UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	**)**	
	)	**No. 10 CR 196**
vs.	**)**	
	)	**Judge Harry D. Leinenweber**
RUDOLPH CARMEN FRATTO	**)**	
WILLIAM ANTHONY DEGIRONEMO	**)**	

RUDOLPH FRATTO'S RESPONSE TO THE UNITED STATES OF AMERICA'S SENTENCING POSITION PAPER

Now comes the defendant, Rudolph Fratto, by and through his attorney, Donald J. Angelini, Jr., and in response to the United States of America's Sentencing Position Paper, states as follows:

Introduction

The defendant, Rudolph Fratto, is due to be sentenced before your honor on September 26, 2012 for violating 18 U.S.C. Sec. 1341 (Mail Fraud). Fraud is a victim-based crime. According to the United States of America, the *Greyhound Exposition Services* is the victim of Rudolph Fratto's crime. No matter what the plaintiff has submitted at the eleventh hour to try to enhance the sentence of Rudolph Fratto, this is not an organized crime case. For an organized crime enhancement to be warranted, there has to show competent evidence that (a) the defendant is a member of organized crime and (b) there is a *nexus* between the crime and the association with organized crime. The plaintiff relies upon a group of organized crime/RICO cases, where the nexus is either "built" in or pleaded to. This is not the scenario in the case at bar. The defendants did

not perpetrate their fraud by being mobsters or pretending to be mobsters. They perpetrated their fraud by pretending to be legitimate businessmen.

2. Inadequate showing of membership

At sentencing, all findings must be supported by a showing made by preponderance of the evidence. *United States v. Short*, 4 F.3d 475, 479-480, 1993 U.S. App. LEXIS 21581 (7th Cir. 1993). There has been no showing, by a preponderance of the evidence, that Rudolph Fratto was ever a member of an organization which espouses criminal beliefs.

In support of its position that Rudolph Fratto is a member of an organized crime family, the government submits transcript testimony from federal informant, Nick Calabrese, who testified at the *Family Secrets* trial. The information which is being sought to prove the proposition that the defendant is a member of organized crime, however, is not based upon the personal knowledge of the Nick Calabrese. Nick Calabrese never testified that he knew Rudolph Fratto. Nick Calabrese never testified that he had personal knowledge that Rudolph Fratto was a made member of an organized crime family. The testimony that was submitted by the government is derived from information from another source (as conveyed to Nick Calabrese) that (a) Rudolph Fratto participated in a swearing in ceremony and that (b) another source mentioned Rudolph Fratto's name in relation to forklifts and the McCormick Place while Nick Calabrese was serving a prison sentence. This information, even if it was credible, is outside of the personal knowledge of Nick Calabrese.

In Government's Exhibit A, the plaintiff offers the introduction of hearsay testimony from Nick Calabrese that another man had once told him that Rudy Fratto was

present during an organized crime initiation ceremony in 1988. In Government's Exhibit B, the plaintiff offers hearsay testimony that Nick Calabrese testified in the same case that a jailhouse confidant had once told him (somewhere between 1997-2000)[1] that Rudy Fratto drew the ire of 'The Chicago Outfit' because he was involved in the business of forklift rentals without the blessings of 'the mob'. Nick Calabrese never testified that he ever met or spoke with Rudy Fratto, and he never testified that he had any knowledge that Rudy Fratto ever committed a crime. Finally, neither Exhibit A nor Exhibit B have any tendency to show that: (a) there was an active Chicago Outfit in 2006 or (b) that Rudy Fratto was still involved in the organization.[2] Most importantly, however, unless the plaintiff intends to support these transcripts with competent evidence concerning Mr. Fratto's association with organized crime, none of this information is corroborated which is required for the introduction for this type of transcript testimony.

In Government Exhibit C, the plaintiff offers testimony by way of an intercept transcript that Rudy Fratto told the cooperating witness that the government wanted to prosecute him because he was from "…(UI) Park". It simply does not follow that he was necessarily a member of a criminal organization called the "Elmwood Park Crew". Next, there is some talk of Fratto referring to a "boss" being entitled to a "bird dog" fee, but it is absolutely impossible to determine whether Fratto is talking about (a) himself, and (b) whether that refers to being a boss at McCormick Place or a boss in an organized crime sense. There is no indication in this action that Rudolph Fratto ever told anyone that he

[1] It is uncontroverted that Rudolph Fratto did not become involved in the bid rigging scam at the McCormick Place until 2006 which makes this superfluous and apparently irrelevant testimony about Rudolph Fratto and McCormick Place forklifts from 1997-2000 in the *Family Secrets* trial suspect for both accuracy and purpose.

[2] While Nick Calabrese testified that the only way to get out of the "outfit" is feet first (implying that Fratto must still have been a made member in 2006), Calabrese is living proof that this is not true.

could use any position with a criminal organization to further the ends of the crime of fraud or that he was ever an organized crime "boss".

In Government Exhibits D, E, and F, the plaintiff offers conversations between Rudy Fratto and the cooperating witness about a business debt which the cooperator owed to people in Cleveland, Ohio. The transcripts are incredibly confusing. Unless there is some corroboration concerning the meaning of these conversations, the relevance of the introduction of the transcripts is tenuous at best. In Government Exhibit D, Rudy Fratto tells the cooperating individual that he had no knowledge of the debt to Cleveland. Obviously, nobody from Cleveland came to Rudy Fratto or anyone he knew to help collect this debt. In Exhibit E, although the defendant acknowledges some slight acquaintance with the Cleveland creditors, he repeatedly intimated to the cooperator that he had no meaningful relationship with them and it appeared that Fratto was actually asking Gilmore for the identities of the Cleveland creditors (Exhibit F, p. 17). Moreover, insofar as can reasonably be garnered from these transcripts, the identity of the Cleveland creditor as an organized crime figure is not apparent. If the court reviews exhibits D through F as a whole, it appears that the cooperating source is continually trying to bate Fratto into interjecting in his behalf, but Fratto seems reluctant to do so, either because he did not want to or because more probably because he really did not know the Cleveland guys.

Based solely upon the transcripts presented to the court, it is untenable to infer that the Cleveland creditor is a member of a criminal organization. Even assuming that the Cleveland creditor was involved in a criminal organization, it would be equally untenable to presume that Rudy Fratto must be also be member of that same organization

merely because he had once met them at a golf outing on a previous occasion. Moreover, there is absolutely zero (0) evidence that Mr. Fratto ever met with anyone from Cleveland to intercede on the cooperator's behalf. There is no follow up to the original statement that Fratto met one of the creditors, and there is zero (0) corroboration that Fratto even had a minimal ability to affect the debt. Moreover, the cooperator knew Rudolph Fratto for over twenty (20) years. He would be the best person to determine what he believed or did not believe about Rudolph Fratto's association with organized crime, and what part that association played in this crime of fraud.

In Government's Exhibit G, the plaintiff offers a transcript of an overhear intercept which captured Rudy Fratto telling an unintelligible story about an incident involving road rage and why you should never 'flip off' another driver. There is no reference to Fratto committing a violent act, however, and the moral of the story (if there is one) is how you should not get out of your car in a road rage situation. In Government's Exhibit H, plaintiff offers a transcript of an overhear intercept, which captured Rudy Fratto using a metaphor to describe how angry he was. The government ignores the fact that in both Exhibit G and Exhibit H, the Rudy Fratto personally disavowed violence as a means to an end. In fact, in the sentencing of William DeGironemo in relation to the conversation surrounding Exhibit H, the government actually commended the defendant for his refusal to consider violence in relation to the person who had placed Mr. DeGironemo in a bad situation:

> "…..He (Fratto) goes on to say that it would have been a mistake to try to do that same thing (violence) in connection with these arrangements, to have used violence against Hertz, but Mr. DeGironemo takes exception with that because he says: No, no, no, it would have been better if we had threatened them from the beginning because it would have caused them to back away and we would have gotten the contract.

Mr. Fratto reiterates: I think it would have made things worse.

Then Mr. DeGironemo disagrees with him…."

3. Inadequate showing of nexus

Even if Rudy Fratto was actually a member of a criminal organization, there has still been no showing that such membership was related to the charged offense for which he now stands convicted. The *United States Constitution* prohibits a sentencing court from considering a defendant's membership in a criminal organization unless such membership is related to the charged offense of conviction. *Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (U.S. 1992) (Finding that a sentencing court had improperly considered a defendant's membership in the white supremacist 'Aryan Brotherhood' prison gang, because this evidence was not relevant to the crime for which the defendant had been convicted).

Even taking everything in a light most favorable to the United States of America, there is no nexus between the 2006 McCormick Place fraud and Rudy Fratto's alleged association with the 'Elmwood Park Crew'. There has been no allegation that the defendant used his reputation to coerce or intimidate the victim into awarding him a contract. This was not a crime of extortion.

Fraud is a victim-based crime. The alleged victim of the fraud is the *Greyhound Exposition Services.* The defendant and his co-defendant did not perpetrate their fraud by pretending to be mobsters. They perpetrated their fraud by pretending to be legitimate businessmen. This fact alone severely undermines any claim of a nexus relationship. The defendants have assumed the guise of legitimacy in order to obtain a benefit at the

expense of an unwitting victim (Greyhound Exposition Services). If the victim, a major corporation, had ever learned that Rudolph Fratto was a member of organized crime, they would have pulled out of any deals immediately.

The defendant cites several cases where the awarding of an upward departure for memberhip in "organized crime" was warranted.[3] *United States v. Damico*, 99 F.3d 1431, 1439, 1996 U.S. App. LEXIS 29192 (7th Cir. 1996) ("…when a nexus to organized crime exists, as it admittedly does here, it provides a proper basis for departure"). (Finding a nexus to organized crime in a RICO case where the defendant had directed a criminal enterprise engaging in extortion, armed robbery, and gambling) See also *United States v Harnhardt*, 361 F.3d 382, 393, 2004 US App LEXIS 4857, 24 (7th Cir. 2004) ("Where membership in or association with the Outfit is used to further the criminal activity for which a defendant is convicted, an upward departure under the guidelines is appropriate") (Finding a nexus to organized crime in a RICO case where the defendant Chicago outfit members used the outfit organization to run a nationwide scheme to plan, perform, and profit from forcible robberies of jewels from jewelers). Id. See also *United States v. Schweihs*, 971 F.2d 1302, 1992 US App LEXIS 17956 (7th Cir. 1992) (allowing a departure upward because the defendants extorted a 'street tax' from an adult business by threatening that the outfit would impose violent repercussions if they failed to pay. Analogizing that an upward departure could be appropriate if the defendant had used his criminal organization to commit a crime commensurate with the way that a defendant might use a firearm to commit a crime) See *United States v. Zizzo*, 120 F. 25

[3] The membership in organized crime, while having "legs" in the Seventh Circuit, is not even referred to in the Office of General Counsel's U.S. Sentencing Commission Manual (March 2012), *Selected Departure and Variance Decisions* as a reason for upward departure.

1338, 1997 US App Lexis 1987. (Allowing a departure upward because the defendants were convicted in a RICO case of running extortion, gambling, and loansharking rackets)

The above cited cases have absolutely no bearing on the issue at bar. Primarily, the above cases are organized crime/RICO cases. Judge Posner has espoused the most quotable reasonable explanation for allowing for upward departure in these types of cases:

> "….We deal here with a criminal syndicate of extensive scope and extraordinary durability-one of the oldest and most notorious criminal enterprises in the United States. Had the guideline range for RICO offenses been set with the Chicago Outfit in mind, it would have greatly over punished the run of the mill criminal activities that are routine grist of RICO prosecutions….The Chicago Outfit is the clearest possible example of a gang operating on such a scale, with such access, over such a long period of time that the danger which it poses to society is not adequately reflected in the guideline range. It is not your average criminal RICO violator". *United States v. Rainone, 32 F. 3d 1203,* 1994 US App Lexis 1994.

It makes perfect sense. The Seventh Circuit has authorized upward departure in organized crime/RICO cases, because the RICO statute encompasses the "mom and pop" RICO violators as well as the Chicago Outfit violators. The RICO statute does not adequately account for the scope of the Chicago crime family so upward departure may be appropriate in those cases. This, however, is not a RICO case.

Moreover, in every one of the above cases, the nexus between the criminal activity and "organized crime" was built in: these were organized crime prosecutions. An element of the offense in a RICO case is committing overt acts to further the ends of the "organization". The nexus was either admitted for purposes of a "plea agreement" or proven at trial. The instant action is not an organized crime prosecution. There is no deficiency in 18 U.S.C. Sec. 1341 (Mail Fraud) to warrant departure because the fraud

statute was not enacted to punish crimes that specifically involve criminal enterprises. In the instant action, the fraud itself is the crime, not committing an act to further the ends of a criminal enterprise.

Most importantly, we know that this is not an "organized crime" prosecution, because the government has told us so. There is zero reference to "organized crime" in the indictment. There is zero (0) reference to "organized crime" in the plea agreement. Most critically and importantly, there is zero (0) reference to "organized crime" in the *Government's Version of the Offense*. [4] Because there is zero (0) reference to "organized crime" in the *Government's Version of the Offense*, there is naturally zero (0) reference to organized crime in the Presentence Investigation Report.[5] An upward departure was never considered by the United States Probation Department.

The gravamen of the government's argument centers around the "Cleveland" debt. Presuming that the Cleveland creditor was a member of a criminal organization (which we do not), the transcripts do not support the required nexus. The cooperating witness owed a legitimate business debt to a creditor in Cleveland. Extensive audio surveillance revealed there are only three cursory conversations in which Gilmore told Fratto about the debt. In the first conversation, Fratto told Gilmore that he had become acquainted with the Cleveland creditor at a golf outing. Gilmore asked Fratto if he could

[4] The United States of America was not prevented from including Rudolph Fratto's membership in organized crime in its *Version of the Offense*. In fact, if the plaintiff was seeking departure for reasons relating to organized crime, the reference should absolutely be in there. Primarily, the United States Probation Officer had no reason to investigate the issue, and the defendant is severely prejudiced because while the probation officer had the ability to support the proposition, he also had the ability to completely discount the relationship between organized crime and the instant offense. As in the standard drug conspiracy, the probation officer would have interviewed investigating agents to either support or dismiss the proposition that there was a nexus between organized crime and the fraud at issue. He was never given that opportunity.

talk to the creditor on his behalf in order to suggest some patience or leniency in repayment/collection of the debt. Fratto told Gilmore that he did not know the creditor well enough to contact him himself. Fratto volunteered to have a meeting with the creditor, as a favor, if Gilmore would arrange it. Fratto agreed to help Gilmore to the extent that Fratto could, in deed, help.

This favor was not a component of the fraudulent scheme to deprive the victim (Greyhound Exposition Services) out of money. Even though the cooperating witness (acting as an agent of the government) continuously urged Fratto to agree to meet in person with the Cleveland creditor, this meeting never took place. It further shows that Fratto's entire vague organized crime references may have been no more than puffing. One of aspects of the defendant's involvement in this action that is often overlooked by the government, is that Rudolph Fratto offered very little if anything to this deal. He had no money. He had no forklifts. He had no experience in the forklift leasing business. And as Gilmore began to see as time went on, Fratto had no connections at the McCormick Place. If Fratto was dropping names, it was only in his efforts to give himself the illusion of importance to this deal to both the cooperator and to his co-conspirator. Organized crime did not play a role in this fraud; there is no nexus.

3. Upward departure is not warranted

Although it was not specifically addressed in the government's position paper, the defendant is assuming that the plaintiff is seeking a two (2) level departure that is equivalent to the departure which was authorized in the Seventh Circuit RICO cases. In that vein, the resulting offense level would be sixteen (16) which would suggest a guideline range of 24-30 months of incarceration.

The co-defendant, William DeGironemo was sentenced in this matter to twelve (12) months of home confinement. The defendants, William DeGironemo and Rudolph Fratto are one (1) criminal history category apart which leaves the defendant, Rudolph Fratto with an additional three (3) months of exposure on both the low end and high end of the guideline range. If the defendant is sentenced as the government hopes, then the testimony from a witness who had no personal knowledge of the defendant could be more important than the actual facts and circumstances of this crime which brought the defendant before your honor.

The defendant prays this court to sentence him on the offense that he committed and the role that he played in that offense. If this was an organized crime case and the defendant was prosecuted for offenses relating to furthering a criminal organization, then the defendant would understand his additional exposure. But it is not. This is not an organized crime case. There is no competent corroborated proof of the defendant's membership in a criminal organization, and there is no nexus between the organization and the crime.

Maybe most importantly, however, if the government wanted to introduce this connection, they should have done so before the United States Probation Department conducted its thorough investigation of this case seven (7) months ago. Before last Wednesday, September 19, 2012 (filing of government's position paper), if this court was wearing its "judicial blinders" and had no knowledge of items that were stricken from the indictment or items that were discussed in the sentencing of the co-defendant, it would have never known that this case had an organized crime component. There is a good reason for that: this is not, never was and never will be an organized crime case.

WHEREFORE, the defendant, Rudolph Fratto prays this court to deny the United States of America's request for upward departure

Date: September 24, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent the notification of such filing to the following:

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