# IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

15-2616

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**UNITED STATES OF AMERICA**

Appellee,

v.

**DONG PYOU HAN**

Appellant.

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*APPEAL FROM THE UNITED STATES DISTRICT COURT*
*FOR THE SOUTHERN DISTRICT OF IOWA*
*HONORABLE JAMES E. GRITZNER, U.S. DISTRICT COURT JUDGE*

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## APPELLANT'S BRIEF

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## SUMMARY OF THE CASE

Defendant pled guilty in the Southern District of Iowa to two counts of making false statements in support of a National Institute of Health grant. At sentencing he faced an uncontested advisory guidelines range of 57 to 60 months, but he sought a downward variance on the grounds of aberrational conduct and sincere remorse. However, the district court rejected variance because of the seriousness of the offense, and sentenced defendant to 57 months of imprisonment – the bottom of the advisory range.

After a review of all court papers and transcripts, counsel respectfully submits this brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing that defendant's 57-month sentence is unreasonable.

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## JURISDICTIONAL STATEMENT

The decision appealed: Defendant Dong Pyou Han appeals from judgment of conviction and sentence entered against him on July 1, 2015, in the Southern District of Iowa, on charges of making false statements. Defendant was sentenced to 57 months of incarceration and appeals his sentence.

Jurisdiction of the court below: The United States District Court had jurisdiction over appellant's federal criminal prosecution pursuant to 18 U.S.C. § 3231: "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

Jurisdiction of this court: This court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

The defendant filed a timely notice of appeal on July 15, 2015, from the judgment formally entered July 1, 2015. (DCD 61 and 63). *See* Fed. R. App. P. 4(b)(1)(A)(i).

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

### I. WHETHER DEFENDANT'S 57-MONTH SENTENCE IS UNREASONABLE.

Authority

18 U.S.C. § 3553(a)

## STATEMENT OF THE CASE

Nature of the Case: This is a direct appeal by defendant, Dong Pyou Han, following guilty plea, judgment and sentence in the Southern District of Iowa on two counts of making false statements.

Factual and Procedural History: Dong Pyou Han was a research scientist at Iowa State University, working in the laboratory of Dr. Michael Cho. (PSR p. 4). Dr. Cho and his research team were engaged in testing and research related to the development of an HIV/AIDS vaccine. (PSR p. 4).

The National Institute of Health (NIH) is a research arm of the United States Department of Health and Human Services (HHS). (PSR p. 4). The NIH awards grants in furtherance of medical research, and Dr. Cho was the beneficiary of such grants in support of his HIV/AIDS vaccine research. (PSR pp. 4-5). The first grant was in 2008 and is not in issue here. Then, in December 2009, Dr. Cho applied for a further grant based upon some promising "breakthrough results" achieved in his lab's experiments. (PSR p. 5). This further grant was approved by the NIH, and Iowa State University was awarded approximately five million dollars to further Dr. Cho's breakthrough research. (PSR pp. 5-7). A follow-up grant of another two million dollars was approved after review of a positive "progress report" submitted by Dr. Cho. (PSR p. 8).

The promise of Dr. Cho's research was in the development of a vaccine (GP41) that appeared to control or neutralize viruses causing AIDS. (PSR p. 5). Sera drawn from rabbits vaccinated with GP41 purported to show significant neutralizing activity, but it was a false showing. (PSR p. 5)

Initially, the false showing of significant neutralizing activity may have been a simple lab mistake, an inadvertent cross contamination, but when discovered by defendant Han he chose to continue the false perception by manipulating data and spiking rabbit sera rather than alerting Dr. Cho to the error defendant had discovered. (PSR pp 5-7). The manipulated data was provided to Dr. Cho by Dr. Han, and then used by Dr. Cho to support the NIH grants. (PSR pp. 5-8).

On June 17, 2014, Dr. Han was indicted in the Southern District of Iowa on four counts of making false statements in violation of 18 U.S.C. § 1001(a)(2). (DCD 5). Pretrial proceedings were routine and without substantial dispute, and the parties eventually resolved the charges by written plea agreement. (DCD 42).

On February 25, 2015, pursuant to the plea agreement, Dr. Han pled guilty to two false statement counts (counts 1 and 2) in return for the government's agreement to dismiss the remaining counts and not pursue other charges. (DCD 42, p. 1). Dr. Han also agreed to a limited waiver of appeal and postconviction

rights. (DCD 42, p. 10). There was no agreement as to the sentence to be imposed. (DCD 42, p. 7).

With defendant's consent, the guilty plea was taken by United States Magistrate Judge Celeste Bremer, who filed a written Report and Recommendation that the plea be accepted. (DCD 41 and 43). There were no objections to the report, and on March 26, 2015, the district court formally adopted the report and accepted defendant's guilty plea. (DCD 45).

The presentence report thereafter determined an advisory guidelines range of 57-71 months, capped, however, at 60 months by the applicable statutory maximum punishment. (PSR p. 15). There were no objections to the calculated range, which reflected an agreement of the parties on loss amount and other guideline calculations. (PSR p. 3). The parties also agreed upon a restitution amount. (Sent. Tr. p. 5).

Sentencing was contested soley on the matter of an appropriate punishment. Dr. Han sought a downward variance and leniency based on his personal circumstances, and the government sought an advisory range sentence. (Sent. Tr. pp. 7-20). After considering the arguments of the parties and defendant's allocution, the district court rejected variance and sentenced defendant to 57 months of imprisonment – – the bottom of the advisory range. (Sent. Tr. pp. 21-

23). The court also imposed a three-year term of supervised release. (Sent. Tr. p. 24). The court recognized that there was "much to be said in favor of" Dr. Han, but found the seriousness of the offense "stunning" and couldn't get beyond "the breach of a sacred public trust in this kind of research." (Sent. Tr. pp. 21-23).

Notice of appeal was timely filed July 15, 2015, from the judgment formally entered July 1, 2015. (DCD 61 and 63).

## SUMMARY OF THE ARGUMENT

Defendant respectfully challenges the reasonableness of his 57-month sentence. The offense conduct was not undertaken for personal gain or an intent to do harm, and the circumstances of defendant's personal history called for leniency. A 57-month sentence was unreasonable punishment under the totality of the circumstances.

## ARGUMENT

This brief is filed pursuant to the direction of *Anders v. California*, 386 U.S. 738 (1967). Counsel directs the court to "anything in the record that arguably supports the appeal." *Id*. at 744.

### I. DEFENDANT'S 57-MONTH SENTENCE IS UNREASONABLE.

Standard of Review: A federal criminal sentence is subject to direct appellate review for both procedural error and substantive reasonableness. *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 597, 169 L. Ed. 2d 445 (2007); *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc).

Procedural errors include, *inter alia*, errors in the calculation of the advisory guideline range, failing to duly consider and apply the statutory sentencing factors of 18 U.S.C. § 3553(a), giving weight to clearly erroneous facts, and failing to adequately explain the choice of sentence. *Id*. A defendant must timely object in the district court in order to preserve any procedural sentencing error for review; otherwise, review is limited to plain error for mere failure to object, and review is extinguished altogether for a party who affirmatively invites or accepts the alleged procedural error. *United States v. Campbell*, 764 F.3d 874, 878 (8th Cir. 2014); *United States v. Hoffman*, 707 F.3d 929, 935 (8th Cir. 2013); *see also United States v. Maxwell*, 778 F.3d 719-34 (8th Cir. 2015) (holding that, absent objection,

circuit will not review a claim that district court failed to adequately explain sentence). Here, defendant did not assert any procedural error in the district court.

The substantive reasonableness of a sentence is reviewed in light of the various sentencing considerations embedded in 18 U.S.C. § 3553(a). *United States v. Ford*, 705 F.3d 387, 389 (8th Cir. 2013); *United States v. Jeffries*, 615 F.3d 909, 910 (8th Cir. 2010). The district court, however, "has wide latitude to weigh the § 3553(a) factors in each case and assign some factors greater weight than others in determining an appropriate sentence." *United States v. Bridges*, 569 F.3d 374, 379 (8th Cir. 2009). A sentence thus is not unreasonable merely because this court would have weighed the factors differently and imposed a different sentence. *United States v. Scott*, 732 F.3d 910, 918-19 (8th Cir. 2013); *see also United States v. Hendrix*, 719 F.3d 918, 920 (8th Cir. 2013) (*per curiam*) ("[D]efendant's arguments demonstrate that a different sentence clearly would have been reasonable. They do not, however, demonstrate that the sentence imposed is unreasonable.")

Accordingly, review of a sentence for substantive reasonableness is "highly deferential" and conducted only for abuse of discretion. *United States v. Roberts*, 747 F.3d 990, 992 (8th Cir. 2014). "A district court abuses its discretion and imposes an unreasonable sentence when it fails to consider a relevant and

significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors." *United States v. Robison*, 759 F.3d 947, 950-51 (8th Cir. 2014) (quoting *United States v. Kreitinger*, 576 F.3d 500, 503 (8th Cir. 2009)).

In light of this "narrow and deferential" review, only an "unusual case" will justify the finding of a substantively unreasonable sentence. *United States v. Shuler*, 598 F.3d 444, 447 (8th Cir. 2010) (quoting *Feemster*, 572 F.3d at 464). A sentence within the advisory guidelines range generally is accorded a presumption of reasonableness on appeal. *United States v. Ray*, 772 F.3d 824, 825 (8th Cir. 2014); *United States v. Jenkins*, 758 F.3d 1046, 1050 (8th Cir. 2014); *United States v. Pappas*, 715 F.3d 225, 230 (8th Cir. 2013).

Nevertheless, substantive reasonableness review is not a "hollow gesture." *United States v. Kane*, 639 F.3d 1121, 1135 (8th Cir. 2011); *see also United States v. Dautovic*, 763 F.3d 927, 934-35 (8th Cir. 2014) (finding 20-month sentence substantively unreasonable in light of defendant's egregious offense conduct, perjury, and lack of remorse). An extreme sentence that reflects an "unreasonable weighing" of the relevant sentencing factors remains subject to correction on appeal. *Id.*

"A defendant need not object to preserve an attack on the length of the sentence imposed if he alleges only that the district court erred in weighing the § 3553(a) factors." *United States v. Miller*, 557 F.3d 910, 916 (8th Cir. 2009).

Merits: Dr. Han's resulting 57-month guideline sentence is substantively unreasonable given the nature and circumstances of the case, and in light of his personal history and characteristics. Defendant respectfully submits that a variance from the advisory guidelines range was warranted.

The offense conduct of the case is an example of a human failing, where Dr. Han could not bring himself to shatter the hopes and excitement of his fellow researchers by revealing that their excitement was driven by an inadvertent cross-contamination. His initial failure was then exacerbated by his subsequent decision to intentionally continue the cross-contamination, thereby fabricating data, while he hoped that the experiments would be successful as work progressed. His fabrication of data caused false statements to be submitted to the NIH, which led to the disbursement of millions of dollars to the research team and university to continue pursuing the research. The amount of money that was disbursed because of the falsehood was "stunning" to the district court, and drove the court's view of the seriousness of the offense. (Sent. Tr. p. 22).

Dr. Han obtained little benefit from his false statements. At most, he received the continuation of his salary and the temporary prestige of being part of promising research. But any acclaim would inevitably turn to disapproval when the falsehood was discovered, which Dr. Han knew would eventually occur. This was not an offense committed so Dr. Han could defraud the government and line his pockets, as his qualifications were such that he assuredly would have been able to obtain other research work if the NIH had ceased funding the efforts in the case. While the sentencing guideline was driven primarily by the high loss amount, that amount did not go directly to Dr. Han, and therefore is a poor means of assessing the appropriate punishment for Dr. Han's false statement crimes. *See United States v. Ovid*, 09-CR-216 (JG), 2010 WL 3940724 at *1 (E.D.N.Y. Oct. 1, 2010) ("[T]he fraud guideline, despite its excessive complexity, still does not account for many of the myriad factors that are properly considered in fashioning just sentences, and indeed no workable guideline could ever do so.").

Dr. Han's atypical acceptance of responsibility for his actions also called for mitigation of the punishment in his case. When the fabrications and falsehoods were discovered, and Dr. Han was confronted during the administrative investigation, he acknowledged his "coward[ly]" and "foolish" decision to replicate the error and fabricate data, and provided a written statement admitting

his misconduct, explaining his hope that future derivatives would have shown similar, but legitimate, results, and noting that his misconduct was not done to hurt anyone. (PSR p. 6). Dr. Han took responsibility and confessed his crimes before the federal charges were ever filed, and continued to take responsibility for his actions through the entirety of his case.

Dr. Han's personal history and characteristics also called for mitigating his punishment. Born in Seoul, South Korea in 1957, as the oldest child in the family, he helped raise his sisters, while his mother struggled with a gambling problem and his father worked outside the home. (PSR pp. 10-11). He was the first of the family to attend college, and paid his own tuition because his parents were not supportive of his pursuit of higher education. (PSR p. 10). Over the course of fifteen years, he went on to earn bachelor's and master's degrees in biology, and a doctorate in virology from Sogang University in Seoul. (PSR p. 13). After his schooling, he worked as a researcher, and his skills brought him to the United States, where he continued his work as a scientific researcher his entire career. (PSR p. 13). During that time, he married, and had two children who are adult students in the United States. (PSR p. 11). His wife and children are United States citizens, and Dr. Han is a lawful permanent resident. (PSR p. 12). His history with law enforcement prior to the events of this case consisted of one

citation for a seatbelt violation in 2002. (PSR p. 10). He is 58 years old, a first offender, and his crime is non-violent.

A defendant's sentence must be "sufficient, but not greater than necessary," to achieve the familiar statutory goals of sentencing. 18 U.S.C. § 3553(a); *see United States v. Tabor,* 439 F.3d 826, 831 (8th Cir. 2006); *United States v. Cawthorn*, 429 F.3d 793, 802 (8th Cir. 2005). Here, Dr. Han's conduct was an aberration in an admirable life. *See United States v. Hadash*, 408 F.3d 1080, 1084 (8th Cir. 2005) (affirming significant downward variance from the sentencing guidelines where the defendant was a "law abiding citizen, who [did] an incredibly dumb thing." (internal quotation omitted)). Indeed, the district court acknowledged that "an otherwise good person made a terribly tragic decision over and over again," and that "there [was] no need to protect the public from further crimes of this defendant." (Sent Tr. p. 22). Dr. Han received little to no personal benefit from his crimes, and what little he did gain has been lost many times over as a result of his conviction and the accompanying collateral consequences. *See*, *e.g.*, *United States v. Vigil*, 476 F. Supp. 2d 1231, 1235 (D.N.M. 2007) (granting a downward variance based on collateral consequences of loss of position and reputation, widespread media coverage, and emotional toll to defendant of two public trials in the case). While the offense was serious, it did not warrant a 57-

month sentence of imprisonment when the offense conduct is considered alongside Dr. Han's personal history and characteristics. Here, the district court abused its discretion by failing to mitigate punishment in light of all the circumstances, as a lesser sentence would have been sufficient to punish defendant's crimes and serve the interests of justice. The district court had an obligation to insure that its sentence was "not greater than necessary" to satisfy the familiar goals of sentencing. 18 U.S.C. § 3553(a). Dr. Han respectfully submits that his 57-month sentence is excessive, unduly harsh, and therefore unreasonable.

## CONCLUSION

For all the above reasons, defendant-appellant respectfully requests that this court reverse his sentence and remand for resentencing.

Respectfully submitted,

*/s/ John P. Messina*

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## CERTIFICATE OF FILING AND SERVICE

I certify that on September 1, 2015, I electronically filed the foregoing brief and addendum with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. The brief and addendum were scanned for viruses using Symantec Endpoint Protection 12.1.4013.4013. I also certify that after receipt of notice that the brief and addendum are filed, I will serve a paper copy of this brief on defendant-appellant by mailing him a copy at his address of record. I further certify that after receipt of notice that the brief and addendum are filed, I will transmit10 paper copies of this brief and addendum to the Clerk of Court and 1 paper copy to the appellee as noted below.

*/s/ John P. Messina*

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**Fed. R. App. P. 32(a)(7) and 8th Cir. Rule 28A(c) Certification**

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7). The brief uses a proportional space, 14 point New Times Roman font. Based on a line count under WordPerfect Version 16.0.0.318, the brief contains 277 lines and 2,759 words, excluding the table of contents, table of authorities, any addendum, and certificates of counsel.

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