APPENDDIX A

EN BANC FILING, DENIAL AND RECALL OF MANDATE

IN THE FOURTH CIRCUIT COURT OF APPEALS

In Re: US v Daryl Barley App. No. 20-6760

MOTION TO VACATE JUDGMENT/MANDATE AND RE-ENTER

On Jan 8,2021, I Daryl Barley filed a Motion for En Banc & Rehearing. After several months of not hearing from the Courts I called on May 21,2021 and spoke with the Clerk, in which I was then notified that my Motion for Rehearing was denied on jan 25,2021. I informed the Clerk that I never got the denial and asked what I could do. I was told that I could file the Writ to the SP. Court. I got off the phone and researched and found out that there is a 90 day time frame to file, that has been extended for 30-60 more days. However, because I have not received the denial and do not have the Writ of Cert forms to be used, I am requesting that the Court Vacate the Denial/Mandate and re-issue the denial, so that I may get my full 90 day timeframe and write to the Sp. Ct to get the Package.

Respectfully submitted on this 24 May,2021

S/ Dayl Barley

Mr. Daryl Barley
Fed No. 14643-084
FCI Butner II
PO Box 1500
Butner, NC 27509

Certificate of Service, 28 USC 1746

I, Darly Barley, do hereby swear under the penalty of perjury that a copy of the herein Motion has been sent to the 4th Circuit of Appeal Court and to the US Supreme Court via US Postal Mail on this 24 day of May,2021 from FCI Butner II.

S/ Dayl Barley

Mr. Daryl Barley

CLERK'S OFFICE
U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 E. MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219

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SPECIAL LEGAL MAIL -
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PRESENCE OF INMATE

Daryl Wendell Barley
#14643-084
FCI BUTNER MEDIUM II
FEDERAL CORRECTIONAL INSTITUTION
P. O. Box 1500
Butner, NC 27509-0000

27509-450000

FILED: May 27, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6760
(4:10-cr-00010-JLK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DARYL WENDELL BARLEY, a/k/a Black

Defendant - Appellant

ORDER

Upon consideration of submissions relative to the motion to recall the mandate, the court denies the motion. On March 19, 2020, the Supreme Court of the United States extended the deadline to file petitions for writs of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

June 3, 2021

Daryl Barley
#14643-084
FCI Butner II
P.O. Box 1500
Butner, NC 27509

RE: Letter/Requesting Forms

Dear Mr. Barley:

The enclosed documents were received on June 3, 2021. These papers fail to comply with the Rules of this Court and are herewith returned.

You may seek review of a decision only by filing a timely petition for writ of certiorari. The papers you submitted are not construed to be a petition for writ of certiorari. Should you choose to file a petition for writ of certiorari, you must submit the petition within the 90 day time limit allowed under Rule 13 of the Rules of this Court. A Copy of the Rules of this Court and a sample petition for a writ of certiorari are enclosed.

Your case must first be reviewed by a United States court of appeals or by the highest state court in which a decision could be had. 28 USC 1254 and 1257.

Sincerely,
Scott S. Harris, Clerk
By:

Susan Frimpong
(202) 479-3039

Enclosures

ATT: Supreme Court Clerk of Court

In re: Requesting Writ of Certiorari Package and Pro Se Forms

My name is Mr. Daryl Barley and I was just informed that my Panel Rehearing /En Banc filing was denied on Jan 25,2021.I did not even find out until May 21,2021 by talking with the 4th Circuit Court of Appeals Clerk. I am requesting a 60-90 day extension as well as the Writ of Certioarari Forms to be sent to me at the below address. Thank you for your time. See attached Letter/Motion to 4th Cir. Clerk.

Respectfully submitted on May 24,2021 by:

S/ Dayl Barl

Mr. Daryl Barley
Fed No. 14643-084
FCI Butner II
PO Box 1500
Butner,NC 27509

Certificate of Service, 28 USC 1746

I, Daryl Barley do hereby swear under the penalty of perjury that a copy of the herein has been sent via US Postal Mail to the US Supreme Court, 1 First St., NE, Washington, DC 20543 on this 24 day of May, 2021 from FCI Butner II.

S/ Dayl Barl
Mr. Daryl Barley

CLERK'S OFFICE
U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 E. MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219
OFFICIAL BUSINESS

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Daryl Wendell Barley
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[redacted]
27509-450000

SPECIAL LEGAL MAIL -
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PRESENCE OF INMATE

FILED: January 25, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Rec on 5/28/21

No. 20-6760
(4:10-cr-00010-JLK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DARYL WENDELL BARLEY, a/k/a Black

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Diaz, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America
Appellee
vs
Daryl W. Barley,
Appellant

App. No. 20-6760

APPELLANTS SUPPORT ARGUMENT FOR PANEL REHEARING/REHEARING EN BANC

Comes now the Appellant, Daryl W. Barley, to petition the Court for a Panel Rehearing/ Rehearing En Banc for the follwing reasons:

On 12/21/20 this Court denied the petitioner/appellant's Appeal & and Request for Remand. Mr. Barley's Appeal was premised on the 1st Step Act's changes to the drug penalties as well as the deriliction of the Appointed Counsels repetitive violations of the Court Orders and a Court that moved in haste without considering all the changes in law since the petitioner's original sentencing. All parties do concede that Barley is eligible for a reduction and all parties have conceded that the Counsel did repeatedly drop the ball and the Court based its decisions on these facts. However, the Court did not have the reference letters or the Institutional conduct report available at the time it made both decisions and when the counsel finally submitted them, the Court did not want to address them any longer. Therefore, no futher reduction was Granted.

However, after the denials this Court issued the Chambers v US 19-7104 ruling , which held that the Court must consider all 3553(a) factors and subsequent changes in law since the sentencing. Which was not done in Mr. Barley's case. Also the Court did not have the benefit of the US v Nasir 2020 US App. Lexis 37489 (3rd Cir. En Banc) ruling which has deemed the Virginia drug statue as overly broad & that Kisor v Wilkie decision now renders the commentary as non-bind -ing, thus leaving both Barley and Nasir as actually innocent of the Career Offender finding.(US v Brown 19-7039 (10th Cir. 2020).. the district court erred by not considering his challenge to his career offender status at his 1st Step Act sentencing and the 1st Step allows the District Court to consider his claim)

More importantly is the split among the circuits now .... in regard to whether the Appeal court can allow the Court to reconsider the additional claims not raised. According to the 3rd Circuit case of US v Hart 19-3718 , which was ruled on the [exact same day this Court denied the petitioner of 12/21/20], the answer is Yes and a the government conceded that it is appropriate as well in Hart.

Therefore, because of this split, it would require this Court to Reconcile and come into conformity with the Sister Circuits, seeing that both courts issued the rulings on the same day and came with 2 different outcomes.

Futhermore, the District Court never resolved the "revelant conduct" increase quantities being used, which is critical because there is a massive difference in the 2d1.1 base offenses. For example,the

PSR originally attributed 361.7 grams of cocaine, 61.7 grams of crack which under the 2009 provisions produced a 2d1.1 level of 22 and 26, but today under the 18:1 and Amendment 782, the new 2d1.1 findings are 20 and 24. (See 2d1.1 drug table effective Nov. 1,2014)

But what happened at sentencing was different, because the Court & PSR applied 2061.7 grams of crack cocaine instead of 61.7 grams, and then created a new marijuana equivalent of 9,741 kilograms, which produced a new 2d1.1 BOL of 34, but today is 32.

When these changes are explored futher , the Court will see that the career offender finding is no longer applicable and that the drug amounts must be changed and that the petitioner's category is no longer a 6, but instead a 4 or 5, and the 2d1.1 new BOL will fall between 77-96 months (cat 4) or 92-115 months (cat 5), which is anywhere between 120 to 158 month difference in the current sentence, thus clearly warranting futher exploration by this Court or En Banc Court and then to be Remanded to the District Court for futher consideration. (See US v Alston 19-3884 (6th Cir. 9/28/20)..the Ohio drug prior no longer qualifies as a career offender predicate and Remand for Resentencing is in order; US v Bautisa 19-10448 (9th Cir. 11/23/20) ..the Arz. drug conviction no longer qualifies as a career offender predicate and warrants resentencing; US v Helding 18-3270 (7th Cir. 2020), US v McDonald 2019 US App. Lexis 36661 (8th Cir. 2019); US v Sterling 18-2974 (8th Cir. 2019) all requiring resentencing without the additional revelant conduct attributed)

Conclusion

This case is a prime vehicle to resolve the split among the Circuits and to provide justice to those like Barley who are still suffering 100:1 racially disparate treatments and whose priors no longer qualify as well as resolve the revelant conduct issues.

In alternative this Court should Vacate the Denial and Remand for the full Reconsideration. Or pernaps issue a Amicus Curiae Request to all willing participants and also assign appeal counsel to argue before the court during oral arguments.

Respectfully submitted on this 8th day of Jan. 2021 by

S/ Daryl Barley

Mr. Daryl W. Barley
Fed No. 14643-084
FCI Butner II
Po Box 1500
Butner,NC 27509

Certificate of Serivce, 28 USC 1746

I, Daryl W. Barley, do hereby swear under the penalty of perjury that a copy of the Panel Rhearing/ Rehearing En Banc supplement arguments (4 copies) has been sent via US Postal Mail to the 4th Circuit Court of Appeals located at 1100 East Main St., Richmond, VA 23219 on this 8th day of Jan. 2021 from FCI Butner II.

S/ Daryl Barley

Mr. Daryl W. Barley

Attachment of Pertinent Portion of US v Nasir, 3rd Cir En Banc

more or less weight to the testimony of a law enforcement agent or police officer than [*14] you would give to that of a civilian witness, simply because he or she is employed as a law enforcement agent or police officer?" (App. at 237-38.) Because Juror 27 answered "yes" to that question, the following colloquy ensued:

> A JUROR: [...] But the other thing that I kind of answered "yes" to was police officer and a person on the street. I would like to think I would be partial (sic), but I don't know.
>
> THE COURT: You would like to think you would be impartial and fair to both sides?
>
> A JUROR: Yes, impartial that is what I would like to say.
>
> THE COURT: What is your concern you wouldn't be?
>
> A JUROR: Well, my daughter dates a state police officer. And I really have a lot of respect for them, you know, and I feel that for the most part they all do a good job, and they try to be fair. I think I might tend to believe what they say. I don't know.
>
> THE COURT: Do you think if I instruct you that you have to be fair and impartial and assess everybody's credibility as best as you can that you would be able to do that?
>
> A JUROR: I would think I would. I would hope I would.

(App. at 305.) Then, outside the juror's presence the Court and counsel had this further conversation:

> [NASIR'S ATTORNEY]: Your Honor, I move to strike on [*15] the basis that she -- her daughter is dating a state police officer and she would tend to believe the officer and police testimony.
>
> THE COURT: What is the government's position?
>
> [GOVERNMENT'S ATTORNEY]: Your Honor, I don't have a real strong one. That she would answer any questions that she was instructed [sic]. She could stay impartial. She confronted all those issues. I certainly understand why [Defense counsel] is objecting.
>
> THE COURT: Any response?
>
> [NASIR'S ATTORNEY]: No response, Your Honor.
>
> THE COURT: I'm going to deny the motion. I felt sufficient confidence that she would work as hard as anyone could to be fair and impartial, and I think she would follow the instructions. So I'm denying the motion to strike.

(App. at 306-07). Nasir argues that the statements "I would think I would" and "I would hope I would" are not sufficiently strong affirmations of impartiality. Because the juror admitted to her concern about partiality, the District Court quite rightly asked follow-up questions to determine whether she was actually biased. *Cf.* United States v. Mitchell, 690 F.3d 137, 142, 57 V.I. 856 (3d Cir. 2012) (holding that actual bias is "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality[,]" unlike implied bias, [*16] which is "presumed as [a] matter of law" (citations and internal quotation marks omitted)). Here, Juror 27's acknowledgement that she "ha[s] a lot of respect for" police officers and "might tend to believe what they say" prompted the District Court to emphasize her obligation to be fair and impartial and to weigh the evidence equally. (App. at 305.) She responded with assurances that she would follow the Court's instructions. Her declaration that she "would think" and "would hope" (App. at 305) that she could be impartial — combined, it seems, with the way in which she said it — allowed the District Court, observing her behavior and mannerisms first hand, to have "sufficient confidence that she would work as hard as anyone could to be fair and impartial." (App. at 306-07.) That decision, on this record, is not manifestly erroneous.

D. The Career Offender Enhancement

Nasir next challenges the enhancement he received at sentencing pursuant to the "career offender" provision of the sentencing guidelines. He argues that he should not have received the enhancement because one of his two prior qualifying convictions was an inchoate drug offense, which does not qualify as a predicate offense under the plain language of the guidelines. [*17] HN9[↑] The interpretation of the guidelines is a legal question, so we exercise plenary review. United States v. Wilson, 880 F.3d 80, 83 (3d Cir. 2018). We agree with Nasir that the plain language of the guidelines does not include inchoate crimes, so he must be resentenced.

1. *The Definition of "Controlled Substance Offenses" in the Guidelines*

HN10[↑] Under section 4B1.1 of the sentencing guidelines, an adult defendant is a career offender if "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and ... the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). If a defendant is a career offender, that designation increases the offense level of the crime for which he is to be

sentenced and mandates a criminal history ranking of Category VI. U.S.S.G. § 4B1.1(b).

The District Court determined that one of Nasir's three convictions in this case is a controlled substance offense, namely his conviction on Count Two for possession of marijuana with intent to distribute. After evaluating Nasir's criminal history, the Court concluded that two of his prior convictions in Virginia state court also qualify as predicate controlled substance offenses: a 2000 conviction for [*18] an attempt to possess with intent to distribute cocaine and a 2001 conviction for possession of marijuana and cocaine with intent to distribute.[9] Nasir was accordingly sentenced as a career offender.

He argues that his conviction in 2000 for attempting to possess with intent to distribute cocaine should not qualify as a "controlled substance offense" under section 4B1.1 because the guidelines' definition of a "controlled substance offense" does not include inchoate crimes.[10] In particular, Nasir points out that section 4B1.2 of the sentencing guidelines defines the term "controlled substance offense," to mean

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b). Nasir notes this definition plainly does not mention inchoate crimes, and consequently asserts that his inchoate "attempt" crime should not qualify as a predicate offense for the career offender enhancement. The analytical problem is more complicated [*19] than that, however, because the commentary to section 4B1.2 appears to expand the definition of "'controlled substance offense' [to] include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 cmt. n.1. That section of the commentary, and, importantly, our precedent on the application of the commentary to the interpretation of the guidelines, informed the District Court's decision to apply the career offender enhancement. The question, then, is whether the more expansive commentary should be given controlling weight in interpreting the narrower guideline at issue here.[11]

2. *The Effect of the Commentary on our Interpretation of the Guidelines*

The extent to which the guidelines' commentary controls our interpretation of the guidelines themselves is informed by principles of administrative law. In Stinson v. United States, 508 U.S. 36, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993), the Supreme Court considered how to classify the commentary to the sentencing guidelines and whether and when it should be given binding interpretive effect. Because the guidelines are written by the Sentencing Commission, a body that straddles both the legislative and judicial branches of the government, the Court determined that the commentary to [*20] the guidelines is more akin to an agency regulation than a statute. Id. at 44. Consequently, the Court determined that the commentary should "be treated as an agency's interpretation of its own legislative rule." Id. Relying on its opinion in *Bowles v. Seminole Rock & Sand Co.*, the Court said that such determinations should be given deference unless they are "plainly erroneous or inconsistent with the regulation." Id. at 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945)). HN12[↑] Further, the Court instructed that, "if the guideline which the commentary interprets will bear the construction," the commentary can expand the guidelines, particularly when the commentary is "interpretive and explanatory." Id. at 46-47. Accordingly, so-called *Seminole Rock*

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[9] Nasir has other prior convictions, but the government and Nasir appear to agree than none of them qualify as predicate offenses.

[10] HN11[↑] An inchoate offense is "[a] step toward the commission of another crime, the step itself being serious enough to merit punishment." Offense, *Black's Law Dictionary* (11th ed. 2019). Inchoate offenses include, for example, the attempt, conspiracy, or solicitation to commit a crime. *Id.*

[11] The Sentencing Commission has proposed an amendment to the guidelines to explicitly include inchoate offenses in section 4B1.2(b). Notice of Proposed Amendments, 83 Fed. Reg. 65400-01, 65412-15 (Dec. 20, 2018). The proposed change has been submitted for notice and comment, and the time for notice and comment has closed. *Id.* However, the Commission does not currently have a quorum (and has not had one since at least 2018), so it cannot act on that issue. U.S. Sentencing Commission, 2018 Annual Report 2-3, at available https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report.pdf.

deference, also sometimes called *Auer* deference,[12] governs the effect to be given to the guidelines commentary.

Our precedent has followed that course. In *United States v. Hightower, 25 F.3d 182 (3d Cir. 1994)*, we applied the principles set forth in *Stinson* to determine whether inchoate crimes are covered by *sections 4B1.1* and *4B1.2* of the sentencing guidelines. We asked "whether the Sentencing Commission exceeded its statutory authority by expanding the definition of a controlled substance offense" when it included inchoate offenses [*21] as part of the definition of the term "controlled substance offense" in the commentary to *section 4B1.2*. *Hightower, 25 F.3d at 184* (internal quotation marks omitted). We determined that the commentary to *4B1.2* was explanatory and therefore binding. *Id. at 185-87*. Specifically, although we admitted that the inclusion of inchoate crimes was an "expansion of the definition of a controlled substance offense[,]" we said that the expansion was "not 'inconsistent with, or a plainly erroneous reading of,' *§ 4B1.2(2)* of the [s]entencing [g]uidelines, and that it does not 'violate[ ] the Constitution or a federal statute.'" *Id. at 187* (second two alterations in original) (quoting *Stinson, 508 U.S. at 38*). We later followed that precedent in *United States v. Glass, 904 F.3d 319 (3d Cir. 2018)*, in which we held that a conviction under a Pennsylvania "attempt" statute qualified as a predicate controlled substance offense for the career offender enhancement under the guidelines.

Our interpretation of the commentary at issue in *Hightower* — the same commentary before us now — was informed by the then-prevailing understanding of the deference that should be given to agency interpretations of their own regulations. Thus, although we recognized that the commentary expanded and did not merely interpret the definition of "controlled substance offense," [*22] we nevertheless gave it binding effect. In doing so, we may have gone too far in affording deference to the guidelines' commentary under the standard set forth in *Stinson*. Indeed, after the Supreme Court's decision last year in *Kisor v. Wilkie, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019)*, it is clear that such an interpretation is not warranted.

In *Kisor*, the Court cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer*, or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous. *Id. at 2414-15*. *HN13*[↑] *Kisor* instructs that "a court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Id. at 2415* (citation, brackets, and quotation marks omitted). Thus, before deciding that a regulation is "genuinely ambiguous, a court must exhaust all the traditional tools of construction." *Id.* (citation and quotation marks omitted).

HN14[↑] Even when a regulation is ambiguous, there are limits to deference. The agency's reading must be "reasonable[,]" as informed by "[t]he text, structure, history, [*23] and so forth[,]" which "establish the outer bounds of permissible interpretation." *Id. at 2415-16*. A court "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight[,]" including whether it is the agency's "official position[.]" *Id. at 2416*. Moreover, an agency's interpretation must "in some way implicate its substantive expertise" if it is to be given controlling weight, since "[s]ome interpretive issues may fall more naturally into a judge's bailiwick." *Id. at 2417*. Finally, the reading must "reflect fair and considered judgment" and not simply be a "convenient litigating position." *Id.* (citations and quotation marks omitted). *HN15*[↑] In short, the degree of deference to be given an agency's interpretation of its own regulations is now context dependent.

3. *Plain Text and Policy*

The definition of "controlled substance offense" in *section 4B1.2(b)* of the guidelines is, again, in pertinent part as follows:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance [*24] (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b). *HN16*[↑] The guideline does not even mention inchoate offenses. That alone indicates it does not include them. The plain-text reading of *section 4B1.2(b)* is strengthened when contrasted with the definition of "crime of violence" in the previous subsection. That definition in *section 4B1.2(a)* does explicitly include inchoate crimes, *see U.S.S.G. § 4B1.2(a)* ("The term 'crime of violence' means any offense ... that — (1) has as an element the use, *attempted* use, or threatened use of physical force against the person of another[.]" (emphasis added)), which further suggests that the omission of inchoate crimes from the very next subsection was intentional.

That suggestion is separately bolstered by the fact that *section 4B1.2(b)* affirmatively lists many other offenses that do qualify as controlled substance offenses. As a familiar canon of construction states, *expressio unius est exclusio alterius*: the expression of one thing is the exclusion of the other. Applying that canon has led at least one court of appeals to conclude that *section 4B1.2(b)* does not include inchoate crimes. *See United States v. Winstead, 890 F.3d 1082, 1091, 435 U.S. App. D.C. 395 (D.C. Cir. 2018)* ("*Section 4B1.2(b)* presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate [*25] offenses.").

There is an important additional policy advantage to the plain-text approach: it protects the separation of powers. If we accept that the commentary can do more than interpret the guidelines, that it can add to their scope, we allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty. Unlike the guidelines, the commentary "never passes through the gauntlets of congressional review or notice and comment." *United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019)* (en banc) (per curiam); *see also United States v. Swinton, 797 F. App'x 589, 602 (2d Cir. 2019)* (quoting same and remanding for resentencing with an instruction for the district court to "consider again whether, in light of the concerns addressed in *Havis* and *Winstead*, the career offender [g]uideline applies" to a defendant whose predicate offenses for the career offender enhancement include a conviction for attempted criminal sale of a controlled substance).

On that basis, along with the plain text of the guidelines, another of our sister courts of appeals has rejected the notion that commentary to *4B1.2(b)* can expand the guidelines' scope. *See Havis, 927 F.3d at 386*. (Because it has not been approved by Congress, "commentary has [*26] no independent legal force—it serves only to *interpret* the [g]uidelines' text, not to replace or modify it."). We too agree that separation-of-powers concerns advise against any interpretation of the commentary that expands the substantive law set forth in the guidelines themselves. *Cf. 28 U.S.C. § 995(a)(20)* (granting the Sentencing Commission power to "*make recommendations* to Congress concerning modification or enactment of statutes relating to sentencing[.]" (emphasis added)).

HN17[↑] In light of *Kisor*'s limitations on deference to administrative agencies, we conclude that inchoate crimes are not included in the definition of "controlled substance offenses" given in *section 4B1.2(b)* of the sentencing guidelines. Therefore, sitting en banc, we overrule *Hightower*, and accordingly, will vacate Nasir's sentence and remand for resentencing without his being classified as a career offender.

E. The Felon-in-Possession Conviction

The final issue on appeal concerns Nasir's conviction under *18 U.S.C. § 922(g)* for being a felon in possession of a firearm. *HN18*[↑] After Nasir filed his opening brief, the Supreme Court decided *Rehaif v. United States*, holding that, "in a prosecution under ... *§ 922(g)* ..., the Government must prove both that the defendant knew he possessed [*27] a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *139 S. Ct. at 2200*. The latter half of that holding — that the government must prove that the defendant knew of his status as a person prohibited from having a gun — announced a newly found element of the crime. *HN19*[↑] For a defendant like Nasir, a previously convicted felon, that knowledge-of-status element means that the government has to prove that he knew he was a "person ... who has been convicted ... of ... a crime punishable by imprisonment for a term exceeding one year." *18 U.S.C. § 922(g)(1)*. Proving that a felon knew he possessed a gun remains necessary but is no longer sufficient for a conviction. Proof of knowledge of status is now essential.

Rehaif represents a reevaluation of an old and oft-invoked criminal statute. Nasir responded to the Supreme Court's opinion by promptly filing a

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[12] In 1945, the Supreme Court upheld a regulation from the Office of Price Administration in *Bowles v. Seminole Rock*, after it determined that the language of the regulation was consistent with Administration's interpretation of the regulation. *Seminole Rock, 325 U.S. at 417*. *Seminole Rock* thus became shorthand for the doctrine of deference to an administrative agency's interpretation of its own regulations. More than fifty years later, in *Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)*, the Court reinforced that doctrine. The doctrine is thus sometimes referred to as *Seminole Rock* deference, after the case that introduced it, and at other times referred to as *Auer* deference, the more recent reiteration of the doctrine.

Retrial is thus allowed and warranted. We will therefore vacate Nasir's conviction on the § 922(g) count of the indictment, and we will remand for a new trial on that charge, at the government's discretion.

III. CONCLUSION

The frustration of diligent prosecutors in this case is to be expected and is fully justified. They did not know they had to, and hence did not, present evidence to the jury to prove that the defendant knew he was a felon when he possessed a firearm. Likewise, the burden on the busy District Court is regrettable, since it too was operating on the then-widely shared understanding of the elements of a § 922(g) offense. HN44[↑] Nevertheless, "[t]he prosecution's failure to prove an essential element of the charged offense [is] plain error [and]... a miscarriage of justice." United States v. Castro, 704 F.3d 125, 138 (3d Cir. 2013) (citations omitted).

In sum, we will affirm Nasir's conviction under the crack house statute and for possession with intent to distribute marijuana. We will vacate his sentence, as it was based on the [*56] application of the career offender enhancement that we have here concluded should not be applied, and we will vacate his conviction as a felon in possession of a firearm. Accordingly, we will remand for a new trial on that charge and for resentencing.

Concur by: BIBAS (In Part); MATEY; PORTER (In Part)

Concur

BIBAS, *Circuit Judge*, concurring in part.

Judges interpret the law. That applies to the U.S. Sentencing Guidelines too. If the Sentencing Commission's commentary sweeps more broadly than the plain language of the guideline it interprets, we must not reflexively defer. The judge's lodestar must remain the law's text, not what the Commission says about that text.

So too here. The plain text of the Guidelines' career-offender enhancement does not include inchoate crimes. The commentary says that it does. The majority rightly rejects this extra-textual invitation to expand a serious sentencing enhancement, and I join Part II.D of its opinion.

But the narrow scope of today's holding hints at a broader problem. For decades, we and every other circuit have followed the Supreme Court's guidance in *Stinson*. That meant we gave nearly dispositive weight to the Sentencing Commission's commentary, not the Guidelines' [*57] plain text. 508 U.S. at 44-46; *see also, e.g.*, United States v. Keller, 666 F.3d 103, 108-09 (3d Cir. 2011); United States v. Boggi, 74 F.3d 470, 474-75 (3d Cir. 1996).

Now the winds have changed. In *Kisor*, the Supreme Court awoke us from our slumber of reflexive deference: agency interpretations might merit deference, but only when the text of a regulation is truly ambiguous. Before deferring, we must first exhaust our traditional tools of statutory construction. Anything less is too narrow a view of the judicial role.

We must look at things afresh. Old precedents that turned to the commentary rather than the text no longer hold. *See* Hassen v. Gov't of the V.I., 861 F.3d 108, 114 n.5, 66 V.I. 973 (3d Cir. 2017) (noting that we may revisit our precedents when they conflict with intervening Supreme Court precedent). Tools of statutory interpretation have thus been thrust to the fore. And one tool among many stands out as well suited to the task: the rule of lenity. As we rework our Sentencing Guidelines cases, lenity is the tool for the job.

I. The Rule of Lenity's Virtues

As Chief Justice Marshall explained, the rule of lenity is venerable. "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95, 5 L. Ed. 37 (1820). It first arose to mitigate

("Moreover, the government here cannot be held responsible for 'failing to muster' evidence sufficient to satisfy a standard which did not exist at the time of trial." (citation omitted)); United States v. Weems, 49 F.3d 528, 531 (9th Cir. 1995) (holding that "double jeopardy protections do not bar retrial" when "[t]he government had no reason to introduce such evidence because, at the time of trial, under the law of our circuit, the government was not required to prove" that element); *see also* Rehaif, 139 S. Ct. at 2201 (Alito, J., dissenting) (noting that, following the majority's decision, "[a] great many convictions will be subject to challenge, threatening the release or retrial of dangerous individuals whose cases fall outside the bounds of harmless-error review.").

draconian sentences. As English statutes kept expanding the death penalty and curtailing mercy, courts tempered them [*58] by construing them narrowly. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 748-51 (1935). The canon was well established by the time of Blackstone. 1 William Blackstone, *Commentaries* *88. And it took root in our law soon thereafter. Wiltberger, 18 U.S. (5 Wheat.) at 95.

Under the rule of lenity, courts must construe penal laws strictly and resolve ambiguities in favor of the defendant. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 427, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 296 (2012). The touchstone is the text: the "ordinary," evidently intended meaning of "the words of the statute." Wiltberger, 18 U.S. (5 Wheat.) at 95.

The rule of lenity serves three core values of the Republic. First, it is entwined with notice and thus due process. *See* McBoyle v. United States, 283 U.S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816 (1931) (Holmes, J.); United States v. R.L.C., 503 U.S. 291, 309, 112 S. Ct. 1329, 117 L. Ed. 2d 559 (1992) (Scalia, J., concurring). It gives citizens fair warning of what conduct is illegal, ensuring that ambiguous statutes do not reach beyond their clear scope.

Second is the separation of powers. As Chief Justice Marshall explained, the rule of lenity stems from "the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." Wiltberger, 18 U.S. (5 Wheat.) at 95. If Congress wants [*59] to criminalize certain conduct or set certain penalties, it must do so clearly.

And third but perhaps most importantly, the rule of lenity serves our nation's strong preference for liberty. As Judge Henry Friendly explained, lenity expresses our "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* Benchmarks 196, 209 (1967). That approach fits with one of the core purposes of our Constitution, to "secure the Blessings of Liberty" for all citizens. U.S. Const. pmbl. Penal laws pose the most severe threats to life and liberty, as the Government seeks to brand people as criminals and lock them away. To guard against those threats, the rule of lenity favors respect for individual rights. Wiltberger, 18 U.S. (5 Wheat.) at 95. Together with the Double Jeopardy and Cruel and Unusual Punishments Clauses, lenity is a longstanding safeguard against excessive punishment. John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. Davis L. Rev. 1955, 1982-2001 (2015).

II. Lenity, Sentencing, and *Kisor*

An agency's reading of its own regulation used to be almost dispositive. That applied equally to the U.S. Sentencing Commission and its commentary. Stinson, 508 U.S. at 44-46. But no more. Now, before a [*60] court defers to an agency interpretation, first it "must exhaust all the 'traditional tools' of construction." Kisor, 139 S. Ct. at 2415 (quoting Chevron USA Inc. v. NRDC, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer" may we give *Auer* deference to an agency's reading of its own rule. *Id.*; *see* Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

A key tool in that judicial toolkit is the rule of lenity. Rather than defer to the commentary, we should use lenity to interpret ambiguous Guidelines. Even though the Guidelines are advisory, they exert a law-like gravitational pull on sentences. *See* United States v. Booker, 543 U.S. 220, 265, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (Breyer, J., remedial majority opinion); Peugh v. United States, 569 U.S. 530, 543-44, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013); U.S. Sentencing Comm'n, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics* 8 (reporting that last year, 75% of offenders received sentences that were either within the Guidelines range or justified by a Guidelines ground for departure). So courts must still attend to the rule and its animating principles.

Lenity's third, key purpose applies here. True, one can debate the relevance of its first two purposes: whether the commentary gives enough notice and whether congressional approval of guidelines with their commentary respects the separation of powers. *Compare* Mistretta v. United States, 488 U.S. 361, 380-411, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989), *with id.* at 422-27 (Scalia, [*61] J., dissenting). But in any event, the presumption of liberty remains crucial to guarding against overpunishment. When a guideline is ambiguous, the rule of lenity calls for adopting the more lenient of two plausible readings. It helps ensure that "criminal punishment . . . represents the moral

condemnation of the community." *United States v. Bass, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971)*.

There is no compelling reason to defer to a Guidelines comment that is harsher than the text. Whatever the virtues of giving experts flexibility to adapt rules to changing circumstances in civil cases, in criminal justice those virtues cannot outweigh life and liberty. Efficiency and expertise do not trump justice. Though expertise improves things for the future, sentencing requires justice tethered to the past. The rule of lenity takes precedence as a shield against excessive punishment and stigma.

That does not mean that lenity displaces all commentary. Only when a comment to an otherwise ambiguous guideline has a clear tilt toward harshness will lenity tame it. Some provisions may have no consistent tilt across all defendants. If so, *Auer* deference might still apply.

Here, however, the guideline's plain text does not include inchoate offenses. The commentary **[*62]** says it does, making it harsher. So we rightly refuse to defer.

* * * *

Courts play a vital role in safeguarding liberty and checking punishment. That includes reading the Sentencing Guidelines. Some provisions are ambiguous. But as *Kisor* teaches, instead of deferring to the commentary the moment ambiguity arises, judges must first exhaust our legal toolkit. This will require work; our old precedents relying strictly on the commentary no longer bind. In undertaking this task, we must not forget the rule of lenity.

MATEY, *Circuit Judge*, concurring.

I concur in the majority opinion in full and write separately as to Part II.E.

Start with this question: how many people serving on a jury in the United States know exactly what it means to be "a felon?" Most, we can guess, know that a felon has run into some trouble with the law. Others, that the person has been convicted of a crime. A particularly serious crime, at least some might say. But how many of the twelve would know the precise definition used by Congress in *18 U.S.C. § 922(g)(1)*, someone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"? No matter, of course. The government will explain it all as **[*63]** it proves the elements of *§ 922(g)*. And along the way, a few jurors will be surprised to learn that a felony is a very particular kind of crime. That despite countless depictions in culture, both popular and timeless, a "felon" is not just a "villain." *See, e.g.*, Felon, Webster's Third New International Dictionary 836 (1993).

Now ask a harder question: if at least some of those jurors need the arguments of a lawyer to get to the right meaning of "felon," then will they all, unanimously and inevitably, conclude that the defendant knew it, too? Perhaps the government's evidence does not add up. Recollections fade, records fail to materialize, witnesses flounder. Might not the defendant's attorney find a chance to sow doubt?

Then, end with the most challenging question: what if those jurors never heard any evidence that the defendant knew he met the exacting definition of "felon" in *§ 922(g)*? That is the issue before us today, an issue that has in recent years appeared throughout the federal courts. And I believe it requires us to properly frame the question presented. On the one hand, we can view the issue as whether the fourth prong of *Olano*'s standard of review for plain error should allow an appellate **[*64]** court to "look outside the record" to find proof of guilt that would affirm an otherwise invalid conviction. On the other hand, we can ask whether the *Sixth Amendment* as originally understood includes an exception to the guarantee that an impartial jury determines a defendant's guilt. An exception that allows appellate courts to independently find an element of an offense proven beyond a reasonable doubt, using proof never presented to the jury.

It is an important distinction because when confronted with a novel question of constitutional law, that is, one not directly controlled by precedent, we should ask if the original understanding of the Constitution tolerates a certain result. No court, it appears, has considered whether the *Sixth Amendment*, as originally understood, allows judges to make a factual determination on an unproven element of an offense by considering documents outside the evidentiary record. Applying *that* test, I have sufficient doubt that the scope of judicial authority imagined by the Framers reaches past the horizon of the *Sixth Amendment's* guarantee. And I do not read *Olano*, as best understood in light of the history of the plain error doctrine, to allow for a result contrary to the original understanding **[*65]** of the *Sixth Amendment*. For those reasons, as I explain below, I

IN THE FOURTH CIRCUIT COURT OF APPEALS

In Re: US v Daryl Barley App. No. 20-6760

MOTION TO VACATE JUDGMENT/MANDATE AND RE-ENTER

On Jan 8,2021, I Daryl Barley filed a Motion for En Banc & Rehearing. After several months of not hearing from the Courts I called on May 21,2021 and spoke with the Clerk, in which I was then notified that my Motion for Rehearing was denied on jan 25,2021. I informed the Clerk that I never got the denial and asked what I could do. I was told that I could file the Writ to the SP. Court. I got off the phone and researched and found out that there is a 90 day time frame to file, that has been extended for 30-60 more days. However, because I have not received the denial and do not have the Writ of Cert forms to be used,I am requesting that the Court Vacate the Denial/Mandate and re-issue the denial, so that I may get my full 90 day timeframe and write to the Sp. Ct to get the Package.

Respectfully submitted on this 24 May,2021

S/ Dgl Bayl

Mr. Daryl Barley
Fed No. 14643-084
FCI Butner II
PO Box 1500
Butner, NC 27509

Certificate of Service, 28 USC 1746

I, Darly Barley, do hereby swear under the penalty of perjury that a copy of the herein Motion has been sent to the 4th Circuit of Appeal Court and to the US Supreme Court via US Postal Mail on this 24 day of May,2021 from FCI Butner II.

S/ Dgl Bayl

Mr. Daryl Barley

ATT: Supreme Court Clerk of Court

In re: Requesting Writ of Certiorari Package and Pro Se Forms

My name is Mr. Daryl Barley and I was just informed that my Panel Rehearing /En Banc filing was denied on Jan 25,2021.I did not even find out until May 21,2021 by talking with the 4th Circuit Court of Appeals Clerk. I am requesting a 60-90 day extension as well as the Writ of Certioarari Forms to be sent to me at the below address. Thank you for your time. See attached Letter/Motion to 4th Cir. Clerk.

Respectfully submitted on May 24,2021 by:

S/ Dayl Bayl

Mr. Daryl Barley
Fed No. 14643-084
FCI Butner II
PO Box 1500
Butner,NC 27509

Certificate of Service, 28 USC 1746

I, Daryl Barley do hereby swear under the penalty of perjury that a copy of the herein has been sent via US Postal Mail to the US Supreme Court, 1 First St., NE, Washington, DC 20543 on this 24 day of May, 2021.from FCI Butner II.

S/ Dayl Bayl

Mr. Daryl Barley

APPENDIX B

INITIAL APPEAL BRIEF FILINGS AND ORDERS

App. No. 20-6760

FILED: May 26, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6760
(4:10-cr-00010-JLK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DARYL WENDELL BARLEY, a/k/a Black

Defendant - Appellant

ORDER

Counsel's motion to withdraw from representation on appeal is granted. The motion for appointment of substitute counsel is deferred pending review of the appeal on the merits following informal briefing.

Further proceedings on appeal are suspended, and this case is remanded to the district court for the limited purpose of permitting the district court to rule on the pending motion for reconsideration.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6760

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DARYL WENDELL BARLEY, a/k/a Black,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, Senior District Judge. (4:10-cr-00010-JLK-1)

Submitted: November 16, 2020 Decided: December 21, 2020

Before MOTZ, DIAZ, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion

Daryl Wendell Barley, Appellant Pro Se. Jennifer R. Bockhorst, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Abingdon, Virginia, for Appellee.

PER CURIAM:

Daryl Wendell Barley seeks to appeal the district court's orders granting relief on his motion for a sentence reduction pursuant to the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, and granting Barley's motion for reconsideration but declining to further reduce his sentence. We have reviewed the record and find no reversible error. Accordingly, we affirm. *United States v. Barley*, No. 4:10-cr-00010-JLK-1 (W.D. Va. May 18, 2020; June 3, 2020). We deny Barley's motion for appointment of counsel and grant his motion for leave to supplement the record. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
INFORMAL BRIEF

No. 20-6760, US v. Daryl Barley
4:10-cr-00010-JLK-1

1. **Declaration of Inmate Filing**

An inmate's notice of appeal is timely if it was deposited in the institution's internal mail system, with postage prepaid, on or before the last day for filing. Timely filing may be shown by:

- a postmark or date stamp showing that the notice of appeal was timely deposited in the institution's internal mail system, with postage prepaid, or
- a declaration of the inmate, under penalty of perjury, of the date on which the notice of appeal was deposited in the institution's internal mail system with postage prepaid. To include a declaration of inmate filing as part of your informal brief, complete and sign the declaration below:

Declaration of Inmate Filing

Date NOTICE OF APPEAL deposited in institution's mail system: 6/9/2020 + 5/18/2020

I am an inmate confined in an institution and deposited my notice of appeal in the institution's internal mail system. First-class postage was prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Signature: Mr. Daryl W. Barley 14643-084 Date: 6/10/2020

[*Note to inmate filers: If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).*]

2. **Jurisdiction**

Name of court or agency from which review is sought:
W.D. VA, Danville Division

Date(s) of order or orders for which review is sought:
4/2/19, 5/18/20 and 6/3/20

3. **Issues for Review**

Use the following spaces to set forth the facts and argument in support of the issues you wish the Court of Appeals to consider. The parties may cite case law, but citations are not required.

Issue 1. Should the Court vacate the order + Remand For Reconsideration Before A New Judge?

Supporting Facts and Argument.

See BRIEF ATTACHED

Issue 2. Should the CLEAR + CONVINCING STANDARD be APPLIED TO "Ghost Dope FINDINGS" INSTEAD OF PREPONDERANCE OF EVIDENCE?

Supporting Facts and Argument.

See BRIEF ATTACHED

Issue 3. NA

Supporting Facts and Argument.

NA

Issue 4. NA

Supporting Facts and Argument

NA

4. **Relief Requested**
Identify the precise action you want the Court of Appeals to take:

1) To VACATE the JUDGMENT(S), REMAND FOR RECONSIDERATION BEFORE A NEW JUDGE + APPOINT NEW COUNSEL TO TIMELY + PROPERLY FILE A "FULL MOTION ON MR. BARLEY'S BEHALF."

5. **Prior appeals (for appellants only)**
A. Have you filed other cases in this court? Yes [X] No [ ]

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?
US v BARLEY 11-4213 + 13-6525 BOTH DENIED

DARYL W. BARLEY, 14643-084
Signature
[Notarization Not Required]

DARYL W. BARLEY
[Please Print Your Name Here]

CERTIFICATE OF SERVICE
****

I certify that on 6/9/20 I served a copy of this Informal Brief on all parties, addressed as shown below: AUSA, JENNIFER R. BOCKHORST
180 W. MAIN ST., SUITE B-19
ABINGDON, VA 24210

DARYL W. BARLEY, 14643-084
Signature

NO STAPLES, TAPE OR BINDING PLEASE

In the Fourth Circuit of Appeals

United States of America
vs
Daryl Barley, Appellant

App. No 20-6760
Crim No. 4:10-cr-00010-JLK

Informal Brief of Appellant

Comes now the Appellant, Mr. Daryl Barley, and Request that this Court Remand the Case for Reconsideration before a "New Judge" To Allow Reconsideration of the "Amount of Reduction" for the Following Reasons:

I. Applicable Facts

1) On May 13, 2010, the Western District of Virginia, Danville Division Returned a Multiple Count Indictment for various Drug offensses stemming from 2009 for Crack/Powder Cocaine offenses.

2) Mr. Barley pled guilty to 2 cts of the Superseding Indictment for: (Doc 40)
Ct-2s Sell, Distribute or Dispense, 21 USC 841(A) & (B)(1)(A) (10-Life) with 851 Filing 20-Life
Ct-3s Sell, Distribute or Dispense, 21 USC 841(A) & (B)(1)(C) (0-20 yrs) with 851 Filing 0-30 yrs

3) On 2/4/11, the Court Imposed 292 mts Concurrently on Cts 2-3s (Doc 52)

4) MR. BARLEY FILED A TIMELY APPEAL, WHICH WAS DISMISSED ON 11/4/11. (DOC 57 + 75) (11-4213 US v BARLEY, 4TH CI- 2011)

5) MR. BARLEY FILED A TIMELY 2255 (DOC 78) WHICH WAS DENIED + THE COA WAS DENIED AS WELL. (4:12-CV-80417-JLK, BARLEY v US, AND 13-6525 (BARLEY v US, DISMISSED)

6) THE APPELLANT FILED FOR A REDUCTION IN SENTENCE IN LIGHT OF THE FAIR SENTENCING ACT, WHICH WAS DENIED DUE TO THE ACT [NOT BEING RETROACTIVE.] (DOC 80 & 86)

7) MR. BARLEY THEN FILED A MOTION FOR REDUCTION PURSUANT TO AMENDMENT 782, WHICH WAS GRANTED (DOC 111) ON APRIL 21, 2015, IN WHICH THE COURT REDUCED BOTH COUNTS FROM 292 to 240 MTHS. (DOC 111)

8) ON DEC 21, 2018, THE 1ST STEP ACT WAS ENACTED + DECLARED THE FAIR SENTENCING ACT AS RETROACTIVE (SEE # 6 ABOVE), WHICH CHANGED MR. BARLEY'S STATUTORY PENALTIES FROM 20 TO LIFE TO NOW 10 TO LIFE. (164 CONG. RE S7020, S7021)

9) ON JAN 28, 2019, THE COURT FILED MR. BARLEY'S NEW LETTER/ 1ST ACT MOTION (DOC 112) + REQUEST FOR COUNSEL.

10) AFTER APPOINTING THE PUBLIC DEFENDER'S OFFICE, COUNSEL CHRISTINE LEE WAS APPOINTED. (SEE EX A, LETTER FROM MARCH 27, 2019)

11) Hence, Mr. Barley sent the requested Program Achievements To Counsel Lee & the Counsel received the letters of support As requested. (See Ex A)

12) On March 29, 2019, the Revised PSR was Prepared, which included the "Revelant Conduct" + Revisions. (Doc 114)

13)* On April 2, 2019, the Honorable Judge Kiser Reduced Mr. Barley's sentence From 240 mths To 235 mths + [Failed To Await] For the [Counsel Lee to File Anything In Support of A Reduction Mot to object To the PSR Findings.] (See Doc 115) And (Ex B District Court Order)

14) As A part of the Plea between the Parties, Mr. Barley was Responsible For [361.7 grams of "Powder Cocaine" And 61.7 grams of "Cocaine Base".] In 2009, these Levels produced A [Bol of 22] For the Powder + [26 For the Crack Cocaine.] (See Ex C 2255 Filing Doc 96 p 1-2). The PSR returned with these Same 361.7 + 61.7 Findings (p. 2 of 2255 order in Case No. 4:12-CV-80417-JCK, Doc 96-97) But According to the PSR + Ftn 2 of the 2255, Mr. Barley Faced A guideline Range of 324 to 405 [if] he went To trial + was Found guilty of the 3 cts in the Superseding Indictment. [But] Mr. Barley did not go to Trial + Mr. Barley did not plead guilty To All 3 cts, instead 2 cts. But Because of the 2009 Statutory Penalty + 851 Filing, the Court was bound To the

240 mths Statutory Pre-FSA penalties. But At Sentencing the Petitioner's 2D1.1 Findings were INCREASED DUE To the Subsequent Arrest post plea Conduct & the Cocaine Base was Changed From 61.7 grams to A whopping 2,061.7 grms of Crack. (See 2255, Ex C, P.2) & the Cocaine Powder & Cocaine Base were Converted to A new Marijuana Equivalent of 9,741 Kilograms of Marijuana, which was A new sentencing Finding of 324 to 405 mths based upon the Revelant Conduct Attribution via "Ghost Dope"
Today this Amount of Powder Cocaine is 20 (361.7 grams) And the Crack is A level 34, which As A Category 5 & is 235-293 mths.

15) The Counsel Lee became Aware of the order issued on 4/2/20 & Filed To Reconsider & Allow the Counsel To File A Full Motion, Accompanied with Certificates & Letters of Support & Judge Kiser with New the order & Granted the Counsel's Request. (See Feb 3, 2020 order & Filings of Also Feb 14, 2020)

[However]

16) Counsel Lee Emailed the Honorable Judge & Requested A New Extension til March 9, 2020. But Counsel Again Failed To File. After "Being Contacted by the Court" In Regard To the [Failure to File], the Counsel Lee Again Stated "I have one other thing To File prior to that, so please expect it From me by Wednesday." But on April 22, 2020, the Counsel Still had Not Filed Anything, 3 wks Later. (See Court Order in Ex D, Doc 121)

17) Because of the Frustrations of the Counsel's inAction + Failure's To Follow thru with her promises To the Court, the Court proceeded Again + Reduced Mr. Banley's sentence by An additional 5 mths From 235 to 230 mths. (See Ex D, Court order + Reasoning) (Doc 121-122)

18) The Court Released the 5/18/20 (Doc 122) And Mr. Banley Filed An Appeal pro se. After he Filed he Received A Letter From Counsel Lee on 5/21/20 + Attached A Filing of Reconsideration based upon the Family Support letters (See Ex E)

19) The Appeal Court issued A order to Suspend the Appeal + Deferred the Appointment of Counsel substitution til the District Court Ruled on the Motion For Reconsideration. (Ex F, Court of Appeals order, Doc 127, 5/26/20)

20) On 6/3/20, the District Court Judge Kisen, Granted the Delayed Counsel's Filing based upon the Appeal order But "Declined To Further Relief". (Ex G, Doc 130)

21) The Petitioner Filed A new pro se Appeal + on 6/9/20 Received the Informal Briefing Package + Now Files his Pro se Brief + Renews his Request For the Assignment of Appellant Counsel + seeks the Forms of Relief As:
1) Remand For Reconsideration before A new Judge [OR]
2) Assigning of New Counsel, with orders To Timely File the Full Motions of Reduction.

II ARGUMENT - 1st IMPRESSION ISSUE

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO WAIT FOR COUNSEL TO FILE A FULL MOTION FOR REDUCTION ON THE PETITIONER'S BEHALF? [IF NOT,] THEN SHOULD THE PETITIONER BE FORCED TO ENDURE THE ACTIONS BASED UPON THE COUNSEL'S OWN NEGLIGENCE & FAILURES. AND WHAT IS THE APPROPRIATE REMEDIES FOR 1 OR BOTH OF THE ACTIONS?

THERE IS A THING CALLED "BAD LAWYERING" AND THE PETITIONER HAS BEEN SUBJECTED TO SUCH "BAD LAWYERING" THAT HAS CAUSED THE COURT TO ACT IRRATIONALLY WHEN CONSIDERING MR. BARLEY'S APPROPRIATE REDUCTION. (SEE WRIGHT V FED BOP 451 F.3d 1231 (11TH 2006). A COMPETENT, FIRST CLASS LAWYER CAN TIE A CASE UP IN KNOTS, NOT ONLY FOR THE JURY, BUT FOR THE JUDGE AS WELL... AND IT IS THE ABLE LAWYERS [NOT THE INCOMPETENT ONES] WHO SHOULD NOT BE PERMITTED IN THE COURTROOM SINCE THEY ARE THE ONES WHO ARE DOING ALL THE DAMAGE. SEE ALSO ART BUCHWALD, BAD LAWYERS ARE VERY GOOD FOR THE U.S. JUSTICE SYSTEM, 64 A.B.A. J. 328 (1978)

THE PETITIONER IS AWARE THAT THE 3582 IS NOT A 2255 FILING, BUT THE COURT WOULD BE REMISS IN ITS DUTY IF IT DID NOT CONSIDER THE FRUSTRATIONS OF THE COURT TOWARD THE COUNSEL'S NEGLIGENT & LACK OF HONOR TOWARD THE COURTS ORDERS & PETITIONER'S LIFE & LIBERTY INTEREST. (LAINE V RICHARDS 957 F.2d 363 (7TH CIR. 1992); MALAUREA V SUZUKI MOTOR CO, 987 F.2d

1636 (11th 1993) ... "[All Attorney's] are officers of the Court & owe Duties to complete candour & primary loyalty To the Court before which they practice and an Attorney's duty to A Client can never outweigh his/her responsibility to see own system of justice Function smoothly"); ABDUL-SALAAM v PA Dept of Corr 14-9001 (3rd 2018) Bad Language)

In this case, Mr. Barley wrote a Letter to the Court in Regard to A Reduction & asked For Counsel to be Appointed. (Doc 112) In Between this Request, the Counsel Lee Did Contact Mr. Barley thru its Associate (Ex A) But Afterwards "Dropped the Ball" & not only Frustrates the Court & its Decision Process, But Also "became the ongoing problem" up to this Filing. Mr. Barley is Asking the Court To Consider, As A 1st Impression, How To Resolve Such woeful Actions, Frustrations & Decisions, which possibly DEPRIVE Defendants of A greater Chance of A Reduction.

The 1st Step Act Did Leave it At the Judges Discretion to Reduce A Sentence & how much. But when the Courts Orders Counsels To be Assigned on A Standing Order is issued For this Purpose, then the Court should Await the Counsels Filing & the Counsel should timely & Properly File, Especially when the Court gives the Counsel Extentions To Do So. Therefore, Mr. Barley's Case should be Remanded For Reconsideration Before A New Judge & with A New Appointed Counsel so that his Case may be properly Considered (US v Gilyard 18-7071 (4th 2019); Rippo v State 368 P.3d 729, 16-6316 (Sp. Ct 2017) Judge Recusal)

III. The PSIR Drug Quantity is not Binding in 3582 Motions For Reduction. But should the Court apply the Clear & Convincing Standard instead of the Preponderance of Evidence?

In US v Rodriguez 921 F.3d 1149 (9th 2019), which is not binding on this Court but is persuasive Authority, the Court held that the PSIR Findings of Relevant Conduct are not Binding in 3582 Motions For Reductions. Because the Court erred in Relying on the PSIR Findings in Determining the Reduction, the 9th Cir of Appeal Vacated the Decision & Remanded For Further Consideration. (See US v Killough 17-10165 (5th Cir 2019) & US v Sterling 18-2974 (8th Cir 2019) both holding the Court Erred in "Adopting" the "Drugs Attributes & the gov. Failed To prove the Quantities" Here, this Court must Consider which Standard of proof Should be "relied upon" when Determining the Reduction because without the Additional 2000 grams of Crack that was Attributed At Sentencing, Mr. Barley's BOL is 24; Instead of 32. The difference between these are substantially Different & the Category V Findings Differ From 77-96 (As BOL 24) to A Dramatic 210-262 based upon the Amount of Cocaine base Differential.[1]

Therefore, The Difference is 300% Lower & warrants this Courts guidance, Especially since the Congressional Body is moving To Reduce the Crack to Powder to 1:1 As of June 8th, 2020, to Cure the Racial Disparity in Drug Offenses. (See US v Lopez 14-30210 (9th Cir 2016)

[1] As According To the H.R. Bill _____, the Congressional Body is Moving As of June 8, 2020 To Reduce the Crack to powder Ratio to 1:1 From 18:1, which would Reduce Barley's 201.1 Finding to 26

The Clear & Convincing evidence standard is defined as: "evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a "greater burden" than preponderance of the evidence but less than the Reasonable Doubt standard. (Black's Law Dict, Abridged 10th ED p. 488); See also US v Collazo 15-50509 (9th Cir, En Banc Pending, the question is "usage of Ghost Dose & Relevant Conduct"); US v Audain 15-13217 (11th Cir 2018)

Therefore, because A "Bare Arrest" does not justify An assumption that A defendant has committed other crimes, this Court should Require the Clear & Convincing standard to be "the rule" when Resolving Sentencing & Resentencing issues. (US v Mitchell 17-1095 (3rd 2019); US v Ridgill 18-50128 (9th Cir 2019). The Court erred in using the preponderance of evidence standard instead of using the Clear & Convincing standard) quoting US v Felix 561 F.3d 1036, 1045 (9th 2009) & US v Mezas de Jesus 217 F.3d 638 (9th Cir 2000) The Sp. Ct overturned the McMillan decision which is the Reason All Courts Adopted the Preponderance standard, but that Reason is not longer Constitutional. Therefore, its time that this Court Re-Evaluate the standards & provide guidance to the 4th Cir Courts, seeing that the differences in both Sentencing & Reduction Filings Must be based upon Constitutional Firm & Reliable Info. (US v Heloing 18-3270 (7th 2020)... the Defendant Agreed to 100 Kilos but the PSR increased to 4,679 Kilos... The Court Applied the PSR finding & we vacate because the evidence must be supported & Reliable or the Defendant will be Sentenced on unReliable information).

IV Conclusion

This Court should VACATE the ORDER, REMAND FOR RECONSIDERATION BEFORE A "FRESH SET OF EYES", NEW JUDGE, with the APPOINTMENT OF NEW COUNSEL & with INSTRUCTIONS TO APPLY the CLEAR & CONVINCING STANDARD & PROPERLY WEIGH ALL REHABILITATION, FAMILY SUPPORT & FILINGS & not be CONFINED TO the "PRE 1st step ACTIONS" & CONSIDER ALL pre-sentencing & post-sentencing 3553 FINDINGS." (US v ALLEN 19-3606 (6th APRIL 14, 2020)... the Court REMANDS BECAUSE the Act DOES not prohibit Courts FROM CONSIDERING A DEFENDANTS post SENTENCING CONDUCT); ADOPTING CLEAR & CONVINCING STANDARD, 57 U. Chi L. Rev 1387 (1990) by RICHARD HUSSEINI)

Respectfully Submitted ON this 16 DAY of JUNE, 2020 by

S/ Daryl Bayl

MR. DARYL W. BAILEY
FED No. 14643-084
FCI BUTNER II
P.O BOX 1500
BUTNER, NC 27509

V CERTIFICATE / PROOF OF SERVICE, 28 USC 1746

I, DARYL W. BARLEY, DO hereby SWEAR UNDER the PENALTY OF PERJURY that A COPY of the INFORMAL BRIEF, ATTACHED SUPPORTING BRIEF & Exhibits A-G HAVE ALL been SENT VIA US POSTAL MAIL, THRU the INMATE Legal MAILING System here AT FCI BUTNER II, PURSUANT to HOUSTON v LACK 487 US 266 (1988), ON this 16 DAY OF JUNE, 2020 FROM FCI BUTNER II. To the Below PARTIES:

1) FOURTH CIRCUIT COURT of APPEALS
1100 EAST MAIN St.
5th FLOOR
RICHMOND, VA 23219

2) AUSA, JENNIFER R. BACKHORST
180 W. MAIN St.
Suite B-19
ABINGDON, VA 24210

Date of Delivery THRU
PRISON Legal MAIL IS:
JUNE 16, 2020

S/ Daryl Barley
MR. DARYL W. BARLEY
FED NO. 14643-084
FCI BUTNER II
PO BOX 1500
BUTNER, NC 27509

In the Fourth Circuit Court of Appeal

U.S.A
vs
Daryl W. Barley

App No. 20-6760
Rchtd. 4:10-CR-00010-FL-1

Motion to Add Additional Claim in Light of US v Chambers 19-7104

Comes now the petitioner, Mr. Daryl W. Barley, hereby pro se humbly before the Court to file "Claim 3" of the pending Appeal case in light of Chambers, which supports the petitioners Claim For Remand + Resentencing / Reconsideration before a new judge.

[Claim 3]

The Petitioner is not Subject To the Ten year Penalty

The petitioner, Mr. Barley, file his 3582(c)(1)(B) Motion pursuant to the 1st Step Act changes in his drug penalties + because of the 851 no longer being Applicable. (See EX A-1 p 12 of pro se filing in District Court). In this case, the Court [Did not Consider] the 851 now being inapplicable pursuant To Sec 401, because Mr. Barley did not Serve "over 12 consecutive months on his prions. As stated in Sec 401 of the 1st Step Act. (Willis Wheeler v US 18-7187 (S.Ct, Remanded June 3, 2019 For the Court to Consider the 1st Step Act)

The Government [Relied on] 2 Virginia Convictions For "Possession of Cocaine". One Conviction The petitioner was given 6 yrs [All Suspended] and the petitioner had To Complete A [4½ Mtl Program] At A Dentention Center In South Hampton, VA. The 2ND Possession of Cocaine, the petitioner was Sentenced To 3 yrs, in which 2 yrs was Suspended + the petitioner served [10 Mths + 15 Days] on the 1 yr Sentence In the Danville City Jail.

At No time did the petitioner served Over 12 Consecutive Months on Either + In Light of Chambers + Sec 401, the 851 No longer Applies + Shows the Court Failed to Consider the Priors No longer Qualifying Especially when Chambers came out + this Court Remanded back For Reconsideration. Therefore, this Court should Vacate the District Court's Judgment + Remand For Reconsideration Before A New Judge Based upon All 3 grounds on Individually.

Respectfully submitted on this 16 day of June, 2020

S/ Daryl Barley

MR: Daryl W. Barley
Fed No: 14643-084
FCI Butner II
P.O Box 1500
Butner, NC 27509

CERTIFICATE OF SERVICE, 28 USC 1746

I, Daryl W. Barley, Do hereby SWEAR UNDER the penalty of perjury that A Copy of the GROUND 3 Supplement has been Sent To the 4th Cir of Appeal Court AND the AUSA of Record below VIA US POSTAL MAIL FROM FCI BUTNER II's

AUSA,

S/ [signature]
MR. DARYL W. BARLEY
FED 14643-084
FCI BUTNER II
P.O BOX 1500
BUTNER, NC 27509

IN THE FOURTH CIRCUIT OF APPEALS

US v DARYL BARLEY

APP. No: 20-6760
RELATED: 4:10-CR-00010-JLK-1

MOTION TO SUPPLEMENT GROUNDS 1-3 WITH CERTIFIED STATE RECORDS RECEIVED + RENEWED REQUEST TO VACATE THE JUDGMENT IN WAKE OF THE 1ST STEP ACT + US v CHAMBERS

COMES NOW, MR. DARYL W. BARLEY, APPELLANT TO FILE THE SUPPLEMENTAL STATE RECORDS IN SUPPORT OF THE REMAND.

THE APPELLANT FILED HIS INITIAL BRIEF IN JUNE 2020. DUE TO THE BOP'S UPDATING OF THE INMATE COMPUTERS LATE ON IN JUNE, THE PETITIONER FILED A GROUND 3 CHAMBERS ISSUE SUPPLEMENT. (US v CHAMBERS, 19-7104, 4TH CIR., APRIL 23, 2020) THE GROUNDS RELATE TO THE COURTS ACTIONS + FAILURES TO "FULLY CONSIDER THE 1ST STEP ACT CHANGES IN BOTH THE STATUTORY PENALTIES + THE 851 PROVISIONS". IN THIS CASE, THE 1ST STEP ACT SECTION 401 STATES THAT A PRIOR CANNOT QUALIFY UNLESS A "CONSECUTIVE 13 MTH" SENTENCE WAS "SERVED" ON THE PRIOR. IN THIS CASE, THE PETITIONER RECEIVED THE COURT RECORDS TO SHOW HE NEVER SERVED THE 12 OR MORE MTHS REQUIRED. (SEE ATTACHED STATE COURT DOCUMENTS RECEIVED ON JULY 13, 2020 + ALSO P 12 OF THE MOTION FOR REDUCTION FILING)

Because the Chambers Decision was out at the time of the Courts "Reconsideration Remand" & the District Court Failed To Remove the 851 penalty as Chambers implies, this Court should Remand For Reconsideration Before A "Fresh set of Eyes or Judge" So All Matters may be Weighed", see the Possession offenses do not Qualify.

The Petitioner no longer Subject to 10-Life because the 851 must be Removed in Light of Chambers, but instead is Subject to 5-40 yrs. Therefore, Remand & Reconsideration are Warranted. (See PSR Case no CR9700103; PSR CR08000673

Respectfully Submitted on this 27 Day of July, 2020 by S/ Daryl Barley
Mr. Daryl W. Barley

Certificate of Service, 28 USC 1746

I, Daryl W. Barley, do hereby swear under the penalty of perjury that a Copy of the State Record(s) Supplements have been sent via US Postal Mail To the 4th Cir of Appeal Court. on this 27 Day of July, 2020 & To AUSA, Jennifer R. Bockhorst, 180 W. Main St., Suite B-19, Abingdon, VA 24210.

S/ Daryl Barley
Mr. Daryl W. Barley
Fed No. 14643-084
FCI Butner II
P.O Box 1500
Butner, NC 27509

APPENDIX C

DISTRICT COURT RULINGS AND FILINGS

Case No. 4:10-cr-00010

AO 247 (02/08) Order Regarding Motion for Sentence Reduction

UNITED STATES DISTRICT COURT

for the

Western District of Virginia

United States of America)
v.)
DARYL WENDELL BARLEY) Case No: 4:10CR00010
) USM No: 14643-084
Date of Previous Judgment: 04/21/2015)
(Use Date of Last Amended Judgment if Applicable)) Defendant's Attorney

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

Upon motion of ☑ the defendant ☐ the Director of the Bureau of Prisons ☐ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion,

IT IS ORDERED that the motion is:

☐ DENIED. ☑ GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of 240 months **is reduced to** 235 months.

I. COURT DETERMINATION OF GUIDELINE RANGE (Prior to Any Departures)

Previous Offense Level:	34	Amended Offense Level:	34
Criminal History Category:	V	Criminal History Category:	V
Previous Guideline Range:	240 to 293 months	Amended Guideline Range:	235 to 293 months

II. SENTENCE RELATIVE TO AMENDED GUIDELINE RANGE

☑ The reduced sentence is within the amended guideline range.

☐ The previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a departure or Rule 35 reduction, and the reduced sentence is comparably less than the amended guideline range.

☐ Other (explain):

III. ADDITIONAL COMMENTS

Defendant's Motion to Appoint Counsel [ECF No. 112] is DENIED.
Defendant is sentenced to 235 months, but not less than time served. Defendant's sentence consists of 235 months on each of Counts 2s and 3s, to be served concurrently.

Except as provided above, all provisions of the judgment dated 04/21/2015 shall remain in effect.

IT IS SO ORDERED.

Order Date: 4/2/2019

Judge's signature

Effective Date: _____
(if different from order date)

Hon. Jackson L. Kiser, Senior U.S. District Judge
Printed name and title

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA,	)	Case No. 4:10cr00010-001
	)	
v.	)	**MEMORANDUM OPINION**
	)	
DARYL WENDELL BARLEY,	)	By: Hon. Jackson L. Kiser
	)	Senior United States District Judge
Defendant.	)	

This matter is before the court on Defendant Daryl Wendell Barley's *pro se* motion to reduce sentence [ECF No. 120]. Although Defendant is represented by counsel, I am ruling on his *pro se* motion for the reasons set forth herein.

On January 11, 2019, the Chief Judge of this District entered Standing Order 2019-1, appointing the Federal Public Defender's Office "to represent any defendant sentenced in this district who was previously determined to have been entitled to appointment of counsel, or who is now indigent, to determine whether that defendant may qualify for retroactive application of the Fair Sentencing Act of 2010 under Section 404 of the First Step Act of 2018." Standing Order 2019-1 (W.D. Va. Jan. 11, 2019.)

On January 28, 2019, Defendant filed a *pro se* motion requesting appointment of counsel "due to the implications of 'The First Step Act of 2018' and how it impacts my case," that I construed as a motion for First Step Act relief. [ECF No. 112.] I denied his request for appointment of counsel but granted him a reduction in his sentence on April 2, 2019. [ECF No. 115.]

On February 3, 2020, the Assistant Federal Public Defender filed an unopposed motion to vacate my order granting Defendant a reduction, arguing that I erred in

construing his original motion for appointment of counsel as one seeking relief under the First Step Act. See United States v. Maxwell, 800 F. App'x 373 (6th Cir. 2020). Accordingly, on February 14, 2020, I vacated the order denying the appointment of counsel and granting Defendant a reduction in his sentence. [ECF No. 119.]

On February 19, Defendant filed another *pro se* motion, this time clearly requesting a reduction in his sentence pursuant to the First Step Act. [ECF No. 120.] Because he was represented by counsel, I did not take any action on his motion at that time. On February 26, his attorney emailed my chambers staff (and the Assistant United States Attorney), informing me that she would be "filing a new First Step Act motion" on Defendant's behalf. She advised that she would be out of town "until March 9, but will seek to file it when I come back." No motion was filed[1] upon her return.

On April 20, my chambers staff followed up with counsel, inquiring if she intended to file anything and, "if so, when can we expect that?" She responded the same day that she did intend to file something, stating: "I have one other thing to file prior to that, so please expect it from me by Wednesday." On Wednesday, April 22, nothing was filed. As of the date of this Opinion over three weeks later, nothing has been filed by counsel.

Despite granting counsel over two months to file a pleading she initially assured the court would be filed the week of March 9, nothing has been filed. Accordingly, I will grant Defendant's *pro se* motion and reduce his sentence pursuant to the First Step Act of 2018.

[1] She clarified in a later email that she did not want to file a new motion, but rather to supplement what Defendant had filed on his own behalf.

The clerk is directed to forward a copy of this Memorandum Opinion and accompanying Order to Defendant and all counsel of record.

ENTERED this 18th day of May, 2020.

SENIOR UNITED STATES DISTRICT JUDGE

AO 247 (02/08) Order Regarding Motion for Sentence Reduction

UNITED STATES DISTRICT COURT

for the

Western District of Virginia

United States of America
v.
DARYL WENDELL BARLEY

Case No: 4:10CR00010
USM No: 14643-084

Date of Previous Judgment: 04/21/2015
(Use Date of Last Amended Judgment if Applicable)

Defendant's Attorney

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

Upon motion of ☑ the defendant ☐ the Director of the Bureau of Prisons ☐ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion,

IT IS ORDERED that the motion is:

☐ DENIED. ☑ GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of 240 months **is reduced to** 230 months*.

I. COURT DETERMINATION OF GUIDELINE RANGE (Prior to Any Departures)

Previous Offense Level:	34	Amended Offense Level:	34
Criminal History Category:	V	Criminal History Category:	V
Previous Guideline Range:	240 to 293 months	Amended Guideline Range:	235 to 293 months

II. SENTENCE RELATIVE TO AMENDED GUIDELINE RANGE

☐ The reduced sentence is within the amended guideline range.

☐ The previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a departure or Rule 35 reduction, and the reduced sentence is comparably less than the amended guideline range.

☑ Other (explain):

Given Defendant's efforts at rehabilitation, education, and vocation while in prison, the court will impose a below Guidelines sentence. He is commended for his efforts.

III. ADDITIONAL COMMENTS

*Defendant's sentence consists of 230 months on Counts 2s and 3s, to be served concurrently.

Except as provided above, all provisions of the judgment dated 04/21/2015 shall remain in effect.

IT IS SO ORDERED.

Order Date: 05/18/2020

Judge's signature

Effective Date: _____
(if different from order date)

Hon. Jackson L. Kiser, Senior U.S. District Judge
Printed name and title

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA,	)	Case No. 4:10cr00010
	)	
v.	)	**ORDER**
	)	
DARYL WENDELL BARLEY,	)	By: Hon. Jackson L. Kiser
	)	Senior United States District Judge
Defendant.	)	

Defendant Daryl Barley was entitled to a five-month reduction in his sentence, pursuant to the First Step Act. Upon his motion, I granted him a ten-month reduction. This matter is now before the court on Defendant Daryl Barley's Motion to Reconsider Reduction Based on Family Support. [ECF No. 125.] In his motion, Defendant presents some evidence regarding his time in incarceration, and various letters from family members regarding him as a brother, father, and friend. Had the information contained in the motion to reconsider been presented with the initial motion or in the months thereafter,[1] it would have been considered. Having considered the information now, I will not grant Defendant a greater reduction than I did in my last Order. [ECF No. 122.] Accordingly, his Motion to Reconsider is hereby **GRANTED**, but no further reduction will be given.

The clerk is directed to forward a copy of this Order to all counsel of record.

ENTERED this 3rd day of June, 2020.

Jackson L. Kiser
SENIOR UNITED STATES DISTRICT JUDGE

[1] As noted in my Memorandum Opinion [ECF No. 121], Defendant's counsel failed to supplement Defendant's motion for over two months. The motion to reconsider is directed squarely at correcting that error.

APPENDIX D

CORRESPONDENCE WITH FORMER APPOINTED COUNSEL

Juval O. Scott
Federal Public Defender

Frederick T. Heblich, Jr.
First Assistant Federal Public Defender

Fay F. Spence
Senior Litigator

Nancy C. Dickenson
Supervisory Assistant Federal Public Defender

Brian J. Beck
Allegra M. C. Black
Randy V. Cargill
Andrea L. Harris
Christine M. Lee
Lisa M. Lorish
Erin M. Trodden
Assistant Federal Public Defenders

Roanoke office:
210 First Street, SW, Suite 400
Roanoke, VA 24011

Phone: (540) 777-0880
Fax: (540) 777-0890

March 27, 2019

Daryl Wendell Barley
Register No. 14643-084
FCI Butner Medium II
P.O. Box 1500
Butner, NC 27509

Dear Mr. Barley,

I am a legal intern in the Office of the Federal Public Defender for the Western District of Virginia. I am assisting attorney Christine Lee in reviewing cases for possible sentence reductions under the First Step Act.

It would be very helpful if you could provide any favorable information that could assist us in evaluating whether we can request a reduction for you. For example, if you have program or educational certificates, an institutional progress report, or favorable information about community or family support, that would help us to be able potentially to advocate for you. Also, judges tend to want to know about prison disciplinary history, so that is something we would need to obtain whether it is favorable or not.

If you have any such information or material that will help us, please send it to the Roanoke address above.

If you would like to add Ms. Lee to your email on CORRLINKS, you may do so and she will add you if she receives the request. Her email address is christine_lee@fd.org.

Please do not hesitate to contact us if you have any questions.

Sincerely,

Andrew Proctor

Andrew J. Proctor
Legal Intern

Juval O. Scott
Federal Public Defender

Monica D. Cliatt
First Assistant Federal Public Defender

Randy V. Cargill
Nancy C. Dickenson-Vicars
Brooks A. Duncan
Andrea L. Harris
Christine M. Lee
Lisa M. Lorish
Donald R. Pender
John Stanford
Erin M. Trodden
Assistant Federal Public Defenders

Roanoke office:
210 First Street, SW, Suite 400
Roanoke, VA 24011

Phone: (540) 777-0880
Fax: (540) 777-0890

May 21, 2020

Daryl W. Barley Reg. No. 14643-084
FCI Butner Medium II
PO Box 1500
Butner, NC 27509

Dear Mr. Barley,

Judge Kiser reduced your sentence an additional five months. Your sentence is now below your guideline range.

As we have discussed in the past, your guideline range did not change based on the First Step Act. Although they can only use the indictment drug weight to determine *eligibility* for a reduction, and to determine statutory maximums and minimums, as I discussed with you and your brother, the PSR weight still determines your *guidelines range.*

As I've tried to explain, there are two questions a judge asks when he received a First Step Act motion:

1. Is this person eligible for a reduction?
2. Does this person deserve a reduction, and if so, how much?

The cases we discussed having to do with the amount of drugs in the indictment go to the first question: and yes, you are eligible for a reduction (and have received one), and also received one last year.

The area where you and I disagree has to do with the second question. You believe that in determining whether you deserve a reduction (which you do) and *how much*, can the judge still consider the drugs in the PSR? (What you and Marcus refer to as "ghost dope").

Unfortunately, the answer is still yes. The judge uses the drug amount in the PSR to set your guidelines, even if it fits your definition of "ghost dope." All the cases say he can do this, as long

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	Criminal No. 4:10CR0010 (JLK)
	)	
	)	
DARYL BARLEY	)	

MOTION TO RECONSIDER REDUCTION BASED ON FAMILY SUPPORT

Undersigned counsel appointed for Daryl Barley, the defendant, has reviewed the Court's Memorandum Opinion filed on May 18, 2020, and states as follows:

1. Counsel apologizes sincerely and without caveat to the Court, to Mr. Barley, and to the government for counsel's failure to supplement Mr. Barley's *pro se* First Step Act motion within over two months from the date of its filing.
2. Counsel agrees with the legal analysis underlying the Court's resolution of Mr. Barley's motion.
3. Counsel's primary contribution would have been to provide for the Court's consideration the enclosed letters of support from Mr. Barley's family members as well as a recent Bureau of Prisons progress report.
4. Because Mr. Barley expressly referenced these letters in his *pro se* motion, but was unable to physically provide them due to his incarceration, counsel submits them now simply in light of any possibility that the Court determines that it would have granted Mr. Barley a larger reduction if counsel had submitted these materials earlier.

5. Counsel respectfully requests that the Court not deny Mr. Barley consideration of these materials due solely to counsel's failure to have filed them sooner, a failure to which Mr. Barley in no way contributed.

Respectfully Submitted,

Christine Madeleine Lee

CHRISTINE MADELEINE LEE
Virginia Bar No. 73565
Office of the Federal Public Defender
for the Western District of Virginia
210 First Street SW, Suite 400
Roanoke, VA 24011
(540) 777-0880

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing and attached documents were electronically filed and will be forwarded to the Office of the United States Attorney this 21st day of May, 2020.

Christine Madeleine Lee

Christine Madeleine Lee

APPENDIX E

PORTIONS OF 2255 FILINGS IMPACTING RULINGS

CASE NO. 4:10-cr-00010-JLK-RSB,ED VA, Danville

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA	)	**Criminal Action No. 4:10-cr-00010-1**
	)	
v.	)	**§ 2255 MEMORANDUM OPINION**
	)	
DARYL WENDELL BARLEY,	)	**By: Hon. Jackson L. Kiser**
Petitioner.	)	**Senior United States District Judge**

Daryl Wendell Barley, a federal prisoner proceeding pro se, filed a motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. The United States filed a motion to dismiss, and petitioner responded with a motion to amend. After reviewing the record, I deny petitioner's motion to amend as futile and grant the United States' motion to dismiss.

I.

A grand jury in the Western District of Virginia issued a three-count superseding indictment against petitioner on August 5, 2010. The superseding indictment charged that petitioner conspired to possess with the intent to distribute more than 50 grams of cocaine base between August 2006 and April 3, 2009, in violation of 21 U.S.C. § 846 ("Count One"); distributed more than 50 grams of cocaine base on April 3, 2009, in violation of 21 U.S.C. § 841(a)(1) ("Count Two"); and distributed more than 50 grams of cocaine base on May 19, 2010, in violation 21 U.S.C. § 841(a)(1) ("Count Three"). Petitioner was arrested and released on bond after his initial appearance.

Petitioner subsequently pleaded guilty to Counts Two and Three pursuant to a written plea agreement. The United States and petitioner jointly recommended finding petitioner responsible for 361.7 grams of cocaine powder and 61.7 grams of cocaine base and receiving a sentence of 240 months' incarceration. The United States and petitioner recognized in the agreement that the court was not bound by these determinations, the court could sentence petitioner to the statutory

maximum, and petitioner would not be allowed to withdraw his guilty pleas if he received a harsher sentence. Petitioner also agreed to waive the rights to appeal and to collaterally attack the judgment, and he agreed that any such action would constitute a breach of the plea agreement. Notably, petitioner agreed not to commit any other crime and acknowledged that the United States could request a harsher sentence if petitioner breached the plea agreement. I had a lengthy colloquy with petitioner and determined that he understood both his rights and the plea agreement and that he knowingly and voluntarily pleaded guilty to Counts Two and Three.[1] I continued petitioner's bond until the January 28, 2011, sentencing hearing.

A Presentence Report ("PSR") was prepared on November 30, 2010, which recommended holding petitioner responsible for 361.7 grams of cocaine powder and 61.7 grams of cocaine base, as described in the plea agreement. Based on this drug quantity and petitioner's personal history, petitioner faced a statutory mandatory-minimum term of 240 months' incarceration, a statutory maximum term of life imprisonment, and a guideline sentence of 240 months' incarceration.[2]

The day before the sentencing hearing, state officials arrested petitioner for allegedly manufacturing a controlled substance and possessing marijuana, and discovered counterfeit $100 bills in his possession. During the sentencing hearing, the United States argued that petitioner breached the plea agreement and should be incarcerated for more than the previously agreed upon 240 months. After hearing the United States' proffer, I determined that petitioner had breached the plea agreement by committing another crime while on bond; adopted the United States' argument that petitioner should be held accountable for 2,061.7 grams of crack cocaine and not the 61.7

[1] I dismissed Count One during the sentencing hearing pursuant to the plea agreement.
[2] The PSR also recited that petitioner faced a sentencing guideline range of 324 to 405 months' incarceration if he went to trial and was found guilty of the three counts charged in the superseding indictment.

grams of crack cocaine described in the plea agreement; and overruled petitioner's objection. To arrive at a single combined offense level, I converted the powder cocaine and cocaine base to 9,741 kilograms of marijuana, pursuant to USSG § 2D1.1[3], and calculated petitioner's new sentencing guideline range to be 324 to 405 months' incarceration. However, I believed the USSG calculations overstated petitioner's criminal history and reduced petitioner's criminal history score from six to five. Petitioner new guideline sentencing range was 292 to 365 months, and I sentenced him to, inter alia, 292 months' incarceration.

Petitioner appealed to the Court of Appeals, arguing that the appeal waiver was not enforceable because the United States breached the agreement by seeking a harsher sentence; that I erred by finding petitioner breached the plea agreement and by attributing 9,741 kilograms of marijuana to him; and that the sentence was unreasonable and excessive based on petitioner's circumstances. The Court of Appeals dismissed the appeal, holding that the United States did not breach the plea agreement and that all terms of the plea agreement, including the appeal waiver, were enforceable against petitioner.

Petitioner then timely filed the instant § 2255 motion, arguing three claims: (1) the sentence violates the Fair Sentencing Act of 2010; (2) the guilty pleas were not entered knowingly and voluntarily; and (3) counsel rendered ineffective assistance.

II.

The United States argues that petitioner is not entitled to proceed via § 2255 because the plea agreement is valid and contains a waiver of the right to collaterally attack the judgment. A "criminal defendant may waive [the] right to attack [a] conviction and sentence collaterally, so long

[3] To combine different controlled substances to obtain a single offense level, I relied on the Drug Equivalency Tables in USSG § 2D1.1 to convert the quantities of powder cocaine and cocaine base to their respective marijuana equivalents, added the converted quantities, and determined a combined offense level.

APPENDIX F

STATE OF VIRGINIA RECORDS SHOWING THE PETITIONER NEVER SERVED THE 12 CONSECUTIVE MONTHS TO SUPPORT 851 STATUTORY PENALTY

SENTENCING ORDER

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: 590

VIRGINIA: IN THE CIRCUIT COURT OF **DANVILLE**

Hearing Date: **January 5, 1998**
Judge: **James F. Ingram**

Commonwealth of Virginia

v.

Darryl Wendell Barley, DEFENDANT

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, **Phyllis M. Mosby, The Assistant Public Defender.** The Commonwealth was represented by **James J. Reynolds.**

On **11/18/97** the defendant was found guilty on the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA CODE SECTION
97-1033	Possess Cocaine (F)	4/7/97	1.2-250

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code 19.2-299.

Pursuant to the provisions of Code 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

Thereupon, defendant, by counsel, moved the court to set aside the verdict as being contrary to law and evidence and without evidence to support it, which said motion, upon consideration by the Court, is overruled, and the defendant, by counsel, excepts.

The Court **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: **four (4) years** for **Possess Cocaine.** The total sentence imposed is **four (4) years.**

A fine of **$400.00** for **Possess Cocaine.**

The Court **SUSPENDS three (3) years** of the **four (4) year** sentence for **Possess Cocaine,** for a total suspension of **three (3) years,** upon the following condition(s):

Serve. The defendant shall serve **one (1) year** in the penitentiary.

Good Behavior. The defendant shall be of good behavior for **three (3) years** from the defendant's release from probation.

Supervised probation. The defendant is placed on probation to commence on his release from incarceration, under the supervision of a Probation Officer for **one (1) year,** or unless sooner released by the court or by the Probation Officer. The defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include **Substance Abuse Counseling and Random Drug Screenings** as prescribed by the Probation Officer.

Operator's License. The defendant's Operator's License shall be suspended for a period of **six (6) months.**

Costs. The defendant shall pay costs of **$1263.50.**

Right to Appeal. The Court advised the defendant and the defendant's attorney of the defendant's right to appeal this conviction to the Court of Appeals of Virginia.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code 53.1-187.

Enter: January 5, 1998

James F. Ingram, Judge

DEFENDANT INFORMATION:

SSN: 228-19-8323 DOB: 4-10-73 SEX: M

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: Four (4) years

TOTAL SENTENCE SUSPENDED: Three (3) years; serve one (1) year in the penitentiary

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF DANVILLE

FEDERAL INFORMATION PROCESSING STANDARDS CODE: 590C

Hearing Date: AUGUST 27, 2008
Judge: DAVID A. MELESCO

COMMONWEALTH OF VIRGINIA v. DARYL BARLEY, Defendant

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, GLENN L BERGER.

The Commonwealth was represented by LESLIE M. MCCANN.

On AUGUST 27, 2008 the defendant was found guilty of the following offenses:

Offense Tracking Number	Virginia Crime Code (For Administrative Use Only)	Code Section	Case Number
590GM5460800483	NAR-3021-M1	18.2-250.1	CR08000673-00
Offense Date: 03/01/2008	Description: POSSESS MARIJUANA 3RD OFFENSE		MISDEMEANOR
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		
Offense Date:	Description:		

[X] The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code § 19.2-299.

[ ] No presentence report was ordered.

Pursuant to the provisions of Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

COMMONWEALTH OF VIRGINIA v. DARYL BARLEY, Defendant

The court **SENTENCES** the defendant to:

Case No. **CR08000673-00** Description **POSSESS MARIJUANA 3RD OFFENSE**

[X] Incarceration with the Virginia Department of Corrections for the term of: _____ years 12 months _____ days

[ ] FINE. The defendant is ordered to pay fine(s) in the amount of $_____.

[X] COSTS. The defendant is ordered to pay all costs of this case.

[ ] RESTITUTION. The defendant is ordered to make restitution in the amount of $_____as set forth below.

[X] DRIVER'S LICENSE SUSPENSION: The defendant's driver's license has been suspended
[X] for a period of ____ years 6 months _____ days [ ] indefinitely.

[ ] RESTRICTED DRIVER'S LICENSE: A restricted driver's license was issued by separate order.

[X] The court **SUSPENDS** ____ years 10 months _____ days of incarceration _____ fine
for a period of _____ upon the condition(s) specified in Suspended Sentence Conditions.

Case No._____ Description _____

[ ] Incarceration with the Virginia Department of Corrections for the term of: _____ years _____ months _____ days

[ ] FINE. The defendant is ordered to pay fine(s) in the amount of $_____.

[ ] COSTS . The defendant is ordered to pay all costs of this case.

[ ] RESTITUTION. The defendant is ordered to make restitution in the amount of $_____as set forth below.

[ ] DRIVER'S LICENSE SUSPENSION: The defendant's driver's license has been suspended.
[ ] for a period of ____ years ____ months _____ days [ ] indefinitely.

[ ] RESTRICTED DRIVER'S LICENSE: A restricted driver's license was issued by separate order.

[ ] The court **SUSPENDS** ____ years ____ months _____ days of incarceration _____ fine
for a period of _____ upon the condition(s) specified in Suspended Sentence Conditions.

Case No._____ Description _____

[ ] Incarceration with the Virginia Department of Corrections for the term of: _____ years _____months _____ days

[ ] FINE. The defendant is ordered to pay fine(s) in the amount of $_____.

[ ] COSTS. The defendant is ordered to pay all costs of this case.

[ ] RESTITUTION. The defendant is ordered to make restitution in the amount of $_____as set forth below.

[ ] DRIVER'S LICENSE SUSPENSION: The defendant's driver's license has been suspended.
[ ] for a period of ____ years ____ months _____ days [ ] indefinitely.

[ ] RESTRICTED DRIVER'S LICENSE: A restricted driver's license was issued by separate order.

[ ] The court **SUSPENDS** ____ years ____ months _____ days of incarceration _____ fine
for a period of _____ upon the condition(s) specified in Suspended Sentence Conditions.

Consecutive/concurrent:

[X] These sentences shall run consecutively with all other sentences.

[ ] These sentences shall run concurrently with all other sentences.

[ ] These sentences shall run consecutively/concurrently as described:

Suspended Sentence Conditions:

[X] **Good Behavior:** The defendant shall be of good behavior for ___ years 12 months [X] from the defendant's release from confinement [ ] _____.

[ ] **Supervised Probation:** The defendant is placed on probation under the supervision of a Probation Officer to commence [ ] upon sentencing [ ] upon release from incarceration for _____ years _____ months _____ days [ ] indefinite or unless sooner released by the court or by the Probation Officer. The defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include substance abuse counseling and/or testing as prescribed by the Probation Officer.

[ ] **Community-Based Corrections System Program pursuant to Virginia Code § 19.2-316.2 or 19.2-316.3:** The defendant shall successfully complete the _____ program. Successful completion of the program shall be followed by a period of intensive probation of _____, followed by a period of supervised probation of _____.

[ ] The defendant shall remain in custody until program entry.

[ ] Registration pursuant to Code § 9.1-903 for offenses defined in § 9.1-902 is required.

[X] The defendant shall provide a DNA sample and legible fingerprints as directed.

[ ] **Special conditions:**

[ ] The defendant shall make restitution as follows:

$_____ to _____.
for case number(s):

$_____ to _____.
for case number(s):

$_____ to _____.
for case number(s):

$_____ to _____.
for case number(s):

COMMONWEALTH OF VIRGINIA v. DARYL BARLEY, Defendant

Post-incarceration supervision following felony conviction pursuant to Virginia Code § 18.2-10 and 19.2-295.2:

[ ] **Post-Incarceration Supervised Probation:** The defendant is placed on supervised probation to commence upon release from incarceration for a period of _____, unless released earlier by the court. The defendant shall comply with all the rules and requirements set by the Probation Officer.

[ ] **Post-Incarceration Post-Release Supervision:** In addition to the above sentence of incarceration, the court imposes an additional term of _____ of incarceration. This term is suspended and a period of post-release supervision of _____, is imposed which is to commence upon release from incarceration. The defendant shall comply with all the rules and requirements set by the Probation Officer.

[X] THE COURT, IN ITS DISCRETION, PURSUANT TO THE PROVISIONS OF § 53.166.1 AND § 53.1-131 OF THE CODE OF VIRGINIA, 1950, AS AMENDED PERMITS THE SAID DEFENDANT TO SERVE THE AFORESAID PERIOD OF CONFINEMENT IN THE DANVILLE ADULT DETENTION CENTER ON WEEKENDS OR DURING THE DAYS AND HOURS HE IS NOT REGULARLY EMPLOYED. PARTICIPATION IS EXPRESSLY MADE SUBJECT TO, AND CONDITIONED UPON, COMPLIANCE WITH ALL APPLICABLE RULES AND POLICIES OF THE WEEKEND OR WORK RELEASE PROGRAM.

THE COURT ADVISED THE DEFENDANT AND THE DEFENDANT'S ATTORNEY OF THE DEFENDANT'S RIGHT TO APPEAL THIS CONVICTION TO THE COURT OF APPEALS OF VIRGINIA.

[X] The defendant was remanded to the custody of the sheriff. [ ] The defendant was allowed to depart.

The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Virginia Code § 53.1-187.

ENTER this 14 day of October, 2008

_____
Judge

DEFENDANT IDENTIFICATION:

Name: DARYL BARLEY

Alias: _____

SSN: 228-19-8323 DOB: 04 / 10 / 1973 Sex: M

SENTENCE SUMMARY:

Total Incarceration Sentence Imposed: 12 MONTHS

Total Sentence Suspended: 305 DAYS

Total Supervised Probation Term: _____

Total Postrelease Term Imposed and Suspended: _____

Total Fine Imposed $.00. Total Fine Suspended $.00.

DISPOSITION NOTICE

CASE NO. J1-1023-01

ACCUSED: Darryl W. Barley

Jurisdiction: Danville

ADDRESS: 2011 Carter St
Danville VA
228-19-8323 4-10-73

☐ GENERAL DISTRICT (TRAFFIC)
☐ GENERAL DISTRICT (CRIMINAL)
☐ GENERAL DISTRICT (CIVIL)
☐ J & DR DISTRICT COURT
☑ CIRCUIT COURT Docketed 12-7-98

☐ Certified to Grand Jury ☐ Extradition waived

☐ Juvenile Transferred to Circuit Court for trial as adult

☑ Convicted of: FTC/community service ☐ Felony ☑ Misdemeanor

Offense Date 12/2/98 Convicted under: ☑ State Code § ☐ Local Ord. 98-3965

☐ Civil Contempt

SENTENCE: **Credit shall be given pursuant to § 53.1-187 for any pre-trial detention**

☑ 60 MONTHS DAYS to be served in jail. CF

☐ Committed to Department of Corrections for

☐ Committed to Department of Youth and Family Services for

Total fines and costs assessed: $ 79.00 todays charge Restitution ordered: $

TO THE SHERIFF, JAIL OFFICER OR CORRECTIONAL OFFICER:
Confine the person named in this notice in your facility to serve the sentence under the terms and conditions stated in this notice unless otherwise ordered released.

SPECIAL CONDITIONS: ☐ Weekend confinement to begin DATE

☐ Work release ☐ Work release (if eligible)

☐ Home-electronic incarceration

☑ Other if payment of 500.00 is made may be released. Sign up for 3 days a week Community Service — Sign Agreement take back to Commonwealth before released

Appeal noted? ☐ Yes ☐ No ☐ Withdrawn

BAIL:

☐ If transferred or certified to Circuit Court ☐ Secured ☐ Unsecured ☐ Recognizance

☐ If appealed ☐ Held Without Bail ☐ No Change in Existing Bail Amount

$ ☐ No Change in Existing Bail Conditions

Circuit Court Date and Time

ADDITIONAL BAIL CONDITIONS: Accused ☐ may ☐ may not depart the Commonwealth of Virginia.

12/7/98 DATE

Brenda T. Burnett, deputy
☐ CLERK ☐ JUDGE

FORM DC-356 11/95 PC (114:6-010 7/98)

DISPOSITION NOTICE

DISPOSITION NOTICE

CASE NO. 99-1023-03

Jurisdiction: Danville

ACCUSED: Daryl Barley

ADDRESS: 2011 Castle St
Danville VA
228-19-8323

☐ GENERAL DISTRICT (TRAFFIC)
☐ GENERAL DISTRICT (CRIMINAL)
☐ GENERAL DISTRICT (CIVIL)
☐ J & DR DISTRICT COURT
☑ CIRCUIT COURT

☐ Certified to Grand Jury ☐ Extradition waived 4-10-23

☐ Juvenile Transferred to Circuit Court for trial as adult

☑ Convicted of: FTC Agreement ☐ Felony ☐ Misdemeanor

Offense Date 4-15-99 Convicted under: ☐ State Code § ☐ Local Ord. Docketed 4-20-99

☐ Civil Contempt

SENTENCE: **Credit shall be given pursuant to § 53.1-187 for any pre-trial detention**

☑ 60 MONTHS 60 DAYS to be served in jail. CF 99-1536

☐ Committed to Department of Corrections for

☐ Committed to Department of Youth and Family Services for

Total fines and costs assessed: $ 79.00 Today charge Restitution ordered: $

TO THE SHERIFF, JAIL OFFICER OR CORRECTIONAL OFFICER:
Confine the person named in this notice in your facility to serve the sentence under the terms and conditions stated in this notice unless otherwise ordered released.

SPECIAL CONDITIONS: ☐ Weekend confinement to begin DATE

☐ Work release ☐ Work release (if eligible)

☐ Home-electronic incarceration

☑ Other Community service

Appeal noted? ☐ Yes ☐ No ☐ Withdrawn

BAIL:

☐ If transferred or certified to Circuit Court ☐ Secured ☐ Unsecured ☐ Recognizance

☐ If appealed ☐ Held Without Bail ☐ No Change in Existing Bail Amount

$ ☐ No Change in Existing Bail Conditions

Circuit Court Date and Time

ADDITIONAL BAIL CONDITIONS: Accused ☐ may ☐ may not depart the Commonwealth of Virginia.

4-19-99 DATE Brenda T. Burnett, deputy ☑ CLERK ☐ JUDGE

FORM DC-356 11/95 PC (114:6-010 7/98)

DISPOSITION NOTICE

Misdemeanor Trial Order

Case No. CR04001181-00

COMPLETE DATA BELOW IF KNOWN

Circuit Court

DARYL WENDELL BARLEY
149 HAMLIN AVENUE
DANVILLE, VIRGINIA

B	M	04	10	1973			

228-19-8323

03/06/2004 OFFENSE DATE

10/26/2004 TRIAL

Attorney: Attorney Type: W

Original Charge: 2ND OFF POSS MARIJUANA #2
Code Cite: 18.2-250.1
|X| S.C. C.C.

Plea:

|X| Defendant Present
| | Not Guilty
| | Guilty to Amended Warrant
| | Nolo Contendere
| | Jury Waived
| | Tried In Absentia
| | Guilty As Charged

Charge: 2ND OFF POSS MARIJUANA #2
Code Cite: 18.2-250.1

Finding:

| | Guilty
| | Not Guilty (Acquitted)
| | Guilty Of Lesser Offense
| | Dismissed/Nolle Prosequi
|X| Appeal/Withdrawn/Affirm
| | Guilty Per Plea Agreement

Charge: 2ND OFF POSS MARIJUANA #2
Code Cite: 18.2-250.1

Sentence:

(1) Sentenced to: 12 MONTHS

(2) Sentence suspended: 8 MONTHS
on, 12 MONTHS GOOD BEHAVIOR.

(3) Report to jail: _____.

(4) Driver's license suspended for 6 MONTHS.

(5) FINE $200.00

(6) COST $1,131.00

(7) CAFee _____

(8) TOTAL $1,331.00

(9) Allowed until SIGN AGREEMENT to pay fines and costs.

Remarks: WORK RELEASE/WEEKENDS OK IF ELIGIBLE.

11-01-04
ORDER DATE

JUDGE