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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, NORTHERN DIVISION**

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THE UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE OLIVER SANDOVAL,

Defendant.

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**SENTENCING  
MEMORANDUM**

**Case No. 1:05-CR-047 DS**

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The defendant, by and through his attorney of record, Jeremy M. Delicino, hereby submits this memorandum to provide information intended to assist the Court in fashioning a sentence “sufficient but not greater than necessary” to achieve the statutory purposes of punishment.

**INTRODUCTION**

The Supreme Court in United States v. Booker, 125 S.Ct. 738 (2005) restored the district court’s ability to fashion a sentence tailored to the individual circumstances of the case and defendant by requiring courts to consider factors other than the sentencing range set forth in the United States Sentencing Guidelines. Indeed, under Section 3553(a), courts *must* sentence

below the applicable range if such a sentence would be sufficient to achieve the purposes of punishment.

While many courts have suggested that the sentencing guidelines remain persuasive, a mechanistic reliance on the guidelines—which actually prohibit the consideration of some relevant factors—could be construed as an abdication of the sentencing court’s responsibility under Booker and 18 U.S.C. § 3553. Indeed, even before the Supreme Court’s decision in Booker, one of the seminal cases interpreting the guidelines was Koon v. United States, 116 S.Ct. 2035 (1996). Central to the holding in Koon was the understanding that judges were able to base a departure on *any* ground not specifically proscribed by the Guidelines.<sup>1</sup> Further, implicit in the Supreme Court’s holding in Koon was that sentencing courts will be confronted with a myriad of factors that the guidelines are incapable of contemplating. Now that sentencing courts are untethered by the constraints imposed by the guidelines, factors previously disfavored or prohibited may be uniquely relevant under the factors set forth in § 3553.

As the Court is well aware, the sentencing guideline range is but one factor that this Court must consider; Booker requires that the court also consider (1) the nature and circumstances of the offense and the history of and characteristics of the defendant; (2) the kinds of sentences available; (3) the need to avoid unwarranted sentencing disparity; and (4) the need to provide restitution. Booker, 125 S.Ct. At 765-65; 18 U.S.C. § 3553(a)(1), (a)(3), (a)(6-7). In addition, Booker established a new, independent limit on the sentence that may be imposed. The primary sentencing mandate of Section 3553(a) states that courts must impose the minimally sufficient

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<sup>1</sup> See Koon, 116 S.Ct. at 2053 (explaining that judges may “consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue”).

sentence to achieve the statutory purposes of punishment—justice, deterrence, incapacitation, and rehabilitation:

The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)].

18 U.S.C. § 3553(a) (emphasis added). This so-called “parsimony provision” is not simply a factor to be considered in determining the appropriate sentence, but rather represents a cap above which the Court is *statutorily prohibited* from imposing—even when a greater sentence is recommended by the sentencing guidelines. See United States v. Denardi, 892 F.2d 269, 276-66 (3<sup>rd</sup> Cir. 1989) (Becker, J., concurring in part, dissenting in part).

The defendant in this case asks the court to consider his unique circumstances before imposing a sentence that is “sufficient but not greater than necessary.”<sup>2</sup> More specifically, the defendant submits that consideration of the defendant’s criminal history, the flawed reliance on drug quantity to determine offense levels, the defendant’s extraordinary post-offense rehabilitation, and the guideline range of the co-defendant justify a substantially lower sentence than that set forth under the sentencing guidelines. Indeed, the defendant respectfully submits that a sentence of 60 months is reasonable under Booker and, just as crucially, likewise complies with the statutory sentencing factors that this court must consider.

**I. THE DEFENDANT’S POST-REHABILITATIVE EFFORTS OVER THE PAST TWO YEARS HAVE BEEN EXTRAORDINARY AND CLEARLY WARRANT CONSIDERATION UNDER BOTH A TRADITIONAL GUIDELINE FRAMEWORK AS WELL AS § 3553.**

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<sup>2</sup> See, e.g., United States v. Acosta-Luna, 136 Fed.Appx. 149, 152 (10<sup>th</sup> Cir. 2005) (the “provisions of 18 U.S.C. § 3553(a), unconstrained by mandatory application of the Guidelines, are now preeminent in sentencing”); United States v. Angelos, 345 F.Supp.2d 1227, 1240 (D.Utah 2004) (“In imposing sentences in criminal cases, the court is required by the governing statute—the Sentencing Reform Act—to ‘impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the Act].’” (Cassell, J.).

Sandoval was taken into custody for this offense on March 29, 2005. At the time of sentencing, he will have served roughly 27 months in custody at the Weber County Jail. The defendant has tried to make the most of his difficult situation despite the relative lack of programs in the county jail.<sup>3</sup> Since virtually the beginning of his incarceration, Sandoval has been involved in the Weber County Literacy program, initially studying to improve his own literacy skills and eventually assisting others to do the same. In addition, Sandoval regularly attends the Addiction Recovery program.

Counsel has spoken with volunteers associated with the literacy and addiction recovery programs, and these volunteers provided letters detailing his efforts.<sup>4</sup> A letter from Sandoval's teacher, Virginia Ackerman, notes that,

[Jose] was an excellent student and finished the four-part course and received his certificate quickly. After completion, he continued to come to class to further his vocabulary and improve his writing skills. He also was eager to help other students who [] were struggling with the language or didn't learn it as quickly as he did.... Jose was one of my very best students...

Similarly, another one of Sandoval's instructors, Jeanne Lucas, noted that,

[Jose] was my student during the basic program and earned his Laubach Way to Reading Diploma. He is now studying to advance his reading and writing skills with another literacy volunteer in the program... I enjoyed teaching him; he is an exemplary student. He is always gracious and is a good influence on other students. He is very willing to help when we need him to explain words and nuances to the other Spanish-speaking students or to help when other assistance is

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<sup>3</sup> The district court in United States v. Hernandez-Santiago, 92 F.3d 97, 101 n.2 (2<sup>nd</sup> Cir. 1996) granted a three level downward departure because of the defendant's prolonged pretrial detention in a state facility. The court reasoned that lengthy detention in a state facility constituted "harsher incarceration" than federal imprisonment because of its lack of educational and therapeutic programs.

<sup>4</sup> Counsel has attached the letters as Addendum A to the defendant's sentencing memorandum.

needed...He is self-motivated and a good leader...

In a similar vein, the defendant's participation in the Addiction Recovery Program has been helpful to himself and fellow inmates. A letter from Boyd Wilcox notes that,

Jose has been attending the classes regularly and is presently working diligently on his 12 Step Program. He is an asset to the program and is always willing to contribute and share his life experiences and his progress and hopes for the future with the other attendees. Jose is appreciated and looked up to by his fellow inmates in the 12 Step Program.

The defendant's lengthy and demonstrated commitment to rehabilitation presents a compelling reason to impose a sentence deviating from the advisory guideline range. Most striking is that the defendant actively pursued rehabilitation while he was incarcerated. He has not only availed himself of the limited opportunities available, he has excelled at them and provided assistance to his fellow inmates. Even before the Supreme Court's decision in Booker, numerous circuits, including the Tenth Circuit, held that post-offense rehabilitation is a proper ground for departure. See United States v. Whitaker, 152 F.3d 1238 (10<sup>th</sup> Cir. 1998); see also United States v. Brock, 108 F.3d 31 (4<sup>th</sup> Cir 1997); United States v. Bradstreet, 207 F.3d 46 (1<sup>st</sup> Cir. 2000).

In order to justify a departure for post-offense rehabilitation under the pre-Booker framework, the defendant's efforts must be exceptional when compared to the rehabilitation of other defendants. United States v. Rudolph, 190 F.3d 720, 728 (6<sup>th</sup> Cir. 1999). One court noted that the test for extraordinary rehabilitation is a "fundamental change in attitude." United States v. Craven, 239 F.3d 91, 100 (1<sup>st</sup> Cir. 2001). Predictably, many courts have recognized that the successful rehabilitation of a defendant is an integral part of the criminal justice process. See e.g., United States v. Core, 125 F.3d 74, 78 (2<sup>nd</sup> Cir. 1997). In addition, Congress has also recognized the significance of rehabilitation by requiring sentencing courts to consider "the need

for the sentence imposed ... to provide the defendant with needed educational and vocational training ... or other correctional treatment...” 18 U.S.C. § 3553 (a)(2)(D); see also United States v. Maier, 975 F.2d 944, 946-47 (2<sup>nd</sup> Cir. 1992).

Given Congress’ and the Sentencing Commission’s emphasis on the importance of rehabilitation and their intent to make rehabilitation an integral consideration for sentencing courts, Sandoval’s rehabilitative efforts should be given special consideration in determining an adequate departure. This is not a case in which a defendant asks for a departure on the basis of a few months of sporadic effort, but rather one in which the defendant has maintained sobriety for approximately two years.

The defendant’s commitment to change was not motivated by a court order, but instead was driven by a bona fide way to turn his life around in order to become a better person. The defendant has had, as the court in Craven noted, “a fundamental change in attitude.”

While the defendant certainly believes that his extraordinary rehabilitation merits a departure under the traditional framework of the sentencing guidelines, he also believes that this rehabilitation is likewise central to any sentence imposed pursuant to 18 U.S.C. § 3553. The Sentencing Reform Act itself was intended, in part, to be an embodiment of the idea that imprisonment was not a means of promoting rehabilitation. As Congress set forth in 28 U.S.C. § 994(k):

The [Sentencing] Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

28 U.S.C. § 994(k) (1988); See also Mistretta v. United States, 488 U.S. 361, 367 (1989) (“[The

Sentencing Reform Act] rejects imprisonment as a means of promoting rehabilitation”).<sup>5</sup>

The defendant further believes that the traditional goals of sentencing apart from rehabilitation—retribution, deterrence, incapacitation—are in no way undermined by imposing a sentence deviating from the guidelines.

**II. THE EXISTING DRUG GUIDELINES FAIL TO PRODUCE A CONFORMING § 3553(a) SENTENCE IN THIS CASE. BECAUSE THE COURTS, COMMENTATORS, AND THE SENTENCING COMMISSION ITSELF HAVE RECOGNIZED MANY SHORTCOMINGS OF THE DRUG GUIDELINES, IT IS PROPER FOR THIS COURT TO CONSIDER THESE LIMITATIONS IN FASHIONING A JUST SENTENCE.**

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<sup>5</sup> In addition, the possibility of rehabilitation is once again a powerful mitigating factor because it is a goal of punishment. 18 U.S.C. § 3553(a)(2)(D).

A. The Majority of Federal Judges Surveyed Believe Drug Sentences Are Greater Than Necessary.<sup>6</sup>

A survey conducted by the Sentencing Commission in 2002 concluded that 73.7 percent of district court judges and 82.7 percent of circuit court judges rated drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses.<sup>7</sup> The trend, even before *Booker*, was for prosecutors and judges to circumvent the severity of the guidelines in drug cases in order to mitigate their harshness and inflexibility.<sup>8</sup> Since the Supreme Court's decision in *Booker*, courts have continued this trend, and the rate of below-guideline sentences in drug cases has increased markedly.<sup>9</sup>

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<sup>6</sup> Much of this discussion is adapted from Amy Baron-Evans's publication, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing after United States v. Booker* (August 2006).

<sup>7</sup> U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 52 (2004), citing U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines* (Feb. 2003), available at <http://www.ussc.gov/judsurv/judsurv.htm>.

<sup>8</sup> *Id.* at 54-55. See also Frank O. Bowman and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 Iowa L. Rev. 477, 479-83 (Jan. 2002).

<sup>9</sup> See United States Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42, 128 (March 2006), available at [http://www.ussc.gov/booker\\_report.pdf](http://www.ussc.gov/booker_report.pdf).

Post-*Booker*, district courts are now even better equipped to address the relative harshness of drug sentences. Courts may, and arguably should, critically examine the assumptions that led to the guideline ranges in the first place. By setting the base offense levels to track the statutory minimums while failing to allow for greater adjustments for mitigating roles, the Sentencing Commission actually exacerbated the severity of drug penalties.<sup>10</sup> In fact, the Commission's actions<sup>11</sup> resulted in prison terms "far above what had been typical in past practice, and in many cases above the level required by the literal terms of the minimum mandatory statutes."<sup>12</sup> In light of the shortcomings acknowledged by the Sentencing

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<sup>10</sup> The drug guidelines were set to conform with the mandatory minimums enacted while the Guidelines were being written, and the resulting guidelines were significantly more severe than past practice. U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47. In addition, the drug guidelines were pegged to the minimum mandatories without the usual internal deliberation and without input from the Sentencing Commission, the Judicial Conference, the Bureau of Prisons or the Parole Commission. See Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 Vill. L. Rev. 383, 408-12 (1996); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 218-19 (Winter 2004).

<sup>11</sup> In the drug arena, commentators have consistently criticized the Commission's focus on "relevant conduct." See, e.g., Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing after United States v. Booker*. In fact, the Sentencing Commission itself recognized that strict adherence to the rigid guidelines structure in drug cases may be problematic. See U.S. Sentencing Commission, *Report of the Drugs/Role Harmonization Working Group* 2-3 (Nov. 10, 1992).

<sup>12</sup> U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 49.

As Amy Baron-Evans observed, "[t]he Commission initially estimated that the drug guidelines would add only one additional month to prison sentences, but as of 2001, over 25% of the average prison sentence for drug offenders was attributable to guideline increases above mandatory minimum penalties. Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing after United States v. Booker* at 29.

Commission itself, the defendant submits that the guideline range suggested in this case is too long to allow the court to faithfully impose a sentencing that serves the purposes of sentencing set forth in § 3553(a).

**B. Drug Quantity Alone is a Poor Proxy to Determine a Just Sentence.**

Just as numerous commentators have assailed the guidelines in drug case as being too harsh, so too have commentators critiqued the Commission's use of drug quantity to determine the ultimate punishment. In fact, the Commission itself has recognized that the elevation of drug quantity to the exclusion of offense characteristics and offender characteristics pertinent to personal culpability has resulted in overstated guideline ranges.<sup>13</sup> This frequent criticism makes intuitive sense; are offenders who possess 500 grams of methamphetamine really more culpable than those who possess 499? If so, does the one gram difference really justify a two-level increase that may mean extra years of incarceration? Because the guidelines make arbitrary decisions based on the quantity (or purity) of the drug possessed, the use of quantity as a proxy for determining the appropriate sentence is inherently suspect and often unwarranted.<sup>14</sup> Indeed, a mechanistic reliance on drug quantity is a poor means of evaluating the seriousness of the

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<sup>13</sup> U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50.

<sup>14</sup> See, e.g., Albert Aschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chic. L. Rev. 901 (1991) (guidelines disregard factors that are important from a just deserts perspective in favor of "harm" only because it is easier to quantify); Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 851-57 (1992) ("Drug quantity, which should count as one among many sentencing factors, and not the most important one at that, becomes the only sentencing factor."); Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission 2* (1995) ("the Judicial Conference ... encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved").

defendant's offense; a quantity-based approach needlessly obscures and undermines the dominant statutory goals of sentencing in this case.

The court in United States v. Nellum, 2005 WL 300073 \*5 (N.D. Ind. Feb. 3, 2005) criticized the quantity-based calculation, noting that randomness results from a quantity-based approach insofar as it depends on how many controlled buys the agents decide to make. Similarly, the court in United States v. Ennis, 468 F.Supp.2d 228 (D. Mass. 2006) criticized the "talismatic" nature of drug quantity, observing that drug quantity may not be consistent with the defendant's culpability. As Judge Gertner noted,

And since the Guideline drafters did not bother to describe the reason for making quantity talismanic, the sentencing purposes advanced by the quantity guideline, § 2D1.1, or what to do when quantity-driven sentences are wholly at odds with any rational sentencing scheme, judges were left "just to weigh the drugs and mechanically compute the offense level." [citation omitted] Happily, the Supreme Court's decision in Booker mandates a different approach: Judges may not simply assume that § 2D1.1 advances the purposes of sentencing spelled out in 18 U.S.C. § 3553(a). Whether it does do so or not depends upon the circumstances of the individual case. Moreover, the failure to consider those circumstances is not simply unfair; it may well be unconstitutional.

In this case, the informant essentially drove the base offense level by asking for five pounds of methamphetamine. While the defendants were unable to provide such a quantity, had they been able to deliver the requested quantity it is possible that the informant himself could have essentially driven up the defendant's guideline range. If, on the other hand, the informant had requested less quantity, the defendant's guideline level might be lower. Over-emphasis on quantity only imposes a myopic view of culpability, and over-reliance on this dominant factor compromises the court's ability to fashion an appropriate sentence that takes into account the myriad other factors that may influence a just sentence.

In addition to the over-reliance on quantity, the defendant submits that reliance on purity can likewise undermine the quest for a proper § 3553(a) sentence. The base offense level in this

case is determined exclusively on the calculation of drug quantity. The offense level is heightened in this case because of the fact that the methamphetamine that was seized was tested for purity. Indeed, had the government elected not to test the drugs for purity, the corresponding offense level would be level 32.<sup>15</sup> The defendant believes that over-reliance on quantity or purity undermines the statutory factors that are supposed to guide a proper sentence.

The defendant submits that there is little principled distinction between one individual who agrees to distribute one quantity of drugs but is not apprehended with the drugs and another who distributes the same (or comparable) quantity of drugs yet receives a higher guideline range simply because the government tested the drugs for purity. Treating similarly situated defendants similarly has long been one of the primary goals of the Sentencing Reform Act; to treat the individuals described above differently for the simple reason that the drugs in one case were tested for purity is unjustifiable.

C. The Empirical Data Derived from the United States Sentencing Commission Warrants a Lower Sentence than Prescribed by the Sentencing Guidelines.

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<sup>15</sup> Under U.S.S.G. § 2D1.1, the base offense level for possessing 1.4 kg of methamphetamine is 32. If the court were to apply this base offense level, the corresponding guideline range would be 70-87 months.

In developing the criminal history component of the sentencing guidelines, the United States Sentencing Commission used preexisting predictive tools.<sup>16</sup> The Guidelines have always considered it essential that the criminal history measure take into account both culpability and recidivism.<sup>17</sup> In order to assess the validity of these tools, the Sentencing Commission recently reviewed the predictive capacity of these methodologies. In its 2004 report entitled, “Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines,” the Sentencing Commission used empirical data to evaluate the predictive statistical power of the criminal history measure. Findings in the 2004 report suggest that the defendant in this case presents a lower risk of recidivism than the majority of defendants.

Offenders sentenced under the drug guidelines in § 2D1.1 recidivate at a rate lower (21.2%) than those sentenced under the guidelines for firearms (§ 2K2.1, 42.3%) and robbery (§ 2B3.1, 41.2%), and at a rate nearly equal to the recidivism rates of those convicted of fraud (§ 2F1.1, 16.9%) and larceny (§ 2B1.1, 19.1%).

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<sup>16</sup> The Guidelines combined elements from the U.S. Parole Commission’s “Salient Factor Score” and the “Proposed Inslaw Scale” to establish the criminal history component.

<sup>17</sup> See U.S.S.G. Ch. 4, Pt. A, intro comment.

The findings of the 2004 study closely parallel the findings of the Department of Justice's 1994 study analyzing drug offenders in the federal system. The DOJ study found that although offenders with minimal criminal histories or no prior contact with the criminal justice system "are much less likely than high-level defendants to re-offend" and "a short prison sentence is just as likely to deter them from future offending as a long prison sentence," they "still receive sentences that overlap a great deal with defendants who had much more significant roles in the drug scheme."<sup>18</sup> The DOJ concluded that the resources used on these offenders "could be used more efficiently to promote other criminal justice needs."<sup>19</sup> Likewise, a RAND Corporation group study in 1995 came to a similar conclusion, recommending that the "Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug," because federal "sentences are often too severe: they offend justice, serve poorly as drug control measures, and are very expensive to carry out."<sup>20</sup>

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<sup>18</sup> U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders With Minimal Criminal Histories*, Executive Summary (Feb. 4, 1994), available on the Booker Fanfan Resources page at <http://www.fd.org>.

<sup>19</sup> *Id.* In addition, one Bureau of Prisons researcher concluded that for the 62.3% of federal drug trafficking prisoners who were in Category I, guideline sentences were costly to taxpayers, had little or no incapacitation or deterrent value, and were actually likely to negatively impact recidivism. Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, Fed. Sent. Rep. 22, 1994 WL 502677 (July/Aug. 1994).

<sup>20</sup> Peter Reuter & Jonathan Caulkins, *Redefining the Goals of a National Drug Policy: Recommendations from a Working Group*, 85 Am. J. Pub. Health 1059, 1062 (1995).

By many of the measures analyzed by the Commission and the Department of Justice in their respective reports, the defendant presents a lower risk of recidivism than the average offender. The defendant has no prior exposure to the criminal justice system, and his efforts at rehabilitation suggest that his risk of recidivism may actually be lower than similarly situated individuals. Indeed, the empirical data gathered by the Commission and the DOJ suggests that the risk of recidivism presented by the defendant may not warrant a sentence in conformity with the guidelines,<sup>21</sup> and likewise suggest that a strict guideline sentence may run afoul of the statutory considerations set forth in § 3553(a). Indeed, if a sentencing court is to take seriously the Commission's contention that the "likelihood of recidivism and future criminal behavior must be considered,"<sup>22</sup> an adjustment in the defendant's sentence is clearly warranted.

In addition, Section 3553(a)(2)(C) explicitly requires courts to consider the need for specific deterrence. Not surprisingly, numerous courts have recognized that a reduced likelihood of recidivism may justify a lower sentence.<sup>23</sup> As such, the defendant submits that the

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<sup>21</sup> In 1999, Commission researchers found that drug trafficking offenders were less likely to recidivate than average offenders, and that their risk of recidivism could be reduced further with drug treatment. Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentencing Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/Aug. 1999).

As noted above, in 2004 the Commission reported its own findings that drug trafficking offenders (along with larceny and fraud offenders) are the least likely to recidivate and that drug treatment and educational opportunities are likely to have a high cost/benefit value. *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004); *Recidivism and the First Offender* (May 2004), available at <http://www.ussc.gov>.

<sup>22</sup> See U.S.S.G. Ch. 4, Pt. A, intro comment. It is also interesting to note that the Sentencing Commission has recently announced its intention to "develop and consider possible options that might improve the operation of Chapter Four (Criminal History)" in light of "the Commission's prior research." See <http://www.ussc.gov/FEDREG/2007finalpriorities.pdf>.

<sup>23</sup> See, e.g., United States v. Lucania, 379 F.Supp.2d 288, 297-98 (E.D.N.Y. 2005).

lower risk of recidivism presented by the defendant justifies a sentence lower than the advisory guideline.

### **III. POTENTIAL DISPARITY WITH THE CO-DEFENDANT IN THIS CASE IS UNJUSTIFIED, AND SANDOVAL'S GUIDELINE RANGE SHOULD BE ADJUSTED ACCORDINGLY.**

It is beyond dispute that one of the principal aims of the Sentencing Reform Act and the Sentencing Guidelines was to reduce disparity among similarly situated defendants.<sup>24</sup> Indeed, one of the specifically enumerated factors a district court must consider is “the need to avoid unwarranted sentence disparities among defendants with similar records who have been convicted of similar conduct.” 18 U.S.C. § 3553(a)(6). The quest for uniformity is based on the premise that justice should be meted out equally for those individuals who are equally culpable; treating two identical individuals differently runs afoul of most people’s notions of justice and arguably constitutes “unwarranted” disparity.<sup>25</sup>

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<sup>24</sup> See U.S.S.G. § 1A1.1 intro (noting that “Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.”) (emphasis in original).

<sup>25</sup> Another potential disparity that arises in this case is the harsher treatment that Sandoval is subject to simply because he is not a United States citizen. Indeed, the defendant’s alienage may preclude him from being eligible for the halfway house at the end of his sentence, will prohibit him from serving his time at a minimum security prison (regardless of his lack of criminal history), and he will not be eligible for a one year reduction in his sentence for completion of the Bureau of Prison’s RDAP program. Even pre-*Booker* courts recognized that the collateral consequence relating to the defendant’s alienage could provide a basis for departure under the guidelines. See, e.g., United States v. Davoudi, 172 F.3d 1130 (9<sup>th</sup> Cir. 1999); United States v. Farouil, 124 F.3d 838 (7<sup>th</sup> Cir. 1997); United States v. Pacheco-Soto, 386 F.Supp.2d 1198, 1205 (D.N.M. 2005) (departing fourteen months because defendant is deportable alien who “faces an unwarranted increase in the severity of his sentence. He likely will not be eligible for any early release, he will not be able to serve his sentence in a minimum security prison, and he may not qualify for reduced credits for participation in a residential drug or alcohol abuse program. These consequences are severe and

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unfair.”).

The defendant submits that the potential disparity between the co-defendants in this case is unwarranted. Counsel has reviewed the statement in advance of plea for Sandoval's co-defendant, Rigoberto Sanchez. In the plea statement, the United States has agreed to recommend a two-level reduction in Sanchez's guideline range under the minor participant provision of the guidelines. If Sanchez's guidelines were otherwise identical to Sandoval's, this departure would result in a guideline range of 87-108 months, compared to the 108-135 prescribed for Sandoval.<sup>26</sup> From even a cursory review of the facts in this case, it is difficult to see how this disparity is justifiable.

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<sup>26</sup> Both of these calculations presume that each defendant meets the criteria of the safety valve provision set forth in § 5C1.2.

The defendant does not suggest that Sanchez should be ineligible for minor participant; clearly, the United States has determined that a lower sentence than the otherwise applicable guideline range is appropriate. The defendant likewise does not suggest that the 87 month sentence set forth in the guidelines for Sanchez is unreasonable.<sup>27</sup> The defendant merely contends that disparate treatment for the two defendant is unjustifiable on the facts of the case.<sup>28</sup> In fact, counsel is aware that Sanchez has a prior conviction for a drug felony. Because he has been previously convicted for a drug trafficking offense, Sanchez would have been subject to a twenty year minimum under the enhancement provisions of 21 U.S.C. § 841. It is thus arguable that Sandoval is not a similarly situated defendant and that he should be treated *more* leniently than his co-defendant. Instead, the guidelines call for a harsher sentence for Sandoval. It is precisely this disparity that this Court is empowered to correct under § 3553(a) and Booker. When the sentencing guidelines produce results at odds with the statutory mandates of the Sentencing Reform Act, this court is obligated to deviate from those guidelines; fealty to the guidelines is unjust and even unconstitutional if adherence to those guidelines undermine the statutory considerations of § 3553(a). The defendant asks that the Court address the disparity between the co-defendants in this case before imposing a sentence “sufficient, but not greater

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<sup>27</sup> Indeed, Sandoval does not intend this discussion to influence this Court’s treatment of his co-defendant. The defendant does believe, however, that the analysis undermining the use of the drug guidelines is not specific to him and is merely a reflection of the systemic problems of a myopic reliance on quantity. Because the drug guidelines poorly reflect the goals set forth in § 3553(a), any defendant should be able to avail himself of similar arguments impugning the guidelines treatment of drug quantity.

<sup>28</sup> Disparate treatment on other grounds may indeed be justifiable. For instance, counsel believes that this Court could justify imposing a lower sentence for Sandoval based on his rehabilitative efforts if Sanchez had not engaged in similar efforts or did not have other mitigating factors of his own. Similarly, this Court could justify disparate treatment on the fact that, unlike Sanchez, Sandoval has no prior

than necessary, to comply with [the purposes of sentencing].” 18 U.S.C. § 3553(a).

**IV. BECAUSE OF THE DEFENDANT’S EXTRAORDINARY REHABILITATION, HIS LACK OF CRIMINAL HISTORY, AND THE SHORTCOMINGS OF THE DRUG GUIDELINES, A SIXTY MONTH SENTENCE IS SUFFICIENT, BUT NOT GREATER THAN NECESSARY, TO SATISFY THE PURPOSES OF § 3553(a).**

The defendant believes that all of the arguments detailed above dispel the notion that a guideline sentence in this case comports with the directives contained in § 3553(a). Because this Court is untethered by the constraints of the sentencing guidelines and instead compelled only to impose a sentence that conforms with the statutory considerations outlined in § 3553(a), the defendant submits that a sentence of 60 months is appropriate in this case. While this suggested sentence is outside of the guideline range, it clearly satisfies the requirements of 18 U.S.C. § 3553(a)(2)(A)-(D).

As noted at the outset of this memorandum, the court must impose a sentence sufficient, but not greater than necessary, to comply with the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

As outlined above, a number of commentators (and judges) have assailed the guidelines for treating drug offenders too harshly. Implicit in their criticism is that overlong sentences fail to adequately reflect the seriousness of the offense and do not constitute just punishment for the offense. In addition, the studies and commentary cited above clearly demonstrate that the

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criminal convictions.

deterrent effect for particular crimes is actually undermined by overlong sentences. Furthermore, the risk of recidivism is actually lower for drug offenders with minimal criminal histories than virtually any other class of offender.

In this particular case, the Court is presented with a sentence that is driven solely on quantity and purity. The defendant's actions would merit a guideline sentence that called for a significantly lower sentence if the purity or quantity was slightly different. Rigid adherence to a quantity-driven guideline overlooks the very real rehabilitative efforts undertaken by Mr. Sandoval, and likewise ignores the Sentencing Commission's own concerns regarding the emphasis on quantity. Similarly, if this court is obligated by statute to consider the likelihood of recidivism (§ 3553(a)(2)(C)), the empirical evidence derived from the Commission's own studies suggests that Mr. Sandoval presents a relatively low risk. His lack of criminal history strongly correlates to a lack of recidivism. Lastly, it is difficult to surmise how a 60 month sentence would not provide a similar (and sufficient) deterrent effect. Such a sentence is by no means a light sentence, and it conveys the public disdain for his actions.<sup>29</sup>

Given the inherent shortcomings of a rigid guideline system, the need to avoid unwarranted disparity, and the rehabilitative efforts of the defendant, counsel submits that a 60 month sentence is a sufficient sentence to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a), and requests that such a sentence be imposed.

DATED this 15<sup>th</sup> day of December, 2007.

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<sup>29</sup> In fact, the deterrent effect in this case is more pronounced because of the defendant's alienage. In addition to the incarceration he would face on any supervised release violation, Sandoval would be subject to prosecution for Illegal Re-Entry under 8 U.S.C. § 1326. Because the instant conviction is for a "drug trafficking offense," he would be subject to an additional 16-level enhancement that could result in a number of years of incarceration. Moreover, the penalties for the supervised release violation and illegal re-entry could run consecutive.

/s/ Jeremy M. Delicino

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JEREMY M. DELICINO  
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 15<sup>th</sup> day of June, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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