UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	Crim. No. 3:11CR182(JBA)
	:	
v.	:	
	:	
JULIANA COLE WEBER	:	March 4, 2012

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GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America ("United States") respectfully submits this memorandum in aid of sentencing, which is presently scheduled for Tuesday, March 6, 2012, at 3:15 p.m. In sum, the United States recommends that the Court impose a sentence within the applicable sentencing guidelines range of 24 to 30 months. This memorandum sets forth the United States' sentencing recommendation in four parts. First, it addresses the offense conduct and charges, by adopting the account set forth in the Presentence Report ("PSR"). Second, it summarizes the procedure to be followed in sentencings in the wake of *United States v. Booker*, 543 U.S. 220 (2005), and its progeny. Third, it adopts the PSR's calculations of the defendant's sentencing range under the Sentencing Guidelines. Fourth, it explains why a sentence within the advisory guidelines range accomplishes the purposes of 18 U.S.C. § 3553(a).

I. The Offense Conduct and Charges

The Government agrees with and adopts the description of the offense conduct as set forth in the February 24, 2012, PSR at pp. 204,¶¶6-15, and respectfully requests this Court to adopt the factual findings of the PSR.

II. Sentencing Post-*Booker*

In *United States v. Crosby*, 397 F.3d 103, the Second Circuit explained that, in light of *United States v. Booker*, 543 U.S. 220 (2005), district courts should engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Id.* at 112. Third, the court must consider the Guidelines range, "along with all of the factors listed in [Title 18 of the United States Code,] section 3553(a)," and determine the sentence to impose. *Id.* at 112-13.

Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific considerations:

> (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 [in the Sentencing Guidelines];
> (5) any pertinent policy statement [issued by the Sentencing Commission];
> (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.

The Second Circuit has instructed district judges to consider the Guidelines "faithfully"when sentencing. *Crosby*, 397 F.3d at 114. "*Booker* did not signal a return to wholly discretionary sentencing." *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006) (citing *Crosby*, 397 F.3d at 113). The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Crosby*, 397 F.3d at 113. Because the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," *Gall v. United States*, 128 S. Ct. 586, 594 (2007), district courts must treat the Guidelines as the "starting point and the initial benchmark" in sentencing proceedings. *Id.* at 596; *see also Rattoballi*, 452 F.3d at 133 (the Guidelines "'cannot be called just 'another factor' in the statutory list, 18 U.S.C. § 3553(a), because they are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges.'") (quoting *United States v. Jiminez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007). The Second Circuit has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also Kimbrough*, 128 S. Ct. at 574 ("We have accordingly recognized that, in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'") (quoting *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007)); *Rattoballi*, 452 F.3d at 133 ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

III. The PSR Properly Calculated the Defendant's Guidelines Sentencing Range.

The government agrees with and adopts PSR's calculations at pp. 5 and 13-14, ¶¶19-29 and 63-73. Specifically, the PSR correctly notes that the defendant has a base offense level of 20 under sections §§ 2T1.1(a)(1) and 2T4.1, based on an aggregate tax loss of $579,465, which falls within the loss range of greater than $400,000 and not greater than $1 million. Three points are subtracted for acceptance of responsibility, resulting in a total adjusted offense level of 17. The defendant presents a criminal history category of I, for a resulting sentencing range of 24 to 30 months, a fine range of $5,000 to $50,000, a term of supervised release of at least one but not more than three years, and a special assessment of $200.

IV. A Sentence Within the Advisory Guidelines Range of 24 to 30 Months is Appropriate, Fair, and Accomplishes the Purposes of 18 U.S.C. § 3553(a).

18 U.S.C. § 3553(a) identifies the following "[f]actors to be considered in imposing a sentence": (1) "the nature and circumstances of the offense and history and characteristics of the defendant"; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, (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 sentencing range set forth in the Guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. The United States submits that a sentence within the advisory sentencing guidelines range of 24 to 30 months faithfully reflects and implements these considerations.

1. Nature and circumstances of the offense, and history and characteristics of the defendant

The serious and very long-term nature of the offense conduct warrants a sentence within the applicable, advisory sentencing guidelines range. As discussed herein, credit is appropriately given to the defendant for her early and thorough acceptance of responsibility, which is already reflected in the guidelines range calculation, and which also warrants consideration in determining what sentence to impose within that range.

As defense counsel accurately notes, the defendant expressed a willingness and desire to cooperate with law enforcement authorities in resolving her unlawful conduct from the first day that she learned of that conduct's discovery by law enforcement, namely, the December 7, 2007, search warrant executions. The defendant did cooperate with the government in assessing her unpaid tax liability, and she has made considerable efforts since that time towards paying down her accumulated back taxes, interest, and penalties.

The government also concurs in the positive characterization of the defendant's business as described in the several letters submitted to the Court. In the course of the investigating agents' interviews of business customers – who had entrusted their children to be trained by the defendant and her colleagues – it was clear that those customers were happy with the training and coaching of their children, including the attention given to the children's safety.

Nonetheless, the other side of the ledger presents a very serious, protracted course of criminal conduct, which had adverse impacts for many individuals besides the defendant. The documented and agreed-upon tax evasion conduct of Count One lasted *six years* – from tax year 2001 through tax year 2006. It was stopped only because of the intervention of the Internal Revenue Service's criminal investigation, which culminated in search warrants being executed at the defendant's business in late 2007. Over those six years, the defendant understated her taxable income by more

than $1.1 million dollars. Her average annual taxable income over those years was more than $468,000. In other words, this was not a matter of a small business struggling on the margins for subsistence – far from it. Even had the defendant paid all her actual federal income taxes due and owing, she would have enjoyed a very substantial net income over this time period. In other words, no mitigating factor such as financial desperation drove this particular criminal conduct.

Also, regarding the Count Two conduct, the defendant failed to pay social security and FICA taxes on behalf of the several grooms whom she employed and housed on the premises of the business. Irrespective of whether some or even all of them may have consented to this practice, such illegal conduct has the effect of denying such employees the basic protections of the social security retirement and disability system, which for persons of low income is often the sole source of such safety net protection available.

Contrary to defendant's assertion that her conduct was "hardly . . . designed to avoid detection," defense sentencing memo at 14, the defendant in fact engaged in a deliberate and equally long-running scheme of cash structuring in an effort to hide her income under-reporting from law enforcement authorities. The structuring conduct was the criminal predicate for the stipulated civil forfeiture of $1 million of seized cash, which consisted of proceeds of such structuring. Specifically, the defendant required her customers to pay her in check amounts of under $10,000, which made it possible for her to cash out such customer checks without generating Currency Transaction Reports from her bank to the Treasury Department.

It should be noted that this conduct placed her customers' reputations and liberty at risk, insofar as the early stages of the investigation focused not only on the defendant, but on the issuers of checks in amounts just below $10,000. All such customers were determined to have had no knowing involvement whatsoever in the defendant's illegal conduct. But to find themselves on the

receiving end of a federal criminal investigation was doubtless a most disruptive and difficult process for them and their families.

Finally, the government notes that, contrary to the defendant's claim that "it is hard to imagine a brighter red flag" being raised by her illegal conduct, the facts prove otherwise. She engaged in this illegal conduct for the better part of six years before it was caught and stopped. Cash transactions made "under the table" are, in fact, one of the major sources of tax evasion around the country, and any government that respects civil liberties in the conduct of its criminal investigations will often find such tax evasion schemes difficult to detect. Our tax system rests, to a significant degree, on a measure of trust and honor for its proper functioning, and it is inaccurate to suggest that the defendant's illegal conduct was less significant owing to its allegedly obvious and glaring nature. It was neither obvious, nor glaring, nor insignificant.

2. Need for sentence to promote respect for law, specific & general deterrence, to protect the public, and provide defendant with needed training, care, and correctional treatment

The United States submits that a sentence within the advisory sentencing guidelines range is warranted in view of the paramount importance of deterring others from such conduct. As discussed above, the criminal conduct at issue – namely, running a quasi-cash business with extensive money structuring in order to shield a large tax evasion scheme from discovery – is both highly opportunistic, and not easily detected by law enforcement authorities. Hence compliance with the law in this area depends almost exclusively on a vigorous policy of general deterrence, that is, the publicly known price of getting caught is sufficiently substantial to discourage the many others who are both tempted and easily able to engage in the same criminal conduct.

3 & 4. The kinds of sentences available / The sentencing range set forth in the guidelines

For the reasons set forth in sub-captions 1, 2, and 5 herein, the United States submits that the available sentencing guidelines range is appropriate in this case.

5. Policy statements issued by the Sentencing Commission and Other Asserted Grounds of Downward Departure or Non-Guidelines Sentence

The defendant has proposed several grounds for either a sentence departure or a non-guidelines sentence. The United States respectfully submits that these asserted grounds – including those set forth in the defendant's Supplemental Sentencing Memorandum – are more appropriately lodged as arguments for a sentence towards the low end of the applicable sentencing guidelines range. The government discusses each argument in the following sequence: extraordinary rehabilitation; pre-sentence "punishment"; impact on third parties; and extraordinary family circumstances.

A. Extraordinary Rehabilitation

The defendant maintains that this case warrants a departure or non-guidelines sentence based on "extraordinary rehabilitation." The government respectfully submits that the defendant's early acknowledgment of responsibility, cooperation in assessing her outstanding tax liability, and substantial efforts in paying down that liability, are entirely worthy of consideration, which is reflected in the acceptance of responsibility credit already factored into the guidelines range, and which can be further reflected in the Court's determination of where to sentence the defendant within that guidelines range.

The Second Circuit Court of Appeals does recognize the validity of departures in truly extraordinary cases of rehabilitation, which take a case outside the "heartland" of what might ordinarily be expected. However, the Court of Appeals has also ruled quite clearly that early

acknowledgment of guilt and pre-judgment payment of restitution do not by themselves qualify as "extraordinary rehabilitation" warranting a departure:

> [B]ecause [defendant] received the two-level reduction in his base offense level for acceptance of responsibility, he already had received credit for returning a portion of the stolen property; [Defendant]'s voluntary repayment of embezzled funds, therefore, did not constitute an "unusual circumstance [ ]" which is "present to a degree substantially in excess of that which is ordinarily involved." U.S.S.G. § 5K2.0. *See, e.g., United States v. Carey*, 895 F.2d 318, 323 (7th Cir.1990) (holding that a downward departure based on restitution was unreasonable because defendant had already been credited for acceptance of responsibility under U.S.S.G. § 3E1.1). The district court's resentencing of [defendant] based on [his] partial restitution, therefore, constituted an improper downward departure.

United States v. Arjoon, 964 F.2d 167, 171 (2d Cir. 1992), *superseded on other grounds by rule, as stated in United States v. Werber*, 51 F.3d 342, 348-349 (2d Cir. 1995). *See also United States v. Carpenter,* 320 F.3d 334, 343 (2d Cir. 2003) ("'pre-conviction restitution is also a form of acceptance of responsibility adequately taken into consideration' by the Sentencing Commission in formulating section 3E1.1 . . . [R]restitution before conviction cannot justify a downward departure . . . .").

B. Pre-sentence Punitive Impact of Case

Defendant also contends that she has already been punished by the pendency of the case and by her having agreed to a stipulated civil forfeiture of $1 million in seized, structured funds. The government agrees that the forfeiture is substantial, and that it evidences the defendant's forthright acceptance of responsibility.

At the same time, the government notes that the potential scope of forfeiture that could have been pursued in an adversarial posture was a great deal larger, and that the parties have in fact reached a reasonable, pre-indictment compromise in this respect. Most significant, there was a serious possibility that Stepping Stone Farm in its entirely could have been subject to forfeiture, owing to the defendant's use of the premises to house and pay under the table several hired grooms,

most or all of whom were illegally present in the United States.[1] Moreover, of the approximately $1.365 million cash seized from the defendant's safe deposit box and home safes, the United States agreed to refrain from litigating approximately $365,000 in forfeiture proceedings, and instead agreed that this latter amount could be credited towards the defendant's substantial tax, interest, and penalties due and owing.

That this case has been pending for a significant amount of time reflects the parties' joint and cooperative efforts to work out several complicated matters prior to indictment, including but not limited to, ascertaining the defendant's liability for back taxes; prosecution decisions concerning the defendant's daughter Juliana Starbuck; and accommodating the defendant's work schedule, including the horse show seasons in the southeastern United States.

C. Impact on Third Parties

The defense warns that a sentence of incarceration places at risk the horse farm business and its employees. The government notes that a substantial share of the business is now operated by the defendant's two daughters, and there is no indication that they are not capable of carrying on the business without the defendant's daily presence on site.

The government also notes that the victims of the criminal conduct of Count Two – failure to pay social security and FICA taxes – were not only the United States government, but also the lower income employees of the farm who were thereby excluded from the protections of the social security and disability safety net. It is somewhat ironic to argue, on behalf of that same class of employees, that the defendant warrants a more lenient sentence.

[1] Under 8 U.S.C. § 982(a)(6), real property used to harbor illegal residents in violation of 8 U.S.C. § 1324(a) is subject to forfeiture.

D. Family Circumstances per U.S.S.G. Section 5H1.6

The defendant also seeks a departure below the advisory sentencing guidelines range based on the Sentencing Guidelines' Policy Statement at Section 5H1.6, which addresses family circumstances. The defendant makes this request based on her role in assisting her adoptive daughter, age 22, who has special mental health needs, and whom the defendant has assisted in matters of day to day living and in attending frequent therapy sessions.

Recognizing that these are often very difficult issues, the government nonetheless opposes the request in this case, based on the rather clear state of the law regarding section 5H1.6. As discussed below, there is a strong presumption in the law against a family circumstances departures, and this case does not appear to be one in which that can be overcome.

Section 5H1.6, captioned "Family Ties and Responsibilities," states in pertinent part that "family ties and responsibilities are *not ordinarily relevant* in determining whether a departure may be warranted." (emphasis added) Accordingly, family ties and responsibilities are

> . . . "a discouraged basis for departure because the Commission has deemed them to be not generally relevant." *United States v. Galante,* 111 F.3d 1029, 1034 (2d Cir.1997); *see also* U.S.S.G. § 5H1.6. "Disruption of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration." *United States v. Johnson,* 964 F.2d 124, 128 (2d Cir.1992). For this reason, a district court may depart downward on this basis only if the "hardship in a particular case is exceptional." *Galante,* 111 F.3d at 1034.

United States v. Tejeda, 146 F.3d 84, 87 (2d Cir. 1998). *See also Koon v. United States*, 518 U.S. 81, 95 (1996) ("discouraged factors . . . should be relied upon only 'in exceptional cases'" (quoting 1995 U.S.S.G. ch. 5, pt. H, intro. comment); *United States v. v. Barber*, 119 F.3d 276, 281 (4th Cir. 1997) ("if the factor is one upon which the Commission discourages departure, a district court properly may depart only if it finds that the factor exists to such an uncommon degree that it is outside the heartland of circumstances embraced by the relevant guideline").

As noted above, the basis for the departure request is the defendant's role in assisting her 22 year old daughter, by providing assistance in day to day living matters and in attending frequent therapy sessions. Without denying the significance of this assistance, it bears noting that the defendant, who lives in Ridgefield, does not reside with her daughter, who lives in Danbury. PSR at p. 8, ¶41. The government recognizes that the defendant's serving a period of incarceration would be disruptive and create new burdens for her family, particularly as regards the assistance that the defendant has up to now provided to her daughter.

However, the pertinent cases require a showing that, during the defendant's period of incarceration, there would not be any other relatives or friends whose assistance would result in adequate care for dependent family members. *See United States v. Archuleta*, 128 F.3d 1446, 1450 (10th Cir. 1997) (vacating a departure, where defendant was the sole support of two children and an elderly diabetic mother, noting the absence in the record of facts showing that (1) other relatives could not care for the dependent family members, and (2) home nursing or other alternative services were not available). The Courts of Appeals have set a high bar for granting family circumstances departures under USSG § 5H1.6. *See, e.g., United States v. Sweeting,* 213 F.3d 95, 104-107 (3d Cir. 2000) ("there is nothing in the record to suggest that [defendant] (and only [defendant]) can provide [her son] with the care and attention he needs," where defendant was a single mother and the sole provider for five children, including a son who had a substantial neurological impairment); *United States v. Rybicki*, 96 F.3d 754, 758-759 (4th Cir. 1996) (family circumstances not sufficiently "exceptional" to justify departure, where defendant had neurologically impaired nine-year old son needing special supervision, and wife experiencing fragile mental health); *United States v. Dyce*, 91 F.3d 1462, 1467-68 (D.C. Cir. 1996) (reversing district court's grant of departure, where defendant

was a single mother with three children under the age of four, one of whom was being breast-fed, and where incarceration would require placing children in foster care).

The defendant's brother and her other two daughters with whom she resides in Ridgefield are capable adults. They along with the defendant have successfully managed and operated their family horse farm business. There is nothing in the record to suggest that the defendant's brother and daughters could not share in providing the part time assistance to their step-sister/niece that, up to now, has been provided by the defendant. By the terms of section 5H1.6, and under the exacting standards set in the cases interpreting this policy statement, the defendant's circumstances simply do not overcome the very strong presumption against such a departure.

6. The need to avoid unwarranted sentencing disparities

A sentence within the applicable sentencing guidelines range will avoid unwarranted sentencing disparities.

7. The need to provide restitution to victims

This factor has been forthrightly addressed by the defendant in her plea agreement and in her already substantial efforts to pay the accrued back taxes, interest, and penalties.

CONCLUSION

For all of the foregoing reasons, the government respectfully recommends that the Court impose a sentence within the applicable, advisory sentencing guidelines range.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2012, I filed a copy of foregoing pleading and caused copies of same to be served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System. Copies of the foregoing have also been sent directly by FAX to counsel for defendant, David T. Grudberg, Esq., FAX no. (203) 784-3199, and to U.S. Probation Officer Timothy Donahue, FAX no. (203) 773-2200.

/s/
Assistant U.S. Attorney