IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA *

v. *

CRIMINAL NO.

CH *

*

* * * * *

SENTENCING MEMORANDUM

A. Background

Mr. H., a 57 year old native of Ecuador, who has resided in the United States for the past 30 years, appears before this Court for sentencing. His federal sentencing guideline range is 78-97 months, based on an offense level 27 and a criminal history category II. A five year mandatory minimum sentence applies pursuant to 18 U.S.C. §841(b)(1)(B). The Immigration and Naturalization Service has lodged against Mr. H. with the U.S. Marshal Service a detainer for deportation proceedings.

The defense requests a downward departure to the mandatory minimum sentence of 60 months. A three level departure from a level 27 to a level 24 would result in a guideline range of 57-71 months and thus allow for imposition of a sentence of 60 months. The departure is sought on the basis that, as a direct result of Mr. H.'s status as a deportable alien, he will endure harsher conditions of confinement than he would if he were not a deportable alien but rather a member of a class of similarly situated offenders.

Courts have held that harsher conditions of confinement resulting from an INS detainer may

be a proper basis for departure. Prior to the Supreme Court's decision in United States v. Koon[1], one Circuit Court of Appeals held that a departure may be proper where "the difference in severity [of conditions of incarceration are] . . . substantial," "the sentencing court . . .[has] a high degree of confidence that [the harsher conditions] will in fact apply for a substantial portion of the defendant's sentence," and that the harsher conditions are "undeserved." United States v. Smith, 27 F.3d 649, 655 (D.C. Cir. 1994). In Smith, the defendant, like Mr. H., a deportable alien convicted of a drug offense, sought a departure on the ground that his alien status would subject him to harsher conditions of confinement. Those harsher conditions included ineligibility for benefits allowing prisoners to transition out of prison to home confinement or a halfway house for the last six months of their sentence and ineligibility for placement in a minimum security prison. The D.C. Court of Appeals reversed the district court's finding that it lacked the authority to depart and remanded with instructions that a departure may be warranted in cases where the increase in severity of conditions is substantial. In the wake of Koon, other courts have followed Smith. See United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997) (holding that harsher conditions of confinement resulting from

---

[1] Prior to Koon, 518 U.S. 81, there was conflict among the circuits over whether harsher conditions of confinement resulting from a defendant's status as a deportable alien was a proper basis for departure. Compare United States v. Restrepo, 999 F.2d 640 (2d Cir. 1993), cert. denied, 510 U.S. 954 (1993) (harsher conditions could not serve as a basis for departure); United States v. Veloza, 83 F.3d 380 (11th cir. 1996) (same); United States v. Nnanna, 7 F.3d 420 (5th Cir. 1993) (same), with United States v. Smith, 27 F.3d 649 (D.C. Cir. 1994) (conditions of confinement resulting from deportation status could provide appropriate basis for departure). In Koon, the Supreme Court made clear that:

> [A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no - as it will be most of the time- the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland.

Koon at 2051, 108. Koon confirmed that absent proscription by the Commission, a sentencing court cannot categorically deny consideration of a particular factor. Instead, courts must review the facts and circumstances of each individual case. Thus, Koon effectively overruled Restrepo and its progeny. See United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997).

a defendant's status as a deportable alien may form the basis for departure if the status would result in "unusual or exceptional hardship in his conditions of confinement."); United States v. Bakeas, 987 F.Supp. 44, 46, 50 (D. Mass. 1997) (district court downwardly departed where defendant's immigration status resulted in "far more onerous conditions" of confinement than those of similarly situated offenders where, but for his immigration status, the defendant would have been classified to a minimum security prison or been eligible for community confinement; however, due to his immigration status, he would have served his time at FCI Oakdale, a Medium Security Level institution in Oakdale, Louisiana; the court departed concluding that "the guidelines did not take into account the possibility that a defendant's alienage might significantly transform the severity of the entire length of his sentence.").

In other contexts, Courts have departed based on conditions of confinement. United States v. Lara, 905 F.2d 599 (2d 1990) (departure granted where defendant's sexual orientation and physical appearance created the potential for victimization which made it appear likely that prison authorities would subject him to solitary confinement to protect him from attacks); United States v. Gonzalez, 945 F.2d 525 (2d. Cir. 1991) (departure due to potential victimization); United States v. Guiro, 887 F.Supp. 66, 71 (E.D.N.Y. 1995) (downward departure where sentence of halfway house could not be imposed for reasons having nothing to do with the offense); United States v. Rule Law JFM-95-0445 (departure due to deplorable conditions at the Baltimore City Detention Center); U.S. v. Stinchecom, JFM-96-0158 (departure based on conditions at the Baltimore City Detention Center, involving defendant's being assaulted by guards and neglected medically). Thus, more severe conditions of confinement resulting from a factor not considered in formulating the guideline is a proper basis for departure under USSG §5K2.0 and 18 U.S.C. §3553(b).

C. Departure Framework

Koon provides that in determining whether to depart, courts must first isolate the ground for departure and then determine whether the ground has been forbidden, encouraged, discouraged, or not mentioned by the Commission. Koon, 518 U.S. at 95. In the instant case, the ground for departure falls within the "unmentioned" category, thus Koon instructs that the sentencing court must first consider the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," id. at 949, and then "decide whether it is sufficient to take the case out of the Guideline's heartland." Id.; see also United States v. Rybicki, 96 F.3d 754 (4th Cir. 1996).

A. The Commission did not take into account the effect a deportable alien's status would have in setting the guideline sentence under USSG §2D1.1.

A review of the relevant case law and USSG §2D1.1 demonstrates that the Sentencing Commission did not take into account the effect alienage would have in setting the relevant guideline sentence for drug offenders subject to that guideline. Courts agree that there is no indication that the Sentencing Commission took into account a defendant's status as a deportable alien in formulating the USSG §2D1.1. In so agreeing, Courts have distinguished the guidelines for illegal re-entry and other immigration-related cases which take into account the defendant's status as a deportable alien, from the guidelines for narcotics cases which do not. For example, in United States v. Gonzalez-Portillo, 121 F.3d 1122 (7th Cir. 1997), the defendant was convicted of an immigration offense under 8 U.S.C. §1326 and was subject to USSG §2L1.2. The Court found that since that guideline applied to offenses which have as an element the defendant's deportable alien status, that factor *was* taken into account by the Commission in formulating the guideline, thus, a departure was not proper. In sharp contrast, in Farouil, F.3d at 846-47, the Court distinguished defendant Farouil's drug

conviction from illegal re-entry cases and found that there was "no reason to believe that the guidelines have accounted for a defendant's status as a deportable alien in setting the level for [importing heroin]." See also Bakeas, 987 F.Supp. at 47 (finding that Commission did not take deportable alien status into account in formulating guideline for bank embezzlement "since this case in no way intrinsically involves alienage."); Smith, 27 F.3d 649 (underlying conviction was for possession with intent to distribute controlled dangerous substance). In addition to the case law, an examination of guideline 2D1.1 reveals that it does not apply to offenses which have as an element or otherwise intrinsically involve the offender's status as a deportable alien, nor does it make explicit or implicit reference to any consideration of a defendant's status as a deportable alien. Having established that the Commission did not consider this factor in promulgating the guideline, the next inquiry is whether the factor as applied in the individual case takes the case outside the heartland.

B. A host of factors will result in a significant increase in the severity of Mr. H.'s conditions of confinement thereby removing this case from the heartland of cases within USSG §2D1.1.

A review of the following list of factors demonstrates that Mr. H. has established a direct causal relationship between the INS detainer and the increased conditions of confinement which place his case outside the heartland of cases encompassed by USSG §2D1.1 and thereby justifies the requested seventeen (17) month departure to the mandatory minimum sentence of sixty (60) months.

1. Geographic separation from his wife, children, and other close, extended family.

But for his immigration status, Mr. H. would be eligible for designation to a federal prison camp within a reasonable and affordable travel distance from his family. As a direct result of his

immigration status he will *either* be designated directly to FCI Oakdale, in Oakdale, Louisiana, see Bakeas, 987 F.Supp. at 46 (finding that due to his immigration status, the defendant would serve any prison time at FCI Oakdale, a Medium Security Level institution in Oakdale, Louisiana), *or* be transitioned from facility to facility.[2] Either designation will significantly diminish, if not prohibit, regular direct in-person contact with family. Travel expenses to far away institutions will be prohibitive.[3] Frequent telephone contact will likely be curtailed because of the expense of long-distance collect telephone calls.

Mr. H. has a documented history of 30 years of residence and extensive family ties in the New York/New Jersey area. The cessation of contact will devastate not just Mr. H. but his 3 school-aged children and wife, with whom he shares a very close relationship. See Attachment One (letter from Jacqueline H., wife of Carlos H.). The devastation of the geographical separation will be compounded by Mr. H.'s age (57 years old) and health. The deprivation of regular, if any, family contact will affect the entire portion of his sentence.

2. Change in security rating

But for the INS detainer, Mr. H. would be designated to a minimum security facility. However, solely as a result of the INS detainer, Mr H. will be designated to serve his time at either

---

[2] Mr. H.'s placement could include the following series of transitions: (1) initial designation to facility pending placement in a special facility which BOP has designated for INS institutional hearings; (2) transfer to the special INS hearing facility when and if an opening becomes available; (3) upon resolution of the INS detainer, transfer to either directly FCI Oakdale, or a different facility pending availability in FCI Oakdale; and (4) final placement in FCI Oakdale, Louisiana. Regardless of whether Mr. H. takes a direct or circuitous route, he is assured ultimate residence in FCI Oakdale.

[3] As of July 27, 1998, the most cost efficient air fare to FCI Oakdale was on Delta Airlines from JFK airport to the Alexandria, LA, at a cost of $278.00 round trip. FCI Oakdale is 30-40 miles from the airport and car rental averages 46.00 per day (shuttle service is 65.00 one way). A stay over is required for this fare. The closest motel is the Country Inn (318 335 4202) at 38.00 per night.

a low or medium security facility[4], which has increased liberty restrictions, and more limited placement options, than a minimum security facility. See Bakeas , 987 F.Supp. 44 (finding that "the Bureau of Prisons takes the position that aliens are ineligible for minimum security classifications"). Ineligibility for minimum security placement precludes placement in a prison camp. See Bakeas, supra (finding that "[P]rison camp and a medium security prison are as different in kind as are home detention and community confinement, and that they have a great impact on whether [the defendant's] sentence is "greater than necessary" (see 18 U.S.C. §3553(a)).

3. Ineligibility for drug treatment as provided in 18 U.S.C. §3621

Mr. H., who is severely addicted to heroin as evidenced by his life-threatening overdose in January of 1998, will be ineligible for the intensive drug treatment program as a result of either his placement at FCI Oakdale or the redesignation process. As a result, he will also be denied the opportunity for a one year reduction which may be granted by the BOP upon successful completion of the intensive drug treatment program. 18 U.S.C. §3621(e)(2)(b).

4. Mr. H. will be ineligible for pre-release confinement as provided in 18 U.S.C. §3624.

Under 18 U.S.C. §3624(c), the Bureau of Prisons shall, where practicable, transition prisoners to home detention or a halfway house type-setting for no more than the last 6 months of the sentence. As a direct result of the INS detainer, Mr. H. will not be eligible for this "reduction" in his sentence.

5. Each of the above factors alone, and in conjunction with each other, bring this case outside of the heartland of 2D1.1 cases.

---

[4] As a result of the INS detainer, Mr. H. will be classified as low security. However, he will be designated, for at least some of his sentence, to FCI Oakdale, a medium security facility.

Mr. H. has demonstrated under the standards set forth in Smith, supra, and Farouli, supra, and as applied in Bakeas, supra,that the increase in the severity of his conditions of confinement will be "substantial" and "will apply for a substantial portion of the sentence," and thus take him outside of the heartland of drug offenders.

C. Extent of Departure

To balance the scales and account for the factors which bring this case outside the heartland of other §2D1.1 cases, Mr. H. respectfully requests that this court depart and impose a sentence of sixty months. This departure is a decrease of only 18 months from the low end of his current guideline range and still subjects him to a substantial prison term. The departure minimally lowers his overall length of incarceration in light of his likely lifetime banishment from his home, the United States. A reduction of 18 months will save taxpayers approximately $32,000, see PSR at par. 46, a savings which is justified by virtue of his impending deportation.

A sentence of sixty months will be the longest sentence Mr. H. has ever served. For Mr. H., due to his age and health, this may be a life sentence. The difference of 17 months may be the difference between seeing his family again and not. The requested departure seeks to balance the scales: though his overall conditions of incarceration will be severely increased as a direct result of the INS detainer, the reduced sentence will account for the disparate treatment he will receive from others similarly situated.

Respectfully submitted,

JAMES WYDA
Acting Federal Public Defender
for the District of Maryland

_____

Kathryn Frey Balter (#10906)
Assistant Federal Public Defender
Tower II, Suite 1100
100 S. Charles Street
Baltimore, Maryland 21201
(410) 962-3962

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Sentencing Memorandum was hand-delivered this _____ day of September, 1998, to Angela White, Assistant U.S. Attorney, 6625 United States Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201.

_____
Kathryn Frey Balter
Assistant Federal Public Defender