

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 99-CR-30040-DRH
)	
JOSEPH NETEMEYER,)	
)	
Defendant.)	

DEFENDANT’S SENTENCING MEMORANDUM

As the court is aware, Defendant Joseph Netemeyer, (Joe), will be sentenced on August 27, 1999, and due to the intricate nature of the charges and negotiations which resulted in the Plea Agreement a discussion of Joe’s position regarding sentencing will conserve valuable judicial resources and allow the sentencing to go much smoother.

The negotiations involve Assistant U.S. Attorney Miquelon’s agreement to file a Motion for Downward Departure pursuant to United States Sentencing Guidelines (U.S.S.G.) § 5K1.1 and 18 USC § 3353 (e), (*Exhibit A*) at the time of Sentencing so that Joe can argue for *any* sentence. As the Court is aware, Ms. Miquelon was not required to agree to this, and the undersigned is extremely grateful to her for showing this amount of judicial discretion and integrity.

Joe will request that the Court grant the 5K1.1/3553 (e) Motion and sentence him to a ***Zone B 12 month sentence*** along with a \$10,000.00 fine and as such this Memorandum will be divided into the following five parts: (a) Introduction; (b) Joe’s Life; (c) Objections to the Presentence Investigation Report (PSR); (d) Relevant Legal Principles Regarding Downward Departures and (e) Conclusion.

A. INTRODUCTION

The PSR describes superficially several aspects which relate to Joe and the charge, and the following areas require a more detailed explanation in order for this Court to understand why the requested departure and sentence are warranted:

1. Family: This whole ordeal has obviously had an unimaginable impact on Joe's family, but *Exhibits B, C, D, and E* show that his wife Patti and children Shelly, Stacey and Jacob all support Joe at a time when he needs their love and support most.

2. Disclosure of the offense: *Paragraph 124* is not entirely accurate with regard to the motivating factor for why Joe went to the Federal Bureau of Investigations (F.B.I.) in the first place. He went to the F.B.I., without an attorney, naively believing that it could be used to "scare" Robert Romanik into paying Joe the money which Romanik owed to Joe on the night clubs. While it is conceivable that this offense would have been discovered, it appears that Joe's initiative gave the Government a valuable head start.

3. Truthfulness: After essentially confessing to his involvement in this crime, Joe was called to testify before the grand jury, where he *never* invoked his Fifth Amendment right not to testify. The truthfulness of this testimony is demonstrated by the fact that others were indicted based on what he said before the grand jury and the two individuals who were most culpable, Romanik and Jeffery Thomas are presently serving jail time because of Joe's truthfulness.

4. Health: Joe's involvement in the underlying activity has been both a curse and a blessing for his health. The stress and pressure which accumulated on Joe prior to January of 1999 have forever damaged his health, and physically he will never be the same. However, subsequent to being diagnosed with diabetes in January of 1999 Joe has lost a great deal of weight, and similarly no longer drinks.

5. Financial Situation: Joe objected to those paragraphs of the PSR with related to his financial status, and in further support to those objections, attached and marked as *Exhibit G* is a Statement of Assets and Liabilities dated August 16, 1999. Joe owes *well over one million dollars* to various individuals, banks and credit card companies. The most valuable asset he has is his interest in Aviston Lumber Company, and this asset has no "real" value due to the restrictive stock agreement which has been in effect since October 26, 1983.

Joe also continues to battle the various banks in civil lawsuits filed by the banks for

matters related to Joe's underlying criminal conviction, and as the Court is aware fighting a bank is an expensive proposition.

The above combined with the fact that Joe also has one daughter in college and another one who will soon start college, makes his financial situation all the more precarious, and adversely impacts his ability to pay a fine greater than \$10,000.00.

6. Remorse: Since Joe is not able to express himself verbally as well as others, the undersigned asked him to write a letter (*Exhibit F*) which could be submitted to the Court in the event he cannot properly gather his thoughts on August 27, 1999.

Joe's letter is nothing less than gut wrenching as he describes the effect this situation has had on those closest to him when he says, ". . . *so the reputation I have brought onto myself, my wife, and 3 children has been devastating and trying at all times as far as that goes.*" The letter shows a husband and father who is preoccupied with the impact his bad decisions will have on his family rather than being self-absorbed and worried about himself.

The letter accurately reflects that his co-Defendant Ross Abert is his only *true* friend, and that Joe was "*the one who talked Ross into this whole mess even though he was a very small part of all the dealing, it was my involvement that convinced him to do anything. . .*"

B. JOE'S LIFE

Had it not been for his decision to become involved with the likes of Robert Romanik, Joe would have continued to lead a normal life as a good family man, working at the family lumber company in Aviston, Illinois which is a small town where as Mrs. Brandmeyer (*Exhibit H*) accurately states, Joe's reputation for honesty and decency "*is earned the old fashioned way by hard work.*" As a result of his actions, Joe will forever have to live with the shame and humiliation he has brought to himself, his family, and his family's name. Prior to his involvement with Romanik, the Netemeyer *name* was untarnished, and now Joe has to spend the rest of his life rebuilding this name for himself and his children.

Besides having a wonderful family, Joe is blessed with *true* friends, who are willing to assist in whatever way possible to show the Court what kind of a person he is. Joe has

devoted a great deal of time helping the National Foundation for Ectodermal Dysplasias (NFED) raise over \$160,000.00. *Exhibits I & J* are letters written by the Executive Director “*I would stake my position here, my role as a civic leader in Lebanon or my involvement at the national level on the depth of his integrity,*” and the Director of Development of NFED show that Joe is someone who truly cares about those less fortunate than him, and that his actions in the underlying matter are out of character.

Exhibit M was written by Joe’s daughter Shelly who was away at college when she learned of the predicament her father was in and is the **only** letter not written with sentencing in mind. In part Shelly writes:

*“Since I have been here I have learn(ed) some realities of life and I am not even half-way there. I in the long run have learned that you guys are my strength. I would go home in a heartbeat if I know it wouldn’t disappoint you. My strength is to achieve for you. I am so **lucky** to have you guys. You are so precious and I love you guys so **much**. You have always been there for me through thick and through thin. You have stood by me through everything and I am me because of you and I hope you never forget that. I love you with all my heart.”*

This letter shows what Joe has **truly** done with his life, and regardless of what transpires on August 27, 1999 or what neighbors say in Aviston, this letter shows that Joe is a success and should be proud of what he has done in his life. The Court **must** look at the whole of Joe’s life when imposing sentence and *Exhibits K & L* show that the exemplary life he has led should be taken into consideration when determining whether the Zone B “split” sentence and \$10,000.00 fine Joe is requesting is fair.

C. OBJECTIONS TO THE PSR

The objections raised by Joe to the PSR are minor, and relate to his ability to pay as well as whether or not the assistance he gave to the Government enables a downward departure to a Zone B and a \$10,000.00 fine.

With regard to Joe’s financial status and ability to pay, the Court need go no further than the attached financial status and letters from Joe and his family. This matter has literally

ruined Joe's financial situation, and is not a situation where he can simply liquidate an asset to pay a fine as the PSR suggests. Rather, a businessman such as Joe has an intricate financial portfolio, and at the present time he finds himself teetering on the brink of financial ruin, which will almost certainly occur if his fine is greater than \$10,000.00.

With regard to this Court's ability to grant probation or a Zone B sentence, Joe expects the Government to file for downward departure based on 5K1.1 and 3553 (e), which will then authorize this Court to impose *any* sentence, including a sentence that is "lower than that established by statute as a minimum sentence." Melendez v. U.S.A., 518 U.S. 120, 116 S.Ct. 2057 (1996)

In U.S.A. v. Elliott, 971 F.2d 620 (10th Circuit 1992) the Defendant pleaded guilty to violating 18 U.S.C.A. Section 656 which has the *identical* language as Joe's violation of Section 1005. Both statutes provide that a defendant violating them "*shall be fined not more than \$1,000,000.00 or imprisoned not more than 30 years or both.*" Like 656, Section 1005 does *not* require imprisonment, and instead gives the Court the option of imposing a fine or imprisonment or both. The Court in Elliott correctly concluded that "if we were to read 3561 (a)(1), a general statutory provision applying to all Class A and Class B felony offenses, as requiring imprisonment, we would create a conflict with 656, which clearly grants the option of no imprisonment. In such cases the more specific statutory provision is controlling." In reaching this conclusion, Elliott cited Guidry v. Sheet Metal Workers, 493 U.S. 365, 107 L.Ed. 2d 782, 110 S.Ct. 680 (1990) which held that it is an elementary tenet of statutory construction that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one."

Surprisingly, the Seventh Circuit in U.S.A. v. Thomas, 930 f.2d 526 (7th Circuit 1991), which cited U.S.A. v. Daiagi, 892 F.2d 31 (4th Circuit 1989) approvingly has taken a liberal view regarding the possibility of probation for *drug offenses* which impose statutory terms of imprisonment where the Government has filed a 3553 (e) motion.

Since Section 1005 is a Class B felony and has no mandatory imprisonment, probation and/or a Zone B sentence is obviously possible once the Government files a 3553 (e) Motion. This Court should follow the above holdings and depart to a Zone B in Joe's case.

Finally, with regard to Joe's voluntary disclosure of the offense and whether or not it rises to a U.S.S.G. 5K2.16 departure, it continues to be Joe's position that he meets the parameters of this Guideline, but due to his Plea Agreement will not request a departure based on 5K2.16. However, it appears that the facts in this particular case meet the language of U.S.S.G. 5K2.16 since Joe (1) voluntarily disclosed the existence of this crime to the F.B.I.; (2) he accepted responsibility for his crime prior to its discovery; and (3) it is unlikely this offense would have been discovered. The example of remorse used in U.S.S.G. 5K2.16, is similar to what occurred here, insofar as instead of remorse, Joe "confessed" out of anger from what Robert Romanik had done.

D. RELEVANT LEGAL PRINCIPLES
REGARDING DOWNWARD DEPARTURES

1. In General

Because of the unique nature of this particular case, it is important to briefly discuss the various legal principles which will allow this Court to sentence Joe to a Zone B 12 month sentence and \$10,000.00 fine.

The legal discussion that follows is based on the hope that the aforesaid 5K1.1/3553 Motion will be filed, thereby allowing this Court to depart to a Total Offense Level 10, Criminal History Category I, for a Guideline range of 6 to 12 months. U.S.S.G. Section 5C1.1 (c)(3) allows that Joe can receive a "split" sentence of six months probation and six months home confinement.

The 5K1.1/3553(e) Motion allows the Court pursuant to 18 USC Section 3553 (a), to punish Joe with a sentence which is "*sufficient, but not greater than necessary*," because upon the filing of this Motion *everything* can be considered in determining whether or not to depart downward from a level 15 to a level 10. Joe would note that the low end of a level

15 is 18 months, and that he expects the Assistant U.S. Attorney to recommend that his sentence be reduced to 12 months, which is the *high end* of a level 10.

The difference between 12 months incarceration and a 12 month split sentence is great, and when deciding whether or not to depart to a 12 month “split” sentence, the statutorily enumerated purposes of sentencing contained in 3553 (a)(2) must be considered. Essentially, these purposes can be broken down into the following parts: *deterrence, retribution, rehabilitation, and protection of the public.*

As the legislative history makes clear, Section 3553 (a) "deliberately [does] not show a preference for one purpose of sentencing over another." S.Rep. No. 98-225, 98th Cong., 1st Sess., at 77 (1983), thus reflecting what has been characterized as "the inclusive theory of punishment." J. Hall General Principles of Criminal Law 308 (2nd ed. 1997). The intent of Section 3553 (a) "is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case." Id.

For someone like Joe, *all* of the attached exhibits show that the damage done to his name and reputation has already created a *deterrent* not only for him, but for those around him, since they will witness firsthand the ramifications of dealing with a snake like Robert Romanik. Joe is an experienced albeit gullible businessman who saw the easy money that could supposedly be made and with Robert Romanik’s urging broke the law. The trauma caused to his family and to him personally will deter him from ever getting involved in something like this again.

The *rehabilitation and protection of the public* purpose of 3553 (a) is met by the simple fact that Joe will *never* get involved with any future “*make money fast*” schemes. Joe and Patti’s letters show that he has learned his lesson the hard way, and a Zone B sentence is something which would meet *all* of the requirements of the Sentencing Guidelines.

With regard to a fine, it is Joe’s position that due to his precarious financial situation

anything above \$10,000.00 would be punitive. All of the loans are current and even though he was indicted, he continued to pay the balances due. The reason for a fine would be to in some way punish Joe, but as the Exhibits demonstrate, he has already been punished enough and in any event a fine above \$10,000.00 is simply not warranted in light of the fact that he brought the crime to the Government.

2. 5K1.1/3553(e) Motion

Again, since the *only* way Joe can argue for a Zone B 12 month sentence is if the Government filed a Motion for Downward Departure based on 3553 (e) and 5K1.1, the Court must consider various elements when departing below a particular guideline range, and these “factors” are set out in United States Sentencing Guidelines Section 5K1.1:

- “(1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant’s assistance;
- (4) any injury suffered, or danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant’s assistance.”

The *only* factor which Joe does not arguably meet is #4, and because he meets all of the other factors, this Court should depart to a Total Offense Level 10 and sentence Joe to 12 month “split” sentence **and** a fine of \$10,000.00. This would be a total departure of only five levels from the offense level 15 mentioned in the PSR.

There is no hard and fast rule regarding how much a Court should depart and the “conservative” approach would be to employ the holding in U.S.A. v. Hayes, 5 F3d. 292 (7th Cir. 1993).

Based on the rationale enunciated by the Hayes’ Court, Joe’s confession alone would warrant a two point reduction under the “timeliness” factor in #5. Similarly under factor #1, due to the significance and usefulness of his truthful testimony against co-defendant’s Thomas and Romanik an additional two point reduction is warranted. If the Court were only

to award an additional one point reduction for either factor #2 and/or #3, this would equal the total of *five* points required to reduce Joe's Total Offense Level from a 15 to a 10.

3. *“Super” Acceptance of Responsibility*

As implausible as it may seem, Joe's motivating factor was to have the F.B.I. assist him in collecting money owed him by Robert Romanik. He went to the F.B.I.'s office without an attorney and unwittingly gave a full confession, which was used to commence an investigation against Robert Romanik and Jeffrey Thomas. Ultimately, the confession was used to indict Joe, and again this should be taken into consideration when determining how far to depart with regard to a sentence and/or fine.

E. CONCLUSION

Joe requests that this Court grant the Government's 5K1.1/3553 (e) Motion and sentence him to a 12 months “split” sentence to be served by 6 months home detention and 6 months probation, and to impose a \$10,000.00 fine

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of August, 1999, a copy of the attached *Defendant's Sentencing Memorandum* was served on the following persons by depositing a copy of same in an envelope with postage prepaid in the United States Mails in the Post Office in East Alton, Illinois addressed as set out, namely:

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