

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

<b>UNITED STATES OF AMERICA</b>	)	<b>CRIMINAL NO. 12-302</b>
	)	
v.	)	<b>The Honorable Cathy Bissoon, Judge</b>
	)	
<b>JEFFREY A. MARKOVITZ,</b>	)	
<b>Defendant</b>	)	

**MEMORANDUM IN SUPPORT OF SENTENCING  
REQUESTING A DOWNWARD VARIANCE**

COMES NOW, the Defendant, Jeffrey A. Markovitz, by and through his counsel, Wayne V. DeLuca, Esquire, and respectfully files this Memorandum in Support of Sentencing Requesting a Downward Variance.

**INTRODUCTION**

On January 24, 2013, the United States Attorney for the Western District of Pennsylvania set forth a proposed plea agreement and stipulated facts. On January 24, 2013 Defendant entered a plea of guilty to Count I, Conspiracy to Commit Smuggling and Introduction Into Interstate Commerce of Unapproved and Misbranded Prescriptions, in violation of 18 U.S.C. §§ 371 and 545, and 21 U.S.C. §§ 331(a) and 333(a)(2) and Count II, Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. § 1956(h). The Defendant has a criminal history level of 1, indicating that he has no prior criminal history. The Defendant is requesting this Honorable Court consider a downward variance and impose a lesser sentence based upon the application of

18 U.S.C. §3553(a) factors to this case. Specifically, he requests that this Honorable Court consider his family circumstances, community service, his extraordinary efforts at post offense rehabilitation, his cooperation with the government, his shame and remorse, his otherwise law abiding character, the sentences imposed on others charged with a similar crime, and a combination of these factors.

**IMPACT OF SENTENCING FACTORS OF 18 U.S.C. § 3553(a) AND LEGAL  
AUTHORITY FOR DOWNWARD VARIANCE**

In 2005 the United States Supreme Court, in *United States v. Booker*, 543 U.S. 220, held that the United States Sentencing Guidelines, (“Sentencing Guidelines”), are advisory only and, as a result, appellate review is limited to determining whether the sentence imposed is “reasonable.” A sentencing court may not presume that a sentence within the applicable sentencing guidelines range is reasonable: “the Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.” *Nelson v. U.S.*, 555 U.S. 350 (2009). *See, U.S. v. Russell*, 564 F.3d 200, 202 (3d Cir. 2009) (a district court commits significant procedural error by treating the Guidelines as mandatory and failing to consider the factors set forth in 18 U.S.C.S. § 3553(a) (2012). For a sentence to be “reasonable” under *Booker*, the “record must demonstrate that the trial court gave meaningful consideration to the factors set forth in 18 U.S.C. § 3553(a) (2012).” *U.S. v. Connors*, No. 06-189, 2007 U.S. Dist. LEXIS 74904 (E.D. Pa. 2007). A sentence is reasonable even if it varies from the Sentencing Guidelines, *U.S. v. Russell*, 564 F.3d 200 (3d Cir. 2009), provided that the district court states logical reasons on the record for the sentence that are consistent with the factors provided in 18 U.S.C. § 3553(a) factors. *Booker, supra. See, Gall v. U.S.*, 552 U.S. 38, 46, 47 (2007) (rejecting an appellate rule that requires “extraordinary” circumstances that justify a sentence outside the

Guidelines range); *U.S. v. Johnson*, No. 07-4731, 2009 U.S. App. LEXIS 8405 (3d Cir. 2011) (quoting *U.S. v. Saintville*, 218 F.3d 246, 249 (3d Cir. 2000)).

As the Sentencing Guidelines are no longer mandatory, a sentencing court is free to make its own reasonable application of the § 3553(a) factors. *Kimbrough v. U.S.*, 552 U.S. 85, 113 (2007) (Scalia, J., concurring). The sentencing court therefore does not enjoy the benefit of a legal presumption that the Sentencing Guidelines should apply. *Rita v. U.S.*, 551 U.S. 338, 351 (2007) (quoting *Booker*, 543 U.S. at 259-260). Though the applicable guidelines range is the initial benchmark for consideration, the sentencing judge must consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors as set forth in § 3553(a). *Pepper v. U.S.*, 131 S. Ct. 1229, 1235 (2011). *See*, § 3553(a); *Nelson v. U.S.*, 555 U.S. 350, 351-352 (2009); *Gall v. U.S.*, 552 U.S. 38, 39, 59 (2007). Therefore, a sentencing judge may exercise wide discretion in the sources and types of evidence he uses to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. *Pepper v. U.S.*, 131 S. Ct. at 1233-35, 1240 (2011). *See*, *Williams v. People of State of N.Y.*, 337 U.S. 241, 246 (2006); *Johnson*, 2009 U.S. App. LEXIS 8405 (quoting *U.S. v. Levinson*, 543 F.3d 190, 195 (3d Cir. 2008) (a district court has broad latitude in sentencing when they have appropriately considered § 3553(a) factors)).

Section 3553(a) broadly mandates that sentencing courts “shall impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in paragraph (2) of this subsection.” It further directs the district court to consider: (1) the nature and circumstances of the offense and the history and characteristics of the Defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the Sentencing Guidelines’ range; (5) any pertinent policy statement; (6) the need to avoid unwarranted sentencing disparities



among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. *See, Johnson*, 2009 U.S. App. LEXIS 8405.

It is apparent that a mathematical or algebraic formula that a sentencing judge must follow in determining the length of a defendant's sentence does not exist. Rather, § 3553(a) requires a sentencing judge to consider "the need for the sentence imposed...to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." *Gall*, 552 U.S. at 38-39, 53. Accordingly, the court must tailor its sentence to reflect the totality of the circumstances as they pertain to the individual defendant as he stands before the court *on the day of sentencing*. *Pepper*, 131 S.Ct. 1229 (2011) (emphasis added); *U.S. v. Bryson*, 229 F.3d 425, 426 (C.A.2 2000). The sentencing judge, unlike the Sentencing Commission, is in a superior position to analyze § 3553(a) in light of the defendant because the sentencing judge has access to, and great familiarity with the individual defendant before him. *Gall*, 552 U.S. at 51 (quoting *Rita*, 551 U.S. at 357-58); *Kimbrough v. U.S.*, 552 U.S. 85, 93 (2007) (stating that a district court's decision to vary from the advisory guidelines may attract greatest respect when the sentencing judge finds a particular case "outside the 'heartland' to which the Commission intends individual Guidelines to apply"); *U.S. v. Howe*, 534 F.3d 128 (3d Cir. 2008). Therefore, a sentencing judge must consider every defendant as an individual and every case as unique. *Gall*, 552 U.S. at 52 (quoting *Koon v. U.S.*, 518 U.S. 81, 113, 116 (1996); *Pepper v. U.S.*, 131 S. Ct. 1229, 1240 (2011)). The sentence imposed must be sufficient, but not greater than necessary to serve the purposes of sentencing under § 3553(a). *Gall*, 552 U.S. at 44; *Rita v. U.S.*, 551 U.S. 338 (2007); *Kimbrough* (holding that a district court does not abuse its discretion by concluding that the Sentencing Guidelines yields a sentence "greater than

necessary” to achieve the sentencing statute’s objectives); *U.S. v. Grant*, No. 08-4016, 2009 U.S. App. LEXIS 9360 (3d Cir. 2009); *U.S. v. Connors*, No. 06-189, 2007 U.S. Dist. LEXIS 74904 (E.D. Pa. 2007).

**THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE  
HISTORY AND CHARACTERISTICS OF MR. MARKOVITZ**

Due process guarantees that defendants have a right of allocution prior to the pronouncement of the sentence. This Memorandum explores the nature of the offense, as well as the history and characteristics of Mr. Markovitz.

**(1) The Nature and Circumstances of the Offense**

**(a) Nature of the Offense**

All federal offenses are serious offenses; however Mr. Markovitz’s offense was nonviolent in nature and he does not present a danger to the community. The Presentence Report (“PSR”) includes a full description of the offense; however, it is important that the Court understand the background and circumstances of Mr. Markovitz’s involvement.

The Defendant owned and operated Dierkens Pharmacy, located in Monongahela, for twenty-five (25) years. During the latter part of his ownership, many customers advised Mr. Markovitz that they were purchasing some of their medications from Canadian pharmacies and discovered that there were significant savings in purchasing drugs from Canadian pharmacies.

The defendant made purchases from Quantum Pharmacy and Universal Pharmacy, both located in Canada. After one purchase, he stopped purchasing from Quantum when he realized the drugs were not manufactured in the United States. He made purchases from Universal because the drugs were manufactured in the United States and Universal was an approved pharmacy by certain States to fill prescriptions for both State and Municipal employees.

A portion of the savings realized from the Canadian purchases were passed on to Defendant's customers.

**(b) History and Characteristics of Mr. Markovitz**

Mr. Markovitz was born April 29, 1955 in the Greenfield section of Pittsburgh, Allegheny County, Pennsylvania. Born to Ida, and Harold Markovitz, an exterminator and produce "huckster," he was the second of three children. Mr. Markovitz's older brother, Steven, is a pharmacist in McKeesport, Pennsylvania, and his younger brother, Michael, is a trader for an energy company in Indianapolis, Indiana. Ida and Harold were both extremely involved with all three children's upbringing.

Attached are letters from family and friends that provide insight unto Mr. Markovitz's character (Group Exhibit B). The letter marked Exhibit C is from former employee Paul Cook. Mr. Cook was a pharmacist who became addicted. Mr. Cook entered into a State Program for Rehabilitation of addicted pharmacists. The Defendant hired Mr. Cook knowing his past addiction. Mr. Markovitz decided to give Mr. Cook an opportunity to work in his profession.

The relationship worked for a time. Mr. Cook started using drugs again and stole from the Pharmacy. He was fired by the Defendant. Exhibit G, is a letter from the terminated employee. This letter was written years before the Defendant's present situation, and best demonstrates the character of Jeff Markovitz.



**(i) Education and Activities**

Mr. Markovitz attended Taylor Allderdice High School located in the Squirrel Hill neighborhood of Pittsburgh, Pennsylvania. He graduated from high school in 1973. Mr. Markovitz had an interest in Pharmacy since thirteen (13) years of age, when he started working part-time at a neighborhood pharmacy. He pursued his dream to become a Pharmacist and attended the University of Pittsburgh five year undergraduate and Pharmacy School combined program. He graduated from Pharmacy School in 1978 and obtained his Pharmacy license in 1979, at twenty four (24) years of age. Mr. Markovitz also obtained a Real Estate license and worked as a real estate agent to supplement his income. Mr. Markovitz met his wife, Randi, at the University of Pittsburgh, while she was earning a degree in social work.

Mr. Markovitz was a member of City of Monongahela Chamber of Commerce and Rotary Club. He was a member of the Jefferson Hills Environmental Quality Board, which addressed local environmental issues. He has also served as Vice President and Treasurer of the Pennsylvania branch of Legend Pharmacies where he assisted in helping independent pharmacies compete with large pharmacy chain stores. Mr. Markovitz is a talented musician and has played the clarinet his entire life. He currently plays in four different community bands, which perform at nursing homes, veterans' homes, and church festivals. Mr. Markovitz belongs to Beth El Synagogue in Greentree, PA. He has served on the Beth Israel Center Board of Directors for seven years, two of which he has served as President, and two of which he has served as Vice President.

Mr. Markovitz has been active in youth sports both in Monogahela and Jefferson Hills, both as a manager and sponsor for numerous teams. He also was active in school board activities.

**(ii) Family Responsibilities of Mr. Markovitz**

Since his marriage to Randi on August 23, 1981, they have had three children: Bryan, Craig, and Elyse. Bryan, Mr. Markovitz's oldest child, graduated from Miami University of Ohio and is now Area Leader of Franchise Operators for Domino's Pizza. Bryan and his wife, Alina, a physical therapist, have two children, Brayden, and Brody and are expecting a third child in March. Mr. Markovitz's second child Craig, graduated with his Doctorate Degree from the University of Minnesota. He currently is an employee of St. Jude Medical doing cardiac research in Leipzig, Germany. Mr. Markovitz's youngest child, Elyse, graduated from Miami University of Ohio with a degree in speech pathology. She then went on to complete her Master's Degree in speech pathology from Ithaca College. She now works at St. Mary's Hospital in Boynton Beach, Florida as a speech pathologist. Mr. Markovitz is very involved in his children's lives and dedicates much of his time to his grandchildren. He and his wife provide childcare for Bryan's children.

Mr. Markovitz personally took care of his father, Harold, while he had cancer. His around the clock care for his father lasted for over five months, until his father died in 2007. Mr. Markovitz worked for his brother, Steven Markovitz because Steven's wife was being treated for cancer and Steven needed time to care for her. Steven's wife passed away on November 8, 2016. Mr. Markovitz filled in for Steven numerous times at Qol Meds, to ensure that Steven would not lose his employment.

**(iii) Legal Authority for a Downward Departure Based Upon Family Circumstances**

Following post-*Booker* precedent, the United States Supreme Court in *Gall* noted, and the government acknowledged, that a downward variance from the guidelines' offense level is



permissible if there are compelling family circumstances. *Gall*, 128 S. Ct. at 602. This Circuit has followed this reasoning, finding that family circumstances may serve as a legitimate basis for a sentencing court to grant a downward departure and/or variance and such circumstances need not be extraordinary. See *United States v. Grant*, No. 08-4016, 2009 U.S. App. LEXIS 9360 (3d Cir. 2009) (sentencing court has discretion to consider family circumstance as a basis for a downward departure); *United States v. Dominguez*, 296 F.3d 192 (3d Cir. 2002) (consideration of family circumstances permits a departure from the sentencing guidelines in cases where family circumstances are unusual). See, *United States v. Galante*, 111 F.3d 1029, 1034 (2d Cir. 1997) (granting a downward departure because the defendant was the sole financial provider for his family and found that the ones who benefit from a downward departure based upon family and circumstances are those dependent on the defendant for financial and emotional support); *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992) (holding that a thirteen level downward departure was proper for a defendant who was the sole care provider for her son and grandchild); *United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991) (holding that a defendant whose family stability, including a disabled grandmother who depended upon his presence, was properly granted a downward departure); *United States v. Warfield*, 283 Fed. Appx. 234 (5th Cir. 2008) (on remand from the Supreme Court, family circumstances may be considered for a downward departure and need not be extraordinary); *United States v. Martinez*, 557 F.3d 597 (8th Cir. 2009) (28 month downward departure for lack of criminal history, family circumstances and health issues); *United States v. Buerro*, 549 F.3d 1176 (8th Cir. 2008) (46 month downward departure for mitigating family circumstances upheld). In *United States v. Munoz-Nava*, the 10th Circuit upheld a downward departure based upon family circumstances stating, “*Gall*, however, indicates that factors disfavored by the Sentencing Commission may be relied on by the district

court in fashioning an appropriate sentencing . . . [even though the circumstances are] neither dramatic nor unusual.” *United States v. Munoz-Nava*, 524 F.3d 1137, 1148 (10th Cir. 2008) (citing *Gall*, 128 S. Ct. at 602.)

Thus, a downward variance is not only beneficial for Mr. Markovitz but also for the defendant’s family, who rely on Mr. Markovitz for emotional support and guidance.

#### **(iv) The Defendant’s Charitable Acts and Good Works**

Section 3553(a) authorizes a sentencing judge to consider a defendant’s civic, charitable, or public service, even though these activities are not ordinarily considered under the Sentencing Guidelines. *Rita v. United States*, 551 U.S. 338, 364-365 (2007) (concurring opinion). Charitable good works are to be considered as reflecting on the defendant’s character under the §3553(a) factors. *United States v. Tomko*, 362 F.3d 558 (3d Cir. 2009) (en banc). Mr. Markovitz has dedicated a substantial amount of his time to volunteering and doing charitable works. During the years he owned the pharmacy, Mr. Markovitz volunteered at The Monongahela Senior Citizens Center several times a year, where he met with senior citizens and explained medications, along with information regarding side effects. He also volunteered at Hospice. As previously mentioned, Mr. Markovitz is a talented clarinetist and volunteers his time to perform at various community and church functions. Mr. Markovitz averages 10-15 hours per week on these activities.

While still in Pharmacy School, Mr. Markovitz was employed at a local neighborhood pharmacy, where he observed many unlawful acts. Mr. Markovitz went before the State Board of Pharmacy and reported these illegal activities. The State Board turned the case over to the Department of Welfare. He was very instrumental in developing a case against the pharmacy

which led to the conviction of its owners. Mr. Markovitz received a letter from the Medicaid Fraud Control Unit, Pennsylvania Office of Attorney General thanking him for his cooperation and testimony. (See, “Exhibit A”)

After graduating from Pharmacy School Mr. Markovitz’s first full-time job was at Dierkens Pharmacy. Unbeknownst to him, Dierkens Pharmacy had a history of illegally selling narcotic prescription drugs. When the owner was arrested for this activity, Mr. Markovitz helped with the investigation and testified in Federal Court, on behalf of the government, at the sentencing hearing.

Soon thereafter, in 1982, Mr. Markovitz purchased Dierkens Pharmacy. He transformed a once drug infested store into a safe, community-oriented pharmacy that caters mainly to senior citizens. Mr. Markovitz also helped the local Monogahela Police Department many times, advising them on drug issues and even testified as an expert witness at the local magistrate on their behalf. Before this incident, Mr. Markovitz has no criminal history, has never had his pharmaceutical license suspended, and has never had any issues with the Drug Enforcement Administration. [DEA]

**(iv) Acceptance of Responsibility and Cooperation with the Government, Post Offense Rehabilitation, and Remorse**

In granting a variance from the guideline range, “a defendant’s degree of remorse at sentencing may also be considered under §3553(a). . . .” *United States v. Howe*, 543 F.3d 128, 138 (3d Cir. 2008). “The district court has a responsibility to look at the whole picture when making its determination of whether a defendant has genuine remorse.” *Id.* at 135. In *Gall*, *supra*, the Court recognized that remorse and post offense efforts made by the Defendant, not as ordered by the Court, could be considered as a basis for a downward variance and that such



efforts need not be extraordinary. The Court stated “Gall’s **self-motivated rehabilitation** lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts.” *Gall*, 128 S. Ct. at 602 (emphasis added).

The importance of a defendant’s post-offense conduct in light of *Booker*, *Gall* and the §3553(a)(1) factors was recently addressed by the United States Supreme Court. *Pepper*, *supra*. In *Pepper*, the Court addressed the issue of whether a district court, when re-sentencing a defendant after an appeal, can consider a defendant’s post-sentencing rehabilitation efforts. The Court decided the issue in the affirmative stating:

Preliminarily, Congress could not have been clearer in directing that **[n]o limitation . . . be placed on the information concerning the background, character, and conduct of a defendant that a district court may receive and consider for the purpose of imposing an appropriate sentence. . . .** A categorical bar on the consideration of postsentencing rehabilitation evidence would directly contravene Congress’ expressed intent in §3661. . . . Such evidence may also be pertinent to the need for the sentence imposed to serve the general purposes of sentencing set forth in §3553(a)(2) - in particular, to afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed educational or vocational training . . . or other correctional treatment in the utmost effective manner.

*Pepper*, 131 S. Ct. at 1241-1242. (emphasis added; internal citations and quotations omitted).

The Court also opined that evidence of a defendant’s post-sentencing conduct “most fundamentally” provides an “up-to-date picture of [a defendant’s] history and characteristics.” *Id.* at 1242. The Court’s instruction regarding the need to consider post-sentencing conduct logically applies equally to the consideration of post-offense conduct as discussed in *Gall*.

Since the onset of this case, Mr. Markovitz has been extremely cooperative with the government. Throughout the investigation, he has willingly disclosed documents and has interpreted documents for the government's use. As a result of Mr. Markovitz's cooperation and ongoing investigation, his sentencing has been continued by the United States Attorney on several occasions. Mr. Markovitz has been under Federal constraints since his Plea on January 24, 2013. Mr. Markovitz accepts full responsibility for the crimes with which he has been charged, having pled guilty to both counts. Furthermore, he has great remorse for his actions, and never intended to put the integrity of his pharmacy at risk.

**(1) The Need for the Sentence Imposed**

The sentence imposed should reflect the seriousness of the crime, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide any needed educational or vocational training, medical care or other correctional treatment. In *Gall*, the Supreme Court rejected any notion that a below guidelines sentence or even a probationary sentence is not punishment. *Gall*, 128 S. Ct. at 595-96. "We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty." *Id.* at 595. "Probation is not granted out of a spirit of lenience . . . probation is not merely letting an offender off easily . . . the probation or parole conditions imposed on an individual can have a significant impact on both that person and society . . ." *Id.* at 596, n. 4.

It should be noted that Defendant has paid the forfeiture amount of \$650,000.00.

**CONCLUSION**

WHEREFORE, Jeffrey A. Markovitz respectfully requests that this Honorable Court sentence him to an appropriate sentence that will not include a period of incarceration. Such a sentence is supported by consideration of the § 3553(a) factors including the Defendant's family circumstances, community service, cooperation with the Government, and payment of \$650,000. Such a sentence is "sufficient, but not greater than necessary," to meet the goals of sentencing.

Respectfully Submitted,

s/Wayne V. DeLuca  
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