

KAREN L. LOEFFLER  
United States Attorney

STEVEN E. SKROCKI  
BRYAN SCHRODER  
Assistant U.S. Attorneys  
Federal Building & U.S. Courthouse  
222 West Seventh Avenue, #9, Room 253  
Anchorage, Alaska 99513-7567  
Tel: (907) 271-5071  
Fax: (907) 271-1500  
E-mail: [steven.skrocki@usdoj.gov](mailto:steven.skrocki@usdoj.gov)  
E-mail: [bryan.schroder@usdoj.gov](mailto:bryan.schroder@usdoj.gov)

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	No. 3:07-cr-00028-RRB
	)	
Plaintiff,	)	<b>UNITED STATES' SENTENCING</b>
	)	<b>MEMORANDUM</b>
vs.	)	
	)	
MARK J. AVERY,	)	
	)	
Defendant.	)	
_____	)	

COMES NOW the United States of America, by and through undersigned counsel, and files with the court a sentencing memorandum in the above captioned case. For the reasons provided below, the United States requests that the court impose a sentence of 20 years for the counts of conviction. A sentence of this length and severity is justified under the facts of the crime, the Section 3553(a) factors, and the United States Sentencing Commission Guidelines. A 20 year sentence is further supported by the victim impact letters provided to the court in aid of sentencing and the conduct of Mark Avery, who since appeal, has shown no remorse, and fails to recognize the illegality of his conduct nor the magnitude of his betrayal to May Wong Smith and her interests.

**I. SUMMARY OF SENTENCING RECOMMENDATIONS**

<b>TERM OF IMPRISONMENT</b> .....	<b>20 Years</b>
<b>SUPERVISED RELEASE</b> .....	<b>3 Years</b>
<b>FINE</b> .....	<b>\$1 Million Dollars</b>
<b>RESTITUTION</b> .....	<b>\$45,925,737.57</b>
<b>SPECIAL ASSESSMENT</b> .....	<b>\$900.00</b>
<b>FORFEITURE</b> .....	<b>N/A</b>

The court has before it a defendant convicted of one of the largest, if not the largest, private financial fraud scams seen in the state of Alaska. The court also has before it an unrepentant perpetrator who stole from an elderly woman. Moreover, he hatched such a sophisticated scheme that he was able to defeat the careful planning of May and Stanley Smith which was specifically designed to prevent this from happening. Despite their planning, trustee Mark Avery, who possessed the skills of a prosecutor and estate lawyer, took for his own benefit a fortune to which he neither deserved nor was entitled. More than 10 years after initiation of this case, and close to 500 court filings later, it is clear that Mark Avery’s greed, avarice, and sense of entitlement drove this crime. His greed and poor judgment then turned his scheme into a disaster for all concerned. Avery’s alleged business plan, along with the purchase of exotic toys and boats ended in failure, collapsing upon itself well before the government served its search warrants for evidence of rocket pods and financial fraud. Avery did this not out of commitment to May Wong Smith, as her money was safe and secure and needed no further investing. Nor did he pursue a purely financial motive to increase May Wong Smith’s holdings. Mark Avery committed this crime for himself and to obtain control of the trust and its assets.

In light of the foregoing, one wonders: *just how much is enough?* For most any person in this country, or on this planet, a fee of \$600,000 a year would be fortune enough. In this case, even that fee, a princely sum by any standard, wasn’t enough. In the end, as the court knows, the

staggering figure of \$52.5 million wasn't enough as that amount disappeared in less than five months. It is not a far stretch to argue that, but for government intervention exactly where would the spending and the draw on May Smith's personal trust have ended. Because May Wong Smith had no idea what was happening to her fortune, he may have eventually raided her entire \$100 million dollar trust to keep his enterprise funded.

In this case, Mark Avery perpetrated the cruelest of financial schemes, preying upon an incapacitated trustor, living far away, and defrauding two other old men, who frankly should have and were entrusted to do better. In this regard, they failed, and bear some degree of responsibility. Messrs. Matheny and Collins were, however, outwitted and outmaneuvered by a much younger man, a man they trusted, and who took for himself what he wanted, withholding information from them until it was too late.

For these reasons, and others cited herein, the United States requests a sentence of 20 years imprisonment.<sup>1</sup>

## **II. GUIDELINE APPLICATIONS**

### **A. Application**

The Guideline provisions for this offense would provide for an adjusted sentencing guideline range of 235-293 months, with a sentencing range of 19-24 years. The United States recognizes that the Final Presentence Report recommends a sentence of 180 months, with credit for time served. In the government's view that recommendation is too lenient given the section 3553 factors, Avery's attempts to manipulate and defraud the jury, and the overall nature of this crime.

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<sup>1</sup> The United States incorporates the facts and arguments about Avery's "cooperation" juxtaposed against his testimony at trial as set forth in its Motion for Reconsideration to the court's order limiting the government's sentencing argument to 10 years. (See Docket 484).

## **B. Acceptance of Responsibility**

There can be no conceivable justification for awarding the defendant a reduction for acceptance of responsibility. Mark Avery went to trial in this case, and testified. He committed perjury in the government's view. The Final Presentence Report similarly concludes. There can be no reduction for acceptance of responsibility.

## **C. Criminal History Category Computation**

The defendant's criminal record is Category 1.

## **III. APPLICATION OF 18 U.S.C. § 3553(a)**

In addition to the Guidelines, the following sentencing factors set forth in 18 U.S.C. § 3553(a) apply with respect to the sentence to be imposed in this case: (1) the nature and circumstances of the offense and history and characteristics of the defendant; (2) the need for the sentence to reflect the seriousness of the offense, afford deterrence, protect the public from further crimes and provide the defendant training and treatment; (3) the kinds of sentences available; (4) the established Guidelines sentencing ranges; (5) any pertinent Guidelines policy statements; (6) the need to avoid unwarranted sentence disparity between defendants with similar records convicted of similar crimes; and (7) the need to provide restitution to victims of the offense. See, 18 U.S.C. § 3553(a)(1) through (7). Each sentencing factor is addressed in turn:

### **A. Nature and Circumstances of Offense and the History and Characteristics of the Defendant.**

#### **1. History and Characteristics of the Defendant – Unlawful Conduct**

By all accounts, Mark Avery's life and career trajectory held much promise. By almost any standard, his upbringing was privileged. He attended the University of California, Berkeley, and later Golden Gate Law School. His father was a well-respected legal icon in the San Francisco Bay Area, known for expertise in the areas of tax and trusts. Avery's childhood

was idyllic and privileged. He wanted for naught. There were trips to the Sierra Nevada mountains in the summer, European biking trips, martial arts lessons, glider lessons, and a defensive driving course at a famous driving school when his driver's confidence was shaken in an accident not his fault. Avery succeeded as an EMT, and succeeded in college and law school. He eventually became a prosecutor, got married and had two children. He had a devoted wife, who worked hard and worked hard to take care of their children.

He was not, however, a successful businessman.

His main business, Regional Protective Service never made him money. In fact, no Avery venture ever turned a profit. Not one.

## **2. The Instant Offense**

In the year leading up to this offense, and despite his monthly salary of \$50,000 a month as trustee for the two trusts, Mark Avery was broke. By all accounts Avery should have been financially "set" for life with such a figure, but that \$600,000 figure per year was not enough. Instead of managing this money, or hiring someone to assist him, Mark Avery used every penny of his trustee fees. In 2004, he "borrowed" \$400,000 from his mother's trust to start a computerized steel cutting business, called "CNC Steel." That plan went nowhere, and at the end Avery kept \$200,000 of that \$400,000 and funneled it into his Wells Fargo "Avery and Associates" account instead of paying those funds back to his mother. In Avery's view, his mother was "taken care of" with a home in San Francisco, worth more than \$1.5 million. Avery's acts with respect to his mother's trust was a harbinger, some would say a trial run, or a much larger "borrowing scheme" to come in 2005. However this second "loan" belonged to yet another woman close to Mark Avery, and one who entrusted him with certain legal and immense

fiduciary duties. Duties for which he was handsomely paid to uphold. And duties which the court knows he utterly breached.

a) The \$52 Million Dollar Heist and Spending Spree

Because of the trial, the court is familiar with Avery's bait and switch approach with trustees Matheny and Collins. As established and argued by the government at trial, Avery took possession of more than \$43.8 million dollars before informing Matheny and Collins that he, personally, had possession of the funds. Indeed, Avery kept drawing millions more down on the margin loan even while millions still resided, unspent, from prior draws. The pattern here was clear. Avery spent in order to exhaust *all* of \$52 million so there was nothing left save for operating expenses. Avery could have, this court knows, spent roughly \$10 million on one or two Gulfstream type aircraft, or the entire \$50 million on a newer Gulfstream 5 aircraft, and fulfilled the proposed "the aircraft investment scheme." The purchase of one or two Gulfstreams may have passed the blush test if an aircraft was truly needed to ensure the grantees use of MSSCT funds. Instead, Avery used the funds for toys, to pay off personal debt and buy rare and historically significant aircraft and other items not in any way related to his proposal to the trustees. It is clear Avery intended and did spend all that was allocated to him. In this way, if the trustees demanded the funds back, the purchases were titled in one or more of Avery's businesses. Of course, Avery never told Matheny or Collins about buying the Mustang and Corsair, Mooseboat and Carver Yacht. In the event they did find out, even these assets were safely out of reach.

In the end, the nature and circumstance of this offense was one directed at benefiting Mark Avery, and Mark Avery only. Any benefit accruing to May Wong Smith was an afterthought and was not, certainly, the primary reason for Avery's theft in the first place.

b) Wells Fargo Counts 16 and 17

Avery is a financial danger to the public at large and his acts, given his legal background and fiduciary responsibility as trustee, could not be more serious. As evidenced by the convictions of Counts 16 and 17, Avery did not hesitate to commit further financial crimes, outside of the margin loan crime, in applying for and receiving a line of credit from Wells Fargo based on a false financial application. As proven at trial, at the time of the application, Security Aviation could not make payroll, and the margin funds were exhausted. In order to make payroll Avery sought a line of credit from First National Bank, which was rejected because Avery would not provide his tax returns and other financial information, and instead sought the line from Wells Fargo. In the government's view, Avery intentionally Avery failed to inform Wells Fargo as to the existence of the margin loan, and his obligation to pay it, while listing as assets such as aircraft, motorhomes, and other property all which had been purchased with margin loan funds. This fraud on the bank was perpetrated in order to conceal the nature of how Avery funded the purchase of Security Aviation, et. al. If he had, most certainly Wells Fargo would have asked for a contract, promissory note or other documentation, which Avery did not possess.

These counts establish that Avery's crimes transcended and expanded beyond the margin loan theft. Each should be recognized by the court in imposing sentence. This case was not just about the margin loan, and these two counts establish Avery's ability to commit crimes outside of the scope of the theft from May Smith.

**B. Need for the Sentence to Reflect the Seriousness of the Offense, Afford Deterrence, Protect the Public, and Rehabilitate the Defendant.**

Avery's actions with respect to this crime violate almost every tenant of decency. May Smith was a personal friend of his father. Avery knew her growing up. As a younger man,

Avery knew for years he was to inherit his father's seat as trustee. There was a personal relationship in place. Despite all of this, Mark Avery financially exploited May Smith for his own benefit.<sup>2</sup>

Even without that, Avery was paid handsomely to keep the ship on course, and do nothing to impact the MST corpus. He was the trust's legal advisor. If that wasn't enough, May Smith was mentally incapacitated and was not able to care for herself. She was sequestered on an island, first in Guernsey, then the Bahamas, far away from prying eyes. Conveniently, the alleged need for "trust secrecy," kept her mental infirmity unknown, and the need to keep May Smith offshore for tax purposes dovetailed nicely with Avery's plans. He could safely hide behind the trust's veil of secrecy, May Smith would not, and could not ever inquire about her funds, and by moving everything related to the scheme to Alaska it would be that much harder for the trustees to be vigilant as to Avery's spending.

In this case, Avery preyed on the most defenseless in an aging society, a woman with no friends, no mental ability to understand what was happening, and a woman who was essentially,

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<sup>2</sup> These are signs of Financial Exploitation, some of which are clearly established here, in italics:

- *Withdrawals of money inconsistent with older person's spending habits*
- *Withdrawals of money inconsistent with older person's income*
- *Will, property title or valuable asset bequeathed to "new" beneficiary* (Avery inherits the trustee seat, as opposed to a search for a more independent and non-biased candidate with Trust/Grantee experience. The trust restatements kept successor trustees in the family, in perpetuity.)
- Older person "can't find" or "misplaced" valuable personal belongings
- *Unusual credit card activity or new credit card account* (or, in this case, a "loan" secured by the Trust assets, akin to a personal and private line of credit)
- Lack of necessities or amenities older person can afford
- Unfilled prescriptions or untreated medical problems
- *Caregiving incommensurate with older person's income*
- Document missing
- *Suspicious signature on document*
- Financial document altered
- *Acquaintance takes up residence with the older person*
- Mail redirected
- Prepaid services not delivered
- Services overcharged
- Incessant phone calls

See, <https://www.justice.gov/elderjustice/financial/faq.html>



aside from personally handpicked caregivers, living alone. Avery took advantage of May Smith's condition, and, it may appear, the other trustees did as well over the years.<sup>3</sup>

With respect to deterrence and rehabilitation, Avery will never, in the government's view, accept nor agree that he did wrong by these acts. A long or longer jail sentence won't change those views, so deterrence to Avery and rehabilitation are not in the offing. He should not benefit from his recalcitrance by a more lenient sentence, and the court should consider the factor of deterrence to others as the strongest factor warranting a significant sentence in this case, especially with respect this country's increasingly aging population and upward trend in financial exploitation of the elderly.

In aid of sentencing, the United States has supplied the court with letters from the May and Stanley Smith Charitable Trust, the May Smith Trust, Ruth Collins, Bruce Raabe, and Jennifer Arnold. It has also provided the court with a letter from a local Anchorage resident seeking the return of funds from Mr. Avery's defunct medical training school.<sup>4</sup> This individual paid Avery's business \$800 for her grandson's tuition, but the school closed due to lack of funding. This is just one example of the very real and large impact Avery's theft had on the local economy and people in general. Many left good paying jobs to jump on the Avery spending spree, without knowing the house of cards was built on fraud. After the collapse of Avery's empire, and Avery's sequestering of millions of dollars with Paul Stockler afterwards, the entire scheme crumbled and dozens were left unemployed and bills from vendors left unpaid.

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<sup>3</sup> Financial exploitation is a frequent form of elder abuse. Among national prevalence studies conducted in the United States, financial exploitation was either the most frequently or second most frequently self-reported form of elder maltreatment, with between 3.5% and 5.2% of the older adult population experiencing financial exploitation by a family member. A study utilizing the Federal Trade Commission's complaint database found 8.3% of adults ages 65 and older experienced some form of consumer fraud. Studies utilizing special samples, such as Adult Protective Services, typically found financial exploitation to be the second or third most frequently reported form of elder abuse (excluding self-neglect). *See, <https://www.justice.gov/elderjustice/financial/faq.html>*

<sup>4</sup> Said amount of \$800 should be directed to this individual as restitution.

The letters provided to the court are self-explanatory and the government will not attempt to supplant their words by attempting a brief summary of each. The letters, each in their own way, provide the court with a real explanation of the personal, emotional, and financial costs of Mark Avery's crimes. The emotional trauma is heartfelt. The personal trauma is similarly real. In terms of dollars and cents, those losses are real as well. The losses to the Trust, as calculated in future earnings, exceed \$150,000,000 million dollars according to Mr. Raabe. The letters provide the court with necessary information as to both the nature of the offense and the seriousness of the offense factors under Section 3553.

**C. Sentencing Ranges Available**

The sentence recommended by the United States is within the Presentence Report and the Sentencing Guidelines.

**D. Pertinent Policy Statements**

The United States is unaware of any pertinent policy statements applicable to the sentence it recommends.

**E. Need to Avoid Sentence Disparity**

To the government's knowledge, this is the largest private fraud prosecuted in the state of Alaska. No case within recent memory comes close. In other districts across the United States, the sentences imposed vary depending on whether the government or a private individual is the victim. In matters of private victims, \$50 million dollar frauds are warranting 20 years incarceration. For example, in a Ponzi scheme in Florida, with an estimated loss of \$37.5 million to the victims the court imposed a sentence of 17 years.<sup>5</sup> In a \$50 million dollar mass marketing scheme, a Nigerian citizen received a sentence of 20 years.<sup>6</sup> So did a Colorado man

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<sup>5</sup> See, <http://www.sun-sentinel.com/local/palm-beach/fl-zada-ponzi-sentenced-20160122-story.html>

<sup>6</sup> <https://www.ice.gov/news/releases/nigerian-man-sentenced-20-years-role-50-million-fraud-scheme>

who bilked investors out of \$4.8 million in bogus timeshare investments.<sup>7</sup> The former owner of the New York Islanders hockey team was saddled with a 20 year sentence, after a guilty plea, in a \$50 million dollar swindle of investors.<sup>8</sup> In many of these cases, the perpetrator used investor money to purchase homes, cars, watches and other lavishes trappings. Avery's purchase of boats, expensive recreational vehicles, Alaska toys, and vintage aircraft are no different. In another case, a defendant in a Sacramento, California "foreclosure rescue scam" case obtained title to 300 homes, with losses of more than \$50 million. That individual, convicted at trial, received a sentence of 35 years.<sup>9</sup> And in another Sacramento case a \$50 million plea deal on a real estate based Ponzi scheme is estimated to land the main perpetrator 18 years in prison.<sup>10</sup>

There are, admittedly, other cases involving fraud which impacted the public at large, and which garnered lighter sentences. However, based on the articles provided here, the 20 year sentence argued by the government is consistent with the types and severity of sentences imposed or available.

#### **F. Fine/Forfeiture/Restitution**

The United States seeks a fine of \$1 million dollars from Avery, along with restitution to the May Smith Trust for \$45,925.737.57. It is believed that Avery is the recipient of a "spendthrift trust" the amount of which, and the monthly distribution of which, is unknown to the government. It is believed to originate from the sale of his mother's home on her passing. The court should inquire in the hope of at least ascertaining the amount and having some of the proceeds applied towards restitution.

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<sup>7</sup><https://www.justice.gov/usao-ndil/pr/former-aurora-resident-sentenced-20-years-prison-48-million-international-timeshare>

<sup>8</sup><http://www.bloomberg.com/news/articles/2014-11-20/walsh-ordered-to-prison-for-554-million-wg-trading-fraud>

<sup>9</sup><http://www.sacbee.com/news/business/article2608541.html>

<sup>10</sup><http://www.sacbee.com/news/local/crime/article57372278.html>

**G. Any Application of Bail Pending Appeal Should Be Denied – Mark Avery Should Be Remanded Pending Appeal**

Avery may move the court at imposition of sentence for bail pending appeal. The United States is opposed.

Under 18 U.S.C. § 3143(b), the following factors must be satisfied for a defendant to be released pending appeal. As stated therein;

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

- (i) reversal,
- (ii) an order for a new trial,
- (iii) a sentence that does not include a term of imprisonment, or
- (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

Factors (iii) and (iv) are unlikely given the extent of the fraud, therefore only factors (A) and (B)(i-ii) are applicable.

As to factor (A) the government maintains a concern that the defendant is both a financial threat to the community as well as a flight risk. As to the first, Avery has no compulsion against acquiring other people's money for his own personal use, regardless of the source. He has proven this in borrowing money from his mother, and from the May Smith Trust. As to flight risk, Avery has already spent five years in prison, and the thought of returning to federal prison for a longer, lengthier sentence may be too much to contemplate. The government

recognizes that Avery has not violated any of his conditions since 2013, however this time he is facing a significant sentence, post-verdict, the certainty of which is absolute.

The factors under subsection (b), that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in a reversal or an order for a new trial, do not lie in Avery's favor. Trial in this matter was relatively straightforward, and the government cannot identify any significant trial issue which would result in reversal or an order for a new trial.

As to pretrial motion practice, Avery filed several non-prevailing motions to dismiss for statute of limitations, specific performance, and other theories which the court seemed to have little trouble in denying. In making this argument the United States relies on the recommendations and factual findings of the court's order denying Avery's various motions to dismiss.

On balance, which appears to favor the government, Avery cannot show that he can raise a substantial question of law or fact likely to result in a reversal or an order for a new trial. Accordingly, any motion for bail, which is opposed by the United States, should be denied.

#### **IV. CONCLUSION**

The United States does not anticipate calling any witnesses during the sentencing hearing. The issue before the court, in terms of the magnitude of the financial crime, and the length of sentence, are new ground for this district. In making its sentencing recommendation of 20 years, without time served, the government understands the gravity of the proposal, but does so in response to Mark Avery's acts taken in this case. Mark Avery, since he has recanted the facts leading up to his plea of guilty, has steadfastly denied responsibility for these crimes as well as his guilt. There is no remorse and no contrition. In the end, each defendant must atone for decisions made, even those made more than a decade ago. Those decisions took financial advantage of an elderly, frail and mentally impaired widow whose personal funds should have

remained untouched. Avery was paid handsomely to protect those funds and instead, Avery embarked on an unnecessary, unjustifiable, and unconscionable scheme which put May Smith's personal wealth at great risk, in essence gambling with house money. In this scheme, Mark Avery elected to feed his financial ego with boats, R/V's, watercraft, and snow machines. He collected a flight of vintage trainer aircraft, including, as a *pie'ce de resistance*, two of the most powerful piston engine fighters of World War 2.<sup>11</sup>

Avery is unrepentant as to the crime he perpetrated against May Wong Smith and the legacy of her husband, Stanley Smith. As the government has stated all along, this case is a breach of trust and a betrayal of that trust of the highest order which impacted the Trust and this community as well. It also impacted many of the hard working people who signed on with Mark Avery and believed in him, all to their detriment. Mark Avery should be sentenced in a fashion befitting the choices made in 2005, none of which benefitted May Wong Smith, or the employees of Security Aviation, or Avery's other companies, or the Trust, but allowed him to fulfill his purchasing and personal fantasies of having his own air force, his own medical training and aircraft medevac companies, and a collection of World War 2 aircraft icons. For all of these reasons, a sentence of 20 years is appropriate and should be imposed by the court as not greater than necessary to uphold the administration of justice.

RESPECTFULLY SUBMITTED May 18, 2016, in Anchorage, Alaska.

KAREN L. LOEFFLER  
United States Attorney

s/Steven E. Skrocki  
STEVEN E. SKROCKI  
Assistant U.S. Attorney

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<sup>11</sup> There remains to this day a heated debate about which aircraft was the best aircraft of World War 2. As witness Bruce Lockwood put it during trial, if flying from a carrier, it was the *Corsair*, if flying escort over Europe, it would have been the *Mustang*. Avery purchased one of each.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2016, a copy of the foregoing was served electronically on:

Michael D. Dieni

s/Steven E. Skrocki  
Office of the U.S. Attorney