

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v

JOSE MARTINEZ AMAYA

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Criminal Case N^o 10-256-09 (RCL)

DEFENDANT'S MEMORANDUM IN AID OF SENTENCING

Defendant, JOSE MARTINEZ AMAYA, by and through undersigned counsel, hereby respectfully submits this memorandum in aid of sentencing for the Court's consideration. Counsel for Defendant has reviewed the *Presentence Investigation Report* (PSI) with Defendant in Spanish.¹ Mr Martinez was found guilty after a jury trial of Count 1, RICO Conspiracy to Conduct a Racketeering Enterprise, in violation of 18 USC § 1962(d) which carries a sentence of up to life in prison; Count 8, Murder in Aid of Racketeering, in violation of 18 USC § 1959(a)(1) which carries a life sentence; and, Count 9, Possession of a Firearm During and in Relation to a Crime of Violence, in violation of 18 USC § 924(c)(1)(A) which carries a 10-year to life sentence that must run consecutively to any other sentence, and Aiding and Abetting, in violation of 18 USC § 2 .

At the outset it is worth noting that Defendant Martinez was willing to accept a plea offer which the government extended to him. That plea would have involved Mr Martinez's pleading to the indictment under Rule 11(c)(1)(C) of the FEDERAL RULES OF CRIMINAL PROCEDURE to an agreed upon term of 35 years imprisonment. However, the plea offer was wired to other defendants who did not want to accept the government's offer. When counsel discussed unwiring

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Defendant was provided with a written Spanish translation of the *Presentence Investigation Report* translated by a Federally Certified Court Interpreter.

the plea with the government as to Mr Martinez so that he could accept the plea, the government denied the request. Subsequently, though, the government unwired the plea to allow Defendant Diaz Atunez to plead guilty while the plea with respect to Mr Martinez remained wired to the other defendants. After that, the government filed a superseding indictment charging Mr Martinez and his codefendants with VICAR.

A. The Presentence Investigation Report

The *Presentence Investigation Report* writer has calculated defendant's Total Offense Level to be 43 and his Criminal History Category as I under the 2013 edition of the *United States Sentencing Guidelines* (USSG). These calculations result in a term of life imprisonment. See PSI, p 19, ¶ 128. Mr Martinez acknowledges that based on the jury's finding of guilt on Count 8 of the indictment, murder in the aid of racketeering, in violation of 18 USC § 1959(a)(1) that the penalty is life imprisonment. See also PSI, p 19, ¶ 125; *but cf, infra*, Part D.

B. Sentencing factors

As promulgated in 18 USC § 3553(a), the Supreme Court has unequivocally held that sentencing courts are to look to both the Guidelines manual and the other sentencing factors articulated in 18 USC § 3553(a), and that the Court may sentence outside the recommended guideline range if the circumstances of the particular case call for such a result. Thus, *United States v Booker*, 125 SCt 738 (2005), has returned to the sentencing courts the ability to apply the traditional sentencing factors in determining a sentence. The factors set forth in Title 18, United States Code, Section 3553, are as follows:

(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;
- (3) the kinds of sentences available;
- (4) the advisory guideline range;
- (5) any pertinent policy statements issued by the Sentencing Commission;
- (6) the need to avoid unwarranted sentence disparities; and
- (7) the need to provide restitution to any victims of the offense.

18 USC § 3553.

The Court is not required to take all the § 3553(a) factors into consideration. Justifying a sentence outside the range does not require canvassing all the factors set forth in § 3553(a), “it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less.” *United States v George*, 403 F3d 470, 473 (7th Cir 2005).

C. Nature and Circumstances of the Offense and History and Characteristics of Defendant

Mr Martinez was convicted by a jury of the three counts in the indictment. The Court is familiar with the trial testimony in this case. It appears that the jury found that Mr Martinez killed Felipe Enriquez, also known as “Zombie,” based solely on the testimony of Manuel Saravia.

“[E]vidence about a defendant’s background and character is relevant because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no excuse.”

Wiggins v Smith, 539 US 510, 535 (2003). In addition, 18 USC § 3553(a) requires the court to consider the history and characteristics of the defendant prior to imposing sentence.

Mr Martinez is a first offender. Prior to his arrest in this case, Mr Martinez had no other contact with the criminal justice system nor had he ever been incarcerated.

Mr Martinez is a 27-year-old El Salvadoran native who grew up poor and fatherless in the town of San Miguel, El Salvador. He was the youngest of four children. When he was approximately six years old, his mother emigrated to the United States and then later brought two of her four children. She came to the United States in search of work to help support herself and her family in El Salvador, leaving Mr Martinez and one brother with his maternal grandmother. Mr Martinez maintains that his grandmother abused him. As the PSI writer points out on page 15, ¶ 91 of the *Presentence Investigation Report*, one of the punishments that the grandmother inflicted on Defendant was to make him kneel on corn grains while she struck him with a rope. There were nine other persons living in his grandmother's 5-room house making living conditions difficult. After about a year of living in these poor conditions, Defendant had to go to work to help support himself and the family. From the time he was approximately 7 years old until he came to the United States, with the help of his mother, Mr Martinez worked and went to school when he could. Thus, he only completed approximately 9 years of formal education in El Salvador before moving to the United States. As a pre-teen youngster he worked harvesting beans, corn and rice in agricultural fields. He also worked in his grandfather's ironworks shop. As he got older, he also worked as an auto mechanic and in construction in El Salvador.

While Mr Martinez was growing up, members of MS-13 in the neighborhood would bully

and mistreat him. When he was nine years old, Mr Martinez recounts how he was forcefully tattooed by members of the gang. According to Mr Martinez's mother, Ms Elsi Elena Hernandez Martinez, one of the principal reasons that she brought her son to the United States when he was approximately 19 years old was to remove him from the environment where he was living which was replete with MS-13 gang members.

After he came to the United States, he began working in construction with Genco Construction in Bethesda, Maryland. He lived with his mother. He attended high school for about three months but had to leave to work to support himself and his family. He was also contributing to the support of his son who lives in El Salvador. Although the PSI writer was unable to verify his employment, counsel has furnished the PSI writer with copies of Mr Martinez's pay stubs and payroll sheets from Genco Corporation and has also attached them to this memorandum as **Exhibits 1 and 2** respectively. Part of the confusion may be due to the fact that Genco had him listed on its payroll as Jose Fernando Amaya. He was paid \$9.50 hourly and worked as an assistant brick layer. On weekends, Mr Martinez would also work on houses with his uncle in Virginia. Members of Mr Martinez's family have also submitted letters to the court on his behalf.²

Two years before his arrest, Mr Martinez moved out of his mother's house and moved in with his girlfriend. Mr Martinez has never been married, but is the father of a minor son who lives in El Salvador. He has never seen his son but spoke with him frequently on the telephone before his arrest in this case. He was also sending money to his son to help his maternal grandmother raise him.

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See, ECF Documents 475-1 and 497.

Mr Martinez is generally healthy although he does suffer from gastroesophageal reflux disorder (GERD) and migraine headaches.

Mr Martinez has no assets and reports no debts. He is not able to pay a fine in this case.

D. Seriousness of Offense, Just Punishment and Deterrence

The most severe penalty available to the Court is life in prison. As the Court is well aware, life in the federal system means life. A life sentence means that Mr Martinez will never walk outside the walls of a federal prison facility. He will not be able to participate in the lives of his friends and family members nor in the life of his son. Courts have warned that “a judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life.” *United States v Moreland*, 568 F Supp 2d 674, 687 (2008). “[I]t is a precept of justice that punishment for a crime should be graduated and proportioned to the offense.” *Atkins v Virginia*, 536 US 304, 310 (2002).

As stated above, Mr Martinez acknowledges that the jury’s finding of guilt on Count 8, murder in aid of racketeering in violation of 18 United States Code Section 1959(a)(1)(2), carries a penalty of life imprisonment. However, such a sentence would be in direct contravention of the statutory factors listed in 18 USC § 3553(a) which require the Court to impose a sentence that is sufficient but not greater than necessary. Consequently, Defendant submits that a sentence of life imprisonment would be cruel and unusual under the 8th Amendment to the United States Constitution. Therefore, Mr Martinez moves for a sentence of 25 years based on a downward departure and a *Booker* variance from the applicable sentencing guidelines in this case. Mr Martinez also moves for downward departure from the statutory life term associated with Count 8 based upon the factors in 18 USC § 3553(a). Mr Martinez also moves for concurrent rather than

consecutive sentences with respect to Counts 1 and 8. Count 9's 10-year sentence, however, must be served consecutively to any other sentence.

E. The Kinds of Sentences Available

As stated above in Part A, the *Guidelines* place Mr Martinez at a Level 43 and a criminal history category of I. The guideline term of imprisonment is life. Count 1 of the indictment—RICO conspiracy to conduct a racketeering enterprise, in violation of 18 USC § 1962(d)—carries a sentence of up to life imprisonment. With respect to Count 1, the RICO conspiracy, Defendant would point out that the jury did not find that he was involved in any robberies in violation of Maryland law or the District of Columbia Code. Likewise, the jury did not find that Mr Martinez was involved in any act in violation of federal narcotics laws nor that he was in any way implicated in witness tampering or retaliation.

The offense of murder in aid of racketeering, in violation of 18 USC § 1959(a)(1), carries a life sentence. In this case there also exists the potential for the Court to sentence Mr Martinez to two consecutive life sentences plus ten years for Count 9, using or carrying a firearm during and in relation to a crime of violence. If the Court does not agree to the 25-year sentence requested in Part D, *supra*, then Defendant requests that any sentence the Court imposes be made to run concurrently with the sentence in Count 8.

F. Defendant Requests that the Court Recommend that He be Housed in a Facility Near the Washington Metropolitan Area

Mr Martinez respectfully requests that the Court recommend that he be housed in a prison facility close to the Washington DC metropolitan area so that his family members, especially his mother, will have an opportunity to visit him—for example, at FCI Cumberland in Cumberland, Maryland, FCI Petersburg, Petersburg, Virginia, or FCI Butner, Butner, North Carolina.

CONCLUSION

Based upon the arguments above, and the factors listed in 18 USC § 3553(a), Mr Martinez would request that the Court impose a sentence of 25 years. Mr Martinez also moves for concurrent rather than consecutive sentences with respect to Counts 1 and 8 and a consecutive 10-year sentence on Count 9.

Respectfully submitted,

/s/ Joseph Virgilio

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(Appointed by the Court)

CERTIFICATE OF SERVICE

I CERTIFY that on June 16, 2015, I filed the foregoing *Defendant's Memorandum in Aid of Sentencing*, in the case of *United States v Jose Martinez Amaya*, Criminal Case N^o 10-256-09 (RCL), on the Court's ECF System which will serve all counsel of record in this case.

/s/ Joseph Virgilio

Joseph Virgilio