

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

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|---------------------------|---|-------------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | |
| v. |) | Case No. 09-00296-06-CR-W-FJG |
| |) | |
| NICHOLAS DONKERSLOOT, |) | |
| |) | |
| <i>Defendant.</i> |) | |

**DEFENDANT’S SENTENCING MEMORANDUM,
WITH REQUEST FOR DOWNWARD VARIANCE
PURSUANT TO GALL V. UNITED STATES.**

COMES NOW the defendant, Nicholas Donkersloot, by and through his counsel, and hereby submits this Sentencing Memorandum in the above-referenced case, pursuant to Rule 32 of the Federal Rules of Criminal Procedure. Mr. Donkersloot is requesting a downward variance from the sentencing range set forth in the advisory Sentencing Guidelines pursuant to *Gall v. United States*, 552 U.S. 38 ((2007)). Sentencing is presently scheduled for August 4, 2010, at 10:30 a.m.

Mr. Donkersloot and the undersigned counsel have thoroughly reviewed the Presentence Investigation Report (“PSR”) and have discussed all issues with respect to sentencing in this case. Further, Mr. Donkersloot, through counsel, previously responded to the probation office with various objections and/or comments to the PSR. This Memorandum is respectfully filed to assist the Court in determining an appropriate sentence.

I. PROCEDURAL BACKGROUND

Mr. Donkersloot was originally named in an indictment charging six individuals with conspiracy to distribute more than five hundred grams of methamphetamine. The indictment also charged one of the six, Mr. Angell, with witness tampering.

On November 25, 2009, Mr. Donkersloot voluntarily entered his plea of guilty to a 1-count Information charging a lesser included offense of distribution of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). By virtue of his guilty plea, Mr. Donkersloot admitted facts to support his guilty plea. He acknowledged that his actions were illegal and wrongful.

Mr. Donkersloot entered into a written plea agreement with the United States. This Court accepted the defendant's plea of guilty and ordered the preparation of a Presentence Investigation Report by the probation office. The PSR has been finalized in this matter. The Court has received communications from the Government supporting a downward departure from the advisory guidelines range.

II. UNRESOLVED ISSUES WITH RESPECT TO PSR

Mr. Donkersloot objects to ¶ 58 of the PSR and asserts that he is entitled to a four-level decrease as he was a minimal participant in any criminal activity pursuant to U.S.S.G. § 3B1.2 and the relevant Application Notes. Mr. Donkersloot was substantially less culpable than the average participant in the conspiracy described in ¶¶ 31-50 of the PSR. There were numerous participants in this conspiracy. (App. Notes 2, 3(A).) In fact, this defendant's name is specifically mentioned in only two of the paragraphs detailing the offense conduct,

and one of the paragraphs refers to Mr. Donkersloot's own admission of participating in 7 "runs" over a 5 year period of time. Mr. Donkersloot was a member of the Okoboji Charter of the El Forastero Motorcycle Club, where most of the other participants were members of the Kansas City Charter of the El Forastero Motorcycle Club and the Galloping Goose Motorcycle Club, which shared a clubhouse in Kansas City. Most of the planning of the distribution or "runs" sponsored by the Kansas City charters was done at the Kansas City clubhouse. Mr. Donkersloot was not present at any of those planning sessions.

The Okoboji Charter of the El Forastero Motorcycle Club was much smaller than the other charters involved in this case, and operated differently. When the Okoboji Charter sponsored a run, they did not utilize "run money" acquired from the members going on the run to acquire methamphetamine for the "run bag;" rather, a member of the Okoboji charter with "deep pockets" (usually Mr. Donkersloot's late father, Lyle Donkersloot, a financially successful farmer and businessman) would donate the methamphetamine.

After methamphetamine was acquired for a run, it would be broken down into one or more "run bags" to be carried on the run. Mr. Donkersloot never took part in preparing a run bag. Mr. Donkersloot never carried the run bag. No methamphetamine for any run bag was acquired from or by Mr. Donkersloot. Also, because Mr. Donkersloot was forbidden from using methamphetamine or cocaine when he joined the club, he never partook of the methamphetamine in the run bag. Mr. Donkersloot's participation in the conspiracy was limited to his membership in the Club and his going on runs knowing that a portion of the "run money" collected from the members who went on the runs would be used to purchase

methamphetamine for the run bags. Mr. Donkersloot is entitled to a four-level decrease for being a minimal participant.

Although the Probation Officer correctly calculated Mr. Donkersloot's criminal history as Category III, Mr. Donkersloot believes that this substantially over-represents the seriousness of his criminal history, since one point was assessed for a conviction nine years before he joined the motorcycle club, and the other four of the five criminal history points all relate to his marriage to Jennifer Donkersloot. Jennifer (now Halbersma) has written a compelling letter to the Court, which explains that the conviction in December 2001 was only a verbal argument, and sets forth the circumstances of the offense on May 20, 2006. The May 20, 2006 incident accounts for three of the six criminal history points assessed, since Mr. Donkersloot was on probation for that offense during some of the offense conduct in the instant case. Without that incident, Mr. Donkersloot's criminal history category would be Category II, and his advisory sentencing range would be correspondingly lowered.

Criminal History Category III also substantially over-represents the likelihood that Mr. Donkersloot will commit other crimes. The offense to which Mr. Donkersloot entered a plea of guilty related solely to his membership in the El Forastero Motorcycle Club, which he terminated over a year before this indictment was unsealed. As reflected in the Presentence Investigation Report, Mr. Donkersloot was assaulted by two club members after he left the motorcycle club because he had supposedly disrespected a third club member. The Presentence Investigation Report also reflects that Mr. Donkersloot terminated his use

of illegal drugs, and has not used illegal drugs since 2008. Therefore, a downward departure is warranted under USSG § 4A1.3(b)(1).

The defendant's detailed explanation of his objections as noted above are fully set out in the Addendum to the PSR

III. SENTENCE TO BE IMPOSED

As the PSR indicates, Mr. Donkersloot's total offense level is 23. He is within Criminal History III. As a result, he is facing an advisory sentencing range of 57 to 71 months. Should the defendant prevail on his objections as described above, the adjusted total offense level would be 19 in Criminal History III with a resulting advisory range of 37-46 months. This sentencing range should also be tempered by the factors set forth under 18 U.S.C. § 3553..¹ The defendant respectfully requests that this Court consider a variance and impose a sentence of probation. At the outset, it should be reiterated that Mr. Donkersloot

¹Most circuits agree that there is a three-step approach to sentencing. First, the guidelines are determined. Then, departures are considered, and finally, variances are analyzed. See, *United States v. Robertson*, 568 F.3d 1203, 1210 (10th Cir. 2009), *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006), c.f. *United States v. Johnson*, 427 F.3d 423 (7th Cir. 2006). This is similar to the approach discussed by the Supreme Court in *Gall v. United States*, 552 U.S. 38, 49-50 (2007), although the *Gall* Court includes the consideration of guideline-approved departures as part of calculating the applicable guidelines range. (“ . . . a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . . . the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.”) For the reasons stated herein, the defendant requests a probationary sentence which is grounded primarily on 18 U.S.C. § 3553(a) factors and related variance arguments regardless of the court's final determination of the adjusted total offense level.

acknowledges his wrongdoing. He does not diminish his wrongful conduct, nor does he excuse it.

APPLICATION OF 18 U.S.C. § 3553(a) FACTORS

As the Supreme Court has long recognized, “it has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon v. United States*, 518 U.S. 81, 113 (1996). With the United States Sentencing Guidelines now rendered “advisory only,” *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007), a district court has substantial discretion in fashioning a sentence appropriate to the individual circumstances of the defendant and the unique facts of the offense. While the Court must consider the guideline range in a case, “the Guidelines are not the only consideration.” *Gall v. United States*, 128 S. Ct. 586, 597 (2007). See *Kimbrough*, 128 S. Ct. at 564 (“the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence”).

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court determined that district courts must consider all of the sentencing factors under 18 U.S.C. §3553(a)(1)-(7) without giving mandatory weight to the sentencing guidelines. The Sentencing Reform Act instructs a Court to impose a sentence “sufficient, but not greater than necessary,” to comply with the stated purposes of punishment. 18 U.S.C. § 3553(a). A sentence of probation will

address all goals of The Sentencing Reform Act. 18 U.S.C. § 3553(a) states, in pertinent part, as follows:

- (a) Factors to be considered in imposing a sentence.--The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
- (1) the nature and circumstances of the offense
and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) the kinds of sentences available;
 - (4) the kinds of sentence and the sentencing range established for...
 - (5) any pertinent policy statement...
 - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 - (7) the need to provide restitution to any victim of the offense.

In view of his guilty plea, the defendant recognizes that his own conduct is the cause of his shame and embarrassment. However, it is respectfully suggested that the consideration of general and specific deterrence, proper punishment and an opportunity for rehabilitation are satisfied with a sentence as set out herein.

In addition, a district court “may not presume that the Guidelines range is reasonable,” and instead “must make an individualized assessment based on the facts presented.” *Gall*, 128 S. Ct. at 597. Moreover, the Supreme Court has specifically ruled that, in balancing the

§3553(a) factors, a judge may determine that, “in the particular case, a within-Guidelines sentence is ‘greater than necessary’ to serve the objectives of sentencing.” *Kimbrough*, 128 S. Ct. at 564. See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (a district court may consider arguments that “the Guidelines sentence itself fails properly to reflect §3553(a) considerations, or [that] the case warrants a different sentence regardless”). A district court may now vary from the applicable guideline range “based solely on policy considerations, including disagreements with the Guidelines.” *Kimbrough*, 128 S. Ct. at 570.

Moreover, certain courts have recently held that, if a court ultimately concludes after considering the 3553(a) factors that a non-guidelines sentence is appropriate, the court’s sentence is entitled to highly deferential review by the appellate court only for a clear abuse of discretion. See, *United States v. Hucksin*, 529 F.3d 1312 (10th Cir. 2008). See also, *United States v. Burns*, 577 F.3d 887, 894-95 (8th Cir. 2009).

Other statutory sections also give the district court discretion in sentencing. Under 18 U.S.C. § 3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation. In sum, in every case, a sentencing court must now consider all of the §3553(a) factors, not just the guidelines, in determining a sentence that is sufficient, but not greater than necessary, to meet the goals of sentencing.

A) 18 USC §3553(a)

1. Nature and Circumstances of the Offense & History and Characteristics of the Defendant:

Crucial to understanding both the circumstances of the offense and the history and characteristics of Nick Donkersloot is his late father, Lyle Donkersloot. An Army veteran of southeast Asia and Ethiopia, Lyle Donkersloot was a man of contradictions. He was patriotic, hard working and outwardly very successful both in farming and in business. His Indian motorcycle shop, Okoboji Chopper Central, was known throughout northern Iowa and southern Minnesota. Lyle himself was a longtime member of the El Forastero Motorcycle Club, and the Okoboji Charter of the club was formed largely on his behalf. Although Lyle Donkersloot was a larger-than-life, beloved character in northern Iowa, he was also a drug abuser, an alcoholic, and, occasionally an abusive spouse and partner. It was he who introduced Nick Donkersloot to illegal drugs when Nick was a teenager. Lyle had inculcated in Nick his love of motorcycles, and Nick was accompanying Lyle on the annual run to Sturgis, South Dakota, when Lyle gave him methamphetamine, ostensibly to keep him alert during the nine-hour ride.

Although Nick became addicted to illegal drugs, as discussed in the PSR, he was nonetheless able to complete his education, obtaining first an Associate's degree *cum laude* from Iowa Lakes Community College, and then a Bachelor's degree from the University of Iowa. After an internship in the film industry in Los Angeles, he returned to Iowa, where he worked at odd jobs before returning to work with Lyle on the family farm and at Okoboji

Chopper Central. It was during that time period that Nick joined the El Forastero Motorcycle Club.

On July 31, 2005, Lyle, Nick and other motorcyclists were riding in a group in Laurie, Missouri, near the Lake of the Ozarks, when Lyle was struck from behind by a drunk driver, then 19-year-old Zachary Tyrl of Kansas City. Nick held Lyle in his arms as he died.

After Lyle's death, Nick's use of alcohol and illegal drugs increased exponentially. This led to problems in his marriage to Jennifer (now Halbersma), and they were divorced on July 13, 2006. Ms. Halbersma's letter to the Court details her perception of the impact Nick's relationship to Lyle, Lyle's death, and Nick's drug abuse had on their marriage.

While the PSR contains a summary of Mr. Donkersloot's social history, the truest reflection of his character is found in the numerous letters of support written on his behalf. The letters are written by people who passionately support this defendant. Mr. Donkersloot clearly has the love and support of his family, as well as others in the community. Most of the writers speak of the transformation they have seen in Mr. Donkersloot since he left the El Forastero Motorcycle Club and overcame his addiction to illegal drugs, which occurred well before the unsealing of the indictment in this case. They also speak of the contributions Mr. Donkersloot has made to his family and to the community since leaving that lifestyle behind. His behavior over the past three years has shown that Mr. Donkersloot is capable of conforming to rules and regulations. His history and characteristics justify an other than guideline sentence.

2. The Need for the Sentence Imposed to Promote Certain Statutory Objectives

A sentence of incarceration is not always necessary in order to satisfy this sentencing mandate. It is the goal of sentencing to prevent unnecessary incarceration and to limit prison sentences to those individuals who pose the greatest risk to society. As renowned criminologist Norval Morris has consistently argued, and reflective of the recent Supreme Court decisions, when determining punishment, "the least restrictive (punitive) sentence necessary to achieve defined social purposes should be imposed."

Mr. Donkersloot must be punished for his actions. However, it is imperative that a punishment be given which is proportional to the social harm committed, as determined by the Court, to serve the goals of sentencing.

(A) To Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense

While Mr. Donkersloot in no way deprecates the seriousness of the offense, his offense conduct was much less aggravated than that of the other defendants in this case. A felony conviction accompanying a term of probation would adequately satisfy this goal.

(B) To Afford Adequate Deterrence to Criminal Conduct

A review of the criminological literature reveals that to the extent that criminal sanctions do have a general deterrent effect, the certainty (how certain an offender will be deterred) of punishment has a far greater deterrent effect than the severity of the sanction. Title 18 USC §3553(a)(2)(B)'s directive that the sentence imposed afford adequate deterrence to criminal conduct does not require a lengthy term of imprisonment.

(C) To Protect the Public from Further Crimes of the Defendant

Mr. Donkersloot has made significant changes to his behavior since he left the El Forastero Motorcycle Club. . This fact is made clear in the letters written to the Court on his behalf. Those changes were self-imposed, before he had any idea that this indictment might be coming. Mr. Donkersloot realizes that he has disgraced himself and others close to him as a result of his arrest and conviction, and he will insure that he never does so again..

(D) To Provide the Defendant with Needed Educational or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner

Mr. Donkersloot graduated from Hartley-Melvin-Sanborn High School in Hartley, Iowa. He graduated *cum laude* from Iowa Lakes Community College with an associate degree in broadcast media. Mr. Donkersloot then returned to school at the University of Iowa in Iowa City, Iowa and obtained a bachelor of arts degree, majoring in communication studies in 1998. Mr. Donkersloot suffers from no mental health disorders. While he has had a history of alcohol and substance abuse issues, he has been clean since October 2008. He is well educated and can continue to be a productive member of society.

3. The Kinds of Sentences Available

18 U.S.C. §3553(a)(3) requires the Court to consider "the kinds of sentences available" in a given case. Here, the Court has available many forms of punishment other than imprisonment which will permit it to craft an appropriate sentence for Mr. Donkersloot - probation, home detention, community confinement, fines, and community service. Indeed,

employing some combination of these types of sentences will allow the Court to both punish Mr. Donkersloot sufficiently, and allow him the opportunity to continue to rebuild his life.

With the Guidelines now advisory and with the enhanced sentencing discretion mandated by *Gall*, the Court is now able to use the availability of such non-custodial sentences to further calibrate a sentence so that it is no "greater than necessary" to accomplish the statutory purposes. As a result, in Mr. Donkersloot's case, where there are so many mitigating factors, the availability of these alternatives under the law weighs in favor of the Court's use of them and against the imposition of a prison sentence. Indeed, courts have used this power in recent years to employ probation, home detention or community confinement to address unique circumstances, even where the applicable guideline range would formerly have prohibited anything but imprisonment.

Gall, supra, is a prime example of such a case, and the history of the defendant in *Gall* makes a striking parallel to that of Mr. Donkersloot. Brian Gall had an advisory sentencing range of 30 to 37 months imprisonment, 552 U.S. at 43; Mr. Donkersloot's advisory range as calculated by the probation office, prior to any departures, is 57-71 months imprisonment, and a departure to half of the advisory guidelines range is frequent in cases like this. Mr. Gall had left his drug conspiracy and "self rehabilitated," discontinuing illegal drug use, well before he was indicted, 552 U.S. at 41-42, just as Mr. Donkersloot has. Mr. Gall, at the time of his indictment and while awaiting sentencing, was gainfully self-employed and contributing to the community, 552 U.S. at 42, just as Mr. Donkersloot was and is. Like Mr. Donkersloot, Mr. Gall provided the sentencing court with a number of letters from relatives,

friends, neighbors and business associates praising his character and work ethic. As the Supreme Court noted, "The District Court quite reasonably attached great weight to Gall's self-motivated rehabilitation, which was undertaken not at the direction of, or under the supervision by, any court, but on his own initiative. This also lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts." 552 U.S. at 59. Mr. Donkersloot respectfully implores this Court to attach similar weight to his self-motivated rehabilitation and to draw that same conclusion with regard to him.

4-5. The Sentencing Guidelines Provisions

While the Court must consider the applicable guideline range and Sentencing Commission policy statements pursuant to 18 U.S.C. § 3553(a)(4) and (5), it is respectfully suggested that any sentence within this range would be "greater than necessary" to serve the purposes of sentencing in this case. There are mitigating factors regarding Mr. Donkersloot's offense and his personal circumstances which are plainly not accounted for in the sterile arithmetic of the computation of the applicable guideline range.

In *Gall*, the Supreme Court ruled that, under the law, a district court "may not presume that the Guidelines range is reasonable." 128 S. Ct. at 597. Indeed, this is a case which warrants a non-guideline sentence.

Each of the relevant sentencing considerations can be satisfied without imposing an advisory guideline sentence. The felony conviction alone serves as a general and specific deterrent. His conduct over the last two years is credible evidence that he is not a candidate

for recidivism. He has been shamed by his conduct. In short, there are substantial reasons as to how a sentence substantially below the advisory guideline range satisfies the concerns of 18 U.S.C. § 3553 and the holding in *Booker*.

The most recent analysis of sentencing data performed by the U.S. Sentencing Commission reflects that judges are imposing below-Guidelines sentences that are justified under a § 3553(a) analysis. The percentage of below-Guidelines “non-government sponsored” sentences that relied entirely on consideration of § 3553(a) factors in imposing a variance in cases in which no downward departure was given have increased from 7.3 in 2006 to 8.1 in 2007, to 10.1% in 2008, to a high of 12.2% through June 2009. U.S. Sentencing Commission, Preliminary Quarterly Data Report, 2d Quarter Release 2009, at Table 1 and Figure A; U.S. Sentencing Commission, Quarterly Sentencing Updates, Final Reports Years FY06, FY07, FY08, at Table 1.

Mr. Donkersloot is well aware that his conduct has placed emotional strain on his family, which he deeply regrets. His conduct has also affected numerous other individuals, which he also regrets. A sentence consistent with the suggestions herein would serve all of the goals of punishment established by the Sentencing Reform Act.

6. The Need to Avoid Unwarranted Sentencing Disparities Among Defendants With Similar Records Who Have Been Found Guilty of Similar Conduct.

All of the defendants previously sentenced by the Court in this case were, by their own admission, much more active participants in the drug conspiracy aspect of the El Forastero and Galloping Goose Motorcycle Clubs than Mr. Donkersloot. They all remained

active in their respective Charters until they were confronted by the law enforcement officials investigating the case. Only Mr. Donkersloot left the Motorcycle Club before a criminal case was threatened, and only Mr. Donkersloot was then assaulted by two of his former El Forastero “brothers.” While Mr. Donkersloot has not had access to the PSRs of other defendants, he is confident that his criminal history, properly viewed, is not significantly more serious than any of theirs. None of the other defendants has demonstrated the self-motivated rehabilitation which Mr. Donkersloot has shown. It certainly would not be unwarranted to treat Mr. Donkersloot more leniently than his codefendants.

POST-OFFENSE REHABILITATION

Under U.S.S.G. 5K2.0, as well as recent court rulings, this Court is not precluded from considering exceptional post-offense rehabilitation when determining an appropriate sentence in this case. In the discussion of *Gall*, supra, Mr. Donkersloot’s self-motivated post-offense rehabilitation has been discussed in detail.

Mr. Donkersloot is self-employed as a farmer in Hartley, Iowa, farming both land he inherited from his father and land he rents for that purpose. During the winter, when farm work is less demanding, he works at odd jobs. He has also written a book concerning his experiences with the motorcycle club, and is seeking its publication.

Mr. Donkersloot is the father of three children. He is actively involved in their lives. He has helped coach his sons’ football teams and has coached his daughter’s YMCA basketball team. He has been affiliated with Never Back Off Promotions, which has raised

and contributed nearly Ten Thousand Dollars (\$10,000.00) for needy and underprivileged children.

Mr. Donkersloot's family and friends have remained loyal and supportive as evidenced by the character letters written by them on his behalf. These letters include letters from his former wife and family, friends, co-workers and community members. The letters provide a more complete picture of Mr. Donkersloot that the Court should also consider in imposing sentence. The irony of the letters is that these are the very people he has hurt by his conduct. His former wife, Jennifer, writes, "The most important change Nick made was to become sober. Nick has been completely drug free since the fall of 2008! This has made such a difference in his life...he's like a new person. Nick is now a much more stable, rational, kind and pleasant person to be around. He now holds himself accountable for his past decisions and behavior. He has always strived to be a good father to our children and he is finally the father that he has always wanted to be."

Mr. Donkersloot is sincerely remorseful for his role in this case. His wrongful conduct has placed emotional strain on his family, which he deeply regrets. His conduct has also affected other individuals, which he also regrets. However, Mr. Donkersloot has demonstrated an extraordinary ability to get his life back on track and stay a productive member of society. He desires to further his efforts at this rehabilitation. A sentence consistent with the suggestions herein would serve all of the goals of punishment established by the Sentencing Reform Act.

IV. CONCLUSION

A sentence of probation for Mr. Donkersloot is consistent with *Gall's* instruction that district courts should “consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Gall*, 128 S.Ct at 598.

For the reasons set forth above, the defendant seeks a sentence of probation with whatever requirements the court desires. In the alternative, he respectfully asks that if a custody sentence is imposed that the Court allow for self-surrender to the Federal Prison Camp at Yankton, South Dakota, the BOP facility closest to his home and that of his children, that he be permitted to surrender on or after November 29, 2010, so that he can harvest and sell the crops he is currently growing to provide for his children during his absence, and for a recommendation that he participate in the Bureau’s Residential Drug Abuse Program.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically by ECF/CM with the United States Court for the Western District of Missouri on this 20th day of July, 2010 with notice of case activity generated and sent electronically to all counsel of record.

s/ Charles R. Rogers

Attorney for Defendant