

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No.: 8:18-cr-296-T-35AAS

GUSTAVO ALBERTO VARGAS
_____ /

SENTENCING MEMORANDUM

COMES NOW, the Defendant, GUSTAVO ALBERTO VARGAS, by and through his undersigned attorney, and hereby files this Sentencing Memorandum, in which he asks this Honorable Court to impose a sentence that is “sufficient, but not greater than necessary” to achieve the purposes of sentencing, pursuant to 18 U.S.C. § 3553(a). As grounds in support hereof, Mr. Vargas states:

Background

Gustavo Vargas fills the people in his life with light and laughter. From the moment he was appointed to counsel’s office, calls and letters from family and friends rolled in. Mr. Vargas grew up in a close-knit and deeply religious family in Colombia. When he speaks of his childhood, he describes it, with joy, as full of “harmony, respect, love, and happiness.” PSR ¶ 37. Around the age of seventeen, Mr. Vargas became involved with the indigenous spiritual

community. He carries a card identifying him as a member to this day. An integral part of the spiritual practice includes the brewing and occasionally consuming of a tea. The tea is a sacramental tea, and it is brewed from plants unique to the region in Colombia. The sacramental tea contains dimethyltryptamine or DMT, a hallucinogen that the United States bans under the Controlled Substances Act. Despite the ban, the United States acknowledges and concedes “that this practice is a sincere exercise of religion . . .” Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423, 126 S. Ct. 1211, 1216, 163 L. Ed. 2d 1017 (2006).

Mr. Vargas remains a citizen of both Colombia and the United States of America. He originally came to this country in 2003-2004 at the invitation of his aunt. PSR ¶ 38. About a year later he fell in love and got married. PSR ¶ 42. The marriage did not survive but the two remain good friends. *Id.* Mr. Vargas is a musician, and plays often in spiritual ceremonies. He worked three jobs before suffering a traumatic work injury. PSR ¶ 44. He regularly attends therapy, attempting to rebuild the strength in his arm. He remains unable to work but cannot wait to return. Before the accident, he worked at a bakery from 5:00 am-2:00 pm. PSR ¶ 51. He took a break and went to his second job cleaning offices from 4:30 pm-10:30 pm. PSR ¶ 52. On weekends, he washed dishes for a local

restaurant from 4:00 pm to midnight. And his employers feel the same way – at least one let the probation officer know they cannot wait until he returns. PSR ¶ 53.

In November of 2017, Mr. Vargas entered to the Tampa Airport. He carried four bottles of ceremonially brewed sacramental tea for a ceremony in Florida. He did not understand that the tea would be considered narcotics and he would be arrested. His aunt describes his involvement in the case as “very naïve”. PSR ¶ 37. When Mr. Vargas talks about the tea, he describes it as a gift that teaches about life and nature. His involvement in this offense stemmed from wanting to assist in the ceremonies, which consist of being in a circle, gazing at the stars, and listening to music. PSR ¶ 18. He considers the tea known as ayahuasca a sacred “gift from God”. Id. The tea was brewed and carried from Colombia legally, to provide at an upcoming January 2018 Miami ceremony involving Seminole and Cherokee tribes.

Procedural History and Guideline Calculations

Mr. Vargas is charged in the instant case with a misdemeanor offense of Possession of a Controlled Substance in violation of 18 U.S.C. § 844(a). The probation officer correctly calculated Mr. Vargas’s advisory guideline range.

With a total offense level of 2, and a criminal history category I, Mr. Vargas's guideline imprisonment range is 0 – 6 months. PSR ¶ 57.

Memorandum of Law

The defense would submit that an analysis of the 18 U.S.C. § 3553(a) factors support a finding that a non-incarceration sentence is all that is necessary to accomplish the purposes of sentencing and that a variance in Mr. Vargas's case would be appropriate.

Mr. Vargas respectfully requests that this Court impose a sentence with no incarceration, as “sufficient but not greater than necessary” to accomplish the purposes of sentencing. 18 U.S.C. § 3553(a). The Sentencing Guidelines are now, of course, advisory. *United States v. Booker*, 543 U.S. 220 (2005). Thus, although the recommended guideline range is obligated to be taken into account, this Court must follow the “parsimony provision” of 18 U.S.C. § 3553(a), which is the “overarching” command of the statute. *Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558, 570 (2007). That provision provides that this Court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of [§ 3553(a)].” Those purposes set forth in paragraph 2, are: “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.” 18 U.S.C. § 3553(a)(2).

A. The Nature and Circumstances of the Offense and the History and Characteristics of Mr. Vargas [18 U.S.C. § 3553(a)(1)]

The history and characteristics of Mr. Vargas, as well as the facts and circumstances of this case would justify a variance. Mr. Vargas is 42 years old, and has never been in trouble. And though he possessed the tea, he did so with a noble intent, seeking as part of his beliefs to help people. The United States Sentencing Commission has a pending addition to Section Five, stating that if a defendant is a “nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.” Exh. A. This case, in particular, suggests that a sentence involving service to the community and possible supervision would be sufficient, but not greater than necessary. He loves to serve and participate in his community. Exh. B.

B. To Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense [18 U.S.C. §3553(a)(2)(A)]

Mr. Vargas has accepted responsibility for his actions, and understand the current state of the law in the United States. Mr. Vargas wishes to heal and return to work. He is active in his community and works tirelessly to help others. He wants to put the horror of the experience with criminal system behind him and will follow any directives of the Court. He did so well on pretrial release, that his supervising officer requested that the location monitoring could be removed. He continues to be on release with no violations, working to regain his strength and work.

CONCLUSION

For the reasons stated herein, Mr. Vargas, respectfully urges this Court to impose a sentence without incarceration. Such a sentence is within the advisory guideline range and is reasonable in light of the factors set forth at 18 U.S.C. § 3553(a).

DATED this 20th day of September, 2018.

Respectfully submitted,

DONNA LEE LEM
FEDERAL DEFENDER

/s/ Nicole Valdes Hardin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of September, 2018, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will send notice of the electronic filing to the following:

Josephine Thomas, AUSA

/s/ Nicole Valdes Hardin

Nicole Valdes Hardin
Assistant Federal Defender



Amendments to the Sentencing Guidelines

April 30, 2018

Effective Date
November 1, 2018

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary submitted to Congress, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at www.ussc.gov and will appear in a forthcoming edition of the *Federal Register*.

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The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. § 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

The Commission specified an effective date of **November 1, 2018**, for the amendments listed above and included in this compilation.

7. ALTERNATIVES TO INCARCERATION FOR NONVIOLENT FIRST OFFENDERS

Reason for Amendment: The amendment adds a new application note to the Commentary at §5C1.1 (Imposition of a Term of Imprisonment), which states that if a defendant is a “nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.” This new application note is consistent with the statutory language in 28 U.S.C. § 994(j) regarding the “general appropriateness of imposing a sentence other than imprisonment” for “a first offender who has not been convicted of a crime of violence or an otherwise serious offense” and cites the statutory provision in support. It also is consistent with a recent Commission recidivism study, which demonstrated that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system have an even lower recidivism rate. See Tracey Kyckelhahn & Trishia Cooper, U.S. Sentencing Comm’n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* at 6–9 (2017).

Where permitted by statute, the Guidelines Manual provides for non-incarceration sentences for offenders in Zones A and B of the Sentencing Table. Zone A (in which all sentencing ranges are zero to six months regardless of criminal history category) permits the full spectrum of sentencing options: (1) a fine only; (2) a term of probation only; (3) probation with conditions of confinement (home detention, community confinement, or intermittent confinement); (4) a “split sentence” (a term of imprisonment followed by a term of supervised release with condition of confinement that substitutes for a portion of the guideline term); or (5) a term of imprisonment only. Zone B (which includes sentencing ranges that have a low-end of one month and a high-end of 15 months, and vary by criminal history category) also authorizes non-prison sentences. However, Zone B sentencing options are more restrictive, authorizing (1) probation with conditions of confinement; (2) a “split sentence”; or (3) a term of imprisonment only. Consistent with the statutory mandate in section 994(j), the application note is intended to serve as a reminder to courts to consider imposing non-incarceration sentences for a defined class of “nonviolent first offenders” whose applicable guideline ranges are in Zones A or B of the Sentencing Table.

For purposes of the new application note, the amendment defines a “nonviolent first offender” as a defendant who (1) has no prior convictions or other comparable judicial dispositions of any kind; and (2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense. It explains that “comparable judicial dispositions of any kind” includes “diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications.”

The amendment adopts language from the statutory and guidelines “safety-valve” provisions to exclude offenders who “use[d] violence or credible threats of violence or possess[ed] a firearm or other dangerous weapon in connection with the offense.” See 18 U.S.C § 3553(f)(2); USSG §5C1.2(a)(2). This real-offense definition of “violent” offense avoids the complicated application of the “categorical approach” to determine whether an offense qualifies as “violent.” See *United States v. Starks*, 861 F.3d 306, 324 (1st Cir. 2017) (describing the “immensely complicated analysis required by the categorical

approach”); see also USSG §5C1.2, comment. (n.3) (noting that the determination of whether “the offense” was violent or involved a firearm requires a court to consider not only the offense of conviction but also “all relevant conduct”). It also ensures that only nonviolent offenders are covered by the new application note.

The amendment also deletes language from the commentary to §5F1.2 (Home Detention) that generally encouraged courts to use electronic monitoring (also called location monitoring) when home detention is made a condition of supervision, and instead instructs that electronic monitoring or any alternative means of surveillance may each be used, as “appropriate.” The goal of this change is to increase the use of probation with home detention as an alternative to incarceration. The Commission received testimony indicating that location monitoring is resource-intensive and otherwise demanding on probation officers. Additionally, it heard testimony that imposing location monitoring by default is inconsistent with the evidence-based “risk-needs-responsivity” (RNR) model of supervision and may be counterproductive for certain lower-risk offenders. For many low-risk offenders, less intensive surveillance methods (e.g., telephonic contact, video conference, unannounced home visits by probation officers) are sufficient to enforce home detention. The revised language would allow probation officers and courts to exercise discretion to use surveillance methods that they deem appropriate in light of evidence-based practices.

Amendment:

§5C1.1. Imposition of a Term of Imprisonment

* * *

Commentary

Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.
2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.
3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months), the court has three options:
 - (A) It may impose a sentence of imprisonment.

- (B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.
- (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

- 4. If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). *See* 28 U.S.C. § 994(j). For purposes of this application note, a “**nonviolent first offender**” is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase “comparable judicial dispositions of any kind” includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.
- 45. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (*i.e.*, the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:
 - (A) It may impose a sentence of imprisonment.
 - (B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

56. Subsection (e) sets forth a schedule of imprisonment substitutes.
67. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

78. The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.
89. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.
910. Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

ADDENDUM TO THE PRESENTENCE REPORT

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
UNITED STATES V. GUSTAVO ALBERTO VARGAS
Docket No. 8:18-cr-296-T-35AAS**

The probation officer certifies the presentence report and any subsequent revisions were disclosed to the defendant, his attorney, and counsel for the government. The content of the addendum, which fairly states any objections made by counsel, also was disclosed to all parties.

OBJECTIONS

By the Government

The government has no objections to the presentence report or the application of the guidelines.

By the Defendant

The defendant has no unresolved objections to the presentence report or the application of the guidelines.

Respectfully Submitted,

Joseph C. Collins
Chief U.S. Probation Officer

/s/ Kaleena K. Roy

By: Kaleena K. Roy
United States Probation Officer

Approved:

/s/ Joshua Luria

Joshua Luria
Supervisory United States Probation Officer

Just a few edits – thanks

Paragraph 39 – His father’s business is currently managed by his sons Juan and Carlos due to his health.

Paragraph 40 – teach should be teacher

Paragraph 54: He checked when he got home and the exact amount of the check for his workman comp is \$556.56

Have a great holiday weekend!

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