UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at Winchester

UNITED STATES OF AMERICA	**)**	
	)	
v.	**)**	**4:12-cr-9**
	)	**Mattice/Carter**
JACKIE McCONNELL	**)**	

RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM

Comes the United States of America, by and through William C. Killian, United States Attorney for the Eastern District of Tennessee, and Steven S. Neff, Assistant United States Attorney, and submits the following response to the defendant's sentencing memorandum for the Court's consideration in deciding an appropriate sentence in the above-styled case.

On May 22, 2012, the defendant entered a guilty plea to Count One of a Fifty-Two count indictment, that is, Conspiracy to Violate the Horse Protection Act (HPA) in violation of Title 18, United States Code Section 371 and Title 15, United States Code, Sections 1824(1), 1824(2)(B), and 1825(2)(B). The maximum punishment for this offense is 5 years imprisonment, 3 years supervised release, $250,000 fine, any lawful restitution, and a $100 Special Assessment. The defendant was advised of these maximum punishments and persisted in his decision to plead guilty knowing the possible consequences.

I. Disclosure of the contents of the pre-sentence report (PSR)

The defendant asserts that the United States cited to information from the PSR in its sentencing memorandum in contravention of the rules. He is mistaken. There is nothing in the local rules or Federal Rule of Criminal Procedure (Fed.R.Crim.P.) that prohibits either party from referencing facts contained in the PSR in a sentencing memorandum.

Fed.R.Crim.P. 32 governs post-conviction procedures and the disclosure of PSRs.

Fed.R.Crim.P. 32 does not prohibit disclosure of information in PSRs and only limits disclosures to diagnoses which might disrupt a rehabilitation program, any sources of information obtained upon a promise of confidentiality, or any other information which might result in physical or other harm to the defendant or others. Fed.R.Crim.P. 32(d)(3). The local rules of the Court echo only the limitations placed on disclosure by Fed.R.Crim.P. 32. "Nothing in this rule requires the disclosure of any portions of the presentence report that are not permitted for disclosure under Federal Rule of Criminal Procedure 32." LR 83.9(h). In his effort to attack the United States as part of his defense strategy, the defendant conveniently ignores the fact that unsealed sentencing memoranda are routinely filed with the Court which reference facts contained in PSRs. Indeed, it would be impossible for either the defense or the United States to make sentencing arguments without referencing certain facts in the PSR. Both sides regularly cite sentencing guidelines calculations, criminal histories, and personal characteristics which support arguments for particular sentences in unsealed court filings. The United States did not disclose the PSR in its entirety, nor did the government reference any items which Fed.R.Crim.P. 32 prohibits from disclosure. Instead, the government referenced a singular fact in the PSR which bears on an appropriate sentence and supports the contention that justice in this case falls primarily into the area of financial penalties. Virtually every case the Court hears involves both sides of the case filing unsealed sentencing memoranda which reference specific facts in the PSR. If facts from PSRs could not be referenced in the public view, the Court would order that all sentencing memoranda filed by both parties be sealed, and all sentencing hearings be closed. Virtually every sentencing hearing finds the parties discussing specific facts from a given defendant's PSR when making arguments for an appropriate sentence.

The United States notes that in a very recent case in which both defendant's counsel represented another criminal defendant in a drug case, they filed a sentencing memorandum which liberally cited numerous facts from their own client's PSR in order to make their sentencing arguments, and they did so without filing it under seal.[1] In any event, counsel for both sides are routinely permitted to cite facts from the PSR when making sentencing arguments in or out of court.

II. Imposition of Fines

The defendant suggests that because he received a civil or administrative fine from USDA as a part of his lifetime ban, it would be inappropriate to also level a significant fine in his criminal case. He also intimates that probation was the only form of punishment agreed to in the plea agreement. These assertions are devoid of merit.

First, the USDA Complaint[2] filed against McConnell is a wholly distinct and separate matter from the instant case. The USDA Complaint was filed due to the defendant's violation of an administrative five-year disqualification order issued by the agency in 2006. The USDA's jurisdiction over the defendant's administrative case is completely independent of the criminal case before this Court; as such the defendant cannot use his administrative Consent Order and Decree to serve double duty or a substitute for the sentence this Court has jurisdiction to enter and enforce.

As an initial matter, the defendant was advised of the potential penalties in this case – including the maximum fine – during the Rule 11 hearing and swore to the Court, even after being advised of the potential fine, that he still wished to plead guilty. During the plea colloquy, the

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[1] *United States v. Barroso*, Case Number 1:11-cr-73-5, Document Number 260.

[2] Attached as United States's Exhibit 1

government further advised the defendant that he faced a maximum fine of $250,000. The first paragraph of the defendant's plea agreement, drafted by the undersigned and signed by all parties including the defendant, contains a reference to the maximum fine in the case. Moreover, that same plea agreement signed by the defendant states that "[t]he defendant and the United States agree that a sentence of probation is the appropriate disposition of this case based on his age, physical health, and lack of criminal history. However, the Court *may still impose any lawful fine(s)* and any special assessment fees as required by law, and order forfeiture as applicable and restitution as appropriate." (R.49, Plea Agreement at 11, paragraph 6 (emphasis added)). It is not incumbent upon government counsel to initiate discussions about terms of a plea deal. Defendant's counsel are in a better position to know their own client's financial situation, and if they had concerns about the potential of a fine, *they* should have raise it with the United States, not the other way around.

The defendant further criticizes the government's citation to the work of Nobel Prize economist Gary Becker's philosophy that fines should play a greater role in adequate punishments in economic or white collar cases.[3] Citing *United States v. Ciccoli*, 2012 WL 2545802 (6th Cir. 2012), the defendant suggests that the court's repudiation of the district court's exorbitant restitution order beyond the amount of loss suffered by the victim of the defendant's crimes somehow invalidates the reasoning espoused by Becker. The defendant's assertion is once again disingenuous, and the circumstances in that case are entirely distinguishable from the instant case. The court in *Ciccoli* invalidated the defendant's sentence because the district court's restitution order was

[3]As noted by the defendant, the undersigned incorrectly attributed a quote from that case to the work of Becker cited by the district court in its opinion. The quote should have been attributed to the case rather than Becker, but it correctly summarizes Becker's theory espoused in the article cited by the government. The correct cite for the exact quote should be *United States v. Ciccoli*, 2012 WL 2545802, *3 (6th Cir. 2012). The undersigned apologizes for the error.

unlawful – not because the Sixth Circuit disregarded the philosophy espoused by Becker as to appropriate punishments in white collar crimes. *Id.* at *4. Moreover, the court mentioned nothing improper about the district court's assessment of a $350,000 fine – also obviously influenced by Becker's impression upon the judge – but instead based the remand on the restitution, not the fine. *Id.*

The defendant further misrepresents the circumstances of the civil fine from USDA and takes additional opportunities to cast aspersions onto the government for requesting a significant fine. First, he completely misquotes the United States's sentencing memorandum, which only asked for a "significant," "extensive," or "large" fine. (*See*, R. 101, United States Sentencing Memorandum, at 2, 12, 15.). Not once did the United States specifically ask for a maximum fine, and the only reference to the maximum fine, when read *in context* rather than *out of context* as quoted by the defendant, is when the government stated, "[t]he Court has the ability to impose an extensive fine under the statutory scheme – up to $250,000 – and the United States urges the Court to exercise its authority in this area to the utmost." *Id.* at 12. The United States will, however, now take the opportunity to heartily encourage the Court specifically, and for the first time, to impose the maximum fine of $250,000 against the defendant.

Defendant accuses the United States of trying to hoodwink the Court by not mentioning the defendant's consent decree with USDA which holds in abeyance the imposition of a $150,000 fine. Instead, it is the defense which is trying to hoodwink the Court into believing that this event constitutes a real consequence for the defendant. Incredibly, the defendant even says, "[g]iven that this fine has already been imposed, the deterrence aspects cited repeatedly in the Government's memorandum simply do not carry significant force." (R. 102, Defendant's Sentencing

memorandum, at 4). Actually, what does not carry significant force is the order of a civil fine which has not been paid and may never be paid. The defendant references a civil fine which was conditional. As far as the government is aware, no civil fine has actually been imposed on the defendant. In as much as the defendant has paid no fine up to this point, his argument is meritless. Frankly, this "non-consequence" is not even worth mentioning to the Court and in any event is irrelevant to the purposes of imposition of a criminal penalty in the case.

The United States invites the Court's attention to the dual civil and criminal fine provisions of federal laws such as the Lacey Act. Title 16, United States Code, Sections 3371-3378. Under the Lacey Act, criminal defendants face consequences of both civil and criminal fines. *See*, 16 U.S.C. Sections 3373(a)(1) and (d)(1) and (2). Much like the Lacey Act, nothing in the Horse Protection Act prevents imposition of a criminal fine if the defendant had also been subjected to a civil fine. *See, e.g., United States v. Bruce*, 437 Fed. Appx. 357, 368 (6th Cir. 2011) (In this Lacey Act case, defendant "pled guilty to five counts, resulting in a possibility of $50,000 in civil penalties *and* $50,000 in criminal fines."). *(Emphasis added*.)

The United States also avers that the civil fine provisions to which the defendant was subjected cover only a brief period not encompassed by the entirety of the time period of his criminal indictment. Indeed, most of the facts supporting the defendant's guilty plea occurred after the conduct alleged in the USDA Complaint which limits its allegations to conduct solely in 2007, after he was disqualified in 2006. Thus, the civil penalty does not adequately address the entirety of the defendant's illegal conduct, nor does it address the repetitive nature of his conduct. It covers only a small fraction of the time period for the conspiracy charged in the instant criminal case. Moreover, the civil fine contains an "escape hatch" in which the defendant would not face *any* financial

consequences due to imposition of a fine unless he were *actually caught* violating the terms of the Consent Decree and Order. Given the defendant's history of circumventing USDA detection and enforcement, this Court should not relinquish its authority to supervise this particularly recalcitrant defendant.

Moreover, unlike the individual sentences the defendant cites in the other HPA cases heard by the Court wherein the maximum fine imposed was $4,000, the defendant's conduct in this case warrants a significantly higher financial penalty. Despite his self-serving assertions to the contrary, the defendant's conduct is *far* different and more egregious than the conduct of others the United States has prosecuted under the HPA. Unlike the others, he has obtained his wealth through *decades* of criminal activity. Even when civil sanctions were imposed, he ignored them and continued to profit from his illegal activities. Unlike most of the others, not only did he commit criminal acts himself, he directed numerous others to do so and directed them to conceal their illegal activities when he believed he might be discovered. Unlike the others, the defendant derived major monetary profits from his business which routinely violated the HPA. Unlike the others, the defendant developed and maintained prestige and fame within Tennessee Walking Horse circles due to his success won primarily through unlawful conduct. The Court routinely removes unlawfully gained income from defendants in a host of cases, from drug dealers to white collar criminals engaged in fraud. For the reasons outlined in the United States's Sentencing Memorandum (R. 101), the United States contends that a maximum fine would be appropriate to serve the interests of justice in this case.

III. 3553 Sentencing Factors

A. General Deterrence

The defendant complains that the "Government makes much of the deterrent argument, but it is questionable how much more deterrence could be achieved than the full and complete loss and destruction of occupation, income, and reputation." (R. 102 at 3). Like his other arguments, the defendant's contention is meritless. To the extent that any of his contentions are true, these are consequences brought on by the defendant himself. He boldly flouted the law for more than thirty (30) years, and even after being caught again and again, as outlined in the government's sentencing memorandum, he continued to habitually violate federal law. If there were ever a case where the maximum fine and its attendant deterrent should be sought, it is the instant case.

B. Specific Deterrence

The defendant states that "the terms of pre-trial release had the expected impact of removing Mr. McConnell from the industry and eliminating all of his income and his livelihood." (R. 102 at 2-3). In fact, the terms of his pre-trial release were not intended for either purpose. The pre-trial release terms did not prevent the defendant from obtaining lawful employment or from being paid income for lawful activities. His "income" was unlawfully acquired, and his "livelihood" consisted of engaging in illegal activities prohibited by both federal and state law. The terms of his pre-trial release were thus designed to prevent him from being in a position to continue engaging in criminal activity. He is not the victim in this case; the horses he harmed and anyone who may have been defrauded due to the defendant's cheating and crimes are the victims.

The defendant's claim that he has "fully accepted his responsibility and the results that have followed" is belied by the complaining which pervasively infects his memorandum and calls

into question his capacity to appreciate the wrongfulness of his conduct, much less accept full responsibility for its consequences. The defendant, by his own conduct, voluntarily placed himself in the position he now faces and the consequences of which he now complains. He cannot claim to "fully accept responsibility" while simultaneously objecting to the legal consequences that flow from his unlawful behavior. He appears only to "accept" and have remorse that his conduct violated the law; he only appears remorseful because "he got caught doing it." He has made no apparent effort at repentance by calling for his colleagues in the Walking Horse industry to reform their ways. He had an opportunity to work at the forefront of efforts to reform. He has thus far chosen to do none of those things. His attitude of martyrdom and victimhood demonstrates that he has not yet been adequately punished and deterred. To accept the terms of no jail time and expect that to be the end of it is hardly the mark of someone who has accepted full responsibility. He has expressed no remorse for the decades of torture he meted out for the past thirty (30) years against animals or the unjust enrichment and ill-gotten gains he received as a result of his wanton, cruel, and unlawful behavior.

C. Protection of the Public

The defendant objects to the government's reference to studies which suggest that those who commit acts of cruelties to animals are more likely to victimize human beings as well. He misreads the intentions of citing the study in that section and selectively complains about the words of the government. The United States repeats the fact that as to the defendant, the United States has no information that the defendant has committed violent crimes (other than the violence done to horses) or is a threat to people, so there does not *appear* to be any danger to the public. The government explicitly stated as much. The references to the studies regarding human conduct,

however, are appropriate. They relate back to the argument of general deterrence made by the United States elsewhere in its Memorandum. People similar to the defendant who engage in the systematic torture of animals may be deterred from continuing the practice if the consequences are severe, which could possibly serve to protect the public if those who also might be dangerous to people are forestalled from feeding their desire to harm others. Again, however, the United States reiterates the fact that it does not believe protection of the public is a serious concern as to *this defendant*.

IV. Conclusion

For the above stated reasons, the United States respectfully reiterates its earlier requests set forth in its original sentencing memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U. S. mail. Parties may access this filing through the Court's electronic filing system.

Respectfully submitted,

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