IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 10-00162-cr-W-GAF
	)	
THEODORE S. WIGGINS,	)	
	)	
Defendant.	)	

SENTENCING MEMORANDUM

COMES NOW Theodore S. Wiggins, by and through his appointed attorney and submits the following issues for this Court's consideration as it contemplates a "just punishment"; as follows;

1. Is Wiggins a Career Offender?

According to the Unites States Sentencing Guidelines §4B1.1, Wiggins is not.

U.S.S.G. §4B1.1(a) provides:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) **the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.**

U.S.S.G. §4B1.2(b) provides:

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or counterfeit substance) with intent to manufacture,

import, export, distribute, or dispense.

Prior to Trial, the government filed two Motions pursuant to "851". The convictions specified were as follows:

DOC 258	CR98-03880		
DOC 345	7CR1990001701	Jackson County	possession

DOC 258 clearly counts under "851". However, the charge described in DOC 345 is a Clay County simple possession case. The crime set forth in DOC 345 did not include an element that Wiggins "intended to manufacture, import, export, distribute or dispense" the controlled substance. Therefore, the crime set forth in DOC 345 does not satisfy the requirements of U.S.S.G §4B1.2(b).

According to the United States Code, 21 U.S.C. 851, Wiggins is not a Career Offender. It would be improper to enhance Wiggin's sentence based on the convictions listed in the "851" Motions. The standard of review on appeal is a de novo review of the district court's use of prior convictions for enhancement purposes. ***United States v. Stallings,*** 301 F.3d 919, 920 (*th Cir. 2002); ***United States v. Cook,*** 356 F.3d 913, 916 (8th Cir. 2004).

21 USC § 851 provides in applicable part:

Sec. 851. Proceedings to establish prior convictions
(a) Information filed by United States Attorney
(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, **unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous**

convictions
to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

As stated above, the only two motions filed by the government prior to trial for increased punishment pursuant to 21 U.S.C. were those identified as DOC 258 and DOC 345. Defendant had no notice that the government would rely on any other conviction to enhance his punishment, if convicted. The purpose of the notice requirements, among others, is to provide the defendant the fundamental fairmess of due process thereby "allowing the defendant `ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." ***United States v. Velazquez,*** 410 F.3d 1011, 1016-17 (8th Cir. 2005).

The government did not satisfy the above requirements of the law and, therefore, Wiggin's sentence cannot be enhanced.

2. Is the PSR computation of Wiggin's "Offense Level" correct?

The PSR writer states that, "The instant offense involved at least 840 grams of cocaine base." No evidence was presented at trial to support that amount of cocaine.

Attached is a copy of a document displayed to the jury at trial to prove that the wire tap evidence showed a total of 287 grams of cocaine (see Attachment A). Additionally, Wiggins was convicted of selling ¼ ounce of cocaine to an undercover police officer. This totals 294 grams of cocaine. The government should be held to the proff they produced to convince the jury of Wiggin's guilt of the crimes charged.

Based on this amount of cocaine (297 grams) and U.S.S.G. §2D1.1(10); Mr. Wiggin's Base Offense Level should be 20.

3. Is the PSR computation of Wiggin's Criminal History correct?

The PSR writer computes Wiggin's criminal history points to total 13. We calculate Wiggin's criminal history points to total 7. In order to explain the difference in our calculation, we will refer to the page and paragraph of the PSR in question.

a. CR98-03880. Page 17, paragraph 71.

This conviction occurred on or before 02/12/98 (date the case was filed). Mr. Wiggins was born on 12/23/1980. Therefore, he was under the age of 18 at the time of this offense. Additionally, the offense occurred more than five years prior to the commencement of the offense charged in this case. The Guideline reference is 4A1.2(d)(2)(B) and results in 1 point not 3.

b. CR99-02436 (16CR99002436-01). Page 19, paragraph 73.

This offense occurred on 4/16/99. On July 31, 2000 Wiggins was sentenced to 10 years incarceration. However, he started his sentence on 6/28/00; was given 120 days "shock time" and released on 10/26/00. The balance of the sentences was suspended. The phrase "Sentence of Imprisonment" is defined by 4A1.2(b)(2) as only that portion of a sentence that was not suspended. Therefore, pursuant to 4A1.1(b), 2 points should be added for this offense not 3.

c. CR98-03880 and CR99-02436. Page 17 and 19, paragraph 71 & 73.

Sentence was imposed on both of these cases on 08/01/2000. Pursuant to 4A1.2(a)(2)(B), these are counted as a single sentence. Therefore, these two offenses should total no more than 2 points, combined.

d. CR2001-02315-02. (16CR01002315-02) Page 21, paragraph 75. As stated Wiggins was originally convicted by a jury, 3/27/03, of all counts. However, he was sentenced to 35 years not 10 years. On August 9, 2007 the Circuit Court of Jackson County set aside the convictions on all counts except Count 3 (Tampering). I believe there were only 11 counts in the original Indictment. On January 26, 2009 an Amended Information was filed and Defendant entered a guilty plea to Count 1 (Robbery in the 2nd Degree) and was sentenced to 10 years; and to Count 2 (Armed Criminal Action) and

was sentenced to 3 years. These sentences were order to run concurrent with the "Tampering In the 1st Degree" sentence imposed on May 5, 2003; and concurrent with sentences imposed in 16CR990002436-01 and 16CR98003880-01. Defendant was granted credit for all time served since April 5, 2001. Pursuant to 4A1.1(a) Wiggins should get 3 points for this conviction even though he was released on September 25, 2009 (nine months later). However, since he was sentenced at the same time on the two prior Jackson County cases listed above, no additional points are appropriate for those two cases.

Based on the above, Mr. Wiggins **CRIMINAL HISTORY POINTS** total **7,**
computed as follows:

page 17, para. 71 1 point*

page 19, para. 73 2 points*

* However, based on 4A1.2(a)(2)(b) the offenses in these two paragraphs result in a total of 2 points.

page 20, para. 74 2 points

page 21, para. 21 3 points

A criminal history point total of "7" results in a "Criminal History Category" of **IV.**

A **Base Offense Level** of **20**, combined with **CRIMINAL HISTORY POINTS** totaling **7;** and no categorization of "career criminal': Mr. Wiggin's sentence in line with the commission's "Statutory Mission" to develop a sentence that furthers the basic purposes of criminal punishment of deterrence,

incapacitation just punishment and rehabilitation in accordance with the "Sentencing Table" is 51 to 63 months. However, his conviction pursuant to 21 USC §841 with one prior proven pursuant to 21 USC §851; mandates a minimum sentence of 20 years or more pursuant to 21 USC §841(b)(1)(A). Since there was no death or seriously bodily injury; and since Wiggins never was in possession (actual or constructive) of a weapon; a just punishment under the statute would be 20 years.

Respectfully submitted,

/s/ Michael W. Walker_____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served electronically via the CM/ECF filing system, this 19th day of November, 2012, upon the following:

Brent Venneman, Assistant united States Attorney

/s/ Michael W. Walker
Michael W. Walker