

romantic relationship introduced her into this world. Finally, Defendant will describe how her desire to attend medical school and addiction to Adderall led to her criminal conduct.

A. "Ivy League Crack"

Adderall is the combination of dextroamphetamine and amphetamine. It is used as part of a treatment program to control symptoms of attention deficit hyperactivity disorder (ADHD) in adults and children. The drug is also used to treat narcolepsy (a sleep disorder that causes excessive daytime sleepiness and sudden attacks of sleep). The combination of dextroamphetamine and amphetamine is in a class of medications called central nervous system stimulants. The drug works by changing the amounts of certain natural substances in the brain. U.S. National Library of Medicine, National Institutes of Health, found at <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000166/>.

In the past decade various publications have described the increasing use of Adderall at some of the Nation's most elite academic institutions. Students in these high-pressure environments use Adderall and other drugs to "enhance" their ability to study and withstand the rigors of competing for grades. These students are looking for a competitive advantage, and buy and sell their prescription Adderall in order to study longer, harder and more effectively. See, e.g., Extreme Studying, "Brain Steroids" at Cornell University, found at

<http://cornellsun.com/node/38629>; Popping Pills a Popular Way to Increase Brain Power, CBS 60 Minutes, found at http://www.cbsnews.com/2100-18560_162-6422159.html?tag=contentMain;contentBody ; Illicit Use of Specific Prescription Stimulants Among College Students: Prevalence, Motives, and Routes of Administration, National Institute of Health, Public Access, found at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1794223/>.

Professional schools, medical residency programs and areas adjacent to this Court are not immune from this phenomenon. Many articles describe the use of Adderall in various academic settings, including law schools. See e.g., J. Schiffner, "Harder, Better, Faster Stronger: Regulating Illicit Adderall Use Among Law Students and Law Schools." ExpressO. 2010, found at http://works.bepress.com/jennifer_schiffner/1/. The neighborhoods near this courthouse appear to be rife with people from many walks of life seeking an advantage through the use of Adderall. Smart Drug Finds a Niche in Park Slope, The Brooklyn Ink, found at <http://thebrooklynink.com/2011/08/26/27664-smart-drug-finds-a-market-niche-in-park-slope/>.

Defendant is not suggesting that she should be treated leniently because so many others are doing what she did. Ms. XXXXXXXXX broke the law, plain and simple. However, the evolving mores concerning the use of this prescription drug will help the

Court understand what led to her crime, which Defendant will describe next.

B. Dr. XXXXXXXX Introduces Defendant to a New World

As set out in the Presentence Report (hereinafter "PSR"), XXXXXXXX XXXXXXXX was born and raised in a small town in Southern Ohio, across the Ohio River from Kentucky. The PSR describes her upbringing, including her parents' divorce when she was 6, her father's slide into violence and alcoholism, and her mother's struggle to raise 4 children as a single parent with limited earning power.

The PSR likewise describes Ms. XXXXXXXX's education, where she earned a degree from a local college. Along the way, she worked a variety of jobs to put herself through school. Defendant also started dancing in strip clubs, a job that too many young women fall into in order to make ends meet.

XXXXXXXXXX XXXXXXXX has wanted to be a doctor for as long as she can remember. She also was a young woman from a working-class town who was taking off her clothes to get an education and to save money in the hope she could attend medical school. She was dancing at a club in nearby West Virginia. This is where she met Dr. MXXXXXXXX GXXXXXX. Dr. GXXXXXX had just finished medical school, and would soon move to Brooklyn to begin his residency at Park Slope Hospital.

The PSR describes what happened next. The two began a

romantic relationship. GXXXXXX impressed Ms. XXXXXXXX with his education, career, money and his New York lifestyle. He also recognized that Ms. XXXXXXXX wanted to attend medical school.

Having just finished the process, Dr. GXXXXXX recognized that Defendant's 2.97 Grade Point Average from SXXXXXX State University might not be good enough for admission to medical school. He suggested that she begin using Adderall when studying for the MCAT (the "Medical College Admission Test"). Dr. GXXXXXX then started writing prescriptions for Ms. XXXXXXXX.

Unfortunately, XXXXXXXX XXXXXXXX got hooked on Adderall. As shown in the PSR, she eventually weaned herself off daily use, but felt as if she needed the drug to study for the MCAT. Dr. GXXXXXX kept writing more prescriptions for Adderall.

C. Addiction Plus Desire to Attend Medical School Yields a Recipe for Disaster

As just noted, XXXXXXXX XXXXXXXX wanted to be a doctor. As described in the PSR, she was introduced to the drug Adderall by Dr. GXXXXXX, who explained that it could enhance Defendant's chance at getting into medical school. The combination of these factors led directly to what happened next when Ms. XXXXXXXX and Dr. GXXXXXX drifted over the line into criminal conduct.

Dr. GXXXXXX began selling Adderall via the "Craigslist" service. He would write prescriptions in his name, and the names of other males. The doctor would also write prescriptions in Ms.

XXXXXXXX's name, in the names of her family members, and some fictitious names. Occasionally, GXXXXXX and Ms. XXXXXXXXXXX would obtain fake identification documents to assist in filling the prescriptions. GXXXXXX would then offer the Adderall pills for sale on Craigslist, and Ms. XXXXXXXXXXX occasionally delivered the pills to the "customers".

The United States Probation Officer accurately describes how Ms. XXXXXXXXXXX and Dr. GXXXXXX have differing recollections as to how the profits from the Adderall sales were divided. The doctor claims the profits were divided evenly. Defendant and her family recall that GXXXXXX used the profits to impress Ms. XXXXXXXXXXX with clothes, trips and a new car. No matter which recollection is more accurate, the couple was breaking the law. Dr. GXXXXXX continued to use his privileges as a physician to write prescriptions, and Ms. XXXXXXXXXXX continued to accept both the drug and the benefits that she got from assisting the doctor in filling the prescriptions.

The PSR describes the tempestuous relationship between Defendant and Dr. GXXXXXX. Eventually, they broke up for good in the Summer of 2009.

After the breakup, Ms. XXXXXXXXXXX was accepted into a medical school in the Caribbean. Tuition for medical school is expensive. Defendant needed significant funds even beyond school loans in order to pay her tuition. In the months before leaving for medical

school, Defendant went back to exotic dancing in order to save more money. Unfortunately, she also went back to something taught to her by Dr. GXXXXXX, selling Adderall over the Internet.

Ms. XXXXXXXXX began medical school in January, 2010. She had a new prescription for Adderall, which she occasionally used for studying. In the Spring of 2010, authorities arrested Dr. GXXXXXX. The doctor told DEA agents about Ms. XXXXXXXXX, and that she was still selling Adderall over the Internet. Agents set up a sting operation using the email name and address of a former "customer." Ms. XXXXXXXXX sent 11 Adderall tablets to this undercover operation in October, 2010. Agents arrested Defendant when she got off a plane on Christmas Day, 2010, when she was traveling home on her break from medical school.

After being released on bail, Ms. XXXXXXXXX moved back with her mother and stepfather. As set out in the PSR, she receives mental health services in her hometown, and is being treated by a psychiatrist and counselor.

II. THE GUIDELINES

The Addendum to the PSR explains that the parties agree that Ms. XXXXXXXXX is accountable for 17 prescriptions of Adderall, along with the 11 pills she sent to the undercover operation. This results in a base offense level 28. Two levels are added pursuant to U.S.S.G. §2D1.1(b)(7), the rarely used enhancement applicable to cases where drugs are distributed through mass marketing.

The parties and the Addendum to the PSR also agree that Defendant is entitled to the 2-level reduction for the "safety valve" provision, U.S.S.G. §2D1.1(b)(16). Along with the reduction for accepting responsibility, this results in a total offense level of 25. Ms. XXXXXXXXX has no prior criminal record, and the resulting advisory Guidelines therefore suggest a range of 57-71 months in custody for her crime.

III. REASONS FOR A BELOW-GUIDELINES SENTENCE

The United States Probation Officer identified reasons in the PSR as to why the Court could consider a sentence below that which is recommended by the Sentencing Guidelines. Defendant suggests that additional reasons support a lower sentence.

Defendant will first review the Court's authority to impose a sentence well below the one suggested by the Guidelines. Next, Defendant will then explain that the Guidelines here seem to be far out of alignment, having been ratcheted up in a manner not contemplated by Congress for this type of case. Finally, Ms. XXXXXXXXX will look at the Probation Officer's suggestion for a downward variance.

A. The Authority to Impose a Lower Sentence

As the Court well knows, the job of sentencing now requires a judge to impose a "reasonable sentence". Gall v. United States, 552 U.S. 38, 46 (2007). A Court must first consult and calculate the Guidelines, but cannot treat those Guidelines as mandatory.

United States v. Cavera, 550 F. 3d 180, 189-190 (2nd Cir. 2008)(en banc). After consulting the Guidelines, the court must turn to the factors set out at 18 U.S.C. §3553(a). Id., at 190.

A sentencing court may vary from the Guidelines based on policy disagreements with the Guidelines. This is true even when that policy disagreement “applies to a wide class of offenders or offenses.” Id., at 191. For example, a District Judge may conclude that the crack cocaine Guideline was greater than necessary to meet the §3553(a) standards because the provision “did not exemplify the Commission exercise of its characteristic institutional role.” Kimbrough v. United States, 552 U.S. 85, at 109 (2007).

On several occasions the Second Circuit has ruled that sentencing judges are permitted to consider broad, policy-based challenges to various Guidelines. In United States v. Tutty, 612 F. 3d 28 (2nd Cir. 2010) the Court found plain error when the sentencing judge believed he could not depart from the child pornography Guidelines. In the earlier decision of United States v. Dorvee, 604 F. 3d 84 (2nd Cir. 2010) the Court of Appeals noted three distinct components of this Guideline which were “eccentric” and of “highly unusual provenance.” Id., at 98. First, the child pornography Guideline was driven by Congressional directives and was not developed through the Commission’s normal “empirical” approach. Id., at 95. Second, this particular Guideline contained

specific offense characteristics that applied to virtually all offenders guilty of the crime. Id., at 96. Finally, the child pornography Guideline failed to distinguish between first-time offenders and those more dangerous criminals who had previously committed sex crimes. Id.

Sentencing judges are free to conclude that a particular Guideline that is not based on empirical data or national experience is therefore "greater than necessary" for imposing a "reasonable sentence" under §3553(a). In Rita v. United States, 551 U.S. 338, 348-50 (2007), the Supreme Court looked at two components of this inquiry: (1) reliance on empirical evidence of preguidelines sentencing practice, and (2) review and revision in light of judicial decisions, sentencing data, and consultation with participants in and experts on the criminal justice system. Where a Guideline was not developed based on this "empirical data and national experience," it is not an abuse of discretion to conclude that it "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." Kimbrough, 552 U.S. at 109-10. See also Spears v. United States, 129 S. Ct. 840, 843-44 (2009) ("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.").

In summary, the Court must first consider the Guidelines here, and the 57-71 month range recommended by those advisory rules.

After considering the Guideline, the Court has the authority to reject the Guideline if it was not based on empirical data and national experience. When a particular Guideline is driven more by directives from Congress than the Commission's experience and data, a sentencing Court has the power to reject the recommended range from such a Guideline.

**B. "Eccentric" Application of the
Guidelines to Prescription Adderall**

Adderall contains dextroamphetamine and amphetamine. It appears that the Sentencing Commission improperly increased the Guidelines for cases like this where legitimate prescription drugs contain amphetamine.

Up until the summer of 2001, the Guidelines calculated cases involving amphetamine far less harshly than the present version. Until that point, amphetamine was not even found on the Drug Quantity Table that follows U.S.S.G. §2D1.1. Furthermore, up until that time, one gram of amphetamine was considered equal to 200 grams of marijuana in the Drug Equivalency Table.

In 2000, Congress passed the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106-310. Section 3611 of this law was entitled "Enhanced Punishment for Amphetamine Laboratory Operators". (emphasis added). Based on this statute, the Sentencing Commission enacted emergency amendments that made all cases involving amphetamine equal to all cases involving

methamphetamine. Punishment for amphetamine offenses was increased by a factor of ten, with one gram of the drug now converting to 2000 grams of marijuana. Eventually, this language became Amendment Number 610 to the Guidelines.

Here is what the Commission gave as its reasons for the tenfold increase in amphetamine cases so as to make these crimes equivalent to all cases involving methamphetamine.

Reason for Amendment: This emergency amendment implements the directive in the Methamphetamine Anti-Proliferation Act of 2000, section 3611 of Pub. L. 106-310 (the "Act"), which directs the Commission to provide, under emergency amendment authority, increased guideline penalties for amphetamine such that those penalties are comparable to the base offense level for methamphetamine.

This amendment revises §2D1.1 to include amphetamine in the Drug Quantity Table. This amendment also treats amphetamine and methamphetamine identically, at a 1:1 ratio (i.e., the same quantities of amphetamine and methamphetamine would result in the same base offense level) because of the similarities of the two substances. Specifically, amphetamine and methamphetamine (1) chemically are similar; (2) are produced by a similar method and are trafficked in a similar manner; (3) share similar methods of use; (4) affect the same parts of the brain; and (5) have similar intoxicating effects. The amendment also distinguishes between pure amphetamine (i.e., amphetamine (actual)) and amphetamine mixture in the same manner, and at the same quantities, as pure methamphetamine (i.e., methamphetamine (actual)) and methamphetamine mixture, respectively. The amendment reflects the view that the 1:1 ratio is appropriate given the seriousness of these controlled substances. (emphasis added).

As noted previously, this case involves amphetamine that is contained in a prescription drug, Adderall. This drug is not "produced by a similar method and [] trafficked in a similar manner" as amphetamine or methamphetamine that comes out of some clandestine drug lab. "Ivy League crack" does not "share similar methods of use" with "meth" or "speed" that is doled out by drug dealers who also peddle other substances.

As also discussed above, courts are suspicious of Guidelines that result from Congressional directives and are not based on empirical data or research. The Sentencing Commission ratcheted up the penalties for all amphetamine cases because it was told to do so by Congress, but it appears that no research or data backs up the Commission's work. More importantly, Congress clearly was troubled by those who operate drug labs. Here, we have a drug that is legitimate, but which is misused after being prescribed by a medical professional. The drug Adderall is mostly used by those in our high-pressure society who want a competitive advantage. This is a far cry from what Congress had in mind when it told the Commission to increase penalties for amphetamine lab operators.

Defendant has not uncovered any reported decisions describing the calculation of the Sentencing Guidelines for a defendant involved in illegal conduct with Adderall. Nevertheless, it seems that the tenfold increase for amphetamine cases was never designed

to affect defendants involved in prescription drugs like Adderall. The application of a Guideline for lab operators to a young woman who foolishly sold prescription pills is "eccentric". There appears to be no research to back up the Commission's claims that all Adderall is "produced" and "trafficked" similarly to methamphetamine. As a result, this Guideline has, in the words of the Second Circuit, a "highly unusual provenance." Under these circumstances, this Court is free to disregard the Commission's ten-fold increase in penalties for amphetamine.

Defendant suggests that one way to consider this case is to look at how amphetamine was punished under the pre-2001 amendments to this Guideline. As noted above, before 2001 the Commission equated one gram of amphetamine with 200 grams of marijuana. Here, the Probation Officer notes that Ms. Wiltshire is responsible for 30.93 grams of amphetamine. This equates to 6,186 grams of marijuana under the pre-2001 version of the Guidelines. The base offense level for this amount of marijuana is level 14. Using the remaining Guideline calculations (plus 2 for mass marketing, minus 2 for safety valve, minus 3 for acceptance of responsibility) yields an adjusted offense level of 13. This adjusted offense level is a rational method for looking at the criminal conduct committed by XXXXXXXX XXXXXXXX.

C. The Probation Officer's Suggestion for a Lower Sentence

The United States Probation Officer noted that Defendant's

addiction to Adderall is related to her involvement in the instant offense. Defendant's addiction led to her criminal conduct. Ms. XXXXXXXX concedes that she would benefit from drug treatment. As a result, the Probation Office also suggests that the Court consider a sentence below the range recommended by the Guidelines.

CONCLUSION

Defendant asks that the Court consider a sentence below the recommendation found in the Sentencing Guidelines. The Court has the authority to engage in a variance from the Guidelines. The facts of the case, and the "eccentric" nature of the Guidelines all call out for a sentence that is far below the range of 57-71 months.

DATED: This 30th day of March, 2012.

Respectfully submitted,
/s/ Paul S. Kish
PAUL S. KISH
Georgia State Bar No. 424277
ATTORNEY FOR XXXXXXXX XXXXXXXX

Kish & Lietz, P.C.
225 Peachtree Street, NE
1700 South Tower
Atlanta, Georgia 30303
404-588-3991
404-588-3995 facsimile

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Sentencing Memorandum by electronic delivery upon:

AUSA Justin Lerer
271 Cadman Plaza East
Brooklyn, New York 11021

DATED: This 30th day of March, 2012.

/s/ Paul S. Kish

PAUL S. KISH
Georgia State Bar No. 424277
ATTORNEY FOR XXXXXXXX XXXXXXXX

Kish & Lietz, P.C.
225 Peachtree Street, NE
1700 South Tower
Atlanta, Georgia 30303
404-588-3991
404-588-3995 facsimile