

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

CASE NO. 98-721-CR-LENARD(s)(s)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTONIO GUERRERO,

Defendant,

**DEFENDANT'S MEMORANDUM IN AID OF SENTENCING AND REQUEST FOR
ALTERNATIVE SENTENCE OF 240 MONTHS INCARCERATION**

The defendant, Antonio Guerrero, by and through his undersigned counsel, and pursuant to U.S.S.G. § 6A1.2-3, p.s., Fed. R. Crim. P. 32 (d), (e)(2) and (f), and the Fifth Amendment to the United States Constitution, respectfully registers his Memorandum in Aid of Sentencing and Request for Alternative Sentence of 240 Months Incarceration and, as grounds therefore, states as follows:

I. INTRODUCTION:

On June 8, 2001, a federal jury in the Southern District of Florida found Antonio Guerrero guilty of conspiracy against the United States (Count 1), in violation of 18 USC § 371, conspiracy to gather and transmit national defense information (Count 2), in violation of 18 USC § 794(c), and acting as an agent of a foreign government without prior notification (Count 16), in violation of 18 USC § 951. On December 27, 2001, this Court adopted the findings of the presentence

investigation report PSR prepared by the probation officer. With a total offense level 43 and a criminal history category I, this Court sentenced Antonio Guerrero to concurrent imprisonment terms of Life, as to Count Two, and five years as to each of the remaining counts.

Antonio Guerrero appealed both the conviction and sentence to the Eleventh Circuit Court of Appeals, under Case No. 01-17176, and on June 4, 2008, the Court issued its findings, affirming the conviction and the application of § 3B1.3 (use of special skill), but remanded for re-sentencing (Count Two only) as to the base offense level 42 (§ 2M3.1(a)), since the Court found that the gathering and transmitting of top secret information was the object of the conspiracy but did not identify a completed act in which this had been accomplished..

On September 4, 2009, Supervising United States Probation Officer Suzanne Ferreira prepared and made available to the parties an Addendum to the PSR, reflecting applicable guideline calculations consistent with the Circuit Court's findings. With a total offense level 39 and a criminal history category I, the advisory guideline range is now 262 to 327 months.

Subsequent to the disclosure of the probation officer's addendum, both the government and the defendant entered into an agreement to resolve the re-sentencing issues as they relate to Count Two. In paragraph 7 of the written plea agreement, the parties have agreed with the guideline calculations and advisory guideline range stated in the probation officer's addendum. In paragraph 8 of the agreement, the parties have agreed to a sentence of 240 months, to be served concurrently with the Court's previously imposed sentences on Counts 1 and 16, a term of 5 years supervised release with conditions, as set forth in the Court's original sentence, a \$100 special assessment and no fine or restitution. Finally, as to paragraph 9 of the agreement, the parties have agreed not to seek any departures from the agreed upon total offense level 39 and not seek any variance beyond the

agreed upon sentence of 240 months incarceration.

II. OBJECTIONS TO PSR:

Pursuant to the written sentencing agreement, the defendant agrees that the total offense level is 39 and with a criminal history category I, the advisory guideline range is 262 to 327 months. Again, pursuant to the written sentencing agreement, the defendant does not seek a downward departure from total offense level 39.

III. SENTENCING SUBMISSION AND REQUEST FOR ALTERNATIVE SENTENCE OF 240 MONTHS INCARCERATION:

Antonio Guerrero appears before this Court for re-sentencing as to Count Two of the Second Superseding Indictment, the Court having previously imposed a Life sentence on December 14, 2001. He has been in continuous custody since September 12, 1998. For the purposes of re-sentencing as to Count Two only, the parties in this case, including the probation officer, agree the advisory guideline range is 262 to 327 months. Further, both the government and the defendant have entered into an agreement that a sentence of 240 months incarceration is consistent with the sentencing objectives of 18 USC § 3553(a). In support of this agreement, the defendant offers the following.

Pursuant to *U.S. v. Booker*, 543 U.S. 220 (2005), and very much applicable to the re-sentencing in this case, district courts are now free from the mandatory nature of the Federal Sentencing Guidelines, *U.S. v. Booker*, 543 U.S. 220 (2005). Subsequent to *Booker*, *Gall v. United States*, 128 S. Ct. 586, and *Kimbrough v. United States*, 128 S. Ct. 558, both decided on December

10, 2007, and *U.S. v. McBride*, 511 F. 3D 1293 (11TH Cir. 2007), made clear that district courts are only required to give “some weight” to the advisory guidelines, as they are to the other 18 USC § 3553 factors, and any attempt to give special weight to the sentencing guidelines is contrary to *Booker*. However, the Supreme Court has since gone further in its recent decision in *Nelson v. United States*, 129 S. Ct. 890 (2009), where the court reiterated what it said in *Rita v. United States*, 551 U.S. 338 (2007), that a sentencing court may not presume that a sentence within the applicable guideline range is reasonable but added “the Guidelines are not only *not mandatory* on sentencing courts, they are also not to be *presumed reasonable*.”

Following his arrest in this case, Antonio spent almost the first five months of his incarceration at the Federal Detention Center in the Segregated Housing Unit (SHU), given the nature of the criminal charges and political environment of South Florida at that time. It was finally decided by prison authorities that Antonio and his co-defendants would be safe in general population if the “Cuban Five” remained together. However, subsequent to the jury’s verdict on June 9, 2001, he was returned to SHU, only to again be re-designated to general population on August 13, 2001. Antonio was designated to the United States Penitentiary (USP) at Florence, Colorado, to serve his sentence and he was transferred through Atlanta and Oklahoma before arriving at the Penitentiary on February 27, 2002.

Antonio’s first work assignment at Florence was in the laundry, from April 23, 2002 to July 2, 2002. However, since October 29, 2002 (see progress report, dated February 14, 2009), Antonio has been employed as a tutor, teaching English as a Second Language (ESL) and G.E.D. classes for Spanish students. Although the letter from John Bellantoni, Supervisor of the prison’s education department, dated March 6, 2009, mistakenly states Antonio has been employed since March of

2003, it does verify his position within the department. Further, Bellantoni writes, “Inmate Guerrero has done and continues to do an outstanding job of tutoring the Spanish language inmates. Observations of his teaching clearly indicate he is highly respected by the inmate population. He has excellent teaching skills which have resulted in many of his students passing the official GED exam or the CASAS, ESL exam. He is always respectful towards staff and other inmates and has never caused any problems within the department. He is a very intelligent individual who has used his abilities in a positive way while incarcerated by tutoring many students over the past six years.”

In addition to the above, Antonio voluntarily teaches the ACE Introduction to Spanish course during the evenings at Florence, as well as a chess class.

Antonio has also completed advanced drawing, water color, oil painting, calligraphy, pen and ink, and sketching courses and now teaches drawing and pastel classes for the Penitentiary’s recreation department.

Mr. Bellantoni’s letter, as well as many of the certificates earned by Antonio at Florence, have been made available to this Court.

Antonio’s last complete progress report, dated February 14, 2009, details his institutional assignments since September 12, 1998, his work assignments since arriving at USP Florence and courses he has completed. It also confirms he has NEVER received an incident report and has already PAID the \$300 special assessment ordered in his case.

On February 20, 2009, a Request for Transfer to FCI Florence or any Medium Security Facility in the North Central Region was made by USP Florence’s Warden, Blake R. Davis, to Delbert Saur, DSCC Administrator. The request was signed by the Warden, as well as Antonio’s Case Manager and Unit Manager. The request was made because Antonio has “displayed good

institutional adjustment since his arrival at USP Florence... has maintained clear conduct...has not received a disciplinary infraction... participates in recommended programs...and the Unit Team believes Inmate Guererro requires the security measures which are provided at a medium security facility.” In making this request, it was necessary to also request a waiver of a Management Variable Public Safety Factor (PSF) due to the Life sentence imposed in this case. This request was ultimately denied by the BOP’s regional office. However, Antonio believes that with an advisory guideline range of 262 to 327 months and possibly a sentence below that range, his transfer to a medium security facility will be imminent and will provide him with even more opportunities to not only work on his own rehabilitation but allow him to contribute to the rehabilitation of other inmates. The BOP reports referenced here have also been made available to this Court.

When Antonio arrived at USP Florence, he was a 43 year old first-time offender who had already served three and a half years of a Life sentence. And he had already learned that the sentencing provisions of 18 USC § 4205 had long ago been repealed and that Life, meant Life. He has been assigned to a seven by ten foot cell in the “high” security Federal Penitentiary at Florence since he arrived in 2002. Through the years, Antonio has shared this cell with another inmate and, at times, he has been all alone. A normal schedule requires that he be confined to his cell ten hours a day. However, USP Florence is a “high” security federal penitentiary housing some of the most violent, troublesome federal inmates in the system, and “lock-downs” are common. The racial riots of 2008 had the Penitentiary in an almost continuous lock-down, requiring Antonio to remain in his cell 24 hours a day.

As harsh and as intimidating conditions at USP Florence might be, visiting hours are generous and family visits are always encouraged by prison officials. However, Antonio’s family

remains in Cuba, they are of very modest means, and must obtain a visa to travel to the United States to see him. Antonio's mother, his sister and his oldest son have continued to make once a year visits to him; however, he has not been able to see his youngest son since his arrest in 1998. Margaret Becker, who continues to provide him with emotional support, has been able to make the trip to Colorado twice since 2002. Clearly, although Antonio had been a model prisoner and has contributed to the educational and recreational programs at Florence, he has not had the same family and social contact with the outside world as most other inmates at this "high" security Penitentiary.

Antonio Guerrero is the younger of two children born to Cuban parents. In approximately 1950, years before the Cuban Revolution, major league baseball scouts came to Cuba and signed Antonio's father to a baseball contract. His father played in the Texas league, beginning in 1952, and when the first season ended, he returned to Cuba, married Antonio's mother, and brought her back for his second season. Antonio's older sister was born in Texas in 1954 and his father played baseball until he was injured and released by the San Antonio Colts in 1957. The family then moved to Miami, where Antonio was born in October of the following year.

Since coming to the United States, the Guerrero family had returned to Cuba for the holidays and whenever Antonio's father was not playing baseball. Such was the case during the Christmas holidays, 1958. However, the Cuban Revolution was complete on January 1, 1959, when Batista fled Cuba among the fighting. Antonio's paternal grandfather then found his (Antonio's) father a job in the cigar factory where he had worked for years, and the Guerrero family decided to stay in Cuba. Antonio was still an infant.

Life for Antonio and his family during the early Castro years was comfortable. His

grandfather and father worked together and Antonio shared a rather large home in Havana with his maternal grandparents, his parents and his sister. However, Antonio's grandfather died in 1969 and his father died the following year of a heart attack, at the age of 44. Antonio's mother had always been a housewife but she now needed to seek employment and the family needed to move to smaller quarters. Antonio remembers sharing a room with his mother and sister for sometime. However, Antonio continued to study and excel in school. By the time he finished high school, he was chosen to attend a special vocational school and was assigned to the construction/architectural group. Antonio had always wanted to be a civil engineer.

In July 1978, just short of his 20th birthday, Antonio left Cuba to study in Kiev. Russia and Cuba had an exchange program at the time and Antonio studied engineering in Russia for the next five years. It was there that he met his first wife, a native of Santiago de Cuba, and they were married in Moscow in 1980. Antonio completed his studies in Kiev in 1983 and returned with his wife to Santiago de Cuba. Antonio, Jr. was born two years later; however, Antonio and his first wife were divorced by 1989.

Antonio married his second wife in Panama in 1991 and his second child, Gabriel, was born the following year. He and his wife separated that year when he came to Miami in May 1992. Paragraph 83 of the PSR is correct in that government records verify he entered the United States on February 27, 1995 and October 13, 1996. Antonio was returning from visits with Gabriel and his mother and he has not seen either of them in 13 years.

The PSR discusses Antonio's life in South Florida from May 1992 until his arrest on September 12, 1998, and he will provide no further comment, except to say he continues to enjoy the support of Margaret Becker.

Antonio is well aware that in fashioning a “reasonable” but not greater than necessary sentence in his case, this Court must consider the nature and circumstances of the offense, 18 USC § 3553(a)(1). To that end, consistent with the Circuit Court’s findings and the revised guideline calculations offered by the probation officer and agreed to by the parties, no top secret information was actually gathered and transmitted. However, the total offense level of 39 is both substantial and has been correctly applied. Nevertheless, according to the United States Sentencing Commission’s Sourcebook of Federal Sentencing Statistics (Sourcebook) FYE 2008, of 67,894 cases (there were actually 76,478 cases that year, but some lacked complete sentencing information), 98.8 % of all federal defendants sentenced in 2008 fell below total offense level 39 (see Table 21 of Sourcebook).

Subsequent to *Booker*, however, this Court must also consider the history and characteristics of the defendant, 18 USC § 3553(a)(1). To that end, Antonio asks this Court to consider his own history, both before and since September 1998. He asks this Court to consider the positive adjustment he has made at Florence under the harshest of conditions, the isolation he continues to feel with only annual visits from his family, and that when he is eventually released from custody, he will be in his late fifties and in an age group with the lowest risk to recidivate.

According to the Sourcebook FYE 2008, as downward variances under 18 USC § 3553, courts cited the nature and circumstances of the offense or the history and characteristics of the defendant (18 USC § 3553(a)(1)) in 5,427 cases, amounting to 23.6 % of all downward variances. Courts have also granted downward variances in 335 cases specific to age.

Finally, pursuant to AO 245B, the Statement of Reasons form district judges complete to report their findings as to specific sentences imposed, Antonio Guerrero respectfully requests this Court consider Part VI of the form, “Court Determination for Sentence Outside the Advisory

Guideline System,” and impose the agreed upon sentence of 240 months incarceration, pursuant to subpart B 1 of that section, because “the sentence imposed is pursuant to a plea agreement for a sentence outside the advisory guideline system, which the Court finds to be reasonable.”

IV: RECOMMENDATION

Antonio Guerrero respectfully asks that this Court consider all of his arguments and the factors of 18 USC § 3553(a), and impose a “reasonable” but not greater than necessary sentence of 240 months incarceration, which has been agreed upon by the parties in furtherance of a just resolution of this matter. Antonio further requests that this Court recommend to the Bureau of Prisons, that in consideration for this newly imposed sentence, and in recognition of his exceptional post-sentence rehabilitation, which has been, in fact, documented by the Bureau of Prisons, that he be re-designated to a Federal Correctional Institution (FCI) within the federal prison system.

Respectfully submitted,

/s/ Leonard I. Weinglass
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed this
8th day of October, 2009, and served on all appropriate parties through that system.

/s/ Leonard I. Weinglass
Leonard I. Weinglass

/s/ John David Pettus
John David Pettus