

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. CR 07-3022MWB
)	
vs.)	
)	
THOMAS RAY DILLAVOU,)	
)	
Defendant)	

GOVERNMENT’S SENTENCING MEMORANDUM

Sentencing in the present case is scheduled for Monday, September 8, 2008 at 10 a.m. The government has no objection to the calculation of the advisory guideline range set forth in the final Pre-Sentence Investigation Report (PSIR). The final Pre-Sentence report was received on September 4, 2008. The government provides the following information on disputed issues, some of which have now been resolved.

Applicability of 2000 or 2002 Guidelines

Defendant asserts the 2000 version of the Sentencing Guidelines may be applicable. The government points out that defendant is charged with filing false tax returns, all of which were filed in 2002. Because the offenses of conviction were all committed in 2002, the U.S. Probation Office has correctly used the 2002 version of the Sentencing Guidelines is applicable. This issue remains unresolved.

Sentencing Guideline Calculations

Defendant had noted an objection to the base offense level calculation, an objection he now intends to withdraw. Therefore, this is no longer a disputed issue, but

defendant intends to raise these matters in connection with motion for downward departure and/or variance. Defendant contends that defendant's remaining actual tax liability is less than the tax loss used to determine the advisory sentencing range. However, the loss amount was properly calculated in the final PSIR. The tax loss amount set forth in Final PSIR ¶ 71 represents 28 percent of a conservative estimate of the amount defendant embezzled from his family's company during the years he committed this offense, an appropriate method of calculating the tax loss pursuant to USSG § 2T1.1, n. (1)(A). The actual amount of tax liability calculated by the Internal Revenue Service which is implicated by paragraph 13 of the plea agreement (calling for preparation of amended personal and corporate returns), contain calculations which have nothing to do with the amounts defendant misappropriated from his family's company, converted to his own use, and failed to report as income. This liability calculation, for example, includes interest, penalties, credits for taxes previously paid and other items not related to defendant's commission of this offense.

Defendant objects to Final PSIR ¶ 28, claiming he is entitled to the third level for acceptance of responsibility. The government has determined it will move for the third level under USSG § 3E1.1(b), to permit the third level for acceptance of responsibility. Therefore, this is no longer an issue the court will need to resolve.

Departures and Variances

Defendant requests downward departures and variances on a number of grounds. The government's position is that none of the grounds alleged, either singly or in combination, provide a sufficient basis for departing from the advisory sentencing guideline range or granting a variance.

In connection with the court's consideration of defendant's various arguments, the government would point out defendant embezzled money from his family's closely held company over a number of years. He abused his position of trust within his own family as the family member with an accounting background and unfettered access to the company's bank accounts. As far as the money he sent to Nigerians, the government would point out, as much as he attempts to portray himself as a victim, he is as much a victim of his own greed, trying repeatedly over a period of years to obtain a large return by gambling his family's company money away. Finally, he did not send all the money he embezzled to the Nigerians. He used some of it to pay for vacations, for home repair, to pay for gifts and other personal expenses. The court should also consider defendant's conduct in lying to bank employees about the legitimacy of Warner Brothers checks he attempted to negotiate as stipulated to by defendant as set forth in the plea agreement, checks he knew were not associated with any legitimate contract with Warner Brothers or anyone else. (See Plea Agreement, ¶19(D)).

Respectfully submitted,

MATT M. DUMMERMUTH
United States Attorney

 9/5/08
By: s/ KANDICE A. WILCOX

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the parties or attorneys of record.

UNITED STATES ATTORNEY

BY: s/ DHalfman

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