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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ORION DOUGLAS MEMMOTT, Defendant,	**CASE NO. 2:08-CR-0402 KJM** **GOVERNMENT'S SENTENCING MEMORANDUM** Date: December 10, 2014 Time: 9:00 a.m. Judge: Hon. Kimberly J. Mueller

I. INTRODUCTION

Attorneys are held to a high standard in a profession entrusted with the responsibility to act in "defense of right and to ward off wrong." *Schware v. Board of Bar Exam. Of State of N.M.*, 353 U.S. 232, 247 (1957). In this case, however, the defendant used the knowledge he earned as an attorney to evade the law, and he used the goodwill and trust given to members of the bar and the bonds of friendship to defraud his friends and clients. Sadly, the defendant's tax evasion does not appear to be an isolated one-time moral lapse. The defendant's tax evasion occurred over a long period of time and was elaborately constructed. Moreover, his tax fraud concealed the crimes he was committing against his friends and clients.

Furthermore, as the defendant admitted in trial, he previously defrauded a state court for his own benefit[1]; and, as explained below, Mr. Memmott has continued to hold himself out as an attorney, even following the suspension of his law license. "Honesty is absolutely fundamental in the practice of law; without it, 'the profession is worse than valueless in the place it holds in administration of justice. *In re Glass*, 58 Cal.4th 500, *17 (2014). These actions show little remorse, and instead display a willingness to deceive to meet selfish ends.

The sentencing guidelines advise a sentence of 63 to 78 months. The PSR recommends a 71 month sentence. The government agrees with the PSR—71 months is an appropriate sentence.

II. THE PSR AND GUIDELINES CALCULATIONS

A. Government has no objections to the PSR

The government has no objections to the PSR. It does, however, offer one clarification:

Paragraph 10 of the PSR states that Ranelle W. invested money with the defendant. Although the distinction is not essential to the outcome of the case or sentencing, Ranelle W. testified that she transferred funds to the defendant to be placed in a medical trust following a plane crash that left her with serious medical problems. She did not transfer the money to the defendant so he could invested it in high risk day trading, or, as was the case here, spend it immediately on dining, vitamins, personal trainers and other personal expenses. *See, e.g.*, Witness Testimony Vol. 2 at 379-384.

B. Government's Responses to Defendant's Objections

1. Paragraph 6: Origin of the Defendant's Tax Liability

The PSR's description of the defendant's tax liability is correct and is consistent with the evidence introduced at trial. Through a variety of entities, the defendant earned income. Then, the defendant took money from the companies, which he spent on himself and on other business ventures. The defendant characterized these payments as loans (much as he tried to do with the fraud income that was the subject of evasion as found by the Court in the present case), but this was disallowed by the IRS. In addition, the defendant failed to file timely, or often at all, his personal tax

[1] Trial Testimony of Orion Douglas Memmott Vol. 2 at 84-85.

returns for these years. TRW 104:2-7; Trial Exs. 1a and 1b. During this time period when the defendant was not filing or paying taxes he had substantial funds with which he could have paid. *See, e.g.,* Trial Ex. 4, pgs. 43:18-20 and 46:24 to 47:4. Eventually, in 2004, in a signed stipulation, the defendant agreed that he owed $656,655. The amount the defendant owes has increased over time because the defendant has accrued interest and penalties.

Contrary to the defendant's current claim that this arrangement was ironically to the defendant's detriment, this arrangement was clearly intended to benefit the defendant, who nearly avoided corporate and personal taxes on the income from his successful ventures in the 1990s.

2. Paragraph 8: Evasion

The defendant seeks to have it both ways with respect to his bank accounts. On one hand, he argues that the money was kept in business accounts because it did not belong to him, while on the other he spent the money that did not belong to him freely on his own personal expenditures. The PSR correctly summarizes the relevant trial testimony that showed the defendant using the business accounts for personal expenditures and even depositing his social security check into business accounts.

3. Paragraphs 13 and 23: Obstruction

Arguing against an obstruction enhancement, the defendant claims his trial testimony was "brutally honest" in that he admitted stealing money from his friends to fund his own lifestyle. While his admissions of theft may offer some closure to his victims, this awakening of truth came *after* he stole their money, spent it on himself, and lied to them for years to conceal his crime. It also has nothing to do with the reasons supporting a two-level enhancement for obstructing justice. The defendant admitted to conduct that, as a lawyer, he knew could not lead to conviction on the crimes charged (and that implicated him only in crimes that were outside the statute of limitations) while denying everything else.

The two point enhancement is appropriate in this case because, as this Court correctly discussed as part of the *willfulness* analysis, the evidence established that the defendant "knew the form [Form 433-A] omitted materially responsive information regarding his real property interests and his income." Findings, Dkt. No. 112 at ¶ 134. The defendant cannot square this finding with his

claim that the Court merely "disagreed" with his self-interested testimony. After all, the Court found his testimony incredible and implausible, for not one reason, but many:

> Mr. Memmott's claim of believing in good faith that he was not violating any provisions of the tax laws is not credible […] It is simply not plausible that someone with Mr. Memmott's level of education, legal training and experience, and business experience, could believe either that he had no reportable property interest in a house claimed as his in a recent lease and in his contested divorce proceeding; or that he had no reportable income for the time covered by the Form 433-A, despite his freely admitting he embezzled funds that he spent on personal expenses and had not repaid in the same year diverted.
>
> Findings, Dkt. No. 112 at ¶ 134.

Second, the government asks that the Court consider the following information as a supplement to the PSR's recommendation that the Court apply a two-level enhancement for obstruction of justice. In its comprehensive written opinion, the Court explained that the defendant's guilt for violating 7206(1) was satisfied "by two different set of facts, either one sufficient to meet the government's burden [of proof]." Findings, Dkt. No. 112 at ¶ 107. The Court separately analyzed each factual basis supporting a conviction under section 7206(1) – specifically, the defendant's omission of the Washington Street Property and Diverted Investor Funds from the Form 433-A in June 2005.[2] Contrary to the Court's specific findings of guilt, the defendant denied wrongdoing as to those items when he testified at trial under oath. Accordingly, the United States identifies two transcript passages in specific support of the obstruction enhancement:

> Question: And why didn't you list the Washington Street property on the 433-A in June of 2005?
>
> Answer: As my real property? I did note that it was my address and indicated that I was living in the home owned by my mother on that form, **but I didn't list it on the real property because I didn't own it**. And I couldn't do anything with it, and I certainly couldn't pledge it for a payment of taxes.

Tr. Oct. 25, 2012, at 43:5-11 (emphasis added).

[2] In its Findings of Fact and Conclusions of Law, the Court employed the terms "Washington Street Property" and "Diverted Investor Funds" to analyze section 7206(1). Accordingly, the United States uses the same terminology.

The Court rejected the defendant's testimony as to Washington Street, finding that when "Mr. Memmott signed the Form 433-A on June 9, 2005, he knew it contained false information as to a material matter, by omitting information regarding the interest he asserted in 1024 Washington Street." Dkt. No. 112 at ¶ 116.

The second trial excerpt shows the defendant's untruthfulness regarding Diverted Investor Funds, which the Court found he had willfully omitted from his Form 433-A. The defendant's trial testimony:

> Question: And the money that you received in an unauthorized fashion, that you stole from your friends, why didn't you list that on the 433-A?
>
> Answer: **I never did think it was my money**. **I really believed that I would get it paid back,** and I will some day.
>
> [….]
>
> Question: You took [the investor money] and used it on your personal expenses, correct?
>
> Answer: I did.
>
> Question: And you spent thousands of dollars a month on personal trainers, vitamins, travel, dining out; is that right?
>
> Answer. I did. []

Tr. Oct. 25, 2012, at 64:14-18, 65:10-15 (emphasis added).

The Court again rejected the defendant's representations, finding that "Mr. Memmott misappropriated the investor funds in the same year they were received, paying only portions back, and personally realized the economic value of the misappropriated funds by expending them on personal matters, including discretionary expenses such as personal trainers and travel." Dkt. No. 112 at ¶ 129. Citing his prior experience as a tax lawyer, the Court charged the defendant with knowledge that "profits or gains realized illegally qualify as taxable income for the year in which they were obtained" and "Mr. Memmott's stated plan to repay the funds does not relieve him of the

obligation to have disclosed the funds on the Form 433-A." *Id.*

4. Paragraph 18: Tax Loss Amount

The defendant argues that his loss amount should be reduced because most of the money he concealed was stolen. There is irony in this argument because the defendant eagerly used the stolen money on a variety of discretionary personal expenditures. Besides the obvious inconsistency of the defendant's suggested approach, it also interprets the guidelines incorrectly.

First, tax losses are not reduced based on actual collectability. *See, e.g., United States v. Brimberry*, 961 F.2d 1286, 1292 (7th Cir. 1992); *United States v. Clements*, 73 F.3d 1330, 1339 (5th Cir. 1996). Therefore, even if the tax debt was uncollectable, it would not reduce the defendant's tax loss.[3]

Second, this is a willful evasion of payment case and a false statement case. In an evasion case, "the tax loss is the total amount of loss that was the object of the offense." U.S.S.G. § 2T1.1(c)(1). The object of the willful evasion of payment was the evasion of the $656,655 assessment. Unlike many other types of tax offenses, the loss amount in an evasion of payment case also specifically includes interest and penalties. U.S.S.G. § 2T1.1 comment. (n. 1). Because of this rule from the application notes, the PSR has indeed misstated the tax loss amount—but in the defendant's favor, since, by his own count, approximately $1.3 million in penalties and interest have not been included in the calculation.

The application of the tax guidelines to evasion cases has also been explained at greater length by the circuit courts. In *United States v. Brimberry*, the Seventh Circuit considered the issue of how to find loss where a defendant had attempted to evade taxes by lying on a collection information statement. 961 F.2d at 1292. Brimberry argued that the proper measure of loss was the amount of money that was hidden, rather than the total deficiency that the defendant was trying to avoid. *Id.* The appellate court recognized the superficial appeal of the argument that the loss was the amount the defendant would have been able to pay, since the defendant was unlikely to ever be

[3] Of course, as established at trial, the defendant had control over a number of assets and illegal income in the hundreds of thousands of dollars per year, so the money would have been collectable over time once the defendant's excessive and undisclosed personal expenditures were disallowed.

able to repay the entire $7 million assessment, but it rejected that argument. *Id.* Instead, the court held that the loss was the amount the defendant "owed and attempted to evade by lying on the collection information statement and hiding assets." *Id.*

Brimberry, however, did come before a 1994 amendment to the tax guidelines. Nevertheless, in looking at the same issue in an evasion of assessment case following the amendment and consolidation of the tax guidelines, the Fifth Circuit found *Brimberry* persuasive and adopted the same method of calculation. *United States v. Clements*, 73 F.3d 1330, 1339 (5th Cir. 1996) ("We agree, and hold that the 'tax loss' evaded means the tax deficiency assessed . . . rather than the amount that the IRS could actually recover").

The application notes lend further support to this method because they make clear that interest and penalties are to be included in loss in evasion of payment cases. U.S.S.G. § 2T1.1 comment. (n. 1.). This places the focus on the amount of money the defendant is attempting to avoid paying rather than a speculative argument over how much the defendant would have had available to pay. This rule only makes sense if it is the amount that is owed, not the amount that is collectable that is considered loss.

Moreover, it is also a fair approach to making the calculation in tax cases. If the rule were otherwise, tax defendants would be incentivized to spend the money they owe irresponsibly or to hide portions of it even better. Frivolous spending would make the tax uncollectable, and thereby reduce a defendant's loss calculation and eventual penalty. As a result, a defendant who wisely invested money that could then be used for restitution would receive a stiffer penalty than a defendant who spent it all and was unable to repay a dime or a defendant who still had some money hidden. That unjust result is not required by the guidelines. Instead, tax loss is calculated equally on the basis of the tax a defendant was attempting to evade.

Here, the defendant agreed to an assessment of taxes, but then concealed assets and arranged his affairs in such a way as to defeat any attempt to collect on that assessment. As in *Brimberry*, he lied on a collection information statement to evade any payment. It was the entire assessment that the defendant was attempting to evade, not just part of it, and that assessment is the loss.

5. Paragraph 19: Failure to Report Source of Income

Contrary to the defendant's assertion that the Form 433-A did not ask his source of income, it does, in Section 4, Question 10: "Do you receive income from other sources other than your own business or employer? (Check all that apply)." In response to this question, the defendant checked only one box—social security income. He failed to check the "Other" box and did not fill in the line to where he was required to specify the source of his "other" income. The defendant continued this falsehood in Section 9, where he was asked in Question 27 about net business income, in Question 28 about net rental income, and in Question 33 about other income. Therefore, the PSR is correct in applying a two level upward adjustment for failing to identify criminally derived income exceeding $10,000.

6. Paragraph 20: Sophistication

Under the guidelines, hiding assets or transactions through the use of fictitious entities and corporate shells "ordinarily indicates sophisticated means." U.S.S.G. § 2T1.1 comment. (n.5). In this case, those factors are present as shown at trial. The defendant offers a justification for his use of shell accounts and entities, but that justification was rejected by the Court when it found willful tax evasion and false statements.

7. Paragraphs 24 and 27: Adjusted and Total Offense Levels

Based on the foregoing, the government believes that the PSR correctly calculates the defendant's adjusted and total offense level.

8. Paragraphs 74, 77, and 78: Request for Departure

The Guidelines disfavor downward departures on the basis of family ties and responsibility. U.S.S.G. § 5H1.6. Here, the limited information provided by the defendant does not meet the strict requirements for this departure. U.S.S.G. § 5H1.6 comment. (n. 1(B)). There has been no showing that there are no effective ameliorative programs, no showing that a departure will address familial impact, nor is there a showing that the defendant was an essential caretaker. U.S.S.G. § 5H1.6 comment. (n.1(B)(i)-(iv)).

Likewise, the defendant's loss of his law license is not a ground for downward departure. U.S.S.G. § 2H1.2. Rather than a downward departure, this factor is more likely a justification for an

upward adjustment under U.S.S.G. § 3B1.3. The government, however, intends to address the defendant's law license in the context of the 18 U.S.C. 3553(a) factors, which are examined in detail below.

III. SENTENCING FACTORS AND SENTENCING RECOMMENDATION

The guidelines account for the tax loss in this case and are an important factor, but there are also additional aspects of this case not captured by the guidelines. 18 U.S.C. § 3553(a)(5). Among the factors that the Court should consider when applying the § 3553(a), are the nature and circumstances of the offense and the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1).

Here, the defendant's conduct was more serious than that captured by the guidelines because he not only evaded his tax obligations, he also defrauded individual victims. Keith Merrill, Ranelle Wallace, and Merrill Osmond were all victims of the defendant's false statements and theft. *See, e.g.*, Trial Testimony of Orion Douglas Memmott Vol. 2 at 86-102. Likewise, the defendant's legal background is an aggravating factor. The defendant was a graduate of a prestigious law school and a member of the California Bar. Rather than using these accomplishments and privileges for positive ends, the defendant relied upon them in conducting his tax evasion and his frauds.

Nor can the Court be assured that the defendant will not commit more crimes when released. 18 U.S.C. § 3553(a)(1)(C). The defendant is articulate, well-educated, and professional in appearance, but indeed, that is part of the problem. People tend to trust the defendant and, as the Court has seen, the defendant takes advantage of that trust. This character trait has not been limited to dishonesty outside the courtroom. As the defendant admitted in trial, he has submitted fraudulent documents in state court. Trial Testimony of Orion Douglas Memmott Vol. 2 at 84-85. His trial testimony was riddled with inconsistencies with prior deposition testimony and exhibits. *See, generally,* Testimony of Orion Douglas Memmott Vol. 2. Moreover, as this Court found by rendering its verdict, the defendant was not forthcoming in his trial testimony in this case.

Furthermore, one would hope that conviction and suspension from the practice of law would have had a beneficial impact on the defendant's veracity. Even after conviction and suspension, however, the defendant continued to hold himself out as a licensed attorney in soliciting business for

his legal practice. *See* Attachment 1 (screenshots of the defendant's Ideal Divorce Solution website from September 25, 2014, where the defendant identifies himself as a practicing attorney); Attachment 2 (screenshots from the defendant's Linkedin profile from September 25, 2014, where the defendant identifies himself as a practicing attorney); PSR ¶ 48 (identifying the defendant as "self-employed with his company, Ideal Divorce Solution); Dkt. 122-2 at 2 (defendant's informal objections, which claim that his current business income from Ideal Divorce Solution was reduced as a result of the loss of his law license). Notably, these advertisements for the defendant's legal practice occurred even after the defendant had received additional discipline from the California State Bar for his repeated failure to properly notify his clients that he had received an interim suspension as a result of the present federal criminal case. *See* Attachment 3 (State Bar Court of California, Case No. 14-N-00488-LMA, Stipulations dated August 4, 2014). In fact, the defendant's contravention of the State Bar rules also violated this Court's specific directive to the defendant that he needed to comply with the State Bar rules regarding client notification. Attachment 4 at 6-7 (Transcript, Aug. 21, 2013). This pattern indicates the defendant's continued unwillingness to obey the law and to conform his conduct to the orders of this Court.

Ordinarily, these factors would argue in favor of a substantial upward variance, in particular in light of the paucity of legally sufficient and factually established mitigating factors. Nevertheless, there are two countervailing factors that the Court may wish to consider. The first is the care of the defendant's disabled son and the second is the defendant's age. As the PSR notes, there are plans in place for the care of the defendant's son if the defendant is incarcerated. PSR ¶ 42. Undoubtedly, this will increase the burden on others in the defendant's family, but unfortunately this is not an uncommon situation as families always tend to suffer from defendants' criminal acts. Here, the family is in a better situation than many because it is able to provide alternate care. PSR ¶ 42. In addition, the defendant, who is the party seeking a variance on this ground, has not addressed the availability and potential impact of the State of California's in-home health care programs for the disabled, federal government disability benefits, and assistance available through the defendant's community and church. *See United States v. Carter*, 510 F.3d 593 (6th Cir. 2007) (district court did not abuse of discretion when it declined to vary in a tax case based on family circumstances where

defendant's absence from his family would be mitigated by his wife's continued presence at home and the family's continued receipt of substantial healthcare, housing, and sustenance benefits).

The defendant's age presents the second question. Seventy-five years of age is past the age of most defendants and it is generally considered to be a time of decreased criminality. In this case, however, these considerations should be balanced against the defendant's uncommonly good health and physical condition, which is evidenced in the PSR and has been apparent in Court.[4] PSR ¶¶ 43-44. Moreover, the defendant committed his offenses well after retirement age. Age did not prevent the defendant from committing tax evasion and fraud and it should not prevent just punishment, especially when the defendant is in better physical and mental condition than many much younger defendants that come before this Court. The government also will not oppose a recommendation for a suitable detention facility for the defendant as determined by defense counsel.

Finally, the Court should also weigh deterrence and the need to promote respect for law in its calculations. 18 U.S.C. § 3553(a)(2)(A) and (B). The defendant's sentence should reflect the need to deter those in the general public, as well as attorneys, who might otherwise be tempted to similar offenses. Tax evasion is a crime that tempts many professionals, and the justice system should take care that the greater socio-economic standing of this defendant and the typical tax defendant does not result in unintended or unconscious unwarranted disparities in punishment. Twice within the first paragraph of his sentencing memorandum, the defendant invokes his Stanford education. Dkt. 127. This makes him more relatable to the lawyers in this case. But, his education is a factor that makes him more culpable, not less—the defendant graduated from a prestigious law school before committing an offense that requires the intentional violation of a known legal duty as an element. Ultimately, the defendant's sentence should further both the reality and perception of justice by avoiding any systemic benefit based on a cognitive bias to like those who are similar. Consistent with this important due process consideration, the amended tax guidelines have been designed to reduce the disparity in sentencing for tax offenses. U.S.S.G. § 2T1.1, comment. (backg'd.). These guidelines provisions point to a sentence that is fair in this case after the § 3553(a) factors are

[4] This longevity appears to run in the family—the defendant's brother testified at trial while using crutches that were the result of an injury sustained while doing backflips.

weighed. Therefore, government agrees with probation's recommendation for a within-guidelines sentence of 71 months, which is sufficient, but not greater than necessary to achieve the goals of § 3553(a).

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court impose a sentence of 71 months of imprisonment.

Dated: December 3, 2014

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