IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA,) Case No. 5:10CR290
)
Plaintiff,) Judge James S. Gwin
)
vs.)
)
SAMUEL R. CICCOLINI,)
)
Defendant.)

GOVERNMENT RE-SENTENCING MEMORANDUM

Now comes the United States of America, by and through counsel, Steven M. Dettelbach, United States Attorney, and Robert E. Bulford, Assistant United States Attorney, and submits its Sentencing Memorandum.

Sentencing Factors

Since the Supreme Court rulings in United States v. Booker, 543 U.S. 220 (2005) and Gaul v. United States, 128 S. Ct. 586, 595-97 (2007), the federal sentencing guidelines have been deemed advisory in nature, and the district court is required to use

broad discretion in sentencing an individual. The Court must first consider the applicable guideline range within the advisory sentencing guidelines and then consider the Title 18, United States Code, Section 3553(a) factors in devising the appropriate sentence. Using these standards, each case is to be considered on its merits. In this matter, both the plea agreement and the initial Presentence Investigation Report (PSR) of August 31, 2010, provided that the Total Offense Level under the U.S. Sentencing Guidelines, after a three level reduction for acceptance of responsibility, is 15. The sentencing guideline range is a term of imprisonment of 18 to 24 months, followed by a term of supervised release of not more than one year.

However, the most recent PSR provided August 31, 2012, is consistent with the findings made by the Court at the sentencing hearing on October 20, 2010, and further explained in the Court's sentencing memorandum of November 11, 2010 (Doc. 24). Based on the additional information received by the Probation Officer after October 11, 2010, the current PSR, the letter of Timothy Killen of October 6, 2010, and statements of the defendant made on and after October 20, 2010, there is sufficient evidence to support the Court's findings. Pursuant to those findings, the final offense level is 26, and the sentencing range is 63 to 78 months.

Title 18, United States Code, Section 3553(a), in pertinent part, provides:

> (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-
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> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) the need for the sentence imposed--
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> (A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective matter;
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> (3) the kind of sentences available;
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> (4) the kinds of sentence in the sentencing range established for--
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> (A) the applicable category of offense committed by the defendant.
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> * * *
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> (5) Any pertinent policy statement . . . issued by the Sentencing Commission...
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> * * *

> (6) The need to avoid unwarranted sentencing 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.

In this matter, the pertinent factors to be addressed are: (1) The nature and circumstance of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence imposed to afford adequate deterrence for criminal conduct; and (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar offenses. In separate sections of this memorandum, counsel will address the germane factors.

SENTENCING FACTOR (1)
The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

Here, there are two offenses--the structuring charge and the false tax return charge. In regard to the structuring count, in early 2003, the defendant had in his room where he lived in the Rectory at the Parish Church approximately $1,038,680.00. The cash was mostly in twenties, fifties and one hundred dollar bills. He wanted to deposit the currency into his personal bank accounts at First Merit and National City Banks. He knew that

financial transactions in excess of $10,000.00 in cash would be reported by the banks. He did not wish to call attention to himself and he did not want the reports filed. To avoid the reports, he made 139 separate deposits into his personal accounts over a period from late March 2003 through June 2003. Each deposit was under $10,000.00 and the total deposits were $1,038,680.00. The defendant made as many as four deposits a day to each bank, always at separate branches.

On January 12, 2008, when he was first confronted with the structuring conduct by the government, the defendant stated he had accumulated approximately $1 million in currency during his tenure as a priest between May 1969 and March 2003. He stated that the accumulation of cash was from gifts he received from individuals and many parishners. He said he was given gifts for performing baptisms, weddings and funerals. Also, he received a significant amount of gifts because of his position as Founder of the Interval Brotherhood Home ("IBH").

His explanation for suddenly wanting to deposit his cash hoard into the bank in 2003 was that he had heard somewhere that the U.S. Treasury was going to issue new currency in twenty and fifty dollar denominations. He was concerned that his twenties and fifties would be worthless. He panicked and wanted to deposit them.

After January 12, 2008, the government began to further investigate the matter by subpoenaing financial records of IBH and the defendant. It was discovered that the defendant was sole signatory on approximately 20 bank accounts at National City Bank and he also had accounts in his name at First Merit and Key Banks.

The false tax return activity involves five tax years: 2002 through 2006. Over the five year period, the defendant failed to report approximately $900,420.00 of taxable income. The largest year for unreported income was 2003, with the amount of $386,400.00 unreported. IRS investigators determined that the additional tax due for criminal purposes for the five year period was $292,503.00.

The source of the unreported income over the five years was funds misappropriated by Samuel R. Ciccolini from the IBH Foundation accounts. The money was deposited into the defendant's personal accounts and co-mingled with funds legitimately there. The defendant had few personal expenses thus, the money in his accounts accumulated interest. The defendant treated the misappropriated funds as his personal stash, over which he had control of the disposition. His tax preparer was never told about these funds.

The willfulness of his conduct is illustrated by the scheme he devised and executed to take the funds from IBH without

detection. His plan involved recording fictitious expenditures in the IBH books for items such as construction work or installation of equipment. He documented expenses on the books of IBH for construction that actually did occur; however, the contractors had donated the materials, time and labor, and did not charge. The projects had been completed at no cost to the Foundation. The defendant prepared records in the books of IBH which indicated that the Foundation had been billed for the work. He also documented that he paid the bills with IBH checks. He listed in the IBH records amounts of checks written which purported to pay for the expenditures. During the time period 2002 through 2006, approximately 35% of the checks the defendant represented to be issued to contractors were actually made payable to National City Bank. These payments did not go to the contractors as indicated in the books and records of the Foundation. Instead, they were converted by Samuel Ciccolini into cash and official bank checks which were deposited in Ciccolini's accounts. The investigators determined that during the period the defendant deposited in excess of $900,000.00 into his personal accounts.

The defendant even created false contractor invoices for amounts never charged and left them with the records of IBH. When a contractor donated time, labor and materials, the defendant would arbitrarily assign a value to the work performed,

provide false invoices, record checks payable to the contractors, and issue Foundation checks made payable to the bank for the arbitrary amount. However, he recorded the checks in the Foundation records as having been issued directly to contractors. The defendant then directed the bank to convert the check into cash, official bank checks, or a combination thereof. He then deposited those funds into his accounts. After learning he was under investigation, the defendant apparently told the Foundation Board Members and others that he had transferred funds from the Foundation to his personal accounts. The defendant told the Board that he took approximately $1,286,000.00 from their accounts. That amount has been returned to IBH. It was returned after the defendant knew he was under investigation.

The defendant's record with IBH and his position as an ordained Catholic Priest provided him with credibility in the area of fundraising for not-for-profit organizations. He was Executive Director of a highly successful not-for-profit which had a huge impact on rehabilitation of alcoholics and those with drug addictions. He had total control over the administration of the organization and its financial accounts. The community held him in high regard and had a tremendous amount of faith and trust in him. He used all of this good will to take advantage of the situation and embezzled funds from the charity. The scheme was an elaborate subterfuge. There was deception at all levels along

the way. He falsified invoices. He falsified financial records. He issued false checks of the not-for-profit. He went to the bank and asked tellers to take the checks and break them down into smaller checks and cash. He took the cash and checks and kept them. He deposited them into accounts at different banks. These were layered transactions. Through this conduct, he took in excess of $1 million from IBH. He did this while he personally was financially sound. He received a significant salary for his work at IBH and was receiving well over $10,000.00 per month in interest income from investments. The funds he took from IBH were returned after he learned that the IRS and the United States Attorney's Office were asking questions about his conduct.

This was not a crime of opportunity. This was an elaborate scheme designed by the defendant to deceive the IBH Foundation, the government, and those from whom he accepted donations on behalf of IBH. He deceived the Trustees, those who trusted him with donations, and even those who sought and received rehabilitative services at IBH. The defendant had dedicated his life to helping those addicted to alcohol and drugs of abuse. He worked long hours and many years to establish the IBH as truly an effective and nationally known rehabilitation center. He also used it as a vehicle to increase his wealth.

The structuring activity is troubling. He knew of the requirements for reporting of financial transactions in excess of $10,000.00. He designed his deposits to avoid them and to avoid calling attention to himself. The structuring activity occurred from late March 2003 through June 2003. He made 139 separate deposits into accounts at two separate banks at various branches thereof. On some occasions, he made four such deposits on a single day.

This investigation has focused on structuring and tax violations. There was no complete analysis of the records of IBH by government investigators. The Board of Trustees of IBH, during interaction with the government agents, always asserted that IBH was not a victim. However, one should not make light of the criminal activity in this case. When contrasting the criminal activity of the defendant with his history, it is all the more troubling. The defendant is a person who was well respected in the Greater Akron community. He used that respect and reputation to facilitate his criminal activity. The nature and circumstances of the offense are aggravated for that reason. The effect his conduct will have in the future on fundraising efforts of IBH and other not-for-profits in the area is unknown. When donors donate money to a not-for-profit or charitable cause, they do that because of their belief in the cause and their belief in the people operating or running the charitable

organization. This conduct could dampen the enthusiasm of those who would donate in the future.

The consideration of the good works of this defendant in evaluating the 18 U.S.C. § 3553 factors cuts two ways. First, while the defendant's efforts on behalf of the addicted are extraordinary and the establishment of and the growth of the IBH Home are impressive; however, he also used the IBH Foundation and Home as a screen to hide his criminal conduct. He took advantage of the situation and duped members of the Foundation Board, donors, and the general public. It is ironic that he could use his good actions to lull the IBH Board Members into a sense of security that allowed him to do what he wanted with the Foundation's funds. That he took advantage of the situation and used his good reputation and record on behalf of the addicted to shield his questionable activity is abhorrent.

The defendant has identified factors for the Court to consider when determining the question of departure from the Guidelines or a variance (non-Guideline sentence). These include the defendant's "civic charitable and public service," the defendant's age, and his mental and emotional condition. Further, he lists his cooperation and repayment of the tax and minimal probability of recidivism.

First, a defendant's physical condition is not "ordinarily relevant in determining whether departures may be warranted."

United States v. Borho, 485 F.3d 904, 913 (6th Cir. 2007). Both physical and mental conditions are not ordinarily relevant grounds for imposing a lower sentence. These factors are discouraged by the Guidelines. Id. In Borho, the Sixth Circuit wrote:

> Although the district court has a "freer hand" to account for even discouraged factors under the Guidelines post-Booker (citation omitted), it must offer a compelling justification if those factors form the basis of a substantial variance from the recommended Guidelines range.

The defendant's physical condition and age are discouraged factors.

SENTENCING FACTOR (2)
The Need for the Sentence Imposed to Reflect the Seriousness of the Offense, to Promote Respect for the Law and to Provide Just Punishment for the Offense

This defendant avoided the required currency transaction reports for financial transactions to deposit in excess of $1 million. He also filed false tax returns. In order to promote respect for the law, there must be an adequate and fair punishment for the offense. There is a need for a sentence of incarceration here to accomplish that. For the tax year for which he pleaded guilty, the defendant neglected to report $407,062.00 in income. The unreported tax on that amount was $129,432.00. The total unpaid tax for the five year period was $292,136.00. These are significant numbers. The deceptive conduct involved here, the amount of income not declared, along

with the amount of tax not paid, necessitate some imprisonment to promote respect for the law and to provide just punishment for the offense. A sentence of little or no incarceration will only promote disrespect and contempt for the law, as it will leave the impression that, because the defendant was able to pay the tax owed, he avoided a prison sentence.

SENTENCING FACTOR (3)
To Effect Adequate Deterrence of Criminal Conduct

In this regard, it is clear that 18 U.S.C. § 3553(a)(5) requires a district court to consider any pertinent policy statements issued by the Sentencing Commission pursuant to § 994(a)(2) of Title 28, United States Code . . . The policy statement pertinent to tax offenses states:

> The criminal tax laws are designed to protect the public interest and preserve the integrity of the nation’s tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to estimated incidents of such violations, deterring others from violating tax laws is a primary consideration underlying these Guidelines. Recognition that the sentence of a criminal tax case will be commensurate with the gravity of offense should act as a deterrent to would-be violators.

U.S.S.G. §2T1.1, intro. cmt. Further, the Guideline Commentary provides that:

> Under pre-Guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This Guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase

> average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue.

U.S.S.G. § 2T1.1 Background Note.

The policy statement and note makes clear that the Commission found there must be a real risk of actual incarceration for there to be a significant deterrence effect in tax cases. See United States v. Engle, 592 F.3d 495 (4th Cir. 2010). In a fraud case involving a 70-year-old at the time of sentencing, a district court, although the Guideline sentencing range was 30 to 37 months, sentenced the defendant to one day in prison. See United States v. Davis, 537 F.3d 611 (6th Cir. 2008). In considering the appeal, the Sixth Circuit wrote:

> While the district court indicated that this sentence would serve the goals of societal deterrence, see id. 3553(a)(2)(B), it is hard to see how a one day sentence for a lucrative business crime satisfies that goal, see Martin, 455 F.3d at 1240 ("Because economic and fraud-based crimes are more rational, cool and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence.") (Internal quotation marks and alteration omitted.) ...

United States v. Davis, 537 F.3d 611, 617-18 (6th Cir. 2008). The sentence was vacated and the case remanded for re-sentencing.

It has also been suggested that the defendant has suffered social embarrassment and loss of job. These are collateral

consequences and are not a part of a sentence. See United States v. Bistline, 665 F.3d 758, 766-67 (6th Cir. 2012).

Here, the defendant has pleaded guilty to false tax returns and structuring offenses. These are economic crimes that require planning with much thought and calculation. If a sentence of little or no incarceration is imposed, it is hard to see any deterrent effect from that. A person contemplating some economic crime in the future could look at that result and conclude he could commit a crime and retain sufficient funds to repay in the unlikely event of detection. Then, if caught, that person could make restitution and expect no prison time. It is hard to imagine how this would deter such crimes. It is anticipation of incarceration in the event of detection that greatly deters criminal conduct. The defendant's conduct here was aggravated and involved an elaborate scheme. There must be consequences sufficient to deter others.

SENTENCING FACTOR (4)
The Need to Avoid Unwarranted Sentencing Disparity Among Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct

The PSR of October 14, 2010, included an attached Appendix chart showing the average sentences nationally for offenses involving tax violations. The mean sentence nationally was 22.4 months of the 390 defendants surveyed. The same Appendix also showed information relating to the Northern District of Ohio,

which involved statistics for eight defendants during the same period as the national chart. The average sentence in the Northern District of Ohio was 39.6 months. The PSR provided to counsel on August 31, 2012, includes only nation-wide information; however, this chart also broke the sentencing categories up by criminal history. That chart shows the mean sentence for similar tax offenses for individuals with a Criminal History Category I is 20 months, with the median sentence beieng 14 months. This chart includes a survey of sentences of 333 individuals in Criminal History Category I. The need to avoid disparate sentences is important here. The Sentencing Guideline calculations are helpful in avoiding this problem. The Guidelines were intended to supplant the unfortunate practice of disparity in sentencing based on socio-economic status. See United States v. DelMonte, 25 F.3d 343 (6th Cir. 1994); United States v. Engle, 592 F.3d 495, 505 (4th Cir. 2010). Recently the Sixth Circuit wrote:

> The point of the Guidelines is to decrease sentencing disparity an objective furthered by a within-Guideline sentence, as opposed to a sentence that varies above or below the advisory range. The very thing Swafford presumably wants--a below-Guideline sentence--is more likely to create disparities than eliminate them. There is nothing wrong to be sure with a below-Guideline sentence. It is just that a request for one should not turn on § 3533(a)(6) (citation omitted).

United States v. Swafford, 639 F.3d 265, 270 (6th Cir. 2011).

Further, in United States v. Davis, 537 F.3d 611, 617 (6th Cir. 2008), the Court wrote:

> ... one of the central reasons for creating the Sentencing Guidelines was to ensure stiffer penalties for white collar crimes and to eliminate disparities between white collar sentences and sentences for other crimes. See United States v. Brewer, 899 F.2d 503, 508 (6th Cir. 1990) (citing Steven Bryer, "The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest," 1700 Hostra L. Rev. 1, 2222 (2006), and U.S.S.G. Chapter 1, Part A, Introductory CMT.) (noting that the Guidelines were an attempt by the Sentencing Commission to address discrepancies and inequities between sentences for white collar crimes and other crimes).

United States v. Davis, 537 F.3d 611, 617 (6th Cir. 2008).

The opinions of the Sixth Circuit, other circuits, and the policy statements in the U.S. Sentencing Guidelines relating to avoiding disparate sentences and deterrence, conflict with the writings and theories of the economist Gary Becker, whose theory seems to address the corporate crime area. His determination in relation to economic crimes may have bearing in the corporate setting when corporate officials and employees make decisions, for economic reasons, that violate regulatory or criminal statutes. If caught, Becker's theory is that very harsh economic penalties on the company will affect the corporate bottom line and then directors and stockholders would move to punish the decision makers. Such punishment may include loss of job and other economic sanctions. This idea has no application to the individual defendant in the tax fraud or white collar fraud

context. Becker has no experience in criminal justice and his theories are not backed by any experience. The Sixth Circuit, the Sentencing Commission and those involved in the criminal justice system know there is no better deterrent than certain loss of freedom. The need to promote respect for the law, provide societal deterrence, and avoid disparate sentences is paramount here. A sentence that includes little or no incarceration will leave the impression that one who has the means to pay will avoid prison while those who cannot pay will be incarcerated. This can only promote disrespect for the law, encourage and not deter criminal conduct, and will not avoid disparate sentencing.

Conclusion

At the initial sentencing hearing through its sentencing memorandum, the government recommended an 18 month sentence, which was at the low-end of the Guideline range contemplated by the plea agreement. At that time, the government, through the sentencing memorandum, also recommended a Guideline fine. It is interesting that the 18 month recommendation is two months less than the mean sentence on the chart included in the fourth revision of the PSR dated August 31, 2012. A sentence in the Guideline range contemplated by the initial plea agreement, while a variance would be sufficient but not greater than necessary to comply with all of the provisions of 18 U.S.C. § 3553(a) and

would avoid disparity in sentencing. A substantial fine is also appropriate in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2012, a copy of the foregoing was filed electronically. Parties may access this filing through the Court's system.

s/ *Robert E. Bulford*

Robert E. Bulford
Assistant U.S. Attorney