

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 3:06 CR 189 (JBA)
 :
 EDWARD FORBES SMILEY, III :

THE BRITISH LIBRARY'S SENTENCING MEMORANDUM

The British Library, by its attorney, Robert E. Goldman, Fox Rothschild LLP, respectfully submits this Sentencing Memorandum regarding defendant Edward Forbes Smiley, III, who is scheduled to be sentenced on September 27, 2006. For the reasons provided below, the British Library recommends an upward departure in the sentencing guidelines. It is respectfully submitted that this sentence is warranted and required given the facts of this case, the supporting law, and the need to reflect the seriousness of the offenses, to impose a just sentence, and to deter others who may be inclined, as Smiley was, to steal world treasures from public and private institutions.

I. BACKGROUND

On June 22, 2006, the defendant entered a guilty plea to a one-count Information charging him with theft from a museum, in violation of 18 U.S.C. § 668. The Information alleged that Smiley, a professional dealer of rare maps, engaged in a series of thefts of approximately ninety seven antique maps, culminating on June 8, 2005 in the theft of a map from the Yale University Beinecke Rare Book and Manuscript Library. The government estimates the value of these maps at in excess of \$3 million.

At time of his guilty plea, defendant acknowledged in a "Stipulation of Offense Conduct" that he had engaged in a series of thefts between January 1, 1998 and June 8, 2005 from other

libraries in the United States and abroad. In the stipulation, the parties agreed that Smiley assisted in the recovery of 86 maps. Five maps have been acknowledged to have been lost by Smiley and therefore, presumptively, unrecoverable. The government has labeled 18 maps as provable against Smiley in absence of his cooperation.¹ In a cooperation agreement with the defendant, the government has agreed that it would not use information provided by Smiley during his cooperation against him in subsequent, unrelated prosecution. The government agreed to ask the Court not to consider information provided by Smiley during his cooperation in tailoring an appropriate sentence. The defendant acknowledged in the cooperation agreement that the sentence to be imposed upon him is within the sole discretion of the Court. Smiley agreed to pay restitution to applicable victims relating to the 97 maps, *as long as*, the maps were recovered by time of sentencing or lost by defendant. Smiley, therefore, has not obligated himself to pay restitution for maps stolen and sold to dealers or collectors and not recovered by time of sentencing.

II. THE BRITISH LIBRARY

The British Library is the national library of the United Kingdom, funded by the government. One of the world's great libraries, it is often described as the steward of the "DNA of civilization." The first resort for American scholars who wish to gain access to Europe's written and visual culture across all the continent's languages, it is also the library of first resort for Europeans in search of information about the Americas. Any loss to The British Library is thus veritably a loss to humankind, including the United States.²

¹ The BL submits that the figure should also include its Apian world map which is not listed. The BL had discovered the theft and Smiley's commission of the offense prior to, and independent of, Smiley's cooperation. The BL was in the process of recovering the map from an American dealer when it was taken into possession by the FBI.

² This summary is extracted from the British Library's Victim Impact Statement previously supplied to the Probation Office. The contents of that statement are incorporated herein and made a part of this public record.

The British Library respectfully exercises its right at the sentencing phase of these proceedings to advocate a position it deems appropriate given the crimes of the defendant. The British Library recognizes that Congress has granted this right to victims pursuant to the Crime Victim Rights Act (CVRA) of 2004. 18 U.S.C. § 3771. The act was designed to be a “broad and encompassing” statutory victims’ bill of rights. 150 Cong. Rec. S10,911 (daily ed. Oct. 9, 2004)(Statement of Senator Kyl). The CVRA recognizes “that the sentencing process cannot be reduced to a two-dimensional, prosecution versus defendant affair... The CVRA commands that victims should be treated equally with the defendant, defense counsel, and the prosecutor, rather than turned into a ‘faceless stranger’.” United States v. Degenhardt, 405 F.Supp. 1341, 1347 (U.S.D.C. Utah 2005). Victim allocution compels a full accounting in the sentencing process “for the serious societal harms – harms that go well beyond money – that economic crimes often impose.” *Id.* The statute was enacted “to make crime victims full participants in the criminal justice system.” Kenna v. United States District Court for the Central District of California, 435 F.3d 1011, 1016 (9th Cir. 2006).

III. SENTENCING CALCULATION

A. Statutory Maximum Sentence

The maximum sentence that may be imposed by the Court is ten years imprisonment, a fine of twice the amount of loss, and a 3 year period of supervised release.

B. Sentencing Guidelines

If the Court were to accept the recommendation of the government that only 18 maps be considered for purpose of determining the amount of loss in this case, the British Library agrees to the following stipulations by the government and defendant:

Under the 2004 Guidelines, the base offense level for theft of cultural heritage resources in violation of 18 U.S.C. § 668 is eight. U.S.S.G. § 2B1.5(a). There is a fourteen-level increase to the offense level because the offense conduct, including relevant conduct, caused a total loss in excess of \$400,000 but less than one million dollars (§ 2B1.5(b)(1), § 2B1.1(b)(1)(H)); a two-level increase because the offense involved a cultural heritage resource from a museum. U.S.S.G. § 2B1.5(b)(2); a two-level increase because the offense involved a cultural heritage resource constituting cultural property. U.S.S.G. § 2B1.5(b)(3); a two-level increase because the offense was committed for pecuniary gain. U.S.S.G. § 2B1.5(b)(4). The combined offense level by this calculation is therefore 28.³

The British Library, however, submits that there should be an additional 2-level increase since the defendant engaged in a pattern of misconduct involving cultural heritage resources. See U.S.S.G. § 2B1.5(b)(5). The guidelines provide that a “pattern of misconduct involving cultural heritage resources means two or more separate instances of offense conduct involving a cultural heritage resource that did not occur during the course of the offense (i.e., that did not occur during the course of the instant offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct)). Offense conduct involving a cultural heritage resource may be considered for purpose of subsection (b)(5) regardless of whether the defendant was convicted of

³ We note that if the Court considered all the maps that Smiley acknowledged stealing, the combined offense level would be increased by four levels to 32 since the loss exceeded \$2,500,000. See U.S.S.G. § 2B1.5(b)(1) and §2B1.1(b)(1)(J). The written terms of the cooperation plea agreement do not preclude the Court’s use of the \$3 million loss figure.

that count. See Application Note 6 to commentary to § 2B1.5.

Pursuant to § 1B1.3(a)(2), the issue is whether all 97 thefts are part of a common scheme or plan as the offense of conviction. The British Library believes that this is the position of the government and defense. It is submitted, however, that 97 thefts over a seven and one-half year period cannot be so simply classified. There is no evidence, for example, that Smiley's first theft was anything other than a crime of opportunity and not part of a master plan extending to two continents. Therefore, absent proof by Smiley that all of the thefts were from the beginning part of a common plan, this enhancement should apply. To argue otherwise would make the enhancement inapplicable to all serial thieves who ply their trade with a semblance of regularity and leave the two time offender who varies the manner of his theft on the hook for the increased sentence. The clear intent of the enhancement is to punish more severely the repeat offender. In the event that the Court does not apply this enhancement for reasons to be articulated by the defense or government, the "pattern of misconduct" by this defendant will become an additional ground for upward departure argued below since it was not adequately taken into consideration by the Sentencing Commission.

Using the loss figures for the 18 maps, the victim believes the combined offense level to be 30 rather than the 28 as determined by the government and defense. With a 3-level decrease for early acceptance of responsibility, our calculation places Smiley at a level 27 which provides for a sentencing guidelines range of 78 to 97 months. The government and defense place the range at 57 to 71 months incarceration.

III. UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES

On his website, E. Smiley Forbes proudly boasted

"My name is Forbes Smiley. I work for collectors and institutions helping them build interesting, and often important collections of

early maps and atlases relating to the discovery and settlement of North America ... My practice has always been to work closely with collectors and develop a long term relationship – with the goals of identifying, acquiring and organizing materials relevant to a regions cartographic history. Once a relationship is established I work to protect the collector’s interest, and to assure that the finest copies of relevant maps and atlases are offered to them as soon as they appear on the market, and at the lowest price possible.”

The case of *United States v. Smiley* has made painfully clear that Smiley created his marketplace and built his inventory through the systematic looting of the world’s great libraries.

The maps stolen by Smiley created the dreams of the explorer, merchant, and powerful. They brought inspiration of a new land to the oppressed and the persecuted. They charted the paths of national expansion and empire building. They marked the rise of British dominance, the origins of a new nation and the demise of a native population. The maps drew the lines between where knowledge ended and imagination began. They represented man’s timeless drive to explore the unknown and to bring definition to the void. In his history, *Romance of Modern Exploration* (1906), Archibald Williams wrote:

“Each traveler will be to us as the Ulysses of his times; one who has seen –
‘Cities of men
And manners, climates, councils, governments.’
We shall follow him in his adventures, sharing in sympathy his difficulties and perils, his admiration of the scenes that Nature spreads before him, his intercourse with strange people. And interest in curious customs. This will teach us what qualities go to make up the Knight Errant of travel, and give us an insight into a mode of life which, in spite of all its hardships, causes him to exclaim-
‘How dull it is to pause, to make an end,
To rust unburnished, not to shine in use,’
And constrains him after each interval of rest to plunge once more into the mysteries of the unknown.”

Smiley’s actions ripped at the heart of our public institutions which stored, protected, and made available to the public over centuries maps which provided a bridge between past and future generations. They displayed, in essence, a time line of human knowledge, the progression

of discovery in a new world, the courage of those who willingly went beyond the rim of the known world.

“People who greatly dread hazard or greatly disapprove of it, and who are not interested in knowledge as such, will naturally disapprove of taking even a small risk for widening at any point the domain of knowledge save where immediate and tangible remuneration is to follow. Naturally, such people, who are often very good people but who possess limited imaginative power, will never be appealed to by the men who prize life as a great adventure; the men who in one age first crossed the Atlantic, first sailed around the Cape of Good Hope, and first passed the Straits of Magellan and circumnavigated the globe; the men who, in another age, first penetrated to the North and South poles, who first crossed Africa, or who found their way for the first time to the forbidden city of the Dalai Lama.”

Theodore Roosevelt, *Outlook Magazine* 1913.

A. Legal Basis For Departure

Section 5K2.0 of the sentencing guidelines provides that the sentencing court may depart from the applicable guideline range if the court finds pursuant to 18 U.S.C. 3553(b)(1) that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. “Departures ... perform an integral function in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing.” Application note 5 to commentary to 5K2.0.

In addition to the general provision provided by § 5K2.0, the applicable sentencing guideline for cultural property thefts, § 2B1.5, provides “[t]here may be cases in which the offense level determined by this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted.” Application note 9 to the commentary to 2B1.5.

In United States v. Medford, 194 F.3d. 419 (1999), the Third Circuit reviewed the district court’s upward departure in a case involving museum theft, in violation of 18 U.S.C. 668. The

defendants in that case stole objects from the Historical Society of Pennsylvania (HSP) valued at approximately \$2 million. At sentencing the district court departed upwards 4-levels finding that the sentencing range did not “sufficiently encompass the egregiousness of the offenses that were involved here.” The sentencing court determined that “[t]he conduct that [the defendants] engaged in is an assault and affront to our culture, to our society, and ... must be dealt with accordingly. [T]he intangibles ... involved ... and the effects that they have ... had upon the institution itself-both here in Philadelphia and ... throughout the country-mandate that the court ... issue an upward departure in this case. Id. at 425. In an opinion written by Justice Alito, the Court upheld the upward departure.

“We agree with the District Court. The price set by the commercial market is insufficient to ‘fully capture the harmfulness of the [defendants] conduct.’ The antiques stolen in this case unquestionably have historical and cultural importance. Moreover, the thefts affected the HSP in ways different in kind from a loss of money or other easily replaceable property, for these thefts damaged the HSP’s reputation. In addition, the monetary value of these objects does not adequately take into consideration the real but intangible harm inflicted upon all of the other victims of this offense, including the City of Philadelphia and the general public. Because section 2B1.1 applies to thefts that cause financial harm to the immediate victim of the offense, the non-monetary damage caused here and the harm inflicted upon the public at large justify the District Court’s departure.”

Id.

In another signature case, United States v. Spiegelman, 4 F.Supp.2d 275 (S.D.N.Y. 1998), the sentencing court departed upwards five-levels in the sentencing guidelines in a case involving the theft of manuscripts from Columbia University Rare Book and Manuscript Library. The losses were estimated at \$1.3 million. The basis for the departure included the findings that (1) the theft had an impact different in kind from a mere loss of money; (2) the economic value did not account fully for the seriousness of the offense; and (3) the offense caused harm not only to the victim institution but to the much broader community. The reasoning of the district court

rings loud in our examination of Smiley.

“Spiegelman intentionally or knowingly risked inflicting, and inflicted, substantial harm not only to Columbia University and its professors and students, but also upon the greater academic community and society as a whole. In callously stealing, mutilating, and destroying rare and unique elements of our common intellectual heritage, Spiegelman did not aim to divest Columbia of \$1.3 million worth of physical property. He risked stunting, and probably stunted, the growth of human knowledge to the detriment of all of us. By the very nature of the crime, it is impossible to know exactly what damage he has done. But this much is clear; this crime was quite different from the theft of cash equal to the appraised value of the materials stolen because it deprived not only Columbia, but the world of irreplaceable pieces of the past and the benefits of future scholarship.”

Id. At 292.

B. Factual Support For Departure

A review of the victim impact statements submitted by the British Library and the other institutions provides support for a finding that Smiley’s transgressions and the resulting harm take this case out of the heartland of other cultural property cases. These statements establish a number of basis for departure.

1. Multiple victims

Smiley stole from seven public and private libraries. Because the applicable sentencing guideline, § 2B1.5, does not deal with injury to more than one victim, departure is warranted in this case. See Application note 3(B)(ii) to Commentary to 5K2.0.

2. Pattern of misconduct involving cultural heritage resources

Should the court in determining the sentencing guidelines range determine that an additional 2-level increase pursuant to U.S.S.G. § 2B1.5(b)(5) is inapplicable given the commentary to the guideline, it is established that “there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” Accordingly, an upward departure for pattern of misconduct is

justified.

3. The economic loss does not fully account for the seriousness of the offense

The harm caused by Smiley transcends monetary loss. Objects significant to British, American, and world heritage have an intrinsic value beyond the monetary worth set in the commercial market. Preservation of objects representing our cultural past enables nations to maintain important bonds with past generations and ensures that future generations will have available to them objects which symbolize common threads which bind the nation and, in this case, connect two countries. Such objects permit scholars and citizens to gain the knowledge and appreciation of historical events which can only come through examination of the very artifacts with which that history was made.

The victim impact statements profoundly articulate the point that monetary loss is almost insignificant compared to other measures of harm to the libraries. They provide compelling statements concerning the provenance of these exceptional pieces. The Apian world map stolen from the British Library by Smiley tells but one tale of the 97 maps stolen. This map was torn from a volume that was owned by Thomas Cranmer, Archbishop of Canterbury. The volume, now absent the map, still bears his signature. Cranmer precipitated England's epoch-making break with Rome by marrying King Henry VIII to Anne Boleyn in 1533. After Henry, he was the most influential man in early Tudor England. The volume shows that Cranmer took a lively interest in geography. Thus, the Apian map represents Cranmer's image of the world. It demonstrates that he believed America to be a separate continent discovered by Amerigo Vespucci and not, as many still believed at that time, that it was part of Asia. This image determined such advice as he gave the king and his ministers on matters of overseas exploration. After Cranmer was burned for his beliefs under Queen Mary I ("Bloody Mary") in 1556, this

volume was confiscated and became part of the (Old) Royal Library. Rebound with its current red morocco and gilt binding under King Charles II at some time between 1660 and 1685, it was presented by King George II to the newly created British Museum in 1757 and passed to the British Library on its creation in 1973.⁴ The volume and map remained intact surviving catastrophic events: the execution of its owner and the disbursement of his property; Civil War and the ascendance of Oliver Cromwell; royal intrigue; times of economic depression; and the Nazi bombing of London. The volume remained intact until visited by Smiley. The maps stolen from Harvard, Yale, the New York and Boston Public Libraries, and the Newberry Library have similar impressive stories to tell.

The victims of his crimes, however, are not simply the individual institutions. The stolen maps have been held in trust by the libraries for future generations. They had been cared for and preserved for centuries until Smiley ripped them from their volumes and slid them into his coat.

Like a drop of oil on a still pond, the number of his victims spreads with time. Smiley's victims include students, scholars, academics, the general public and individuals yet to be born who will not have the opportunity to sit at a desk, open a leather bound volume, and see the world as Archbishop Cranmer and others saw it in the 16th Century. No one can predict with certainty what book or image will spark the curiosity of a reader to learn, to dream, to explore, to accomplish. One particular anecdote is worth considering. When Antarctic explorer Robert F. Scott was a schoolchild, his family and teachers dismissed him as a dreamer who seemed to look beyond the school room's walls. On January 18, 1912, Scott and four members of his party approached the South Pole believing that they were the first men to reach this once seemingly improbable goal. They soon discovered that they had been recently beaten to the pole by the

⁴ The British Library believes that Smiley stole three other maps from their facility. The descriptions of these maps set forth in our impact statement have equally significant background.

Norwegian, Raold Amundsen. Returning, the Scott team met blizzard conditions making further progress impossible. Their end had come, their strength and food supply exhausted. Scott penned a letter to the public as he lay dying in his canvas tent,

“ The causes of this disaster are not due to faulty organization, but misfortune in all the risks which had to be undertaken. Writing is difficult, but for my own sake I do not regret this journey, which has shown that Englishmen can endure hardships, help one another and meet death with as great a fortitude as ever in the past. We took risks. We knew we took them. Things have come out against us, and therefore we have no cause for complaint, but bow to the will of Providence, determined still to do our best to the last. . . . Had we lived I should have a tale to tell of the hardihood, endurance and courage of my companions which would have stirred the heart of every Englishman.”

Although we may never learn what sparked and fueled Scott’s dreams of exploration, we do know that Scott was committed up to his death to further man’s knowledge. His last words were found in a journal in which Scott had also recorded his hand drawn maps of his route of discovery which provided new information which filled the void of former maps of the desolate region. Using this example, one can see that maps tell many stories beyond what is recorded on the parchment. Without question, each map stolen by Smiley of early North America during the age of discovery reveals more than the mere lines drawn by the cartographer.

The victim impact statements provide measures of additional losses beyond commercial value:

- following the thefts, Smiley altered many of the maps he stole, bleaching the paper, removing library stamps, and cutting new margins to disguise their pedigree. Their provenance was destroyed, erasing their individual characteristics;

- the maps stolen by Smiley and yet to be recovered are likely to be lost for decades, if not forever. Many of the maps, due to scarcity and value, are difficult or impossible to replace;

- Smiley's betrayal of the goodwill and professionalism of the library staff with whom he dealt has impacted on their morale. In addition, thousands of hours of library staff hours have been diverted from necessary duties to examine all volumes viewed by Smiley;

- legitimate researchers and the general public will now find it more difficult to gain access to this material;

- the volumes that contained the stolen maps have also been damaged by the removal. The remaining text and maps have lost substance and context;

- the libraries reputations have been damaged within the public and academic arenas. Confidence in the libraries' capacity to protect their material has been compromised. Their ability to receive gifts and support from donors has been diminished;

- with the visibility of Smiley's acquisition of \$3 million worth of maps from libraries, there is the need to use limited financial resources to provide for increased security to deter those encouraged by Smiley's profits.

- with the end of the government's investigation and the sentencing of Smiley, the libraries will be left to expend their own resources to recover maps that continue to be missing. Smiley maintains that he kept no business records concerning his sale of the stolen maps. This appears to be an incredible claim since it is illogical that a dealer of Smiley's stature with important wealthy clients would fail to keep some detail of his transactions to know what has been delivered and what gaps in the collection may still be filled. If Smiley is believed, it establishes that he maintained no records in order to eliminate a record of his crimes. Most importantly, he has ensured that no trail may be followed to recover the maps that continue to be missing.

For all of the foregoing reasons, it is requested that the Court depart upwards from the

applicable sentencing guidelines range.

V. REQUESTS TO THE COURT PRIOR TO SENTENCING

The guidelines and the Medford decision make it clear that this Court should advise the defendant prior to the sentencing hearing that the Court is considering whether an upward departure is appropriate. “Before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 [of the Federal Rules of Criminal Procedure] requires that the district court give the parties reasonable notice that it is contemplating such a ruling.” United States v. Medford, 194 F.3d at 424.

VI. SENTENCING RECOMMENDATION

Smiley was a welcomed visitor to the victim institutions. He was recognized by many library staffers as having a great familiarity and expertise with rare maps. He understood the significance of each map, not simply as a collectible object but more importantly for what each map told us about ourselves. To successfully operate and continue to make their collections available, libraries require that a bond of trust be honored between the visitor and the institution. A library maintains at great cost notable collections. The institutions with regularity embrace the inquisitive mind and open their volumes for inspection and review. The user, in turn, implicitly agrees to honor and respect the available material. Tragically, E. Forbes Smiley defied the trust that staffers and libraries placed in him. With each successive theft, Smiley tore at the collegial atmosphere of these institutions.

Congress has recognized that the goals of sentencing include the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to afford adequate deterrence to others. 18 U.S.C. § 3553. It is respectfully requested that this Court

impose a sentence which recognizes not only the significance of the libraries' losses but, more importantly, reflects the injuries Smiley has inflicted on the public at large and future generations. Given Smiley's protracted criminal acts, any sentence up to the maximum could not be deemed to be too severe. Although Smiley will argue, and the government may concur, that factors warrant a downward departure, it should be recognized that Smiley has already received benefits for the selective cooperation that he chose to provide.⁵ Double jeopardy provisions make it impossible to later prosecute Smiley for any acts arising from the theft of the 97 maps. His cooperation has resulted in the government agreeing to limit the loss figure for guidelines calculation to 18 maps. He has ensured by being sentenced first by this Court that he will receive no additional imprisonment in the local prosecution. He will effectively, as of September 27, bring to an end the government's investigation.

⁵ The British Library questions the level of Smiley's cooperation. When first asked whether he had stolen additional maps from the library, Smiley replied that "he did not remember." This was hardly an assuring response. When pressed further by the library through counsel, Smiley's inability to recall transformed, late in time and close to sentencing, to a denial. This change is highly suspect.

We also note that our requests that Smiley agree that we may examine his statements to the authorities in order to assist us locate additional maps and prepare for sentencing have been refused. The government has also denied our request to examine the statements. We know that Smiley lied repeatedly when he was first confronted by Yale staff. Given the defendant's and the government's refusal to permit us to review the cooperation statements, we cannot assess for ourselves the progression of Smiley's truth telling.

We note further that Smiley has refused our request to examine whatever records the government may have obtained from Smiley. The victims have not received a list of individuals to whom Smiley has sold the maps and the identification of each map sold to the dealers and collectors. Smiley has not provided sufficient answers raised to him through counsel. The victims are left, therefore, with no assistance from Smiley to locate the missing maps.

There remains, however, a strong remedial measure available for the public and the victim institutions. This is simply knowing on September 27, 2006 that the guilty man has been appropriately punished, the losses of the victims have been recognized and considered, and that a strong message of deterrence to others is established by this Court.

Respectfully submitted,

Robert E. Goldman, Esquire
Fox Rothschild LLP
on behalf of The British Library

Dated: September 13, 2006