IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

*

THE UNITED STATES OF AMERICA *

v. * Criminal No. AMD-97-0290

F B *

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DEFENDANT'S SENTENCING MEMORANDUM
AND MOTION FOR DOWNWARD DEPARTURE

The Defendant, through his attorneys, Beth M. Farber, Acting Federal Public Defender for the District of Maryland, and Gary W. Christopher, Assistant Federal Public Defender, respectfully submits this memorandum with respect to his sentencing scheduled for May 1, 1998. For the reasons stated below, counsel for Mr. B moves for a downward departure pursuant to USSG §5K2.0.

INTRODUCTION AND BACKGROUND

On February 13, 1998, Mr. B entered a plea of guilty to Count One of the indictment, which charged his use of an unauthorized access device in violation of 18 U.S.C. § 1029(a)(2). The plea was entered pursuant to an agreement wherein the parties stipulated to a base offense level of 6 pursuant to USSG §2F1.1, an upward "loss" adjustment of six levels pursuant to §2F1.1(b)(1)(G), an upward adjustment of one level pursuant to §2F1.1(b)(2) because more than minimal planning was involved in the offense, and a downward adjustment of two levels pursuant to §3E1.1 because of Mr. B's acceptance of responsibility. The parties also stipulated that a downward role adjustment would be appropriate in the case, but are in disagreement as to its extent: the government characterizes Mr. B's role as minor and will accordingly support a

downward adjustment of two levels pursuant to USSG §3B1.2(b), whereas counsel for Mr. B will maintain at sentencing that his role is minimal, justifying a four-level downward adjustment pursuant to §3B1.2(b). At sentencing, therefore, the government will take the position that the adjusted (predeparture) offense level is 10, and the defense will contend that it is 8.

Mr. B has reviewed the Presentence Report with counsel and has no substantial objection to any of the findings or factual averments contained within it. He agrees that his criminal history category is 1 and agrees with the offense level calculation, except that he contends that his role in the offense should properly be characterized as minimal rather than minor.

The purpose of this memorandum is to set forth defendant's arguments that a four-level downward adjustment is appropriate under USSG §3B1.2(b) and that the Court should grant a downward departure from the adjusted offense level.

ARGUMENTS

I. MR. B PLAYED A MINIMAL ROLE IN THE OFFENSE.

With the object of "provid[ing] a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant," USSG §3B1.2, comment. (backg'd.), the United States Sentencing Guidelines direct that a downward offense level adjustment of four levels is in order for a defendant who plays a minimal role in concerted activity. This designation "is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." USSG §3B1.2, comment. (n.1). Mr. B maintains that he was plainly the least culpable of the three offenders involved in this offense and that, indeed, his conduct was clearly "minimal" within the meaning of the Guideline.

Joseph B (defendant's father) and Brenda Mackenzie were the principal actors in this scheme. Joseph B acquired the credit card encoder which made the scheme possible; he then acquired hundreds of credit card numbers from all available sources -- from trash cans, by using a video camera at ATM machine locations, and, in several instances, from his son, the defendant. Though counsel's understanding of Mackenzie's role is incomplete, it is clear that the lion's share of the loss is attributable to her. The overwhelming majority of the charges were hers, and she substantially financed the operation of her trucking company by using fraudulent credit cards supplied by Joseph B.

The defendant, was stationed in Hawaii throughout virtually the entire period of time when Joseph B and Brenda Mackenzie were operating the scheme in Maryland. His involvement, as detailed in the presentence report and to the Court at the time of the plea of guilty, was his general knowledge that his father and Mackenzie were involved in fraudulent activity, in making his own VISA card available to his father for encoding, in providing his father with several sales slips, and in making a few purchases with one of the fraudulent cards. The government asserts that the restitution amount owed by Mr. B (i.e. the amount directly attributable to his misconduct) is $2677.46 -- less than 4% of the loss.

Defendant's role in this offense is clearly "minimal" within every meaning of the term. The Court should award a four-level downward departure.

II. THE LOSS OF HIS MILITARY CAREER IS A COLLATERAL CONSEQUENCE OF THIS MISCONDUCT JUSTIFYING A DOWNWARD DEPARTURE.

At the time his father involved him in this offense, Mr. B was a Third Petty Officer in the United States Navy, holding the military occupation specialty of Hull Maintenance Technician Fireman. PSR ¶54. In the nearly four years he served in the Navy, Mr. B consistently received superior reviews and commendations. He was proud of his position in the United States Navy and had every reason to believe and hope that it would be his career.

Mr. B lost that career as a result of his involvement in this case. He is now employed as a welder. He and his wife spend more for necessary living expenses than they make. PSR ¶ 61. His situation, therefore, is very unlike that of most federal defendants, for whom the consequence of violating a federal law is exclusively in the form of the punishment imposed by the Court. The Defense therefore maintains that the collateral consequence which Mr. B has already suffered -- loss of his military career -- provides an appropriate ground for downward departure.

Under USSG §5K2.0 (p.s.) and 18 U.S.C. § 3553(b), a sentencing court possesses authority to depart from the Guidelines if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. Where a sentencing factor is not mentioned in the Guidelines, "[p]resence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court." Sec. 5K2.0 (p.s.).

A defendant's having suffered collateral consequences or punishment for the misconduct being sentenced is such a factor. It is nowhere mentioned in the guidelines, and accordingly the

Court "must, after considering the 'structure and theory of both relevant individual guidelines and the [g]uidelines taken as a whole,' . . . decide whether [the factor] is sufficient to take the case out of the Guideline's heartland." *United States v. Koon*, 116 S.Ct. 2035, 2045 (1996) (*quoting United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)); *see United States v. Rybicki*, 96 F.3d 754, 758 (4th Cir. 1996).

Indeed, the *Koon* Court itself confirmed that, in some circumstances, where an offender's misconduct results in the loss of his career, a court sentencing him federally for that misconduct may ground a downward departure on the fact of the collateral punishment. The Supreme Court specifically rejected the government's contention that "[a] defendant's loss of career opportunities must always be an improper consideration . . . ." 116 S.Ct. at 2050. The Ninth Circuit had ruled that the District Court's award of a downward departure based on the defendants' loss of their law enforcement careers was improper, since such a factor would be inevitably implicate impermissible socioeconomic considerations. The Supreme Court disagreed, noting that "the link [to socioeconomic factors] is not so close as to justify categorical exclusion of the effect of conviction on a career." *Id*. at 2052. The Court went on to declare improper the collateral consequences departure in *Koon*, but only because the loss of a police career typically follows a conviction for violating the civil rights of a citizen under color of law under 18 U.S.C. § 242. "It is to be expected that a government official would be subject to the career-related consequences petitioners faced after violating § 242, so we conclude these consequences were adequately considered by the Commission in formulating § 2H1.4."

The same may not be said, of course, of the heartland fraud defendant, who would not typically be punished both with a sentence and with the loss of his career and livelihood. In a

sense, Mr. B's discharge from the Navy is harsher than any punishment this Court might impose, and surely promotes all of the sentencing objectives identified by Congress in the Sentencing Reform Act.[1] This Court may, by a modest downward departure, plainly take account of the stern lesson already conveyed to Mr. B by way of the loss of his career.

II. GUIDELINE LEVEL COMPUTATION

The defense suggests the following guideline level computation.

Count One

Adjusted (pre-departure) offense level per PSR ¶ 28. 10

Additional downward adjustment for minimal
under USSG §3B1.2(a). . . . . -2

Downward departure - loss of career collateral consequence. . . . . -2

Final offense level. 6

Offense level 6 at Criminal History Category I yields a sentencing range of 0-6 months. The defense recommends a sentence of probation, pursuant to USSG §5B1.1(a).

Should the Court not be persuaded by the foregoing arguments for downward adjustment and departure, in order to avoid Mr. B's losing the employment on which his family depends, the defense recommends pursuant to USSG §5C1.1(c)(3), a sentence of probation that includes home detention for a period of six months as a condition.

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[1] 18 U.S.C. 3553(a)(2) requires courts to consider
"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. . . ."

CONCLUSION

The defense suggests that imposition of the sentence recommended would be "sufficient, but not greater than necessary, to comply with the purposes [of federal sentencing]" 18 U.S.C. § 3553(a).

Respectfully submitted,

BETH M. FARBER
Acting Federal Public Defender

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this eighth day of February, 1998, a copy of the foregoing Motion and Memorandum was delivered to Bonnie S. Greenberg, Esquire, Assistant United States Attorney, 6625 United States Courthouse, 101 W. Lombard Street, Baltimore, Maryland 2l20l and to John W. Skozilas, Jr., Senior U.S. Probation Officer.

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GARY W. CHRISTOPHER
Assistant Federal Defender