

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL ACTION
	)	NO. 1:21-CR-206-JPB
ANDRE LEE GAINES	)	
_____	)	

SENTENCING MEMORANDUM

COMES NOW the Defendant, ANDRE LEE GAINES, by and through undersigned counsel and hereby files this sentencing memorandum in support of a reasonable sentence. Mr. Gaines asks that this Court impose a sentence of probation.

I. BACKGROUND

Mr. Gaines is 67 years old. Prior to this case, he had never been arrested or charged with a crime. He joined the Navy a few years out of high school in 1973 and served honorably for 21 years. After the Navy, he worked for 14 years for the United States Post Office. Due to a physical disability, he was forced to retire from the Postal Service in 2004.

Mr. Gaines's physical and mental condition has deteriorated over the years. The presentence report indicates that he suffers from 19 different medical conditions and takes 17 different medications. (PSR at ¶¶ 48 and 50). His conditions are serious. He has suffered several strokes, has type 2 diabetes, atrial

fibrillation, and seizure disorder. In addition, he suffers from chronic pain in his back, neck, arms, and hands. As a result of his strokes, Mr. Gaines suffers from vascular cognitive impairment.

A recent neuropsychological evaluation by Dr. Felicia C. Goldstein from the Emory University Brain Health Center found that because of the cognitive impairment, Mr. Gaines suffers from severe impairments in executive functioning and memory. Executive function “refers to the higher-level cognitive skills you use to control and coordinate your other cognitive abilities and behaviors.” *Executive Functions*, University of California San Francisco, Weill Institute for Neurosciences, <https://memory.ucsf.edu/symptoms/executive-functions>. (last visited September 28, 2021). Deficits in executive function result in difficulty organizing, difficulty in planning, inability to multitask, difficulty processing, storing, and/or retrieving information, and difficulty with abstract concepts. *Id.* In addition, Mr. Gaines’s overall intellectual functioning, along with his working memory, processing speed, and verbal comprehension all fall between the second and eighth percentiles for individuals who are his age. Mr. Gaines has been suffering from these conditions for many years. He was physically frail and mentally diminished at the time that the offense conduct occurred in the summer of 2020.

Mr. Gaines is before this Court because Darrell Thomas and John Gaines, Mr. Gaines's cousin and supposed friend, took advantage of the cognitively impaired Mr. Gaines. Darrell Thomas is a fraudster and scam artist who used business owners to defraud the Small Business Administration out of millions of dollars in COVID relief money. John Gaines is an associate of Darryl Thomas.

John Gaines knew that Mr. Gaines had a dormant travel business that existed in name only. John Gaines schemed with Darryl Thomas to trick Mr. Gaines into allowing them to use the dormant business to apply for a Paycheck Protection Program (PPP) loan. Andre Gaines did not know that they were going to apply for a PPP loan, never saw any of the paperwork, and had no part in the application process. After the loan was approved, most of the proceeds of the loan were distributed to Thomas, John Gaines, and Carla Jackson, John Gaines's wife. Mr. Gaines only figured out what happened after the fact when he was contacted by the FBI. Once he was contacted by the FBI, Mr. Gaines made a false statement to the agent by repeating what he was told to say by Mr. Thomas. Mr. Gaines has entered a plea of guilty to one count making a false statement to the FBI agent.

II. ARGUMENT AND CITATION TO AUTHORITY

The presentence investigation report ("PSR") calculates Mr. Gaines's Total Offense Level as 12. With a Criminal History Category I, this yields a guideline

sentencing range of 10 to 16 months. Mr. Gaines asks that the Court impose a sentence of probation.

Between the several grounds for downward departure under the guidelines and downward variance pursuant to 18 U.S.C. § 3553(a) that Defendant will discuss below, the Court has many avenues to justify a probated sentence. In this memorandum, Defendant will first address the grounds for a downward departure and then discuss the grounds for a downward variance. In the end, however, the bottom line is that it would be cruel, unnecessary, and unreasonable to put this medically fragile, cognitively impaired, and elderly man in prison in light of his honorable personal history and the circumstances of this offense.

A. Grounds for a Downward Departure Under the Guidelines

1. Downward departure for age, mental condition, and physical condition

Mr. Gaines's age, mental condition, and medical condition provide a basis for both a downward departure under the guidelines and a downward variance pursuant to § 3553(a). Under the sentencing guidelines, age "may be relevant in determining whether a departure is warranted if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from typical cases covered by the guidelines." U.S.S.G § 5H1.1. The guideline further indicates that age provides a ground for a downward departure where the defendant is elderly and infirm and

where another form of punishment would be less expensive than incarceration. *Id.* The guidelines contain similar downward departure provisions with similar language for mental conditions and physical conditions. U.S.S.G. §§ 5H1.3 and 5H1.4.

It is hard to imagine a defendant who would be more aptly described by these guideline downward departure provisions than Mr. Gaines. He is elderly, disabled, medically fragile, and cognitively impaired. This rare combination of advanced age, serious medical conditions, and cognitive difficulties, puts Mr. Gaines far outside the heartland of the typical defendant who comes before the Court.

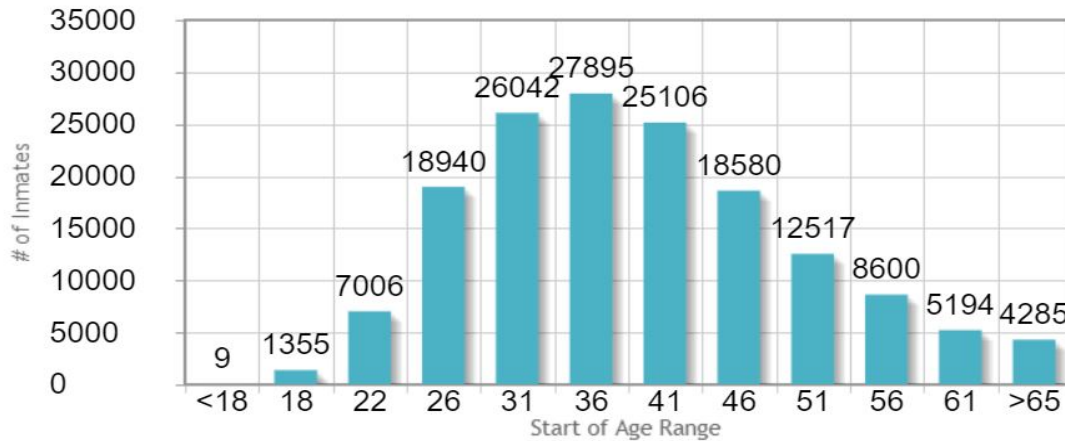
At 67, Mr. Gaines would be among the oldest inmates in the federal prison system if sentenced to a term of imprisonment. According to the Bureau of Prisons, there are only 4,285 federal inmates who are over the age of 65. This is just 2.8 percent of the federal prison population. In the prison context, anyone over the age of 50 is considered elderly.¹

¹ “It is recommended that, in order to have a uniform reference point, correctional agencies nationwide adopt age 50 as the chronological starting point to define ‘older offenders.’ This is based on a number of factors including socioeconomic status, access to medical care, and lifestyle of most offenders.” Dr. Joann B. Morton, *An Administrative Overview of the Older Inmate*, U.S. Department of Justice, National Institute of Corrections, 4 (1992), available at <http://static.nicic.gov/Library/010937.pdf>.

Inmate Age

Statistics based on prior month's data -- Last Updated: Saturday, 25 September 2021

Please Note: Data is limited due to the availability of offense-specific information.



Federal Bureau of Prisons, *Inmate Statistics, Inmate Age*, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (last visited September 29, 2021).

The guidelines note that a downward departure for age, mental condition, and physical infirmity would be appropriate in situations where alternatives to incarceration are less expensive. The presentence report list the cost of incarceration for Mr. Gaines at \$44,258 per year. In 2004, the United States Department of Justice's National Institute of Corrections determined that the cost of incarceration for older inmates is between \$60,000 and \$70,000 per year. See National Institute of Corrections, *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, at 11 (2004). These cost are likely

even higher today. A 2016 report by the Office of Inspector General of the Department of Justice found that costs for incarcerating aging inmates (defined as those over 50) is substantially higher than costs for younger inmates. Office of Inspector General of the Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, February 2016, <https://oig.justice.gov/reports/2015/e1505.pdf> (last viewed September 29, 2021). The cost for medical care was 10 times higher for older inmates and medication expenses was 14 times higher for older inmates. *Id.* These higher costs are the result of the increased medical needs of this population. Mr. Gaines is already a very ill man, as he continues to age, his medical needs will only increase. The cost of probation is only \$4,454 per year. This is a far less costly alternative.

2. Downward departure for aberrant behavior

Pursuant to U.S.S.G. § 5K2.20, a downward departure is appropriate because the offense conduct constitutes aberrant behavior for Mr. Gaines. Under this policy statement, the court may downwardly depart “if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.” U.S.S.G. § 5K2.20(b).² Mr. Gaines satisfies each of these factors. There was

² Prohibitions of the application of this policy statement contained in

little planning in this offense. The agent called Mr. Gaines out of the blue, Mr. Gaines asked a codefendant how he should answer the agent's questions, and Mr. Gaines did that when the agent called back. All the conversations took place on the same day and Mr. Gaines's conversations with the agent were brief. This offense is certainly a marked deviation from Mr. Gaines's law-abiding life. He is a senior citizen with no criminal record. He served his country honorably in the Navy for 21 years and then worked for the Post Office for 14 years. Clearly, this is aberrant behavior that qualifies for a downward departure under § 5K2.20.

B. Grounds for a Downward Variance under 18 U.S.C. § 3553(a)

The ultimate command of 18 U.S.C. § 3553(a) is to impose a sentence that is "sufficient, but not greater than necessary, to comply with" the sentencing purposes stated in the statute. 18 U.S.C. § 3553(a). This parsimony provision requires district courts to impose the minimum punishment needed to satisfy the purposes of sentencing—just punishment, deterrence, protection of the public, and rehabilitation of the defendant. Thus, although § 3553(a) requires the sentencing court to consider the applicable guideline range, it is only one of several factors, and it is the parsimony provision that serves as "the guidepost for

§ 5K2.20(a) and (c) do not have any impact or applicability to Mr. Gaines's situation.

sentencing decisions post-*Booker*.” *United States v. Ferguson*, 456 F.3d 660, 667 (6th Cir. 2006).³

Each of the reasons discussed above as grounds for a downward departure under the guidelines are also grounds for a downward variance under § 3553(a). In fact, because the Court does not have to jump through the hoops required for a downward departure, the Court has more freedom to downwardly vary under § 3553(a). Defendant will discuss these and other grounds for a downward variance within the § 3553(a) framework.

³ Congress has set forth the factors a sentencing court must consider in determining a reasonable sentence, which include:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims.

United States v. Talley, 431 F.3d 784, 786 (11th Cir. 2005) (summarizing 18 U.S.C. § 3553(a)).

1. Mr. Gaines's history, medical, mental and physical conditions, and circumstances of the offense

As the court considers Mr. Gaines's history and the circumstances of the offense, his age, medical conditions, physical disabilities, and intellectual and cognitive deficits all justify a downward variance. He is so debilitated mentally and physically that it is unlikely that he would be able to function in prison. Such a fate would be inhumane for this man who made a false statement to an FBI agent about a financial crime when the false statement did nothing to obstruct or impede the investigation.

Mr. Gaines's age and physical condition should be considered as a ground for a variance because prison life is harder and harsher for older inmates. "Older prisoners, even if they are not suffering illness, can find the ordinary rigors of prison particularly difficult because of a general decline in physical and often mental functioning which affects how they live in their environments and what they need to be healthy, safe, and have a sense of wellbeing." Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, at 45 (January 2012). Ordinary prison life may cause older inmates great difficulty. For example, things like having to climb stairs, walking long distances for meals, standing in lines for medication or meals, and sleeping on thin mattresses are all part of everyday prison life, but can be extremely challenging for older inmates. For someone like Mr. Gaines who is cognitively impaired and suffers from so

many medical ailments, prison life would be so harsh and difficult that it would be outside the realm of reasonable punishment.

A variance is also appropriate because Mr. Gaines would be extremely vulnerable in prison because of his age, cognitive impairments, and physical infirmities. Prisons are filled with men who are much younger and much stronger than Mr. Gaines. Because of his age and poor physical and mental condition, he could easily be targeted and victimized by other inmates. This makes prison a much more difficult and dangerous place for Mr. Gaines. The Supreme Court has recognized that vulnerability in prison is a valid ground for a downward departure. *Koon v. United States*, 518 U.S. 81 (1996). Certainly, it is a valid ground for the Court to consider under § 3553

2. Recidivism, deterrence, just punishment, and aberrant behavior

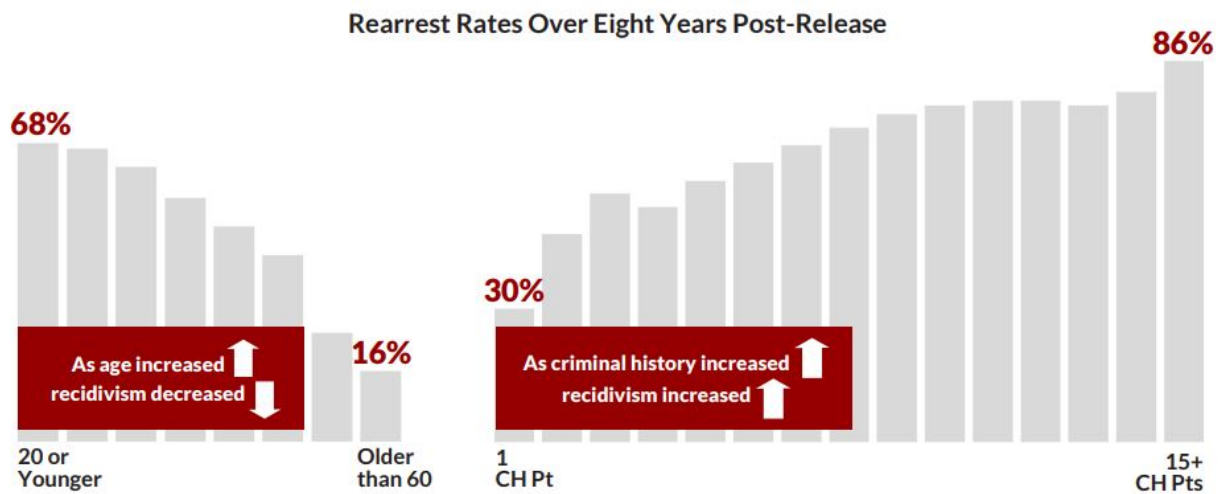
Mr. Gaines is 67 years old. Aside from this offense, he has never been in any legal trouble. He has a long and productive work history and a stable family life. Mr. Gaines has maintained a spotless record while released on bond in this case and satisfied all of the requirements of pretrial supervision.

Mr. Gaines's history of good behavior and his post-offense record of good conduct demonstrates that the offense was aberrant behavior. It never would have occurred if John Gaines had not taken advantage of Mr. Gaines and lured him into Darrell Thomas predatory scheme. Mr. Gaines's long history of living a straight

and narrow life also undermines the need to impose a prison sentence for deterrence purposes. Research by the United States Sentencing Commission indicates that as age increases, recidivism decreases and that individuals with lower criminal history are less likely to recidivate.

Offender Characteristics

A federal offender's age² and criminal history³ were closely correlated with their likelihood of reoffending while an offender's education level was also associated with their likelihood of reoffending.



United States Sentencing Commission, Report at a Glance: Recidivism and Federal

Sentencing Policy, February 2021,

[https://www.ussc.gov/sites/default/files/pdf/research-and-](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/rg_recidivism-series.pdf)

[publications/backgrounders/rg_recidivism-series.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/rg_recidivism-series.pdf) (last visited 9/29/2021).

At his age and with no criminal history, Mr. Gaines is not a risk of recidivism and prison is not necessary to protect the public from him. 18 U.S.C. § 3553(a)(2)(C).

While certainly recidivism is not an issue with Mr. Gaines, § 3553(a)(2)(B) suggests that the Court consider the need to deter others from criminal behavior in determining a sentence. The government could argue that a prison sentence would send a message to others and prevent them from committing an offense. While this argument may have a gut level appeal, substantial social science research has consistently shown that while the certainty of being caught and punished has a deterrent effect, “increases in severity of punishments do not yield significant (if any) marginal deterrent effects.” Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006). In fact, “there is no decisive evidence to support the conclusion that harsh sentences actually have a general or specific deterrent effect on potential white-collar offenders.” Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-449 (2007). The real deterrent effect appears to occur when the criminal sanction is accompanied by informal sanctions such as social censure, shame, and loss of respect. *Id.*

This prosecution has caused Mr. Gaines to experience tremendous shame. He has always lived an honest life and it sickens him to think that this offense will cause people to think differently of him. The humiliation that has come as a result of being publicly identified as part of this case causes Mr. Gaines genuine pain every single day.

A sentence of probation is a severe and serious sanction that entails a substantial loss of liberty. This sentence would promote respect for the law and provide a just punishment for Mr. Gaines. 18 U.S.C. § 3553(a)(2)(A). As the Supreme Court explained:

We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. *See United States v. Knights*, 534 U.S. 112, 119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (“Inherent in the very nature of probation is that probationers ‘do not enjoy the absolute liberty to which every citizen is entitled’” (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); internal quotation marks omitted)). Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. USSG § 5B1.3. Most probationers are also subject to individual “special conditions” imposed by the court.

Gall v. United States, 552 U.S. 38, 48, 128 S. Ct. 586, 595-96 (2007).

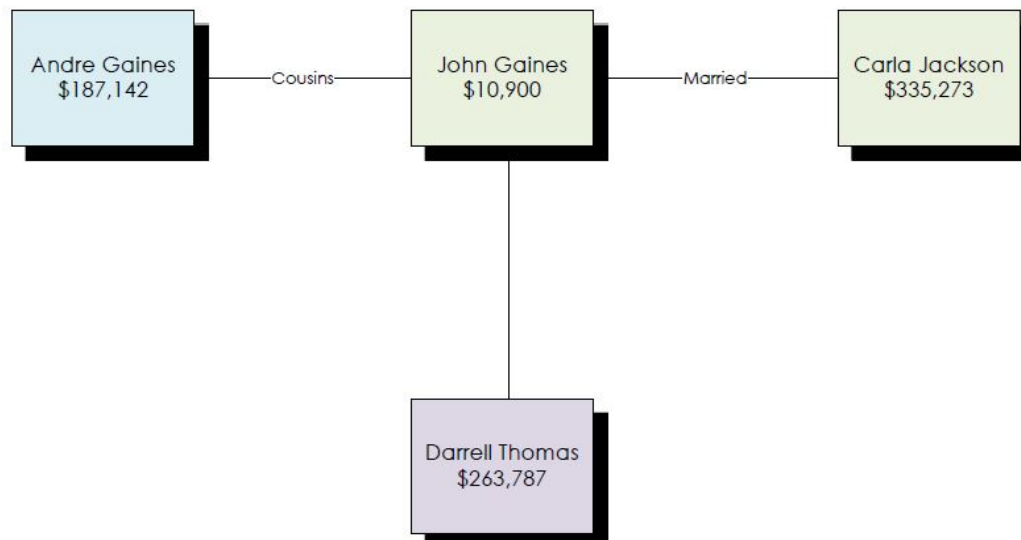
A sentence is only just and only promotes respect for the law when it is proportionate. A sentence that is too severe for the offense or the individual involved undercuts these goals and promotes public distrust for the system. The public respects the criminal law only when the punishment fits the crime. A sentence that is too high or too low promotes distrust and disrespect for the law.

This Court has described §3553(a)(2)(A) as encompassing the concept of “just deserts” and indicated that this means that the sentence should “reflect the

gravity of the defendant's conduct," but at the same time "should not be unreasonably harsh under the circumstances of the case." *United States v. Pugh*, 515 F.3d 1179, 1195 (11th Cir. 2008) quoting *S.Rep. No. 98-225*, at 75-76, 1984 U.S.C.C.A.N. 3182, 3258-59. Here, probation is a just punishment. Imprisonment is not.

3. The burden of restitution

Mr. Gaines did not spend any of the money that came from the PPP loan. The money was all deposited into his business account and most of it was pulled out by John Gaines and Darrell Thomas. The money that remained in Mr. Gaines's business account was seized by the Government at the time of his arrest. The chart shows where all of the money from the PPP loan ended up.



Despite spending none of the money, Mr. Gaines has agreed to \$806,000 in restitution – the entire amount of the loan. What this means is that for the rest of his life, Mr. Gaines will be hounded by the Government to pay back an amount of money that went through his account, but that he never actually spent or used. This burdensome financial penalty is one more punishment that Mr. Gaines will have to suffer and one more reason that sending him to prison is unnecessary.

III. CONCLUSION

WHEREFORE, for all of the reasons set forth herein, Mr. Gaines respectfully requests that the court impose a sentence of probation.

Dated: This 29th day of September, 2021.

Respectfully Submitted,

/s/ Brian Mendelsohn

Brian Mendelsohn

Georgia Bar No. 502031

Attorney for Andre Lee Gaines

Federal Defender Program, Inc.

Centennial Tower, Suite 1500

101 Marietta Street, N.W.

Atlanta, Georgia 30303

(404) 688-7530; Fax: (404) 688-0768

Brian_Mendelsohn@fd.org