

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

JAMES MICHAEL ATCHLEY

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Case No. 4:08-CR-119-Y (33)

**Atchley's Motion for Variance From
the Calculated Guidelines Level**

In accordance with the Court's Order Setting Scheduling for Sentencing dated 18 February 2009, Atchley respectfully moves for variance from the Presentence Report's calculated guidelines level of 37 which calls for a sentence of prison between 210 and 262 months. Atchley contends that the imposition of a maximum term of probation along with an order of a substantial amount of community service would comprise a sufficient sentence that is not greater than necessary.

Respectfully submitted,

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I. Preliminary Statement

The Court’s task of sentencing is guided by 18 U.S.C. § 3553(a) and the Supreme Court’s recent decisions in *Booker*, *Gall*, and *Rita*, all which control the application of the Guidelines.¹ Procedurally, the Court is required to correctly calculate the applicable Guideline range and take that measure as a “starting point and initial benchmark” in its sentencing analysis.² The Court must consider any non-frivolous arguments for variance and must provide a statement of reasons for the sentence that it imposes.³ Ultimately, the Court must select a sentence within the statutory range that is “sufficient, but not greater than necessary” to satisfy the varied purposes identified by Congress.⁴

2. The PSR, Addendum, and Guideline Calculations

A. The Base Offense Level is Flawed

The recommended sentence under the United States Sentencing Guidelines Manual is 210 to 262 months. This range is throttled by the uncorroborated testimony of a pleading co-defendant who never mentioned such a distribution quantity before seeing his own presentence report.⁵ This guideline matches or exceeds the maximum punishment for the following offenses: Attempt or conspiracy with respect to

¹ *United States v. Rita*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); see also *United States v. Carty*, 520 F.3d 984, 991-94 (9th Cir. 2008) (step-by-step sentencing procedure in light of recent Supreme Court precedent).

² *Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007) (quoting *Gall*, 128 S. Ct. at 586).

³ *Rita*, 127 S. Ct. at 2468.

⁴ See 18 U.S.C. § 3553(a)(1) & (2).

⁵ Atchley previously submitted Government emails for the Court’s review that contradict this co-defendant’s account. The Addendum wholly ignored those statements in assessing Atchley’s base offense level.

homicide, 18 U.S.C. § 2332(b); enticement into slavery, 18 U.S.C. § 1583; torture, 18 U.S.C. § 2340A; and, seditious conspiracy, 18 U.S.C. §2384. Likewise, under the Guidelines, selling someone into the slave trade is only an offense level 22, U.S.S.G. § 2H4.1 and transmitting top secret national defense information is a 29, U.S.S.G. § 2M3.3. Atchley's base offense level is a 36.

Atchley's base offense level is not only astonishing for a first-time offender, it presents a gross distortion of culpability. The DEA identified Khanh The Nguyen as a larger-scale supplier of MDMA as early as 2004. Parallel DEA and ICE investigations subsequently identified three distribution cells operated by Hoang Pham, Khai Pham, and Kevin Keno Davis/Chunyi Zhang. This Court sentenced Nguyen to 180 months, Hoang Pham to 168 months, Davis to 188 months, and Zhang to 120 months in prison. Atchley wasn't even on the DEA's radar until January 2008 when a small-time buyer identified him as a source of supply. The ensuing PSR investigation shows that law enforcement sources could not even identify quantifiable distribution amounts for Atchley five months after his arrest and after over 20 defendants agreed to cooperate with the Government (*see* PSR ¶ 93). Despite this abject lack of credible information, Atchley's guideline level sets a sentence that is six years higher than Nguyen's⁶ and Davis's, and seven years higher than Pham's.⁷

The Addendum's benchmark is meritless and should be ignored.

⁶ Nguyen is reported to have distributed 200,000 pills per month in the Dallas/Fort Worth area for approximately 3 years (PSR ¶¶ 13 to 27).

⁷ The guideline calculation even exceeds the statutory maximum of 20 years imprisonment.

B. Availability of Safety Valve

Although the safety valve by its express terms applies only to certain offenses with statutory minimum sentences, courts have held that the safety-valve reduction in section 2D1.1(b)(9) applies even when a defendant is not convicted under a section 5C1.2 statute and regardless whether a mandatory minimum is at play.⁸ And though the guidelines are advisory, the trial court must apply 18 U.S.C. § 3553(f) if the requirements are met.⁹ Atchley meets the statute's criteria.

18 U.S.C. 3553(f) lays out five independent requirements to achieve safety valve status:

- the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- the offense did not result in death or serious bodily injury to any person;
- the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were the part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

⁸ *United States v. Osei*, 107 F.3d 101 (2nd Cir. 1997); *United States v. Warnick*, 287 F.3d 299 (4th Cir. 2002); *United States v. Masbek*, 406 F.3d 1012 (8th Cir. 2005); *United States v. Mertilus*, 111 F.3d 870 (11th Cir. 1997).

⁹ See *United States v. Cardenas-Juarez*, 469 F.3d 1331 (9th Cir. 2006); *United States v. Quirante*, 486 F.3d 1273 (11th Cir. 2007).

PSR paragraphs 109-111 recognize that Atchley has no prior criminal history and the offense did not involve any injury, violence, or weapons. On 5 November 2008, the day of his arrest, Atchley waived his Miranda rights and fully cooperated, answering agents' questions about the offense and the involvement of other co-defendants.

The only contested element under the safety valve statute is whether Atchley acted as a manager or supervisor of the conspiracy. The Presentence Report states that he was based upon the following paragraphs:

Atchley distributed MDMA to the following persons: Samone Sellers, Stephen Scherzer, Sabrina Satterfield, Michael Watkins, and others. Atchley directed the activities of Stephen Scherzer who assisted him in delivering MDMA. (PSR ¶ 30(6).)

The investigation, corroborated by Agent West, confirm the defendant directed the activities of Stephen Scherzer during the conspiracy, which involved five or more participants or was otherwise extensive. The defendant need not have to pay a participant to supervise or direct their [sic] activity. (PSR Add. § I.)

Neither paragraph demonstrates the facts needed for the enhancement to apply. The gravamen of the enhancement is control--control to the extent that Atchley should be held accountable for the actions of others.¹⁰ The material issue is whether Atchley restricted the sales of his co-conspirators, whether he controlled the manner or price of the sales of ecstasy to others, or whether he claimed a larger share of the proceeds on sales.¹¹ The mere coordination of sales or his standing in the role as a supplier of drugs to others do not, without more, come within the ambit of the enhancement.¹²

¹⁰ *United States v. Torres*, 53 F.3d 1129, 1142 (10th Cir. 1995).

¹¹ *Id.*; see also U.S.S.G. § 3B1.1, com. 4 (November 2008).

¹² *United States v. Anderson*, 189 F.3d 1201, 1211-12 (10th Cir. 1999).

The Government cites *United States v. Job*¹³ for the proposition that the enhancement rightly applies, but the *Job* court found that the enhancement was applied in error due to factual insufficiency. The Government's enhancement faces the same hurdle here.

The PSR's prong of "otherwise extensive" as applied to Atchley also remains unproved. Though the Government has huddled 33 defendants together in a wide-net conspiracy indictment, that fact doesn't mean that Atchley was involved in the hierarchical organization envisioned in section 3B1.1. By the time Atchley's PSR was issued, at least 29 defendants had pleaded guilty. None of the co-conspirators pegged Atchley as having authority or control over anyone else in the overall organization (*see* PSR ¶¶ 91-93). Indeed, co-defendants and other sources could not identify specific distribution amounts (PSR ¶ 93) let alone facts evidencing some kind of hierarchical control. Atchley's status as a street-level dealer (PSR ¶ 86) also belies the idea that his spoke on the conspiracy wheel was "extensive" or even involved five people at any given time. Thus the enhancement even fails on the "otherwise extensive" element.

C. The Third Point

Atchley timely notified the Government of his change of plea¹⁴ so the sole reason that the Government has not moved for the acceptance reduction is because Atchley desired to preserve his appellate rights. The Court should recognize the third

¹³ *United States v. Job*, 101 F.3d 1046, 1065 (5th Cir. 1996).

¹⁴ The Government set a unilateral plea date of 15 December 2008 and Atchley notified the Government of his change of plea on that date.

point in its sentencing discretion¹⁵ for two reasons: the checks-and-balances of appellate review and the Government's forum-shopping of the point.

First, the appellate court is not a trial court but a court of legal error.¹⁶ Appellate review stands as a check on both the court and the Government *vis-a-vis* the rights of a defendant. The gravity of appellate review is illustrated by the case of *United States v. Reedy*,¹⁷ a child pornography case. In that case the Government argued that it could group the counts of indictment by individual image rather than by the website. On review, the Fifth Circuit repudiated the Government's argument, holding that it presented an "extreme interpretation" of the statute that stood to expose the defendant to 150,000 years of imprisonment.¹⁸ If Reedy had waived his appellate rights, subsequent defendants would have been subjected to the same illegal argument. Both the Government and the Court should welcome appellate review because it engenders justice.

Second, if Atchley's case number had ended with an A instead of a Y, the Government would not have hesitated to move for the third point without the benefit of an appellate waiver. If the Government wants to withhold its power of the third point, it should do so with equanimity to all defendants. A man's liberty should not be decided by the luck of the Government's draw.

¹⁵ See *United States v. Newson*, 515 F.3d 374, 376 (5th Cir. 2008).

¹⁶ *United States v. Sidbu*, 130 F.3d 644, 654 (5th Cir. 1997).

¹⁷ 304 F.3d 358 (5th Cir. 2002).

¹⁸ *Id.* at 368.

3. **18 U.S.C. § 3553(a)(1)-(4) Factors and the Kinds of Sentences**

In *Gall v. United States*,¹⁹ Brian Gall faced a presentence report that called for a prison sentence of 30 to 37 months.²⁰ Gall, an abuser of ecstasy, cocaine, and marijuana, had joined an ecstasy conspiracy for seven months and netted over \$30,000 on his sales. The district court, instead of heeding the Government’s argument of “the Guidelines are appropriate and should be followed,” ordered a sentence of probation. The court characterized the sentence not as an act of leniency, but a “substantial restriction of freedom,” and reminded Gall that he faced harsh consequences if he violated any of the terms of his probation. This Court should do the same with Atchley.

A. Pre-Arrest Conduct

Atchley was born in Abilene, Texas in 1986 of parents who abused illegal drugs. Rick and Jaime Atchley adopted him when he was just three weeks old and moved to Keller, Texas where Rick later became the preaching minister for the Richland Hills Church of Christ.

Though the family provided a stable and supportive environment, over time Atchley entertained feelings of isolation and separation from the family and sank into depression. As early as fifth grade, he began seeing a counselor and was prescribed different kinds of anti-depressants.

¹⁹ 128 S. Ct. 586, 595 (2007)

²⁰ Gall’s plea agreement allowed him to escape the recent enhancements in the ecstasy guidelines. *See id.* at 592. In 2001, The U.S. Sentencing Commission stiffened the guideline penalties for ecstasy, more than tripling the potential jail terms for people caught selling over 800 pills. If Atchley’s objections to the PSR (sans Addendum) were sustained and the Court recognized the third point of acceptance, his original guideline sentencing range would be similar to Gall’s, even with the enhanced ecstasy guidelines.

In high school, he went on various mission trips with his father's church where he helped build churches and proclaimed his faith to kids groups. He got involved in the theater arts and was part of Fort Worth Christian School's One Act Play that won the state competition during his junior year. He won the Most Talented Actor award. Despite these early successes, Atchley continued to skirmish with depression. A week before his eighteenth birthday he tried to end his life by CO₂ poisoning. His mother found him in the family's garage racing the accelerator with the garage door closed. He was taken to Millwood Hospital where he was admitted for a week and later released with the diagnosis of major depression and destructive behavior disorder.

It was just a year before his suicide attempt that he began smoking marijuana. A high school friend introduced him to the drug and he found that it provided some temporary relief from his depression.

Soon after his return from Millwood, his parents discovered his marijuana habit and dispatched him to a youth rehabilitation center in Arkansas called Capstone. While the average length of stay at Capstone is ninety days, he stayed over five months. The program was not successful for him; he left Arkansas with more knowledge than he needed to about know illegal drugs and he felt as if his family "worked better" without him around.

Upon his return, he moved out of his parents' house because of the parent-child relationship problems identified at Millwood and his desire to continue to casually smoke marijuana. He moved to a one-bedroom apartment in North Richland Hills and his parents helped him with the move by buying him a Dodge Neon and subsidizing his apartment rent and car insurance.

He got a job as a waiter at Don Pablo's in Fort Worth and continued to casually smoke marijuana when he could as he learned the hard life of living off of tips. Once he became friends with the other waitstaff and management, they started to look to him for small buys of marijuana. His sales were negligible; just enough to support his own smoking habit. But he saw that he could earn more money selling marijuana to the waitstaff than he could waiting tables. He couldn't handle the job and quit after just two months.

Then he went to work for Matrix Air, a vacuum and air purifier distributor, as a contractor. Matrix sold him on the idea that he'd clear \$2,000 a week selling the products from door-to-door. Instead of pointing him to Grapevine, Colleyville, or Southlake, they made him go to Stop Six. He actually tried to sell Matrix's expensive vacuum cleaners and air purifiers to Government housing residents, but couldn't sell a single one. He gave up when he couldn't afford to spend any more money and gas on such a dead-end job.

In August 2005, his father was able to secure a job for him at Barrow Electric. He worked for \$8.00 an hour, driving a truck and delivering electrical supplies. He didn't enjoy the job, but he stuck it out because of his father's connection and he didn't have any other place to go.

It was at Barrow that he began going to clubs and doing ecstasy. He migrated over to ecstasy because it had become the drug of choice. At first, he paid for the pills out of his own pocket. But after some time he had the idea that if he bought the pills in larger numbers they'd come cheaper. He did just that and resold them to friends to fund his own habit. Like Don Pablo's before, his sales were negligible. After a year

and a half at Barrow, he left after having a falling out with his boss. He thought that he had better job prospects at Silverleaf Resorts.

At Silverleaf, he sold Tyler resort packages over the telephone. He continued to go to the clubs on the weekends and buy small stashes of discounted pills to resell to his friends. He worked at Silverleaf for six months and was even promoted, but he left when “just couldn’t stand talking to person after person on the phone and trying to talk them into driving all the way from the Dallas area to Tyler to tour a crappy resort.”

Three weeks later, he landed another door-to-door sale job selling Vios for 20/20 Communications. As luck would have it, he was ticketed the very first day on the job for not having a license selling door-to-door. Despite that setback, he stuck it out because he had bills to pay. It was around this time that his discount buys gained traction because the clamor for the drug was getting louder. He quit 20/20 because he knew that it was a dead-end job and that he could make more money selling his discounted pills.

The ecstasy life wasn’t so lucrative. He never made much more than paying his personal bills and funding his own drug habit. In January 2008 he lost all of his money to a botched buy and didn’t sell any ecstasy for three months. Money was so tight that he took a call center job at Novo 1 in April earning \$9.00 per hour. That job allowed him to avoid eviction from his apartment.

He got taken with a fake set of pills in July. He never recovered as a dealer after this botched purchase; he acted more or less like a courier for buyers since he didn’t have any of his own money to put into any of the buys. In September 2008, he was so

low on money that he took out a car title loan on the Neon. The car was repossessed right after he was arrested.

B. Post-Arrest Conduct

On 5 November 2008, federal agents went to Atchley's parents' home to arrest Atchley. His parents called him and explained the circumstances. He voluntarily drove to the house, turned himself in, waived his Miranda rights, and answered all the agents' questions about his activities and the few other defendants that he knew.

After arraignment, he has been able to sit down with his legal counsel and his parents and take stock of his life since the day he moved out of their house. Through these counselors, and Johnathan Stormant, the youth counselor at Richland Hills Church of Christ, Atchley has committed himself to a path of rehabilitation.

Understanding by his experiences of dead-end jobs and the small-time drug life that a high school education doesn't provide needed job skills or marketability, he enrolled in Tarrant County Community College. At school, he rediscovered his love (and talent) for acting and gotten involved in several play productions.²¹ For a career path, he has embarked on a curriculum that will give him an associates degree in Information Technology/Convergence Technologies. This course program will lend him the educational background needed to sit in 2011 for the following examinations:

- comptia a+
- comptia conu+
- comptia network+

²¹ Atchley had been cast in a play called *Jimmy and the Tornado* that is set to be performed in various county libraries over the summer 2009. He had to turn down the part because of his detainment beginning on 18 May 2009.

- CCNA
- MCSA
- comptia security+

Upon matriculation and certification,²² he will become a certified network and security technician. These technicians are able to command \$150-\$200 per hour in the field.

Under the Sentencing Reform Act, Congress announced its view that probation is a distinct sentence with independent value in the overall federal sentencing scheme.²³ That value can be gleaned from the *Gall* case. Brian Gall was a young college student who got involved in a conspiracy with a popular drug. After netting over \$30,000 in profits, Gall withdrew from the conspiracy, graduated from college, and began an honest life by working as a master carpenter. Instead of following the Government's robotic argument that "the Guidelines are appropriate and should be followed," the court saw that the focus of justice for Gall's sentence should have been rehabilitation and not punishment.

C. Conclusion

Michael Atchley's rebound from the crime of drug conspiracy is not as dramatic as Brian Gall's, but the focus of sentencing should remain the same.²⁴ Atchley is a first-time offender and probation is presumptively appropriate. Congress authorized

²² A list of the course load is attached as Exhibit A.

²³ *See* 28 U.S.C. §994(k); 18 U.S.C. § 3582(a); *see also Gall v. United States*, 128 S. Ct. 586, 595-96 (2007) (affirming the proposition that probation is not a sentence of leniency or a 100% variance from the guidelines).

²⁴ *See* 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. Rep. 98-225 at 119, 176 (1983).

probation for Atchley's offense²⁵ and the Sentencing Commission's failure to implement guidelines regarding probation should not be dispositive on the kinds of sentences open to him.²⁶ Like Gall, he's put himself on the road to rehabilitation and a sentence of a maximum term of probation coupled with a substantial amount of community service will do more to promote justice than a disproportionately harsh sentence that fails to account for the real pre-arrest and post-arrest conduct and circumstances in this case.

²⁵ See 18 U.S.C. § 3561(a)(1) (citing 18 U.S.C. § 3559(a)).

²⁶ UNITED STATES SENTENCING COMMISSION, *Recidivism and the First Offender* 1-2 (May 2004) ("The efforts of these past criminal history staff working groups have not resulted in a guideline amendment to establish a first offender provision."). See at http://www.usc.gov/publicat/Recidivism_FirstOffender.pdf.

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