IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	
		Criminal No.: CCB-10-0336
TONY COLLINS,	*	
Petitioner.	*	

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GOVERNMENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR IMPOSITION OF A REDUCED SENTENCE PURSUANT TO SECTION 404 OF THE FIRST STEP ACT

The United States of America, by undersigned counsel, hereby responds to Petitioner's Motion for Imposition of a Reduced Sentence Pursuant to Section 404 of the First Step Act. ECF No. 1036. The government requests that Petitioner's motion be denied.

BACKGROUND

Tony Collins ("Petitioner") was a member of a high-volume Baltimore drug-trafficking organization responsible for distributing cocaine, cocaine base, and heroin in and around Baltimore City. *See* ECF No. 345, (Superseding Indictment); Presentence Report ("PSR") at ¶¶ 7-8. Consequently, on December 15, 2010, Petitioner was charged in a twenty-four-count Superseding Indictment, with one count related to him: conspiracy to distribute 50 grams or more of a mixture or substance containing a detectable amount of cocaine base, 5 kilograms or more of a quantity of a mixture containing a detectable amount of cocaine, and a mixture containing a detectable amount of heroin, in violation of 21 U.S.C. § 846 (Count One). ECF No. 345 (Superseding Indictment).

On October 18, 2011, Petitioner pled guilty pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) to the sole count against him. ECF No. 659, (Rearraignment), 661 (Plea

Agreement). The parties agreed that a sentence of 160 months' imprisonment was the appropriate disposition of the case. ECF No. 661 (Plea Agreement) at ¶ 12. Petitioner stipulated in the plea agreement that his offense involved at least 280 grams of cocaine base. *Id*. at ¶ 7.

At sentencing, the Court adopted the factual findings and advisory guideline application in the presentence report ("PSR"), and determined that Petitioner's base offense level was 37 under U.S.S.G. § 4B1.1, the sentencing guideline for career offenders. Statement of Reasons ("SOR"); PSR at ¶ 22. Petitioner's base offense level was reduced three levels under §§ 3E1.1(a) & (b) for acceptance of responsibility. PSR at ¶¶ 19-20. As a result, Petitioner's final offense was 34. PSR at ¶ 24. When combined with a criminal history category of VI, Petitioner's guidelines sentencing range was 262 to 327 months. PSR at ¶ 53; SOR. Petitioner's statutory penalty range was a minimum term of imprisonment of ten years and a maximum term of life imprisonment, pursuant to 21 U.S.C. § 841(b)(1)(A).

Had the career offender guideline not been applied, the base offense level would have been 34 under § 2D1.1(c)(4), based on 5 kilograms of cocaine and 50 or more grams of cocaine base. PSR at ¶ 12. A two-level increase would have applied under § 2D1.2(a)(2), because the offense occurred at Gilmor Homes public housing complex in the Sandtown-Winchester area of West Baltimore, a protected location. *Id*. After a three-level adjustment for acceptance of responsibility, Petitioner's non-career offender offense level would have been 33. Combined with his non-career offender criminal history category, his guidelines would have been 210-262 months.

On February 2, 2012, the Honorable Benson Everett Legg sentenced Petitioner to the agreed-upon sentence of 160 months' imprisonment. ECF No. 751 (Judgment and Commitment Order ("J&C"). Petitioner did not appeal his conviction or sentence.

Petitioner now moves this Court to reduce his sentence pursuant to Section 404 of the First Step Act of 2018 to time served. ECF No. 1036. It is the Government's position that Petitioner is not eligible for a Section 404 sentence reduction, and alternatively requests that any reduction be denied as a matter of discretion.

LEGAL FRAMEWORK

Section 404 of The First Step Act of 2018, Public Law No. 115-015, permits this Court, upon motion of the defendant or the government, or upon its own motion, to impose a reduced sentence on certain offenses in accordance with the Fair Sentencing Act of 2010, if no such reduction was previously granted. First Step Act of 2018, Pub. L. No. 115-015, § 404, 132 Stat 015, 015 (2018). The section also expressly provides that any relief is discretionary. *Id*. ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."). Section 404 reads:

> **SEC. 404. Application of Fair Sentencing Act.**
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> (a) Definition of covered offense.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
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> (b) Defendants previously sentenced.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) Limitations.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall

> be construed to require a court to reduce any sentence pursuant to this section.

First Step Act of 2018, Pub. L. No. 115-015, § 404, 132 Stat 015, 015 (2018).

Substantively, § 404(b) of the First Step Act provides that a court "may" in its discretion "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 […] were in effect at the time the covered offense was committed." The Fair Sentencing Act of 2010, which took effect on August 3, 2010, reduced the disparity in the treatment of cocaine base and powder cocaine offenses from 100-to-1 to 18-to-1. *See Dorsey v. United States*, 567 U.S. 260, 264 (2012); Pub. L. No. 111-220, 124 Stat. 2372. Section 2 of the Fair Sentencing Act reduced the penalties for offenses involving cocaine base by increasing the threshold drug quantities required to trigger mandatory minimum sentences under 21 U.S.C. § 841(b)(1)(A) and (B).[1] Pub. L. No. 111-220, § 2, 124 Stat 2372. Specifically, the quantity of cocaine base necessary to trigger the 5-year mandatory minimum under § 841(b)(1)(B) was increased from 5 grams of cocaine base to 28 grams, and the quantity necessary for the 10-year minimum under § 841(b)(1)(A) was increased from 50 grams to 280 grams. *Dorsey*, 567 U.S. at 269; Section 2(a), 124 Stat. 2372. Thus, a "covered offense," which is defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 […], that was committed before August 3, 2010," is an offense where the statutory penalty range has changed because it was based on a quantity of crack cocaine.

Procedurally, the proper mechanism for reduction motions invoking Section 404 is found in 18 U.S.C. § 3582(c)(1)(B). Section 3582(c)(1)(B) provides that a "court may not modify a

[1] Section 3 of the Fair Sentencing Act, which is not at issue here, eliminated the mandatory minimum sentence for simple possession. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 3, 124 Stat 2372, 2372 (2010).

term of imprisonment once it has been imposed except that – (1) in any case – […] (B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute[…]." And indeed, Section 404 of the First Step Act expressly authorizes by statute changes to the penalty range for certain long-final sentences. Relief is discretionary. First Step Act, § 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.").

ANALYSIS

I. Petitioner's offense involved at least 280 grams of cocaine base.

It is the government's position that Petitioner was not convicted of a "covered offense" as required by the Fair Sentencing Act, because he admitted his drug trafficking activity involved "at least 280 grams but less than 840 grams of cocaine base." ECF No. 661 (Plea Agreement) at ¶ 7. Because the Fair Sentencing Act increased the quantity necessary for the 10-year minimum under § 841(b)(1)(A)(iii) from 50 grams to *280 grams*, this quantity would have resulted in the same statutory penalty both before and after the Act.

The government recognizes, however, that the Fourth Circuit's recent decision in *United States v. Wirsing*, 943 F.3d 175 (4th Cir. Nov. 20, 2019), as amended (Nov. 21, 2019) is now circuit precedent.[2] The government acknowledges that *Wirsing* is controlling for this Court on this issue, but we do not concede that the case was decided correctly, and we thus note our objection and preserve our argument for purposes of any subsequent appeal in this case or others. Specifically, the government's position is that actual quantities should matter in eligibility

[2] The Fourth Circuit held in *Wirsing* that "[a]ll defendants who are serving sentences for violations of 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii), and who are not excluded pursuant to the expressed limitations in Section 404(c) of the First Step Act, are eligible to move for relief under that Act." *Wirsing*, 943 F.3d at 186.

determinations, as the sole change effected by the Fair Sentencing Act that the First Step Act made retroactive was an adjustment of quantity thresholds. The portion of the Fair Sentencing Act at issue, which focused entirely on drug quantities, simply stated:

> SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.
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> (a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—
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> (1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams;" and
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> (2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams."

Section 2(a), 124 Stat. 2372. The result was a simple, crystal-clear modification of the statute's quantity requirements. Drug quantities obviously differ from case to case. By simply amending the quantity thresholds, Congress was requiring courts to focus on the relevant quantities in each case.

The First Step Act's plain text shows that Congress, in enacting § 404, was concerned about a particular class of cocaine base defendants – those whose statutory penalties would have been lower but for the fact that they were sentenced before August 3, 2010, and, therefore, could not take advantage of the Fair Sentencing Act. *See Dorsey v. United States*, 567 U.S. 260, 264 (2012) (concluding that the Fair Sentencing Act's more lenient penalty provisions apply to defendants sentenced after August 3, 2010, whether or not their crimes were committed before that date). Every defendant charged and sentenced today for the exact crime Petitioner committed would face the same statutory penalty range he faced. "Granting Defendant a sentence unavailable to defendants charged and sentenced today would turn the First Step Act's goal on its head." *Gadson*, 2019 WL 4463393, at *2.

Here, because Petitioner's conspiracy conviction involved at least 280 grams of cocaine base, precisely the amount contemplated by the current 280-gram threshold in § 841(b)(1)(A)(iii), there was no cocaine base-related disparity with respect to his statutory penalty range. While this Court may be constrained by the *Wirsing* decision from finding Petitioner ineligible, the Court can deny relief as a matter of discretion.

II. Petitioner's offense involved five kilograms of cocaine.

Additionally, Petitioner's statutory penalty range for his conspiracy conviction for distribution of cocaine and cocaine base was not modified by the First Step Act because both before and after the effective date of the Fair Sentencing Act, the statutory range for his offense involving five kilograms of powder cocaine was ten years to life imprisonment, under 21 U.S.C. § 841(b)(1)(A)(ii), and remains so today. Therefore, it is the government's position that Petitioner's conviction is not for a "covered offense."

The government recognizes, however, that the Fourth Circuit's recent decision in *United States v. Gravatt*, No. 19-6852, 2020 WL 1327200 (4th Cir. Mar. 23, 2020), is also now circuit precedent.[3] The government acknowledges that *Gravatt* is controlling for this Court on this issue, but we do not concede that the case was decided correctly, and we thus note our objection and preserve our argument for purposes of any subsequent appeal in this case or others.

III. This Court should consider the factors set forth in 18 U.S.C. § 3553(a) and deny relief.

The factors set forth in 18 U.S.C. § 3553(a) support a discretionary denial of a sentence reduction in this case. "Nothing in [Section 404] shall be construed to require a court to reduce

[3] The Fourth Circuit held in *Gravatt* that a defendant convicted of drug trafficking conspiracy involving both cocaine base and powder cocaine was eligible for relief under the First Step Act. *Gravatt*, 2020 WL 1327200, at *4.

any sentence pursuant to this section."). First Step Act, § 404(c). Thus, § 3553(a) factors are highly relevant in determining whether a defendant should receive a discretionary reduction of sentence.

Section 3553(a) provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary," to comply with the purposes described in § 3553(a)(2):

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2)(A)-(D). In imposing the sentence, the court shall consider *inter alia* "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).[4]

Here, the history and characteristics of the defendant are an important consideration (18 U.S.C. § 3553(a)(1)), as Petitioner's criminal history is substantial, resulting in his classification as a career offender when he was sentenced for the instant offense. *See* PSR at ¶¶ 27-39. His criminal history includes prior convictions in the State of Maryland for drug-trafficking activity.

[4] Additionally, the Court may consider an eligible defendant's post-sentencing conduct in determining whether relief is appropriate. *See Pepper v. United States*, 562 U.S. 476 (2011). The government acknowledges that Petitioner's conduct in the Bureau of Prisons has been good. *See* Petitioner's Exhibit 3. However, as Chief Judge James K. Bredar recently wrote: "Although all inmates are expected to behave while they are incarcerated, and to progress through the security rating process, not all do. All inmates are expected to adhere to their programmatic regimens, including, when appropriate, obtaining a GED, but, again, not all do." ECF No. 193 at 2, in *United States v. Blackwell*, case no. JKB-10-cr-00493.

PSR at ¶¶ 27, 31, 33.[5] Petitioner was also convicted of robbery, a crime of violence, in the Circuit Court for Baltimore City. PSR at ¶ 29. Petitioner's lengthy criminal history suggests that he has relied on criminal activity for his livelihood, despite efforts to rehabilitate, punish and deter him.

The nature and circumstances of the offense are also an important consideration here. 18 U.S.C. § 3553(a)(1). Petitioner's instant offense involved a large quantity of street narcotics, mirroring his prior narcotics convictions and presenting a great potential for harm to the community. And, although Petitioner argues his offense involved no guns (ECF No. 1036 at 1, 8), the conspiracy which gave rise to his sole charge of conviction did involve firearms possessed by other members of the conspiracy. *See* ECF No. 345 (Superseding Indictment) at 13, 14, 20, 21, 22, 23, 24, 25, 26. Indeed, other participants were charged with possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c) (Dione Fauntleroy in Count Eleven, Damian Jackson in Count Eighteen, Taii Speaks in Count Twenty, and Roger Ford in Count Twenty-Two); possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k) (Dione Fauntleroy in Count Twelve and Taii Speaks in Count Twenty-One); possessing a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g) (Damian Jackson in Count Nineteen and Roger Ford in Count Twenty-Three); and possessing body armor after a felony conviction, in violation of 18 U.S.C. § 931(a)(1) (Roger Ford in Count Twenty-Four).

The prolific arming of Petitioner's co-defendants suggests this conspiracy was not simply a "nonviolent drug offense" (ECF No. 1036 at 8) as he claims. As such, Petitioner's conviction

[5] One of Petitioner's prior convictions was for simple possession; however, in that case the facts show that he and other individuals were suspected of engaging in a narcotics transaction. PSR at ¶¶ 27-28.

cannot be made light of as a mere drug offense. Chief Judge Bredar recently emphasized "the correlation between illegal drug trafficking and violent crime." ECF No. 193 at 3-4, in *Blackwell*, case no. JKB-10-cr-00493. He wrote:

> There is no serious dispute that the illegal drug business brings with it violence, often lethal and on a large scale. The Court finds and concludes that those who participate in and profit from large scale, illegal drug trafficking activities are engaging in conduct that at least indirectly leads to widespread violence.

Id.

Additionally, the large quantity of cocaine (five kilograms) and cocaine base (280 to 840 grams) indicates that no disparity demands correction.

The need to afford adequate deterrence to criminal conduct crime and promote respect for law is also important here. 18 U.S.C. § 3553(a)(2)(A) & (B). Petitioner pled guilty pursuant to Rule 11(c)(1)(C), and agreed to serve a sentence of 160 months in the Bureau of Prisons. As discussed above, the sentence was substantially lower than both his career offender guidelines range (262 to 327 months) and non-career offender guidelines range (210-262 months). *See supra* at 2-3. In fact, the sentence is lower than the non-career offender guidelines that would apply today (168-210). *See* ECF No. 1036 at 8. Moreover, by agreeing to a plea of 160 months pursuant to Rule 11(c)(1)(C), Petitioner avoided what would have been a **mandatory** life sentence, pursuant to 21 U.S.C. 851. *See* ECF No. 639.

Furthermore, the government rejects as misplaced any contention that Petitioner no longer qualifies as a career offender. (ECF No. 1036 at 7-8). Petitioner attacks his career offender predicate offenses on the basis of case law and argument more appropriately raised in a motion under 28 U.S.C. § 2255.[6] *See e.g.*, *United States v. Maxwell*, 210 F.3d 363 (4th Cir.

[6] Specifically, Petitioner cites *United States v. Norman*, 935 F.3d 232, 239 (4th Cir. 2019), a case that would not provide an avenue to bring a § 2255 motion, particularly in light of the bar

2000) (unpublished) (noting that petitioner's motion filed under § 3582(c)(2) "is more appropriately characterized as" a § 2255 motion); *Saunders v. United States*, No. DKC 16-2399, 2016 WL 7429165, at *1 & n. 1 (D. Md. Dec. 23, 2016) (construing what purported to be a motion under § 3582(c)(2) as a motion under § 2255 and noting that a "[p]etitioner may not evade the procedural requirements for successive § 2255 motions by attaching other titles to his motion").

His argument to that effect is inappropriate, as the First Step Act does not provide an avenue for such collateral review. Although the Act could have been drafted to create a right to collateral review or plenary resentencing, it was not. This Court should decide whether to modify a defendant's sentence "by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act.'" *United States v. Brooks*, 788 F. App'x 213, 214 (4th Cir. 2019) (quoting *United States v. Hegwood*, 934 F.3d 414, 417-19 (5th Cir. 2019)). *See also United States v. Curry*, 792 F. App'x 267, 268 (4th Cir. 2020) ("the Sentencing Guidelines calculations are simply adjusted 'as if' the current lower drug offense sentences were in effect at the time of the commission of the offense.").

Moreover, Petitioner's reliance on the COVID-19 outbreak (ECF No. 1036 at 9-10) suggests this motion is an end-run around the jurisdictional bar to requesting early release from the Volunteers of America halfway house, where he is currently housed. The First Step Act was not created as a mechanism for early release on the basis of COVID-19. Furthermore, there is no evidence that Petitioner's physical condition reflects he is at risk, nor is there evidence that there is an outbreak of COVID-19 at VOA. Indeed, finality in sentencing is a hallmark of federal law,

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on collateral review of career offender classification established by *Beckles v. United States*, 136 S. Ct. 2510, 195 L. Ed. 2d 838 (2016).

which mandates that once a judgment is entered, it generally shall be "final" for "all purposes." 18 U.S.C. § 3582(b). The Fourth Circuit has itself recognized that the sentencing statute, 18 U.S.C. § 3582(b), "states that a district court may not modify a term of imprisonment once it has been imposed unless the Bureau of Prisons moves for a reduction, the Sentencing Commission amends the applicable Guidelines range, or another statute or Rule 35 expressly permits the court to do so." *United States v. Goodwyn*, 596 F.3d 233, 235 (4th Cir. 2010) (internal quotations marks and citations omitted). *See also United States v. Cunningham*, 554 F.3d 703, 708 (7th Cir. 2009) ("[T]here is no 'inherent authority' for a district court to modify a sentence as it pleases; indeed a district court's discretion to modify a sentence is an exception to [§ 3582's] general rule [barring modification]."). Additionally, federal law also vests the BOP with plenary power to designate where inmates serve their sentences. *See* 18 U.S.C. § 3621(b). BOP retains this discretion even when an inmate is designated to serve the remaining portion of their sentence in a halfway house or home confinement. *See* 18 U.S.C. § 3624(c). The Supreme Court has recognized that prisoners lack any right to mandate where they serve their sentence. *See Meachum v. Fano*, 427 U.S. 215, 223 (1976).[7]

The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct is also an important consideration. 18 U.S.C. § 3553(a)(6). Here, at least six of Petitioner's co-defendants were previously sentenced to the same 160-month sentence as a result of Rule 11(c)(1)(C) plea agreements. *See* ECF Nos. 485 (Kevin Jenkins J&C); 713 (Travis Stanfield J&C); 715 (Dione Fauntleroy J&C); 749 (William Herring J&C); 753 (Jerome Powell J&C); 777 (Kimmer Baker J&C). The Court

[7] As recently as March 26, 2020, in denying a defendant's nine- month early release from the VOA based on a COVID 19 claim, U.S. District Court Judge Richard D. Bennett held that "[t]his Court has no jurisdiction to grant such relief." *United States v. Demario Lamar Brown*, Memorandum Order, RDB-16-cr-00553 at 2.

should consider whether Petitioner merits relief where his similarly situated co-defendants may not.

IV. A time-served sentence is inadequate to satisfy the requirements of 18 U.S.C. § 3553(a).

For all the reasons discussed above, this Court should decline to reduce Petitioner's sentence. If the Court does decide to grant a reduction, however, the government asks that it delay his release for a period of at least 10 calendar days from the date of the court's order, so as to enable the Bureau of Prisons to conduct an appropriate pre-release review.[8]

CONCLUSION

For the reasons stated herein, the Government respectfully requests that this Honorable Court DENY Petitioner's motion with prejudice.

Respectfully submitted,

Robert K. Hur
United States Attorney

By: _____/s/_____
Ellen E. Nazmy
Special Assistant United States Attorney

_____/s/_____
David I. Salem
Assistant United States Attorney

[8] Such a review would allow the BOP, among other things: (1) to review the defendant for possible civil commitment as a sexually dangerous person, as required by 18 U.S.C. § 4248; (2) to notify victims and witnesses of the release of an offender as required by 18 U.S.C. § 3771; (3) to notify law enforcement officials and sex offender registration officials of the release of a violent offender or sex offender pursuant to 18 U.S.C. §§ 4042(b) and (c); and (4) to permit adequate time to collect DNA samples pursuant to 42 U.S.C. § 14135a.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 30, 2020, a copy of the foregoing Response was delivered via ECF to Shari Silver Derrow, Esquire, counsel for the Petitioner.

By: _____/s/_____
Ellen E. Nazmy
Special Assistant United States Attorney