IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

**UNITED STATES OF AMERICA**

vs. Case No. XXXX

**THOMAS SMITH,**

**Defendant.**
_____/

**SENTENCING MEMORANDUM**

Thomas Smith is twenty years old and a high school graduate who has attended Gulf Coast Community College. He has no prior criminal convictions. He faces a mandatory minimum five year prison sentence and a relatively high sentencing range because of the unreasonably harsh penalties reserved for those involved with the controlled substance of crack cocaine. In light of these circumstances, Mr. Smith is hopeful the Court will consider imposing a sentence at the bottom of the effective Sentencing Guidelines range.

While the Sentencing Guidelines, without reference to the mandatory minimum requirement, recommend a range of 57 to 71 months, the effective range is 60 to 71 months because of the mandatory minimum requirement. (PSR ¶ 47). While Mr. Smith is of the view that his circumstances would justify a sentence below what is recommended purely by the Sentencing Guidelines, he recognizes that the Court is obligated to impose a sentence of at least 60 months. Accordingly, it is his request that the Court impose a sentence of no more than the required 60 months.

Someone like Mr. Smith who has taken steps to advance his education will have greater

opportunities and is less likely to commit additional crimes.[1] That Mr. Smith, at age twenty, has no prior criminal convictions, suggests, too, that the likelihood of recidivism is reduced.[2]

It is the Guidelines disparate treatment of powder cocaine and crack that is most responsible for the disproportionally high Guidelines range. Indeed, it produces a range far greater than is necessary to comply with the goals of sentencing set forth in 18 U.S.C. § 3553(a)(2). The failure of the crack cocaine Guidelines to fulfill the goals of federal sentencing has long been recognized by the United States Sentencing Commission:

> After carefully considering all of the information currently available - some 16 years after the100-to-1 drug quantity ratio was enacted - *the Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act.* The 100-to-1 drug quantity ratio was established based on a number of beliefs about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.

United States Sentencing Commission, *Cocaine and Federal Sentencing Policy* at 91 (May 2002)(emphasis added)[3].

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[1]U.S. Sentencing Commission, *The Criminal History Computation of the Federal Sentencing Guidelines* at 13 (May 2004) (available at www.ussc.gov).

[2]*See* U.S. Sentencing Commission, *Recidivism and the "First Offender"* (May, 2004) (available at www.ussc.gov).

[3]It is a failing that has been addressed repeatedly by the Sentencing Commission:

> In order to fully grasp the problem with the crack/powder disparity as it concerns the § 3553 factors, one need look no further than the work of the Sentencing Commission over the last 10 years. In 1995, by a 4 to 3 vote, the Sentencing Commission submitted to Congress a proposed amendment to the Sentencing Guidelines that would have equalized the penalties for powder cocaine and crack cocaine. Congress, however, passed, and the President signed, legislation disapproving the proposed amendment. In 1997, the Sentencing Commission issued a report urging congressional consideration of a range of alternatives for revising the cocaine penalty scheme. Congress took no action on the report. In its May 2002 report, the Sentencing Commission has once again implored Congress to act to address the unjustified

Recently, the Judicial Conference of the United States has announced its intention "to oppose the existing sentencing differences between crack and powder cocaine and agreed to support the reduction of that difference." *Preliminary Report, Judicial Conference Actions*, at 5 (September 19, 2006). Likewise, the American Bar Association has called on Congress to "amend federal drug laws to eliminate the differences between sentencing imposed for crack and powder cocaine offense."[4] The Constitution Project's Sentencing Initiative has stated "the committee is unanimously of the view that the 100-1 weight ratio upon which guideline and mandatory minimum sentences for powder and crack cocaine are based is unjustifiable as matter of policy." *Recommendations for Federal Criminal Sentencing in a Post-Booker World* at 10 (July 2006)(available at www.constitutionproject.org). [5]

Mr. Smith recognizes that a number of circuit courts have concluded that courts may not rely on the disparity between crack and powder cocaine in justifying a sentence *below* the guidelines. *See* United States v. Pope, 461 F.3d 1331 (11th Cir. 2006); United States v. Pho, 433 F.3d 53 (1st Cir.

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> disparity between powder and crack cocaine sentences. Review of the Sentencing Commission reports leaves little doubt that the Guidelines' penalties for crack lack any principled justification that can withstand scrutiny under § 3553.

United States v. Perry, 389 F.Supp.2d 278, 301-301 (D. R.I. 2005). It is one, too, that has been recognized by a number of district courts. *See* Perry at 305-307 and the decisions cited therein.

This year the Commission has, again, directed its attention to the disparity, with testimony being presented at a public hearing that took place on November 14. (The testimony is available at www.ussc.gov).

[4]Testimony of Stephen A. Saltzburg on behalf of the American Bar Association before the United States Sentencing Commission on November 14, 2006 at 1. (available at www.ussc.gov).

[5]The Constitution Project describes itself as "a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues through a unique combination of scholarship and activism," www.constitutionproject.org/index.cfm. Its Sentencing Initiative Project has included such preeminent jurists as, now, United States Supreme Court Justice Samuel Alito and continues to include United States District Court Judge Paul Cassel. Its co-chair is former United States Attorney General Edwin Meese, III.

2006); United States v. Eura, 440 F.3d 625 (4th Cir. 2006); and United States v. Castillo, 460 F.3d 337 (2nd Cir. 2006).[6] Mr. Smith, however, is *not* asking for a sentence below the guidelines, he is asking only for a sentence *at the low end of the available guidelines range.*

There is good reason for such a sentence. The difference in the treatment of the two forms of cocaine is stark:

> Another way of illustrating the problem is that five grams of crack, which triggers a five-year mandatory minimum sentence, represents only 10-50 doses with an average retail price of $ 225 -- $ 750 for the total five grams. In contrast, a powder cocaine defendant must traffic in 500 grams of powder, representing 2500-5000 doses with an average retail price of $ 32,500 -$ 50,000, in order to receive the same five-year sentence. The 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they converted it to crack, could make enough crack to trigger the five year mandatory minimum for each defendant.

United States v. Smith, 359 F.Supp. 2d 771, 779 (D.Wis. 2005).

The practical effect of the disparity can be seen in Mr. Smith's case. Mr. Smith delivered 28 grams of crack cocaine to the informant. As recognized in the Presentence Report, that produces an offense level of 28. (PSR ¶ 20). With a three level reduction for acceptance of responsibility, Mr. Smith ends up at offense level 25, which, absent the mandatory minimum requirement, places Mr. Smith in the recommended range of 57 to 71 months. The same quantity of powder cocaine, however, would place Mr. Smith at offense level 14. With a two level reduction for acceptance of responsibility, he would be at offense level 12, which produces a recommended range of 10 to 16 months.

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[6]But *see* United States v. Gunter, 462 F.3d 237, 249 (3rd Cir. 2007):

> In other words, once between the minimum and maximum statutory ranges of 21 U.S.C. § 841(b), there is nothing special about the crack cocaine sentencing guidelines that makes them different, or less advisory, than any other guidelines provision. Thus, the district court erred under Booker in treating the crack/powder cocaine sentencing differential incorporated in the guidelines as mandatory in opposing the final sentence.

Most importantly, the findings of the Sentencing Commission show that, at the very least, a sentence at the low end of the Guidelines range is appropriate. In it's 2002 *Cocaine and Federal Sentencing Policy* report, the Sentencing Commission included a careful analysis of the disparity between the two forms of cocaine and explained at length why the 100- to-1 ratio is unjustified.[7] According to that report, Congress considered different drug quantity ratios before settling on the 100-to-1 ratio. "The legislative history does not provide conclusive evidence of Congress' reason for doing so. . ." *Id.* at 8. That history, though, "suggests that Congress may have been motivated by the perceived heightened harmfulness of crack cocaine to prescribe mandatory minimum penalties for crack cocaine based on the harm such quantities could cause, regardless of whether the offenders were 'serious' or 'major' traffickers as defined elsewhere." *Id.* at 8-9.

The Commission's report recognizes that "the legislative history does suggest that Congress concluded that crack cocaine was more dangerous than powder cocaine and therefore warranted higher penalties based on five important beliefs." *Id.* at 9. Those beliefs, as set forth in the Commission's report are:

- Crack cocaine was extremely addictive. The addictive nature of crack cocaine was stressed not only in comparison to powder cocaine, but also in absolute terms.

- The correlation between crack cocaine use and distribution and the commission of other serious and violent crimes was greater than that with other drugs. Floor statements focused on psycho-pharmacologically driven, economically compulsive, as well as systemic crime (although members did

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[7]Congress, of course, did not establish the Sentencing Guidelines ranges for crack cocaine. It did, however, establish the 100-to-1 ratio in requiring 5 year mandatory minimum penalty for 5 grams of crack cocaine and the 10 year mandatory for more than 50 grams, while requiring the same penalties respectively for 500 grams and 5,000 grams of powder cocaine. *See* 21 U.S.C. § 841. The Sentencing Commission "responded" to the legislation "by incorporating the statutory 100-to-1 drug quantity ratio into the sentencing guidelines and extrapolating upward and downward to effectively set sentencing guideline penalty ranges for all drug quantities." *Cocaine and Federal Sentencing Policy* at iv.

not typically use these terms).

- Physiological effects of crack cocaine were considered especially perilous, resulting in death to some users and causing devastating effects on children prenatally exposed to the drug.

- Young people were particularly prone to using and/or being involved in trafficking crack cocaine.

- Crack cocaine's purity and potency, low cost per does, and the ease with which it was manufactured, transported, disposed of, and administered, were all leading to its widespread use.

*Id.* at 9-10.

The findings of the Sentencing Commission undermine those five beliefs. The claim of addiction is, perhaps, the strongest, but arises, not because of the nature of crack cocaine, but because of the way it is administered.

> Both powder and cocaine and crack cocaine are potentially addictive. (*See* Chapter 2.) The risk and severity of addiction to cocaine is directly related to the method by which the drug is administered into the body, rather than the form of the drug. Smoking or injecting any drug, including cocaine, generally produces the quickest onset, shortest duration, and most intense effects, and therefore produces the greatest risk of addiction.
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> Crack cocaine can only be readily smoked, which means that crack cocaine is always in a form and administered in a manner that puts the user at the greatest potential risk of addiction. Powder cocaine can be injected, snorted, or consumed orally. Injecting powder cocaine puts the user at similar risk of addiction as smoking crack cocaine, but only 2.8 percent of powder cocaine users inject the drug. Most powder cocaine users snort the drug, which puts the user at a lower risk of addiction than smoking crack cocaine.
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> In short, while crack cocaine always represents the most addictive form of cocaine, powder cocaine typically represents a somewhat less addictive form of the drug because it is usually snorted. Precisely quantifying this difference is impossible and, as a result, determining an appropriate degree of punishment differential to account for any difference in addiction potential is difficult. The addictive nature of crack cocaine, however, independently does not appear to warrant the 100-to-1 drug quantity ratio.

*Id.* at 93-94.

The thought that the use of crack cocaine led to an inordinate amount of dangerous or harmful activity has similarly failed to stand up to closer scrutiny.

> More recent data indicate that significantly less trafficking-related violence or systemic violence, as measured by weapon use and bodily injury documented in presentence reports, is associated with crack cocaine trafficking offenses than previously assumed. In 2000, weapons were not involved to any degree by any participant in the offense in almost ***two-thirds*** (64.8%) of crack cocaine ***offenses***. Furthermore, ***three-quarters*** of federal crack cocaine offenders (75.5%) had ***no personal weapon involvement***. Further, when weapons were present, they rarely were actively used. In 2000, only 2.3 percent of crack cocaine ***offenders*** used a weapon. Bodily injury of any type occurred in 7.9 percent of crack cocaine offenses in 2000.
>
> As mentioned earlier, recent data on protected classes of individuals and locations also do not substantially support previous concerns about the high prevalence of other aggravating conduct in crack cocaine offenses. In 2000, only 4.2 percent of crack cocaine offenses involved minor co-participants, and even fewer - 0.5 percent - involved the sale of the drug to a minor Only 4.5 percent of crack cocaine offenses occurred in protected locations such as near schools and playgrounds, and sales of crack cocaine to pregnant women were almost never documented.
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> In short, although the harmful conduct described above does occur more often in crack cocaine offenses than in powder cocaine offenses, it occurs in only a relatively small minority of crack cocaine offenses. This finding raises two principal concerns. First, to the extent that the 100-to-1 drug ratio was designed to account for the harmful conduct examined in this section, it sweeps too broadly by treating ***all*** crack cocaine offenders ***as if*** they committed these various harmful acts, even though most crack cocaine offenders in fact had not. In other words, the offense seriousness of most crack cocaine offenders is overstated by the 100-to-1 drug quantity ratio, suggesting that a differential this extreme is unjust.

*Id.* at 100.

The belief that young people were particularly prone to using or being involved in the trafficking of crack cocaine has turned out to be entirely false.

> Although these Congressional concerns of the mid-1980s were understandable at the time, recent data indicate that he epidemic of crack cocaine use by youth never materialized to the extent feared. The National Household Survey on drug Abuse reports that crack cocaine use among 18- to 25-year old adults historically has been low. Between 1994 and 1998, on average less than 0.4 percent of those young adults reported using crack cocaine within the past 30 days. In fact, in 1998 ***the rate of powder cocaine use among young adults was almost seven times as high*** as the rate

> of use of crack cocaine.
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> Monitoring the Future surveys report similar findings about cocaine use by high school seniors. From 1987 to 2000, on average less than 1.0 percent of high school seniors reported crack cocaine use within the past 30 days. During that same period, *the rate of powder cocaine use by high school seniors was almost twice as high*, but averaged only 1.9 percent. The low rate of crack cocaine use by young people also is consistent with Commission sentencing data indicating that in 2000 only 0.5 percent of federal crack cocaine offenses involved the sale of the drug to a minor.
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> Data are not available regarding the number of underage crack cocaine traffickers at the state and local levels, but sentencing data suggest youth do not play a major role in crack cocaine trafficking at the federal level. Minors were involved in only 4.2 percent of federal crack cocaine offenses in 2000. The average age of federal crack cocaine traffickers was 29 years old, only four years younger than the average age of all federal drug traffickers (33 years).

*Id.* at 96-97.

The Commission found that prenatal exposure to crack cocaine produced results that were no different to prenatal exposure to powder cocaine.

> A number of conclusions from more recent data are relevant to assessing the 100-to-1 drug quantity ratio in this context. First, recent research indicates that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure. To this point, Dr. Deborah Frank states "there are no physiologic indicators that show to which form of the drug the newborn was exposed. The biologic thumbprints of exposure to these two substances in utero are identical." Since recent research reports no difference between the negative effects from prenatal crack cocaine and powder cocaine exposure, no differential in the drug quantity ratio based directly on this particular heightened harm appears warranted.
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> Second, recent research indicates that the negative effects of prenatal cocaine exposure are significantly less severe than believed when the current penalty structure was established. Although there does appear to be an association between prenatal cocaine exposure and some negative developmental effects (*e.g.*, attention and emotional regulation), the Acting Director of the National Institute on Drug Abuse (NIDA), Dr. Glen Hanson, reports that "researchers have found the effects to be not as devastating as originally believed . . . .
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> Additionally, Dr. Frank's recent findings are in accord with NIDA's position. Dr. Frank testified before the Commission that "there are small but identifiable effects" of prenatal cocaine exposure on infants, but that evidence of any negative long-term effects is inconsistent. Dr. Frank further finds that the negative effects associated with

> prenatal cocaine exposure do not differ in severity, scope, or kind from prenatal exposure to other illegal and legal substances. In fact, the negative effects from prenatal exposure to cocaine are very similar to those associated with prenatal tobacco exposure and less severe than the negative effects of prenatal exposure to alcohol. The fact that prenatal exposure to ***legal*** substances causes similar harms as prenatal exposure to cocaine further complicates accounting for the harms of prenatal cocaine exposure by quantity-based ***criminal*** penalties, particularly penalties that purport to distinguish between different forms of cocaine in part because of those perceived harms.
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> Third, even these findings of small but identifiable effects" of prenatal cocaine exposure must be used cautiously in setting sentencing policy to account for this heightened harm because of other complicating factors. Dr. Hanson explained:
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> > Factors such as the amount and number of all drugs used, inadequate prenatal care, socio-economic status, poor maternal nutrition, and other health problems, and exposure to sexually transmitted diseases are just some examples of why it is difficult to determine the exact effects of prenatal drug exposure . . . ***[W]e must be cautious in drawing causal relationships in this area. . . .***
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> Dr. Chasnoff echoed this warning, asserting that "the home environment is ***the*** critical determinant of the child's ultimate outcome."

*Id*. at 94-95.

The report finds no difference in terms of yield of the two substances. "With respect to doses, one gram of powder cocaine generally yields five to ten doses where as one gram of crack cocaine yields two to ten doses." *Id*. at 17.

The result of developing a drug sentencing policy upon incorrect assumptions has been detrimental to the goals of sentencing. As mentioned, there is some uncertainty about the intent of Congress in establishing the penalties for various controlled substances. With the exception of crack cocaine, though, the best evidence seems to show that Congress intended to "create a two-tiered penalty structure for discreet categories of traffickers. Specifically, Congress intended to link the five year mandatory minimum penalties to what some called 'serious' traffickers and the ten year mandatory minimum penalties to 'major' traffickers. Drug quantity [was to] serve as a proxy to

identify those types of traffickers." *Id*. at 6. "A 'major trafficker' was defined as someone who operated a manufacturing or distribution network, while a 'serious trafficker' was defined as someone who managed 'retail level traffic' in 'substantial street quantities.'"[8] The lower thresholds for crack cocaine, though, has meant that most of those sentenced fell short of being either a "major" or "serious" trafficker: "[t]he dominance of lower level offenders is particularly pronounced among crack cocaine offenders, two-thirds of whom were street-level dealers in 2000." *Cocaine and Federal Sentencing Policy* at 36.

To the extent that the Department of Justice maintains that the existing ratio should remain in effect, most of their arguments, if examined closely, have more to do with the population that has chosen to use crack cocaine than they do to the nature of the drug itself.[9] In the testimony before the Sentencing Commission on November 14th of this year Jonathan Caulkins, a professor from Carnegie Mellon University, and Peter Reuter, a professor from the University of Maryland and co-director of the Drug Policy Research Center of the RAND Corporation, presented that conclusion and provided an example:

> Alcohol provides a useful parallel. Younger males consume much more of their alcohol in the form of beer than do older females; the latter are more likely to consume wine or spirits. For young males, alcohol generates a great deal of violent crime; for older females alcohol leads to adverse health and family consequences but not much violence against weaker victims. Analysis might show that on average beer produces more violent crime per liter of ethanol but one would hardly claim that beer was itself more criminogenic. That association with crime is simply a consequence of

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[8]Testimony of Ryan S. King, a Policy Analyst with the Sentencing Project, a criminal justice policy organization, at the November 14, 2006, hearing before the Sentencing Commission (quoting from William Sade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Arizona Law Review 1233, 1252 (1996).

[9]*See* Testimony of R. Alexander Acosta, United States Attorney for the Southern District of Florida, on behalf of the United States Department of Justice before the United States Sentencing Commission on November 14, 2006 (available at www.ussc.gov).

> preferences among groups that differ in their propensity for certain kinds of acts. If young males preferred fortified wines, then fortified wines would appear to be more criminogenic.

(Testimony is available at www.ussc.gov).

"The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000." *Cocaine and Federal Sentencing Policy* at 102. The net result of punishing more harshly what amounts to a particular population is a sentencing policy that is seen by many as unfair and racially biased:

> Primarily as the result of the different penalties for crack and powder cocaine, and contrary to one of the Sentencing Reform Act's primary goals, the sentencing guidelines have led to increased disparity between the sentences of blacks and whites. Before the guidelines took effect, white federal defendants received an average sentence of 51 months and blacks an average of 55 months. After the guidelines took effect, the average sentence for whites dropped to 50 months, but the average sentence for blacks increased to 71 months. Spade, supra, at 1266-67 (citing 1993 U.S. Department of Justice, Bureau of Justice Statistics Report). Although there is no indication that the legislators intended that the law have a discriminatory effect, as Commissioner Michael Gelacak noted, "If the impact of the law is discriminatory, the problem is no less real regardless of the intent." UNITED STATES SENTENCING COMMISSION, Special Report to Congress: Cocaine and Federal Sentencing Policy (Apr. 1997), reprinted in 10 FED. SEN. REPTRL. 184, 189 (Jan./Feb. 1998).

United States v. Smith, 359 F. Supp. 2d at 780.

This racially disparate impact of the 100-to-1 ratio coupled with the disproportionate impact upon low-level offenders runs counter to the requirement of 18 U.S.C. 3553(a)(2) "for the sentence imposed - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense":

> Further, when a Guideline sentence involves a nearly impossible-to-justify disparity such as this, the sentence neither accurately reflects the seriousness of the offense, nor promotes general respect for the criminal justice system. As stated by the Sentencing Commission in its 2002 report, gross sentencing disparities actually promote less respect for the law because the penalties suggest untoward discrimination and fall more heavily on smaller offenders and those with a lower criminal history category, leaving more significant drug dealers facing shorter sentences.

United States v. Perry, 389 F. Supp. 2d at 304.

Mr. Smith has, here, surely devoted far more space than he should have with regard to this argument about the disparity between the treatment of powder and crack cocaine. After all, his goal is a limited one, only that of convincing the Court to impose a sentence at the bottom of the available Guidelines range. The point, though, is that in addition to Mr. Smith's efforts to take advantage of educational opportunities and his lack of a prior criminal record, the failure of the crack cocaine Guidelines to fulfill the mandated goals of sentencing support such a sentence.

He makes this argument, too, in recognition of the fact that the threats he made to the informant might be seen as justification for, at least, a greater sentence within the recommended guidelines range. As Mr. Smith has already argued a number of times in the course of his case, it is important to recognize that the threats were the results of his belief that the informant had stolen the cocaine and accused him of stealing the proceeds of the sale that never occured. While the Court will undoubtedly consider the threats, Mr. Smith is of the hope that the Court will consider that the threats had everything to do with Mr. Smith's effort to recover the cocaine and nothing to do with his actual intentions. It is his hope, too, that the considerations argued in this sentencing memorandum outweigh whatever weight the Court chooses to attribute to the threats.

Thus, it is Mr. Smith's contention that his lack of any prior convictions, his efforts at obtaining an education, and the unjustifiably harsh treatment of crack cocaine in the Sentencing Guidelines calculations justify a sentence at the lowest end of the available Sentencing Guidelines range. Mr. Smith respectfully requests the Court to consider imposing such a sentence.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Christopher Canova, Assistant United States Attorney, 111 N. Adams Street, 4th Floor, Tallahassee, FL 32301, by electronic delivery this 5th day of December, 2006.

Respectfully Submitted,

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