

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Criminal No. 14-3608 MCA

NATHAN MONDRAGON,

Defendant.

SENTENCING MEMORANDUM

COMES NOW NATHAN MONDRAGON, Defendant, by and through his undersigned appointed counsel, Charles Fisher, and hereby submits this Sentencing Memorandum for the Court's consideration at his forthcoming sentencing hearing.

A. INTRODUCTION

The life of Defendant Nathan Mondragon is potent evidence that, at least for some, there is real substance in the old characterization of alcohol as "Demon Drink".

On December 23, 2014, Defendant Nathan Mondragon voluntarily entered a Guilty plea to Count 2 of the Indictment charging him with assault of John Doe on or about September 14, 2014 resulting in serious bodily injury to him in violation of 18 U.S.C. §§ 1153 and 113(a)(6).

As appears from both the Admission of Facts on page 3 - 4 of the Plea Agreement, ¶¶8-9, and his statement of acceptance of responsibility, Presentence Report ("PSR"), ¶34, pages 9-11, Mr. Mondragon has fully and unreservedly accepted responsibility for the offense. He also took the opportunity at the plea hearing before Chief United States Magistrate Judge Molzen to express his remorse and regret to the victim John Doe, who attended the hearing in person. In his statement of acceptance of responsibility, Mr. Mondragon has also expressed his sincere remorse

to both the Court and his family, apologizing to them for what his irresponsible behavior has put them through.

B. FACTUAL BACKGROUND

As appears from his statement of acceptance of responsibility, Mr. Mondragon stayed occasionally at John Doe's house. PSR, ¶34, at 10. On the day of the incident, John Doe went to get a bottle of liquor. Government Discovery ("GD"), at 28. John Doe agrees that he and Mr. Mondragon, with some help from John Doe's cousin, had drunk at least one half of the bottle of liquor before John Doe went to take a shower. John Doe acknowledges that both he and Mr. Mondragon were intoxicated. GD, at 29.¹ It should also be noted that, on John Doe's admission to Christus St. Vincent Hospital sometime after 2.15 in the morning of September 15, 2014, he was noted to be very combative and agitated due to intoxication, to the degree that he needed to be physically restrained. GD, at 130.

Because of *his* state of intoxication, Mr. Mondragon is not sure exactly what happened to provoke him, beyond a vague recollection that John Doe told him that he needed to pay John Doe or he could not stay there anymore and making a gesture that Mr. Mondragon understood as threatening. PSR, ¶34, at 10. Mr. Mondragon also recalls John Doe saying something like "There are other ways to pay me" and grabbing his buttocks.

When the fight started, neither of them were armed, and John Doe hit Mr. Mondragon back, knocking him to the floor. GD, at 17. Mr. Mondragon has acknowledged that provocation affords him neither a defense to nor an excuse for stabbing John Doe. PSR, ¶34, at 10.

¹ Indeed, alcohol intoxication had also obviously played a part in an earlier dispute between them. *Id.*.

C. OBJECTIONS TO & COMMENTS ON PRESENTENCE REPORT

PSR ¶28-29, at 8: In describing the impact upon him, John Doe states that, following publicity concerning the case, he has been ostracized and ridiculed in the pueblo and that, during a ceremonial dance at Christmas time in which he was a participant, he was publicly humiliated by being undressed down to his underwear by the “clowns”. Both Mr. Mondragon and undersigned counsel sympathize with John Doe for having been subjected to this discrimination and intolerance. As John Doe himself states, his sexual orientation was already known to members of the pueblo before the incident at issue in this case and he was subject to unpleasant and disparaging name-calling. Mr. Mondragon has heard that publicity about the case has resulted in *him* also being condemned for his perceived sexual orientation. Moreover, Mr. Mondragon wants it to be clearly understood that he had nothing to do with the conduct of the “clowns”, with whom he had no contact prior to the Christmas ceremonial dances.

PSR ¶336-7, at 11: There is no dispute as to the base offense level identified by the Probation Officer and that the use of a knife may result in a 4 level increase.

PSR ¶38, at 11: However, without in any way minimizing their seriousness, it is strongly disputed that the injuries sustained by John Doe can properly be determined to be “life-threatening bodily injury” within the meaning of United States Sentencing Guidelines (“USSG”) §2A2.2(b)(3)(C) in the absence of the opinion of a medical professional to that effect.

To reach this conclusion, the Probation Officer appears to be relying on the lay opinions of law enforcement officers. It is understandable that, when dealing with an emotional scene, there might be different impressions as to the injury or injuries sustained by John Doe, but those differences undermine the reliability of the law enforcement officers’ assessment. Taos Tribal Police Officer Brian Garcia saw “two (2) stab wounds to the *upper left* side of [John Doe’s]

chest.” GD, at 34. [emphasis added]. The victim John Doe himself alleges Mondragon stabbed him twice “on the chest and on the *right* side of his body”. GD, at 17. [emphasis added]. John Doe also claimed that the assault caused both his lungs to collapse. Id., at 17., and Id., at 28. In fact, as appears below only one lung affected.

In his reports, BIA S/A Montowine initially referred to Mr. Mondragon stabbing John Doe “numerous times”. GD, at 6.² In the same report, BIA S/A Montowine then reported that “Mondragon [*sic*] sustained two (2) knife wounds, one being to the neck.” Id., at 7.

However, on John Doe’s admission to Christus St. Vincent Hospital, the Admission Notes found one (1) stab wound to the right upper anterior chest and a left cheek laceration. See, e.g., GD, at 128. It was noted that John Doe’s “respirations [were] non-labored, symmetrical chest wall expansion.” Id. It was also noted that the left cheek laceration had already been repaired by sutures in the Emergency Department.³ Following his admission, and, although tests raised the “possibility of a right pneumothorax, GD, at 176, by the day after his admission, September 16, 2014, no “definite pneumothorax” was visualized and the chest tube was removed. Id. at 134. John Doe’s left lung was consistently clear. Id., at 176. All symptoms had resolved by the time of John Doe’s discharge two days later on September 18, 2014.

Accordingly, it is respectfully submitted that the injuries should be considered “serious bodily injury” as charged in the statute, rather than “life-threatening”, and that the base offense level should therefore be increased by 5 rather than 7 levels.⁴

² Though not strictly synonymous, this was re-stated by the Probation Officer as “Mondragon has stabbed John Doe *multiple* times.” PSR, ¶14, at 5. [emphasis added].

³ It is unclear whether this is a reference to Christus St. Vincent Hospital or Holy Cross Hospital in Taos.

⁴ Although not injured nearly as seriously as John Doe, Mr. Mondragon was not unscathed in this incident. Mr. Mondragon was struck in the head at least twice with a stick, resulting in a 4 cm. laceration, which required staples, as well as suffering from a concussion, and having experienced loss of consciousness and some seizure activity. A large right subcutaneous hematoma was noted near the vertex. At Holy Cross Hospital in Taos, Mr. Mondragon was noted to have slurred speech, the smell of alcohol on his breath, and he appeared to be intoxicated. Mr. Smith claims

PSR ¶39, at 11: The Probation Officer identifies a victim related adjustment, based on the conclusion that John Doe was “physically restrained” during the incident.

Application Note 1.(K) to USSG §1.B1.1 defines “physically restrained” as meaning “the forcible restraint of the victim such as by being tied, bound, or locked up.”

Once again, there were inconsistent statements made with respect to this aspect of the incident. Tecumseh Smith, the witness on whom this conclusion depends, initially informed Taos Pueblo Police Officer Brian Garcia that he saw John Doe *standing* in the bathtub while Mondragon was saying “Why did you make me do this to you?”. GD, at 15 and 34. In a later interview with BIA S/A J.P. Montowine, Tecumseh Smith changed his account and informed the agent that John Doe was lying in the bath and Mondragon kneeling beside him with a knife held to John Doe’s throat. Id. at 21. The Probation Officer relies and accepts this later account. PSR, ¶24.

It is respectfully submitted that, in light of the inconsistency, the Court cannot be sure that John Doe was restrained and therefore the 2 level increase should not be added.

PSR ¶40, at 11: It is respectfully submitted that since both John Doe and Mr. Mondragon were intoxicated, they were equally vulnerable in that respect. However, it is not disputed that John Doe was naked while taking a shower, which presents a legitimate basis for him being a vulnerable victim.

to have been the person to strike him with a stick. GD, at 15. At the time of his arrest, Mr. Mondragon believed it was John Doe that hit him with a stick. Id., at 36. This may reveal the degree of Mr. Mondragon’s intoxication during this incident.

D. RECALCULATION OF TOTAL OFFENSE LEVEL

By reason of the foregoing, it is respectfully submitted that the adjusted offense level should be 25, rather than 28 and that , once acceptance of responsibility is factored in, the total offense level should be 22.

PSR, ¶130, at 32: The Probation Officer has identified a ground for any upward departure based on Inadequacy of Criminal History pursuant to USSG §4A1.3 because Mr. Mondragon's tribal convictions are not part of the computation of his criminal history. For reasons set forth below, it is respectfully submitted that Mr. Mondragon's tribal criminal record vividly manifests the disease of chronic alcoholism from which he suffers and an upward departure to Criminal History category IV is not necessary to provide the Court with ample authority to impose a sentence that reflects the seriousness of the current offense that is also a reasonable sentence.

**E. CONSIDERATION OF GROUNDS FOR DOWNWARD DEPARTURE
AND/OR 18 U.S.C. §3553(a) FACTORS**

It is accepted that the Court must begin its analysis by correctly calculating the applicable advisory guideline range pursuant to 18 U.S.C. §3553(a)(4) & (a)(5). However, following *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005) and its progeny, the advisory guideline range is just one of several factors the Court must consider to arrive at a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. §3553(a). The Court must then consider all of the §3553(a) factors to determine whether they support the advisory guideline sentence. *Gall v. United States*, 552 U.S. 38, 50 (2007). The Court must make an individualized assessment based on all of the facts to determine whether a

departure or a variance is warranted. *Id.* After this inquiry, the Court may impose any sentence that is “reasonable” and may depart or vary from the Guidelines for any fair and just reason. *United States v. Smart*, 518 F.3d 800, 804 (10th Cir. 2008). To be substantively reasonable, the sentence should reflect not only the nature and circumstances of the offense but also the §3553(a) factors as applied to the case, including the history and characteristics of the defendant. *United States v. Verdin-Garcia*, 516 F.3d 884, 895 (10th Cir. 2008); see also *United States v. Angel-Guzman*, 506 F.3d 1007, 1014-15 (10th Cir. 2007)(same).

The Court is also required by 18 U.S.C. §3553(a) to consider what sentence will: “reflect the seriousness of the offense, ... promote respect for the law, and ... provide just punishment for the offense”, 18 U.S.C. §3553(a)(2)(A); “afford adequate deterrence to criminal conduct”, 18 U.S.C. §3553(a)(2)(B); “protect the public from further crimes of the defendant”, 18 U.S.C. §3553(a)(2)(C), and “provide the defendant with needed educational ... training, medical care, or other correctional treatment in the most effective manner”, 18 U.S.C. §3553(a)(2)(D). The Court must also consider the kinds of sentences available. 18 U.S.C. §3553(a)(3).

The sufficient-but-not-greater-than-necessary requirement, often referred to as the “parsimony provision”, is not just another “factor” to be considered along with the others set forth in §3553(a), but sets an independent limit on the sentence a court may impose, to which all the enumerated factors are subservient.

Moreover, 18 U.S.C. §3661 mandates that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”

The [Sentencing] Commission has not developed any standards or recommendations that affect sentencing ranges for many individual

characteristics. Matters such as age, education, *mental or emotional condition*, *medical condition (including drug or alcohol addiction)*, employment history, *lack of guidance as a youth*, *family ties*, or military, civil, charitable, or public service are not ordinarily considered under the Guidelines. See USSG. Manual §§ 5H1.1-6, 11, and 12 (Nov. 2006). These are, however, matters that §3553(a) authorizes the sentencing judge to consider. See, *e.g.*, 18 U.S.C. §3553(a)(1)). *Rita v. U.S.*, 551 U.S. 338, 127 S.Ct. 2456, 2473 (2007) (Stevens, J. and Ginsburg, J., concurring). [emphasis added].

“[I]t is fair to assume that the Guidelines, insofar as practicable, reflect a *rough approximation* of sentences that *might* achieve §3553(a)’s objectives.” *Id.*, 127 S.Ct., at 2465 (majority opinion) [emphasis added]. Thus, the Court may take into consideration that the guideline sentence should not apply “because the Guidelines sentence itself fails properly to reflect §3553(a) considerations...” *Id.*, 127 S.Ct., at 2465. The Supreme Court’s decisions mean that “the standards governing departures do not bind a district court when employing its discretion with respect to variances.” *U.S. v. Chase*, 560 F.3d 828 (8th Cir. 2009) (case remanded to consider defendant’s characteristics which could warrant a downward variance under §3553(a)).

The Court is required to “consider every convicted person as an individual and every case a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon v. United States*, 528 U.S. 81, 113 (1996). The sentence must be reasonable based on the Court’s assessment of the factors set forth in 18 U.S.C. § 3553(a). *United States v. Kristl*, 437 F.3d 1050, 1053 (10th Cir. 2006). To impose a reasonable sentence, the Court must consider the factors set forth in 18 U.S.C. §3553(a) and select a sentence that is “sufficient, but not greater than necessary” to fulfill the sentencing goals established by Congress. *United States v. Mateo*, 471 F.3d 1162, 1163 (10th Cir. 2006).

F. CONSIDERATIONS SPECIFIC TO DEFENDANT

While a defendant’s lack of guidance as a youth is ordinarily not relevant in determining whether a departure is warranted, USSG §5H1.12, the Court may consider this factor in

combination with other aspects of the defendant's history and characteristics in determining what is a reasonable sentence, including considering a variance. 18 U.S.C. §3553(a)(1).

In Mr. Mondragon's case, he did not even meet his father, an itinerant pow wow singer, until just two (2) years ago when Mr. Mondragon was 26 years old. PSR, ¶91, at 26. Thus, he might reasonably perceive that he had been abandoned by his father, and he was left without the fatherly guidance essential to a young male in the pueblo milieu, in which role models for young males are particularly influential.

Under the USSG, a defendant's mental and emotional condition may be relevant in determining the appropriate sentence. USSG §5H1.3. The Court may also consider a defendant's physical condition, including drug and alcohol dependence. USSG §5H1.4. It is respectfully submitted that, in Mr. Mondragon's case, these conditions were and are "present to an unusual degree" and therefore constitute a legitimate basis for a downward departure.

Even if the Court concludes that the USSG imposes insuperable limitations on these factors as grounds for a downward departure, pursuant to 18 U.S.C. §3553(a), the Court may in its discretion vary from a recommended guideline range sentence without finding that any of these factors are present to an *unusual* degree. *Smart*, 518 F.3d, at 808; see also, *United States v. Ranum*, 353 F.Supp.2d 984, 989 (E.D. Wis. 2005).

Mr. Mondragon has just had his 29th birthday. He started drinking alcohol at age 13. PSR, ¶104. It caused him to drop out of Taos High School in the 9th grade. PSR, ¶107. With no high school diploma and no vocational training, he was therefore ill-equipped to find steady employment. He started out with beer, but progressed to spirits. He admits to having been drinking 1/5th of hard liquor a day in the year leading up to his arrest. *Id.* Mr. Mondragon has

also abused various types of illegal drugs over the years, including frequent use of cocaine and methamphetamine. PSR, ¶104.

As the PSR recounts at ¶¶50-69, at 12-21, sixteen (16) out of twenty (20) sets of *adult convictions* involved intoxication, with Mr. Mondragon often described as being highly or extremely intoxicated, several times to the point of passing out, including in the roadway, and sometimes associated with expressions of suicidal intent.

As the PSR recounts at ¶¶72-73, at 21, four (4) out of the four (4) instances of *other criminal conduct* by Mr. Mondragon involved various forms of intoxicants.

As the PSR recounts at ¶¶73-89, at 21-23, seven (7) out of the seven (7) *pending charges*, including the Taos Pueblo case corresponding to this Indictment involved intoxication, with Mr. Mondragon being sometimes described as highly intoxicated, sometimes passed out, and sometimes as expressing suicidal intent.

Finally, as the PSR recounts at ¶¶81-89, at 24-26, four (4) out of Mr. Mondragon's nine (9) *other arrests* involved intoxication, at least one of which to the point of him passing out.

It should also be noted that, in May 2014, Mr. Mondragon sustained serious injuries, including a fractured skull, a fractured shoulder and fractured ribs, for which he was hospitalized in Texas. Absent a medical or psychological assessment, it is unclear whether the head injury resulted in any injury that may have contributed to his behavior thereafter.

In combination, and together with his experiences in the company of the paternal side of his family in Minnesota, PSR, ¶93, at 26-27, this may explain Mr. Mondragon's belief that he had been possessed by demons and his past suicidal ideation.

The Court in its discretion determined that a psychological evaluation of Mr. Mondragon would not be of assistance to the Court at sentencing. Undersigned counsel cannot claim any

professional credentials that would qualify him to assess Mr. Mondragon's physical and mental health. However, the above described history appears to support the conclusion that Mr. Mondragon has been a slave to addiction, and principally alcohol addiction, for most of his life.

The current medical science states that addiction is rooted in the biology of the brain. The obsession and compulsion to abuse substances is the result of a dysfunction of the brain in the same way as cardiac insufficiency is a disease of the heart. D. Engleman et al., "Why Neuroscience Matters for Rational Drug Policy" 11 Minn J.L. Sci & Tech 7, 8, 15 (Winter 2010.) Indeed, addiction and substance abuse have been repeatedly recognized as mental health disorders by the American Psychiatric Association. Dramatic advances over the past two decades in both the neurological and behavioral sciences inform that addiction to any drug, including alcohol, manifests itself as an irrepressible drive to take the drug, despite the undesirable consequences. It is a result of a reconfiguration of the circuitry of the reward and decision-making systems of the brain which leads to increased cravings for the drug, accompanied by diminished impulse control. One of the first steps in active addiction is the reinforcement which comes from drug-induced increases in dopaminergic activity. The brain's dynamic circuitry interprets the drug as a highly positive stimulus and then reconfigures the brain's neurotransmitters to seek more drugs. As a consequence, the brain becomes physically dependent on the chemicals provided by the drug taking and the number of neurotransmitter receptors for the drug increase. The stimuli associated with the drug begin to drive cravings and compel an addict to seek more and more drugs to satisfy these cravings. In the process, addicts place the use of drugs above the welfare of their families, the safety of the community, and even their own well being. See, Engleman, et al., 11 Minn. J. Sci&Tech 7, 8, 15-18 (Winter 2010).

Drug addiction is rampant among criminal offenders and "substance abuse is highly

correlated to an increased propensity to commit crime.” USSG § 5H1.4. According to a report from the Bureau of Justice Statistics, nearly seven out of ten jail inmates met the criteria for substance abuse or dependence in the year before their arrest. Bureau of Justice Statistics, U.S. Dep’t of Justice, Special Report: Substance Dependence, Abuse and Treatment of Jail Inmates. In addition, almost half of the men and eighty percent of the women who seek treatment for addiction meet the criteria for post traumatic stress disorder. Smith, R., Substance Abuse: Our Current Understanding, Case Western Reserve School of Medicine (2014). These statistics, rather than justifying the Sentencing Commission’s unwillingness to account for addiction in criminal sentencing, in fact demonstrate the wisdom of an “addiction variance” in an effort to avoid the unfortunate specter that our criminal justice system would punish people, not for their conduct, but for their disease.

However, in spite of Mr. Mondragon’s bleak past record, there are encouraging signs. Indeed, it is distressing that, in the days leading up to this offense, Mr. Mondragon had made contact with, and been interviewed by, the Albuquerque Rescue Mission with a view to getting out of Taos Pueblo and seeking professional and spiritual help for his addictions. In the days immediately before the offense, Mr. Mondragon posted on Facebook on September 10, 2014 “Really think that its bout that time to change my olways for good!!!”, and on September 13, 2014 “Day one of my sobriety!!! Real talk” He also posted a comment on September 14, 2014 at 11.09 a.m.: “Already was tempted last nightbut I said who am I lying to - myself !!!.....I can't”

Now that he has been sober since his arrest, Mr. Mondragon is finally able to develop considerable self-knowledge and analysis. Mr. Mondragon states that, without drink, he is neither angry nor violent. He is blessed with a supportive and forgiving family. His mother, Rose

Mondragon, describes him, when sober, as “artistic, caring, and having a good heart” and “a funny guy who makes everybody laugh”. PSR ¶95. She believes that he was affected by the satanic rituals and drugs that he was exposed to in Minnesota. Id. But she also sees that he has changed since his arrest.

Perhaps foremost among the changes is that, while he has been in custody, Mr. Mondragon has recognized how he lost his way and considers himself fortunate to have re-discovered his faith in God. He has been studying the Bible. He believes that, with God’s help, he can turn his life around, and when released from his sentence, he would like to do missionary work. PSR, ¶34, at 11.

Mr. Mondragon also recognizes that he may need additional professional help to completely overcome his past addictive behaviors. Id.

He did not participate in the 500 Residential Drug and Alcohol Program (RDAP) during his previous incarceration in a federal prison. PSR, ¶105, at 29. If eligible, he would like to be considered for that program.

During his previous prison term, Mr. Mondragon participated in the GED program they offer in Florence, Colorado. PSR, ¶34, at 11. He was ready to take my GED test but it was cancelled because of a major prison disturbance. Id. He was about to test again in Florence when someone stole all the calculators. Id. This time, he is determined to make sure that he completes the GED course and pass the test. Id..

G. CONCLUSION

For the foregoing reasons and as stated above, it is respectfully submitted that the total offense level should be 22. It is further respectfully submitted that the Court should not adopt the recommendation that Mr. Mondragon’s criminal history category should be increased from III to

IV. A total offense level of 22 with a criminal history category of III gives a guideline range of 51 to 63 months.

It is respectfully submitted that a “*just* punishment” in all the circumstances pursuant to 18 U.S.C. §3553(a)(2)(A) should take into account that Mr. Mondragon’s current offense of conviction and the overwhelming majority of his past offenses derive from a terrible disease of addiction for which he will require extensive treatment.

Given the fact that he is just 29 years old and is now demonstrating a significant will to change, it is respectfully submitted that a sentence of 51 months would be a reasonable sentence in the particular circumstances of this case and this Defendant.

Respectfully submitted,

/s/ Charles Fisher

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Certificate of Service

I hereby certify that, on June 2, 2015, the foregoing pleading was filed electronically pursuant to CM/ECF procedures for the District of New Mexico, which caused the following parties or counsel to be served by electronic transmission, as more fully reflected by the Notice of Electronic Filing:

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