

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
v.) Cr. No. 15-10338-FDS
11. CESAR MARTINEZ,)
a/k/a "Cheche,")
Defendant)

SENTENCING MEMORANDUM OF THE UNITED STATES

On February 26, 2018, after a month long trial, a United States District Court jury convicted Herzzon Sandoval, a/k/a “Casper,” Edwin Guzman, a/k/a “Playa,” and Erick Argueta Larios, a/k/a “Lobo,” of racketeering conspiracy, in violation of 18 U.S.C. § 1962(d), and convicted Cesar Martinez, a/k/a “Cheche,” of conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 846. In its Pre-Sentence Report dated July 12, 2018 (“PSR”), the United States Probation Office concluded that Martinez’s guideline sentencing range (“GSR”) was 60-63 months with a 60-month mandatory minimum sentence.

The evidence presented at trial demonstrated that the advisory guideline range does not fully account for the danger posed by Martinez. Pursuant to 18 U.S.C. § 3553(a), the United States respectfully requests that the Court sentence Martinez to 120 months in prison and 3 years of supervised release.

During the investigation, agents utilized CW-1 to set up several so-called “protection details” with members of MS-13 who believed they were protecting kilogram-sized cocaine shipments from Massachusetts to New Hampshire (in actuality, MS-13 members and CW-1 picked up cocaine from an undercover police officer and delivered the cocaine to another

undercover police officer while under constant surveillance). On February 14, 2014, Martinez, Jose Hernandez-Miguel, also known as “Muerto,” and CW-1 “protected” a one-kilogram shipment of cocaine. Agents recorded a conversation with Martinez before the protection detail where he eagerly assured CW-1 he was an experienced drug trafficker who would break up any attempt by the police to intercept the cocaine delivery. Martinez was well-suited for the role of look-out: on the way back from New Hampshire to Chelsea, Martinez called CW-1 to report, “There goes the truck and the [unintelligible] again. Along Central Street, man . . . the whore doesn’t have a front plate.” In fact, Martinez spotted one of the agents on surveillance in a truck without a front license plate. Like all the other MS-13 members who participated, Martinez was paid \$500 for protecting the kilogram of cocaine.

In addition to the drug protection detail with Muerto and CW-1, several cooperating witnesses identified Martinez as “Cheche,” a member of MS-13’s Eastside Loco Salvatrucha (or ESLS) clique. During the trial, the Court heard reliable evidence of Martinez’s involvement with MS-13 and his commission of serious crimes of violence, including the following:

- In 2008, Muerto – a cooperating witness this Court has previously found to be credible – testified that he and Martinez went to the Maverick Square T station in East Boston to hunt for “chavalas.” Martinez, Muerto, and two other MS-13 members attacked a group of gang rivals with a machete, a baseball, and knives before retreating to Martinez’s home.
- On December 14, 2014, MS-13 member Hector Enamorado, a/k/a “Vida Loca,” murdered Javier Ortiz in an after-hours beer hall in Chelsea. Noe Salvador Perez Vasquez, a/k/a “Crazy,” provided Vida Loca the murder weapon, and Luis Solis Vasquez, a/k/a “Brujo,” provided armed back up. At trial, Muerto testified that Martinez drove Crazy and Brujo from the ESLS home base, a garage in Everett, to meet Vida Loca in Chelsea. Once there, Crazy delivered the gun to Vida Loca and Vida Loca and Brujo murdered Ortiz and shot a second victim, Saul Rivera, in the chest.
- Agents successfully recorded several ESLS clique meetings. At the beginning

of each meeting, the clique's Second Word, Edwin Guzman, a/k/a "Playa," collected dues from the assembled members, including Martinez. These dues went to support MS-13 generally, to purchase clique firearms, to aid clique members in trouble, and to help bring deported clique members back to the United States. Martinez was also present when the clique discussed topics such as whether to join MS-13's East Coast Program and the need to discipline clique members who violated gang rules.

- On January 8, 2016, Martinez and other members of ESLS met at a garage in Everett to consider whether to promote Joel Martinez, a/k/a "Animal," to homeboy or full member in MS-13. In the months preceding the meeting, Animal had murdered a teenaged gang rival in East Boston and (with ESLS clique members) stabbed two other gang rivals. During the meeting, ESLS members discussed what it took to become a member of MS-13, discussed ways to take credit for Animal's murder, and discussed ways to shield Animal from the police. Members discussed how ESLS needed more members like Animal, who was willing to represent MS-13 "the right way." Prospective members had to be tested: "Let them come and kill. Let them come and feel the pressure . . . they need to stick the knife in and see what happens . . . if you have love for the Barrio, you will show your balls there." At the conclusion of the meeting, ESLS members kicked and beat Animal as Edwin Guzman, the clique's Second Word, counted for thirteen seconds. After the beating, members flashed MS-13 gang signs as they raced to embrace Animal. One member put his arm around Animal's shoulder and said, "Welcome to the Mara." Martinez's face was clearly captured on the video recording of the jump in ceremony.¹
- After the defendants were arrested, ESLS member Erick Argueta Larios, a/k/a "Lobo," told Muerto that in 2015 he had believed that CW-1 was an informant and had asked for a "green light" or permission to murder CW-1 from the clique's leader, Herzzon Sandoval, a/k/a "Casper." Lobo recruited Martinez to help him commit the murder and Lobo told Muerto that he and Martinez had "everything ready" to commit the murder.

¹ The recording of the jump in ceremony suggests that before the meeting, Martinez was concerned about the attention that Animal and other younger prospective members could bring to the clique. Ultimately, whether Martinez expressed reservations about Animal joining ESLS is beside the point. ESLS was comprised of older, more mature members who operated more quietly, but no less lethally, than other MS-13 cliques in Massachusetts. ESLS (through Brujo, with Martinez's help) participated in the murder of Ortiz in 2014. Members of ESLS committed numerous violent attacks over the years, including, for example, Martinez and Muerto's above-referenced 2008 attempted murder and Muerto's attempted murder at Highland Park in Chelsea on May 12, 2015. When Martinez told the clique, "What I told you and as I explained to you, what I don't want is for the homies to go to jail," he is not rejecting the ethos of MS-13 but rather expressing his desire that the clique continue to operate as it had. Nevertheless, Martinez was at the jump in ceremony and along with other members of ESLS welcomed Animal into MS-13.

Simply put, Martinez is more dangerous than his GSR suggests. Martinez's involvement in MS-13 was corroborated by the testimony of two members of his ESLS clique, Muerto and Mauricio Sanchez, also known as "Tigre," by the ESLS clique recordings, and by his involvement in the protection detail along with other MS-13 members. Martinez committed violence on behalf of MS-13 and he contributed funds to ensure the success of the enterprise. At Lobo's sentencing hearing, the Court concluded that Muerto's credible testimony, plus other corroborating evidence, was sufficient to find by a preponderance that Lobo had conspired to murder CW-1, and Lobo's GSR was based in large part on that finding. It is significant – but based on the evidence, not surprising – that Lobo selected Martinez to help him carry out a core MS-13 function, the murder of a suspected informant.

For the reasons set forth above, the government requests that the Court sentence Martinez to 120 months in prison. This is a significant upward departure from his correctly-calculated GSR but it is the only sentence that serves general and specific deterrence, promotes respect for the law, and protects the public. While it appears certain that Martinez will be deported at the conclusion of his sentence, the government further requests that the Court impose a period of 3 years of supervised release.

CONCLUSION

For all of the foregoing reasons, the Court should sentence Martinez to 120 months in prison followed by 3 years of supervised release.

Respectfully submitted,

ANDREW E. LELLING
United States Attorney

By: /s/ Christopher Pohl
Christopher Pohl
Kelly Begg Lawrence
Glenn A. MacKinlay
Kunal Pasricha
Assistant U.S. Attorneys

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify the foregoing document was filed through the Electronic Court Filing (ECF) system on November 26, 2018 and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ Christopher Pohl
Christopher Pohl
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
VS.)
CESAR MARTINEZ)
)
Criminal Action No. 15-10338-FDS

CESAR MARTINEZ SENTENCING MEMORANDUM

The current defendant, Cesar Martinez was found not guilty of conspiracy to conduct enterprise affairs through a pattern of racketeering activity while convicted of conspiracy to possess with intent to distribute cocaine of five hundred grams or more following a month long trial. The advisory sentencing guidelines set the base offense level for that crime at Level 24. The Probation Department concluded that the defendant meets the first four criteria of U.S.S.G. §5C1.2, but would need to satisfy criterion 5¹ to qualify for a two level reduction under U.S.S.G. §2D1.1(b)(17).

A. ADVISORY SENTENCING GUIDELINE APPLICATION

The Probation Department sets out in the Presentence Report, 25 pages related to the activities for which the jury returned a verdict of not guilty in this case. There are two paragraphs in those 25 pages (¶ 37 &38) directly related to the count of conviction on the drug charge. The defendant has objected to the inclusion of these activities in his report and renews that objection here again to the Court.

¹ This criteria requires the defendant to submit to a proffer session with the prosecution prior to the date of the sentencing giving a truthful and full account concerning the offense of conviction. The defendant will address this aspect more fully under his presentation relative to 18 U.S.C. §3553(a) later in this memorandum.

The Probation Report does not attempt to assert that any of the racketeering conduct contained in those 25 pages, constitutes relevant conduct for this defendant as set out under U.S.S.G. §1B1.3. Nor could there be as there is no (1) reasonably foreseeable acts and omissions of others (2) in furtherance of (3) the jointly undertaken criminal activity for which the defendant was convicted.

The conspiracy of which the defendant was convicted, dealt with an FBI "sting" operation² in February 2014, called a "protection detail". (See trial transcript day 4, page 23, **Exhibit 1**). Cesar Martinez was charged with a conspiracy involving the individuals associated with the planned FBI "details" done in October and December 2014, not the persons set out as participating with him in February 2014.³

The conduct forming the February, October and December 2014 "protections details" was unrelated to the Racketeering Conspiracy as the trial testimony showed this was entered into and committed by the individuals for their own personal gain. It had no involvement with any MS-13 or ESLS enterprise. The participants were instructed not to mention this conduct to the clique leadership. Trial exhibits of consensual recorded conversations supports the lack of any related activity. A synopsis of the December 8, 2014 consensual recording clearly demonstrates this:

-2-

² The FBI directed the cooperating witness in this case (CW-1) to ask people that he knew in the clique if they wanted to help him (CW-1) protect a drug shipment being transported by car from Massachusetts to New Hampshire. (See Trial Transcript day 4 page 26 **Exhibit 2**).

³ The FBI was required to seek separate authorization , as a new enterprise, in order to be able to operate the "protection details" in October and December 2014. (See trial day 4, page 30 **Exhibit 3** and the internal request for approval **Exhibit 4**).

CW-1: Fine, but don't tell Casper about this thing, or anything because last time I told the dudes and they told me some shit that they were going for sure, and at the last minute they cancelled on me.

CW-1: ... The Mara is one thing and this business is another. (**Exhibit 5**)

Further substantiation of this being an independent activity, was that no part of the fee for the "protection detail" was given or paid to the clique. The participants were told they would be paid the fee upon completion splitting up the amount given by the person accepting delivery in New Hampshire.

B. CONSIDERATIONS IN IMPOSING A PARTICULAR SENTENCE

In imposing a sentence, a District Court, should "impose a sentence sufficient, but not greater than necessary" to accomplish the sentencing goals advanced in §3553(a)(2) including just punishment, deterrence, recidivism and rehabilitation. See *Rita v. United States*, 551 U.S. 338, 347-48 (2007). In crafting an appropriate sentence, the Court should make sure that the sentence fits not only the offense but the offender and should "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." See *Gall v. United States*, 552 U.S. 38, 52 (2007). "[A] sentencing judge should engage in a ...holistic inquiry,'by considering' a tapestry of factors, through which runs the thread of [the] overarching principle' of parsimony." *United States v. Russell*, 537 F.3d 221, 228 (1st Cir. 2008) (quoting *United States v. Rodriguez*, 731 F.3d 20, 28 (1st Cir. 2008)).

“Consistent with the principle that “the punishment should fit the offender and not merely the crime, this Court has observed a consistent and uniform policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by law, particularly the fullest information possible concerning the defendant’s life and characteristics. That principle is codified at 18 U.S.C. §3661, which provides that “[n]o limitation shall be placed on the information” a sentencing court may consider “concerning the [defendant’s] background, character and conduct,” and at §3553(a), which specifies that sentencing courts must consider, among other things, a defendant’s “history and characteristics,” §3553(a)(1).”

Pepper v. United States, 561 U.S. 476, 477 (2011)(citations omitted).

Government’s Recommended Sentence

The government in its sentencing memorandum of November 26, 2018 asks the court to impose a ten year sentence and three years of supervised release on Mr. Martinez. In arguing for a significant upward departure the government asks that the court adopt, as aggravating factors, the very evidence which the jury explicitly rejected in returning a verdict of not guilty on the racketeering indictment.

In its argument in support of an upward departure, the government appears to have abandoned its long held position throughout the trial of Mr. Martinez which is that the credibility of its immunized witnesses should be approached with great caution. Indeed, FBI Special Agent Jeffrey Wood insisted to jurors that he would not credit an uncorroborated statement of such an individual. Special Agent Jeffrey Wood

testified on Day Four of the trial to this aspect of relying upon certain witnesses during cross examination as follows:

A. ...I would say that we listen to what the cooperating witnesses and confidential informants tell us, and then we corroborate what they tell us through recordings and the gathering of evidence. We just don't take their word for it.

Q. Because you don't trust the cooperating witnesses, correct?

A. I guess that would be somewhat of a fair type explanation, but I just don't listen to one person and just say, okay, you said that, and that's true. I have to have evidence to say it's true.

Q. Well you testified at a prior hearing, correct?

A. Yes

Q. And you testified that you don't trust your cooperating witnesses ; do you recall testifying to that?

A. Yes, I mean, that's a fair thing that, yes, my witnesses are criminals, so I have to go and prove what they tell me so that I know what they're telling is the truth when they tell me.

Q. And you have to corroborate what they tell you, and you do that by gathering other evidence, such as recordings?

A. Yes (Exhibit 6)

Throughout the trial, the government sought to bolster its witnesses's credibility by introducing both videotaped recordings as well as audio recordings of purported gang members in its case-in-chief. In both its opening and closing arguments the government emphasized the strength of its corroborated witness testimony. At no point did the government appear to vouch for the independent validity

of its immunized witnesses. In the case of Mr. Martinez, however, there were several instances where the government's evidence failed to meet its own stated test for credibility as expressed by Special Agent Wood.

Now, at sentencing, the government simply reargues the same uncorroborated assertions of Jose Hernandez-Miguel, "Muerto", which the jury has already rejected at trial. In assessing the totality of testimony at trial, Muerto was a credible witness in the instances where his testimony was corroborated through recordings, law enforcement testimony, observation, and police reports. However, in the testimony cited by the government in its memorandum none of Muerto's testimony regarding alleged prior bad acts by Cesar Martinez were corroborated.

The government first relies upon the accusation, by Muerto, that Mr. Martinez was involved in a violent altercation on a summer day in 2008 in Maverick Square in East Boston. According to Muerto members of the 18th Street gang were viciously stabbed with machetes and beaten with a bat and other weapons. This testimony about such a violent attack was unsupported by medical records, police accounts, or any testimony of eye witnesses.

It would have reasonably been expected that victims of such a violent attack would have been hospitalized, that police officers who investigated the attack would have written reports, and that residents of a busy neighborhood on a summer day would have witnessed some aspect of such an attack. Further, the testimony regarding the size of the weapons shrunk considerably under cross examination and government documents introduced by the defendant, showed Mr Martinez not to live in that section of the city.

The government recycles Muerto's testimony concerning another attack in which Muerto alleged that Mr. Martinez provided transportation for Crazy from Everett to obtain a gun that was used by Vida Loca to murder Javier Ortiz in Chelsea on December 14, 2014. Muerto, however, was not a percipient witness to these events, a fact that was not lost on the jury. Muerto claimed to have learned this information after the fact but Muerto had no personal knowledge of whether or not it was true. Perhaps more revealing is Muerto's statement that he would not go along in violation of clique rules which would result in a beating. Also his denial of having his own transportation and riding a bus were refuted by the testimony of Tigre regarding ownership of a motor vehicle by Muerto⁴.

In the same vein, the government includes Muerto's story that Lobo had requested a "green light" from gang leaders to murder CW-1 whom Lobo suspected of informing on him to Chelsea Police. Mr. Martinez was said to have offered to provide Lobo with a weapon to carry out the attack. Muerto claimed to have heard this story from an unnamed gang member at Wyatt Detention Center during 2016. Even if one were inclined to believe Muerto, it is impossible here to credit the veracity of the unnamed gang member who was his purported source.

The government directs the court to the January 8, clique meeting in Everett. There are quotations in the government from gang members which are disturbing in

⁴ In a recorded conversation between CW-1 and Muerto , not introduced at trial but produced by the government (Bated # USA-GD-00012344) has Muerto speaking about setting up a surveillance camera at his home to protect his car.

their subject matter. Here, however, to the government's credit, the government includes Mr. Martinez's objections to the inclusion of Animal as a member of the clique. Mr. Martinez warned the group that the inclusion of younger violent members will result in members going to jail and he expressed his opposition to doing so. This meeting was both videotaped and audio taped and was shown several times to the jury. Mr Martinez is ridiculed by the government's informant, CW-1, for not wanting more violence at that time.

C. CONSIDERATION OF THE FACTORS SET OUT IN 18U.S.C. §3553(a)

1. Personal History and Characteristics of the Defendant

As acknowledged by the Probation Department, Cesar Martinez was 38 years old, having been born on May 12, 1980 in Metapan, El Salvador. Cesar Martinez is one of seven children born to Rosa and Rigoberto Martinez. (See **Exhibits 7 & 8**) Before coming to the United States at age 19, the defendant attended school in El Salvador. The enclosed certificates (**Exhibits 9-12**) demonstrate that he was a conscientious student who was well liked. He came to the United States fleeing the hostilities on-going at that time in El Salvador. There are two letter of character reference from El Salvador submitted herewith for Mr Martinez. (**Exhibits 13 & 14**)

The defendant has acknowledged entry into the United States without inspection at age 19, but sought and was granted temporary protective status by the Department of Homeland Security ever year thereafter up until his arrest and confinement on this case. The defendant was also granted a employment authorization by Homeland Security. (See **Exhibit 15** as a representative example).

The defendant was gainfully employed and filed federal and state income taxes each year. (See **Exhibit 16** as a representative example). All during the FBI investigation in this case, Cesar Martinez was operating a towing business from the garage in Everett. He had purchased and owned his own tow truck. (**Exhibit 17**) He was also helping with mechanical work in the garage as well. (**Exhibit 18** Trial Transcript Day 14 page 19).

Cesar Martinez has, contrary to the government's attempts to characterize him as a person of violence, clearly not a person participating in some of the violent physical acts. As previously stated, the testimony of two cooperating witnesses, "Muerto" and "Tigre" failed in that attempt. Muerto it can be said self destructed with his attempt. Tigre, through his testimony, made no such attempt and actually became a supporter of the true character of Cesar Martinez.

There is an old saying, "character is what you are in the dark" which here can be applied to Cesar Martinez. Tigre was asked directly by the government in a proffer session about this issue and then again at trial by defense counsel. Each time the response was the same, that Cesar Martinez was known for not showing up for any fights or other gang activity. (**Exhibit 19** Trial Transcript Day 14 page 20). Cesar was busy working and trying to raise his daughter Samantha. (See PSR §122-123).

When an older county inmate at Plymouth was being harassed and his meals taken by younger inmates, Cesar Martinez stepped in to aid the man. Cesar was taken to the hole initially as a disturbance had occurred and he was part of it. However he was quickly released when the full story was known.

In the present case Cesar Martinez had the opportunity to speak with the government and become eligible for application of a two level drop under the "safety valve" for the Sentencing Guidelines. He chose not to do so out of a real concern for the well being of his family here in the United States and those back in El Salvador. He believed that he would be viewed as a cooperator for which retaliation would occur. So, rather than gain a lower sentence he chose safety for himself and his family and in so doing he accepts that he will get a higher sentence.

In the same context, he has had to endure threats in the Dedham jail due to the fact he was found not guilty of the racketeering count. He has not sought any retaliation but accepted such actions now as part of the course his life has taken. He also recognizes the potential for retribution upon deportation. A nephew, living with his family in El Salvador was brutally killed and left in a ditch on his way home from work. The nephew was not in any way associated with any gang in El Salvador.

In assessing the character of the individual now before the court, Cesar Martinez suffered a serious injury when arrested. The handcuffs were placed so tightly on him that he suffered a permanent injury to his left wrist. He has had surgery upon his wrist while incarcerated. This was not done at one of the world's finest hospitals in Boston but rather at the Lemuel Shattuck Hospital in Franklin Park. This is an injury which will be with him for the rest of his life. An added punishment. (See **Exhibit 20**).

2. The Need for the Sentence Imposed

Certainly there is a need to a period of incarceration as the transport of cocaine is a serious offense. Here the current statute carries a minimum mandatory term of five years. Congress is currently debating the future need for such minimum mandatory sentences. If the safety valve came into operation here the court would have complete discretion as to the applicable sentence.

Perhaps the larger issue here is the need to assess how a defined period of incarceration prevents Recidivism. The Guideline offense level is not intended or designed to predict recidivism.⁵ An older first time inmate such as Cesar Martinez is substantially less likely to reoffend. Additional studies have shown that any increases in the severity of the sentence do not yield any significant effects.

3. Post Arrest Rehabilitation

Although it would be a consideration for a variant sentence if a mandatory minimum were not applicable, it is still a matter for the court to consider in fashioning the appropriate length of incarceration. While housed initially at Plymouth, Mr Martinez was limited in his efforts to improve himself by the absence of programs.

Once Mr Martinez was placed at Dedham, a plethora of opportunities were placed before him. He has sought to apply himself diligently at Dedham to become a better person. He is trying to obtain a high school equivalency certificate. The current grades for the courses taken are presented herein as **Exhibits 21-27**. He has also has completed a course of motivation called "TruThought." It deals with being positive

⁵ See "Recidivism Among Federal Offender: A Comprehensive Overview". United States Sentencing Commission March 2016.

in reflections on difficult times in life. Most recently, Mr Martinez completed a course on "Parents Helping Parents" His aspiration is to have skills at parenting when he will again have the opportunity to be with both of his daughters.

4. Promoting Respect for the Law and Providing Just Punishment

A sentence of 60 months committed in this case is sufficient to satisfy the ends of punishment in all of the circumstances presented here regarding Cesar Martinez. Such a sentence takes into account the totality of the actions for which the defendant is responsible. Where he to be sentenced in consideration of the allegation of Muerto and the 25 pages of the PSR included in what is sent to the Bureau of Prisons, Mt Martinez facing a significant higher security level and possible incarceration in a "gang unit". He would face possible physical retribution due to the not guilty finding on the racketeering count in his case.

Such a sentence (60 months) t would also encompass principles derived from cases describing what the First Circuit has called "sentencing factor manipulation" See *United States v. Montoya*, 62 F.3d 1 (1st Cir. 1995). The government brought CW-1 up to Massachusetts and encouraged his actions in being part of ESLS. The "beating in" of Animal came about through CW-1 with government aid. Cesar Martinez tried to resist this action and was soundly chastised by CW-1 in front of others. Now the government wants him held accountable. Even the "protection details" for which Cesar Martinez is accountable, were an FBI created process. The testimony of Muerto, concerning allegations of prior bad acts by Cesar Martinez, seemed to have evolved upon reflection after he became a government witness seeking to further buttress his

value. The defendant submits that all of these factors are intertwined with the sentencing recommendation of the government and therefore would make any sentence over 60 months substantively unreasonable.

CONCLUSION.

For the reasons states above, Cesar Martinez, requests that the Court determine that a sentence of 60 months committed be sufficient and impose such here.

Respectfully submitted
CESAR MARTINEZ
by his attorney,

/s/ Stanley W. Norkunas
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the enclosed Defendant's Sentencing memorandum on all counsel of record and the clerk's office by filing same this 17th day of November 2018 using the court's ECF system.

/s/ Stanley W. Norkunas
Stanley W. Norkunas

LIST OF EXHIBITS
(Filed as a Separate Document)

Exhibit 1. Trial Transcript Day 4, Page 23

Exhibit 2 Trial Transcript Day 4, Page 26

Exhibit 3 Trial transcript Day 4, Page 30

Exhibit 4 Internal FBI Memorandum

Exhibit 5 Recording of CW-1 from December 8, 2014

Exhibit 6 Trial Transcript Day 4, Pages 98-99

Exhibit 7 Photograph of Martinez Family in El Salvador

Exhibit 8 Photograph of Martinez Family in El Salvador

Exhibit 9 Certificate of Achievement from El Salvador

Exhibit 10 Certificate of Achievement from El Salvador

Exhibit 11 Certificate of Achievement from El Salvador

Exhibit 12 Certificate of Achievement from El Salvador

Exhibit 13 Character Reference Letter

Exhibit 14 Character Reference Letter

Exhibit 15 Homeland Security Forms Filed By Defendant

Exhibit 16 Federal Income Tax 1040 Filed by Defendant

Exhibit 17 Photograph of Tow Truck owned by Defendant

Exhibit 18 Trial Transcript Day 14, Page 19

Exhibit 19 Trail Transcript Day 14, Page 20

Exhibit 20 Medical Forms for Injury of Defendant

Exhibit 21 Certificate of Program Attended

Exhibit 22 Certificate of Program Attended

Exhibit 23 Certificate of Program Attended

Exhibit 24 Certificate of Program Attended

Exhibit 25 Certificate of Program Attended

Exhibit 26 Certificate of Program Attended

Exhibit 27 Certificate of Program Attended

Transcript of Sentencing

December 18, 2018

[Pages 3 to 28]

1

PROCEEDINGS

2

THE CLERK: All rise. Thank you. Please be seated.

3

Court is now in session in the matter of United States vs.

4

Cesar Martinez, Criminal Action Number 15-10338.

5

Would counsel please identify themselves for the record.

7

MR. POHL: Good afternoon, your Honor, Christopher Pohl for the United States.

9

THE COURT: Good afternoon.

12:06PM 10

MR. NORKUNAS: Good afternoon, your Honor, Stanley Norkunas with Mr. Saltzman for Mr. Martinez.

12

THE COURT: Good afternoon.

13

THE CLERK: I will swear the interpreter.

14

(Interpreter was sworn)

15

THE CLERK: Would you please identify yourself for the record.

17

THE INTERPRETER: Gabriel Haddad.

18

THE COURT: All right. Good afternoon.

19

THE INTERPRETER: Good afternoon.

12:07PM 20

THE COURT: This is the sentencing of Cesar Martinez.

21

I've received and read the pre-sentence report as revised through July 12th, the defendant's sentencing memorandum, which had extensive exhibits, some of which were filed today, and the government's sentencing memorandum filed November 26th.

25

To my knowledge, no other materials were submitted to

1 the Court. Is there anything else I should have seen that I
2 have not?

3 MR. POHL: No, your Honor, thank you.

4 MR. NORKUNAS: No, your Honor.

5 THE COURT: Mr. Norkunas, I know you've had an
6 opportunity to review the pre-sentence report. Have you gone
7 over it with the defendant?

8 MR. NORKUNAS: I have, Judge.

9 THE COURT: Is that correct, Mr. Martinez?

12:07PM 10 THE DEFENDANT: Yes.

11 THE COURT: Okay. All right. There are several
12 objections to the pre-sentence report. Let me go through them
13 quickly. There's an objection as to the inclusion of the name
14 "Cheche," which I'm going to overrule. He was charged that way
15 in the indictment and any alias, nickname or whatever
16 identifying information is I think appropriately included in a
17 pre-sentence report.

18 There's an objection about safety valve eligibility.
19 I assume he has not completed the fifth component; is that
12:08PM 20 right?

21 MR. POHL: Correct, your Honor.

22 THE COURT: So that's overruled. Then we have this
23 question of the acquitted conduct, the inclusion of information
24 concerning racketeering conspiracy and so on. Here's my view
25 on this, which affects both inclusion of the PSR and the

1 sentencing itself.

2 The law permits me to consider acquitted conduct.

3 It's a different standard of proof, that is, criminal guilt as
4 opposed to sentencing accountability. Because I can consider
5 other relevant conduct, I think this information is properly in
6 the report, and the gang association with MS-13 I think is
7 important information, if not critical information for
8 designation and classification purposes.

9 For sentencing purposes, I have no problem considering
12:09PM 10 uncharged conduct, uncharged conduct. Drug weight would be a
11 common example. You know, there's all kind of things in the
12 PSR, both positive and negative, that are not part of the
13 criminal case, per se. You know, whether someone beat up his
14 girlfriend or whether he volunteers for his church, whatever,
15 all of that broadly is under the heading of uncharged conduct.

16 Acquitted conduct is it seems to me a lot different.
17 I think considerable caution is advisable. I think it's
18 important even if I'm permitted to consider that information to
19 take care not to undermine public confidence in the sentencing
12:10PM 20 process.

21 I'm not going to act as if the acquittal never
22 happened even though the law permits me to do that, and so I
23 think the information is properly in the report. I'm going to
24 consider some of it to some degree, but I think there are
25 limits, and considerable cautions apply, so I'm sure we'll

1 return to that topic, but in terms of the objections, both set
2 forth by the defendant are overruled.

3 So let me turn then to the guideline calculation. The
4 base offense level is 24 based on drug weight. There's no
5 adjustments. The criminal history score is 0. The criminal
6 history category is I. The guideline range without reference
7 to the mandatory minimums 51 to 63, but there is a five-year
8 mandatory minimum, so the range is 60 to 63. The supervised
9 release range is 4 to 5 years. There's a four-year mandatory
12:11PM 10 minimum on that as well, is there not?

11 PROBATION OFFICER: Yes, your Honor.

12 THE COURT: The fine range is 10,000 to \$5 million and
13 a special assessment of \$100 is mandatory. Is there any
14 objection to that calculation?

15 MR. POHL: No, your Honor.

16 MR. NORKUNAS: Not with the Court having overruled the
17 defendant's objection, correct, Judge.

18 THE COURT: I think even then it doesn't affect it. I
19 mean, that's basically a drug guideline calculation without
12:12PM 20 regard to anything else. All right. So let me hear from the
21 government as to the recommendation.

22 MR. POHL: Thank you, your Honor. For the reasons
23 that are set out in the government's sentencing memorandum,
24 we're asking you to give a sentence that is above the guideline
25 range using your discretion under 18 U.S.C. 3553(a) because I

1 do believe that the evidence that you heard at the trial
2 provides you with reliable information to hold that
3 Mr. Martinez is a more dangerous individual than the guidelines
4 suggest.

5 I understand the Court's sort of it's more than
6 instinct, but it's sort of a starting point, a general
7 proposition concerning acquitted conduct and the care we have
8 to take in using acquitted conduct that could conceivably give
9 a perception that we were not paying close enough attention to
12:13PM 10 the jury's verdict.

11 On the other hand, I know we have done that in this
12 case. I've looked, for instance, at sentencing of Erick
13 Argueta-Larios, "Lobo," where the jury had acquitted him on a
14 drug trafficking count. It was a similar count to the drug
15 case, the drug count that Mr. Martinez was ultimately convicted
16 of.

17 Though we did use it and use the reliable information
18 produced at trial and in the sentencing, in the PSR to
19 correctly calculate his guidelines, and the Court used that to
12:13PM 20 impose what I thought was an appropriate sentence.

21 We're asking you to do a very similar thing here.
22 Mr. Martinez was identified by several of the witnesses at the
23 January-February Group 3 trial as a member of MS-13, as a
24 member of the Eastside Locos Salvatrucha clique.

25 Mr. Martinez was recorded at clique meetings where

1 gang business, including payment of dues to MS-13 leaders in
2 El Salvador, payment of funds to acquire clique weapons, to
3 help out MS-13 members who had been arrested with pending cases
4 where those types of topics were discussed.

5 Mr. Martinez was present at the jump-in ceremony for
6 Joel Martinez, "Animal," where members of his clique discussed
7 growing the clique, discussed jumping in Mr. Martinez and other
8 younger members into the clique and ultimately was present when
9 Mr. Martinez was beat into the gang, so this is -- these are I
12:15PM 10 think powerful indicators that Mr. Martinez is a more dangerous
11 individual than his guideline range suggests.

12 I'd note, too, that the pre-sentence report, that's
13 not sort of the violence side. We've listed many of the
14 examples of how Mr. Martinez came into both the January,
15 February and the March-April trial in our sentencing
16 memorandum, and I'll go through those again quickly now, but I
17 would take a moment to talk about the drug count itself that
18 Mr. Martinez during the drug sort of protection detail that he
19 participated in and in the calls leading up to it was, you
12:15PM 20 know, clear that he was comfortable with this type of activity,
21 that he had engaged in similar behavior in the past, and I
22 think it's worth noting that Mr. Martinez was, you know, for
23 lack of a better term, good at it.

24 During the protection detail that he personally
25 participated in, Mr. Martinez did successfully spot one of the

1 surveillance officers that was in an unmarked vehicle and
2 warned CW-1 and "Muerto" that they were being followed, so I
3 think there's reason to believe -- I don't know why
4 Mr. Martinez did not engage in the safety valve proffer because
5 it was mentioned several times in Mr. Norkunas' papers.
6 Though, of course, if he had done a truthful safety valve
7 proffer, he would have had to reconcile whatever he said with
8 his recorded statements, and his recorded statements suggest
9 that he was more involved in drug trafficking than this one
12:16PM 10 particular deal. That itself would give you a reason to
11 increase his guideline range.

12 The other reasons that are set out in the trial and in
13 our sentencing memorandum. "Muerto" identified Mr. Martinez as
14 a participant in an attack on an 18th Street member prior to
15 "Muerto" being deported that involved an assault, an attack in
16 East Boston.

17 "Muerto" identified Mr. Martinez as the person who
18 drove "Crazy" and "Brujo" to the scene of the murder in Chelsea
19 on December 14th, 2014, and that Mr. Martinez was present at
12:17PM 20 the garage where the plan to put that murder, with that murder
21 was essentially set in motion, and while those instances
22 involves testimony from a cooperating witness and were not
23 necessarily, were not recorded themselves on audio/video, all
24 the other instances that I raised, the clique meetings, the
25 topics that were discussed at the clique meetings, the "Animal"

1 jump-in meeting, the fact that according to "Lobo," Erick
2 Argueta-Larios, that he had asked for permission to kill CW-1
3 and that Mr. Martinez was going to be the person who was going
4 to help him do that.

5 Many of those things were recorded on audio or
6 videotape and are generally corroborated by the evidence that
7 were produced in other aspects of the investigation, so this
8 would still be, if you gave it, I think the lowest sentence
9 that the government's recommendation was for 120 months. If
12:18PM 10 you gave that sentence, that would still be the lowest sentence
11 that was given for a person who went to trial in any of these
12 cases. I think that's appropriate. I think Mr. Martinez, it
13 would be appropriate for Mr. Martinez to be the lowest
14 sentenced defendant who went to trial, and I think it may well
15 have been appropriate for Mr. Martinez even if the government
16 had won both the racketeering count and the drug count.

17 I think it would have, but I think the gap between the
18 other defendants who were tried with Mr. Martinez and their
19 sentences that they received and Mr. Martinez' guideline range
12:19PM 20 is too great given the quantum of reliable evidence that you
21 have to consider, and I would ask you to use that reliable
22 evidence in fashioning a sentence under 3553(a) that is more
23 appropriate for Mr. Martinez than the guidelines themselves
24 call for.

25 THE COURT: This bit about the discussion about

1 murdering CW-1.

2 MR. POHL: That was not captured on a recording, if
3 that's what you were flipping back for.

6 MR. POHL: And I think that was -- and, again, each
7 defendant comes before are you and stands on a different
8 footing, and I don't in any way mean to suggest that the
9 decisions that the Court made in one defendant with one quantum
0 of evidence are somehow binding on this Court and this
1 defendant, but I think it's significant that when Mr. Larios
2 was sentenced that conspiracy where Larios -- you know,
3 ""Muerto"" testified that "Larios --" flip back and forth
4 between the gang names and the true names, I apologize.

15 "Muerto" testified that Lobo had asked "Casper" for
16 permission to kill CW-1, and that when Lobo confessed his plan
17 to "Muerto" that the person he had included in that plan was
18 "Cheche" and that "Cheche" had agreed to help him but that
19 "Casper" never gave permission to do that, and, in fact,
20 instructed the clique to continue its investigation.

21 So, you know, much like the acquitted conduct for Lobo
22 on the protection detail, I think we have a scenario in which
23 the Court I think has previously found Muerto's testimony to be
24 generally credible, that in Larios' guideline range, we used
25 that fact, those facts, the "Muerto-Lobo-Cheche" plan to kill

1 CW-1 fact as a basis to sort of anchor his guideline range
2 where it was, and that having -- you know, for the same reasons
3 that you viewed that to be credible and reliable enough for you
4 to use it for guideline purposes in Mr. Larios' case, I think
5 it's a factor that you can consider here.

6 So, again, if all of that is true, and I certainly
7 think it is true, I think Muerto's testimony was credible on
8 this point, and it's corroborated by the other evidence that
9 you heard in the case generally, you know, it's still Lobo
12:22PM 10 who's the one that wants to kill CW-1, and Cheche is still the
11 person who has essentially agreed to help Lobo, so it would
12 still be appropriate for this defendant to receive perhaps a
13 lesser sentence than you imposed for Larios, but I think having
14 made those kinds of assessments in other similarly situated
15 defendants, it's appropriate for you to take it into account
16 here, so it's a significant upward departure from the
17 guidelines.

18 We know that, but I think based on the evidence that
19 you heard at the trial and the findings that you've made in
12:22PM 20 other defendants in that trial, in their sentences, that it is
21 a sentence that more closely comports with the directives of
22 3553(a) than the guidelines set out in the PSR, so for those
23 reasons we'd ask you to impose it.

24 THE COURT: Okay. Thank you. Mr. Norkunas.

25 MR. NORKUNAS: Judge, I think it's important that

1 we're dealing with 3553(a). The guideline range itself,
2 there's a recognition through the PSR that relevant conduct
3 considerations don't encompass in this particular case any of
4 the racketeering aspects.

5 The drug enterprise was a separate enterprise
6 disavowed by "Casper" himself to begin with for the clique and
7 then set up separately by the FBI as an enterprise that they
8 have used in other circumstances, in other situations, and
9 everybody except Mr. Casper ultimately becomes a government
12:23PM 10 participant that dealt with the one enterprise that he
11 participated in as a lookout.

12 And I think, again, the government, my argument had
13 been before, and I'm trying to regurgitate that at trial that
14 they have to start all over again, and, therefore, it was
15 disassociated with what he did since he was charged with the
16 other individuals.

17 So we're looking at an enhancement in this particular
18 case, really it's 3553(a), what is the characteristics and
19 background of the individual perhaps under 3661, which I
12:24PM 20 referenced in our memo is where the government is trying to
21 come in with this additional defendant. Normally it's the
22 defendant that does that.

23 Judge, I would submit it really comes down to two
24 aspects in this particular case. One is is there credibility
25 in the limited aspect of "Muerto" as it relates to a 2008

1 alleged activity in East Boston, and then, second, what he
2 talks about with "Lobo," which is secondary hearsay that he
3 gets to begin with.

4 My understanding in review of the evidence was he
5 picked this up for another unnamed individual who said "Lobo"
6 said that to him who said that to "Muerto."

7 And in the context overall of the case, we have looked
8 to, I think everyone looks for, and the jury did certainly and
9 the government, Special Agent Wood's statement of how the FBI
12:24PM 10 views confidential informants and cooperating witnesses, and he
11 was emphatic I'm sure in every trial, I didn't hear that, but
12 he said it in the grand jury, he said it in the first trial,
13 ours was the second, he repeated it there, it's in the
14 sentencing memorandum, "These people are crooks. We tend not
15 to really believe anything they say unless independently we,
16 law enforcement, can look at and corroborate what they have to
17 say." In almost all the other circumstances when "Muerto" gave
18 statements, there's recorded testimony about those, the violent
19 acts.

12:25PM 20 There is not relative to what he says about the
21 alleged Lobo issue to get CW-1 at some point in time,
22 therefore, you have to say how can I give that weight?
23 Obviously, the jury didn't give it weight at their level, but
24 in terms of a lesser consideration, we're here, and, again,
25 it's under 3553(a), there's nothing there.

1 And I think the one in East Boston is the one that
2 perhaps says it best. There's nothing that substantiated that,
3 and I would submit the demeanor of the witness himself under
4 cross-examination when I was asking him about how you'd get
5 down to the main square by the police station on a sunny day
6 with these size weapons, they kept shrinking, Judge. Finally,
7 he ended up with a souvenir bat size in terms of whatever he
8 was bringing with him.

9 There were no reports or anything to come into that.

12:26PM 10 The only documentation, and if we go back to
11 Special Agent Wood, that gives any corroboration does it the
12 opposite. It says, in fact, that Mr. Martinez had referenced
13 to Homeland Security, ICE, that he lived in Revere.

14 There was no documentation to counter that, and
15 "Muerto" said, Oh, we went to his home in East Boston right out
16 of the square. Nothing substantiated that, so I think trying
17 to give that weight to enhance an individual sentence would be
18 inappropriate, Judge, I really do, and I think there has to be
19 some credibility, some level of credibility, some level of
12:27PM 20 believability for the Court to say whatever standard it is, I
21 give those types of accusation this type of reference.

22 The one with the gun for Vida Loca also as "Tigre"
23 helped Mr. Martinez relative to that. There was no car for
24 Mr. Muerto. It turns out the car was an important item for
25 Mr. Muerto. That's how he did all his drug dealing. That's

1 how he did a number of other activities. All of a sudden that
2 day, he had to take the bus. I don't even know there could
3 have been a bus from wherever he lives to Everett, and that was
4 then the circumstances oh, yes, we are collectively going to,
5 including Mr. Martinez, are going to deliver this gun, oh, by
6 the way, even though it's a mortal sin of the clique, I'm going
7 to go home and rest instead of standing up for someone else.

8 Ultimately, in our review, both Mr. Martinez and
9 myself, continuously of other aspects of this, there was a
12:28PM 10 recorded call that I referenced in a footnote in which
11 Mr. Muerto was such care for his car when he's talking to CW-1,
12 he's talking about taking care of it and having surveillance so
13 to make sure nobody can damage it, a prized item for him.

14 He's not taking the bus, so I don't think any of the
15 issues that he presented relative to this individual, and,
16 remember, Mr. Martinez had been here since 1999. Whenever ESLS
17 started, I don't remember if that came into evidence in the
18 trial itself.

19 So, over the 16 years leading up to the point of his
20 arrest, these are the incidences the government says this is
21 why you should enhance him and punish him. I think there's a
22 secondary issue here, and I acknowledged that to the Court, as
23 I have to Mr. Martinez, and that's "Muerto, no." There's no
24 way that that can give credence to do an enhanced sentence
25 under 3553(a) or any other type of provision, but there's

1 membership. There's membership in MS-13, and I would expect
2 the Court to say, All right, what do you do with that?

3 I'd like to come back to that in a moment, Judge,
4 because Mr. Pohl had asked, and I've referenced it in my
5 memorandum, again, why didn't Mr. Martinez come in for a safety
6 valve proffer?

7 And what has come to me both through Mr. Martinez and
8 correctional officials is when the not guilty came back,
9 whatever the mentality of the rest of the MS-13 crowd, they
12:29PM 10 believe that meant he had become a cooperating witness, and,
11 therefore, he started to get severe threats.

12 In that time period, a relative living with his family
13 in El Salvador was brutally murdered. His brother had been
14 down there, and they came back, and apparently the police in
15 El Salvador give you pictures of the person's body as they
16 found it.

17 He had his throat cut, and he was shot in the back of
18 the head. After they had stripped off his shirt down, I'm
19 assuming looking for tattoos and threw him in a gutter beside
12:30PM 20 the road is the type of fear of what am I going to gain and is
21 it worth for both my family and myself. It's an individualized
22 consideration. Nobody can stand up here and say there's a
23 right or a wrong to that in terms of going in.

24 He couldn't do the safety valve. He's going to
25 federal prison. With the inclusion of all the material that's

1 in there, he's going to go to a higher security element. In my
2 reading of the B.O.P., he may very well be going to a gang
3 prison and facing more of the MS-13 element there.

4 So, just take your pounding, take your five years and
5 move on. The safety valve is not an operable thing for you in
6 those circumstances.

7 I also think, Judge, it's important now when we look
8 at MS-13, you remember at some point in time, again, remember
9 he had an operable business out of that garage, and there are
12:31PM 10 those factors that if you're going to continue to do that, to
11 some degree you probably have to stand around or look like
12 you're a cooperator, but they don't have him doing other
13 aspects of crimes of violence.

14 I think as a whole, Judge, if CW-1 and "Muerto" were
15 taken out of that equation, ESLS was a retired group of
16 violence perpetrated in the vast scope of what the government
17 collected relative to this.

18 The aspect of you all remember by being a member, you
19 give some encouragement, and I want to use the term "aiding and
12:31PM 20 abetting," but some encouragement to what's going on. Although
21 he is the one person in all of the tapes collected by the
22 government that stood up and said, "I don't want these guys in
23 the January 8th meeting, we shouldn't have these young kids in,
24 we shouldn't have these violent people in here, we shouldn't
25 have "Animal" in here," and he gets chastised and really cut

1 down by CW-1 having uttered that statement, circumstances when
2 you're looking around, you're now going to step back.

3 There is nobody else they can point to that ever
4 utters those types of statements relative to the crew. And
5 there is two things. If he was able to take the safety valve,
6 that's a two-level reduction.

7 He also has, and once a safety valve was there on the
8 table, the Court could look at post-arrest rehabilitation, and
9 this is a gentleman that has done a substantial amount of that.
12:32PM 10 I included those exhibits for the Court's consideration. He's
11 getting his G.E.D. He has helped other inmates. The
12 institutions, both Plymouth and Dedham have recognized that he
13 has been an exemplary person relative to his confinement.

14 He has taken other courses where he could. He has
15 done what he could to benefit himself and prove himself. There
16 is perhaps another level relative to that, so as the Court is
17 considering, is there some reflection that I should have upon
18 just membership in MS-13?

19 This is a gentleman that because of the fear and the
12:33PM 20 violence that could come upon him and his family, and that was
21 the reason he asked to put the family pictures under seal
22 because he has a real concern if they could identify those
23 people. I don't know how they would do that, through court
24 documents, but perhaps they could, they would be in severe
25 jeopardy, and he may himself once he is, in fact, deported and

1 sent back, but so you would start really with an offense level
2 somewhere around 36 months, and if you give him, as I've
3 requested, the 60 months you have done an enhancement for his
4 being in there because he suffers the penalties of not getting
5 a safety valve by being associated with those individuals.

6 He suffers where he's going to go for his confinement,
7 which is going to be substantial, and whatever potential
8 damages are that await him there, and if you look at the
9 totality of what this person has accomplished in his life, he
12:34PM 10 has family, he has a daughter and a stepdaughter that he has
11 helped and he has given support to, and some day he would like
12 to be able to contact those folks again.

13 The post-arrest rehabilitation, Judge, again, setting
14 aside Muerto because there is no credibility to the
15 accusations, again, put out in the government's memorandum for
16 those instances itself. I would submit, Judge, that you are
17 considering all aspects of what has occurred in this case and
18 what is a fair, reasonable and sufficient sentence for this
19 person, and I would ask you, therefore, Judge to impose a
12:34PM 20 sentence of 60 months for Mr. Martinez. Thank you.

21 THE COURT: All right. Mr. Pohl, do you want to
22 respond?

23 MR. POHL: The Court is very well aware of the
24 evidence at the jump-in ceremony. I think Mr. Norkunas
25 overstates what Mr. Martinez' said and what he was trying to

1 do, and I think the most you can say from that perfect comment
2 that Mr. Norkunas made is that he wanted to make sure that the
3 clique continued to operate successfully and for its clique
4 members to not get arrested, but I think Mr. Norkunas puts too
5 much weight on that one sentence, and I think it's much more
6 telling that Mr. Martinez is there for what was an hour-long
7 discussion in an ultimate jump-in meeting of Mr. Martinez than
8 that one passage in isolation. That's too much weight to put
9 on it.

12:36PM 10 For all the reasons that I've said earlier, if
11 "Muerto" was credible enough in Lobo's case to use that
12 conspiracy to commit murder as a guideline anchor, then he was
13 credible enough to enhance Mr. Martinez' sentence, and the
14 other evidence in the case recorded and otherwise corroborates
15 the correctness of the Court's earlier finding, so for those
16 reasons I think a higher sentence than the guideline range is
17 called for.

18 THE COURT: Mr. Martinez, do you wish to address the
19 Court before I impose sentence?

12:36PM 20 THE DEFENDANT: No.

21 THE COURT: All right. As I indicated in my earlier
22 remarks, I do find this circumstance somewhat difficult.
23 Again, I think considerable caution needs to be applied when
24 dealing with acquitted conduct evidence. We do have the
25 advantage here of recordings, which capture in some instances

1 the defendant's own words.

2 I think that's one advantage with that is that there's
3 no credibility issue there, and one of the difficult issues
4 with acquittal is trying to puzzle out if it's possible to what
5 extent the jury considered credibility issues because, well, it
6 just feels different, I guess, even though, again, the law
7 permits me to consider acquitted conduct evidence if I had a
8 special interrogatory and if the jury said I do not find the
9 evidence of X to be credible, it would give me considerable
12:38PM 10 pause to say that I did find it credible.

11 In any event, in addition to the drug detail evidence,
12 I could find fairly easily by a preponderance of the evidence
13 that Mr. Martinez was a member of MS-13, that he attended ESLS
14 clique meetings, that he was present at the beat-in of
15 "Animal," which was, among other things, a reward for him
16 having committed a murder and attempted murders, and I think
17 everyone present was surely aware of that. Certainly it was
18 openly discussed.

19 Then we have basically three other groups of evidence
12:38PM 20 or pieces of evidence. Mr. Martinez drove "Crazy" and "Brujo"
21 to the apartment to give the gun to "Vida Loca" right before
22 the Ortiz murder.

23 The evidence as to what Mr. Martinez knew is unclear.
24 I think it's a reasonable inference he knew the purpose of the
25 trip in general terms, but there's, I guess, some room for

1 doubt there. We have this incident where "Lobo" said he was
2 prepared to murder CW-1 and that "Cheche" was part of the plan.
3 That was not recorded, and we have, again, nothing recorded
4 from "Cheche," his own words about what he knew or intended.

5 I do find "Muerto" to be generally credible and that
6 his evidence is generally corroborated, and I have given it
7 considerable weight in the past, but here there is, I guess,
8 limited corroboration for whatever that's worth, and then we
9 have Muerto's testimony about the 2008 attack where "Muerto"
12:40PM 10 said there was this attack and that Mr. Norkunas indicated that
11 his -- he back tracked somewhat from his story, but, in any
12 event, there's no independent corroboration of any of that.

13 So, again, the whole thing I find, I guess,
14 troublesome in the light of the acquittal, and I do need to
15 proceed cautiously. I certainly have given a fair number of
16 very substantial sentences in this case as a whole, including
17 multiple life sentences, even more sentences measured in
18 decades, but I think some caution is advisable here, even if
19 that means perhaps someone who doesn't deserve it is getting a
12:41PM 20 break.

21 And I will note also for the record that he is 38
22 years old, for whatever that's worth. That kind of cuts both
23 ways. On the one hand, he doesn't have the excuse of youth for
24 his conduct, but also he's less likely to recidivate, and he
25 has some degree of post-arrest rehabilitation, which is part of

1 the mix as well.

2 So, again, I'm concerned about undermining the jury
3 verdict entirely. I don't know what the jury verdict meant
4 exactly. I don't know what they had trouble with. I don't
5 have to accept it, but I want to give it, again, considerable
6 degree of deference under the circumstances.

7 I'm going to at the end of the day depart upward but
8 only to 72 months. I think that I'm essentially adding a year
9 to the mandatory minimum. I think that reflects the fact that
12:42PM 10 I think it's clear to me anyway that Mr. Martinez is more
11 dangerous an individual than the guidelines or his criminal
12 record suggest.

13 I certainly have the power to give more. Mr. Pohl
14 makes a credible effort that he deserves more, and he may well
15 be right, but, again, I am troubled by the acquittal, and I
16 think under the circumstances that's what I'm going to do, and
17 I will, of course, give the four-year term of supervised
18 release.

19 There is no forfeiture issue, is there?

12:43PM 20 MR. POHL: No, your Honor, thank you.

21 THE COURT: Mr. Norkunas, do you have any
22 recommendations concerning place of incarceration?

23 MR. NORKUNAS: No, Judge. Just so the record is clear
24 on that, I discussed that with Mr. Martinez. I made a couple
25 of suggestions to him, particularly being Danbury, and he

1 thought perhaps he might be better to wait until he got to
2 Brooklyn and find out, you know, where the safest place for him
3 to be might arise. I couldn't answer that for that him.

4 THE COURT: All right. As is my practice, I'm going
5 to formally state the sentence I'm going to impose followed by
6 a statement of the reasons. When I've concluded, I'll give
7 counsel an opportunity to interpose additions, corrections or
8 objections to that sentence.

9 Would the defendant please stand. Pursuant to the
12:44PM 10 Sentencing Reform Act of 1984 and having considered the
11 sentencing factors set forth at 18 United States Code,
12 Section 3553(a), it is the judgment of the Court that the
13 defendant, Cesar Martinez, is hereby committed to the custody
14 of the Bureau of Prisons to be imprisoned for a term of 72
15 months.

16 Upon release from imprisonment, the defendant shall be
17 placed on supervised release for a term of four years.

18 Within 72 hours of release from custody of the Bureau
19 of Prisons, the defendant shall report in person to the
12:44PM 20 district to which he is released.

21 While on supervised release, the defendant shall
22 comply with the following terms and conditions:

23 He must not commit another federal, state or local
24 crime.

25 He must not unlawfully possess a controlled substance.

1 He must refrain from any unlawful use of a controlled
2 substance.

3 He must submit to one drug test within 15 days of
4 release from imprisonment and at least two periodic drug tests
5 thereafter, not to exceed 104 tests per year.

6 He must cooperate in the collection of DNA as directed
7 by probation.

8 He shall comply with the standard conditions that have
9 been adopted by the Court, which are set forth at
12:45PM 10 Section 5D1.3C of the Sentencing Guidelines and which will be
11 set forth in detail in the judgment.

12 If ordered deported or removed, he must leave the
13 United States and shall not return without prior permission of
14 the secretary of the Department of Homeland Security. I'm
15 going to add a further special condition that's not in the PSR.

16 I'm going to order him to refrain from any contact
17 with any victim or witness or victim family or witness family
18 as a condition of supervised release.

19 And it is further ordered that the defendant shall pay
12:45PM 20 the United States a special assessment of \$100, which shall due
21 immediately.

22 All right. You may be seated. In terms of the formal
23 reasons for the sentence, it is a nonguideline sentence imposed
24 under Section 3553(a) for the reasons indicated.

25 Obviously, I expect that the defendant will be

1 deported. If he is, the term of supervised release will help
2 assert greater control over him if he returns; if he is not,
3 the term of supervised release will help him adjust to being
4 out of prison and ensure adequate supervision, and I'm imposing
5 no fine, as he's established that he's not able and even with
6 the use of a reasonable installment schedule is not likely to
7 pay all or part of the fine required under the guidelines. The
8 \$100, of course, is mandatory.

Do counsel have any addition or correction or
objection to that sentence not previously raised?

11 MR. POHL: No, your Honor.

12 MR. NORKUNAS: No, Judge.

13 THE COURT: All right. The sentence is hereby imposed
14 as stated. Let me give him his advice of rights.

15 Mr. Martinez, you can appeal your conviction. You also can
16 appeal your sentence, particularly if you think that the
17 sentence was contrary to law.

18 If you're unable to pay the costs of appeal, you may
19 ask permission to have those costs waived and appeal without
20 pain. You must file any notice of appeal within 14 days after
21 the entry of judgment, and if you request, the clerk will
22 immediately prepare and file a notice of appeal on your behalf.

23 All right. Again, I suppose I should add I don't take
24 particular pleasure in imposing a long sentence, and I don't
25 take particular pleasure I guess here in imposing a short

1 sentence when there's very good argument, short, in context.
2 Of course, six years is a long time, but a relatively short
3 sentence when there's a good argument that a longer sentence
4 ought to be imposed, but, again, I think it's important that I
5 give appropriate weight to the jury's verdict, and
6 that's essentially what I'm intending here.

7 All right. Is there anything further, Mr. Pohl?

8 MR. POHL: No, your Honor.

9 THE COURT: Mr. Norkunas.

10 12:47PM MR. NORKUNAS: No, Judge, thank you.

11 THE COURT: All right. Thank you.

12 THE CLERK: All rise.

13 (Whereupon, the hearing was adjourned at 12:47 p.m.)

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