APPENDIX

TABLE OF CONTENTS
Public Material (Appended to Petition)

Under Seal Material
(Supplemental Appendix Volume)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017

(Argued: January 17, 2018 Decided: July 27, 2018)

Docket No. 17-948

UNITED STATES OF AMERICA,

Appellee,

-- v. --

MORRIS E. ZUKERMAN

Defendant-Appellant.

897 F.3d 423

Before:

KATZMANN, Chief Judge, KEARSE and POOLER, Circuit Judges.

OPINION

PER CURIAM:

Defendant-Appellant Morris Zukerman appeals from a judgment of conviction entered on March 21, 2017, in the United States District Court for the Southern District of New York (Torres, *J.*). After pleading guilty to tax evasion and to corruptly endeavoring to obstruct and impede the due administration of the internal revenue laws, Zukerman was sentenced to pay restitution of $37 million, serve a 70-month term of imprisonment, and pay a $10 million fine. On appeal, this case calls on us to determine whether the fine imposed was procedurally and substantively unreasonable. It was not. In particular, the district court did not err in

calculating the fine range recommended by the Sentencing Guidelines; Zukerman was given adequate opportunity to inform the district court of his financial condition and ability to pay a fine; and the imposition of a $10 million fine was within the district court's discretion. Accordingly, the judgment of the district court is **AFFIRMED**.

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Morris Zukerman is the founder of M.E. Zukerman & Co., an investment management firm also known as "MEZCO." In 2007, a MEZCO subsidiary sold certain assets for $110 million, at which time Zukerman enacted a scheme to avoid paying taxes on the proceeds of that sale, as well as on approximately $12 million of operating income MEZCO received as a result of its earlier ownership of those assets. Zukerman falsified several documents in order to effectuate this scheme, which allowed MEZCO to evade over $30 million in taxes. When aspects of these transactions were audited by the Internal Revenue Service in 2008, Zukerman lied to the tax professionals working for him and fabricated documents relating to the transactions, causing several false statements to be made to the IRS. *See In re Grand Jury Subpoena Dated March 2, 2015*, 628 F. App'x 13, 14-15 (2d Cir. 2015) (rejecting claims of attorney-client privilege relating to those false statements).

Separate and apart from those activities, Zukerman engaged in several other schemes to avoid paying taxes and to throw the IRS off of his trail. He avoided paying over $4.5 million in state taxes related to paintings used to decorate his and his families' living quarters, which were purchased, in part, with

his ill-gotten gains from the MEZCO tax evasion. In addition, he provided false information in connection with his personal tax returns, as well as those of his family members and his household employees, causing each of them to file false tax returns over the course of several years. When the personal taxes of both Zukerman and his daughter were audited, Zukerman once again provided false documentation and representations to the IRS. Finally, Zukerman also failed to file several years' worth of tax returns for the Zukerman Family Trust despite the trust's receipt of significant taxable income.

On June 27, 2016, Zukerman pleaded guilty to tax evasion, in violation of 26 U.S.C. § 7201, and to corruptly endeavoring to obstruct and impede the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a). In addition to requiring that he pay restitution in the amount of $37 million, Zukerman's plea agreement stipulated to a Sentencing Guidelines range of between 70 to 87 months' imprisonment and a fine of between $25,000 to $250,000. On March 21, 2017, the district court principally sentenced Zukerman to a 70-month term of imprisonment, ordered $37 million to be paid in restitution, and imposed a fine of $10 million. Judgment was entered that same day, from which Zukerman appealed.

Following oral argument, we subsequently entered a summary order pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), remanding this matter to the district court for the limited purpose of elaborating on the rationale for the fine imposed. *United States v. Zukerman*, 710 F. App'x 499 (2d Cir. 2018). The district court provided such elaboration via a Supplemental Memorandum dated May 4, 2018

("Supp. Mem."), after which the instant appeal was reinstated. We now address Zukerman's arguments.

On appeal, Zukerman contends that the fine component of his sentence was procedurally and substantively unreasonable. Because Zukerman did not raise any procedural objections below, his procedural arguments are "deemed forfeited on appeal unless they meet our standard for plain error." *United States v. Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007). That standard requires Zukerman to "establish (1) error (2) that is plain and (3) affects substantial rights," only after which will we "consider whether to exercise our discretion to correct it, which is appropriate only if the error seriously affected the 'fairness, integrity, or public reputation of the judicial proceedings.'" *Id.* at 209 (quoting *United States v. Doe*, 297 F.3d 76, 82 (2d Cir. 2002)).

Zukerman's first procedural argument is that the district court overlooked U.S.S.G. § 5E1.2(h) in calculating the Guidelines' recommended sentencing range, which had the effect of doubling the recommended fine. That provision states that an earlier version of the Guidelines should be applied "[f]or offenses committed prior to November 1, 2015." Count One of Zukerman's indictment alleges that his corrupt endeavors to obstruct and impede the due administration of the internal revenue laws occurred "[f]rom in or about 2007 through in or about 2015," however, and Zukerman averred during his plea allocution that the conduct underlying Count One took place "from 2007 through 2015." Jt. App. 60, 99. One cannot reasonably interpret "through 2015" to mean only prior to November 1, 2015. Moreover, Zukerman's plea agreement expressly recognized the applicability of the Guidelines range of which he now

complains. That the district court did not apply the pre-November 1, 2015 Guidelines to Zukerman was not an error, much less a plain error.

Nor is there any merit to Zukerman's contention that inadequate consideration was given to his ability to pay a $10 million fine. As soon as the district court set a date for sentencing, it foreshadowed that a major fine was possible, requesting information concerning "how fines have been calculated" in "cases where you have this degree of violation of law." Jt. App. 107. Zukerman subsequently submitted an affidavit regarding his financial condition as of August 2, 2016, at which time his net-worth was in the eight-figure range. Zukerman now contends that the affidavit was outdated by time he was sentenced in March 2017, but he declined to provide updated information in any of several submissions he made to the district court after receiving a revised Pre-Sentence Report on November 9, 2016, which incorporated information regarding his financial condition from his August 2016 affidavit. His failure to do so continued even after the government expressly asserted that he could "pay a substantial fine and should be ordered to do so—through a substantial variance from the $25,000 to $250,000 Guidelines range" in February 2017. *Id.* at 322. At his sentencing hearing, Zukerman objected neither specifically that he could not afford to pay the fine imposed, nor more broadly that his financial condition had materially changed since the submission of his affidavit. He was afforded ample opportunity to attempt to show any limitations on his ability to pay a fine, yet he failed to do so. *See United States v. Elfgeeh*, 515 F.3d 100, 136 (2d Cir. 2008) (defendant must be given "at least a minimal opportunity to show that he lacks the ability to pay

the fine"). Accordingly, it was not plain error for the district court to rely on the information that Zukerman himself had provided.[1]

We next address the substantive reasonableness of Zukerman's fine, which we review "under a 'deferential abuse-of-discretion standard,'" *United States v. Thavaraja*, 740 F.3d 253, 258 (2d Cir. 2014) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). We "identify[] as substantively unreasonable only those sentences that are so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice," recognizing that although we "have a role to play in patrolling the boundaries of reasonableness, we do so modestly, not substituting our own judgment for that of the district courts." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (internal quotation marks, citation and alteration omitted). Under that lenient standard, Zukerman's fine is not unreasonable.

First, the district court "put significant weight on the nature and circumstances of [Zukerman's] crimes" pursuant to 18 U.S.C. § 3553(a)(1), explaining that "[t]ax crimes represent an especially damaging category of criminal offenses," which "strike[] at the foundation of a functioning government." Supp. Mem. at 5; *cf. New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937) ("Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government.");

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[1] Zukerman's third procedural argument—that the district court's explanation of his sentence was inadequate—is moot in light of our *Jacobson* remand.

Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, *J.*, dissenting) ("Taxes are what we pay for civilized society . . . ."). Accordingly, the district court expressed deserved opprobrium for Zukerman's "calculated scheme to defraud the government of tens of millions of dollars for the sole purpose of increasing his personal wealth," executed through efforts that "spanned fifteen years and involved submitting more than 50 falsified tax forms for at least ten different individuals." Supp. Mem. at 6.

Zukerman counters that these factors do not support an upward variance from the recommended fine range because they were already addressed as part of his offense level under the Sentencing Guidelines. But the district court was not bound to conclude that the offense level adequately accounted for the complexity and scope of Zukerman's actions. To the contrary, "the historic role of sentencing judges," which "continue[s] to be exercised," is to consider "the judge's own sense of what is a fair and just sentence under all the circumstances." *United States v. Jones*, 460 F.3d 191, 195 (2d Cir. 2006). Moreover, "a district court's decision to vary from the Guidelines 'may attract the greatest respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply.'" *United States v. Cavera*, 550 F.3d 180, 192 (2d Cir. 2008) (en banc) (quoting *Kimbrough v. United States*, 552 U.S. 85, 109 (2007)). In particular, the Guidelines related to tax offenses "drastically vary as to the recommended sentence based simply on the amount of money involved," such that "a district court may find that even after giving weight to the large or small financial

impact, there is a wide variety of culpability amongst defendants and, as a result, impose different sentences." *Id.* Thus sentences varying from the Guidelines in tax matters, "if adequately explained, should be reviewed especially deferentially." *Id.* We therefore accede to the finding that an above-Guidelines fine was necessary "to reflect the complexity, scope, and extreme nature of [Zukerman's] criminal activity." Supp. Mem. at 7; *cf.* Scott A. Schumacher, *Sentencing in Tax Cases After* Booker*: Striking the Right Balance Between Uniformity and Discretion*, 59 VILL. L. REV. 563, 594 (2014) (noting that the Guidelines "provide only a two-point increase for a sophisticated means adjustment," which "can be cancelled out by an acceptance of responsibility adjustment, making the defendant's culpability and the manner in which the tax loss was generated virtually irrelevant").

Second, and again pursuant to 18 U.S.C. § 3553(a)(1), the district court concluded that Zukerman's "history and characteristics also pointed toward a substantial above-Guidelines fine." Supp. Mem. at 7. This was based upon his "history of uncharged criminal conduct" and his "repeated refusal to fess up," despite having "had ample opportunities to come clean," as weighed against his "role in the lives of his friends and family, as well as his philanthropy." *Id.* at 8. Zukerman does not challenge the district court's weighing of these factors, nor could he. *See Broxmeyer*, 699 F.3d at 289 ("The particular weight to be afforded aggravating and mitigating factors 'is a matter firmly committed to the discretion of the sentencing judge' . . . ." (quoting *United States v. Fernandez*, 443 F.3d 19, 32 (2d Cir. 2006)).

Third, the district court "put the most weight" on the need for deterrence, pursuant to 18 U.S.C. § 3553(a)(2)(B)-(C). Supp. Mem. at 9. As regards general deterrence, Zukerman asserts that his Guidelines-minimum term of imprisonment "is enough to make an example of him to others," Def. Br. 44, but the sentencing judge was by no means bound by such an argument. Instead, the district court determined that general deterrence "has a particularly important role" here "due to the significant resources required to monitor and prosecute tax crimes," which cost the government hundreds of billions of dollars annually. Supp. Mem. at 9. Moreover, the district court explained that enforcement of tax laws has "a 'significant and positive deterrent effect' on would-be tax violators" because, as compared to most criminals, "tax criminals are more likely to account for the size of a fine and the likelihood that it will be imposed" and are therefore more likely to eschew criminal conduct if it will be unprofitable. *Id.* at 10 (quoting Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265, 321 (2011), and citing Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 WM. & MARY L. REV. 721, 749 (2005)). That rationale is eminently reasonable. *Cf. Cavera*, 550 F.3d at 196 ("Where the profits to be made from violating a law are higher, the penalty needs to be correspondingly higher to achieve the same amount of deterrence."); *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) ("Considerations of (general) deterrence argue for punishing more heavily those offenses that either are lucrative or are difficult to detect and punish, since both attributes go to

increase the expected benefits of a crime and hence the punishment required to deter it.").

Zukerman also summarily argues that it is "obvious" his fine is not necessary for purposes of specific deterrence in light of his prison term and the "pain and humiliation his prosecution has caused." Def. Br. 43-44. Although there can be little doubt Zukerman has suffered, we "must give due deference to the district court's decision" that specific deterrence justified an upward variance in light of Zukerman's long-running tax evasion scheme, *Gall*, 552 U.S. at 51. "It was clear" to the district court "that simply being caught did not deter" Zukerman, as his "criminal activities had only grown in size and scope" since they first began at the turn of the century. Supp. Mem. at 11. Given that an earlier "$233,000 slap-on-the-wrist . . . proved useless in dissuading [Zukerman] from evading his taxes" thereafter, the district court was entitled conclude that a Guidelines-range fine of up to $250,000 would be similarly inadequate, such that "[a] significant penalty was required." *Id.* at 11-12. In light of Zukerman's enormous resources, the district court properly determined that a more onerous fine was needed in order to deter future illegal conduct. *See infra* at 17-19.[2]

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[2] The district court noted that a longer incarceral term was not necessary in order to specifically deter Zukerman at his sentencing hearing, but it referenced the totality of his experience with the criminal justice system—including the fine imposed upon him—as necessary to achieving that end. *See* Special App. 38 ("I do not think that there is a need for a term of imprisonment at the higher end of the guidelines range in order to achieve the goal of specific deterrence. I have confidence that

Fourth, the district court recognized that there was some risk of an unwarranted sentencing disparity, but it "assigned less weight than it might typically have" to this factor because it found "few, if any, defendants" who were similarly situated. *Id.* at 12. Although Zukerman's fine is certainly an outlier as compared to the fines typically imposed in tax cases, his arguments based on aggregated sentencing data and vague summaries of other cases are unconvincing. The relevant question is not simply whether there are disparities, but whether there are "unwarranted sentence disparities" as between Zukerman and others "with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6). "The point merits little discussion" because Zukerman "failed to provide sufficient information to compel the district court to find that these [other defendants] were so similarly situated to himself that any disparity in sentence would be unwarranted." *Broxmeyer*, 699 F.3d at 296-97; *see also United States v. Irving*, 554 F.3d 64, 76 (2d Cir. 2009) ("The district court was not required to consult . . . statistics. Averages of sentences that provide no details underlying the sentences are unreliable to determine unwarranted disparity because they do not reflect the enhancements or adjustments for the aggravating or mitigating factors that distinguish individual cases." (internal quotation marks and alteration omitted)).[3]

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this experience throughout this case has gotten that message across loud and clear.").

[3] The only tax offender Zukerman discusses with specificity is Robert Pfaff, who was sentenced to 97 months' imprisonment and fined $3 million. As explained by the district court, however, there are myriad distinctions between

Fifth, the district court "looked to 18 U.S.C. § 3571(d), which permits a court to set a fine that is 'twice the gross loss.'" Supp. Mem. at 14. In light of the estimated $45 million tax loss caused by Zukerman, that would allow for a fine far larger than that which was actually imposed. The district court also considered that Zukerman's agreed-upon restitution was $7.5 million lower than the estimated tax loss and that several million dollars' worth of interest would have accrued in the years between the beginning of Zukerman's charged criminal conduct and his restitution payment. Taking these disparities into account, the district court concluded that a $10 million fine was "sufficient, but no greater than necessary," to comply with the statutorily enumerated factors to be considered in imposing a sentence. *Id.* at 15 (quoting 18 U.S.C. § 3553(a)). We

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Zukerman and Pfaff: (1) Pfaff designed and implemented fraudulent tax shelters on behalf of others but was not a direct beneficiary of the tax loss he caused, whereas here the tax loss directly benefitted Zukerman and his family; (2) Pfaff was convicted alongside two co-defendants, whereas Zukerman was the sole director of the scheme at issue; (3) Pfaff had no history of uncharged criminal conduct, whereas Zukerman had been dodging taxes for year prior to the conduct for which he was ultimately indicted; and (4) Pfaff had lost his entire net worth by time of his sentencing, whereas Zukerman still enjoyed a $35 million net worth. But even assuming *arguendo* that Pfaff and Zukerman were similarly situated, the disparity in their sentences points in both directions: Pfaff's fine may have been smaller, but he was also sentenced to an additional 27 months' imprisonment as compared to Zukerman. As a result, we cannot say whose sentence was more lenient. *Cf. United States v. Rinaldi*, 461 F.3d 922, 931 (7th Cir. 2006) (affirming sentence where sentencing judge "chose not to increase [defendant's] term of imprisonment, but opted instead to increase the fine; punishing the perpetrator with a correlate of his own crime").

infer from the district court's choice of language—*i.e.*, that it "looked to" this factor rather than "putting significant weight" on it—that this was a relatively minor aspect of the district court's analysis. *Cf. Novella v. Westchester Cnty.*, 661 F.3d 128, 142 (2d Cir. 2011) ("the presumption of consistent usage and meaningful variation, and the textual cannon of *expressio unius est exclusio alterius*" suggest that "the presence of [a phrase] applicable to one [factor] makes clear that the [phrase's] omission" elsewhere "was deliberate").

Although Zukerman now asserts that the district court erred in considering the gap between his restitution and the estimated tax loss, as well as the absence of interest in calculating the tax loss, he cites no authority for the proposition that the district court could not take these factors into account. Indeed, these seem pertinent considerations in ensuring that Zukerman would not ultimately profit from his tax evasion. *See* 18 U.S.C. § 3572(a)(5) ("In determining whether to impose a fine, and the amount, . . . the court shall consider . . . the need to deprive the defendant of illegally obtained gains from the offense . . . ."). Regardless, we need not definitively rule on the propriety of these considerations because they were referenced in Zukerman's Pre-Sentence Report, the district court's adoption of which was unopposed by Zukerman.

Sixth, the district court "accorded significant weight to [Zukerman's] income and financial resources, as well as the limited burden of a $10 million fine." Supp. Mem. at 15. Zukerman contends that he is being unfairly punished because of his wealth, but 18 U.S.C. § 3572(a) mandates that "[i]n determining whether to impose a fine," a sentencing

judge "shall consider . . . the defendant's income, earning capacity, and financial resources," as well as "the burden that the fine will impose upon the defendant." That is in accord with the Sentencing Guidelines' instruction that sentencing judges "shall consider," among other factors, "the defendant's ability to pay the fine" and "the burden that the fine places on the defendant and his dependents." U.S.S.G. § 5E1.2(d)(2)-(3).

It stands to reason that a defendant's wealth is relevant in determining whether a particular fine will deter illegal conduct. Zukerman implies that sentencing judges should consider only whether a defendant is unable to pay a given fine, but nothing in the text or history of the Guidelines, let alone common sense, suggests that this is meant to be a one-way ratchet. A fine can only be an effective deterrent if it is painful to pay, and whether a given dollar amount hurts to cough up depends upon the wealth of the person paying it. Indeed, as noted above, a previous "$233,000 slap-on-the-wrist" did not deter Zukerman, with his extraordinary resources, from subsequently evading his taxes once again. Supp. Mem. at 11. We therefore join our sister Circuits in holding that a defendant's wealth and earning capacity are pertinent considerations in assessing an appropriate fine. *See United States v. Teel*, 691 F.3d 578, 591 (5th Cir. 2012) ("[T]he court properly utilized its discretion to vary from the Guidelines by taking into account [the defendant's] financial resources when determining the appropriately punitive fine in the first instance."); *United States v. Koestner*, 628 F.3d 978, 980 (10th Cir. 2010) ("[T]he amount of the fine was reasonably related . . . to Koestner's ability to pay a fine . . . .") *United States v. Blackwell*, 459

F.3d 739, 771 (6th Cir. 2006) ("[T]he district court committed no error . . . in considering Defendant's ability to pay."); *see also United States v. Adams*, 243 F. App'x 249, 250 (9th Cir. 2007) ("Socioeconomic status is different than financial resources. The former has no place in sentencing, but the latter is required by statute." (internal citations omitted)).[4]

Lastly, the district court "put substantial weight" on the payment of restitution by "corporate entities," as a result of which "only the fine would be paid from [Zukerman's] own pocket." Supp. Mem. at 15. Zukerman responds that restitution was properly paid by MEZCO because it was MEZCO's tax evasion that caused most of the tax losses at issue and, in any

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[4] We see no inconsistency between our holding and *United States v. Mancilla-Mendez*, 191 F. App'x 273, 274 (5th Cir. 2006), or *United States v. Graham*, 946 F.2d 19, 22 (4th Cir. 1991), on which Zukerman relies. "Those cases deal with challenges to upward *departures*, not *variances*." *Teel*, 691 F.3d at 591. The former "'is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines,'" whereas the latter "refers to a non-Guidelines sentence outside the Guidelines framework." *Pepper v. United States*, 562 U.S. 476, 498 n.12 (2011) (quoting *Irizarry v. United States*, 553 U.S. 708, 714 (2008)). "The pertinent question in a departure case is whether 'there exists an aggravating or mitigating circumstance of a kind . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Teel*, 691 F.3d at 591 (quoting 18 U.S.C. § 3553(b)). In contrast, we address "variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a)." *Irizarry*, 553 U.S. at 715. The district court properly recognized that distinction, as it "d[id] not find any grounds warranting a departure under the guidelines," but nevertheless found "a variance pursuant to 18 United States Code § 3553(a) . . . appropriate" in this case. Special App. 6, 38.

event, payments made by MEZCO are tantamount to payments made by him. The latter point appears to be somewhat disingenuous, as elsewhere Zukerman takes the position that he no longer has any interest in MEZCO for purposes of asserting that the district court overestimated his net worth. Zukerman cannot have it both ways: if he no longer owns MEZCO and believes that its value is not attributable to him, it follows that he should not be credited with MEZCO's restitution payments.[5]

Regardless of MEZCO's current ownership, however, a more fundamental principle remains: "Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986); *see also Paroline v. United States*, 134 S. Ct. 1710, 1726 (2014) ("The primary goal of restitution is remedial or compensatory, but it also serves punitive purposes." (internal citation omitted)). The district court was charged with ensuring that Zukerman's fine should be "punitive" when "taken together with other sanctions imposed." U.S.S.G. § 5E1.2(d). To the extent that the corporate payment of restitution reduced the degree to which restitution personally punished Zukerman, which seems likely given that it appears he owned only a 50% interest in MEZCO even

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[5] Zukerman informed the district court that he transferred his interest in MEZCO to his wife as a result of the publicity surrounding his prosecution. He subsequently argued that "Mrs. Zukerman's assets are not relevant to assessing her husband's ability to pay," Def. Br. 18-19 n.3, and that assets "belong[ing] exclusively to Zukerman's wife" could not "be fairly considered in assessing Zukerman's ability to pay," Def. Reply Br. 16.

prior to transferring those interests to his wife, it was well within the district court's discretion to counteract that effect by increasing the fine it imposed on him. In doing so, it "further[ed] the traditional sentencing goals of rehabilitation and deterrence, by forcing [Zukerman] to directly witness the effect[] of [his] crimes." *In re Silverman*, 616 F.3d 1001, 1009 (9th Cir. 2010); *cf. Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1643 (2017) ("[A] pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner' . . . ." (quoting *Huntington v. Attrill*, 146 U.S. 657, 668 (1892))).

Focusing on each facet of the district court's reasoning individually, rather than their totality, is to miss the forest for the trees. The district court concluded that Zukerman, a very wealthy man who has repeatedly and brazenly committed sophisticated tax fraud—a rarely caught and more rarely punished offense that undercuts the functioning of state and federal governments—ought to pay a fine hefty enough to take any financial benefit out of his crimes and to give pause to others who might be tempted to commit similar crimes. The district court further concluded that the Guidelines range did not encompass a fine necessary to accomplish those ends. Instead, the district court calculated the size of the fine based, in part, on an estimate of the tax loss Zukerman caused less the amount of restitution he had agreed to pay. Zukerman's fine thus "resulted from the reasoned exercise of discretion." *Cavera*, 550 F.3d at 193. Under the "circumspect form of review" we apply when the substance of a sentence is challenged, *id.*, we need not find a district court's reasoning compelling in order to affirm, so long as

"the sentence was reasonable," *Gall*, 552 U.S. at 56. Because we find that it was, we see no reason to overturn Zukerman's sentence in any respect.

For the foregoing reasons, we **AFFIRM** the judgment of the district court and **DENY** Zukerman's motion to stay his sentence pending this appeal as moot. We have considered all of the defendant's arguments and find in them no basis for vacatur.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at 40 Foley Square, in the City of New York, on the 6th day of February, two thousand eighteen.

Present: ROBERT A. KATZMANN,
Chief Judge,
AMALYA L. KEARSE,
ROSEMARY S. POOLER,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,
v. No. 17-948
MORRIS E. ZUKERMAN,
Defendant-Appellant.

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710 F. App'x 499

Appeal from the United States District Court for the Southern District of New York (Torres, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, and **DECREED** that the judgment of the district court is **REMANDED**.

Morris Zukerman challenges the reasonableness of the sentence imposed after he entered into a plea agreement for corruptly endeavoring to obstruct and impede the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a), and tax evasion, in violation of 26 U.S.C. § 7201.

Zukerman was sentenced by the district court for the Southern District of New York (Torres, *J.*) on March 21, 2017, and judgment was entered that same day. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Zukerman's plea agreement stipulated that the Guidelines range for his sentence was 70 to 87 months' imprisonment and a fine of between $25,000 and $250,000, although it was further agreed that the parties could seek a sentence outside of the stipulated Guidelines range based upon the factors to be considered in the imposition of sentences pursuant to 18 U.S.C. § 3553(a). *Cf. Irizarry v. United States*, 553 U.S. 708, 714-15 (2008) ("Although the Guidelines, as the starting point and the initial benchmark, continue to play a role in the sentencing determination, there is no longer a limit . . . on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a)." (internal quotation marks and citation omitted)). The Government subsequently sought a sentence consisting of "a term of incarceration within the Stipulated Guidelines range" and "a substantial fine . . . through a substantial variance from the $25,000 to $250,000 Guidelines range," though the Government did not specify an amount or range for the fine it sought. App. 291, 322. Zukerman was sentenced to 70 months' imprisonment and fined $10 million. On appeal, Zukerman contends that the imposition of a $10 million fine was both procedurally and substantively unreasonable, without challenging the reasonableness of either his prison term or the restitution he has paid.

"We have declined to articulate precise standards for assessing whether a district court's explanation of its reason for imposing a non-Guidelines sentence is sufficient," *United States v. Pereira*, 465 F.3d 515, 524 (2d Cir. 2006), and "are hesitant to require the district court to utter any specific incantation," *United States v. Rattoballi*, 452 F.3d 127, 138 (2d Cir. 2006). "The particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge, with appellate courts seeking to ensure only that a factor can bear the weight assigned it under the totality of circumstances in the case." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (internal quotation marks and citations omitted). Nevertheless, district courts "must adequately explain the chosen sentence to allow for meaningful appellate review," *Gall v. United States*, 552 U.S. 38, 50 (2007), and it remains "'uncontroversial' . . . that a major variance from the Guidelines range 'should be supported by a more significant justification than a minor one,'" *United States v. Jones*, 531 F.3d 163, 171-72 (2d Cir. 2008) (quoting *Gall*, 552 U.S. at 50).

Because the Guidelines "covering 'offenses involving taxation' . . . drastically vary as to the recommended sentence based simply on the amount of money involved," without a concomitant variation to reflect the "wide variety of culpability amongst defendants," such sentences are "reviewed especially deferentially" to allow for sentencing disparities "based on the factors identified in § 3553(a)." *United States v. Cavera*, 550 F.3d 180, 192 (2d Cir. 2008) (en banc). "Although a judge need not utter robotic incantations repeating each factor that motivates a sentence," *United States v. Park*, 758 F.3d 193, 197

(2d Cir. 2014) (internal alterations and quotation marks omitted), we can only defer to a sentencing judge's justifications "if adequately explained." *Cavera*, 550 F.3d at 192. The district court endeavored to explain its reasoning orally at the sentencing hearing and in its written statement of reasons, but the record nevertheless remains unclear as to why and how it settled on $10 million as the fine amount: for example, the relative weight assigned to the various factors cited in its oral and written explanations; to what extent, if any, the district court considered the disparity between the sentence imposed on Zukerman and those imposed in other tax prosecutions; and the basis for its determination that a $10 million fine (in conjunction with other aspects of Zukerman's sentence) was "sufficient, but not greater than necessary, to comply with the purposes" of criminal sentencing as required by § 3553(a).

At this stage, we believe this issue is best resolved by means of what is known in this Circuit as a *Jacobson* remand, in which we remand "partial jurisdiction to the district court to supplement the record on a discrete factual or legal issue while retaining jurisdiction over the original appeal." *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 832 F.3d 92, 115 (2d Cir. 2016) (Winter, *J.*, concurring); *see also United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994) (recognizing the authority of federal appellate courts to seek "supplementation of a record without a formal remand or the need for a new notice of appeal before the appellate panel acts on the supplemental record"). Accordingly, we direct the district court to elaborate on its rationale for imposing a fine greater than those typically imposed

in tax prosecutions, and for the amount selected. Upon such elaboration by the district court, either party may restore the matter to the active docket of this Court by letter, without filing a new notice of appeal. In the event that either party seeks further action from this Court, the matter will be referred to this panel.

For the foregoing reasons, we hereby **REMAND** the judgment of the district court for further proceedings consistent with this order.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK
s/ CATHERINE O'HAGAN WOLFE, CLERK
[seal omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -against- MORRIS E. ZUKERMAN, Defendant.	16 Cr. 194 (AT) **SUPPLEMENTAL MEMORANDUM**

ANALISA TORRES, District Judge:

On June 27, 2016, Defendant, Morris E. Zukerman, pleaded guilty to corruptly endeavoring to obstruct and impede the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a), and tax evasion, in violation of 26 U.S.C. § 7201. Plea Hr'g Tr., ECF No. 23. On March 21, 2017, the Court sentenced Defendant to a prison term of 70 months, ordered restitution of $37.5 million, and imposed a $10 million fine. Judgment, ECF No. 58. Defendant appealed part of his sentence, challenging the procedural and substantive reasonableness of the $10 million fine. Notice of Appeal, ECF No. 63.

On appeal, the Second Circuit issued a remand under *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994). The Circuit directed the Court to "elaborate on its rationale for imposing a fine greater than those typically imposed in tax prosecutions, and for the amount selected." *United States v. Zukerman*, 710 F. App'x 499, 501 (2d Cir. 2018) (summ. order). The Circuit sought an explanation of, for example, the weight assigned to various sentencing factors, the consideration given to the disparity between

Defendant's sentence and sentences imposed in similar tax prosecutions, and the basis for the Court's determination that a $10 million fine was sufficient, but not greater than necessary, to adhere to the purposes of sentencing, as required by 18 U.S.C. § 3553(a). *See id.* at 500. This memorandum serves to supplement the record to explain the Court's basis for imposing the $10 million fine.

BACKGROUND

I. Facts

Defendant was educated at Phillips Academy, Harvard College, the University of Cambridge, and Harvard Business School. *See* Final Revised Presentence Report ("PSR") ¶¶ 139–40, ECF No. 29. In the years following his business school graduation, Defendant rose to prominence in the field of finance. *Id.* ¶¶ 142–44. He was a Managing Director at Morgan Stanley for almost two decades, before starting his own investment company, M.E. Zukerman & Co. ("MEZCO"), in 1988. *Id.* ¶¶ 142–43.

Defendant was first investigated by state authorities in 2002 for evading sales and use taxes on $2.8 million worth of "Old Master" paintings he had purchased between 1999 and 2003. *Id.* ¶ 70. Defendant was never charged, however, and he agreed to repay $233,000 in taxes owed. *Id.* ¶ 71.

The federal government began investigating Defendant and MEZCO in 2008, after a MEZCO subsidiary, the MEZCO Specialty Oil Corporation ("SOC"), failed to pay over $28 million in corporate income taxes. *Id.* ¶ 10. The Government's investigation ultimately revealed that, between 2007 and 2015, Defendant evaded over $45 million in taxes, not including interest. *Id.* ¶ 13. During that period,

Defendant committed a number of crimes involving himself and [redacted], including personal income tax fraud, sales and use tax fraud, healthcare fraud, employment fraud, and auto insurance fraud. *Id.* ¶¶ 9–13.

Specifically, Defendant (1) evaded corporate income taxes, on behalf of SOC, *id.* ¶¶ 2–3; (2) evaded personal income tax for the tax years 2008 to 2012, *id.*, including by lying to a tax preparer "that he had made a deductible contribution to a charitable land trust, when in fact he knew the payments were in exchange" for a house on an island off of Maine, *id.* ¶ 92; (3) evaded personal income tax for the tax years 2008 to 2012, on behalf of his wife, *id.* ¶¶ 2–3; (4) evaded personal income tax for the tax years 2008 to 2012, on behalf of [redacted], *id.*; (5) caused to be filed a Form 1120 return falsely claiming that, in 2008, another company he owned, Bodley Investment Company, acquired an interest from SOC and then sold it, *id.*; (6) submitted a tax protest letter in June 2012 to the Internal Revenue Service ("IRS") containing various false statements, *id.*; (7) created and submitted false and misleading documents to the IRS in connection with his 2009 Form 1040 tax audit, *id.*; (8) concealed ownership of and income from various corporations that he, in fact, owned and controlled, *id.*, and (9) provided false information to his tax preparers, in September 2008 and July 2010, regarding the ownership and sale of SOC, *id.*.

In addition, Defendant (10) evaded New York State sales tax on a $645,000 pair of 8 carat diamond earrings, *id.*; (11) purchased over $50 million in Old Master and other paintings, while failing to report those purchases to the New York State Department of Taxation and Finance, thus depriving New York State

of over $4.5 million in taxes, *id.*; (12) diverted funds from corporate entities he controlled to pay the salary of his domestic employee, *id.*; (13) diverted funds from corporate entities he controlled to pay for health care insurance for his domestic employee, *id.*; (14) paid unreported cash wages to multiple domestic employees, which caused false tax reporting by both Defendant and those employees, *id.*; and (15) fraudulently obtained reductions in the cost of his automobile insurance by falsely informing his insurer, Chubb, that his five vehicles were garaged in Westchester County and not in Manhattan, going so far as to invent a false address in the town of Mamaroneck when a Chubb broker questioned Defendant about this lie, *id.*

II. Procedural History

On May 11, 2016, Defendant was indicted on three counts: (1) corruptly endeavoring to obstruct and impede the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a); (2) tax evasion, in violation of 26 U.S.C. § 7201; and (3) wire fraud, in violation of 18 U.S.C. § 1343. *See* Indictment, ECF No. 3. On June 27, 2016, Defendant pleaded guilty to Counts 1 and 2. Plea Hr'g Tr. 19:6–11; 22:21–23. At the plea hearing, the Court notified Defendant and the Government that, for the purposes of sentencing, it was "interested in . . . examples of cases where [there is] this degree of violation of law, in particular, how fines have been calculated." *Id.* at 27:11–14.

On November 9, 2016, the Probation Department issued its final Presentence Report ("PSR").[1] The PSR calculated the fine range under the Sentencing Guidelines to be $25,000 to $250,000 and the maximum fine to be $90 million per count. *See* PSR, at 51. Defendant did not contest the Guidelines range, but argued against the imposition of a fine. Def. Sentencing Mem. at 49, ECF No. 37. Defendant argued that fines were rarely imposed in cases with tax losses between $20 million and $50 million. *Id.* He further argued that in cases where courts did impose a fine, the fine was below or within the Guidelines range over 90% of the time. *Id.*

The Government argued for a "substantial variance" above the Guidelines range. Gov't Sentencing Mem. at 80–81, ECF No. 51. The Government contended that Defendant's argument was "irrelevant," as it did not address whether the defendants in other cases had the ability to pay. *Id.* at 80. Here, the Government argued, Defendant had the means to pay a substantial fine, especially because restitution would be paid by Defendant's corporate entities. *Id.* at 80–81.

On March 21, 2017, the Court sentenced Defendant to a 70-month term of imprisonment, followed by a one-year term of supervised release. *See* Judgment; Sentencing Tr. 39:2–9. The Court also ordered Defendant to pay a special assessment of $200, restitution of $37,574,951.88, and a fine of $10

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[1] At sentencing, the Court explicitly adopted the factual recitations set forth in the PSR. Sentencing Hr'g Tr. 5:4–5, ECF No. 60. Both Defendant and the Government had the opportunity to object, and neither did so. *Id.* at 3:17–5:5

million. *See* Judgment; *see also* Statement of Reasons ("SOR") 4 (stating restitution amount).

On April 4, 2017, Defendant appealed the $10 million fine. *See* Notice of Appeal. On February 28, 2018, the Circuit ordered a *Jacobson* remand, restoring "partial jurisdiction to the district court to supplement the record on a discrete factual or legal issue while retaining jurisdiction over the original appeal." *Zukerman*, 710 F. App'x at 501. Specifically, the Circuit directed the Court to "elaborate on its rationale for imposing a fine greater than those typically imposed in tax prosecutions, and for the amount selected." *Id.*

DISCUSSION

Prior to imposing a fine, the Court considered all the factors under 18 U.S.C. §§ 3553(a), 3571(d), and 3572(a). In the discussion below, the Court elaborates on its key considerations. First, the Court explains how it weighed the § 3553(a) factors. Specifically, the Court discusses its consideration of (1) the nature and circumstances of the offense, (2) the history and characteristics of Defendant, (3) the need for adequate deterrence, (4) the need to avoid unwanted disparities, and (5) whether a $10 million fine was sufficient, but not greater than necessary in light of § 3571(d). Second, the Court explains its consideration of the 18 U.S.C. § 3572(a) factors, particularly Defendant's income and financial resources.

I. 18 U.S.C. § 3553(a) Factors

A. Nature and Circumstances of the Offense

The Court put significant weight on the nature and circumstances of Defendant's crimes when imposing the $10 million fine. Tax crimes represent

an especially damaging category of criminal offenses, as tax evasion strikes at the foundation of a functioning government. The Court emphasized the harms of Defendant's conduct at his sentencing proceeding:

> The obligation to pay taxes is one of the fundamental building blocks of our society. Our government is able to operate only because we, as individuals and a community, agree to pay our fair share. Our taxes are used to defend the homeland, to educate our children, to take care of the needy, sick, and elderly, and, indeed, to operate our system of justice. The public benefits from the services of our government, and the public is the victim of Mr. Zukerman's fraud.

Sentencing Hr'g Tr. 38:3–11.

In addition to general harm, the specific circumstances surrounding Defendant's crimes supported a significant fine above the Guidelines range. As the Court explained at sentencing, Defendant executed a calculated scheme to defraud the government of tens of millions of dollars for the sole purpose of increasing his personal wealth:

> These are weighty offenses over the course of many years. Mr. Zukerman evaded taxes totaling millions of dollars. He was driven not by need, but by unmitigated greed. He entangled himself in a web of lies and deceit, lying to his tax preparer, and then hiring lawyers to defend his lies. He went to such extraordinary lengths in order to cheat. These frauds were deliberate and calculated. Mr. Zukerman thought himself to be above the law.

Id. at 37:11–18.

Indeed, Defendant's fraud spanned fifteen years and involved submitting more than 50 falsified tax forms for at least ten different individuals, the net result of which was cheating federal, state, and local governments out of more than $45 million. *See* PSR ¶¶ 9–13. This complex scheme, singlehandedly devised by Defendant, involved sophisticated means, including the use of offshore entities to conduct and conceal his illegal financial activity. *Id.* ¶ 103. To execute such large-scale tax evasion, Defendant also repeatedly misled his tax preparers, accountants, and attorneys. *See, e.g., id.* ¶¶ 20–27, 32–36.

His greed also drove him to ensnare [redacted] in his criminal activities—preparing false tax returns on behalf of [redacted] for multiple years, *id.* ¶¶ 38–40, enlisting the assistance of [redacted] when obtaining millions of dollars of untaxed art, *id.* ¶ 70, and causing his wife to sign false tax returns, *id.* ¶¶ 41–42. When Defendant had opportunities to come clean, for example, during IRS audits, he repeatedly failed to do so. The Court imposed an above-Guidelines fine, in accordance with § 3553(a)(1), to reflect the complexity, scope, and extreme nature of Defendant's criminal activity. *See* SOR at 3 (identifying extreme conduct and complexity and scope of fraud as reasons for a variance).

B. History and Characteristics of the Defendant

The Court concluded that the Defendant's history and characteristics also pointed toward a substantial above-Guidelines fine. First, although Defendant had no formal criminal history for the purposes of the Guidelines, he did have a history of uncharged

criminal conduct that did not factor into the $45 million loss amount. PSR ¶ 66. Most notably, between 1999 and 2003, Defendant conspired with art gallery owners to evade New York taxes on Old Master paintings that he purchased for nearly $3 million. *Id.* ¶ 70. The galleries shipped empty crates to out-of-state locations and created sham billing and delivery information to give the false impression that the paintings left New York. *Id.* Following New York's investigation into the conspiracy, Defendant acknowledged that he knew that his conduct was illegal. *See* Gov't Sentencing Mem. at 77. Defendant avoided prosecution by agreeing to serve as a witness against the art galleries and to pay back $233,000 in sales and use taxes. PSR ¶ 72.

After being faced with the threat of criminal prosecution for his art fraud conspiracy, Defendant was undeterred. He engaged in an almost identical scheme a few years later, and on an even larger scale. From 2008 to 2014, Defendant purchased an additional 73 paintings worth $52 million, evading over $4.5 million in sales and use taxes in the process. *Id.* ¶ 56. During this time period, Defendant also lied about where he garaged his five cars in order to pay lower auto insurance premiums. *Id.* ¶¶ 67–68. And, in order to help [redacted] purchase a $4 million apartment, Defendant directed his personal banker to write a letter containing falsehoods about [redacted]'s income, which convinced a co-op board to approve [redacted] purchase of the apartment. *Id.* ¶ 69. The Court concluded that not only the history of uncharged criminal conduct between 1999 and 2016, but also the flagrant repetition of his art fraud conspiracy after having been investigated, weighed heavily in favor of a high fine.

Second, Defendant had ample opportunities to come clean. For example, Defendant could have avoided criminal prosecution had he confessed during either a 2011 or 2014 IRS audit. Sentencing Hr'g Tr. 32:19–33:2 ("Mr. Zukerman had the chance essentially to get amnesty here. If he had stepped forward when he was first audited by the civil branch of the IRS, there wouldn't have been any criminal prosecution. Or if he stepped forward during this second audit, when he was confronted by the civil branch [of] the IRS. So he had the opportunity, just like the people who get the amnesty did, to step forward and take part and essentially escape criminal prosecution."). Accordingly, the Court imposed a substantial fine in part to account for Defendant's repeated refusal to fess up despite the number of investigations and audits that provided him the opportunities to do so.

Third, the Court considered Defendant's letters of support emphasizing his role in the lives of his friends and family, as well as his philanthropy. *Id.* at 36:25–37:6 ("I have received many, many letters in support of Mr. Zukerman. Of course the unfortunate consequence of any sentencing proceeding is the collateral effect the sentence has on a defendant's family and friends. I credit Mr. Zukerman for his strong support of education through charitable contributions and for his devotion to family, friends, and employees. He has had a positive impact on many lives."). Crediting Defendant's "positive impact on many lives," *id.*, the Court concluded that a shorter term of incarceration at the bottom end of the Guidelines range was appropriate. Coupled with restitution and a high fine, the Court determined its

judgment would account for the totality of the circumstances.

C. Adequate Deterrence

The Court put the most weight on the general and specific deterrence factors under § 3553(a) when determining the appropriate fine for Defendant. *See id.* at 38:16–19 ("I am also mindful of the fact that others just like Mr. Zukerman are watching to determine whether they, too, will try to avoid paying their fair share."); *see also* SOR at 3 (selecting § 3553(a)(2)(B) as a reason for the variance from the guidelines).

First, although general deterrence is a prescribed goal of every sentencing, it has a particularly important role in sentencing for criminal tax offenses due to the significant resources required to monitor and prosecute tax crimes. Tax avoidance, and outright evasion, is a tremendous social problem, costing the government over $450 billion per year between 2008 and 2010. *See* Chris Matthews, *Here's How Much Tax Cheats Cost the U.S. Government a Year*, FORTUNE, Apr. 29, 2016, *available at* http://fortune.com/2016/04/29/tax-evasion-cost. Due to limited resources provided to tax crime investigation and enforcement, the government can only criminally prosecute a limited number of tax evaders. The Sentencing Commission acknowledges this challenge, explaining in its introductory note to the tax-related guidelines that

> [t]he criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of

> the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

U.S.S.G. ch. 2, pt. T, introductory cmt.; *see also* U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL § 1.01[4] (2008), *available at* https://www.justice.gov/sites/default/files/tax/legacy/2013/05/30/CTM%20Chapter%201.pdf. ("Because there are insufficient resources to prosecute all violations, deterring others from violating the tax laws is a primary consideration."); Louis Kaplow and Steven Shavell, *Fairness Versus Welfare*, 114 Harv. L. Rev. 961, 1225–1303 (2001).

The Sentencing Commission's commentary also emphasizes that deterrence of large-scale tax evasion—such as the $45 million of evaded taxes in Defendant's case—calls for an even larger sanction. "[A] greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases." U.S.S.G. § 2T1.1 cmt. background.

The importance of general deterrence in the context of tax-related offenses is more than theoretical: tax-enforcement actions have a "significant and positive deterrent effect" on would-be tax violators. *See* Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 Emory L.J. 265, 321

(2011). That is because white-collar crime appears to be more "rational" and "calculated" than "crimes of passion or opportunity," meaning that tax criminals are more likely to account for the size of a fine and the likelihood that it will be imposed. *See* Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 Wm. & Mary L. Rev. 721, 749 (2005) (arguing that white-collar crime is "a prime candidate for general deterrence" because it would "cease" if it became "unprofitable").

The instant case, therefore, presented a unique opportunity to deter tax evasion. Defendant was well known in the business world. He was a Managing Director at Morgan Stanley, and then founded his own investment firm, specializing in acquisitions and investments in the energy sector. PSR ¶¶ 139–40, 142–43. Several media outlets extensively covered Defendant's indictment and sentencing, both because of his name and the staggering amount of taxes he intentionally withheld from the government. *See, e.g.*, Pete Brush, *Tax-Dodging Moneyman Gets Nearly 6 Years, $10M Fine*, LAW360 (Mar. 21, 2017), *available at* https://www.law360.com/articles/904392/tax-dodging-moneyman-gets-nearly-6-years-10m-fine; Jesse Drucker, *Oil Investor Zukerman Dodged $45M in Taxes, U.S. Says*, BLOOMBERG (May 23, 2016), *available at* https://www.bloomberg.com/news/articles/2016-05-23/ex-morgan-stanley-energy-group-head-indicted-for-tax-evasion; Nate Raymond, *New York Energy Investor Indicted for $45 Million Tax Scheme*, Reuters (May 23, 2016), *available at* https://www.reuters.com/article/us-new-york-crime-zukerman/new-york-energy-investor-indicted-for-45-million-tax-scheme-idUSKCN0YE2OU. Accordingly,

in view of Defendant's prominence in the field of finance, and reflecting the Sentencing Commission's commentary, the Court put significant weight on § 3553(a)(2)(B) when imposing a $10 million fine on Defendant.

Second, the Court put significant weight on the specific deterrence factor when considering the appropriate fine. *See* SOR at 3 ("Given the scope and complexity of the defendant's tax fraud, and to provide sufficient deterrence, an upward variance to the amount of the fine is warranted."). As explained above, prior to his prosecution for the instant offenses, Defendant was investigated for his participation in an art fraud conspiracy from 1999 to 2003, PSR ¶¶ 70–71, engaging in crimes he then repeated from 2008 to 2014, *id.* ¶ 56.

It was clear to the Court at the time of sentencing that simply being caught did not deter Defendant. Indeed, the Court carefully considered the fact that, in the time since the state's investigation into the 1999 art-delivery conspiracy, Defendant's criminal activities had only grown in size and scope. The Court concluded that the $233,000 slap-on-the-wrist Defendant received in 2002 proved useless in dissuading him from evading his taxes. A significant penalty was required to specifically deter Defendant from engaging in more tax fraud.

D. Disparities

The Court put less weight on § 3553(a)(6) for the purposes of determining an appropriate fine because, simply put, the Court concluded that there existed few, if any, defendants with similar records who had been found guilty of similar conduct. *See* Sentencing Hr'g Tr. 37:19–20 ("I am cognizant of the need to avoid

unwar[ranted] sentence disparities."). With no directly comparable cases, the Court assigned less weight than it might typically have in another case.

The Court considered that the only post-*Booker* tax crime in this Circuit with a loss magnitude comparable to or exceeding Defendant's was that of Robert Pfaff, who received a $3 million fine and was sentenced to 97 months' imprisonment for a tax loss exceeding $100 million. *See* MCM Data Consulting, Defendants Scored According to USSG § 2T1.1 Who Were Ordered to Pay a Fine, Tax Loss >$1 Million, National FY 1999 - FY 2016, http://www.mcmdataconsulting.com/defendants.pdf; *see also United States v. Pfaff*, 407 F. App'x 506, 507 (2d Cir. 2010) (summ. order) (affirming conviction). Although the tax loss in Pfaff's case exceeded that of Defendant, Pfaff was not a direct beneficiary of the tax loss. Rather, because Pfaff worked at an accounting firm, the tax loss attributed to him was the result of "designing, implementing, and marketing fraudulent tax shelters" for the benefit of his clients. *United States v. Pfaff*, 619 F.3d 172, 173 (2d Cir. 2010). In contrast, the tax loss in Defendant's case benefitted only Defendant and his relatives.

Other aspects distinguished Pfaff from Zukerman. Pfaff was convicted alongside co-defendants Raymond Ruble and John Larson. *See id.* Here, Defendant was the sole defendant in his case, and he alone directed the tax-evasion scheme. Also, Pfaff did not have a history of uncharged criminal conduct—nor a history of facing investigations for such conduct, *see* Pfaff Sentencing Mem., at 1, *United States v. Stein*, No. 05 Cr. 888, 2009 WL 7360963 (S.D.N.Y. Mar. 18, 2009), whereas Defendant repeatedly engaged in criminal conduct—even after being caught, *see* PSR ¶¶ 66–72.

Finally, Pfaff had lost his entire net worth by the time of sentencing, *see* Pfaff Sentencing Mem., at 1, whereas Defendant enjoyed a net worth exceeding $37 million, PSR ¶ 145.

Given the lack of comparable tax cases, the Court also looked to fraud cases involving massive losses. The Court concluded that the $10 million fine was on par with fines imposed on similarly situated defendants. For instance, the defendant in *United States v. Garrison*, 133 F.3d 831 (11th Cir. 1998), pleaded guilty to participating in a Medicare fraud scheme that resulted in an $11.5 million loss to the victims involved. *Id.* at 837. Though the Sentencing Guidelines range was a prison sentence of 33 to 41 months and a fine between $7,500 and $75,000, the district judge imposed a 33-month prison term and a total fine of $2.5 million. *Id.* at 837. The defendant challenged several aspects of her sentence, including the fine, arguing that it was "so large and disproportionate to the offense to be unreasonable on its face." *Id.* at 849 (internal quotation marks omitted).

In upholding the fine, the Eleventh Circuit affirmed the district judge's reasoning that a large fine was warranted "to be sure that the combined sentence reflects the seriousness of the offense and that it promotes respect for the law," especially because it was "a very high profile case" that bore on "the public's concern about the Medicare program and the possibility of losing medical benefits in old age." *Id.* at 850 (emphasis omitted). To that end, the Eleventh Circuit further explained that, "[g]iven [the defendant's] substantial profits over time from her Medicare fraud, the district judge did not believe that the highest Sentencing Guidelines applicable fine was

sufficient to punish Garrison's calculated crime that defrauded Medicare, our federal, public health insurance program." *Id.* at 852.

The Second Circuit has likewise upheld fines well above the Guidelines range in cases involving defendants who defraud the government. *See, e.g.*, *United States v. Gushlak*, 495 F. App'x 132 (2d Cir. 2012) (upholding a judgment imposing a $25 million fine that was 33 times the Guidelines maximum because it "was necessary to deter [defendant] from engaging in future securities frauds" and because defendant likely had "a greater ability to pay a fine than his financial statements suggested"); *United States v. Merritt*, 988 F.2d 1298, 1312 (2d Cir. 1993) (upholding a judgment requiring defendant, who pleaded guilty to conspiracy to defraud the United States, to pay the maximum fine of double the loss, or $1.87 million). Accordingly, the Court concluded that a $10 million fine would not result in unwarranted disparities.

E. Sufficiency and Necessity

Under § 3553(a), the Court arrived at an amount that would be sufficient, but not greater than necessary. Because Defendant's crimes involve pecuniary losses to the Government and gains to him and [redacted], the Court looked to 18 U.S.C. § 3571(d), which permits a court to set a fine that is "twice the gross loss." *See also* PSR ¶ 167; Plea Hr'g Tr. 12:12–14 ("The maximum allowable fine is $250,000 or twice the gain you received from the crime or twice the loss to any victims, whichever is greater."). Having caused an estimated $45 million tax loss, Defendant could, therefore, be fined up to $90 million per count of conviction, *id.* (stating the

maximum fine for each count to be $90 million); *see also id.* at 50 (clarifying that the maximum fine was $90 million "per count").

Mindful of this upper limit, the Court noted that Defendant's corporate entities made restitution of only $37.5 million out of the total $45 million tax loss—leaving $7.5 million in unaccounted losses. Considering that $7.5 million figure, the Court also weighed the possible interest that would have accrued in the 9 years between Defendant's first charged criminal activity and his restitution payment.[2] In light of the $7.5 million in unaccounted losses, the potential accumulated interest on such losses, and the maximum possible fine, the Court concluded that $10 million was sufficient, but no greater than necessary to comply with § 3553(a).

II. 18 U.S.C. §3572(a) Factors

Finally, under 8 U.S.C. § 3572(a), the Court accorded significant weight to Defendant's income and financial resources, as well as the limited burden of a $10 million fine. *See* SOR 3. First, Defendant's total annual income was over [redacted] million per year. PSR ¶ 145. Second, despite having already paid—using corporate funds—millions in restitution prior to sentencing, his net worth remained at over [redacted] million. *Id.* ¶¶ 145, 154; Sentencing Hr'g Tr. 37:23–24 ("Mr. Zukerman remains an astonishingly wealthy man despite paying millions owed to the government."). Defendant's assets included almost [redacted] million in securities assets, a [redacted] million

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[2] For example, applying 2% annual compound interest only to the $28 million in tax liability owed by Defendant in 2008 yields approximately $5 million in interest.

apartment, [redacted] million in art, and [redacted] million in jewelry—as well as over [redacted] million in other assets. PSR ¶ 145. Through a trust, with his wife as trustee, Defendant also owned a [redacted] million "cottage" in Maine, *id.* ¶ 155, and his wife had interests in two properties in Arizona, *id.* ¶ 156. Third, the Court put substantial weight on the fact that Defendant's corporate entities paid the $37.5 million in restitution, indicating that only the fine would be paid from Defendant's own pocket. Sentencing Hr'g Tr. 37:20–22 ("Although he has taken steps to make the government whole through restitution, many of those payments have come from his companies and not from his own pocket."); Gov't Sentencing Mem. at 80.

Accordingly, the Court concluded that not only had Defendant failed to establish his inability to pay a substantial fine, *see* U.S.S.G. § 5E1.2(a) ("The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine."), but also that a $10 million fine was not overly burdensome in light of Defendant's income and financial resources.

CONCLUSION

For the key reasons discussed above, the Court concluded that the imposition of a fine well above the Guidelines range was warranted. Defendant is directed to file a copy of this supplemental memorandum with the Clerk of the Court of the Second Circuit Court of Appeals, with the request that she forward it to the panel that issued the aforementioned remand.

SO ORDERED.
Dated: May 4, 2018
New York, New York

s/ Analisa Torres
ANALISA TORRES
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

v.

MORRIS E. ZUKERMAN,

Defendant.

----------x

New York, N.Y.

16 Cr. 194 (AT)

March 21, 2017
11:20 a.m.

Before:

HON. ANALISA TORRES,

District Judge

APPEARANCES

JOON H. KIM
Acting United States Attorney for the Southern District of New York

BY: STANLEY J. OKULA, JR.
EDWARD A. IMPERATORE
Assistant United States Attorneys

WILLIAMS & CONNOLLY, LLP
Attorneys for Defendant

BY: JAMES A. BRUTON
DAVID M. ZINN
DAVID M. HORNIAK
AMY B. McKINLAY

ALSO PRESENT:
ANTHONY RAGUSA, Internal Revenue Service
DIANA CHOU, Postal Inspection Service

THE COURT: Good morning. We are here in the matter of the United States v. Zukerman.

Would you make you appearances, please.

MR. OKULA: Yes, your Honor. Stanley Okula for the United States. I am joined at counsel table by assistant United States attorney Edward Imperatore and the two investigators in the case, starting with the closest to me, Anthony Ragusa from the Internal Revenue Service and Diana Chou from the United States Postal Inspection Service. Good morning.

MR. BRUTON: Your Honor, James Bruton for Mr. Zukerman. I have with me David Zinn, who is also on the briefs, and David Horniak. In addition, in the courtroom we have another one of our lawyers, Amy McKinlay. So there are actually four of us at this point, your Honor.

THE COURT: You may be seated.

MR. BRUTON: Thank you.

THE COURT: This matter is on for sentencing.

In connection with today's proceeding, I have reviewed the revised presentence investigation report dated November 9, 2016, including the recommendation and addenda; the defendant's sentencing submission dated January 13, 2017; the government's sentencing letter dated February 7, 2017; the defendant's notice of supplemental authority, dated February 22, 2017; the government's response dated February 27, 2017; the government's letter dated March 17, 2017; and the defendant's response dated March 20, 2017.

Have the parties received each of these submissions?

MR. OKULA: Yes, your Honor.

MR. BRUTON: Yes, your Honor.

THE COURT: Have the submissions been filed with the Clerk of Court?

MR. OKULA: Yes, your Honor, in the redacted form that has been approved by the court.

MR. BRUTON: That's correct, your Honor.

THE COURT: Are there any other submissions?

MR. OKULA: Not on behalf of the government, your Honor.

MR. BRUTON: Not on behalf of Mr. Zukerman, your Honor.

THE COURT: Mr. Bruton, have you read the presentence report?

MR. BRUTON: I have, your Honor.

THE COURT: Have you discussed it with your client?

MR. BRUTON: I have, your Honor.

THE COURT: Mr. Zukerman, have you read the presentence report?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you discussed it with Mr. Bruton?

THE DEFENDANT: Yes.

THE COURT: Have you had the opportunity to go over with him any errors in the report or anything else that should be brought up with me?

THE DEFENDANT: Yes.

THE COURT: AUSA Okula, have you reviewed the presentence report?

MR. OKULA: I have, your Honor.

THE COURT: Mr. Bruton, do you have any objections to the presentence report regarding factual accuracy?

MR. BRUTON: No, your Honor. Although we did point out, and I think it is in the probation officer's report, that there are a lot of additional items that Mr. Okula has involved that's beyond the case that is there. He has added additional items. We, frankly, couldn't address those. And so our position is that it is a lot of relevant conduct that he has added, which we have felt is not necessarily indicative of things that Mr. Zukerman did.

But on the main issues, we have absolutely no objection. All the heartland issues in the probation report are --

THE COURT: But you are not making an application to in any way alter or modify the report.

MR. BRUTON: No, your Honor. We simply had to bypass those because we couldn't keep up with all of it.

THE COURT: AUSA Okula, do you have any objections regarding factual accuracy?

MR. OKULA: We have none, your Honor.

THE COURT: Hearing no objections, the court adopts the factual recitations set forth in the report.

The presentence report will be made a part of the record in this matter and placed under seal. If an appeal is taken, counsel on appeal may have access to the report without further application to the court.

Although courts are no longer required to follow the sentencing guidelines, we are still required to consider the applicable guidelines in imposing sentence and, to do so, it is necessary that we

accurately calculate the sentencing range. There is a plea agreement in this case. Am I correct that the parties stipulated in the agreement that the stipulated sentencing guidelines range is 70 to 87 months' imprisonment?

MR. OKULA: Yes, your Honor.

MR. BRUTON: That's correct, your Honor.

THE COURT: I understand that this range is based in part on a two-point increase pursuant to United States Sentencing Guidelines Section 2T1.1(b) because the offense as stated in Counts One and Two involved sophisticated means.

I also understand that the government, the defendant, and the probation department are recommending a two-point reduction in the offense level because Mr. Zukerman has demonstrated acceptance of responsibility for the offense under Section 3E1.1(a) of the guidelines and a one-point reduction because he has given timely notice of his intention to enter a plea of guilty under section 3E1.1B of the guidelines. Is that right.

MR. OKULA: It is, your Honor.

MR. BRUTON: That's correct, your Honor.

THE COURT: Having considered the totality of the circumstances, including Mr. Zukerman's acceptance of responsibility for the offense and timely notice of his intention to enter a plea of guilty, I conclude that Mr. Zukerman is therefore eligible for a three-point reduction in the offense level.

Accordingly, based on my independent evaluation of the sentencing guidelines, I find that the offense level is 27, the criminal history category is I, and the guidelines range is 70 to 87 months of imprisonment,

one to three years of supervised release, and a fine of $25,000 to $250,000.

I have considered whether there is any other appropriate basis for departure from the advisory range within the guidelines system, and although I recognize that I have authority to depart, I do not find any grounds warranting a departure under the guidelines.

Now I will hear from the parties.

Does the government wish to be heard with regard to sentencing?

MR. OKULA: We do, your Honor, just briefly.

May I address from here or would you prefer that I address from the podium?

THE COURT: Whatever. It is your choice.

MR. OKULA: Your Honor, we endeavored in our sentencing memo to outline in a comprehensive fashion all of the facts that we believe are important for your Honor to impose sentence today. I will not repeat all of them. I simply want to focus on two or three critical issues, your Honor.

First, the court, when imposing sentence in cases, oftentimes, if not more often than not, faces issues or sees reasons essentially that give some explanation to the criminal conduct. The court sees, for instance, impoverished upbringing or crimes of economic desperation, even in tax cases, your Honor, where there are, according to the defendants, hazy rules that they complain about that lead them to cross over the line or an employment tax cases where an employer will, for instance, put their money towards expenses rather than paying their employment taxes.

This case, your Honor, presents none of those issues. There are two words, and two words alone,

that explain the conduct in this case: unmitigated greed. It is a simple reason that the defendant carried out this plan year after year after year. After all, the defendant is in a financial position that is enjoyed by very few in this country. There was no economic need for him to do what he did. And yet he devised a scheme and carried it out in so many different ways -- on a corporate tax level, on an individual level, on a sales tax level with respect to the artwork that he purchased. The only explanation for the conduct, your Honor, is greed, and I think that that's important to take into consideration when trying to understand what the reasons were behind the criminal conduct.

The second point we wish to urge for the court, and we stressed it very hard in the memo that we submitted, is the vital importance, your Honor, that sentences of incarceration play with respect to deterrence in criminal tax cases. The message has to be clear to those, especially in cases like this, where there is no motivation other than greed, the message has to be that there are important, significant ramifications to the conduct. Stated otherwise, your Honor, if the court were to accept the defendant's arguments essentially that, well, we have to pay back all of the money that we owe, we are going to have to pay interest on that, and penalties on that, and, you know, he has lost face in the community because of his crimes, if that were the basis for the court to essentially impose a probationary sentence, it would send the wrong message. It would essentially say that if you are caught, all you have to do is pay back your money and there are not going to be meaningful consequences.

Our point is simply, your Honor, there have to be meaningful consequences lest people out there who are making the decision about whether they are going to get caught or whether there are serious repercussions if they do get caught, they are going to take it into consideration and think, hey, maybe it is worth it. They have to see the message, and that plays an important role in cases like this, especially, your Honor, in a case like this one, where Mr. Zukerman had prior involvement with the criminal justice system.

Now, to be sure, he has no criminal history according to the guidelines, but the undisputed facts are that he was caught up in the sales and use tax evasion scheme and investigation that was carried out by the D.A.'s office during the 1999 through the 2002 time period. So imagine that. They knock on his door. He gets a criminal defense attorney. He goes nextdoor to the D.A.'s office where he is interviewed by the ADA who has run the investigation and, to be sure, they are focusing, the D.A.'s office was, on the galleries because the galleries were the ones who were essentially orchestrating these schemes, but the customers were just as culpable. And during Mr. Zukerman's interview, he acknowledged his criminal involvement in that scheme.

So what does that mean? Why is that important? It means, and I am sure the court sees it in a lot of other cases, and I see it when judges impose sentence, that one of the messages that the judges send when somebody gets a sentence is, you have to understand that if you come back in front of me, it's going to be bad news, because we are going to have a violation of supervised release and you are going to jail. Judges in this courthouse say that all the time. In other

words, if you come back a second time, it's going to be bad news for you.

Well, Mr. Zukerman had a prior involvement with the D.A.'s office and, for better or for worse, they decided not to prosecute him, but he was criminally culpable. So he had the chance at that point to say, You know what? I dodged a bullet there. I escaped. I am going to set the path to be honest and punctilious in everything I do going forward. But astoundingly, breathtakingly, a handful of years later, he decides to do the very same thing.

So this is a long way of saying, your Honor, that is why the message of deterrence is doubly important in a case like this. Because if the message is that even if you were caught up once before and you get caught a second time and you get a slap on the wrist, that's a bad message for deterrence.

The final point I want to make, your Honor, relates to the submission that the defendant made with respect to the Horsky agents, the case in Virginia that both parties made a submission on. Mr. Bruton, quite astutely, emphasized the facts that were favorable to Mr. Horsky in that case, including the sentence, but one of the things that I think is important for the court to appreciate with respect to the Horsky case and how this case is so different is that Horsky was the guy who had a couple hundred million dollars in the undeclared Swiss account, that was in Israel. The IRS starts knocking on his door once they get information about his scheme, and immediately upon his involvement with the criminal investigation of the division of IRS, he makes a decision, you know what? They got me. I'm going to set things right.

This case is such a stark contrast from that, that it is important to keep in mind all the steps that Mr. Zukerman had to essentially change his ways, and this doesn't even take into consideration his involvement with the D.A. After all, he was audited during the Bodley audit. Remember he tried to declare during the 2008 tax year some of the Penreco gains falsely on the Bodley tax return. But he is audited on the Bodley tax return in about 2010 or thereabouts. He has a decision then to make. He knew he had engaged in false tax reporting. He knew he had not paid taxes and all that. So what did he do when he was faced with the auditors at that point? He prevaricates. He essentially gets his lawyers to tell a false story to the IRS. The court is familiar with that whole story. So the point is that the defendant had choices all along the way.

I was astounded in reading the explanation of conduct that Mr. Zukerman submitted. It's at page 91 of the presentence report. In explaining what happened with Bodley, the defendant, through his attorney, said "The 2008 Bodley tax return came under audit by the IRS, and the IRS disallowed the losses and credits." And this is the important sentence. "Having long ago committed to the position that Bodley had acquired and sold an interest in Penreco, it was too late for Mr. Zukerman to change his story."

It was not. It was not too late. He could have come clean at that point. There was nothing that prevented him from saying, You know what? I'm under audit. I'm going to honestly report it right now. Going forward I will pay the back taxes. After all, it was a civil audit then. It wasn't even a criminal investigation. But what was the decision that he

made? He not only gave false information to the IRS, but then he had his lawyer transmit that to the appeals office when it was under audit after that.

And the audit fraud didn't end then. So he gets through Bodley and there are two other instances when the civil branch of the IRS audited Mr. Zukerman's returns. They audited him with respect to I believe the 2008 year that contains the false charitable contribution figure to the main conservation entity. What did he do when he was faced with that audit? Did he say, You know what? I escaped the Bodley. I'm dealing with this. Time to come clean? No. He provided false information to the IRS and convinced them falsely that those claims that he made on the return were true and accurate.

And then, with respect to the family members' audit, once again, there are a couple of important points with respect to that. One, the damage that Mr. Zukerman caused was not limited just to himself. By dragging the family members into it, he wreaked havoc on many different people with respect to their financial accounts, their involvement in the investigation.

And even with respect to that audit, the family member comes to him and says, Hey, the IRS is asking about this item. What does he do? Does he say, You know what? I am going to be honest with respect to this family member. I'm going to tell them that there was no real basis for that claim on the return? Does he do that? No. He provides false information that's transmitted to the IRS in order, once again, to try to get over on the IRS.

So the point, your Honor, is a simple one, and I'm sorry to belabor it, but there were numerous points

along the way that the defendant had a choice to make. Am I going to be honest? Am I going to start on the path of the right? Am I going to correct that which I did which was utterly wrong? No. He just wanted to keep going and going and going and, once again, the only explanation was greed.

So beyond those comments, your Honor, which in some form or another are set forth in our papers, we will rest on our papers.

If the court has any questions, we are happy to address anything else.

THE COURT: Does defense counsel wish to be heard?

MR. BRUTON: Yes, your Honor.

I would like to start off a little bit because obviously Mr. Okula's position is largely this issue of greed. Whether that is clear or not is absolutely uncertain. I think that in the years that I have been dealing with taxpayers, the issues are never clear. It is always involving other issues as well. And in his case, what you see is somebody who has been a very, very good person in a lot of respects. We have -- you know there is a number of roughly 100 letters of people who have come on his behalf, speaking on his behalf. He has touched people in all walks of life. He has done a lot of things that are truly exemplary. He had this tax issue, and that's not good. And he is here today to finish the guilty plea. He has pled guilty, and he is here to take the consequences of that, and he is not shirking that.

What I would like to point out, your Honor, is that one of the things -- we have got a plea agreement here that had a number of undertakings that he is supposed to be involved with, and one of the things

was a restitution order, $37 million agreed between the parties. And he has never once held back or shirked or avoided trying to do what was necessary to respond and in fact ended up overpaying the amounts. What happened was he submitted all the payments to the IRS. They are in bonds. Each one the IRS already has the money, has had the money since last April and May, and so that's all been in their hands awaiting your order, your Honor, and then they will go ahead and act on that, and those monies will be in the Treasury. They are in the Treasury now, but they will belong to them exclusively at that point. And he worked hard to try to get that done, and he never shirked, never tried to avoid it, never tried to do anything that would suggest that he was trying to undercut the issue of pleading guilty and responding to what your Honor is going to have to do in terms of the ultimate result here.

He then went about, you will see in the plea agreement, there are a list of tax returns that were to be filed. They were all filed on February 28. It turned out to be about between 28 and 81 tax returns that were involved that he caused the filing of and caused the payment of and caused the interest to be paid on to make sure that it was there.

The point is, and I have always thought this throughout my career, that one of the things that has to be done is, there has to be a remedial side. It has to be straightened out. If we get a taxpayer who has had the problems that Mr. Okula is arguing for, the first thing we do is make sure that that person is in the system and operating in a way that gets all this up to speed so that going forward the tax work will be done and done appropriately. He has, in the process, gotten first-rate accounting help, people who will

watch and make sure things are done. He did not have that before. That is done to make sure that he doesn't have to worry about whether he is, as Mr. Okula says, tempted by greed in a particular instance. He won't be, because the accountants will be there working with him and making sure that everything gets covered.

That remedial part is done, and he has gone through the process in ways, your Honor, that I think were extraordinary. I haven't in my career had that many returns filed in an association with a guilty plea and a sentencing, and that's a good thing. What it does is it gets the individual back into the system where they need to be.

I would like to move from there to these separate issues of deterrence. I guess we can go to that. I guess the -- we have given your Honor a copy -- oh, forgive me, one thing, I need to give a copy of all the tax work that was done.

Do you mind, your Honor, if I approach and just give you a summary of the tax that was done?

THE COURT: You may.

MR. BRUTON: So, in addition to the $37,547,951.88 that he submitted to address the restitution, which was more than the letter called for, that's already in the additional items that I have given you here, are the other tax returns in the amounts that were paid in association with that.

Now, I was a little bit upset last week when Mr. Okula sent a letter saying, Judge, you should treat this as more fraud. The issue here was not that. When I was a prosecutor, if the taxpayer would come forward and be cleaning up his act and we could show that he was honestly trying to do that, that was a

reason to rejoice. That wasn't a reason to sit there and suggest, well, we have got to punish him more. We are getting him into the system. The point is that he has got to get back into the tax system, and this is how you do it. And so, your Honor --

THE COURT: So are you arguing that his payment of taxes that were due is somehow praiseworthy?

MR. BRUTON: I guess, your Honor, I am. And the reason why I am saying that is because, you know, obviously these things weren't done and they had to be done. If he doesn't go ahead and honestly prepare these and honestly do this, then the government is still hurt. The IRS is still hurt. The idea is to come forward and get everything you can. He made judgments on things where he decided in favor of the government, even if he could have, for civil tax reasons, disagreed and done something different. The reason why he did it was to be absolutely on the safe side, to make sure that he was doing more than he was required to do under the law. Most of these, a lot of them we could have said he can't -- no problem, go ahead, don't take the deduction or don't take the income. But he didn't do that. He went in, and went through it. And I have seen a lot of these, and I have seen situations where taxpayers are fighting even through this process. That never happened with Mr. Zukerman. Mr. Zukerman's position has been always, Let's do what's right now. I can't do anything about the past, but I can do what I can with the future and current.

THE COURT: So you are saying that his having paid taxes that were due is praiseworthy. Do you also think that is extraordinary?

MR. BRUTON: Extraordinary?

THE COURT: Do you think it is extraordinary to pay taxes that are due?

MR. BRUTON: No, it is certainly not. But the idea -- there are lots of people who are not in a situation where they are trying to get all the payments made that need to be made.

THE COURT: So you are saying there are those who avoid paying taxes, therefore we should praise Mr. Zukerman for paying his taxes?

MR. BRUTON: No, we should praise Mr. Zukerman for coming back into the system. He was out of the system. He is now in the system. Going forward he will be filing. He is on the right track. That's what I am suggesting. And if somebody has failed, the fact that they fail and then they turn around and do what's right seems to me praiseworthy. There are other alternatives. People can continue to head down the bad track. People leave the country. People do all kinds of things to avoid taxes. This man said: Look, I know I have done wrong.

I feel horrible about what I have done.

THE COURT: So do you think he should get a good citizenship reward for paying the back taxes?

MR. BRUTON: No, your Honor. He is just back in the system. He is just back in the system. That's all. And that's quite a lot. That's quite a lot, to get somebody who has been out of the system into the system. And I am not suggesting that a medal needs to be there. That is not anywhere near what I am contending. What I am contending is that he spent a lot of time and a lot of hard work trying to make sure it was right and trying to make sure -- the IRS is going to look at all these tax returns. There are going to be

penalties on top of them. He is going to pay all those. The penalties can be as high as 75 percent on all of these, and he is going to have to pay all of those and he will pay all of those. He has submitted everything. The IRS now has him within the system, doing what's right. That's not a commendation. That's not a community service award. It is just doing what needs to be done to get him where he needs to be. We have got a whole body of taxpayers out there who need to be in the system who aren't. And we have a circumstance here where actually the plea agreement was a good thing because it allowed for the possibility of making sure that we got him on all tracks, on all the things that he was doing. So I am not trying to suggest, your Honor, that he needs a medal. What I am suggesting is that he has done things to show the government and the IRS and his country that he wants to be right, and that's the only point of it. That's all he can do. And the remediation process -- and that's what it is -- all he can do is show that he wants to be back in the system where he needs to be, and that's what he has done here, your Honor. And that, to me, has a value, and it's a useful thing and the government should -- it should be happy about it, because it's not happening everywhere. So when I was a prosecutor, I would have been happy about that because most of the time the defendants try to figure any way they can to avoid it, and he hasn't done that.

I will go ahead and move on if you would like, your Honor.

I wanted to address this issue of deterrence because it is crucial to what we are talking about. We have the probation officer has suggested a possible variance of down to 40 months -- excuse me, 48 months from the original 70 to 87 months that are in

the guidelines. Mr. Okula hasn't responded to that, so I assume that's not what he wants and I don't expect him to want that. But the fact is that she has recognized that there are a number of qualities that this gentleman has that are suggestive that a variance would be a good result and an appropriate result, given what he was doing to try to correct and at the same time all of the good qualities, personal qualities he has.

He has a wonderful family. I don't see that very often. I don't see the family -- there is 45 years of marriage and solid relationship. I don't see that. I don't see that with young people who grow to be -- each of these young ladies is a wonderful, wonderful member of society. They are doing great things, and they are good. All of that bespeaks with Mr. Zukerman that quality that Mr. Okula keeps arguing about, greed, greed, greed. There are other qualities that are offsetting. And we have to understand not everybody -- everybody has -- bears their sins, if you will, and the issue is, how do we address those things and what is the appropriate response in dealing with it?

The issue that I wanted to talk to you about, though, has to do with Judge Rakoff's views on the sentencing guidelines, because we start with the sentencing guidelines that are a very high level. We argued in the brief, and I would like to give you a copy of a little schematic that we came up with later that may help.

In the *Casperson* case Judge Rakoff is raising -- he was dealing with the fraud guidelines at that time, but one of the things he argues is that these numerical guidelines don't give us a good way to know how to sentence somebody because the dollars are just

numbers. It is just bean counting. It doesn't really get to the heart of the issue, which is what's an appropriate result here? You will see on the schematic that we have provided, back in 1987 through the 1988 period, the same offense Mr. Zukerman had to the penny was 27 to 33 months. I happened to be the Deputy Assistant Attorney General and then the Acting Assistant Attorney General during those years. Those were years where we were trying to figure out, guidelines put a pressure on us that we couldn't necessarily deal with, and that was how we were going to quantify how the sentences should be. Because if you take dollar amounts, you have to figure out how much time it takes or how much time should be related to the time that somebody would spend in prison.

And so these calculations, the initial bump took place in '89 to '91, and it went up and it is still -- 41 to 51 for Mr. Zukerman is still much lower than what we have now. And then it went down a little, and then it bumped back up, and then look at where it is now. It just overwhelmed the numbers for the earlier period. And this is post-*Booker*, which is a surprise, because *Booker* is in there trying to say we have got to start getting a little more rational about this in connection with the issues of handling the sentencing and how we do it, that it is not just an issue of number counting, but it has to be something else. So the guidelines are putting us in a position where that is the case. But had he been involved in this process back in 1987, '88, '89, he would have been in guidelines that would have been -- the bottom of the guidelines would have put him under three years. Is there any real difference with those?

In fact, if you go with the guidelines, I went through the guidelines in each case and checked the amendments and the explanation of the amendments, and there was none. And what you find out is that they were bumping the fraud guidelines, and they did tax automatically. So there was no real reason to bump tax to here or tax to here, tax to here and tax to here, because they were doing something over with the fraud guidelines and they had no indication as to whether or not this was good, whether it was helpful from a deterrence standpoint, to what the resolution would be.

But what Judge Rakoff talks about is, how can you say that -- if you are analyzing deterrence, how can you say that this number is any different than this number or that that's more appropriate than the other number? So what he says is, he sort of throws away the guidelines. I can say to you that if we started with the original guideline intention, which was to say that we want some moderate tax evaders to be put in jail, that was the calculation. And at that time, it's interesting, because we were trying desperately to be able to argue -- Mr. Okula just sort of argues deterrence, but it's deterrence disjointed from anything. It doesn't really tell you that if you want to have an 87-month sentence here, why is that more deterrent or why is that deterrent relative to the 27-33? What's the difference between the two from the standpoint of deterrence? And he won't be able to tell you that.

And the reason was, back in those days, the IRS and the department, we put together a program called the -- let me get that one for you, the zip code, where they were using zip codes to determine whether or not there were crimes in those areas, and what they

would do is they would take every crime where somebody went to jail and they would look around within the surrounding area codes, and they would determine that in those area codes they had certain people who were civilly violating or criminally violating or other things.

There was a problem. And the problem was that they prosecute so few tax cases, that you can't tell what the deterrent value of any particular transaction is. So you won't know whether it is better from a deterrent standpoint that Mr. Zuckerman be at the top here based on the 2001 guidelines or whether it is okay for him to be down here in the original guidelines where they said this is what we want and this is how we want to do it. You will find, as you go across that, that there is no explanation as to why they went up. None. They don't explain it. It just goes.

And that bespeaks Judge Rakoff's argument that the numbers, in the numerical program like that, don't make any sense. And that's why we have to find something that works, but it may be that the variance is required for the court to say, We look at all this, and we see all these problems, and we look at this person, and we look at the good qualities, we look at the bad qualities, and within that range somewhere, there is an appropriate sentence, and that appropriate sentence builds in deterrence, it builds in punishment, and it builds in all the other pieces that were there.

When I started, I was talking about trying to remedially get him back into the system. There is more. Obviously deterrence and punishment are necessary and they are parts of the program. I wasn't suggesting that we just deal with it, just the civil side.

This plea agreement is much more than that. It is more than that for a good reason.

But the question here is, if we are talking about deterrence, how much is enough? What do we have to have involving Mr. Zukerman that will deter without doing damage in other areas?

He is 72 years old, almost 73. He has got a wonderful family. He has got little grandchildren. I have little grandchildren. I think about him all the time when I think about my own grandchildren, just tearing up his heart.

What's enough? What is enough in this situation? And that is what we -- I think the guidelines are calling for and questioning when we use just numbers. He is not a number. And part of the brief that we have submitted shows you what kind of person he is in the other areas, the areas that Mr. Okula can't talk about and doesn't know. We have got all the letters of friends and workmates and others. You know, there are just a lot of them. There are some there that are very compelling. And that tells you that there is a different piece of that person that is involved.

It's not just a situation where we are talking about what he did. Goodness knows, we have got to get him back in the system. We have got to get right.

But now, when we punish him and we use him for deterrence, because it is using him for deterrence, what's enough? And that's the question. And that's what the variance allows the court to do is to decide what's enough.

We listed a number of cases in there, and I would like to talk just for a minute -- and I apologize for taking so long -- but there are a number of cases that

deal with this issue of offshore Swiss banking and those kinds of things, and you saw a list of them in our brief that were there, and none of those people are getting much in terms of jail when they do get prosecuted.

The fact is that there are about 54,000 of them, at least as of the end of '15, 54,000 people had gotten into an amnesty program with the IRS and got themselves out completely criminally. Completely. This in between 2009, after the UBS case, 2009, '10, '11, '12. And they are petering out now, because most of the ones that really want to be bad, they are gone and the ones who are resolved are resolved. 54,000 people, an average of 150, $180,000 per individual of tax that was evaded. That works out to be close to a million dollars for each person.

So you have a group of people, 54,000 people, walked into the system, spent all of their time hiding money offshore, and the IRS says, we are going to give you amnesty, come on home, and the result is that they end up with people who pay no tax at all in the situation who now all they have to do is pay up the tax.

When you asked about the question of whether he should get a medal, most of those people got tax deals, civil deals. They paid part of it. They disclosed part of it, and they went on about their business, and they have never been asked a question since. This man is doing everything he can to get right with the system because he didn't go outside the country. He stayed here in the U.S. These are business crimes. He agrees and he admits it was wrong, but he stands here with those 54,000 who essentially walked through the system on their own. That tells you there is a question for deterrence. Because if that many people

can leave the system and walk away just for the civil payments, what does it tell you about criminal? Those are the worse crimes, the ones that are overseas, the ones where they really held it.

Mr. Zukerman's stuff can be found in the books and records of his company. There was nothing out there. He made the wrong statements to the IRS, but they were easily uncovered. There was no inability to follow. In fact, they had his -- one of his former accountants working with them, leading them through. So they had all that they needed.

But those offshore people, where is the deterrence there? And what do we say to him now that he didn't do something as bad as they did? I had cases that make his dwarf that were over there that walked through the system and came out scot-free. We paid tax --

THE COURT: Are you saying that he is being treated unfairly by the prosecution?

MR. BRUTON: Your Honor, I am not. What I am suggesting, the law sets it out just the way Mr. Okula has pressed. I am suggesting that we are trying to address the issue of deterrence. Because when we get to the question -- the obligations under the guidelines and under the law, we don't sentence for more than will properly resolve the aims of the system. What I am suggesting is there is something going on, there is a tectonic split that is going on that the IRS either didn't think about or thought about very well when they said, We are going to let these people go free, but the Zukermans, because they didn't leave the country, they are still bad, maybe not even as bad as the ones over there that they let free, isn't getting that done.

He is not here to say I shouldn't be punished. He is here to say, please punish me within a framework that makes sense, where if there is real deterrence, let's address the real deterrence. But he is not trying to say I should be walking away scot-free. He is here. He has pled guilty, and he has gone forward with this, and he is here because it is important to be here in this country, to be a taxpayer in this country and be right, to have his family nearby, to have his friends nearby, to have all those in his favor. That's what that is all about, your Honor.

But the end, the calculation, his question of how much is enough is critical. Is it enough for a taxpayer -- we have cited some cases in there -- that a relatively small jail sentence is still plenty for deterrence; that having Mr. Okula's eight years doesn't mean an ounce of difference for deterrent purposes.

What we have tried to argue is that already the deterrence is kicking in. He is already dealing with these tax issues. He is already going through the process of paying all of this money. He is going through all of the process of standing before the court here, and is it necessary that that number be huge?

President Obama had a number of cases at the end of his term where he commuted people -- he gave some pardons, but a lot of commutations -- and a lot of those were situations where the guidelines, for one reason or another, had been grossly too high in his judgment and they got cut off because we held people too long. It is no different with a tax person. It may appear different, but it is not any different that the guidelines were inflated just as the process of other cases, drug cases, other cases, that caused the inflation of jail times.

And so the question, and I hope, I pray, Lord, Judge, that you see this, I pray that, yes, he is here honorably trying to say, I want to do right, I will do what I need to do, whatever it is on there, he has already told me that, but in the end reducing the number so that it is not inordinate, beyond what's needed to actually be able to establish deterrence and be able to punish him in a reasonable way.

Your Honor, I think I have taken a lot of your time. I apologize. If you have questions, I am happy, but if you want any additional -- I will close.

I just would say that this case -- Mr. Okula's arguing that Mr. Zukerman didn't come forward early enough. That may largely be my fault because, frankly, I didn't understand the case early enough, and perhaps I would have understood it earlier and perhaps Mr. Okula's resolution would have been sufficient. But I didn't. And it's not on him that I asked him to wait and assert his constitutional rights as necessary. He disclosed everything, all of the documents were given. There was never anything held back, your Honor. And that wasn't on him. That's on me.

And I just ask your Honor, if you can see a way to bring him to a thing that makes sense here, that we can recognize the wrongdoing without pushing this beyond what's really necessary and what's appropriate.

Thank you.

MR. OKULA: May I respond very, very briefly, your Honor?

THE COURT: You may.

MR. OKULA: Just three quick points, your Honor.

First, with respect to the amended returns that were filed, we submitted that letter on Friday because we thought it was important that the court understand that, in addition to the criminal numbers in the indictment, that, as a result of the defendant's amended returns, there was $17 million of additional unreported income that were revealed.

Let me just explain that. I like to think that we conducted a fairly comprehensive investigation here, your Honor, but the fact is that sometimes we can't -- we have to put pens down and decide what we are going to charge and we don't get everything. We rely in some significant measure when a case is resolved that the amended returns are going to make clear the full extent of what the criminal wrongdoing was.

So the point we just tried to make is that it is extraordinary, by my experience and I think anybody I have worked with, that, in addition to the numbers that we saw earlier, that you have the emergence of $17 million of additional unreported income that had not previously been recognized. That's why we thought it was important. That number standing alone is sufficient for any other criminal tax case.

Your Honor, Mr. Bruton essentially tried to make an argument that because people who have Swiss accounts are taking part in amnesty programs that it is somehow unfair that he is prosecuted in this fashion here, because all those other people are getting away without prosecution. But Mr. Zukerman had the chance essentially to get amnesty here. If he had stepped forward when he was first audited by the civil branch of the IRS, there wouldn't have been any criminal prosecution. Or if he stepped forward during this second audit, when he was confronted by the civil branch the IRS. So he had the opportunity, just like

the people who get the amnesty did, to step forward and take part and essentially escape criminal prosecution. He chose a different path.

That's all I want to say, your Honor.

THE COURT: Mr. Zukerman, would you like to say something?

THE DEFENDANT: Yes, your Honor. Thank you, your Honor, for the opportunity to speak to you.

I recognize and profoundly regret the criminal offenses that I have committed and to which I pled guilty before you. This is painful to acknowledge, standing as I do now before the court, my family, my friends, and the world, but I accept sole responsibility for them, your Honor. This I do.

I vow within myself and before the court never to engage in such wrongdoing again. I have undertaken actions to ensure this, for example, by engaging highly qualified and honorable tax accountants for in depth advice and counseling to ensure full compliance and accurate tax reporting at all times.

In accepting responsibility for what I have done, I have vowed to do as much as I can to repair any and all damage I may have caused the government, my community, my family and friends who depend on me for employment, and my business associates.

I have done so financially by making restitution in full for amounts claimed by the government. I have also filed multiple tax returns and made tax payments for uncharged personal corporate and trust entities for the years 2007 and 2014. And I have tried to do this scrupulously, bending over backwards. Tax returns are complicated, and it is not always obvious which is right, and I have made the decisions to always favor the government in this undertaking.

Beyond financial reparations, your Honor, I have begun volunteering as a counsellor at the Fortune Society in Queens. As a result, I have had the opportunity to engage in one-on-one counseling and teaching formerly incarcerated members of the community seeking help to reintegrate into society. I pray that this has meaningfully impacted the lives of the people I have met. They are often in desperate need. It is utterly tragic to see this. Serving clients at the Fortune Society has allowed me to see what I am now facing and has helped me understand how I can turn my past misdeeds into a positive and compassionate force for helping others in need.

The reaction to my wrongdoing has already unleashed a torrent of pain, disappointment, and punishment suffered by my family and friends. It is heartbreaking for me to see and feel this. It undermines the kind of citizen, husband, father, grandfather, employer, and friend and example I have always hoped to be.

I recognize I have brought this on myself, your Honor, and now I will serve the sentence your Honor deems fit, knowing this.

Thank you.

THE COURT: Is there any reason why sentence should not be imposed at this time?

MR. OKULA: No, your Honor.

MR. BRUTON: No, your Honor.

THE COURT: As I have stated, the guidelines range applicable to this case is 70 to 87 months of imprisonment, one to three years of supervised release, and a fine of 25 to $250,000.

Under the Supreme Court's decision in *Booker* and its progeny, the guidelines range is only one factor

that I must consider in deciding the appropriate sentence. I am also required to consider the other factors set forth in 18 U.S.C. § 3553(a). These includes:

First, the nature and circumstances of the offense and the history and characteristics of the defendant;

Second, the need for the sentence imposed to:

(a) 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 education or vocational training, medical care, or other correctional treatment in the most effective manner;

Third, the kinds of sentences available;

Fourth, the guidelines range;

Fifth, any pertinent policy statement;

Sixth, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

Seventh, the need to provide restitution to any victims of the offense.

Ultimately I am required to impose a sentence sufficient, but no greater than necessary, to comply with the purposes of sentencing that I mentioned a moment ago.

I have given substantial thought and attention to the appropriate sentence in this case in light of the section 3553(a) factors and the purposes of sentencing as reflected in the statute.

Under section 3553(a), I am to take into account the history and characteristics of the offender, Mr. Zukerman, who is 72, was born in New Jersey to a middle class family. He and his brother were principally raised by their father after their mother's premature death. Mr. Zukerman developed a strong work ethic, going to Harvard College and Business School, and then rose through the ranks at Morgan Stanley before starting his own firm.

I have received many, many letters in support of Mr. Zukerman. Of course the unfortunate consequence of any sentencing proceeding is the collateral effect the sentence has on a defendant's family and friends. I credit Mr. Zukerman for his strong support of education through charitable contributions and for his devotion to family, friends, and employees. He has had a positive impact on many lives.

I am also mindful of the fact that he has accepted responsibility for his crime as reflected in his plea of guilty. Although none of these facts excuse his conduct, there is sufficient support for the reasonableness of a guidelines sentence. These are weighty offenses over the course of many years. Mr. Zukerman evaded taxes totaling millions of dollars. He was driven not by need, but by unmitigated greed. He entangled himself in a web of lies and deceit, lying to his tax preparer, and then hiring lawyers to defend his lies. He went to such extraordinary lengths in order to cheat. These frauds were deliberate and calculated. Mr. Zukerman thought himself to be above the law.

I am cognizant of the need to avoid unwarned sentence disparities. Although he has taken steps to make the government whole through restitution,

many of those payments have come from his companies and not from his own pocket. Mr. Zukerman remains an astonishingly wealthy man despite paying millions owed to the government.

As the government provided, as part of their sentencing submission, many defendants who have committed tax fraud totaling sums far less than Mr. Zukerman's fraud have received very significant terms of imprisonment. The obligation to pay taxes is one of the fundamental building blocks of our society. Our government is able to operate only because we, as individuals and a community, agree to pay our fair share. Our taxes are used to defend the homeland, to educate our children, to take care of the needy, sick, and elderly, and, indeed, to operate our system of justice. The public benefits from the services of our government, and the public is the victim of Mr. Zukerman's fraud.

I do not think that there is a need for a term of imprisonment at the higher end of the guidelines range in order to achieve the goal of specific deterrence. I have confidence that this experience throughout this case has gotten that message across loud and clear. However, I am also mindful of the fact that others just like Mr. Zukerman are watching to determine whether they, too, will try to avoid paying their fair share.

In sum, my judgment, for the reasons stated, is that a term of imprisonment within the guidelines range of 70 to 87 months is merited here, and a fine above the guidelines range is warranted. Accordingly, I do believe that a variance pursuant to 18 United States Code § 3553(a) is appropriate.

Mr. Zukerman, please rise for the imposition of sentence.

It is the judgment of this court that you are sentenced to 70 months of imprisonment, followed by one year of supervised release. You will be required to pay a fine of $10 million and a mandatory $200 special assessment, both of which shall be due immediately.

You will also be required to make restitution in the amount of $37,547,951.88. Restitution shall be due immediately.

The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

The mandatory and standard conditions of probation shall apply. They include that:

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

The defendant shall not illegally possess a controlled substance.

The defendant shall not possess a firearm or destructive device.

The defendant shall cooperate in the collection every DNA as directed by the probation officer.

However, the mandatory drug testing condition is suspended because the court determines that the defendant poses a low risk of substance abuse.

Mr. Bruton, will you make sure to review with your client the other mandatory and standard conditions of supervised release that are included in the judgment that I will sign?

MR. BRUTON: Yes, your Honor, I certainly will.

THE COURT: In addition, the following special conditions set forth in the presentence report will apply. They are:

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with any payment schedules.

The defendant shall submit his person, residence, place of business, vehicle, and any property or electronic device under his control to a search on the basis that the probation officer has reasonable suspicion that contraband or evidence of a violation of the conditions of supervised release may be found. This search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents of the premises that the premises may be subject to search pursuant to this condition.

Upon release, the defendant is to report to the nearest probation office within 72 hours. The defendant shall be supervised by the district in which he resides.

The sentence as I just described applies to both counts and the time shall run concurrently.

Does either counsel know of any legal reason why the sentence should not be imposed as stated?

MR. OKULA: No, your Honor.

MR. BRUTON: No, your Honor.

I do have a couple of matters, though, as soon as you are finished.

THE COURT: Does either party wish to be heard regarding voluntary surrender or where the term of imprisonment should be served?

MR. OKULA: We have no opposition to voluntary surrender on a date set appropriately by the court, your Honor.

MR. BRUTON: Your Honor, the defendant obviously requests self-surrender.

THE COURT: Did you have a particular time or date?

MR. BRUTON: Well, most of these are running at least 45 days. I don't know what the Bureau of Prisons needs, if it needs more than that to situate him.

We would like to ask your Honor that he be -- the court ask that you make the following recommendation to the Bureau of Prisons, that it designate the defendant to the satellite facility SCI Otisville to facilitate family visitation and to accommodate his religious needs.

In addition, the court wishes to see defendant placed as close to his daughter in New York as is possible. We would ask that your Honor would pass that on to the Bureau of Prisons in terms of -- we recognize that sometimes they don't listen, but you have at least a good voice to pass that on to them if you are able to.

THE COURT: That application is granted. I will make that recommendation.

The defendant is to surrender by May 20, 2017, at the institution designated by the Bureau of Prisons.

MR. BRUTON: Does that give us about 45 days, your Honor?

THE COURT: By May 20?

MR. BRUTON: May 20.

THE COURT: Yes.

MR. BRUTON: Sounds about right. 45, I have heard it as high as 60 days for the Bureau to deal with. Would you be willing to extend to the 60th day so that we could do everything that's necessary so that we can get him designated properly?

THE COURT: Yes. The 60th day is fine.

MR. BRUTON: Thank you.

THE COURT: The sentence as stated is imposed. That is the sentence of this court.

You have a right to appeal your conviction and sentence except to whatever extent you may have validly waived that right as part of your plea agreement. The notice of appeal must be filed within 14 days of the judgment of conviction. If you are not able to pay the costs of an appeal, you may apply for leave to appeal *in forma pauperis*. If you request, the Clerk of Court will prepare and file a notice of appeal on your behalf.

I have a request of you, Mr. Zukerman, and that is that you continue to use your knowledge and skills to assist the inmates who have had far less education and advantages than yourself.

Are there any other applications?

MR. BRUTON: Yes, your Honor. We need the dismissal of Count Three. I think the plea agreement provides that there is an open count that needs to be dismissed.

MR. OKULA: We hereby move for dismissal of Count Three, your Honor.

THE COURT: The application is granted. Count Three is dismissed.

The matter is adjourned.

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DEFENDANT: MORRIS E. ZUKERMAN
CASE NUMBER: 16 cr 194-01 (AT)
DISTRICT: Southern District of New York

STATEMENT OF REASONS
(Not for Public Disclosure)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony and Class A misdemeanor cases.

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A. ☑ **The court adopts the presentence investigation report without change.**

* * *

II. COURT FINDING ON MANDATORY MINIMUM SENTENCE *(Check all that apply)*

* * *

C. ☑ No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE: *(BEFORE DEPARTURES OR VARIANCES)*

Total Offense Level: 27

Criminal History Category: 1

Guideline Range: (*after application of §5G1.1 and §5G1.2*) 70 to 87 months

Supervised Release Range: 1 to 3 years

Fine Range: $ 25.000 to $ 250.000

☐ Fine waived or below the guideline range because of inability to pay.

* * *

IV. GUIDELINE SENTENCING DETERMINATION *(Check all that apply)*

A. ☑ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range does not exceed 24 months.

B. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range exceeds 24 months, and the specific sentence is imposed for these reasons: *(Use Section VIII if necessary)*

C. ☐ The court departs from the guideline range for one or more reasons provided in the Guidelines Manual. *(Also complete Section V)*

D. ☑ The court imposed a sentence otherwise outside the sentencing guideline system (i.e., a variance). *(Also complete Section VI)*

V. DEPARTURES PURSUANT TO THE GUIDELINES MANUAL *(If applicable)*

* * *

VI. COURT DETERMINATION FOR A VARIANCE *(If applicable)*

A. **The sentence imposed is**: *(Check only one)*

☑ above the guideline range

☐ below the guideline range

B. **Motion for a variance before the court pursuant to**: *(Check all that apply and specify reason(s) in sections C and D)*

1. **Plea Agreement**

☐ binding plea agreement for a variance accepted by the court

☐ plea agreement for a variance, which the court finds to be reasonable

☐ plea agreement that states that the government will not oppose a defense motion for a variance

2. **Motion Not Addressed in a Plea Agreement**

☐ government motion for a variance

☐ defense motion for a variance to which the government did not object

☐ defense motion for a variance to which the government objected

☐ joint motion by both parties

3. **Other**

☑ Other than a plea agreement or motion by the parties for a variance

C. **18 U.S.C. § 3553(a) and other reason(s) for a variance** *(Check all that apply)*

☑ The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)

☑ Mens Rea ☑ Extreme Conduct ☑ Dismissed/Uncharged Conduct

☐ Role in the Offense ☐ Victim Impact

☑ General Aggravating or Mitigating Factors *(Specify)* Complexity and scope of fraud

☑ The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(l)

☐ Aberrant Behavior
☐ Age
☐ Charitable Service/Good Works
☐ Community Ties
☐ Diminished Capacity
☐ Drug or Alcohol Dependence
☐ Employment Record
☐ Family Ties and Responsibilities
☐ Lack of Youthful Guidance
☐ Mental and Emotional Condition
☐ Military Service
☐ Non-Violent Offender
☐ Physical Condition
☐ Pre-sentence Rehabilitation
☐ Remorse/Lack of Remorse
☑ Other: (Specify) Ability to pay a more substantial fine

☐ Issues with Criminal History: *(Specify)* _____

☑ To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))

☑ To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))

☐ To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))

☐ To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))

☐ To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))

☐ To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))

☐ To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)

☐ To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

☐ Acceptance of Responsibility	☐ Conduct Pre-trial/ On Bond	☐ Cooperation Without Government Motion for Departure
☐ Early Plea Agreement	☐ Global Plea Agreement	
☐ Time Served *(not counted in sentence)*	☐ Waiver of Indictment	☐ Waiver of Appeal

☐ Policy Disagreement with the Guidelines *(Kimbrough v. U.S., 552 U.S. 85 (2007): (Specify)*

_____

☐ Other: *(Specify)* _____

D. ***State the basis for a variance.*** *(Use Section VIII if necessary)*

The defendant has the financial ability to pay a significant fine in addition to the restitution agreed to in the plea agreement. Much of the restitution has been paid by the defendant's corporate entities. Given the scope and complexity of the defendant's tax fraud, and to provide sufficient deterrence, an upward variance to the amount of the fine is warranted.

* * *

VII. COURT DETERMINATIONS OF RESTITUTION

A. ☐ **Restitution Not Applicable.**

B. **Total Amount of Restitution: $** 37,574,951.88

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Date of Imposition of Judgment

3/21/2017

s/ Analisa Torres

Signature of Judge

Analisa Torres, U.S.D.J.

Name and Title of Judge

Date Signed 3/21/17

18 U.S.C. § 3553

§ 3553. Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(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—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines 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); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; 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—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement 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); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

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[1] So in original. The period probably should be a semicolon.

(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.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—-

(1) IN GENERAL.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court 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. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) CHILD CRIMES AND SEXUAL OFFENSES.—

(A)[2] SENTENCING.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating 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 greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided

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2 So in original. No subpar. (B) has been enacted.

substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a 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 lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

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[3] So in original. The second comma probably should not appear.

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence

pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3572

§ 3572. Imposition of a sentence of fine and related matters

(a) FACTORS TO BE CONSIDERED.—In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director,

employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) FINE NOT TO IMPAIR ABILITY TO MAKE RESTITUTION.—If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

(c) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

(1) modified or remitted under section 3573;

(2) corrected under rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified under section 3742;

a judgment that includes such a sentence is a final judgment for all other purposes.

(d) TIME, METHOD OF PAYMENT, AND RELATED ITEMS.—(1) A person sentenced to pay a fine or other monetary penalty, including restitution, shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments. If the court provides for payment in installments, the installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule.

(2) If the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court, but

shall be the shortest time in which full payment can reasonably be made.

(3) A judgment for a fine which permits payments in installments shall include a requirement that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine. Upon receipt of such notice the court may, on its own motion or the motion of any party, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(e) ALTERNATIVE SENTENCE PRECLUDED.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be carried out if the fine is not paid.

(f) RESPONSIBILITY FOR PAYMENT OF MONETARY OBLIGATION RELATING TO ORGANIZATION.—If a sentence includes a fine, special assessment, restitution or other monetary obligation (including interest) with respect to an organization, each individual authorized to make disbursements for the organization has a duty to pay the obligation from assets of the organization. If such an obligation is imposed on a director, officer, shareholder, employee, or agent of an organization, payments may not be made, directly or indirectly, from assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) SECURITY FOR STAYED FINE.—If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court)—

(1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;

(2) require the defendant to provide a bond or other security to ensure payment of the fine; or

(3) restrain the defendant from transferring or dissipating assets.

(h) DELINQUENCY.—A fine or payment of restitution is delinquent if a payment is more than 30 days late.

(i) DEFAULT.—A fine or payment of restitution is in default if a payment is delinquent for more than 90 days. Notwithstanding any installment schedule, when a fine or payment of restitution is in default, the entire amount of the fine or restitution is due within 30 days after notification of the default, subject to the provisions of section 3613A.

18 U.S.C. § 3742

§ 3742. Review of a sentence

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of

probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are

clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under

subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) SENTENCING UPON REMAND.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) APPLICATION TO A SENTENCE BY A MAGISTRATE JUDGE.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) DEFINITIONS.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).