IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIM NO. 15-398**
WAYDE MCKELVY	**:**	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTIONS FOR DOWNWARD DEPARTURE

The United States of America, by its attorneys Jennifer Arbittier Williams, Acting United States Attorney for the Eastern District of Pennsylvania, and Robert J. Livermore and Sarah M. Wolfe, Assistant United States Attorneys, respectfully represents as follows:

I. Introduction

On October 12, 2018, following a three-week trial, a jury found defendant WAYDE MCKELVY guilty on ten counts of wire fraud and securities fraud based on his role in the Mantria Ponzi scheme. He is scheduled to be sentenced by the Court on June 10, 2021. The sentencing guidelines recommend 30 years to life imprisonment due to the egregious nature of his offense conduct and his prior criminal record. In its sentencing memorandum, the government recommended that the Court sentence MCKELVY to 20 years in prison, which is substantially below the recommended guideline range.

The defendant has filed three motions for downward departures. For the following reasons, they should all be denied.

II. Criminal History

In his first motion, the defendant seeks a downward departure pursuant to USSG § 4A1.3, arguing that his criminal history category of III substantially overrepresents the seriousness of his criminal history or likelihood that he will reoffend. While the guidelines provide many examples of upward departures for inadequate criminal history categories, they provide few examples of appropriate downward departures under this category. Significantly, many of the cases cited by the defendant involved offenders who had multiple minor convictions that occurred in their youth.[1]

In this case, MCKELVY's criminal history calculation is not driven by minor offenses he committed as a teenager, but by numerous convictions he committed as a grown man with a wife and two daughters. He has seven adult convictions, only three of which incurred criminal history points. All of his convictions occurred after the age of 25 and all of the convictions that garnered criminal history points occurred after the age of 35. In short, the defendant has no one to blame but himself for his criminal history category of III.

Moreover, MCKELVY compounded his prior offense conduct by repeatedly violating the terms of court supervision. On some occasions, MCKELVY served more time in jail on the violation than the original offense. This is a critical factor. The defendant argues that his criminal history category overstates the likelihood that he will reoffend in the future. But reality paints a much different picture. The fact that he has demonstrated over a lengthy period of time

[1] All of the cases cited by the defendant pre-date United States v. Booker, 543 U.S. 220 (2005), when the guidelines were essentially mandatory. After Booker, district courts obviously have greater flexibility in determining an appropriate sentence without straining to award departures.

his contempt for the criminal justice system by repeatedly violating the terms of his court supervision suggests that he is actually more likely to re-offend than someone with no prior criminal record and no history of violations.

The defendant further argues that his post-offense conduct suggests that he is unlikely to offend again. To the contrary, MCKELVY's post-offense conduct is hardly exemplary. As MCKELVY admitted during trial, he continues to peddle the same fraudulent schemes, albeit using aliases or even his daughters' names. MCKELVY has not paid a dime towards the SEC judgment against him but rather actively evaded that judgment. He failed to pay federal income taxes on the $6 million in fraudulent proceeds he obtained from the Mantria scheme and continues to evade the substantial IRS tax liens against him. MCKELVY has not accepted responsibility for his criminal conduct and likely never will. His impenitent post-offense conduct suggests that he is more likely to re-offend than other defendants with the same or lower criminal history category.

For these reasons, the defendant's criminal history score appropriately measures his criminal record in comparison with other defendants. His motion should be denied.

III. Role in the Offense

In his second motion, the defendant requests a downward departure pursuant to USSG § 3B1.2 based on his purported mitigating role in the offense. According to MCKELVY, a reduction is appropriate because co-defendants TROY WRAGG and AMANDA KNORR provided him with false information about the financial state of Mantria and, thus, he was but a duped pawn. The facts proved at trial revealed a very different dynamic. Not only was MCKELVY extremely close with WRAGG, but he was the one who lured in the investors. It

was MCKELVY who brought this Ponzi scheme to so many victims. Indeed, based on his critical role in the offense, the Presentence Report awarded MCKELVY a two-level *enhancement* for aggravating role pursuant to USSG § 3B1.1(c). The defendant has objected to the enhancement and now seeks a four-level *reduction* for his role in the offense. Obviously, if the two-level *enhancement* is appropriate, then the four-level *reduction* for role in the offense in inappropriate.

As the defendant correctly recited in his motion, the guidelines provide five factors for the court to consider when determining whether a downward adjustment is appropriate. As described below, all five factors support the government's position that a downward adjustment for mitigating role is unwarranted.

(a) The degree to which the defendant understood the scope and structure of the criminal activity.

The first factor which the Court must consider is the degree to which the defendant understood the scope and structure of the criminal activity. The defendant argued that since WRAGG and KNORR controlled the day-to-day operations of Mantria, he did not fully understand the scope and structure of the criminal activity. However, the evidence at trial proved that WRAGG and MCKELVY were on equal footing. WRAGG looked up to MCKELVY as a mentor. WRAGG and MCKELVY spoke on the phone almost every day. WRAGG took strategic guidance from MCKELVY and often copied his business strategies and mannerisms.

Moreover, as MCKELVY admitted during SEC testimony before and after the collapse of Mantria, MCKELVY fully understood Mantria's financial situation and knew full well that the statements he made to the investors to induce them to invest were false. During his October

22, 2009 SEC deposition, which was introduced into evidence at trial, MCKELVY admitted that he knew the value of Mantria was "squat at this point." Contrary to his representations to the investors, MCKELVY explained to the SEC that Mantria's biochar program was only in the "test stages" and opined that Mantria Industries was not worth anything "until it comes to fruition." MCKELVY further stated that he knew that Mantria had not sold any biochar in the past because "we couldn't produce it." When asked about biochar products generally, MCKELVY admitted, "We haven't sold anything. We just have inquiries, but we haven't taken any orders." MCKELVY further commented, "Until they start making real revenue, I don't think it is worth anything." When asked about the value of the Tennessee real estate that Mantria allegedly owned, MCKELVY responded, "in my opinion, [it's] zero." MCKELVY stated that the land had been appraised at $100 million, "but until it sells, I think it is worth nothing." The value of the land was a critical part of his investment pitch in that MCKELVY told prospective investors that their investments were guaranteed by $100 million in real estate.

Therefore, while MCKELVY may not have been involved in the day-to-day management of Mantria, MCKELVY was well-informed about the financial reality of Mantria and, as the jury found, he intentionally lied to the prospective investors in order to induce them to invest. MCKELVY's own sworn testimony proves that he fully understood the scope and the structure of the criminal activity.

(b) The degree to which the defendant participated in the planning or organizing of the criminal activity.

The second factor for the Court to examine is the degree to which the defendant participated in the planning or organizing of the criminal activity. As the government argued in more detail in its sentencing memorandum, while it is true that WRAGG and to a lesser extent,

KNORR, controlled Mantria, MCKELVY exercised complete control over Speed of Wealth and Mantria's fund-raising operations. MCKELVY's fundraising based on false statements to investors was the essence of the fraud scheme. Owning or operating an unprofitable company is not illegal. The criminal activity here was lying to the investors to induce them to invest in that company. MCKELVY and the Speed of Wealth employees that he supervised, such as Donna Jarock, were the primary contacts for the investors. MCKELVY exercised complete control over the seminars where he pitched Mantria to the investors. He organized the seminars and promoted them with paid advertisements. MCKELVY and Jarock met with prospective investors and answered their questions about Mantria and how to invest. New investors did not invest directly in Mantria; rather, the funds were sent to entities controlled by MCKELVY. The investors invested primarily based upon MCKELVY's false statements to them.

For these reasons, MCKELVY was instrumental in the planning and organizing of the criminal activity.

(c) The degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority.

The third factor is the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority. The evidence introduced at trial proved that no one told WAYDE MCKELVY what to do or how to do it. MCKELVY had complete control over Speed of Wealth and the fundraising aspects of Mantria. When MCKELVY and WRAGG disagreed on any issue, MCKELVY always prevailed for a very simple reason - MCKELVY controlled the money. WRAGG knew that if MCKELVY stopped pitching Mantria to investors, Mantria would be bankrupt within a month because Mantria had no other source of funds. For example, when WRAGG suggested to MCKELVY that he register as a

broker with the SEC, MCKELVY refused and threatened to walk away from Mantria. See Government Exhibit KG-9. WRAGG could not make any move without MCKELVY's blessing because MCKELVY controlled the money.

(d) The nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion he had in performing those acts.

The fourth factor the Court must consider is the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion he had in performing those acts. Again, WAYDE MCKELVY had complete control over the fundraising activities of Mantria which was the essence of the criminal conduct. There was no law which forbade Mantria from operating in the manner in which they did - many companies lose money on financial transactions. The criminal conduct here was lying to the investors to induce them to invest in Mantria. The defendant spent the bulk of his 27-page recitation of facts focusing on all the ways in which WRAGG and KNORR deceived the investors, which is true, but the fundraising activities were completely controlled by MCKELVY. MCKELVY exercised complete discretion in raising funds for Mantria and he took center stage in lying to the investors about Mantria. Moreover, it was MCKELVY's idea for the investors to take out loans to invest in Mantria which contributed heavily to their financial devastation once Mantria collapsed. Thus, the nature and extent of MCKELVY's participation in the offense proves that a downward departure for role in the offense is not warranted.

(e) The degree to which the defendant stood to profit from the criminal activity.

The fifth and final factor for the Court to consider inures heavily in favor of the

government - the degree to which the defendant stood to profit from the criminal activity. Despite stealing $54 million, WRAGG and KNORR only pocketed a few hundred thousand dollars each. The bulk of the criminal proceeds went to WAYDE MCKELVY. MCKELVY put $6.2 million of the funds he stole from the investors into his own pocket. MCKELVY then gleefully and proudly spent those funds on prostitutes, alcohol and gambling.

For these reasons, all five factors prove that a downward adjustment for role in the offense is not warranted. On the contrary, MCKELVY's role in the offense in organizing the fundraising activities warrants a two-level increase in his offense conduct, as found in the Presentence Report.

IV. Diminished Capacity

Finally, the defendant asks for a downward departure pursuant to USSG § 5K2.13 based on his alleged diminished capacity. In his motion, the defendant claims that he has been suffering from Cyclothymic Disorder and Alcohol Use Disorder and, therefore, was not capable of exercising appropriate judgment during the Mantria fraud. Notably, the guidelines specifically state that "the court may not depart below the applicable guideline range if the significantly reduced mental capacity was caused by the voluntary use of drugs of other intoxicants." The defendant attempts to side-step this restriction through the expert witness report of Dr. Catherine M. Barber, who opined that MCKELVY suffered from Cyclothymic Disorder – "a chronic condition of reduced mental capacity, which contributed substantially to the commission of the offense."

As an initial matter, the government notes that the information at Dr. Barber's disposal was limited. She interviewed MCKELVY on two occasions by video and she has never met

him in person. Dr. Barber reviewed some, but not all, of the evidence introduced at trial and only a fraction of the discovery provided to the defendant. She never spoke to any of the victims nor read the victims' testimony at trial to get their impressions of MCKELVY and his mental functioning at the time of the offense. Moreover, while experts of this nature commonly rely on years of mental health treatment in performing their evaluations, in this case, MCKELVY has never sought mental health treatment, so no such evidence was available to Dr. Barber. Accordingly, Dr. Barber is relying on a very limited amount of evidence to form her conclusions about MCKELVY's mental health at the time of his offense conduct.

Before a district court may exercise its discretion to depart pursuant to section 5K2.13, a defendant must prove, among other things, that (1) the offense is "nonviolent" and (2) a significantly reduced mental capacity contributed to commission of the offense. United States v. Rosen, 896 F.2d 789, 791 (3d Cir.1990); United States v. McDowell, 888 F.2d 285, 291 (3d Cir.1989) (defendant usually bears burden of persuasion when attempting to justify downward departure). The defendant must prove these elements by a preponderance of the evidence. See McDowell, 888 F.2d at 291; United States v. McBroom, 124 F.3d 533, 539 (3d Cir. 1997). Section 5K2.13 is intended to create lenity for those whose significantly reduced mental capacity cause them to commit the offense of conviction. See United States v. Chatman, 986 F.2d 1446, 1452 (D.C.Cir.1993), (the purpose of section 5K2.13 is to "treat with lenity" individuals whose significantly reduced mental capacity contributed to the commission of the crime.) Lenity is appropriate because "two of the primary rationales for punishing an individual by incarceration—desert and deterrence—lose some of their relevance when applied to those with reduced mental capacity." Id.

Despite the purpose for which it was submitted, Dr. Barber's report offers no grounds for the defendant to obtain succor from Section 5K2.13. Dr. Barber found that "Wayde McKelvy is an intelligent man with an impressive scope of knowledge in various areas of business and finance as well as strong communication skills." She noted that MCKELVY's alleged mental health issues "do not excuse him from culpability" in this serious criminal conduct. She further noted that MCKELVY has never suffered from any type of physical, sexual, or emotional abuse and described his own childhood as "great." Indeed, it seems that MCKELVY's primary issue over the years has been alcoholism – a factor that is expressly prohibited from consideration of a downward departure. Dr. Barber stated that any impact in MCKELVY's judgment was caused by his "long-term alcohol dependence" and not on any other mental health issue.

As the defendant's voluntary intoxication cannot form the basis of a downward departure, Dr. Barber introduces a new rationale for the defendant's purported inability to appreciate his wrongdoing: she claims that MCKELVY also suffers from Cyclothymic Disorder. This opinion fails as a legal matter, however, because even if this diagnoses were true, she offers nothing to show that MCKELVY's alleged Cyclothymic Disorder rendered his mental capacity *significantly* reduced. To the contrary, Dr. Barber noted that many people who suffer from Cyclothymic Disorder are highly successful. Indeed, Dr. Barber found MCKELVY to be highly intelligent and knowledgeable. She opined that there are no medical issues which are "currently impairing Mr. McKelvy's mental functioning." Furthermore, there is no evidence that MCKELVY is currently receiving or has ever received treatment for a mental health issue, which suggests that Dr. Barber's concerns may be overexpressed. Compare United States v. Follette, 990 F. Supp. 1172, 1179 (D. Neb. 1998) (granting downward departure for Cyclothymic Disorder due to the

defendant's long history of mental health issues). Thus, there is no evidence that MCKELVY's alleged mental health issues caused or contributed in any way to his criminal conduct. See United States v. Childs, No. CRIM.A. 01-CR-778-02, 2007 WL 2850641, at *3 (E.D. Pa. Oct. 1, 2007) (finding that there was no evidence that the defendant's Cyclothymic Disorder contributed to his criminal conduct).

At the end of her report, Dr. Barber concluded that MCKELVY's Cyclothymic Disorder motivated him to commit this crime. Dr. Barber arbitrarily dismissed the concept that MCKELVY was motivated by greed to commit the instant offense despite overwhelming evidence to the contrary. The evidence introduced at trial showed MCKELVY and WRAGG celebrating the money they stole from the Mantria investors. Even after the collapse, MCKELVY was trying to raise another $5,000 to support his extravagant lifestyle. See Government Exhibit KG-26. During his SEC deposition, MCKELVY admitted that he was spending $30,000 per month from his share of the fees generated by Mantria investors. MCKELVY explained that he spent the $30,000 per month on "Living expenses. I have rent of $8,000, I have a car payment of $2,000. I have got car payments. I have groceries. I have got entertainment. Taxes to pay." MCKELVY then bragged, "Oh yes, I live good." There is no question that this fraud scheme was about simple greed. The defendant's attempt to blame his criminal conduct on an allegedly newly diagnosed mental health issue is unsupported by the evidence in this case.

Having established that there are no legal grounds for a downward departure, the Court should also consider the equitable grounds. There are very few defendants in the Federal Bureau of Prison who do not suffer from some type of mental health issue. Far too many of

them have been the victims of sexual of physical abuse of some nature which has resulted in significant mental health issues. Mental health treatment in many segments of our society is simply nonexistent and some defendants do deserve consideration at sentencing for these issues. WAYDE MCKELVY is not one of those defendants. WAYDE MCKELVY is a man who looked his neighbors in the eye, lied to them to get them to invest in Mantria, and filled his pockets with their hard-earned savings. MCKELVY then took that money and spent it on gambling, prostitutes, and alcohol. MCKELVY now stands before this Court and asks for a downward departure for that conduct. MCKELVY's disgraceful conduct should be condemned, not excused. MCKELVY is simply not a defendant who deserves leniency.

Based on the above, the defendant's motion for a downward departure pursuant to USSG § 5K2.13 should be denied.

V. Conclusion

For the reasons described herein, the defendant's three motions for downward departures should be denied.

Respectfully submitted,

JENNIFER ARBITTIER WILLIAMS
United States Attorney

/s/
ROBERT J. LIVERMORE
SARAH M. WOLFE
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Sentencing Memo was served upon the following:

William Murray, Esq.

/s/
ROBERT LIVERMORE
Assistant United States Attorney