

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

UNITED STATES OF AMERICA

vs.

**UNDER SEAL
CASE NO: 4:11cr69-RH**

DANNY HAYAK

SENTENCING MEMORANDUM

Danny Hayak is a 24 year old young man with a full scale IQ score of 64. He reports receiving a disability check for mental retardation since he was a child. In the case pending before this Court, he assisted in the sale of an unusually small quantity of crack cocaine, .09 grams. Given Mr. Hayak's disability and the nature of the offense, a sentence of probation would be "sufficient, but not greater than necessary, to comply" with the goals of sentencing established by Congress. 18 U.S.C. § 3553(a).

Mr. Hayak's History and Characteristics

As recognized in the Presentence Report, Mr. Hayak was placed in the educable mentally handicapped program when he was in the first grade. PSR ¶46. The school psychologist who tested Mr. Hayak when he was 10 years old reported Mr. Hayak's full scale IQ to be 56. *Id.*, Ex. 1, pp. 2-3.¹ Later, when Mr. Hayak was 18 years old and had been charged with an offense in state court, Tallahassee psychologist Gregory Prichard examined Mr. Hayak pursuant to a court order for the purpose of determining whether his mental retardation rendered him incompetent to stand trial.

¹Exhibit One is the "Report of Psychological Services" from the Leon County Schools that is dated May 12, 1998. In the body of the report, the psychologist states that Mr. Hayak's full scale IQ is 56. On the first page of the report, perhaps as a typographical error, it lists his full scale IQ as 62.

After testing Mr. Hayak, Dr. Prichard concluded that Mr. Hayak's full scale IQ score was 64. Ex. 2, p. 4.² Dr. Prichard concluded that Mr. Hayak was incompetent to stand trial:

The nature and extent of his retardation precludes his ability to rationally and factually address his case. His comprehension is not very good, he is not very articulate, he is concrete in his thinking, and he simply does not have a factual or rational grasp of proceedings now pending against him. This appears directly related to his limited intelligence.

Ex. 2, p. 5. The judge in Mr. Hayak's case concurred with Dr. Prichard's opinion and committed him to Florida State Hospital's mentally retarded defendant program in December of 2005. Ex. 3, p. 1.³ It wasn't until September 6, 2006, that the Court found Mr. Hayak competent to stand trial. *Id.* at p.2.

Mr. Hayak's sentence for the offense included a period of probation, but he was subsequently charged with violating that probation. In conjunction with the proceedings, Dr. Prichard, again, examined him for competency. *See* Ex. 3. At that time, Dr. Prichard concluded that Mr. Hayak "seems to have retained competency material from his learning at [the mentally retarded defendant's program]" and that Mr. Hayak seemed "to have a full factual and rational appreciation of the charges now lodged against him." *Id.* at p. 5. He concluded that Mr. Hayak was competent to proceed with the violation hearing. In his report, Dr. Prichard briefly summarized Mr. Hayak's status and reiterated his finding that Mr. Hayak was mentally retarded:

Mr. Hayak is a client of the Agency for Persons with Disabilities as a mentally retarded young man. He has been receiving Social Security disability income for mental retardation most of his life. He has been to the mentally retarded defendant's

²Exhibit 2 is the "Confidential Psychological Report" prepared by Gregory A. Prichard and dated December 8, 2005.

³Exhibit 3 is the "Confidential Psychological Report" prepared by Gregory A. Prichard and dated September 8, 2008.

program in late 2005 and 2006. Hence, Mr. Hayak is mentally retarded according to the Florida Statutes, classified in the mild range.

Id.

The Nature and Circumstances of the Offense

The evidence in the case before this Court shows that Mr. Hayak and others were in the yard of a residence on Thomasville Road where there had been apparently regular cocaine sales. PSR ¶¶ 8-10. The incident that led to Mr. Hayak's arrest involved a sale of .09 grams of crack cocaine, worth \$30, to an undercover officer. *Id.* Mr. Hayak's role was that of approaching the officer, taking the order, passing that request on to Jonathan Thompson, taking the cocaine from Thompson and handing it to the officer, receiving the money from the officer, and delivering the money back to Thompson. *Id.* It is not clear what, if any, benefit Mr. Hayak received from performing the task. *Id.* The conduct that led to the charge, then, is that of assisting Mr. Thompson in selling less than a tenth of a gram of crack cocaine.

The Mitigation of Mental Retardation

Mental retardation is a devastating handicap. It has a profound affect on an individual's ability to understand and process information, engage in logical reasoning and, perhaps, most relevant to Mr. Hayak's case, often results in the individual following the lead of others:

[C]linical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant

evidence that they often act on impulse rather than pursuant to a premeditated plan, and that *in group settings they are followers rather than leaders*.

Atkins v. Virginia, 536 U.S. 304, 318 (2002) (emphasis added). While the handicap does not excuse criminal conduct, it is usually seen as reducing the individual’s culpability for that conduct. *See Id.* (“Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability”).

In the American Psychological Association’s *Amici Curiae* brief filed in Atkins (*Amicus Br.*), the Association referred to the susceptibility of the mentally retarded to manipulation: “Moreover, people with mental retardation are often especially eager to please others, a characteristic obviously susceptible to manipulation.” *Amicus Br.* at 9.⁴ The Association, too, drew an analogy to the susceptibility of children to “undue influence”:

A comparison with children is useful here. Adults with mental retardation, of course, are *not* children. Nonetheless, with respect to personal culpability, adults with mental retardation and children share the critical characteristics of diminished capacity to understand the moral and factual consequences of their actions, to control their impulses, and to make independent decisions without undue influence by others.

Id. at 2 (emphasis in the original). The Association also noted that those such as Mr. Hayak who fall in the subcategory of “mild” mental retardation still suffer from significant deficits:

Alternatively, people with mental retardation are sometimes sub-classified as having either “mild,” “moderate,” “severe,” or “profound” mental retardation, depending on the degree of their intellectual and adaptive functioning. Note that the term “mild” mental retardation can be misleading, for even the highest functioning individuals with mental retardation must have substantial cognitive and behavioral disabilities before they can be diagnosed with retardation.

⁴The brief is available at the American Psychological Association’s website: <http://www.apa.org/about/offices/ogc/amicus/atkins.aspx> . The brief is styled McCarver v. North Carolina, a companion case. *See Atkins v. Virginia*, 536 U.S. at 316, n. 21.

Id. at 6, n. 3. Overall, only one to three percent of the general population are considered to be mentally retarded. *Id.* at 8 (“Although there is no precise census of the number of people with mental retardation, studies invariably put the number at less than 3% of the population, usually in the 1% to 3% range”). Given the affects of the disability, then, “impaired intellectual functioning is inherently mitigating.” Tennard v. Dretke, 542 U.S. 274, 287 (2004).⁵

The Mitigating Circumstances of the Offense

Mr. Hayak’s role in the offense is, as well, a mitigating circumstance. He was not the one selling the cocaine, and it is unclear whether he received any benefit at all from the assistance he provided Mr. Thompson. Then, too, the quantity sold is unusually small, nine one-hundredths of a gram. That quantity places Mr. Hayak at offense level 12, the lowest category for the distribution of cocaine base. It covers especially small quantities, less than 1.4 grams. Admittedly, while considering such small quantities, the differences made between one quantity and the next may not make a great deal of difference. Nonetheless, the quantity involved, here, is fifteen times less than the 1.4 grams that represents the ceiling of the range.

USSG § 5K2.13

Mr. Hayak’s mental retardation justifies a below-guideline sentence either on the basis of a traditional guideline departure or as a variance.⁶ Section 5K2.13 of the United States Sentencing

⁵In a survey of United States District Court Judges conducted in 2010, eighty percent of those surveyed thought “diminished capacity” was “ordinarily relevant to departure and/or variance consideration.” United States Sentencing Commission, *Results of Survey of United States District Judges January 2010 through March 2010*, Table 13. The survey is available at: http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf.

⁶*See United States v. Jordi*, 418 F.3d 1212, 1215 (11th Cir. 2005) (“[T]he application of the guidelines is not complete until the departures, if any, that are warranted, are appropriately considered”).

Guidelines Manual provides for a downward departure in cases of diminished capacity. The provision provides that “[a] downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense.”

The application note goes on to state that:

“‘Significantly reduced mental capacity’ means the defendant, although convicted, has a significantly impaired ability to (a) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (b) control behavior that the defendant knows is wrongful.”

While there seems to be little in the way of either published or unpublished decisions where the provision has been applied to the benefit of the defendant, courts have recognized that the provision is due careful consideration. See United States v. Jones, 42 Fed. Appx. 879, 981 (7th Cir. 2002); United States v. Hogan, 1995 WL 225710 (D.C. Cir. 1995)(unpublished).

Mr. Hayak assisted in the sale of the cocaine to the undercover officer “while suffering from a significantly reduced mental capacity,” and it seems likely that his deficit contributed substantially to the commission of the offense in that he was far more likely than others to be manipulated or to follow the lead of other individuals such as Mr. Thompson. That same susceptibility to the influence of others surely impaired Mr. Hayak’s ability to “control behavior that” he knew was “wrongful.”

18 U.S.C. §3553(a)

Apart from Mr. Hayak’s eligibility for a departure under the Guidelines, the requirements of 18 U.S.C. § 3553(a) also compel a below-Guidelines sentence. Mr. Hayak’s mental retardation is a “characteristic of the defendant.” In that his limited intellectual ability makes him less culpable than others, a sentence of probation satisfies the need for the sentence “to reflect the seriousness of

the offense, to promote respect for the law, and to provide just punishment for the offense.” 18 U.S.C. § 3553(a)(2)(A). Sentences that are unnecessarily long or harsh fail this requirement just as surely as sentences that are too lenient to too short. *See Gall v. United States*, 552 U.S. 38, 52 (2007) (where the Court found the facts of the case “provide[d] support for the district judge’s conclusion that . . . ‘a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.’”).

Mr. Hayak’s role in *assisting* the sale of an especially small quantity of cocaine is part of “the nature and circumstances of the offense” the courts are required to consider. 18 U.S.C. § 3553(a)(1). The same consideration about the need for the offense to reflect the seriousness of the offense, promote respect for the law, and provide just punishment supports a lesser sentence when the Guideline calculations overstate the seriousness of the offense. *See, e.g., United States v. Soto*, 2011 U.S. Dist. LEXIS 64052, *9 (E.D.Wash. June 14, 2011) (unpub.) (where court concluded that a four-level enhancement for possessing a firearm in connection with a burglary and a two-level enhancement for possession of the same firearm “overstate[d] the seriousness of the Defendant’s offense”); *United States v. Lopez-Arellano*, 2010 U.S. Dist. LEXIS 120373, *8 (E.D.Mich. Oct. 27, 2010) (unpub.) (where court concluded that the Guideline calculations in an unlawful reentry case “overstate[d] the seriousness of the offense and the need to protect the public”); *United States v. Desmond*, 2008 WL 686779, *2 (N.D. Ill. March 11, 2008) (unpub.) (where, in a case involving perjury and fraud, the court concluded that “the offense level determined under the Guidelines substantially overstates the seriousness of the offense”); *United States v. Keller*, 2005 WL 6192897, *8 (N.D. Tex. Oct. 17, 2005) (unpub.) (where the court concluded that, because of the loss

calculations “the offense level determined by the Guidelines substantially overstates the seriousness of the offense”).

Among the others factors listed in § 3553(a)(2), the one most often argued by the Government is the need to avoid unwarranted sentencing disparities. The concern, though, is with those disparities that are *unwarranted*. *See, e.g., United States v. Owens*, 464 F.3d 1252, 1256 (11th Cir. 2006); *United States v. Duncan*, 479 F.3d 924, 929 (7th Cir. 2007) (“18 U.S.C. § 3553(a)(6) does not instruct district courts to avoid all differences in sentencing, only unwarranted disparities.”). To impose the same sort of sentence on Mr. Hayak as someone with a standard intellect who had taken a more central role in the offense is a false equality that ignores the facts.

Conclusion

Because of the quantity of drugs involved in this case, Mr. Hayak already faces what is for federal courts a relatively low Guideline range of 10 to 16 months.⁷ Given his limited intellectual capacity, his limited role in the offense, and the quantity of cocaine, that range, though, is “greater than necessary, to comply [with the goals of sentencing established by Congress].” 18 U.S.C. § 3553(a). Mr. Hayak, therefore, respectfully requests this Court to forego any sentence of imprisonment and impose a period of probation.

⁷Mr. Hayak falls in Zone C of the Guidelines Sentencing Table, which, were the Court to impose a Guidelines sentence, allows the Court to substitute half of the imprisonment with home detention. *See* USSG §5C1.1(d)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Jason Coody, this 17th day of April, 2012.

Respectfully submitted,

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Out of concern for privacy, the names of the defendant and the other defendant are fictional and some of the other circumstances of the offense have been changed.