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UNITED STATES OF DISTRICT COURT
DISTRICT OF ARIZONA

United State of America,)	No. CR06-560-PHX-DGC
)	
Plaintiff,)	
)	DEFENDANT’S SENTENCING
vs.)	MEMORANDUM
)	
Wilbert Hoffart,)	Sentencing: 3/5/07 at 2:00 p.m.
)	
Defendants.)	(Before the Honorable David G. Campbell)
)	

Defendant, Wilbert Hoffart, through undersigned counsel, respectfully submits the following Sentencing Memorandum and attached letters of support for this Court’s consideration in determining an appropriate sentence in this case.

RESPECTFULLY SUBMITTED this 26th day of February, 2007.

KIMERER & DERRICK, P.C.

S/Amy L. Nguyen
CLARK L. DERRICK
AMY L. NGUYEN
Counsel for Defendant Hoffart

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background

Mr. Hoffart is before this Court for sentencing after entering into a plea agreement with the Government in which he pled guilty to one count of Bank Fraud, a class B felony offense. The plea agreement stipulates that the Government will recommend a sentence at the low end of the applicable guideline range, as well as a three-point reduction in the offense level pursuant to U.S.S.G. § 3E1.1. The plea agreement also specifically states that Mr. Hoffart retains the right to move for a downward departure and a sentence below the applicable guideline range.

II. Appropriate Sentence

A. Base Offense Level and Loss Amount - U.S.S.G. § 2F1.1

Mr. Hoffart agrees with the base offense level and loss amount set forth in the Draft Presentence Report (“the Report”).¹ Pursuant to § 2F1.1, which was in effect on the date the offense was committed, Mr. Hoffart’s base offense level is 6. The factual basis set forth in the plea agreement and admitted to by Mr. Hoffart states that Harris Trust and Savings Bank suffered a loss of \$1,519,000.00. (Plea Agreement at 9). Using this loss amount increases the offense level by 12 points.

B. Criminal History Category – U.S.S.G. § 4A1.1

Mr. Hoffart agrees with the Report’s suggested Criminal History Category of I, as Mr. Hoffart has absolutely no criminal history.

C. Acceptance of Responsibility – U.S.S.G. § 3E1.1

Mr. Hoffart requests this Court to adopt the recommendation of the Presentence Report and apply a three-point downward adjustment pursuant to § 3E1.1(a) and (b). He has fully

¹ As of today’s date, Mr. Hoffart has not received the final Presentence Report, but assumes the calculations will remain the same given that there were no objections from either party.

1 admitted to committing the conduct underlying his conviction, as evidenced by his guilty plea, and
2 expresses extreme remorse for his actions. Moreover, he provided complete information to the
3 Government and notice of his intention to plead guilty in a timely manner.

4 **D. Downward Departure - U.S.S.G. § 5K2.12, Coercion/Duress**

5 Pursuant to § 5K2.12, this Court may decrease a sentence below the applicable guideline
6 range “[i]f the defendant committed the offense because of serious coercion, blackmail or duress,
7 under circumstances not amounting to a complete defense.” That section further states:
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9 The extent of the decrease ordinarily should depend on the reasonableness of
10 the defendant’s actions, on the proportionality of the defendant’s actions to the
11 seriousness of the coercion, blackmail, or duress involved, and on the extent
12 to which the conduct would have been less harmful under the circumstances
as the defendant believed them to be.

13 § 5K2.12 (emphasis added). Although the guideline states that ordinarily, a departure will only be
14 warranted when the coercion involves a threat of physical injury, substantial damage to property
15 or similar injury resulting from the unlawful action of a third party, physical harm is not always
16 necessary. *See United States v. Garza-Juarez*, 992 F.2d 896, 911-913 (9th Cir. 1993).

17 In *Garza-Juarez*, the district court granted a downward departure based on coercion and
18 duress where a government agent initially proposed the illegal activity and persistently contacted
19 the defendant until the scheme was completed. *Id.* at 912. The Government appealed the court’s
20 decision to grant the departure, arguing that “some sort of physical harm is necessary to warrant a
21 downward departure.” *Id.* at 911. The Ninth Circuit rejected the Government’s argument, stating
22 that “the ordinary meanings of “coercion” and “duress” support the district court’s action.” *Id.*
23 “To coerce is to nullify individual will, and this can be accomplished through intimidation as well
24 as by force, power and violence.” *Id.* (citing *Webster’s Third New International Dictionary* 439
25 (1968)). “Duress is defined by Webster as ‘stringent compulsion by threat of danger, hardship or
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1 retribution.” *Id.* at 912. The Ninth Circuit, therefore, upheld the district court’s decision, stating,
2 “[t]his sort of aggressive encouragement of wrongdoing, although not amounting to a complete
3 defense, may be used as a basis for departure under section 5K2.12.” *Id.*

4 Like *Garza-Juarez*, Mr. Hoffart was faced with severe intimidation and threats of hardship
5 and retribution which led him to commit the instant offense. As stated in the factual basis for the
6 plea agreement, Mr. Hoffart reported directly to Bruce Walderson, an executive officer of
7 Southprint International (“SPI”). The factual basis also states that Mr. Hoffart falsely increased
8 SPI’s accounts receivables and devised a method of tracking the fraudulent invoices *at the*
9 *direction and instruction of Walderson*. However, in addition to instructing Mr. Hoffart to
10 perpetrate the fraudulent scheme, Walderson *threatened Mr. Hoffart that if he did not do as he*
11 *said, he would be fired from his job*. Indeed, the fact that Mr. Hoffart received *absolutely no*
12 *financial gain* from the commission of his offense further proves that he had no motive to “cook
13 the books” other than to satisfy the demands of his employer. Being his sole source of financial
14 support and having no other employment options at the age of 57, Mr. Hoffart complied with his
15 boss’ demands to save his job. Walderson’s intimidation and threats of retribution effectively
16 nullified Mr. Hoffart’s “individual will” to do what he knew was right. *See Garza-Juarez*, 992
17 F.2d at 911-12. A downward departure based on duress and coercion under § 5K2.12 is therefore
18 warranted under these circumstances.

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22 **E. Downward Departure – U.S.S.G § 5H1.4, Physical Condition**

23 Section 5H1.4 states that although physical condition is not ordinarily relevant in
24 determining an appropriate sentence, “an extraordinary physical impairment may be a reason to
25 depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as
26 efficient, and less costly than, imprisonment.”
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1 Several circuits and district courts have applied and affirmed downward departures
2 based on physical condition in circumstances similar to those of the instant case. In *United*
3 *States v. Rioux*, the Second Circuit affirmed a downward departure pursuant to § 5H1.4 where
4 the defendant had a *diseased kidney* requiring regular blood tests and prescription medicines
5 and underwent a double hip replacement after contracting bone disease. 97 F.3d 648, 663 (2nd
6 Cir. 1996) (district court reduced the defendant’s offense level from twenty to ten and
7 sentenced him to three years probation and six months home confinement). Similarly, in
8 *United States v. Greenwood*, the Fourth Circuit upheld a downward departure based on the fact
9 that the defendant lost both of his legs below the knee in the Korean War and required
10 treatment. 928 F.2d 645, 646 (4th Cir. 1991). Likewise, in *United States v. Long*, the Eighth
11 Circuit affirmed a downward departure where the defendant presented reports of four doctors
12 stating that if sentenced to prison, he would be exceedingly vulnerable to victimization and
13 potentially fatal injuries due to his unspecified physical impairments. 977 F.2d 1264, 1278 (8th
14 Cir. 1992) (holding that the district court did not err in concluding that “the imposition of a
15 term of imprisonment could be the equivalent of a death sentence for Mr. Long.”). Finally, in
16 *United States v. Hildebrand*, the Eighth Circuit affirmed a downward departure where the
17 defendant was seventy years old and had unspecified life-threatening conditions. 152 F.3d 756,
18 767-68 (8th Cir 1998) (holding that the district court did not abuse its discretion in departing
19 from a sentencing range of fifty-one to sixty-three months and imposing a sentence of five
20 years probation, with six months in a community correctional facility followed by eighteen
21 months of home confinement).

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26 In the instant case, Mr. Hoffart was diagnosed with Emphysema in November of 2005,
27 and only receives 16% of the air he should be receiving. He uses an inhaler every day and is
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1 currently taking Pro Air and Albuterol. Since the diagnosis, Mr. Hoffart is required to see his
2 physician every three to six months, depending on the severity of the disease. As a result of his
3 condition, Mr. Hoffart was forced to leave his last job and is now qualified to receive social
4 security disability, although he has not yet opted to receive those payments. According to his
5 physician, the Emphysema has severely decreased Mr. Hoffart's life expectancy and estimates
6 that he has 9-10 years to live. If he gets an infection or cold, his life expectancy can be reduced
7 even more. In addition to Emphysema, Mr. Hoffart was also diagnosed with diverticulitis and
8 moderate chronic obstructive pulmonary disease. He also has cracked vertebrae, rheumatoid
9 arthritis in his back, degenerative discs and spurs on his vertebrae. Mr. Hoffart therefore
10 requests this Court to apply a downward departure pursuant to § 5H1.4 given his severe and
11 potentially fatal physical health conditions.
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14 **F. Factors under 18 U.S.C. § 3553(a)**

15 In the consolidated case of *United States v. Booker/Fanfan* ("*Booker*"), 543 U.S. 220,
16 125 S. Ct. 738 (2005), the United States Supreme Court held that the Federal Sentencing
17 Guidelines set forth in 18 U.S.C. § 3551 are advisory, rather than mandatory, in nature. In so
18 doing, the Court instructed the district courts to consider both the advisory guidelines and the
19 factors listed in 18 U.S.C. § 3553(a) in formulating an appropriate sentence. 125 S.Ct. at 757.
20 An examination of these factors as they apply to Mr. Hoffart demonstrates that a sentence
21 below that prescribed by the advisory sentencing guidelines is appropriate.
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24 The sentencing statute first requires a court to take into account "the nature and
25 circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. §
26 3553(a)(1). Significantly, Mr. Hoffart *has absolutely no criminal history*. To the contrary, for
27 the first 57 years of his life, he was a productive, law-abiding citizen. He served four years in
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1 the United States Navy before being honorably discharged. He comes from a good, Christian
2 family and has three siblings, all of whom are successful in their chosen careers. He is married
3 with three children and has one grandchild with whom he is very close. His son works in
4 quality control for an aluminum factory and his daughter is unemployed as the result of a
5 severe blood disorder (TTP). Fortunately, Mr. Hoffart's family has supported him throughout
6 his case and will continue to do so after he receives his sentence. (See attached Letters of
7 Support).
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9 It is also significant to point out that upon the first contact by law enforcement
10 regarding the fraudulent scheme, Mr. Hoffart *immediately* disclosed his participation in the
11 scheme and offered his full cooperation. This included disclosing the operations of SPI, the
12 location and significance of the false account receivables, other individuals
13 participating/promoting the scheme, and the location of relevant documents. Mr. Hoffart also
14 participated in several taped telephone conversations with Walderson at the Government's
15 direction in an effort to obtain additional evidence against Walderson. Mr. Hoffart also agreed
16 to wear a wire during a meeting with Walderson, but Walderson ceased all contact with him.
17 Although Mr. Hoffart was not able to enter into a "Cooperation Plea Agreement," his efforts to
18 assist the Government should be taken into account at sentencing.
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21 Additionally, the circumstances surrounding Mr. Hoffart's offense are not particularly
22 heinous or destructive. Rather, as previously mentioned, he committed the offense at the
23 direction of his boss and under the threat of losing his job. Although he will be held
24 responsible for paying more than \$1.5 million in restitution, he did not receive *any* monetary
25 benefit from his offense. With that said, Mr. Hoffart readily acknowledges the wrongfulness of
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1 his conduct and expresses extreme remorse for his actions. He is ashamed of his conduct and is
2 very apologetic to those he has hurt in the process.

3 The sentencing statute also requires that the sentence be “sufficient, but not greater than
4 necessary” to achieve the purposes of the statute, among them the promotion of respect for the
5 law, the provision of a just punishment for the offense, the adequate deterrence of criminal
6 conduct, and the protection of the public from further crimes of the defendant. 18 U.S.C. §
7 3553(a)(2). As previously mentioned, this conviction constitutes Mr. Hoffart’s first and only
8 criminal conviction, and can certainly be considered a gross deviation from his otherwise law-
9 abiding life. With his background, age and physical condition, there is a very low risk of him
10 re-offending, thereby decreasing the need for a lengthy or even somewhat significant prison
11 sentence. Indeed, the fact that Mr. Hoffart will now have a serious felony on his record, lose
12 his civil rights, have to pay more than \$1.5 million in restitution and have extreme difficulty
13 obtaining future employment is sufficient punishment for his crime. Imposing a lengthy prison
14 sentence under these circumstances will undoubtedly prove to be counterproductive and more
15 harsh than necessary to promote respect for the law.
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19 Lastly, the sentencing statute requires the Court to consider the need to provide
20 restitution to any victim of the offense in determining an appropriate sentence. 18 U.S.C.
21 3553(a)(7). Pursuant to the plea agreement, Mr. Hoffart will be required to pay \$1,519,000 in
22 restitution to Harris Trust and Savings Bank. As pointed out in the Report, Mr. Hoffart’s sole
23 income comes from social security and his financial liabilities leave him with a negative
24 monthly cash flow. In order to pay the restitution, he hopes to utilize his education and obtain
25 employment as a tax consultant or Microsoft technician. However, a significant term of
26 imprisonment would delay his future employment and, in turn, delay payment of restitution.
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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2007, I electronically transmitted the attached Motion to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Howard D. Sukenic
Assistant U.S. Attorney
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408

COURTESY COPY of the foregoing
Emailed and mailed this 26th day of February, 2007, to:

The Honorable David G. Campbell
United States District Courthouse, Suite 623
District of Arizona
401 W. Washington, SPC 58
Phoenix, AZ 85003

COURTESY COPY of the foregoing
faxed this 26th day of February, 2007, to:

Elizabeth Gonschak-Peters
United States Probation Officer
401 W. Washington Street, Suite 160
Phoenix, AZ 85003
Fax: 602-322-7419

By: _____