

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

No. 16 Cr. 553 (BMC)

LEONID GERSHMAN et al.,

Defendants.

----- X

**DEFENDANT LEONID GERSHMAN'S
MEMORANDUM IN AID OF SENTENCING**

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STATEMENT

Defendant Leonid Gershman respectfully submits this memorandum, together with the attached support letters, to assist the Court in fashioning a sentence that is “sufficient, but not greater than necessary to fulfill the purposes of sentencing.” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (quoting 18 U.S.C. § 3553(a)).

OVERVIEW

At a trial in August and September of last year, a jury convicted Gershman of a list of charges that included racketeering, marijuana distribution, various species of extortion, illegal gambling, arson and an 18 U.S.C. § 924(c) weapons charge. Given the gravity of these charges, Gershman acknowledges that a lengthy prison sentence is in order. Even so, the February 20 draft Presentence Report¹ – which proposes an advisory Guidelines range of 168-210 months – grossly overshoots the mark. A sentence at the bottom of this range, when combined with the mandatory seven year consecutive term on the § 924(c) conviction, would put Gershman – a 35 year old with no prior convictions – in prison for a total of 21 years.

A two-decade-long prison sentence would be harsh punishment for any first-time offender. For Gershman, a loving father who was a productive member of his community before he succumbed to addiction, it would be staggering. Justice demands – and the Guidelines, properly calculated, advise – substantially less prison time.

¹ Gershman submitted objections to the draft PSR on March 6, 2019. Those objections remain pending before the Probation Department, which has not yet released a final report.

BACKGROUND AND CHARACTERISTICS

Lenny Gershman is loyal, dauntless, confrontational and possessed of an occasionally volatile temper. These traits made him an able bill collector – at least when the debtors were thugs or conmen – and rendered him useful to cannier villains like Renat Yusufov and Vyacheslav Malkeyev, who called upon Gershman for “muscle” in disputes with other street toughs. Tr. 1422, 1587. They do not, however, explain *why* Gershman cast his lot with criminals. The answer to that question lies beneath Gershman’s outward personality, in a deeply alienating adolescence and a predisposition to addiction.

I. CHILDHOOD

As the government frequently reminded the jury at trial, Lenny started life in the former Soviet Union. Born in 1983, he did not remain there long. The Gershmans, like thousands of Jewish families, fled the chaos and anti-Semitism that prevailed during the final years of Soviet rule. In 1988, Larissa and Fema Gershman settled their family – which included Lenny, his grandmother and 15-year-old sister – in Nazareth, Israel.

Lenny’s 11 years in Nazareth – apart from occasional rocket attacks, bombings and an early exposure to narcotics addiction (PSR ¶ 226) – were relatively stable ones. Despite his family’s modest economic circumstances, Lenny had no trouble assimilating into life in Israel. He did well enough in school, excelled at soccer and, as he matured into a teenager, looked forward to serving in the Israeli Defense Forces.

His parents, it seems, were less sanguine about that prospect. They immigrated for a second time in 1999, dragging their 16 year old son 6,700 miles to Brooklyn. PSR ¶ 228.

This transition – which would be challenging for any adolescent – was ruinous for Lenny. Just a few months away from completing secondary school in Israel, the bespectacled, non-English speaker found himself, at age 16, in the tenth grade. Things got worse from there. After a year of relentless bullying, Lenny – now a severely depressed 17 year old – was *demoted* to the ninth grade. PSR ¶¶ 239, 245. He survived this humiliation only to be “discharged” from the school system, without a diploma, once he reached the age of 18. PSR ¶ 245.

Records from Lenny’s ignominious stint at Brooklyn’s Franklin D. Roosevelt High School describe a reasonably well-behaved and courteous youth who fared poorly in terms of “scholastic standing, attendance, leadership and ability to get along with [other] students.” *Id.*

II. EARLY ADULthood

Shunted into adulthood with no academic credentials, no trade and only a few years’ experience with the English language, the path Lenny took through his late teens and early 20s serves as a testament to his fundamentally sound character and values. Employed by 19 and a father at 20, Lenny concentrated his efforts on *belonging*, earning a place and a good name for himself in the community. He pursued these goals in the traditional way: working hard to support his young family. *See* PSR ¶¶ 230, 252-54

(discussing the birth of Lenny's son and his legitimate work history); Jan. 6, 2019, ltr. from Larissa and Fema Gershman (Lenny's parents express pride in the alacrity with which their 20-year-old son "assumed all of [the] responsibilities" of fatherhood).

Lenny also went out of his way to replace the friendships he had been forced to abandon in Israel. Acquaintances from this period describe him as a "family-oriented man" who was unflappably "supportive" of friends, devout in his faith and "passionate" about raising his son, Aiden. Undated ltr. from Venessa Aizenberg, 1-2; *see also* Dec. 11, 2019 ltr. from Alexander Zhorov (echoing Ms. Aizenberg's sentiments); Dec. 17, 2019 ltr. from Roman Palankerin (crediting Lenny with "help[ing]" the writer to "get more acquainted with [his] jewish heritage"); Jan. 10, 2019 ltr. from Dr. Olga Kheyson (describing Lenny's "exemplary" bond with his son); undated ltr. from Alla Medvedovskaya (fondly remembering the "comfort" and "kindness" that Lenny extended to the writer following the death of her brother).

III. ADDICTION AND DECLINE

A deep vein of addiction runs through Lenny's life and personality. As a child in Israel, he watched his uncle use heroin. Later, as he struggled to acclimate to life in the United States, Lenny began smoking marijuana on a daily basis. By the time he was approaching his mid-20s, alcohol and marijuana were exacting their toll on his most precious relationships. *See* PSR ¶ 230 (Aiden's mother attributes the end of her "romantic relationship" with Lenny in 2006 to his increasingly frequent drug use).

Following a motorcycle accident in 2011, Lenny began receiving regular prescriptions for the opiate-laced painkiller, Percocet. He was soon consuming 15 Percocet every day, parting with \$2,000 every month to buy the pills. PSR ¶ 240. Pricy though they were, opiates were a bargain compared to Lenny’s gambling problem. From approximately 2012 until the time of his arrest, Lenny accumulated tens of thousands of dollars in debt at illicit poker dens like the one he was convicted of operating in this case. *See* PSR ¶ 248.

As the weight of these addictions grew, Lenny became increasingly involved in his future codefendants’ criminality.

OBJECTIONS TO THE PSR’S GUIDELINES CALCULATION

I. INTRODUCTION

The PSR breaks the offense conduct into eleven “[g]roup[s],” each consisting “of [c]losely [r]elated” racketeering acts and substantive counts. U.S.S.G. §§ 3D1.1, 3D1.2; *see* PSR ¶¶ 103-115. It then assigns each group the offense level that applies to “the most serious . . . count[or racketeering act] in the [g]roup.” U.S.S.G. § 3D1.3(a).

The groups are as follows:

Group No.	Charge	Offense Level
1	Extortion of Isok Shlomi	26
2	Extortion of Denis Dulevskiy	26
3	Extortion of Albert Normatov	26

4	Extortion of Gennady Vinokurov	26
5	Extortion of “Ponchik”	26
6	Extortion of Leo Kotovnikov	26
7	Extortion of “J.R.”	24
8	Extortion of Rufat Zarbailov	29
9	2220 Voorhies Ave. Arson	30
10	Illegal Gambling	25
11	Marijuana distribution	30

The draft PSR then adds a 5-point “[m]ultiple [c]ount [a]djustment” to the group with the highest offense level – the marijuana distribution charge – to arrive at a “[t]otal [o]ffense [l]evel” of 35. PSR ¶¶ 209-15; *see* U.S.S.G. § 3D1.4

Gershman takes no exception to this grouping analysis. Instead, his objections focus on the enhancements for obstruction of justice (U.S.S.G. § 3C1.1) and leadership (U.S.S.G. § 3B1.1(a)). The Probation Department applies both enhancements universally, adding six offense levels to each offense group. Gershman contends that the enhancements are universally *inapplicable* or of limited applicability.

II. THE UNSUBSTANTIATED OBSTRUCTION ENHANCEMENT

The draft PSR charges that, following his arrest in November 2016, Gershman twice attempted to interfere with the government’s investigation into his interactions with Denis Dulevskiy.² The first attempt – which the Report characterizes as a bid to

² The draft PSR refers to Dulevskiy as “John Doe #2.”

“unlawfully influence a witness” (PSR ¶ 138) – culminated in Gershman’s sister, Anyeta Fuxman, asking Dulevskiy to explain his relationship with Gershman to “a lawyer” (presumably, Gershman’s previous counsel). PSR ¶ 138. According to the Probation Officer,

[Gershman] contacted [his sister and his future codefendant] Artiom Pocinoc . . . and asked for them to contact [Denis Dulevskiy] with regard to . . . [wiretap] record[ings] . . . dealing with the extortion of [Dulevskiy]. Ms. Fuexman [sic] and her husband [subsequently] met with [Dulevskiy] and asked [] him to meet with a lawyer and tell the lawyer that the recorded conversation was a friendly discussion After meeting with Mr. and Mrs. Fuexman [sic], [Dulevskiy] changed his telephone number in hopes of not being contacted again by the defendant and his associates.

PSR ¶ 136.

The second attempt, dubiously cast as an effort “to produce a false or altered record,” consisted of a brief and inconclusive exchange of text messages between Gershman’s girlfriend and Pocinoc. The Probation Officer writes that

In September 2017, the defendant had his girlfriend, Lorena [], contact[] Pocinoc and ask [him] to contact [Dulevskiy] again. . . . In their conversation, [Lorena] says, “Lenny asked . . . if Dennis could write a letter.” To which Pocinoc replied, “You know I can talk to [Dulevskiy] and we’ll meet with you and you’ll tell me what to say but . . . he’s such a cowardly guy[,] I do not think he’ll agree.”

PSR ¶ 137.

A. THERE WAS NO ATTEMPTED OBSTRUCTION

The Probation Department’s obstruction analysis melts under even the lightest scrutiny. With respect to the first attempt, the Department’s assertion that Gershman

“asked” his sister to make contact with Dulevskiy is pure supposition. PSR ¶ 136. The request could just as easily have originated elsewhere. For instance, Gershman’s previous counsel – unaware that the government intended to charge Gershman with extorting Dulevskiy³ – may well have viewed Dulevskiy as a potential defense witness, someone who could testify that Gershman’s bombast was just that: bombast. *Compare* GX 63t (Gershman showers Dulevskiy with insults and threats during a brief telephone conversation), *with* Tr. 611-12 (Dulevskiy reluctantly admits that his relationship with Gershman was “friendly” and “social[]”). The absence of proof tying Lenny to Mrs. Fuxman’s conduct is reason enough to drop the enhancement. *Cf. United States v. House*, 551 F.3d 694, 700 (7th Cir. 2008) (obstruction enhancement founded on a third party’s “attempt to persuade a witness not to” appear in court is appropriate, “provided the evidence established that [the defendant] intended to have [the third party] ask [the witness] not to appear”).

Even if Mrs. Fuxman’s overture to Dulevskiy were Gershman’s idea, it would be impossible to infer that he intended to “threaten[], intimidate[], or otherwise unlawfully influence[] a potential witness.” *United States v. Archer*, 671 F.3d 149, 166-67 (2d Cir. 2011) (quoting U.S.S.G. § 3C1.1 cmt. n.4(a)). Dulevskiy did not testify that he was intimidated and it is difficult to imagine why he should have been. Gershman’s messenger was, after all, a middle-aged mother of two children. *Cf. Archer*, 671 F.3d at

³ The “John Doe #2” extortion charges first surfaced in the August 31, 2017, Second Superseding Indictment. *See* ECF No. 168. Gershman’s arraignment on the charges occurred on September 8.

167 (observing that “[m]ost” applications of the obstruction enhancement “involve *clear and direct threats* against cooperating witnesses or government agents”) (emphasis supplied); *United States v. Jackson*, 975 F.2d 104, 106 (9th Cir. 1992) (obstruction enhancement applies to “statements [that] can be reasonably construed as [] threat[s]”).

Finally, it is far from evident that Mrs. Fuxman (or, anyone else) sought to persuade Dulevskiy to lie. If anything, Mrs. Fuxman urged Dulevskiy to tell the truth: several of Gershman-Dulevskiy conversations were, in fact, “friendly.” Tr. 611-12; *Archer*, 671 F.3d at 167 (in evaluating the propriety of an obstruction enhancement, “district courts may draw inferences from context and must determine what the defendant ‘meant by his words, and how a listener would reasonably interpret those words’”) (quoting *United States v. Shoulberg*, 895 F.2d 882, 883-84 (2d Cir. 1990)).

Crediting the Department’s second theory of obstruction – that Gershman intended “to produce a false, altered, or counterfeit document or record” when he (allegedly) asked Lorena to ask Pocinoc to ask Dulevskiy “to write a letter” – requires an act of faith. There is no evidence to support the PSR’s assumption that the contemplated letter would have contained false information relevant to the “investigation [or] prosecution” of Gershman’s offense. U.S.S.G. § 3C1.1. Even if there were, it is doubtful that Gershman’s conduct – essentially floating an idea – “represents a substantial step towards the fulfillment of a criminal design.” *Shoulberg*, 895 F.2d at 885; *see id.* (explaining attempt liability requires “intent to commit the crime and . . .

conduct” amounting “to more than mere preparation”) (internal quotation marks omitted).

B. EVEN IF AN OBSTRUCTION ENHANCEMENT WERE WARRANTED, IT WOULD APPLY ONLY TO THE DULEVSKIY EXTORTION CHARGES

To the extent Gershman took steps to “obstruct or impede the administration or justice,” his efforts were directed exclusively at the “investigation[and] prosecution” of the Dulevskiy extortions. U.S.S.G. § 3C1.1; *see* PSR ¶¶ 136-38. It follows that if an obstruction enhancement applies at all, it affects only to the “group of . . . counts” that includes the Dulevskiy-related charges. U.S.S.G. § 3C1.1 cmt. n.8.

The Probation Department disagrees. According to the PSR, the obstruction enhancement applies to “*all*” the offenses of conviction, not just those that related to Dulevskiy. PSR ¶ 138 (emphasis supplied). The PSR cites no authority for its across-the-board approach to the enhancement, observing only that “[t]he instant offense encompasses racketeering activity that spans at least 6 years.” *Id.*

That is nonsense. Guidelines § 2E1.1 sets down the rule for determining the base offense level for a RICO conviction. It reads:

(a) Base Offense Level (Apply the greater):

- (1) 19; or
- (2) the offense level applicable to the underlying racketeering activity.

U.S.S.G. § 2E1.1; *see* PSR ¶ 101 (discussing § 2E1.1). The commentary to the guideline explains that where, as in this case, there are multiple “underlying” racketeering acts,

each *underlying offense [is treated] as if [it were] contained in a separate count of conviction*. To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

U.S.S.G. § 2E1.1 cmt. n.1 (emphasis supplied).

With respect to the PSR’s § 3C1.1 analysis, the “underlying offense” (U.S.S.G. § 2E1.1) is the extortionate collection charge in Racketeering Act Three of the trial indictment. *See* S4 Indictment ¶ 15. Applying § 2E1.1’s instructions, that charge is treated as a “separate count of conviction.” U.S.S.G. § 2E1.1. As such, the “instant offense” for § 3C1.1 purposes *is not* – as the Probation Department mistakenly assumes (*see* PSR ¶ 138) – Gershman’s RICO conviction; it is, rather, Gershman’s “use of extortion means” to collect money from Dulevisky (S4 Indictment ¶ 15).

Commonsense must prevail: if Gershman is to receive an obstruction enhancement, the 2-level bump applies *only* to the Dulevskiy extortion offense group.

III. THE GOVERNMENT FAILED TO ESTABLISH GROUNDS FOR A ROLE ENHANCEMENT

Gershman concurs with the Probation Department’s observation that, with respect to a racketeering conviction, the propriety of a Guidelines Chapter 3, Part B role adjustment turns on “[the] defendant’s [overall] participation in the . . . RICO enterprise.” PSR ¶ 116. The agreement ends there.

The Probation Department devotes fewer than 10 lines of text to justifying U.S.S.G. § 3B1.1’s whopping four-level “organizer or leader” enhancement. PSR ¶ 116.

The relevant passage of the draft PSR contains a handful of vague and mostly inaccurate assertions. *Compare* PSR ¶ 116 (asserting that “[Gershman] was [] in charge of the [gambling] ledgers”), *with* Tr. 204-05 (Yusufov identifies Igor Krugly as the partner who possessed “the list” of poker debts), *and* Tr. 232 (Yusufov fingers “Senya” as the poker spot’s “manager,” responsible for “writ[ing] down how much [players] won . . . [and] lost”); *compare also* PSR ¶ 116 (“Lenny [] managed the loansharking business, [] direct[ing] Malkeyev, Poci noc, Bobritsky and [Mrs. Fuxman]”), *with* Tr. 759 (Malkeyev testifies that Mrs. Fuxman merely funded some of the loans that Gershman extended to third parties), *and* Tr. 816 (Malkeyev admits that he lent money on his own account), *and* Tr. 958 (Bobritsky recalls Malkeyev ordering him to collect loan money). It fails altogether to analyze Gershman’s “role in the overall RICO enterprise.” *United States v. Ivezaj*, 568 F.3d 88, 99 (2d Cir. 2009). In fact, the Probation Department’s generalizations touch upon just four of the trial indictment’s 16 predicate acts.

Ultimately, the government bears “the burden of proving facts to support” an aggravating role adjustment. *United States v. Smith*, 174 F.3d 52, 55-56 (2d Cir. 1999) (internal quotation marks omitted). Gershman briefly explains why it must fail.

A meaningful analysis of a racketeering defendant’s role begins with the “nature and scope” of the enterprise. U.S.S.G. § 3B1.1 cmt. n.4. It may end there, as well. *Cf. United States v. House*, 883 F.3d 720, 723-24 (7th Cir. 2018) (observing that the factors identified in § 3B1.1’s commentary may assist “in determining whether § 3B1.1 applies at all”). Although the government “need not” demonstrate “a hierarchical structure or

‘chain of command’” to win a RICO conviction, *Boyle v. United States*, 556 U.S. 938, 949 (2009), it does just that in a “typical” case. *United States v. Gotti*, 459 F.3d 296, 308 (2d Cir. 2006) (describing the “hierarchy” of a “organized crime family”).

This case was atypical. So much so that this Court commented at trial on the “absence of [any] kind of structure[,]sharing [or] pooling of profits from all the criminal activities.” Tr. 1321. “The syndicate” (S4 Indictment ¶ 1), it emerged, was little more than a

bunch of individual criminals who occasionally get together to join [in] particular individual criminal acts, but it’s not as if everything criminal they do yields a common benefit that is then divided in some prearranged way between them.

Tr. 1321. The amorphous and fragmented association between the principal actors frustrates attempts at a “commonsense judgment” concerning “status” and “relative culpability.” *United States v. Colon*, 919 F.3d 510, 517 (7th Cir. 2019).

The record does, however, provide unassailable support for one proposition: if the syndicate had a leader or organizer, it was not Gershman. In fact, a close examination of the trial testimony hints that Gershman was something of an outsider.

Consider the following facts:

- Of the eleven supposed “members of the enterprise” (PSR ¶ 55), only four – Aleksey Tsvetkov, Yusufov, Malkeyev and Bobritsky – are alleged to have committed a crime with Gershman before the gambling conspiracy commenced in early 2016.
- Out of this core group of four, three – Tsvetkov, Yusufov and Malkeyev – participated in the gambling conspiracy.

- Each core member had a relationship with at least one other member of the quartet before he became acquainted with Gershman. Tr. 82 (Yusufov relationship with Tsvetkov extends back to the 1990s); Tr. 165 (Yusufov and Malkeyev “friends” for “15 years”); Tr. 678 (Malkeyev has known Gershman for about “10 years”); Tr. 680 (Malkeyev and Bobritsky childhood friends).
- Each core member had participated in narcotics distribution and/or organized crime for years before Gershman became involved in either. Tr. 427 (Yusufov admits to selling drugs in 1990s); Tr. 680 (Malkeyev admits selling marijuana in high school); Tr. 931 (Bobritsky began selling drugs at 15).
- Malkeyev and Bobritsky were equal partners with Gershman in the marijuana distribution conspiracy. Tr. 875. The third conspirator, Tsvetkov, did not share his profits with Gershman. *Id.*
- Of the three core members who participated in the gambling conspiracy, two – Tsvetkov and Yusufov – “claimed” a larger “share of the fruits” than Gershman. U.S.S.G. § 3B1.1 cmt. n.4. Malkeyev and Gershman had an equal stake in the poker game. Tr. 725.
- Yusufov admitted sharing in the proceeds of a crime that Gershman committed without Yusufov’s help or involvement. Tr. 150-51. Malkeyev, likewise, acknowledged his receipt of a “referral fee” from Gershman on usurious loans. Tr. 759. There is no evidence that either Yusufov or Malkeyev ever reciprocated.

In light of the foregoing, the Court should decline to apply U.S.S.G. § 3B1.1 enhancement.

IV. CORRECTED GUIDELINES RANGE

Striking the ill-conceived obstruction and leadership enhancements leaves Gershman’s total offense level at 29, producing an advisory guidelines range of 87-108 months.

CONCLUSION

Gershman respectfully requests a sentence that balances the need for punishment against the reality that he is a 35-year-old son and father who has made, and can still make, a positive contribution to his community.

Dated: New York, NY
April 15, 2019

Respectfully submitted,

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