

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
V.	:	Case No.: 1:12-CR-00061-ML
	:	
RALPH M. MARIANO	:	

DEFENDANT'S SENTENCING MEMORANDUM

Defendant, Ralph M. Mariano, by and through counsel, submits this memorandum to aid the Court with imposing a sentence in his case that is "sufficient, but not greater than necessary" to achieve the statutory sentencing purposes of 18 U.S.C. § 3553.

I. BACKGROUND

On May 30, 2013, Mr. Mariano pleaded guilty to three offenses: (1) Conspiracy to Commit Theft of Government Property in violation of 18 U.S.C. § 371; (2) Theft of Government Property in violation of 18 U.S.C. §§ 641 and 2; and (3) Tax Evasion in violation of 26 U.S.C. 7201. The Court accepted Mr. Mariano's plea and adjudged him guilty. He is scheduled for sentencing on Friday, November 1, 2013.

U.S. Probation issued its presentence report (PSR) related to this case on October 18, 2013. That same day, prior to issuance of the PSR, Mr. Mariano's counsel represented to Probation by email that Defendant objects to the finding in paragraph 20 of the PSR that Mr. Mariano "has not clearly demonstrated an acceptance of responsibility" to receive a levels decrease pursuant to U.S.S.G. § 3E1.1. Defendant's objection is also noted in an addendum to the PSR. The substance of the objection is set forth in Section II below.

II. ACCEPTANCE OF RESPONSIBILITY

As stated above, the PSR recommends that Mr. Mariano not receive a reduction for acceptance of responsibility in his guidelines calculation. Probation's adverse recommendation

appears to follow the government's objection to Mr. Mariano receiving the acceptance reduction filed on September 11, 2013 and supplemented on October 10, 2013 (Attachment A).

The government's objection is apparently based upon statements made by Mr. Mariano in written complaints he filed with the Department of Justice's Office of Professional Responsibility (OPR) against the Assistant U.S. Attorney(s) assigned to this case. His written complaints are dated September 4, 2013; September 11, 2013; and September 24, 2013, respectively (Attachment B).¹ Mr. Mariano avers that his complaints to OPR do not disqualify him from receiving a levels reduction for accepting responsibility to his charged misconduct.

The U.S. Sentencing Guidelines (U.S.S.G.) provide for a potential reduction of 3 points for a defendant who demonstrates acceptance of responsibility for his offense. U.S.S.G. § 3E1.1. Section 3E1.1 (a) provides for a decrease by 2 points if the "defendant clearly demonstrates responsibility for his offense." U.S.S.G. § 3E1.1 (a). Section 3E1.1 (b) provides for a further decrease of 1 point "if the defendant qualifies for a decrease under section (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion by the government." U.S.S.G. § 3E1.1 (a).

In the instant case, Mr. Mariano avers that he should receive a full 3-level reduction for his acceptance of responsibility, as provided for by the terms of his plea agreement. The burden of proving acceptance of responsibility lies with the defendant. *United States v. Franky-Ortiz*, 230 F.3d 405, 408 (1st Cir. 2000). "To prove acceptance of responsibility, a defendant must truthfully admit or not falsely deny the conduct comprising this conviction, as well as any

¹ Mr. Mariano's OPR complaints were filed on his own. The complaints consist of cover letters authored by Mr. Mariano detailing his allegations against the U.S. Attorney's Office and prosecutors assigned to this case, as well as voluminous enclosures. Since Mr. Mariano's statements contained in the complaints are the focus of the government's objection to his receiving acceptance of responsibility points, only the letters have been filed with the Court. Their enclosures are too voluminous to attach to this sentencing memorandum, but may be made available upon request from the Court.

relevant conduct for which he is accountable.” *United States v. Garrasteguy*, 559 F.3d 34, 38 (1st Cir. 2009)(citing *United States v. Glaum*, 356 F.3d 169, 180 (1st Cir. 2004)).

A. 2-Point Decrease under U.S.S.G. § 3E1.1 (a)

To determine whether a defendant qualifies for an acceptance of responsibility reduction under U.S.S.G. § 3E1.1 (a), the Court must look to U.S.S.G. § 3E1.1, cmt (n.1) for a non-exclusive list of considerations or factors. These considerations include, but are not limited to, a defendant truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting, or not falsely denying, any additional relevant conduct for which is the defendant is accountable under §1B1.3 (Relevant Conduct), U.S.S.G. § 3E1.1, cmt (n.1(A)); voluntary termination or withdrawal from criminal conduct or associations, U.S.S.G. § 3E1.1, cmt (n.1(B)); voluntary surrender to authorities promptly after commission of the offense, U.S.S.G. § 3E1.1, cmt (n.1 (D)); voluntary resignation from the office or position held during the commission of the offense, U.S.S.G. § 3E1.1, cmt (n.1 (F)); and post-offense rehabilitative efforts, U.S.S.G. § 3E1.1, cmt (n.1 (G)).

The application of these considerations to the facts of Mr. Mariano’s case warrants awarding him with a 2-point reduction for acceptance of responsibility. Mr. Mariano tendered his guilty plea, which the Court accepted on May 30, 2013. Since then, he has not withdrawn or attempted to withdraw his guilty plea. This Court is fully aware that Mr. Mariano previously sought a continuation of his sentencing hearing to explore this particular issue. After careful consideration, Mr. Mariano did not move to vacate his plea – an action consistent with the acceptance of responsibility that he portrayed on May 30, 2013. Since then, Mr. Mariano has not denied his involvement in the admitted offenses or sought to minimize his participation in the admitted or relevant conduct.

Prior to both his indictment and pleading guilty, Mr. Mariano was first charged, by way of a criminal complaint, on February 3, 2011. He responded by surrendering to authorities on February 7, 2011. He also ceased any further contact with many of his co-conspirators at or near this time. Mr. Mariano's admitted offenses all pertain to misconduct he committed while a government employee for the U.S. Navy and Department of Defense. Mr. Mariano voluntarily resigned from his government position on or about August 25, 2011. He also participated in post-offense rehabilitative efforts by consistently attending weekly one-on-one counseling sessions since March 3, 2013 up to and including the present time (Attachment C).

As additional evidence of Mr. Mariano's acceptance of responsibility, beyond those considerations enumerated in the guidelines commentary, this Court may consider Mr. Mariano's post-misconduct behavior. Since his surrender on February 7, 2011 up to the present time, Mr. Mariano has remained on pretrial release. During this time, he has not been accused or suspected of engaging in or committing any further misconduct. He has complied with all imposed terms and conditions of his pretrial release.

Further, Mr. Mariano has not denied his admitted wrongdoing or level of wrongdoing. He stipulated to the amount of loss from his actions, nearly \$18,000,000.00, in his plea agreement with the government and has since made no effort to challenge this amount. He made no challenge or objections to the factual assertions contained in the PSR, to include the government's version of events set forth in paragraph 17 entitled "Prosecution Version." Mr. Mariano has not been accused of or charged with obstructing justice, perjury or making untruthful or conflicting statements under oath with respect to his previously admitted misconduct. He also makes no attempt to blame others for his actions. All of these factors, individually and collectively, weigh in favor of awarding him acceptance of responsibility points.

The government's objection to Mr. Mariano's receipt of a 2-point downward adjustment should be carefully scrutinized by this Court. The substance of the government's objection is derived from the content of Mr. Mariano's OPR complaints. Those complaints, which the government cites in its written objection to Probation, are attached for the Court's consideration. Mr. Mariano urges the Court to review his OPR complaints in order to make its own individual assessment of whether he made statements or engaged in conduct inconsistent with his guilty plea and acceptance of responsibility.

Mr. Mariano's OPR complaints attack the prosecutorial conduct by Assistant U.S. Attorneys assigned to this matter. One of the prosecutors named in Mr. Mariano's complaint authored the very objection seeking to deny his acceptance of responsibility points. The complaints also contain commentary by Mr. Mariano regarding the credibility of certain government witnesses, some of his Co-Conspirators, and other forms of evidence disclosed and relied upon by the government to secure his indictment. Mr. Mariano does not maintain his innocence in his OPR complaints or make assertions inconsistent with his acceptance of responsibility. In essence, he challenges and calls into question the conduct of the attorney(s) responsible for his prosecution, the government's overall theory of its case against Mr. Mariano, and the process leading up to his indictment and guilty plea. Mr. Mariano should not be penalized by this Court or the government for seeking to report and correct what he perceives – even if a misperception – as misconduct by members of the U.S. Attorney's Office or flaws in the criminal justice system.

Notwithstanding Mr. Mariano's comments and beliefs contained in the OPR complaints, to include assertions that some government witnesses committed perjury and particular items of evidence are unreliable, he simply does not recant his guilty plea or former acceptance of

responsibility. To the contrary, Mr. Mariano specifically states in his written complaint of September 4, 2013 that “[m]y plea is not the issue,” “it is the means and the methods of this USAO [U.S. Attorney’s Office] and its investigators that I seek to address.” In this same complaint, he states his intent “not to hide behind my actions,” acknowledges his own “poor judgment,” and relays his preparedness to “own up to my own actions.” Mr. Mariano’s commentary in this regard underscores the very acceptance of responsibility he displayed to the Court at his change of plea hearing on May 30, 2013.

B. 1-Point Decrease under U.S.S.G. § 3E1.1 (b)

The decision of whether to file a motion to afford a defendant with an additional 1-point reduction under U.S.S.G. § 3E1.1 (b) is primarily within the discretion of the government. *United States v. Beatty*, 538 F.3d 8 (1st Cir. 2008). “[F]or the most part, the government has unbridled discretion in deciding whether to file such a motion” for this one level adjustment. *Id.* at 15 (*citing United States v. Sandoval*, 204 F.3d 283, 285 (1st Cir. 2000)). The government’s discretion is constrained in only two instances: (1) where the government’s failure to move is based on a constitutionally impermissible factor or (2) the failure to move is not rationally related to a legitimate government end where “the government explicitly undertakes to make, or to consider making, such a motion.” *Id.* (*citing Sandoval*, 204 F.3d at 286).

In the instant case, Mr. Mariano and the government contracted by way of a plea agreement for the government to move the Court, at the time of sentencing, for this one level decrease in accordance with U.S.S.G. § 3E1.1 (b). The government has since changed its tune, again, because of Mr. Mariano’s statements contained in the OPR complaints. Defendant reiterates the reasons set forth above in support of his position that this one level decrease is

warranted. Further, Mr. Mariano avers that no legitimate government end is achieved by denying him this additional point.

It should be noted that counsel does not comment on the credibility or veracity of Mr. Mariano's allegations contained in his OPR complaints. They were filed by Mr. Mariano in his individual capacity. The allegations are presumably under investigation by proper authorities and should neither be cited nor invoked to interfere with the sentencing process. Unfortunately, the government has seized upon them to gain a tactical sentencing advance, which the Defense argues should not be permitted by this Court.

In each of his complaints, Mr. Mariano expresses fear of retaliation or retribution for the complaints. In response to his attack on a prosecutor assigned to this case, he now finds himself, coincidentally, on the receiving end of an objection by the government authored by the very same prosecutor under attack that he not receive any points for acceptance of responsibility, to include the single point that lies within the government's discretion.

The Defense urges the Court to conclude that allowing the government to breach the terms of its contract with Mr. Mariano by not moving for this one level decrease neither serves nor is rationally related to serving a legitimate government end. To the contrary, rewarding this sentencing maneuver by the government to deprive Mr. Mariano of this or any of the acceptance points will work against legitimate government ends by creating a chilling effect on those seeking to report what they perceive as prosecutorial misconduct. The Defense would like to believe the government would prefer the opposite, that is, to foster a climate where all individuals, including defendants, feel comfortable coming forward to report perceived injustices to the Department of Justice without fear or risk of retaliation.

For the aforementioned reasons, Mr. Mariano asks that he be awarded the 1-point adjustment pursuant to U.S.S.G. § 3E1.1 (b). Alternatively, should the Court conclude that it lacks authority to award this particular point, Mr. Mariano asks the Court to exercise its discretion under *United States v. Booker* and 18 U.S.C. § 3553 by adjudging a sentence consistent with the guidelines range, had he been afforded this acceptance point.

III. POST-BOOKER SENTENCING

In today's federal sentencing landscape, District Courts are required to fashion a sentence "sufficient, but not greater than necessary" to achieve the statutory purposes of punishment set forth in 18 U.S.C. § 3553 (a). *United States v. Booker*, 543 U.S. 220 (2005). Sentencing should begin with a calculation of the applicable sentencing guidelines range. *Gall v. United States*, 128 S. Ct. 586, 596 (2007) (citing *Rita v. United States*, 127 S. Ct. 2456, 2480 (2007)). The guidelines calculation is a starting point and initial benchmark for the Court to consider, however, it is not the only sentencing consideration. *Id.* A Court may not presume that the guidelines range is reasonable, but must make an individualized assessment based upon the facts presented in each case. *Gall*, 128 S. Ct. at 597. After both parties are afforded an opportunity to argue for whatever sentence they deem appropriate, the Court should then consider all of the factors outlined in 18 U.S.C. § 3553 (a). *Id.*

To determine an appropriate sentence that is sufficient, but not greater than necessary, the Court shall consider the following:

- (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 educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;
- (5) any pertinent policy statement issued by the Sentencing Commission;
- (6) the need to avoid unwarranted sentence disparities among the 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. 18 U.S.C. § 3553.

The government argues that a sentence at the high end of the guidelines range is warranted for Mr. Mariano based upon its analysis and application of the 18 U.S.C. § 3553 sentencing considerations. While the Defense makes no request or suggestion for a particular jail term, it asks the Court to consider its own application of the sentencing factors.

(1) The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant.

Mr. Mariano stands before the Court as a 55 year-old, first time offender who, through his own actions and admissions, has brought significant discredit upon himself, his family, the United States Navy, Department of Defense, and United States government. He offers absolutely no excuse or justification for his actions. Further, he makes no attempt to minimize his involvement or role in his admitted misconduct. Mr. Mariano acknowledges that he deserves significant punishment for his wrongdoing and fully anticipates the Court will impose such punishment at the time of sentencing.

When contemplating an appropriate sentence in this case, Mr. Mariano asks the Court to consider that he is single, has never married and does not have any children. Notwithstanding, he is and has always been a man committed to his family. Mr. Mariano has two elderly parents, including a father who suffers from a plethora of ailing health conditions, is routinely in and out of the hospital due to heart complications and whose life expectancy is growing increasingly short. Mr. Mariano has been the primary caretaker for his elderly parents for the past several

years. Though he has adult siblings, Mr. Mariano accompanies his father to physicians' appointments and assists his mother with household chores. The Marianos do not drive, lack financial means to travel, and are inching toward the end of their natural lives. Should this Court adopt the sentencing recommendation of the government, it is highly plausible that Mr. Mariano may not see his parents again in this lifetime once placed into federal custody.

Mr. Mariano is also a committed friend and was a known mentor to others while employed by the Navy (Attachment D). Notwithstanding his recent actions, Mr. Mariano completed twenty-nine (29) years of public service with the government. He made many meaningful contributions and achievements during this time period. His resume is attached to further illustrate his professional accomplishments (Attachment E). His career is now destroyed, as is any meaningful prospect of finding equivalent employment in the foreseeable future. His record and reputation are forever scarred. He has no chance of ever working for the government or in the defense industry again. This lasting reality is a form of punishment which this Court cannot affect with its adjudged sentence.

Mr. Mariano also has a reputation of performing charitable work during his lifetime. He was a reliable contributor to his church for many years. Also, while residing in the greater Washington, D.C. area, he made considerable contributions to the city's homeless population. He purchased food and clothing, especially during the holiday season and winter months, which he then donated and distributed to the poor (Attachment F). Mr. Mariano asks the Court to consider these selfless acts when measuring his worth at the time of sentence.

Mr. Mariano is now financially destitute. He has virtually no assets or income. Any monies he illegally obtained are completely gone and non-recoverable. Mr. Mariano is barely employed, only part-time due to the graciousness of a caring relative. But for the few dollars he

earns each week and the gifts/contributions he receives from friends and relatives on an infrequent basis, he can barely sustain himself financially. This circumstance is due to his own fault. Mr. Mariano went from the top of his game as a trusted, well-respected, handsomely paid electrical engineer under the employ of the federal government to a publicly disgraced, convicted felon with little to no hope of a measureable future. Regardless of the sentence imposed by this Court, the future course of Mr. Mariano's destiny cannot likely be changed.

(2) The Need for the Sentence Imposed To Reflect the Seriousness of the Offense, Promote Respect for the Law, Provide Just Punishment for the Offense, Afford Adequate Deterrence to Criminal Conduct, Protect the Public from Further Crimes of the Defendant, and Provide the Defendant with Needed Educational or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner.

Mr. Mariano concedes that a jail term is warranted to further these particular sentencing considerations. However, an extended jail term as that advocated for by the government is not necessary to promote respect for the law, to deter Mr. Mariano from committing future misconduct or to protect the public. His respect for the law may be inferred from his acceptance of responsibility during his guilty plea hearing on May 30, 2013. Further, as stated above, Mr. Mariano is a first-time offender. Given his age, acceptance of responsibility and the Court's anticipated sentence, this Court may conclude that his likelihood of recidivism is exceptionally low. This is further evidenced by the rehabilitative efforts and documented progress he has already made, without any confinement, through the regular attendance of counseling.

(3) The Kinds of Sentences Available.

The Court has many sentencing options at this disposal. Mr. Mariano asks the Court to consider that a just punishment is not limited to extended jail time and may include alternative sentencing terms. A prolonged jail sentence will, among other things, add to the existing liability already imposed on the tax payers by Mr. Mariano's admitted misconduct. Based on

financial numbers set forth in the PSR, for each year Mr. Mariano remains confined, the taxpayers will shoulder an additional estimated annual liability of \$29,000.00. Though piling in comparison the amount of loss attributed to Mr. Mariano for his admitted acts, the competing public interests of properly stewarding tax dollars (i.e. public funds) and seeking restitution from Mr. Mariano weigh in favor of a reduced jail term from the term suggested by the government combined with a prolonged period of court-ordered public or community service.

Mr. Mariano is an educated man with a great deal of engineering experience. He would, if ordered, better serve his victim (i.e. the public) through working in the community towards a greater good opposed to increasing his existing burden on the taxpayers from sitting idle in a jail cell. Mr. Mariano asks the Court to consider this alternative sentencing option opposed the lengthy jail term proposed by the government.

(4) Any Pertinent Policy Statement Issued by the Sentencing Commission.

With respect to this sentencing consideration, Mr. Mariano asks the Court to consider the background commentary to U.S.S.G. § 3E1.1. U.S.S.G. § 1B1.7 provides that “[s]uch commentary is to be treated as the legal equivalent of a policy statement.” The background commentary for the acceptance of responsibility provision of the guidelines provides that “[t]he reduction of offense level provided by this section recognizes legitimate societal interests” such as that “a defendant who clearly demonstrates acceptance of responsibility for his offense...is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.” U.S.S.G. § 3E1.1 cmt. For the reasons set forth in Section II of this memorandum, Mr. Mariano asks that he be afforded the 3-point level decrease for his acceptance of responsibility, or alternatively, sentenced by the Court under its post-*Booker* discretion and 18 U.S.C. 3553 (a) as if he had been awarded this level decrease.

(5) The Need to Avoid Unwarranted Sentence Disparities Among the Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct.

With respect to this sentencing factor, Mr. Mariano asks the Court to consider how some of his co-conspirators, both charged and uncharged, have already or are expected to be treated at sentencing. Under conspiracy liability, all members of a conspiracy are viewed through the eyes of the law as equally responsible for their co-conspirators actions that are carried out in further of the common conspiratorial objectives. The government contracted via a plea agreement to recommend a sentence of no jail for Mr. Mariano's father, Ralph Mariano, Jr. Accordingly, he was sentenced to a term of home confinement. The government similarly contracted and committed to recommending a sentence of no jail time for Mr. Mariano's long-time girlfriend, Ms. Mary O'Rourke, who is awaiting sentence. In comparison, the government now asks the Court to sentence Mr. Mariano at the upper end of the guidelines range. This great sentencing disparity, as suggested by the government, does not comport with principles of fairness or equity.

Moreover, Gary Scavoni, an unindicted co-conspirator in this case, was neither charged nor punished in this case. Mr. Scavoni received immunity from the government in exchange for his testimony and cooperation against Mr. Mariano. Though Mr. Mariano has no standing to question or challenge the government's exercise of its discretion regarding the grant of immunity, he simply asks the Court to consider this fact when adjudging sentence. According to the government, Mr. Scavoni's delivery of weekly payments to Mr. Mariano in the amount of several thousand dollars rendered Mr. Mariano's admitted misconduct possible. This key facilitator has been allowed to walk free while the government remains intently focused, proverbially speaking, on placing Mr. Mariano into a locked cage and throwing away the key. Again, this proposed disparity promotes unfairness and inconsistent punishments.

(6) The Need to Provide Restitution to Any Victims of the Offense.

Mr. Mariano fully acknowledges the appropriateness of court-ordered restitution in this case. Though it may take him the rest of his natural life to make a meaningful impact in the debt he apparently owes society, he is eager to begin making contributions toward it, however small. Mr. Mariano specifically seeks a split sentence consisting of a reduced jail time from that recommended by the government combined with extensive community service hours tantamount to long-term, full-time, indentured servitude. Mr. Mariano is committed to working the majority of his natural life in the community implementing the lessons learned from his actions and experiences to better the lives of others. He feels such service will make a greater, long-term impact on the public rather than the short-lived news of his commitment to federal confinement facility. Instead of the “remembered today, forgotten tomorrow” effect of a long jail sentence, Mr. Mariano avers that society will benefit more from his continued presence in the community serving the public, as the Court and Department of Probation may direct. This proposed sentencing term will allow society to exact some measure of restitution and contributions from Mr. Mariano for his admitted acts.

IV. CONCLUSION

Based upon the foregoing, Mr. Mariano, by and through counsel, respectfully asks the Court to reject the government’s sentencing recommendation, award him a decrease for acceptance of responsibility, and consider a split sentence that consists of both jail and a prolonged community or public service requirement in lieu of extended confinement.

Respectfully submitted this 29th day of October 2013.

RALPH M. MARIANO
By his attorney,

John L. Calcagni III (Bar No.: 6809)
Law Office of John L. Calcagni III, Inc.
One Custom House Street, Third Floor
Providence, RI 02903
Phone: (401) 351.5100
Fax: (401) 351.5101
Email: jc@calcagnilaw.com

CERTIFICATION

I hereby certify that this document was sent via hand-delivery to government counsel,
Assistant U.S. Attorney Lee Vilker, on October 29, 2013

John L. Calcagni III (Bar No.: 6809)
Law Office of John L. Calcagni III, Inc.
One Custom House Street, Third Floor
Providence, RI 02903
Phone: (401) 351.5100
Fax: (401) 351.5101
Email: jc@calcagnilaw.com