

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No.:22-60028-CR

UNITED STATES OF AMERICA,

Plaintiff

vs.

LUKE JOSELIN,

Defendant.

_____ /

LUKE JOSELIN’S SENTENCING MEMORANDUM

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I AUTHORITY AND PURPOSE

The Defendant, by and through undersigned counsel and pursuant to ***Rule 32(i)(4)(A)(i)*** of the ***Federal Rules of Criminal Procedure***, hereby submits the following Sentencing Memorandum, designed to assist the Court in arriving at an equitable disposition of the instant matter. The Defendant's objective is threefold:

1. Establish an accurate Guideline calculation.
2. Supplement the PSI's information about Mr. Joselin; and,
3. Justify a Departure and/or Variance.

II GUIDELINES

A. Disputed information:

The Defendant has objections with the Presentence Investigation Report offense level and does dispute some of its information. Specifically, the Defense objects to paragraphs 19, 20, 22, 27, 28, 29, 30, 31, 32, 33, 39, 43, 46, 50, 84, 89, and 95 of the Presentencing Investigation Report. [D.E. 88]

B. Adjustments:

The Probation Officer did not find any information to adjust the offense level for acceptance of responsibility or obstruction of justice.

C. Role Assessment:

An adjustment for the Defendant's role in the offense was applied in the presentence investigation report. Because the Defendant was an organizer, leader, manager, or supervisor in any criminal activity, his offense level is increased by two (2) levels. The Defense is objecting to paragraphs 19, 20, 22, 27, 28, 29, 30, 31, 32, 33, 39, 43, 46, 50, 84, 89, and 95 of the Presentencing Investigation Report. [D.E. 88] (*Id.*)

D. Victim Impact:

The government has verified the victim in this case is the Small Business Administration (SBA). As such, a victim affidavit and notice were submitted to the SBA by the probation office.

Further, victims J.A.G.C. and T.D. are identified as having their personal identifying information stolen and/or used in furtherance of the offense. However, according to the government, victims J.A.G.C. and T.D. did not suffer any actual loss, thus they are not owed restitution.

E. Acceptance of Responsibility:

Mr. Joselin provided a signed acceptance of responsibility statement. However, pursuant to § 3E1.1, comment. (n.2), an adjustment for acceptance of responsibility is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt. The Probation Officer noted that the defendant was found guilty of the instant offense, following a jury trial.

F. Specific Offense Characteristics:

The defendant is responsible for a loss of \$3,600,000. Because the loss was more than \$3,500,000 but less than \$9,500,000, his offense level was increased by eighteen (18) levels, § 2B1.1(b)(1)(J) Because the offense involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, the offense level is increased by two (2) levels, § 2B1.1(b)(10)(C).

The Defendant respectfully requests that the Court sustain his objection with respect to his specific offender characteristics. [Id. at ¶ 43 and 44]

G. Downward Departure Considerations:

Application Note 21(C) of the Guidelines acknowledges that there may be cases where the Offense Level determined under §381.1 of the Guidelines "... overstates the seriousness of the offense." A salient securities fraud example is used by the Commission to illustrate its point where the harm inflicted is relatively small, but the group of victims is relatively large. While it is the Defendant's burden to establish entitlement to a downward departure, *United States v. Cruz*, 946 F.2d 122, 126 (11th Cir. 1991), as expressed in Defendant's objections to the probation officer, and in this Memorandum, the essence of Defendant's crime makes this consideration appropriate. *United States v. Rodriguez*, 64 F.3d 638 (11th Cir. 1995).

The probation officer has not identified any factors that may warrant a departure and/or variance. On the other hand, the Defense respectfully requests that the Court grant his request for departure and/or variance based upon his criminal history and medical condition.

H. Applicability:

As pivotal as the Guidelines were - and important as they remain - as a result of the *Booker*, *Gal*, and *Rita* decisions, the Sentencing Guidelines are now but one among several equally important factors that the Court must consider in fashioning a sentence that, as stated in the introductory Comments to Chapter Five of the Sentencing Guidelines ("Determining the Sentence"), is "**...sufficient but not greater than necessary...**" to achieve the objectives

designated in **18 USC §3553** (emphasis added). "A district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence." *United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006). The "justification for [a] variance must be 'sufficiently compelling to support the degree of the variance.'" *United States v. Bel/*, 537 Fed. Appx. 883 (11th Cir. 2013) and "[t]he weight to be accorded any given §3553(a) factor is a matter committed to the sound discretion of the district court." *United States v. Clay*, 483 F.3d

In the instant case, the United States Probation Office concluded that Mr. Joselin's Total Offense Level is **29** (with a Criminal History Category of **I**), thereby making his Guideline Imprisonment Range **87 - 108** months.

The Defense again is objecting to the guideline calculation provided by the Office of Probation. The Defense is requesting that the Court find that his Total Offense level is 17 (with a Criminal History Category of I), thereby making his Guideline Imprisonment Range 24-30 months. Per 18 U.S.C § 1028A(a)(1) and (b)(2) as to Count Twelve of the indictment, the Court is required to impose the respective count consecutive to the underlying count.

I. Sentencing Factors

Along with the Guidelines, the Court must now consider the factors set out in **18 USC §1349, 18 U.S.C. § 1343, and 18 U.S.C. § 1028A(a)(1)** specifically.

J. Nature and Circumstances of the Offense:

To be clear, at 36 years of age, Mr. Joselin stands convicted of wrongdoing and he does not seek to deny or minimize it. He has accepted it was wrong for his role. However, his circumstances are dire. Mr. Joselin suffers from blindness as well as asthma.

K. History and Characteristics of Mr. Joselin:

The Defendant is a young man and a lifelong resident of South Florida who was raised in a “low-income” home. The Defendant completed his education until the 11th grade. Mr. Joselin is completely blind in his right eye and approximately 60% blind in his left eye. Mr. Joselin also suffers from asthma and has trouble breathing. Mr. Joselin does not suffer from mental health issues or substance abuse.

L. Seriousness/Respect/Punishment

There is nothing about a federal prosecution that does not very pointedly drive home to the community at large and, particularly, this Defendant, the seriousness of the offense. Indictment, expense, anxiety, and incarceration demand the public's attention.

But, as the United States Supreme Court recognized in *Gal*, supra. "a sentence of imprisonment may work to promote not respect, but derision, of the law, if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing. *Gal*, 552 U.S.

The Defendant has been under continuous custody since the date of his arrest. The Defendant wishes to return to his daily activities which include taking care of his wife and

working to provide for his family.

M. Adequate Deterrence:

In general, the process of federal prosecution affords prospective wrongdoers plenty of justification for abstaining from criminal behavior. Unlike its state counterpart, the federal conviction rate is substantially higher; unless found not guilty, there is no exception to felony conviction, incarceration is generally longer, and expense greater.

Courts have noted that the deterrence factor "unquestionably envisions more severe sentences for defendants considered more likely to commit further crimes and less severe sentences for those unlikely to commit [additional] crimes." *United States v. Rodriguez*, 724 F. Supp. 1118, 1120 (S.D.N.Y. 1989).

At 36, with no prior criminal history (Category I), the likelihood of recidivism by Mr. Joselin is de minimis. "Lack of criminal history, even though already taken into account in calculating his advisory guideline range, could nevertheless form the basis for a variance." *United States v. Chase*, 560 F.3d 828,831 (8th Cir. 2009). *See also, United States v. Howe*, 543 F.3d 128, 137 (3rd Cir. 2008) (affirming district court's variance based upon, among other things, fact that defendant "led an honorable and lawful life until this point and had no prior criminal history."); *United States v. Cabrera*, 567 F. Supp. 2d 271, 279 (D. Mass. 2008) (granting variance because defendants "with zero criminal history points are less likely to recidivate than all other offenders").

N. Public Protection:

The public is not in need of protection from Luke Joselin.

O. Training/Treatment:

Mr. Joselin needs treatment for his ongoing medical and vision needs.

P. Sentences Available:

As to each of Counts One through Ten, the maximum term of imprisonment is 20 years, 18 U.S.C. §§ 1349 and 1343. As to Count 12, the mandatory term of imprisonment is two years, which shall run consecutively to any other term of imprisonment, 18 U.S.C. § 1028A(a)(1). Accordingly, the Court is free to impose any sentence within the statutory range; from incarceration to whatever the Guidelines' Imprisonment Range is subsequently determined to be.

Q. Sentencing Disparity:

The Defendant's co-conspirator's have been sentenced as follows:

On January 19, 2021, Jean Louis plead guilty to Counts One and Two of the information which charged him with bank fraud, in violation of 18 U.S.C. §1344, and aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1). On June 29, 2021, he was sentenced to 51 months imprisonment (27 months as to count one and 24 months as to count two), followed by three years of supervised release, \$200.00 special assessment, and \$109,411 restitution. On August 30, 2022, Judge Singhal granted a sentence reduction under Rule 35

to 27 months imprisonment (3 months as to count one and 24 months as to count two, to run consecutive to count one). [D.E. 84] [Id. at ¶ 4]

On January 20, 2022, Renaldo Harrison plead guilty to Counts One and Two of the information. Count One charged him with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and Count Two charged him with wire fraud in violation of 18 U.S.C. § 1343. On September 2, 2022, Judge Scola granted the government's 5K1.1 motion requesting a downward departure of 33% from the guidelines and granted a downward variance under 18 U.S.C. § 3553(a). Harrison was sentenced to two years' probation as to each of Counts One and Two, to be served concurrently, with special condition of 30 days of intermittent confinement. [D.E. 84] [Id. at ¶ 5]

With a Total Offense Level of 29 (Criminal History Category 1), as originally calculated by the probation officer, the average sentence, absent any departure and/or variance, is 87 months to 108 months.

Should the Court sustain Defendant's objections, Joselin has a total offense level of twenty-nine (29), with a specific offense characteristic level of 18 points, and sophisticated means enhancement of two additional levels. The Defense is objecting to the Adjustment Role enhancement of two (2) levels and is respectfully requesting that this court sustain his objection. Thereby, the Defendant is requesting that his total offense level be seventeen (17) and criminal history of I, therefore the guideline imprisonment range is 24-30 months in the Bureau of Prison's custody. Per 18 U.S.C § 1028A(a)(1) and (b)(2) as to Count

Twelve of the indictment, the Court is required to impose the respective count consecutive to the underlying count. It is the Defendant's position that the applicable guideline range is in Zone C of the sentencing table, thereby making the Defendant ineligible for probation.

III LUKE JOSELIN'S UNCHARGED CONDUCT SHOULD NOT BE CONSIDERED FOR PURPOSES OF SENTENCING

A. Uncharged Conduct

Joselin specifically objects to the offense conduct section of the Presentencing Investigation Report based on uncharged conduct. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was the first in a series of landmark sentencing cases that forever changed the sentencing landscape. *Apprendi* held that a defendant's right to "due process of law," must include "a jury determination that [he] is guilty of every element of the crime which he is charged, beyond a reasonable doubt." *Id.* at 477 (quoting *United States v. Gaudin*, 515 U.S. 275, 278 (1993)). As the *Apprendi* opinion explained, the defendant's right to a jury trial "has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . .'" *Id.* at 477 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)).

Four terms after *Apprendi*, *Blakely v. Washington*, 542 U.S. 296 (2004) held that the Fifth Amendment due process interests of Defendants like Joselin are implicated by a sentencing fact not proven by that high standard. *Id.* at 305; See, e.g, Alan De Bois and

Anne E. Blanchard, Sentencing Due Process: How Courts Can Use Their Discretion to Make Sentencings More Accurate and Trustworthy, 18 Fed. Sent's Re. 84 (2005).

Blakely's majority criticized the approach taken in this PSR, in which "a judge could sentence a man for committing robbery even after the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene." 542 U.S. at 306. The same reasoning applies to increasing a person's offense level for being committing crimes in connection with uncharged felony offenses. It includes all of the conduct of Joselin, which is innocent conduct because the Government failed to indict Joselin on the conduct.

As we all know, United States v. Booker, 543 U.S. 200 (2005), rendered the Guidelines advisory to avoid the Sixth Amendment jury trial considerations set out in Blakely.

In Rita v. United States, which followed Booker and Blakely, the majority opinion asserted that the facts supporting the ultimate sentencing decision should be subject to "thorough adversarial testing . . ." 551 U.S. at 338, 351 (2007). In addition, Justices Scalia and Thomas, dissenting in Rita, emphasized that "all facts needed to authorize a sentence must be found by the jury beyond a reasonable doubt in order to 'give intelligible content to the right of jury trial.'" Id. at 573 (quoting Blakely, 542 U.S. at 305).

Mr. Joselin raises a constitutional claim framed by Justice Scalia:

. . . as I noted in Rita, the Court has not foreclosed as-applied constitutional

challenges to sentences. The door therefore remains open for a Defendant to demonstrate that this sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury.

Gall v. United States, 552 U.S. 38, 60 (2007) (J. Scalia, concurring). This is what the PSR seems to suggest: sentencing on facts on charges that were not included on an indictment but accepted by a probation officer, or the United States. This Court often reflects, as it should, on the public perception of what is just. From the public's perspective, most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were not indicted.

To the public, Mr. Joselin's was never placed on notice of the evidence that the Government intended to use for purposes of sentencing until after he was convicted.

In the Florida state courts, the notion that Mr. Joselin would be punished for uncharged conduct is unthinkable. Every Floridian would agree on at least this much: uncharged conduct is not considered proof of anything, let alone another crime. He should not be so sentenced here, either.

In summary, Luke Joselin is requesting that the Court consider only the facts and evidence that support the indictment, to which he was convicted. Further, Joselin is requesting that the Court disregard the uncharged conduct in its sentencing decision and fashion an appropriate sentence based on the verdict of the Jury.

IV RECOMMENDED DISPOSITION

Considering the factors enumerated in 18 USC §3553 and, as provided in §5C1.1 of the Guidelines, entitled: Imposition of a Term of Imprisonment, the Defense respectfully suggests that the Court accept the Defendant's recommendation of the least amount of incarceration, supervised release, and restitution, would be " ...sufficient but not greater than necessary ..." to achieve the objectives designated in 18 USC §3553 (emphasis added).

V CONCLUSION

Not the facts, the law, the Guidelines, nor the character of the Defendant require an excessive amount of incarceration for vindication of the criminal justice system. To the extent Mr. Joselin must be punished for his transgression, given the impact of his offense, his vision, and no prior criminal history, he has suffered enough. The least amount of incarceration, supervised release, and restitution, would not only solidify for Mr. Joselin the wrongfulness of his conduct but it would spare his family, especially his wife, the financial and emotional burden of being without her husband. Finally, such a disposition would not only allow Mr. Joselin to work and remain productive in an effort to support and provide for his family but it would allow Mr. Joselin - a proud and decent man - to conclude that the Government and the Court treated him fairly, all things considered.

VI POST-SENTENCING REQUESTS

1. **Appeal Bond**

Pursuant to 18 USC §3143(b)(1), should the Court impose a term of incarceration, Defendant requests he be allowed to remain at liberty pending an appeal. The appeal is not for purpose of delay and raises a substantial question of law likely to result in reversal, there are several legitimate issues that would meet this requirement.

2. **Voluntary Surrender**

In the event incarceration is imposed and the Court refuses to set an appeal bond, given how Mr. Joselin has conducted himself from the time of his arrest through and including trial and sentencing, the Defense requests he be allowed to voluntarily surrender to the designated institution.

When appropriate, voluntary surrender benefits both the Government as well as the Defendant; the former avoids the cost of housing and transportation to the designated facility, while the latter avoids the stress such transfer generally involves.

3. **Facility Recommendation**

Recognizing it is not binding upon the Federal Bureau of Prisons, in the event incarceration is imposed, Defendant requests the Court recommend FCI Miami, Satellite camp. The facility is close to the Defendant's home, would minimize the hardship of visitation upon the Defendant's family, and is a level one facility that, given the Defendant's exposure, he would qualify for.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was electronically filed, by CM/ECF, this 31st day of October 2022.

By: /s/ Dameka L. Davis, Esq.

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