

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA : Case No. 3:07-CR-222 (AHN)
: :
: :
v. : :
: : May 21, 2008
JUSTEN KASPERZYK :

UNITED STATES' SENTENCING MEMORANDUM

I. Introduction

The Government respectfully submits this memorandum in aid of sentencing, which has been scheduled for Tuesday, May 27, 2008 at 10:00 a.m. The memorandum outlines the procedure to be followed in sentencings in the wake of *United States v. Booker*, 543 U.S. 220 (2005), explains why the Presentence Report (“PSR”) properly calculates the defendant’s sentencing range under the U.S. Sentencing Guidelines, and argues that the defendant’s record as a police officer, his gambling and childhood history do not warrant either a departure from the advisory range specified by the Guidelines, or a variance from that range when deciding upon the appropriate sentence in light of the factors outlined in 18 U.S.C. § 3553(a).

This Court must fashion a sentence for Justen Kasperzyk that promotes respect for the law. The sentence must reflect the seriousness of the offenses committed by Kasperzyk as well as provide a message, both specifically to him and generally to the public, particularly law enforcement officers and others who hold a position of trust within the community, that they are not above the law. Justin Kasperzyk says that he is sorry for the embarrassment that he caused but then goes to great lengths to justify the fact that he planted evidence and arrested an innocent

man. Never once does the defendant apologize to the victim of this offense; rather he maintains that he was only trying to make the City of New Haven safer, apparently by acting in violation of the law. For a police officer to stand before this Court and maintain that the means justify the ends; that all citizens do not deserve the same constitutional protections is nothing short of astounding. Moreover, Justen Kasperzyk never once acknowledges that the victim of the Truman Street arrest was not the individual identified in the search warrant affidavit. Based on all the facts of this case, the Government leaves to the discretion of the Court the appropriate sentence to be imposed in the case in light of the factors outlined in 18 U.S.C.

§ 3553(a).

II. The Sentencing Guidelines

A. The Law

The Supreme Court clarified the continuing role of the Sentencing Guidelines and the scope of the sentencing court's discretion in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* makes clear that this Court must consider both the sentencing factors set forth in 18 U.S.C. Section 3553(a), and the Sentencing Guidelines in fashioning a reasonable sentence. *Id.* at 249. While the Sentencing Guidelines are no longer mandatory following *Booker*, they must still be considered in determining the appropriate sentence. Because the Guidelines reflect the Sentencing Commission's considered judgment about all of the factors set forth in § 3553(a), the Supreme Court and the Second Circuit have made it clear that the Guidelines continue to play a central role in a sentencing court's § 3553(a) calculus. The Second Circuit has recognized the continuing relevance of the Sentencing Guidelines following *Booker* in determining an appropriate sentence:

[I]t is important to bear in mind that *Booker/ Fanfan* and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge. Thus, it would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum. On the contrary, the Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to "consider" the Guidelines and all of the other factors listed in section 3553(a). We have every confidence that the judges of this Circuit will do so, and that the resulting sentences will continue to substantially reduce unwarranted disparities while now achieving somewhat more individualized justice.

United States v. Crosby, 397 F.3d 103, 113-14 (2d Cir. 2005).

Under the non-mandatory Guidelines regime established by *Booker* and *Crosby*, the sentencing judge is empowered to make the factual findings necessary for determining what the recommended Guidelines Sentence is in a particular case. *Crosby*, 397 F.3d at 113 (“the sentencing judge is entitled to find all the facts appropriate for determining either a Guidelines sentence or a non-Guidelines sentence”).

The judge must consider the Guidelines in conjunction with the other factors enumerated in § 3553(a), in order to determine whether there is any reason to deviate from the advisory Guidelines range. These factors include: (1) “the nature and circumstances of the offense and history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, (d) “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”; (3) the kinds of sentences available; (4) the sentencing range set forth in the Guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid

unwarranted sentencing disparities; and (7) the need to provide restitution to victims.

Accordingly, in the majority of cases, a sentence within the Guidelines range is reasonable, and accommodates the congressional purpose set forth in § 3553(a), affirmed by the Supreme Court, of obtaining fair sentences which are uniform to the extent possible. As explained below, this case does not present the rare case in which the Guidelines (including the rules governing departures) fail to produce a sentencing range that fully accords with the various factors set forth in § 3553(a).

Departures from the sentencing range dictated by the Guidelines are sanctioned only in select cases. As the Supreme Court has stated: Congress allows district courts to depart from the applicable Guideline range if “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” *Koon v. United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. § 3553(b)). As the Guidelines provide, and as the Court in *Koon* explained, “[t]he Commission intend[ed] the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes,” acknowledging that departures may be considered when the conduct differs “significantly” from the norm. *Id.* at 93 (quoting U.S.S.G. Ch. 1, Pt. A(4)(b)). In *Koon*, the Court found that the Sentencing Commission had provided “considerable guidance as to the factors that are apt or not apt to make a case atypical, by listing certain factors as either encouraged or discouraged bases for departure.” *Id.* at 94. The Court thus recommended that sentencing courts ask the following questions in determining whether a departure is warranted:

- 1) What features of this case potentially take it outside the Guidelines' 'heartland' and make of it a special, or unusual case?
- 2) Has the Commission forbidden departures based on those features?
- 3) If not, has the Commission encouraged departures based on those features?
- 4) If not, has the Commission discouraged departures based on those features?

Koon, 518 U.S. at 95 (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) (Breyer, J.)). The Court went on to advise that in the case where “the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.” *Id.* at 96.

B. The PSR Properly Calculates the Defendant’s Guidelines Sentencing Range at 18-24 Months of Imprisonment.

The Government agrees with the PSR’s calculation of the defendant’s Guidelines range, and contends that defendant’s request for a downward departures or variances from the appropriate Guidelines range should be denied. As part of the plea agreement in this case, the government and the defendant agreed that, the defendant's applicable Sentencing Guidelines to be at a range of 18 to 24 months' imprisonment and a fine range of \$ 4,000 to \$ 40,000.

As to the civil rights conspiracy charge, the base offense level under U.S.S.G. § 2H1.1 is 12. Six levels are added under U.S.S.G. § 2H1.1(b)(1) because the defendant was a public official at the time of the offense as well as because the defendant was acting under the color of law. With regard to the theft of government property charge, the base offense level under

U.S.S.G. § 2B1.1 is 6. Two levels are added under U.S.S.G. §3B1.3 for abuse of a position of trust, resulting in an adjusted offense level of 8. The parties agree that the two counts do not involve substantially the same harm and, therefore, under U.S.S.G. § 3D1.2 are not grouped together into a single group. However applying U.S.S.G. § 3D1.4 does not result in an increase to the highest offense level because the offense level for theft of government property charge is 10 levels less serious than the offense level for the civil rights conspiracy charge. *See* U.S.S.G. § 3D1.4 (c). Therefore, the combined offense level is 18. Three levels are subtracted under U.S.S.G. § 3E1.1 for acceptance of responsibility, as noted above, resulting in a total offense level of 15. A total offense level of 15 with a criminal history category I, which the parties calculate the defendant to be, results in a range of 18 to 24 months of imprisonment (sentencing table) and a fine range of \$4,000 to \$40,000, U.S.S.G. § 5E1.2(c)(3). *See* PSR at ¶¶ 89, 95.

The defendant expressly understands that the Court is not bound by this agreement on the Guideline and fine ranges specified above. The defendant further expressly understands that he will not be permitted to withdraw the plea of guilty if the Court imposes a sentence outside the Guideline range or fine range set forth in this agreement.

III. Justen Kasperzyk Has Presented This Court With No Extraordinary Facts to Support Either A Downward Departure Or A Non-Guidelines Sentence

The PSR notes that defense counsel advised that he “will be seeking a downward departure and/or a non-Guidelines consideration based on a variety of variables including (A) the defendant’s long-standing positive police record; (B) how his gambling addiction contributed to his involvement in the instant offense; (C) the undue influence of the defendant’s superior officer; and (D) the effect of his father’s influence on his childhood, and the defendant’s ability

to succeed in spite of it. PSR at ¶100.

The Government objects to a downward departure or a non-Guidelines sentence based on these factors. Kasperzyk has not demonstrated that any of the factors upon which he relies is present in an unusual or exceptional way and, therefore, no factor supports a departure under applicable Second Circuit precedent. Each departure request should be rejected on its own terms and in the aggregate. Because Kasperzyk is the party seeking a departure, he bears the burden of showing, by a preponderance of the evidence, that it should be granted. *See United States v. McDowell*, 888 F.2d 285, 291 (3d Cir. 1989). If granted, the departure must be a “reasonable” one. *United States v. Alba*, 933 F.2d 1117, 1123 (2d Cir. 1991). The Government will address the anticipated arguments regarding the defendant’s record as a police officer, influence by Lieutenant White and gambling. The Government reserves the right to address the defendant’s upbringing and any other arguments advanced by the defendant at the time of sentencing.

The Facts Do Not Support A Downward Departure or Non-Guidelines Sentence Based On Defendant’s Record as a Police Officer

Based on the PSR, the Government anticipates that the defendant will seek a departure based on employment related contributions. Section 5H1.11 provides that “[C]haritable or public service; employment-related contributions and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.” *See United States v. Rioux*, 97 F.3d 648, 663 (2d Cir. 1996). In *United States v. Serafini*, 233 F.3d 758 (3d Cir. 2000), the defendant was a Pennsylvania state legislator who had been convicted of giving perjured testimony to a federal grand jury which was investigating a scheme to funnel corporate political contributions through third-party nominees. During his sentencing

hearing, the district court granted the defendant's request for a three-level reduction in his guidelines range on the basis of his civic activities. The Government appealed the district court's decision to depart to the extent it relied upon the defendant's activities as a state legislator. The Third Circuit agreed with the Government on the activities of the defendant as a state legislator, finding that:

As to Serafini's activities as a state legislator, they are work-related and political in character. . . Conceptually, if a public servant performs civic and charitable work as part of his daily functions, these should not be considered in his sentencing because we expect such work from our public servants.

Id. at 773.

As in *Serafini*, the defendant's employment related contributions here were to a great extent simply what he was expected to do as part of his job as a police officer. Although, the Government does not minimize the difficult job that a police officer performs, taking into account both the good and the bad that this defendant did in his job as a police officer does not result in a record so extraordinarily positive to warrant a downward departure.

A discussion of the facts of this case is warranted to appreciate fully that Justen Kasperzyk was not a good cop, motivated only by a desire to make the streets of New Haven safer. On November 9, 2006, the defendant and other detectives and officers executed the search warrant at 65-67 Truman Street, first floor apartment. Upon entering the first floor apartment, the defendant observed a black male coming out of the back bedroom. The individual was secured during the execution of the warrant. As part of the search, the defendant and Jose Silva searched the basement of 65-67 Truman Street, access to which was from the common hallway. The following narcotics were found in the basement: a sandwich bag containing a white powder-like substance (suspected cocaine) with an approximate weight of 7.4 grams; 19 white rock-like

substances (suspected crack cocaine); and 1 clear plastic bag containing 40 small red baggies, each with a green plant-like substance (suspected marijuana). Kasperzyk moved the suspected narcotics from the basement to the back bedroom of the first floor apartment, resulting in the unlawful arrest of the individual found within the apartment. Granted, the evidence shows that White was aware of and tacitly approved the unlawful arrest but Kasperzyk, not White executed the plan.

A law enforcement officer, acting in an undercover capacity (UCE), was present during the Truman Street search. According to the UCE, during the time that he and White were searching the bedroom, Justin Kasperzyk came into the bedroom quickly with his hands close to his chest. Kasperzyk went to the closet where White was searching. Kasperzyk pushed White out of the way and quickly put his hands into the closet and removed them. According to the UCE, Kasperzyk stuck his hands in and out so quickly that he could not and did not pull anything out of the closet. However, when Kasperzyk pulled his hands out of the closet, he turned held out a bag in each hand and exclaimed, "look what I found." He then told the occupant of the back bedroom, "I saw you throw it into the closet. I'll swear to it." After Kasperzyk left the bedroom, the UCE asked White, "where did Justen get the bags, out of the closet?" White responded that "I don't know. I was just standing here and he pushed me out of the way. I guess it came out of there now." White then laughed. White was a coconspirator but his actions do not excuse Kasperzyk's decisions or minimize his role.

Justin Kasperzyk took an oath to protect the citizens of New Haven and to uphold the law. Yet, in order to make an arrest, "tighten up the case," he violated that oath; Kasperzyk planted evidence and falsely arrested an individual. As a result, the victim spent almost four

weeks in jail and entered a plea under the Alford doctrine in order to make bond. Kasperzyk severely compromised a citizen's ability to trust that the police will fairly enforce the law.

Kasperzyk's attempt to justify that he violated the civil rights of an individual underscores that, as a police officer, he lost the ability to distinguish between right and wrong. According to the defendant, drug dealers "know that if the drugs are not in their immediate possession, but rather in a common area, the basement of a three family house, they would avoid prosecution of the possession of the drugs." (Kasperzyk Letter at 3). In so arguing, the defendant is asking this Court to countenance a system in which the means justify the ends. Quite simply, the request must be denied. Certainly, a police officer should be focused on getting the drugs out of a house or off the street; a police officer should not, however, be focused on setting up someone in order to make an arrest and gain a statistic. More problematic in this case, however, is that there is no evidence that the victim was a drug dealer. The victim was at the apartment of an individual suspected of drug dealing but was not the person named in the warrant. The victim has no record of drug arrests or drug convictions.

The defendant goes to great lengths in his letter to the Court to describe the first floor apartment on Truman Street as a 24 hour drug factory. According to the defendant, "a four man crew of drug dealers had taken over an apartment," and "the apartment at Truman Street was set up solely for a 24 hour a day narcotics operation. There was no evidence of making this apartment a permanent place of residence with the apartment only containing a bed, a T.V., and an empty dining room table and a small table and chair set up in the back of the room with an open window where we had information drugs were being sold out of." (Kasperzyk Letter at 2-3). The search warrant affidavit, however, describes that one individual known as K.E. was

selling drugs out of the first floor apartment and the basement. The affidavit says nothing about four persons selling drugs out of the window. In fact, during the search, there was evidence that someone lived at the apartment because the closet in which the defendant pretended to find the drugs was full of clothes and there were two dressers in the bedroom that had clothes in them.

The defendant represents that he “did not do this for any professional or person gain, but for the safety and a better quality of life for the tenants of 65-67 Truman Street.” (Kasperzyk Letter at 5). The defendant did act for professional gain; he acted to “tighten up a case” and make an arrest. The defendant did not take a drug dealer off the street; he arrested an innocent man, not the individual described in the search warrant affidavit.

In addition to the civil rights violation, Kasperzyk also abused the system by stealing money from search sites.

Filmore Street

On March 1, 2007, the UCE participated in a search warrant that was being executed by the Narcotics Enforcement Unit at an address on Filmore Street in New Haven. Present at the search, among many others, were White and Kasperzyk. The search was executed in connection with a drug investigation, and the location was being searched for drugs, money and other evidence. During the search, an officer associated with the UCE observed Kasperzyk in an upstairs bedroom, with money laid out on a bed in front of him. Kasperzyk was seen handling the money and fiddling around with it. This was unusual because, typically, money is simply seized at the search location and counted later. The officer watching Kasperzyk also saw Kasperzyk slip something into his pocket, and then soon thereafter saw Kasperzyk with a square wad in his right hand pants pocket, which was in the general shape of folded money. Later in the

search, a stash of money, drugs and guns was found in a hidden location in the basement of the house. Various pieces of evidence were handed down a line of officers who were involved in the search. The officer who had seen Kasperzyk upstairs again saw Kasperzyk with money in his hand. The officer next saw Kasperzyk walk around a corner, and when Kasperzyk came back he had no money in his hand. And, the officer observed a new bulge in Kasperzyk's left-hand pocket, again in the general shape of folded money. The next day, the UCE asked White about the search, and told White that he believed Kasperzyk took money during the search. White responded by thanking the UCE for the information, and said he would call the UCE later. White later called back and told the UCE that he was right. White further said that the "guy" asked him (White) for his jewelry store guy, because he (presumably Kasperzyk) was going to buy a present for his wife.

March 5 Sting

On March 5, 2007, a person cooperating with the FBI made an anonymous call to Kasperzyk at the police station. The caller told Kasperzyk that there were drugs located in a specified motel room in New Haven. Previously, FBI agents had rented the room, and a planted drug paraphernalia and money there. Specifically, under the mattress, agents placed a bag containing \$5000 in cash, which belonged to the FBI. Also, out in the open, agents had left cutting and packaging material. Soon after the caller spoke with Kasperzyk, surveillance agents observed Kasperzyk and others entering the motel room and looking around the room. Kasperzyk and the others entered the room with the motel's pass key and did not have a warrant. They did not take anything during this search.

The cooperating caller spoke again with Kasperzyk several hours later. Kasperzyk told

the caller that he had entered the motel room, saw the drug paraphernalia and left. The caller said that he had seen people putting cash under the bed. Kasperzyk told the caller that he did not check under the bed and would go back to check. A short time later, surveillance observed Kasperzyk arrive at the hotel room with two narcotics officers from New Haven Police. The trio then searched the room and left. A subsequent search of the room by FBI agents revealed that the money, which had been hidden under the mattress, was gone, along with some of the drug paraphernalia. Kasperzyk called the cooperating caller once more, after returning from the search. Kasperzyk told the caller that he did not arrest anyone, but that he did get the money. Kasperzyk suggested to the caller that he should work for him as an informant, and that he would pay him cash for his work. Kasperzyk gave the caller both his and White's cell phone numbers. A review of the records filed with the New Haven Police evidence room showed that Kasperzyk had submitted into evidence \$4640.00 in cash. Accordingly, \$360 of Government funds was missing. Later on the evening of March 5, the FBI conducted a raid of the First Independent Club ("FIC") in New Haven. It is well known that illegal gambling takes place at this location, and evidence gathered during the course of this investigation revealed that Kasperzyk frequently gambled at the FIC. During the raid of the FIC, FBI agents found both evidence that gambling activity was taking place in the FIC and Justen Kasperzyk. Kasperzyk had no money on his person at the time of the search. However, approximately \$18,000 in cash was seized from the gaming tables. Of that money, sixteen twenty dollar bills (amounting to \$320) was traceable by serial number to the money left by the FBI at the motel room searched by Kasperzyk earlier in the day.

Kasperzyk did not make the streets of New Haven safer; rather he harmed the judicial

system which relies on a police officer to tell the truth and made it more difficult for honest police officers to do their job because he gave persons a reason to distrust law enforcement. A departure or non-Guidelines sentence is not warranted for Justen Kasperzyk's work as a police officer.

The Defendant Is Not Entitled to a Downward Departure or a Non-Guidelines Sentenced Based on His Being Influenced by his Superior Officer

The defendant seeks a departure, claiming that he was influenced by his superior officer; Lieutenant William White. William White supervised the Narcotics Enforcement Unit and certainly did not set a good example. However, in this particular case, Kasperzyk made his own decisions; Kasperzyk stole the money from the hotel room and from the Filmore Street search, not White. During the Truman Street search, both Kasperzyk and White participated in a conspiracy to violate the civil rights of an individual. White knew of and by his inaction sanctioned the defendant's decision to move drugs but Kasperzyk moved the drugs and falsely implicated an individual.

The Defendant's Gambling Activity Neither Substantially Contributed To The Offense Nor Rendered The Defendant Unable to Control His Behavior

The PSR notes that the defendant may seek a departure or a non-Guidelines sentence based on an argument that his gambling addiction contributed to the instant offense. PSR ¶ 100. Section 5H1.3 provides that "mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted except as provided for in Chapter 5, Part K, Subpart 2 (departures)." And, U.S.S.G. § 5K2.13 provides that a trial court may exercise its discretion to grant a downward departure on the ground of diminished capacity if the defendant "committed the offense while suffering from a significantly reduced mental capacity" that

“contributed substantially to the commission of the offense.” However, a court may not depart below the applicable guideline range if “the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants.” *Id.* The Commentary Application Note for the Guideline defines significantly diminished capacity as meaning that “the defendant although convicted has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful. “The standard here for granting a downward departure on the basis of diminished capacity is not that the defendant recognizes the difference between wrong and right, which may negate intent, but rather that his diminished capacity significantly impaired his judgement or his ability to understand the wrongfulness of his actions.” *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005). Here, the Government will assume that the defendant may argue that what he describes as a gambling addiction impaired his ability to control the wrongful behavior. The evidence, however, fails to show any causal connection between the civil rights conspiracy and a gambling problem. And, as to the theft of money, although Kasperzyk may have stolen the money to gamble, there is no evidence that he suffered from a reduced mental capacity, that is he understood that his conduct was unlawful and had the ability to control his conduct. Kasperzyk stole the money when it was convenient and he thought that he would not get caught. He was careful not to steal all the money seized from a location but rather an amount that would not attract attention. Prior to the search, on February 15, 2007, the UCE spoke with Kasperzyk about his gambling in a recorded conversation. Among other things, Kasperzyk explained that he made \$70,000 the past year playing poker; that he did not have to pull money out of his pay check for about nine months; that he plays cards Monday and

Wednesday nights; and that in one month he lost \$4000. Kasperzyk aid that he tried to keep a bankroll for his money and to keep track of what he wins and loses. Kasperzyk also explained that his wife had no idea how much he gambled, and once she found his bankroll of \$10,000.00. Justen Kasperzyk's gambling did not significantly impair his judgement. Rather, Kasperzyk's police activities simply provided him with opportunities to steal money to gamble without having to dip into his own funds too much.

IV. Conclusion

For the reasons set forth above, the Government respectfully requests that, based on all the facts of the case, the Court sentence defendant Justen Kasperzyk to a term of imprisonment that reflects the seriousness of the offense, promotes respect for the law, and provides just punishment.

Respectfully submitted,

/s/

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
FED. BAR NO. ct01942
157 CHURCH STREET, 23RD FL.
NEW HAVEN, CT 06510
TEL. (203) 821-3700

CERTIFICATION OF SERVICE

I hereby certify that on May 21, 2008, a copy of the foregoing was filed electronically, by facsimile and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Nora R. Dannehy
NORA R DANNEHY
ACTING UNITED STATES ATTORNEY