

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No.
)	
)	
)	
Defendant.)	

**DEFENDANT SENTENCING MEMORANDUM
AND MOTION FOR DOWNWARD VARIANCE**

COMES NOW Defendant by and through his attorney, and hereby files this Sentencing Memorandum to aid the Court in imposing a sentence which is sufficient but not greater than necessary to serve the objectives of sentencing, as reflected in 18 U.S.C. § 3553(a).

I. Introduction

On [redacted] appeared before the Court, and entered a plea of guilty to Count 16 of a 16-count indictment, charging him with willful failure to collect and pay over tax, in violation of 26 U.S.C. § 7202. Through his plea, Mr. [redacted] agreed to accept full and complete responsibility for his actions, and knows he will live the rest of his life with the consequences. The plea agreement (Doc. 23), painstakingly negotiated by the parties, permits Mr. [redacted] to seek a sentence outside of the calculated United States Sentencing Guideline range. (Doc. 23, p. 7, ¶ 10(f)). This Court is obviously free to impose any sentence authorized by law, including any sentence outside the applicable Guidelines Range that is not “unreasonable.”

Through this memorandum, the Court will see that there are distinct and unique circumstances surrounding Mr. [redacted] actions leading to this conviction, and that his conduct

represents an aberration in a life and career characterized by hard work, industry, an extraordinary commitment to his friends, family, and coworkers, and law-abiding behavior. The Court will also see that since 2017 – and well prior to being charged with any criminal offense – Mr. [redacted] has brought his business into compliance with the requirements of the tax laws, and that [redacted] has now accounted for and paid over all taxes owed for the last several years. (See Doc. 26, p. 5, ¶ 14). And finally, the Court will see that Mr. [redacted] has, since 2016, lived a quiet, law-abiding life, without incident.

While the advisory sentencing guidelines recommend a sentence of imprisonment, under *United States v. Booker*, 543 U.S. 220 (2005), *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007), the Court can and should vary from the guidelines and impose a sentence of probation. This memorandum will show why.

II. Standards for Imposing Sentence

As the U.S. Supreme Court established in *Booker*, *Gall*, and *Kimbrough*, a sentencing Court has broad discretion to consider nearly every aspect of a particular case (and a particular defendant) in fashioning an appropriate sentence. “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Gall*, 552 U.S. at 52 (citing *Koon v. United States*, 518 U.S. 81, 113 (1996)). It is axiomatic that *Booker* rendered the U.S. Sentencing Guidelines (“Guidelines”) advisory rather than mandatory. *Booker*, 543 U.S. at 264. And in *Gall*, the Supreme Court took pains to point out that 18 U.S.C. § 3553(a)(3) “directs the judge to consider sentences other than imprisonment.” *Gall*, 552 U.S. at 59. The *Kimbrough* Court stressed that the sentencing judge is not bound by the Guidelines or Guidelines Policy Statements; rather, he may make his

own policy judgments, even if those judgments are different than those provided for in the Guidelines. *Kimbrough*, 552 U.S. at 101. *See also*, *Spears v. United States*, 555 U.S. 261, 264-265 (2009).

The primary federal statutes governing sentencing in the federal district courts are 18 U.S.C. § 3553(a) and 18 U.S.C. § 3661. Section 3553(a) contains an introductory portion and seven subsections. The introductory portion directs the sentencing court, in determining a particular sentence, to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from future crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the Guidelines; (5) Guidelines Policy Statements; (6) the need to avoid unwarranted sentence disparities; and (7) the need to provide restitution. The introductory portion of § 3553(a) also directs the sentencing court to “impose a sentence sufficient but not greater than necessary” to comply with the purposes of subsection (2). Indeed, this is “the overarching goal in federal sentencing.” *Freeman v. United States*, 564 U.S. 522, 131 S.Ct. 2685, 2692 (2011).

Of crucial importance, 18 U.S.C. § 3661 makes it clear that “no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” Put simply, in addition to the § 3553(a) sentencing factors, the court may receive and consider *any* information concerning the defendant’s background, character, and conduct in imposing a sentence. The Supreme Court highlighted the centrality of this concept: “In

particular, we have emphasized that ‘[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.’ Permitting sentencing courts to consider the widest possible breadth of information about a defendant ‘ensures that the punishment will suit not merely the offense but the individual defendant.’” *Pepper v. United States*, 562 U.S., 131 S. Ct. 1229, 1240 (2011) (citations omitted).

**III. The History, Characteristics, Background, Character, and Conduct of
Justify a Downward Variance and Sentence of Probation.**

A. Personal Experience, Good Character, and Works.

was born in Independence, Missouri. His mother was a homemaker, and his father, was a sheet metal worker. set a great example for , working hard in his job and putting in long overtime hours. When was ten years old, began taking him to job sites with him. taught to weld, and other skill sets associated with construction.

did very well in vocational programs in school, and was, as he describes, a “decent student.” He took drafting and engineering classes at high school, and showed great aptitude in design. He forged a good relationship with his drafting teacher, , now retired, who helped him cultivate his skills as a construction designer and drafter. After graduation, took some classes at Longview Community College, but eventually turned his focus to trade schools. He became certified as an electrician, plumber, and in refrigeration. He worked in a job shop doing computer assisted drafting.

After completing several trade certifications, [REDACTED] began performing contract engineering for various entities. He eventually found work doing computer assisted drafting work for the [REDACTED], working directly under [REDACTED]. [REDACTED] traveled the United States working at cancer hospitals and federal penitentiaries. In 1997, he married his first wife, and in 1999, his first daughter, [REDACTED], was born.

In 2000, when the [REDACTED] family sold the company he worked for, [REDACTED] started in construction. [REDACTED], his father [REDACTED], and another partner began designing and building mini-storage facilities. In 2001, [REDACTED] bought their first construction company, and began managing it together. [REDACTED] handled the bulk of the financial and office management side, while [REDACTED] handled estimating projects and managing construction projects in the field. The company grew considerably between 2000 and 2007.

In 2006, [REDACTED] married his second wife, [REDACTED], who was also the office manager of the construction company. They combined their families, and set off on a new adventure to raise four children together.

B. Tragedy Strikes

In 2007, [REDACTED] had a stroke, and [REDACTED] was forced to take on all management responsibilities for the business, to include not only his responsibilities in the field, but also the financial management responsibilities formerly held by his father. The company was in the middle of building a large mini-storage facility development and a fitness facility, and the work began to become overwhelming for [REDACTED].

At the same time, in early 2007, [REDACTED] began to develop symptoms of an unknown autoimmune illness. She was constantly exhausted, and experienced regular debilitating pain.

received a number of misdiagnoses before visiting Johns Hopkins, and receiving a final diagnosis of “autoimmune disorder – unspecified,” with the specialist essentially unable to determine if she had Multiple Sclerosis, or Sjogrens disease, or both. Dealing with the early phases of this disease made [redacted] unable to work, and she was not able to assist [redacted] with the office management and accounting responsibilities. At one point, she was in a wheelchair for eighteen months.

Meanwhile, the economy crashed in 2008 and 2009, causing massive failures in every sector of the worldwide economy, including construction. The company’s invitations to bid went from fourteen to fifteen per day, to approximately seven to eight per week. Pricing competition among construction firms became increasingly cutthroat, and [redacted] was forced to take the company into different and unfamiliar construction footprints to survive, including contracting with the federal government.

This perfect storm of tragedies took its toll on [redacted]. He began drinking heavily during this period of time to cope with stress. Of the three DUI offenses reflected in his criminal history, two of them occurred during 2008.

Neither [redacted] nor [redacted] health situations improved, and [redacted] struggled to figure out how to make the business succeed. [redacted] wanted to exit the ownership structure of the business and reduce his hours, and [redacted] found himself in multiple workouts with banks due to foreclosures on construction contracts. In order to honor his father’s wishes to phase out of the ownership of the business, [redacted] formed [redacted] 2010. [redacted] entered an agreement with his father to make lease-to-own payments for his father’s share of the former business’s assets over time. [redacted] kept the customer lists, accounts receivable, and existing contracts. Now

essentially working on his own due to the tenuous health of _____, _____ attempted to make _____ succeed in the wake of an enormous worldwide financial crisis.

Because _____ inherited the already jeopardized contracts of the former business, however, the company started in a hole. Several of the contracts were going through foreclosures, and the lender banks regularly reached into _____ operating account to withdraw payments to service interest, without any part of the payment going to principal. During this period of time, _____ and _____ sold a number of personal assets in order to put money back into the company to service the debt load. _____ was unable to make payments to the federal and state governments on amounts that _____ had withheld on employee wages, but continued to hope that the next contract or job would help him dig his way out of the hole.

_____ began to experience significant anxiety and depression during this time, and was prescribed a mood stabilizing medication by a physician.

C. IRS Investigation, Formation of _____, and Compliance with Tax Laws Since 2016.

In 2016, the IRS initiated an investigation into _____, due to the failure to account for and pay over taxes withheld from employees' wages and employer's share of FICA.

_____ decided to cease operations as _____, and to start a new company,

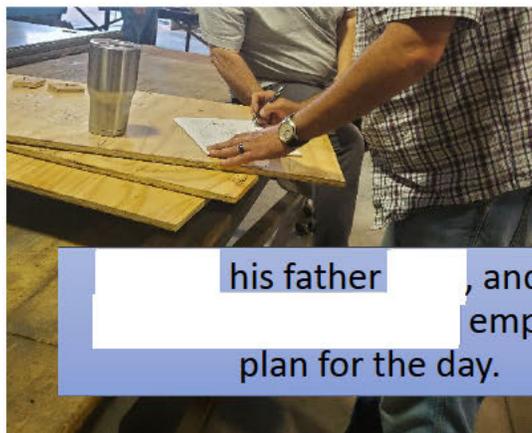
_____, in order to start over and "get things right" with taxes going forward. Since that time, _____ is compliant with its tax obligations.

_____ is a company doing business in the Kansas City area, performing design, steel fabrication, and construction services. It has approximately twenty-five employees, and supplies business to a large number of subcontractors in the area. _____ changed the business

model to stick with his core competency, which is to focus on structural steel. In the last year, [redacted] moved into new warehouse space to accommodate its growing construction and steel fabrication work.

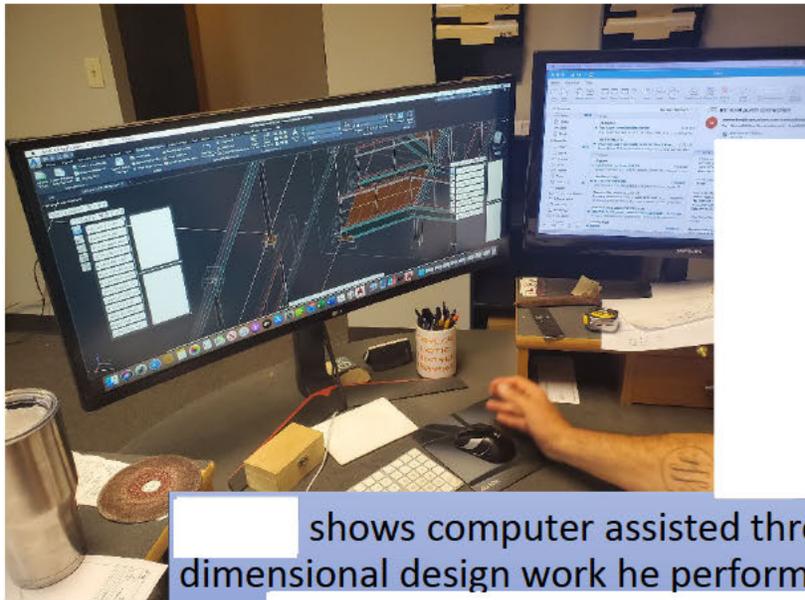


The new [redacted] warehouse and office, located on [redacted]



[redacted] his father [redacted], and other employees plan for the day.

trained himself over the years to do three-dimensional CAD/CAM computer engineering, which allows him to run three-dimensional models for structural steel building designs. He has applied these skills to help the company win bids and construct functional and beautiful spaces for organizations such as _____, the _____, and the _____, which is a career and technical high school.



_____ shows computer assisted three-dimensional design work he performed on _____



_____ Supervising construction underway at the _____

At this juncture, [redacted] is operating in the black, and current on all of its tax obligations. [redacted] has substantial construction projects underway under [redacted] leadership, most of which involve contracts and financing. Mr. [redacted] is well aware that he will owe a substantial restitution obligation after sentencing in this matter. He wants to continue to operate [redacted] not only to provide support for his family and dozens of employees, but also to make substantial good faith efforts to pay down the restitution he will owe.

At bottom, [redacted] is a closely held family company. Its continuing operation and good will is almost entirely dependent upon [redacted] continued association with the business on a day-to-day basis. [redacted] wins construction bids based on [redacted] reputation and relationships. [redacted] provides excellent service and completes contracts based on close attention to the daily operation and supervision of the company. If [redacted] receives a sentence of incarceration, it isn't likely that [redacted] can survive. Neither [redacted] nor [redacted] have the complete skill set or are of sufficiently robust health to fulfill the role that [redacted] does at [redacted] on a day-to-day basis.

D. Criminal History is Overstated, Warranting a Downward Departure or Variance.

Mr. [redacted] has been assessed three criminal history points for misdemeanor DUI offenses, and two criminal history points because of a finding that he “committed the instant offense while under a criminal justice sentence for probation in the [redacted]” (Doc. 26, pp. 7-8). He has had no other criminal charges (other than the criminal tax charges in the case at bar) since 2008. This places him in Criminal History Category III. Mr. [redacted] respectfully submitted that the calculation of his criminal history points significantly over-

represents the severity of his criminal history or the likelihood that he will commit further crimes.
See U.S.S.G. § 4A1.3.

“Even though criminal history is taken into account in determining the guidelines range, overstated criminal history is a permissible reason for a variance.” *United States v. Jones*, 507 F.3d 657, 659 (8th Cir. 2007). Courts have granted or affirmed downward departures on the ground that the defendant’s criminal history category overstated the severity of the defendant’s criminal history, which included “convictions for grand larcenies, possession of narcotics, a weapons violation, driving with suspended license violations and probation revocation.” *United States v. Summers*, 893 F.2d 63, 65 (4th Cir. 1990).

Mr. [redacted] criminal history point total is comprised entirely of driving under the influence convictions – two of which occurred in 2008 during the most trying and stressful time of his life, when his business was failing, his father and business partner was sidelined because of a stroke, and his wife was wheelchair bound on her way to a diagnosis of multiple sclerosis. Moreover, the PSR recommends adding two points under § 4A1.1(d) for conduct occurring outside the scope of the dates alleged in the indictment due solely to the rule regarding “relevant conduct.” This is simply not in the same league as the more serious types of offenders (such as persons with prior felony convictions) that Criminal History Category III was designed to address. In sum, a mechanical application of the Guidelines in this case significantly exaggerates the significance of Mr. [redacted] criminal history. For this reason, Mr. [redacted] respectfully request the Court to grant a motion for downward departure in this case to criminal history category II, a level that more accurately reflects the seriousness of his criminal history.

E. Family and Community Support.

As the Court will see from the letters which will be submitted on Mr. _____ behalf before sentencing, he enjoys a strong base of family and community support. The family and emotional support that a defendant can be expected to receive from family and community members is another recognized basis for a downward variance. *United States v. Sayad*, 589 F.3d 1110, 1114-1115 (10th Cir. 2009); *United States v. Autery*, 555 F.3d 864, 874 (9th Cir. 2009) (family support one of several valid grounds for downward variance from 41-51 months to probation); *United States v. Martin*, 520 F.3d 87, 92 (1st Cir. 2008) (family support is one of three valid reasons for 91-month downward variance).

F. Strong History of Employment.

The lengthy summary of Mr. _____ strong and credible history of employment is set forth above, and will not be repeated here. However, it is notable that even during the harm to his reputation due to his indictment on the instant charges, Mr. _____ has maintained his self-employment through _____ and his relationships in the community which permit _____ to continue to operate. As the Court knows, steady and meaningful employment is one of the greatest measures of whether an individual is likely to be successful if granted a sentence of probation.

G. Family Circumstances Merit a Sentence of Probation.

Mr. _____ wife, _____, has been diagnosed with a non-specific autoimmune disorder, and Multiple Sclerosis. Mr. _____ is her primary care giver. Mrs. _____ has described to the undersigned counsel that she has “good days and bad days,” but that often her “bad days” last weeks or even months. When her disease has its greatest impact, she deals with pain, fatigue, balance issues, and is largely bedridden. Mr. _____ has to help her with basic self-care tasks, and is also the primary caregiver for their two high-school aged children.

If Mr. [REDACTED] is sentenced to a term of incarceration, it would work not only a financial hardship upon this family, but also would deprive Mrs. [REDACTED] of her primary source of care and support in dealing with her medical condition.

IV. The Nature and Circumstances of the Offense and Mr. [REDACTED] Substantial Post-Offense, Pre-Indictment Rehabilitation Call for a Sentence of Probation.

This Court is familiar with the nature and circumstances of the offense, which are described in the presentence report, and which are further described above. Simply put, Mr. [REDACTED] failure to account for and pay over to the state and federal governments payroll taxes occurred in the context of a perfect storm of professional and personal tragedies which struck simultaneously, and which compounded over time. Mr. [REDACTED] was in a vicious cycle of debt, business failure, and family illness which led to poor decisions, for which he has already paid dearly.

However, Mr. [REDACTED] has demonstrated, since 2017, that he is able to “right the ship” and conduct himself and his business in a law-abiding manner. [REDACTED] is fully compliant with the tax laws, as noted in the presentence report. This kind of post-offense, pre-indictment rehabilitation is precisely the basis for departure identified by the Court in *Gall v. United States*, 522 U.S. 38, 128 S.Ct. 586 (2007), wherein the Court affirmed the judgment of a district court granting a defendant a thirty-month downward variance and sentencing him to probation because of the defendant’s voluntary withdrawal from a conspiracy, and post offense conduct showing that he would not return to criminal behavior, and that he was not a danger to society.

In *Gall*, the district court sentenced Brian Gall, a participant in an ecstasy distribution conspiracy, to a term of probation for thirty-six months, which was a downward variance from a Guideline range of thirty to thirty-seven months of imprisonment. *Id.* at 591-92. Gall had

withdrawn from the conspiracy (from which he had netted \$30,000 income) a few months after joining it, ceased selling or using illegal drugs of any kind, graduated from college, started a career, and otherwise lived a reputable life for the three-and-a-half years preceding his sentence. *Id.* at 591-92.

Applying the factors enumerated in § 3553(a), the district judge determined that a sentence of probation was “sufficient, but not greater than necessary to serve the purposes of sentencing,” in light of Gall’s post-offense conduct, the support offered by his family and friends, his lack of any criminal history, and his age at the time of the offense conduct. *Id.* The district judge explained that a sentence of probation would reflect the seriousness of Gall’s offense, while a prison term would deprive society of Gall’s contributions despite evidence that Gall understood the consequences of his criminal conduct, posed little risk of recidivism, and would not be a danger to society. *Id.*

The Eighth Circuit reversed and remanded, holding that the variance granted to Gall was so substantial that it needed to be supported by extraordinary circumstances. *Id.* at 594. In a 7-2 decision, the Supreme Court reversed. The Court first rejected the Eighth circuit’s rule that a so-called “extraordinary” variance from the Guidelines must be justified by “extraordinary” circumstances. *Id.* at 595. The Court also discredited the Eighth Circuit’s rule that any non-prison sentence amounts to a “100% departure” from a Guidelines sentence, because that approach “gives no weight to the ‘substantial restriction of freedom’ involved in a term of supervised release or probation.” *Id.* at 595-96.

The *Gall* Court then addressed the Eight Circuit’s review of the district judge’s § 3553(a) analysis, concluding that because the Court of Appeals gave virtually no deference to the district court’s decision, the court engaged in an analysis that “more closely resembled de novo review

of the facts presented and determined that, in its view, the degree of variance was not warranted.” *Id.* at 600. The Court held that the district judge properly considered Gall’s age, his early withdrawal from the conspiracy, and his efforts to rehabilitate himself as supporting a variance under several 3553(a) factors. *Id.* at 600-01.

In the wake of *Gall*, the Eighth Circuit has affirmed a number of substantial downward variances, some involving proof of post-offense rehabilitation. *See, e.g., United States v. McFarlin*, 535 F.3d 808, 811 (8th Cir. 2008) (affirming downward variance in a drug trafficking case from a Guideline range of 60 months to a sentence of probation, in part because of evidence that the defendant’s “addiction to pain medication contributed to the criminal activity alleged in the indictment,” and because of evidence in the record concerning defendant’s post-arrest rehabilitation); *United States v. McGhee*, 512 F.3d 1050, 1051-52 (8th Cir. 2008) (103-month downward variance); *United States v. Lehmann*, 513 F.3d 805, 807-08 (8th Cir. 2008)(37 month downward variance).

Here, there are significant similarities which make Mr. _____ case equally appropriate for a significant downward variance to a sentence of probation. Mr. _____, like Mr. Gall, voluntarily ceased criminal activity prior to any charges being filed, and voluntarily made an effort to bring his business into line with the requirements of the tax laws. Also, like Mr. Gall, when confronted with charges relating to his criminal conduct, Mr. _____ manifested an early acceptance of responsibility.

Here, as in *Gall*, no significant term of imprisonment is necessary to reflect the seriousness of Mr. _____ offense, in that a lengthy term of imprisonment “would be countereffective by depriving society of the contributions of the Defendant who ... understands the consequences of his criminal conduct and is doing everything in his power to forge a new

life.” *Id.* at p. 593. Mr. [redacted] post offense conduct, like Mr. Gall’s, “indicates neither that he will return to criminal behavior, nor that [he] is a danger to society.” And finally, Mr. [redacted] post offense conduct between December, 2016, and the indictment filed in the instant case, like Mr. Gall’s, “was not motivated by a desire to please the Court or any other Governmental agency, but was the pre-Indictment product of the Defendant’s own desire to lead a better life.” *Id.*

Therefore, Mr. [redacted] substantial post-offense rehabilitation, considered in conjunction with the other § 3553(a) factors identified herein, merits a downward variance to sentence of probation.

V. Consideration of § 3553(a)(6) Calls for a Sentence of Probation.

We now turn to 18 U.S.C. § 3553(a)(6), which directs that the “need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” be considered when imposing sentence. To this end, counsel has compiled data, attached hereto as Ex. A, showing the following:

- In Fiscal Year 2019, in criminal tax cases, only 25.4 percent of cases were sentenced within the United States Sentencing Guideline range. There were no upward departures. In 59 percent of criminal tax cases, a downward variance was granted. (Ex. A, Table 31). The extent of the downward variance granted in criminal tax cases averaged 61.6 percent. (Ex. A, Table 40).
- Also, in Fiscal Year 2019, in criminal tax cases, 35.1 percent of cases resulted in a sentence of probation, with 22.1 percent receiving “probation only,” and 13.0 percent receiving “probation and alternatives,” to include cases in which offenders received conditions of confinement as described in § 5C1.1.

These statistics show that Mr. [redacted] request for a downward variance to a sentence of probation is well within the realm of reasonableness, as the Courts are not generally reticent about giving below-guidelines or probationary sentences in criminal tax cases, where the sentencing factors favor it.

Moreover, there are numerous examples in this district, circuit, and across the country where defendants charged or convicted of criminal tax violations with varying guideline recommendations were given sentences of probation. Most recently, on July 30, 2020, this Court sentenced Steven Matthews – who was originally charged with attempting to evade or defeat tax, and willful failure to file returns – to a term of five years of probation with 120-day home confinement with work release. *See United States v. Matthews*, Case No. 4:17-cr-00109-GAF-1. Similarly, in *United States v. Randall Barker*, Case No. 6:18-cr-10152-EFM-1 in the United States District Court for the District of Kansas, in a case where the defendant was convicted under 26 U.S.C. § 7201 (income tax evasion) – the defendant was sentenced to one year of probation, and an order of restitution.

VI. Conclusion

As he appears today, Mr. [redacted] has shown the Court – nearly four years after the acts for which he has accepted responsibility – that he is worthy of the probationary sentence conferred to other similarly situated defendants. Such a result is just and appropriate. [redacted] outside of prison, is a threat to no one. Indeed, he has shown in the last four years that the community is a better place with him in it, through his business efforts, his support of his loved ones in need of care, and his compliance with the requirements of the tax laws for several years. His incarceration will truly serve no useful purpose, will result in an unwarranted burden to the taxpayers, and will cause a disruption in the lives of his many employees.

Should the Court agree that a just, reasonable, and probationary sentence is appropriate, *Booker, Gall, and Kimbrough* allow this Court to impose probation. In fact, § 3553(a) *directs* that the sentencing court “*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection.” (emphasis added). For the foregoing reasons, Mr. prays that this Court impose a sentence of probation in this case.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system for electronic delivery to all counsel of record.

/s/ J. Justin Johnston
Attorney for Defendant