UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.: 4:01cr00914
	)	
DAVID KAY, *et al.*,	)	
	)	
Defendants.	)	

UNITED STATES' OPPOSITION TO DEFENDANT MURPHY'S MOTION FOR DOWNWARD DEPARTURE

Defendant Murphy seeks a downward departure on the grounds (1) his conduct falls "outside the heartland" of the Foreign Corrupt Practices Act ("FCPA"), and (2) there are mitigating circumstances, including the purportedly "blameless life" led by the defendant, which favor a downward departure. *See* Defendant Murphy's Motion for Downward Departure ("Mot. to Depart") (filed Dec. 15, 2004). First, because "Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person," including payments "to foreign tax officials to secure illegally reduced customs and tax liability," the defendant's conduct is not atypical compared to other prosecutions under the FCPA. *See United States v. Kay*, 359 F.3d 738, 755 (5th Cir. 2004). Second, there are no mitigating circumstances warranting a downward departure, particularly where defendant's purportedly "blameless life" includes two civil fraud judgments,

participation in bribery schemes spanning seven years, and obstruction of justice. The Motion should be denied.[1]

ARGUMENT

I. The conduct is not outside the "heartland" of the Guideline.

A court may depart from the applicable guideline range when it "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). "Unusual or atypical cases are not 'adequately taken into consideration,' hence the heartland departure." *United States v. Hemmingson*, 157 F.3d 347, 360 (5th Cir. 1998). The Guidelines explain the "heartland" exception:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

U.S.S.G., ch. 1, pt. A, intro. comment. 4(b).

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[1] The initial Presentence Report did not identify any factors concerning the offense or the offender that would warrant departure from the guideline range. *See* Initial Presentence Investigation Report of defendant Murphy ("PSR") at Paragraph 79.

A district court cannot depart from the Guidelines, however, unless it first finds, on the record, that the facts or circumstances of a case remove that case from the heartland of typical cases. *United States v. Barrera-Saucedo*, 385 F.3d 533, 536 (5th Cir. 2004). In *United States v. Koon*, 518 U.S. 81 (1996), the Court directed sentencing courts to ask four questions:

> 1. What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case?
>
> 2. Has the Commission forbidden departures based on those features?
>
> 3. If not, has the Commission encouraged departures based on those features?
>
> 4. If not, has the Commission discouraged departures based on those features?

Id. at 95 (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)). "Where the factor at issue is not mentioned in the Guidelines, the sentencing court must, after considering the structure and theory of both relevant individual guidelines and the Guidelines as a whole, decide whether it is sufficient to take the case out of the Guidelines' heartland, bearing in mind that departures based on

grounds not mentioned in the Guidelines will be highly infrequent." *Barrera-Saucedo*, 385 F.3d at 536 (citing *Koon*, 518 U.S. at 96).

Here, the sole feature identified by the defendant that purportedly takes the proscribed conduct outside the "heartland" of the Guideline is the defendant's contention that the FCPA had not "in the past, been applied to the conduct that is alleged in this case." Mot. to Depart at 1. This factor is not mentioned in the Guidelines. Nor does the defendant mention any authority for his contention that "novel application" of a statute removes the conduct from the "heartland" of the Guideline.

The fact that a case may present a legal issue of first impression should not, by itself, make the case atypical or otherwise outside the "heartland" of the Guidelines. To hold otherwise would potentially turn every case that presents a novel issue of law into a case that is outside the "heartland" of the Guidelines, which runs afoul of the stricture that "departures based on grounds not mentioned in the Guidelines will be highly infrequent." *Barrera-Saucedo*, 385 F.3d at 536 (citing *Koon*, 518 U.S. at 96).

Further, in *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004), the court determined that Congress specifically intended the FCPA to cover the conduct at issue. Contrary to defendant's contention, this prosecution was not a "new

direction taken with the application of the FCPA." *See* Mot. to Depart at 1. To the contrary, the court in *Kay* determined that Congress had expressed its intention, both directly and indirectly, for the FCPA to cover "bribes paid to foreign tax officials to secure illegally reduced customs and tax liability" to assist the payor in obtaining or retaining business on three separate occasions – in 1977, 1988, and 1998. *Id.* at 755.

In reviewing Congress' intent in originally enacting the FCPA in 1977, the court determined that Congress intended the FCPA "to include bribes meant to affect the administration of revenue laws." *Id.* at 748. As stated by the court:

> Congress was obviously distraught not only about high profile bribes to high-ranking foreign officials, but also by the pervasiveness of foreign bribery by United States businesses and businessmen. Congress thus made the decision to clamp down on bribes intended to prompt foreign officials to misuse their discretionary authority for the benefit of a domestic entity's business in that country.

Id. at 749. In fact, the court noted there was "*little difference*" between the "[*o*]*bvious*[]" FCPA violation involving a corporation bribing a foreign official to award a contract, and a violation involving a corporation lawfully obtaining a contract from an honest official by submitting the lowest bid but "bribing a different government official to reduce taxes and thereby ensure that the under-bid

venture is nevertheless profitable." *Id.* (emphasis added). Similarly, when Congress narrowly defined exceptions and affirmative defenses to the FCPA in 1988, the court noted that the statements in the Conference Report for the 1988 amendments – that "retaining business" under the FCPA included payments such as those made "to a foreign official for the purpose of obtaining more favorable tax treatment" – reflected one of the concerns that initially motivated Congress to enact the FCPA. *Id.* at 753. And in reviewing Congress' ratification of the Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"), the court concluded that unlawfully reducing "the taxes and customs duties at issue here to a level substantially below that which ARI was legally obligated to pay *surely* constitutes an 'improper advantage' under the Convention." *Id.* at 754 (emphasis added).

In addition, not only is the generic conduct at issue here typical of cases covered by the FCPA, but defendant's specific intent is as well. There was evidence at trial demonstrating that defendant Murphy was aware of the FCPA. *See* Murphy Ex. 7 (ARI Policy Statement on the FCPA). The documentary and testimonial evidence at trial also demonstrated the direct link between the reduction in sales taxes and customs duties effectuated by the bribes and the

retention or maintenance of ARI's business in Haiti. Defendant Kay, for instance, warned Murphy that Haiti's newly implemented "TCA" sales tax system could have "a profound and lasting effect on the profitability of the Haiti market." *See* Government Ex. 73. Two years after Haiti implemented the TCA tax, Kay informed Murphy that the company's 5% loss of market share in Haiti was "related to the TCA tax." *See* Government Ex. 98. And defendant Kay demonstrated for Murphy in graphic form how the savings in customs duties and taxes caused by the bribes allowed ARI to sell its rice at a price below its competitors. *See* Government Ex. 83. The evidence, in short, demonstrated defendant Murphy's involvement in bribing Haitian government officials with the specific intent to reduce taxes and thereby ensure that the Haitian venture was profitable. Such conduct falls squarely within the heartland of cases typified by the FCPA.

II. There are no mitigating circumstances sufficient to warrant a downward departure.

The defendant also seeks a downward departure based on (1) his purportedly "blameless life" prior to the conviction, and (2) financial dependence on him by the defendant's family. These circumstances are not sufficient to warrant a downward departure.

Contrary to defendant's contention, the PSR does not state or otherwise reflect that "to this point Mr. Murphy has lived a blameless life." *See* Mot. to Depart at 4. The PSR notes defendant Murphy's involvement in four separate bribery schemes spanning a period from 1991 until his termination by ARI in October 1999. *See* PSR at ¶ 9. The PSR states that the decision to increase the amount of the bribes paid to the Haitian customs officials in January 1998 was motivated, in part, by financial difficulties faced by ARI following a civil fraud judgement against, among others, defendant Murphy personally. *Id.* at ¶ 8. The PSR notes that defendant Murphy continued to bribe Haitian government officials after his termination by ARI, and that he did not cease making the bribes until he was forced to flee Haiti in February 2000. *Id.* at ¶ 11. Following disclosure of the bribery scheme, the PSR notes that defendant Murphy obstructed justice by lying to the SEC about his involvement in the bribery scheme and failing to produce all of the documents in his possession. *Id.* at ¶¶ 14, 18. The PSR notes that defendant Murphy was held civilly liable for $14.4 million to ARI for, among other things, violating his fiduciary duties and committing felony theft by fraudulently appropriating his former employer's assets. *Id.* at ¶ 59. And the PSR notes that defendant Murphy remains a defendant in a civil lawsuit filed against him by the

SEC. *Id.* at 60. Although such conduct spanning over a decade is "unusual," it is not of the type that warrants a downward departure.

Nor are the defendant's family responsibilities sufficient to warrant a downward departure. The Guidelines state that "[f]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. § 5H1.6. The defendant has offered no circumstances related to his family responsibilities that are extraordinary. *See* Mot. to Depart at 4.[2] To the contrary, in terms of financial dependence, for instance, it appears that defendant's family will continue to benefit from the approximately $35,000 per year in income from defendant's interest in a limited liability company, *see* PSR at ¶ 55, and a $300,000 family trust, *id.* at ¶ 62.

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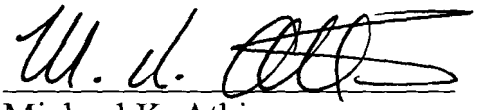
[2] *Cf. United States v. Alba*, 933 F.2d 1117, 1122 (2d Cir. 1991) (extraordinary family responsibilities found for father of a 4 and 11 year-old who, among other things, worked two jobs and lived his wife, his two children, his disabled father – who depended upon defendant to help him get in and out of his wheelchair – and his paternal grandmother).

CONCLUSION

For the foregoing reasons, defendant Murphy's Motion for a Downward Departure should be denied.

Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of the United States' Opposition to Defendant Murphy's Motion for a Downward Departure was served on the following attorneys by U.S. Mail on this, the 27th day of December 2004:

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