

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 21-60171-CR-SMITH

CINDI ELLIS DENTON,

Defendant.

OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT AND
MEMORANDUM OF LAW

COMES NOW, the Defendant, CINDI ELLIS DENTON, by and through her undersigned counsel and files these Objections to the Presentence Investigation Report. In support, Ms. Denton states as follows:

OBJECTIONS

1. Defendant, as to paragraph 35 of the Presentence Investigation Report, hereinafter referred to as “PSI,” would point out that the controlled call took place on July 2, 2020 not June 2, 2020.

2. Defendant objects to paragraphs 38, 41, and 126 of the PSI as to the amount of restitution owed. \$113,426.09 of the fraudulently obtained monies were recovered. Thus, the amount of restitution owed is \$377,883.91. Proof of this, by way of Bank of America bank statements, were provided, this morning, to U.S. Probation and the Government. USPO Rebecca Hill has indicated that she will make the necessary adjustment/correction by way of the Addendum.

3. Defendant objects to paragraphs 39 and 49 of the PSI. Ms. Denton seeks a mitigating minimal role adjustment/reduction in this case under 3B1.2(a). Ms. Denton is significantly less involved than the other co-conspirators. See argument below.

4. Defendant objects to paragraphs 51 & 55. The adjusted offense level should be 14. The total offense level should be 12.

5. Defendant objects to paragraph 116 of the PSI. Based on a total offense level of 12 and a criminal history category of I, the guideline imprisonment range is 10 to 16 months in Zone C.

6. Defendant seeks a downward variance and/or departure based on Defendant being a first time offender, aberrant behavior (Section 5K2.20), extraordinary medical and family circumstances, and the unlikelihood of recidivism.

**MEMORANDUM OF LAW AND REQUEST FOR VARIANCE
AND/OR DEPARTURE.**

DEFENDANT IS ENTITLED TO A MINIMAL ROLE REDUCTION

Cindi Ellis Denton, after two months of the Covid-19 pandemic and lockdown, was recruited by Ross Charno, who was working with James Stote, one of the original and the principal player in this PPP fraudulent scheme. Stote and Phillip J. Augustin were the original participants in devising the PPP application scheme. See paragraphs 17 & 18 of the PSI.

Augustin and Charno were recruiters who along with Stote received kickbacks and benefitted significantly. In our case, Charno received a \$98,262 kickback payment. It was Stote who prepared the false documents and was involved in the preparation of at least 90 fraudulent PPP applications. The false documents that he prepared included falsified bank statements and payroll tax forms.

Stote and Charno would choose the number of employees to be reported chosen based on fictional payroll figures. This was done to avoid an average employee salary that might raise suspicion. When Stote and Charno were arrested, law enforcement found stacks of paper printed out and organized, by entity, containing an “intake form,” fabricated forms 941, or both for approximately 80 different entities.

Ms. Denton was recruited as were many others. Ms. Denton did not refer others to the scheme. Ms. Denton had no level of sophistication. She did not prepare any of the falsified documents. She did sign and submit the PPP application. Her business did receive the proceeds. Ms. Denton is seeking a minimal role reduction. *See United States v. Cruickshank*, 837 F.3d 1182, 1192-95 (11th Cir. 2016), where the Court addresses Amendments 635 and 794 to the Sentencing Guidelines and the non-exhaustive list of factors for the Court to consider in determining whether or not an individual as Ms. Denton is deserving of a minimal to minor role adjustment.

ABERRANT BEHAVIOR – Section 5K2.20

Cindi Ellis Denton’s behavior was an aberration from her conduct for 63 years of her life. She had never been in any kind of trouble and she had always worked legitimately. In a very difficult and stressful time, and in need she succumb to the lure of her recruiter.

This Court has the discretion to depart downward after making a careful determination that the defendant’s conduct constituted a single, aberrant act. *United States v. Withrow*, 85 F.3d 527, 531 (11th Cir. 1996). “The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.” See U.S.S.G. Section 5K.20 (b) Requirements (2018); *United States v. Orrega*, 363 F.3d 1093, 1096-1097 (11th Cir. 2004). Ms. Denton’s involvement, on her part, was without any significant planning (i.e. it was thrust upon her), it was not her idea, it was of a very limited duration, and clearly a marked deviation from an otherwise law-abiding life.

3553(a) FACTORS/VARIANCE REQUEST

In *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, (2005), the Supreme Court held that the Sentencing Guidelines are advisory only, not mandatory. “The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.” *Id.* at 245, 125 S. Ct. at 767. After this Court calculates the Guidelines range, it may impose a more severe or more lenient sentence as long as the sentence is reasonable. *Id.* at 245, 125 S. Ct. at 767.

Before the Court is a 63 year old who has significant medical health ailments. See paragraphs 73 – 77. This includes a stroke in June, 2018 and cervical spine surgery in 2015. She also suffers from osteoarthritis or degenerative arthritis in her spine, her knees, and hips, and degenerative joint disease of both knees. Further, she suffers from hypertension and high cholesterol.

Ms. Denton is the guardian of her 12 year old granddaughter and is also the primary caretaker of a 7 year old, whose mother committed suicide 2 years ago. Ms. Denton homeschools both of them and attends to their special needs. See paragraphs 66, 69 & 70 of the PSI.

This Court has to consider the Section 3553(a) factors and, in this particular case, the record supports a probationary sentence. The lack of sophistication, the Defendant being a first and one-time participant, her legitimate employment history, her aberrant behavior, and the extraordinary medical condition of Ms. Denton as well as the family circumstances.

In determining the sentence minimally sufficient 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. Section 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, it is important, for the Court, to remember that all 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, the Supreme Court in Gall v. United States, 552 U.S. ____, 128 S. Ct. 586 (2007), made it clear that any attempt to give special weight to the sentencing guidelines is contrary to its holding in Booker, which means the guidelines are advisory. See also, Kimbrough v. United States, 552 U.S. ____, 128 S. Ct. 558 (2007). Both of these cases, decided the same day, make it clear that the district courts are only required to give "some weight" to the advisory guidelines, as the are to the other 18 U.S.C. Section 3553(a) factors.

At sentencing, this court must give an explanation of its reasons for imposing a below advisory guidelines sentence; the court must give its reasoning or indication of what facts justified its variance from the advisory Guidelines range, and how the sentence satisfies the 3553(a) factors. See United States v. Livesay, 525 F. 3d 1081 (11th Cir. 2008).

The Eleventh Circuit has stressed that district courts are not to treat the guidelines as presumptively reasonable. United States v. Hunt, 459 F. 3d 1180 (11th Cir. 2006) (explaining that courts "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"). In fact, the Hunt Court explained that there are "many instances where the Guidelines range will not yield a reasonable sentence." Id. at 1184.

In Gall v. U.S., 128 S. Ct. 586, 598, 599 (2007), the district court was affirmed in its sentence of probation, in part, for defendant's age at the time of the offense conduct); See also U.S. v. Dusenberry, 9F. 3d 110 (6th Cir. 1993)(downward departure granted due to defendant's age and medical condition-removal of both kidneys requiring dialysis three times a week); U.S. v. Clark, 289 Fed. Appx. 44 (5th Cir. 2008) (court applied a below guidelines term of 190 months for methamphetamine conspiracy conviction because defendant's age made him unlikely to commit further crime upon release).

The Eleventh Circuit repeatedly has affirmed below guideline sentences after Booker. United States v. Clay, 2007 WL 968837, No. 06-10088 (11th Cir. April 3, 2007) (affirming 60 month sentence even though guidelines were 188-235 months based on post-offense rehabilitation); United States v. Gray, 453 F. 3d 1323 (11th Cir. 2006) (affirming 72 month sentence even though low end of guidelines were 151 months, more than double sentence imposed); United States v. Halsema, 180 Fed. Appx. 103 (11th Cir. 2006) (unpublished) (affirming 24 months sentence even though guidelines were 57-71 months); United States v. Williams, 435 F. 3d 1350 (11th Cir. 2006) (90 months imprisonment was sufficient, but not greater than necessary to punish, deter, and rehabilitate defendant even though low end of guidelines was 188 months).

A sentence of two (2) years of probation is a sufficient sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2021, I electronically filed the foregoing document/pleading with the Clerk of the Court using CM/ECF.

Respectfully submitted,

MANUEL GONZALEZ, JR., ESQ.
121 Alhambra Plaza
Suite 1500
Coral Gables, Florida 33134
(305) 444-1400
(305) 938-5009 (FAX)

BY: /s/Manuel Gonzalez, Jr.
MANUEL GONZALEZ, JR., ESQ.
FLORIDA BAR NO. 397997
mannylaw7@yahoo.com