UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITEL	STATES	OF AMERICA,)	
		Plaintiff)	
)	
		v.)	03-CR-30029-MAI
)	
LEROY	PERSON,)		
		Defendant)	

SUPPLEMENTAL STATEMENT OF REASONS

April 27, 2005

PONSOR, U.S.D.J.

On April 13, 2005, the court sentenced the defendant to 84 months in the custody of the Bureau of Prisons with six years of supervised release. The court's reasons for imposing this sentence were set forth in detail orally at the sentencing hearing. This memorandum will briefly summarize them.

Preliminarily, it is important to note that the jury never convicted this defendant of having committed any crime involving the distribution of cocaine base in the form of so-called "crack" cocaine. Nor does the record of the trial permit this court to make such a finding (assuming it would be permitted to do so).

A 1993 amendment to the Sentencing Guidelines makes this omission crucial. For the past twelve years, at least for purposes of the Guidelines, forms of cocaine base other than crack have been treated as ordinary cocaine, <u>i.e.</u> without

the enhanced penalties associated with crack. <u>See U.S.S.G.</u> App. C, Amend. 487 (1993).

The government has argued that, while the absence of any conviction involving the crack form of cocaine base might be significant for purposes of the Sentencing Guidelines, this deficiency should not affect application of the statutory minimum mandatory sentence pursuant to 21 U.S.C. § 841 (b) (1) (B) (iii), which calls for a mandatory five-year sentence (enhanced in this case to a mandatory ten-year sentence due to the defendant's prior conviction for felony drug offenses) for a crime involving five grams or more of "cocaine base."

For the reasons set forth in the Supplemental Statement of Reasons issued on March 14, 2005 in the case of <u>United</u>

States of America v. Gregory Thomas, 03-CR-30033-MAP, this court is of the opinion that the First Circuit, if squarely presented with the issue, will agree with the solid majority of circuits that have concluded that the narrower definition of "cocaine base" applicable since 1993 to the Sentencing Guidelines applies equally to the statutes governing minimum mandatory sentences. It is unreasonable to suggest that Congress, in situations where the consequences are so grave, could have intended one definition of cocaine base to apply for Sentencing Guidelines purposes and another to apply to

sentences governed by statute. Moreover, it can hardly be denied that the severely enhanced penalties set forth in the statute for "cocaine base" were enacted as a response to a plague of crack distribution; they were not intended to address other, less harmful forms of cocaine base.

In reaching this conclusion, the court acknowledges that the Court of Appeals in <u>United States v. Richardson</u>, 225 F.3d 46 (1st Cir. 2000), appears, without extended discussion, to hold to the contrary. That decision, however, relies on an earlier First Circuit decision, <u>United States v. Lopez-Gil</u>, 965 F.2d 1124, 1134 (1st Cir. 1992), which predates the 1993 amendment to the Guidelines, and does not cite or address the numerous cases in other circuits holding to the contrary after 1993.

Where the consequences are so profound -- here, a excessive sentence of life in prison -- the First Circuit, in my opinion, will wish to revisit this issue, adequately briefed and in the center of its radar screen. A copy of this court's <a href="https://doi.org/10.1001/jhap-10

Following its decision that no statutory minimum mandatory sentence applied, this court went on to the issue of defendant's career offender status, concluding, with some hesitation, that the now-advisory Sentencing Guidelines do

place the defendant in that category.

The court's hesitancy derived from the uncertain impact of the Supreme Court's recent decision in Shepard v. United States, __ U.S.__, 125 S.Ct. 1254 (2005), upon the determination of what constitutes an appropriate prerequisite crime justifying the career offender status. In this case, the defendant clearly has one prior drug offense. It is not entirely clear, however, that either of his other convictions (for assault and battery by means of a dangerous weapon and for resisting arrest) would qualify necessarily as the second prerequisite conviction. Both crimes appear to be generic offenses allowing constructions, under certain circumstances, that would not qualify them always and necessarily as "crimes of violence" as defined by U.S.S.G. § 4B1.2.

At hearing, the court ultimately concluded that the more powerful argument was that, at least, the resisting arrest conviction constituted an adequate second prerequisite "crime of violence," placing the defendant in a career offender status and generating a Sentencing Guidelines range of 262-327 months.

The court nevertheless made the determination that, even under a mandatory Sentencing Guidelines regime, it would depart downward to a sentence of 84 months, based upon the

conclusion that the career offender status would grossly overstate the seriousness of the defendant's criminal history. Defendant possesses only one scorable prior conviction for drug distribution, which netted him a sentence of approximately twelve months' incarceration. The other prerequisite offense, resisting arrest, grew out of a relatively minor fracas and resulted in a sentence of probation. While the defendant clearly does have other convictions, they simply do not justify, in any realistic sense, the imposition of the full sentence called for under the advisory career offender guidelines.

To the extent that the court's decision to depart downward is incorrect either in substance or in scope, the court would conclude that the same sentence was reasonable in light of the criteria set forth in 18 U.S.C. § 3553. In determining a reasonable sentence, the court would take into consideration the overstatement of the defendant's criminal history, and the fact that he suffered a severe psychological injury as a young child when he realized the people who were raising him were not (as he had been told) his true parents. Beyond this, the court would take into consideration that the sale itself was extremely small and that the defendant has a very high capacity for rehabilitation. He possesses both marketable skills as a

meat cutter and electrician, and a supportive family.

The sentence adequately addresses the nature and circumstances of the offense itself, which involved one sale of approximately \$250 of cocaine base. It also addresses the background and history of the defendant. The court in particular considered the importance of deterrence in the sentence that it chose. The seven-year sentence will be more than adequate to deter others who may be tempted to commit this same crime. Finally, the court considered the prospects for rehabilitation for the defendant and found that they would be enhanced with the particular sentence imposed, especially the long term of supervised release.

As noted, the court's reasons for the sentence are set forth in more detail in the transcript of the court's oral remarks at the sentencing hearing. This memorandum is only intended to provide a summary of the court's reasoning.

MICHAEL A. PONSOR U. S. District Judge

Publisher Information

Note* This page is not part of the opinion as entered by the court.

The docket information provided on this page is for the benefit of publishers of these opinions.

3:03-cr-30029-MAP USA v. Person Date filed: 06/19/2003

Attorneys

Mark J. Albano Dalsey, Ferrara & Albano 73 State Street Suite 101 Springfield, MA 01103 413-736- 6971 413-746-9224 (fax) malbano@dalsey-	representing	Leroy Person (1) (Defendant)
ferrara.com Assigned: 09/20/2004 LEAD ATTORNEY ATTORNEY TO BE NOTICED		
Terrence M. Dunphy Fallon, Sullivan, Dunphy & Mulvaney 115 State St. Suite 500 Springfield, MA	representing	Leroy Person (1) (Defendant)
01103 413-732-0346 413-736-8610 (fax) terrencedunphy@comcast.net Assigned: 06/27/2003 TERMINATED: 06/25/2004 LEAD		
ATTORNEY ATTORNEY TO BE NOTICED Lori H. Levinson Cain, Hibbard, Myers & Cook 66	representing	Leroy Person (1)
West Street Pittsfield, MA 01201 413-443-4771 413-443-7694 (fax) Ilevinson@cainhibbard.com		(Defendant)
Assigned: 06/18/2004 TERMINATED: 09/20/2004		
LEAD ATTORNEY ATTORNEY TO BE NOTICED	roproporting	LICA (Digintiff)
Todd E. Newhouse United States Attorney's Office 1550 Main Street 3rd Floor Springfield, MA 01103	representing	USA (Plaintiff)
413-785-0109 413-785-0394 (fax)		
Todd.Newhouse@usdoj.gov Assigned: 06/19/2003		
LEAD ATTORNEY ATTORNEY TO BE NOTICED		