

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA**

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CASE NO: 1:23CR021
	)	
BRANDON THURMOND,	)	
Defendant.	)	

SENTENCING MEMORANDUM ON BEHALF OF BRANDON THURMOND

The Defendant, Brandon Thurmond, by and through undersigned counsel and pursuant to Rule 32(i)(4)(A)(I) of the Federal Rules of Criminal Procedure, hereby submits the following Sentencing Memorandum, designed to assist the Court in arriving at an equitable disposition of the instant matter. Mr. Thurmond's objectives are as follows:

1. Supplement the second revised Presentence Investigation Report and
2. Justify a Departure and/or Variance.

A. Disputed Information:

Mr. Thurmond does not have objections to the Presentence Investigation Report, but asks the Court to consider the sentencing approach of the United States Court of Appeals for the Third Circuit in *United States v. Banks* (Nos. 19-3812 and 20-2235) (3rd Cir. 2022) and the Fourth, Sixth, Ninth, and Eleventh Circuits that agree that the United States Supreme Court in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), applies a less deferential standard to Guideline commentary in contrast to the deferential standard to Guideline commentary in *Stinson v. United States*, 508 U.S. 36 (1993).

B. Adjustments:

The probation officer determined that the offense level should be decreased by one level for acceptance of responsibility pursuant to USSG §3E1.1(b).

C. Role Assessment:

The probation officer did not allocate an adjustment for Mr. Thurmond's role in the instant offense.

D. Victim Impact:

The Government has verified the victims in this case as "various government agencies and programs". [PSI pages 7 – 8, no. 28, 29] They are as follows:

- 1) Arizona Department of Economic Security,
- 2) Harvest Small Business Finance, LLC,
- 3) Small Business Administration, and
- 4) Georgia Department of Labor.

E. Acceptance of Responsibility:

Mr. Thurmond provided a signed acceptance of responsibility statement. [PSI page 8, no. 30].

F. Specific Offense Characteristics:

Mr. Thurmond is responsible for a total actual loss of \$130,228.00. The total intended loss is \$234,442.00. The probation officer relies upon USSG §2B1.1., Application Note 3(A), "loss is the greater of actual loss or intended loss" to hold Mr. Thurmond accountable for \$234,442.00, jointly and severally, for Guidelines calculation purposes.

G. Downward Departure Considerations:

The probation officer has not identified any factors that may warrant a departure and/or variance. Application Note 21(C) of the Guidelines acknowledges that there may be cases where the Offense Level determined under §2B1.1 of the Guidelines "...overstates the seriousness of the offense." The United States Sentencing Commission used a securities fraud example to illustrate its point where the harm inflicted is relatively small, but the group of victims is relatively large. While it is the Defendant's burden to establish entitlement to a downward departure, *United States v. Cruz*, 946 F.2d 122, 126 (11th Cir. 1991), the essence of Mr. Thurmond's offense makes this consideration appropriate. *United States v. Rodriguez*, 64 F.3d 638 (11th Cir. 1995). Mr. Thurmond

respectfully requests that this Court grant his request for departure and/or variance based upon his acceptance of responsibility for the offense, history of good works or charitable efforts, the effect of incarceration on Mr. Thurmond's minor daughter, immediate family, and the adolescent boys that he mentors as a partner with Village Strong Nonprofit Co., and his unilateral submission to mental health therapy.

H. Applicability:

The Sentencing Guidelines are one among several equally important factors that the Court must consider in fashioning a sentence that, as stated in the introductory Comments to Chapter Five of the Sentencing Guidelines (“Determining the Sentence”), is “...sufficient but not greater than necessary...” to achieve the objectives designated in 18 U.S.C. § 3553. “A district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence.” *United States v. Hunt*, 459 F.3d 1180 (11 th Cir. 2006). The “justification for [a] variance must be ‘sufficiently compelling to support the degree of the variance.’” *United States v. Bell*, 537 Fed. Appx. 883 (11th Cir. 2013) “The weight to be accorded any given §3553(a) factor is a matter committed to the sound discretion of the district court.” *United States v. Clay*, 483 F.3d 739,743 (11th Cir. 2007). In the instant case, the United States Probation Office concluded that the Total Offense Level is 14 and the Criminal History Category is II, thereby recommending a guideline imprisonment range of 18 months to 24 months.

APPLICATION OF THE 18 USC §3353 SENTENCING FACTORS

I. Nature and Circumstances of the Offense:

Mr. Thurmond is 34 years of age and stands convicted of wrongdoing that he does not seek to deny or minimize. Mr. Thurmond has acknowledged that he was wrong for participating in the illegal acts before the Court.

J. History and Characteristics of Mr. Thurmond:

Mr. Thurmond is a young man in the prime of his life. A native of Augusta, Georgia, Mr. Thurmond was reared by a single mother and has three maternal half-siblings and three paternal half-siblings. Mr. Thurmond was an excellent football player in high school and as a student athlete at University of Arkansas Pine Bluff he earned the Southwestern Atlantic Conference Defensive Player of the Year. In 2013 Mr. Thurmond signed with the Atlanta Falcons as a free agent affording him the opportunity to play in the National Football League as a defensive end. Mr. Thurmond finished his football career as a member of the Canadian Football League in 2016.

Mr. Thurmond is involved and engaged with the youth in his community. He currently serves as a mentor for middle school boys as a Village Strong Nonprofit Co., partner. He recently held a free football training camp for approximately 50 middle school age boys to learn fundamental football skills and provide guidance/mentorship *i.e.* maintaining good grades to ensure readiness for college, provide them information about his life including good and bad decisions that he has made and explain how bad decisions can have lifelong effects, and be a surrogate father figure for boys who do not have active fathers in their lives. Mr. Thurmond understands first hand how it feels to grow up in a home without a father and the trauma the lack of patriarchal guidance can have on a adolescent boy's physical, emotional, mental and spiritual health. The negative impact can and often does continue to affect an adolescent boy into his adulthood.

Mr. Thurmond has a stable home environment and is thriving in his relationship with Brandi Barkus. (See character letter from Brandi Barkus dated April 17, 2024). Together they have moved into a home and forged a family that includes Ms. Barkus' 12 year old daughter, Dakota, and Mr. Thurmond's 11 year old daughter, Laila, who regularly visits. The two girls are *de facto* sisters. Recently, the Department of Family and Children Services ("DFCS") removed Laila from her biological mother's residence due to alleged mental, emotional, and physical abuse. DFCS has determined that Laila will greatly benefit from living with Mr. Thurmond full time, but temporarily placed Laila with fictive kin while Mr. Thurmond files a Petition for Legitimation. A hearing on the Petition for Legitimation is scheduled for May 17, 2024, at the Juvenile Court of Dekalb County.

Mr. Thurmond also actively seeks outlets to improve his personal growth and initiated mental health therapy from TabulaRasa Integrative Health, Inc. (See character letter from Kim Barkus dated April 18, 2024). His initial appointment was held on Monday, October 2, 2024, with Kim Barkus,

a Licensed Clinical Social Worker, a Certified Alcohol and Drug Counselor, and a Certified Clinical Trauma Professional Level II. Mr. Thurmond began attending weekly sessions for one hour and over a period of time has increased his weekly sessions to bi-weekly sessions.

Ms. Barkus diagnosed Mr. Thurmond with Chronic Post-Traumatic Stress Disorder and Moderate Generalized Anxiety Disorder. She recommends that Mr. Thurmond continue individual, bi-weekly counseling.

“Mr. Thurmond initially presented as guarded, but was willing to engage in receiving counseling services to improve emotional regulation, interpersonal relationships, and processing unresolved trauma. In sessions, Mr. Thurmond has been open and candid regarding his life experiences and in processing these experiences, he has gained insight as to how emotionally damaging events of his past influenced his decision making. Mr. Thurmond has also expressed remorse and regret for past decisions that have negatively impacted others. In this writer’s opinion and experience, Mr. Thurmond has put forth a great amount of effort into facilitating positive change in his life.”

K. Seriousness/Respect/Punishment

A federal prosecution drives home to the community at large and, particularly, to Mr. Thurmond, the seriousness of the instant offense. Indictment, arraignment, change of plea hearing, and a statutory maximum term of imprisonment of 20 years has Mr. Thurmond’s full attention. Mr. Thurmond respects this Court and acknowledges that he will be punished for his offense.

Mr. Thurmond has been a model defendant while on a pre-trial Appearance Bond. He has abided by the conditions set forth in the Order Setting Conditions of Release and the Additional Conditions of Release. Mr. Thurmond maintains full time employment at Publix Warehouse as a selector, in addition to, mentoring youth, organizing a free football clinic for adolescent males, and actively shares his life story that includes the positive attributes of his life, as well as, shortcomings that include he is a convicted felon and was incarcerated for five years. His behavior while awaiting sentencing exemplifies that Mr. Thurmond respects this Court and is making great effort to rehabilitate his life outside the confines of prison.

L. Adequate Deterrence:

The process of federal prosecution affords prospective wrongdoers justification for abstaining

from criminal behavior. Unlike its state counterpart, the federal conviction rate is substantially higher, incarceration is generally longer, and expense is greater. Courts have noted that the deterrence factor “unquestionably envisions more severe sentences for defendants considered more likely to commit further crimes and less severe sentences for those unlikely to commit [additional] crimes.” *United States v. Rodriguez*, 724 F. Supp. 1118, 1120 (S.D.N.Y. 1989).

At 34 years of age, Mr. Thurmond has spent the first half of his thirties incarcerated and/or abiding by pre-trial bond conditions. Mr. Thurmond is solely focused on being present in his daughter, Laila’s life. The life that he has created with his girlfriend and their two daughters is the most powerful deterrent. If Mr. Thurmond is incarcerated and Laila is unable to remain with fictive kin, Laila may be lost in the throes of foster care and Mr. Thurmond’s worst nightmare will be brought to fruition.

M. Public Protection

The public is not in need of protection from Mr. Thurmond.

N. Treatment:

Mr. Thurmond needs additional mental health treatment to address his ongoing mental health needs.

O. Sentences Available:

The Guidelines recommend that a defendant in Zone D not be sentenced to terms of probation. However, now that the guidelines are advisory, the restrictions the Guidelines used to impose on probation, split sentences, and community or home confinement, no longer limit courts in the same way. Courts now have the authority to impose these kinds of sentences in almost any case. Judges may place a defendant on probation or impose split sentences for a defendant whose guidelines fall within Zone D, especially when Zone D ranges have low ends of at least 12 months and 18 months.

P. Rehabilitation:

18 U.S.C. §3553 (a)(2)(D) “requires a district court judge to ‘consider ... the need for the sentence imposed ... to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in that the sentence provide rehabilitation and treatment in the most effective manner.” Zunkel, Erica (2019) “18 U.S.C. §3553(a)’s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in “the Most Effective Manner”,” Notre Dame Journal of International & Comparative Law: Vol. 9: Iss. 1, Article 5, page 49, 55. It is questionable if the Bureau of Prisons (“BOP”) has the resources to provide rehabilitation and treatment. The Department of Justice’s Inspector General and studies reflect that the BOP “faces numerous hurdles to providing ‘the most effective’ care for defendants due to overcrowding, staffing shortages, high medical costs, and budget cuts.” *Id.* at 72.

“Imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C. §3582(a)(2012). The holding in *Tapia v. United States* provided, in part, “judges have no mechanism for requiring defendants to participate in BOP programs, nor for guaranteeing that such programs will be available to defendants in BOP custody. To the contrary judges can require participation in rehabilitative programs as a condition of probation or supervised release, which supports the argument for non-incarceration sentence.” 564 U.S. 319, 331 (2011).

In the instant case, an out-of-custody alternative will provide Mr. Thurmond with rehabilitation and treatment in the most effective manner. Mr. Thurmond currently attends individual, bi-weekly mental health therapy. Incarceration will more than likely cause his mental health therapy to come to a screeching halt.

The BOP psychologists “are directed to give first priority to crisis intervention, suicide prevention, treatment of severely mentally ill inmates, treatment of BOP employees, and the initial screening of inmates. Brief counseling, individual psychotherapy, and group therapy – the treatment options that an inmate can request by self-referral – are all prioritized after these more emergent mental health issues.”

U.S. Dep’t of Justice, Fed. Bureau of Prisons, Program Statement P5310.17, Psychology Services Manual, at 4 – 5 (Aug. 25, 2016), https://www.bop.gov/policy/progstat/5310_017.pdf.

Q. Sentencing Disparity:

There is a split in the federal circuit courts regarding the amount of deference that should be given to United States Sentencing Guidelines commentary. Whereby deference is given to commentary by some circuit courts, there are other circuit courts that do not extend such deference when sentencing a defendant. The issue of deference is highly important in white collar cases *i.e.* wire fraud governed by Section 2B1.1 of the U.S. Sentencing Guidelines Manual.

In 2022 the Third Circuit in *United States v. Banks* held that “ ‘loss’ under Section 2B1.1 refers only to the loss the victim actually suffered” and not the intended loss. (Nos. 19-3812 and 20-2235 at page 20) (3rd Cir. 2022) The Court gave deference solely to the guideline and no deference to the definition of loss found in the commentary “[b]ecause the commentary expands the definition of ‘loss’”. *Id.* The Third Circuit’s holding in *Banks* was based upon the United States Supreme Court’s decision in *Kisor v. Wilkie* which held “before a court may defer to an agency’s interpretation of its regulation, it must exhaust all the traditional tools of construction and find the regulation to be ‘genuinely ambiguous.’” 139 S. Ct. 2400, 2415 (2019). The Third Circuit is joined by the Fourth, Sixth, Ninth and Eleventh circuits who are in agreement that the United States Supreme Court should also extend less deference to the commentary of the Guidelines. *United States v. Dupree*, 57 F.4th 1269, 1274 - 75 (11th Cir. 2023) (en banc).

CONCLUSION

“A sentence of imprisonment may work to promote not respect, but derision, of the law, if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.” *Gall v. United States*, 552 U.S. 38, (2007), Considering the factors enumerated in 18 U.S.C. §3553, we respectfully request that this Court give deference to *United States v. Dupree* and sentence Mr. Thurmond to a term of probation, supervised release, and restitution to sufficiently achieve the objectives of sentencing. Such a disposition will not only allow Mr. Thurmond to work and remain productive in an effort to support and provide for his family, but it will allow Mr. Thurmond to continue to pour into the community by serving as a much needed mentor to adolescent age boys whose fathers are absent in their lives.

POST-SENTENCING REQUESTS

1. Appeal Bond

Pursuant to 18 U.S.C. §3143(b)(1), should the Court impose a term of incarceration, Mr. Thurmond respectfully requests he be allowed to remain at liberty pending an appeal. The appeal is not for purpose of delay.

2. Voluntary Surrender

In the event incarceration is imposed and the Court refuses to set an appeal bond, given the manner in which Mr. Thurmond has conducted himself pursuant to the Appearance Bond, Mr. Thurmond respectfully requests he is allowed to voluntarily surrender to the designated institution.

When appropriate, voluntary surrender benefits both the Government as well as Mr. Thurmond. The former avoids the cost of housing and transportation to the designated facility, while the latter avoids the stress such transfer generally involves.

3. Facility Recommendation

Recognizing it is not binding upon the Federal Bureau of Prisons, in the event incarceration is imposed, Mr. Thurmond requests the Court recommend FCI Atlanta. The facility is close to Mr. Thurmond's home, would minimize the hardship of visitation upon his family, and is a low security federal correctional institution with a detention center.

Submitted this 29th day of April, 2024.

s/Michon Walker

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, a true and correct copy of the above and foregoing Sentencing Memorandum was forwarded to all counsel of record via Notice of Electronic filing. Submitted this 29th day of April, 2024.

s/Michon Walker
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