

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 13-CR-00164-RWS-DDN
)	
JOSE RIVERA,)	
)	
Defendant.)	

DEFENDANT’S SENTENCING MEMORANDUM

Jose Rivera is someone who life has already punished. He is one of those people who plod along in life plagued by bad luck. Some of the bad luck, like being sexually abused as a 7 year old by his uncle or his son’s death Jose had no control over. Other bad luck like this case is of Jose’s own making.

Jose is able to argue at Sentencing that a variance from the Advisory Guideline sentence is in order so that he can request a 5 year sentence. The Government is expected to argue for a sentence of nearly 18 years. Generally, a chasm as wide as this is difficult for a Defendant to bridge. However, as will be shown below, a 5 year sentence meets all of the requirements of 18 U.S.C. 3553.

I. Jose Rivera

Why? That’s the question that exists in any federal criminal case. Generally, this question is answered by “greed.” Here, the twist on “greed” is that Jose committed his crime out of “ financial necessity.”

Any sane person would conclude that dealing illegal narcotics to make ends meet is foolhardy. But, a father desperate to provide for his family is not sane. A father, like Jose, with a documented history of mental illness combined with an autistic son he needed to support crossed the line into committing illegal acts and now will be sentenced for those criminal acts.

A. Previous Criminal Record

Great hay can be made out of Jose's prior criminal record. The obvious argument will be that because of his criminal record Jose knew the ramifications of his actions and as such deserves an 18 year sentence.

Superficially, Jose's criminal record appears to be horrid. Seven Criminal History points and a Criminal History Category IV is bad. But, a closer look at ¶¶52 through 61 show someone whose entire criminal conduct occurred during Bill Clinton's first term as President --- nearly 20 years ago, when Jose was in his early 20's. The passage of time, while not eliminating Jose's criminal record should at the very least mitigate its impact on the ultimate sentence this Honorable Court imposes.

B. Paragraph 66

“According to Rivera, when he was seven years of age, he was sexually molested by his uncle, who was in his twenties.” This one sentence in the PSR took approximately 10 minutes for Jose to tell the probation officer. Jose had to stop, ask for water, and cry. His initial instinct was not to tell a “stranger” about being abused by his uncle, due to embarrassment. This one sentence is axiomatic of the “bad luck” suggested in the opening paragraph of this Sentencing Memorandum. It is impactful when someone carries the yoke of sexual abuse by a family member when they are only seven years old.

Mixed into this cauldron of sexual abuse is the physical abuse Jose witnessed his father give his mother. The abuse was so severe that Jose's Mom was hospitalized on two different occasions.

Partly because of the spousal abuse he witnessed, Jose did not want anything to do with his father. Even though they live in the same city Jose and his father haven't seen each other in decades. The lack of a male role model growing up obviously impacted Jose.

Jose's youth was stolen from him at age 7. How can any child have a “normal” childhood after going through what Jose went through? Not surprisingly, Jose began to act out when he was a teenager. This “rebelliousness” lasted until Jose was approximately 25 and resulted in several incarcerations mentioned in the PSR.

C. Nancy Diaz-Rivera

Upon meeting his future wife Nancy, Jose had to make a decision. Either, continue his “rebelliousness” which would result in further incarceration or be the man that he was meant to be. “Rebelliousness” meant life without Nancy. A life with Nancy meant stability.

The undersigned has met Nancy and she is a strong woman who fully supports Jose as witnessed by Exhibit A. She is disappointed in the decisions Jose made which will ultimately result in his incarceration, but supports him because she understands the love that Jose has for her and their children. (See Exhibit B)

Jose was blessed because Nancy had two young sons when they met, Anthony and Nelson. Jose ultimately adopted both boys and raised them as his own. Probably because Nelson was younger than Anthony and enjoyed sports, Jose quickly developed a tight bond with him.

Nelson was a star linebacker at Mather High School in Chicago. He had begun receiving telephone calls from college recruiters. He and Jose spent countless hours together talking about football and Nelson’s future. Bad luck followed insofar as Nelson was shot and killed in 2004.

D. Jose’s Mental Condition

Understandably, Jose’s mental condition was fragile due to being sexually abused as a 7 year old and witnessing his father beat his mother. This fragility was exacerbated after Nelson’s death. In 2007 Jose was involved in a car accident with his youngest son Jose Jr. who suffers from autism. The airbags deployed and the car was filled with smoke. Jose feared that Jose Jr. had been killed. This event set him over the edge emotionally and psychologically.

He was diagnosed with posttraumatic stress disorder (PTSD) as well as depression. As a result of the wars in Iraq and Afghanistan very little needs to be said about what PTSD is and how it impacts individuals like Jose. The PTSD diagnosis subsequent to a traffic accident shows both how much Jose loves his family and how fragile he is/was emotionally.

3 years prior to the accident Jose lost his son, Nelson. Jose obviously hadn't recovered from that tragedy or the sexual abuse when he was involved in a traffic accident where neither he or his son were injured. This anxiety, which persists today, caused his PTSD.

Oftentimes, just before Sentencing, a Defendant's physical or emotional condition mysteriously is exacerbated. Obviously, this is done in order to obtain some sympathy. Here, Jose's depression and PTSD were diagnosed nearly 6 years ago. He was prescribed Lexapro and Paxil, but is currently taking Zoloft and Trazadone.

Being charged in this federal conspiracy has caused untold anxiety for Jose, but thankfully, through pretrial services he is able to see a counselor and talk about his fears.

E. Support of Autistic Children

Like physical and mental conditions, acts of kindness and charity tend to appear out of thin air just prior to a Defendant's sentencing date.

As a young man, Jose participated in various athletic endeavors. He passed his love of sports to his children. Jose wanted his autistic son Jose Jr. to participate in sports, and when no one stepped forward to volunteer to coach the baseball team for children with disabilities in 2009, Jose stepped up to the plate.

Jose wanted Jose Jr. and other children with disabilities to become involved in other sports and started a bowling league for children with disabilities.

F. Jose Rivera Jr.

Writing about Jose Rivera and the bond he has with his son Jose Jr. is impossible. All fathers want to have a special bond with their sons. Children born with disabilities require special attention which makes the bond that much more "special." and that much stronger.

Jose Jr. was only 2 pounds when he was born premature. Nancy was suffering from postpartum depression and Jose bore the responsibility to take care of his son. The first 3 years of his young life, Jose Jr. was ferried back and forth to the hospital every few months. Jose took his son to the hospital and waited with him while there. This time with Jose Jr. only strengthened the natural bond that a father has with his son.

Jose Jr. was not developing normally. Jose and Nancy assumed that it was because Jose Jr. had been born prematurely and they held out hope that as time progressed, Jose Jr. would develop as their other children had. At the age of 3 Jose Jr. was not communicating, so after a battery of tests, he was diagnosed with autism.

At the time of the diagnosis, because of a back injury resulting in Jose not being able to maintain “normal” employment, Jose was the primary caregiver of Jose Jr. Jose helped his son learn to speak at age 5 and has been a constant presence in his son’s life.

Good fathers are always a “constant” presence in their children’s lives. But, for a child with a severe disability like Jose Jr., the word “constant” takes on a completely new meaning. Jose has been “there” for Jose Jr. physically, emotionally and spiritually in ways that parents like the undersigned cannot comprehend.

For example, the PSR notes in paragraph 14 that Jose Jr. recently learned to tie his shoes. He is 14 years old. Imagine the patience and understanding that Jose & Nancy had in order to help Jose Jr. accomplish this. Each day with Jose Jr. is a struggle, but one that Jose is happy to have.

Jose Jr. will live the rest of his life with Jose and Nancy. At the very least 5 of those years will be while his father --- his caregiver --- is incarcerated in the Bureau of Prisons. Jose Jr. is incapable of processing that his father will be away for 5 years. He will only know that a huge presence in his life will no longer be there.

II. 3553(a) Considerations

A. Introduction

As embryos humans become wired to try and “blame” their actions on something or someone if they are caught. Humans become “trained” to shirk responsibility and to “blame” their failures on someone else or on their personal weaknesses or traits.

Humans become trained to not let a weakness or disability be used as an “excuse.” When viewing someone who has committed a crime it is very easy to lack sympathy for a person’s weaknesses, because it is easier to be judgmental than compassionate.

At one time, the federal criminal justice system prohibited any sort of compassion on the part of sentencing judges. Draconian is the word most often used to describe the

U.S. Sentencing Guidelines. It seems that the drafters of the Guidelines went back to the childhood perception of not using personal weaknesses as an excuse for committing crimes. If a Defendant tried to explain their conduct through the prism of a personal weakness like drug addiction or a horrible childhood, the probation officer, Assistant U.S. Attorney and sentencing judge would practically ignore this explanation as an “excuse.”

No one can argue with the fact that Jose Rivera took the “easy” way out. In order to make ends meet, he began dealing drugs. But, the money he earned from dealing drugs went directly to supporting his family as juxtaposed to new vehicles or other “flashy” drug dealer type items. Jose had a history of abuse and had weakened mental state as a result of his son’s death and the traffic accident. Jose’s mental condition is documented.

The bottom line is that there is a cause and effect. The cause of Jose’s involvement in this conspiracy was his need to make ends meet. Jose became involved in this conspiracy in order to provide for his family. There is no doubt whatsoever that Jose is using his dreary financial circumstances and mental condition as an “excuse” in order to receive a reduced sentence. But, those financial circumstances and his mental condition are real and obviously had an impact on his conduct.

Every time Jose facilitated the distribution of illegal narcotics, he increased the possibility that he would be caught. He had been to prison before and knew what loss of freedom meant. But, desperate people do desperate things and staring Jose directly in the face was his dismal economic situation and his need to provide for his family.

Jose made bad choices and he is going to be punished for those choices. The question is whether or not a 5 year sentence, 18 year sentence or somewhere in the middle is sufficient punishment.

B. Gall v. United States

The Sentencing Guidelines were enacted to ensure that “the crime fit the time.” The goal was to reduce sentencing disparities. Over time though Circuit court decisions slowly eroded a sentencing judge’s ability to ensure that a particular Defendant is treated fairly. Relevant conduct was liberalized in such a way so that a first time non-violent

drug offender could easily receive a 20 year sentence. Appellate decisions ensured that various enhancements were practically “automatic.” Downward departures of practically any kind were frowned upon. In the “old” days Jose’s could only hope for a 10 or 20 year sentence.

Booker began the slow and seemingly tedious return to a system where the sentencing judge could view the entirety of the circumstances including *who* the Defendant is and not rely solely on the Guidelines. A sentencing judge could now have true input into the sentence that he handed out.

The culmination of *Booker* is *Gall v. United States*, 128 S. Ct. 586; 169 L. Ed. 2d 445; 2007 U.S. LEXIS 13083; 76 U.S.L.W. 4009 (Dec. 2007) But for *Gall*, Jose would be hamstrung to try and argue what he feels is an appropriate sentence. Once this Honorable Court determined the Guideline calculations, realistically the sentencing would conclude.

The language in *Gall* is breathtaking. The Supreme Court held that a District Judge “may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented.” (p. 3) As will be shown below, a 5 year sentence is appropriate and meets all of the factors set out in 18 U.S.C. §3553 (a).

Gall allows the District Court to use its own judgment and common sense in determining what sentence should be imposed on a particular Defendant based in part on *who* the Defendant is.

No individual, including Jose Rivera wants to go to prison, but he knows that he has to be punished for what he did. Jose is hopeful that this Honorable Court will fashion a sentence which will not require incarceration for more than 60 months. The argument against this type of a sentence would be that “Jose Rivera knew what he was doing was wrong. A lot of people have miserable economic situations, and those people don’t deal drugs. He could have tried to find a second or third job.” *Gall* beautifully rebuts this argument. Just going through this ordeal has had a huge impact on Jose.

As will be shown below, Jose has already begun to pay a huge price for what he did. Pre-*Gall*, the best sentence Jose could hope for would be at least 10 years. Post-

Gall, this Honorable Court can vary from this draconian Guideline sentence and depart downwards to a sentence of 5 years.

B. 18 U.S.C. 3553(a)(1)

At page 22, *Gall* lists and discusses the seven factors that a sentencing court *must* consider. The first factor is a broad command to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." *18 U.S.C. § 3553(a)(1)*. It is the undersigned's position that Jose comes out ahead on this point.

Even though this conspiracy consists of voluminous discovery, wiretaps and dozens of co-conspirators, at the end of the day it is a pretty straightforward drug conspiracy. St. Louis drug dealers needed heroin and went to Chicago to locate a supplier. Jose became engrossed in the conspiracy and ultimately was arrested, charged and now awaits sentencing for his actions.

Trying to decide where Jose fits into the scheme of things is different though. The only blemish on Jose Rivera as a person is his criminal history, which concluded nearly 20 years ago.

Jose's nature is that of a loving, gentle father and husband. Jose's nature is of a man dedicated to helping his children, especially his autistic son. Jose's nature is of a man traumatized by the loss of one son and near loss of another.

The history and characteristics of Jose are trumpeted in the family and friends that he has. In the past 20 years he has led a law abiding life devoted to his family, and this should count for something at his sentencing.

The second factor requires the consideration of the general purposes of sentencing, including:

"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." § 3553(a)(2).

The undersigned has written numerous Sentencing Memorandums going through each of the foregoing sections in excruciating detail to show why his client deserves a particular sentence. The bottom line for any sentencing imposed is to ensure that the Defendant has learned their lesson, won't break the law again and will become a productive member of society.

Starting with (c), protecting the public from further crimes of the Defendant assumes that there will be further crimes. Undoubtedly, someone like Jose who has been incarcerated should have known better. But, a 5 year sentence under the circumstances is harsh. Jose had money problems and took the easy way out. Instead of getting help when his mental condition became exacerbated with the additional pressures caused by money problems, Jose began dealing drugs. Jose will not be a part of Jose Jr.'s life for at least the next 5 years. It is implausible to think that he has not learned his lesson.

Subsections (A) and (B) are the difficult hurdles to clear. Requesting what might be considered a "light" sentence seems to be contrary to just punishment and deterrence. The argument will go that if Jose gets off easy, no message will be sent to others similarly situated who might have money problems and decide to deal drugs as a way to solve these problems.

It seems that the only thought that goes into just punishment and deterrence is the time a Defendant is incarcerated. There is a mental/psychological side to incarceration that too often is ignored. The fear of being incarcerated and being removed from one's family is oftentimes worse than the actual incarceration.

Before this Honorable Court is a man who is the caregiver for an autistic child. A man with his own mental issues resulting from sexual abuse and tragic loss. Jose's "world" is his family and especially Jose Jr. A 46 year old man like Jose views 5 years of incarceration and the separation resulting therefrom completely differently than a 20 year old.

Jose committed a crime and needs to be punished. The question is how big does the “stick” need to be to ensure just punishment? For example, how is it possible to quantify the fear that someone like Jose has for Jose Jr.’s future because he is going to prison for at least 5 years? How is it possible to quantify the humiliation and degradation that Jose has caused his family as a result of his actions? How is it possible to quantify the stress and anxiety that Jose has felt since he was charged? How is it possible to quantify what it means to the father of a son with disabilities like Jose, who because of his actions will cause untold problems for Jose Jr. in the future? How is it possible to quantify the stress that a husband like Jose must feel knowing that when he is sent to prison the family who depended on him for emotional and financial support will be alone?

A lot of people, perhaps the Government included, would say that Jose should have thought of that before becoming involved in criminal conduct. That’s a fair point. At the same time though post-*Gall* these seemingly small matters figure into the just punishment and deterrence equation.

The fourth and fifth elements discuss the Sentencing Guidelines and policy statements and have been thoroughly discussed above.

3553(A)(6) deals with "the need to avoid unwarranted sentence disparities.” Simply stated, it is a crap shoot as to what unwarranted sentence disparities even means. The case was essentially wrapped up once Jose was arrested. Any cooperation type of Plea negotiations were non-existent. The benefit Jose received from the Plea Agreement was an ability to argue for 5 years as opposed to 10 years. There will always be disparities in sentencings because each Assistant U.S. Attorney, sentencing judge and defense attorney are different.

Here, what needs to be taken into consideration are the personal hurdles that Jose had to deal with on a daily basis. He suffers from depression and PTSD. He is the primary caregiver of an autistic son. When crafting a sentence and determining whether or not a 5 year sentence might create some “sentencing disparity,” this Honorable Court must take into consideration the *entire* Defendant.

Preceding the 3553 list is a general directive to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing described in the second factor. It has been discussed above that a 5 year sentence can be deemed a sentence which is not greater than necessary to comply with the purposes of sentencing.

III. Conclusion

As in all sentencings, this Honorable Court has the extraordinarily difficult task of deciding how to find the "middle ground" to sentence Jose Rivera. Is 18 years too great? Is 60 months too light?

This case has shredded Jose's personal life. He is keeping his family together by a thread. He does not know how he will explain to Jose Jr. that he is "going away."

The undersigned has developed a great deal of respect and appreciation for Jose Rivera. It has been hard getting to know someone like Jose realizing that the "best" he can hope for is a 60 month sentence.

For the foregoing reasons, Jose Rivera requests a 60 month sentence.

JOSE RIVERA

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2014, a copy of the attached *Sentencing Memorandum* was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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