

## Memorandum of Appeal

Your Honor, I write this Memorandum of Appeal with the utmost respect for the court and its members. This memorandum and its contents are not meant to challenge or question any aspect of my guilt or the facts around my guilt. I am guilty of all of the frauds I committed against the victims: Family Office and Facebook.

The purpose of this appeal is to challenge material misstatements that were made in each of my sentencings, to introduce key aspects of the case that I pleaded for my lawyer to introduce without success, and to introduce new information and evidence that you should have had in rendering your sentence.

I bring this appeal under the basis of "Ineffective Counsel", knowing full – well the reputation of my counsel, Thomas Bergstrom. I do not challenge that Mr. Bergstrom is a respected lawyer. However, I feel that in my representation, he failed to portray crucial details due to a firm belief that he had from the inception of our relationship: that this crime would result in no more than a 3 year sentence, period.

Based on this belief, Mr. Bergstrom chose, despite my constant pleading, not to introduce and utilize information I am including in this appeal. Every aspect of Mr. Bergstrom's strategy revolved around his belief in a sentence of no more than 3 years; including what was to be my scheduled self-surrender to jail in September 2014, a year before my expected sentencing.

**Background:**

**Family Office Thefts:**

ESG was formed after spending over 5 years working at Morgan Stanley with a group of affluent individuals. Identifying a void that I felt existed in the marketplace, I approached a family I worked with and explained my idea for the company. Expressing interest in my idea, I left Morgan Stanley to form ESG in June 2005.

Starting as a small company working out of my house, ESG would quickly begin to grow. Beginning in 2007, blinded by my fear of failing and the opportunity of what ESG could become, and confronted with a short fall in cash flow, I made the unforgiveable decision to take funds from clients to cover payroll and other expenses. These actions would continue through 2009.

I was fully aware of the wrong I was doing, and tried to justify it, convincing myself that I would have the means to pay everyone back. Haunted by these crimes, I spent all of 2010 seeking a sale of a portion of the company to repay these crimes. A suitor was identified in late 2010, negotiations ensued, and I was on my way to closing on the transaction when the Facebook opportunity arose. I now felt that with the Facebook Transaction, I would have the means to repay the Family Office Client funds.

I committed unforgiveable acts against my Family Office Clients that I cannot explain. I will never forgive myself for what I have done to my clients, AND also to the employees who helped me build such a tremendous company.

**Facebook Thefts:**

Beginning in January 2011, I was tasked and began to investigate the purchase of Pre-IPO shares of Facebook on behalf of a few of my clients. A private market existed for these shares and the largest Marketing Agent was a firm named Sharespost. Contacting Sharespost, I was informed of the availability of a block of 600,000 shares at \$27 per share from a current Facebook employee named Daniel Williams.

Relaying the terms to my investors, they expressed interest and I proceeded with the formation of ESG Capital Partners, LP and began calling the capital to close on the purchase. I was to earn fees and a percentage of the profits as compensation.

As closing approached, I was notified that Mr. Williams was now not looking to sell as he was not ready to leave the employ of Facebook, a condition of any stock sale. Contacted by Tim Sullivan, the President of Sharespost, I was informed that while the Mr. Williams events were unfortunate, he had another party who was looking to sell 2,000,000 shares; the number we were ideally looking for at the time. Mr. Sullivan proceeded to introduce me to "Ken Dennis", who I was informed was overseeing a Direct Share Transaction with Facebook on behalf of Carlos Slim, the Mexican Billionaire.

Speaking to Mr. Dennis, he explained to me the reason for the transaction, the process the transaction would follow, the parties at Facebook involved, and the Counsel (David Meyer of Venable) that I would be working with. Mr. Dennis went so far as to arrange a conference call with the CFO of Facebook, David Ebersman, during which Mr. Ebersman confirmed the Slim Facebook Transaction and discussed the possibility of Facebook taking office space in Slim owned commercial real estate.

As time progressed, the number of shares offered to me increased, and ESG began to receive requests from Mr. Meyer to fund deposits towards the closing of the shares. With the deposits made, Mr. Dennis began to describe the timing of the first closing, making sure I was prepared. The first closing of 10,000,000 shares was set to occur on or before 9/15/2011 and I was to earn \$1.50 a share or \$15,000,000. Subsequent closings were to happen within days or weeks. It is with this belief that I made the commitments to the Avalon, NJ shore house and Conshohocken, PA office building.

From 9/15/2011-12/19/2011, I would be told by Mr. Dennis that the deal is alive and well, but was just delayed due to its extreme complexity. This was a daily event. While very angry about the stress the delay was bringing, mostly due to the very poor decision to utilize fees early to purchase the shore house and make deposits on the office building, I never once questioned the validity of the deal. This

would all change on 12/20/2011 when, for the first time in over 9 months, I would not hear from Mr. Dennis.

I had been told by Mr. Dennis to expect documentation on 12/20/2011 and I began to worry as I was not hearing from him. By 12/21/2011, my concern grew and I began contacting Mr. Meyer and expressing my concerns. Despite multiple emails, calls, and texts to Mr. Dennis and Mr. Meyer between 12/20/2011-12/23/2011, I heard nothing until being contacted by Stuart Webb, Chief General Counsel of Venable. On 12/24/2011, Mr. Webb wrote that I was to stop contacting Mr. Meyer as neither he nor Venable had any knowledge about the deal I was referencing. I immediately replied back disputing these claims, copying and attaching emails, letters, and other communications that I had with Mr. Meyer. Mr. Webb would then ask me "Who do you think you have been talking to?" to which I replied, "Ken Dennis and David Meyer" and supplied him with the contact information for each.

Days later, on 12/27/2011, Mr. Webb informed me that the man I thought I was dealing with, "Ken Dennis", was actually Troy Stratos, who had been arrested on 12/19/2011 on a suspicion of fraud against Nicole Murphy. Requesting my current counsel to lookup the charges, I immediately contacted the US Attorney in charge notifying him of my suspicion that I had been defrauded. USAA Pickles, upon hearing my claims responded, "We have been wondering where he has been getting his money."

I began and would continue to assist the Government in any request made including my testimony in May 2015 in the Stratos Criminal Trial in Sacramento, CA. In May, the Jury found Mr. Stratos guilty after 2 hours of deliberation, and my 3 days of testimony led the media to identify me as "The Government's Chief Witness." I would later learn that Stratos was under surveillance throughout our entire relationship.

Knowing that I had been defrauded, I now had to acquire legitimate shares attempting to earn back the funds lost to Stratos and my own misdeeds. This proved challenging as once I contacted the authorities, the authorities contacted Facebook and my association with Stratos was now in question.

By the middle of October 2012, as the lockup period of the shares approached, and it became clear that I could not replace the missing funds, I contacted the two largest investors to confess. Meeting, and in subsequent conversations with them, they expressed to me that they did not want me to surrender to the Government and that this could better be handled in a private manner. I would resign as the General Partner of each fund and would begin to meet multiple times per week with the new General Partner of Fund 1. Investor calls would be scheduled and the group decided a Private Solution was best. Loan offers were made to me to correct my frauds against Fund 2, replacing the funds so I could then assist with pending Fund 1 litigation against Venable, Mr. Meyer, and Mr. Stratos.

Prior to contacting the investors, I engaged Ms. Lisa Matthewson to serve as my counsel. She was adamant that I confess to the Government before being reported as it would benefit me greatly at sentencing. I explained to her that I had to respect the wishes of my victims and trust that they wanted a private settlement. With that said, I expressed to her that I just wanted this over, and wanted a fresh start from my mistakes of the past. The years of holding these secrets had caused great stress and I just wanted all of this over.

Ms. Matthewson would ultimately convince me that the only way to receive a truly "fresh start" was to confess and accept my punishment. My only request to her was to get me through the end of the year as my mom was scheduled to have lung cancer surgery, and my wife and kids were not aware what was going on. I contacted Ms. Matthewson on 1/2/2013 authorizing her to contact the US Attorney's office to schedule my confession, which ultimately would take place on January 7, 2013.

By self-confessing, I made the Government aware of my crimes. The Government moved quickly to seize the real estate and FBI Agent Bantner followed me to my office to take possession of company computers and servers for copying. I would not receive these computers back for several days. Further, I spent 2 days in the FBI's Fort Washington office walking Agent Bantner through the accounting files and assisted him in understanding and calculating the fraud.

As soon as the investors learned of my self-surrender, they proceeded to file Civil Law Suits seeking to take possession of the real estate. In addition, upon the return of the computers and server from the FBI, and without my knowledge, the investors hired an IT Firm to enter ESG's offices and to attempt to access my server closet to copy the files. Receiving a tip that the IT Firm was in the building, I immediately ordered them to stop what they were doing, and banished my employees from the building. This sequence clearly shows that the hiring of the IT Firm was a result of my self-confession and not, as Mrs. Potts stated, the reason for the self-confession.

I feel it is important to point out that in the first 5 months (January 2013-May 2013); I had a change in US Attorney (USAA Foa to USAA Potts) and a change in counsel (Ms. Matthewson to Mr. Bergstrom). While I initiated the change of counsel, it is my belief that these changes have led to many, if not all, of the discrepancies in facts and details that were lost in the transition. I believe this is clearly evident in the question of my self-confession, as USAA Foa and others present were clearly surprised by the details of my confession and their lack of knowledge of the events.

**Basis of Appeal:**

**Ineffective Counsel: Thomas Bergstrom**

1) Strategy and Game plan: As described in the "background" section of this appeal, Mr. Bergstrom was emphatic that the crimes I committed would result in no more than a 3 year sentence. I repeatedly explained to him my concern about the significance of the Family Office thefts, to which he would state that the real story was the Facebook Fraud, and the fact that if I wasn't defrauded, none of this would have happened.

Meeting with him the week before the August 3rd sentencing, I reiterated my concern about the Family Office thefts to which he would respond, "These thefts are not the story, if not for Facebook, you would not be in jail."

I believe that these opinions of Mr. Bergstrom led to many important factors not being presented, and many misstatements not being disputed.

2) Voluntary Disclosure of Offense (5k2.16): Mrs. Potts alleged that my "Self Confession" on January 7, 2013 was prompted by an IT firm coming to my office on behalf of the investors. As described in the "background" portion of this appeal, my decision to confess was made a month earlier and the IT firm did not come to my office until after the computers were returned by the FBI after my confession.

Further, as evidence please refer to the following email exhibits:

Investor Loan Offer (Exhibit A): As described, certain investors offered to loan me funds prior to my self-confession to correct my issues with Fund 2 so I could assist them in the pending litigation against Venable, Meyer, and Stratos.

Lawrence Ahrem Email (Exhibit B): Lawrence Ahrem represented the Investors. In this email, he states my intent to not accept the investor loan offer made on 12/10/2012. After receiving the offer, I met with Mrs. Matthewson. In this meeting, it was decided that I would self-confess after the holidays. This loan would have been the primary method of a Private Settlement, and not accepting it is consistent with my intent to self-confess.

Josh Levine Email (Exhibit C): Josh Levine was an ESG employee who took over the management of ESG after my self-confession. To allow the company to continue, I allowed Josh and the staff to utilize ESG Office Space, Systems and Equipment. Per the 1/11/2013 email in reference, upon my realization that an IT firm was accessing the server without my knowledge, I immediately notified Josh that "you have 20 minutes to leave the building." As part of my deal with Josh, and following the instructions of the FBI, I made it clear to Josh that no one was to access the server room without my knowledge.

3) Pre-Sentence Report Comments and Changes: Receiving my Pre-Sentence Report on 6/29/2015, I emailed Mr. Bergstrom on 7/2/2015 detailing many incorrect statements, concerns, omissions, and areas that needed to be challenged. On a call days later, Mr. Bergstrom acknowledged receipt and I appealed for him to set a meeting with Mr. McGary, my probation officer. Mr. McGary had come to see me weeks earlier and stated that if I had any questions after receiving the draft of the report to let him know and he would come to see me.

This meeting did not happen as Mr. Bergstrom felt it wasn't needed, and upon receiving my final PSR on 7/22/2015, I realized that many, if not all, of my comments and concerns were never presented to Mr. McGary. Please find attached an email to Mr. Bergstrom on 7/2/2015 (Exhibit D) reflecting all of my comments and concerns that were never addressed. Specifically, you will see on multiple occasions, comments from me that the report is missing a very critical detail: My Self- Confession.

4) Jack E. Burns, Sr. and Matthew Powell Sworn statements: During the August 3rd sentencing I had several friends and family members speak on my behalf. During these speeches, two of them, Jack E. Burns, Sr., my father, and Matthew Powell, my best friend, were asked a question pertaining to their knowledge and my disclosure to them of the "Family Office" thefts. Both did not understand the question being asked at the time, and I plead for Mr. Bergstrom to interject and correct the record. He responded to my shock that he was not going to go "tit for tat" with the prosecution.

Enclosed please find Sworn Statements from Jack E. Burns, Sr. (Exhibit E) and Matthew Powell (Exhibit F) clarifying their knowledge of the "Family Office" thefts and the date on which I notified them of my thefts.

Further, both had unique connections to the ESG Offices as my father was utilizing office space before and after my confession and the sister- in-law of Matthew Powell worked for ESG Family Office. Both individuals received a full confession by me, and witnessed indirectly the consequences of my thefts.



5) Conditions of Confinement: During sentencing while Mr. Bergstrom argued the conditions of imprisonment I endured, Your Honor commented that these conditions were "Likely for my safety" due to my role as a Government Witness. Mr. Bergstrom's response was a pseudo agreement with you, showing his complete lack of detail awareness.

The conditions I endured were not a result of ensuring my safety, but were the standard conditions of a County Jail. I am a federal prisoner yet spent over 10 of the 13 months of pre-sentencing incarcerated in County Jails, where a typical day was 21-23 hours of confinement vs. 10 hours in a federal facility. Federal inmates are due a standard of incarceration that I did not receive.

In addition, during the 6 months that I was in California, I was unable to see family and my lawyer resulting in great family stress and the legal issues I am challenging today.

Upon my return, my intent was to switch counsel but I decided that I did not have the time to do so.

6) Plea Agreement Changes: After self-confessing and assisting the FBI with the details of my fraud, I was presented with and pleaded guilty to a plea agreement defining my crimes as \$11 Million to a Financial Institution, \$1.5 Million to Family Office, and \$7 Million to Investors. Never was it described to me that these figures could be changed and if so the terms of my plea would be changed. I did not learn of these changes until I received my Pre-Sentence Report on 6/26/2015. When I raised this with Mr. Bergstrom, he expressed confidence that the Court would side with us on this matter and the figures in the plea agreement would be used in the loss calculation.

7) Dr. Barber Report: Upon engaging Ms. Matthewson and in my early meetings with her, I became very emotional questioning: "How I could have allowed this to happen?" and "Why did I do this?" Ms. Matthewson immediately recommended I meet with a counselor to help answer these questions. I

began meeting with Dr. Catherine Barber shortly after my self-confession. Upon switching counsel to Mr. Bergstrom, I expressed the value I was receiving from these sessions and expressed my desire to continue. Based on his confidence of a "3 year maximum sentence" he deemed these sessions a waste and of no importance.

As I stood before the court during the August 3<sup>rd</sup> sentencing, I wished I had finished these sessions and had Dr. Barber there on my behalf. After the 3<sup>rd</sup>, during the extension, I immediately contacted Mr. Bergstrom stating my desire to finish the analysis and to have her testify in the second sentencing. I wanted support in giving you a better answer to your question of "Why I did this" and felt her clinical explanation was extremely valuable.

Mr. Bergstrom once again refused to engage her, calling it a waste and of no value. (Exhibit G)

Attached please find a letter from Dr. Barber (Exhibit H) stating her willingness to complete the evaluation and her belief that it would be useful in answering your questions. I plan to work with her along with other experts when released to help identify why I did these things to ensure this never happens again.

8) Use of Proceeds Spreadsheet: US Attorney Pickles listed as an exhibit in the Stratos trial a spreadsheet I utilized to plan for the investment of the proceeds from the Facebook Transaction. Please find attached a version of the "Use of Proceeds" (Exhibit I) that I requested Mr. Bergstrom to request and submit to the court. US Attorney Pickles included this spreadsheet as part of his testimony as it clearly shows my belief that the transaction was real, and shows my intent to not only repay all funds but to give away almost \$10,000,000 to Charity and Family.

I ask that the court request the final version from US Attorney Pickles, as the version I am attaching is not the final version.

9) Post August 3rd Intent to Switch Counsel: Immediately after the August 3rd sentencing, I began discussing my desire to switch counsel from Mr. Bergstrom due to the lack of preparedness and unwillingness to listen to my concerns. Prior to the August 3<sup>rd</sup> hearing, I expressed deep concern about the time being given to my case- 1 hour of face to face meeting between my return from California (June 1, 2015) and my sentencing (August 3, 2015). Immediately following the August 3rd sentencing, I contacted William DeStefano, who I knew well. I expressed to Mr. DeStefano in an email on 8/6/2015 (Exhibit J) and in phone conversations my concern with Mr. Bergstrom, my concern that a switch would delay my sentencing, and my concern that The Court would view this decision unfavorably.

Mr. DeStefano ultimately recommended against the switch due to time constraints and the courts possible interpretation. He did promise to help me make sure Mr. Bergstrom was better prepared for the second sentencing. I would contact Mr. Bergstrom through email on 8/26/2015 (Exhibit K) expressing my concerns at the events of the 3rd, the lack of communication after the sentencing, and my desire to meet ahead of the second sentencing. This meeting would never occur.

In hind sight, I wish I followed my gut and switched counsel to Mr. DeStefano upon my return from California, as I had planned.

**New information and Evidence:**

1) Recalculation of Loss Amount and Victim Table: Prior to my second sentencing, I informed Mr. Bergstrom of my belief that shares that had been returned to Fund 2 from Fund 1 were not being credited towards the loss amount. Based upon information obtained from Civil Lawsuits filed, it is my belief that roughly 20,000 shares were returned to Fund 2. Using the Government formula and assuming the share price paid in Fund 2 was roughly \$32 a share, this would result in a credit of roughly \$640,000 against the loss amount.

Additionally, I requested that an understanding would be reached on the potential return and reallocation of the approximately 180,000 shares involved in the Civil cases of:

ESG Fund 2 vs. Passport Capital (100,000 shares)

ESG Fund 2 vs. Fund 1 (Roughly 55,000 shares)

ESG Fund 2 vs. other Members of Fund 2 (Roughly 25,000 shares)

This topic was never addressed in either of my sentencing hearings, and due to the potential "Private Nature" that exists in Civil Actions, I ask the court to be responsible for recalculating the true Restitution Amount and Victim Allocation. It is my belief that the loss amount will be decreased by \$3,000,000-\$4,000,000 for these shares. If I am correct, the victim table will change dramatically.

2) 9th Circuit Ruling on ESG Capital vs. Venable, Meyer, and Stratos: This ruling is a factor in my case. It was my hope that the official ruling would have been received from the December 7, 2015 9th Circuit Court of Appeals hearing on whether the Civil Case of ESG Capital Partners vs. Venable, Meyer, and Stratos should continue, by my submission of this appeal. Unfortunately, the ruling has not yet come forward. Based on media reports of the hearing, and the hearing recording on You Tube (9th Circuit Court of Appeals ESG) it seems clear that the judges feel Meyer and Venable were complicit in the Stratos fraud.

This is evidenced by the following quotes (Source Daily Journal "Former Venable Partner Under Fire at 9th Circuit" (Exhibit L)):

"You're going to have a very tough job." Warning from Judge Pregerson to Venable Counsel Kevin Rosen

"I understand you're saying it might be a slippery slope." cut in Judge Callahan. "But this is an avalanche."

"Pregerson questioned why the panel shouldn't just allow the case- dismissed by Judge Wright- to proceed to trial."

"Your client (Meyer / Venable) would never win at trial." Callahan told Rosen. "Jurors already don't like lawyers. 12 people in the community aren't going to look kindly on this." Callahan was likely referring to the weight of evidence against Meyer, who allegedly went to extraordinary lengths to help Stratos.

"Meyer should have known Stratos was swindling ESG, argued Grignon (ESG's Counsel). In addition, Venable previously defended Stratos in a Civil Suit dismissed in May 2011, Nicole Murphy vs. Bank of America et al."

All of this was summed up by Grignon (ESG's Counsel) by stating:

"When you put it all together in timing, there is no innocent explanation. There was little that was routine in the behavior in this case. It's not business as usual or providing legal service." The panel seemed to agree, repeatedly voicing rebukes of Meyer's actions expressing surprise that Venable authorized payments to itself out of its Client Trust Accounts.

"This is like a movie." stated Judge Callahan

I include this not to make excuses or to justify what I did. My actions were without explanation. I include this to show that despite my actions, a fraud still would have occurred.

For a Senior Partner at a Prestigious Law Firm to concoct a lie assisting a known Con Man, at the same time his Firm was representing the Con Man in another fraud is difficult to comprehend. Further, for the Firm to pay itself hundreds of thousands of dollars in fees from its own Client Trust Account, using funds on deposit for another transaction seems highly unethical.

My mistakes are unforgivable, but I have accepted responsibility and my punishment. It is time for Venable and Meyer to do the same.

3) Letter of Support from Retired Ambassador Ned Siegel: One of the few positive events of the past 5 years was my introduction to Retired Ambassador to the Bahama's, Ned Siegel. Ambassador Siegel represented a large Financial Institution that was looking to aquire Pre-IPO Facebook Shares, and he and I developed a personal and business relationship over many months. He has continued to be a very good friend through the very tough times I am going through, and I cannot thank him enough.

Prior to my sentencings, I asked Mr. Bergstrom to contact Ambassador Siegel as he had offered to help in any way. Asking Mr. Bergstrom on multiple occasions, including the 7/2/2015 PSR Email (Exhibit D), Mr. Bergstrom would state once again that this was not needed due to his confidence in my expected sentence.

Attached please find a letter of support from Ambassador Siegel (Exhibit M). I submit this letter to show that upon my release I have supporters who are offering to assist me in getting back on my feet despite the unforgiveable mistakes I have made. Ambassador Siegel and others will be friends and mentors moving forward helping me to ensure that This Will Never Happen Again!!!!

To this day I cannot understand why Mr. Bergstrom would have deemed this support not important.

4) Other items requiring Assistance of Counsel: In addition to the items detailed in this appeal, there are additional items I would like to add, but need the assistance of counsel prior to introducing them. These items involve recent law changes, pertinent case law, and general procedure. I ask the court to please appoint me counsel, as I am unable to afford counsel on my own.

I ask the court to understand and acknowledge that this is not a "Final Filing" and that with the assistance of counsel I will be able to add or delete sections of this appeal as deemed appropriate. In addition, I want to confirm that in no way am I waiving my attorney client privilege with Ms. Mattewson or Mr. Bergstrom through the submission of this appeal.

**Conclusion:**

I want to further reiterate that I am not questioning anything pertaining to my guilt. The purpose of this appeal is to correct misstatements and introduce facts that I believe should have been presented ahead of your rendering of my sentence.

I ask the court to appoint me Counsel so I can pursue this appeal to its fullest. I believe the question of Loss Amount and Victim Allocation will be an on-going event and I seek assistance from the court.

I take confidence in Your Honor's words that you believe I will never commit crimes of this nature again, and ask you to remember the Prosecutors response and your surprise to your question of her recommendation on my sentence. Mrs. Potts was certainly tough on me, but her response vs. the Guidelines Number shows there are many factors to consider in the entirety of this case. It is likely not a coincidence that the sentence Mr. Bergstrom was sure of and the sentence recommended by Mrs. Potts are similar. While Mr. Bergstrom made serious mistakes, in my opinion, his firm belief in my expected sentence could not have been without basis.

I am a relatively young individual who has learned his lesson the hard way. I have experienced great punishment to date, and not just the kind counted in days of incarceration. I have spent hundreds of hours soul searching how I could have done what I have done. I have a drive within me to correct these wrongs.

I thank you for your consideration of my Appeal. I hope for the opportunity to address these items in front of the Court and ask that you appoint me counsel to assist with the appeal.

Sincerely,

A handwritten signature in black ink that reads "Timothy Burns". The signature is written in a cursive style with a long horizontal stroke at the beginning.

Timothy D. Burns