

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)
)
 v.)
 [REDACTED])

Criminal Nos. [REDACTED]

SENTENCING MEMORANDUM

Davee [REDACTED] daughters are 9 and 2. Mr. [REDACTED] accepts that he has missed the last 3.5 years of their lives because of his decision to sell heroin. His younger daughter was born while he has been in custody in this case. Because of COVID-related restrictions, he has never been able to touch her. He knows he will not get that time back, and he accepts that lost time as punishment for his actions.

The difference between 3.5 years (roughly, the non-career offender guideline range, which amounts to time served) and the career offender range, at stake in this sentencing, is the difference between him going home or missing out on the next 12 to 15 years of his daughters' lives.



The career offender enhancement results in a more than 1000% increase in the Guidelines range for [REDACTED] from 15 to 21 months (based on criminal history category IV and offense level 10) to 188 to 235 months (based on criminal history category VI and offense level 31).¹ The weight of heroin that Mr. [REDACTED] is responsible for in this case is 7 grams.² He possessed no gun, and there was no violence.

Mr. [REDACTED] has submitted a detailed objection to the legal application of the career offender enhancement.³ Here, he explains why, even if this Court finds it to be technically applicable, this Court should nonetheless impose a variance to the non-career offender range. This is because the career offender guideline, similar to application of the prior felony information under 21 U.S.C. § 851, disproportionately and unfairly targets Black Americans – and Black Pittsburghers in particular.

If this Court agrees with Mr. [REDACTED] objection to the career offender enhancement, Mr. [REDACTED] asks that the arguments in this Memorandum be considered with respect to his request for a sentence of time-served in consideration of the 2018 case and the supervised release violation at 12-71. If this Court finds that the enhancement nevertheless applies in Mr. [REDACTED] case, he asks for a

¹ See PSR ¶¶15, 21, 36. In Section IV.B of his Supplemental Position on Sentencing Factors (Doc. 68), Mr. [REDACTED] additionally argues that the correct Guidelines range without career offender enhancement is 10 to 16 months based on criminal history category III and offense level 10. This results in an even greater disparity.

² See PSR ¶ 7.

³ See Doc. 68.

variance to the non-career offender guideline range as detailed below. Mr. [REDACTED] will supplement this argument at the sentencing hearing depending on this Court's decision on his legal arguments.

Mr. [REDACTED] has been in custody in this case since his arrest on May 20, 2018.⁴ From May 20, 2018, to the sentencing hearing date of October 6, 2021, Mr. [REDACTED] has been in custody for over 40 months. The BOP views this amount of time, after including good conduct time, as equivalent to 46 months' imprisonment.

The Guidelines range for Mr. [REDACTED] supervised release violation is 30-37 months' imprisonment. However, counsel for Mr. [REDACTED] notes that the maximum potential violation on the supervised release is 24 months.⁵ Mr. [REDACTED] accepts that he has violated the terms of his supervised release and is willing to accept the consequences for that violation.

For the reasons in this Memorandum and those that will be presented at the sentencing hearing, Mr. [REDACTED] asks this Court for a sentence of time served consisting roughly of a 24-month sentence at Case No. 12-71 and a 16-month sentence at Case No. 18-148. A time-served sentence is justified under the § 3553(a) factors, as explained below.

⁴ See Investigative Report, City of Pittsburgh Bureau of Police, attached as Exhibit E (noting arrest on May 20, 2018). Mr. [REDACTED] asks that this Court supplement the Presentence Report to note this custody date.

⁵ See Doc. 44, Violation Worksheet, Case No. 12-71 (citing 18 U.S.C. § 3553(e)(3)).

I. A variance is warranted because the career offender and 851 enhancements applied in Mr. [REDACTED] case are imposed disproportionately against Black men in the Western District of Pennsylvania, and nationally, including in Mr. [REDACTED] case, creating unwarranted sentencing disparities.

In the late 1980s, a wide and continuously expanding gap began to form between the sentences of Black individuals and those of other races. The expanding gap is the result of a number of factors, including then-newly, 21 U.S.C. § 851, and the career offender guideline, U.S.S.G. § 4B1.1, “that have a disproportionate impact on” Black individuals and “serve no clear sentencing purpose.”⁶ The Sentencing Commission recognized this disparity over 15 years ago:⁷

Despite the Commission’s efforts to equalize the treatment of certain crimes, such “white collar” and “street” crimes involving similar economic harms, increasingly severe treatment of other crimes, particularly drug offenses and repeat offenses, has widened the gap among different offender groups. Today’s sentencing policies, crystalized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.

The career offender enhancement, U.S.S.G. § 4B1.1, is calculated without reference to race, but its application shows the effects of the racism baked into the City of Pittsburgh’s policing practices described here. Sentencing courts have the

⁶ *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, United States Sentencing Commission, 113-35 (2004) (Addressing the effect of the Career Offender Guideline) (“U.S.S.C. Report”), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

⁷ *Id.* at 135 (highlights added).

choice whether to sentence an individual within, above, or below the career offender range, consistent with the factors in 18 U.S.C. § 3553(a).

Prior felony informations, under 21 U.S.C. § 851 (“851s”), are left to prosecutorial discretion, and their application varies depending on the policy of the Attorney General in office. The filing of an 851 triggers an increased mandatory minimum sentence under 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B). In Mr. [REDACTED] case, where no mandatory minimum threshold is applicable, the filing of an 851 triggers an increased statutory maximum penalty (30 years instead of 20 years) and it doubles the mandatory term of supervised release (at least 6 years instead of at least 3 years).⁸

The increase in the maximum statutory penalty increases the career offender guideline range, from offense level 32 to offense level 34.⁹ In Mr. [REDACTED] case, the filing of the 851 has the effect of raising the career offender range from 151 to 188 months (offense level 29 and CHC VI) to 188 to 235 months (offense level 31 and CHC VI). This raises the bottom of the Guidelines range by about 3 years, from to 12.6 to 15.6 years, simply because the prosecution chooses to file the 851.

The disparate impact of these two enhancements on Black individuals is no accident, as the disparity result in large part from local policing practices and prosecutorial discretion.

⁸ 21 U.S.C. § 841(b)(1)(C).

⁹ U.S.S.G. § 4B1.1(b).

A. Black men in Pittsburgh are subjected to over-policing, resulting in their disparate representation in our criminal justice system upon arrest.

Black people make up only 23.2% of the Pittsburgh population.¹⁰ Although they are far from the majority of Pittsburghers, they are the subject of 76.8% of all frisks conducted by the Pittsburgh Police Department.¹¹ Of those subjected to warrantless search and seizures, 71.3% are Black.¹² 46.9% of those involved in traffic stops are Black.¹³ During the traffic stop, Black men in Pittsburgh are frisked during traffic stops 9.9 times more often than White men¹⁴ and are subject to warrantless search and seizures 9.2 times more often than White men.¹⁵

The over-policing of Black bodies in this city begins at an early age. The City of Pittsburgh is notorious for its school-to-prison pipeline. Over the past fifteen years, juvenile justice referral rates in Allegheny County have decreased significantly, yet despite this downward trend, Black girls in our district are referred to law enforcement at rates higher than Black girls in 99% of other cities,

¹⁰ Pittsburgh City, Pennsylvania, U.S. Census Bureau (Jul. 1, 2019), <https://www.census.gov/quickfacts/fact/table/2pittsburghcitypennsylvania,PA/PST045219>.

¹¹ 2020 Statistical Report, City of Pittsburgh Bureau of Police (2020) at 108, https://apps.pittsburghpa.gov/redtail/images/14012_FINAL_DRAFT_7_Annual_Report_2020.pdf.

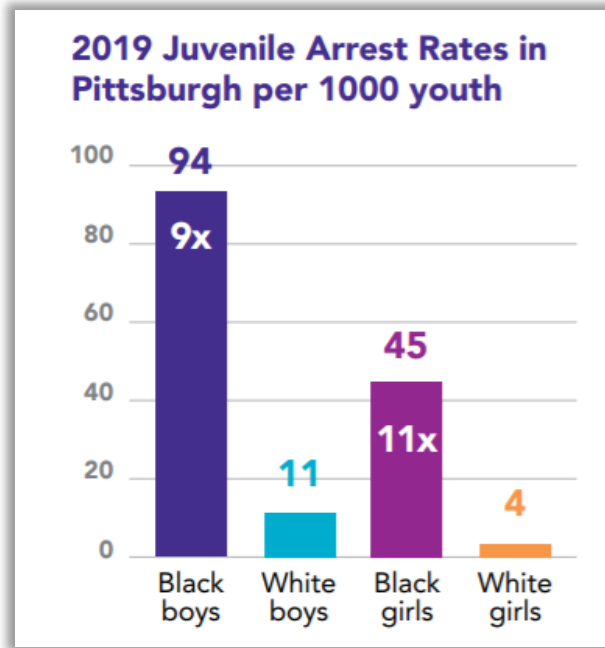
¹² *Id.* at 111.

¹³ *Id.* at 107.

¹⁴ Pittsburgh Community Taskforce for Police Reform (October 2020), at 10-11, https://apps.pittsburghpa.gov/redtail/images/11740_Community_Task_Force_on_Police_Reform_October_2020_Report.pdf.

¹⁵ *Id.*

and **Black boys are referred at rates higher than boys in 98% of other cities.**¹⁶ As the overall juvenile justice referrals decrease, the racial disproportionality of the referrals is increasing:¹⁷



As shown in the chart above, **Black boys are nine times more likely than White boys to be arrested.**¹⁸

Pittsburgh children are also subject to searches and seizures at disparate rates. In 2019, 83% of the warrantless search and seizures conducted by the Pittsburgh Police Department, of children ages 11 through 18 were of Black

¹⁶ Disrupting Pathways to Juvenile Justice for Black Youth in Allegheny County, Black Girls Equity Alliance at p.1, https://npr-brightspot.s3.amazonaws.com/legacy/sites/wesa/files/bgea_disrupting_the_pathways_to_juvenile_justice_report.pdf.

¹⁷ *Id.* at 6.

¹⁸ *Id.*

children.¹⁹ That same year, 100% of the warrantless searches of children ages 10 and under were of Black children.²⁰

The disproportionate targeting by the police continues through early adulthood. In 2020, 20.7% of Black men in Pittsburgh between the ages of 19-29 were arrested.²¹ That means over **one in five young Black men in our community were arrested last year.** Black men in this age group are arrested at approximately 10.2 times the rate of young white men.²² This study, conducted by the Heinz Endowments, called the racial disparity “a serious problem in the city.”²³ The frequency in arrests is very likely the result of the disproportionate rates in which Black men experience contact with law enforcement, and specifically that Black people are arrested for drug-related offenses at much higher rates than White people, which is discussed next.²⁴

The chart below summarizes the disparities in police action in Pittsburgh discussed above:²⁵

¹⁹ 2019 Statistical Report, City of Pittsburgh Bureau of Police (2019), at 36, *supra* note 10.

²⁰ *Id.*

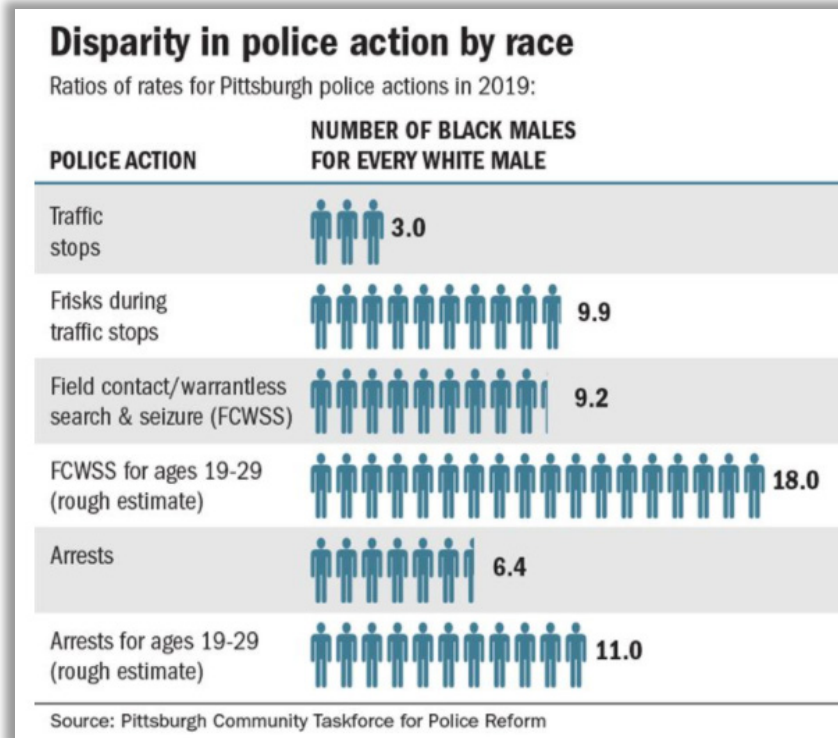
²¹ Ralph Bangs, *Black-White Disparities in Arrests in the city of Pittsburgh*, The Heinz Endowments, at 2-3 (Feb. 23, 2021), <https://www.heinz.org/UserFiles/File/Pittsburgh%20arrests%20by%20race%202017-2020.docx.pdf>. For more information on the study, see <https://www.heinz.org/equity>.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 4.

²⁵ Ashley Murray, *Task force on police reform announces its recommendations*, Pittsburgh Post-Gazette (Oct. 19, 2020), <https://www.post->



Across the country, the police arrest Black people at much higher rates for drug-related offenses. Yet, research has found that White people actually have a higher rate of illicit drug use.²⁶ And, the groups have approximately the same rate of drug sales.²⁷ Despite the fact that White and Black Americans have about the same rate of drug sales, Black Americans are arrested 2.7 times as often as White

gazette.com/news/crime-courts/2020/10/19/Pittsburgh-police-Task-force-reform-announces-recommendations-conduct-changes-social-justice/stories/202010190099.

²⁶ *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, The Hamilton Project (last visited May 19, 2021), https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

²⁷ *Id.*

Americans for drug-related offenses, and 3.7 times more for marijuana possession.²⁸

Pittsburgh’s disparity is even greater, where Black residents are arrested for marijuana possession 6.2 times more than white residents.²⁹



B. Once brought into court, prosecutorial discretion only intensifies existing racial disparities.

The existence of a prior conviction is not a race-neutral factor in sentencing because it does not account for the prosecutorial discretion that results in the

²⁸ *The War on Marijuana in Black and White*, American Civil Liberties Union, (June 2013), <https://perma.cc/G4QP-9K9P>.

²⁹ 2020 Statistical Report, City of Pittsburgh Bureau of Police (2020) at 97, https://apps.pittsburghpa.gov/redtail/images/14012_FINAL_DRAFT_7_Annual_Report_2020.pdf.

disparity in Black and White defendants charged and ultimately convicted of felony offenses.

Results of a 2017 study revealed that White individuals were 25% more likely than Black individuals to have their most serious charge dropped or reduced to a less-severe charge.³⁰ As a result, White defendants who faced initial felony charges were approximately 15% more likely than Black defendants to be convicted of a misdemeanor instead.³¹ White defendants with no prior convictions were over 25% more likely than Black defendants with no prior convictions to receive charge reductions.³²

In misdemeanor cases, the disparity is greater. White individuals facing misdemeanor charges were nearly 75% more likely than Black defendants to have all charges carrying potential terms of imprisonment dropped, dismissed, or reduced to less severe charges.³³ White individuals charged with misdemeanors who had no prior criminal history were 46% more likely than similarly situated Black individuals to have all charges carrying a potential prison sentence dropped or reduced to charges that carry no potential imprisonment.³⁴

³⁰ *Research Finds Evidence of Racial Bias in Plea Deals*, Equal Justice Initiative, (Oct. 26, 2017), <https://eji.org/news/research-finds-racial-disparities-in-plea-deals/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

Like the disparity in policing practices, the disparity in prosecutorial charging decisions and pre-adjudication detention can be seen at a young age. Black children make up only 14% of the Pennsylvania statewide youth population, yet they represent 62% of youth held in detention prior to adjudication and 47% removed from their homes and sent to residential placement.³⁵ Black children also represent 62% of youth charged as adults through the direct filing of cases in adult court, and 55% of the cases where charges are sent to adult court at the discretion of a juvenile court judge. ³⁶ The disparity grows even larger when focusing on Black boys. Black boys make up 7% of the state's youth population, but account for 56% of adult prosecution convictions.³⁷

The fact that young Black men, like Mr. [REDACTED] present to this Court with the requisite prior convictions for recidivist sentencing enhancements at a much higher rate than their White counterparts is not a coincidence, nor is it a result of Black men being more prone to criminal behavior. It is the result of systemic racism that is built into the policing and prosecutorial practices in our district.

³⁵ *The Pennsylvania Juvenile Justice task Force, Report and Recommendations*, June 2021, https://www.pacourts.us/Storage/media/pdfs/20210622/152647-pajuvenilejusticetaskforcereportandrecommendations_final.pdf/.

³⁶ *Id.*

³⁷ *Id.* at 28.

The inequities across the criminal justice system have long-lasting effects that seep into federal court, as they trigger discretionary application of recidivist sentencing enhancements and long career offender guideline ranges.

C. As a result of discriminatory policing and charging practices, a disproportionate number of Black men in our district are eligible for the career offender enhancement.

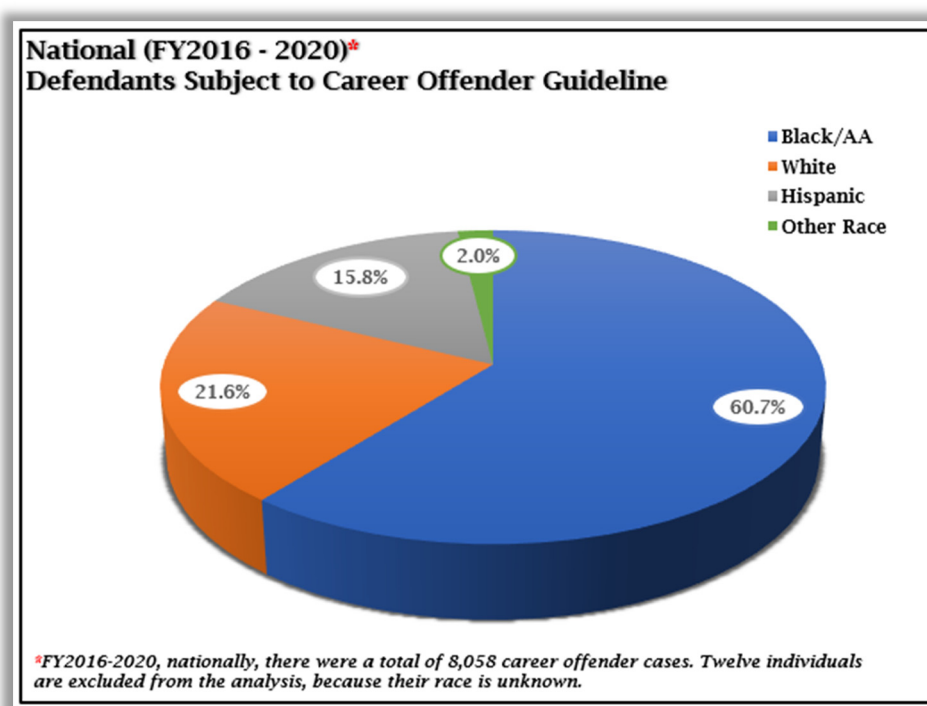
The direct effect of the discriminatory policing and prosecutorial practices in Pittsburgh is that a disproportionate number of Black defendants in our district are eligible for recidivist sentencing enhancements. Although the career offender enhancement, U.S.S.G. § 4B1.1, is calculated without reference to race, its application shows the effects of the racism baked into the City of Pittsburgh's policing practices. Sentencing courts have the choice whether to sentence an individual within, above, or below the career offender range, consistent with the factors in 18 U.S.C. § 3553(a).

At one level, this is a national issue. Since at least 2004, the United States Sentencing Commission identified the career offender guideline as a source of significant, unwarranted adverse impact on Black individuals sentenced in federal court.³⁸ The Commission suggested that Black individuals are more often "subject to the severe penalties required by the career offender guideline."³⁹

³⁸ U.S.S.C. Report at 133-134.

³⁹ *Id.*

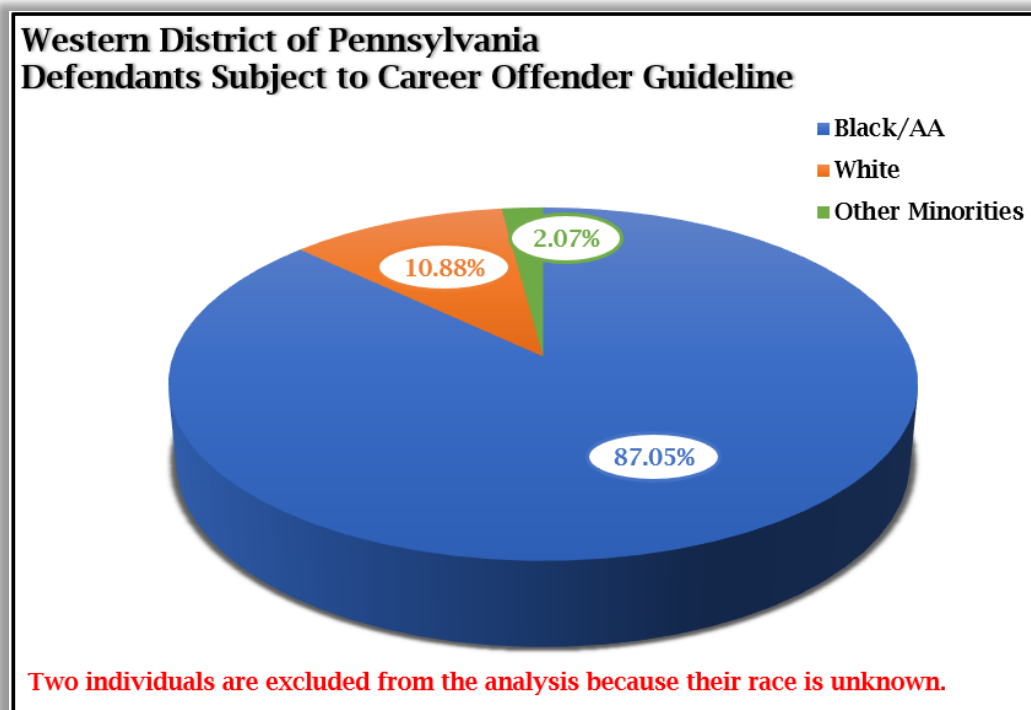
Across the country, in fiscal years 2016 to 2020, there were 8,058 career offender cases. Of the 8,058 cases, 4,883 (60.7%) of career offenders were Black, 1,737 (21.6%) were White, 1,268 (15.8%) were Hispanic, and 158 (1.9%) were Other races.⁴⁰ This percentage is particularly high considering Black individuals only make up 19.1% of all prosecutions in fiscal year 2020, and this percentage is “largely unchanged” from prior years.⁴¹



⁴⁰ Individual Offender Datafiles, United States Sentencing Commission, (FY 2016 – FY 2020), <https://www.ussc.gov/research/datafiles/commission-datafiles>. See also 2020 Annual Report and Sourcebook of Federal Sentencing Statistics, United States Sentencing Commission, at 54, (last visited Sept. 21, 2021) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf>.

⁴¹ 2020 Annual Report and Sourcebook of Federal Sentencing Statistics, United States Sentencing Commission, at 7 (last visited Sept. 24, 2021) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf>.

Even though this is a national issue, the local numbers mean show that this merits special attention in our district in particular. The Western District of Pennsylvania is among the top five districts with the highest portion of career offenders prosecuted.⁴² And among those individuals prosecuted here, an even higher percentage are Black as compared to the national numbers. From fiscal year 2016 through 2020, the Western District of Pennsylvania designated a total of 195 individuals as career offenders. 168 of those individuals (87%) were Black.⁴³



⁴² *Quick Facts Career Offenders*, United States Sentencing Commission, (last visited Jun. 16, 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf

⁴³ *Individual Offender Datafiles*, United States Sentencing Commission, (FY 2016 – FY 2020), <https://www.ussc.gov/research/datafiles/commission-datafiles>.

This is not the result of our district having an unusually high number of drug cases. In FY 2019, there were 19,478 individuals sentenced under U.S.S.G. § 2D1.1.⁴⁴ Only 165 (less than 1%) of those cases came from this district.⁴⁵ Comparatively, the districts with the highest number of drug trafficking cases had nearly 10 times the number of cases as our district.⁴⁶

In addition to finding that the career offender guideline has a disproportionate impact on Black individuals, the Sentencing Commission report found that the guideline advances no sentencing purpose when applied on the basis of prior drug convictions like Mr. Ward's. The Commission reported that the overall rate of recidivism for category VI offenders two years after release is 55%, but the recidivism rate for such offenders who are career offenders based on prior drug offenses is only 27%, and thus "more closely resembles the rates for offenders in lower criminal history categories in which they *would be* placed under normal criminal history scoring rules."⁴⁷

This is particularly relevant because drug offenses make up the overwhelming majority of career offender cases.⁴⁸ The guideline originated with a

⁴⁴ *Interactive Data Analyzer*, United States Sentencing Commission (last visited Jun. 10, 2021), <https://ida.ussc.gov/analytics/saw.dll?Dashboard>.

⁴⁵ *Id.*

⁴⁶ In FY 2019, the top two districts for drug trafficking offenses were the Western District of Texas (1,249 cases) and the Southern District of California (1,183 cases). *Id.*

⁴⁷ See U.S.S.C. Report at 134 (emphasis in original).

⁴⁸ Nationally, 77% of career offender cases are drug cases. *Quick Facts Career Offenders*, United States Sentencing Commission, (last visited Jun. 16, 2021),

statutory directive 28 U.S.C. § 994(h), enacted as part of the Sentencing Reform Act of 1984. The Sentencing Commission, however, did not follow the plain terms of this directive and expanded the class of career offenders to include numerous drug offenses not listed in the statute and to also include state misdemeanors subject to a statutory maximum of more than one year.⁴⁹ As the Commission noted, and as explained above, Black Americans are more likely to have these prior drug convictions than similar White drug dealers, despite similar rates of drug sales, so the expansion of the guidelines by the Sentencing Commission has particularly harsh effect on Black individuals facing sentencing hearings in federal court.⁵⁰

More recently, in 2016, the Sentencing Commission has continued to note this disparity, including that the recidivist enhancement based on drug offenses does not serve the purposes of sentencing in 18 U.S.C. § 3553(a).⁵¹ The Commission published its findings from a multi-year study of the career offender guideline.⁵² In that report, the Sentencing Commission concluded and recommended to Congress that the career offender enhancement be amended – that it should *not* apply to

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf.

⁴⁹ USSG, App. C, Amend. 528 (Nov. 1, 1995).

⁵⁰ U.S.S.C. Report at 133-134.

⁵¹ *Id.*

⁵² See Report to the Congress: Career Offender Sentencing Enhancements (Aug. 2016), available at <http://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements>.

those like Mr. [REDACTED] who qualify for the enhancement based on prior “controlled substance offenses” alone.⁵³

Rather, the Commission submitted that the enhancement should only be applied to those who have at least one prior conviction for a “crime of violence” as well as one other controlled substance offender or crime of violence.⁵⁴ The Commission based this conclusion on recent criticism of the career offender guideline, sentencing data, and its recidivism research.⁵⁵ Twelve years after the 2004 study, then, the Commission comes to the same conclusion about the utility of the career offender enhancement as applied to prior drug offenses.

Despite advancing no sentencing purpose, a career offender designation has a significant impact on defendants in that it drastically increases individuals’ Guidelines ranges. In fiscal year 2019, across the eight major offense types, the median sentence imposed was 141 months for career offenders.⁵⁶ That is 2.6 times the non-career offender median sentence of 54 months.⁵⁷ As the Sentencing Commission itself has said, “if a sentencing rule has a significant adverse impact and there is insufficient evidence that the rule is needed to achieve a statutory

⁵³ *See id.* at 3.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Individual Offender Datafiles*, United States Sentencing Commission, (FY 2019), <https://www.ussc.gov/research/datafiles/commission-datafiles>.

⁵⁷ *Id.*

purpose of sentencing, then the rule might be considered unfair toward the affected group.”⁵⁸

This is particularly true in Mr. [REDACTED] case, as the career offender guideline results in a more than 1000% increase in the Guidelines range from 15 to 21 months (based on CHC IV and offense level 10) to 188 to 235 months (CHC VI and offense level 31).⁵⁹

D. Prosecutorial discretion again worsens racial disparities in the decision whether to file an 851 information.

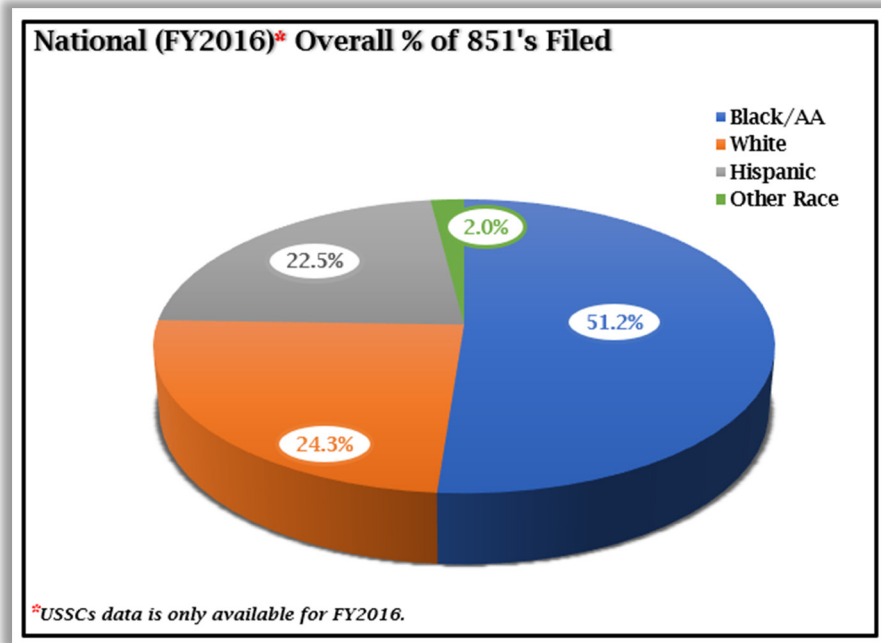
The United States Sentencing Commission’s most recent report addressing the application and impact of 21 U.S.C. § 851 reported that nationally, 51.2% of the 851s filed across the country in FY 2016 were filed against Black individuals,⁶⁰ while Black individuals make up only 23.6% of individuals charged in drug trafficking cases.⁶¹

⁵⁸ U.S.S.C. Report at 114.

⁵⁹ In his Supplemental Position on Sentencing Factors (Doc. 68), Mr. [REDACTED] further explains application of the career offender guideline in his particular case. See Doc. 68 at 5.

⁶⁰ *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders*, United States Sentencing Commission, page 13 (last visited Sept. 21 2021) https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf.

⁶¹ *Id.* at 38.



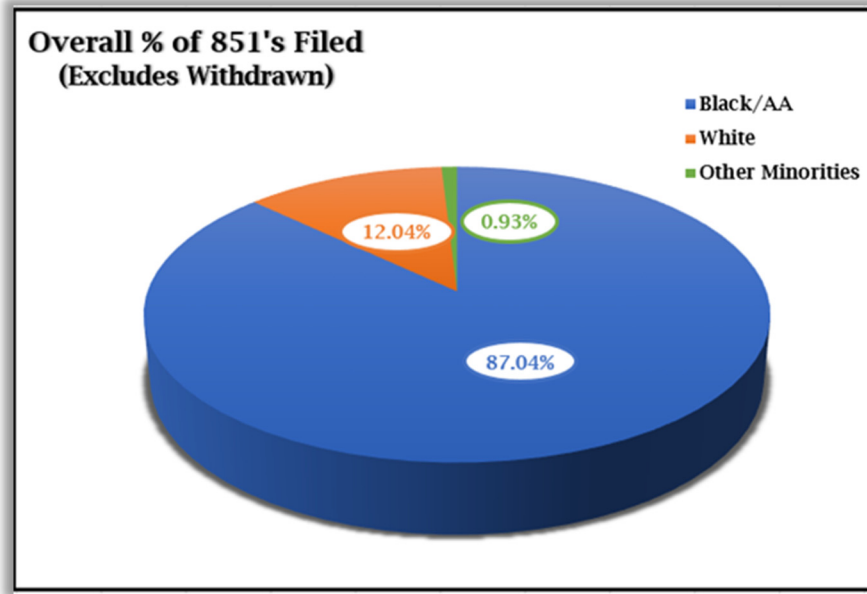
The Sentencing Commission's report also discusses "significant variation" in the extent to which enhanced penalties are sought amongst eligible individuals.⁶²

The Western District of Pennsylvania is among the districts in the country with the highest percentage of defendants eligible for the 851 enhancement.⁶³ Although a larger percentage of Black individuals in this district had the requisite prior convictions to qualify for 851 enhancements, even after accounting for eligibility, Black individuals comprised of an increasingly larger portion of eligible defendants who were ultimately subject to 851 filing.

⁶² *Id.* at 6.

⁶³ *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders*, United States Sentencing Commission, page 51 (last visited Sept. 21 2021) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf.

The Federal Public Defender’s Office for the Western District of Pennsylvania obtained a list of all § 851 enhancements filed by the United States Attorney’s Office for the Western District of Pennsylvania from calendar year 2016 until 2020 from the Clerk of Courts. **In the Western District of Pennsylvania, 87.04% of 851 enhancements were filed against Black individuals.**



Out of the 216 851s filed between 2016 and 2020, only 26 were filed against White defendants, the remaining enhancements were filed against 188 Black defendants and 2 other minority defendants:

851 Filing Year	# of 851's Filed by Race			% of 851's Filed by Race		
	Other Minorities	Black/AA	White	% Other Minorities	% Black/AA	% White
2016	0	7	0	0.00%	100.00%	0.00%
2017	1	14	0	6.67%	93.33%	0.00%
2018	0	65	8	0.00%	89.04%	10.96%
2019	0	56	10	0.00%	84.85%	15.15%
2020	1	46	8	1.82%	83.64%	14.55%
	2	188	26			

The Federal Public Defender also obtained data from the United States Sentencing Commission for Fiscal Years 2016 through 2018.⁶⁴ The data provided by the Sentencing Commission for fiscal year 2016 identified not only individuals for whom the 851 was filed, but also highlighted individuals who were 851 eligible, but the government declined to file. In FY 2016, a total of 99 individuals were eligible for the 851 enhancement, 12 of whom were White.⁶⁵ That year, 13 851s were filed. **All were filed against Black individuals.**⁶⁶

With the assistance of the Federal Defender's Sentencing Resource Counsel, our office was able to identify defendants in the 2017 and 2018 dataset who were eligible for an 851 enhancement:

⁶⁴ The method of collecting and organizing the relevant 851 data differs between the Sentencing Commission and the Clerk of Courts. For example, the Sentencing Commission data are sorted by fiscal year and the data obtained from the Clerk of Courts are organized by calendar year. Also, the Sentencing Commission data sort 851 filings by the year the defendant was sentenced; whereas, the Clerk of Court's data are organized by the year the 851 was filed. Finally, for people sentenced in FY 2016, the Sentencing Commission identified who was eligible for an 851 filing, but did not have one filed. The Sentencing Resource Counsel analyzed Sentencing Commission data from FY2017 and FY2018 to determine eligibility data for those years; however, it was unable to determine 851 eligibility for people sentenced in FY 2019 and 2020. The Clerk of Courts' data do not include such detail. As a result, Mr. [REDACTED] is including information from both data sets and provides this explanation as to why the years for each data set do not match.

⁶⁵ *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders (2018) Datafile*, United States Sentencing Commission, <https://www.ussc.gov/research/datafiles/commission-datafiles#NaN>.

⁶⁶ *Id.*

	2018		2017		2016		Total				
	Eligible	Filed		Eligible	Filed		Eligible	Filed			
White	9	1	White	1	0	White	12	0	White	22	1
Black	51	21	Black	46	8	Black	85	13	Black	182	42
Other	4	2	Other	4	2	Other	2	0	Other	10	4

This additional data, together with the Sentencing Commission data further highlights how infrequently the government applies this enhancement to White defendants. In fact, from 2016 to 2018, there were 21 White defendants sentenced who were eligible for an 851 filing, but for whom the government chose not to file.

Filing an 851 is a matter of prosecutorial discretion, unlike eligibility for the career offender enhancement, which is calculated by application of the Guidelines. That the 851 filings demonstrate the same racial disparities as found in the career offender numbers, plea and sentencing outcomes, arrests, and overpolicing, sheds light on how Black Pittsburghers fare far worse in our city's criminal courts.

Our district's practices mirror the same racial injustices found throughout Pittsburgh. Those injustices are heightened in Pittsburgh as compared to the same statistics nationally.

E. Davee [REDACTED] criminal history mirrors the history of disparate racial impact of policing of Black boys and men in Pittsburgh.

While Mr. [REDACTED] juvenile convictions correctly did not contribute to his criminal history score, their presence in the PSR, without the context of the racial impact of policing of Black children, could negatively impact this Court's view of Mr.

[REDACTED] As explained above, Pittsburgh officers police Black children at a

significantly higher rate than White children.⁶⁷ The disparity widens when it comes to sentencing Black children because they are routinely removed from their homes and placed into detention facilities or residential programs instead of offered diversion programs like similarly situated White children.

Unfortunately, Pennsylvania has a history and current practice of underutilizing diversion programs and places children, especially Black boys in residential and detention facilities at unreasonably high rates. In fact, most children who have little or no prior history of delinquency, like Mr. [REDACTED] are not offered the chance to complete diversion before formal court processing.⁶⁸

This Court should also consider that the existence of a prior juvenile adjudication that resulted in residential placement or confinement is not a race-neutral factor in sentencing because it does account for the significant disparity in Black children removed from their homes as a result of juvenile delinquency. Black children make up only 14% of the statewide youth population and 38% of the written allegations coming into the juvenile justice system.⁶⁹ Yet, they represent 62% of youth held in detention prior to adjudication and 47% of youth sent to

⁶⁷ Disrupting Pathways to Juvenile Justice for Black Youth in Allegheny County, Black Girls Equity Alliance at p.1, https://npr-brightspot.s3.amazonaws.com/legacy/sites/wesa/files/bgea_disrupting_the_pathways_to_juvenile_justice_report.pdf.

⁶⁸ *Id.* (“64 % of youth assessed as low risk to reoffend do not receive diversion and are instead petitioned into court.”)

⁶⁹ *Id.* at 26.

residential placement.⁷⁰ The disparity grows even larger when focusing attention on Black boys. Black boys represent 22% of misdemeanor written allegations, but 36% of youth sent to residential placement for a misdemeanor.⁷¹

The PA Juvenile Justice Task Force found that disparities by race and gender for residential placement exist, even when youth are charged with the same offense. For misdemeanor drug possession, Black boys make up only 16% of written allegations but 33% of residential placements for that charge.⁷² Mr. [REDACTED] start in juvenile placement happened as the result of exactly one such residential placement, when he was committed to the Academy program for a misdemeanor possession of heroin charge.⁷³

Mr. [REDACTED] youth convictions should have absolutely no bearing on his sentence. *Graham v. Florida* and *Miller v. Alabama* both recognized that although youth does not absolve juveniles of responsibility for their actions, it does lessen their culpability. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (a juvenile's “transgression ‘is not as morally reprehensible as that of an adult.’”); *Miller v. Alabama*, 567 U.S. 460 (2012). In addition, the Supreme Court has recognized that “juveniles are more vulnerable or susceptible to negative influences

⁷⁰ *Id.*

⁷¹ *Id.* at 28

⁷² *Id.*

⁷³ See PSR ¶ 27.

and outside pressures, including peer pressure” than adults. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

This was exactly the case for Mr. [REDACTED]. Instead of allowing Mr. [REDACTED] who had no prior drug convictions or history of violence, to participate in a juvenile diversion program, Mr. [REDACTED] was removed from his home and placed in a residential program.⁷⁴ Numerous reports, including the most recent report published by the Pennsylvania Juvenile Justice Task Force find that youth “should be diverted from formal court processing wherever appropriate” because “[o]verservicing low-risk youth can increase recidivism.”⁷⁵

Overservicing played out in one instance for Mr. [REDACTED] in 2007, where he was continued on probation under “restitution only” status, solely to fulfill the \$160 in court costs he owed.⁷⁶

These issues do not automatically cease at age 18. In May 2017, the United States Sentencing Commission released a report following its review of the sentencing of “youthful offenders,” defined as those age 25 and younger.⁷⁷ Of the 689 young people designated as career offenders sentenced from 2010 through 2015,

⁷⁴ See PSR ¶ 27.

⁷⁵ “Disrupting Pathways,” *supra* at 15.

⁷⁶ See Exhibit G, Academy Review Report dated October 2007 (recommending that Davee “remain on probation to fulfill his restitution commitments”). Elsewhere in the records, this is referred to as “restitution only” status.

⁷⁷ See Youthful Offenders in the Federal System (May 2017), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf.

a large majority of those defendants (507 total) received a sentence below the career offender guideline range.”⁷⁸

Although Mr. [REDACTED] is now older than 25, all of his prior offenses, including his prior federal offense, occurred when he was considered a “youthful offender” by the Sentencing Commission’s definition, meaning, he was under 25 years old. At the time of this offense, he had just turned 26. In the interest of justice, Mr. [REDACTED] youth at the time of his prior offenses warrants proper consideration, and the Commission’s statistics provide support for the proposed sentence below the advisory Guidelines range.

Another key factor animating how racial disparities play out in Mr. [REDACTED] criminal record are the neighborhoods where he grew up. Mr. [REDACTED] was raised in low-income housing in Northview Heights, Brighton Place, and North Charles Street. These are communities with a large police presence, and communities where Black men like Mr. [REDACTED] are more likely to be arrested.

The 2020 Heinz Endowment study explained that two reasons for the disparity in arrest rates among young men in Pittsburgh are that a much higher share of Black people in Pittsburgh live in “extremely disadvantaged neighborhoods,” bringing with that joblessness and low-quality schools, and Black people are arrested for drug-related offenses at much higher rates than White

⁷⁸ See *id.* at 45-46.

people.⁷⁹ Mr. [REDACTED] family members agree, and they mention neighborhood as a contributing factor to Mr. [REDACTED] criminal conduct. His mother, Helen [REDACTED] raised 8 children in low-income housing projects in the North Side of Pittsburgh.⁸⁰ Ms. [REDACTED] writes, “The streets and his surrounding[s] in the community we lived in got in his way. Where we lived was surrounded by violence and drugs.”⁸¹

The data shows that as a Black man, Mr. [REDACTED] is more likely than his white counterpart to be arrested, prosecuted, and subject to an increased penalty at sentencing. The racial disparities in the City of Pittsburgh’s criminal justice system and in the application of recidivist sentencing enhancements in the Western District of Pennsylvania call out for attention from this Court in sentencing Mr. [REDACTED]

II. The additional factors in 18 U.S.C. § 3553(a) support a sentence of time served.

The racial disparities in Pittsburgh policies practices and in state and federal sentencing courts are important in viewing Mr. [REDACTED] history and the allegations in this case. These are not excuses for his conduct. Rather, they are reasons justifying a reduced sentence. Additional reasons justifying a time served sentence are explained below.

⁷⁹ *Id.* at 4.

⁸⁰ Exhibit H at 3, Letter from Helen [REDACTED]

⁸¹ *Id.*

F. Davee [REDACTED] family and community support justifies a reduced sentence.

Mr. [REDACTED] family and community see beyond his arrest and conviction record. They recognize there is much more to Davee. Cedric Lyons is Mr. [REDACTED] father-in-law figure, as he is the mother of Cenara Scrivens. Mr. Lyons writes that Davee “has always been upfront with me, and honest” and is “like a son” to him.⁸² Davee’s mother writes that Davee was the sibling who was “the biggest help” and the one who “tries to hold our family together.”⁸³

Everyone in the family sees how important Davee’s two daughters are in his life. Ms. [REDACTED] writes that Davee’s older daughter, the 9-year old “adores him.”⁸⁴ Davee “shows patience and love with her where she listens and thrives because of the relationship he has with his daughter,” even when he is imprisoned.⁸⁵ Ms. Scrives explains the toll that this daughter’s incarceration has taken on Davee, writing that she is having problems in school and has been assigned a therapist.⁸⁶

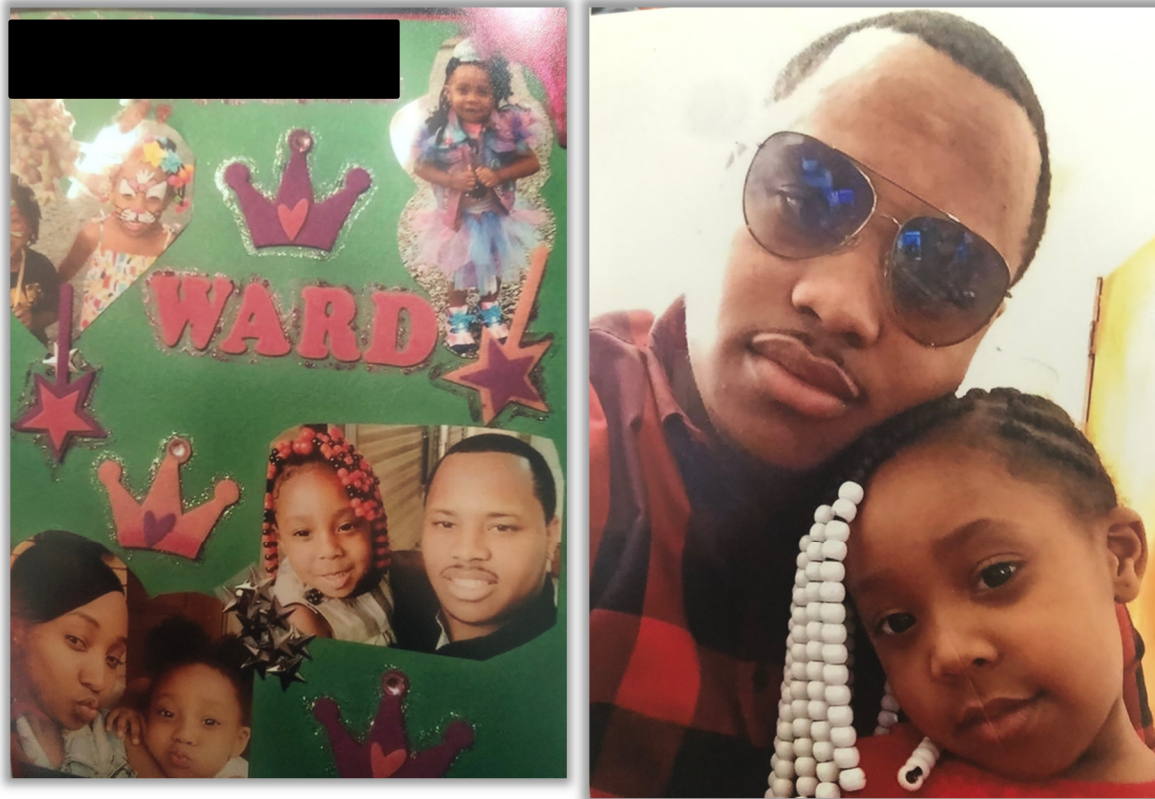
⁸² Exhibit H at 4, Letter from Cedric Lyons.

⁸³ Ex. H at 3.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Exhibit H at 1, Letter from Cenara Scrivens.



Davee calls his children every day. They joke, and they focus on the future.⁸⁷

Erika Wingfield, a family friend and a Reintegration Specialist with Allegheny County Juvenile Courts, watched Davee grow up and sees him as a man “with strong character who treats others with courtesy and respect.”⁸⁸ She has watched him be a great son, brother, nephew, and father.⁸⁹

On this basis, a variance is warranted. *See, e.g., United States v. Pauley*, 511 F.3d 468 (4th Cir. 2007) (being a “good parent” is a “valid consideration under § 3553(a)” in support of downward variance).

⁸⁷ *Id.* at 2.

⁸⁸ Exhibit H at 6, Letter from Erika Wingfield.

⁸⁹ *Id.*

G. Mr. [REDACTED] has a tremendous opportunity for mentorship and professional development through Richard Garland.

Professor Richard Garland has provided an expert opinion in connection with the disputed issue of Mr. [REDACTED] gang membership.⁹⁰ Separately, Professor Garland will testify at the sentencing hearing concerning a unique reentry and mentorship opportunity that he wants to provide Mr. [REDACTED] upon his release. Professor Garland is the director of Reimagine Reentry, a group that provides holistic services for citizens returning from prison in Allegheny County.⁹¹

Through Reimagine Reentry, Mr. [REDACTED] is eligible to participate in a 6-week training program that, upon completion, allows him to enter a union for carpentry, plumbing, or labor. The group also provides mentorship. Professor Garland reports that there are currently lots of jobs available through the union and this course will allow Mr. [REDACTED] to be on a fast track to a salary, with benefits, that can support Mr. [REDACTED] and his family.

Professor Garland has discussed this opportunity with Mr. [REDACTED] and his family, and everyone agrees this is a special opportunity that Mr. [REDACTED] has not had previously. Professor Garland also heard from community members, such as Reggie Smith, what a good job Mr. [REDACTED] did when he worked at YouthPlaces,⁹² and he

⁹⁰ Doc. 68, Exhibit A.

⁹¹ See Reimagine Reentry, University of Pittsburgh Graduate School of Public Health, <https://publichealth.pitt.edu/home/research-practice/research-centers-and-institutes/center-for-health-equity/violence-prevention-initiative#reimagine>.

⁹² See Exhibit H, page 5 (letter from Reggie Smith).

especially seek's Mr. [REDACTED] participation in Reimage Reentry so that Mr. [REDACTED] can bring this same energy to Professor Garland's program. Specifically, Reggie Smith wrote that Mr. [REDACTED] was "instrumental" in making sure the youth in the program were engaged.⁹³

This opportunity only exists if Mr. [REDACTED] does not have to serve another 10+ years in custody.

H. Conditions of incarceration due to the COVID-19 pandemic support a reduced sentence for Mr. [REDACTED]

Mr. [REDACTED] year in federal pretrial custody was made much more severe due to the restrictions imposed as a result of the COVID-19 pandemic.

Because the conditions of Mr. [REDACTED] confinement are harsher than would otherwise occur due to the pandemic, they justify a reduced sentence. At least three courts in this District have varied below the Guidelines as a result of harsher presentence confinement conditions at the local jails contracted with the U.S. Marshals. *See* Statement of Reasons, *United States v. Hurt*, Case No. 17-cr-285 (Fischer, J.) (Nov. 6, 2020) (granting variance, in part, because defendant "served time during COVID-19 with protocols in place, making it more onerous and also restricted access to programming"); Statement of Reasons, *United States v. Stevens*, Case No. 18-cr-32 (Fischer, J.) (Nov. 5, 2020) (same); Sentencing Hr'g, *United States v. Reddix*, Case No. 19-376 (Conti, J.) (Mar. 18, 2021) (granting variance, in part,

⁹³ *Id.*

because Allegheny County Jail has (“ACJ”) had “horrible conditions with the lock down” because of the “the inability to see loved ones [and] inability to have more frequent phone calls with family,” as well as the lack of programming); Sentencing Hr’g, *United States v. Cox*, Case No. 18-cr-50 (Cercone, J.) (May 18, 2021) (granting variance, in part, based on the “limitations on [defendant’s] liberty that prisoners normally have” in jail).

Mr. [REDACTED] has been incarcerated during the entirety of the pandemic to-date. He has been transferred, from NEOCC to the Butler County Prison, due to circumstances caused by the pandemic and other factors having nothing to do with his conduct. He has been subjected to more time spent confined in his cell, little to no programming opportunities, and reduced freedom to move around the jail including in recreational areas, in large part due to pandemic-related restrictions. For example, Mr. [REDACTED] completed three programs while at NEOCC, but they were all prior to the pandemic.⁹⁴

It is difficult to overstate the enormous toll of incarceration during COVID on Mr. [REDACTED]. Ms. Scrivens describes perhaps the gravest example, where, because of a prohibition on contact visits due to COVID, Davee “has not held, hugged, or had any physical contact” with his younger daughter, who was born while he was in custody.⁹⁵

⁹⁴ See Exhibit F, Certificates of Achievement.

⁹⁵ Ex. H at 1.

I. A sentence of time served provides for sufficient deterrence and a term of supervised release protects the public from future crimes.

It is not the length of Mr. [REDACTED] potential sentence, but rather, the certainty of punishment that drives the deterrent effect of prison time.⁹⁶ A study by the U.S. Department of Justice concluded that “[s]ending an offender to prison isn’t a very effective way to deter crime Prisons actually may have the opposite effect.”⁹⁷ This is why a Guidelines sentence for Mr. [REDACTED] cannot be justified on the basis of deterrence. “[L]engthy prison sentences cannot be justified on a deterrence-based, crime prevention basis.”⁹⁸ The Brennan Center for Justice similarly concludes, “Empirical studies have shown that longer sentences have minimal or no benefit on whether offenders or potential offenders commit crimes.”⁹⁹

CONCLUSION

For all of these reasons, and along with the reasons that will be presented at the sentencing hearing, after taking into account all of the § 3553(a) factors, Mr. [REDACTED] asks the Court for a sentence of time served.

⁹⁶ National Institute of Justice, Five Things About Deterrence (Sept. 2014), available at <https://ncjrs.gov/pdffiles1/nij/247350.pdf>.

⁹⁷ *Id.*

⁹⁸ Daniel S. Nagin, Deterrence in the Twenty-First Century, 42 Crime & Just. 199, 202 (2013).

⁹⁹ Brennan Center for Justice, What Caused the Crime Decline? 26 (Feb. 2015), <https://www.brennancenter.org/publication/what-caused-crime-decline>.

Respectfully submitted,

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