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

UNITED STATES OF AMERICA,

vs. **CASE NO. XXXXXX**

MARY JONES,

Defendant.
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DEFENDANT'S SENTENCING MEMORANDUM

Ms. Jones, who is 48 years old, has completed a rehabilitation process that she had already begun prior to the February 19, 2006, incident that led to her arrest. She played a minimal role in what was a $200 drug transaction that had been arranged by an informant. Upon her arrest, she immediately cooperated with law enforcement authorities. Given these circumstances, a period of probation would be "sufficient, but not greater than necessary," to comply with the goals of sentencing set forth in 18 U.S.C. § 3553(a)(2).[1] 18 U.S.C. § 3553(a).

[1]Ms. Jones contends, as well, that the unjustifiable disparity in the punishment of those that distribute crack cocaine as compared to those that distribute powder cocaine, supports a below-Guidelines sentence. *See* United States v. Pickett, 475 F.3d 1347, 1356 (D.C. Cir.2007) (Rogers, J. concurring) ("It has taken many years, but the court finally has concluded that it is authorized to hold, and does hold, that a district court, in sentencing a defendant, may properly take into account the fact that the 100-to-1 ratio embedded in the Sentencing Guidelines for crack-to-powdered cocaine offenses bears no meaningful relationship to a defendant's culpability"). She will not, though, argue the issue at length because (1) the stated grounds are sufficient to support a sentence of probation and, (2) because she recognizes the holding in United States v. Pope, 461 F.3d 1331 (11th Cir. 2006), and this Court's obligation to follow existing precedent. She, nonetheless, wishes to make it clear that she contends that the Court in Pickett decided the issue correctly, while the Court in Pope decided the issue incorrectly.

The Offense and Ms. Jones's Circumstances

Over a year ago, in February of 2006, a confidential informant, who presumably was trying to earn a lesser sentence for himself, approached Mary Jones and asked her to help him purchase crack cocaine. Ms. Jones, who is 48 years old and had been addicted to crack cocaine for nearly a decade, was in the process of winning her fight against that addiction. The informant, though, was persistent, calling Ms. Jones at work and ultimately showing up at Ms. Jones's residence, asking her to take him to see "Slim," the individual who ultimately sold the informant the cocaine. While there had not been any prearranged agreement for compensation, Ms. Jones was still susceptible to the temptation of crack cocaine and, while driving back with the informant from Slim's residence," took a "hit" of the $200 worth of cocaine the informant had purchased.

Ms. Jones's difficulties largely began following the death of her 20-year old daughter in a car accident in October of 1996. Ms. Jones's brother, Danny Smith, has explained the circumstances in his letter to the Court:

> In early 1997 I began to notice a change in my sister shortly after the death of her daughter. You see, Mary lost her daughter twice. She became pregnant at a young age and our father made her put up the baby for adoption, which he says is the worst mistake he ever made. Her daughter, Lisa, lived in Montgomery, Alabama. Her adopted parents told her about her mother and where she lived, so when Lisa was about sixteen she came to live with Mary for about four or five years until she was killed in a car accident just in October of 1996. After this Mary was having a really hard time and began to hang around people she never had before. I knew that the people she was hanging with were trouble and involved in drugs. My friends started telling me things my sister was doing and places she was going. I knew something was really wrong then because this was not things Mary would normally do. You know you hear people all the time say they would

> never believe this one or that would be on drugs, but they are. I never dreamed that my sister would be a crack head, but she was. It got to where we never saw her anymore and if we did it would only be for a few minutes. This went on for a long time.

Exhibit 1.[2] *See also* Exhibit 2 (letter of Dianne Wilson); Exhibit 4 (letter of Ms. Jones's mother, Linda Smith); and Exhibit 8 (letter of Marie Smith, Ms. Jones's sister-in-law).[3]

As Ms. Jones will explain at sentencing, during the years of her addiction she led an aimless existence, working only for limited periods of time, removed from her family, and doing little if anything productive. She will testify, too, though, that some 5 or 6 months prior to the transaction with the informant, she literally moved back "across the river," rejoining her family and the rest of the law-abiding productive community.[4] And while she readily admits that on February 19th of last year she surrendered to the temptation of her former lifestyle, she has, since then, continued her remarkable rehabilitation. Her friends and family confirm her success. *See* Exhibit 2 (letter from co-worker Wanda Wilson[5]), Exhibit 3 (letter from her sister, Wanda

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[2]Ms. Jones will provide a copy of all of the exhibits to the Court and the Government prior to her scheduled sentencing date and will introduce a copy of the exhibits at the sentencing hearing. The exhibits are not attached to this memorandum.

[3]Despite her lifestyle and addiction to crack cocaine, Ms. Jones avoided any criminal convictions prior to the February 19, 2006, transaction. That same night she was arrested for driving on a suspended license and a crack cocaine pipe was found in her car, which led to the two convictions listed in paragraph 21 of the presentence report.

[4]Following her daughter's death, Ms. Jones moved into Sumpter County on the other side of the Taylor River.

[5]"This is one ex-junkie that has really turned her life around. . . Now, after many years of being a junkie, Mary has gained control of her life again."

Smith[6]), Exhibit 4 (letter from her mother, Faye Smith[7]), Exhibit 5 (letter from Joyce Williams, owner of the Evergreen Restaurant and former employer[8]) Exhibit 10, (letter form co-worker Sandra Novey[9]), Exhibit 9 (letter from Karen Rudd, her supervisor at Publix[10]), Exhibit 5 (letter from co-worker Tom Johnson[11]), Exhibit 8 (letter from her sister-in-law, Jane Smith[12]), and Exhibit 1 (letter from her brother, Frank Smith[13]).

18 U.S.C. 3553(a)

The mandate of 18 U.S.C. § 3553(a) is, of course, for the court to "impose a sentence

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[6]"Mary has made a big change in her life. She is no longer on drugs . . ."

[7]"She has changed her life completely for the better. . . She has struggled hard to overcome this problem."

[8]"I have seen a drastic positive change in her personality and in her health. . . She has conquered her struggle with drugs all by herself with no help from any program."

[9]"She does not drink, go partying or do drugs any more - always early for work and has a very pleasant attitude with everyone. She attends church and I believe God is leading her and helping her to be a better person."

[10]"Mary has worked very hard to overcome her problems and put them behind her. . . she has totally turned her life around and has been drug free and a very good employee, never misses, always gives 100%."

[11]"What I have seen in Mary is an improvement from day to day for the past year. She is successfully overcoming her drug problem."

[12]". . . Mary has really done a total turn around and has her life back together . . ."

[13]"We all prayed for her one day and GOD answered our prayers. I guess he had let her hit rock bottom. She stopped hanging out with the people she was. She came home to her house, got a job, and began to get back on her feet. She has now been doing great for about two years. At first it was not easy for her. One night she called my house around 11:00 p.m., I answered the phone and she was crying so hard I couldn't hardly understand her. She told me that she was having a craving so bad for the drugs, but she was determined to beat it. Me and my wife talked to her until 2:30 a.m., until the desire for the drugs has passed. To the best of my knowledge she has been off drugs for at least a year and a half, maybe two years. . . I believe Mary is through with drugs."

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 a sentencing court must consider:

> (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 Ms. Jones's case, it is the "circumstances of the offense and the history and characteristics of the defendant" that justifies a sentence of probation. Such a sentence would, as well, fulfill the remaining purposes set forth in the statute.

Role of the Advisory Sentencing Guidelines

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.

Then, too, a sentence imposed outside of the Guidelines' scheme does not require extraordinary circumstances:

> Before Booker, we recognized that district courts were required to sentence within the guideline range except in unusual cases, United States v. Johnson, 347 F.3d 635, 640 (7th Cir. 2003), and anything but a loose comparison to pre-Booker departure cases would vitiate the post-Booker discretion that sentencing courts enjoy. All that is necessary now to sustain a sentence above the guideline range is "an adequate statement of the judge's reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant." Dean, 414 F.3d at 729.

United States v. Castro-Juarez, 425 F.3d 430, 436 (7th Cir. 2005).

The History and Circumstances of the Defendant

There is, though, nothing ordinary about Ms. Jones's successful struggle to overcome her addiction to crack cocaine. Her success is "extraordinary" in the same way as was the defendant's rehabilitation in United States v. Almaguer, No. 8:06cr18, 2007 WL 81931, *6 (D. Neb. January 5, 2007):

> In the court's experience, Almaguer's rehabilitation is far outside the norm. First, it is unusual that a defendant with a substantial addiction who is charged with a drug crime will show complete compliance with a drug-testing regimen while under supervision. Almaguer has reported for and tested clean on all drug tests. Also, even in a formal treatment program, it is unusual that a methamphetamine offender will successfully abstain from drugs. Almaguer's ability to stay free of drugs through her own efforts and without the aid of formal treatment is exceptional. Her achievement is even more extraordinary in view of her long-standing and severe addiction. The court is sadly familiar with the addictive power of methamphetamine and the difficulty of overcoming that addiction. The court finds that Almaguer's commitment to her rehabilitation is sincere and genuine. In this court's experience, Almaguer's efforts go far beyond those exerted by a typical offender who is credited with two-or-three-level reductions for acceptance of responsibility. The court finds that Almaguer's rehabilitation and recovery is exceptional and the court will accordingly depart from the Guidelines range on that ground.

Ms. Jones was not, of course, involved with methamphetamine, but with cocaine, a controlled substance described by the United States Drug Enforcement Administration as "powerfully addictive." Http://www.usdoj.gov/dea/concern/cocaine.html. Like Ms. Almaguer, it is Ms. Jones' longstanding addiction and her success in overcoming it on her own that is particularly unusual.

In Almaguer, the court found that a downward departure was appropriate under the traditional Guidelines analysis. Similarly, the Eleventh Circuit Court of Appeals has held that "a

truly extraordinary post-arrest, pre-sentencing recovery may . . . justify a downward departure." United States v. Williams, 948 F.2d 706 (11th Cir. 1991). The court has held, though, that under the traditional Guidelines departure analysis, any departure is limited to "the horizontal access of the sentencing table." United States v. Pickering, 178 F.3d 1168, 1175 (11th Cir. 1999). And while Ms. Jones arguably qualifies for a departure for exceptional rehabilitation, she is already at criminal history category I and, thus, the analysis in Pickering would prohibit the Court from using a traditional Guidelines departure for the purpose of reducing Ms. Jones's sentence below the Guidelines range.

The reasoning set forth in Pickering for limiting the departure to the horizontal access is that, "post-offense rehabilitation–'bear[s] only a tangential, if any, relation to [the offender's] just desserts . . .[and] instead reflect[s] more strongly on the offender's rehabilitation potential and likelihood of recidivism.'" 178 F.3d at 1175. That analysis, however, ignores those such as Ms. Jones who have longstanding addictions to a controlled substance and the ongoing, if unnoticed, criminal conduct that necessarily flows from the use of the controlled substance. Unabated, such circumstances would give rise to a significant likelihood of recidivism. Abated, it greatly reduces the possibility of recidivism.

"Since Booker, [however], the Guidelines are no longer a straight-jacket binding courts to artificially created and cruel paradoxes of sentencing. . ." United States v. Hawkins, 380 F. Supp. 2d 143, 161 (E.D. NY 2005). Indeed, "rehabilitation," rather than "extraordinary rehabilitation," is part of an individual's "history" and may justify a below-guidelines sentence. Hawkins, 380 F. Supp. 2d at 158-161. Thus, the requirement of 18 U.S.C. § 3553(a)(1) to consider "the history and characteristics of the defendant," includes the consideration of Ms. Jones's rehabilitation and

justifies a below-Guidelines sentence.

The Nature and Circumstances of the Offense

Ms. Jones's offense involves .9 grams of cocaine base. (PSR ¶ 12). Given the small quantity of the controlled substance, an argument that the Guidelines calculations are unfairly driven by the quantity of the controlled substance may seem odd. Nonetheless, given the low thresholds for crack cocaine, that is exactly the case. The lowest offense level for cocaine base, level 12, requires less than 250 milligrams of the substance. The threshold for level 14 is that figure of 250 milligrams, while the threshold for offense level 16, the one applicable to Ms. Jones's case, is 500 milligrams.

As recognized by some courts, consideration of the role of the defendant is often overshadowed by the emphasis the Guidelines place on drug quantity. *See*, e.g., United States v. Milne, 384 F.Supp.2d 1309, 1312 (E.D. Wis. 2005) ("With their almost singular focus on loss amount, the guidelines sometimes are insufficiently sensitive to personal culpability"); United States v. Ennis, 468 F.Supp.2d 228, 230 (D. Mass. 2006) ("And since the Guideline drafters did not bother to describe the reason for making quantity talismanic, the sentencing purposes advanced by the quantity guideline, § 2D1.1, or what to do when quantity-driven sentences are wholly at odds with any rational sentencing scheme, judges were left 'just to weigh the drugs and mechanically compute the offense level.'"); United States v. Adelson, 441 F.Supp.2d 506, 509 (D.N.Y. 2006)("As many have noted, the Sentencing Guidelines, because of their arithmetic approach and also in an effort to appear 'objective,' tend to place great weight on putatively measurable quantities such as the weight of drugs in narcotics cases . . . without, however, ever explaining why it is appropriate to accord such huge weight to such factors."). What is, in Ms.

Jones's case, the Guidelines' undue emphasis on drug quantity, is reason to limit the weight given the Guidelines and reason to give closer consideration to her limited role.

Arguably, Ms. Jones may be entitled to an adjustment under the Sentencing Guidelines pursuant to U.S.S.G. § 3B1.2 as "a minor participant." The district court judge in United States v. Sanchez, 925 F. Supp. 1004, 1013-1014 (D. NY 1996), found the defendant, who was a "facilitator" in a conspiracy involving 212 kilograms of cocaine, to be entitled to the two-level reduction that is extended to a "minor participant":

> There are many roles in a conspiracy. A typical conspiracy involves a supplier, a courier, a middleman and a buyer. If his role must be typed, Sanchez must be classified as a middleman. His role was to bring together the buyer and the seller. For his efforts, he was to receive a fee of $ 500 per kilogram. The Court must then focus on the typical offender convicted on conspiracy.
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> The most culpable conspirator is usually the supplier, the conspirator who controls large quantities of drugs. The courier also ranks high on the culpability scale because he or she carries drugs from place to place and often uses weapons or other elements of violence. The next most culpable must be the buyer as he or she distributes quantities of drugs to other dealers, thereby becoming a retail level supplier. In my view, the least culpable is the facilitator (or those who assist the deal by acting as driver or lookout). As a facilitator, Sanchez is by definition less culpable than the typical offender convicted of conspiracy to distribute drugs.

Ms. Jones's role was especially limited. The informant asked to be put in contact with a particular person and their was no agreement for her to even be compensated. Regardless, though, of whether Ms. Jones qualifies for the downward departure, her limited participation in the offense is one of the "circumstances of the offense" that the Court is obligated to consider pursuant to 18 U.S.C. § 3553(a)(1). That is the case, regardless of the Guidelines calculations:

> Judges may not simply assume that § 2D1.1 advances the purposes of sentencing spelled out in 18 U.S.C. § 3553(a). Whether it does do so or not depends upon the circumstances of the individual case. Moreover, the failure to consider those circumstances is not simply unfair; it may well be unconstitutional.

United States v. Ennis, 468 F. Supp. 2d at 230.

The Other Factors of § 3553(a)

Thus, "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), are considerations that justify the sentence of probation in Ms. Jones's case. The other factors listed in the statute support that conclusion, as well. Given the small quantity of drugs involved, Ms. Jones's limited role, her efforts at rehabilitation, and her cooperation with law enforcement immediately following the offense, a period of probation does "reflect the seriousness of the offense," "promote[s] respect for the law," and "provide[s] just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). Given the unique circumstances in Ms. Jones's case, a sentence of probation also will, in the broad sense, "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Ms. Jones's limited criminal history, her rehabilitation, and for that matter, her age, show that the likelihood of recidivism is low and that a period of incarceration is not necessary "the protect the public from further crimes of the defendant." § 3553(a)(2)(C).[14]

As for the need to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6), it is the modifier "unwarranted" that is critical to the analysis. In Ms. Jones's case, it would be a false sense of

[14]*See* United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, Exhibit 9 at p. 28 (2004)(showing that for those defendants in criminal history category I, the recidivism rate begins at 29.5% for those under 21, decreases for each 5-year age category thereafter, and is at 6.9% for those defendants, like Ms. Jones, who are in the 41 to 50 age bracket.), available at http://www.ussc.gov/publicat/recidivism_general.pdf.

equality to impose largely the same sentence upon her as if she had been the seller of the cocaine and continued to be involved in the drug addiction and lifestyle that led to the offense. *See* United States v. Ennis, 468 F. Supp. 2d at 235 ("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.'"). Furthermore, given the disparity between the average drug sentence in the Northern District of Florida and the rest of the nation, a lesser sentence in Ms. Jones's case would only reduce disparity. According to the United States Sentencing Commission's *2006 Source Book of Federal Statistics,* the average sentence in the Northern District of Florida for drug trafficking offenses in fiscal year 2006 was 153.3 months, which was 82% higher than the national average of 84.4 months.[15]

The sentencing range established by the Guidelines and policy statements from the Sentencing Commission are, of course, included in the statute, as well. Ms. Jones, though, has argued at some length that, given the circumstances in her case, those considerations should not be controlling. The remaining factors in the statute, the need to provide the defendant with educational training, correctional treatment, etc., (§3553(a)(2)(D)), the kinds of sentences available (§3553(a)(3)), and the need to provide restitution (§3553(a)(7)), do not have any special relevance to Ms. Jones's case and would not justify a sentence other than probation.

Ms. Jones, therefore, respectfully requests this Court to sentence her to a period of probation.

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[15]The statistics are available at: www.ussc.gov/ANNRPT/2006/SBTOC06.htm.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery to Stephen Kunz, Assistant U.S. Attorney, 111 N. Adams Street, 4th Floor, Tallahassee, FL 32301, this March 29, 2007.

Respectfully Submitted,

s/Randolph P. Murrell

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The actual names of the defendant and others, some dates, and places have been replaced with fictitious names, dates, and places for reasons of privacy.