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

UNITED STATES OF AMERICA

v. **CASE NO.**

FRANKLIN JAMES
_____/

SENTENCING MEMORANDUM

Defendant, Franklin James, is 65 years of age, having worked as a custodian for 28 years at a Lakeland high school, Washington High School. With a limited intellect that places him in the bottom 3% of the population, he was especially susceptible to the assurances and request of Reginald Thompson, who persuaded Mr. James to commit the crimes for which this Court will sentence him.[1] His lifetime of steady employment, a resiliency marked by a cheerful and friendly bearing that has made him a friend to many, and his age all suggest that Mr. James is unlikely to commit any additional crimes. Given these circumstances, a sentence significantly less than the roughly 4 to 5 years (51 to 63 months) recommended by the United States Sentencing Guidelines would be "sufficient, but not greater than necessary," to comply with the goals of sentencing established by Congress. 18 U.S.C. § 3553(a).

As can be seen from the Presentence Investigation Report, Mr. James was a custodian at Washington High School from August of 1978 through March of 2007. (PSR ¶59) He also worked for a period of 15 years for Florida's Department of Transportation, performed side jobs as a carpenter, and recently worked weekends for Reginald Thompson's roofing company. (PSR ¶60) Despite being unable to read and write and a limited intellectual capacity, Mr. James combined his

[1]Reginald Thompson, is, of course, the individual for whom Mr. James testified falsely.

steady work habits with moderate and responsible spending, and he has managed to save over $200,000. (PSR ¶ 63).[2]

The stability in his life, which is the sort not often seen in those who come before this Court, is reflected, too, in his marriage. He and his wife, Lucille, who died 4 years ago, were married for 41 years and raised two sons. (PSR ¶50-51) Mr. James helped raise, as well, 3 step daughters. *Id.*

Mr. James' limited intellectual abilities are borne out by the psychological testing conducted by a Tallahassee psychologist, Gregory Chandler.[3] Dr. Chandler administered the standard IQ test, the Full WAIS-III, to Mr. James and concluded that "97% of the population has a higher IQ score than Mr. James." Chandler, *Confidential Psychological Evaluation*, at 3. (Exhibit 1)[4] Several individuals have written letters on Mr. James' behalf and two of them, as well, refer to Mr. James' limited abilities. Patricia Adams, who taught Mr. James in Adult and Community Education, mentions his "limited literacy and comprehension skills," (Ex. 3-A). William Hancock, a former principal of Washington High School and who for 10 years was the Superintendent of the Polk County Schools, writes that Mr. James's "good intentions and willingness to help were abused by others on the custodial staff," and that "[e]fforts were made by the supervisors to insure that Franklin was not taken advantage of." (Ex 3-B). He writes, too, that there were times when Mr. James's

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[2]Mr. James advises that, contrary to what he had told the Probation Officer, that the "20 X 20 warehouse" is worth $3,000 rather than the $30,000 that is listed in the PSR. (PSR ¶63)

[3]Dr. Chandler, whose report and C.V., which is Exhibit 2, will be forwarded to the Government and the Court with the other exhibits, recently testified for the State of Florida about the intellectual capacity of John Couey, who in a widely publicized case was recently sentenced to death for the rape and murder of a child, Jessica Lunsford. *See* St. Petersburg Times, "Grieving Father Speaks to Killer," July 18, 2007 (available at: http://www.sptimes.com/2007/07/18/State/Grieving_father_speak.shtml).

[4]The referenced exhibits "Ex," are not attached, but will be forwarded in advance of sentencing to both the Court and the Government. The defense will introduce them, as well, as Mr. James's sentencing hearing.

"inability to clearly understand the directions or the intentions of his supervisors," led to Mr. James being "persuaded by someone with less than honorable intentions to do otherwise."*Id.*

The letters, too, describe Mr. James' dependability at work and his willingness to help others in the community. Ms. Adams writes that "Mr. James was a very helpful person, so much so that he worked on weekends and late in the evenings helping teachers gets classrooms ready for numerous special events. He was a person who never said no and helped everyone to the extent that he had little time for himself." (Ex. 3-A) She mentions, too, observing Mr. James "helping elderly people by doing repairs and odd jobs for them." *Id.* She goes on to describe Mr. James as "a very pleasant and cheerful person," saying that "no matter how tough the situation was, he always had a 'big' smile on his face." *Id.* Jessie Jefferson, the track and football coach at Washington High School, describes Mr. James as "always. . . helpful." (Ex. 3-C) He writes, too, of Mr. James helping "those in need, sometimes out of his own pocket." *Id.* Willie Burr, a fellow worker at Washington High School, says that Mr. James's "whole mission in life seemed to be one of service to others." (Ex. 3-D) Mr. Hancock writes that in the "36 years" he worked in the Polk County School District, he found "Mr. James was one of the very best custodians." (Ex. 3-B) He describes Mr. James as "always dependable and eager to be of assistance to everyone," and reports that Mr. James was "known to volunteer for the most undesirable tasks." *Id.* He goes on to state:

> My opinion of Franklin, which is shared by many of my former colleagues that have worked with him daily, is that he is a good and decent man, one that is respected and admired for his decency and integrity. He is admired for his efforts to overcome his inherit shortcomings through hard work and dedication to improving his life and those in his family.

Id.

The positive aspects of Mr. James' life, admittedly, seem to conflict with two circumstances: Mr. James' use of controlled substances and a conviction 12 years ago for grand theft. While Mr.

James' marijuana use goes back many years, his use of cocaine seems to have occurred late in his life, after his wife passed away. (PSR ¶57) He is clearly in need of drug treatment and a program of drug counseling would be appropriate.

As for the theft, the undersigned has not had a lot of success in investigating the underlying circumstances. While the court file is available as are offense reports, the public defender that represented Mr. James has destroyed her file. Mr. James maintains that he had nothing to do with the theft of any boots or door knobs . He maintains that while he did end up with a cell phone, it was something that was in the trash. There were apparently a series of thefts throughout the buildings in which Mr. James worked, and there were others arrested.[5] It, at least, seems possible that others who were responsible for the theft took advantage of Mr. James and that, without the tenacity of someone more capable, Mr. James may have entered a plea of no contest in a court system that tends to spend little time on low level cases that offer probation.

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 sufficient, but not greater than necessary, to comply" with the purposes of sentencing set forth in the second paragraph of that same statute. In United States v. Hunt, 459 F.3d 1180, 1182 (11th Cir. 2006), the court summarized the now often-quoted 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

[5]*See* the October 3, 2007 internal memo from Federal Public Defender Investigator Edward McFarland regarding his interview with the officer who wrote the offense report in the case, Steven Kelly. (Ex. 4).

(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 [. . .by the Sentencing Commission];
(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.

The United States Sentencing Guidelines

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.

In Hunt, the court rejected "any across-the-board prescription regarding the appropriate deference to give the guidelines." 459 F.3d at 1184. Instead, 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. The reasoning in Hunt is consistent with the United States Supreme Court's decision this summer in Rita v. United States, 127 S.Ct. 2456, 2465 (2007), where the court recognized that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."[6] Thus, in Mr. James's case, as in any other, this "[C]ourt's Booker sentencing discretion presupposes no thumb on the scale in favor of a Guidelines sentence." United States v. Wachowiak, 496 F.3d 744, 749 (7th Cir. 2007).

This term, in Gall v. United States, No. 06-749, the United States Supreme Court will decide whether extraordinary circumstances are necessary to support an extraordinary variance from the Guidelines. While the Eleventh Circuit Court of Appeals has concluded that it does, *see, e.g.*, United States v. Crisp, 454 F. 3d 1285, 1292 (11th Cir. 2006), Mr. James contends the Eleventh Circuit Court of Appeals has decided the issue erroneously and subscribes to the arguments made by the petitioner in Gall. *See* 2007 WL 2197584 (Appellate Brief) (U.S. July 18, 2007), Brief for Petitioner, (No. 06-7949). Mr. James contends, as well, that his circumstances, particularly that of his limited intellectual ability and his susceptibility to Mr. Thompson's influence, amount to an extraordinary circumstance.

Regardless, though, of the outcome in Gall, it is clear that most below-Guidelines sentences do not require the court to find an unusual factor or circumstance that is unique to the defendant. Indeed, to require an unusual factor or something unique to the defendant, is to give priority to the Guidelines and to ignore the holdings in Hunt and Rita:

> There have been suggestions in some recent appellate decisions that a district court may not vary from the guidelines unless it finds some factor unusual or unique to the defendant warranting the variance. It is difficult to see the basis for such a rule --

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[6]In his concurring opinion in Rita, Justice Stevens put it this way: "I trust that those judges who had treated the Guidelines as virtually mandatory during the post-Booker interregnum will now recognize that the Guidelines are truly advisory." Rita, 127 S.Ct. at 2474.

> which sounds very much like the old departure standard -- in Booker or § 3553(a). Moreover, such a rule improperly elevates the guidelines above the other factors set forth in § 3553(a). In essence, it makes the guidelines the objective measure of the sentence, and disallows any other sentence unless the court is able to explain why the guideline sentence is wrong. The district courts' limited departure authority did not save the guidelines in Booker, see 543 U.S. at 234-35, and if appellate restriction of sentencing discretion continues such that the new system begins to resemble the old, another disruption may be in the offing.

United States v. Cull, 446 F. Supp. 2d 961, 966 (E.D. Wis. 2006). *See also* United States v. Wallace, 458 F. 3d 606, 613 (7th Cir. 2006) (" if Booker means anything at all, it must mean that the court was permitted to give further weight to a factor covered by a specific Guidelines adjustment . . ."). As the Government has explained in its brief in Gall, it agrees with this proposition:

> But modest (or ordinary) deviations from the Guidelines do not require extraordinary justifications. The proportionality review thus does not demand an extraordinary justification for most non-Guidelines sentences.

2007 WL 2406805 (Appellate Brief) (US August 22, 2007), Brief of the United States (No. 06-7949).

Application of § 3553(a) to Mr. James's Case

In Mr. James's case, it is "the nature and circumstances of the offense" as well as "the history and characteristics of the defendant" that justify a lesser sentence. 18 U.S.C. § 3553(a)(1). His willingness to assist Mr. Thompson without any real compensation or benefit and his susceptibility to Mr. Thompson's influence are the circumstances of the offense that are relevant. His limited intellectual ability, his long, commendable, work history and his stable family life, his willingness to help others, and his age are the relevant "history and characteristics of the defendant."

Of the goals set out in 18 U.S.C. § 3553(a)(2), the Government and surely the Court consider carefully 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;" "to afford adequate deterrence to criminal

conduct;" "to protect the public from further crimes of the defendant;" and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Mr. James recognizes that the offenses of perjury and obstruction of justice are serious offenses as they tend to undermine the reliability of the judicial system and show disrespect for the authority of the courts. Nonetheless, especially when the efforts to mislead are so easily discredited and obvious, a sentence of significantly less than the 4 or 5 years recommended by the Sentencing Guidelines would still meet the goal that the sentence reflect the seriousness of the offense, promote respect for the law, and to provide just punishment.[7]

In considering what is a just sentence and what sort of sentence is necessary to fulfill the goal of deterrence, it is worth considering the method of the Guidelines in cases such as Mr. James's . As explained in paragraph 31 of the Presentence Report, there is a cross reference that leads to the use of §2X3.1 of the Guidelines Manual. The key provision and the one that results in what is a relatively

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[7]Two especially well publicized cases also tend to show that a significantly reduced sentence would be sufficient to reflect these goals. In the case of United States v. I. Lewis "Scooter" Libby, No. CR 05-394 (D.D.C. 2007), where the district judge imposed a 30 month sentence for obstruction of justice, false statement and two counts of perjury, President Bush famously concluded that the sentence was "excessive" and commuted the prison sentence. *See* Douglas A. Berman, *Bush's Reasons for Libby's Commutation. . . will others now see similar compassion from Bush and his Justice Department?*, Sentencing Law on Policy, July 2, 2007, at http://sentencing.typepad.com/sentencing_law_and_policy/2007/week27/index.html. While the complicated circumstances in Mr. Libby's case bear no similarity to the simple and undisputed conduct of Mr. James, some would surely argue that Mr. Libby's conduct was far more serious than Mr. James'. Others, of course, may differ, but the point is that if a sentence that involved no incarceration was sufficient in Mr. Libby's case, surely something less than the 4 or 5 years recommended by the Guidelines would be sufficient to reflect the seriousness of Mr. James's case.

In United States v. Rita, the defendant was convicted of perjury, making false statements, and obstruction of justice for having lied to a grand jury investigating a gun company that produced kits that "amounted to machine guns." 127 S.C. at 2459-2460. The district court imposed a sentence of 33 months, 127 S.C. at 2461, a sentence which the defendant, unlike Mr. Libby, will have to serve and that the Supreme Court ultimately upheld as reasonable. Even that sentence, though, is less than the sentence recommended by the Guidelines in Mr. James's case.

high offense level in Mr. James's case is subsection (a)(1) that bases the offense level on the offense level for "the underlying offense." In Mr. James's case that "underlying offense" is the offense of Mr. Thompson's. *See* PSR ¶32. Mr. Thompson was convicted of being a felon in possession of a firearm and, absent any aggravating criminal history, the offense level would ordinarily be 14. *See* USSG §2K2.1(a)(6).[8] It is only because of Mr. Thompson's criminal history and his armed career criminal classification that placed him at offense level 33. *See* PSR ¶32.

The point is that the Sentencing Commission and presumably most people recognize the crime of being a felon in possession of a firearm to be, in terms of seriousness, a relatively moderate offense. It is only the fortuity of the nature of the perpetrator's criminal history that, in terms of the Guidelines calculations, make the crime an especially serious one. Thus, in a very real sense, Mr. James's crime is significantly more serious only because of the fortuity of Mr. Thompson's criminal history. In determining what is a just sentence and in determining what in a general way is sufficient for deterrence, it makes little sense to base those decisions on a circumstance that finds its existence in the complexities of the Sentencing Guideline calculations and typically would be unknown to whomever lied about the offense. *See* United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007)(where, although in a different setting, the Court recognized that "[d]eterrents work best where the targeted conduct results from conscious decision making, because only if the decision maker considers the possible results of her actions can she be deterred."). Thus, given the nature of Mr. Thompson's offense, a lesser sentence would suffice to fulfill the twin goals of a just sentence and

[8]With a base offense level of 14 and the subtraction of 2 offense levels for acceptance of responsibility, Mr. James's offense level would be 12. With a Criminal History of Category I, he would find himself in Zone C with a recommended range of 10-16 months. *See* USSG §2X3.1. In Zone C, of course, the Court would have the option of substituting home confinement for half of the prison sentence. *See* USSG §5C1.1(d)(2).

adequate deterrence.[9]

Of the constellation of these concerns that are presumably most important to the Government, it is the consideration of the need to protect the public from further crimes of the Defendant that most resonants in favor of Mr. James. In the United States Sentencing Commission's report, *Measuring Recidivism: Criminal History Computation of the Federal Sentencing Guidelines, Exhibit 9 at p. 28 (2004),* the Commission reports 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 6.2% for those defendants, like Mr. James, who are over 50 years of age.[10] His long work history and stable lifestyle surely, too, must reduce the likelihood of recidivism and show that there is little need for a long sentence to protect the public from further crimes.

Finally, while the need to avoid sentencing disparities is due careful consideration, the statute addresses only those disparities that are *unwarranted*. United States v. Owens, 464 F.3d 1252, 1256 (11th Cir. 2006); 18 U.S.C. § 3553(a)(6)(". . . the need to avoid *unwarranted* sentence disparities . . ."); United States v Duncan, 479 F.3d 924, 929 (7th Cir. 2007)("18 U.S.C. § 3553(a)(6) does not instruct district courts to avoid all differences in sentencing, only unwarranted disparities."). Presumably most of those sentenced for obstruction of justice and perjury lack the limited intellectual ability of Mr. James, lack his long history of work and stability, and are much younger. To sentence Mr. James in the name of uniformity as if these traits and circumstances did not exist,

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[9]It is worth noting that the Government recognizes that disagreements with the policy decisions of the Sentencing Commission can support a below-Guidelines sentence. *See* United States v. Kimbrough, 2007 WL 2461473 (Appellate Brief)(US August 30, 2007) Brief for the United States) at 16 (No. 06-6330) ("The Sentencing Guidelines are now advisory, and courts may vary based solely on policy considerations, including disagreements with the Guidelines.")

[10]The report is available at: www.ussc.gov/publicat/Recidivism_General.pdf.

creates a false sort of equality in sentencing and ignores the statutory command to avoid only *unwarranted* disparity.[11]

Conclusion

Even when the Sentencing Guidelines were mandatory, sentencing courts were to treat those before them as individuals. *See* Koon v. United States, 518 U.S. 81, 113 (1996) ("It has been 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."). The decision in Booker and the command of the statute to impose a sentence that is "sufficient, but not greater than necessary," has given sentencing courts greater latitude to impose a sentence that fits not only the crime, but the person before the court. Mr. James respectfully submits that a sentence less than 4 to 5 years would do just that consistent with this Court's statutory obligation.

[11]Here, in the Northern District of Florida, the need for less disparity in sentencing would generally support a *lesser* sentence. The United States Sentencing Commission does not publish a district-by-district breakdown of sentences in perjury and obstruction of justice cases. Nonetheless, the average sentence in the Northern District of Florida in fiscal year 2006 was longer than that of any of the other 93 federal districts. For the year, the District's average sentence was114.4 months. With the national average at 59.1 months, North Florida's average sentence is 94 percent higher than the national average.

CERTIFICATE OF SERVICE

I hereby certify that a copy has been furnished to the office of Assistant United States Attorney, Corey Smith, by electronic transmission this October 9, 2007.

Respectfully submitted,

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