

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p>UNITED STATES OF AMERICA</p> <p style="text-align:center">v.</p> <p>ROBERT ROWAN, Defendant.</p>	<p>CRIMINAL ACTION No. 06-321</p>
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MEMORANDUM & ORDER

Katz, S.J.

January 10, 2007

Before the court are Defendant's objections to the factual findings in the Presentence Investigation Report ("PSI") and to the calculation of Defendant's offense level under the Sentencing Guidelines, as well as Defendant's motions for downward departure pursuant to U.S.S.G. §§ 5H1.1 and 5K2.13. The court has considered the objections and motions and has heard arguments on them, at the sentencing hearing, from both Defendant and the government. For the following reasons, Defendant's objections and motions are overruled in part and denied, respectively, but the court, in the exercise of its post-Booker discretion, will depart downward from the applicable guideline range.

I. Summary of Facts

On June 28, 2006, Defendant was charged by information with one count of mail fraud in violation of 18 U.S.C. § 1341. On August 8, 2006, Defendant waived his right to an indictment and pleaded guilty to this one charge. At the

sentencing hearing, the court adopted as findings of fact those factual statements contained in the Presentence Investigation Report (“PIR”) as to which there was no objection. These facts are summarized below.

A. The Offense Conduct

On September 16, 1997, Defendant was given a Power of Attorney over the affairs of a woman (A.A.H.). Defendant and A.A.H. and her husband (now deceased) had become personal and business acquaintances. The Power of Attorney required Defendant to act in a fiduciary capacity and to use all funds belonging to A.A.H. solely for the benefit of the health and maintenance of A.A.H., and not for the personal use or benefit of himself. Defendant, by virtue of the Power of Attorney, had access to the funds of A.A.H. which were in accounts under the care, custody, and control of, among others, PNC Bank and CoreStates Bank.

Between September 1997 and December 2001, Defendant, without A.A.H.’s permission, wrote and cashed many checks, made debit card transactions, and withdrew funds at ATM machines on the PNC Bank and CoreStates Bank accounts of A.A.H., all of which were for the personal use and the benefit of Defendant, not A.A.H. These transactions included:

1. Purchase of a residence for Defendant in January 1998 at 2029 Colonial Drive, Bristol Township, Bucks County, Pennsylvania, in the amount of \$128,900; sold by Defendant on July 9, 2001 for \$155,000.

2. Purchase of a residence for Defendant in October 1998 at 1005 Dolphin Drive, Bristol Township, Bucks County, Pennsylvania, in the amount of \$145,000; sold by Defendant on September 22, 1999 for \$150,000.¹

3. Purchase of a residence for Defendant in August 1999 at 3 West Anchor Drive, Little Egg Harbor, Ocean County, New Jersey, in the amount of \$119,900; sold by Defendant on May 17, 2001 for \$152,000; and

4. Purchase of a residence for Defendant in June 2001 at 318 Rosewood Avenue, Lower Southampton Township, Bucks County, Pennsylvania, in the amount of \$168,900; sold by Defendant on December 28, 2001 for \$183,500.²

In several of these transactions, Defendant used the United States mail to further and facilitate his fraudulent scheme to use A.A.H.'s funds for his own personal use. For example, on July 16, 2001, Defendant caused to be delivered by mail, according to the directions thereon, a deed for the property located at 2029 Colonial Drive, Croydon, Pennsylvania. This deed was mailed from the Bucks County Recorder of Deeds to M.B., the purchaser of the property from Defendant.

¹ Defendant argues that this residence was acquired so that A.A.H. could live in it, but offers no evidence that supports this assertion. The evidence Defendant has presented shows that A.A.H. authorized the sale of the residence on September 18, 1999, but that does not mean that Defendant had her permission when he acquired the residence in October 1998. See Defendant's Sentencing Memorandum, Exhibit B. To the extent Defendant asserts that he had A.A.H.'s permission to buy this residence in October 1998, the court credits the facts alleged in the PIR over Defendant's assertion.

² Defendant also asserts that he had A.A.H.'s permission to buy this residence, but, again, he offers no evidence that proves this. As with the 1005 Dolphin Drive residence, Defendant's evidence shows that A.A.H. approved of the sale of this residence, but there is nothing to show her approval of its purchase. See Defendant's Sentencing Memorandum, Exhibit C. Thus, the court credits the facts alleged in the PIR over Defendant's assertion that he had A.A.H.'s permission to buy this residence in June 2001.

B. Defendant's Background and Current Situation

Defendant is 63 years old. Before committing the offense of conviction, he had no criminal record. He claims that he has never been treated for any mental illnesses or referred for psychological treatment, and there is no evidence that refutes this. When interviewed by his probation officer, Defendant responded appropriately, exhibited no unusual behavior and appeared to be alert with good recall as to dates of events in his life.

Defendant was an alcoholic from age 21 until age 43 when he was told by his doctor that continued alcohol abuse would lead to his eventual death from liver disease. Since then, Defendant has not touched alcohol. He claims never to have used any other controlled substances.

Defendant's attended school until he was 16 years old, but never passed the sixth grade. Defendant is therefore only marginally proficient in reading and writing.

Defendant's Social Security Administration earnings history report reveals very little legitimate employment, but Defendant apparently has worked as a handyman for most of his life. From approximately 1983 to 2000, Defendant was employed at the Neshaminy Flea Market, which was owned by A.A.H. and her

husband.³ Defendant also had a table at the flea market and eventually managed the flea market for A.A.H. At some point, A.A.H. became ill, and Defendant became her personal aide. According to Defendant, A.A.H. compensated him for these extra services.

In September 1997, Defendant gained Power of Attorney over A.A.H.'s estate; this Power of Attorney was removed in August 2001. A.A.H. subsequently sued Defendant in state court to recover what Defendant had taken from her by abusing this Power of Attorney. On February 16, 2006, a Pennsylvania state court entered an \$881,244.24 judgment in favor of A.A.H. and against Defendant.

II. Legal Standard

In applying the Sentencing Guidelines, the court is mindful that:

[T]he Supreme Court made clear in Booker [v. United States, 543 U.S. 220 (2005)] that the Guidelines are now advisory. Thus, district courts, post-Booker, exercise broad discretion in imposing sentences, so long as they begin with a properly calculated Guidelines range, fully consider the broad range of factors set forth in 18 U.S.C. § 3553(a), and all grounds properly advanced by the parties at sentencing.

United States v. Vampire Nation, 451 F.3d 189, 196 (3d Cir. 2006). According to the Third Circuit, the factors a sentencing court must take into account include:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant, § 3553(a)(1);

³ In 1984, Defendant's only child, Barbara Ann Rowan, was raped and murdered at the flea market when she was 14 years old. The case was never solved.

- (2) the need for the sentence to reflect the seriousness of the crime, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and provide the defendant with needed education or vocational training, medical care, and other correctional treatment in the most effective manner, § 3553(a)(2);
- (3) the kinds of sentences available, § 3553(a)(3);
- (4) the applicable Guidelines sentence, § 3553(a)(4);
- (5) the pertinent policy statements of the Sentencing Commission, § 3553(a)(5);
- (6) the need to avoid unwarranted sentencing disparities, § 3553(a)(6);
- and
- (7) the need to provide restitution to victims, § 3553(a)(7).

United States v. King, 454 F.3d 187, 194 (3d Cir. 2006). “[T]hese factors overlap to some degree with the bases for potential Guidelines departures.” Id. at 194–95. In ruling on such departures, the court also considers the Third Circuit’s “pre-Booker caselaw, which continues to have advisory force.” Id. at 196.

III. Discussion

A. Defendant’s Offense Level and Guidelines Range

The PIR calculates Defendant’s offense level and guidelines range as follows:

- Base offense level (under U.S.S.G. § 2F1.1(a))	6
- Enhancement for causing more than \$500,000 in loss (under U.S.S.G. § 2F1.1(b)(1)(K))	+10
- Enhancement for “more than minimal planning” under U.S.S.G. § 2F1.1(b)(2)(A)	+2
- Enhancement for harming a “vulnerable victim” under U.S.S.G. § 3A1.1(b)(1)	+2
- Reduction for acceptance of responsibility and assistance under U.S.S.G. § 3E1.1(a) and (b)	-3
TOTAL	17

Since Defendant has zero criminal history points, his criminal history category is I, and the PIR's applicable guideline range is 24–30 months' imprisonment.

Defendant objects to the loss enhancement under U.S.S.G. § 2F1.1(b)(1) and the vulnerable victim enhancement under U.S.S.G. § 3A1.1(b)(1). Defendant does not challenge the rest.^{4,5} Defendant's objections are discussed below.

Defendant's objection to the loss enhancement will be overruled, but his objection to the vulnerable victim enhancement will be sustained. Defendant's offense level therefore will be 15, his criminal history category will be I, and his guideline sentence range will be 18–24 months' imprisonment.

B. Defendant's Objections to the Factual Findings in the PIR

1. Paragraphs 9 and 54 – The “Vulnerable Victim” Enhancement

Defendant objects to paragraphs 9 and 54 of the PIR. More specifically, Defendant argues:

[A.A.H.] was not mentally incompetent on September 16, 1997 when she appointed Robert Rowan her agent pursuant to a Durable Power

⁴ Defendant, in his plea agreement, stipulated to the application of both the two-level enhancement for “more than minimal planning” and the three-level downward adjustment for acceptance of responsibility and assistance. See Guilty Plea Agreement at ¶ 8(b) and (c). The government does not object to the downward adjustment, see Government's Sentencing Memorandum at 2, and case law supports the court's application of the “more than minimal planning” enhancement. See United States v. Mummert, 34 F.3d 201, 205 (3d Cir. 1994); United States v. Cianscewski, 894 F.2d 74, 81–83 (3d Cir. 1990).

⁵ The court agrees with Defendant that the power of attorney granted to Defendant by A.A.H. on September 16, 1997 was a “durable power of attorney.” See PIR ¶ 9.

of Attorney. [A.A.H.] was not elderly, ill or suffering from dementia. [A.A.H.]’s competence was confirmed by her own legal counsel who witnessed the signing of the Durable Power of Attorney, Gerald L. Bowen, Jr. Esquire of Southampton, Pennsylvania.

Defendant’s Sentencing Memorandum at 4–5. The relevant portions of the PIR states that A.A.H. was “an elderly and ill woman suffering from dementia”; the PIR does not say whether A.A.H.’s attorney was present when A.A.H. granted Defendant the Durable Power of Attorney. According to the PIR, Defendant “reportedly became [A.A.H.’s] personal aide” at some point, and “defendant claims that she would provide him with cash for his services.” PIR ¶ 54.

With regard to whether A.A.H. was “elderly, ill or suffering from dementia,” the court finds Defendant more credible than the PIR, because there is no evidence that A.A.H. suffered from dementia or that she was ill. The record does not even disclose her age. On the other hand, though, the documents attached to Defendant’s Sentencing Memorandum show that A.A.H. retained sufficient control of her own affairs to authorize the sale of 1005 Dolphin Drive residence in September 1999, and the sale of the 318 Rosewood Avenue residence in December 2001. See Defendant’s Sentencing Memorandum, Exhibits B and C.

In determining whether to apply the vulnerable victim enhancement under U.S.S.G. § 3A1.1(b)(1),⁶ the Third Circuit uses a three-part test:

⁶ U.S.S.G. § 3A1.1(b)(1) reads as follows: “If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.” U.S.S.G. § (continued...)

The enhancement may be applied where: (1) the victim was particularly susceptible or vulnerable to the criminal conduct; (2) the defendant knew or should have known of this susceptibility or vulnerability; and (3) this vulnerability or susceptibility facilitated the defendant's crime in some manner; that is, there was "a nexus between the victim's vulnerability and the crime's ultimate success."

United States v. Zats, 298 F.3d 182, 186 (3d Cir. 2002) (quoting United States v. Iannone, 184 F.3d 214, 220 (3d Cir. 1999)).

Applying this test, the case law, and the text of and commentary to § 3A1.1(b)(1), the court concludes that it is not appropriate to subject Defendant to the vulnerable victim enhancement in this case, because [A.A.H.]'s vulnerability did not

⁶(...continued)

3A1.1(b)(1) (2000). Application Note 2 reads as follows:

For purposes of subsection (b), "vulnerable victim" means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

U.S.S.G. § 3A1.1 cmt. n.2 (2000).

“facilitate[] the defendant’s crime in some manner.” Zats, 298 F.3d at 186. United States v. Monostra, 125 F.3d 183 (3d Cir. 1997) is instructive on this point. In Monostra, the Third Circuit reversed the district court’s application the vulnerable victim enhancement in a bank fraud case where the defendant’s immediate supervisor was blind. Although the Monostra court agreed that the supervisor was vulnerable, and that the defendant knew about this vulnerability, it concluded that the victim’s vulnerability had not facilitated the defendant’s crime, because there was no evidence that the victim would have been less vulnerable if he could have seen. Id. at 189–91. The same is true here. A.A.H. was physically frail enough to require Defendant’s help, but in the absence of evidence of her illness or dementia, the court cannot conclude that that frailty facilitated Defendant’s crime. After all, one does not have to be physically mobile to keep an eye on one’s affairs. Since the court concludes that the vulnerable victim enhancement does not apply to this case, Defendant’s objection to it is sustained.

2. Paragraphs 10b and 10d – The Amount of Loss

Defendant also objects to paragraphs 10b⁷ and 10d of the PIR, and to the government’s assertion that Defendant’s conduct caused A.A.H. to suffer a loss of

⁷ Defendant’s sentencing memorandum errs in calling this an objection to paragraph 10a. See Defendant’s Sentencing Memorandum at 5.

\$571,356.80 for purposes of enhancing Defendant's offense level under U.S.S.G. §

2F1.1(b)(1). Defendant's objection reads, in relevant part, as follows:

(1) The [Presentence Investigation Report ("PSI")] at ¶ 10.a. shows that 1005 Dolphin Drive was sold with the authorization of [A.A.H.]. See Exhibit "B." The property sold for a profit of \$5,000.

(2) The PSI at ¶ 10.d. shows that Robert Rowan sold a property in behalf of [A.A.H.] for \$183,500. The Settlement Statement dated December 28, 2001 shows that \$100,429.22 was paid to a mortgage company, \$72,173.28 was paid to [A.A.H.'s] attorney Wayne N. Cordes, Esq., \$250,000 was paid to Kenneth Harrison, Esq. for legal fee and \$12,032.50 settlement charges. Therefore the \$183,500 for the sale of 318 Rosewood Avenue should not be included in the loss suffered by [A.A.H.]. See Exhibit "C."

With the reduction of the loss calculated by the government at \$571,356 (PSI ¶ 5.a.) by \$183,500, the loss is \$387,856.

Using Government's Sentencing Memorandum Exhibit "A" a review of the Corestates Checking Account #1528-5803 for checks written between August 1, 1997 and September 8, 1998 shows that these checks were written either by [A.A.H.] or by Robert Rowan for the benefit of [A.A.H.]. Therefore, the amount of loss must be lowered by \$62,064 for a total loss of \$325,792.

Defendant's Sentencing Memorandum at 6-7.

The court rejects Defendant's argument, because, under § 2F1.1(b)(1), what matters is the loss Defendant *intended* to cause, not the loss Defendant actually caused. See U.S.S.G. § 2F1.1 cmt. n.8 (2000) ("[I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is

greater than the actual loss.”); United States v. Feldman, 338 F.3d 212, 221 (3d Cir. 2003); United States v. Torres, 209 F.3d 308, 311 (3d Cir. 2000).⁸

On the issue of Defendant’s intent, the government bears the burden of proof by a preponderance of the evidence, see United States v. Evans, 155 F.3d 245, 253 (3d Cir. 1998), and the court concludes that the government has met its burden of showing that Defendant intended to cause A.A.H. to suffer a loss of \$571,356.80. The undisputed facts in the PIR reveal that Defendant engaged in a concerted, uninterrupted, meticulous scheme to abuse his power of attorney. See United States v. Coyle, 63 F.3d 1239, 1251 (3d Cir. 1995) (endorsing the “gross gain” approach to calculating loss in cases of embezzlement and similar breaches of fiduciary duty); see also United States v. Badaracco, 954 F.2d 928, 938 (3d Cir. 1992) (cited extensively in Coyle). The transactions at issue in this case span the entire period – i.e., about 4 years – during which he held the power of attorney, and there is every indication that Defendant would have continued to abuse the power of attorney if it had not been

⁸ It is worth noting, however, that the court finds that the actual loss caused by Defendant’s conduct is, as Defendant argues, only \$325,792.80. This finding will not affect the calculation of Defendant’s guideline range, but it will affect the court’s restitution order. Since this case falls within the ambit of the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A(c) (2006), “restitution must be . . . based upon *losses directly resulting* from [the defendant’s criminal] conduct.” United States v. Fallon, 470 F.3d 542, 548 (3d Cir. 2006) (emphasis in original, internal quotation omitted); see also United States v. Feldman, 338 F.3d 212, 219 (3d Cir. 2003) (noting that under the MVRA “the amount of restitution awarded is limited to the amount of actual loss caused by the defendant’s crime”). Therefore, the court will order Defendant to pay \$325,792.80, not \$571,356.80, in restitution to A.A.H., and any monies Defendant pays to A.A.H. pursuant to the judgment against him in state court can be credited toward Defendant’s outstanding restitution bill.

taken away from him. See United States v. Katora, 981 F.2d 1398, 1406–07 (3d Cir. 1992) (finding it relevant to the defendants’ intent that they engaged in an uninterrupted course of fraudulent conduct until they were arrested, and discrediting the defendants’ assertions that they intended to repay their victims). Moreover, Defendant pleaded guilty to committing mail fraud, an element of which is that he “devised or intend[ed] to devise any scheme or artifice to defraud.” 18 U.S.C. § 1341 (2000); see also McCarthy v. United States, 394 U.S. 459, 466 (1969) (“[A] guilty plea is an admission of all the elements of a formal of a formal criminal charge.”). It is also relevant that A.A.H.’s physical frailty lessened her ability to interfere with his plans or to actually use the houses and money he was acquiring in her name. Since the court finds that Defendant intended to cause A.A.H. to suffer a loss of \$571,356.80, Defendant’s objection to the 10-level enhancement to his offense level under U.S.S.G. § 2F1.1(b)(1)(K) is overruled.

C. Defendant’s Motions for Downward Departure

1. Age – U.S.S.G. § 5H1.1

U.S.S.G. § 5H1.1 reads as follows:

Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse).

U.S.S.G. § 5H1.1 (2000).

Under the Sentencing Guidelines, age is a “discouraged” basis for departure. See Iannone, 184 F.3d at 227 n.10. This means that a “departure [based on age] is permissible only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.” United States v. Sally, 116 F.3d 76, 80 (3d Cir. 1997); see also United States v. Higgins, 967 F.2d 841, 845–46 (3d Cir. 1992) (same rule); United States v. Shoupe, 929 F.2d 116, 120 (3d Cir. 1991).

With these principles in mind, and in the exercise of its post-Booker discretion, the court will deny Defendant’s motion for a downward departure because of his age. Defendant offers nothing more than numbers. At the time was granted power of attorney over A.A.H., he was 57 years old. Today he is 63 years old. Without more, the court does not believe this is sufficient to warrant a downward departure, and the now-advisory case law in the Third Circuit supports this conclusion. See United States v. Marin-Castaneda, 134 F.3d 551, 556–57 (3d Cir. 1998) (upholding the district court’s denial of a downward departure and adding that “[a]bsent some extraordinary infirmity, we cannot conclude that the bare fact that [defendant] was 67 years old would have justified a downward departure by the district court”); United States v. Monaco, 23 F.3d 793, 798 n.7 (3d Cir. 1994)

(disapproving of a downward departure based on age and remarking that “[w]e find nothing remarkable about [defendant’s] age of fifty-seven”).⁹

2. Diminished Capacity – U.S.S.G. § 5K2.13

U.S.S.G. § 5K2.13 reads as follows:

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

U.S.S.G. § 5K2.13 (2000). The Application Note to this section adds that

“‘[s]ignificantly reduced mental capacity’ means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.” U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 cmt. n.1 (2000).

⁹ The PIR adds that Defendant “reported experiencing back pain” and “suffers from liver pain, resulting from cirrhosis caused by alcohol abuse” which was diagnosed 20 years ago. PIR, ¶ 45. Defendant otherwise appears to be in good health. Although Defendant’s ailments are not irrelevant to the court’s analysis, the court finds that Defendant “does not seem to suffer from any unusual impairments for a man his age.” Marin-Castaneda, 134 F.3d at 557.

The Third Circuit has boiled down the guideline text and commentary to the following analysis:

Under § 5K2.13, a departure may be granted where a defendant (1) has committed a non-violent offense, (2) while suffering from a significantly reduced mental capacity, (3) that was not caused by the voluntary use of intoxicants, (4) where the defendant's mental incapacity contributed to the commission of the offense, and (5) so long as the defendant's criminal record does not indicate a need for imprisonment to protect public safety.

United States v. Vitale, 159 F.3d 810, 816 (3d Cir. 1998). “Section 5K2.13 is an encouraged departure,” which means that “the sentencing court is authorized to depart if[,as is true with the guideline at issue in this case,] the applicable guideline does not already take it into account.” McBroom, 124 F.3d at 538 (citing Koon v. United States, 518 U.S. 81 (1996)). Moreover, the Third Circuit has made it clear that the “sentencing court [must] consider both a defendant's cognitive capacity and his or her volitional capacity when considering a downward departure pursuant to section 5K2.13.” Id. at 548.¹⁰

With these principles in mind, and in the exercise of its post-Booker discretion, the court will deny Defendant's motion for a downward departure because of his diminished mental capacity. Again, Defendant offers very little to support his

¹⁰ In the Third Circuit, “[a] person may be suffering from a ‘reduced mental capacity’ for the purposes of section 5K2.13 if either: (1) the person is unable to absorb information in the usual way or to exercise the power of reason; or (2) the person knows what he is doing and that it is wrong but cannot control his behavior or conform it to the law.” McBroom, 124 F.3d at 548.

motion. He observes that he is “sixty-three year old handy-man with a sixth grade education,” that he “was in over his head when he was appointed agent by the Durable Power of Attorney,” and that “bad bookkeeping and bad decisions lead to the criminal negligence that caused a financial loss to [A.A.H.]” Defendant’s Sentencing Memorandum at 2–3. It may be true that Defendant’s lack of sophistication and education betrayed him in this case, but that does not mean that Defendant suffered from a “significantly reduced mental capacity” for purposes of § 5K2.13.¹¹ Rather, the facts show the opposite. The PIR says that:

The defendant states that he has never been treated for any mental illnesses nor has he been referred for psychological treatment. This officer has not uncovered any information that would refute the defendant’s claims. At the time of the interview by the probation office, the defendant responded appropriately, exhibited no unusual behavior and appeared to be alert with good recall as to dates of events in his life.

PIR, ¶ 45. On these facts, Defendant does not suffer from either reduced cognitive capacity or reduced volitional capacity within the meaning of § 5K2.13, so the court, in the exercise of its post-Booker discretion, will deny Defendant’s motion for downward departure on this ground. The now-advisory case law in the Third Circuit supports this conclusion. See Vitale, 159 F.3d at 816; see also United States v. Teel, 296 F. Supp. 2d 593, 595 (E.D. Pa. 2003); United States v. Lester, 268 F. Supp. 2d 514, 518–21 (E.D. Pa. 2003); United States v. Motto, 70 F. Supp. 2d 570, 576–78

¹¹ Defendant satisfies the other requirements for the departure because his offense was non-violent and was not caused by the voluntary use of intoxicants, and because his lack of a criminal record means that imprisonment is not necessary to protect public safety.

(E.D. Pa. 1999); United States v. Maack, 59 F. Supp. 2d 448, 453 (E.D. Pa. 1999) (“The court believes that [the defendant] suffered from tragic human frailties, not a significantly reduced mental capacity.”). Compare United States v. Bennett, 9 F. Supp. 2d 513, 527 (E.D. Pa. 1998) (granting a downward departure based on diminished capacity where the defendant, who “believed his work was consistent with his religious belief and God-ordained mission, . . . appear[ed] to have been subject to some form of extraordinary distortion” of this cognitive faculties or volition).

D. Defendant’s Sentence in Light of 18 U.S.C. § 3553(a)

The court, in the exercise of its post-Booker discretion, will depart downward from the applicable guideline range. See United States v. Booker, 543 U.S. 220, 245–46 (2005) (holding that the Sentencing Guidelines are “effectively advisory”). Booker “requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004).” Id.

The court will sentence Defendant to 5 years of probation, a condition of which shall be home detention for 18 months. See U.S.S.G. § 5F1.2. This sentence constitutes a downward departure from the applicable guideline range and therefore must be justified by the factors listed in 18 U.S.C. § 3553(a). See United States v. Gee, 226 F.3d 885, 903 (7th Cir. 2000) (“Imprisonment substitutes are not

available for offense levels that fall in Zone D. See U.S.S.G. §§ 5B1.1 cmt. 2, 5C1.1(f) & cmt.8, 5F1.2.”); United States v. Fulton, 987 F.2d 631, 634 (9th Cir. 1993). The court’s reasoning is explained below.

In reaching this conclusion, the court has considered the applicable Guidelines sentence, see 18 U.S.C. § 3553(a)(4),¹² and the kinds of sentences available, see 18 U.S.C. § 3553(a)(3),¹³ the pertinent policy statements of the Sentencing Commission, see 18 U.S.C. § 3553(a)(5),¹⁴ the need to avoid unwarranted sentencing disparities, see 18 U.S.C. § 3553(a)(6),¹⁵ and the need to provide restitution to victims, see 18 U.S.C. § 3553(a)(7).¹⁶

The court has paid particular attention, however, to the factors set forth in 18 U.S.C. § 3553(a)(1). Although the nature and circumstances of Defendant’s offense suggest that a term of imprisonment would be justified, Defendant’s history and characteristics lean toward the non-incarcerative sentence the court has decided

¹² Since Defendant’s offense level is 15, and his criminal history category I, Defendant’s guideline sentencing range is 18–24 months’ imprisonment.

¹³ The punishment options available to the court include probation, imprisonment (followed by supervised release), a fine, and the sentencing options set forth in U.S.S.G. § 5F1.1–7 (2000).

¹⁴ Defendant already has directed the court to the policy statements in U.S.S.G. §§ 5H1.1 (Age) and 5K2.13 (Diminished Capacity). The court is aware of the other policy statements in Chapter Five, Parts H and K, and in the rest of the guidelines.

¹⁵ The court is aware of this need.

¹⁶ The court is aware of this need, and, pursuant to the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A(c) (2006), will order Defendant to pay restitution to A.A.H. in the amount and subject to the conditions discussed in note 10, supra.

to impose. Before committing this offense, Defendant had no criminal history, and, by all accounts was a hard-working citizen. He lacked a good education, but only because he quit school “at age 16 to begin working and help provide for his family.” PIR, ¶ 50. Defendant and his wife have been married for 38 years, and have endured the rape and murder of their only child more than 20 years ago. Over the years, Defendant built a strong friendship with A.A.H. and her husband through their work at the Neshaminy Flea Market. After A.A.H.’s husband passed away, Defendant was kind enough to help A.A.H. as her personal aide. Although Defendant egregiously abused the durable power of attorney that A.A.H. conferred upon him in 1997, this conduct smacks more of aberrant behavior¹⁷ than premeditated fraud. Indeed, there is nothing inconsistent about saying that Defendant intended to abuse his power of attorney, while also saying that Defendant was “in over his head.” Ignorance of the law is no defense, but the court believes Defendant was not aware of just how illegal his conduct was. Moreover, the court believes that Defendant would not have continued defrauding A.A.H. as long as he did if he had fully appreciated the illegality of his conduct. Finally, Defendant’s apparent willingness to suffer his punishment and move on with his life supports the proposition that Defendant’s offense was “a marked deviation by the defendant from an otherwise law-abiding life.” U.S.S.G. § 5K2.20 cmt. n.1 (2000).

¹⁷ Cf. U.S.S.G. § 5K2.20 (2000).

The court's below-guidelines sentence is also consistent with 18 U.S.C. § 3553(a)(2). With regard to the need for the sentence to reflect the seriousness of the offense and provide just punishment, Defendant's below-guidelines sentence accomplishes these goals, because the applicable guidelines range overstates the seriousness of the offense. More specifically, the guideline enhancement for the amount of intended loss – \$571,356.80 – overstates the harm to the victim, because the victim probably will be able to recover most, if not all, of the funds that Defendant misappropriated – either through the sale of the homes Defendant purchased, or from Defendant himself.¹⁸ See United States v. Kushner, 305 F.3d 194, 198–99 (3d Cir. 2002); Monaco, 23 F.3d at 798–99; United States v. Stuart, 22 F.3d 76, 83–84 (3d Cir. 1994). As for the need to promote respect for the law and afford adequate deterrence, the court submits that both goals are furthered better when the punishment is more closely tied to the seriousness of the offense of conviction, and the court doubts that Defendant will recidivate. The need to protect the public is not particularly strong in this case, as Defendant is a 63-year old man whose offense appears to constitute aberrant behavior. Lastly, while the court is not aware of any need on Defendant's part for education or vocational training, medical

¹⁸ For example, the court already has concluded that A.A.H. experienced an actual loss of only \$325,792.80. See note 8, supra.

care, or other correctional treatment, these needs will be better served if Defendant serves a period of probation and home detention than if Defendant is incarcerated.

For all of these reasons, the court believes it is appropriate to exercise its post-Booker discretion and impose a sentence below the applicable guideline range in this case. As noted above, Defendant will be sentenced to 5 years of probation, a condition of which shall be 18 months of home detention.

IV. Conclusion

For the foregoing reasons, Defendant's objections and motions for downward departure are overruled in part and denied, respectively, but the court, in the exercise of its post-Booker discretion, will depart downward from the applicable guideline range.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p>UNITED STATES OF AMERICA</p> <p style="text-align:center">v.</p> <p>ROBERT ROWAN, Defendant.</p>	<p>CRIMINAL ACTION No. 06-321</p>
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ORDER

AND NOW, this 10th day of January, 2007, upon consideration of Defendant's objections and motions for downward departure, and after a sentencing hearing, it is hereby **ORDERED** that said objections and motions are **OVERRULED IN PART** and **DENIED**, respectively. However, the court, in the exercise of its post-Booker discretion, will depart downward from the applicable guideline range.

BY THE COURT:

/s/ **Marvin Katz**

MARVIN KATZ, S.J.