CRIMINAL PRACTICE IN THE WESTERN DISTRICT OF VIRGINIA

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Overview by Larry W. Shelton

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1966—Pub. L. 89-465, §§5(b), 5(a)(1), June 22, 1966, 80 Stat. 216, 217, substituted "RELEASE" for "BAIL" in chapter heading and "Release in noncapital cases prior to trial" for "Jumping Bail" in item 3146, and added items 3147 to 3152.

1954—Act Aug. 20, 1954, ch. 772, §3, 68 Stat. 748, added item 3146.

§3141. Release and detention authority generally

(a) PENDING TRIAL.—A judicial officer authorized to order the arrest of a person under section 3041 of this title before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings, under this chapter.

(b) PENDING SENTENCE OR APPEAL.—A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained under this chapter.

(Added Pub. L. 98-473, title II, §203(a), Oct. 12, 1984, 98 Stat. 1976; amended Pub. L. 99-646, §55(a), (b), Nov. 10, 1986, 100 Stat. 3607.)

PRIOR PROVISIONS

A prior section 3141, acts June 25, 1948, ch. 645, 62 Stat. 821; June 22, 1966, Pub. L. 89-465, §5(b), 80 Stat. 217, related to powers of courts and magistrates with respect to release on bail or otherwise, prior to repeal in the revision of this chapter by section 203(a) of Pub. L. 98-473.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99-646, §55(a), (b), substituted "authorized to order the arrest of a person under section 3041 of this title before whom an arrested person is brought shall order that such person be released" for "who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be released" and "under this chapter" for "pursuant to the provisions of this chapter".

Subsec. (b). Pub. L. 99-646, §55(a), substituted "under this chapter" for "pursuant to the provisions of this chapter".

EFFECTIVE DATE OF 1986 AMENDMENT

Section 85(j) of Pub. L. 99-646 provided that: "The amendments made by this section [amending this section and sections 3142 to 3144, 3148 to 3149, and 3156 of this title] shall take effect 30 days after the date of enactment of this Act [Nov. 10, 1986]."

SHORT TITLE OF 2004 AMENDMENT

Pub. L. 108-458, title VI, §6951, Dec. 17, 2004, 118 Stat. 3775, provided that: "This subtitle [subtitle K (§§6951, 6952) of title VI of Pub. L. 108-458, amending section 3142 of this title] may be cited as the 'Pretrial Detention of Terrorists Act of 2004'."

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101-647, title IX, §901, Nov. 29, 1990, 104 Stat. 4826, provided that: "This title [amending sections 3143 and 3145 of this title] may be cited as the 'Mandatory Detention for Offenders Convicted of Serious Crimes Act'."

SHORT TITLE OF 1984 AMENDMENT

Section 202 of chapter I (§§202-210) of title II of Pub. L. 98-473 provided that: "This chapter [enacting sections 3062 and 3141 to 3150 of this title, amending sections 3041, 3042, 3154, 3156, 3731, 3772, and 4282 of this title and section 636 of Title 28, Judiciary and Judicial Procedure, repealing sections 3043 and 3141 to 3151 of this title, and amending rules 5, 10, 40, 46, and 54 of the Federal Rules of Criminal Procedure, set out in the Appendix to this title, and rule 9 of the Federal Rules of Appellate Procedure, set out in the Appendix to Title 28] may be cited as the 'Bail Reform Act of 1984'."

SHORT TITLE OF 1982 AMENDMENT

Pub. L. 97-267, §1, Sept. 27, 1982, 96 Stat. 1136, provided: "That this Act [amending sections 3152 to 3156 of this title and section 604 of Title 28, Judiciary and Judicial Procedure, and enacting provisions set out as notes under sections 3141 and 3152 of this title] may be cited as the 'Pretrial Services Act of 1982'."

SHORT TITLE

Section 1 of Pub. L. 89-465 provided: "That this Act [enacting sections 3146 to 3152 of this title, amending sections 3041, 3141 to 3143, and 3568 of this title, and enacting provisions set out as a note below] may be cited as the 'Bail Reform Act of 1966'."

PURPOSE OF BAIL REFORM ACT OF 1966

Section 2 of Pub. L. 89-465 provided that: "The purpose of this Act [enacting sections 3146 to 3152 of this title, amending sections 3041, 3141 to 3143, and 3568 of this title and enacting provisions set out as a note above] is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."

§3142. Release or detention of a defendant pending trial

(a) IN GENERAL.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

(b) RELEASE ON PERSONAL RECOGNIZANCE OR UNSECURED APPEARANCE BOND.—The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) RELEASE ON CONDITIONS.—(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person

or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties, who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) TEMPORARY DETENTION TO PERMIT REVOCATION OF CONDITIONAL RELEASE, DEPORTATION, OR EXCLUSION.—If the judicial officer determines that—

(1) such person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) DETENTION.—(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—

(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(B) an offense under section 924(c), 956(a), or 2332b of this title;

(C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;

(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

(f) DETENTION HEARING.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—

(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion in a case that involves—

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a

determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

(g) FACTORS TO BE CONSIDERED.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) CONTENTS OF RELEASE ORDER.—In a release order issued under subsection (b) or (c) of this section, the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) CONTENTS OF DETENTION ORDER.—In a detention order issued under subsection (e) of this section, the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) PRESUMPTION OF INNOCENCE.—Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

(Added Pub. L. 98-473, title II, §203(a), Oct. 12, 1984, 98 Stat. 1976; amended Pub. L. 99-646, §§55(a), (c), 72, Nov. 10, 1986, 100 Stat. 3607, 3617; Pub. L. 100-690, title VII, §7073, Nov. 18, 1988, 102 Stat. 4405; Pub. L. 101-647, title X, §1001(b), title XXXVI, §§3622-3624, Nov. 29, 1990, 104 Stat. 4827, 4965; Pub. L. 104-132, title VII, §§702(d), 729, Apr. 24, 1996, 110 Stat. 1294, 1302; Pub. L. 108-21, title II, §203, Apr. 30, 2003, 117 Stat. 660; Pub. L. 108-458, title VI, §6952, Dec. 17, 2004, 118 Stat. 3773; Pub. L. 109-162, title X, §1004(b), Jan. 5, 2006, 119 Stat. 3085; Pub. L. 109-248, title II, §216, July 27, 2006, 120 Stat. 617; Pub. L. 109-304, §17(d)(7), Oct. 6, 2006, 120 Stat. 1707; Pub. L. 110-457, title II, §§222(a), 224(a), Dec. 23, 2008, 122 Stat. 5067, 5072.)

REFERENCES IN TEXT

The Controlled Substances Act, referred to in subsecs. (e) and (f)(1)(C), is title II of Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (§801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

The Controlled Substances Import and Export Act, referred to in subsecs. (e) and (f)(1)(C), is title III of Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1285, as amended, which is classified principally to subchapter II (§951 et seq.) of chapter 13 of Title 21. For complete classification of this Act to the Code, see Short Title note set out under section 951 of Title 21 and Tables.

PRIOR PROVISIONS

A prior section 3142, acts June 25, 1948, ch. 645, 62 Stat. 831; June 22, 1966, Pub. L. 89-465, §5(c), 80 Stat. 217,

set forth provisions relating to surrender by bail, prior to repeal in the revision of this chapter by section 203(a) of Pub. L. 98-473.

AMENDMENTS

2008—Subsec. (e). Pub. L. 110-457, §222(a)(1)-(4), designated first through third sentences as pars. (1) to (3), respectively, and redesignated former pars. (1) to (3) as subpars. (A) to (C), respectively, of par. (2).

Subsec. (e)(2)(B), (C). Pub. L. 110-457, §222(a)(5), substituted "subparagraph (A)" for "paragraph (1) of this subsection".

Subsec. (e)(3). Pub. L. 110-457, §222(a)(6), substituted "committed—" for "committed", "46," for "46.", "title;" for "title, or", and "10 years or more is prescribed;" for "10 years or more is prescribed or", inserted subpar. (A), (B), (C), and (E) designations, and added subpar. (D).

Subsecs. (f)(1)(A), (g)(1). Pub. L. 110-457, §224(a), substituted "violence, a violation of section 1591," for "violence,".

2006—Subsecs. (b), (c)(1)(A). Pub. L. 109-162 inserted "and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a)" after "period of release".

Subsec. (c)(1)(B). Pub. L. 109-248, §216(1), inserted concluding provisions.

Subsecs. (e), (f)(1)(C). Pub. L. 109-304 substituted "chapter 705 of title 46" for "the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)".

Subsec. (f)(1)(E). Pub. L. 109-248, §216(2), added subpar. (E).

Subsec. (g)(1). Pub. L. 109-248, §216(3), added par. (1) and struck out former par. (1) which read as follows: "the nature and circumstances of the offense charged, including whether the offense is a crime of violence, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed or involves a narcotic drug;".

2004—Subsec. (e). Pub. L. 108-458, §6952(1), in concluding provisions, inserted "or" before "the Maritime" and "or an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed" after "or 2332b of this title.".

Subsecs. (f)(1)(A), (g)(1). Pub. L. 108-458, §6952(2), inserted ", or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed" after "violence".

2003—Subsec. (e). Pub. L. 108-21, in concluding provisions, substituted "1901 et seq.)," for "1901 et seq.), or" and "of this title, or an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title" for "of title 18 of the United States Code".

1996—Subsec. (e). Pub. L. 104-132, §702(d), inserted ", 956(a), or 2332b" after "section 924(c)" in concluding provisions.

Subsec. (f). Pub. L. 104-132, §729, in concluding provisions, inserted "(not including any intermediate Saturday, Sunday, or legal holiday)" after "five days" and after "three days".

1990—Subsec. (c)(1)(B)(xi). Pub. L. 101-647, §3622, amended cl. (xi) generally. Prior to amendment, cl. (xi) read as follows: "execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;".

Subsec. (c)(1)(B)(xii). Pub. L. 101-647, §3623, amended cl. (xii) generally. Prior to amendment, cl. (xii) read as follows: "execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;".

Subsecs. (e), (f)(1)(C). Pub. L. 101-647, §1001(b), substituted "the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)" for "section 1 of the Act of September 15, 1980 (21 U.S.C. 955a)".

Subsec. (g)(4). Pub. L. 101-647, §3624, substituted "subsection (c)(1)(B)(xi) or (c)(1)(B)(xii)" for "subsection (c)(2)(K) or (c)(2)(L)".

1988—Subsec. (c)(3). Pub. L. 100-690 substituted "the order" for "order".

1986—Subsec. (a). Pub. L. 99-646, §55(a), (c)(1), in par. (1) struck out "his" after "released on" and substituted "under subsection (b) of this section" for "pursuant to the provisions of subsection (b)", in par. (2) substituted "under subsection (c) of this section" for "pursuant to the provisions of subsection (a)", in par. (3) substituted "under subsection (d) of this section" for "pursuant to provisions of subsection (d)", and in par. (4) substituted "under subsection (e) of this section" for "pursuant to provisions of subsection (e)".

Subsec. (b). Pub. L. 99-646, §55(c)(2), struck out "his" after "person on" and "period of".

Subsec. (c). Pub. L. 99-646, §55(c)(3), designated existing provision as par. (1) and redesignated former pars. (1) and (2) as subpars. (A) and (B), in provision preceding subpar. (A) substituted "subsection (b) of this section" for "subsection (b)" and "such judicial officer" for "he", in subpar. (B) redesignated subpars. (A) to (N) as cls. (i) to (xiv), in provision preceding cl. (i) substituted "such judicial officer" for "he", in cl. (i) substituted "assume supervision" for "supervise him", in cl. (iv) substituted "on personal" for "on his personal", in cl. (x) substituted "medical, psychological," for "medical", designated provision relating to the judicial officer not imposing a financial condition that results in the pretrial detention of a person as par. (2), and designated provision permitting the judicial officer to impose at any time additional or different conditions of release as par. (3), and in par. (3) struck out "his" after "amend".

Subsec. (d). Pub. L. 99-646, §55(c)(4), in pars. (1) and (2) substituted "such person" for "the person" and in concluding provisions substituted "such person" for "the person" in four places, "such judicial officer" for "he", "paragraph (1)(E) of this subsection" for "paragraph (1)(B)", and "such person's United States citizenship or lawful admission" for "that he is a citizen of the United States or is lawfully admitted".

Subsec. (e). Pub. L. 99-646, §55(c)(5), in introductory provisions inserted "of this section" after "subsection (f)" and substituted "such judicial officer" for "he", "before" for "prior to", "described in subsection (f)(1) of this section" for "described in (f)(1)", and "if such judicial officer" for "if the judge", in par. (1) inserted "of this section" after "subsection (f)(1)" in two places, and in pars. (2) and (3) inserted "of this section" after "paragraph (1)".

Subsec. (f). Pub. L. 99-646, §72, in par. (1)(D) substituted "any felony if the person has been convicted of two or more offenses" for "any felony committed after the person had been convicted of two or more prior offenses" and inserted ", or a combination of such offenses", in par. (2)(A) inserted "or" after "flee;", and in concluding provisions, inserted provision permitting the hearing to be reopened at any time before trial if the judicial officer finds that information exists that was unknown to the movant at the time of the hearing and that has a material bearing on whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

Pub. L. 99-646, §55(c)(6), substituted "such person" for "the person" wherever appearing, in introductory provision inserted "of this section" after "subsection (c)" and struck out "in a case" after "community", in par. (1) inserted "in a case" and in subpar. (D) of par. (1) inserted "of this paragraph" in two places, in par. (2) substituted "upon" for "Upon" and inserted "in a case", and in concluding provisions, substituted "sua sponte" for "on his own motion", "whether such person is an addict" for "whether he is an addict", and "finan-

cially" for "he is financially", and struck out "for him" after "appointed" and "on his own behalf" after "witnesses".

Subsec. (g). Pub. L. 99-646, §55(c)(7), in par. (3)(A) substituted "the person's" for "his", in par. (3)(B) substituted "the person" for "be", and in par. (4) inserted "of this section".

Subsec. (h). Pub. L. 99-646, §55(a), (c)(8), in introductory provision substituted "under" for "pursuant to the provisions of" and inserted "of this section" and in par. (2)(C) struck out "the provisions of" before "sections 1503".

Subsec. (i). Pub. L. 99-646, §55(a), (c)(9), in introductory provision substituted "under" for "pursuant to the provisions of" and inserted "of this section" and in par. (3) struck out "his" after "consultation with".

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by sections 2532 to 2534 of Pub. L. 101-647 effective 180 days after Nov. 29, 1990, see section 2531 of Pub. L. 101-647, set out as an Effective Date note under section 2001 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-646 effective 90 days after Nov. 10, 1986, see section 55(j) of Pub. L. 99-646, set out as a note under section 3141 of this title.

ABOLITION OF IMMIGRATION AND NATURALIZATION SERVICE AND TRANSFER OF FUNCTIONS

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under section 1551 of Title 8, Aliens and Nationality.

§ 3143. Release or detention of a defendant pending sentence or appeal

(a) RELEASE OR DETENTION PENDING SENTENCE.—(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—

(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

(ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

(b) RELEASE OR DETENTION PENDING APPEAL BY THE DEFENDANT.—(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

(c) RELEASE OR DETENTION PENDING APPEAL BY THE GOVERNMENT.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States under section 3731 of this title, in accordance with section 3142 of this title, unless the defendant is otherwise subject to a release or detention order. Except as provided in subsection (b) of this section, the judicial officer, in a case in which an appeal has been taken by the United States under section 3742, shall—

(1) if the person has been sentenced to a term of imprisonment, order that person detained; and

(2) in any other circumstance, release or detain the person under section 3142.

(Added Pub. L. 98-473, title II, §203(a), Oct. 12, 1984, 98 Stat. 1981; amended Pub. L. 98-473, title II, §225(f), Oct. 12, 1984, 98 Stat. 2038; Pub. L. 99-646, §§51(a), (b), 55(a), (d), Nov. 10, 1986, 100 Stat. 3605-3607, 3609; Pub. L. 100-690, title VII, §7091, Nov. 18, 1988, 102 Stat. 4410; Pub. L. 101-647, title IX, §902(a), (b), title X, §1001(a), Nov. 29, 1990, 104 Stat. 4826, 4827; Pub. L. 102-572, title VII, §703, Oct. 29, 1992, 106 Stat. 4515.)

PRIOR PROVISIONS

A prior section 3143, acts June 25, 1948, ch. 645, 62 Stat. 821; June 23, 1966, Pub. L. 89-465, §5(d), 80 Stat. 217, related to additional bail prior to repeal in the revision of this chapter by section 203(a) of Pub. L. 98-473.

AMENDMENTS

1992—Subsec. (b)(1). Pub. L. 102-572 substituted "subparagraph (B)(iv) of this paragraph" for "paragraph (b)(2)(D)".

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,)
)
V.) Criminal No.: [redacted]
)
[redacted])

MOTION FOR DISCOVERY

Comes now the defendant, [redacted], by counsel, pursuant to Federal Rules of Criminal Procedure 16 and 26.2, the Federal Rules of Evidence, and the United States Constitution and requests the following:

1. Copies of all statements, written or recorded, of the defendant in the possession, custody or control of the government.

2. The substance of any oral statement(s) made by this defendant.

3. Any and all police or law enforcement reports containing statements of witnesses

4. Any and all statements by witnesses concerning the offenses alleged in the indictment including but not limited to the grand jury testimony of witnesses and witness statements required to be disclosed under Fed. R. Crim. Pro. 26.2 and the Jenck's Act.

5. The original notes of the law enforcement officials or their agents pertaining to the offense alleged in the indictment.

6. The names and addresses of all witnesses to the offenses alleged in the indictment.

7. Any and all reports of scientific tests or experiments which are material to the preparation of the defense or are intended for use by the government as evidence.

8. All photographs, videotapes, audiotapes, papers, documents, tangible objects or other items encompassed by Fed. R. Crim. Procedure 16(c) which are material to the preparation of a defense or intended for use by the government as evidence.

9. A copy of defendant's criminal record, if any.

10. The name and address of any informer(s) who may have provided evidence or information relevant to this case.

11. All evidence which the government may introduce pursuant to Federal Rule of Evidence 404(b).

12. Any and all other evidence now in your possession, control or custody or which may come into your possession, control or custody, which is favorable to the defendant or which is relevant to the guilt or punishment of the defendant, including, but not limited to:

(a) A copy of any written agreement, promise or other document showing any agreement, understanding, or other arrangement between any informant(s) or other witnesses involved in this case and the United States, the Commonwealth of Virginia, or any law enforcement authority.

(b) A copy of the criminal record, if any, of any informant(s) or other witnesses involved in this case.

(c) The substance of any oral agreement, promise or other arrangement between any informant(s) or witnesses involved in this case and the United States, the Commonwealth of Virginia, or any law enforcement authority.

(d) The style, jurisdiction and outcome of any case in which any informant(s) or other witnesses involved in this case has testified.

(e) The Federal and State income tax returns of any paid informant(s) or other paid witnesses involved in this case.

(f) All records showing payments of any amount to any informant(s) or other witnesses involved in this case made by the United States, the Commonwealth of Virginia, or any other law enforcement authority.

(g) All evidence of an exculpatory nature, as defined in Brady v. Maryland, 373 U.S. 83 (1973) and those cases interpreting that opinion.

(h) A written summary of testimony the government intends to use under Rules 702, 703, or 705 including the witness's opinions, the bases and reasons therefore, and the witness's qualifications.

13. All evidence subject to discovery upon request by the defendant pursuant to the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the United States Constitution.

Respectfully submitted,

[redacted]

By: s/Larry W. Shelton
Of Counsel

Larry W. Shelton, VSB# 15205
Federal Public Defender's Office
210 First Street, Suite 400
Roanoke, Virginia 24011
PHONE: (540) 777-0880
FAX: (540) 777-0890

Counsel for Defendant
[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September 2015, I served the foregoing Motion for Discovery upon Andrew Bassford Esquire, Assistant United States Attorney, United States Attorney's Office, Post Office Box 1709, Roanoke, Virginia 24008-1709 by electronic notification through the CM/ECF system and to Julia Dudley, Clerk, United States District Court, 210 Franklin Road, S.W. Roanoke, Virginia 24011 through CM/ECF.

By: s/Larry W. Shelton

APPENDIX C

**IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

UNITED STATES OF AMERICA)
)
v.) Criminal No
)
)
)

JOINT DISCOVERY AND INSPECTION ORDER

THIS DAY came the United States of America, by its Attorney, and the Defendant, by counsel, and moved the Court for entry of an Order governing the provisions of discovery by the respective parties in this case, pursuant to Rules 16 and 12.1, 12.2, 12.3 and 6(e) of the Federal Rules of Criminal Procedure. Whereupon, the Attorney for the United States and counsel for the Defendant moved the Court to approve and order the following schedule of discovery and inspection in this case, which said Motion the Court granted; it is therefore

ADJUDGED and **ORDERED** that the United States of America permit the defendant to inspect, copy and/or photograph:

(1) any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. If the defendant is a corporation, partnership, association or labor union, the

court grants the defendant discovery of relevant recorded testimony of any witness before a grand jury who (a) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (b) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(2) Such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(3) Books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(4) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(5) Written summary of testimony that the government intends to use under Rules 702,

703 or 705 of the Federal Rules of Evidence during its case-in-chief, as required by Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure.

(6) Any statements of a witness that is in the possession of the government and which relates to the subject matter of the witness's testimony, pursuant to F.R.Cr.P. 26.2(a) and Title 18, United States Code, Section 3500.

IT IS FURTHER ORDERED that the United States provide to the Defendant any evidence of an exculpatory nature, as defined in Brady v. Maryland, 373 U.S. 83 (1973), and those cases interpreting that opinion.

In the absence of good cause shown, the United States must notify the defendant of its intent to present 404(b) evidence (prior bad acts) at least 7 days before trial.

IT IS FURTHER ORDERED that the defendant permit the attorney for the United States to inspect, copy and/or photograph:

(1) any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(2) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, or control of the defendant, and which the defendant intends to introduce as evidence in chief at the trial or which was prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(3) Written summary of testimony that the defendant intends to use under Rules 702, 703 or 705 of the Federal Rules of Evidence during its case-in-chief, as required by Rule 16(b)(1)(C)

of the Federal Rules of Criminal Procedure.

(4) Any statements of a witness that is in the possession of the defendant and which relates to the subject matter of the witness's testimony, pursuant to F.R.Cr.P. 26.2(a).

IT IS FURTHER ORDERED that the accused disclose whether he intends to introduce evidence to establish an alibi, and if so, that within the time limits set forth in F.R.Cr.P 12.1(a), the defendant state the specific place or places at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. If the defendant makes disclosure under this paragraph, then the government must make disclosure of its witnesses under F.R.Cr.P. 12(b).

IT IS FURTHER ORDERED, pursuant to F.R.Crim.P. 12.2, that, if the defendant intends to rely upon a defense of insanity or to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall notify the government in writing of such intention and file a copy of such notice with the clerk.

IT IS FURTHER ORDERED, pursuant to F.R.Crim.P. 12.3, that, if the defendant intends to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement of Federal intelligence agency at the time of the alleged offense, the defendant shall serve upon the attorney for the Government a written notice of such intention, and that the parties otherwise comply with F.R.Crim.P. 12.3.

IT IS FURTHER ORDERED that the parties provide the above-ordered discovery and inspection not later than 14 days before trial at the office of the United States Attorney.

IT IS FURTHER ORDERED, pursuant to Federal Rules of Criminal Procedure 6(e),

16, and 26.2, 26 U.S.C. §§ 6103(h)(4)(D) and (i)(4)(A), and the authority of this Court to administer its proceedings, and on motion of the United States, it is ORDERED that the United States is permitted to disclose to counsel for the defense as part of voluntary discovery, grand jury transcripts, tax information, and other investigative materials.

IT IS FURTHER ORDERED that the United States may use this material for the prosecution of the case and may make such further disclosures as may be necessary for, and for the sole purpose of, prosecuting this case.

IT IS FURTHER ORDERED that counsel for the defense and the individual defendant(s) may use this material solely for the defense of the case, may not photocopy any materials designated in writing by the United States except as needed for defense of the case (any photocopy is governed by this order as if it was an original), may not remove any materials designated in writing by the United States from the office of defense counsel unless kept in the personal possession of defense counsel at all times, may not disclose any materials designated in writing by the United States to any person other than counsel and staff directly assisting in the defense of the instant case, and may not disclose or discuss any materials designated in writing by the United States with any person except in the presence of defense counsel and as necessary to the preparation of the defense, or as permitted by further order of the court. Unauthorized disclosure of grand jury, tax return, or investigative materials is a violation of federal law and violation of this Order may be deemed a contempt of court pursuant to 18 U.S.C. § 401.

If the defendant does not wish to receive the above described materials, it is ordered and directed:

(1) that the Court and the United States Attorney's office be so advised in writing upon

receipt of this order; and

(2) that the defendant and/or defendant's counsel not examine or read any materials covered by this order.

IT IS FURTHER ORDERED that if, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under the Rules of Criminal Procedure, such party shall promptly notify the other party, or that other party's attorney, or the court of the existence of the additional evidence or material.

IT IS FURTHER ORDERED that the Clerk of this Court shall certify copies of this order to each attorney who becomes counsel in this case at anytime and to any party acting pro se. However, if an Indictment in this case is under seal, the Clerk should delay sending a copy of this Order to defense counsel until the unsealing of the Indictment.

ENTERED this 20th day of October, 2015.

/s/ Michael J. Watanabe

UNITED STATES DISTRICT JUDGE

SEEN AND AGREED:

R. ANDREW BASSFORD
Assistant United States Attorney
Bar No. 42584

LARRY W. SHELTON
Counsel for Defendant

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Docket No. XXXXX
XXXXX (*Defendant*)	)	
	)	

DEFENDANT'S SENTENCING MEMORANDUM

ALTHOUGH APPLICATION OF THE CAREER OFFENDER ADVISORY GUIDELINES MAY BE PROCEDURALLY REASONABLE IN THE INSTANT CASE, IT WOULD BE SUBSTANTIVELY UNREASONABLE, BECAUSE DOING SO WOULD NOT SERVE THE OBJECTIVES OF 18 U.S.C. §3553(a).

Defendant is before the court for sentencing following his plea of guilty to distribution of a measurable quantity of methamphetamine. He faces a recommended range of imprisonment for 151 to 188 months under the sentencing guidelines because he is a "career offender." That designation stems from *defendant's* convictions in State court for which he served a grand total of six months and one day in jail. Without application of the career offender enhancements, *defendant* faces a guidelines range of 70 to 87 months. We submit this memorandum in support of our argument that a sentence within this 70 to 87 month range is the appropriate sentence for Mr. *XXXX*. We begin with a discussion of why a broad application of the career offender guidelines to every case where those guidelines may technically apply is contrary to the objectives of sentencing set forth in 18 U.S.C. Section § 3553(a) and end with a discussion of Mr. *XXXX*'s situation.

I. CAREER OFFENDER GUIDELINE IS MERELY ADVISORY AND SHOULD NOT TRUMP §3553(a) FACTORS

Sentences recommended by the career offender guideline are among the most severe and least likely to promote sentencing purposes in the United States Sentencing Guidelines Manual. *See* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 133-34 (2004).[1] One problem is that the guideline range is keyed to the statutory maximum, the result of a congressional directive to the United States Sentencing Commission. Another problem, created by the Commission itself, is that the class of career offenders is defined much more broadly than the statute requires. Neither the severity of the guideline nor its breadth is the product of careful study, empirical research, or national experience.

On January 12, 2005, in *Booker v. United States*, 543 U.S. 220 (2005), the Supreme Court rendered the guidelines advisory. Judges are now invited to consider arguments that a guideline itself fails properly to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita v. United States*, 551 U.S. 338, 351, 357 (2007). Judges "may vary [from guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines" *Kimbrough v. United States*, 552 U.S. 85, 101, 109 (2007) (internal quotation marks omitted), particularly when the Commission did not act in "the exercise of its characteristic institutional role," i.e., did not base a guideline on "empirical data and national experience." *Id.*

[1] This report is available at http://www.ussc.gov/15_year/15year.htm [hereinafter Fifteen Year Review].

at 109. The courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge." *Rita*, 551 U.S. at 347. Judges have embraced this invitation with respect to a number of guidelines, including the career offender guideline, with approval from the courts of appeals.[2]

Writing for the Court in *Rita*, Justice Breyer said that it may be "fair to assume" that the guidelines "reflect a rough approximation" of sentences that "might achieve § 3553(a)'s objectives," because the original Commission based the guidelines on an empirical study of average time served before the guidelines, and because the guidelines can evolve in response to sentencing data, feedback from judges, practitioners and experts, and penological research. *Rita*, 551 U.S. at 348-50. The career offender guideline was not developed in that manner. It was initially based on a congressional directive requiring the Commission to set guideline ranges at or near the statutory maximum for certain specifically described repeat violent and repeat drug offenders. The Commission then significantly deviated from the directive, applying the severe

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[2] *See United States v. Corner*, 598 F.3d 411 (7th Cir. 2010); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009); *United States v. McLean*, 331 Fed. Appx. 151 (3d Cir. 2009); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); cf. *United States v. Friedman*, 554 F.3d 1301, 1311-12 & n.13 (10th Cir. 2009) (recognizing court's authority to disagree with career offender guideline but concluding that district court's sentence was not based on that disagreement). These courts have recognized that the courts may disagree with the career offender guideline, although it is based in part on a congressional directive, because that directive is to the Commission, not to the courts. Id. However, a panel of the Eleventh Circuit held that courts may not disagree with the career offender guideline because it is based on a directive to the Commission. See *United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009). Vazquez filed a petition for certiorari, and the Solicitor General confessed error. The Supreme Court granted certiorari, vacated the judgment, and remanded to the Eleventh Circuit for consideration in light of the Solicitor General's position. *Vazquez v. United States*, 130 S. Ct. 1135 (2010). As of this writing, the Eleventh Circuit has not issued a new opinion after remand.

punishments directed by Congress to offenders not described by Congress, without stated reasons or careful study, and contrary to feedback from the courts and its own empirical research.

II. DEVELOPMENT OF THE CAREER OFFENDER GUIDELINE

The career offender guideline contains a table with seven offense levels corresponding to seven statutory maxima ranging from more than one year to life, and it automatically places the defendant in criminal history category VI, the highest in the Sentencing Table, regardless of whether the actual criminal history score is lower. *See* U.S. Sentencing Guidelines Manual § 4B1.1(b); Ch. 5, Pt. A. For nearly all defendants sentenced under the guideline, the statutory maximum is 20 years or more.[3] Thus, for most defendants, the guideline range is 210-262 months, 262-327 months, or 360 months to life.

The Commission did not use average time served in the pre-guidelines era as the starting point for the career offender guideline because it was directed by 28 U.S.C. § 994(h) to set guideline ranges at or near the maximum term authorized for those offenders with an instant offense and prior convictions described in the statute. Thus, according to the Commission, "much larger increases are provided for certain repeat offenders" under § 4B1.1 than under pre-guideline practice, "consistent with legislative direction."[4] According to the Supreme Court, the

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[3] Seventy-five percent of career offenders are convicted of drug trafficking, 11% are convicted of firearms offenses, and 7% are convicted of robbery. See U.S. Sentencing Commission, 2009 Sourcebook of Federal Sentencing Statistics, Table 22. The statutory maxima for these offenses are 20 years or more.

[4] See U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987), available at http://www.fd.org/pdf lib/Supplementary %20 Report.pdf.

Commission's "empirical approach" of basing guidelines on actual time served before the guidelines is an important reason that it may be "fair to assume" that a guideline "reflect[s] a rough approximation" of sentences that "might achieve § 3553(a)'s objectives."[5] Just as the Commission did not use an empirical approach in developing the drug guidelines, instead keying offense levels to statutory minimum sentences,[6] the Commission did not use an empirical approach in developing the career offender guideline, instead keying offense levels to statutory maximum sentences. Thus, the guideline cannot be assumed to be a "rough approximation" of § 3553(a)'s objectives.

Nor did the Commission follow the plain terms of the statutory directive. It expanded the class of "career offenders" subject to the guideline beyond that required by 28 U.S.C. § 994(h). It included numerous drug offenses not listed in the statute and adopted a broader definition of "crime of violence" than Congress intended. And, although it appears that Congress intended the word "felony" to mean an offense classified as a "felony" by the convicting jurisdiction, the Commission defined "felony" to include state misdemeanors if subject to a statutory maximum of more than one year under state law. No empirical data was cited and no reason was given for these deviations from the statutory terms. Most of the expansions were adopted within the first few years after the guidelines went into effect in 1987. Yet, for the first eight years, the

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[5] *Rita*, 551 U.S. at 350

[6] *See Gall v. United States*, 552 U.S. 38,46 (2007) ("Notably, not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes."); Kimbrough, 552 U.S. at 96 ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme.").

Commission stated as the sole authority for the guideline that "28 U.S.C. § 994(h) mandates that the Commission assure certain 'career' offenders, *as defined in the statute*, receive a sentence of imprisonment 'at or near the maximum term authorized.' *Section 4B1.1 implements this mandate.*" See U.S. Sentencing Guidelines Manual §4B1.1, comment (backg'd). (1987) (emphasis added).

In the early 1990s, some courts of appeals began to invalidate career offender sentences because the Commission had exceeded the plain statutory language of 28 U.S.C. § 994(h),[7] while other courts of appeals held that the Commission had acted pursuant to its broader guideline amendment authority.[8] The Commission then issued an amendment acknowledging that it "ha[d] modified the statutory definitions in various respects," but stating that it had acted pursuant to "its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p)," and claiming that in doing so, it had "focus[ed] more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and . . . avoid[ed] 'unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct,' 28 U.S.C. § 994(b)(1)(B)."[9]

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[7] *See United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993); *United States v. Bellazerius*, 24 F.3d 698 (5th Cir. 1994); *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994), reversed, 65 F.3d 691 (8th Cir. 1995) (en banc).

[8] *United States v. Parson*, 955 F.2d 858, 867 (3d Cir. 1992); *United States v. Heim*, 15 F.3d 830, 832 (9th Cir. 1994); *United States v. Allen*, 24 F.3d 1180, 1187 (10th Cir. 1994); *United States v. Hightower*, 25 F.3d 182, 185 (3d Cir. 1994); *United States v. Damerville*, 27 F.3d 254, 257 n.4 (7th Cir. 1994); *United States v. Piper*, 35 F.3d 611, 618 (1st Cir. 1994); *United States v. Kennedy*, 32 F.3d 876, 889 (4th Cir. 1994).

[9] *See* 58 Fed. Reg. 67522, 67532 (Dec. 21, 1993); U.S. Sentencing Guidelines Manual App. C, Amend. 528 (1995); U.S. Sentencing Guidelines Manual § 4B1.1, cmt. (2009).

None of the expansions of the class of "career offenders," before or after the Commission's *post hoc* justification, were explained with empirical evidence or any reason, and the Commission ignored explicit requests for reform from the courts and the sentencing data. The Commission's own empirical research shows that the guideline, particularly as applied to drug offenders, who comprise the vast majority of career offenders, is more severe than necessary to achieve the purposes of sentencing and creates unwarranted disparity, including racial disparity, as well as unwarranted uniformity.[10] The guideline does not in fact "focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate," or "avoid 'unwarranted sentencing disparities.'"

III. EXPANSION OF THE CAREER OFFENDER GUIDELINE CONTRARY TO THE PLAIN LANGUAGE OF §994(h).

The career offender guideline exceeds the express terms of § 994(h) by including as prior convictions drug offenses not listed in the statute, a definition of "crime of violence" broader than the definition intended by Congress, and offenses that are not "felonies" as defined by Congress. The only reason the Commission has given for these expansions is the blanket *post hoc* justification inserted in the commentary in 1995 in response to court decisions holding that it had exceeded its statutory authority. *See* U.S. Sentencing Guidelines Manual § 4B1.1, comment. (backg'd) U.S. Sentencing Guidelines Manual, App. C, Amend. 528 (Nov. 1, 1995).

Reasons are important. First, they tell judges, lawyers, defendants, and the public whether the Commission has followed sound practices to reach sound sentencing recommendations. Second,

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[10] *See Fifteen Year Review, supra.*

the Commission is required to provide reasons for guideline amendments to Congress, 28 U.S.C. § 994(p), and is required to systematically disseminate to the public information regarding sentences imposed under the guidelines and their effectiveness in meeting the purposes of sentencing.[11] Third, under the advisory guideline system, a sentence within the guideline range does not necessarily require lengthy explanation, but *only* if it is "clear that the judge rests his decision upon the *Commission's own reasoning* that the Guidelines sentence is a proper sentence (in terms of § 3353(a) and other congressional mandates) in the typical case."[12] A more lengthy explanation is required if the court rejects or accepts a party's argument "contest[ing] the Guidelines sentence generally under § 3553(a)" as "an unsound judgment" or because the guidelines "do not generally treat certain defendant characteristics in the proper way."[13] If the Commission gives no reason or an inadequate reason, the judge has no reason to follow the guideline. Fourth, if the Commission tried to explain its guidelines, it would have to find that same are in need of revision. For example, if the Commission were to explain the career offender guideline, it would have to confront the fact that its own empirical evaluation, not conducted until 2004, found that the guideline recommends punishment that is excessive in most cases in which it applies.

A. Drug Trafficking Offenses

Congress directed the Commission to specify a term of imprisonment at or near the

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[11] *See* 28 U.S.C. § 995(a)(15), (16) (requiring systematic collection and reporting of information regarding sentences imposed under the guidelines, their relationship to sentencing purposes, and their effectiveness in meeting sentencing purposes).

[12] *Rita*, 551 U.S. at 357 (emphasis added).

[13] *Id.*

maximum for a defendant convicted of a "felony" that "is an offense *described* in" 21 U.S.C. §§ 841, 952(a), 955, 959, and 46 U.S.C. § 70503, and has two or more prior "felonies," each of which is one of these enumerated federal offenses or a "crime of violence." *See* 28 U.S.C. § 994(h)(1)(B), (2)(B) (emphasis added). An early version of the career offender guideline published for comment stated that "[t]he controlled substance offenses covered by this provision are identified in 21 U.S.C. § 841; 21 U.S.C. §§ 952(a), 955, 955a [later codified at 46 U.S.C. § 70503], 959; and in §§ 405B and 416 of the Controlled Substance Act as amended in 1986." *See* 52 Fed. Reg. 3920 (Feb. 6, 1987). This version was discarded without explanation. Beginning with the first official set of guidelines, the Commission added numerous state and federal drug offenses to those listed in § 994(h), all without explanation.

Congress had in mind "repeat drug traffickers."[14] Its view at the time was that drug trafficking was "extremely lucrative," that it was "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."[15]

A typical repeat drug trafficker prosecuted in federal court today does not fit this description. He or she sells small quantities on a street corner, or acts as a courier for big dealers who seldom get caught.[16] The typical repeat offender is poor and often an addict, selling or

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[14] S. Rep. No. 98-225, at 175 (1983)

[15] *Id.* at 20, 256.

[16] The largest proportion of powder offenders is couriers and mules and the largest proportion of crack offenders is street level dealers. U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* at 20-21, 85 (2007)

carrying drugs to support a habit or simply to live or provide for family.[17] As the Commission has noted, African Americans are more likely to have prior drug convictions than similar white drug dealers because it is easy to detect offenses that take place on the street in impoverished minority neighborhoods.[18] It is not unusual for a confidential informant working with law enforcement to make repeated buys of small amounts, or to encourage a small-time dealer to cook powder cocaine into crack, for the purpose of increasing the punishment under the drug trafficking statutes, the drug guidelines, and the career offender guideline.[19] Thus, while Congress had in mind wealthy big-time dealers with a record of federal drug trafficking offenses, the career offender guideline usually applies to repeat small-time dealers with a record of relatively minor state offenses.

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[17]The Director of the Bureau of Prisons reports that 40% of all federal inmates have a substance use disorder, and 53% of all federal inmates have been convicted of drug trafficking. See Statement of Harley G. Lappin at 2, 7, Director, Federal Bureau of Prisons, Before the Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, U.S. House of Representatives, Mar. 10, 2009, http://appropriations.house.gov/Witness_ testimony/CJS/harley_lappin_03_10_09.pdf (last visited Apr. 25, 2010).

[18]*See* Fifteen Year Review, *supra* note 1, at 134.

[19]*See, e.g., United States v. Fontes*, 415 F.3d 174 (1st Cir. 2005) (noting that at agent's direction, informant rejected two ounces of powder defendant delivered and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [producing an offense level of 28, but a career offender range of 360 months to life]. Had the government decided to purchase powder cocaine (consistent with Williams' prior drug sales), the base criminal offense level would have been only 14," and a career offender range of 210-262 months); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. 2005) (noting that defendant could have been arrested after the first undercover sale, but agent purchased the same amount on three subsequent occasions, doubling the guideline sentence from 87-108 months to 168-210 months).

IV. EMPIRICAL EVIDENCE AND NATIONAL EXPERIENCE

A. Empirical Research by the Commission and Others Regarding the Purposes of Sentencing

1. Incapacitation

When a defendant has a qualifying instant offense and two qualifying priors, the career offender guideline assigns him an offense level that is keyed to the statutory maximum and a Criminal History Category of VI even when he has fewer than 13 criminal history points, the number of points otherwise required to be placed in Criminal History Category VI. *See* U.S. Sentencing Guidelines Manual § 4 B1.1.

In its 2004 Fifteen Year Review, the Commission reported that the overall rate of recidivism for category VI offenders two years after release is 55%, but the recidivism rate for such offenders who are career offenders based on prior drug offenses is only 27%, and thus "more closely resembles the rates for offenders in lower criminal history categories in which they would be placed under the normal criminal history scoring rules."[20] *See* Fifteen Year Review, *supra* note 1, at 134 (emphasis in original). This "makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses." *Id.* (emphasis in original).

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[20] In the year following Booker, the instant offense of 71.8% of defendants sentenced under the career offender guideline was drug trafficking. See United States Sentencing Commission, Final Report on the Impact of United States v. Booker on Federal Sentencing 138 2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf (last visited Apr. 25, 2010) [hereinafter Post-Booker Report]. What kinds of priors they had is not reported.

The recidivism rate of those whose career offender status was based on one or more prior "crimes of violence" was about 52%. Id. However, this does not mean that the recidivating events were violent or otherwise serious. Only 12.5% of the recidivating events for Category VI offenders overall were a "serious violent offense," defined as homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic violence, and weapons offenses, and only 4.1% were drug trafficking.[21] The largest proportion of recidivating events (38.3%) were probation or supervised release revocations,[22] which can be anything from failing a drug test to failing to file a monthly report or to report a change of address.

2. Deterrence

The Commission notes that criminologists had testified 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." *See* Fifteen Year Report, *supra* note 1, at 134.

Current empirical research on general deterrence shows that while certainty of punishment has a deterrent effect, "increases in severity of punishments do *not* yield significant (if any) marginal deterrent effects. . . . Three National Academy of Science panels reached that conclusion, as has every major survey of the evidence." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Just. 1, 28-29 (2006). Typical of the findings on general deterrence

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[21] U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 32, Exh. 13 (2004), available at http:// www.ussc.gov/ publicat/Recidivism_General.pdf (last visited Apr. 25, 2010) [hereinafter Measuring Recidivism].

[22] *Id.*

are those of the Institute of Criminology at Cambridge University. See Andrew von Hirsch, et al, Criminal Deterrence and Sentence Severity: *An Analysis of Recent Research* (1999).[23] The report, commissioned by the British Home Office, examined penalties in the United States as well as several European countries. It examined the effects of changes to both the certainty and the severity of punishment. While significant correlations were found between the certainty of punishment and crime rates, the "correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance." The report concludes that "the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects."

Particularly relevant to the career offender guideline, there are additional reasons that severity does not deter violent or drug crime. "[S]erious sexual and violent crimes are generally committed under circumstances of extreme emotion, often exacerbated by the influence of alcohol or drugs." Tonry, Purposes and Functions of Sentencing, supra. Drug crimes are "uniquely insensitive to the deterrent effects of sanctions," because "[m]arket niches created by the arrest of dealers are . . . often filled within hours." See Michael Tonry, The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings, 38 Crime and Just. 65, 102 (2009).

3. **Unwarranted Disparity, Including Racial Disparity; Unwarranted Uniformity**

The Commission reports that sentences in the guidelines era "have a greater adverse impact on black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation," and that one of the reasons is

[23] summary of these findings is available at http://members.lycos.co.uk/lawnet/SENTENCE.PDF

the "increasingly severe treatment of . . . repeat offenders" under the career offender guideline. Fifteen Year Review, supra note 1, at 135. In fiscal year 2000, black offenders were 26% of offenders sentenced under the guidelines generally, but 58% of offenders sentenced under the career offender guideline. *Id.* at 133. "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." *Id.* The Commission suggested that African Americans are more often "subject to the severe penalties required by the career offender guideline" than similar white offenders because of "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." *Id.* at 133-34.

The Commission's report indicates that the career offender guideline, especially as it applies to repeat drug offenders, does not "clearly promote an important purpose of sentencing," because the recidivism rates of such offenders more closely resemble the rates for offenders in the lower criminal history categories in which they would be under the normal criminal history scoring rules, and because incapacitating low-level drug sellers fails to prevent drug crime. *Id.* at 134. While this is true regardless of the race of any particular repeat drug offender, it is especially problematic because the guideline has "unwarranted adverse impacts on minority groups." *Id.*

Another form of unwarranted disparity is unwarranted uniformity, i.e., sentencing unlike offenders the same. A 1988 Commission study notes that the career offender guideline makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions . . . even if one defendant was a drug 'kingpin' with serious prior offenses, while the other defendant was a low-level street dealer [with] two

prior convictions for distributing small amounts of drugs.[24]

B. Sentencing Data

The Commission has a duty to systematically collect, study, and disseminate information regarding sentences imposed, its relationship to the purposes of sentencing, and its effectiveness in accomplishing those purposes.[25] Surprisingly, given the Commission's recognition that the career offender guideline produces "some of the most severe penalties imposed under the guidelines,"[26] and its claim that it has modified the statutory definitions to focus more precisely on offenders for whom this severe punishment is appropriate and to avoid unwarranted disparity,[27] the Commission has never published in its Annual Sourcebooks or its Quarterly Updates following the Booker decision the rate or reasons for below-guideline sentences in these cases, the mean or median sentence length, or what the qualifying instant or prior convictions were.

Some data, however, is available. A decade before *Booker*, a commissioner and former commissioner conducted a study of departures, which found "extensive use of [downward] departures from sentences generated by the career offender guideline," and that these were "quite substantial," "typically" to the sentence that would have applied absent the career offender provision. The reasons for departure identified in the article were that the predicates were "minor or too remote in time to warrant consideration." See Michael S. Gelacak, Ilene H. Nagel, and

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[24]U.S. Sentencing Commission, Career Offender Guidelines Working Group Memorandum at 13 (March 25, 1988), http://www.src-project.org/wp-content/uploads/2009/08/ ussc_report_ careeroffender.pdf

[25]*See* 28 U.S.C. § 995(a)(12)-(16)

[26]Fifteen Year Review, *supra* note 1, at 133.

[27]U.S. Sentencing Guidelines Manual § 4B1.2, cmt

Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 356-57 (1996).

The Commission's only account of data on below guideline sentences in career offender cases appears in its March 2006 report on the impact of *Booker* after one year. There, it reported that the rate of below guideline sentences had risen from 10% in the pre-PROTECT Act period and 7.3% in the post-PROTECT Act period to 21.5% in the year after Booker.[28] The median percent decrease rose from 28.2% post-PROTECT Act, to 33.4% for downward departures and 30.5% for variances post-Booker.[29] Three instant offense types comprised 91.9% of all career offender cases (71.8% drug trafficking, 10.9% robbery, 9.2% firearms) and these same types of offenses comprised 94% of below guideline sentences.[30] Three quarters of the below guideline sentences were in drug trafficking cases, and only 40.5% of sentences in such cases were within the guideline range.[31]

C. Judicial Opinions

The Commission gives no account of written opinions in sentencing outside the career offender guideline, and apparently does not examine them in any systematic fashion. Yet, these are a rich source for understanding the guideline's flaws and why a lower sentence is sufficient but not greater than necessary to satisfy sentencing purposes. Now that judges are free to disagree

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[28] *See* Post-Booker Report, *supra* note 104, at 137

[29] *Id.* at 140

[30] *Id.* at 138

[31] *Id.* at 138-39

with the career offender guideline solely on policy grounds,[32] and to fully consider individual characteristics and circumstances as well, judicial opinions can serve as a "common law" for sentencing in this area.

1. **Drug Trafficking Offenses**

Judges often depart or vary when the defendant is a career offender based on prior drug convictions. See, e.g., *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (relying on the Commission's findings that when the priors are drug offenses, the career offender guideline is not justified by increased recidivism or deterrence and creates racial disparity, combined with individual characteristics, to conclude that a higher sentence "would be following a 'statutory directive' for the sake of the directive, i.e., to exalt form over substance."); *United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (cataloguing a variety of failures to satisfy sentencing purposes especially when priors are minor and remote, and noting that punishing "defendants with relatively minor records" is "likely not what Congress had in mind."); *United States v. Serrano*, slip op., 2005 WL 1214314 (S.D.N.Y. May 19, 2005) (imposing a below guideline sentence based on the fact that defendant was an addict, from which his offense stemmed, priors were remote, time previously served was less than one year).

Judge Goodwin's opinion in *United States v. Moreland* 568 F. Supp.2d674 (S.D.W.Va

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[32]*See United States v. Corner*, 598 F.3d 411 (7th Cir. 2010); *United States v. Gray*, 577 F.3d 947, 950 (8th Cir. 2009); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009); *United States v. McLean*, 331 Fed. Appx. 151 (3d Cir. 2009); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Martin*, 520 F.3d 87, 88-96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008); cf. *United States v. Friedman*, 554 F.3d 1301, 1311-12 & n.13 (10th Cir. 2009) (recognizing court's authority to disagree with career offender guideline but concluding that district court's sentence was not based on that disagreement).

2008) is a good example of reasons for a sentence below the guideline range based on a combination of individual characteristics of the defendant (broken home, graduated from high school, took college courses) and circumstances of the offense (small amounts of drugs and no violence or firearms in instant offense or two priors), and policy grounded in purposes of sentencing.

The judge found that (1) the inflexible requirement that any drug offense that meets the broad definition be counted regardless of the amount of drugs, sentence imposed, or length of time passed is unjust; (2) the guideline puts a prior conviction for distribution of one marijuana cigarette on a par with a drug kingpin or a violent offender who uses firearms to commit crimes, i.e., unwarranted similarity; (3) the guideline reaches defendants who are neither the "repeat violent offenders" nor the "repeat drug traffickers" Congress meant to target; (4) distribution of one marijuana cigarette in 1992 and distribution of 6.92 g. crack in 1996 "hardly constitute the type and pattern of offenses that would indicate Mr. Moreland has made a career out of drug trafficking," and the entire amount distributed in defendant's lifetime (14.77 g. crack and a single marijuana cigarette) "would rattle around in a matchbox"; and (5) "disposal" to 30 years in prison would interfere with rehabilitation, where the defendant had an excellent chance of turning his life around.

As to the need to avoid unwarranted disparities, the judge said:

> This factor initially seems to encourage deference to the Guideline range, because the Guidelines were developed to eliminate unwarranted sentencing disparities in federal courts. In practice, however, the focus of the Guidelines has gradually moved beyond elimination of unwarranted sentencing disparities and toward the goal of eliminating all disparities. . . . [T]his outcome is not only impractical but undesirable. The career offender provisions of the Guidelines, as applied to this case, perfectly exhibit the limits of a Guideline-centric approach. Two relatively

> minor and non-violent prior drug offenses, cumulatively penalized by much less than a year in prison, vaulted this defendant into the same category as major drug traffickers engaged in gun crimes or acts of extreme violence. The career offender guideline provision provides no mechanism for evaluating the relative seriousness of the underlying prior convictions. Instead of reducing unwarranted sentencing disparities, such a mechanical approach ends up creating additional disparities because this Guideline instructs courts to substitute an artificial offense level and criminal history in place of each individual defendant's precise characteristics. This substitution ignores the severity and character of the predicate offenses.

As to congressional purposes, the judge said that "for this defendant," ten years in prison and eight years of supervised release "sufficiently captures Congressional policy . . . of imposing harsher sentences on repeat offenders," and "also fulfills Congress' other policy objectives aimed specifically at sentencing courts embodied in 18 U.S.C. § 3553(a), such as the mandate that the court impose a sentence that is sufficient, but not greater than necessary, to promote respect for the law and reflect the seriousness of the offense."

2. Large Disparity Between Prior Sentences and Career Offender Sentence

When the guidelines were still mandatory, the Second Circuit reasoned that a major reason for imposing an especially long sentence upon those who have committed prior offenses is to achieve a deterrent effect that the prior punishments failed to achieve. That reason requires an appropriate relationship between the sentence for the current offense and the sentences, particularl y the times served, for the prior offenses. . . . In some circumstances, a large disparit y in that relationship might indicate that the career offender sentence provides a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance present 'to a degree' not adequately considered b y the Commission. *United States v. Mishoe*, 241 F.3d 214, 220 (2d Cir. 2001). Relying on *Mishoe in Colon*, Judge Sessions noted "the potentially large disparity between past

and present sentences," i.e., "Colon has never been sentenced to a term in the Massachusetts state prison system; he has only served short sentences (between three and six months) in the House of Corrections," while under the career offender enhancement, "the minimum Guidelines sentence would be 188 months," "more than a ten-fold increase over and above the total cumulative time Colon has previously served in his life" and "approximately fourteen years longer than all of Colon's previous sentences combined, including probation violations." Because the "relationship between the current sentence and prior sentences is an important factor in the overrepresentation inquiry," but "the Guidelines limit the extent of horizontal departures, only allowing courts to reduce the criminal history category by one level," "the Court hereby departs vertically to offense level twenty-five, the level mandated by the Guidelines absent the application of the career offender provision," and "also departs horizontally by one level to criminal history category V." *United States v. Colon*, slip op., 2007 WL 4246470 *7 (D. Vt. Nov. 29, 2007); see also *United States v. Moreland*, slip op., 2008 WL 904652 *11 (S.D. W. Va. Apr. 3, 2008) ("Mr. Moreland spent a total of less than six months in jail for his two previous offenses, and a sentence that takes ten years from his young life will certainly promote respect for law," as opposed to the 360-month career offender guideline sentence.

V. SECTION 3553(a) FACTORS

The primary mandate of 18 U.S.C. §3553 (a) is that the District Court shall impose a sentence "sufficient, but not greater than necessary, to compl y with the purposes of punishment set forth in subdivision (a) (2) of the statute. *Id.* (emphasis added). The four purposes identified are: (1) retribution ("to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"); (2) deterrence; (3) incapacitation ("to protect the

public from further crimes of the defendant"); and (4) rehabilitation ("to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"). In determining a sentence that is sufficient, but not greater than necessary, the Court is directed to consider the following factors in addition to the advisory guidelines: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of sentence available; (3) the advisory sentencing guideline range; (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (5) the need to provide restitution. *Id.* The guidelines are only one of the factors to consider, not the controlling factor, and the guidelines do not adequately consider the range of other factors required by the statute.

A. The History and Characteristics of the Defendant

Defendant is a 25 year – old white male, the only child of XXXXX and XXXXX. He was born in Galax, Virginia and enjoyed a healthy childhood filled with sports. *Defendant* was a promising baseball player in high school and won a scholarship to Radford University. He enrolled at Radford in the fall of 2004 but withdrew from school a few weeks later due to home sickness and depression caused by a shoulder injury and his inability to play baseball. Shortly thereafter, his mother, XXXX, became seriously ill with a heart condition. It was then that *defendant* began to experiment with drugs resulting in his ultimate addiction to methamphetamine.

Prior to his withdrawal from college, *defendant* had no record of criminal activity. Between January, 2005 and September, 2008 he was convicted of three driving related offenses for which he received small fines and no jail time and one felony offense: possession with the

intent to distribute marijuana. For this offense, he received one day of confinement and a lenghtly period of probation. On, September 21, 2008, he was charged with unlawful wounding and assault and battery in Carroll County, Virginia. For these offenses, he served a total of 6 months confinement in addition to supervised probation. The instant offense occurred on October 21, 2010, and he has been on pretrial release in state and federal court since his arrest.

In March, 2011, *defendant* and his girlfriend, XXXXX, became the parents of a son, XXXX. *Defendant* currently resides with his girlfriend and son in Carroll County and he works in construction with his girlfriend's father. He is a doting father and has already begun his long march to rehabilitation.

B. The Nature And Circumstances Of The Offense

Pursuant to a plea agreement, *defendant* entered a guilty plea to Count 2 of the indictment, which charged him with distributing a measurable quantity of methamphetamine. For guideline purposes, he has been held accountable for more than 50 but less than 200 grams of methamphetamine. There is no evidence that the defendant ever possessed a firearm or that his drug distribution involved violence or threats of violence. *Defendant* was a methamphetamine addict who sold drugs to supply his habit. The non-violent nature and circumstances of the instant offense substantially mitigate against the application of the career offender guideline provision.

C. Kinds of Sentence Available

Defendant is not eligible for probation. He faces a substantial prison sentence even if he is not treated as a career offender. In addition, he will be required to serve a long period of supervised release. Without application of the career offender guideline enhancement, his

guideline range would be 70-87 months. For his prior convictions, *defendant* served a total of 6 months and one day in jail. A sentence within the 70 – 87 month guideline range for the instant offense would be more than 10 times greater than any previous punishment. Such a sentence, that takes him away from his young son and girlfriend, will certainly promote respect for the law.

D. Avoiding Unwarranted Sentence Disparity

According to the U.S. Sentencing Commission, the median federal prison sentence nationally for drug trafficking in 2005, after *Booker*, was 60 months. United States Sentencing Commission, *Statistical Information Packet: Fiscal Year 2005*, available online at http://www.ussc.gov/JUDPACK/JP2005.html (accessed 5/9/06). This means that 50% of drug trafficking defendants received 60 months or less, and the remaining 50% received a sentence higher than 60 months. Thus, a sentence within the 70 – 87 month guideline range would be near the mid-range of sentences imposed for drug trafficking. Given the relatively small amount involved in *Defendant* transactions, and the lack of a weapon or violence, a sentence higher than 87 months would seem an unwarranted disparity.

E. Retribution

A sentence within the 70 – 87 month range would certainly reflect the seriousness of the offense and provide just punishment. It is doubtful that any higher sentence would do more to "promote respect for the law." To the contrary, when compared with the relatively minor amount of drug trafficking engaged in by *defendant* and drug sentences received by other offenders, a much higher sentence could be viewed as disproportionate. As observed by the Supreme Court, a disproportionately harsh punishment "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." *Gall*, 552 U.S. at 54.

F. Deterrence/ Incapacitation

Statistically, drug trafficking offenders have the lowest rate of recidivism in most criminal history categories when compared to other categories of crime. U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 13. Based upon these statistics, there is no deterrence / incapacitation function served by sentencing *defendant* to more than 87 months.

G. Rehabilitation

During a sentence within the 70-87 month range, *defendant* would have the opportunity to obtain the intensive, inpatient treatment setting for his drug addiction. He could also pursue vocational opportunities that would prepare him to support himself and his family upon release from incarceration. A significant term of post-release supervision would do more to further his rehabilitation and transition to society than would additional years added onto his sentence.

CONCLUSION

Defendant is a minor drug trafficker who suffers from addiction to methamphetamine. The nature of the offense, his characteristics, his need for drug counseling and recidivism statistics all suggest that the purposes of punishment will be sufficiently served by a sentence within the 70-87 month guideline range. Anything longer would be more than necessary and, thus, a violation of the directive of 18 U.S.C. §3553(a) to impose a sentence that is sufficient, but not greater than necessary, to comply with the purposes of punishment.

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by: counsel

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2011, I electronically filed the foregoing Memorandum with the Clerk of Court, using the CM/ECF system, which will send notification of such filing to R. Andrew Bassford, Assistant United State Attorney, counsel for the United States.

s/Larry W. Shelton