

Defendant Cooperation

In addition to the information on Mr. Rodriguez's background provided in the social history, we request that the Court consider his extensive cooperation with law-enforcement agencies via a formal cooperation agreement with the United States Attorney. This cooperation is especially relevant in light of the Supreme Court's recent *Kimbrough* (06-6330) and *Gall* (06-7949) decisions, which, in expanding upon the sentencing reforms that began to crystallize with *Booker*, have appropriately returned discretion to district-court judges and require consideration of all factors delineated in § 3553(a) rather than the punitive and narrow calculus of the Sentencing Guidelines. *Gall* merits particular note because the Supreme Court held that judges need not justify sentences outside of the Guidelines range by citing "extraordinary circumstances." Substantive factors previously relegated to footnotes—e.g., offense circumstances; defendant history, character and condition; cooperation; broader sentencing purposes—can now carry the weight they deserve.

Regarding Mr. Rodriguez's cooperation, the core issue is simple: Based on his conversations with Mr. Rodriguez and AUSA Price, it is defense counsel's understanding that Mr. Rodriguez fully cooperated with the AUSA, in compliance with a cooperation agreement signed in July 2006. Despite this, Mr. Price did not grant Mr. Rodriguez a 5K1.1 letter. While Mr. Price stated that Mr. Rodriguez's cooperation did not produce results consistent with "substantial assistance," we believe that Mr. Rodriguez's assistance does merit a sentence outside of the Guidelines range of 135-168 months, based on the following:

1 Offense-level calculation

Mr. Rodriguez's exposure to 135-168 months' incarceration is based not on the quantity of cocaine with which he was arrested, 55 kilograms, but a far larger quantity that he never directly possessed, was never found in his possession, and has never been located. That quantity boosted his presumed possession to 55-155 kilograms. This aggravation of the presumed offense, and the consequent leap in prospective punishment, rests solely on Mr. Rodriguez's verbal statement to law-enforcement officials that another vehicle traveling with his own contained additional cocaine. That cocaine was never seen or recovered by law-enforcement agents, and there appears to have been no direct, specific and reliable information that he possessed the additional quantity.

2 Extent of cooperation

Mr. Rodriguez began to cooperate before he had signed a cooperation agreement, absent a promise from Mr. Price, ultimately with only the prospect of a 5K1.1 letter, at the AUSA's sole discretion. Without exception, Mr. Rodriguez cooperated with all requests for information and action, in full compliance with the agreement. This included at least four proffer meetings preceding his release on bond and attempts to engage targets of ongoing Drug Enforcement Administration (DEA) investigations whom DEA and AUSA staff knew to be violent. Before Mr. Rodriguez's release on bond, Mr. Price informed defense counsel that the information Mr. Rodriguez had provided was reliable. From that point forward,

neither Mr. Price nor DEA agents expressed any reservations regarding the reliability and fullness of Mr. Rodriguez's cooperation. This included assistance with ongoing criminal investigations in New York City, upstate New York and Florida. Mr. Rodriguez also volunteered to engage drug dealers in the Dominican Republic, to dig deeper into the criminal enterprise, but was rebuffed by the AUSA, even with the prospect of his close supervision in the field by law-enforcements agents.

3 Risk to safety

As AUSA and DEA agents were well aware, Mr. Rodriguez, by participating in investigations of criminal enterprises known to be violent, significantly risked his safety and that of his wife and children. Indeed, he was so distressed by the prospect of violent reprisal that he physically shook during at least one proffer session. Several weeks after Mr. Rodriguez's arrest, while he was detained in North Carolina, a relative was murdered in Georgia. Although it is unknown if this murder was related to his arrest, it is reasonable to conclude that an average person in Mr. Rodriguez's circumstances would logically assume so and therefore experience heightened fear. Nonetheless, he continued to cooperate without exception.

4 Usefulness of information

AUSA Price informed defense counsel that Mr. Rodriguez's cooperation, despite its reliability, ultimately did not produce significant results and therefore did not merit a 5K1.1 letter. While we take the AUSA at his word, it remains that Mr.

Rodriguez did fully comply, and it is not clear that either (a) this information might not yet prove actionable or (b) the failure to produce results thus far is any fault of Mr. Rodriguez. It is notable that upon his release from more than five months' detention, he was directed to cultivate relationships with suspects targeted by the AUSA, but none of them would engage him. He had become a pariah. This should not have been surprising, as it is widely accepted that a cooperating witness's usefulness often decreases with the length of detention before release—he is assumed to be a “snitch” and is accordingly *persona non grata* among the very people upon whose communications he now depends for leniency. No wonder then that Mr. Rodriguez, though he faithfully complied with all of his orders from AUSA Price and DEA after his release, was studiously avoided by those he was directed to engage.

5 Character of Mr. Rodriguez

While we do not contend that Mr. Rodriguez is a man of exemplary character, we believe that his extensive cooperation with the AUSA and DEA was not solely an attempt to reduce his sentence but an attempt to redeem himself. In addition to the profile presented in the social history, we urge the Court to consider the extent to which his cooperation, over the course of many months and at great potential risk to himself and his family, indicates that he is remorseful and capable of reform.

6 Questionable value of 5K1.1 letters

Although the AUSA believes that Mr. Rodriguez does not merit a 5K1.1 letter, the history of these letters is so riddled with ambiguity and inequity that one must question their value. Because the AUSA alone determines the worthiness of a defendant's cooperation—except in those atypical cases where the Court reviews the 5K1.1 determination—it is difficult if not impossible to know if that determination was reasonable and just. The prosecution, with its particular perspective and biases, is the sole arbiter. A defendant can fully comply, at considerable personal risk, and yet be denied the letter because he lacks the appropriate criminal connections, because law-enforcement did not act quickly enough or made poor decisions, or because any of a host of other factors entirely beyond his control dash his efforts.

Even the United States Sentencing Commission concluded, in a 1998 study on the issuance of 5K1.1 letters, that it was “not able to find direct correlations between the type of cooperation provided, type of benefit or result received by the government, the making of a 5K1.1 motion, and the extent of the substantial assistance departure received.” The presumably dispositive factors in the 5K1.1 decision—including type of cooperation, benefit of cooperation, defendant culpability or function, relevant conduct, offense type—did not generally explain the results. (Maxfield and Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, United States Sentencing Commission, 1990 (20).) For these reasons alone, we believe it appropriate that the Court, in the absence of a 5K1.1 letter from the AUSA, independently consider the value of Mr.

Rodriguez's cooperation as a mitigating factor under § 3553(a) and sentence him outside of the Guidelines range, below the minimum of 135 months.

7 Cooperation merits more than nothing

If “substantial assistance”—whatever that constitutes—merits a reduction in sentence, and the absence of cooperation merits no reduction, then surely full cooperation that does not produce the desired results, whatever the reasons, merits an intermediate reduction commensurate with the good faith exhibited by the defendant and the risk to safety that he and his family assumed. Surely it is not equitable to ask Mr. Rodriguez to cooperate in criminal investigations, to receive his unfailing compliance, to risk his safety and that of wife and his children, and then to simply shrug and walk away because, for reasons largely beyond his control, his cooperation did not produced the desired results.

Recommendation

Given the new mandate to consider the full range of § 3553(a) factors in determining sentence, we urge the Court to sentence Mr. Rodriguez below the minimum Guidelines term of 135 months, consistent with the circumstances of his offense-level calculation, the good faith he exercised, and the risk he and his family have assumed because of his cooperation. It would be well within any conventional standard of “reasonableness” to do so; more importantly, it would be just.

We thank the Court for its time and consideration in this matter.

Respectfully submitted,

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