

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
 )  
 v. ) CRIMINAL NO. XXXXXXXX  
 )  
XXXXXXXXXXXXXXXXXXXX )

DEFENDANT'S SENTENCING MEMORANDUM  
AND MOTION FOR DOWNWARD DEPARTURE

Defendant, XXXXXXXXX, moves this Court to depart downward because:

- (1) his conduct in returning to the United States was precipitated solely by his fervent desire to assist in the financial well-being of his family and thus was a lesser harm within the meaning of U.S.S.G. §§ 5K2.11 and 5K2.0;
- (2) his Criminal History Category of V significantly over-represents both the seriousness of his history and the likelihood that he will commit further crimes, U.S.S.G. § 4A1.3.; and
- (3) the combination of these factors takes the case out of the heartland of illegal reentry cases, see §5K2.0, comment.; United States v. Koon, 518 U.S. 81, 111-112 (1996); United States v. Sklar, 920 F.2d 107, 116 (1st Cir. 1990).

**FACTS**<sup>1</sup>

**Background**

Mr. XXXXXX is a 39 year-old man born and raised in the Dominican Republic. When he was twenty years old he traveled to the United States so he could pursue opportunities unavailable to

---

<sup>1</sup>This statement is intended primarily to highlight those facts included in the Presentence Report ("PSR"), or that are the subject of dispute.

him in Dominican Republic. After he arrived in the United States, Mr. XXXXXX married, lived and worked in New York for two years before moving separating from his then-wife and moving to Massachusetts. Mr. XXXXXX married his present wife, YYYYYYY, in 1989 and was granted conditional residency status the same year. He became a lawful permanent resident in 1990.

Over the course of the six year period he was in the United States before his first arrest in 1991, Mr. XXXXXX was continually employed in a variety of jobs in New York and Massachusetts, and as a laborer first in Amherst and later in Lawrence while his wife completed her education and began her career.

Beginning in 1990, while living in Lawrence with his wife, Mr. XXXXXX developed an addiction to crack cocaine. This addiction, and the life that accompanied the addiction, resulted in convictions in Lawrence district court on separate and unrelated charges of distributing drugs and receiving a stolen motor vehicle. Mr. XXXXXX pled guilty to both complaints simultaneously and was sentenced to fifteen months committed with probation to follow. He served his time and successfully completed probation in late December, 1993. His oldest child Taisha (now aged ten) was born during the relatively placid time following this first incarceration.

Sadly, Mr. XXXXXX's successes in his battle to maintain

sobriety were short-lived after his release from supervision. By early 1994, Mr. XXXXXX was once again heavily using crack cocaine. His use of crack (and the attendant lifestyle of petty crime) led to two additional convictions, one each in Lawrence and Lynn district courts. Mr. XXXXXX once again pled guilty to both complaints and was sentenced to fifteen months after which he was deported to the Dominican Republic.

From his deportation in September 1995 to his return to Lawrence in January 2000, a four and one-half year period, Mr. XXXXXX lived and worked in the Dominican Republic. He was able to find skilled work in the Dominican Republic as a woodworker and, for a time, as a security guard at a 3 Com facility there. He disavowed the use of any drugs and has maintained his sobriety ever since. In addition, Mr. XXXXXX attempted to financially contribute to his wife and daughter in Lawrence from his meager income in the Dominican Republic.

In the meantime, YYYYYY secured a job with the Lawrence Public Schools and began trying to chart a path towards financial stability for her and the couple's young daughter. She was able to buy a home with money saved and contributions by Mr. XXXXXX and his family. Sadly, the Dominican economy, and Mr. XXXXXX's position in it, were insufficient to provide for the stability Ms. YYYYYY craved for the family. Faced with difficult financial circumstances, and the need for a young daughter to have her

father at home, Mr. XXXXXX and his wife discussed and agreed that Mr. XXXXXX should return to the United States to work.

Upon his return to the United States, Mr. XXXXXX worked in various jobs and, most importantly, handled child care duties for Taisha while Ms. YYYYYY pursued her career as a guidance counselor in the public schools. Soon a second child, Jeremy, was born to the couple and Mr. XXXXXX became the primary caretaker for their young son so his wife could return to work quickly. Other than his attempt to use a false identity to work and travel, Mr. XXXXXX engaged in no illegality. He likewise has maintained his sobriety since 1994. Mr. XXXXXX's earnings and his ability to provide child care, in conjunction with his wife's income, were sufficient to provide the family with modest financial stability.

#### **The Instant Arrest and Federal Indictment**

Mr. XXXXXX's wife, YYYYYY, is a naturalized U.S. Citizen originally from the Dominican Republic. In the summer of 2003, Mr. XXXXXX and Ms. YYYYYY discussed a trip to the Dominican Republic planned by Ms. YYYYYY to visit relatives. Mr. XXXXXX voiced his uneasiness concerning Ms. YYYYYY's travel alone with two young children. Mr. XXXXXX took the risky step of applying for a passport under the name ZZZZZZZZ so that he could accompany the family on the trip.

Upon showing up at the passport office, Mr. XXXXXX was

confronted by agents from the Diplomatic Security Service. He immediately admitted, even before being placed in custody, that he had used a false identity and revealed his true name and identifying information.

Based in part on these admissions, Mr. XXXXXX was arrested and charged by complaint solely with passport fraud, now the subject of Count One of the indictment. The U.S. Attorney's Office, however, added the additional charge of unlawful reentry, now the subject of Count Two of the indictment, when it presented the case to the grand jury. Had Mr. XXXXXX been indicted only on the original charge of passport fraud, he would have been subject to a base offense level of 8 after acceptance of responsibility and a guideline sentencing range of 15-21 months. See PSR ¶¶ 27-35.

Mr. XXXXXX has been detained since his arrest. As a result of Mr. XXXXXX's arrest and loss of earnings and companionship, Mr. XXXXXX's wife and two children have suffered financially and emotionally. They will continue to suffer great hardship while Mr. XXXXXX serves his sentence, likely at a facility remote from the family, and is then deported to the Dominican Republic. Ms. YYYYYY and the children nevertheless remain supportive of him.

## ARGUMENT

1. THE EXTRAORDINARY CIRCUMSTANCES REGARDING DEFENDANT'S FAMILY AND HIS LACK OF VIABLE CHOICES TO ADDRESS HIS FAMILY'S FINANCIAL NEEDS MITIGATE HIS CONDUCT AND WARRANT DEPARTURE.

The Sentencing Commission, through U.S.S.G. § 5K2.11, has specifically recognized that there will be cases where a defendant, although culpable, may nevertheless warrant a lower sentence where the conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. U.S.S.G. § 5K2.11 is an encouraged departure provided there is an appropriate factual predicate. United States v. Carvell, 74 F.3d 8, 11-12 (1st Cir. 1996).

The factual circumstances in the case at bar meet the criteria of § 5K2.11. Mr. XXXXXX's return to the United States resulted not from the ordinary motivation of illegal reentry defendants to seek a better life and/or to commit new crimes. Rather, his return was motivated by his perception that returning to the U.S., and the kind of earnings available here, was the only way to avoid the specific and identifiable greater harm - financial instability of his wife and daughter. Courts have long recognized that family motivations and concerns alone can overcome the strictures of the sentencing guidelines scheme. See United States v. Sclamo, 997 F.2d 970 (1st Cir. 1993) (although under U.S.S.G. § 5H1.6 family ties are not ordinarily relevant in determining whether a sentence should be outside the guideline

range, extraordinary family circumstances may form a valid downward departure basis).

Family ties and concerns can take on an especially persuasive role in the immigration context, where the issue is the balancing of motivation with the deterrence aspect of the illegal reentry guideline. See also United States v. Lipman, 133 F.3d 726 (9th Cir. 1997)(an illegal reentry defendant motivated to return by family ties may be less culpable than a defendant returning for pecuniary benefit). Here, the circumstances of Mr. XXXXXX's return - which occurred only after over four years in the Dominican Republic and much soul searching by the family in to whom he was committed - demonstrates that Mr. XXXXXX's sole motivation was to avoid harm to his family. Thus this case, like Sclamo, is "readily distinguished from ordinary cases, where one can only speculate about the stresses that incarceration of a family member might cause." 997 F.2d at 974. Society's interest in punishing the conduct of returning to the United States, given the defendant's motivations and his demonstrated commitment to his family, is significantly diminished in these circumstances. Consequently, departure under U.S.S.G. § 5K2.11 is warranted. See Carvell, 74 F.3d at 10-11 (departure warranted for marijuana grower who believed he needed to use marijuana to prevent himself from committing suicide).

Similarly, Mr. XXXXXX's conduct in returning under these

circumstances does not "cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue."

U.S.S.G. § 5K2.11. The defendant's sentencing range in this case is driven primarily by the 16-level increase mandated by U.S.S.G. § 2L1.2(b)(1)(A) because of the defendant's prior aggravated felony convictions. The legislative history leading up to the guideline is instructive in that it demonstrates a specific archetype of illegal reentry offenders which Congress targeted for severe punishment. The guideline at issue followed from legislation that increased the statutory maximum for illegal reentry. During the debate over the 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 (1987). Senator D'Amato described the "expansive drug syndicates established and managed by illegal aliens [in Florida]." Id. He also described 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 . . . [I]n southern California [law enforcement] apprehended a Columbian . . . [w]ho had been deported previously from the United States and, according to the 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 killings in California.

Id.

The archetype described by Senator D'Amato is a far cry from the defendant, whose sole motivation in returning to the United States was to avoid the instability to his family that would result in his failure to contribute to the family's finances. Consequently, Mr. XXXXXX's conduct does not cause or threaten the harm or evil sought to be prevented by the law proscribing the illegal reentry of deported aggravated felons and this Court can and should depart to a lower sentence. U.S.S.G. § 5K2.11.

Because Mr. XXXXXX's return to the United States was motivated by his perception of a greater harm should he not return, and because his conduct did not cause or threaten the harm sought to be proscribed by the aggravated felon illegal reentry statute, departure is warranted. See United States v. Jose Samuel Ipina-Ipina, Criminal No. 97-10152-01 (Wolf, J.)(departure from 41 months to 18 months in illegal reentry case warranted where defendant had well-founded concern for his teenage daughter, who had a history of heart problems and was not being properly cared for by her half brother).

2. MR. XXXXXX'S CRIMINAL HISTORY CATEGORY OF III SIGNIFICANTLY OVER-REPRESENTS BOTH THE SERIOUSNESS OF THE TWO CONVICTIONS THAT ACCOUNT FOR ALL OF HIS ENTIRE CRIMINAL HISTORY AND THE LIKELIHOOD OF RECIDIVISM.

The First Circuit's decision in United States v. Rivera, 994

F.2d 942, 947-48 (1st Cir. 1993), broadly construed a district court's authority to depart from the guidelines in cases that are outside the "heartland" of the guidelines, especially where a specific guideline provision "encourage[s]" grounds for departures. The guideline at issue here, § 4A1.3, is such a provision. It expressly authorizes a downward departure where the criminal history classification "significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3.

Here, the gravamen of Mr. XXXXXX's criminal record consists of two separate pleas consolidating cases for which he received concurrent sentences. The drug convictions resulted from hand-to-hand sales of relatively small amounts of drugs. Had Mr. XXXXXX been sentenced to just two months less than the fifteen months he served pursuant to each of the pleas, Mr. XXXXXX's ultimate sentence would be drastically reduced as he would no longer be eligible for the 16-point enhancement in U.S.S.G. § 2L1.2(b)(1)(A)(providing for a 16, rather than 12, point enhancement for drug trafficking offenses where sentence exceeds 13 months). Moreover, two of the convictions, PSR ¶¶ 47 & 48 would not have counted at all for purposes of the sentencing guidelines because of their age and Mr. XXXXXX would have just five criminal history points. See U.S.S.G. § 4A1.2(e)(3).

Balanced against these relatively ancient convictions is Mr. XXXXXX's rehabilitation since his release from incarceration over eight years ago. After his release and deportation, Mr. XXXXXX secured skilled employment in Colombia and kept ties to a family to whom he remains devoted. He has been trouble-free both in the Dominican Republic and since his return to the United States, with the exception of the use of the identity of a deceased man in order to work and travel. His sole preoccupation has been with working and taking care of his family.

For these reasons, the defendant's Criminal History Category of V significantly over-represents both the seriousness of his history and the likelihood that he will commit further crimes. U.S.S.G. § 4A1.3.

3. THE UNIQUE COMBINATION OF THE ABOVE FACTORS WARRANTS DEPARTURE.

The Sentencing Commission acknowledges that a combination of characteristics and circumstances, none of which alone takes the case out of the heartland, may warrant departure. See U.S.S.G. § 5K2.0, commentary. The defendant's cultural assimilation into the United States and his documented extraordinary mental and emotional condition, together as well as separately, warrant a downward departure. See Koon, 518 U.S. at 111-112; Sklar, 920 F.2d at 117 .

**CONCLUSION**

Because of this highly unusual situation in which defendant returned to the United States for the sake of his family, and because his Criminal History Category of V vastly overstates the seriousness of his criminal history, the facts of this case make it a compelling one for departure from the normal reentry-after-deportation guideline, U.S.S.G. § 2L1.2. The defendant respectfully moves this Court depart downward from the applicable guideline range.

AUGUSTO XXXXXX  
By his attorney,