

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

Criminal No. 08-302 RHK-FLN

v.

**DEFENDANT'S POSITION WITH
REGARD TO SENTENCING**

Michael Catain,

Defendant.

Defendant, Michael Catain, appearing through his attorney of record, hereby respectfully presents his position regarding sentencing.

I.

INTRODUCTION

Mr. Catain stands before the Court profoundly remorseful, both for his conduct and for the impact of his actions upon others. Mr. Catain respectfully requests the Court grant his motion for a Downward Departure and/or Variance because of his limited conduct in this case and the likelihood that he will not re-offend.

In the instant case, it is conceded by all parties that Mr. Catain had no actual knowledge that the defrauded investors' funds were not being used to purchase electronic goods. Mr. Catain's involvement in this case began on January 1, 2002, the date of the first money wire into Enchanted Family Buying Company's account. Initially, Mr. Petters came to Mr. Catain to make amends for a previous legitimate business deal gone bad whereby Mr. Petters had ruined Mr. Catain's line of credit with the General Electric Capital Company (Mr. Catain owned and operated Universal Capital Group from 1996-

2002). Mr. Catain was told by Mr. Petters that he was purchasing bulk inventory from China and other manufacturers through his personal contact. Mr. Catain understood that Mr. Petters, through his contacts, would store the inventory and then resell them at a mark-up for profit. It has been shown that the main co-conspirators, including Ms. Coleman, knew that the inventory did not exist. However Mr. Catain thought, in earnest, that he needed to pretend to be the source of incoming money so that the investors would not cut Mr. Petters out of the middle. At no time did Mr. Catain know that there was in fact no inventory. The Government, despite being able to prove that all of the main co-conspirators knew the inventory did not exist, determined that there was no evidence that Mr. Catain knew the inventory did not exist. Mr. Catain did not know that investors were being defrauded as such. He only knew that he was pretending to be a source to allow the Petters business operations to run smoothly.

II.

ARGUMENT

A. The Section 3553(a) Factors Support a Substantial Variance from the Guidelines.

Under 18 U.S.C. § 3553(a), an appropriate sentence is one that is sufficient, but not greater than necessary, and is one that is consistent with the factors under § 3553(a):

“(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 the offense under the Guidelines;

(5) any pertinent policy statement;

(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.”

In the instant case, this Court should choose a sentence that varies from that contained in the applicable Guideline because such a sentence effects the sentencing goals of 18 U.S.C. § 3553 and, considering all of the facts and circumstances in this matter, is just.

The fundamental question this Court must grapple with is how much time imposed would adequately effect the varied, and sometimes contradictory, purposes of sentencing. Mr. Catain respectfully asks the Court for a sentence that reflects his conduct and not that of the other co-defendants. “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes

magnify, the crime and punishment to ensue.” Koon v. U.S., 518 U.S. 81, 113 (1996).

Mr. Catain is entitled to an explanation for a given sentence that explains the why and how of its appropriateness in light of the sentencing standards established in Kimbrough v. U.S., 128 S. Ct. 558 (2007) and Gall v. U.S., 128 S. Ct. 586 (2007).

1. The Nature and Circumstances of the Offense.

Mr. Catain crossed the line by agreeing to receive investors’ funds through his business account knowing the investors believed Mr. Catain was the vendor of the electronic goods. His role was limited to this. Unlike Tom Petters, Deanna Coleman, Robert White and Larry Reynolds, Mr. Catain had no knowledge of the larger fraud. He did not know the funds were being diverted and not used to purchase electronic goods. As the Supreme Court notes, “the defendant’s motive for committing the offense is one important factor” in determining the appropriate sentence, Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993). While Mr. Catain acted for personal gain, he did not do so with the knowledge that others would be harmed. Applied here, the rule supports a lower sentence, not a higher one.

2. The History and Characteristics of the Defendant.

At the Sentencing hearing, Mr. Catain’s wife of 35 years, his children and friends will stand with him. The message from all will be the same: they have known this man for decades; he has a good heart and has always tried to help others and do the right thing. It is clear that whatever the ultimate sentence, here is a man whose 54 years have not been spent cheating or swindling people.

We ask that this Court sentence the person, Michael Catain, rather than the crime. Traditionally, “[t]he focus of white collar sentencing is on the offense, with little recognition given to the clear slate of these offenders.” *The Challenge of White Collar Sentencing*, E.Podgor, 97 *Journal of Law and Criminology* 731, 733 (2007). Mr. Catain has no prior criminal record, worked hard his entire life to provide for his family and is known to be a caring and generous man.

Additionally, we ask this Court to take into account Mr. Catain’s personal motivation for committing the offense. Although motive is never required to be proven at trial and is ignored by the Sentencing Guidelines, it is a crucial consideration at sentencing. It is well established in our jurisprudence that a more culpable mind deserves to be punished more severely than one with more innocent intentions. Although Mr. Catain may have misled people in receiving the investors’ funds, he truly believed the investments were for actual inventory owned by Tom Petters, and everyone would make money in the end. While it is obvious Mr. Catain’s conduct stems from his desire for greater income, it is also the result of good intentions mixed with a lack of knowledge of the true nature and scope of this fraud. Under §3553(a) Mr. Catain’s motives for committing the offense should be taken into account at sentence.

3. A Sentence to Reflect the Seriousness of the Offense, Promote Respect for the Law, Provide Just Punishment and Avoid Unwarranted Sentence Disparities.

Section 3553(a)(6) requires a sentencing court to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Sentencing disparity was said to be one of the most

important evils the Sentencing Guidelines were intended to cure. United States vs. Ray, 920 F.2d 562 (9th Cir. 1990), *amended*, 930 F.2d 1368, 1372-73 (9th Cir. 1991). In this case, the district court's adherence to the Sentencing Guidelines would result in an unwarranted sentencing disparity between Mr. Catain and a similarly situated co-defendant, Ms. Coleman.

Deana Coleman will receive a sentence of no more than five years imprisonment. Michael Catain faces up to twenty years in prison. This is despite the fact that Mr. Catain's behavior, although admonishable, is less culpable than that of Ms. Coleman, Robert White and Larry Reynolds. To impose a harsher sentence upon Mr. Catain than that imposed upon Ms. Coleman would result in an unwarranted sentencing disparity and a sentence for Mr. Catain that is disproportionate to his crime.

The law in the Eighth Circuit Court of Appeals permits, but does not require, the court to evaluate intra-conspiracy disparities. United States vs. Kane, 470 F.3d at 1281 (8th Cir. 2006) (holding district court did not abuse its discretion in considering intra-conspiracy disparity). Pursuant to 18 U.S.C. §3553(a)(6), "the need to avoid unwarranted sentence disparities among defendants with similar records and who have been found guilty of similar conduct" is a factor that the court should consider in imposing a sentence. However, "[p]erfect parity among the sentences imposed on the various members of a criminal conspiracy is no doubt impossible to achieve, given the complexity of the task." United States vs. Lazenby, 439 F.3d 928, 934 (8th Cir. 2006) (comparing sentencing disparities between co-conspirators). In Lazenby, the court expressed concern about disparate sentences among co-conspirators based upon a district

court's decision to give one defendant an 83% downward variance, while declining to give such a variance to the other. *Id* at 932. The court was particularly sensitive to the fact that the defendant who received the downward variance was the more culpable of the two. *Id* at 933. In this case, Mr. Catain is the least culpable of the above stated defendants.

Lazenby is directly applicable to the present case as the district court could very well impose sentences ranging from probation to 20 years imprisonment. Mr. Catain is the only main defendant who did not know that the inventory investors believed they were investing in did not exist. Although Ms. Coleman was the "whistleblower" of the scheme, it could be said that she was in a position Mr. Catain was not given her level of involvement and knowledge of the unraveling scheme. When Mr. Catain inquired as to where the inventory was being stored, Ms. Coleman and others led Mr. Catain to believe that it was being stored in a warehouse. Ms. Coleman, Robert White and Larry Reynolds knew this to be false. They knew people were investing money in inventory that did not exist and ultimately the investors would suffer losses.

Ms. Coleman created false purchase orders and invoices related to the purchase of merchandise from Nationwide International Resource Inc. (NIR) and Enchanted Family Buying Company (EFBC). This behavior, despite Ms. Coleman's cooperation with the authorities, is far more culpable than Mr. Catain's. Mr. Catain never saw these documents nor did he ever sign these documents. His signatures were forged. All Mr. Catain knew was that at the request of Mr. Petters, he was acting as the owner of electronic goods to prevent Petters' investors from cutting Mr. Petters out of the process.

Robert White created false purchase orders related to the fictitious sale of merchandise to BJ's, Wholesale Club, Sam's Club, Costco and Boscov. Once again, Mr. Catain had no knowledge of these forged documents.

Phone conversations were monitored by the United States Government involving Mr. Petters, Ms. Coleman, Mr. White and Mr. Reynolds. In these recordings Mr. Petters repeatedly admits executing the fraud scheme by providing fraudulent information to investors and acknowledging there were no electronic goods. Mr. Petters also attributes knowledge of, and participation in, the entire fraud to Ms. Coleman, Mr. White and Mr. Reynolds. Mr. Catain is never mentioned as a person with knowledge of the underlying fraud.

Additional phone conversations were arranged by the United States Government between Ms. Coleman and Mr. Reynolds. In that conversation Mr. Reynolds admits that Mr. Petters told him about the fake purchase orders and that he was aware of the entire fraud. At Mr. Petters' request Mr. Reynolds would meet with and speak to PCI investors falsely representing that his company (NIR) was selling PCI large amounts of merchandise as depicted in the fictitious purchase orders. Mr. Reynolds also arranged for representatives of insurance companies to tour warehouses of electronic goods owned by other companies, while representing that the goods were those sold to PCI.

The government investigation revealed that while Mr. Peters stayed in close contact with Ms. Coleman, Mr. White and Mr. Reynolds he had minimal contact with Mr. Catain. In fact, when Ms. Coleman called Mr. Catain at the direction of the United States Government it was clear Mr. Catain had no idea that electronic goods were not

being purchased and sold. Mr. Catain simply repeated that Tom Petters had asked him to set up the account because “the lenders, umm, were trying to go behind his back, you know, so were trying to protect Tom’s sources” (Transcript of telephone conversation between Michael Catain and Deanna Coleman Pg 6).

Giving Mr. Catain a sentence greater than Ms. Coleman’s creates an unwarranted disparity when comparing his culpability to the culpability of Ms. Coleman and the other main co-defendants in the conspiracy. The evidence reveals that Mr. Catain was not an insider. He was a former business associate who had already suffered financially due to his relationship with Mr. Petters. Because of a need by Mr. Petters, and perhaps to make amends, he gave Mr. Catain a small role in the large enterprise, but that role pales in comparison to the true Petters insiders like Ms. Coleman, who had full knowledge of the nature and magnitude of the fraud. Therefore, Mr. Catain respectfully requests that his sentence be no greater than that imposed on Ms. Coleman. Anything more would be unreasonable due to being disproportionate to his culpability.

III.

A Sentence of No More than Sixty Months is a Reasonable and Appropriate Sentence.

The sentencing court’s discretion and obligation to consider the personal traits and characteristics has been clear since Booker. Section 3553(a), “as modified by Booker, contains an overarching provision instructing courts to ‘impose a sentence sufficient, but not greater than necessary,’ to achieve the goals of sentencing.” Kimbrough, *supra*, 128 S.Ct. at 570. The Sentencing Guidelines are but one of several factors to consider when

imposing a sentence, and should not be given more or less weight than any other. Carty, *supra*, 520 F.3d 99. Nor is there a requirement of “extraordinary” circumstances to justify a sentence outside the Guidelines range. Gall, *supra*, 128 S.Ct. at 595. If properly applied, the “principle of parsimony” of §3553(a) can avoid “the utter travesty of justice that sometimes results from the guidelines’ fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense.” United States vs. Adelson, 441 F.Supp.2d 506, 512 (SDNY2006).

At sentencing, the district court need not “articulate in a vacuum how each §3553(a) factor influences its determination.” Carty, *supra* 520 F.3d at 992. “However, when a party raises a specific, nonfrivolous argument tethered to a relevant §3553(a) factor in support of a requested sentence then the judge should normally explain why he accepts or rejects the party’s position.” Carty, *supra* 520 F.3d at 992-993 (citing Rita vs. United States, 551 U.S. 338, 127 S.Ct. 2456, 2468 (2007)).

Sentencing the person rather than the crime is even more important in a white collar case due to the excessive focus on the loss and the fact that a short sentence will usually suffice. A properly calculated Guideline sentence is often so harsh that it is unconscionably disproportionate to the seriousness of an individual’s participation. That is clearly the case for Mr. Catain.

The plea agreement between the United States Government and Mr. Catain stipulated the value of the laundered funds is approximately twelve billion dollars, which far exceeds 400 million dollars, the highest category pursuant to §2B1.1(b)(1). However, the net gain to Mr. Catain as calculated by the Government was approximately 14-16

million dollars. Unlike any other main defendant, Mr. Catain did not have knowledge of the underlying fraud being perpetrated. His conduct is relatively passive and narrow in scope. It cannot be disputed that Mr. Catain was unaware that the funds being wired to PCI from EFBC were not being used to purchase electronic goods. Nor can it be disputed that Mr. Catain had represented to only one investor on one occasion at a social gathering that he was the vendor of electronic goods.

Mr. Catain's distance from the central features of the Government investigation is further underscored by the fact that there is no evidence that he sought out investors, assisted investors or participated in preparing fraudulent invoices or documents. In other words, he believed the funds were being used to purchase electronic goods.

Mr. Catain's offense level computation is largely driven by the value of the total amount of laundered funds (12 billion dollars) routed through the EFBC account and re-directed to the account of PCI. This results in a total offense level of 37 with a guideline range of 210-262 months. Mr. Catain respectfully submits that this an unreasonable result based on his role and requests the Court to consider a downward departure/variance that would be reflective of not only his role but also his net gain (14-16 million dollars).

In the event the Court determines a sentence based on Mr. Catain's net gain is an appropriate starting point, the defendants proposed guideline range would be as follows:

Base Offense level	30
Acceptance of Responsibility	-3
Criminal History Category I:	70-87 months

The idea of focusing on the amount of loss for determining an individual's sentence can result in a substantial overstatement of that person's role in the offense. "[A] system that employs a mathematical calculation to determine an individual's sentence omits proper recognition of the offender, the offense, and the need to protect society from future dangerousness." *The Challenge of White Collar Sentencing*, 97 *Journal of Law and Criminology* 731, 753 (2007). Mr. Catain respectfully asks the Court to prevent this from happening to him.

IV.

CONCLUSION

For each of the reasons set forth above, Mr. Catain respectfully seeks a downward departure/variance from the Guideline range pursuant to 18 USC§3553(a) of no more than 60 months.

Respectfully submitted,

COLICH & ASSOCIATES

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