IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 1:15-cr-00033
	)	
STACEY POMRENKE,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF OBJECTIONS and
MOTION FOR DOWNWARD DEPARTURE OR VARIANCE

The Defendant ("Ms. Pomrenke") submits the following in support of her Objections to Pre-Sentence Report and Motion for Downward Departure or Variance:

INTRODUCTION

Pursuant to 18 U.S.C. § 3553(a), this Court is obliged to consider a set of seven factors in imposing a sentence that is "sufficient, but not greater than necessary" to comply with the purposes of federal sentencing that are listed in section 3553(a)(2). The Supreme Court described the process in *Gall v. United States*, 552 U.S. 38 (2007). "A district court should begin all sentencing proceedings by correctly calculating" the sentencing range under the advisory guidelines issued by the Sentencing Commission ("the Advisory Guidelines"). *Id*. at 50. *See* 18 U.S.C. § 3553(a)(4).

The Advisory Guidelines provide the Court with "the starting point and the initial benchmark." *Gall*, 552 U.S. at 49. There is no presumption that the range from the Advisory Guidelines is reasonable or appropriate in the circumstances of any particular case. *Id*. at 50. *See Nelson v. United States*, 555 U.S. 350, 352 (2009) ("The Guidelines are not only ***not mandatory*** on sentencing courts; they are also not to be ***presumed*** reasonable.") (emphasis in the original).

The Probation Office prepared a Pre-Sentence Report (the "PSR"). It concludes that the base offense level is 14 under USSG § 2C1.1 (PSR ¶ 36), then adds two levels under USSG § 2C1.1(b)(1)[1] for multiple offenses (PSR ¶ 37), plus six levels under USSG §§ 2C1.1(b)(2)[2] and 2B1.1(b)(1)(C) based on the conclusion that the value of the benefits received or obtained "was more than $40,000 but less than $95,000" (PSR ¶ 38), plus four levels under USSG § 2C1.1(b)(3) because "the offense involved a public official in a high-level decision making position" (PSR ¶ 39), for an adjusted offense level of 26, with a range under the Advisory Guidelines of 63-78 months. In its addendum to the PSR, the Probation Office did not alter its conclusions based on Ms. Pomrenke's objections.

Ms. Pomrenke submits that the adjusted offense level should be 15. She asks the Court for a below-guidelines sentence, so that she will not be away from her family any more than the Court deems necessary.

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[1] PSR ¶ 37 cites § 2C1.1(a)(1) but applies § 2C1.1(b)(1).

[2] PSR ¶ 38 does not cite but applies § 2C1.1(b)(2).

ARGUMENTS

1. There should be no increase under USSG § 2C1.1(b)(2).

Ms. Pomrenke objected to the PSR with respect to the six-level increase under USSG § 2C1.1(b)(2). She asks the Court to sustain her objections, or to make a downward departure or variance, because she did not receive benefits of more than $40,000. Instead of a six-level increase under USSG § 2C1.1(b)(2), she should be given no increase, because she received less than $6,500.

Under USSG § 2C1.1(b)(2), the Court must determine "the value of the payment," "the benefit received or to be received in return for the payment," "the value of anything obtained or to be obtained by a public official or others acting with a public official," or "the loss to the government from the offense" - "whichever is greatest" − for each of the "bribes," with the amounts then added together. If the total exceeds $6,500, then the offense level is increased by the number of levels shown for that amount in the table for USSG § 2B1.1. The PSR concluded that "[t]he total amount ... the defendant conspired to solicit and obtain from a variety of vendors was in excess of $26,822.18" (the sum of the figures in PSR ¶¶ 20, 22, 23, and 24). PSR ¶ 30. The PSR added $31,000 (for purposes of USSG § 2C1.1(b)(2)), which is the sales price for the Tahoe. PSR ¶ 30.[3]

[3] The PSR also recites that "[t]he investigation determined that the tax loss in this case was at least $79,327." PSR ¶ 30. The tax loss was disputed at trial and will be disputed in connection with sentencing if the tax guidelines are ever used.

1.1. The sale of the Tahoe ($31,000) should not be included.

The sales price for the Tahoe should not be considered for purposes of USSG § 2C1.1(b)(2). There is no evidence connecting the sale of the Tahoe with any of the "bribery" related crimes to which USSG § 2C1.1(b)(2) would apply, all of which took place years later. *See*, *e.g.*, *United States v. Manrich*, 529 Fed. Appx. 322 (4th Cir. 2013) (remanding for resentencing, where there was no evidence to support the Government's claim that one-third of the defendant's earnings were tied to his crimes). The Government did not try to prove that there was any scheme involving vendors going on back in 2006, when the Tahoe was sold. In PSR ¶ 19, the conspiracy involving outside vendors is described as having taken place during the years 2008 through 2013.

Even if the sale of Tahoe is considered for purposes of USSG § 2C1.1(b)(2), the "value of the payment" made by BVU to purchase the vehicle, or "the value of anything obtained or to be obtained by" Ms. Pomrenke as a public official, or "the loss to the government from the offense" were all much less than $31,000. Note 3 of the Commentary to § 2C1.1 provides that the term "loss" for purposes of § 2C1.1(b)(2) "shall be determined in accordance with Application Note 3 of the Commentary to § 2B1.1." There was no "loss" under Note 3 of the Commentary to § 2B1.1, where BVU bought property with a "fair market value" that was as much as what BVU paid for it. Similarly, the value of the payment from Ms. Pomrenke's

perspective was only the net of what she received and what she gave up, which was title to the Tahoe. "The value of a transaction is often quite different than the face amount of that transaction." *United States v. White Eagle,* 721 F.3d 1108, 1122 (9th Cir. 2013) (quoting *United States v. Fitzhugh*, 78 F.3d 1326, 1331 (8th Cir. 1996)). There was evidence at trial about why BVU paid that particular amount for the Tahoe. 2/24/16 Tr. 181:9-184:1, 187:19-193:17. BVU kept the Tahoe in service for another six years.

If the Court reduces the $57,822.18 cited in PSR ¶ 30 by $31,000 for the Tahoe, then Ms. Pomrenke would receive only a four level increase under USSG § 2B1.1(b)(1)(C) and not a six level increase.

1.2. The scorer's table for Mr. Rosenbalm's school ($4,125) should not be included.

The $4,125 that ETI Construction paid for the scorer's table at Tri-Cities Christian School (PSR ¶ 23) should not be considered for purposes of USSG § 2C1.1(b)(2). The scorer's table purchase, unlike the sponsorship by vendors for BVU events, was not a matter that Mr. Rosenbalm discussed with Ms. Pomrenke or other BVU employees, other than Mr. Copeland. At trial, Mr. Copeland testified that Mr. Rosenbalm asked him to ask ETI to sponsor a "score board" for Tri-Cities Christian School. 2/23/16 Tr. at 173:3-173:7. Mr. Edwards recalled that Mr. Rosenbalm said, "I know we just hit ETI up to pay for this Christmas party, but see if they'll donate a sign to Tri-Cities Christian School." 2/24/16 Tr. at 33:3-33:5. In

fact, there is an email in which Mr. Rosenbalm wrote those words to Mr. Copeland.[4] Mr. Rosenbalm's actions were not "reasonably foreseeable."

Ms. Pomrenke found out about the scorer's table when she saw an email from the school in February 2013. Ms. Pomrenke reported this payment and others to the Chairman of the Board, Ms. Esposito, and later to the audit firm Brown Edwards. Her complaints led to the investigation of payments to ETI and the resulting criminal charges against Mr. Rosenbalm, Mr. Kelley, Mr. Copeland, and Mr. Edwards. Mr. Rosenbalm's misuse of his position "to request vendors of BVU to provide services and materials to Tri-Cities Christian School" was cited in the Brown Edwards letter to the Board dated September 16, 2013.[5] The discussion of the letter led to misprision charges against Mr. Bressler and Mr. Clifton.

The $4,125 payment made by ETI for the scorer's table should not be included for purposes of USSG § 2C1.1(b)(2) because it was not part of an offense that Ms. Pomrenke committed or to which she conspired. Even if ETI's payment for the scorer's table is considered part of an offense for which Ms. Pomrenke was convicted, there should be a downward departure pursuant to USSG § 5K2.16, or a variance, because she reported the payment to the Board at a time when there was no pending investigation.

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[4] Email from Mr. Rosenbalm to Mr. Copeland, November 8, 2012 @ 4:43 PM (Exhibit 1).

[5] Letter from Christopher Banta to BVU Board, September 16, 2013 (Exhibit 2).

1.3. The 2012 holiday parties ($20,947.18) should not be included.

The $20,947.18 spent on holiday parties in 2012 should not be considered for purposes of USSG § 2C1.1(b)(2). $20,947.18 of the remaining $22,697.18 consists of the three payments for BVU's holiday parties in 2012: $5,800 that Alcatel paid for the children's Christmas party, PSR ¶ 22, $2,850 that ETI Software paid for the Thanksgiving lunch, and $12,297.18 that ETI paid for the Christmas party, PSR ¶ 23. Ms. Pomrenke asks the Court for a downward departure or variance with respect to the effect of these payments on her sentence. These payments should not be used to increase Ms. Pomrenke's sentence, based on the "nature and circumstances of the offense," which the Court is obliged to consider under section 3553(a)(1). The full value of the payment went to the government itself, and not to Ms. Pomrenke or any of the defendants in any of the related cases. These were gifts to the BVU Authority, authorized by the highest levels of management, for the benefit of its entire workforce.[6]

The solicitation of "sponsorships" from vendors in November 2012 was the result of Mr. Rosenbalm's determination to pay year-end bonuses to BVU employees despite revenue shortfalls that Ms. Pomrenke reported to the Board in advance of their October 15, 2012, meeting. On Friday, October 12, Ms. Pomrenke emailed BVU's financial results through the end of September 2012 to the

[6] BVU Authority has the power by law to accept gifts. Va. Code § 15.2-7207(12).

members of the BVU Board in advance of their Monday meeting.[7] On Monday morning, October 15, Mr. Rosenbalm chastised Ms. Pomrenke for sending the financial figures before he reviewed them: "we cannot continue to put out to the Board before I see them."[8] Mr. Rosenbalm complained to Ms. Pomrenke that "by presenting this month we have put the employees bonus at jeopardy."[9]

When Ms. Pomrenke defended sending out the financial figures, Mr. Rosenbalm replied that "the inclination is to tighten up when you see things like this and that is what we may face. It also puts Paul, Jim and Faith at greater risk to say take it to the full board in November which is after Thanksgiving."[10] He thought that the Board would "tighten up" based on the poor financial results and that the executive committee of Mr. Hurley, Mr. Rector, and Ms. Esposito would be more likely to postpone action on bonuses until the full Board's meeting after the Thanksgiving holiday, instead of giving approval in time for checks to be presented at the employee lunch on November 13. Later on October 15, Mr. Rosenbalm decided that since "[t]he Thanksgiving lunch is on Nov 13th" he wanted to know if the end of October financials would be available before then "and if we are still short at the magnitude we are now have a proposed 'cuts' of

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[7] Email from Ms. Pomrenke to Mr. Rosenbalm, cc: Mr. Bundy, October 12, 2012 @ 2:09 PM. (These emails are combined as Exhibit 3).

[8] Email from Mr. Rosenbalm to Ms. Pomrenke, October 15, 2012 @ 10:33 AM.

[9] Email from Mr. Rosenbalm to Ms. Pomrenke, October 15, 2012 @ 11:08 AM.

[10] Email from Mr. Rosenbalm to Ms. Pomrenke, October 15, 2012 @ 11:11 AM.

offset this shortfall."[11] Ms. Pomrenke explained that getting the October financials together so early would be "extremely disruptive" for the accounting staff, to which Mr. Rosenbalm replied that the problem was Ms. Pomrenke's fault: "If you had not put September in this month we would not be in this position. If you had reviewed it with me first I would have stopped it. The box we are in is not my making."[12] Again on October 18, Mr. Rosenbalm asked Ms. Pomrenke and the Chief Operations Officer, Mr. Bundy, for a list of budget cuts. Ms. Pomrenke tried again to explain about the September figures, and Mr. Rosenbalm replied, "I am afraid it will not help with those that oppose the bonus. At this point if November is not considerably better I am not sure if I can approve the bonus. If we can come up with $250k recurring cuts that will help greatly."[13]

As Mr. Bundy testified at the trial, he and Ms. Pomrenke met with Mr. Rosenbalm, prior to the November 6 email from Ms. Pomrenke that was Government's Exhibit 77. 2/17/16 Tr. at 34:2-35:10. The package that Mr. Rosenbalm adopted to salvage the Christmas bonuses involved a total of $210,350, including the sponsorships from Alcatel, ETI Software, and ETI Construction, plus a series of budget cuts. Ms. Pomrenke circulated the list of the cuts and the

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[11] Email from Mr. Rosenbalm to Ms. Pomrenke, cc: Mike Bundy, October 15, 2012 @ 1:57 PM.

[12] Email from Mr. Rosenbalm to Ms. Pomrenke, October 17, 2012 @ 2:43 PM.

[13] Email from Mr. Rosenbalm to Ms. Pomrenke, cc: Mr. Bundy, October 18, 2012 @ 1:40 PM.

sponsorships on November 7, to which Mr. Rosenbalm replied "When will we know on the three parties."[14] Mr. Bundy replied that "Eti has confirmed on the 15 for the Christmas party."[15]

Later on November 7, Ms. Pomrenke wrote to Mr. Bundy that the October financial results were good enough so that "[w]e will not need the cuts," and he replied, "Great news."[16] On November 8, Ms. Pomrenke asked Mr. Rosenbalm whether in light of the improved financials he would go ahead with the bonus, since an earlier decision would benefit the accounting staff, but Mr. Rosenbalm replied "Give me a few minutes to craft an email to the Ex Committee."[17] Mr. Rosenbalm emailed the figures, including the three sponsorships and Ms. Pomrenke's financial report, to the three members of the Executive Committee, Mr. Hurley, Mr. Rector, and Ms. Esposito, explaining that "I have been holding off on approving the Christmas bonus because of the poor financial results in September."[18] He told Mr. Bundy and Ms. Pomrenke to "[g]ive them an hour or so to respond and then this is approved."[19]

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[14] Email from Mr. Rosenbalm to Ms. Pomrenke, cc: Mr. Bundy, November 7, 2012 @ 11:12 AM.

[15] Email from Mr. Bundy to Mr. Rosenbalm and Ms. Pomrenke, November 7, 2012 @ 11:12 AM.

[16] Email from Mr. Bundy to Ms. Pomrenke, November 7, 2012 @ 9:43 PM.

[17] Email from Mr. Rosenbalm to Ms. Pomrenke, November 8, 2012 @ 3:14 PM.

[18] Email from Mr. Rosenbalm to Mr. Hurley, Mr. Rector, and Ms. Esposito, cc: Ms. Pomrenke and Mr. Bundy, November 8, 2012 @ 3:27 PM.

[19] Email from Mr. Rosenbalm to Ms. Pomrenke and Mr. Bundy, November 8, 2012 @ 3:27 PM.

Ms. Pomrenke did not attend the Thanksgiving luncheon. Mr. Bundy responded to her inquiry about it, that the bonuses were well received and that Mr. Rosenbalm had made a presentation to the employees about them.[20] Mr. Rosenbalm and Ms. Pomrenke thanked the accounting staff for the extra work involved in getting the October financials together and processing the bonus.[21] Sometime after the Christmas party, Ms. Pomrenke emailed the invoice for the party to Mr. Copeland to forward to ETI Construction for direct payment.

The $20,947.18 was paid because Mr. Rosenbalm and the Executive Committee approved the event sponsorships as part of his larger plan to plug the budget gap in order to fund the employee Christmas bonuses for 2012. Ms. Pomrenke was just another link in the chain between Mr. Rosenbalm's decision, approved by the Executive Committee, and the three vendors who were asked to be "sponsors." These payments did not involve the secret misuse of Ms. Pomrenke's position for personal gain or to manipulate any contracts. She opposed the overall plan as financially unnecessary and an imposition on her staff. She is no more responsible for these payments than was Mr. Bundy, who was not prosecuted for these sponsorships (or anything else), or the three members of the Executive Committee, who were not prosecuted for these sponsorships, or Mr. Copeland, Mr.

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[20] Email from Mr. Bundy to Ms. Pomrenke, November 13, 2012 @5:25 PM.

[21] Email from Mr. Rosenbalm to Ms. Pomrenke, cc: Matthew Boothe, Debbie Fleenor, Lisa Brooks, Kim Branson, and Mr. Bundy, November 14, 2012 @ 5:14 PM.

Lane, and the other department heads who contacted the vendors, who were not prosecuted for these sponsorships. If the $22,697.18 was reduced by this amount, the remainder would be less than the $6,500 threshold for any increase under USSG § 2C1.1(b)(2). The difference for Ms. Pomrenke is four offense levels, which would mean a difference of approximately 18-24 months under the Advisory Guidelines.

1.5. The Guidelines based on "loss" are increasingly viewed as unjust.

In the *McDonnell* case, and other like cases, defendants have argued that the Advisory Guidelines incorporating the loss tables from USSG § 2B1.1 are too severe.[22] Ms. Pomrenke asks the Court to consider whether a sentence without any increase under USSG § 2C1.1(b)(2) would be sufficient to meet the purposes of section 3553(a), in light of the other provisions that would give Ms. Pomrenke an elevated offense level without any increase based on the money involved.

2. Ms. Pomrenke should be granted a downward departure or a variance because her reporting of Mr. Rosenbalm's misconduct was the proximate cause of the investigation and criminal cases.

Ms. Pomrenke pointed out in her objections to the PSR that she was a whistleblower. USSG § 3B1.2 allows a two-level reduction for a defendant "who plays a part in committing the offense that makes him substantially less culpable

[22] *See*, *e.g.*, "Rise of ABA Task Force's 'Shadow Sentencing Guidelines,'" New York Law Journal, Volume 255 – No. 64 (April 5, 2016) (Exhibit 4).

than the average participant in the criminal activity." Ms. Pomrenke asks the Court to sustain her objections, and allow her this reduction. Similarly, section 3553(a)(1) requires the Court to consider "the history and characteristics of the defendant." Ms. Pomrenke asks the Court to grant her a downward departure or variance because her reporting began the chain of events that resulted in the nine criminal convictions – including her own.

Like Mr. Bressler, Mr. Kelley, and Mr. Copeland, Ms. Pomrenke's employment was controlled by Mr. Rosenbalm. Mr. Clifton has explained to the Court: "As a result of the allegations made by CFO Pomrenke the Board notified CEO Rosenbalm of their concerns and suspended him pending further inquiry."[23] Ms. Pomrenke reported on Mr. Rosenbalm when she had no way of knowing whether she would be fired in retaliation.

At the sentencing hearing for Mr. Bressler, the Court reflected on what might have been, if Mr. Bressler had spoken out at the meeting at which the Board discussed what to do about Mr. Rosenbalm's misconduct. The Board was discussing Mr. Rosenbalm's misconduct because Ms. Pomrenke had reported it to Ms. Esposito. Without her action, there would have been no criminal investigation, and yet it only took one person to speak out for the facts to be uncovered. None of the defendants in the "related" cases ever came forward to report illegal conduct

[23] Sentencing Memorandum, Doc. 14 at page 12, *United States v. Clifton*, Case No. 1:16-cr-00012 (W.D. Va. July 8, 2016).

before the FBI approached them. Like the defendant in *Gall*, Ms. Pomrenke asks this Court to take note of the "critical relevance" of her "voluntary" action in bringing information to the Board's chairman, "a circumstance that distinguished [her] conduct not only from that of all" the defendants in the related cases, "but from the vast majority of defendants convicted of conspiracy in federal court." *Gall*, 552 U.S. at 56-57. Ms. Pomrenke came forward when no one else did.

Mr. Kelley, Mr. Copeland, Mr. Rosenbalm, Mr. Hurley, Mr. Bressler, and Mr. Clifton all got their sentences reduced for accepting responsibility after they were told they would be prosecuted. Ms. Pomrenke risked her employment by reporting on Mr. Rosenbalm. Her whistleblowing before there was an investigation, that led to an investigation and the series of convictions, ought to carry similar weight in measuring what is a fair punishment.

3. Ms. Pomrenke should be given a downward departure or variance to avoid "unwarranted disparities" in sentencing.

A related factor for the Court to consider, pursuant to section 3553(a)(6), is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Ms. Pomrenke asks the Court to make a variance from the Advisory Guidelines and reduce her sentence, to the extent necessary to avoid "unwarranted" disparities between her sentence and the sentences that were given in the related cases and other similar cases.

The PSR listed as "related" the cases against Mr. Rosenbalm, Mr. Kelley, Mr. Edwards, Mr. Copeland, Mr. Bressler, Mr. Hurley, Mr. Clifton, and Mr. Clark. Mr. Rosenbalm, Mr. Kelley, Mr. Edwards, Mr. Copeland, Mr. Bressler, Mr. Hurley, Mr. Clifton, and Mr. Clark entered into plea agreements, including provisions related to the calculation of their offense levels for purposes of the Advisory Guidelines. Their plea agreements, sentencing memoranda, and judgments are matters of public record. Like Ms. Pomrenke, none of them had any criminal history.

In these "related" cases, this Court imposed sentences that it believed were "sufficient, but not greater than necessary." Mr. Rosenbalm was originally sentenced to 33 months, based on a total offense level of 18.[24] Mr. Kelley was sentenced to 30 months, based on a total offense level of 17.[25] Mr. Edwards was originally sentenced to 24 months, based on a total offense level of 17.[26] Mr. Copeland was originally sentenced to 24 months, based on a total offense level of 15.[27] Mr. Bressler was sentenced to 6 months in prison plus 6 months of home

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[24] Plea Agreement, Doc. 5, Sentencing Memorandum, Doc. 14, and Judgment, Doc. 17, *United States v. Rosenbalm*, Case No. 1:15-cr-00021.

[25] Plea Agreement, Doc. 4, Sentencing Memorandum, Doc. 13, and Judgment, Doc. 15, *United States v. Kelley*, Case No. 1:15-cr-00008.

[26] Plea Agreement, Doc. 3, Sentencing Memorandum, Doc. 15, and Judgment, Doc. 20, *United States v. Edwards*, Case No. 1:15-cr-0010.

[27] Plea Agreement, Doc. 4, Sentencing Memorandum, Doc. 14, and Judgment, Doc. 19, *United States v. Copeland*, Case No. 1:15-cr-00009.

detention, based on a total offense level of 13.[28] Mr. Hurley was sentenced to 6 months in prison plus 6 months of home detention, based on a total offense level of 13. Mr. Clifton was sentenced to 5 months in prison and 5 months of home detention, based on a total offense level of 12. All were sentenced within the range indicated by the Advisory Guidelines.

Mr. Rosenbalm, Mr. Kelley, and Mr. Copeland were public officials who received payments from vendors of BVU. Their conduct was more culpable than Ms. Pomrenke's conduct. Mr. Rosenbalm gave the orders to "hit up" the major vendors for money over a period of five years. No one else knew all of what Mr. Rosenbalm was doing to get money from the vendors. The "culture of corruption" sent him and others to prison was his responsibility. Mr. Kelley and Mr. Copeland lied over and over and stole hundreds of thousands of dollars that went into their own pockets. They concealed their crimes for years.

Even so, the higher base offense level from USSG § 2C1.1 was not used in their cases, and none one of them received increases based on §§ 2C1.1(b)(1), 2C1.1(b)(2), or 2C1.1(b)(3). In Mr. Rosenbalm's plea agreement, the Government agreed to application of USSG § 2C1.2 – the guideline for gratuities - for program fraud, with a base offense level of 11. The guideline for gratuities, USSG § 2C1.2, is "more lenient" than the guideline for offenses involving bribes. *See United*

[28] Plea Agreement, Doc. 4, Sentencing Memorandum, Doc. 14, and Judgment, Doc. 22, *United States v. Bressler*, Case No. 1:16-cr-00013.

States v. Sunchild, 2016 WL 1445316 at *1 (9th Cir. April 13, 2016) ("The district court applied the more lenient gratuity sentencing guideline under USSG § 2C1.2 instead of the bribery sentencing guideline under USSG § 2C1.1."). In the plea agreements for Mr. Kelley and for Mr. Copeland, the Government agreed to application of USSG § 2B1.1, the guideline for fraud, with a base offense level of 6. Each of them received three level deductions for acceptance of responsibility under USSG § 3E1.1. The sentences of Mr. Rosenbalm and Mr. Copeland were subsequently reduced for "substantial assistance."

Even if a difference in sentence is "warranted" to the extent that Ms. Pomrenke received no reductions in the PSR for acceptance of responsibility or substantial assistance, the difference in sentence is "unwarranted" to the extent that the Government has chosen to apply a "dramatically different methodology," of the kind the Court addressed in *United States v. Ring*, 811 F. Supp.2d 359 (D.D.C. 2011). In that case, the Court considered the sentencing of Kevin Ring, the only one of the defendants in the Jack Abramoff bribery cases who went to trial, as to whom the Government recommended a sentence of 210 to 262 months, based on an adjusted offense level of 32. (Jack Abramoff himself was sentenced to 48 months and ordered to pay back $23 million in his case.)[29] Mr. Ring complained

[29] "Former Lobbyist Jack Abramoff Sentenced to 48 Months in Prison on Charges Involving Corruption, Fraud, Conspiracy and Tax Evasion,"

that by calculating the Advisory Guidelines in a different way in his case, and claiming that his total offense level "should be the highest of all participants in the conspiracy" even though others including Mr. Abramoff himself "were clearly more culpable" the Government was retaliating against him going to trial.

The Court observed that within the Advisory Guidelines, there are several provisions that account for leniency to be afforded to those who plead guilty or cooperate with the government, including the provisions for substantial assistance and acceptance of responsibility. What the Government cannot do, the Court explained, is employ a "dramatically different methodology" for calculating the Advisory Guidelines range. 811 F. Supp.2d at 366-67. The federal system "does not permit the calculation of offense levels using one methodology for defendants who plead guilty, but a dramatically different one for the 'only lobbyist who went to trial and chose not to plead guilty and cooperate with the United States.'" *Id*. at 367. As appendices to its opinion, the Court reviewed the sentences of the other Abramoff defendants. It concluded that the correct adjusted offense level was 23, and ultimately sentenced Mr. Ring to only 20 months.[30]

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https://www.justice.gov/archive/opa/pr/2008/September/08-crm-779.html (viewed July 21, 2016).

[30] "Former Abramoff Colleague Kevin Ring Sentenced to 20 Months in Prison for Conspiracy, Honest Services Fraud and Payment of Gratuities Related to Illegal Lobbying Scheme," https://www.justice.gov/opa/pr/former-abramoff-colleague-kevin-ring-sentenced-20-months-prison-conspiracy-honest-services (viewed July 28, 2016).

Ms. Pomrenke asks the Court to make a variance, consistent with the language and intent of section 3553(a)(6), so that Ms. Pomrenke is given the benefit of the same method of calculating her sentence. If this Court made its calculation under the same Advisory Guidelines that were used for Mr. Rosenbalm, USSG § 2C1.2 with a base offense level of 11 instead of 14, or the Advisory Guidelines that were used for Mr. Kelley and Mr. Copeland, USSG § 2B1.1 with a base offense level of 6 instead of 14, then the range for Ms. Pomrenke would be substantially reduced, even without their reductions for substantial assistance and acceptance of responsibility. Ms. Pomrenke is not entitled to identical sentences as the other defendants, but she is entitled to the benefit of the same rules in the calculation of her sentence. Discrimination against her in the methodology of calculating the sentencing range is not only inconsistent with the purpose of the Advisory Guidelines, it also infringes on Ms. Pomrenke's Sixth Amendment rights. The Court should reduce Ms. Pomrenke's adjusted offense level downward by at least three levels, to avoid an unwarranted disparity between her and the others.

Also related to "unwarranted disparities," the Court should consider the sentence imposed in the *McDonnell* case, which was 24 months. Mr. McDonnell was convicted at trial on eleven counts, including multiple counts of honest services fraud, conspiracy to commit honest services fraud, multiple counts of extortion, and conspiracy to commit extortion. The pre-sentence report concluded

that the total offense level was 32, including a ten-level increase for the money that the McDonnell family got from Mr. Williams and a two-level increase for obstruction of justice under USSG § 3C1.1 based on Mr. McDonnell's perjury at trial, for which the range under the Advisory Guidelines is 121-151 months.[31] Mr. McDonnell's counsel asserted that "the appropriate Sentencing Guidelines calculation for Mr. McDonnell yields a sentence range of 33 to 41 months," based on an adjusted offense level of 20, but argued for 6,000 hours of community service instead.[32] Judge Spencer sentenced Mr. McDonnell to 24 months,[33] which is at the high end of level 15 or the low end of level 17. The outcome in *McDonnell* contradicts arguments the Government might raise in this case as to why Ms. Pomrenke should not receive a sentence like the one he got, instead of a sentence like the one suggested by the PSR. Mr. McDonnell held a position of even greater responsibility, not only went to trial but lied on the witness stand, and took a lot more money for himself and his family.

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[31] Sentencing Position of the United States, Doc. No. 591, and Response of the United States, Doc. No. 597, *United States v. McDonnell*, Case No. 3:14-cr-00012 (E.D. Va.).

[32] Sentencing Memorandum of Robert F. McDonnell, Doc. No. 582, *United States v. McDonnell*, Case No. 3:14-cr-00012 (E.D. Va. December 23, 2014).

[33] Judgment, Doc. No. 624, *United States v. McDonnell*, Case No. 3:14-cr-00012 (E.D. Va. January 6, 2015).

4. The Court should give Ms. Pomrenke a downward departure or variance because other courts generally do not follow the guidelines in cases subject to USSG § 2C1.1.

In cases for which USSG § 2C1.1 was the primary guideline, the mean sentence was 27 months and the median sentence was 18 months during the years 2006-2014, in 2,455 cases.[34] For "bribery" cases in 2015, the mean was 27 months and the median was 18 months.[35] In cases for which USSG § 2C1.1 was the primary guideline, the sentence imposed was three years or less in 77% of cases, and one year or less in 30% of cases, during the years 2006-2014, despite a base offense level that starts at 12.[36] During those same years, defendants were sentenced to more than five years in less than 9% of cases. Ms. Pomrenke should not receive more than the average sentence.

In cases for which USSG § 2C1.1 was the primary guideline, the frequency of "within guidelines" sentences has declined since 2006.[37] In cases for which USSG § 2C1.1 was the primary guideline, courts imposed "within guidelines" sentences in only 22% of cases and below guidelines sentences in 77% of cases in

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[34] U.S. Sentencing Commission, Interactive Sourcebook, "Sentence Length in Selected Primary Sentencing Guidelines," Fiscal Years: 2006-2014 (Exhibit 5).

[35] U.S. Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, Table 13, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table13.pdf (viewed August 1, 2016).

[36] U.S. Sentencing Commission, Interactive Sourcebook, "Sentence Length," Primary Sentencing Guideline: § 2C1.1, Fiscal Years: 2006-2014 (Exhibit 6).

[37] U.S. Sentencing Commission, Interactive Sourcebook, "Sentences Relative to the Guideline Range Over Time (4 Categories)," Primary Sentencing Guideline: §2C1.1, Fiscal Years: 2006-2014 (Exhibit 7).

2015. The sentencing courts imposed "non-government sponsored below range" sentences in 35% of cases in 2015.[38] In cases for which USSG § 2C1.1 was the primary guideline, the gap between the range under the Advisory Guidelines and the sentences that the courts have been imposing for cases increased during the years 2006-2014.[39]

The Commission rewrote USSG § 2C1.1 in 2004 to make it more harsh.[40] The courts have decided that USSG § 2C1.1 is too punitive, far more often than not. They impose below guidelines sentences in cases subject to USSG § 2C1.1 three times more often than they impose sentences within the guideline range.

A police officer convicted of extortion cited these statistics, claiming USSG § 2C1.1 "should not be given any significant weight."[41] He also argued that the guideline minimum of 37 months was "closer to a drug trafficking or firearm sentence than a typical public corruption sentence." The Court sentenced him to 15 months.[42] A "within guidelines" sentence of 63 months in Ms. Pomrenke's case

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[38] U.S. Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, Table 28, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table28.pdf (viewed July 31, 2016).

[39] U.S. Sentencing Commission, Interactive Sourcebook, "Average Sentence and Average Guideline Minimum Comparison Over Time," Primary Sentencing Guideline: §2C1.1, Fiscal Years: 2006-2014 (Exhibit 8).

[40] 2015 Guidelines, Appendix C, vol. III, amendment 666.

[41] Sentencing Memorandum, Doc. 204, *United States v. Tanabe*, Case No. 3:11-cr-00941 (N.D. Cal. 2014).

[42] "Dirty DUI" Cop Sentenced To Fifteen Months For Extortion And Honest Services Fraud, https://www.justice.gov/usao-ndca/pr/dirty-dui-cop-sentenced-fifteen-months-extortion-and-honest-services-fraud (viewed August 2, 2016)

would equal or exceed the national median sentence for cases involving manslaughter (40 months), arson (60), drug trafficking (60), firearms (57), racketeering (54), and national defense (31) in the years 2006-2014.[43]

5. Ms. Pomrenke is needed at home and needs to be home.

Ms. Pomrenke asks the Court to vary from the Advisory Guidelines on account of her family circumstances. While it is true that the Commission takes the view that family ties and responsibilities "are not ordinarily relevant" USSG § 5H1.6, many courts have reduced sentences based on circumstances related to the defendant's family. According to the Interactive Sourcebook, sentencing courts have cited "family ties and responsibilities" 2,151 times as a reason for downward departure from the guideline range in the years 2006-2014.[44] In 2015, sentencing courts cited "family ties and responsibilities" as a reason for downward departure another 275 times.[45] In *Gall*, the Government acknowledged that "probation could be an appropriate sentence," if "there are compelling family circumstances." *Gall,* 552 U.S. at 59.

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[43] U.S. Sentencing Commission, Interactive Sourcebook, "Sentence Length in Each Primary Offense Category," Fiscal Years: 2006-2014 (Exhibit 9).

[44] U.S. Sentencing Commission, Interactive Sourcebook, "Reasons Given By Sentencing Courts for Downward Departures from the Guideline Range," Fiscal Years: 2006-2014 (Exhibit 10).

[45] U.S. Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, Table 25, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table25.pdf (viewed online July 30, 2016).

In many of these cases, there is no substitute for the defendant's care. One recent case involved a mother convicted of bribery and facing up to 30 months in prison under the guidelines, whose child suffered from a crippling disease requiring extensive care.[46] The Court in that case sentenced the defendant to "time served."[47] *See United States v. Munoz-Nava*, 524 F.3d 1137 (10th Cir. 2008) (defendant's family circumstances qualified as exceptional and warranted downward departure in sentencing, in a pre-*Booker* case); *United States v. Spero*, 382 F.3d 803 (8th Cir. 2004) (same); *United States v. Roselli*, 366 F.3d 58 (1st Cir. 2004) (same). *See also United States v. Schroeder*, 536 F.3d 746 (7th Cir. 2008) (remanding for resentencing based on proper consideration of argument based on family circumstances).

Post-*Booker*, this Court is obligated to consider Ms. Pomrenke's family circumstances, as part of its consideration of "the history and characteristics of the defendant." Ms. Pomrenke's children are young. Just as they need her, she needs them. The Court can consider that time away from the children will be especially punitive for Ms. Pomrenke.

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[46] "Weighing 'fantastic' maternal care against bribery conviction, judge delays Tremont woman's sentencing," Journal Star, May 5, 2016 (viewed online at http://www.pjstar.com/news/20160505/weighing-fantastic-maternal-care-against-bribery-conviction-judge-delays-tremont-womans-sentencing).

[47] *United States v. Gilmer*, Judgment, Doc. 19, Case No. 1:15-cr-10062 (C.D. Ill. June 14, 2016).

6. Other mitigating factors apply.

The Court can consider other additional factors related to Ms. Pomrenke. A sentencing court may find downward departure appropriate if a defendant's life has demonstrated "exceptional" good works for the community. *See, e.g.*, *United States v. Rita*, 551 U.S. 338, 365 (2007) (Stevens, J., concurring) (noting that the sentencing court may consider public services under section 3553(a). "Whether good works qualify as exceptional is evaluated with reference to the offender's wealth and status in life." *United States v. Cooper*, 394 F.3d 172, 177 (3d Cir. 2005). The list of Ms. Pomrenke's community activities is lengthy.

The Court can reduce a defendant's sentence where the criminal conduct is at odds with the defendant's life and character. *See United States v. Benkahla*, 501 F. Supp. 2d 748, 761 (E.D. Va. 2007); *United States v. Ranum*, 353 F. Supp. 2d 984, 991 (E.D. Wis. 2005). A variant sentence is appropriate where a defendant has no criminal history. *See United States v. Autery*. 555 F.3d 864, 879 (9th Cir. 2009) (because "Criminal History Level I did not fully account for [defendant's] *complete* lack of criminal history, considering it as a mitigating factor was not redundant or improper.") (emphasis added). Ms. Pomrenke's history has been about hard work, not bad acts. She has achieved a fair amount of professional recognition for her accomplishments.

The Court can consider the collateral consequences that this case has already had on Ms. Pomrenke and her life. The crucible of public scrutiny under which she has been placed has caused her to suffer and will deter others. *See*, *e.g.*, *United States v. Edwards*, 595 F.3d 1004, 1006 (9th Cir. 2010) (holding that section 3553 "does not require the goal of general deterrence be met through a period of incarceration" and upholding the district court's determination that probation and restitution were adequate, where the guideline range was 27-33 months); *United States v. Stewart*, 590 F.3d 93, 141 (2d Cir. 2009) (sentencing court properly considered that the "conviction itself already visit[ed] substantial punishment" on defendant by likely barring him from future work in his profession).

CONCLUSION

Based on the foregoing, and based on the facts stated in the Sentencing Memorandum separately filed, Ms. Pomrenke asks the Court to conclude that the applicable offense level is no more than 15 and that she should be sentenced below the guideline range.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of August, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to the following:

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