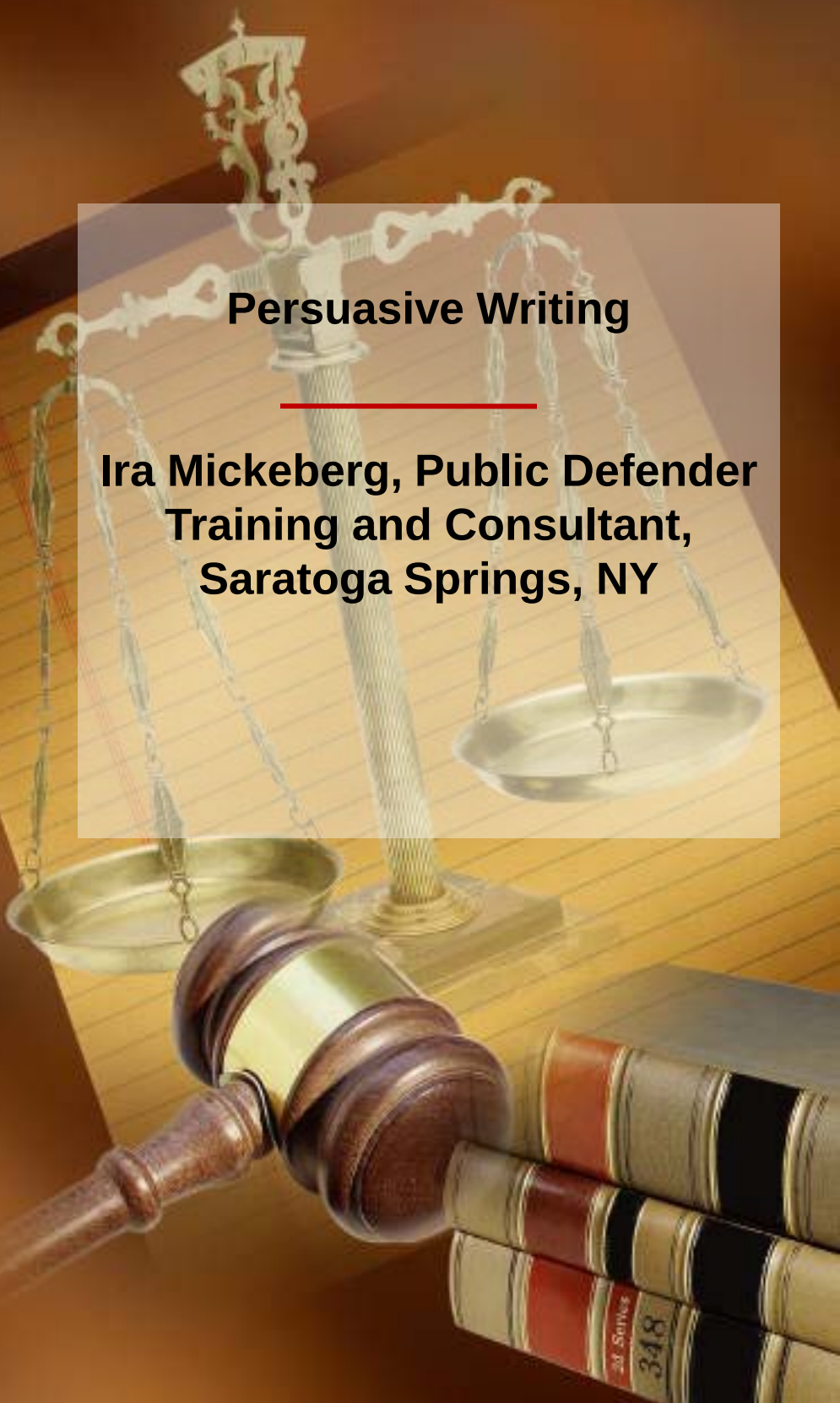


SENTENCING

ADVOCACY WORKSHOP

Persuasive Writing

**Ira Mickeberg, Public Defender
Training and Consultant,
Saratoga Springs, NY**



WRITTEN SENTENCING ADVOCACY

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I. Some General Principles For Report Writing

A. YOUR REPORT DOES NOT HAVE TO LOOK OR READ LIKE AN “OFFICIAL” COURT DOCUMENT OR A WELFARE DEPARTMENT CASE FORM

1. Remember, the goal is persuasion. Reports that look and sound like every other bureaucratic document that gets thrown into a case file do a poor job of persuading the court to treat our clients fairly. Make your report look like something that will persuade a judge.

2. There is no such thing as a “required” form for a defense sentencing report. The fact that your office has “always” used a particular form is not a good reason for continuing to use it if it is not persuading judges to impose the sentence you want.

B. USE YOUR SENTENCING REPORT TO TELL A PERSUASIVE STORY

1. People, even judges, are persuaded by a good story. Your chances of getting what you want are increased if your sentencing report tells a persuasive story about your client and the case that lead the judge to believe that it is doing the right thing by accepting your sentence recommendation.

2. When you write your report, consciously think about what makes a good story. Focus on these elements before you begin to write:

a. Who are the characters in your story, and how will each character be portrayed?

b. Where will your story be set? Usually there will be more than one setting, such as: your client’s childhood home; his cell in jail; the place where the crime took place; the mental institution where your client spent most of his life; etc.

c. In what sequence will you tell your story? What is the beginning, where does it move to after the beginning, and how does it end?

3. Use your theory of defense paragraph as a guide for writing your report.

III. Some General Principles For Persuasive Writing

A. Remember that good legal writing has two goals:

1. Persuasion
2. Clarity

B. Persuasive Writing

1. Know what your theory of defense is for sentencing. A sentencing theory of defense

may be defined as:

A paragraph of four or five sentences that summarizes the factual, emotional, and legal reasons why the court should impose a favorable sentence. It tells your client's story of mitigation, rehabilitation, or reduced culpability, and it resolves any problems or questions the judge may have about imposing the sentence you want.

2. Having an sentencing theory of defense will allow you to consciously decide what is important to your case. This is crucial to writing your brief, because you can choose your words intelligently only if you know what you are trying to accomplish with them. For example:

1. What facts are you trying to emphasize?
2. What facts are you trying to downplay?
3. What emotions are you trying to elicit in the reader?
 - a. Disbelief.
 - b. Frustration over an injustice.
 - c. Anger.
 - d. Sympathy.

3. Write about facts. In most cases, there is little debate over the law. The real issue is whether the facts of your case fit within the relevant legal boundaries.

a. The facts about your client's life, and the facts about the crime for which he has been convicted should be used to persuade, not just provide background information. Select and emphasize those facts which advance your argument.

b. Use facts to create the mood in which your brief will be read. For example, If you want the reader to feel sympathy for your client, select facts and use language which will make him or her appear sympathetic.

c. If you discuss sociological principles, be sure that you quickly follow up by explaining what about the facts of your case makes those principles relevant.

4. Remember principles of primacy and recency. People are most persuaded by what they hear first and what they hear most recently. Applying this to persuasive writing means that:

a. You must put the best stuff first. This is so essential that it must be done, even if it means rearranging the order or form you usually follow when writing a report. Don't save the best material for later, or for a "surprise." If you wait, there is a good chance that either the judge won't get around to reading it, or that he or she will have already decided the issue against you after reading the weaker material you led with.

b. End on a high note -- even if it means looping back to the strong information you started the report with.

5. Use active, not passive language.

Active: She went to the office at 9:00 A.M.

Passive: She had gone to the office at 9:00 A.M.

Active: He took the money from the drawer.

Passive: He had taken the money from the drawer.

6. Use graphic language to support your case.

Dull: The officers forcibly entered the room.

Graphic: The police smashed through the door.

Dull: She threatened appellant with a gun.

Graphic: She held a gun to appellant's head.

or: She stuck a gun in appellant's face.

BUT: Be sure that you only use graphic language where it will help you. Don't use it to enhance the prosecution's case.

7. Use dull, conclusory language when describing facts you want to minimize.

ex: Dull (but good): Appellant held a gun.

Graphic: Appellant brandished a 9mm automatic.

Dull (but good): Appellant was found with the complainant's personal property.

Graphic: Appellant was grasping the victim's wedding ring and life savings.

8. Avoid "social worker-talk" and "cop-talk."

a. Using institutional language legitimizes the behavior of the police and the court system. This should be avoided in your writing, because the default position of those systems is harshness in sentencing.

b. Using institutional language suggests that everything that happened in your case was normal and routine. Your job, however is to create exactly the opposite feeling -- to convince the court that your case is not routine, and should be treated differently from the many defendants who get maximum sentences.

c. Remember that institutional language is designed to give the impression that your client is a bad person.

ex: Cop-talk: They apprehended the alleged perpetrator.
Normal speech: They arrested somebody.

Cop-talk: They proceeded to the vehicle.
Normal speech: They went to the car.

9. Use language that humanizes your client.

- a. Refer to your client by his or her name.
- b. Don't always refer to your client as "defendant."
- c. Try to include factual details which make your client seem to be a decent

person.

ex: Instead of: Ms. Smith was on her way to work.

Humanize: Ms. Smith was walking to her job at Ace Motors, where she had been a salesperson for three years.

Instead of: Mr. Jones went home.

Humanize: Mr. Jones went to his apartment on Laurel Road, where he lived with his wife and three children.

10. Don't obviously and unrealistically sugar-coat things.

- a. You don't have to minimize the seriousness of the crime unless the facts support your claim.
- b. Avoid unrealistic and unbelievable claims that your client is a wonderful person.
- c. Avoid assertions that are so trivial that the court will automatically dismiss them.

C. Clear Writing

1. In general, shorter is better.

- a. Short sentences enable you to communicate in a way that is easier for most people to understand.
- b. If a sentence is too convoluted or difficult to understand, try to divide it into two or three separate sentences.
- c. Short paragraphs allow the reader to absorb information in amounts they can handle.

2. Decide how you are going to organize your story.

- a. Every story can be told from various perspectives. For example:
 - 1. Chronologically, according to the events of the incident.
 - 2. Chronologically, according to the events of your client's life.
 - 3. From the perspective of individual characters.
- b. Select an organizational form which best compliments your sentencing theory of defense.
- c. Once you have chosen a perspective from which to tell your story, stick with it. Try not to flip back and forth between other organizational forms.

3. Avoid meaningless language. Many words have specific meanings, but are instinctively used by sentencing advocates and lawyers as filler, when they have nothing of substance to say. Some of these words are:

- a. Clearly
- b. Mere
- c. Obviously
- d. Generally
- e. Certainly

4. Be sure to do reality testing on everything you write. Before filing something, always ask yourself, "Would someone outside the criminal justice system understand and believe this?"

Whenever possible, have someone from outside the criminal justice system read your report. Ask him or her questions about the clarity and organization of your facts and arguments - then listen to the answers and make changes accordingly.

A SAMPLE OF PERSUASIVE SENTENCING ADVOCACY

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Hon. Harold Baer, Jr.
December 30, 2003
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December 30, 2003

BY HAND

Hon. Harold Baer, Jr.
United States District Court
500 Pearl Street
New York, NY 10007

**Re: United States v. Usman Wai
Dkt. No. 03-CR-450-02 (HB)
Request for Downward Departure**

Dear Judge Baer:

Usman Wai is scheduled to appear before you on January 8, 2004 for sentencing. He pled guilty to Conspiracy to Aid and Assist in the Preparation of False Tax Returns in violation of 18 U.S.C. §371 and 26 U.S.C. §7206(2). The purpose of this letter is to request that the Court grant Mr. Wai a modest downward departure and substitute a term of home detention for that of jail time in conjunction with a term of supervision.

Mr. Wai is the "Don Quixote" of the Pan-African Movement

Many people consider Usman Wai, 61, to be the "Don Quixote" of the Pan-African movement. He has devoted his life to chasing an impossible dream, the creation of a "United States of Africa." Born in Sierra Leone, Mr. Wai, at great personal and financial cost, founded and maintained the Pan-African Public Policy Organization ("PAPPO"), a group designed to help destitute Africans to live with greater dignity and to help the nations of Africa realize their potential through unified action. He has created a website, advised journalists, and given away significant amounts of money to support the cultural and educational endeavors of promising young Africans, despite living near the poverty level himself. Mr. Wai has been described as "the most devoted Pan-Africanist of his generation," by Okey Ndibe. Professor Ndibe, currently the Writer in Residence and a Professor of Literature at Simon's Rock College of Bard College at Great Barrington, MA, was a founding editor of *African Commentary* in 1989.

Mr. Wai's dreams, like Don Quixote's, often seem fantastical. It sometimes appears that his zeal for ideals is matched only by his inability to produce concrete results. When Probation Officer Wanda Whitney interviewed Mr. Wai and asked him about the civil war raging in his country, he simply broke down in tears. In the words of Professor Ali A. Mazrui, Mr. Wai's long time colleague and the Albert Schweitzer Professor in the Humanities, Institute of Global Cultural Studies at Binghamton University, State University of New York, Mr. Wai's dream of African regional

integration and intensified ties between Africa and African-Americans reflects a noble “ambition [which] outstrips what any single individual can possibly achieve.”¹

Mr. Wai’s deep antipathy to injustice, coupled with his frustration at being unable to correct it, led directly to his violation of the American tax laws. Mr. Wai eked out a modest living for many years by providing emigrant Africans with advice and helping poor Africans and African-Americans complete bureaucratic forms, including those required by the Internal Revenue Service and Immigration and Naturalization Service. He eventually learned, from news media, that millions of well-to-do Americans were able to escape income taxes completely through what he perceived as clever accounting practices. He was struck by this inequity because his own low income clients, unable to run personal expenses through their businesses or make charitable contributions for which they received indirect personal benefits, paid what Mr. Wai perceived as unfairly burdensome taxes.

Like Don Quixote, Mr. Wai responded to this perceived injustice in a naive and fantastical way. He helped his poor clients invent imaginary deductions so that they, like their rich counterparts, could avoid tax liability. Although Mr. Wai’s actions resulted in approximately \$117,000 in illicit gains for his clients, his own profit was negligible. He charged the same flat fee of \$300.00 for each tax form he prepared, regardless of the number or type of deductions included.

There has never been any doubt that Mr. Wai is indigent and that his crime was altruistically motivated. At the initial presentment, the Court appointed Joshua Dratel, Esq. to represent him. When Mr. Dratel asked Mr. Wai what prompted his crime, Mr. Wai produced an article from the New York Times, dated December 16, 1998, entitled “48 Million Americans Pay Zero Income Taxes.”² Mr. Wai also produced additional literature from the mainstream media confirming this anomaly in tax enforcement. Mr. Wai never concealed his motives or contended that he had not violated the law. He wanted to help poor people. Mr. Dratel was stunned. Mr. Wai appeared to have committed a financial crime without any motive of personal financial gain.

Mr. Wai’s Extraordinary Efforts on Behalf of African Unity and the Absence of Any Motive of Personal Financial Gain in His Crime Compel a Modest Downward Departure.

Mr. Wai has lived in the United States for thirty years. This case, needless to say, marks his only conflict with the law. The Presentence Report (“PSR”) calculates the tax loss caused by Mr. Wai’s crime at approximately \$117,000. This, after various adjustments, results in a total offense level of 13, and a sentencing range of 12 to 18 months. Mr. Wai pled guilty pursuant to a Pimental letter which contained identical calculations.

¹See, Letter from Ali A. Mazrui, Albert Schweitzer Professor in the Humanities, Institute of Global Cultural Studies, Binghamton University, State University of New York dated October 17, 2003, annexed hereto as Exhibit A, the original of which was sent directly to the Court.

²A copy of this article is annexed hereto as Exhibit B.

Mr. Wai and I have reviewed the PSR and have no objections either to its factual recitation or calculations of his Sentencing Guidelines. The Pimental letter, unlike a plea agreement, does not restrict Mr. Wai's ability to move for downward departures.

The purpose of this letter is to request that the Court grant Mr. Wai a three level downward departure. This would reduce Mr. Wai's total offense level to 10, his sentencing range to 6 to 12 months, and place him in Zone B, which would allow the Court to substitute home detention for a term of imprisonment. The basis of this request is Mr. Wai's extraordinary history of civic and charitable works, and his lack of any significant personal gain from his tax crime.

Mr. Wai Has Dedicated His Life to the Cause of African Unity and the Betterment of Life for All Africans and African-Americans.

Usman Wai was born into a traditional elite family in Sierra Leone. He was educated there in British schools and came to the United States to further his education and promote the goal of a united Africa. Mr. Wai studied journalism at the University of California at Irvine in the early 1970's. He later attended the Graduate School of Journalism and Communications at the University of Ghana at Legon and earned a Bachelor of Arts Degree from Lehman College of the City University of New York in 1989. He worked as a bus driver for the New York City Transit Authority while earning his degree and also as an intern Governor Mario Cuomo's press office at the World Trade Center.

Two of Mr. Wai's brothers also immigrated to the United States. Sidique Wai is currently the Chief of Health Initiatives for the New York City Housing Authority. Mustafa S. Wai is a Certified Public Accountant with the firm of Deloitte & Touche in Washington, D.C. Mustafa recounts how he was but one of many African college students whom Mr. Wai, despite his own lack of personal wealth, assisted with rent and tuition. Few, if any, of these students would have been able to complete college without Mr. Wai's help.³

³See, Letter from Mustafa S. Wai, October 31, 2003, annexed hereto as Exhibit C, the original of which was sent directly to the Court.



Usman Wai

second right with his family

In 1985, African and African-American intellectuals and activists founded PAPPO, an organization dedicated to the ideal of African Unity, and appointed Mr. Wai as its director. In the summer of 1995, *West Africa*, a leading journal of African thought, published an article, "Movement for African Unity"⁴ which described PAPPO's goals as follows:

Ten years ago, in 1985, some like-minded Africans and people of African descent founded the Pan-African Public Policy Organization (PAPIO). Its director is Usman Wai, a Sierra Leonean Pan-Africanist resident in the United States. The founding of PAPPO came as the culmination of years of pondering the condition of Africa and Africans; reflecting on the domestic preoccupations of some African leaders while history was literally leaving our continent behind. From inception, PAPPO was meant to be the pre-eminent, public membership organization that would create awareness and sensitize Africans and their friends around the world on the great need to embrace the Pan-Africanist ideal. The founding membership say they had no illusions about the tasks at hand and the obstacles to overcome. They were only too aware that many of Africa's political leaders were, at best, indifferent; even hostile to the idea of the continent coalescing into the United States of Africa. But apart from those leaders, many of the continent's intellectual elite have taken the position that uniting Africa is too complex, too complicated, and should be left alone.

Mr. Wai elaborated on the problems which the Pan-African movement faced, and the means by which PAPPO hoped to solve them:

⁴A copy of "Movement for African Unity" is annexed hereto as Exhibit D.

Says Wai: "One of these ways is to take the case directly to the people of Africa, friends of Africa and peoples of African descent worldwide, thus bypassing the political elite obsessed with their petty kingdoms. In order to win the minds and hearts of the people of Africa everywhere, PAPPO intends to employ the latest technological advances in computers and communications unleashed by the Information Superhighway. The organization will, of course, need money; lots of it. It will need moral support also. We will engage in the business of publishing a Pan-African international news magazine of record in addition to setting up a powerful radio and television network in Africa. There is also great concern for the need to resettle and rehabilitate people displaced either by natural disasters or man-made tragedies such as the ones in Sierra Leone, Liberia, Rwanda, Somalia, Sudan and Burundi under the aegis of the Global Pan-African Relief and Refugees Fund."

As director of PAPPO, Mr. Wai has published articles such as "A Vote For a United States of Africa," *African Commentary*, December-January, 1990-91⁵, reviewed documentaries such as the PBS/BBC television series The Africans: A Triple Heritage⁶, and actively advised numerous African activists who immigrated to the United States. These include Okey Ndibe, currently the Writer in Residence and a Professor of Literature at Simon's Rock College of Bard College at Great Barrington, MA, who helped found *African Commentary* in 1989. Professor Ndibe, describes Mr. Wai as "the most devoted Pan-Africanist of his generation," and describes how Mr. Wai provided moral, editorial and financial support to *African Commentary* in its fledgling days.⁷ Professor Ndibe attests that Mr. Wai's devotion to the cause of African unity was not simply to the realm of ideas noting that Mr. Wai helped financially sustain many young Africans, while barely living above the poverty level himself. Over the past few years, Mr. Wai has dedicated himself to building a website "www.tusaw.com" whose goal is to spread the message of African unity and increase the ease of communication among activists.

Mr. Wai's self-sacrifice and personal generosity have been confirmed by many, including Lloyd Taylor, President of the New York Livery Base Owners & Drivers Association, Inc., and Ekwow Spio-Garbrah, Chief Executive Officer of the Commonwealth Telecommunications

⁵A copy of this article is annexed hereto as Exhibit E.

⁶See, Letter of Ali A. Mazrui, annexed hereto as Exhibit A.

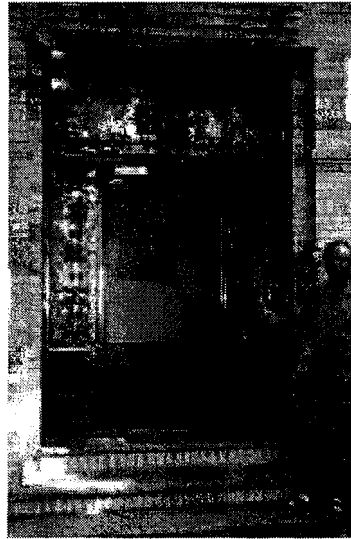
⁷See, Letter of Professor Okey Ndibe, October 17, 2003, annexed hereto as Exhibit F, the original of which was sent directly to the Court.

Organization, an intergovernmental treaty organization based in London comprising some 50 full and associate member countries.⁸

Mr. Wai has done all of his work from a small, sparsely furnished apartment in Williamsbridge, a low income section of the Bronx, where he lives with his ex-wife. Mr. Wai helps provide financial and emotional support to his 38 year old daughter, Zainab Wai-Lassana, a clerical associate at Kings County Hospital in Brooklyn. He regularly helps his grandchildren, Massah Lassana and Cecil Lassana, with their homework and plays an integral role in their lives.⁹



Usman Wai in



his home office

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⁸See, Letter of Lloyd Taylor, October 16, 2003, annexed hereto as Exhibit G; Letter of Ekwow Spio-Garbrah, October 6, 2003, annexed hereto as Exhibit H. The originals of both of these letters were sent directly to the Court.

⁹See, Letter from Zainab Wai-Lansana, October 15, 2003, Letter from Massah Lansana, October 15, 2003, and a Joint letter from Alfred Collins and Yemah Wai-Collins, Mr. Wai's brother-in-law and sister, October 15, 2003, collectively annexed hereto as Exhibit I. The originals of all of these letters were sent directly to the Court.

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home in
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Mr. Wai's Crime Was Motivated by a Misguided Desire to Help Poor People

Mr. Wai, while staunchly believing that the United States of America should be a model for the future United States of Africa, came to see the American system of taxation as oppressive of lower-income, working people. He read accounts of well-to-do people paying little if any income tax, and saw his own clients working long hours, barely making ends meet, and paying substantial sums to the government. In retrospect, Mr. Wai understands that he was wrong to allow his compassion overcome his fundamental respect for the American way of life. His methods were simple, unsophisticated, and transparent to anyone who reviewed his clients' returns. He simply began inventing fictitious deductions so that his clients would avoid taxes. Mr. Wai charged his clients no more than \$300 per return. While the government's "loss" was approximately \$117,000, Mr. Wai's "profit" was no more than \$7,800. The PSR implicitly recognizes this when it notes that Mr. Wai will not be required to pay restitution, which will instead come from his clients who now have to pay their full income tax. *See*, PSR ¶ 15.

The Court Should Grant Mr. Wai a Modest Downward Departure Because the Calculated "Tax Loss" Overstates the Seriousness of His Crime and Because of His Extraordinary Charitable and Civic Activity.

A district court has the discretion to sentence below the range specified by the Guidelines if it determines that there is a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. §3553(b); U.S.S.G. §5K2.0. A court must determine whether the particular facts of the case fall outside the "heartland" of cases which typically fall within the Guidelines. *United States v. Bonnet-Grullon*, 212 F.3d 692, 700 (2d Cir. 2000).

In *United States v. Greene*, 249 F.Supp. 262 (S.D.N.Y. 2003), Judge Scheindlin granted a downward departure under circumstances that are strikingly similar to those in this case. The defendant in *Greene*, like Mr. Wai was a tax preparer who provided lower income people with false deductions to eliminate their tax liability. He also displayed extraordinary selflessness by adopting and raising six underprivileged children. The defendant in *Greene*, like Mr. Wai, was in his sixties. Although the defendant in *Greene* had a prior harassment conviction, Judge Scheindlin departed and imposed a sentence of probation without any condition of home detention.

Courts have recognized, with respect to tax and other financial crimes, that a downward departure may be warranted where the amount of the "loss" calculated by Guidelines overstates the seriousness of the defendant's crime. *United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998).

The Second Circuit, in particular, has recognized that a defendant who committed a financial crime may be entitled to a downward departure where he was not motivated by personal gain or greed. United States v. Broderon, 67 F.3d 452 (2d Cir. 1995). The Second Circuit has also recognized that charitable and civic works may form the basis for a downward departure if they are truly “extraordinary”. United States v. Korman, 343 F.3d 628 (2d Cir. 2003); *See also*, United States v. Tocco, 200 F.3d 401 (6th Cir 2000); United States v. McClatchey, 316 F.3d 1122 (10th Cir. 2003). Although courts have been disinclined to grant downward departures to well-to-do defendants who made large financial contributions to their favorite charities, the courts have been more favorably inclined to working class defendants who give of “themselves” as well as contributing money. United States v Serafini, 233 F.3d 758 (3d Cir. 2000). The Guidelines themselves recognize that a downward departure may be appropriate in a non-violent crime where the conduct represents aberrant conduct in the defendant’s otherwise law abiding life. U.S.S.G. §5K2.20. In determining the appropriateness and extent of a downward departure, the court may not only consider each of these factors individually, but may consider whether these factors, when taken together, combine to create a situation that “differs significantly from the ‘heartland’ cases covered by the guidelines.” United States v. Core, 125 F.3d 74 (2d Cir. 1997); United States v. Rioux, 97 F.3d 648 (2d Cir. 1996); United States v. Somerstein, 20 F.Supp.2d 454 (E.D.N.Y. 1998).

All of these factors combine to suggest that the Court should grant Mr. Wai a downward departure. Mr. Wai is 61 years old, has no history of any conflict with the criminal law, and is the most unlikely of criminals. This is not a typical tax case in which the tax loss roughly approximates the defendant’s gain. Mr. Wai’s motive was not to enrich himself, but to assist poor people. His “profit” was but a minute fraction of the loss. This is consistent with his life-long devotion to the cause of African unity and his consistent pattern of emptying his own pocket to assist young people. Mr. Wai allowed his compassion and extraordinary generosity of spirit to overcome his better judgment. There is no likelihood that this will ever again cause him to break the law.

The Court should grant Mr. Wai a modest three level departure. This would reduce his total offense level from 13 to 10, and his sentencing range to 6 to 12 months. This type of downward departure is even more modest than those approved by appellate courts for extraordinary civic activities, *Compare*, United States v Serafini, *supra*, (three level downward departure affirmed for *well-to-do* defendant who had made substantial charitable contributions), or United States v. Broderon, *supra*, (seven level departure approved) where the defendant’s motive in an economic crime was not self-enrichment, but helping his troubled corporation. This would allow the Court to substitute a term of home detention for jail time.

I respectfully request that the Court downwardly depart and impose a term of home detention as a condition of a probationary sentence.

I thank the Court for its consideration of this matter. Please feel free to have your Chambers call me if you have any questions.

Hon. Harold Baer, Jr.
December 30, 2003
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Sincerely,

Lloyd Epstein

LE:pc

cc. Andrew Fish, Esq.
Assistant United States Attorney

Ms. Wanda Whitney
United States Probation Officer

Clerk of the Court

Mr. Usman Wai