

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA)
)
) CAUSE NO. 3:08–CR-00055(01)RM
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)
ROBERT C. CULP)

SENTENCING MEMORANDUM

Robert Culp operated a mortgage fraud scheme from 2003 to 2007. He purchased inexpensive homes, often in need of repair, and arranged to have them appraised and sold at inflated values to persons procured for that purpose. Mortgages on the homes were obtained; from the mortgage proceeds, Mr. Culp would pay the straw purchasers and those who had procured them. Mr. Culp’s straw purchasers were to pay closing costs, but Mr. Culp paid them instead. Wells Fargo, which issued many of the mortgages, required that there be no secondary financing for the cash the purchaser/borrower was to bring to the closings. To hide the source of the closing costs, Mr. Culp’s accomplices had the purchasers open accounts at National City Bank and arranged for certified checks to be drawn on those accounts for the purchasers to present at closing. Mr. Culp pleaded guilty to an information charging him with bank fraud. 18 U.S.C. § 1344.

Mr. Culp objected to ¶ 34 of the presentence report, which recommends a loss amount for purposes of determining the guideline range.¹ The government

¹ Mr. Culp originally objected to ¶¶ 16 and 34 of the presentence report, which recommend an enhancement for the use of sophisticated means, and to ¶¶ 16 and 37, which recommend an enhancement for Mr. Culp’s role in the offense. After Mr. Culp obtained new counsel, those

had no objection to the presentence report, although it offered another potential loss amount in its sentencing memorandum. The court adopts as its own findings ¶¶ 1-33 and 35-89 of the presentence report, specifically including ¶¶ 48-73 concerning Mr. Culp's financial condition and earning ability.

A sentencing court must first compute the guidelines sentence correctly, then decide whether the guidelines sentence is the correct sentence for that defendant. United States v. Santiago, 495 F.3d 820, 825 (7th Cir. 2007). The court employs the 2008 version of the sentencing guidelines.

The base offense level for fraud is 7. U.S.S.G. § 2B1.1(a)(1). That offense level is increased by 2 levels because the scheme used sophisticated means, U.S.S.G. § 2B1.1(b)(9)(C), by 2 more levels because Mr. Culp derived gross receipts of more than \$1 million from financial institutions, U.S.S.G. § 2B1.1(b)(14)(A), and by 3 more levels because he managed or supervised five or more criminal participants, U.S.S.G. § 3B1.1(b), producing a subtotal of 14.

A fraud defendant's offense level is increased by additional levels corresponding to the amount of the loss. Loss is the greater of the actual loss — the reasonably foreseeable pecuniary harm that resulted from the crime — and the intended loss — the pecuniary harm that was intended to result from the crime. U.S.S.G. § 2B1.1 Application Note 3(A); United States v. Riley, 493 F.3d 803, 809 (7th Cir. 2007). The loss must be proven by a preponderance of the

objections were abandoned and the new objection raised.

evidence, but the court need only make a reasonable estimate of the loss. U.S.S.G. § 2B1.1 Application Note 3(C). If there is a loss that cannot be determined reasonably, the court is to use the gain that resulted from the crime as an alternative measure of the loss. U.S.S.G. § 2B1.1 Application Note 3(B). “Loss cannot include the value of services a defendant legitimately performed for the victims of his fraud, but it does include the ‘amount that the defendant placed at risk by misappropriating money or other property’”. United States v. Swanson, 483 F.3d 509, 513 (7th Cir. 2007) (no error in not excluding amounts spent on legitimate closing costs) (*quoting* United States v. Lauer, 148 F.3d 766, 768 (7th Cir. 1998)). The loss cannot include the fair market value of property returned and services rendered by the defendant and his confederates before the offense was detected. U.S.S.G. § 2B1.1 Application Note 3(E)(i). The intended loss in a straw purchase/mortgage fraud situation is the difference between the amount of the intended loan and the amount realized upon foreclosure. United States v. Radziszewski, 474 F.3d 480, 486-487 (7th Cir. 2007); *see also* United States v. Serfling, 504 F.3d 672, 679-680 (7th Cir. 2007) (insurance fraud: loss amount was difference between loan proceeds and what lender ultimately obtained from the collateral).

The presentence report notes Mr. Culp’s statement as part of his plea agreement that he profited \$5,000 to \$7,000 on each of 199 houses; multiplication of those figures produces a loss amount figure of \$1,194,000. It now appears that there were 194 properties rather than 199, which would make that figure

\$1,164,000. The guidelines require a 16-level increase if the loss exceeded \$1 million but didn't exceed \$2.5 million. U.S.S.G. § 2B1.1(b)(1)(I).

Mr. Culp objects to that recommendation. Like the presentence report, he looks to his gain as an alternative measure of loss and calculates his net gain at zero. He explains that the warranties and guarantees that accompanied the houses he sold resulted in his having to do an unanticipated amount of repair and upgrade to the houses, increasing his expenses and overhead. Not being privy to their presentence reports, Mr. Culp speculates that co-defendants William DePalma and Linda Riffle appear to have been sentenced on the basis of their net gain.² If Mr. Culp is right that there was no loss because there was no net gain, there would be no increase in his offense level for the loss.

The government, without really objecting to the presentence report's recommendations, offers three alternative ways of calculating the loss. The direct victim, Wells Fargo, hasn't finished calculating the loss amount. First, the government notes that Mr. Culp admitted that the properties' sales prices (on which the Wells Fargo mortgage loans were based) were deliberately inflated by twenty percent to cover the kickbacks to the straw purchasers. The government then adds the properties' sales prices from 2003 to 2008 and arrives at a sum of \$12,960,539.33. Twenty percent of that figure — \$2,592,107.87 — is known loss

² The presentence reports of those defendants made no reference to net gain, though each report focused on transactions in which the defendant was involved personally. Mr. Culp, of course, was involved in all 194 properties. Neither Mr. Riffle nor Mr. DePalma objected to the loss amount, so the court did not engage in analysis as thorough as is required for Mr. Culp.

to Wells Fargo. Even that figure, the government argues, would be too low because the Indiana Attorney General's investigation indicates that the purchase prices were inflated by much more than twenty percent: for example, the true market value of a property on North Lawrence Street was \$28,000, while Mr. Culp priced the property at \$75,000. The sentencing guidelines require an 18-level enhancement for a loss between \$2.5 million and \$7 million. U.S.S.G. § 2B1.1(b)(1)(J).

As its second alternative, the government notes that as of March 6, 2009, Wells Fargo has calculated its loss on nine of the 194 properties. The losses on those nine properties totaled \$416,728.18 — an average of \$46,303.13 per property. If that loss-per-property figure is carried over the entire 194 properties, the resulting loss figure is \$8,982,807. *See* U.S.S.G. § 2B1.1 Application Note 3(C)(iii) (“The estimate of loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following . . . The approximate number of victims multiplied by the average loss to each victim.”). The sentencing guidelines require a 20-level enhancement for a loss between \$7 million and \$20 million. U.S.S.G. § 2B1.1(b)(1)(K).

As its third alternative, the government notes that without any per-property calculation, Wells Fargo is known to be out \$416,728.18 so far. If nothing else, the government argues, that figure must be preferred over Mr. Culp's zero gain/zero loss theory. The sentencing guidelines require a 6-level enhancement for a loss between \$30,000 and \$7,000. U.S.S.G. § 2B1.1(b)(1)(D).

The court is required to calculate what the guidelines recommend as the first step in the sentencing process. United States v. Robinson, 435 F.3d 699 (7th Cir. 2006). What the parties may have discussed, or even briefly agreed on, in plea negotiations doesn't affect the guidelines' operation. Perceived disparities with sentences already imposed on co-conspirators don't affect the guideline calculations. United States v. Vaughn, 433 F.3d 917, 925-926 (7th Cir. 2006).

Mr. Culp's calculation is unpersuasive for a number of reasons. First, the cases he cites in support of his theoretical framework don't endorse the use of "net gain" rather than simple "gain." United States v. Gupta, 463 F.3d 1182, 1200 (11th Cir. 2006), contains no endorsement of a "net gain" model; it simply rejected the sentencing court's theory that the loss was zero since one corporation was happy to pay inflated charges that triggered even more inflated government reimbursement. Similarly, in United States v. Austin, 54 F.3d 394, 402-403 (7th Cir. 1995), the court considered no "net gain" argument. In United States v. Wasz, 450 F.3d 720, 728 (7th Cir. 2006), the court actually rejected the argument that loss should be based on the defendants' net gain. Id. ("[T]he defendants' gain does not serve as an accurate measure of the loss where the fair market value of the stolen goods can be determined, as it can be in this case."). The court has found no case in which a "net gain" model was used to determine loss.

Second, Mr. Culp's zero-gain calculation relies on netting out his kickbacks to the straw purchasers and payments to Mr. DePalma and Ms. Riffle for finding those straw purchasers. The court agrees with the government that these are not

expenses that should lower the defendant's sentencing range. See United States v. Campbell, 42 F.3d 1199, 1205 (9th Cir. 1994) ("We do not subtract the costs of pulling off the caper.").

Third, if gain to the defendant is to be used as a stand-in for loss, it is an exceedingly unreasonable facsimile of the loss. To use Mr. Culp's figure, the court would have to conclude that because the scheme turned out to be more expensive to operate than he originally thought, the sentencing range should be lower. That rationale seems to fly in the face of U.S.S.G. § 2B1.1 and virtually all the commission commentary. If gain to the defendant is to substitute for the loss figure, the defendant's sworn statement in his plea agreement that he made a profit of \$5,000 to \$7,000 on each property provides the best measure.

Fourth, and most fundamentally, however, gain is to be used "as an alternate measure of loss only if there is a loss but it reasonably cannot be determined." U.S.S.G. § 2B1.1 Application Note 3(B). The Wells Fargo figures — as well as logic — indicate there was a loss. And the government has offered three methods of determining the loss. If any of those three is a reasonable estimate of the loss, the guidelines forbid use of the defendant's gain as an alternate measure of loss.

The government's amount-of-the-kickbacks measurement produces a reasonable estimate of intended loss. Mr. Culp inflated the purchase price (and so the amount financed) to cover these payments to his buyers, and no true appraisal would include the cost of the kickback. It is true, as the government

notes, that the intended loss likely was higher than twenty percent per property — it would be an odd scheme to defraud if it intended to enrich only straw purchasers — but the intended loss would be no lower than that. And when working from a twenty percent per property base, the loss amount would seem unlikely to be almost triple that amount, which is what would be needed to cross the \$7 million mark to the next guideline gradation.

The government's \$46,300 per property figure, based on the early returns from Wells Fargo, produces a reasonable estimate, but less reasonable estimate than that produced by the twenty percent approach. It simply cannot be said whether the nine properties thus far calculated are representative samples of the full 194. Such assurance is needed before sampling four percent of the properties and projecting the results across all.

For the inverse reason, the government's \$416,728 figure — the loss actually calculated to date — is not a reasonable estimate of the pecuniary loss. Ninety-five percent of the properties are excluded from that calculation. One can't know from that figure how great the loss is, but it is certainly greater than \$416,728.

The court finds the loss amount to be between \$2.5 million and \$7 million. Mr. Culp's offense level is increased by 18 levels, U.S.S.G. § 2B1.1(b)(1)(J), to level 32. Mr. Culp's offense level is decreased by 3 levels (with the third level coming on the government's motion at the sentencing hearing) to reflect his clear and timely

acceptance of responsibility, U.S.S.G. § 3E1.1, and further proceedings at the sentencing hearing produced a final adjusted offense level of 26.

This is Mr. Culp's first criminal sentence, so he is assigned to criminal history category I, the guidelines recommend a sentencing range of 63 to 78 months' imprisonment. U.S.S.G. § 5A.

The court is to determine the sentence pursuant to 18 U.S.C. § 3553, United States v. Booker, 543 U.S. 220 (2005). Accordingly, the court turns to the statutory factors, seeking a reasonable sentence: one sufficient, but not greater than necessary, to satisfy the purposes of the sentencing statute. 18 U.S.C. § 3553(a).

The court is to use the guideline range as the starting point and the initial benchmark, but may not presume that the recommended range is reasonable. Gall v. United States, 128 S.Ct. 586, 596-597 (2007). As just calculated, the sentencing guidelines, which ordinarily pose the best hope, on a national basis, for avoiding unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, 18 U.S.C. § 3553(a)(6); United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006), recommend a sentencing range of 63 to 78 months. The government recommends a sentence of 78 months. The defense recommends a sentence below the advisory range. The statute of conviction allows a sentence as long as 30 years. 18 U.S.C. § 1344.

There is little mitigation to be found in the crime's nature and circumstances. Mr. Culp reaped more than a million dollars for himself — and

more for his confederates — in fraudulent transactions involving nearly 200 properties. A variety of lending institutions were victimized. Even some of the criminal participants — the purchasers — were victimized when they were left holding mortgaged properties they could neither afford nor sell. The scheme went on for five years (including more than \$4 million in property purchases after the FBI started its investigation) and involved at least five people — Mr. Culp, Mr. DePalma, Ms. Riffle, two people who falsified loan applications, and one person who provided inflated appraisals. Mr. Culp reaped substantial personal financial gain used to buy houses and boats. In mitigation, Mr. Culp spared the government the time and expense of trial and even indictment.

Mr. Culp is 44 years old. Until he resigned in the face of these charges, he had served as a police officer for more than seventeen years. From all reports, he was an outstanding officer who served the public and his department with courage, valor, and integrity. He is a college graduate. Mr. Culp has no history of substance abuse. He is married (though divorcing) with three children aged three to eleven. His physical and mental health are reasonably good, though imperfect. Mr. Culp seems to present a considerably lower than average risk of future criminal activity.

We are still learning the impact of mortgage fraud and its impact on communities. At this point in history, it is difficult to identify a crime that has had a more severe national economic impact than mortgage fraud. Given the duration and financial success of Mr. Culp's scheme, though, a significant sentence seems

needed to reflect the offense's seriousness, to provide just punishment for the offense, and to afford adequate deterrence to criminal conduct by others. All other things being equal, reasonable uniformity in sentencing tends to promote respect for the law. But while the guidelines accurately reflect these factors, they are high because they don't reflect the extent of Mr. Culp's service to his community — not just his having been a public servant, but as a supervisor of the SWAT team, dealing with the most violent of situations in which police officers find themselves and many of his community's most dangerous people.

Review of the factors specifically set forth in 18 U.S.C. § 3553(a) persuade the court that in light of the nature and circumstances of the crime, the need for the sentence to reflect the seriousness of the offense and to provide just punishment and to promote respect for the law, the need to avoid unwarranted sentencing disparities, and the range recommended by the guidelines, offset somewhat by Mr. Culp's history and characteristics and low risk of future criminal activity, a sentence below the advisory range, or 54 months (four and a half years), is reasonable.

Neither party objected to the restitution amount proposed by the presentence report. Restitution in the amount of \$1,194,000 is mandatory. A three-year supervised release term is appropriate in light of the amount of restitution due. Mr. Culp cannot pay the fines required by the guidelines even if afforded the most generous of installment payment schedules, so the court imposes no fine. A special assessment of \$100.00 is mandatory. 18 U.S.C. § 3013.

Accordingly, it is the judgment of the court that the defendant, Robert C. Culp, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 54 months.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which he is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with the fifteen standard conditions of supervised release that this court has adopted, and shall comply with the following additional conditions:

(1) the defendant shall not possess a firearm or destructive device; and

(2) the defendant shall pay the financial penalty imposed by this judgment, and as long as any part of the restitution remains unpaid, the defendant shall provide the probation officer with access to any requested financial information and, unless the defendant and the probation officer have agreed on a reasonable installment payment schedule and the defendant is in compliance with that payment schedule, shall not incur any new credit charges or open additional lines of credit without the probation officer's approval.

It is further ordered that the defendant shall make restitution payments to the United States District Court clerk, 102 Robert A. Grant Federal Building, 204 S. Main St., South Bend, Indiana 46601, in the sum of \$1,194,000, to be disbursed to the victims yet to be determined. The government is directed to submit a list of victims and amounts within 90 days of this date. Restitution shall be due in full immediately, and shall be paid at a minimum rate of \$200 per month commencing thirty days after placement on supervision. Any payment that is not payment in full shall be divided proportionately among the persons named. The defendant shall notify the United States Attorney for this district within 30 days of any change in mailing or residence address that occurs while any portion of the restitution remains unpaid. If at any time this defendant's restitution payments combine with restitution made on these claims by any other person to amount to an aggregate sum of \$1,194,000 together with interest required by law, this defendant shall have no further obligation to make restitution under this order.

Because the defendant is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the sentencing guidelines, the court imposes no fine.

The defendant shall pay to the United States a special assessment of \$100.00, which shall be due immediately.

Because this offense is not drug related and this defendant has no history of substance abuse, the court declines to order the drug testing ordinarily required as part of a federal criminal sentence.

Without objection from the government, the court finds by clear and convincing evidence that the defendant poses no risk of flight or danger to any other person, and accordingly grants him the privilege of voluntary surrender. The defendant shall report to the facility designated by the Bureau of Prisons, as advised by the United States Marshal, not later than 9:00 a.m. on April 24, 2009.

ENTERED: March 13, 2009

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

cc: R. Culp
M. Kus, N. Otis
D. Schmid
USM
USPO