

In the United States District Court
Northern District of Texas
Fort Worth Division

United States of America §
 §
v. § Case No. 4:10-CR-041-Y (05)
 §
Hugo Alberto Guerrero §

Motion for Variance

Hugo Guerrero files this motion for variance for a downward departure outside the guidelines regime under 18 U.S.C. § 3553(a). A sentence of 45 months or less is a sufficient sentence for his role in the offense.

Respectfully submitted,

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Memorandum in Support

Guerrero's Role

Guerrero was driving to his mom's house when Omar Garcia's phone rang and the caller said he needed someone to follow his marijuana sale. Garcia asked Guerrero if he wanted to make some money following a truck and he said yes. He needed the money for a root canal that his dentist had prescribed that morning. He didn't have any dental insurance to pay for the treatment, and with this job he could pay the dentist and indulge his drug habit with money left over. (The dentist had prescribed a crown too, but that was too much money to pay all at once.)

All Guerrero knew from the call was that he'd be following an unknown someone that was going to have marijuana with him (cocaine was never discussed and doesn't appear to have been part of the deal with the officers). He didn't know how much marijuana there was, who he was going to follow, or who was negotiating the deal.

He wasn't invested in the outcome. He wasn't even sure how much he was going to get paid.

The Recommended Sentence

The presentence report recommends an imprisonment range of 87 to 108 months based primarily on the quantity of drugs found at the duplex; namely, 153 kilograms of marijuana and 206 grams of cocaine. This recommendation, throttled by the amount of drugs found for the overall conspiracy, minimizes the questions of Guerrero's real role in the offense. While he has argued for a minor role deduction, this deduction is limited and doesn't come close to offsetting the high quantity-driven recommended range.

The Guidelines Miss the Mark

The Sentencing Commission has never explained how drug quantity is meant to measure the seriousness of the offense or how it relates to the purposes of section 3553(a).

Apparently, the Commission has decided that quantity can be used as a proxy for culpability, but that's a hit-and-miss affair. Sometimes quantity might reflect a defendant's culpability, but most of the time it doesn't. Here, it doesn't.

Since Guerrero has been charged with the full measure of the drugs in the master bedroom, it's likely that all the other defendants have too. That's a classic case of false uniformity: punishing equally all who are not remotely equal. Under the guidelines' quantity scheme, everyone is treated equally culpable, from those who stood to make a profit on the sale to those who set up the deal to those who imported the drugs to those, like Guerrero, who were to receive little more than piecework wages for a few minutes' involvement. That's not remotely fair.

The way that Guerrero came into the transaction makes it clear that his culpability isn't related at all to the amount of drugs in the bedroom. The 153 kilograms of marijuana and 206 grams of cocaine were just a happenstance. It didn't matter whether they tilted the scale at 20, 50, or 5,000 pounds. Their weight bears no connection to his culpability; it unfairly magnifies his sentence.

The guidelines' role reductions aren't any help either. They're vague and arbitrary. They allow a deduction for minor or minimal participation, but they don't meaningfully define *minor* or *minimal*. If a defendant is a minor or minimal participant, the Court is allowed to deduct two points. Not six. Maybe three. But never more than four. Why not

five or even eight if it's based solely on the facts of each case? They're inconstant, tethered to a progressive sentencing table driven by a different parameter.

And they're available only for the defendant who is less culpable than the *average* participant. Who's average? The average participant in this conspiracy or in all drug cases?¹ Looking beyond his co-defendants to the growers, the importers, the high-level suppliers, the money-launderers, etc., of this marijuana and cocaine, Guerrero's role is small indeed. Looking to all comparable drug cases, it's miniscule.

Defense's Recommendation

Section 3553(a) directs the court to impose a sentence that is sufficient, but not greater than necessary. In so doing, the Court is supposed to consider the nature and circumstances of the offense and his role in it—not just add up the quantity of the drugs involved in the scheme.

His inconsequential role—following a truck for \$500 or \$1,000—and concomitant ignorance of the deal merits a sentence of 45 months or less. The PSR's recommended range of 87 to 108 months is too harsh.

¹ Compare *United States v. Nobles*, 69 F.3d 172, 190-91 (7th Cir. 1995) (defendant compared just to group) to *United States v. Tom*, 330 F.3d 83, 96 (1st Cir. 2003) (comparing defendant to others convicted of comparable crimes).

Dated: 30 June 2010

Respectfully submitted,

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Certificate of Service

I hereby certify that on 30 June 2010 I used the ECF system of the Court to file this motion electronically. The ECF system provides a copy to all counsel of record and I am serving a copy via mail to the following persons:

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