

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE**

UNITED STATES OF AMERICA)	
)	
v.)	NO. 3:18-CR-167-TRM
)	
CHRISTINA ERIN MYERS)	

**MOTION FOR DOWNWARD DEPARTURE
AND/OR VARIANCE AND SENTENCING MEMORANDUM**

Comes the Accused, Christina Erin Myers, by and through counsel, and submits this Motion for Downward Departure and/or Variance and Sentencing Memorandum for this Honorable Court’s consideration in Ms. Myer’s sentencing hearing. In support of which the Defendant would show as follows:

I. FACTUAL ALLEGATIONS

Christina Erin Myers was charged on October 16, 2018 in a six-count indictment. Counts one through four charged Mrs. Myers with Wire Fraud in violation of 18 U.S.C. §1343, Count five charged Mrs. Myers with money laundering in violation of 18 U.S.C. §1957, and Count six charged Mrs. Myers with money laundering in violation of 18 U.S.C. §1956. On November 26, 2019, Mrs. Myers pled guilty to Count one and Count Six of the Indictment. Since that time, Mrs. Myers has remained on pretrial release without issue pending sentencing.

II. SENTENCING GUIDELINE ANALYSIS

The Pre-Sentence Investigation Report (PSR) was completed on March 2, 2020. The PSR indicates a base offense level of 7 for Count 1, pursuant to §2B1.1(a)(1). The PSR also made upward adjustments as negotiated and included within the plea agreement of twelve points pursuant to §2B1.1(b)(1)(G), four points for financial hardship pursuant to §2B1.1(b)(2)(B), and two points for vulnerable victims pursuant to §3A1.1(b)(1). The PSR also included an additional two points for abuse of a position of private trust pursuant to §3B1.3. This resulted in a total offense level for Count One of 27. As to Count Six, the PSR indicates a base offense level of 27 pursuant to U.S.S.G. §2S1.1(a)(1) and §2B1.1(a)(1). The PSR applied

an upward adjustment of two points pursuant to U.S.S.G. §2S1.1(b)(2)(B), resulting in a total offense level of 29 for Count Six. Following the 3-point reduction for Acceptance of Responsibility pursuant to §3E1.1 (a) and (b), the PSR indicates an Adjusted total offense level of 26 for Mrs. Myers. Mrs. Myers has no prior criminal history, placing her in criminal history category I. Accordingly, Ms. Myer's advisory guideline range set out within the PSR is 63-78 months.

The Defendant has objected to the upward adjustment for abuse of a position of private trust pursuant to U.S.S.G. §3B1.3, and accordingly would assert that the appropriate offense level is 24, resulting in an advisory guideline range of 51-63 months.

It is also significant to note that Mrs. Myers entered into a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B) following extensive and lengthy plea negotiations. While not binding on the Court, as a part of the negotiation and plea in this case, the parties stipulated to what sections of the guidelines and particularly which enhancements would apply, including a specific loss amount, the existence of financial hardship for five or more victims, and that the defendant should have known the victims were vulnerable. Parties did not include an enhancement for abuse of private trust pursuant to §3B1.3 which was applied within the PSR. The Defendant has objected to the enhancement, however Mrs. Myers would ask the Court to honor the spirit of the agreement as negotiated by parties and entered and apply a total offense level of 24, resulting in an advisory sentencing guideline range of 51 to 63 months. Additionally, Mrs. Myers would ask that this Honorable Court further vary below this advisory range in establishing a sentence that is sufficient but not greater than necessary in this case.

III. PERSONAL BACKGROUND

Christina Myers is one of three daughters born to Anita and Kenneth Wilmouth. Mrs. Myers was born in Tacoma, Washington, however, has lived in East Tennessee almost her entire life. Mrs. Myers graduated from Lenoir City High School in 2000. Mrs. Myers majored in Journalism at the University of Tennessee where she obtained her Bachelor of Science degree. Mrs. Myers is 38 years old and has been married to her husband Jason Myers since 2003. They have three daughters who are 11, 14, and 16 years old. Mrs. Myers is actively involved in her community and church through individual efforts and as a parent of three active daughters. She does not have a history of alcohol or substance abuse. As many

members of her community will attest to Mrs. Myers is known in the community to offer her time, presence, and assistance as a fellow parent and caregiver. Prior to the instant charges, Mrs. Myers has never been charged or convicted of any criminal offense.

IV. CHRISTINA MYER'S CHARACTER

The following individuals have offered letters in support of Christina Erin Myers, which are attached as Collective Exhibit A to this memorandum:

These individuals with personal knowledge of Christina Erin Myers paint a picture of a devoted mother, daughter, and sister as well as a longtime community volunteer, a vigorously involved parent of three active girls, and an individual that epitomizes the criteria for a significant downward departure.

The testimonial letters from the above individuals creates a record that Mrs. Myers' character and past behavior is such that the instant offense conduct is a vast deviation from an otherwise law abiding, compassionate, and generous life. The following excerpts highlight just a few anecdotes regarding Mrs. Myers from those who know her best:

The excerpts above illustrate that Mrs. Myers is known to give her time and attention to her community and solidify her reputation as a caring and devoted mother. The following excerpts from family members reiterate this theme.

These excerpts from Mrs. Myers' family's letters also paint a picture of a nurturing daughter, sister, and mother who has earned the love and respect of her family through her kind-hearted, loving, and generous disposition. Her family's love for her and her love for her are steadfast.

V. SENTENCING FACTORS TO CONSIDER

There are a litany of factors that must be considered in determining the appropriate sentence for Mrs. Myers. First, the court must examine the appropriate guidelines and calculate the applicable range of punishment for the offense. As the Court is well aware, the United States Supreme Court deemed the Guidelines "effectively advisory" in United States v. Booker, after finding the mandatory nature of the Guidelines as previously imposed was a violation of the Sixth Amendment. United States v. Booker, 543 U.S. 220 (2005). The Court held that any sentence imposed must be viewed in light of its overall "reasonableness" as applied to the defendant in question. Id. While the courts are still required to calculate and consider the ranges of punishment as determined by the guidelines, they court may also "tailor the sentence in light of other statutory concerns" including consideration of the factors set out at 18 U.S.C. § 3553(a) in addition to bases for departures that are set out within the guidelines. Id. In United States v. McBride, the Sixth Circuit explained that "while the Guidelines remain important, they are now just one of the numerous factors that a district court must consider when sentencing a defendant." 434 F.3d 470, 475 (6th Cir. 2006).

Following the calculation of the appropriate guideline level and ranges, the court should look to any potential grounds for downward departure set out within the guidelines that may be

applicable in a given case. Any factor or combination of factors may support downward departure, if it is not prohibited by the Guidelines and takes the case outside the “heartland of cases” contemplated within the guidelines. United States v. Coleman, 188 F.3d 354, 361 (6th Cir.1999) (en banc).

Next, the Court must examine the applicability of any grounds for an additional variance from the calculated guideline range in the instant case. Such grounds include any of the factors set out within 18 U.S.C. § 3553(a) however are not limited to those. After the Booker decision, “many of the very factors that used to be grounds for downward departure under the Guidelines are now considered by the district court—with *greater latitude*—under section 3553(a).” McBride, 434 F.3d at 476 (emphasis added). In fact, the Sixth Circuit points out “that there is not complete agreement among the courts over whether the Guideline-based ‘departures’ truly even exist at this point.” Id. at 477. “The assertion that departures are obsolete has an element of truth—for there is now no mandatory guideline range from which to depart—and does properly shift the focus of our review to reasonableness.” Id. A district court in the post-Booker era is mandated by Section 3553(a) to determining the appropriate sentence for a defendant based upon the totality of the circumstances surrounding the case and under the auspice of reasonableness. Included in this mandate is the instruction that the court “shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth” in the provision. 18 U.S.C. § 3553(a) (emphasis added).

Finally, after assessing the appropriate advisory range of punishment and addressing all of the enunciated factors for both departure and variance, the court may examine any additional factors in the case at issue that may be applicable or that would make the case one “outside the heartland” of cases that are contemplated by the specific section of the guidelines. The Supreme Court has

indicated that “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” Koon v. United States, 518 U.S. 81, 113 (1996).

When examining the totality of the circumstances including both the conduct and Mrs. Myers’ personal history, the Court has sufficient information to depart downward from the advisory guideline range to reach a sentence that is sufficient, but not greater than necessary to comply with the purposes of sentencing.

A. Grounds for Downward Departure

Courts have recognized that two distinct types of departures exist under the United States Sentencing Guidelines, those that are specifically proscribed and those that are unguided. Based on this recognition, courts have been granted wide discretion to examine each case and defendant individually and apply grounds for departure that may be applicable based on the totality and uniqueness of the case. See generally Koon v. United States, 518 U.S. 81, 113 (1996). When examining each section of the guidelines, the Commission instructs courts to “treat each guideline as carving out a heartland” which is a typical case that displays the type of conduct that the guideline describes. U.S.S.G., Chapter 1, Part A Introduction, 4(b) (Policy Statement) Departures. When a case arises that is outside this “heartland” or typical case that was contemplated by the guidelines as fashioned, a court has wide discretion to fashion an appropriate sentence through the use of departures. “When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.” Id.

In determining if a case merits a departure, a court may utilize any factors, other than those specifically prohibited by the guidelines, which may alone or aggregated establish a sufficient basis for departure. “[T]he Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds from departure in an unusual case.” *Id*; see United States v. Stewart, 154 F. Supp. 2d 1336, 1339–40 (E.D. Tenn. 2001). The United States Supreme Court and the Sixth Circuit have each approved of the evaluation of additional unlisted factors that may be guiding in granting departures so long as they are taken into account in the contemplation of the prohibitions and policy goals that are set out within the guidelines. See generally Koon v. United States, 518 U.S. 81, 95, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); United States v. Coleman, 188 F.3d 354, 361 (6th Cir.1999) (en banc).

After determining the applicability of a departure, the Court must next address the degree or range that is appropriate to depart in light of the unique issues of the case. See United States v. Joan, 883 F.2d 491, 494 (6th Cir.1989). For example, the Sixth Circuit Court of Appeals approved a departure of three levels based upon a seventy-two-year-old defendant’s age, physical condition, lack of danger to the public, lack of flight risk, and relatively minor role in the offense. United States v. Sabino, 274 F.3d 1053, 1079 (6th Cir. 2001). In the instant case, the Court is faced with an atypical defendant that remove this case from the “heartland” of cases that are contemplated by U.S.S.G. § 2B1.1.

1. Bases for Departure-Unguided

As previously noted, the Court is also permitted to engage in an “unguided” evaluation of additional bases for departure that are not necessarily proscribed within the guidelines. In examining the instant case, the Court is presented with a somewhat unique set of facts. Mrs. Myers is an individual with no prior criminal history whatsoever. Moreover, when approached by law

enforcement she cooperated fully with their investigation without counsel, providing an account of her actions and permission to search her property. Mrs. Myers has been exceptionally cooperative and remorseful throughout this entire process. She has also continued to be cooperative and compliant during the pendency of the case as noted by the office of probation and parole including following all requests and maintaining gainful employment. Mrs. Myers also presents a lack of danger to the public based on the nonviolent nature of the offenses at issue. Additionally, Mrs. Myers presents an extremely low risk of recidivism. This event was quite apparently a grave deviation from an otherwise law abiding and productive life.

Mrs. Myers has accepted responsibility and agreed to several substantial enhancements in reaching a plea in this case. This mother of three has accepted the fact that she will serve a term of imprisonment and face substantial restitution for her actions. This case, and particularly this defendant, are outside the heartland of cases contemplated by the guidelines and accordingly is ripe for a departure from the advisory guideline range.

B. Grounds for Variance Outside Sentencing Range

As highlighted above, the Booker court in making the Guidelines advisory in nature, directed the court to a series of factors and considerations that should be examined in determining departures, variances, and the overall reasonableness of a sentence imposed. Specifically, courts have been directed to 18 U.S.C. § 3553(a) which provides a list of factors that are important to that determination, although not exclusive. The factors set out within that section provide in pertinent part as follows:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) 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;
 - (B) to afford adequate deterrence to criminal conduct;

- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Additionally, the United States Supreme Court has provided some direction on downward variances. In Gall v. United States, the court directed appellate courts to “take the degree of variance into account and consider the extent of a deviation from the Guidelines,” and “rejected an appellate rule that required ‘extraordinary’ circumstances to justify a sentence outside the Guidelines range.” 128 S.Ct. 586, 594-95 (2007). In U.S. v. Long, 37 Fed. App’x 718 (6th Cir. 2002), the Court held that a sentencing court may depart from the applicable guideline range if the it finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” Id.

In the instant case, taking each of the enunciated factors, along with others that are not prohibited, the Court is presented with an individual who is uniquely situated for a substantial downward variance from the advisory guideline range.

1. Nature and Circumstances of the Offense-18 U.S.C. §3553(a)(1)

The seriousness of the offense cannot be understated. However, Mrs. Myers has been extremely cooperative and has accepted responsibility for her actions throughout the pendency of the investigation and disposition of the case. When confronted by law enforcement, she voluntarily spoke with agents, signed a consent to search her property, and provided documentation admitting to the conduct at issue. Mrs. Myers agreed to plead guilty and has completely accepted responsibility for her actions, including in her interview with the Office of Probation and Parole. See PSR page 10, paragraph 59. While the facts surrounding the offense are serious, the gravity of the offense conduct was sufficiently addressed in the negotiation of a plea agreement and inclusion of the applicable factual basis. Additionally, this was a nonviolent offense and Mrs. Myers presents no risk to the public as it relates to this conviction. Moreover, Mrs. Myers has done everything in her power to be cooperative and show that this was an aberrant event that she will never be involved in again along with showing that she is extremely remorseful.

2. History and Characteristics of the Defendant-18 U.S.C. §3553(a)(1)

a. Mrs. Myer's personal background, history, and characteristics

Christina Myers is a 38-year-old married woman with three daughters, all under the age of 18. Mrs. Myers has led a law-abiding life up until and since the instant offense further displaying the inexplicable nature of the conduct at issue. The character letters as set out above describe a woman who has always been wholly devoted to her family and to her children. Mrs. Myers was raised locally and possesses a bachelor's degree. Mrs. Myers has always maintained a good record of employment, even following the entry of a guilty plea in this case. While she will stand a convicted felon following her term of imprisonment, her education will allow her to have an avenue for employment upon release. Moreover, as the Court is aware, this is a strong indicator of

rehabilitative and reintegrative success upon release. Mrs. Myers is blessed with a wonderful support system of family and friends who stand in support of her despite the conduct at issue in this case.

3. The Need for the Sentence Imposed-18 U.S.C. §3553(a)(2)

a. Reflect the seriousness of the offense , promote respect for the law, and provide just punishment for the offense

Mrs. Myers is facing a substantial term of imprisonment for the offenses at issue. In negotiating a plea agreement, Mrs. Myers agreed to numerous enhancements beyond the loss amount to appropriately reflect the seriousness of the offense. Respectfully, Mrs. Myers would argue that the advisory guideline range originally agreed upon within the plea agreement, 51-63 months, paired with the agreed restitution amount, more than appropriately reflects the seriousness of the offense and establishes an appropriate advisory guideline range. Additionally, even if the court were to grant substantial downward variance in this matter, Mrs. Myers will be sentenced to a term of imprisonment paired with a substantial amount of restitution she will need to satisfy upon her release. These factors all appropriately outline the seriousness of the offense and provide punishment for the conduct. Accordingly, a sentence that substantially varies below the advisory guideline range, paired with court-imposed conditions and restitution, will sufficiently reflect the seriousness of the offense and provide just punishment.

b. Afford adequate deterrence, protect the public, and provide training or care to the defendant

Regardless of any departures or variances that may be granted by this Honorable Court, Mrs. Myers, an individual with no criminal history, will likely serve a term of imprisonment in the custody of the Bureau of Prisons for this offense. The imposition of a term in custody alone would be substantial enough to provide both general and specific deterrence in this case, however other

alternatives that can be paired with any term imposed can also work to create a heightened deterrent effect.

Moreover, Mrs. Myers will be a convicted felon and will experience all the repercussions of such a status for the rest of her life. The repercussions of her actions will have a lasting effect on every aspect of her life, providing a substantial and continuing specific deterrence to criminal activity. Among those consequences is a loss to her family. Mrs. Myers will miss years with her children. She will likely miss many of the most significant adolescent events of each of her daughters, including at least one high school graduation. These are all punishments that she will face in addition to a term of imprisonment, a term of supervised release, and a substantial amount of restitution in this case. Each of these aspects, while they cannot be considered alone, are critical in assessing the deterrent effect on future conduct of Mrs. Myers and others. Accordingly, this punishment is more than sufficient to not only provide punishment and work to protect the public in the future, but also to provide general and specific deterrence.

4. Avoid Unnecessary Sentencing Disparities-18 U.S.C. §3553(a)(6)

The Court here is presented with a white-collar offense, involving fraud as recognized by the factual basis for the plea agreement. Significantly, the Sixth Circuit Court of Appeals addressed sentencing in white collar cases in some depth in United States v. Musgrave in 2016. United States v. Musgrave, 647 Fed. Appx. 529 (6th Cir. 2016). Mr. Musgrave was convicted following a jury trial of four counts including wire and bank fraud, establishing an advisory guideline range of 57-71 months imprisonment. Musgrave at 532. The sentencing court's original sentence was vacated and remanded and upon resentencing, the court imposed a sentence of one day imprisonment, five years of supervised release with 24 months of home confinement, and a \$250,000 fine. Id. at 533.

On appeal, the Sixth Circuit upheld this sentence as substantively reasonable and an appropriate downward variance from the advisory guideline range.

In assessing the district court's consideration of 18 USC §3553(a)(6) and various sentencing statistics, the Sixth Circuit Court of Appeals noted as follows:

Based on the district court's review of statistics and other cases, of all white-collar defendants in our circuit, nearly 30% receive no prison time, and approximately one-third of that 30% receive some form of home confinement instead.

Id. at 538.

The Sixth Circuit also noted “[t]here is reason to believe that, because the loss Guidelines were not developed using an empirical approach based on data about past sentencing practices, it is particularly appropriate for variances.” Id. citing United States v. Corsey, 723 F.3d 366, 379 (2d Cir.2013) (internal citations omitted).

While the specific facts and sentence imposed in Musgrave were clearly an outlier, the logic and analysis used in affirming the sentence are critical to review here. The Sixth Circuit noted that it is not only common practice of courts in our circuit to vary substantially below the advisory range in non-violent white-collar cases, but also that it may be encouraged considering the lack of empirical support for the loss guidelines. In examining the instant case, it is worth considering that nearly one third of white-collar defendants in the Sixth Circuit received no prison time whatsoever, some of which affected far greater loss amounts than Mrs. Myers. Moreover, various courts within our circuit have not hesitated to formulate a sentence that utilizes a combination of imprisonment, home confinement, community service, and substantial restitution to affect the goals of 18 U.S.C. §3553. As noted by the Sixth Circuit, the district court's reasoning in Musgrave which determined that the 18 U.S.C. §3553 factors, paired with the need to provide restitution to the victims made

the sentence imposed reasonable. Applied here, numerous factors would support a substantial downward variance from the advisory guideline range.

5. Provide Necessary Restitution-18 U.S.C. §3553(a)(7)

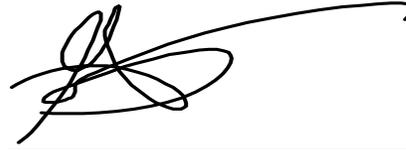
Mrs. Myers has already agreed to the restitution amount owed to the victims in this case pursuant to her plea agreement. Significantly, Mrs. Myers will not be able to contribute to restitution while she is incarcerated. Courts have noted that the consideration of providing restitution to victims is one that, when taken in consideration with all the other factors set out in 18 U.S.C. §3553, can be relevant in granting a variance. For example, in United States v. Musgrave, the Sixth Circuit Court of Appeals upheld a substantial downward variance, noting that “the goal of obtaining restitution for the victims is best served by a non-incarcerated and employed defendant” and that “the Court can be responsive to the victim's need to be made whole, while also imposing a sentence that is sufficient but not greater than necessary to satisfy all other purposes of sentencing”. United States v. Musgrave, 647 Fed. Appx. 529, 536 (6th Cir. 2016)(internal citations omitted).

Mrs. Myers would ask this Honorable Court to consider this factor, along with all the other factors set out within 18 U.S.C. §3553 in granting a downward variance in the instant case.

VI. CONCLUSION

WHEREFORE, the Accused, Christina Erin Myers, respectfully moves this Honorable Court to grant a substantial variance in order to impose a sentence sufficient but not greater than necessary in the instant case.

RESPECTFULLY SUBMITTED this 20 October 2020.



GREGORY P. ISAACS, BPR# 013282
ASHLEE B. MATHIS, BPR #034342

THE ISAACS LAW FIRM
J. FRANKLIN AMMONS, BPR #031947
ASHLEE B. MATHIS, BPR #034342

618 South Gay Street, Suite 300
Post Office Box 2448
Knoxville, Tennessee 37901-2448
865.673.4953/(fax)673.4950
www.isaacslawfirm.com
gpi@isaacslawfirm.com

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing pleading was filed electronically. Notice of this filing be forwarded via the Court's electronic filing system to all parties on the electronic filing receipt and/or by hand-delivery or by placing a true and correct copy of the same in the United States Mail with sufficient postage to carry the same to its destination.

Frank M. Dale, Jr.
United States Assistant Attorney General
Howard H. Baker, Jr. U.S. Courthouse
800 Market Street, Room 211
Knoxville, Tennessee 37902
865-545-4167/(fax)545-4176
Frank.Dale@usdoj.gov

DATED this 20 October 2020.



Gregory P. Isaacs