SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

THE PEOPLE OF THE STATE OF NEW YORK -against- JOEL SANDERS, Defendant.	Ind. No. 773/2014

PEOPLE'S OPPOSITION TO MOTION FOR RESENTENCING

Defendant Joel Sanders complains that he will not pay the fine imposed at sentence because doing so would impede his lifestyle and the lifestyle enjoyed by his adult children. But the law does not mandate that a fine is appropriate only if it is so small that payment will effectively be costless to the defendant. A sentence of no moment is no sentence at all.

Background

On May 8, 2017, defendant Sanders was convicted after trial of Scheme to Defraud in the First Degree, felony violation of the Martin Act, and Conspiracy in the Fifth Degree. The jury found that defendant Sanders engaged in a quarter-of-a-billion-dollar fraudulent scheme while acting as the chief financial officer of Dewey & LeBoeuf, which at the time of defendant Sanders' criminal scheme was one of the largest law firms in the world. The evidence at trial established that, as a direct result of the fraud, Dewey's debt increased by $47 million between 2009 and 2012. During that same period, defendant Sanders was paid $9.3 million, nearly 20% of the increased debt his fraudulent scheme facilitated. In the end, Dewey failed, people lost

their jobs, and the banks and insurance companies taken in by defendant Sanders' scheme lost over $100 million. Defendant Sanders' three-and-a-half-year-long criminal conduct ensnared at least seven other people, all of whom, unlike the defendant, have accepted responsibility for their conduct.

On October 10, 2017, defendant Sanders was sentenced to a conditional discharge, conditioned on the performance of 750 hours of community service and payment of a $1 million fine. The conditions of sentence, which were reduced to writing and signed by the defendant, require that defendant Sanders "pay at least 1/3 of the fine annually on or before September 12 of each year following the imposition of this sentence, during the three-year term of the conditional discharge until the fine is satisfied." Conditions of Conditional Discharge, at 1. (Attached hereto as Exhibit 1.) The conditions of defendant Sanders' discharge clearly provide that, "if defendant fails to pay the fine in accordance with the direction of the Court, the defendant shall be imprisoned for one year until the fine is satisfied." *Id.*

Defendant Sanders has failed to comply with the conditions set by the Court by paying 1/3 of his fine by September 12, 2018. Instead, on October 25, 2018, a month-and-a-half after his first fine payment was due, defendant Sanders filed a motion to be resentenced, admitting to assets of $1.5 million and income of $375,000 per year, but claiming that his "dire financial circumstances," Motion to Revoke or, Alternatively, Reduce the Fine Pursuant to C.P.L. 420.10(5) and Incorporated Memorandum of Law in Support Thereof, at 9 ("Motion"), prevent him from making the required payment and claiming that the fine is unconstitutionally excessive in any event.

Defendant Sanders' untimely motion is baseless, and his assets – which he concedes are more than sufficient to satisfy not only the 1/3 payment that is now nearly two months late, but also the entire fine – are in fact far greater than he admits. Defendant Sanders has shown, once again, that he does not think any rules apply to him, and his false and misleading Declaration, *see* Declaration of Joel Sanders in Support of Motion for Resentencing to Revoke or, Alternatively, Reduce or Otherwise Alter the Terms of the Fine Pursuant to C.P.L. 420.10(5) ("Declaration"), is a fraud on this Court.[1] Defendant Sanders should be immediately remanded, in accordance with the Conditions of Conditional Discharge he signed and of which he is well aware.[2]

Legal Principals

A sentence for a felony may include a fine "not exceeding ... double the amount of the defendant's gain from the commission of the crime." PL § 80.00(1)(b). "[G]ain to a third party of the defendant's choice constitutes 'the defendant's gain' within the meaning of Penal Law § 80.00." *People v. Kramer*, 132 A.D.2d 708, 711 (2d Dep't 1987). "Where the court imposes a fine, ... the sentence may provide that if the defendant fails to pay the fine ... in accordance with the direction of the court, the defendant must be imprisoned until the fine ... is satisfied."

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[1] Defendant Sanders has demonstrated repeatedly that he refuses to be bound by any rules that do not suit him. His refusal to abide by the rules landed him before the Court in the first instance, and that refusal has continued. For example, defendant Sanders complains that he has been disbarred, but in disbarring him, the Second Department noted that defendant Sanders failed to notify the court of his convictions, as required by law, *See* Exhibit 5 to Motion, at 2. Here, defendant Sanders has failed to abide by a clear condition of his sentence (which he acknowledged by his signature) and tries to pass it off as though he has not. *See* Declaration, at ¶ 5 (swearing on October 24, 2018, six weeks after the payment was due, that he has an "imminent deadline imposed by the trial court to satisfy the Year-One installment of $333,333.33").

[2] Among the many inaccuracies contained on the Declaration and Motion is a statement that defendant Sanders filed a motion to stay the fine in the First Department contemporaneously with the filing of his Motion here. The People have not been served with any stay motion, and the First Department has reported to a member of our Appeals Bureau that no such motion has been filed.

CPL § 420.10(3). A defendant may apply for resentencing if he believes he is unable to pay a fine. *See* CPL § 420.10(5). In determining whether a defendant is able to pay a fine, the court must consider all of the defendant's assets and sources of income. *See id.* When the sentence includes neither probation nor imprisonment, "if the court is satisfied that the defendant is unable to pay the fine ... it must adjust the terms of payment; or lower the amount of the fine ...; or ... revoke the entire sentence imposed and resentence the defendant" to any legal sentence. *Id.*

The defendant bears the burden of "establish[ing] that he is unable to pay the fine because of indigency." *People v. Toledo*, 101 A.D.3d 571, 571 (1st Dep't 2012). When a defendant fails to pay a fine or claims that he is unable to pay a fine:

> a sentencing court must inquire into the reasons for the failure to pay. If the [defendant] willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may ... sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the [defendant] could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a [defendant] who has made sufficient bona fide efforts to pay.

Bearden v. Georgia, 461 U.S. 660, 672 (1983); *People v. Thomas*, 159 A.D.3d 499, 499 (1st Dep't 2018).

A defendant "who has made sufficient bona fide efforts to pay his fine ..., and who has complied with the other conditions of [his sentence], has demonstrated a willingness to pay his debt to society and an ability to conform his conduct to social norms." *Bearden*, 461 U.S. at 672. When a defendant has made sufficient bona fide efforts to pay his fine but simply cannot do so, the court must consider alternative punishment other than imprisonment. "For

example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the [defendant] perform some form of labor or public service in lieu of the fine." *Id.* "Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a [defendant] who has made sufficient bona fide efforts to pay." *Id.*

On the other hand, there is no "constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." *Tate v. Short*, 401 U.S. 395, 400 (1971). For example, "failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine ... may reflect an insufficient concern for paying the debt he owes to society for his crime." *Bearden*, 461 U.S. at 668. Failure to make bona fide efforts to convert non-cash assets to cash needed to pay the fine may reflect the same insufficient concern. A decision not to imprison a defendant in the first instance, "reflects a determination by the sentencing court that the State's penological interests do not require imprisonment." *Id.* at 670. Nonetheless, a defendant's "failure to make reasonable efforts to repay his debt to society may indicate that this original determination needs reevaluation, and imprisonment may now be required to satisfy the State's interests." *Id.* A court's decision on a motion to resentence under section 420.10(5) is not appealable. *See People v. Morse*, 148 A.D.3d 611 (1st Dep't 2017); *People v. Vasquez*, 74 A.D.3d 462, 463 (1st Dep't 2010); *People v. Guervil*, 2016 N.Y. App. Div. Lexis 8896 (2d Dep't 2016); *People v. Frederick*, 123 A.D.2d 468 (3d Dep't 1986).

The Court should remand defendant Sanders in accordance with the sentence, because he admits to having assets sufficient to pay the fine imposed by the Court, and in fact his assets are far greater than he admits.

Defendant Sanders complains, without real substantiation, that he simply cannot afford to pay his fine.[3] Yet defendant Sanders concedes that he and his wife own a house on Long Island free and clear that, according to his reckoning, is worth $650,000, nearly twice the amount of the fine payment that is due this year. Declaration, at ¶ 20. He has made no "reasonable efforts to repay his debt to society" by selling this asset. *Bearden*, 461 U.S. at 670. Defendant Sanders claims he has not done so because he wants his two college-educated, adult sons, whom the People believe to be 25 and 30 years old, to live in the house. Declaration, at ¶ 20. Of course, defendant Sanders is free to support any adult he chooses, but he is not free to prioritize doing so over satisfying the conditions of his sentence.

But that is not his only asset. Defendant Sanders also concedes that he and his wife own, according to his reckoning, a $1 million apartment in Miami, which is encumbered only by a $150,000 mortgage. Defendant Sanders asserts that he has been "unable to obtain approval for a personal or home equity loan [or] an equity line of credit." Declaration, at ¶ 18. He also claims that he has been unable "to develop any type of new banking relationship" as a result of the charges and his conviction. Motion, at 5. Defendant Sanders provides no real details of the efforts he has made to establish credit or banking relationships, and his assertion is inconsistent with evidence obtained by the People, as discussed below. Moreover, defendant

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[3] This is not the first time that defendant Sanders has told the Court, without substantiation, that he is broke. Prior to the first trial, the defendants informed the Court that they lacked the resources to proceed to trial. *See* Tr. of January 12, 2015, at 9:3-17; 13:19 – 14:3. The Court offered to refund the defendants' cash bail to offset trial expenses, as long as each defendant provided a standard form sworn Affidavit of Financial Information. *Id.*, at 14:4 – 17:7. Once it was clear defendant Sanders would have to provide a sworn affidavit of his financial condition, including all assets, gifts, transfers, and other financial information, he decided he did not want his bail money back. *Id.* at 32:6-20.

Sanders has not provided any justification for his failure to downsize or move into a more modest residence in order to satisfy his sentencing obligations.

The fact is, defendant Sanders' descriptions of these assets are just plain false and misleading. While the Court need not conduct a hearing to determine the true nature and value of defendant Sanders' assets, given that his concessions in his Declaration demonstrate his ability to pay the fine, it is important for the Court to understand the true extent of defendant Sanders' real estate holdings. Defendant Sanders and his wife own a condominium on the top (43rd) floor of a luxury, beachfront tower on Collins Avenue in Miami Beach, Florida. (A Google Maps image of the tower – circled in red – is attached as Exhibit 2) Their condominium has direct views of the ocean, and because their condominium is on the top floor, its outdoor balcony is larger than the balconies of all other identical apartments beneath it. (A floorplan of the condominium and a description from the Declaration of Condominium are attached as Exhibit 3.) Defendant Sanders claims this condominium is worth only $1 million. Current listings and recent sales for apartments in the same line in his building (meaning they have an identical layout but with smaller balconies) suggest otherwise:

- The apartment one floor below is currently for sale for $1.6 million;
- The apartment three floors below is currently for sale for $1.49 million;
- The apartment 22 floors below is currently for sale for $1.295 million;
- The apartment 26 floors below is currently for sale for $1.2 million;
- The apartment 27 floors below sold for $1.42 million in January 2016;
- The apartment ten floors below sold for $1.17 million in November 2016;
- The apartment 29 floors below sold for $1.09 million in February 2018; and
- The apartment 34 floors below sold for $1.08 million in September 2018.[4]

[4] Listing prices and sales prices were obtained from http://www.zilbert.com/trump_tower_III/trump_tower_III.asp#description on October 29, 2018.

This information also calls into question the $650,000 value defendant Sanders places on the house he owns outright on Long Island. The house on one side of defendant Sanders' house, which appears to be smaller in size on the same size lot and which, like defendant Sanders' house, has an inground pool, sold for $760,000 in late 2016.[5] (An aerial image of both houses – with defendant Sanders' house circled in red and the neighboring house circled in blue – and an image of the front of defendant Sanders' house are attached as Exhibit 4.)

Defendant Sanders also asserts that he has no assets, although he makes other claims that muddy that assertion. Perhaps he does so because he knows he is making this assertion in a sworn affidavit being filed with the Court, and he knows the assertion is untrue. Defendant Sanders claims that "[a]ll savings and other assets my wife and I have accumulated throughout the years have been depleted." Declaration, at ¶ 15. Yet, in the same paragraph, he asserts that tax obligations from retirement account withdrawals "will eliminate any other savings and pension I have accumulated." Declaration, at ¶ 15. He doesn't explain how he still has pension and savings if all of his savings and other assets have been depleted. He also claims that he has "had to cash out *significant* portions of [his] retirement fund to pay" for legal bills. Declaration, at ¶ 16 (emphasis added). Defendant Sanders' use of the word "significant" further demonstrates that he is not without assets, as he claims. He also claims that some of his "accounts have been frozen," Declaration, at ¶ 18, but fails to state the amount in those accounts. Finally, he opines that if he is incarcerated, his wife "will have little choice but to

[5] This information was obtained from https://www.zillow.com/homedetails/9-Moonedge-Rd-Northport-NY-11768/59340905_zpid/ on October 29, 2018.

liquidate all of our assets." Declaration, at ¶ 24. That would be impossible to do if all of their assets had been depleted, as he claims under penalty of perjury.[6]

But it is not just his inconsistent statements that reveal his assets are greater than he claims. As the Court knows, defendant Sanders' mother unfortunately passed away during the trial. She left certain securities to defendant Sanders, and in early late September 2017, nearly five months after he was convicted and just under two weeks before he was sentenced, defendant Sanders opened two accounts at Santander Securities. (Copies of the new account forms for these accounts are attached as Exhibits 5 and 6.) The establishment of these accounts calls into question defendant Sanders' claim that he has been unable to establish a relationship with any financial institution since his conviction.[7] Additionally, on the new account forms, each of which defendant signed and certified as accurate, *see* Exhs. 5, at 6 & 6, at 6, defendant Sanders stated that his liquid net worth was between $750,000 and $1,000,000, consisting of $500,000 in mutual funds an $300,000 in cash and cash equivalents. *See* Exhs. 5, at 3 & 6, at 3. Defendant Sanders certified that he had these assets a mere twelve days before he was sentenced and made aware of his obligation to pay a $1 million fine. He has failed to explain to the Court whether he still has these assets, and if not, why he diverted them to other uses knowing full-well his obligations under his sentence.

These facts put the lie to defendant Sanders claim that he has used his "best efforts to earn, raise, generate or borrow funds to satisfy" his fine obligation. Declaration, ¶ at 7. Further

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[6] Defendant Sanders also swears that, "[g]iven the ever-increasing expenses, we have not been unable to accumulate any savings." Declaration, at ¶ 13. His motion also states that he "has no assets that he cannot sell." Motion, at 6. It is unclear whether these statements are Freudian slips or strategically-placed double negatives.

[7] The People are not representing that these are defendant Sanders' only accounts at a financial institution. Indeed, the exhibits appended to his Motion show that he has other accounts, as discussed below.

contradicting his claim that he has depleted all of his assets, the securities defendant Sanders inherited from his mother, valued at over $30,000, were still in his Santander Securities accounts as of October 31, 2018, a week after he swore in his Declaration that all of his assets were depleted. (Copies of the October statements for the two accounts are attached as Exhibit 7.)

Defendant Sanders also fails to account for what became of over $11.5 million he was paid by Dewey & LeBoeuf.[8] He also fails to account for the proceeds of the sale of his apartment in Manhattan. According to New York City records, he sold the apartment in April 2015 for $1.775 million, at a time when his mortgage on the property was under $700,000. He also fails to explain whether there was any equity in the hotel apartment he co-owned with Stephen DiCarmine, which appears to have been sold for $800,000 in February 2017. He also fails to account for the $200,000 in bail money that was returned to him at sentencing. *See* Tr. of October 10, 2017, at 21:18. Indeed, this $200,000 was returned at a time when defendant Sanders knew he had an upcoming fine obligation. His failure to set the money aside for the fine clearly demonstrates "an insufficient concern for paying the debt he owes to society for his crime[s]." *Bearden*, 461 U.S. at 668.

The Santander Securities accounts are not the only financial relationships defendant Sanders has been able to establish since his conviction. According to information available to law enforcement, defendant Sanders is making lease payments on a 2018 Audi A3 Premium and car payments on a 2017 Mercedes Benz C 300. A 2018 Audi A3 Premium would have

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[8] 2007: $175,000.02; 2008: $2,117,616.67; 2009: $2,400,000.00; 2010: $2,000,000.00; 2011: $2,000,000.00; 2012: $1,683,125.77; LTIP: $1,205,185.36.

been unavailable prior to defendant Sanders' conviction in May 2017, so he was clearly able to enter into a vehicle lease agreement with Volkswagen Credit following his conviction. In fact, he may have entered into this agreement after he was sentenced and became aware of his fine obligation. Defendant Sanders has failed to explain why he is maintaining two luxury cars at a time when he knows he has an outstanding fine obligation as part of his sentence.

Defendant Sanders claims that his "monthly net income enables [his] family to just minimally meet [their] basic living expenses in South Florida, pay the mounting legal bills, and provide support for [his] family." Declaration, at ¶ 13. Defendant Sanders fails to state what other family members contribute to household income. Additionally, according to the paystub defendant Sanders appended to his filing, *see* Exhibit 3 to Motion, his monthly take home pay, after 401(k) and 401(k) catch-up deductions, is over $21,000.[9] According to the new account forms defendant Sanders submitted to Santander Securities, his monthly expenses ("including mortgage payments, long terms debts, utilities, alimony or child support, etc.") are only $3,000. Exhs. 5, at 3 & 6, at 3. Defendant Sanders has failed to explain why he has not saved $18,000 each month over the last year ($21,000 net pay minus $3,000 expenses), or over $200,000 in total, to pay his fine.

With respect to his expenses, defendant Sanders has mentioned mounting legal bills, and he certainly has a right to representation, but representation can be appointed if he can no longer afford it. Also, while defendant Sanders has a right to representation, the Court is entitled to consider the merits of the submissions on which he has presumably spent money.

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[9] Defendant Sanders fails to explain why he has not ceased 401(k) contributions during the three years he owes fine payments. This would provide additional gross pay of nearly $25,000 per year to put towards the fine.

Since sentencing, defendant Sanders has submitted two meritless motions, one seeking to vacate his conviction because a cooperator wrote an email that was entirely consistent with that cooperator's trial testimony and another seeking to dismiss the entire case by applying a civil statute of limitations to one of the charges on which he was convicted.

Defendant Sanders also asserts that his annual salary is $375,000, Declaration, at ¶ 13, but he does not state whether he receives any sort of bonus or other forms of income.[10] Notably, he failed to provide the Court with a W2. On the new account forms for his Santander Securities accounts, he asserted that his annual income is between $400,000 and $500,000, significantly more than the $375,000 he disclosed.[11] *See* Exhs. 5, at 3 & 6, at 3.

Defendant Sanders claims that he has been "denied a new credit line," Declaration, at ¶ 18, but fails to state at how many institutions he has sought a credit line. He also claims that he has been unable "to develop any new banking relationship, or maintain prior banking relationships," and is "unable to obtain approval for a personal or home equity loan, an equity line of credit, or even a checking and savings account." Declaration, at ¶ 18. But he again fails to state at how many financial institutions he has sought such loans, lines of credit, or accounts. As previously stated, his claims are contradicted by the fact that (at the very least) he has opened new securities accounts and entered into a credit relationship with respect to his car

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[10] Defendant Sanders also complains that he cannot make additional income by serving on a private or public board, practicing law, or being a partner at his current firm, where he holds an administrative position. Declaration, at ¶¶ 12 & 14. He clearly does this less to support an inability to raise funds for his fine and more to try to convince the Court that he has been sufficiently punished even without a fine. But these assertions are red herrings. There is no evidence that defendant Sanders ever previously served or sought to serve in a paid director position. There is also no evidence that a public or private board would employ him, even without convictions, when as CFO he led his firm into one of the largest, if not the largest, law firm bankruptcy in history. There is likewise no evidence that defendant Sanders ever practiced law or that he ever sought or was granted equity partnership at Greenspoon Marder in the six years from 2012 until his disbarment in March of this year.

[11] It is worth noting that even the $375,000 in wages disclosed by defendant Sanders would put him well within the top one percent of wage earners in the United States. *See* https://www.ssa.gov/cgi-bin/netcomp.cgi?year=2017.

lease. He also fails to state how he manages to accept his large salary payments or pay his bills without a relationship with any financial institution. To that point, the paystub appended to defendant Sanders' filing reveals that his net pay is direct deposited into a checking account, *see* Exhibit 3 to Motion, directly contradicting his assertion.

In *Bearden*, the Supreme Court noted that it "has long been sensitive to the treatment of indigents in our criminal justice system." 461 U.S. at 664. The People will venture a guess that the Court was not thinking of a defendant with a million-and-a-half dollars in equity in an top-floor, ocean-front condominium, a three-quarters-of-a-million-dollar home owned outright, between $750,000 and $1,000,000 in liquid assets, over $30,000 in securities, income of between $400,000 and $500,000 per year to cover monthly expenses of $3,000, a 2018 Audi and a 2017 Mercedes Benz. But defendant Sanders seems to think they were. He seems to believe there are and should be two different sets of rules of criminal justice, one for rich people like him, and one for all others. But he is wrong.

Defendant Sanders has conceded, even in his false, misleading, and incomplete disclosures, that he has the assets needed to pay the fine payment that is now nearly two months past due. At a minimum, he has failed to meet his burden of "establish[ing] that he is unable to pay [his] fine because of indigency." *Toledo*, 101 A.D.3d at. All along, defendant Sanders has had "the means to pay [his] fine [but] refuses or neglects to do so." *Tate*, 401 U.S. at 400. Either way, he should be immediately remanded in accordance with the terms of his sentencing conditions. Further, he has violated the conditions of his discharge and submitted a false and misleading Declaration to the Court. The conditions of his discharge should be revised to require payment of the full $1 million fine immediately.

Even if the Court were to determine that defendant Sanders cannot afford to pay the fine, he should be resentenced to a period of incarceration.

Even were the Court to determine that defendant Sanders has met his burden of establishing that he cannot pay the fine payment that is now well past due, he should be resentenced to a period of incarceration. A custodial sentence is appropriate in such a situation when the sentencing court "determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence." *Bearden*, 461 U.S. at 672.

The Supreme Court identified several alternatives to imprisonment in *Bearden*. "For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the [defendant] perform some form of labor or public service in lieu of the fine." *Id.* None of these alternatives is adequate here. Extending the time for making payments would place the payment of the fine outside of the allowable three-year period of conditional discharge and therefore outside of the Court's supervision, limiting remedies should defendant Sanders again decide not to fulfill his obligation. Reducing the fine here would likewise be inadequate. As discussed below, the gain at issue was many millions of dollars, irrespective of how it is calculated, and the Court already intentionally set the fine low relative to the gain involved so that it could reasonably be paid. Lowering it even more would fail to meet the State's interest in punishment and deterrence in this case. Finally, defendant Sanders has already been sentenced to 750 hours of community service, and it would make little sense to add on more community service as a substitute for the fine imposed.

At sentencing, the People sought a prison term of 1 1/3 to 4 years. The People continue to believe that this was the appropriate sentence. Nonetheless, in light of the alternative one-

year jail sentence imposed, the People believe that the appropriate resentence under the circumstances is one year of incarceration. Therefore, if the Court determines that the defendant Sanders cannot pay the fine, the Court should "revoke the entire sentence imposed and resentence the defendant" to imprisonment for one year. CPL § 420.10(5)(d).

Defendant Sanders' constitutional claim must be denied as procedurally flawed and is meritless in any event.

Defendant Sanders also argues that the fine imposed was unconstitutionally excessive and should be lowered to a *de minimus* amount. Motion, at 8-9. This argument constitutes an impermissible ground for resentencing under section 420.10(5), and this branch of his motion should be dismissed as procedurally defective. A motion to set aside the sentence as illegally imposed must be brought pursuant to Criminal Procedure Law section 440.20, so that any order resulting from the motion can be permissively appealed by the defendant, *see* CPL § 450.15(2), or appealed as of right by the People, *see* CPL § 450.20(6).

In any event, the motion is meritless. To the People's knowledge, no court in this State has ever held that a fine imposed pursuant to Penal Law section 80.00 violates the Excessive Fines Clauses of the United States and New York constitutions. The cases cited by the defendant are clearly distinguishable and actually support the fine imposed here. In *United States v. Bajakajian*, 524 U.S. 321 (1998), a husband and wife stated they were bringing $15,000 out of the country when in fact the possessed over $357,000 in cash they were removing from the country. *See id.* at 324-5. The defendant pleaded guilty to failure to report, and federal law required forfeiture of the entire $357,000. *See id.* at 325-26. The Supreme Court held the that the forfeiture was a fine, *see id.* at 334, and that "a punitive forfeiture violates the Excessive

Fines Clause if it is grossly disproportional to the gravity of the defendant's offense." *Id.* In holding that the forfeiture was excessive, the Court noted that the defendant's crime was "solely a reporting offense," *id.* at 337, was "unrelated to any other illegal activities," *id.* at 338, that the maximum sentence for his crime was six months in jail, that the maximum fine was $5,000, *see id.*, and that the harm caused was minimal. *See id.* at 339.

Of course, *Bajakajian* dealt with a forfeiture. The First Department addressed the application of the Excessive Fines Clause in a case involving a civil fine in *Matter of Prince v City of New York*, 108 A.D.3d 114 (1st Dep't 2013). Prince removed a television antenna from the top of curbside garbage to use in his artistic endeavors. He received a summons for unauthorized removal of recyclable material, was assessed a mandatory $2,000 fine, and his vehicle was impounded until the fine was paid. *See id.* at 116. The First Department held that a "fine is unconstitutionally excessive if it notably exceeds in amount that which is reasonable, usual, proper or just. Thus, the Excessive Fines Clause is violated where the fine is grossly disproportional to the gravity of the offense." *Id.* at 119 (internal alterations, quotations, and citations omitted). The First Department further held that, "[i]n determining gross disproportionality, a court should consider the seriousness of the offense, the severity of the harm caused and the potential harm had the defendant not been apprehended, the maximum fine to which the defendant could have been subject, and the defendant's economic circumstances." *Id.* at 121. The First Department held that the fine was excessive. *See id.* at 122.

This case is unlike either *Bajakajian* or *Prince*. In both of those cases, the fine (or forfeiture) bore no relation to the conduct at issue. Here, by law, the fine must be related to

gain and cannot be greater than twice the gain from the crime, including gain by Dewey. *See Kramer*, 132 A.D.2d at 711. If viewed as the entire proceeds of the line of credit and private placement, the gain was $250 million. If viewed as the loss to the banks and insurance companies, the gain was over $100 million. If viewed as the amount by which Dewey's debt increased after the scheme began, the gain was $47 million. If viewed as the amount defendant Sanders personally received during the course of the scheme, the gain was $9.3 million. Even if one assumes that defendant Sanders' employment contract would have been honored under any circumstances and the gain is only the amount of his discretionary bonus during the period of the scheme, the gain was still $4.2 million. No matter how one cuts it, the fine does not violate the Excessive Fines Clause. If anything, the fine is disproportionally small given the gravity of the offense. The Court alluded to this at sentencing when noting that it was opting for a fine that could actually be paid. In imposing the fine, the Court stated:

> Penal Law 80 and 80.05 empower the Court to impose fines on felonies and misdemeanors not to exceed double the amount of a defendant's gain.
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> Gain is the amount of money derived from the crime less any return to the victim and the law is clear that in this case the gain can be gained to a third party, such as Dewey & LeBoeuf.
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> A couple of cases on that actually out of the Second Department, People against Severino, People against Kramer.
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> I find it also reasonable to view the salary that the defendant accrued in the course of the scheme as gain for the defendant from the crimes of which he has been convicted.[12]
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> So on either of those two theories, either gained at Dewey & LeBoeuf or somewhat indirect gain to the defendant through Dewey & LeBoeuf, a law

[12] Despite this unambiguous statement, defendant Sanders asserts that he "did not personally benefit from any ill-gotten gains, and no findings specifically noted in transcript of the sentencing hearing." Motion, at 9-10.

firm with which he was intimately connected, it is proper to compute the defendant's gain in the millions of dollars.

His earnings were conceded in this case, although counsel believes them to have been unreasonable.

Similarly, the [losses to] the banks and investors were essentially not disputed.

In any case, there's ample material in the trial record to support either basis for computing gain.

I have in mind, for example, the testimony of the Citibank representative Ellen Hope regarding $24 million in debt that were ultimately sold for 50 cents on the dollar.

So in light of the sufficiency of the trial record in this regard, there is no need for any further hearing to compute the exact amount of gains since they greatly exceed the amount of the fine I intend to impose in this case.

Again, that's an approach that was followed in Kramer.

So on the facts of this case, on the record, an enormous fine could be imposed in this case, but it seems wiser to impose one for which there is actually a reasonable prospect of payment.

Tr. of October 10, 2017, at 17:12 – 19:1.

The $1 million fine imposed complies with the law and does not violate the Excessive Fines Clauses of the United States and New York constitutions. Frankly, the entire section of defendant Sanders' Motion claiming that the fine is excessive betrays defendant Sanders' belief that it is his crimes and convictions that are *de minimus*. He continues to believe that he is the true victim here. To the People's knowledge, defendant Sanders is already the only defendant in this courthouse in at least the last two decades not to receive a custodial sentence after being convicted after trial of Scheme to Defraud but not Larceny. Failing to impose the terms of his sentence by

imprisoning him after his refusal to pay his fine or further eroding his sentence will simply embolden his erroneous beliefs.

Conclusion

For the foregoing reasons, defendant Sanders' Motion should be denied in its entirety, and he should forthwith be remanded in accordance with the clear terms of his sentence. His conditions of discharge should be revised to require payment of the full $1 million fine immediately.

Dated: November 5, 2018

Respectfully submitted,

Peirce R. Moser
Assistant District Attorney