

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No.
)	
[THE ACCUSED],)	*** <i>TO BE FILED UNDER SEAL</i> ***
)	
Defendant.)	

DEFENDANT’S SENTENCING MEMORANDUM

As the court is aware, Defendant The Accused, is presently scheduled to be sentenced on August 4, 2000. On June 1, 2000, Defendant filed his objections to the presentence investigation report (PSR) and because these objections and negotiations with the Government regarding downward departures will impact The Accused’s ultimate sentence, a discussion of [The Accused]’s position regarding sentencing will conserve valuable judicial resources and allow the sentencing hearing to go much smoother.

The PSR objections all revolve around [The Accused]’s criminal history, and if the Court grants these objections, he would be “safety valve” eligible and receive a guideline sentence of approximately five years as opposed to the mandatory minimum ten year sentence called for in the PSR. The negotiations with Assistant U.S. Attorney Massey involve his agreement to file a Motion for Downward Departure pursuant to United States Sentencing Guidelines (U.S.S.G.) § 5K1.1 and 18 USC § 3353 (e), if applicable or a Rule 35 Motion to be filed within one year of sentencing if [The Accused] continues to cooperate with the Government. [The Accused] has agreed that if the Court determines he is “safety valve” eligible and the Government files either of the downward departure motions, he will *not* request a sentence of less than five years. (See Exhibit A) Furthermore, in the event that a 5K1.1 Motion is filed, Defendant *will withdraw* his objections to the PSR, and argue for a five year sentence.

Since [The Accused] will request that the Court ultimately sentence him to *60 months* this Memorandum will be divided into the following five parts: (a) The conspiracy; (b) Background; (c) Criminal History/PSR Objections; (d) Relevant Legal Principles Regarding Downward Departures and (e) Conclusion.

A. THE CONSPIRACY

The leader/organizer of this conspiracy was [The Accused]'s friend (paragraph 31), in whose house the methamphetamine lab was found, and who would send various individuals, including [The Accused], to purchase precursor chemicals to be used in the manufacture of methamphetamine. [The Accused] was/is a drug addict who supported his addiction to methamphetamine by assisting his friend and doing whatever was asked of him by his friend. Apparently, [The Accused] friend's house had an elaborate ventilation system installed to mask the odor of the methamphetamine. [The Accused]'s friend received a sentence of 57 months, which in all probability will be reduced to approximately 40 months if a Rule 35 is filed on his behalf.

Upon being arrested and meeting with the undersigned, [The Accused] set up a meeting to proffer with the agents. Said proffer was to have taken place in December of 1999. However, at the last minute [The Accused] canceled the proffer because he was scared that some of the people he was going to proffer against would harm members of his family. His entire family continues to reside in the Freeburg, Illinois area, which is where the meth. was manufactured and rather than put his family in danger by proffering, [The Accused] decided to do plead guilty "straight up" which would have resulted in a ten year sentence. Ultimately, [The Accused]'s family prevailed on him to help the Government and not worry about their safety. In March of 2000 [The Accused] gave a truthful proffer, which should result in additional indictments being filed against other drug dealers and manufacturers of meth.

It would be easy for [The Accused] to wallow in self pity or try to "blame" someone for the fact that regardless, the leader/organizer of the conspiracy, [The Accused]'s friend, will receive a lesser sentence than [The Accused], and in actuality it has been more difficult for the undersigned to explain to members of [The Accused]'s family the justification for his

friend receiving a sentence less than [The Accused]. [The Accused] has made it clear to the undersigned and members of his family that the sentence his friend receives is unimportant to him because they both broke the law and if [The Accused] can get into the Bureau of Prisons' residential drug abuse program (RDAP) he will be happy. [The Accused] has accepted *full* responsibility for his actions (Exhibit B) and has not attempted to blame his addiction or others for his predicament.

From the beginning [The Accused] has instructed the undersigned to seek some sort of a sentence where he can get into the residential drug abuse program and has indicated from the beginning that he would consider a five year sentence to be a "home run." This is the first time the undersigned can recall where a client has requested such a stiff sentence, instead of begging for leniency or probation and it is a testament to the fact that [The Accused] realizes he has broken the law and knows that he deserves to be punished.

Also, a five year sentence will allow [The Accused] to participate in the Bureau of Prisons' residential drug abuse program which will hopefully allow him to tame his drug addiction.

B. BACKGROUND

As Exhibits C, D, E, F and G reflect, [The Accused] is blessed to have a loving, supportive family, who will help him readjust once he is released from prison.

[The Accused]'s mother, was confronted with the most difficult decision any parent could face. When DEA agents arrived at [The Accused]'s house on December 3, 1999 (paragraph 9), she knew that [The Accused] had broken the law, and knowing that [The Accused] would probably go to jail she still assisted the agents in locating [The Accused]. While her decision to essentially turn her son in has caused her great pain, nevertheless, [The Accused] and his entire family have indicated to the undersigned that it was the right thing to do (Exhibit B), because his parents have always taught their children that actions have consequences, and if you break the law, you should be punished.

On one occasion, when the undersigned met with members of [The Accused]'s family, [The Accused]'s mother said that [The Accused] being incarcerated was a blessing in

disguise because at least she knew where he was. She indicated that there were times when days/weeks would pass without hearing from [The Accused] and that she would drive by a ditch or hear about an accident on the radio and be afraid that [The Accused] was dead.

[The Accused]'s family knew he was a drug addict, and had been for some time. [The Accused] likewise recognized that he was an addict and in November of 1999, with the help of his family tried to conquer his addiction by seeking inpatient treatment at Gateway. Paragraph 74 sets out this attempt: "...approximately one month prior to the defendant's arrest for the instant offense [The Accused] attempted to enter the inpatient substance abuse program offered at Gateway in Caseyville, Illinois, but was not accepted into the program because he had used methamphetamine five days prior to trying to enter the program."

Perhaps had he been admitted into Gateway [The Accused] would have ceased his dealings with his friend and never been charged, and in reality his honesty with the intake counselor at Gateway prevented him from getting the help he needed. [The Accused] simply is not strong enough to conquer his drug addiction by himself and for that reason has made it clear that whatever sentence he receives he will request that he be admitted into the Bureau of Prisons' residential drug abuse program.

Paragraphs 76, 77, and 78 detail [The Accused]'s extensive work history, and one can observe how his addictions affected his ability to work. During the months preceding his arrest for the instant offenses, [The Accused]'s work record was erratic at best. Unlike a great deal of Defendants who appear before this Honorable Court, [The Accused] has skills which will assist him and likewise has a job offer waiting for him once he is released from the custody of the Bureau of Prisons. Joseph Kreher, who is president of General Machine, Inc. where worked at one time, states in part "I am so confident that [The Accused] is worth the effort that I am willing to offer to him a position at General Machine, Inc. anytime he may need one." (Exhibit H)

Prior to his arrest, [The Accused]'s life had spiraled out of control. In the months preceding his arrest, [The Accused] had filed for bankruptcy and the bank foreclosed on his house. At the time of his arrest he had custody of his son (paragraph 71), but lost custody

upon being incarcerated. [The Accused] has hit bottom, and the only way he has to go is “up.” Hopefully he will make the most out of this costly lesson and conquer his drug addiction once and for all.

C. CRIMINAL HISTORY/OBJECTIONS TO PSR

1. Background

Sometime in 1996, [The Accused] hit and damaged a utility pole. Because he was unable to pay for damages caused to the pole, Illinois Power was able to have [The Accused]’s license suspended *civilly* (and not for any criminal act), by filing the requisite paperwork with the Illinois Secretary of State’s office in Springfield. [The Accused] *never* fought this suspension and *never* hired an attorney to assist him with the suspension or the resulting traffic offenses.

[The Accused] continued to drive on the suspended license, and was charged a total of eight times (paragraphs 51 through 58) with operating a motor vehicle on a suspended license, and on three occasions (paragraphs 51, 56 and 57) received one year supervision plus fine and costs. One year of supervision was imposed when [The Accused] appeared in court without any money to pay the fine and costs, and because the period of supervision was one year [The Accused] received a total of three criminal history points for these convictions. He was put on supervision to ensure that the fines and costs were paid. The other five times appeared in court with money to pay the fine and *no supervision* was imposed, and consequently no criminal history points were added.

In 1999, [The Accused] filed for bankruptcy, listing as one of his debts the amount owed to Illinois Power. Because the debt was discharged in bankruptcy, [The Accused]’s license was reinstated, meaning that at the present time he has a valid driver’s license.

2. Application Note 6 to U.S.S.G. Section 4A1.2

When the undersigned began his representation of [The Accused], he realized that the twelve month supervision period imposed by the court in these three minor traffic offenses would remove [The Accused] from the “safety valve.” As was explained above, [The Accused] did not decide to cooperate until March of 2000 because he feared that his

cooperation would result in members of his family being harmed. Obviously, for purposes of the “safety valve” his criminal history was irrelevant if he did not proffer, and once [The Accused] decided to proffer the undersigned immediately attempted to ascertain whether or not it was possible to have the three minor traffic convictions vacated and the cases dismissed.

Prior to doing anything else, the undersigned traveled to Assistant U.S. Probation Officer Donna Hoosman’s office to advise her, in person, that he was going to attempt to have [The Accused]’s traffic convictions vacated and the cases dismissed. The undersigned advised Ms. Hoosman that he could not locate any Seventh Circuit caselaw regarding the issue of whether a vacated and dismissed sentence would count for criminal history points, and that he wanted to advise her before doing anything so that *no one* would think that the undersigned was trying to do something which could be interpreted as inappropriate.

Ms. Hoosman indicated that she did not know whether or not having the cases vacated and dismissed would subtract the criminal history points, but she agreed that it would be helpful to [The Accused] and could conceivably be the basis for an argument at sentencing that the three criminal history points not count toward [The Accused]’s criminal history.

Because the undersigned does not practice regularly in St. Clair County, he contacted Randy Kelley, who is a respected attorney practicing in Belleville, Illinois. The undersigned advised Mr. Kelley of [The Accused]’s situation, and Mr. Kelley advised that in order to have a conviction vacated and case dismissed, he would have to speak to St. Clair County State’s Attorney Robert Haida. Upon being assured that [The Accused]’s license had *not* been suspended for any alcohol related or criminal offense State’s Attorney Haida agreed to vacate the convictions and dismiss the charges against [The Accused]. At all times, State’s Attorney Haida was aware that there were federal drug charges pending against [The Accused] and State’s Attorney Haida *personally* reviewed [The Accused]’s traffic history and agreed to vacate and dismiss the charges. Had the convictions been for anything other than minor traffic violations, State’s Attorney Haida would *not* have agreed to vacate the convictions and dismiss the cases.

The foregoing is important so that the Court knows that *nothing* was being done behind anyone's back. Everything was explained to the probation officer *before* attempting to do anything, and the Orders were agreed to by *the* State's Attorney and *not* some junior Assistant State's Attorney. Everything was above board and in plain view.

The undersigned has an absolute duty to do the best job he can for *any* client, and at the same time not do something which can be viewed as inappropriate or unethical. Had [The Accused]'s convictions been serious felonies, or DUI's the undersigned would not have attempted to have them vacated or dismissed, because in the undersigned's opinion that would be improper. This case is different because [The Accused]'s license was suspended *civilly* for his failure to pay restitution from a minor traffic accident nearly four years ago, and because the times he appeared in court *with* money his sentence differed from the times he appeared in court without money.

As it stands presently, the minor traffic convictions have been vacated and the cases dismissed, thereby meeting the parameters of Application Note 6 to U.S.S. G. Section 4A1.2. The convictions were vacated and cases dismissed because [The Accused] appeared in St. Clair County without an attorney. It is the undersigned's position based on experience handling traffic tickets, that had [The Accused] appeared with an attorney, the predicament would have been explained to the Assistant State's Attorney and the cases "*nolle prossed*," or a shorter period of supervision would have been imposed.

Under the "rule of lenity" this Honorable Court should take everything into consideration, including the reason [The Accused]'s license was suspended in the first place and grant the objections to the presentence investigation report.

3. "*Safety Valve*"

If the Court grants [The Accused]'s objections to the PSR, he would meet all of the requirements of U.S.S.G. Section 5C1.2, namely that (1) he would only have one criminal history point; (2) no violence or firearm was used; (3) the offense did not result in death or serious bodily injury; (4) [The Accused] was not a leader/organizer; and (5) [The Accused] gave a truthful proffer regarding his involvement in the underlying case *and* other criminal

activity. Upon being “safety valve” eligible, [The Accused] would receive an additional two points off of his Base Offense Level. This would produce a Total Offense Level of 25, Criminal History Category I, for a sentencing range of 57-71 months, and pursuant to his agreement with the Government, [The Accused] would request a sentence of 60 months.

4. Adequacy of Criminal History

However, because [The Accused] routinely continued to drive on a suspended license, it would be foolish for the undersigned to argue that [The Accused] is a Criminal History Category I. If the Court were to grant the objections to the PSR, [The Accused] would be “safety valve” eligible and if the Court then determined that under U.S.S.G. Section 4A1.3 the minor traffic offenses are more reflective of someone who is a Criminal History Category II, [The Accused] could still receive a guideline sentence of 63-78 months instead of the 120 month mandatory minimum sentence that would apply otherwise. If the Court were to determine that [The Accused] should receive a 63 or 78 month sentence, pursuant to his agreement with the Government, he would only request a departure to 60 months if a 5K1.1 Motion or Rule 35 were filed.

5. Agreement with the Government

In the event [The Accused] meets the requirements of U.S.S.G. Section 5K1.1, and the Government moves for a downward departure at the time of sentencing, the foregoing would be moot, because in that case, pursuant to agreement between the parties, [The Accused] will *withdraw* his objections to the PSR and request that this Honorable Court depart from 120 months to 60 months.

D. RELEVANT LEGAL PRINCIPLES **REGARDING DOWNWARD DEPARTURES**

1. Introduction

Plea negotiations in this particular case were as difficult as the undersigned has ever had, in large part because it appeared that [The Accused] was going to be a “guideline casualty,” meaning that because of his inability to cooperate in the beginning, the “best” sentence he could receive was ten years. Then, for understandable reasons, Assistant U.S.

Attorney Massey was upset at the fact that [The Accused]'s minor traffic convictions were vacated and the cases dismissed. Thankfully, everything seemed to come together prior to the Change of Plea, with both sides giving concessions so that a Plea Agreement could be consummated.

This section of the Sentencing Memorandum is important in the event the Court denies [The Accused]'s objections to the PSR, and/or the Government files a Motion for Downward Departure under U.S.S.G. Section 5K1.1 or a Rule 35. In that situation, [The Accused] would request that the Court depart downward from 120 months to **60** months.

2. 18 USC Section 3553

Pursuant to 18 USC Section 3553 (a), a sentencing court is to impose a sentence "sufficient, but not greater than necessary," to comply with the statutorily enumerated purposes of sentencing, namely, general and special deterrence, retribution, rehabilitation, and incapacitation. (Emphasis added.)

a. Rehabilitation

The aspect of *rehabilitation* is the easiest to address, since [The Accused] has a loving family to return to. In this case, rehabilitation involves [The Accused] cleansing his body and mind of drugs, which is something he attempted to do prior to being arrested on these charges. [The Accused] has shown that he, and he alone is responsible for this predicament, which is the first step toward being rehabilitated, and he has shown every sign that upon being released from prison he will not return to a life of drugs.

b. Retribution

With regard to the aspect of *retribution*, [The Accused] has already received the worst sentence anyone could possibly give him; a life knowing that his actions will take him away from his son for at least three more years.

The reality is that by dealing methamphetamine and other drugs, [The Accused] probably caused other individuals to become addicts, and while these individuals might not have been "forced" to purchase drugs from his friend, he has taken full responsibility for his actions and is a reason why he should be punished and not receive a slap on the wrist.

If a 5K1.1 Motion or a Rule 35 Motion is filed, this Court will then be able to take into consideration whether a five year sentence is appropriate retribution for [The Accused]'s actions. The undersigned and [The Accused] are cognizant that the U.S. Attorney's office will only request a one-third reduction of [The Accused]'s sentence, but upon the filing of a Motion for Downward Departure, this Court can reduce [The Accused]'s sentence to whatever it feels is appropriate, and here, [The Accused] is requesting that the Court depart to a 60 month sentence regardless of where his sentence commences.

c. Deterrent

It also should be pointed out that any retribution takes into consideration the fact that [The Accused] will have to serve a certain amount of time away from his family, which essentially acts as a *deterrent* against others in his family and community from committing the same crime. Similarly, [The Accused]'s son has two addicts for parents meaning that he has a predilection toward being an addict himself. Once [The Accused] is released from prison and becomes involved in [his son's] life again, the fact that he can tell his son that drug use will lead to prison is extremely powerful, meaning that [The Accused]'s punishment will be a future deterrent to his son.

E. CONCLUSION

[The Accused] requests that this Court grant his objections to the presentence investigation report and if the Court determines that his various traffic offenses are more similar to a Defendant who has a Criminal History Category II, that he be sentenced to 63 months.

If the Court denies the objections to the Presentence Investigation Report and the Government files a 5K1.1/3553 (e) Motion or a Rule 35 [The Accused] would request that his sentence be reduced from 120 months to 60 months.

Also, [The Accused] requests that this Court make a recommendation that he be admitted into the Bureau of Prisons' residential drug abuse program so that he can hopefully exorcize the drug demons and become a positive member of society.

Finally, [The Accused] requests that this Court recommend that he be incarcerated at

the Bureau of Prisons' facility located in El Reno, Oklahoma which offers the 500 hour residential drug abuse program, which will benefit [The Accused].

[The Accused] and his family have made it clear to the Court, the probation officer and the undersigned that [The Accused] has broken the law, and should be punished accordingly. A five year sentence will be sufficient to meet all of the sentencing requirements mapped out by the United States Sentencing Guidelines, and at the same time will be a long enough sentence so that [The Accused] can be admitted into the 500 hour residential drug abuse program.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 18th day of July, 2000, 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. Randy Massey, Esq.
Assistant United States Attorney
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Fairview Heights, Illinois 62208

Mrs. Donna Hoosman
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