

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

UNITED STATES OF AMERICA

v.

CRIMINAL NO. [REDACTED]

[REDACTED] [REDACTED] [REDACTED], et al.

**DEFENDANT [REDACTED]'S SUPPLEMENTAL SENTENCING MEMORANDUM
AND MOTION FOR DOWNWARD DEPARTURE
IN LIGHT OF *UNITED STATES V. BOOKER***

COMES NOW the defendant, [REDACTED] [REDACTED] [REDACTED], by counsel, and submits this supplemental sentencing memorandum in light of *United States v. Booker*, 125 S. Ct. 738 (2005).

Summary of Argument

I. On January 12, 2005, the U.S. Supreme Court held that the Sixth Amendment right of jury trial applied to the U.S. Sentencing Guidelines because district courts were required to apply the Guidelines and required to increase guideline ranges based upon findings of aggravating facts. The Court then obviated the Sixth Amendment requirement by finding that the Guidelines had to be made advisory. Accordingly, district courts now are to continue with fact-finding, but are to treat the advisory guideline range as only one of a number of factors to consider in determining a sentence under 18 U.S.C. § 3553(a).

II. In determining that statutory sentence, courts are bound by the mandate and overarching principle expressed in Section 3553(a): that they impose sentences that are sufficient but not greater than necessary, to comply with the purposes of sentencing expressed in the statute. These purposes are retribution, deterrence, incapacitation, and rehabilitation. The factors that the court are to consider in determining a sentence are the facts relating to the offense and the defendant, the kinds of sentences

available, the Sentencing Guidelines Manual, including the (now non-mandatory) guideline range, the need to avoid unwarranted sentencing disparity, and the need to provide restitution where applicable. Whereas neither Section 3553 nor *Booker* suggests that any one of these factors is to be given greater weight than any other factor, it is clear that all of these factors are subservient to Section 3553(a)'s mandate to impose a sentence not greater than necessary to comply with the four purposes of sentencing. Further, although courts have differed already on how much weight to give to the advisory guideline range (i.e., whether to give it weight equal to or greater than the other factors), the better approach is to treat it equally. Should this Court decide that the advisory guideline range is the dominating factor, then Mr. [REDACTED] objects on the basis that such treatment effectively makes the Guidelines binding again and thus violates his rights under the Sixth Amendment.

III. In order for a sentence imposed under Section 3553 to be reasonable, a district court must begin with a correct determination of the guideline range. In addition to the objections raised last August, Mr. [REDACTED] further argues that in this case, the Court should apply reasonable doubt as the appropriate standard of proof, not merely preponderance of evidence, for three reasons. First, neither Congress nor the Sentencing Commission prohibit application of the higher standard. Second, due process requires it in this case, to ensure accurate fact-finding and public confidence in the outcome. Third, several other courts have already concluded after *Booker* that application of the reasonable doubt standard is appropriate and necessary. Finally, even before *Booker*, courts recognized that certain cases required application of a standard of proof higher than simply preponderance.

Additionally, in calculating the final offense level used to determine the advisory guideline range, the Court should depart down on several bases. First and foremost, the current offense level of 41 severely

overstates the seriousness of the offense because of (1) the dramatic difference between the alleged intended loss and the actual loss amounts, (2) the unusually large number of adjustments applied under both the fraud and money-laundering guidelines, and (3) the fact that Mr. ██████ did not personally benefit from the fraud. Second, a downward departure is warranted based on the combination of Mr. ██████'s charitable work and his family ties and responsibilities. Accordingly, Mr. ██████ argues that the final offense level should be 23, which when combined with Criminal History Category III yields an advisory guideline range of 57-71 months.

IV. After determining the final advisory guideline range, this Court must then determine what sentence is appropriate under Section 3553. Mr. ██████ first argues that this Court should not consider any aggravating factors beyond those that are already reflected in the advisory range, because, by analogy to capital cases, the sentencing authority may consider only those aggravating factors expressly authorized. The Sentencing Guidelines account specifically for many aggravating factors, providing for significantly more increases than decreases in offense level, as this case illustrates. In contrast, the Court is not limited in what mitigating factors it may consider. In light of the factors expressed in Section 3553, Mr. ██████ argues that he be sentenced to a term of imprisonment that does not exceed the advisory guideline range he has argued properly applies. Further, a sentence below the advisory guideline range is warranted.

Argument

I. The Booker Holdings

In his original sentencing pleading, filed August 27, 2004, Mr. ██████ objected to the application of upward adjustments to his offense level in part on the basis of *Blakely v. Washington*, 124 S. Ct. 2531

(2004).¹ Specifically, Mr. ██████ argued the holding of *Blakely* applied to the federal Sentencing Guidelines, and therefore that no enhancement could be applied in his case that had not been either found by a jury beyond a reasonable doubt or admitted by him.

The Supreme Court has now decided that *Blakely* does in fact apply to the Guidelines. *Booker*, 125 S. Ct. at 755-56 (opinion by Stevens, J., for Sixth Amendment majority) (5-4). However, in a second opinion, authored by Justice Breyer, the Court ruled 5-4 that the mandatory nature of the federal sentencing guidelines is “incompatible” with the *Booker* Court’s Sixth Amendment holding, and that therefore 18 U.S.C. § 3553(b)(1) (providing that district courts “shall” impose a guidelines sentence) and § 3742(e) (setting forth standards of appellate review) can and must be severed from the remainder of the Sentencing Reform Act and excised. *Id.* at 756-57 (Breyer, J., for remedy majority). This, in the remedy majority’s words, makes the sentencing guidelines “effectively advisory” in all cases. *Id.* at 757. The result is that district courts must now impose a sentence that is “sufficient but not greater than necessary” to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), after considering:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the kinds of sentences available;
- (3) the guidelines and policy statements issued by the Sentencing Commission, including the (now non-mandatory) guideline range;

¹ By filing this supplemental pleading, Mr. ██████ in no way retreats from the arguments he raised in his initial pleading as to the non-*Blakely* objections regarding the calculation of loss under U.S.S.G. § 2B1.1(b)(1) and U.S.S.G. § 2S1.1(a)(1), the determination of the number of “victims,” U.S.S.G. § 2B1.1(b)(2), and the enhancement for allegedly obstructing justice, U.S.S.G. § 3C1.1.

- (4) the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct; and
- (5) the need to provide restitution to any victim of the offense.

18 U.S.C. § 3553(a)(1), (3)-(7).

II. Determining a Sentence Generally After *Booker*

Section 3553(a) has been described in *Booker* and much post-*Booker* case law as containing various “factors” – one of which is the Sentencing Guidelines and the guideline range calculated pursuant to them – that must now be considered in determining a sentence. This is a potentially misleading oversimplification. Section 3553(a) is actually comprised of two distinct parts: the so-called “sentencing mandate” contained in the prefatory clause of Section 3553(a), and the “factors” to be considered in fulfilling that mandate. The sentencing mandate is an overriding principle that limits the sentence a court may impose.

A. The Section 3553(a) Sentencing Mandate: The “Parsimony Provision”

The basic mandate and overriding principle of Section 3553(a) requires a district court to impose a sentence “*sufficient, but not greater than necessary,*” to comply with the four purposes of sentencing set forth in Section 3553:

- (a) retribution (to reflect seriousness of the offense, to promote respect for the law, and to provide “just punishment”);
- (b) deterrence;
- (c) incapacitation (“to protect the public from further crimes”); and
- (d) rehabilitation (“to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

18 U.S.C. § 3553(a)(2).

The sufficient-but-not-greater-than-necessary requirement has been described as the “parsimony provision.” *See, e.g., United States v. Brown*, ___ F. Supp. 2d ___, 2005 WL 318701, at *6 (M.D. Pa. 2005); *see also Bifulco v. United States*, 447 U.S. 381, 387 (1980) (explaining that statutory construction “rule of lenity” applies to sentencing statutes as well as to substantive criminal offense statutes). The parsimony provision is not just another “factor” to be considered along with the others set forth in Section 3553(a). Rather, it sets an independent upper limit on the sentence a court may impose.

B. The Section 3553(a) Factors to Be Considered in Complying With the Sentencing Mandate

In determining what sentence is sufficient but not greater than necessary to comply with the Section 3553(a)(2) purposes of sentencing, the court must consider several factors listed in Section 3553(a). These are (1) “the nature and circumstances of the offense and the history and characteristics of the defendant;” (2) “the kinds of sentence available;” (3) the guidelines and policy statements issued by the Sentencing Commission, including the (now non-mandatory) guideline range; (4) the need to avoid unwarranted sentencing disparity; and (5) the need to provide restitution where applicable. 18 U.S.C. § 3553(a)(1), (a)(3), (a)(5)-(7). Neither the statute itself nor *Booker* suggests that any one of these factors is to be given greater weight than any other factor. However, what is clear is that all of these factors are subservient to Section 3553(a)’s mandate to impose a sentence not greater than necessary to comply with the four purposes of sentencing.

Because of the ambiguity in the statute and opinion, the first two published district court sentencing opinions after *Booker* have presented two very different views regarding how much weight should be given

to advisory guidelines. Judge Cassell of the District of Utah, only one day after *Booker* was decided, ruled that he will continue to give “considerable weight” or “heavy weight” to the sentencing guidelines, deviating from the applicable range only “in unusual cases for clearly identified and persuasive reasons.” *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005); *see also United States v. Wilson*, ___ F. Supp. 2d ____, 2005 WL 273168 (D. Utah Feb. 2, 2005) (reaffirming position and responding to critics of first *Wilson* decision).

In a much better reasoned opinion, Judge Adelman of the Eastern District of Wisconsin disagreed, noting that *Wilson* is inconsistent with the remedial majority in *Booker*, which “direct[s] courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore.” *United States v. Ranum*, 353 F. Supp. 2d 984, 2005 WL 161223, at *1 (E.D. Wis. Jan. 19, 2005). Judge Adelman reasoned that while courts must “seriously consider” the guidelines and give reasons for sentences outside the range, “in doing so courts should not follow the old ‘departure’ methodology.” 2005 WL 161223, at *2. Judge Adelman further recognized that

[t]he guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the “heartland.” Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines, so long as that the ultimate sentence is reasonable and carefully supported by reasons tied to the § 3553(a) factors.

2005 WL 161223, at *2; *see United States v. Myers*, 2005 WL 165314, at *1 (S.D. Iowa Jan. 26, 2005) (Pratt, J.) (agreeing with *Ranum* approach and arguing that the *Wilson* approach is in error because it makes the guidelines, “in effect, still mandatory”); *United States v. West*, 2005 WL 180930, at *2 (S.D.N.Y. Jan. 27, 2005) (following *Ranum*); *see also United States v. Ameline*, ___ F.3d ____, 2005

WL 350811, at *7 (9th Cir. 2005) (stating that advisory guideline range is “only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence”).

If this Court chooses to follow the approach of *Wilson*, then Mr. ██████ objects to that approach on the ground that such a sentencing practice effectively makes the Guidelines as binding as they were before *Booker*. The *Wilson* approach therefore violates both the Sixth Amendment and the interpretation of Section 3553 adopted by the remedial majority in *Booker*.² And because the “weighted guidelines” approach in effect makes the Guidelines binding (thereby triggering the Sixth Amendment), this Court may therefore enhance Mr. ██████’s sentence based only on facts proven to a jury beyond a reasonable doubt or admitted by him.

III. Determining the Appropriate Sentence in This Case

A. Calculation of the Advisory Guideline Range

In *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005), the Fourth Circuit stated that, as to its review of a sentence for reasonableness, “the determination of reasonableness depends not only on an

² As Justice Scalia explains in his dissent in *Booker*,

Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise – if it thought the Guidelines not only had to be ‘considered’ (as the amputated statute requires) but had generally to be followed – its opinion would surely say so.

Booker, 125 S. Ct. at 791 (Scalia, J., dissenting). Likewise, if the remedial majority thought the guidelines had to be given “heavy weight,” its opinion would have said so. The remedial majority clearly understood that giving any special weight to the guideline range relative to the other Section 3553(a) factors would violate the Sixth Amendment.

evaluation of the actual sentence imposed, but also the method employed in determining it.” *Id.* at 381 n.8. The Court of Appeals also observed that “the first step for sentencing courts is to determine the range prescribed by the guidelines after making such findings of fact as are necessary,” and further, that “the district court must consider the *correct* guideline range before imposing a sentence.” *Id.* at 381. Accordingly, and in addition to the objections raised last August (*see* footnote 1, *supra*), Mr. ██████ makes the following arguments regarding the appropriate standard of proof and the need for a substantial downward departure.

1. Standard of Proof

Although the Supreme Court in *Booker* determined, by making the Guidelines advisory, that a judge would make factual findings, it did not specifically address the standard of proof by which that judge would make the findings.³ Given the magnitude of the increase in the advisory guideline range in this case, from 4 to 10 months all the way up to 360 months to life imprisonment, this Court should apply the reasonable doubt standard for three reasons.

First, neither Congress nor the Sentencing Commission has expressly provided for the preponderance standard to serve as the only proof standard at federal non-capital sentencing. Congress, through the Sentencing Reform Act, has not spoken to the issue at all. The Commission, in commentary to U.S.S.G. § 6A1.3, a policy statement, has stated only that it “believes that use of a preponderance of

³ Although *United States v. Watts*, 519 US 148 (1997) (per curiam), might appear to countenance the use of a preponderance standard at sentencing for punishment-enhancing facts, the Sixth Amendment majority in *Booker* seemed to go out of its way to limit the reach and meaning of that decision: “Watts . . . presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us” 125 S. Ct. at 754 n.4.

the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.” However, this provision has not been officially re-examined since *Jones*, *Apprendi*, *Blakely*, and *Booker* were decided. See *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 124 S. Ct. 2531 (2004); *United States v. Booker*, 125 S. Ct. 738 (2005); see U.S.S.G. § 6A1.3, p.s., hist. note (last amended Nov. 1, 1998). Further, the same commentary also stresses that, in each case, the “sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law” and “disputes about sentencing factors must be resolved with care.” U.S.S.G. § 6A1.3, p.s., comment.

Second, the reasonable doubt standard, which derives from the Fifth Amendment’s Due Process Clause, applies as much to fact-finding by a court as to fact-finding by a jury. The Supreme Court case establishing this principle, *In re Winship*, 397 U.S. 358 (1970), addressed proof standards in a setting (juvenile proceedings) in which the Sixth Amendment’s jury trial right is not applicable. In other words, the *Winship* Court was concerned about assuring that *judges* apply the heightened proof standard, both to ensure the accuracy of fact-finding in individual cases, and also to ensure public confidence in the results of criminal proceedings: “[The] use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *Id.* at 364; *cf.* 18 U.S.C. 3553(a)(2) (in determining appropriate sentence, court must consider the need to “promote respect for the law”).

Third, district courts since *Booker* have found that applying the reasonable doubt standard to guideline enhancements, even under an advisory system, is not only appropriate but even necessary. Judge

Bataillon, of the District of Nebraska, has found that while “nothing prevents a defendant from waiving his right to a jury trial and consenting to factfinding by the court,” “[t]here is no authority to support the contention that a defendant can consent to a change in the burden of proof for a criminal prosecution . . . because the burden of proof is not the defendant’s to waive.” *United States v. Huerta-Rodriguez*, ___ F. Supp. 2d ____, 2005 WL 318640, at *5 (D. Neb. Feb. 1, 2005) (relying on *Winship*, 397 U.S. at 364, and other Supreme Court decisions). Judge Bataillon further – and importantly – observed that, “[w]hatever the constitutional limitations on the advisory sentencing scheme, the court finds that it can never be reasonable to base any significant increase in a defendant’s sentence on facts that have not been proved beyond a reasonable doubt.” 2005 WL 318640, at *6. Accordingly, the judge concluded, “[t]he court finds that although *Booker*’s Sixth Amendment holding may not require [the use of the reasonable doubt standard], it is not precluded.” *Id.* Further, because “[i]t is up to the court to determine a reasonable sentence . . . the court will not rely on facts proved to a mere preponderance of evidence in order to increase a defendant’s sentence to any significant degree.” *Id.*; *see also United States v. West*, 2005 WL 180930, at *3 (S.D.N.Y. Jan. 27, 2005) (Sweet, J.) (stating that “[n]othing in *Booker* appears to suggest that such fact-finding [as to the Section 3553(a) factors], as limited by the principles of *Apprendi* and its progeny, is inappropriate. Accordingly, this Court will sentence West based upon the facts admitted in connection with his plea and upon those facts found by the Court in the context of analysis under subsection 3553(a), as limited by *Apprendi* and *Booker*”).

Finally, even before *Apprendi*, *Blakely*, and *Booker*, federal courts recognized that large increases in a guideline range warranted the application of a higher standard of proof, at least clear and convincing.

As the Second Circuit has stated in discussing a case involving numerous enhancements, as Mr. ██████'s does,

In our view, the preponderance standard is no more than a *threshold* basis for adjustments and departures, and the weight of the evidence, at some point along a continuum of sentence severity, should be considered with regard to both upward adjustments and upward departures. With regard to upward adjustments, a sentencing judge should require that the weight of the factual record justify a sentence within the adjusted Guidelines range. In doing so, the Court may examine whether the conduct underlying multiple upward adjustments was proven by a standard greater than that of preponderance, such as clear and convincing or even beyond reasonable doubt where appropriate.

United States v. Gigante, 94 F.3d 53, 56 (2d Cir.1996); *see also United States v. Restrepo*, 946 F.2d 654, 661 (9th Cir. 1991) (suggesting that clear and convincing evidence is appropriate when relevant conduct dramatically increases sentence); *United States v. Kikumura*, 918 F.2d 1084, 1100-02 (requiring clear and convincing evidence to support extreme departure); *United States v. St. Julian*, 922 F.2d 563, 569 n.1 (10th Cir. 1990) (suggesting that district court should consider whether higher standard was warranted in considering upward departure). Therefore, even if the Court disagrees with Mr. ██████ that it must find facts beyond a reasonable doubt when determining the advisory guideline range, at a minimum, any facts that it relies upon to increase the offense level must be supported by evidence that surpasses the threshold of the clear and convincing standard.

2. Grounds for Downward Departure

The Court should depart to a lower offense level on the following bases, whether taken individually or in combination.

a. **The Offense Level Severely Overstates the Seriousness of the Offense**

Application note 18(C) of Section 2B1.1 provides, “There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.” U.S.S.G. § 2B1.1, comment. (n.18(C)). Mr. ██████’s is such a case for three reasons.

First, the probation officer determined that an 18-level increase must be applied for both the fraud and money-laundering counts based on her “intended loss” calculation of \$6.4 million. PSR ¶ 241, Wksht A. (As explained in Defendant’s August 2004 filing, however, the intended loss is incorrectly calculated and unsupported by the evidence.) In contrast, the actual loss is a tiny fraction of that amount, \$43,221,54.⁴ Even the probation officer’s calculation of actual loss, \$350,404 (with which Mr. ██████ also disagrees, as previously explained), is barely 5% of the intended loss amount. In light of this severe disparity, then, if the Court determines that intended loss should be used rather than actual loss, this case cries out for a downward departure.

Moreover, this case is much like others in which such departures were appropriately considered. In *United States v. McBride*, 362 F.3d 360, 377-78 (6th Cir. 2004), for example, the court of appeals remanded (after plain error review) for consideration of a departure a fraud case in which the intended loss

⁴ This actual loss figure was calculated by adding together the total values from three of the spreadsheet sheets provided by the government prior to the original sentencing in September 2004. These spreadsheets delineate the checks negotiated at Bunny’s Pawn Shop that can be attributed to Slam Fest 2003 (\$7,910.01); 30th Annual Peninsula Relays & Virginia Association USA Track & Field Junior Olympics (\$16,940.00); and Heisman-Lombardi Awards (\$7,245). To that sum, we added \$7,816.53 (American Express), \$2,700 (EVADA), and \$610 (Red Cross).

of over \$1 million “substantially overstated” the actual loss of \$800. Likewise, in *United States v. Roen*, 279 F.Supp. 2d 986, 992 (E.D. Wis. 2003), the district court departed down nine levels because “the amount of loss bore little or no relation to economic reality” and “the discrepancy between the actual loss – \$19,000 – and the intended loss – over \$1.2 million – was extreme.” Finally, the Fourth Circuit has recently affirmed (even under a *de novo* standard of review) a departure by another judge of this Court, who departed down five levels, from offense level 17 to offense level 12, in part on the basis that the intended loss amount, \$800,000, substantially overstated the seriousness of the offense where the actual loss was less than \$1,200. *United States v. Kalili*, unpublished, No. 03-4927, 100 Fed. Appx. 903 (4th Cir. June 16, 2004) (copy attached at end of memorandum).

Second, a downward departure is warranted, not only for the fraud offense calculations (pursuant to Section 2B1.1’s application note 18(C)) but also for the money laundering calculations (by analogy to Section 2B1.1 and under authority of U.S.S.G. § 5K2.0) because of the unusually high number of enhancements applied under each guideline.⁵ Although the Sentencing Commission intended enhancements to be applied cumulatively, *see* U.S.S.G. § 1B1.1, comment. (n.4), it is highly unlikely that the Commission envisioned such a number and combination as that faced by Mr. ██████; thus “there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that” set by the otherwise applicable guideline

⁵ In calculating the offense level for the fraud offenses, the probation officer added five separate enhancements to the base offense level of 7 to arrive at an adjusted offense level of 39; for the money-laundering offenses, the officer enhanced the base offense level on six separate grounds, thus increasing the offense level from 7 to 41. *See* PSR Wksht A.

range. U.S.S.G. § 5K2.0(a)(1). *See United States v. Lauersen*, 348 F.3d 329, 343-44 (2nd Cir. 2003) (remanding case for consideration of downward departure in insurance fraud case where application of multiple under U.S.S.G. § 2B1.1 caused offense level to go to 33 because “the cumulation of such substantially overlapping enhancements, when imposed upon a defendant whose adjusted offense level translates to a high sentencing range, presents a circumstance that is present ‘to a degree’ not adequately considered by the Commission . . . [and] permits a sentencing judge to make a downward departure”); *United States v. Jackson*, 346 F.3d 22, 26 (2d Cir. 2003) (similar result in credit card fraud case); *see also United States v. Gigante*, 94 F.3d 53, 56 (2d Cir.1996) (finding downward departure to be authorized where substantially enhanced sentence range results from series of enhancements proven only by preponderance of evidence).

Third and finally, Mr. ██████ did not commit this offense for his personal gain. As the evidence at trial showed, he lived modestly. Further, the trial evidence showed that when income was generated, it was plowed back into Mr. ██████’s businesses to cover operating costs. Thus, this case is also similar to that of *United States v. Broderson*, 67 F.3d 452 (2d Cir. 1995), in which the Second Circuit affirmed a seven-level departure in a contracts fraud case in part because the defendant did not profit personally, as well as because the calculated loss significantly overstated the seriousness of the defendant’s conduct. *See also United States v. Walters*, 87 F.3d 663 (5th Cir. 1996) (in money laundering case, district court reasonably departed downward where defendant did not personally benefit from the fraud; because the lack of benefit was not considered by the Guidelines, U.S.S.G. §5K2.0 authorizes departure).

Accordingly, if the Court determines that intended loss should be used, then based on the tremendous disparity between the intended and actual loss, the number of enhancements applied, and the

lack of personal gain to Mr. ██████, a reduction of twelve levels is appropriate in Mr. ██████'s case. This reduction reflects the difference in number of offense levels between the PSR's calculation of intended loss (18-level increase) and Mr. ██████'s calculation of actual loss (6-level increase).

b. Chapter Five Factors

Section 5H1.6 provides, "Family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted." U.S.S.G. § 5H1.6, p.s. Section 5H1.11 provides that "[m]ilitary, civic, charitable, or public service; employment related contributions; and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the guideline range." U.S.S.G. § 5H1.11, p.s. The commentary to Section 5K2.0 provides that, as to departures based on circumstances identified as "not ordinarily relevant," "a departure based on any one of such circumstances should occur only in exceptional circumstances, and only if the circumstance is present to an exceptional degree." U.S.S.G. § 5K2.0, p.s., comment. (n.3(C)). The commentary further provides that "[I]f two or more of such circumstances are each present to a *substantial* degree, however, and taken together, make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c)" of Section 5K2.0. *Id.*

As to the factual basis for a departure under Section 5H1.11, several trial witnesses testified to charitable works performed by Mr. ██████ directly or through the Youth at Risk Foundation. For example, government witness ██████ testified about the charitable works that YARF performed by distributing food to kids in Petersburg, visiting battered women's shelters and providing supplies for the children, and providing food in low-income neighborhoods through Reachin' the Streets. Government witness ██████ participated in a project for YARF, an after-school program at the YMCA that

encourages children to stay out of trouble. Government witness [REDACTED] testified that [REDACTED] sponsored a successful men's summer league basketball program. She also remembers a talent show that Mr. [REDACTED] and YARF put on at Gillian's and the entertainment that they provided for a National Night Out event. Government witness [REDACTED] (a.k.a. [REDACTED]) testified that Mr. [REDACTED] and YARF participated in a fatherhood conference in Portsmouth. Government witness [REDACTED] testified that [REDACTED] was good with kids, that he would counsel the kids, and would put them to work.

[REDACTED] testified that Mr. [REDACTED] and YARF participated in the Fatherhood Festival and arranged talent shows and dances for kids. [REDACTED] worked with YARF and helped with YARF's back-to-school event in Boston. As well, he videotaped YARF's participation in the Fatherhood Festival. [REDACTED] testified that YARF gave out school supplies and food and provided entertainment for the Fatherhood Festival. [REDACTED], from the PACE program, testified that Mr. [REDACTED] helped with National Night Out by providing entertainment, DJ services, lights and sound. [REDACTED] testified that Mr. [REDACTED] attended and helped with distribution of food in Lincoln Park, a low-income neighborhood. Finally, [REDACTED] testified that her son had drug problems and ADHD and that no one would help her. She called Mr. [REDACTED], who responded by becoming a mentor for her son, giving him a place to go and otherwise helping him.

Additionally, the defense will offer the affidavits of at least two other character witnesses, [REDACTED] and [REDACTED]. These affidavits will be provided to the Court and counsel at least 7 days prior to sentencing. Both Ms. [REDACTED] and Mr. [REDACTED] will attest to [REDACTED]'s good character and his interest and involvement with youth in the community.

In regard to family circumstances, Mr. [REDACTED] intends to offer the affidavit of [REDACTED] [REDACTED], his wife, to support his request for downward departure based on his family ties and responsibilities. This affidavit will be provided to the Court and counsel at least 7 days in advance of sentencing. In summary, Ms. [REDACTED] would declare under oath that she and the defendant have two sons: [REDACTED], who is about to turn 16, and [REDACTED], who is 14 and is autistic. Ms. [REDACTED] describes Mr. [REDACTED] as a loving and devoted father to their sons. Since Mr. [REDACTED]'s incarceration, Ms. [REDACTED] has had an extremely difficult time meeting the needs of their family, both financially and emotionally. [REDACTED] has had a difficult adjustment and has acted out at school because he no longer has his father's guiding hand. The school has expelled him as a result of this behavior. Mr. [REDACTED] does speak with [REDACTED] via the telephone on a daily basis. Ms. [REDACTED] believes that [REDACTED]'s development will be affected due to her husband's incarceration because she cannot handle him either physically or emotionally on her own outside the home. Therefore, [REDACTED] spends most of his time alone in his room now. Ms. [REDACTED] supports their family financially with only a limited income gained from selling used items at flea markets and on eBay.

3. The Advisory Guideline Range

While Mr. [REDACTED] does not intend by offering this advisory guidelines calculation to forfeit any of the objections previously made as to the various enhancements, both in regard to *Blakely* issues and non-*Blakely* issues, the defense provides the following calculations in order to assist the Court in determining a more accurate starting point for sentencing.

Beginning with the base offense level of 7 under U.S.S.G. § 2B1.1(a)(1)(B) because the counts of conviction carry a maximum of twenty years, the Court should first add an increase of 6 levels for the actual loss amount of \$43,221.54. *See* footnote 4. Next, it is appropriate to add no greater than 2 levels

for the number of victims, because the offense “was committed through mass marketing.” U.S.S.G. § 2B1.1(b)(2)(A). Finally, under the fraud guideline it is appropriate to add 2 levels for acting on behalf of a charitable organization. U.S.S.G. § 2B1.1(b)(7)(A). Under the money-laundering guideline, U.S.S.G. § 2S1.1, which incorporates the fraud guideline calculations, it is further appropriate to add 2 levels for the convictions under 18 U.S.C. § 1956. In regard to Chapter Three adjustments, a 4-level adjustment for Mr. ██████’s leadership role would also be appropriate. U.S.S.G. 3B1.1. However, no enhancement for obstruction enhancement is warranted, as argued in the PSR objections pleading filed last August. The total offense level would thus be 23, which when combined with a criminal history category III, yields a guideline range of 57-71 months.

B. Determination of the Statutory Sentence

1. Consideration of Aggravating Factors

As stated previously, Section 3553(a) requires a court to heed (among other factors) the nature and circumstances of the offense; the history and characteristics of the defendant; and the need for the sentence to reflect the seriousness of the offense, promote respect for law, provide “just punishment,” afford adequate deterrence, protect the public, and provide needed educational or vocational training, medical care, “or other correctional treatment.” 18 U.S.C. §§ 3553(a)(1), (2)(A)-(D). Courts must also consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6).

In considering the history and characteristics of the defendant, the Sentencing Guidelines reflect most of the aggravating factors that courts commonly encounter. A tilt toward the aggravating factors appears in the predominance of upward adjustments over downward adjustments in specific offense

characteristics listed in each offense guideline in Chapter Two of the Guidelines, and in the Chapter Three adjustments. Factors that add points to the offense level far outnumber factors that subtract points. Mr. ██████'s case illustrates that point with exceptional clarity: in calculating the offense level for the fraud offenses, the probation officer added five separate enhancements to the base offense level of 7 to arrive at an adjusted offense level of 39; for the money-laundering offenses, the officer enhanced the base offense level on no less than six separate grounds to increase the offense level from 7 to 41. PSR Worksheet A. In contrast, Mr. ██████ received not a single downward adjustment. Based on her calculations, the probation officer determined that Mr. ██████'s (now advisory) guideline is 360 months to life imprisonment.

The emphasis on the aggravating continues in subchapters 5H and 5K, which discourage or forbid more grounds for downward departure than they encourage. Subchapter 5H includes no recommended downward departures and only two departure considerations (criminal history, U.S.S.G. § 5H1.8, and dependence upon criminal activity for livelihood, § 5H1.9) that cut both ways. Subchapter 5K includes thirteen suggestions for upward departure (U.S.S.G. §§ 5K2.1–5K2.9, 5K2.14, 5K2.17, 5K2.18, 5K2.21), but only eight suggestions of downward departure (U.S.S.G. §§ 5K1.1, 5K2.10, 5K2.11, 5K2.12, 5K2.13, 5K2.16, 5K2.20 and 5K2.22).

The trend in due process jurisprudence of sentencing, which is most apparent in capital cases, is to limit aggravating factors to those set out in statutes, but to reject limits on mitigating factors. *See Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989) (“the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant’s character or record or the circumstances of the offense;” there, mental retardation and childhood abuse), *overruled on other grounds*, *Atkins v. Virginia*,

536 U.S. 304 (2002); *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (“the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence”); compare 18 U.S.C. § 3592(a) (in a capital case, sentencing jury “shall consider *any* mitigating factor, including the following”) (emphasis added) with § 3592(b) (same jury may consider only enumerated statutory aggravating factors).

The Sentencing Guidelines provide a helpful analog in non-capital cases. They collect many statutory aggravating factors and a few mitigating factors, but following *Booker*, courts may now appropriately look to individual cases and circumstances for any other mitigating factors that apply. Importantly, those include previously prohibited or discouraged departure considerations, see *Koon v. United States*, 518 U.S. 81, 93-96 (1996), that *Booker* now permits – if not requires – federal courts to weigh again.

In the capital setting, forbidding consideration of possible mitigation violates due process. *Buchanan v. Angelone*, 522 U.S. at 276. Courts have no principled reason to apply a different due process rule to mitigation of federal sentences short of active punishments of death. Those non-capital sentences extend to and include a passive death sentence of life without parole – which is presently the top of the guideline range in Mr. ██████’s case. And Congress made consideration of the individual and his individual case a centerpiece of non-capital sentencing under the Sentencing Reform Act of 1984. 18 U.S.C. § 3553(a)(1) (a sentencing court shall consider “the nature and circumstances of the offense and the history and characteristics of the defendant”); § 3551(a) (a sentence must achieve the purposes of § 3553(a)(2)(A) through (D) “to the extent that they are applicable in light of all the circumstances of the case”).

A focus on enumerated aggravating factors, but on both enumerated and non-enumerated mitigating factors, fits closely with the statutory command that the sentence in the end be “sufficient, but not greater than necessary” to achieve the goals of sentencing that Section 3553(a) establishes. Congress’s requirement is the lowest adequate sentence. The statute forbids an adequate sentence that is higher than it might be. In short, the statute favors mitigation of the sentence, although not depreciation of the crime.

2. Consideration of Mitigating Factors

Even when no traditional departure is available or granted, a district court may still sentence outside the applicable guidelines range in exercising its discretion under Section 3553 – i.e., in imposing a statutory sentence – without the need to justify the sentence under a “departure” or “heartland” methodology. Put another way, even if this Court does not find that the downward departures requested above are appropriate to consider in determining the advisory guideline range in the first instance, the Court should consider the grounds and supporting facts in determining a statutory sentence.

This is because by statutory requirement, “*no limitation* shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. § 3661 (emphasis added). This statutory language overrides the (now-advisory) policy statements in Part H of the Guidelines, which list as “not ordinarily relevant” to sentencing a variety of factors, including a defendant’s family ties and responsibilities, and his charitable service. *See Stinson v. United States*, 508 U.S. 36, 44 (1993) (noting in context of analogy between Sentencing Guidelines and administrative law that “if a statute is unambiguous, the statute governs”); U.S.S.G. §§ 5H1.6, 5H1.11.

The Court must therefore still consider the facts giving rise to the departure grounds in determining what sentence is sufficient but not greater than necessary to meet the purposes of sentencing. Accordingly, Mr. ██████ incorporates into this section the arguments made above for downward departure to a lower advisory guideline range.

3. Recommendation for Statutory Sentence

As previously explained, after determining the final advisory range, the court must then consider that range as one of the many factors laid out in Section 3553(a). While the Court must consider all of the facts, it should consider the following in particular. First, the Court must consider the nature and circumstances of the offense. 18 U.S.C. § 3553(a)(1). Mr. ██████'s conduct does not represent the typical fraud offense, in that many of the alleged "victims" in fact received what they requested, and were satisfied with what they received. For example, Craig ██████ from Bethel High said that the books provided by JSP made money for the school and its programs. ██████ ██████ from Hermitage High testified that he was happy with JSP's brochures and that Mr. ██████ delivered what he wanted. ██████ ██████ from Woodrow Wilson testified that he was happy with JSP's product and the money from the books went into the athletic fund. ██████ ██████ from Pop Warner testified that the cheerleaders sold the JSP programs and made money from them. ██████ ██████ and ██████ ██████ were both satisfied with the JSP programs. ██████ ██████ testified that she was happy with the JSP programs, that the booster club made money selling them and Mr. ██████ also sent the school an additional \$200-\$300 from his profits.

The offense is also atypical in that, as previously argued, there was very little evidence presented at trial that Mr. ██████ personally profited from his businesses, much less in any significant way. To the contrary, income to JSP and YARF was generally consumed by its expenses.

Second, the Court must consider the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1). Mr. ██████ incorporates here the arguments made above for a downward departure based on family ties and responsibilities and on charitable works. ██████ ██████ is a man with a good heart, who fully intended to help the youth and others in his community. Sadly, his actions often fell short of his noble intentions.

Third, the Court must consider the need for restitution. 18 U.S.C. § 3553(a)(7). Regardless of the amount of restitution ordered by the Court, a long sentence will mean that Mr. ██████ will be unable to make restitution payments in anything more than a merely token fashion.

Fourth, the Court must consider the need to prevent unwarranted disparity among defendants who have committed similar offenses. 18 U.S.C. § 3553(a)(6). According to the United States Sentencing Commission, Office of Policy Analysis, 2002 Datafile (accessible on the Commission's website at <http://www.ussc.gov/JUDPACK/2002/vae02.pdf>), the national average sentence for fraud defendants is 19.6 months incarceration. For money-laundering offenses, the national average is 47.6 months. In the Eastern District of Virginia, those numbers vary only slightly from the national statistics, with the average sentence for fraud offenses being 19.5 months and the average for money-laundering being 50.9 months. Even applying the advisory guideline range calculated by Mr. ██████ is to sentence him to more time than many fraud and money-laundering defendant receive. To sentence Mr. ██████ to a sentence of 360 months or higher clearly would not satisfy the need to prevent unwarranted sentence disparity. Nor would it promote respect for the law. 18 U.S.C. § 3553(a)(2)(A).

In light of the statutory factors and arguments above, Mr. [REDACTED] asserts that a sentence which is lower than the advisory guideline range is appropriate in that it is sufficient, but not greater than necessary, to fulfill the purposes of sentencing under the Sentencing Reform Act.

Respectfully submitted,

[REDACTED]

Of Counsel

Gretchen L. Taylor
Virginia State Bar No. [REDACTED]
Assistant Federal Public Defender
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510

Also on the supplemental memorandum
Frances H. Pratt
Research and Writing Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Supplemental Sentencing Memorandum and Motion for Downward Departure in Light of *United States v. Booker* was mailed this 10th day of March, 2005, to Michael C. Moore, and to Joseph E. DePadilla, Assistant United States Attorneys, 8000 World Trade Center, 101 W. Main Street, Norfolk, Virginia 23510, and to Natasha Palmer, Senior U.S. Probation Officer, Suite 300, 1001 Omni Boulevard, Newport News, VA 23606.

Gretchen L. Taylor
Assistant Federal Public Defender