

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA : Case No. 3:08CR110(JBA)
: :
: :
v. : :
: : September 16, 2008
CYNTHIA MCCLENDON :

UNITED STATES' REPLY TO DEFENDANT'S SENTENCING MEMORANDUM

I. Introduction

The Government respectfully submits this memorandum in response to defendant's sentencing memorandum dated September 9, 2008 [doc. #28]. Sentencing in this case has been scheduled for Monday, September 22, 2008 at 10:00 a.m. The memorandum explains why the Presentence Report ("PSR") properly calculates the defendant's sentencing range under the U.S. Sentencing Guidelines, addresses certain assertions and arguments offered by the defendant, and leaves to the discretion of the Court the appropriate sentence to be imposed in the case in light of the factors outlined in 18 U.S.C. § 3553(a).

This Court must fashion a sentence for Cynthia McClendon that promotes respect for the law. The sentence must reflect the seriousness of the offense committed by Cynthia McClendon as well as provide a message, both specifically to her and generally to individuals who are employed by government entities and entrusted with confidential information that their position, and the information to which they are entrusted as a result of that position, is not and cannot be for sale.

II. The Sentencing Guidelines

A. The Law

The Supreme Court clarified the continuing role of the Sentencing Guidelines and the scope of the sentencing court's discretion in United States v. Booker, 543 U.S. 220 (2005). Booker makes clear that this Court must consider both the sentencing factors set forth in 18 U.S.C. Section 3553(a), and the Sentencing Guidelines in fashioning a reasonable sentence. Id. at 249. While the Sentencing Guidelines are no longer mandatory following Booker, they must still be considered in determining the appropriate sentence. Because the Guidelines reflect the Sentencing Commission's considered judgment about all of the factors set forth in § 3553(a), the Supreme Court and the Second Circuit have made it clear that the Guidelines continue to play a central role in a sentencing court's § 3553(a) calculus. The Second Circuit has recognized the continuing relevance of the Sentencing Guidelines following Booker in determining an appropriate sentence:

[I]t is important to bear in mind that Booker/ Fanfan and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge. Thus, it would be a mistake to think that, after Booker/Fanfan, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum. On the contrary, the Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to "consider" the Guidelines and all of the other factors listed in section 3553(a). We have every confidence that the judges of this Circuit will do so, and that the resulting sentences will continue to substantially reduce unwarranted disparities while now achieving somewhat more individualized justice.

United States v. Crosby, 397 F.3d 103, 113-14 (2d Cir. 2005).

Under the non-mandatory Guideline regime established by Booker and Crosby, the

sentencing judge is empowered to make the factual findings necessary for determining what the recommended Guideline Sentence is in a particular case. Crosby, 397 F.3d at 113 (“the sentencing judge is entitled to find all the facts appropriate for determining either a Guidelines sentence or a non-Guidelines sentence”).

The judge must consider the Guidelines in conjunction with the other factors enumerated in § 3553(a), in order to determine whether there is any reason to deviate from the guideline range. These factors include: (1) “the nature and circumstances of the offense and history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, (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 sentencing range set forth in the Guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims.

B. The PSR Properly Calculates the Defendant’s Guidelines Sentencing Range at 4-10 Months of Imprisonment.

The Government agrees with the PSR’s calculation of the defendant’s Guidelines range. More specifically, as part of the plea agreement in this case, the Government and the defendant agreed that the defendant's applicable Sentencing Guidelines to be at a range of 4 to 10 months’ imprisonment and a fine range of \$1,000 to \$10,000. With respect to the theft/bribery in federal programs, the Government and the defendant stipulate that the base offense level under U.S.S.G.

§ 2C1.1 is 11. Two levels are subtracted under U.S.S.G. § 3E1.1 for acceptance of responsibility, resulting in a total offense level of 9. A total offense level of 9 with a criminal history I, which the parties calculate the defendant to be, results in a guideline range of 4-10 months' imprisonment and a fine range of \$1,000 to \$10,000(U.S.S.G. § 5E1.2(c)(3)).

As part of the plea agreement, the defendant and the Government agreed that in addition to the other penalties provided by law, the defendant would make restitution to the Government in the amount of \$550, which represents the value of the gratuities accepted by her during the investigation.

At this time, the defendant has requested a departure from the Guidelines range or a non-Guidelines sentence, that being a sentence of probation. The defendant has accepted responsibility and acknowledges that she took money as consideration for giving Philip Jacobs a legal file, "knowing it was wrong." PSR ¶ 12. The defendant has acknowledged that for ten years she accepted gratuities from Philip Jacobs and Robert Jacobs in return for providing confidential and privileged information to the Jacobs which assisted the Jacobs in the bail bond business. PSR ¶¶ 8-9. As a result of the relationship, it is estimated that Robert Jacobs paid the defendant \$50 every six weeks over the years and Philip Jacobs probably \$1500 over the years. *See* Arrest Affidavit ¶ 23-24. In this instance, albeit for small dollar amounts, because of the gratuities corruptly accepted, the defendant breached the integrity of the State Public Defender's Office in a way that brings disrepute to the judicial system.

C. The Defendant's Conduct Was Not An Isolated Incident Based On a Lack Of Understanding

As noted above, the defendant recognizes that her conduct was wrong. The Government

agrees with the defendant and recognizes that the Jacobs had the money and made the requests of her. The Government does, however, take issue with the assertion that “it is not clear that she fully understood the ramifications of the attorney/client privilege especially since the only information that she was giving out was location information for absconders.” Defendant’s Sentencing Memo (Def. Memo.) at 14. The defendant did not simply give out information relating to absconders. She provided both Philip Jacobs and Robert Jacobs with client files. In that regard, it is significant to note that counsel for defendant requested a copy of the file that his client provided to Jacobs on July 30, 2008 in return for \$500.00. In response to the request, the Government notified counsel that neither the undersigned attorney nor the agents working on the investigation and prosecution had viewed the file. In the course of the investigation, Cynthia McClendon provided Philip Jacobs with a client file from the Public Defender’s Office. Without more, the Government treated the file as privileged and had agents, unrelated to the case, make a copy of the file and seal the copy. At the defendant’s request and on April 1, 2007, Philip Jacobs returned the original file to Cynthia McClendon.

On May 20, 2008, Debra Del Prete Sullivan, Legal Counsel to the Office of the Chief Public Defender, unsealed and reviewed the copy of the file. She represented to the Government that, in fact, there were two files for an individual client and that the State Public Defender’s Office was asserting a privilege over both files. She generally described the contents of the files as: (1) Two Applications for the services of a Public Defender; (2) Attorney Notes; (3) Two Appearance Forms for the Assistant Public Defender Jim Chase; (4) Two New Haven Case Incident Reports; (5) Two Different Computerized Records (likely from the Judicial Department, either from the criminal motor vehicle docket or CJIS); and (6) a criminal record of the client.

Ms. Del Prete Sullivan maintained that, absent a court order, the State Public Defender's Office would not produce items (1) and (2) on the basis of the attorney/client and work product privileges and items (3)-(6) on the basis of general confidentiality. Thus, the Government could not make the file available for review.

Indeed, that Cynthia McClendon recognized the seriousness and wrongfulness of her actions is manifest from her statements to Philip Jacobs. On July 30, 2007, when Jacobs asked for a client file, she responded that "If I get this file, I will have to give it to you by my house." Within approximately 15 minutes, the defendant telephoned Philip Jacobs and told him that she had the file. McClendon stated that "[W]e need to be careful. I could get fired for this. We need to meet on Olive Street near my house." Philip Jacobs and the defendant met later that day on Olive Street. The meeting was recorded. During the in-person meeting, the defendant again stated that "listen I will get fired. ... Don't let nobody see that file." Philip Jacobs gave her \$500 (provided by the FBI) and told her "I gave you extra, don't count it now. I want you to have it. You have done a lot for me over the years." The defendant did not hesitate in accepting the cash and replied "Okay. Don't let nobody see the file. Make copies of it." On August 1, 2007, Philip Jacobs returned the client file to the defendant. The meeting was recorded both audio and video. Philip Jacobs thanked McClendon for the file. Cynthia McClendon told Philip Jacobs that what he did for her was a blessing and that she bought clothes for her parents. Philip Jacobs inquired as to whether he could count on her again and McClendon responded "[w]e need to be careful- don't call the office, call me at home..." The defendant recognized the seriousness of her actions; knew that she must return the file; but finally was willing to continue the mutually beneficial and corrupt relationship.

The corrupt relationship was one that existed for many years. In other words, July 30, 2007 was not the first time that the defendant had provided a client file to the Jacobs. Cynthia McClendon accepted cash from Philip Jacobs over the past 10 years as consideration for her providing him with original intake or rearrest client files to review to assist him in the bail business. Philip Jacobs returned some but not all of the files to McClendon. In addition, Cynthia McClendon also accepted cash from Robert Jacobs as consideration for her providing information to him. In addition, Robert Jacobs “loaned” the defendant \$100-\$200 approximately 5 or 6 times and Cynthia McClendon paid back some but never all the money. For example, when a person for whom Robert Jacobs had posted a bond failed to appear, Cynthia McClendon provided him with contact information from the Public Defender’s file. In addition, on approximately 5 or 6 occasions, Cynthia McClendon gave Robert Jacobs a client’s file in an envelope. Robert Jacobs would then take the file to the 3rd Floor of the New Haven Courthouse in order to review it. After reviewing the file and obtaining any helpful information, Robert Jacobs returned the file to the defendant. PSR ¶ 8.

The defendant submits a character letter in which the person writes “It is sadly ironic that these men (the Jacobs) will profit from the solicited misdeed of the very person they corrupted. It turns to the concept of justice on its head.” That the Jacobs may be more culpable and may have benefitted to a greater extent financially does negate the fact that the defendant’s conduct was not an isolated incident but rather was part of a long term, corrupt relationship in which she sold the confidences of a law office. That the defendant must face the consequences of her criminal acts and be sentenced by a Court, which has the full picture of the corruption, to include the relative culpability of the various players, before it, hardly turns justice on its head.

III. Conclusion

Based on all the facts of this case, the Government respectfully requests that the Court impose a sentence in this case that reflects the seriousness of the offense, promotes respect for the law, and provides just punishment.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on September 16, 2008, a copy of the foregoing was filed electronically, by facsimile and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Nora R. Dannehy
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