

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
 :
 vs. : CRIMINAL NO. 3:13CR177 (WWE)
 :
 JUAN JOSE ALVAREZ DE LUGO : JANUARY 17, 2014

MEMORANDUM IN AID OF SENTENCING

On September 18, 2013, Juan Alvarez de Lugo entered a guilty plea to a one-count Information which charged him with wire fraud in violation of 18 U.S.C. § 1343. In his plea and in the plea agreement and stipulation, Mr. Alvarez de Lugo has accepted responsibility for his criminal misconduct.

Mr. Alvarez de Lugo is scheduled to be sentenced on January 28, 2014. He comes before this Court deeply remorseful for his conduct and fully aware of the wrongfulness of his actions. In advance of sentencing, he submits this memorandum to urge the Court, in the exercise of its duty to fashion a sentence tailored to be sufficient but not greater than necessary to serve the purposes of a sentence as set forth in 18 U.S.C. § 3553(a)(2).

ARGUMENT

It is thoroughly established now that it is unconstitutional to require sentencing courts to follow mandatory sentencing guidelines. *See United States v. Booker*, 543 U.S. 220 (2005). Thus, while the Court is required to consider the range of penalties suggested by the Sentencing Guidelines in determining the appropriate sentence in a given case, the Court is not bound by that range, and may not assume that it is the proper range. *See United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Instead, the Court must treat the sentencing range recommended by the Guidelines as one among numerous factors identified under the statute.

A. Mr. Alvarez de Lugo's Advisory Guidelines Range.

According to the plea agreement and presentence report, Mr. Alvarez de Lugo is subject to a base offense level of 7. Sixteen levels are added based on the amount of the loss and two levels are added because the crime involved more than 10 victims for a total offense level of 25. Assuming a three-level credit for acceptance of responsibility, his adjusted offense level would be 22. The parties

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and the probation office are in agreement that Mr. Alvarez de Lugo has no prior criminal convictions and thus falls into Criminal History Category I (CHC I). An offense level of 22 in CHC I yields an advisory imprisonment range of 41-51 months. A sentence within the advisory imprisonment range would not be reasonable in this case and should not be imposed.

B. Sentencing Considerations

There are circumstances in this case that are “of a kind or to a degree not adequately taken into consideration by the Sentencing Commission.” 18 U.S.C. § 3553; USSG § 5K2.0. In particular, the defendant relies, both individually and in combination, on the following factors which justify a downward departure: 1) Mr. Alvarez de Lugo’s offense level substantially overstates the seriousness of the offense; 2) Mr. Alvarez de Lugo’s low likelihood of recidivism; 3) Mr. Alvarez de Lugo’s excellent employment history; 4) the punishments already suffered by Mr. Alvarez de Lugo; 5) considerations under 18 U.S.C. § 3553(a); and 6) the totality of the circumstances.

1. Mr. Alvarez de Lugo’s Offense Level Substantially Overstates the Seriousness of the Offense.

The Sentencing Guidelines explicitly contemplated that the fraud guidelines could substantially overstate the loss in a particular case. In U.S.S.G. 2B1.1, Application Note 19(C), the Sentencing Commission said:

Downward Departure Consideration.- There may be cases in which the offense level under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

Mr. Alvarez de Lugo requests that the Court consider imposing a non-Guidelines sentence in light of the guidance provided by the above-referenced note. In this case, while Mr. Alvarez de Lugo does not dispute that his offense is serious, he did not set out to commit frauds or to steal money from his investors. Mr. Alvarez de Lugo and his business partner conceived of the idea of real estate investment at a time when the market was still relatively strong. He went into the endeavor with the intention of investing his money and the money of his investors, hoping that with the contact his partner had with the New Haven city council they would be able to get better prices on their investment properties. At no time was his intention simply to permanently deprive his investors of their money,

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and indeed, he did repay some of the initial investments according to the agreements. He does acknowledge, however, that to continue to falsely claim a connection to New Haven government was wrong and, indeed, fraudulent.

Mr. Alvarez de Lugo receives a total of 18 offense level points as a result of the loss amount and the number of victims in this case and respectfully submits that such a significant increase in his offense level results in a guideline imprisonment range (41-51 months) which is substantially higher than necessary to fulfill the various purposes of sentencing and thus a non-Guidelines sentence is warranted.

2. Mr. Alvarez de Lugo's Age When Committed First Crime and Low Likelihood of Recidivism.

Juan Jose Alvarez de Lugo led a law-abiding, indeed an exemplary life until 2005 when he began to engage in the conduct which brings him before this Court. He committed his first crime at the age of 46 years. Since the inception of this case, Mr. Alvarez de Lugo has mentally tormented himself for his poor judgement. The emotional toll this case has taken on Mr. Alvarez de Lugo is much worse than any sentence of imprisonment could be. The Court is permitted to depart downward in cases where the Guidelines fail to take into consideration the length of time during which the defendant refrains from engaging in criminal activity. In this case, that amount of time is 46 years. In consideration of this factor, the defendant seeks a below-Guidelines sentence.

In *United States v. Ward*, 814 F. Supp. 23 (E.D.Va. 1993), the defendant faced a mandatory life sentence for his involvement in a drug conspiracy. The judge chose to depart downward based on the defendant's criminal history and his age. *Id.* at 24. In that case the court noted that

While awarding defendants generally . . . some credit for leading relatively crime-free lives, the Criminal History Category of the Sentencing Guidelines does not account for the length of time a particular defendant refrains from criminal conduct . . . the guidelines do not distinguish between a nineteen-year-old and a sixty-year-old, both of whom have led crime-free lives and consequently are assigned the same low Criminal History Category.

Id. The Court concluded that "the length of time a person refrains from the commission of crimes, which is invariably tied to a person's age, is a factor that is critical to a court's determination of the sentence it should impose." *Id.*

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Given Mr. Alvarez de Lugo's age at the time he first engaged in criminal conduct, a below-Guidelines sentence is warranted in this case. Additionally, given his age and his criminal history, he is unlikely to reoffend. It is anticipated that Mr. Alvarez de Lugo currently falls in Criminal History Category I. According to government statistics, offenders in CHC I have a substantially lower risk of recidivating within two years than do offenders in CHC VI. (*See Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, United States Sentencing Commission, May 2004). Given that Mr. Alvarez de Lugo is a low threat of recidivism, a below-Guidelines sentence is appropriate.

3. Mr. Alvarez de Lugo's Excellent Employment History.

Ever since he has been old enough to hold a job, Mr. Alvarez de Lugo has been employed. Upon leaving school with an engineering degree, he established his own business which has been very successful over the years. Despite various economic downturns over the years, he has always worked hard to support himself and his family. This has always been his most important priority.

"The Guidelines provide that previous employment record is not "ordinarily relevant" to the determination of whether a departure is warranted." *United States v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1990) *citing* USSG § 5H1.5. In the *Jagmohan* case, however, the court found that the defendant, an immigrant, "had been gainfully employed for the nine years since he had entered this country." *Id.* Similarly, Mr. Alvarez de Lugo has consistently maintained employment, running several successful businesses over the course of his adult life. While this may not in itself justify a departure, when taken in conjunction with all of the factors enumerated in the defendant's Memorandum in Aid of Sentencing, a below-Guidelines sentence is warranted.

4. Nontraditional Punishments Already Suffered by Mr. Alvarez de Lugo.

One of the purposes of sentencing, and indeed a valid and reasonable purpose, is punishment. The Guidelines, however, only deal in the "traditional" forms of punishment, namely imprisonment, home confinement, and community supervision. There are other forms of punishment that are both significant and, to some, much more punitive. In Mr. Alvarez de Lugo's case, his involvement in this

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scheme has devastated not only his life, but the lives of his friends and family. At the age of 52, he has, for the first time in his life, been arrested and had to go through the humiliating and shameful process of being booked, fingerprinted and photographed. For the first time in his life he has been imprisoned. He has lost his good name and his clean record. He now has a felony criminal record, something that will follow him for the rest of his life and no doubt impact his ability to find work. He has been separated from his wife and his children, which in itself has been punitive for him. He spent his entire adult life as a successful businessman, both in Venezuela and in the United States. This case has destroyed that reputation. His businesses, once so successful, are now defunct. When he leaves jail, whenever that may be, he will be gathering the shreds of his reputation, and starting over from scratch at this late juncture in his life. His family is losing their home in Branford. Mr. Alvarez de Lugo's son has had to put his education on hold due to both financial considerations as well as the need for him to be at home helping to support his mother. Perhaps most devastatingly, Mr. Alvarez de Lugo is now losing his wife of 27 years who has filed for divorce as a result of this case. Many of the investors in this case were friends and colleagues. He has not only lost their friendships, but he is emotionally tormented by the harm that his poor choices have caused these people he cares about. In short, Mr. Alvarez de Lugo has been leading a tormented life for years as a result of his involvement in this scheme. Given the significant punishment he has already suffered in light of his involvement in this case, and the fact that, having been through this public shaming ordeal, he has been more than sufficiently deterred from ever engaging in criminal activity of any kind going forward, Mr. Alvarez de Lugo respectfully submits that a below-Guidelines sentence is sufficient and reasonable.

Furthermore, as a result of his arrest and conviction in this case, Mr. Alvarez de Lugo now faces the very real possibility that his status as a lawful resident alien in this country will be revoked and he will be deported back to his native country of Venezuela. This possibility is fraught with danger for Mr. Alvarez de Lugo. As outlined in the third addendum to the PSR, Mr. Alvarez de Lugo brought his family to this country because he feared for their safety as well as his own safety. Mr. Alvarez de Lugo's father-in-law, Enrique Salas, was a politician in Venezuela during a time of political and

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economic unrest. He opposed Hugo Chavez, a former military officer who was responsible for two failed coups d'etat in the 1990's. While Chavez's attempts to wrest control of the country from the reigning power ultimately failed, they also destroyed the political stability of the country and resulted in a financial crisis. Salas ran against Chavez for the presidency in 1998 and lost the election but won the enmity of the new president. Mr. Alvarez de Lugo also became politically active at the urging of his father-in-law, running for a seat in the Venezuelan congress. He actually won the election but because of political corruption, never took office. As a result of he and his father-in-law's political activity, Mr. Alvarez de Lugo and his family came under attack. They all had to travel with bodyguards at all times and there were many abduction threats against his family members, particularly his children. Chavez also began to damage Mr. Alvarez de Lugo's financial interests, seizing farms that Mr. Alvarez de Lugo had owned for many years, as well as land and property from other members of his family. While Chavez died in March of 2013, his successor, Nicolas Maduro, is a member of Chavez's party and will likely continue to target Mr. Alvarez de Lugo should he be deported back to Venezuela. Chavez and this case have already devastated his business interests in his homeland. He faces the possibility of further political persecution, separation from his wife and children, and financial ruin if he returns to Venezuela. These facts are also punitive for Mr. Alvarez de Lugo, although they are not taken into consideration by the sentencing guidelines. For these reasons as well, a below-Guidelines sentence in this case is reasonable.

5. The Factors Set Forth in § 3553(a) Require a Below-Guidelines Sentence.

In order to determine the appropriate sentence, the Court must turn to § 3553(a), the “overarching provision instructing district courts to ‘impose a sentence sufficient, but not greater than necessary,’ to achieve the goals of sentencing.” *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007). An analysis of the § 3553(a) factors makes clear that a below-Guidelines sentence is reasonable in this case.

A. Nature and Circumstances of the Offense and History and Characteristics of the Defendant.

Section 3553(a)(1) is a “broad command to consider ‘the nature and circumstances of the offense and the history and characteristics of the defendant.’” *Gall*, 128 S. Ct. 38, 596 n.6 (2007). It

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is not limited, and may not be limited, by the Commission's restrictive policy statements regarding what a judge may not consider. As Justice Stevens put it, the Commission "has not developed any standards or recommendations" for many individual characteristics, but "[t]hese are . . . matters that § 3553(a) authorizes the sentencing judge to consider," even though they are "not ordinarily considered" under the Guidelines. *Rita v. United States*, 127 S. Ct. 2456, 2473 (2007) (Stevens, J. Concurring).

Mr. Alvarez de Lugo is a well-educated businessman who has enjoyed success in his chosen field throughout his career. While he has experienced financial set backs at times, he has always found a way, through hard work, skill and determination, to rebuild himself and his businesses. In this case, Mr. Alvarez de Lugo's investment venture began as a real attempt to take advantage of the boom in the real estate market, to obtain properties cheaply, make necessary repairs and then resell the properties at a profit. Mr. Alvarez de Lugo did not enter into this venture with the intent to swindle anyone; at no time did he intend to permanently deprive his investors of their property. The venture ultimately failed as a result of a combination of the political and financial crisis in Venezuela and the real estate crisis in this country. Mr. Alvarez de Lugo deeply regrets his choices in continuing with the venture without the previously contemplated ties to the city of New Haven. He simply believed that with hard work he would be able to find success as he always had in the past. At times he even paid some of his investors and the debts of the venture with his own funds. In addition, he too was a victim of a fraudulent investment scheme as he, in a desperate attempt to recoup the losses of his investors, invested a substantial sum of money with Allen Stanford, a current federal inmate who is now serving 110 years for running a Ponzi scheme. Some of that investment has been recouped by the government through the proceedings against Stanford and will be used to repay part of the money owed to Mr. Alvarez de Lugo's investors.

Mr. Alvarez de Lugo now faces many hard truths: he now has a felony criminal record; he has lost his good name and his reputation as a businessman; he has harmed the financial interests of people he knew and cared about; he has hurt his family members, making it impossible for his son to continue with his education and causing his wife to file for divorce; he is financially devastated; he faces the

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potential of deportation to Venezuela where he may be persecuted by the reigning political party; and he has deeply disappointed himself. He faces a deeply uncertain future, but is determined to return to work, rebuild his business, and pay back the debt he owes to his investors. A lengthy term of imprisonment will only postpone his ability to begin to repay his debt to his investors and is unreasonable under the circumstances.

B. Seriousness of the Offense, Respect for the Law, Just Punishment.

Section 3553(a)(2)(A) requires the judge to consider “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” The purposes set forth in this section are generally referred to collectively as “retribution.” A sentence that is excessive in light of the seriousness of the offense promotes disrespect for the law and provides unjust punishment.

The nature of the offense, as well as its seriousness, is not in question. This Court does not have to send Mr. Alvarez de Lugo to jail to teach him to respect the law. Mr. Alvarez de Lugo’s long history of law-abiding, indeed exemplary behavior, is proof enough that he respects the law. He has acknowledged the wrongfulness of his conduct and knows what he needs to do to begin to make amends for his criminal conduct. While punishment is necessary and warranted, Mr. Alvarez de Lugo has now been in custody for a year which is sufficient punishment under the circumstances. The sooner he returns to the community, the sooner he will be able to begin to repair the damage his conduct has caused.

C. Adequate Deterrence to Criminal Conduct.

Section 3553(a)(2)(B) requires the judge to consider “the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct.” While many believe that the higher the sentence, the greater the effect in deterring others, the empirical research shows no relationship between sentence length and deterrence. The general research finding is that “deterrence works,” in the sense that there is less crime with a criminal justice system than there would be without one. But the question for the Court is “marginal deterrence,” *i.e.*, whether any particular quantum of punishment results in increased

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deterrence and thus decreased crime. Here, the findings are uniformly negative: there is no evidence that increases in sentence length reduce crime through deterrence. “Three National Academy of Science panels, all appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence.”¹

The reason that higher sentences do not have a deterrent effect is that potential criminals are not generally aware of the penalties for their prospective crimes, do not believe they will be apprehended and convicted, and simply do not consider sentence consequences in the manner one might expect of rational decision makers. Tonry, *supra* n.11, at 28-29. A recent review of the issue concluded: “There is generally no significant association between perceptions of punishment levels and actual levels . . . implying that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms.”² Furthermore, there is no need to impose a lengthy term of imprisonment in this case, as Mr. Alvarez de Lugo has already been sufficiently deterred by his arrest, prosecution and the year he has spent in custody, which is particularly punitive for him because he is a first time offender who has never been incarcerated a day in his life prior to this arrest. The guidelines in this case call for a sentence that is significantly more than is necessary to achieve both specific and general deterrence.

Another problem with justifying punishment as a means to deter others, besides its ineffectiveness, is that it is immoral to punish one person merely to promote deterrence of others.

Judicial punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime.

¹Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research*, 28-29 (2006). *See also* David Weisburd et al, *Specific Deterrence in a Sample of Offenders convicted of White-Collar Crimes*, 33 *Criminology* 587 (1995) (finding that in a study of federal white collar offenders in the pre-guideline era, there was no difference in deterrence between probation and imprisonment); Andrew von Hirsch, et al, *Criminal Deterrence and Sentence Severity: an Analysis of Recent Research* (1999) (examining effects of changes to both certainty and severity of punishment and finding that there is no basis to infer that “increasing the severity of sentences generally is capable of enhancing deterrent effects.”).

²Gary Kleck, et al, *The Missing Link in General Deterrence Theory*, 43 *Criminology* 623 (2005).

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For one man ought never be dealt with merely as a means subservient to the purpose of another.³

Given the ineffectiveness of and ethical problems with general deterrence and the financial costs to society of imprisoning an individual, general deterrence is not a good reason for a lengthy prison term. *See United States v. Cole*, 622 F. Supp.2d 632, 638-40 (N.D. Ohio 2008) (disagreeing with the theory that an offender should be incarcerated for a period longer than retribution requires for the purpose of deterrence).

D. Protection of the Public From Further Crimes of the Defendant.

Section 3553(a)(2)(C) requires the judge to consider “the need for the sentence imposed . . . to protect the public from further crimes of the defendant.” This purpose has to do with the risk of recidivism and the danger posed by the defendant, if any.

Mr. Alvarez de Lugo has spent his life being a hard-working entrepreneur. His involvement in this investment venture was not intended to be a scheme to swindle people from their money; it was meant to be a legitimate opportunity to take advantage of the real estate boom in this country. Mr. Alvarez de Lugo has never committed a crime prior to this case and will never commit another crime. There is no reason to believe Mr. Alvarez de Lugo poses some threat to the community that requires additional time in prison to resolve. Given the staggering financial difficulties this country finds itself in and the significant cost of warehousing Mr. Alvarez de Lugo for any additional period of imprisonment, it would appear that a swift release would certainly better protect the financial concerns of the community.

E. Rehabilitation in the Most Effective Manner and Kinds of Sentences Available.

Section 3553(a)(2)(D) requires the judge to consider “the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” Section 3553(a)(3) requires the judge to consider all of “the kinds of sentences available” by statute. When the Sentencing Reform Act was enacted, Congress did

³Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* ¶ 549 (W. Hastie trans., Edinburgh: Clark, 1887).

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not believe that prison was rehabilitative. Today, there is substantial evidence that prison, by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders, leads to increased recidivism,⁴ and that community treatment programs are more effective in reducing recidivism than prison treatment programs.⁵

There is no rehabilitative goal in this case that requires further incarceration for Mr. Alvarez de Lugo. He is a well-educated, formerly successful business man with over 20 years of employment history and a significant history of success in the business world. He has never used any illegal drugs and does not abuse alcohol and thus does not require any treatment that would be available within the Bureau of Prisons. No addition to his current period of incarceration is necessary to comply with the statutory mandate that the sentence be “sufficient, but not greater than necessary” to achieve the goal of rehabilitation.

6. The Totality of the Circumstances.

Should this Court determine that none of the grounds stated above individually justify a downward departure, collectively they would provide ample grounds to depart when considering *United States v. Rioux*, 97 F.3d 648, 663 (2d Cir. 1996).

CONCLUSION

For the reasons discussed in this memorandum, in addition to any other deemed appropriate by the Court, Mr. Alvarez de Lugo respectfully requests a below-Guidelines sentence. Such a sentence would be sufficient but not greater than necessary to meet all the purposes of sentencing in this case.

⁴See Lynne M. Vieraitis, Tomaslav V. Kovandzie, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 *Criminology & Public Policy* 589 (2007).

⁵For example, the Washington State Institute for Public Policy found that community drug treatment reduces recidivism by 9.3%, while prison drug treatment programs reduce recidivism by only 5.7%, and that treatment-oriented intensive supervision reduces recidivism by 16.7%. See *Washington State Institution for Public Policy, Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Exh. 4 at p. 9 (October 2006), available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>, last visited March 15, 2010.

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Respectfully submitted,

THE DEFENDANT,
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FEDERAL DEFENDER OFFICE

Dated: January 17, 2014

/s/ Deirdre A. Murray

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 17, 2014, a copy of the foregoing Memorandum in Aid of Sentencing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Deirdre A. Murray

Deirdre A. Murray