

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 10-00131-01-CR-W-FJG
)	
DENNY RAY HARDIN,)	
)	
Defendant.)	

SENTENCING MEMORANDUM

The United States of America, by and through its undersigned counsel, files this Sentencing Memorandum to assist the Court during the sentencing hearing of defendant Denny Ray Hardin. For the reasons explained below, and in light of the distinctive and pervasive nature of the defendant's serious violations of federal law, the United States submits that a sentence of 120 months' imprisonment followed by 5 years' supervised release complies with the purposes of the factors set out in 18 U.S.C. § 3553(a).

BACKGROUND

1. On May 5, 2010, a grand jury in the Western District of Missouri returned a 21-count indictment against defendant Denny Ray Hardin alleging eleven counts of creating fictitious obligations in violation of 18 U.S.C. § 514; four counts of mail fraud affecting a financial institution in violation of 18 U.S.C. § 1341; and six counts of mail fraud in violation of 18 U.S.C. § 1341. (Doc. 1.)

2. On September 14, 2011, after a three-day trial, this Court found the defendant guilty on all 21 counts of the indictment, and ordered the preparation of a presentence investigation report (PSR). (Doc. 179.)

3. On November 28, 2011, the United States Probation Office circulated a preliminary PSR. The preliminary PSR recommended a sentencing range of 210 to 262 months' imprisonment based on the following Sentencing Guidelines calculation:

Base offense level [U.S.S.G. § 2B1.1(a)(1)]:	7
Specific Offense Characteristics –	
Intended loss greater than \$100,000,000 [§ 2B1.1(b)(1)(N)]:	+26
Misrepresentation that defendant was acting on behalf of a government agency [§2B1.1(b)(8)(A)]:	<u>+2</u>
Total offense level:	35
Criminal History Category:	III
Guidelines range:	210 to 262 months

(PSR ¶¶ 51-60, 69, 135.) The preliminary PSR also considered, but did not recommend enhancements for the number of victims that sustained actual losses from the defendant's conduct and for obstruction of justice. (PSR ¶¶ 44-46).

4. On December 23, 2011, the United States served its objections to the PSR. The United States objected to paragraph 44 to the extent that the paragraph did not recommend an enhancement for the number of victims that suffered actual losses as a result of the defendant's fraud; that is, those persons that paid the defendant hundreds of dollars to issue worthless Bonded Promissory Notes (BPNs) on their behalves. Because the evidence establishes that more than 50 persons paid the defendant to issue BPNs, the United States recommended an additional four-level enhancement pursuant to U.S.S.G. § 2B1.1(b)(2)(B), which resulted in the following Sentencing Guidelines calculation:

Base offense level [U.S.S.G. § 2B1.1(a)(1)]:	7
Specific Offense Characteristics –	
Intended loss greater than \$100,000,000 [§ 2B1.1(b)(1)(N)]:	+26
Offense involved 50 or more victims [§2B1.1(b)(2)(B)]:	+4
Misrepresentation that defendant was acting on behalf of a government agency [§2B1.1(b)(8)(A)]:	<u>+2</u>
Total offense level:	39
Criminal History Category:	III
Guidelines range:	324 to 405 months

In addition, the United States objected to the reasons provided in paragraphs 45 and 46 of the PSR for not recommending a two-level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1.

5. On December 28, 2011, the Probation Office issued the final PSR with an Addendum rejecting each of the United States’ objections. (Doc. 190.)

6. On January 3, 2012, the defendant filed a document titled Finding of Moot: Finding of Fraud, Deceit and Misrepresentation. (Doc. 193.) That document appears to object to a number of paragraphs of the PSR. While the specific intention of that document is not clear, the United States will address those portions that appear to be objections to the PSR.

7. Attached to the defendant’s Finding of Moot document (Doc. 193) as Exhibit 1 is an affidavit from Melinda Harrington that also appears to object to a number of paragraphs of the PSR. Ms. Harrington is not a party to this action, she is not an attorney, and by order of this Court she does not represent the defendant in this case. (*See* Doc. 137.) While the Court could disregard Ms. Harrington’s affidavit, to the extent that affidavit represents objections that the defendant may adopt, the United States will address those objections as well.

8. On January 25, 2012, the Probation Office issued a Second Addendum to the PSR that addresses the objections contained in the defendant’s January 3, 2010, filing. (Doc. 195.) The

Probation Office disagreed with all but one of the defendant's objections. That objection was the defendant's objection to paragraph 70, which regarded an arrest warrant and does not affect the Sentencing Guidelines calculation in this case. In the Second Addendum, the Probation Office acknowledged that the arrest warrant described in paragraph 70 of the preliminary PSR was not for the defendant but rather was for a different, similarly named person.

UNITED STATES' OBJECTIONS TO PSR

The United States respectfully submits that in addition to the enhancements recommended in the PSR, the Court should also apply a four-level enhancement pursuant to U.S.S.G. § 2B1.1(b)(2)(B) because more than 50 persons suffered an actual loss as a result of the defendant's offense conduct. The United States also respectfully submits that while it agrees with the Probation Office that no enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 should apply under the unique facts of this case, the Probation Office cites the wrong reasons for not recommending the application of that enhancement.

A. Loss and Victim Enhancements

The United States agrees with the finding in paragraph 44 of the PSR that “[a]s a result of [the defendant's] offense, the intended loss was in excess of \$100,000,000.” Consequently, the United States further agrees with the application of a 26-level enhancement pursuant to U.S.S.G. § 2B1.1(b)(1)(N) because the offense involved and intended loss of more than \$100,000,000 as recommended in paragraph 52 of the PSR.

The United States, however, objects to the statement in paragraph 44 (“Victim Impact”) that the persons that paid the defendant to issue BPNs on their behalf were viewed “as participants in the offense rather than as victims since a reasonable person would have known that BPNs are

fraudulent.” The persons that purchased BPNs from the defendant were victims of the defendant’s scheme under the Sentencing Guidelines because those persons suffered actual, pecuniary losses from the defendant’s false and fraudulent claims that BPNs had monetary value. *See* U.S.S.G. 2B1.1 App. note 1 (“‘Victim’ means (A) any person who sustained any part of the actual loss determine under subsection (b)(1).”). Purchasers paid at least \$100 per BPN based on the defendant’s false and fraudulent promises that BPNs could be exchanged for value, when in fact the notes were worthless. As the Eight Circuit has recently held, paying for something that does not have the value the defendant claimed suffices to make the purchasers victims of the defendant’s scheme regardless of the purchasers’ personal motivation for obtaining the worthless items. *See United States v. Goodyke*, 639 F.3d 869, 873-74 (8th Cir. 2011) (rejecting defendant’s contention that the district court erred in applying 4-level victim enhancement because the victims should have known the items were fraudulent and the victims were happy to receive the fraudulent items).

In addition, the Court can find that the amount of loss caused by the defendant’s conduct should be calculated per the intended loss of the defendant’s activities and still find that the actual loss caused by the defendant’s activities supports the application of an enhancement for the number of victims. *See United States v. Quevedo*, 654 F.3d 819 (8th Cir. 2011) (holding that the court did not err in both finding a loss enhancement for intended loss to the United States due to claims on fraudulent tax forms and a victim enhancement based on actual loss to the persons whose names were on the tax forms). In this case, while the actual loss to the persons that purchased BPNs is much less than the intended loss to the creditors that received the BPNs, those purchasers still incurred actual losses, and an enhancement for the number of victims that purchased the worthless notes should apply.

Based on this analysis, the United States submits that the evidence at trial, along with additional evidence it is prepared to present at the sentencing hearing, supports a finding that more than 50 people paid the defendant for BPNs. Consequently, a four-level enhancement pursuant to U.S.S.G. § 2B1.1(b)(2)(B) should apply to the defendant's offense level in addition to the other enhancements listed in the preliminary PSR.

B. Obstruction of Justice

The United States agrees with the Probation Office that a two-level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 should not apply in this case. The activities summarized in paragraph 46 of the PSR are serious and were intended to impede the prosecution in this case. The majority of those activities, however, were done by the defendant, and others working at the defendant's direction, while the defendant was representing himself in this matter. While the defendant's filings, including filings accusing others involved in this case of treason, were intended to influence the Court, those filings were made by a *pro se* defendant as part of his own defense case. See U.S.S.G. § 3C1.1 App. n. 2 ("This provision is not intended to punish a defendant for the exercise of a constitutional right."). Although it is certainly possible for a *pro se* defendant to obstruct justice while pursuing his own defense, the United States submits that under the unique facts of this case, the defendant's filings constituted non-obstructive, albeit overzealous and misguided, advocacy.

The United States, however, does object to the reasons stated by the Probation Office in paragraph 47 of the PSR for not applying an obstruction of justice enhancement. In that paragraph, the Probation Office states that "because the defendant's conduct did not appear to significantly obstruct or impede the investigation or prosecution of the instant offense and because the defendant

clearly has mental health issues that contributed to his obstructive behavior, no enhancement was applied.” First, the Sentencing Guidelines do not require successful obstruction of justice for the enhancement to apply; an attempt to obstruct may suffice. *See* U.S.S.G. § 3C1.1 (“If the defendant willfully obstructed or impeded, *or attempted to obstruct or impede*, the administration of justice with respect to the . . . prosecution . . . of the instant offense of conviction . . . increase the offense level by 2 levels.”) (emphasis added). Second, the Court found that the defendant was competent not only to proceed to trial but also to represent himself at trial. The defendant’s mental health did not in any way impede him from presenting his desired defense and does not in any way excuse either his methods or their intended effects. The mental health of a competent defendant should not prevent a finding that the defendant obstructed justice.

Even though the United States does not believe an enhancement for obstruction of justice should apply, the defendant’s obstructive behaviors in this case – especially when viewed in light of his prior state-court conviction for tampering with a judicial proceeding, his prior state-court conviction for simulating legal process, his prior statements that the punishment for treason is death, and a recorded telephone call in which he references “killing” judges and lawyers – are aggravating circumstances the Court should take into account when determining the appropriate sentence pursuant to 18 U.S.C. § 3553(a).

C. Guidelines Calculation

The United States believes that a proper application of the Sentencing Guidelines requires the application of a four-level enhancement for the number of victims. When added to the offense level currently in the PSR, the defendant’s total offense level would be 39 and his recommended sentencing range would be 324-405 months’ imprisonment. Assuming the Court agrees that an

enhancement for obstruction of justice does not apply under these facts, the United States submits that 324-405 months' is the defendant's properly calculated Guidelines range.

DEFENDANT'S OBJECTIONS TO PSR

The United States bears the burden of proving beyond a preponderance of the evidence every factual assertion in the PSR that was objected to by the defendant. While it is difficult to determine whether the defendant intends some of his comments in his Finding of Moot document (Doc. 193) to be the objections to the PSR, to assist the Court with handling the defendant's myriad objections, the United States outlines what evidence it will present in response to what it understands to be the defendant's objections on a paragraph-by-paragraph basis as follows:

Paragraphs 1 – 7: Despite the defendant's objections, these paragraphs of the PSR state procedural facts obtained from the docket entries that are public record in this case. To the extent necessary, the United States will request that the Court simply take notice of these procedural facts.

Paragraphs 9 – 43: These paragraphs of the PSR describe the offense conduct and are based on investigative reports reviewed by the Probation Office. The United States presented evidence at trial regarding the defendant's conduct that the Court can consider at sentencing. In addition, the United States anticipates presenting a small amount of additional evidence at the sentencing hearing regarding the scope of the defendant's offense conduct. The United States will ask the Court to rely on the evidence at trial as well any additional evidence at sentencing in determining the offense conduct in this case.

Paragraphs 52 & 60: The defendant's objections to these paragraphs of the PSR are not factual objections, but rather are legal objections to the recommended Guidelines calculations in the PSR. Both of these paragraphs relate to the recommended application of a 26-level enhancement

for the amount of the defendant's intended loss. These points can be argued as a matter of law and no additional evidence is necessary.

Paragraph 65: This paragraph of the PSR relates to the defendant's 2005 state-court conviction for tampering with a judicial proceeding. The defendant does not appear to object to the fact of that conviction, but rather the appropriateness of a later probation revocation. That probation revocation does not factor into the defendant's Guidelines calculation, and, to the extent necessary, that probation revocation was covered by evidence presented at trial.

Paragraph 70: The Probation Office has stated that the statements in this paragraph are erroneous. Nonetheless, that paragraph does not effect the Guidelines calculation in this case.

Paragraphs 71 – 75: These paragraphs of the PSR detail additional arrests and criminal conduct that do not factor into the Guidelines calculation in this case. To the extent necessary, the United States will present testimony from the Probation Office regarding these paragraphs.

Paragraphs 81 & 83 – 121: These paragraphs of the PSR related to the physical and mental characteristics of the defendant and were based on reports reviewed by the Probation Office. To the extent necessary, the United States will present testimony from the Probation Office regarding these paragraphs.

In addition to the paragraphs of the PSR just discussed, the affidavit by Melinda Harrington that is attached as Exhibit 1 to the defendant's Finding of Moot document (Doc. 193) also objects to a number of additional paragraphs of the PSR. That affidavit is not an adequate legal means for making objections to the PSR, but the United States nonetheless responds to those remaining objections as follows:

Paragraph 46: This paragraph of the PSR states that on a recorded prison call, the defendant made a statement about lawyers and judges being killed or put in jail. That statement was previously the subject of a factual finding in the defendant's Detention Order (Doc. 78). In addition, Ms. Harrington does not appear to be objecting to the fact that the statement was made, but rather is arguing its significance. For those reasons, the United States submits that there is no need for additional evidence regarding statements the defendant made during that call.

Paragraph 48: This paragraph of the PSR states the legal conclusion that the defendant is not entitled to a reduction for acceptance of responsibility under the Guidelines. The defendant was convicted at trial and, therefore, is not entitled to any reduction for acceptance. Any objection to this paragraph should be overruled.

Paragraphs 63 & 64: These paragraphs of the PSR relate to criminal history of the defendant that does not result in any criminal history points. It is entirely unclear what the objection is, but it appears legal in nature, and should be overruled.

Paragraphs 77, 82, 125, & 131: To the extent the defendant's objections contradict any information in these paragraphs of the PSR, none of the information in these paragraphs of the PSR affects the Guidelines calculation in this case. Nonetheless, to the extent necessary, the United States will present testimony from the Probation Office regarding these paragraphs.

SENTENCING RECOMMENDATION

The defendant's offense conduct was serious, extensive, and persistent. The defendant did not cease his conduct after numerous warnings by law enforcement, financial institutions, other creditors, or other governmental agencies that his BPNs were fraudulent. Instead, the defendant continued to defraud purchasers with false promises of debt relief while profiting greatly from their

desperation. The evidence at trial establishes that the defendant caused greater than \$100,000,000 in intended loss and caused more than 50 people to suffer an actual loss. For that reason, a Guidelines range of 324 to 405 months' imprisonment accurately reflects the seriousness of the defendant's offense, and sentence within that range would be a reasonable sentence. The United States respectfully submits, however, that the totality of the factors this Court must consider under 18 U.S.C. § 3553(a) warrant a non-Guidelines sentence of 120 months' imprisonment to be followed by five years' of supervised release.

The § 3553(a) factors all prescribe a harsh sentence for the defendant's offenses of conviction and his relevant conduct. The defendant's crimes, however, are unique and determining a sentence that is no greater than necessary to achieve the goals of § 3553(a) requires careful attention to the history and characteristics of the defendant. Simply put, the defendant has for years acted as if he was beyond the law. He has made the nonsense claim that he is a "sovereign citizen" conveniently entitled to all of the benefits but none of the burdens or responsibilities of life in the United States. He exploited his understanding of that ideology and his ability to "talk the sovereign citizen talk" to sell worthless sheets of paper to the like minded or easily confused. During the course of his scheme, the defendant told his state probation officer that no one could make him stop, and why would he? He did not have a job, he made good money from the fraud, and he reveled in the attention he got on the Internet and elsewhere. It was a fun game for the defendant, but playing sovereign had to stop. The first steps were the charges in this case, and the next will be the punishment he deserves for these crimes.

The last steps will be rejoining society and becoming a productive, law-abiding citizen of the United States. Given the defendant's age, a Guidelines sentence would be an effective death

sentence and would not force the defendant to abandon the his childish, “sovereign citizen” game. A sentence of 120 months’ imprisonment will mean that the defendant will likely be released while still young enough to get a job and that the defendant will be required to live according to the laws of the United States. Forcing the defendant to do that, forcing the defendant to live and act like the United States’ citizen that he is, constitutes just punishment in this case, and any sentence this Court imposes should take that into consideration.

The United States’ recommendation for a non-Guidelines sentence is not made out of leniency or to accommodate the Guidelines overstating the seriousness of the defendant’s conduct. Rather, that recommendation is intended to provide an appropriate punishment for this defendant. To help ensure that the defendant does comply with the law after his release, the United States further recommends the maximum term of five years’ supervised release to follow any term of imprisonment the Court may impose. The defendant has a history of failing to comply with probation and has acted poorly during prior supervision. Five years of supervised release will require the defendant to obey the conditions of his release over the long-term or else return to prison. The choice will be his, and obligating him to make the choice to live within the law while his conduct is being monitored and supervised will demonstrate whether he has truly learned from his crimes and is prepared to move on with his life as he has repeatedly claimed.

Respectfully submitted,

Beth Phillips
United States Attorney

By */s/ Brian P. Casey*

Brian P. Casey
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on February 1, 2012, to the CM-ECF system of the United States District Court for the Western District of Missouri, and a copy of the foregoing was mailed to:

Denny Ray Hardin, *Pro Se*
Register No. 22264-045
CCA
100 Highway Terrace
Leavenworth, KS 66048

/s/ *Brian P. Casey*

Brian P. Casey
Assistant United States Attorney