IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA v. CLARENCE P. PETTIBONE, Defendant.	)	Case No. 11-cr-065-wmc

SENTENCING MEMORANDUM OF UNITED STATES

The United States of America, by John W. Vaudreuil, United States Attorney for the Western District of Wisconsin, by Stephen P. Sinnott and Laura Przybylinski Finn, Assistant U.S. Attorneys for that district, submits this memorandum in connection with the sentencing of Clarence Pettibone.

Argument

Defendant Pettibone asks the Court to depart from the otherwise applicable advisory guideline in this case on two alternative grounds. First, he asks the Court to depart under Application Note 19(c) of USSG 2B1.1, arguing that the calculation of the adjusted offense level "overstates the benefit to Pettibone." (dkt. 119, pp. 2-7). Second, Pettibone asks the Court to depart below the guidelines based on USSG §5K2.0. (dkt. 119, p. 7). He does not cite a specific section of that guideline, but argues generally that the Court should depart under USSG 5K2.0 because Pettibone had an "inferior role" in the bribery scheme, "little or no knowledge of the amount being taken" and "little" gain.

(dkt. 119, pp. 7-9). Neither suggested ground provides a basis for a departure from the advisory guideline range in this case.

The bribery guideline calls for an upward adjustment to the offense level in certain bribery offenses, based on the nature of the offense. The guideline provides:

> If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, *whichever is greatest*, exceeded $5,000, increase by the number of levels from the table in §2B1.1 (THEFT, Property Destruction, and Fraud) corresponding to that amount.

USSG §2C1.1(b)(2) (emphasis added). Pettibone does not dispute the fact that the benefit Whiteagle's clients received in return for the payments exceeded $2,500,000, or the fact that Whiteagle himself received $3,000,000. (dkt. 119, p. 3). Under either measure, the offense level is adjusted 18 levels under USSG §2C1(b)(2). Pettibone instead argues that the resulting guideline range "overstates the benefit that resulted from his involvement in the offense conduct." On that basis, he asks the Court for a downward departure under Application Note 19 to USSG §2B1.1. That note recognizes that "a downward departure may be warranted" in "cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense." USSG §2B1.1, Application Note 19. The guidelines define the term "offense" as the offense of conviction and all relevant conduct. USSG §1B1.1, Application Note 1(H).

The resulting offense level in this case, while high, does not overstate the seriousness of the offense -- a long-running and extensive bribery scheme involving millions of dollars in tribal government business corruptly-obtained from the Ho-Chunk

Nation. Pettibone's role in this classic corruption scheme was not unusual. Unfortunately, the bribery scheme in this case is an all-too-familiar classic tale of corruption, one where a middleman pays bribes to a corrupt legislator to help clients obtain government business.

Pettibone's real complaint is not with the seriousness of the offense itself, but with what he sees as the failure of the guidelines to take into account his relatively lesser *role* in the offense. The guidelines, however, expressly prohibit any departure based on a defendant's mitigating role, which may only be taken into account under §3B1.2 (Mitigating Role). USSG §1B1.1. While Timothy Whiteagle was a major player in this bribery scheme, Pettibone played a central -- indeed, key -- role in the offense and is not entitled to a role in the offense adjustment. Over the course of at least six years, Whiteagle touted Pettibone to his clients as his man on the inside, the "key" to the clients' success, and during that time Pettibone took money and valuables from Whiteagle and the clients and unfailingly supported them at every turn in their efforts to do business with the Nation.

Pettibone, in an effort to characterize his role as tangential when compared to Whiteagle's, says he received "at least $30,000" in money and valuables from Whiteagle. (dkt. 119, p. 7). As a preliminary matter, it should be noted that there is not much force in a public official's argument that he should get a sentencing break because he was bought cheaply. That criminal gain is to be split among co-conspirators is of "no significance." *United States v. Vrdolyak*, 593 F.3d 676, 681 (7th Cir. 2010) (kickback fraud scheme).

In any event, Pettibone's personal gain was not limited to $30,000. In citing this figure, Pettibone is referring to the checks, money orders, and car that were uncovered in the investigation. Those items, however, are not the universe of valuables that Pettibone received. Whiteagle took a lot of money from his accounts in untraceable cash. He took Pettibone on golf outings, to NFL football games, and to strip clubs -- including one visit that ran up a tab of $15,000. (PSR ¶¶11, 42, 49). In addition, Whiteagle solicited and obtained from Money Centers a $50,000 per year job for Pettibone's cousin, saying that he did so at the behest of Pettibone. (PSR ¶79). Also, Pettibone was clearly the intended recipient of the $45,000 cashier's check payable to "Park Institute BRF" that Whiteagle obtained just prior to the searches in August 2008 and then turned into cash four months later. (PSR ¶82, 91). By any calculation, the benefits Pettibone received were not minimal.

So, too, his role was not inferior. Key pieces of evidence show that Pettibone was not merely used by Whiteagle. Instead, the evidence shows that Pettibone happily joined the bribery scheme and was fully-aware of its scope and the multi-million dollar contracts involved:

(a) Pettibone was well aware of his ethical obligations; he is the legislator who moved for passage of the Code of Ethics Act. (PSR ¶9).

(b) Pettibone consulted with Whiteagle about how to help Cash Systems, to their mutual benefit. Among the documents recovered in the search of Whiteagle's house, agents recovered a typed list of questions dated December 29, 2004, from Whiteagle to Pettibone. Following each of Whiteagle's typed questions is Clarence Pettibone's

handwritten response. The document is a telling snapshot of Whiteagle conferring with Pettibone about how they urgently needed to help Cash Systems win out over the competitor – Global. In response to Whiteagle's question, "When will Cash Systems be voted on - what's the strategy??" Pettibone wrote, "Will need to talk tomorrow." Whiteagle also asked, "Twin/Whitewings [rival legislators] funded by Global are putting up a fight so we need to get CS in ASAP. Can the Thunders in Fairchild show up in force next Wednesday too at the area meeting. . . . . ??" Pettibone's handwritten response states: "Will they be willing to vote against a general council meeting? Let's take the vote on regular area mtg nite Jan 12th to not have a general council." The letter ends with Whiteagle's typed caveat: "We have to get that global funded killed off *or we will pay big time soon Clarence*." (Emphasis added.) Below that is Pettibone's handwritten check mark. (PSR ¶46).

(c) In 2006, Whiteagle, Atherton, and Pettibone went to dinner together with Trinity representatives, where Dave Payne of Trinity heard Pettibone refer to Trinity and ask Whiteagle, "Are these the ones you want me to pick?" (PSR ¶20).

(d) On March 10, 2008, Whiteagle emailed Wolfington and -- tellingly -- *simultaneously sent a copy of the email to Pettibone.* Whiteagle wrote Wolfington and copied Pettibone:

> . . . Altho its been a while for you to get in the door with the HCN we have kept our word, you are in!! We have devoted many months to prepare your way into the HCN <u>without pay</u> and be assured the next 5 days will determine what we do next with you with the HCN. Mr. C [referring to Pettibone] and I have discussed this thoroughly too that if what you say changes and it's a continued pattern we will need to review our

> relationship... You haven't much time to get that Cash Access contract put together and discussed with Joe Decorah [of the Nation's business department]. I strongly advised you to finalize the contract so the other related departments can review it too before the 18th of March even if that means your presence here at BRF. You should meet the legislators and staff!!! You need to meet with 6 HCN legislators that Mr. C. knows will back you and the President and Joe Decorah on the 18th . . ."

(underlining in original). (PSR ¶71). In this same email, Whiteagle recommended to Wolfington that Money Centers insist on an up front $2.5 million dollar fee from the Nation for the licensing of proprietary software known as "ONswitch" -- software designed to allow the Nation to eventually take over and conduct its own cash access services. In essence, in the email -- notably, copied to Pettibone -- Whiteagle tells Wolfington that Pettibone and Whiteagle recommended Money Centers get $2.5 million out of the Nation while the getting was good. [1]

(e) Finally, Pettibone received a direct offer of a bribe of $5,000 to $7,000 per month in "personal compensation" to be disguised as payments to his martial arts school. Atherton wrote to Pettibone on July 15, 2008:

> Clarence, if personal compensation was/is a concern for you, let me put your mind at ease...We cannot compensate you outright, as in a direct payment, however, Trinity can pay me, then I can compensate you, we must be careful to protect your position as paying you directly is a criminal offense... What ever arrangement you have with anyone else, I can assure you, the Trinity team will beat.... Would $5000 to $7000 a month contribution to T.K.D. [a reference to Pettibone's Tae Kwon Do

[1] Whiteagle wrote, "DO NOT leave out the dollar figure for ONswitch as you will only get one chance to get your contract and product thru on the 18th. Mr. C and I discussed this in depth and we believe your fault, or our fault, nobodies (sic) fault there will be political issues over the next 12 months, which will build up regardless to the point that ONswitch funding from the Ho-Chunk Nation may never be available to your group due to the politics. So it has to be in there the $2.5 million."

> school] be satisfactory? Dave [Payne] will personally see to this... And another thing.... you would have never been out of the loop for supporting elder housing with the Trinity team... you were and still are always included... in compensation.

(PSR ¶37). Pettibone did not reject the offer. Twenty-one days later the investigation became overt, and the offer became unrealizable.

Pettibone also offers, as grounds for a departure, the argument that because of his age and un-electability, it is highly unlikely that he will ever again take a bribe. A low risk of recidivism may be a proper factor for the Court to consider under 18 U.S.C. §3553(a). It is not, however, a proper basis for departure under the guidelines.

A significant sentence is appropriate when an elected public official engages in bribery, not to foster *specific* deterrence, for once, a public official's crime is exposed, continuing to take bribes becomes extremely difficult, if not impossible. Instead, a significant sentence is appropriate for *general* deterrence -- to assure that others similarly situated who might be tempted toward corruption are put on notice that the risk outweighs the benefit.

Conclusion

For all of these reasons, a departure from the advisory guidelines range is not warranted.

Dated this 9th day of July 2012.

Respectfully submitted,

JOHN W. VAUDREUIL
United States Attorney

By: /s/

STEPHEN P. SINNOTT
First Assistant U.S. Attorney

And: /s/

LAURA PRZYBYLINSKI FINN
Criminal Division Chief