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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY PELLICANO, et al.

Defendants.

_____/

No. CR-05-01046-DSF

DEFENDANT ANTHONY PELLICANO'S SENTENCING MEMORANDUM

Honorable Dale S. Fischer
Date: December 15, 2008
Time: 1:30 p.m.

TO THE CLERK OF COURT, PARTIES AND COUNSEL:

Defendant Anthony Pellicano files this, his Sentencing Memorandum.

Dated: December 10, 2008

Respectfully Submitted,

/s/ Michael Artan

Michael Artan
Counsel for Defendant
Anthony Pellicano

DEFENDANT ANTHONY PELLICANO'S SENTENCING MEMORANDUM

I. INTRODUCTION

The Probation Office has compiled a well-reasoned report that the defense endorses almost fully. In contrast, the government has taken an extreme view of the case at hand that is out of keeping with similar federal prosecutions. These offenses are out of the RICO norm and the government's characterization of the conduct is overstated.

Illegal wiretapping and invasions of privacy have been an unfortunate part of life for decades. The wiretapping of Dr. King is well-known. The Watergate episode brought our government to a halt. Yet, through all this, the sentences for wire-tapping and other similar invasions of privacy have been far shorter than even what *the defense* is seeking.[1]

Mr. Pellicano has done much good in his life. He has been incarcerated since late 2003 and his own life is a shambles, with health problems and lawsuits abounding. A seventy-month sentence is more than adequate to meet the basic aims of sentencing law.

II. COMMENTS AS TO THE PRESENTENCE REPORT

To assist the sentencing process, the Court looks to the United States Probation Office. Courts have rejected efforts to curtail or exclude the role of a probation officer as a violation of the separation of powers doctrine. Instead, it has been held that in preparing the presentence report, the probation officer acts as an arm of the court, not on behalf of the prosecutor. *United States v. Woods*, 907 F.2d 1540 (5th Cir. 1990); *United States v. Belgard*, 894 F.2d 1092 (9th Cir. 1990). In accordance with this independent

[1] For instance, Charles Colson's sentence in relation to the Watergate bugging and burglary was only five years, with the old credit calculations.

role, the Probation Office has correctly recommended to the Court an appropriate sentence for Mr. Pellicano.

On September 12, 2008, the United States Probation Office submitted its Presentence Investigation Report ("PSR") to assist the Court in the sentencing of Mr. Pellicano. In the PSR, the Probation Officer calculated that: (1) the base offense level was 24 points; (2) there were no points for role in the offense or specific offense characteristics; (3) 5 points were added for the multiple count adjustment; and (4) the total offense level was 29. With a criminal history category of II, the probation officer determined that Mr. Pellicano had an advisory sentencing guideline range of 97- 121 months.

On September 24, 2008, the Probation Officer, along with taking into account the factors enumerated at 18 U.S.C § 3553(a), recommended that the Court impose a sentence of 70 months followed by a three year term of supervised release on Mr. Pellicano.

On October 24, 2008, the government filed its sentencing memorandum. A copy was received by the Probation Office on October 27, 2008. The government objected to both the Probation Office guideline calculation of 97-121 months as well as the reasoning supporting the appropriate 70 month term of imprisonment. The government objected and contended that: (1) the final offense level should be 33 levels and (2) the advisory sentencing range should be 151 – 188 months. Predicated on its inflated sentencing range, the government nearly tripled the 70 month recommended sentence and pressed for its maximum term of imprisonment of 188 months.

In considering the prosecution's objections and notwithstanding the voluminous size of the prosecution's memorandum, the Probation Officer mainly identified three areas of objections within the well-reasoned PSR: (1) Without any Ninth Circuit support, the prosecution believed that a four-level enhancement should apply to all counts of conviction; (2) The prosecution believed that a two-level enhancement for special skill

should apply to the wire-tap convictions; and (3) The prosecution argued that grounds for an upward departure exist and are justified.

On November 7, 2008, the Probation Office responded to the government. Upon considering the government's arguments to enhance its calculations, the Probation Office informed the Court that it ". . . stands by the calculations as set forth in the PSR." The Probation Office expressly rejected the prosecution's "grounds" for an upward departure and found nothing warranting the two-level special skills enhancement but deferred the matter to the Court.

Significantly, the Probation Office did not sway from its recommended 70 month sentence.

III. FACTS RELATING TO SENTENCING—MR. PELLICANO'S PERSONAL ATTRIBUTES

The PSR decribes Mr. Pellicano's hard-scrabble youth, the success that eventually came to him from hard work and his fall from favor. The years before his arrest in November 2002, were overshadowed by the attention and energy focused on the needs of his son Luca, who was severely autistic. Kat Pellicano's October 23, 2008 letter, sent directly to the Court, outlines the difficulties Mr. Pellicano and his wife dealt with to provide for their son's needs. Ms. Pellicano also describes the numerous times that Mr. Pellicano helped those in need for little or no fee.

At the time of his arrest in November 2002, Mr. Pellicano was a nationally recognized forensic audio expert. He had a long career as a private investigator working for a succession of prominent attorneys in the private and public sector. He worked many times for local, state and federal government agencies and authorities.[2] As of the time of his arrest in November 2002, he had no criminal record.

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[2] Letters relating to Mr. Pellicano's work were submitted in connection with his earlier *Franks* motion. For the Court's convenience, they will be re-submitted under separate cover.

In his work for government agencies, Pellicano was routinely trusted with custody of original undercover and other recordings in order to properly analyze them. Mr. Pellicano's assistance reached throughout the United States. For the federal government, he has been commended for case work in the Northern District of Alabama, Middle District of Florida, the Northern District of California and the Judge Advocate General's Corps. His commended work for state agencies included the State's Attorney of DeKalb County, Illinois, the City of Houston, Texas, the Arizona State Senate Committee on Ethics, the California Attorney General, the San Jose Bureau of Narcotic Enforcement, the California Commission on Judicial Performance, the Los Angeles County District Attorney, the Orange County District Attorney, San Bernardino County District Attorney, Santa Clara County District Attorney as well as law enforcement authorities.

Among the cases in which Pellicano assisted the government was his work enhancing nearly forty-year old tape recordings that made it possible for the Department of Justice to successfully prosecute the perpetrators of the 1963 Birmingham church bombing that killed four young African-American girls. Pellicano was brought in to the Birmingham case because the FBI's work on the tapes was not adequate.

Anthony Pellicano's standing in the community was exemplary and he was highly regarded as an expert among law enforcement and prosecutorial agencies.

He has been in custody since late 2003. He has been sued in numerous civil actions.[3] He has suffered health difficulties while in custody. He is indigent. Being unable to care for his family, his life is in ruin.

[3] Many of the plaintiffs in those actions have provided letters that were supplied by the prosecution.

IV. APPLICABLE SENTENCING FACTORS

A. The Court's Discretion

By now, it is well settled that the Court's mandate is to apply the sentencing factors set forth in 18 U.S.C. § 3553 (a), with the Federal Sentencing Guidelines to be advisory rather than mandatory. *See United States v. Booker*, 543 U.S. 220 (2005).

In *Rita v. United States*, 127 S. Ct. 2456; 168 L. Ed. 2d 203 (2007), the Supreme Court focused on the extent to which the Guidelines must be honored by the trial court. In determining whether a Court of Appeals "may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines," the Supreme Court observed that such a presumption may be applied, but added:

> "For one thing, the presumption is not binding. It does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case. [Citations] Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater fact finding leeway to an expert agency than to a district judge. Rather, the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.
>
> Further, the presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) (2000 ed. and

> Supp. IV). That provision tells the *sentencing judge* to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely (a) "just punishment" (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. The provision also tells the sentencing judge to "impose a sentence sufficient, but not greater than necessary, to comply with" the basic aims of sentencing as set out above." *Rita, supra,* at 2463. (Emphasis in original)

It follows from the determinations of the Supreme Court in *Rita* that the § 3553 (a) factors should be the focus of the sentencing court.

C. Offense Characteristics

The sentences sought by the government for the offenses at hand are totally out of the norm. For example, it would appear that the three-year sentence given to co-defendant Terry Christensen is the highest wire-tapping sentence ever in the United States.[4]

As to the charges relating to access of police data bases, here too the government's position seems extreme. For instance, on December 8, 2008, the government announced a guilty plea and plea agreement for Mark T. Rossini, a former Supervisory Special Agent of the FBI who "made over 40 searches of the FBI's Automated Case Support System (ACS) which contains confidential, law-enforcement sensitive information that relates to historic and on-going criminal investigations initiated by, and supported by, the

[4] This statement is an estimate, based on a diligent internet search that included the Department of Justice website and Lexis.

FBI."[5] The plea agreement for Mr. Rossini was for five misdemeanors and, as described by the Department of Justice, the likely sentence was from zero to six *months*.

The importance of the charges relating to improper access to the police data bases have been exaggerated by the government. Virtually all of the information accessed was public information. Department of Motor Vehicle information is available to bonded subscribers at low fees, convictions are public records, and the rest of the information, except for arrests without convictions, are readily available on data bases legally used by law firms and investigators nation-wide.

D. The Need For A Sentence To Reflect The Basic Aims Of Sentencing: (a) "Just Punishment" [Retribution], (b) Deterrence, (c) Incapacitation and (d) Rehabilitation.

The basic aims of sentencing will be met with the sentence sought by the defense. The sentence advocated by the defense is already far greater than any other wiretapping sentence, so retribution is achieved. This widely-publicized case has already had a substantial deterrent effect—the unfortunate ruination of Mr. Pellicano's life is well-known among investigators and lawyers. This ruination has also served to incapacitate Mr. Pellicano from any possibility of future misconduct. Extended warehousing of Mr. Pellicano will have no rehabilitative effect and will serve no public good.

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[5] This quotation is from the Department of Justice Press Release for the prosecution of FBI agent Mark T. Rossini. A copy of the Press Release and other documents relating to this case will be filed under separate cover. The Rossini prosecution is related to the case at hand in the sense that a 302 Report previously filed with the Court by the defense, was apparently the fruit of one of Mr. Rossini's illegal searches.

E. The Sentencing Guidelines.

1. The Government's Burden Under The Guidelines

The government has the burden of proving the facts necessary to support a sentence enhancement by a preponderance of the evidence. *United States v. Pham*, 2008 U.S. App. Lexis 20101 (9th Cir, September 23, 2008); (sentence vacated and remanded because government failed to carry burden proving four level enhancement for 50 or more victims) *citing United States v Allen*, 434 F.3d 1166, 1173 (9th Cir. 2006).

The government's burden includes role enhancements. *United States v. Milton*, 153 F.3d 891 (8th Cir. 1998). Although hearsay statements may be used at sentencing, a district court must carefully scrutinize hearsay evidence to ensure that it has sufficient indicia of reliability. *United States v. Scheele*, 231 F.3d 492, 500, fn.5 (9th Cir. 2000).

Without indicia of reliability, the government asks for certain sentencing enhancements in this case. For example, parading the claim that Mr. Pellicano was attempting to threaten Alex Proctor using Sandra Carradine as a messenger (this fabrication has been leaked to press on at least one occasion) has no reliable factual basis to support an obstruction enhancement. Although a government trial witness, Ms. Carradine was never asked any questions about this alleged plot.

2. Determining the Base Offense Level Under the Guidelines

The PSR correctly determined one offense level for the RICO counts under USSG 3E1.1. PSR ¶ 96. In cases under USSG 2E1.1, the sentencing court must determine what was "the underlying racketeering activity." *United States v. Rose*, 320 F.3d 170 (2nd Cir. 2003). The PSR correctly assigned an offense level to each predicate act and applied the grouping rules. *Id. United States v. Nguyen*, 255 F.3d 1335 (11th Cir. 2001) (noting that Application Note 1 also refers to Chapter 3D which includes the grouping provisions). The PSR assigned offense levels for each substantive count. PSR ¶¶ 97-112. Because each particular offense witnessed varying levels of Mr. Pellicano's participation, each conviction (and predicate act) correctly had a different corresponding role in the offense

adjustment. Finally, the PSR applied Chapter 3D and grouped the offense levels into the final offense level of 29. PSR ¶ 132.

Significantly, **wiretapping is not a RICO predicate** under 18 U.S.C. § 1961(1). Notwithstanding that the government incorrectly includes wiretapping in its description and purpose of the RICO enterprise in the Fifth Superseding Indictment, the wiretapping sentencing facts cannot be used in determining the 3B1.1 aggravating role enhancements Put another way, without Ninth Circuit support and contrary to the USSG expressed language, to apply only "underlying racketeering activity" [USSG 2E1.1(a)(2)], the prosecution incorrectly attempts to apply the maximum four level enhancement to all offenses. Excluding the wiretapping facts from the determining the role in the offense adjustment is critical because, as the PSR correctly notes, it is the offense with the greatest leadership role as well as the offense with the most extensive. PSR ¶ 102.

3. The Four Level Enhancement Does Not Apply For Each Count

The PSR correctly assigned varying levels of USSG 3B1.1 *role* enhancements for the RICO convictions (2 levels), the wiretapping convictions (4 levels) and no role enhancements for the conviction pertaining to a wiretapping device. (PSR ¶¶74, 82, 91, 102, 109). Regardless of the factual distinctions and leadership in these counts (and ignoring its own charging decisions) the government believes that the maximum four levels should apply. This approach completely ignores the expressed language in USSG 2E1.1, Application Note 1 which requires the application of Chapter Three Parts A, B, C and D adjustments to the RICO predicate acts.

The prosecution mainly looks to *United States v. Damico*, 99 F3d 1431 (7th Cir. 1996) to support its broad brush approach to the role adjustment.[6] Unlike this case, Damico conceded that the facts of the role enhancement would apply to the overall RICO

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[6] In placing RICO cases in relative context, it bears noting that the *Damico* Court imposed a sentence of 87 months for the defendant's 15 year RICO leadership role of a criminal enterprise engaged armed robbery, extortion, gambling and book making.

conspiracy. Here, however, the offense which arguably includes the facts showing Mr. Pellicano to be an organizer and in a leadership role (as well as being otherwise extensive) results in the four level enhancement is the non-RICO predicate of wiretapping.

Moreover, the fact that a defendant plays an important or even essential role in a criminal enterprise does not necessarily require an aggravating role adjustment. Haines, *Federal Sentencing Guidelines Handbook*, page 1038. 2007—2008 Edition. A defendant must be a supervisor in the actual criminal conduct. Id. It is not sufficient that he supervises other participants in the conspiracy in their non-criminal activities. A defendant who merely manages a business that was used in the offense is not subject to the role adjustment. *United States v. Ramos-Paulino,* 488 F.3d 459 (1st Cir 2007(reversing role enhancement that was based on control over activities rather than participants).

The critical distinction between the government and the PSR in determining the offense level is what enhancement level should be applied, to what counts and on based on what facts. The PSR correctly notes that the only offense conduct warranting a 4 level increase because of Mr. Pellicano's role, the number of participants and because it was extensive is ***only*** the wiretapping conduct. Because wiretapping is not a RICO predicate those facts can not be used to support a 4 level enhancement for Mr. Pellicano's role in the overall RICO conspiracy.

4. The Adjustment for Obstruction Of Justice Under USSG 3C1.1 Should Not Apply.

Prior to filing its sentencing memorandum, the government lobbied the Probation Office to include a two point enhancement against Mr. Pellicano for obstruction of justice. PSR ¶ 53. The prosecution's information left the probation unconvinced. Accordingly, the determination of this issue was left with the Court. PSR ¶ 111.

The Court should find that the two point enhancement does not apply.

5. The USSG 3C1.1 Obstruction of Justice Enhancement Should Not Apply.

The government argues for a two level increase for obstruction of justice claiming that Mr. Pellicano intimidated witnesses and ordered the destruction of evidence. Appreciating the weakness of these allegations, no criminal charges were ever filed against Mr. Pellicano on any of these claims. Indeed, the claim that there was a plot to intimidate Alex Proctor has been hauled out in the past by the government for the media. Also, in March 2003, Judge Tevrizian rejected the government's story that Mr. Pellicano threatened Tarita Virtue when he rejected the government's efforts for remand while successfully out on bail.

Although steadfast in his refusal to cooperate with the government, there are several instances where Mr. Pellicano has taken steps to assist the process. For instance, at the time of the first search warrant, he informed and directed the FBI to the explosives stored in his office. He self-surrendered to federal custody before ordered to do so after his conviction for the first offense.

Absent from the prosecution's arguments for an obstruction enhancement are several "tests" that serve to qualify whether the enhancement applies. The obstructive conduct must be material; that is it must have some impact on the investigation or prosecution of the federal offense. *United States v. Zagari,* 111 F.3d 307, 328-29 (2nd Cir. 1997)(reversing even though defendant's false state deposition was motivated by the federal offense, "motivation alone does not equate to materiality;" *United States v. Jenkins*, 275 F3d 283 (3rd Cir. 2001) (finding no evidence that the federal proceedings were impeded by defendant's failure to appear in state court); *United States v. Jimenez-Ortega,* 472 F.3d 1102 (9th Cir. 2007)(remanding where district judge failed to find that false testimony was material).

Materiality has been found where a defendant's conduct had the potential to weaken the government's case or prolong the pendency of the charges. Haines, *Federal*

Sentencing Guidelines Handbook, page 1107, 2007-2008 Edition. The defendant's conduct is material if it sends the investigators on the wrong trial. Id.

The prosecution represents that the wiretapping investigation began at the time of Mr. Pellicano's detention hearing on November 22, 2002 when Sarit Shafir reported the incident to the FBI. While this "tip" may have launched the larger investigation, there is nothing shown by the government that Mr. Pellicano knew of this investigation and had the requisite *men rea* to obstruct the investigation. *See United States v. Campa*, 529 F.3d 980 11th Cir. 2008)(the court rejects attack on the obstruction enhancement because the defendant deliberately gave a false name to "consciously act[ed] with the purpose of obstructing justice." Here, apart from conclusions and argument, the government fails to show that any alleged destruction of evidence either by Kevin Kachikian or by the employees at PIA was knowingly ordered so as to impede an investigation. *If the government's theory was correct, Mr. Pellicano would have destroyed the evidence used in this case. Instead, the government was able to seize rooms of data over the course of 2003.*

Equally lacking in evidentiary support is the claim that Mr. Pellicano intimidated witnesses. Where a defendant's statements to a witness are ambiguous or not clearly intimidating, they may not justify an obstruction increase. *United States v. McLaughlin*, 126 F.3d 130 (3d Cir. 1997) (reversing enhancement even though defendant sent investigators to secretly tape record statements from witnesses); *United States v. Emmert*, 9 F.3d 699 (8th Cir. 1993)(statements advising witnesses to "stay strong" and "be quiet" were not so plainly obstructive as to warrant adjustment). The same ambiguity is seen in the alleged "threats" to Tarita Virtue *via* her father and the letters pertaining to Alex Proctor. Also, the so-called "Proctor threat" has nothing to do with this case at all and certainly can't be considered in sentencing.

Given that the government fails to satisfy its burden, the two-point enhancement for obstruction does not apply.

6. The Enhancement For Special Skills Does Not Apply.

The PSR correctly concluded that the USSG 3B1.3 special skill enhancement does not apply to Mr. Pellicano because he had others perform the tasks requiring these skills. PSR ¶ 103. The "special skills" enhancement cannot be based on the co-conspirator's skills. *United States v. Gromley*, 201 F.3d 290 (4th Cir. 1990)(reversing increase where defendant simply gathered information from clients and fabricated dependent's information, filing status, and tax credit claims, which he then turned over to the other conspirators who possessed special skills). The fact that a crime was committed skillfully is insufficient to show that defendant used a special skill; nor does the mere fact that the defendant learned how to commit the offense justify a USSG 3B1.3 increase. Haines, *Federal Sentencing Guidelines Handbook*, pages 1090-91; 2007-2008 Edition.

Finally, the adjustment for the use of a special skill may not be employed if the skill is included in the base offense level of the Chapter 2 guideline. This would result in impermissible double-counting. Clearly, both of the offenses of wiretapping or manufacturing an eavesdropping device inherently include a special skill to do so. To include this enhancement in the guideline calculation would result in impermissible double-counting.

7. The Guidelines Support a Finding of Criminal History Category I or a Concurrent Sentence Beginning on November 23, 2003.

The PSR places Mr. Pellicano in criminal history category II due to his January 24, 2004 conviction for possession of explosives. PSR ¶¶ 136 – 146. It is undisputed that finding Mr. Pellicano possessing explosives and launching the wiretapping investigation flow from the same investigation and search warrant—the Anita Busch extortion investigation. Moreover, all three of these cases concerned Mr. Pellicano, his role as a private investigator and the operations of the Pellicano Investigation Agency. The explosives were found in a safe at Mr. Pellicano's office. The same offense which conducted the wiretapping activity and stored the evidence seized by the government at the same and subsequent times. In other words, the conviction for possession of

explosives was part and parcel the conduct of the instant offense – or, as the government labeled it, "a veneer of legitimacy" created at Pellicano Investigative Agency.

USSG 4A1.2(a)(1) precludes counting as a "prior sentence" any sentence previously imposed for conduct that is "part of the instant offense." Where the prior sentence is part of the instant offense, it should not be counted in criminal history. *United States v. Henry*, 288 F.3d 657 (5th Cir. 2002) (reversing criminal history points where conviction was part of current offense); *United States v. Thomas,* 54 F.3d 73 (2nd Cir. 1995) (priors may be relevant conduct as part of "same course of conduct" even if they are not part of a common scheme or plan).

If, the Court should find, however, that Mr. Pellicano has a criminal history category of II, it should run the sentence in the instant case concurrent with the sentence and time served in the previous case. USSG 5G1.1(c) simply says that a sentence may be imposed to achieve "reasonable punishment," and Application Note 3 adds that this is to "avoid unwarranted disparity."

The delay in charging and bringing Mr. Pellicano forward to face the new charges resulted in a lost opportunity to have this instant sentence run concurrent with the explosives sentence. Indeed, the government had knowledge of the wiretapping from January 2003, according to the search warrants and discovery in the case. Yet, the indictment for the case at hand was not returned until October 2005; and the government waited 5 months, just as the term of the first sentence discharged, before "arresting" Mr. Pellicano in prison. USSG 5G1.1(c) along with the factors in 18 U.S.C. § 3553 support a beginning Mr. Pellicano's sentence from November 2003, not February 4, 2006.

8. Factors Supporting Downward Departure

As seen in the 18 U.S.C. § 3553 analysis of this memorandum, there is ample reason to sentence Mr. Pellicano to 70 months with credit for time served since November 23, 2003.

V. CONCLUSION

For the above reasons, defendant Anthony Pellicano seeks a 70 month sentence consistent with the arguments and contentions above.

Respectfully submitted,

/s/Michael Artan

Dated: December 10, 2008

Michael Artan
Counsel for Defendant
Anthony Pellicano