

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	
	)	
	)	
Defendant.	)	

**DEFENDANT’S OBJECTIONS TO THE PRESENTENCE REPORT**

Defendant \_\_\_\_\_, through his attorney, Assistant Federal Public Defender Michael Dwyer, objects as follows to the Presentence Investigation Report (PSR), which was prepared before the Supreme Court’s decision in *United States v. Booker*, 125 S. Ct. 738 (2005), and consequently, treats the Guidelines as mandatory without regard to the statutory factors in 18 U.S.C. § 3553(a), which now govern sentencing.

**I. Sentencing Principles Post-*Booker***

In *Booker*, the Court held that *Blakely v. Washington* applied to the federal sentencing guidelines, and that the Sixth Amendment’s jury trial guarantee prevented judges from finding facts that exposed a defendant to increased prison time. *Booker*, 125 S.Ct. 738, 745. As a remedy, a different majority of the Court excised the provision of the Sentencing Reform Act that made the guidelines mandatory, 18 U.S.C. § 3553(b)(1). *Id.* at 764. This remedial majority held that district courts must still consider the guideline range, 18 U.S.C. § 3553(a)(4) and (5), but must also consider the other statutory concerns in § 3553(a). *Id.* at 757-69 Thus, after *Booker*, the guidelines are just one of a number of sentencing factors.

Section 3553(a) requires courts to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2.” 18 U.S.C. § 3553. Section 3553(a)(2) states that such purposes are: (A) to reflect the seriousness of the offense, promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence, (C) to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. *See Id.* Section 3553(a) further directs sentencing courts to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (3) the kinds of sentences available; (4) the sentencing range established by the guidelines; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. *See id.*

Thus, courts may no longer uncritically apply the guidelines. *See United States v. Ranum*, 353 F.Supp.2d 984, 985 (E.D.Wis. 2005). In every case, courts must now consider not just the Guidelines but *all* of the § 3553(a) factors, many of which the guidelines previously required courts to reject or ignore.<sup>1</sup> In sum, “*Booker* is not as an invitation to do business as usual.” *Id.* at 987. District courts must sentence the person before them as an individual.

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1. For instance, under § 3553(a)(1), the court must consider a defendant’s “history and characteristics”, yet under the Guidelines, the court was generally forbidden to consider a defendant’s age, U.S.S.G. § 5H1.1, his education and vocational skills, § 5H1.2, his mental and emotional condition, § 5H1.3, his physical condition including drug or alcohol dependence, § 5H1.4, his employment record, § 5H1.5, his family ties and responsibilities, § 5H1.6, his socio-economic status, § 5H1.10, his civic and military contributions, § 5H1.11, and his lack of guidance as a youth, § 5H1.12.

## A. Application to Mr. \_\_\_\_\_'s Case

1. Nature of the Offense. The offense conduct consists of Mr. \_\_\_\_\_'s distribution of less than a quarter gram of crack, .23 grams, on May 14, 2003 and possession of 5.03 grams of cocaine base on November 2, 2003. The seriousness of these offenses is mitigated by the relatively small drug quantity involved, which is just barely above the five-year mandatory minimum threshold quantity and far below the median for the majority of crack cocaine offenders.

Lower drug quantities correspond to lower culpability as defined by offender function. *See* United States Sentencing Commission, Report to the Congress, Cocaine and Federal Sentencing Policy, at p. 45 (May 2002).<sup>2</sup> Smaller scale street level dealers wield little decision-making authority and have limited responsibility. *Id.* at 99-100. The 2002 Report reflects the median drug quantity involved for street-level crack dealers who make up the majority of crack cocaine offenders was 52 grams, ten times the amount that \_\_\_\_\_ has accepted responsibility for. *Id.* at 46.

### 2. History and Character of the Defendant

Mr. \_\_\_\_\_'s history and character weigh heavily in his favor. During his upbringing, \_\_\_\_\_'s parents separated when he was eight years old. He was unable to live with his father with whom he had a close relationship. He would visit him on weekends and during the summer. From kindergarten through eighth grade, he attended six different elementary schools. He failed third grade, finally dropping out of school in the ninth grade. At age 13, he began

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2. Available at [www.ussc.gov](http://www.ussc.gov) (United States Sentencing Commission website).

working in his father's business. He currently works full time, earning \$7.67 an hour as \_\_\_\_\_.

Now age 21, Defendant \_\_\_\_\_ has been in a stable relationship with the same woman, \_\_\_\_\_, for 3 years. They have two children, \_\_\_\_\_, age one, and \_\_\_\_\_, age seven months. Ms. \_\_\_\_\_ has a three-year old child, \_\_\_\_\_, from a prior relationship, but his biological father neither maintains contact nor provides financial support. Defendant \_\_\_\_\_ has effectively shouldered and discharged this responsibility. He is the only father \_\_\_\_\_ has known. Devoted to his family, \_\_\_\_\_ provides both financially and emotionally for Ms. \_\_\_\_\_ and all three children. She works full time earning \$6.30 an hour. This close-knit family's stability depends on \_\_\_\_\_'s continued presence, and his emotional and material support. His absence would have a profound impact on them. From a family and employment standpoint, \_\_\_\_\_ has done all of the right things.

\_\_\_\_\_ has zero criminal history points (criminal history category (CHC) of I). Based on his history and his character, he is not a danger to society. The Sentencing Commission's research study on recidivism rates of Guideline offenders concluded that "offenders with zero criminal history points have lower recidivism rates than offenders with one or more criminal history points." *See* U.S.S.C., "Recidivism and the 'First Offender,'" 17 (May 2004).<sup>3</sup> "All offenders with zero criminal history points have a primary recidivism rate of 11.7 percent. This zero point recidivism rate is substantially lower than the recidivism rates for offenders with only one criminal history point (22.6%) or for offenders with two or more points (36.5%) combined in the CHC II through CHC VI column." *Id.*, at 13-14.

### 3. Needs of the Public

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3. Available at [ussc.gov/publicat/Recidivism\\_FirstOffender.pdf.html](http://ussc.gov/publicat/Recidivism_FirstOffender.pdf.html)

\_\_\_\_\_’s offense did not involve acts that have been associated with higher levels of culpability; such as, using or carrying a gun for self-protection, causing serious bodily injury to an individual, involving a juvenile or distributing drugs in proximity to a school. Therefore, a lengthy period of incarceration is not necessary to protect the public.

Attorney General Alberto Gonzales during his recent confirmation hearings asserted that prison is best suited “for people who commit violent crimes and are career criminals,” and he also stressed that a focus on rehabilitation for “first-time, maybe sometimes second-time offenders . . . is not only smart, . . . it’s the right thing to do.” Transcript of the Senate Judiciary Committee’s hearings on the nomination of Alberto R. Gonzales to be attorney general.<sup>4</sup>

#### 4. Advisory Guidelines

As *Booker* directs, in determining Defendant’s sentence, this court must consider the advisory Guidelines. Under section 2D1.1(a)(3), the base offense level for a total of 5.26 grams of cocaine base (crack) involved in the two counts is Level 26. *See* U.S.S.G. § 2D1.1(c)(7).

Offense level 26 seriously overstates the seriousness of the offense and \_\_\_\_\_’s low-level culpability. The Sentencing Commission has itself powerfully concluded that “the Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 [Anti-Drug Abuse] Act.” *See* United States Sentencing Commission, Report to the Congress, Cocaine and Federal Sentencing Policy at 91 (2002) (emphasis added).<sup>5</sup> The 1986 Act created the five and 10 year mandatory minimum penalties

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4. Available at: [www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html](http://www.nytimes.com/2005/01/06/politics/06TEXT-GONZALES.html)

5. Available at: [ussc.gov/r\\_Congress/02Crack/2002crackrpt.html](http://ussc.gov/r_Congress/02Crack/2002crackrpt.html)

applicable to federal drug trafficking offenses. The Act also established the 100:1 drug quantity ratio between powder and crack cocaine, that the Commission concluded firmly and unani- mously, “cannot be justified.” *See* United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy (1997).<sup>6</sup>

The Commission responded to the Act by incorporating the statutory mandatory minimum sentences into the guidelines. It used the mandatory minimum quantities to calibrate the drug-quantity table, selecting offense levels 26 and 32 in which the bottom of the range was greater than the mandatory minimum.<sup>7</sup> Congress, in establishing the 5 and 10 year mandatory minimums, indicated that they were intended for first time offenders who are “serious” (“the managers of the retail traffic”) and “major” drug traffickers (“manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities”). *Id.* at 99.

The legislative history indicates that

The Federal government’s most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

H.R. Rep. No. 99-845, at 11-12 (1986).

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6. Available at: [ussc.gov/r\\_Congress/NEWCRAK.pdf](http://ussc.gov/r_Congress/NEWCRAK.pdf)

7. Offenses involving 5 grams or more of crack were assigned a base offense level 26 corresponding to a guideline range of 63 to 78 months for a first time offender in criminal history category I (a guideline that just exceeded the 5-year statutory minimum for such offenses). Similarly, offenses involving 50 grams of crack corresponded to an offense level 32.

Because \_\_\_\_\_'s role was not that of a leader or manager, but a small street-level retail trafficker, level 26 seriously overstates his offenses and his culpability. This factor is relevant to the statutory purposes of sentencing under section 3553(a). The *Booker* remedy enables this Court to give greater consideration to this overstatement in its assessment of the reasonableness of the proposed Guideline range, in conjunction with the nature and circumstances of the offense and characteristics of \_\_\_\_\_.

5. \_\_\_\_\_ is safety valve eligible.

Sentencing Guidelines section 2D1.1(b)(6) instructs that for specified offenses, “[i]f the defendant meets the [safety valve] criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.1(a)...[the court shall] decrease by two levels” defendants’ total offense level. The safety valve statute, 18 U.S.C. § 3553(f), provides that for various drug offenses, a district court “shall impose a sentence . . . without regard to any statutory minimum sentence” if the defendant meets five statutory criteria. 18 U.S.C. § 3553(f); *see also* §5C1.2 (incorporating statutory criteria).

The PSR establishes that \_\_\_\_\_ has satisfied the first four safety valve criteria: (1) he has no criminal history points; (2) he did not threaten to use, or use any, violence or possess any type of weapon ; (3) the offense did not result in any injury, let alone serious bodily injury or death; and (4) he did not function as a supervisor, manager, leader, or organizer of others in the offense. *See* § 3553(f)(1)- (f)(4) The fifth and final criteria provides that “not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all of the information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is

already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.” 18 U.S.C. § 3553(f)(5). The statute does not require that the defendant’s truthful disclosure come in any specified form, place, or manner.

\_\_\_\_\_’s attorney has informed the government that \_\_\_\_\_ stands ready to satisfy the fifth criteria in any manner the government chooses. Believing that Mr. \_\_\_\_\_ does not qualify for the safety valve, the government chose not to meet with him. Assistant United States Attorney \_\_\_\_\_, who represents the government in this case, said that \_\_\_\_\_ could submit a written statement through his attorney. \_\_\_\_\_’s attorney will do so separately by letter, but \_\_\_\_\_ remains open to any other means to demonstrate that he can satisfy the final safety valve criteria.

Upon satisfaction of all five criteria, \_\_\_\_\_ must be sentenced without regard to the otherwise applicable five-year mandatory minimum sentence, and he should receive an additional two-level reduction in the total offense level. *See* U.S.S.G. §5C1.2.

6. The enhancement for reckless endangerment during flight is not justified.

The PSR erroneously asserts that \_\_\_\_\_ “recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. . . .” PSR at 4. Consequently, it erroneously adds two levels under the Chapter Three Adjustment for Reckless Endangerment During Flight. *See id.*; Sentencing Guidelines §3C1.2.

The information in the PSR falls far short of establishing, much less proving beyond a reasonable doubt, that \_\_\_\_\_ created any risk of death or serious bodily injury, let alone a substantial risk. Because this is an aggravating adjustment under Chapter Three, the

government bears the burden of proof on this issue, and \_\_\_\_\_ believes that the applicable standard of proof is the beyond-a-reasonable-doubt standard.

After police saw Defendant on the front porch at \_\_\_\_\_, he fled on foot, running north on \_\_\_\_\_. A short distance away, at \_\_\_\_\_, the front door to the residence was open. Defendant ran into the open door, through the house, and out the rear door. There is no evidence that he touched anyone as he ran into or through the house. Nothing in the PSR suggests that he threatened or assaulted anyone in the process of entering or leaving \_\_\_\_\_. Although the PSR asserts that the residence “was occupied by Mary \_\_\_\_\_, and several of her grandchildren,<sup>8</sup> Defendant \_\_\_\_\_ believes that this assertion is incorrect. Mary \_\_\_\_\_ and three of the children (not grandchildren) were outside, in the front of the residence, as Defendant entered and departed. Mary \_\_\_\_\_’s children’s ages are 18, 15, 12, and 11. Defendant was in the house only for the length of time it takes to run from the front door to the back door. No weapons were displayed or discharged during the pursuit, and the government has never suggested that \_\_\_\_\_ was armed.

Under any standard of proof, these facts fail to establish the “substantial risk of death or serious bodily injury to another person” that section 3C1.2 explicitly requires. *See* Sentencing Guidelines §3C1.2. After *Booker*, however, Defendant believes that the government bears the burden of establishing a section 3C1.2 adjustment beyond a reasonable doubt. In his separate opinion, Justice Thomas observed:

The commentary to [Sentencing Guidelines] § 6A1.3 states that “[t]he [Sentencing] Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in

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8. PSR at 2.

resolving disputes regarding application of the guidelines to the facts of a case." The Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.

*Booker*, 125 S. Ct. at 798 n.6 (Thomas, J., dissenting in part). Similarly, Judge Bataillon in Nebraska concluded that post-*Booker*,

[t]he Due Process Clause is implicated whenever a judge determines a fact by a standard lower than "beyond a reasonable doubt" if that factual finding would increase the punishment above the lawful sentence that could have been imposed absent that fact. *Id.* at 754-55; *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348. *Booker* does not alter these due process constraints on sentencing. *See Blakely*, 124 S.Ct. at 2539-40."

*United States v. Huerta-Rodriguez*, 2005 WL 318640 (D. Neb. Feb. 1, 2005) (footnote omitted).

A finding of reckless endangerment under Sentencing Guidelines section 3C1.2 is such a fact and, therefore, the government's burden in \_\_\_\_\_'s case requires proof beyond a reasonable doubt.

That the facts found in the PSR fall far short of proving reckless endangerment is evident when one looks at case law concerning section 3C1.2. Unlike \_\_\_\_\_'s extremely brief transit from the front to the back of the Mary \_\_\_\_\_ residence, the more typical case involves dramatically more egregious conduct. In *United States v. Cook*, 356 F.3d 913, 917 (8<sup>th</sup> Cir. 2004), for example, the defendant drove through a residential area while intoxicated, crossed an intersection through oncoming cross-traffic, abandoned his car, charged into a stranger's home to hide, and required police to enter the house at gunpoint and arrest him in the presence of a mother and her seven children. *See* 913 F.3d at 917. As in *Cook*, reckless endangerment typically involves police pursuit of a defendant fleeing at high speed in a motor vehicle. *See*

*United States v. Moore*, 242 F.3d 1080, 1081 (8<sup>th</sup> Cir. 2001) (defendant fled police, drove 80 to 100 mph, ran two red lights, and swerved in and out of traffic on a busy highway); *United States v. Valdez*, 146 F.3d 547, 553-54 (8<sup>th</sup> Cir. 1998) (defendant fled by driving 70 to 80 mph on gravel road for over four miles with three state troopers in pursuit, waved shotgun during chase, and police fired at fleeing truck); *United States v. Sykes*, 4 F.3d 697, 700 (8<sup>th</sup> Cir. 1993) (police had to force defendant's speeding vehicle off road to apprehend him); *United States v. Pierce*, 388 F.3d 1136 (8<sup>th</sup> Cir. 2004) (defendant rammed police vehicle with his truck multiple times and then collided with parked cars); *see also United States v. Goolsby*, 209 F.3d 1079, 1081 (8<sup>th</sup> Cir. 2000) (defendant pushed minor child, who was in his care, into path of oncoming police vehicle as he fled officers attempting to execute search warrant). Other cases involve a loaded gun pointed at police officers. *See United States v. Rice*, 184 F.3d 740, 742 (8<sup>th</sup> Cir. 1999) (defendant pointed loaded gun at uniformed officers executing a search warrant); *United States v. Santiago Rivas-Gomez*, 2002 WL 21942 (8<sup>th</sup> Cir. 2002)(unpublished) (defendant aimed his gun at a pursuing officer and pulled the trigger).

\_\_\_\_\_ 's conduct contrasts sharply with these cases. His unarmed flight threatened no one. He was on foot, not in a vehicle. He exited \_\_\_\_\_ immediately after entering. In these circumstances, the reasoning of *United States v. Reyes-Oseguera*, 106 F.3d 1481 (9<sup>th</sup> Cir. 1997) should apply. The court “reiterate[d] the rule that instinctive flight on foot from law enforcement is insufficient on its own to justify the application of section 3C1.2. The guidelines contemplate that some additional conduct must create a substantial risk.” *Id.* at 1483 (emphasis added). The court then applied this rule in reviewing the district court's conclusion that Reyes-Oseguera should receive the reckless endangerment adjustment because “(1) Reyes-Oseguera

fled law enforcement officers on foot; and (2) an armed law enforcement officer pursued, tackled, and subdued Reyes-Oseguera.” *Id.* at 1484. It concluded that the government had failed to prove reckless endangerment:

Reyes-Oseguera's instinctive flight alone will not support the enhancement, nor will the armed agent's pursuit. Most flight will draw pursuit, and most law enforcement officers are armed. To hold that a defendant recklessly endangers another solely because he is pursued by an armed agent is the functional equivalent of finding instinctive flight sufficient. We are also wary of attributing an awareness of the actions of law enforcement officials to suspects who are in the midst of instinctive--and therefore not reasoned or contemplative--flight.

*Id.* Like Reyes-Oseguera, \_\_\_\_\_ did not “recklessly create[] a substantial risk of death or serious bodily injury to another person.” Sentencing Guidelines §3C.12.

#### 7. The Applicable Guidelines

The PSR has calculated a guideline range of 60 to 71 months which does not reflect Mr. \_\_\_\_\_’s eligibility for the safety valve. PSR, at 7. After a 2-level safety valve reduction, and a 3-level reduction for acceptance of responsibility, the advisory Guideline range is properly computed at 37 to 46 months, based on a total offense level of 21 and Criminal History Category I. This range, however, reflects the serious overstatement of the offense resulting from the 100:1 crack/powder ratio discussed above. Had \_\_\_\_\_ possessed only powder cocaine, his offense level would have dropped to level 12 and, after a 2-level reduction for acceptance of responsibility, resulted in a guideline range of 6 to 12 months. Taking into account all of the information in these objections, \_\_\_\_\_ believes that the 37 to 46 month range is unreasonable under the circumstances and requests a lower sentence to reflect the true seriousness of his crime and the nature and circumstances of his life experience.

Dated March 11, 2005.

Respectfully submitted,

/s/Michael Dwyer

MICHAEL C. DWYER

Federal Public Defender

1010 Market Street, Suite 200

St. Louis, Missouri 63101

Telephone: (314) 241-1255

Fax: (314) 421-3177

E-mail: [Michael\\_Dwyer@fd.org](mailto:Michael_Dwyer@fd.org)

Attorney for Defendant \_\_\_\_\_

**CERTIFICATE OF SERVICE**

Assistant Federal Public Defender Michael Dwyer certifies that he filed Defendant \_\_\_\_\_'s Objections to the Presentence Report electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon, Assistant United States Attorney. He also certifies that he provided copy of this document to the United States Probation Officer, St. Louis Missouri 63102, via hand delivery.

Dated March 11, 2005

/s/Michael C. Dwyer

MICHAEL C. DWYER

Assistant Federal Public Defender