IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	**NO: 3:08-cr-95-JAJ**
	:	
vs.	:	**DEFENDANT, DAMIEN TIMOTHY HOWARD' S MOTION FOR DOWNWARD VARIANCE FROM ADVISORY GUIDELINE RANGE**
DAMIAN TIMOTHY HOWARD,	:	
	:	
Defendant.	:	

COMES NOW the Defendant, Damian Timothy Howard, and in support of his Motion for Downward Variance from Advisory Guideline Range states to the Court as follows:

1. The Defendant's sentencing in this matter is scheduled for Thursday, July 2, 2009 at 11:00 a.m. at the United States Courthouse in Davenport, Iowa. United States District Court Judge John A. Jarvey will preside at sentencing. Defendant's current advisory guideline range is 292 to 365 months.

2. Defendant is requesting a Motion for Downward Variance from his advisory guideline range sentence of 292 to 365 months. In support thereof, Defendant bases his request on all of the statutory factors in Title 18 U.S.C. § 3553(a), Gall v. United States, 128 S.Ct. 586 (2007) and Spears v. United States, 129 S.Ct. 840 (2009).

3. Defendant bases his request on the factors of his difficult childhood, his low intelligence or mental retardation, and the disparity between crack cocaine sentencing guidelines and powder cocaine sentencing guidelines.

WHEREFORE, Defendant requests the Court grant his Motion for Downward Variance from the advisory guideline range of 292 to 365 months and sentence him to a lesser term of imprisonment and for such other and further relief as this Court deems just and proper in the premises.

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2009, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: Assistant U.S. Attorney Cliff Cronk

By: /s/ Alfred E. Willett

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Damian Howard

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	**NO: 3:08-cr-95-JAJ**
vs.	:	**DEFENDANT'S MEMORANDUM OF AUTHORITIES IN SUPPORT**
DAMIAN TIMOTHY HOWARD,	:	**OF DOWNWARD VARIANCE**
Defendant.	:	

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FACTS

The Defendant presents the following facts in support of his Motion to Vary Downward from the Advisory Guideline Range sentence of 292 to 365 months to a lesser term of imprisonment.

The Defendant has been detained in the U.S. Marshals Service Custody since September 19, 2008. See, p. 2, Arrest Date section. The Defendant is 28 years old, has a 10th grade education and has six (6) children. See, p. 3, Identifying Data section.

Pursuant to U.S.S.G. § 3B1.1 and 3B1.2, neither an aggravating nor mitigating role adjustment is warranted in Mr. Howard's case. See, P.S.I.R. ¶ 22.

According to U.S.S.G § 4B1.1(a), the defendant is considered a career offender because he was at least 18 years old at the time of the instant offense, the instant offense is a felony drug offense, and the Defendant

has at least two prior felony drug convictions. On June 15, 2000, the Defendant was convicted of Delivering a Controlled Substance in Scott County District Court. On June 15, 2000, the Defendant was convicted of Delivering a Schedule II Controlled Substance in Scott County District Court. See, P.S.I.R. ¶ 33.

During his P.S.R. interview, the Defendant stated that he was involved in one of his felony convictions because he wanted to earn money to support his own drug habit. See, P.S.I.R. ¶ 55.

While Mr. Howard was on parole prior to April 23, 2007, there was no indication of drug use by him. Defendant was discharged and paroled. See, P.S.I.R. ¶ 70.

The Defendant has a total of 17 criminal history points and a criminal history category of VI. The Defendant is a career offender. See, U.S.S.G. § 4B1.1. See, P.S.I.R. ¶ 80.

The Defendant's first contact with the juvenile justice system occurred when he was age 13 in reference to a charge of First Degree Robbery and Third Degree Criminal Mischief. See, P.S.I.R. ¶ 81.

Mr. Howard's family members are no strangers to the criminal justice system. The Defendant's father was indicted in United States District Court for the Southern District of Iowa in June, 1995 for possession with intent to distribute cocaine base. On December 8, 1995, he was sentenced to 60 months imprisonment and four years of supervised release. His conditions of release were modified on August 7, 2001, to include four months of

home confinement after he was convicted of resisting arrest. On April 8, 2003, the Defendant's father was discharged from supervised release. See, P.S.I.R. ¶ 99.

The Defendant has five full-siblings. Archie, Jr., is reportedly incarcerated at the Iowa Department of Corrections on a domestic charge. See, P.S.I.R. ¶ 100.

Mr. Howard's family are also no strangers to the effects of violence. Mr. Howard's brother, Dane, died at age 18 from a gunshot wound. See, P.S.I.R. ¶ 100.

Mr. Howard has several paternal half-siblings. Dennis Bailey, Sr., was indicted in United States District Court for the Southern District of Iowa in August, 1997, for distribution of cocaine base. On April 17, 1998, Mr. Bailey, Sr. was sentenced to 170 months imprisonment followed by five years of supervised release. In May, 2007, Mr. Bailey's supervised release was revoked. He was sentenced to 18 months incarceration with no supervised release to follow. See, P.S.I.R. ¶ 101.

Hano Bailey died in 2008 from a gunshot wound. See, P.S.I.R. ¶ 101.

It is interesting to note that the Defendant looked up to his father as a role model. See, P.S.I.R. ¶ 102.

The Defendant has been involved in a relationship with Lashunda Bateman since age 16. This relationship has produced five children; Damien Jr., age 12; Danaja, age nine; Dane, age six; Daquez, age five; and Daisha, age four. Daisha is a special needs child in that she has cerebral

palsy. The Defendant is reported to be a good father to all of his children. See, P.S.I.R. ¶ 103.

The Defendant was also involved in a relationship with another woman which produced one child, Jtavia Hill. Prior to the Defendant's incarceration, Jtavia visited Defendant at his home and spent weekends with his family. See, P.S.I.R. ¶ 104.

The Defendant reportedly owes a total of $13,370 in unpaid child support for five of his children. See, P.S.I.R. ¶ 105.

In regards to Mr. Howard's mental and emotional health, he reported taking "hyper pills" as a teenager for Attention Deficit Hyperactivity Disorder (ADHD). Defendant did receive mental health treatment at Vera French Community Mental Health Center for ADHD between 1989 and 1995. In 1999 the Defendant underwent a psychiatric evaluation and the diagnostic impression at that time was cannabis abuse, possible ADHD, mild mental retardation and/or conduct disorder suspected, and Global Assessment Functioning (GAF) 30. See, P.S.I.R. ¶ 111.

The Defendant's father verified that Mr. Howard has limited functioning. See, P.S.I.R. ¶ 114.

In regards to controlled substances, the Defendant experimented with alcohol and marijuana. He was introduced to those substances through friends and/or family. At age 18, he began consuming alcohol and reportedly consumed one case of beer, daily, until he was incarcerated. See, P.S.I.R. ¶ 115.

In regards to marijuana, the Defendant began smoking this substance on a daily basis at age 16. He smoked one-half ounce to one ounce of marijuana per day. According to the Defendant, his last use of marijuana was six to seven years ago. See, P.S.I.R. ¶ 116.

Mr. Howard did receive outpatient substance abuse between February and March of 2000. However, the Defendant's family appeared uninvolved in his recovery. See, P.S.I.R. ¶ 117.

In 2002 and 2004, Mr. Howard was diagnosed with both cannabis and alcohol dependence. See, P.S.I.R. ¶ 118 to 119.

In regards to the Defendant's formal education, he attended high school at Eastern Avenue School in Davenport but dropped out of school in his sophomore year at the time of the birth of his son. The Defendant himself noted that he does not know how to read very well. See, P.S.I.R. ¶ 121.

In regards to Mr. Howard's employment, he had legitimate employment between 2001 and 2002 and for tax year 2004. See, P.S.I.R. ¶ ¶ 125 - 127. However, it does not appear that Mr. Howard has the ability to pay any type of fine.

Currently, the guideline provisions provide that based on a total offense level of 35 and a criminal history category of VI, the guideline imprisonment range is 292 to 365 months. See, P.S.I.R. ¶ 136.

Mr. Howard's guideline range for a term of supervised release is at least ten years. See, P.S.I.R. ¶ 138.

His guideline range for a fine is from $20,000 to $8,000,000. See, P.S.I.R. ¶ 142.

In regards to the factors that may warrant a variance, the Defendant has an abundant amount of criminal history which started when he was 14 years old. See, P.S.I.R. ¶ 145.

However, the Defendant presents with a history of alcohol and marijuana abuse. He has received mental health treatment and was diagnosed with ADHD, mild mental retardation, and/or conduct disorder suspected. See, P.S.I.R. ¶ 146.

Defendant contends that his advisory guideline range of 292 to 365 months is an excessive sentence of imprisonment in light of this Defendant's individual history and the circumstances of his case. Defendant's sentence will be followed by at least ten (10) years of supervised release.

LAW

Defendant contends that some of the other factors articulated in his Motion for Downward Variance have found support in recent Eighth Circuit Appeals decisions.

> "In fashioning a 'sentence sufficient, but not greater than necessary,' 18 U.S.C. § 3553(a), 'district courts are not only permitted, but required, to consider "the history and characteristics of the defendant"' *White*, 506 F.3d at 644 (quoting 18 U.S.C. § 3553(a)(1)). As a consequence, factors such as a defendant's age, medical condition, prior military service, family obligations, entrepreneurial spirit, etc., can form the bases for a variance even though they would not justify a departure. *Id.* (citing *United States v. Ryder*, 414 F.3d 908, 920 (8th Cir. 2005) (remanding for resentencing where a district court believed it

> lacked discretion to vary based on the defendants' ill health and advanced ages); and *United States v. Lamoreaux*, 422 F.3d 750, 756 (8th Cir. 2005) (approving of the consideration of non-Guidelines factors such as a prior military service, the pregnancy of the defendant's wife, a defendant's need to care for his children, and a defendant's entrepreneurial spirit, in fashioning an appropriate sentence)). In addition, factors that have already been taken into account in calculating the advisory guideline range, such as the defendant's lack of criminal history, can nevertheless form the basis of a variance. *Id*." U.S. v. Chase, 560 F.3d 828, 830-31 (8th Cir. 2009).

Therefore, items such as the Defendant's mental health history are factors this Court can take into consideration in imposing a downward variance. In a 2008 decision, the Eighth Circuit Court of Appeals did note the granting of a downward variance based upon a past history of family problems.

> "Price, however, did not receive a Guidelines sentence but a sentence varying below her Guidelines range by twelve months. The only evidence that Price offers in support of her argument that her below-Guidelines sentence is unreasonable is her past history of family problems. The district court considered this evidence but found that it was not sufficiently compelling to warrant a greater variance, and we conclude that the district court acted within its discretion in determining the extent of the variance. *See United States v. Austad*, 519 F.3d 431, 434 (8th Cir. 2008) (recognizing that while our reasonableness review may take into consideration the extent of the district court's deviation from the Guidelines range, we 'must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.') (quoting *Gall v. United States*, --- U.S. ---, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007)." U.S. v. Price, 542 F.3d 617, 622 (8th Cir. 2008).

Recently, the United States Supreme Court felt that a District Court had the authority to replace the guidelines' 100:1 ratio for crack/powder

cocaine offenses with its own 20:1 ratio. See, Spears v. United States, 129 S.Ct. 840 (2009). In that case, originating from the United States District Court for the Northern District of Iowa, the sentencing court imposed a 20:1 ratio for crack/powder cocaine offenses. The United States Supreme Court discussed the rejection of the 100:1 ratio.

> "As a logical matter, of course, rejection of the 100:1 ratio, explicitly approved by *Kimbrough*, necessarily implies adoption of some other ratio to govern the mine-run case. A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity. Put simply, the ability to reduce a mine-run defendant's sentence necessarily permits adoption of a replacement ratio.
>
> To the extent the above quoted language has obscured *Kimbrough's*, holding, we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines. Here, the District Court's choice of replacement ratio was based upon two well-reasoned decisions by other courts, which themselves reflected the Sentencing Commission's expert judgment that a 20:1 ratio would be appropriate in a mine-run case. See, *Perry*, 389 F.Supp.2d, at 307-308; *Smith*, 359 F.Supp.2d, at 781-782; Report to Congress 106-107, App. A, pp. 3-6." Id. at 843-44.

Defendant contends that the implementation of a 20:1 ratio in this case would reduce the total offense level to a level 32 and a three level reduction for acceptance of responsibility would reduce the total offense level to a level 29. The advisory guideline range for a criminal history category VI and a total offense level 29 is 151 to 188 months.

Defendant contends that a sentence of less than 292 to 365 months is still a sentence that is sufficient but not greater than necessary to

comply with the purposes of sentencing described in Title 18 U.S.C. § 3553(a).

CONCLUSION

> "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 punishment to ensue. Id. at 113, 116, S.Ct. 2035." Gall v. United States, 128 S.Ct. 586, 598 (2007).

Based upon the aforementioned facts and legal authorities, Defendant requests that the Court vary downward from the advisory guideline range of 292 to 365 months to a lesser sentence of imprisonment.

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2009, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: Assistant U.S. Attorney Cliff Cronk

By: /s/ Alfred E. Willett

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