IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. CR 06-538 JH

MARY QUAINTANCE,

Defendant.

SENTENCING MEMORANDUM
ON BEHALF OF DEFENDANT MARY QUAINTANCE

Through counsel, Defendant Mary Quaintance files the following Sentencing Memorandum, analyzing her sentencing pursuant to the United States Sentencing Guidelines as well as pursuant to Title 18, United States Code, Section 3553(a). The Pre-Sentence Investigation Report (PSR) recommends a Guideline sentencing range of 37-46 months. PSR, ¶ 71. Ms. Quaintance submits that an analysis of the Guidelines, in conjunction with an analysis of 18 U.S.C. § 3553(a), warrant a probated sentence.

As grounds in support, Ms. Quaintance submits the following.

1. INTRODUCTION AND BACKGROUND

Mary Quaintance is a 53 year old woman who grew up in the western United States, living in California, Idaho, Washington, Nevada, Texas, and Arizona. Ms. Quaintance's childhood was difficult, marked by poverty and by the abuse of a veteran-father who returned from war physically and psychologically damaged. Ms. Quaintance and her siblings were regularly beaten and emotionally abused, and on one occasion Ms. Quaintance was battered by her father to the extent that her nose was shattered. Lamentably, as a young girl, Ms. Quaintance

also experienced sexual abuse at the hands of her paternal grandfather. Eventually, Ms. Quaintance left home to stay with her maternal grandparents. Despite this difficult backdrop, Ms. Quaintance attended school into the 12th grade, and managed to audit some college courses at a local community college.

At 53 years old, Ms. Quaintance has experienced some very serious health problems, including cervical cancer in 2000. Ms. Quaintance has developed a chemical sensitivity to solvents, and experiences an allergic reaction to numerous medications, including most pain medications. Ms. Quaintance also has been diagnosed with high cholesterol in 2007, and experiences shortness of breath. Ms. Quaintance was treated with medication for a period of several months, but after completion of her medication, there was no improvement in her breathlessness. Ms. Quaintance presently does not take any prescribed medication.

Ms. Quaintance has had one contact with the law in her life, an arrest in July 1984 in Yakima, Washington which resulted in her being charged with Possession of a Controlled Substance (Marijuana). PSR, ¶ 43. Ms. Quaintance does not dispute the fact that she pleaded guilty at that time to simple possession, and shortly thereafter moved to Texas with her husband. From 1984 until the arrest in this case, Ms. Quaintance had no other contacts with the law. Ms. Quaintance has no other pending cases or other criminal conduct.

2. OBJECTIONS TO THE PRE-SENTENCE REPORT: ¶¶ 21, 25

Mary Quaintance objects to the statement, attributed to her in the Pre-Sentence Report (PSR), that she stated to arresting officers that they had "disrespected a high woman member of the Church by asking her to remove her earrings." PSR, ¶ 21. Ms. Quaintance never made this statement, and believes that the statement was reported in the initial police reports based upon

comments made by her husband Danuel Quaintance. Furthermore, Ms. Quaintance states that the phrasing of the statement–"disrespected", "high woman member"–contains wording that she would not have used. Accordingly, Ms. Quaintance objects to the statement being attributed to her.

Ms. Quaintance also objects to any reference in the PSR about alleged cocaine use. *See* PSR, ¶ 25. From its initiation, this case has been one of marijuana possession and use. At the time of the arrests in February 2006, and even subsequent to the thorough search of the Quaintance property in Arizona, there was absolutely no evidence of cocaine use. The first time alleged cocaine use by Ms. Quaintance was ever mentioned was after Timothy Kripner was arrested for a violation of his conditions of release. At that time, Kripner was arrested for testing positive for cocaine use (and other drugs). Faced with re-incarceration, Mr. Kripner continued his efforts to cooperate with the Government, and mentioned Ms. Quaintance's supposed cocaine use for the first time. Kripner continued this story during the August 2006 evidentiary hearing. Transcript of August 2006 Evidentiary Hearing (hereafter "Transcript") at 280 et seq. Kripner's allegations, however, have never been substantiated. Without anything more than the unsubstantiated allegation of a biased, drug-using co-defendant who was trying to please the Government in order to obtain leniency, Ms. Quaintance objects to any mention of cocaine use in the PSR.

3. DEPARTURE ANALYSIS UNDER SENTENCING GUIDELINES

A review of the discovery reveals that, on February 22, 2006, Ms. Quaintance was driving the vehicle and her husband Danuel was the passenger. Ms. Quaintance was present because her husband Danuel lacked a driver's license and therefore needed someone else to drive

for him. Danuel Quaintance was traveling to New Mexico to show Timothy Kripner how and where to retrieve the marijuana that was going to be left by unknown Mexican backpackers. Ms. Quaintance reluctantly agreed to drive, and was quite upset from the start at being asked to get involved in the trip to Lordsburg.

The minimal participation of Ms. Quaintance is further revealed by the details of the initial investigation and arrests. It is clear from discovery that Danuel Quaintance did all the talking, he communicated almost exclusively with the police officers, and once arrested, he was most vocal in informing the officers of his views on the perceived illegality of their actions. Throughout the investigation on February 22, 2006, Ms. Quaintance was cooperative and silent.

a. **Defendant Did not Control the Amount of Drugs She Possessed**

Mary Quaintance possessed no knowledge of the amount of marijuana that would be retrieved in New Mexico on February 22, 2006. For that matter, neither did Danuel Quaintance. Rather, Ms. Quaintance was asked by Danuel to drive to Lordsburg so he could show Mr. Kripner where to meet the backpackers, but was provided absolutely no information as to how much marijuana would be located there.

Additionally, Ms. Quaintance had absolutely no knowledge of the activities of her brother Joseph Butts in Missouri on February 13, 2006, and certainly had no knowledge or control over the marijuana that he possessed at the time of his arrest. There is nothing that has emerged from the investigation of these matters to suggest that Ms. Quaintance had any involvement in the February 13, 2006 incident. Of course, Ms. Quaintance has pleaded guilty to Counts 1 and 2 of the *Superseding Indictment*, and therefore accepts responsibility for the marijuana discovered on February 13, 2006. While the quantities of marijuana are rightfully

attributed to Ms. Quaintance as per the terms of the plea agreement, the extent of Ms. Quaintance's involvement (or non-involvement) in each incident is relevant for sentencing purposes.

In *U.S. v. Mendoza*, 121 F.3d 510 (9th Cir. 1997), it was determined that the district court has discretion to depart where the defendant had no knowledge of or control over the amount or purity of the drugs, if the court were to determine that the facts are outside the heartland of such cases. Because this ground is not one categorically proscribed by the Guidelines, it may form the basis of a departure given appropriate facts. 121 F.3d at 513-514. Similarly, the Second Circuit upheld a downward departure when the district court found the defendant had no knowledge of any particular quantity of cocaine, and no particular quantity was foreseeable to him in connection with the conspiracy of which he was a member. *U.S. v. Chalarca*, 95 F.3d 239, 245 (2d Cir.1996). Furthermore, one district court more recently departed from a suggested Guideline sentence of 57 months to probation, based upon the facts that the defendant was a low-level "functionary" in a larger methamphetamine organization. The district court wrote that the defendant

> "was [merely] a functionary. Although his responsibilities were growing, he still did not take a profit; he was on salary. He had even less control over the direction of the enterprise than [the codefendant]. He took orders from [the codefendant]. The amount of pseudoephedrine that passed through his hands reflects someone else's decisions, not his own."

U.S. v. Jaber, 362 F.Supp.2d 365 (D. Mass. 2005). *Cf. U.S. v. Mikaelian*, 168 F.3d 380 (9th Cir. 1999), *amended*,180 F.3d 1091 (low purity of heroin cannot be categorically excluded as ground for departure).

It would appear that Mary Quaintance, like the defendant in *Jaber*[1], was more of a "functionary" than a central player in the marijuana activities of February 2006. Ms. Quaintance, as the wife of Danuel Quaintance, did not arrange for the transportation or retrieval of the marijuana seized on either February 13 or February 22, 2006. On February 22, the evidence supports the conclusion that Mary Quaintance simply provided a ride for her husband at his request. There is no evidence to suggest Mary Quaintance ever made any profits from her or her husband's activities. The quantities of marijuana tend to reflect the actions of her brother Joseph Butts and her husband Danuel Quaintance moreso than they reflect the actions and decisions of Mary Quaintance. Accordingly, given these unique circumstances, Ms. Quaintance respectfully submits that a departure is warranted, as she had no control over the quantity of drugs attributed to her by the PSR.

b. Mary Helen Quaintance was a Minor/Minimal Participant

The district court may grant a base offense level reduction if it finds a defendant relatively less culpable than other participants in the offense. USSG § 3B1.2. The Guidelines allow the court to consider a four level decrease in the offense level for "minimal" participation and a two level decrease for a "minor" participant, with the option of awarding a three level decrease for those "falling between." USSG § 3B1.2(a), (b). Application note 4 to § 3B1.2 provides that a "minimal participant" "is intended to cover defendants who are plainly among

[1] The defendant who received probation in *Jaber* was an individual named Momoh. Mr. Momoh was an employee of Mr. Jaber. Facts showed that Mr. Jaber was associated with another individual–Mr. Abu-Lawi–who was indicted separately along with 26 co-defendants in a national-in-scope methamphetamine manufacturing conspiracy. In the *Jaber* case, Mr. Momoh acted at the request of Mr. Jaber, was paid a salary, but had no control over the quantities of precursor chemicals that were distributed. It turns out that Mr. Jaber was effectively a franchisee of Mr. Abu-Lawi. *See U.S. v. Jaber,* 362 F.Supp.2d 365, 376-78 (D. Mass. 2005).

the least culpable of those involved in the conduct of a group" and is an adjustment to be "used infrequently." Application note 5 explains that a "minor participant" is "one who is less culpable than most other participants." Application note 3(A) states the adjustments are generally "for a defendant... [who is] substantially less culpable than the average participant." The decision to award or deny a role adjustment is heavily dependent on the facts. § 3B1.2, Appl. Note 3(C).

Absent a stipulation by the parties, it is the defendant's burden to establish, by a preponderance of the evidence, that a reduction for minor participation is warranted. *U.S. v. Chavez*, 229 F.3d 946, 956 (10th Cir. 2000); *U.S. v. Harfst*, 168 F.3d 398, 401-02 (10th Cir. 1999). The inquiry focuses "upon the defendant's knowledge or lack thereof concerning the scope and structure of the enterprise and of the activities of others involved in the offense". *U.S. v. Calderon-Porras,* 911 F.2d 421, 423-24 (10th Cir. 1990).

The facts of this case warrant a two- if not a four-level downward role adjustment. Nothing revealed pursuant to Butts' February 13, 2006 arrest links Mary Quaintance in any way to that incident, and Ms. Quaintance was simply present on February 22, 2006. The fact that Joseph Butts is Mary Quaintance's brother and a fellow member of the Church of Cognizance does not mean that Mary Quaintance directed Joseph Butts, nor does the fact that Mary Quaintance is married to Danuel Quaintance imply that she is closely involved in or somehow directed or co-directed, the February 22 incident. Similarly, the fact that she is one of a handful of Enlightened Cognoscenti of her Church does not suggest that she had any role in the decisions made by the Church. As revealed during the August 2006 evidentiary hearing and as found by this Court, the structure of the Church of Cognizance is such that the Enlightened Cognoscenti

do not direct other members of the Church. *See* Doc. 192, *Memorandum Order and Opinion*, at 26 ("Although the Church of Cognizance has 'enlightened cognoscenti', the members of the church are not led, supervised, or counseled by these cognoscenti."). Accordingly, the fact that Mary Quaintance is an Enlightened Cognoscenti does not translate into any specific leadership role; rather, an Enlightened Cognoscenti is merely an individual who has demonstrated a degree of knowledge and mastery of the tenets of the Church of Cognizance. Transcript at 91 (testimony of Michael Senger).

Other evidence in this case demonstrates that Danuel Quaintance is the de facto leader of the Church of Cognizance and Mary Quaintance plays a minimal role (if any) in the administration of the Church. The evidence clearly shows that Danuel Quaintance is the founder and the individual who "established" the Church in the State of Arizona. Anna Dibble, a member of the Church, testified that when she was deciding on becoming a member of the Church, she spoke to Danuel Quaintance (not Mary Quaintance) "several times" to learn about the Church. Transcript, at 151. Similarly, Michael Senger testified that when he first contemplated joining the Church of Cognizance, he also contacted Danuel Quaintance (without mention of Mary Quaintance). Transcript, at 98-99. Neither Dibble nor Senger identified Mary Quaintance as an individual whom they interviewed concerning their efforts to learn more about, and ultimately join, the Church of Cognizance.

During his testimony, Timothy Kripner referred to Danuel Quaintance as the individual whom he spoke with regarding the planning and carrying out of February 22, 2006 incident. For example, Kripner testified that when he arrived at the Quaintance residence on February 21, he met with Danuel to discuss the Butts' arrest and the amount of the Missouri state court bond.

Transcript, at 286-87. Kripner further stated that Mr. Quaintance told him the backpackers were from a monastery in Mexico. *Id.* Kripner testified that, during the retrieval of the marijuana in Lordsburg, Danuel Quaintance told him to take off because a semi-truck was approaching. *Id.* at 290. While Kripner stated that he smoked marijuana with both Mr. and Mrs. Quaintance when he received the courier certificate, he initially did not mention Mary Quaintance as partaking in the "half decent circle", but only mentioned Mary Quaintance when prompted by the prosecutor. *Id.* at 291.

Kripner provided further details about the incidents of February 22, 2006. Kripner revealed that during the stop in downtown Lordsburg, Danuel Quaintance received a phone call about the backpackers already being at the drop location. *Id.* at 292. Kripner also testified that he had to make a call to Danuel Quaintance, on the cell phone purchased for him by Danuel Quaintance, since the walkie-talkie was not functioning. *Id.* at 293. Kripner testified that he knew the backpackers would load the vehicle "[b]ecause Mr. Quaintance stated that they would load my car." *Id.*, at 289.

The weight of the evidence before this Court clearly signals that Danuel Quaintance played a greater role in the events of February 22, 2006, and that Mary Quaintance was a minimal player in those events, and even moreso in those of February 13, 2006. Despite the PSR's conclusion to the contrary, the "new" case agent determined that Mary Quaintance was less culpable than Danuel. *See* PSR, ¶ 27. Ms. Quaintance's minimal role warrants a two- if not a four-level reduction in her offense level.

c. U.S.S.G. § 5C1.2, "Safety Valve"

Mary Quaintance notes that the Pre-Sentence Report concludes that the Defendant

qualifies for relief pursuant to the "safety valve" provisions of 18 U.S.C. § 3553(f). Accordingly, unless there is an objection from the United States (which is not anticipated), Mary Quaintance simply states that any resulting sentence in this matter may (and should) be below the five year minimum mandatory sentence mandated by 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

4. ANALYSIS PURSUANT TO 18 U.S.C. § 3553(a)

a. Nature and Circumstances of Offense

The offenses at issue are the non-violent possession of marijuana, and partaking in a conspiracy to commit the same offense on an earlier date. The impetus for the investigation came from an inquisitive Border Patrol Officer in Lordsburg, New Mexico, who observed three individuals partaking in what is by all accounts innocent conduct: buying gas and food items, and conversing, at a gasoline station. The Quaintances were not the targets of any ongoing criminal investigation, but the Border Patrol officer apparently thought it odd that three individuals would purchase two buckets of KFC chicken and a couple of bags of chips, so he decided to follow them. Without reciting the details of Ms. Quaintance's arrest, suffice it to say that Mary Quaintance was cooperative throughout the entire investigation, and her involvement was markedly less than that of her husband. Apart from the numerous legal issues raised throughout the pendency of the litigation, the case is one of conspiracy and simple possession.

Beyond the straightforward nature of the crimes charged, though, lies a case that presents emotionally complicated and layered issues. The Quaintances use marijuana in concert with their religious beliefs, and while this Court may have previously found that these beliefs are not sincerely held, for the Quaintances, their religion provides direction and meaningfulness in their

lives. Marijuana is not only their sacrament but also their deity. The act of possessing marijuana in February 2006, even if illegal under the federal drug laws, was an effort to practice their religion. Contrary to the Government's assertions, the Quaintances did not profit from the sales of marijuana; a cursory view of their property in Pima, Arizona suggests that these individuals were living well *within* their means, as their sole source of income is Danuel's Social Security Disability Income (SSDI) benefits. Thus, in terms of the nature and circumstances of the offense, the non-violent crimes were motivated by a religious belief system, which beliefs the Quaintances still hope to have vindicated by the federal courts.

b. History and Characteristics of Mary Quaintance

As discussed above, Danuel and Mary Quaintance have been married for 35 years, reside in a small, rural community in southeastern Arizona, have two children and several grandchildren who live nearby, and have very strong ties to their community. Mary Quaintance stays at home with her husband Danuel, and the family gets by through Danuel's SSDI benefits based upon his service in the Vietnam War. Mary Quaintance experienced a rather traumatic childhood, marked by dislocations, abuse and violence. Now 53 years old, Mary Quaintance experiences health problems, including a recent serious bout with cervical cancer.

Other than the instant case and a very old marijuana possession case, Mary Quaintance has had no contact with the law

c. The Need for the Sentence Imposed to Promote Certain Statutory Objectives

A sentence that is shorter than the 37-46 month term recommended by the Sentencing Guidelines will still reflect the seriousness of the offense, promote respect for the law, and provide just punishment for Mary Quaintance. Any incarceration for Ms. Quaintance will be a

serious hardship, as she is 53 years old with no prior experience of being incarcerated. A sentence of probation with strict conditions will certainly promote respect for the law, for others will see Ms. Quaintance punished for what is essentially a non-violent marijuana offense. By the same token, any sentence–even probation–will afford adequate deterrence to both Mary Quaintance and to society at large from committing further criminal conduct, for like-minded individuals will realize that one who possesses marijuana in the name of one's religion risks severe ramifications. Ms. Quaintance has demonstrated that she is not a threat to society, as she has fully complied with pre-trial release over the course of the last three years. Incarceration will not have any beneficial impact on Ms. Quaintance, at least in terms of receiving educational training, medical care, or other correctional treatment.

d. The Kinds of Sentences Available

In *Booker*, the Supreme Court served and excised 18 U.S.C. § 3553(b), the portion of the federal sentencing statute that made it mandatory for courts to sentence within a particular sentencing guidelines range. *Booker*, 543 U.S. 220, 2005 WL 50108 at *16. This renders the sentencing guidelines advisory. *Id.* Thus, available sentences in the present case include not only incarceration, but also probation with a variety of restrictive conditions. *See, eg.,* 18 U.S.C. §§ 3551, 3559, 3561, 3571, 3581.

e. The Sentencing Range Established by the Sentencing Commission

The Sentencing Guidelines suggest a sentencing range of 37-46 months. Ms. Quaintance suggests to the Court that a sentence of three years or more in federal prison is excessive, given the unique facts of this case. Ms. Quaintance is a 53 years old grandmother who primarily spends her days tending to the needs of her family. Other than one prior marijuana offense from

over 20 years ago, Mary Quaintance has not been in trouble with the law. This dearth of criminal history, combined with Ms. Quaintance's age, suggests that it is extremely unlikely that Ms. Quaintance will re-offend. Given these circumstances, a sentence of three years or more is not a reasonable sentence.

f. The Need to Avoid Unwarranted Disparities

Reducing Ms. Quaintance's sentence to probation will not result in an unwarranted disparity for a variety of reasons. First, Ms. Quaintance's case is unique. Few if any other individuals in the country stand in similar shoes, to the extent that there are individuals being prosecuted for religiously-motivated possession of marijuana. Second, Mary Quaintance's history is unique, and she has always been a productive and law abiding citizen. Third, her present condition is tenuous, with Ms. Quaintance still feeling the effects of cervical cancer from several years ago. Fourth, as this Court may be aware, the parties had attempted plea negotiations for quite some time, and under the terms of those earlier proposed agreements, Ms. Quaintance was to have received a role reduction with the ability to seek further reductions. These discussions broke down not so much over Ms. Quaintance's objections, but rather over the parties' inabilities to reach an agreement as to Danuel Quaintance. Now, there is no stipulation that Ms. Quaintance is receive a role reduction, despite a guilty plea to the *Superseding Indictment.* A shorter sentence now for Mary Quaintance would be entirely consistent with the earlier intent of the parties (although Ms. Quaintance understands that the Government may oppose her request for a role reduction at this juncture).

g The Need to Provide Restitution to Any Victims of the Offense

There are no victims in the present case, and therefore this factor does not impact the

Court's sentencing decision.

5. CONCLUSION

As demonstrated above, a departure in offense level would adequately serve the purposes of sentencing by both punishing and deterring. A probated sentence will effectively punish Ms. Quaintance, just as it would effectively deter others who might consider engaging in similar conduct. Moreover, given the particular facts of this case, and specifically the Defendant's minimal role, a suggested Guideline sentence of 37-46 months is excessive and unreasonable; a probated sentence will equally serve the goals of criminal sentencing.

Mary Quaintance submits that the sufficient-but-not-greater-than-necessary requirement of 18 U.S.C. § 3553(a), or "Parsimony Provision", should play a role at sentencing, particularly when a district court can conclude that two sentences would be equally sufficient in meeting sentencing goals. In *U.S. v. Ministro-Tapia*, 470 F.3d 137 (2d Cir. 2006), the Second Circuit held that, "if a district court were explicitly to conclude that two sentences equally served the statutory purpose of [18 U.S.C.] § 3553, it could not, consistent with the parsimony clause, impose the higher." *Id.* at 142. The Tenth Circuit has not provided specific instruction to the contrary, and for this reason the holding in *Ministro-Tapia* has been deemed "persuasive". *See U.S. v. Vigil*, 476 F.Supp.2d 1231, 1322 (D.N.M. 2007) (Browning, J.) (concluding that the "not greater than necessary" language of 18 U.S.C. § 3553(a) "is perhaps not an independent basis for the reduction of a criminal sentence as a departure or variance", but that it is an "additional check" on the Court's sentencing analysis under *United States v. Booker* and 18 U.S.C. § 3553).

The arguments set forth above demonstrate that a sentence of probation effectively serves the statutory purposes of 18 U.S.C. § 3553(a). Consistent with the Parsimony Provision and

after careful analysis of the arguments contained herein, Mary Quaintance respectfully submits that a sentence of probation is sufficient, but not greater than necessary, to comply with the statutory directives set forth in 18 U.S.C. § 3553(a). In the event that the Court refuses to place Ms. Quaintance on probation, Ms. Quaintance respectfully requests a sentence of twelve months and one day.

Respectfully submitted,

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I HEREBY CERTIFY THAT on December 24, 2008, I filed the foregoing electronically through the CM/ECF system, which caused AUSA Luis Martinez to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

AND I FURTHER CERTIFY THAT on such date I served the foregoing by hand deliver/fax on the following non-CM/ECF Participants.

Mindy Pirkovic, USPO

filed electronically
JOHN F. ROBBENHAAR