UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-CR-20231-MIDDLEBROOKS

UNITED STATES OF AMERICA

vs

CARLOS VAZQUEZ,

Defendant.
______________________________________/

UNITED STATES OF AMERICA'S RESPONSE TO POSITION OF DEFENDANT WITH RESPECT TO SENTENCING FACTORS, REQUEST FOR VARIANCE AND INCORPORATED MEMORANDUM OF LAW

The United States of America files this response to Defendant's objection to the PSI, styled, "Position of Defendant with Respect to Sentencing Factors, Request for Variance and Incorporated Memorandum of Law," DE 49 ("Defendant's Motion").

A. Defendant has not Accepted Responsibility

"A defendant who maintains innocence, ***blames others,*** and expresses regret only for the consequences of criminal conduct does not accept responsibility within the meaning of § 3E1.1." *United States v. Fowler*, 213 Fed. Appx. 788, 790 (11th Cir. 2007) (citing *United States v. Speck,* 992 F.2d 860, 863 (8th Cir.1993)) (emphasis added). The comments to the Guidelines make clear that a defendant's acceptance of responsibility "may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right." U.S.S.G. § 3E1.1(a) cmt. n. 3 (2001). Defendant's Motion blames an unindicted co-conspirator for perpetuating the fraud at issue in this case and suggests that Defendant suffered from "willful blindness or deliberate ignorance." Putting aside the obstruction of justice, Defendant's Motion makes clear that he has not accepted responsibility – by blaming others, and minimizing his responsibility when he received the proceeds of the fraud into an account he opened for that purpose. Moreover, Defendant did not provide U.S. Probation with a timely statement of responsibility or comply with U.S. Probation's requests for information. PSI ¶ 21. Instead, Defendant recorded a backdated deed in the public records and misstates his immigration status to avoid the consequences of his conduct. Accordingly, defendant has not accepted responsibility.

B. Defendant has obstructed justice by repeatedly lying about his Citizenship.

Defendant is not a United States Citizen. He has repeatedly lied about his immigration status throughout these proceedings.

According to his initial pretrial services report, Defendant advised U.S. Probation that he was born January 18, 1964 in Havana, Cuba, but is a naturalized United States Citizen. However, as reflected in the report, probation discovered that Defendant has an outstanding warrant of removal pending with immigration, and a final order of removal was entered. This was specifically addressed by Magistrate Goodman when fashioning the terms of Defendant's bond. *Hrg. Tr.* 9:11-12:4 Mar. 29, 2021.

At the change of plea hearing on September 13, 2021, Defendant stated that he was born in Cuba but has "been an American citizen since 1976." DE54:13. The United States had to request that the Magistrate complete the full plea colloquy regarding removal from the country. DE 54:15-17. During his pre-trial services interview, Defendant claimed to be born in Chicago PSI ¶ 19.

Following the change of plea, the undersigned confirmed with Immigration and Customs Enforcement that Defendant is NOT a United States Citizen. Defendant's immigration file which will be at Vazquez's sentencing contains the following:

- A copy of Defendant's Cuban birth certificate, which contains the same date (Jan. 18, 1964) and place of birth (Havana) as he initially told U.S. Probation,
- A copy of Defendant's Memorandum of Creation of Record of Lawful Permanent Residence,
- A Memorandum of Oral Decision finding that Defendant is subject to removal, and ineligible for relief which was personally served on Defendant on November 6, 1997,
- An Immigration and Naturalization Service order of supervision referencing the order excluding or deporting Defendant and requiring that Defendant periodically report to the Immigration and Naturalization Service, which was acknowledged and signed by Defendant on April 16, 1999,
- An INS order of supervision referencing the order excluding or deporting Defendant and requiring that Defendant periodically report to the Immigration and Naturalization Service, which was acknowledged and signed by Defendant on April 4, 2000.

The immigration file also contains the Board of Immigration Appeals written decision determining that "there is no question [Defendant] has been convicted of aggravated felonies. An alien lawfully admitted for permanent residence who is convicted of an aggravated felony is not eligible for cancellation of removal or a waiver of admissibility." The Board of Immigration Appeals specifically considered Defendant's argument that he derived U.S. Citizenship from his father, and rejected his claim based on Defendant's failure to demonstrate that his father had legal custody of him.

A number of federal appeals courts have determined that making false misrepresentations regarding citizenship justify an enhancement for obstruction of justice. *See United States v. Perez-Crisostomo*, 899 F.3d 73, 76 (1st Cir. 2018) ("This court has also repeatedly affirmed that lying about one's name and nationality during criminal proceedings is material and merits an obstruction enhancement."). The Sixth Circuit Court of appeals has affirmed an enhancement for obstruction of justice in a similar case. *See United States v. Bruce*, 396 F.3d 697, 712 (6th Cir. 2005), *vacated in part on reh'g,* 405 F.3d 1034 (6th Cir. 2005). As explained by the Sixth Circuit:

> Defendant stated during a presentence investigation interview that he was a citizen of Bermuda until he became a naturalized United States citizen in 1991. He then recanted this claim, however, when the probation officer confronted him with a 1993 document in which he acknowledged that he was an alien who was being released from the custody of the Immigration and Naturalization Service ("INS") until he could be deported. Upon being shown this document, Defendant changed his story and claimed to be a citizen of Bermuda.

In *Bruce,* the Defendant quickly recanted his false claim of citizenship during a pre-trial services interview. Here however, Defendant has repeatedly claimed to multiple probation officers and magistrates, and this Court that he is a naturalized United States Citizen. He still apparently maintains he is a United States citizen.

Defendant argues that his claims to Untied States Citizenship to U.S. Probation are not material. However, as explained by the Sixth Circuit "information is 'material' where, 'if believed, it would tend to influence or affect the issue under determination.'" *Id*. (emphasis original, internal quotations removed) (citing U.S.S.G. § 3C1.1, cmt. n.6). "It follows, therefore, that the guideline is applicable even though a probation officer might not have believed the defendant's false assertion or, as here, was able to quickly disprove it." *Id.* Here, Defendant's conduct went far beyond simple misstatements to U.S. Probation. Defendant provided the false information in connection with his bond application. He also misstated his citizenship to Magistrate McAliley in connection with his change of plea, causing her to initially forego advising Defendant of the immigration consequences of his plea. Accordingly, Defendants false statements regarding his immigration status justify an enhancement for obstruction of justice.

C. The sophisticated means enhancement is appropriate.

As the commentary to the sentencing guidelines states, "Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." *United States v. Jenkins,* 497 Fed. Appx. 931, 932 (11th Cir. 2012). Here the entire fraud relied up on a corporate shell, namely Big League L.L.C. Big League had been defunct for years, but Defendant reinstated it in order to have a conduit to commit the PPP fraud at issue here. Additionally, fake tax documents were prepared on behalf of Big League L.L.C. and submitted in support of the fraudulent loan application, Defendant opened a new bank account to facilitate the fraud. Accordingly, the sophisticated means enhancement is appropriate.

Conclusion

For the foregoing reasons, Defendant's objections to the PSI should be overruled. !

Respectfully submitted,

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