

IN THE
SUPREME COURT OF THE UNITED STATES

JUNIEL RIOS,

Petitioner,

-VS-

UNITED STATES OF AMERICA,

Respondent.

APPENDIX- VOLUME I

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES G. WHITE, ESQ.

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INDICTMENT

Sep 15, 2015

STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
15-20723-CR-UNGARO/OTAZO-REYES
CASE NO. _____

18 U.S.C. § 922(g)(1)

18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

vs.

JUNIEL BARRIOS RIOS,

Defendant.

INDICTMENT

The Grand Jury charges that:

On or about September 2, 2015, in Miami-Dade County, in the Southern District of Florida, the defendant,

JUNIEL BARRIOS RIOS,

having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE ALLEGATIONS

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **JUNIEL BARRIOS RIOS**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 922(g)(1), as alleged in this Indictment, the defendant shall forfeit to the United States of America any

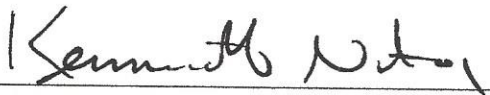
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firearm and/or ammunition involved in or used in the commission of such violation, pursuant to Title 18, United States Code, Section 924(d)(1).

All pursuant to Title 18, United States Code, Section 924(d)(1) and the procedures set forth in Title 21, United State Code, Section 853, as made applicable by Title 28, United States Code, Section 2461(c).

A TRUE BILL

FOREPERSON


WIFREDO A. FERRER
UNITED STATES ATTORNEY


MATTHEW J. LANGLEY
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

CASE NO. _____

v.

JUNIEL BARRIOS RIOS,

Defendant.

Superseding Case Information:

Court Division: (Select One)

X Miami _____ Key West _____
 _____ FTL _____ WPB _____ FTP _____

New Defendant(s) Yes _____ No _____
 Number of New Defendants _____
 Total number of counts _____

I do hereby certify that:

- I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
- I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.
- Interpreter: (Yes or No) Yes
 List language and/or dialect Spanish
- This case will take 1-2 days for the parties to try.
- Please check appropriate category and type of offense listed below:

(Check only one)

(Check only one)

I	0 to 5 days	<u>x</u>	Petty	_____
II	6 to 10 days	_____	Minor	_____
III	11 to 20 days	_____	Misdem.	_____
IV	21 to 60 days	_____	Felony	<u>x</u>
V	61 days and over	_____		

6. Has this case been previously filed in this District Court? (Yes or No) No

If yes:

Judge:

Case No. _____

(Attach copy of dispositive order)

Has a complaint been filed in this matter?

(Yes or No) Yes

If yes:

Magistrate Case No. _____

15-mj-03179-BLG

Related Miscellaneous numbers: _____

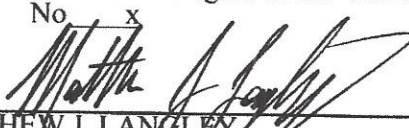
Defendant(s) in federal custody as of _____

Defendant(s) in state custody as of _____

Rule 20 from the District of _____

Is this a potential death penalty case? (Yes or No) No

- Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes _____ No x
- Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes _____ No x


 MATTHEW J. LANGLEY
 ASSISTANT UNITED STATES ATTORNEY
 FLORIDA BAR NO. 97331

*Penalty Sheet(s) attached

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: JUNIEL BARRIOS RIOS

Case No: _____

Count #: 1

Felon in Possession of a Firearm and Ammunition

Title 18, United States Code, Section ~~X~~ 922(g)(1)

*Max. Penalty: 10 Years' Imprisonment

*Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.

PLEA AGREEMENT

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 15-20723-CR-UNGARO(s)**

UNITED STATES OF AMERICA

v.

JUNIEL BARRIOS RIOS,

Defendant.

_____ /

PLEA AGREEMENT

The United States Attorney's Office for the Southern District of Florida ("this Office") and JUNIEL BARRIOS RIOS (hereinafter referred to as the "Defendant") enter into the following agreement:

1. The Defendant agrees to plead guilty to Count 2 of the Superseding Indictment, which count charges the Defendant with possession with the intent to distribute ethylone, in violation of Title 21, United States Code, Section 841(a)(1) and Count 3 of the Superseding Indictment which count charges the Defendant with possession of a firearm in furtherance of drug trafficking, in violation of Title 18, United States Code, Section 924(c)(1)(A).

2. This Office agrees to seek dismissal of Count 1 of the Superseding Indictment after sentencing.

3. The Defendant is aware that the sentence will be imposed by the Court after considering the advisory Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The Defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the Court relying in part on the results of a pre-sentence investigation by the

Court's probation office, which investigation will commence after the guilty plea has been entered. The Defendant is also aware that, under certain circumstances, the Court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The Defendant is further aware and understands that the Court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose a sentence within that advisory range; the Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory range. Knowing these facts, the Defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses identified in paragraph 1 and that the Defendant may not withdraw the plea solely as a result of the sentence imposed.

4. The Defendant understands and acknowledges that, as to Count 2, the Court may impose a statutory maximum term of imprisonment of twenty years, followed by a term of supervised release of at least 3 years and up to life, may impose a fine of up to \$1,000,000, and may order restitution. The Defendant also understands and acknowledges that, as to Count 3, the Court must impose a mandatory term five years imprisonment and up to life, to be served consecutively to any other sentence, followed by a term of supervised release of up to 5 years, may impose a fine of up to \$250,000, and may order restitution.

5. The Defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 4 of this agreement, a special assessment in the amount of \$100 as to each count of conviction, for a total of \$200, will be imposed on the Defendant. The

Defendant agrees that any special assessment imposed shall be paid at the time of sentencing. If a Defendant is financially unable to pay the special assessment, the Defendant agrees to present evidence to this Office and the Court at the time of sentencing as to the reasons for the Defendant's failure to pay.

6. This Office reserves the right to inform the Court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the Defendant and the Defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

7. This Office agrees that it will recommend at sentencing that the Court reduce by two levels the sentencing guideline level applicable to the Defendant's offense, pursuant to Section 3E1.1(a) of the Sentencing Guidelines, based upon the Defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the Defendant's offense level is determined to be 16 or greater, this Office will file a motion requesting an additional one level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the Defendant has assisted authorities in the investigation or prosecution of the Defendant's own misconduct by timely notifying authorities of the Defendant's intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently. This Office, however, will not be required to make these recommendations or file this motion if the Defendant: (1) fails or refuses to make a full, accurate and complete disclosure to the probation office of the

circumstances surrounding the relevant offense conduct; (2) is found to have misrepresented facts to the government prior to entering into this plea agreement; or (3) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

8. The Defendant is aware that the sentence has not yet been determined by the Court. The Defendant also is aware that any estimate of the probable sentencing range or sentence that the Defendant may receive, whether that estimate comes from the Defendant's attorney, this Office, or the probation office, is a prediction, not a promise, and is not binding on this Office, the probation office or the Court. The Defendant understands further that any recommendation that this Office makes to the Court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The Defendant understands and acknowledges, as previously acknowledged in paragraph 3 above, that the Defendant may not withdraw his plea based upon the Court's decision not to accept a sentencing recommendation made by the Defendant, this Office, or a recommendation made jointly by the Defendant and this Office.

9. The Defendant agrees that he shall cooperate fully with this Office by: (a) providing truthful and complete information and testimony, and producing documents, records and other evidence, when called upon by this Office, whether in interviews, before a grand jury, or at any trial or other Court proceeding; (b) appearing at such grand jury proceedings, hearings, trials, and other judicial proceedings, and at meetings, as may be required by this Office; and (c) if requested by this Office, working in an undercover role under the supervision of, and in

compliance with, law enforcement officers and agents. In addition, the Defendant agrees that he will not protect any person or entity through false information or omission, that he will not falsely implicate any person or entity, and that he that he will not commit any further crimes.

10. This Office reserves the right to evaluate the nature and extent of the Defendant's cooperation and to make that cooperation, or lack thereof, known to the Court at the time of sentencing. If in the sole and unreviewable judgment of this Office the Defendant's cooperation is of such quality and significance to the investigation or prosecution of other criminal matters as to warrant the Court's downward departure from the advisory sentencing range calculated under the Sentencing Guidelines and/or any applicable minimum mandatory sentence, this Office may make a motion prior to sentencing pursuant to Section 5K1.1 of the Sentencing Guidelines and/or Title 18, United States Code, Section 3553(e), or subsequent to sentencing pursuant to Rule 35 of the Federal Rules of Criminal Procedure, informing the Court that the Defendant has provided substantial assistance and recommending that the Defendant's sentence be reduced. The Defendant understands and agrees, however, that nothing in this agreement requires this Office to file any such motions, and that this Office's assessment of the quality and significance of the Defendant's cooperation shall be binding as it relates to the appropriateness of this Office's filing or non-filing of a motion to reduce sentence.

11. The Defendant understands and acknowledges that the Court is under no obligation to grant a motion for reduction of sentence filed by this Office. In addition, the Defendant further understands and acknowledges that the Court is under no obligation of any type to reduce the Defendant's sentence because of the Defendant's cooperation.

12. This Office agrees that it will not recommend an upward departure from the advisory guideline range based upon the nature of the offense, the Defendant's relevant offense conduct, or the background of the Defendant.

13. The defendant agrees to forfeit to the United States voluntarily and immediately all firearms and ammunition involved in or used in the offenses charged in the Indictment. Such property includes, but is not limited to: two tactical police bullet-proof vests, one taser, one AR-15 automatic rifle (serial # DSS001348), and 27 rounds of 5.56 mm ammunition manufactured by Double Star Corp.

14. The defendant agrees to waive all interest in the above-named property in any administrative or judicial forfeiture proceeding, whether criminal or civil, state or federal, and also agrees to voluntarily abandon all right, title, and interest in the above-named property.

15. The defendant agrees to waive any appeal of the forfeiture. The defendant also waives any failure by the Court to advise the defendant of any applicable forfeiture at the time the guilty plea is accepted as required by Rule 11(b)(1)(J) of the Federal Rules of Criminal Procedure.

16. The defendant further agrees to waive any applicable time limits for the initiation of administrative or civil judicial forfeiture proceeding and/or further notification of any such forfeiture brought against the above-named property.

17. The defendant further understands that forfeiture is independent of any assessments, fines, costs, restitution, or any other penalty that may be imposed by the Court.

18. The defendant knowingly and voluntarily waives any claim or defense he may have under the Eighth Amendment to the United States Constitution, including any claim of excessive fine or penalty with respect to the forfeited property.

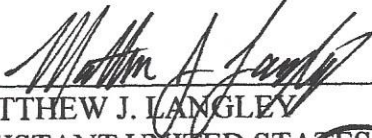
19. The Defendant is aware that Title 18, United States Code, Section 3742 and Title 28, United States Code, Section 1291, afford the Defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the Defendant hereby waives all rights conferred by Sections 3742 and 1291 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing. The Defendant further understands that nothing in this agreement shall affect the government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b), and Title 28, United States Code, Section 1291. However, if the United States appeals the Defendant's sentence pursuant to Sections 3742(b) and 1291, the Defendant shall be released from the above waiver of appellate rights. By signing this agreement, the Defendant acknowledges that the Defendant has discussed the appeal waiver set forth in this agreement with the Defendant's attorney.

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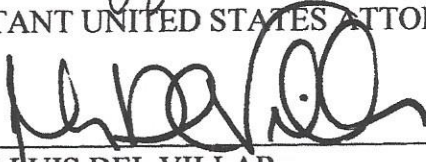
20. This is the entire agreement and understanding between this Office and the Defendant. There are no other agreements, promises, representations, or understandings.

WIFREDO A. FERRER
UNITED STATES ATTORNEY


Date: 11/25/15

By: 
MATTHEW J. LANGLEY
ASSISTANT UNITED STATES ATTORNEY

Date: 11/25/15

By: 
JORGE LUIS DEL VILLAR
ATTORNEY FOR DEFENDANT

Date: 11/25/15

By: 
JUNIEL BARRIOS RIOS
DEFENDANT

FACTUAL PROFFER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 15-20723-CR-UNGARO(s)

UNITED STATES OF AMERICA

v.

JUNIEL BARRIOS RIOS,

Defendant.

FACTUAL PROFFER

If this matter were to proceed to trial, the Government would prove the following facts beyond a reasonable doubt:

1. Based on information provided by a Confidential Informant ("CI"), law enforcement became aware that Juniel Barrios RIOS, was in possession of a controlled substance, that is, ethylone or its analogues, otherwise known as "Molly." During monitored telephone conversations, the CI arranged for a controlled purchase of Molly from RIOS.

2. On Wednesday, September 2, 2015, the CI arrived in the area of RIOS' residence, located at 6955 N.W. 4th Avenue in Miami, Florida. In a telephone conversation, RIOS asked the CI to conduct the purchase inside his residence but the CI insisted that the transaction occur outside in his/her vehicle. RIOS agreed to meet the CI outside.

3. RIOS exited his residence and met the CI at his/her vehicle. RIOS did not have the Molly with him and asked the CI to see the money first. The CI showed RIOS the money for the purchase. RIOS then went inside his residence to retrieve the narcotics.

4. RIOS again exited his residence and walked to the CI's vehicle with a clear bag of Molly sticking out of the pocket of his cargo pants. RIOS took the Molly out of his pocket and

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reached inside the CI's vehicle window to make the exchange. RIOS then walked around the CI's vehicle in order to take possession of the money in exchange for the Molly. It was at that point that RIOS noticed law enforcement approaching and he took flight on foot.

5. Law enforcement chased after RIOS and gave verbal commands for him to stop, however RIOS continued to flee. During his flight, law enforcement observed RIOS throw a clear bag. Law enforcement immediately retrieved the clear bag and saw that it was filled with a substance which later field tested positive for ethylone or Molly. Law enforcement eventually caught up to RIOS and he was apprehended.

6. RIOS was arrested, signed a written *Miranda* waiver, and agreed to cooperate with law enforcement. RIOS also signed a consent-to-search form for his residence and law enforcement conducted a search of his residence. During the search, they seized an AR-15 semi-automatic rifle (serial # DSS001348), which held one magazine loaded with 27 rounds of 5.56 mm ammunition (Double Star Corp.).

7. RIOS was questioned by law enforcement and admitted that he possessed the Molly and was attempting to complete the narcotics purchase with the CI before he ran from law enforcement. He further admitted that he possessed the AR-15 for two years.


8. A subsequent review of RIOS' criminal history revealed that he has three prior felony convictions, including two felony burglary convictions. RIOS has not received a pardon, applied for clemency, or otherwise restored his right to own, possess or use firearms or ammunition.

9. Further investigation also revealed that the AR-15 semi-automatic rifle (serial # DSS001348), and the 27 rounds of 5.56 mm ammunition (Double Star Corp.) were manufactured outside the state of Florida.

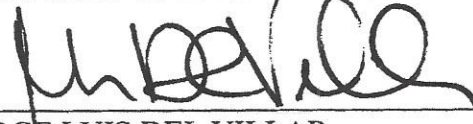
10. RIOS did possess with the intent to distribute ethylone and possessed the AR-15 semi-automatic rifle in furtherance of his distribution of narcotics.

WIFREDO A. FERRER
UNITED STATES ATTORNEY


Date: 11/25/15

By: 
MATTHEW J. LANGLEY
ASSISTANT UNITED STATES ATTORNEY

Date: 11/25/15

By: 
JORGE LUIS DEL VILLAR
ATTORNEY FOR DEFENDANT

Date: 11/25/15

By: 
JUNIEL BARRIOS RIOS
DEFENDANT

**DEFENDANT MOTION FOR
DOWNWARD DEPARTURE AND
REQUEST FOR REASONABLE SENTENCE**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 15-CR-20723-UU

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUNIEL BARRIOS RIOS,

Defendant.

MOTION FOR DOWNWARD DEPARTURE FROM THE GUIDELINES AND REQUEST FOR
REASONABLE SENTENCE AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, the Defendant, JUNIEL BARRIOS RIOS, by and through the undersigned counsel and files this Motion for Downward Variance from the Guidelines and Request for Reasonable Sentence and Incorporated memorandum of Law, and in support thereof alleges the following:

BACKGROUND

There is a history of mental illness in in Mr. Barrios-Rios' family. The Mr. Barrios-Rios' mother has suffered from Bipolar Disorder for most of her life, and Mr. Barrios-Rios has been receiving treatment for his mental health issues since the age of five (5). Like his mother, Mr. Barrios-Rios the has been diagnosed with Bipolar Disorder and ADD.

Mr. Barrios-Rios turned to illegal narcotics as a means of self-medicating for his condition. However, his mental health issues have only been exacerbated by his addiction illegal narcotics.

Mr. Barrios-Rios' first addiction was to marijuana, but then he quickly graduated to cocaine, ecstasy and finally "molly."

DISCUSSION

The era of mechanized application of the sentencing guidelines to formulate a sentence is over. The United States Supreme Court's decision in Pepper v. United States, 131 S. Ct. 1229 (2011) makes it abundantly clear that an era of individualized sentencing has begun and appears to here to stay. It has been the law for several years that the sentencing guideline range is not presumptively reasonable, is advisory only, and is only one, and certainly not the most important factor the Court must consider in fashioning a reasonable sentence. Rita v. United States, 127 S. Ct. 2456 (2007); Gall v. United States, 128 S. Ct. 586 (2007). In United States v. Hunt, 459 F. 3d 1180 (11th Cir. 206), the Court specifically held that there are many instances where the guideline range will not yield a reasonable sentence. *Id.* At 1184. The Court further held that District Courts are obligated to impose a reasonable sentence regardless of the guideline range, so long as the guideline has been considered. *Id.*

In the United States Supreme Court's most recent decision minimizing the impact of the guidelines on imposing a reasonable sentence, the Court stated:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Koon v. United States, 518 U.S. 81 (1996). Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime. Williams v. New York, 337 U.S. at 247, 69 S. Ct. 1079.

Pepper *supra*. 1239-40. The Court went on to say:

In particular, we have emphasized that “[h]ighly relevant is not essential to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” *Id.* at 247, 69 S. Ct. 10-79. Permitting sentencing courts to consider the widest possible breath of information about a defendant “ensures that the punishment will suit not merely fit the offense but the individual defendant.” Wasman v. United States, 468 U.S. 559 (1984). *Id.* at 1240.

While courts should give “respectful consideration” to the now advisory guidelines and their accompanying police statements, the Court in *Pepper* stressed the post-*Booker* decision make it clear that a district court may in appropriate cases impose a non-guideline sentence based on a disagreement with the Sentencing Commission’s views. *Pepper*, *supra*. At 1247.

With the exceptions of unconstitutional considerations (e.g. race, sex, etc.), there is no limit to the type and nature of the information a court may consider in imposing a reasonable sentence. That point was made abundantly clear by the United States Supreme Court in the opening paragraph of its decision in *Pepper*, *supra*:

This court has long recognized that sentencing judges “exercise a wide discretion” in the types of evidence they may consider when imposing sentence and that “[h]ighly relevant if not essential to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” Williams v. New York, 337 U.S. 241, 246-247, 69 S. Ct. 1079. Congress codified this principle at 18 U.S.C. § 3661, which provides that “no limitation shall be placed on the information” a sentencing court may consider concerning the [defendant’s] background, character, and conduct” and at § 3553(a), which sets forth certain factors that the sentencing courts must consider, including “the history and characteristics of the defendant.” § 3553(a)(1)

Pepper, *supra*. at 1235.

Considering the factors set forth in 18 U.S.C. § 3553(a) and the statutory requirement that this court must sentence Mr. Barrios Rios to a sentence sufficient, but not greater than necessary

to comply with the purposes set forth in 18 U.S.C. § 3553(a), it is respectfully submitted that a significant variance below the prescribed guidelines is appropriate.

Two significant grounds exist to justify a downward departure from Mr. Barrios Rios' sentencing guidelines. First, pursuant to U.S.S.G. § 4A1.3(b)(1), Mr. Barrios Rios' criminal history category of (V) significantly over-represents the seriousness of his criminal history. Second, a downward departure under §3553(a) is warranted due to Mr. Barrios-Rios' over-stated criminal past, history of drug addiction and psychological disorders which has included diagnosis of bipolar disorder, depression, and anxiety.

Both, the request for a reduction in criminal history category under §4A1.3 and a downward departure pursuant to §3553(a) will be discussed together in the foregoing because the Courts have intertwined the two, when considering a situation such as Mr. Barrios-Rios'.

OVER-REPRESENTED CRIMINAL HISTORY U.S.S.G. §4A1.3 AND DOWNWARD DEPARTURE
PURSUANT TO 18 U.S.C. § 3553(a)

The defendant's guidelines clearly over-state the seriousness of his criminal history, and the proposed guideline sentence conflicts with § 3553(a)'s directive to impose a sentence "sufficient but not greater than necessary."

This Court has obviously encountered numerous defendants falling within each of the six criminal history categories. The question that now confronts the Court is whether, given its experience, Mr. Barrios-Rios' criminal history is typical of the criminal history that Category V or VI offenders normally possess. Counsel, who has also encountered numerous defendant's falling within each of the six criminal history categories, submits that it is not.

The most serious of Mr. Barrios-Rios' prior convictions are the two (2) convictions for Unoccupied Burglary for which he was sentenced on April 27, 2011 at twenty-one (21) years of age. At this time of his life, Mr. Barrios-Rios was motivated by his addiction to drugs and the need to support his habits. Unfortunately, like many young men who find themselves addicted to drugs and without a job to support their habits, Mr. Barrios-Rios' turned to theft as a means to support his habit. As a result of these convictions, Mr. Barrios-Rios received a concurrent sentence of three hundred sixty-four (364) days in the Miami-Dade County Jail, which amounts to the longest sentence he has received to date¹. The rest of Mr. Barrios-Rios' contacts with the law are of the type commonly associated with those addicted to drugs. These include a string of arrests for petit theft, possession of narcotics and driving while license suspended, the latter of which is the result of the suspension imposed by the Department of Motor Vehicle as a result of being convicted for possession of narcotics². The Court should also note, that despite his history

¹ See, *U.S. v. Collington*, 461 F.3d 805 (6th Cir. 2006) (120- month sentence in drugs-and-gun case upheld in the face of 188 -235 months advisory range, in part because the judge found that defendant had never been in custody for a substantial period, despite criminal history category of IV). See also, *Marion v. U.S.*, 2008 WL 4602304 (D. Maine Oct. 15, 2008) (district court departed one criminal history category from the career offender level, noting that one of the predicate crimes was punished by only a fine and the other predicate offense brought the defendant a suspended sentence and then, upon his violation of probation, only 30 days; the district court observed that the sentencing judge's opinion in imposing sentence for the priors was more reliable proof of the nature of the crimes than the untested allegations in the underlying police reports)

² See, *U.S. v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (career offender range of 188-235 months for defendant convicted of two prior sales when he was age 20 was greater than necessary to satisfy sentencing purposes. Absent career offender finding, guidelines called for 87-108 months; court imposed 126 months in part because Commission's study showed that in cases of low-level street dealers, career offender status often produces sentences far longer than prior sentences and greater than necessary to deter a defendant from re-offending).

of drug addiction and psychological disorders, Mr. Barrios-Rios' prior criminal history is devoid of any violent acts against a person or law enforcement.

In U.S. v. Mishoe, 241 F.3d 214 (2d Cir. 2001) the Court held that a large disparity between the length of the prior sentences imposed and the guidelines sentence may indicate that a career offender term provides a deterrent effect in excess of what is required and may "constitute a mitigating circumstance present 'to a degree' not adequately considered by the Commission." Additionally, in U.S. v. Colon, 2007 WL 4246470 (D. Vt. Nov. 29, 2007) the Court found that the difference between the prior sentences served and recommended guidelines justified a departure from the career offender range. The court noted that the recommended guideline sentence in that case would have been over a ten-fold increase from prior sentences served by the defendant. In light of the nature of the prior offenses, the sentences served, and the large disparity between prior sentences and the present sentence, the Court found a downward departure was appropriate.

Additionally, as a result of U.S. v. Boardman, 528 F.3d 86, 87-88 (1 Cir. 2008) district courts now have "broader freedom" to determine whether prior convictions qualify as predicate crimes of violence for purposes of the career offender Guideline. In U.S. v. Sanchez, 517 F.3d 651, 662-67 (2 Cir. 2008) the Court remanded for clarification as to whether sentence was affected by judge's mistaken view that 28 U.S.C. Sec. 994(h) restricted his authority to impose a non Guideline sentence or to grant further downward departure. Here, the Court found that 994(h)'s instruction to the Sentencing Commission that it assure sentences for career offenders

"at or near" statutory maximum did not deprive district court of authority to impose shorter sentences by way of a non-Guideline sentence or departure³.

A downward departure pursuant to U.S.S.G. §4A1.3 is not to say, of course, that Mr. Barrios-Rios' prior convictions should be ignored. Rather, it implements the Sentencing Commission's recognition that in some cases a defendant's criminal history category over-represents the seriousness of his or her criminal history. A lower criminal history category would more adequately reflect that Mr. Barrios-Rios does have a criminal history that is more significant than others. However, a lower criminal history category would also recognize that Mr. Barrios-Rios is not the type of hardened criminal, having committed at least a couple of serious past offenses and having served significant periods of incarceration⁴.

Finally, although § 4A1.3(b)(3) indicates that for career offenders, a departure "may not exceed one criminal history category," the line of cases following Booker and Rita, clearly indicate that such restrictions on sentencing discretion are advisory only and do not foreclose the

³ See, U.S. v. Jenkins, 537 F.3d 1 (1 Cir 2008) (Although district court denied departure for overstated criminal history, it varied 62 months below the minimum 262 guideline sentence after balancing defendant's history as a gross recidivist against his history as a low-level, non-violent drug offender) See also,

⁴ See, U.S. v. Collington, 461 F.3d 805 (6th Cir. 2006) (upholding sentence of 120 months where guideline range was 188 -235 months in part because guidelines did not reflect defendant's actual criminal history, that he had only previously served 7 months in prison before the offenses and was an ideal candidate for reform, and that "this incident was the first time that this quantity of drugs and guns had been found in [his] possession."); See also, U.S. v. Moreland, 568 F. Supp. 2d 674 (S.D. W. Va. 2008) (court rejects career offender guideline range of 30 years to life to impose statutory minimum 120 months for a defendant whose remote and non-violent predicate convictions were cumulatively penalized by much less than a year in prison).

imposition of non-guideline sentences based on consideration of all the § 3553(a) factors in a given case⁵.

Unfortunately, the Commission has not developed any standards or recommendations that affect sentencing ranges for many of the individual characteristics that apply to Mr. Barrios-Rios. Matters such as age, lack of education, mental or emotional condition, medical condition (including drug or alcohol addiction), lack of guidance as a youth, or family ties are not ordinarily considered under the Guidelines. See USSG. Manual §§ 5H1.1-6, 11, and 12 (Nov. 2006). These are, however, the specific matters that § 3553(a) authorizes the sentencing judge to consider. See, e.g., 18 U.S.C. § 3553(a)(1)).

To conclude, Mr. Barrios-Rios' recommended guideline range of 262 to 327 months is not only unreasonable but far greater than necessary to either punish the defendant or protect the community, and as such, a downward departure under either §4A1.3 or §3553(a) is warranted⁶.

⁵ See, U.S. v. Villarini, 298 Fed. Appx. 79 (2 Cir. 2008) (court applied departure to use guideline range of 168-210 months because career offender range of 188-235 months overstated criminal history);

⁶ See U.S. v. Thompson, 206 F. App'x 642 (8th Cir. 2006) (court varied from 135-168 month advisory range to 110 months apparently due to defendant's drug addiction and bipolar disorder); and

See also U.S. v. Patzer, 548 F.Supp.2d 612 (N.D.Ill.,2008)(court imposed sentence of 13 year term, followed by five years of supervised release, despite guidelines range of 346 - 411 months, finding that his prior offenses designating him as a career offender were less serious than most such offenses considered for purposes of that guideline, he had difficult childhood and had not been properly diagnosed and treated for ADD, and his conduct stemmed from mental health and drug problems that were treatable, and that he had potential for rehabilitation with support of friends and foster family.)

WHEREFORE, based upon the above and foregoing, Mr. Juniel Barrios Rios respectfully requests that the grant this motion and sentence him accordingly.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was electronically filed with the Clerk of Courts using CM/ECF, and faxed to the U.S. Probation Office this 14th day of January 2016.

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