

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

**CASE NO. XXXX
UNDER SEAL**

FRANK BAKER,

Defendant.

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SENTENCING MEMORANDUM

Frank Baker is a sixty-seven year old retired business executive. He and his wife raised three successful children who have been helped and guided by him. He is a Vietnam veteran who has health problems, some of which resulted from his service. There is every reason to believe he will not violate the law in the future. He committed the offense of selling a firearm to an out-of-state resident under circumstances that would not have caused any real harm. Given all of this, a sentence of probation would be “sufficient, but not greater than necessary, to comply” with the goals of sentencing established by Congress. 18 U.S.C. § 3553(a).

Mr. Baker’s History and Characteristics

As testified to at trial by Mr. Baker and as set out in the Presentence Report, Mr. Baker spent fourteen years as the president of Alpha Omega, a Orlando business that manufactures computer components. As his daughter, Melissa Baker writes, Mr. Baker worked hard and developed a remarkably successful company:

The man I knew worked eighty and ninety hour weeks to provide for his family, to provide the best food and shelter, and give his children opportunities he never had. He built a company in Orlando that provided well-paying jobs

to hundreds of people, then later, thousands of people, thousands of families. Under his direction, the company became a world leader in manufacturing component parts for computers.

Ex. 1, p.2.¹ Over the years, he worked, as well, for the Digital Corporation, the Independent Technology Company, and Gateway Computers. PSR ¶ 56.

The three children he raised have all become successful adults. His daughter, Lisa, recently completed eight years of service in the Air Force and is a physician. Ex. 1, p. 2. His son, Frank, Jr., is a law school graduate and a business executive for a financial consulting company. Ex. 2, p. 1.² His son, Herbert, is a counselor at a community college in Virginia. PSR ¶ 44. In their letters, Lisa and Frank, Jr. both, describe their father's role in their success. Ex. 1, p. 2; Ex. 2, p.2. In a moving example of Mr. Baker's devotion to his children, Frank, Jr. has described his surrender to an alcohol and prescription drug addiction and his "father's guidance and help" in overcoming the addiction. Ex. 2. pp. 2-4. He believes his father's stubborn support saved his life. *Id.* at 3.

Mr. Baker served a year in Vietnam, arriving in mid-1967. He did clerical work at a large Army base, Long Binh, and drove messages to companies in Saigon, Bien Hoa, and Dian, which were within roughly a 30 mile radius of Long Binh. He worked, as well, as a driver for the battalion commander. Although not involved in combat, Mr. Baker, as a driver, had to contend with sniper fire, mines, and unexpected attacks from civilians. While serving at Long Binh, Mr. Baker came under fire from rocket and mortar attacks. He was present at Long Binh during the Viet Cong's TET offensive in 1968. Mr. Baker describes the aftermath as one where there were so many dead Viet

¹Exhibit 1 is the November 4, 2011, from Mr. Baker's daughter, Melissa Baker. It is attached.

²Exhibit 2 is the November 7, 2011, letter from Mr. Baker's son, Frank Baker, Jr. It is attached.

Cong that he and other soldiers had to dig long ditches to bury them. He was exposed to Agent Orange as he drove through rural areas that had been dusted with the defoliate.

Like many soldiers, Mr. Baker did not leave Vietnam unscathed. The presentence report notes that Mr. Baker underwent surgery in 2009 for prostate cancer. PSR ¶ 46. As set out in the Veteran Administration's November 6, 2009, "Rating Decision," the Veteran's Administration determined that Mr. Baker suffers a 20 percent disability rating due to complications from the surgery. Ex. 3, p. 1.³ As explained in the report, the Veteran's Administration, under the Agent Orange Act of 1991 (38 U.S.C. § 1116), determined that "a positive association" exists between exposure to the chemical defoliant known as Agent Orange and a variety of health problems, including prostate cancer. *Id.* at p. 2. It is because of that "positive association" that the Veteran's Administration determined that Mr. Baker's cancer was related to his service in Vietnam. Paragraphs 48 through 51 of the presentence report details the post-traumatic stress disorder of which Mr. Baker suffers. While Mr. Baker believes the psychological report from which that information was drawn contains inaccuracies and overstates his difficulties, his post-traumatic stress is part of the price Mr. Baker has paid and continues to pay more than 40 years after his Vietnam service.

Mr. Baker suffers from health difficulties that are often seen in individuals his age. Apart from his prostate cancer, which is considered to be in remission, Mr. Baker had hip replacement surgery in February of this year. PSR ¶ 46. He believes he will also need to have his other hip replaced in the near future. He suffers, too, from chronic obstructive pulmonary disease and coronary heart disease. PSR ¶ 47. Both his father and his older brother died from heart disease. PSR ¶¶ 41, 42.

³The report is attached.

The Nature and Circumstances of the Offense

The jury found that Mr. Baker violated the prohibition against selling a firearm to an out-of-state resident when he sold the firearm to Agent Lewis. That prohibition exists for the purpose of ensuring that states can enforce their own firearm laws and to prevent a resident of one state from circumventing that state's firearm laws by purchasing a firearm in another state. *See* S. Rep. No. 90-1097, at 80-81 (1968) (“existing Federal controls . . . do not adequately enable the States to control the firearms traffic within their own borders”); H.R. Rep. No. 90-1577, at 9 (1968) (explaining that Congress enacted 18 U.S.C. § 922(b)(3), the related statute which prohibits licensed firearm dealers from selling firearms to out-of-state residents, “to prevent the avoidance of State and local laws controlling firearms by the simple expediency of crossing a State line to purchase one”); Defendant Holder's Opposition to Plaintiff's Motion for Preliminary Injunction in Lane v. Holder, Case No. 1:11cv503, at 22-23 (E.D. Va. July 8, 2011) (explaining Congress' purpose in enacting 18 U.S.C. § 922(b)(3)).⁴

There does exist a complicated array of state laws pertaining to firearms. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Survey of State Procedures Related to Firearm Sales, 2005*⁵; Bureau of Alcohol, Tobacco, Firearms and Explosives, *State Laws and Published Ordinances - Firearms (2009-2010, 30th Edition)*.⁶ Thirty three states, including Florida and Georgia, however, allow private citizens to sell firearms at gun shows without background checks or without requiring

⁴The brief is available through PACER and is document number 31.

⁵*Survey of State Procedures Related to Firearm Sales, 2005* is available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ssprfs05.pdf>

⁶ *State Laws and Published Ordinances - Firearms (2009-2010, 30th Edition)* may be downloaded at: <http://www.atf.gov/publications/firearms/state-laws/30th-edition/index.html>

any sort of permit on the part of the seller or the purchaser. *Survey of State Procedures*, at 9, Table 6 at 77. No state prohibits the possession of either the firearm that was the subject of Count Two of the indictment, the Kimber .45 caliber pistol, or the two firearms Mr. Baker sold the agents on December 12, 2009. *State Laws and Published Ordinances*.

Had he been about 25 miles north across the state line, Agent Lewis, who represented himself as a Georgia resident, could have purchased the very same firearms at a gun show in Georgia, and the transaction would have been legal in every way. Had that occurred there would have been no greater scrutiny of Agent Lewis' background than occurred when Mr. Baker conducted the transaction. The agent's subsequent possession of the firearms would have been lawful.

In the southeastern United States, North Carolina is the only state that requires background checks or permits when a private citizen sells a firearm to another citizen of that state. *Survey of State Procedures*, Table Six. Admittedly, Mr. Baker's conduct in selling the firearm to an out-of-state resident carried with it the *potential* of allowing a resident from a state such as North Carolina to evade that state's requirements pertaining to the sale of firearms. It is, though, only this theoretical or unrealized harm that is at issue.

Then, too, the violation was one of procedure, failing to follow the requirements in selling a firearm, not that of providing a firearm to someone who could not have possessed it. Agent Lewis convincingly presented himself as a former United States Marine and a veteran of the Iraq war who was knowledgeable about firearms and a hunter. The content of his conversation and his appearance, as observed by the Court, gave Mr. Baker every reason to believe his representation about being a former Marine. The photo Agent Lewis showed Mr. Baker of the hog he had shot lent credibility to the representation that he was a hunter. There was, then, no reason for Mr. Baker to

believe that Agent Lewis could not possess a firearm or would have failed any kind of a background check.

18 U.S.C. § 3553(a)

As the Court is aware, Congress' "overarching instruction [is] to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." Kimbrough v. United States, 552 U.S. 85, 111 (2007). Mr. Baker's success in raising his children, his accomplishments as a businessman, and his service to his country as a young soldier are all part of his "history and characteristics" that are part of the § 3553(a) sentencing equation. They inform the Court, too, about Mr. Baker's character and the likelihood of further criminal conduct.

Courts have frequently given weight to the individual's military service and relied upon it to impose a below-guidelines sentence. *See, e.g.,* Porter v. McCollum, 130 S. Ct. 447, 445 (2009) ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did"); Kimbrough v. United States, 552 U.S. at 110 ("The [district] court noted that Kimbrough had no prior felony convictions, that he had served in combat during Operation Desert Storm and received an honorable discharge from the Marine Corps . . ."); United States v. Chase, 560 F.3d 828, 830 (8th Cir. 2009) ("factors such as a defendant's age, medical condition, prior military service, family obligations . . . can form the bases for a variance even though they would not justify a departure"); United States v. Howe, 543 F.3d 128, 139 (3d Cir. 2008) (Another justification [for the variance] was Howe's twenty years of military service followed by honorable discharge"). Mr. Baker service in Vietnam presents a

particularly compelling circumstance, not only because of what he did for his country and the risks he endured, but also because of the long-lasting adverse health effects he has suffered.

Courts, too, have considered the individuals's health in determining whether to impose a below-guidelines sentence. *See, e.g., United States v. Smith*, 590 F.3d 570, 575 (8th Cir. 2009) (noting that the district court imposed a below-guidelines sentence, in part, because of the defendant's "poor health"); *United States v. Kempf*, 317 Fed.Appx. 342, 343 (4th Cir. 2009) (unpub.) (noting that district court imposed a below-guidelines sentence, in part, because of the defendant's "'significant' health issues"); *United States v. Sobol*, 2008 WL 4427908, *1 (E.D.N.Y. Sept. 12, 2008) (unpub.) (where, in imposing a below-guidelines sentence, the court did so, in part, because of the defendant suffered from "several significant health issues"). In Mr. Baker's case, there is also the practical consideration that his health is likely to worsen over time, posing difficulties for him and, for that matter, the Bureau of Prisons. Similar considerations convinced one court to impose a departure sentence:

It seems imminently logical that Willis is at an age where these medical conditions will invariably get worse. It seems logical that being away from his support structure, both family and doctors, will invariably exacerbate his conditions. It seems logical that were he to go to jail for three years between the ages of 69 and 71 that he will emerge in substantially worse shape than he is now . . . it seems logical that while the BOP can care for him, the costs of that care are bound to escalate.

United States v. Willis, 322 F.Supp. 2d 76, 84-85 (D.Mass. 2004).

Mr. Baker's reduced risk of recidivism, be it recognized on the basis of the life he has led or his age, figures directly in the requirement of 18 U.S.C. § 3553(a)(2)(C) that courts impose sentences that "will protect the public from the further crimes of the defendant." Studies show that those in Mr. Baker's circumstances, over fifty years of age and in Criminal History Category I, have

an especially low rate of recidivism. See United States Sentencing Commission, *Measuring Recidivism: Criminal History Computation of the Federal Sentencing Guidelines* (2004), Exhibit 9.⁷ Of all the different age and criminal history categories, the rate for those in Mr. Baker's category is the lowest listed, 6.2%. That compares to an overall recidivism rate of, for example, 31.9% for those from ages twenty-one to twenty-five. *Id.* Those like Mr. Baker who have no arrests have an even lower rate of recidivism than those individuals in Criminal History Category I who have an arrest history and are "the most empirically identifiable group of federal offenders who are the least likely to re-offend." United States Sentencing Commission, *Recidivism and the "First Offender"* (May 2004) 17.⁸ Mr. Baker's low risk of recidivism means that there is no need to impose a prison sentence to protect the public from future crimes.

Courts have recognized the significance of a reduced risk of recidivism and relied upon it in imposing below-guideline sentences. See, e.g., Pepper v. United States, 131 S. Ct. 1229, 1234 (2011), (where the Court describes "the likelihood that [the defendant] will engage in future criminal conduct," as "a central factor that sentencing courts must consider."); United States v. Carter, 538 F.3d 784, 792 (7th Cir. 2008) (where the court concluded the district court did not abuse its discretion when it determined that the defendant, "based on her age and the totality of circumstances . . . was unlikely to commit further crimes in the future" and upheld a "sentence significantly below an advisory guidelines sentence"); United States v. Panyard, 2009 WL 1099257, *1 (S.D.Mich.

⁷The report is available at:
http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf

⁸The report is available at:
http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf

April 23, 2009) (unpub.) (where the court imposed a 15-month sentence in lieu of a sentence in the guideline range of 27-33 months “in light of Defendant’s history, personal characteristics, and low risk of recidivism . . .”); United States v. Nellum, 2005 WL 300073, *3 (N.D.Ind. Feb. 3, 2005) (unpub.) (where court imposed a sentence of 108 months in lieu of a sentence in the guideline range of 168-210 months because, in part, the defendant, at 57 years of age, had a low likelihood of recidivism).

Courts have also found it appropriate to impose below-guideline sentences where the guideline calculations overstated the seriousness of the offense. *See, e.g., United States v. Soto*, 2011 U.S. Dist. LEXIS 64052, *9 (E.D.Wash. June 14, 2011) (unpub.) (where court concluded that a four-level enhancement for possessing a firearm in connection with a burglary and a two-level enhancement for possession of the same firearm “overstate[d] the seriousness of the Defendant’s offense”); United States v. Lopez-Arellano, 2010 U.S. Dist. LEXIS 120373, *8 (E.D.Mich. Oct. 27, 2010) (unpub.) (where court concluded that the guideline calculations in an unlawful reentry case “overstate[d] the seriousness of the offense and the need to protect the public”); United States v. Desmond, 2008 WL 686779, *2 (N.D. Ill. March 11, 2008) (unpub.) (where, in a case involving perjury and fraud, the court concluded that “the offense level determined under the Guidelines substantially overstates the seriousness of the offense”); United States v. Keller, 2005 WL 6192897, *8 (N.D. Tex. Oct. 17, 2005) (unpub.) (where the court concluded that, because of the loss calculations “the offense level determined by the Guidelines substantially overstates the seriousness of the offense”).

Section 3553(a)(2)(A) directs sentencing courts to impose a sentence that “reflects the seriousness of the offense, to promote respect for the law, and to provide just punishment for the

offense.” Sentences that are unnecessarily long or harsh fail this test just as surely as sentences that are too lenient to too short. *See Gall v. United States*, 552 U.S. 38, 52 (2007) (where the Court found the facts of the case “provide[d] support for the District Judges’ conclusion that . . . ‘a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing’”). Despite the recommendation of the guidelines for a prison sentence, a sentence of probation would accurately reflect the seriousness of Mr. Baker’s offense, promote respect for the law, and provide just punishment.

Among the other factors listed in § 3553(a)(2), the one most often argued by the Government is the need to avoid unwarranted sentencing disparities. The concern, though, is with those disparities that are *unwarranted*. *See, e.g., United States v. Owens*, 464 F.3d 1252, 1256 (11th Cir. 2006); *United States v. Duncan*, 479 F.3d 924, 929 (7th Cir. 2007) (“18 U.S.C. § 3553(a)(6) does not instruct district courts to avoid all differences in sentencing, only unwarranted disparities.”). To impose the same sort of sentence on Mr. Baker as someone who was younger, in better health, had not demonstrated his good character in working hard to be a successful businessman and devoting himself to his family, had not served in Vietnam, had a greater risk of recidivism, and had committed the offense in a more egregious way, is a false equality that ignores the facts.

Conclusion

Even when the Sentencing Guidelines were mandatory, sentencing courts were to treat those before them as individuals. *See Koon v. United States*, 518 U.S. 81, 113 (1996) (“It has been

uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”). The change in the law brought about by the decision in Booker v. United States, 543 U.S. 220 (2005), and the command of 18 U.S.C. § 3553(a) to impose a sentence that is “sufficient, but not greater than necessary,” have given sentencing courts latitude to impose a sentence that fits the crime and the person before the court. Mr. Baker respectfully requests this Court to do just that and to impose a sentence of probation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jason Coody, Assistant United States Attorney, by hand delivery, to 111 N. Adams Street, Tallahassee, FL 32301, this 10th day of November, 2011.

Respectfully Submitted,

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Out of concern for the privacy of the defendant and of others, the defendant's name and the names of others have been changed as have some of the details that would tend to identify the defendant.