

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
DONNA JONES,)
)
Defendant.)

DEFENDANT'S SENTENCING MEMORANDUM

I. Introduction

In the criminal justice system, due to their respective positions the prosecutor and defense attorney generally take positions which are polar opposites.

The prosecutor, who along with law enforcement has investigated a Defendant sees the crimes that were committed and harm that was caused. The defense attorney gets to know the Defendant after discovery of the criminal conduct. In most white collar cases like Donna Jones' the Defendant is remorseful for their conduct and the defense attorney only sees that remorse as well as the good qualities the Defendant possesses.

It is up to the sentencing court to ascertain what to do with these polar positions, and what sentence is fair, just and appropriate.

When Donna is sentenced on September 20, 2015, the parties envision the 30-37 month advisory Guideline sentence contained in the PSR. Donna intends to request that this Honorable Court vary from this advisory Guideline range to a 15 month sentence.

Gall requires that before making any sort of final sentence the Court must make Guideline calculations. As such this Memorandum will be divided as follows: 1. The impact of the crime; 2. Donna's background; 3. *Gall v. United States*; and 4. Conclusion.

II. The Impact of the Crime

A. Gambling Addiction

As embryos humans become wired to try and “blame” their actions on something or someone if they are caught. Humans become “trained” to shirk responsibility and to “blame” their failures on someone else or on their personal weakness or trait.

Humans become trained to not let a weakness or disability be used as an “excuse.” When viewing someone who has committed a crime it is very easy to lack sympathy for a person’s weaknesses, because it is easier to be judgmental than compassionate.

At one time, the federal criminal justice system prohibited any sort of compassion on the part of sentencing judges. Draconian is the word most often used to describe the U.S. Sentencing Guidelines. It seems that the drafters of the Guidelines went back to the childhood perception of not using personal weaknesses as an excuse for committing crimes. If a Defendant tried to explain their conduct through the prism of a personal weakness like drug addiction or a horrible childhood, the probation officer, Assistant U.S. Attorney and sentencing judge would practically ignore this explanation as an “excuse.”

Like most addicts, Donna never thought she had a gambling problem. Even as her life was spiraling downward, she thought things were under control. She lied to herself. After taking money from what she earned to gambled, Donna then began stealing from Joplin to support her habit, which she expressed to her counselor Rhonda Janson. (Exhibit A)

A glimpse of Donna’s gambling records indicate she had a horrible gambling addiction. Not a bad addiction — a HORRIBLE gambling addiction that overtook her life. Gambling caused her to lose her way and because of this weakness Donna will be incarcerated.

Donna stole from her employer the City of Joplin. Her theft was not very sophisticated insofar as Donna didn’t concoct a clever “scheme” to steal. Nevertheless

the money she took from Joplin alStard Donna to enter the gambling casinos that have sprouted up throughout the midwest and essentially throw her ill gotten money away.

In *United States v. Peterson*, 363 F. Supp. 2d 1060 (E.D. Wis. 2005), 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

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 Donna's case, the undersigned could cite example after example regarding circumstances where a Defendant's gambling was a reason used by a District Court for a departure.

The bottom line is that there is a cause and effect. The cause of Donna's theft was her gambling addiction. Donna stole money so that she could gamble. There is no doubt whatsoever that Donna is using her gambling addiction as an "excuse" in order to receive a reduced sentence. The gambling addiction is real and it obviously had an impact on her conduct.

B. Violation of Trust

The City of Joplin trusted Donna to do an honest day's work and receive an honest day's pay. Donna violated this trust by over time stealing in excess of half a million dollars. Donna Jones stole from her community. She stole from her friends. She stole from acquaintances. She violated the trust of those she worked with as well as her community. Donna's actions harmed the entire Joplin community. This is the trust that the Government will undoubtedly—and should—focus on when Donna is Sentenced. Fortunately, the City of Joplin bonded Donna and as such her thefts will be covered by insurance.

But the real trust that Donna Jones violated is that of her loved ones. That is the trust that means most to someone like Donna.

Her husband Thomas is a former councilman of Joplin. That is something for an entire family to be proud of. Being a *Jones* in Joplin meant something. Donna is now a pariah in Joplin. The *Jones* name that she and Thomas took a lifetime to build will forever be linked to Donna and her crimes. Wherever Donna goes, fingers are pointed and long stares are directed her way. In white collar cases this is the unseen punishment that a Defendant receives, because it is impossible to quantify the impact that this has on a human being.

Donna broke the law and should be punished. She hasn't complained or whined about the treatment she receives by others because part of "doing the crime" is "doing the time" even if that means public ridicule. No one can deny that. But, Donna's grandchildren who are in grade school are taunted and tormented by other students for Donna's actions.

Losing the trust of one's grandchildren has to be traumatic and the undersigned recalls vividly Donna's expression when she explained the impact her actions have had on her grandchildren. They no longer look at her the same way and don't understand what Donna did, but they know it has caused them undeserved grief.

C. Retirement

Instead of retiring from Joplin and joining Thomas in retirement they have been planning for years, Donna will be mired in a life of having to live in a miserly fashion. That's probably just though, because Donna brought this on herself. Because of Donna's crimes she will lose her pension from Joplin and have to repay the money she stole. The Jones dotage will be highlighted by having to live off of Thomas' pension and both of their social security, without the benefit of Donna's pension.

The undersigned is not seeking sympathy for this, because the reality of committing a crime is the collateral damage that a Defendant never foresees. At the same time though, it is a kind of punishment that is not taken into consideration by the advisory Guidelines.

III. Donna Jones

Donna Jones has lived an idyllic life. A loving husband, wonderful children and a steady middle class lifestyle. It is difficult to square what Donna did with who she is.

As mentioned above, an unfortunate and unintended result in criminal cases is that the sentencing Judge sees the worst side of the Defendant. Here, a woman who bilked the system. Pre-*Gall* it was practically impossible to humanize a Defendant because once the Offense Level was decided, the sentencing concluded. As will be shown below, post-*Gall* this Honorable Court can see the "entire" Donna Jones and hopefully impose a 15 month sentence.

Normally, dozens of letters of support for Donna would have been forwarded to this Honorable Court to be used to show why a 15 month sentence would be appropriate. One time, it was pointed out to the undersigned by a District Court Judge that letters of support do not carry much weight in determining a sentence because they are written by people who have an interest in the outcome. This is a valid point, and the undersigned is certain that this Honorable Court understands that Donna is a loved and respected member of her community and has the support of her family.

As such the undersigned sifted through some of the letters he received and thought that it would be helpful for this Honorable Court to see what some members of her community think of Donna.

Geraldo Johnson (Exhibit B) is a member of Joplin's city council and as such was Donna's boss at the time the thefts occurred. Donna lost Mr. Johnson's trust due to the crimes she committed. But, he correctly points out that while Donna's poor choices will result in punishment, it does not take away from the "true" person that she is. He describes Donna as "being there" for him and his loved ones and is hopeful that this Honorable Court will be lenient in its sentence.

One of the co-workers Donna let down is Marcey Star (Exhibit C) who worked side by side with Donna for nearly 15 years. Nothing Donna did seemed out of the ordinary and Ms. Star was surprised at what Donna had done. Again though, like Mr. Johnson, she discusses the numerous positive qualities Donna possesses. "Civilians" like Ms. Star are oftentimes more perceptive than attorneys. She correctly states:

"I am not trying to make it sound like she is this great, wonderful, perfect person. What I am saying is I cannot imagine what she must have been going through to do what she did. For someone of such character to have reached the point of desperation to think there was no other alternative. The Donna that I know is still a good person and though she had a lapse in judgment, ***I would hope that what she has done does not take away all that she was and is as a person.***" Emphasis added

This practical, logical, and common sense analysis by "civilian" Marcey Star flies in the face of how the drafters of the Draconian Guidelines envisioned punishment for crimes. As will be seen below, thanks to *Gall*, District Courts are now allowed to craft a sentence based on the "whole" of a Defendant's life, not just on the parts dealing with the Defendant's crimes.

Former Joplin Fire Captain Dan Wandles (Exhibit D) and lifelong friend Francine Winderson (Exhibit E) go to lengths to show this Honorable Court that Donna has a large reservoir of trust that has been built up over her lifetime. This offense has taxed the

reservoir but her past actions have more than made up for the disappointment these crimes have caused.

There obviously are others in Joplin who feel the exact opposite about Donna. They feel betrayed by what Donna did and are wholly unsympathetic towards her. They would urge this Honorable Court to throw the proverbial “book” at Donna. The question though, is whether or not these individuals know the “whole” Donna Jones who will be sentenced by this Honorable Court on March 25, 2015 or the Donna Jones who stole half a million dollars from Joplin?

IV. Gall v. United States

A. Introduction

The Sentencing Guidelines were enacted to ensure that “the crime fit the time.” The goal was to reduce sentencing disparities. Over time though Circuit court decisions slowly eroded a sentencing judge’s ability to ensure that a particular Defendant is treated fairly. Relevant conduct was liberalized in such a way so that a first time non-violent drug offender could easily receive a 20 year sentence. Appellate decisions ensured that various enhancements were practically “automatic.” Downward departures of practically any kind were frowned upon.

Booker began the slow and seemingly tedious return to a system where the sentencing judge could view the entirety of the circumstances including *who* the Defendant is and not rely solely on the Guidelines. A sentencing judge could now have true input into the sentence that he handed out.

The culmination of *Booker* is *Gall v. United States*, 128 S. Ct. 586; 169 L. Ed. 2d 445; 2007 U.S. LEXIS 13083; 76 U.S.L.W. 4009 (Dec. 2007) But for *Gall*, Donna would be hamstrung to try and argue what she feels is an appropriate sentence. Once this Honorable Court determined the Guideline calculations, realistically the sentencing would conclude.

The language in *Gall* is breathtaking. The Supreme Court held that a District Judge “may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented.” (p. 3) As will be shown below, a 15 month sentence is appropriate and meets all of the factors set out in 18 U.S.C. §3553 (a).

Gall allows the District Court to use its own judgment and common sense in determining what sentence should be imposed on a particular Defendant based in part on *who* the Defendant is.

Donna Jones does not want to go to prison, but she knows that she has to be punished for what she did. Donna is hopeful that this Honorable Court will fashion a sentence which will not require incarceration for more than 15 months. The argument against this type of a sentence would be that “Donna Jones got off. She only has to go to jail for a little over a year.” *Gall* beautifully rebuts this argument. Just going through this ordeal for the past year has had a huge impact on Donna.

As will be shown below, Donna has already paid the price for what she did. Pre-*Gall*, the best sentence Donna could hope for would be 2 ½ years. Post-*Gall*, this Honorable Court can vary from this draconian Guideline sentence and depart downwards to a sentence of 15 months.

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 Donna comes out ahead on this point.

Quite frankly, it would be a long and convoluted discussion regarding the nature and circumstances of the offense, because it is intertwined with Donna's gambling addiction. Donna stole over half a million dollars from the City of Joplin. But for her gambling addiction Donna would in all likelihood not have stolen anything, would have

worked until retirement and enjoyed the fruits of her labor. Donna can no longer dream of her future including a pleasant retirement, because she knows she will be spending at best the next 15 months in jail.

Donna is mortified by her conduct and she admits the significance of her illegal actions. Donna realizes that she took advantage of the trust she was given in her job to embezzle hundreds of thousands of dollars from the accounts at the City of Joplin. She understands the impact her crime has had on the City of Joplin, its employees, the community and even the investigators who worked to get to the bottom of it all.

For Donna, however, this was a first-time non-violent offense. As has been stated above, but for these crimes, Donna has led a law-abiding life without even a hint of criminal wrongdoing. U.S. Department of Justice officials have stressed to Congress and the public that the toughest federal sentences should be aimed principally toward violent and repeat offenders. See e.g., Testimony of Principal Deputy Attorney General William Mercer to Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives, at 14 (March 16, 2006) (explaining that tough federal sentences are properly not focused on "non-violent first offenders"); Testimony of Assistant Attorney General Christopher Wray to Subcommittee on Crime, Terrorism and Homeland Security of the Committee on the Judiciary, United States House of Representatives, at 8-9 (Feb. 10, 2005) (stressing that most federal prisoners "are in prison for violent crimes or had prior criminal record before being incarcerated"); Letter to the Editor from Dan Bryant, Assistant Attorney General. WASH. POST, Dec. 24, 2005, at A25 (asserting that "[t]ough sentencing makes Americans safer by locking up repeat and violent offenders").

The records analyzed by federal investigators show that the money Donna embezzled from the City of Joplin went to feed her gambling addiction. Donna did not buy fancy things or take expensive vacations. She poured nearly all of the stolen funds

into the riverboat gambling casinos that fed her illness. Her problem was one of addiction, not greed.

The history and characteristics of Donna are trumpeted in the family and friends that she has. She has led a law abiding life. She has worked her entire adult life without even a whiff of impropriety. Through this entire ordeal she has focused on ensuring that her actions have not adversely impacted her family. She has learned the hard lesson that she is unable to “protect” them from what she has done and the embarrassment she has caused them.

Her gambling addiction — her weakness— has ruined her good family’s name. The periphery of Donna’s happiness has been impacted. Donna can’t go to the grocery store without getting stares, she can’t go to her grandkids’ schools without hearing some derogatory remark and she can’t fathom a happy retirement that she and Thomas dreamed of.

The second factor 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;

"(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." § 3553(a)(2).

The undersigned has written numerous Sentencing Memorandums going through each of the foregoing sections in excruciating detail to show why his client deserves a particular sentence. The bottom line for any sentencing imposed is to ensure that the

Defendant has learned their lesson, won't break the law again and become a productive member of society.

Starting with (c), protecting the public from further crimes of the Defendant assumes that there will be further crimes. Donna is willing to be placed on as tight a leash as this Honorable Court deems just. Donna had a spotless and exemplary record prior to being charged in this case. Donna took the easy way out when her gambling addiction overtook her. Instead of getting help when she started stealing, Donna lied to herself and others so that she could continue going on the gambling boats. There came a point where Donna's conduct got out of hand and she crossed a point of no return. Donna is a convicted felon as a result of this. It is implausible to think that she has not learned her 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 Donna gets off easy, no message will be sent to others similarly situated who might steal from their employers.

The carrot and stick analogy seems to fit. Each crime and Defendant have their own unique set of circumstances. A Defendant who is "doing life on the installment plan" because they constantly break the law and for whom prison is a home away from home needs the stick.

The question is how big does the "stick" need to be to ensure just punishment? For example, how is it possible to quantify the fear that someone like Donna has of going to prison? How is it possible to quantify the humiliation and degradation that Donna's family has been caused as a result of her actions? How is it possible to quantify the stress and anxiety that Donna has felt since she was charged? How is it possible to quantify what it means to a mother or grandmother like Donna who because of her actions has caused ridicule to her loved ones? How is it possible to quantify the stress that a wife,

mother and grandmother like Donna must feel knowing that when she is sent to prison the family who depended on her will be alone?

A lot of people, perhaps the Government included, would say that Donna should have thought of that before becoming involved in criminal conduct. That's a fair point. At the same time though post-*Gall* these seemingly small matters figure into the just punishment and deterrence equation.

The third factor § 3553(a)(3) pertains to the kinds of sentences available and is a perfect segue 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))).

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.

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").”

Incarceration is no longer mandated. It is wholly unfair to take the position that the *only* just punishment is 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 a sentencing court should not show a preference for one purpose of sentencing over another.

The fourth and fifth elements discuss the Sentencing Guidelines and policy statements and have been thoroughly discussed above. It is Donna’s position that she comes out “ahead” on those elements.

3553(A)(6) deals with "the need to avoid unwarranted sentence disparities.” Simply stated, it is a crap shoot as to what unwarranted sentence disparities even means in the white collar world. That’s because each Defendant is different and their respective circumstances unique. The motive of a crime has to be explored.

Whether or not a variance is warranted must be taken into consideration. In other cases, where a Defendant suffered from a gambling addiction variances have been granted. In others, a variance has not been granted. This Honorable Court will hopefully look to all of the 3553(a) factors and try to “pigeonhole” Donna into other similarly situated cases where it has sentenced a Defendant with the obvious hope that it will decide to vary in her case.

Preceding the 3553 list is a general directive to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing described in the second factor. It has been discussed above that home confinement or probation can be deemed a sentence which is not greater than necessary to comply with the purposes of sentencing. The undersigned is requesting a 15 month sentence which is much greater than probation or even home confinement.

V. Conclusion

As in all sentencings, this Honorable Court has the extraordinarily difficult task of deciding how to find the “middle ground” to sentence Donna Jones. Is 30 months too great? Is 15 months too light?

This case has shredded Donna’s personal life. She is keeping her family together by a thread.

The undersigned has developed a great deal of respect and appreciation for Donna Jones. It has been hard getting to know someone like Donna realizing that the “best” she can hope for is a 15 month sentence. But for these crimes Donna has led an unblemished life, loved and respected by everyone who crosses her path.

For the foregoing reasons, Donna Jones requests a 15 month sentence.

DONNA JONES

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