UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**02-50024-02**
	)	
v.	)	**SENIOR JUDGE XXX E. WALTER**
	)	**MAGISTRATE JUDGE ROY PAYNE**
XXX XXX XXX,	)	
	)	
Defendant.	)	
	)	

SENTENCING MEMORANDUM

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XXX XXX

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I. INTRODUCTION

Although this Court has previously announced its intention to resentence XXX Craig XXX to a life imprisonment, Mr. XXX notes that the intent of *Booker v. Washington*, 125 S.Ct. 738 (2005) was to allow judges to again be judges. As one Court has noted:

> Sentencing will be harder now than it was a few months ago. District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual. *Booker* is not an invitation to do business as usual.

United States v. Ranum, 353 F.Supp. 2d 984, 987 (E.D. Mich. 2005). By this Sentencing Memorandum, Mr. XXX hopes to demonstrate to the Court that a life sentence in this case would "not only be unreasonable, but also unconscionable." *United States v. Moreland*, 366 F.Supp. 2d 416, 424 (S.D. W.Va. 2005).

Instructive, perhaps, is the discussion by United States District Judge XXX Molloy in *United States v. Hoskins*, 364 F.Supp. 2d 1214 (D. Mt. 2005). In that case, the advisory Guideline calculation was a life sentence. *Id*. at 1215. In finding a life sentence to be "unreasonable," the Court noted:

> Post *Booker* and *FanFan*, it is my experience that sentencing is more difficult. I have tried to apply the law as the Congress intended, in light of Justice Breyer's majority opinion in Booker. In nine years as a judge I have meted out four life sentences. Two of the defendants that I sentenced to life in a federal prison had brutally murdered an innocent man in cold blood. They committed the murder because they wanted to know what it felt like to kill someone. With the agreement of the victim's family, and to avoid the death sentence, the murderers entered a plea agreement whereby they pled guilty and stipulated to the imposition of two consecutive life sentences for each of them. Thus, the defendants chose imprisonment for life to avoid a potential sentence of death.
>
> In another case, *United States v Dewalt*, CR 02-46-M-DWM, Dewalt was convicted after a jury trial of distributing methadone that resulted in a death in violation of 18 U.S.C. § 841(a)(1) . Under the circumstances and the law,

> the Congress mandated a life sentence 18 U.S.C. § 841(b)(1)(C). Because the statute required a life sentence to be imposed I did so.
>
> The fourth defendant I sentenced to life in prison was in the case of *United States v. Jensen*, CR 03-27-M-DWM. In that case Jensen had two prior felony drug distribution convictions. The United States Attorney, acting under 18 U.S.C. § 851, sought sentence enhancement which led to the mandatory imposition of a life sentence. Though I did not believe a life sentence was just, I had no discretion to impose a different sentence.
>
> Each case involved either the choice of a life sentence to avoid the death penalty, or a life sentence mandated by the Congress.....
>
> The prosecution asks me to impose a life sentence simply because it is the sentence dicXXXd by the advisory Guidelines. That argument assumes that *Booker's* abandonment of mandatory Guidelines is illusory. Upon examination of the entire *Booker* opinion, I am convinced that the Supreme Court did not intend for the Guidelines to be advisory in theory but mandatory in fact. Following *Booker*, I am empowered to give a legally reasonable sentence, irrespective of what the Guidelines would require. There will no doubt be many cases in which the sentence suggested by the Guidelines is reasonable. Since the *Booker* decision, it is my experience that the great majority of cases fall into this category. The case of Shane Douglas Hoskins, however, is not one of them.

Id. at 1215-116 (footnote omitted). *See also Moreland*, 366 F.Supp.2d at 424 (Sentencing career offender convicted of distributing crack cocaine to ten years imprisonment after finding that "a life sentence would not only be unreasonable, but also unconscionable.").

II. SENTENCING GUIDELINES

Initially, it should be noted that it is questionable whether a life sentence is even called for by the advisory Sentencing Guidelines. The Presentence Report (the "PSR) prepared in this case justifies an offense level of 44 based upon three conclusions. First, that based solely upon the word of Earl XXX, Mr. XXX "is responsible for at least three (3) kilograms of crack cocaine and at least seven (7) kilograms or more of powder." *See* PSR at ¶¶ 23, 28. Second, again based solely upon the word of Earl XXX, that Mr. XXX tried to get XXX "to 'take the charges' in this case. *Id*. at ¶ 32. Third, that despite the fact that a jury acquitted James XXX and despite the

fact that Vincent XXX testified under oath that he did not deal drugs with Mr. XXX, that Mr. XXX was, nevertheless, a leader of a criminal activity that involved five or more participants including John XXX and Vincent XXX. *Id.* at ¶ 31. Mr. XXX addresses each of these conclusions in turn.

A. Objections to the PSR

1. Drug Amounts

As noted above, these drug amounts alleged in this case are based solely upon the word of Earl XXX who traded his testimony for a significant sentence reduction. More important, these particular drug amounts are not even based upon sworn testimony from XXX, but, rather, hearsay information allegedly provided by XXX to DEA Agent Will XXX. Indeed, the information regarding three kilograms of crack and seven kilograms of powder is based on the testimony of Agent XXX at the prior sentencing in this matter and allegedly reflects what XXX told him in a debriefing. *See*Sentencing Tr. at 9. Nevertheless, when XXX was placed under oath and subject to cross examination, the only estimates he gave regarding crack cocaine amounts was that Mr. XXX purchased "about" one kilogram of crack from David Sosa and that the alleged conspiracy involved over fifty grams of crack. *See* Trial Tr. at 211, 213. These inconsistencies were specifically noted by the United States Court of Appeals in this case and formed part of the reason for remand. *XXX v. United States*, 379 F.3d 233, 266-67 (5th Cir. 2004).[1]

[1] It should also be noted that Agent XXX himself has provided inconsistent information. In the PSR it is reported that Mr. XXX told agents "he has been purchasing one (1) or two (2) kilograms of cocaine every two weeks for *nearly (4) monthsin 2000.*" *See* PSR at ¶ 21 (emphasis added). Nevertheless, at trial, Agent XXX testified that Mr. XXX told him he purchased "1 to 2 kilos of cocaine...every two weeks for a *couple month* period. *See* Trial Tr. at 140 (emphasis added).

Moreover, XXX's testimony regarding the drug amounts is suspect for a myriad of other reasons besides the inconsistencies contained noted above:

> • At trial, Earl XXX testified that he took Mr. XXX the proceeds from the November 15, 2000 sale of drugs to James XXX and that he took the proceeds to Mr. XXX at 9374 Simpson Road. *See* Trial Tr. at 216-17. Nevertheless, attached hereto as Attachment A is the Declaration of James XXX stating that Mr. XXX took the money to "West 70th where his sister staed [sic.] and went to work after he left there"[2].
> Moreover, Mr. XXX was told that this was witnessed by the DEA, although both DEA agents who testified at trial claimed memory loss on this issue. *See* Trial Tr. at 186-88; 203.
>
> • James XXX testified at the new trial hearing that, at the behest of the DEA, he also attempted to get Mr. XXX to sell him drugs and Mr. XXX told him, "You know I don't do that...." *See* New Trial Tr. at 175, 179. Although this phone call was tape recorded, a copy of the tape has never been produced to the defense. *Id*. at 179-80.
>
> • Russell XXX who was a trustee in the jail pod in which XXX was held and who worked in the law library and ran a Bible study, testified at trial that XXX told him that he was willing to fabricate evidence because he (XXX) was mad at "his people" for not hiring him an attorney when he was arrested. *See*Trial Tr. at 426-33.
>
> • Bobbie XXX, who was raised with XXX, testified at trial that XXX told him that David XXX was his cocaine supplier and he never mentioned getting drugs from Mr. XXX. *See* Trial Tr. at 470-79.
>
> • Likewise, Freddie Young testified at the new trial hearing that XXX told him that he obtained his drugs from David XXX and David Sosa and XXX also told him that Mr. XXX *never* supplied him with drugs. *See* New Trial Tr. at 103-106.
>
> • It is undisputed that Mr. XXX had a severe addiction to crack cocaine. *See*,*e.g.*,Trial Tr. at 479-80. There was testimony at trial, and that testimony is supported by basic common sense, that a person heavily addicted to crack cocaine would never be trusted with the large drug amounts that XXX attributed to Mr. XXX. *Id*. at 399 ("[I]t's very difficult for an addict to be productive selling drugs or make money selling drugs, because he would use

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[2] This was part, but not all, of the testimony that Mr. XXX hoped to elicit from Mr. XXX at the new trial hearing in this matter. Nevertheless, after finding that Mr. XXX' testimony could have made a difference at trial, the Court refused to hear any further specifics from Mr. XXX as to what his testimony would have been. *See* New Trial Tr. at 185, 190, 194.

> up most of his benefit."); 480 ([I]t's illogical for a crack addict to be dealing in large quantities, or any quantity at all, because they smoke up everything they have, because you're addicted.")
>
> • Proving that there is no honor among drug dealers, during the undercover purchase of cocaine from XXX in this case on November 15, 2000 XXX told the confidential informant that the cocaine he was selling was a half kilogram even though he only provided a quarter kilogram. *See*Trial Tr. at 190-92.

In sum, this Court should be loathe to base any drug amount findings on the word of Earl XXX. This is especially true since the jury in this case apparently had a hard time believing XXX. Indeed, if the jury found XXX to be credible, how can its acquittal of Mr. XXX on Count 2 and James XXX on Count 1 be explained? Undersigned counsel submits that the reason the jury convicted Mr. XXX of Count 1 is because, without objection by Mr. XXX' defense counsel, the government erroneously argued to the jury:

> And if Mr. XXX XXX is a drug addict, where, ladies and gentlemen, where was he getting the drugs? For him to get cocaine necessarily means that he's involved in cocaine trafficking. There's two people in that conspiracy right there: the person he got the drugs from and himself.

Indeed, the jury was told that it was duty bound to convict Mr. XXX of Count 1 simply because he admittedly purchased crack cocaine from others to support his personal habit.[3] Although Mr. XXX acknowledges that, as a legal matter, the acquittals in this case are immaterial, it is hoped that the jury's likely view of XXX's credibility would give this Court pause before imposing another life sentence.

2. Obstruction

At trial, XXX testified for the first time during *redirect examination* that Mr. XXX allegedly offered him financial support *not to testify* at the trial. *See* Trial Tr. 278-79. The fact that these allegations came out for the first time on redirect examination is suspicious enough.

Nevertheless, in the PSR, the claim morphed into a claim that Mr. XXX tried to get XXX to "'take the charges' so [Mr. XXX] could get away with being prosecuted for any criminal behavior...." *See* PSR at ¶ 32. Not surprisingly, the alleged claim(s) was never recorded in any of the case agent's debriefing notes. *See* Trial Tr. at 279. **Nevertheless, at the original sentencing in this matter, the government was allowed to have it both ways, using debriefing notes over trial testimony for drug amounts but trial testimony (that changed for purposes of the PSR) over debriefing notes for an obstruction of justice enhancement.**

What is even more suspicious is that XXX never testified as to how this alleged offer was made to him. If it was made in writing, where is the writing? If it was made by telephone, the government had no problem obtaining tapes of jail conversations in an attempt to use them as evidence in this case, so where is the tape? *See* New Trial Tr. at 145-47.

Again, this Court would have to base a life sentence on a person with one criminal history point *solely* on the word of Earl XXX when it is only based upon XXX's *belated* claim at trial that changed in the presentence report for sentencing purposes. Moreover, it defies logic that, if the claim was true, it cannot be supported in any way.

3. Leadership

Assuming that the jury did not convict Mr. XXX solely based upon his role as a drug purchaser to support a severe habit although that, in fact, appears to be the case, there is still no support for the leadership enhancement in this case. As noted above, one of the alleged participants in the criminal scheme was James XXX, although the jury acquitted Mr. XXX. While Mr. XXX acknowledges that the jury was applying a "beyond a reasonable doubt" standard, there would be serious due process concerns for the Court to base the leadership

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[3] An assignment of error on this argument was only reviewed for appeal for plain error

enhancement *solely* on the word of XXX that Mr. XXX was involved with Mr. XXX when the jury rejected that testimony. Perhaps if there was more evidence supporting XXX's alleged involvement with Mr. XXX it would be appropriate to go behind the jury verdict, but there is not. In addition, the five participants are alleged to include Vincent XXX. *See* PSR at ¶ 31. Nevertheless, XXX testified at trial that he *never* dealt cocaine with Mr. XXX. *See* Trial Tr. at 335-36.

Moreover, as evidence of his alleged "leadership," the PSR claimed that Mr. XXX "was head of the 'Lakeside Kings' street gang and that the drugs would be sold through the gang. *See* PSR at ¶ 13 It is now clear that this information was totally incorrect. Indeed, attached hereto as Attachment B is an affidavit from Corporal Ted XXX of the Shreveport Police Department. Corporal XXX is responsible for maintaining intelligence on Shreveport gangs and keeping up on gang membership. *See*Attachment B at ¶ 3. Corporal XXX States, "I can say categorically that the claim that Mr. XXX 'was the head of the Lakeside street gang' is a false sXXXment." *Id*. at ¶ 6. Corporal XXX also States that he would have been aware if Mr. XXX had even been a member of that gang and, to Corporal XXX's expert knowledge, Mr. XXX was not. *Id*. at ¶ 5.

B Standard of Review

With the risk of being redundant, the Court is imposing a life sentence on a man with one criminal history point based solely on the word of a person who traded testimony for a reduced sentence and whose testimony is unsupported and inconsistent. This begs the question of the standard which the Court will use to evaluate the testimony. While not suggesting that the Court *must* use a "beyond a reasonable doubt" standard, Mr. XXX would like to commend the

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since no objection was made by Mr. XXX' trial counsel. *XXX*, 379 F.3d at 263.

opinion of United States District Judge Joseph R. Goodwin in *United States v. Gray*, 362 F.Supp. 2d 714, 719-21 (S.D. W.Va. 2005) to this Court:

> In their sentencing memoranda, the defendants argued that reasonable doubt is the correct burden of proof to apply to factual determinations at sentencing. My reading of *Booker*, however, suggests that the advisory Guideline determinations must still be made by a preponderance of the evidence. Specifically, the remedial majority opinion States that "the district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Booker*, 125 S.Ct. at 767. This directive makes no mention of a changed standard of proof. Accordingly, the natural inference appears to be that district courts must calculate the advisory Guideline range using the same burden of proof that was used under the mandatory regime. Under the mandatory regime, district courts were instructed to make factual findings at sentencing by a preponderance of the evidence. *See, e.g., United States v. Watts*, 519 U.S. 148, 156, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) ("The Guidelines sXXX that it is 'appropriate' that facts relevant to sentencing be proved by a preponderance of the evidence, U.S.S.G. § 6A1.3, comment, and we have held that application of the preponderance standard at sentencing generally satisfies due process." While determining the advisory Guideline range, I will therefore continue to make factual findings by a preponderance of the evidence, as I did during the sentencing hearing in this case. As I explain below, however, the reasonable-doubt standard does retain some usefulness in the new advisory system.
>
> Because *Booker* rendered the Guidelines advisory, part of my sentencing determination turned on how much faith I placed in the Guideline advice. As Justice Stevens noted in his dissent in Booker: "Judges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C.A. § 3553(a) . . . . How will a judge go about determining how much deference to give to the applicable Guidelines range?" *Booker*, 125 S. Ct. at 787-88 (Stevens, J., dissenting in part). In general, I will continue to place great weight in the recommendation offered by the Guidelines, as such advice is the product of almost two decades of expert analysis and consideration. Nevertheless, the Guidelines are now advice rather than instruction. One of the fundamental problems with advice is determining how much confidence to place in it. The reliability of the advice helps inform that determination, and reliability is best quantified through an appropriate standard of proof. Specifically, the reasonable-doubt standard offers a useful method for measuring the degree of certainty that I have in the factual determinations underpinning the advisory Guideline range.

> The burden of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979). Traditionally, criminal convictions have rested on a finding of proof beyond a reasonable doubt. This "requirement that guilt of a criminal charge be established beyond a reasonable doubt dates at least from our early years as a Nation." *In re Winship*, 397 U.S. 358, 363, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). In a civil action that only involves monetary damages, "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiffs favor," and accordingly it "seems peculiarly appropriate" to apply a preponderance standard. In criminal matters, however, "we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty," and we believe in general that "it is far worse to convict an innocent man than to let a guilty man go free." *Id*. at 372. (Harlan, J., concurring). The American people have always maintained a healthy degree of wariness towards the coercive force of the government, especially when fundamental individual rights are at stake. *Id*. at 363 ("The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."). Clearly, it is a long-standing and deeply cherished tradition of this nation to bar the sXXX from depriving a person of their liberty without certainty of guilt. This desired certainty has long been quantified as proof beyond a reasonable doubt.

See also, United States v. Malouf, 377 F. Supp. 2d 315, 329 (D. Mass. 2005) (“I go further. If a substantial sentence hinges on a finding of a specific quantity, then, in the language of *Gray*, I (and the public) should have a high degree of confidence in this finding.”); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005).

Again, Mr. XXX is not suggesting that the Court cannot use a preponderance of the evidence finding with regard to applying the advisory Sentencing Guidelines in this case, but, before sending a man to prison for life who has never before been to prison, he urges the Court to “measur[e] the degree of certainty that [it has] in the factual determinations underpinning the advisory Guideline range” given that they are based almost entirely on the word of Earl XXX.

III. 18 U.S.C. § 3553

In setting an appropriate sentence, 18 U.S.C. § 3553 directs this Court to consider, *inter alia.:*

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed-- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
>
> (3) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

After engaging in such considerations, 18 U.S.C. § 3553 directs the Court *not* to impose any sentence "greater than necessary."

A. The nature and circumstances of the offense and the history and characteristics of the defendant.

1. Offense Characteristics

With regard to the offense itself, Mr. XXX was not found in possession of even one milligram of cocaine. Again, the "offense" is mostly the product of the testimony of Earl XXX. In short, while the offense itself is a serious offense, the circumstances surrounding the conviction weigh in favor of a more lenient sentence than otherwise might be appropriate. Likewise, as set forth below, there is a serious question regarding the crack/powder distinction that also warrants a lesser sentence in this case then provided for by the advisory Sentencing Guidelines.

2. Offender Characteristics

As to the offender characteristics, these weigh heavily in favor of a minimum sentence. Mr. XXX has one criminal history point. *See* PSR at ¶ 42. He has one prior conviction more than a decade ago for which he received probation. *Id*. at ¶ 40. He is forty-four years old and has three children.[4] Moreover, he often took children in off the streets and welcomed them as part of his family. *See* Trial Tr. at 472-474. Bobbie XXX recalls that Mr. XXX took him in, "bought me clothes to wear on my back and fed me when I was hungry." *Id*. at 472. Mr. XXX purchased Mr. XXX his first suit so that he could bring Mr. XXX to church. *Id*. at 473. Mr. XXX is also a diabetic and, as detailed below, is now in poor physical health. *See* PSR at ¶ 56.

While this background is very important, what has happened to Mr. XXX and what he accomplished since his conviction is even more important. Not soon after his transfer to F.C.I. Beaumont following sentencing, it became known that Mr. XXX had attempted to cooperate with the DEA (a fact that is now published in the reported cases in this matter). *See* Attachment C. As a result, he was viciously attacked and had to be transferred from Beaumont all the way to Lompoc, California and away from his family because his safety and security could not be guaranteed at Beaumont.

Nevertheless, since his imprisonment, Mr. XXX has taken every opportunity to better himself. He has taken education courses in various subjects (see Attachment D):

•The Underground Railroad
•The 54th Massachusetts
•African American Studies
•American Presidents I
•Malcom X

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[4] For an excellent discussion as to how age should be considered in post-*Booker* sentencing see *United States v. Nellum*, 2005 U.S. Dist. LEXIS 1568 (N.D. In. Feb. 3, 2005). That Court relied upon the Sentencing Commission's study of age and recidivism that is set forth in http://www.ussc.gov/publicat at Recidivism_General.pd+. **Notably the recidivist rate for a person between 41-50 in Criminal History Category I is only 6.9 percent and over 50 is 6.2 percent. *Id*. at 28.**

•American Presidents II
•American Presidents III
•Lyndon Johnson
•Battle of Midway
•The White House
•Christopher Columbus
•The Kennedys
•Korean War
•Japanese Empire I
•Japanese Empire II
•American History 1763-1860
•American History 1861-1865
•American History 1866-1913
•China I
•China II
•China III
•Literature VI
•The Fall of Communism
•40 hour Patenting Program

Likewise, he has pursued his spiritual education receiving diplomas in General Bible Knowledge related to both the New and Old Testaments as well as taking the following courses (see Attachment E):

•Spiritual Gifts
•Alive in Christ
•The Church
•Personal Evangelism

Indeed, one of the Pastors involved in the Prison Ministries has written a letter to this Court that is attached hereto as Attachment F. The Paster notes that "[w]e have a prison ministry at both prisons [where Mr. XXX has been incarcerated] and have observed Brother XXX for the best part of one year at both facilities." The Pastor writes that Mr. XXX "has been to literally every single service! He has been very trust worthy when given responsibility, teachable, and humble. He has studied hard and even preached on occasion."

Nevertheless, despite Mr. XXX' best efforts, he suffered a serious medical condition that likely came about as a result of to his incarceration. Indeed, he spent almost a month in the

University of Kentucky Medical Center and underwent an diskectomy operation. *See* Attachment G. He likewise suffered from a pulmonary embolus and deep venous thrombosis of both lower extremities. *Id*. Following the release from the hospital on **April 29, 2005,** he was sent to F.M.C. Springfield and was told that he needed to follow up with the hospital's doctor or a spine specialist. *Id*. **Medical records reveal that, at least as of November 13, 2005- almost seven months since his release from the hospital, he has not seen a spine specialist!!!** *See* Attachment H. Moreover, as of recent, there have been setbacks in his physical therapy that has resulted in his inability to attempt activities without a back brace. *See* Attachment I.

In sum, as a result of his offense and consequent incarceration, Mr. XXX was attacked physically and his health has deteriorated substantially. At his prior sentencing hearing Mr. XXX was a healthy man, yet the Court will likely see a much different man at resentencing. Nevertheless, despite these setbacks, Mr. XXX has taken great steps to improve himself both by the way of scholarly education and spiritual education. There can be no doubt that the offender characteristics in this case are substantially mitigating.

B. Seriousness of the Offense, Respect for the Law, Deterrence, Just Punishment, Protection of the Public, and Rehabilitation

The seriousness of the offense is discussed above and will be discussed below in relation to the crack/powder distinction. It is submitted that a sentence substantially less than a life sentence will deter others from committing drug offense. Regarding respect for the law, just punishment and protection of the public, Mr. XXX has paid dearly for his crimes as outlined above. He will come before the Court for resentencing a different person than is alleged to have committed the offense for which he will be sentenced. As far as rehabilitation, Mr. XXX' prison records indicate that he is taking full advantage of rehabilitation opportunities and the only question that remains is will his life be thrown away or will he be given a chance by this Court to

prove himself. *See, e.g., United States v. Carvajal*, 2005 U.S. Dist. LEXIS 3076 (S.D.N.Y. Feb. 22, 2005) (**"Rehabilitation is also a goal of punishment. That goal cannot be served if a defendant can look forward to nothing beyond imprisonment. Hope is the necessary condition of mankind, for we are all created in the image of God. A judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life."**).[5] Of course, Mr. XXX' need for adequate medical care militates in favor of release as he is not being seen by the proper medical personnel while at F.M.C. Springfield and, as a result, his rehabilitation has been severely retarded. In sum, none of these considerations dictates a life sentence without the possibility of ever being released; quite the opposite.

C. Unwarranted Disparity

This Court is likely aware of the controversy surrounding sentencing in crack cocaine cases versus powder cocaine cases, but the following is a brief synopsis as set forth in *United States v. XXX*, 359 F.Supp. 2d 771, 776-82 (E.D. Wis. 2005):

> Courts, commentators and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological or scientific justification, and creates a racially disparate impact in federal sentencing. *See, e.g., United States v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring); *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring); *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo.), *rey'd*, 34 F.3d 709 (8th Cir. 1994); *United States v. Patillo*, 817 F. Supp. 839 (CD. Cal. 1993); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 Stan. L. Rev. 1283 (1995); Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System that Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. Tol. L Rev. 215 (1994); *The Debate on 2002 Federal Drug Guideline Amendments*, 14 Fed. Sen. Reptr. 123, 188-242 (Nov./Dec. 2001-Jan./Feb.

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[5] *See also*, 18 U.S.C. § 3582(a) ("[I]mprisonment is not an appropriate means of promoting correction and rehabilitation.")

2002); *Rethinking the Crack Cocaine Ratio*, 10 FED. SEN. REPTR. 179,184-208 (Jan./Feb. 1998).

The 100:1 ratio first appeared in the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986), a law prompted in large part by the sudden death of basketball star Len Bias, purportedly from a crack overdose. *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233,1249 (Winter 1996). In response to a perceived crack epidemic and in a climate that "some have characterized as frenzied," Congress dispensed with the normal deliberative process and hurriedly passed a bill. *Id*. at 1250: *see also Clary*, 846 F. Supp. at 784-85 (discussing legislative history),*United States v. Walls*, 841 F. Supp. 24, 29-30 (D.D.C. 1994), *aff'd in part, remanded in part*, 315 U.S. App. D.C. 111, 70 F.3d 1323 (D.C. Cir. 1995) (same). The 1986 Act established severe mandatory minimum penalties for even first time offenders: 5 years in prison for those possessing 5 grams of crack (or 500 grams of powder), and 10 years for possessing 50 grams of crack (or 5 kilograms of powder). Subsequently, the guidelines incorporated the statutorily established disparity in penalties between crack and powder. See 21 U.S.C. § 841 (b); Spade, *supra*, at 1249.

Because of its expedited passage, the Act left little legislative history. However, it appears that Congress associated crack with crime and violence, considered it more addictive than powder, and was concerned that its low cost and ease of manufacture would lead to more widespread use. *Id*. at 1252 . Members of Congress stated that their goal was to target "serious" and "major" crack dealers. . However, the legislative history, such as it is, contains no rationale for the 100:1 ratio; legislators suggested other ratios -- 50:1 and 20:1 -- but Congress rejected them, *Id*. at 1252, 2254. A former staff member of the House Judiciary Committee characterized the process as "the crassest political poker game," "I'll see your five years and I'll raise you five years." *Id*. at 1255.

The Commission has studied the issue in depth and concluded that the assumptions underlying the disparity between crack and powder are unsupported by data. First, while legislators may have intended to target serious drug traffickers, the Commission's data indicate that two-thirds of federal crack cocaine defendants are street level dealers. Diana Murphy, Statement to Senate Judiciary Committee, May 22, 2002, reprinted in 14 Fed. SEN. RETPR. 236, 237 (Nov./Dec. 2001-Jan./Feb. 2002). Indeed, the 100:1 ratio actually targets low level dealers in a manner inconsistent with the intent of the 1986 Act. As one commentator estimated, at offense level 32...,

> dealers of drugs other than crack would have been dealing between $ 500,000 and $ 8 million worth of drugs, while crack defendants would have been dealing roughly $ 5750 worth of the drug.

> Another way of illustrating the problem is that five grams of crack, which triggers a five-year mandatory minimum sentence, represents only 10-50 doses with an average retail price of $ 225 -- $ 750 for the total five grams. In contrast, a powder cocaine defendant must traffic in 500 grams of powder, representing 2500-5000 doses with an average retail price of $ 32,500 -$ 50,000, in order to receive the same five-year sentence. The 500 grams of cocaine that can send one powder defendant to prison for five years can be distributed to eighty-nine street dealers who, if they converted it to crack, could make enough crack to trigger the five year mandatory minimum for each defendant. The result is that local-level crack dealers get average sentences quite similar to intrasXXX and intersXXX powder cocaine dealers; and both intra- and intersXXX crack dealers get average sentences that are longer than international powder cocaine dealers.

Spade, *supra*, at 1273 (internal footnote omitted).

Second, although legislators may have believed that crack was associated with other harmful conduct, Commission data indicate that "aggravating conduct occurs in only a small minority of crack cocaine offenses." Murphy, *supra*, at 238. "For example, an important basis for the establishment of the 100-to-1 drug quantity ratio was the understanding that crack cocaine trafficking was highly associated with violence. More recent data indicate that significantly less systemic violence . . . is associated with crack cocaine trafficking than was reported earlier." *Id*. More importantly, the prevalence of aggravating factors in crack cases "does not differ substantially from the prevalence in powder cocaine offenses." *Id.*

Third, the Commission concluded that pharmacological differences between crack and powder do not justify the disparity in penalties. "Cocaine is a powerful stimulant and in any form produces the same physiological and psychotropic effects." *Id*. at 239. Even the expert who testified before Congress before it adopted the 100:1 ratio acknowledged the absence of reliable evidence indicating that crack was more addictive or dangerous than powder. *Clary*, 846 F. Supp. at 791-92 (citing testimony of Dr. Robert Byck). Since then, other prominent experts have opined that crack is not more dangerous than powder -- in fact, the converse may be true -- and that crack is not physically more addictive, though it is possibly psychologically more addictive. See *United States v. Maske*, 840 F. Supp. 151, 155 (D.D.C. 1993) (discussing testimony of Dr. George Schwartz); *see also* *Willis*, 967 F.2d at 1226 (Heaney, J., concurring) ("More recently, drug researchers have concluded that the short-term and long-term effects of crack and powder cocaine are identical"); *Walls*, 841 F. Supp. at 28 (citing testimony of Dr. Schwartz). The Commission's most recently obtained evidence confirms that

the disparity in penalties is disproportionate to any reasonable assessment of crack's harmful effects. *See* U.S. Sentencing Commission Hearing, 2/25/02: *Cocaine Pharmacology. "Crack Babies." Violence*, reprinted in 14 FED. SEN. REPTR. 191,193 (Nov./Dec. 2001-Jan./Feb. 2002) (testimony of Dr. Glen Hanson of National Institute on Drug Abuse) (stating that the pharmacological effects of crack and powder cocaine are "very similar"); *see also* Murphy, *supra*, at 239. Finally, the evidence collected by the Commission shows that, in comparison to the mid-80s, the use of crack has decreased. U.S. SENTENCING COMMISSION HEARING, 2/25/02, *supra*, at 191 (testimony of Dr. Hanson).

Thus, none of the previously offered reasons for the 100:1 ratio withstand scrutiny. Perhaps most troubling, however, is that the unjustifiably harsh crack penalties disproportionately impact on black defendants. Blacks comprise between 80% and 90% of federal crack cocaine defendants, compared to just 20% to 30% of powder cocaine offenders. See Murphy, *supra*, at 239; U.S. SENTENCING COMMISSION HEARING, 2/25/02, supra, at 205 (testimony of Wade Henderson of the Leadership Council on Civil Rights); *see also Clary*, 846 F. Supp. at 786; *Walls*, 841 F. Supp. at 28; *Maske*, 840 F. Supp. at 154; *Patillo*, 817 F. Supp. at 843 n.6. This is so despite the fact that statistics suggest that the majority of crack users are white. *See Clary*, 846 F. Supp. at 787 n.68 (citing National Institute on Drug Abuse statistics).

Primarily as the result of the different penalties for crack and powder cocaine, and contrary to one of the Sentencing Reform Act's primary goals, the sentencing guidelines have led to increased disparity between the sentences of blacks and whites. Before the guidelines took effect, white federal defendants received an average sentence of 51 months and blacks an average of 55 months. After the guidelines took effect, the average sentence for whites dropped to 50 months, but the average sentence for blacks increased to 71 months. Spade, *supra*, at 1266-67 (citing 1993 U.S. Department of Justice, Bureau of Justice Statistics Report). Although there is no indication that the legislators intended that the law have a discriminatory effect, as Commissioner Michael Gelacak noted, "If the impact of the law is discriminatory, the problem is no less real regardless of the intent." UNITED STATES SENTENCING COMMISSION, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997), reprinted in 10 FED. SEN. REPTRL. 184, 189 (Jan./Feb. 1998).

Finally, the disparity in sentences involving crack and powder brings irrationality and possibly harmful mischief into the criminal justice system. All crack begins as powder, and transforming one into the other involves a quick and uncomplicated operation. Thus, guideline sentences vary widely based on facts that have little to do with culpability. For example, in *United States v. Shepherd*, 857 F. Supp. 105 (D.D.C. 1994), *remanded by*, 322 U.S.

> App. D.C. 160, 102 F.3d 558 (D.C. Cir. 1996), the defendant agreed to sell powder to an undercover officer. However, the officer, pursuant to his office "policy," insisted that the defendant cook the powder into crack. She did so in her microwave and thus raised her guideline range from 46-57 (with a 5 year mandatory minimum) to 108-135 months (with a 10 year mandatory minimum). *Id.* at 106-08. In its 1995 submission to Congress, the Commission reported a case in which two crack dealers, dissatisfied that the 255 grams of powder they had purchased converted to only 88 (rather than the usual 200) grams of crack, arranged to return the drugs to their supplier, who had agreed to replace the powder at no cost. However, before they returned the drugs, the crack dealers were arrested. At sentencing, their guideline range was 121-151 months, while the supplier's range was just 33-41 months. Spade, *supra* at 1273
>
> To its great credit, the Commission has repeatedly sought to reduce the disparity. See UNITED STATES SENTENCING COMMISSION, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 132 (2004); Diana Murphy, Statement to Senate Judiciary Committee, May 22, 2002, reprinted in 14 FED. SEN. RETPR. 236 (Nov./Dec. 2001-Jan./Feb. 2002); UNITED STATES SENTENCING COMMISSION, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997), reprinted in 10 FED. SEN. REPTR. 184, 189 (Jan./Feb. 1998); UNITED STATES SENTENCING COMMISSION, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (1995); *see also* U.S. SENTENCING COMMISSION HEARING, 3/10/02: *Cocaine Sentencing*, reprinted in 14 FED. SEN. REPTR. 217,224 (Nov./Dec. 2001 -Jan./Feb. 2002) (testimony of Judge Sim Lake on behalf of the U.S. Judicial Conference, in favor of "dramatically lowering the current 100 to 1 crack to powder cocaine ratio"). Unfortunately, the disparity remains, both in the context of mandatory minimum sentences under 21 U.S.C. § 841(b) and under the guidelines. Only Congress can correct the statutory problem, but after *Booker* district courts need no longer blindly adhere to the 100:1 guideline ratio.....

Consequently, over the years, various ratios of crack/powder cocaine have been discussed.

> In 1995, the Commission issued a report that strongly recommended that the 100:1 ratio be reduced. On May 11, 1995, the Commission presented to Congress several amendments to the Guidelines. 60 *Fed.Reg.* 25,074 (1995). The Commission unanimously agreed that the 100:1 ratio was too great, and a majority recommended instead adopting a 1:1 equivalence between crack and powder cocaine. 60 *Fed.Reg.* 25077. Although Congress did not adopt the amendment, it directed the Commission to make further recommendations regarding cocaine sentencing. See *Pub.L.* No. 104-38, § 2(a)(1)(A), 109 *Stat.*

> 334 (1995). The Commission was directed to maintain stiffer sentences for crack offenses than for cocaine offenses; however, it was free to recommend a less severe ratio. *Id.*
>
> In 1997, the Commission issued another proposal, again stating that a 100:1 ratio was unjustifiable, and recommended a 5:1 ratio. In July of 1997, the Attorney General also recommended a 5:1 ratio, and the Clinton administration publicly proposed reducing the ratio to 10:1. However, no bill was introduced to implement any of these recommendations and no formal amendment to the Guidelines was proposed.
>
> In 2002, the Commission again unanimously found that the 100-to-1 ratio was "unjustified." 2002 REPORT at 91. The Commission also sXXXd that the ratio "fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act." *Id*. The Commission concluded that the "intrinsic harms posed by the two drugs (e.g., addictiveness)" did justify some degree of difference in base offense levels, which could be reflected in a less severe ratio of 20:1. *Id*.at 93, 100, 106.

United States v. Clay, 2005 U.S. Dist. LEXIS 22601 (E.D. Tenn. 2005). As a result, numerous courts around the nation have taken this nonsensical ratio and its racial effects into account when considering the application of 18 U.S.C. 3553 §(a)(6) and a sentencing court's duty to "avoid unwarranted sentence disparities."

A case very analogous to the instant case is the very recent case of *United States v. Fisher*, 2005 U.S. Dist. LEXIS 23184 (S.D.N.Y. Oct. 11, 2005) (attached hereto as Attachment J). In that case, as is alleged here, the Court found "the government ha[d] proven, by a preponderance of the evidence, that Fisher [was] responsible for the distribution of more than 1.5 kilograms of cocaine." His base offense level was 38 and his Criminal History Category was I. Nevertheless, using its *Booker* discretion to fairly adjust the crack/powder ratio to 10:1, the Court sentenced the defendant to 151 months imprisonment.

> It is important to note that 1.5 kilograms of powder cocaine, as opposed to crack cocaine, would have required a base offense level of 26, resulting in a Guidelines range at CHC I of 63-78 months in custody. The difference between 63 and 235 months, the lowest end of the respective Guidelines

> ranges, is *over fourteen years.* This enormous difference makes little sense for the reasons set forth below.

See also, United States v. Leroy, 373 F.Supp. 2d 887 (E.D. Wis. 2005) (Reducing 100-125 month guideline sentence to 70 months using its *Booker* discretion to apply a 20:1 ratio); *United States v. Simon*, 361 F.Supp. 2d 35 (E.D.N.Y. 2005) (Using a 10:1 or 20:1 crack/powder ratio to resentence a defendant following *Booker*); *XXX*, 359 F.Supp. 2d 771 (Using 20:1 ratio under its *Booker* discretion); *United States v. Stukes*, 2005 U.S. Dist. 23394 (S.D.N.Y. Oct. 12, 2005) (same); *United States v. Perry*, 2005 U.S. Dist. LEXIS 20230 (D. R.I. Sept. 16, 2005) (Noting that "[t]his Court's conclusion that a non-Guideline sentence is called for is also supported by the vast majority of district courts that have evaluated the crack/powder cocaine sentencing disparity in the wake of *Booker*/*Fanfan*" and using 20:1 ratio); *United States v. Castillo*, 2005 U.S. Dist. LEXIS 9780 (S.D.N.Y. May 2, 2005) (same); *United States v. Harris*. 2005 U.S. Dist. LEXIS 3958 (D.D.C. March 7, 2005) (Using *Booker* and the "persuasive authority" of the Sentencing Commissions' studies to lower the ultimate sentence of a defendant with 14 criminal history points based on the nonsensical crack/powder ratio.

Mr. XXX commends these cases to the Court's attention. More importantly, Mr. XXX submits that, given the nonsensical and racially divisive 100:1 ratio, the Court should follow the "vast majority of district courts that have evaluated the crack/powder cocaine sentencing disparity in the wake of *Booker*/*Fanfan*" and truly impose a "reasonable" sentence in this case as it is now duty bound to do.

IV. CONCLUSION

As noted above, 18 U.S.C. § 3553 directs the Court not to impose any sentence "greater than necessary." An argument can be made that a ten year mandatory minimum applies in this

case.[6] Undersigned counsel submits that imprisoning a forty-four year old man, who has never been in prison before, who has had a severe crack habit and who has taken great steps to turn his life around, to ten years imprisonment is more than reasonable in this case. Moreover, any greater sentence *would* be "greater than necessary" and, therefore, improper under 18 U.S.C. § 3553.

Respectfully submitted,

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XXX XXX

[6] *But see United States v. Turner*, 319 F.3d 716 (5th Cir), *cert. denied*, 538 U.S. 1017 (2003) (Holding that simply because a conspiracy as a whole involved a particular amount of drugs, the court must still make findings that the individual conspirator could be held responsible for those amount of drugs before applying a mandatory minimum sentence). *Accord*, *Derman v. United States*, 298 F.3d 34 (1st Cir.), *cert denied*, 537 U.S. 935, 1048 (2002); *United States v. Colon-Solis*, 354 F.3d 101 (1st Cir. 2003), *cert. denied sub. nom., Ruiz v. United States*, 541 U.S. 1005 (2004); *United States v. Allen*, 65 Fed. Appx. 476 (4th Cir. 2002);*United States v. Knight*,

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on November 7, 2005, I cause the foregoing document to be served by first class mail, postage prepaid, on XXX Hathaway, United States Attorney's Office, 300 Fannin Street, Shreveport, Louisiana 71101-3083.

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F. Clinton Broden

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342 F.3d 697 (7th Cir. 2003), *cert. denied sub. nom., Williams v. United States*, 540 U.S. 1227 (2004); *United States v. Stiger*, 413 F.3d 1185 (10th Cir. 2005).