

**IN THE UNITED STATES OF AMERICA
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

UNITED STATES OF AMERICA

vs.

CASE NO.

JOSEPH PIERCE,

Defendant.

_____ /

SENTENCING MEMORANDUM

Joseph Pierce was nineteen years of age when, in December of last year, he committed the offense of discarding United States mail. He was, at the time, employed by the United States Postal Service as a rural carrier associate. During the same time period he was also working as a crew leader at the Beefburger Drive-in on Capital Circle in Tallahassee. (PSR ¶ 39). Since his arrest, he has continued to work at Beefburger and recently began a second job working at the Circle K convenience store on North Monroe Street in Tallahassee. He committed his offense, not for gain, but because, with the increased demands on mail carriers during the pre-Christmas season, he was having difficulty delivering all the mail on time. (PSR ¶ 12). Having never been arrested before, Mr. Pierce has no criminal history. Given Mr. Pierce's age, his employment history, and his absence of any criminal history, a sentence that allows him to continue to work would be "sufficient, but not greater than necessary," to comply with the goals of sentencing. 18 U.S.C. § 3553(a).

The circumstance that most readily sets Mr. Pierce's situation apart from many others is his willingness to work. When he was working for the Post Office and Beefburger, he was working as many as eighty hours a week. When he began at the post office he was working generally three days

a week, starting at 6:30 a.m. and concluding at 4:00 or 4:30 p.m. Toward the end of his employment, he would sometimes work five days a week. During that same time, he was working thirty to forty hours at Beefburger. There were days he would leave the Post Office at 4:30 p.m., arrive at Beefburger at 5:00 p.m., and work until 11:00 p.m. or midnight. Recently, even knowing that he runs a substantial risk of going to prison, he found that second job at Circle K. Mr. Pierce estimates that between the two jobs he is now working fifty to sixty hours a week.

His current employment comes, too, at a time that has been difficult for many American workers. The most recent statistics from the United States Department of Labor show that African-American men twenty years and older have an unemployment rate of 15.5%.¹ Surely, too, the percentage is much higher for those individuals who appear for sentencing in federal courts across the country.

Mr. Pierce's age is a consideration, as well. In a 2005 report from the Office of Juvenile and Delinquency Prevention of the United States Department of Justice, the Department recognized that "the parts of the brain that govern impulse, judgment, and other characteristics may not reach complete maturity until an individual reaches age 21 or 22." *Id.* At 8.² Recently, too, the United States Supreme Court concluded that life sentences for juveniles violate the Eighth Amendment prohibition against cruel and unusual punishment, largely because of the immaturity and greater possibility for change associated with those under eighteen:

¹This statistic comes from a June 4, 2010, news release from the Bureau of Labor Statistics, U.S. Department of Labor, dated June 4, 2010, which reports the statistics from May of 2010. The report is available at www.bls.gov/news.release/pdf/empsit.pdf.

²The report is available at www.ncjrs.gov/pdffiles1/ojdp/212757.pdf.

As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.*, at 569-570, 125 S. Ct. 1183, 161 L. Ed. 2d 1. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.*, at 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." Thompson, *supra*, at 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (plurality opinion). No recent data provide reason to reconsider the Court's observations in Roper about the nature of juveniles. As petitioner's amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as Amici Curiae 16-24; Brief for American Psychological Association et al. as Amici Curiae 22-27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. Roper, 543 U.S., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Ibid.*

Graham v. Florida, ____ S. Ct. ____, 2010 WL1946731, *13 (May 17, 2010). Mr. Pierce was not a juvenile when he committed the instant offense and the issue, of course, is not whether he should be sentenced to life imprisonment. Nonetheless, as recognized by the Department of Justice, the character and thinking process of even young adults is incomplete and much of what was said in Graham has meaning here. Indeed, Mr. Pierce's crime shows a failure to weigh his actions and an impetuous failure to seek a better solution, both traits commonly associated with immaturity.

Mr. Pierce's employment history and youthful age are included in his "history and characteristics," part of the statutorily required consideration in the sentencing determination. 18

U.S.C. § 3553(a)(1). Similarly, his reason for committing the offense is part of “the nature and circumstances of the offense,” the other part of the statutorily required consideration. *Id.*

There was a time, of course, when district courts were limited in their ability to rely upon circumstances such as age and employment history in arriving at a sentence. That, though, is no longer the case, and sentencing courts are required to consider such factors:

The Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines. See United States Sentencing Commission, Guidelines Manual 5H1.1-6, 11, and 12 (Nov. 2006).³ These are, however, matters that § 3553(a) authorizes the sentencing judge to consider. *See, e.g.*, 18 U.S.C. § 3553(a)(1).

Rita v. United States, 551 U.S. 338, 364-365 (2007) (Stevens, J. concurring). *See also* United States v. Jarvi, 537 F.3d 1256, 1263 (10th Cir. 2008) ("We have now held that district courts have broad discretion to consider individual characteristics like age, employment, and criminal history in fashioning an appropriate sentence under 18 U.S.C. § 3553(a), even when disfavored under the Guidelines or already accounted for in another part of the calculation").

In Gall v. United States, 552 U.S. 38 (2007), the court relied on the youth of the twenty-one year old defendant as one of the reasons justifying a below-guideline sentence:

In summary, the District Judge observed that all of Gall's criminal history "including the present offense, occurred when he was twenty-one-years old or younger" and appeared "to stem from his addictions to drugs and alcohol." *Id.*, at 122-123. The District Judge appended a long footnote to his discussion of Gall's immaturity. The footnote includes an excerpt from our opinion in Roper v. Simmons, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), which quotes a study stating that a lack of maturity and an undeveloped sense of responsibility are qualities that "often result in impetuous and ill-considered actions." The District Judge clearly stated the relevance of these studies in the opening and closing sentences of the footnote: "Immaturity at the time of the offense conduct is not an inconsequential

consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five. . . . [T]he recent [National Institutes of Health] report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a sentencing court should account for age when inquiring into the conduct of a defendant." App. 123, n 2.

Id. at 57-58.

Similarly, the courts have recognized that employment history is a valid justification for a below-guideline sentence. *See, Kimbrough v. United States*, 552 U.S. 85, 110 (2007) ("second, the [district] court considered Kimbrough's 'history and characteristics.' § 3553(a)1) . . . [noting] that Kimbrough has no prior felony convictions, that he had served in combat during Operation Desert Storm and received an honorable discharge from the Marine Corps and that he had a *steady history of employment*" (emphasis added); *United States v. Sota*, 2010 U.S. Dist. LEXIS 53118, *14-15 (E.D. Wis. April 30, 2010); *United States v. Garza*, 2008 U.S. Dist. LEXIS 100400, *8 (N.D. Ill. December 4, 2008).

This Court is well aware of the goals of sentencing set forth in 18 U.S.C. § 3553(2)-(7). Mr. Pierce's work history, his lack of any criminal history, his age, the circumstance that his crime was largely the product of his immaturity, and that as a young man, he has a greater capacity for change, suggests a reduced possibility of recidivism and are relevant to the need to promote respect for the law.³ Indeed, as recognized by the Sentencing Commission, across all criminal history categories,

³ Just, however, as a sentence that is too short may fail to reflect the seriousness of the offense, promote respect for the law, or provide just punishment, so will a sentence that is excessively harsh. *See, e.g., United States v. Ontiveros*, 07-CR-333, 2008 U.S. Dist. LEXIS 58774, *6 (E.D. Wis. July 24, 2008) ("[A] sentence that is disproportionately long in relation to the offense is unjust and likewise fails to promote respect [for the law]"); *United States v. Zavala*, No. 07-14851, 2008 U.S. App. LEXIS 24168, *8-9 (11th Cir. Nov. 25, 2008) ("[A]ny higher sentence would promote disrespect for the law.") (quoting the district court).

“those with stable employment in the year prior to the instant offense are less likely to recidivate (19.6%) than those who are unemployed (32.4%).”⁴ The Sentencing Commission has determined, too, that those who, like Mr. Pierce, are not only first offenders under the Guidelines, but who also have no prior arrests, are the least likely to commit further offenses.⁵ They have the lowest recidivism rate, 6.8%, and are described in the Commission’s report as “easily the most empirically identifiable group of guideline federal offenders who are the least likely to re-offend.”⁶

Mr. Pierce’s calculated guideline range is that of six to twelve months of imprisonment. (PSR ¶ 45). However, as recognized in the presentence report, he falls in Zone B of the Sentencing Table, which provides several options to the Court, including a sentence of probation that substitutes home detention for the period of imprisonment. (PSR ¶ 46). Thus, the Court could impose six months of home detention in lieu of imprisonment and still impose a guideline sentence. While such a sentence would allow Mr. Pierce to continue working, a lesser sentence of probation without any home detention or a shorter period of home detention would be “sufficient, but not greater than necessary,” to comply with the goals of sentencing. 18 U.S.C. § 3553(a). Mr. Pierce respectfully requests this Court to impose such a sentence.

⁴United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (May 2004)*, at 12. Available at: www.ussc.gov/publicat/Recidivism_General.pdf.

⁵United States Sentencing Commission, *Recidivism and the “First Offender” (May 2004)*, at 17. Available at www.ussc.gov/publicat/Recidivism_FirstOffender.pdf. The Committee notes that there are two other groups that, under the Guidelines, are technically first offenders, those who have arrests and no convictions and those who have convictions which, for one reason or another, are not counted. Both have higher recidivism rates than those who have never been arrested.

⁶*Id.* at 16-17.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Corey Smith, Assistant United States Attorney, 111 N. Adams Street, 4th Floor, Tallahassee, FL 32301, by electronic delivery this 15th day of June, 2010.

Respectfully Submitted,

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Names and places have been changed.