

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WISCONSIN**

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UNITED STATES OF AMERICA,

Plaintiff,

**Case No. 19CR151**

v.

FRANCISCO MARTINEZ,

Defendant.

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**MOTION FOR VARIANCE FROM THE SENTENCING  
GUIDELINES**

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The defendant, Francisco Martinez, by counsel, Edward J. Hunt, The Hunt Law Group, S. C., submits this motion for variance from the sentencing guidelines in support of his request that he be sentenced to a term of imprisonment of no more than 57-71 months in this case.

**I. A Sentence in Variance with the Recommended Sentencing Guidelines is Warranted Because in Fairness the Defendant Should Qualify for Safety Valve and an Additional 2 Level Reduction under the Advisory Guidelines from his Base Offense Level Because He Should be Safety Valve Eligible.**

What Martinez proposes in this Motion for Variance he realizes, is an uphill struggle. Nevertheless he feels that this argument must be made because of the unique circumstances of his case. He acknowledges, as the United States Probation Officer does in his Addendum to the Pre Sentence Report, that absent a motion from the Government pursuant to 18 U.S.C. § 3553 (e), there is no current provision that would allow the Court to disregard the law and sentence Martinez in accordance with this Motion. Nevertheless sentencing law in federal court has been evolving in leaps and bounds. Perhaps this Court is willing to consider Martinez's objections and his present request for a sentence variance. His argument for a sentence variance is an equitable one. Assessing 3 points for revocations where he was not convicted of

the underlying allegations puts him unfairly in the 15 year time zone, a time zone he would not find himself within but for the inclusion of the revocations discussed below. Counting the offense in ¶ 42 of the PSR over represents his criminal history and creates sentencing disparities. The offense in ¶ 42 of the PSR should not be included as part of his criminal history. The effect of including the offense in ¶ 42 of the PSR provides the Court with an opportunity to depart or vary downward for the reasons set forth below.

Martinez objects to the 3 criminal history points assessed against him at ¶ 42 of the PSR arising out of a conviction for Possession of Cocaine, Manufacture Delivery Cannabis, and Possession of Weapon by Felon occurring on August 27, 2001 for which he was sentenced to 4 years prison. He was paroled on September 27, 2002. On May 21, 2003, his parole was revoked arising out of conduct alleged in Ogle County Circuit Court Case Number 03CM131. Martinez maintained his innocence as to the charges in that case. Importantly the charges in that case were

dismissed. Yet Martinez was revoked for conduct which the State was unable to obtain a conviction. See ¶ 56. Martinez was paroled again on August 7, 2003. Martinez was again revoked on June 23, 2004 arising out of conduct alleged in Ogle County Circuit Court Case Number 04CM350. Martinez maintained his innocence as to the charges in that case. Martinez also disputes the contention that he absconded after the conduct alleged in Ogle County Circuit Court Case Number 04CM350. Importantly the charges in that case were dismissed. Yet Martinez was again revoked for conduct which the State was unable to obtain a conviction. See ¶ 57. Martinez was discharged on July 29, 2004.

But for these two revocations which extended his period of incarceration beyond 2002, Martinez would not have scored any criminal points for this conviction because he would have been outside the 15 year window described in United States Sentencing Guideline § 4A1.2 (e)(1) if one counts from his release on parole on 09/27/2002 to the date he joined the Conspiracy in this case in

September, 2018. See ¶ 21. Martinez maintains he was wrongfully revoked twice for offenses he had not committed. These wrongful revocations resulted in Martinez being incarcerated during “any part of such fifteen year period.” USSG § 4A1.2 (e)(1). But for the additional time he was incarcerated which flowed into the fifteen year window, this conviction would not count and he would not have a three point assessment for the criminal conviction in ¶ 42 of the PSR. Martinez therefore would qualify for the limitation on applicability of statutory minimum sentences, pursuant to 18 U.S.C. § 3553(f) and USSG § 5C1.2, known as the “Safety Valve”.

But for this conviction and the three points assessed, Martinez criminal history would be at 0 points and Criminal History Category I. In light of the First Step Act of 2018, one point offenses assessed for the minor offenses described in ¶¶ 46 and 47 of the PSR would not count under the changes to 18 U.S.C. § 3553(f) (1) (A) . But for the assessment of 3 points for the offense in ¶ 42, Martinez has met the criteria for safety valve eligibility from the mandatory minimum

sentence of ten years under 18 U.S.C. § 3553(f) (1)-(5). And Martinez argues that the three points assessed substantially overrepresents the seriousness of Martinez's criminal history and the likelihood that the defendant will commit other crimes. It is well established that a "district court may conclude that the criminal history category overstates the severity of the defendant's criminal history." *U.S. v. Martin*, 438 F.3d 621, 641-642 (6<sup>th</sup> Cir. 2006) (Martin J. Concurring). This Court can look at the lack of seriousness as to Martinez's criminal history and using 3553 factors find that a variance is in order.

Judges are now invited to consider arguments that a guideline itself fails properly to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007). Judges "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines,"

*Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007) (internal quotation marks omitted), and when they do, the courts of appeals may not "grant greater fact finding leeway to [the Commission] than to [the] district judge." *Rita*, 127 S. Ct. at 2463.

If the Court agrees with Martinez's request to be sentenced under the limitation on applicability of statutory minimum sentences, pursuant to 18 U.S.C. § 3553(f) and USSG § 5C1.2, known as "Safety Valve", his total offense level of 27 is decreased two levels under USSG § 2D1.1(b)(18) and the criteria set forth in subdivisions (1) – (5) of USSG § 5C1.2(a). With a total offense level of 25 and a Criminal History Category I, Martinez's sentencing guidelines would be 57-71.

Martinez should qualify for the safety-valve provision under the statutory changes and his arguments above, but he does not qualify for an additional two-level reduction under the advisory guidelines due to no change being made by the United States Sentencing Commission to the Guidelines Manual under §§2D1.1(b)(18) and

## 5C1.2.

Pursuant to USSG §2D1.1(b)(18), if Martinez meets the criteria set forth in subdivisions (1) – (5) of USSG §5C1.2(a), the offense level is decreased by two levels. Although Martinez should meet the statutory requirements for safety-valve eligibility under the First Step Act and the arguments advanced above for variance, the U.S. Sentencing Commission has not amended the guidelines under USSG §2D1.1(b)(18). Accordingly, the U.S. Sentencing Commission has indicated that the two-level reduction should not be applied when calculating the advisory guideline range if Martinez has more than one criminal history point. They further note the Court has the authority under 18 U.S.C. § 3553(a) to grant a similar two-level reduction to newly eligible safety-valve offenders not meeting the guideline criteria. If the Court should do so, it would be considered a variance from the guidelines.

If the Court exercises its authority under 18 U.S.C. § 3553(a) to grant a two level reduction to Martinez as a variance from the



guidelines, Martinez's total offense level would be 25 and a Criminal History Category I. Martinez sentencing guideline imprisonment range therefore would be 57-71.

Martinez asks this Court to employ a variance from the guidelines as discussed above and sentence him to the low end of the guideline range as if his offense level had been reduced by two points under the safety valve provision. If the Court follows Martinez's request, a sentence of four years and nine month (**57 months**) is sufficient, but not greater than necessary to fashion a just sentence in this case under 18 U.S.C. § 3553(a).

### **CONCLUSION**

For the reasons set forth above, Martinez submits that a sentence of no more than 4 years and 9 months (57 months) is a fair and just sentence and a sentence that is sufficient, but not greater than necessary.

Dated this 20th day of April, 2021.

Respectfully submitted,

s/Edward J. Hunt

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