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

UNITED STATES OF AMERICA

vs. **CASE NO.**

FRANKLIN BUSH
_____/

SENTENCING MEMORANDUM

The defendant, Franklin Bush, is a 32 year old man with an admittedly significant criminal history. He qualifies as a career offender, though, largely on the basis of drug offenses involving small quantities of controlled substances. He is not a drug kingpin and has typically sold drugs at the retail level. His instant offense is consistent with his history. Given these circumstances, a sentence less than the advisory guideline range of 188 to 235 months would be "sufficient, but not greater than necessary" to fulfill the congressionally established goals of sentencing. 18 U.S.C. § 3553(a).

Std. Intro

Parsimony

Sentencing Guideline Calculations

Sub-Heading

Absent the career offender classification, the United States Probation Office has determined that Mr. Bush's offense level would have been 26. The combination of offense level 26 and Criminal History Category VI produces a range of 120 to 150 months. The defense contends that the offense level should be 24, which would produce a guideline range of 100 to 125 months.[1] With the career offender provision producing a guideline range of 188 to 235 months, it increases the

[1]The dispute is over whether Mr. Bush should be assessed, pursuant to USSG § 2D1.1(b)(2), a two-level increase in the offense level for having "used violence" based on his efforts to resist a police dog that was used to arrest him.

bottom of the guideline range by 60% over the probation office's calculations and by about 90% over the defense calculation.

Sub-Heading

Mr. Bush's Instant Offense and Criminal History

Mr. Bush's instant offense involves repeated sales of small quantities of cocaine: 8.8 grams of powder cocaine on May 4, 2012, (Count One), PSR ¶12; 8.8 grams of crack cocaine and 2.2 grams of powder cocaine on May 17, 2012, (Count Two), PSR ¶13; 8.8 grams of crack cocaine on August 24, 2012, (Count III), PSR ¶14; and the discovery of 15.5 grams of powder and 2.2 grams of crack cocaine upon the execution of a search warrant at Mr. Bush's residence on August 30, 2012, PSR ¶15. The relevant conduct includes the discovery of 34.7 grams of powder cocaine in conjunction with a November 24, 2011, traffic stop and the sale of .6 grams on February 17, 2012. PSR ¶¶9,11.

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There are a number of prior offenses that qualify Mr. Bush as a career offender. The three offenses listed in paragraph 29 as justification for the enhancement are, as explained below, relatively minor offenses. Mr. Bush concedes that there are two other offenses that may be closer to what Congress had intended. In paragraph 39, there is a charge of resisting an officer with violence and in paragraph 42 there is a drug trafficking charge that involved 252 grams of crack

cocaine.[2] Nonetheless, the qualifying offenses say much about the sort of criminal conduct in which Mr. Bush has engaged and about how arbitrary the career offender guideline can be.

Mr. Bush committed the sale of cocaine charge listed in paragraph 36 of the presentence report almost 12 years ago. He "sold $10.00 worth of crack cocaine to a confidential informant." PSR ¶36. Three years later, Mr. Bush committed another qualifying offense, sale of cocaine. PSR ¶38. In that instance, he sold $20 worth of cocaine. *Id.* Doc.

The third and most recent conviction that supports the career offender classification is the offense of "fleeing and eluding at a high speed." PSR ¶43. Despite the nature of the charge, however, Mr. Bush advises that while he did ignore the officers efforts to stop him, he drove only 25 yards and did not proceed at a high rate of speed. The narrative account for the incident provided by the officer as well as a map of the area in Quincy where the offense occurred, both of which are attached as Exhibit Two, supports Mr. Bush's claim. In the narrative, the officer makes no allegation regarding excess speed, explains that he observed Mr. Bush behind the wheel for less than a block,

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[2]Neither of these offenses entered into the career offender classification. The resisting with violence charge did not because the sentence imposed for the resisting offense occurred on the same date as one of the sale of cocaine cases that did support the career offender classification. *See* USSG § 4A1.2(a)(2) (which provides that multiple sentences should be counted as a single sentence "[i]f there is no intervening arrest" and "the sentences were imposed on the same date.")

The probation office has not suggested that the trafficking offense would support the career offender classification presumably because, in the absence of Shepard-approved documents showing the offense involved something other than the purchase of the controlled substance, it would not serve as a predicate offense. *See* United States v. Shannon, 631 F.3d 1187, 1190 (11th Cir. 2001) ("In sum, because we assume that Roye's prior conviction involved no more than purchase with intent to distribute, and this act in not included in § 4B1.2(b)'s definition, his prior conviction was not a "controlled substance offense." Attached as Exhibit One are the information and the judgement in the trafficking offense. The information tracks the language of the statute: "did unlawfully and knowingly sell, purchase, manufacture, deliver, or was knowingly in actual or constructive possession." The judgment states only that Mr. Bush was convicted of "Trafficking in Cont. Sub."

that a passenger then took the wheel, and subsequently failed to stop at a stop sign and crashed into a privacy fence.[3]

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Sentencing Commission Strayed From Its Institutional Role

Sub-Heading

In January of this year, United States District Judge Mark W. Bennett, in the case of United States v. Newhouse, __ Fed. Supp. 2d __, 2013 WL346432 (N.D. Iowa 2013), summarized much of the criticism that has been directed at the career offender guideline. He began with the conclusion that "the Sentencing Commission strayed from its institutional role with the career offender guideline." *Id.* at * 11. Judge Bennett cites a number of reasons that led him to that conclusion. Among them is the "unwarranted double counting" that results from the application of the drug enhancement provisions found in 21 U.S.C. § 851. *Id.* at *12 (quoting from U.S. Sentencing Guidelines Manual App. C, amend. 506) (1994). The double counting comes from the increase in the maximum penalty provided in § 851, which, in turn, results in a higher guideline range under the career offender provision. Absent the 851 enhancement, Mr. Bush's maximum penalty would

Case Law

[3]In the narrative that is attached as part of Exhibit Two, the officer writes that while stopped "at the intersection of Smith Street and Lincoln Street," he observed Mr. Bush driving the Ford truck "north bound on Lincoln Street." When the officer "activated [his] overhead emergency lights and proceeded behind the vehicle," Mr. Bush "turned east on Smith Street," continued to travel and ignored [the] emergency lights." The officer "activated [his] emergency siren" and, then, observed "[Mr. Bush] switch seats with the back seat passenger." Afterwards, "[t]he vehicle "failed to stop at the stop sign at Williams and Smith Street and . . . crashed into a privacy fence and then a U.S. mail box." The fellow driving at that point continued on and jumped several more curbs before stopping the truck.

The attached map shows that there is only one block between Lincoln Street where Mr. Bush turned once the emergency lights were activated and Williams Street at which point the back seat passenger had begun driving the truck.

have been 20 years and his offense level would have 32. With the enhancement, his maximum penalty increases to 30 years, which results in an offense level of 34.

In Rita v. United States, 551 U.S. 338, 349 (2007), Justice Breyer set out the now often cited process initially used by the Sentencing Commission: "The Commission took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interest of greater rationality, avoiding inconsistency, complying with Congressional instructions, and the like." Judge Bennett, however, notes that the Commission strayed from that process in that it began with sentences that were harsher than those imposed prior to the creation of the Guidelines:

> Thus, unlike the guidelines development process described in Rita, the Sentencing Commission did not use empirical data of average sentences, pre-guidelines, as the starting point for the Career Offender guideline. See 28 U.S.C. § 994(m); S. Rep. No. 98-225, at 116 (1983) (noting that under the sentencing guidelines "the average time served should be similar to that served today in like cases"). Instead, as the Sentencing Commission said, "much larger increases are provided for certain repeat offenders, consistent with legislative direction" than under pre-guidelines practice. See U.S. Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 44 (1987), available at http://www.src-project.org/wp-content/pdfs/reports/USSC_Supplementary%20Report.pdf. As a result, the Career Offender sentencing ranges were set at or near the maximum term, regardless of whether the resulting sentences met the purposes of sentencing, created unwarranted disparity, or conflicted with the "parsimony provision" of § 3553(a), which directs judges to impose a sentence that is "sufficient, but not greater than necessary" to accomplish the goals of sentencing.

Case Law

United States v. Newhouse, at *12.

These shortcomings and others led Judge Bennett to "find that the Career Offender guideline results from an imprecisely implemented Congressional mandate and is entitled to considerably less deference than those guidelines where the Sentencing Commission has exercised its institutional expertise and utilized empirical analysis." *Id* at *13. Judge Bennett concluded that "[s]ometimes

the Career Offender guideline, even with all its identified flaws, arrives at a sentencing range that fulfills the overarching purpose of sentencing - imposing 'a sentence sufficient but not greater than necessary, to comply with the purposes' of federal sentencing. *See* 18 U.S.C. § 3553(a)." He went on to conclude, though, that "particularly when applied to low level, non-violent drug addicts, it all too often arrives at a sentencing range that is in acuminous conflict with the § 3553(a) factors and with a just and fair sentence." *Id.*

Other Shortcomings of the Career Offender Guideline Sub-Heading

There are other problems, as well, with the guideline. It is a provision capable of resulting in what Judge Bennett describes as "unwarranted sentencing uniformity." Newhouse at *17. That's the case because it "does not distinguish between defendants, convicted of the same drug offense, based on either the seriousness of their current offense or their prior convictions." *Id.* Career offenders who have a prior felony drug conviction and sell 28 grams of crack cocaine have a base offense level of 37, the same as those who traffic in 280 grams or more of crack cocaine.[4] The defendant who has two prior sales of $10 worth of crack cocaine qualifies as a Career Offender just as does the defendant who has multiple 5 kilogram sales of cocaine.

Because, as in Mr. Bush's case, the predicate offenses for a high percentage of career offenders are based on street-level drug sales, which involve a high percentage of minority individuals in poor neighborhoods, the provision appear to be disproportionately applied to African-American defendants:

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[4]18 U.S.C. § 841(b)(1)(A)(iii) provides for a maximum penalty of life for those who traffic in 280 grams or more of crack cocaine. Subsection 841(b)(1)(B)(iii) provides for a maximum penalty of life for those who have a prior felony drug conviction and traffic in 28 grams or more of crack cocaine. The Career Offender Guideline, USSG §4B1.1(b)(1) establishes an offense level of 37 if the offense statutory maximum is life.

> 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 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent 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. (Interestingly, Hispanic offenders, while representing 39 percent of the criminal docket, represent just 17 percent of the offenders subject to the career offender 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).
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> Other Sources

U.S. Sentencing Commission, *Fifteen Years of Guideline Sentencing*, 133-34 (Nov. 2004). *See also* Newhouse at n.37 ("The Career Offender guideline has had a disturbing, grossly disparate impact on African-Americans.").

The Sentencing Commission has also questioned whether the Career Offender guideline has any appreciable effect on the sales of drugs when it is applied to low-level drug sellers:

> The question for policymakers is whether the career offender guideline,especially as it applies to repeat drug traffickers, clearly promotes an important purpose of sentencing. Unlike repeat violent offenders, whose incapacitation may protect the public from additional crimes by the offender, criminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone
> else.
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> Other Sources

U.S. Sentencing Commission, *Fifteen Years of Guideline Sentencing*, 134 (Nov. 2004).

The Sentence Should Be Among the 60% Below the Guideline Range — Sub-Heading

Mr. Bush's case is less compelling than the "low-level pill smurfer" drug addicted defendant in Newhouse. *Id* at *1. Nonetheless, Judge Bennett was right when he concluded that the guideline

was due less deference, something demonstrated by the imposition of below guideline sentences in more than sixty percent of career offender cases. *Id.* at *17.[5] Indeed, Judge Bennett, in imposing a below-guideline sentence in Newhouse, wrote that he was joining "the growing course of federal judges who have rejected applying the career offender guideline in certain cases", and cited a number of those cases:

> United States v. Whigham, 754 F.Supp.2d 239, 247–48 (D.Mass.2010) (granting downward variance on a number of grounds and noting that "there is also no question that the career offender guidelines are flawed."); United States v. Merced, No. 2:08–cr–000725, 2010 WL 3118393, at *4 (D.N.J. Aug. 4, 2010) (granting variance from Career Offender guideline based on defendant's specific circumstances rather than as a policy based variance); United States v. Woody, No. 8:09CR382, 2010 WL 2884918, at *9 (July 20, 2010) (declining to apply Career Offender guideline because its application resulted in a sentence "excessively harsh" given defendant's offense conduct and criminal history); United States v. Patzer, 548 F.Supp.2d 612, 617 (N.D.Ill.2008) (declining to apply Career Offender guideline where its application overstated the seriousness of the defendant's prior convictions and was in excess of that required for deterrence); United States v. Moreland, 568 F.Supp.2d 674, 688 (S.D.W.Va.2008) (granting variance from Career Offender guideline where defendant was not "the 'repeat violent offender' nor 'drug trafficker' targeted by the career offender guideline enhancement," had not demonstrated a "pattern of recidivism or violence," and applying the Career Offender guideline resulted in unwarranted sentencing uniformity); United States v. Malone, No. 04–80903, 2008 WL 6155217, at *4 (E.D.Mich. Feb. 22, 2008) (granting downward variance from Career Offender guideline because sentence under it would punish defendant "greater than necessary to achieve the objectives of sentencing" and would have an "unwarranted impact" on minority groups " 'without clearly advancing a

Case Law

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[5]Judge Bennett provided the details in his opinion:

> The Sentencing Commission reported that in fiscal year 2011, only 39.9% of defendants subject to the Career Offender guideline were sentenced within it. Only 1.1% were sentenced above the range. Judges departed or varied below the range in 26.6% of cases without a prosecution motion, and in 38.4% of cases with a prosecution motion. The high rate of below-guideline sentences indicates widespread dissatisfaction with the severity of the Career Offender guideline by both judges and prosecutors.

United States v. Newhouse, at *19.

> purpose of sentencing.' ") (quoting U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing, An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform 134 (2004)); United States v. Fernandez, 436 F.Supp.2d 983, 988–90 (E.D.Wisc.2006) (declining to apply Career Offender guideline because, based on defendant's specific circumstances, it produced a guideline range "greater than necessary to satisfy the purposes of sentencing."); United States v. Naylor, 359 F.Supp.2d 521, 524 (W.D.Va.2005) (declining to impose Career Offender guideline due to defendant's Bush age when he committed the predicate offenses); United States v. Serrano, No. 04CR.424–19(RWS), 2005 WL 1214314, at *8 (S.D.N.Y. May 19, 2005) (imposing "non-guideline sentence" where defendant's Career Offender predicate offenses were all minor drug offenses for which defendant had never spent more than one year in prison); United States v. Carvajal, No. 04CR222AKH, 2005 WL 476125, at *5 (S.D.N.Y. Feb. 22, 2005) (finding Career Offender guideline resulted in sentences "excessive, in light of the nature of [defendant's] recidivism, for the Guidelines for Career Offenders are the same regardless of the severity of the crimes, the dangers posed to victims' and bystanders' lives, and other appropriate criteria."); cf. United States v. Poindexter, 550 F.Supp.2d 578, 580–81 (E.D.Pa.2008) (noting that sentencing court did not apply Career Offender guideline because it "determined that the career offender designation 'overrepresents the total offense level in this case' ").

United States v. Newhouse, at *9. In Mr. Bush's case, even though his conduct is more aggravated than that of the defendant in Newhouse, there are, given the particular circumstances of his case and his criminal history, still compelling reasons to include Mr. Bush in that majority of Career Offender sentences that fall below the advisory guideline range. It is "the nature and circumstances of the offense, " the series of street-level sales to informants, as well as "the history and characteristics of the defendant, "a history of conduct that is largely similar to the instant charges, that justify a below-guidelines sentence. 18 U.S.C. § 3553(a)(1).

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;" the need "to afford adequate deterrence to criminal conduct;" the need "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

3553(a)

been found guilty of similar conduct." 18 U.S.C. § 3553(a)(2). Excessively long sentences under the career offender guideline do not "provide just punishment." United States v. Williams, 481 F.Supp.2d 1298, 1304 (M.D. Fla. 2007). Such sentences can "offend[] the very notion of justice," and do "not promote respect for the law." *Id*.

Case Law

In considering deterrence, Judge Presnell in Williams recognized that proportionality entered into the analysis: "It seems appropriate to consider the deterrence factor in light of the seriousness of the offense: the deterrent effect of a harsh sentence should be reserved for those serious crimes where society's need for protection is greatest." *Id.* at 1304. In urging this consideration, Mr. Bush does not intend to minimize the nature of his offense or his criminal history. Nonetheless, both the nature of the offense and the nature of the defendant's criminal history and play a role in the determination.

The need to avoid sentencing disparity is, of course, always due careful consideration. The concern, though, is with 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...")(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. Bush as those being sentenced for far more serious drug offenses, whose criminal histories are either more violent or more extensive than Mr. Bush's is a false equality that ignores the facts. *See* United States v. Ennis, 468 F.Supp.2d 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 sentence disparities among defendants with similar records who have been guilty of similar conduct.'").

Case Law

Conclusion Sub-Heading

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 in every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."). The command of Congress to impose a sentence that is "sufficient, but not greater than necessary," provides sentencing courts with the latitude to impose a sentence that fits the crime and the person before the court. Mr. Bush, therefore, respectfully requests this Court to exercise that discretion and to sentence him to a period of incarceration less than that provided for by the Career Offender sentencing guideline.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically furnished to Assistant U.S. Attorney Michael Simpson, this 21st day of May, 2013.

Respectfully submitted,

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