

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 21-60069-CR-ALTMAN
CASE NO. 22-60064-CR-ALTMAN

UNITED STATES OF AMERICA,
Plaintiff,

v.

TEVIN SOUFFRANC,
Defendant.

**MEMORANDUM ADDRESSING UTILITY OF THE THEORY OF DETERRENCE AT
SENTENCING**

I. DETERRENCE AND SENTENCING

Among the sentencing factors this Court is called upon to evaluate in its assessment of an appropriate sentence is the concept of “deterrence,” both general and specific deterrence.

A. GENERAL DETERRENCE

Courts repeatedly voice their concern for deterrence as a significant, if not overwhelming factor, in sentencing under the Sentencing Reform Act, specifically in applying the § 3553(a) factors.

The theory of general deterrence is that imposing a penalty on one person will demonstrate to others the costs of committing a crime, thus discouraging criminal behavior. For example, the sentencing of a defendant in a firearms case, the argument goes, will be an exemplar for others who need to be deterred from carrying and using guns; thus, a longer prison term will, ostensibly, deter others.

Arguably, stiffer sentences operate to deter the illegal purchase and use of guns, especially by those engaged in illicit activity. Long (or longer) prison

sentences warn members of the community that being caught and prosecuted for carrying an illegal gun will result in a substantial term of imprisonment – intuitively, the longer the sentence, the more effective the deterrent effect.

For various reasons discussed herein, this submission seeks to demonstrate why, despite its intuitive appeal, the template for deterrence which is the root justification for longer prisons sentences (either within or above the applicable sentences recommended by the advisory United States Sentencing Guidelines), is fundamentally flawed.¹

In June 2017 Professor Jeffrey Fagan, Ph.D., provided a report and expert testimony at the sentencing in *United States v. Lawrence Murray*, in federal district court in Brooklyn, New York. Professor Fagan challenged the assumption that a longer term of incarceration will necessarily have a deterrent effect on future gun crimes. *See* Exh. A hereto (Report of Jeffrey Fagan, Ph.D.). In his report and hearing testimony Professor Fagan concluded – without contradiction from any government expert – that although general deterrence is one of the essential justifications for criminal punishment, the deterrent effect of criminal sanctions (and specifically for gun violence) are *specific to the risks of detection, not to the severity of punishments*.

¹ In support of some of the conclusions and arguments presented herein I am specifically relying on two works: (i) the expert report and affidavit of Professor Jeffrey Fagan, Ph.D., submitted at the sentencing in the case of *United States v. Lawrence Murray*, 16 Cr. 243 (E.D.N.Y. 2017), before the Honorable Jack B. Weinstein. Professor Fagan is the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School, and a Professor in the Department of Epidemiology at the Mailman School of Public Health at Columbia University. *See* Exh. A hereto, Professor Fagan’s Expert Report and Affidavit, dated June 16, 2017; and Exh. B, the 2016 Report from the Brennan Justice Center for Justice, “How Many Americans are Unnecessarily Incarcerated?” (hereinafter “The Brennan Report”).

Professor Fagan explained that “[a] ‘rational offender’ will decide whether or not to commit a crime by weighing the benefit of not committing a crime with the benefit of committing the crime without being caught and the benefit of committing a crime that results in being caught and punished.” See Exh. A (Report of Jeffrey Fagan, Ph.D.) at 4. A decision not to commit the crime requires knowledge by the would-be offender of (i) the law prohibiting the act, (ii) the risks of detection, and (iii) the risks of punishment. In addition, it assumes that each potential offender is capable of *rational* weighing the costs and benefits of her decision. *Id.*

The essential premise in the theory of general deterrence is that of *rational action* by criminal offenders. It is axiomatic that many, if not all offenders, do not act *rational*. Whether criminal defendants can calculate the consequences of their actions depends on a variety of factors, including the type of offense, and factors specific to the offender—his/her age, emotional maturity, level of education, and experience with decision-making. Professor Fagan’s research demonstrates the paucity of data supporting the notion of rational decision-making by criminal offenders in making these kinds of calculations when considering criminal action. Professor Fagan’s expert report concluded that *there is no reliable evidence that appreciably longer periods of incarceration for violent crimes have a general deterrent effect on the population*. See Exh. A (Report of Jeffrey Fagan, Ph.D.) at 6-8.

To the extent there is a deterrent effect from criminal justice enforcement activity, it is derived from raising the *risks of apprehension*. The consensus of

the literature is that deterrent effects really stop there. That lengthy prison sentences do not add much to the cost-benefit calculation; that most offenders – because of their age, lack of maturity, lack of history in decision-making capacity, and life experiences – are fundamentally unable to appreciate the difference between 3 years, 5 years, 10 years, or 20 years of incarceration.

According to Professor Fagan, and specifically as to gun crimes, there is little reliable evidence “of a general deterrent effect of lengthy sentencing enhancements that impose additional years of incarceration for crimes committed with a firearm.” See Exh. A (Report of Jeffrey Fagan, Ph.D.) at 8-12 (citing Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in *EVALUATING GUN POLICY* 251 (Jens Ludwig & Philip J. Cook, eds., 2003); Richard Rosenfeld, Robert Fornango & Eric Baumer, *Did Ceasefire, Compstat, and Exile Reduce Homicide?*, 4 *CRIMINOLOGY & PUB. POL'Y* 419 (2005); Colin Loftin & David McDowall, “One with a Gun Gets You Two”: *Mandatory Sentencing and Firearms Violence in Detroit*, 455 *ANNALS AM. ACAD. POL. & Soc. SCI.* 150 (1981); Colin Loftin, Milton Heumann & David McDowall, *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 17 *L. & Soc’y REV.* 287 (1983); Colin Loftin & David McDowall, *The Deterrent Effects of the Florida Felony Firearm Law*, 75 *J. CRIM. L. & CRIMINOLOGY* 250 (1984); David McDowall, Colin Loftin & B. Wiersema, *A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crime*, 83 *J. CRIM. L. & CRIMINOLOGY* 378 (1992); John J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the*

Benefits on the Margin, in *Do Prisons Make us Safer? The Benefits and Costs of the Prison Boom*, 269 (Steven Raphael & Michael Stoll eds., 2009); Thomas A. Loughran, Edward P. Mulvey, Carol A. Schubert, Jeffrey Fagan, Alex R. Piquero & Sandra H. Losoya, *Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, 47 *CRIMINOLOGY* 699 (2009)).

The degree of certainty of punishment, rather than the speculative notion of the length and severity of punishment, provides the strongest general deterrent effect. *See* Exh. A (Report of Jeffrey Fagan, Ph.D.) at 12. (“People are more motivated by the probability of being caught than by the severity of the punishment . . . increased sanctions do not substantially reduce future recidivism but instead produce only a small deterrent or incapacitation effect on recidivism.” *See* Exh. A (Report of Jeffrey Fagan, Ph.D.) at 7 (citations omitted).

Addressing general deterrence, Professor Fagan concludes, “because the strongest general deterrent effect derives from the certainty as opposed to severity of punishment,” additional incarceration . . . provide[s] little if any marginal effect on the deterrence of gun crimes by other individuals in the community.” *See* Exh. A (Report of Jeffrey Fagan, Ph.D.) at 12.

Two factors that undermine the very concept of a “rational offender” – which is a pre-requisites for the theory of general deterrence—include: (i) knowledge of what is the sentencing regime – plainly there is no way for a person in a community contemplating the possibility of a crime to know the risks, thus there can be no rational assessment of risk; and (ii) knowledge of the

applicability of the sentencing Guidelines – in order to engage in the rational decision-making that justifies deterrence the putative offender would have to know what the punishment is that they could expect – information that is simply not readily available or communicated. To the extent such information may even be communicated, there is no basis to believe what is being communicated is remotely accurate. The conclusion is inescapable – and supported by Professor Fagan’s expert report and his empirical research in the area – that enhanced sentences do not have a deterrent impact on the community under the theory of general deterrence.

According to Professor Fagan’s research, even knowledge of lengthy likely sentences, does not operate as a deterrent. The key to deterrence is the risk (certainty) of punishment, not the depth or length of punishment.

In sum, for a sentencing in any given case to provide effective general deterrence to future possible offenders, those future offenders would have to have some idea of what sentence was ultimately imposed on any defendant, appreciate the likelihood of detection and of the federal sentencing guidelines, and engage in a rational cost-benefit analysis. This process is highly unlikely, in part because adolescents believe, perhaps correctly, that they will never be caught.

An additional consideration in assessing the likelihood of deterrence, is the fact that a large number of young men in high-crime neighborhoods carry guns for what they say is self-protection. Almost none have the benefit of enough education or life experience to have developed the capacity to weigh the costs

and benefits of carrying an illegal weapon. Imposing on prospective defendants a “longer” sentence would not help them develop this skill. Even assuming that future offenders could engage in rational decision-making, Professor Fagan’s research demonstrates, such decision-making “does not suggest that the cost-benefit analysis would be responsive to the punishment imposed” on any given defendant. *See* Exh. A (Report of Jeffrey Fagan, Ph.D.), at 12. Thus, imposing longer prison sentences in order to deter future gun violence is futile.

B. COMMUNITY EFFECT OF ENHANCED SENTENCES

A valid consideration for the Court in its assessment of the utility of longer sentences is the community impact. The impact of imposing longer sentences on individual defendants has an adverse impact on the community precisely because of the impact of such sentences on the individual upon his return to the community. Inevitably, sentenced defendants are released from confinement. To the extent an offender is “hardened” during incarceration, released offenders pose a greater threat to the community upon release.

Another consideration in imposing longer sentences is the cost to a defendant’s community of long-term imprisonment: warehousing defendants longer than necessary (and as argued herein, without the justification that such sentences further a deterrent effect) with nothing more, strips these offenders of any possibility of making any contributions to their communities and families upon release. The large number of people who come from deprived communities and are imprisoned, and their absence while in prison, has a disastrous political, social, and economic effect on their communities and on their families. This

impact is then suffered by the community as a whole.

C. SPECIFIC DETERRENCE

A third seminal consideration in imposing sentence – and an often-cited justification for longer sentences – is “specific deterrence.” The theory is that a longer sentence will achieve the goal of persuading the specific defendant before the Court to resist further criminal behavior.

Professor Fagan’s research demonstrates, however, that long sentences do not achieve specific deterrence for the same reasons that they do not achieve general deterrence. *See generally* Exh. A (Report of Jeffrey Fagan, Ph.D.). The key to both general and specific deterrence is the known risk of detection and punishment, not the length of the sentence. The fact that a defendant was apprehended and will serve a term of incarceration will provide more specific deterrence than would any additional (or longer) term of incarceration. *Id.* Therefore, the rationale that added punishment – either beyond that called for by the advisory Guidelines, or a mandatory minimum statute – operates to provide greater specific deterrence is simply untrue, and not supported by any social science research or literature.

The Sentencing Commission provides some assistance in seeking uniformity of sentencing; and each defendant before the court is entitled to be treated as an individual human being. This basic premise is embodied in the Sentencing Reform Act – and is expressly recognized by the First Circuit in *United States v. Flores Machicote*, 706 F.3d 16, 24 (1st Cir. 2013)(“A sentencing judge’s resort to community-based characteristics does not relieve him or her of

the obligation to ground sentencing determinations in case-specific factors.”)(citing *United States v. Politano*, 522 F.3d 69, 74 (1st Cir. 2008)(“It is possible for a sentencing judge to focus too much on the community and too little on the individual and, thus, impose a sentence that cannot withstand the test of procedural reasonableness.”). Thus, notwithstanding community-based factors, courts must also consider other relevant factors, including the defendant’s health and his family situation, and the reality which exposes the fallacy of the deterrent effect of long sentences, and the likely effect such sentences will have on the defendant and the community.

II. UNNECESSARY INCARCERATION IN THE UNITED STATES

The 2016 report, *How many Americans are Unnecessarily Incarcerated?* published by the Brennan Center for Justice at New York University School of law (the “*Brennan Report*”), addressed the methodology and impact of mass incarceration in the United States over the period of approximately the last forty years. The fundamental question addressed by the *Brennan Report* is whether “mass incarceration” has achieved the goal of reducing crime? *See Exh. B, Brennan Report* at p. 4. Thus, the *Brennan Report* confronted the relationship between mass incarceration, and the substantial decrease in crime over the last four decades.

The *Brennan Report* rebuts the assumption that mass incarceration has caused the vast decrease in crime – relying on the substantial social science research and data which supports the conclusion that “increased incarceration played an extremely limited role in the crime decline” and that “social and

economic factors, and to some extent policing [practices] drove” the decrease in crime levels. *See Brennan Report* at p. 5. Thus, the Brennan report relies on research establishing that “keeping people in prison for *longer* periods” reaches a point of diminishing returns in terms of crime control. *Id.* (emphasis original)(citing Christian Henrichson & Ruth Delaney, Vera Inst. of Justice, *The Price of Prisons: What Incarceration Costs Taxpayers 10* (2012); Ilyana Kuzienko, *Going Off Parole: How the Elimination of Discretion Prison Release Affects the Social Cost of Crime 21* (Nat’l Bureau of Econ Research, Working Paper No. 13380, 2007)).

Similar to debunking the belief in the efficacy of deterrence based on longer sentences, the *Brennan Report* demonstrates that mass incarceration through longer prison sentences does not have the effect of lowering crime rates, or of instilling rehabilitation. Indeed, the *Brennan Report* reveals that longer prison sentences instead have a “criminogenic” effect – of “actually lead[ing] people to commit more crimes after release.” *Brennan Report* at p. 5 (citing Ilyana Kuzienko, *Going Off Parole: How the Elimination of Discretion Prison Release Affects the social Cost of Crime 21* (Nat’l Bureau of Econ Research, Working Paper No. 13380, 2007); and Matthew R. Durose et al., Bureau of Justice Statistics, *Recidivism of Prisoners Release in 30 States in 2005: Patterns from 2005 to 2010* (2014)).

Thus, the *Brennan Report* reaches four principal findings:

- (i) A substantial number of the 1.4 million state and federal prisoners, an estimated 39% (approximately 576,000 people)

are incarcerated with little public safety rationale – shorter prison sentences or alternatives to incarceration would provide a more reasoned and coherent approach with a limited impact on public safety;

- (ii) Alternatives to incarceration are a more effective sentence for the approximately 364,000 lower-level offenders – studies support the conclusion of the *de minimus* rehabilitative impact of longer prison sentences and the increase in recidivism they foster;
- (iii) An estimated 212,000 prisoners have already served sufficiently long sentences justifying release within the next year with little or no public safety concerns; and
- (iv) Approximately 79% of the prison population suffer from either drug addiction or mental illness – and 40% suffer from both; alternatives such as treatment are more effective sanctions.

Brennan Report at p. 7-8. These findings support recommendations for decreasing prison population without a concomitant concern for public safety.

III. CONCLUSION

The expert report of Dr. Fagan and the *Brennan Report* provide context and support for a more reasoned approach to this Courts' assessment of the need for extended incarceration based on the putative goal of deterrence, and concerns for recidivism and rehabilitation.

As Dr. Fagan reports (where deterrence is not furthered by longer prison sentences) and as the *Brennan Report* documents (where incarceration has not had an impact in the reduction of crime – and instead has the limited utility of

warehousing persons with no discernable impact on crime) there is no reasoned or coherent basis for the *de facto* continued imposition of longer sentences.

Mr. Souffranc respectfully submits the arguments presented herein are well-within the factors contemplated by the Sentencing Reform Act for Your Honor to consider at sentencing. We urge the Court consider these arguments, together with the history and characteristics specific to Mr. Souffranc, in the Court's exercise of its sentencing discretion under § 3553(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on August 19, 2022, 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 or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Juan J. Michelen