
20 want me to address this, let me go ahead and address the
21 guideline issues and then I'll talk about 3553 issues in
22 general as we get a little bit further down the road.

23 One of the other issues that we have with regard
24 to guidelines issues other than the amount of loss is the
25 enhancement for 250 or more victims, Your Honor. That's

1 under 2 B 1.1 B 2. And, again, this is fairly completely
2 argued in the sentencing memorandum starting at page 109.
3 But the point here, again, and let me step back, Your Honor,
4 because obviously there's, there's the world of the
5 guidelines and then there's the real world.

6 In the world of the guidelines there are very
7 specific definitions with regard to who counts as a victim.
8 We are not for a minute saying that there isn't a real world
9 definition of who victims are that would not include the
10 companies that contracted with the PEOs here to have the
11 taxes withheld for their employees. But I'm dealing with the
12 specifics of this particular enhancement. And victim is
13 technically defined in the application notes to 2 B 1.1 as
14 not including persons who have not as yet suffered any
15 pecuniary harm as a result of the offense. Application note
16 one to 2 B 1.1 defines victim as any person who sustained any
17 part of the actual loss determined under subsection B 1.
18 Application note 3 A 1 defines actual loss as reasonably
19 foreseeable pecuniary harm that resulted from the offense,
20 and specifically distinguishes this concept from intended
21 loss.

22 I think that the presentence report has got it
23 wrong in one way and that when there is a reference in the
24 guidelines to reasonably foreseeable pecuniary harm, they're
25 not talking about reasonably foreseeable pecuniary harm that

1 may result at some point in the future post sentencing. What
2 they were talking about is reasonably foreseeable pecuniary
3 harm that was reasonably foreseeable at the time of the
4 offense and has been actualized and is an actual loss at the
5 time of the sentencing.

6 Right now the persons or entities that have
7 suffered actual losses at the time of this sentencing is,
8 one, the United States government, more specifically the
9 Internal Revenue Service. No one else has suffered any loss,
10 actual loss as a result of this offense at this time.

11 The guidelines are I think very clear with regard
12 to this, and for that reason, notwithstanding the fact that I
13 can understand from a layman's perspective how these entities
14 would be considered to be victims.

15 From the perspective of the guidelines in terms
16 of how it defines harm, it is actual loss and it is actual
17 loss determined as of the time of the sentencing, to the
18 extent at least that that loss was foreseeable at the time of
19 the offense. The actual loss here at the time of the
20 sentencing is the loss suffered by the IRS, and the
21 government, I think we're on the same page here. Whatever
22 arguments may be made about people who may potentially be
23 liable for loss at some point in the future, there is no
24 other person or entity who has suffered an actual out of
25 pocket loss at this point in time. For that reason this

1 particular enhancement doesn't apply as you would expect,
2 analogous to other tax cases, the victim here being the IRS
3 or the federal government generally.

4 If you don't have any questions, Your Honor, I'll
5 just go on to the next enhancement.

6 THE COURT: Okay.

7 MR. SANDS: The next enhancement is for harm to a
8 financial institution, that's under 2 B 1 P. That
9 enhancement applies if the defendant derived from one or more
10 financial institutions. And our argument here I guess is a
11 pretty simple one. There is a definition of financial
12 institution that is included in application note one to this
13 particular guideline and the entities that suffered loss here
14 are not included in that list. This is not an embezzlement
15 case, this is not a case involving a massive bank fraud.
16 This was not a case where there was a loss of over a million
17 dollars to a financial institution.

18 THE COURT: Okay.

19 MR. SANDS: Next in line, Your Honor, and this
20 one ends up being I guess a little more substantive in terms
21 of the evidence. The PSR has indicated that Mr. Amodeo
22 should receive a denial of acceptance of responsibility under
23 3 E 1.1, and the rationale for that has shifted a little bit
24 over time, but my understanding of the real gravamen of that
25 at this point in time is that it is based on, and you can see

1 it based on the addendum in page two to the presentence
2 report, Mr. Amodeo filing those lawsuits in 2008 against Mr.
3 Berman and against Mr. Holtz.

4 Now, I've given you just as a representative
5 sampling, you actually have in the evidence in this case a
6 copy of the complaint against Mr. Berman. The idea being
7 here, Your Honor, that it was inconsistent with his own
8 acknowledgment of his guilt in this case to have actually
9 filed an action on the government's behalf, Your Honor, I
10 mean the government is the ultimate recipient and beneficiary
11 of these funds, to file an action on the government's behalf
12 in order to allege professional malpractice on the part of
13 Mr. Berman and Mr. Holtz.

14 Now, again, at first blush, there may be concerns
15 about his having filed a lawsuit like that when he is
16 accepting responsibility for having been a leader or
17 organizer. Again, I have to take the court back though to my
18 initial comments with regard to why Mr. Amodeo is guilty, why
19 other people who conspired with him are guilty. Mr. Amodeo
20 is guilty because he came up with a plan not to pay payroll
21 taxes and to use them for other purposes. As soon as he came
22 up with that plan and he implemented it, he committed a crime
23 under Cheek. He intentionally violated a known legal duty.

24 Now, notwithstanding that fact, I think that
25 there is ample evidence in this case that Mr. Berman and Mr.

1 Holtz did little or nothing to prevent that crime from taking
2 place. And I would point Your Honor to a number of different
3 factors and we'll get into this, I'll probably get into it in
4 more depth when we start talking about 3553 --

5 THE COURT: You don't represent him in that case,
6 do you?

7 MR. SANDS: No, I don't. No, I don't represent
8 him, but there are some very fine law firms that do and as my
9 understanding, I mean I don't want to proffer things that are
10 not accurate, I'm sure Mr. Gold will correct me, but my
11 understanding is that they are pursuing those lawsuits with
12 an understanding with the government that they can do so and
13 collect the fees on a contingency basis and pay over the
14 award to the government. Am I wrong?

15 MR. GOLD: Well, I can let Miss Cream address it,
16 but there's no actual agreement to do so. But just so the
17 court knows, in that case as I understand it the lawyers are
18 going to get 55 percent and, if the government agrees to it,
19 we would get 45 percent. I believe Mr. Slaughter is also a
20 beneficiary of the attorneys' fees in that particular civil
21 case as I understand the contract.

22 MR. SANDS: I'm left out in the cold.

23 THE COURT: In more ways than one apparently.

24 MR. SANDS: Yes, Your Honor. It's typical.

25 MR. SLAUGHTER: I think we were waiting for her

1 supervisor to approve the contracts. This has been something
2 that's been going on for a year and a half.

3 MS. CREAM: Your Honor, we're getting a little
4 bit far afield, but just for clarity sake, it was within the
5 last month or so that I got a formal package summarizing the
6 lawsuits and asking for the Department of Justice to make an
7 official decision about whether or not, if the litigation
8 continued and if there was a recovery, would the government
9 attempt to forfeit the full recovery or any of the portion
10 due under the agreements with Mr. Amodeo as a contingency fee
11 on the theory that the insurance premiums were paid with
12 proceeds of this crime, and it is, to say the least, a pretty
13 novel issue. So I have sent the package to Washington to the
14 asset forfeiture and money laundering section asking for
15 their opinion on whether or not it's something that this
16 office can even agree to, or whether we hold off on any
17 decision, if and only if there's a recovery, take it up and
18 decide it there. So there's quite a bit of ambiguity still
19 on what's going to happen with that. And certainly neither
20 Mr. Gold nor myself is vouching for the validity of any such
21 lawsuits.

22 THE COURT: So the 55 percent contingency fee was
23 something that Mr. --

24 MR. SLAUGHTER: I think it's lower than that, but
25 there won't be any, there won't be any settlement until the

1 government approves it because nobody's going to do a lick of
2 work without --

3 THE COURT: So the 55 percent contingency fee is
4 something --

5 MR. SLAUGHTER: I think they lowered it to 45.

6 THE COURT: Mr. Slaughter, please don't interrupt
7 me, sir.

8 MR. SLAUGHTER: I'm sorry. I didn't know I was.

9 THE COURT: I want to try to ask this question
10 one more time.

11 So the 55 percent contingency fee is something
12 that Mr. Amodeo negotiated with whoever plaintiff's counsel
13 is?

14 MS. CREAM: Yes, Your Honor.

15 MR. SANDS: May I continue, Your Honor?

16 THE COURT: Yes, sir.

17 MR. SANDS: My point being, this is an awfully
18 odd basis on which to deny acceptance of responsibility.
19 These lawsuits are being filed, the beneficiary of these
20 ultimately being the United States government, and on a
21 perfectly valid basis, which is notwithstanding the fact that
22 Mr. Amodeo was involved in as I have explained a crime from
23 day one. These gentleman had a professional responsibility
24 to step in and tell him, first of all, about the full
25 criminal ramifications of the crime and, second, to step back

1 and recuse themselves from any further involvement in the
2 business if he didn't desist in the crime.

3 None of that ever, ever happened. And I think
4 that there is, again, I'm not arguing the civil case, but my
5 point is that there is a perfectly good faith basis to say,
6 notwithstanding the fact that you're involved in an ongoing
7 course of conduct which is illegal under Cheek because you're
8 intentionally violating a known legal duty to say I had
9 attorneys, I had accountants, and not only did they never
10 tell me about the criminal ramifications of this, they never
11 stepped back themselves or did anything else to try to stop
12 this conduct from occurring. And that was prejudicial to Mr.
13 Amodeo and it is a correct statement, we believe, of the
14 facts in this case, that these people got involved, and I'll
15 talk about that a little bit more as we go on, but that these
16 people got involved in this case and they ultimately did
17 nothing to prevent this crime from occurring, and in fact
18 reaped large financial benefits themselves from it.

19 Which brings me to the second issue that you
20 raised right at the outset which is something I've been
21 thinking about, too, and it is something which I was
22 concerned, you know, might be misrepresented in terms or
23 misunderstood in terms of the facts that were coming out
24 during the sentencing, and that is how to characterize Mr.
25 Amodeo's involvement.

1 We are not, and I don't think that you will see
2 an allegation to this effect in a sentencing memorandum, we
3 are not alleging that Mr. Amodeo was some defenseless sheep
4 who somehow was manipulated and controlled and maneuvered by
5 these cunning accountants and attorneys for their own
6 benefit. What we are alleging is that, and again I think
7 I'll step back to some of the not so great imagery and
8 metaphors from my sentencing memoranda, he was a runaway
9 train. He was a bipolar sufferer with manic and even
10 psychotic delusions who was going to do what he was going to
11 do. He was going to fulfill his vision unless somebody
12 stopped him. But what he did have somehow the self
13 consciousness to be able to do was begin to surround himself
14 with people, Dr. Pollack, Mr. Berman, Mr. Holtz, the dean of
15 forensic accountants, Mr. Marrero, the former CID chief in
16 Miami, to surround him with people whom one might expect to
17 protect him from his worst proclivities. Those people not
18 only -- I don't mean to include Mr. Marrero in that, but I
19 will include the others. Those people not only didn't stop
20 him, they opened the flood gates and just allowed this crime
21 to pass on to its inevitable course.

22 THE COURT: Let me ask you this: Does this
23 argument turn on the mental illness of the defendant? I mean
24 but for the mental illness, do you have this argument
25 regarding the acceptance of responsibility issue? In other

1 words, let me put it this way so we're on the same page:

2 Let's assume that Mr. Amodeo does not suffers from no mental
3 illness and he now files suit against Berman and Holtz.

4 Would your argument be the same?

5 MR. SANDS: No. I think it would be completely
6 different. I think I understand what you're saying. I think
7 that Mr. Amodeo could have not pled guilty and could have
8 gone to trial on the theory that he relied on the advice of
9 counsel. He didn't do that. And there's the big difference.
10 Because let's get back to what I said at the very beginning.
11 It doesn't take an attorney, it doesn't take a genius, it
12 doesn't take the world's leading forensic accountant to know
13 that you can't collect these payroll taxes and not pay them
14 over to the IRS.

15 THE COURT: I'm talking about backing out the
16 issue, the mental illness question, and then saying would he
17 even be able to state a cause of action against these other
18 people. Because if it is a valid cause of action, then I
19 think your argument has a lot more traction.

20 MR. SANDS: I'm not going to step in the place of
21 the civil attorneys in this case because there are different
22 standards that apply with respect to whether they might be
23 guilty, might be responsible for professional misconduct or
24 professional negligence in that case. What I will say is
25 that I think that there is a qualitative difference in what

1 we're looking at here. We're not saying simply that he
2 relied on advice of counsel. What we're saying is that he
3 reached out to these people. Why on earth, I mean, I'm sure
4 you've seen as well --

5 THE COURT: To protect him from himself.

6 MR. SANDS: Yes, to protect himself from himself.

7 One of the many, many oddities of this case is that in the
8 middle of what the government really describes as a train
9 robbery, Mr. Amodeo is clustering around himself, you know,
10 one of the leading forensic accountants, CID chief who is
11 actually, you know, talking with the IRS, a psychiatrist.
12 And he is actually making statements about needing to be
13 protected from himself. And these people are not doing that.
14 And again, I want to make clear that Mr. Amodeo wasn't some
15 weak-minded, simpering fool who they controlled for their own
16 purposes. He was a raging bull who was going to go in one
17 direction until he was stopped.

18 Yeah, give him this, he placed all of these
19 people in place. It's one of the central oddities of this
20 case. If you're conducting this kind of a train robbery
21 involving this kind of money, are you going to involve
22 yourself with these people? There is an explanation for why
23 he involved himself with these people and he made it quite
24 clear from the get-go and you heard some of it. I wanted to
25 protect myself from myself. Give me \$150,000, you know, and

1 I'll spend it. He needed to protect himself from himself.

2 He was going to do what he was going to do absent
3 somebody putting up a red flag. Somebody turning on a red
4 light. And that never happened in this case. And that's why
5 I don't see any sense in which, certainly from the
6 perspective of his good faith in having filed these actions,
7 that there's any inconsistency with the idea that he is both
8 guilty and that he has a cause of action against these people
9 for having given grossly unprofessional advice to him.

10 And, you know, even if there were, I mean I think
11 what we're talking about is legal arguments, we're not
12 talking about the facts here of what happened. We're talking
13 about how those facts can be constructed by a civil attorney
14 in a civil courtroom in order to make a case for professional
15 liability, which is completely different than what we're
16 looking at here.

17 The reason, Your Honor, I focus so much on those
18 two cases and the reason, by the way, that those two cases
19 are focused on in the presentence report is that there is a
20 case out there which makes all of this prior conduct which
21 had been relied upon to some extent in the presentence
22 report. For example, Mr. Amodeo having filed a bankruptcy.
23 Mr. Amodeo not having notified the government of his
24 collection of the Sunz money. All of that is irrelevant
25 under the guidelines with regard to the determination of

1 acceptance of responsibility under 3 E 1.1. And that's
2 because, for a very, very good reason, it's one I remember I
3 used to argue before there was a good Eleventh Circuit case
4 that now is pretty much on point, which is that it makes no
5 sense to deny somebody acceptance of responsibility on the
6 basis of conduct that occurs before they enter into a plea
7 agreement. The whole point obviously of, and this is quite
8 clear, in the history of the guidelines, that one of the
9 important points of the acceptance of responsibility
10 reduction is in order to provide an incentive for defendants
11 to finally come into the fold and go ahead and do what is
12 necessary to plead guilty, save the court the time and
13 expense of sending them to trial, and acknowledge what
14 they've done.

15 That conduct is all prior to Mr. Amodeo actually
16 entering into the plea agreement in this case. Under United
17 States V Wade, 458 F.3d 1273, Eleventh Circuit, 2006, the
18 Eleventh Circuit Court of Appeals joined the First and Sixth
19 Circuits concluding that it is appropriate to look to the
20 commencement of federal charges against the defendant as the
21 starting point for measuring acceptance of responsibility.
22 The court has an excellent analysis much more eloquent than I
23 have just gone through with Your Honor as to why it is
24 important from a policy perspective to allow defendants who
25 may have been not accepting responsibility in the past to

1 come forward, accept responsibility, enter into a plea
2 agreement, and move on from there and get some benefit for
3 actually having entered into the plea agreement.

4 I think that Wade in that respect is dispositive
5 of everything in this that I have seen alleged in the
6 presentence report other than the fact that you've got these
7 two lawsuits filed in 2008 out there which are still ongoing,
8 which as I have said, I just do not see how they are
9 inconsistent with the idea that Mr. Amodeo's accepted
10 responsibility.

11 Bearing in mind, Your Honor, once again, I don't
12 mean to beat a dead horse, but Mr. Amodeo is accepting that
13 he is a leader or organizer of the conspiracy and he's
14 accepting the loss for the full length of the conspiracy but
15 for the one issue in December 2004, which has no real effect
16 on the offense level. It is hard to imagine how under those
17 circumstances, agreeing that he's leader organizer, agreeing
18 to all those funds, that Mr. Amodeo hasn't at the very least
19 accepted responsibility for the offense.

20 As a matter of fact, I think that you can
21 certainly argue, you know, based on the painstaking work that
22 he has done during the two years he provided cooperation with
23 the government, which is reflected ultimately distilled and
24 crystalized in the sentencing statement of facts as to what
25 happened, how it happened, when it happened, what documents

1 were involved, who was at what meeting, what was said. That
2 not only represents acceptance of responsibility, it
3 represents a super acceptance of responsibility. This isn't
4 a one page outline of what I did and I'm not going to say
5 anything more. This is a painstaking, gut-wrenching
6 explanation of everything that happened in the case, which
7 lays out Mr. Amodeo as being the leader organizer of a huge
8 conspiracy.

9 Our only difference with the government as I see
10 it is that we think it's bigger than the government does I
11 guess in that we really believe that, you know, we take them
12 at their word that there's a conspiracy here and that there
13 are a lot of different people involved. And Mr. Amodeo's
14 work with the government was really a long history of trying
15 to explain exactly how this all makes sense and how the
16 different pieces fit together and how this explains how
17 different people were in the loop at different particular
18 times, and even if they weren't actually withholding
19 physically themselves the payroll tax money and refusing to
20 pay it over, they were involved in a broader plan, scheme, to
21 take that money and not pay it over to the IRS.

22 For that reason, I think that it's clear-cut that
23 he should get an acceptance of responsibility adjustment. I
24 just don't see how, particularly what you've already heard
25 about these lawsuits, how that would be considered -- thank

1 you, Your Honor -- how that would be considered inconsistent
2 it acceptance of responsibility. Mr. Amodeo is not seeking
3 any money for himself, he's actually seeking another means to
4 pay back the government, which was a major part, however
5 badly executed, that was his effort for the last two years in
6 terms of trying to recover monies for the government by using
7 these various attorneys to prosecute all of these lawsuits to
8 try to bring the money back.

9 Would it benefit Mr. Amodeo in the sense
10 ultimately of reducing the amount of his loss, the amount of
11 the restitution that would have to be paid? Absolutely.
12 Would it ultimately bring it down to zero? That hardly seems
13 likely. I mean the real beneficiary is the U.S. government.

14 Those are the basic guideline differences we
15 have, Your Honor. In truth, because of the plea agreement in
16 this case and the cap of 25 years, some of these adjustments
17 may really simply be academic, but of course we have to argue
18 them. We have to try to get a correct guidelines analysis.
19 What I will say, however, and now I'm moving, I don't know if
20 you want me to yet, but I can because it segues directly from
21 acceptance of responsibility into a departure for acceptance
22 of responsibility, there's another case directly on point
23 with that. And that has to do in this case because of the
24 cap, the 25 year cap that Mr. Amodeo has under his plea
25 agreement. He doesn't actually get the benefit of the

1 acceptance of responsibility that's bargained for in the plea
2 agreement.

3 And there is an another case, it's called United
4 States versus Rodriguez, another Eleventh Circuit case, and
5 this one's from 1995 and the cite, Your Honor, is 64 F.3d
6 638. Again, it's in the sentencing memorandum, it's at page
7 114. And what happened in the Rodriguez case is it was an
8 analogous circumstance. The Eleventh Circuit considered the
9 appeal of the defendant, his offense level and criminal
10 history, it resulted in 135 to 168 month sentencing range,
11 but his sentence was statutorily capped at 96 months. He
12 pled guilty, he was given a three level reduction for
13 acceptance of responsibility, but it ended up being
14 irrelevant because of the cap. Under those circumstances,
15 the court stated that, quote, a departure from the sentence
16 prescribed by 5 G 1.1 A when the defendant's acceptance of
17 responsibility has not been duly recognized is consistent
18 with the goals of the guidelines. As discussed above, the
19 guidelines contemplate that a defendant's acceptance of
20 responsibility will be recognized at sentencing. Moreover,
21 one of the legitimate social interests served by rewarding a
22 defendant's acceptance of responsibility is providing an
23 incentive to engage in plea bargaining. Plea bargaining is
24 an essential component of the administration of justice and
25 should be encouraged because it keeps the justice system from

1 becoming overburdened with full scale trials.

2 The court of appeals held that the district court
3 had the discretion to reward the defendant's acceptance of
4 responsibility by departing downward when 5 G 1.1 A rendered
5 3 E 1.1 ineffectual in reducing the defendant's actual
6 sentence.

7 We believe that is actually the case here. It's
8 an analogous situation to what the court was looking at in
9 United States versus Rodriguez, and to step back for a second
10 here, this was a cooperating plea agreement and Mr. Amodeo
11 ended up spending two years trying to help out the government
12 in this case. As you know, the government's made no
13 substantial assistance motion, notwithstanding all of the
14 information and assistance that we detailed both in the
15 sentencing memorandum and during the presentation of the case
16 before Your Honor. Without that, the benefit of his bargain
17 in this case was simply the statutory cap and the acceptance
18 of responsibility that he might get. And he should at least
19 be given in that respect the benefit of his bargain. Bearing
20 in mind that Rodriguez was out there and within our
21 contemplation at the time that the plea was entered into,
22 Rodriguez being a 1995 case.

23 THE COURT: Well, Mr. Sands, does this argument
24 about diminished mental capacity have any significance with
25 regard to your acceptance of responsibility argument,

1 particularly with regard to the filing of the lawsuits?

2 MR. SANDS: Oh, absolutely. I haven't gone into
3 it because I think that Rodriguez -- not Rodriguez, I'm
4 sorry -- Wade tells you you don't even, you don't look back
5 before the plea agreement, the filing of the actual charges.
6 In this case he pled guilty as soon as the charges were
7 filed. You don't even look back to that conduct. But if
8 Your Honor were to look back to that conduct, and certainly
9 given that I'm asking you to make a departure ultimately for
10 acceptance of responsibility, you know, we could look back to
11 that conduct, I mean at least for argument sake, and what we
12 would argue with respect to that, Your Honor, is the
13 polygraph among other things. Mr. Amodeo took a polygraph
14 with regard to that conduct.

15 THE COURT: That's not a, for your benefit as
16 your argue, I should tell you that that's not going to be a
17 strong argument. I think I'm more concerned with whether his
18 mental illness in some way should be factored into the
19 court's discretionary acceptance of responsibility.

20 MR. SANDS: And I was getting to that. Because I
21 am, I was listening closely to your questions. We're not
22 arguing that the polygraph is not somehow influenced by the
23 fact that he has a mental issue. In other words, the
24 polygraph may tell you nothing more than that at the time
25 that he takes the polygraph he actually believes what he's

1 saying. But in that respect, I think the polygraph is
2 important in that it is just another barometer for Your Honor
3 of the extent to which the mental disability, the mental
4 issue comes into play with regard to the acceptance of
5 responsibility and the actions that took place after he began
6 cooperating with the government.

7 My point here being, you know, regardless of
8 whether Mr. Amodeo really was helping the government or not,
9 he thought that he was at the time that he took the
10 polygraph, and with regard to his acceptance of
11 responsibility or determining whether or not he is somehow
12 not accepting responsibility, I think that you can't help but
13 take into account the fact that at that point in time Mr.
14 Amodeo was still not under the medical regime he's under
15 today, was not receiving the medications that he's receiving
16 today. I think that he wasn't, for example, receiving the
17 Geodone at that point in time and that you have to look at
18 his mental state and what he was trying to do and trying to
19 achieve within the prism of his brain disorder. You can't
20 look at him like you would look at any other defendant. And
21 I think that the polygraph is a good barometer of that, that
22 even if he's absolutely, and I'm not trying to reinvent the
23 government's case with regard to other people, I'm not trying
24 to argue with the government about how much they were helped
25 or how much they weren't helped, at least right now. All I'm

1 saying is that the polygraphs are a good barometer that he at
2 least thought that he was doing the right thing. In just the
3 same way, bull in the china shop. I mean what a repetition
4 of the same behavior that got him into trouble in the first
5 place. Mr. Amodeo, if not controlled, either by strong
6 medication or by external forces, such as attorneys,
7 accountants, or even prosecutors, is, and at that point in
8 time and before, likely to run amuck. Even with the best of
9 intentions. I mean the amazing thing, if you think about it,
10 Your Honor, about that whole substantial assistance period,
11 is that it is basically the offense conduct redux. It is a
12 repetition of what got him into trouble in the first place in
13 that he gets these ideas. And in the first instance it's the
14 idea about building this capital genesis plan and ruling the
15 world. But ultimately with the government it's suddenly a
16 reversal and now it's Frank Amodeo, G-man, trying to go out
17 and collect all this money for the government, to try to
18 prove that he can get everything back, to try to prove that
19 he's smarter than everybody else, to try to prove that he can
20 make everything right. And he made a complete mess of it.
21 How did he make a complete mess of it? Well, in large part
22 by not communicating with the people he needed to communicate
23 to. But I mean just vintage Frank Amodeo. And perfectly
24 evocative of the disorder which repeats itself again and
25 again and again, up to the present day, medicated and under

1 control, you know, by Dr. Choras.

2 If I could just step back for a second with
3 regard to that. Mr. Amodeo has been extremely helpful in I
4 think ultimately trying to explain things to the government,
5 helping me prepare the sentencing memorandum. I know that at
6 times it may have appeared to Your Honor like he was
7 controlling the defense in this case, but I can say if I have
8 somehow through frustration at a particular point in time by
9 not having a document, that's my fault, that's not his fault.
10 He has been extremely helpful to me and trying to do what he
11 wanted to do all along which is simply present to the court
12 all of the facts of the case, which are, as I've told you,
13 incredibly incriminating to him from our point of view. They
14 make him responsible as a leader or organizer for at least
15 170 million dollars. But he wants the court to understand
16 everything, everything about the case. Unfortunately at
17 times that ends up making it seem as if he's somehow
18 displacing responsibility on to other people.

19 Well, you know, if it walks like a duck and
20 quacks like a duck, it's a duck. There are other people who
21 are responsible in this case. It doesn't diminish his
22 responsibility for the amount of the loss, for being a leader
23 organizer, but it is a factor, and I want to talk about this
24 a little bit more, it is a factor in terms of the way that
25 his diminished capacity expressed itself during the course of

1 the case, and how not that he was controlled by others, but
2 how the bull in the china shop was just left to run amuck.
3 Notwithstanding the fact that you've got this incredible
4 constellation of attorneys and accountants who seem to be
5 busy doing absolutely nothing in terms of maintaining order.

6 Bear in mind, Your Honor, that April 2006 meeting
7 that you witnessed today, there's another 50 million dollars
8 that's let out of the stable after that. After they're
9 claiming that they're in control. I mean this case is
10 absolutely amazing in terms of the absolute abdication of any
11 responsibility. Absolutely amazing. I've never seen
12 anything remotely like it. And I just don't want the court
13 to get the impression that we're simply trying to blame other
14 people. Mr. Amodio is taking responsibility for everything.

15 THE COURT: If your point is to shock the court
16 by the conduct of other professionals who are relied on
17 routinely to help people stay out of trouble and do the right
18 thing, you've succeeded.

19 MR. SANDS: Thank you. That was our point. And
20 it's not simply to, I guess my point is it's not simply to
21 displace responsibility. It's to explain certainly the way
22 in which -- when I first got involved with this I asked
23 myself a question, how could this have happened? This is a
24 disbarred attorney who is practically coming from nothing.
25 He's getting off supervised release not long before all of

1 this takes place. How can this particular person ultimately
2 get left with the responsibility for nearly 200 million
3 dollars in taxpayer dollars? That is mind boggling. How it
4 happened is a fascinating story. And it's a fascinating
5 story that involves a concatenation of a number of different
6 circumstances and people who basically stood back and allowed
7 it to happen.

8 I'm not imputing guilt or responsibility to the
9 government with respect to this. I know you've read the
10 sentencing memorandum. I think that a perfect example of
11 what is going on and what happened in this case is presented
12 not by the effect of all of these professionals, these
13 accountants and attorneys on Mr. Amodio, but the clear effect
14 of all of these accountants and attorneys on Miss Berkowitz,
15 the revenue agent, who I impute no wrongful conduct to in any
16 way. Miss Berkowitz is dealing though with Mr. Marrero and
17 Mr. Holtz, both from Miami, down where she's from, with a
18 host of attorneys and accountants. I cannot imagine, in her
19 defense, that it could have occurred to her that these people
20 would be involved in this serial train robbery. That is how
21 somehow she shows the forbearance from 2005 through 2006
22 until the end of this fiasco without calling an immediate
23 stop to it all, without saying, for example, under 7512, as
24 of today I'm sending you a letter that says you have to
25 segregate your trust fund taxes from the rest of your funds,

1 and if you don't do so, you're actually going to be
2 committing a crime under 7202. She never does it. I'm not
3 blaming her for not doing it. Clearly what happened, she
4 wasn't relying upon the good offices of Mr. Amodeo. She
5 wasn't relying upon his credibility. She was relying upon
6 the credibility of all of these other people, all of these
7 other people that were involved in the case. And that's the
8 only way this makes any sense whatsoever. That's the way
9 that the cow got out of the barn.

10 Now, does that make Mr. Amodeo less guilty? No,
11 it doesn't make Mr. Amodeo less guilty. He's still the
12 leader and organizer of a plot to take nearly 200 million
13 dollars in payroll taxes. But what it does do is provide a
14 context, and the context I think Your Honor is all important,
15 you know, not only within the guidelines, but it's important
16 under 3553 because I think you have to understand how it is
17 that this could have happened in the first place in order to
18 understand, for example, what kind of a threat Mr. Amodeo may
19 be in the future at whatever point in time he is allowed to
20 re-enter society. And it also is important to understand
21 simply how the offense occurred in the first place.

22 What I am saying is this offense could not have
23 occurred in terms of its scope and its gravity without a
24 community of people who weren't controlling and manipulating
25 Mr. Amodeo, but instead were standing back and allowing him

1 to wreak havoc while they collected paychecks for two years.
2 And it's a sad commentary on everybody involved. And it is
3 important for the reasons I've laid out. But we do not
4 believe that it, you know, it is in any way a rejection of
5 his acceptance of responsibility for being a leader or
6 organizer and being responsible for all that money.

7 THE COURT: Okay.

8 MR. SANDS: I've talked about the guidelines
9 issues and I've talked about one of the potential departure
10 issues that you would have, Your Honor, that would be the
11 departure for acceptance of responsibility. The other issue,
12 and of course I've been talking around this all the time, is
13 the departure, both -- I say within the guidelines, I mean
14 recognized by the guidelines, and under potentially just as a
15 factor for you to consider under 3553 which would be the
16 diminished capacity.

17 We have in this case, it's an interesting --

18 THE COURT: What's the difference?

19 MR. SANDS: I think that there may not be any
20 functional difference whatsoever really. I think that the
21 guideline actually provides a, kind of a relatively unique
22 situation in which you can make a determination in this case
23 both within the guidelines and outside the guidelines that
24 would be supplementary and, you know, mutually reinforcing
25 because, as Dr. Danziger testified, he meets the criteria for

1 a departure under 5K2.13 in terms of having a significantly
2 reduced mental capacity that contributed substantially to the
3 commission of the offense.

4 I don't think that there is any real doubt --
5 first of all, let me step back. At this point in time I
6 don't think that there's much doubt that Mr. Amodio suffers
7 from a brain disorder. He has been diagnosed by
8 psychologists and psychiatrists and behavioral neurologists
9 and neurophysiologists coming out of his ears. And we can go
10 through them in length. They're actually all set out in the
11 sentencing memorandum, you know, where I've summarized all of
12 the reports. But you're talking about at least eight doctors
13 from different disciplines, all concurring in the same basic
14 diagnosis. And I would add corroborative of a diagnosis that
15 was made back at the BOP back in the year 2000, long before
16 the offense conduct in this case.

17 Now, granted, psychothemia is a slightly
18 different variant of the bipolar disorder than the type
19 one --

20 THE COURT: It sounds to me, I may not have it
21 exactly right, but it sounds like it's a variant in degree.

22 MR. SANDS: Yes, I think that that is right, too.
23 And, again, this is my layman's understanding from reading
24 about it on the National Institute of Mental Health website
25 and so forth.

1 THE COURT: But your point is that there have
2 been people all along the way from the mental health
3 disciplines that have concluded that he has a mental illness
4 of some sort, including or beginning with, in your recent
5 recitation, the Bureau of Prisons before he was released, and
6 concluding with another seemingly objective source, that
7 being the McLean people at Harvard, right?

8 MR. SANDS: Not only that, and this was no secret
9 to the people at Mirabilis either, I mean this is something
10 that was part of his personal history, you know, the
11 defrocked attorney who has the mental problems but is a
12 genius. This is part of his personal ideography in a way.
13 But I think that if you look at the psychothymia diagnosis
14 back in 2000 it makes perfect sense in the context of what
15 we're looking at now.

16 I'm not going to start testifying here, but it's
17 not surprising to me that somebody in a prison camp with no
18 stressors whatsoever other than, you know, having to dig up
19 the daisies and exercise is not going to show, and also
20 without any exacerbation from caffeine, for example, is not
21 going to show the same level of mania that somebody would
22 who, for example, is in a situation like in this case where
23 they are basically being enabled by attorneys and accountants
24 and other advisors who are all telling him how brilliant he
25 is and going along with his plans.

1 Dr. Danziger provided testimony with regard to
2 that. He said that that would add fuel to the fire. It
3 also, and again, this isn't something that we've talked
4 about, but I think it's even more important than the
5 attorneys and accountants and other advisors. The man is
6 being provided with unlimited, almost, resources in which to
7 realize his crazy plans. Imagine, Your Honor, the effect,
8 the catalyzing effect of being provided, somebody like Frank
9 Amodeo being provided with an almost unlimited source of
10 funds to do whatever you wanted to do with. The amazing
11 thing is how little he did on his own behalf. He gave to
12 charities, he did buy a nice big house for his wife. But you
13 didn't hear testimony from the government about his going
14 crazy and using funds for his personal purposes. What you
15 actually saw was Frank Amodeo doing what? Frank Amodeo
16 trying to realize his absolutely psychotic dream of world
17 domination by investing money like there was no end to it.

18 My point being if the approbation of the
19 attorneys and the accountants and all the professionals added
20 fuel to the fire, imagine how much more fuel to the fire was
21 added by the unlimited access that they allowed him to all of
22 these funds. I mean, really, that is the crazy catalyst in
23 this case which ended up, ended up, you know where it ended
24 up? It ended up in the Roosevelt room of the White House.

25 Now, the Roosevelt room of the White House. One

1 of the other things we learned from this case --

2 THE COURT: I kind of wondered whether they would
3 check criminal background and that sort of thing, wouldn't
4 you?

5 MR. SANDS: Well, I learned something in this
6 case, I knew it before and it really hit home. But I'm not
7 making political statements here because it really applies in
8 a bipartisan basis. You give enough money to a lobbying firm
9 with connections and you can do all sorts of things. You can
10 go to the White House. You can be put on panels with august
11 and former secretaries of state, etcetera. You can do all
12 sorts of things for a half a million. It's actually amazing
13 how little money it really takes. That's one of the other
14 lessons here. Those are the sorts of things that Frank
15 Amodeo, completely consistent with his brain disorder, spends
16 his money on. He spends his money on the realization of
17 what? And I guess, you know, this is also a 3553 issue, this
18 is not a sinister plan. Frank Amodeo is not a psychotic with
19 a sinister plan. It is a plan about world domination, he's
20 going to be some sort of an emperor, but he seems to be a
21 benevolent dictator in his dreams of the future where
22 governments wither away and there is a cooperative economic
23 system where businesses are basically feeding back on each
24 other and assisting each other, all under the sponsorship of
25 Frank Amodeo, who has basically taken the place of the United

1 Nations, I guess.

2 The point is that in this particular case the
3 sickness really manifested itself in terms of kind of a
4 benevolent vision, albeit an absolutely crazy one. Whatever
5 Your Honor wants to make of that in terms of 3553, I think it
6 is significant in some way, but I guess the point being that
7 Frank Amodeo is a megalomaniac. Frank Amodeo has psychotic
8 delusions of grandeur when not properly medicated, but his
9 heart's in the right place I guess is the only way I'd say it
10 in that at the same time that he's doing all of these other
11 things, he's actually trying to help people with Katrina
12 relief. He's got a grandiose vision of himself which is not
13 as some sort of a demonic figure, but is instead somebody who
14 is going to be a savior, salvation to the world.

15 But the point is that the diagnosis has actually
16 been consistent all the way through, I think. It makes sense
17 that psychothemia would be all that would be diagnosed back
18 in the benign arena of the prison with no stressors, and it's
19 certainly consistent that Mr. Amodeo would go, absolutely run
20 amuck with access to unlimited funds and the approbation and
21 reinforcement of all of these people that he looked up to and
22 respected.

23 So, in summary, we think that there's been a,
24 really an uncontroverted case here that Mr. Amodeo does
25 suffer from a mental defect and that in that sense he

1 fulfills really the first prong of 5K2.13.

2 Now, what's the second real prong of 5K2.13?
3 That the mental defect contributed substantially to the
4 commission of the offense. It explains the entire offense.
5 It's hard to imagine how this offense could have occurred
6 certainly on the scale that it did occur without a
7 concatenation of the various circumstances that I've talked
8 about. But one of the most important was Frank Amodeo, the
9 bull in the china shop, the manic individual with psychotic
10 delusions of grandeur who believed that he could take money
11 from the federal government and use it for other purposes to
12 create the biggest corporation on earth. It just wouldn't
13 have occurred.

14 I would like to spend a minute with regard to
15 that, Your Honor, on the, and I know I may be beating a dead
16 horse, but on the way that this, the mental disorder
17 manifested itself in terms of his interaction with his
18 advisors and how the crime actually developed, and how it
19 ultimately crystalized in terms of what you see happening on
20 the tapes that you have in April 2006. I'm not, I won't
21 spend very long on it, I'm not going to recapitulate the
22 case, but I think there may be, you know, some ambiguity
23 that's been created by some of the testimony in this case
24 about what's happening in the latter part of 2005 strictly
25 based, I mean maybe in part on the testimony of Edie Curry.

1 What happened, I think you know from reading our
2 sentencing memorandum, is in the summer of 2005 we've already
3 completed basically the Sunshine companies plan and we've
4 moved on now to the PBS plan which is basically to take the
5 PEOs that are now being operated under PBS and move them over
6 to AEM, which is a company which is a subsidiary of
7 Mirabilis. And what happens at that point in time is that
8 AEM entered into an assignment agreement whereby they would
9 purchase the PEO book of business from PBS on July 25, 2005.
10 Now, the importance of all this, why I'm getting back to this
11 is you might get the impression from the testimony of Edie
12 Curry that somehow Mirabilis had nothing to do with this book
13 of business that was being run through Presidion, but that's
14 not what happened at all. It's actually a very, it's a
15 complicated series of events, but a perfectly understandable
16 one if you just look at it chronologically.

17 What happened was AEM entered into the assignment
18 agreement. They were going to get the book of business as of
19 July 28, 2005. They subsequently decided let's not do that
20 right now, and there are reasons that are laid out in the
21 sentencing memorandum, and they retroactively amended it to
22 delay the transfer of actual ownership of the PEO book of
23 business until December 31 of 2005. During that entire
24 period, Your Honor, the last half of 2005, millions and
25 millions of dollars of taxes are just not being paid.

1 Now, it's not as if, however, Mirabilis doesn't
2 have anything to do with any of this. AEM actually enters
3 into a management services agreement for that same period
4 which enables them to manage the book of business through
5 December 31, 2005. So for that period of time it's not, Edie
6 Curry and others can't simply say, oh, Your Honor, that was
7 Presidion, that wasn't us. Through that entire period of
8 time, the second half of 2005, the book of business is
9 actually being managed under a management agreement by a
10 wholly-owned subsidiary of Mirabilis AEM.

11 Now, what happens then is at the end of 2005 they
12 actually, pursuant to the agreement which had been moved back
13 to December 31 as you'll recall, they assume ownership of the
14 book of business of Mirabilis. Okay. Again, whatever Edie
15 Curry or anybody else may say about being Presidion's book of
16 business and we don't know about that, this is AEM, a
17 wholly-owned subsidiary of Mirabilis, which now owns the book
18 of business as of January 1 of 2006.

19 Now, letters even go out, Your Honor, at that
20 point in time, and I'm getting to information that's
21 specifically referred to in the April 18 chairman's meeting
22 that you viewed. Letters go out at that point in time, in
23 early 2005, saying AEM doing business as Mirabilis HR has now
24 taken over these PEO contracts and is responsible for them.
25 That extends into the period then when we've got the meeting

1 at the Mirabilis chairman's meeting, and that's why, and just
2 because we've got that in evidence and I'm hoping that maybe
3 you'll take another look at it as well when you're reviewing
4 this, that's why you hear a crystallization of everything
5 that's important really in that one meeting.

6 And what I mean by that is in that meeting
7 they're concerned, you'll hear it at the end of the meeting,
8 about the first quarter of 2006. There's real concern by
9 them about the first quarter of 2006 by Mirabilis. And you
10 know why that is? Because they sent out the letter and said,
11 hey, we own and control the book of business, AEM doing
12 business as Mirabilis HR, in the first quarter of 2006. They
13 know exactly what's going on at that point in time and
14 they're worried about it. They know about the 144 million
15 and that's not the Sunshine company taxes. They aren't
16 anywhere near 144 million. That's the PBS taxes. It's a
17 combination, but that includes the PBS taxes, they know it
18 and they're worried about it, and that's why they're saying
19 we've got exposure for this first quarter of 2006. Why is
20 that? Because they sent out letters under the agreement
21 whereby they assumed ownership as of December 31, 2005, they
22 now own the thing. No more stories about, oh, we don't have
23 control, somebody else has control. They're stuck with it.
24 And that's why there is the real concern, there's the real
25 consternation in that meeting about the fact that they're

1 stuck with the first quarter.

2 Now, why is it just the first quarter? Because
3 if you actually and, again, this is all laid out in the
4 sentencing memorandum, what they do and, again, this is an
5 absolute train robbery. What they do is they purport to
6 foist back ownership back on Presidion for the second quarter
7 because at that point in time they're getting more and more
8 into debt, they realize that they've got more and more
9 personal liability, and so what they do now is they try to
10 retroactively rescind their purchase of the PBS book of
11 business and try to foist it back on Presidion.

12 And you know what they do in addition to that?
13 They not only retroactively rescind it, but they say we'll
14 keep the credit for any taxes that haven't been paid because
15 there were some taxes that were paid in the first part of the
16 first quarter, but we're going to give you back all the
17 liabilities. So they actually created a credit for
18 themselves and tried retroactively by basically after the
19 fact, ex post facto, rescinding an agreement to foist the
20 liability back on Presidion. And that's why they thought at
21 that point in time our liability extends only to the first
22 quarter of 2006 because they had concocted this plan in which
23 they would basically foist all of the liability back on
24 Presidion and actually, I mean and this is the most amazing
25 thing, keep credit for the tax monies that had been paid.

1 That's the context. And, again, it's all laid out I think
2 fairly clearly in the sentencing memorandum. That is the
3 context in which that conversation takes place. That is why
4 they're so concerned in the context of that conversation
5 about that first quarter 2006. Everybody knows exactly
6 what's going on.

7 You know what one of the most important things
8 you need to bear in mind as you watch those tapes is?
9 Everybody knows they're being taped. And so you have to look
10 at everything within the filter of knowing that they know
11 they're being taped. And so you get these soliloquies by
12 somebody like Holtz. Gee, I hate to think that people would
13 think that we were somehow responsible for this. He knows
14 good and well exactly what the situation is. He's talking,
15 and we now know because you saw the tape, in a meeting
16 immediately thereafter he's talking about a bullet plan for
17 the IRS.

18 Everybody is in the loop on this. Everybody
19 knows what's going on. Including Mr. Holtz, including Edie
20 Curry, including Mr. Berman. Everybody is in the loop on
21 this. Everybody knows what's going on. And everybody is
22 basically trying to pass the hot potato by rescinding
23 transactions, recharacterizing transactions and moving
24 corporate responsibility back and forth in order that they
25 won't be liable as the hundred percent person for the taxes.

1 Crazy as it may seem, Your Honor, to any sane person now
2 looking back on it, the thing that everybody should have been
3 worrying about was going to jail, but instead what everybody
4 is focused on is trying to avoid responsibility for the
5 hundred percent penalty.

6 Now, I'm not saying that there weren't people who
7 in the back of their mind knew there were more problematic
8 consequences that might ensue, but you certainly don't see it
9 anywhere in any of the documentation.

10 The only time, and again, and again, we had a
11 little discussion about this today with regard to the legal
12 memoranda.

13 THE COURT: Let me interrupt for one second, Mr.
14 Sands, because my court reporter just looked back at me, and
15 when he does that it means I've gone more than 90 minutes
16 without a break. So how much longer are you going to be?

17 MR. SANDS: I don't have that much longer, but I
18 wouldn't mind taking a quick break just to be able to --

19 THE COURT: How much longer do you think you'll
20 be?

21 MR. SANDS: I think maybe ten minutes.

22 THE COURT: Okay. We'll take a break and I'll
23 let you continue.

24 (BRIEF RECESS.)

25 THE COURT: You may continue.

1 MR. SANDS: I promise I will take less than ten
2 minutes.

3 Where we left off, where this all dovetails into
4 what was going on in April '06 and in that meeting as well.
5 What had happened at that point in time, I've explained to
6 you what had occurred in terms of the corporate structure up
7 to that point in time. They realized basically that they
8 were accruing unpaid tax liabilities on a daily basis which
9 they could no longer blame on Presidion, that AEM now was
10 liable for and the responsible officers would potentially be
11 liable under the hundred percent penalty as well.

12 And what happened, and again, Mr. Amodeo doesn't
13 step back from this and takes responsibility for it as well,
14 is they came up with an idea, and this basically involved a
15 service agreement retroactively effective as of January where
16 they recharacterized the purchase and sale and said AEM
17 doesn't actually own the book of business, notwithstanding
18 the letters that we sent out, etcetera, telling the customers
19 that we did, and basically taking credit then for the tax
20 payments that had been made for AEM, but foisting the
21 liability back on Presidion. That's what, and again why I
22 mention it again, that's what, Your Honor, Mr. Glover is
23 referring to when he says that they have drawn a very thin
24 line in the sand and that Amodeo thinks they are, quote, well
25 insulated. The thin line in the sand is this attempt to

1 retroactively throw back the liability back on PBS and
2 Presidion Corporation and not take responsibility for it.

3 Now, the irony, and again it pervades this entire
4 case, is that these distinguished accountants and financial
5 experts and attorneys are purporting to rely at this point in
6 time on the august legal opinion of Frank Amodeo with regard
7 to the propriety of what they're doing.

8 If you actually look again at that meeting video,
9 Glover can barely say those words. They sound so
10 preposterous. And everyone knows exactly what is going on at
11 that point in time. As a matter of fact, and again, I'll
12 point your attention to another document which you will have
13 the opportunity to review because it is in evidence, look at
14 the mock deposition, Your Honor, done several months later.
15 But before the government's involved, any criminal
16 investigation in the case, the mock deposition in which Mr.
17 Amodeo testifies at length about the entire plan, including
18 discussions, and I can point you to specific page numbers.
19 Look at 86 and 87 of the mock deposition. Specific
20 references to the fact that the payroll taxes aren't being
21 paid. There's a reference to increasing the IRS obligation
22 by a hundred million dollars.

23 Now, the amazing thing is you'll understand
24 what's going on in the mock deposition because you've
25 listened to the evidence in this case, you've read the

1 indictment, you've read the sentencing memorandum. It would
2 be gobbledygook, I admit, to outsiders, but to people in the
3 know who are in that room, people in the know like Curry,
4 Holtz, Baiers, Berman, Stanley, they know exactly what he's
5 talking about.

6 And you know what the amazing thing is? You
7 don't see, we don't know of any word of protest that's ever
8 given by anybody, any word of astonishment, of horror at what
9 they've done. A final revelation of the crime that's been
10 committed under their very eyes. Instead what you get is
11 Edie Curry coming over to him and telling him, oh, it sounds
12 like a racketeering offense the way you say it. That's the
13 truth of this case.

14 Without denying any liability on Mr. Amodeo's
15 part, he is just one of the players in this sad drama. There
16 are other players as well.

17 THE COURT: How about leader organizer with many
18 enablers, would that describe it?

19 MR. SANDS: Absolutely. Absolutely, Your Honor.

20 THE COURT: Hold on one second, Mr. Sands. I
21 don't want to be distracted by this.

22 (BRIEF PAUSE.)

23 THE COURT: Go ahead, Mr. Sands. I'm sorry.

24 MR. SANDS: I couldn't have said it better. To
25 use a hackneyed expression, this was kind of a perfect storm,

1 too, in terms of people coming together and providing an
2 environment in which something absolutely horrific could
3 occur.

4 Why is that important? Well, it's important to
5 the diminished capacity defense that we're laying out because
6 if it weren't for the fact that one of the participants was
7 the bipolar bull in the china shop with delusions of
8 grandeur, it couldn't have happened either. But it couldn't
9 have happened really without the participation of other folks
10 as well. Not because they were leading him by the nose, but
11 because those were the gate keepers. Those were the people
12 who had the opportunity to stop this from happening and they
13 didn't do it. And instead what they ultimately ended up
14 doing was creating a situation where poor Revenue Agent
15 Berkowitz really could end up being in a situation where she
16 exercised forbearance thinking that these people were honest,
17 legitimate folk who certainly wouldn't allow something like
18 this to happen under their watch. That's how this crazy
19 offense happened.

20 And I think that it's important not only
21 technically with regard to the diminished capacity offense
22 and how it shows that Mr. Amodeo's illness was a contributing
23 factor and played into the fact that the offense occurred in
24 the first place, but I think that it also is important from a
25 3553 perspective in terms of understanding what should be

1 done in the future. How should you treat Mr. Amodeo? You
2 know, what needs to be done in terms of specific deterrence?

3 Mr. Amodeo is a different man today than he was
4 back then. I mean he is finally under a medication regime
5 which is keeping him in check. Does that mean Mr. Amodeo
6 doesn't have good days and bad days? Does it mean he doesn't
7 occasionally have manic days, days where he's up and days
8 where he's down? I can tell you, you may even have witnessed
9 that a little bit of yourself. Absolutely he's going to live
10 the rest of his life with a brain disorder. A brain disorder
11 that has to be controlled by medication. But under the care
12 of doctors he's doing that.

13 Certainly, whatever ultimately is crafted for Mr.
14 Amodeo in terms of a sentence, it needs to take into account
15 the fact that he cannot be placed in a situation, he cannot
16 be allowed to be in a situation where he would have this kind
17 of access to other people's funds in the future. How it ever
18 happened in the first place, I don't know. As a disbarred
19 attorney in the situation he was in, it's absolutely
20 unthinkable. But it happened. And I leave it to the people
21 who have to do the difficult job of judging to figure out how
22 to craft a sentence that would do justice in this very, very
23 difficult case.

24 I have a few, just minor housekeeping details and
25 I think I'll stay within my ten minutes. We did have an

1 objection to the use of the 2D guidelines instead of the 2T
2 guidelines. I think that the probation officer got that one
3 a hundred percent right as I was looking back through.

4 THE COURT: The reference back.

5 MR. SANDS: Yes. And I withdrew that as a
6 result.

7 We did have, Your Honor, the one issue with
8 regard to the forfeiture. I've already talked about the
9 restitution and computation of loss aspects of it. I will
10 say that with regard to the forfeiture we had two properties
11 outstanding that were still at issue, there was the Delaney
12 property and the lake property -- Euclid Avenue. I keep
13 getting it wrong. The Delaney property we have an agreement
14 that there isn't any issue with regard to the forfeitability
15 of that property because that property was, there's a basis
16 to conclude that that property ultimately was purchased, even
17 though it was purchased with the payment on the consulting
18 agreement with regard to the Sunshine companies, it was paid
19 out of PBS funds, and as a result Mr. Amodio should be
20 responsible for that.

21 With regard to the other property which would be
22 the Euclid property, that was actually purchased with funds
23 that came directly from the trench of money that was paid out
24 in December of 2004 and our arguments with that are simply
25 the arguments that I've already made to Your Honor, that in

1 that case he wasn't a principal of the Sunshine companies, he
2 wasn't involved with the Sunshine companies, he didn't own
3 the Sunshine companies until December 31 and those are
4 preexisting tax liabilities. And whatever one may think of
5 arrangements that occurred, the government's notion of what
6 happened in terms of premising the liability on the theory
7 that Mr. Amodeo simply stole 8.9 million dollars from Mr.
8 Vanderburg does not make any sense in terms of the context of
9 their continuing association in the case. And that basically
10 is our argument with regard to that property in a nutshell.

11 As we've already indicated to Your Honor, it
12 doesn't make a whit of difference to Mr. Amodeo in terms of
13 the personal forfeitability of his funds because it would be
14 forfeitable as a substitute asset even if it's not directly
15 forfeitable. It potentially could, if she were to lodge a
16 claim, have some effect on the ability of his estranged wife
17 to argue that she has some interest in the property that
18 would entitle her to get something out of it.

19 That, Your Honor, I think resolves -- it doesn't
20 resolve, but it at least addresses all of the issues that I
21 have. If you have any questions.

22 Thank you.

23 THE COURT: Thank you, Mr. Sands.

24 Miss Cream, if you'll provide me with a proposed
25 order with regard to the Delaney property, I will sign it

1 based on the stipulation.

2 MS. CREAM: Thank you, Your Honor. You already
3 have the order.

4 THE COURT: All right. I'll ask Miss Darley to
5 deliver it to me then.

6 MS. CREAM: Your Honor, just so you're aware, you
7 have a proposed order for Delaney and also for Euclid.

8 THE COURT: Mr. Gold.

9 MR. GOLD: Your Honor, let me start with a couple
10 things as a backdrop, first of which is that the statement of
11 facts in the sentencing memo were, what we agreed to is that
12 they were Mr. Amodeo's recollection of the facts. We did not
13 agree that they were true and accurate, only that that's what
14 he would have testified to. And as it turns out he pretty
15 much marched through a good deal of it anyway.

16 This was not meant to be a trial. We had no
17 intention of bringing in 20 or 30 witnesses to refute
18 everything. And this whole discussion about other
19 individuals and their culpability is really irrelevant to
20 what we're doing here today. That's the reason there's an
21 ongoing criminal investigation into what some of these other
22 folks did.

23 THE COURT: There are no other indictments out
24 there now?

25 MR. GOLD: Other than the corporations, that's

1 correct. But it is ongoing.

2 You know, one of the problems that we have, and I
3 know the court wanted to hear all the relevant evidence, but
4 with not having Edie Curry here, there were statements that
5 were made that I think would have been refuted by her, you
6 know, including this business about the protest which she
7 would have said is she did protest, at the break, she got up,
8 she didn't come back. She didn't want to be a part of it.

9 The mock depo was really nothing more than a spin
10 of the facts for the IRS. So when you take a look at that,
11 you have to keep in mind what the purpose was. And also keep
12 in mind that Mr. Slaughter was there at that particular depo.

13 But let me move past all of that because I really
14 don't think it's the crux of this case or this sentencing.
15 And the other thing I think you need to keep in mind is when
16 evaluating Mr. Amodeo's testimony, here's a man who has
17 admitted on cross examination that he has lied on numerous
18 occasions to serve his purpose. And as I go through this
19 you'll see where I believe that that's exactly what he was
20 doing with this court.

21 Let me talk first about the number of victims.
22 There were approximately 2900 employers who were the victims
23 of the wire fraud. Mr. Amodeo pled guilty to the conspiracy
24 to commit wire fraud. He knew that the money was supposed to
25 be turned over to the IRS and that's what was promised to

1 these individuals. It's not just the government who is the
2 victim, okay. It is these 2900 employers. They might still
3 be held responsible for these taxes. And the issue is not
4 the actual loss, but what was intended.

5 The intent was that somebody other than these
6 folks was going to get stuck with the loss, whether it was
7 the government or the employers. And it was reasonably
8 foreseeable that it could wind up being those very employers
9 that got stuck. And to be honest, I don't think that Mr.
10 Amodeo and the others cared who got stuck as long as it
11 wasn't them. And I think that's what it's all about.

12 When you look at the guidelines under victims for
13 2B1.1, it talks about the intended loss, not the actual loss,
14 and it was clearly foreseeable to Mr. Amodeo and these other
15 folks.

16 THE COURT: Hold on one second.

17 Okay. Go ahead, Mr. Gold.

18 MR. GOLD: And I think if you look at the
19 application note under 2B1.1, especially where it talks about
20 the loss under subsection 3, it talks about the loss is the
21 greater of actual loss or intended loss, and it talks about
22 the pecuniary harm that was intended to result from the
23 offense. Well, we know how much was intended.

24 THE COURT: That's 2B1.13? Is that what you
25 said?

1 MR. GOLD: No. I believe it's subsection three A
2 little three. Now, I'm dealing with the book that was in
3 effect at the time of the offense which was the 2006 version.
4 And I don't know if there have been any changes.

5 THE COURT: Go ahead, Mr. Gold.

6 MR. GOLD: All right. Let me move on to the
7 financial institutions issue. It is our contention that the
8 PEOs were financial institutions. And if you look at 2B1.1,
9 application note 1, it defines financial institution. And it
10 talks about banks, it talks about pension funds, it talks
11 about health, medical or other associations, and any other,
12 and it says and any similar entity, whether or not insured by
13 the federal government, and it includes associations that
14 undertake to provide pension, disability or other benefits,
15 for example, medical or hospitalization insurance to large
16 numbers of persons.

17 We have a situation here where the PEOs hold this
18 money supposedly in trust for the employers, just like a bank
19 would. The PEOs provide 401K benefits, workers' comp, health
20 insurance benefits, and although it is not exactly the
21 health, medical or hospital insurance association, but it is
22 an association that undertakes to provide these other things,
23 just as discussed in the application note.

24 So we believe that a PEO does qualify as a
25 financial institution.

1 THE COURT: Okay.

2 MR. GOLD: Let me turn next to the loss figure.
3 And I think one of the things I'm going to request that the
4 court do when you ultimately come to your conclusions is I
5 think, for forfeiture purposes, I think it's necessary that
6 the court make a determination whether it was consulting fees
7 or not, or whether it was payroll taxes, regardless of
8 whether Mr. Amodeo owned the company or didn't own the
9 company. But I think the court should address whether it was
10 consulting fees because I think it will have an impact on the
11 way the forfeiture may ultimately proceed. And I would ask
12 the court to consider doing that.

13 THE COURT: Well, let me hear from you with
14 regard to Mr. Sands' argument that there was this letter of
15 instructions that came from Mr. Vanderburg and a power of
16 attorney, and that Mr. Amodeo claims that he orally rejected
17 it and never signed it. So he says it's not a -- that it is
18 a fee and that evidence supports that conclusion, otherwise
19 it couldn't be because it was still within the other company
20 and he didn't have any part of the other company.

21 MR. GOLD: Well, first of all, I think when you
22 look at that exhibit, what they were asking him to do is,
23 it's basically two crooks not trusting each other. I think
24 that's what it ultimately boils down to.

25 THE COURT: You probably don't get much argument

1 from them on that point.

2 MR. GOLD: Well, I'm not sure, but, now, what
3 happens is they were concerned about getting stuck. When you
4 look at his explanation for what happened, I don't think it
5 holds water. First of all, when you look at the e-mail to
6 which Mr. Sands made reference, it doesn't say anything in
7 there about this power of attorney or this memo. All it says
8 is things are going to change, you're on the bus, you're off
9 the bus. But there's no interpretation, there's nothing in
10 there that says that they're backing out because of that.

11 My explanation is Mr. Amodeo says I'm not going
12 to sign that. I'm not going to agree that I'm going to fork
13 over these taxes. And they decide to go ahead anyway because
14 they needed the money, they needed the capital. So they were
15 going to maybe stupidly trust Mr. Amodeo to do the right
16 thing. But I don't think that that says that that means that
17 it was consulting fees. And I think there's other factors
18 that show that it's not consulting fees.

19 Number one, you've got government exhibit number
20 2 --

21 THE COURT: Well, you would say that the only
22 thing that supports the conclusion that this money
23 constituted consulting fees is Mr. Amodeo saying that.

24 MR. GOLD: That's correct. I think all the other
25 evidence points to the fact that it wasn't consulting fees,

1 and I'll go through that now.

2 THE COURT: Okay.

3 MR. GOLD: First of all, government exhibit 2,
4 it's a letter to the auditors showing that it's a deposit for
5 the tax controversy. Not an expense. It says nothing about
6 fees. Now, Mr. Amodeo's explanation on cross examination is
7 that really that was a lie, the auditors knew it was a lie,
8 and he said that the document to the auditor showing it was a
9 deposit was a backdate to the auditors and he's blaming them.
10 And I can give you page citations, too, if the court wants.
11 And that that's on cross examination, page 134.

12 Now, I would suggest to the court that that is
13 now Mr. Amodeo either lying to this court or trying to spin
14 it in a positive way, but I would suggest to this court that
15 there's no way those auditors started backdating documents
16 and accepting that that was going to be a lie, that that's
17 how they were going to book it. I just cannot with any
18 thought believe that that would happen.

19 Now, another thing that Mr. Amodeo said was that
20 he received 750,000 for expenses on the consulting agreement,
21 and then on cross examination, page 130, he admits that it's
22 not in the agreement. He said on direct examination that he
23 was to get paid for prospective work, that it justified the
24 fact that it was 8.9 million in consulting fees, and yet on
25 cross examination at page 131, he admits that there's nothing

1 in the agreement that talks about a prospective fee
2 situation. And when you think about it, at that point the
3 Sunshine liabilities were 13 million. He was going to get a
4 nine million dollar fee to save them 13 million? There's
5 nothing in the record at all, not a single document or single
6 witness that says it was for prospective savings.

7 He also said that he had had a private agreement
8 with Mr. Vanderburg and he goes it was on the QT. Despite
9 two years of investigation by both the government and the
10 defense, there is not a single document that exists showing
11 that. He's never told the agents that, despite the numerous
12 meetings, and there's nothing on the undercover tapes to show
13 that there was any discussion about a private agreement with
14 Mr. Vanderburg. Frankly, because it didn't exist. The only
15 person saying that is Mr. Amodeo, and I would suggest that,
16 weighing his testimony, I would have to weigh against
17 whatever he says.

18 Now, I'm kind of surprised that they're relying
19 on the polygraph at all to support anything. I think there
20 is absolutely no validity to the polygraph, whether based on
21 the way it was done or the questions. I would ask this court
22 to totally exclude -- well, not necessarily exclude, but not
23 take into account anything from that polygraph because I
24 don't think there is any validity whatsoever. And I think
25 even the court in your questions to Mr. Keifer at the end

1 showed just how invalid that polygraph was. So I'm a little
2 bit surprised that after all that we went through with Mr.
3 Keifer that they're still trying to rely on this polygraph.

4 Now, I want to talk about the obstruction and the
5 acceptance, and here's what Mr. Sands is missing. Regardless
6 of how you view the acceptance at the time that the PSR was
7 done, somebody who lies during the course of a sentencing,
8 and if you look at 3C1.1, it includes sentencing. And to the
9 extent that there was evidence of obstruction or lack of
10 acceptance before, now we have the fact that Mr. Amodeo has
11 testified at this sentencing. I'm going to go through a
12 number of situations where he either flat out lied or in ways
13 he tried to mislead this court that would allow this court to
14 score him for obstruction of justice. And once you score him
15 for obstruction of justice, he loses acceptance of
16 responsibility except under extraordinary circumstances. And
17 I don't think these were extraordinary circumstances where he
18 takes the stand before this court and he lies. And I'll take
19 you through all these items.

20 Now, the other thing I just wanted to say really
21 quick before I forget is, Mr. Sands was talking about the
22 Rodriguez case and he's asking this court to depart downward
23 on the acceptance because of that case. In effect, he's
24 asking the court for them to violate the plea agreement. If
25 you look at paragraph nine in the plea agreement, it says in

1 there that both sides agree that there should not be an
2 upward or downward departure with the exception that they get
3 to reserve the right to talk about the diminished capacity.
4 Nothing about Rodriguez. As Mr. Sands said, he knew at the
5 time of the plea agreement that Rodriguez was out there. And
6 so for him to now come in here and argue for a downward
7 departure, in effect, violates the plea agreement between the
8 government and Mr. Amodeo.

9 And by the way, when Mr. -- let me go back one
10 second to the other facts concerning the 8.9 million. Mr.
11 Sands was talking about all these people including Edie
12 Curry, and what she said was she didn't know where that money
13 came from. She said he told her it was from other clients
14 and other clients' funds. All right. Now, let's look at
15 some of the things that I would suggest comprise obstruction
16 of justice. And I know that I'm going to hear in a few
17 minutes that his bipolar disorder made him lie or fogged his
18 memory, even though he's on the medications now, but let me
19 go through what I think we have for obstruction. And that
20 is, he stated on his direct examination at page 79 that I
21 told him to wind up Mirabilis. On cross examination at page
22 174 he admitted that that was not true, that I did not so
23 direct him.

24 He also, and here's, you know, one of the other
25 issues. This business about the contingency fee. He said

1 clearly he was given no directions about the contingency fee.
2 Mr. Slaughter had to stand up before this court and say,
3 Judge, that's not what happened. That is an enormous lie by
4 Mr. Amodeo.

5 He also said he told Mr. Slaughter about the
6 bankruptcies before they were filed, and that was on cross
7 examination, pages 180 to 181. The next morning Mr.
8 Slaughter had to get up and correct on the record that that
9 did not happen. And I'm sure Mr. Sands will get up here and
10 say, well, that's Mr. Amodeo's recollection, but he's now on
11 the meds that he's supposed to be on. These were intended to
12 mislead or deceive the court.

13 Now, he also said that he filed the bankruptcies
14 in May of 2008 to save a seven million dollar asset. But, in
15 fact, that's not what happened. The Winpar bankruptcy was
16 filed in May of 2007, well before any discussions regarding
17 the bankruptcies in May of 2008. It was not done to save the
18 asset at that time as Mr. Amodeo testified on direct at page
19 84.

20 When I asked him about government exhibit number
21 6, which was the letter to the auditors, he denied that he
22 made the statements, that he never owned stock or equity in
23 Mirabilis and he had never been an employee, officer or
24 director. And then, and that was at the cross, page 122,
25 lines 21 and 22 in particular. Government exhibit 7 shows

1 that he listed the shares on the financial statement, but Mr.
2 Amodeo's spin now today is, ah, Mr. Myers prepared it and he
3 knew it was false. Mr. Amodeo signed it knowing that's what
4 he was telling whoever it was who was going to rely on that
5 statement. So, in fact, he did wind up stating that he owned
6 those shares.

7 He said that he wasn't a shareholder or director,
8 but if you look at government exhibit number 8, the board of
9 directors meeting of February 15, 2009, it says that he was a
10 shareholder and the sole director.

11 Now Mr. Amodeo says, oh, it's a proxy for Yaniv
12 Amar, and I think you can take a look, I don't have the exact
13 cite on this, but he also admits that he never brought it to
14 the attention of the auditors and he testified the shares
15 were never authorized. But when you go back and you look at
16 one of the tapes that was played, and I believe it was of the
17 February phone calls, Mr. Amodeo says I'm not holder of the
18 black shares, basically I get to make all the decisions. So
19 at least in his mind at that time he certainly was the owner,
20 and for him to tell this court that he didn't own any shares
21 or that he was never an officer or director, the documents
22 belie that.

23 In what I consider to be the biggest whopper of
24 all, he said that 50 to a hundred CPAs told him it was not
25 illegal to not pay the taxes. And that was the cross on page

1 158, recross on page 193. I cannot imagine under any
2 circumstances that 50 to a hundred CPAs or attorneys told him
3 that he didn't have to pay payroll taxes. It strains
4 credibility on the grandest scale. And as a matter of fact,
5 Miss Curry said that she didn't tell him that. Mr. Holtz
6 never said it in her presence. And out of 15 million pages
7 of documents there's not a single piece of paper that says
8 it's okay, that it's not illegal. So for him to come in here
9 and say 50 to a hundred people told him it wasn't illegal, to
10 me that may be the largest of all the lies.

11 He stated in his sentencing memo that the
12 government allowed him to take a \$10,000 per month salary.
13 He didn't testify to it. But when I was on cross
14 examination, page 177, he admitted that it wasn't authorized.
15 This also seems to be perhaps not a flat out lie, but I think
16 an attempt to mislead this court, and that is he says that
17 when he found out that the Sunshine liabilities jumped to 55
18 million by the end of 2004, it didn't bother him. It was
19 just another challenge. Anybody whose company, and these
20 were the Sunshine companies, the Wellington company who is
21 going to be on the hook now for 55 million dollars instead of
22 13 million, ought to be concerned. This is not just a
23 challenge.

24 There is absolutely nothing, he testified that
25 others directed the non-payment of taxes, that he only did it

1 80 percent. Well, maybe it's a matter of semantics. He told
2 person A to do it and then they directed it. But the bottom
3 line is all the evidence in this case points to one person
4 directing the payments not be made and that's Mr. Amodeo.

5 He said that he had no money after he got out of
6 jail on his direct examination, page 126, and yet on cross
7 examination he admitted that within a few month period he had
8 received a hundred thousand dollars from Yaniv Amar.

9 He also, and I think this was an attempt to
10 mislead the court rather than a flat out lie, but he tried to
11 have this court believe that his conviction, his original
12 conviction was only a lack of internal controls. It was just
13 the last client. And yet on cross examination he admitted
14 that he stole the money. And when he tried to suggest it was
15 his only transgression, he admitted to stealing money from
16 other people. And that was at the cross on page, at least
17 page 115 where he talked about a few people, including one
18 where he said I should have been convicted about that one.
19 But the way he made it sound to this court on direct
20 examination, oh, it was just my last client, it was just this
21 lapse.

22 On the disbarment, he tried to characterize this
23 Pearl matter as insignificant. He said he paid her back and
24 that was the end of the criminal matter. But that's the
25 complaint for which he was disbarred. And when you look at

1 the Georgia Supreme Court opinion, which is government
2 exhibit number 2, it contradicts what Mr. Amodeo said.

3 Also, when he says that after the voluntary
4 suspension he was still contesting some of the actions going
5 forward. Well, when you look at the disbarment order by the
6 Georgia Supreme Court, there is nothing about him contesting
7 anything. Actually, it's to the contrary, it says he never
8 responded to the bar whatsoever. So either that's another
9 spin or it's another lie.

10 And he also tried to suggest to this court on his
11 direct examination, page 44, that on January 5 of 2005, I'm
12 trying to remember if it was '05 or '06, that he was going
13 down to meet with the IRS on another client. Well, on cross
14 examination he had to admit it was one of his own companies.
15 It wasn't another client. It was his own company. And he
16 tried to make it sound like he had absolutely nothing to do
17 with him. And if you take a look at cross on page 139,
18 you'll see specifically what I'm talking about.

19 So regardless of what is in the PSR to start, I
20 would suggest that his lies before this court qualify him for
21 obstruction of justice and losing acceptance of
22 responsibility.

23 Now, I want to talk next about the substantial
24 assistance issue, and we did not file a motion for
25 substantial assistance. When the United States decides

1 whether to file a motion for substantial assistance, we have
2 to look at the good things he did and weigh them against the
3 bad things. And it is supposed to be full and complete
4 cooperation in terms of what he was doing. Well, we give him
5 credit, absolutely, for preparing the documents and helping
6 to organize them. He made it sound like he just turned these
7 all over, but it was pursuant to subpoena. He had a duty to
8 do that. Did he have a duty to organize them? No. And
9 that's one of the things that he did. We would have wanted
10 to have used him as a witness. You've seen him testify. You
11 know there is absolutely no way in the world that we could
12 ever use this man as a witness in any subsequent prosecution
13 between the lies, because of his stated bipolar disorder,
14 he's unusable as a witness.

15 The bankruptcies that were actually filed in May
16 of 2008, the ones that he didn't tell Mr. Slaughter about,
17 they weren't for the United States' benefit. It was
18 actually, if you'll recall his testimony, the employees
19 wanted out at that point. It had nothing to do with that
20 seven million dollar piece of property because that was
21 Winpar that was filed in May of '07. And what has happened,
22 first of all, it was not an appropriate use of Title 11, and
23 I blame the bankruptcy lawyers in part for that. In fact,
24 it's wound up wasting Mirabilis's assets. There has been
25 more money spent for expenses or for incurring debt than the

1 amount that they've actually brought in. And most of the
2 litigation has been with us, the United States. We spent
3 eight months actively litigating the bankruptcy before we
4 came to a resolution. And that diverted our attention for
5 literally eight months while we were having to deal with all
6 the litigation in the bankruptcy court.

7 And in the Winpar investigation, to the extent
8 that at the very beginning of his cooperation he thought that
9 he was going to get this asset or save this asset, it has
10 resulted in over a year's worth of litigation. Miss Cream's
11 had to go up to Tennessee on several occasions. It's only
12 been very recently that that has been resolved. And the
13 increase in the value had nothing to do with Mr. Amodeo.
14 What it had to do with, the creditors in that case wound up
15 seeking bids that boosted the value of the property. And on
16 top of it we lost money in that case because, as part of the
17 agreement, we ultimately gave the unsecured creditors, who we
18 owed nothing to, 80 cents on the dollar, so we lost more
19 money on that.

20 The United States also has a policy of not giving
21 substantial assistance for cooperating in the recovery of
22 assets relating to the defendant's own asset forfeiture.
23 It's considered a part of acceptance of responsibility.
24 Because otherwise a defendant could, in effect, buy
25 substantial assistance by letting us know about forfeitable

1 assets that we don't know about. And it's considered part of
2 the acceptance of responsibility, not part of substantial
3 assistance.

4 When somebody lies to us, when somebody steals
5 from us, we don't reward them with substantial assistance,
6 and I don't think this court should either. It has to be
7 full and complete assistance, and we did not get it.

8 Now, let me talk about the diminished capacity.
9 I don't disagree and I concede that he has some sort of
10 bipolar disorder. Mr. Sands talked about the fact about this
11 psychotic nature of it, but the first time that tag came up
12 was in June of '08. Nobody had diagnosed him with the
13 psychotic features before he had his melt down in May or June
14 of '08, at which point he exhibited these psychotic features.

15 The court got an opportunity to look at all those
16 tapes, and whether he had the bipolar disorder is not the
17 issue. The question is did it contribute to his actions.
18 And from the United States' perspective, we don't believe
19 there's evidence to show that causal link.

20 Let me go into a number of details on this
21 diminished capacity.

22 THE COURT: Mr. Gold, I need to interrupt for one
23 minute. I need to take a break. It may be just five
24 minutes, it may be 15. It won't be any longer than that.

25 MR. GOLD: Okay.

1 (BRIEF RECESS.)

2 THE COURT: Mr. Gold.

3 MR. GOLD: On the bipolar issue, I want to go
4 back a second and start at looking historically how this came
5 up. We know that he was diagnosed back in 2000 with maybe a
6 mild form of the bipolar disorder. By 2003 he had money,
7 especially by the end of 2004, and the minute he got the
8 money, he put it into a trust for his stepson. Knowing that
9 he needed the help, he should have put money aside for
10 himself at that time. Instead, he spent money on a home, a
11 condo, cars. And even though he always had enough money, he
12 chose not to seek treatment until after this investigation
13 arose, until after Mr. Slaughter suggested it.

14 He did everything he ever wanted to do, now he
15 says I'm bipolar, I made bad judgments. But when you look at
16 what Mr. Danziger looked at, Dr. Danziger took a few videos
17 that were hand supplied by defense counsel and drew
18 conclusions. He didn't see all of the other times or all the
19 other videos where Mr. Amodeo interacted with people. He
20 thought that Mr. Amodeo's idea that you can predict human
21 behavior with economics was delusional and yet several noted
22 writers have suggested that. I suppose Dr. Danziger would
23 say that Circuit Judge Posner is delusional too because he
24 suggests the same thing.

25 Mr. Amodeo is not any different than hundreds of

1 other white collar criminals who are grandiose and have large
2 plans, whether realistic or not. According to Dr. Danziger I
3 assume that all those folks would be considered bipolar.

4 We know that Mr. Amodeo lied to Dr. Krotenberg in
5 hiding his grandiose thoughts. According to Dr. Danziger, I
6 guess because Dr. Pollack was speaking Klingon in a business
7 setting, he too would be delusional.

8 And when you look at what Mr. Amodeo did
9 accomplish, he wound up with 85 companies in about a two year
10 span. So his idea of branching out, whether it was
11 nationally or internationally, was not so farfetched because
12 he was well on his way. Before June of '08, you got to see
13 the tapes, he was in control, he was functional, there's no
14 suggestion that he wasn't. And I would suggest that there is
15 no causal relationship between his bipolar disorder and this
16 crime.

17 Was he bipolar? Yes. Did he make some bad
18 judgments? Yes. But clearly he was in control. And he was
19 able also to segregate information and give it to only those
20 people who needed to know information. For example, he said
21 when Edie Curry testified, she said she asked for financial
22 statements, but she wasn't given them. He told certain
23 people some things, he told other people other things. It
24 was to maintain the control, it was to direct everything, and
25 it was so there were no checks and balances. This was not

1 because of his bipolar disorder, this was because of his
2 desire to control everything.

3 And what I am concerned with is that if this
4 defendant receives a reduction because he has a bipolar
5 disorder that from this day forward we will see every white
6 collar defendant come in here with a psychiatrist.

7 THE COURT: But is it really a reduction if I
8 factor it in under 3553?

9 MR. GOLD: I think it is.

10 THE COURT: A reduction from what?

11 MR. GOLD: Well, I think taking it into account
12 as a factor of 3553 buys into the fact that the bipolar
13 disorder in effect caused this behavior. Regardless of
14 whether you look at it at 5K2.13 or under 3553, you buy into
15 the argument that it causes behavior. And I think everything
16 this court has seen would suggest otherwise.

17 I have just a couple other comments, and that is
18 there are some legitimate PEOs, but if the court takes a look
19 at the literature and the decisions, this industry is in need
20 of a serious overhaul. There are a number of bad eggs
21 involved. And I would request that this court send not only
22 Mr. Amodeo a message, but the PEO community, that you can't
23 steal payroll taxes. There's nothing legal about doing it.
24 And I would ask the court to send a message that if you're
25 going to steal payroll taxes, you're going to go to jail for

1 a long time.

2 And, lastly, I think it's time to recognize Mr.
3 Amodeo for what he is. He's an admitted liar, he's someone
4 who will say whatever it takes, whatever he thinks he need to
5 say, and he's a thief. Not just now, going back for years.
6 And from the United States' perspective, we gave him his
7 break when we charged this case. We allowed him to plead to
8 the five felonies rather than the wire fraud counts because
9 that would have drastically changed the picture. And as a
10 result, I'm going to ask that this court impose the 25 year
11 sentence that is statutorily available.

12 MR. SANDS: Your Honor, could I be heard on one
13 point?

14 THE COURT: I'll give you a few minutes in
15 rebuttal if you'd like.

16 MR. SANDS: Thank you.

17 With regard to the acceptance of responsibility,
18 Your Honor, Mr. Gold had mentioned that we have -- may have
19 violated the plea agreement in some way by talking about the
20 potential of the court departing downward to recognize the
21 lack of any utility in the acceptance of responsibility. I
22 would direct the court's attention to the plea agreement in
23 this case, and to page five in particular which indicates
24 under paragraph seven, acceptance of responsibility, three
25 levels.

1 At the time of sentencing, and in the event that
2 no adverse information is received suggesting such a
3 recommendation to be unwarranted, the United States will not
4 oppose the defendant's request to the court that the
5 defendant receive a two level downward adjustment for
6 acceptance of responsibility. The date of this plea
7 agreement is September 22, 2008. It postdates the conduct
8 that the United States is talking about with regard to Mr.
9 Amodeo supposedly obstructing justice with regard to the
10 bankruptcy and with regard to the money from Sunz.

11 The United States knew about that information at
12 the time that they entered into this plea agreement. If
13 anybody is violating the terms of the plea agreement, it's
14 the government in trying to make an argument now that Mr.
15 Amodeo does not qualify for acceptance of responsibility on
16 the basis of those factors.

17 May I continue?

18 THE COURT: Just one second.

19 Yes, sir.

20 MR. SANDS: With regard to December 2004, Mr.
21 Gold had mentioned, once again directed the court's attention
22 to the document that's in evidence which is an acknowledgment
23 and an amount on deposit which Mr. Amodeo has actually
24 scrawled in that it's for resolution. That, if you look at
25 the document, Your Honor, is completely consistent with what

1 we're saying is that what Mr. Amodeo was doing was providing
2 a document that said as of December 31, the moment that they
3 were actually going to move the money and change over the
4 companies, that the amount was on deposit.

5 Now, in fact, as Mr. Amodeo readily acknowledged,
6 he had been spending the money, but there's nothing in that
7 document which is in conflict or conflicts with the idea that
8 this money was actually for consulting fees. What you didn't
9 hear from the government at any point in this case is, you
10 didn't hear any mention, for example, well, Mr. Amodeo didn't
11 include this on his tax returns as consulting fees. You
12 didn't hear the government say, well, there's evidence in the
13 record that Presidion Corporation or Mr. Vanderburg referred
14 him to the Department of Justice or otherwise complained
15 about his use of these funds and application of them as
16 consulting fees. The reason you didn't hear that is because
17 it's not true.

18 With regard to so much of the rest of it, we're
19 talking about an extremely complicated set of events here and
20 a person who I think by anybody's acknowledgment suffers from
21 a mental disability. The list of items that Mr. Gold went
22 through, I'm not going to address those on an individual
23 basis, but those are not items that go to whether Mr.
24 Amodeo's accepted responsibility in this case. The question,
25 for example, of whether shares were authorized but not

1 actually issued doesn't have anything to do with anything
2 with regard to whether Mr. Amodeo has accepted responsibility
3 for being the leader or organizer of a crime that involved
4 somewhere between 180 and 190 million. Those are red
5 herrings. They don't have anything to do with his acceptance
6 of responsibility. And I would suggest to the judge if you
7 look over those things, they're either ambiguous or they're
8 explainable as simply differences of opinion or differences
9 in recollection.

10 Finally, with regard to substantial assistance,
11 the government has mentioned that he's unusable as a witness.
12 Well, I mean, the truth is in the eye of the beholder. I'm
13 not going to argue with Mr. Gold whether he's usable or not
14 usable as a witness. But that is not the sole criterion for
15 determining whether or not somebody has substantially
16 assisted in the investigation or prosecution of other people.
17 In fact, Mr. Amodeo provided a wealth of information and
18 year's worth of assistance, and his assistance actually in
19 even putting together the sentencing memorandum is kind of a
20 crystallization and a distillation of that and that you can
21 see exactly from Mr. Amodeo exactly how in all of its glory
22 and warts and all is the better way to describe it, how this
23 sordid affair laid out. And it is actually many respects
24 worse, many respects worse than what you would actually see
25 in the indictment. Mr. Amodeo laid all that out. Mr. Amodeo

1 provided the government with all that information. Simply to
2 say he's unusable as a witness only answers half of the
3 question.

4 The government says, well, he also, we don't take
5 into account as a matter of principle that Mr. Amodeo may or
6 may not have assisted in the recovery of assets. That's not
7 taken into account under substantial assistance. Well, it
8 appears to be a big criterion for them though in denying him
9 substantial assistance. They refer, again and again, to how
10 he impeded their efforts with regard to the recovery of
11 assets. It sounds to me like what's good for the goose is
12 good for the gander. It either matters or it doesn't matter.
13 And I'm not sure what difference ultimately whether or not
14 Mr. Amodeo's filing bankruptcy, whether that ultimately
15 helped in terms of the long term recovery of assets or not,
16 and I think that may not be known until the future, but how
17 that bears on whether Mr. Amodeo actually provided
18 substantial assistance to the government in the investigation
19 or prosecution of other people.

20 The government in this instance I think is
21 completely mixing apples and oranges and unfairly. They're
22 focusing on something that doesn't have anything to do with
23 the criteria which are recognized as being a valid basis for
24 substantial assistance.

25 Finally, with regard to incapacity --

1 THE COURT: Do you agree that if I found that he
2 obstructed justice, I cannot very easily or could not at all
3 give him acceptance of responsibility?

4 MR. SANDS: No, I don't. I mean I think that
5 there is actually a provision, as Mr. Gold accurately provide
6 pointed out, the guidelines talk about extraordinary
7 circumstances. I think that the case law has to some extent
8 superseded the guideline with respect to that with regard to
9 people who accept responsibility after the obstruction of
10 justice occurred. With regard to those people, all of the
11 same facts or factors, policy factors with regard to
12 incentivizing people in terms of pleading guilty apply. And
13 I think really the case and the theory has moved beyond that
14 guideline provision and I would say even to the extent that
15 you say, well, it's still there, there's still a loophole
16 there which recognizes in extraordinary cases that you would
17 still apply it, and I would say then an extraordinary case
18 would be a situation where well after the alleged conduct,
19 comes in, pleads guilty, etcetera.

20 THE COURT: How would you answer the same
21 question with this slight variation? If I found that he lied
22 to the court during his testimony during the sentencing
23 hearing, and that constituted obstruction of justice, would
24 that remove the possibility of giving him credit for
25 assistance?

1 MR. SANDS: You mean for acceptance of
2 responsibility? I think that that, the case that I've cited
3 would no longer be applicable in that case because you're
4 talking about obstructive conduct that occurs after the plea
5 agreement.

6 THE COURT: I know. It's outside the holding of
7 the case that you cited, but --

8 MR. SANDS: Right. What I would say to Your
9 Honor is this is obviously a situation which you and other
10 judges encounter fairly frequently when defendants testify
11 which is where you draw the line in terms of what is really
12 obstructive as opposed to what is in this case, for example,
13 an extremely complicated set of facts extending over a number
14 of years and whether or not the testimony really goes to a
15 point that is somehow violative of the idea of acceptance of
16 responsibility.

17 The things that Mr. Gold has pointed out, I mean,
18 they don't have anything to do with whether Mr. Amodio has
19 accepted responsibility for this offense. I mean the idea
20 that, for example, he didn't dwell on, you know, all of the
21 people involved in the misuse of the trust account back in
22 his prior practice in the Nineties, that is simply not a
23 proper basis, I would say, for the judge making a
24 determination that, you know, somehow this is obstruction of
25 justice which violates acceptance of responsibility in this

1 case.

2 I think you have to draw the line somewhere when
3 a defendant takes the stand as he is entitled to do and make
4 principal decisions about whether a defendant has, in fact,
5 accepted responsibility for his conduct. I think in this
6 case it's almost a given, given that in this particular
7 situation Mr. Amodeo's accepting responsibility for 180
8 million dollars and accepting responsibility for being a
9 leader or organizer. He's not even contesting that
10 adjustment.

11 Finally, with regard to substantial assistance --
12 not substantial assistance, with regard to the diminished
13 capacity, I just have one point to make in final kind of
14 rebuttal to what Mr. Gold has been talking about. One factor
15 that the court should take into account, I think, in
16 determining whether or not his diminished capacity actually
17 contributed to this offense, and I would simply say think
18 about the fact that there was absolutely, in the final
19 analysis, no chance of success and no exit strategy for Mr.
20 Amodeo in this offense. It appears that there may well have
21 been an exit strategy for certain other people. We wouldn't
22 know that I guess until the other shoe drops at some point in
23 the future. But there was no exit strategy for Mr. Amodeo.
24 This was, you know, that freight train, it was heading toward
25 an end of the track that could only result in a massive

1 catastrophe for him.

2 No sane person would do the things that he did.
3 He had absolutely no ability to back out of this. There were
4 other people who could provide cover for themselves through
5 Mr. Amodeo. He had no cover for himself. This was a
6 catastrophe personally waiting to happen, and a catastrophe
7 for the government that was unfolding. And I think you need
8 to take into account the fact that there was no exit plan,
9 how completely irrational ultimately in the final analysis
10 this crime was in thinking about whether the crime really was
11 motivated to some extent by the mental disability.

12 Thank you, Your Honor.

13 MR. SLAUGHTER: Your Honor, will I be permitted
14 to say something next Tuesday in mitigation?

15 THE COURT: That's a good question, Mr.
16 Slaughter. I said before that there could be allocution at
17 the time of the sentencing. That doesn't contemplate though
18 rehashing the same material.

19 MR. SLAUGHTER: I wasn't going to rehash
20 anything.

21 THE COURT: But, yes, of course. I suppose that
22 I could be criticized by some for setting this much time for
23 sentencing. I don't know what other judges do, that's a
24 great mystery in the federal system, we work so independently
25 of one another, we don't even know what one another does. I

1 do know that I strain the Marshal Services resources by
2 spending a lot of time in here and nobody ever says anything
3 directly to me, but I get a lot of body language and
4 questions that indicate a certain amount of consternation.
5 Not from Mr. Lutrell, he's just Mr. Wonderful to work with,
6 but I know that I allow a lot of time. But I also recognize
7 that this is important and when I see a potential lengthy
8 sentence, I want to make sure that everybody gets heard. And
9 I hope I haven't given the impression that I was impatient or
10 asking anybody to compromise their position by simply stating
11 that I didn't want a repeat of what I already had.

12 MR. SLAUGHTER: I don't plan on repeating, I just
13 wanted to, I was there at the time when I told him it's a
14 crime.

15 THE COURT: If we're going over that, then I
16 think I would rather give you a few minutes of rebuttal on
17 your own since you're the one who would speak to that now,
18 right now. If you can do it.

19 MR. SLAUGHTER: Your Honor, what I wanted to say
20 was I was hired for the bar review type of thing to try to
21 get his bar back, and when he asked me to help him find a
22 lawyer to help with the IRS, I went back and I read that
23 transcript, which I've told you before, and when I read that
24 transcript, and I read it a second time, it was clear to me
25 that there was a massive bank robbery going on. And I got an

1 IRS guy to help me and we confronted him. And even when we
2 confronted him the first day, I don't think he believed it,
3 but the second day he did believe us. And within less than
4 six weeks he was in Mr. Gold's office starting to cooperate.
5 And that's all I want to bring.

6 I mean he spent a great deal of money paying me
7 and paying people in my office to help. And Mr. Gold and Mr.
8 Smith and I, we all went through these roller coaster rides.
9 I mean, when I'm saying roller coaster rides, it was a daily
10 thing, how was Frank going to be that day. And we're here
11 today and he hasn't back pedaled and he's accepting
12 responsibility. And it has been a long, long drive and
13 effort and fight to get him here. But I just wanted to say
14 that. And one of the reasons that I brought Mr. Sands in is
15 because I thought I might be a witness and I've enjoyed
16 working with him, but it's been two and a half years and it's
17 been a rocky road.

18 THE COURT: Well --

19 MR. SLAUGHTER: I mean a rocky road because of
20 the mental issues.

21 THE COURT: Counsel represent their clients and I
22 get the benefit of the good arguments and the insight each
23 side has, and sometimes it makes my work more difficult. It
24 certainly has in this case. But I understood from the
25 beginning that you were acting responsibly and I've heard

1 nothing to the contrary. And I understand you've been with
2 this case a long time. I haven't been actively involved with
3 it nearly as long as you have, but I've been aware of it, and
4 Mr. Gold and Mr. Amodeo show up all the time for continuances
5 in the bankruptcy proceedings.

6 MR. SLAUGHTER: When Mr. Gold mentions three
7 million documents or whatever, he's not kidding.

8 THE COURT: I know. Let me take care of a few
9 items now and I'll have to think about the others a little
10 bit and give more thoughtful answers to the issues you've
11 given me to decide.

12 I don't want you to think that these are not well
13 thought out. They're brief rulings, but I have thought about
14 them.

15 I'm going to start out with the polygraph exam.
16 That's not really an issue framed in the presentence report,
17 it's not an issue before me any more because I exercised my
18 discretion in allowing the polygraph expert to testify.
19 However, after hearing his testimony and considering the
20 circumstances under which the exam was given, the questions
21 and the responses, I didn't think it was helpful. Although
22 he was given permission to testify and give his opinion
23 pursuant to 702, I sit as a finder of fact and just like
24 juries I can accept or reject the testimony as I see fit.
25 But I did not think that that testimony was helpful. Not for

1 any lack of qualification of the expert. I thought he was
2 qualified.

3 With regard to the loss figure, I think it is
4 incredible that there could be a consultation fee of that
5 amount of money, that percentage of the amount in question at
6 the time. I think that the preponderance of the evidence is
7 in favor of the 181 million dollars and not in favor of the
8 172 million dollars. I'm not going through a checklist of
9 the issues, the subissues and the arguments regarding the
10 facts that support that conclusion. They're in the record.
11 But that's where I wind up with that.

12 With regard to the -- and I will sign your other
13 order, Miss Cream.

14 MS. CREAM: Thank you.

15 THE COURT: With regard to the bipolar disease
16 which has permeated this hearing, I have to give some thought
17 to that. I think that it would be an easy call on the guilt
18 phase of a proceeding because it is not a question of legal
19 insanity, and there doesn't appear to be any issue with
20 regard to intent, but I do find that the defendant suffers
21 from a bipolar disease as described by the psychiatric
22 expert, Dr. Danziger, and supported by other findings of
23 other mental health providers from the time of the
24 defendant's original incarceration through his stay at the
25 clinic at Harvard University. And I think the disease is a

1 factor that I need to consider in crafting a sentence under
2 3553A. By making that finding I'm not making a finding as to
3 the nexus between the disease and the conduct that Mr. Gold
4 spoke to. I have to give some thought to that.

5 Thank you very much for your help. I will see
6 you next week.

7 MR. SLAUGHTER: Thank you, Your Honor. What
8 time?

9 THE COURT: Let me ask. Miss Darley, what time?

10 1:30. I'm not going to have the time to give you
11 the kind of lengthy written order that I know the United
12 States Attorney's Office, I hope they're accustomed to
13 receiving from me in cases of this magnitude, but I will make
14 my findings on the record and have a briefer than usual
15 order.

16 MR. GOLD: Your Honor, one housekeeping matter.
17 This morning I referred to a government exhibit as number 5.
18 It is the e-mail between Edie Curry and Mrs. Amodeo. It
19 should have been number ten. We've put the correct sticker
20 on the exhibit. We just wanted that for the record.

21 THE COURT: Okay.

22 (SENTENCING CONCLUDED.)
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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Anthony Rolland

ANTHONY ROLLAND