IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CR-13-063-F
	)	
BARTICE A. KING, et al.,	)	
	)	
Defendants.	)	

PRELIMINARY FINDINGS AND COMMENTS
WITH RESPECT TO SENTENCING

As I have previously noted, (*see*, doc. no. 1814 filed on November 17, 2015), one of the court's obligations at sentencing is to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Thus, one of the goals of the sentencing proceedings in this case will be to avoid dissimilar treatment of similarly situated defendants and, conversely, to avoid a cookie cutter approach that would accord similar treatment to defendants who are *not* similarly situated. Gall v. United States, 552 U.S. 38, 55 (2007). In this case, in which at least 26 defendants will be sentenced, these considerations are especially prominent. The purpose of these preliminary findings and comments is to articulate some of the considerations that will be applicable to all of the sentencings in this case. For the benefit of the parties and a reviewing court, these preliminary findings should be considered to be supplemental to, but an integral part of, the court's findings at each of the sentencings in this case. These

preliminary findings will be made part of the non-public statement of reasons in each judgment entered in this case.

I. Basic considerations.

A. Statutory provisions.

Three statutory provisions are fundamental to the sentencings in this case.

First, under 18 U.S.C. § 3553(a), the court is obliged, in each instance, to impose a sentence that is "sufficient, but not greater than necessary," to accomplish the purposes of sentencing as set forth in § 3553(a)(2). This "parsimony principle," as the Court of Appeals calls it, has been expressly recognized in our circuit. United States v. Martinez-Barragan, 545 F.3d 894, 904 (10th Cir. 2008). This sentencing court "must be guided" by the parsimony principle. *Id.* A direct corollary of the parsimony principle is the proposition that a sentence should not be unnecessarily destructive. In many instances, sentencing is unavoidably destructive of family relationships, earning capacity and other positive qualities, but I am mindful of the need to avoid imposing sentences that are unnecessarily destructive.

The task of imposing a sentence that is sufficient, but not greater than necessary, to accomplish the objectives of sentencing is also informed by what I call the concept of proportionality. I think it is fair to say that, except when express statutory mandates require otherwise, proportionality is a concept that permeates everything we do in sentencing in the federal judicial system. In many cases, that concept of proportionality first comes into play with the charging decision, which, of course, is entirely within the province of the executive branch. But the concept of proportionality is also very relevant to the duties of the judicial branch, and the judicial branch has the advantage of applying a sense of proportionality at the end of the case, with the benefit of all

that will have transpired, rather than at the beginning of the case, when the charging decision is made. It must be understood, of course, that proportionality is an amorphous concept. The first question that comes to mind is: What should be proportionate to what? And I will be the first to acknowledge that a professed concern for proportionality invites analysis that is ostensibly honest but actually driven by a desired outcome. In sentencing these defendants, one of the most relevant considerations, in my view, is the need for the sentences to reflect some sense of proportionality between the sentence and the societal harm that flowed from the defendant's conduct. On that score, and in the interest of seeing to it that all the parties have access to the same materials that I have received, I will note a passage from an unsolicited letter written to me by the foreman of the jury in the most recent trial in this case:

> The way I look at, with all the "legal" sports gambling that goes on in the U.S.[,] coupled with the fact that no one was physically harmed and nobody was forced to place bets, I see no threat to society by allowing both Mr. Dorn and Mr. Korelewski [sic] to avoid prison time. I truly believe that our taxpayer money is better spent on these "criminals" by allowing them the opportunity to make a legal living outside of prison walls. I strongly support some sort of deferred sentence or probation.

I hasten to add that this letter is of interest but determinative of nothing.

Second, under § 3661, "no limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court may receive and consider for the purpose of imposing an appropriate sentence." In some cases, the defendant comes before the court with the benefit of little or nothing by way of mitigating facts based on his background, character and conduct. But in some instances, which may include some of the defendants in this case, there may, for example, be family or medical

considerations that are unusually noteworthy and which would cut in favor of consideration of alternatives to straight incarceration. By the same token, the government is, of course, free to point out aggravating facts that have not been made plain to the court or which should not be taken lightly in determining the appropriate sentence.

Third, as I have already noted, under § 3553(a)(6), I am required to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." And as I have also noted, I should likewise avoid similar treatment of defendants who are not similarly situated. Gall v. United States, 552 U.S. 38, 55 (2007).

The need to avoid unwarranted sentencing disparities deserves some discussion. In order to accomplish that objective, I am going to be especially mindful that the core criminal activity in this case was the operation of an illegal gambling business, as prohibited by 18 U.S.C. § 1955 and as charged in Count 2. It is not much of an over-generalization, if over-generalization at all, to say that the Count 1 racketeering activity and the Count 3 money laundering activity involved no conduct other than that which was, in this substantial and far-flung illegal gambling operation, a necessary adjunct of the business that was operated in violation of § 1955, which is, of course, the statutory prohibition that was specifically tailored to what these defendants did from day to day. And on this point, I am mindful that Bartice King, the founder, mastermind and undisputed boss at the apex of this entire operation, was acquitted on Count 1. Consequently, he will come before the court with a base offense level of 12, under the advisory guidelines, while the lowliest runner, having been convicted by plea or verdict on Count 1, comes before the court with a base offense level of 19. There are specific offense characteristics and other adjustments that may

well reduce that disparity, but the fact that, under the advisory guidelines, the beginning point for Bartice King is seven points lower than it is for almost all of the other defendants cannot be ignored as I identify the real conduct that should be punished. On this issue, I note that some of the defense lawyers have suggested that this case presents a prime example of overreaching, particularly with respect to Counts 1 and 3. There is no need for me to reach a conclusion on that one way or the other, but I will observe that one problem with overreaching is that, in those outer reaches, such as Counts 1 and 3, there can be a tendency to get erratic results, as witness the fact that, in the most recent trial, the jury acquitted every single defendant on Count 3 even though, with one exception, every other defendant who went to trial was convicted on Count 3.

Accordingly, I will bear in mind these considerations, among others, as I try to avoid unwarranted sentencing disparities.

B. Case law.

I do not intend to cover all of the case law that will inform my approach to sentencing these defendants, but a few matters established by the case law should be noted.

First, as the Supreme Court explicitly stated in Gall, at p. 49, I "may not presume that the Guidelines range is reasonable." I am, instead, required to make an individualized assessment based on the facts presented. Consistent with that principle is the Supreme Court's rejection, also expressed in Gall, at p. 47, of any notion that extraordinary circumstances are required to justify a sentence outside the guidelines.

Second, in sentencing the defendants who went to trial, I will not substitute my view of the evidence for the jury's verdict. United States v. Bertling, 611 F.3d 477, 481 (8th Cir. 2010). It is inappropriate for the sentencing

judge to resolve in the defendant's favor a factual issue that the jury has resolved in the government's favor beyond a reasonable doubt. United States v. Rivera, 411 F.3d 864, 866 (7th Cir. 2005).

Third, in sentencing, I will not take into account the possibility that these defendants, as white collar defendants, have suffered greater reputational harm or have more to lose as a result of the mere fact of conviction. United States v. Prosperi, 686 F.3d 32, 47 (1st Cir. 2013). For example, in assessing the need for deterrence under § 3553, I will not take into consideration the collateral consequences of prosecution and conviction.

II. Other matters.

With respect to conditions of supervision relating to gambling, it is my intent, in each instance, and in the absence of an indication of gambling addiction or a similar problem, to impose the same condition that I imposed on defendant Greg Roberts, which is a prohibition only of activities relating to illegal gambling. However, the government is free, in any particular instance, to give me any reason the government may want to offer in support of a more restrictive gambling condition.

At sentencing, I will, as I customarily do, invite the government to make any comment the government may choose to make with respect to sentencing. The government will, of course, be free to comment with respect to any or all of the § 3553 factors, but I invite the government, with respect to the sentencing of each defendant, to bring to my attention any facts that would suggest that a sentence including any significant term of incarceration is necessary in order to protect the public from further crimes of the defendant. There may be other reasons to consider incarceration in any particular instance, but I am particularly

interested in what the government may have to say about the need to keep the community safe by incarcerating these defendants.

Dated this 5th day of January, 2016.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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