UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Plaintiff,

v. Criminal No. 10-CR-00075-001 (JMR)

TREVOR GILSON COOK,

Defendant,

DEFENDANT TREVOR GILSON COOK'S SENTENCING MEMORANDUM

INTRODUCTION

Defendant, Trevor Gilson Cook, asks this Court to grant a downward departure and variance sentencing him to 20 years incarceration instead of the maximum allowable 25-year maximum. Though a 20 year sentence is still higher than necessary to insure adequate deterrence, and may create unwarranted sentencing disparities between similar defendants, it most accurately reflects the true severity of Cook's offense as well as his personal circumstances and history. The sentence of 324 to 405 months imprisonment called for by the United States Sentencing Guidelines (hereinafter "Guidelines") without the statutory maximum of 25 years, violates the first governing principle of federal sentencing that any sentence imposed be "sufficient *but not greater than necessar*y to comply with the purposes listed in 18 U.S.C. § 3553(a)."

Although Cook has admitted guilt for a large scheme to defraud investors, there are several compelling reasons to grant him a modest downward departure and variance. First, the application of Criminal History Category II overstates the severity of Cook's criminal history

warranting a downward departure to a Category I. Second, and most importantly, because Guideline § 2B1.1 does not exemplify the Commission's exercise of its characteristic institutional role, a downward variance is warranted. Further, a downward variance is appropriate here because application of U.S.S.G § 2B1.1 leads to "factor creep," a process by which overlap between the applicable Guideline enhancements overstates the degree of harm and culpability. Lastly, a variance in order to account for the total period of incarceration Cook has served in the Sherburne County jail is proper. Thus, this Court should grant a modest variance and impose a sentence of 20 years.

ARGUMENT

The Court must impose a reasonable sentence that is sufficient *but not greater than necessar*y to comply with the purposes listed in 18 U.S.C. § 3553(a). *Gall v. United States*, 552 U.S. 38 (2007) (emphasis added); 18 U.S.C. § 3553(a). Section 3553(a) contains seven factors to be considered at sentencing:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and 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) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;
>
> (5) any pertinent policy statement;

(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.

United States Code 18 U.S.C. § 3553(a). A consideration of these factors establishes that a 20 year sentence is sufficient to achieve these purposes.

I. SINCE APPLICATION OF THE GUIDELINES SUBSTANTIALLY OVER-REPRESENTS THE SERIOUSNESS OF COOK'S CRIMINAL HISTORY, A DOWNWARD DEPARTURE IS APPROPRIATE.

The Guidelines are advisory, not mandatory. *United States v. Booker*, 543 U.S. 220 (2005). Even after *Booker*, the process of sentencing begins with an understanding of the applicable Guideline range. *United States v. Feemster*, 483 F.3d 583, 588 (8th Cir. 2007). The parties here did not calculate Cook's guideline range in the plea agreement because the application of U.S.S.G. § 5G1.1(c)(1) dictates that Cook be sentenced to no more than 300 months, as this is the maximum consecutive term justified by the two counts of conviction. The parties agreed, however, that the guideline calculation would exceed the statutory maximum 300 months. The pre-sentence report assigns Cook a total offense level of 40, and a corresponding sentence range of 324 – 405 months. This guideline range assumes that Cook is appropriately assigned a Criminal History Category of II, based on his 2 criminal history points allocated from his prior convictions under Minnesota's Impaired Driving Code from 1998 and 2004 respectively. But a criminal history category of II substantially over-represents the severity of Cook's criminal history, justifying a downward departure. U.S.S.G. § 4A1.3(b)(1). A Criminal History Category I is more appropriate here, resulting in a Guideline range of 292 – 365 months. Therefore, the statutory maximum sentence of 300 months is within the applicable Guideline range.

Pursuant to U.S.S.G. § 4A1.3(b)(1), a downward departure may be warranted where a defendant's criminal history category over-represents the seriousness of the defendant's criminal history. *State v. Bradford*, 500 F.3d (8th Cir. 2007); *United States v. Payne*, 81 F.3d 759 (8th Cir. 1996). The United States Sentencing Commission has recognized that the use of criminal history points to compute sentencing ranges can lead to unjustifiably disparate treatment of offenders. *See* Comments to USSG § 4A1.3. This is because a defendant's criminal history invariably relies on the degree of leniency or harshness received by the criminal justice system in the past. *United States v. Maloney*, 466 F.3d 663, 670 (8th Cir. 2006); *United States v. Senior*, 935 F.2d 149, 151 (8th Cir.1991).

In this case, operation of Minnesota's Impaired Driving Code has created a criminal history score that "substantially over-represents the seriousness of the defendant's criminal history." U.S.S.G. § 4A1.3(b)(1); *see United States v. Fisher*, 669 F. Supp. 2d 1013, 1022 (D. N.D. 2009)(granting a downward departure under Guideline 4A1.3(b)(1) based on a relatively stale impaired driving offense). This is so because Minnesota's Impaired Driving Code is designed to increase the certainty of criminal apprehension and conviction in order to place offenders in special probationary programs that focus on dealing with their chemical dependency problems. *See* Minn. Stat. § 169A.40 (modifying arrest rules to facilitate DWI arrests); Minn. Stat. § 169A.20 (creating strict liability criminal offense allowing conviction without a *mens rea* term); Minn. Stat. § 169A.70 (requiring chemical dependency assessments for DWI convictions). Because the Code places a premium on intensive probation, combined with enhanced sentencing for recidivist offenders, prosecutors and courts have little incentive to treat defendants with leniency by allowing them to avoid convictions through deferred prosecution programs or stays of adjudication. *See* Minn. Stat. § 169A.275, § 169A.276 (providing increased mandatory

minimum sentences based on DWI recidivism); Minn. Stat. § 169A.24, § 169A.25, § 169A.26 (providing increased statutory maximum sentences based on DWI recidivism); Minn. Stat. § 609.135 (increasing the probationary term for misdemeanor DWI convictions). The fact that the Minnesota Department of Public Safety's reported 32,576 arrests for impaired driving are by far the highest raw number of arrests for any type of offense, and that the Department's reported 98% clearance rate is the highest among all offenses, supports the conclusion that impaired driving offenders in Minnesota do not receive leniency. *2009 Bureau of Criminal Apprehension Minnesota Justice Information Services Uniform Crime Report* at 11; *See also* http://www.dps.state.mn.us/comm/press/newPRSystem/viewPR.asp?PR_Num=1042

Impaired driving convictions in Minnesota are conceptually different from other criminal convictions because they are justified by the need to apprehend and rehabilitate, as opposed to the retributivist logic of punishing criminal behavior that creates harm with a guilty mind. *Pallas v. Commissioner of Public Safety*, 781 N.W.2d 163 (Minn. Ct. App. 2010)(highlighting the importance of a DWI offender's rehabilitation). Put in different terms, Cook's criminal history evinces an individual whose alcohol dependency creates a risk of public harm, as opposed to a repeat offender with a pattern of intentionally harming individuals through criminal behavior. *See United States. v. Saffeels*, 39 F.3d 833, 838 (8th Cir. 1994); *United States v. Estrada*, 965 F.2d 651, 653 (8th Cir. 1992)(implying that similarity or dissimilarity between offense conduct and prior criminal history can justify departures under Guideline § 4A1.3). As a result, Cook should be granted a slight downward departure to Criminal History Category I.

II. THE FACTORS SET FORTH IN SECTION 18 U.S.C. § 3553(a) JUSTIFY A DOWNWARD VARIANCE.

The sentencing guidelines are but one of the factors the Court considers in imposing a sentence on a defendant. *See* 18 U.S.C. § 3553(a)(4)(A)(1) ("the sentencing range

established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines.") As the United States Supreme Court explained, "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Gall*, 127 S. Ct. at 596; *see also United States v. Barron*, 557 F.3d 866, 868 (8th Cir. 2009). A consideration of all of the § 3553(a) factors supports a downward variance.

A. Because the Application of Guideline 2B1.1 Does Not Exemplify the Commission's Exercise of Its Characteristic Institutional Role, a Downward Variance is Appropriate.

After *Kimbrough v. United States*, 128 S.Ct. 558, 574 (2007) and *Spears v. United States*, 129 S.Ct. 840, 843. (2009), this Court has discretion to consider whether Guidelines sentencing ranges actually serve the purposes of sentencing in 18 U.S.C. § 3553(a), even in the mine run case. In cases where "the Guidelines do not exemplify the Commission's exercise of its characteristic institutional role," defined as developing "Guideline sentences using an empirical approach based on data about past sentencing practices", then the Court has discretion to grant a downward variance. *Kimbrough*, 128 S. Ct. at 575, 567; *United States v. O'Connor*, 567 F.3d 395, 398 (8th Cir. 2009); *United States v. Davis*, 538 F.3d 914, 918 (8th Cir. 2008). This is just such a case.

Both *Kimbrough* and *Spears* involved the question of whether a district court abused its discretion by justifying a sentence below the applicable guideline range based on a policy determination that the crack cocaine to powder cocaine sentencing disparity of 100 to 1, as embodied in U.S.S.G. § 2D1.1, did not further the aims of Section 3553(a). *Kimbrough*, 128 S. Ct. at 573; *Spears*, 129 S.Ct at 843. In both cases, the Court held that such an analysis lay well

within the discretion of the trial court. *Id.* The Court in *Kimbrough* highlighted that a lower sentence was especially proper because the Guidelines did not take into account empirical sentencing information in setting the 100 to 1 ratio. *Id.* Because U.S.S.G. § 2D1.1(c) did not rely on the Commission's traditional expertise grounded in devising sentencing ranges that reflect existing empirics, the Court found that the trial court appropriately questioned the rationale behind the guideline. *Id.* at 573.

Under § 2B1.1, Cook's offense level increases by 26 points because the loss amount is greater than $1,000,000,000; it increases by another 6 points because the crime involved more than 250 victims. Just like the guideline section invoked in *Kimbrough* and *Spears*, the application of § 2B1.1 in this case does not exemplify the Commission's exercise of its characteristic institutional role.

A brief history of the United States Sentencing Commission's (hereinafter "Commission") treatment of fraud sentencing shows that while its initial guidelines were based on solid empirics, the current guidelines merely reflect a lex talionis, eye for an eye, approach driven by political directives from Congress, public opinion surveys and direction from other government bodies. As a result, the § 2B1.1 range in the context of a large loss fraud scheme is not justified by any Section 3553(a) factor. It also violates Section 3553(a)'s parsimony principle that any sentence be "sufficient, but not greater than necessary" to meet the Section 3553(a) factors.

Until 1989, § 2F1.1 provided a base offense level of 6 for fraud crimes, an enhancement of 11 for a loss amount over $5,000,000, an increase of 2 for more than one victim, an additional 2 levels for an aggravating role under § 3B1.1, totaling an Offense Level of 21 with a guideline range of 45 to 51 months for Cook's crime in 1988. U.S.S.G. § 2F1.1 (1988), § 3B1.1 (1988). The Commission could correctly justify this computation based on two empirical calculations.

First, the Commission increased fraud sentences from pre-guidelines practice in order to eliminate unwarranted disparities between fraud crimes and larceny crimes with similar loss amounts. U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 56 (Nov. 2004)(hereinafter *Fifteen Year Report*). Second, the Commission decided that white-collar crimes, such as fraud, required "a short but definite period of confinement" in order to "achieve adequate deterrence." *Id.* The fact that certainty of punishment, as opposed to severity of punishment, has a proven general deterrent effect justifies this approach. *See e.g. United States Sentencing Commission Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses*, Remarks of Professor Daniel Nagin at 22 (stating "one consistent finding in the deterrence literature is that the certainty rather than the severity of punishment seems to be the most effective deterrent"). As a result of the Commission's decisions, "the rate of imprisonment for fraud offenders rose from about 50 percent in the pre-guidelines era to almost 70 percent by 2001." *Fifteen Year Report* at 58.

Beginning in 1989, the Commission began to lose its empirical moorings by increasing the prison term for fraud offenders "often in response to congressional directives." *Fifteen Year Report* at 56. The Commission itself admits that,

> The appearance early in the guidelines era of these mandated sentence increases for economic crimes, and the perceived absence of empirical research establishing the need for them, led one former Commissioner to warn that the SRA's promise of policy development through expert research was being supplanted by symbolic "signal sending" by Congress.

Id. The Commission provided an increase of 18 for a loss of over $80,000,000, resulting in an Adjusted Offense Level for Cook's crime of 28 and corresponding to a term of 87 – 108 months, a term nearly twice that contemplated in 1988. In support of this near doubling of incarceration,

the Commission simply stated "the purposes of this amendment are… to increase the offense levels for larger losses to provide additional deterrence and better reflect the seriousness of the conduct." Commentary to U.S.S.G. § 2F1.1 (1989). These justifications supported the 1988 guideline, which already greatly increased punishment for fraud offenses from pre-guideline levels by limiting the availability of probation. *Fifteen Year Report* at 56. Given the lack of empirical support for the 1989 increase, coupled with the Commission's own admission referenced above, the only conclusion is that the near doubling of punishment for a fraud crime with a loss amount over $80,000,000 was motivated by perceived political pressure to get tough on fraud offenders.

The next increase in Guideline punishment for fraud crimes came in 2001, when the Commission approved a series of changes known as the "2001 Economic Crimes Package," which culminated from six years of debate amongst a variety of stakeholders in the federal criminal justice community, including the Department of Justice, the United States Probation Office and representatives of the criminal defense bar. THE 2001 FEDERAL ECONOMIC CRIME SENTENCING REFORMS: AN ANALYSIS AND LEGISLATIVE HISTORY, 35 INLR 5, 29 - 30 (2001). The heightened sentence range for large dollar frauds resulted from a compromise between the defense bar and the other stakeholders in which punishment decreased slightly for low loss offenders. *Id.*

The Commission itself cited three factors justifying the 2001 increase, which were feedback from public opinion studies, input from the Department of Justice and survey results from the federal judiciary. *Federal Register* (Vol. 62, No. 1, 152-198) at 18. Before the 2001 enhancements, 53% of Federal District Court Judges expressed the opinion that Guideline 2F1.1 did not provide adequate punishment for economic crimes. *The U.S. Sentencing Guidelines,*

Results of the Federal Judicial Center's 1996 Survey, Report to the Committee on Criminal Law of the Judicial Conference of the United States. Federal Judicial Center (1997). The survey results are in stark contrast, however, to upward departure rates in economic crimes cases, which was only 1.16% in fraud cases from 1996 to 2000. *See Exhibit A.* When discussing the Economic Crimes Package of 2001, a commentator noted that under the Guidelines before 2001, were federal judges truly dissatisfied with Guideline § 2F1.1's perceived leniency, they would have imposed upward departures more frequently, for example under Guideline § 5K2.5. *United States Sentencing Commission Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses*, Remarks of James Felman at 61 – 63. Thus, the empirical data available to justify the 2001 Economic Crimes Package increases was, at best, equivocal as to the true position of the federal judiciary.

Nonetheless, due to the 2001 Economic Crimes Package, a loss amount of over $100,000,000 lead to a 26 level enhancement. U.S.S.G. § 2B1.1 (2001). In addition, legislation included a 4 level enhancement for more than 50 victims. *Id.* Before 2001, the Guidelines only contained a 2 level enhancement for either more than one victim or "more than minimal planning." U.S.S.G. § 2F1.1 (2000). The Commission provided no empirical basis whatsoever for the number of victims enhancement, nor did it explain its rationale for doing so in the Commentary to the 2001 Amendments. *Commentary to* U.S.S.G. § 2B1.1 (2001). In total the 2001 Economic Crimes Package provided for an adjusted offense level of 38 for Cook's crime, with a sentencing range of 262 – 327 months. U.S.S.G. §2 B1.1 (2001).

In 2003, in response to specific direction from Congress under the Sarbannes-Oxley Act of 2002, the Commission amended the guidelines to further increase sentence severity. *Fifteen Year Report* at 56; U.S. Sentencing Commission, *Increased Penalties Under The Sarbanes-Oxley*

Act of 2002 (January 2003). The combination of an increased base offense level of 7 for fraud and an additional enhancement of 6 levels for more than 250 victims, lead to an adjusted offense level of 43 in this case. U.S.S.G. § 2B1.1 (2003). These changes were made specifically at Congress's direction, without any attempt at empirical justification. U.S. Sentencing Commission, *Increased Penalties Under The Sarbanes-Oxley Act of 2002* (January 2003).

The initial fraud guideline, U.S.S.G. § 2F1.1 (1987) appropriately called for "a short but definite period of confinement" in order "both to ensure proportionate punishment and to achieve adequate deterrence." *Fifteen Year Report* at 56. The Commission justified this conclusion with empirical analysis based on the need to provide similar sentencing for fraud and larceny offenders, as well as to assure general deterrence for fraud offenders with short but meaningful prison terms. *Id.* Since then, the Adjusted Offense Level has increased for Cook's crime from a range of 45 - 51 months to life imprisonment. No solid empirical evidence exists to justify this increase, instead the Commission relied either on political direction from Congress, compromise between stakeholders or survey results that contradicted actual practice in the district courts. Guideline § 2B1.1, thus should not be given deference under *Kimbrough v. United States*, 128 S.Ct. 558, 574 (2007) and *Spears v. United States*, 129 S.Ct. 840, 843. (2009), because there is no empirical evidence supporting § 2B1.1 as it applies to Cook. This lack of empirical evidence justifies a variance.

B. Cook's Adjusted Offense Level of 43 is a Result of "Factor Creep" and Does Not Reflect The Seriousness of This Offense, Nor Promote Respect for The Law, Nor Provide Just Punishment for This Offense.

Section 3553(a)(2)(A), which directs this Court to consider "the need for the sentence imposed… to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," counsels in favor of a variance. Cook's Adjusted

Offense Level of 43 is unduly severe as a result of "factor creep" and does not promote these goals.

Cook's Adjusted Offense Level is equal to the base offense level for First Degree Murder, in violation of 18 U.S.C. § 1111 and Guideline § 2A1.1. 18 U.S.C. § 1111(a) defines First Degree Murder as:

> the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing… is murder in the first degree.

It appears that the consensus in the United States is that premeditated murder is worse than any fraud or theft crime as evidenced by the fact that while 37 states authorize capital punishment for murder, none do so for property crimes. *See* http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty#BJS. While there are obvious differences between a premeditated killing and a large fraud scheme, the Guidelines invite a comparison based on their stated goal of "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." FEDERAL SENTENCING GUIDELINES HANDBOOK, 2009 – 2010 EDITION, 3. If Cook's illegal conduct is not as serious as premeditated murder, then using an Adjusted Offense Level of 43 inappropriately denigrates the severity of premeditated murder, and thereby promotes disrespect for the law as well as unjust punishment for Cook's fraud even considering the high loss amount.

The Sentencing Guidelines equates these two offenses as a result of "factor creep." *Fifteen Year Report* at 137; *quoting* Ruback, Barry & Jonathan Wroblewski. 2001. *The Federal Sentencing Guidelines – Psychological and Policy Reasons for Simplification.* PSYCHOLOGY, PUBLIC POLICY, & LAW 7(4):739-775. Reflecting on its first fifteen years, the Sentencing Commission stated:

> While many guideline amendments have clarified ambiguous terms or simplified guidelines operation, other amendments have added to their complexity. It is possible to imagine countless circumstances that would make an offense more serious… it is difficult to argue that any of these considerations are irrelevant, yet, as more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.

A comparison of the available adjustments in Guideline § 2A1.1 and Guideline § 2B1.1 illustrates the dilemma. Guideline § 2A1.1 contains no adjustments, it simply states that first degree murder gets a base level of 43. Guideline § 2A1.1 can be simple because the underlying statute, Section 1111(a), identifies a discrete harm, the killing of a person. Guideline § 2B1.1, in contrast, must be complex since the most common underlying crimes, mail and wire fraud, simply prohibit using either the mails or wires "in furtherance of a scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1343. Unlike in the case of person crimes, there is no equivalent to the harm continuum from bodily harm to death.

As a result, Guideline § 2B1.1 contains at least 29 sentence enhancing adjustments. SENTENCING HIGH-LOSS CORPORATE INSIDER FRAUDS AFTER BOOKER, 20 Fed.Sent.R. 167 at 6. The relevant adjustments in this case, for number of victims and loss amount, as well as the Guideline § 3B1.1 adjustments for leadership role and abuse of trust, seek to approximate mens rea and degree of harm. *Id.* All these adjustments, excluding number of victims, were viewed as important culpability factors by judges in the pre-guidelines era. *Commentary to* U.S.S.G. § 2B1.1, at 15(b) (2001) But they were not necessarily used in tandem, in all cases, in the same arithmetic fashion called for by the Guidelines. 20 Fed.Sent.R. 167 at 6.

For Cook, the reliance on these four factors overstates both the degree of harm and the degree of culpability. *Compare United States. v. Lauersen,* 362 F.3d 160, 164. (2nd Cir. 2004)(stating, in a large loss health care fraud case, "although the Guidelines contemplate the

aggregation of applicable enhancements… what is present to a degree not adequately considered by the Commission is the combined effect of the aggregation of substantially overlapping enhancements"). Guideline § 2B1.1 is premised on the idea that loss amount is a proxy both for degree of harm and degree of culpability. *Commentary to* U.S.S.G. § 2B1.1, at 15(b) (2001). If loss amount is viewed as the degree of harm, then there is significant overlap with the adjustment for number of victims. While the Commission has never explained why the number of victims is important, it can logically be viewed as a proxy for degree of harm. But it is difficult to conceive of how a large loss amount can be reached without a high number of victims, or in the alternative risking harm to large institutional lenders, and thereby receiving a different upward adjustment.

Similarly, if loss amount is viewed as a proxy for degree of mental culpability, there is overlap with the adjustment for abuse of trust. Almost all fraud crimes involve some abuse of trust, because in order for the victim to suffer harm, he or she must rely on the defendant's misrepresentation. While Guideline § 3B1.1 only calls for enhancement if "defendant abused a position of public or private trust," it is very difficult to imagine a high loss amount case where a defendant is not in a position of public or private trust.

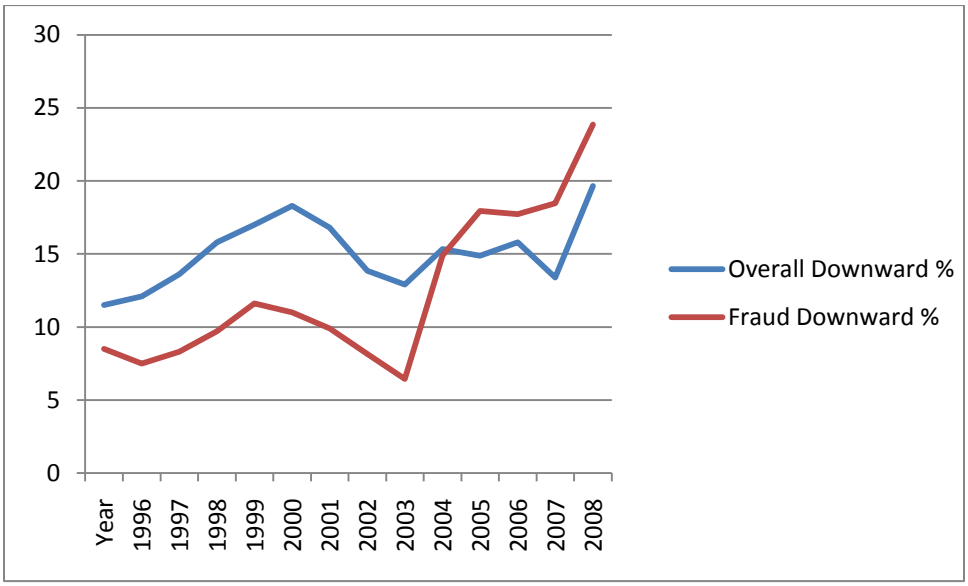
In summary, a variance is appropriate because "factor creep" creates an unduly severe Adjusted Offense Level for Cook. For this reason, Cook respectfully requests that this Court grant a downward variance. A downward variance of three Offense Levels is modest, and will properly account for "factor creep."

C. A 20 Year Sentence Will Not Create Unwarranted Disparities Between Similar Defendants.

Section 3553(a)'s direction to consider the "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar

conduct," is meant to focus the Court both on disparities between different judges and districts, as well as between co-defendants in similar cases. *United States v. Parker*, 462 F.3d 273, 277 (3rd Cir. 2006); *United States v. Lewis*, 594 F.3d 1270, 1276 (10th Cir. 2010); *United States v. McGee*, 408 F.3d 966, 988 (7th Cir. 2005). Accordingly, it is useful to evaluate the statistical analysis generated by the United State Sentencing Commission. *See Lewis*, 594 F. 3d at 1276 (criticizing reliance on anecdotal evidence). Anecdotal comparisons can also have persuasive value. *Mcgee*, 408 F.3d at 988 (relying on anecdotal result in a related case).

Because deviations from § 2B1.1 are becoming more common, a variance in this case would not lead to an unwarranted disparity. The following graph depicts downward departures and variance rates for all Guideline sentences, and for fraud sentences, with the exception of those downward departures justified by Guideline § 5K1.1(a) for substantial assistance to the government:



Thus, in 2008, district courts granted downward variances in nearly 20% of all criminal cases and in nearly 25% of all fraud cases. From 2003 – 2008, the trend of increasing below-

guideline sentences for both overall Guideline sentences and for fraud sentences can logically be explained by *United States v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004). What *Booker* and its progeny cannot explain, however, is that during the same period the rate of below-guideline sentences in fraud cases for the first time outstripped the overall rate. A cause of the sharp increase in below-guideline sentences for fraud offenses, therefore could be a reaction by federal district court judges to increased guideline sentences for fraud crimes implemented in 2001 and 2003. Cook's Adjusted Offense level under the 2001 Economic Crimes Package would have been 38, with a sentencing range of 262 – 327 months, with acceptance of responsibility, his range would have been 188 – 235 months. Cook's requested sentence of 240 months, is only slightly above this range, and therefore would not create an unwarranted disparity. Consequently, this Court should grant a slight downward variance to provide a sentence consistent with 2001 levels.

Anecdotal evidence also supports the conclusion that a 240 month sentence would not result in unwarranted disparities between similarly situated defendants. The Second Circuit described a sentence of 25 years, which is the maximum allowable sentence for Cook under the two counts of conviction, as "a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation." *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006). The Defendant in that case, Bernard Ebbers, "was the Chief Executive Officer ("CEO") of WorldCom, Inc., a publicly traded global telecommunications company." *Id.* at 110. Ebbers' intentional, repeated fraudulent conduct resulted in a total offense level of 42, based on astronomical loss amounts, effected victims, harm to a financial institution and, most importantly, no acceptance of responsibility. *Id.* at 117. Yet Ebbers received a five year

downward variance, lowering a 30 year Guideline range to 25 years. *Id.* Other examples of variances in high loss fraud cases are *United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006), *United States v. Rigas*, 490 F.3d 208, 239 (2d Cir. 2007) and *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008).

Further, a comparison with recent, large fraud cases in the District of Minnesota shows that a 20 year sentence for Cook is justified. Within the last year, three other notable fraud defendants have received substantial prison terms. In *United States v. Dao*, 0:09-cr-00048 (Doc # 104), a very similar though smaller fraud scheme generating a loss amount of $7.2 million justified a 144 month sentence, slightly below the pre-sentence offense range of 151 - 188 months. *See* (Doc # 96 at 1). In *United States v. Hays*, 0:09-cr-00091 (Doc #72), another similar but smaller fraud defendant who created a $22 million loss received a guideline range sentence of 117 months. On the other end of the spectrum, of course, is *United States v. Petters*, 0:08-cr-00364 (Doc # 400), where a $3.5 billion dollar loss amount lead to a sentence of 600 months, or 50 years.

The range provided by these cases, from nearly 10 years for Hayes to 50 years for Petters, provides a rough idea of where a fair sentence for Cook should lie. Though the loss amount in this case is significantly greater than in *Hays* and *Dao*, as is the number of victims, Cook's offense conduct is otherwise fairly similar, involving false promises about security of the scheme combined with poor investment strategy and reckless personal use of investor money. *Hays* and *Dao* are also similar in that all three defendants accepted responsibility by pleading guilty. For these reasons, and because Cook's loss amount is orders of magnitude less than *Petters*, Cook's offense is much similar to *Hays* and *Dao* and should thus receive a sentence closer to 10 years than to 50. Based on this, a 20 year sentence is warranted.

D. A 20 Year Sentence Appropriately Considers the Nature and Circumstances of the Offense and The History and Characteristics of Cook.

Since *United States v. Booker*, and *Gall*, the Eighth Circuit has approved of downward variances based on compelling, mitigating personal circumstances. *E.g., United States v. Lehmann*, 513 F.3d 805, 808 – 09 (8th Cir. 2008). While Cook does not conform to prevailing stereotypes of white-collar offenders, the nature and circumstances of his offense, as well as his personal history and characteristics, neither justify aggravated nor mitigated punishment. The Court may consider the following as Cook's allocution under FED. R. CRIM. P. 32(i)(4)(A).

Cook comes from a modest background, having only one working parent, receiving a need based scholarship to attend the University of Minnesota, and working as a caddy to help pay for his a private high school education. (Presentence Report at 13.) His family life as a child had its share of difficulty. His biological parents divorced when he was very young, and his step father was verbally abusive to his mother. *Id.* When defendant was 22, his older brother died of a drug overdose. *Id.* At age 23, his step-father died of colon cancer causing his mother to commit suicide. *Id.* Cook struggles with alcohol abuse issues. *Id.* at 13, 15. Cook has also dealt with a significant birth defect on his face, which required multiple corrective surgeries and is still evident today. *Id.* at 15. Despite these difficulties, Cook has been able to maintain a stable marriage and enjoys the emotional support of his biological father. *Id.* at 14.

Given these difficulties, Cook had to become self sufficient at a young age, and his self sufficiency provides important context to the nature and circumstances of his offense. Up until January of 2008, Cook reasonably believed that his trading activity at Crown Forex SA generated significant profits that might cover the principal and promised return on his investor's money. Account statements from Crown Forex showed significant trading profits of over $98 million dollars during the period February 2007 to July 2009. *See Exhibit B (Letter of Paul*

Walsh). In January of 2008, Cook traveled to Switzerland to meet with representatives of Crown Forex SA, which was his largest trading platform as well as his largest debtor. At this time, he realized that Crown Forex SA was in dire financial straits, putting in jeopardy the substantial value of his investor's Crown Forex SA accounts. He then defrauded investors in an unsuccessful attempt to solve the problem himself, by continuing to solicit and invest new capital. At this point, his business lost any claim of legitimacy and became a purely fraudulent enterprise. Cook recognizes that he made other misrepresentations and omissions before January of 2008, and that those actions constitute part of the overall crime, but up until that point he reasonably believed that his trading activities at Crown Forex SA could provide significant returns to his investors.

Cook's self-sufficient nature also explains why his offense does not bear the hallmarks of many other recent, large loss fraud crimes. Cook never held himself out as a philanthropist. *United States v. Petters*, 0:08-cr-00364. Cook did not leverage his position at a large, respected company. *United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006). Cook abused no substantial political or legal connections to foster his scheme. *United States v. Rothstein*, 09-60331 (S.D.FL 2010) Cook did not make an entire community a party to his crime. *United States v. Rubashkin*, 08-cr-1324 (N.D.IA 2010). In short, he did not share his corruption not with society-at-large but instead only with a small group of compatriots. While Cook had help from others, his crime amounts to a fraudulent attempt to rescue his business from a problem, the looming insolvency of Crown Forex SA, which he did not intend create.

None of the above makes Cook a candidate for this Court's extraordinary mercy, it simply puts Cook and his offense in context. Cook asks this Court to view his offense for what it

is, a large but otherwise fairly unremarkable fraud scheme. For this he deserves a lengthy prison term and twenty years is "sufficient, but not greater than necessary."

E. A 20 Year Sentence Is More Than Sufficient To Afford Adequate Deterrence to Criminal Conduct.

As mentioned above, the Commission in 1988 believed that a sentence of 45 - 51 months was sufficient to deter future large loss fraud schemes. U.S.S.G. §2F1.1 (1988). This belief is consistent with the prevailing academic consensus on general deterrence, which is that the certainty of apprehension and punishment creates deterrence, while incremental increases in punishment do not. David Young, *Introduction to Cesare Beccaria, On Crimes and Punishments*, at 9 (David Young trans., Hackett Pub. Co. 1986) (1764); Andrew Ashworth *Sentencing and Criminal Justice*, at 76 (Cambridge University Press, Cambridge, 2005); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006); Zvi Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 477 – 48 (2007). This academic consensus is based not on theory alone, but on empirical research. *Criminal Deterrence and Sentence Severity: An Analysis Of Recent Research*, Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney and P.O. Wikstrom (1999). Simply put, there is not a shred of evidence to discredit the Commission's initial decision that a sentence of 45 - 51 months is sufficient for general deterrence purposes. Cook should receive a sentence of 20 years not to deter future offenders, but because it is the sentence that he deserves based on the harm he intentionally caused.

F. A 20 Year Sentence Is Sufficient To Protect The Public From Further Crimes of Cook.

Cook will be 39 when sentenced. Upon his release if given a 20 year sentence, he will be 59. Based on his age, education status, marital status, criminal history category, length of sentence and the nature of his offense, it is highly unlikely that Cook will either violate his supervised release or commit a new offense.

As part of its Fifteen Year Report, the Commission conducted an in-depth statistical analysis of potential causes of recidivism, defined broadly as either a violation of supervised release or a new criminal charge. *United States Sentencing Commission, Measuring Recidivism: The Criminal History Computation Of The Federal Sentencing Guidelines* (May 2004). For fraud and larceny offenders in Criminal History Category Two, the overall recidivism rate within two years of release is 11.6%. *Id.* at 13, 30. Indeed fraud and larceny offenders in criminal history Categories I and II have the lowest recidivism rates of all offenders measured. *Id.* Add to this the fact that Cook being over 50 upon release, being married at the time of offense, having a college education and serving a lengthy sentence all make recidivism less likely. *Id.* at 12 – 13. The Commission's own analysis shows that Cook is highly unlikely to commit another crime upon a release at age 59.

G. Cook Requests a Slight Downward Variance to Account for Civil Contempt Time and Hard Time Served at the Sherburne County Jail Since his Criminal Case Commenced.

Under prevailing law, Cook is entitled to credit for "any time he spent in official detention prior to the date the sentence commences… as a result of the offense for which the sentence was imposed." 18 U.S.C. § 3585 subd. b. In this case, Section 3585 subd. b indicates that Cook's term of imprisonment effectively began on April 13, 2010, when he was arrested on this offense. But Cook has physically been in custody since January 25, 2010 due to a civil

contempt order. From January 25, 2010 until April 13, 2010, Cook spent 78 days in custody, and requests that this Court grant him an additional, slight downward departure to account for this roughly 2.5 months.

18 U.S.C. § 3585 subd. b states in relevant part that:

> Credit for prior custody... A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences… as a result of the offense for which the sentence was imposed.

While the plain language of Section 3585 subd. b is arguably ambiguous, in that the civil contempt detention arose "as a result of the offense" for which Cook is now convicted, Cook is not entitled for time served under a civil contempt order. *See Ochoa v. United States*, 819 F.2d 366, 369 (2d Cir. 1987)(reviewing precedent and legislative history before concluding that civil contempt time does not fit under Section 3585 subd. b). U.S.S.G. § 5G1.3 subd. c, however, gives this Court discretion to, in effect, credit Cook for the 78 days he spent in civil contempt alone, granting a variance of 78 days. Guideline §5G1.3 subd. c states:

> In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Given that the civil contempt order is justified by the same subject matter as the fraud scheme for which Cook is convicted, as opposed to an unrelated course of contumacious conduct, this Court should grant an additional downward variance of 78 days to achieve reasonable punishment.

Cook also requests an additional slight hard-time variance to account for the fact that conditions in the Sherburne County jail are spartan in comparison to a medium-

security federal prison, where Cook is likely headed. *United States v. Fiorito*, Slip Copy, 2010 WL 1507645, 39 (D.Minn. 2010).

CONCLUSION

Cook is before this Court because has admitted guilt for a large fraud scheme that caused great financial harm to many victims. For this, he deserves a substantial prison term. Cook asks this Court not for extraordinary mercy, but simply to consider that any sentence greater than 20 years of incarceration constitutes undeserved punishment and therefore violates the governing parsimony principle for federal sentencing. Cook asks this Court to rely on the factors set forth above and sentence him to 20 years in prison. To do so will accurately account for the severity of Cook's offense, while serving all other relevant goals of sentencing.

Date: August 17, 2010

Respectfully submitted,

By: /s/ *William J. Mauzy*

William J. Mauzy (#68974)
Piper Kenney Webb (#275621)
Casey T. Rundquist (#390475)
510 1st Avenue North
Suite 610
Minneapolis, MN 55403
(612) 340-9108
Attorneys for Defendant Cook