

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
 v.) CRIMINAL NO. XXXXXXXX
)
XXXXXXXX)

DEFENDANT'S AMENDED SENTENCING MEMORANDUM
(FILED UNDER SEAL)

Defendant, XXXXXXXX, respectfully submits this amended sentencing memorandum, rewritten in light of United States v. Booker, and asks that it be substituted for the memorandum filed on December 23.

FACTS

The instant offense occurred on October 3, 1999. On that date, XXXXXXXX sold an undercover police officer a small amount of heroin, with a net weight of .11 grams. At the time, XXXXXXXX was a heroin and crack cocaine addict.

The Probation Department has determined that XXXXXX qualifies as a career offender. PSR ¶ 50. If he were not a career offender, based on the amount of drugs involved, the guideline range would be 24 to 30 months.

Defendant's Background

The following information regarding the defendant's background history and circumstances is taken from the

Presentence Report ("PSR"), as well as a report prepared by John Daignault, Psy.D. Dr. Daignault is a psychologist who recently examined the defendant. His report is attached hereto as Exhibit A.

XXXXXXXX is a 33-year-old recovering heroin and crack addict and 7th grade dropout. XXXXXXXX never knew his father, and was raised by his abusive stepfather and mother. Money was tight and XXXXXXXX depended on neighbors for hand-me-down clothes. He was embarrassed at school by his poverty.

At the age of five, XXXXXXXX was struck in the eye by an apple thrown by another child, requiring surgery and losing much of his sight in his right eye.

XXXXXXXX's two half-sisters enjoyed close relationships with their biological fathers.

While living at home, XXXXXXXX had little contact with his mother and stepfather, who smoked marijuana and kept to themselves. He was primarily raised by his half-sister Patsy, who told the probation officer that XXXXXXXX felt neglected by his mother and sorely felt the absence of his biological father from his life. PSR, ¶ 89.

When XXXXXXXX was only 3 or 4 years old, his stepfather began physically and emotionally abusing him. XXXXXXXX was

punched, beaten with belts and switches, and forced to stand in a corner for hours, facing further abuse if he slouched while doing so. When the Department of Social Services investigated neighbors' complaints about the abuse, XXXXXXXX followed his mother's instructions to lie and say that everything was fine.

While in school, XXXXXXXX was a special needs student. After repeating the seventh grade, he left school "because he felt like he was being made fun of by other students." PSR, ¶ 104. XXXXXXXX's prison records indicate that his educational assessment scores fell below average in reading, math, and language. PSR, ¶ 103a. He failed the GED exam in 1999, but has stated that he wants to try again.

XXXXXXX became homeless at the age of 15, when his mother and father kicked him out of their home. They never allowed him to return, not even for one night. He lived in crack houses and began to smoke crack and use cocaine and heroin. He had started smoking marijuana at the age of 10 or 11, after finding it lying around the house. XXXXXXXX continued to live on the streets until he first went to jail, at the age of 18, in 1989. During his time on the street, he was shot in the stomach, requiring surgery.

Psychological evaluations of XXXXXXXXX conducted when he was a teenager identified his feelings of anger and abandonment regarding his lack of a father and noted that he was amenable to treatment. PSR, ¶ 97-98. An evaluation conducted at McLean Hospital in May 1988 observed that he felt regret and remorse for his behavior and had the potential for "better coping with stress and internal impulses." PSR, ¶ 98. Unfortunately, it appears that XXXXXXXXX did not receive any treatment as a result of these evaluations.

According to Dr. Daignault, "XXXXXXX cries profusely as he recalls how he had nowhere to go at this young age. 'I just wanted to be part of a family! I didn't know about this drug stuff until I went to the streets! I had nowhere to go! I just wanted a family!'" Psychological Evaluation at 4.

XXXXXXX describes feeling that his family didn't care. "It made me feel I wasn't supposed to be on this earth . . . If your mother doesn't love you, no one will." Psychological Evaluation at 4.

At the time of the instant offense, XXXXXXXXX was using heroin and crack daily.

Dr. Daignault diagnoses XXXXXXXXX with a chronic Major Depressive Disorder. He attributes XXXXXXXXX's drug use to an effort to self-medicate this depression.

ARGUMENT

Under the Supreme Court's decision in United States v. Booker, 543 U.S. _____ (2005), the sentencing guidelines no longer are binding on the court. Instead, the court should look to 18 U.S.C. § 3553(a), and impose a sentence which is "sufficient but not greater than necessary" to achieve the four purposes of sentencing set forth in § 3553(a)(2). In imposing sentence, the Court must consider all of the factors set forth in § 3553(a)(1)-(7). While § 3553(a)(4) is the applicable guideline range and § 3553(a)(5) is the Commission's policy statements, including departures, other factors play an equal role under the statutory scheme. These include "the nature and circumstances of the offense and the history and characteristics of the offender." 18 U.S.C. § 3553(a)(1).

The nature of the offense in this case is the sale of approximately one-tenth of a gram of heroin for \$70 to an undercover officer. Were it not for XXXXXXXXX's record, the guidelines would call for a sentence of 24-30 months. XXXXXXXXX

already has spent 43 months in custody, far longer than any other period of incarceration he ever has experienced.

XXXXXXXX's personal history and characteristics also support the notion that a sentence of 12½ years would be unduly harsh under the circumstances.

As Dr. Daignault notes, XXXXXXXX "is the product of an extremely abusive, neglectful, and traumatic development, reportedly marked by abandonment by his biological father, caretakers who used marijuana regularly, neglect by his mother, and extensive physical abuse." Psychological Evaluation at 5. "XXXXXXXX longed for acceptance and love in his family of origin but felt rejected and scorned on every front." Id.

XXXXXXXX's underlying trauma and depression fed the early development of an enduring drug addiction. "At a very early age, XXXXXXXX discovered the anaesthetizing effects of substances . . . which he found suppressed his self hatred, reduced his emotional dysphoria, and produced artificial states of excitement and energy, as well as a sense of belongingness. He quickly developed a full blown addictive disorder, relying on these substances to 'treat' his underlying depression." Psychological Evaluation at 6.

XXXXXXXXX told Dr. Daignault, "I used drugs to not care about myself . . . I never enjoyed drugs; they took me out of my misery." Psychological Evaluation at 4. He also told the Probation Officer "that the drugs and alcohol 'knocked him out,' and helped him to cope with his fears while living on the streets." PSR, ¶ 102. This is not a case where XXXXXXXXX chose to use drugs in order to get high; instead, he took them in order to survive psychologically. "His chronic failure to overcome his substance disorder is directly related to the self-destructive trajectory he traveled along, due to these underlying psychological issues." Psychological Evaluation at 6.

Dr. Daignault concludes, "There is a direct causal relationship between XXXXXXXXX's psychological symptoms and his commission of the instant offense with the development of his substance addiction as an intervening variable aimed at self-medicating his psychological disorder. In my clinical judgment, his motivation in the instant offense was to ensure the ongoing availability of substances, with which he was attempting to self-medicate his excruciatingly painful psychological disorders." Psychological Evaluation at 6.

XXXXXXXXX's criminal record is directly related to his unusual circumstances, fending for himself on the streets at a

young age, seeking refuge in crack houses, and using drugs to self-medicate the depression that arose from his abusive and neglected upbringing. Dr. Daignault concludes that once XXXXXXXX's underlying psychological disorders and related substance abuse are treated, "the risk of criminal recidivism will be even further reduced." Psychological Evaluation at 7.

With the exception of one period when he was treated for depression on an outpatient basis, XXXXXXXX has not received any significant psychological treatment and has never been in a comprehensive drug treatment program, although he has occasionally tried to abstain from the use of drugs and participated in a drug program in prison.

In fact, XXXXXXXX reports that upon release from his last period of imprisonment, he tried to refrain from drug use for a period of time, but became increasingly demoralized about his financial circumstances and estrangement from his family. He returned to using crack and heroin, "using it daily and constantly by the time of the instant offense." Psychological Evaluation at 4.

XXXXXXX now has been drug-free for 42 months, the longest period of time since he began to use drugs as a young teenager. Dr. Daignault notes that XXXXXXXX has developed a profound belief

in religion, praying every day and attending regular Bible study classes. He also now is receiving support from his family, "tearfully noting that his mother recently extended him an offer to return home to live after he is released from incarceration." Finally, Dr. Daignault notes that "XXXXXXXXX expresses a desire to enter into substance rehabilitation and treatment following his release from custody." Psychological Evaluation at 5.

The purposes of sentencing, as set forth in 18 U.S.C.

§ 3553(a)(2), are:

(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;.

The court may depart in consideration of the Commission's policy statement, U.S.S.G. § 5K2.13, in effect on the date of the offense, because XXXXXXXX committed the offense while suffering from a significantly reduced mental capacity. Departure is warranted because the offense was caused at least in part by XXXXXXX's untreated chronic Major Depressive Disorder. It need not be the "sole cause" but a "contributing cause," that is, it

must have "contributed to some extent to the commission of the offense." United States v. Aker, 181 F.3d 167, 174 (1st Cir. 1999); United States v. Lauzon, 938 F.2d 326, 331 (1st Cir. 1991). Where, as here, XXXXX's drug use was a contributing factor, departure is warranted where a mental illness was also a significant contributing factor, and the defendant used drugs to alleviate the symptoms of an otherwise untreated mental illness. See United States v. Cantu, 12 F.3d 1506, 1514 n(9th Cir. 1993); United States v. McFadzean, 1999 WL 1144909, *3 (N.D. Ill. 1999) (and cases cited therein).

Whether or not the Court relies on U.S.S.G. § 5K2.13, a sentence of five years is sufficient, but not greater than necessary, to reflect the seriousness of the offense: the sale of \$70 worth of heroin. It also will provide adequate deterrence, since it is far longer than any sentence XXXXXXXX previously has served. Given XXXXXXXX's current situation - drug-free for more than 3½ years, with newfound faith, insight, and family support - the need to protect the public from him is greatly diminished, especially if he receives the treatment that he both needs and wants.

The relationship between XXXXXXXX's psychological disorder and trauma and his history of drug abuse and criminal convictions indicates that what is needed in this case is treatment, not

lengthy incarceration. XXXXXXXX has reached a point where he is searching for help, ready and willing to make a significant change in his life. There is every indication that the sooner he can get that help, the more successful he will be in rehabilitating himself.

CONCLUSION

For the foregoing reasons, this Court should impose a sentence of five year's imprisonment.

XXXXXXX
By his attorney,

/s/ XXXXXXXX