

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	NO. CR 07-3022
)	
vs.)	
)	MOTION FOR DOWNWARD
THOMAS RAY DILLAVOU,)	DEPARTURE AND DOWNWARD
)	VARIANCE
Defendant.)	

COMES NOW, the Defendant, Thomas Ray Dillavou, by and through his undersigned counsel, in support of his Motion for Downward Variance and Motion for Downward Departure states to the Court as follows:

I. FACTS

1. This case is before the Court for purposes of sentencing at 3:00 p.m. on Thursday, July 10, 2008.
2. On January 18, 2008, the Defendant plead guilty to Count 1 and Count 4 contained in the Superseding Indictment as follows:

Count 1 charges: On or about May 22, 2002, in the Northern District of Iowa, defendant did willfully make and subscribe a Form 1040 U.S. Individual Income Tax Return for calendar year 1997, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said Form 1040 U.S. Individual Income Tax Return defendant did not believe to be true and correct as to every material matter, in that

the said Form 1040 Individual Tax Return claimed defendant's total income was \$50,885, whereas, as defendant then and there well knew and believed, defendant's actual income was more than \$50,885 which is in violation of Title 26, United States Code, Section 7206(1)n.

Count 4 charges: On or about June 25, 2002, in the Northern District of Iowa, defendant did willfully make and subscribe a Form 1040 U.S. Individual Income Tax Return for calendar year 2000, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said Form 1040 U.S. Individual Income Tax Return defendant did not believe to be true and correct as to every material matter, in that the said Form 1040 Individual Tax Return claimed defendant's total income was \$47,146, whereas, as defendant then and there well knew and believed, defendant's actual income was more than \$47,146 which is in violation of Title 26, United States Code, Section 7206(1)n.

3. There is no statutory minimum sentence for the two charges to which this defendant has pled guilty offense.
4. The Initial Presentence Investigation Report indicates a total offense level of 16 with 1 criminal history point for a criminal history category I resulting in a sentencing guideline imprisonment range of 21 to 27 months. This calculation is

disputed.

5. The Defendant is a married 54 year old white male who has had no prior significant criminal history. The Defendant is a few credit hours short of being a college graduate with a business degree. The Defendant is a small business owner who has built this small plastics manufacturing company (P.I.M., Inc.) up over the last 22 years. Defendant is a 50% owner of P.I.M., Inc. stock. Defendant has had every title and position at P.I.M., Inc., with the exception of President. He has maintained full-time employment with that company during that time not only for himself but for his wife and 14 other lesser skilled full time employees. Attached hereto marked Exhibits 1 and 2 are photographs showing the full-time work force of P.I.M., Inc.
6. In May of 2004 The United States Sentencing Commission issued its 15 year report on Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines. That report indicates that the Defendant's characteristics (listed above) put him at a lower rate to recidivate than other federal offenders. For example, the fact that this defendant is white puts the likelihood of the Defendant's recidivism at 8.9%. His full time employment status puts likelihood of his recidivism at 12.7%. His education attainment being some college puts the recidivism level at 13.9%. The fact that he is married puts his recidivism rate at 9.8%. Finally, the fact that Defendant is a male over the age of 50 with criminal history category of I puts the likelihood of Defendant's recidivism at 6.2%. This final statistic is the most realistic in our case and for this defendant.

7. In addition, the Defendant argues that the Court should use the 2000 Federal Sentencing Guidelines when determining his sentence as both counts relate to their obligations to accurately file tax returns for the years 1997 and 2000. Defendant acknowledges he filed his returns late and those filings occurred in 2002.
8. Paragraph Nine of the plea agreement Defendant entered into on January 18, 2008 states as follows:

The defendant understands that the government will urge that the 2002 version of the United States Sentencing Guidelines applies. Defendant may urge that a version of the United States Sentencing Guidelines for a different year will apply. If the 2002 version of the United States Sentencing Guidelines does apply, the parties agree that the Sentencing Guidelines will be applied, in part, as follows:

Counts 1 and 4

- A. *The parties agree the defendant would have a base offense level 16, pursuant to the USSG §§2T1.1 and 2T4.1 (Tax Table). This is based on an approximate tax loss of \$153,488 (28 percent of the approximate \$548,172 in unreported gross income).*
- B. *The parties agree and stipulate that the defendant's base offense level should be increased by 2 levels because the offense involved sophisticated means, under USSG §2T1.1(b)(2).*
- C. *The parties agree that no additional USSG §2T1.1 guideline adjustments are appropriate.*

Acceptance of Responsibility

- D. *As of the date of this agreement, defendant appears to qualify for a two-level downward adjustment for acceptance of responsibility. However, the government shall be free to contest the adjustment under USSG §3E1.1(a) should it discover information showing defendant has not accepted responsibility or should the defendant subsequently fail to continue to accept responsibility by failing to pay the special assessment; by providing false information to the court, the probation office, or the government; by unlawfully using controlled substances; by attempting to obstruct justice; by falsely denying or frivolously contesting relevant conduct; by reaching this plea*

agreement; or by acting in a way that is inconsistent with, or failing to act in any way that is consistent with, the granting of the adjustment under USSG §3E1.1(a). The parties do not stipulate to the applicability of the third-level downward adjustment for acceptance pursuant to USSG §3E1.1(a). The parties do not stipulate to the applicability of the third-level downward adjustment for acceptance pursuant to USSG § 3E1.1(b), but defendant will argue that the third level should be applied.

9. The Defendant should also be given a credit under USSG § 3E1.1(b) for a third-level downward departure adjustment for his acceptance of responsibility if the Court finds the Defendant to be a level 16 or greater. The government complains the defendant delayed in stepping forward to plead guilty. The defendant was subpoenaed to appear before the grand jury in May of 2001. The government delayed from then until May of 2007 to actually indict this Defendant. The government has never been in a hurry here. Defendant should be allowed to see the government's evidence before he is expected to plead guilty to any charge. The Superseding Indictment came down January 9, 2008 and this defendant pled guilty on January 24, 2008. No appreciable delay existed here by this Defendant.
10. As the Presentence Investigation Report shows the actual additional federal taxes due for 1997 amounts to an overpayment of federal taxes of \$5006.00 for Tom and Valerie Dillavou. This is actually a credit. For 2000 Mr. and Mrs. Dillavou owe the Internal Revenue Service \$43,756.00 in actual federal income taxes. The 2000 tax year interest and penalties total \$76,863.67 for a grand total of \$120,619.67 owed to the Internal Revenue Service for Thomas and Valarie Dillavous' personal returns. The Dillavous owe a total of \$155,872.00 to the Internal Revenue Service as of July 1, 2008.

11. Quoting from the majority opinion *U.S. v. Gall*, 552 U.S. ____ 2007: The District Court Judge in *Gall v. United States* states: “At the end of both the sentencing hearing and the sentencing memorandum, the District Judge reminded Gall that probation, rather than ‘an act of leniency,’ is a ‘substantial restriction of freedom.’ *Id.*, at 99, 125. In the memorandum he emphasized:

‘Gall will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court. Of course, the Defendant always faces the harsh consequences that await if he violates the conditions of his probationary term’ *Id.*, at 125.

Finally, the District Judge explained why he had concluded that the sentence of probation reflected the seriousness of Gall’s offense and that no term of imprisonment was necessary:

“Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life. The Defendant’s post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society”.

12. Based upon the facts and applicable law stated above, Defendant makes this

Motion. The Court should exercise its discretion and depart downward and/or grant a variance.

MOTION FOR DOWNWARD DEPARTURE

II. LEGAL ARGUMENT

A. USSG Application.

§3553(a) Motion for Downward Variance

18 U.S.C. §3553(a) states as follows:

“(a) **Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

- (1) *the nature and circumstances of the offense and the history and characteristics of the defendant;*
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant;
and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for–
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines–
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 949(p) of title 28);

- (5) any pertinent policy statement–
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.”

¹The Supreme Court held in *United States v. Booker* that the mandatory nature of the sentencing guidelines system violated the Sixth Amendment of the United States Constitution. 543 U.S. 220, 226-27 (2005). To remedy this, the Supreme Court modified the federal sentencing statute to make the sentencing guidelines truly guidelines – advisory, but not binding on the sentencing court. *Id.* At 245. Subsequent litigation has affirmed the authority of the sentencing court to sentence within the range of choice dictated by the facts and applicable law of the case before it. *See Gall v. United States*, No. 06-7949, 128 S.Ct. 586, 602 (2007)

¹ Quoting from Judge Pratt’s analysis of the law presently set forth in *United States v. Shipley* 4:07-CR-00081

(upholding a sentence outside the advisory guideline range as reasonable); *Kimbrough v. United States*, No. 06-6330, 128 S. Ct. 558, 570 (2007) (noting that sentencing courts may vary from the advisory guideline range based solely on policy considerations, including disagreement with the policy underlying the guidelines in a case); *Rita v. United States*, No. 06-5754, 127 S. Ct. 2456, 2465 (2007) (stating that a district court may consider arguments that “the Guidelines sentence itself fails to properly reflect [18 U.S.C.] § 3553(a) considerations”).²

The result of this development in sentencing law is that sentencing courts must “take account of” the advisory guideline range as part of all the sentencing goals and factors enumerated in 18 U.S.C. § 3553(a), but are no longer bound by the sentencing range indicated by the applicable guideline in the case. *Cunningham v. California*, No. 05-6551, 549 U.S. 270, ___, 127 S. Ct. 856, 867 (2007); *Booker*, 543 U.S. at 261.

The advisory guidelines are, therefore, “the starting point and the initial benchmark” in determining a sentence. *Gall*, 128 S.Ct. at 596 (stating that “a district court should begin all sentencing proceedings by correctly calculating the applicable Guideline range”). While district courts must “give respectful consideration to the Guidelines,” they are permitted to “tailor the sentence in light of other statutory concerns as well.” *Kimbrough*, 128 S.Ct. at 570 (quoting *Booker*, 543 U.S. at 245-46). “[T]he Guidelines are not the only consideration,

² Quoting from Judge Pratts analysis of the law presently set forth in United States

vs. Shipley 4:07-CR-00081

[and] the district judge should consider all of the § 3553(a) factors” to fashion the appropriate sentence. *Gall*, 128 S. Ct. at 596. As required by the Sentencing Reform Act, the “overarching provision instruct[s] [the] district courts to ‘impose a sentence sufficient, but not greater than necessary’ to accomplish the goals of sentencing, including ‘to reflect the seriousness of the offense,’ ‘to promote respect for the law,’ ‘to provide just punishment for the offense,’ ‘to afford adequate deterrence to criminal conduct,’ and ‘to protect the public from further crimes of the defendant.’” *Kimbrough*, 128 S. Ct. at 570 (quoting 18 U.S.C. §3553(a)).

In determining the sentence that is “sufficient, but not greater than necessary,” the statute further directs the sentencing court to consider the nature and circumstances of the offense, the history and characteristics of the defendant, the sentencing range and pertinent policy statement issued by the Sentencing Commission, the kinds of sentences available, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a); accord *Kimbrough*, 128 S.Ct. at 570. The sentencing court “may not presume that the Guidelines range is reasonable,” but rather must “make an individualized assessment based on the facts presented” to arrive at a sentence that is sufficient, but not greater than necessary, in a given case. *Gall*, 128 S.Ct. at 597. While the rationale for a non-guidelines sentence will necessarily be more detailed the further the deviation from the advisory guideline suggested by the Sentencing Commission, there is no legal requirement that

“extraordinary circumstances” are a prerequisite to imposition of a non-guideline sentence. *Id.* The sentencing judge has a greater familiarity with an individual case than either the Sentencing Commission of the Court of Appeals, and is “therefore, ‘in a superior position to find facts and judge their import under § 3553(a)’ in each particular case.” *Kimbrough*, 128 S. Ct. at 574 (quoting *Gall*, 128 S. Ct. at 597).

BASIS FOR DOWNWARD DEPARTURE

The parties stipulated that based upon the dollar figures available in January 2008 there was an approximate tax loss of \$153,428.00.

Applying the 2002 U.S. Sentencing Guidelines:

Defendant contends the actual tax due for the 2 years to which defendant pled guilty based upon amended returns accepted by the Internal Revenue Service are a credit of \$5006.00 for 1997 and an actual federal income tax due of \$43,756.00 for 2000.

Applying §2T1.1(a)(2) to Count 1 since there was no tax loss for 1997, defendant would be a level 6 plus a 2 level upward adjustment for sophistication under §2T1.1(b)(2).

Applying §2T1.1(a)(1) to Count 4 for the tax year 2000 there is a federal income tax due of \$43,756.00 (not including \$76,863.67 of penalties and interest due). Defendant should be at a level 14 with a 2 level increase for sophistication to a level 16. This is the level that should be shown on the Presentence Investigation Report at paragraphs 21 and 26 applying the 2002 U.S. Sentencing Guidelines. If the defendant receives a 2 level reduction for acceptance of responsibility using the 2002 U.S. Sentencing Guidelines calculations, the defendant is a criminal history 1 at a level 14 for a sentencing guideline range of 15 – 21 months. If defendant receives the full 3 points for acceptance, he is a level 13 for a

sentencing guideline range of 12 – 18 months.

Applying the 2000 U.S. Sentencing Guidelines:

The defendant would be at a level 4 for the 1997 federal tax return and level 13 plus 2 for a level 15 for the 2000 federal tax return. If the defendant receives a 2 level reduction for acceptance of responsibility using the 2000 U.S. Sentencing Guidelines calculations, the defendant is a criminal history 1 at a level 13 for a sentencing guideline range of 12 – 18 months.

Defendant seeks a corrected U.S. Guideline range from 21 to 27 months as set forth in the first draft Presentence Investigation Report after departure down to a sentence of 12 months home confinement with electronic monitoring followed by 2 years of probation and 2 years supervised release.

The Defendant requests the Court consider the 3553(a) factors including the Defendant's history. Defendant seeks a variance down to 12 months of home confinement with electronic monitoring and be allowed to go to work Monday through Saturday followed by 2 years supervised release. The Defendant requests the Court to take the facts in this case into consideration pursuant to 18 U.S.C. § 3553(a)(1) as well as USSG §4A1.3.

As stated above, the Defendant will be 55 years old on July 11, 2008 one day after sentencing. The guidelines fail to account for this phenomenon of decreasing recidivism with increasing age of the Defendant, and renders the U.S. Sentencing Guidelines an imperfect measure of how well the sentence protects the public from further crimes of this

Defendant. The Defendant has a criminal history I and the alleged criminal behavior occurred 8 to 12 years preceding this sentencing. The Defendant's age, race, marital status, education and other related factors make the likelihood of recidivism extremely low. Defendant's counsel has pointed out to the Court the statistics regarding recidivism based upon a study of the U.S. Sentencing Guidelines and U.S. sentencing policies. The Court can take into account the length of time the Defendant's refrains from commission of his first crime. See *US v. Ward* 814 F. Supp. 23 (E.D. Va. 1993). The Court should consider this factor in favor of this Defendant.

In addition, the Court is entitled to look at the tax tables during the time frames the money was diverted by Defendant's engagement in the Nigerian scam. Reviewing Form 4549A (attached to the PSIR in final form) as it relates to Count 1 the Defendant is actually entitled to a credit of \$5,006.00 as opposed to a tax liability even though he pled guilty to this count. The Court should consider that as it relates to Count 1 the Government didn't actually lose any money. It is only the Defendant that lost money. In addition the Defendant didn't benefit financially from his misconduct of sending funds over to Nigeria. This is true even after he had been instructed to stop the international investment/business development that had been agreed upon between himself and his partner Knopf. More importantly, the Defendant continued sending money to Nigeria and other places around the Globe at the insistence of the Nigerians did not benefit him and conversely resulted in a tax liability because of the handling given the funds and Defendant's failure to include those funds in his personal returns. The District Court should depart downward where the Defendant did not personally benefit from the scheme in which he had been defrauded.

The Court can and should consider that the Defendant in this case, while not justified in his behavior, was defrauded by a scheme that netted him nothing but loss, embarrassment, humiliation, tax liability and family strife. See *U.S. v. Walters* 87 F. 3d 663 (5th Circuit 1996). *U.S. v. Broderon* 67 F. 3d 452 (2nd Circuit 1995).

As stated above the Defendant has 14 full-time employees plus family members that rely on P.I.M., Inc. for a job, benefits, insurance and a future in the Fertile, Iowa area. The Defendant has a growing obligation to the Internal Revenue Service not only personally but to keep the doors of P.I.M., Inc. open in the future. The business is a solid on going business which could withstand the losses set forth in the PSIR and in addition provide full-time employment to these people. Defendant not only owes a tax obligation to the United States he also will soon owe a tax obligation to the State of Iowa for the mishandling of funds under this Nigerian scheme. Applying the case of *U.S. v. Meriweather* 431 F. 3d 692, 702 the Court should depart downward to probation in part because a sentence of probation will make this Defendant better able to provide restitution to the victims of the crime committed. In this case, the Defendant should be given 12 months electronic monitoring followed by 2 years supervised release which will better afford this Defendant the opportunity and time to pay restitution. It will also allow that business known as P.I.M., Inc. to remain in business and continue operating. See also *U.S. v. Coleman* 370 F. Supp. 2d 661 (So. District Ohio 2005). Restitution is a factor not only under the U.S. Sentencing Guidelines but it is also factor under 18 U.S.C. 3553(a)(7).

As set forth in the PSIR Final Draft and referred to directly in the fact portion above, this Defendant not only cares for his 83 year old mother who has bladder cancer in

need of chemotherapy treatments, he also is required to help his 54 year old wife who has had five knee operations within the last few years. The results of these knee operations are such that she walks with crutches, has lack of mobility and strength. The Defendant has many people relying on him not only for employment but for educational funds, medical funds, family support and other family obligations as set forth in the PSIR. The Court can consider the Defendant's age, health condition and family obligations to others who rely on this Defendant for day-to-day functioning and needs. See §5H1.6. See also *U.S. v. Leon* 341 F.3d 928 (9th Circuit) in a false income tax return case the District Court granted a downward departure of six levels from 30 months to 10 to 16 months because the Defendant was the sole caregiver of his wife who suffered from renal failure and was suicidal. The Defendant in this case has extraordinary family circumstances listed above including one child in college, one child in high school, a wife with severe medical problems and limitations along with a mother who is dependent upon him for transportation and financial support during her cancer treatments.

BASIS FOR DOWNWARD VARIANCE

The Defendant has spent the last 22 years of his life building and committing himself to the growth and continued success of P.I.M., Inc. in Fertile, Iowa. The Court should review the Defendant's excellent employment history in the context of the motivation and behavior of this Defendant. It certainly would be inconsistent for this Defendant to commit 22 years of his life to build a business only to undermine it and cause its failure. This has been a heart wrenching realization for Defendant. Defendant's motives while illegal were not committed in bad faith. The Defendant was required to send

cash to Nigeria and the easiest way for him to do that was to follow the procedure established. Defendant continued writing checks to himself or diverting cash to himself to then be taken to Western Union and sent overseas. This process of acquiring the funds on a short term basis only to turn around and send them out as part of a Nigerian scam is consistent with the Defendant's excellent employment history and the efforts he has made to support not only himself and his family but 14 full-time employees in the small town of Fertile, Iowa. The Court can consider the Defendant's long impressive work history under 3553(a) factors.

The Court can also consider the attempted cooperation of a Defendant in dealing with the IRS. In this case, when the Defendant and his family were brought before the Grand Jury starting in May 2001, the Defendant came forward and admitted the vast sums that he had sent to Nigeria and offered to cooperate with the IRS to see if they could recover any of the funds from the Nigerians. The Defendant's statement which is set forth in the PSIR, particularly at Paragraph 18, confirms that he had requested information over 50 times about any efforts being made by the government or the IRS to recapture the money or find the people who scammed the Defendant and P.I.M., Inc. Those 50 efforts including offers at the time of the Grand Jury testimony confirm that the Defendant was ready, willing and able to cooperate with the Government to seek recovery of the funds and actually result in the arrest of the guilty party. Those requests were ignored. The Court can consider the attempted cooperation by this Defendant. See *U.S. v. Tenzer* 213 F.3d 34 (2nd Circuit 2000). The Court can consider the Defendant's family ties, responsibility and community ties not only from the standpoint of the applicable guideline range but also

from the determination of the amount of restitution or fine.

The Court can also consider the high probability that the business run by this Defendant will go under if he were to be incarcerated which would result in an undue hardship on the 14 full-time employees plus others relying the products being made, the income flowing from the business and, of course, the resulting taxes. The Guidelines do not prohibit a departure on grounds that the incarceration of the Defendant will cause job losses to his employees. See *U.S. v. Milikowsky* 65 F.3d 4 (2nd Circuit 1995); *U.S. v. Olbres* 99 F.3d 28 (1st Circuit 1996). *U.S. v. Kloda* 133 F. Supp. 2d. 345 (S.D.N.Y. 2001) This Court can grant a departure based in part by the needs of the Defendant's business and his employees.

III. CONCLUSION

WHEREFORE, Defendant prays the court grant Defendant's Motion for Variance and/or Motion for Downward Departure for the reasons stated above.

DATED this 2nd day of July, 2008.

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