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March 21, 2010

VIA ECF and First Class Mail

Honorable Nicholas G. Garaufis
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Diego Berrera 10 Cr. 040 (NGG)

Dear Judge Garaufis:

I am writing this letter with regard to the sentencing of Diego Barrera, which is scheduled for March 26, 2010, as a result of his guilty plea to the offense of bulk cash smuggling, in violation of 31 U.S.C. Section 5316(a)(1)(B). Mr. Barrera has been incarcerated continuously since his arrest on January 6, 2010. Although the U.S. Attorney's Office for the Eastern District of New York had agreed to conditions of bond, Mr. Barrera could not be released because of a "detainer" lodged against him by the Customs and Border Protection agency, a component agency of the Immigration and Customs Enforcement. Accordingly, for all of the reasons set forth in this letter, I ask that the Court conclude that Mr. Barrera's conduct falls outside of the "heartland" to which the federal sentencing guidelines were meant to apply and to sentence the defendant to time served.

The reasons for this request include: (1) the nature and circumstances surrounding this offense, which demonstrate that Mr. Barrera was not engaged in money laundering with criminal proceeds, but was rather a businessman "transiting" from Colombia to China; (2) his lack of any prior criminal history; (3) his early plea in this case; (4) his voluntary agreement to forfeit approximately \$94,000.00 to the United States; (5) the need to avoid unwarranted sentencing disparity; (6) the fact that his was aberrant behavior within the meaning of the Federal Sentencing Guidelines; and (7) other relevant factors under the provisions of 18 U.S.C. Section 3553(a).

Because this Court ordered an expedited pre-sentence report to be prepared, I have not yet had a chance to review the conclusions of the pre-sentence writer, who has indicated that the report will not be prepared until one or two days before the scheduled sentencing date. I am filing this letter now in accordance with the Court's general order regarding the filing of materials in criminal cases and would request the opportunity to supplement or revise these materials, if necessary, after I have reviewed the pre-sentence report

DIEGO BARRERA'S PERSONAL BACKGROUND

Diego Barrera is a Colombian citizen who was born on December 5, 1979. Despite only obtaining the equivalent of a high school education, Mr. Barrera has worked his entire life in order to support himself and his family, including jobs as a street musician, dish washer, pet store employee, pharmaceutical salesman, and electronics wholesaler. Mr. Barrera ultimately opened his own import export business called "Digital Center," specializing in televisions, computers and related accessories. The business imports these goods from China and the products are sold in Colombia, South America. Mr. Barrera is the business' leader and employs other family members, including one brother who actually moved to China in order to establish contacts with Chinese manufacturing concerns and another brother who works as a salesman in Colombia.

Mr. Barrera is the loving father of two children and has been partnered with his common law wife, Ingrith, for more than fourteen years. During his period of incarceration in the United States, Mr. Barrera's wife and other family members have been in almost daily contact with his defense attorneys and have expressed their unrelenting support for him. It goes without saying that his children miss him terribly and are confused at the thought of their father's incarceration.

Moreover, as a result of his incarceration in the United States, Mr. Barrera's business has been greatly injured. He was in charge of the strategic planning for the operation, controlled its financial resources, and was the personal representative for many of the business' contacts in Colombia and abroad. During his incarceration in the United States at the Geo Jail in Jamaica, Queens, from January 6, 2010 until the present, he has been unable to have private conversations concerning his business activities or otherwise manage its affairs. Mr. Barrera is also deeply concerned that his incarceration and conviction in the United States will have a very detrimental effect on his reputation as a businessman in the future.

OFFENSE CONDUCT

Mr. Barrera was arrested on January 6, 2010 at the JFK International Airport in Queens, New York. His tickets, which were purchased on December 28, 2010, routed him from the Bogota International Airport on Avianca Flight 0020, with a four hour layover in New York before the next step in his trip to Asia on Cathay Airlines. On prior trips, Mr. Barrera had been routed from Colombia to China via the Charles DeGaulle Airport in Paris, France. On those trips, Mr. Barrera was not required to exit through Customs before changing planes.

At the time of his arrest on January 6, 2010, Mr. Barrera entered the country en route to China. Because of the configuration of the gates at JFK International Airport, he was required to pass through the customs checkpoint to transfer planes. Unfortunately, upon entry into the United States, Mr. Barrera failed to declare that he had approximately

\$124,000.00 in Euros (the equivalent of approximately \$178,000.00 U.S. dollars) hidden in the lining of his carry on backpack.

As a result, he entered a guilty plea on March 1, 2010 to a violation of 31 U.S.C. Section 5316(a)(1)(B). This offense carries with it a possible maximum sentence of five years, no mandatory period of incarceration, a maximum fine of up to \$250,000.00 and a special assessment of \$100.00. As part of the Plea Agreement, Mr. Barrera agreed to a forfeiture in the amount of \$94,000.00.

The Plea Agreement sets forth the following advisory guideline calculation:

1. The base offense level is 16 (6 levels for offense adjusted by amount of cash).
2. An upward adjustment of 2 levels for bulk cash smuggling.
3. A two level downward adjustment for acceptance of responsibility.
4. An additional 1 level downward adjustment for an early plea.

This calculation results in an adjusted guideline range of 15, which corresponds to a sentencing guideline range of 18-24 months, assuming a Criminal History Category I.

SENTENCING ANALYSIS

Since the Supreme Court's decision in United States v. Booker, 542 U.S. 220 (2005), a court must impose a sentence which is sufficient, but no greater than necessary, to effectuate the statutory requirements set forth in 18 U.S.C. Section 3553(a). A sentencing court must consider both the "Guideline ranges" and also "tailor the sentence in light of the other statutory concerns as well." Booker, 542 U.S. at 245-46. As the Second Circuit has noted, since Booker ended the mandatory aspect of the sentencing guidelines, "the duty imposed by Section 3553(a) acquires renewed significance." United States v. Crosby, 397 F.3d 103, 111 2d Cir. 2005).

These statutory factors include: (1) the nature and circumstances of the offense and history and characteristics of the defendant; (2) the need for the sentencing to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment; (3) specific and general deterrence; (4) the need to provide the defendant with training, medical care, or treatment; available sentencing alternatives; (5) consistency in sentencing among similarly-situated defendants; and (6) the need to provide restitution. 18 U.S.C. § 3553(a).

Although the starting point for the calculation of a defendant's sentence is with the application of the relevant federal sentencing guideline calculation, it is also now clear that the sentencing court has discretion to impose a sentence outside of the range when it is justified by the 3553(a) factors. Thus, in Gall v. United States, 552 U.S. 38, 47-48 (2007), the Supreme Court rejected that suggestion that it takes "extraordinary circumstances" to sentence a defendant outside of the guideline range or the use of a "rigid mechanical formula" based upon the percentage of departure from the guidelines

as a test of the reasonableness of a sentence. Similarly, in Kimbrough v. United States, 552 U.S. 85, 109 (2007), the Supreme Court noted that the sentencing judge has greater familiarity with any particular defendant and any particular case than the generic guidelines and that the decision to “vary” from the advisory guidelines was entitled to the greatest respect when the court finds that a particular case is “outside the heartland” for which the federal sentencing commission intended the guidelines to apply.

In reliance upon the discretion to vary from the sentencing guideline range, other judges in this district have granted significant downward adjustments to the presumptive guideline range. These decisions, of course, are not binding on any other sentencing judge, but they do appear instructive on the issue presented to the Court by Mr. Barrera’s sentencing. Thus, for example, in United States v. Parris, 573 F.Supp.2d 744 (E.D.N.Y. 2008), the court granted a downward variance of 300 months when imposing a sentence in a securities fraud prosecution when he believed that imposing a guideline sentence would result in a manifest injustice. Similarly, in United States v. Ramirez, 792 F.Supp. 922 (E.D.N.Y. 1992), the Court imposed a sentence of probation when the presumptive guideline range was 33-41 months because of a variety of personal factors unique to the defendant. See also United States v. Mateo, 299 F.Supp.2d 201 (S.D.N.Y. 2004)(a variety of circumstances, including severity of conditions of pre-sentencing and post-sentencing confinement and totality of defendant’s personal circumstances justified nine level downward sentencing adjustment).

APPLICATION OF 18 U.S.C. 3553(a) FACTORS

1. Nature and Circumstances of Offense/Defendant’s Characteristics

In this case, the nature and circumstances of the defendant’s conduct reflect that this is a case which is outside the heartland of conduct punished by the criminal statute to which he entered a guilty plea. It seems clear that the purpose of the Treasury’s reporting requirements and the currency smuggling statutes is an effort to prevent persons involved in criminal activities from bringing funds either into, or out of, the United States. Indeed, at least one court has noted that these types of statutes require the registration of an “otherwise innocent item . . . on which duty is not generally collected.” United States v. Warren, 612 F.2d 887, 891 (5th Cir. 1980). The Warren court also noted that the legislative history of the predecessor statute reveals Congressional intent “not to create obstacles to the free flow of legitimate international trade and commerce.” 612 F.2d at 891, n.5.

Mr. Barrera’s conduct, while a violation of the statute, clearly does not fall within the ambit of the criminal activity the Treasury regulations are designed to attack. Mr. Barrera was not engaged in money laundering, nor were the funds in his possession the proceeds of crime. Rather, his motive in secreting the funds was to ensure that they were not stolen or he was kidnapped upon his departure from Colombia. As the Court may know, Colombia is a nation in the midst of great internal strife, as there is armed conflict between members of various terrorist groups in that country, including the FARC, the AUC, the ELN and others. It is well known that these groups use kidnapping and

extortion as a means of raising funds to finance their activities. It is not an infrequent occurrence for members of airport security and even unfortunately, the Colombian police to be in the employ of such groups and to provide them with information concerning passengers traveling with large sums of currency. In addition, Colombia has a series of currency export laws which greatly impede the ability of its citizens to engage in international commercial transactions. Likewise, commercial transactions with Chinese businesses are routinely undertaken in cash. For all these reasons, Mr. Barrera determined that it would be necessary to secrete the funds he was taking to purchase merchandise in China inside of his backpack.

Mr. Barrera's failure to report the money upon his unintended entry into the United States was a criminal act, but one that is outside of the conduct the criminal statute principally seeks to punish. Likewise, Mr. Barrera's conduct in failing to report the money did not deprive the United States of any import duties and the nature of the offense's impact on the interest of the federal government under these circumstances is *de minimis*.

Finally, this is Mr. Barrera's first conviction; defense counsel submitted to the pre-sentence writer a document reflecting that he has no criminal history in Colombia. He has no history of drug or other substance abuse.

2. Seriousness of the Offense/Promote Respect for the Law/Just Punishment

Mr. Barrera entered an early guilty plea in this case and accepted responsibility for his actions in an effort to demonstrate respect for the law. Mr. Barrera has acknowledged the seriousness of his offense and has lived with the regret of his conduct every day since his arrest on January 6, 2010. He has been suffering from extreme insomnia at the jail and has visited the clinic on several occasions as the result of his intense anxiety about the charges against him.

Moreover, Mr. Barrera agreed to a forfeiture of half of the funds in his possession at the time of his arrest – or approximately \$94,000.00.

The issue of just punishment will be addressed later in this letter.

3. Specific and General Deterrence

With respect to the factor of specific deterrence, there is good reason to believe that Mr. Barrera will have his United States visa revoked and will never be allowed to enter this Country again as the result of his felony conviction. In that regard, the interests of specific deterrence have already been satisfied.

Mr. Barrera intends to do his part in furthering the interest of general deterrence by advising his business and personal colleagues of the criminal penalties associated with failing to report more than \$10,000.00 in cash upon entry into the United States.

4. Training/Treatment/Alternative Sentences

These factors do not appear to be implicated in Mr. Barrera's sentencing. If released, he intends to return immediately to Colombia and after being reunited with his family, intends to return immediately to work in an effort to salvage and rebuild his business.

5. Unwarranted Sentencing Disparity

This guideline factor also strongly argues in favor of a sentence of time served in this case. There is a direct precedent from this jurisdiction in which a defendant who was involved in bulk cash smuggling received a probationary sentence.

In United States v. Khan, 325 F.Supp.2d 218 (E.D.N.Y. 2004), Judge Weinstein imposed a sentence of probation on the defendant after he was convicted at a trial of attempting to remove \$293,266.00 from the United States without completing a customs declaration. Like Mr. Barrera, the defendant in Khan was a legitimate businessman and even though he attempted to remove nearly \$100,000.00 more than Mr. Barrera from the United States and was convicted after a trial – he still received a probationary sentence. The federal sentencing statute expressly states that the Courts impose sentences designed to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. Section 3553(a)(1)(e). The application of this precept would more than seem to justify a sentence of time served for Mr. Barrera.

6. Restitution

Mr. Barrera has agreed to a significant forfeiture in this case. There is no direct victim of his crime and the defense respectfully request that this Court not impose any restitution as an element of the sentence.

7. Aberrant Behavior

The provisions of the federal sentencing guidelines also provide that a court may grant a downward departure if it concludes that the defendant's conduct constituted “aberrant conduct.” U.S.S.G. Section 5K2.20. In order to qualify for this departure, the court must conclude that the defendant committed a single criminal act, which: (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law abiding life. The Second Circuit has adopted a “totality of the circumstances” test for determining the applicability of this departure. See Zecevic v. United States Parole Commission, 163 F.3d 731, 736 (2d Cir. 1998).

The application notes for this guideline reflect that when assessing the application of this departure, a court should consider a defendant's mental state, employment record, history of good works, motivation for committing the offense, and efforts to mitigate the offense. In this case, the defendant's decision not to complete the currency reporting

requirement appears in every possible way to be a spontaneous, isolated incident in a life in which Mr. Barrera has otherwise been a law abiding citizen. His failing to report the money appear to be wholly aberrant to his otherwise law abiding and productive life. A similar result has been reached in other cases in which a defendant's conduct met the requirements of the downward departure. See, e.g., United States v. Paterson, 281 F.Supp.2d 626 (E.D.N.Y. 2003)(defendant received 13 level downward departure for aberrant behavior when role in drug offense which was limited to making introduction between two persons).

CONCLUSION

For all of his life until January 6, 201, Diego Barrera was a husband, father, business owner, and productive citizen of Colombia. All of that changed in the instant in which he failed to complete form informing the United States that he was carrying more than \$10,000.00 in cash on his person. As a result, he has been incarcerated thousands of miles from his home, business, and family. He entered an early guilty plea and agreed to forfeit \$94,000.00 in cash. He has done everything within his power to accept responsibility for his actions. Even though the U.S. Attorney's Office agreed to conditions of bail, the detainer placed on the defendant denied him the opportunity to remain in the community and work while his case was resolved in the courts. He now has a criminal conviction and will probably never be able to enter the United States again.

As set forth in this letter, the defense believes that this case falls outside of the heartland of the criminal conduct the bulk cash smuggling statute was designed to punish. We ask this Court to grant a downward variance and/or a downward departure based upon the aberrant nature of the offense and to sentence Mr. Barrera to time served, giving him the opportunity to return as quickly as possible to the life and loved ones that he has been apart from for the last two and a half months.

Sincerely,

/s/ Robert Feitel

Robert Feitel

cc: Assistant United States Attorney Celia Cohen
(via ECF and first class mail)