IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Cr. No. 05-0066 (PLF)**
	)	
WALTER ANDERSON,	)	
	)	
Defendant.	)	
	)	

REPLY TO THE GOVERNMENT'S MEMORANDUM IN AID OF SENTENCING

Mr. Anderson has pleaded guilty to tax evasion in 1998 and 1999, and Fraud under the D.C. Code for evasion of D.C. taxes in 1999. He has accepted responsibility for his actions and is prepared to accept the consequences of those actions. However, as noted in our earlier pleadings, Mr. Anderson has already suffered greatly the consequences of his actions, both directly through imprisonment under very harsh conditions at the D.C. Jail for well over two years, and collaterally through the loss of his businesses, income, and reputation. The goals of just punishment and deterrence have already been met. This is not, as the government asserts, a case wherein the Court should exceed the guidelines and sentence Mr. Anderson at the maximum. Instead, for the reasons cited in our earlier pleadings, this is a case where the Court should exercise its discretion to sentence Mr. Anderson, pursuant to the factors outlined in 18 U.S.C. § 3553 and Booker, to a sentence below the guideline range.

I. Guideline Calculation

The government is correct that the plea agreement referred to the 2001 guidelines. (See Exhibit 1). However, the plea agreement (which was drafted by the

government and thus must be interpreted in Mr. Anderson's favor under both contractual law and the rule of lenity) does not contain a clear statement of agreement to the 2001 guidelines over any other set of guidelines. Although the agreement clearly indicates Mr. Anderson *for purposes of the guideline calculations* will not contest the government's position that the loss amount is more than $100,000,000 and that the crime involved sophisticated means, the application of the 2001 guidelines is less obvious. The only place in the agreement that references the guidelines is paragraph 2:

> Mr. Anderson agrees that the court shall sentence Mr. Anderson after a consideration of the factors contained in 18 U.S.C. § 3553(a), and the court is obligated to calculate and consider, but is not bound by, the United States Guidelines (2001).

One thing is clear: the Court is not bound by the guidelines, 2001 or otherwise. And in fact, the Court remains free to consider whether another version of the guidelines, e.g., the 1999 or 2000 guidelines, is more appropriate, because of *ex post facto* considerations. Given the language of the plea agreement, the Court is obligated to calculate and consider the 2001 guidelines, but the Court should also calculate and consider the 1999 or 2000 guidelines. (There is a marked difference between the resulting sentencing ranges.) Then, the Court should sentence Mr. Anderson in accordance with all of the statutory factors, including the appropriate guideline range.

Mr. Anderson did not waive any *ex post facto* considerations – he was not even aware of them. Counsel mistakenly relied upon the current guidelines because that is what usually applies,[1] but this was not a concession made during plea negotiations. In fact, between

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[1] When reviewing the guidelines with Mr. Anderson, counsel used the "brown book" which is the 2004 edition.

the time the plea offer was made and the time it was entered into in open Court, counsel had not discussed with the government what the guideline range would be. Rather, the discussions surrounded what enhancements would be asked for and what loss amount would be conceded for purposes of the guidelines, at what the maximum sentence would be capped, and ensuring that we would be able to argue for whatever sentence we believed was appropriate. Until receiving the Presentence Report, Counsel had no conversations with Mr. Anderson about the earlier versions of the guidelines and the fact that they would be more favorable for him. Thus, Mr. Anderson cannot be said to have knowingly waived any *ex post facto* considerations. And, "[t]he sentencing court is not authorized to impose an unconstitutional sentence – such as a sentence that violates the Ex Post Facto Clause – and such a sentence is therefore illegal." United States v Groves, 369 F.3d 1178, 1182 (10th Cir. 2004). The fact that the parties misunderstood what the guidelines might be is neither relevant nor binding on the Court.

It is well settled that when *ex post facto* considerations exist, the Court is to use the guidelines in effect at the time the offense was committed. See United States v. Gaviria, 116 F.3d 1498, 1513 (D.C. Cir. 1997); United States v. Booze, 108 F.3d 378, 381 n.3 (D.C. Cir. 1997); United States v. Clark, 8 F.3d 839, 844 (D.C. Cir. 1993). The guidelines provide

> [i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

U.S.S.G. § 1B1.11(b)(1). The commentary to that section of the guidelines makes it clear that what matters is the last date of the offense of conviction, not relevant conduct. See App. Note 2. The same holds true in tax evasion cases. See, e.g., United States v. Martin, 363 F.3d 25,

32, n. 3 (1st Cir. 2004).

The government asserts in footnote 13 of its pleading that "tax evasion is a continuing course of conduct." Notably, the government does not cite a single case to support this conclusion. And while a tax evasion count can be continuing if drafted correctly for purposes of determining when the statute of limitations runs (a procedural question), with respect to the issue of what guidelines apply (a constitutional question), there is case law to the contrary. See Norwitt v. United States, 195F.2d 127, 133 (9th Cir. 1952) ("An attempt to evade a tax and the payment thereof is not a continuing offense."); United States v. Kirkman, 755 F. Supp. 304, 306 (D. Idaho, 1991) ("Neither the language of this statute, nor any case law of which this court is aware, compels the conclusion that tax evasion can be treated as a continuing offense, or that the filing of a tax return is a requisite element of tax evasion."). The fact that the government can point to what it believes were "obstructive actions taken after the March 2002 searches" and asserts that those actions "would have been offered by the government as proof that he knowingly and intentionally committed the crimes charged" is not sufficient to render tax evasion a continuing offense for purposes of determining what guidelines apply.[2] These statements are more akin to relevant conduct, not elements of the offense. A fraud or tax evasion scheme is not a continuing offense when considered in light of

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[2] The government had a choice when it sought the indictment in this case to either charge multiple years of tax evasion as a continuing offense or to charge each year of tax evasion as a separate count. The former may have had the advantage of using a later edition of the sentencing guidelines, but it would have limited the maximum sentence to 5 years. The government chose the latter, presumably to allow them to obtain a longer sentence by seeking consecutive sentences on multiple counts. But having done so, they are now constrained by the protection the Ex Post Facto Clause gives Mr. Anderson. Additionally, although the government charged Count One in a way that may have brought Mr. Anderson's later actions into question, that is not the count that he pleaded guilty to under the plea offer they made.

the *ex post facto* issue. The relevant date is the date when the crime has been committed. See United States v. Swanson, 394 F.3d 520, 524 (7th Cir. 2005); United States v. Barger, 178 F.3d 844, 848 (7th Cir. 1999). In this case, Mr. Anderson completed the act of tax evasion charged in Count V in 1998, and tax evasion charged in Count VI in 1999 (the counts he pleaded guilty to), before the adoption of the 2001 guidelines. Thus, the probation office is correct[3], and the appropriate guideline manual is the earlier edition.

II. The Smaller World Trust

Mr. Anderson created the Smaller World Trust on October 1, 1993, in the British Virgin Islands. (See Exhibit 2). The trust was an irrevocable trust. Mr. Anderson was the settlor of the trust, G&A was the trustee (and Mr. Anderson through his management control over G&A fulfilled that role), and Mr. Anderson was also the initial protector. But, importantly, he was not nor could he ever become a beneficiary of the Trust. (See Exhibit 3) Mr. Anderson designed the trust documents as a purpose trust, with the final purpose trust to be formed consistent with the purpose provisions in draft form. (See Exhibit 4).

Initially, the primary purpose of the trust was to accumulate resources from venture capital and business development activities which would be managed through entities owned by the Trust, i.e., G&A and Iceberg. No distributions were to be made for a term of 13 years. At the conclusion of the 13 year period, in October 2006, a purpose trust would be formed and the ultimate beneficiaries would be determined at that time. Mr. Anderson's list of

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[3] At the time this pleading is being finalized, it is not yet clear what position the Probation Office will ultimately adopt. The draft presentence report indicates a guideline range of 57 to 171 months, but the government has objected and the Probation Office has yet to issue its final report. In any event, this is a legal question for the Court to resolve.

purposes included the promotion of commercial development of space and scientific research and development of space; reduction of weapons proliferation and arms trading, including by governments, support for human rights and the elimination of genocide and slavery. Over time, he added attachments, drafted amendments to the trust, altered the protector list, and added settlor comments consistent with the provisions of the original trust documents. (See Exhibit 5). Notably, the trust provisions would not have allowed Mr. Anderson to make material changes, i.e., he could never make himself or his family a beneficiary. In 1996, he entered into a custodian agreement with Silvia Rubio de Molina to act as the custodian for the Smaller World Trust. (See Exhibit 6). Importantly, Mr. Anderson believed that he had created a valid trust and he acted accordingly in his business dealings.

Although it was not his only concern, at the time he created the trust, he believed that by designating the assets as being held for charitable or public purposes, he would have no tax liability. It is fair to say that when he created the trust and placed all of the assets of G&A in it, he hoped that it would G&A would grow, but he had no idea it would become as large as it did before the crash. He hoped that by the time he was ready to retire, he would be able to accumulate a sizeable trust to distribute in accordance with the purposes he had identified.

The government seems to suggest, despite significant evidence to the contrary, that Mr. Anderson did not actually establish the Trust in 1993, but rather in 2003. Although he is by nature a private person and was keenly interested in protecting the confidentiality of trust, he did at least allude to it on several occasions. For example, a review of the Buchanan notes (his accountants during the relevant years) shows that he disclosed to them that he was the

trustee of a "UK Trust." (See Exhibit 7). Mr. Anderson suspects that they misunderstood when he said British Virgin Island Trust and made the notation "UK". Nevertheless, it demonstrates that he did discuss his role as a trustee. Additionally, although Mr. Anderson tried to walk the line in how he described the owners of Iceberg in his depositions (i.e., he tried not to volunteer information and to decline to disclose the nature of the trust), he now recognizes that on at least one occasion he crossed that line during a civil deposition. Generally speaking, he tried to stick to the answer that he did not know the ultimate owners of the SWT. He believed he could truthfully say this because the ultimate beneficiaries had not yet been determined. He did however in a very general way, tell various people that the money being generated was for charity, was in a trust, or would support causes they believed in.

Mr. Anderson did consult with the Dancia Penn firm in February 2003 after the government's investigation had begun. As the government is well aware, we have asserted attorney client privilege with respect to communications between Mr. Anderson and the Dancia Penn firm, and in particular with the opinion she rendered. That opinion was rendered specifically to Mr. Anderson, not to G&A and thus remains privileged. We have asked the government not to refer to the substance of those communications and to return the opinion to Mr. Anderson. (See Exhibit 8). Nevertheless, they have referred to it and have drawn incorrect conclusions. First and foremost, Mr. Anderson did not consult with Dancia Penn to form the Smaller World Trust. He had already formed it. But, after learning of the government's investigation and consulting with private legal counsel, he decided to retain Dancia Penn to determine whether any changes would be needed in the trust documents in light of the investigation. It is a huge, insupportable leap, to suggest that because Mr. Anderson consulted

Dancia Penn in February 2003, that he created the Trust at that time. Finally, Dancia Penn's opinion about the trust even if it were not privileged, which it clearly is, is not relevant to the question of whether Mr. Anderson believed it to be valid before obtaining that opinion.

The government has cast aspersions on Mr. Anderson's character and impugned his motives throughout its pleading. For example, the government asserts

> G&A was not actually created until October 27, 1992. However to create the illusion that G&A existed more than a year earlier, and that his conveyance of MAT shares to G&A had occurred long before the initiation of merger negotiations, defendant purchased a pre-existing "shelf-company" which he renamed G&A.

Gov't Memorandum at p. 4, n. 2. In fact, Mr. Anderson and Icomnet (a company formed by Mr. Anderson and Mr. Michael Potter), entered into an agreement in December 1991, to form a new company that would become G&A. (See Exhibit 9). Mr. Anderson purchased the shelf company which had a different name, Evangeline, at the suggestion of the BVI firm because it was a quicker way to form a corporation. (See Exhibit 10). He subsequently changed the name to Gold & Appel Transport, S.A. in October 1992. Although there was a delay in forming the company between the option agreement in December and the incorporation, Mr. Anderson neither sought nor created any "illusion" that it existed earlier. The shelf corporation was used for perfectly legitimate reasons, and there was no suggestion that earlier transactions had occurred. Similarly, the government suggests that Mr. Anderson intentionally defrauded Rochester Tel by claiming he transferred most of his shares of MAT to G&A. That is simply not true. His intention to transfer the majority of the shares of MAT to G&A was formed in 1991 and is reflected in the December option agreements. John Klusaritz, one of the attorney's

involved in the deal testified before the grand jury that in December 1992, while working on the deal, he

> became aware of a transfer that had occurred the prior September by Mr. Anderson of a substantial . . . position [probably meant portion] in Mid-Atlantic to a BVI company . . . called Gold and Appel, and we became aware that that transfer apparently was done pursuant to an option agreement that was entered into in December of 1991.

Klusaritz GJ testimony at 14. That is consistent with Mr. Anderson's recollection of the timing of the events. And it is consistent with the documentation. Moreover, it refutes any suggestion that Mr. Anderson was creating an illusion that the company existed earlier. At the same time, Mr. Anderson confirmed for the lawyers that he maintained control over G&A and had an option to buy G&A. What mattered was not who owned G&A for tax purposes, but who controlled G&A. There was no secret that Mr. Anderson was the one controlling G&A. As Mr. Klusaritz testified

> the intent here is that Rochester is the buyer of the company, essentially wants to know that if they're dealing with Gold and Appel, they're really dealing with Anderson, and he's really the face and the person who is Gold & Appel. . . . [I]f they were buying the company, they would probably want to know who the major shareholders were.

Klusaritz GJ testimony at 43. Everything Mr. Anderson did was well documented and was presented to the lawyers for their review. While what he did may have had tax consequences, it was not done to defraud shareholders, creditors, or anyone else.

What the government's argument really boils down to is that Mr. Anderson repeatedly lied about his ownership of Gold & Appel. Mr. Anderson believed at the time that

because of the way he had structured the trust, he did not in fact own Gold & Appel. Rather, it was owned by the Smaller World Trust and the ultimate owners had yet to be determined. He may have been wrong about this from a tax standpoint, but that does not mean it is not what he actually believed.

Mr. Anderson acknowledges that he used the alias Mark Roth in setting up Iceberg Transport. However, this again was not some complex scheme to defraud creditors, shareholders or anyone else. He did not have any identification in the name Mark Roth, he never obtained credit in the name Mark Roth, and that name was never used for any other purpose at any other time. By early 1997 he had discontinued the use of that name. (See Exhibit 11). Additionally, he provided his own passport when setting up the mailbox rental agreement in 1993, and used his own name in conjunction with the name Roth. (See Exhibit 12.)

The government has also made much of the handwritten notes of Mr. Anderson purportedly granting his mother an exclusive option to purchase Iceberg. It is Mr. Anderson's position that this note was never actually meant to be an option, nor could it have been, but was just notes he made. Certainly it would not have been consistent with his practice to grant an option to purchase to his mother or anyone else in a handwritten note. One thing Mr. Anderson did religiously was to document all his transactions in typewritten form, signed off formally by the nominee directors or at a minimum himself representing whatever entity was involved. This is the only example where he is purported to do something so significant in a handwritten, informal way. Additionally, Mr. Anderson did possess the draft bearer shares (they appear to be just the draft certificates – they are undated, are not issued to "bearer", are unnumbered and

do not otherwise appear executed) but, in his mind, he held them in trust for the Smaller World Trust.

The government's assertion that Mr. Anderson falsely identified himself as a citizen of the Dominican Republic in an application for Barclays has puzzled Mr. Anderson from the first time he heard it. He has no recollection of ever doing so, and is as certain as he can be that he did not. He has reviewed the form and although the rest of the application is in his handwriting, he believes that note is not. Someone has clearly crossed out what was originally written and scribed Dominican Republic. It also does not make any sense since Mr. Anderson provided Barclays with a copy of his U.S. passport. (Exhibit 13).

Again with respect to the alleged "cover-up", Mr. Anderson admits many of the facts alleged by the government, but disputes the assertion that these actions were taken to conceal his assets or obfuscate his ownership. For example, the government points to the letter he wrote directing himself to engage in tasks relating to removing G&A's assets for safekeeping. This was simply a continuation of his longstanding policy of documenting everything he did and maintaining the corporate record. Had he not written the letter documenting what he was doing, he would have been accused of acting surreptitiously. Notably, he did not remove assets that belonged to him personally, such as the Rosine painting which remained in his home until it was sold.

The government has also lumped together a number of transactions to suggest that Mr. Anderson "lavished the money [belonging to G&A] on himself and others." When one actually examines these transactions individually, it tells a very different story. The Wyoming Avenue condominium was a modest home for himself. He took out a loan from

G&A in an arms length transaction which he paid back with interest. He then rented it to someone else for a period of time before ultimately selling it. The Georgetown condo is his current home – again a modest home for a bachelor with his personal income (as opposed to the income of G&A). He purchased this home with another arms length loan from G&A which he paid back with appropriate interest. [prior to learning of investigation]. The Madrid mansion was a real estate investment which belongs to the trust (now the Smaller World Foundation) – neither he nor any girlfriend ever resided therein. The Adams Morgan row house again was an investment for G&A which was sold and all proceeds went to G&A. Neither he nor any girlfriend ever lived therein. All the income from the property went to G&A. There were a couple of true gifts identified: he did give a female friend $87,000 to assist her in the purchase of her Foggy Bottom condominium. This was a direct gift from him to her. As discussed in our initial pleading this is a transaction he has since learned was never properly accounted for in the G&A books. Although the money came from G&A, it should have been reflected on the G&A books as a loan to him. Additionally, the $150,000 that went to a long-term personal female friend from G&A was a gift from Mr. Anderson directly. The money came from the G&A account, but it was at a time that G&A owed him over $400,000 on a loan from him. It may not have been fully documented at the time. The Manhattan commercial building was a loan investment for renovation of property in which Mr. Anderson retained an interest. Mr. Anderson did transfer $2.4 million to Ms. Nevia in exchange for a lease of water rights located under the Brazilian farm. Mr. Anderson believes that this lease was a perfectly valid business arrangement and the amount paid is fully commensurate with the value received. G&A made investments in another water related business, Aquarius Holdings, Ltd. These investments

began around the same time. Ultimately G&A invested over $10 million in Aquarius. He had an interest in freshwater, the Brazilian farm was on protected land, and the investment was consistent with other freshwater investments he was making.

IV. History and Characteristics of Mr. Anderson

As we noted in our earlier pleading, Mr. Anderson has attempted to make the best of a bad situation while incarcerated at the D.C. Jail. His charity is not limited to space initiatives. He has tried to help individuals he has come into contact with while incarcerated. After submitting our initial pleading, we received a letter from Hugh Dennis, an inmate Mr. Anderson was incarcerated with for a period of time. (Exhibit 14). Mr. Dennis described his friendship with Mr. Anderson:

> I met Mr. Anderson while I was in C.T.F. for violating my probation. He was placed in my cell in 2/05 until 10/05. In that time we had become good friends. Mr. Anderson was nothing like I had thought he would be. Instead of comparing out like he was better than everyone else there, he did just the opposite. . . . [W]e were two worlds apart, we had nothing in common, but in spite off (sic) everything we had to be there. . . . One day Mr. Anderson ask me what had me so preoccupied, as I begin to tell him he begin to become concerned in my struggles. . . . One day Mr. Anderson offered to assist me with some legal help. . . . Mr. Anderson showed me nothing but genuine concern in helping me prove my innocent! . . . I also believe that God works through people to help other people! Mr. Anderson was one of those people your honor!

(See Exhibit 14).

V. Nature and Circumstances of the Offense/Loss Calculation

Counsel has also obtained an expert report from the Eisner Firm which was engaged to review documents from an accounting perspective when we were preparing for trial.

This firm spent a great deal of time reviewing the accounting records and other documents produced by the government. As a result of their review, they formed a number of conclusions that are delineated in the report. (See Exhibit 15). One of their conclusions from reviewing the records is that

> Anderson was diligent in his efforts to establish and administer the offshore foreign entities. . . . [A] review of the transactions indicates that Anderson (1) did not engage in activities with the intent to defraud creditors, (2) did not divert assets for his personal gain, and (3) did not co-mingle his personal assets with any of the offshore entities. His actions indicate that he believed he was following the letter of the law with respect to the administration of these entities.

(Eisner Report at 3). Additionally, Mr. Anderson maintained his own assets and kept them separate from the assets of G&A or other entities he formed:

> He maintained accurate records and made sure that he did not commingle his personal portfolio with that of G&A or any other separate entity that he formed. Between 1995 and 1999, he reported applicable investment income, including net capital gains, totaling approximately $3.3 million.

(Eisner Report, at 4-5).

Another area addressed by the Eisner Firm is the tax loss calculation. As noted in the Mr. Anderson's initial memorandum, there are many ways to calculate taxes due. The government has chosen the way that maximizes the taxes owed. However, that is not the only legitimate way:

> The Government's tax liability computation was based on the assumption that the additional income to be reported on Anderson's personal federal income tax returns was primarily sub-part F income and taxed at a rate of 39%. Hypothetically, if one was to assume that all the foreign entities should not have existed in the first place, then all the income from the foreign

> activities would have been reported on Anderson's personal federal income tax returns as non-sub-part F income at rates less than 39%. More specifically, the investment activity reported would be subject to capital gains rates resulting in taxes being computed at lower rates.

(Eisner Report at 6.) If the capital gains rates had been applied, using the government's numbers, Eisner concludes that the taxes due would be significantly less than $100,000,000. If he had engaged in even minimal tax planning efforts, the amount could have been significantly less.

CONCLUSION

Mr. Anderson respectfully requests that the Court reflect upon the purposes of sentencing and note that most of those purposes have already been met. As compared to other defendants charged with the same crime, his punishment has been more sever. Mr. Anderson has been deterred, he has been punished, he has demonstrated respect for the law. In light of all of the factors present in this case, we respectfully request that the Court sentence Mr. Anderson to a minimal period of incarceration.

Respectfully Submitted,

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