

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
vs.)	Case No. 12-06001-01/19-CR-SJ-GAF
)	
RAFAEL HERNANDEZ-ORTIZ,)	
)	
Defendant.)	

**SENTENCING MEMORANDUM ON BEHALF
OF RAFAEL HERNANDEZ-ORTIZ**

Pursuant to Rule 32 of the Federal Rules of Criminal Procedure, Defendant Rafael Ortiz respectfully submits the following Memorandum to assist the Court in determining his sentence.

I. BACKGROUND

Rafael Ortiz pled guilty to Count 1 Conspiracy to Transport Illegal Aliens, to Unlawfully Produce Identification Documents, to Unlawfully Transfer the Means of Identification of Another Person, and to Commit Social Security Fraud 18 U.S.C. 371 (Class D Felony). Mr. Ortiz’s PSR alleges his base offense level is 11, with an upward adjustment of 9 levels pursuant to 2L2.1(b)(2)(C), adjustment for acceptance of responsibility under 3E1, 1(a) and (b), therefore, Mr. Ortiz’s total offense level is 17, according to the PSR. Mr. Ortiz has no criminal history points; placing him in category I, as such Mr. Ortiz’s current sentencing range is 24 to 30 months.

Mr. Ortiz has had no, or limited contact with law enforcement throughout his life. His involvement in the current conspiracy came about as a favor to a church member in his congregation.

Mr. Ortiz was asked to drive as a favor to the church, to help individuals get IDs in order for members to obtain or keep employment. Furthermore, Mr. Ortiz did benefit financial from his

involvement in this conspiracy. Since being in prison Mr. Ortiz has become a part of the jail's Christian ministry group.

II. SENTENCING GUIDELINE AND 18 U.S.C. § 355(a)

As this Court is aware, the Federal Sentencing Guidelines are no longer mandatory. The United States Supreme Court has ruled that “mandatory” sentences violate the Sixth Amendment. United States v. Booker, 543 U.S. 220, 260-261, 226-228 (2005). The Booker Court determined any violation of the Constitution could be cured by modifying the federal sentencing statute making the guidelines “advisory.” Id at 245. The Booker case was summed up in United States v. Ranum, 353 F. Supp. 2d 984, 987 (E.D. Wisc. 2005):

Sentencing will be harder now than it was just a few months ago.

District Courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors; listen carefully to defense and government counsel, and sentence the person before them as an individual.

Booker is not an invitation to do business as usual.

The range in sentencing, dictated by the facts of each individual case, has been significantly broadened. See Gall v. United States, 128 S. Ct. 586, (2007). (finding the guidelines are only one of the factors to be considered when imposing sentence); Kimbrough v. United States, 128 S. Ct. 558 (2007) (noting the Courts may vary from guideline ranges based solely on policy considerations, including disagreement with the guideline). Rita v. United States, 127 S. Ct. 2456 (2007) (holding that a district court may consider arguments that “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations”). These cases show that the District Court may determine that in a particular case, a sentence within guidelines is greater than necessary to serve the objective of sentencing. Kimbrough at 563.

Pursuant to the Sentencing Reform Act, as modified by Booker, Courts are required to take account of the Guidelines together with other sentencing goals. Booker at 543 U.S. at 261. A District Court should begin by correctly calculating the applicable Guidelines range. “The Guidelines are the starting point and initial benchmark but are not the only consideration.” Gall 628 S. Ct. at 588. The District Judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. The Court must make an individualized assessment based on the facts presented. Gall 128 S. Ct. at 598.

The Primary directive is 18 U.S.C. § 3553(a) is for sentencing courts to impose a sentence sufficient, but not greater than necessary, to comply with the following purposes by looking at seven factors:

- (1) the nature and circumstances of the offense and the history and 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 education or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentences and the sentencing range established for –
- (5) any pertinent policy statement –

(6) the need to avoid unwarranted sentence 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.

III. NATURE AND CIRCUMSTANCE OF THE CURRENT OFFENSE

Mr. Ortiz was approached by one of his church members to drive individuals from Minnesota to Saint Joseph Missouri so individuals could obtain driver's licenses and other forms of state identification. Mr. Ortiz had previously traveled to the Saint Joseph area with his church organization, because his church in Minnesota had a church conference in Saint Joseph. Mr. Ortiz was asked to drive someone's car whom he did not know. Mr. Ortiz drove from Austin, Minnesota to Saint Joseph, Missouri on three occasions. Mr. Ortiz traveled two times with two occupants and the last time with three occupants. On each occasion Mr. Ortiz willingly drove the illegal aliens to obtain fraudulent sets of documents.

IV. ASSESSING HERNANDEZ-ORTIZ'S CONDUCT

To assess Mr. Ortiz's conduct the court must examine the aggravating and mitigating factors.

A. Aggravating Factors

Mr. Ortiz willingly provided the transportation of illegal aliens in order that they might obtain false documentation, to gain employment and/or false driver's licenses. Mr. Ortiz understood the reason and the purpose that he was to transport the individuals.

B. Mitigating Factors

Mr. Ortiz was involved in the conspiracy for less than six months and his involvement, involved .002% of the total documents produced over the course of the conspiracy. Mr. Ortiz's motivation was created by his desire to assist the church leaders in his congregation, who asked him to drive the illegal aliens.

Mr. Ortiz while he has been in the United States, worked in farm fields in North Carolina during the harvest times, for three to four months each year. During the off season from harvest, Mr. Ortiz worked in the construction field, when work was slow in construction, he removed snow and performed landscaping as needed in Minnesota. Mr. Ortiz has been a hard working family man. He is in a long term relationship with Sylvia Montelogo whom they have three children together, ages 13, 8, and 4 years old. Mr. Ortiz's children are United States citizens and his long term partner, Mrs. Monotelogo is in the United States legally. Since this arrest, Mr. Ortiz has been ordered to be removed from the United States in absentia.

In the case at bar, Mr. Ortiz did not benefit financially. His motivation was to help others and because of this desire, he chose to be a handler by transporting illegal aliens to obtain illegal documents.

V. APPROPRIATE SENTENCE

A. Presentence Investigation Report

The PSR file on July 28, 2013 calculated Mr. Ortiz's base offense level at 11 pursuant to § 2L2.1. Because the overall conspiracy involved approximately 3,500 identification documents, the PSR added 9 levels to Mr. Ortiz, pursuant to § 2L2.1(b)(2)(c); therefore the adjusted offense

level subtotal as determined by the PSR is 20. After applying a 3 level reduction for the acceptance of responsibility pursuant to § 3E1.1(a) and § 3E.1(b), the total level is 17, as calculated by the PSR.

Mr. Ortiz's Criminal History point is zero, which places his Criminal History Category at I. The total offense level with a criminal history category of I, corresponds to an advisory guideline range of 24 to 30 months.

The advisory guideline range for a fine is \$5,000.00 to \$50,000.00.

B. Requested Sentence

(1) **Numbered Documents**

U.S.S.G. § 2L2(b)(2) provides that the Court shall increase Defendant's Base Offense level by 9 if the offense involved 100 or more documents. The PSR states, Mr. Ortiz is essentially responsible for the total amount of documents involved in the conspiracy therefore the Court should adopt a conspiracy theory of liability in the consideration of this enhancement. Defendant concedes to the fact in the offense, he jointly agreed to take part in the conspiracy involving approximately seven (7) documents, therefore, his base offense level should increase by three (3) levels. See U.S.S.G. § 2L2.1(a)(2)(A). Defendant's conduct involved three (3) trips to St. Joseph, Missouri from Austin, Minnesota and involved approximately seven individuals.

In ascertaining the amount of documents involved under the U.S.S.G. § 2L2.1, it was held in United States v. Beeb, (not reported in F. Supp. 2d (2010), 2010 WL2103578, "the courts look to this doctrine of relevant conduct. This doctrine is described in U.S.S.G § 1B1.3. The guideline included as relevant conduct in the case of jointly undertaken criminal activity all (1) reasonably foreseeable acts and omissions of others" (2) in furtherance of (3) the jointly

undertaken criminal activity”. See also United States v. Spotted Elk, 548 F. 3d 641, 673 (8th Cir. 2008). As noted in the commentary of U.S.S.G. § 1B1.3 and Spotted Elk, the concept of relevant conduct under the Guidelines, on the one hand, and conspiracy liability, on the other hand are not the same. id. Under U.S.S.G. § 1B1.3 is the scope of the individual defendant’s criminal undertaking and his or her foreseeability in light of that undertaking, rather than the scope of the entire conspiracy. Whereas, in the substantive conspiracy liability, the focus is on the entire conspiracy and the foreseeability in light of that conspiracy. Conduct under U.S.S.G. § 1B1.3 is individualized rather than broad like substantive conspiracy.

When looking at case law on the subject of U.S.S.G. § 2L2.1, the defendants have been held only to the standard as articulated under relevant conduct pursuant to the Guidelines. The Courts have not used a substantive conspiracy liability standard as suggested by the PSR.

Mr. Ortiz was only responsible for approximately seven false documents and the documents he could have foreseen in the conspiracy. In light in the law on U.S.S.G. § 2L2.1, Mr. Ortiz at the very most is only responsible for 6-24 documents, therefore at a 3 level increase from a base level of 11.

(2) **“Other Than for Profit”**

U.S.S.G. § 2L2.1 (b)(1) provides, “ If the offense was committed other than for profit, or the offense involved smuggling, transporting, or harboring of the defendant’s spouse or child, decrease by three levels”. The purpose of the guidelines, the commentary of § 2L2.1 states, “the offense was committed other than for profit” means that there was no payment or expectation of

payment for the smuggling, transporting, or harboring of any of the unlawful aliens” Mr. Ortiz’s involvement was not for financial gain or profit. He was not given anything of value to transport the illegal aliens nor did he seek compensation. Mr. Ortiz’s involvement was to assist others as a way of helping fellow church members. As such, not for profit, thus entitles him to a three level reduction.

(3) **Mitigating Role**

U.S.S.G § 3B1.2, states, “Based on the defendant’s role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by four levels. (b) If the defendant was a minor participant in any criminal activity, decrease by two levels. Applicability of Adjustment under commentary for § 3B1.2, states, “A defendant who is accountable under § 1B1.3 (relevant conduct) only for the conduct in which the defendant was personally was involved and who performs a limited function in concerted criminal activity is not precluded for consideration for an adjustment under this guideline. Here Mr. Ortiz played a limited role in the subject criminal activity. Mr. Ortiz was involved in approximately .002% of the illegal documents involved in this conspiracy. As stated earlier Mr. Ortiz’s sole involvement was to drive the illegal aliens to St. Joseph, Missouri at the request of others to obtain the fraudulent sets of documents. As noted in U.S.S.G. § 3B1.2 note 4, this reductions, is intended to cover defendants who are planning among the least culpable of these involved in the conduct of a group”. See United States v. Jones, 145 F. 3d 959, 963 (8th Cir.).

(4) **Sentencing Guideline Calculation by Mr. Hernandez-Ortiz**

Base offense level	11
More than six but less than four aliens	+ 03
Role in the offense	- 02
Acceptance of responsibility	<u>- 02</u>
Total offense level	10

The total offense level of 10, with a criminal history category of I corresponds to an advisory guideline of 6-12 months.

Conclusion

Rafael Ortiz broke the law not as a willful act of disregard but to assist his community. Mr. Ortiz although he committed an unlawful act, did not do so with the intent to harm or maim. Mr. Ortiz is not a typical criminal defendant. He is a loving father, a good friend, an honest hardworking man, whom has given generously of his time to others. Aside from his involvement in the charges and admitted too conspiracy, Mr. Ortiz has lived a life seeking to help others and take care of his family. Under the circumstances, when the courts analyze the factors set forth above, a sentence to 12 months with credit for time served would be just out come for society. First, if taking into consideration the seriousness of the offense and promotion of the respect for the law. Next, would be serve as a deterrent for others in like circumstances, and would be a punishment sufficient, but not greater than necessary to comply with the factors set forth.

For the reasons stated, Mr. Ortiz respectfully requests that the court impose a sentence of 12 months with credit for time served in Federal custody, with no fine levied.

Respectfully Submitted,

Fulcher & Brooks LLC

/s/ Darren E. Fulcher

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of September, 2013, he has filed the above foregoing Sentencing Memorandum through the ECF filing system that has sent notification of such filing to the United States Attorney's Office.

/s/ Darren E. Fulcher

Darren E. Fulcher