IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
ST. LOUIS DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
ERIC O'RILEY,	)
	)
Defendant.	)

DEFENDANT'S SENTENCING MEMORANDUM

I. Introduction

Sentencing Memoranda generally "write themselves." This Honorable Court pointed out one time that the prosecutor only sees the "criminal" and the defense attorney only sees the "contrite person." As such, the defense attorney hammers as hard as possible on the person he knows through a memorandum.

Eric O'Riley possesses a calm, cool, collected demeanor that comes across as arrogant and uncaring. This has prevented the undersigned from having a clear understanding of Eric and his crime which in turn would normally make it difficult to explain to this Honorable Court in a Sentencing Memorandum why incarceration is not warranted.

Thankfully though, within the past week the undersigned has been able to know a "different" Eric O'Riley and feels strongly that the rationale of the United States Supreme Court in *Gall* holding that incarceration is **NOT** necessary and that probation in and of itself is a punishment.

II. Stan Wells

In all white collar cases there is a "hallelujah moment" where the Defendant "gets it." In the past few years, Eric has nibbled around the edges of the implications of his crime and what it means to him personally, his family and members of the community.

Since Eric's guilty plea, there has been an incredible amount of give and take regarding the issue of restitution. Ultimately, the disagreement centered on a few thousand dollars and even though the final number would not impact Eric's Advisory Guideline Sentence, the parties wanted to ensure that this Honorable Court had a correct restitution figure.

After playing the middle-man, the undersigned suggested that everyone meet at Assistant U.S. Attorney Stan Wells's office so that a final figure could be agreed upon. On August 21, 2014 the undersigned and Eric met with Mr. Wells. After 15 minutes the restitution amount was agreed upon.

More importantly, after the meeting Stan Wells made uplifting type of comments to Eric. Mr. Wells told Eric that he had a lot to offer society. Mr. Wells told Eric that he would request a sentence of one year and one day and explained the reasons. Those reasons hit Eric like a lightning bolt.

On January 26, 2015 and January 27, 2015 the undersigned and Eric met to discuss sentencing and it was readily apparent that Eric "got it." His "hallelujah moment" occurred on January 21, 2015 and his demeanor and outlook regarding everything had changed.

III. Overbearing Father

If a medal were given for most overbearing father, Eric's Dad Dan would win the platinum medal. His temperament is beyond gold level status.

Until January 21, 2015 the albatross around Eric's neck was his Dad, who continually interjected himself into the case, including the restitution figure. Jim Frazier was leading from behind by directing how Eric handled the discovery, trial and sentencing. Between January 21, 2015 and January 27, 2015 Eric finally told his Dad to "butt out."

Generally, overbearing parents are more background noise than anything. Their children are grown and have made decisions which are criminal in nature. Eric stole money from his employer and that cannot be blamed on his Dad.

As will be seen at sentencing though, Eric's relationship with his father was vastly different from his relationship with Rob Rogers, who was the legendary Superintendent of the Louiesville School District.

IV. The Crime

As the only child of successful parents, Eric had an idyllic childhood. Nothing in his past would suggest that Eric would be anything other than a successful and upstanding member of his community.

Any son who follows in his father's footsteps and enters into the family business be it insurance, law, or finance does so with a sense of pride, trepidation and a feeling of of fulfillment. Eric was no different.

His parents Jim and Jane both succeeded in their professions. While attending his parents' alma mater in Springfield, Eric decided to study finance with an eye towards returning home, working with his Dad and ultimately taking over the family business.

Those plans changed once Eric was hired by Louiesville Superintendent Ron Rogers. After a short time working with Mr. Rogers, Eric decided not to return to Michigan. This news was not well-received by his father.

Eric was originally hired as a payroll clerk in 2004 and Mr. Rogers convinced Eric to return to Springfield to work on an MBA. In 2008 Eric earned his MBA and immediately went from earning $30,000 a year to $65,000 a year.

When Eric started his new position as a salaried employee he continued paying himself a stipend that was reserved for hourly employees. Eric dummied up the books to try and hide the overpayment, was ultimately caught and charged by the Government.

At any criminal sentencing, especially in white collar cases, "why" the Defendant broke the law is something which has to be answered satisfactorily in order to avoid incarceration. Here, the "why" is unique and deals with Eric's overbearing father and Eric's relationship with Tim Rogers. On August 26, 2014 Eric explained to the undersigned for the first time "why" he stole money from the Louiesville School District. It frankly made sense to the undersigned. Rather than try to explain the "why" in this

Sentencing Memorandum, it will be better for Eric to explain to this Honorable Court on September 12, 2014 why he committed this crime.

V. The Elephants in the Room

Two elephants will be in the courtroom on September 1, 2015. Each will have to be addressed before analyzing the aspects of 3553 and requesting a variance to a Zone B sentence of 7 months of home confinement and 7 months of probation.

The first elephant is Eric's gambling. It is not lost on Mr. Wells, the undersigned and no doubt this Honorable Court that the amount of money Eric gambled away since his change of plea would have made a significant dent in the restitution.

The second elephant is the fact that since being fired by Louiesville, Eric has not held a steady job. This elephant is easier to deal with than gambling because as will be seen supra., there are shades of gray that exist for someone who works for their father or takes care of elderly grandparents. While not technically "earning" money or having a job, Eric did more than lay around the house doing nothing.

VI. 3553 Factors

A. Incarceration is NOT Required

Eric's Adisory Guideline Sentence is a Zone C. His Total Offense Level is a 13. The 12-18 month Advisory sentence can be served by one-half incarceration and one-half probation.

Eric will request a two level variance to a Total Offense Level of 11 which is a Zone B. He will request a 14 month Zone B sentence which will **NOT** require incarceration. This is the rare white collar case where a Defendant's Advisory Guideline range is **NOT** a Zone D, which mandates incarceration.

The case which ultimately did away with the Draconian Guidelines was *Gall v. United States.* It is somewhat surprising that lost on just about everyone in the criminal justice system is that the Defendant in ***Gall*** **was given probation and the United States Supreme Court stated that probation in and of itself constitutes punishment.**

The United States Supreme Court in *Gall* clearly held that incarceration is no longer mandated. It is wholly unfair to take the position that the ***only*** just punishment is

some sort of imprisonment so as to act as a deterrence to other fraud Defendants. To follow this approach would violate the legislative history to Section 3553 (a) where Congress has held that a sentencing court should not show a preference for one purpose of sentencing over another.

This aspect of *Gall* deals with the third factor § 3553(a)(3) which pertains to the kinds of sentences available and is a perfect seguey regarding just punishment and deterrence. *Gall* discussed probation which to a casual observer is viewed as "getting off easy." *Gall* held:

> "We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. **Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.** See *United States v. Knights, 534 U.S. 112, 119, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001)* **("Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled'"** (quoting *Griffin v. Wisconsin, 483 U.S. 868, 874, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987))*.
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> 4 Probationers may not leave [*596] the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. *USSG § 5B1.3*. Most probationers are also subject to individual "special conditions" imposed by the court. Gall, for instance, may not patronize [***19] any establishment that derives more than 50% of its revenue from the sale of alcohol, and must submit to random drug tests as directed by his probation officer. App. 109.
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> 4 See also Advisory Council of Judges of National Council on Crime and Delinquency, Guides for Sentencing 13-14 (1957) ("Probation is not granted out of a spirit of leniency . . . . As the Wickersham Commission said, probation is not merely 'letting an offender off easily'"); 1 N. Cohen, The Law of Probation and Parole § 7:9 (2d ed. 1999) ("The probation or parole conditions imposed on an individual can have a significant impact on both that person and society . . . . Often these conditions

> comprehensively regulate significant facets of their day-to-day lives . . . . They may become subject to frequent searches by government officials, as well as to mandatory counseling sessions with a caseworker or psychotherapist")." [Emphasis added]

The foregoing holding in *Gall* should mean something in a case like Eric O'Riley's. Sending Eric to jail is not necessary.

B. 18 U.S.C. 3553(a)(1)

At page 22, *Gall* lists and discusses the seven factors that a sentencing court ***must*** consider. The first factor is a broad command to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." *18 U.S.C. § 3553(a)(1)*. It is the undersigned's position that this is a "draw." The nature and circumstances of the offense are pretty bad. Eric stole money from the Louiesville School District; money that could have gone to education. Fortunately, the "victim" for restitution purposes is an insurance company, meaning that the school children were not adversely impacted.

The history and characteristics of Eric are not fully developed yet due to his age. He is a young man with literally his whole life ahead of him. Prior to this case, Eric has never broken the law. He presently is using his finance abilities by helping his Dad at work. He also has been helping his elderly grandparents with daily chores and moving from one location to another.

1. Gambling Addiction

Eric does have a gambling addiction. This is something that can be taken into consideration for purposes of sentencing. In all cases the undersigned has been involved in, gambling addiction is part of the crime. The Defendant/client feeds his or her addiction by stealing. Here, Eric's gambling addiction had nothing to do with the crime. He did not steal to feed his addiction. However, it is obvious that Eric's addiction is real. For purposes of 3553, this Honorable Court can take into consideration Eric's gambling addiction when deciding whether or not to vary downward.

Like most addicts, Eric never thought he had a gambling problem. It seemed as if he had things under control, but as the stress, pressure and anxiety of this case began taking ahold of him, Eric soothed himself in gambling boats. Eric is blessed to have been on pre-trial release as his gambling got out of control, because he has been able to take steps to stop. As part of his supervised release, Eric requested self-banning from casinos and any other gambling type activities.

Eric's situation is similar to that of the Defendant in *United States v. Peterson*, 363 F. Supp. 2d 1060 (E.D. Wis. 2005), where the sentencing judge relied on 18 U.S.C. § 3553(a) and *Booker* to impose a sentence of one day in prison and five years of supervised release in a case in which the defendant defrauded a bank of over $80,000 to fuel a gambling addiction. There, the defendant had been in counseling for his addiction and had been progressing well. The guidelines called for 12 to 15 months in prison, but the court imposed the below-guideline sentence so that the defendant could continue to work and pay restitution in light of the directives to the court in § 3553(a)(7) to consider the need to provide restitution to the victim of the offense, and in § 3553(a)(2)(D) to provide defendant with needed treatment in the most effective manner. Id. at 1062-63 Relying on this rationale, this Honorable Court can certainly vary from a Zone C sentence to a Zone B sentence.

In *United States v. Sadolsky*, 234 F.3d 938 (6th Cir. 2000) the court of appeals held that district court's two-level downward departure under §5K2.13 in computer fraud, based on defendant's compulsive gambling disorder, was not an abuse of discretion, where defendant's disorder was a likely the cause of his criminal behavior, given that he had already "maxed out" his own credit line before resorting to fraud to pay his gambling debts – no direct causal link required between the diminished capacity and the crime charged).

In Eric's case, the undersigned could cite case after case regarding circumstances where a Defendant's gambling was a reason for a departure.

The bottom line is that Eric's gambling addiction is something which should be considered for purposes of a variance.

C. 18 U.S.C. 3553(a)(2)

The second factor mentioned in *Gall* requires the consideration of the general purposes of sentencing, including:

> "the need for the sentence imposed --
>
> "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> "(B) to afford adequate deterrence to criminal conduct;
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> "(C) to protect the public from further crimes of the defendant; and
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> "(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *§ 3553(a)(2).*

Starting with (D), Eric is fortunate to have an MBA. He is a smart young man who made a series of huge mistakes. Thankfully, he does not need any educational training. He needs to use his schooling though to get a job.

Protecting the public from further crimes of the Defendant assumes that there will be further crimes. Eric is willing to be placed on as tight a leash as this Honorable Court deems just. Eric had a spotless and exemplary record prior to being charged in this case. He hopefully will explain to this Honorable Court's satisfaction why he committed this crime. Eric is a convicted felon as a result of this. It is implausible to think that he has not learned his lesson.

Subsections (A) and (B) are the difficult hurdles to clear. Requesting what might be considered a "light" sentence seems to be contrary to just punishment and deterrence. The argument will go that if Eric gets off easy, no message will be sent to others who might steal from their employers.

If this Honorable Court is convinced to take this draconian approach, *Gall* can be thrown out the window. Who cares that the United States Supreme Court declared that probation is punishment? If someone charged with and convicted of a federal crime is ***not*** incarcerated, there is no just punishment or deterrence.

The carrot and stick analogy seems to fit. Each crime and Defendant have their own unique set of circumstances. A Defendant who constantly breaks the law and for whom prison is a home away from home needs the stick. Psychologically, Eric has already been punished. Probation and home confinement will be a further punishment. How is it possible to quantify the fear that someone like Eric has of going to prison? How is it possible to quantify the humiliation and degradation that Eric's family has been caused as a result of his actions? How is it possible to quantify the stress and anxiety that Eric has felt since he was charged? Post-*Gall* these seemingly small matters figure into the just punishment and deterrence equation. Post-*Gall* this Honorable Court can determine that just punishment and deterrence are satisfied by 7 months of home confinement and 7 months of probation.

D. Restitution

Part of Eric's epiphany on January 21, 2015 was his agreement with Mr. Wells's contention that Eric's parents were victims of Eric's crimes. Eric stole money and was going to make full restitution on the day of his Sentencing by borrowing the $100,000 from his parents. Eric took to heart what Mr. Wells told him and on January 21, 2015, Eric told the undersigned that he stole the money and that he intended to repay it without assistance from his parents.

This is significant because it shows that Eric is taking responsibility for what he did. He has taken to heart what Stan Wells told him. He understands that actions have repercussions and that part of the repercussions is to have to repay what he stole. He will not be able to repay the $100,000 in a short period of time --- it will take him years. Every time Eric makes a restitution payment, he is being punished. That ultimately is the harshest type of punishment.

VII. Conclusion

Hopefully, this Honorable Court will follow the lead of *Gall* and recognize that probation and home confinement constitute punishment --- that incarceration is not mandatory. As such, Eric requests that this Honorable Court vary to a Zone B sentence of 14 months to be served 7 months in home confinement and 7 months probation.

ERIC O'RILEY

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