

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs.

CASE NO. XXXXXX

**** *,

Defendant.

DEFENDANT'S SENTENCING MEMORANDUM

Defendant, **** *, pursuant to the decision in United States v. Booker, 543 U.S. 220 (2005), requests this Court to impose a sentence that is “sufficient but not greater than necessary to comply with” the goals of sentencing set forth in 18 U.S.C. § 3553(a)(2). 18 U.S.C. § 3553(a). Those goals, the consideration of the “nature and circumstances of [Mr. **** *’s] offense, ” § 3553(a), and the other factors set forth in the statute support a sentence of less than the eighty-seven to one hundred and eight months called for by the United States Sentencing Guidelines.

The greater weight of the evidence shows that Mr. **** *’s role in the offense must have been a limited one. From all appearances, his task was to receive the drugs and transport them to someone else. There was testimony during the suppression hearing that Mr. **** *was headed to Jacksonville once he received the cocaine. The vehicle he was driving belonged to someone else as, for that matter, did the cell phone he was using at the time of his arrest. There wasn’t any drug distribution paraphernalia attributable to Mr. **** *. While there was suspicious paperwork found in the truck, it is not clear that Mr. **** *had any responsibility for generating that paperwork. Indeed, the presence of the Western Union receipts that clearly belonged to someone else, affirmatively suggest the other documents also belonged to someone else. Then, too, there was no

evidence showing that Mr. *****paid for or had the resources to pay for the shipment of the drugs. The most telling circumstance of all, though, is that of his responsibility of receiving the package of cocaine. It seems to be common practice for those most involved to avoid the risk of being arrested by delegating tasks such as receiving the package in this case to those least involved. The government, in its closing argument, recognized that fact:

We don't have to prove that Mr. *****was the boss of this; that he was the one making the decisions. It is sufficient, under the instructions the judge is going to give you, even if he was just a small-time player, and that may be the case, since he was the one that had the risk of being there to pick up the cocaine.

This Court, in arriving at the sentencing decision in this case, must, of course, consult the United States Sentencing Guidelines. *See United States v. Munoz*, 430 F.3d 1357, 1369 (11th Cir. 2005). Nonetheless, courts must also consider the other factors set out in § 3553(a). Indeed, in some instances, the guidelines may have little persuasive force in light of some of the other § 3553(a) factors:

Although "judges must still consider the sentencing range contained in the Guidelines, . . . that range is now nothing more than a suggestion that may or may not be persuasive . . . when weighed against the numerous other considerations listed in [§ 3553(a)]." *Id.* at 787 (Stevens, J., dissenting). Indeed, as one district judge has already observed,

the remedial majority in *Booker* [] direct[s] courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore. For example, under § 3553(a)(1) a sentencing court must consider the "history and characteristics of the defendant." But under the guidelines, courts are generally forbidden to consider the defendant's age, his education and vocational skills, his mental and emotional condition, his physical condition including drug or alcohol dependence, his employment record, his family ties and responsibilities, his socio-economic status, his civic and military contributions, and his lack of guidance as a youth. The guidelines' prohibition of considering these factors cannot be squared with the § 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant.

United States v. Ranum, 353 F. Supp. 2d 984, 986 (E.D.Wis.2005) (citations omitted). Thus, mitigating circumstances and substantive policy arguments that were

formerly irrelevant in all but the most unusual cases are now potentially relevant in every case.

United States v. Glover, 431 F.3d 744, 752-753 (11th Cir. 2005) (Tjoflat, J. specially concurring). *See also*, United States v. Huerta-Rodriguez, 355 F. Supp.2d 1019, 1023 (D. Neb. 2005) (“post-Booker, the Sentencing Reform Act (SRA) requires the sentencing court to regard the guidelines’ ranges as one of the many factors to consider in determining the sentence”).

The Sentencing Guidelines, themselves, provide for an adjustment for those who played a limited role. *See* USSG § 3B1.2 (Mitigating Role). Given the absence of any information about who else was involved in conspiracy and what role they played, though, this Court cannot compare Mr. *****’s role to the others, and Mr. *****, therefore, appears ineligible for any reduction pursuant to § 3B1.2. *See* United States v. DeVaron, 175 F.3d 930, 940 (11th Cir. 1999) (en banc) (holding that in comparing the defendant’s role to the other participants in the offense, district courts could do so but “only to the extent that they are identifiable or discernible from the evidence,” and that the “conduct of participants in any larger criminal conspiracy is irrelevant”).

Thus, under the structure of the guidelines, Mr. *****faces the same sentence he would face had he been a more central figure in the conspiracy. Such a sentence, though would fall short of “the need to avoid unwarranted sentence disparities among defendants. . . who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). The fact is that the Guidelines, while proclaiming the goal of uniformity, sometimes fail to do accomplish that goal when the sentence is based primarily on drug quantity. The Constitution Project recognized as much.¹ The Project’s Sentencing Initiative

¹ It is a group which describes itself as “a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues thorough a unique combination of scholarship and activism,” www.constitutionproject.org/index.cfm. Its Sentencing Initiative Project includes such preeminent conservative jurists as United States Supreme Court nominee Samuel Alito and United States District Court Judge Paul Cassel, author of the decision in United States v. Wilson, 350 F.Supp.2d 910 (D. Utah 2005).

report concludes that the Sentencing Guidelines “place excessive emphasis on quantifiable factors such as monetary loss and drug quantity, and not enough emphasis on other considerations such as the defendant’s role in the criminal conduct.”² In its report Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, at 50, the United States Sentencing Commission recognized the criticism of the over-reliance on drug quantity: “Drug quantity has been called a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making.” The end result is that the Guidelines produce sentences that, while uniform by the standards of the Guidelines, sometimes sentence those minimally involved much like those who are central figures in the crime.³

The goals set forth in §3553(a)(2) consist of the “need for the sentence imposed”

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational, training, medical care, or other correctional treatment in the most effective manner

It is hard to be precise in meeting these goals. In this case, though, Mr. *****, whose longest sentence has been 30 days for driving on a suspended license, is facing a mandatory five year prison sentence. See ¶¶ 34, 35, 54, PSR. Thus, this court will necessarily be imposing a significant sentence. Accordingly, whether the sentence falls within the Guidelines range of seven years and a few months

² <http://www.constitutionproject.org/article.cfm?messageID=101>.

³Even the uniformity of sentencing under the Guidelines is probably overstated. According to the United States Sentencing Commission’s 2003 Sourcebook of Federal Sentencing Statistics, which presents the most current statistics available, the average sentence in the Northern District of Florida for drug trafficking offenses was 64% higher than the national average (131.5 months vs. 80.1 months).

to nine years, or is closer to the mandatory five year sentence, the sentence will surely promote the goals of reflecting the seriousness of the offense, affording adequate deterrence, and protecting the public. The point, though, is that when the other factors of § 3553(a) are considered - in particular, the “nature and circumstances of the offense” (§ 3553(a)(1)) and the need to avoid “unwarranted sentence disparities” (§ 3553(a)(7))- it is apparent that the goals of federal sentencing can be accomplished with a sentence less than that called for by the Guidelines.

Mr. *****requests this Court to impose just such a sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by electronic format to Assistant United States Attorney Michael Simpson, this 24th day of January, 2005.

s/Randolph P. Murrell
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