Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Assistant United States Attorney
Deputy Chief, Criminal Division
U.S. Attorney's Office
Eastern District of Tennessee
Knoxville, Tennessee

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1994; BPR # 016414

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

In addition to Tennessee, I have been admitted to practice in the following states:

Georgia, Bar # 026288, Admitted June 7, 1993 by examination, Inactive-The State Bar of Georgia does not require that I maintain an active license because I do not practice law in Georgia. I am eligible to activate the license at any time by paying an additional fee. My license is considered to be in good standing.

Alabama, Bar # ASB-4143-L67C, Admitted September 24, 1993 by examination, Active-I hold a Special Membership License in Alabama. The Alabama State Bar considers this to be an active license that is in good standing. I can convert this license to an occupational license by paying an additional fee.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Professional Employment Experience Since Law School

Assistant United States Attorney
Eastern District of Tennessee
Knoxville, Tennessee
October 2001 – present

Assistant District Attorney General
4th Judicial District
Sevierville, Tennessee
August 1994 – October 2001

Associate
Scott & Associates
Sevierville, Tennessee
March 1994 – August 1994

Staff Attorney
Family Inns of America, Inc.
Pigeon Forge, Tennessee
October 1993 – March 1994

Occupation, Business, or Profession Other than the Practice of Law

Law Clerk
Office of the District Attorney
Birmingham, Alabama
August 1992 – May 1993

Law Clerk
Gorham & Waldrep, PC
Birmingham, Alabama
June 1992 – August 1992

Waiter
Dugan's, Inc.
Birmingham, Alabama
May 1991 – July 1991

Waiter
Ruby Tuesday
Knoxville, Tennessee
January 1990 – April 1990

Prior to these jobs I worked at various times in one of my family's businesses. My duties varied from washing dishes and cooking in our family restaurant to working with my father in other aspects of the business.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not Applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Currently, I serve as Deputy Chief of the Criminal Division of the United States Attorney's Office in Knoxville. My current practice is almost exclusively criminal. The only exceptions are some collateral responsibilities. I have served in this capacity since September 2008. As Deputy Criminal Chief, I have direct supervisory responsibility for seven attorneys, an intelligence specialist, and some support staff. The attorneys I supervise work in various fields of criminal prosecution that include white collar crime and fraud, public corruption, organized crime, antitrust, civil rights, immigration, child exploitation, environmental crimes, national security, asset forfeiture and many other areas. These attorneys appear in U.S. District Court and the U.S. Sixth Circuit Court of Appeals on behalf of the United States. I also supervise all cases and investigations that arise in any of the National Parks and other areas of special maritime and territorial jurisdiction of the United States within the district. Additionally, I maintain a small caseload, ranging from white collar crimes to national security matters. I approve all charging decisions and plea agreements of the attorneys I supervise. I also review their written work product and courtroom performance.

My responsibilities also include direct supervision of all matters in the district related to national security and terrorism (both international and domestic). This includes all litigation and prosecution of matters involving terrorist financing, material support of terrorism, the Arms Export Control Act, the Foreign Corrupt Practices Act and anything involving the critical infrastructure and national security of the United States. This litigation requires that I be fully familiar with both the Foreign Intelligence Surveillance Act and the Classified Information Procedures Act. It also requires that I maintain the appropriate high security clearances required to work with this information. Since I began supervision of these matters in 2008, the number and quality of these cases have greatly improved.

I also have several collateral duties and responsibilities. One that I am especially proud of is my development of the Project Safe Childhood program in the district. Project Safe Childhood is a Department of Justice program designed to aggressively combat the growing problem of child exploitation on the internet. It targets individuals who exploit children by possessing, receiving, and distributing child pornography or who use the internet to groom children to sexually exploit. The program has enjoyed much success since I started it in 2006.

Among the other collateral responsibilities I have include being the point of contact (POC) with the Department of Justice for coordination of civil rights investigations, the district's International Coordinator, and the district's Ethics Advisor. As the Civil Rights POC, I am responsible for reviewing all credible allegations involving the criminal deprivation of civil rights. As International Coordinator, I am responsible for ensuring that the United States' Mutual Legal Assistance Treaty obligations are met in the district. This requires me to occasionally be appointed as a Commissioner by the U.S. District Court to ensure our compliance with treaty obligations. In this capacity, I have dealt with many countries including France, Germany, Ukraine, the Russian Federation and Switzerland and have had to litigate many issues. In my role as the Ethics Advisor, I provide a variety of functions in support of the U.S. Attorney's Office, including the review and approval of outside activities, travel, conflicts

of interest, and recusals.

In addition to these duties in the district, I also participate as a member of the Department of Justice Evaluation and Review Staff (EARS). EARS teams travel to other U.S. Attorney's Offices and evaluate and review the performance of the management personnel in the offices. I have been a member of many of these teams and participated in reviews of offices such as the District of New Jersey, the Northern District of Illinois, the Western District of Michigan, the Northern District of Alabama, and the District of Rhode Island. Participation in the EARS program is by invitation only.

From September 2006 until September 2008, I was the Section Chief of the General Crimes Section in the Knoxville office. My duties included supervision of the other attorneys in the section as well as maintaining a large caseload.

Prior to becoming a supervisor, I was an Assistant U.S. Attorney (AUSA) in the General Crimes Unit in Knoxville with a caseload that included a diverse assortment of cases. In my time at the U.S. Attorney's Office, I have prosecuted a wide variety of cases including white collar crime and fraud, immigration, civil rights, child exploitation, narcotics, violent crime, public corruption, organized crime and many others.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

My entire work experience as a licensed attorney has been in the area of criminal law, with the exception of very brief periods working as a staff attorney with a local hotel chain and as an attorney with a commercial transaction law firm at the beginning of my legal career.

From August 1994 until October 2001, I served as an Assistant District Attorney General (ADA) in the 4th Judicial District of Tennessee. The 4th Judicial District includes Cocke, Grainger, Jefferson, and Sevier counties. During my seven plus years as an ADA, I prosecuted hundreds, if not thousands, of cases in all of the Circuit, General Sessions and Juvenile courts in the 4th Judicial District. During this period, I tried over 100 jury cases involving crimes such as

homicide, rape, child rape, burglary, robbery, narcotics offenses, arson, theft and other crimes. I have tried cases in every county of the Judicial District and on more than one occasion would prosecute a jury trial in a county on one day then travel to another county for a jury trial the next day. It would be difficult to quantify the number of cases that I disposed of by guilty plea during this time or that I tried in the General Sessions or Juvenile courts in the district. When I left the District Attorney's Office, I was carrying a caseload of over 300 cases in Circuit Court. Because we practiced vertical prosecution in the 4th Judicial District, I was responsible for each case from its inception through conviction. This means that I started with a case in General Sessions Court with a preliminary hearing, handled the matter before the grand jury, and then was assigned the case when it was sent to Circuit Court. Not included in these numbers are the many cases disposed of in the General Sessions Court by trial. These would include driving under the influence, assault, petty thefts and other cases that would require trial if not settled by guilty plea. Managing a docket of this size was very difficult and it required me to work long hours to be successful.

Since October 2001, I have served as an AUSA in the Eastern District of Tennessee. As a trial AUSA handling a heavy caseload, I have had an opportunity to be responsible for many cases from investigation through conviction. I have handled cases at all stages of litigation including grand jury investigation, pre-trial litigation, trial before a jury and on appeal before the U.S. Sixth Circuit Court of Appeals. The cases I have handled have ranged from complex white collar matters such as securities fraud or tax evasion to civil rights prosecutions, public corruption matters and racketeering offenses. While the volume of cases that I was responsible for did not approach that of what I dealt with as an ADA, they were substantially more complex. I have also had to work very long hours to be successful in this position.

I have listed below some examples of the various types of cases that I have personally prosecuted during my career. This list is by no means intended to be a complete list.

United States v. Thomas A. Austin - Austin, a former General Sessions Court judge in Roane County, was convicted of Hobbs Act extortion for his role in a scheme to extort kickbacks from a local driving school and a privately owned probation office. Undercover audio and video evidence was crucial to the development of this case. He was sentenced to 44 months in prison.

United States v. William Cotton - Cotton, a Hamilton County, Tennessee county commissioner, was convicted at trial of conspiracy to commit Hobbs Act extortion and attempted Hobbs Act extortion. Cotton had accepted bribes in exchange for his support of a company that was providing recycling services to Hamilton County. This case was one of the several Operation Tennessee Waltz cases that resulted in the convictions of several state officials in Tennessee. AUSA John Maccoon was co-counsel on this case.

United States v. David Webber, Shayne Green, Joshua Monday, Samuel Franklin & Will Carroll - Webber, Green, Monday, Franklin and Carroll were five Campbell County, Tennessee sheriff's deputies who were convicted of conspiracy to violate civil rights. The proof showed that the five officers traveled to the home of a Campbell County resident to serve a probation violation warrant and to search for drugs. When he refused to consent to the search, the officers tied him

to a chair and assaulted him until he submitted. One officer placed a firearm in his mouth and repeatedly threatened to pull the trigger. The proof also showed that one of the officers used this as an opportunity to steal many of the belongings of the family that lived there. All five officers were convicted and sent to prison.

United States v. David A. Becker - Becker, who had previously been convicted of child sex abuse under the name Ira Lustgarden in Colorado, was convicted for his participation in a ring of sex offenders that sexually molested young boys and distributed video of the molestations over the internet. The proof also showed that some of the sex abuse was broadcast live over the internet. He was sentenced to life in prison without the possibility of parole.

The FBI "White Spider" human trafficking and public corruption investigation - The White Spider investigation began in 1997 when operators of Korean spas that were fronts for prostitution attempted to bribe Blount County General Sessions Judge William Brewer. The case ultimately expanded into a five-year nationwide investigation conducted by the Federal Bureau of Investigation in Tennessee, Ohio, Michigan, Connecticut, Kentucky and California. This investigation, which included extensive undercover operations, 9 court authorized wiretaps (7 in Tennessee and two in California), and 70 search warrants, revealed an extensive criminal enterprise. I began working on this case after my arrival at the U.S. Attorney's Office in 2001 with AUSA Steven H. Cook.

In the Eastern District of Tennessee alone, a federal grand jury returned 7 Racketeer Influenced Corrupt Organization Act (RICO) indictments charging 35 defendants with 143 bribery acts and over 750 felony counts including 544 money laundering offenses based on laundering over $2.5 million in criminal proceeds. Over $500,000 in bribes were recovered and over $5 million in assets were seized and forfeited.

State of Tennessee v. Terry Proffitt - Proffitt, a former City of Pigeon Forge police officer, was convicted of the first degree murder of his wife by a Sevier County jury. Proffitt committed the murder in the presence of their children. At trial, the defense focused on the defendant's mental state at the time of the murder and his capacity to form the requisite criminal intent. This defense was defeated, he was convicted and sentenced to life in prison.

State of Tennessee v. Jimmy Thornton - Thornton, a notorious Cocke County drug dealer, was convicted of sale and delivery of cocaine after a lengthy jury trial. This case was built largely on the evidence of cooperating witnesses and was very contentiously litigated. Thornton's conviction was overturned on appeal because of an error committed by the trial court but he was subsequently convicted and sent to prison after further litigation.

I have also litigated many cases in the U.S. Sixth Circuit Court of Appeals, both on brief and at argument. The most significant of these was *United States v. Vonner*. Vonner was convicted of distribution of crack cocaine and sentenced, shortly after the United States Supreme Court released its opinion in *United States v. Booker*, to a term of imprisonment. *Booker* changed the way the U.S. District Courts applied the U.S. Sentencing Guidelines and federal sentencing procedure. Vonner's sentence was appealed and after argument the Sixth Circuit panel

remanded the case back for re-sentencing because of a failure of "procedural reasonableness" in light of *Booker* by the sentencing judge. I felt strongly that the appellate court had made a mistake so I filed, with the permission of the Solicitor General of the United States, a petition for rehearing *en banc*. The court granted my petition and the matter was briefed and argued again by the parties. Because of the significance of the issue the court allowed *amicus curiae* briefs to be filed by non-parties. After rehearing, the court ruled in favor of the United States. The *Vonner* opinion is still frequently cited by courts and lawyers during sentencing litigation. The opinion may be found at *United States v. Vonner*, 452 F.3d 560 (6th Cir. 2006), rev'd en banc, 516 F.3d 382 (6th Cir. 2008).

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Please see number 8 above for a summary of matters of special note in trial and appellate courts.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not Applicable

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not Applicable

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

Not Applicable

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your

application, and whether or not the body submitted your name to the Governor as a nominee.

Not Applicable

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Legal Education

Cumberland School of Law
Samford University
Birmingham, Alabama
1990-1993, awarded Juris Doctor May 22, 1993
Recipient, John Cabler Corbett Scholarship
Member, Cordell Hull Speakers Forum

Undergraduate Education

University of Tennessee
Knoxville, Tennessee
1985-1989, awarded Bachelor of Arts in History with a minor in Economics May 12, 1989

PERSONAL INFORMATION

15. State your age and date of birth.

Age: 46

Date of Birth: November 19, 1966

16. How long have you lived continuously in the State of Tennessee?

I have continuously been a resident of Tennessee since birth. The only time I have lived outside the state was the period I was in law school from 1990-1993.

17. How long have you lived continuously in the county where you are now living?

I have lived continuously in Knox County for over three years. Prior to this, our primary residence was in Sevier County from 1997 until 2010. We still own our home in Sevier County and use it as a second residence.

18. State the county in which you are registered to vote.

Knox County

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Officer Candidate
United States Marine Corps
Marine Corps Combat Development Command
Quantico, Virginia
June 11, 1990 - August 14, 1990
Uncharacterized Discharge, an Entry Level Separation due to a broken left arm suffered during a training accident.
Please see attached letter from the Commandant of the Marine Corp

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

No

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

East Tennessee Historical Society – Charitable
Secretary – 2013 to present
Board of Directors – 2008 to present
Member – 1994 to present

Foundation for the Sevier County Public Library System – Charitable and educational
President – 2013 to present
Vice-president – 2010 to 2012
Board of Directors – 2006 to present

U.S. District Court Historical Society
President – 2012 to present

Bible Study Fellowship, Int. – Religious
Participant 2005 – 2011

St. John's Cathedral, Knoxville, Tennessee
Member – 2012 to present

Leadership Sevier Class of 2011 – Civic

Smoky Mountain Historical Society – Charitable
Member – 1995 to present

Sequoyah Hills-Kingston Pike Association -- Charitable
Member 2010 – present

Sequoyah Hills Preservation Society - Charitable
Member 2010 - present

Friends of the Great Smoky Mountains – Charitable
Member 2000 – present

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

Sigma Phi Epsilon Fraternity - Sig Ep is a college, social fraternity that limits its membership to men. I was a member during my time at the University of Tennessee. It is an officially recognized fraternity on the university campus.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Hamilton Burnett American Inn of Court
President – 2011 to 2012
Vice-president – 2010 to 2011
Secretary/Treasurer – 2009 to 2010
Master of the Bench - 2005 to present

Knoxville Bar Association, 1998 to present
Membership Committee, 2005 to present

Member, Criminal Justice Section – 2010 to present
Member, Government and Public Service Lawyers Section – 2004 to present
Barristers Executive Committee 2000

Knoxville Bar Foundation
Fellow – Class of 2013

Sevier County Bar Association
Member – 1994 to present

National Association of Assistant United States Attorneys
Member – 2001 to present

I have been a member of both the Tennessee Bar Association and the American Bar Association in the past. I have not renewed these memberships because of the increasing expense associated with them. I am also a member of both the State Bar of Georgia and the Alabama State Bar Association. These memberships are automatic by virtue of the fact that I am licensed in both jurisdictions. I have been a member of both since 1993.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

Commendation from FBI Director Robert S. Mueller, III for my work in the case of *United States v. Thomas A. Austin*

Knoxville Bar Foundation
Fellow – Class of 2013

Department of Justice Special Act or Service Award - 2005, 2006, 2008

Department of Justice Sustained Superior Performance Award - 2008, 2009, 2010, 2011, 2012

30. List the citations of any legal articles or books you have published.

Not Applicable

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Not Applicable

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not Applicable

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached are the briefs from *United States v. Vonner*, 452 F.3d 560 (6th Cir. 2006), rev'd en banc, 516 F.3d 382 (6th Cir. 2008). I have included the original final brief, the petition for rehearing *en banc*, and final supplemental brief. This case is discussed in detail above. This was my case but because of the significance of the issues involved at the time all of the briefing was thoroughly reviewed both in this district and in Washington, DC. I would have had difficulty putting together briefing of this caliber in such a short time frame without substantial input and assistance from others.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

Simply put, I believe it is one of the most honorable positions an attorney can occupy in our justice system and it is a position that I have always wanted to hold. I have remained committed to public service throughout my career because I believe we have the finest justice system in the world. It is certainly not perfect, and it can be terribly flawed at times, but I believe it is a significant factor in making our country such a great place to live. I have always worked hard to make the justice system better in every position I have held and I hope to continue to do so from the bench.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I have always believed that the practice of law is a profession and not a business. As such, I believe that attorneys have an obligation to seek equal justice under the law. Because of my current position, I am not permitted to perform pro bono legal services. I have worked to compensate for this with involvement in organizations such as the Hamilton Burnett American Inn of Court. The Inn is committed to legal ethics and improving professionalism among members of the Bar. By working to improve professionalism it is hoped that the commitment to justice for all will continue to grow in the legal community. I also have been very active in the Knoxville Bar. Traditionally, participation by attorneys in government positions has been low. I chose to serve on the membership committee in hopes of increasing membership in the Bar by lawyers who traditionally avoid these organizations. I believe that bar organizations improve collegiality and that, in turn, improves professionalism and a lawyer's commitment to equal justice under the law.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

The position I seek is Judge on the Tennessee Court of Criminal Appeals, Eastern Section. The Court hears criminal appeals from the trial courts in Tennessee. There are 12 judges on the Court, four in each section. Each section coincides with one of the grand divisions. The Court hears cases monthly in Knoxville, Nashville, and Jackson and its caseload is very heavy. If I am selected I will be committed to the hard work that is necessary to resolve the many matters that are pending before the Court. I possess the experience, work ethic, integrity, judgment and demeanor to have a positive impact on the Court and community.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

Currently, my community participation tends to be focused on my love of history and learning. I serve on the Board of Directors of the East Tennessee Historical Society, which is based in Knoxville. The Society operates the East Tennessee History Center which is home to the Museum of East Tennessee History, the Calvin M. McClung Historical Collection, and the Knox County Archives. It is an exceptional organization.

I also serve on the Board of Directors of the Foundation for the Sevier County Public Library System. Currently, I am President. The Foundation is charged with raising money for construction and maintenance of the library facilities in Sevier County. In 2010 we opened the newly constructed King Family Library in Sevierville. It is a wonderful new facility constructed at a cost of over $12 million, the vast majority of which was donated by members of the community.

If appointed, I intend to increase my community involvement in the area of child advocacy. I have not done so in the past because of my direct involvement with the Project Safe Childhood program in the Eastern District of Tennessee. But, I can certainly envision getting more involved with child advocacy organizations such as Childhelp. I am also very interested in

programs that educate the public about their court and justice systems and would love to become more involved in increasing public knowledge of the Tennessee court system.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I am largely the man I am today because of my family. I have been blessed with loving parents who taught me the value of hard work and instilled in me a sense of justice and fairness that has dominated my professional life. To say that they are self-made is an understatement. My father and mother lifted our family out of very modest circumstances by determination and hard work. It is by their example that I have conducted my life and will in the future.

I now have my own family, and I strive daily to serve as a good example for now and in the future. As I write this, my daughter is two years old and there is not a day that goes by that I do not worry about what kind of world she will grow up in. My profession is one way that I can set an example for her and shape the world she will inherit.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. I have worked under this principle for my entire career and enforced the law without regard to my personal opinion. As I stated above, our criminal justice system is not perfect but it would be even less so if individuals allowed their personal beliefs to take precedence over what has been made the law. Our laws are what make our society what it is today. They are what separate us from other societies that are mired in corruption and injustice. If someone does not agree with what the law states then they should work to change it, not refuse to follow or enforce it. I have absolutely no reservations about answering yes to this question.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. The Honorable Gary R. Wade
Chief Justice, Tennessee Supreme Court
505 Main Street, Suite 200
Knoxville, Tennessee 37902
(865) 594-6121

B. The Honorable Thomas A. Varlan
Chief Judge, U.S. District Court, Eastern District of Tennessee
800 Market Street, Suite 143
Knoxville, Tennessee 37902
(865) 545-4762

C. James R. Dedrick
U.S. Attorney (Ret.)
Eastern District of Tennessee
[redacted]

D. Hugh B. Nystrom, Jr.
Director
Childhelp Tennessee
2505 Kingston Pike
Knoxville, Tennessee 37919
(865) 637-1753

E. The Very Rev. John C. Ross
St. John's Cathedral
413 Cumberland Ave.
Knoxville, Tennessee 37901
(865) 521-2930

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, Eastern Division and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: June 9, 2013.

Charles E. Atchley Jr.
Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Charles E. Atchley, Jr.
Type or Printed Name

Chas E. Atchley, Jr.
Signature

June 9, 2013
Date

016414
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Georgia # 026288

Alabama # ASB-4143-L67C

No. 05-5295

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALVIN VONNER,

Defendant-Appellant.

On appeal from the United States District Court
for the Eastern District of Tennessee, Northern Division

FINAL BRIEF OF PLAINTIFF-APPELLEE

HARRY S. MATTICE, JR.
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STATEMENT REGARDING ORAL ARGUMENT

This case involves solely the review of defendant's sentence following his guilty plea to one count of distributing crack cocaine, which was imposed under the post-*Booker* advisory Guidelines and the factors set forth in 18 U.S.C. § 3553(a). There are no facts in dispute. The United States submits the decisional process will not be aided by oral argument and it accordingly is not requested.

In the event the Court grants defendant's oral argument request, the United States respectfully requests argument by way of teleconference as a cost-saving measure for the federal government.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 inasmuch as defendant was charged with an offense against the United States. Sentencing decisions of the district court are reviewed pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

1. Whether defendant has demonstrated the district court plainly erred by failing to make additional sentencing findings.

2. Whether the district court violated defendant's Sixth Amendment rights by including in the calculation of his advisory Guideline range defendant's undisputed prior drug distribution.

3. Whether defendant's sentence within the Guideline range is "reasonable."

STATEMENT OF THE CASE

On December 9, 2003, the grand jury indicted defendant on one count of distributing at least five grams of crack cocaine on August 7, 2002, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). (R. 3, Indictment, App. Vol. I, 12.)

On January 27, 2004, defendant pleaded guilty to the charge in the indictment pursuant to a plea agreement with the United States. (R. 17*, Courtroom Minutes; R. 18, Plea Agreement, App. Vol. I, 23.)[1] The parties filed a signed Stipulation of Facts setting forth the factual basis for the plea. (R. 19, Stipulation of Facts, App. Vol. I, 29.)

The presentence report ("PSR") was prepared and disclosed to the parties on March 22, 2004 and was revised on June 21, 2004. (PSR at 1, App. Vol. II, 142.)

On April 9, 2004, defendant filed a written Notice of No Objection to Presentence Report. (R. 21, Notice, App. Vol. II, 155.)

On May 3, 2004, defendant filed a motion and a supporting memorandum requesting a downward departure from the PSR's recommended Guideline range pursuant to U.S.S.G. § 5K2.0 based upon alleged extraordinary mental and emotional harm to defendant as a result of childhood trauma and abuse. (R. 22, Motion for Downward Departure, App.

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[1]Citations to record entries not designated for inclusion in the appendix are marked with an asterisk. The United States has designated only those documents necessary for resolution of the issues presented. Fed. R. App. P. 28(b)(1).

Vol. I, 31; R. 23, Memorandum, App. Vol. I, 33.) The United States filed a response in opposition to the motion for a departure, to which defendant filed a Reply. (R. 24*, Response in Opposition; R. 27*, Reply by Defendant.)

On May 24, 2004, defendant filed a Motion to Sentence Defendant Without Regard to the Sentencing Guidelines and to Disregard Downward Departure Reporting Requirements with a supporting Memorandum of Law based upon the PROTECT Act and the so-called Feeney Amendment. (R. 25*, Motion; R. 26*, Memorandum.) The United States filed a response in opposition on June 7, 2004, to which defendant filed a reply. (R. 28*, Response by United States; R. 30*, Reply by Defendant.)

On June 22, 2004, the United States filed a motion pursuant to U.S.S.G. § 3E1.1(b) for defendant to receive an additional one-level reduction in his offense Guideline level based upon his timely acceptance of responsibility. (R. 31*, United States' Motion for Acceptance of Responsibility.)

On June 24, 2004, defendant filed a Motion to Videotape the Sentencing Hearing and a Motion to Allow Defendant to Wear Non-Inmate Clothing to the Sentencing Hearing, to which the United States filed objections, and which the district court thereafter denied. (R. 32*, Motion to Videotape; R. 33*, Motion to Allow Defendant to Wear Non-Inmate Clothing; R. 35*, United States' Response; R. 36*, United States' Response; R. 41*, Order denying Motions.)

Also on June 24, 2004, defendant filed a one-page Notice of Supplemental Authority in support of his Motion to be Sentenced Without Regard to the Sentencing Guidelines based upon an attached 173-page decision of a district court in Massachusetts holding the United States Sentencing Guidelines to be unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). (R. 34*, Supplemental Authority.)

Later that same day, June 24, 2004, defendant filed a Second Notice of Supplemental Authority based upon the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004). (R. 37*, Second Notice of Supplemental Authority.)

On July 23, 2004, the United States filed a response to defendant's *Blakely* memorandum of law, to which defendant filed a reply. (R. 42*, United States' Response; R. 44*, Defendant's Reply.)

On January 31, 2004, defendant filed a Sentencing Memorandum in which he noted his sentencing hearing had been continued "in anticipation of the Supreme Court's decision in *United States v. Booker*," plus his cooperation with the United States, and further noted that, *Booker* having been decided, his prior Motions to Depart and to be Sentenced Without Regard to the Sentencing Guidelines "have either been affirmed by the Supreme Court or rendered moot." (R. 47, Sentencing Memorandum at 4-5, App. Vol. I, 82-83.) Defendant then identified four "Bases for Variance from Advisory Only Sentencing Guidelines

Calculations" upon which he relied for the court's determination of a reasonable sentence. (*Id.* at 5, App. Vol. I, 83.)

At the sentencing hearing, defendant stated he had no objection to the PSR and stated that his pre-sentencing motions were moot. (R. 51, Sentencing Hearing Transcript, TR at 4-5, App. Vol. I, 111-12.) The district court accordingly denied the motions as moot. (*Id.* at 5-6, App. Vol. I, 112-13.)

Following argument by the parties as to the appropriate sentence, and defendant's statement in allocution, the district court imposed a sentence of 117 months, which was in the middle of the Guideline range, and identified the factors in § 3553(a) upon which the court was relying. (*Id.* at 28, App. Vol, I, 135.)

The district court's written Judgment was entered on February 11, 2005, and defendant filed a timely Notice of Appeal on February 24, 2005. (R. 49, Judgment, App. Vol. I, 13; R. 50, Notice of Appeal, App. Vol. I, 20.)

STATEMENT OF FACTS

1. Defendant's offense conduct.

The following facts are set forth in the PSR, as to which defendant stated in writing and on the record that he had no objections, and/or are set forth in the Stipulation of Facts filed in support of defendant's guilty plea.

On May 27, 2002, defendant was released from prison following his completion of a sentence imposed in Knox County Criminal Court for second degree murder. (PSR at ¶ 31, App. Vol. II, 148.) On August 6, 2002, law enforcement officers received information from a confidential informant (CI) that defendant had been fronted a kilogram of powder cocaine from Will Gant "so that defendant could 'get on his feet' after being released from prison."[2] (*Id.* at ¶ 7, App. Vol. II, 144.) When the CI went to meet defendant at an apartment in the Walter P. Taylor housing development to purchase some crack cocaine, defendant told the CI to return in an hour because defendant had not yet cooked the powder cocaine into crack. Thereafter, at about noon, defendant contacted the CI and said the crack was ready. Law enforcement officers gave the CI $1,200 in cash and outfitted him with an audio recorder and the CI met with defendant and purchased 23.6 grams of crack from defendant in a recorded transaction. (*Id.*)

The next day, August 7, 2002, the same CI advised law enforcement agents he had received a telephone call from Lucky Clark who asked if the CI needed any crack, to which the CI had responded he needed two ounces.[3] (*Id.* at ¶ 8, App. Vol. II, 145; R. 19, Stipulation of Facts at 1, App. Vol. I, 29.) The price agreed upon was $2,200. (*Id.*) Clark

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[2]Gant was prosecuted in a separate case. (See PSR at page 1, App. Vol. II, 142, *United States v. Will Gant*, Case No. 3:03-cr-139.)

[3]Clark was prosecuted in a separate case. (See PSR at page 1, App. Vol. II, 142, *United States v. Lucky Clark*, Case No. 3:03-136.)

and the CI agreed that Clark would bring the crack to the CI's apartment, and the CI was again outfitted with a wire and given the cash to buy the crack. (*Id.*) Later that afternoon, defendant called the CI and said he was bringing the crack to the CI and asked the CI for directions to his apartment. Defendant later came to the CI's apartment and sold 33.3 grams of crack for $2,200. (*Id.*) Defendant was videotaped as he entered and left the apartment and two audio-recordings of the transaction were made as well. (R. 19, Stipulation of Facts at 2, App. Vol. I, 30.)

2. Facts relevant to sentencing.

The probation officer calculated defendant's offense level based upon defendant's two recorded sales of crack to the CI on August 6 and 7, 2002. Thus defendant was held accountable for 53 grams of crack, which established a base offense level under the Guidelines of 32. (PSR at ¶ 14, App. Vol. II, 145.) No enhancements were applied. Defendant's base offense level was reduced three levels for his acceptance of responsibility, resulting in a total offense level of 29. (*Id.* at ¶¶ 19, 22, App. Vol. II, 146.) Defendant had five criminal history points, thus his criminal history category was III. (*Id.* at ¶ 34, App. Vol. II, 149.)

The statutory sentencing range was not less than 5 or more than 40 years pursuant to 21 U.S.C. § 841(b)(1)(B). (*Id.* at ¶ 53, App. Vol. II, 152.) With a total offense level of

29 and a criminal history category of III, the Guideline range was determined to be 108 to 135 months. (*Id.* at ¶ 54, App. Vol. II, 152.)

As noted, prior to the sentencing hearing, defendant filed a written Notice that he had no objections to the PSR. (R. 21, Notice, App. Vol. II, 155.) Defendant also filed a lengthy written Sentencing Memorandum in which he identified four bases in support of his argument for a sentence below the advisory Guideline range. (R. 47, Sentencing Memorandum, App. Vol. I, 79.)

At the sentencing hearing, defendant first confirmed that he had no objections to the PSR. (R. 51, Sentencing Hearing Transcript, TR at 4-5, App. Vol. I, 111-12.) In addition, in light of the decision in *Booker*, defendant stated his presentencing motions were moot, and the district court accordingly denied the motions on this basis. (*Id.* at 5-6, App. Vol. I, 112-13.)

Defendant then addressed the court through counsel and noted that the Guideline range was "but one of the factors" that the district court considers in its post-*Booker* sentencing decision, and that the other factors include those set forth in § 3553(a). (*Id.* at 7-8, App. Vol. I, 114-15.) Analyzing those factors in light of his argument that his sentence should be below the Guideline range, defendant reiterated the four factors set forth in his Sentencing Memorandum: (1) his severe childhood neglect, trauma, and abuse (*id.* at 8-11, App. Vol. I, 115-18); (2) his post-arrest confinement in the local jail, in which he was

placed in "lock down" for much of the time due to his prior murder conviction (*id.* at 11-12, App. Vol. I, 118-19); (3) his cooperation with the United States (*id.* at 12-14, App. Vol. I, 119-21); and (4) the inclusion of the drug sale on August 6, 2002 as relevant conduct for purposes of calculating his Guideline range (*id.* at 14-15, App. Vol. I, 121-22).

As for this last factor, defendant did not dispute that he sold the CI the crack on August 6, 2002, nor did he object to the district court's consideration of this drug offense as "relevant conduct" for purposes of the Guideline calculations. (*Id.*; see PSR at ¶ 7, App. Vol. II, 144.) Defendant acknowledged that in light of the Supreme Court's decision in *Booker*, there was no Sixth Amendment impediment to the district court considering the undisputed drug transaction in its calculation of the now-advisory Guideline range. (R. 51, Sentencing Hearing Transcript, TR at 15, App. Vol. I, 122.) Defendant argued the uncharged conduct should not be taken "as heavily into consideration" because such uncharged conduct allegedly was the reason the Supreme Court had found in *Booker* that the mandatory Guideline range was unconstitutional. (*Id.*)

In summing up, defendant argued that in light of these four factors, a sentence within the Guideline range "would not be fair, would not meet the interest of justice," and that instead of incarceration defendant "needs the tools of life," which his childhood and life experience had failed to provide. (*Id.* at 16-17, App. Vol. I, 123-24.)

The district court thanked defense counsel, stating "[t]he Court appreciates your arguments you've advanced," and then permitted the United States to respond. (*Id.* at 17, App. Vol. I, 124.) Counsel for the United States acknowledged that defendant's childhood had been deprived. (*Id.* at 17-18, App. Vol. I, 124-25.) However, in assessing the appropriate sentence in light of the factors in § 3553(a), the United States noted that the record demonstrated defendant unquestionably is a "violent, dangerous man" who had been unable to live in society without engaging in violent, criminal misconduct, and thus incarceration was necessary for the protection of society. (*Id.* at 18-19, App. Vol. I, 125-26.) The Guideline range had in fact calculated defendant's criminal history favorably to defendant, and the resulting range presented a reasonable time period given defendant's history for violence and recidivism. (*Id.*)

With respect to defendant's cooperation with the government, the United States noted that this factor was not ripe as a basis for lowering defendant's sentence, but would appropriately be considered upon the filing of a later motion, at which time the court would be given evidence to support a sentencing reduction. (*Id.* at 20-21, App. Vol. I, 127-28.)

As for the court's consideration of the drug sale on August 6, 2002, the United States noted that defendant was not disputing that he sold the crack and had agreed it was properly included by the probation officer as relevant conduct for calculation of the advisory Guideline range. The United States strongly argued the resulting Guideline range was in

fact "extremely generous" in its representation of defendant's offense conduct and, particularly, defendant's criminal history. (*Id.* at 21, App. Vol. I, 128.) This was not a basis for reducing defendant's sentence. (*Id.*)

The district court heard defense counsel in reply, at which time defendant underscored that his childhood trauma and his lengthy periods of incarceration contributed to a lack of opportunity to develop skills qualifying defendant to work, and thus he turned to crime when he was not in prison. (*Id.* at 21-23, App. Vol. I, 128-30.)

Defendant then personally addressed the district court at length in allocution. (*Id.* at 24-27, App. Vol. I, 131-34.) At one point, when defendant's emotions made it difficult for him to continue, the district court patiently stated "if you want to take a moment to compose yourself, I want you to be able to say everything you feel like you need to say," and asked the court deputy to provide defendant with a Kleenex. (*Id.* at 26, App. Vol. I, 133.) After the court was assured that defendant had said everything he desired to express, the district court then took a recess to "review the files and consider the matters." (*Id.* at 27, App. Vol. I, 134.)

Following the recess, the district court addressed defendant and stated as follows:

> THE COURT: All right. Mr. Johnson, if you'll return to the lectern with Mr. Vonner, we'll proceed with sentencing at this point. First, Mr. Vonner, let me say that the Court appreciates the apology you offered this morning. You're obviously facing some period of incarceration. And while I know you need help and are asking for help once you – once that period of

incarceration is over, I mean, I would encourage you, as you heard somebody [state] here this morning, during your period of incarceration to, you know, dedicating yourself to hopefully learning the proper tools and education and other matters that would be offered to you through your Federal prison incarceration that, you know, will give you certain life skills and lifestyles that will be of benefit to you when your period of incarceration is over. Certainly, the Court will – There's been made mention of not only your cooperation today, but your encouraged cooperation. And the Court would certainly encourage you to continue in that regard.

With respect to the sentence in this case, the Court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, and the advisory Guideline range, as well as the other factors listed in 18 United States 3553 (a). Pursuant to [the] Sentencing Reform Act of 1984, it is [the] judgment of the Court that the defendant, Alvin George Vonner, is hereby committed to the custody of [the] Bureau of Prisons for a term of imprisonment of a hundred and seventeen months. It is felt that this term is reasonable in light of the aforementioned, in light of the aforementioned factors and is a sentence, furthermore, that will afford adequate deterrent and provide just punishment.

The Court will recommend that you receive five hundred hours of substance abuse treatment from the Bureau of Prisons Residential Drug Abuse Treatment Program. Upon release from imprisonment, you shall be placed on supervised release for a term of five years.

(*Id.* at 27-28, App. Vol. I, 134-35.)

The district court then imposed the conditions of supervised release, imposed the required special assessment, waived the imposition of a fine, accepted the plea agreement, and advised defendant of his right to appeal the sentence by filing a notice within ten days. (*Id.* at 29-30, App. Vol. I, 136-37.)

The district court then asked counsel for the United States if there were any objections to the sentence that were not previously raised, to which counsel responded in the negative. (*Id.* at 30, App. Vol. I, 137.) The district court next asked counsel for the defendant, "does the defendant have any objection to the sentence just pronounced not previously raised," to which counsel stated, "No, Your Honor." (*Id.*) The court asked again: "Anything further from or on behalf of the defendant?" Counsel responded by asking the court to recommend a prison geographically close to Knoxville, which the district court indicated it would be "glad" to do. (*Id.*)

The court then personally addressed defendant and stated, "Mr. Vonner, I would add to you that, you know, the Court encourages you to not only continue your cooperation, but also to, you know, use this time to develop the skills that you believe are necessary and that will be useful to you when your period of incarceration is over." (*Id.* at 30-31, App. Vol. I, 137-38.) The district court one final time turned to defense counsel and asked, "Anything further, Mr. Johnson?" to which counsel stated, "No, Your Honor." (*Id.* at 31, App. Vol. I, 138.) The district court recessed the proceeding. (*Id.*)

SUMMARY OF THE ARGUMENT

Defendant is incorrect in his argument that the district court erroneously failed to resolve factual issues. First, defendant did not identify any factual disputes by way of Rule 32, and thus did not trigger the district court's fact-finding role. Secondly, defendant's

arguments in support of a lower sentence were legal, not factual, arguments. Thus to the extent defendant asserts the district court left unresolved factual disputes, defendant either waived his right to complain or, regardless, all of his allegations were legal, not factual.

Defendant was asked several times after sentence was imposed whether he had any objections to the sentence and affirmatively stated he did not. Defendant now argues the court allegedly failed to make adequate findings in support of its sentence. Defendant forfeited this argument and must demonstrate plain error warranting relief.

No plain error occurred. After *Booker*, this Court's review is for "reasonableness." The record demonstrates the district court's sentencing procedures were in accordance with this Court's prior authority and provide an adequate basis for the Court's appellate review. The district court is not required to specifically respond to every argument defendant makes in support of a lower sentence. Here, the Guideline range was undisputed. The court patiently heard the parties and defendant at length as to the appropriate sentence, and recessed to consider those arguments. The court's imposition of sentence included specific recommendations that defendant participate in vocational, educational and drug treatment programs, and encouraged defendant's continuing cooperation with the United States, which is adequate to demonstrate the court considered these matters in connection with its sentencing decision. The court then identified the § 3553(a) factors it had considered and imposed a sentence within the Guideline range, noting further appropriate factors to support

its decision. Defendant has failed to demonstrate any error warranting resentencing as to the district court's findings or its sentencing procedures. The sentence should be affirmed.

Defendant's argument that Sixth Amendment error occurred due to judicial fact-finding at sentencing was not raised below and thus review is for plain error. No error occurred where the post-*Booker* Guideline range was advisory, and thus there was no Sixth Amendment impediment to the district court finding facts at sentencing. The district court was permitted to take into account in calculating the advisory Guideline range the drug transaction on August 6, 2002, which defendant agreed occurred as stated in the PSR and which he also agreed constitutes "relevant conduct" that properly is included in the offense level determination. This argument is wholly without merit.

Defendant has failed to demonstrate his sentence is unreasonable. The offense level and criminal history were factually and legally undisputed, the Guideline range was undisputed, and the record demonstrates the district court considered the range and the factors set forth in § 3553(a) and selected a sentence within the range. This sentence meets the "reasonableness" standard and should be affirmed.

ARGUMENT

1. Defendant has failed to demonstrate plain error based upon the district court's failure to make additional sentencing findings.

Defendant argues the district court erred because it allegedly "failed to make any findings on the record and articulate the basis for the sentence provided" and, as a result, this Court cannot engage in the "meaningful appellate review" to which defendant has a statutory right. (Defendant's Brief at 22.) Defendant alleges "the district court below did not make *any* factual findings," asserting that the court's statement that it had "considered" the § 3553(a) factors is inadequate for this Court's "reasonableness review." (*Id.* at 25, emphasis in original.) Defendant argues "substantial factual issues" allegedly were left unresolved by the district court, including defendant's request for a departure based upon childhood abuse, defendant's cooperation with the United States, and the "inherent unreliability of the uncharged conduct" involving defendant's crack sale to the CI on August 6, 2002. (*Id.* at 26.)

Defendant's argument is wholly without merit. First, to the extent defendant is asserting there allegedly were unresolved factual issues, defendant waived the right to require the district court to decide any issues of fact or make any additional findings resolving alleged factual issues. Defendant stated in writing and on the record that he had no objections to the PSR. *See* Fed. R. Crim. P. 32(f)(1) (within fourteen days of receipt of

the PSR "the parties must state in writing any objections, including objections to material information . . . contained in or omitted from the report"). By failing to raise factual disputes by way of Rule 32, any appellate objection has been waived. *See United States v. Hurst*, 28 F.3d 751, 760 (6th Cir. 2000) (defendant must bring alleged factual dispute to district court's attention at the time of sentencing in order to trigger court's fact-finding duty under Rule 32). Defendant did not object to the facts as stated in the PSR and received the benefit of the full three-level reduction in his Guideline range for accepting responsibility for his offense conduct. He therefore has waived his right to object on appeal to rulings on alleged issues of fact.

Moreover, defendant's arguments were not and are not factual issues necessitating resolution. Rather, defendant advanced legal arguments in support of a lower sentence, identifying four legal bases upon which the district court allegedly should impose a sentence below the advisory Guideline range. That is why defendant did not object to any facts as stated in the PSR, as required by Rule 32. *See United States v. Smith*, 24 F. App'x 369, 376 (6th Cir. 2001) (defendant's sentencing objection was not factual but legal, to which Rule 32 did not appear to apply, and the court's ruling was adequate to resolve it) (unpublished, copy attached).

Therefore, to the extent that defendant is asserting in his brief that the district court left unresolved issues of fact, (1) he waived his right to make this argument by not

identifying controverted facts as required by Rule 32, and (2) he is mistaken because there simply were and are no facts in dispute.

As for defendant's legal arguments in support of a lower sentence, the district court is not required to specifically or expressly respond to each of defendant's individual legal arguments. The district court is required by statute to provide reasons supporting its selection of the sentence within the Guideline range as set forth in 18 U.S.C. § 3553(c). Defendant argues the district court failed to make adequate findings to explain the reason for its sentence.

Defendant forfeited his right to raise this objection on appeal. After sentence was imposed, in response to express questions from the district court, defendant twice stated he had no objection to the sentence as imposed. (R. 51, Sentencing Transcript, TR at 30-31, App. Vol. I, 137-38.) *See United States v. Bostic*, 371 F.3d 865, 873 (6th Cir. 2004) (district court must expressly provide opportunity for objections after imposing sentence, defendant forfeits any objection not raised in response, and review on appeal will be solely for plain error). Here defendant affirmatively stated several times that he had no objection to the sentence, and thus he foreclosed the opportunity for the district court to "correct[] any error," or to clarify the basis for its sentence or to make the additional findings defendant now argues allegedly were necessary. *Id.*

This Court thus reviews the alleged lack of adequate sentencing findings under the Rule 52(b) plain error standard. As stated in *Johnson v. United States*, 520 U.S. 461 (1997), "[b]efore an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is 'plain,' and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 466-67.

As explained *infra*, there was no error in this case, plain or otherwise, as to the district court's findings in support of its sentence, nor has defendant demonstrated any violation of any right warranting a remand for further findings.

As is now becoming well settled, after *Booker* this Court reviews the defendant's sentence for "reasonableness." *United States v. Booker*, 543 U.S. 220 (2005). When remanding for resentencing under *Booker*, the Court has stated as follows:

> Accordingly, on remand, we encourage the sentencing judge to explicitly state his reasons for applying particular Guidelines, and sentencing within the recommended Guideline range, or in the alternative, for choosing to sentence outside that range. Such a statement will facilitate appellate review as to whether the sentence was "reasonable." However, we take no position as to the content or extent of such a statement.

United States v. Jones, 399 F.3d 640, 650 (6th Cir. 2005). In *United States v. Webb*, 403 F.3d 373 (6th Cir. 2005), the Court made the following statement:

> [W]e read *Booker* as instructing appellate courts in determining reasonableness to consider not only the length of the sentence but also the factors evaluated and the procedures employed by the district court in reaching its sentencing determination. Thus, we may conclude that a sentence is unreasonable when the district judge fails to "consider" the applicable Guidelines range or neglects to "consider" the other factors listed in 18 U.S.C. § 3553(a), and instead simply selects what the judge deems an appropriate sentence without such required consideration. We decline, however, to define rigidly at this time either the meaning of reasonableness or the procedures that a district judge must employ in sentencing post-*Booker*. Instead we believe it prudent to permit a clarification of these concepts to evolve on a case-by-case basis at both the district court and appellate levels. Any specific clarification of the reasonableness standard is also unnecessary in this case, as we conclude that there is nothing in the record which suggests that the district court 's sentencing determination was unreasonable.

Id. at 383-84 (footnote and citation to *Booker* omitted).

The *Webb* Court then went on to analyze the district court's sentencing decision. The Court first found that the district court properly calculated the Guideline range. The Court next noted that the district court properly considered the defendant's lengthy criminal history and parole status at the time of the offense conduct. *Id.* at 384. The Court then found the district court "considered" defendant's offender characteristics as set forth in the PSR, which had indicated defendant lacked education and suffered from substance abuse. *Id.* at 385.

Notably, the *Webb* Court did not require the district court to specifically or expressly state it was taking defendant's lack of education or substance abuse into account in the selection of the sentence. Nor was the district court faulted for failing to expressly state

what weight it was ascribing to this factor in the selection of the sentence. Rather, the Court inferred that the district court "considered" defendant's lack of education and abuse where the district court recommended that defendant participate in the Bureau of Prisons' education and drug treatment programs. *Id.*

Finally, the *Webb* Court concluded its review by stating "there is no evidence in the record that the district court acted unreasonably, by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors." *Id.* Given the entire record, and given the nature of the case, the district court's sentencing process passed muster with this Court and the sentence was affirmed. *Id.*

The Court in *United States v. Jackson*, 408 F.3d 310 (6th Cir. 2005), relied upon *Webb* to note as follows:

> *Booker* requires an acknowledgment [by the district court] of the defendant's applicable Guideline range as well as *a discussion* of the reasonableness *of a variation* from that range. Further, in determining the sentence, the district court *must consider* the advisory provisions of the Guidelines and the other factors identified in 18 U.S.C. § 3553(a).

Id. at 305 (emphasis added).

In *Jackson*, the United States appealed the district court's eight-level departure below the Guideline range where the district court arbitrarily selected a sentence based solely upon a litany of offender characteristics rather than the Guideline range or the factors identified in § 3553(a). *Id.* at 303-04. "The district court's reasoning, however, did not

include any reference to the applicable Guideline provisions or further explication of the reasons for the particular sentence." *Id.* at 305. Thus the Court granted the United States' request for a remand to correct the district court's neglect of the Guidelines and the § 3553(a) factors. *Id.* The *Jackson* Court noted in a concluding footnote that "[d]istrict courts have always been required to exercise their sentencing discretion in a manner which allows for meaningful appellate review," and "the fact that the Guidelines are now advisory does not alter" that requirement. *Id.* at n.4.

These cases demonstrate that while the Court has always required the record to demonstrate the basis for the sentencing decision so that the Court can determine that the district court relied upon proper factors in the exercise of its sentencing discretion, the Court has never required the district court to individually or expressly respond to every argument advanced by defendant during the sentencing proceeding. Nor has the Court invaded the district court's discretionary sentencing process by requiring the lower court to state the weight it ascribed to each factor in reaching its decision.

For example, in *United States v. Murillo-Iniguez*, 318 F.3d 709 (6th Cir. 2003), defendant claimed "the district court never made an explicit finding" resolving his argument that his prior cocaine offense was not an "aggravated felony" upon which his offense level could be enhanced. *Id.* at 711-12. Defendant asserted the record of his prior drug conviction did not exclude a finding that it involved only personal drug use. The

probation officer and the United States responded by identifying evidence in the record that showed the drug offense necessarily involved distribution. *Id.* at 712. After hearing argument of the parties back and forth on the issue, the district court did not expressly find whether or not the drug conviction qualified as an aggravated felony under the Guidelines. Instead, the court stated it would not reduce defendant's sentence unless it found the criminal history category in the PSR overstated his criminal history, a conclusion that it apparently rejected. The enhancement was applied. *Id.*

Defendant argued the district court owed him an express ruling on the characterization of his prior drug conviction and asked the Court to remand for resentencing. This Court first noted "[w]e review the record as a whole to determine whether or not the district court was aware of his discretion in the matter and properly exercised that discretion in making an informed legal judgment." *Id.* at 712. The Court concluded that "[b]ased upon the sentencing decision the district court made and the evidence in the record, the district court did in fact make a finding" on the contested prior conviction. It was adequate for this Court's review that the district court heard the argument, considered it, and then stated what the court found would necessarily be required for a sentencing reduction. *Id.* The Court refused to remand the case so that the district court could state explicitly what it had implicitly found to be true.

In the present case, the record amply demonstrates the basis for the district court's sentencing decision. This is a simple, straightforward case that involves no unique sentencing factors or issues. *See Webb*, 408 F.3d at 385 (noting nature of case influenced sentencing procedure that district court was required to follow). Here, the court heard counsel for the parties and defendant personally at length as to the proper sentence to impose. The court then recessed for the express purpose of considering its sentencing decision. The court returned and first addressed defendant personally and expressly acknowledged that the district court had considered his statement in allocution as to his childhood abuse, lack of education and vocational skills, and other offender characteristics. In response, the court strongly encouraged defendant to avail himself of the Bureau of Prisons' educational and vocational programs and recommended participation in its substance abuse treatment program. (R. 51, Sentencing Transcript, TR at 27-28, App. Vol. I, 134-35.) After imposing sentence, the court again encouraged defendant in this area. (*Id.* at 30-31, App. Vol. I, 137-38.) Thus the record demonstrates the district court fully considered defendant's offender characteristics in the exercise of its sentencing discretion. *See Webb*, 403 F.3d at 385.

The record demonstrates the district court fully considered defendant's argument that a sentence below the range was appropriate based upon defendant's cooperation with the United States. In response, the court stated it "would certainly encourage you to continue

in that regard," implicitly indicating it would entertain a motion at the proper time as the United States had argued. (R. 51, Sentencing Transcript, TR at 28, App. Vol. I, 135.) This factor was addressed again after sentence was imposed. (*Id.* at 30-31, App. Vol. I, 137-38.)

After addressing these primary offender characteristics, the district court stated its sentencing decision was based upon the nature of the offense – drug trafficking in crack cocaine – defendant's offender characteristics, the Guideline range – which was undisputed to be 108 to 135 months – and other § 3553(a) factors, and imposed a sentence in the middle of the range of 117 months. (*Id.*) The court stated it found this sentence to be "reasonable" in light of these factors, expressly adding this sentence would provide adequate deterrence and just punishment. (*Id.*)

The record therefore adequately demonstrates the basis for the district court's selection of a mid-range sentence following the extensive arguments of the parties. As the *Webb* Court noted, the record fully rebuts any concern that the court was considering an impermissible basis for the exercise of its discretion. Certainly the record adequately demonstrates for this Court's review that the district court selected the sentence based upon defendant's offense conduct and criminal history, and considered his offender characteristics and cooperation with the United States. No further findings are necessary and defendant's request for a remand should be denied.

2. Defendant's Sixth Amendment rights were not violated by including in the calculation of the advisory Guideline range defendant's prior drug distribution.

Defendant argues his Fifth and Sixth Amendment rights were violated where his advisory Guideline range included as "relevant conduct" the amount of crack he sold on August 6, 2002. (Defendant's Brief at 32.) Defendant argues that since he did not admit he sold the drugs as part of the Stipulation of Facts in support of his guilty plea, it was error to increase his offense level by including this drug amount in the calculation of his advisory range. (*Id.* at 30-31.)

Arguably, defendant waived this objection by stating affirmatively he had no objection to the PSR, which included the August 6 drug quantity in the Guideline calculation. Moreover, before the district court, as noted above, defendant did not assert that the Sixth Amendment barred consideration of this uncharged conduct. Instead, defendant argued the uncharged August 6 transaction should not be taken "as heavily into consideration" as the stipulated August 7 transaction.[4] (R. 51, Sentencing Hearing Transcript, TR at 15, App. Vol. I, 122.) At best, defendant forfeited his alleged Sixth Amendment error by failing to raise it below and review is solely for plain error.

---

[4]The United States notes that since the August 6 and 7 transactions were equally taken into account in the Guideline range calculation, which defendant agreed was the proper way to calculate the range, defendant's argument that the district court should not take the August 6 uncharged relevant conduct "as heavily into consideration" was legally impossible.

No error occurred, plain or otherwise. First, defendant admitted he sold the crack to the CI on August 6, 2002. Defendant stated he had no objections to the PSR, obviating the necessity for the United States to present testimony and the audio-tape of the sale to prove to the district court that defendant sold the crack on August 6, 2002. As noted, defendant received a reduction in his Guideline range for acceptance of responsibility because he admitted his offense conduct.

Secondly, it is undisputed the August 6 drug transaction constituted "relevant conduct," *see* U.S.S.G. § 1B1.3(1) and (2), and was properly included in the Guideline range calculation, as defendant acknowledged in his Notice of No Objection to the PSR.

Finally, defendant's alleged Sixth Amendment error was cured by the Supreme Court in *Booker*. The district court in this case was free to consider the undisputed August 6 drug sale as part of the Guideline range calculation because defendant was sentenced under the Sentencing Reform Act as amended in *Booker*. Where the Guideline range is advisory, no Sixth Amendment right accrues, and judicial fact-finding in the calculation of the Guideline range is permissible. *See Booker*, 543 U.S. at 233 ("When a trial judge exercises his discretion to select a specific sentence within a defined guideline range, the defendant has no right to a jury determination of the facts that a judge deems relevant."). Under the post-*Booker* advisory Guidelines, this Sixth Amendment argument has no merit.

3. Defendant's sentence within the Guideline range is "reasonable."

Defendant's final argument is that his sentence is unreasonable. First, defendant argues, the district court should have given his arguments in support of a lower sentence more weight than the Guideline range. (Defendant's Brief at 32.) Defendant then sets forth for this Court's consideration all of the reasons he argued before the district court as to why his sentence should have been lower, including his childhood trauma and abuse (*id.* at 38-41), the conditions of his presentence confinement (*id.* at 41-42), and his cooperation with the United States (*id.* at 42). He reiterates that the district court should have given little or no weight to the drug sale on August 6, 2002. (*Id.* at 43.) For the first time, defendant argues the disparity in the Guidelines between offense levels for crack and powder cocaine provides a basis for a lower sentence. (*Id.* at 43-46.) This argument was never mentioned before the district court. Finally, defendant refers back to his first issue and states that the Court's review for reasonableness at this point is "purely speculative" given the lack of "factual findings" or "appropriate analysis" by the district court. (*Id.* at 47.)

As noted above, defendant forfeited his argument as to a lack of findings or proper analysis where he responded before the district court that he had no objections to the sentence as imposed, and thus to the extent he raises the same arguments, review is for plain error. The United States relies upon its argument *supra* and asserts the record demonstrates a remand for resentencing is unwarranted.

To the extent defendant is arguing simply that the length of his Guideline range sentence is unreasonable, defendant has failed to demonstrate any error. The offense level was based solely upon defendant's personal drug sales and his criminal history. Defendant did not dispute any of the facts that underlie his offense level or his criminal history, nor did he assert any legal error in the calculation of the Guideline range. The district court considered defendant's arguments for a sentence below the undisputed range and chose to sentence defendant within the range based upon proper factors and a proper sentencing procedure. Defendant has failed to demonstrate that his sentence is unreasonable and it should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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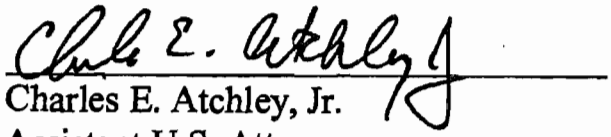
United States Attorney

By: 

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No. 05-5295

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ALVIN VONNER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

UNITED STATES' PETITION FOR REHEARING AND REHEARING EN BANC

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STATUTES, RULES AND REGULATIONS

STATEMENT IN COMPLIANCE WITH FED. R. APP. P. 35(b)

The government seeks rehearing and rehearing en banc as the panel decision in this case, United States v. Vonner, __ F.3d __, 2006 WL 1770095 (6th Cir. June 29, 2006), conflicts with two decisions of the Sixth Circuit Court of Appeals, United States v. Jones, 445 F. 3d 865 (6th Cir. 2006), and United States v. Williams, 436 F.3d 706 (6th Cir. 2006), and consideration is necessary to secure and maintain uniformity of the Court's decisions.

1. The majority's decision directly conflicts with the prior Sixth Circuit decision in United States v. Jones, 445 F.3d 865 (6th Cir. 2006). In that case, the majority rejected the contention that the sentence at issue was procedurally unreasonable because "the district court did not explain its rejection of [the defendant's] argument for a reduced sentence." Id. at 871. The Jones majority held that "a sentence within the applicable Guidelines range [does] not lose its presumption of reasonableness whenever a district judge does not explicitly address every defense argument for a below-Guidelines sentence." Id. If it were otherwise, the *Jones* majority said, "procedural reasonableness review w[ould] become appellate micromanaging of the sentencing process." Id.

2. The majority in the present case expressly states it is ignoring United States v. Williams, 436 F.3d 706 (6th Cir. 2006). "Despite the fact that under

Section 3553(a) the advisory guidelines are but one of many sentencing factors to be considered, and without a reasoned explanation, the Williams panel 'joined several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness.'" Vonner, 2006 WL 1770095, at * 5 (footnote omitted). The majority then goes on to explain why the Williams presumption is irrelevant to the majority's conclusion that the district court must expressly consider each mitigating argument advanced by the defendant, and must expressly explain to the defendant the reasoning behind a decision to reject that argument as a basis for selecting a lower sentence. Id. at ** 5-7. "[T]he record must simply be sufficiently clear to allow us to be assured that the district court considered all the arguments before it and to understand how those arguments factored into the district court's ultimate sentencing determination. This is required even where the district court's sentence of a defendant is presumptively reasonable under Williams." Id. at * 7.

STATEMENT

1. Defendant was charged in a one-count indictment with a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and pled guilty on January 27, 2004. A Presentence Report ("PSR") was prepared and calculated defendant's Guideline range to be 108 to 135 months incarceration. Defendant filed a statement of no

objections to the PSR. The sentencing hearing was delayed in anticipation of the Supreme Court's ruling in Booker and was held on February 7, 2005. Vonner, 2006 WL 1770095, at * 2.

2. Prior to the sentencing hearing, counsel for defendant and the government filed sentencing memoranda with the district court. Id. Defendant's memorandum stated that the court should vary from the advisory Guideline range based upon (1) Vonner's traumatic childhood; (2) Vonner's impairment as a result of his long history of alcohol and drug abuse; (3) the circumstances surrounding Vonner's involvement in selling narcotics; (4) the conditions of his presentence confinement; and (5) Vonner's cooperation and assistance to the government. Id.

3. At the hearing, defendant argued that these factors warranted a sentence below the advisory Guideline range. Id. at * 3. The government countered that the factors put forth by the defendant were insufficient to warrant a sentence outside the advisory Guideline range. Id.

4. Following argument the district court took a short recess to consider the appropriate sentence. Id. After returning the district court issued its sentence of 117 months and, as summarized by the majority, stated the following:

> With respect to the sentence in this case, the Court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, and the advisory Guideline range, as

> well as the other factors listed in 18 United States [Code] 3553(a). Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Alvin George Vonner, is hereby committed to the custody of the Bureau of Prisons for a term of imprisonment of a hundred and seventeen months. It is felt that this term is reasonable in light of aforementioned factors and is a sentence, furthermore, that will afford adequate deterrence and provide just punishment.

Id. at * 3.

5. However, the majority fails to mention that upon returning to the bench the district court addressed defendant personally and had just stated as follows:

> All right. [Defense counsel], if you'll return to the lectern with Mr. Vonner, we'll proceed with sentencing at this point. First, Mr. Vonner, let me say that the Court appreciates the apology you offered this morning. You're obviously facing some period of incarceration. And while I know you need help and are asking for help once you – once that period of incarceration is over, I mean, I would encourage you, as you heard somebody [state] here this morning, during your period of incarceration to, you know, dedicating yourself to hopefully learning the proper tools and education and other matters that would be offered to you through your Federal prison incarceration that, you know, will give you certain life skills and lifestyles that will be of benefit to you when your period of incarceration is over. Certainly, the Court will – there's been made mention of not only your cooperation today, but your encouraged cooperation. And the Court would certainly encourage you to continue in that regard.

(R. 51, Sentencing Hearing Transcript, TR 27-28, App. Vol. I, 134-35.) And, the district court thereafter recommended the 500-hour substance abuse program. (Id. at 28, App. Vol. I, 135.)

6. The district court then asked both counsel if there were any objections to the sentence that had not been raised. Id. at * 9. Both attorneys replied in the negative. Id. The district court again asked defense counsel if there were any other matters that need to be addressed and the answer was "No." Id.

7. On appeal, defendant asserted his sentence was "procedurally unreasonable" and the majority agreed. Id. at * 7. While admitting that the presumption of reasonableness applied because the district court selected a sentence within the Guideline range, the majority stated that this did not relieve the district court of its duty to adequately explain the sentence. The majority held that "[w]here a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." Id. at * 6. "[I]f a defendant provides mitigating evidence, the record must: (1) indicate that the court considered it and (2) provide the court's reasons for rejecting the defendant's argument." Id. at * 7. In this case, "the evidence that the district court actually considered Vonner's various arguments is sketchy as [sic] best" and "[t]his type of offhanded dismissal of a defendant's claims provides mere lip service to the district court's responsibility to carefully weigh all the facts and provide a defendant with a well-reasoned, well-thought-out sentencing decision." Id.

8. The dissent stated that the district court said it had considered all the sentencing factors in 18 U.S.C. § 3553(a) and that "we should accept the statement of the court as truth." Id. at * 9. In addition, the dissent noted that the district court had addressed the prison programs available to defendant for vocational and educational improvement while incarcerated and had recommended that defendant participate in the 500-hour substance abuse program while incarcerated. Id. The dissent underscored that the district court gave defendant two opportunities to inform the district court that he felt the explanation for the sentence was unreasonable or inadequate. Id. at ** 9-10.

9. Lastly, the dissent stated that reasonableness is a "flexible standard," reminding the majority that "trial judges are on the front line dealing with real live defendants, and are in a far better position than appellate courts to determine the circumstances justifying [a sentence]." Id. at * 10 (quoting United States v. Joan, 883 F.2d 491 (6th Cir. 1989)). The dissent noted that this case is "very similar" to United States v. Giles, 170 Fed. Appx. 414, 416 (6th Cir. 2006), where the district court had stated that "the defendant needed to further his education and learn a trade," and then found in support of its sentence, "For the record, the court has considered the nature and circumstances of the offense, the history and characteristics of the defendant and the advisory guideline range, as well as other

factors listed in 18 USC § 3553(a)." Vonner, 2006 WL 1770095, at * 10. The Giles Court had affirmed the sentence, rejecting defendant's argument that the district court's findings resulted in a sentence that was procedurally unreasonable. Id. In conclusion, the dissent objected to the majority approaching a position of appellate "micro-managing" of the sentencing process, noted that the Court's decisions had "confused attorneys and district courts alike," and expressed concern that "[s]entencing hearings will soon exceed trials in length, if we do not simplify the process." Id.

REASONS FOR GRANTING THE PETITION

THE MAJORITY'S DECISION IS CONTRARY TO UNITED STATES v. JONES AND UNITED STATES v. WILLIAMS.

1. In this case, a divided panel of the Sixth Circuit vacated defendant's sentence in a published opinion and remanded for resentencing. The majority held that the district court did not provide an adequate explanation for the sentence and that the sentence was therefore procedurally unreasonable. The majority acknowledged (1) that the district court complied with its obligation to consider the factors in 18 U.S.C. § 3553(a) and (2) that a sentence within the Guideline range is presumptively reasonable. It nevertheless adopted the rule that, when a defendant makes a specific argument for a sentence below the Guidelines range,

the record must "indicate . . . that the district court considered the defendant's argument" and, in addition, must "explain why the district court decided to reject that argument." Vonner, 2006 WL 1770095, at * 7. Applying that rule, the majority concluded as to this case that even if "the record indicates that the district court considered all of [defendant's] arguments," "there is nothing in the record that explains why the district court rejected [defendant's] arguments." Id. (emphasis added).

This Court has never required a sentencing court to explicitly consider each of a defendant's mitigating arguments in order for the sentence to be considered procedurally reasonable. For example, in United States v. Webb, 403 F.3d 373, 385-86 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006), the Court found that a district court "considered" the § 3553(a) offender characteristics that defendant lacked education and had addiction problems by recommending the Bureau of Prisons' substance abuse program. Id. at 385-86. Nor was the district court faulted for failing to expressly state what weight it was ascribing to this factor in the selection of the length of the defendant's sentence. Rather, the Court inferred that the district court "considered" defendant's lack of education and substance abuse where the district court recommended that defendant participate in the Bureau of Prisons' education and drug treatment programs. Id. The Webb Court

concluded its review by stating "there is no evidence in the record that the district court acted unreasonably, by, for example, selecting the sentence arbitrarily, or basing the sentence on impermissible factors." Id.

In Jones, the Court stated that "[t]he district court need not explicitly reference each of the § 3553(a) factors in its sentencing determination," Jones, 445 F.3d at 869, and that it need not "explicitly address every defense argument," id. at 871. "However, there must be sufficient evidence in the record to affirmatively demonstrate the court's consideration of these factors." Id. (internal quotation marks omitted). The Court has consistently stated that, even in cases where the Williams presumption applies, the record must provide a basis for "meaningful appellate review" by demonstrating the district court considered the statutory sentencing factors. See, e.g., United States v. Ward, 447 F.3d 869, 871 (6th Cir. 2006) (noting rebuttable presumption of reasonableness and that district court must "articulate its reasoning" sufficient "to allow for reasonable appellate review"); United States v. Richardson, 437 F.3d 550, 553-54 (6th Cir. 2006) ("This rebuttable presumption does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence."); United States v. Foreman, 436 F.3d 638, 644 (6th Cir. 2006) ("Williams does not mean that a Guidelines sentence will be found

reasonable in the absence of evidence in the record that the district court considered all of the relevant section 3553(a) factors.").

The majority in this case goes well beyond this prior authority and replaces a requirement that the record demonstrate the district court's consideration of the relevant § 3553(a) factors with an unprecedented requirement that the district court expressly (1) consider and (2) explain its consideration of every mitigating argument advanced by defendant.

The record in this case meets the standard for procedural reasonableness established by the Court. As noted above, the majority omits from its quotation of the district court's sentencing findings a significant portion of the district court's statement when the district court personally addressed defendant and stated defendant would benefit from the Bureau's vocational programs and from the substance abuse programs. Thus, in fact, the district court "considered" defendant's arguments of his deficient childhood and personal background and found that these factors did not warrant reducing defendant's sentence, but did warrant the district court recommending that defendant receive assistance through the Bureau of Prisons.

Finally, the United States notes that although the majority discusses in detail the "extensive evidence" introduced by defendant to support his motion for a

sentence below the advisory Guideline range, Vonner, 2006 WL 1770095, at ** 2-3, defendant submitted no evidence. No testimony was taken from any individual and defendant introduced no documents into the record. This raises the question as to whether a district court must make the same detailed findings to satisfy the Court's review for procedural unreasonableness where, as in this case, defendant merely makes unsupported arguments in mitigation and does not establish an evidentiary basis.

In sum, the majority has adopted a rule that is in conflict with prior decisions of the Court and that has significant adverse practical consequences. By requiring that each mitigating argument be explicitly addressed and its consideration expressly explained, the decision imposes a substantial burden on district courts in this Circuit, which conduct thousands of sentencing hearings each year. The United States is aware of no other circumstance in which a court is required to address every argument advanced by a party appearing before it; all that is required is that the ruling be consistent with the evidence and the applicable legal principles. There is no reason for an exception in the context of criminal sentencing. Post-Booker, a district court is obligated to impose a sentence that is appropriate in light of the evidence and the factors set forth in 18 U.S.C.

§ 3553(a), and a district court can comply with that obligation without specifically addressing every argument a defendant makes.

2. In addition, the majority in this case undercut the Court's precedent by not giving proper weight to the presumption of reasonableness established in United States v. Williams, 436 F.3d 706 (6th Cir. 2006). In Jones, the Court explained the effect of the presumption:

> A sentence within the applicable Guidelines range should not lose its presumption of reasonableness whenever a district judge does not explicitly address every defense argument for a below-Guidelines sentence. Otherwise, the procedural reasonableness review will become appellate micromanaging of the sentencing process.

Jones, 445 F.3d at 871.

The majority unduly criticizes the holding in Williams that within-Guidelines sentences are entitled to a rebuttable presumption of reasonableness. Vonner, 2006 WL 1770095, at ** 5-6. The majority's complaint that "the advisory guidelines are but one of many factors to be considered," id. at * 5, is at odds with the purpose of the rebuttable presumption. The majority cites as contrary the concurring opinion in United States v. Buchanan, 449 F.3d 731, 735 (6th Cir. 2006) (Sutton, J., concurring). Id. at * 5 n.3. The result of such authority within the Circuit, as the dissent points out, is the confusion of attorneys and the district courts. The majority's analysis in this case amounts to the very "appellate

micromanaging" rejected by the Court in Jones and strips the presumption of any effect whatsoever. Review by the entire Court is needed to reconcile conflicting opinions of the Court regarding the issue of procedural unreasonableness in criminal sentencings.

CONCLUSION

For the reasons stated, en banc review is necessary to secure and maintain uniformity of the Court's decisions.

Respectfully submitted,

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By: _____

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FORMAT CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing Petition for Rehearing and Rehearing En Banc was prepared using 14-point Times New Roman font and consists of 15 pages excluding material not counted under Fed. R. App. P. 32.

Dated: July 13, 2006

Charles E. Atchley, Jr.
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No. 05-5295

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALVIN VONNER,

Defendant-Appellant.

On appeal from the United States District Court
for the Eastern District of Tennessee, Northern Division

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUES[1]

1. Whether defendant has demonstrated that the district court plainly erred by failing to state additional reasons for the selection of his sentence within the Guidelines range.

2. Whether defendant has rebutted the presumption that his sentence within the Guidelines range is reasonable.

STATEMENT OF THE CASE

The United States incorporates herein by reference the statement of the case in its original brief.

By Order entered June 22, 2007, the Court directed the parties to file supplemental briefs addressing the effect on this appeal of *Rita v. United States*, 127 S. Ct. 2456 (2007).

STATEMENT OF FACTS

The United States incorporates herein by reference the factual summary in its original brief.

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[1]Defendant's claim of a Sixth Amendment error due to alleged fact-finding at sentencing is fully addressed in the United States' original brief and is not addressed in this supplemental brief. The United States has elected to restate the remaining two issues in light of cases decided since the United States filed its original brief on July 5, 2005.

SUMMARY OF ARGUMENT

In *Rita*, the Supreme Court held that an appellate court does not err by applying a presumption of reasonableness to a Guidelines range sentence. The presumption reflects the increased likelihood that a sentence is reasonable where there is a consensus between the Sentencing Commission and the sentencing judge after each analyzes the § 3553(a) factors.

As for the sentencing judge's § 3553(c) statement of reasons, the *Rita* Court found that it is legally sufficient where the record demonstrates that the judge considered the parties' sentencing positions and has a reasoned basis for the exercise of its decisionmaking authority. The appropriate length, depth, and format of the district court's sentencing analysis, which necessarily varies according to the context of the case, generally is left to the professional judgment of the judge.

Reviewing the court of appeals' application of the presumption of reasonableness, the Supreme Court held the affirmation of the sentence was lawful. The Court concluded that none of the special circumstances on which Rita relied required, in light of § 3553(a), a below-Guidelines sentence.

The present case is straightforward and similar to the mine run of cases involving street-level drug distribution. Given that context and the four special

circumstances identified by defendant in support of a below-range sentence, the sentencing judge's statement of reasons is legally sufficient. The record demonstrates that the sentencing judge was well-prepared and knowledgeable about the procedural and substantive posture of the case, including the information in the presentence report, listened attentively to the lengthy arguments of the parties, was particularly responsive to defendant personally during allocution, and then took the unusual step of recessing for the purpose of considering the arguments in light of the record before the court.

Upon returning to the bench, the sentencing judge first expressly and appropriately demonstrated that he had considered defendant's primary argument for leniency, expressly explained why defendant's second argument was not a basis for a lower sentence, and implicitly found defendant's two other alleged special circumstances did not support a below-range sentence. The sentencing judge exercised its decisionmaking authority and agreed with the Sentencing Commission that a sentence within the advisory Guidelines range was appropriate in light of the relevant § 3553(a) factors. Given the facts of this case, the sentencing judge's statement of reasons was wholly proper and legally sufficient.

The special circumstances identified by defendant do not require a sentence lower than the Guidelines range. The record demonstrates that the sentence

expressly took into account defendant's primary mitigating argument, his second argument was not ripe for a reduction in his sentence, his third argument was not atypical of similarly-situated defendants, and his last argument was without factual or legal basis. Defendant has not rebutted the presumption that his Guidelines range sentence is reasonable.

ARGUMENT

1. The Supreme Court's review for reasonableness in *Rita*.

The defendant in *Rita* was convicted of perjury, making false statements, and obstruction of justice and was sentenced by the district court to 33 months, the low end of the undisputed Guidelines range. *Rita*, 127 S. Ct. at 2462. The Fourth Circuit reviewed the sentence by applying a presumption of reasonableness, rejected Rita's arguments that the district court's sentencing explanation was inadequate and that his sentence was unreasonable in length, and affirmed. *Id.* The Supreme Court agreed to review the validity of the appellate presumption, the sufficiency of the district court's statement at sentencing, and the reasonableness of the length of the sentence. *Id.*

The Court first held that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines." *Id.* "[A]ppellate 'reasonableness' review" is the

culmination of a process that begins with the sentencing judge's consideration of a detailed presentence report applying the Guidelines to the particular case and continues with the "thorough adversarial testing" of the appropriateness of the Guidelines sentence in light of the statutory considerations in § 3553(a). *Id.* at 2465. The congressional purposes set forth in § 3553(a) also guide the work of the Sentencing Commission in writing the Guidelines. *Id.* at 2463-64.

Thus where the sentencing judge selects a sentence within the Guidelines range, "the presumption reflects the fact that . . . *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one." *Id.* at 2463 (emphasis in original). "[T]he sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale." *Id.* The appellate presumption of reasonableness "simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id.* at 2465. The presumption does not diminish or detract from the district court's task to select a sentence "sufficient, but not greater than necessary, to comply with

the purposes" of § 3553(a). *Id.* at 2467. "[W]here judge and Commission *both* determine that the Guidelines sentence is an appropriate sentence for the case at hand, that sentence likely reflects the § 3553(a) factors (including its 'not greater than necessary' requirement)." *Id.* (emphasis in original). Accordingly, the Fourth Circuit permissibly reviewed Rita's Guidelines range sentence through the lens of a presumption of reasonableness. *Id.* at 2467-68.

The *Rita* Court then considered whether the district court's statement of reasons is "legally sufficient" to satisfy § 3553(c). *Id.* at 2468. The district court is required by § 3553(c) to "state in open court the reasons for its imposition of the particular sentence." *Id.* (quoting 18 U.S.C. § 3553(c) (2000 ed., Supp. IV)). This provision fosters public trust and confidence in the judiciary by presenting in open court the sentencing judge's reasoned decisionmaking. *Id.* On the other hand, the Court noted, the statute does not require "a full opinion in every case," and the appropriate length, depth, and format of the district court's sentencing analysis is left to the individual judge's "own professional judgment." *Id.*

Speaking generally, the Court stated that ordinarily "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* "Nonetheless, *when a judge decides simply to*

apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical." *Id.* (emphasis added). In a Guidelines case, "the judge *normally* need say no more," although "speak[ing] at length to a defendant . . . may indeed serve a salutary practice." *Id.* (emphasis added).

Continuing to speak generally, the Court noted that in a case where a defendant argues that the Guidelines "reflect an unsound judgment" or where a defendant "presents nonfrivolous reasons for imposing a different sentence," then the "judge *will normally* go further and explain why he has rejected those arguments." *Id.* (emphasis added). Depending upon the circumstances of the case, the judge may provide a brief explanation or the explanation may be lengthier. *Id.*

The Court found that the district court's explanation of the reasons for the sentence implicates no Sixth Amendment jury trial right. *Id.* The function of the statement of reasons is to assure "reviewing courts (and the public)" that the sentencing process is "reasoned" and, by elucidating the intersection between the

§ 3553(a) factors as reflected in the Guidelines and as applied to a particular defendant, the sentencing judge's statement contributes to the continuing evolution of the work of the Commission as intended by Congress. *Id.* at 2469.

The Court then turned to the sentencing judge's statement of reasons in Rita's case, which the Court concluded is "brief but legally sufficient." *Id.* Rita was convicted of perjury before a federal grand jury that was investigating a gun distribution company selling kits from which purchasers could build machineguns, which it was believed the company had not properly registered for importation. *Id.* at 2459. Rita had purchased one of the machinegun kits and lied before the grand jury when asked about related statements that he made to a government agent and about subsequent conversations he had with employees of the company. *Id.* at 2460. A jury convicted Rita on charges of perjury, making false statements, and obstruction of justice. *Id.*

The presentence report determined that the applicable Guidelines range was 33 to 41 months. *Id.* at 2460-61. At the sentencing hearing, Rita presented evidence in support of a sentence below the range. *Id.* at 2461. After this evidence was presented, the sentencing judge expressly stated that Rita was arguing for a below-range sentence and itemized the three bases for that variance: Rita's vulnerability in prison because he had employment experience in the

criminal justice system, his military service, and his poor physical condition. *Id.* In response, the United States argued that a sentence within the range was appropriate because Rita's perjury interfered with the grand jury's investigation and, as a former government employee in criminal justice, Rita necessarily appreciated the seriousness of his offense conduct. *Id.* at 2461-62. The Supreme Court noted that during the United States' argument, "[t]he sentencing judge asked questions about each factor." *Id.* at 2462.

The *Rita* Court set forth the sentencing judge's statement of reasons in support of the sentence:

> After hearing the arguments, the judge concluded that he "was unable to find that the [report's recommended] sentencing guideline range . . . is an inappropriate guideline range for that, and under 3553 . . . the public needs to be protected if it is true, and I must accept as true the jury verdict." The court concluded: "So the Court finds that it is appropriate to enter" a sentence at the bottom of the Guidelines range, namely a sentence of imprisonment "for a period of 33 months."

Id. (quoting the Appendix, citations omitted, changes and ellipsis in original).

On appeal, Rita objected to these limited comments by the sentencing judge and argued they were "inadequate." *Id.* at 2468. The Supreme Court disagreed: "In our view, given the straightforward, conceptually simple arguments before the

judge, the judge's statement of reasons here, though brief, was legally sufficient." *Id.*

The Court recapped that Rita requested a non-Guideline range sentence based upon "three sets of special circumstances: health, fear of retaliation in prison, and military record." *Id.* at 2469. "The record makes clear that the sentencing judge listened to each argument." *Id.* The district court "considered the supporting evidence" and "was fully aware of defendant's physical ailments and imposed a sentence that takes them into account." *Id.* Later in the opinion, the Court explained that the sentencing judge sufficiently responded to Rita's argument regarding his physical condition by confirming that adequate medical treatment was available through the Bureau of Prisons. *Id.* at 2470.

As for the mitigating argument that Rita was a vulnerable inmate, the record demonstrated that the judge "understood" this position and also that he "considered" Rita's lengthy military service and the medals and awards he had received. *Id.* at 2469. "The judge then simply found these circumstances insufficient to warrant a sentence lower than the Guidelines range of 33 to 45[sic] months," which was implicit in the judge's statement that "this range 'was not inappropriate.'" *Id.* The sentencing judge also immediately added that the bottom of the range was "appropriate." *Id.* Referring to the concise nature of the

sentencing judge's statements, the Court reasoned, "He must have believed that there was not much more to say." *Id.*

The Court acknowledged that the sentencing judge "might have said more." *Id.* For example, the judge might have expressly stated that he "heard and considered" defendant's mitigating arguments, or he might have explicitly said that he found a Guidelines range sentence to be "proper in the mine run of roughly similar perjury cases," or he might have said that Rita's personal circumstances were insufficiently different to warrant a non-Guidelines sentence. *Id.* The sentencing judge made none of these findings. "But context and the record make clear that this, or similar, reasoning, underlies the judge's conclusion. Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively." *Id.*

The Court next turned to whether the Fourth Circuit permissibly found that, "after applying the presumption," Rita's Guidelines-range sentence "was not unreasonable." *Id.* at 2470. The Court reviewed how the Guidelines quantify Rita's offense conduct and criminal history, resulting in a range of 33 to 41 months. *Id.* In response to Rita's argument that this range fails to account for his poor health, fear of retaliation, and military service, the Court found the sentence

adequately reflects Rita's "special circumstances." *Id.* "His sentence explicitly takes health into account by seeking assurance that the Bureau of Prisons will provide appropriate treatment." *Id.* The threat of retaliation was no different than "any former law enforcement official might suffer," and thus was no basis for leniency. *Id.* As for Rita's military experience, Rita had not claimed that this fact warranted a sentence "more lenient than the sentence the Guidelines impose." *Id.* "Like the District Court and the Court of Appeals, we simply cannot say that Rita's special circumstances are special enough that, in light of § 3553(a), they *require* a sentence lower than the sentence the Guidelines provide." *Id.* (emphasis added). The judgment was affirmed. *Id.*

2. Vonner has not demonstrated that the district court plainly erred by failing to state additional reasons for the selection of his Guidelines range sentence.

In the present case, defendant argues that his sentence is unreasonable because the district court's statement of reasons is factually and legally insufficient. (Defendant's Brief at 22-27.)

As explained in our original brief, (United States' Brief at 18), the plain-error standard of review applies to this objection where, after the sentence was selected, defendant failed to raise it when the district court expressly asked if he had any objections. *See United States v. Bailey*, 488 F.3d 363, 367-68 (6th Cir.

2007) (plain error standard applies to Bailey's objections to the sentencing judge's analysis where the judge asked Bailey if he had any objections after pronouncing sentence and he responded in the negative); *United States v. Blackwell*, 459 F.3d 739, 772-73 (6th Cir. 2006) (same), *cert. denied*, 127 S. Ct. 1336 (2007).

Defendant has not demonstrated error, plain or otherwise. The United States notes at the outset that to the extent defendant persists in his claim that the statement of reasons is "factually" insufficient because the court failed to resolve his alleged objection to the drug sale that was considered relevant conduct, this argument is foreclosed by the record. (United States' Brief at 26-27.) As the panel found, there were, and are, no controverted facts in this case. *See United States v. Vonner*, 452 F.3d 560, 564-65 (6th Cir.), *vacated, reh'g en banc granted* (Oct. 12, 2006).

The context and the record demonstrate that the district court's statement of reasons is legally sufficient. This is a simple drug trafficking case that presented this sentencing judge with nothing out of the ordinary. Statistics published by the Sentencing Commission indicate that in the 2005 fiscal year in which defendant was sentenced, the district judges in the Eastern District of Tennessee sentenced 328 defendants for drug trafficking offenses, which comprised 50.2% of the district's sentencing caseload. See United States Sentencing Commission, *Federal*

Sentencing Statistics by District, available at http://www.ussc.gov (follow "Publications," then follow "Federal Sentencing Statistics").

Further, this is a typical drug distribution case that could not be more straightforward. *See Rita*, 127 S. Ct. at 2468 (judge's statement of reasons likely will be briefer where case is typical). Defendant pleaded guilty to a single charge of distributing over five grams of crack cocaine to a confidential informant in a video-taped, audio-recorded, controlled sale on August 7, 2002. (See PSR at ¶¶ 1-2, App. Vol. II, 144.) Defendant stipulated in writing to the facts of the sale and agreed that the amount of crack was 33.3 grams. (R. 19, Stipulation of Facts, App. Vol. I, 29.) The day before this sale, defendant sold the same informant 23.6 grams of crack in an audio-recorded, monitored, controlled sale, which was included in the PSR as relevant conduct, to which defendant did not object. (PSR at ¶ 7, App. Vol. II, 144; R. 51, Sentencing Transcript, TR 4-5, App. Vol. I, 111.) The probation officer calculated defendant's offense level using solely the amount of crack that defendant sold on August 6 and August 7, 2002, and no enhancements were applied. (PSR at ¶¶ 14-19, App. Vol. II, 145-46.) Defendant received a three-level reduction for acceptance of responsibility, which resulted in a total offense level of 29. (*Id.* at ¶¶ 19, 22, App. Vol. II, 146.)

Defendant received three criminal history points based upon a prior conviction for second degree murder that had resulted in a sentence of sixty years. (*Id.* at ¶ 31, App. Vol. II, 148.) During his incarceration, defendant had twenty-eight disciplinary infractions, including possession of drugs and a deadly weapon, fighting, and creating a disturbance. (*Id.*) Parole was mandated on December 26, 2001 after defendant served nineteen years, parole was revoked on January 24, 2002, and defendant completed the sentence on May 27, 2002. (*Id.*) The offense conduct in this case occurred less than three months later in August 2002, which increased defendant's criminal history points by two, placing defendant in criminal history category III. (*Id.* at ¶¶ 32-34, App. Vol. II, 149.)

Based upon a total offense level of 29 and a criminal history category III, the Guidelines range was 108 to 135 months, with a statutory mandatory minimum five years up to a maximum of forty years pursuant to 21 U.S.C. § 841(b)(1)(B). (*Id.* at ¶¶ 54-55, App. Vol. II, 152.)

The probation officer describes in detail defendant's personal and family history, including defendant's commitment to State custody at age three, his return to his parents at age five, and his placement in youth centers and foster homes from age thirteen when his father was incarcerated and his mother left the home after stabbing a man. (*Id.* at ¶ 44, App. Vol. II, 151.) Defendant has eight

surviving siblings, six who live in Knoxville, and had a brother who died from injuries received in a fall while running from the police. (*Id.* at ¶ 43, App. Vol. II, 151.)

Defendant's substance abuse also is described in detail, and includes the contents of a letter dated June 7, 2004 from defendant in which he states that after his release from prison in May 2002, defendant smoked twenty to twenty-five marijuana "blunts" per day, drank beer daily, and took Xanax and pain pills nearly daily. (*Id.* at ¶¶ 49-50, App. Vol. II, 152.) Defendant sought treatment for his drug and alcohol abuse. (*Id.*)

The probation officer states that defendant left school after completing one semester of the tenth grade, had not received his GED, and had no recent employment history because of his lengthy period of incarceration on his prior murder conviction. (*Id.* at ¶¶ 51-52, App. Vol. II, 152.)

When defendant appeared for sentencing on February 7, 2005, the record demonstrates that the sentencing judge was intimately familiar with the facts of defendant's case, both substantive and procedural. After defendant was sworn, the court first determined that defendant understood the offense to which defendant had pleaded guilty and the statutory minimum and maximum sentence, that defendant had read and discussed the PSR with counsel, and that defendant had no

objections to the PSR. (R. 51, Sentencing Transcript, TR 3-4, App. Vol. I, 110-11.) The sentencing judge sua sponte noted that the United States had moved for the third-level reduction for defendant's acceptance of responsibility and granted that motion. (*Id.* at 4-5, App. Vol. I, 111-12.)

The sentencing judge then sua sponte stated that defendant had filed two motions "post-*Blakely*, pre-*Booker*" and asked if it would be "appropriate" to consider those motions moot in light of the decision in *Booker*, and defendant agreed through counsel that the court was correct. (*Id.* at 5, App. Vol. I, 112.) The court denied the motions as moot, stating it would "certainly allow [defendant] to make the appropriate argument," and invited the United States to address the issue of the sentence to be selected. (*Id.* at 5-6, App. Vol. I, 112-13.) The United States reserved the opportunity to respond to defendant's argument, but noted for the record its position that a sentence within the Guidelines range was appropriate in this case. (*Id.* at 6, App. Vol. I, 111.)

Defendant began by stating that the Guidelines range was now merely advisory and identified some of the § 3553(a) factors the court had to also consider, and then addressed the four circumstances in his case that he argued supported a sentence below the range. (*Id.* at 7-8, App. Vol. I, 114-15.) These included: (1) defendant's "severe childhood neglect, trauma, and abuse"; (2)

defendant's presentence incarceration in which defendant was placed in restricted "lockdown" in the local jail as a result of his prior murder conviction and had been incarcerated for over a year locally waiting for the decision in *Booker*; (3) defendant's "assistance to the government," noting that although he had refused to cooperate for the past year, in the month prior to sentencing he had agreed to meet with the United States, had done so on one occasion, and had provided information that was deemed to be "good"; and (4) defendant's argument that the controlled drug sale on the day before defendant's offense conduct should be given "little or no weight." (*Id.* at 8-16, App. Vol. I, 115-24.) Defendant concluded by stating that a Guidelines-range sentence was not required or fair and that, instead of incarceration, defendant needed treatment, training, and "the tools of life." (*Id.* at 16, App. Vol. I, 123.)

After defendant's argument, the sentencing judge thanked counsel and stated, "The Court appreciates your arguments you've advanced." (*Id.* at 17, App. Vol. I, 124.)

The United States responded to three of defendant's four mitigating circumstances. Although defendant's childhood was tragically, severely deprived, (*id.* at 17-18, App. Vol. I, 124-25), that unfortunate past had to be viewed in the context of other § 3553(a) factors. Defendant's criminal history and arrest record

demonstrated that, as an adult, defendant has continuously engaged in violent, criminal conduct, some of which the United States described in detail. Given defendant's uncontrollable recidivism for offenses involving drugs and violence, incarceration was necessary for the protection of society. (*Id.* at 17-20, App. Vol. I, 124-27.) The Guidelines range in fact calculated defendant's criminal history favorably to defendant since his murder conviction received the same points as a lesser offense; the resulting Guidelines range presented a time period that was entirely appropriate given defendant's history. (*Id.* at 20, App. Vol. I, 127.)

With respect to defendant's cooperation, the United States noted that defendant recently had met with the government but that this factor was not ripe and there was no credible information before the court at that time to support a below-range sentence based upon assistance to the United States. (*Id.* at 20-21, App. Vol. I, 127-28.)

As for the court's consideration of the drug sale on August 6, 2002, the United States noted that defendant was not disputing that he sold the crack and had agreed it was properly included by the probation officer as relevant conduct for calculation of the advisory Guidelines range and the court should consider this conduct in its sentencing decision. (*Id.* at 21, App. Vol. I, 128.) The United States argued that the Guidelines range was in fact "extremely generous." (*Id.*)

The judge heard defense counsel in reply, at which time defendant underscored that his childhood trauma and his lengthy periods of incarceration contributed to a lack of opportunity to develop skills qualifying defendant to work, and therefore he turned to crime when he was not in prison. (*Id.* at 21-23, App. Vol. I, 128-30.) Defendant stated that he needed "adequate treatment and care and training that he will receive in the Federal system and the proper transition that he'll receive in the Federal system." (*Id.* at 23, App. Vol. I, 130.) A Guidelines-range sentence was not in the interest of justice. (*Id.*)

Defendant then personally addressed the district court at length in allocution. (*Id.* at 24-27, App. Vol. I, 131-34.) At one point, when defendant's emotions made it difficult for him to continue, the sentencing judge patiently stated "if you want to take a moment to compose yourself, I want you to be able to say everything you feel like you need to say," and asked the court deputy to provide defendant with a Kleenex. (*Id.* at 26, App. Vol. I, 133.)

After the judge was assured that defendant had said everything he desired to express, the sentencing judge stated that he was taking a recess to "let me consider the – review the files and consider the matters." (*Id.* at 27, App. Vol. I, 134.)

Following the recess, the sentencing judge addressed defendant as follows:

> THE COURT: All right. Mr. Johnson, if you'll return to the lectern with Mr. Vonner, we'll proceed with sentencing at this point. First, Mr. Vonner, let me say that the Court appreciates the apology you offered this morning. You're obviously facing some period of incarceration. And while I know you need help and are asking for help once you – once that period of incarceration is over, I mean, I would encourage you, as you heard somebody [state] here this morning, during your period of incarceration to, you know, dedicating yourself to hopefully learning the proper tools and education and other matters that would be offered to you through your Federal prison incarceration that, you know, will give you certain life skills and lifestyles that will be of benefit to you when your period of incarceration is over. Certainly, the Court will – There's been made mention of not only your cooperation today, but your encouraged cooperation. And the Court would certainly encourage you to continue in that regard.
>
> With respect to the sentence in this case, the Court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, and the advisory Guideline range, as well as the other factors listed in 18 United States 3553(a). Pursuant to [the] Sentencing Reform Act of 1984, it is [the] judgment of the Court that the defendant, Alvin George Vonner, is hereby committed to the custody of [the] Bureau of Prisons for a term of imprisonment of a hundred and seventeen months. It is felt that this term is reasonable in light of the aforementioned, in light of the aforementioned factors and is a sentence, furthermore, that will afford adequate deterrent and provide just punishment.
>
> The Court will recommend that you receive five hundred hours of substance abuse treatment from the Bureau of Prisons Residential Drug Abuse Treatment Program. Upon release from imprisonment, you shall be placed on supervised release for a term of five years.

(*Id.* at 27-28, App. Vol. I, 134-35.)

After imposing the conditions of supervised release and addressing other matters, (*id.* at 29-30, App. Vol. I, 136-37), prior to adjourning, the judge again personally addressed defendant and stated, "Mr. Vonner, I would add to you that, you know, the Court encourages you to not only continue your cooperation, but also to, you know, use this time to develop the skills that you believe are necessary and that will be useful to you when your period of incarceration is over." (*Id.* at 30-31, App. Vol. I, 137-38.)

Defendant has not demonstrated that this statement of reasons was plain error or that the sentencing judge legally was required to say more. The record establishes unquestionably that the judge was prepared and knowledgeable about all aspects of defendant's case and that the judge attentively listened and considered each of defendant's arguments, the United States' position, and, particularly, defendant's comments in allocution. *See Rita*, 127 S. Ct. at 2469 (noting the record demonstrated the "sentencing judge listened to each argument" and was "fully aware" of defendant's circumstances).

The sentencing judge's thoughtful consideration of the case is further demonstrated by the court's recess for that express purpose. The sentencing judge not only "understood" defendant's arguments but, in fact, after hearing the parties at length, took time to think about what had been said in light of the information

before the court. The sentencing judge took the unusual step of recessing during sentencing, demonstrating that he did not merely brush aside the parties' arguments and default to a pre-conceived sentencing determination. The record contains conclusive proof that the salient facts noted by the Court in *Rita* are present here – the sentencing judge listened, considered, was fully aware of the facts and circumstances pressed by defendant, in this case recessed to consider the parties' arguments in light of the record before the court, and thereafter made a reasoned decision.

The sentencing judge expressly addressed defendant's primary mitigating argument as soon as the judge returned to the bench. Defendant had ended with a strong plea for treatment and for vocational and educational training. The sentencing judge accordingly began by underscoring that the sentence selected by the court took into consideration defendant's request. In "salutary," sensitive remarks directed personally to defendant, *see Rita*, 127 S. Ct. at 2468 ("often at sentencing a judge will speak at length to a defendant"), the sentencing judge twice explained to defendant that the sentence was intended to provide him with the opportunity to take advantage of the programs he was requesting, including vocational and educational training and treatment for substance abuse.

Under the circumstances, the sentencing judge demurred on providing a more detailed, direct explanation in open court as to why defendant's tragic childhood did not warrant a below-range sentence. *See Rita*, 127 S. Ct. at 2469 (the sentencing judge's brevity indicated that, in the district court's view, nothing more needed to be said). Through his sincere statements to defendant regarding training and treatment, the sentencing judge determined that he had appropriately and adequately responded to an argument for leniency based upon defendant's personal family history. *Id.* at 2468 (the reviewing court will defer to the individual judge's "own professional judgment" as to the depth, length, and method of responding to a party's arguments). Further, as the United States pointed out, defendant's childhood deprivation contributed to violent, drug-related criminal conduct in defendant's adult life, triggering competing public safety and deterrence issues. Suffice it to say, this Court should not find that the sentencing judge's statement of reasons is insufficient because he chose explicitly to address defendant's need for vocational and educational training and substance abuse treatment as the appropriate means of implicitly demonstrating that he fully considered defendant's tragic past in the selection of the sentence.

In addition, while defendant's argument regarding his deprived childhood was the key special circumstance that defendant promoted in favor of a lower

sentence, unfortunately, this factor is not uncommon in numerous drug cases before the district court. This circumstance does not render defendant's case atypical, nor is it a complex, unique subject as to which the public or the Commission perhaps could have benefitted from further explanation. *Id.* at 2469 (in some cases, the statement of reasons may advance a laudatory public policy purpose or assist the Sentencing Commission's work). In sum, as to the consideration of defendant's abusive childhood experiences, there is no plain error in the sentencing judge's statement of reasons.

Similarly, the sentencing judge expressly and appropriately addressed defendant's claim that a lower sentence was supported by his cooperation. Taking into account the United States' response that, as even defendant indicated, he had not yet provided any concrete, corroborated information, the court considered this factor and advised defendant that it was not a basis for a lower sentence at that time. Defendant was encouraged to continue to pursue his cooperation. Again, this argument was considered and explicitly addressed.

The record demonstrates that the sentencing judge listened and considered defendant's remaining two arguments, both of which lacked substance, and implicitly found they did not warrant a below-range sentence. The length of defendant's pre-sentencing incarceration was not a basis for a lower sentence

because defendant, like numerous other defendants, chose to delay sentencing until after the *Booker* decision, the court sentenced him less than three weeks later, defendant did not agree to attempt to cooperate until right before sentencing, and, in any event, defendant would receive credit for the time served since his arrest. Under these circumstances, the length of defendant's presentence incarceration was not a basis for leniency and no additional explanation was needed.

As for defendant being placed in "lockdown" at the county jail, the record demonstrates the judge listened and considered this factor but implicitly found a lower sentence was not warranted on this basis. This circumstance would exist for any defendant who has a prior criminal history for violence and a prior murder conviction, it was not inappropriate for the court implicitly to find this was not a basis for a below-range sentence, and defendant has not demonstrated the court plainly erred by failing to expressly explain its conclusion in its statement of reasons. *See Rita*, 127 S. Ct. at 2469 (sentencing judge heard the argument but must have considered it unnecessary to say more under the circumstances, which was not legally in error).

Likewise, the record demonstrates that defendant's fourth argument regarding the relevant conduct drug sale was considered and implicitly rejected as a basis for a Guidelines variance. There was no question that defendant made the

undercover sale, which was recorded and admitted by defendant, and defendant agreed the Guidelines range properly took this relevant conduct into account. At least a portion of defendant's argument appeared to be a hybrid Sixth Amendment challenge in which defendant appeared to argue that if a sentence within the Guidelines range was selected, the district court was reverting to a pre-*Booker* mandatory regime, and a Sixth Amendment issue arose. Since defendant admitted the drug sale and there was no legal support for this argument, it was not plain error for the sentencing judge to consider it frivolous. *See Rita*, 127 S. Ct. at 2468 (judge normally will explain his rejection of *nonfrivolous* reasons for imposing a different sentence).

Thus with regard to defendant's third and fourth arguments, the context and the record reflects that the sentencing judge listened and considered defendant's position but "simply found these circumstances insufficient to warrant a sentence lower than the Guidelines range." *Rita*, 127 S. Ct. at 2469.

As in *Rita*, the sentencing judge in this case could have said more in explanation for the sentence selected. However, unlike in *Rita*, the matters left unsaid were not favorable to defendant and did not need to be said to be understood. Whereas in *Rita* the Court reasonably hypothesized about statements the sentencing judge might have made regarding defendant's military service or

his poor physical condition, in this case the additional statements that the sentencing judge might have made would have highlighted the unremarkable explanation that a lengthy sentence was deemed necessary to afford protection of the public and to provide adequate deterrence in light of defendant's likelihood of recidivism. The sentencing judge no doubt believed that such comments were unnecessary and that, in a straightforward case of street-level drug trafficking and given defendant's criminal history for violence, "there was not much more to say." *Id.* Moreover, as noted above, the sentencing judge's full consideration of defendant's arguments was made clear by the court's decision to take a recess and review the presentence report and other information before determining the appropriate sentence. In this context, the brevity of the court's statement may be considered an exercise of reasoned professional judgment in a case that was not atypical in the mine run of similar drug trafficking cases.

That is not to say that the sentencing judge took lightly the significance of the sentencing occasion or defendant's tragic circumstances. Rather, the court considered all of the circumstances and attempted to focus in open court on those matters that it believed would encourage defendant, while at the same time fulfilling its duty to demonstrate it had taken into account the other relevant

§ 3553(a) factors. Everyone in the courtroom, particularly defendant, as well as the public, knew the reasons why a Guidelines range sentence was appropriate, and the district court did not plainly err by deciding, in its professional judgment, not to make more explicit its implicit findings. The statement of reasons was entirely sufficient in this case.

3. Vonner has not rebutted the presumption that his sentence within the Guidelines range is reasonable.

Defendant argues that, in light of the circumstances in his case, his sentence is greater than necessary to fulfill the purposes of § 3553(a). (Defendant's Brief at 36-47.) Defendant essentially argues before this Court the mitigating circumstances he promoted before the district court. (*Id.*)

Defendant's sentence within the advisory Guidelines range is credited by the Court with a rebuttable presumption of reasonableness. *United States v. Williams*, 436 F.3d 706, 709 (6th Cir. 2006), *cert. denied*, 2007 WL 1854202 (June 29, 2007). Defendant has not rebutted the presumption that the sentence selected by the sentencing judge is reasonable.

As noted above, defendant's advisory range was based solely upon the drug amount that defendant personally distributed, a three-level reduction for his acceptance of responsibility, and his criminal history. The claims that defendant

makes as to special circumstances either were taken into account in the sentence, fail to distinguish defendant's case from that of other street level drug dealers, or were immaterial.

The sentence explicitly takes into account defendant's deprived childhood by recommending vocational and educational training and substance abuse treatment programs. *See Rita*, 127 S. Ct. at 2470 (defendant's poor physical condition was taken into account where the court affirmed that medical treatment was available by the Bureau of Prisons).

As for defendant's claim regarding the treatment he experienced during his presentence incarceration, it is reminiscent of Rita's argument that he was vulnerable to retaliation in prison due to his prior employment. *Id.* The Supreme Court noted that this circumstance is a potentially adverse experience that all similarly-situated persons would suffer by incarceration, thus it is not a basis for finding the Guidelines range sentence unreasonable. *Id.* Likewise, defendant's treatment by the local jail was not personal to him but reflects the classification and treatment afforded all persons with his criminal history. It is immaterial to the selection of a non-range sentence.

The length of defendant's presentence incarceration was of his own choosing, would be credited to him by the Bureau of Prisons in the calculation of

his sentence, and otherwise is not atypical. Numerous defendants delayed sentencing until after *Booker*.

Defendant's cooperation was expressly rejected by the district court as a present basis for a variance. Defendant has not argued that the United States' assessment of his cooperation at the time was inaccurate. Defendant had chosen to delay any cooperation for a year and therefore this circumstance bore no sentencing fruit at the time he appeared before the court.

Finally, defendant's argument as to the sentencing judge's consideration of his relevant conduct was, frankly, somewhat unfathomable with respect to the selection of his sentence. Defendant admitted he engaged in the second drug transaction, it unquestionably was relevant conduct, the drug amount properly was included in the calculation of his offense level, and defendant did not object to the PSR. If defendant had objected, the United States would have presented the audio-tape of the transaction to establish well beyond a preponderance of the evidence that defendant committed this offense. Indeed, defendant could have been charged with this offense and earned two felony drug convictions. It was treated under the Guidelines and at sentencing as it would be in other typical cases involving such multiple-drug transactions by a defendant. There is nothing in the record to suggest that the sentencing judge gave this drug transaction more weight

than was legally proper and there is nothing to suggest it is a mitigating, special circumstance that supports a below-range sentence.

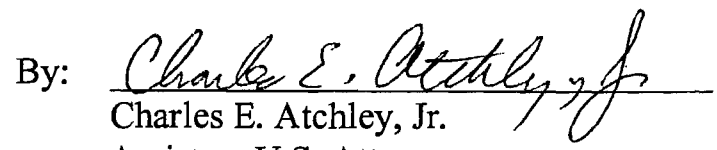
Defendant accordingly has not rebutted the presumption or shown that in light of the § 3553(a) factors the circumstances in this case "require a sentence lower than the sentence the Guidelines provide." *Rita*, 127 S. Ct. at 2470. The district court was well within its discretion in agreeing with the Sentencing Commission that the Guidelines-range sentence selected is sufficient, but not greater than necessary, to fulfill the statutory sentencing purposes.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

JAMES R. DEDRICK
United States Attorney

By: 

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CERTIFICATION PURSUANT TO RULE 32(a)(7)(B)

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that the brief of the United States contains 6981 words, excluding the table of contents, table of citations, statement with respect to oral argument, any addendum, and the certificates of counsel. This certification is based on the word count of the word-processing system used in preparing the government's brief, WordPerfect 12 for Windows.

Respectfully submitted,

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Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Supplemental Brief were sent by FedEx on July 19, 2007, to the following:

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IN REPLY REFER TO
1131
MROR-E
17 Jul 1990

From: Commandant of the Marine Corps
To: Candidate Charles E. ATCHLEY JR., [redacted] USMCR
Via: Officer Selection Officer, 2620 Elm Hill Pike, Suite 405, Nashville, Tennessee 37214

Subj: DISENROLLMENT FROM THE PLATOON LEADERS CLASS PROGRAM

Ref: (a) Lan's Message from CSA:HQ:USMC dtd 9 Jul 1990
(b) PLC Service Agreement (LAW) dtd 19 March 1990
(c) MCO P1900.1C MARCORSEPMAN

1. This Headquarters has been notified that you are not physically qualified for the Platoon Leaders Class Program.

2. Per the provisions of references (b) and (c), effective 14 August 1990, you are disenrolled from the Platoon Leaders Class Program and no longer have any contractual affiliation or obligation to any component of the United States Marine Corps. You are separated as an Officer Candidate Disenrollment, Code KHE1. Your description of service is "entry level separation." Members in this status do not receive a discharge certificate or characterization of service at separation.

3. You can be assured that your physical status was given a fair and complete evaluation. If a significant change in your physical status occurs, please bring this new medical information to the attention of your officer selection officer.

4. I regret the disappointment which I know you feel in this matter. Your participation in the Platoon Leaders Class Program has been greatly appreciated and I hope that your Marine Corps experiences will be of value to you in your future endeavors.

A. P. ALFANO
By direction

Copy to:
CO, 6th MCD
OIC, CAU MCCDC, QUANT, VA