

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	CASE NO.
)	
Plaintiff,)	
)	SENTENCING MEMORANDUM
v.)	
)	
M-M,)	
)	
Defendant.)	

Mr. M is charged with illegal reentry into the United States, in violation of 8 U.S.C. § 1326(a) & (b). The statutory maximum penalty is 20 years imprisonment, up to 3 years supervised release, up to \$250,000 fine and a \$100 special assessment. Mr. M entered a plea of guilty to the charge, without entering into a plea agreement with the government and is scheduled for sentencing on April 18, 2005. Mr. M provides this memorandum for the Court's use in administering an appropriate sentence for his crime. This memorandum also contains several attachments with articles of interest, to assist the Court in determining Mr. M's sentence.

In determining a reasonable sentence for Mr. M, the Court needs to be mindful of "its duty to impose a sentence sufficient, but not greater than necessary to comply with sentencing purposes." *United States v. Booker*, 125 S. Ct. 738, 766-67 (2005). Specifically, the Court should examine the following factors when imposing a sentence in this case.

Nature and Circumstances of the Offense and History of the Defendant

In considering the nature of the offense and Mr. M's history, the sentence imposed should be based on the particular factors relating to the offense and the circumstances involving the likelihood of rehabilitation. 18 U.S.C. § 3553. No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted

of a federal offense, which the Court may receive and consider for imposing an appropriate sentence. 18 U.S.C. § 3661.

The Presentence Investigation Report (PSR) gives a summary of Mr. M's history and characteristics in paragraphs 60 thru 63. Mr. M is a native of Michoacan, Mexico. Mr. M ran away from home at age 18 seeking work. He came to the United States by age 29 and has lived in Washington, California and Nebraska. He has several siblings living in the United States and reports that his mother lives in Grand Island, Nebraska. Mr. M is married and has fathered three children. One child is deceased and the other two children live with their mother. Mr. M reports he has a good relationship with his wife.

Mr. M returned to the United States for the same reason many illegal aliens return—to find work and be with family that is living in the U.S. Family ties to the United States drive illegal crossing into the country with overwhelming frequency, as well as the promise of providing a better living for immediate family. By virtue of this prosecution for illegal reentry, Mr. M has learned that he is permanently barred from entry into the United States, unless he manages to gain permission from the Department of Homeland Security to reenter. He has also come to appreciate that his reasons for returning are not necessarily unique, however compelling those reasons may be. Herein, he expresses his intent to abide by the Immigration and Naturalization Act, and not return unless granted express permission to do so.

Sentencing Considerations: 18 U.S.C. § 3553(2)(A) thru (D)

In considering the harm done to society, the sentence imposed should reflect the seriousness of the offense and provide a just punishment for the offense. § 3553 (a)(2)(A).

In doing so, the sentence will promote respect for the law and will be an adequate deterrence for criminal conduct, thus protecting the public from further crimes. § 3553 (a)(2)(A), (B) & (C). The punishment should also provide the defendant with the needed educational or vocational training, medical care, and other treatment in the most effective manner to rehabilitate the defendant so the defendant may return to society in a productive manner. § 3553 (a)(2)(D).

Assessing the seriousness of Mr. M's offense requires some inquiry into the frequency of illegal crossing into the United States. Border Patrol agents apprehended 560,000 illegal immigrants along the 350-mile stretch of Arizona's border with Mexico last fiscal year, according to a Reuters Foundation AlertNet report of March 31, 2005. See Attachment 1, *Foes of Illegal Immigration to Patrol Mexico Border*, Reuters p. 2 (March 31, 2005). As of March 2004, 8.5 million undocumented aliens resided in the United States, which has increased by 23% over the past year to 11 million, according to an Associated Press report of March 21, 2005. See Attachment 2, *Undocumented Immigrants Close to 11 Million*, MSNBC News, Associated Press, p. 2 (March 21, 2005). Mexicans comprise 57% of the 11 million undocumented aliens in the United States. *Id.*

Narrowing the examination to the state of Nebraska alone, the INS estimated in February 2003 that the illegal alien population of Nebraska was about 24,000 residents. See Attachment 3, *Federation for American Immigration Reform*, p.6 (Report also details social and other issues in Nebraska in reference to alien populations in the state, documented and undocumented alike). The numbers are astonishing at first glance and seem to support that punishment for crossing the border ought to be harsh. But, the seriousness of the crime is offset by how illegal aliens, aliens like Mr. M, actually view illegal immigration.

In an article by Victor Davis Hanson, a professor of Classics at California State University in Fresno (Attachment 4, *The Universe of the Illegal Alien*, Background, Center for Immigration Studies, June 2003), the plight and vision of the illegal alien from Mexico is adeptly explained. Dr. Hanson explains that in Mexico, there is a definitive hierarchy in social structure which deprives Mexicans of any realistic hope of escaping poverty. Dr. Hanson states:

For the rustic Mexican who occupies the bottom rung of a static society and has virtually no chance of upward mobility, America represents not just an escape from drudgery, but the phantasm of redemption — a way not so much of getting rich, but of getting even.

Attachment 4, p. 2. Dr. Hanson explains that the wage for menial labor in America is far better than anything earned in Mexico. An unskilled laborer from the Sierra Madre is lucky to make \$25 a week; in California he can easily earn nearly \$10 an hour and often more.

Id at 1.

Illegal aliens from Mexico learn that some Americans are supportive and can deliver housing, medicine, and food beyond anything they can expect at home. Dr. Hanson states:

For all the brutality of America, the immigrant senses a weird sort of kindness here. Or at least he senses the presence of a select and liberal group of Americans in health care, law, education, and government who feel it is their duty to help him, of all people — the lowly immigrant!

Id at 2.

The result is that illegal aliens crossing from Mexico simply do not see their behavior as criminal. An almost collective consciousness, wanting access to some level of prosperity, drives illegal crossing from Mexico. The illegal alien from Mexico sees his action as permissible in the sense that he will work honestly, for honest pay, and not as a crime for which imprisonment is the result.

Mr. M must, however, acknowledge his personal immigration history in relationship to his criminal history. He does understand that all the reasons he may have come to the United States do not justify his past transgressions, which classify him as a person the United States bars from reentry for life.

The Kinds of Sentences Available

The court in considering the above factors should look to the various kinds of sentences available and should look to the sentencing ranges in the advisory Sentencing Guidelines for a recommendation of the applicable sentence for the offense committed including the need for restitution for victims of the offense. § 3553 (a)(3), (4) & (7). Lastly, the court needs to take into consideration the disparities among defendants with similar records who have been found guilty of similar conduct. § 3553 (a)(6).

The presentence investigation report (“PSR”) places Mr. M at a base offense level 8, with 16 points added for a prior conviction for a felony drug trafficking offense for which the sentence exceeded 13 months. An adjustment for acceptance of responsibility is made, reducing Mr. M’ offense level to 21. The PSR also places Mr. M in a criminal history category IV. Based on a total offense level 21 and a criminal history category IV, his advisory guideline range is 57-71 months.

Mr. M did not enter into a plea agreement with the government. The statutory range of imprisonment is 0-20 years, up to \$250,000 in fines, up to 3 years supervised release, and a \$100 special assessment.

Mr. M asserts his criminal history is substantially overstated. The PSR states that three points should be added to his criminal history total for two convictions in 1990 and 1991 that normally would be too old to use in calculating Mr. M’ criminal history. In

paragraphs 42 and 43 of the report, the PSR counts one conviction under 4A1.1(b) for a 180 day sentence on October 19, 1990, and another conviction under 4A1.1(c), for a 30 day sentence on January 23, 1991. The U.S. Probation officer who compiled the report relied upon reports from the Bureau of Immigration and Customs Enforcement, stating that Mr. M last entered the United States on April 1, 1999. Using the April 1, 1999 date, the convictions in paragraphs 42 and 43 can be counted, under U.S.S.G. § 4A1.2(3)(2), as those sentences were imposed within ten years of the defendant's commencement of the instant offense. Mr. M asserts that counting those convictions, which are nearly 15 years old, is an overstatement of his criminal history and the points should not be assessed. Additionally, he reminds the Court he did not admit to entering the U.S. on that date during his plea colloquy, and the government did not assert the April 1, 1999 date as the date of the offense in the Indictment.

Lastly, the court needs to take into consideration the disparities among defendants with similar records who have been found guilty of similar conduct. § 3553 (a)(6). Mr. M has attached to this memorandum a report compiled in November of 2004, which reflects sentencing for illegal reentry defendants across the nation. See Attachment 5, Memorandum, Fast Track Programs (November 22, 2004). Mr. M should be sentenced, at the very least, in accordance with the information provided in Attachment 5.

CONCLUSION

Mr. M should receive a period of incarceration much lower than the advisory guideline range of 57-71 months.

1. A sentence less than 57 months is a just punishment, considering the nature of Mr. M's crime balanced against the factors that influence illegal immigration into the United States from Mexico;
2. The realization that imprisonment is a consequence for crossing into the United States from Mexico illegally, when the social consciousness of the Mexican illegal alien does not comprehend the activity as criminal, is sufficient deterrence, so a lengthy prison sentence is not necessary;
3. With the exception of traffic offenses, Mr. M has not been involved in criminal activity in the United States for nearly 15 years, and his criminal history does not merit a sentence of 57 months or more;
4. Mr. M should, at the very least, be sentenced in accordance with similarly situated individuals in jurisdictions with high incidence of immigration crimes, where a "fast-track" program exists.

RESPECTFULLY submitted, this 1st day of April, 2005.

M-M, Defendant,

By: s/ Jessica L. Milburn

JESSICA L. MILBURN

Assistant Federal Public Defender

222 South 15th Street, Suite 300N

Omaha, NE 68102

(402) 221-7896

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following: Christian Martinez, Assistant United States Attorney, Omaha, NE.

I also certify that a true and correct copy of the above and foregoing was duly served upon Andy Hale, United States Probation Office, 111 South 18th Plaza, #C79, Omaha, NE 68102, by interoffice mail on June 28, 2005.

s/ Jessica L. Milburn