

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

UNITED STATES OF AMERICA *
Plaintiff * CRIMINAL NO. 00-000
vs. *
DEFENDANT *
Defendant *
* * * * *

DEFENDANT’S REQUEST FOR A DOWNWARD DEPARTURE

TO THE HONORABLE DANIEL R. DOMINGUEZ
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF PUERTO RICO

COMES NOW defendant Defendant, represented by the Federal Public Defender, and respectfully STATES and PRAYS:

I. INTRODUCTION

1. The *Presentence Report* in this case was filed and made available to the undersigned on February 15, 2001.

2. On February 23, 2001, the undersigned met with U.S. Probation Officer Victor Canino, to address certain possible objections to the same. On February 26, 2001, an amended Presentence Report was received, which addressed the issues discussed with Mr. Canino.

3. After examining the same, and the amendments made by the Probation Officer, the defense expressly waives the 35 days period established in Rule 32(b)(6)(A), and requests the Court to proceed with Sentencing.

4. As will be discussed in detail below, the defendant requests that this Court (1) make a downward departure in the Criminal History Category, based upon over-representation of the same, and/or (2) make a downward departure the adjusted offence level based upon the excessiveness of the Guideline enhancement as applied, and/or (3) make a downward departure to the adjusted offence level based on unlisted factors under Guideline 5K2.0, and *Koon v. United States*, 116 S. Ct. 2035 (1996).

II. PERTINENT BACKGROUND AND GUIDELINE CALCULATION

5. The *Presentence Report*, starting at page 2, calculates Mr. Defendant's offence level. According to the same the base offence level is 8, according to Guideline 2L1.2. The base offence level is increased by 16 points due to the application of Guideline 2L1.2(b)(1)(A). Three points are reduced base on timely acceptance of responsibility. The above places Mr. Defendant in an adjusted offence level of 21.

6. The *Presentence Report*, starting at page 3, calculates Mr. Defendant's Criminal History Category.

- On April 17, 1991, Mr. Defendant was convicted of possessing 10 glassine packets of heroin. He was sentenced by the Supreme Court of Providence, Rhode Island to 6 months probation. For this offence he was awarded 1 criminal history point.
- On August 18, 1992, the defendant was convicted of 21 U.S.C. 841 in the U.S. District Court for the District of Rhode Island. He was sentence fo 21 month of imprisonment and 5 years of supervised release. For this offence he was awarded 3 criminal history points

7. A total of 4 criminal history points place the defendant at a Criminal History Category of III, which cover from 4 to 6 criminal history points.

III. ARGUMENT IN FAVOR OF A DOWNWARD DEPARTURE

A. Downward Departure Based on Over-Representation of Criminal History

8. Mr. Defendant has two prior convictions. However, without denying or minimizing them, they are not as egregious as they might initially appear.

9. On April 17, 1991, Mr. Defendant was convicted of possessing 10 glassine packets of heroin. He was sentenced by the Supreme Court of Providence, Rhode Island to 6 months probation.

10. This term of supervision was apparently deemed so negligible by the sentencing court that it was imposed as an unsupervised probation.

11. Secondly, on August 18, 1992, the defendant was convicted of 21 U.S.C. 841 in the U.S. District Court for the District of Rhode Island. He was sentenced to 21 months of imprisonment and 5 years of supervised release.

12. Specifically the defendant was found responsible for the possession of 27.12 grams of cocaine. According to the *Sentence* entered by U.S. District Judge Ronald Lagueux, the adjusted offense level was 12, and the defendant had no prior convictions. However that Court made an upward departure, and sentenced him at Criminal History III.

13. While the validity of the conviction by Rhode Island District Court cannot be challenged in this proceedings, it is pertinent to discuss the reasonableness the upward departure. This is particularly so since, as will be seen, the recommendation by the Probation Officer, and departure

made by the Rhode Island District Court, was made second guessing the Rhode Island state court.

The pertinent part of the Presentence Report reads as follows:

“In this instance, it is believed that the defendant’s criminal history category under-represents his criminal activities. Mr. Defendant has two prior drug related arrests, which, thus far, have resulted in one conviction for which he received a probationary sentence. It is noted that the defendant was charged with possession of heroin when, more appropriately it might have been possession with intent to delivered heroin. Had the defendant received a minor jail sentence in that case, his criminal history category would have been II. Additionally, the defendant has pending charges in the State of Connecticut, which include possession with intent to sell a net weight of 300.1 grams of cocaine/cut mixture of 300.1 grams of cocaine cut/mix with a 87.33% purity. He was on bail from this charge when he committed the instant offence, Consequently, a criminal history of III would appear to be more representative of the defendant’s prior criminal activities, A total offence level of 14 with a criminal history category of III, would have resulted in a guideline imprisonment range of 21-27 months.”

14. Mr. Defendant base offence level was the next to lowest offence level available in the drug quantity chart of Guideline 2D.1. If the defendant had been correctly sentenced, according to the Guidelines, he would have been exposed from 10 to 16 months of imprisonment.

15. The enhancement was unreasonable and unjustified, not sustained by the facts, and as stated before, second guessing the Rhode Island State Court, which was the Court who had the case and the facts before it, and who was in the best position to make sentencing determinations and exercise adequate sentencing authority.

16. If we were to second guess the Rhode Island District Court, as it did the state court, and had the been defendant properly sentenced, he might have benefitted from a departure under Application Note 5 of Guideline 2L1.2. The same reads as follows:

“Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and

(C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony”

17. Although Mr. Defendant’s underlining offense technically qualifies for the 16 point enhancement dictated by Guideline 2L1.2 (b)(1)(A), it also justifies a departure due to the seriousness of said offense.

18. Based on the above arguments, it is requested that the Court consider lowering the criminal history category of defendant to category II.

B. Downward Departure to the Adjusted Offence Level Based on Unreasonableness of 16 level enhancement for Aggravated Felonies

19. The only reason that Mr. Defendant is considered an aggravated felon, and imposed a 16 point enhancement as an aggravated felon, is due to the fact that any and all drug related convictions, indifferent of the kind of sentence imposed, are considered aggravated felonies. Under that scheme a sentence of probation, and a sentence of 10 years of incarceration are considered in the same manner. The Guideline calculation as determined in the *Presentence Report* significantly over-represents his situation, and the appropriate punishment for the offence.

20. The argument as to the seriousness of Mr. Defendant’s prior conviction and the 16 level enhancement of the guidelines are the facts of said conviction. When arrested Mr. Defendant possessed a total of 27.12 grams of cocaine. Such a small amount of cocaine, the next to lowest level in the drug quantity chart, is different in kind and degree than, and outside of the norm of, other offenses like large scale drug charges and murder charges which also trigger the 16 level enhancement. Congress may have ben justified in lumping together the very different categories of aggravated felonies when enacting the Immigration laws. However, the application of the 16-level

enhancement in the same manner to a person convicted of murder or large scale drug trafficking and one convicted as Mr. Defendant of a 27.12 grams sale of cocaine is unfair and inappropriate.

21. The unreasonableness of the situation becomes apparent when compared with other guidelines. The usual increase prescribed by the Guidelines is from 2 to 4 level for any one individual factor. In aggravated felony situations the increase is of 16 levels. This increase is more shocking when compared with the following.

- If he committed a hate crime, was the leader of a conspiracy, the enhancement would be of only 4 points See Guideline 3A1.1.
- If he committed an act of terrorism, the enhancement would be of 12 points. See Guideline 3A1.4.
- He would have to transport or transmit between \$5,000,000 and \$10,000,000 in stolen property, or defraud between \$20,000,000 and \$40,000,000, to receive a 16 point enhancement. See Under Guideline 2F1.1 (b)(1)(Q). Laundering any amount over \$100,000,000 would only receive a 13 point enhancement. See Guideline 2S1.1(b)(2)(n).
- If he was charged with manslaughter, all violence and weapons injury increases are topped at 9 levels. See Guideline 2A2.2(b)(3).
- If he were to in any way persuade a minor to engage in prohibited sexual conduct, the increase would be of only 7 levels. See Guideline 2G2.2.
- If he were to cause or threaten with physical violence to obstruct justice, the increase would be of only 8 levels. See Guideline 2J1.2.

- In he were to engage in slavery, and the slave suffered permanent or life threatening injury, the increase would be of only 4 levels. See Guideline 2H4.1(b)(1)(A)
- If he were to transport over 1000 pounds of explosive material, the increase would be of only 5 levels. See Guideline 2K1.3(b)(1)(e).
- If he were to brandish a weapon inside an aircraft with disregard of safety for human life, the increase would be of 15 levels. See Guideline 2K1.5(b)(1).
- If he were to transport over 50 firearms, the increase would be of 6 levels. See Guideline 2K2.1(b)(1)(F).
- If he were to smuggle over 100 aliens into the United States, or falsify over 100 passports, the increase would be of 9 levels. See Guideline 2L1.1(b)(2)(C). If an alien were to die during the smuggling, the increase would be of only 8 levels. See Guideline 2L1.1(b)(6)(4).
- If he were to discharge in a continuous, manner toxic substances into the environment, the increase would be of 6 levels. See Guideline 2Q1.2(b)(1)(A).

22. Obviously, it is impossible to reconcile such astonishing disparities. The only way a sensible result can be obtained in this matter is through aggressive use of the Court's authority to depart.

23 . In *United States v. Hinds*, 803 F. Supp, 675 (W.D.N.Y. 1992), affirmed by the Second Circuit without written opinion in *United States v. Hinds*, 992 F. 2d 321 (1993), the Western District of New York tackled a similar situation. Mr. Hind was facing the same 16 level enhancement. Analyzing the situation, and the unfairness created by this Guideline, the District Court states

“However, it is inappropriate and it makes for an unfair sentence to apply the Commission's scheme in the same manner to a person convicted of murder, which

carries a possible life sentence, to one convicted of money laundering. Perhaps the 16-level increase resulted from the Commission's concern with major drug dealers involved in large-scale cocaine or heroin distribution in the United States. Clearly, defendant Hinds fails to meet that description. To treat Mr Hinds in such a manner is essentially unfair."

24. This Guideline came into effect following legislation that increased the statutory maximum for illegal reentry. The legislative history of the change in that statute illuminates why and when Congress felt increased punishments were appropriate. In the debate leading to passage of Pub.

L. 100-690, Senator Alphonse D'Amato stated:

"These felons are involved in an array of illegal enterprises including drug trafficking, money laundering, fraudulent credit card rings, racketeering, weapons sales and prostitution.133 Cong. Rec. S4992-01."

25. Senator D'Amato described the "expansive drug syndicates established and managed by illegal aliens [in Florida]." Id. He stated that these syndicates can be traced through Central America and the Caribbean and they "operate many of the drug networks.. .crack, cocaine~ and heroin.. .in Florida and throughout the United States." Id. Senator D'Amato also pointed out that the government knows of clandestine drugs labs in the United States run by illegal Colombians, a group of Nigerians involved in heroin drug smuggling operations, and of "one of the largest and most widespread crack operations" in the United States run by illegal Haitians. Senator D'Amato went on to describe specific examples of individuals he contemplated would be prosecuted under the new enhanced penalties:

". . police officers in Florida are familiar —with an illegal Haitian who has eighteen active warrants against him for drug offenses. Police have seized three passports issued to him in three different names, eleven driver's licenses, immigration cards and numerous firearms and stolen property.

[law enforcement] in southern California apprehended a Columbian. . . [who] has been deported previously from the United States and according to the Drug Enforcement Administration (DEA) is linked with fifty drug related murders and is currently the subject of six drug killings in the New Orleans area and a series of drug dealings in California. Id.”

26. Senator D’Amato, in support of his bill, emphasizes that ‘These aliens are not exceptions, but rather, among 100,000 illegal alien felons in the United States” Id.

27. Thus, Senator D’Amato described the type of illegal alien that Congress envisioned would be punished under the statute in question. That “heartland” does not describe Julio Cesar Defendant. He has an “aggravated” felony conviction, the reality being that it is for relatively minor drug transaction. He has absolutely no ties to the crime underworld. He should be punished accordingly. Our recommendation fits the crime and the defendant.

28. Sitting en banc, the Ninth Circuit found that the illegal reentry guideline to disproportionately punish individuals, in that case and for obvious geographical reasons usually Mexicans, who have been deported following conviction for and “aggravated” felony. *United States v. Sanchez-Rodriguez*. 161 F.3d 556 (9th Cir. 1998) (en banc). The Ninth Circuit authorized downward departures in such cases where the extraordinary enhancement found in Guideline 2L1.2(b)(1)(A) overstates the significance of a defendant’s criminal history. The Ninth Circuit ruled as it did because principals of fairness and proportionality would be offended were the court without departure authority in such cases. In this regard, the Ninth Circuit applied the reasoning set forth in *United States v. Reves*, 8 F.3d 1379 (1993), wherein the court encouraged departures to avoid “disproportionate punishment” of vastly different individuals who fall within a single guideline application. *Keyes* at 13 85. The reasoning of *Sanchez-Rodriguez* and *Reves* is especially appropriate

in Mr. Defendant' s case because his situation falls far outside the "heartland" of illegal reentry cases. In this regard it is instructive to understand the origin of the draconian reach of Guideline 2L1.2(b)(1)(B).

**C. Downward Departure to the Adjusted Offence Level Based on
Unlisted Factors under Guideline 5K2.0**

29. Guideline 5K2.0 is a policy statements, and provides as

"Under 18 U.S.C. §§ 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. ...

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. ...

...

Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines."

30. Mr. Defendant is a resident of the Dominican Republic, without legal status in the United States. Based only on his alienage, he is barred from receiving various of the benefits other inmates, who are U.S. citizens, receive while incarcerated under the Custody of the Bureau of Prisons. Among the limitations are:

- He will never be eligible for intermittent confinement, home detention, community confinement or be designated to a minimal security prison;
- He is not eligible for boot camp;
- He is not eligible for the intensive drug rehabilitation program, and even if he takes part in the same, he will not receive any bonus towards his sentence.

31. The First Circuit has not addressed the issue. However the Seventh Circuit did so in *U.S. vs Farouil*, 124 F 3d. 838 (1997), determining that there is “no reason to believe that the Guidelines have accounted for defendant’s status as a deportable alien. ... The district court is free to consider defendant’s status as alien results in unusual or exceptional hardship conditions of confinement.”

32. In the same vein, in *U.S. vs Smith*, 27, F 3d, 649 (D.C., 1994) the District of Columbia Circuit determined, in a drug case, that “a downward departure may be appropriate of the defendant’s status as a deportable alien is likely to cause a fortuitous increase in the severity of the sentence.”

33. Mr. Defendant situation is the one considered in this line of cases. Due exclusively to his alienage, his sentence will be more severe than that of a U.S. citizen who was imposed exactly the same term of imprisonment.

IV. RECOMMENDED DOWNWARD DEPARTURE

34. The defense is requesting the Court to consider two departure alternatives, one which would result in lowering the adjusted offence level, and another which would result in lowering the criminal history category.

35. If Mr. Defendant was sentenced to the imprisonment range applicable for a non-aggravated felon, his sentence would be a base offense level of 8 based on 2L1.2(b)(1)(B) plus 4

levels for the felony enhancement described in section (B) and a reduction of 2 levels for Mr. Defendant's acceptance of his responsibility, for a total adjusted base offense level of 10. This adjusted base offense level of 10 with a criminal history category of III results in an imprisonment range of 10 to 16 months.

36. On the other hand, if sentenced according to the guideline range resulting from a base offense level of 21 and a criminal history category of I, the result would be a guideline range 37 to 46 months. If he were considered a criminal history category of II, the result would be a guideline range of 41 to 51 months.

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

38. This sentence would be a just and fair one, and would be proper punishment for Mr. Defendant, as mandated by 18 U.S.C. 3553

V. GROUNDS FOR THE COURT'S AUTHORITY TO DEPART

39. As will be discussed in detail below, this Court has authority to depart under and under *Koon v. United States*, 116 S. Ct. 2035, 2045 (1996) and its progeny.

40. The United States Sentencing Guidelines were created in order to further the basic purposes of criminal punishment. Section 3553(a)(2) of Title 18, 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.

41. The United States Sentencing Commission was very clear in establishing its policy statement. The Commission sought to create a sentencing system that was fair and effective. It sought a reasonable uniformity between sentences to avoid the prevailing situation at that time where people were being sentenced to indeterminate sentences and the parole board had the responsibility of determining how much of the sentence the person would actually serve in prison. However, tension was created between the idea of proportionality and uniformity. Having a few simple categories would lump together offenses, different in important aspects and although the result would be a uniform sentence, the product would be a non-proportional sentence to the individual aspects of the case. The final outcome of the Commission's efforts is a set of categories, relatively broad which omit distinctions that in some instances may be important yet includes most of the distinctions required by statute and the data collected .

42. Although relevant distinctions will occur rarely, when they do, the Court has the power to depart from the guidelines. See Chapter 1 Pt. A of the Guidelines. The Court is allowed to depart downward from the proposed sentencing range whenever "there exists a ... mitigating circumstance of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different than the described". See 18 U.S.C. § 3553(b) and Guideline 5K2.0.

43. There is no express limitation on the district court's discretion in sentencing once it has validly decided to depart. *United States v. Alvarez*, 51 F. 3d. 36,41 (5th cir. 1995). In view that the

nature and circumstances of an underlining aggravated felony are not part of the list of limited prohibited basis, the District Court may depart in its discretion under these basis. See *United States v. Sánchez-Rodriguez*, 161 F. 3d. 556,560 (9th cir. 1998)

44. According to the policy statement of the Sentencing Commission, departures are approved when factors exist in a particular case that have not been given adequate consideration by the Commission or when the application of the guidelines in a particular unusual circumstance results inadequate. USSG § 5K2.0 and *United States v. Díaz-Díaz*, 135 F. 3d.572,580 (8th. Cir. 1998)

45. In *Koon v. United States*, 116 S. Ct. 2035, 2045 (1996), the Honorable Court had the opportunity to clarify the difference between encouraged, discouraged and prohibited departures. The departures the Commission chose to prohibit are only a few. The Commission also provided guidance as to the discouraged and encouraged departures. The encouraged factors that warrant a departure from the guidelines are those “that the Commission has not been able to take into account fully in formulating the guidelines”.

46. Some of these departures are found in Application notes of the guidelines, others have been recognized through leading cases and yet others, due to the vast number of possibilities, have yet to be presented before the court in atypical cases. The Guidelines Manual commentaries, which interprets or explains a guideline, is authoritative unless it violates the Constitution or a federal statute. *Stinson v. United States*, 113 S. Ct. 1913 (1993).

47. If the Court were to consider under Application note 5, as discussed above, once it is determined that a particular case complies with the three prerequisites determined in the Application

note 5, there is no express limitation on the District Court's discretion on how far to depart. *United States v. Alvarez*, 51 F. 3d. at 41.

48. This departure gives the sentencing court authority to consider each case separately and individually and determine a sentence tailored to the seriousness of the crime. It gives the Judge the opportunity to stray from the impersonal sentencing formula, which doesn't take into consideration all necessary factors. It rejects the technical application of the 16 level enhancement for any prior which fits the aggravated felony definition, without considering that aggravated felonies vary greatly. Some are more serious than others. Some are worth the 16 level adjustment, some are not. The sentencing court must then, after applying the enhancement, determine whether a downward departure is warranted. *United States v. Sánchez-Rodríguez*, 161 F. 3d. at 560.

WHEREFORE, defendant respectfully requests this Honorable Court to take notice of the above, and for the foregoing reasons, we respectfully urge downward departures in accordance with the argument and authority set forth above.

In San Juan, Puerto Rico, this September 13, 2001.

Joseph C. Laws, Jr.
Federal Public Defender

Assistant Federal Public Defender
USDC-PR
259 F. D. Roosevelt
Hato Rey, P.R. 00918
TEL. (787) 281-4922
FAX. (787) 281-4899

CERTIFICATE OF SERVICE

I HEREBY CERTIFY: That a copy of the foregoing Motion was served on counsel for the government, U.S. Attorney Guillermo Gil (Attn: Assistant U.S. Attorney Aixa Maldonado) by delivering it to his office at the Federal Building, Carlos Chardón Avenue, San Juan, Puerto Rico.

Assistant Federal Public Defender