

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA :
 :
 :
v. : CRIMINAL NO: 08-10184-GAO
 :
JEFFREY S. WINDLE :

DEFENDANT’S SENTENCING MEMORANDUM
And
MOTION FOR VARIANCE FROM THE GUIDELINE RANGE

Introduction

Jeffrey Windle submits this memorandum to assist the court in determining an appropriate sentence. For the reasons set forth in detail below, the defendant respectfully recommends that the court sentence him to a period of incarceration for not more than 90 months to be followed by the maximum period of supervised release with a special condition that the first six months be spent in home confinement. That sentence is “sufficient, but not greater than necessary” to comply with the purposes set forth in 18 U.S.C. §3553(a)(2). Under the circumstances present in Windle’s offense and personal characteristics, it is a sentence that reflects the seriousness of the offense, promotes respect for the law and provides just punishment. It further recognizes the need for Mr. Windle to resume living in the community in a responsible manner and with the assistance and supervision of the probation office to find a new field of employment that will enable him to begin making amends to Cambium Learning and the Congregational Church of South Dennis and to resume the financial and emotional support of his wife and children.

Under the circumstances of this case, the sentence set by the advisory guidelines is greater than necessary to accomplish the sentencing goals. The particular circumstances that make the advisory guideline range excessive will be discussed below.

Jeffrey Windle pleaded guilty before Your Honor on March 10, 2009, to a 24-count Superseding Indictment that charges him with: (Counts 1-5, 16-20) Mail Fraud in violation of Title 18 U.S.C. §1341; (Counts 6-10,) Wire Fraud in violation Title 18 U.S.C. §1343; (Counts 11-15) Money Laundering in violation of Title 18 U.S.C. §1957; (Ct 21-24) Tax Evasion in violation of Title 26 U.S.C. §7201. He is also named in two Forfeiture allegations for Fraud and Money Laundering, 18 U.S.C. §981(a)(1)(C), §982(a)(1), and §2461(c).

A pair of decisions by the United States Supreme Court outlined the factors that a district court judge should consider in formulating a defendant's sentence, *Gall v. United States*, 128 S.Ct. 586 (2007), *Kimbrough v. United States*, 128 S.Ct. 558 (2007). Those decisions radically transformed the entrenched sentencing practices of the past 20 years, practices that ignored, for the most part, sentencing factors statutorily embedded at 18 U.S.C. 3553(a). Subsequently, the First Circuit weighed in on the scope and extent of a district court's discretion under the now-advisory federal sentencing guidelines. *U.S. v Martin* 520 F.3d 87(1st Cir 2008): "This appeal represents our first full-fledged application of the teachings of *Gall*." The *Martin* court advises: "A sentencing determination should begin with the calculation of the particular defendant's GSR...[including] an assess[ment] of any departures....Properly calibrated, the GSR should serve as the sentencing court's 'starting point' or 'initial benchmark.' *Gall*, 128 S.Ct at 596. Even so, the guidelines are only advisory, *Booker*, 543 U.S. at 262, and the sentencing court may not mechanically assume that the GSR frames the boundaries of a reasonable sentence in every case. *Gall at 596-97*." *Id* 91 Most recently, the Supreme Court emphasized: "Our cases do

not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable.” *Nelson v U.S.* No. 08-5657 (U.S.Sup.Ct. Jan. 26, 2009) (Per Curiam). The final sentence rests with the explained determination of the court. *United States v. Jimenez-Beltre*, 440 F.3d 514, 518-19 (1st Cir. 2006) (en banc). A sentencing judge may additionally reject the Guideline range on the basis of a policy disagreement with the Guidelines. *U.S. v. Spears*, 129 S. Ct. 840, 844 (1/21/09); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008).

Procedurally, as *Gall* and now *Martin* directs, we begin with the Advisory Guideline range.

The Advisory Guidelines

There is disagreement among all the parties regarding the appropriate guideline level. As of this writing, the Presentence Report calculates the offense level of the advisory guideline to be 31, Criminal History Category IV, (guideline range 151 – 188 months), whereas the government submits the correct guideline level is 30 and Criminal History Category IV (guideline range 135 – 168 months).

The defendant believes the appropriate guideline level is 29, Criminal History Category III for a guideline range of 108 – 135 months. Windle’s guideline level of 29 results from the removal of the “sophisticated means” enhancement from the PSR calculations. As explained in the defendant’s Objections to the Presentence Report, the facts related to the enhancement have significant overlap with the “Abuse of Trust” enhancement. Moreover, the Sentencing Commission’s decision to increase the loss table by two levels to incorporate the former enhancement of “more than minimal planning” was done to avoid the overlap between “sophisticated means” and “more than minimal planning”. See Objection to ¶45(c). As a result, courts have forgotten that the definition of “more than minimal planning” contains many of the factors necessary for the application of “sophisticated means.”

The defendant also avers that Criminal History Category III is appropriate because Offenses in ¶¶71 and 72¹ should have been assessed a total of 3 points instead of 4 points because there was no intervening arrest between these related cases. *See* Objections ¶¶72, 76.

Statutory Considerations of Sentencing Factors at 18 U.S.C. §3553(a)

Nature and Circumstances of the Offense

The defendant is in substantial agreement with the government's version of the offense. He admits that he embezzled large sums of money from his employer, Cambium Learning, and the Congregational Church of South Dennis. While we can never know for certain what motivated Mr. Windle to ever embark on such a scheme, there is evidence among documents and letters submitted to the court that provide a profile of a deeply troubled man. To understand if not to excuse this, it is necessary to look at Windle's life beginning from his early childhood experiences.

History and Characteristics of Mr. Windle

Jeffrey Windle, presently 42 years old, was born the second son to a prosperous couple in Sutton, MA. The elder Windle owned a successful textile company based in Millbury, MA. The mother worked as a dental hygienist. Extremely occupied by his business, it seemed that Terrence Windle had little time for the defendant or his wife. While there was no rancor in the home, neither was there warmth and affection. During a recent Psychological evaluation conducted by Jeffrey S. Long, Ph.D, in April, 2009, the defendant advised that his parents divorced when he was a young child because "my mother said she was never in love with my father—they were just friends—the divorce falls in line with how my father is." The defendant believed that all his relations with his father were conducted like a business, with the defendant

¹ The offense described at ¶73 has been vacated and should be removed from the presentence report.

always ending up on the short end. Following the divorce, the defendant and his brother, William, lived with their mother, visiting with their father every other weekend. Windle craved affection from his father, but it was never there. To the contrary, the defendant related to the Probation Officer that his father was “very critical, constantly pointing out Windles’s negative attributes, and ignoring anything positive...The defendant advises that he has spent the majority of his life trying to please his father to no avail, believing that he was not worthy of his father’s love.” PSR ¶86. The defendant’s emotional life is filled with slights from the father that developed into internalized feelings of worthlessness. Even the defendant’s mother who professes profound love and loyalty to the defendant has caused the defendant to feel less than valued. He relates tagging along with his mother while she was looking for another husband. Eventually the mother did find a husband who “was very moody, emotionally abusive toward his wife, and drank heavily.” PSR ¶87. Eventually, in 1992, the couple divorced.

Adding to his depression and emotional isolation, the defendant felt that neither of his parents ever really listened to what he was saying to them. “No matter how I tell my parents how I feel, they tell me, I’ve never felt that way.” Psych report pg4. In the young Jeffrey, the emotional abusiveness of his father and the somewhat emotional distance of his mother created a profound sense of worthlessness. Beginning in his early school years, his depressive nature affected his learning. An average student, Jeffrey was often unfocused and uninterested in school. He had trouble sleeping at night and trouble getting up in the morning. During his junior year in High School, he experienced a depressive episode in which he couldn’t get up in the morning and missed 60 days of school which evidently went unnoticed by his parents until the guidance counselor alerted the parents that Jeffrey was in danger of not graduating.

Neither did the defendant have intimate school friends. Since he summered on Martha's Vineyard where his mother retained a home, he never developed good school buddies. When school mates did pay attention to him, he could not believe they really liked him since, of course, he was worthless. Instead, in his mind, the only thing about him that would attract interest was his father's money and the Windle name as one of the most prosperous families in Sutton. He admits to trying to buy friends in High School, "to get people to like me for what I had, not for who I was." This need to convey the appearance of being prosperous and successful set a pattern for Jeffrey's adult life.

Windle's academic troubles continued into college. He was depressed much of the time during his first year at American International College. Later, he missed so many classes that he failed to graduate from Bentley College after attending there for three years. "I stayed in bed to escape, I don't know what I was escaping from—maybe from not being accepted. I've never had much self-worth." Psych Report Pg5.

Following his college years, he got a job with a financial service company he believes only because of his last name. He firmly believed success depended on who you knew. By the time Windle was 23 year's old he began getting into trouble by stealing small sums of money by returning purchased items and changing the value of the item.

Windle met his future wife, Jeannine, in 1989 shortly before he began criminal episodes of stealing money. She reports "that while they were dating, Windle began to display severe mood swings, occasionally mentioning to her that he felt suicidal and was thinking of hanging himself. She states that his emotional volatility waxed and waned throughout their marriage, but that he always stated that he had 'personal demons' with which he was contending." Psych report pg 9.

Mrs. Windle was unaware of Windle's legal involvement when they married in 1994. She was three months pregnant when Windle began serving his first incarceration for the state in 1996. At the time of his 1997 presentence investigation for the second incarceration and conviction of making false claims on his income tax returns, Jeannine felt that she could not trust the defendant and would need marriage counseling to repair the damage done to the relationship. *PSR ¶.104*. Since then, and in spite of his criminal involvement, Jeannine continues to believe in Windle and has deep affection for him. The couple now have two children, ages 9 and 12.

Over the years of living with Windle, Jeannine has come to know his fragile emotional condition and understands that he is mentally ill. On April 28, 2008, just prior to his arrest for the instant offense, the defendant checked himself into the psychiatric unit at Cape Hospital for fear he would harm himself. Jeannine Windle writes:

I am not going to sugar coat this last year, because it has been an emotional roller coaster. However, I was relieved when Jeffrey was admitted to the psychiatric ward at Cape Cod Hospital. For years life with Jeffrey had been an emotional roller coaster, and the last four, prior to this year, was the worst. So I was hopeful that we were finally going to find answers to Jeffrey's highs and lows of his emotions. I cannot imagine how it feels to deal with feelings of despair and unworthiness everyday of your life, but that is what he dealt with. I suspected there was mental instability there, I couldn't get him to see it. Finally he did, when he was put on medication at Cape Cod Hospital. He told me after he was on the medication that he was "finally seeing things clearly for the first time." It was wonderful to witness him taking the medication, how much better he was. Unfortunately, he is no longer able to receive the medication. It was my one salvation in this terrible nightmare, that my husband was finally getting help...The only thing I know is that dealing with someone who has mental illness is hard, you don't know from one minute to the next, but what I do know is this, I wouldn't trade Jeffrey Windle for who or what he is for anything, for that man is a kind and generous man, for that man once you become his friend, he is a fierce friend, you're his friend no matter what!...I will never condone what Jeffrey has done, but this situation doesn't make him a BAD man, he's a sick man who needs help.

The defendant reports great admiration for his older brother, William, describing him as a "wonder child," stating that he has been successful in a variety of undertakings and holds advanced degrees. Windle has always known that William was his parents' favorite child. Even

in recent times, the defendant complained that his mother always preferred to visit William in Texas than to spend time with the defendant and his family. It appears the approval and love shown to William has resulted in William's success as a businessman and Navy Captain. In spite of William being his parents' favorite, the brothers have great affection for each other.

William Windle writes:

I have talked with Jeffrey regularly about his troubles and the reasoning behind them, and although I live in Texas, I have visited with him in Plymouth. I plan on doing so again on June 18th. He accepts responsibility for what he has done and he is sincere in his remorse, accepting the consequences. I can offer no excuse for what Jeffrey has done, but I do believe that he is an addict to his possessions. His self-worth has manifested itself throughout his life in his belongings.

The court is in possession of other letters from friends who have come to know the defendant as a kind and thoughtful person who cares greatly for his wife and children. A retired guidance counselor who has known Jeffrey his entire life believes that Jeffrey is still able to be rehabilitated with the proper interventions. His uncle writes that he believes Jeffrey is a very sick young man who has let down his family and friends because of a condition that unfortunately none of us understood or corrected.

To be sure, Jeffrey Windle has been damaged since childhood. Dr. Long opines that "In addition to and underlying his depression, Mr. Windle demonstrates considerable personality disturbance in which he has pursued and crafted a grandiose, prosperous, successful façade that masks an underlying sense of inadequacy, emptiness, and self-hatred." Key to understanding Windle's recidivist behavior, Dr. Long continues,

The disparity between the 'ideal' and the 'real' has fueled recurrent incidents of deception and misconduct in his quest to create an illusory life of success and wealth. In the past, Mr. Windle often misrepresented his credentials and circumstances in order to impress and influence others and feverishly tried to acquire possessions to do the same. However, in doing so, he became increasingly anxious and depressed, believing himself to be a fraud and fearing discovery. As such, depression and suicidality emerged not out of his fear of having nothing, but from 'being' nothing—which remains his core belief

about himself. Taken together, Mr. Windle demonstrates aspects of both Narcissistic and Avoidant Personality Disorders—two personality styles that have shame and shame-avoidance at their core. *Report* pg 10.

In spite of his distorted thought processes, Windle has been able to maintain the love of a wife and children. He learned from the mistakes of his parents and is always available to his children. He has provided love and support to friends who care for him, not because of his money, but because he has demonstrated to them that he is a kind and caring person.

Meeting the Purposes of this Sentence

As Jeffrey Windle stands now before the Court for disposition, the Court must impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in the statute at 18 U.S.C. §3553(a)(2) i.e., (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 education or vocational training, medical care, or other correctional treatment in the most effective manner.

The defendant wishes the Court to consider that a sentence of 90 months followed by the maximum term of supervised release with a condition of the first six months in home confinement is sufficient to meet the purposes prescribed by the statute. Removal from his family and the community for seven and a half years, followed by three years of Supervised Release and six months home confinement is sufficient to provide a just punishment and promote respect for the law. The felony conviction alone should prevent Windle from ever working in a position where he has access to the finances of a company or a person. The enormity of the theft in this case mandates a punishment that removes Windle from the community for a substantial period of time. But there is some concern for Windle's post-incarceration life and the expressed

need of ongoing mental health treatment to address his problems. Dr. Long suggests “Although medication may be a necessary component of his treatment, in my clinical opinion, medication alone will be insufficient in dealing with his deep-seated emotional and interpersonal issues. As such, Mr. Windle would benefit from long-term interpersonally-based psychotherapy that addresses his personality disturbance, his distorted sense of identity and relationships, and their associated behavioral sequelae.” Psych report pg 11. For this reason, the defendant asks the court to place him under the able supervision of the Federal Probation Office for the maximum period of supervised release. It is noteworthy that while he was under Probation’s supervision in the past, he committed no new offense.

There is general deterrence in the sentence as the message is sent that stealing from your employer will result in significant loss of liberty. Specific deterrence has already been met as the defendant has lost his career as an office manager; he will spend a significant amount of time in jail; his friends and family are now aware of the offense and of Windle’s mental condition and his dark secret. Although his children are still young, there will be a time when he must explain to them that he did wrong and attempt to repair the damage he has done to their confidence in him. He will be monitored not only by Probation, but his family members too.

Whatever the Court decides regarding his remaining obligation to pay restitution (following the forfeiture) will have to wait until he is released from jail and able to secure employment. He knows that he is also obliged to meet with the IRS and pay taxes on the embezzled funds. All of these financial obligations will be further removed and unpaid the longer he is incarcerated.

The public is not in need of further protection from the defendant. Even after he leaves the watchful eye of his probation officer, continued psychotherapy and his record should prevent

him from committing this crime again. Nor is there is any evidence that Windle is aggressive or violent or prone to harm anyone.

Finally, §3553(a) requires the court to consider correctional treatment in the most effective manner. Mr. Windle is prepared to be incarcerated and he sees it as his just punishment for violating the trust of his employer and his church. His remorse is clear to all who have spoken to him since his arrest. Seven and a half years incarceration will give him time to receive counseling and possibly medication that will stabilize the effects of his mental disorder.

Finally, the sentence should avoid unwarranted disparity with similarly situated defendants. To that end, some consideration may be given to the Sentencing Commission data on sentences imposed for the past 22 years. It is noteworthy that since *Blakely* and *Booker*, judges across the country have been consistently imposing sentences below the guidelines in property cases where the main guideline is §2B1.1. While the Commission does not offer an explanation, it is apparent that courts across the country believe that the fraud guideline has been raised to a height that is unsustainable.² It is difficult to find the exact details of each sentence reported to the Commission. But anecdotal stories are of some significance. For example, Mitchel Guttenberg was sentenced in U.S.District Court, SD/NY (No.07-00141, 11/03/2008) to 6.5 years after having stolen \$15.8 million in insider trading; *U.S. v Thurston*, 544 F.3d 22 (1st Cir.2008), a three month sentence for Medicare Fraud in the amount of \$5million is upheld over a guideline range of 63 – 78 months.

² See U.S.Sentencing Commission, 2003 – 2008 Datafiles, USSCFY03-USSCFY08. A graph at Figure D shows the Average Sentence Length and Average Guideline Minimum Quarterly Data for §2B1.1 Offenders (Theft, Property Destruction, and Fraud) Fiscal years 2003-2008. Whereas the average (mean) guideline and sentence overlapped in 2005 at 14 months, by 2008, the mean guideline sentence increased to 23 months, while the mean sentence imposed dropped 18 months. The graph dramatically shows the mean sentence imposed to be consistently below the guideline mean.

All things considered, the defendant respectfully submits that any sentence greater than 90 months will only serve to punish his wife and children. He asks the court to consider the length of that sentence, not for himself, but for the harm an extended absence from his wife and children will do to them.

Respectfully submitted, Jeffrey S. Windle,
By his Attorney,

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