

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-20943-CR-MOORE/GARBER

UNITED STATES OF AMERICA

vs.

CARLOS ALVAREZ and
ELSA ALVAREZ,

Defendants.

**UNITED STATES' SENTENCING MEMORANDUM AND
RESPONSE TO CARLOS ALVAREZ'S REQUEST FOR DOWNWARD DEPARTURE**

Defendants Carlos Alvarez and Elsa Alvarez have both pled guilty in this case and are awaiting sentencing. To assist the Court, the United States hereby files this memorandum containing its sentencing recommendation as to each defendant and its response to Carlos Alvarez's request for downward departure. Based on the gravity of the conduct engaged in by the Defendants, the difference in culpability between the two Defendants, and the sentencing factors of 18 U.S.C. § 3553, the United States respectfully recommends that the Court sentence Carlos Alvarez to the statutory maximum of 60 months' imprisonment and Elsa Alvarez to 21 months' imprisonment.

BACKGROUND

As is reflected in the Presentence Investigation Report (PSI) for each Defendant, beginning in the late 1970s, Carlos and Elsa Alvarez each independently began passing information to the Cuban Government. At the beginning, both Carlos Alvarez and Elsa Alvarez each independently established and maintained relationships with contacts from the Cuban Intelligence Service (CuIS)

and separately provided those contacts information of interest to the Cuban government.¹ Over time, however, Carlos Alvarez and Elsa Alvarez began to work as a team on behalf of the CuIS. The CuIS instructed the Alvarezes to gather information on prominent people, community attitudes, political developments, and current events of interest to the Cuban government. The Alvarezes would receive these instructions through personal meetings, messages written on water-soluble paper, coded pager messages, and encoded electronic communications via shortwave radio.

While it was Carlos Alvarez alone who possessed the technical capability to decode the shortwave radio transmissions from the CuIS, such transmissions contained taskings for both Carlos Alvarez and Elsa Alvarez to complete. After decoding the messages, Carlos Alvarez would inform Elsa Alvarez of the taskings she had been given by the CuIS. After Carlos Alvarez and Elsa Alvarez gathered the information requested by the CuIS, Carlos Alvarez would compile written reports, which he would encrypt using a computer disk and send back to the CuIS. Although it was Carlos Alvarez alone who would write and encrypt the reports, the reports would include information gathered by Elsa Alvarez as well. The reports would be signed with the names “David and Deborah,” the codenames given to Carlos Alvarez and Elsa Alvarez by the CuIS. After Carlos Alvarez mailed the encrypted reports to various post office boxes in New York, he would attempt to erase all evidence that the reports had been written by burning papers in his backyard and attempting to erase the reports from his computer.

Not all of Carlos Alvarez’s attempts to remove evidence from his computer succeeded, however. FBI analysts were able to recover material from the “slack space” of one the Alvarezes’

¹Carlos Alvarez did not coerce Elsa Alvarez to engage in such activity; to the contrary, the two barely knew each other at the time that each separately began passing information.

home computers. This material contains scattered reports and excerpts from reports prepared by Carlos Alvarez in the 1990s. Contrary to the Defendants' attempts to downplay the importance of the information they provided to the CuIS, the slack space material provides a snapshot of just how detailed and comprehensive the Alvarazes were in responding to their taskings. Whereas Carlos Alvarez now claims that their reporting consisted of "harmless gossip," Sentencing Memorandum of Carlos Alvarez at 20, the slack space material tells a strikingly different story.²

Without revealing the sensitive details contained within the material, some examples of the reporting contained in the slack space follow:

- On November 24, 1995, Carlos Alvarez prepared a written report to the CuIS containing sensitive information about the personal finances and private business ventures of Modesto Maidique, the president of Florida International University. [Exhibit A at Bates # 0719-0721].

- On December 1, 1995, Carlos Alvarez prepared a written report to the CuIS concerning his conversations with Thomas Will, who claimed to have in his possession a redacted study by a "government agency" of the United States that documented "the most complete information available in the United States regarding the status of telecommunications in Cuba." Alvarez provided the CuIS with multiple telephone numbers belonging to Will. Alvarez also informed the CuIS that Will had actually been the one who had conducted the underlying research for the study. In a subsequent report, Alvarez detailed the study's table of contents. [Id. at Bates

²The entirety of the slack space material, incorporated herein as Exhibit A, has been filed separately under seal. Because the material contains non-public information about individuals in the local Cuban-American community, including sensitive details of private conversations the Defendants had with such individuals, the material has been filed under seal to avoid any further victimization.

0721-0725].

- In 1996, Carlos Alvarez prepared a written report in which he told the CuIS that “an investigation should continue” into Jose Basulto, a leader of Brothers to the Rescue, and into “the ties he has to the CIA, the Cuban American Foundation and financial interests such as Bacardi.” In the same report, Carlos Alvarez promised to “remain vigilant to that respect.” [Id. at Bates # 0737]

- In 1996, Carlos Alvarez prepared a written report to the CuIS stating that one of his contacts had met personally with Richard Nuccio, President Clinton’s special adviser for Cuba, who “was very depressed by the events and he has been devastated by the signing of the Helms Burton Law.” Alvarez further reported that Nuccio believed that these events had undermined Track II, an official United States initiative to encourage Cuba’s internal development. [Id. at Bates # 0743]

- On September 13th of an indeterminate year in the 1990s, Carlos Alvarez prepared a written report to the CuIS reporting on a meeting that had occurred the previous day at Florida International University between various professors and Michael Egan, who Carlos Alvarez describes as “the Director of the Investigations Office at the United States Department of State.” [Id. at Bates # 0749].

- In December of an indeterminate year in the 1990s, Carlos Alvarez prepared a written report to the CuIS indicating that “it was not possible to capture the communication of two weeks ago” and further extending “congratulations to all comrades on the anniversary of the triumph of the revolution and our best wishes for the New Year.” The report is signed “Affectionately, David and Deborah.” [Id. at Bates # 0718].

In addition, statements given to the FBI by the Defendants reveal the identities of additional individuals on whom the Defendants reported to the CuIS. As but three examples, Carlos Alvarez admitted that he reported on:

- Lula Rodriguez, who later served as Personal Assistant to Attorney General Janet Reno, as Director of International Visitors at the United States Information Agency, and as Deputy Assistant Secretary of State for Public Affairs;
- Nelson Reyneri, who later became the Hispanic Outreach Director for the Democratic National Committee; and
- One of his students at FIU who works as an analyst for the FBI.

Likewise, Elsa Alvarez indicated in her FBI interview that she had invited Lula Rodriguez to the Alvarezes' house for dinner in order to gather information on her to report to the CuIS.

As these examples make clear, the reporting done by the Alvarezes contained substantially more than "harmless gossip." Rather, the Alvarezes were engaged in classic intelligence work. The reporting, which was done in response to express taskings by the CuIS, enabled the CuIS to develop intelligence files on individuals of interest to it. By providing sensitive, non-public information about specific individuals who were (or would later be) in positions of power and authority, the Alvarezes helped give the CuIS potential ammunition to use against such individuals should the need to do so arise. The fact that the taskings were covertly transmitted to the Alvarezes and that the Alvarezes covertly transmitted their responses back to the CuIS further substantiates the information's value and importance to the CuIS.

According to his statements to the FBI, Carlos Alvarez ceased passing information to the CuIS in 2002, after he passed information about Orlando Gutierrez, an educator in Miami. By his own admission, however, Carlos Alvarez continued to have contact with members of the CuIS

through 2004, including contact with the CuIS official in charge of selecting young professionals from the United States to participate in an exchange program with Cuba. According to Elsa Alvarez, she stopped having contact with members of the CuIS in 1991. Such a claim, however, is belied by the material retrieved from the Alvarezs' computer. As late as 1996, Carlos Alvarez and Elsa Alvarez were attempting to meet with one of their CuIS handlers. See Exhibit A at Bates # 0736 ("We will go together because we consider that there is no justification for one of the two to take a trip of this nature with[out] being accompanied by the other. Given the recent political changes we are worried about this type of trip to a point that with certainty is being closely monitored."). In addition, Elsa Alvarez met in 2004 with another longtime CuIS agent, although Alvarez maintains that the visit was a purely social one.

ARGUMENT

I. CARLOS ALVAREZ SHOULD BE SENTENCED TO 60 MONTHS' IMPRISONMENT

Based on all of the facts and circumstances surrounding his offense, his greater culpability when compared with Elsa Alvarez, and the sentencing factors in 18 U.S.C. § 3553, it is the view of the United States that Carlos Alvarez should be sentenced to the statutory maximum 60 months' imprisonment.

A. There is No "Analogous Offense Guideline" Pursuant to U.S.S.G. §2X5.1.

As an initial matter, Carlos Alvarez's argument that he should be sentenced pursuant to U.S.S.G. §2M3.3 is without merit. There is simply no analogous guideline provision for 18 U.S.C. § 951(a). See United States v. Gerardo Hernandez, et al., Case No. 98-721-CR-Lenard, Sentencing Transcript, at 37 ("I agree with the conclusion by the probation officer that after examination there is not an analogous statute and thus an ensuing guideline provision for the [§ 951(a)] offenses."). In this case, unlike in cases contemplated under §2M3.3, Carlos Alvarez formally affiliated with a

foreign power's intelligence service in a prolonged and sustained campaign to gather intelligence deemed important by his covert handlers. See 18 U.S.C. § 951(d) (defining "agent of a foreign government"). By contrast, §2M3.3 does not presuppose "an individual who agrees to operate within the United States subject to the direction or control of a foreign government." Id. Instead, §2M3.3 requires only a single instance where classified material is mishandled or national security information is transmitted. To be sure, there is no evidence that Carlos Alvarez transmitted classified or national security information in this case. That said, however, Alvarez's formal and sustained affiliation with a foreign power whose interests are hostile to those of the United States, for a period of nearly thirty years, suggests that this case involves conduct more serious than the one-time acts encompassed by §2M3.3. As a result, this Court should sentence the Defendant pursuant to the provisions of 18 U.S.C. § 3553. See U.S.S.G. §2X5.1 ("If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 shall control . . .").

B. No Downward Departure is Warranted.

Carlos Alvarez requests a downward departure in his sentence for three separate reasons, each of which is entirely groundless.

First, and most brazenly, Alvarez suggests that he is deserving of a downward departure pursuant to Application Note 2 of §2M3.1 because the information provided by Carlos Alvarez to the CuIS "was likely to cause little or no harm." Carlos Alvarez Sentencing Memorandum at 16. As set forth above, §2M3.3 is not an analogous offense guideline; neither it nor its Application Notes have any bearing here, thus gutting Defendant's argument.

Perhaps more importantly though, Defendant's argument starkly reveals how Carlos Alvarez to this day fundamentally misunderstands the seriousness of his crime. Individuals who agree to clandestinely serve as agents of a foreign power, answering to that power and not to the laws of the

United States, pose a grave risk. Gathering information and carrying out tasks as directed by the foreign power, the individuals become instruments of that power's actions and policies in ways they cannot predict and damage the interests of the United States in ways they will never know. The risk is especially great where, as here, the foreign power is one whose interests are inimical to those of the United States.

In this case, Carlos Alvarez conspired to serve as a covert agent of the CuIS for a period of nearly thirty years. As part of that conspiracy, he repeatedly composed encrypted written reports responding to specific encoded requests for information from the CuIS. The few scattered reports that the United States was able to recover from his computer reveal the detail and range of his reporting. Just from those few isolated reports, which are but a handful of the likely hundreds of reports filed by Carlos Alvarez over the course of the conspiracy, it is apparent that Alvarez provided sensitive and private information about prominent members of the Cuban exile community, information related to the United States' knowledge of Cuban telecommunications networks, and information from private conversations with then-President Clinton's Special Adviser to Cuba. See Exhibit A at Bates # 0719-0725, 0743]. Only by extrapolating from these handful of reports, and envisioning the hundreds of other similar reports compiled by the Alvarezes over the nearly thirty-year conspiracy, can one begin to grasp the true severity of Carlos Alvarez's conduct.

The damage that Carlos Alvarez has done to the interests of the United States is literally incalculable. That is to say, it is impossible to know why the CuIS wanted the information that it did and for what purposes the CuIS ultimately used the information provided. What is known, however, is that the CuIS considered the information sensitive and important enough to insist on it being transmitted in a covert, encrypted format and that for over twenty years Carlos Alvarez repeatedly provided whatever information the CuIS requested. It is also known that some of the

information provided concerned individuals who later rose to prominent positions in national politics and within the federal government. The notion that Alvarez now deserves a downward departure because the precise nature of the harm to the interests of the United States cannot be statistically measured is absurd.

Alvarez's remaining two grounds for downward departure are similarly farfetched. By its terms, §5K2.16 provides a ground for departure only when a defendant "voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to be discovered otherwise." U.S.S.G. §5K2.16 (emphasis added). Such a scenario does not remotely resemble what occurred in this case. It is undisputed that, in this case, it was the FBI who went to speak to Alvarez, not the other way around. Moreover, the FBI approached Alvarez at the conclusion of a lengthy investigation into his covert activities on behalf of the Cuban Intelligence Service. The fact that Alvarez confessed when confronted by the FBI about his long-investigated criminal conduct in no way triggers application of §5K2.16. Along the same lines, Alvarez's request for a departure pursuant to §5K1.1 asks this Court to adopt the novel proposition that a defendant who confesses to the authorities when approached and questioned about his crime somehow deserves a departure for his "substantial assistance" in achieving his own conviction. Such an argument makes a mockery of §5K1.1 and should not be entertained by this Court.³

³Moreover, even if Carlos Alvarez had a colorable argument that he provided substantial assistance (which he does not), his position that the Court could consider such substantial assistance in the absence of a government motion is inconsistent with the law of this circuit. See United States v. Crawford, 407 F.3d 1174, 1182 (11th Cir. 2005); United States v. Taylor, 164 Fed. Appx. 934, 937 (11th Cir. 2006) (unpublished) ("We have made clear that, even post-Booker, a motion from the government is required before a district court may depart downward from the guideline range on the basis of substantial assistance.").

C. A 60 Month Sentence for Carlos Alvarez is Reasonable and Just.

Carlos Alvarez deserves the statutory maximum sentence of 60 months' imprisonment. Such a sentence is reasonable and just considering the totality of his conduct, the seriousness of his offense, and the need to deter others from engaging in similar conduct. As this Court is well aware, Alvarez was originally charged with the substantive offense of being an unregistered agent of a foreign power under 18 U.S.C. § 951(a), a charge which carries a maximum ten year sentence. As part of a plea deal, he was permitted to plead to a § 371 conspiracy charge, which has a maximum of five years. Given the length of his participation in the conspiracy, the direct role he took in providing the CuIS with requested information, the harm that his conduct caused to the interests of the United States, and the benefit that he has already received by being permitted to plead to a conspiracy count, the United States respectfully recommends that the Court sentence him to the 60 month maximum.

II. ELSA ALVAREZ SHOULD BE SENTENCED TO 21 MONTHS' IMPRISONMENT.

As for Elsa Alvarez, it is the view of the United States that, based on all of the facts and circumstances surrounding her offense, her lesser culpability when compared with Carlos Alvarez, and the sentencing factors in 18 U.S.C. § 3553, she should be sentenced to 21 months' imprisonment.

As was detailed above, in addition to working actively to help conceal her husband's criminal activity, Elsa Alvarez herself participated in providing information to the CuIS. She was individually and repeatedly tasked to provide certain information to the CuIS and did in fact provide such information. She knew that taskings were delivered to her by the CuIS through the radio system that she and her husband had at their home, even though it was her husband, not her, who physically operated the radio. Elsa Alvarez would give the information requested by the CuIS to

her husband so that he could communicate the information back to the CuIS. In 1991, Elsa Alvarez traveled with her husband traveled to Cuba and attended a ceremony where they were honored with medals for the work they had done on behalf of the Government of Cuba. As recently as 1996, it was contemplated that she would travel with her husband to Cuba to meet with one of their CuIS handlers.

All of that said, Elsa Alvarez played a lesser role than her husband. The evidence indicates that she ceased her active reporting for the CuIS well before her husband did. The evidence further indicates that she encouraged her husband to cease his reporting as well. It is because of this lesser role that the United States permitted Elsa Alvarez to plead guilty to a misprision of a felony, while it required her husband to plead to the more serious conspiracy charge.

As is indicated in her PSI, the Sentencing Guidelines do not provide a means by which to calculate Elsa Alvarez's offense level. Although there is a specific guideline that deals with misprision of a felony offenses, that guideline calculates a defendant's offense level as being "9 levels lower than the offense level for the underlying offense." U.S.S.G. §2X4.1. Because there is no specified offense level for the underlying offense in this case, it is not possible to arrive at an offense level calculation under §2X4.1. As a result, the provisions of 18 U.S.C. § 3553 control.

That said, the guideposts set by §2X4.1 remain instructive. Section 2X4.1 provides that the base offense level for misprision of a felony should be "in no event less than 4, or more than 19." U.S.S.G. §2X4.1. In other words, no matter how serious the underlying offense, the Sentencing Guidelines recommend that no defendant convicted of misprision of a felony be given a base offense level higher than 19. In cases where a defendant charged with misprision has entered a timely guilty plea and has accepted responsibility, that defendant should in the ordinary course end up with a total

offense level no higher than 16.⁴ The Sentencing Guidelines recommend that a defendant with a criminal history category of I and a total offense level of 16 should receive a sentence within a range of 21 to 27 months of imprisonment.

The United States took these guideposts into consideration in fashioning its recommendation for Elsa Alvarez's sentence. As with Carlos Alvarez, all of Elsa Alvarez's conduct was taken into account by the United States at the time she was permitted to plead guilty to a misprision of a felony. To the extent she deserves a "break" because of her lower level of culpability relative to her husband, she has already received that break by being permitted to plead to a charge less serious than the one to which her husband was permitted to plead. In short, the United States believes that Elsa Alvarez should receive a sentence equivalent to one that falls within the highest possible Guidelines range applicable to a defendant who pleads guilty to misprision of a felony covered by the Guidelines. As a result, the United States respectfully seeks a sentence of 21 months' imprisonment for Elsa Alvarez.

⁴It has not gone unnoticed by the United States that Elsa Alvarez has, in her letters to the Probation Office and in comments conveyed to the media through her attorney, come perilously close to undercutting the "acceptance of responsibility" a defendant usually achieves by virtue of a guilty plea. If the Sentencing Guidelines in fact applied to the calculation of Elsa Alvarez's offense level in this case, it is likely that the United States would contest the customary three-level reduction for acceptance of responsibility, based on the Defendant's false denials of her relevant conduct in this case. To plead guilty in the courtroom and then have your lawyer proclaim on the courthouse steps that your only crime was "being a wife" is disingenuous and unseemly. Nevertheless, because the United States represented to counsel prior to the time of the plea that it intended to recommend a 21 month sentence, it will still do so. To the extent that the Defendant is asking for an even lower sentence, however, her continued refusal to accept full responsibility for the entirety of her conduct should be a factor given heavy weight by this Court.

CONCLUSION

For all the reasons stated above, the United States respectfully requests that the Court, after taking into consideration all the facts and circumstances of the offenses, the Defendants' relative culpability levels, and the sentencing factors of 18 U.S.C. § 3553, sentence Carlos Alvarez to 60 months' imprisonment and sentence Elsa Alvarez to 21 months' imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 26, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ Matthew S. Axelrod
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