

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

v.

Case No. **-CR--001**

SENTENCING MEMORANDUM

Preliminary Statement

***** comes before this court for sentencing following his plea of guilty to a one-count indictment charging Mr. ***** with illegal reentry of a removed alien, in connection with his attempt on January 29, 2008 to enter the United States through the Massena port of entry for the purpose of visiting the Akwesasne Mohawk Casino with a female friend. Mr. ***** has been in custody since his arrest on January 29, 2008.

Based upon each of the factors to be considered under 18 U.S.C. §3553(a), including Mr. *****'s innocuous purpose for reentering the U.S. (to spend a couple of hours at the Akwesasne Mohawk Casino, which is a short drive from his home just across the Canadian border); the age of the 1986 prior felony conviction which triggers his enhanced guidelines sentence in this case; the fact that the same prior felony conviction has already been used to increase the sentence in

Mr. ****'s 1991 illegal reentry case, making its use in this case the third time Mr. **** could be punished for that 1986 conviction; and the unwarranted disparity that would arise in this case from the lack of an early disposition program in this federal district, a sentence consistent with the guidelines range would be far greater than necessary to serve the purposes of sentencing. Accordingly, Mr. **** will ask the Court to impose a sentence of time served (nearly 6 months).

I. THE COURT'S SENTENCING AUTHORITY AND DUTIES..

This Court has a great deal of discretion when determining an appropriate sentence for Mr. ****. Recent case law directs the court to give renewed and equal significance to all of the factors found under 18 U.S.C. §3553(a) (most of which were rendered meaningless by the mandatory sentencing guidelines), and the statutory mandate to impose a sentence “*sufficient, but not greater than necessary*” to satisfy the statutory purposes of sentencing. Sentencing courts are no longer bound by the sentencing guidelines or the policy statements presented in those guidelines; sentencing courts also are no longer permitted to give undue weight to the sentencing guidelines at the expense of the other statutory factors.

A. The Court is required to consider all factors under 18 U.S.C. §3553(a).

On January 12, 2005, the Supreme Court ruled that its Sixth Amendment holdings in Blakely v. Washington, 542 U.S. 296 (2004) and Apprendi v. New Jersey, 530 U.S. 466 (2000) apply to the federal sentencing guidelines, concluding that

[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

United States v. Booker, 543 U.S. 220, 244 (2005). The remedial majority in Booker severed and excised those portions of the Sentencing Reform Act of 1984 that made the guidelines, and

the sentencing range computed therein, mandatory, “mak[ing] the Guidelines effectively advisory.” *Id.* at 757.

Post *Booker*, courts must treat the guidelines as just one of a number of sentencing factors under 18 U.S.C. §3553(a). A sentencing court’s primary responsibility is to follow the mandate of the “parsimony clause” within §3553(a): to “impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph 2.” 18 U.S.C. §3553(a) [emphasis added].

The Second Circuit has “recognized that district courts are to impose sentences pursuant to the requirements of §3553(a)—including the requirements of §3553(a)’s parsimony clause—while appellate courts are to review the sentences actually imposed by district courts for reasonableness.” *United States v. Williams*, 475 F.3d 468, 476-477 (2d Cir. 2007), citing *United States v. Ministro-Tapia*, 470 F.3d 137, 138 (2d Cir. 2006).

The purposes to be served by a “sufficient, but not greater than necessary” sentence are:

- (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.

18 U.S.C. §3553(a)(2).

In determining the minimally sufficient sentence, the statute further directs the courts to consider, in addition to the purposes in paragraph 2 and the sentencing guidelines and policy statements, the following factors:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

* * *

(3) the kinds of sentences available;

* * *

(6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. §3553(a).

Section 3582 then directs the court, “in determining whether to impose a term of imprisonment... [to] consider the factors set forth in section 3553(a) ... *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.*” 18 U.S.C. §3582(a) [emphasis added].

In United States v. Crosby, the Second Circuit recognized the increased significance of §3553(a) factors in light of the remedy in Booker:

Prior to Booker/Fanfan the section 3553(a) requirement that the sentencing judge ‘consider’ all of the factors enumerated in that section had uncertain import because subsection 3553(b)(1) required judges to select a sentence within the applicable guideline range unless the statutory standard for departure was met. Now, with the mandatory duty to apply the guidelines excised, the duty imposed by section 3553(a) to “consider” numerous factors acquires renewed significance.

United States v. Crosby, 397 F.3d 103, 111 (2d Cir. 2004).

The Supreme Court in Rita recently provided further guidance on the weight to be given the sentencing guidelines by sentencing courts, determining that even though, on appeal, a presumption of reasonableness may be read into the guidelines, there is no such presumption before the District Court. Rita v. United States, 127 S. Ct. 2456 (2007). The Court clarified that the District Court must independently evaluate whether a sentence consistent with the guidelines complies with the mandate of 18 U.S.C. §3553(a). Id. The Court explained that the presumption of reasonableness in the appellate court contemplates that “*both* the sentencing judge and the

Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case”; it does not arise from deference given to the guidelines. Id. at 2465 (emphasis in original).

The Supreme Court has more recently explained in Gall that

after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the §3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented.

Gall v. United States, ___ U.S. ___, 128 S. Ct. 586, 596-597, 2007 WL 4292116, *7 (2007).

The directives of Booker, Gall and §3553(a) make clear that courts may no longer uncritically apply the guidelines, and they may not give the guidelines any greater weight than any of the other §3553(a) factors.

Justice Scalia explained the point well in his dissent from Booker’s remedial holding:

Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise--if it thought the Guidelines not only had to be ‘considered’ (as the amputated statute requires) but had generally to be followed--its opinion would surely say so.

Booker, 125 S. Ct. at 791 (Scalia, J., dissenting in part). In its later opinions in Rita and Gall, the Supreme Court has made it perfectly clear that giving any special weight to the guideline range relative to the other Section 3553(a) factors would violate the Sixth Amendment.

In sum, in every case, a sentencing court must now consider all of the §3553(a) factors, not just the guidelines, in determining a sentence that is “sufficient, but not greater than necessary” to meet the goals of sentencing.

II. THE COURT SHOULD IMPOSE A SENTENCE OF TIME SERVED IN LIGHT

OF ALL OF THE FACTORS UNDER 18 U.S.C. §3553(a).

A. History and Characteristics of Defendant

Mr. **** is a 40-year-old Canadian citizen who has caught zero breaks in his life. The presentence report (hereinafter 'PSR') fairly reflects his unfortunate and disturbing childhood and upbringing. As verified by Canadian probation records, at 5 years old, he was found by authorities walking the street in an intoxicated state, having been given alcohol by his mother since the age of 3. After that event, he was placed in foster care. He had no contact with his father, who was a high-ranking member of the Satan's Motorcycle Club.

While in foster care, **** was raised in the home of a physically abusive, alcoholic foster father. Parental supervision was entirely lacking, allowing **** to be exposed to drugs and alcohol constantly at a very young age. He was drinking regularly at 12 years old, and he began using marijuana at 11 years old, a time when most young boys are starting 6th grade.

He left the foster home at 15 years old, hitchhiking to the U.S. He has lived on his own ever since, and not particularly well due to his young age, complete lack of life skills and a developing drug and alcohol addiction at the start of his "independence". It is no surprise that he had to resort to desperate measures just to survive and that he migrated toward the type of crime evident in his record, including engaging in prostitution to earn money for basic needs and to feed his addiction.

His history reflects the continuing deleterious effects of drug and alcohol addiction. Not until the mid-1990s was Mr. **** evaluated for mental health issues, which revealed significant mental illness, which explains much more about his contacts with law enforcement during the ten years prior and the time since that diagnosis.

Simply put, Mr. **** has lived the life of a broken man who, with the care and guidance of loving parents and with the proper detection and treatment of his mental illness, likely would not be in the situation he faces now.

B. The nature and circumstances of the offense.

Mr. ****'s attempted reentry into the U.S. this past January was for the innocuous purpose, misguided as it was, to treat a new girlfriend to a good time for a couple hours at the Akwesasne Mohawk Casino. The government does not dispute that that was his purpose. His home in Cornwall at the time was minutes away from the border, which, in turn, is a very short distance from the casino.

Although he should have known better than to test his luck at the border, he had little appreciation that driving such a short distance—literally a few miles—would expose him to significant imprisonment.

As serious as the crime of illegal reentry is, Mr. ****'s culpability relative to that of other individuals convicted of the same offense is substantially less. The intent of the sentencing guidelines towards individuals with similar histories is to severely punish individuals found in the U.S. or attempting to enter the U.S. with the intent to commit crimes in the U.S. or to take up residence. Mr. ****'s conduct, as serious as it may be, is not the type of conduct the guidelines are designed to address with the most serious enhancements of the applicable guidelines range.

C. The kinds of sentences available and purposes of sentencing to be served.

1. Objections to the Presentence Report

Factual contents

Mr. ****'s objections to and clarifications of the facts in the PSR are limited to those items noted in his objection letters to Probation, attached here as Exhibit A.

Guidelines computation

Mr. **** objects to the guidelines computations set forth in the presentence report on the basis that ¶14 improperly scores a prior conviction, characterized as a “drug trafficking offense”, as a 12-level enhancement under U.S.S.G. §2L1.2. The nature of that prior conviction is not alleged in the indictment nor supported by proof before a jury beyond a reasonable doubt, and Mr. **** has not admitted that the prior conviction was a “drug trafficking offense”. Accordingly, at most, the conviction should be scored no higher than as an 8-level enhancement.

Further, Mr. **** seeks to preserve an objection to any sentence in excess of the statutory maximum of 2 years provided in 8 U.S.C. §1326(a).

a. THE SENTENCING ENHANCEMENTS FOR PRIOR CONVICTIONS IN SUBSECTIONS (b)(1) AND (b)(2) OF 8 U.S.C. §1326 ARE UNCONSTITUTIONAL.

In Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Supreme Court considered the felony and aggravated felony enhancements in subsections (b)(1) and (b)(2) of 8 U.S.C. §1326. There were two holdings in the case. In the first holding, interpreting the statute, the Court determined that the proper interpretation of the statute--and the meaning Congress intended--was that the fact of the prior conviction is a “sentencing factor” to be found by a judge at sentencing, not a jury at trial. See, Almendarez-Torres, 523 U.S. at 228-35. The second holding, called into question by subsequent decisions, was that such a statute is not unconstitutional; the Court held that it does not violate the Sixth Amendment to let a judge decide such “sentencing factors.” See, id. at 239-47.

i. The constitutional holding of Almendarez-Torres--that it does not violate the Sixth Amendment to let a judge decide sentencing factors that are prior convictions--is no longer good law.

The second holding, addressing the constitutional issue, has been severely undercut by the Supreme Court's subsequent decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and, most recently, Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254 (2005), and it can no longer be viewed as good law. First, the majority in Apprendi, which established the general rule that facts which increase the penalties for crimes must be submitted to a jury and proven beyond a reasonable doubt (see, id. at 490), questioned the validity of Almendarez-Torres. The Court acknowledged that "it is arguable that Almendarez-Torres was incorrectly decided, (footnote omitted) and that a logical application of our reasoning today should apply if the recidivist issue were contested," Apprendi, 530 U.S. at 489. Justice Thomas spoke even more strongly in a concurring opinion. He noted that the consequence of the Apprendi rule for Almendarez-Torres "should be plain enough," Apprendi, 530 U.S. at 518 (Thomas, J., concurring), characterized the Almendarez-Torres decision as "an error to which I succumbed," id. at 520 (Thomas, J., concurring), and explained:

If a fact is by law the basis for imposing or increasing punishment--for establishing or increasing the prosecution's entitlement--it is an element... When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in Almendarez-Torres, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction.

Apprendi, 530 U.S. at 521 (Thomas, J., concurring) (citations omitted).

The more recent discussion in Shepard contains comparable suggestions from all of the justices.¹ Justice Thomas continued to express his view strongly and directly, stating:

Almendarez-Torres, like Taylor [v. United States, 495 U.S. 575 (1990)], has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided. The parties do not request it here, but in an appropriate case, this Court should consider Almendarez-Torres' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of Almendarez-Torres, despite the fundamental "imperative that the Court maintain absolutely fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."

Shepard, 544 U.S. at 27-28 (Thomas, J., concurring in part and concurring in judgment)

(citations omitted). Second, the dissenting justices joined in, opining that "today's decision reads Apprendi to cast a shadow possibly implicating recidivism determinations, which until now had been safe from such formalism." Shepard, 544 U.S. at 37 (O'Connor, J., dissenting). Regarding the dissent's charge that Shepard "may portend the extension of [Apprendi] to proof of prior convictions," the plurality stated that "[i]t is up to the future to show whether the dissent is good prophesy." Shepard, at 26, n.5.

The Second Circuit decision in United States v. Weisser, 417 F.3d 336, cert. denied, 125 S. Ct. 505 (2d. Cir. 2005) supports the demise of Almendarez-Torres. In Weisser, the trial court enhanced defendant's criminal history category beyond that supported by the jury's verdict based upon facts neither proved to a jury nor admitted by the defendant. The Second Circuit

¹The issue actually before the Court in Shepard was whether police reports and/or statements in support of a complaint could be considered under the "categorical approach" which must be used in determining the nature of a prior conviction under the Armed Career Criminal Act, codified at 18 U.S.C. §924(e). The Supreme Court held that such documents could not be considered.

stated, “The district court's horizontal departure violated the Sixth Amendment because it was based on facts not found by the jury.” United States v. Weisser, 417 F.3d at 350.

Insofar as one of the grounds offered by the trial judge in Weisser for upward departure on criminal history grounds was defendant’s past violations of parole, the type of fact, like a prior conviction, provable to the court with adjudicative documents, it appears Weisser calls into question the continued vitality of the “prior conviction exception” to the Apprendi/Blakely rule established by Almendarez-Torrez, allowing proof of prior convictions by judge under the lesser preponderance of evidence standard.

In light of all this, the second holding in Almendarez-Torres no longer can be viewed as good law. The use of the fact of a prior conviction to increase a sentence must be treated just like the use of any other fact to increase a sentence, that is, it must be alleged in the indictment and proven to a jury beyond a reasonable doubt.

ii. The demise of the Almendarez-Torres’s holding regarding the constitutionality of judicial findings of prior conviction enhancements means the statute’s enhancement provisions must be invalidated.

The demise of the Almendarez-Torres holding regarding the constitutionality of using judicial findings to increase a sentence does not mean that the first holding regarding interpretation of the statute can be changed. The interpretation of the statute was a separate holding based on thorough consideration and application of multiple principles of statutory construction, leaving no room for reinterpretation here. Subparagraph b of the statute with its enhanced penalty provisions, as written, is unconstitutional, and it is up to Congress, not the courts, to rewrite it, if Congress chooses to do so.

On that ground, the maximum penalty applicable to Mr. ****’s case is 2 years

imprisonment, as provided in 8 U.S.C. §1326(a), and the Court should not sentence him beyond that maximum term.

iii. Mr. **'s guideline range cannot be based upon the 12-level enhancement because a qualifying prior conviction was not pled in the indictment, proved beyond a reasonable doubt or admitted by defendant.**

Mr. **** also objects to the scoring of the prior conviction as an 12-level enhancement pursuant to Shepard v. United States and United States v. Weisser on the basis that the government has not proved beyond a reasonable doubt that the prior conviction is a “drug trafficking offense”.

Here, the indictment alleges with respect to Mr. Villeneuve’s prior conviction that it was an “aggravated felony”, not a “drug trafficking offense”. Mr. ****’s allocution in this case was sufficient only to establish a prior “aggravated felony”, not a prior “drug trafficking offense”. Insofar as the government has not established beyond a reasonable doubt that the conviction was for the latter, the sentence cannot be enhanced beyond the 8-level enhancement under §2L1.2(b)(1)(D).

2. A guideline sentence should not be imposed when it is enhanced by a 22-year-old conviction.

The 1986 prior conviction (for 1985 conduct) that has triggered the 12-level enhancement scored in the PSR is a 22-year-old conviction. In another light, the conviction is older than Mr. **** was (18 years old) at the time of the event underlying the conviction. That conviction, based on its ancient age, has no bearing on Mr. ****’s circumstances now. The court can, as a matter of policy and on the specific facts of this case, determine that the application of an enhancement based upon such an old conviction would yield a sentence that is “greater than

necessary” to serve the purposes of sentencing. See, United States v. Kimbrough, 128 S. Ct. 558 (2007)

3. A guideline sentence should not be imposed when Mr. ** has already been punished on two prior occasions for the same prior conviction that enhances the guideline sentence in this case.**

The 1986 Florida conviction resulted in a sentence of 100 days in 1986. That prior conviction was also taken into account in the Northern District of New York when Mr. **** was sentenced on his 1991 illegal reentry and served to enhance his sentence. If that 1986 prior conviction is applied to enhance Mr. ****’s sentence in this case, this would be the third time Mr. **** will have received further punishment for that same conduct.

The Court can, and should, consider that such a result would mean that a guidelines range based upon that enhancement would be “greater than necessary” to serve the purposes of sentencing.

4. The need to avoid a sentence “greater than necessary”; the lack of a fast track program.

The lack of a “fast-track” program in this district further supports a sentence of time served when a sentence of further imprisonment would be “greater than necessary” to serve the purposes of sentencing, in light of the guidance of United States v. Rodriguez, ___ F.3d ___, 2008 WL 2265898 (1st Cir., June 4, 2008). In that case, the First Circuit recognized the impact of the Supreme Court’s recent decisions in Kimbrough and Gall on its earlier decisions regarding, among other things, consideration to be given to the lack of a fast-track program within districts in the First Circuit. In an earlier decision, the First Circuit held that the lack of a fast-track program could not form the basis of a “variant”, or non-guideline, sentence because of the court’s assumption that Congress, by passing the PROTECT Act, must have deemed disparities

that might arise between fast-track and non-fast-track districts “warranted”. United States v. Andujar-Arias, 507 F.3d 734 (1st Cir. 2007). In the recent Rodriguez decision, the First Circuit abrogated that holding, citing the Supreme Court’s clarification of the broad discretion vested in sentencing courts in the Gall and Kimbrough decisions and, as specifically held in Kimbrough, that a sentencing court is empowered to impose a non-guidelines sentence in a particular case “based solely on policy considerations, including disagreements with the [Sentencing] Guidelines.” United States v. Kimbrough, 128 S. Ct. 558, 570 (2007). The First Circuit cited Kimbrough’s explicit rejection of the government’s position that, in the context of the 100-to-1 crack/powder cocaine disparity in the sentencing guidelines, Congress must have mandated the guidelines’ disparity because it mirrored the statutory sentencing scheme, further citing the Supreme Court’s assertion that it “decline[d] to read any implicit directive into... congressional silence.” United States v. Rodriguez, ___ F.3d ___, 2008 WL 2265898, *4-*5, quoting, United States v. Kimbrough, 128 S. Ct. At 571.

In short, this Court has broad discretion to impose a non-guidelines sentence if the sentence in this non-fast-track district, as compared to disparate sentences in fast-track districts, gives rise to a sentence that is greater than necessary to serve the purposes of sentencing.

The Second Circuit’s most recent pronouncement on the issue, which occurred prior to the Supreme Court’s issuance of the Kimbrough and Gall decisions, was set forth in United States v. Mejia, 461 F.3d 158 (2d Cir. 2006). The government may rely on Mejia for its position that the Court cannot consider the lack of a fast-track program as a basis for a non-guidelines sentence. The Mejia court based its decision on the same erroneous presupposition of the pre-Kimbrough/Gall First Circuit decision, that disparities that arise between fast-track and non-fast-

track districts must have been sanctioned by Congress by its passage of the PROTECT Act. Based on that erroneous view, Mejia held that a sentence is not unreasonable because of the sentencing court's failure to adjust a sentence to account for the lack of a fast-track program. United States v. Mejia, 461 F.3d 158 (2d Cir. 2006). As recognized by the First Circuit, the Second Circuit's failure to acknowledge the discretion the trial court clearly has, in light of Kimbrough, and Gall, to reject the policy considerations upon which the Mejia decision was based--and to determine that a guideline sentence is greater than necessary in a non-fast-track district--renders Mejia no longer good law.

CONCLUSION

Taking into consideration all of the applicable factors and considerations under 18 U.S.C. §3553(a) and related statutes, Mr. ***** respectfully requests that the Court impose a sentence of time served.

Date: July 14, 2008

ALEXANDER BUNIN
Federal Public Defender

By: Timothy E. Austin
Timothy E. Austin
Bar Roll No. 508098
Assistant Federal Public Defender
39 North Pearl Street
Albany, New York 12207
Tel: (518) 436-1850
Fax: (518) 436-1780
tim_austin@fd.org

To: United States District Court Clerk
Edward Grogan, Esq., AUSA
Jay Driscoll, USPO

CERTIFICATE OF SERVICE

I, Timothy E. Austin, Esq., attorney of record for the above-named defendant, hereby certify that on July 14, 2008, I electronically filed the foregoing Sentencing Memorandum with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to Edward Grogan, Assistant U.S. Attorney, and I served the same upon USPO Jay Driscoll by emailing a .pdf copy of the same to Jay_Driscoll@nynp.uscourts.gov.

DATED: July 14, 2008

ALEXANDER BUNIN
Federal Public Defender

By: /s/Timothy E. Austin
Timothy E. Austin, Esq.
Assistant Federal Public Defender
Bar No.: 508098
39 North Pearl St., 5th Floor
Albany, NY 12207
Tel: (518)436-1850
Fax: (518)436-1780
tim_austin@fd.org