

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) No. 00-CR-40071-JPG
)
JESSE JONES, a/k/a "TOOT",)
)
Defendant.)

DEFENDANT'S SENTENCING MEMORANDUM

INTRODUCTION

At the outset, the undersigned wants to commend the Assistant Probation Officer who prepared the Presentence Investigation Report (PSR). Due to Defendant Jesse Jones' (hereinafter referred to as "Jesse") diminished mental capacity it was quite difficult to obtain the requisite information to complete the PSR. The PSR is complete, thorough and goes into extraordinary detail thereby making it much easier for the respective parties to state their positions and for this Honorable Court to render its decision regarding what sentence to impose.

As the court is aware, Jesse is presently scheduled to be sentenced on November 8, 2001 as a result of his having previously pled guilty to all three counts of the indictment which charged him with possession with intent to distribute less than 5 grams of "crack" cocaine in violation of 21 U.S.C. Section 841 (a)(1).

On two previous occasions, Jesse was convicted in Jefferson County for unlawful delivery of less than one gram of "crack." (Paragraphs 40 and 41) Pursuant to United States' Sentencing Guidelines Section (U.S.S.G.) 4B1.1 Jesse is a "Career Offender" meaning that notwithstanding these minuscule amounts of "crack" his criminal history category is a VI, and instead of his base offense level commencing at a 31, it commences at a level 34.

Jesse's acceptance of responsibility has been full and complete, thereby warranting a three (3) level reduction, giving him a total offense level of 31, where the applicable sentencing range is 188 to 235 months, or approximately 15 years to 20 years.

Because of Jesse's diminished mental capacity, a Motion for Downward Departure Pursuant to U.S.S.G. Section 5K 2.13 has been filed, and because the Government will contest this Motion, this Honorable Court will have to decide whether Jesse's mild retardation is a basis for a departure.

The purpose of this Memorandum will be to show the Court why Jesse should be sentenced to the low end of the Guideline range, 188 months, as well as to convince it to *grant* his motion for downward departure and depart to a sentence of between 84 to 120 months, or 7 to 10 years.

As such this Memorandum will be divided into the following parts: (a) brief case history; (b) the offense and Jesse's background; (c) relevant legal principles regarding sentencing options; and (d) conclusion requesting a recommended sentence and other relief.

A. BRIEF CASE HISTORY

On August 17, 2000, the undersigned appeared with Jesse before the Honorable Philip Frazier who entered and order of detention. At that time, the undersigned learned that Jesse was illiterate, and from that time on, all documents had to be read and explained to Jesse. The undersigned explained the best he could how the federal sentencing guidelines applied to Jesse's case, and Jesse agreed to cooperate with and give the Government a proffer regarding his illegal activities in Jefferson County, Illinois.

On September 19, 2000, October 16, 2000, November 16, 2000, and November 20, 2000 Jesse attempted to proffer with Government agents. Because Jesse's mental state never improved, the undersigned filed on November 30, 2000 a Motion entitled "Defendant's Motion for Examination to Determine Mental Fitness to Stand Trial and Motion to Continue." Said Motion was granted and this Honorable Court appointed Dr. James Peterson who evaluated Jesse's mental capabilities as it pertained to his ability to fully understand the

nature of the charges and the ramification of the charges against him. Dr. Peterson concluded that Jesse's scores would place him in the mild to moderate level of mental retardation. Dr. Peterson also opined that Jesse was not competent to stand trial, which was ***not*** something Jesse requested as part of his Motion.

Because of Dr. Peterson's conclusion as it related to competency, in an abundance of caution, this Honorable Court entered an order which sent Jesse to the Metropolitan Correctional Center in Chicago where he was evaluated by Dr. Daniel Greenstein who decided that Jesse was "faking" his diminished capacity, while at the same time admitting that Jesse has an extremely low I.Q. The interesting thing about Dr. Greenstein's report is its conclusion which stated that Jesse's "feigned impression of suffering from Moderate or Severe Mental Retardation represents a volitional attempt to facilitate a finding of incompetency." Incompetency has ***never*** been an issue in this case; rather the degree of Jesse's diminished mental capacity was and is the issue.

For purposes of filing a Motion for Downward Departure Pursuant to 5K2.13, Jesse was evaluated by Dr. Dan Cuneo who placed Jesse's cognitive abilities at the level of an eight to nine year old. Dr. Cuneo concluded that "*while Mr. Jones does know that selling drugs is wrong and could have controlled his behavior if he so desired; his reasoning, insight, and judgment are greatly impaired.*"

As part of the Plea Agreement, the Government allowed Jesse to plead guilty without filing an enhancement which would have doubled his mandatory minimum sentence from five years to ten years, meaning that if Jesse's Motion for Downward Departure is granted, this Honorable Court can depart to a sentence under ten years, and impose whatever sentence it feels to be fair.

B. THE OFFENSE AND JESSE'S BACKGROUND

The well-written Presentence Investigation Report (PSI) provides a great deal of information about Jesse and this offense, and the following points bare emphasis for supplemental discussion.

a. Jesse' background

At most, Jesse attended school until the fourth or fifth grade. (paragraph 48) Regardless of whether or not Jesse attended school there is no doubt that he is illiterate and that educationally, he is severely limited.

Sadly, Jesse's lack of education is about the only thing that stands out about his background. He came from a broken home, and no one ever attempted to help him with his disability. Perhaps at an early age had a family member or teacher placed Jesse in special education classes, he might have gained rudimentary skills which might have helped in the future. But, that never happened, and Jesse will appear before this Honorable Court on November 8, 2001, as an unskilled, illiterate man whose writing ability is limited to printing his name.

Because of Jesse's mental deficiency, he applied for and received supplemental security income (SSI). Since moving to Jefferson County from Mississippi, Jesse has been taken care of by his aunt Mentha Smith and cousin Stephanie Moore. That is the only family Jesse really knows, and throughout the past year they have been as supportive of Jesse as possible.

b. Prior drug usage

It appears that in order to support his drug habit, Jesse dealt small quantities of drugs for other individuals. He was convicted twice in Jefferson County of dealing minuscule amounts of "crack" and these two prior convictions make him a Career offender. It is not apparent whether or not Jesse was addicted to drugs, but regardless it would appear that his drug usage is partially to blame for his two prior convictions.

c. Relevant Conduct

In today's world, it is rare for a criminal Defendant's relevant conduct not to exceed fifty grams of "crack" cocaine, because crack's addictive nature entails more "dealing" than other drugs. An argument could be made that Jesse's relevant conduct would be between 20 and 35 grams of "crack" cocaine instead of 35 to 50 grams of "crack" cocaine. Normally, Jesse would cross-examine Mssrs. Watson and Wilson to show that the amounts of "crack"

they attribute to Jesse in their proffers were not “truthful.” Since said proffers account for 28 grams of “crack” cocaine, Jesse’s relevant conduct would not be between 35 and 50 grams of “crack” cocaine. However, it makes little sense to win the battle and lose the war, because by “winning” the battle regarding relevant conduct, Jesse would lose the “war” since he would still be a career offender under the Guidelines.

The discovery in this matter and the PSR show that Jesse was not a big drug dealer, and at best was a “flunkie” for others. This is bolstered by the fact that Jesse was never charged in a conspiracy with other individuals with whom he supposedly dealt “crack.”

C. RELEVANT LEGAL PRINCIPLES

Jesse has pleaded guilty to a crime and since he will receive his punishment on November 8, 2001, various legal principles regarding sentencing should be discussed here in the hopes that the Court will sentence Jesse to the low end of his Guideline range, 188 months and grant his Motion for Downward Departure. As such, this portion of the Sentencing Memorandum will discuss the elements of U.S.S.G. Section 5K2.13 as well as pertinent sentencing statutes and will hopefully be able to show why a **sentence of between 7 and 10 years** should be imposed.

A benefit that Jesse enjoys is that this Honorable Court has a better understanding than most District Courts as to what a particular Defendant “deserves” in the way of sentencing, and understands that in some situations the rigidity of the Sentencing Guidelines are overly-draconian. The undersigned has been before this Honorable Court on numerous occasions, and knows that it weighs *everything* when deciding what sentence it feels is appropriate to impose and whether or not a downward departure motion is well taken.

1. U.S.S.G. Section 5K2.13

In order for this Honorable Court to grant Jesse’s Motion for Downward Departure Pursuant to Section 5K2.13, he must clear several hurdles. He must demonstrate that he in fact does suffer from a diminished capacity, that his diminished capacity is not the result of taking drugs, and that the public will not be in jeopardy if a downward departure is granted.

a. Diminished capacity

The first issue which must be dealt with squarely is whether or not Jesse “*committed the offense while suffering from a significantly reduced mental capacity?*” The **only** answer to this question is an unequivocal “**YES.**” But, because the Government has decided to contest the obvious, a discussion regarding Jesse’s reduced mental capacity is appropriate.

Figuratively, and literally, Dr. Greenstein believes Jesse is “playing dumb.” Dr. Cuneo’s report does a fine job refuting Dr. Greenstein’s conclusions, but the fact that Jesse is receiving SSI due to his severe learning deficiency is an even better barometer that Jesse dealt the “crack” for which he pleaded guilty to while suffering from a significantly reduced mental capacity. Obviously, if the Social Security Administration, a part of the United States’ Government, felt that Jesse was faking his severe learning disability, they would have immediately cut him off of SSI. Recognizing that Jesse had a significantly reduced mental capacity, the Social Security Administration refused to send the checks directly to him, and instead sent Jesse’s SSI to his aunt, who then distributed the funds to Jesse.

Dr. Greenstein did exactly what was asked of him by this Honorable Court, namely to determine whether or not Jesse was legally competent to stand trial. The undersigned **never** argued, attempted to argue, or will ever argue that Jesse’s mental problems made him incompetent to stand trial. In order to reach his conclusion that Jesse was “faking it” for purposes of competency, Dr. Greenstein admitted that Jesse was suffering from a very low intelligence quotient (i.q.). Dr. Greenstein concluded that this extraordinarily low i.q. did not amount to a mild or moderate form of retardation. Even though this conclusion is rebutted by both Dr. Peterson and Dr. Cuneo, the one thing that all three men agree on is that Jesse suffers from a low i.q. This alone is enough for this Honorable Court to conclude that Jesse’s low i.q. amounts to a significantly reduced mental capacity.

This conclusion becomes even easier, because Dr. Cuneo, limiting his examination to whether or not Jesse was suffering from a reduced mental incapacity at the time of the offense, concluded that he was. Dr. Cuneo went beyond reviewing, and criticizing, Dr.

Greenstein's conclusions. Dr. Cuneo discussed uncontradicted facts, namely, the Social Security Administration naming his aunt as the payee for Jesse's SSI, the TASC counselor who had great difficulty interviewing Jesse, Jesse's inability to do simple mathematics and Jesse receiving SSI for a mental deficiency as indicating that Jesse was ***neither*** literally or figuratively "playing dumb." Dr. Cuneo cut through a great deal of psychological jargon, most of which is unintelligible to non-professionals, by simply stating that Jesse is "functioning cognitively at the level of an eight or nine year old." Because of this, Jesse's "reasoning, insight, and judgment are greatly impaired."

b. Prior drug use

Hopefully, the argument at sentencing will focus on the respective reports and what each side feels the evidence regarding said reports to be. Jesse has admitted that he has bought, sold and used illegal narcotics, but any drug usage has no impact whatsoever on his diminished capacity.

U.S.S.G. Section 5K2.13 is crystal clear regarding the fact that this Honorable Court has no power to depart downward if it finds that Jesse's "significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants." In other words Jesse would be out of luck if he attempted to claim that a drug addiction caused him to have a significantly reduced mental capacity.

Jesse was born with his disability and because no one seemed to be concerned about registering Jesse in special education programs or otherwise, which might have bettered his situation, he has limped through life and is now facing a sentence of nearly 20 years. He has used drugs and alcohol because they made him feel better, which is no excuse. However, because the undersigned is requesting a departure to between 7 and 10 years, if this Honorable Court were to recommend that Jesse be admitted into the Bureau of Prisons' 500 hour residential drug and alcohol program (RDAP) perhaps he can receive the help he needs to conquer any drug addiction he might have so that when he is released from prison he can remain drug free.

c. Public risk

There is not a hint of violence in Jesse's past. Jesse was convicted twice in Jefferson County, Illinois for selling minuscule amounts of "crack" and received a lenient sentence the first time and a period of incarceration the second time. Because of these convictions for distributing minuscule amounts of "crack" Jesse will be sentenced to an extended period of incarceration because he is a Career Offender.

Similarly, nothing in the charges to which Jesse pleaded guilty to would lead anyone to think that the public needs to be protected from him. Jesse was not charged in a conspiracy, and his relevant conduct, while arguably higher than what the undersigned feels it should be, is relatively small compared to other cases emanating from the Southern District of Illinois or even Jefferson County, Illinois.

Likewise, if this Honorable Court were to grant Jesse's Motion for Downward Departure Pursuant to 5K2.13, and departed to a sentence of between 7 and 10 years, the public would not be put at risk. If Jesse were sentenced to 7 years on November 8, 2001, his "outdate" would be approximately 2006. The BOP offers spectacular programs for individuals like Jesse, and hopefully while incarcerated he would learn how to read and write as well as do other rudimentary tasks which would make him a functioning member of society when released. In reality, this is one of the few times that a criminal defendant can truly reap benefits by being incarcerated, and again, a downward departure would not put the public at risk.

d. Extent of departure

It would be silly for the undersigned to claim that Jesse's mild retardation was 100% the cause of his present legal problems and request a downward departure to a ridiculously low sentence. Likewise, it would be just as silly for anyone to try to convince this Honorable Court that any mental incapacity Jesse had, did not contribute to his drug dealing.

Like most of cases involving downward departures, there is a middle ground that this Honorable Court has to find. The undersigned is trying to be conservative and realistic while at the same time follow the tenets of U.S.S.G. Section 5K2.13 by requesting a departure from

15 years to a sentence of between 7 to 10 years. Dr. Cuneo's "bottom line" supports such a departure, because an 8 to 9 year old child obviously knows the difference between right and wrong, and even though such a child is punished for doing something wrong the "on/off switch" to their reasoning abilities sometimes gets "stuck" and they simply cannot control behavior which they know to be wrongful.

e. Poff

Clearly, this Honorable Court has discretion to determine whether or not a downward departure for Jesse's significantly reduced mental capacity is warranted, and therefore there does not need to be a great deal of legal argument regarding this. While researching the issue, the undersigned came across a dissent written by the Honorable Frank Easterbrook in *U.S.A. v. Poff*, 926 F.2d 588 (7th Cir. 1991). Judge Easterbrook's understanding and grasp of the issue of diminished capacity is striking and the language he uses is simply magical.

Judge Easterbrook states on page 595 "when the disturbed person's conduct is non-violent, however, incapacitation is less important." *Poff* is a case which will be cited in great detail in the following section, but it shows that for purposes of U.S.S.G. Section 5K2.13 the term "significantly reduced mental capacity" can be broadly interpreted by the District Court.

2. Statutory Analysis

As the Court is well aware, 28 U.S.C. 994 (k) and 18 U.S.C. 3553 (a) are the two statutes it must rely upon in imposing sentence on a particular Defendant, and this section will discuss the elements of these statutes to show why a departure to 7 to 10 years satisfies the statutory requirements of sentencing.

a. 28 U.S.C. 994 (k)

Simply stated, 28 U.S.C. 994 (k) removes the sympathy factor from sentencing, and was implemented to ensure that no defendant was incarcerated in order to put him in a place where it was hoped that rehabilitation would occur. Here, the aspect of rehabilitation should be viewed as a place where Jesse can receive some sort of special education so at the very minimum he can learn to read and write.

994 (k) specifies specific traditional penological purposes for incarceration such as “rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” The portion of 994 (k) regarding “educational training” jumps out because prison can actually be an “opportunity” for Jesse. Prison not only will offer him the opportunity to receive special education, and drug counseling but he also will be able to learn some sort of a trade so that he can find gainful employment once he is released from the Bureau of Prisons.

The undersigned has represented hundreds of criminal defendants in federal court, who dropped out of school because it was easier for them to deal drugs than it was to go to school and do homework. Almost to a client they realize that had they not dropped out of school they would have a much easier road to rehabilitation and they use the BOP to facilitate obtaining an education. Jesse is no different, although because of his significantly reduced mental capacity, he won’t be able to learn as much or go as far as other inmates.

b. 18 U.S.C. Section 3553

Section 3553 states in pertinent part:

3553. Imposition of a sentence

“(a) factors to be considered in imposing a sentence.—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. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) 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 . . . (and)
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”

Starting with the preamble of 3553 which states “the court shall impose a sentence sufficient, but not greater than necessary,” a sentence of 7 to 10 years is certainly a sufficient sentence, and under the circumstances it would not appear to be “greater than necessary.”

What would be accomplished by a sentence in excess of 10 years accomplish? Someone will respond to this question by claiming that Jesse’s prior criminal history shows that he needs to learn his lesson—that he needs to be deterred, which is what 3553 (a)(2)(B) deals with. Judge Easterbrook rebuts this assertion, where in *Poff* he stated:

“Under both the desert approach to sentencing and the deterrence approach, mental states short of insanity are important. Persons who find it difficult to control their conduct do not – considerations of dangerousness to one side – deserve as much punishment as those who act maliciously or for gain. . . Scarce resources and prison space achieve greater deterrence when deployed against those who are most responsive to the legal system’s threats and who pose the greatest danger if not deterred . . . Because legal sanctions are less effective with persons suffering from mental abnormalities, a system of punishment based on deterrence also curtails its sanctions.”

It is therefore important for deterrence purposes that this Honorable Court take into consideration Jesse’s greatly reduced mental capacity when deciding how much it should depart from his Guideline range.

Regarding 3553 (a)(1), the undersigned has already devoted a great deal of time discussing the nature and circumstances of Jesse’s offense as well as his history and characteristics. It should be stressed though that had Jesse been “smart” enough to recall things in order to give a truthful proffer, he would have been eligible for a sentence reduction pursuant to Federal Rule of Criminal Procedure 35. He should be punished for his offense because he broke the law, even though like most 8 or 9 year olds his reasoning, insight, and judgement were greatly impaired. Everyone around Jesse operates with 100 watt bulbs, while on his best day, Jesse is operates with a 20 watt bulb, and this should count for something when it comes time for this Honorable Court to decide by how much it should depart when imposing a sentence.

Surely, a 7 to 10 year sentence reflects the seriousness of Jesse's offense. This is his third time through the system, and Jesse's former parole officer indicated that he was able to appropriately respond, particularly when the likelihood of returning to prison increased (paragraph 55). The District Court Judge in *Poff* similarly found that the Defendant could be influenced by legal sanctions. So, a 7 year sentence will deliver a very, very strong message to Jesse that unless he stops dealing drugs, he will end up spending the rest of his life in jail. Almost any living person would understand that type of message.

Section 5K2.13 read as a whole, including the final reference to the "need for incarceration to protect the public," says that when incapacitation is not an important justification for punishment, mental condition may be the basis of a departure.

At first blush the Sentencing Guidelines appear to be extraordinarily draconian, and it would appear that a sentencing Court has lost some of its discretion in deciding by how much to depart when it determines that a Defendant, like Jesse, suffers from a significantly reduced mental capacity. Thankfully, Judge Easterbrook again rides to the rescue by stating in *Poff* that: "The criminal justice system has long meted out lower sentences to persons who, although not technically insane, are not in full command of their actions. The Sentencing Commission based its guidelines on the common practices of judges, which it attempted to make more uniform without fundamentally altering the criteria influencing sentences."

As the legislative history makes clear, Section 3553 (a) "deliberately [does] not show a preference for one purpose of sentencing over another." S.Rep. No. 98-225, 98th Cong., 1st Sess., at 77 (1983). In including several purposes of sentencing without favoring any of them, Section 3553 (a) reflects what has been characterized as the inclusive theory of punishment. However, Section 3553 (a) allows for "different purposes ... [to] play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants." S. Rep. No. 98-225, 98th Cong., 1st Sess., at 77 (1983). The intent of Section 3553 (a) "is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case." Id.

The undersigned could discuss ad infinitum the various aspects of sentencing, but in reality, if this Honorable Court grants Defendant's Motion for Downward Departure Pursuant to 5K2.14, it is free to sentence Jesse to whatever sentence it feels would satisfy the requirements of 28 U.S.C. 994 (k) and 18 U.S.C. 3553 (a), and hopefully this Honorable Court will sentence Jesse to a sentence of 84 months on the low end or at the most 120 months.

C. CONCLUSION

Jesse respectfully requests that this Honorable Court:

1. determine that Jesse's total offense level is 31, which with a criminal history category is IV yields a sentencing range commencing at 188 months, and to sentence him to 188 months;
2. grant his Motion for Downward Departure Pursuant to 5K2.13 and to depart downward to a sentence of 7 to 10 years;
3. recommend that Jesse be allowed to participate in the BOP's 500 hours RDAP program, and
4. recommend to the Bureau of Prisons that Jesse serve the rest of his sentence at a facility close to his family in Mt. Vernon, Illinois.

JESSE JONES

STOBBS LAW OFFICES

BY:

John D. Stobbs II, NO. 06206358
Attorney for Defendant
346 West St. Louis Avenue
East Alton, Illinois 62024
Telephone: (618)259-7789
FAX: (618)259-4145

CERTIFICATE OF SERVICE

The undersigned certifies that on the 26th day of October, 2001, a copy of the attached ***Defendant's Sentencing Memorandum*** was served on the following persons by depositing a copy of same in an envelope with postage prepaid in the United States Mails in the Post Office in East Alton, Illinois addressed as set out, namely:

Mr. Christopher Moore
Assistant U.S. Attorney
402 West Main, Suite 2A
Benton, Illinois 62812

Ms. Tammi Spencer
Assistant U.S. Probation Officer
402 West Main
Benton, Illinois 62812

STOBBS LAW OFFICES

346 W. St. Louis Ave.
East Alton, IL 62024