UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

-vs- **Case No. 6:05-cr-137-Orl-31KRS**

PASCUAL SALAZAR-PACHECO

MEMORANDUM SENTENCING OPINION

Defendant, Pascual Salazar-Pacheco ("Pacheco") was born in Michoacan, Mexico on January 10, 1970. At some point, he entered the United States illegally. In 1991 and again in 1998, he was convicted of drug-related offenses in California. He was deported back to Mexico on May 15, 2000.

Pacheco returned to the United States in late 2004. On July 14, 2005, he was arrested in Apopka, Florida for driving without a license. Under questioning by an agent of the Bureau of Immigration and Customs Enforcement, Pacheco admitted his true identity and nationality, his previous drug conviction[1] and deportation, and the fact that he had returned to the United States without seeking permission from the appropriate government officials. On August 10, 2005, he was indicted on a charge of illegally re-entering the United Sates after deportation, a violation of 8 U.S.C. §§ 1326(a) and (b)(2). On September 29, 2005, Pacheco pleaded guilty to that offense. Pacheco is now before the Court for sentencing.

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[1]It is not clear whether Pacheco mentioned all or merely some of his previous drug-related offenses at this time.

The U.S. Department of Probation's Presentence Investigation Report on Pacheco scored him at a base offense level 8, according to United States Sentencing Commission, *Guidelines Manual* ("USSG")§ 2L1.2 (titled "Unlawfully Entering or Remaining in the United States"). Then 16 levels were added under USSG § 2L1.2(b)(1)(A)(i) due to his 1998 conviction for a drug trafficking offense, which resulted in a three-year sentence. Two levels were deducted for Pacheco's acceptance of responsibility for his conduct, and one level was deducted for his timely notification of his intent to plead guilty, resulting in a final total of 8 + 16 - 2 - 1 = 21.

In addition to adding 16 levels to his base score, Pacheco's 1998 drug conviction added three points to his criminal history total. Combined with the two points Pacheco received for his 1991 conviction – for which he received a sentence of probation and time served – this resulted in Pacheco falling into criminal history category III.[2] Cross-referencing offense level 21 with criminal history category III produces a Guideline sentencing range of 46 to 57 months in prison.

In the absence of the 16-level increase for the 1998 drug trafficking conviction – which, it should be noted, is also accounted for in Pacheco's criminal history score – the Guideline sentence would have been two to eight months.[3] And the Guidelines would have permitted a sentence of probation, with a substitution of community confinement, home detention, or intermittent confinement for straight prison time. USSG § 5C1.1(c)(3). Stated differently, Pacheco's Guideline sentence for

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[2]Criminal history category II consists of those individuals with either two or three criminal history points, while criminal history category III consists of those with four, five, or six points.

[3]Offense level 6, criminal history category III, which falls in Zone B of the Guideline matrix. At offense level 8, Pacheco would only have been entitled to a two-level decrease for acceptance of responsibility rather than the three levels available at offense level 16 or higher. USSG § 3E1.1.

unlawfully entering the United States – and committing no other crimes of any significance[4] – would result in a prison term about one and a half times as long as the one imposed for the drug trafficking offense that earned him that 16-level enhancement. In addition, that 16-level enhancement increases his minimum Guideline prison term from zero to 46 months.

In *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the United States Supreme Court held that the Federal Sentencing Guideline scheme as it then existed violated the Sixth Amendment. Rather than invalidate the Guidelines entirely, the *Booker* court severed the statutory provisions making application of the Guidelines mandatory. *Id.* at 756-57. The result was to make the Guidelines effectively advisory:

> [Our decision] requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004).

Section 3553(a) requires a sentencing court to impose a sentence sufficient, but not greater than necessary, to accomplish the following:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (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;

18 U.S.C. § 3553(a)(2). Stated differently, "the underlying goals of the sentencing statute are 'retribution, general deterrence, incapacitation, and rehabilitation.'" *United States v. Glover*, 431 F.3d

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[4]Aside from the offense of driving without a license, the only illegal act that the government even suggested Pacheco might have engaged in was that of working illegally.

744, 751 (11th Cir. 2005) (Tjoflat, J., concurring) (quoting *United States v. Mogel*, 956 F.2d 1555, 1558 n.2 (11th Cir. 1992). In crafting a sentence designed to accomplish these goals, the court must also consider the nature and circumstances of the offense and the history and characteristics of the defendant; the kind of sentences available; the kinds of sentences and the sentencing range established under the Guidelines; any pertinent Sentencing Commission policy statement; the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a)(1),(3)-(7). Although it must consider all of these factors, the sentencing court need not explicitly refer to all of them or discuss them on the record. *United States v. Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005).

After *Booker*, no one can reasonably dispute the fact that sentencing courts have discretion to impose a sentence lesser than the low end of the Guideline range, so long as that sentence is reasonable in light of the Section 3553(a) factors. *See United States v. Shelton*, 400 F.3d 1325, 1333-34 (11th Cir. 2005). Nonetheless, the Department of Justice ("DOJ") continues to do so. At every sentencing hearing before this Court, the prosecution recommends a Guideline-range sentence, making no effort to explain that recommendation in light of the Section 3553(a) factors. After any below-Guideline sentence, the prosecutor routinely objects, and the only explanation offered is that the sentence falls short of the Guideline range. Obviously (though not openly), the government continues to maintain its policy that the only reasonable sentence is one that falls within or exceeds the Guideline range[5] – a position that obviously contradicts the Supreme Court's pronouncements in

[5]When this Court imposes a sentence exceeding the Guideline range (and the prosecutor's recommendation), the prosecution never objects. In addition, DOJ utilizes a "Booker Sentencing

Booker. And DOJ has maintained this posture even though the Eleventh Circuit has explicitly rejected its argument that a sentence in the Guideline range is, per se, a reasonable sentence. *See United States v. Talley*, 431 F.3d 784 (11th Cir. 2005).

By continuing to insist that this Court rigidly adhere to the Guidelines, prosecutors are violating their obligation as officers of the Court and failing to provide this Court with any meaningful assistance in crafting a reasonable, just sentence. *See Talley* at 788 (stating that "the party who challenges a sentence bears the burden of establishing that the sentence is unreasonable in light of both [the] record and the factors in section 3553(a).").

Despite the prosecution's refusal to participate, this Court is obligated to engage in the always-difficult process of applying the Section 3553(a) factors to a particular crime and a particular defendant. In this instance, that process is complicated by the enhancement scheme set forth in USSG 2L1.2, which in this Court's view is inconsistent with the Section 3553(a) factors, as detailed below.

The offense of illegal re-entry after deportation is certainly a serious matter. The United States has a legitimate interest in protecting its borders. On the other hand, as is true of most of these cases, the Defendant is here to obtain work. Although the government's official policy is to prevent people like the Defendant from obtaining such work, it is widely understood that the vitality of America's economy depends at least in part on the millions of illegal aliens who work here. Although that political dispute is not one for this Court to resolve, it does provide context as to the relative severity of this crime.

Report Form," which it refuses to disclose, to track those judges who impose a below-Guideline sentence, but not those who impose a sentence exceeding the Guideline range. See *In re Belvett*, 2005 WL 852649, at *2 (M.D.Fla. 2005).

As for Pacheco himself, the only thing he did wrong this time, other than re-enter illegally and seek to work, was to drive without a license. Based on his remarks at the sentencing hearing (and a lack of evidence to contradict them), he appears to have been gainfully employed and to have committed no other criminal acts after his illegal re-entry. Thus his history and characteristics, since his re-entry, are unremarkable. However, his prior criminal record also requires consideration. In 1991 he pled guilty to a drug offense in California and received a suspended sentence with credit for time served. Seven years later, he was convicted for the sale and transportation of cocaine and methamphetamine, pleading guilty to one count and receiving a three-year prison sentence. His sentence for the second count was stayed pending the successful completion of his sentence on the first count. The Court notes that there is no evidence of any other offenses, particularly since he re-entered the United States.

Promoting respect for the law and providing just punishment for the offense, while noble, necessary goals, are inherently subjective and not susceptible to objective analysis (or to a mechanical sentencing matrix, for that matter). So, while the Court keeps those purposes in mind, this opinion will not elaborate upon them. Similarly, no extended discussion is required in regard to adequate deterrence. The Court finds that protection of America's borders requires incarceration, rather than mere deportation. Finally, in this case the Court has only one real type of sentence available – incarceration – and restitution is not an issue.

There is no indication that the public needs any particular protection from this defendant – aside from his criminal record, which is modest and not recent. However, incarceration may end up providing Pacheco with educational or vocational training, aiding him in becoming a productive

member of society. It appears that he took advantage of such opportunities when he was previously incarcerated.

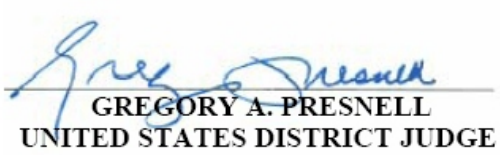
Which brings the Court to the Guideline, which ties in the need to avoid unwarranted sentencing disparities among Defendants with similar records who have been found guilty of similar conduct. The Court has previously noted the quantum leap in sentencing severity caused by the 16-level enhancement. And, because the prior conviction also serves to increase the criminal history score, a form of compounding results, increasing Pacheco's score on both the vertical and horizontal axes for a sentence he has already served. This multiplicative effect raises serious concerns of fairness in the Guidelines scheme.

Moreover, the enhancement scheme of USSG 2L1.2 is inherently arbitrary. Some crimes are selected for a 16-level enhancement while others, which might be more serious, are found deserving of only an 8-level enhancement. For example, a relatively minor drug offense might result in a sentence exceeding 13 months, automatically resulting in a 16-level enhancement under 2L1.2. Whereas a prior conviction for embezzlement, fraud, tax evasion, money laundering, involuntary servitude, obstruction of justice, perjury or bribery would result in an eight-level enhancement. Obviously, in a particular case any one of these crimes could be much more serious than that of, say, selling a few hundred dollars' worth of cocaine. But the Guideline does not recognize any such possibility. When viewing it in that fashion, one must conclude that 2L1.2 is arbitrary and capricious, and in many cases will produce a result that is simply not reasonable.

Given this Court's consideration of the factors set forth in 18 U.S.C. § 3553(a), imposing a Guideline sentence of 46 to 57 months would be unreasonable in this case. The Court finds that a

sentence of 30 months is reasonable and appropriate under the particular circumstances of this case.[6] This sentence is two and a half times the maximum sentence for the base offense at Pacheco's criminal history category.[7] In the Court's opinion, such a sentence is sufficient, but not greater than necessary, to deter Pacheco and others from re-entering the United States under similar circumstances and to serve the other goals of the Federal Sentencing Guidelines. Judgment will be entered accordingly.

DONE and **ORDERED** in Chambers in Orlando, Florida on January 20, 2006.



GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Marshal
United States Attorney
United States Probation Office
United States Pretrial Services Office
Counsel for Defendant
Pascual Salazar-pacheco

[6]Using the sentencing matrix, this term falls at the midpoint of a 16-III score, double the Defendant's base level.

[7]Thus, the Court has, in effect, enhanced Pacheco's sentence, but has done so in a judicious rather than mechanical fashion.