

I. INTRODUCTION

A. Statement of the Case

This report is submitted on behalf of [REDACTED] to assist the Court in the difficult task of imposing a fair and appropriate sentence in this case. [REDACTED] pleaded guilty on March 22, 2006 to count fifty-three of a 57 count indictment, specifically, Conspiracy to Distribute and Possess with Intent to Distribute ecstasy, a Class C felony. [REDACTED] plea of guilty was preceded by a plea agreement executed on February 23, 2006, between [REDACTED] and the government. The agreement stipulated that an offense level 23 with a provision allowing the Court to determine whether a minor participant reduction of 2 points to offense level 21, or a minimal participant reduction of 4 points to offense level 19 is applicable. Otherwise, the parties agreed that the offense level would be 23. Of course, the Court is not bound by the plea agreement.

B. Overview

This report is meant to supplement the Probation Department's Presentence Report, to provide the Court with additional insight into [REDACTED] [REDACTED] background, particularly his long standing drug addiction, and to bring to the Court's attention mitigating information regarding [REDACTED] [REDACTED] criminal history and the extent of his involvement in the instant offense.

Based on all of our research, and on [REDACTED] background, criminal history and his limited involvement in this offense, it is our opinion that he does not fit the description of a career offender as intended by the Federal Sentencing Guidelines, but rather that his prior arrests represent a criminal history typical of a heroin addict whose arrests were the result of his possession of heroin for personal use. There is every indication that [REDACTED] involvement in the instant offense was limited and that he is the least culpable of all co-defendants. The primary objective of 18 U.S.C. § 3661, "that the district court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing", and that "no limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" require a thorough and individualized evaluation of [REDACTED] personal and criminal history and a sentence pursuant to 18 U.S.C. 3553(a) determination in keeping with those facts.

C. Sentencing Under Booker

Even prior to United States v. Booker, when the Sentencing Guidelines were mandatory, they placed essentially no limit on the number of potential factors that may warrant a departure Koon v. U.S., 518 U.S. 81,

106 (1996), and allowed for departures “where there exists an aggravating or a mitigating circumstance of a kind not adequately taken into consideration in the guidelines” (USSG 5.K2.0 Commentary). The applicable question is whether [REDACTED] should receive a downward adjustment or a sentence variance to his advisory guideline, pursuant to U.S.S.G. 4A1.3 or 18 U.S.C. 3553 (a) because his designation as a Career Offender, pursuant to U.S.G. 4B1.1, overstates the seriousness of his criminal history and his propensity to commit future offenses. The United States Sentencing Guidelines provide for a downward departure from a criminal history category in cases where reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes. U.S.S.G. 4A1.3 (b) (1).

This policy statement gives the Court great latitude in determining the relevancy of the defendant’s criminal history; the limiting language usually found in departure provisions of the Guidelines such as circumstances not adequately taken into consideration by the Sentencing Commission is notably absent. See, e.g., U.S.S.G. 5K2.0; United States v. Schoupe, 988 F.2d 440, 444-47 (3d Cir. 1993) (Schoupe II)(In determining whether defendant’s criminal history is inadequately reflected, district court may consider factors which Commission may have otherwise considered).

The flexibility provided the district court in U.S.S.G. 4A1.3 stems from the impossibility of a precise calibration of criminal backgrounds. Congress directed the Sentencing Commission to consider the relevance of a defendant's criminal history when formulating its guidelines and policy statements. 28 U.S.C. 994(d) (10). The Commission itself acknowledged considerable difficulty in defining an approach that would adequately capture the relevance of the defendant's criminal history in calculating a sentencing range. Supplemental Report of the Initial Sentencing Guidelines and Policy Statements, at 41-44 (June 18, 1987). The Commission has made no definitive judgment as to the reliability of the existing data which underlies the Commission's approach to calculating a criminal history score. However, the Commission will review existing data insofar as they become available in the future." U.S.S.G. Chapter 4, Part A, Introductory Commentary.

The Court of Appeals for the Third Circuit, recognizing criminal history as one of the most flexible concepts in the guidelines, has held that a sentencing court should depart downward when the criminal history category significantly over-represents the seriousness of the defendant's prior conduct. Schoupe II, 988 F. 2d at 444. Our own District Court has recognized the validity of downward departure for over-representation of criminal history. See United States v. Urbanski, Criminal No. 00-215 (Judge Simandle, September 22, 2000); United States v. Sean Smith, Criminal Nos.

00-73 and 00-413 (Judge Orlofsky, October 13, 2000); United States v. Kareem James, Criminal No. 00-150 (Judge Irenas, November 3, 2000).

Other circuits have followed the lead of the Third Circuit and also allowed downward departures when a defendant's criminal history score overemphasizes the severity of prior conduct. See United States v. Lindia, 82 F. 3d 1154 (1st Cir. 1996); United States v. Rivers, 50 F. 3d 1126 (2d Cir. 1995); United States v. Mishoe, 241 F. 3d 214 (2d Cir. 2001); United States v. Abbott, 30 F. 3d 71 (7 Cir. 1994).

Additionally, it is well-established that where the criminal history category over-represents the seriousness of a defendant's prior conduct, a downward departure may be granted despite a defendant's classification as a career offender. See United States v. Schoupe (Schoupe II), 35 F. 3d 835, 838 (3d Cir. 1994). See also United States v. Reyes, 8 F. 3d 1379 (9th Cir. 1993); United States v. Bowser, 941f. 2d 1019 (10th cir. 1991); United States v. Pinckney, 938 F. 2d 519 (4th Cir. 1991); Unites States v. Senior, 935 F. 2d 149 (8th Cir. 1991); Unites States v. Dean, 908 F. 2d 215, 216 (7th Cir. 1990), cert. denied 501 U.S. 1206 (1991). Furthermore, [b]ecause career offender status enhances both a defendant's criminal history category and offense level a sentencing court may depart under proper circumstances. Schoupe III, 35 F. 3d at 835-839.

With an offense level of 29 and a criminal history category of VI, [REDACTED] [REDACTED] faces an advisory guideline range of 151 to 188 with the

application of Career Offender status. Although, [REDACTED] technically falls within the Career Offender provision, his history of criminal conduct is considerably less serious than that of most career offenders. *See Bowser*, 941 F. 2d at 1023 awarding downward departure from Career Offender designation where defendant's history was comparatively less serious than most Career offenders); *United States v. Senior*, 935 F. 2d 149, 151 (8th Cir. 1991) (applying guideline range that would have applied if defendant did not fall under career offender status was a reasonable departure).

It is respectfully submitted that for the reasons set out below the criminal conduct and characteristics of [REDACTED] call for an advisory sentence at or near a sentence range of 63-78 months with the lowest end of the sentence imposed at 63 months. Such a sentence is reasonable. It recognizes reasons for an appropriate advisory sentence under the circumstances, takes into account that he is a minimal participant based upon his conduct in this case and overall history of his criminal conduct.

II. [REDACTED] Social History

In preparation of this report, NCIA interviewed [REDACTED] in its offices in New York City and met with and had numerous conversations with [REDACTED] [REDACTED] attorney Mr. Anthony G. Simonetti. We spoke with [REDACTED] [REDACTED] family members by telephone and reviewed letters of support written on

██████████ behalf by relatives, friends, neighbors and his former wrestling coach and mentor from high school. We reviewed pertinent case materials including the following: plea agreement, ██████████ ██████████ offense statement; a videotape of a meeting he attended with ██████████, ██████████, his coconspirators, and government undercover agents (video is sent separately as part of this submission with a cover letter addressed to the Court); ██████████ prior criminal history and court records regarding the same from the Circuit Courts of Cooke County and Dupage County,); hospital records verifying ██████████ ██████████ gunshot wounds from 1982 (attached as Exhibit 1). Finally, we conducted exhaustive research on the Federal Sentencing Guidelines and relevant case law as they pertain to Career Offender Status.

██████████ Personal History

So as not to belabor the Court with information contained in the Presentence Report, the following is an abbreviated personal history of ██████████ ██████████.

██████████ was born in Chicago, Illinois on January 30, 1964, the youngest of five children of ██████████.

██████████ suffered a fatal stroke in his mid-60s in 1970 and ██████████ ██████████ died of cancer in 1994.

██████████ and his siblings remain close. ██████████, age 49; ██████████, age 46; and ██████████, age 42, reside in Illinois. A paternal half sister,

██████████, age 72, lives in California. ██████████ brother ██████████ died of a heart attack at the age of 40 in 1994.

As a young child, ██████████ witnessed domestic violence in his home. His father was an alcoholic who beat ██████████' mother when he was drunk. ██████████ parents finally separated when he was six and from that time on, ██████████ raised her children as a single mother, working as a school bus aide to support her family. Still, ██████████ has fond memories of his childhood in a close-knit family and recalls that his mother was able to provide adequate financial support for the family to live comfortably.

██████████ attended local public schools and graduated from Proviso East High School in Maywood, Illinois, in 1982. He was the captain of the varsity wrestling team for three years, during which the team won the state finals in 1980 and 1981. His coach at the time, ██████████, who has coached school sports for 38 years, considered ██████████ a vital part of the team's success. Twenty five years later, ██████████ still remembers ██████████. He wrote a very moving letter (attached hereto as Exhibit 2) to the Court on ██████████' behalf in which he describes his relationship with ██████████ when he was his coach and mentor.

I got to know ██████████ and his family because he participated in wrestling programs offered year around, and in the

summer we would travel all over the state and country to compete. I drove Lester home many times, dropping him off on 5th Avenue in Maywood, a rough section of town, where he lives with his elderly mother and older brothers. One of [REDACTED] brothers was a great high school athlete a state champion diver and an All-American diver in college. He was [REDACTED] mentor and a model for hard work and persistence.

With [REDACTED] help, [REDACTED] was accepted to Jamestown College in South Dakota and would have begun college in the fall of 1982 along with several classmates. That summer, [REDACTED] life was altered when he was shot in the abdomen by thieves trying to steal hubcaps from his family's car. He underwent surgery and spent a month in the hospital recuperating. His wrestling and college career, his avenue to a more productive life away from Maywood, ended prematurely and [REDACTED] classmates went to Jamestown College without him. While [REDACTED] friends' lives changed over the years after high school -- they graduated from college, got good jobs, got married and started families -- [REDACTED] life changed very little. He was still single, still working at menial jobs and had few prospects. There were two things that he felt gave his life meaning -- his relationship with his family and his volunteer work at his old high school, where he could relive

his days as a varsity wrestling champion. Though [REDACTED] never wrestled again, he maintained his relationship with his former coach who took him up on his offer to help out at the school. [REDACTED], in his letter, describes [REDACTED] contributions:

Through the years [REDACTED] had always been interested in helping younger kids and would regularly come and help the high school team by encouraging them, and giving them tips on technique. He also bought sweatshirts, shoes and wrestling gear to help motivate kids. The kids looked up to him because of his reputation as a great wrestler at Proviso. I know that to give back to young people was always a positive thing for [REDACTED].

██████████ life took another tragic turn in 1994, when his mother and his brother ██████████ died within months of each other. ██████████ had a special relationship with his brother ██████████. ██████████ was a championship swimmer and diver and a high school swimming coach whose athletic career continued long after his brother ██████████ ended. ██████████ looked up to ██████████ and was proud of his success. On the night before he died, not long after their mother passed away, ██████████ stayed at ██████████ house. The following morning ██████████ found ██████████ dead in his bed.

██████████ was inconsolable. Within weeks after the deaths of his mother and brother, ██████████ ██████████ drug use, which until that time consisted of marijuana use begun after his shooting incident, soon escalated into heroin use. ██████████' heroin habit, which continued to plague him until his arrest on the instant offense, resulted in four drug related arrests and convictions, two of which constitute the predicate offenses that trigger the career offender designation.

In 1995, less than one year after the deaths of his mother and brother, ██████████ ██████████ married ██████████. They had no children and within two years they were divorced. Shortly thereafter, his on and off girlfriend of many years, ██████████, gave birth to his daughter, ██████████, who is now 16 years old. ██████████ had two children from a previous relationship at the time and according to ██████████ and others, ██████████ ██████████ has not

only contributed to [REDACTED] upbringing, but he has been a surrogate father to both of [REDACTED] other children, [REDACTED], now 19 years old, and [REDACTED], 22. Though they no longer live together, [REDACTED] [REDACTED] and [REDACTED] are on good terms and see each other regularly when [REDACTED] [REDACTED] visits his daughter.

For the past several years, [REDACTED] has been in a relationship with [REDACTED]. Though [REDACTED] has been living with his sister [REDACTED] and her husband since his arrest, he sees [REDACTED] regularly and has taken on a fatherly role to her 15 year old son. A friend of the couple, [REDACTED] writes: (Letter attached as Exhibit 3.)

In the years that I have known [REDACTED] he has always been a kind and helpful person...He has been a loyal companion to [REDACTED] his girlfriend and my best friend. More importantly he is an excellent father for his daughter and [REDACTED] son... [REDACTED] absence was felt on his stepson's first day of high school, but he knows he needs to keep up with the high level of standards even in [REDACTED] [REDACTED] absence. His step-son is currently a freshman at Downers Grove High School, on the school honor role, and a starting guard on the basketball team. This is just a fragment of the importance [REDACTED]' presence is in the lives of his friends and family...

Despite his lack of a college education or marketable skills, [REDACTED] [REDACTED] has always been employed. Recalling how his mother strived to support her family, he has never shunned menial work, rather, has taken any job available to him in order to support himself and to assist with his daughter's care. As documented in the PSI, from 1985 until his arrest, he has worked in a variety of capacities earning slightly more than the minimum wage. He has worked as a grocery store clerk, an assembly line laborer, as a car wash attendant and warehouse worker. Recently, he was fired from his job at Senior Flexonics warehouse, where he was earning \$8.50 per hour, due to his conviction on the instant offense.

While on released on bail, [REDACTED] has attempted to remain employed as a factory worker for an agency that places individuals with employers in need of temporary workers.

Since his arrest in March 2005, [REDACTED] has made a successful rehabilitation. He has maintained stable residence and steady employment and has refrained from all drug and alcohol use, as verified by consistently negative results on drug tests administered while he is under Pretrial Services Agency supervision.

[REDACTED] explained that prior to his most recent arrest, he viewed himself as a victim of unfortunate incidences over which he had little control. Sober and without the clouding of judgment resulting from years of dependency on drugs, [REDACTED] has since been able to make an

honest assessment of his life and his poor judgment and choices that have culminated in his current legal predicament and he is committed to changing his negative attitudes and behaviors. The fact that he has been able to maintain his commitment, even in light of the period of incarceration he is most certainly facing gives credence to his firm resolve and greatly increase the chances of his on-going successful rehabilitation.

Substance Abuse History

██████████ began using drugs when he was 19 years old. Although never diagnosed with or treated for depression, it is very likely that the shooting incident that ended ██████████ wrestling and college career, and ten years later, the deaths of his mother and brother triggered a need for ██████████ to self-medicate depression and grief. As the son of an alcoholic, ██████████ is considerably more predisposed to drug and alcohol abuse than children of non-substance using parents. Though it was readily available to him growing up, it was while he was recuperating from his gunshot wound that ██████████ first began using marijuana. Ten years later, following the deaths of his mother and brother in close succession, ██████████ was introduced to and began using heroin.

Despite his on-going heroin use, ██████████ managed to maintain employment and function at a level most likely far below his potential. Still, his drug use clouded his judgment, interfered with his personal

relationships and brought him into contact with the criminal justice system. While under probation supervision and while incarcerated, [REDACTED] took every opportunity to get treatment for his addiction, and did in fact, remain sober for periods of time following treatment. However, when faced with stress or negative feelings beyond his ability to deal with, he would revert to drug use. For the past 24 months since his arrest on the instant offense, [REDACTED] has been sober, evidencing his capacity to remain sober and rehabilitate his life.

**Psychological Evaluation and Report of Dr. Gerald Cooke
(attached as Exhibit 4)**

At the request of defense counsel, [REDACTED] underwent a psychological evaluation conducted by clinical and forensic psychologist Gerald Cooke, Ph.D. in May 2006. In addition to standardized I.Q. and psychological tests, Dr. Cooke administered the Psychopathy Checklist Revised (PCL-R), a measure of antisocial attitudes, values and behaviors measuring the degree of psychopathy that can be used to predict antisocial behavior. Dr. Cooke also conducted a personal background interview, including a detailed history of [REDACTED] [REDACTED]' history of substance abuse, and reviewed [REDACTED] plea agreement and his prior criminal history.

Testing of [REDACTED] intellectual functioning revealed a prorated Verbal I.Q. of 82, which is in the Low Average Range and at the 12th percentile of the population. Personality testing findings revealed that [REDACTED] is well within the normal range on the Psychopathic Deviate Scale, and in fact, he scored much lower than most individuals with a criminal history. In Dr. Cooke's words, however, he does have a considerable tendency to act impulsively and without giving adequate thought before acting and he tends to lack a sufficient amount of anticipatory anxiety or guilt that would inhibit him from becoming involved in actions which would have negative consequences for himself and/or others.

The PCL-R is an actuarial measure based on research, which compares the presence of psychopathic/antisocial attitudes, values and behaviors of the person being tested with a normative group of male prison inmates. In his letter to defense counsel reporting the finding of his evaluation of [REDACTED], Dr. Cooke explains that the PCL-R has been shown to be predictive of an individual's potential for the above-mentioned traits to be expressed in criminal activity. Of [REDACTED] score on this particular test, Dr. Cooke made the following statement:

His [REDACTED] score on this measure reveals that, despite his criminal involvement with drugs and his criminal history, that he is only at 5.7% compared to the male prison inmate

population. This means that more than 94% of male prison inmates are more psychopathic than he is.

In ending his evaluation letter, Dr. Cooke addressed the issue of Career Offender Status regarding [REDACTED] in the following manner:

While this examiner is well aware that the determination regarding whether he is a career offender must be made by the Court, from a psychological perspective he does not show the kinds of characteristics usually associated with that designation, and both his prior and this present charge are more the result of his own drug dependency.

III. Application of Sentencing Factors to the Facts of the Case

Factors That Warrant a Downward Departure Or Discretionary Variant Sentence

The Advisory Sentencing Guidelines Range Results in a Greater than Necessary Sentence in this Case

[REDACTED], a 45 year old man with a lifelong history of substance abuse and a minimal, minor at most, participant in the instant offense, is facing a sentence of imprisonment of approximately 12 1/2 to 15 1/2 years under the literal application of the sentencing guidelines. Such a

sentence is completely out of context with [REDACTED] personal history characteristics and an evaluation of the circumstances of his prior criminal history. In addition, an overly lengthy period of imprisonment would mean that [REDACTED] would serve many more years than even the most culpable defendants in this case.

Even prior to United States v. Booker, the Sentencing Guidelines provided judges the authority to depart from the recommended Guideline range for unique circumstances that were not reflected in the necessarily broad categories outlined in the Sentencing Guidelines.

The Sentencing Commission's November 2004 report, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, describes several functions that departures from the Guidelines serve, namely: they help maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices. 28 U.S.C. 994 (b)(1)(B). They allow fine-tuning of sentences when literal application of a guideline would fail to achieve the guideline's intended purpose (Hofer & Allenbaugh, 2003). Finally, the Commission noted that departures provide feedback to the Commission, which allows them to refine the guidelines accordingly.

Section 3553 (c) requires the sentencing court to state in open court the reasons for its imposition of the particular sentence and the reason for imposing a sentence at a particular point within a guideline range that exceeds 24 months. For sentences outside of the guidelines range, the court must provide the specific reason for the imposition of a sentence different from that described, which reasons must be stated with specificity in the written order of judgment and commitment. (March 2006 amendment to 28 U.S.C. § 994 (w) (1) requires that the reasons must be stated on AO Form 245B.)

Appellate courts have stressed the obligation of sentencing courts to explain the reasons for a sentence, particularly in the case of a departure or a non-guidelines sentence. The Third Circuit found, in United States v. Grier, 449 F.3d 558, 574-75 (3d Cir. 2006), that *Booker*, in rendering the guidelines advisory rather than mandatory, “place[d] a premium on the explanation of sentencing decisions and that a “reasoned and rational justification for a sentence is necessary to assure the parties of the fairness of the proceedings, to instill public confidence in the judicial process, and to allow for effective appellate review.” The advisory guidelines for ██████████ ██████████, which would require a sentence of approximately between 12 1/2 and 15 1/2 years of imprisonment is clearly a situation in which a strictly literal application of the guidelines misrepresents both the defendant’s individual characteristics and his criminal history. It would create gross

disparity between [REDACTED] sentence and those of his more culpable similarly situated defendants. It would result in an overly punitive sentence that would be counterproductive to [REDACTED] future rehabilitation and would disrupt, and perhaps do irreparable damage to [REDACTED] relationship with his teenage daughter, his two step-children, and his girlfriends' son, all who are on the verge of adulthood and without other male parental support and guidance.

Career Criminal Status Overstates the Severity of [REDACTED] Prior Criminal History

The designation of [REDACTED] as a Career Criminal Offender represents a distortion of the facts underlying [REDACTED] prior criminal history. Even his two prior convictions for Possession with Intent to Deliver Heroin involved drug weights that are consistent with personal use for someone with [REDACTED] substance abuse history. In agreeing to plead to the delivery charges, in return for probation in one case and a reasonable term of imprisonment on the other (considering that the conviction was a violation of probation), [REDACTED] could not conceive that these convictions would someday result in a sentencing enhancement of ten or more years.

██████████ first arrest and conviction, for Battery, occurred when he was 20 years old. He was sentenced to 12 months of probation supervision and a \$100 fine. He received no Sentencing Guidelines Criminal History points for this conviction. A second arrest, seven years later for Possession of Heroin, resulted in a sentence of 30 months probation and a \$230 fine. His probation was terminated satisfactorily and no Sentencing Guidelines Criminal History points result from this conviction. Essentially, ██████████ has demonstrated throughout his adult life that he is not a violent person.

██████████ has only three convictions that result in Sentencing Guidelines Criminal History points. The first, in 1993, when ██████████ was 28 years old, was for Possession of Heroin, for which he was sentenced in June of 1994 to 30 months intensive probation supervision and a \$230 fine. Despite the fact that his next arrest 21 months later for Possession of Heroin with intent to Deliver (less than 10 grams) was a violation of his probation on the previous conviction, he was once again sentenced to 30 months probation and a \$230 fine. He violated the conditions of this period of probation one month short of completing his sentence when he was arrested for Possession of Heroin with Intent to Distribute (more than one gram, but less than 15 grams) 29 months later, in September 1998. He was released pending sentencing for six months and sentenced in March 1999 to 4 years imprisonment with credit for time served; \$1,000 CDS assessment; \$50 lab fee and \$225 fine. He was released at his earliest

possible release date 20 months later in October 2000 and discharged from parole without incident in October 2002. Because [REDACTED] was incarcerated for more than one year, this conviction resulted in 3 Criminal History points and constituted the second of two predicate offenses that expose [REDACTED] to designation as a Career Offender under the Sentencing Guidelines.

Circuit courts have upheld district court downward departure decisions based on various factors that apply [REDACTED]. In United States v. Reyes, 8F. 3d 1379 (9th Cir. 1993), the court upheld a downward departure from 210 to 33 months, from career offender guidelines, in both offense level and criminal category, where the defendant was a comparatively minor offender, but remands for court to state reason for extent of departure; United States v. Mishoe, 241 F. 3d 214 (2d Cir. 2001) reversed district court's grant of downward departure because they should not automatically be given to street level offenders, granted that horizontal departure in criminal category may be warranted where prior sentences were lenient; In United States v. Gayles, 1 F. 3d 735, 739 (8th Cir. 1993) the case was remanded to permit the judge to consider downward departure, noting that in making the determination, the judge must consider the historical facts of the defendant's criminal history.

**DOWNWARD DEPARTURE OR DISCRETIONARY VARIANT
SENTENCE IS WARRANTED**

The following additional substantial factors provide basis for departure pursuant to 4A1.3 or variance pursuant to 18 U.S.C. § 3553(a) from a career offender sentence:

1. Other than street level drug offenses committed without an accomplice or criminal conspirator and involving small amounts of drugs, [REDACTED] does not exhibit serious other evidence of prior criminal behavior. He was a minor participant in the instant offense. Dr. Cooke's psychological report concluded that he does not have the kinds of characteristics associated with career offender, has a fair prognosis to refrain from drug use as evidenced by his drug free condition while on parole and does not, to the extent that he does not possess aggressive behavior towards others, pose a danger to society. United States v. Lawrence, 916 F. 2d 553, 554 (3d Cir. 1993) (Court granted a departure based in part upon testimony of a psychiatrist that the likelihood of recidivism was low and on the fact that defendant's violations were not violent or anti-social.) On bail since March 2006 to now, [REDACTED]

██████████ has been drug free. His predicate career offender offenses were for street level drug offenses, that were non-conspiratorial and without an accomplice and involved a small amounts of drugs by a person struggling with drug addiction. Unites States v. Mishoe , 241 F. 3d 214, 219 (2d Cir. 2001) (Downward departure pursuant to 4A1.3 may be warranted for a combination of factors, including drug amount and role in the offense.) United States v. Nichols, 740 F. Supp. 1332 (N.D. Ill. 1990) (departure based upon the defendant's conviction for less than one gram of cocaine and a close review of defendant's criminal record revealed no actual violence.); United States v. Parker, 2002 U.S. Dist. Lexis 12164 (E.D. Pa. 2004)(dealing in a small amount of drugs and street level role warranted a downward departure)

2. ██████████ two predicate drug offenses led to a sentence of probation and a four year sentence with him serving nine months before receiving parole, a parole he successfully completed. The predicate offenses were committed while he was struggling with his own addiction and to support his drug habit. In the

instant drug offense, [REDACTED] was a minimal participant. (See VCR provided separately and transcripts of consensual recording related to the instant case, which are marked Exhibit 5, as support for his minor participation.) Downward departure has been granted for significant over-representation of the seriousness of a defendant's criminal history or the likelihood that he will commit future crimes where the relationship between the sentence for the current crime and the time served for the prior offense is lacking. "... if a defendant served no time or only a few months for the prior offenses, a sentence of even three to five years for the current offense might be expected to have requisite deterrent effect" in an appropriate case for a criminal career offender. See Mishoe at 220.

3. The core of [REDACTED] problem with the law is drug addiction. He committed his first career offender predicate drug offense in 1996 at age 32, his second at age 35 in 1999 and the instant offense at age 39. He has overcome his addiction in the past. From 1996 to 1999 (see attached Exhibit 6 containing 1999 Gateway

prison Rehabilitation Program record for [REDACTED])

and currently since being admitted to bail in 2006.

Court's have granted substantial downward departures for similar offenders. See United States v. Maddelana , 893 F. 2d 815 (6th Cir. 1989) (holding that sentencing court has discretion to consider defendant's attempts to stay away from drugs in departing downward from career offender provision.)

4. [REDACTED] participation in the instant offense was marginal. He did not spur the activity, obtain the drugs, furnish payment for the drugs, receive anything in return for or related to the drugs, and in fact did not know about the drug transaction until after the arrangements by others for their delivery to undercover agents were almost completed. The length and scope of and nature and scope of career offender may be a basis for a downward or upward departure or variance in an unusual case, such as, where the court may conclude that defendant's criminal history was significantly less serious than defendants in the same criminal history category. Smith v. Brown, 903 F. 2d 540, 544 (8th cir. 1990); United States v. Smith, 909 F. 2d 1164,

1169 (8th Cir 1990); 18 U.S.C. 3553 (b). Not all career offenders are the same. The trigger here for the career offender sentence is [REDACTED] minor participation in the instant case coupled with earlier street level drug cases involving small amounts by an addict supporting his own habit by his activities.

5. Sentencing [REDACTED], who is age 43, to a sentence at least three times that which he would merit as a minor participant in the instant case means he would be at least 55 years old, when he is released from prison, for conduct that overstates his prior criminal history involving a probationary sentence for one predicate offense and a four year sentence for the other predicate offense, which warranted parole after he spent nine months in prison. See United States v. Sheard, 2002 U.S. Dist. Lexis 9986 (E.D. Pa. 2002). Also, a downward departure under 4A1.3 can be justified in part by a "large disparity" between prior sentences and that called for under a career offender guideline. United States v. Mishoe, 241 F. 3d 214, 220 (2d Cir. 2001). (such disparity "might indicate that the career offender sentence provides a deterrent effect so in excess of

what is required in light of prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance...”).

6. A Sentencing Commission Study: Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (2004) has compiled statistics showing a disparate impact of career offender provision on African-Americans. See, Presumptively Unreasonable: Using The Sentencing Commission’s Own Words To Attack the Advisory Guidelines, page 2, citing the Commission Report at page 133.
7. Under the totality of the circumstances in this case, it is respectfully submitted, that there is support for the Court, pursuant to 18 U.S.C. Section 3553(a) (1), to impose an advisory sentence as requested above well below the advisory guideline range. The factors above and his personal characteristics evince an offender not typical of a career offender. His life altering event, his drug free life until he was in his 20s, his intermittent success and failure with his drug habit giving rise to the convictions for small amounts of drug dealt to support

a personal habit, the minor participant culpability for the instant offense and a psychologist's considered conclusion that he poses a fair risk not to recidivate reinforce that he is not a person deserving of a full career offender sentence .

8. The motion for a downward departure I hopefully is not be opposed by the government. United States v. Boshell, 728 F. Supp. H. 1990).

Since United States v. Booker, 125 S. Ct. 738 (2005), the guiding principle for sentencing has been to arrive at a sentence "sufficient but not greater than necessary" to achieve the purposes of sentencing delineated in 18 U.S.C. § 3553 (a)(2). This determination can be somewhat subjective in viewing the characteristics of a defendant relative to seriousness of offense and whether the criminal history category substantially over-states the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

██████████ respectfully submits that in his case an advisory sentence at or near a sentence range of 63-78 months with the lowest end of the sentence imposed at 63 months. It is respectfully submitted that such a sentence is reasonable and equitable leaving Court, Counsel and the

government feeling satisfied that a sentence sufficient but not greater than necessary has been imposed.

Even in the absence of a downward departure, counsel and NCIA respectfully submits that a Guidelines range that represents [REDACTED] limited role in the offense, his prior criminal record, which is not representative of a career offender, and a consideration of the tremendous sentencing disparity that would exist without a careful evaluation of these issues, would result in a Sentencing Guidelines Range recommended above, which appropriately is far below a rigid sentence determination. The sentence in the Probation Sentence Report would be irrational and greater than necessary.

Adjustment for Minimal Participant

[REDACTED] full statement of his involvement in the instant offense is contained in the Presentence Report and summarized in this section.

Even in the light most favorable to the government's description of the [REDACTED] involvement in the instant offense, [REDACTED] is the least culpable of all the co-defendants in this case, which warrants a four point downward adjustment pursuant to U.S.S.G. 3B 1.2 (a). [REDACTED] cannot qualify for this adjustment if he is designated a career offender. However, under the advisory guidelines along with the sentencing statute, it may be considered as a sentencing factor.

On October 10, 2003, ██████████ accepted an invitation to ride with two friends to Atlantic City. At some point, either just prior to departing on the trip (government's version), or half way through the trip (██████████ version), ██████████ learned that the purpose of the trip was for ██████████ to transport money and ecstasy to undercover agents in Atlantic City.

He was named, along with ██████████ and ██████████ and ██████████ (██████████ father) in only two counts of a 55 count indictment, in stark contrast to his co-defendants. He was charged, but did not plead to Count 54, the substantive count of possession with intent to distribute ecstasy.

In the 12 page narrative in the Offense Conduct section of the Presentence Report, which is based on information contained in the indictment and information provided by the government, ██████████ ██████████' name appears in only three paragraphs. The government describes a telephone conversation between ██████████, the leader of the enterprise, and an undercover agent, during which ██████████ states that his son ██████████ knew an individual (co-defendant ██████████ ██████████) from whom he could obtain the ecstasy and a subsequent telephone conversation between ██████████ and ██████████ and an undercover agent, during which arrangements for the delivery of the

ecstasy was discussed. There is no description of any activity on the part of [REDACTED] that would connect him with the conspiracy.

Nowhere in the government's version of the offense does it say that [REDACTED] [REDACTED] arranged for the purchase of the drugs, that he actually handled the drugs, or that he received any money for the drugs after they were delivered by [REDACTED] to the undercover agents in Atlantic City.

In his post-arrest statement to the FBI, [REDACTED] describes how he declined additional invitations by co-defendants to participate in drug transactions after the Atlantic City trip, and how he had no contact with the co-defendants in this case prior from the day of the instant offense until his arrest two years later on August 21, 2005. He did have in his possession at the time of his arrest, a small quantity of heroin for his personal use, another indication of the drug addiction that has plagued [REDACTED] most of his adult life, clouded his judgment, and resulted in his involvement in criminal activity in several prior arrests and in the instant offense, as well.

It is our respectful opinion that [REDACTED] involvement in this case is overestimated by the two point reduction applied in the PSI guidelines computation pursuant to U.S.S.G. 3B1.2 (b) and that the facts of this case support, at a minimum, the three point reduction also allowed under U.S.S.G. 3B1.1 (b), reserved for defendants who fall between the designations of "minimal" and "minor."

Summary of Reasons Pursuant to 18 U.S.C. 3553 (c) for Sentence

██████████ respectfully submits the following reasons to Your Honor

for use by the Court to tailor a sentence, as recommended

herein, that is sufficient but not greater than necessary:

1. ██████████ should receive a downward departure or sentence variance to his advisory guideline, pursuant to U.S.S.G. 4A1.3 or 18 U.S.C. 3553 (a) because his designation as a Career offender, pursuant to 4B1.1, overstates the seriousness of his criminal history and his propensity to commit future offenses. The following reliable information is a basis for this conclusion.
2. Although ██████████ technically falls within the Career Offender provision, his history of criminal conduct is considerable less serious than that of most career offenders and applying a departure or variance at 63 months is reasonable.
3. ██████████ criminal history and predicate drug offenses triggering career offender status are a result of his struggle with drug addiction, arising from personal loss and tragedy early in life. His drug activities bespeak street level activities dealing in small amounts of drugs to support his drug habit. All of his drug offenses were committed alone without an accomplice or a coconspirator. The drug weights are consistent with personal use for someone with ██████████ substance abuse history.
4. ██████████ has exhibited long periods of drug sobriety and non-involvement in drug activities. For the last 24 months since his arrest and while on bail for 15 months, ██████████ has been drug free

and exhibited a rehabilitation and drug sobriety and freedom from the drug criminal culture that led to his drug activities. The incarceration recommended herein is sufficient to deter him and provide for his rehabilitation while deterring other from similar offenses.

5. [REDACTED] through a lifetime of working hard to honestly support himself is able and willing to work hard and be a productive member of society. He has shown through past activities outlined herein that he is a person who gives himself by contributing time to the community to help young members of the community to be better citizens through sports activities.
6. The Psychological report of Forensic Psychologist Gerald Cooke concludes based upon testing that [REDACTED] does not show the characteristics usually associated with career offender, and both his prior and present charge are more the result of his own drug dependency. [REDACTED] has a fair prognosis of refraining from drug use when he is released to the community. This conclusion is reinforced by [REDACTED] remaining free of drugs for the last two years as confirmed by Pretrial Services. Dr. Cooke concluded that there is no evidence of antisocial behavior or any personality disorder outside of his drug use. There is a good likelihood that [REDACTED] [REDACTED], given his age and personal characteristics, will upon release from prison after serving this sentence no recidivate.
7. A strictly literal application of the guidelines misrepresents both the defendant's individual characteristics and his criminal history. It would create a gross disparity between [REDACTED] sentence and the sentences of those similarly situated. It would produce an overly punitive sentence.

8. [REDACTED] is a non-violent person. Other than his drug offenses, [REDACTED] does not exhibit serious other evidence of criminal behavior. He was a minimal participant.
9. Given the overall facts herein, the relative brevity of [REDACTED] prior prison sentences and the nature of his predicate offenses and the instant offense, a 63 month sentence would be appropriate and expected to have the requisite deterrent effect. It would avoid a large disparity between prior sentences and that called for under career offender guideline. [REDACTED] participation in the instant offense was marginal. He neither arranged to obtain, obtained, provided, paid for or was paid for the drugs, nor did he profit from them. In fact, he did not know of the purpose of the trip from Chicago to New York to Obtain the drugs until he was half way there. He was truly a passive participant making his criminal history overall less serious than defendants in the same criminal history category.

Conclusion

For all of the reasons stated above, the Court should fashion a sentence sufficient but not greater than necessary pursuant to 18 U.S.C. 3553 (a) by imposing a sentence on [REDACTED] at or near 63 months of imprisonment. [REDACTED] respectfully further requests a recommendation by the Court to the Bureau of Prisons that his sentence be served at FCI Oxford, a place closest to family and able to provide vocational and trade training, which [REDACTED] desires.

Respectfully submitted,

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Certification

I hereby certify that a copy of the attached memorandum has been served upon the following individuals by FedEx Overnight mail:

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