IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs. **Case No. 4:06crXXX**

JOHN DOE,

Defendant.
_____/

SENTENCING MEMORANDUM

John Doe is thirty-five years old. Compared to the other conspirators involved in this case and related cases, Mr. Doe's role is a relatively minor one. He has cooperated with the Government, but, in large part due to his limited role, he has been unable to provide the Government with information that rises to the level of substantial assistance. His inability to qualify for a substantial assistance motion coupled with his classification as a Career Offender creates the possibility that he may receive a sentence much longer than those that played a major role. While Mr. Doe has a significant criminal history, which has earned him eighteen criminal history points, his Career Offender classification is based upon a violent offense that occurred nearly thirteen years ago and two drug offenses involving small quantities of drugs. Given these circumstances, a sentence less than the fifteen and a half to nineteen and a half years recommended by the advisory Guidelines would be "sufficient, but not greater than necessary," to comply with the goal of sentencing set forth in 18 U.S.C. § 3553(a)(2). 18 U.S.C. § 3553(a).

In the Presentence Report, the probation officer has listed the key participants in the conspiracy as Tom Jones and Will Smith, individuals not named in the superceding indictment in

Mr. Doe's case. In the Presentence Report, Smith is described as "the most culpable of the conspirators in the case." (PSR ¶ 15). His role is described as that of "supplying cocaine to all of the co-defendants in Tallahassee,"and is said to have "maintained connections to the larger suppliers in South Florida." *Id.* Jones is described as "a larger scale cocaine supplier in the Tallahassee area." (PSR ¶ 16). He "obtained powder cocaine from Will Smith and supplied various others with powder cocaine." *Id.* The report describes Mr. Doe as "a mid-level cocaine dealer in Tallahassee." (PSR ¶ 17). Of those listed in the indictment, Mr. Doe is, on the basis of drug quantity, about in the middle. The factual basis supporting Mary Davis's guilty plea contributes 85 grams to her (Doc. 123). The factual bases for the others show Fred Clark responsible for 255 grams (Doc. 88), Mike Masters with one kilogram (Doc. 114), and David Miller with what must be many kilograms (Doc. 71).[1] Mr. Doe is responsible for 422 grams of cocaine. (PSR, ¶ 14).

In attempting to provide substantial assistance, Mr. Doe has been interviewed by law enforcement officials and has even attempted to arrange some kind of third party substantial assistance. None of his efforts, however, have apparently risen to the level that would, in the view of the United States Attorney's Office, justify a substantial assistance motion. Mr. Doe is unsure of the level of assistance provided by Mr. Smith, Mr. Jones, or any of the individuals named in the indictment. None of them, with the exception of Mr. Jones, have been sentenced. Mr. Jones, however, whose role was surely far greater than nearly everyone but Mr. Smith, was sentenced on August 3, 2006, by Judge Hinkle in case number 4:05crXXX. Judge Hinkle imposed a sentence of 84 months (Doc. 75), a sentence less than half of the 188 months that

[1]According the Court Docket, the remaining individual named in the indictment, Roger Morris, is currently awaiting trial

represents the bottom of the advisory range in Mr. Doe's case.

Mr. Doe has a significant criminal history. It begins with a commercial burglary that occurred nearly seventeen years ago when Mr. Doe was eighteen years of age, includes an aggravated battery offense with a deadly weapon that occurred nearly thirteen years ago and a series of drug offenses: a 1994 felony possession of a controlled substance offense, a 1998 case involving the crime of possession of intent to sell cocaine, a 2002 case involving two counts of sale of cocaine, and a 2002 possession of cocaine case. All of the drug offenses, though, involve small quantities. Mr. Doe will, at his sentencing hearing, introduce court documents from those cases. Those documents show that the 1994 case involved what is described as a single "crack rock" found in a car occupied by Mr. Doe and a co-defendant. The 1998 possession with intent to sell case involved what was apparently a small quantity of powder cocaine.[2] The two sale counts in the 2002 case, together, involved 2.6 grams of powder cocaine sold to an informant. When the officers went to serve the warrant and arrest Mr. Doe for those incidents, he was found in possession of roughly $1,100.00 and what was described as a "small baggy of suspected powder cocaine." That incident led to the 2002 possession charge.

Mr. Doe's status as a Career Offender is based in part upon the 1995 aggravated battery charge. On the surface it appears to be a serious case. As it is described in the Presentence Report, Mr. Doe was involved "in an altercation" and during the incident, "the defendant struck the victim on the side of the head with a firearm, which caused the firearm to discharge." The Presentence Report says the victim was struck in the back of the neck with a bullet suffering a

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[2]The Probable Cause Affidavit filed in the case does not state the quantity of cocaine, stating only that the cocaine was in a "small blue plastic baggie." The defense is in the process of trying to secure more information about the quantity and expects to have that information prior to Mr. Doe's February 20th sentencing hearing.

superficial wound." Nonetheless, the initial sentence involved a suspended sentence and two years of probation with 4 months in custody. It was not until some seven months later when Mr. Doe was found in possession of that one rock of crack cocaine and violated his probation that the court sentenced him to thirty-three months. That sentence ran concurrently with the 1994 felony possession case in which the court also imposed a thirty-three month sentence. The other two offenses that serve as a predicate for the Career Offender finding are the 1998 case where Mr. Doe was convicted of the offense of possession with intent to sell cocaine and the 2002 case where he was convicted of two counts of sale of cocaine. In the former case, the court sentenced Mr. Doe to a year and a day in jail. In the latter case, the court sentenced him to two years and two days in jail to run concurrently with the 2002 possession case.

The classification of Mr. Doe as a Career offender more than doubles the advisory Guidelines range. As a Career Offender, Mr. Doe falls in the range of 188 to 235 months. (PSR ¶ 63). If, however, his sentence is calculated on the basis of his criminal history of VI ((PSR ¶ 45) and what would have been an offense level of 21 (PSR ¶¶ 26, 29), the recommended range would have been 77 to 96 months.

Two circumstances justify a sentence below that recommended by the Guidelines calculations: (1) the need for some parity in the sentences of those who participated in the crime; and (2) the recognition that the range produced by the Career Offender guideline overstates the extent of Mr. Doe's criminal activity.

The mandate of 18 U.S.C. § 3553(a) is, of course, for the court to "impose a sentence sufficient, but not greater than necessary, to comply" with the purposes of sentencing set forth in paragraph 2 of that same statute. In United States v. Hunt, 459 F.3d 1180, 1182 (11th Cir. 2006), the court summarized the factors that must be considered:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need 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;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established . . .;
> (5) any pertinent [Sentencing Commission] policy statement . . .;
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense.

In Mr. Doe's case, it is the "circumstances of the offense," the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," that justifies a sentence below that recommended by the Career Offender guideline. Such a sentence would, as well, fulfill the remaining purposes set forth in the statute.

As recognized in Hunt, there has been a continuing debate among the courts as to how much weight should be given to one of the listed factors, the Sentencing Guidelines. 459 F.3d at 1183-1184. The decision in Hunt, however, has resolved the debate for the Eleventh Circuit. In the decision, the court rejected "any across-the-board prescription regarding the appropriate deference to give the guidelines." 459 F.3d at 1184. Rather, a "district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence." 459 F.3d at 1185. Thus, as recognized by Judge Tjoflat in United States v. Glover, 431 F.3d 744, 752-753 (11th Cir. 2005), in some cases the Guidelines

may have little persuasive force in light of some of the other § 3553(a) factors:

> Although "judges must still consider the sentencing range contained in the Guidelines, . . . that range is now nothing more than a suggestion that may or may not be persuasive . . . when weighed against the numerous other considerations listed in [§ 3553(a)]." *Id*. at 787 (Stevens, J., dissenting). Indeed, as one district judge has already observed,
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> > the remedial majority in Booker [] direct[s] courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore. For example, under § 3553(a)(1) a sentencing court must consider the "history and characteristics of the defendant." But under the guidelines, courts are generally forbidden to consider the defendant's age, his education and vocational skills, his mental and emotional condition, his physical condition including drug or alcohol dependence, his employment record, his family ties and responsibilities, his socio-economic status, his civic and military contributions, and his lack of guidance as a youth. The guidelines' prohibition of considering these factors cannot be squared with the § 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant.
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> United States v. Ranum, 353 F. Supp.2d 984, 986 (E.D.Wis.2005) (citations omitted). Thus, mitigating circumstances and substantive policy arguments that were formerly irrelevant in all but the most unusual cases are now potentially relevant in every case.

As with many issues revolving around the Booker decision, there has been some debate about whether the provision found at § 3553(a)(6), regarding unwarranted disparity in sentencing, provides a sentencing court with the authority to impose a sentence below the advisory Guidelines range to provide parity with the sentences of the codefendants. Last year the Seventh Circuit Court of Appeals wrote:

> The Government rightly observes that comparison with co-defendants is not usually enough to establish a sentencing disparity for purposes of § 3553(a)(6). As we said in United States v. Boscarino, 437 F.3d 643, 638 (7th Cir. 2006), "the kind of 'disparity' with which § 3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case.

United States v. Bullock, 454 F.3d 637, 640 (7th Cir. 2006).

While that observation hardly encourages the use of the subsection to establish parity

among codefendants, it falls short of a prohibition against doing so ("usually not enough"). Furthermore, in Bullock, the court ultimately decided the subsection was applicable to Bullock because she had been sentenced by a different judge in another case. That is, of course, at least in part, the same circumstance present here: Judge Hinkle sentenced Tom Jones in an altogether different case

As with the Seventh Circuit Court of Appeals, the Eleventh Circuit Court of Appeals has not been especially receptive to the idea of using the subsection to provide some parity in the sentencing of co-defendants. In a *per curiam* unpublished decision, the court rejected a claim that a sentence was unreasonable because the co-defendants received lesser sentences:

> We reject Edinson's contention that his sentence is unreasonable because his co-defendants were given lower sentences. While § 3553(a)(6) speaks of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," the provision is more concerned with unjustified differences across judges or districts than between co-defendants in a single case. United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006). "Disparity between the sentences imposed on codefendants is generally not an appropriate basis for relief on appeal." United States v. Regueiro, 240 F.3d 1321, 1325-26 (11th Cir. 2001). As we have previously recognized, "to adjust the sentence of a co-defendant in order to cure an apparently unjustified disparity between defendants in an individual case will simply create another, wholly unwarranted disparity between the defendant receiving the adjustment and all similar offenders in other cases." United States v. Chotas, 968 F.2d 1193, 1198 (11th Cir. 1992).

United States v. Edinson, Case No. 06-11460, 2006 U.S. App. LEXIS 30854, 6-7 (11th Cir. Dec. 12, 2006)[3]. Rejecting a claim that a sentence is unreasonable, however, is not tantamount to concluding that the section cannot be used to justify a lesser sentence. Indeed, the excerpt cites another Seventh Circuit opinion that uses the same language cited above, that the subsection is "more concerned with unjustified differences across judges or districts." Here, again, that is not

[3]As an unpublished decision, Edinson, of course, has no precedential value. *See* 11th Cir. R. 36.2; Moore v. Barnhart, 405 F.3d 1208, 1211 n. 3 (11th Cir. 2005).

to say the subsection cannot be used to create some parity between defendants.

The claim about creating "unwarranted disparity" with "similar offenders in other cases," comes from the decision in Chotas, a 1992 case decided prior to the Booker decision, when the Guidelines were still mandatory. It is, furthermore, a concern that should carry little weight in this District given the disparity between sentences imposed in the Northern District of Florida and the rest of the nation. According to the United States Sentencing Commission's 2005 Sourcebook of Federal Sentencing Statistics, which represents the most current statistics available, the average sentence in the Northern District of Florida for drug trafficking offenses in Fiscal Year 2005, following the Booker decision, was 78% higher than the national average (150 months vs. 84.4 months)[4]. Given the statistics, a lesser sentence in Mr. Doe's case would only decrease that disparity.

More on point than either the decision from the Seventh Circuit or the unpublished decision from the Eleventh Circuit, is a case that came out just this week from the Second Circuit Court of Appeals, which has adopted a position that seems consistent even with courts that have expressed some reluctance to rely upon § 3553(a)(6). In United States v. Wills, Case No. 06-0115, 2007 WL 366071, *4 (2nd Cir. Feb. 5, 2007), the court began with language similar to that found in those decisions that have expressed reluctance in authorizing the use of the subsection to bring parity to the sentences imposed upon co-defendants:

> This Court has noted that the Sentencing Reform Act of 1984, "whence the language in § 3553(a)(6) comes," was intended to eliminate national disparity. United States v. Fernandez, 443 F.3d 19, 31 n. 9 (2d Cir.2006). We have also observed, however, that the plain language of § 3553(a)(6) does not on its face restrict the kinds of disparity a court may consider. Fernandez, 443 F.3d at 31 n. 9. In other words, although it is unclear whether the provision allows for co-defendant sentence comparisons, the primary purpose of the provision was to

[4]These statistics are available at: www.USSC.gov//JUDPACK/2005/fln05.pdf.

reduce unwarranted sentence disparities nationwide.

> Since Booker, circuit courts have taken diverse positions on whether the phrase "unwarranted sentence disparities" in § 3553(a)(6) permits consideration of co-defendants' sentences. *See, e.g.*, United States v. Davis, 437 F.3d 989, 997, (10th Cir.) *cert. denied* 126 S.Ct. 1935 (2006) (co-defendant comparisons not permitted); United States v. Walker, 439 F.3d 890, 893-94 (8th Cir.2006) (assuming without extensive discussion that § 3553(a)(6) requires consideration of co-defendant disparity); United States v. Parker, 462 F.3d 273, 277 (3d Cir.2006), *cert. denied* 127 S.Ct. 462 (2006) (holding that a district court is not required to consider sentencing disparity among co-defendants, but is permitted to do so in certain circumstances and in a particular manner).

Wills, at *4, n. 5.

The court went on, however, to explain that while the subsection does not require sentencing courts to consider disparity between the sentences of co-defendants, it does not prohibit them from doing so:

> We do not, as a general matter, object to district courts' consideration of similarities and differences among co-defendants when imposing a sentence. In this respect, we agree with the Third Circuit's approach to co-defendant sentence disparities set forth in United States v. Parker, 462 F.3d 273 (3d Cir.), *cert. denied*, 127 S.Ct. 462 (2006). The Third Circuit determined that "although § 3553(a) does not require district courts to consider sentencing disparity among co-defendants, it also does not prohibit them from doing so. So long as factors considered by the sentencing court are not inconsistent with those listed in § 3553(a) and are logically applied to the defendant's circumstances, we accord deference to the court's 'broad discretion in imposing a sentence within a statutory range.' " *Id.* at 277 (quoting United States v. Booker, 543 U.S. 220, 233 (2005)). Indeed, 18 U.S.C. § 3553(a)(1) provides a natural and necessary basis for placing the actions of an individual defendant in the broader context of the crime he or she committed. Section 3553(a)(1) requires consideration of "the nature and circumstances of the offense" and "the history and characteristics of the defendant." Under the advisory Guidelines scheme explicated in Booker, it is appropriate for a district court, relying on its unique knowledge of the totality of circumstances of a crime and its participants, to impose a sentence that would better reflect the extent to which the participants in a crime are similarly (or dissimilarly) situated and tailor the sentences accordingly. It would be anomalous to grant a district court "broad discretion in imposing a sentence within a statutory range," Booker, 543 U.S. at 233, but deny the court the ability to consider the sentence in its complete relevant context.

Wills, at *5. *See also* United States v. Presley, Case No. 00-80756, 2006 US Dist. LEXIS 95063, *20-25 (E.D. Mich. Dec. 19, 2006) and the cases cites therein. Thus, there is justification for using the subsection to establish parity in the sentencing of codefendants. Given the sentence already imposed upon Mr. Jones and the sentences that may be imposed upon Mr. Doe's codefendants, there is a compelling reason to do so in Mr. Doe's case.

Beyond the § 3553(a)(6) goal of avoiding unwarranted sentencing disparities, subsection (a)(2) requires the court, in imposing sentence, to consider the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." Unreasonable disparity in sentencing can promote *disrespect* for the law and provide something less than just punishment:

> 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. 2d 278, 304 (D.R.I. 2005). In the context of the disparity between co-defendants, clearly extreme disparities can fail to promote respect for the law:

> Perfect parity among the sentences imposed on the various members of a criminal conspiracy is no doubt impossible to achieve, given the complexity of the task. But the extreme disparity in these two sentences not only fails to serve the legislative intent reflected in § 3553(a)(6), it also suggests an arbitrary level of decision-making that fails to "promote respect for the law," § 3553(a)(2)(A).

United States v. Lazenby, 439 F.3d 928, 934 (8th Cir. 2006). Thus, the need for the promotion of respect for the law and the need for a just sentence are also considerations that would justify a lesser sentence in Mr. Doe's case.

At this point, the disparity that is apparent is that between the potential sentence called for by the advisory Guidelines in Mr. Doe's case and the sentence received by Tom Jones. If this

Court should follow the advisory Guidelines in Mr. Doe's case, there would seem to be, at the very least, also a substantial risk of real disparity between Mr. Doe's sentence and Mr. Smith's sentence and the sentences that might be imposed upon Mr. Miller and, maybe even Mr. Masters. That is not to say that there should be exact parity. It seems clear that Mr. Jones must have received the benefit of a substantial assistance motion and, from what Mr. Doe knows of the circumstances, it seems likely that Mr. Smith will be the beneficiary of one, as well. It is not to say, either, that a substantial reduction in sentence was not warranted in Mr. Jones's case, nor that it would not be warranted in Mr. Smith's case.

It's not clear to Mr. Doe whether the reduction in Mr. Jones's sentence and whether any potential reduction in Mr. Smith's sentence is based upon their assistance in prosecuting lower level offenders such as Mr. Doe. If that were the case, though, it would be atypical, as the Government more often than not rewards those lesser involved for their assistance in prosecuting those that operate at a higher level. Regardless, though, of the circumstances of the assistance given by Mr. Jones and Mr. Smith, the risk presented is one that has been described as a "cooperation paradox":

> Yet, the escape hatch for cooperation creates a paradox. Defendants who are most in the know, and thus have the most "substantial assistance" to offer, are often those who are most centrally involved in conspiratorial crimes. The highly culpable offender may be the best placed to negotiate a big sentencing break. Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss.

Tom J. Schulhofer, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature, Rethinking Mandatory Minimums,* 28 Wake Forest L. Rev. 199, 212 (1993). It is this "paradox," that Mr. Doe is hopeful the Court will address by exercising the authority extended to the court by the Booker decision.

Thus, whether it is seen as a need to avoid unwarranted sentencing disparity or as a need to promote respect for the law or to provide just punishment, the court has the authority to reduce the stark disparity that can arise between the major offenders and those less involved that can arise because of the distorting effect of a substantial assistance motion. It is Mr. Doe's position that a sentence of less than 188 months would, therefore, be appropriate.

The potential for disparity in Mr. Doe's case is magnified by the Career Offender provision of the Sentencing Guidelines. While he recognizes he has a significant record, his most recent history consists almost entirely of drug offenses involving small quantities of drugs.

As recognized by one Massachusetts district court judge, there can be a considerable difference from one individual labeled as a Career Offender and the next:

> There are, in short, career offenders and *career offenders*. Treating offenders who are not equally culpable the same is a false equality, not at all consistent with the admonition "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

United States v. Ennis, 2006 U.S. Dist. LEXIS 93895, *21 (D. Mass. Dec. 22, 2006) (emphasis in original). Accordingly, sentencing courts have, for any number of reasons, been willing to impose sentences below that recommended by Career Offender Guideline:

> Courts have, in pre- and post-Booker cases, recognized that the career offender guideline can produce a penalty greater than necessary to satisfy the purposes of sentencing. *See, e.g.*, United States v. Mishoe, 241 F.3d 214, 220 (2d Cir. 2001)("In some circumstances, a large disparity [between the length of the prior sentences and the sentence produced by the guideline] might indicate that the career offender sentence provides a deterrent effect so in excess of what is required . . . as to constitute a mitigating circumstance present 'to a degree' not adequately considered by the Commission."); United States v. Rivers, 50 F.3d 1126, 1131 (2d Cir. 1995)(stating that the district court can depart where the range created by the career offender provision overstates the seriousness of the defendant's record); United States v. Qualls, 373 F. Supp. 2d 873, 876-77 (E.D. Wis. 2005)(stating that in some cases the career offender guideline creates sentences far greater than necessary, such as where the qualifying offenses are

> designated crimes of violence but do not suggest a risk justifying such a sentence, or where the prior sentences were short, making the guideline range applicable to the instant offense a colossal increase); United States v. Serrano, No. 04-CR-414, 2005 U.S. Dist LEXIS 9782, at *22-25 (S.D.N.Y. May 19, 2005)(imposing non-guideline sentence where defendant's career offender predicates were minor drug offenses on which he served little time); United States v. Corber, 2005 U.S. Dist. LEXIS 8927, at *7-9 (D. Kan. Apr. 13, 2005), aff'd, 159 Fed. Appx. 54 (10th Cir. 2005)(finding that the career offender guideline created sentence greater than necessary, considering the nature of the predicate offenses and the instant offense); United States v. Phelps, 366 F. Supp. 2d 580, 590 (E.D. Tenn. 2005)(stating that "it is not unusual that the technical definitions of 'crime of violence' and 'controlled substance offense' operate to subject some defendants to not just substantial, but extraordinary increases in their advisory Guidelines ranges," which in some cases will be greater than necessary, especially where "the defendant's prior convictions are very old and he has demonstrated some ability to live for substantial periods crime free or in cases where the defendant barely qualifies as a career offender"); United States v. Carvajal, No. 04-CR-222, 2005 U.S. Dist. LEXIS 3076, at *15-16 (S.D.N.Y. Feb. 22, 2005)(finding that the career offender guideline produced a sentence greater than necessary under § 3553(a)).

United States v. Fernandez, 436 F. Supp.2d 983, 988-989 (D. Wis. 2006). *See also*: United States v. Williams, 435 F. 3d 1350, 1353 (11th Cir. 2006) (where the district court found the recommended Career Offender sentence of 188 to 235 months did "not produce a just and reasonable result," and that "the difference between sentences within the Guidelines range with the enhancement and without the enhancement was too disparate to ignore").

In deciding whether a Career Offender sentence is appropriate, it is worth considering, as well, what appears to be an exacerbation of racial disparity in sentencing that arises because, like Mr. Doe, so many are found to be Career Offenders based upon convictions for relatively minor drug offenses:

> In 2000, there were 1,279 offenders subject to the career offender provisions, which resulted in some of the most severe penalties imposed under the Guidelines. Although Black offenders constituted just 26% of the offenders sentenced under the Guidelines in 2000, they were 58% of the offenders subject to the severe penalties required by the career offender guideline. Most of these offenders were subject to the guideline because of the inclusion of drug trafficking

> crimes in the criteria qualifying offenders for the guideline. . . Commentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods (Tonry, 1995), which suggests that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers (Tonry, 1995; Blumstein, 2000). United States Sentencing Commission, *15 Years of Guideline Sentencing*, 133-134 (Nov. 2004). That same report from the Sentencing Commission also questions whether the career offender guideline, "especially as it applies to repeat drug traffickers," actually acts as a deterrent and whether it accurately predicts a higher rate of recidivism. *Id.* at 134.

United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 133-134 (Nov. 2004)[5].

In some cases, the Career Offender calculations may legitimately serve the purposes of sentencing and fulfill the mandate of Congress to sentence serious repeat offenders harshly. In Mr. Doe's case, though, the Career Offender Guidelines call for the same sentence for him, whose prior offenses involve surely less than an ounce of cocaine, as they would for an individual whose prior offenses included kilograms of cocaine. In doing so it foregoes consideration of the actual circumstances of Mr. Doe's prior crimes in favor of an artificial claim to uniformity. It ignores, as well, the principal that has remained "uniform and constant in the federal judicial tradition for the sentencing judge to 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." Koon v. United States, 518 U.S. 81, 113 (1996).

Mr. Doe's prior drug offenses involved small quantities of drugs and even considering the thirteen year old aggravated battery offense, his prior sentences have resulted in period of incarceration dramatically less than what is recommended by the Career Offender guideline.

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[5]Available at: www.ussc.gov/15_year/15year.htm.

Given that and given that reliance upon the guideline would result in a sentence more than twice as long as the sentence already received by Mr. Doe's supplier who was engaged in drug trafficking at a level significantly greater than was Mr. Doe, the considerations of 18 U.S.C. § 3553(a) justify a sentence less than the fifteen and a half years recommended, at a minimum, by the Career Offender guideline. Mr. Doe respectfully requests this Court to impose 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, Timothy Jansen, Attorney at Law, for Mary Davis, Barbara Hobbs, Attorney at Law for Mike Masters, Teri Donaldson, Attorney at Law for David Miller, Charles McMurray, Attorney at Law for Terrence Oliver, Clyde Taylor, Attorney at Law for Fred Clark, and Bernard Daley for Will Smith, by electronic delivery this 9th day of February, 2007.

Respectfully Submitted,

By: s/Randolph P. Murrell

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[Note to readers: The names of all the defendants have been changed to protect the guilty - RM]