Sentencing Hearing Manual

Overseas Prosecutorial
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SENTENCING HEARING MANUAL

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The material developed represents the expert opinion of the above authors on the effective implementation of the sentencing hearing, in line with the provisions of the Criminal Code and Criminal Procedure Code, and U.S. best practices. The Manual is aimed to serve as guidance and tool for the Kosovo justice system. The Manual includes some of the samples developed, and used by U.S. Instructors, Michelle M. Baeppler, First Assistant United States Attorney and Megan Miller, Assistant United States Attorney, Northern District of Ohio, during the Sentencing hearing workshops in December 2022.

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Introduction

The substantial difference between criminal trial and sentencing in criminal proceedings is almost clear: The trial determines the culpability of the defendant, while the sentencing determines the consequences for the defendant who was found guilty.[1]

The sentencing hearing from Article 356 of the Criminal Procedure Code (hereinafter CPC)[2] of 2022, presented for the first time in such format, represents a clear indicator of the importance that should be given to sentencing. This hearing resembles the process before the International Criminal Court (ICC). The provision of Article 76 paragraph 2 of the ICC creates the possibility of a separate sentencing hearing before the end of the trial, in order to examine additional evidence or submissions related to sentencing. Same as in the case of the ICC, in Kosovo, the hearing is not mandatory and is scheduled based on the party's request or set by the court *ex officio*. When the court considers that all the relevant mitigating or aggravating circumstances have been sufficiently addressed in the case file, or during the trial, and if there is no request from the parties to hold such a hearing, the court will proceed to sentencing without a hearing. However, when assessing whether or not such a hearing should be held, it should always be taken into consideration that unlike all other stages of the procedure, this hearing allows parties to focus exclusively on the circumstances that are important for sentencing. This is even more significant in cases where the range between the legal minimum and maximum is quite large. After clarifying the issue of culpability, parties now have the opportunity to present evidence regarding sentencing and argue the aggravating and mitigating circumstances.

[1]Demleitner, Berman, Miller, Wright, Sentencing Law and Policy: Cases, Statutes, and Guidelines, fifth edition, Chapter 6: Procedure and Evidence in Sentencing, Wolters Kluwer, New York, 2022.
[2]Criminal Procedure Code No. 08/L-032 of the Republic of Kosovo, Article 356, Sentencing hearing following guilty plea or judgment of guilty, Official Gazette of the Republic of Kosovo / No. 24 / 17 August 2022, Prishtinë.

Despite the fact that the CPC of 2022 describes the hearing in detail, we must nevertheless bear in mind that such a hearing does not represent an innovation for the justice system. This is because such hearings were possible, and were also held under the CPC of 2012, whereby provision of Article 248[3], provided that in case of a guilty plea by the defendant in the initial hearing, the judge can hold a separate hearing:

"If the single trial judge or presiding trial judge is satisfied that the matters provided for in paragraph 1 of the present Article are established, he or she shall render a ruling to accept the guilty plea made by the defendant and shall proceed with sentencing, ***schedule a hearing to determine a matter relevant for*** *sentencing, or shall suspend sentencing pending the completion of the cooperation by the defendant with the state prosecutor."*

Therefore, the difference with the new code lies in the fact that now such a hearing, except in cases where the defendant pleads guilty, can also be held at the end of the main hearing upon a request of the party or according to the court's assessment, if considered necessary.

This material aims to answer some questions raised by legal professionals on what the best practice in the practical implementation of the hearing is. The material serves to facilitate the work of parties and the court, always aiming at the widest possible implementation in practice of the concepts provided by the Supreme Court's Sentencing Guidelines or other similar documents. Over time and as the justice system builds and publishes its judicial practice, the conduct of such hearings, but also the assessment of important circumstances for sentencing will become increasingly easier, thus reaching the point where the courts will be clear on differentiation between the weight that is given to a circumstance in one case, in comparison to another case.

[3] Criminal Procedure Code No. 04/L-123, Article 248, Guilty pleas during the initial hearing, paragraph 4, Official Gazette of the Republic of Kosovo, No. 37, December 28, 2012, Pristina.

I. The importance of the sentencing hearing

The sentencing hearing presents an opportunity for all parties involved in the process to focus very specifically on individualizing the punishment and differentiating between the lesser and higher forms of responsibility of perpetrators. Active engagement of the parties is very important for conducting such a process. The CPC has foreseen that such engagement is to be expected from the state prosecutor, the accused, the defense counsel, the injured party or the victim and the victim advocate or victim representative. At the same time, such a hearing greatly facilitates the work of the court in determining the adequate sentence, given that parties are more engaged in presenting the relevant circumstances for weighing the sentence. This way, it is for the court to assess which of those circumstances are more relevant to the specific case, and also determine their weight in relation to the mitigation or aggravation of the sentence both within and beyond the legal range. At the same time, having more such circumstances available, makes it easier on the court to focus on an adequate reasoning of the judgment, thus fulfilling the legal obligation but also increasing transparency in decision-making.

The sentencing hearing also provides for an opportunity, when possible, to research and analyze the perpetrator's financial situation in order to determine the amount of the fine, and moreover the restitution for the injured party. By setting the fine in accordance with the defendant's financial situation, the court makes sure that such a sentence really affects prevention in the future, but also the equal treatment of perpetrators by punishing perpetrators with different financial situations equally.

The sentencing hearing at the end of the main hearing is a sequence or continuation of the main hearing. This is established by the provision of Article 355 of the CPC which states that:
If after the closing statements of the parties the single trial judge or trial panel ***does not find a need for any further evidence, and no request for a sentencing hearing was made*** *by the state prosecutor, the accused or his defense counsel,* ***or if all parties agree to waive the sentencing***

hearing *as such hearing is not needed, the single trial judge or presiding trial* ***judge indicates that the main trial has been concluded****."*[4]

This means that when the hearing is scheduled, the single trial judge or panel of judges partially completes the trial only regarding the defendant's culpability and withdraws for rendering a verdict, respectively for deliberation and voting. If conviction judgment is announced, and where a sentencing hearing is scheduled, the decision on culpability of defendant is included in the court records, and it only deals only with the culpability of the defendant and not with the level and type of sentence. Thus, the person is still not considered a convicted person when the conviction judgment is announced, as the adequate sentence has not been imposed yet. From the announcement of the conviction judgment, the subsequent procedure for sentencing cannot deal with aspect of the defendant's culpability. Meanwhile, if the court issues acquittal judgment, the case is closed in its entirety.

[4]Criminal Procedure Code No. 08/L-032, Article 355 Conclusion of the Main Trial, Deliberation and Voting, Official Gazette of the Republic of Kosovo, No. 24, August 28, 2022, Pristina

II. Cases appropriate for holding a sentencing hearing

The provisions of the CPC have made it clear that sentencing hearing is not mandatory in all cases. The question that arises naturally is, in which cases it would be of interest to schedule such a hearing? To answer this question, the court, as well as parties, can consider several factors:

- ***Complexity of the case.*** The more complex the case, the more people, offenses or complex evidence/circumstances it involves, the more necessary it will be to hold a hearing. This is especially important in cases with multiple perpetrators when it is important to individualize the circumstances surrounding each of them, but also in cases involving many victims, as the victims are given the opportunity to present their views on the impact of the crime on them, especially in the psychological and financial aspects. The complexity may also have to do with cases with which the court and the parties have not faced earlier, therefore, increased attention is required for aspects of weighing the sentence.

- ***Very large range between the legal minimum and maximum.*** Holding a hearing makes much more sense in cases with a very large range than in cases where the difference between the legal minimum and maximum is very small. This due to the fact that there is not much room left for the parties to argue since the perpetrator was already declared guilty. A very large range between the minimum and the maximum leaves much more room for a different approach by courts and consequently calls into question the fairness of that decision.

- ***Disagreements about applicable mitigating and aggravating circumstances***. The more indication there is that there will be disagreement about the relevant circumstances in a case, the more there is a need for such a hearing. This is especially important when it comes to the personal circumstances and character of the perpetrators.

If it is decided to hold a sentencing hearing, the closing speach of the parties does not deal with issues related to the level and type of punishment. At the same time, when it comes to the state prosecutor, now for the first time according to the provision of Article 351, the prosecutor has the opportunity to propose the level of sentence:

"The state prosecutor may propose the amount of the punishment, and that a judicial admonition or one of the alternative punishments under Article 46 of the Criminal Code be imposed."

In such cases, the aforementioned part of sentencing proposal is reserved for the sentencing hearing. The prosecutor must bear in mind that the proposal about the amount of sentence, combined with the mitigating and aggravating circumstances and their reasoning, will have more credibility if it is focused on circumstances relevant to the specific case, since in this form it enables individualization of the sentence in the best way by focusing on the circumstances specific to the defendant, the manner in which the offense was committed and the impact those actions had on the victim(s). The hearing also provides the best opportunity for harmonization of practices regarding sentence calculation for similar sentences in similar cases and situations.

III. Request for holding a sentencing hearing

Article 356 of the CPC, provides that:

"The request for a sentencing hearing is made in writing or in the ***record after the accused pleads guilty or before the anticipated conclusion of the main trial.*** *The state prosecutor, the accused or his defense counsel may request that a hearing be held to present matters relevant to sentencing. The request for such a hearing by the accused or his defense counsel shall not be regarded as any admission of guilt.*[5]

According to the above-mentioned provision, the request for scheduling the hearing can be submitted by the state prosecutor, the accused or his/her defense. This means that the victim or the injured party does not have the opportunity to submit such a request. However, victims can do this through the state prosecutor by proposing that such a hearing be held, while the prosecutor is best suited to assesses whether such a request is necessary.

Below is a logical analysis of the various moments when a sentencing hearing can be requested and scheduled.

a. Scheduling of the hearing after the guilty plea in the initial hearing

Compared to the scheduling of the hearing during the main trial, the submission of the request in the initial hearing is clearer. This is due to the fact that the defendant has already plead guilty and the court only has to focus on the amount and type of sentence. As mentioned above, this is not an innovation for the justice system as it is provided for in Article 248 of the 2012 CPC.[6] The difference between the two provisions lies in the fact that while under Article 248 the court has the opportunity to decide if there is a need to hold a separate sentencing hearing, Article 356 of the new CPC (of 2022) specifically mentions the request submitted by the parties. Article 242 provides that:

[5] Criminal Procedure Code No. 08/L-032, Article 356, Sentencing Hearing following Guilty Plea or Judgment of Guilty, par 2 Official Gazette of the Republic of Kosovo, No. 24, 17 August 2022, Pristina

[6] Criminal Procedure Code No. 04/L-123, Article 248, Guilty pleas during the initial hearing, Official Gazette of the Republic of Kosovo, No. 37, 28, December 28, 2012, Pristina.

If the single trial judge or presiding trial judge is satisfied that the matters provided for in paragraph 2 of this Article are established, he renders a ruling to accept the guilty plea made by the defendant and proceeds with sentencing, schedules a hearing pursuant to Article 356 of this Code to determine a matter relevant for sentencing, or suspends sentencing pending the completion of the cooperation by the defendant with the state prosecutor.[7]

The above paragraph, clarified that upon entering a guilty plea, the judge has three options:

- Take a decision for the approval of the guilty plea and proceed with the imposition of the sentence;
- Schedule a sentencing hearing (which will take place in accordance with Article 356) either at the request of the parties or *ex officio*.
- Suspend the imposition of the sentence until the end of the cooperation of the defendant with the prosecutor, and in this case the degree of cooperation will be the main determinant of the level of the sentence. In this case too, at the end of cooperation, the court can schedule the hearing under Article 356 to assess the cooperation and other circumstances.

In cases where the hearing is scheduled after the guilty plea at the initial hearing, parties, and in particular the defendant, mostly need a separate hearing to focus on issues important to the type and level of punishment. This is because they did not have the opportunity to deal with them during the main trial.

b. Scheduling the hearing before the expected end of the main trial

This part requires more analysis because of the question marks that are raised about the manner and period of such a request. Should there be a special request or is it sufficient to declare such a request at the hearing, etc. Therefore, in general, the sentencing hearing cannot be analyzed and treated in isolation within Article 356 only, but, always, in conjunction with other provisions of

[7] Criminal Procedure Code No.08/L-032, Article 242, Guilty Plea and Imposition of Penal Sanctions during the Initial Hearing, Official Gazette of the Republic of Kosovo, Nr.24, 17 august 2022, Prishtinë.

the CPC. It is precisely the diversity of these provisions that makes this analysis difficult because, for a successful completion of the hearing an adequate and logical interpretation is required.

Initially, Article 350 can be broken down into two moments. We will address those by analyzing two of the paragraphs of this article:

"Upon completion of the evidentiary proceedings, *the single trial judge or presiding trial judge calls on the parties and their representatives, to sum up their arguments."*[8]

Which means that the moment of completion of evidentiary proceedings is the most accurate moment for filing a request for scheduling the hearing or for the court to decide to hold the hearing *ex officio*. This paragraph is related to the following paragraph which states as follows:

"If a sentencing hearing has been requested pursuant to Article 356 of this Code, ***the closing statements shall only address arguments and facts regarding the guilt or innocence of the accused."***[9]

Based on the above paragraph, parties must know in advance, before the closing statement, whether a separate sentencing hearing will be held or not. This is due to the fact that in this case parties will not discuss the circumstances and issues related to the type and level of punishment, or the proposal for punishment, in the case of prosecutor, pursuant to Article 351. *What does the closing statement address, when a separate sentencing hearing is scheduled?* Article 350 of the CPC as stated above, is limited only to addressing arguments and facts related to culpability or innocence of the accused.

As mentioned above, when it comes to complex cases, involving a big number of evidence, defendants, victims or those with a very wide range between the minimum and maximum punishment, etc., it is acceptable for parties to submit a request to the court to hold a separate hearing, which is important due to complexity and in order to individualize the punishment in a case of a guilty verdict. **Filing of such a request is not considered an admission of guilt** and this

[8] Criminal Procedure Code No. 8/L-032, Article 350, Parties' Closing Statements, par 1, Official Gazette of the Republic of Kosovo, No.24, 17 august 2022, Prishtinë.
[9] Ibid. paragraph 3.

is best confirmed by the last part of Article 356 paragraph 2 "... *The request for such a hearing by the accused or his defense shall not be considered an admission of guilt* . "

Traditionally, when presenting the closing argument, parties have requested that if the defendant is to be found guilty, certain mitigating and aggravating circumstances should be taken into account. However, parties have not used this opportunity to a sufficient degree, and mainly presented general circumstances without any evidence or additional argumentation of circumstances. The difference with the current provisions of the CPC lies in the fact that during the closing statement, parties are no longer required to present concrete circumstances in favor or disfavor of the defendant, as this is now left for the sentencing hearing. This represents a significant change from past practice.

Can the request be submitted in the prior stages of proceedings? The CPC mainly refers to two situations when parties can request holding of a sentencing hearing. However, there is provision in the CPC that prohibits parties from submitting such a request in the earlier stages of proceedings. In fact, it would be very reasonable if such a discussion and request (even orally at any moment during the main trial) is made early on, especially as mentioned above in cases that are complex, involve several defendants, victims or even have many circumstances that can affect the sentence. Having indications that parties are interested in a separate hearing, depending on the finding of the court at the end of proceedings, may help the court to decide whether a hearing should be scheduled *ex officio*.

IV. Scheduling a hearing *ex officio*

CPC has foreseen the possibility for the court to schedule a hearing on its own. Article 356 provides that:

"The single trial judge or trial panel may also order a sentencing hearing ex officio to obtain additional information relevant to the sentence if such a hearing is not requested by the parties."[10]

Thus, according to this provision, the single trial judge or trial panel has also been given the opportunity, even if none of the parties has submitted a request, to schedule it *ex officio* if it considers that holding such hearing would help to break down the factors that can impact the level of sentence. For such a decision, the court should also start from the above questions if holding such a hearing is necessary. The court has to decide on the timing for holding a hearing: whether it will schedule it within 7 days from the announcement of the verdict, or whether it will ask for the pre-sentencing report and therefore postpone this deadline until the submission of the report. The court takes this decision either based on its own assessment or based on indications it has from the parties.

The primary consideration for the court, is the complete verification of the factual situation and the determination of sentence proportional to the degree of responsibility and damage. In cases, especially where there is a large range between the minimum and maximum sentence, it will be of great assistance to the court to have a complete overview both from the Probation Service, but also from the parties, about all circumstances that are not already related with the defendant's culpability but with the amount and type of punishment. For the court, the financial situation of the defendant is also important in many cases to assess both in terms of determining the fine or even restitution. The same can be said about the assessing the suitability for any of the alternative or accessory punishments.

[10] Criminal Procedure Code No. 08/L-032, Article 356, Sentencing hearing following a guilty plea or conviction, par 3, Official Gazette of the Republic of Kosovo, No.24, 17 august 2022, Prishtinë.

V. The Court decision on the submitted request

The CPC does not give any reference on the possibility of the court to reject the request submitted by the parties. Thus, according to Article 356,

*"The single trial judge or trial panel **grants the request** and advises the parties that the closing statements shall address only the guilt or innocence of the accused."*[11]

There is nothing in the above paragraph indicating that such a request can be rejected by the court. This paragraph only states that the Court grants the request. Therefore, we consider that such an possibility was not given to the court. In fact, the court seems to take the opinion of parties to observe whether they consider that holding the hearing is necessary or not. This is because according under the CPC:

*"If after the closing statements of the parties the single trial judge or trial panel does not find a need for any further evidence, and no request for a sentencing hearing was made by the state prosecutor, the accused or his defense counsel, **or if all parties agree to waive the sentencing hearing as such hearing is not needed,** the single trial judge or presiding trial judge announces that the main trial has been concluded."*[12]

The aforementioned paragraph does not say that the opinion of parties determines whether the hearing is to be held, but only that an opinion on the reasonableness of holding it can be obtained from them This can be expressed both in cases where the request is presented by parties themselves and when the court considers scheduling such hearing ex officio.

[11] Criminal Procedure Code No. 08/L-032, Article 356, par 4 Sentencing hearing following a guilty plea or conviction, Official Gazette of the Republic of Kosovo, No.24, 17 august 2022, Prishtinë.
[12]Criminal Procedure Code No. 08/L-032, Article 355, Conclusion of the Main Trial, Deliberation and Voting, Official Gazette of the Republic of Kosovo, No. 24, 17 August, 2022, Pristina.

VI. Plea Agreement

While Article 356 is quite clear regarding the scheduling of the hearing after entering a guilty plea, some questions have been raised regarding the necessity to schedule a hearing in cases of a plea agreement. This is probably due to practice or even ambiguities regarding the plea agreement on the length of the sentence when the defendant enters into a plea agreement with the prosecutor.

The plea agreement includes two elements:

- Negotiation about the offenses that will be included in the indictment.
- Negotiation of the prosecutor's sentence recommendation.

Hereunder we will focus on the second element to clarify the reasonableness of holding a sentencing hearing in cases where the parties negotiate a plea agreement. Article 230 provides that:

"If the court is satisfied that all of the conditions in paragraph 17 of this Article are established, the court accepts the guilty plea agreement and orders that the agreement be filed with the court. ***The court sets a date for the parties to make their statements regarding sentencing after which the court imposes the punishment.....*** *"*[13]

In accordance with the aforementioned paragraph but also other relevant paragraphs in this article, it becomes clear that the hearing can be held even in cases where a plea agreement is reached. This is because, in principle, according to paragraphs 1.1 and 2.1 of this same article, the parties agree to:

"The state prosecutor's agreement to recommend a more lenient punishment to the court. This may include the recommendation for a sentence under the minimum provided by the law, but not under the ranges of mitigation of punishment;[14]

This means that in the plea agreement, as a principle, parties agree that the prosecutor proposes a more lenient punishment (even in terms of type), mitigation related to the range of punishment and not necessarily the exact punishment that the court would have to impose. This way, the court would have a greater discretion in determining the punishment. With the holding of the hearing

[13] Criminal Procedure Code No. 08/L-032, Article 230, Negotiated Pleas of Guilty, par 20 Official Gazette of the Republic of Kosovo, No. 24, 17 August, 2022, Pristina
[14] Ibid.par 1, sub-par 1.1 and 1.2.

and the presentation of the circumstances by the parties, it is possible for the court to take a fairer decision on the punishment. The same would be the case with cooperating witnesses. According to Article 230:

"The plea agreement may also include a provision in which the parties agree on a ***range of punishment to be proposed by the state prosecutor if the defendant cooperates substantially****, whereas if the court imposes a sentence outside of this range to the detriment of one party, that party is entitled to appeal against the decision on the sentence."*[15]

In such cases, depending on the contribution made by the cooperating witness, the court assesses how much that contribution was and accordingly adjusts the type and level of punishment.

Ibid.par.12.

VII. The pre-sentencing report and the role of the Probation Service

The Probation Service is a central body of the state administration subordinate to the Ministry of Justice. It was founded only two decades ago. Among other things, this service is vested with the authorization for preparation of the social survey and pre-sentencing reports for the perpetrators of criminal offenses. Such an obligation is foreseen by Article 136 of the Law on the Execution of Criminal Sanctions, which states:

"Before imposing an alternative punishment, the court may request a report from the probation service. The probation service submits the report to the court before the punishment is imposed, within three (3) weeks from filing such a request. The report issued before punishment is imposed shall determine the punishment, or alternative punishments appropriate for the convicted person taking into account the objectives of resocialization and prevention of future criminal offenses."[16]

With the entry into force of the CPC, in the framework of the sentencing hearing, the possibility for the court to engage the Probation Service in the preparation of the pre-sentencing report has been re-emphasized already:

"Following the announcement of a guilty judgment, the single trial judge or trial panel may order, ex officio or upon the request of the parties, from the probation service to compile a pre-sentencing report."[17]

Thus, the court initially approves the request to hold the hearing, withdraws for deliberation and decision and if it renders a judgment of conviction, it can, on its own or at the request of the party expressed in the hearing, request the preparation of the pre-sentencing report. There is a difference between what is provided by the Law on the execution of criminal sanctions and the CPC. This is due to the fact that the Law focuses on situations where the court has already decided to impose an alternative punishment, and in fact only requires the assessment and suggestion of the Probation Service, as to which punishment would be more adequate. The CPC goes beyond this provision,

[16] Law No. 08/l-132 for the execution of criminal sanctions, Article 136, Report before the imposition of alternative punishment, Official Gazette of the Republic of Kosovo / No. 21 / 10 August 2022, Prishtinë.
[17] Criminal Procedure Code No. 08/L-032, Article 356, Sentencing hearing following a guilty plea or conviction, par 6, Official Gazette of the Republic of Kosovo, No.24, 17 August 2022, Prishtinë.

providing that in any case when the court considers that there is not enough data to decide on the specific punishment, there is the possibility of engaging the Probation Service to provide the necessary data.

At the same time, while the Law gives the possibility to the Probation Service to prepare such a report within a period of three weeks, the CPC leaves it in discretion of the court to determine the date of delivery of the report as part of the order. However, when setting the deadline for submitting the report and holding the hearing, the court must take into account the reasonable deadline that can be given to the Probation Service, but also the deadlines set by the CPC regarding the time of completion of the main hearing.[18] The Court shall instruct the Probation Service to submit sufficient copies for the prosecutor and the defense so that parties have the opportunity to object the arguments presented in the report.

What can the pre-sentencing report focus on when the Probation Service lacks sufficient capacity and resources to comply with the court's order? Being aware of this fact, it is possible that at this stage, the Probation Service will focus more on a social survey of the defendant. We know that, not infrequently, it is precisely the family and personal circumstances of the defendant that affect the length of the sentence. At the same time, just because the KPP has foreseen such an opportunity for the engagement of the Probation Service, this does not represent a reason for the parties in proceedings, with special emphasis on the state prosecutor, to remain passive and not engage in presenting circumstances.

Together with the request to the Probation Service, the court asks the parties, or rather enables the parties, to also present, within the same deadline, their submissions with the circumstances that go in favor/disfavor of the aggravation/mitigation of the punishment. Thus, since the defendant's culpability has already been established by the court, it is easier for the parties to focus only on circumstances that are important for the level of punishment and necessarily in their reasoning. The Court shall instruct parties to present sufficient copies of their submissions for the opposing party so that parties have the opportunity to object the arguments presented by the opposing party.

[18] Criminal Procedure Code No. 08/L-032, Article 310, Time to complete the main trial, Official Gazette of the Republic of Kosovo, No. 24, 17 August, 2022, Pristina.

VIII. Preparation for the hearing-Practical tips

Preliminary preparation for the sentencing hearing is a key element for the efficiency of this hearing. To ensure that every necessary step is taken into consideration, it is important for the court (individual judge or panel) to have a checklist in front of them for every step of the procedure.[19] The same can be said for the prosecutor and defense counsel, as this ensures that each is prepared for the hearing.

Good lawyers always have a checklist of legal requirements prepared before the hearing so that they can follow the course and make sure that the judge is addressing each of the required issues. Although it is ultimately the responsibility of the case judge to adhere to all legal and procedural requirements, it is in the best interest of the parties to ensure that the judge will do so.[20]

It is in the interest of the prosecutor not only to prepare and present the facts that are important for sentencing, but it is equally important to have communication with the victim to remind him/her of the opportunity under the CPC to present the Damage Statement, to declare himself/herself in the hearing and what the victim can expect to take place during this hearing. If the victim is represented by the victim's advocate or other authorized representative, then this role of notification and preparation of the victim can be taken by the latter.

Everything that was stated about the prosecutor, also applies to the defense counsel and the defendant. The defense counsel must prepare the defendant for the hearing and explain the importance of adequate presentation of not only the arguments but also the declaration at the hearing.

[19] See enclosed Annex 2.

[20] Williams CJ, Sentencing Advocacy: Principles and Strategy, A.Basic Preparation, Pg.85

IX. The presence of parties in the hearing

The presence of parties in the hearing is an issue which is actually not addressed specifically within Article 356. However, it is for the courts themselves to build the practice during the implementation of this Article. Our aim is to provide the best clarification regarding the presence of parties in these proceedings through the analysis of other provisions of the CPC.

Regarding the presence of the prosecutor in the hearing, it is considered as necessary, therefore, the absence is a reason for postponing the hearing. In these cases, the court acts in accordance with the provisions of the CPC.[21] In terms of the presence of the defense counsel, the provisions of the CPC referring to the representation by the defense counsel, the necessary defense and the trial in absentia apply to this hearing as well. Therefore, in the following part, the discussion is mainly focused on the presence of the main parties to the proceedings. It is advisable to have a Probation Officer in the hearing to present the findings in the pre-sentence report. If such presence is not possible, if deemed necessary, the pre-sentence report may be read at the hearing. Parties would have already been familiarized with the content of this report.

a. Presence of the Defendant

In principle, it can be said that the presence of the defendant in the hearing is mostly in the interest of the defendant. The sentencing hearing is in fact a continuation of the main hearing. This due to the fact that all the issues that would have been addressed in the closing statement are addressed in this hearing, and the difference lies in the fact that ***this takes place after the court has already decided on the defendant's culpability***, which is a very important element. Therefore, the provisions of Article 282[22] of the CPC regarding the presence of the defendant, and the consequences for non-appearance apply to the presence of his/her defense counsel. In case of the defendant's absence, the court acts in accordance with the provisions of the CPC to ensure his/her presence. The defendant can also voluntarily waive participation in the hearing. The new CPC,

[21] Criminal Procedure Code No. 08/L-032, Article 301, Failure of the State Prosecutor to Appear at the Main Trial, Official Gazette of the Republic of Kosovo, No. 24, 17 August 2022, Prishtina.
[22] Criminal Procedure Code No. 08/L-032, Article 282, Persons summoned at the main trial, Official Gazette of the Republic of Kosovo, No. 24, 17 August 2022, Prishtina.

which entered into force recently, in Article 303[23] provides for trial in absentia. This article allows the possibility that if certain conditions are met (and in cases from Article 104 of the Criminal Code without the need to meet any conditions[24]), the hearing can be held even without the presence of the defendant. Thus, in relation to the conditions set forth in par. 2.1 and 2.2, it follows that if the defendant at the initial hearing, the main trial or when the judgment is announced "... *has been informed of the obligation to be present for the trial and that the trial may continue if the accused voluntarily decided not to be present at the trial* ..."[25] then the hearing can take place even in the absence of the defendant. At the beginning of the hearing, the judge makes sure that reasonable efforts have been made to find the accused and if he determines that he has voluntarily decided to be absent from the trial, he also takes into account the difficulties of postponing the trial for the court and the parties.[26] In general, the principles of this article would apply in their entirety to the sentencing hearing. Regarding the representation of the defendant's interests, the provisions of Article 11[27] and Article 56[28] of the CPC related to cases where mandatory protection is foreseen, also apply. When the defense attorney does not appear in the hearing, the court acts in compliance with Article 304[29] of the CPC.

The defendant may choose to make the issues regarding sentencing that are in his favor known through a submission to the Court before the hearing. The Court in principle must make maximum efforts to ensure the participation of the defendant in this hearing, since not only would the rights of the defendant be fully complied with, but at the same time it would not risk non-fulfillment of the foreseen conditions and return the case for a retrial. The court can also use virtual platforms for ensuring participation of the defendant who is in custody (if the relevant conditions exist), taking into account the provisions of Article 281 of the CPC.[30] Finally, if due to the circumstances

[23] Criminal Procedure Code No.08/L-032, Article 303, trial in absentia, par 4, Official Gazeta of the Republic of Kosovo, No.24, 17 August 2022, Prishtinë.
[24] Ibid.paragraph 7.
[25] Ibid.subparagraph 2.1.
[26] Ibid.paragraph 5.
[27] Criminal Procedure Code No.08/L-032, Article 11, Adequacy of Defense, Official Gazette of the Republic of Kosovo, No.24, 17 August 2022, Prishtinë.
[28] Criminal Procedure Code No.08/L-032, Article 56, Mandatory Defense, Official Gazette of the Republic of Kosovo, No.24, 17 August 2022, Prishtinë.
[29] Criminal Procedure Code No.08/L-032, Article 304, Failure of Defense Counsel to Appear at Main Trial, Official Gazette of the Republic of Kosovo, No.24, 17 August 2022, Prishtinë.
[30] Criminal Procedure Code Nr.08/L-032, Article 281 Venue of Main Trial par.7, Official Gazette of the Republic of Kosovo, Nr.24, 17 August 2022, Prishtinë.

of the case the court finds that it is necessary to postpone the hearing, or if the defense requests the postponement in order to enable the presence of the defendant, this can be done in accordance with Article 286 of the CPC.[31]

b. Presence of the victim

While the presence of the defendant was discussed above, we have a different situation when it comes to the presence of the victim in the sentencing hearing. It is important for the court, when confirming the presence of the parties in the hearing, to confirm that the victim was notified of the hearing and was summoned to participate. However, the participation of the victim is not necessary due to the fact that par. 10 and 11 include the word "*may*" when referring to the declaration of the injured party, the victim, the victim's advocate or the victim's representative. This also means that the victim, instead of appearing at the hearing, can be represented by the victim's advocate or representative. If the victim has declared that he will participate in the hearing but fails to appear, the Court may ask the victim's advocate or the victim's representative or even the prosecutor (if the victim's advocate or the victim's representative is not present) to inform the victim about the hearing, while continuing with the hearing.

[31] Criminal Procedure Code No.08/L-032, Article 286, Adjournment of Main Trial, Official Gazette of the Republic of Kosovo, No.24, 17 August 2022, Prishtinë.

X. Hearing of parties in the hearing

The sentencing hearing ultimately enables a much more active participation of parties in the proceedings. The decision on the amount and type of punishment can be considered fair in terms of giving opportunities only if full and strong presentation of arguments and evidence from all parties is presented and is therefore less likely to be overturned or changed on appeal. This is also in accordance with the principle of equality of arms embodied in Article 6 of the European Convention on Human Rights, which stipulates that all parties must have an equal opportunity in the proceedings to present and comment on all evidence presented to the court for consideration. Thus, according to paragraph 7 of this article, the aforementioned parties can present:

- cases for aggravation of punishment, including data from the criminal record of the accused.
- issues for mitigation of punishment, including those relevant for mitigation of punishment below the minimum prescribed by law.
- statement or arguments for an appropriate sentence, either orally or in writing; and
- any other matters that the single trial judge or trial panel finds relevant in determining an appropriate sentence.

Is the 7-day period sufficient for holding this hearing in cases where a pre-sentencing report is not required?

The foreseen 7-day deadline, although quite short, will still be achievable if both parties start thinking about this moment, from the outset of case proceedings. So, for example the state prosecutor, can collect data from the pre-trial investigations, which are relevant to the amount of the sentence and every time he comes across such data, he/she keeps a record of it, knowing that he will have to include it in the closing statement or in the sentencing hearing if such a hearing has been scheduled. The prosecutor can collect the data directly, or indirectly by giving a checklist to the investigators. The Chief State Prosecutor's Guidelines contain such a form which can be useful to prosecutors and investigators.[32] At the end of the process, all that remains is the summary of these circumstances in a document and the inclusion of any other circumstances that became known during the process. Also, the parties must necessarily focus on the reasoning as to why the

[32]Chief State Prosecutor's Guidelines on the role and contribution of the state prosecutor in sentencing, pg. 21, Pristina, December 2020.

same is relevant and reasonable for the specific case and for challenging the circumstances which are invoked by the defendant, if according to the opinion of the prosecutor, they are not applicable or at least do not have the weight ascribed by the defense. The same commitment is expected from the defense side.

In other more complex cases involving more criminal offenses, and many more victims or defendants, the court and the parties may need more time for preparation. Therefore, it would be reasonable, considering that CPC allows the court to postpone the holding of the hearing, if necessary, by asking the Probation Service to prepare a report. Suggestions for the content of this report have already been elaborated above, so it is important that this part focuses more on how these hearings can be as efficient as possible.

Can the parties present their arguments before the hearing? The answer would be Yes. The prior submission of arguments greatly affects the efficiency of the procedure. In cases ***where the court orders Probation to prepare a pre-sentence report***, the judge at the same time advises the parties that the deadline for submission of the report applies to the prosecution and defense if they want to present their sentencing arguments. The victim may present a copy of the Declaration of damage. In cases when ***no pre-sentence report is requested*** parties should be advised to submit their arguments no later than three (3) days prior to the hearing. A copy is also submitted to the opposing party. This way, at the hearing, parties will be ready to present arguments already raised by them, but at the same time they will also be prepared to counter allegations raised by the other side or findings in the pre-sentence report. The court, on the other hand, will be prepared and informed in advance of the arguments of the parties. These submissions together with any additional arguments that will be made known during the hearing will become part of the court case file. As such, it will be easier for the courts of higher instances to decide in case of submission of legal remedies by the parties. ***Attached to this material you can find some samples of submissions*** from the USA which are presented as examples to see what a presentation of the prosecutor and the defense in the USA looks like. Through these submissions, the court is notified in writing of the parties' claims about the circumstances relevant to the sentence. If we go back to Article 356 par 7 of the CPC, we can observe that this paragraph talks about what can be presented to the court, but it is not mentioned anywhere that this is done only through the declaration of

parties in the proceedings. Therefore, in order to maximize efficiency of this hearing, the most adequate solution is to set a deadline for filing of parties' submissions regarding issues that go in favor of mitigation or aggravation before holding the hearing. This would allow the parties to be prepared for the claims of the opposite party, and the court would also receive these allegations well in advance.

Regarding the order in which parties are heard, paragraph 8 of Article 356 mentions that the provisions of the Criminal Procedure Code on the order of presentation of evidence in main trial apply *mutatis mutandis*, although in fact par. 7 lists parties, and this order is also in accordance with Article 350[33] par.1 and Article 323[34] par.1 (the state prosecutor, the injured party or the victim, the victim's advocate or the victim's representative, the defense counsel and finally the accused). In the Hearing, parties have the opportunity to dispute the claims of the other party regarding the circumstances presented by them.

a. Defendant's statement

This hearing gives the defendant the opportunity to express all the issues he/she considers to be in favor of the mitigation of sentence. It is much more effective and powerful if the court has the opportunity to hear directly from the defendant what he has to say about the amount of the sentence, than only submitting written submissions. According to par. 9 of Article 356, the accused has the right to speak at the hearing in favor of the mitigation of his/her sentence. This is in accordance with par. 7.2. of the same article, which specifically provides that in the hearing, among other things, "*matters in mitigation of the sentence, including those relevant for the mitigation of the sentence under the minimum punishment provided by the law*;" can be presented. Regarding the type and level of the sentence, it would be understandable for the defendant and his/her defense to focus mainly on the circumstances related to the character and other circumstances of the perpetrator as well as other positive aspects with the aim of influencing the maximum reduction of the sentence. Both the defendant and the defendant's defense counsel have

[33] Criminal Procedure Code No. 8/L-032, Article 350, Parties' Closing Statements, par Official Gazette of the Republic of Kosovo, No.24, 17 august 2022, Prishtinë.
[34] Criminal Procedure Code No.08/L-032, Article 323, Order of Presentation of Evidence at Main Trial, Official Gazette of the Republic of Kosovo, No.24, 17 august 2022, Prishtinë.

the opportunity to object the prosecutor's or victim's allegations in their statement, but not to cross-examine them. Finally, the issue of culpability is not questioned in the statement of the defendant, or that of the other parties, as this issue is already decided by the conviction judgment.

b. Victim Statement

When speaking in general about the equality of arms, Article 356 paragraphs 10 and 11 gave importance to the victim's declaration either through the declaration during the hearing or through the declaration of damage pursuant to Article 214.[35] This presents an opportunity for the victim to express himself/herself either in writing or directly, about the material, physical or psychological impact that the offense had on him/her. In fact, the Declaration of Damages should have been part of the case, since in principle this statement was made by the victim at the beginning of the proceedings. However, if such a declaration was not part of the case file, the hearing is the last opportunity to present it and also share it with the parties. Par.11 provides that the declaration must be shared with the accused and the state prosecutor, but in principle such a declaration must be part of the prosecutor's file from the time it is drafted. Therefore, we consider that this reference on the state prosecutor is more related to the cases where the victim has not completed the Declaration until the hearing or has completed it with additional data in the meantime. Filing the Declaration at the hearing enables the victim to present the data more accurately, especially related to the material damage, if he/she did not have this data at the beginning of proceedings when he/she filled out the form. This can also have a positive effect on the determination of restitution by the Court instead of the victim being referred to a civil litigation.

Finally, it is important to mention the fact that according to par. 10 the victim cannot recommend the type and level of punishment for the defendant. This means that par. 7.3 is not applicable for the declaration of the victim, victims advocate or the victim's representative. Such an possibility is allowed only for the prosecutor, who for the first time can propose the level of punishment, as well as the imposition of a judicial admonition or any alternative punishment foreseen by Article 46 of the Criminal Code.

[35] Criminal Procedure Code No. 08/L-032, Article 214, Declaration of Damage by the injured party, Official Gazette of the Republic of Kosovo, No. 24, 17 August 2022, Pristina.

c. Presentation by the prosecutor

Just as the prosecutor has a central role in criminal proceedings, he/she also has a role in sentencing.[36] With the introduction of the sentencing hearing, this obligation of the prosecutor and other parties in the procedure has further deepened, making the importance of active participation in the presentation of evidence known, not only about the guilt or innocence of the defendant, but also about important circumstances related to the amount and type of punishment. The prosecutor's role in sentencing is broken down in more detail in the Guidelines of the Chief State Prosecutor,[37] therefore, this material will focus only on specific issues related to CPC innovations. These innovations mainly refer to the prosecutor's argumentation regarding the circumstances relevant to sentencing and the sentence proposal. When we talk about the prosecutor's arguments, it should be borne in mind that holding a separate hearing allows the prosecutor to focus not only on the data related to the prison sentence, but also on the suitability for other types of punishment, taking into account the specifics of the case at hand, the degree of responsibility, past conduct of the defendant but also the impact of the crime on the victim. So, the prosecutor is given the chance to make these arguments related, to the level of sentence, in the first instance without having to present them in the appeal. We believe this would reduce the need to file an appeal every time. In the event the first instance court did not take into account the prosecutor's contentions regarding the punishment, and if it failed to reason them, it allows for challenging the first instance court decision on this very basis. It is important to understand that in this process the prosecutor does not bear the sole burden of arguing about the circumstances that affect the type and level of punishment. This is because it is the obligation of the defense counsel, the accused, the victim and the victim's representative or advocate to give their contribution for easier decision-making.

It is also true that the prosecutor can, and by all means should, challenge in his/her statement arguments made by the defense for mitigation of punishment which are unreasonable.[38] The same can be said about the mitigating circumstances, when the prosecutor is aware of them he/she should make them known, or if the same have been presented by the defense and the prosecutor considers

[36] Demleitner, Berman, Miller, Wright, Sentencing Law and Policy: Cases, Statutes, and Guidelines, fifth edition, Chapter 2, point C. Prosecutor; Wolters Kluwer Publication, New York, 2022.
[37] Chief State Prosecutor's Guidelines on the role and contribution of the state prosecutor in sentencing, pg. 21, Pristina, December 2020.
[38] Ashworth, Andrew and Kelly, Rory, Sentencing and Criminal Justice, seventh edition, Oxford, UK; New York, NY, Hart Publishing, and imprint of Bloomsbury Publishing, 2021.

that they are relevant, he/she should not challenge them without grounds. This way, the proposal of the type and level of punishment by the prosecutor will be more credible as it will be based on tangible and more reliable data. However, the prosecutor must ensure that such data are collected throughout the entire proceedings ready to be summarized and reasoned.

XI. Administration of evidence

One of the questions raised by legal professionals was the issue of whether there should be administration of evidence in this hearing? Given that the sentencing hearing represents a new practice for the Republic of Kosovo, as such it is very logical to start with the careful steps in conducting this hearing, to then advance later to more complex hearings, however it is also important to find the best way for an effective implementation of such hearings. In different systems, there are different standpoints regarding this aspect.

The general principle is that sentencing decisions are part of the criminal trial and as such, should be subject to normal criminal proceedings. This has been the position within the European Convention on Human Rights since 1972:[39]

"The Commission considers that appeals related to sentencing procedures, even after entering a guilty plea, may raise issues from Article 6 of the Convention, in that, for example, the defendant must have the opportunity to be represented when the prosecution presents evidence regarding the sentence. In the Commission's opinion, the determination of criminal charges in the sense of Article 6(1) of the Convention does not only include the determination of the culpability or innocence of the accused, but also the principle of determining his/her sentence; and the phrase 'everyone accused of a criminal offense' in Article 6(3) includes persons who, despite being found guilty, have not yet been sentenced. The Commission notes that questions about sentencing may be closely related, and that in criminal proceedings of many member states of the Convention, they cannot be separated at this stage of proceedings."

[39]Ashworth Andrew, Sentencing and Criminal Justice, 13.1.3 Towards procedural fairness p.429, sixth edition, Cambridge University Press, 2015.

Considering that Article 356 does not provide details on all the issues surrounding the conduct of the hearing, to clarify this issue, an analysis of the broader concepts of the CPC referring to the evidence procedure is required."[40]

Based on the above description, the Commission has treated the sentencing proceedings in the same way as all other criminal proceedings. However, considering that at the sentencing stage the defendant's culpability has already been decided, issues that are addressed in this hearing are necessarily limited. The following analysis aims to offer some suggestions on how to make this hearing as successful as possible, especially at this initial stage in the Kosovar practice. Thus, a parallel must first be drawn with the presentation of the closing statement under the CPC:

"Persons presenting closing statements may refer to admissible evidence, as well as proceedings, applicable law, the character and demeanor of the witnesses as observed in the judicial proceedings, as well as mitigating and aggravating factors. They may use charts, diagrams, court-approved transcripts of tapes or their functional equivalent, summaries and comparisons of evidence, if they are based on admissible evidence, as well as enlargements of exhibits and any demonstrative or illustrative exhibit or demonstration made in court."[41]

Given that, as stated above, the hearing represents a sequence of the main trial, presentation of tables, diagrams, summaries and graphs is allowed in this hearing as means to support the argument on the applicability and relevance of certain mitigating or aggravating circumstances. However, it should be borne in mind that in the sentencing hearing, none of the aforementioned, nor the declaration of parties, should refer to the culpability or innocence of the defendant, as this is a matter already decided with a judgment and the evidence procedure in this regard is closed by the court.

In the US where a sentencing hearing takes place in every criminal case without exception, there is already an established practice on how the hearing is conducted. The declaration of parties about

[40]X v..United Kingdom (1972), Application No.6998/75, Report of the Commission, Strasbourg, 1980. Ashworth Andrew, Sentencing and Criminal Justice System, p.429, sixth edition, Cambridge University Press, 2015.
[41] Criminal Procedure Code No. 8/L-032, Article 350, Parties' Closing Statements, par 2, Official Gazette of the Republic of Kosovo, No.24, 17 august 2022, Prishtinë.

matters of importance for the type and level of punishment is a daily routine. There are cases where, exceptionally, parties' claims about the existence of a circumstance are also supported by a written statement submitted by a third party. These documents mainly deal with the character and personality of the defendant rather that substantial issues.

Letters can be very influential when they are honest and open a window into the defendant's past and character...Lawyers should instruct those writing letters that they should not give their opinion on the defendant's innocence. It is much better if the supporting letters give concrete examples of the defendant's kindness or other contributions to society, rather than to be rhetorical...these words give the judge of the case very little information about the true character of the defendant.[42] What is important to note about the hearing is the efficiency of that hearing which is conducted in record time of an average, one to several hours, and in rare and more complex cases it can last even longer. It should be born in mind that the aspect of culpability has already been dealt with, therefore there is no need for the hearing to turn into a new judicial trial with unnecessary complication or delay of the process.

Practically, it should be borne in mind that in cases where the hearing is held within the 7-day deadline, such time may not be sufficient for collection of new evidence. Therefore, it is recommended that parties consider collection of evidence and materials necessary for determining the type and level sentence from the very beginning of proceedings. This way, the key elements that affect the determination of the sentence can be extracted from the evidence and the case file, without the need to administer new evidence. The main focus of parties for this hearing should be on the circumstances that refer to the behavior and character of the defendant, family situation and financial situation. The latter is of particular importance when imposing a fine or restitution. The victim, on the other hand, can complete the Declaration of Damage with additional data, indicating the financial impact that the crime has had on him/her more precisely.

In cases where the court requires a pre-sentencing report, parties are given a longer period of time, and as a result there is an opportunity to focus on concrete circumstances and evidence that affect the level of punishment. In the more complex cases it is of interest to also focus on the defendant's financial situation, given that most Articles of the Criminal Code provide for the punishment of a

[42]Williams CJ, Sentencing Advocacy: Principles and Strategy, A.Basic Preparation , Pg.86

fine either as the main or as accessory punishment. This would allow the court to use the Supreme Court's Guidelines for imposing criminal fines[43] and the calculator[44] developed for this purpose, and this way the fine will have the same effect as any other punishment provided by the Criminal Code.

How long the hearing last and what can and should be administered ultimately depends on whether the hearing takes place after entering of a guilty plea, the plea agreement or at the end of the main trial and at the same time how controversial are the claims of one side regarding the other.

If the defendant has pleaded guilty based on a plea agreement, the scope of facts that may be challenged by the parties may be limited within the terms of the agreement. If the defendant is found guilty after the trial, the judge may limit himself/herself to the case files and refuse to accept new evidence at the sentencing hearing.[45]

[43]Specific guidelines for imposing fines as a criminal sanction, Supreme Court of the Republic of Kosovo, Prishtina, 2020.
[44] See: https://supreme.gjyqesori-rks.org/kalkulatori-i-gjobes/
[45] Williams CJ, Sentencing Advocacy: Principles and Strategy, C.Preparation for Factually-Contested Sentencing Hearings], Pg.89

XII. Announcement of judgment after the sentencing hearing

Article 356 is very clear regarding the issue of announcing the judgment. More specifically, this article states:

"At the conclusion of the sentencing hearing, the single trial judge then withdraws to render the judgment, whereas the trial panel then withdraws for deliberation and voting in order to render the judgment. The provisions of Article 365 of this Code apply mutatis mutandis for the announcement of the sentence."[46]

With the introduction of the sentencing hearing, drafting of the conviction judgment is postponed. In fact, the Court announces the decision on the defendant's culpability, including only the provision on the defendant's guilty verdict in the record. Article 365 par.3 provides that:

"If the single trial judge or presiding trial judge issues a judgment of guilty and a sentencing hearing is scheduled pursuant to Article 356 of this Code, the ***enacting clause of this judgment*** **only contains the fact that he is guilty..."**

The deadlines of Article 365 apply to the announcement. It should be borne in mind that when the defendant is found guilty, he/she is not yet considered a convicted person without the completion of the sentencing process. Thus, at the conclusion of the sentencing hearing, the conviction judgment is drafted in accordance with Article 364.

Regarding the announcement of the judgment, Article 356 refers to the deadlines provided for in Article 365,

"The judgment is announced by the single trial judge or presiding trial judge ***immediately*** *after the court has rendered it.* ***If the court is unable to render judgment on the day*** *the main trial or the sentencing hearing is completed,* ***it postpones the announcement by a maximum of three (3) days*** *and determines the time and place for the announcement of the judgment."*

[46] Criminal Procedure Code No. 08/L-032, Article 365, Announcement of Judgment, par 12 Official Gazette of the Republic of Kosovo, No. 24, 17 August 2022, Pristina.

The reasoning of the judgment is a very important element of the court's decision-making process. Now with the scheduling of the separate hearing for setting the sentence, the court has much more material both for deciding about the sentence and also for reasoning the circumstances affecting the level of sentence.

The reasoning of the sentence affects the legitimacy of sentencing decision and also reduces the risk for subsequent users of the sentencing decision—including the appellate court, corrections officers, crime victims, and the defendant— to misunderstand court's findings and the implications of those findings.[47]

[47] Model Criminal Code, Chapter 10.06. Sentencing proceedings: Sentencing Proceedings; Findings of Fact and Conclusions of Law}, pg. 687.

Conclusion

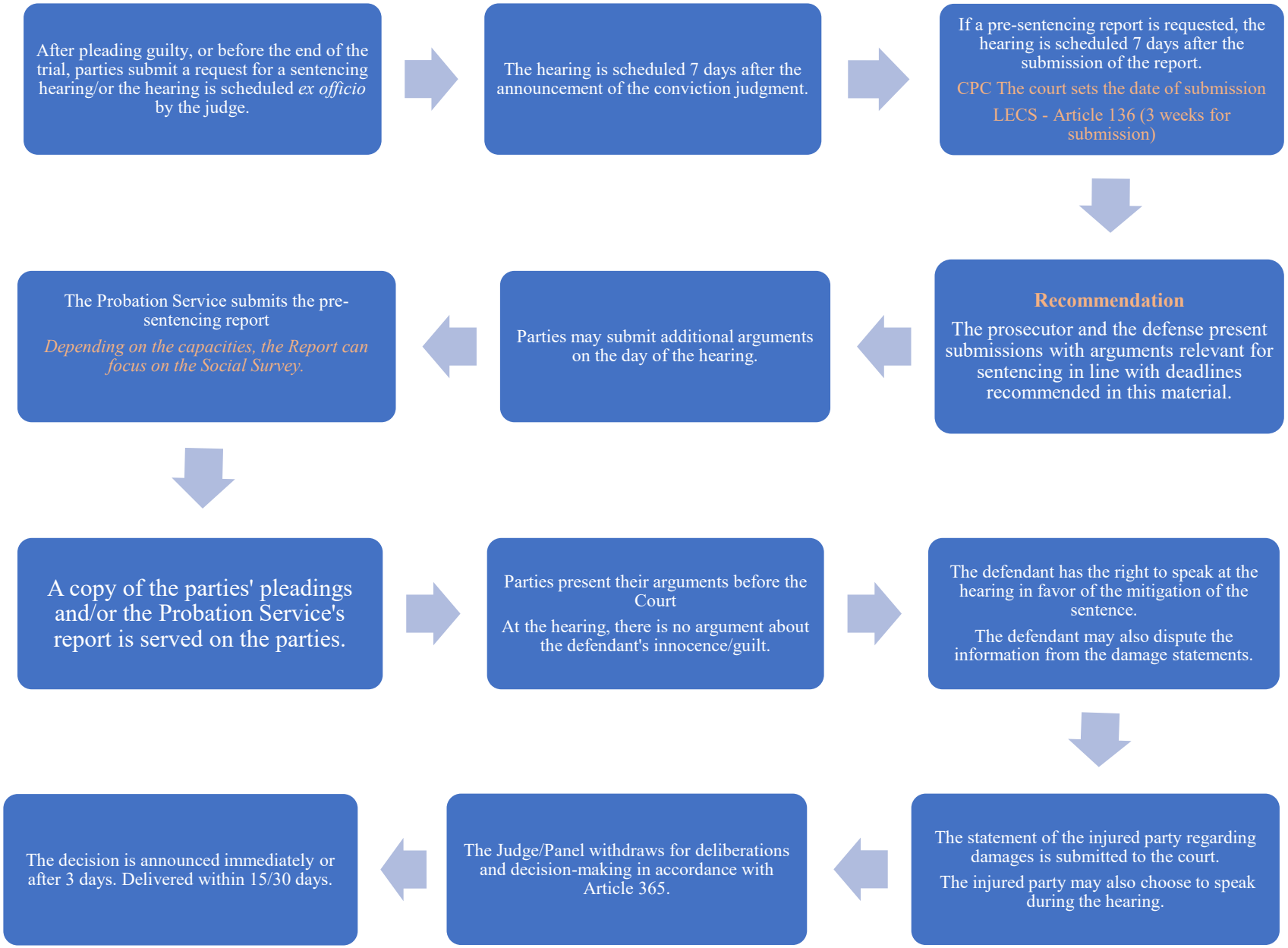
Although an innovation in our law, the Sentencing Hearing is very likely to evolve over time in such a way that the parties themselves and the justice system will see its value and importance. Of course, the justice system but also parties will need time to determine the best practice in implementing this hearing which ultimately contributes to harmonization of sentences in accordance with the legal provisions, the Supreme Court Sentencing Guidelines, and the principle of proportionality.

The sentencing hearing is a process that allows all parties to be involved in the process. All parties must be treated as equal before the court in terms of the opportunity to present evidence, and it is equally important to have the opportunity to comment on whether or not the evidence presented is sufficient to prove the existence of any circumstance affecting the sentence. This way, the burden for determining the most appropriate punishment does not fall only on the court.

All participants in this process, including court, should aim for a hearing with as fewer unnecessary complications as possible, and which is also as efficient as possible. In most cases, criminal trials take a lot of time going through the procedures and delaying this hearing when the defendant's culpability has already been determined makes no sense. Everyone should see this hearing as an ideal opportunity to ensure that the sentence is as proportional and fair as possible in relation to the circumstances of the specific case. This way, the public’s trust in the court's decision-making also increases.

Attached to this material the reader can find a diagram on the pathway of the sentencing process as well as some samples of submissions in the USA filed by the prosecutor, defense, and Probation Service, through which the court is informed in writing of the parties' allegations and findings of the Probation Office on circumstances relevant to the sentence.

Appendix 1: The pathway to sentencing hearing


After pleading guilty, or before the end of the trial, parties submit a request for a sentencing hearing/or the hearing is scheduled *ex officio* by the judge.
The hearing is scheduled 7 days after the announcement of the conviction judgment.
If a pre-sentencing report is requested, the hearing is scheduled 7 days after the submission of the report.
CPC The court sets the date of submission
LECS - Article 136 (3 weeks for submission)
Recommendation
The prosecutor and the defense present submissions with arguments relevant for sentencing in line with deadlines recommended in this material.
Parties may submit additional arguments on the day of the hearing.
The Probation Service submits the pre-sentencing report
Depending on the capacities, the Report can focus on the Social Survey.
A copy of the parties' pleadings and/or the Probation Service's report is served on the parties.
Parties present their arguments before the Court
At the hearing, there is no argument about the defendant's innocence/guilt.
The defendant has the right to speak at the hearing in favor of the mitigation of the sentence.
The defendant may also dispute the information from the damage statements.
The statement of the injured party regarding damages is submitted to the court.
The injured party may also choose to speak during the hearing.
The Judge/Panel withdraws for deliberations and decision-making in accordance with Article 365.
The decision is announced immediately or after 3 days. Delivered within 15/30 days.

Appendix 2: Sentencing checklist for judge/trial panel

Judge/Trial Panel Checklist
Sentencing after Initial Hearing or Main Trial

I*f the defendant pleads guilty at the initial Hearing or Main Trial and a sentencing hearing was requested or decided ex officio.*

_____**Announce** the guilty verdict (*Include in the record the enacting clause*).

_____**Set a sentencing hearing date**:

___**I.** ***If no pre-sentence report*** is ordered, set the hearing not later than seven (7) days from the conclusion of the main trial.

___ Notify the prosecution and defense that they may submit sentencing related information no later than three (3) days prior to the hearing. Ask to submit copies to the opposing party as well. Parties may supplement their submissions at the hearing.

___**II.** ***If you order a presentence report*** set a sentencing hearing date no later than seven (7) days from the submission of the report.

____ Specify the deadline for submission of the pre-sentence report (*deadline for submission of the report depends on the complexity and/or number of defendants*).

____ Notify the prosecution and defense that the same deadline applies for submission of their arguments. Parties may supplement their submissions at the hearing.

____ Ensure a copy of the presentence report is provided to the prosecutor and defense.

_____**Victim:** In both instances above, notify the victim for the opportunity to submit the Declaration of Damage.

_____**Presence of parties**: Notify the parties of the specific requirements regarding their presence and representation at the hearing.

Sentencing hearing

_____ **Open the hearing** and identify presence of parties and whether they were duly summoned.

____ ***Presentation by parties***:

____ Probation Officer (*if present*) presents the Pre-sentence report.[48]

____ Argument of prosecutor

____Testimony of victim

____Argument of defense counsel

____Testimony of defendant

____Read/Testimony of others on behalf of defendant

_____ Close the hearing.

_____ **Retreat to decide the Sentence.** If a trial panel all judges in the panel should review the mitigating/aggravating factors and decide on the non/relevance of factors presented by the parties. See below full list of factors.

Par.	DECIDE ON RELEVANCE OF AGGRAVATING FACTORS ART.70	YES	NO
2.1	A high degree of participation of the convicted person in the criminal off.		
2.2	A high degree of intention on the part of the convicted person		
2.3	The presence of actual or threatened violence in the commission of the criminal offense;		
2.4	Whether the criminal offense was committed with particular cruelty		
2.5	Whether the criminal offense involved multiple victims;		
2.6	Whether the victim of the criminal offense was particularly defenseless or vulnerable;		
2.7	The age of the victim, whether young or elderly;		
2.8	The extent of the damage caused by the convicted person, including death, permanent injury, the transmission of a disease to the victim, and any other harm caused to the victim and his or her family;		
2.9	Any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense;		
2.10	Evidence of a breach of trust by the convicted person;		
2.11	Whether the criminal offense was committed as part of the activities of an organized criminal group; and/or		
2.12	If the criminal offense is a hate act, which is any crime committed against a person, group of persons, or property, motivated upon …		
2.13	Any relevant prior criminal convictions of the convicted person		
2.14	If the offense is committed within a domestic relationship		
	List any other factors in aggravation		

[48] If Probation officer is not present, the Court may read the report. Parties should already have a copy of their report.

Par.	DECIDE ON RELEVANCE OF MITIGATING FACTORS ART.70	YES	NO
3.1	Circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity;		
3.2	Evidence of provocation by the victim;		
3.3	The personal circumstances and character of the convicted person;		
3.4	Evidence that the convicted person played a relatively minor role…;		
3.5	The fact that the convicted person participated in the criminal offense … through aiding, abetting, or otherwise assisting another;		
3.6	The age of the convicted person, whether young or elderly;		
3.7	Evidence that the convicted person made restitution or compensation to the victim;		
3.8	General cooperation by the convicted person with the court, including voluntary surrender;		
3.9	The voluntary cooperation of the convicted person in a criminal investigation or prosecution;		
3.10	The entering of a plea of guilty		
3.11	Any remorse shown by the convicted person;		
3.12	Post conflict conduct of the convicted person		
3.13	…effectively contributing to releasing or bringing the kidnapped, abducted, taken or detained person forward alive or voluntarily providing information that contributes to identifying others responsible for the criminal offense; a		
3.14	with regard to terrorism offences…the offender renounces terrorist activity before …assists in the prevention or mitigation of the effects…identifies with sufficient detail to allow the arrest/prosecution of another terrorist…or prevents further….		
	List any other factors in mitigation		

_____ **A. When ordering Jail Sentence**

____ Duration

_____ Credit for time served on detention on remand.

_____ Aggregate sentence if multiple offences committed.

_____ If Accessory punishments ordered use list from Table in Section C

_____ Suspended (*specify if replacing a fine or imprisonment or both*)?

_____ Converted to a fine (*in case of imprisonment of up to 6 months*)?

_____ Replaced with community service? Length_____ *(30h-240h)*

_____ Mandatory rehabilitation treatment for drug/alcohol addition? _____ Duration (*may last for the entire duration of imprisonment*).

_____ **B. When ordering Semi-liberty** (*for imprisonment up to 1 year*)

____ List conditions for compliance.

_____ Return the material benefit acquired (*Art.48 par.3*).

_____ Compensate the damage caused by the criminal offence (*Art.48 par.3*).

_____ Other obligations under Article 56 *(see obligations in Section E Table)*

_____ If Accessory punishments ordered use list from table in Section C.

_____ C. When ordering accessory punishment

Art.	ACCESSORY PUNISHMENT	YES	NO	PERIOD
60	Deprivation of the right to be elected;			
61	Order to pay compensation for loss or damage;			
62	Prohibition on exercising public administration or public service functions;			
63	Prohibition on exercising a profession, activity or duty;			
64	Prohibition on driving a motor vehicle			
65	Confiscation of a driver license;			
66	Order to publish a judgment; and			
67	Expulsion of a foreigner from the territory of the Rep.of Kosovo.			

_____ D. When ordering a fine

_____ Amount _____

_____ Due date (*less than 15 days or more than 3 months*)

_____ If paid in installments (*in justifiable circumstances up to 2 years*)

_____ If replaced with Community service go to Section G (*max.240h*)

_____ If replaced with Jail Sentence go to Section A

_____ E. When ordering suspended sentence.

____ Duration (*between 1-5 years*)

____ Length of verification period (*1-5 years*).

____ For Order for mandatory rehabilitation treatment list duration(*3-12mnth*) _____

____ For Order for supervision by Probation Service list duration (*6mnth-3 y.*) _____

____ If Accessory punishments ordered use list from Table in Section C

____ Conditions (*failure to comply may lead to revocation*):

____ a. Due to previously committed criminal offense.

____ b. Due to failure to comply with the following conditions:

Par.	Obligations set forth in a suspended sentence (Art.56)	YES	NO
1.1	To receive medical or rehabilitation care in a health care institution		
1.2	To undergo a medical or rehabilitation treatment program		
1.3	To visit a psychologist and/or another consultant and act in accordance with their recommendations		
1.4	To receive vocational training for a certain profession		
1.5	To perform a work activity		

1.6	To use wage and other income or property to fulfill a family obligation		
1.7	To refrain from changing residence without informing the probation service		
1.8	To abstain from the use of alcohol or drugs		
1.9	To refrain from frequenting certain places or locales		
1.10	To refrain from meeting or contacting certain people		
1.11	To refrain from carrying any kind of weapon		
1.12	To compensate or restitute the victim of the offense		
1.13	To return the material benefit acquired from the commission of the criminal offense		
1.14	Not to possess or use a computer or to access the internet as directed by the court		
1.15	To provide financial reports as directed by the court		

____ F. Waiver of punishment

____ May also order:

____ Mandatory rehabilitation treatment (Art.87). Duration _____ (*max.2 years*).

____ G. When ordering Community Service

____ Duration (*6 months – 3 years*).

____ State if replacing a fine (*only for a fine up to 2500 Euro)*.

____ State if replacing a jail sentence (*only for imprisonment up to 1 year*).

____ Include the obligation to maintain contact with the Probation Service.

____ May include obligations under Section E (*conditions under par a &b*)

____ H. Judicial Admonition

____ Include a warning that in case of a repeat action a harsher sentence will be imposed.

____ May also order:

____ Mandatory rehabilitation treatment (Art.87). Duration _____ (*max.2 y.*).

____ Prohibition on driving a motor vehicle (*Art.59 par.2.5 & 3*)

____ Render the judgment:

_____ Reasoning- Ensure the reasoning includes the specific justification of the factors considered at sentencing.

_____ Specify Court Fees from Article 449 of the CPC

_____ Announce the Judgement:

_____ Immediately after the judgment is rendered; or

_____ Notify the time and place for the announcement of the judgment (*no later than3 days from the conclusion of the hearing*).

_____ Notice on the right to appeal:

_____ Advise the parties of the right to appeal (*30-day deadline to appeal*).

_____ Where an alternative punishment has been imposed, warn the accused conditions by which he/she is bound to abide.

Appendix 3: Example of the prosecution sentencing hearing memorandum

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	**CASE NO.: 0123 554:CR000055**
	)	**JUDGE BRIAN JUSTICE**
Plaintiff,	)	
	)	
v.	)	**GOVERNMENT'S CONSOLIDATED SENTENCING BRIEF**
	)	
JACK JOHNSON, and HARRY JAMISON,	)	
	)	
Defendants.	)	

The United States of America, by and through Michelle M. Baeppler, First Assistant United States Attorney, and Megan R. Miller, Assistant United States Attorney, respectfully submits this sentencing memorandum.

Respectfully submitted,

Memorandum

I. Summary of Offense Conduct, Charges, and Convictions

A. Charged Individuals

i. Jack Johnson

Defendant Jack Johnson was a resident of the City of Cleveland, Ohio, and was elected to serve as a Councilperson for the City of Cleveland. Johnson was elected to represent Ward 4, which included the Buckeye-Shaker neighborhood.

ii. Harry Jamison

Defendant Harry Jamison worked for the City of Cleveland, Ohio, as Johnson's Executive Assistant, a position Jamison held for over 20 years. Jamison was responsible for assisting Johnson with administrative tasks, including those required for Johnson's various projects in Ward 4.

iii. Dan Hopkins

Co-conspirator Dan Hopkins was a resident of Cleveland Heights, Ohio. Hopkins was Executive Director of SDC. In that capacity, his responsibilities included authorizing SDC to issue checks, reviewing SDC expenditures, and submitting appropriate expenditures for reimbursements from grants awarded by the City.

iv. Robert Fitzpatrick

Co-conspirator Robert Fitzpatrick worked for the City of Cleveland, Ohio, in the Division of Recreation. Fitzpatrick began his work for the City in or around 1985. Fitzpatrick worked in various positions within the Division of Recreation until being promoted to regional manager in 2010. In this position, Fitzpatrick oversaw operations at seven recreation centers within the City, which included directly supervising the center manager at each recreation center.

B. Charged Schemes *(details removed-see Fact pattern)*

i. The $1,200 Reimbursement Scheme

ii. The SDC Scheme

iii. The Tax Scheme

iv. The Justice Scheme

C. Charges and Convictions

On Friday, July 30, 2021, after an approximately two-week trial, a jury returned a verdict finding Johnson and Jamison guilty of all counts.

II. Specific Considerations

i. Role Enhancement: Organizer or Leader (Johnson Only)

An upward role enhancement should apply because Johnson was an organizer or leader. Under § 3B1.1(a), a defendant's offense level should be increased "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive[.]" U.S.S.G. § 3B1.1(a). A participant is "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, appl. n.1. This Court should consider Johnson's "exercise of decision-making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." *United States v. McDaniel*, 398 F.3d 540, 551 (6th Cir. 2005) (quoting U.S.S.G. § 3B1.1 appl. n.4). A district court need not find each factor to warrant an enhancement. *United States v. Gates*, 461 F.3d 703, 709 (6th Cir. 2006).

Additionally, this Court must find that find that Johnson "exerted control over at least one individual within [the] criminal organization…" *United States v. Vandeberg*, 201 F.3d 805, 811 (6th Cir. 200]0) (internal quotation marks omitted); *see also* U.S.S.G. § 3B1.1 app. n.2. A defendant whose sentence is enhanced under U.S.S.G. § 3B1.1(a) or (b) need not directly supervise more than five persons, so long as the defendant exerted some level of control or influence over at least one of five or more persons involved in the criminal activity. *United States v. Baker*, 559 F.3d 443, 449 (6th Cir. 2009) (citing *United States v. Robinson*, 503 F. 3d 522, 529 (6th Cir. 2007)).

Here, the participants included Jamison, Hopkins, Fitzpatrick, Kelly Johnson, and Johnson himself. Johnson had an employer-employee relationship with Jamison and directed him regularly. Johnson directed Hopkins to keep invalid individuals on SDC's payroll.

Hopkins complied. After all, as Hopkins testified at trial, losing then Councilman Johnson's support would have been a "death knell" for SDC. Johnson developed his relationship with Fitzpatrick when Fitzpatrick was a child. Johnson ensured that Fitzpatrick, his children, and his wife were all employed with the City. Then, when Johnson needed a participant in his scheme, he came to collect on these favors. Johnson even took advantage of his own son, Kelly Johnson, to fraudulently obtain money from the SDC payroll program. Indeed, enriching Johnson was the primary goal of the conspiracy in this matter. Johnson took the lion's share of the proceeds of the fraud and tax scheme.

Johnson argues that the enhancement should not apply because there were less than five participants because Kelly Johnson was not criminally responsible for the scheme. This argument is without merit. As detailed above, Kelly Johnson completed fraudulent timesheets that falsely reflected he has worked certain hours for SDC that, in fact, he had not. Kelly Johnson then submitted these timesheets to SDC, which issued paychecks to Kelly Johnson. Kelly Johnson would then distribute these checks to Johnson for deposit into his account. All the while knowing the reported hours were false and knowing that Jack Johnson was not giving him the proceeds of these checks.

ii. Role Enhancement: Manager or Supervisor (Jamison Only)

An upward role enhancement also applies to Jamison as an organizer or leader. Under § 3B1.1(b),

a defendant's offense level should be increased "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive…" U.S.S.G. § 3B1.1(b). The Application Note 4 factors and requirement that Jamison managed or supervised at least one of the five participants, as outlined above, also apply to this Section 3B1.1(b) enhancement.

As outlined above, the participants included Johnson, Hopkins, Fitzpatrick, Kelly Johnson, and Jamison himself. Jamison argues that he was not a manager or supervisor of Fitzpatrick or Kelly Johnson. In fact, as Johnson's figurehead, Jamison played an important role in supervising the participants in this scheme. Jamison ensured that Fitzpatrick completed and submitted timesheets. Jamison even provided Fitzpatrick with false tax forms to help cover up the fraud by reporting income to the IRS that Fitzpatrick did not actually receive. When negative news broke about the fraudulent reimbursement scheme, Jamison told Fitzpatrick not to worry and that everything would be okay. When it comes to Kelly Johnson, Jamison was his literal supervisor. And while title itself is not enough, here, Jamison took the timesheets from Kelly Johnson, delivered them to Hopkins for payment, and then received and distributed the resulting paychecks. Additionally, Jamison directed Hopkins to issue bonus checks to certain individuals.

iii. Abuse of Position of Public or Private Trust

An upward enhancement because Johnson and Jamison abused positions of public or private trust. Under § 3B1.3, an enhancement applies "[i]f the defendant abused a position of public or private trust…in a manner that significantly facilitated the commission or concealment of the offense…" U.S.S.G. § 3B1.3. The Guidelines define a position of "public or private trust" as one that is:

[C]haracterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

Jack Johnson was an elected councilmember for the City. He has almost unilateral decision making that helped facilitate the fraud in this case. For instance, John Fennelly, a City employee in the Community Development Department, testified that it was so easy for a councilperson to designate Block Grant funds that the funds were referred to as "Councilmatic" funds.

As Johnson's executive assistant of over 20-years, he acted as almost figurehead for Johnson. For example, Jamison was able to drop off Johnson's reimbursement requests to Carrie Rentz without question. As detailed above, Jamison also was able to bring Johnson's tax forms to the tax preparer and cause SDC to issue bonus checks.

iv. Use of a Minor

An upward enhancement applies because Johnson used minors to commit the fraud in this case. Under U.S.S.G. § 3B1.4, the enhancement applies when a defendant "used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense[.]" The phrase "used or attempted to use" is includes "directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting." U.S.S.G. § 3B1.4, appl. n.1. The government is required to show that the defendant actively and intentionally used a minor in the commission of the offense. *United States v. Butler*, 207 F.3d 839, 848-49 (6th Cir. 2000). ("Congress' inclusion of these considerations indicates that to deserve § 3B1.4 enhancement, one must do more than simply participate in crime with a minor."). However, the children used in the offense need not have any knowledge of what they were doing. *See United States v. Jenkins*, 229 F. App'x 362, 369 (6th Cir. 2005) ("USSG § 3B1.4…does not impose a knowledge requirement on the minor who is used in the commission of the offense.") (internal quotation and citations omitted).

From June 30, 2014, through January 12, 2018, Hopkins issued approximately 75 SDC payroll checks totaling approximately $7,136.15 to Mat Johnson (aka Mat Rodriguez-Cornier). Mat Johnson was a minor at the time he was involved in the offense. Johnson called Mat Johnson as a trial witness. Notably, Mat Johnson denied cutting grass for SDC during the time June 2014 and January 2018. He stated he only started cutting grass for SDC "a couple years" before his testimony, and then only as a volunteer. He did, however, work for the former Jack Johnson Recreation Center. Mat Johnson came from a family in Puerto Rico that "did have much[.]" Johnson's family knew Mat Johnson's family. When Mat Johnson was just 13 years old, he began living with Johnson.

From December 28, 2012, through March 29, 2019, Hopkins issued approximately 104 SDC payroll checks totaling approximately $34,178.75 to Kelly Johnson. During part of the offense, he was also a minor child. Johnson called Kelly Johnson as a trial witness. Kelly Johnson does not know the circumstances of how he came to live in the United States from his homeland, the Marshall Islands. He does not know his birth parents or have contact with them. His earliest memory of Johnson was when Kelly Johnson came to the United States when he was about seven or eight years old. As late as a week before his testimony, Kelly Johnson worked for the City of Cleveland in the Recreation Center. Kelly Johnson testified that before he turned eighteen, he gave some of his SDC payroll checks to Johnson. Johnson helped Kelly Johnson get a job at SDC. Kelly Johnson testified that he never did work for SDC dafter 8:00 p.m. However, he signed time sheets showing that he was working for SDC after 8:00 p.m.

The evidence, testimony, and Probation Department investigation show that Johnson took custody of young men from disadvantaged backgrounds. They lived with him. He placed them in positions to work for SDC. Even when John Hopkins expressed to Johnson the financial that paying Kelly Johnson, Mat Johnson, and Jack Johnson, Jr. was putting on SDC, Johnson ensured that these individuals remained on the payroll.

v. Obstruction

An upward enhancement also applies because Johnson and Jamison obstructed justice. Under U.S.S.G. § 3C1.1, an obstruction of justice enhancement applies when:

(1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation,

prosecution, or sentencing of the instant offense of conviction, and

(2) the obstructive conduct related to

(A) the defendant's offense of conviction and any relevant conduct; or

(B) a closely related offense

Obstructive conduct can vary widely in nature, degree of planning, and seriousness. *Id.*, appl. n.3. There are several reasons the obstruction enhancement applies. Regarding the tax scheme, the enhancement applies based on the substantive convictions the defendant's sustained in counts 14 and 15. *See* U.S.S.G. 3C1.1 appl. n.4(I).

Additionally, Fitzpatrick testified that after he was approached by federal agents in the Summer of 2020, Johnson and Jamison approached him a series of times. The day after federal agents approached Fitzpatrick, Johnson and Jamison called him on the phone. Jamison asked where Fitzpatrick was headed, and Fitzpatrick informed the defendants that he was headed to work. Jamison met Fitzpatrick at work and asked whether anyone had visited Fitzpatrick's home. Fitzpatrick disclosed that the FBI had visited him. Jamison told Fitzpatrick that if anyone else visited him he should make no comment. Later, when Fitzpatrick was walking to a youth football game in his neighborhood Johnson and Jamison approached him in a vehicle and Johnson told Fitzpatrick "you're being awful quiet." Finally, Johnson and Jamison followed Fitzpatrick as he drove to a local gas station. Johnson and Jamison checked Fitzpatrick for his phone and looked in his trunk. Johnson and Jamison again inquired if anybody had approached Fitzpatrick. Johnson specifically told Fitzpatrick that if anybody should approach him, he should tell "them I was giving you $300 and you were signing receipts" and Jamison reiterated that message. This attempt to influence a witness through intimidation is precisely when this enhancement should apply. *See* U.S.S.G. 3C1.1 appl. n.4(A), *see also United States v. French*, 976 F.3d 744 (6th Cir. 2020).

Additionally, regarding Johnson, the Sixth Circuit has affirmed this Court's application of 3C1.1 to instances where a defendant provides materially false testimony at trial. *United States v. Russ*, 600 F. App'x 438 (6th Cir. 2015). As detailed above, Johnson testified that he paid Robert Fitzpatrick consistent with what he placed on his monthly expense report. Johnson even admitted to filling out a W-4 tax form at the end of the year to attest to what he had paid Fitzpatrick. Federal agents, however, analyzed Johnson's bank records and did not see any pattern of money around $1,200, in any form, leaving Johnson's accounts every month as payment to Fitzpatrick. There was also no pattern of money, in any form, regularly going into Fitzpatrick's bank account to suggest that he was receiving payments from Johnson. This false testimony is central to the case against Johnson.

Finally, once the jury returned its verdict, the government requested that the Court remand Johnson given his proximity to the community on which he inflicted such damage and "specifically that witness, Robert Fitzpatrick, who lives in the same neighborhood" as Johnson. The Court inquired of Johnson where he was going to be residing, noting Johnson's trial testimony that he moved from the neighborhood. Johnson told the Court that he was going to be living at "1234 East Boulevard, Number 5." (Id.). The Probation Department, however, found that Johnson still owned and was living on a different street—in Fitzpatrick's neighborhood. The Court should consider if Johnson's lie was material to its decision regarding bond.

III. The § 3553(a) Factors Warrant a Custodial Sentence at the High-End of the Guidelines Range

Under 18 U.S.C. § 3553(a), "[t]he Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. Those purposes are:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from future crimes of the defendant; and

(D) to provide the defendant with needed training, medical care, or other correctional treatment in the most effective manner.

In determining the appropriate sentence, the court must consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the four legitimate purposes of sentencing (described above);

(3) the kinds of sentences available;

(4) the Guidelines range itself;

(5) any relevant policy statement by the Sentencing Commission;

(6) the need to avoid unwarranted sentence disparities among defendants; and

(7) the need to provide restitution to any victims. 18 U.S.C. § 3553(a)(1)-(7).

Considering the nature and circumstances of the offense of conviction, the need to afford adequate deterrence, and the need to avoid unwarranted sentencing disparities, the government submits that a custodial sentence at the high-end of the Guidelines range is sufficient but not greater than necessary.

A. Nature and Circumstances of the Offenses

There is an insidious sort of deception that occurs in public corruption cases. *See United States v. Spano*, 411 F. Supp. 2d 923, 940 (N.D. Ill.) *aff'd* 447 F.3d 517 (7th Cir. 2006) ("Public corruption demoralizes and unfairly stigmatizes the dedicated work of honest public servants. It undermines the essential confidence in our democracy and must be deterred if our country and district is ever to achieve the point where the rule of law applies to all—not only to the average citizen, but to all elected and appointed officials"). It is a deception hidden in the skilled act of convincing the

electorate that one is decent, honest, and true when, in fact, one is engaged in fraud and self-dealing. Former Cleveland City Councilman, Defendant Jack Johnson, and his former Executive Assistant, Defendant Harry Jamison, carried on their ruse together. Each working in concert to convince the citizens of the city of Cleveland that Johnson was a champion for the Buckeye-Shaker neighborhood in Cleveland's Ward 4. In fact, Johnson was funding his unsustainable monthly cash needs by siphoning public money offered in the service of one of Cleveland's most vulnerable communities.

The Guidelines contemplate an enhancement when defendants target a particularly vulnerable *individual*. (*See*, U.S.S.G. § 3A1.1). This provision, however, is not tailored to crimes like Johnson and Jamison perpetrated against particularly vulnerable *communities*. The Court should understand and consider the challenges faced by the community from which Johnson and Jamison stole. The Center for Community Solutions ("CCS") is a local nonpartisan think tank that uses public data to find solutions to health, social, and economic issues. The CCS issues City of Cleveland Neighborhood Fact Sheets, which highlight demographic, health, and social indicators for each neighborhood in the City of Cleveland and include basic demographic information about each neighborhood and data on employment and income, poverty, education, housing, and health. This includes a fact sheet on Cleveland's Ward 4, last released in 2016. The CCS reports that nearly 20,000 people live in Ward 4. Over 95% of the residents are African American. Over a quarter of adults live with a disability. Only 54% those 16 years of age or older participate in the work force. Over 63% of the entire population is eligible to receive assistance from food banks with 38% of all people and over 60% of all children living in poverty.

But Johnson and Jamison's dishonesty went far beyond a deception of and theft from the public. They also lied to and manipulated City of Cleveland employees, workers at the Buckeye Shaker Square Development Corporation, and even groomed impoverished young men from difficult backgrounds—even Johnson's own family and wards—to help carry out their fraud.

This is no ordinary public corruption case. The depth, breadth, and impact of the corrupt and deceptive schemes designed and orchestrated by Johnson and Jamison warrant a custodial sentence at the high-end of the Guidelines range.

B. History and Characteristics of the Defendants

i. Jack Johnson

Johnson has been afforded the privilege of serving the citizens of Cleveland for more than two decades. Johnson came from a family of means who, according to him, was even able to donate upwards of $10,000 annually to the former Jack Johnson Recreation Center from approximately 1981 to 2018. Johnson described his grandfather, Bishop Looper, as "a very wealthy man." Johnson's mother lived to 77, his father to 52. Johnson testified that his mother was a registered nurse and was going to medical school, and his father was a supervisor at TRW. Johnson described his family as "middle class" and noted that he "[n]ever wanted for anything." His family was not touched by drug addiction or alcoholism. Johnson enjoys the support of his brother and adoptive children. Although he has experienced health issues in the past, he has been able to afford medical treatment at the Cleveland Clinic. Before his indictment, Johnson was earning a salary of $89,000 annually and drawing an annual pension of $73,008—a total income of just over $162,000.

ii. Harry Jamison

Like Johnson, Jamison too grew up in a household with both his mother and father. His father lived to age 78, and his mother, age 85, currently resides in Cleveland, Ohio. Jamison is close with some of his siblings and is an active father in his son's life. Jamison is in good physical health. Jamison had the benefit of not only a high school diploma but also a bachelor's degree from University of Toledo. Prior to indictment, Jamison worked at the City as Johnson's executive assistant since 1992, earning $44,000 a year. In addition to his employment with the City, from 1990 to 2018, Jamison purportedly held a second full-time job as the supervisor for the SDC landscaping program where he earned an additional $62,000 per year.

iii. Johnson and Jamison Broke the Law Despite Privilege and Status

As noted above, both Johnson and Jamison lived lives that were very different to the lives of many Ward 4 residents. They grew up in families which afforded them opportunities to do just about anything they wanted. Despite these options, Johnson and Jamison chose crime. The Court should consider this decision when imposing its sentence.

C. The Purposes of Sentencing: Deterrence and Promoting Respect for the Law

We have heard too often from politicians convicted of public corruption—"everyone was doing it." Without certain and sufficient consequences for corrupt behavior, fraudulent practices continue and corrupt systems flourish. The citizens of the city of Cleveland deserve better than what Jack Johnson and Harry Jamison provided. To promote respect for the law and provide deterrence, it is important to send a message that corrupt conduct—even by long term public officials like Johnson and Jamison—is serious and will not be tolerated. In public corruption cases especially, it is important for anyone who might consider a similar course of action to see that someone who misuses a position of public trust for his own benefit will face strict punishment. *See United States v. Peppel*, 707 F.3d 627, 637 (6th Cir. 2013) (noting that general deterrence is particularly effective in cases involving economic and public corruption crimes); *see also United States v. Kuhlman*, 711 F.3d 1321, 1328 (11th Cir. 2013) (key objective of sentencing should be "to send a message to other [public officials] that [bribery] is a serious crime that carries with it a correspondingly serious punishment"); *United States v. Morgan*, 635 F. App'x 423, 450-51 (10th Cir. 2015) (noting that "[d]eterrence is a crucial factor in sentencing decisions for economic and public corruption crimes such as this one" and concluding a sentence of probation was unreasonable and "encourage[d] rather than discourage[d] [public officials] from engaging in [bribery] because they might conclude that the only penalt[y] they will face if they are caught [is probation]"). It is also important for members of the public to see that when their trust is betrayed, meaningful consequences follow. "Without meaningful consequences for a breach of trust, their trust is no more than blind trust." *Morgan*, 635 F. App'x at 450.

Likewise, a significant sentence will also assure the public that "white collar criminals will not be dealt with less harshly than those criminals who have neither the wit nor the position to commit crimes other than those of violence." *United States v. Brennan*, 629 F. Supp. 283, 302 (E.D.N.Y.

1986); *see also United States v. Davis*, 537 F.3d 611, 617 (6th Cir. 2008) (noting that "[o]ne of the central reasons for creating the sentencing guidelines was to ensure stiffer penalties for white-collar crimes and to eliminate disparities between white-collar sentences and sentences for other crimes").

There is a critical interest that must be vindicated when a politician who helps authorize and levy taxes is himself a tax cheat. Indeed, general deterrence occupies an especially important role in sentencing for criminal tax offenses. As the Sentencing Commission has stated:

The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would be violators.

Introductory Cmt. to U.S.S.G. § 2T1.1. *See also United States v. Weaver*, 126 F.3d 789, 793 (6th Cir. 1997). In imposing a sentence, the Court must send a message that none of us—even those who are elected to lead—are absolved of our collective responsibility to support the nation and the plethora of causes and campaigns pursued with our tax dollars.

IV. No Downward Departure of Variance is Warranted in this Case

Johnson and Jamison made great issue of the good deeds they did for the community and have both submitted letters of support highlighting the same. Such letters should not be dispositive as many defendants who receive them often are deserving of imprisonment. *See United States v. Emmenegger*, 329 F. Supp. 2d 416, 423 (S.D.N.Y. 2004) (commenting that the "vast majority of defendants … continue to receive the love and support of their families," and "[m]any, in turn, love their families and friends … and participate in charitable activities"). The fact that many of Defendants' family, friends, and neighbors (and others they showered with money and benefits) think highly of them make them no different from most other white-collar criminals. *See United States v. McClatchey*, 316 F.3d 1122, 1135 (10th Cir. 2003) ("excellent character references are not out of the ordinary for an executive who commits white-collar crime; one would be surprised to see a person rise to an elevated position in business if people did not think highly of him or her").

Although defendants may have supporters who will describe their good deeds and character, the Seventh Circuit suggests that this type of evidence should be weighed cautiously (at best) in deciding a sentence for a public official. In *United States v. Vrdolyak*, 593 F.3d 676, (7th Cir. 2010), Judge Posner found that the district court placed too much weight on letters written on behalf for a number or reasons, including:

Politicians are in the business of dispensing favors; and while gratitude like charity is a virtue, expressions of gratitude by beneficiaries of politicians' largess should not weigh in sentencing.

Id. at 683. Instead, Defendants' actions and words they did when they thought no one was listening or observing them speak louder than any after-the-fact testimonials in their favor.

Additionally, while Defendants may lay claim to various good deeds they have performed, various courts of appeals have reversed as an abuse of discretion departures predicated on service to the public that was extremely compelling. *See United States v. Winters*, 105 F.3d 200, 209 (5th Cir.

1997) (reversing a downward departure based on the defendant's distinguished military service, during which he was twice wounded in combat and awarded two Purple Heart medals); *United States v. Rybicki*, 96 F.3d 754, 758-59 (4th Cir. 1996) (reversing a departure based on the national service of "a highly decorated Vietnam War veteran who had
saved a civilian's life during the My Lai incident and had an unblemished record of 20 years of service to his country, both in the military and in the Secret Service").

Moreover, those good deeds described by the character witnesses or detailed in any letters on the Defendants' behalf must be squared with their actions and words in this case. Here, past good deeds do not mitigate the Defendants' actions in using funds intended for one of Cleveland's most vulnerable communities to enrich the man who was elected to represent that community. Indeed, the political gladhanding described by Judge Posner may be precisely why Johnson and Jamison were able to carry on their schemes undetected for so long. That some members of the community were helped despite Johnson taking his illegal cut in secret does not alleviate the harms caused by that theft. For a community like Buckeye Shaker, the money Johnson stole could have made a very great difference.

More broadly, individuals in Defendants' shoes, who have had the opportunity to do good work and build relationships with influential people, are not entitled to a get-out-of-jail-free card, particularly for serious crimes. As the Eighth Circuit stated, in general, white-collar criminals "enjoy sufficient income and community status so that they have the opportunities to engage in charitable and benevolent activities." *United States v. Haversat*, 22 F.3d 790, 796 (8th Cir. 1994). "[W]e expect the district courts to view such evidence with the skepticism of experience in sentencing executives who commit white-collar offenses." *Id.*; *see also United States v. Morken*, 133 F.3d 628, 630 (8th Cir. 1998) (finding defendant's good works unremarkable); *United States v. Millar*, 79 F.3d 338, 345 (2d Cir. 1996) (refusing to review the district court's decision not to depart based upon the defendant priest's charitable works and public service, where the district court recognized its authority to depart; the defendant "had benefits that few defendants have, including education, respect in his work, skills of advocacy,
intelligence, and the calling to serve as a priest"); *United States v. Jordan*, 130 F.Supp.2d 665, 672-73 (E.D. Pa. 2001) (denying a departure for a defendant convicted of money laundering, despite numerous letters detailing substantial charitable contributions, generosity to community members in need of food, and service as mentor for neighborhood youths; these acts, "while commendable, are not so exceptional or extraordinary for a person" like the defendant who owned a small business); *United States v. Scheiner*, 873 F.Supp. 927, 933-35 (E.D. Pa. 1995) (departure was not warranted for a doctor convicted of conspiring to defraud an insurance company, despite his contributions to the young and poor minorities, including financial sponsorship of several basketball teams, serving on several community boards, working in a podiatry clinic where free services were provided to the poor, and generally [having] served as a source of support and inspiration to many).

These decisions are grounded in the recognition that individuals with sufficient stature, ability, and opportunity to earn sizable incomes are often involved in community service and charitable endeavors, and such activities do not remove the defendant from the contemplated heartland of defendants charged with white-collar offenses. Indeed, it is widely recognized that "the [Sentencing] Commission intended its guidelines and policy statements to 'equalize punishments for white collar and blue collar crime,'" and courts have endeavored to implement that intention in sentencing. *United States v. Thurston*, 358 F.3d 51, 80 (1st Cir. 2004) (reversing the district court's downward departure where the white-collar defendant's good works, although

"admirable," were insufficient to qualify as exceptional in light of, among other things, his status as a prominent corporate executive with the means to make financial contributions and engage in civic and charitable activities), vacated on other grounds, 125 S. Ct. 984 (2005); *see also United States v. Wright*, 363 F.3d 237, 248-49 (3d Cir. 2004) (upholding the district court's denial of a downward departure where the defendant minister's good works, although "profound," "substantial," and "sustained," were not so extraordinary as to justify a downward departure). As District Judge Marrero in the Southern District of New York observed:

[W]hite collar offenders, because of their greater wealth and leadership in the community, enjoy much greater opportunities to participate and rise to prominence in charitable activities, and also possess the means to contribute resources with larger generosity to community service organizations. These social and economic advantages could enable them to gain a substantial edge over blue collar offenders who cannot make claim to comparable means and opportunities with which to mitigate the full impact of a heavy sentence.

United States v. Fishman, 631 F. Supp.2d 399, 403 (S.D.N.Y. 2009). To permit departures primarily based on such charitable activity would in effect be penalizing poorer defendants.

Certainly, the Court should consider what genuine good deeds Johnson and Jamison have done. These are nice. But these good acts must be balanced against the corruption and deceit they exhibited in this case. This Court should decline to treat favorably those defendants with the means—whether lawfully or unlawfully obtained—to dole out favors to the very community from which they are stealing. That is what Johnson and Jamison did here.

III. Conclusion

For the foregoing reasons, the government asks this Court to impose custodial sentences at the high-end of the advisory Guidelines range for Defendants Jack Johnson and Harry Jamison, together with joint and several restitution and a subsequent term of supervised release.

Respectfully submitted,

Appendix 4: Example of defense sentencing hearing memorandum

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO.: 0123 554:CR000055
	)	
Plaintiff,	)	JUDGE BRIAN JUSTICE
vs.	)	
	)	
JACK JOHNSON,	)	SENTENCING MEMORANDUM
	)	
Defendant.	)	

CASE HISTORY (Details removed- See Fact Pattern)

SPECIFIC CHALLENGES

Defendant Jack Johnson challenges the increase for his role in the offense because there were less than five or more participants involved in the criminal charges. The only additional participants were Jamison, Hopkins, and Fitzpatrick.

Defendant Johnson challenges the increase for use of a minor, specifically that Johnson used or attempted to use his two children, who were less than eighteen years of age, to commit the charged offenses and to assist him in avoiding detection of misappropriating federal funds. Johnson's children independently wanted to work for the City of Cleveland and SDC, and the Government failed to present evidence or testimony that Johnson's children were complicit in the Federal Theft Program scheme or were just being used to pad the pockets of their father.

Finally, Defendant Johnson challenges the obstruction of justice increase, both for (i) instructing Kent Fitzpatrick to lie to the FBI and/or (ii) tampering with Edi Johnson's testimony and document production to the Grand Jury. In trial, Fitzpatrick testified that Jamison told him to lie to the FBI, but Johnson never said anything to him directly about monies received by him. Moreover, it is our position that Edi Johnson testified that he independently came to a decision as to the number and accuracy of charitable donations made to the Recreation Center by Johnson. Further, he testified that he did not fabricate or lie about what donations were provided to the Center. So, Johnson should not be given an increase for obstructing justice.

RELEVANT PERSONAL AND FAMILY BACKGROUND INFORMATION

Jack Johnson was born on July 1, 1946, in Cleveland, Ohio, and now is 76 years of age. While growing up in Cleveland, he had two brothers, one now deceased. His parents were working class folks. His mother worked as a nurse, and his father was employed as a supervisor at TMT. Both parents are now deceased. Johnson, although never married, raised several adopted children, two of whom are twins, age 17, who reside with Johnson. Both of these children were born in the Dominican Republic before immigrating to the United States. His adult children include Jack, Mat, and Kelly who are well-functioning and well-adjusted adults. Johnson has served as a father figure for many young children and adults throughout his lifetime.

Currently, Johnson's health condition has worsened over the last several years. He had been

diagnosed with a blood-clotting disorder, diabetes, a herniated disc, and a pulmonary embolism. Late in December 2019, Johnson had surgery on the meniscus in his left knee. He has been just advised that he may be in the early stages of dementia. His treating physician recently made a referral for testing because Johnson exhibited signs and symptoms of the medical condition.

Since 1980, and for over the last 40 years, Johnson was employed with the City as a Councilman. He is generally accepted in his community as a person and elected official who had served admirably for the residents of the City and who had impacted many lives of young people and seniors as well. Johnson has many well-wishers, friends, colleagues, and co-workers who admire and respect him for all of the good he has done with the community. We have provided a number of letters of family and friends who can attest to the generosity, sincerity, integrity, and hard-working ethos.

The Defendant seeks a downward variance for his position of being an irreplaceable parent to two children. In support of our legal position, the Defendant contends that the District Court has the authority to conclude that the unique circumstances of this offense support a lesser sentence. Johnson is currently seventy-six years old and has sole custody of both of his sons. Given the fact that Johnson has sole custody of both children whom he has raised by himself, the impact of a long incarceration would have a devastating impact on the children. These two children are solely dependent on him for the maintenance and care, and would have to enter foster care, since Johnson does not have any other family members and/or friends who could assume full custody of his two sons.

Johnson does not present a danger to the public at large if shown leniency by this Court by granting this sentencing departure. Also, he is no longer working in public service, and is akin to being "retired." Johnson is no longer in the position of public trust, and certainly will not commit future crimes. We safely say this since Johnson has lived a long law-abiding life, and, now in his advanced age of 76 years old, he presents little or no risk to reoffend.

SENTENCING FACTORS

When evaluating the factors under 3553(a), a trial court can and should take into consideration the age of the defendant. Johnson is now 76 years old with, arguably significant, health problems, which health problems are certain to become worse as time moves on. Granted, age is certainly not the only factor to consider, but it is a strong consideration along with Johnson's health issues. Although it is unpredictable as to how long someone will live, statistically speaking, according to the most recent data from the Centers for Disease Control and Prevention the average life expectancy is 77.3 years-74.5 years for men and 80.2 years for women.

Here, in this case, we strongly believe that the factual circumstances of the case, the personal characteristics and history, and current family circumstances warrant a downward sentencing variance.

With this being so, it is hoped that this Court will adopt our legal arguments for leniency.

Respectfully submitted,

Attorneys for Jack Johnson

Appendix 5: Example of Probation pre-sentence report

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO[49]

UNITED STATES OF AMERICA	**)**	
	)	**PRESENTENCE INVESTIGATION REPORT**
vs.	**)**	
	)	**Docket No.: 0123 554:CR000055**
Jack Johnson	**)**	
	)	

Prepared for: The Honorable Brian Justice
U.S. District Court Judge

Assistant U.S. Attorney	**Defense Counsel**
Michelle M. Baeppler	Kathreen Turney
Megan R. Miller	Ben Alverson

Sentence Date: **December 13, 2022, at 1:00 PM**

Offense: Counts 1 and 2:
Conspiracy to Commit Federal Program Theft
Not more than 5 years imprisonment/$250,000 fine

Counts 3-8:
Federal Program Theft
Not more than 10 years imprisonment/$250,000 fine

Counts 9-13:
Aiding and Assisting in the Preparation of False Returns
Not more than 3 years imprisonment/$250,000 fine

Count 14:
Tampering with a Witness
Not more than 20 years imprisonment/$250,000 fine

Count 15:
Falsification of Records in Federal Investigations
Not more than 20 years imprisonment/$250,000 fine

[49] This is a shortened and redacted version of the Pre-sentence report used during the Sentencing Hearing Workshop in December 2022.

Identifying Data:

Birth Name: Jack Johnson
Date of Birth: July 1, 1946
Age: 76
Race: Black or African American
Sex: Male
Height: 70 inches
Weight: 180 pounds
Eye Color: Brown
Hair Color: Black
Education: High School Diploma
Dependents: 2
Citizenship: U.S. Citizen
Legal Address:
Alias(es): None
Scars,
Marks, Tattoos: None
Alternate IDs: None

PART A. THE OFFENSE

Charge(s) and Conviction(s)

Pretrial Adjustment: Pretrial services records indicate the defendant has complied with all Court ordered conditions of release.

The Offense Conduct

The following account of the instant offense is based on a review of case records provided by the United States Attorney's Office and a discussion with the case agents assigned to this case.

Background Information and brief summary of each count- (*see Fact pattern)*

Victim Impact

The victims in this case are:

- United States Department of Housing and Urban Development (HUD). The amount of restitution owed - $619,224.12.
- Internal Revenue Service. The amount of restitution owed- $104,272.

Adjustment for Acceptance of Responsibility

Further, the defendant provided the following written statement:

You ask me to explain what this trial did to my life.

This trial destroyed my unblemished reputation after forty (40) years of service to the citizens of the city of Cleveland. I knew early in my career what my calling was and I tried to do my best to better the lives of those that believed that they had no voice in our government. I have helped over a thousand young people become productive citizens through my interaction with them through the Cleveland Division of Recreation. I am the longest serving City Council Committee Chairman in the history of the United States and I am the only person in Cleveland history to have a building named in his honor while still serving in office.

I have adopted five (5) children; believing that people in public service should set an example by what they do, not by what they say that they will do.

If I had the opportunity to do things over again, I would do some things differently. Some mistakes were made.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s) None.

Adult Criminal Conviction(s)- Mr. Johnson was cited and fined for "Miscellaneous," Speeding, Registration, and Prohibited U Turn (2) in the Shaker Heights Municipal Court, Shaker Heights, Ohio; Brooklyn Mayor's Court, Brooklyn, Ohio; Cleveland Heights Municipal Court, Cleveland, Ohio; and Orange Mayor's Court, Akron, Ohio. Those convictions do not receive criminal history points, per U.S.S.G. § 4A1.2(c)(2).

Other Arrests

Date of Arrest	Charge	Court/Agency	Disposition
06/02/1982	Unfair Campaign Practices (two counts); Case No. Cr-15-012345	Cleveland Police Department; Cleveland, Ohio	09/17/1982: Case dismissed

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

Jack Johnson was born on July 1, 1946, in Cleveland, Ohio. He has been a lifelong resident of the Cleveland area. His father died at the age of 52 from a heart attack. Johnson's mother died in 1997 at the age of 77.

The defendant's parents worked to support the family. His mother worked as a nurse, and his father was employed as a supervisor at TMT. Mr. Johnson described having a good childhood. He was taught right from wrong and was provided with all of his basic necessities. Mr. Johnson was not exposed to drug use or excessive alcohol use. There was no violence in the home. Johnson's only childhood regret is not finishing college.

Johnson was raised with his two siblings. One of his brothers died in 2018 at the age of 69 from a heart attack, and he had been an engineer at Ford. His other brother, age 71, resides in New Orleans, Louisiana, and is a professor. He maintains a close relationship with him.

The defendant has never been married, and he has adopted several children over the course of his adult life. He adopted two children, age 17, from the Dominican Republic when they were 12 years old. He adopted Kenny., at age 8; Kelly at age 7; and Mat at age 12. Kenny, now age 31, resides in Arkansas, and he works as a truck driver. Kelly, now age 24, resides in Cleveland and is employed by the City of Cleveland and sells clothing. Mat, now age 20, resides in Cleveland and is a college student. Mr. Johnson noted that he has always been involved with his children. They are aware of the instant offense and are all in good physical health. They will remain supportive of him. According to Mr. Johnson, he has also helped raise other children in the community and estimated that he has assisted over 100 children over the years.

Physical Condition

The defendant stands 5 feet, 10 inches tall and weighs 180 pounds. He has brown eyes and black hair. According to Johnson, he is in poor health. He was diagnosed with several health conditions and has undergone surgery and medical treatment for various conditions.

Records from the Cleveland Clinic confirmed surgery, allergies, and other various diagnoses in his medical history.

Mental and Emotional Health

The defendant has no current or historical mental and emotional health concerns.

Substance Abuse

Mr. Johnson said he consumed alcohol 40 years ago. He has no history of illicit drug use.

Educational, Vocational and Special Skills

Johnson graduated from John Adams High School in Cleveland, Ohio, in 1964. He reported that he attended Case Western Reserve University in Cleveland, Ohio, from 1964 to 1966. Records have been requested but not received.

Employment Record

Mr. Johnson was employed as a City of Cleveland councilman from 1980 until his retirement in 2021. The last salary he earned was $89,000 per year. Mr. Johnson receives a pension in the amount of $6,084 per month.

Prior to being elected a councilman, the defendant reported employment as the recreation director for the City of Cleveland from 1964 to 1980.

Financial Condition: Ability to Pay

The defendant provided a completed financial form with supporting documentation.

Additionally, a TransUnion credit report was completed.

Assets

Huntington	$7,250.00
Vehicle	$11,000.00
Residence	$70,500.00
OPERS	$115,100.00
Total Assets	**$203,850.00**

Liabilities

Second Mortgage (PNC)	$67,000.00
2018 Tesla	$2,000.00
Total Liabilities	**$69,000.00**

Monthly Income

Net Income	$2,800.00
Retirement Income	$5,000.00
Total Monthly Income	**$7,800.00**

Monthly Expenses

Home/Mortgage	$1,600.00
Gasoline	$250.00
Car Payment	$900.00
Health Insurance	$600.00
Utilities	$1,200.00
Auto Insurance	$200.00
Total Monthly Expenses	**$4,750.00**