

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2:17-CR-05-02

v.

Hon. Gordon J. Quist
U.S. District Court Judge

TRACEY SMITH-KILPATRICK,

Defendant.

DEFENDANT'S MEMORANDUM REGARDING SENTENCING
AND MEMORANDUM IN SUPPORT OF MOTION FOR DOWNWARD VARIANCE
FROM THE SENTENCING GUIDELINES BASED ON THE APPLICATION OF THE
FACTORS SET FORTH IN 18 U.S.C. §3553(a)

NOW COMES the Defendant Ms. Tracey Smith-Kilpatrick, through counsel, and offers this sentencing memorandum for the Court's consideration in anticipation of sentencing on June 7, 2018, at 10:30 a.m. Ms. Smith-Kilpatrick has also moved this Honorable Court to grant her a downward variance from the advisory sentencing guidelines and offers this memorandum in support of that motion.

Introduction and Background

Ms. Smith-Kilpatrick found herself drawn into these proceedings when the government filed a superseding indictment on September 20, 2017. RE. 86: Superseding Indictment, PageID 201. In this indictment, the government charged Ms. Smith-Kilpatrick with conspiring to distribute, and possessing with the intent to distribute, heroin and powder cocaine (in violation of 21 U.S.C. § 841(a)(1)) from December 2014 to April 2016 in Michigan's Upper Peninsula. *Id.* Ms. Smith-Kilpatrick was one of five people so charged in that superseding indictment. *Id.* The case proceeded to trial on January 8, 2018. RE. 169: Minutes, Jury Trial Day 1, PageID 670. On January 16, 2018, a jury convicted

Ms. Smith-Kilpatrick of one count of conspiracy to distribute and possess with intent to distribute heroin and/or cocaine base (fewer than 100 grams of heroin and 28 grams or more of cocaine base). RE. 175: Verdict, PageID 679. Ms. Smith-Kilpatrick now faces sentencing for this conviction. The final presentence investigation report (“PSR”) in this case was filed on May 29, 2018. *See* RE. 220: Final PSR, PageID 2211-50. It includes guideline calculations of offense level 36, criminal-history category I, and an advisory range of 188 to 235 months. RE. 220: Final PSR, PageID 2250. Its recommended sentence is 120 months. RE. 220: Final PSR, PageID 2250. Objections to the guideline scoring remain outstanding. *See* RE. 220: Final PSR, PageID 2246-49.

Application of 18 U.S.C. § 3553(a)

Of course, as this Court knows, under *United States v. Booker*, 543 U.S. 220 (2005), as clarified by *Gall v. United States*, 552 U.S. 38 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007), sentencing courts consider multiple factors in determining a defendant’s sentence. After correctly calculating the advisory sentencing guideline range, a sentencing court should listen to arguments by the parties regarding the appropriate sentence to impose, and then turn to 18 U.S.C. § 3553(a) in light of the sentences advocated by the parties. *See Kimbrough*, 552 U.S. at 108-11. After considering the advisory guideline range, the positions of the parties, and the § 3553(a) factors, the sentencing court should impose a sentence sufficient, but not greater than necessary, to achieve the purposes of sentencing. *See id.* at 91; *see also* 18 U.S.C. § 3553(a). Sentencing courts should explain the sentences they impose to such an extent that defendants and reviewing courts may understand the basis for a chosen sentence. *See, e.g., Rita v. United States*, 551 U.S. 338, 356 (2007).

Under 18 U.S.C. § 3553(a), a sentencing “court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing as the section articulates them. The section calls on courts to consider a variety sentencing factors. For the Court’s convenience, Ms. Smith-Kilpatrick will enumerate these factors below.

A. *Section 3553(a)(1) looks to the nature and circumstances of the offense and the history and characteristics of the defendant.*

Ms. Smith-Kilpatrick stands convicted of participating in a drug-distribution conspiracy. She maintains her innocence. It bears noting that Ms. Smith-Kilpatrick falls into criminal-history category I, with her most recent prior conviction dating back more than a decade. Her prior offenses number two: driving with a suspended license and possessing marijuana. Ms. Smith-Kilpatrick has never faced a sentence more serious than one year of probation. She has had no violations while on bond for the instant case.

As a child, Ms. Smith-Kilpatrick enjoyed very close relationships with her parents. She remembers her father, who died when she was seven-years old, extremely fondly. He would take her fishing and on special lunch dates. She describes her mother as her best friend. Yet in the course of her forty-one years, Ms. Smith-Kilpatrick has also experienced an excessive share of loss: her father dying when she was seven, her sister succumbing to cancer when Ms. Smith-Kilpatrick was fifteen, and her husband John Kilpatrick dying of a heart attack when she was twenty-eight years old.

After her husband died, Ms. Smith-Kilpatrick eventually began a relationship with James Wilson, whom she'd known as a friend for several years. With him, she has two children. She has also been a caretaker for a disabled stepson, who has required high levels of care. As Ms. Courtney Bates explains in her attached letter of support, Ms. Smith-Kilpatrick is one of those people who goes far out of their way to make sure those around them have what they need and feel loved and supported. Ms. Whitney Carey, who is Ms. Smith-Kilpatrick's stepsister, emphasizes, in her attached letter, that Ms. Smith-Kilpatrick is a "loving, caring, giving, and courageous mother." As Ms. Carey describes it, Ms. Smith-Kilpatrick "is the rock of [the] family" and "keeps [everyone] going."

As the Court will see in all of the attached letters of support, Ms. Smith-Kilpatrick's family and supporters see her as the core of the family, and as Ms. Smith-Kilpatrick's mother so astutely observes in her letter, Ms. Smith-Kilpatrick's loss of her father at such a young age shaped Ms. Smith-Kilpatrick

to cling to people and to be excessively accommodating to try to “keep people,” whom she naturally feared she could lose, as she lost her father. Ms. Smith-Kilpatrick is a giver, perhaps to a fault. Letters of support are attached as **Exhibit A**.

B. Section 3553(a)(2)(A) calls for consideration of the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

Even if Ms. Smith-Kilpatrick agreed with the jury’s verdict, and she does not, a guideline sentence, or even the sentence of ten years suggested in the final PSR, would be more than necessary to reflect the seriousness of Ms. Smith-Kilpatrick’s alleged role in the alleged conspiracy, promote respect for the law, and provide just punishment. In this vein, counsel would return to the often-cited work of Judge James S. Gwin of the Northern District of Ohio. The Sixth Circuit addressed Judge Gwin’s sentencing studies in *United States v. Collins*, 828 F.3d 386, 387 (6th Cir. 2016), where it considered a five-year sentence for receiving and distributing child pornography and for possessing child pornography. The guidelines in that case yielded an advisory range of 262 to 327 months. *Collins*, 828 F.3d at 388. Judge Gwin had polled the trial jury to gain insight into community sentiment regarding sentencing. *Id.* Jurors recommended sentences in the case between 0 and 60 months, with the mean sentence falling at 14.5 months and the median coming in at eight months. *Id.* With one exception, every juror recommended a sentence less than half the mandatory minimum. *Id.* The Sixth Circuit ultimately upheld the significantly-below-guidelines sentence. *Id.* at 391.

Judge Gwin has studied whether the advisory sentencing guidelines reflect community sentiment on the issue of just punishment. *See* Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harvard L. & Policy Rev. 173 (2010). Based on a study of twenty-two cases, he has observed that “the median juror recommended sentence was only 19% of the median Guidelines ranges and only 36% of the bottom of the Guidelines ranges.”

Id. at 175. This work “suggests that the Guidelines are untethered to appropriate punishments as determined by jurors actually hearing the case.” *Id.*

Related to drug cases specifically, Judge Gwin’s law-review article cited above discusses a case in which the jury convicted a defendant of possession with the intent to distribute approximately 16 grams of cocaine base, of using or carrying a firearm during a drug-trafficking offense, and of being a felon in possession of a firearm. *Id.* at 190. This defendant had a significant criminal history, which put him in criminal-history category VI. *Id.* He faced two statutory mandatory minimum sentences of five years each, to be served consecutively. *Id.* The guidelines recommended a sentencing range of 120 to 150 months of imprisonment on the drug offenses (again, consecutive to the five years of mandatory imprisonment for the use of a firearm during the drug-trafficking charge). *Id.* In combination, the advisory guidelines recommended a period of imprisonment of 180 to 210 months. *Id.* The jury received a list of the defendant’s prior convictions, and when asked what sentence they believed appropriate, “the jurors gave a median recommended sentence of 36 months, with a standard deviation of 12.” *Id.* While each juror privately and anonymously completed their recommendation, without discussing it with other jurors, six jurors all recommended a sentence of 36 months. *Id.* This recommended sentence “stands in stark contrast to the median Guidelines recommendation of 195 months.” *Id.* Given Judge Gwin’s findings, it seems likely jurors would recommend a similar deviation from the guidelines in Ms. Smith-Kilpatrick’s case.

C. Section 3553(a)(2)(B) points out the need to afford adequate deterrence to criminal conduct, and § 3553(a)(2)(C) asks courts to consider the need to protect the public from future crimes by the defendant.

Ms. Smith-Kilpatrick has the supportive family, strong pro-social community ties, and demographic traits to make her an extremely low risk for recidivism. According to the U.S. Sentencing Commission, criminal history and age at the time of release can indicate a defendant’s risk for

recidivism.¹ Defendants like Ms. Smith-Kilpatrick, who fall into criminal-history category I, have the lowest rates of recidivism (35.4% for those with no criminal-history points), while those in criminal-history category VI have the highest rates (77.1%). *Id.* Likewise, age can help predict recidivism. Defendants younger than 21 at the time of release have a recidivism rate of 65%, while those released when they are older than 60 have a recidivism rate of 16.5%. *Id.* At forty-one years old now, Ms. Smith-Kilpatrick is moving toward that lowest recidivism rate.

The Sentencing Commission has found that “[t]here [is] little apparent association between the length of imprisonment and recidivism for drug trafficking offenders overall.” *Id.* This finding correlates to earlier scholarship finding that “numerical offense severity” for a defendant’s offense (i.e. a defendant’s total offense level under the guidelines) does not correlate with recidivism.² The Commission has noted that “once Criminal History Category is accounted for, length of imprisonment is associated with lower rates of recidivism. Again, longer sentences result in older ages at release, which combined with criminal history differences, are likely factors affecting this result.” U.S. Sentencing Commission, *Recidivism Among Federal Drug Trafficking Offenders* at 3.

Regarding gender, the Florida Department of Corrections has found that women are half as likely to reoffend compared to men. In a 2016 study, that department looked at recidivism rates three years after release: the rate for males fell at 27%; the rate for females landed at 13%.³

¹ See U.S. Sentencing Commission, *Recidivism Among Federal Drug Trafficking Offenders* 3 (Feb. 2017), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170221_Recidivism-Drugs.pdf.

² See U.S. Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview* 20 (March 2016), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

³ Florida Department of Corrections, *2015 Florida Prison Recidivism Study* (Dec. 2016), available at <http://www.dc.state.fl.us/pub/recidivism/2015/gender.html>.

One can sum up these findings by saying that a low criminal-history score and increased age indicate a lower risk of recidivism while offense severity (as indicated by offense level) does not contribute to the recidivism analysis. *See id.* at 94 (reiterating findings on age and criminal history). Being female also indicates a lower risk for reoffending. Given these statistics, deterrence is not a paramount concern with Ms. Smith-Kilpatrick, who is already forty-one years old, is female, and has almost no criminal history.

D. Section 3553(a)(2)(D) provides for consideration of the needs of a defendant: the need to provide for educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Congress and the Supreme Court recognize that prison does not affect rehabilitation efficiently. *See* 28 U.S.C. § 994(k) (directing the Sentencing Commission to craft guidelines that recognize “the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment”). The Supreme Court prohibits imprisonment for rehabilitative reasons. *See Tapia v. United States*, 564 U.S. 319, 321 (2011).

Beyond these policy stances on prison and rehabilitation, Ms. Smith-Kilpatrick does not need extensive rehabilitation and programming. She graduated from Redford High School in Detroit in 1996. For income, she has her late husband’s pension and survivor benefits. She does have an interest in pursuing cosmetology training.

E. Section 3553(a)(3) directs courts to consider the kinds of sentences available.

Under *Booker*, and with advisory sentencing guidelines, the Court has almost the full array of sentencing options at its fingertips here. The statutory sentencing range of five to forty years presents the only constraint on the Court’s sentencing discretion. It bears noting that the PSR writer has suggested a below-guidelines sentence may be appropriate in this case—suggesting a sentence of 120 months. RE. 220: Final PSR, PageID 2250.

F. Section 3553(a)(4) then calls for consideration of the advisory guideline sentencing range.

As calculated in the final PSR, the advisory guideline range involves offense level 36, criminal-history category I, and a range of 188 to 235 months. In looking at the Guidelines' trajectory, it is interesting to note that, by any measure, "the severity and frequency of punishment imposed by the federal criminal process during the guidelines era is markedly greater than it had been before." *See* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1328 (2005). Custodial sentences have been imposed in far greater numbers than they were in the pre-guidelines era, "and the length of imposed sentences has nearly tripled." *Id.* In 1984, some 48% of federal defendants received purely probationary sentences. *Id.* at 1328 n.64. In 2002, that number had dropped to 9.1%. *Id.* In 2017, that number had fallen to 6.9%.⁴

Mean custodial sentences generally reflect a similar trend, but the system is responding to change in that area, likely in large part because of shifts in drug-sentencing policy. These mean sentences increased from 24 months in 1984 to 66.9 months in 1993.⁵

It is beyond the scope of a sentencing memo to discuss the overall social and economic effects of these federal sentencing policies, but evidence does suggest that the Guidelines have not solved the problems of the federal criminal-justice system and the expense of over-incarceration. *See* Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. at 1350. Nor have these changes likely caused a decline in crime. Studies from the '90s and early '00s have tried to show

⁴ U.S. Sentencing Commission, *2017 Sourcebook of Federal Sentencing Statistics*, Figure D: Distribution of Offenders Receiving Sentencing Options (Fiscal Year 2017), available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/FigureD.pdf>.

⁵ Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. at 1328 n.65. Currently, they sit at 45 months. U.S. Sentencing Commission, *2017 Sourcebook of Federal Sentencing Statistics*, Table 13: Sentence Length in Each Primary Offense Category (Fiscal Year 2017), available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table13.pdf>.

that mass imprisonment has caused a decline in crime rates. Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 30-31 (2006). But the Western world as a whole has seen a comparable decline in crime rates, and the U.S. stands as the only country to quintuple its imprisonment rate and experiment with mass incarceration. *Id.* at 31. Canada's imprisonment rate has remained steady at about 100 people per 100,000 in population for about forty years; Canada's crime rates, however, closely parallel those of the United States. *Id.* (while these numbers may be somewhat dated now, they still provide a useful view of the issues).

The Sentencing Commission has begun to recognize these problems. This past spring, the Commission proceeded to amend § 5C1.1. In November, the amended version of that section will take effect and provide a presumption in favor on non-custodial sentences for certain first-time offenders.⁶ While Ms. Smith-Kilpatrick would not qualify for this presumption for a few reasons, the amendment still warrants consideration in the § 3553(a) context at hand because the policy considerations behind it, related to defendants with very minimal criminal history, are in play here. The Commission has recognized that “28 U.S.C. § 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense.”⁷ The guideline changes the Commission was considering when it made that statement involved changes to Chapter Four to further implement the congressional directive at § 994(j). *Id.* While the Commission ultimately decided to amend § 5C1.1 rather than Chapter 4, the impetus of implementing § 994 remains the same—and applies here. Essentially, the Commission's recent changes boil down to a recognition

⁶ See U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines* 75 (April 2018), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180430_RF.pdf.

⁷ See U.S. Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* 23 (Aug. 25, 2017), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20170824_rf_proposed.pdf.

of the appropriateness of imposing non-custodial sentences, and lower custody sentences when applicable, to offenders with minimal criminal history, people like Ms. Smith-Kilpatrick.

G. Section 3553(a)(5) asks courts to consider any pertinent policy statements from the U.S. Sentencing Commission.

The Commission's amendments that take effect in November, related to first-time offenders, discussed above, provide important guidance in this case.

H. Section 3553(a)(6) provides for consideration of the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct.

The idea of sentencing “[d]isparity gets its content from the purposes of sentencing. Unwarranted disparity is different treatment that is unrelated to our legitimate sentencing goals, or uniform treatment that fails to take into account differences among offenders that are relevant to our purposes and priorities.” Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker*, 38 Ariz. St. L.J. 425, 442 (2006). In Ms. Smith-Kilpatrick's case, a below-guidelines sentence would account for appropriate sentencing parity in this case. As it stands now, Ms. Smith-Kilpatrick faces a guideline range appropriate for a drug “kingpin.” *See* U.S.S.G. § 3B1.1, comment. (n.4) (discussing the application of the four-level aggravating-role enhancement to kingpins and others). This forty-one-year-old widow and mother hardly seems to fit into this sentencing role.

As Justice Alito has discussed, as a new generation of criminal-justice participants enters into service, the sentencing pendulum may be swinging back toward a local exercise of “informed discretion.” *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1352 n.6 (2016) (Alito, J., concurring). The “conceit of law,” as some have described it, which obliged incumbent sentencing decision makers to impose mandatory guideline sentences for decades no longer serves to deter continued reevaluation of the guidelines and imposition of sentences more responsive to individual, specific cases. *See id.* Ms. Smith-Kilpatrick's advisory guidelines do not fit her circumstances, circumstances which suggest the need for this more responsive, individualized tailoring.

I. Section 3553(a)(7) addresses the need to provide restitution to any victims of the offense.

Restitution is not an issue in this case. *See* RE.220: Final PSR, PageID 2244.

Sentencing Guideline Objections

Ms. Kilpatrick objects to the drug-quantity calculations and the guideline enhancements based on alleged maintenance of a drug house and a supposed leadership role.

a. The drug quantity calculated in the final PSR rests on unreliable evidence and is not supported by a preponderance of the evidence.

The final PSR bases the guideline offense level on 1,150.95 kilograms of marijuana equivalent. RE. 220: Final PSR, PageID 2236. This calculation yields a base offense level of 30. RE. 220: Final PSR, PageID 2236. A preponderance of the evidence must support a drug-quantity finding, and sentencing courts should err on the side of caution in finding drug quantity. *United States v. Woodside*, 642 F. App'x 490, 496 (6th Cir. 2016). A mere allegation regarding drug quantity will not support a finding. *Id.*

In the case at hand, the drug quantity calculated in the final PSR rests on the allegations of self-interested snitches, who testified at trial in order to obtain sentencing benefits. The only drug quantity that can be said to rest on more than a mere allegation is the jury's finding of 28 grams of cocaine base. *See* RE. 175: Verdict, PageID 679. This finding puts the base offense level at 24 (this would also be the total offense level if the Court were to grant Ms. Smith-Kilpatrick's other objections). A total offense level of 24, with a criminal-history category of I, yields an advisory range of 51 to 63 months (a 5-year mandatory minimum sentence is present in this case, however).

b. Ms. Smith-Kilpatrick did not maintain a drug house; even if the jury's finding on the offense is correct, a preponderance of the evidence does not support imposition of this enhancement when Ms. Smith-Kilpatrick's residence was just that—a residence.

While Ms. Smith-Kilpatrick does *not* concede the accuracy of the jury's conviction, even if she did participate in a drug conspiracy, she did not maintain a drug house for purposes of the two-level

enhancement under § 2D1.1(b)(12). As touched on above, the evidence related to Ms. Smith-Kilpatrick's participation in the alleged drug conspiracy hinged on the self-serving testimony of snitches seeking sentencing benefits. This foundation does not rise to a preponderance of the evidence. And even if this Court credits that testimony, the allegations do not show that Ms. Smith-Kilpatrick maintained premises primarily for drug-related activities

In determining whether to apply this enhancement, courts should consider just that question: whether the defendant maintained the subject premises primarily for drug-related activities. As discussed in the commentary to § 2D1.1, “manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant’s primary or principal uses for the premises.” U.S.S.G. § 2D1.1, comment. (n.17). Drug manufacturing or distribution must constitute more than an “incidental or collateral” use of the premises. *Id.* In making the determination, a sentencing court “should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.” *Id.*

Ms. Smith-Kilpatrick used her residence as a residence. The PSR writer cites *United States v. Johnson*, 737 F.3d 444 (6th Cir. 2013), to support application of the enhancement, but *Johnson* does not support the enhancement here. In *Johnson*, the Sixth Circuit upheld application of the enhancement: the defendant “maintained at least one room in his home for the purpose of storing marijuana for later distribution” and “[a]s part of the conspiracy, [the defendant] received marijuana deliveries from a supplier in Texas and stored 1200 pounds of the drug in his home during an eight-month period.” *Id.* at 447. Officers observed three instances of members of the conspiracy traveling to the Arkansas home to retrieve large quantities of drugs for distribution in Tennessee. *Id.* When officers searched the home, they uncovered “237 pounds of marijuana in the northeast bedroom, a gun in the bedroom closet, \$15,000 in cash and a scale.” *Id.* The reviewing court discussed how “tools of the trade” (such

as laboratory equipment, scales, guns and ammunition to protect inventory and profits) and profits (including large quantities of money) and multiple employees or customers present in a home make it more likely that property was used for drug activity. *Id.* at 447-48.

In Ms. Smith-Kilpatrick's case the PSR points to the self-serving testimony that conspirators stored and packaged drugs in Ms. Smith-Kilpatrick's home and picked up controlled substances from the home to take them to the Upper Peninsula. RE.22: Final PSR, PageID 2248. Yet even if one credits these allegations, such activities do not indicate that drug activity was a *primary purpose* of maintaining the home or demonstrate that such actions occurred on any sort of *significant* scale at the residence.

In *Johnson*, the Sixth Circuit emphasized the storage of controlled substances in the home, pointing to the large quantities of drugs stored in the residence. *See, e.g., Johnson*, 737 F.3d at 448-49. Similarly, in *United States v. Sanchez*, 810 F.3d 494, 495 (7th Cir. 2016), the defendant received \$1,500.00 a month for allowing a friend to store drugs in his house. The defendant made the drugs available when individuals arrived to pick them up. *Sanchez*, 810 F.3d at 495. In the course of a year, the defendant "stored at least 30 kilograms of heroin and received \$18,000 as payment for his service as a conduit." *Id.* The sentencing court applied the § 2D1.1(b)(12) enhancement because the defendant had allowed his residence to be used as a "stash house" on a "constant basis for a substantial sum of money." *Id.* at 496. The appellate court emphasized that the use of the home was "integral" to the conspiracy. *Id.* at 497. The same simply cannot be said here. Even crediting the unreliable testimony, Ms. Smith-Kilpatrick was not receiving large payments for use of her home or storing significant quantities of drugs. The residence was far from "integral" to any drug activity.

c. Even crediting the unreliable testimony and the jury's verdict, Ms. Smith-Kilpatrick does not qualify for the leadership enhancement under § 3B1.1(a).

The final PSR has assessed a four-level enhancement under § 3B1.1(a). RE. 220: Final PSR, PageID 2237. This enhancement represents the highest possible aggravating-role enhancement.

Compare U.S.S.G. § 3B1.1(a), (b), & (c). The enhancement distinguishes between leaders/organizers and lower-level managers and supervisors. Section 3B1.1's commentary advises that, in distinguishing leadership and organizational roles from those of mere management or supervision, "titles such as 'kingpin' or 'boss' do not control." U.S.S.G. § 3B1.1, comment. (n.4). Factors sentencing courts should consider in analyzing application of the enhancement include the exercise of decision-making authority, the nature of the defendant's participation in the offense, "the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." *Id.* More than one person can qualify as a leader or organizer of a criminal association or conspiracy. *Id.* And the enhancement does *not* apply to a defendant who merely suggests committing an offense. *Id.*

Nothing the PSR points to suggest this enhancement should apply to Ms. Smith-Kilpatrick, even if one credits the unreliable testimony presented at trial. The PSR argues that Ms. Smith-Kilpatrick allegedly "controlled the distribution of cocaine base within the conspiracy" and "exercised decision-making authority over who received cocaine base and opted not to provide Mr. Cooley with a supply." RE. 220: Final PSR, PageID 2248. It alleges that Ms. Smith-Kilpatrick provided Ms. St. Vincent with a condom containing drugs and instructed her to transport it. RE. 220: Final PSR, PageID 2248. And it alleges that Ms. Smith-Kilpatrick arranged rental vehicles used to transport controlled substances to the Upper Peninsula. RE. 220: Final PSR, PageID 2249. The report classifies this activity as "an integral part of the planning and organization of the offense." RE. 220: Final PSR, PageID 2249. This position, however, ignores the truly leading roles of people like James Wilson. *See, e.g.*, RE. 220: Final PSR, PageID 2230, ¶¶ 129-31 (detailing the testimony of Isaac Cooley about the directions given by and the role of James Wilson). It also ignores the fact that renting cars or telling someone to transport something hardly makes one a leader of an endeavor. Even making such

