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

UNITED STATES OF AMERICA

vs. **CASE NO.**

WILLIAM Banks,
Defendant.
_____/

DEFENDANT'S SENTENCING MEMORANDUM

William Banks is a 58 year old Viet Nam veteran. For the last 30 years he has made a modest living doing carpentry work. He owns a small well-worn home in rural Leon County on the edge of the Apalachicola National Forest. With his limited income, he does not own any kind of car or truck. He walks where he has to go.[1] Between the ages of 19 and 48, he had three misdemeanor convictions. It has been more than 10 years since he committed the last one. For the last 30 years he has been active in the Pine Forest Baptist Church. He serves as a Sunday School "superintendent" for the small church that has about 40 members. Those in his community find him to be likeable and do not see him as any kind of a threat to anyone. Given these circumstances and given the nature of the offense, a sentence of probation would be "sufficient," but not greater than necessary to comply with the goals of sentencing established by Congress. 18 U.S.C. § 3553(a).

Mr. Banks grew some 65 marijuana plants in the National Forest behind his house. From his perspective, it was an experiment of sorts from which he did not expect any benefit. Mr. Banks does

[1]In fact, when he came for his presentence investigation interview on January 2nd of this year, he walked the 11 miles from his home to the courthouse in time to make it for the 9:00 a.m. interview.

not use marijuana, so he did not personally have any use for the plants.[2] His co-defendant, Franklin Austin, from whom Mr. Banks received the seeds, did want the marijuana for his personal use and, undoubtedly, had plans for distributing at least some of it. Mr. Banks knew that, but saw his efforts at growing the plants as largely helping Mr. Austin. Mr. Banks had known Mr. Austin for the past three or four years and, in some ways, thought of the younger man as almost a "son."

The "over-arching provision" of 18 U.S.C. § 3553(a) is, of course, to impose a sentence sufficient, but not greater than necessary" to meet the goals of sentencing established by Congress. Kimbrough v. United States, 128 S.Ct. 558, 570 (2007). The statute, in addition to requiring the sentencing court to consider the "nature and circumstances of the offense," requires the court to consider the "history and characteristics of the defendant."§ 3553(a)(1).

Mr. Banks's service in the military years ago during the Viet Nam war, his work history, his modest life style, and his age are surely circumstances that fall within this latter category. Then, too, that he committed the offense without the intent to reap any profit or benefit are circumstances that set his case apart from the typical drug trafficking offense and enter into the consideration of the "nature and circumstances of the offense."

In Rita v. United States, 127 S.Ct. 2456, 2474 (2007), Justice Stevens wrote in his concurring opinion: "I trust that those judges who have treated the Guidelines as virtually mandatory during the post-Booker interregnum will now recognize that the Guidelines are truly advisory." The decisions in Kimbrough v. United States, 128 S.Ct. 558 (2007) and Gall v. United States, 128 S.Ct. 586 (2007) have reinforced Justice Stevens' remark. Sentencing courts clearly have the authority to fashion the

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[2]In paragraph 15 of the Presentence Report, it is reported that Mr. Banks grew the plants for his own personal use. As Mr. Banks explained when he entered his guilty plea and during his debriefing by the Government, he did not make that statement.

sort of sentence that fits the crime and the individual.[3]

In Kimbrough, the court described role of the Guidelines in relation to 18 U.S.C. § 3553(a):

> The statute, as modified by Booker, contains an overarching provision instructing district courts to "impose a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing, including "to reflect the seriousness of the offense," "to promote respect for the law," "to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a) (2000 ed. and Supp. V). The statute further provides that, in determining the appropriate sentence, the court should consider a number of factors, including "the nature and circumstances of the offense," "the history and characteristics of the defendant," "the sentencing range established" by the Guidelines, "any pertinent policy statement" issued by the Sentencing Commission pursuant to its statutory authority, and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Ibid*. In sum, while the statute still requires a court to give respectful consideration to the Guidelines, see Gall v. United States, *ante*, 128 S. Ct. 586, 169 L. Ed. 2d 445, Booker "permits the court to tailor the sentence in light of other statutory concerns as well," 543 U.S., at 245-246, 125 S. Ct. 738.

Kimbrough, 128 S.Ct. at 570.

In Gall, the court rejected the proportionality test that flowed from the holding of so many circuit courts that had held that an extraordinary departure required "extraordinary circumstances."

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[3]At least one Circuit Court Judge has criticized what he sees as a failure of sentencing courts to exercise this still relatively new discretion:

> Except for those judges and lawyers who prefer to continue routine conformity to the old pre-Blakely-Booker process of guideline sentencing, there is widespread disapproval of the present muddled system. This is because, in the main, the old system is just continuing on as though nothing had happened -- continuing under the pretext that the guidelines are only "advisory" instead of being considered only as a starting point against the backdrop of the more sensible and humane penological goals set out in § 3553(a), Title 18. This case is one more example of the continuing problem, the problem of guidelineism, or "guidelinitis," the inability of most federal courts to break their habit of mechanically relying just on the guidelines alone.

United States v. Sexton, 512 F.3d 326, 333 (6th Cir. 2008)(Merritt, J. dissenting).

Gall, 128 S.Ct. at 594-595. The court went on to describe the Guidelines as a "starting point," but also emphasized the need for an "individualized assessment":

> As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. See *id.*, at , 127 S. Ct. 2456, 168 L. Ed. 2d 203. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. *Id.*, at , 127 S. Ct. 2456, 168 L. Ed. 2d 203.

Gall, 128 S.Ct. at 596-597.

In United States v. Hunt, 459 F.3d 1180, 1182 (11th Cir. 2006), the court summarized the § 3553(a) factors:

> (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 [. . .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.
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> The need to reflect the seriousness of the offense, to promote respect for the law, and to

provide just punishment for the offense is always an important consideration. A sentence of imprisonment, though, or a sentence within the advisory Guidelines range does not always fulfill that purpose. It would not in Mr. Banks's case. In Gall, the Court quoted from the District Court's order where the District Court judge wrote that "'a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.'" 128 S.Ct. at 586. The real conduct and circumstances in Mr. Banks's case amount to a middle-aged man who poses little threat to anyone who was engaged in conduct that surely falls far short of the sort of drug trafficking contemplated by the federal statute.

In considering what is a just sentence, it is worth considering the arbitrary role Mr. Banks's 1997 conviction for battery and shoplifting play in the Guidelines calculations. He was sentenced in December of 1997 for that offense to one day in jail and one year of probation. Over 9 years ago, a violation of probation warrant was issued in that case. Unresolved for years, it earned Mr. Banks the three criminal history points that places him in Criminal History Category II. (PSR ¶¶ 33-36). Were it not for that 9-year-old unresolved warrant, Mr. Banks would have no criminal history points and would have been eligible for the safety valve. *See* USSG § 5C1.2. With a two level reduction accorded to those that are eligible for the safety valve (USSG § 2D1.1(b)(11)), Mr. Banks's offense level would have been 10, which, with a Criminal History Category I ,would have placed him in zone B with an advisory range of 6 to 12 months. In zone B, one of the sentencing options would have been probation with home detention in lieu of any imprisonment. *See* USSG § 5C1.1(c)(3).[4] Thus, while Mr. Banks must bear some responsibility for ignoring the outstanding warrant, that 9-year-old

[4]Mr. Banks does not currently have a telephone in his home, something required for electronic monitoring. He, however, believes he could afford to have a telephone installed should the Court impose a requirement of home detention.

misdemeanor warrant is what propels him into the advisory range of 12 to 18 months. Given that the Guideline calculations rest upon such a circumstance, the argument that a sentence within the advisory Guidelines range is necessary to promote respect for the law or to provide just punishment isn't a convincing one.

Mr. Banks does not dispute that there is a need to deter people from growing marijuana. Nonetheless, given his age, his service to the country, his participation at his church, and even his willingness to walk eleven miles early on a freezing January morning to comply with this Court's orders, sets him sufficiently apart from the sort of drug trafficker that can be deterred only by a prison sentence.

The need to protect the public from further crimes of the defendant is a circumstance that clearly weighs in Mr. Banks's favor. No one who knows Mr. Banks would consider him to be a threat to anyone. That he participated in this crime without any expectation of profit or benefit shows, too, that he's not some one bent on improving his circumstances by committing crimes. In that Mr. Banks is 58 years old, the likelihood of him committing further crimes is greatly reduced. In the United States Sentencing Commission's report, *Measuring Recidivism: Criminal History Computation of the Federal Sentencing Guidelines*, Exhibit 9, (2004), the Commission recognizes the greatly reduced risks of recidivism for those who are over 50 years of age.[5] Thus, a period of probationary supervision should be more than adequate to protect the public.

Among the others factors listed in § 3553(a), the one most often argued by the Government is the need to avoid unwarranted sentencing disparities. However, across the nation, the average federal sentence in 2007 for drug trafficking was 85.6 months for drug trafficking. United States

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[5]The report is available at www.ussc.gov/publicat/Recidivism_G.pdf.

Sentencing Commission, 2007 Sourcebook of Federal Sentencing Statistics at 171. At 164 months, the average sentence imposed in the Northern District of Florida is almost 92% higher than the national average. *Id.* at 187. (The statistics are available at: www.ussc.gov/annrpts.htm). Thus, if anything, a lower sentence in Mr. Banks's case would tend to reduce the disparity between the Northern District of Florida and the rest of the nation.

Furthermore, when the district court correctly calculates and reviews the Guidelines ranges, the court has gone a long way toward addressing this concern. *See* Gall, 128 S.Ct. at 559 ("since the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities.") The court has recognized, too, that much of the concern about uniformity will be met by the combination of Advisory Guidelines, appellate review for reasonableness, and the ongoing revision of the Guidelines. *See* Kimbrough, 128 s.Ct. at 573-574. ("As we explained in Booker, however, advisory Guidelines combined with appellate view for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'").

Then, too, the concern is with those disparities that are *unwarranted*. United States v. Owens, 464 F.3d 1252, 1256 (11th Cir. 2006); *See also* 18 U.S.C. §3553(a)(6)("...the need to avoid *unwarranted* sentence disparities...")(emphasis added); 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."). To impose the same sort of sentence on Mr. Banks as those who grow marijuana for a profit and who are younger and present a far more serious risk of recidivism is a false equality that ignores the facts. *See* United States v. Ennis, 468 F. Supp. 3d 228, 235 (D. Mass. 2006)("treating offenders who are not equally culpable the same is a false equality, not at all consistent with the admonition 'to avoid unwarranted sentencing disparities among defendants

with similar records who have been found guilty of similar conduct'").

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."). Decisions in Booker, Rita, Kimbrough, and Gall and the command of the statute to impose a sentence that is "sufficient, but not greater than necessary," have given sentencing courts greater latitude to impose a sentence that fits the crime and the person before the court. Mr. Banks, therefore, respectfully requests this Court to exercise that discretion and to consider a period of probation in lieu of the advisory Guidelines range of 12 to 18 months.

CERTIFICATE OF SERVICE

I hereby certify that a copy has been furnished to the office of Assistant United States Attorney, Winifred Nesmith, 111 N. Adams Street, 4th Floor, Tallahassee, FL 32301, by electronic transmission on this 10th day of March, 2008.

Respectfully submitted,

s/Randolph P. Murrell

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