

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

UNITED STATES OF AMERICA

vs.

CASE NUMBER: XXX

WESLEY MORRISON,

Defendant.

_____ /

SENTENCING MEMORANDUM

Defendant, Wesley Morrison, played a limited role in the offense. While he stole and provided the majority of the checks used to commit the fraud, he had no role in passing the checks and did not receive any of the \$42,000 or so received by the others who participated in the scheme. He, therefore, qualifies for either a minor role reduction pursuant to USSG § 3 B1.2(b) or a below-guidelines sentence. As it stands, the calculated guideline range of 12 to 18 months is “greater than necessary to achieve the goals of sentencing established by Congress.” 18 U.S.C. § 3553(a).

Mr. Morrison, while he was working as an employee of the post office, stole some of the checks used by Charles Clarkson to commit the fraud. The scheme is outlined in detail in the Presentence Report. PSR ¶¶ 6 - 19. The essence of it is that a number of individuals, but primarily Charles Clarkson, forged the stolen checks, deposited the checks in the bank accounts of usually knowing and willing individuals, and then withdrew cash. It appears that a total of 13 checks were involved. The scheme resulted in a loss of almost \$47,000. PSR ¶ 41. Mr. Morrison’ role, though, was limited to the theft of some of the checks. He did not receive any of the proceeds from the scheme.

The base level for Mr. Morrison' offense is 7. PSR ¶ 40. He received a 6-level increase based on the loss amount, PSR ¶ 41, and a 2-level increase because of the number of victims. PSR ¶ 42. With a 2-level reduction for acceptance of responsibility, his total offense level is 13. PSR ¶¶ 47, 48.

In the undersigned's August 27, 2010, letter to United States Probation Officer, Donna Garrison, there is no objection to the guideline calculations. However, after further consideration, the defense contends that Mr. Morrison is eligible for a 2-level reduction pursuant to USSG § 3B1.2(b) for being a "minor participant."

In determining Mr. Morrison' role in the offense, the Court is obligated to "measure [his] role against the relevant conduct attributed to [him] in calculating [his] base offense level." United States v. DeVaron, 175 F. 3d 930, 943-944 (11th Cir. 1999). To succeed in this claim, Mr. Morrison has to establish that he "played a relatively minor role in the conduct for which [he has] already been held accountable." *Id.*, at 944. The guideline definition of minor role also "clearly contemplates some assessment of relative culpability." *Id.*

Despite Mr. Morrison' limited role in the offense, the sentencing scheme required by the guideline treats him as if he had participated in forging the checks, opened the facilitating bank accounts, and profited from the scheme. The applicable guideline section, § 2 B1.1, provides no discount for the fact that Mr. Morrison did none of these things.

In DeVaron, there was some question about the role of the others involved in the conspiracy. In this case, though, the Presentence Report documents at length the role played by Mr. Clarkson and the other participants. Those roles far exceed Mr. Morrison' participation. The facts of the case, thus, dictate a 2-level reduction in the offense level because of Mr. Morrison' minor role.

The same result can also be reached through a departure or a variance. Mr. Morrison's sentence is largely determined by the 6-increase based on the loss amount. As has been recognized, though, "with their almost singular focus on loss amount, the guidelines sometimes are insufficiently sensitive to personal culpability." United States v. Milne, 384 F. Supp. 2d 1309 (E.D. Wisc. 2005). *See also*, United States v. Stuart, 22 F. 3d 76, 83 (3rd Cir. 1994) ("in a few circumstances, strict application of the loss tables can overstate the seriousness the of the offense"). The Constitution Project also recognized as much.¹ The Project's Sentencing Initiative report concludes that the Sentencing Guidelines "place excessive emphasis on quantifiable factors such as monetary loss and drug quantity, and not enough emphasis on other considerations such as the defendant's role in the criminal conduct."² The end result is that the Guidelines produce sentences that, while uniform by the standards of the Guidelines, sometimes sentence those minimally involved much like those who are central figures in the crime. Given Mr. Morrison's role in this offense, that is exactly the circumstance here.

The commentary to § 2B1.1 notes that "there may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense" and that in "such cases, a downward departure may be warranted." USSG § 2B1.1, comment. (n. 19(C)). *See also*, United States v. Costello, 16 F. Supp. 2d 36, 40 (D. Mass. 1998) ("I conclude that in this

¹ It is a group which describes itself as "a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues through a unique combination of scholarship and activism," www.constitutionproject.org/index.cfm. Its Sentencing Initiative Project included such preeminent jurists as now United States Supreme Court Justice Samuel Alito and former United States District Court Judge Paul Cassel, author of the decision in United States v. Wilson, 350 F.Supp.2d 910 (D. Utah 2005).

² <http://www.constitutionproject.org/article.cfm?messageID=101>.

situation a downward departure is warranted because the \$20 million loss figure substantially overstates the defendant's culpability.") With the greater discretion afforded courts by the decision in United States v. Booker, 543 U.S. 22205, courts have also granted variances in cases where the loss amount overstated the defendant's responsibility. *See, e.g., United States v. Ranum*, 353 F. Supp. 2d 984, 990 (E.D. Wis. 2005) (where the court "found the guideline range, which depended so heavily on the loss amount, greater than necessary"); United States v. Samaras, 390 F. Supp.2d 805, 809 (E.D. Wis. 2005) (where the court imposed a below-guideline sentence noting that "defendant's guideline range was driven by the high loss amount, yet he played no role in setting that amount and he profited no more than in his legitimate business dealings"); United States v. Watt, 2010 WL 1676439, *16 (D. Mass. April 27, 2010) (where the court imposed a below-guidelines sentence recognizing that the guidelines scheme, which effectively makes loss "a proxy for evaluating culpability," was not always appropriate).

Mr. Morrison is guilty of the offense of which he was convicted because he aided Mr. Clarkson in committing that crime. Nonetheless, he did so without expecting any financial benefit, and he received none. Furthermore, while there is no dispute that his actions were central to the commission of the crime, his role in providing the checks, when compared with the role of Mr. Clarkson and others, is a minor one. He, therefore, respectfully requests this Court to reduce his offense level by two-levels for being a minor participant or, alternatively, to impose a below-guideline sentence as a departure or a variance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery to the Office of Eric Mountin, Assistant United States Attorney, 111 N. Adams Street, Tallahassee, FL 32301, this September 13, 2010.

Respectfully submitted,

s/ Randolph P. Murrell _____

Randolph P. Murrell
Federal Public Defender
Florida Bar No. 220256
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
(850) 942-8818

Fictional names have been substituted for the real names of the participants because of privacy concerns.