UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

United States of America	)	
	)	
v.	)	**No. 3:12-CR-60**
	)	**Judge Greer**
Richard Baumgartner a/k/a "JB," a/k/a "Judge B"	)	

United States of America's Response to Defendant's Sentencing Memorandum (R. 160) and Defendant's Reply to Government's Sentencing Memorandum (R. 163)

The United States respectfully offers this response to Defendant's Sentencing Memorandum (R. 160) and Defendant's Reply to the United States's Sentencing Memorandum (R. 163). In his sentencing documents, Defendant asks the Court for probation. There are cases where a sentence of probation is appropriate. This is *not* one. And, there are cases where a sentence above the Guidelines range is appropriate. This *is* one. The Court, therefore, should depart and/or vary upward to impose a sentence of at least 24 months' imprisonment.

A. Probation is inappropriate in this case.

Defendant requests that the Court impose a sentence of 24 months' probation. In support of that request, Defendant has submitted numerous letters from friends and former colleagues. That is neither surprising nor remarkable. It happens in almost every case where the defendant is educated and well-connected. The United States is confident, however, that as the Court undertakes the difficult task of imposing sentence it will keep in the forefront of its mind the evidence that was introduced against Defendant at trial. Evidence such as Defendant—in his judicial chambers—recruiting a former participant in his Drug Court to buy drugs for him.

Evidence such as Defendant using a taxpayer-funded cell phone to arrange drug deals. Evidence such as Defendant having drugs delivered to him in the courthouse. And, evidence such as Defendant using his power and position to try and cover it all up by making misrepresentations to other people (including three judges and a prosecutor).

At one time, Defendant may have been a good lawyer, a good judge, and a community leader. He may have a law degree, and he may have distinguished friends willing to write letters on his behalf. But, none of that changes what Defendant did and the harm his conduct has caused. As Defendant sees things, his prior employment and educational pedigree are mitigating factors. The opposite is true. After all, "[c]riminals who have the education and training that enables people to make a decent living without resorting to crime are more rather than less culpable than their desperately poor and deprived brethren in crime." *United States v. Kuhlman*, ____ F.3d ____, 2013 WL 857344, at *7 (11th Cir. 2013) (internal quotations omitted) (reversing below-Guidelines probationary sentence for chiropractic physician convicted of fraud); *see also United States v. Bistline*, 665 F.3d 758, 766 (6th Cir. 2012) (reversing below-Guidelines sentence and stating "[w]e do not believe criminals with privileged backgrounds are more entitled to leniency than those who have nothing left to lose") (internal quotations omitted).

Defendant has also argued that imprisonment is unnecessary because the interest in deterrence has already been served through his "public humiliation, loss of judicial position, disbarment, loss of pension benefits,[1] and the stigma of having a permanent felony conviction."

[1]The Court should be aware that Defendant is currently appealing the termination of his pension. In his appeal, Defendant claims, *inter alia*, that his convictions in this case were unrelated to his judicial position. Defendant's appeal of his pension termination is still pending.

(R. 160, Defendant's Sentencing Memo at 25.)[2] That argument lacks merit. Section 3553(a)(2) "plainly states that the *sentence* imposed" should afford adequate deterrence. *Bistline*, 665 F.3d at 765 (emphasis in original) (addressing § 3553(a)(2)(A)). None of the things mentioned by Defendant are "consequences of his sentence, as opposed to consequences of his prosecution and conviction." *Id*. Consideration of "these sorts of consequences—particularly ones related to a defendant's humiliation before his community, neighbors, and friends—would tend to support shorter sentences in cases with defendants from privileged backgrounds, who might have more to lose along these lines." *Id*. at 765-66. Accordingly, "recitation of these collateral consequences therefore does nothing" to support Defendant's argument regarding what his sentence should be in this case. *Id.*[3]

Defendant has also asked the Court to consider that he "voluntarily retired" from the bench and surrendered his law license. (R. 160, Defendant's Sentencing Memo at 8.) In reality, Defendant retired and surrendered his license only *after* he was visited by TBI agents and confronted with evidence of his criminal activities. He took those actions only after being caught. That is not particularly commendable. Nor should it be viewed as an act of accepting responsibility—especially considering that Defendant proceeded to trial where he put the United States to its burden on each count.

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[2]Defendant has described misprision as "quite obscure and antiquated." (R. 160, Defendant's Sentencing Memo at 25.) While misprision may be charged less frequently than some crimes, it bears mentioning that, according to Defendant's own statistics, between October 2011 and September 2012 there were 351 misprision sentences imposed. (*Id*. at 27.)

[3]In *Bistline*, the Court reversed the district court's sentence of one night in jail for a child pornography defendant. *Id*. at 760. As part of its analysis, the Sixth Circuit faulted the district court for considering collateral consequences of the defendant's conviction when determining the appropriate sentence under § 3553(a). *Id*. at 765.

A sentence of probation would fall at the bottom of the Guidelines range. This is not a case for the bottom of the Guidelines range. Instead, it is a case for a sentence above the Guidelines range because Defendant's conduct was "extraordinary" and "a shock to our system of justice and the rule of law." *United States v. McCafferty*, 482 F. App'x 117, 127 (6th Cir. 2012) (affirming above-Guidelines sentence for a defendant who committed criminal acts while a sitting judge).

B. An upward departure and/or variance is appropriate in this case.

An upward departure and/or variance is appropriate in this case. Nothing Defendant has said in his sentencing documents changes that fact. The United States will not regurgitate its prior analysis here. Instead, the United States will address two specific issues.

1. Defendant's reliance on *United States v. Ellis*, 419 F.3d 1189 (11th Cir. 2005) is misplaced.

First, Defendant mistakenly argues that his position regarding the inapplicability of U.S.S.G. § 5K2.7 is supported by *United States v. Ellis*, 419 F.3d 1189 (11th Cir. 2005). *Ellis* is different from the current case because there the governmental disruption resulted from conduct for which the defendant was not convicted. *Id*. at 1192-93. The defendant in *Ellis* (a former district attorney) was convicted of violating 18 U.S.C. § 1001. *Id*. at 1190. But, the significant governmental disruption argument was based on the defendant's sexual relationship with someone he was prosecuting—conduct that was not the basis for the § 1001 conviction. *Id*. at 1191-92. As the Eleventh Circuit explained, "any disruption" to governmental services was not a result of the defendant lying to the FBI. *Id*. at 1192. Rather, it was a result of the defendant having sex with a person he was prosecuting. *Id*. That was the basis on which the *Ellis* court distinguished its prior decision in *United States v. Gunby*, 112 F.3d 1493 (11th Cir. 1997). *Ellis*,

419 F.3d at 1192 (explaining that the governmental disruption caused by the corrupt judge in *Gunby* "was actually attributable to the fraud to which Gundy pled guilty").

The current case is more like *Gunby* than *Ellis*. In *Gunby*, the defendant was a sitting state court judge who was convicted of embezzlement. *Gunby*, 112 F.3d at 1494. The *Gunby* court concluded that the defendant's behavior warranted an upward departure because it "cause[d] people to question the integrity and impartiality of the judiciary therefore undermin[ing] the rule of law and disrupt[ing] the functioning of the courts." *Id*. at 1502. Here, like *Gunby* and unlike *Ellis*, the conduct for which Defendant has been convicted is the same conduct that has significantly disrupted the Knox County criminal justice system by causing a loss of confidence in the system's integrity.

Defendant attempts to distinguish *Gunby* by arguing that the corrupt judge's embezzlement affected 33,601 cases, while Defendant's conduct involved significantly less cases. (R. 163, Response at 11.) The fundamental problem with Defendant's argument is that the corrupt judge's conduct in *Gunby* affected cases only in the sense that the litigants paid an inflated filing fee. *Gunby*, 112 F.3d at 1496. Here, on the other hand, cases were *actually* affected by Defendant's criminal conduct—jury verdicts in horrific cases involving innocent victims were thrown out and new trials ordered. That did not happen in *Gunby*. Defendant's conduct has caused more harm to the justice system than the defendant's conduct did in *Gunby*. And, it should not be lost on this Court that the defendant in *Gunby* received an above-Guidelines sentence of 41 months' imprisonment. *Id*. at 1502.

Defendant has argued that *Gunby* and many of the other cases cited by the United States are distinguishable for one reason or another. But, Defendant has not attempted to distinguish the Sixth Circuit's recent decision in *McCafferty*. In *McCafferty*, the Sixth Circuit affirmed the

district court's decision to vary upward from a 0-6 month Guidelines range to impose a sentence of 14 months' imprisonment for a state court judge convicted of violating 18 U.S.C. § 1001. *McCafferty*, 482 F. App'x at 119, 126. When describing its rationale for affirming the above-Guidelines sentence, the *McCafferty* Court agreed that the upward variance was warranted due to the "severe nature of McCafferty's offense, and how it shakes the very core of our system of justice." *Id*. at 128 (quoting the district court).

At the district court level, the judge-turned defendant in *McCafferty* sought probation just as Defendant does today. (N.D. Ohio, 1:10-CR-00387-SL, Sentencing Memo, R. 354, Page ID #3671.) And, in making that request the defendant in *McCafferty* tore a page from the same playbook as Defendant; she submitted ninety-five pages of letters of support from attorneys, friends, and other community members. (*Id*. at R. 354-1, Appendix, Page ID#3672-3766.) She also filed a sentencing memorandum highlighting her community service and her professional accomplishments throughout her legal career. (*Id*. at R. 354, Sentencing Memo Page ID#3653-3664.) The district court considered all of that information, found it unpersuasive, and varied upward to a sentence of 14 months' imprisonment after concluding that a sentence within the 0-6 Guidelines range would have been "woefully inadequate." *McCafferty*, 482 F. App'x at 126-27 (affirming the district court's decision). The same is true here; an upward departure and/or variance is warranted.

2. Defendant's criminal conduct was the cause of great harm to the citizens of Knox County and the justice system in general.

Defendant has characterized the impact of his conduct on the Knox County criminal justice system as "a smooth and orderly transition." (R. 163, Response at 5.) When one thinks of what happened in the Knox County criminal justice system as a result of Defendant's conduct,

however, the words "smooth and orderly" do not come to mind. A more apt description was offered by veteran criminal defense attorney and law professor, Richard Gaines: "It's a giant mess." Jamie Satterfield, *More Questions Than Answers After Fatal Carjacking Convictions Tossed Out*, Knox News Sentinel (Dec. 2, 2011).[4]

Despite Defendant's attempt to paint a different picture, he is responsible for that "giant mess." He is responsible for the motions, the appeals[5], the hearings, and the retrials. He is responsible for the additional taxpayer expenditures and hours of extra labor by government employees. He is responsible for the victims of heinous crimes (such as murder and rape) having to relive those experiences. But for Defendant's conduct, those things would not have happened. It is that simple.

One of the individuals who will receive a new trial due to Defendant's conduct is Jayson Bailey, a child rapist. The child victim's family members made the following statements that accurately sum up the harm Defendant has caused both to the individual victims, as well as the criminal justice system as a whole: "We're supposed to trust the judicial system in Knox County again? Sorry I don't trust them one bit. . . . [The child victim] did everything she was supposed to do and the justice system failed her. Judge Baumgartner failed her . . . ." WBIR, *Baumgartner's Misconduct Calls Another Case Into Question* (December 16, 2011) (*available at* www.wbir.com/news/article/194457/2/Baumgartners-misconduct-calls-another-case-into-question). Defendant's conduct has caused great harm to innocent individuals and the Knox County criminal justice system. His sentence should reflect that fact.

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[4]The United States may present testimony at the sentencing hearing to establish the extent to which the Knox County criminal justice system has been significantly disrupted.

[5]Those appeals included a petition for writ of certiorari to the Supreme Court of the United States, which required a response by the Tennessee Attorney General's Office. *See Thomas v. Tennessee*, 133 S. Ct. 838 (2013) (denying certiorari).

Conclusion

For the reasons stated above and in its original Sentencing Memorandum, the United States believes that an above-Guidelines sentence of at least 24 months' imprisonment would be sufficient but not greater than necessary to serve the purposes of sentencing.

Respectfully submitted,

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