UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	**§**	
Plaintiff,	**§**	
v.	**§**	**3:19-CR-[redacted]**
[redacted],	**§**	**ECF**
Defendant.	**§**	

DEFENDANT'S FIRST OF TWO SENTENCING MEMORANDA

Defendant [redacted], through his attorney, Assistant Federal Public Defender Douglas A. Morris, files this Sentencing Memorandum, requesting a significant downward variance for the following reasons: (a) The guideline sentence range will result in a sentence that is contrary to numerous factors of 18 U.S.C. § 3553(a), but in particularly § 3553(a)(6); and (b)(1) similar to the flaws highlighted in Kimbrough v. United States, 552 U.S. 85, 89 (2007), there is an absence of empirical or scientific evidence to support this sentence under United States Sentencing Commission, Guidelines Manual, § 2D1.1 (Nov. 2018); (b)(2) quantity-based sentencing is flawed and has produced an unreasonable sentence in this case; and (b)(3) the comparative valuation of harm between methamphetamine and other narcotics supports a sentence below the current guideline sentence range. Accordingly, a supportable policy disagreement exists to show that the application of U.S.S.G. § 2D1.1 to this case will result in an unreasonable sentence.

I. AUTHORITY TO DEPART AND/OR VARY FROM THE APPLICABLE GUIDELINE SENTENCING RANGE

After United States v. Booker, 543 U.S. 220 (2005), "'district courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.'" Peugh v. United States, 569 U.S. 530, 541 (2013) (quoting Gall v. United States, 552 U.S. 38, 50, n.6 (2007)) (emphasis in the original) (internal quotations omitted). This rule may be in part due

to the Court stating that Congress tasked the Commission with integrating the factors of 18 U.S.C. § 3553(a) into the Guidelines. See Rita v. United States, 551 U.S. 338, 347-51 (2007).

Specifically, the Court stated, *inter alia*, "that the sentencing statute envision both the sentencing judge and the Commission . . . carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale." Id. at 348. In fashioning that *retail sentence*, a sentencing judge's discretion is not unlimited; that is, in addition to starting with the correct guideline calculation, a sentencing judge must consider the factors included in § 3553(a). See Pepper v. United States, 562 U.S. 476, 490-91 (2011). When applying the facts of the case—including the human being who stands before the sentencing court—to the Guidelines and § 3553(a) and arriving at the *retail sentence*, "a sentencing court may vary from the Guidelines based solely on *policy considerations*, including disagreements with the Guidelines, if the [sentencing] court feels that the guidelines sentence fails probably to reflect . . . [the] considerations [within § 3553(a)]." United States v. Campos-Maldonado, 531 F.3d 337, 339 (5th Cir. 2008) (per curiam) (emphasis added) (citing Kimbrough, 552 U.S. at 100-02; United States v. Williams, 517 F.3d 801, 809-10 & n.42 (5th Cir. 2008)).

In the end, "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*.'" Peugh, 569 U.S. at 542 (quoting and citing Freeman v. United States, 564 U.S. 522, 529 (2011) (plurality opinion) (emphasis in original)).

II. THE FIRST OF TWO REASONS TO VARY FROM THE SENTENCE RANGE

a. Punishment based on relevant conduct in a controlled-substance offense may not reflect a defendant's culpability and may be contrary to § 3553(a)(6).

1. Analysis

Relevant to this argument, for those who are convicted of a drug-trafficking offense and sentenced under U.S.S.G. § 2D1.1, the Guidelines punish defendants in three different ways. The first and simplest basis of sentencing is that a person can be sentenced based on the amount of the controlled substance actually seized or recovered—that information is all that the government knows about the defendant's conduct.

The second is the person can be sentenced based not only the amount of recovered controlled substances, but also the amount of the controlled substances that the defendant or others stated that the defendant distributed. See United States v. Barfield, 941 F.3d 757, 762 (5th Cir. 2019) (citing U.S.S.G. § 1B1.3(a)(1)(A) (remaining citation omitted)). Indeed, absent the introduction of "evidence to rebut [a] . . . post-arrest admission of relevant conduct, the district court may consider it at sentencing." Id. at 764. Given an absence of rebuttable evidence, "a defendant's uncorroborated admission of prior drug trafficking 'may be the sole basis for the findings on relevant conduct.[]'" Id. (quoting and citing United States v. Barnes, 3 F.3d 437, 1993 WL 347015, *4 (5th Cir. 1993) (per curiam) (unpublished)).

The last is a combination of the first two with the punishment of only the first method. This method involves the defendant first receiving an immunity agreement from the government, then the defendant confesses to all relevant conduct, and then based on the immunity agreement the guidelines only call for punishment that is based on information independent of the information that the defendant provided to the government. See United States v. Chavful, 781 F.3d 758, 759-64 (5th Cir. 2015); United States v. Harper, 643 F.3d 135, 136-43 (5th Cir. 2011); United States

v. Marsh, 963 F.2d 72, 73-75 (5th Cir. 1992) (per curiam); U.S.S.G. § 1B1.8. To best understand this complex sentencing scheme, let us consider a hypothetical.

2. Hypothetical and Discussion

A. Hypothetical

A drug trafficking organization (DTO) "fronts" or loans kilogram quantities of methamphetamine to Alan to sell to others. Over time, the DTO also pays Alan to temporarily store ("stash") scores of kilograms of methamphetamine that are awaiting transportation to other parts of the country. As to sales, Alan typically sells methamphetamine in kilogram, half-a-kilogram, and quarter-kilogram quantities (a kilogram is 1000 grams). On the occasion where a client wants less than a kilogram, and all that Alan has is a complete and unopened kilogram of methamphetamine, Alan will open a package of methamphetamine and weigh out either a 500-gram quantity or 250-gram quantity in front of the purchaser. In order to perform this process, Alan has plastic bags of various sizes, at least one digital scale, a money counter, and other items that are needed to package and sell large quantities of methamphetamine.

In total, Alan's "relevant conduct" would exceed 1000 kilograms of methamphetamine over the past three years.

Bob and Carl are both independent drug traffickers. Bob abuses marijuana and Carl is addicted to methamphetamine. Both sell methamphetamine in order to pay for the aforementioned abuse and/or addiction and to pay day-to-day bills. Bob and Carl went separately to Alan's "stash house" in a rural area South of Dallas so that Bob could purchase 250 grams of methamphetamine from Alan and Carl could purchase a kilogram of methamphetamine from Alan. Arriving separately, Alan weighed out 250 grams of methamphetamine and fronted it to Bob—both had agreed that Bob would pay Alan later. Alan sold Carl a separate kilogram of methamphetamine.

Alan retained the remaining 750 grams of methamphetamine from the kilogram that he opened to supply Bob, and he also retained five other kilograms of methamphetamine at that time.

After the sale, Bob placed the 250 grams of methamphetamine into his backpack, climbed on his motorcycle, and eventually rode East on Interstate 30. In a small stretch of I-30 in Hunt County, Texas, which is in the Dallas Division of the Northern District of Texas, Bob stopped to get something to eat, but he failed to use his blinker or use a hand signal. A trooper with the Department of Public Services who occasional works with the federal government pulled Bob over for the traffic violation and learned that Bob was driving without a license. The trooper arrested Bob, performed an inventory search of his backpack, and located the 250 grams of methamphetamine and a pistol.

Upon arrival at the jail, the trooper informed Bob of the obvious—Bob was in a lot of trouble—and then offered a method for which Bob could curry favor with law enforcement and "look good" to a judge to whom Bob would eventually appear. The first step to gaining favor would be to fully confess to all trafficking conduct for which Bob had engaged and then later help law enforcement arrest other people. Ignorant to many things in life, but particularly ignorant to the effects of "entering law enforcement confessional" without an immunity agreement of some sort, like the asylees in the dayroom of an psychiatric hospital and in the care of Nurse Ratched,[1] Bob then commenced to confessing. This confessing included statements that on their face did not quite add up such as purchasing 50 kilograms of methamphetamine for $3,300 to $3,600 dollars per kilogram, (which would be a gross of $165,000 to $180,000), but then also stating that he made (netted) over $100,000 selling methamphetamine. Nevertheless, the instant goal was achieved—

[1] Ken Kesey, One Flew Over the Cuckoo's Nest, 44-45 (Penguin Classics 2002) (1962).

law enforcement released Bob from custody. Later, Bob attempted to assist law enforcement, but neither's half-hearted attempts led to any arrests.

Ultimately, Bob's "case went federal" and agents arrested Bob at his home.

In Bob's case, the government did not possess any independent knowledge that Bob had engaged in the trafficking of 50 kilograms of methamphetamine; on its face the mathematics of Bob's conduct as he stated it did not add up; law enforcement did not recover packaging, ledgers, or other materials general associated such large scale trafficking; and Bob did not have any of the accoutrements of such a large amount of money—he appeared poor. Nevertheless, a false confession or not, Bob confessed to trafficking in 50 kilograms of methamphetamine, and how does one overcome the commonsense phrase that is usually applied in such cases: "Were you lying then or are you lying now?" With precedent against him,[2] and faced with the unsurmountable task of proving a negative, Bob's guideline sentence-range is based on the admitted 50 kilograms of methamphetamine and a pistol.

As to Carl, Carl entered his pick-up truck and drove North on Highway 175 to meet fellow traffickers and drug addicts Daniel, Ernest, and Frank so that they could further divide the kilogram into four packages of 250 grams per package, which is what Carl had done weekly for two years (56 weeks per year x 2 = 112 x 1 kilogram = 112 kilograms). After dividing the kilogram of methamphetamine into four equal packages of 250 grams in each package, Carl left his partners with one of those 250-gram packages.

Shortly thereafter, Carl stopped for breakfast in downtown Dallas, Texas at the McDonald's Restaurant across from the federal courthouse. Unfortunately for Carl, an Agent with the Drug Enforcement Agency, (who was eating breakfast), noticed Carl's nervous behavior,

[2] See Barfield, 941 F.3d at 760-63.

dilated pupils, "meth mites" (formication), and that Carl's pick-up truck—Carl was still sitting in his pick-up truck—had an expired registration sticker. Upon questioning, it was determined that Carl did not have a driver's license and he had a warrant for his arrest due to not paying past fines related to moving violations. After arresting Carl, the agent and other law enforcement officials performed an inventory search of Carl's pick-up truck and located the 250 grams of methamphetamine and a pistol. Shortly thereafter, the agent took Carl across the street to the holding cell of the United States Marshal and then wrote a Criminal Complaint against Carl.

It was an unusually slow day at the federal courthouse so the agent and the prosecutor were not only able to get Carl into Magistrate Court for his initial appearance, but they and the appointed lawyer were also able to arrange for Carl to debrief that afternoon. Before debriefing, however, the parties agreed, pursuant to U.S.S.G. § 1B1.8 and a general immunity agreement with the government, that the information that Carl provided as part of the debriefing would not be used in the calculation of his guideline sentence range. Carl then debriefed and provided information that resulted in the arrests of Daniel, Ernest, and Frank and to the arrest of an alternative source of supply—George. Carl knew that Alan was closely connected to a violent drug cartel so he did not provide information against Alan. Because the government was not independently aware of Carl's trafficking of 112 kilograms of methamphetamine (of which he admitted to trafficking), the immunity agreement resulted in the guideline-sentence-range being based on the pistol and 250 grams of methamphetamine (mixture). Moreover, because his cooperation resulted in the arrest of Carl's three co-defendants, the government provided further immunity to Carl from punishment for trafficking in the form of a reduction of six-offense-levels for the cooperation.

In the meantime, Alan received a telephone call from long-time customer Harold who requested that Alan deliver 250 grams of methamphetamine to Harold. In a good mood after selling 1250 grams of methamphetamine, Alan decided he would oblige Harold by making the requested delivery. Harold lived in Johnson County, Texas, which is also in the Dallas Division of the Northern District of Texas. Near Johnson County, Alan was following too close to the car in front of him, which a passing police officer noticed. The police officer pulled Alan over to the side of the road. Alan rolled down the window, and the officer smelled the remains of Alan celebratory marijuana joint and noticed Alan's nervousness and glassy eyes. The officer had Alan step out of the car and had Alan perform a sobriety test. Alan failed the test and was arrested. An inventory search located the 250 grams of methamphetamine and a pistol. Because Alan was connected to a violent drug cartel and was concerned about that cartel finding out anything about cooperation, when law enforcement attempted to convince Alan to cooperate, Alan invoked his right to remain silent and his right to have counsel present, and he then declined to cooperate.

In sum, Alan, Bob, and Carl are all arrested within hours of each other in different local jurisdictions, but all within our District and Division. Moreover, law enforcement arrested all three in possession of 250 grams of methamphetamine (mixture) and a pistol.

Alan's sentence will be based on 250 grams of methamphetamine (mixture) and a pistol, because that is all that the government knows about Alan's illegal conduct.

Bob's sentence will not be based solely on the 250 grams of methamphetamine (mixture) and the pistol for which the government is aware; instead, the sentence will be based on the pistol and the uncorroborated confession that Bob made to trafficking 50 kilograms of methamphetamine (mixture).

Carl's sentence will not be based on the pistol and the 112 kilograms of methamphetamine (mixture) for which Carl confessed; instead, based on the protection of the immunity agreement, the sentence will be based on the pistol and the 250 grams of methamphetamine (mixture) that the immunity agreement does not protect.

Alan and Carl will have gross offense-levels of 26 for the 250 grams of methamphetamine (mixture) and 2 offense-levels for the pistol. See U.S.S.G. §§ 2D1.1(b)(1); 2D1.1(c)(7)—Drug Quantity Table. Bob will have a gross offense-level of 38 for over 45 kilograms of methamphetamine (mixture) and 2 offense-levels for the pistol. See U.S.S.G. §§ 2D1.1(b)(1); 2D1.1(c)(1)—Drug Quantity Table.

Assuming a Criminal History Category I, and a reduction for acceptance of responsibility, the following are the sentence ranges for each person:

Alan: 250 grams of a methamphetamine (mixture) and a pistol results in a net offense-level 25 and **a sentence range of 57-71 months**. See U.S.S.G. Ch.5, Pt.A–Sentencing Table.

Bob: 50 kilograms of methamphetamine (mixture) and a pistol results in a net offense-level 37 and **a sentence range of 210-262 months**. See U.S.S.G. Ch.5, Pt.A–Sentencing Table.

Carl: 250 grams of a methamphetamine (mixture), a pistol, and an *excused* reduction of 6 offense levels for successfully cooperating results in a net offense-level 19 and **a sentence range of 30-37**. See U.S.S.G. Ch.5, Pt.A–Sentencing Table. Without the reduction for cooperation, the sentence range would be the same at that of Alan—**57-71 months**.

B. Reality, Facts, and Discussion

Sentencing based on what we know or what we believe we know and argument

It should be apparent that in the above hypothetical, "Bob" represents Mr. Smith. As to Alan, Carl, Daniel, Frank, George, and Harold, they represent variations of the thousands of defendants who have appeared in our courthouse over the decades of the Guidelines. Here, the controlled-substance portion of the guideline calculation calls for an offense level of 38. See (PSR ¶¶21 & 29.) This is based on a confessed 50 kilograms of methamphetamine (mixture), which includes 263.60 grams of known methamphetamine (mixture) and the purported drug proceeds of $7,049. See (PSR ¶¶21, 22, & 29.) Add two offense-levels for the firearm, and subtract three offense-levels for acceptance of responsibility, there is a net offense-level of 37 and a sentence range of **210-240 (262) months of imprisonment**.[3] See (PSR ¶85.)[4]

Under an "Alan scenario" for Mr. [redacted], we would take the 263.60 grams of seized methamphetamine, see (PSR ¶¶21, 22, & 29), and the purported drug proceeds of $7,049 being the equivalent of two kilograms[5] (Mr. [redacted] stated that he purchased methamphetamine for $3,000 to $3,600 per kilogram), see (PSR ¶20), which would be approximately 2263 grams (2.2 kilograms) of methamphetamine (mixture). For 2.2 kilograms of methamphetamine (mixture), the U.S.S.G. § 2D1.1 calls for an offense level of 32. See U.S.S.G. § 2D1.1(c)(4). Then add the enhancement of two offense-levels for the firearm, and subtract three offense-levels for acceptance of responsibility, and this results in a net offense-level of 31 and a **sentence range of 108-135 months**.[6] See U.S.S.G. Ch.5, Pt. A—Sentencing Table.

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[3] Criminal History Category I.

[4] Mr[redacted] signed a cooperation agreement with the government on May [redacted], which is well after he cooperated against himself and well after he attempted to cooperate with local law enforcement before the beginning of his federal case—too late to receive the same protection as "Carl."

[5] See United States v. Barry, 978 F.3d 214, 216-20 (5th Cir. 2020).

[6] Criminal History Category I.

The "lesson learned" from the above hypothetical and the comparison between Mr. Smith's case and the hypothetical defendants is quite apparent—by increasing punishment based on the government's knowledge of conduct and a defendant's statements to law enforcement and others we are subjecting defendants to *inter alia*, the believability of a defendant's incriminating statements, the honesty of defendants and the willingness of defendants to cooperate, the vagaries of investigative resources, immunity agreements and whether defendants give protected or unprotected confessions, charging decisions, and the willingness of law enforcement to actually act on a defendant's efforts to cooperate. Not only is this apparent, but it is also ironic—these variables create the types of unwarranted disparities that the Guidelines are supposed to be designed to prevent.[7] Does this seem contrary to 18 U.S.C. § 3553(a)(6) and other factors of § 3553(a)? Yes.

b. Conclusion

For the above reasons, Mr. Smith requests that this Court consider the **sentence range of 108-135 months** and downwardly vary from that point to a sentence that this Court determines is reasonable under the circumstances of this case.

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[7] Congress' second purpose [in enacting the Comprehensive Crime Control Act of 1984] was to reduce 'unjustifiably wide' sentencing disparity.[] It relied upon statistical studies showing, for example, that in the Second Circuit, punishments for identical actual cases could range from three years to twenty years imprisonment.[]

Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hostra 1, 4-5 (Fall 1988) (footnotes and accompanying citations omitted).

In fairness, the focus of the above quote is on how the Guidelines are supposed to address *regional* differences and differences between courtrooms; nevertheless, in attempting to meet this goal, the Guidelines have created differences—and forced similarities—in sentences that bear little to the facts of both individual cases and cases overall—at least that is the argument of Mr. Smith, and reality supports this argument.

III. THE SECOND SET OF REASONS TO VARY FROM THE GUIDELINES

Section 2D1.1 is not based on empirical or scientific evidence, and in constructing § 2D1.1 the Commission failed to exercise characteristic institutional role; in this case, quantity-based sentencing results in an unreasonable sentence; and the conversion ratios between methamphetamine and other controlled substances are not based on empirical evidence or science, and punishment based on these ratios in a methamphetamine case is neither just nor reasonable.

a. Section 2G2.2 is not based on empirical evidence and in constructing § 2D1.1 the Commission failed to exercise characteristic institutional role.

Just as U.S.S.G. § 2G2.2—child pornography—is not based on empirical evidence[8] and the Commission failed to exercise its institutional role, the Commission equally failed to exercise its characteristic institutional role and did not rely upon empirical or scientific evidence in constructing the U.S.S.G. § 2D1.1. Moreover, the Commission has failed to provide material guidance to District Judges as to the appropriate and reasonable sentence range should be in a case that falls under § 2D1.1—even at the "wholesale level."

> The first Commissioners derived the initial drug trafficking sentencing guidelines (§ 2D1.1 . . .) largely from the mandatory minimum quantity thresholds established in the Anti-Drug Abuse Act of 1986.[] That Act, however, did not provide any mandatory minimums for methamphetamine trafficking offenses. Consequently, the initial sentencing guidelines did not list methamphetamine in the 'Drug Quantity Tables.' . . .

United States Sentencing Commission, Methamphetamine[,] Final Report 7 (Nov. 1999), available at https://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/drugs/199911_Meth_Report.pdf (last accessed on Mar. 19, 2021) (hereinafter "Final Report"). The above admission makes it clear that, instead of scientific and empirical evidence, the Commission used the relevant statutory sentence ranges as anchors to create § 2D1.1 and

[8] See United States v. McLaughlin, 760 F.3d 699, 707-08 (7th Cir. 2014) (citations omitted); United States v. R.V., 157 F.Supp.3d 207, 252, 258-67 (E.D.N.Y. 2016); United States v. Cruikshank, 667 F.Supp.2d 697, 701-03 (S.D. W.Va. 2009). As we all know or should know, the cited out-of-Circuit and District Court cases are not binding on this Court; nevertheless, all of them offer persuasive arguments that coincide in many ways with the arguments that Mr. Smith makes in this Motion.

ultimately set the sentencing ranges. See id.; see also United States v. Moreno, No. 5:19-CR-002, 2019 WL 3557889, *2-3 (W.D. Va. 2019) (unpublished); United States v. Johnson, 379 F.Supp.3d 1213, 1218-19 (M.D. Ala. 2019); United States v. Bean, 371 F.Supp.3d 46, 51 (D. N.H. 2019); United States v. Ibarra-Sandoval, 265 F.Supp.3d 1249, 1252-53 (D. N.M. 2017); United States v. Hayes, 948 F.Supp.2d 1009, 1010-33 (N.D. Iowa 2013);[9] United States v. Hubel, 625 F.Supp.2d 845, 849-50 (D. Neb. 2008).

Because the Commission chose to rely upon statutes as anchors for offense levels instead of science and past practices—empirical evidence—to construct § 2D1.1, there no doubt that § 2D1.1 "'do[es] not exemplify the Commission's exercise of its characteristic institutional role.'" Spears v. United States, 555 U.S. 261, 264 (2009) (per curiam) (quoting Kimbrough, 552 U.S. at 102) (discussing the "crack" guidelines)); See Johnson, 379 F.Supp.3d at 1218-19; Bean, 371 F.Supp.3d at 51; Ibarra-Sandoval, 265 F.Supp.3d at 1252-53; Hayes, 948 F.Supp.2d at 1022-27; Hubel, 625 F.Supp.2d at 849-50; see also Final Report at 7.

b. In the instant case, sentencing based on *quantity* is flawed and will result in an unreasonable sentence.

The Guidelines use of quantity as a basis for sentencing is based on a reality that *may* have been true at the time of construction, and may be true for a few today, but is divorced from our current reality for most—including Mr. Smith. Therefore, using quantity of methamphetamine as seen in U.S.S.G. § 2D1.1(c)—Drug Table as stand-alone and/or primary basis for sentencing is unreasonable.

[9] The Honorable Mark W. Bennett, United States District Judge, Northern District of Iowa, Western Division, performs a yeoman's job in analyzing the Statutes and Guidelines as they relate to methamphetamine. See Hayes, 948 F.Supp.2d at 1010-1033.

"Congress decided on 'the weight of the drugs involved in the offense as the *sole proxy* to identify '*major*' and '*serious* dealers.'" United States v. Williamson, 953 F.3d 264, 268 (4th Cir. 2020) (emphasis added) (citing and quoting Kimbrough, 552 U.S. at 96); see Johnson, 379 F.Supp.3d at 1219-20. According to the legislative history, weight/quantity was meant to be a method to identify and punish "'the kingpins—the masterminds who are really running these operations. . . .'" Hayes, 948 F.Supp.2d at 1020-21 (citing and quoting United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy, 119 (Feb. 1995) (citing 132 Cong. Rec. S. 14,300 (Sept. 30, 1986)), available at https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy (last accessed on Mar. 31, 2021)). "[F]aithful to Congress's policy judgments, the Commission took the ADAA as a *mandate* to increase drug sentencing about traditional benchmarks and, furthermore, to calibrate sentences to the type and quantity of drug involved in certain convictions." Williamson, 953 F.3d at 268 (citation omitted) (emphasis added). Thus, instead of "'an empirical approach based on data of past sentencing practices[,]' . . . the Commission formulated Guideline [§] 2D1.1(c) based on the 'weight-driven scheme' in the Anti-Drug Abuse Act of 1986 [ADAA] . . . ." Johnson, 379 F.Supp.3d at 1218-19 (citing and quoting Kimbrough, 552 U.S. at 96); see United States v. Robinson, 542 F.3d 1045, 1047 (5th Cir. 2008) (crack cocaine); Hayes, 948 F.Supp.2d at 1015-16; Hubel, 625 F.Supp.2d at 849-50; see also United States v. Dayi, 980 F.Supp.2d 682, 684 (D. Md. 2013) (marijuana); United States v. Ysidro Diaz, No. 11-CR-00821-2 (JG), 2013 WL 322243, *4-9 (E.D.N.Y. Jan. 28, 2013) (unpublished) (crack cocaine); United States v. Chao Vang, 789 F.Supp.2d 1020, 1023 (E.D. Wis. 2011) (MDMA); Henderson v. United States, 660 F.Supp.2d 751, 753 (E.D. La. 2009) (crack cocaine).[10]

[10] In United States v. Carrillo, 440 F.Supp.3d 1148, 1151-53 (E.D. Cal. 2020), the Honorable Kimberly J. Mueller, United States District Judge, Eastern District of California, does a good job of summarizing the policy disagreements

Though the Commission treated the statutory ranges as mandates on how to construct U.S.S.G. § 2D1.1, admittedly "'there is nothing inherently wrong with the Guidelines taking drug quantity into account. If all else is equal, a dealer who sells 50 kilograms of heroin inflicts more harm on society, and deserves greater punishment, than one who sells on kilogram.'" Johnson, 379 F.Supp.3d at 1220 (quoting Diaz, 2013 WL 322243, at *12). Not all drug traffickers, however, are equal; therefore, the quantity of the controlled substances can be a "poor proxy for culpability." Johnson, 379 F.Supp.3d at 1220 (citing Diaz, 2013 WL 322243, at *13) (remaining citations omitted). "To draw on popular imagination, it is the . . . Stringer Bells, Tony Montanas, and Walter Whites of the world who bear the greatest culpability, not the street peddlers, middlemen, and mules, regardless of the quantity of drugs that happen to be involved in the [drug] crimes . . . ." Johnson, 379 F.Supp.3d at 1220.

Ultimately, to rely solely on *quantity* as "a proxy for the offender's role in the drug trade hierarchy[,]" id. (footnote and associated citation omitted)—and thus warranting the punishment fit for a "kingpin"—is to create a "result [that would] be a classic case of false uniformity. False uniformity occurs when we treat equally individuals who are not remotely equal because we permit a single consideration, like drug quantity, to mask other important factors." United States v. Cabrera, 567 F.Supp.2d 271, 273 (D. Mass. 2008) (citations omitted); see Johnson, 379 F.Supp.3d at 1220. "False uniformity . . . cause[s c]ourt[s] to sentence . . . [one defendant] to a punishment meant for another." Ibarra-Sandoval, 265 F.Supp.3d at 1252-53 (citation omitted).

Here, early in the morning of [redacted], local authorities arrested Mr. [redacted] with a pistol, a small amount of marijuana, 250.53 grams of methamphetamine, and $4,449. See (PSR ¶¶13 & 14.) It does not appear that, during this traffic stop and subsequent arrest, there were other

that are made in a number of the above cited cases.

indicia of trafficking such as baggies, scales, ledgers, and other items that are frequently recovered from traffickers—but not so much from mules. See (id.) During that traffic-stop Mr. [redacted] confirmed that he knew that the methamphetamine was in the car, but claimed that the methamphetamine belonged to Teressa [redacted].[11]

On May [redacted] was a passenger in a vehicle that Mr. [redacted] was driving.[12] Law enforcement pulled Mr. [redacted] over for speeding, and it appears that law enforcement seized some unstated amount of marijuana.[13] Ms. [redacted] *claimed* "possession of *all narcotics* found in the vehicle."[14] It appears that the next month law enforcement arrested Ms. [redacted] for possessing 295 grams of methamphetamine.[15]

Law enforcement later learned that Mr. [redacted] was distributing methamphetamine—information from Mr. [redacted]s cellular telephone indicates that he was also selling relatively small quantities of marijuana—so law enforcement orchestrated a purchase of methamphetamine from Mr. [redacted]. See (PSR ¶¶15 & 16.) On October 13, 2018, law enforcement purchased *13.7 grams of methamphetamine* from Mr. [redacted]. See (PSR ¶16.)

On May 3, 2019, law enforcement arrested Mr. [redacted] at his home. See (id.) Upon arrest, law enforcement located a pistol, $3,600, and an unknown quantity of marijuana. See (id.) Though Mr. [redacted] appears to have informed law enforcement that he "bought high and sold low"—it is claimed that Mr. [redacted] said that he purchased 50 kilograms of methamphetamine in bulk for the

[11] See United States v. Ford, 3:19-CR-582-B (N.D. Tex. Nov. 6, 2019). In the Factual Resume Ms. [redacted] and the government agreed that on June [redacted] she "was in possession of approximately 295 grams of methamphetamine, which she intended to distribute, while driving to Dallas, Texas." (Docket Entry 31: Factual Resume, p.2) (Nov. 19, 2020).

[12] See Fate Department of Public Safety, Arrest Supplement: Charge HSC § 481.121 Possession of Marijuana (a)(1) (May 5, 2018) (Gov_00000064 (Discovery Document)).

[13] See id.

[14] (Id.) (emphasis added). The mention of "narcotics" may mean that Ms. [redacted] possessed methamphetamine on this occasion as well.

[15] See supra, n.11. This charge and conviction may or may not support Mr. [redacted]s assertion that the methamphetamine that law enforcement found and seized on March [redacted], belonged to Ms. [redacted].

previous 12 to 14 months (approximately 3.5 kilograms per month) for approximately $3,300 to $3,600, which equals between $165,000 to $180,000 in gross expense, but he netted over $100,000 in drug proceeds—it does not appear that law enforcement recovered any of the typical detritus of trafficking. See (PSR ¶20.) Specifically, it does not appear that law enforcement recovered baggies and other packaging material, scales, ledgers, money counters, cutting agents, and so on.

A review of the government's analysis of Mr. [redacted]s cellular telephone also does not appear to show any of the signs of large-scale—3.5 kilograms per month—distribution of methamphetamine.[16] Moreover, Mr. [redacted] lacked any of the trappings of a kingpin, a major dealer, a mastermind, a "Walter White." That is, no expensive or fancy cars or trucks, no big house(s), no flashy cloths, none of the wealth and superficial "glamor" often seen in cases involving the kingpin, mastermind, and major dealer. Instead we see the lifestyle and the net income of a "deliveryman . . . who received little more than piecework wages." Cabrera, 567 F.Supp.2d at 273 (citations omitted). Mr. [redacted]s status as small-time trafficker and a Sad Sack in the world of drug trafficking is not only illustrated by his relatively small hand-to-hand transaction of 13.7 grams (about a half of an ounce) of methamphetamine to a confidential informant, but also by the conversation that Mr. [redacted] (ES) had with law enforcement (LE) after his arrest on March [redacted]

ES: "[I am] not a bad person, . . . [I] had to make money somehow."

ES: "I can't catch a break cause [sic] I keep getting arrested for child support."

ES: "I don't know what else to do."

LE: "Selling drugs ain't the route to go."

[16] See Government Discovery, North Texas Electronic Crimes Task Force, Extraction Report: Cellbrite Reports (May 13, 2019).

ES: "I know."[17]

What kind of "kingpin" appears to want to pay his child support, but keeps getting in trouble for not being financially able to do so?

If *culpability* is to mean anything, if "the nature and circumstances of the offense and the history and characteristics of the defendant[]" are to mean anything; and if "promot[ing] respect for the law[] and . . . provid[ing] just punishment for the offense[]" are to mean anything, then it must be reasonable to make a *distinction* in the sentences between those who are the "Walter Whites" of methamphetamine trafficking and those who dropped out of high school in the ninth grade, stayed intoxicated on marijuana and other controlled substances during their formative years, remained "stoned" on marijuana in the years after adolescents and into adulthood, and then (unsurprisingly) became marginally employed as adults—the uneducated dope fiends who are the literal and metaphorical mules, petty traffickers, and "soldiers" who make up and are the cannon fodder of that "industry." Right? Instead, however, the sentences that, initially—at least in theory—were to be reserved for the "Walter Whites" of the world, ended up being applied equally to all—a false equivalency or a "false uniformity." See Johnson, 379 F.Supp.3d at 1220; Ibarra-Sandoval, 265 F.Supp.3d 1249, 1252-53; Cabrera, 567 F.Supp.2d at 273.

Beyond the Statute and the Guidelines, how did we even arrive at this guideline sentence range? The sentence range is based primarily on the confession of an intoxicated and marginally educated dope-fiend who tried to impress law enforcement about his ability to get them what he thought they want and talk himself out of a jam[18]—Mr. [redacted].

[17] See Fate Department of Public Safety, Officer J. Pope #5539, K-9 Division, Case No. 2018-1489 (Mar. 5, 2018) (Gov_00000022 (Discovery Document)).
[18] Cf. Barfield, 941 F.3d at 759-61.

In the end, there should be little to no argument that by anchoring § 2D2.1 to the relevant statutes without any use of empirical date[19] (or even scientific information) creates "false uniformity" by focusing on one factor—quantity. Cf. Johnson, 379 F.Supp.3d at 1220; Ibarra-Sandoval, 265 F.Supp.3d 1249, 1252-53; Cabrera, 567 F.Supp.2d at 273. This results in over-punishment for some and under punishment for others, but for most, the punishment rarely fits the "goldilocks principle."[20] Why? Because § 2D2.1 is wed to the statute and divorced, not just from reality, but also from the factors of 18 U.S.C. § 3553(a).

c. The ratios between methamphetamine and other controlled substances are not based on empirical evidence or science and punishment in a methamphetamine case based on these ratios is neither just nor reasonable.

"[In 1986, b]ased largely on information provided by the Drug Enforcement Administration, the initial guidelines assigned methamphetamine an equivalency equal [a **comparative valuation**] to twice that of cocaine and .4 that of heroin (*i.e.*, 1 gram of methamphetamine = 2 grams of cocaine = .4 gram of heroin = 400 grams of marijuana)." Final Report at 7 (emphasis in the original) (footnote omitted);[21] see (Def.'s Ex. 1 (U.S.S.G. § 2D1.1—Drug Equivalency Tables: 2.42-46, (Oct. 1987));[22] see also Johnson, 379 F.Supp.3d at 1217-19. Of note, at that time, 1 gram of fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) was equal to 31.25 grams of heroin. See (Def.'s Ex. 1).

A cleaner way of stating this is that in 1986, a gram of methamphetamine was valued the same as 400 grams of marijuana; a gram of cocaine was valued the same as 200 grams of marijuana, and a gram of heroin was valued the same as 1 kilogram of marijuana (.4 grams of

[19] "The government does not dispute that, in establishing the methamphetamine guidelines, the Commission began with Congress's mandatory minimums and made no effort to use empirical date to deviate from Congress's judgment." Bean, 371 F.Supp.3d at 51.
[20] See United States v. Irey, 612 F.3d 1160, 1197 (11th Cir. 2010) (en banc).
[21] In plain English, based on empirical evidence and information from the DEA, methamphetamine had an equivalence of twice that of cocaine and less than half that of heroin.
[22] In 1987, the Commission used heroin as the equivalency and/or "common currency."

heroin ÷ 400 grams of marijuana = 100 grams of marijuana per tenth of a gram of heroin or 1 gram of heroin = 1 kilogram of marijuana). As to fentanyl, a gram of fentanyl was valued the same as 31.25 kilograms of marijuana.[23] See (id.)

In response to the Anti-Drug Abuse Act of 1988, which set forth mandatory minimum penalties for methamphetamine trafficking, the Commission incorporated the statutory penalties into the guidelines for methamphetamine. See Final Report at 7-8; see also Hubel, 625 F.Supp.2d at 849-50. Based on the 1988 Act, the **comparative valuation** went *from* the above ratio in 1986 to "1 gram of methamphetamine = 5 grams of cocaine = 1 gram of heroin = 1 kilograms of marijuana [in 1988]. . . . In effect, Congress's mandatory minimum designation . . . translated into guideline changes that ascribed to methamphetamine a potency approximately 2.5 time that of the former law." Final Report at 7-8; see (Def.'s Ex. 2 (U.S.S.G. § 2D1.1—Drug Equivalency Tables: 2.42 (Nov. 1989)); see also Johnson, 379 F.Supp.3d at 1217-19. The Commission also decreased the valuation of fentanyl from (a) 1 gram of fentanyl equal to 31.25 grams of heroin or 31.25 kilograms of marijuana to (b) 1 gram of fentanyl becoming equal to 2.5 grams of heroin or 2.5 kilograms of marijuana. See (Def.'s Ex. 2).

The statutory and guideline penalties have continued to march along to our current ratio, which has a **comparative value** of 1 gram of methamphetamine (mixture) = 10 grams of cocaine = 2 grams of heroin = 2 kilograms of marijuana ("converted drug weight" in today's guideline-speak). See U.S.S.G. § 2D1.1, comment. (n.8(D)) (Schedule I and II Opiates *); U.S.S.G. § 2D1.1, comment. (n.8(D)) (Cocaine and Other Schedule I and II Stimulants (And Their Immediate

[23] Each tenth of a gram of heroin (or 100 milligrams) is the same as 100 grams of marijuana for purposes of punishment. Each gram of fentanyl is the same as 31.25 grams of heroin for purposes of punishment. There are 312.50 tenths in 31.25 grams (31.25 x 10 = 312.50). Multiply 312.50 tenths by the 100 grams (the ratio of 100 milligrams (1/10th grams/.10 gram) of heroin to 100 grams of marijuana), and you have 31,250 grams of marijuana. Divide 31,250 grams by 1000 grams (there are 1000 grams in a kilogram), and you have 31.25 kilograms. Or, 1 gram of heroin is equal to 1 kilogram of marijuana so 1 gram of fentanyl, which is equal to 31.25 grams of heroin, is equal to 31.25 kilograms of marijuana.

Precursors)*); U.S.S.G. § 2D1.1, comment. (n.8(D)) (Schedule I Marihuana). As to fentanyl, it has retained its value of 2.5 kilograms of marijuana (converted drug weight). See U.S.S.G. § 2D1.1, comment. (n.8(D)) (Schedule I and II Opiates*). To summarize, while 1 gram of methamphetamine (mixture) has gone from being equal to 400 grams of marijuana to 1 gram of methamphetamine (mixture) being equal to 2000 grams (2 kilograms) of marijuana, cocaine (200 grams of marijuana) and heroin (1 kilogram of marijuana) have remained the same, and fentanyl has gone from 1 gram of fentanyl being equal to 31.25 kilograms of marijuana to 2.5 kilograms of marijuana. Compare id. with (Def.'s Ex.'s 1 & 2).

A gram of methamphetamine is ten times as "bad" as a gram of cocaine and nearly the same as fentanyl? Fentanyl? Apparently it only takes two **milligrams** of fentanyl to kill most people. See United States Drug Enforcement Agency, Alarming Spoke in Fentanyl-related Overdose Deaths Leads Officials to Issue Public Warning, https://www.dea.gov/press-releases/2020/08/06/alarming-spike-fentanyl-related-overdose-deaths-leads-officials-issue (Aug. 6, 2020) (last accessed on Apr. 3, 2021). A comparison might help. A typical "baby aspirin" is 81 milligrams; *ergo*, there are nearly 40 deadly doses of fentanyl in "baby aspirin" (81 mg ÷ 3.3 mg = 24.54), and 50 deadly doses in a gram of fentanyl. We should all be able to agree that mortality is a measurement of harm.

In 2016, the deaths by overdosing on fentanyl increase 540% over the past three years. See Josh Katz, The First Count of Fentanyl Deaths in 2016: Up 540% in Three Years, New York Times, Sept. 2, 2017, (citing the National Center for Health Statistics, Centers for Disease Control and Prevention), available at https://www.nytimes.com/interactive/2017/09/02/upshot/fentanyl-drug-overdose-deaths.html?_r=0 (last accessed on Apr. 13, 2021). This same article not only states that 20,100 people in this country died of overdosing on fentanyl and fentanyl analogues, but also

states the following about deaths by overdosing in this country between 2000 and 2016 (the chart shows the growth in deaths by overdose over these years): 15,400 people died by overdosing on heroin; 14,400 died from overdosing on prescription opioids; 10,600 died from overdosing on cocaine; and the penultimate cause of death by overdose is methamphetamine at 7,660 (methadone death are the lowest at 3,280). See id. These figure bear out common knowledge—fentanyl, heroin, prescription opioids, and cocaine are more dangerous and more deadly than methamphetamine. See id. While it is not the same as comparing iron pyrite to gold, perhaps this valuation system between methamphetamine and other narcotics is a testament to the politicization of punishment, "gubment" genius, or both.

IV. CONCLUSION

"Methamphetamine offenses receive more severe sentences than any other drug." Bean, 371 F.Supp.3d at 53 (citing United States v. Nawanna, 321 F.Supp.3d 943, 953-54 (N.D. Iowa 2018)). As such, "the methamphetamine guidelines create unwarranted sentencing disparities between methamphetamine offenses and offenses involving other major drugs." Id. at 50. Why is it unwarranted? Everyone agrees that methamphetamine is dangerous and harmful to the community, but is "methamphetamine [(mixture)] . . . twice as potent, dangerous, destructive[,] or addictive than heroin? I am aware of no objective evidence—from the United States Sentencing Commission or otherwise—supporting such a proposition." Harry, 313 F.Supp.3d at 973; see Moreno, 2019 WL 355889, *4.

It is clearly that U.S.S.G. § 2D1.1 is not based on science and it is not based on facts. Yes, decades ago "little intellectual elite, in a far distant capitol"[24] decided that the best way to "solve" the dope problem was that we should simply "punish" our way of the problem. In doing so, this "little intellectual elite" decided that (1) every defendant and the defendant's conduct is a "square peg;" (2) every defendant—a human being—and the defendant's conduct would fit into a "square-hole" sentence range, and (3) that our "in the field" district judges must then place that "square peg defendant" into that "square-hole sentence" and all will be reasonable. In the end, they simply addressed a complex problem in the fashion of the Red Queen.[25]

[24] Ronald W. Reagan, 40th President of the United States of America, A Time for Choosing: Television Campaign Address for Barry Goldwater Presidential Campaign, (Oct. 27, 1964), available at https://youtu.be/qXBswFfh6AY (last accessed Apr. 2, 2021).

[25] See Lewis Carroll, Alice's Adventures in Wonderland & Through the Looking Glass and What Alice Found There, 78-88 (Barnes & Noble Books 2004).

Ultimately, this central government driven sentencing scheme—sentencing that is based on politics, hysteria, and outdated assumptions—that minimizes science, evidence, and the personal connection with the facts associated with the human being standing at the podium, seems to be a reflection of our bureaucratic "gobment" at its worst.

For all of the above reasons, Mr. [redacted] requests that, after determining the sentence range as the law requires, this Court then "start" the sentence range at 108 to 135 months and then vary downward from the guidelines sentence range to a reasonable sentence.

Respectfully submitted,

/s/ Douglas A. Morris
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CERTIFICATE OF SERVICE

I certify that on April 16, 2021, I caused a copy of Defendant's Motion to be delivered via electronic filing to the Honorable David C. Godbey, United States District Judge; [redacted]

s/s *Douglas A. Morris*
Douglas A. Morris
Assistant Federal Public Defender