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

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**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**SUELLYN KAY DENSLEY,**

**Defendant.**

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**SENTENCING MEMORANDUM**

**Case No. 2:05CR00624**

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The defendant, by and through her 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. The defendant also intends to file an additional sealed sentencing memo that supports the sentencing request made in this case.

**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,

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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”).

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 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 her unique circumstances before imposing a sentence that is “sufficient but not greater than necessary.” More specifically, the defendant submits that consideration of the defendant’s criminal history, disparities between state and federal sentencing, and the history of abuse the defendant has endured<sup>2</sup> warrants a departure from the advisory guideline. Because of these factors, which will be detailed below, the defendant respectfully submits that a sentence of home confinement is reasonable under Booker and likewise complies with the statutory sentencing factors that this court must consider.

A. 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>2</sup> This factor will be detailed separately in a sealed supplemental sentencing

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memorandum.

In developing the criminal history component of the sentencing guidelines, the United States Sentencing Commission used preexisting predictive tools.<sup>3</sup> The Guidelines have always considered it essential that the criminal history measure take into account both culpability and recidivism.<sup>4</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. A number of the findings in the 2004 report suggest that the defendant in this case presents a lower risk of recidivism than the majority of defendants.

First, one of the primary predictive measures of recidivism rates analyzed by the Commission was gender. The Commission found that women recidivate at a lower rate than men.<sup>5</sup> The empirical data analyzed by the Commission indicated that men recidivated at a rate of 24.3%, compared to 13.7% for women.<sup>6</sup>

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<sup>3</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>4</sup> See U.S.S.G. Ch. 4, Pt. A, intro comment.

<sup>5</sup> “Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines,” A Component of the Fifteen Year Report on the U.S. Sentencing Commission’s Legislative Mandate (May 2004) at 11.

<sup>6</sup> Id.

Second, the Commission also analyzed what effect the age of the offender had on the likelihood of recidivism. Not surprisingly, the Commission found that the rate of recidivism almost always decreased as the age of the offender increased. While the rate of recidivism was 35.5% for offenders under 21 and 31.9% for offenders between the ages of 21-25, the rate of recidivism for offenders in the same age category as Ms. Densley (36-40) was 19.7%.<sup>7</sup>

Third, while race is generally a prohibited factor in sentencing considerations, the Commission noted a substantial predictive power in analyzing the race of offenders.<sup>8</sup> The empirical data showed that the rate of recidivism for Caucasian offenders (16.0%) was markedly lower than the rates for African-Americans (32.8%) and Hispanics (24.3%).

Fourth, those with stable employment in the year before their offense are less likely to recidivate (19.6%) than those who were unemployed (32.4%).<sup>9</sup> As paragraph 58 of the defendant's PSR notes, Densley was employed by T & J Transportation for the year before her offense.

Fifth, the presentence report also indicates that the defendant's educational background included some college. The Commission's study revealed that offenders who completed less than high school recidivated at a substantially higher rate (31.4%) than those with a high school degree (19.3), some college (18.0%), and offenders with college degrees (8.8%).<sup>10</sup>

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<sup>7</sup> See Id. at Exhibit 9.

<sup>8</sup> Id. at 12.

<sup>9</sup> Id.

<sup>10</sup> Id.

Sixth, 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%). In fact, for those offenders sentenced in criminal history category II, offenders sentenced for drug offenses recidivate at a rate lower than any other category measured by the Commission.<sup>11</sup>

By nearly all the measures analyzed by the Commission in its report, the defendant presents a lower risk of recidivism than the average offender. The empirical data gathered by the Commission suggests that the risk of recidivism presented by the defendant may not warrant a sentence in conformity with criminal history category II. 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>12</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. Likewise, numerous courts have recognized that a reduced likelihood of recidivism may justify a lower sentence.<sup>13</sup> As such, the defendant submits that the lower risk of recidivism presented by the defendant justifies a departure from the advisory guideline.

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<sup>11</sup> Id. at Exhibit 11. For offenders in criminal history category II, the rates of recidivism were as follows: drug offenses (19.8%); fraud (26.3%); larceny (37.9%); firearms (26.8%); robbery (31.4%); and all other guidelines (23.6%).

<sup>12</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>13</sup> See, e.g., United States v. Lucania, 379 F.Supp.2d 288, 297-98 (E.D.N.Y. 2005) (listing post-*Booker* courts that have noted a lower rate of recidivism for older defendants).

B. The Disparity Between State and Federal Sentences Warrants a Departure from the Advisory Guidelines.

Since the Supreme Court's decision in Booker a number of courts have considered whether the disparities between state and federal sentences are appropriate factors in assessing the reasonableness of a sentence. Most of the courts analyzing this issue have recognized the mandate of § 3553(a)(6), which advises courts to consider the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct. The directive in § 3553(a)(6) does not, however, specify whether the provision applies only to federal defendants.

The cases addressing this potential disparity post-Booker have varied in their approaches to the issue. The Eighth Circuit affirmed a sentence where the judge considered the potential state sentence before imposing a sentence *above* that prescribed by the Guidelines. United States v. Winters, 416 F.3d 856 (8<sup>th</sup> Cir. 2005). In affirming the enhancement of the defendant's federal sentence because the state purportedly punished the offense more severely, the court in Winters noted that "[w]e have been directed to review a sentence for reasonableness based on *all* the factors listed in § 3553(a)(6). The Guidelines range is merely one factor. We cannot isolate possible sentencing disparity to the exclusion of the [sic] all the other § 3553(a) factors." Id. at 861. If the district court could properly *enhance* a defendant's sentence based on the disparity between the potential state and federal sentences, the court should clearly be empowered to *reduce* a defendant's sentence for disparity as well. The court in United States v. Lucania, 379 F.Supp.2d 288 (E.D.N.Y. 2005) held that courts may consider the disparities arising from

divergent federal and state sentencing practices.<sup>14</sup>

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<sup>14</sup> See also United States v. Habbal, 2005 WL 2674999 at \*5 (E.D. Va.) (noting that “a significant sentencing disparity with what the defendant would face in state court would thus be unwarranted.”). In addition, the Fourth Circuit has held that consideration of state and federal disparity is generally, though not always, impermissible. United States v. Clark, 434 F.3d 684 (4<sup>th</sup> Cir. 2006) (recognizing that “the consideration of state sentencing practices is not necessarily impermissible per se”).

Candidly, the defendant acknowledges that there have been a number of courts rejecting the argument for departure based on the state-federal disparity.<sup>15</sup> The argument that has often been employed by these courts is that to depart would actually cause greater disparity among similarly situated defendants since state sentencing practices may vary greatly among the states. The assumption underlying this argument is that one of the principal goals of the guideline was *national* uniformity.<sup>16</sup> While the goal of uniformity is laudable, courts have been too quick to assume that national uniformity is a more compelling goal than local uniformity. As Professor O’Hear notes,

While national uniformity is undoubtedly one purpose of the Guidelines, that purpose should not be regarded as absolute and unyielding. Under the Guidelines, national uniformity competes with many other sentencing objectives, which may help to explain why sentencing reform has not come close to achieving national uniformity in practice.

Courts not only have deferred too quickly to the principle of national uniformity, but also have failed to recognize a countervailing principle that I call “local uniformity.” The national uniformity principle insists that all similarly situated federal defendants receive similar sentences. In contrast, the local uniformity principle insists that similarly situated defendants within the same locality receive similar sentences, whether prosecuted in state or federal court. Local uniformity is as valid an objective as national uniformity for a rational sentencing scheme. Indeed, one of the central objectives of sentencing reform, the minimization of arbitrariness, provides as much support for local as for national uniformity.<sup>17</sup>

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<sup>15</sup> In fact, some courts pre-Booker and post-Booker have rejected arguments for departure based on the disparity between state and federal sentences.

<sup>16</sup> Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 Iowa L. Rev. 721 (2002).

<sup>17</sup> Id. at 725.

The defendant freely acknowledges that sentencing reform was driven in part by unwarranted sentencing disparities.<sup>18</sup> Whether the Congressional intent focused solely on nationwide disparity, however, is less certain. As one Senate committee report noted,

Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public. A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public. Such sentences are unfair in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law.<sup>19</sup>

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<sup>18</sup> Whether the goal of uniformity has been achieved by the guidelines, however, is a source of scholarly debate. Professor Douglas Berman has suggested that “one must keep in mind that the pre-*Booker* guideline-centric sentencing process may have itself undermined, rather than enhanced, the goal of greater sentencing consistency in the federal system.” Memorandum of Amicus Curiae, Professor Douglas A. Berman, In Support of Appellants, *United States v. Carty*, Criminal No. 05-10200 (9<sup>th</sup> Cir. 2006). See also Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85 (2005) (contending that the guidelines actually *increased* disparity in the federal system).

In addition, the quest for “uniformity” in sentencing in some ways disregards the Supreme Court’s holding in *Booker*, which maintained that “the uniformity that Congress originally sought to secure ... is no longer an open choice” under the Sixth Amendment. *Booker*, 542 U.S. at 263-64.

<sup>19</sup> *Id.* at 729 (citing S. Rep. No. 98-225, at 45-46 (1983), reprinted in U.S.C.C.A.N. 3182, 3182-3562).

It is difficult to fathom how local disparities are any more justifiable than nationwide disparities. Indeed, the Congressional concern directed at unwarranted disparities should not be so narrowly construed to refer to only nationwide disparities.<sup>20</sup> Any disparity, whether local or national, undermines the integrity of a judicial system that must mete out not simply sentences, but just sentences as well.

In rejecting the potential state-federal disparity as a basis for departure, most courts have failed to recognize the directive of the guidelines themselves as well as the seminal Supreme Court case governing departures, Koon v. United States.<sup>21</sup> Section 5K2.0 of the sentencing guidelines provides for departures from the prescribed guideline range when “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission...” Similarly, the Supreme Court in Koon held that courts may depart on an unmentioned factor if “the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.”<sup>22</sup>

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<sup>20</sup> As Professor O’Hear aptly noted, “to the extent that the Guidelines reflect a desire to minimize unwarranted disparity, there is no reason to equate that goal exclusively with national uniformity: federal-state disparities may also be “unwarranted.”” O’Hear, *supra* note 16, at 740. Professor O’Hear reiterates this observation later in his article, recognizing that there is no reason to presuppose that the disparity considered by Congress was confined to national disparities. As he remarked, “[t]here should be little surprise that Congress failed to establish one particular type of disparity as a priority. In focusing on disparity, Congress was expressing a concern about arbitrariness in sentencing, not necessarily endorsing a particular vision of uniformity.” *Id.* at 742 n.134.

<sup>21</sup> 518 U.S. 81 (1996).

<sup>22</sup> 518 U.S. at 109.

It is undeniable that Congress and the Supreme Court have endowed the guidelines with the flexibility to depart from the prescribed guideline when warranted by mitigating circumstances. It is also clear that Congress required the Sentencing Commission to engage in a more deliberative and reasoned approach to disparity than the hasty and dismissive treatment most courts have given the issue. Indeed, Congress required the Commission to consider the relevance of such factors as “the community view of the gravity of the offense” and “the current incidence of the offense in the community.”<sup>23</sup> The Senate Report also confirms the congressional concern with local disparity, noting that “in certain situations, the Commission may find it appropriate to draft the guidelines to take account of considerations based on pertinent regional differences.”<sup>24</sup>

As a matter of public policy, there is ample reason to consider the disparities at issue in this case. First, the guidelines were targeted at reducing the arbitrariness of former sentencing practices. To the extent that local disparities undermine this goal, consideration of these disparities is proper and in harmony with the purpose of the guidelines themselves. Second, state and local governments may actually be better equipped to fashion sentences that are appropriate and in conformity with the needs of the public. As two commentators have noted, “for the most part, governments that are smaller and closer to the people will make better

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<sup>23</sup> 28 U.S.C. § 994(c)(4), (7) (1994). As Professor O’Hear noted, “[t]he Commission is also directed to consider the relevance of “the current incidence of the offense... in the Nation as a whole,” 28 U.S.C. § 994(c)(7), indicating that Congress intended to contrast “community”-based considerations with national considerations.” O’Hear, *supra* note 16, at 742 n.135.

<sup>24</sup> O’Hear, *supra* note 16, at at 729 (citing S. Rep. No. 98-225, at 45-46 (1983), reprinted in U.S.C.C.A.N. 3182, 3182-3562).

judgments about what is publicly valuable to do than governments that are larger and more remote. ...”<sup>25</sup> Third, the Sentencing Commission itself, through § 5K2.0 as well as its own publications, has acknowledged that “regional variations and preferences of state and local governments ... should be respected in the criminal law context.”<sup>26</sup>

### Possible State Sentences

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<sup>25</sup> Philip B. Heymann & Mark H. Moore, *The Federal Role in Dealing With Violent Street Crime: Principles, Questions, and Cautions*, 543 Ann. Am. Acad. Pol. & Soc. 185, n. 32 at 104.

<sup>26</sup> U.S. Sentencing Comm’n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 7 (1997). Indeed, it could be argued that the fast-track departures in place in various jurisdictions constitute official approval of consideration of local factors. As the court in *Lucania*, *supra*, noted, “fast-track programs are ‘perhaps the quintessential form of ... localization in federal sentencing.’” (citing Michael M. O’Hear, *Localization and Transparency in Sentencing*, 27 Hamline L. Rev. 357, 373 (2004)).

The defendant was initially charged with the Manufacture or Attempted Manufacture of Methamphetamine. Pursuant to plea negotiations, the defendant pled guilty to Attempted Manufacture of Methamphetamine, in violation of 21 U.S.C. § 841(a)(1). The federal statute to which Densley pled guilty has a similar state counterpart in Utah. Utah Code Annotated § 58-37d-4(1)(e) makes it unlawful to knowingly or intentionally conspire with or aid another in a clandestine laboratory operation.<sup>27</sup> A violation of this provision is a second degree felony. It is possible, however, that the state would have charged Densley with a first degree felony given the presence of potential aggravating conditions.<sup>28</sup> For the purposes of this argument, the defendant concedes that the charge would have been under UCA § 58-37d-5, punishable as a first degree felony.

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<sup>27</sup> UCA § 58-37d-4(1)(f), which prohibits the production or manufacture of a controlled substance, and § 58-37d-4(1)(h), which prohibits the extraction or chemical processing of substances to be used in the process of manufacturing illicit substances, could also apply given the facts of this case. Both subsections are second degree felonies under Utah law.

<sup>28</sup> See UCA § 58-37d-5.

A first degree felony conviction in Utah is punishable by an indeterminate term of 5 years to life in the Utah State Prison. The prescribed prison term, however, is not mandatory if a defendant is convicted of a first degree felony. The decision of whether to imprison a defendant or place the defendant on probation is left to the discretion of the sentencing judge. The sentencing judge must consult, though is not required to follow, a sentencing matrix that sets forth the applicable punishments.<sup>29</sup> Similar to the federal sentencing guidelines, the sentencing matrix endeavors to take into consideration both the seriousness of the underlying conduct as well as the defendant's likelihood of recidivism.<sup>30</sup> In this respect, it is clear that the Utah Sentencing Commission promulgated guidelines that took into account traditional sentencing factors such as punishment, deterrence, and recidivism. Indeed, one could easily suggest that the Utah Sentencing Commission promulgated guidelines that already account for some of the factors this court must consider under § 3553.

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<sup>29</sup> A copy of the sentencing matrix is attached as Addendum A.

<sup>30</sup> In the Utah Sentence and Release Guidelines adopted by the Utah Sentencing Commission, the Guidelines' instructions note that the "dominant underlying philosophy of the guidelines is that criminal sentences should be proportionate to the seriousness of the offense for which the offender was convicted. Other major policies are inherent in the guidelines. These are the offender's overall culpability based on the nature of the current offense and the offender's role coupled with the supervision history and likelihood to recidivate, as inferred from the offender's criminal history."

In the course of a state prosecution, it is likely that Densley would have received a plea offer that would have reduced the degree of the felony charged.<sup>31</sup> Because the potential plea offer depends on prosecutorial discretion as well as a number of considerations not easily outlined here, the defendant will assume that *no* plea offer would have been made.<sup>32</sup> Further, the defendant will assume that she either pled guilty as charged or was convicted after trial.<sup>33</sup> Even making these improbable assumptions, the defendant's sentencing matrix in Utah would still prescribe a probationary sentence.

Calculating the defendant's criminal history under the Utah guidelines places Densley in Criminal History Category I.<sup>34</sup> Because her state charges would be classified as a '1<sup>st</sup> Degree Other,' her Crime Category would be row E. The result of these classifications would be a

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<sup>31</sup> The striking number of cases resolved through plea negotiations in federal court has been well documented, and there is little reason to believe that the prevalence of plea bargaining in Utah's state courts would be less than what occurs in federal court. A typical plea offer on a first degree felony that does not involve violence is often a second degree felony, though these offers depend on a host of factors.

<sup>32</sup> Obviously, given the defendant's limited criminal history and the factual circumstances surrounding the lab, the defendant would have been in a good position to receive a more lenient offer than a first degree felony.

<sup>33</sup> Just as the federal sentencing guidelines reward defendants for guilty pleas (see U.S.S.G. § 3E1.1), prosecutors and courts in Utah (and the entire country) are also inclined to provide the defendant with an incentive to plead guilty.

<sup>34</sup> Densley would receive one point for her prior misdemeanor conviction, placing her in criminal history row I. It is conceivable that she would receive an enhancement for her supervision history, namely that this offense occurred while she was on court probation. It is unlikely, however, that her court probation for a DUI conviction would constitute being "under current supervision" since there is no formal supervisory component imposed when one is placed on court probation. Even if one were to impose points, however, Densley's criminal history would be category II.

sentence falling squarely within the area calling for regular probation.<sup>35</sup> While the defendant cannot offer empirical evidence as to how often sentencing judges impose sentences in conformity with the recommendations of the sentencing matrix, most judges dutifully consult the matrix and faithfully consider its recommendation before imposing sentence.

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<sup>35</sup> Even if Densley’s criminal history was Category II, the sentencing matrix would call for “Intermediate Sanctions.” These sanctions are sentences similar to probation but attach more onerous conditions on the probationary period. According to the Utah Sentencing Commission, examples may include: electronic monitoring, referral to the day reporting centers, participation in residential treatment centers, etc.

If one were to assume that Densley had been offered a second degree felony as part of the plea negotiations, which is hardly a radical assumption, her sentencing matrix would again call for probation. If the sentencing judge ignored the recommendation of probation and instead imposed prison, the Bureau of Prisons would typically incarcerate the defendant for sixteen months.

In order to assist this court in its analysis, the defendant has received sentencing statistics for the state of Utah from the Director of the Bureau of Research and Planning for the Department of Corrections. These statistics, which are included as attachments,<sup>36</sup> describe the frequency with which offenders convicted under 58-37d-4 and 58-37d-5 were sent to prison. The statistics provided indicate the percentage of offenders sentenced to probation for each degree of felony.<sup>37</sup> For instance, between 1999 and 2005, the last complete year for which statistics are available, 51 of the 131 offenders convicted of a first degree felony for violating § 58-37d-4 were granted probation. This indicates that nearly 40% of offenders convicted of the most severe felony still received probation. In addition, these statistics do not control for criminal history. That is, one who had no criminal history is included in these statistics just the same as one who was a career criminal. Logically, one would assume that those offenders with less criminal history were even more inclined to receive probation than the overall figures indicate.

Between 1999 and 2005, there were 448 offenders sentenced for second degree felony violations of 58-37d-4. Of these offenders, roughly 60% (269) were sentenced to probation. This data leads to a few conclusions. First, that an offender was much more likely to be convicted for a second degree felony, possibly because of the inducement of a reduction from a first degree felony. Second, offenders were more likely to be granted probation than prison.

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<sup>36</sup> The statistics are attached as Addendum B.

<sup>37</sup> As noted above, the ultimate degree of the offense is usually a function of the plea offer. Thus, though the statute could charge either a first or second degree felony, a common resolution involves a reduction from the grade of offense charged. This assumption is borne out by an analysis of the data provided, as one will notice the relative scarcity of first degree felony convictions for violations of § 58-37d-4.

Third, that 60% probably *under-represents* the likelihood that someone in Densley's criminal history category would be given probation.

Predictably, those offenders who violated § 58-37d-4 and were convicted of third degree felonies were much more likely to be sentenced to probation than prison. Indeed, roughly 64% (60) of the 94 offenders were granted probation. Again, the data may actually *under-represent* the likelihood of an offender with little criminal history being granted probation.

Even for those offenders who were sentenced to prison, the mean length of incarceration exceeds the guidelines prescribed in this case. While the data provided is not as exhaustive as the total offender data described above, the Department of Corrections has provided the mean sentence length for offenders convicted under § 58-37d-4.<sup>38</sup> For those convicted of first degree felonies and sentenced to prison (roughly 60% of offenders), the mean sentence served was 47.6 months. For those convicted of second degree felonies and sentenced to prison (roughly 40% of offenders), the mean sentence served was 19.2 months. For those convicted of third degree felonies and sentenced to prison (roughly 36% of offenders), the mean sentence served was 14 months.<sup>39</sup>

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<sup>38</sup> These statistics are attached as Addendum C.

<sup>39</sup> The mean sentence length for all offenders would obviously be much lower since the mean sentence length only includes those offenders sentenced to prison. For instance, if one were to assume that the 163 offenders constituting the sample size received average sentences of 19 months in prison and that the ratio of offenders sentenced to probation was roughly 60% (as discussed above), the mean prison sentence would be roughly 7.6 months for all offenders convicted of second degree felonies. A similar analysis for those offenders convicted of first degree felonies produces a mean prison sentence of 29 months, and those convicted of third degree felonies served a mean prison sentence of 5 months.

Clearly, the decision to impose probation or sentence the defendant to prison still remains the sentencing judge's prerogative. The Utah Sentencing Commission considered the risks of recidivism as well as the severity of the offense and still considered regular probation to be a suitable punishment in Densley's case. While there may have been aggravating or mitigating circumstances affecting a state judge's disposition of the case, the mere fact that the Utah Sentencing Commission,<sup>40</sup> a body sensitive to the needs of the public as well as the needs of the offender, suggests that probation is the appropriate punishment should be particularly influential in this court's determination of a reasonable sentence.

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<sup>40</sup> It is important to note that the Utah Sentencing Commission is comprised of representatives from "all facets of the justice systems: judges, prosecutors, defense attorneys, legislators, victims, law enforcement, treatment specialists, ethnic minorities, corrections, parole authorities, and others." The diverse makeup of the state's sentencing commission suggests that a broad array of concerns and interests are taken into consideration in promulgating the guidelines.

By proposing a probationary sentence, Utah’s sentencing matrix tacitly recognizes the reduced risk of recidivism presented by offenders with little criminal background.<sup>41</sup> In implementing the federal sentencing guidelines, Congress directed the U.S. Sentencing Commission to ensure that the “guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”<sup>42</sup> The defendant believes that her case presents a stark example of the potential disparity between state and federal sentences, and this court should consider this potential disparity before imposing sentence. Furthermore, the defendant submits that the Utah Sentencing Commission considered many of the § 3553 factors in formulating the guidelines, and that this consideration provides ample justification for a sentence that departs from the advisory guideline yet still comports with § 3553 and the mandate of reasonableness pronounced in Booker.

DATED this 18<sup>th</sup> day of December, 2007.

/s/ Jeremy M. Delicino

JEREMY M. DELICINO  
Attorney for Defendant

CERTIFICATE OF SERVICE

<sup>41</sup> Indeed, the United States Sentencing Commission itself has found that minimal involvement with the criminal justice system can be a powerful predictor of a reduced likelihood of recidivism. See Recidivism and the First Offender (May 2004), available at [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf).

In addition, if one of the goals of sentencing is to reintegrate the defendant back into society, this court should be mindful of the U.S. Sentencing Commission’s findings that offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences. See Measuring Recidivism, *supra* note 5, at 13.

<sup>42</sup> 28 U.S.C. § 994(j).

I hereby certify that on this 18<sup>th</sup> day of October, 2006, 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:

**Lana Taylor (E-Filer)**dwink@dea.state.ut.us mrumph@utah.gov

/s/ LaRane Kasteler

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