

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
Plaintiff,

v.

DEFENDANT,
Defendant.

CRIMINAL NO. 00-000

**OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT
AND SENTENCING MEMORANDUM**

HON. HECTOR M. LAFFITTE
CHIEF JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NOW COMES defendant, hereinafter known as “defendant”, through his undersigned attorney and very respectfully states and prays as follows:

1. On December 28, 1999, Mr. Defendant plead guilty to a one count indictment charging him with being an alien previously deported from the United States, who attempted to enter the United States, without obtaining, prior to his reembarcation at a place outside thereof the express consent from the Attorney General of the United States or his application for admission from a foreign contiguous territory, to such alien’s reapplying for admission.

2. Mr. Defendant plead guilty pursuant to a Plea Agreement in which the parties stipulated that the applicable base offense level for said conviction is 24 (base offense level of 8 increased by 16 levels pursuant to 2L1.2(a) and (b)(1)(A)). It was also stipulated that this base offense level should be reduced by 3 levels due to Mr. Defendant’s timely acceptance of his responsibility pursuant to 3E1.1(a) and (b). Furthermore, the parties stipulated that Mr.

Defendant's criminal history category seemed to be over represented and that for purposes of sentencing he should be categorized as having a criminal history category of I. Mr. Defendant reserved his right to request a downward departure as he may deem warranted pursuant to 5K2.0 and the government reserved its right to oppose said departure.

3. On May 13, 1999, the undersigned received the Presentence Investigation Report, "PSI", prepared by USPO Dávila.

4. Mr. Defendant objects to the criminal history category as determined in the PSI as well as the outcome of the predicate offense, as expressed by USPO Dávila.

5. Mr. Defendant also objects to Part F, of the PSI, where USPO Dávila determined that she had not identified any factors which would warrant a departure from the guidelines.

6. The following is a sentencing memorandum in support of Mr. Defendant's position.

PERSONAL AND FAMILY TIES

Freddy Defendant, as his friends and family call him, was born in Santo Domingo, Dominican Republic on June 24, 1964. Mr. Defendant has seven full siblings procreated by his mother Agustina Polanco, a homemaker, and his father Santiago Defendant, an agricultural worker. He also has four other maternal siblings. The ages of his siblings range from 56 to 35. Mr. Defendant is the youngest at age 34. At the age of 9 his parents separated. Although Mr. Defendant's father supported the family financially, Mr. Defendant was brought up in an extremely poor environment. Since an early age he and his siblings were forced to work in order to support the family needs. In 1984, Mr. Defendant left home in order to search for better job opportunities. Shortly after arriving in New York, Mr. Defendant met his one and only

wife,. At first their relationship was not accepted by his wife's family since they were prejudiced against Mr. Defendant, due to his nationality. Eventually after observing his sincere effort to gain their trust, the family accepted him. (See sworn statements from , Mr. Defendant's mother in law, , Mr. Defendant's brothers in law, exhibits 1,2 and 3 respectively) In December 26, 1985, they married. (See marriage certificate, exhibit 4)

During their marriage they have procreated 4 children whose names and current ages are: son, age 12, son2, age 11, son3, age 10 and daughter, age 8. All of the children are United States citizens (See enclosed document, exhibit 5) and have lived in New York for all their lives, except for the few months when they left with their father when he was deported. During the time Mr. Defendant was in the Dominican Republic, his wife gave birth to the only child who was born there, son, who was eventually registered as an American citizen born abroad. Mr. Defendant has always been a dedicated and loyal father and husband. Mr. Defendant is known in the community to that effect. The children have written letters to Your Honor asking for leniency. (See letters from three children)

Defendant's wife suffers from herniated discs and is frequently bed stricken. Mr. Defendant does most of the household chores and cares for the children. Mr. Defendant's daily schedule is to wake the children up prior to departing for work at 7AM. His wife Marilyn prepares them for school. He returns to walk the children to school and then goes back to work at a grocery store, where he is considered an honorable hard working man. His employer considers Mr. Defendant to be his best employee. (See sworn statement prepared by owner of R. Grocery, exhibit 9) Mr. Defendant is in charge of opening the store and has access to the store at any and all times. He works six days a week, and supervises the other employees. When the children are dismissed from school, Mr. Defendant takes time off from work to pick

them up. He takes them home, makes sure they are safe and then goes back to work until late at night. He sometimes closes the store and arrives home to help prepare the children for the next day.

Mr. Defendant is also known in the community. The pastor from the local church, the school principal and several neighbors who have known Mr. Defendant for some time are willing to come forward and express their admiration and respect for him, as well as grief and empathy for the family. (See letters from Reverend ; , the children's school principal and , Mr. Defendant's friends and neighbors, exhibits 10-14 respectively)

Mr. Defendant is also a dedicated friend. Mr. Defendant left New York for two reasons. Hurricane George had passed leaving him without communication with his elderly parents. Mr. Defendant was desperate to know how they were and decided to go to the Dominican Republic to see for himself. Mr. Defendant's mother, , 76 years old, has been suffering from hypertension for some time. In April 1998, she had a crisis and had to be hospitalized. When Hurricane George came, Mrs. was still recovering. Mrs. has submitted to the undersigned a medical certificate and a sworn statement to that effect. (See medical certificate and sworn statement, exhibit 15 and 16) The second reason for the trip was that a close friend, Mr. , who had also been without communication with his family, asked him to come to Puerto Rico and see how his family was. Mr. mother was like a stepmother to Mr. Defendant during several years when she lived in New York. Now she is an elderly women with ortho arthritis and diabetes, living in Puerto Rico. (See medical certificate, exhibits 17) When Mr. Defendant returned from the Dominican Republic, he was detained. (See sworn statement from Mr. , exhibit 18)

EMPLOYMENT AND EDUCATION HISTORY

Mr. Defendant completed the 11th grade in the Dominican Republic. He then came to the United States in search of better job opportunities. He has worked in several grocery stores and in Central Jersey Coating, removing asbestos.

HEALTH

Mr. Defendant suffers from high blood pressure and lacks lactose tolerance. Otherwise, he is in good health.

FINANCIAL STATEMENT

Mr. Defendant was the sole provider for his wife and four children. Due to his wife's physical condition, and the need to care for the four children when they are dismissed from school, Mr. Defendant's income was the only income the family had. They did not receive any government aid. Mr. Defendant also partially supported his elderly parents in the Dominican Republic. Since Mr. Defendant's arrest on October 14, 1998, the family has had to seek government aid in order to survive. Marilyn Defendant has had to move with the children to a smaller apartment and is finding it impossible to make ends meet. Therefore, we agree with the financial statement as prepared in the PSI. We respectfully request that no fine be imposed.

BACKGROUND ON FREDDY GARCIA'S PRIOR CRIMINAL CONVICTIONS

In 1987, Mr. Defendant was charged with possession with the intent to distribute and conspiracy to possess with the intent to distribute more than 500 grams of cocaine in the Southern District of New York. Mr. Defendant went to trial and was found guilty for the conspiracy charge and was sentenced to 2 years imprisonment. USPO Dávila stated in the PSI

that Mr. Defendant plead guilty to said charge. The judgement and Probation/Commitment Order prove otherwise (See enclosed document, exhibit 19). This conviction results in three (3) criminal history category points.

In 1984, Mr. Defendant was charged with Possession of Gambling Records in the first degree (felony) and Promoting Gambling in the second degree (misdemeanor). The day after being charged, he plead guilty to Attempting to possess Gambling Records in the second degree (misdemeanor) and was sentenced to a fine. Fourteen years have passed since said conviction for a misdemeanor. USPO Dávila gave Mr. Defendant one point in his criminal history category calculation for said conviction under 4A1.1(c). According to Application Note 3, making reference to section 4A1.2(e), "A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted". Therefore, this conviction doesn't earn Mr. Defendant any criminal history points for a grand total of 3 criminal history points. According to the guidelines, Mr. Defendant is in a level II criminal history category.

GROUND FOR DEPARTURE

First ground for departure: Cultural Assimilation, Family Ties

The Sentencing Commission has categorically excluded certain factors as basis for departure. These factors are: race, gender, national origin, creed, religion, socioeconomic status, lack of guidance as a youth, drug or alcohol dependence and economic hardship. Other than these basis, excluded by the Commission, the sentencing court has the authority to decide whether to depart. United States v. Sánchez-Rodríguez, 161 F. 3d. 556, 560 (9th. Cir. 1998). There is no limit on the number of potential factors that may warrant a departure. United States v. Lipman, 133 F. 3d. 726, 730 (9th. Cir. 1998).

In deciding whether a departure is warranted, the court must determine if there are mitigating circumstances not adequately taken into account by the Sentencing Commission. USSG § 5K2.0. The sentencing court must decide whether the factor being considered for the departure, given the facts and circumstances of the case, is sufficient to take the case out of the heartland and warrant a departure. See Lipman , 133 F. 3d. At 730. Cultural Assimilation is akin to the factor of family and community ties, which is discussed in USSG § 5H1.6. The court has the authority to depart on these bases in extraordinary circumstances. This means that the defendant's family and community ties are sufficiently unusual or extraordinary to warrant a departure in a particular case. Koon v. United States, 518 US 81(1996). In United States v Mirna Rivera, 994 F. 2d. 942 (1st. Cir.1993) the Honorable Court recognized extraordinary family circumstances as a basis for departure when present in a way which takes the case out of the heartland of the guidelines.

In the present case, Mr. Defendant came to the United States at the age of 19. Shortly after he met his wife to be, Marilyn Defendant, an American citizen. With Mrs. Defendant he has fathered four children, whose present ages range from ages 8 through 12. Mr. Defendant's children are Americans, they speak and write English and are accustomed to the American school system and culture, which is the only one they have known. The children have lived all of their lives in New York with the exception of a few months when they left with their father when he was deported. They have only studied in a United States school system. Mr. Defendant has been employed all the time he has been in New York. He has been able to keep his family off welfare, although recently, due to his incarceration, they have had to seek welfare assistance. Mr. Defendant and his family have always lived in the same neighborhood. They are known by their neighbors as a strong family unit. Several of the neighbors and friends

wrote letters to Your Honor stating their impression of this family and of Mr. Defendant as a father and husband. The Priest from the local church and the school principal also recognize Mr. Defendant's qualities as a parent and a husband.

Second Ground for Departure: Deportation is a greater hardship for Mr. Defendant and his family than to the average deportable alien.

Due to Mr. Defendant and his family's ties to the United States, the unavoidable deportation is an extremely harsh punishment. Deportation will cause him and his family a greater hardship than it would to the typical reentry defendant because New York is their homeland, his for 14 years and his children, for their whole lives. However, despite being aware of the difficulties they will be exposed to, Mr. Defendant's family is willing to move to the Dominican Republic, because even though deportation is a harsh punishment, separation is the worst of all. The first time Mr. Defendant was deported, the whole family left. Mr. Defendant's children, who were very young, got sick with serious intestinal problems and upon their return had to be kept in the hospital for several days. Mr. Defendant trusts that since his children are older now, they will be able to remain healthy or overcome any environmental related illness, which might come from the change of residence.

Mrs. Defendant has offered a sworn statement which reflects how Mr. Defendant's arrest has affected her family. (See sworn statement, exhibit 20)

Third Ground for Departure: Mr. Defendant returned to the United States to avoid a greater harm.

Mr. Defendant committed the instant offense to avoid a perceived greater harm. He is entitled to a departure pursuant to USSG § 5K2.11. When Mr. Defendant was deported he left with son, his eldest child but still an infant, and his wife Marilyn Defendant, who was pregnant at the time. Mrs. Defendant had their daughter, , in the Dominican Republic. When she became pregnant again, due to her negative experiences as to the health services in the Dominican Republic, she came to the United States to have their third child, . She returned to the Dominican Republic with Charlie being a newborn. Mrs. Defendant tried to remain at her husband's side but couldn't because her children were always sick, mostly with intestinal problems. While still a newborn infant, son developed severe intestinal problems. He was hospitalized in the Dominican Republic, but they were not able to heal him. Eventually the family had to return to the United States in search of better health services. Mr. Defendant planned on bringing his wife and the three small children to safety and then returning to the Dominican Republic. Sons and Mrs. Defendant required outpatient treatment. But son was admitted to the hospital (See The Long Island College Hospital documents which show that son was admitted on March 7, 1991, and discharged on March 18, 1991, exhibit 21) and after being discharged required outpatient treatment. Mr. Defendant's trip back was postponed. After the children were well Mr. Defendant decided to leave once he settled his family into a safe comfortable environment. He kept postponing his return until his fourth child, Christina, was born. Returning to the Dominican Republic was always on his mind, but because of the love and co-dependance that he has with his family and since his family was never well enough off for him to leave them alone, he never returned.

Furthermore, Mrs. Defendant has also had health problems which make it difficult for her to care for her children alone. She has suffered from a collapsed lung since she was a child and sometimes has trouble breathing. (See doctor's certificate of when she was diagnosed as a child, exhibit 22) She also has several herniated discs and has been advised not to lift more than 10 pounds. (See medical certificate, exhibit 23) Because of her back condition, she is often bed stricken.

Fourth Ground for Departure: Application of the Sentencing Guidelines had he been detained in 1991, when he returned.

Had Mr. Defendant been detained when he returned in 1991, there is a very high probability that the sentencing judge, when presented with the extraordinary circumstances justifying Mr. Defendant's return, would have departed from the applicable sentencing guideline range pursuant to 5K2.11.

Even without a departure, Mr. Defendant's guideline imprisonment range, according to the 1991 Sentencing Guidelines, varies greatly from today's applicable range. (See 1991 Federal sentencing Guidelines Manual, exhibit 24) The 1991 guideline calculation is as follows: The applicable base offense level is 8 pursuant to 2L1.2(a) which is increased by 4 levels pursuant to 2L1.2(b)(1). Application note 3 states that an upward departure may be warranted where the person was deported after a conviction for an aggravated felony. The total base offense level should the judge not have chosen to depart either upward, for the aggravated felony, or downward, because Mr. Defendant entered in order to avoid a greater harm, would have been 12. Said base offense level would have been adjusted by decreasing 2 levels for Mr.

Defendant's acceptance of his responsibility pursuant to 3E1.1(a) for an adjusted base offense level of 10. Mr. Defendant's criminal history category would have resulted different as well. His criminal history category would have been category III. (1 point for attempting to possess gambling records in the second degree pursuant to 4A1.1(c), 3 points for the drug conviction pursuant to 4A1.1(a), and 2 points pursuant to 4A1.1(e) since less than 2 years passed since his release and his return for a grand total of 6 which translates into a CHC of III) A base offense level of 10 with a CHC of III applied to the Sentencing Table results in an imprisonment range of 10-16 months. AUSA Klumper and USPO Dávila have been given copies of all the documents mentioned in this motion, with the exception of the copies of the United States Sentencing Guidelines of 1991.

Fifth Ground for Departure: When Mr. Defendant was deported he was told that if he reentered illegally, he would be sentenced to a maximum of 2 years.

When Mr. Defendant was deported he was given a document by the Immigration and Naturalization Service, INS, warning him in Spanish and in English that should he return illegally and be convicted of reentry, a felony, he could be punished by up to 2 years of imprisonment. Said document was given to the defense as part of the discovery materials. (See enclosed document, exhibit 25) Although we are aware that this warning, of itself, does not warrant a departure because Congress has the authority of changing the laws as it deems necessary, if viewed in conjunction to the other departures suggested herein, it can be considered for purposes of departing from the applicable guideline range. As stated in United States v. Hind, 803 F. Supp 675, 679 (W.D. New York, 1992) on precisely this issue, "Standing

alone, this would not warrant a downward departure but should be considered, coupled with other factors, in making a determination whether a more lenient sentence should be given.”

CONCLUSION

In conclusion, for the reasons presented herein, it is the defense’s position that Mr. Defendant’s case is one outside of the heartland. We have presented several reasons why this Court should depart from the applicable guidelines in the present case. We respectfully suggest that a departure is warranted in order to reach and adequate sentence to pursue the basic purposes of criminal punishment as established in Title 18 U.S.C. § 3553 (a)(2). As we well know, section 3553 (a)(2) provides that a sentence must reflect the seriousness of the offense, promote respect for the law and provide just punishment for that offense. It must afford adequate deterrence to criminal conduct and protect the public from future crimes of the defendant. It must also provide the defendant with the needed educational or vocational training, medical care or other correctional treatment in the most effective manner. At sentencing, the Court must impose a sentence sufficient, but not greater than necessary and comply with the purposes underlining the need to impose a sentence.

All these purposes can be achieved by sentencing Mr. Defendant to a sentence of imprisonment of 10-16 months, which is the sentence he would have received had he been detained when he reentered in 1991. Eventually, Mr. Defendant will be deported and his family will leave with him to start a new life in a country foreign to them all. Said punishment, in itself, will be an extreme hardship that this family will have to overcome.

In view of the previous analysis we believe that a downward departure is warranted.

WHEREFORE, because of the aforementioned facts and circumstances, it is respectfully requested from this Honorable Court that a downward departure be granted and in consequence this Court sentence Mr. Defendant to serve 10-16 months of imprisonment.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, May 21, 1999.

JOSEPH C. LAWS, JR.
Federal Public Defender

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CERTIFICATE OF SERVICE

On May 21, 1999, I served a copy of the foregoing Motion on counsel for the government, U.S. Attorney Guillermo Gil (Attn: Assistant U.S. Attorney Klumper) by delivering it to his office at the Federal Building, Room 452, 150 Chardón Avenue, San Juan, Puerto Rico.