

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

WAYDE McKELVY

CRIMINAL No. 15-398-3

ORDER

AND NOW, this _____ day of June, 2021, upon consideration of Defendant's Motion for Downward Departure Pursuant to U.S.S.G. § 4A1.3(b), it is hereby ORDERED that the Motion is GRANTED. The Court will depart downward _____ levels under § 4A1.3(b).

BY THE COURT:

THE HONORABLE JOEL H. SLOMSKY, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

WAYDE McKELVY

CRIMINAL No. 15-398-3

**DEFENDANT’S MOTION FOR DOWNWARD
DEPARTURE PURSUANT TO U.S.S.G. § 4A1.3(b)**

Defendant Wayde McKelvy (“McKelvy”), by and through his attorney, William J. Murray, Jr., hereby moves this Court for a downward departure pursuant to U.S.S.G. § 4A1.3(b) for the reasons set forth in the accompanying memorandum of law.

Dated: May 25, 2021

Respectfully submitted,

/s/ wjm 409

William J. Murray, Jr., Esquire

P.O. Box 22615

Philadelphia, PA 19110

(267) 670-1818

Williamjmmurrayjr.esq@gmail.com

Counsel for Defendant Wayde McKelvy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 25, 2021, a true and correct copy of Defendant's Motion for Downward Departure was served via email and the Electronic Case Filing ("ECF") system upon the following:

Robert J. Livermore, Esquire
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106

Sarah Wolfe, Esquire
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106

Richard P. Kasarda
U.S. Probation Officer
Edward N. Cahn U.S. Courthouse & Federal Building
504 West Hamilton Street
Allentown, PA 18101

/s/ wjm 409
William J. Murray, Jr., Esquire

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

WAYDE McKELVY

CRIMINAL No. 15-398-3

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S
MOTION FOR DOWNWARD DEPARTURE PURSUANT TO § 4A1.3(b)**

Defendant, Wayde McKelvy (“McKelvy”), by and through his attorney, William J. Murray, Jr., respectfully submits this Memorandum of Law in Support of his Motion for a Downward Departure pursuant to § 4A1.3(b) of the United States Sentencing Guidelines (“U.S.S.G.” or “Guidelines”). For the reasons set forth herein, McKelvy respectfully requests that the Court grant the motion for downward departure and impose a sentence below the advisory guideline range.

I. PROCEDURAL HISTORY

On September 2, 2015, Troy Wragg, Amanda Knorr, and McKelvy were charged by indictment with conspiracy to commit fraud, in violation of 18 U.S.C. § 371 [Count 1]; wire fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1343 and 2 [Counts 2 through 8]; conspiracy to engage in securities fraud, in violation of 18 U.S.C. § 371 [Count 9]; and securities fraud and aiding and abetting, in violation of 15 U.S.C. §§ 78j(b), 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2 [Count 10]. Wragg and Knorr both pled guilty; McKelvy pled not guilty and proceeded to trial. On October 12, 2018, a jury found McKelvy guilty of all ten counts in the indictment.

II. RELEVANT FACTS

A. Offense Conduct

McKelvy was convicted of fraud, conspiracy to commit fraud, securities fraud and conspiracy to commit securities fraud based on his involvement with Wragg, Knorr and Mantria in the Mantria Ponzi scheme. McKelvy began promoting Mantria after he met with Wragg in August 2007. McKelvy promoted Mantria from September 2007 through November 2009, when the Securities and Exchange Commission (SEC) shut Mantria down. In November 2009, the SEC filed a civil complaint against Mantria, Wragg, Knorr, Speed of Wealth, and McKelvy. McKelvy did not oppose the civil action, and the SEC obtained a civil judgment against him for \$13,416,407. McKelvy's involvement with Mantria took place between September 2007 and November 2009 – about 11 and a half years ago.

B. McKelvy's Criminal History

McKelvy's criminal history includes seven arrests and convictions over a period of 23 years, which result in six criminal history points and a criminal category level of III. All of the offenses were non-violent and appear to be a result of McKelvy's alcoholism; five of the convictions were for driving under the influence of alcohol, one was for speeding and one was for harassment. In addition, none of McKelvy's offenses involved fraud or financial offenses. McKelvy's last offense – driving under the influence – was over eight and a half years ago. McKelvy's criminal history as set forth in the PSR is:

- On May 18, 1989, McKelvy was arrested for driving under the influence; he pled guilty on September 14, 1989. (zero points);
- On July 25, 1989, McKelvy was arrested for driving under the influence; he pled guilty on September 14, 1989. (zero points);
- On December 11, 1993, McKelvy was arrested for driving under the influence; he pled guilty on April 21, 1994. (zero points);

- On November 25, 1998, McKelvy was arrested for harassment; he pled guilty and was sentenced to a **one-year term of probation** on December 15, 1998; on February 21, 2001, McKelvy's probation was revoked for failure to report as directed and provide urinalysis and the court sentenced McKelvy to serve **one day of imprisonment. (one point)**;
- On February 4, 2001, McKelvy was arrested for driving while impaired; on May 4, 2001, he pled guilty and an alcohol evaluation was ordered; on March 13, 2002, McKelvy was sentenced to serve **180 days imprisonment** – he was made **eligible for work release and/or home detention (two points)**;
- On September 26, 2012, McKelvy was arrested for speeding; on November 14, 2012, he pled guilty and was ordered to pay fines and costs (zero points); and
- On September 27, 2012, McKelvy was arrested for driving under the influence; on January 29, 2013, he pled guilty and an alcohol evaluation was ordered; on April 8, 2013, he was sentenced to **serve not less than 60 days to 365 days of imprisonment and 24 months of consecutive probation**, ordered to abstain from alcohol consumption and participate in alcohol treatment; on January 30, 2014, bench warrant issued for violation of term of probation (failure to report); March 6, 2015, the **court revoked McKelvy's probation, and ordered McKelvy to serve 365 days of imprisonment**. The court **authorized work release** with consent to 24-hour alcohol monitoring. On September 9, 2015, McKelvy was released from custody. **(three points)**.

The PSR calculated McKelvy's total offense level at 49. McKelvy objects to the calculation of the total offense level and the applicability of several specific offense characteristic enhancements. McKelvy submitted those objections to the probation officer and also addresses those objections in his sentencing memorandum. McKelvy submits that the proper total offense level is 31. The advisory guideline range for offense level 49 (treated as level 43) is life under both criminal history category III and criminal history category I. The advisory guideline range for total offense level 31 and criminal history category of III is imprisonment of 135 to 168 months and the advisory guideline range for total offense level 31 and criminal history category I is imprisonment of 108 to 135 months.

C. Post Offense Conduct

The SEC shut Mantria down in November 2009. Since then, McKelvy committed two offenses – Speeding on September 26, 2012, and driving under the influence on September 27, 2012. McKelvy has not committed any offenses since he was indicted in this matter in September of 2015. McKelvy was on pretrial release (\$50,000 O/R bond) since October 1, 2015. After he was convicted in October 2018, the Court permitted McKelvy to continue to remain released pending sentencing. McKelvy has not had any issues while he was released on bail. This is in stark contrast to Wragg who engaged in two separate fraud schemes after he pled guilty and began cooperating with the government.

III. ARGUMENT

A. A Criminal History Score of Six and Criminal History Category of III Substantially Over-represents the Seriousness of McKelvy's Criminal History and the Likelihood that he will Commit a Crime in the Future

Section 4A1.3 of the Guidelines allows a departure from the Sentencing Guidelines where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. See United States v. Shoupe, 988 F.2d 440, 444-47 (3d Cir. 1993) (vacating and remanding for resentencing after holding that a sentencing court may depart downward in the criminal history category); United States v. Jones, 216 F. App'x 189 (3d Cir. 2007) (departure granted for overstated criminal history prior to Booker); United States v. McAllister, No. 89-0369, 1993 U.S. Dist. LEXIS 13109, at * 5 (E.D. Pa. August 9, 1993) (noting that Third Circuit had previously affirmed district court's downward departure from criminal history category VI to criminal history category I); United States v. Parker, No. 00-315, 2002 U.S. Dist. LEXIS 12164 (E.D. Pa. January 3, 2002) (court granted defendant's motion for

downward departure pursuant to § 4A1.3 and reduced defendant's criminal history category by two criminal history category levels, from category VI to category IV); United States v. Sheard, No. 01-338, 2002 U.S. Dist. LEXIS 9986, at *3 (E.D. Pa. June 3, 2002) (court granted downward departure under U.S.S.G. § 4A1.3 for a defendant with five prior convictions for robbery, theft and "small time drug dealing" whose sentences had not exceeded eleven and a half to twenty-three months); United States v. Herrick, 545 F.3d 53 (1st Cir.2008) (court granted departure from criminal history category IV to category III, concluding the defendant's CHC overstated the likelihood he would reoffend, particularly where his last conviction was 12 years earlier); United States v. Senior, 935 F.2d 149, 150 (8th Cir. 1991) (defendant with prior record of three Pizza Hut robberies at age twenty where he received concurrent sentences, and two drug selling offenses at age twenty-four, granted downward departure from career offender guideline range for federal drug offense committed at age twenty-seven); United States v. Taylor, 843 F. Supp. 38, 46-47 (W.D. Pa. 1993) (drug defendant entitled to downward departure from career offender guideline because prior burglary convictions were more than ten years old and occurred when defendant was teenager and his crimes did not involve any violence or use of weapons); United States v. Wilkerson, 183 F. Supp. 2d 373 (D. Mass. 2002) (criminal history category VI over-represented seriousness of defendant's criminal history warranting departure to IV, where he had no convictions for crimes of violence, and had received sentences for prior convictions which just barely triggered scoring under guidelines); United States v. DeJesus, 75 F. Supp. 2d 141 (S.D.N.Y. 1999) (category V over-represented defendant's criminal history where several priors resulted in probation, only one of three jail sentences exceeded 60 days, two of eight convictions involved loitering and trespass and did not count, remaining six convictions resulted in no more than 2 years jail, and most conduct occurred before age 21, whereas defendant was now married

and responsible father and longer sentence under higher criminal history category “will lessen not increase the likelihood of rehabilitation.”).

“The sentencing court must make an ‘individualized’ inquiry into such factors as ‘the amount of drugs involved in . . . prior offenses, his role in those offenses, the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for’” under the relevant criminal history category. Sheard, 2002 U.S. Dist. LEXIS 9986, at *3, n. 3, quoting United States v. Mishoe, 241 F.3d 214, 219 (2d Cir. 2001); see also, Shoupe, 988 F.2d at 447 (factors including defendant’s age and immaturity at the time of his prior offenses and the closeness in time between those offenses may be pertinent as to whether defendant’s criminal history category level over-represents the seriousness of his criminal history). The Application Notes for § 4A1.3 indicate that consideration should be given not only to the number of previous offenses, but also to the nature and vintage of those offenses. U.S.S.G. § 4A1.3, Application Note 3.

In Shoupe, the defendant sought a downward departure claiming that his career offender status overstated his criminal history. Shoupe, 988 F.2d at 444. The district court interpreted an earlier decision by the Third Circuit as precluding it from considering certain factors in a motion for a downward departure, including defendant’s youth and immaturity at the time he committed the earlier offenses, the short time span between those crimes and the fact that defendant needed to support his dependent child, and declined to depart from the prescribed guideline range. Id. The Third Circuit reversed and remanded holding that the district court may depart downward and adjust the criminal history category calculated under the “rigid formulae” of the guidelines. Id. at 445. The Shoupe Court held that that the defendant’s age and immaturity at the time of his prior offenses and the closeness in time between those offenses may be considered in

determining whether defendant's criminal history category level over-represents the seriousness of his criminal history.

In Parker, the court granted the motion for a downward departure of a defendant with prior convictions for robbery and kidnapping for which he was sentenced to 10 years imprisonment, and for a controlled substances offense for which he was sentenced to 42 to 96 months imprisonment. Parker, 2002 U.S. Dist. LEXIS 12164, at *7. The Parker Court followed the factors set forth by the Second Circuit in Mishoe, 241 F.3d at 219. In Mishoe, the Second Circuit held that a decision to depart pursuant to § 4A1.3 should be "based on an individualized consideration of factors" and that such factors may include "the amount of drugs involved in [the defendant's] prior offenses, his role in those offenses, the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for" under the criminal history category. Mishoe, 241 F.3d at 219. The Parker Court considered the Mishoe factors, the fact that defendant's prior drug conviction involved a small quantity of cocaine, and that his role was that of a street-level dealer and concluded that the defendant's career offender status significantly over-represents the defendant's criminal history category and the likelihood that he would commit further crimes. Parker, 2002 U.S. Dist. LEXIS 12164, at *15. Therefore, the court found that the criminal history category of VI and a total offense level of 37 seriously over-represented Parker's criminal history and the likelihood that he would commit future crimes and granted Parker's motion for a downward departure.

McKelvy moves for a downward departure from Criminal History Category Level III to I. McKelvy respectfully submits that Criminal History Category III over-represents his criminal history and the likelihood that he will commit a crime in the future, and hereby moves for a downward departure/variance pursuant to U.S.S.G. § 4A1.3. All of McKelvy's prior offenses

were non-violent and directly related to his alcohol problems – five were for driving under the influence of alcohol and one was for speeding. None of McKelvy’s offenses involved fraud or financial offenses. McKelvy’s last offense occurred over eight and a half years ago. McKelvy has been on pretrial release (\$50,000 O/R bond) since October 1, 2015. After he was convicted in October 2018, the Court permitted McKelvy to continue to remain released pending sentencing. McKelvy has not had any issues while he has been on pretrial and post-conviction release. Also, the sentences McKelvy received as a result of those prior offenses – terms of probation, work release/home confinement, one day of imprisonment, and approximately six months of imprisonment – are significantly less than the advisory guideline range he is now facing under Criminal History Category III and the increase in the advisory guideline range between Criminal History Category III and I. Moreover, McKelvy has made a fundamental change in his lifestyle by substantially reducing his drinking. Since he moved back in with his parents, McKelvy has focused on caring for his parents (McKelvy’s father passed away on April 14, 2021). Finally, McKelvy presents an extremely-low risk for recidivism. Statistically speaking, the low risk is linked to his age (fifty-eight) and the nature of his offense. See *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, U.S. Sentencing Commission (May 2004); available at www.ussc.gov/publicat/Recidivism_General.pdf. McKelvy’s low risk of recidivism is further evidenced by the fact that McKelvy has not committed an offense since 2012 – over eight and a half years ago. Accordingly, we submit that a Criminal History Category level III significantly over-represents McKelvy’s criminal history category and the likelihood that he would commit further crimes. Therefore, McKelvy respectfully requests that this Honorable Court grant a downward departure/variance pursuant to U.S.S.G. § 4A1.3.

IV. CONCLUSION

For all the reasons set forth herein, McKelvy respectfully requests that this Court grant a downward departure pursuant to U.S.S.G. § 4A1.3 and impose sentence below the advisory guideline range.

Dated: May 25, 2021

Respectfully submitted,

/s/ wjm 409

William J. Murray, Jr., Esquire

P.O. Box 22615

Philadelphia, PA 19110

(267) 670-1818

Williamjmmurrayjr.esq@gmail.com

Counsel for Defendant Wayde McKelvy