UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 20-cr-20124
Hon. LAURIE J. MICHELSON

vs.

ERSKIN BERNARD PERRYMAN,

Defendant.

_____/

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DEFENDANT ERSKIN BERNARD PERRYMAN'S SENTENCING MEMORANDUM AND OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT

NOW COMES the Defendant, ERSKIN BERNARD PERRYMAN ("Defendant"), by and through his attorney, SANFORD A. SCHULMAN and states in support of his Sentencing Memorandum and Objections to Presentence Investigation Report as follows

INTRODUCTION AND OVERVIEW

A. Nature and Circumstances of LLOYD DANIEL BATE's Offense and His History and Characteristics

Erskin Perryman was far more a supplier of drugs than he was engaged in sex trafficking. He never transported the woman to his father's house or away from his father's house and he certainly never held them hostage or assaulted them. However, he was at least one of the suppliers of drugs to the woman residing in the home and for his contributing role and the firearms at the home, he has accepted full responsibility.

Erskin pled guilty and the advisory guidelines for possession with the intent to distribute controlled substances starts at 20 points and is increased by 2 points for the firearms that were recovered from the home and an additional 2 points because one of the firearms apparently had been reported stolen and then an addition 4 more points because the firearms was in the same location as the drugs for a total of 28 points before reduction for acceptance of responsibility.

The parties entered into a Rule 11 Plea Agreement that anticipated a base level of 34 points for the charge of conspiracy to engage in sex trafficking by force, fraud or coercion. However, as will be further set forth below, there appears to be some division in the various circuits with the 9th Circuit reversing a conviction where the trial court applied the 34-point base level. Even the presentence report initially calculated the base level as 14 with 4 point enhancement for threats of violence and the exploitation of the victim.

Assuming this court adopts the base level as set forth in the plea agreement and the amended presentence investigation report the court can also consider that the defendant's prior criminal history is simply overstated. He received an unanticipated 3-points for a conviction 17 years ago for felony firearm in 2004 in addition to the 3-points for his 2008 felony firearm second conviction with his last conviction in 2016 for delivery of less than 50 grams which he received a probationary sentence adding two additional points.

The initial sentencing guidelines calculated by probation placed the guideline range at 100 to 125 months but were later adjusted to 188 to 235 based on the modified base level.

The defense urges this court to look at the defendant's actual role in the offense (which the defense characterizes as a minor participant entitling him the appropriate point reductions), his lack of direct connection to the firearms, his lack of assaultive

behavior, his decision to plea without filing motions and full acceptance of responsibility and that his plea likely induced the plea of the co-defendant. In addition, as equally as important, his personal history which includes his relationship with his wife and children and their spouses and his overstated criminal history. (See attached letters in support). All of which provides this Court an ample basis to sentence below the advisory guidelines and impose a sentence of 60 months.

The Offense

The home at Hazelwood was admittedly a den for drugs and commercial sex crimes. Many of the woman had long been involved in drug use and had worked in the sex for money industry. That certainly does not excuse Erskin's conduct. But, quite frankly, most individuals seeking to purchase drugs may already be involve in the exchange of sexual acts for money or drugs. There is no evidence that Erskin ever used force or assaulted anyone but acknowledges that there firearms found at the home however his role was focused on supplying the drugs and for this a sentence which is sufficient but not greater than necessary is requested.

Characteristics of Erskin Perryman

Erskin is described as a mild-mannered, respectful and family man. He has no history of assaultive behavior and has been married for 25 years to Monique Perryman. They have successful children ages 28, 21 and 14. He is intelligent and completed high

school and some community college courses. He hopes to pursue additional eduction in the field of horticulture.

B. Legal Framework

While this Court must still correctly calculate the guideline range, Gall v. United States, 552 U.S. 38, 49 (2007), it may not treat that range as mandatory or presumptive, id. at 51; Nelson v. United States, 555 U.S. 350, 352 (2009), but must treat it as "one factor among several" to be considered in imposing an appropriate sentence under § 3553(a). Kimbrough v United States, 552 U.S. 85, 90 (2007). The Court must "consider all of the § 3553(a) factors," "make an individualized assessment based on the facts presented," id. at 49-50 and explain how the facts relate to the purposes of sentencing. Id. at 53-60; Pepper v. United States, 131 S. Ct. 1229, 124243 (2011). The Court's "overarching" duty is to "'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing." Id. at 101; Pepper, 131 S. Ct. at 1242-43.

A key component of Supreme Court law, designed to ensure that the guidelines are truly advisory and constitutional, is the authority of this Court to disagree with a guideline as a matter of policy. Because "the Guidelines are now advisory . . ., as a general matter, courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." Kimbrough, 552 U.S. at 101-02 (internal punctuation omitted) (citing Rita v. United States, 551 U.S. 338, 351

(2007) (district courts may find that the "Guidelines sentence itself fails properly to reflect § 3553(a) considerations").

C. Need for Adequate Deterrence, 18 U.S.C. § 3553(a)(2)(B)

The empirical evidence is unanimous that there is no relationship between sentence length and general or specific deterrence, regardless of the type of crime. See Andrew von Hirsch et al., Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (1999) (concluding that "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance," and that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects"); Michael Tonry, Purposes and Functions of Sentencing, 34 Crime and Justice: A Review of Research 2829 (2006) ("[I]ncreases in severity of punishments do not yield significant (if any) marginal deterrent effects. . . . Three National Academy of Science panels, all appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence."); David Weisburd et al., Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes, 33 Criminology 587 (1995) (finding no difference in deterrence for white collar offenders between probation and imprisonment); Donald P. Green & Daniel Winik, Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders, 48 Criminology 357 (2010) (study of over a thousand offenders whose sentences varied substantially in

prison time and probation found that such variations "have no detectable effect on rates of re-arrest," and that "[t]hose assigned by chance to receive prison time and their counterparts who received no prison time were re-arrested at similar rates over a four-year time frame").

The Sentencing Commission has found that "[t]here is no correlation between recidivism and guidelines' offense level. . . . While surprising at first glance, this finding should be expected. The guidelines' offense level is not intended or designed to predict recidivism." U.S. Sent'g Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, at 15 (2004) ["U.S. Sent'g Comm'n, Measuring Recidivism"]. See also Part IV.A.3, infra. And according to "the best available evidence, . . . prisons do not reduce recidivism more than noncustodial sanctions." Francis T. Cullen et al., Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science, 91 Prison J. 48S, 50S-51S (2011).

While this case certainly involved sex trafficking, the defense asserts that Erskin Perryman's role in the offense should be a significant factor and an adequate sentence should consider his overstated criminal history and personal characteristics.

GUIDELINE CALCULATION

The defendant, ERSKIN PERRYMAN pled guilty to Count One: Felon in Possession of a Firearm 18 USC Sec. 922(g); Count Four: Possession with intent to distribute Heroin in violation of 21 USC Sec. 841(a)(1) and Count Eight: Conspiracy to

Engage in Sex Trafficking by Force, Fraud or Coercion in violation of 18 USC Sec. 1594(c). (R. 62, Plea Agreement, PgID 331-354)

The defense does not dispute that the plea agreement contains a specific provision that "the parties recommend under Federal Rule of Criminal Procedure 11©(1)(B) that the following sentencing guideline provisions apply: 2G1.1(a)(1) (base level), 2K2.1(a)(4)(A). 2K2.1(b)(1)(A), 2K2.1(b)(4) (base level and enhancement for possession of firearm and number of firearms found) (2 point increase for firearm that was located) and 2k2(1.(b)(6(B) (firearm in close proximity with firearm)." (R. 62, Plea Agreement, Page 10, PgID 341).

The Government and the defense acknowledge that there is a split in various circuits as to the application of sentencing guideline provision 2G1.1(a)(2) and 2G1.1(a)1) and the appropriate base level. The defense points out that there is a division in the application of the guideline and that some circuits apply a 14 point base level and not the 34 point base level. The objection is not intended to be viewed as a breach of the agreement, but to allow this Court to consider the variance in application of the sentencing guidelines.

The parties agree that this Court ultimately decides what is the sentencing guidelines irrespective of the position of the parties or even probation and is entitled to consider the case law on the issue.

Probation initially calculated the base level as 14 based on Section 2X1.1 of the USSG and in the amended report recommended an increase in the guidelines from base level 14 to base level 34 based on USSG Sec. 2X1.1(a) and 2G1.1(a)(2) instead of 2G1.1(a)1). The defense maintains that the application of the sentencing guidelines in paragraphs 32, 29, 41, 45 and 76 will have a bearing on the base level calculation and the overall advisory guidelines.

Under the federal sentencing guidelines, attempt crimes are generally governed by USSG § 2X1.1. See U.S. Sentencing Guidelines Manual § 2X1.1 (2001). "Where a defendant is convicted of an attempt crime not itself covered by a specific offense guideline, calculation of the defendant's sentence must be pursuant to § 2X1.1." United States v. Martinez, 342 F.3d 1203, 1205 (10th Cir. 2003) (USSG § 2X1.1 can apply even when the attempt crime and the completed offense are included in the same statute).

When an attempt crime is not expressly covered by another guideline, USSG § 2X1.1(a) first directs the sentencing court to calculate the defendant's offense level pursuant to the guideline applicable to the substantive offense. More specifically, the court must apply "the base level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." See U.S. Sentencing Guidelines Manual § 2X1.1(a) (2001). HN5 "Under 2X1.1(a), the base offense level will be the same as that

for the substantive offense. But the only specific offense characteristics from the guideline for the substantive offense that apply are those that are determined to have been specifically intended or actually

The base offense level for a conspiracy to commit sex trafficking is the same as the base offense level for the underlying substantive sex trafficking crime. See U.S.S.G. § 2X1.1(a). The base offense level for sex trafficking is 34 "if the offense of conviction is 18 U.S.C. § 1591(b)(1)." U.S.S.G. § 2G1.1(a)(1). Otherwise, the base offense level is 14. U.S.S.G. § 2G1.1(a)(2).

The defense relies on United States v. Wei Lin, 841 F.3d 823 (9th Cir. 2016) for direction. In Wei Lin the appellate court held that 18 U.S.C. § 1591(b)(1) is not a separate offense. See United States v. Todd, 627 F.3d 329, 334 (9th Cir. 2009). 18 U.S.C. § 1591(a) describes the offense of sex trafficking, and § 1591(b) describes the different penalties applicable to convictions under § 1591(a). Id. 18 U.S.C. § 1591(b)(1) imposes a fifteen-year mandatory minimum if the offense involved minors under the age of fourteen, or force, threats of force, fraud or coercion. Lin's underlying substantive sex trafficking offense involved fraud or coercion, but the mandatory minimum in 18 U.S.C. § 1591(b)(1) does not apply to conspiracy to commit sex trafficking, see 18 U.S.C. § 1594(c), so Lin was not subject to the fifteen-year mandatory minimum. The same as the case with Mr. Perryman.

According to Lin's plea agreement and judgment, Lin was convicted of violating 18 U.S.C. § 1594(c). The substantive offense underlying his conspiracy conviction was 18 U.S.C. § 1591(a). The plea agreement and judgment do not mention 18 U.S.C. § 1591(b)(1). Nevertheless, the district court found that, for purposes of determining his base offense level, Lin's underlying offense of conviction was 18 U.S.C. § 1591(b)(1), because the conduct involved in the underlying substantive offense would have been punished under § 1591(b)(1) if Lin had been convicted of the substantive offense. The appellate court disagreed and reversed.

The most straightforward interpretation of U.S.S.G. § 2G1.1(a)(1) is that a base offense level of 34 applies only when the defendant is actually convicted of an offense subject to the punishment provided in 18 U.S.C. § 1591(b)(1). However, the district court rejected this interpretation of U.S.S.G. § 2G1.1(a)(1). The district court erroneously reasoned that because 18 U.S.C. § 1591(b)(1) is not a separate offense, no one can ever be convicted of violating 18 U.S.C. § 1591(b)(1). See Todd, 627 F.3d at 334. In order for U.S.S.G. § 2G1.1(a)(1) to have any meaning, then, it must require something other than a conviction for violating 18 U.S.C. § 1591(b)(1).

The district court then found that Lin's "offense of conviction" should be determined by looking at his offense conduct. Since Lin's underlying substantive offense was a violation of 18 U.S.C. § 1591(a) by means of fraud or coercion, and since § 1591(b)(1) punishes violations of § 1591(a) that are committed by means of fraud or

coercion, the district court concluded that Lin's offense of conviction was 18 U.S.C. § 1591(b)(1).

The district court stated that this interpretation was consistent with the definition of "offense of conviction" found in U.S.S.G. § 1B1.2(a). But U.S.S.G. § 1B1.2(a) does not give a general definition for the term "offense of conviction" to be applied throughout the guidelines. Instead, it merely instructs courts on what "offense of conviction" means when "[d]etermin[ing] the offense guideline section . . . applicable to the offense of conviction." U.S.S.G. § 1B1.2(a). In this context, a conduct-based definition makes perfect sense. Offense guideline sections are not named with reference to specific statutes, although Appendix A to the Sentencing Guidelines provides an index matching certain statutes to their corresponding guideline sections. When trying to determine which guideline sections apply to which crimes, a court must naturally look at the offense conduct of the crime. For example, in determining which offense guideline applies to a 18 U.S.C. § 1591(a) conviction, a court must necessarily look at the offense conduct involved, because there is no offense guideline named "18 U.S.C. § 1591(a)."

The appellate court stated as follows: "…the situation at hand is much different. Here, a simple matching exercise can be done to determine if the offense of conviction is 18 U.S.C. § 1591(b)(1) — simply by looking at the judgment. This is not a situation where we must translate from state statutes to federal statutes, or from plain English

names of crimes to federal statutes. We are translating from federal statutes to federal statutes. It seems tortured to say that, when we know what federal statutes the defendant was convicted of, and we are asked to determine if the defendant's offense of conviction was a specific federal statute, we should break those statutes down into their offense conduct and then compare that conduct, as opposed to simply comparing the federal statutes that we have on both sides of the equation."

With regards to the argument that 18 U.S.C. § 1591(b)(1) describes a punishment, and not an offense, there is a much simpler answer than the one given by the district court. To determine if 18 U.S.C. § 1591(b)(1) is the offense of conviction, courts should simply ask if the defendant was convicted of an offense subject to the punishment provided in 18 U.S.C. § 1591(b)(1) — that is, was the defendant subject to the statute's fifteen-year mandatory minimum sentence. This solution is not only simple, and as close to a literal reading of U.S.S.G. § 2G1.1(a)(1) as possible without rendering the guideline meaningless, it is also most likely what the Sentencing Commission intended.

First, it is unlikely that the Sentencing Commission intended an offense conduct comparison, because the Sentencing Commission knew how to require such a comparison explicitly, and did not do so. For example, later in the same guideline section, U.S.S.G. § 2G1.1(c)(1) directs courts to apply another guideline "[i]f the offense involved conduct described in 18 U.S.C. § 2241(a) . . ." If the Sentencing

Commission wanted § 2G1.1(a)(1) to apply whenever the defendant's offense involved conduct described in 18 U.S.C. § 1591(b)(1), the Commission would have used the same language in § 2G1.1(a)(1) as it used in § 2G1.1(c)(1). The Commission's choice not to use that language indicates that it was not their intention to require an offense conduct comparison.

Second, the Commission likely intended § 2G1.1(a)(1) to apply only when the defendant received a fifteen-year mandatory minimum sentence, because the higher base offense level in § 2G1.1(a)(1) was created in direct response to Congress's creation of the fifteen-year mandatory minimum. See United States Sentencing Commission, Amendments to the Sentencing Guidelines 27 (2007) available at http://www.ussc.gov/Legal/Amendments/Official_Text/20070501_Amendments.pdf ("[T]he Adam Walsh Act added a new mandatory minimum . . . of 15 years under 18 U.S.C. § 1591(b)(1) . . . In response, the amendment provides a new base offense level of 34 . . . if the offense of conviction is 18 U.S.C. § 1591(b)(1), but retains a base offense level of 14 for all other offenses."). The Commission therefore likely did not want the higher base offense level to apply when the defendant was not subject to § 1591(b)(1)'s fifteen-year mandatory minimum.

In sum, common sense, the plain language of the guidelines, and the Sentencing Commission's commentary, all show that U.S.S.G. § 2G1.1(a)(1) only applies to defendants who are subject to a fifteen-year mandatory minimum sentence under 18

U.S.C. § 1591(b)(1). The 9th Circuit in Lin found that it was not subject to 18 U.S.C. § 1591(b)(1)'s mandatory minimum and the district court erred in applying § 2G1.1(a)(1) to Lin. This error was not harmless. See United States v. Munoz-Camarena, 631 F.3d 1028, 1030-31 (9th Cir. 2011). The 9th Circuit reversed the district court's base offense level determination, vacate Lin's sentence, and remand for re-sentencing." United States v. Wei Lin, 841 F.3d 823 (9th Cir. 2016)

2. The defendant objects to the failure to reduce the advisory guidelines by 2 points for being a minor participant.

Erskin Perryman did not live at the residence where the co-defendant and the victims resided. He has admitted his role in the offense and denies that he ever held anyone against their will, used force or even the threat of force against anyone or threatened eviction. The victims were involved in acts of prostitution long before they came to the co-defendant's house. The victims were also already addicted to drugs. This does not justify the fact that Erskin Perryman visited the home nearly daily and provided heroin and crack to the residents. However, his role was more aligned with a minor participant. He never used any firearms, never assaulted, had almost no physical contact with the residents at the home. For his role, Mr. Perryman should receive a two point reduction for a minor participant.

USSG § 3B1.2(b). The mitigating-role adjustment for a minor participant in a criminal activity allows for a 2-level reduction in offense level under the guidelines. Id.

That reduction applies to defendants who are "less culpable than most other participants, but whose roles could not be described as minimal." United States v. Tatum, 462 F. App'x 602, 607 (6th Cir. 2012) (quoting USSG § 3B1.2, comment (nn.4-5)). United States v. Hill, 982 F.3d 441, 444 (6th Cir. 2020)

E. Need for Incapacitation, 18 U.S.C. § 3553(a)(2)(C)

The guidelines in the pending case are extremely high and do not adequately take into consideration that while Erskin provided drugs to the woman in the home, he ever forced them to take the drugs, they may have received drugs from other sources and he has fully admitted and accepted responsibility. His role in the sex trafficking is minor at best and the firearms, while in his co-defendant's home, was never in his actual possession nor was it ever used by Erskin against any of the woman.

F. Requested Sentence

The defense would urge this court to consider a sentence of 60 months. Erskin has demonstrated that while his conduct was criminal and warrants punishment, his life as a husband and father has been exemplary. He has accepted responsibility for his role and, while he never assaulted anyone, or used a firearm against anyone, he is being held responsible for the atmosphere that was created and his role in furthering this appalling situation. However, the guidelines do not adequately consider his overstated criminal history and his personal characteristics which justify a sentence of 60 months which is sufficient but not greater than necessary.

In addition, if a custodial sentence is imposed, the defendant, ERSKIN PERRMAN, would request a recommendation in the Residential Drug Abuse Program (RDAP) (if eligible) and a recommendation for a placement in the Bureau of Prisons in close proximity to his family.

Respectfully submitted,

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Date: March 14, 2021

attack the sentence." Fed. R. Crim. P. 11(b)(1)(N); *see also United States v. Toth*, 668 F.3d 374, 377–78 (6th Cir. 2012).

Perryman does not dispute that he waived his appellate rights knowingly and voluntarily. Instead, he argues that his issues on appeal fall outside the scope of his waiver because the district court calculated his guideline range incorrectly and imposed a sentence that exceeded the correct advisory guideline range by fifty-five months. However, Perryman reserved the right to appeal his sentence only if it exceeded the guideline range calculated by the district court at sentencing, not the range that he calculated himself or some objectively correct range. *See Griffin*, 854 F.3d at 915 ("Defendant fails to realize . . . that the maximum of the sentencing range that must be exceeded before [he] may appeal his sentence is *not* the sentencing range associated with the sentence computation that [he] believes is appropriate." (internal quotation marks and citation omitted); *United States v. Beals*, 698 F.3d 248, 255 (6th Cir. 2012). Perryman agreed that if he received a sentence below the range calculated by the district court, his waiver of the right to appeal that sentence on any grounds, including challenging the calculation itself, would be effective. At sentencing, the district court calculated Perryman's guideline range as 188 to 235 months imprisonment. Perryman was sentenced below this range to a total term of 180 months' imprisonment. Perryman's appeal of his sentence, below the guideline range calculated by the district court, is therefore precluded by his valid appellate waiver.

The motion to dismiss is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk