

United States of America
First Circuit Court of Appeals

NO. 08-1706

UNITED STATES OF AMERICA,

Appellee,

v.

JOSE ELIAS ALMONTE GABRIEL

Defendant/Appellant

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Jose Elias Almonte Gabriel plead guilty in the United States District Court for the District of Puerto Rico of reentry of a deported alien, contrary to 8 U.S.C. §1326(a) and §1326(b)(2).

The court (*Francisco A. Besosa, Jr., J.*), sentenced him to 60 months committed.

A notice of appeal was filed on May 2, 2008.

STATEMENT OF ISSUES

1. Did the court err in not granting Mr. Almonte Gabriel a downward departure in his sentence, due to a variety of idiosyncratic circumstances?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Jose Elias Almonte Gabriel is a citizen of the Dominican Republic. As a boy he worked with his father, a farmer, and also has worked in the construction trades. MOTION FOR DOWNWARD DEPARTURE (Apr. 23, 2008), *appx.* at 17; PSI ¶¶ 34, 47.¹ Because of his poor background, he has had no formal education. *Id.*; PSI ¶ 46. Mr. Almonte Gabriel came to the United States for economic reasons in 1986 after his father died. PSI ¶ 35.

Mr. Almonte Gabriel is not troubled by emotional or psychological problems, nor by drug abuse. SENT.TRN. at 11; PSI ¶ 44. Nonetheless, during a two-year period in the mid-1990s, he committed several drug crimes.

In August 1995, Mr. Almonte Gabriel committed two counts of possession of drugs within 1000 feet of a school in New Jersey. PSI ¶ 20. A year later he committed possession of heroin in Massachusetts. PSI ¶ 21. A few months later he committed conspiracy and possession with intent to deliver cocaine in Pennsylvania, a crime classified as an aggravated felony. PSI ¶ 22. Mr. Almonte Gabriel served three years on the New Jersey charges, and nine months for the Massachusetts crime concurrent with the New Jersey time. PSI ¶¶ 20-21. In

¹PSI refers to the Presentence Investigation Report dated March 18, 2008, with subsequent attachments. It was prepared by the Puerto Rico Probation Office in connection with Mr. Almonte's sentencing. The PSI is included in the separate appendix.

Pennsylvania, he got a mandatory three-to-ten year sentence, and was released in 2002 after serving about four years. His Pennsylvania parole will expire in 2012, and has resulted in a detainer subsequent to the matter before this Court. PSI ¶ 22; SENT.TRN. at 7, 11. In the same two-year time-frame, he was charged with other drug crimes, which did not result in convictions. PSI ¶¶ 24-25.

In 1999 during the proceedings in those matters, Mr. Almonte Gabriel was ordered removed from the United States. After his release from Pennsylvania incarceration in 2002, he was deported. PSI ¶ 35; SENT.TRN. at 11.

Mr. Almonte Gabriel has three children. He supports one of his sons, who is infected with a highly communicable disease, and is now in his late 20s. PSI ¶¶ 10, 36; SENT.TRN. at 9. He also supports his daughter, Génesis, who is 11 years old and lives with her mother in New York. PSI ¶¶ 10, 37-39.

The crime bringing Mr. Almonte Gabriel to this Court consisted of trying to fly to the United States from the Dominican Republic. He was arrested at the airport in Carolina, Puerto Rico, on November 8, 2007, while attempting to board a flight bound to Philadelphia, Pennsylvania. PLEA TRN. at 13.

There is no evidence of any criminal behavior since his mid-1990s drug dealing. But because one of his prior crimes was an “aggravated felony,” for his illegal reentry Mr. Almonte Gabriel faced a maximum imprisonment of 20 years.

8 U.S.C. §1326(a) and §1326(b)(2). The court expected that Mr. Almonte Gabriel would be removed from the United States after his federal and state sentences are completed. SENT.TRN. at 12; 8 U.S.C. § 1101(a)(43) (removal for conviction of drug trafficking offense).

Despite their separation, Mr. Almonte Gabriel maintains a good relationship with his daughter Génesis. PSI ¶ 39. In his allocution, Mr. Almonte Gabriel testified that when he spoke to Génesis on the phone, she said, “Daddy, when are you come over, Daddy?” SENT.TRN. at 8. Unable to resist, Mr. Almonte Gabriel risked a visit. PSI ¶¶ 10, 37. MOTION FOR DOWNWARD DEPARTURE (Apr. 23, 2008), *appx.* at 17. Thus Mr. Almonte Gabriel’s crime was not nefariously motivated. SENT.TRN. at 9. He promised to not again come to the United States. *Id.*

Mr. Almonte Gabriel was taken into custody immediately upon his arrest in Puerto Rico in November 2007, and has been detained ever since. ARRAIGNMENT TRN. at 5. Mr. Almonte Gabriel plead guilty in January 2008. PLEA TRN. at 6. Although his motion for a downward departure appears to have been either ignored or denied, he was sentenced (*Francisco A. Besosa, J.*) to five years in prison, based on the applicability of the “fast track” program. SENT.TRN. at 10-11.

This appeal followed.

SUMMARY OF ARGUMENT

Jose Elias Almonte Gabriel argues that he should have been provided a downward departure from the sentencing guidelines because his prior convictions overstate his criminal history, and because he will be deported anyway.

ARGUMENT

The federal sentencing statute directs that courts shall impose a sentence “sufficient, but not greater than necessary” to comply with its purposes. Among the purposes are providing “just punishment” for the offense and “adequate deterrence” to future crime, taking into account “mitigating circumstances” and the need to “protect the public.”

Courts may depart downward from the sentencing guidelines based on these factors, and also based on idiosyncratic characteristics of the defendant and his circumstances. *United States v. Martin*, 520 F.3d 87 (1st Cir. 2008).

Mr. Almonte Gabriel’s prior convictions overstate the seriousness of his criminal history. Although they are within the time period allowed by the sentencing guidelines, U.S.S.G. 4A1.2.(e), all his crimes occurred within a two year window a decade ago. It appears that his bout of drug-dealing was economically motivated, as he has no history of drug abuse, few marketable skills, and three children to support.

Mr. Almonte Gabriel will be promptly deported following his release from prison. Shorter imprisonment will not increase the risk of public harm, nor the effectiveness of deterrence. Along with the year-and-a-half he has already served, being deported alone is just punishment. Delaying his return to his homeland will

further impoverish his children by keeping Mr. Almonte Gabriel from being an earner, and will divest society generally of his productive work. Most important, it will deprive a young daughter any opportunity for meaningful contact with her father.

Finally, incarceration costs the United States over \$24,400 annually. PSI ¶ 53 (estimate by Administrative Office of the United States Courts, as of May 2007). The actual cost is far higher – possibly in the millions. *See* Mark Cohen, *The Monetary Value of Saving a High-Risk Youth*, 14 J. QUANTITATIVE CRIMINOLOGY 5 (1998) (external costs in the range of \$1.5 to \$1.8 annually in 1997 dollars).² The price of immediately transporting Mr. Almonte Gabriel to the Dominican Republic is a tiny fraction of those amounts.

Although these factors do not excuse Mr. Almonte Gabriel's crime, to which he plead guilty, his motion for a downward departure should have been granted.

²This article is not in the appendix, but for the convenience of the court and the parties, is included on the CD disk filed with this brief.

CONCLUSION

Based on the foregoing, Jose Elias Almonte Gabriel respectfully requests this Court grant his motion for downward departure, and to order his immediate release from custody on the charges giving rise to this appeal so that he can sooner face ultimate deportation.

Mr. Almonte Gabriel requests that his attorney be allowed to present oral argument.

Respectfully submitted,

Jose Elias Almonte Gabriel
By his Attorney,

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Dated: May 23, 2009

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I hereby certify that on May 23, 2009, two copies of the foregoing, as well as a disk containing the foregoing, will be forwarded to Nelson J. Perez-Sosa, Esq., Office of the United States Attorney, 350 Carlos Chardon Ave., Torre Chardon, Room 1201, San Juan, PR 00918-0000.

Dated: May 23, 2009

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I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version 11, and that it contains no more than 1502 words, exclusive of those portions of the brief which are exempted.

Dated: May 23, 2009

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ADDENDUM

1. JUDGMENT 12

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