

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

NO. 01-3992

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,**

vs.

**JESSE JONES, a/k/a "TOOT"
Defendant-Appellant.**

**Appeal from the United States District Court
for the Southern District of Illinois
Case No. 00-40071-JPG
The Honorable J. Phil Gilbert, Presiding**

Brief of Defendant-Appellant Jesse Jones, a/k/a "Toot"

**JOHN D. STOBBS II
346 West St. Louis Avenue
East Alton, Illinois 62024
(618) 259-7789**

ATTORNEY FOR DEFENDANT-APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. 01-3992

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JESSE JONES, a/k/a "TOOT",

Defendant-Appellant.

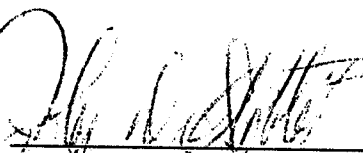
)
)
) Honorable J. Phil Gilbert
) District Court Judge Presiding
)
) District No. 00-40071-JPG
)
)

CERTIFICATE OF INTEREST

1. Defendant's name is Jesse Jones, a/k/a "Toot".
2. Defendant is not a corporation.
3. John D. Stobbs II, who was appointed pursuant to the Criminal Justice Act states that he is the attorney for Defendant-Appellant in this case.

STOBBS LAW OFFICES

BY:



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

TABLE OF CONTENTS

CERTIFICATE OF INTEREST	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
SUMMARY OF THE ARGUMENT	9
ARGUMENT	10
CONCLUSION	18
CERTIFICATE OF SERVICE	19
ATTORNEY'S CERTIFICATE PURSUANT TO FED.R.APP.P.32(a)(7)(C) .	20
ATTORNEY'S CERTIFICATE PURSUANT TO CIRCUIT RULE 30(d)	21
ADDENDUM A - U.S.S.G. Section 5K2.13 Policy Statement	22
ADDENDUM B - U.S.S.G. Amendment 583	23
APPENDIX TABLE OF CONTENTS	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
1. <u>U.S.A. v. Crucean</u> 241 F.3d 895 (7 th Cir. 2001)	10
2. <u>U.S.A. v. Ventrilla</u> 233 F.3d 166 (2 nd Cir. 2000)	10
3. <u>U.S.A. v. McBroom</u> 124 F.3d 533 (3 rd Cir. 1997)	16,17
4. <u>U.S.A. v. Poff</u> 926 F.2d 588 (7 th Cir. 1991)	17

JURISDICTIONAL STATEMENT

This is a direct appeal from the judgment and sentence of the United States District Court for the Southern District of Illinois, the Honorable J. Phil Gilbert presiding, entered on November 13, 2001. See, Judgment in a Criminal Case, Appendix A (App. 1). The District Court for the Southern District of Illinois is located within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. 28 U.S.C. § 41.

The District Court has jurisdiction pursuant to 28 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States of America. The jurisdiction of the District Court was invoked by the United States Attorney for the Southern District of Illinois under the criminal laws of the United States of America by charging Defendant, Jesse Jones with distributing illegal narcotics.

Defendant, Jesse Jones was charged by the United States of America in a three count Indictment alleging three violations of Title 21, United States Code, § 841(a)(1). See, Indictment, Appendix B. (App. 9)

On July 10, 2001 Defendant pleaded guilty to all three counts alleged in the Indictment. On November 8, 2001 Defendant was sentenced to 151 months imprisonment and four years supervised release.

On November 8, 2001 a timely Notice of Appeal was filed by Defendant. See, Notice of Appeal, Appendix C. (App. 11)

Jurisdiction is conferred on the United States Court of Appeals for the Seventh Circuit by 28 U.S.C. § 1291 and Fed. R. App. P. 4(b).

Similarly, pursuant to 18 U.S.C. § 3742 (a)(1) and (2) appellate jurisdiction is warranted because the District Court imposed a sentence which was in violation of law and which misapplied the Sentencing Guidelines. At sentencing, the District Court stated "First of all, with respect to the departure for diminished capacity under 5K2.13 the Court is going to exercise its discretion in not granting a downward departure on that ground." The District Court went on to state that "And when the Court reviews 5K2.13, the Court does not feel that this defendant would meet the criteria to downward depart under that section of the Guidelines." (Appendix G, App. 41)

The combination of these two statements indicate that the District Court was confused as to the applicable law regarding downward departures under United States Sentencing Guideline § 5K2.13, because on the one hand the District Court refused to exercise its discretion to depart downward and then stated that said refusal was based on its belief that Defendant-Appellant did not meet the criteria to depart downward under Section 5K2.13. Yet as will be shown supra, the Court then made statements showing that Defendant met all of the requirements of 5K2.13.

STATEMENT OF ISSUES

1. The Court erred in concluding that Defendant did not meet the criteria to depart downward pursuant to United States Sentencing Guidelines § 5K2.13.

STATEMENT OF THE CASE

Defendant Jesse Jones was charged in a three count Indictment with three counts of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841 (a)(1) in the Southern District of Illinois. On July 10, 2001 Defendant pleaded guilty to all counts of the Indictment.

A Presentence Investigation Report was prepared and on September 28, 2001 Defendant-Appellant filed his Objections to the Presentence Investigation Report, See, Supplemental Appendix A. (Supp. App. 1) On September 24, 2001 Defendant filed a Motion for Downward Departure pursuant to 5K2.13, See, Appendix D. (App. 13). On October 26, 2001 Defendant filed a Sentencing Memorandum, See, Appendix E (App. 20) and on October 30, 2001 filed a Motion for Downward Departure pursuant to U.S.S.G. § 5K2.0 and 4A1.3 and Memorandum in Support Thereof. See, Appendix F. (App. 34) On November 8, 2001 the District Court granted Defendant's Motion for Downward Departure pursuant to 4A1.3 and denied the Motions for Downward Departure pursuant to 5K2.0 and 5K2.13. (Appendix G, Transcript pages 37-39, App. 41-43)

On November 8, 2001 Defendant was sentenced to a term of 151 months imprisonment and four years of supervised release. See, Appendix A, App. 2

STATEMENT OF FACTS

Defendant Jesse Jones is a 41-year-old mentally retarded individual who was born in Columbus, Mississippi. (Sentencing Transcript page 9) “(T __)”¹. Most of Defendant’s family picked cotton. (T 9) Defendant was raised by his grandparents, (T 9) apparently because his mother also suffers from a mental disability. (T 10) While he lived in Mississippi, Defendant worked at a slaughter house where he would clean up. (T 11) Defendant went to school for a few years in Mississippi and was passed from grade-to-grade without learning to read or write. Defendant apparently never attended any sort of “special education” classes. See Appendix E, App. 22.

When Defendant’s grandparents died, because his mother was unable to care for him, he moved to Mt. Vernon to live with his Aunt Mentha Smith. He lived with her until a few years before his arrest in August of 2000. (T 10) Because of his mental disability, Defendant applied for and began receiving Social Security income (T 10). The Social Security Administration deemed that Defendant was unable to handle his own funds and as such, Mentha Smith was appointed as the overseer of any funds he received from Social Security. (T 17) Prior to receiving Social Security the Government would have sent Defendant to be evaluated to determine whether or not his mental condition was severe enough to receive social security. (T 17) In order to receive social security for a mental condition, Defendant’s I.Q. would have to be below 60. (T 17)

¹The Sentencing Transcript will be referred to as “(T __)”.

At the time of his arrest in August of 2000 Defendant had two prior State convictions for distribution of less than one gram of "crack" cocaine. (Appendix E, App. 20) Notwithstanding the small amount of illegal narcotics involved in these two prior State cases, for purposes of sentencing, Defendant was a "career offender" and as such his Criminal History Category was a VI and his Base Offense Level commenced at a 34 as opposed to a 31. (Appendix E, App. 20)

On September 19, 2000, October 16, 2000, November 16, 2000, and November 20, 2000 Defendant attempted to proffer with Government agents (Appendix E, App. 21) and the Government conceded at sentencing that Defendant's mental condition prohibited him from giving a truthful proffer. (T 18) Because of Defendant's inability to remember matters which would allow him to give a truthful proffer, the Government refused to file a Downward Departure Motion for Substantial Assistance pursuant to Fed. R. App. P. 35. (Appendix E, App. 22)

After Defendant's last attempt to proffer, a Motion entitled "Defendant's Motion for Examination to Determine Mental Fitness to Stand Trial and Motion to Continue" was filed. See, Appendix I and (Appendix E, App. 21). Dr. James Peterson was appointed by the District Court to evaluate Defendant and Dr. Peterson concluded that Defendant's scores placed him in the mild to moderate level of mental retardation. (Appendix E, App. 22) Dr. Peterson conducted a full scale I.Q. test to reach his conclusion. (T 16)

Because Dr. Peterson concluded that Defendant was not competent to stand trial, the District Court entered an Order which sent Defendant to the Metropolitan Correctional

Center where he was evaluated by Dr. Greenstein. (Appendix E, App. 22) Dr. Greenstein admitted that Defendant had an extremely low I.Q. but concluded that Defendant "feigned impression of suffering from Moderate or Severe Mental Retardation represents a volitional attempt to facilitate a finding of incompetency." (Appendix E, App. 22) Dr. Greenstein used the K-BIT screening test. (T 16) The K-BIT test is a screening test and is not sensitive enough to pick up how low a particular individual is functioning. (T 16)

For purposes of filing a Motion for Downward Departure pursuant to 5K2.13, Defendant was evaluated by Dr. Daniel Cuneo who placed Defendant's cognitive ability at the level of an eight or nine-year-old. (Appendix E, App. 22) 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." See Appendix D, App. 19

At sentencing Dr. Cuneo discussed the tests used by Dr. Peterson (Wechsler Adult Intelligence Scale, Third Edition, which is considered the Gold standard to determine someone's I.Q. [T 15]) and Dr. Cuneo concluded that Dr. Peterson's test was more accurate. (T 14-16) The Government did not cross-examine Dr. Cuneo as to any of his findings. (T 20)

At sentencing Dr. Cuneo testified that in a Mega study conducted by Brown, it was demonstrated that the average I.Q. of individuals in penal institutions was roughly 93 and that the average I.Q. by definition is 100. (T 14) Based on Dr. Peterson's conclusions that Defendant had a full scale I.Q. of 54, Defendant would have the cognitive level of an eight

or nine-year-old, and would be “way less than the bottom 1 percent.” (T 15) Defendant would be 1 out of 1000, meaning that if there were 1000 people Defendant would be the “slowest” one in the group. (T 15)

Based on Defendant’s background, criminal history, and the report of Dr. Cuneo, downward departures based on U.S.S.G. § 5K2.13, 4A1.3 and 5K2.0 were filed. (Appendices D, E & F respectively)

Defendant requested that the District Court depart to a sentence of between seven and ten years. (Appendix E, App. 32) On November 8, 2001 the District Court granted Defendant’s Motion for Downward Departure pursuant to 4A1.3 and departed to a Criminal History Category IV. (T 38) The Court refused to depart downward based on U.S.S.G. § 5K2.0 and 5K2.13. (T 37) Defendant was sentenced to 151 months of imprisonment and 4 years of supervised release. (T 41).

SUMMARY OF THE ARGUMENT

The District Court abused its discretion in denying Defendant's Motion for Downward Departure Pursuant to United States Sentencing Guideline Section 5K2.13 because Defendant's mental retardation combined with the fact that the instant offense is not a crime of violence and his criminal history is non-violent mean that Defendant meets all of the requirements of Section 5K2.13. As such the District Court misapplied the Sentencing Guidelines and an illegal sentence resulted.

ARGUMENT

Standard of Review

Because the issue in this case involves an illegal sentence based on an incorrect application of the Guidelines, the Defendant must convince this Court that the District Court abused its discretion in order to prevail. U.S.A. v. Crucean 241 F.3d 895 (7th Cir. 2001)

Introduction

Had the District Court simply refused to exercise its discretion in not granting a downward departure pursuant to Guidelines Section 5K2.13, then in all probability there would be no appellate jurisdiction. However, by stating that “when the Court reviews 5K2.13, the Court does not feel that this Defendant would meet the criteria to downward depart under that section of the guidelines,”. (Appendix G, App. 41) the District Court opened its decision up to review as to whether or not an illegal sentence was imposed because 5K2.13 of the Guidelines was misapplied to Defendant.

In U.S.A. v. Ventrilla, 233 F.3d 166 (2nd Cir. 2000), the Court vacated and remanded for resentencing the District Court’s refusal to depart downward pursuant to Section 5K2.13 of the Sentencing Guidelines. The Defendant in Ventrilla contended that his sentence was imposed in violation of law, and because the District Court was ambiguous as to whether or not it had the authority to grant the downward departure, the Second Circuit determined that the District Court’s decision was in violation of the law and required remand for resentencing. Here, the District Court clearly indicated that it had the authority to depart

downward but claimed that it was unable to do so because Defendant did not meet the requirements of Section 5K2.13. If in fact Defendant does meet the requirements of 5K2.13 this would show confusion. The District Court took a hybrid approach in reaching its decision, by on the one hand refusing to exercise discretion, but on the other hand determining that Defendant did not meet the requirements of 5K2.13. Had the District Court concluded that Defendant met all of the requirements of 5K2.13 and *then* decided not to exercise its discretion to depart downward, then this Court would not have jurisdiction, and this appeal would properly be dismissed.

Because that is not the case though this Court does have jurisdiction and can look at the facts to determine whether or not the District Court abused its discretion in determining that Defendant did not meet the requirements of 5K2.13.

United States Sentencing Guideline Section 5K2.13

Once this Honorable Court determines that it has jurisdiction, the matter becomes relatively straightforward insofar as Defendant either meets the requirements of 5K2.13 or he doesn't. If he does, then the District Court abused its discretion and the matter should be remanded for resentencing.

What makes the fact situation of the instant case unique is that while concluding that Defendant did not meet the requirements of 5K2.13, the District Court in its colloquy with the Defendant made statements which show Defendant in fact meets all of the requirements of 5K2.13. It is Defendant's position that had the District Court properly applied 5K2.13 to the facts of his case that a downward departure under 5K2.13 for diminished capacity would have been made.

Section 5K2.13 states in its entirety (Addendum A):

“§5K2.13 Diminished Capacity (Policy Statement)

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.”

So, in order to be eligible for a downward departure pursuant to 5K2.13, the Defendant must prove by a preponderance of the evidence the following:

1. that he was suffering from a significantly reduced mental capacity at the time of the offense;
2. that the voluntary use of drugs did not cause the significantly reduced mental capacity;
3. that the instant offense did not involve actual violence or a serious threat of violence; and,
4. that his criminal history is not violent in nature and as such the public does not need to be protected from him.

A. Significantly Reduced Mental Capacity

Quite clearly Defendant’s mental retardation constitutes a significantly reduced mental capacity and the District Court stated, “there is no question, and the Court’s not

going to reiterate what everyone, basically, agrees, that Mr. Jones has severely reduced mental capabilities." The District Court went on to say that "this defendant probably is more severely mentally handicapped than probably most, if not any, other defendant I have seen before me." Based on these statements alone, it is clear that Defendant's mental retardation constitutes a significantly reduced mental capacity.

The Government should be foreclosed from arguing that Defendant's mental retardation does not constitute a significantly reduced mental capacity in light of the fact that for the past two decades Defendant has been receiving social security benefits from the United States. The Government's own doctors concluded that Defendant's mental retardation was such that he warranted social security benefits. Furthermore, the Government concluded that Defendant's mental condition prohibited him from being able to take care of the social security funds that were paid to him and as such named his aunt, Mentha Smith to administer the funds for him.

Defendant's mental retardation foreclosed him from reaping the benefits of his desire to enter into a cooperating plea agreement with the Government, and receive some sort of a sentence reduction by way of a motion for downward departure pursuant to Federal Rule of Criminal Procedure 35 or United States Sentencing Guideline Section 5K1.1. Defendant decided early on that he wanted to cooperate with the Government in the hopes he would have his sentence reduced. Defendant could claim that he is being punished for his mental retardation insofar as unlike other defendants who lie during proffers, he is neither smart enough to tell the truthfully recall events constituting his relevant conduct or purposefully lie to the Government about his activities in illegal narcotics.

In a civil lawsuit Defendant could conceivably claim that he would be protected by the Americans with Disabilities Act, because as a mentally retarded person he is being treated differently by the Government for purposes of downward departures than other cooperating individuals who are not mentally retarded. Because the Government could properly argue that it is within its sole discretion to file motions for downward departure for substantial assistance, the only mechanism in the Guidelines which could aid Defendant is 5K2.13. His mental retardation is something which sadly is the only thing Defendant has which could allow for a sentence less than the 12 ½ years which the District Court imposed.

In "Defendant's Motion for Downward Departure Pursuant To U.S.S.G. Sections 5K2.0 & 4A1.3 & Memorandum In Support Thereof" (Appendix F, at App. 36) Defendant stated that "when Rule 35's are filed in this District, the Government limits itself to not requesting more than 1/3 off of a Defendant's sentence, no matter the cooperation the Defendant gives. There is no rhyme or reason as to why a Defendant who gives minimal information, but whose cooperation convinces others to plead guilty would receive the same recommended 1/3 reduction as a hypothetical Columbian drug lord who gives information about multi-tons of drugs, murders etc. Here, someone with a severe learning disability who was diagnosed as mildly retarded by two professionals, was not able to "cooperate" with the Government because of this disability, yet Garrett Watson, Kalim Wilson, who do not have Mr. Jones' disability were able to successfully proffer. They provided information against Mr. Jones and no doubt because of this "substantial cooperation" will receive some sort of a sentence reduction."

B. Significantly Reduced Mental Capacity Not Caused By Drug Use

While Defendant is addicted to drugs, his mental retardation was not caused by the voluntary use of drugs, because quite simply he was born retarded.

C. Offense Did Not Involve Actual Violence

Prior to November 1, 1998, an argument could have been made that the instant offense of distributing these small amounts of "crack" cocaine constituted a "crime of violence" under the Guidelines and as such Defendant might not have been eligible for a downward departure under 5K2.13. However, Amendment 583 (Addendum B) to the Guidelines changed that and 5K2.13 was amended so that the section involving the instant offense being a crime of violence was changed to read "(2) . . . the offense involved actual violence or a serious threat of violence." (Addendum B)

Regardless of Amendment 583, it would almost be silly for anyone to claim, that for purposes of federal criminal law, the distribution of these small amounts of "crack" cocaine, amount to a crime of actual violence or a serious threat of violence.

D. Defendant Does Not Have a Violent Criminal History

Similarly, with regard to whether or not Defendant's criminal history indicates a need to incarcerate him to protect the public, the District Court stated in granting Defendant's Motion for a Downward Departure Pursuant to U.S.S.G. Sections 5K2.0 and 4A1.3 and Memorandum in Support Thereof, "in making its decision that it over-represents is taking into the factor that his previous adult convictions were, basically, traffic oriented, driving on a suspended license, operating an uninsured motor vehicle. And because of these two

unlawful deliveries, he - - under the law he's jumped to a career offender, a career offender status with a Criminal History Category VI. And in the judgment of this Court, that just grossly overstates the criminal history compared to other people of similar situations."

E. Significantly Reduced Mental Capacity Contributed to The Commission of The Offense

Defendant's significantly reduced mental capacity impacted on his being charged in this offense because while he knew the difference between right and wrong, it allowed him to be used by "crack" dealers. "He doesn't have the capacity to open up the business of selling crack. He was used by other people, like he was used by Monte Lesure and others."(T39)

While the District Court correctly concluded that Defendant's mental retardation constituted a significantly reduced mental capacity, what is educational about Amendment 583 is the fact that the Amendment was brought about by the Third Circuit's decision in U.S.A. v. McBroom, 124 F.3rd 533 (3rd Cir. 1997). The Defendant in McBroom is a child pornographer who at one time was a practicing attorney. That fact alone makes the difference between the Defendant in McBroom and the Defendant in the present case startling.

But, like the Defendant in McBroom, the Defendant in the present case knew the difference between right and wrong, and could have controlled his behavior but was unable to do so because of his mental condition. See, Dr. Cuneo's report, Appendix D, App. 15. He was unable to do so because his mental condition made him an "easy mark" for large distributors of "crack" cocaine who wanted to "use" Defendant.

The McBroom decision relied heavily on the dissenting opinion in U.S.A. v. Poff, 926 F.2d 588 (7th Cir. 1991). The Poff dissent discusses in depth how a Defendant's mental condition should impact on the sentence imposed by the District Court. If "significantly reduced mental capacity" fails to apply to someone who is mentally retarded but does apply to a child pornographer or other "white collar" non-drug offenders then the application of 5K2.13 must be expanded to include Defendants similarly situated to this Defendant.

Had the District Court here not misapplied the facts of Defendant's case to Section 5K2.13, the outcome certainly would have been different.

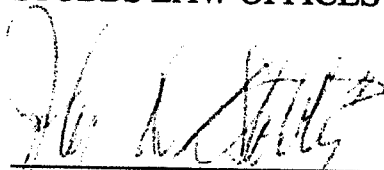
CONCLUSION

Defendant requests that this Honorable Court determine that he in fact meets all of the requirements of United States Sentencing Guideline Section 5K2.13, and that the District Court abused its discretion in refusing to apply 5K2.13. As such Defendant requests that this case be remanded to the District Court for resentencing.

Respectfully Submitted,

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 16th day of January, 2002, two copies of the attached *Brief*, along with one copy on magnetic media 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

STOBBS LAW OFFICES

A handwritten signature in dark ink, appearing to read "John Stobbs", is written over a horizontal line.

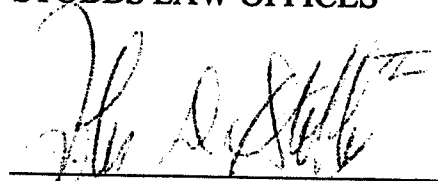
346 W. St. Louis Ave.
East Alton, IL 62024

ATTORNEY'S CERTIFICATE PURSUANT TO RULE 32(a)(7)(C)

Now comes the undersigned counsel, attorney on appeal, who certifies that the Appellant's brief contains 3,708 words, which comports to the provisions of Fed.R.App.P. 32(a)(7)(C). The brief was prepared using Corel WordPerfect 9.

STOBBS LAW OFFICES

BY:



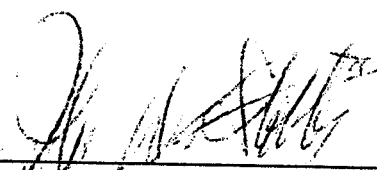
John D. Stobbs II, NO. 06206358
Attorney for Defendant-Appellant
346 West St. Louis Avenue
East Alton, Illinois 62024
Telephone: (618)259-7789
FAX: (618)259-4145

ATTORNEY'S CERTIFICATE PURSUANT TO CIRCUIT RULE 30(d)

I have included all material required by Circuit Rule 30(a) and (b) in the Brief
Appendix.

STOBBS LAW OFFICES

BY:



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

ADDENDUM A

§5K2.13 Diminished Capacity (Policy Statement)

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. *For purposes of this policy statement –*

“Significantly reduced mental capacity” means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

ADDENDUM B

583. Section 5K2.13 is amended by striking the text in its entirety as follows:

“If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.”,

and inserting:

“A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. For purposes of this policy statement —

‘Significantly reduced mental capacity’ means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.”.

The purpose of this amendment is to allow (except under certain circumstances) a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity. This amendment addresses a circuit conflict regarding whether the diminished capacity departure is precluded if the defendant committed a “crime of violence” as that term is defined in the career offender guideline. Compare United States v. Poff,

926 F.2d 588 (7th Cir. 1991) (en banc) (definition of “non-violent offense” necessarily excludes a crime of violence), cert. denied, 502 U.S. 827 (1991), United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989) (same), United States vo Mayotte, 76 F.3d 887 (8th Cir. 1996) (same), United States v. Borrayo, 898 F.2d 91 (9th Cir. 1989) (same), and United States v. Dailey, 24 F.3d 1323 (11th Cir. 1994) (same), with United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993) (court must consider all the facts and circumstances to determine whether offense was non-violent; terms are not mutually exclusive), United States v. Weddle, 30 F.3d 532 (4th Cir. 1994) (same), and United States v. Askari, 140 F.3d 536 (3d Cir. 1998) (en banc) (“non-violent offenses” are those that do not involve a reasonable perception that force against persons may be used in committing the offense), abrogating United States v. Rosen, 896 F.2d 789 (3d Cir. 1990) (non-violent offense means the opposite of crime of violence). The amendment replaces the current policy statement with a new provision that essentially represents a compromise approach to the circuit conflict. The new policy statement allows a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity, except under the following three circumstances: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. The amendment also adds an application note that defines “significantly reduced mental capacity” in accord with the decision in United States vo McBroom, 124 F.3d 533 (3d Cir. 1997). The McBroom court concluded that “significantly reduced mental capacity” included both cognitive impairments, an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of “significantly reduced mental capacity”. The effective date of this amendment is November 1, 1998.

APPENDIX TABLE OF CONTENTS

Appendix A
Judgment in a Criminal Case
App. 1

Appendix B
Indictment
App. 9

Appendix C
Notice of Appeal
App. 11

Appendix D
Motion for Downward Departure Pursuant to 5K2.13
App. 13

Appendix E
Sentencing Memorandum
App. 20

Appendix F
Motion for Downward Departure Pursuant to U.S.S.G. Section 5K2.0
and 4A1.3 and Memorandum in Support Thereof
App. 34

Appendix G
Pages 37-39 of Sentencing Transcript
App. 41

Appendix H
Motion for Examination to Determine Mental Fitness
to Stand Trial and Motion to Continue
App. 44

APPENDIX A

Judgment in a Criminal Case

App. 1

UNITED STATES DISTRICT COURT

Southern

District of

FILED
Illinois

01 NOV 13 PM 2:55

UNITED STATES OF AMERICA

V.

JESSE JONES

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

CLERK
U.S. DISTRICT COURT

SOUTHERN DISTRICT IL
BENTON OFFICE 4-00024007-1001-JPG

Case Number:

John D. Stobbs, II

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1, 2 and 3 of the Indictment.

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
1 U.S.C. 841(a)(1)	Distribute and Possess with Intent to Distribute More Than 5 of Cocaine Base	11/09/1999	1
21 U.S.C. 841(a)(1)	Possession with Intent to Distribute less than 5 Grams of Cocaine Base	02/08/2000	2 and 3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is _____ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 426-17-7899

Defendant's Date of Birth: 04/26/1960

Defendant's USM No.: 05231-025

Defendant's Residence Address:

923 S. 12th Street

Mt. Vernon, IL 62864

Defendant's Mailing Address:

Same as above

11/08/2001

Date of Imposition of Judgment

Signature of Judicial Officer

J. Phil Gilbert, District Judge

Name and Title of Judicial Officer

Date

DEFENDANT: JESSE JONES
CASE NUMBER: 4:00CR40071-001-JPG

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 151 months.
151 months on Counts 1, 2 and 3. All Counts to run concurrent with each other.

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be placed in the Intensive Drug Treatment Program.

☒ The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. _____ p.m. on _____
as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____
as notified by the United States Marshal.
as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JESSE JONES
CASE NUMBER: 4:00CR40071-001-JPG

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years
years on Count 1 and 3 years on Counts 2 and 3. All Counts to run concurrent with each other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and two periodic drug tests thereafter.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JESSE JONES
CASE NUMBER: 4:00CR40071-001-JPG

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall participate as directed and approved by the probation officer for treatment of narcotic addiction, drug dependence, or alcohol dependence, which includes urinalysis or other drug detection measures and which may require residence and/or participation in a residential treatment facility. Any participation will require complete abstinence from all alcoholic beverages.

The defendant shall complete a vocational rehabilitation evaluation as directed by the probation officer and follow the recommendation of said evaluation as required.

DEFENDANT: JESSE JONES
CASE NUMBER: 4:00CR40071-001-JPG

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$ -0-	\$ -0-

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

<u>Name of Payee</u>	<u>*Total Amount of Loss</u>	<u>Amount of Restitution Ordered</u>	<u>Priority Order or Percentage of Payment</u>
----------------------	----------------------------------	--	--

TOTALS \$ _____ \$ _____

The above fine includes costs of incarceration and/or supervision in the amount of \$ _____

If applicable, restitution amount ordered pursuant to plea agreement \$ _____

The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

the interest requirement is waived for the _____ fine and/or _____ restitution.

the interest requirement for the _____ fine and/or _____ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: JESSE JONES
CASE NUMBER: 4:00CR40071-001-JPG

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A. ☒ Lump sum payment of \$ 300.00 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with _____ C, _____ D, or _____ E below; or
- ☐ Payment to begin immediately (may be combined with _____ C, _____ D, or _____ E below); or
- C. ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D. ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E. ☐ Payments are due immediately, through the Clerk of the Court, but may be paid from prison earnings in compliance with the Inmate Financial Responsibility Program. Any Financial penalties that remain unpaid at the commencement of the term of supervised release shall be paid at the rate of \$ _____ per month, _____ % of defendants monthly gross earnings, whichever is greater.
- F. ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

App. 6

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: JESSE JONES
CASE NUMBER: 4:00CR40071-001-JPG

STATEMENT OF REASONS
(Not for Public Disclosure)

The court adopts the factual findings and guideline application in the presentence report.

OR

- x The court adopts the factual findings and guideline application in the presentence report, except (see attachment, if necessary):
as to those matters resolved by the court.

Guideline Range Determined by the Court:

Total Offense Level: 31
Criminal History Category: 4
Imprisonment Range: 151 to 188 months
Supervised Release Range: 3 to 5 years
Fine Range: \$ 15,000.00 to \$ 4,000,000.00

X Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: \$ _____

- Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(B)(ii) (or in offenses committed before April 23, 1996, pursuant to 18 U.S.C. § 3663(d)).
- Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3663A(c)(3)(A).
- Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because determining complex issues of fact and related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, pursuant to 18 U.S.C. § 3663A(c)(3)(B).
- For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.
- Partial restitution is ordered, pursuant to 18 U.S.C. § 3553(c), for the following reason(s):

DEFENDANT: JESSE JONES
CASE 4:00CR40071-001-JPG

STATEMENT OF REASONS
(Not for Public Disclosure)

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from sentence called for by the application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following

OR

☒ The sentence departs from the guideline range:

upon motion of the government, as a result of a defendant's substantial assistance, or

☒ for the following specific reason(s):

The Court grants the defendant's Motion for Downward departure based upon 4A1.3. The Court finds that the defendant's true criminal history is substantially less with the criminal history of the other defendant's. The Court therefore based upon 4A1.3 reduces the criminal history from 6 to 4 reducing the imprisonment range to 151 to 188 months (previous range was 188 to 235).

APPENDIX B

Indictment

App. 9

**SUPPRESSED
FILED**

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

AUG 11 2000

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON OFFICE

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

JESSE JONES, a/k/a "TOOT,")

Defendant.)

CRIMINAL NO. 00-CR-40071-JPG

Title 21, United States Code, Section 841(a)(1)

INDICTMENT**THE GRAND JURY CHARGES:****COUNT 1**

On or about the 9th day of November, 1999, in Jefferson County, within the Southern District of Illinois,

JESSE JONES, a/k/a "TOOT,"

did knowingly and intentionally distribute and possess with intent to distribute more than five grams of a mixture and substance containing cocaine base, commonly called "crack cocaine", a Schedule II Narcotic Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 2

On or about the 14th day of January, 2000, in Jefferson County, within the Southern District of Illinois,

JESSE JONES, a/k/a "TOOT,"

did knowingly and intentionally distribute and possess with intent to distribute less than five grams of a mixture and substance containing cocaine base, commonly called "crack cocaine", a Schedule II Narcotic Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 3

On or about the 8th day of February, 2000, in Jefferson County, within the Southern District of Illinois,

JESSE JONES, a/k/a "TOOT,"

did knowingly and intentionally distribute and possess with intent to distribute less than five grams of a mixture and substance containing cocaine base, commonly called "crack cocaine", a Schedule II Narcotic Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL



FOREPERSON



W. CHARLES GRACE
United States Attorney

Recommended Bond: Detention

APPENDIX C

Notice of Appeal

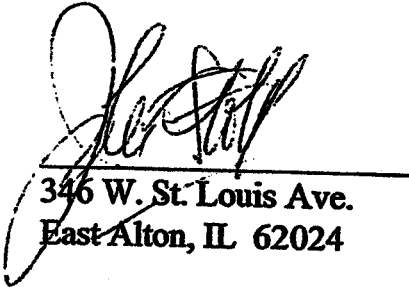
App. 11

CERTIFICATE OF SERVICE

The undersigned certifies that on the 8th day of November, 2001, a copy of the attached *Notice of Appeal* 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

STOBBS LAW OFFICES



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

APPENDIX D

Motion for Downward Departure Pursuant to 5K2.13

App. 13

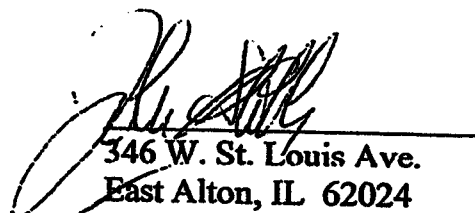
CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of September, 2001, a copy of the attached *Motion for Downward Departure Pursuant to 5K2.13* 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. Tammy Spencer
U.S. Probation Officer
402 West Main
Benton, Illinois 62812

STOBBS LAW OFFICES



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

Daniel J. Cuneo, Ph. D.

Clinical Psychologist

5825 Westcliffe Drive

St. Louis, Missouri 63129

314-846-4439

September 20, 2001

John D. Stobbs, II
Attorney at Law
346 West St. Louis Avenue
East Alton, Illinois 62024

Re: U.S.A. v. Jesse Jones
00-CR-40071-JPG

Dear Mr. Stobbs:

Pursuant to court order on September 18, 2001 I evaluated Mr. Jesse Jones at Williamson County Jail for the purpose of establishing an opinion as to whether Mr. Jones suffered from a significantly reduced mental capacity at the time he committed the offense. Jesse Jones is a 41 year old, never married, African American male who pled guilty on July 10, 2001 to one count of Distribute and Possess with Intent to Distribute More Than 5 grams of Cocaine Base and two counts of Possession with Intent to Distribute Less Than 5 grams of Cocaine Base. In addition to my interview with Mr. Jones, I conferred with my colleague, Dr. Stephen Hardy, who had evaluated Mr. Jones on August 31, 2001. I reviewed the January 23, 2001 Psychological Evaluation by James Peterson, Ph. D. I reviewed the Forensic Report by Daniel S. Greenstein, Psy, D. I reviewed the August 31, 2001 Presentence Investigation Report by Tammi Spences, U. S. Probation Officer, and Jon Gobert, Supervising U. S. Probation Officer. I reviewed Dr. Pravin Gandhi's January 5, 1996. I reviewed the January 30, 1996 TASC substance abuse assessment by Colleen Flanagan. Finally, I spoke with the jail staff as to Mr. Jones' behavior since he has been incarcerated.

At the beginning of my interview with Mr. Jones I informed him of the limited confidentiality of my assessment as I would be sending a copy of my findings to you and you in turn may be sharing them with the U.S. Attorney's Office and the presiding judge. When asked if he understood the aforementioned information and if he wished to continue, Mr. Jones mumbled yes. I then asked him to repeat back in his own words what he had just agreed to do and he was unable to do so. When pushed, he became more agitated and insisted that I "had his papers." After repeated attempts Mr. Jones eventually grasped and was able to repeat back in his own words that I was telling other people about what he told me.

Mr. Jones was escorted to the interview room by a Williamson County Jail staff person. He was dressed in an orange jump suit and walked with a pronounced limp. He had his left pants leg raised and there were pronounced scars from burns on his left leg. He was somewhat difficult to understand as he would mumble his words. These difficulties became more pronounced the

App. 15
Exhibit A

more agitated he would become.

Mental Status Exam revealed Mr. Jones to be oriented to person and place, but not to time. In other words, he knew who he was and that he was at Williamson County Jail, but he could not give the day of the week, month, or year. When pressed, he insisted that he did not know and added that he cannot read or write. This same difficulty with time was seen in both Dr. Greenstein's May 31, 2001 Forensic Report and Dr. Peterson's January 23, 2001 psychological report. Dr. Hardy also related that he had noted this same confusion over time in his August 31, 2001 report. This confusion over time appeared to be due primarily to Mr. Jones' extremely limited intellectual abilities. These same type of difficulty with time and an ability to relate events in sequence has been seen repeatedly in past assessments. For example, Colleen Flanagan in her January 30, 1996 TASC assessment indicated that Mr. Jones had much difficulty relating events in sequence due to a severe learning disability. Ms. Flanagan also indicated that due to Mr. Jones' cognition problems, he was unable to provide a history of his substance abuse. Ms. Spences in her August 31, 2001 Presentence Investigation also related that "Jones appeared to struggle cognitively, and was therefore, unable to render complete and accurate information."

Mr. Jones' memory, both short and long term, was impaired and consistent with his limited intellectual abilities. For example, he could only repeat back accurately three numbers forward and could at best only give a limited history. He could not give dates and had difficulties with significant events in his life. For example, he could not remember when he severely burned his leg or give me any accounting of how the accident occurred. All he could say was that it had happened when he "was a kid." He could not tell me when he was placed on disability or even the reason why. He has given different accounts to different people. This appears to be due not to be a deliberate attempt to deceive, but rather due to his not knowing and confabulating. When pressed for additional information, he would become agitated and stammer over and over, "You got the paperwork."

Mr. Jones denied experiencing any type of hallucinations and no delusional material could be elicited in his thinking. His affect was at time agitated when he would be confronted. He denied any past history of severe depression, suicide ideation, or suicide attempts. His thinking itself was neither loose nor tangential, but rather very concrete. This would be consistent with his extremely limited intellectual abilities.

Intellectually Mr. Jones is functioning in the Mild Mentally Retarded Range of Intelligence based upon his January 22, 2001 performance on the Wechsler Adult Intelligence Scale - III (Verbal IQ 55, Performance IQ 63, Full Scale IQ 54). This would place Mr. Jones' cognitive abilities at the level of an eight to nine year old. It would be consistent with his inability to read or write. It would be consistent with his limited vocabulary, sentence structure, and syntax. It

would be consistent with his poor memory and inability to place events in sequence. It would also be consistent with his placement on SSI. It would be consistent with social security deeming him unable to handle his own funds and having his aunt serve as his payee.

Dr. Greenstein had administered the Kaufman Brief Intelligence Test (K-BIT) and Mr. Jones scored in the Moderate Mentally Retarded Range of Intelligence (Verbal IQ 45, Performance IQ 45, Full Scale IQ 40). Dr. Greenstein had opined that there was a significant decline between Mr. Jones' his January, 2001 performance on the WAIS-III and his May, 2001 performance on the K-BIT and that this decline was beyond what could be accounted for by statistical variance. This may not be the case, though, as the K-BIT was not intended for an in depth assessment of individuals functioning at such a limited level. It was Dr. Greenstein's opinion that Mr. Jones had exaggerated his cognitive impairments and also his deficiencies in the knowledge requisite to be deemed competent to stand trial.

Mr. Jones does have a lengthy history of substance abuse. When asked when he first started drinking, he stated, "I don't know all about that." When asked when he first started drinking, he answered, "Grown." When asked how much he drank, he mumbled, "Drink every day." He could not tell me the amounts he drank, but did admit to getting drunk on a daily basis whenever he had the money. Past records indicated that he has had alcohol withdrawal symptoms, an increase in tolerance, and a loss of control. He admitted to experiencing morning drinking and blackouts.

When asked about his past drug abuse, he stated that he used marijuana "a long time ago." When asked about his past cocaine, he mumbled, "Couldn't even tell you that." Mr. Jones did tell other interviewers that he had used cocaine prior to his arrest. When pressed for more information, he became quickly upset and kept insisting that I "got the papers."

Mr. Jones denied any prior mental health treatment. He also denied any past drug or alcohol treatment. Past records had indicated that his cousin, Ms. Stephanie Moore, indicated that Mr. Jones had attended treatment with Comprehensive Services in Mt. Vernon, Illinois in 1997 or 1998 for substance abuse. The Presentence Investigation indicated that Mr. Jones had successfully completed substance abuse treatment with TASC on December 16, 1996.

When asked whether he had been in prison, Mr. Jones, replied, "Yeah, drugs." When pressed for additional information, he stated that he had been at Vandalia Correctional Facility for four months and added, "The Glass House. I had a brace on my leg. Put a box on your leg there." His Presentence Investigation indicated that he was first charged with Unlawful Delivery of a Controlled Substance when he was 35. He pled guilty and received 30 months probation and six

months jail time. At 37 he was charged again with Unlawful Delivery of a Controlled Substance. He pled guilty on August 5, 1998 and was sentenced to three years. He was paroled on August 17, 1999 and discharged from parole on August 17, 2001.

The diagnosis for Mr. Jones based upon my evaluation would be the following:

- Axis I: Alcohol Dependence in a Controlled Environment
Cocaine Abuse in a Controlled Environment
Cannabis Abuse in a Controlled Environment
- Axis II: Mild Mental Retardation
- Axis III: Deferred

The diagnosis of Alcohol Dependence in a Controlled Environment is based upon Mr. Jones' lengthy abuse of alcohol where he has shown an increased tolerance for alcohol and past withdrawal. His alcohol abuse has caused significant impairment. He would continue to abuse alcohol if he were not in a controlled environment.

The diagnosis of Cocaine Abuse in a Controlled Environment is based upon Mr. Jones' past use of cocaine which has caused clinically significant impairment and recurrent substance - abuse related problems. He would continue to abuse cocaine if he were not in a controlled environment.

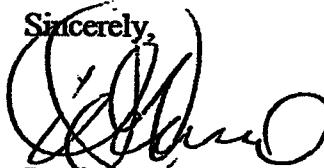
The diagnosis of Cannabis Abuse in a Controlled Environment is based upon Mr. Jones' past use of marijuana which has caused clinically significant impairment. He would continue to use marijuana if he were not in a controlled environment.

The diagnosis of Mild Mental Retardation is based upon Mr. Jones' significantly subaverage intellectual functioning as evidenced by his performance on the Wechsler Adult Intelligence Scale - III (Verbal IQ 55, Performance IQ 63, Full Scale IQ 54). It would be consistent with his performance in the mentally retarded range on the K-BIT. It should be noted that the K-BIT is not the test of choice to assess individuals functioning in the lower levels of mental retardation. Second, it is based upon Mr. Jones' concurrent deficits in his present adaptive functioning. This can be seen by his placement on social security disability and his aunt being his payee. It can be seen by his impairment in scholastic abilities as he is illiterate and cannot even do simple math. It would be consistent with his impaired memory, concrete thinking, inability to place events in sequence, and limited vocabulary and verbal skills. Finally, the onset of his extremely limited intellectual abilities began before age 18.

Jesse Jones
September 20, 2001
Page - 5 -

It would be my opinion that Mr. Jones was suffering from a significantly reduced mental capacity (Mild Mental Retardation) at the time of the alleged offenses. His overall intellectual abilities are below the bottom 1 %ile. Jesse Jones is only functioning cognitively at the level of an eight to nine year old. 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.

If you have any questions or if I can be of any further assistance, please do not hesitate to ask.

Sincerely,

Daniel J. Cuneo, Ph. D.

APPENDIX E

Sentencing Memorandum

App. 20

FILED
OCT 26 AM 10:24
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESSE JONES, a/k/a "TOOT",

Defendant.

)
)
)
)
) No. 00-CR-40071-JPG
)
)
)
)

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 an 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's 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 Messrs. 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 therefor 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

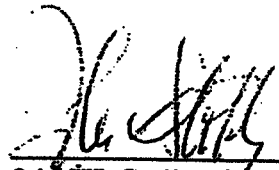
CERTIFICATE OF SERVICE

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

APPENDIX F

**Motion for Downward Departure Pursuant to U.S.S.G. Sections 5K2.0 & 4A1.3
and Memorandum in Support Thereof**

App. 34

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 07-10-2008 BY 60322

))))))))

)

))

))

))

)

Memorandum

With the promulgation of the U.S. Sentencing Commission's Federal Sentencing Guidelines many District Judges incorrectly assumed that there was very little that they could do to alleviate some of the harshness contained in the Guidelines, and rarely granted downward departures where a particular Defendant did not meet the exact requirements of a particular Guideline section. This all changed with the Supreme Court's decision in *Koon v. U.S.A.*, 518 U.S. 81, 135 L.Ed. 2d 392, 116 S.Ct. 2035 (1996), which breathed life into downward departures by greatly broadening the District Court's ability to grant downward departures.

Chapter 1A (4)(b) directs the sentencing court to treat each "guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds any atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." And in drafting the Guidelines, the Commission "did not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."

As will be shown below, Mr. Jones' situation is unique and warrants downward departures based on the fact that the entirety of his circumstances.

Koon explained that a sentencing court considering a departure should ask the following questions:

- "1) What features of this case, potentially, take it outside the Guidelines' 'heartland' and make it a special or unusual case?
- 2) Has the Commission forbidden departures based on those features?
- 3) If not, has the Commission encouraged departures based on those features?
- 4) If not, has the Commission discouraged departures based on those features?"

Here, the Court is presented with someone who has a profound learning disability which he was born with, and for which he never received "real" help due in large part to his poor upbringing in rural Mississippi. The Commission forbids a departure based solely on

a Defendant's background, but what separates Mr. Jones' case from other typical "feel sorry for me background cases," is that it appears as if Mr. Jones was surrounded by a loving family who simply didn't have the resources and/or ability to help him with his severe learning disability. Similarly, if Mr. Jones did in fact attend a few years of school, no teacher took the time to seek some sort of special education classes for Mr. Jones, probably because the school system in Columbus Mississippi didn't have special classes. Mr. Jones was passed from grade to grade without learning to read and write. When someone with limited abilities is not given a chance in life from the very beginning the case is no longer in the "heartland," and a departure is warranted.

The undersigned and Government will quarrel for purposes of 5K2.13 as to whether Mr. Jones' extremely low i.q. amounts to mild mental retardation, but there can be no quarrel over the fact that due to Mr. Jones' severe learning disability he has been receiving Supplemental Security Income (SSI) from the Social Security Administration. Perhaps, technically Mr. Jones would not be eligible for a 5K2.13, but Mr. Jones is anything but the "typical" Defendant who appears before this Honorable Court for Sentencing.

Mr. Jones decided early on that he wanted to cooperate with the Government in the hopes he would have his sentence reduced. Unfortunately, his extremely low i.q. prevented him from giving a proffer which would allow the Government to file a motion for downward departure for substantial assistance. Mr. Jones is not Monte Lesure, a hardened criminal from Mt. Vernon who is intelligent enough to know how to play the system. Mr. Jones is neither smart enough to tell the truth or purposefully lie to the Government about his activities in illegal narcotics. It is true that the Government did not file a motion to enhance Mr. Jones' sentence from a 5 year mandatory minimum to a 10 year mandatory minimum, and the undersigned is grateful that the Assistant U.S. Attorney handling this case was able to convince his office to stray from its policy—in this particular case—of filing the enhancement for Defendants who do not cooperate with the Government. But the effect that this decision has on this case is that it allows for this Honorable Court to depart to a sentence

of under 10 years if it desires. If not, this Honorable Court can sentence Mr. Jones to the "best" sentence he could have received had the Government filed the enhancement, 10 years.

Mr. Jones' disability adversely impacted his attempt to successfully proffer with the Government and for purposes of 5K2.0 this Honorable Court can take that into consideration when deciding whether or not to depart downward. Mr. Jones proffered four times and made a diligent effort to be truthful, but because of his mental problem he was unable to do so. Quite simply, he would be unjustly prejudiced by not receiving a departure because the effect of such a refusal would be to discriminate against someone based solely on a disability. If this were a civil case, Mr. Jones would be protected by the Americans with Disabilities Act, but where his life is truly in the hands of others, including the undersigned, he doesn't seem to have the same protections, and there's just something wrong with that.

The foregoing paragraph is not an attempt to impugn the Government or its agents. The F.B.I. agent handling this case has treated Mr. Jones with nothing but respect, compassion and understanding. But, when Rule 35's are filed in this District, the Government limits itself to not requesting more than 1/3 off of a Defendant's sentence, no matter the cooperation the Defendant gives. There is no rhyme or reason as to why a Defendant who gives minimal information, but whose cooperation convinces others to plead guilty would receive the same recommended 1/3 reduction as a hypothetical Columbian drug lord who gives information about multi-tons of drugs, murders etc. Here, someone with a severe learning disability who was diagnosed as mildly retarded by two professionals, was not able to "cooperate" with the Government because of this disability, yet Garrett Watson, Kalim Wilson, who do not have Mr. Jones' disability were able to successfully proffer. The provided information against Mr. Jones and no doubt because of this "substantial cooperation" will receive some sort of a sentence reduction.

Because of two minor drug convictions in Jefferson County, Mr. Jones will be sentenced as a Career Offender. As such his criminal history category will be a VI. His two charges involve an amount of "crack" cocaine barely exceeding 5 grams and a second charge

involving less than 1 gram of "crack" cocaine. Yet, without a departure, the "best" sentence Mr. Jones can hope for is 15 years. The two State charges involved personal use amounts, yet without realizing the horrible implication of pleading guilty to distribution rather than possession, and certainly to get a quick deal, Mr. Jones pleaded guilty. There is caselaw which deals with the issue of over-representation of criminal history, and the question for this Honorable Court to decide is whether or not other hardened criminals who have appeared before this Honorable Court as Career Offenders are "equal" to Mr. Jones? Likewise, is Mr. Jones similarly situated to a "kingpin" who has been smart enough to avoid being arrested on State charges so that when he appears before this Honorable Court for sentencing he is a criminal history category I, II or III? At the worst, Mr. Jones would be a criminal history category IV, which is what he would be under Guidelines before the Career Offender statute makes him a criminal history category VI.

Here, the denial of downward departures would have the effect of "generalizing" Mr. Jones' situation instead of developing a particular purpose for the sentence. In this particular instance, mechanically applying the Guidelines and sentencing Mr. Jones to 15 years would treat him like any other Defendant who is a Career Offender, without regard for the two minor convictions which make him a Career Offender, his background, or his severe learning disability which prohibited Mr. Jones from cooperating with the Government. A downward departure from 15 years to an "ultimate" sentence of between 7 and 10 years would be just and fair under the circumstances.

Conclusion

WHEREFORE, Defendant requests that this Honorable Court grant his Motion for Downward Departure under 4A1.3 and find that a criminal history category VI over-represents his criminal history and find that Defendant is a criminal history category IV. Also, Defendant requests that this Honorable Court grant his Motion for Downward Departure pursuant to 5K2.0 and depart downward to a sentence of between 84 and 120 months or 7 to 10 years.

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 30th day of October, 2001, a copy of the attached **DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE PURSUANT TO U.S.S.G. SECTIONS 5K2.0 & 4A1.3 & MEMORANDUM IN SUPPORT THEREOF** 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 Street
Benton, Illinois 62812

STOBBS LAW OFFICES



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

APPENDIX G

Pages 37-39 of Sentencing Transcript

App. 41

1 a 15-year sentence would shock the conscience of the Court
2 in relation to this particular case. That, again, is not.

3 The fact that the sentence may shock the
4 conscience, I do not think, is a grounds or justification
5 for departure. The departure has to be based on factors as
6 set forth in the guidelines. You know, there's various
7 different factors in considering departures, departure for
8 diminished capacity, departures for aggravating or
9 mitigating circumstances, departures for overrepresenting
10 criminal history, and departures for under duress. And so
11 the Court does agree that it does have the right to depart
12 under these grounds and is going to go through each of them.

13 First of all, with respect to the departure for
14 diminished capacity under 5K2.13, the Court is going to
15 exercise its discretion in not granting a downward departure
16 on that ground. There's no question, and the Court's not
17 going to reiterate what everyone, basically, agrees, that
18 Mr. Jones has severely reduced mental capabilities. But
19 inability to reason and lack of judgment would fit probably
20 95 percent of the defendants that appear before this Court.
21 And when the Court reviews 5K2.13, the Court does not feel
22 that this defendant would meet the criteria to downward
23 depart under that section of the guidelines.

24 5K2.0, the heartland, the Court, similarly,
25 is going to exercise its discretion not to grant a downward

1 departure on that ground. Again, the Court does not feel
2 that this particular case, the fact of his low IQ and poor
3 childhood and inability to reason and lack of judgment and
4 his retardation takes it out of the heartland. Again, that
5 could fit quite a few of the defendants that have appeared
6 before me, although I will say that this defendant probably
7 is more severely mentally handicapped than probably most, if
8 not any, other defendant I have seen before me. But again,
9 the Court's exercising its discretion not to depart downward
10 under that ground.

11 With respect to the 4A1.3 grounds for downward
12 departure for overrepresentation of criminal history, the
13 Court is going to grant that motion for downward departure
14 finding that, specifically, that this Court concludes that
15 this defendant's criminal history is significantly less
16 serious than that of most defendants with the same criminal
17 history. You know, the Court has not and I'm not
18 establishing a precedent that someone with two convictions
19 for unlawful delivery of a controlled substance, even if
20 it's a minuscule amount such as here, when compared to other
21 amounts of drugs that this Court usually sees before it, is
22 a grounds for downward departure for overrepresentation.

23 The Court is, in making its decision that it
24 overrepresents, is taking into the factor that his previous
25 adult convictions were, basically, traffic oriented, driving

1 on a suspended license, operating an uninsured motor
2 vehicle. And because of these two unlawful deliveries,
3 he -- under the law he's jumped to a career offender, a
4 career offender status with a Criminal History Category VI.
5 And in the judgment of this Court, that just grossly
6 overstates the criminal history compared to other people
7 similarly situated.

8 There's no question, in the opinion of this Court,
9 that this defendant may be technically, under the law, is a
10 crack dealer, but realistically, Mr. Jones is not a crack
11 dealer in the realistic use of that term as this Court has
12 observed in its over 9 years of trying drug cases in federal
13 court. Mr. Jones is just used by crack dealers. He doesn't
14 have the capacity to open up a business of selling crack.
15 He is used by other people, like he was used by Monte Lesure
16 and others. And he will likely be used again when he gets
17 out of prison if he goes back to Mt. Vernon.

18 He does not have the ability to -- he knows right
19 from wrong, but he is subject to being used, taken advantage
20 of by other people, and he does not have the independent
21 thinking to be a crack dealer in the street use of that
22 term, although technically under the law he is.

23 So the Court's going to, for those reasons, find
24 that the Criminal History Category of VI overrepresents this
25 defendant's true criminal history and criminality and will

APPENDIX H

**Motion for Examination to Determine Mental Fitness to Stand Trial
and Motion to Continue**

App. 44

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESSE JONES, a/k/a "TOOT",

Defendant.

)
)
)
)
)
)
)
)
)
)

No. 00-CR-40071-JPG

U.S. DISTRICT COURT
SOUTHERN DISTRICT IL
CLERK

00 NOV 30 AM 9:44

FILED

**DEFENDANT'S MOTION FOR EXAMINATION TO DETERMINE
MENTAL FITNESS TO STAND TRIAL AND MOTION TO CONTINUE**

Comes now Defendant, by his attorney, John D. Stobbs II, and for his Motion for Examination to Determine Mental Fitness to Stand Trial states:

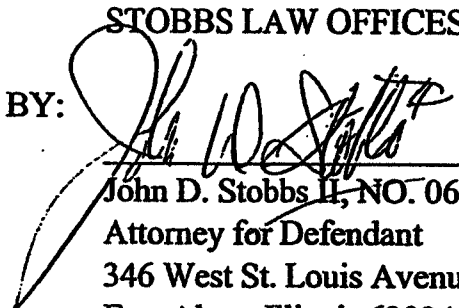
1. The undersigned has met with Defendant on at least five occasions, and has developed concerns regarding the ability of Defendant to assist at trial.
2. It appears to the undersigned that Defendant has some sort of a mental defect because of an extremely low *i.q.* to fully understand the ramifications of the charges against him.
3. The undersigned is **NOT** in any way claiming that there is something psychologically wrong with Defendant and is not requesting a psychiatric or psychological evaluation of Defendant for the purpose of determining "sanity."
4. Rather, the undersigned is requesting that an independent third party evaluate Defendant to determine whether or not Defendant is suffering from any form of mild retardation which prevents Defendant from assisting at trial and which could be used as a possible defense at trial.
5. Because Defendant is requesting this evaluation, he likewise is requesting that all dates be continued.

WHEREFORE, Defendant requests that all dates be continued and that this Court allow him to be evaluated by an independent third party to determine whether or not Defendant has a mental condition which could be used as a possible defense at trial or which impedes his ability to fully assist his attorney at trial.

JESSE JONES

STOBBS LAW OFFICES

BY:

A handwritten signature in black ink, appearing to read "John D. Stobbs II", is written over a horizontal line.

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 30th day of November, 2000, a copy of the attached **DEFENDANT'S MOTION FOR EXAMINATION TO DETERMINE MENTAL FITNESS TO STAND TRIAL AND MOTION TO CONTINUE** 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

STOBBS LAW OFFICES


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

against him and whether or not the consequences thereof would impede Defendant's ability to properly assist with his defense.

6. The examiner's opinion as to whether the Defendant was fully capable of understanding at the time of the offense charged the ramifications of his conduct.

The defendant is ordered committed to the Attorney General for placement in a suitable facility for a reasonable period, but not to exceed 30 days.

The 30 days allowed for the examination, under this order shall begin on the day the defendant physically reports to the designated institution.

IT IS SO ORDERED.

DATED: _____, 2000.

J. PHIL GILBERT
Chief Judge