

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :  
 : No. 3:05cr292 (EBB)  
 :  
 v. :  
 : April 4, 2007  
 :  
 TERRENCE STEELE aka "T-Fur" :

**GOVERNMENT'S MEMORANDUM IN AID OF SENTENCING**

The government respectfully submits this memorandum in aid of sentencing in the above-referenced case, currently scheduled for April 5, 2007. For the reasons set forth herein, the government opposes the defendant's grounds for departure and requests that the Court sentence the defendant to term of imprisonment that it deems appropriate.

**I. Background**

On December 11, 2006, the defendant was convicted after a three-day jury trial for one count of conspiring to possess with the intent to distribute 50 grams or more of cocaine base, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(A); and for one count of possessing with the intent to distribute 50 grams or more of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A). Prior to trial, the government filed an information pursuant to Title 21, United States Code, Section 851, to establish the fact of the defendant's prior conviction for a felony drug offense. Consequently, the defendant faces a mandatory minimum of 20 years' imprisonment, with a maximum of life imprisonment; and his corresponding range under the Sentencing Guidelines is 360 months' imprisonment to life imprisonment.

The evidence at trial established that on March 10, 2005, the defendant distributed 57.7

grams of cocaine base to a cooperating witness, in exchange for \$2,020. The meeting between the defendant and the cooperating witness was recorded and videotaped, and played to the jury. The evidence also established that the defendant had conspired to distribute more than 50 grams of cocaine with co-conspirator Christopher Goins. Specifically, the jury heard a recording of a meeting between the cooperating witness and Goins, in which Goins admitted that he had supplied the defendant with the cocaine base that the defendant had distributed to the cooperating witness on March 10.

The evidence at trial also established beyond a reasonable doubt that the substance that the defendant had distributed on March 10 was cocaine base, also known as crack cocaine. The cooperating witness testified that he had been selling crack cocaine for many years and recognized the substance that the defendant distributed as crack. The cooperating witness also testified that the price that the defendant charged was consistent with the street value of crack cocaine. The jury also heard the testimony of two FBI agents -- Mark Gentil and Sean Sullivan -- who were directly involved in this investigation. Agents Gentil and Sullivan both testified to their significant experience in narcotics cases and, more specifically, cases involving cocaine base. Both agents testified that the substance distributed by the defendant was consistent with the appearance and texture of crack cocaine. The jury further heard the testimony of Nicole Pearson, who was a friend of the defendant. Ms. Pearson testified that she had allowed the defendant and several of his drug associates to use her residence in New Haven to “cook,” or convert, cocaine powder into crack cocaine. She also testified that she had observed the defendant breaking the converted crack cocaine into individual, distribution-size, packages. Lastly, the jury heard from Babita Joseph, a forensic chemist at the Drug Enforcement

Administration. Ms. Joseph testified that she had received the substance distributed by the defendant and used numerous confirmatory tests -- Fourier-transform infra-red spectroscopy, gas chromatography, mass spectroscopy, and gas chromatography flame ionization detector -- to conclude that the substance was, in fact, cocaine base. The jury was presented with reports of her findings and notes, all of which supported her testimony that she was “100% confident” that the substance distributed by the defendant was cocaine base.

## **II. Discussion**

### **A. The defendant’s criminal history category of VI does not substantially over-represent the seriousness of the defendant’s criminal history**

The government opposes the defendant’s claim that his criminal history category of VI “significantly over-represents the seriousness of that history.” Def. Memo at 3. Section 4A1.3(b)(1) of the Sentencing Guidelines states that “[i]f reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.”

Here, the defendant does not and indeed cannot dispute his designation as a career offender.<sup>1</sup> That designation is more than appropriate, given the defendant’s criminal history that runs both broad and deep.

“The career offender provision produces sentences far longer than those resulting from

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<sup>1</sup> In the alternative, the defendant has a “natural” criminal history category of VI, owing to the 20 criminal history points from his nine prior convictions. PSR at ¶ 35. Indeed, even if the defendant’s failure to appear convictions were discounted, his resulting criminal history score would be a staggering 16, which would still place him comfortably within the criminal history category of VI.

computation under the regular Guidelines provisions.” United States v. Richardson, 923 F.2d 13, 15 (2d Cir. 1991). “This is in keeping with the congressional mandate that career offenders be sentenced at or near the maximum sentence imposed by statute.” Id. (citing 28 U.S.C. § 994(h)). The primary purpose of the career offender provision is to ensure “consistent treatment of all recidivists.” Richardson, 923 F.2d at 15. To that end, the Second Circuit noted that by focusing on the “recurrence of offenses rather than on the specifics of the most recent offense,” the career offender provision is “consistent with the legislative discussions advocating harsh treatment for all recidivists.” Id.

A review of the defendant’s formidable criminal history clearly shows that the defendant is the type of recidivist that the career offender provision was meant to punish. The defendant was first convicted in September 1990, for carrying a dangerous weapon and selling narcotics, for which he received a total of 5 years jail, 3 years to serve, and 3 years of probation. He was discharged on September 4, 1992. *One day after his discharge*, he was arrested again for selling narcotics, to which he ultimately pled guilty on March 2, 1994, and received a 5 year jail sentence, to run concurrently with a 6 month sentence that he received for failing to appear. He was ultimately released to supervised parole on April 3, 1997. A mere three weeks after his release, he was again arrested, this time for threatening. He was convicted for that offense on April 17, 1997 and received 6 months’ jail, suspended, with 18 months’ conditional discharge. Just two months after that conviction, the defendant was arrested yet again, on August 21, 1997, for interfering and resisting arrest, for which he was ultimately convicted on June 9, 1998, and received 6 months jail. The defendant was discharged from custody on March 8, 1999. Less than one year later, on February 3, 2000, he was again arrested, for interfering and resisting and

for failure to appear (which itself was substituted down from a second degree assault charge), for which he was ultimately convicted on March 8, 2002, and received one year in jail. While on pre-trial release for his February 2000 arrest, he was arrested again -- this time on November 27, 2001, for second degree forgery, fifth degree larceny, and for failure to appear. The defendant resolved those charges with his March 8, 2002, and received 1 year in jail. The defendant was released from custody in December 2002. A little more than two years after his release from those convictions, he participated in the March 2005 cocaine base conspiracy that led to his conviction in this matter.

The foregoing review of the defendant's formidable criminal history demonstrates that time and again, spanning almost 15 years, the defendant repeatedly returned to criminal behavior immediately or shortly after being released from custody. The defendant has demonstrated a clear pattern of criminal behavior and leaves little doubt that he is a recidivist. With the exception of an "off the books" job that he had from May until June 2004, PSR at ¶ 51, the defendant has had no stated employment in the past 17 years. Indeed, as the Nicole Pearson testified during the trial, the defendant made money by selling drugs. As such, the defendant is a proper candidate for application of the career offender designation, including designation as a criminal history category of VI. As stated in Richardson, the primary focus of the career offender provision is to punish the recurrence of offenses and to exact consistent treatment of all recidivists, irrespective of whether the defendant is characterized as a "street dealer." Id. at 16.

**B. The rule of lenity does not apply**

The defendant argues that the Sentencing Guidelines' definition of "crack," see U.S.S.G. § 2D1.1(c), note (D), is ambiguous and that the rule of lenity requires that he be sentenced on the

basis of the corresponding Guidelines range for cocaine. That argument fails for several reasons.

First, the defendant's mandatory minimum sentence of 20 years is controlled by statute, not by any provision of the Sentencing Guidelines. The defendant was convicted by a jury for conspiring to possess with intent to distribute 50 grams of cocaine base and for possessing with the intent to distribute 50 grams of cocaine base, and the government filed a second offender notice prior to trial. Thus, pursuant to 21 U.S.C. § 841(b)(1)(A), the defendant must be sentenced to a term of imprisonment of at least 20 years. The defendant's asserted ambiguity between crack and cocaine is irrelevant for statutory purposes. 21 U.S.C. § 841(b)(1)(A) does not make any reference to crack; it refers only to cocaine base. See United States v. Barbosa, 271 F.3d 438, 465 (2d Cir. 2000) ("we hold that, while the term 'cocaine base' means only crack when a sentence is imposed under the Sentencing Guidelines, 'cocaine base' encompasses all forms of cocaine base with the same chemical formula when the mandatory minimum sentences under 21 U.S.C. § 841(b)(1) are implicated"); see also United States v. Palacio, 4 F.3d 150, 154-55 (2d Cir. 1993) (holding that a substance that contains cocaine base is subject to the enhanced penalties of 21 U.S.C. § 841(b) even if the substance is not "crack"). A jury found, beyond a reasonable doubt, that the defendant had conspired to distribute and distributed *cocaine base*. Furthermore, the Court should reject any argument that the statute upon which the defendant was found guilty, 21 U.S.C. § 841(b)(1)(A), is ambiguous. That argument was expressly rejected by the Second Circuit in United States v. Rivera, 112 F.3d 506, 1996 WL 626397, at \*2 (2d Cir. Oct. 30, 1996) (rejecting defendant's argument that the rule of lenity should apply as to 21 U.S.C. § 841(b)(1)(A)).

Second, owing to the defendant's status as a career offender, the issue of whether

U.S.S.G. § 2D1.1(c) is ambiguous is moot because the defendant's Guidelines offense level is determined on the basis of U.S.S.G. § 4B1.1, the "career offender" provision. Pursuant to that provision, the defendant's offense level is determined by referring to the *statutory maximum penalty* for the offense that the defendant was convicted. Because of the jury verdict as to the defendant, the applicable statutory maximum penalty for the offense of conviction is life imprisonment. Thus, under U.S.S.G. § 4B1.1(b)(A), the defendant's offense level, as calculated by the PSR, is 37. Nothing in 21 U.S.C. § 841(b)(1)(A) or in U.S.S.G. § 4B1.1 refers to crack. The defendant's asserted claim of Guidelines' ambiguity over the definition of crack and cocaine is therefore moot.

Third, even if the defendant's rule of lenity claim were considered, that argument would still fail. "The rule of lenity 'requires the sentencing court to impose the lesser of two penalties where there is an actual ambiguity over which penalty should apply.'" Canales, 91 F.3d 363, 367 (2d Cir. 1996) (quoting United States v. Fisher, 58 F.3d 96, 99 (4th Cir. 1995)). "The rule is inapplicable unless 'after a court has seize[d] [on] every thing from which aid can be derived, it is still left with an ambigu[ity]'" Canales, 91 F.3d at 367-68 (quoting Chapman v. United States, 500 U.S. 453, 463 (1991)). "The particular provision must be facially ambiguous as well as ambiguous as applied to the particular defendant." Canales, 91 F.3d at 368 (citation omitted). "In other words, a defendant is afforded lenity only where a penal provision 'did not clearly proscribe [the defendant's] conduct and did not accord him fair warning of the sanctions the law placed on that conduct.'" Id. (citation omitted).

In Canales, the defendant raised the exact argument addressed by Mr. Steele: that the Guidelines use of the term "crack" is ambiguous because there is "no consensus as to what

constitutes ‘crack’ in the scientific community.” Id. at 367. Indeed, just as Mr. Steele now asserts, defendant Canales relied upon the testimony of cocaine experts adduced in United States v. Davis, 864 F. Supp. 1303 (N.D. Ga. 1994), and argued that “[a] chemist can only say whether a substance contains cocaine base (i.e., C17-H21-NO4), or cocaine hydrochloride (i.e., cocaine powder, or C17-H21-NO4-HCl).” 91 F.3d at 367. Thus, according to Canales, “because there is no scientific distinction between crack and non-crack cocaine base, the Guidelines’ definition of crack ‘lacks any scientific meaning’ and is hence facially ambiguous, mandating application of the rule of lenity.” Id.

The Second Circuit addressed the issue of ambiguity raised by Canales and rejected that argument. Specifically, the court held:

The Guidelines’ definition of crack is not facially ambiguous. First, statutory terms are to be given their common and ordinary meaning. The street name “crack” is not ambiguous, because crack has a common and ordinary meaning that is understood by [the defendant], by others in the drug trade, and by citizens in communities that are plagued by the drug. Moreover, the Guidelines provide a fairly precise definition of crack: “[A] form of cocaine base, usually prepared by processing cocaine hydrochloride [powder cocaine] and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.” That definition adequately describes crack by its tell-tale appearance and by the common method of its manufacture. The Guidelines definition is therefore lucid enough for lawyers, dealers, users and citizens.

Second, the point of the rule of lenity is for statutes to serve as a “fair warning . . . in language that the common world will understand. The term crack is commonly understood to denote a certain cocaine substance. Canales contends that a more technical definition of crack cocaine is required. But a more technical definition would not necessarily provide a fairer warning. Chemistry is not always the best language for making distinctions that are well understood in common parlance. For example, ice, water and water vapor are different things, yet they have the same chemical formula. The idea that Canales would have been better forewarned about the criminality of his conduct if the Guidelines had been expressed in chemical formulae is not persuasive. We hold that the Guidelines’ definition of crack does not create an ambiguity that might justify application of the rule of lenity.

Id. at 368. Likewise, this Court should apply the clear Second Circuit authority on this precise issue and hold that the Sentencing Guidelines' provisions regarding crack and cocaine are not ambiguous. For all the foregoing reasons, it would be inappropriate for the rule of lenity to be applied; there is simply no ambiguity presented here.

**C. A lengthy period of incarceration is appropriate**

As discussed earlier, the defendant's formidable criminal history, spanning almost 15 years, demonstrates that he is a proper candidate for designation as a career offender, and thus, a lengthy period of incarceration associated with that designation is warranted. Moreover, the evidence presented at trial belies the defendant's attempt to minimize his involvement in narcotics trafficking. Def. Memo at 10. Nicole Pearson testified that the defendant made money by selling drugs, specifically, crack cocaine. Ms. Pearson testified that she had known the defendant for many years and had never known the defendant to have had a stable job. That testimony is confirmed by the findings in the PSR. Moreover, Ms. Pearson stated that she allowed the defendant and several of his associates to convert cocaine powder into crack cocaine at her residence on several occasions. She also observed the defendant break down the cooked crack cocaine into individual packages. Her testimony, which was uncontested, contradicts the defendant's assertion that his criminal conduct was "minor" or that he was "unaware of what he was selling." Def. Memo at 10.

**III. CONCLUSION**

For the foregoing reasons, the government opposes the defendant's grounds for departure and requests that the Court sentence the defendant to term of imprisonment that it deems appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of April 2007, a copy of the foregoing memorandum was sent, via facsimile, to Norman A. Pattis, Esq., 649 Amity Road, P.O. Box 280, Bethany, Connecticut 06524. Facsimile: 203-393-9745.

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