

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

v.

Robert Dean White,

Defendant.

CRIMINAL 08-299 RHK

**WHITE'S POSITION
ON SENTENCING**

SUMMARY OF ARGUMENT

The Government's successful prosecution of Thomas Petters was directly attributable to the initiative and efforts of defendant Robert White. It was White who suggested to Deanna Coleman that the two should reveal the PCI scheme to authorities. The PSR obscures this reality by stating that the Government's investigation began when "Deanna Coleman walked into the U.S. Attorney's Office with her attorney, Allan Caplan." White's cooperation allowed the Government and the Court to prevent Petters from fleeing. His testimony at Petters' trial was critical to establishing Petters' far flung plan, knowledge, and criminal intent. Through his work with the Court-appointed Receiver (and others), White secured for the Government millions of dollars to help ameliorate the impact of the PCI scheme. Although the Government's "star witness" was nominally Deanna Coleman, its principal debt is plainly to Robert White.

Coleman's role the scheme itself was more central and sustained than White's. Whereas Coleman helped create the PCI scheme beginning in approximately the mid-1990's, Petters recruited White in 1999 only to perpetuate it. *See* PSR ¶¶ 19, 21. Although White initially believed the creditors he was deceiving might ultimately be repaid by legitimizing PCI, he eventually realized that the financing scheme was unredeemable. *See id.* ¶ 81. The PSR

accurately indicates that, once White became involved in the scheme, his role was comparable to Coleman's. *Id.* ¶¶ 66-67. Comparison of White and Coleman is therefore proper. Indeed, there is no reason to believe that, had the two approached authorities together—as White had suggested—the Government would not have offered them precisely the same plea terms.

Through charge-bargaining, the Government has limited Coleman's maximum sentence to five years in prison. In contrast, having charged White with more serious offenses carrying maximum sentences of 10 and 20 years respectively, the Government has agreed only to make two motions on White's behalf: one for acceptance of responsibility, the other for substantial assistance. The latter motion confers upon the Court exceptionally broad discretion.

The Court should exercise that discretion to award White a downward departure sufficient to bring his sentence in line with Coleman's. In addition, or in the alternative, the Court should recognize the distorting effect of the Government's charge-bargaining pursuant to section 3553(a)'s command to avoid unwarranted sentencing disparities between similar defendants committing similar conduct. Pursuant to this command, the Court should grant White a variance to eliminate unwarranted disparity. Either way, using the lawful authority furnished by both the Guidelines and section 3553(a), the Court should recognize White as the true author of the Government's successful prosecution of Petters, and should ensure that White receives a sentence comparable to Coleman's.

STATEMENT OF FACTS

Deanna Coleman assisted Thomas Petters in creating the PCI scheme beginning in approximately the mid-1990's. *See* PSR ¶ 19. Petters recruited Robert White in 1999 to help perpetuate the scheme. *See id.* ¶ 21. Thereafter, White and Coleman played roughly comparable roles in the offense. *See id.* ¶¶ 66-67.

Although White believed at the start that the investors he was deceiving might ultimately be repaid by legitimizing PCI, he eventually realized that the financing scheme was unredeemable. *See* PSR ¶ 81. Consequently, White repeatedly suggested to Coleman that—together—they should contact authorities. Coleman repeatedly opposed the notion, arguing that Petters still had a plan to make things right. Coleman, eventually acceded to the idea, however, and the two agreed they should secure assistance from a lawyer in Cleveland (so Petters would not learn of their intention). But on the eve of a planned trip to Cleveland, Coleman claimed to have changed her mind. She then betrayed White by contacting Allan Caplan on her own behalf, and contacting authorities alone. *See* PSR ¶ 12.

Although Coleman told the Government during their first meeting that White was willing to cooperate as well, the Government elected to rely exclusively on Coleman to build its case against Petters. Coleman's deception, and the Government's justifiable caution in limiting the number of cooperating witnesses, therefore deprived White of the opportunity to cooperate in the initial investigation.

Not surprisingly, White contacted Coleman while she was cooperating with the Government and pressed her further about contacting authorities. Coleman reported these inquiries to the Government. Still fearing that too many cooperating witnesses might compromise its investigation, the Government instructed Coleman to continue to hold White off.

In this way, the Government actively prevented White from becoming a cooperating witness.

Whereas the Government initially demurred when Coleman said that White, too, was willing to cooperate, the Government now instructed Coleman to take affirmative measures to ensure that White would refrain from contacting them.

Authorities executed the search warrants on September 24, 2008. *See* PSR ¶ 15. At that time White had in his desk a nine-month old check for approximately \$1 million, which he had never cashed. White's possession of this check powerfully confirms that he had long since mentally withdrawn from the scheme, had become unwilling to personally profit from it, and was merely awaiting the procurement of counsel to contact authorities. Indeed, White began cooperating with the Government immediately after execution of the warrants. That cooperation has been substantial and has taken many forms.

First, soon after the warrants were executed, Petters contacted White, suggested that White should flee, and indicated that he, Petters, intended to flee as well. White reported this conversation to the Government and agreed to wear a wire. During a subsequent recorded conversation, Petters again discussed his intention to flee. Presentation of this evidence to the Court allowed the Government to demonstrate that Petters was a flight risk, and to have him kept in custody pending trial. Whereas Coleman's cooperation assisted the Government in building its case against Petters, White's cooperation helped ensure that the Government would have the opportunity to place that case before a jury.

Second, White has cooperated with authorities in collecting assets with which to compensate victims of the scheme. White recognized that certain stock owned by Petters and him had significant value. White eventually arranged for sale of the stock, and thereby netted approximately \$3 million, which he then turned over to the Court-appointed Receiver. *See* PSR

¶¶ 130-33, 136. White has also cooperated with the Receiver in clawback litigation. Finally, White has cooperated with Winthrop & Weinstein in that firm's efforts to retrieve other proceeds from the scheme.

White's significant efforts to ameliorate the financial damage caused by the PCI scheme is particularly notable considering that Coleman and several other defendants involved in the scheme have attempted to abscond with proceeds rather than to amass funds on behalf of the Government.

Third, Robert White testified at Petters' jury trial. His testimony has been described as among the most valuable given.

GOVERNING PRINCIPLES

The overall purpose of the Guidelines is to ensure consistency and proportionality in sentencing. *See, e.g.*, 18 U.S.C. § 3553(a)(6) (instructing that sentencing court should "avoid unwarranted sentence disparities"); *United States v. Booker*, 543 U.S. 220, 253, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."); *United States v. Jackson*, 959 F.2d 81, 83 (8th Cir. 1992) ("The intent of the Sentencing Guidelines ... is clear: to avoid unwarranted sentencing disparities among similarly situated defendants.").

"Under the current advisory guidelines regime, the district court 'should begin all sentencing proceedings by correctly calculating the applicable Guidelines range,' because that determination provides an 'initial benchmark' that helps 'secure nationwide consistency.'" *United States v. Vickers*, 528 F.3d 1116, 1120 (8th Cir. 2008) (quoting *Gall v. United States*, 552 U.S. 38, 49, 128 S. Ct. 586, 169 L.Ed.2d 445 (2007)). The court "should then consider all of the

§ 3553(a) factors to determine whether they support the sentence requested by a party.” *Gall*, 552 U.S. at 49-50, 128 S. Ct. 586. In so doing, the court “may not presume that the Guidelines range is reasonable.” *Id.* at 50, 128 S. Ct. 568. Instead, the court “must make an individualized assessment based on the facts presented.” *Id.* If the court

decides that an outside-Guidelines sentence is warranted, [it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance... After settling on the appropriate sentence, [the court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Gall, 552 U.S. at 50, 128 S. Ct. 568 (citations omitted).

A sentence outside the Guidelines range need not be justified by extraordinary circumstances. *United States v. Anderson*, 533 F.3d 623, 634 (8th Cir. 2008). Nevertheless, “a major departure should be supported by a more significant justification than a minor one.” *Gall*, 552 U.S. at 50, 128 S. Ct. 586. “A [district] court abuses its discretion and imposes an unreasonable sentence when it ‘fails to consider a relevant factor that should have received significant weight; ... gives significant weight to an improper or irrelevant factor; or ... considers only the appropriate factors but in weighing those factors commits a clear error of judgment.’” *United States v. Mousseau*, 517 F.3d 1044, 1048-49 (8th Cir. 2008) (quoting *United States v. Rouillard*, 474 F.3d 551, 556 (8th Cir. 2007)).

The Sentencing Act, which has become particularly important under the advisory guidelines regime, provides in relevant part:

§ 3553. Imposition of a sentence

(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 994 (p) of title 28);
- (5) any pertinent policy statement—
 - (A) 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

- (B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.[1]
- (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.

18 U.S.C. § 3553(a)(1)-(7).

White submits that this Court should first determine the appropriate Guidelines range in light of the plea agreement. It should then grant White a downward departure to 5 years based on two factors not identified or adequately considered by the Sentencing Commission in creating the Guidelines: (1) the Government's affirmative efforts to prevent White from revealing the scheme and cooperating in its investigation; and (2) White's extraordinary efforts to mitigate the financial harm caused by the scheme. *See* USSG § 5K2.0(a)(2) (authorizing departures based on factors not identified or adequately considered by Sentencing Commission). Next, the Court should exercise its substantial discretion under section 5K1.1 to grant White a downward departure to equalize his sentence with that which will be received by Coleman. Should the Court conclude that an equalizing sentence cannot be achieved in this manner, the Court should apply the command of § 3553(a)(6) to impose such a sentence to avoid an unwarranted sentencing disparity between White and Coleman, similar defendants who committed similar conduct, and as to whom no disparity *favoring Coleman* could be "warranted."

ARGUMENT

I. THE COURT SHOULD GRANT WHITE DOWNWARD DEPARTURES UNDER SEVERAL GUIDELINES PROVISIONS TO ENSURE HE RECEIVES A SENTENCE NO LONGER THAN COLEMAN'S.

White and the Government entered a plea agreement contemplating an opening Guidelines sentencing range of 210 to 262 months (which assumes the Court will grant the Government's motion for a 3-point acceptance-of-responsibility departure). Beginning from the low end of that range, the Court should then grant additional departures moved by the parties, ultimately imposing upon White a sentence comparable to Coleman's.

A. The Initial Guidelines Sentencing Range Should Be 210 To 262 Months.

White's plea agreement with the Government contemplates a total offense level of 37, yielding a Guidelines imprisonment range of 210 to 262 months. *See* PSR at F.2. In deriving this range, the parties assumed the Court will—pursuant to the Government's motion—grant White a full 3-point reduction for acceptance of responsibility. In addition, this initial range is without regard to any additional reduction under section 5K1.1 for substantial assistance.

The PSR, in contrast, computes a total offense level of 41, yielding a range of 324 to 360 months. *See* PSR ¶¶ 100-02, 141. The PSR explains as follows:

The sentencing guideline range contained within the presentence investigation report does differ from that which was contemplated by the plea agreement. Specifically, the plea agreement noted the offense involved 10 or fewer victims [indicating that a 2-level increase was warranted]. However, based upon information that came to light after the defendant's guilty plea, the offense actually involved more than 250 victims; therefore, a 6-level increase was warranted. Therefore, the sentencing range is much higher than the one contemplated by the parties.

PSR ¶ 144. The PSR, too, assumes the Court will grant a full 3-point reduction for acceptance of responsibility, and is without regard to any additional reduction under section 5K1.1. *See generally* PSR ¶¶ 79-102, 141, 155-57.

The Court should enforce the parties' plea agreement, and accordingly should begin its sentencing computation from 210 months. *See, e.g., United States v. Lovelace*, 565 F.3d 1080, 1087 (8th Cir. 2009) (holding that "[w]hen the offense level is part of the inducement or consideration for pleading guilty, the government breaches a plea agreement by advocating a higher offense level than that specified in the agreement."); *United States v. Olesen*, 920 F.2d 538, 540 (8th Cir. 1990) (holding that "[o]nce a court has accepted an agreement, however, there is no provision in the rules that allows it to reject or modify the agreement."). This is particularly so because White's cooperation helped the Government identify many of the additional victims referenced by the PSR. White's cooperation cannot be used to his detriment.

B. The Court Should Grant The Government's Motion For A Full 3-Point Acceptance-Of-Responsibility Departure.

The Government has agreed to move for a full acceptance-of-responsibility departure.

See PSR ¶ 82. Section 3E1.1 authorizes such departures, and provides:

§ 3E1.1. Acceptance of Responsibility

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

USSG § 3E1.1. An adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See id.*, comment (n.6). White has greatly assisted authorities and was the first person involved in the scheme to plead guilty. Because he plainly

qualifies under subsection (b), the Court should grant the Government's motion for a full 3-point reduction.

C. The Court Should Grant White Departures Under Section 5K2.0(a)(2) Because (i) Official Acts Affirmatively Deterring His Cooperation And (ii) His Extraordinary Efforts To Mitigate Financial Harm, Create Mitigating Circumstances Not Identified Or Adequately Considered By The Sentencing Commission.

Section 5K2.0 of the Guidelines provides for departure upon circumstances not identified or adequately considered by the Sentencing Commission, and provides in relevant part:

§5K2.0. Grounds for Departure (Policy Statement)

- (a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—

* * *

- (2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—

- (A) IDENTIFIED CIRCUMSTANCES.—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (e.g., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.
- (B) UNIDENTIFIED CIRCUMSTANCES.—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

USSG § 5K2.0(a)(2)(A)-(B).

This section recognizes that departures “perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing.” USSG § 5K2.0, comment. In addition, the Eighth Circuit has recognized that “the Sentencing Commission and sentencing courts play complementary roles in fine-tuning an individual sentence.” *United States v. Smart*, 518 F.3d 800, 808 (8th Cir. 2008) (citing *Kimbrough v. United States*, 552 U.S. 82, 128 S. Ct. 558, 169 L.Ed.2d 481 (2007)).

1. White is entitled to a reduction because official conduct prevented him from cooperating in the Government’s investigation.

Under section 5K2.0(a)(2), a sentencing court may take in to account official action that prevents a defendant from cooperating with the Government as fully as he might otherwise have done. *See United States v. Goossens*, 84 F.3d 697 (4th Cir. 1996). Goossens entered a plea agreement contemplating that he “would cooperate fully with an investigation of additional criminal activity by other individuals. In exchange, if Goossens’ assistance to law enforcement efforts proved substantial in the Government’s view, it would seek a downward departure from the applicable guideline range pursuant to U.S.S.G. § 5K1.1.” *Id.* at 699. After accepting Goossens’ plea, however, the district court “ordered Goossens to cease his active cooperation in investigative operations.” *Id.* Consequently, Goossens “was unable to assist the Government personally or to participate in an operation planned by the United States Customs Service.” *Id.*

Because the district court’s order prevented Goossens from cooperating, the PSR identified no mitigating circumstances. *Goossens*, 84 F.3d at 699. Goossens nevertheless sought a downward departure on the ground that “the order imposed by the district court prohibiting him from further participation in the undercover investigation prevented him from qualifying for a

departure based on substantial assistance.” *Id.* The district court construed this departure request as one under § 5K1, and denied it because the Government had made no such motion. *Id.* When the district court *sua sponte* granted a downward departure on the basis of diminished mental capacity, the Government appealed. *Id.* at 699-700.

Although the appellate court ruled that the diminished-capacity departure was improper, *Goossens*, 84 F.3d at 700-02, it went on to consider Goossens’ argument that the below-guidelines sentence could nevertheless be affirmed

because the district court erred in refusing to depart on the basis set forth in his motion seeking a downward departure—namely, that the order of the district court prohibiting his active cooperation with law enforcement officials, and depriving him of the opportunity to qualify for a substantial assistance departure, was not a factor that was considered adequately by the Sentencing Commission in formulating the guidelines and, therefore, was an appropriate basis for a departure pursuant to U.S.S.G. § 5K2.0.

Goossens, 84 F.3d at 702.

The appellate court concluded that “[t]he district court committed a clear abuse of discretion by imposing the prohibition on cooperation with law enforcement officials as a condition of Goossens’ release.” *Goossens*, 84 F.3d at 703. The lower court had thereby “improperly frustrated Goossens’ desire to cooperate in order to qualify for more favorable sentencing treatment and the Government’s legitimate hope that he would aid in law enforcement authorities’ investigative efforts.” *Id.* at 703-04 (citing *United States v. French*, 900 F.2d 1300, 1302 (8th Cir. 1990)). The court noted:

Both Congress and the Sentencing Commission have recognized the importance of defendants’ cooperation with law enforcement by establishing provisions affording defendants with the potential to qualify for more lenient sentencing for federal criminal offenses if they provide substantial assistance to law enforcement authorities in investigating or prosecuting other criminal offenders.

Goossens, 84 F.3d at 704.

The appellate court agreed with Goossens that “the Sentencing Commission did not consider the possibility that a district court might affirmatively prohibit a defendant from cooperating with law enforcement authorities in an effort to qualify for a departure based upon substantial assistance.” *Goossens*, 84 F.3d at 704. Although the court refused to affirm the downward departure sentence on this alternative ground (not reached by the district court), it remanded the case and instructed that “on remand the district court should determine whether, under the circumstances of this case, this factor is sufficiently important such that a sentence outside the guideline range should result.” *Id.*

In the present case, the Government rather than the district court actively prevented White from furnishing the Government with substantial assistance. The Government knew from its first meeting with Coleman that, like Coleman, White intended to reveal the scheme and was willing and able to assist the Government. As Coleman had anticipated, however, the Government preferred her cooperation alone to ensure that Petters would not learn of its investigation. Although the Government’s concern for the security of its investigation was plainly legitimate, its decision to accept assistance exclusively from Coleman allowed Coleman—through her dishonesty—to deprive White of the opportunity to cooperate as he otherwise might have.

In addition, the Government learned from Coleman during the course of its investigation that White continued to press Coleman about revealing the PCI scheme to authorities. The Government now instructed Coleman to hold off White. Again, the Government’s concern for the security of its investigation was legitimate. White’s repeated inquiry, however, only verifies that he was committed to ending the scheme and that he was ready, willing and able to cooperate with the Government in its investigation. Voluntary withdrawal from criminal conduct plainly

bears on culpability. *See, e.g.*, USSG § 3E1.1, comment (n.1.(b)) (so indicating); *United States v. Phillips*, 664 F.2d 971, 1018 (5th Cir. Unit B Dec. 1981) (noting that to establish withdrawal from a conspiracy, the defendant must show affirmative acts ““to defeat or disavow the purpose of the conspiracy””) (quoting *United States v. Wentland*, 582 F.2d 1022, 1025-26 (5th Cir. 1978)). Through its instructions to Coleman, however, the Government now affirmatively prevented White from contacting authorities or furnishing cooperation before execution of the search warrants. Essentially, the Government chose to accept valuable assistance exclusively from Coleman, and to prevent White from furnishing such assistance.

White does not challenge the Government’s prudential decision to protect the security of its investigation. He submits, however, that the Government’s active role in preventing him from furnishing the degree of assistance he might otherwise have provided—and the degree of assistance actually provided by Coleman—is a special circumstance not considered by the Sentencing Commission, and is thus one qualifying for consideration under § 5K2.0(a)(2)(B). *See Goossens*, 84 F.3d at 704. *Cf. also United States v. Lakhani*, 480 F.3d 171, 186 (3d Cir. 2007) (acknowledging that district court at sentencing “would have been entitled to consider the Government’s pervasive role in this case,” even though jury had rejected defendant’s entrapment defense).

2. White is entitled to a reduction based on his extraordinary efforts to ameliorate the financial consequences of the PCI scheme.

A district court has discretion to depart downward if the court finds a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. *United States v. Garlich*, 951 F.2d 161, 163 (8th Cir. 1991) (citing 18 U.S.C. § 3553(b) & USSG § 5K2.0). A court can likewise depart “based on a

factor the Commission considered if the court finds that ‘in light of unusual circumstances, the guideline level attached to that factor is inadequate.’” *Id.* (quoting USSG § 5K2.0). The Guidelines authorize a departure for the payment of restitution. *See* USSG § 3E1.1. Nevertheless, a district may grant an additional downward departure where the extent and timing of a defendant’s restitution are sufficiently unusual. *Garlich*, 951 F.2d at 161.

The Eighth Circuit affirmed a downward departure on the basis of extraordinary restitution in *United States v. Oligmueller*, 198 F.3d 669 (8th Cir. 1999). Oligmueller misrepresented the amount of cattle he owned to secure a loan. *Id.* at 670. At the time the fraud was discovered, Oligmueller owed the bank approximately \$894,000. *Id.* First Oligmueller, then his son, subsequently liquidated assets to repay the bank. *Id.* Oligmueller also

pledged assets not previously pledged to the bank, including his ranch, and worked to prepare assets for sale so that the bank would receive the highest possible return. Oligmueller also took a job with a farm supply company, and set up a lawn mower repair business. Additionally, he turned over approximately half of his social security payment each month to pay his debts.

Oligmueller, 198 F.3d at 670. Through these efforts, Oligmueller reduced the bank’s losses to \$58,000. *Id.* at 670-71. The district court granted Oligmueller a downward departure “on the basis of Oligmueller’s extraordinary efforts to rehabilitate himself.” *Id.* at 671.

The appellate court affirmed the departure based on the grounds set forth in section 5K2.0. *Oligmueller*, 198 F.3d at 672. The court observed:

Oligmueller voluntarily began making restitution almost a year before he was indicted. He worked hard to ensure that his assets received the highest possible value, including taking care of the crops until harvest, carefully tending the livestock until sale, and loading the hay trucks for the bank. He often worked sixteen-hour days. He turned over his life insurance policy and his wife’s certificate of deposit. He also took an outside job, and gave up his home. Additionally, the restitution paid constitutes a substantial percentage, nearly ninety-four percent, of that owed to the bank. Therefore, we find no abuse of discretion by the district court in making this departure.

Oligmueller, 198 F.3d at 672 (footnote omitted). *Cf. also United States v. Kapitzke*, 130 F.3d 820, 823-24 (8th Cir. 1997) (atypical post-offense rehabilitation may support guidelines downward departure).

The facts of this case make clear that—even before White knew the PCI scheme had been exposed—he worked vigorously ameliorate its harmful economic consequences. First, on September 24, 2008, the day authorities executed the search warrants, White had in his desk a nine-month old bonus check for approximately \$1 million, which he had never cashed. (Coleman had cashed and used the comparable bonus check she received at the same time).

Second, likewise, White was in the process of repaying money he had taken as part of the scheme. At Petters' direction, Coleman and White created an entity named ONKA to help hide the PCI scheme. At Coleman's suggestion, she and White took approximately \$1 million from that entity. By the time the Government shut down the PCI scheme, however, White had repaid half the amount taken. (Coleman had repaid nothing).

Third, after execution of the search warrants, White recognized that certain stock owned by Petters and him had significant value. *See* PSR ¶¶ 130-33, 136. White eventually arranged for sale of the that stock, and thereby netted approximately \$3 million, which he then turned over to the Court-appointed Receiver. *Id.* ¶¶ 134-36. White has also cooperated with the Receiver in clawback litigation. Finally, White has cooperated with Winthrop & Weinstein in that firm's efforts to recover additional proceeds from the PCI scheme.

It should be noted that White's extensive efforts to make restitution have come amid significant personal turmoil. White's relationship with his wife quickly deteriorated after execution of the search warrants in September 2008. PSR ¶ 115. Mrs. White unilaterally decided to terminate a pregnancy. *Id.* Although the couple attended marriage counseling, these

efforts were to no avail. Mrs. White asked White to leave their home in August 2009. Since that time, White has been living in a cabin in Annandale. *Id.* Particularly viewed in this light, White's significant efforts to ameliorate financial damage are noteworthy considering that Coleman and several other defendants charged in relation to the scheme (Catain, Reynolds and Bell) have attempted to abscond with proceeds from the scheme, rather than to amass them on behalf of the Government.

Taking into consideration both official actions that prevented White from cooperating with the Government and his extraordinary restitution efforts, the Court should grant White a downward departure to 60 months, thereby placing him on equal footing with Coleman *before* the Court considers the Government's substantial assistance motion.

D. The Court Should Grant White A Downward Departure Under Section 5K1.1 So That His Ultimate Sentence Is No Longer Than Coleman's.

Section 5K1.1 authorizes downward departures for the provision of substantial assistance to authorities, and provides:

§ 5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
 - (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
 - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
 - (3) the nature and extent of the defendant's assistance;
 - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

USSG § 5K1.1.

A reduction for assistance to authorities “shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.” *See id.*, comment (n.2).

A district court has exceptionally broad discretion to determine the extent of a departure under section 5K1.1. *See, e.g., United States v. Van Nguyen*, 602 F.3d 886, 894-95 & n.8 (8th Cir. 2010) (noting that court has adopted “proscriptions against ‘notions of exceptional/extraordinary circumstances, departure percentages, proportionality review, and similar data-based standards of review’ to appellate review of § 3553(e) and § 5K1.1 substantial assistance motions”); *United States v. Peterson*, 581 F.3d 669, 672 (8th Cir. 2009) (affirming 50% downward departure based on § 5K1.1 where district court adequately explained its departure); *United States v. Berni*, 439 F.3d 990, 993 (8th Cir. 2006) (per curiam) (concluding that appellate court reviews sentence involving § 5K1.1 downward departure for reasonableness using abuse of discretion standard; sentence is reasonable where district court correctly calculated Guidelines range, permissibly applied § 5K1.1 departure, and considered resulting adjusted range and § 3553(a) factors); *United States v. Cooper*, 274 F.3d 230, 248 (5th Cir. 2001) (“A district court has almost complete discretion to determine the extent of a departure under § 5K1.1.”). In considering the proper extent of departure in this case, this Court should bear in mind the following.

White essentially delivered to the Government its nominal “star witness,” Deanna Coleman. It was White who suggested to Coleman that—acting together—they should approach

authorities and expose the PCI scheme. Had White immediately acted on this idea rather than first suggesting to Coleman that they should act together, he would plainly have occupied the “star witness” role Coleman usurped through her dishonesty. In any event, both White and Coleman both actually played critical roles in the genesis, investigation and consummation of the Government’s case. Moreover, any beneficial results the Government obtained through Coleman’s assistance are directly attributable to White.

Genesis: During the final period of the PCI scheme, White repeatedly approached Coleman and suggested that they should jointly contact authorities to reveal the scheme. Whereas White had formerly believed that the scheme could be redeemed, and that funds obtained by means of false representations could be made good by legitimizing PCI’s operations, he had since concluded that the scheme had taken on a life of its own, that it had grown into a genuine Ponzi scheme, and that there was no way that the PCI would ever be able to earn enough through legitimate operations to repay investors. *See* PSR ¶ 81. When White explained his view to Coleman, she repeatedly opposed White’s suggestion, arguing that Petters still had a plan to make things right. Coleman eventually agreed with White, however, and agreed that that they should contact authorities to reveal the scheme.

White and Coleman agreed that they should have counsel to assist them in approaching the government, but believed it would be impossible to obtain counsel in either the Twin Cities or Chicago without Petters becoming aware of their actions. Accordingly, they agreed to interview counsel located in Cleveland. On the eve of their departure for this interview, however, Coleman told White she had changed her mind. In this way, Coleman bought herself time. Having put off White, Coleman decided to act alone, contacted local attorney Allan Caplan and, with his assistance, approached the government alone. *See* PSR ¶ 12. In this way,

Coleman ensured that she alone would apprise the Government of the scheme and that—if the Government wished to have only one cooperating witness—she would be that sole witness. Thus, although Coleman was in fact the person who informed the government about the scheme, her decision to do so is traceable directly to White.

Investigation: Having deceived White, Coleman contacted the Government alone and revealed the scheme. She told the Government at their first meeting that White, too, intended to reveal the scheme and was willing to cooperate in building a case against Petters. As Coleman had shrewdly anticipated, however, the Government concluded that, to protect the integrity of its investigation, it would be wiser to have only one insider assist in its investigation. Coleman thus became the Government's principal cooperating witness because: (1) she deceived White, and (2) in an abundance of caution, the Government determined that it wished conduct its investigation with only one inside witness. Thus, even though Coleman wore the wire that captured critical conversations with Petters, *see* PSR ¶ 14, the Government's access to that evidence is directly traceable to White's decision to approach Coleman about revealing the scheme.

In addition, manifesting his by-now longstanding conclusion that the scheme should end, White cooperated with the Government immediately upon execution of the search warrants on September 24, 2008. That cooperation was more honest and complete than that provided by Coleman or any other witness, and has taken many forms.

Consummation: Shortly after the Government executed the search warrants, Petters contacted White, suggested that White should flee, and indicated that he, Petters, intended to flee as well. White reported this conversation to the Government and agreed to wear a wire. During a subsequent recorded conversation, Petters again discussed his intention to flee. Presentation of

this recorded conversation to the Court allowed the Government to demonstrate that Petters was a flight risk, and to have him kept in custody pending trial. Whereas Coleman's cooperation had assisted the Government in building its case against Petters, White's cooperation helped ensure that the Government would have the opportunity to place that case before a jury. And White's testimony at Petters' trial has been described as among the most valuable given. It helped the Government to demonstrate Petters' intimate knowledge and direction of the PCI scheme, and thereby to establish his criminal intent and liability. In addition, White has substantially assisted the Government in ameliorating the harm caused by the PCI scheme. *See supra*, Arg. § I.C.2.

As previously noted, the Government has made a motion for a downward departure under section 5K1.1. The Court has exceptionally broad discretion to determine the extent of a departure under that provision. *Berni*, 439 F.3d at 993. Exercising this discretion in light of the criteria contained in section 5K1.1, the Court should grant White a departure of sufficient extent so he will receive a sentence no longer than Coleman's.

First, White's cooperation was timely. USSG § 5K1.1(a)(5). Although Coleman rather than White first exposed the PCI scheme and assisted in the Government's initial investigation, this was so only because Coleman appropriated White's idea to contact authorities. Second, White's direct and indirect assistance were critical to the success of the Government's case. USSG § 5K1.1(a)(1). As to indirect assistance, the facts make plain that the investigative and testimonial benefits the Government derived from Coleman's assistance are directly attributable to White. As to direct assistance, White himself furnished the Government with additional investigative and testimonial benefits that have significant independent value.

Third, White's assistance has been completely honest and unqualified from the start. USSG § 5K1.1(a)(2). Coleman immediately told the Government that White, too, was willing to

assist the Government. Although the Government elected not to accept his assistance before executing the search warrants on September 24, 2008, White began cooperating the moment the Government took that step. As if to underline his longstanding psychological withdrawal from the PCI scheme, White had in his desk on that date a nine-month old check for \$1,000,000 he had never cashed. In addition, the PSR specifically notes White's candor and forthrightness. *See* PSR ¶ 80.

Fourth, White's assistance was extensive and varied. USSG § 5K1.1(a)(3). He induced Coleman to contact authorities; wore a wire that secured valuable information; testified at trial; secured the Receiver millions of dollars; and furnished additional assistance in ameliorating the financial effects of the PCI scheme. Notably, several other defendants in this matter attempted to abscond with proceeds even after they began cooperating, rather than assisting the Government in recovering those proceeds, conduct sufficient to disqualify a defendant from receiving a downward departure under the Guidelines. *See, e.g., United States v. Tjaden*, 473 F.3d 877, 879-80 (8th Cir. 2007) (holding that district court properly denied acceptance-of-responsibility departure where government presented evidence that defendant "had resumed fraudulent activities" prior to sentencing); *United States v. Lim*, 235 F.3d 382, 385 (8th Cir. 2000) (holding that district court properly denied departure where defendant "firmly refused to assist in any way with the recovery of the jewelry that he obtained through his crimes and secreted away").

A departure equalizing White's sentence with Coleman's does not require "extraordinary circumstances." *See, e.g., Van Nguyen*, 602 F.3d 894-95 & n.8. This Court should nevertheless find that White has provided an extraordinary degree of cooperation, meriting an unusually large substantial assistance departure. *Cf. United States v. DeMonte*, 25 F.3d 343, 3480-50, 351 (6th Cir. 1994) (affirming downward departure based upon defendant's "extraordinary cooperation").

II. IN ADDITION, OR IN THE ALTERNATIVE, THE COURT SHOULD GRANT WHITE AN EQUALIZING VARIANCE UNDER SECTION 3553(a)(6) TO AVOID AN UNWARRANTED SENTENCING DISPARITY BETWEEN WHITE AND COLEMAN, SIMILAR DEFENDANTS WHO COMMITTED SIMILAR CONDUCT.

Section 3553(a) provides in part that in determining the particular sentence to be imposed upon a defendant, the district court must consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). Should the Court conclude that an equalizing sentence cannot be achieved under the Guidelines alone, the Court should apply the command of § 3553(a)(6) to impose such a sentence to avoid an unwarranted sentencing disparity between White and Coleman, similar defendants who committed similar conduct. *See United States v. Lazenby*, 439 F.3d 928, 934 (8th Cir. 2010) (disapproving extreme disparity between co-conspirators’ sentences as contrary to “the legislative intent reflected in § 3553(a)(6)”).

Pursuant to § 3553(a)(6), the Court should recognize the distorting effect that the Government’s charge-bargaining has on the sentencing issue before it. The Government knowingly allowed and encouraged Coleman to deprive White of the opportunity to join her in approaching the Government and in cooperating in its initial investigation. Worse, it affirmatively instructed Coleman during the investigation to deter White from contacting them.

Having prevented White from cooperating, the Government then sharply distinguished between Coleman and White based on the cooperation they had furnished. Whereas the Government demanded from White guilty pleas to two offenses carrying statutory maximum sentences of 10 and 20 years respectively, it accepted from Coleman a plea to conspiracy to commit mail fraud, 18 U.S.C. § 371, carrying a statutory maximum sentence of 5 years. Thus, the Government was not content to charge Coleman and White with the same offenses—yielding

the same presumptive sentencing ranges—then to distinguish between them through differing 5K motions. Instead, the Government engaged in rank charge-bargaining.¹

This is critical to the Court’s sentencing decision. For it is well understood that in our charge-based Guidelines system, the charged offense mechanically determines the advisory sentencing range, and thereby can have a profound and even improper effect upon sentencing. *See, e.g., United States v. Lieberman*, 971 F.2d 898, 996-99 (3d Cir. 1992). In *Lieberman*, for example, the Government charged defendant bank executive with both bank embezzlement and attempted income tax evasion for the amount he embezzled. *Id.* at 991, 998. The district court granted the defendant a downward departure, explaining in part that

it had never before seen a defendant charged with both embezzlement and tax evasion for the moneys he embezzled. The court noted that while there was no prosecutorial misconduct, “the result of this highly unusual situation where a defendant is charged both with the embezzlement and with the tax evasion of the very same money that he embezzled is unusual and disparate and constitutes, albeit, not in bad faith, an inappropriate manipulation of the indictment, which the Sentencing Commission asserts that I can control through the use of departure power.”

Lieberman, 971 F.2d at 998. The government appealed.

The appellate court first noted that the district court was *required* to consider the command of § 3553(a)(6) to avoid unwarranted sentencing disparities. *Lieberman*, 971 F.2d at 998. It then commented on the basis of the district court’s departure:

[T]here is no indication either that the Commission rejected the manipulation of the indictment charges as a basis for departure or that it intended to foreclose departures on this basis. On the contrary, a policy statement in the Introduction to the Guidelines states that the Sentencing Commission “recognized that a charge offense system has

¹ Naturally, White does not suggest that the Judiciary should control charging, a quintessentially Executive function. *See, e.g. Wayte v. United States*, 70 U.S. 598, 607-08, 105 S. Ct. 1524, 84 L.Ed.2d 547 (1985). Instead, as will be developed further, he submits that the Judiciary should not allow the Executive—through the charging decision—to control the imposition of particular sentences, a plainly Judicial function. *See, e.g., Gall v. United States*, 552 U.S. 38, 50, 128 S. Ct. 586, 169 L.Ed.2d 445 (2007) (noting that when imposing sentence, a district court “must make an individualized assessment based on the facts presented”).

drawbacks” and that “a sentencing court may control *any* inappropriate manipulation of the indictment through use of its departure power.” U.S.S.G., Ch. 1, Pt. A, (4)(a), Policy Statement (emphasis added). The adjective “inappropriate” does not necessarily suggest bad intent on the part of the prosecutor, but can apply to prosecutorial zeal that results in charging a particular defendant disproportionately to others similarly situated.

Lieberman, 971 F.2d at 998 (footnote omitted). The policy statement revealed that “the Commission is aware of the potential problem caused by manipulation of the indictment, and has invited the district courts to use their departure power to counteract it.” *Id.* at 998 n.8. Indeed, the Commission itself had observed that “the ‘most important’ drawback of the charge offense system is ‘the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment.’” *Id.* at 998 n.9 (quoting U.S.S.G. Ch. 1, Pt. A, (4)(a), Policy Statement). The appellate court ultimately concluded that “a sentencing court possesses the authority to depart downward based on the manipulation of the indictment.” *Id.* at 998.²

Again, there is simply no reason to believe that—had White and Coleman approached the government together (as White had suggested)—the Government would not have offered them precisely the same plea terms. Because the Guidelines calculation in this case is a direct and

² So-called “fast-track” cases likewise support the proposition that courts may take into account under section 3553(a)(6) initial sentencing disparities caused by congressionally sanctioned charge-bargaining in illegal re-entry cases. *See, e.g., United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009) (“We conclude that, under the logic of *Kimbrough*, it is within a sentencing judge’s discretion to consider a variance from the Guidelines on the basis of a fast-track disparity.”); *United States v. Rodriguez*, 527 F.3d 221, 225, 227 (1st Cir. 2008) (same); *United States v. Peralta-Espinoza*, 383 F.Supp.2d 1107, 1108 (E.D.Wis. 2005) (holding “under 18 U.S.C. § 3553(a)(6), courts may reduce sentences to remedy ... disparity” caused by fast-track programs); *United States v. Ramirez-Ramirez*, 365 F.Supp.2d 728, 732 (E.D. Va. 2005) (“In some cases, under *Booker* and 18 U.S.C. § 3553(a), it may be appropriate for the Court to exercise its discretion in order to minimize the sentencing disparities that exist in cases involving illegal re-entry.”). Again, the point is not that the Judiciary should control charging. *See, e.g., United States v. Medrano-Duran*, 386 F.Supp.2d 943, 945 (N.D. Ill. 2005) (“Charge bargaining, of course, involves the exercise of prosecutorial discretion, a proper and essential element of our criminal justice system.”). Instead, it is that “[t]here is nothing in § 3553, *Booker*, or any other existing authority to support a construction of § 3553(a)(6) that allows Congress and prosecutors to determine what sentence disparities are warranted and unwarranted but prevents a court from doing so.” *Id.*

mechanical result of charge-bargaining, the Court should essentially disregard that range, and should base the sentence it ultimately imposes on the Court's own comparison between White and Coleman. *See, e.g., United States v. Jones*, 160 F.3d 473, 483 (8th Cir. 1998) (“[T]o the extent that the government's behavior directly results in prejudice to a defendant, which is significant enough to take the case out of the heartland of the Sentencing Guidelines, district courts have the discretion to grant an appropriate downward departure.”). Considering that the Guidelines presumptive sentencing range has become advisory since *Booker* even in routine cases, the Court should conclude that the advisory range in this case—where charge-bargaining has mechanically produced disparate sentences from the outset—is entitled to no advisory weight whatsoever. Although White does not challenge the Government's power to charge, he asks the Court to independently evaluate his proper sentence as compared with Coleman's and, for the reasons set forth above, to grant a variance rendering those sentences equal. 18 U.S.C. § 3553(a)(6).

Indeed, the Eighth Circuit has noted that departures are permitted to ameliorate disparity caused by initial charging decisions. *United States v. Yellow Earrings*, 891 F.2d 650, 655 (8th Cir. 1989) (citing *United States v. Correa-Vargas*, 860 F.2d 35, 39-40 (2d Cir. 1988)).

CONCLUSION

For all the foregoing reasons, White respectfully requests that the Court impose on him a sentence comparable to that received by co-defendant Deanna Coleman.

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Respectfully submitted,

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