UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No.: 6:24-cr-00053-RBD-RMN

v.

SETH DOWNES

Defendant.
_____/

SENTENCING MEMORANDUM

Seth Downes submits this sentencing memorandum for this Honorable Court's consideration.

Introduction

plus ça change, plus c'est la même chose

The more things change, the more they stay the same.

Jean Baptiste Alphonse Karr (1849)

Once upon a time, the kingdom of federal sentencing was dictated by mandatory guidelines whose hobgoblins were consistency and uniformity.[1] While providing certainty, consistency and uniformity disregarded the unique

[1] "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." Ralph Waldo Emerson, *Self-Reliance: An Excerpt from Collected Essays, First Series* (James Munroe and Co. 1841),

circumstances of the defendant – "the human failings that sometimes mitigate[d], sometimes magnify[ied], the crime and the punishment to ensue." *Koon v. United States,* 518 U.S. 81, 113 (1996). Federal sentencing was a kingdom of injustice since the fate of every defendant was reduced to a sentencing matrix whose outcomes solely reflected the individual's criminal conduct and criminal history. In such a realm, retribution became the predominant sentencing consideration despite its human and societal costs.[2]

Mandatory guidelines determined punishment in advance and in the process sacrificed judicial discretion for bureaucratic fiat proselytized by unseen sentencing commissioners. In such a realm, the Presentence Report (PSR) became the ultimate arbiter of justice and federal judges became nothing more than

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[2] Concerning such human and social costs,

> [defendants'] lives and their families' lives were devastated, and millions more continue to be today, as states and the federal government continue to use mandatory minimums, three-strikes laws, and other sentencing enhancements. And yet, evidence to support our retributive, punitive approach is limited. In fact, we know this approach doesn't make our communities safer in the way proponents claim and the public assumes. A 2021 meta-analysis of 116 studies found, for example, that custodial sentences do not prevent reoffending—and can actually increase it. That's because incarceration destabilizes people's lives. The brutality of U.S. prisons, the difficulties securing employment and housing with a conviction history, and the overall lack of financial security all negatively impact people—and their ability to succeed—after prison.

Nicolas Turner, *Research Shows That Long Prison Sentences Don't' Actually, Improve Safety,* Vera Instit (Feb. 13, 2023), *see also* Erin Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* (Harvard Univ. Press 2020)(finding that "a punitive, moralizing conception of individual responsibility provides, at the very least, a cover for public acceptance of a harsh and unforgiving punishment culture").

scriveners. After all, someone is needed to memorialize the mandatory guideline sentence on a paper judgment.

But a realm that replaces judicial discretion with an unwavering focus on a defendant's criminal conduct and criminal history is a realm that ignores the "long" and "durable" tradition of sentencing judges "enjoying discretion in the sort of information they may consider at an initial sentencing proceeding." *See Concepcion v. United States*, 597 U.S. 481, 482 (2022)(citation omitted). It is also a realm which treats statutory mandates as interesting, but irrelevant, hurdles. *See e.g.*, 18 U.S.C. § 3661 ("[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence"). And finally, it is a regime that determines punishment based solely on a defendant at the moment of his offense rather than the person he has become on the date of his sentencing. *Compare Pepper v. United States*, 572 U.S. 476 (2011).

Once, we believed that *Booker* conquered the tyranny of the mandatory guideline regime and restored judicial discretion in the sentencing process. Or at least, we hoped it did. Such a belief is hard to maintain in a realm that continues to entrust sentencing outcomes in the hands of non-judicial actors. Unique circumstances that sometimes mitigate and durable traditions requiring broad empirical considerations are still lost in a sentencing regime that is infected with

the vestiges of the past mandatory guideline system. Sentences continue to be dictated in advance by prosecutors who control sentencing outcomes[3] through charging decisions and the use of minimum mandatories.[4] It doesn't help the cause that federal prosecutors continue to request guideline sentences. While such blind allegiance to the guidelines provides certainty in sentencing outcomes and reflects an unwavering faith in the United States Sentencing Commission, fidelity to the guidelines is often fidelity to injustice.

The prosecutor's predominant role at sentencing is bolstered by the second vestige of the failed guideline regime – the PSR. This consequential document emphasizes the importance of the Indictment in focusing on a defendant's criminal conduct and criminal history.[5][6]

So, in the era after the mandatory guideline regime, nothing much has changed. A defendant's fate is often determined by a limited narrative that focuses on his past sins. With such a focus, the Indictment and PSR present Downes's

[3] "Meet the new boss, same as the old boss." The Who, *Won't Get Fooled Again*, Who's Next (Track Records 1974).

[4] "Sentence first – verdict afterwards" Lewis Carroll, *Alice's Adventures in Wonderland*, 146 (Macmillan & Co. 1865).

[5] The Indictment, as parroted by the PSR, tells a tale of sound and fury, signifying nothing. *See* William Shakespeare, *Macbeth*, Act 5, Scene 5, 19-28 (1603)("Life's but a walking shadow, a poor player, that struts and frets his hour upon the stage, and then is heard no more. It is a tale . . . full of sound and fury, signifying nothing").

[6] Notwithstanding the limitations of a PSR, Probation Officer Natalie Holton did an outstanding job in the instant case.

criminal conduct as the primary sentencing factor under 18 U.S.C. § 3553(a). According to this conception, the other § 3553(a) factors are reduced to rhetorical niceties. They are nothing more and nothing less than tedious inconveniences to the inevitable result – a sentencing outcome driven by a defendant's criminal conduct and criminal history. Such a sentencing outcome marks a ceaseless return to the past[7] – a return to a time when the fate of every federal defendant was reduced to a mandatory sentencing matrix.

Admittedly, if this Court's sentencing consideration was limited to Downes's criminal actions, the government's customary call for a guideline sentence is alluring. At the very least, the limited story of the guidelines offers familiarity and certainty. But limited narratives are often false ones ("Stop the Steal," "Crack Babies," "Equal Protection under the Law").[8] While tempting, then, a guideline sentence cannot achieve a just result in Downes's case.

Chapter I
Offense Conduct and History and Characteristics

> *It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the*

[7] "So we beat on, boats against the current, borne back ceaselessly into the past" F. Scott Fitzgerald, *The Great Gatsby* (Charles Scribners & Sons 1925).

[8] Limited narratives have a profound and negative impact on decision-making. *See*, *e.g.*, Dolan & Henwood, *Five Steps Toward Avoiding Traps in Narrative Decision-Making*, Nat'l Inst. of Health (Aug. 12, 2021); *see also* Akira Kurosawa, *Rashomon* (Daiei Films release on Dec. 26, 1951, in the U.S.). But born out of fear, such narratives satisfy the human desire for certainty. *See*, *e.g*, Maria Konnikova, *Why We Need Answers*, The New Yorker (Apr. 30, 2013).

punishment to ensue.

Koon, 518 U.S. at 113.

Downes appreciates the seriousness of his convictions for wire fraud. He also recognizes that he will forever bear the shame of being a convicted felon. *See* Chapter 2, *infra*. Nevertheless, despite the allegations against Downes, certain factors mitigate his crime.

A. *Offense Conduct*

The Indictment alleged that Downes conspired with Simmerer to commit wire fraud involving loans through the Paycheck Protection Program ("PPP"). *See* Doc. 115 at 1-8. It further alleged that Downes committed four substantive wire offenses. *See id*. at 10-11. In addition to the conspiracy charge, the jury only convicted Downes on Count 3, which involved the receipt of $194,000 into Simmerer and Downes' joint account at Notre Dame Credit Union. *See id*. at 10. Because he was acquitted of the other substantive charges (Counts 2, 4, & 5), the receipt of funds into the joint account was the only predicate supporting Downes' conviction on the conspiracy charge. Notably, the jury's verdict acquitted Downes of any affirmative conduct or fraud concerning the submission of the loan applications even though his name was on many of the loan documents. In finding such, the jury had to conclude that Downes wasn't involved in the fraudulent preparation and submission of the loans.

This necessary determination was consistent with the evidence which

established that Simmerer controlled the loan process, controlled the information, controlled the finances and controlled Downes. Further evidence demonstrated that Downes had no interaction with the banks and had little to no involvement with Your 10 Life or its directors concerning the loan applications. Finally, the testimony of the Government witnesses established Downes' lack of sophistication and his naivete.

Based on the foregoing, it is apparent that Downes played a minor role in Simmerer's scheme – a fact recognized by both the PSR and the Government. Downes's lesser role and lesser intent underscores his lesser culpability. Indeed, the degree of a defendant's culpability "is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender's degree of culpability in committing the crime, in particular, **his degree of intent (mens rea)**, motives, **role in the offense**, and mental illness or diminished capacity." Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (Feb. 2005)(emphasis added). While Downes has been found liable for criminal actions, his lesser culpability calls for a lesser sentence. Supreme Court precedent and the guidelines themselves recognize this argument. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 305 (2002)("As to retribution, the severity of the appropriate punishment necessarily depends on the offender's culpability"); *see also* USSG § 2G2.2 (reducing offense level by two-

levels where the defendant does not intend to traffic in, or distribute child pornography); USSG § 2L1.1(b)(1)(for passport offenses, if "the offense was committed other than for profit" decrease the offense level by three levels); USSG §§ 2D1.1 and 5C12 (reducing guideline level and eliminating minimum mandatory based on safety valve which applies to less culpable and less dangerous offenders).

B. *History and Characteristics*

> *Surely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the great religions, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, "the history and characteristics of the defendant."*

United States v. Adelson, 441 F. Supp. 2d 506, 513-14 (S.D.N.Y. 2006).

Consistent with the trial testimony of the Government witnesses, the *Letters of Support* demonstrate that Downes exhibits exemplary human qualities. In sum, he is an exceedingly kind and decent man. *See Letters of Support*, attached hereto as Exhibit 1. Aaron Klein states that Downes "is one of the most kind-hearted and trusting people I have ever met. He is sweet, sincere, and deeply compassionate, with a remarkable love for all living things and nature." Ex.1, *Letter of Aaron Klein*. *See also id, Letter of Andres Perez* ("In every interaction I have had with him, he has demonstrated kindness, humility, and a desire to contribute positively to the people around him"). Similarly, Nathan Mikkelson writes: "Throughout the time I

have known Seth, he has consistently demonstrated every good character one would hope to find in a person of virtue: honesty, integrity, kindness, and responsibility." *Id.*, *Letter of Nathan Mikkelson; see also id, Letter of Grace Downs* ("I believe the court has gotten to see the true Seth as I know him - compassionate, caring, dependable and affable").

The *Letters of Support* establish that Downes' kindness extends to all he encounters. Joseph Wolfert describes the support and care that Downes has provided him over the years. Ex. 1, *Letter of Joseph Wolfert*; *see also id*, *Letter of Michael Kreiner* ("Out of everyone I know, Seth is a person I hold in the highest regard, and he is always the first to lend a helping hand"). Ruth Manges writes about the profound impact Downes has had in her life.

> He helped me to process some of the extreme trauma I faced as a child, and to let it go. He taught me how to accept myself and my thoughts. He was such a deep and abiding friend, and perhaps one of the deepest friendships I have ever had.
>
> Seth also applied action and effort to our friendship. During COVID I had lost my job, and I was struggling to afford bills along with groceries. Around this time Seth came to visit me, and he took me to the store and bought my cats the largest container of food and litter available. Along with that, he also gave me $40 – with no expectation of being paid back. I will never forget this day, because had done more for me during that situation than any of my family had.

Ex. 1, Letter of Ruth Manges.

Downes' compassion to and commitment to others is demonstrated by his charitable work. His sister, Joan Downes, states:

> He developed a deep-seated desire to seek out purpose and help

> others. Following high-school, Seth worked as a missionary at a religious organization in Ohio, where he helped set up weekly retreats for families. He then spent several months volunteering for a ministry that traveled across the United States mentoring troubled teens. The fact that Seth chose to spend his young adulthood guiding at-risk youth – despite the lack of guidance he received himself – is a testament to his good-will and desire to help those around him.

Id., *Letter of Joan Downes*

The critical question case for this Court is how an individual like Downes, who exhibits the best human qualities, succumbs to Simmerer's fraudulent machinations. As previously noted, the trial testimony of the Your Ten Life employees and the *Letters of Support* demonstrate that Downes was unsophisticated and naïve. Such qualities made Downes susceptible to Simmerer's manipulation.

But Downes' susceptibility went far beyond naivete or a lack of sophistication. The roots of his vulnerability are found in his childhood. Downes was homeschooled in an environment where both physical and emotional abuse was the norm. Joan Downes states: "We were homeschooled in a rigid religious framework where questioning authority – specifically our father – was often met with physical or mental abuse." *Id.* Catherine Downes describes the hell that she and her brother endured:

> Our home environment was marked by neglect, fear, and volatility. Our father was often emotionally disengaged except during periods of anger. He frequently screamed at us, delivered lengthy lectures about sin and obedience, and used physical punishment and intimidation.
>
> Seth was naturally curious and thoughtful, and I specifically

> remember him being physically punished for asking questions that were perceived as challenging authority.

Id., *Letter of Catherine Downes*.

In his letter, Andres Perez depicts how Downes' past continues to haunt the person he is today.

> *He simply was not used to being allowed to make decisions for himself. I now see how, after leaving home and joining a program to better himself, this same submissiveness made him vulnerable again to someone very much like his father—someone who sought to control him and use him—which contributed to his involvement in the circumstances that led to his conviction.*

Sara Manuel, who testified for the Government during trial, echoes Andres Perez's depiction. "The greatest weakness I saw in Seth was his inability to trust his own wisdom and be easily swayed. While his first instinct was usually astute, he was quick to lose confidence in his own judgement and defer to an outside opinion." *Id. Letter of Sara Manuel*. Ms. Manuel further describes how Downes' insecurity affected his interaction with Simmerer. "[Seth Downes] was doubtful about many things. I encouraged him to trust himself and his instincts, but every time Shawn would have a great story to justify the decision and Seth would fold." *Id*. Still, Ms. Manuel concludes:

> I can say without a doubt, Seth Downes is one of the most caring, heartfelt individuals I know. While his inexperience and lack of self confidence cause him to make some drastic misjudgments, to this day, I still have the utmost faith and trust in him. I believe the world would be a much better place with more people like him and I would be happy to put my name and reputation on the line for him.

Id.

Returning to *Adelson*, "the weighing of the bad and the good" in Downes case proves that he is worthy of this court's mercy – a concept foreign to a rigid sentencing matrix that refuses to go beyond a defendant's criminal conduct.

Chapter 2
Just Punishment

> *All in all, punishment hardens and renders people more insensible; it concentrates; it increases the feeling of estrangement; it strengthens the power of resistance.*

Friedrich Nietzsche, *The Genealogy of Morals*, essay 2, aph. 14 (1887)

In imposing a just sentence, this Court should consider the significant punishment resulting from the indirect consequences of Downes felony conviction. Prior to the instant offense, Downes had no criminal felony record. Now, based on his felony conviction, Downes will face an overwhelming number of consequences. A congressional report authored by the United States Government Accountability Office (GAO) demonstrates that there are 641 collateral consequences of a nonviolent felony conviction. *See* GAO Report 17-691, NONVIOLENT DRUG CONVICTIONS, *Stakeholders Views on Potential, Actions to Address Collateral Consequences*, (Sept. 2017), summary excerpt attached hereto as Exhibit 2. Of these 641 collateral consequences, 497 (78%) of them may last a lifetime. *See id.*

Chapter 3
Educational, Medical Care, or Other Correctional treatment

> *Judges carry the heavy burden of depriving individuals of their liberty. But the Bureau of Prisons shoulders the constitutional burden of protecting the remaining rights of the incarcerated while in custody.*

United States v. Bardell, 634 F.Supp.3rd 1083, 1084 (M.D. Fla. 2022).

Gainfully employed and without a medical condition or substance abuse issue, Downes does not require correctional treatment or education.

Chapter 4
Deterrence

> *"No punishment has ever possessed enough power of deterrence to prevent the commission of crimes."*

Hannah Arendt, *Eichmann in Jerusalem*, Epilogue (1963)

The two aspects of deterrence of relevance in the instant case are general and specific deterrence. As this section establishes, the former should be given little weight, while the latter supports Downes's request for a variance.

A. *General Deterrence*

The belief that prison sentences are effective in deterring crime is the last refuge for the misled. As is the case with so many simple stories in our country, the principle of general deterrence is a false narrative unsupported by empirical study or evidence.[9]

Indeed, the Department of Justice (DOJ) has concluded that incarcerating defendants is not an effective means of deterrence. *See* U.S. Dept. of Justice, Nat'l

[9] *See* fn. 8, *supra*.

Inst. of Justice, *Five Things About Deterrence* (July 2014) attached as Exhibit 3. The DOJ has further found that even increasing the severity of punishment does little to deter punishment.

The DOJ's findings are consistent with other empirical studies that have determined there is no correlation between punishment and reductions in crime. *See* Dr. Oliver Roeder et al., *What Caused the Crime Decline*?, Brennan Center for Just., 22-23 (Feb. 12, 2015); s*ee also* Gary Kleck and J.C. Barnes, *Deterrence and Macro-Level Perceptions of Punishment Risks: Is There a "Collective Wisdom*?", 59 Crime & Delinquency 1006, 1031-33 (2013)(concluding that "increases in punishment levels do not routinely reduce crime through general deterrence mechanisms, because the fundamental link between punishment levels and perceptions of punishment levels appears to be weak to nonexistent"). Unfortunately, the use of the general deterrence rationale has effectuated mass incarceration. *See* Dr. Oliver Roeder et al., *What Caused the Crime Decline*?

B. *Specific Deterrence*

1. Empirical Studies

The likelihood that the defendant "will engage in future criminal conduct [is] a central factor that district courts must assess when imposing sentence." *Pepper,* 562 U.S. at 492. As in the case of general deterrence, empirical evidence does not establish a relationship between sentence length and specific deterrence, regardless of the type of crime. *See* National Institute of Corrections*, Myths and*

Facts, Why Incarceration is Not the Best Way to Keep Communities Safe (2016). The best available evidence establishes that imprisonment does not reduce recidivism more than noncustodial sanctions. Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S-51S (2011). Rather, there is strong evidence that prison contributes to increased recidivism. *See Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002,* 6 Criminology & Public Policy 589 (2007).

> Thus, the most effective to promote public safety and ensure that convicted persons can lead law-abiding lives is through broad use of non-incarceration sentences, especially since "incarceration does little to change a person's behavior" and **persons sentenced to prison have higher recidivism rates than those sentenced to community corrections.**

Myth and Facts, at 1, 4 (emphasis added).

2. Downes's lower risk of recidivism

Downes has no criminal history. Moreover, he has been employed throughout his life and does not have a substance abuse problem. These factors demonstrate that Downes poses a lower risk of recidivism. *See* U.S. Sent. Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12-13 (May 2004).

In imposing the least sufficient sentence to account for the need to protect the public from further crimes of Downes, this Court should consider the statistically low risk of recidivism presented by him. *United States v. Urbina*, slip op., 2009 WL 565485, *2-3 (E.D. Wis. Mar. 5, 2009) (considering low risk of

recidivism indicated by defendant's lack of criminal record, positive work history, and strong family ties).

Chapter 5
The Guidelines

> Criminal behavior can fuel public outcry and drive broad legislative and executive agendas to get 'tough on crime.' But how does that translate to specific instances? If you take a matrix to factor offense severity, overlay it with mandates born of popular outrage, and tailor it purportedly to address almost every eventuality, you get 'justice' dictated in advance, marked by visceral condemnation, and based on the pretense of omniscience.

United States v. Williams, 372 F.Supp.2d 1335, 1337-1338 (M.D. Fla. 2005)(Presnell, J.).[10]

A guideline recommendation is owed little deference.[11] Promogulated to provide sentencing consistency, the sentencing guidelines achieved its goal through the consistent imposition of sentences that were both irrational and unjustly harsh.

The history of the guidelines is a history of failure. For example, the crack guidelines sentenced offenders 100 times harsher than cocaine offenders despite the lack of an empirical basis for such a disparity. The drug guidelines were

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[10] Although *Williams* was reversed by the Eleventh Circuit in *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006), the Eleventh Circuit's decision was overruled by the United States Supreme Court. *See Kimbrough v. United States*, 552 U.S. 1353 (2007).

[11] As recognized in *Gall*, district courts "may not presume that the Guidelines range is reasonable." 552 U.S. at 49. *See also Rita v. United States*, 551 U.S. 338, 351 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.").

eventually amended to correct the problem.[12] But the cure, treating 28 grams of crack the same as 500 grams of cocaine, was equally absurd since it resulted from Congressional compromise rather than scientific evidence. *See, e.g.,* Safia Samee Ali, *AG Issues New Guidance on Ending Sentencing Disparities for Crack versus Powder Cocaine*, NBC News (Dec. 22, 2023), available at https://www.nbcnews.com/news/us-news/ag-issues-new-guidance-ending-sentencing-disparities-crack-powder-coca-rcna62162.[13]

Such is the case with the fraud guidelines since they are not the product of careful study based on empirical evidence. Consequently, the fraud guidelines do not reflect an approximation of sentences that might achieve § 3553 objectives.

In *Rita v. United States*, 551 U.S. 338 (2007), the Supreme Court gave two reasons that it may be "fair to assume" that the guidelines "reflect a rough approximation" of sentences that might achieve § 3553(a)'s objectives. First, the

[12] The amendment to the crack guidelines was not a rare event. Indeed, the Sentencing Commission has amended the Guidelines Manual more than 800 times over a period of four decades. During the past forty years, Congress has rejected a proposed amendment only once. *See* Cong. Research Serv., Congressional Review of Proposed Amendments to the U.S. Sentencing Guidelines (June 6, 2023). The fact that the Guidelines have been changed over 800 times underscores their persistent failures. Of course, one could argue that the number of amendments demonstrates the guidelines are trying to get it right. Unfortunately, it underscores their inherent unreliability and persistent failures. *See*, *e.g.*, Samuel Beckett, *Worstward Ho* (Grove Pr. 1984)("Try again, Fail Again, Fail Better").

[13] Unfortunately, the absurdity found in the crack guidelines is not the exception. For instance, methamphetamine offenses are treated more severely than fentanyl or heroin despite the latter substances' great health risks. *See*, *e.g.*, DEA, National Drug Threat Assessment (March 2021). The guidelines treat one gram of methamphetamine 20 times more harshly than one gram of heroin and eight times more harshly than fentanyl. *See* USSG § 2D1.1(D).

original Sentencing Commission used an "empirical approach," which began "with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past." *Id.* Second, the Commission can review and revise the guidelines based on judicial feedback through sentencing decisions, and consultation with other frontline actors, civil liberties groups, and experts. *Id.* at 348-50. The Court recognized, however, that not all guidelines were developed in this manner. *See Gall,* 552 U.S. at 46 & n.2; *Kimbrough v. United States*, 552 U.S. 85, 96 (2007). When a guideline "do[es] not exemplify the Commission's exercise of its characteristic institutional role," because the Commission "did not take account of 'empirical data and national experience,'" the sentencing court is free to conclude that the guideline "yields a sentence 'greater than necessary to achieve § 3553(a)'s purposes, even in a mine-run case." *Kimbrough*, 552 U.S. at 109-10.

A. An Advisory Sentencing Range Pursuant to Section 2B.1 Is Not Based on Empirical Data or National Experience

Because the Sentencing Commission failed to rely on empirical data or national experience in promulgating or amending the fraud guideline (USSG § 2B1.1), it failed to fulfill its institutional role. Thus, this Court is free to disagree on reasoned policy grounds, with its recommendation. *Kimbrough*, 552 U.S. 101-02, 109-10; *Rita*, 551 U.S. at 351, 357.

When the Commission adopted the original guidelines in 1987, it "decided to abandon the touchstone of prior past practice" with respect to white collar offenses. Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key*

Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 22-23 (1988). The Commission quickly abandoned its original goal of ensuring "short but definite" sentences. Beginning just two years after the Guidelines went into effect, prison sentences for fraud offenders were steadily increased. The effect of those increases on this case was to add four levels for loss in 1989, to add five more levels for loss in 2001, and to increase the base offense level by one level in 2003. Consequently, Downes' advisory guideline range is now significantly higher than under the original 1987 guidelines.

Because of these essential problems with USSG § 2B1.1, sentences in fraud cases reflect significant judicial disagreement with the guidelines. Indeed, "since *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines for cases like these and the fundamental requirement of Section 3553(a) that judges impose sentences 'sufficient, but not greater than necessary' to comply with its objectives." Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 169, 2008 WL 2201039, at *4 (Feb. 2008).

B. The Advisory Guidelines are Inconsistent with § 3553(a).

While a discussion of guideline limitations undermines confidence in their recommended outcomes, such an analysis fails to address their most fundamental

problem. That is, the rigid matrix of the guidelines is driven by a limited narrative of criminal conduct and criminal history. Consequently, they disregard the expansive narrative of a defendant's life and disregard the less general factors under § 3553(a). As recognized by Judge Tjoflat, in some cases the Guidelines may have little persuasive force when considering the other § 3553(a) factors. *United States v. Glover*, 431 F.3d 744, 752-53 (11th Cir. 2005), *abrogation on other grounds*, *United States v. Joseph,* 371 Fed.Appx. 70 (11th Cir. 2010)(unpublished).

In Downes case, a mechanical application of the guidelines does not account for the unique factors that mitigate his sentence – a result that is antagonistic to § 3553(a), as well as *Koon*. In placing offense conduct above all else, the guidelines do not account for unique circumstances of his offense. *See* Chapter I, *supra*. They do not account for his exemplary qualities. *See id.* They do not account for the significant impact of the collateral consequences of his conviction. *See* Chapter 2, *supra*. They do not account for his low risk of recidivism. *See* Chapter 3, supra. They do not account for the unwarranted disparity that would result from a guideline sentence. *See* Chapter 6, *infra*. And they do not account for his need to pay restitution in this case. *See* Chapter 7, *infra*.

The inability of the guidelines to meet the requirements of § 3553 constitutes a grave failure in Downes' case. To be sure, a mechanical application of the guidelines in his case is necessarily inconsistent with a just sentencing process as contemplated by Supreme Court precedent and the § 3553(a) factors. Such a

technical approach would only prove that injustice not always occurs through the impact of cataclysmic judicial decisions but often flows from the tide of quiet bureaucratic choices made without foresight or contemplation.[14]

Chapter 6
Disparity

> *In imposing a sentence, the Court must 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)

Regarding the goal of avoiding disparity in the sentences of defendants, this factor strongly supports Downes's request for variance. To support this tenet, exhibit 4 provides a chart of fraud cases nationally, many of which involved losses far greater than the alleged loss in this case. Similarly, exhibit 5 provides a chart of fraud cases in the Eleventh Circuit. In *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008), Judge Block took a similar collection of cases into account in imposing an appropriate sentence for two securities fraud offenders. Based on these cases, the court concluded that "[t]hose [defendants] who were not cooperators and were responsible for enormous losses were sentenced to double-digit terms of imprisonment (in years); [while] those whose losses were less than

[14] "The greatest evil is not now done in those sordid 'dens of crime' that Dickens loved to paint. It is not done even in concentration camps and labor camps. In those we see its final result. But it is conceived and ordered (moved, seconded, carried, and minuted) in clean, carpeted, warmed, and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voice."

C.S. Lewis, The Screwtape Letters at xxxvii (1961 ed.).

$100 million were generally sentenced to single-digit terms." *Id.* at 753. The court relied on this national pattern in arriving at a sentence of 60 months for the two defendants who faced an advisory guideline range of 360 months to life. *Id.* at 745.

Chapter 7
Restitution

> *In imposing a sentence, the Court must consider "the need to provide restitution to any victims of the offense"*

18 U.S.C. § 3553(a)(7)

Downes will owe restitution. If Downes is incarcerated, his ability to pay restitution will be severely impacted. Conversely, a non-prison sentence will allow Mr. Downes to make restitution. *See* 18 U.S.C. §3553(a)(7). Thus, this § 3553 factor supports the imposition of a probationary sentence with house arrest. *See United States v. Rangel*, 697 F.3d 795, 803-04 (9th Cir. 2012)("the district court's goal of obtaining restitution for the victims of Defendant's offense, 18 U.S.C. § 3553(a)(7), is better served by a non-incarcerated and employed defendant")(citation omitted).

Conclusion

> "*Midway through this life we borne upon I found myself in a dark wood where the way of truth was wholly lost and gone.*"

Dante Alighieri, *La Divina Commedia, Inferno*, Canto I (1472)

Perhaps, beginning this memorandum as a fairy tale distracts us from the seriousness of federal sentencing with all its trappings from a PSR to the determined U.S. Marshalls waiting with their handcuffs. This memorandum

wasn't written as a distraction. Rather, it is an imperfect response to an imperfect situation. To think that Seth Downes, this decent, naïve, and kind man, will carry the weight of a felony conviction and the possibility of prison sentence is unfathomable. To think that like so many before him, Downes's life and fate will be measured and weighed against the anchoring effect[15] of the guidelines is indeed less than ideal, perhaps absurd. Caught in such a situation, the format of a fairy tale seems just about right.

Putting aside the undersigned's literary pretensions and rhetorical devices, the unique circumstances presented in Downes's case warrant a variance below the applicable guideline range. Such a variance is necessary to vindicate the preeminence of 18 U.S.C. § 3553(a) and the broad perspective of *Koon, Pepper* and *Concepcion*, rather than the limited narrative presented by the sentencing guidelines.

While it may be easy to turn to the guidelines to judge the Defendant's crimes, that isn't justice. His crime cannot be the sole consideration. As this memorandum demonstrates, Downes's request for a probationary sentence is supported by so many mitigating factors from the circumstances of his offense to the man he has always been. While the retribution and visceral condemnation of

[15] The anchoring effect is a person's tendency to rely heavily on the first piece of information they receive in decision-making. The effect often impacts decisions concerning numerical values such as pricing or the guidelines. *See* Andrea J. Caceres-Santamaria, *The Anchoring Effect,* Page One Economics, Federal Reserve Bank of St. Louis (April 2021).

the guidelines is easy, it shouldn't be. For retribution and condemnation always carry consequences – ramifications that extend beyond Downes to so many others whose lives he has touched with his naivete and simple kindness.

Respectfully submitted,

/s/ Fritz Scheller

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all parties this 9th day of June 2026.

/s/ Fritz Scheller
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