

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA

*

v.

*

Criminal No. _____

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* * * * *

SENTENCING MEMORANDUM UNDER SEAL

_____ pleaded guilty on March 7, 1996, to one-count of bank fraud in violation of 18 U.S.C § 1344. Mr. _____ submits this Memorandum with respect to the sentencing proceeding scheduled for July 25, 1996 at 9:00 a.m. The Presentence Report (PSR) provides for a final offense level of 16, criminal history category I and a sentencing range of 21-27 months. The plea agreement entered into by the parties provides that the government will recommend the bottom half of the range. The defense does not disagree with the technical calculations of the Guidelines by William Kirby, United States Probation Officer.

The plea agreement permits the defense to request downward departures. Both sides have also agreed to waive their appeals of the Court's decisions with respect to the departure requests. Pursuant to the agreement and for the reasons stated below, counsel for Mr. _____ requests downward departures of four offense levels to an offense level of 12, a range of 10-16 months, and recommends

the that this Court impose a split sentence of five months imprisonment and five months home confinement.

INTRODUCTION

Mike _____ is 56 years old. He was born in Baltimore, Maryland. He has worked hard all his life. Mr. _____ left high school after his junior year and joined the United States Marine Corps. After his honorable discharge, he worked for two years in the Bethlehem Steel Corporation as a laborer in the pipe mill at Sparrows Point, Maryland.

Beginning in 1961, Mike _____ began working at _____ Buick which was owned and operated by his father. He bought the business from his father prior to his father's death in 1965. As the president of the company, he drew a salary, low by industry standards, of approximately \$65-\$70,000 (PSR at ¶ 68). Since the demise of the business, Mr. _____ has labored as a keeper and trainer of horses at "Oak Tree Farm" where he makes approximately \$800 a month. As the Court records reveal, because of the debts accrued due to the demise of Rea _____ Buick, including the use of his home and savings as collateral on the loans at issue in this case, Mr. _____ has lost any wealth he ever had. He has been deemed "indigent" by the court and qualified for appointed counsel (PSR at ¶ 67-68).

Prior to the start of his career in the automobile industry, Mr. _____ married the former Mary Orrison in 1959. Mike and

Mary _____ have three children, two daughters, Suzanne and Leslie, and one son, James. The Court has received letters from Mary and Suzanne _____ which describe the turbulent family situation. In addition, Dr. Roger Lewin's report address the turbulent family situation. Dr. Lewin describes Mr. _____'s personality disorders and destructive attempts at self-medication through substance abuse. Dr. Lewin reports that, at the time of the offense conduct, Mr. _____'s mental illness produced suicidal ideation. Because of Mr. _____'s limitations, the family has suffered through very hard times. Nevertheless, as the letters reflect, the stress and turmoil has not extinguished the family's love for each other. Indeed, his daughter Leslie's perception of Mr. _____'s needs had a profound impact on her decision making. At the time of the offense, Dr. Lewin and Leslie _____ perceived that, if the business did not survive, Mike _____, because of his illness, may not survive.

On March 7, 1996, Mike _____ pleaded guilty at his initial appearance in this Court to one count of bank fraud. As his business declined, his desperation to save the family business grew. He lied to Mellon Bank to keep open a credit line and save his business. In open court and during the PSR interview, Mr. _____ accepted responsibility for his criminal conduct. Mr. _____ also explicitly and frankly acknowledged that his

daughter, Leslie, was only involved in this matter because of her efforts to meet her father's needs.

Mike _____ committed a crime that cost Mellon Bank hundreds of thousands of dollars. As will be discussed below, Mike _____ committed this fraud while suffering from a "diminished capacity." His conduct was the direct product of a mental illness. He had no intention of Mellon Bank suffering any loss. He always intended to repay the bank because he always intended to stay in business it was essential that he do so. He always hoped that when he retired, he could give the business to his daughter, Leslie.

Mike _____ has lost virtually everything; his marriage, his home, and his wealth. As the letters reveal, his family still loves him, and many friends' loyalty support him. That does not ease his most profound pain. Instead of becoming his business partner and heir, his daughter, Leslie, is his co-defendant in a federal criminal case. Because of a mental illness, Mike _____ committed a crime that cost Mellon Bank hundreds of thousands of dollars. The loss that Mike _____ has inflicted upon himself and his family will never be healed. Mellon Bank lost thousands of dollars. Mike _____ lost everything, including his dreams.

I. A downward departure is justified under § 5K2.13 because the offense was committed while Mr. _____ suffered from a diminished mental capacity.

U.S.S.G. §5K2.13 provides for a downward departure for the defendant's "diminished capacity" as follows:

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

In the instant matter, Mr. _____ has submitted the report of Dr. Roger Lewin as evidence that Mr. _____ suffered from a diminished capacity at the time of the offense. See Appendix 3. Dr. Lewin is uniquely situated to offer such an opinion. Dr. Lewin was Mr. _____'s treating psychiatrist for four years, including the time of the offense. Counsel retained Dr. Lewin and he has met with Mr. _____ again over the past four months. On the basis of his medical relationship with Mr. _____ over the past years, he has opined that Mr. _____ was suffering from a "diminished capacity" at the time of the offense. See generally, United States v. Glick, 946 F.2d 335, 338 (4th Cir. 1991); United States v. Cantu, 12 F.3d 1506, 1512-13 (9th Cir. 1993). ("In everyday language, 'reduced mental capacity' refers to a lack of full intellectual functioning . . . [It] comprehends both organic dysfunction and behavioral disturbances that impair the formation of reasoned judgments.")

Based upon his long medical relationship with Mr. _____,

Dr. Lewin concludes:

"Mr. _____'s judgement was substantially impaired through this period for reasons having to do with his mental health, including anxiety and depression and a personality disorder. Specifically, he was unable to process vital business information and business counsel in a reasonable, lucid and direct way. He pursued a course of action which, while consistent with his lifelong pattern of trying to cover up for and conceal what he sees as his inadequacies, was disastrous for his own interests. I believe he did this out of mental disturbance, personal insecurity and desperation, not rapaciousness."

App. 3 at p. 3.

Dr. Lewin reports that Mr. _____'s "ability to process information or to reason was substantially impaired." United States v. Goosens, 84 F.3d 697, 701 (4th Cir. 1996). The Stipulation evidences that Mr. _____ was not operating at a "high level of mental functioning" at the time of the offense. Id. at 701. Indeed, Dr. Lewin's report concludes that, because of the mental illness that Dr. Lewin was treating at the time of the offense conduct, Mr. _____ could not so function. His "judgment was substantially impaired" and the impairment directly led to the offense conduct. (Appendix 3 at p. 3.)

A significant downward departure is appropriate because the defendant's criminal conduct was directly caused by his diminished capacity.

In the alternative, a downward departure is warranted in this case pursuant to §§ 5H1.3 and 5K2.0. Section 5K1.3 states that mental and emotional conditions are not ordinarily relevant to a determination of whether to sentence outside the guideline range, except as provided in Chapter Five, Part K, Subpart 2. Mental and emotional conditions which are present to an unusual degree however, and which distinguish the case from the "heartland" cases may form an appropriate basis for a downward departure, whether or not the situation is specifically provided for in Chapter Five, Part K, Subpart 2. See Chapter Five, Part H, Introductory Commentary; § 5K2.0, policy statement and commentary.

That the Sentencing Commission intends the sentencing court to feel free to exercise its discretion in granting departures in unusual cases, even where the basis of the departure is a factor the Commission has deemed "not ordinarily relevant" is evidenced by the recent amendments to Chapter Five. For example, the introductory commentary to Chapter Five, Part H, that section which delineates the factors considered "not ordinarily relevant" in departure determinations, was amended in 1994 to include the statement: "Furthermore, although [the listed] factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases." Chapter 5, Part H, introductory commentary.

In addition, § 5K2.0 was also specifically amended in 1994 to include the following paragraph:

An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

Thus, § 5H1.3 should be read as stating that mental and emotional conditions are ordinarily relevant as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure) but may be relevant beyond those situations delineated in Chapter Five, Part K, Subpart 2 where the condition is present to an unusual degree and distinguishes the case from the "heartland." United States v. Christensen, 18 F.3d 822, 826 n.8 (9th Cir. 1994) (If the district court were to conclude [on remand] that [the defendant's] mental illness qualified as an extraordinary case, it would be authorized to depart downward under U.S.S.G. §§ 5H1.3 and 5K2.0"); also c.f. United States v. Lauzon, 938 F.2d 326, 333 (1st Cir.) ("Borderline intelligence is not so extraordinary as to overcome the clear mandate of policy statement § 5H1.3 that mental conditions 'are not ordinarily relevant in determining whether a sentence should be outside the guidelines'"), cert. denied, 112 S.Ct. 450 (1991), see also Koon, supra.

Mr. _____ was suffering from a "diminished capacity" and a departure under 5K2.13 is justified. In the alternative, if the

Court finds that Mr. _____ has not met the requirements of 5K2.13, then the Court has the discretion to consider Mr. _____'s limited mental capacity, along with the defendant's less culpable intentions in committing this offense, in fashioning an appropriate departure from the applicable guideline range. Koon; United States v. Hines, 26 F.3d 1469, 1478, n. 6 (9th Cir. 1994). Mr. _____'s mental illness, combined with the mitigating circumstances discussed elsewhere in this Memorandum, distinguishes his case from the "heartland" of fraud cases and justifies a departure to reflect his diminished mental state.

II. The Total Amount of Loss and the Offense Level Over-represents Mike _____'s Criminal Culpability.

To determine the appropriate guideline range for an offense involving fraud, § 2F1.1(b)(1) of the United States Sentencing Guidelines relies upon the total amount of loss caused by the fraud as a "proxy for the seriousness of the offense." United States v. Rostoff, 53 F.3d 398, 404 (1st Cir. 1995). However, the Application Notes to Guideline 2F1.1 acknowledge that the "proxy" is inadequate and district courts should use their departure power to fashion a sentence which more accurately reflects the defendant's culpability. "In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense In such cases a downward departure may be warranted." U.S.S.G. 2F1.1, Application Note 10.

The Supreme Court recently reviewed the procedure by which a downward departure should be considered. Koon v. United States, ___ U.S. ___, 1996 WL 318800. In so doing, the Court acknowledged the extraordinary discretion to craft a fair and just sentence which has long been a part of the sentencing tradition and which the Guidelines have not changed.

The Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This too must be remembered, however. 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 the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt.

Id. at p. 21.

When considering a departure, the Koon Court recommended that district courts follow the analysis of then Chief Judge Bryer in United States v. Rivera, 994 F.2d 942, 949 (CA 1 1993). The Koon/Rivera analysis emphasizes an examination of the extent to which the Guidelines explicitly consider the departure.

We agree with [the Rivera] summary. If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guidelines, the court should

depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. Cf *ibid.* If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," *id.*, at 949, decide whether it is sufficient to take the case out of the Guideline's heartland.

Id. at p. 10.

Mike _____ requests a departure because the fraudulent conduct in this case is distinguishable from the heartland of § 2F1.1 cases. The conduct was not based upon an intent to profit from the fraud itself. The conduct, trying to delay payment on a bank loan to keep a business alive, is far different from that of a "con artist" who deceives the bank solely to permanently deprive the bank of its funds. In addition, the amount of loss "proxy" is distorted by market factors, beyond the defendant's control. Negative market developments drastically exacerbated the losses of Rea _____ Buick and, hence, of Mellon Bank.

In the instant case, the Guidelines have encouraged such a departure request. As mentioned above, the commentary to 2F1.1 specifically embraced such a departure because of the likelihood of over-representation of offense level when dollar loss is relied upon as a "proxy for the seriousness of the offense." Rostoff, supra.

The Stipulation in the plea agreement acknowledges that the defendant did not profit from the fraud against Mellon Bank.¹ (Plea letter and Stipulation attached as Appendix 1, see pp. 13-14.) Mr. _____'s misconduct was a desperate, irrational business decision; to deceive the bank, obtain "float" on his current loan and keep a family business alive until the market improved and/or he obtained more loans. Mike _____ always intended to pay his debtors. It was essential for him to do so if he was to continue in the car business.

The Guidelines' sentencing range established by § 2F1.1 does not distinguish Mike _____, who exercised grossly poor business judgment, but never intended to permanently deprive anyone of their funds, and the perpetrator who entered into a scheme solely to deprive the victim of their money. In fact, Judge Posner, writing for the Seventh Circuit, acknowledged the necessity of fashioning a sentence under the Guidelines which distinguishes the perpetrator who committed a crime of deceit in order to obtain the temporary use of funds, from a "con artist" who embarked on a complicated scheme solely to steal funds.

¹ The government does not significantly differ from this position. The government suggests that Mr. _____ profited from the fraud because he continued to draw his salary and incidental perquisites longer than he should have if the true nature of the business' dire condition was known. The government agrees that there was no increase in the defendant's compensation during the course of the fraud. Finally, the defendant's compensation was low, compared to other dealership owners. Appendix 1, Stipulation of Facts, at pp. 13-14, PSR at ¶ 67.

In United States v. Schneider, 950 F.2d 555 (7th Cir. 1991), a case where a husband and wife lied in order to obtain a government contract which they fully intended to perform, Judge Posner, writing for the Seventh Circuit, reversed the sentence because the method of calculation of loss was irrational.

That is not the end of the analysis, however, because "loss" within the meaning of the Guidelines includes intended, probable, or otherwise expected loss, a qualification of vital importance in a case such as this where the fraud is discovered or otherwise interrupted before the victim has been fleeced. United States v. Davis, 922 F.2d 1385, 1391-92 (9th Cir. 1991). But it is necessary to distinguish between two types of fraud. One is where the offender -- a true con artist (as in Davis) -- does not intend to perform his undertaking, the contract or whatever; he means to pocket the contract price without rendering any service in return. In such a case the contract price is a reasonable estimate of what we are calling the expected loss, and we repeat that no more than a reasonable estimate is required. United States v. Haddon, *supra*. 927 F.2d at 951-53; Sentencing Guidelines § 2F1.1, Application Note 8. The other type of fraud is committed in order to obtain a contract that the defendant might otherwise not obtain, but he means to perform the contract (and is able to do so) and to pocket, as the profit from the fraud, only the difference between the contract price and his costs.

Id. at 558. United States v. Bradford Bruce, No. WN-93-069 (D.Md. 9124193) (departure from 24-30 months to 18 months sentence where 0, an unlicensed commodities dealer lost \$700,000 of investors' money when the market crashed, but did not intend for anyone to lose money).

Mike _____ is not a "con artist." His conduct was not "predatory." It was self-destructive. The rapid decline of his car business impacted upon his loan with Mellon Bank, but also caused the loss of his home, his marriage, his livelihood and his life savings. Mr. _____ believed, throughout the time period of the offense, that he could turn his business around if he obtained an additional "working capital loan," thus, which would give the business the wherewithal to survive until he could increase sales. The Guidelines' loss "proxy" does not reflect this distinction. As Judge Posner notes, this distinction must be taken into account to sentence fairly and rationally.

Furthermore, as the Stipulation and the numerous letters to the Court note, economic factors beyond Mr. _____'s control played a profound role in "exacerbating the loss" and, hence, distorting the loss "proxy" under 2F1.1. See Appendix 1, Stipulation of Facts at p. 8, and Appendix 2.²

² Letters in support of Mike _____ have been obtained by counsel and are attached for the Court's consultation as Appendix 2. Letters of particular note regarding the changing nature of the automobile business and Mr. _____'s ability to cope, see the letter of Appendix 2, Letter 36, T.J. O'Donnell, owner of O'Donnell Pontiac; letter 27, Marty Spence, R.N., L.C.S.W.C., sister of Mr. _____; John L. Tansey, M.D. ("We have always felt that Mike was not properly equipped or trained to assume the management of a highly competitive auto agency, but was forced into it on his father's death. . . He tried to do the best he could for his family.") Pat Hayes, former owner of Pat Hayes Buick, Appendix 2, Letter, p. 39 ("I never knew or heard anything [Mike _____] ever did that was even disrespectful, _____ unlawful").

Courts have recognized the potential for distortion from outside economic forces and held that the District Court's departure power should be used to calculate a fair sentence. In United States v. Rostoff, 53 F.3d 398, 405 (1st Cir. 1995), the First Circuit affirmed the District Court's departure in a sentence for bank fraud because "economic forces not under the control of, or precipitated by the defendants, especially the sudden, unforeseen collapse of the New England real estate market . . . a collapse that decimated the demand for residential condominiums . . . increased the magnitude of the losses." Id. at 405. See also, United States v. Monaco, 23 F.3d 793 (3d Cir. 1994) (departure granted because amount of losses under §§ 2F1.1 overstated defendant's culpability because the defendant's intent was not to steal money from the government, but to obtain a de facto interest-free loan.)

The Koon decision confirms the reasoning of the First and Third Circuits. Under the analysis recommended in Koon, the impact of outside economic forces is an encouraged factor. See Application Note 11 to § 2F1.1. The impact of outside economic forces is not "already taken into account" by 2F1.1. If the Court concludes, as the Stipulation provides, that outside economic force exacerbated the loss, then a departure is justified.

In the instant case, the Stipulation of facts entered into between the parties acknowledges the role outside factors played in

the exacerbation of the amount of fraud and the amount of loss. The Stipulation specifically refers to the negative impact of the recession and the Iraqi invasion of Kuwait on the sale of Buicks in 1990. (See Appendix 1 at p. 8.)

In addition, the numerous letters, including letters from members of the auto industry, acknowledge the role that the rise in imports, the fundamental change in the American auto industry and Mike _____'s desperation at the loss of a business that had been in his family since 1937, played in the offense. (See Appendix 2.)

Such developments had a profound impact on a fraud that was intended to procure a short-term interest-free loan. Because of the "dramatically negative" sales, instead of recovering and paying the loan, the fraud and its consequences escalated. Under the Koon and Rostoff analysis, because 2F1.1 does not take into account the defendant's less culpable intent and the role of outside economic forces played in escalating the loss, a significant departure is justified.

III. A downward departure is justified because the defendant's conduct constitutes "single acts of aberrant behavior."

The defendant's conduct in this matter was "aberrant" and justified a downward departure. The Guidelines specifically "encourage" such a departure. Koon, supra at p. 10. "The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures." U.S.S.G. Ch. 1, Pt. A4(d).

As discussed above, the fraud in this case was motivated by a desperate need to obtain a short-term interest-free loan. Mr. _____ fully intended to repay the loan. Furthermore, Mr. _____, as described in Section I and the report of Dr. Lewin attached at Appendix 3, was suffering from a "diminished capacity" at the time of the offense. Mr. _____ was under extreme pressure to save his family business which was started by his father in 1937 and which he intended to leave to his daughter, Leslie _____. Finally, Mr. _____, as the letters in

Appendix 2 evidence, was a valuable member of the community, who has never been in significant legal trouble before and has performed numerous good acts for fellow members of the community. The conduct in the instant case is the product of unique stress and Mr. _____'s diminished capacity. The criminal acts are obviously "out of character" and constitute "single acts of aberrant behavior." A significant departure is justified.

In United States v. Glick, 946 F.2d 335, 338 (4th Cir. 1991), a case decided prior to Koon, supra, the Fourth Circuit adopted a narrow definition of aberrant behavior demanding that the defendant's conduct be without "extensive planning." The Glick analysis does not follow the procedure recommended in Koon and should not bind this Court. Nevertheless, even under the more narrow Glick standard, the defendant's conduct is "aberrant."

In Glick, the Court reversed the lower court's aberrant behavior departure in a prosecution for interstate transportation of property. The Court found that the defendant's conduct in sending five separate letters to his employer's competitor over a ten-week period and his use of a code to hide the scheme prevented a finding of aberrant behavior.

Because of the extensive planning, number of actions involved, and length of time over which Glick planned and perpetrated his offense, his actions do not constitute a single act of aberrant behavior. The district court erred in so concluding.

Id. at 338 [citation omitted].

In the instant case, while the fraud occurred over a significant period of time, the defendant was operating under a "diminished capacity" and, as the Stipulation concedes, did not and was not able to execute the fraud in any day-to-day manner. Appendix 1, Stipulation of Facts, at p. 10-12.) In fact, he was incapable of performing the ministerial acts necessary to execute the fraud because he was dyslexic and cannot perform rudimentary mathematics. Under the totality of the circumstances, even under Glick, a departure is justified.

Nevertheless, the narrow Glick holding cannot survive in light of the Koon decision. "Single acts of aberrant behavior" is provided for in the Guidelines and, thus, is an encouraged departure. Based upon Koon, the District Court's decision is whether the Guidelines "takes into account," under the "totality of the circumstances," the proffered departure ground. If it does not, then a departure is justified. Koon; see also Grandmaison v. United States, 77 F.3d 555 (1st Cir. 1996); United States v. Takai, 941 F.2d 738, 741 (9th Cir. 1991); United States v. Pena, 930 F.2d 1486, 1494 (10th Cir. 1991).

Section 2F1.1 does not take into account the evidence that the defendant's conduct was "aberrant." The defendant's conduct is a first offense. United States v. Ward, 814 F. Supp. 23 (E.D. Va. 1993) (defendant's relatively crime-free life for many years was basis for departure; Guidelines do not distinguish crime-free life

of young person from someone who has remained crime-free for many years). However, the defendant's evidence of aberration is more than a first offense argument. The defendant's conduct was the product of his desperate circumstances and his diminished capacity. The evidence of his good character in the numerous letters further evidences the aberrant nature of the defendant's criminal act. Most importantly, unlike the defendant in Glick, the defendant's conduct was not the result of "extensive planning," nor did he perform a "number of actions" in achieving the fraud. To the contrary, the evidence in the stipulation and Dr. Lewin's report suggests that the defendant was incapable of performing those tasks. Under either the narrow Glick interpretation or under the recommended Koon analysis, a departure is justified.

IV. A departure is justified because of the collateral consequences which Mr. _____ has suffered as a result of his criminal conduct and conviction.

The discovery of the instant offense resulted in the seizure of Mr. _____'s business, the loss of his home and savings which were in place as additional collateral on the loan to Mellon Bank. In addition, Mr. _____ lost his marriage of 30 years and saw his entire family suffer under the strain of the prosecution and the attendant publicity. (PSR at ¶ 59.) Most painfully, Mr. _____ had to bear witness as his criminal conduct ensnared his daughter, Leslie _____, in the scheme and the prosecution of the scheme to defraud Mellon Bank. Mr. _____'s dream of handing down a family business, in existence since 1937, to his daughter, is shattered. Instead, Mr. _____ now must recognize his responsibility for his daughter's conviction, the destruction of her career, and a potential jail sentence.

In United States v. Gaind, 829 F. Supp. 669 (S.D.N.Y. 1993), aff'd 31 F.3d 73 (1994), the Court granted a departure because a defendant suffered similar collateral consequences from a conviction. In Gaind, the prosecution was for making false statements in connection with contracts for the Environmental Protection Agency. The Gaind Court relied upon 18 U.S.C. § 3553(a) and (b) because the collateral consequences suffered by the defendant, including the loss of his business, made it unlikely

that the defendant could ever obtain such a position in industry to commit such a crime again. Such collateral consequences satisfied the primary goals of sentencing, protection of the public and deterrence.

In addition, Mr. _____ has suffered profound anguish and remorse by seeing his daughter convicted and his entire family torn apart from the stress of the prosecution. Such consequences may serve as an additional ground for departure. See generally, United States v. Monaco, 23 F.3d 793 (3rd Cir. 1994).

Mr. _____ is in therapy and makes his living as a laborer working with horses on a horse farm. He will never be in a position to defraud a bank again. He has lost his business, his home, his standing in the community and much of his family. Mike _____ is indigent, dependent upon his estranged wife for coverage under her medical insurance and court appointed counsel for legal representation.

As in Gaind and Koon, the "judicial tradition" of sentencing allows the Court to consider such extraordinary collateral consequences and grant a departure from the Guideline range.

CONCLUSION

For all the reasons set forth in the PSR and this Memorandum, defense counsel recommends that this Court grant a downward departure of four levels - one level for each of the above-stated grounds. In the alternative, Mr. _____ requests the Court combine grounds, if appropriate, to reach the same result.

Defense counsel respectfully recommends that this Court impose a split sentence of five months imprisonment and five months home confinement with a recommendation he serve his period of confinement at Volunteers of America. This will punish Mr. _____, but will also permit Mr. _____ to retain his community and family ties, maintain his employment and continue his therapeutic relationship with Dr. Lewin. Such punishment meets the needs of the community, Mr. _____ and the long "judicial tradition" of individualized sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

_____I HEREBY CERTIFY that on this 22nd day of July, 1996, a copy of the foregoing Sentencing Memorandum was hand delivered to Jefferson Gray, Assistant United States Attorney, United States Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201.

James Wyda
Assistant Federal Public Defender