IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 04-CR-XXX-JCH
	)	
[The Accused],	)	
	)	******To be Filed Under Seal******
Defendant.	)	

DEFENDANT'S SENTENCING MEMORANDUM

Comes now Defendant, by his attorney, John D. Stobbs II, and for his Sentencing Memorandum states:

I. Introduction

In the post-*Booker* world, the "hope" for a non-Guideline reduced sentence becomes the dream of many criminal Defendants. Defendant [The Accused] is no different.

However, the *reality* is that in this case the Guideline range of 151-188 months is appropriate and as such the undersigned will request that this Honorable Court impose a sentence of 133 months which represents the 151 month minimum sentence less the 18 month sentence [The Accused] received for revocation of his supervised release. A 133 month sentence is in effect a sentence of 151 months since the Guidelines require the supervised release revocation sentence to be consecutive to this sentence.

II. Cooperation

At the outset, the undersigned wants to make clear that even though Defendant gave detailed proffers to the Government as part of his Plea Agreement no Motion for Downward Departure Pursuant to 5K1.1 will be filed by the Government. Specifically, Defendant provided to the Government the name of Jennifer Young, who supplied Defendant with massive quantities of pills. To date Ms. Young has not been apprehended.

When the undersigned filed a Motion to Continue Sentencing based on his hope that Ms. Young would be apprehended prior to Defendant's sentencing so that a Motion for Downward Departure under 5K1.1 could be filed, Assistant U.S. Attorney Wissler responded by e-mail on April 28, 2005 (Exhibit A)stating:

> "I am out of town at a seminar right now but have been able to access my email. I just got your motion to continue [The Accused] sentencing. I will not object to your motion, but I want you to understand that I will not, under any circumstances, give [The Accused] a 5K. Period. I thought I had made that perfectly clear, but evidently not. I don't know how much clearer I can be about it: He is not getting a 5K. Under any circumstances. I don't care if Jennifer Young gets arrested or not - he's not getting one. I'm sorry if there was somehow a misunderstanding about that issue, but I honestly don't know how there could have been. Especially after you filed the objections to the PSR and I told you again that I was not giving him a 5K or making a 3553 motion.
>
> If you still want his sentencing continued, I won't object. But please tell your client that there will be no 5K. I don't want him accusing me of misleading him. Sirena"

It remains a mystery to the undersigned how his objections to the Presentence Investigation Report, which incidentally were upheld by the Probation officer, would have anything to do with a 5K1.1. The undersigned recognizes that the Government cannot be forced to file a 5K1.1 Motion, but it is nevertheless disheartening for the Government to state that under no circumstances will a 5K1.1 Motion be filed even though the ***only*** information about Jennifer Young was given by [The Accused]. The Government will be in an awkward position if Ms. Young is apprehended and she is told to "flip" because of [The Accused]'s cooperation against her.

However, Ms. Young has not been apprehended to date and while Defendant believes he should eventually receive consideration from the Government for his cooperation, the fact is that at the present time his cooperation has not risen to "substantial assistance" for purposes of a 5K1.1 Motion or an argument under *Booker* that his cooperation should result in a reduced sentence.

III. Criminal History

At first blush [The Accused]'s criminal history is atrocious. At first blush it would seem he would be a candidate for the high end of the Guideline range to be run *consecutive* to the 18 month sentence he received for violating his supervised release.

Fortunately, the undersigned is in a unique position to discuss Defendant's criminal history, because he represented Defendant in all of his Missouri state cases, which constitute virtually all of his criminal history.

For purposes of criminal history in his 1997 federal case, the state convictions mentioned in paragraphs 29 and 34 of the Presentence Investigation Report were treated as related conduct. They were part of the overall federal case. The federal case consumed the Missouri state cases and actually drove the results of the state cases. So long as Defendant would not be incarcerated in Missouri, and the federal Government paid for Defendant's incarceration, the State prosecutors agreed to a concurrent state/federal sentence.

With regard to his prior criminal conduct, due to the fact that the Missouri prosecutors would not dismiss their cases, Defendant has 14 criminal history points instead of only 8 criminal history points. So, instead of being a Criminal History Category IV, Defendant is a Criminal History Category VI, meaning that for criminal history purposes, the Guidelines have punished Defendant sufficiently.

IV. Supervised Release Revocation

Defendant is a hard-core drug addict. There is no *nice* way to say this. As a result of not being able to stay away from methamphetamine, Defendant received an 18 month sentence for having his supervised release revoked.

The conduct in the *instant* criminal case is the conduct used by the Probation Office to file its Complaint to have Defendant's supervised release revoked. Even though caselaw does not support a double jeopardy argument, it seems wholly unfair that Defendant is essentially being punished twice for the same actions, and the only way to avoid this would be for this Honorable Court to sentence Defendant to 133 months. By doing this, Defendant would in essence receive a 151 month sentence.

Although the Sentencing Guidelines provide in Section 7B1.3(f) that a revocation sentence is to be served consecutively to any other term of imprisonment, Chapter 7 is only a policy statement. Hopefully, the combination of *Booker* and a policy statement will be enough to convince this Honorable Court to in essence make the supervised release sentence concurrent to the sentence [The Accused] will receive for this offense. In any event, the "policy statement," which is for the purpose of "providing guidance," is in conflict with the relevant statute. See U.S.S.G. Ch. 7 pt. A1 and §7B1.4(a). 18 U.S.C. §3584(a) provides in pertinent part that "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run consecutively or concurrently." All circuits, including the Eighth, agree that a sentencing court has the discretion to order concurrent sentences in this situation. This discretion should be bolstered by *Booker*.

Prior to *Booker*, Circuit courts such as the Seventh Circuit in *United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995), specifically held that despite the Chapter 7 policy statement that revocation sentences should be run consecutive to any undischarged sentence, sentencing courts had discretion to order concurrent or partially concurrent sentences.

There are two issues of import raised by the *Hill* Decision.

First, the *Hill* Court discussed the implicit principal underlying the Chapter 7 policy statement here under discussion - that every separate violation of the law deserves a separate sanction. Id. The *Hill* Court went on to hold that absent exceptional circumstances it would be an abuse of discretion to impose a consecutive sentence for violation of supervised release. Id. At 233. Then the *Hill* Court went on the discuss one of the exceptional circumstances - where there is an overlap between the conduct that put a defendant in breach of his supervised release and the conduct being punished by the undischarged term of imprisonment. Where the overlap is complete it can be argued that the defendant has received some sanction for violating his supervised release and thus a concurrent sentence may be appropriate. Id. The *Hill* defendant engaged in conduct that violated the terms of his

supervised release and he was sanctioned for that conduct under another rubric, a state sentence. Id.

The *Hill* defendant was sentenced by the state forgery, attempted obstruction of justice and theft. But he violated the terms of his supervised release by not committing a crime and testing positive for illegal narcotics. Thus the *Hill* defendant was in that incomplete overlap category of defendants the *Hill* Court noted. On remand, the *Hill* Court invited the sentencing court to "consider the possibility of making Hill's sentence partly consecutive and partly concurrent as a way of more precisely matching Hill's incremental punishment for violating the conditions of his supervised release to the gravity of his offense and other relevant circumstances." Id.

By comparison, [The Accused] appears to be in the first category noted by the Seventh Circuit in *Hill* of those defendants whose conduct in violating supervised release is exactly the same as the conduct resulting in a new charge and where, therefore, concurrent sentences may be appropriate.

A consecutive sentence would mean that [The Accused] would effectively receive, at best, the minimum 151 month sentence for this case as well as the 18 month sentence for the supervised revocation case. Consecutive sentences would result in 14 years incarceration as opposed to 12 ½ years incarceration if these two sentences were made concurrent by this Honorable Court.

V. Statutory Analysis

[The Accused] is requesting that he be incarcerated for 151 months total—133 months for the *instant* case and 18 months for his supervised release revocation case. Admittedly, this

an unusual request, but fortunately the circumstances and statutory analysis lend themselves to this sentence.

Once this Honorable Court conducts its analysis under the Guidelines, *Booker* breathes life into 28 U.S.C. 994 (k) and 18 U.S.C. 3553 (a). These are the two statutes this

Honorable Court must rely upon in imposing sentence on a particular Defendant, and this section will discuss the elements of these statutes to show why a sentence of 133 months 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.

The aspect of *rehabilitation* is intriguing in [The Accused]'s case, because on the one hand the argument would go that doing "hard time" in a prison would rehabilitate [The Accused] since drug rehabilitation and other "nice" methods of rehabilitation have not worked. The *best* sentence [The Accused] can hope for is 151 months of which he would serve 85% or nearly ***11 years.*** Certainly, an 11 year sentence would be considered harsh punishment for Defendant's actions under the circumstances.

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 only reason for purposes of [The Accused]'s case that this is important, is to point out to this Honorable Court that perhaps [The Accused] will be able to obtain further types of vocational training to assist him in finding a job when he is released from prison. [The Accused] has had gainful employment around the time of his crime and the more training he is given, the better off he will be in the future.

b. 18 U.S.C. § 3553

If 994 (k) is the proverbial *stick* then for purposes of sentencing 18 U.S.C. § 3553, U.S.S.G. is the carrot because under *Booker* it allows this Honorable Court to view [The Accused] as a whole before rendering a sentence which is appropriate.

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," it is [The Accused]'s hope that 151 months of confinement is a sufficient sentence, and that under the circumstances it would not appear to be "greater than necessary."

Regarding 3553 (a)(1), the undersigned has already discussed the nature and circumstances of [The Accused]'s offense as well as his criminal history and characteristics. It is important though, for purposes of 3553, that this Honorable Court recognize that [The Accused] is a Criminal History Category VI due to his criminal history which consists of methamphetamine convictions for essentially the same criminal conduct. Furthermore, in 1997, he pleaded "guilty" straight-up without giving information to the Government. [The Accused] is not someone who is arrested and immediately tries to work his sentence down by cooperating with the Government. Here, facing a very difficult decision, [The Accused] ultimately cooperated with the Government and gave truthful proffers regarding drug activities in the Eastern District of Missouri. The Government responded with the e-mail which has been marked as Exhibit A. Whether he will receive a benefit from the

Government for this cooperation is not germane to the discussion of whether a 151 month sentence is appropriate for purposes of 3553.

This Honorable Court must determine whether or not a 151 month sentence reflects the seriousness of [The Accused]'s actions and whether or not such a sentence would promote respect for the law. Subsection (a)(2)(A) of 3553 urges the sentencing court to mete out *just punishment* for the criminal activity. A 151 month sentence is more than double what [The Accused] received in 1997, but what this Honorable Court must grapple with is whether or not this is *just* under the circumstances.

Due to [The Accused]'s prior convictions he is requesting to be sentenced under Criminal History Category VI. He is not making excuses for his criminal past by claiming that it overstates his criminal history. As such, it reflects the seriousness of his actions and will show future Defendants that if they keep breaking the law, they will be severely punished.

However, the crux of 3553 is that whatever sentence is imposed must be *just* and 3553(a)(2)(B)(C)&(D) define in small ways what is *just*.

3553(a)(2)(B) states that the sentence must deter future criminal conduct. Obviously, [The Accused] did not learn the first time through the system. He is hoping to receive, at best, a sentence more than double than what he received in 1997. [The Accused] has a horrible addiction to methamphetamine that is triggered under certain stressful situations. He will either learn to deal with his addiction in a non-criminal way, or he will ultimately die incarcerated. There is no middle ground. Either 12 ½ years in jail will teach him that his freedom is more valuable than a "high" or the U.S. Probation office will revoke him again and he will be charged in another federal criminal case.

One would be hard pressed to claim that 12 ½ years is not a stiff sentence and that the public would not be protected by having [The Accused] incarcerated for such an extended period. Unlike 1997, [The Accused] will not be eligible for any reduction in his sentence by serving in the Bureau of Prisons 500 hour drug program, meaning that at best he will have

to serve 85% of a 12 ½ year sentence. Unstated in 3553(a)(2)(C) is that the public includes [The Accused]'s family, friends and loved ones. They have stood by him throughout the good times and all of the bad times. In their own way they have suffered due to his criminal conduct and will continue to suffer while he is incarcerated. Throughout approximately the last 10 years, the undersigned has come to know [The Accused]'s family and friends. They are without a doubt good and honorable people who have suffered due to [The Accused]'s addiction. While not necessarily "protecting" his family, a 12 ½ year sentence signals to [The Accused] that he is the only one capable of stopping the cycle of suffering that he continues to put them through. Attached and marked as Exhibits B, C, D, E, F, G, and H are letters from his family, friends and loved ones.

3553(a)(2)(D) deals with the rehabilitation aspect of incarceration, and is probably the most overlooked section of 3553. Paragraphs 63 through 67 show that Defendant has the capacity to be gainfully employed. Hopefully, while incarcerated he will avail himself of the opportunity to learn additional trades so that when he is released he will be in a better position to find gainful employment.

Finally, co-Defendants McDonald and Bay received 46 months and 105 months respectively. At best [The Accused] can hope for a sentence more than triple Mr. McDonald's and 70% more than Mr. Bay's. 3553(a)(6) discusses unwarranted sentence disparities among similarly situated Defendants. What separates Mr. Bay from [The Accused] is that Mr. Bay's convictions apparently technically did not warrant a Criminal History Category VI. Under the circumstances a 151 month sentence is proportionate to that of Mr. Bay.

VI. Conclusion

WHEREFORE, Defendant requests that this Honorable Court sentence Defendant to 133 months to be served consecutively to the 18 month sentence imposed by the Honorable Donald J. Stohr.

[The Accused]

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