Appendix A-3

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	
VS.	:	CRIMINAL ACTION NO.
	:	1:16-CR-221-LMM
JACOBY BURNS	:	

SENTENCING MEMORANDUM

COMES NOW the Defendant Jacoby Burns, by and through undersigned counsel, and provides the following information under relevant case law and Title 18 U.S.C. Section 3553(a) for the Court's consideration in determining an appropriate sentence.

Jacoby Burns understands that he committed a serious crime, and he understands that he has betrayed the trust placed in him by his friends, and family, and he is profoundly remorseful.

In seeking some measure of leniency we appeal not to sympathy but to reason. We request a sentence that is both rational and proportionate. The instant offense involves the sale of less than 1/4 gram of heroin on one occasion.

I. SENTENCING GUIDELINE OBJECTIONS

A. FELONY OBSTRUCTION AS A PREDICATE FOR CAREER OFFENDER [PARAGRAPHS 39, 44]

Pursuant to §4B1.1, the probation officer has classified Mr. Burns as a career offender based on two prior felony convictions that she asserts are qualifying crimes of violence under the career offender guideline. Specifically, Mr. Burns was convicted of Aggravated Assault, Burglary, and Aggravated Battery in Fulton County Superior Court in case 03-SC-04202 on December 18, 2003, and he was convicted of two counts of Felony Obstruction of a Law Enforcement Officer in Fulton County Superior Court in case 13SC122388 on March 2, 2014.

Mr. Burns contends that felony obstruction in Georgia is categorically not a violent felony and should not count as a predicate offense for an enhanced sentence under the career offender guideline because it is indivisible and overly broad. It is indivisible because it contains one set of indivisible elements. In addition, it is overly broad because it includes more conduct than the equivalent federal statute. Therefore it is not a violent felony.

Effective August 1, 2016, the United States Sentencing Commission amended the definition of a crime of violence for §4B1.1(Career Offender) .

The Commission stated that amendment was made in light of the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), regarding the statutory definition of "violent felony" in 18 U.S.C. 924(e) (commonly referred to as the "Armed Career Criminal Act" or "ACCA"). While not addressing the guidelines, the statutory language the Court found unconstitutionally vague in the ACCA (often referred to as the "residual clause") is identical to language used in the "career offender" guideline. The amendment eliminates the residual clause in the career offender guideline definition of "crime of violence."

As amended, §4B1.2(a) (definitions of terms used in Section 4B1.1) now defines a "crime of violence" as any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that-

(1) has as an element the use, or attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sexual offense, robbery, arson, extortion, or the unlawful possession of a firearm described in 26 U.S.C. §5845(a) or explosive material as defined in 18 U.S.C. §841(c).

The probation officer has indicated that the conviction for felony obstruction qualifies a crime of violence under §4B1.2(a)(1) because it has

as an element the use, or attempted use, or threatened use of physical force against the person of another.

Mr. Burns acknowledges that felony obstruction has been found by the Eleventh Circuit to constitute a violent felony for the purposes of career offender and ACCA, which uses the same definition for violent felony as the career offender guideline. *United States v. Johnson*, 579 Fed. Appx. 920 (11th Cir. 2014) (unpublished; career offender) United *States v. Brown*, 805 F.3d 1325, 1327 (11th Cir. 2015)(ACCA); *United States v. Nix*, 628 F.3d 1341, 1342 (11th Cir. 2010)(ACCA); *United States v. Romo Villalobos*, 674 F.3d 1246 (11th Cir. 2012)(ACCA). However, the United States Supreme Courts decision in *Descamp v.United States*, 133 S.Ct. 2276 (2013) requires an analysis of predicate offenses that was not properly done in any of the above cited decisions. The analysis required by *Descamps* is whether the statute is indivisible and whether it is overly broad.

1. *Descamps* changes the landscape

In *Descamps v. United States*, the Supreme Court held that a sentencing court must not apply the modified categorical approach when the crime of conviction has "a single, indivisible set of elements sweeping more broadly than the corresponding generic offense." *Descamps* at 2283. In *Descamps*, the Supreme Court evaluated California's burglary statute,

which, in contrast to the generic form of burglary, did not require that an entry into a structure be unlawful. *Id.* at 2285-86. Because California's burglary statute did not require that an entry be unlawful, the modified categorical approach "ha[d] no role to play in th[e] case." *Id.* at 2285. According to the Supreme Court in *Descamps*, "a statute is divisible when it sets out one or more elements of the offense in the alternative - for example, stating that burglary involves entry into a building *or* an automobile." *Id.* at 2282.

In light of *Descamps,* the question this Court must answer is whether Georgia's felony obstruction statute has "a single, indivisible set of elements sweeping more broadly than the corresponding generic offense." If so, the Court may not look to the indictment or any other documents approved by *Shepard v. United States*, 554 U.S. 13 (2005)., and must conclude that it is not a violent felony under the career offender guideline. If on the other hand, the Court concludes that Georgia's felony obstruction charge is "divisible," then it will be permitted to review the indictment under the modified-categorical approach to determine if it is a violent felony that could serve as a career offender predicate.

Georgia's felony obstruction statute states the following:

> [w]hoever knowingly and willfully resists, obstructs or opposes any law enforcement officer, prison guard, correctional officer,

> probation supervisor, parole supervisor, or conservation ranger in the lawful discharge of his official duties by offering or doing violence to the person of such officer or legally authorized person is guilty of a felony and shall, upon conviction thereof, br punished by imprisonment for not less than one nor more than five years.

O.C.G.A. §16-10-24.

The federal equivalent of Georgia's felony obstruction statute requires the element of force. 18 U.S.C. §111. It states:

> (a) In general - Whoever
>
> > (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 114 of this title while engaged in or on account of the performance of official duties, or
> >
> > (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,
> >
> > Shall, where the acts in the violation constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, where such acts involve physical contact with the victim of the assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.
> >
> > (b) Enhanced penalty - Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but fails to do so by reason of a defective component)

> or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18. U.S.C. §111. This is the definition that the Courts consider a generic definition.

2. Georgia's felony obstruction statute includes conduct that is not violent

"Sentencing courts conducting divisibility analysis in this circuit are bound to follow any state court decisions that define or interpret the statute's substantive elements because state law is what the state supreme court says it is." *United States v. Howard*, 742. F.3d 1334, 1336 (11th Cir. 2014).

In the State of Georgia, the appellate court have held that "[v]erbal threats of force can obstruct an officer and authorize a felony conviction under O.C.G.A. §16-10-24(b)." *Jackson v. State*, 213 Ga. App. 520(1994). In *Jackson*, the police advised the defendant that he was being arrested when the "defendant stood in the back of a truck with a tire iron raised over his head and threatened to kill [the officer] if they did not leave his brother alone. The defendant who was only a few feet away from [the officer], cursed at the officers and repeated this threat several times." *Id.* Finding that verbal threats can sustain a conviction for felony obstruction, the Georgia Court of Appeals considered the definition of "fight" to include not only physical struggle, but also verbal disagreement, including "to act in

opposition to anything: to struggle; contend; strive; clash." *Id.* The Court held that "[c]ommunications that reasonably can be interpreted as threats of violence can constitute opposition to an officer's authority sufficient to support a conviction for obstruction." *Id.*

Along the same lines as *Jackson*, one can also be guilty of felony obstruction in Georgia for taking a "fighting stance" and yelling obscenities at an officer. *In re D.D.*, Ga. App. 512 (2007). In *D.D.*, officers were attempting to arrest the defendant, a juvenile, for an unrelated offense when he "assumed a 'fighting stance,' placed his fists in front of his face, and yelled obscenities at the officer while refusing to obey commands." *Id.* at 513. The evidence, the Court found, "was sufficient to show that D.D. 'offered to do violence' to the officer." *Id.*

Additionally, mere verbal acts may be sufficient to constitute an offer of violence under Georgia's felony obstruction statute if such words can be interpreted as a threat of violence. *Arnold v. State*, 249 Ga. App. 156, 159(2001). Further more, in *Gillison v. State* 254 Ga. App. 232 (2002), the defendant was convicted of felony obstruction and the conviction was affirmed by the Georgia Court of Appeals because the defendant kicked behind the officer, saying, "I'll break your f*****g leg, f*****g cop!" The officer "had to move out of the way to avoid being kicked." *Id.* at 232. The

Court of Appeals found that the defendant "threatened violence when he said that he intended to break a police officer's leg," and violated Georgia's felony obstruction statute without any violence having been done and without a touching. *Id. See also, Weldon v. State*, 211 Ga. App. 602 (1993)(running away can constitute felony obstruction); *Steillman v. State*, 295 Ga. App. 778(2009)(verbal threats can constitute felony obstruction).

The appellate cases interpreting Georgia's felony obstruction statute demonstrate that Georgia's felony obstruction statute is overly broad. Georgia's appellate courts have held that verbal threats are sufficient to authorize a conviction. By contrast, these same verbal threats would not qualify as an obstruction under the federal obstruction statute. To be a felony under the federal statute, the conduct must "involve physical contact" not required by the Georgia statute. In addition, the verbal acts constituting felony obstruction in Georgia would not include as elements the use, attempted use, or threatened use of physical force against another as required by the career offender guideline.

3. Georgia's felony obstruction statute is not a violent felony under *Johnson v. United States*

The United State Supreme Court determined that Florida's felony battery offense is not a violent felony for purposes of ACCA in *Johnson v.*

United States, 559 U.S. 133, 145 (2010). In *Johnson,* the Supreme Court held that 'physical force' "means violent force - that is, force capable of causing physical pain or injury to another person." *Id.* at 140. For further support of this meaning, the Court stated, "[w]hen the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer." *Id.*

In *United States v. Estrella*, &58 F.3d 1239(11th Cir. 2014), The Eleventh Circuit applied the Supreme Court's ruling in *Johnson*. The defendant was convicted of illegal re-entry and his sentence was enhanced under the United States Sentencing Guidelines based ob a prior Florida conviction for " wantonly or maliciously throw[ing], hurl[ing], or project[ing] a missile, stone or other hard substance, which would produce death or great bodily harm, at a vehicle being used or occupied by a person." *Id.* at 1243. The Court was faced with the question of whether a violation of the Florida statute was a 'crime of violence' under the sentencing guidelines definition as 'having as an element the use, attempted use, or threatened use of physical force against the person of another.' *Id.*

Based on the modified categorical approach, the Court held that the Florida statute was not a crime of violence. To reach this conclusion, the Court first determined that the Florida offense was divisible, meaning a

statute that "sets out one or more elements of the offense in the alternative" and that the statute included some conduct that would be a violent felony and some that would not. *Id.* at 1245. Based on the statute being divisible and including conduct that would be a violent felony, the court is permitted to review documents that were approved by *Shepard v. United States*, 544 U.S. 13 (2005). *Id* at 1245. Concluding that the *Shepard* approved documents did not specify upon which mens rea - wantonly or maliciously - formed the basis of the conviction, the government failed to meet the burden of proving by a preponderance of the evidence that this conviction was a predicate enhance for ACCA. *Id.* at 1254.

4. Georgia's felony obstruction statute is indivisible and categorically not a crime of violence

Georgia's felony obstruction statute, O.C.G.A. §16-10-24(b), is an indivisible statute because it sets out a single, indivisible set of elements under *Descamps*. Furthermore, according to *Jackson, Gillison, In re D.D. Weldon, and Steillman*, Georgia's felony obstruction statute includes conduct that does not include the use, attempted use, or threatened use of force that is capable of causing physical pain or injury to another as discussed in *Johnson V. United States*, 559 U.S. 133 (2010). Furthermore,

according to *Arnold* and *Gillison*, Georgia's felony obstruction statute can include mere verbal acts.

Because Georgia's felony obstruction statute is indivisible and overly broad by including conduct that is not included in the career offender guideline, Georgia's felony obstruction statute is not a violent felony and cannot be used as a predicate offense for an enhancement under the career offender guideline.

B. INFORMATION FROM NON-*SHEPHARD* DOCUMENTS

[PARAGRAPH 39]

In paragraph 39, the probation officer has included information from a police report which is not to be considered under the categorical approach or modified-categorical approach. *Shephard v. United States,* 544 U.S. 13 (2005). Therefore, the defendant's requests that the information obtained from the police report not be considered under either the categorical or modified categorical approach and be removed from the PSR.

II. 3553(a) FACTORS

A. The Advisory Guideline Range is not to be Presumed Reasonable

The Supreme Court stated in no uncertain terms that the Guidelines cannot be used as a substitute for a sentencing court's independent

determination of a just sentence based upon consideration of the statutory factors spelled out in Title 18 U.S.C. Section 3553(a). *Nelson v. United States*, 555 U.S. 350 (2009)(per curiam); *Spears v. United States*, 555 U.S. 261(2009)(per curiam). The Court's decisions in Spears and Nelson built upon its earlier decision *Kimbrough v. United States*, 552 U.S. 87 (2007), and *Gall v. United States*, 552 U.S. 38 (2007), establishing the Sentencing Guidelines as simply an advisory tool to be considered alongside the other Section 3553(a) factors.

"Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable." *Nelson*, 555 U.S. at 352. "The Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable." Id. In other words, sentencing courts commit legal error when they use a Sentencing Guidelines range as a default sentence, unless reasons exist to impose a sentence inside that range.

Although sentencing courts must still consider the Sentencing Guidelines, Congress has required federal courts to impose the least amount of imprisonment necessary to account for the considerations and accomplish the sentencing purposes set forth in Title 18 U.S.C. Section 3553(a). These include (a) the nature and circumstances of the offense and the history and characteristics of the defendant; (b) the kinds of sentences available, (c) the

advisory Guidelines range; (d) the need to avoid unwarranted sentencing disparities; (e) the need for restitution; and (f) the need for the sentence to reflect the following: the seriousness of the offense, promotion of respect for the law and just punishment for the offense, provision of adequate deterrence, protection of the public from future crimes and providing the defendant with needed educational and vocational training, medical care, or other correctional treatment. *See Kimbrough*, 552 U.S. at 90.

This statutorily mandated "parsimony provision" is not just another factor to be considered along with the other factors set forth in Section 3553(a) - it sets an independent limit upon the sentence. In addition, there is no limitation concerning the background, character and conduct convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence. Title 18 U.S.C. Section 3661.

After through consideration of a sentence under the guidance of Section 3553(a), a sentencing court may find that a particular case falls outside the "heartland" contemplated by the guidelines or that "the guidelines sentence itself fails to properly reflect the Section 3553(a) considerations," or that **"the case warrants a different sentence regardless."** *Rita v. United States*, 551 U.S. 338, 347 (2007)(emphasis

added). Although the District Court must begin its analysis by correctly calculating the advisory sentencing range, the sentencing court is then free, in light of the other statutory sentencing factors, to impose an entirely different sentence. This is because, under *Rita*, a district court is free to disagree, based on the Section 3553(a) sentencing factors, with the United States Sentencing Guidelines'(USSG) "rough approximation" of the appropriate sentence for any given case. *Id.*

B. Amount of Drugs

Although the probation officer correctly calculated the base offense of 12 pursuant to §2D1.1(c)(14) (less than 10 grams) the lowest amount of heroin counted under the sentencing guidelines, the actual amount involved was less than 1/4 of a gram. Therefore, the amount involved in the one transaction in the instant case is less than 1/40 of the amount required to trigger a base offense level of 12 (27-33 months with criminal history of V).

C. Mr. Burns need for drug treatment

Mr. Burns freely admits that he has a drug dependency problem, and that he was involved in the instant transaction in order to supply his own addiction. He requests that the Court take this into consideration when determining a reasonable sentence and that the court include as part of his sentence the most intensive drug treatment program available.

CONCLUSION

For all these reasons, Mr. Burns asserts that he is not a career offender and his total offense level, with two levels subtracted for acceptance of responsibility, should be 10 with a criminal history category of V and a guideline range of 21-27 months. Based on the fact that the amount involved was 40 times less than the amount required to trigger this offense level, Mr. Burns asserts that a reasonable sentence, considering all the factors of §3553(a), would be 15 to 18 months. Furthermore, Mr. Burns maintains that this would be a reasonable sentence even if the Court were to find that he was a career offender under the sentencing guidelines.

Respectfully submitted,

/s/Paul Cognac
Bar No. 173334

1401 Georgia Park, Suite 110
Peachtree City, Georgia 30269
678-826-6186

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing Memorandum using the ECF system which will automatically send e-mail notification of such filing to opposing counsel, AUSA Laurel Boatright.

This 24th day of October, 2016.

/s/ Paul M. Cognac
Paul M. Cognac
Georgia Bar No. 173334
Attorney for Defendant

1401 Georgian Park, Suite 110
Peachtree City, Georgia 30269
(678)826-6186