



U.S. Department of Justice

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February 23, 2014

Honorable Joel A. Pisano  
United States District Judge  
Clarkson S. Fisher Federal Building and U.S. Courthouse  
402 East State Street  
Trenton, New Jersey 08608

Re: United States v. Eliyahu Weinstein, Crim. No. 11-701 (JAP)

Dear Judge Pisano:

The Court and the parties are in the midst of an evidentiary hearing regarding disputed Guidelines issues. The Government anticipates that the Court will shortly resolve those disputed issues as part of step one of the sentencing process, and proceed, in step three of the sentencing process, to consider the factors listed in Title 18, United States Code, Section 3553(a), at which point the Court will pronounce sentence.

The government submits this letter to respectfully request that when the Court does impose sentence, it further state that it would have imposed the same sentence, given its consideration of the Section 3553(a) factors, even if all disputed Guidelines issues had been resolved completely in defendant's favor, which would result in a Guidelines range of approximately 155 to 188 months' imprisonment. Accordingly, the Government requests that the Court impose its sentence in the alternative, noting that in light of its consideration of the Section 3553(a) factors, it would have imposed the same sentence even under different Guidelines ranges.

The Third Circuit has endorsed this approach, finding that it is possible for a Court to engage in the three-step sentencing analysis, arrive at a sentence, and then to explain that even had its Guidelines calculation been different, it would have arrived at the exact same sentence – an “alternative sentence” – because of its analysis of the sentencing factors set forth in Section 3553(a). See, e.g., United States v. Zabielski, 711 F.3d 381 (3d Cir. 2013). If the District Court provides an alternative sentence and – critically – thoroughly

Hon. Joel A. Pisano

February 23, 2014

Page 2

explains the reasons for this alternative sentence, Third Circuit precedent indicates that the Court of Appeals will be much less likely to vacate and remand even if for some reason the District Court erred in its Guidelines calculation. See id.

Alternative sentences, if properly explained, are acceptable because Guidelines application errors may be harmless. “In the context of a Guidelines calculation error, this means that the record must demonstrate that there is a high probability that the sentencing judge would have imposed the same sentence under a correct Guidelines range, that is, that the sentencing Guidelines range did not affect the sentence actually imposed.” Id. at 387 (internal quotation marks omitted); see also, e.g., United States v. Thayer, 201 F.3d 214, 229 (3d Cir. 1999) (holding that sentencing calculation errors are harmless errors if the District Court makes clear that the erroneous calculation “did not affect the district court’s selection of the sentence imposed.”) (citation omitted). There must be a “clear statement to that effect by the sentencing judge.” Zabielski, 711 F.3d at 387.

In Zabielski, the Court of Appeals upheld a sentence which included the erroneous application of an enhancement, because “the District Court’s detailed findings of fact and explanation convince us there is a high probability that it would have imposed the same sentence irrespective of the [] enhancement. The District Court demonstrated its awareness of the details of the crime . . . [and] then conducted a thorough analysis of the § 3553(a) factors.” Id. at 388.

The Zabielski Court continued: “For the benefit of future cases, we emphasize that where . . . the district court does not explicitly state that the enhancement had no effect on the sentence imposed, it usually will be difficult to ascertain that the error was harmless. An explicit statement that the district court would have imposed the same sentence under two different ranges can help to improve the clarity of the record, promote efficient sentencing, and obviate questionable appeals . . . .” Id. at 389.

The Zabielski Court concluded by quoting the Court of Appeals for the Eleventh Circuit: “[P]ointless reversals and unnecessary do-overs of sentence proceedings can be avoided if district courts faced with disputed guidelines issues state that the guidelines advice that results from decision of those issues does not matter to the sentence imposed after the § 3553(a) factors are considered.” Zabielski, 711 F.3d at 389 (quoting United States v. Keene, 470 F.3d 1347, 1349 (11th Cir. 2006) (further quotation marks and citations omitted)).

Hon. Joel A. Pisano  
February 23, 2014  
Page 3

The Government's sentencing memoranda, and the victim impact statements provided so far, have provided a significant amount of information relating to the Section 3553(a) factors. The Government will provide a further explanation of these factors as part of its presentation when sentencing resumes on February 24-25, 2014.

Thank you for your consideration.

Respectfully submitted,

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