

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-CR-80144-RS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOFF STENN WROY PHILOSSAINT,

Defendant.

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DEFENDANT PHILOSSAINT'S SENTENCING MEMORANDUM AND
MOTION FOR VARIANCE

Defendant, JOFF STEN WROY PHILOSSAINT, through counsel, files this Motion for a Sentence Variance and sets forth other sentencing factors, pursuant to 18 U.S.C. § 3553(a) as follows:

Pursuant to Title 18, United States Code, § 3533(a), the court shall impose a sentence sufficient, but not greater than necessary, to comply with the purpose set forth in § 3553(a)(2).

I. The Economic Crime Guideline, Section 2B1.1¹ Recommends a Disproportionate and Draconian Sentence for Joff Philossaint, a Non-Violent, First-Time Offender

The economic crime guideline is driven primarily by Section 2B1.1's current loss table, which has an outsized role in determining the length of Joff's sentence. The sentencing calculation for federal economic crimes includes an enhancement under Section 2B1.1's economic loss table based upon a very broad vision of loss. The calculations in this loss table are extraordinarily important because the magnitude of the enhancement will drive the severity of the sentence in Joff's case.

The Sentencing Commission has substantially increased penalties for economic crimes to often extreme levels.² With respect to fraud type crimes, the Sentencing Commission has deviated from its standard practice of anchoring recommended sentencing ranges in empirical data.³ Additionally, the series of sentencing guideline amendments has resulted in a loss table today that recommends sentences for economic crimes that are orders of magnitude greater than the same

¹ Although Defendant's sentence is determined pursuant to USSG § 2S1.1, that guideline refers to the underlying fraud guideline, USSG § 2B1.1.

² Mark W. Bennett et al., *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 950 n.48 (2017)

³ James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT'G REP. 138, 138 (2010); U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT'G COMM'N 2009) (recognizing that while the Commission generally anchored its Guidelines in empirical data, it departed from the empirical data in crafting guidelines for economic crimes).

sentence for the same crime back in the mid-1980s.⁴ For example, as Judge Rakoff explains, while a typical fraud in 1987 would have produced a guideline range of 30–37 months, by 2003, that same case would result in a recommended sentence of 151–188 months, an increase of more than 500 percent.⁵ Because of the Commission’s “preoccupation and reliance with ‘quantifiable offense characteristics’ the guidelines short shrift both mitigating and aggravating factors relative to culpability and harm.”⁶ The current loss table is likewise a poor indicator for relative culpability in Joff’s case. The loss calculation fails to account for the extent to which Joff personally profited from the offense.

The Government suggests Joff is responsible for the total reasonably foreseeable loss attributable to all co-conspirators/co-defendants, regardless of how much each conspirator personally profited from that amount. The Government urges the Court to sentence Joff to over 10 years’ imprisonment, a draconian sentence. (DE: 304). Accordingly, the current loss table, which is often the determining factor in an economic crime offender’s sentence, has an outsized role in influencing such sentences.

⁴ See Bennett et al., *supra* at 951-53; Felman *supra* at 138.

⁵ *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012), *aff’d*, 747 F.3d 111 (2d Cir. 2014).

⁶ Bennett et al., *supra* at 957.

Section 2B1.1 is routinely not followed. The U.S. Sentencing Commission Interactive Data Analyzer shows that judges are more likely to vary below the Guideline range in Section 2B1.1 cases compared to the average federal criminal case. For example, Federal judges, on average, tend to grant non-government sponsored downward variances to first time (Category I) offenders in approximately 24 percent of all cases. In contrast, in sentencing first-time (Category I) offenders under Section 2B1.1, federal judges, on average, grant non-government sponsored downward variances in approximately 31 percent of cases.⁷

Indeed, sentencing courts depart or vary below the Guidelines in the majority of cases to which Section 2B1.1's loss enhancement applies. In 2022, utilizing the Interactive Data Analyzer, more than 60 percent of sentences issued to Category I fraud offenders were below the Guideline Range. Moreover, during the 2018-2022 fiscal years, out of 51 defendants whose primary guideline was USSG § 2B1.1, with a Final Offense Level of 35, a Criminal History Category of I, a guideline range of 168 to 210 months,⁸ and excluding anyone who received a reduction for substantial assistance pursuant to USSG § 5K1.1, the median length of imprisonment imposed

⁷ Interactive Data Analyzer, U.S. SENT'G COMM'N, <https://ida.ussc.gov>. This data is from 2015 through 2022.

⁸ Defendant disputes the offense level of 35 and resulting guideline range that probation calculated in Defendant's Presentence Investigation Report. (DE: 281).

was 96 months. *See* U.S. Sentencing Commission’s Judiciary Sentencing Information (“JSIN”).

Courts have resisted a rigid application of the sentencing guidelines, including application of the “amount of loss” enhancement. One district court for example, stated:

What drove the Government’s calculation in this case, more than any other single factor, was the inordinate emphasis that the Sentencing Guidelines place in fraud cases on the amount of actual or intended financial loss. As many have noted, the Sentencing Guidelines, because of their arithmetic approach and also in an effort to appear “objective,” tend to place great weight on putatively measurable quantities, such as weight of drugs in narcotic cases or the amount of financial loss in fraud cases, without, however, explaining why it is appropriate to accord such huge weight to such factors.

United States v. Adelson, 441 F. Supp. 2d 506, 509 (S.D.N.Y 2006), *aff’d* 301 F. App’x 93 (2d Cir. 2008).

The loss enhancement under USSG § 2B1.1 results in a draconian sentence for Joff Philossaint, a non-violent, first-time offender.

II. Request for Variance

History and Characteristics of the Defendant

The evidence in this case reveals a man who has engaged in behavior that was totally uncharacteristic. Before his involvement in this offense, Mr. Philossaint’s life was defined by hard work and dedication to his family and community.

Joff Philossaint was born on March 15, 1990, in Port-de-Paix, Haiti. (PSI ¶ 118). He received his bachelor's in public administration from the University of Port-au-Prince. (PSI ¶ 138). In 2016, at age 26, Joff immigrated to the United States. (PSI ¶ 125). Joff first worked at a Dania Beach Casino in security and engineering. He later became a driver for Uber. Joff then began working for various companies and became involved in the instant charges. In 2021, Joff became a naturalized U.S. citizen. (PSI ¶ 21).

Joff's cousin, Louineze Mertil, attests to the hard-working nature of Joff:

Upon his arrival to this [sic] United States his work ethic was evident. He did not waste any time working to build a life for himself and for his family. He immediately learned how to drive. He immediately started looking for a job, His drive was rooted in his desire to not only make a living for his children but for his family back in Haiti, mother, siblings and other family members.

See Exhibit "1" – Letter from Louineze Mertil, (attached hereto).

Joff has always supported his two sons, Jay, age 5, and Jeremiah, age 3. (PSI ¶ 121). Defendant has another son, Giovany, who resides in Haiti with the son's mother. (PSI ¶ 122). Prior to his incarceration for the instant case, Joff provided voluntary child support for his three children in varying amounts. (PSI ¶¶ 121, 122). Joff is especially helpful to his ex-wife, Ferlinda, who unfortunately is very sick. In a letter to the Court, Ferlinda describes the significant role Joff has played in providing care to their two young children, as well as his assistance to her while battling a fatal prognosis:

Presently, I'm faced with a debilitating disease called Lupus. My lungs are slowly deteriorating. In the coming weeks, my doctor plans to add my name to the organ donation waiting list. I have no other aid to support myself or my children in his absence. I'm overwhelmed and my abilities are limited.

Mr. Joff Philossaint is the primary provider and caretaker of our two sons. Throughout our relationship, he's been a responsible father and caregiver. Mr. Philossaint is a warm-hearted, nurturing, and loving father. In my children's eyes, he's their hero, mentor, and role model.

See Exhibit "2" – Letter from Ferlinda Mertil Philossaint, (attached hereto). Morgan Carbajal, Ferlinda's doctor, emphasizes the uncertain term of assistance necessary for Ferlinda:

Ms. Philossaint is a patient under my care due to an advanced, life threatening chronic lung condition that renders her disabled and oxygen-dependent....As her condition is progressive and likely terminal without an extreme intervention such as [a] lung transplant, I believe her need for assistance will be indefinite.

See Exhibit "3" – Letter from Morgan Paloma Carbajal, M.D., (attached hereto). Joff's inherent nature as a provider is further illuminated with regard to his mother, Lamerice Philossaint:

I am a person who suffer with an underline [sic] condition of High Blood Pressure/diabetes...Joff is my main support system. He makes sure my doctor visits is taking [sic] care of and my medicine are getting paid. Without Joff being around its becoming a little difficult. I'm not able to go to the doctor like I should to maintain my illness.

See Exhibit "4" – Letter from Lamerice Philossaint, (attached hereto).

Gerta Telfort-Morency, a friend of Joff's, recounts Joff's valuable contributions not just towards her children, but also the Haitian-American community:

We met over 6 years ago. I can attest to his respectfulness, kindness, and incredible work ethic. He...has made exceptional contributions to his community in the United States.

He volunteered his time to tutor my children in math and French and was always ready to help a fellow Haitian to adjust in the USA with jobs, translating English/Creole and work skills.

See Exhibit "5" – Letter from Gerta Telfort-Morency, (attached hereto).

Joff's character, life history and circumstances support a downward variance well below the current guideline range set forth in the PSI.

Request for Two-Level Variance Based on New Guideline Amendment, § 4C1.1

Joff Philossaint is a first-time, non-violent offender. Defendant urges the Court to consider his lack of a criminal history, and to reduce his sentencing guidelines by two levels pursuant to an amendment to the Guidelines set to become effective November 1, 2023.

On April 5, 2023 the Sentencing Commission met and voted to promulgate the Proposed Amendments to the United States Sentencing Guidelines. Many of the Proposed Amendments are in response to the Congressional Directive to the Sentencing Commission which seeks to limit long periods of incarceration only to

violent offenders and offenders of very serious crimes. United States Sentencing Commission Chairman, Carlton W. Reeves in his opening remarks explained that many of the Amendments promulgated by the Sentencing Commission were being proposed in order to “give judges more discretion to expand non-carceral options to more people.”⁹

Chairman Reeve’s remarks are in keeping with the trajectory that began with the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), and followed by *Kimbrough v. United States*, 128 S. Ct. 558 (2007), *Rita v. United States*, 127 S. Ct. 2546 (2007), and *Gall v. United States*, 128 S. Ct. 586 (2007). A trajectory which for the past eighteen years has resulted in imposing lower sentences for non-violent, first-time offenders with a particular emphasis on individualized sentencing. Thus, while the Guidelines remain “the starting point and the initial benchmark” in determining a sentence, this Court “may not presume that the Guidelines range is reasonable,” but must “make an individualized assessment based on the facts presented.” *Gall*, *supra* at 596-598.

One of the most recent examples of the Sentencing Commission’s commitment to the trajectory that began post-*Booker*, has come in the form of the proposed amendment to the Advisory Guidelines. Of particular note is the proposed

⁹ https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230405/20230405_remarks.pdf (page 18-19).

Amendment which creates a new section under “Chapter Four - Criminal History and Criminal Livelihood” entitled: § 4C1.1 Adjustment for Certain Zero-Point Offenders. This new provision calls for a two-point decrease from the total base offense level of the applicable Guidelines.

Mr. Philossaint meets all ten criteria set out in USSG § 4C1.1:

- a) Joff has not received any criminal history points (PSI ¶ 112);
- b) Joff has not received an adjustment under § 3A1.4 (Terrorism);
- c) Joff did not use any violence or credible threats of violence in connection with the offense;
- d) The offense did not result in death or serious bodily injury;
- e) The instant offense is not a sex offense;
- f) Joff did not personally cause financial hardship;
- g) Joff did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- h) The instant offense of conviction is not covered under § 2H1.1 (Offenses involving individual rights);
- i) Joff did not receive an adjustment under § 3A1.1 (Hate Crime Motivation or Vulnerable Victim) or § 3A1.5 (Serious Human Rights Offense); and

j) Joff did not receive an adjustment under § 3B1.1¹⁰ (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848.1.

Several judges in the Southern District of Florida have already applied the two-level reduction for “zero point” offenders, notwithstanding the effective date of the amendment is not for another few months. *See United States v. Christian Encarnacion*, 22-20422-DMM; *United States v Robles*, 22-20494- RNS; *United States v. Saomi Tatiana Mera-Palomino*, 22-20501-BB; and *United States v. Yohan del Pozo Hernandez*, 22-cr-20429-RNS. Accordingly, Joff should likewise receive a two-level reduction at his upcoming sentencing.

Collateral Consequences Support a Variance

Joff’s potential future deportation is a collateral consequence that a sentencing court may consider under 18 U.S.C. § 3553(a). *United States v. Hercules*, 947 F.3d 3, 5 (1st Cir. 2020). The Government chose to prosecute Joff on Count 4 – acquiring naturalized U.S. citizenship by fraud – with the goal of Joff facing deportation upon completing his sentence. The consequences of very likely deportation are insurmountable. Joff’s two children, Jay and Jeremiah, will have no choice but to be

¹⁰ Defendant objects to any aggravating role adjustment applied in Defendant’s PSI report. (DE: 281).

raised without their father, who has been a critical, stable figure in their young lives. There will also be detrimental consequences for the health of Joff's ex-wife, Ferlinda, and mother, Lamerice, for whom Joff has been a primary caregiver. *See United States v. Leon*, 341 F.3d 928 (9th Cir. 2003) (Defendant's indispensable role in caring for wife who recently had her kidney removed due to renal cancer constituted sufficient extraordinary family circumstances to warrant downward departure of six levels). Further, Joff's livelihood will be in danger if sent back to Haiti.

Haiti remains at a Level 4, Do Not Travel, travel advisory with the U.S. Department of State. Haiti Travel Advisory, U.S. Dep't of State, available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/haiti-travel-advisory.html> (last visited June 12, 2023). This is "due to kidnapping, crime, civil unrest, and poor health infrastructure." *Id.* The State Department warns:

Kidnapping is widespread, and victims regularly include U.S. citizens. Kidnappers may use sophisticated planning or take advantage of unplanned opportunities, and even convoys have been attacked. Kidnapping cases often involve ransom negotiations and U.S. citizen victims have been physically harmed during kidnappings. Victim's families have paid thousands of dollars to rescue their family members.

Violent crime, such as armed robbery, carjackings, and kidnappings for ransom that include American citizens are common. Mob killings against presumed criminals have been on the rise since late April. Travelers are sometimes followed and violently attacked and robbed shortly after leaving the Port-au-Prince international airport. Robbers and carjackers also attack private vehicles stuck in heavy traffic congestion and often target lone drivers, particularly women. As a

result, the U.S. Embassy requires its personnel to use official transportation to and from the airport.

Protests, demonstrations, tire burning, and roadblocks are frequent, unpredictable, and can turn violent. The U.S. government is extremely limited in its ability to provide emergency services to U.S. citizens in Haiti – assistance on site is available only from local authorities (Haitian National Police and ambulance services). Local police generally lack the resources to respond effectively to serious criminal incidents. Shortages of gasoline, electricity, medicine, and medical supplies continue throughout much of Haiti. Public and private medical clinics and hospitals often lack qualified medical staff and even basic medical equipment and resources.

Id. The government is plagued with corruption and police have not been able to control gang violence. The U.S. State Department has explained:

The government rarely took steps to identify, prosecute, and punish government and law enforcement officials who committed abuses or engaged in corruption, and civil society groups alleged widespread impunity regarding these acts.

Gang violence continued at high rates in the Port-au-Prince metropolitan area. Some gangs allegedly received support from political and economic elites. Kidnappings for ransom by armed gangs increased and affected all parts of society. Armed gangs were also responsible for armed conflicts resulting in killings, brutal attacks on citizens, targeted instances of sexual violence, mutilation of human remains, widespread displacement, and the destruction of homes and property.

2022 Country Report on Human Rights Practices: Haiti, U.S. Dep't of State, available at <https://www.ecoi.net/en/document/2089114.html> (last visited June 12, 2023).

Because Joff will likely face deportation, he will be ineligible to serve the last part of his prison term in the community confinement reentry program, or to benefit from the First Step Act, which would enable Joff to earn additional time credits. The unavailability of these options has the effect of making the affected prison term more severe for foreign nationals, and, in Joff's case, revoked citizenship. *See United States v. Thomas*, 999 F.3d 723, 736 (D.C. Cir. 2021).

The Need for the Sentence to Reflect the Seriousness of the Offense, Promote Respect for the Law and Provide Just Punishment

The Probation Officer calculates a total offense level of 35 and a guideline imprisonment range of 168-210 months for Defendant. (DE: 295-1). The Government, on the other hand, recommends Joff be sentenced to a term of incarceration in the range of 121-151 months, with a total offense level of 32. (DE: 304). The recommended sentencing ranges proposed by both Probation and the Government result in a sentence that is far greater than necessary to reflect the seriousness of the offense, promote respect for the law, and deter future criminal conduct.

The sentences already rendered to two of Joff's co-conspirators support a variance well below the above guideline ranges. David Andre Johnson, a co-conspirator of Joff, was involved in completing fraudulent applications for EIDL and PPP loans for his business, DDZ Enterprises, LLC. (PSI ¶ 79). Mr. Johnson pled

guilty to five counts of wire fraud, amounting to \$730,734.00. *See United States v. Johnson*, 22-cr-60201-RS (DE: 29). Despite a Criminal History category of II, Mr. Johnson was sentenced to 24 months imprisonment followed by three years' supervised release. *See Johnson* (DE: 48,50).

Brianna Monique Gayle, one of Joff's co-defendants, worked with Joff for over a year. (PSI ¶ 78). Prior to her involvement with Joff in the instant case, Ms. Gayle worked for ADP. (DE: 94). While working for Joff, Ms. Gayle contacted ADP on multiple occasions to manage payroll accounts, to add or remove accounts, and to retrieve payroll documents and W-2 forms for the payroll accounts. (PSI ¶ 78); (DE: 94). Additionally, Ms. Gayle obtained for herself, as an independent contractor, a fraudulent PPP loan for approximately 20 thousand dollars. (PSI ¶ 78). Despite pervasive involvement in the conspiracy, Ms. Gayle was sentenced to a non-incarceration term of three years' probation followed by six months' home detention. (DE: 215).

Many of Joff's co-defendants have not been sentenced, as their cases remain pending. Considering the sentences already rendered to those involved in the conspiracy, fairness dictates a sentence for Mr. Philossaint well below his guideline range as outlined in his PSI, and well below the Government's recommended guideline range of 121-151 months.

WHEREFORE, Defendant respectfully moves this Court to grant Defendant a sentence variance as requested herein, pursuant to 18 U.S.C. § 3553(a).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DEFENDANT PHILOSSAINT'S SENTENCING MEMORANDUM AND MOTION FOR VARIANCE was filed electronically with the Clerk of the Court through the CM/ECF system and copies of same distributed to all counsel of record and known interested parties on this 21st day of June, 2023.

By: /s Scott W. Sakin
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