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No. 05-4997

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

WILLIAM G. TOMKO,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL EN BANC BRIEF FOR THE PLAINTIFF-APPELLANT

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IN THE UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA,

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WILLIAM G. TOMKO,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF
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SUPPLEMENTAL EN BANC BRIEF FOR THE PLAINTIFF-APPELLANT

Defendant, an affluent owner of a large construction company, coerced more than a dozen subcontractors into submitting false invoices to make it appear that their work had been done for his construction company, rather than to construct defendant's lavish personal residence. Over the course of four years, defendant's company claimed the payments to the subcontractors as business expenses, which tax benefits flowed to defendant's personal returns and fraudulently reduced his personal taxes. Defendant was sentenced to probation with home confinement in the very same 8,000-square-foot mansion he built through the tax fraud for which he was convicted, and ordered to pay a $250,000 fine that he paid without difficulty. Defendant's "gilded cage" confinement is not only unreasonable, it brings disrepute to the courts of this Circuit.

ARGUMENT

DEFENDANT'S SENTENCE, PROBATION WITH HOME DETENTION IN THE VERY SAME 8,000-SQUARE-FOOT MANSION HE BUILT THROUGH THE TAX FRAUD FOR WHICH HE WAS CONVICTED, IS UNREASONABLE

I. *Standard of Review*

This Court's role in reviewing a sentence is two-fold. First, this court must "ensure that the district court committed no significant procedural error in arriving at its decision," such as, among other things, "failing to consider the § 3553(a) factors." *United States v. Wise*, 515 F.3d 207, 217 (3d Cir. 2008) (citing *Gall v. United States*, 128 S. Ct. 586, 597 (2007)). If the Court "determine[s] that the district court has committed no significant procedural error, [the court will] then review the substantive reasonableness of the sentence under the abuse-of-discretion standard." *Id*. at 218 (citing *Gall,* 128 S. Ct. at 596).

II. *The sentence is procedurally unreasonable because the district court failed to consider general deterrence*

"To determine if the [district] court acted reasonably in imposing the resulting sentence, [this Court] must first be satisfied the court exercised its discretion by considering the relevant factors." *United States v. Sevilla*, No. 07-1105, 2008 WL 4069453 *3-*4 (3d Cir. 2008), quoting *United States v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2006). "The record must demonstrate the trial court gave meaningful consideration to the § 3553(a) factors. The court need not discuss every argument made by a litigant if an argument is clearly without merit. Nor must a court discuss and make findings as to each of the § 3553(a) factors if the

record makes clear the court took the factors into account in sentencing. On the other hand, a rote statement of the § 3553(a) factors should not suffice if at sentencing either the defendant or the prosecution properly raises 'a ground of recognized legal merit (provided it has a factual basis)' and the court fails to address it. . . ." *Id.*

A. *General deterrence is a primary §3553(a) factor in tax prosecutions*

Title 18, Section 3553(a), lists factors a district court "shall" consider in sentencing a defendant. Among the factors a sentencing court "shall" consider is general deterrence. *See* 18 U.S.C. 3553(a)(2)(B) ("to afford adequate deterrence to criminal conduct"). Consistent with the statutory mandate that a sentence promote general deterrence, the Sentencing Commission articulated why, despite the general appropriateness of imposing a non-prison sentence for non-violent first offenders, *see* 28 U.S.C. 994(j), at least some short term of imprisonment was appropriate for first time offenders convicted of economic crimes such as tax evasion:

> . . . Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.' If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.
>
> . . . The Commission's view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes,

> particularly when compared with the status quo where probation, not prison, is the norm.

U.S.S.G. Ch. 1, Pt. A, § 4(d), intro. comment. (Nov. 1997 ed.)

General deterrence is important for many economic crimes. But general deterrence is a "primary" consideration in tax prosecutions, "[b]ecause of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations." U.S.S.G. Manual, ch.2, pt.T, intro. comment. (1997). 1/ In 2007, for example, there were 1,081 criminal tax convictions compared to over 136 million federal income tax returns filed. 2/ And although the current audit rate of 1-2% could arguably be increased, the United States cannot audit its way out of the tax gap. "[F]or the 2001 tax year, [for example,] the overall gross tax gap [from legal source income] was estimated to be approximately $345 billion, corresponding to a noncompliance rate of 16.3 percent. After accounting for enforcement efforts and late payments, the amount was reduced to $290 billion, corresponding to a net noncompliance rate of 13.7 percent." U.S. Department of the Treasury, Internal Revenue Service, *Reducing the Federal Tax Gap: A Report On Improving Voluntary Compliance*, 2007 WL 2295615 (August 02, 2007). Given the difference between the audit rate and the noncompliance rate, and the

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1/ *See also* U.S.S.G. Manual § 2T1.1, comment. (backg'd) ("[A]ny additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue.").

2/ *See* IR-2007-185, 2007 WL 3275943 (Nov. 7, 2007); TRAC Reports, *Internal Revenue Service Convictions for 2007*, http: // www.taxanalysts.com/www/tracreports.nsf/ Lookup/1?OpenDocument.

incontestable importance of reducing the multi-billion dollar tax gap, the need for the sentence in a criminal tax prosecution to promote -- and to actually achieve -- general deterrence cannot reasonably be questioned. A sentence that treats a tax crime as little more serious than a traffic violation, as does the sentence here, not only is unreasonable from the viewpoint of judicial administration, but also undermines the integrity of the United States' voluntary tax system.

B. *General deterrence was raised and is factually grounded*

The prosecutor, referencing the fact that defendant's tax fraud was accomplished with the assistance of over a dozen subcontractors and was committed over four years (A. 67), forcefully argued that the § 3553(a) factor of general deterrence warranted a term of imprisonment:

> A lengthy term of incarceration is also important for something you didn't mention in what you just went through, and that's third party deterrence, particularly in this industry. In this case, if this case is any indication, this contracting industry is riddled, riddled with tax fraud. A sentence of probation tells this industry: Go ahead, cheat on your taxes. If you get caught, you'll have to pay some money, but you won't have to go to prison. You won't have to go to jail.

(A. 69-70.)

General deterrence, a factor of paramount importance in tax prosecutions, thus was raised in the district court and was factually grounded in the record. *Cf. United States v. Howe*, No. 07-1404, 2008 WL 4251920 *8 (3d Cir. 2008) ("the record in this case reveals that the colloquy between the Government and the District Court focused

mostly on the degree of remorse exhibited by Howe, rather than the importance of general deterrence"). Because general deterrence was raised by the prosecutor and was factually grounded, the district court was required to give general deterrence meaningful consideration in sentencing defendant for his tax crime.

C. *The district court did not even mention the words "general deterrence" in fashioning defendant's sentence*

In sentencing defendant, the district court did not discuss the § 3553(a) factor of general deterrence, nor address the general deterrence argument raised by the prosecutor. Although the court did mention the word "deterrence," the record is clear that the district court's references concerned specific deterrence, not general deterrence. *See* (A. 64: "I am to afford adequate deterrence to the Defendant's criminal conduct. Here, the Defendant has one prior criminal incident which is alcohol-related, but has otherwise led a crime-free life. I am to protect the public from further crimes of this Defendant. Here, the Defendant has not been involved in other crimes even though this is a serious offense here. The likelihood of recidivism in this case I find is very little."); (A. 73: "I also recognize that the fine is above the guide-line range. Given the Defendant's wealth, the guideline range in fines is insufficient deterrence."). *See also United States v. Tomko,* 498 F.3d 157, 166 n.9 (3d Cir. 2007) ("The District Court did consider the need to afford adequate deterrence to the defendant's criminal conduct, i.e., 'specific deterrence.' However, neither the record nor the sentence

reflects meaningful consideration of the equally important need to deter others, i.e., 'general deterrence.'").

D. *The district court not only failed to give general deterrence meaningful consideration, but it seemingly failed to take that factor into account at all*

Neither the record nor the sentence imposed reflects meaningful consideration of the § 3553(a) factor of general deterrence.

Defendant constructed his personal residence, over the course of four years, by coercing more than a dozen subcontractors into submitting false invoices to make it appear that their work had been done for his construction company. 3/ The resulting structure that defendant financed with the diverted business funds was an 8,000-square-foot two-story gated residence on approximately eight acres in Venetia (Peters Township), Pennsylvania. (A. 400 at ¶32.) There are four bedrooms and six bathrooms. (*Id.*) An in-law apartment contains another bedroom and bathroom. (*Id.*) Other features of the home include a home theater with an eight-foot projection screen and stadium seating, an indoor shooting range (now a storage room), an outdoor pool and sauna, and a full bar. (*Id.*) There are a four-car garage and an additional one-car garage off the in-law apartment. (*Id.*) The contents of the house include $1,843,500 in household furnishings, $464,800 in jewelry, and $81,000 in fine art. (A. 402 at ¶40.)

3/ The general contractor with overall responsibility for building defendant's house refused to participate in defendant's tax fraud, so defendant contacted (and coerced) the subcontractors directly. (A. 68.)

As aptly stated by the panel majority in the initial opinion: "The perverse irony of this gilded cage confinement was not lost on the Government, it is not lost on us, and it would not be lost on any reasonable public observer of these proceedings, including those would-be offenders who may be contemplating the risks associated with willful tax evasion." *Tomko*, 498 F.3d at 166. See Mike Seate, *Tax Cheats' Sentences Treat Rich Gently*, Pitts. Tribune Review, Oct. 18, 2005, available on Westlaw at 2005 WLNR 16872992; Torsten Ove, *Wealthy Contractor Convicted of Tax Evasion Avoids Prison*, Pitts. Tribune Review, Oct. 1, 2005, available on Westlaw at 2005 WLNR 15580154. Moreover, the requirement that the district court give meaningful consideration to general deterrence was not satisfied by its rote statement that it was "taking all of the [§ 3553] factors into account." *See e.g., United States v. Sevilla*, No. 07-1105, 2008 WL 4069453, at *3-*4 (3d Cir. 2008) (Although the district court "considered Sevilla's role in the crime compared to that of his co-conspirators, it did not address Sevilla's colorable arguments relating to his childhood and the crack/powder disparity other than to say that it had 'considered all of the [§] 3553(a) factors.'").

II. *Defendant's "gilded cage" sentence is substantively unreasonable*

The Supreme Court's decision in *Gall v. United States*, 128 S. Ct. 586, 597 (2007), "leave[s] no doubt that an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that

appellate review has not been extinguished." *United States v. Levinson*, No. 07-1544, 2008 WL 425501 (3d Cir. Sept. 18, 2008), quoting *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). Even when viewed through that abuse-of-discretion prism, defendant's "gilded cage" sentence is substantively unreasonable.

A. *This Court should vacate defendant's sentence as substantively unreasonable, because no acceptable reasoning can justify a sentence of probation with home confinement*

A panel of this Court recently stated that "[o]ne implication of *Gall* is that [this Court] should treat a failure to 'adequately explain the chosen sentence -- including an explanation for any deviation from the Guidelines range' -- as a problem that can typically be addressed by giving the sentencing judge an opportunity to better explain the reasoning behind the decision. It will be a rare case when it is clear that no acceptable reasoning can justify a given sentence. Yet even rightly admired judges may make a decision which we believe is unsupportable, and we are obligated to point that out when it occurs." *United States v. Levinson*, No. 07-1544, 2008 WL 425501 (3d Cir. Sept. 18, 2008).

The unreasonableness of defendant's home-confinement sentence cannot be cured by remanding so the district court can voice the words "I have considered general deterrence." No acceptable reasoning can justify sentencing defendant to probation with home detention in the very same 8,000-square-foot mansion that defendant built through the tax fraud for which he was convicted. Accordingly, this Court should

vacate the sentence as being substantively unreasonable. On this point, we believe that it can be fairly inferred that the district court itself concluded that a sentence wholly without confinement was insufficient to comply with the purposes of sentencing, *see* 18 U.S.C. 3553(a), as the court did, in fact, impose confinement; *i.e.*, one year of home detention. The rub in this case is that the method by which the district court sought to make a non-prison sentence sufficient -- the imposition of home detention as a condition of probation -- was unreasonable. Given the facts underlying defendant's crime, defendant's sentence brings disrepute to the courts of this Circuit, and no amount of further explanation by the district court can justify it.

B. *This Court should give defendant's probationary sentence closer scrutiny because it is an overly lenient sentence imposed in a mine-run case*

In *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Supreme Court held that "closer review [by the appellate court] may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case." 128 S. Ct. at 575. Accordingly, if a district court were to justify a probationary sentence in a tax case with an explicit statement that it disagreed with the Sentencing Commission's policy determination that imprisonment is an appropriate sentence for first time offenders convicted of tax offenses, the sentence clearly would be subject to closer appellate scrutiny. The closer scrutiny expected by the Supreme Court in

Kimbrough certainly should be no less applicable where a policy disagreement is implicit rather than explicit. Moreover, as this case illustrates, a district court's granting a substantial variance from a correctly calculated Guidelines range in a mine-run case is functionally equivalent to a decision based upon a policy disagreement with the Guidelines.

Tomko's offense was a mine-run tax crime. An owner and operator of "one of the largest Mechanical Contracting firms in the state" of Pennsylvania (A. 598), Tomko leveraged his influence in the contracting industry to coerce smaller subcontractors into submitting false invoices to make it appear that their work had been done for his construction company, rather than to construct defendant's personal residence. (A. 420-435.) Over the course of four years, Tomko's company claimed the payments to the subcontractors as business expenses, with tax benefits flowing to defendant's personal returns and fraudulently reducing his reported personal taxes.

Tomko is a mine-run criminal tax defendant, if not worse. Similar to the convictions of many tax offenders, Tomko's present conviction is, except for a prior alcohol-related offense, his only criminal conviction. 4/ (A. 63.) Like many successful business owners, Tomko is kind to his employees 5/ and nurtures a good relationship with labor organi-

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4/ There is evidence, however, that Tomko engaged in similar tax fraud in constructing a vacation home. (A. 397, 441.)

5/ Tomko's being kind to his employees, of course, benefitted Tomko's business and ultimately inured to his financial benefit.

zations. 6/ Comparable to many individuals of wealth and high social standing, Tomko writes checks to charitable organizations and participates in Christmas gift drives that help needy families. 7/ The only notable fact that distinguishes this case from other mine-run cases, perhaps, is that after the Presentence Investigation Report was delivered to defendant's attorney, a private detective working for the attorney contacted Habitat for Humanity on defendant's behalf, in a conceded attempt to promote community service as a condition of defendant's sentence. 8/ (App. 58-59; A. 263-264.)

Defendant's probationary sentence embodies an implicit policy disagreement with the Sentencing Commission, indicating a view on the court's part that even in mine-run cases, imprisonment, even a short term of imprisonment, is not an appropriate sentence for first

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6/ Tomko was able to coerce the subcontractors into participating in his tax fraud scheme because of his influence in the contracting industry. Thus, balanced against Tomko's employment and community ties is the fact that Tomko used those very same employment and community ties to facilitate his tax crime.

7/ Defendant's ability to make monetary contributions was facilitated by his tax evasion. On this record, it is not clear that defendant's charitable contributions even exceeded the tax he evaded. Defendant's holiday gift giving included providing gifts for thirty needy families and contributing gloves and scarves to needy children.

8/ Tomko concealed from Habitat for Humanity the fact that he was a convicted felon who volunteered for the purpose of getting a more lenient sentence. (A. 57.) As we explain in our reply brief (pp. 5-6), if this Court approves defendant's sentence based on his belated and self-serving association with Habitat, one probable consequence is not hard to foresee: other members of the defense bar will also contact needy charities and cause them to unknowingly accept the services of convicted felons.

time offenders convicted of tax evasion. That disagreement is manifested by the district court's total failure to address either the § 3553(a) factor of general deterrence or the government's general deterrence argument. Closer scrutiny of the sentence is accordingly appropriate.

C. *Defendant's unreasonable sentence was not made sufficient by the imposition of a large fine he had no difficulty paying*

The unreasonableness of defendant's sentence is not negated by a $250,000 fine that defendant had no trouble paying. Indeed, justifying the lenient sentence upon defendant's paying a large fine only reinforces the unfortunate perception that the administration of justice is different for the extremely wealthy than it is for everyone else. As aptly stated by the panel majority in the initial opinion: "Such a justification for leniency in sentencing only reinforces the perception that wealthy defendants can buy their way out of a prison sentence, and is inconsistent with Congress's clear intent, as expressed in the Sentencing Reform Act and § 3553(a), to reduce unwarranted disparities in sentencing, so often based on socio-economic status." *Tomko*, 498 F.3d at 173. *Cf. United States v. Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) ("[P]ermitting greater leniency in sentencing in those cases in which restitution is at issue and is a meaningful possibility (i.e., generally white-collar crimes) would, we believe, nurture the unfortunate practice of disparate sentencing based on socio-economic status, which the guidelines were intended to supplant."); *United States v. Seacott*, 15 F.3d 1380, 1389 (7th Cir.1994) ("Allowing sentencing courts to depart downward based on a defendant's ability to make

restitution would thwart the intent of the guidelines to punish financial crimes through terms of imprisonment by allowing those who could pay to escape prison. It would also create an unconstitutional system where the rich could in effect buy their way out of prison sentences.").

CONCLUSION

Defendant's sentence is both procedurally and substantively unreasonable. Indeed, it brings disrepute to the courts of this Circuit. The sentence should be vacated and the case remanded for re-sentencing.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Rule 28.3(d), it is hereby certified that because the attorneys on this brief represent the Federal Government, the requirement that at least one attorney be a member of the bar of this Court is waived.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of the Court order of September 17, 2008, because this brief contains 3,353 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14-point Century Schoolbook type style.

3. The undersigned hereby further certifies that the foregoing brief filed electronically with the Court is in PDF searchable format, that the text of the PDF copy is identical to the text of the paper copy, that the PDF version has been electronically scanned for viruses with the Trend Micros OfficeScan Antivirus program and that, according to the program, no viruses were detected.

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CERTIFICATES OF SERVICE

It is hereby certified that on October 1,2008, the original and twenty-five copies of this supplemental en banc brief were mailed to the Court and that a PDF copy of this brief was electronically filed with the Court by e-mailing a copy to electronic_briefs@ca3.uscourts.gov.

It is hereby certified that service of the foregoing supplemental en banc brief has been made on counsel for the defendant-appellee and on counsel for amici on this 1st day of October, 2008, by mailing to each a copy thereof in a envelope, properly addressed as follows:

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