


United States Courts  
Southern District of Texas  
FILED

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

 DEC 20 2005

Michael N. Milby, Clerk of Court

UNITED STATES OF AMERICA

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v.

CRIMINAL NUMBER H-03-217

JAMIE OLIS

GENE SHANNON FOSTER and

HELEN CHRISTINE SHARKEY

**SENTENCING MEMORANDUM OF THE UNITED STATES**

TO THE HONORABLE JUDGE OF SAID COURT:

The United States of America, represented by the undersigned Assistant United States Attorney, files this Sentencing Memorandum recommending sentences for the defendants in accordance with 18 U.S.C. § 3553 (a). For reasons set forth below, the United States respectfully requests that the Court sentence the defendants within the U. S. Sentencing Guideline range that results from the application of the sentencing factors already approved in United States v. Olis, 429 F.3d 540 (5<sup>th</sup> Cir 2005), based on a finding of an actual loss to victims of not less than \$20 million pursuant to U.S.S.G. §2B1.1(b)(1)(L), and after due consideration of the substantial assistance provided by defendants Gene Foster and Helen Sharkey in the successful criminal prosecution of Jamie Olis and with regard to civil enforcement proceedings brought by the Securities Exchange Commission relating to Project Alpha.

**The Defendants and their Roles in the Offense(s) of Conviction**

The defendants come before this court having been convicted of serious offenses and no longer in possession of the reputations and advancement opportunities they once held as members of a respected profession and as important contributors in the management of a public company

whose stock was traded around the world. Most noteworthy among them is Jamie Olis, once an ambitious young executive with a CPA certificate, with a successful track record as a counselor in international and domestic income tax matters, and with promising prospects for promotion to top management in the company. He was not alone in his desire to rise within the company which meant that, at some point, he needed to accomplish feats that would be noticed and appreciated by those who could advance his career. He viewed his position in Dynegey's tax department as a stepping stone to a higher position within the company and he had a model for advancement: the company's Chief Financial Officer, himself a former tax accountant, who had advanced to his titular position through the finance department and who showed Olis favor. Olis coveted a position with Dynegey's finance department and to get it, he needed to perform in a way that would capture the attention of top management.

Project Alpha was Olis' vehicle for advancement. He threw himself into it, becoming the central player in its formation and execution. No one else in the company matched his understanding of it, and no one was more assertive in seeing it through. But, a problem developed. The potential financial backers of the transaction balked at taking on risk, which the auditors insisted on if the transaction was going to achieve Olis' objective of creating desperately needed operating cash flows. Operating cash flow was touted to analysts, whose recommendations heavily influenced stock prices, because it is a prominent indicator of a company's success and its future prospects. The problem with the financial backers had to be resolved because, otherwise, a promising, ambitious young executive trying to hasten his rise within a large publicly-traded company with cash flow problems affecting its stock price would not be someone who had proposed a clever solution to such a prominent issue, but instead, he would be someone who caused the company to commit millions in

start-up costs with little or nothing to show for it. No one wants to find themselves in such a position because it presents a supreme test of character.

Among the defendants, it was Olis who first faced this test and failed it. It was Olis who came up with the illicit solution of using secret agreements to hide the truth from the company's auditor when an employee of the auditing firm, looking for something to do to move things along, stumbled onto Olis' secret plan—the plan that resulted in the defendants' convictions. Foster and Sharkey were a part of Olis' scheme, but their roles were quite different. Foster held the rubber-stamp and Sharkey held an eraser. It was Olis who played the critical role in coming up with the illicit solution to the auditors' resistance to the elimination of essential risk in the deal. However, once briefed on that solution, Foster promptly assented to it and then later reported it to the Chief Financial Officer, who assented to it as well. Sharkey, on the other hand, became the person who sanitized the written record of the transaction—the representation letter(s) charged in Count 3 that were necessary to obtain critical tax and accounting opinions certifying the propriety of the operating cash flow benefits being sought—to ensure that it was devoid of any reference to the secret agreements. As a Certified Public Accountant with big-firm experience auditing publicly-traded companies, Sharkey had a clear understanding of the nefarious nature of her efforts to ensure that the auditor(s) were kept in the dark.

Each of the defendants played a somewhat different, but nonetheless, critical role in ensuring that material information that each knew to be false and/or incomplete was kept from the company's auditors, and in turn, from shareholders who trusted the defendants and paid them well for their supposed vigilance. That compensation varied among the defendants. Olis was well paid and handsomely rewarded for his achievements—of which Project Alpha was the most noteworthy. He

received not only top salary and bonuses for his work, including his work on Project Alpha, he was promoted to equal rank with his former supervisor Foster, and unlike Foster and Sharkey, he was singled out and rewarded with special stock options reserved for the “top 35 contributors” within the company. Unfortunately, for Olis, however, the truth found its way out before he could fully reap the benefits of a stock price that he so ably manipulated for a time.

Foster, too, was well-paid. One might easily conclude that the superior creativity and drive of his “subordinate” Olis indicated that Foster was too well paid by a company that overvalued his/Foster’s abilities. Nonetheless, his reward and his creativity, while inferior to Olis’, was superior to Sharkey’s.

Sharkey was earning just over six-figures, but her limited participation in the company’s stock plan, and friction that developed between her and her superior over Project Alpha, meant that she reaped little more than a lateral move within the company that enabled her to keep her job. In fact, her lower status in the company seems to have played an important role in her involvement in the cover-up that ensued with the SEC investigation, including the specious excuse first offered and documented in an email from Olis to company attorneys that Andersen’s auditors had full knowledge of secret documents. Emboldened by the illusory protection of an impressive array of professional advisors assembled by the company to deflect criticism of Project Alpha and to delay, if not avoid, making financial restitution to aggrieved shareholders, she opted to close ranks and resist various investigative efforts until her smoking gun emails surprisingly surfaced and made her indictment and conviction imminent.

In pleading guilty to the top count of conspiracy, Foster and Sharkey, unlike Olis, gave up the chance, when some thought it a realistic possibility, that the evidence might be so complex that

the government might be unable, for the sake of complexity alone, to prove guilt beyond reasonable doubt. Instead, when there was a good chance that the complexity of the evidence might prevent a jury of their peers from reaching a verdict, Foster and Sharkey elected to accept responsibility for their criminal acts and limit their exposure to a breathtaking Guidelines sentence. Olis, on the other hand, despite being the author of emails that were patently incriminating, chose a different path. Despite being offered the same plea opportunity, he chose to test the government's ability to present an extremely complex subject to a jury and test the jury's ability to understand that subject matter beyond reasonable doubt. He chose badly. And, yet, even after his conviction, on several occasions, including as recently as this month, he was offered the opportunity to reduce his sentence by providing evidence against other co-conspirators, if any. Instead, he chose silence. If Olis could supply such testimony, common sense dictates that he would do so. He has not. By his own silence, Olis has affirmed his status as the top conspirator in Project Alpha.

Rather than owning up to his illicit role in Project Alpha, Olis has instead chosen to emphasize his mid-level status within the company. His status within the company is quite different from his status within the conspiracy, however. He was, without any reasonable doubt, the idea man—not only in the development of Project Alpha but also in the manner in which it was to be concealed from the company auditors and, of the three proven conspirators, he received the most financial benefit from Project Alpha through salary increases, a promotion, and special stock options. By comparison, after Project Alpha's cash flows took hold in the market for the company's stock, Foster exercised options at a profit and borrowed several hundred thousand dollars from the company to pay income taxes on that profit so that he could substantially reduce taxes on expected future appreciation of that stock. When the truth about Project Alpha finally came to light and the

price of Dynegy's stock collapsed, so did Foster's ability to repay this loan. Thus, ironically, because of his optimism about the company's prospects following Project Alpha, Foster's punishment includes a huge debt that was the direct result of his misconduct.

Project Alpha was not some isolated oversight by a few misguided mid-level office workers who didn't get much out of it. It was a deliberate effort by the defendants, acting in concert with one another, each carrying out a particular, necessary, and distinct role, to manipulate the financial statements of a publicly-traded company to the substantial financial detriment of a large number of people. Many of those people were considerably less fortunate than the defendants. For example, the employee beneficiaries of the University of California Retirement System, who had a right to, and did, misplace their trust and confidence in the defendants. Because of the times in which it occurred, Project Alpha became a historically-significant securities fraud that shook the confidence of the nation and the world. As a result, the sentences of recalcitrant defendant Jamie Olis and his cooperating co-defendants should reflect it.

**Motions for Departure for Substantial Assistance under USSG § 5K1.1**

On August 5, 2005, Gene Shannon Foster and Helen Christine Sharkey entered a plea of guilty to Count One of the above-captioned indictment charging conspiracy to commit mail, wire and securities fraud. Foster's role in the offense was essentially watching Olis come up with problem-solving solutions, assenting to them, reporting them to his superior and enjoying the benefits of riding Olis' coattails. Sharkey's role in the offense was two-fold: First, upon being told that problems with Dynegy's auditors were going to be resolved by keeping obviously important information from them, Sharkey took responsibility for making certain that written communication with the auditors contained no references to the concealed information. Second, as civil and criminal

investigations of Project Alpha got underway, her role shifted to withholding material information from authorities that would have, and eventually did, lead to discovery of these secret agreements and the intervening cover-up. To that end, when interviewed by the United States in December 2002 and confronted about a transparent effort on her part to conceal the truth about a \$250,000 advance fee arrangement that was an effort by Gene Foster to make it appear that Dynegy had actually paid for a tax opinion on Project Alpha, Sharkey resisted overtures to come clean and assist authorities in getting to the truth about Project Alpha. Even a month later, when the company, after having sat on them for a time, finally released her email revealing that an Andersen employee had been banished for stumbling onto some of the secret arrangements (the ABG Holding hedge), Sharkey continued to participate in a cover-up of the truth about Project Alpha. When, on the eve of her indictment, it was made clear that she would be charged with conspiracy for her role in Project Alpha and that her emails and those of her co-conspirators would assure conviction, Sharkey accepted responsibility for her actions and agreed to assist in the continuing investigation of Project Alpha. Her availability as a witness was made known to the other targets of the investigation, and very soon thereafter, the United States finalized a plea agreement with Gene Foster, who, despite the weight and clarity of the incriminating emails, had indicated an interest in accepting responsibility but had delayed his decision in a failed attempt to secure assurance of a recommendation of probation.

Over the next several weeks, Foster and Sharkey made themselves available at the convenience of the United States. They were debriefed and placed on the witness list for the trial of Jamie Olis. As the trial approached, however, concerns about Sharkey's ability to clearly communicate important information to the jury undermined her value as a witness. Foster's value as a witness, on the other hand, was confirmed, and after the testimony of other witnesses and the

incriminating emails had been submitted to the jury, he took the stand to underscore the story told by the emails and to inform the jury that it was Olis who had reported to Foster that the “problem” with the auditors would be “solved” by “putting the tear-up provisions in amendments that would not be given to Arthur Andersen.”<sup>1</sup> Foster also added that Olis had been with him when he reported that solution to a superior<sup>2</sup> and that Olis, by then Foster’s equal, had countermanded Foster’s advice in April 2002 that the company emphasize Project Alpha’s cash flow benefit when the Wall Street Journal began asking questions because Olis “thought that would be detrimental to the company.”<sup>3</sup> Foster also rebutted Olis’ disingenuous attempt to mislead the jury about “the circle” incident and supplied important evidence about Olis’ motives and his role as the conceptual “go-to” person for Project Alpha.

Sharkey’s lesser value as a trial witness notwithstanding, her availability as a potential trial witness had substantial value. Even though Foster handed the defense an argument that he had simply plead out to avoid a long sentence when, near the end of cross-examination, he did not acknowledge that he had lied when he told the SEC a few months earlier that he believed “Project Alpha was a good deal,” the United States concluded that more evidence was not necessary to sustain its burden of proof and rested after Foster’s testimony without calling Sharkey. Olis asked to recess for the day, and the next morning, he, too, rested—without putting on any witnesses. One reason for this development was defense counsel’s concern that the Sharkey had been held in reserve as a rebuttal witness if Olis testified. Unlike Foster, who had received Olis’ after-the-fact report that the

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<sup>1</sup>Foster testimony, Day 6, page 188

<sup>2</sup>Foster testimony, Day 6, pages 191-93

<sup>3</sup>Foster testimony, Day 7, pages 46-51



problem with the auditors would be solved with “tear-up” amendments, Sharkey had been present to observe the crime unfold, both as to the “tear-ups” and the “ABG Holding hedge” and she had reaped little reward for her involvement in comparison to Olis and Foster. Sharkey’s availability as a rebuttal witness conserved valuable resources by shortening the trial and hastening the jury’s verdict.

In addition to their assistance with the trial of Jamie Olis, Foster and Sharkey’s continued cooperation enabled the United States to further evaluate the involvement, or lack of involvement, of others in Project Alpha. Finally, in addition to providing assistance in the criminal investigation of Project Alpha, Foster and Sharkey have made themselves available to, and at the convenience of, the Securities Exchange Commission in connection with its civil enforcement proceedings concerning Project Alpha. Those proceedings are ongoing, and a fair assessment of this cooperation is that it has been, and continues to be, exceptionally useful in those proceedings.

Therefore, Foster and Sharkey should be given credit at sentencing for their assistance to authorities, as contemplated by USSG §5K1.1. Each faces a Guidelines sentence of 60 months. Based upon the assistance each has provided as a result of their relative roles in the Project Alpha conspiracy, the United States moves that the Court grant each a downward departure from their otherwise applicable Guidelines sentence of 60 months and recommends that the Court impose a custodial sentence of 30 months for Gene Foster and 18 months for Helen Christine Sharkey.

#### **Sentencing Factors**

On January 12, 2005, the Supreme Court handed down its decision in United States v. Booker and United States v. Fanfan, 125 S.Ct. 738 (2005). These cases involved the constitutionality of the Guidelines. The key holding in these cases was that the district courts are no

longer required to abide by the Guidelines in sentencing defendants. Rather, the Guidelines are advisory and the courts must consult the Guidelines and take them into account in determining the appropriate sentence in every case. The district courts must also consider other factors set out in 18, U.S.C., § 3553(a). That is, the district courts are required to impose a sentence which reflects the seriousness of the offense; promote respect for the law; provide just punishment for the offense; deter criminal conduct; protect the public from further crimes by defendant(s); and provide defendants with needed training, medical care, or other correctional treatment. Pursuant to 18 U.S.C. § 3553 (a) (2), the district courts must consider the nature and circumstances of the offense; the history and characteristics of the defendant; the purposes of sentencing as mentioned above; the kinds of sentences available; the sentencing range set out by the sentencing guidelines; the need to avoid unwarranted sentence disparities among similarly situated defendants; and, the need to provide restitution to any victims. A district court's sentence is reviewable on appeal for reasonableness.

### **Analysis and Recommendations**

Nature and Circumstances of the Offenses: This factor has been addressed in the narrative description of the defendants' respective roles in the offenses of conviction herein above.

History and Characteristics of the Defendants: The defendants were individuals who were afforded, and capitalized upon, uncommon opportunities to become well-educated, affluent, successful and respected professionals, but who used their special skills and positions of trust to take advantage of those who trusted the defendants to look out for their interests and who compensated the defendants well for supposedly doing so. Olis had the additional advantage of scholarships provided by the generosity of others. Rather than set an example for others consistent with the implicit expectations of his benefactors, Olis chose to do harm to others and, unlike his co-

defendants, he further chose to resist overtures to provide assistance to authorities in ensuring that all involved, if more than those charged, were brought to justice. The history and characteristics of the defendants supports exemplary custodial sentences.

The kind of sentence and the Guidelines' sentencing range established for the category of offense committed by the defendants: Jamie Olis faces a Guidelines sentence of 188+ months based the offense characteristics of the offense being complicated and sophisticated in nature, committed through the use of special skills, causing a loss in excess of \$20 million to a universe of victims exceeding 50 in number. A sentence of 188+ months is "reasonable" in light of the factors set forth in 18 U.S.C. §3553(a). After Booker, "where the sentencing judge, in the exercise of discretion, imposes a sentence within a properly calculated Guideline range, [the Court of Appeals, in its] . . . reasonableness review . . . will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines and . . . it will be rare for a reviewing court to say such a sentence is unreasonable." United States v. Smith, 417 F.3d 483, 490 (5th Cir. 2005) (quoting United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005), internal quotations omitted).

Furthermore, under § 3553(a), the sentence imposed must reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public. This Court previously made the following observations in relation to the §3553(a) factors:

There are four basic criteria that underlie federal sentencing policy: They are specific deterrence, general deterrence, rehabilitation and retribution, which means the need to reflect the seriousness of the crime, to promote respect for the law and to provide just punishment for the crime. Because . . . it is unlikely that Mr. Olis will commit futures crimes or that he is in need of substantial rehabilitation, those two factors are of minor importance in this case. The factors that are important are general deterrence and retribution. While the sentencing range in this case is very high for

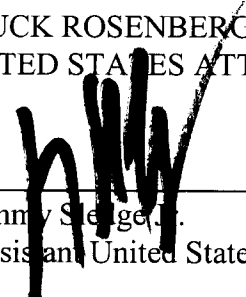
a first-time offender like Mr. Olis, this Guideline range reflects Congress' intent that white collar corporate fraud defendants receive harsh sentences. In our system of Government, laws such as those violated by Mr. Olis provide boundaries within which citizens may lawfully act. A criminal who illegally exceeds those boundaries gains an undue advantage over those who act within legally imposed boundaries. This is a particularly important consideration in sophisticated economic crimes such as those committed by Mr. Olis. Enormous incentives exist to commit such crimes. They are difficult to detect and they cause great harm to individual investors and to the capital markets in general. The concept of retribution is grounded on the premise that a society demands punishment for those who knowingly violate its laws. Absent the assurance of legally imposed punishments, citizens would lose respect for the laws under which they operate and could ultimately conclude that following the law is of little importance. Weighing all of these factors, the Court concludes that Mr. Olis should be sentenced to 292 months in prison. The Court concludes that this sentence is warranted not only by the letter of the Sentencing Guidelines but by the need to deter others from committing similar crimes and to assure society that the law will punish those who commit such crimes.

United States v. Olis, S.D.Tex. Criminal No. H-03-217, Sentencing Transcript dated March 25, 2004, Document 138 at pages 21-22. Given a sentencing range of 188+ months based upon a recalculated loss to victims of over \$20 million, a custodial sentence of 188 months is consistent with the 18 U.S.C. §3553(a)(2) factors of reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, affording adequate deterrence, and protecting the public and is recommended. The Court must also consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6). Reduced custodial sentences for defendants Foster and Sharkey of 30 months and 18 months, respectively, are fully consistent with this goal because, Foster and Sharkey are very differently situated by reason of their decisions to promptly accept responsibility for their actions and assist authorities in bringing co-conspirator(s) to justice as described herein above.

WHEREFORE PREMISES CONSIDERED, the United States respectfully requests this Honorable Court to sentence the defendants in accordance with the Guidelines as indicated herein above.

Respectfully submitted,

CHUCK ROSENBERG  
UNITED STATES ATTORNEY

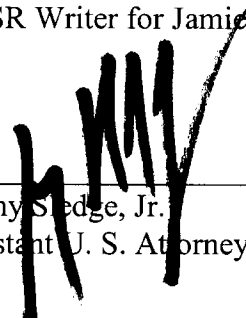
By:   
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CERTIFICATE OF SERVICE

I hereby certify that, as required by the rules of this Court, a copy of the foregoing has been/will be promptly served upon:

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