Robert M. Seines
Attorney at Law
1312 N Monroe St
Spokane, WA 99201
509-844-6002
fax 509-255-6003

Attorney for Defendant

UNITED STATES DISTRICY COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. STEPHEN LAWRENCE MURPHY, Defendant.	Case No. 2:22-CR-00084-TOR DEFENDANT'S SENTENCING MEMORANDUM AND MOTIONS FOR VARIANCE OR DEPARTURE

STEPHEN MURPHY, by and through his attorney, Robert M. Seines, respectfully submits the following sentencing memorandum and motions for departure or variance.

1. BACKGROUND.

On July 19, 2022 a nine-count indictment was filed in this court charging Stephen Murphy and his wife Stephanie Murphy with crimes related to three Paycheck Protection Program (PPP) loans they applied for and received under the Coronavirus Aid, Relief and Economic Security Act

(CARES Act). They three loans totaled $62,499.00. The loans were later forgiven by the Small Business Administration.[1]

Stephen Murphy entered a guilty plea to Count 8, False, Fictitious, or Fraudulent Claims, 18 U.S.C. §287, on November 22, 2022.

Probation filed a final Presentence Investigation Report on April 12, 2023. ECF 55. The PSIR accurately calculates Mr. Murphy's USSG sentencing guideline range. PSIR ECF 55 at ¶ 178. Probation also notes that Mr. Murphy is eligible to a sentence of 1 to 5 years of probation under 18 U.S.C. §3561(c)(1). *Id* at ¶181.[2]

2. FACTS

In the spring of 2021 the Murphy's learned from an acquaintance that they could go a website sponsored by an entity named Womply and obtain PPP loans. On March 23, 2021 Stephen Murphy went to the website of Womply and applied for a PPP loan using SBA Form 2483 (3/21).[3]

---

[1] Mr. and Mrs. Murphy agree they should pay $62,400 in restitution.

[2] Mr. Murphy is not eligible for probation under the sentencing guidelines because his guidelines range is in Zone D. USSG §5B1.1, comment (2). ECF ¶182

[3] The PPP Application is Attachment 1.

Turns out, Womply is a shady financial technology firm that takes PPP applications, approves them, then submits the applications to several lenders. SBA, in reliance on the approved applications, funds the loans and pays fees to Womply and the lender. Congress is presently investigating Womply and other similar firms for financial fraud. Following is a link to a statement by SBA about the fraud investigation:[4]

https://proxy.www.sba.gov/article/2022/dec/08/us-small-business-administration-statement-house-select-subcommittee-coronavirus-crisis-report

SBA requires borrowers to submit documentation to the lenders or their agents proving they are eligible for a PPP loan. However, Mr. Murphy's SBA Form 2484 was not accompanied by tax returns or *any other* documentation that verified his eligibility. Even so, Womply falsely represented that Mr. Murphy

[4] Here are two other articles describing Womply PPP fraud investigations:

https://www.usatoday.com/story/news/investigations/2021/11/23/ppp-companies-blueacorn-womply-added-congressional-probe/8730237002/

https://www.npr.org/2022/12/06/1140823783/a-congressional-report-says-financial-technology-companies-fueled-rampant-ppp-fr verified his income with a 2020 Schedule C, Profit or Loss from Business (sole proprietorship).[5]

In sum, the Murphys found Womply's PPP loan application process to be effortless. It was basically money for nothing. Then, after following Womply's abbreviated path to money – three checks totaling $62,400 appeared – almost from thin air.

Stephen and Stephanie Murphy used the money to pay for living expenses, buy a tiny home and tools and equipment. The money also enabled them to rise out of a dead-end lifestyle and become productive citizens in their community. Probation notes:

> Mr. Murphy expressed before he and his wife were indicted, his wife became clean and sober, and he was working toward his sobriety. He stated, "we were able to become better society members. We were given the opportunity to be better citizens in our community." He expressed, having the money made me so I was not dealing with the people I was prior [i.e., drug addicts and distributors]. I was no longer searching out things to make me happy because I was no longer in poverty.

PSIR ECF 55 at ¶29.

---

[5] Womply's "Supporting Tax Documents" is Attachment 2. It states that Stephen Murphy provided Womply with his 2020 Schedule C documenting $100,000 in income. Mr. Murphy never filed a tax return or Schedule C in 2020.

3. MOTIONS AND GROUNDS FOR VARIANCE OR DEPARTURE.

The United States, in the filed plea agreement, will recommend a sentence at or below the low end of the guidelines. ECF 40 at ¶ 10.

Probation also recognizes that a sentence less than the guideline range may be appropriate:

> Mr. Murphy's convictions began at the age of 21 and consists of driving offenses, crimes against community members, domestic violence related offenses, and offenses exhibiting a longstanding polysubstance abuse addiction. Mr. Murphy has spent long periods incarcerated to include 12, 18, and 27.75 months, yet he continues to commit crimes. Despite Mr. Murphy's past criminal behavior, he has begun to make changes in his life to include, maintaining stable employment, having a residence, and refraining from using all illicit substances including marijuana. Additionally, he obtained a driver's license, opened a bank account, and has exhibited behaviors similar to productive members of society since being indicted for the instant offense. <u>As such, a sentence less than the guideline range may be sufficient to reflect the seriousness of the offense, promote respect for the law, and to provide just punishment, while affording adequate deterrence to future conduct.</u> PSIR ECF 55 at 197 (emphasis added).

As this Court is well aware, the sentencing guidelines are just the "starting point in the initial benchmark" in determining a sentence. *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 596 (2007), (stating that "a district court should begin all sentencing proceedings by correctly calculating the applicable guideline range.”).

The sentencing court “may not presume that the guideline range is reasonable.” But must “make an individualized assessment based on the facts presented” to arrive at a sentence that is sufficient, but not greater than necessary in each case. Gall, 128 S.Ct. at 597.

The Supreme Court has affirmed the authority of the sentencing court to impose a term of imprisonment outside the guideline range if the court deems it fitting and reasonable under the facts of that case and the applicable law. See, *Gall*, 552 U.S. at 602; *Kimbrough v. United States,* 552 U.S. 85, 128 S.Ct. 558, 570 (2007) (holding that sentencing courts may vary from the advisory guideline range based solely on policy considerations, or the sentencing court’s disagreement with the guideline range in a particular case).

Finally, the sentencing court is not required to see “extraordinary circumstances” to impose a sentence outside the guidelines:

> We reject, however, an appellate rule that requires “extraordinary” circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.

Gall, 128 S.Ct. at 594-95.

(a) The Fraud Sentencing guidelines and 18 U.S.C. §3553(a).

Mr. Murphy's calculated offense level is presently 10 which, along with his 12 Criminal History points, puts him in Zone D of the Sentencing Table. PSIR ECF 55 at ¶ 35.

The fact that the amount of loss exceeds $45,000 and is less than $90,000 is the offense characteristic that has the most dramatic effect on Mr. Murphy's guideline range by increasing his total offense level by 6 per USSG 2B1.1(b). However, courts and legal scholars have questioned the actual correlation between the amount of loss and the number of points that should be added to the base offense level.

The usefulness of the Guidelines' loss table in fraud cases was aggressively challenged by Judge Rakoff in *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006):

> What drove the Government's calculation in this case, more than any other single factor, was the inordinate emphasis that the Sentencing Guidelines place in fraud cases on the amount of actual or intended financial loss. As many have noted, the Sentencing Guidelines, because of their arithmetic approach and also in an effort to appear "objective," tend to place great weight on putatively measurable quantities, such as the weight of drugs in narcotics cases or the amount of financial loss in fraud cases, without, however, explaining

> why it is appropriate to accord such huge weight to such factors. *See generally,* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 69 (1998).

441 F.Supp.2d at 509.

> …
>
> What this exposed, more broadly, was the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense.

Id at 511.

In "Drawn from Nowhere": A Review of the U.S. Sentencing Commission's White Collar Sentencing Guidelines and Loss Data," Federal Sentencing Reporter, Vol. 26, No.1, October 2013, the author conducted a survey of cases and statistics from the U.S. Sentencing Commission and noted trends with respect to the application of the loss guideline, 2B1.1(b)(1)(I).

The author notes, following the detailed presentation and analysis of the sentencing statistics, that:

> Courts are varying downward more often and at a greater magnitude in fraud cases than in any major offense category. The statistical evidence reviewed above strongly points to the concept of loss as the primary reason for the judiciary's increasing dissatisfaction with the fraud Guidelines. Federal Sentencing Reporter, Vol. 26, No. 1, page 25.

Given the ongoing debate concerning the Sentencing Guidelines particular to fraud cases and considering the facts of this case; a below-guidelines sentence without imprisonment, and an adequate restitution order would be sufficient, and not greater than necessary, and would result in a just sentence for Mr. Murphy.

b. Departure for Post-Offense Rehabilitation.

In *United States v. Tzok-Sierra*, 387 F.3d 978 (9th Cir. 2004) the 9th Circuit reviewed a downward departure for post-offense rehabilitation. The Court determined that post-offense rehabilitation can be the basis for a downward departure. *Id.* at 981 (citing *United States v. Thompson,* 31 F.3d 1071, 1077 (9th Cir. 2002) (Berzon, J., concurring) (referencing § 5K2.0)). The court held that the departure "must be based on a determination that defendant had demonstrated an extraordinary level of rehabilitation." Id.

This Court knows how difficult it is for meth addicts to get clean and turn their lives around. Mr. Murphy's level of rehabilitation is indeed exceptional and clearly justifies a downward departure.

(c) Relative cost of imprisonment.

USSG §5H1.4(b) directs the Court consider the relative costs of treatment vs incarceration. Probation indicates that the annual cost of imprisonment in a BOP facility is $44,258. In comparison, supervision by Probation is $4,454 and a Residential Reentry Center is $35,761. PSIR ECF 55 at ¶ 185.

4. 18 U.S.C. §3553(a).

(b) The Court can find reasons justifying a sentence outside the guideline range by considering the factors enumerated in 18 U.S.C. § 3553(a).

After determining the sentence pursuant to the advisory sentencing guidelines, a Court must consider the following factors pursuant to 18 U.S.C. § 3553(a):

> (a) **Factors To Be Considered in Imposing a Sentence**. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the

> defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;(4) and (5) the United States Sentencing Guidelines and Policy Statements;
>
> …
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.18 U.S.C. § 3553(a).

"The overarching statutory charge to a sentencing court is to "impose a sentence sufficient, but not greater than necessary" to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment." *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008),

Probation has completed a detailed and thoughtful analysis regarding sentencing considerations in Mr. Murphy's case. In conclusion, Probation tells the Court:

> … Despite Mr. Murphy's past criminal behavior, he has begun to make changes in his life to include, maintaining stable employment, having a residence, and refraining from using all illicit substances including marijuana. Additionally, he obtained a driver's license, opened a bank account, and has exhibited behaviors similar to productive members of society since being indicted for the instant offense. As such, a sentence less than the guideline range may be sufficient to reflect the seriousness of the offense, promote respect for the law, and to provide just punishment, while affording adequate deterrence to future conduct. PSIR ECF 55 at ¶ 197.

Stephen Murphy respectfully requests the Court to carefully consider if anything would be gained by incarcerating him for the guideline range of 21 to 27 months, **or** even for any length of time. In the years since the offense, he has become clean and sober. He has changed and improved his life, and in so doing, he has earned respect in his community and is a productive community member.

Probation has determined that Mr. Murphy is eligible under statute for a sentence of probation which clearly a far better alternative to incarceration in this case.

5. RECOMMENDATION

Based on the facts in the record and the above memorandum, Stephen Murphy asks the Court to vary or depart downward in its sentencing guideline calculation. Then, after consideration of 18 U.S.C § 3552(a) and 18

U.S.C.§3561(c)(1) impose a sentence of 1 to 5 years probation, along with restitution or community service.

SIGNED this 19th day of April, 2023 at Spokane, WA.

s/ Robert M. Seines
ROBERT M. SEINES
Attorney for Stephen L. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2023 I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notification of such to: Tyler H.L. Tornabene Assistant U.S. Attorney.

s/Robert M. Seines