

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V.

*

SENTENCING MEMORANDUM

08-CR-4

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Hon. Norman A. Mordue

JEAN ERIOL SOIJEUNE

BACKGROUND

Jean Eriol Soijeune is scheduled for sentencing following a plea of guilty on February 5, 2008 to Count 1 of a four count Indictment, charging the defendant with willfully and knowingly used and attempted to use a United States Passport, which passport had been designed for the use of another person, in that the defendant presented the passport to an Inspector of the United States Customs and Border Protection at the Champlain, New York Port of Entry, in violation of 18 U.S.C. Section 1544.

COURT'S SENTENCING POWER POST BOOKER/FANFAN

This court has an unprecedented level of discretion to use when determining an appropriate sentence for Mr. Soijeune. The case law directs the court to give renewed significance to the factors found under 18 U.S.C. 3553(a). The court is no longer bound by the Sentencing Guidelines or the policy statements presented in those guidelines. In the appropriate case, the court can look to the real conduct of an individual and carefully analyze all evidence and circumstances that should be considered, not only that evidence the guidelines call attention to.

I. **Other factors in 18 U.S.C. 3553 are of equal or greater significance than the Sentencing Guidelines.**

The remedial majority in *Booker* struck those portions of the Sentencing Reform Act that made the application of the sentencing range, computed using the Sentencing Guidelines mandatory. In so doing, the Supreme Court rendered the Sentencing Guidelines advisory. In *U.S. v. Crosby*, 397 F.3d 103 (2nd Cir. 2004), the Second Circuit recognizes the increased significance of section 3553(a) factors.

and keeping in mind 18 U.S.C. 3553(a)(6) which sets forth the “the need to avoid unwarranted sentence disparities among defendant’s with similar records who have been found guilty of similar conduct” that “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.” *Crosby*, 397 F.3d 103 (2nd Cir. 2004).

Post *Booker*, courts must treat the guidelines as just one of a number of sentencing factors, being mindful that the primary goal of the sentencing guidelines is, as set forth in 18 U.S.C. 3553(a)(6), to address “the need to avoid unwarranted sentence disparities among defendant’s with similar records who have been found guilty of similar conduct” . In light of recent case law developments, there remains no legal basis to give any more or less deference to the Sentencing Guidelines as just one factor in the overall analysis pursuant to 18 U.S.C. 3553(a). More importantly, the basic tenet of the guidelines as set forth in Section 3553(a) is that, “The court shall impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection”. (Emphasis added) Section 3553(a)(2) states that such purposes 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.

In addition to the Second Circuit, other courts have recognized the “renewed significance” of 3553(a) factors. Judge Adelman, in United States v. Ranum, 353 F. Supp. 2d 984, (E.D. Wis. 2005) with charges identical as those in the instant case, correctly states, “The guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the “heartland.” Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines, so long as the ultimate sentence is reasonable and carefully supported by reasons tied to the Section 3553 (a) factors.” Supra at 987. Another words, as Judge Adelman states, “Booker is not an invitation to do business as usual.” Supra at 987. Judge Pratt, in United States v. Myers, 353 F. Supp. 1026 (S.D. Iowa 2005), adopts Judge Adelman’s view because “[t]o treat the guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the guideline range would be presumptively unreasonable in the absence of clearly identified factors . . . [and] making the Guidelines in effect, still mandatory, ” viewing Booker, “as an invitation, not to unmoored decision making, but to the type of careful analysis of the evidence that should be considered when depriving a person of his or her liberty.” Supra, at 1028.

In the past, the court may have been limited in applying a departure based on the policy statements under the guidelines. Under the new advisory system, a “judge who has considered the policy statements concerning departures, need not definitively resolve such questions if the judge has fairly decided to impose a non-guidelines sentence.” U.S. v. Crosby, supra. The court,

in the appropriate case, can and should now consider factors the guidelines previously discouraged. (U.S.S.G. §5H et seq.) Even if those factors are not present to the exceptional standards once required by the guidelines, the court now must consider a lower sentence if appropriately based on those factors. The court is no longer limited by the “zones” in the guidelines. If a sentence of time served is appropriate, regardless of the advisory guidelines, the court has the ability to fashion a sentence that recognizes the “real conduct” of an offense. This approach should not lead to inappropriate sentence disparity, rather, individual justice can be distributed in the appropriate case.

Recently the United States Supreme Court in United States v. Gall, 128 S.Ct. 586 (2007), has in effect given back to the federal judiciary the broad discretion they appropriately enjoyed before the enactment of the sentencing guidelines. In Gall, the defendant pleaded guilty to conspiracy to distribute the controlled substance “ecstasy”. The presentence report recommended a sentence of (30) to (37) months in prison and the Court sentenced the defendant to (3) years probation. Ultimately, the Supreme Court found that the sentenced was justified based on the Court’s application and analysis of the § 3553 (a) factors, and the Court rejected an appellate rule that requires “extraordinary” circumstances to justify a sentence outside the Guidelines range.

In the instant case, as in Gall, the application of the § 3553 (a) factors would justify the imposition of a less severe non-guideline sentence.

DEFENDANT HISTORY AND CHARACTERISTICS

_____ Jean Eriol Soijeune, age 27, was born in Port au Prince, Haiti. Mr. Soijeune’s father was murdered during a robbery in 2004 and his mother died of a heart attack in 2005. He has no

siblings but he does have numerous cousins residing in Haiti, Canada, and the United States. Mr. Soijeune grew up poor as his father worked in the construction field and his mother worked in a fruit market.

Mr. Soijeune left Haiti as a teenager and resided in Guadalupe for about 5 years and then relocated to moved to Florida in 2001. Mr. Soijeune met Nicole Hillman in Florida and they had 2 children together, Elaina Soijeune, age 3 and Dante Soijeune, age 2. Ms. Hillman resides with the children in North Port, Florida. Mr. Soijeune has a good relationship with his children and had played a very active role in raising them before he was deported in 2006. Mr. Soijeune has not seen Ms. Hillman or their children in over a year but he has maintained regular telephone contact with them after his deportation and since his arrest in this case.

In Nicole Hillman's letter to the Court, (attached Exhibit 1) she attests to what an excellent father Mr. Soijeune was to their children and that she couldn't have asked for a better person to have children with. She indicates "Jean" worked hard to support them when they all resided together and that he continued to send her money every month once he arrived and was residing in Canada. The plan was for Nicole and Jean to save enough money for her and the children to join Jean in Canada but finances ultimately were not sufficient for them to do so. Ms. Hillman then began quarreling with her mother and her mother told her she didn't want her and the children residing with her anymore. Jean learned of Nicole's difficulties with her mother and, fearing that they would be put out of her mother's house and not have a place to stay, Jean was trying to get to Florida to help them in their time of need. As Nicole indicates in her letter, Jean loves the kids and worries about them constantly.

Nicole's mother, Lisa Hillman, also wrote a letter to the Court. (Attached as Exhibit 2) Ms. Hillman also attests to what a good father and provider Jean was to her daughter and

grandchildren and how difficult it has been on her daughter, Nicole, without Jean's support. She confirms that she allowed Nicole and the children to reside with her for over a year but then told Nicole they had to move out. As indicated in Nicole's letter, that was when Jean attempted to re-enter to be with them. Ms. Hillman also indicates in her letter that Jean loves his children with all of his heart, and that she has heard the anguish in his voice and listened to him cry because he cannot be with them.

It is clear from these letters that Mr. Soijeune is a hard working individual who has been a loving and supportive husband and parent to Nicole and this children. He is clearly revered by his family members. Counsel has spent much time with Mr. Soijeune discussing his case. Counsel has seen him become tearful and distraught when discussing his current and future separation from Nicole and their children.

EDUCATION AND EMPLOYMENT

Mr. Soijeune attended High School in Haiti but he does not recall graduating. While in the United States Mr Soijeune attended a school in Florida to improve his English speaking skills and to learn to read and write in English. After a while he had to stop as he had to work to support Nicole and their children.

Mr. Soijeune is a hard worker as demonstrated by his extensive employment history, primarily in the stucco trade. After arriving in Florida, Mr. Soijeune was employed full-time for about four (4) years doing stucco work for three (3) different building companies; Smith Plaster Company, Design, and Cyprus, all located in Naples, Florida, earning \$10 to \$14 per hour. Then for about two (2) years until he was deported in 2006, Mr. Soijeune was employed at McDaniel Construction in Fort Myers, Florida, as a construction supervisor earning \$19 per hour. He is

clearly a hard working individual.

Mr. Soijeune was issued Canadian Work Permit after arriving there in that country in February 2007. He has diligently attempted to find employment since moving to Canada but at the time of his arrest he had been unsuccessful.

NATURE AND CIRCUMSTANCES OF THE OFFENSE

Mr. Soijeune re-entered the United States to be with his wife and children whom he had not seen since his arrest and deportation in 2006. Mr. Soijeune was especially anxious to see his family upon learning of Nicole's difficulties with her mother and then fearing that she and the children would be put out of her mother's house and be homeless. Mr. Soijeune was trying to get to Florida to help his family in their time of need. Mr. Soijeune has indicated that under no circumstances will he ever again enter the United States without permission to do so.

CONCLUSION

Mr. Soijeune is a decent individual who loves his family and has worked hard over the years to support them. The letters from Nicole Hillman and her mother, Lisa, praise Jean as a father and hard working individual who took good care of his family.

Mr. Soijeune returned to the United States to be with his family and for no other reason. Mr. Soijeune moved to Canada with hopes of his family joining him there but that did not work out. Mr. Soijeune is truly remorseful for his actions and he will never again attempt to enter the United States illegally. As a result of this conviction, Mr. Soijeune will be deported back to Haiti.

For the reasons cited herein, we would respectfully request that the Court find that the

advisory sentencing range of (10) to (16) months is unreasonably harsh. Mr. Soijeune was arrested on December 21, 2007, and has been detained on these charges since that time. As of the sentencing date of July 17, 2008, Mr. Soijeune will have been incarcerated on this charge for almost seven (7) months. We would respectfully request that the Court consider and abide by the dictate of Section 3553(a), which requires courts to “impose a sentence sufficient, *but not greater than necessary*, to meet the goals of sentencing. Under the circumstances as detailed above, we submit that seven (7) months incarceration is sufficient to meet the goals of sentencing in this case.

For the above reasons, we would respectfully request that the Court impose a less severe non-guideline sentence of time served. As the Court is aware, once Mr. Soijeune has finished his sentence in this case, he will be detained for additional time in immigration custody pending the deportation process. We would also respectfully request that the Court recommend that Mr. Soijeune serve any remaining sentence in a facility as close as possible to North Port, Florida.

Date: July 1, 2008

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Certificate of Delivery

I certify that I have delivered a copy of the foregoing pleading to Assistant United States Attorney Edward Grogan, Esq., at 445 Broadway, Room 218, Albany, New York by electronic filing and U.S. Probation Officer, Kelly Hart, United States Probation Office, 445 Broadway, Albany, New York 12207 by email.

/s/ George E. Baird, Jr.

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