UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Docket No. 09-CR-197
	:	
STEVEN E. SCHLEIFER	:	

DEFENDANT STEVEN E. SCHLEIFER'S REPLY TO THE GOVERNMENT'S MEMORANDUM IN AID OF SENTENCING

TABLE OF CONTENTS

I. Introduction

Contrary to the assertion in the first paragraph of the Government's Memorandum, the plea agreement in this case does not mandate a prison sentence. Rather, Mr. Schleifer stipulated in the plea agreement that eighteen to twenty-four months imprisonment was the reasonable, applicable range under the United States Sentencing Guidelines ("Guidelines"). The Government also agreed that Mr. Schleifer could argue for a non-Guideline sentence under 18 U.S.C. § 3553(a). And the defense articulated the reasons for a non-custodial sentence pursuant to this statute in its Sentencing Memorandum.

The Government maintains, however, also based on 18 U.S.C. § 3553(a), that Mr. Schleifer should receive a custodial sentence within the Guidelines range. The Government's analysis is misplaced for three reasons. First, as to the nature and circumstances of the offense, the Government principally relies on the conduct of the underlying bank conversion, rather than the tax offense to which Mr. Schleifer has pled guilty. Second, the Government mischaracterizes Mr. Schleifer's character. Third, the cases cited by the Government in support of incarceration under a deterrence theory actually dictate the opposite result—that a non-custodial sentence is appropriate in this case.

II. Mr. Schleifer Did Not Plead Guilty to Any Violative Conduct Involving a Bank Conversion.

A sentencing court should consider the nature and circumstances of the offense when determining an appropriate sentence. 18 U.S.C. § 3553(a)(1). While it is true that acts other than the offense conduct may be relevant to the Court's consideration of an appropriate sentence, the Government virtually ignores the offense at issue in this case. Instead, the Government relies on the nature and circumstances of crimes for which Mr. Schleifer has not been charged, namely wire and mail fraud and conspiracy to commit these crimes. Government's Memorandum Aid of

Sentencing ("Government Memorandum") at 12-13. Indeed, the Government only makes fleeting references to Mr. Schleifer's tax crime. *Id.*

The Government's reliance on the facts underlying the bank conversion is especially surprising because the Government had ample time to indict Mr. Schleifer on other charges. As stipulated, the conduct related to the actual bank conversion occurred in or about mid-2004. On January 2, 2006, Mr. Schleifer became aware of the investigation regarding his conduct. More than three years later, Mr. Schleifer agreed to enter into a tolling agreement with the Government until July 2009, in part, so that the Government could continue to investigate his involvement in the bank conversion. In July 2009 Mr. Schleifer agreed to yet another tolling agreement, and on September 1, 2009, he pled guilty to a tax offense.

Thus, for over five years the Government could have charged Mr. Schleifer with matters relating to the bank conversion. In fact, during this time, as discussed in Mr. Schleifer's Sentencing Memorandum, other defendants also involved in the bank conversion came before this Court and pled guilty to securities fraud and conspiracy to commit mail, wire, and securities fraud.[1] *See, e.g.*, Press Release, U.S. Attorney's Office District of Connecticut (Mar. 26, 2009), Ex. 1; Press Release, U.S. Attorney's Office District of Connecticut (May 11, 2009), Ex. 2. Yet the Government chose to accept a guilty plea from Mr. Schleifer to a single tax count. Having had sufficient time to fully investigate Mr. Schleifer's conduct, it is unfair for the Government to seek a prison sentence based almost exclusively on the bank conversion.

[1] The two defendants discussed in Mr. Schleifer's Sentencing Memorandum received three years probation, a $10,000 fine, and 300 hours of community service and one day of imprisonment followed by three years of supervised release and a $5,000 fine. Sentencing Memorandum on behalf of Steven E. Schleifer at 15-16 (Nov. 10, 2009) ("Schleifer Sentencing Memorandum"), Docket No. 21.

III. The Government Has Misrepresented Mr. Schleifer's Character.

Equally as important as the nature and circumstances of the offense are the characteristics of the defendant. 18 U.S.C. § 3553(a)(1). Throughout the Government Memorandum, the Government repeatedly describes Mr. Schleifer as a well-off, greedy millionaire. The Government even argues that Mr. Schleifer's payments of tax deficiencies, penalties, and interest should be used against him at sentencing under the theory that these payments demonstrate his poor character, because he obviously had sufficient funds to pay his taxes in the first instance. Government Memorandum at 14.

The Government's position is unsupported by the record before the Court. As described by the letters submitted by Mr. Schleifer's family, friends, and rabbis, Mr. Schleifer is a caring and loving father, and a modest and humble man who has suffered greatly from the pain his conduct has caused himself and his family. He is not a CEO that has looted his company. He is fifty-three years old and his entire net worth is approximately $1.1 million ($300,000 of which represents the equity in his home). Presentence Report at 12. Mr. Schleifer drives a 2007 Toyota Sienna and lives in a home, which he bought for $253,000 in 1996, with his wife and three of his six children. He is a family man who admits to having made the worst mistake in his life.

To that end, Mr. Schleifer accepted responsibility by immediately paying his tax deficiencies, penalties, and interest, and agreeing to disgorge and/or make restitution to the Securities and Exchange Commission ("SEC") under terms to be agreed upon by the SEC.[2] Plea Agreement Between the U.S. Attorney's Office for the District of Connecticut and Steven E.

[2] The Government requests that this Court also "order the Defendant to disgorge the ill-gotten gains consistent with the plea agreement." Government Memorandum at 18. We respectfully submit that, pursuant to the plea agreement, the SEC has been given the sole authority to determine the terms of disgorgement. Plea Agreement, *supra* at 3. Alternatively, even if this Court issues an Order, it would be premature at this time because the SEC has yet to contact Mr. Schleifer or his counsel. Indeed, the SEC could eventually waive the restitution, in whole or in part.

Schleifer at 3 ("Plea Agreement"), Docket No. 3. That Mr. Schleifer's payments should be used against him at sentencing is contrary to the core sentencing principles of punishment and restitution. Indeed, under the Government's reasoning, defendants' net worth could be used against every defendant whose net worth exceeded the financial loss or harm attributed to him.

IV. The Case Law Relied Upon by the Government for a Custodial Sentence, Under a Deterrence Rationale, Dictates the Opposite Result—No Incarceration.

The Government contends that Mr. Schleifer should receive a prison sentence to deter others from violating the nation's tax laws. In support, the Government relies on two sentencing opinions and an equitable argument that the wealthy should not receive more lenient sentences than the poor. Government Memorandum at 15-17. Both contentions should be rejected for the reasons discussed below. Additionally, as the Government has correctly noted, illegal conduct in connection with bank conversions may be deterred through non-custodial sentences. Schleifer Sentencing Memorandum, *supra* at 16-17.

The Government cites *United States v. Ture*, 450 F.3d 352 (8th Cir. 2006), for the proposition that "[a] sentence that does not include a significant period of imprisonment sends the wrong message." Government Memorandum at 15. But the ultimate disposition in *Ture*—no imprisonment—serves as precedent for a non-custodial sentence in this case. In *Ture*, the defendant pled guilty to evading federal income tax. 450 F.3d at 354. Although the tax loss was calculated at $240,252, the district court sentenced the defendant to two years of probation and 300 hours of community service. *Id.* at 355. The district court relied on 18 U.S.C. § 3553(a) for the non-Guidelines sentence, citing, among other factors, the defendant's lack of criminal history, cooperation with the government, remorse and conduct since the offense, and the deterrence caused by the significant fines and felony conviction. *Id.* at 355-56.

The Court of Appeals vacated the sentence for failing to include a prison term, reasoning, in part, that "[t]o reduce sentencing disparities, the Guidelines sought to ensure more

tax evaders were sentenced to prison, specifically focusing on those who evaded more than $100,000 in federal taxes." *Id.* at 358-59. On remand, the defense argued that the intervening U.S. Supreme Court decisions of *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Gall v. United States*, 552 U.S. 38 (2007), also discussed in Mr. Schleifer's Sentencing Memorandum, provided a basis for the district court to adhere to its original sentence. *United Sates v. Ture*, No. 04-95 (JRT)(FLN), Sentencing Memorandum at 1 (Mar. 7, 2008), Ex. 3. The district court imposed its original sentence of two years probation and 300 hours of community service for the tax offense. *United States v. Ture*, No. 04-95 (JRT), Resentencing Judgment in a Criminal Case (Apr. 28, 2008), Ex. 4.

The second decision cited by the Government, *United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008), involved such egregious conduct that it provides little guidance when considering Mr. Schleifer's sentence. But the *Cutler* court's reasoning actually weighs in favor of a non-custodial sentence for Mr. Schleifer. In *Cutler*, the defendant was involved in a bank fraud, which resulted in more than a $106 million loss. *Id.* at 146. As the CFO, the defendant also supervised a tax scheme in which the company failed to report $29 million of its employees' earned income. *Id.* at 145. The tax loss eventually attributed to the defendant was $5 million. *Id.* at 163. In rejecting the district court's finding that a lengthy prison sentence was unwarranted, the Second Circuit, relied, in part, on the relevant Guidelines commentary: "'[T]his guideline relies most heavily on the amount of loss that was the object of the offense. *Tax offenses, in and of themselves are serious offenses*; however, *a greater tax loss is* obviously more harmful to the treasury and *more serious than a smaller one* with otherwise similar characteristics.'" *Id.* (quoting U.S. Sentencing Guidelines Manual § 2T1.1 Background).

Like the defendant in *Ture*, Mr. Schleifer has no criminal history, and he has accepted responsibility and is remorseful for his actions. The Probation Office has also found that "it does

not appear that [Mr. Schleifer] is at risk of committing further crimes." Presentence Report at 15. The significant costs he has incurred in connection with this incident as well as the pain and suffering he has caused his family will surely serve as a deterrent. Further, both *Ture* and *Cutler* stand for the proposition that a significant tax loss, i.e., a loss at least over $100,000, should be a factor supporting a custodial sentence. The $48,762 tax loss attributed to Mr. Schleifer is much less than the $240,252 tax loss in *Ture*. Plea Agreement, *supra* at 2. And although Mr. Schleifer has accepted responsibility for failing to report income on a Form 1040, it should be noted that Mr. Schleifer in fact believed that the taxes on the profit from the bank conversion would be paid by his associate, who was also involved in the transaction. *See* Plea Agreement, *supra* at 13-14 (stipulating that after the sale of the shares "[Mr. Schleifer] caused Associate #1 to retain a portion of the profits . . . *to cover any potential tax liability reported to the Internal Revenue Service by virtue of the . . . sales*" (emphasis added)).

Finally, the Government suggests that this Court consider the disparity between sentences of the "rich and educated" and the "poor and less-privileged." Government Memorandum at 15. The Government, however, cites no support or case law for its position that poor people have been receiving harsher sentences for violations of the crime at issue, 26 U.S.C. § 7212(a). Thus, this consideration should be completely disregarded.

V. Conclusion

In light of the arguments above, it is respectfully requested that the Court impose a sentence of probation.

Dated: New York, New York
December 15, 2009

Respectfully submitted,

By: s/ Ira Lee Sorkin

Ira Lee Sorkin (PHV03587)
Daniel K. Roque
DICKSTEIN SHAPIRO LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 277 6500
Facsimile: (212) 277 6501

Certificate of Service

I hereby certify that on December 15, 2009, a copy of the foregoing Defendant Steven E. Schleifer's Reply to the Government's Memorandum in Aid of Sentencing was filed electronically 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/System.

_s/ Ira Lee Sorkin_____
Ira Lee Sorkin (PHV03587)
DICKSTEIN SHAPIRO LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 277 6500
Facsimile: (212) 277 6501
sorkini@dicksteinshapiro.com

United States Attorney's Office District of Connecticut
Press Release

March 26, 2009 FORMER NEW YORK RESIDENT ADMITS ROLE IN BANK IPO SCHEME

Nora R. Dannehy, Acting United States Attorney for the District of Connecticut, announced that RON KREISEL 30, of Los Angeles, California, formerly of Monsey, New York, pleaded guilty today before United States District Judge Janet Bond Arterton in New Haven to one count of conspiracy to commit mail fraud. The charge relates to KREISEL's participation in a scheme to illegally invest in and profit from mutual savings banks that converted to publicly traded entities.

According to documents filed with the Court and statements made in court, KREISEL worked for a co-conspirator who devised a scheme to open accounts at numerous mutual savings banks in anticipation of the banks eventually converting to publicly-traded entities in order to purchase shares of stock when the banks converted to stock form. KREISEL first worked as an office employee but subsequently took on an expanded role including opening accounts, buying stock, and transferring stock to an account operating as a "foundation" that facilitated the avoidance of taxes.

Federal and state banking regulations require converting mutual banks that are conducting Initial Public Offerings ("IPOs") to give eligible depositors priority rights in purchasing the newly issued shares, and these priority rights or "subscription rights" that are non-transferable, allow depositors to purchase shares at the "subscription price" or "offering price" generally set at $10.00.

KREISEL, together with and at the direction of his co-conspirator, opened accounts at numerous mutual savings banks, including several based in Connecticut. However, because KREISEL and his co-conspirator did not live in Connecticut and certain mutual savings banks require by charter that depositors be state residents, KREISEL and his co-conspirator opened some accounts using false addresses and false employment information for themselves, and sometimes used names and social security numbers of other individuals to open accounts.

In addition to opening accounts at mutual banks using false information, KREISEL and his co-conspirator sought to profit through the purchase of stock they were not entitled to buy. They sought to accomplish this by recruiting other individuals to be "investors" and finance stock purchases, and recruited account holders at mutual savings banks so they could use their subscription rights. KREISEL and his co-conspirator entered into illegal arrangements with the investors and account holders whereby the co-conspirators and the investors would provide funds to finance the purchase of shares in the various IPOs and then share the profits generated by the purchase of and subsequent sale of the shares.

Federal regulations prohibit mutual bank depositors from selling or transferring their IPO subscription rights or entering into agreements or understandings to sell or transfer

the shares prior to the offering.

On certain transactions, KREISEL's co-conspirator forged account holders' signatures on stock order forms and submitted the fraudulent forms via mail or commercial interstate carrier to the banks for the purchase of shares.

After purchasing the shares, KREISEL and his co-conspirator transferred the shares to brokerage accounts so that the shares could be sold for a profit in the open market, generally at prices above the IPO price. On a number of transactions, the shares were sold through a brokerage account in the name of "The C. Foundation," thus avoiding the proper reporting to the Internal Revenue Service of the profit. KREISEL and his co-conspirator then arranged for and made payments to the account holders whose subscription rights had been used to buy the stock, and arranged for and made payments to other investors who helped to fund the purchases.

KREISEL personally profited $229,396 from this scheme and, in connection with his guilty plea, has placed this amount in escrow so that these funds can be applied to a fine, order of forfeiture, or order of restitution at the time of his sentencing. KREISEL also must resolve any tax liability with the Internal Revenue Service.

When he is sentenced, KREISEL faces a maximum term of imprisonment of five years and a fine of up to $458,792.

This matter is being investigated by the Internal Revenue Service – Criminal Investigation Division and the United States Postal Inspection Service. The case is being prosecuted by Assistant United States Attorneys Michael S. McGarry and Calvin B. Kurimai.

CONTACT: **U.S. ATTORNEY'S OFFICE**
Tom Carson
(203) 821-3722
thomas.carson@usdoj.gov

United States Attorney's Office District of Connecticut
Press Release

May 11, 2009 **NEW YORK MAN ADMITS ROLE IN BANK IPO SCHEME**

Nora R. Dannehy, Acting United States Attorney for the District of Connecticut, announced that CHAIM CITRONENBAUM, 52, of Monsey, New York, pleaded guilty today before United States Magistrate Judge Joan G. Margolis in New Haven to one count of conspiracy to commit mail fraud and to defraud the Internal Revenue Service, and one count of mail fraud. The charges relate to CITRONENBAUM's leadership of a scheme to illegally invest in and profit from mutual savings banks that converted to publicly traded entities.

According to documents filed with the Court and statements made in court, CITRONENBAUM devised a scheme to open accounts at numerous mutual savings banks in anticipation of the banks eventually converting to publicly-traded entities in order to purchase shares of stock when the banks converted to stock form. CITRONENBAUM and others opened and controlled accounts in CITRONENBAUM's name, in the names of other individuals, and in the names of various entities, including a "foundation" that facilitated the avoidance of taxes.

Federal and state banking regulations require converting mutual banks that are conducting Initial Public Offerings ("IPOs") to give eligible depositors priority rights in purchasing the newly issued shares, and these priority rights or "subscription rights" that are non-transferable, allow depositors to purchase shares at the "subscription price" or "offering price" generally set at $10.00.

CITRONENBAUM and others opened accounts at numerous mutual savings banks, including several based in Connecticut. However, because CITRONENBAUM and his co-conspirators did not live in Connecticut and certain mutual savings banks require by charter that depositors be state residents, CITRONENBAUM and his co-conspirators opened some accounts using false addresses and false employment information for themselves, and sometimes used names and social security numbers of other individuals to open accounts.

In addition to opening accounts at mutual banks using false information, CITRONENBAUM and his co-conspirators sought to profit through the purchase of stock they were not entitled to buy. They sought to accomplish this by recruiting other individuals to be "investors" and finance stock purchases, and recruited account holders at mutual savings banks so they could use their subscription rights. CITRONENBAUM and others entered into illegal arrangements with the investors and account holders whereby the co-conspirators and the investors would provide funds to finance the purchase of shares in the various IPOs and then share the profits generated by the purchase of and subsequent sale of the shares.

Federal regulations prohibit mutual bank depositors from selling or transferring their

IPO subscription rights or entering into agreements or understandings to sell or transfer the shares prior to the offering.

On certain transactions, CITRONENBAUM forged account holders' signatures on stock order forms and submitted the fraudulent forms via mail or commercial interstate carrier to the banks for the purchase of shares.

After purchasing the shares, CITRONENBAUM transferred the shares to brokerage accounts so that the shares could be sold for a profit in the open market, generally at prices above the IPO price. On a number of transactions, the shares were sold through a brokerage account in the name of "The Citronenbaum Foundation," thus avoiding the proper reporting to the Internal Revenue Service of the profit. CITRONENBAUM and others then arranged for and made payments to the account holders whose subscription rights had been used to buy the stock, and arranged for and made payments to other investors who helped to fund the purchases.

CITRONENBAUM personally profited more than $1.6 million from this scheme and, in connection with his guilty plea, he will be required to forfeit that amount at the time of his sentencing. CITRONENBAUM also must resolve any tax liability with the Internal Revenue Service.

CITRONENBAUM is scheduled to be sentenced by United States District Judge Janet Bond Arterton on July 30, 2009, at which time CITRONENBAUM faces a maximum term of imprisonment of 25 years and a fine of up to approximately $3.2 million.

This matter is being investigated by the Internal Revenue Service – Criminal Investigation Division and the United States Postal Inspection Service. The case is being prosecuted by Assistant United States Attorneys Michael S. McGarry and Calvin B. Kurimai.

CONTACT: **U.S. ATTORNEY'S OFFICE**
Tom Carson
(203) 821-3722
thomas.carson@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 04-95 JRT/FLN

UNITED STATES OF AMERICA, Plaintiff, v. GERALD TURE, Defendant.	)	SENTENCING MEMORANDUM

The Defendant, Gerald Ture, through his Counsel, Daniel M. Scott, submits to the the Court at his resentencing that the reasoning of the United States Supreme Court in *Kimbrough v. United States*, ___U.S. ___, 128 S. Ct. 558 (2008), and *Gall v. United States*, ___U.S. ___ 128 S. Ct. 586 (2008), dictate the imposition of the same sentence as that originally imposed by this Court on June 20, 2005. After an exhaustive analysis of the sentencing factors set forth in Title 18 U.S.C. §3553(a), the Court determined that a sentence of two years probation conditioned upon the performance of 300 hours of community service was "sufficient but not greater than necessary" to achieve the statutory purposes of sentencing, after considering the circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, and the need to avoid unwarranted disparities. That sentence was correct in 2005 and it is correct under the law in 2008.

A. Facts.

Gerald Ture was born in 1937. He grew up in a working class family in St. Paul,

Minnesota. He never finished high school, electing to begin his working career as soon as he was able. He originally planned to make the military his career, but was found physically unfit while in the U.S. Marines. He worked his way up in the metal fabrication business, eventually rising to the ownership of a small machine shop, Drill-A-Matic, in 1970. He managed that business for 34 years, until it was liquidated in late 2004.

Mr. Ture married Patricia Ture in 1959. He and his wife raised four children. Their marriage broke up shortly after their daughter, Corrine, died of cancer at age 17. Patricia Ture received ownership of Drill-a-Matic as part of the divorce settlement in 1978, but Mr. Ture continued to manage the business for the next 26 years. When the business was liquidated in 2004, the proceeds went to his wife.

Mr. Ture now lives in an apartment in White Bear Lake, Minnesota. At the time of sentencing he was unemployed and collecting his Social Security retirement benefits. He has no pension income. His assets are negligible, primarily consisting of a seven year old pickup truck.

The parties both agreed that Mr. Ture had not been filing his personal income taxes from 1996 to 2000. As the manager of Drill-a-Matic, he received income averaging $125,000 per year. In the late 1990's he invested in two startup businesses. His gains and losses in those businesses were in dispute. At he time of the plea, the Government maintained that the lost taxes exceeded $340,000 for the five year reporting period. The government later submitted revised figures to the Probation office showing a tax loss of

$240,252. Mr. Ture did not have a final figure at the time of the plea, but anticipated that the total loss could be less than $100,000. He submitted figures to the Probation office showing the tax loss to be something less than $200,000. (The actual figure of $165,763, reported to the Probation office, was never included in the PSI report or its addendum).

Due to a fluke in the U.S. Sentencing Guidelines, the dispute was meaningless. Either figure resulted in a total offense level of 13.[1] With a Criminal History Category of I, Mr. Ture's suggested sentencing guideline range was 12-18 months.

B. SENTENCE.

At Sentencing the Court correctly found that his duty was to form a sentence in compliance with 18 USC §3553 (a), considering all of the factors of the offense and the background of the defendant as well as the guideline ranges suggested by the Sentencing Commission. After reviewing the factors found in paragraphs 1-7 of 18 USC §3553 (a), the Court stated in its written Sentencing Memorandum (dated July 1, 2005) as follows:

> **"STATEMENT OF REASONS**
>
> The Court has carefully reviewed the Presentence Report prepared by the United States Probation Office, heard all of the arguments and views of the parties and has fully considered all of the sentencing factors enumerated in 18 U. S.C. §3553(a).

---

[1] The loss figure was agreed by the parties to be a controlling admission by the Defendant of his tax liability. This also is less than what appears. First the IRS was not bound by the figure, only Mr. Ture. Second, with penalties and back interest the final tax figure would be truly astonishing in any event.

The Court makes the following findings and states the following reasons in support of the sentence imposed in this case:

The Court finds that a probationary sentence is fair and reasonable in this case considering all of the sentencing factors enumerated in this memorandum. The probation sentence together with a significant community service requirement and the anticipated cost to the defendant of paying back taxes, interest, and penalties, constitutes a sentence that is sufficient and not greater than necessary.

This is the defendant's first criminal offense after a long life. The means he used to commit the crime were relatively unsophisticated and he has cooperated fully with the investigation and his prosecution. He has expressed remorse for committing the crime and he has remained law abiding throughout the pendency of this case. Defendant has a heart condition which is serious and requires ongoing treatment. History and personal characteristics support not sending this defendant to prison at the age of 68 years.

The Court finds no need to protect the public from further crimes of the defendant; he is unlikely in view of his past to commit any crimes in the future. The Court also finds it unlikely that this sentence will affect whether other business people commit crimes. There will be significant restrictions on Mr. Ture during his probationary period; he has a significant community service

requirement and he will have to pay significant sums of money to the Internal Revenue Service. In addition, the federal felony conviction will affect him in significant ways.

The bottom of the guideline range is 12 months, just above the range where probation is an authorized sentence under the guidelines. For the reasons stated, the Court finds no reason to sentence the defendant to prison, finding that a fair and reasonable sentence has been imposed."

C. Circuit Court Criticism of the Sentence.

In the appellate decision, the Eighth Circuit Court of Appeals concluded that a probationary sentence was not reasonable:

> Three reasons counsel our conclusion that the District Court abused its discretion in meting out an unreasonable sentence. First, the District Court failed to accord significant weight to the Guidelines range, to the seriousness of Ture's offense, or to the need to avoid unwarranted sentencing disparities. The resultant sentence also does not promote respect for federal tax laws, provide just punishment, or ensure adequate deterrence to willful tax cheats. *See* 18 U.S.C. § 3553(a)(2), (4), (6). Giving due weight to these factors, we conclude that any sentence without a term of imprisonment is wholly unreasonable.

United States v. Ture, 450 F. 3d 352, 357 (8th Cir. 2006).

On its own the Appeals Court found that deterrence should be a controlling factor in sentencing: "Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines." 450 F. 3d at 35. The appellate court cited with approval the use of imprisonment as a revenue enhancer:

> "Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue. " 450 F. 3d at 358.

The appellate court could not make its feeling that tax law violations require imprisonment any more clear:

> "[W]e believe the District Court failed to adequately consider the seriousness of Ture's offense, the goal of promoting respect for our federal tax laws, and the need for a just sentence including imprisonment. The Court also failed to faithfully consider the Guidelines, which strongly advocate in favor of a term of imprisonment for a willful tax evader in these circumstances.
>
> * * *
>
> The District Court also failed to consider the importance of a term of imprisonment to deter others from stealing from the national purse. As the Guidelines explain, willful tax evaders often go undetected such that those who are caught-especially those who are caught evading nearly a quarter-million dollars in tax-must be given some term of imprisonment. The goal of deterrence rings hollow if a prison sentence is not imposed in this case." 450 F. 3d at 358.

Somewhere along the line the appellate court lost sight that the guidelines only called for a one year sentence and were only one level above the range for a non-imprisonment sentence alternative: "A review of Ture's offense and the factors the District Court considered almost begs the question of who gets prison if Ture does not." 450 F. 3d at 358.

The court found the need for restitution to be irrelevant as an alternative to

imprisonment.

Finally the appellate court found "the remaining factors-though certainly relevant-did not justify a sentence without a term of imprisonment. These remaining factors simply are not so extraordinary as to warrant a no-prison sentence." 450 F. 3d at 359.

D. Why *Kimbrough, Rita, and Gall* set aside the Circuit Court reasoning.

In Kimbrough, Rita and Gall, the Supreme court rejected each of the reasons given by the appellate court to reject the sentence imposed by this Court. First, there is no standard of review to consign variances from the guideline range into non-extraordinary and extraordinary classifications. Second, it is the District Court's duty to weigh the factors such as deterrence and balance them against the other factors in Section 3553(a), not the circuit court's. Third, the standard of review is abuse of discretion with deference to the District Court analysis of the appropriate sentencing factors.. Finally, the circuit court must give weight to the punishment embodied in a conviction with the restrictions on liberty inherent in a probationary sentence.

Beginning with *Rita v. United States* .127 S. Ct. 2456 (2007). and continuing with *Gall v. United States*, 128 S. Ct. 586 (2007)., and *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Supreme Court fleshed out the considerations for the sentencing courts in fashioning a sentence under §3553(a) after the surgery performed upon it by the Court in *United States v. Booker*, 543 U.S. 220 (2005), and the distinct limitations of the appellate

courts in their review of the sentence. In *Rita* the Supreme Court made clear that *"sentencing judge"* has the statutory duty to apply the seven factors of §3553(a) to the individual facing sentence before the court (emphasis in the original. 124 S. Ct at 2463). In determining the sentence the court "may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." 124 S. Ct at 2465.

In *Gall and Kimbrough*, the Supreme Court addressed the question specifically left open in *Rita*, the limits of review for sentences imposed outside the guideline range calculated for an individual case.

> "We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.
> As an initial matter, the approaches we reject come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Gall v. U.S.* 128 S. Ct at 595.

Of particular interest to Mr. Ture's case is the observation by the Court:

> On one side of the equation, deviations from the Guidelines range will always appear more extreme-in percentage terms-when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years. Moreover, quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines gives no weight to the "substantial

> restriction of freedom" involved in a term of supervised release or probation." 128 S. Ct at 595.

When reviewing a sentence from the District Court, the Supreme Court directed the appellate court to determine if the District Court properly calculated the guidelines, considered the factors allowed by §3553(a), and finally that the weight that the District Court assigned to the importance of an individual factor be reviewed with a deferential standard. Even strong disagreement with the sentence is not grounds for reversal:

> "The Court of Appeals clearly disagreed with the District Judge's conclusion that consideration of the § 3553(a) factors justified a sentence of probation; it believed that the circumstances presented here were insufficient to sustain such a marked deviation from the Guidelines range. But it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence."

As noted in *Kimbrough, supra*, the sentencing court is not even bound by the analysis underlying the guideline itself if the court feels that it does not adequately take into consideration the 3553(a) factors.

The reasoning of the appellate court in Mr. Ture's case conflicts with the law in specific ways:

First, the appellate court applied the "extraordinary" departure and the percentage analysis to the sentence, an approach specifically rejected by the Supreme Court. The circuit court has acknowledged that the standard of review it applied prior to *Gall* was error: "Now, bound by Gall, our standard of review is more deferential than when we

employed the 'extraordinary circumstances' method." *United States v. Bragg,* 511 F. 3d 808, 812 (8th Cir. 2008). See also *United States v. McDonald*, ___F. 3d ___No. 05-1617 (8th Cir. March 4, 2008), slip op at 2-3.

Second, the appellate court erred by applying its standard concerning which legitimate factors should have more weight than others.

Third, the court specifically eliminated a probationary sentence from consideration, for any person who evaded more than $100,000 in taxes treating the guidelines as mandatory.

Fourth, the court saw as improper, the District Court's consideration of restitution as a factor in sentencing, even though it is a required factor under §3553(a)(7).

Drawn to its essence, the appellate court agreed with the District Court that a variance was justified, it just didn't think that it should have been probation. The appellate court cited the history of sentencing in tax cases, noting that historically half of all tax case sentences were probation, a historical fact that the appellate court and the sentencing commission wanted to change. As the Supreme Court noted in *Rita*, and again in *Kimbrough*, although the Sentencing Commission was entitled to come to its own conclusion on how to weigh the factors of 3553(a) in determining the guidelines, the District Court has a separate statutory duty to do the same thing with each individual defendant. The appellate court found that deterrence, that is, that a defendant should not be sentenced for his criminal act, but rather should be punished intentionally out of

proportion to the gravity of the offense, in order to deter the others from criminal violations, is an overriding goal, rather than just one of the factors under §3553(a)(2). There is no statutory basis for that proposition in the law. Congress did not place 26 U.S.C. §7201 in the category of offenses for which probation is not an option. Congress was presumably as aware as the Sentencing Commission that half of all tax convictions resulted in probationary sentences, but it never changed the statute to accentuate the role of deterrence for this particular violation[2].

E. Should the sentence change?

Mr. Ture's remand for re-sentencing was with instructions to the District Court to re-examine it sentence in light of 18 U.S.C. 3553 to determine what sentence is reasonable under the statutory mandate. The court's sentence was correct then and it is correct now.

Mr. Ture entered a plea to Count 3 of the Indictment, charging him with felony failure to file his tax return for the tax year 1999, in violation of Title 26 U.S.C. §7201. There is no minimum penalty, the maximum penalty is five years imprisonment, a three year term of supervised release, a $250,000 fine, and the costs of imprisonment and prosecution.

Step 1: determine the guideline.

---

[2] There is an equally valid counter argument to the deterrence factor. If Congrees and the executive were actually concerned about the seriousness of tax violations they would fund the investigation of more cases. It is not up to the courts to make up for the lack of enthusiasm of the other two branches of government.

Although there may be some disagreement on how we got here, all parties agree that the guideline calculation is Offense level 13, Criminal History Category I, yielding a recommended sentencing range of 12-18 months.

Step 2: allow each party to present what they believe to be the appropriate sentence.

The government did not object to the Presentence Report. Mr. Ture filed his sentencing position (Docket entry #14). Both sides were afforded allocution, and will be able to do so again at resentencing.

Step 3: The court considers all of the applicable §3553 factors to determine the appropriate sentence.

18 U.S.C. §3553 (a)(1) directs the Court to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth" in the succeeding sentencing factors enumerated in the law. 18 U.S.C. §3661 states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person... which a court...may...consider for the purpose of imposing an appropriate sentence."18 U.S.C. §3582(a) states "that imprisonment is not an appropriate means of promoting correction or rehabilitation." 28 U.S.C. §994 (j), directed at the Sentencing Commission, states the Congressional policy that "a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" is appropriate.

18 U.S.C. §3553 (a)(2-7) set for the list of factors the court is required to consider

to determine the appropriate penalty for a law violator:

1. The nature and circumstances of the offense.

2. The history and characteristics of the defendant.

3. The need to reflect the seriousness of the offense.

4. The need to promote respect for the law.

5. The need to provide just punishment for the offense.

6. The need to afford adequate deterrence to criminal conduct.

7. The need to protect the public from further crimes of the defendant.

8. The need to provide the defendant with educational or vocational training, medical care or other correctional treatment in the most effective manner.

9. Kinds of sentences available.

10. The Sentencing guideline calculation for this case and defendant.

11.Pertinent policy statements of the Sentencing Commission.

12. The need to avoid unwarranted disparity among defendants with similar records with similar offense conduct.

13. The need to provide restitution to any victims of the offense.

Step 4: The court documents its reasoning.[3]

At the original sentencing this court understood its duty to consider all of the factors set forth in § 3553(a) in determining the appropriate sentence to impose upon Mr.

[3] Four step process set up in *Gall v. U.S.*, *supra*, 128 S. Ct at 598

Ture. In its written Sentencing Memorandum, prepared in compliance with 18 U.S.C. § 3553 (c)(2), the Court carefully parsed out the 13 factors relevant to the initial sentence contained within § 3553(a)(1-7) and printed in Step 3 of this memo. In its "Statement of Reasons," the trial court analyzed the facts of Mr. Ture's case as they applied to the statutory sentencing factors. The Court specifically found that, "[t]he probation sentence together with a significant community service requirement and the anticipated cost to the defendant of paying back taxes, interest and penalties, constitutes a sentence that is sufficient and not greater than necessary."

The Court went on to summarize facts relevant to the factors to be weighed at sentencing.

Concerning the nature and circumstances of the offense, the Court was faced with a non-violent tax offense. This is a felony conviction which will have "significant" effects on Mr. Ture. The offense was "relatively" unsophisticated; he didn't file his personal tax returns. As the manager, it was simple to have his compensation listed as consulting or subcontracting. He conveniently did not issue himself a IRS Form 1099. Once the IRS looked, he admitted his wrongdoing and pleaded guilty. Mr. Ture filed no pretrial motions and did not even want an attorney to protect himself. He expressed remorse for the offense, and stayed out of trouble during the prosecution, to no one's surprise.

The Court noted that Mr. Ture's history and personal characteristics did not

support sending him to prison. He was 68 years old, a time when most are enjoying a well-deserved retirement. His business has closed and he enters his retirement years with a truly astonishing debt to the Government; a government which will aggressively pursue collection efforts ensuring his poverty for the remainder of his years.

Mr. Ture is not just Criminal History Category I, which only counts criminal behavior over the last 10-15 years, he has had no criminal history for the last 70 years. Instead he has been a productive citizen, rising from the working class, without the benefit of education, to a position of owning and then managing a small machine shop/fabrication business. He has raised a family and was married for nearly 20 years before the tragic death of his teenage daughter precipitated a martial breakup. Even so, he managed the business he once owned for the benefit of his ex-spouse. He liquidated the business with the proceeds to his ex-wife only in anticipation of his sentencing in federal court.

At age 70 now his economically productive career is nearly over. His heart disease had progressed to the point that open heart surgery was necessary with continuing pain and medication to this day. Open heart surgery is only a temporary fix for a long-term condition. Further surgeries will be necessary.

Medical condition is a specific factor to be considered by the sentencing court under § 3553(a)(2)(D). In United States v. Ryder, 414 F. 3d 908 (8th Cir. 2005), the appellate court reversed and remanded a sentence back to the trial court to consider the

effect of a medical condition under § 3553(a)(2)(D) that specifically did not rise to the extent to warrant a guideline departure, explaining:

> The prior mandatory nature of the Guidelines deprived the district court of the opportunity to consider age and physical condition in any manner other than as a basis for a Guidelines departure. Now coupled with the requirements in § 3553(a) that a district court consider a defendant's characteristics and the need to provide medical care in the most effective manner when sentencing a defendant, the district court would be well within its discretion to at least consider Alfred's and Mary Ann's ages and medical conditions as non-Guideline factors on remand. (414 F. 3d at 920).

This Court saw no need for incarceration to protect the public form future criminal conduct in light of Mr. Ture's otherwise stellar history.

The real crux of the Government's argument is its belief that a non-incarceration sentence is not enough to promote respect for the law or to serve the deterrence function. This Court did not see the additional deterrence factor for other businessmen between the prospect that they would receive a felony conviction, be financially wiped out at the age of 68 with the prospect of Government garnishment of any income or assets, a significantly different if accompanied by a year in jail versus no year in jail.

Factoring in the defendant's health and otherwise good conduct over a lifetime, together with a suggested guideline calculation that was only one level over a suggested non-prison sentence, it is reasonable for the Court to find that the public would agree that the jail sentence was not necessary to achieve just punishment. The trial court certainly would not abuse its discretion in striking that balance.

Conclusion.

A non-custodial sentence under 18 U.S.C. §3553(a) for a violation of the tax laws for a 68 year old man with a history of heart trouble, with no prior record, who had cooperated with the government, after thoughtful analysis of the appropriate sentencing factors is "a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing described in § 3553(a).

Dated: March 7, 2008

Respectfully submitted,

KELLEY & WOLTER, P.A.

s/Daniel M. Scott
Daniel M. Scott
Attorney I.D. No. 98395
Attorney for Defendant
431 South Seventh St., Suite 2530
Minneapolis, MN 55415

AO 245B (Rev. 06/05) Sheet 1 - Judgment in a Criminal Case

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.
GERALD TURE

RESENTENCING
JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: **04-95 (JRT)**
USM Number: **11531-041**
Social Security Number: 0257
Date of Birth: June 8, 1937

Daniel M. Scott
Defendant's Attorney

THE DEFENDANT:

[**x**] pleaded guilty to count: **3**.
[] pleaded nolo contendere to counts(s) which was accepted by the court.
[] was found guilty on count(s) after a plea of not guilty.
The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
26 U.S.C. § 7201	Tax Evasion	1999	3

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the Defendant pay the Special Assessment amount of **$100.00** in full immediately.

[] The defendant has been found not guilty on counts(s) **.**
[**x**] Counts 1,2, 4, 5 and 6 are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in the economic circumstances.

April 25, 2008
Date of Imposition of Judgment

s/ John R. Tunheim
Signature of Judge

JOHN R. TUNHEIM, United States District Judge
Name & Title of Judge

April 28, 2008
Date

AO 245B (Rev. 06/05) Sheet 4 - Probation

DEFENDANT: GERALD TURE
CASE NUMBER: 04-95 (JRT)

PROBATION

The defendant is hereby sentenced to probation for a term of **2 years.**

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

[**x**] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[**x**] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[**x**] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it shall be a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: GERALD TURE
CASE NUMBER: 04-95 (JRT)

ADDITIONAL PROBATION TERMS

a The defendant shall perform 300 hours of community service, as directed by the probation office.