UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-20231-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARLOS VAZQUEZ,

Defendant.

_________________________________/

**POSITION OF DEFENDANT WITH RESPECT TO SENTENCING FACTORS, REQUEST FOR VARIANCE AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW, undersigned Counsel for Defendant CARLOS VAZQUEZ and files this, his Position of Defendant with Respect to Sentencing Factors, Request for Sentencing Variance and Incorporated Memorandum of Law and would furthermore state as follows:

Firstly, Mr. Vazquez readily admits and takes complete responsibility for his actions herein, which were primarily orchestrated by unindicted co-conspirator Armando Del Portillo. He was approached by Mr. Del Portillo on an internet site and was offered an opportunity through him to apply for a Government loan. At the time he provided his pertinent information to Mr. Del Portillo necessary to apply for a loan, Mr. Vazquez was unaware that the loan being sought was a loan being offered for businesses suffering from the economic effects of the COVID-19 pandemic. It was on or about June 30, 2020, when Del Portillo submitted an application on behalf of Defendant Vazquez's business Big League, which contained materially false statements, wherein Vazquez then realized that something was amiss. Mr. Vazquez has slowly learned the concept of willful blindness or deliberate ignorance since being represented by the undersigned. The Court is more than aware of the procedural background of this case wherein Mr. Vazquez did not satisfy the change of plea colloquy's on 2 occasions. It was Mr. Del Portillo who devised the scheme and who has not been brought to justice. It must be noted that Mr. Vazquez has offered his assistance, however, the Government has declined to even speak to Mr. Vazquez about Mr. Del Portillo's activities. It was Del Portillo who reinstated the Defendant's company Big League, by paying for the reinstatement with his own credit card. And it was Del Portillo who received and negotiated a check in the amount of $170,900.00. Finally and what is most unusual for this type of offense, Defendant Vazquez purchased a cashier's check in the amount of $175,957.40, with the unlawfully derived proceeds, made payable to the IRS, which he voluntarily surrendered to the United States during the pendency of these proceedings! Upon being arrested (he voluntarily surrendered) Mr. Vazquez admitted to his involvement in this scheme.

The Defendant objects to paragraphs 19, 20 and 27 wherein he is assessed a 2 level enhancement for obstruction of justice. It is alleged that during his interview for the PSI Mr. Vazquez advised he was born in Chicago. Mr. Vazquez contends that he told Ms. Johnson, the Probation Officer, that he was raised in Chicago, as he was born in Cuba. Mr. Vazquez maintains that he is a naturalized U.S. citizen through his parents. The Defendant's father purportedly is in possession of the documents requested by probation. Unfortunately Mr. Vazquez is currently not on speaking terms with his father and his mother is deceased. As of this filing, the undersigned has attempted to make contact with the father, however, has been unsuccessful thus far.

It is respectfully submitted that this enhancement does not apply in this situation. It is submitted by the Probation Officer that Vazquez willfully obstructed or impeded the administration of justice with respect to the sentencing in this case, however, Section 3C1.1 specifically requires that the obstructive conduct relate to the Defendant's offense of conviction and any relevant conduct. In addition, the Commentary at Application Note 2 suggests that the

Court should be cognizant that inaccurate statements by the defendant may result from confusion, mistake or faulty memory and thus not all inaccuracies reflect a willful attempt to obstruct justice. In addition, the information purportedly provided to Ms. Johnson must be materially false. Material evidence as defined at Section 3C1.1 Commentary 6, defines material evidence as fact, statement or information that, if believed, would tend to influence or affect the issue under determination. Consequently, even assuming Mr. Vazquez stated he was born in Chicago, that assertion clearly cannot be described as one that would tend to influence or affect the issue under determination. This enhancement should not be applied.

Mr. Vazquez has provided an acceptance statement which should be included in the Addendum to the PSI. In essence, Mr. Vazquez is truly sorry for his actions in this case. He got involved with someone who advised he could get him a loan for his business. He initially did not realize that it was a loan designed for businesses impacted by the COVID-19 pandemic. He later realized, but deliberately ignored the fact that his defunct business wasn't entitled to this loan, however, deliberately ignored this reality. He later during the course of these proceedings as indicated below, voluntarily returned a cashier's check made payable to the IRS to the Government, further evidencing his acceptance of responsibility. Finally, it should be noted that Mr. Vazquez surrendered to authorities at their request.

Finally, the Defendant objects to the sophisticated means enhancement as reflected at paragraph 24. Amendment 792 to the U.S. Sentencing Guidelines narrowed the focus of the specific offense characteristic at §2B1.1(b)(10)(C) to cases in which the defendant intentionally engaged in or caused conduct constituting sophisticated means. U.S.S.G. Supp. App. C., Amend. 792. Prior to the amendment, the enhancement applied if "the offense otherwise involved sophisticated means." Based on this language, courts had applied this enhancement on the basis of the sophistication of the overall scheme without a determination of whether the defendant's own conduct was "sophisticated." See, e.g., United States v. Green, 648 F.3d 569, 576 (7th Cir. 2011); United States v. Bishop-Oyedepo, 480 Fed. App'x 431, 433–34 (7th Cir. 2012); United States v. Jenkins-Watt, 574 F.3d 950, 965 (8th Cir. 2009). The Commission concluded that basing the enhancement on the defendant's own intentional conduct better reflects the defendant's culpability and will appropriately minimize application of this enhancement to less culpable offenders.

Consequently, the Defendant submits that his total offense level at paragraph 31 should reflect an offense level of 18 at paragraph 99 offense level 18, criminal history I, with an advisory range of 27-33 months.

## DISCUSSION OF THE 3553 FACTORS AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Title 18, United States Code, Section 3553(a), the Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purpose set forth in subparagraph (a)(2). As the Court is well aware, due to the mandatory aspect of subsection (b)(1) being held unconstitutional by *United States v. Booker*, 543 US. 220, (2005), Title 18, United States Code, section 3553 is purely advisory for the Court. This allows the Court to use its discretion to deviate from the guidelines if 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.

To determine a reasonable sentence, the District Court must consider several factors in addition to the Advisory Federal Sentencing Guidelines enumerated in Title 18, United States Code, and Section 3553. These factors are as follows:

> (1) the nature and circumstances of the offense and the history and the characteristics of the defendant; (2) the need for the sentence imposed - (A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of the defendant as set forth in the Guidelines issued by the Sentencing Commission that are in effect on the date Defendant is sentenced; (5) any pertinent policy statements issued by the Sentencing Commission (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

Fortunately, the Section 3553(a) factors and the advisory nature of the Guidelines has given this Honorable Court discretion in which to fashion a sentence that is sufficient but not greater than necessary to comply with the purpose set forth in the section 3553(a) factors.

As reflected above, the Court needs to impose a sentence that is sufficient, but not greater than necessary to comply with the purposes set forth in paragraph 2 of this subsection. The Court, in determining the particular sentence to be imposed, shall consider, among other things, the nature and circumstances of the offense and the history and characteristics of the Defendant and the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.

## <u>HISTORY AND CHARACTERISTICS OF CARLOS VAZQUEZ</u>

Mr. Vazquez was physical abused by his alcoholic father during his childhood. His mother, with whom he was very close, passed away in 2015. This had a devastating impact on Mr. Vazquez's mental state as he then went into a serious depression. In July of 2020 he was hospitalized (Baker Acted). He has been attending bi- weekly psycho-therapy sessions as a condition of his release. He hasn't missed a session. He also has been prescribed medication for anxiety.

Mr. Vazquez is morbidly obese (467 pounds) and generally not in good health. He could benefit from substance abuse treatment.

It is respectfully submitted that the Court should consider a variance when determining an appropriate sentence and also recommend to the Bureau of Prisons (if incarcerated) that he be designated to a medical facility to care to his medical concerns. The undersigned anticipates supplementing this Position submission and provide the Court with further grounds to consider a variance.

Respectfully submitted,
By: *<u>/s/ Albert Z. Levin, Esq.</u>*

**<u>CERTIFICATE OF SERVICE</u>**

I hereby certify that on October 28, 2021, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

By: *<u>/s/ Albert Z. Levin, Esq.</u>*

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