**\UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

**UNITED STATES,**

**Plaintiff,**

**v.** **Case No. 6:17-cr-147-ORL-31KRS**

**TYRONE SMITH,**

**Defendant.**
**_____/**

## SENTENCING MEMORANDUM

The Defendant, TYRONE SMITH, by and through his undersigned attorney, respectfully submits his Sentencing Memorandum for this Honorable Court's consideration. Mr. Smith requests this Court to review the circumstances of his case pursuant to 18 U.S.C. § 3553, and impose a variance in his case. In support thereof, Mr. Smith states the following:

## STATEMENT OF FACTS

***Procedural History***

1. On October 30, 2017, Mr. Smith pled guilty, pursuant to a plea agreement, to one count of distribution of Carfentanil in violation of 21 U.S.C. §§

841(a)(1) and 841(b)(1)(C). *See* Doc. 56-57.

2 Mr. Smith's sentencing hearing is set for February 9, 2018. Doc. 77.

***Guideline Calculations***

3. Based on Mr. Smith's minor role and acceptance of responsibility, his total offense guideline level would have been a level 19 with a criminal history category of III. *See, e.g.*, PSR at ¶¶ 52; 54, 57-58, and 70. Thus, Mr. Smith would have been facing 37-46 months of imprisonment. *See* USSG Ch. 5, pt. A, Sentencing Table.

4. Notwithstanding the foregoing, the Presentence Report (PSR) asserts that Mr. Smith is a career offender under USSG §4B1.1.

5. Mr. Smith's career offender status is based on two prior sales of crack cocaine in 2007 and 2008. PSR at ¶¶ 67-69. In 2007, Mr. Smith sold $60 worth of crack cocaine. PSR at ¶ 67. In 2008, he sold $40 and $20 worth of this same substance. PSR at ¶¶ 68-69.

6. Based on Mr. Smith's career offender status, the PSR calculates his total offense level as a level 29 with a criminal history category of VI. *See* PSR at ¶¶ 29, 71. Thus, the PSR contends that Mr. Smith is facing a guideline sentencing range of 151 to 188 months of incarceration. *Id.* at ¶ 97. Such an advisory sentence represents an increase of 400% in Mr. Smith's guideline range.

7. There is no minimum mandatory penalty in Mr. Smith's case.

## MEMORANDUM OF LAW

This memorandum examines the issue of whether an advisory guideline range of 151 to 188 months (13 to 15 years) constitutes a just sentence. The answer seems apparent. Indeed, Mr. Smith's case demonstrates the essential irrationality and cruelty of the guidelines. While this memorandum establishes that a variance is warranted under 18 U.S.C. § 3553, it also raises a critical question. That is, whether the career offender guideline is a vicious aberration in an otherwise rational system of justice, or whether instead, it provides a poignant commentary on a system of laws that is characterized by its remarkable depersonalization through a façade of mathematical niceties.

### I. *Booker and its Progeny Provides the Court with the Discretion to Impose a Sentence of Home Detention*

A district court's discretion is no longer limited by the guidelines since its matrix is now considered merely advisory. *United States v. Booker,* 543 U.S. 220, 245-67 (2005). Thus, a court is now unencumbered in its ability "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." *Gall v. United States*, 552 U.S. 38, 53 (2007) (quoting *Koon v. United States,* 518 U.S. 81 (1996)).

Congress has identified four "purposes" of sentencing: punishment, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553(a)(2). To achieve these ends, § 3553(a) requires sentencing courts to consider not only the advisory Guidelines range, but also the facts of a specific case through the lens of seven factors as discussed below. *See* 18 U.S.C. § 3553(a)(1)-(7). Against the backdrop of the seven statutory factors, the application of the career offender guidelines is antagonistic to a just sentence.

## II. ***An Examination of the § 3553 Factors Establishes that a Variance is Warranted in Mr. Smith's case***

The following sections analyze the § 3553 factors against the factual backdrop of Mr. Smith's case.

### 1. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

Mr. Smith recognizes the seriousness of his crime. Nevertheless, there are significant mitigating factors regarding his conduct. Consistent with his conduct in the instant case, Mr. Smith is a non-violent, low-level drug offender. The Government, as well as the United States Probation Office, agrees that Mr. Smith played a minor role in the offense. PSR at § 52. Such a position is unremarkable. Mr. Smith's criminal conduct was limited in scope. On a single occasion, he dropped off drugs in a vehicle for his co-defendant Paul Andre McNeal. Furthermore, Mr. Smith participated in this criminal event to satisfy his own drug habit.

As a low-level and non-violent drug addict, Mr. Smith is not the type of defendant that the career offender guideline was meant to address. *See United States v. Newhouse*, 919 F.Supp. 2d. 955, 959 (N.D. Iowa 2013)(imposing significant variance in case involving street-level offender based on the conclusion that career offender guideline does not achieve just sentencing in such cases). Rather, Mr. Smith is the typical "low-hanging fruit" that is often captured in the War on Drugs – a war whose primary success has been filling federal prisons beyond capacity. *See id.* at 958; *see also United States v. Vasquez*, No. 09-cr-259 (JG), 2010 WL 1257359, at *3 (E.D.N.Y. Mar. 30, 2010)(stating that in "the war on drugs" "prosecutors can decide that street-level defendants like Vasquez-the low hanging fruit for law enforcement-must receive the harsh sentences that Congress intended for kingpins and managers, no matter how many factors weigh in favor of less severe sentences.").

Notwithstanding the foregoing, Mr. Smith comprehends that this case represents another episode in his history of petty drug offenses and drug abuse. Still, the significance of the first § 3553 factor is found in its comprehension that a defendant's criminal conduct must be considered in the context of Mr. Smith's entire life, including his history and characteristics.

In assessing Mr. Smith's case, the unavoidable, but critical question is why he continues to find himself confronting harsh prison sentences for underwhelming drug offenses. A compelling answer is found in Mr. Smith's background, including his

history of long-standing and consistent drug abuse. As the PSR demonstrates, Mr. Smith has no history of violence. Instead, he has been plagued by a series of criminal offenses involving small amounts of drugs. *See* PSR at ¶¶ 64-68. In addition, the PSR notes that Mr. Smith began using drugs at the age of 16 and continued to abuse narcotics until his arrest at the age of 36 – some 20 years. PSR at ¶ 88. The impact of Mr. Smith's long-standing substance abuse problems on his decision-making cannot be overstated. While drug addiction has often been viewed as the result of a lack of willpower and character in the addict, experts generally agree that narcotic dependence is a form of mental illness. *See* Nat. Instit. Of Drug Abuse, "Comorbidity: Addiction and Other Mental Illnesses" (Sept. 2010), hereto attached as Exhibit 1. Addiction is "a complex brain disease characterized by compulsive, at times uncontrollable drug craving, seeking, and use despite devastating consequences – behaviors that stem from drug-induced changes in brain structure and function." *See id*. at 1.[1]

Notably, Mr. Smith's struggles with drugs did not occur in a vacuum. Indeed, Mr. Smith's early drug use is the expected result of a childhood spent surrounded by drugs. *See* PSR at ¶ 79. Having never met his father, Mr. Smith was reared by his mother and her boyfriend Clinton Griffin. While Mr. Smith's mother abused marijuana

[1] As one famous addict stated, "[i]f you have never been addicted, you have no clear idea what it means to need junk with the addict's special need. You don't decide to be an addict. One morning you wake up sick and you're an addict." William Burroughs, *Junky*, prologue p. xxxviii (Ace Books 1953).

and alcohol, Clinton Griffin was a recalcitrant user of crack cocaine. *See id.* Thus, the blueprint for Mr. Smith's drug abuse was written years before he committed his crimes.[2] *See* Nat. Instit. Of Drug Abuse, *Drugs, Brains and Behavior: The Science of Addiction*, (July 2014), hereto attached as Exhibit 2. *See also* Egeland, Yates, Appleyard, & van Dulmen, *The Long-Term Consequences of Maltreatment in the Early Years: A Developmental Pathway Model to Antisocial Behavior*, Child. Serv.: Social Policy Research and Practice, 5(4), 249-260 (2002).

Regardless of its genesis, Mr. Smith's continued involvement in drug-related offenses was based on a lack of judgment resulting from his significant daily drug habit. *See* PSR at ¶ 88 (noting that Mr. Smith was consuming drugs until the time of his arrest). Although such addiction does not excuse Mr. Smith's culpability for his offense, it does mitigate his blameworthiness for his actions. That is, the degree of a defendant's blameworthiness "is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender's degree of culpability in committing the crime, in particular, his

[2] As Shakespeare wrote:

> Yes, truly, for look you, the sins of the father are to be laid upon the children. Therefore I promise ye I fear you. I was always plain with you, and so now I speak my agitation of the matter. Therefore be o' good cheer, for truly I think you are damned . . .
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> *Merchant of Venice*, Act III, Scene 5 (1597).

degree of intent (mens rea), motives, role in the offense, and mental illness or diminished capacity." Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (Feb. 2005). Applying these factors to Mr. Smith's circumstances underscores that his culpability or blameworthiness is mitigated by his long-standing drug addiction.

Finally, a lamentable, if not tragic aspect of Mr. Smith's life, is that his childhood was not only impacted by his early exposure to drugs, but also affected by his experience of neglect and abuse. *See* PSR at § 80. Tiffany Smith, the defendant's sister, states that in their home of emotional and physical deprivation, Mr. Smith was heroic in working to feed his siblings and in acting to stop Clinton Griffin's sexual abuse of her. *See id*.[3]

Tiffany Smith's discussion of her brother's actions provides critical insight into his character. That is, Mr. Smith cannot merely be dismissed as a hopeless street addict or drug offender. While it true that he failed to transcend the muck of his past, he still possesses important character traits that provide hope for his future.[4] As Preston

[3] The PSR fails to note that Clinton Griffin was arrested, convicted and imprisoned based on the defendant's intervention.

[4] Undoubtedly, an adherent to the tenet of American exceptionalism would argue that Mr. Smith could have escaped his past by pulling himself up by his bootstraps. Perhaps such a contention would offer some merit if American Exceptionalism was predicated on anything other than economic opportunity. Indeed, "[s]eventy per cent of people born into the bottom quintile of income distribution never make it into the middle class, and fewer than ten per cent get into the top quintile."

Griffin writes:

> My name is Preston Griffin and I am the brother of Tyrone Smith. Tyrone was my father figure growing up. When I was sick he took good care of me. When I would cry, he wiped my tears.
>
> Most of the time, when my mother was at work, Tyrone would prepare meals and would be the last to eat, to make sure everyone was full. Tyrone is a very compassionate person and it is the norm to put others first. One time when we became homeless due to my mother losing her job, Tyrone would go to day labor to help my mom out. That was a huge responsibility on a kid but he barely complained . . . I appreciate him being there even though my father was not.

Letter of Preston Griffin, attached hereto as Exhibit 3.

**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*

In imposing just punishment to reflect the seriousness of the offense, it is important to consider that "[l]ow-level, non-violent drug addicts who participate in the drug trade to support their habits are hardly the kind of individuals Congress had in

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(James Surowiecki, *The Mobility Myth*, The New Yorker (March 3, 2014); *see also* Thomas Piketty, *Capital in the Twenty-First Century* (Harvard Univ. Press 2014). As both Surowiecki and Piketty demonstrate, the traditional claim of upward mobility in America is not borne out by rational analysis. Consequently, the myth of American exceptionalism, as famously articulated by Horatio Alger, is without basis. The unfounded persistence of this illusion, however, allows the continued economic exploitation of individuals like Mr. Smith whose original and only sin was being born into poverty. Surowiecki, *The Mobility Myth* (stating that "most people who are poor are poor because 'they made the mistake of being born to the wrong parents.'")(citation omitted). The utility of the myth is ultimately premised on its ability to secure a system of economic exploitation. *See, e.g.* Karl Marx, *A Contribution to the Critique of Hegel's Philosophy of Right* (1843)("To call on them to give up their illusions about their condition is to call on them to give up a condition that requires illusions.").

mind when it directed the Sentencing Commission to promulgate the Career Offender guideline." *Newhouse*, 919 F.Supp. 2d. at 974. Instead, Congress's directive specifically targeted "drug trafficking offense[s]" involving large amounts of drugs. *Id.* (citing S. REP. NO. 98–225 at 175 (1983), 1984 U.S.C.C.A.N. 3182, 3358).

Thus, sentencing Mr. Smith to the same penalties that were designed for significantly more serious offenders does not constitute just punishment. In addition, a one-size-fits-all scheme that imposes lengthy sentences indiscriminately on offenders, regardless of their culpability, does not promote respect for the law.

Furthermore, in imposing "just punishment" for an offense, a sentencing court should not disregard the additional penalties and hardships that will accompany Mr. Smith's felony record. Based on his conviction, Mr. Smith will face an overwhelming number of collateral consequences. A recent congressional report authored by the United States Government Accountability Office (GAO) demonstrates that there are 641 collateral consequences of a nonviolent felony conviction. *See* GAO Report 17-691, NONVIOLENT DRUG CONVICTIONS, *Stakeholders Views on Potential, Actions to Address Collateral Consequences*, (Sept. 2017), available at http://www.gao.gov/products/GAO-17-691.pdf, summary excerpt attached hereto as Exhibit 4. Of these 641 collateral consequences, 497 (78%) of them may last a lifetime. *See id.*

In a recent opinion from the Eastern District of New York, Judge Fredrick Block

concluded that "sufficient attention has not been paid at sentencing . . . to the collateral consequences facing a convicted defendant. And I believe that judges should consider such consequences in rendering a lawful sentence." *United States v. Nesbeth,* Case No. 1:15-cr-00018, 2016 WL 3022073, at *1 (E.D.N.Y May 24, 2016)(varying downward from guideline range of 33 to 44 months imprisonment to one-year of probation for a drug defendant based in part on the number of statutory and regulatory consequences she faced as a convicted felon); *see also* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion, in Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (Marc Mauer & Meda Chesney-Lind eds., 2002).

In granting a variance in *Nesbeth*, the court asserted that the collateral effects of a criminal conviction can be "devastating" to a defendant. *Nesbeth*, 2016 WL 3022073, at *1. Indeed,

> [m]yriad laws, rules, and regulations operate to discriminate against ex-offenders and effectively prevent their reintegration into the mainstream society and economy. These restrictions amount to a form of 'civi[l] death' and send the unequivocal message that 'they' are no longer part of 'us.'

*Id*. (citing Michelle Alexander, *The New Jim Crow* (2010)). As Judge Block concluded, "[t]oday, the collateral consequences of criminal convictions form a new civil death." *Id*. at *3

As *Nesbeth* establishes, the civil death that Mr. Smith faces as a result of his felony record constitutes significant punishment.

*B. To afford adequate deterrence to criminal conduct*

A consideration of this factor compels an analysis of the principles of both general and specific deterrence. As the following discussion demonstrates, both principles support Mr. Smith's request for a variance.

*1. General Deterrence*

The principle of general deterrence is based on the absurd premise that prison sentences deter crime. This faulty conception has resulted in the mass incarceration of individuals in the United States.

> For the past 40 years, the United States has been engaged in a vast, costly social experiment. It has incarcerated a higher percentage of its people, and for a longer period, than any other democracy. In fact, with 5 percent of the world's population, the U.S. is home to 25 percent of its prisoners. There are five times as many people incarcerated today than there were in 1970. . . [The] archipelago of prisons and jails costs more than $80 billion annually — about equivalent to the budget of the federal Department of Education.

Dr. Oliver Roeder et al., *What Caused the Crime Decline*?, Brennan Center for Just., 22-23 (Feb. 12, 2015), *available at* https://www. brennancenter. org/publication/what-caused-crime-decline.

The condition of mass incarceration is especially troubling since there is no correlation between punishment and reductions in crime. *See id; see also* Gary Kleck and J.C. Barnes, *Deterrence and Macro-Level Perceptions of Punishment Risks: Is There a "Collective Wisdom"*?, 59 Crime & Delinquency 1006, 1031-33 (2013). Kleck

and Barnes' study concludes:

> there is generally no significant association between perceptions of punishment levels and the actual levels of punishment that the criminal justice system achieves. This in turn implies that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms, because the fundamental link between actual punishment levels and perceptions of punishment levels appears to be weak to nonexistent.

(*Id*. at 1031). The United States Department of Justice agrees with the conclusion that incarcerating defendants is not an effective means of deterrence. *See* U.S. Dept. of Justice, Nat'l Inst. of Justice, *Five Things About Deterrence* (July 2014), attached hereto as Exhibit 5. In fact, the Department of Justice finds that even increasing the severity of punishment does little to deter punishment. *See id*..

2. *to protect the public from further crimes of the defendant;*

As a preliminary matter, increasing Mr. Smith's term of imprisonment will not have a positive impact on his risk of recidivism. That is, the empirical evidence does not establish a relationship between sentence length and specific deterrence, regardless of the type of crime. *See* National Institute of Corrections, *Myths and Facts, Why Incarceration is Not the Best Way to Keep Communities Safe* (2016), attached hereto as Exhibit 6; *see also* Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, 48 Criminology 357 (2010) (study of over a thousand offenders whose sentences varied substantially in prison time and probation found that

such variations "have no detectable effect on rates of re-arrest," and that "[t]hose assigned by chance to receive prison time and their counterparts who received no prison time were re-arrested at similar rates over a four-year time frame"). In sum, the best available evidence establishes that imprisonment does not reduce recidivism more than noncustodial sanctions. Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 50S-51S (2011).

In this regard, the 2016 study by the National Institute of Corrections establishes three critical tenets. First, incarceration has a negligible impact on crime prevention. *See* Ex. 6 at 4. Instead, a longer prison sentence may actually lead to a greater risk of recidivism. *See id*. There is strong evidence that prison—by disrupting education and employment, reducing prospects for future employment, weakening family ties and exposing less serious offenders to older more serious offenders—leads to increased recidivism. *See The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Public Policy 589 (2007). Moreover, harsh penalties do not improve the long-term outcomes of the offender. Ex. 6 at 4. *See also* Friedrich Nietzsche, *The Genealogy of Morals*, essay 2, aph. 14 (1887).("All in all, punishment hardens and renders people more insensible; it concentrates; it increases the feeling of estrangement; it strengthens the power of resistance.*")*. Finally, community correction programs are more effective in reducing recidivism. *Id*. at 5.

Moreover, the career offender guideline fails to promote the goal of specific

deterrence since it overstates the "seriousness of a defendant's record and the risk of his reoffending, particularly when the defendant is a low-level, non-violent drug offender." *Newhouse*, 919 F.Supp.2d at 975. The United States Sentencing Commission recognizes that the guideline distorts the actual likelihood of recidivism on the part of defendants who qualify on the basis of prior drug convictions. *See* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing* [hereinafter *Fifteen Years*] 134 (Nov. 2004). Indeed, the recidivism rate of a career offender, whose prior convictions for drug crimes, is significantly less than other offenders assigned a criminal history category VI. *Id*.

*C. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;*

Mr. Smith does not require medical treatment while in the Bureau of Prisons. He does, however, request drug treatment, as well as mental health counseling and vocational training. Notably, Mr. Smith's participation in a drug treatment program will significantly reduce his risk of recidivism. Newhouse, 919 F.Supp.2d at 977.

**3. The Kinds of Sentences Available**

Because a mandatory minimum sentence does not apply in Mr. Smith's case, this Court may vary from the advisory guideline range.

### 4-5. The Kinds of Sentences and the Guideline Sentencing Range Established and any Pertinent Sentencing Commission Policy Statements

Although the impact of the guidelines on a court's sentencing discretion has been discussed in Section I, *supra*, the critical question in Mr. Smith's case is the exact weight this Court should give to the guidelines. As recognized in *Gall*, district courts "may not presume that the Guidelines range is reasonable." 552 U.S. at 49, 128 S. Ct. at 597. 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.

The career offender guidelines pose a risk in Mr. Smith's case for a more elemental reason – they falsely provide a promise of predictability and fairness. Because we believe the guidelines to be the product of great deliberation and reasoned judgment, we often assume that they provide clear direction for the proper sentencing of every criminal defendant, notwithstanding their backgrounds and the particular circumstances of their case.[5] Thus, we depend on the guidelines to relieve us of the burden and uncertainty of having to decide a just sentence for the particular defendant.[6]

[5] Of course, the guidelines do address the background of each defendant and the circumstances of each case in a limited fashion through criminal history and offense conduct.

[6] At its core, the rigid matrix of the sentencing guidelines demonstrates the deeply-rooted human aversion to uncertainty and ambiguity. *See, e.g*, Maria Konnikova, *Why We Need Answers*, The New Yorker (Apr. 30, 2013). As Konnika asserts, studies demonstrate that the need to respond to uncertainty or a lack of clarity is present in the early stages of human development. *Id*. Because of our distress with the unknown and uncertain, we seek to achieve "cognitive closure" defined as the "desire for a firm answer to a question and an aversion to ambiguity." *Id*. (citing Dr. Arie Kruglanski,

In effect, the guidelines, with their promise of mathematical certainty, provide a court with a sheltering sky against the purported abyss of ambiguity.[7] But such security is a false god and every time we make a sacrifice to it we are lost.[8] Regarding the false promise of the guidelines, this Court once noted:

> Criminal behavior can fuel public outcry and drive broad legislative and executive agendas to get "tough on crime." But how does that translate to specific instances? If you take a matrix to factor offense severity, overlay it with mandates born of popular outrage, and tailor it purportedly to address almost every eventuality, you get "justice" dictated in advance, marked by visceral condemnation, and based on the pretense of omniscience.

*United States v. Williams*, 372 F.Supp.2d 1335, 1337-1338 (M.D. Fla. 2005) (Presnell, J.).[9]

Rather than a rational matrix, the career offender guidelines represent "a failed attempt to come up with a rule that applied to all defendants in all circumstances, regardless of the actual offenses, their nature, or their timing." *United States v. Vasquez*, 796 F.Supp.2d 1370, 1371 (M.D. Fla. 2011). *See also United States v. Dixon*, Case No. 2016-cr-16-MHT, WL 4492843, at *3 (M.D. Ala. 2016); *Newhouse*, 919

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*Motivated Closing of the Mind*, Psych. Rev., at 263-83 (Apr. 1996)). In promulgating the career offender guideline, the Sentencing Commission traded reason for the comfort of certainty.

[7] *See* Paul Bowles, *The Sheltering Sky* (Random House 1949)("The sky hides the night behind it and shelters the people beneath from the horror that lies above.")

[8] *See* Bowles, *Sheltering Sky*, ("Security is a false God. Begin to make sacrifices to it and you are lost.").

[9] Although *Williams* was reversed by the Eleventh Circuit in *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006), the Eleventh Circuit's decision was overruled by the United States Supreme

F.Supp.2d, at 977-978.

The false security of the guidelines is in their historical ability to effectuate results that are fundamentally unjust. For instance, for years, the guidelines for crack cocaine created a situation where defendants were harshly and unfairly sentenced. "As with the crack cocaine guideline, the Sentencing Commission strayed from its institutional role with the Career Offender guideline, albeit in both its creation and expansion." *Newhouse*, 919 F.Supp.2d at 969.

Consequently, the career offender guideline does not reflect an approximation of sentences that might achieve § 3553 objectives. In *Rita v. United States*, 551 U.S. 338 (2007), the Supreme Court gave two reasons that it may be "fair to assume" that the guidelines "reflect a rough approximation" of sentences that might achieve § 3553(a)'s objectives. First, the original Sentencing Commission used an "empirical approach," which began "with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past." *Id.* Second, the Commission can review and revise the guidelines based on judicial feedback through sentencing decisions, and consultation with other frontline actors, civil liberties groups, and experts. *Id*. at 348-50. The Court recognized, however, that not all guidelines were developed in this manner. *See Gall*, 552 U.S. at 46 & n.2; *Kimbrough v. United States*, 552 U.S. 85, 96 (2007). When a guideline "do[es] not exemplify the Commission's exercise of its

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Court. *See Kimbrough v. United States*, 552 U.S. 1353 (2010).

characteristic institutional role," because the Commission "did not take account of 'empirical data and national experience,'" the sentencing court is free to conclude that the guideline "yields a sentence 'greater than necessary to achieve § 3553(a)'s purposes, even in a mine-run case." *Kimbrough*, 552 U.S. at 109-10.

Concerning the creation of the career offender guidelines, said guidelines were initiated based on a Congressional directive to target "repeat drug traffickers" and "repeat violent offenders." S. Rep. No. 98–225, at 175 (1983), 1984 U.S.C.C.A.N. 3182, 3358. Congress further stated that drug trafficking was an "extremely lucrative" enterprise "carried on to an unusual degree by persons engaged in continuing patterns of criminal activity," and that "drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country." *Id.* at 20, 213, 256.

Despite its original purpose of targeting large-scale drug traffickers, the career offender guideline's ill-conceived design and expansion often captures impoverished, low-level addicts, such as Mr. Smith within its limitless net. The evolution of the career offender guideline beyond its intended scope exemplifies the injustices that follow the Sentencing Commission's abandonment of empirical evidence, as well as its characteristic institutional role. As noted in *Newhouse*,

> 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), 1984 U.S.C.C.A.N. 3182, 3299 (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.

919 F.Supp.2d at 973.

A mechanical application of the career offender guideline to Mr. Smith's case would be necessarily inconsistent with the § 3553(a) factors.[10] As previously noted, the career offender guideline is antagonistic to both *Koon* and § 3553(a), in failing to consider the unique circumstances of the offense, as well as the history and characteristics of the defendant. *See* Section 1, *supra*. The guideline also disregards the § 3553(a) factor of just sentencing and thus fails to promote respect for the law. *See* Section 2(A), *supra*. The guideline's essential deficiency is underscored by its failure to address the § 3553(a) factor of specific deterrence. *See* Section 2(b)(2), *supra*.

[10] Notably, the career offender guideline is not only antagonistic to the § 3553 factors, but also contradicts its own and other guidelines in setting a defendant's criminal history category. As opposed to the calculation of the Criminal History Category which is based on the sentences imposed in prior cases, the career offender guideline looks to the greatest punishment authorized by law. *Compare* USSG §§ 4A1.1 and 4A1.2 with USSG § 4B1.2.

Finally, as *Newhouse* notes, the career offender guideline violates the other § 3553 factors including the purposes of sentencing, disparity, and the statute's parsimony clause. 919 F.Supp.2d at 973. The inability of the career offender guideline to meet the requirements of § 3553 is a particularly grave failure in cases involving low-level offenders like Mr. Smith. In such cases, a rigid application of the career offender guideline can only accomplish a draconian result. In this regard then, the guideline's genesis proves that injustice not always occurs through the impact of cataclysmic judicial decisions,[11] but often flows from the tide of quiet bureaucratic choices made without foresight or contemplation.[12]

Thankfully, the career offender guideline is no longer mandatory. Further, because it did not result from empirical study or institutional expertise, the guideline warrants little deference. *Newhouse*, 919 F.Supp.2d at 974. This latter tenet is recognized by federal courts throughout the United States. For example, from 2012 to 2016, the rate of within guideline range sentences for career offenders decreased from

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[11] *See, e.g, Dred Scott v. Sanford*, 60 U.S. (Howard) 393 (1857); *Korematsu v. United States*, 323 U.S. 214 (1944); *Citizens United v. FEC*, 558 U.S. 310 (2010).

[12] As one author noted:

> The greatest evil is not now done in those sordid 'dens of crime' that Dickens loved to paint. It is not done even in concentration camps and labor camps. In those we see its final result. But it is conceived and ordered (moved, seconded, carried, and minuted) in clean, carpeted, warmed, and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voice.

C.S. Lewis, The Screwtape Letters at xxxvii (1961 ed.).

30.2% in fiscal year 2012 to 24.5% in fiscal year 2016. *See* U.S. Sent'g Comm'n, *Quick Facts: Career Offenders* at 2 (2016), attached hereto as Exhibit 7. This growing trend in the imposition of non-guideline sentences is to be expected. Because the career offender guideline conflicts with the principle of just sentencing when applied to low level, non-violent drug addicts such as Mr. Smith, it

> follows that district courts should not be overly shy about concluding that particular defendants, even if third-time drug sellers, do not have the profile Congress and the Commission had in mind when they directed that sentences for career drug offenders be set at or near the top of the statutory range. *Booker* discretion is at its zenith when sentencing courts make the judgment that the particular conduct of the defendant falls only marginally within the scope of a guideline that even the Commission regards as overbroad and (in some applications) counter-productive.

*United States v. Pruitt*, 502 F.3d 1154, 1172 (10th Cir.2007) (McConnell, J., concurring), *vacated for reconsideration,* 552 U.S. 1306, 128 S.Ct. 1869, 170 L.Ed.2d 741 (2008).

Recognizing the havoc caused by its past sins, the United States Sentencing Commission has recently submitted proposals to Congress addressing the problem of the career offender guideline's application in cases involving defendants like Mr. Smith. *See* U.S. Sent'g Comm'n, *Report to Congress: Career Offender Sentencing Enhancements* (Aug. 2016), excerpt hereto attached as Exhibit 8. In its Report, the Sentencing Commission concludes that:

> The career offender directive should be amended to differentiate between career offenders with different types of criminal records, and is best

> focused on those offenders who have committed at least one "crime of violence."
>
> Career offenders who have committed a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future.
>
> Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive.

*Id*. at 3. The Sentencing Commission's conclusions are especially critical to this Court's consideration of Mr. Smith's sentence. Because Mr. Smith does not have any violent history, the Sentencing Commission suggests that he should be subject to the same criminal penalties that apply to the drug offender, who is not subject to the enhancement.

**6 The Need to Avoid Unwarranted Sentence Disparities Among Defendants With Similar Records Who Have Been Found Guilty of Similar Conduct**

As noted above, because of the essential problems with the guidelines, career offender sentences reflect a widespread judicial disagreement with the guidelines. Indeed, the fact that courts have only found the advisory guideline range to be appropriate in approximately 24% of career offender cases supports Mr. Smith's request for a variance.

Moreover, rather than promoting unwarranted disparity, the application of the

career offender guidelines "has the strong potential to lead to ... unwarranted sentencing uniformity." *Newhouse*, 919 F.Supp.2d, at 977-978. *See also Dixon*, Case 2016-cr-16-MHT, WL 4492843, at *3; *Vasquez*, 796 F.Supp.2d at 1371.

Mr. Smith's case illustrates that the danger of sentencing uniformity may pose a greater risk than the danger of sentencing disparity. By advising a sentence for Mr. Smith according to the same penalties that apply to a drug kingpin, the career offender guideline blithely achieves not only the irrational, but the absurd.

7. **The Need to Provide Restitution to Any Victims of the Offense.**

Community-based restitution is applicable in this case. *See* PSR at ¶ 107.

## CONCLUSION

The unique circumstances presented in Mr. Smith's case justify a variance from the Sentencing Guidelines. Because the decision in *Booker* has made the Guidelines advisory and the parsimony clause of § 3553(a) the paramount consideration, the that statute's sentencing factors show that a sentence below the advisory guideline range is "sufficient but not greater necessary to comply with" the goals of sentencing.

In the end, returning the argument to to the original issue of whether the career offender guideline is merely an aberration, rather than a commentary on our system of justice, is not particularly important. Regardless of the answer, if our federal sentencing regime possesses any legitimacy, Mr. Smith cannot be sentenced according to an ill-conceived and unjust guideline. Mr. Smith, therefore, requests this Court to

impose a variance.

Respectfully submitted,

*/s/ Fritz Scheller*
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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all parties of record on this 7th day of February 2018.

*/s/ Fritz Scheller*
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