

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILLIP BARRY ALBERT,

Defendant.

Case No. 23-CR-34-SEH

Government's Sentencing Memorandum

The government recommends that the Court sentence Albert to 36 months' imprisonment, to be followed by an appropriate period of supervised release. A sentence of 36 months' imprisonment would best serve the sentencing factors in 18 U.S.C. § 3553(a), including the need to provide just punishment, the need for general deterrence, and the need to avoid sentencing disparities among similarly situated defendants. The Court should also order restitution to the IRS and to Pelco in the amounts specified in the plea agreement pursuant to 18 U.S.C. § 3663(a)(3).

Discussion

As discussed in the government's motion for upward variance (Dkt. # 32, filed under seal), Albert's conduct is more egregious than the average tax offense resulting in \$1 million in tax loss to the IRS, because of his extensive fraud while serving as the president of Pelco Structural. As noted, this fraud included paying himself phony "reimbursements" and structuring the payments so they would come to him tax-free,

making illicit purchases with the company credit card and then covering up the illicit purchases with accounting gimmicks, and materially misrepresenting the company's financial well-being to his bosses at Pelco's parent company, Pelco Products. As noted in the victim impact statements, Pelco calculates their total actual loss at over \$10 million, without taking into account loss of business opportunities because of the stain Albert's conduct has left on the company. Albert's entire embezzlement scheme is relevant at sentencing, even the parts that are not "relevant conduct" under the sentencing guidelines, because the whole scheme helps provide an understanding of Albert's "history and characteristics." 18 U.S.C. § 3553(a)(1).

In addition to causing a loss to the IRS of \$1,000,232 and causing at least \$2,615,750.00 in losses to Pelco, Albert's actions after Pelco fired him provide additional justification for a stiff sentence. In May 2021, knowing he had intentionally underreported his income from 2014 through 2019, Albert caused Amended U.S. Income Tax Returns, Forms 1040X, to be filed for years 2016, 2017, and 2018. (Dkt. # 14 at 12). Rather than taking any steps toward mitigating the harm he had caused, Albert's Forms 1040X simply repeated the original amount of income reported on the 2016-2018 returns, while indicating that Albert's original 1040s "may be incomplete." He represented twice in each Form 1040X that he had filed his original 1040s "in good faith," and he represented that the only reason for any possible question as to the accuracy of the forms 1040 was the civil litigation that had since begun between himself and Pelco, which might eventually lead to an updated

Schedule K-1 from Pelco. In short, even though Albert knew he had not been honest with the IRS for six years, he took the opportunity in 2021 to submit “amended” tax returns that didn’t actually amend anything.

Albert’s intelligence and overall sophistication show he knew exactly what he was doing at every step of his criminal scheme. As noted in the government’s response to Albert’s PSR objections, Albert was described by those who knew him best as smart, meticulous, and detail-oriented. His former colleague and former tax-preparer, Jim Lawson, said Albert was one of the smartest people Lawson knew, someone who was certainly capable of doing his own tax returns. (Dkt. # 40, Ex. B at 2). Before getting into the manufacturing industry, Albert worked as a tax-preparer at Kurtz, Kurtz, and Associates, a public accounting firm, alongside Lawson. (*Id.* at 2). Every year – including all the years between 2014 and 2019 – when Albert would send Lawson his documents to do his taxes, the document package was perfect. (*Id.*). Albert provided summary documents to go along with the primary source documents, and those were meticulously organized as well. (*Id.*). Every aspect of Albert’s fraud was carefully planned and willfully executed.

A stiff sentence is needed in this case to deter similar wrongdoing by would-be tax cheats in the future. One congressional purpose in enacting 18 U.S.C. § 3553 was to ensure that serious white-collar crimes are more likely to be punished by imprisonment. *See* S. REP. 98-225, 76, 1984 U.S.C.C.A.N. 3182, 3259. The need to “promote respect for the law,” “afford adequate deterrence to criminal conduct,” and

“avoid unwarranted sentence disparities” are particularly acute “in the context of white collar crime.” *United States v. Sample*, 901 F.3d 1196, 1200 (10th Cir. 2018).

“White collar criminals may be particularly susceptible to general deterrence because ‘[d]efendants in white-collar crimes often calculate the financial gain and risk of loss, and white-collar crime therefore can be affected and reduced with serious punishment.’” *Id.* at 1201.

In *Sample*, the Tenth Circuit reversed the district court’s sentence of probation as substantively unreasonable for a defendant who misappropriated over a million dollars. *Id.* The court noted the “mean length of imprisonment [for fraud offenders with criminal history category II] is 39 months.” *Id.* The court also observed that “[i]n imposing minimal sentences on white-collar criminals, courts ‘raise concerns of sentencing disparities according to socio-economic’” status. *Id.*; see *United States v. Mueffelman*, 470 F.3d 33, 40 (1st Cir. 2006) (noting the importance of “minimiz[ing] discrepancies between white- and blue-collar offenses, and limit[ing] the ability of those with money or earning potential to buy their way out of jail”).

One representation in Albert’s apology video doesn’t withstand scrutiny.

Albert says in his apology video that he always intended to pay back the stolen money to the company. This self-serving revelation, submitted for the first time three weeks before his sentencing, finds no support in the record. Albert once told Dani Munroe a similar story with regard to his fraudulent use of the company credit card. When she questioned him about his personal purchases on the company card, he

reassured her that he reconciled those purchases with Pelco at the end of each month. (Dkt. # 32, Ex. E at 3). In retrospect, that representation was a complete fabrication.

Albert lied often, including about simple things that most people would not even think to lie about, according to Kasey Scott. (Dkt. # 32, Ex. B at 3). He once claimed to Scott that Don Eagleton had stolen \$20,000 from Pelco and that Albert had caught him in the act. (*Id.*). This didn't make much sense to Scott, since Albert would likely have just fired Eagleton if that were true. (*Id.*). Ellie Lane talked about how Albert would lie about taking Juan Grande, the driver he originally hired for Eagleton who then became Albert's personal driver, with him on business travel. (Dkt. # 32, Ex. D at 6). Albert would be leaving for a business trip and mention that Grande would not be at work either because he was taking personal vacation; later, Lane would see on Grande's Instagram posts that he was at Flemings at the same time Albert was using the corporate credit card at Flemings. (*Id.*). Dani Munroe echoed Lane, saying Albert once lied about a business trip to Clean Line Energy, telling Munroe that he would meet up with his son Jordy there; Munroe later found out it was Grande, not Jordy, who went on the trip with Albert. (Dkt. # 32, Ex. E at 3). Albert's latest yarn should be viewed with skepticism, to say the least.

The Court should order restitution under § 3663(a)(3), not under §§ 3563(b)(2) or 3583(d).

Per the plea agreement, the Court should order restitution to both the IRS and

Pelco as an independent part of the sentence – under § 3663(a)(3) – and not merely as a condition of supervised release or probation – under §§ 3563(b)(2) or 3583(d).

Albert agreed to provide permissive restitution to Pelco separate and apart from the IRS, acknowledging that restitution was due to Pelco “pursuant to 18 U.S.C. § 3663(a)(3)” for offenses “related to this plea agreement.” (Dkt. # 14 at 9-10). Thus, enforcement of the Court’s restitution order should not be limited to the period of supervision, as it would under §§ 3563(b)(2) or 3583(d).

Conclusion

Because a sentence of 36 months’ imprisonment, achieved through an upward variance, best serves the § 3553(a) factors and would result in a sentence sufficient, but not greater than necessary, to serve the purposes of sentencing, the government urges the Court to sentence Albert to 36 months’ imprisonment, to be followed by an appropriate period of supervised release.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 8th day of March, 2024, I electronically transmitted the foregoing sealed document to the Clerk of Court using the ECF System for filing and transmittal of electronic notice to the following ECF participants:

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