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January 16, 2005

The Honorable XXXXX
United States District Court for the
District of Maryland
5600 Cherrywood Lane
Greenbelt, Maryland 20770

_____ Re: Sentencing of United States v. B. X
Case # XXX-0000

Your Honor:

On XXXX, 2005, Dr. B. X will appear before Your Honor for sentencing. Almost two years ago, on XXXX, 2003, Dr. X plead guilty to one count of conspiracy to distribute narcotics in violation of 21 U.S.C. § 846 and one count of health care fraud in violation of 18 U.S.C. § 1347. Dr. X's sentencing was postponed so that she could assist the Government in the related criminal trial of XXXX, the pharmacist who dispensed the narcotics involved in this case. The following sentencing letter is submitted to aid the Court in imposing sentence.

I. Dr. X's Sentencing in the Wake of *United States v. Booker/FanFan*.

Within the last week, the United States Supreme Court in *United States v. Booker/Fan Fan*, 2005 WL 50108 (Jan. 5, 2005), held that the United States Sentencing Guidelines are no longer mandatory on the Court. Rather, the Guidelines must function as just that: guidelines that district courts must consider as one factor among others set forth more generally in 18 U.S.C. § 3553(a). *See id.* at * 19-20. Courts must therefore consider the sentencing guidelines, but also "tailor the sentence in light of other statutory concerns, see 18 U.S.C. § 3553(a)." *Booker*, 2005 WL at *2.

Section 3553(a) requires the Court to impose a sentence "sufficient *but not greater than necessary*" to comply with several goals of sentencing. 18 U.S.C. § 3553(a). The Court must consider both "the history and character of the defendant" and the "nature and circumstances of the offense" including the "seriousness of the offense." Further, § 3553 mandates that the Court impose a sentence that:

- Promotes respect for the law
- Provides just punishment
- Protects the public from further crimes of the defendant

- Provides to the defendant necessary educational, medical or other correctional treatment in the *most effective manner*
- Avoids unwarranted disparities between similarly situated defendants
- Allows for restitution to any victims of the offense

18 U.S.C. § 3553(a) (emphasis added).

As part of this analysis, the Supreme Court has directed this Court to consider where Dr. X falls under the Sentencing Guidelines. *See Booker*, at *20. Once that advisory guideline range is determined, however, the Court must still consider the above factors in determining an overall “reasonable” sentence. Accordingly, where warranted, the Court may deviate from the advisory guideline range to effect proper punishment. The following memorandum first addresses where Dr. X should fall under the Advisory Guidelines and then addresses the § 3553 which counsel in favor of a shorter rather than lengthier term of incarceration.

II. Under the United States Sentencing Guidelines, An Advisory Guideline Sentence of Thirty-Seven Months is Warranted.

Dr. X’s offense stems from her writing prescriptions for oxycodone-based painkillers for herself and others which were filled out and dispensed by pharmacist XXXX and XXXX Pharmacy. Over the course of the conspiracy, which lasted from 1998 to 2002, Dr. X suffered from her own severe addiction to these painkillers which undisputedly resulted in her participation in the instant offense. As her addiction intensified, so did her need to obtain painkillers and, thus, so did her participation in this offense. Dr. X’s role in the conspiracy ended when the DEA searched her office and home in April 2002. Immediately thereafter, she entered into drug treatment. She was indicted on the instant offense in January 2003, pleaded guilty before this Court, and has cooperated with the government since she became aware of its investigation.

Under the 2004 Sentencing Guidelines Manual, Dr. X begins at a criminal history category I because she has no prior offenses, and a base offense level for the narcotics offense of

28 under § 2D1.1.¹ Dr. X then receives a two-level adjustment for abuse of position of trust under U.S.S.G. § 3B1.3.

Despite the complex nature of this case, Dr. X pleaded guilty just three months after her indictment. Dr. X also completely informed the Government of her own involvement in the offense. Accordingly, Dr. X anticipates receiving a 3-level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1, and an additional 2-level reduction pursuant to the safety-valve provision at U.S.S.G. §§ 2D1.1 and 5C1.2.

Further, Dr. X cooperated immediately with the Government, meeting with them in early 2003. Dr. X's cooperation primarily focused on her information regarding XXXX, the pharmacist who provided Dr. X and many others with illegal prescription narcotics. Because XXXX's trial date was postponed several times, Dr. X's case remained pending for two years. During this time, she engaged in several multiple-hour proffer and preparation sessions with the United States Attorney's Office and testified during the XXX trial for 3 days. After a 7 week trial, Mr. XXXX was convicted on all counts. In exchange for her cooperation, Dr. X anticipates that the Government will move for an additional 2-level reduction in her sentence, pursuant to U.S.S.G. § 5K1.1.

Finally, Dr. X's extraordinary post-offense rehabilitation warrants an additional reduction in her Guideline sentence. Under Dr. X's plea agreement, she is permitted to request an additional 2-level departure to account for her rehabilitation. Dr. X submits that her demonstrated ability to overcome her addiction, and her efforts that predated her indictment in this case, warrant this reduction.

It is well settled that district courts may depart downward where a defendant demonstrates extraordinary post-offense rehabilitation. *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997). More specifically, a defendant's drug rehabilitation efforts, if extraordinary, can justify such departure. *See, e.g., United States v. Newlon*, 212 F.3d 423 (8th Cir. 2000). In *United States v. Newlon*, for example, the Eighth Circuit upheld a district court's departure based on a defendant's participation in an 85-hour drug rehabilitation program prior to his arrest in his federal case and on other indicia of the defendant's "sincere desire for treatment" and "marked improvement in behavior and attitude." *Id.*; *see also United States v. Normandeau*, 2003 WL 1974807 (2d Cir. 2003) (upheld downward departure for defendant completing jail drug rehabilitation program and volunteer efforts); *United States v. Larson*, 2003 WL 723961 (10th

¹This offense level is based on revised calculations resulting from a change in the Sentencing Guidelines Manual and is set forth more particularly in defense counsel's letter dated XXXX, 2005, to the United States Probation Office to be included in Dr. X's Pre-Sentence Report. This reduction in the drug-quantity offense level does not affect the offense levels for her health care fraud count which group with the narcotics offense pursuant to § 3D1.2 of the Advisory Guidelines.

Cir. 2003) (upholding post-offense rehabilitation downward departure where defendant participates in drug rehabilitation but reverses for district court to make findings); *United States v. Lange*, 241 F.Supp.2d 907 (E.D. Wisc. 2003) (granting downward departure where defendant successfully completed drug program, reconnected with family, complied with Pretrial conditions and showed overall commitment to rehabilitation); *United States v. Hernandez*, 2001 WL 96369 (S.D.N.Y. 2001) (granting departure where defendant voluntarily entered detoxification and rehabilitation program, stayed drug-free for two years, and made significant life changes).

Importantly, when assessing “extraordinary” rehabilitation, the Court may consider the severity of the defendant’s addiction measured against her ability to not only stay drug-free, but reemerge as a productive member of society. *See United States v. Bryson*, 163 F.3d 742, 748-49 (2d Cir. 1998). Consequently, when a defendant recovers from a debilitating drug addiction, “the ordinary responsibilities of citizenship . . . may, depending on the starting point of rehabilitation, be sufficient” to justify departing downward “if that achievement is the product of substantial commitment over time.” *Id. See also United States v. Rosado*, 254 F. Supp. 316, 321 (S.D.N.Y. 2003) (granting downward departure where drug rehabilitation combined with renewed support of children, betterment of education, and break with criminal comrades demonstrated renewed commitment to productive citizenship).

Here, Dr. X’s success in drug rehabilitation and therapy for almost three years is nothing short of extraordinary. Before becoming addicted to painkillers, Dr. X had been a successful practicing dentist since 1978. As one of a handful of African-American Women in her graduating dentistry class at Howard University, she worked hard to build her practice. During her addiction, she lost all of this and much more.

Dr. X first became addicted to oxycodone in 1997, when her gynecologist prescribed Loricet for her chronic pain. Over the next five years, Dr. X’s abuse of these pain killers led her down a path of destruction. As her addiction escalated, she engaged in the offense she brought her before this court, fueling her need to obtain more pills. For over four years, the more out of control her addiction became, the more she lost. By her arrest in January of 2003, her licenses to practice dentistry lapsed, her practice had crumbled; she lost her home, was financially ruined, and plunged into a deep psychological depression.

Prior to her arrest, in April 2002, Dr. X recognized how badly her addiction had ravaged her and her family, and how it drove her criminal conduct in this case. Consequently, 8 months before her indictment and arrest, she voluntarily enrolled in the XXXX drug rehabilitation center. There, she participated in an intensive outpatient treatment which required her to go through a several day detoxification program, attend one-on-one and group counseling sessions every day as well as undergo routine urinalysis. According to XXXX, Dr. X demonstrated a sincere motivation to participate and continue in treatment. *See Sample XXXX records at Exhibit A*. Unfortunately, because Dr. X could no longer afford her home, she had to move to Baltimore for a brief period with her sister in Catonsville, Maryland. She, therefore, could not attend

XXXX, but continued periodically seeing her physician, Dr. AAA and a psychiatrist, Dr. BBBB, who prescribed antidepressant medications and assisted her in remaining drug free.

After Dr. X was indicted, she resumed treatment with a renewed intensity. Placed on Pretrial Supervision, Dr. X was drug tested from her first day in the courtroom and regularly thereafter for over a year while on Pretrial Supervision. Notably, *all* of her urinalyses were negative for any illegal substances. According to her former Pretrial Officer, CCCC, also attended weekly outpatient treatment to successful completion at the University of Maryland and XXXXX of Baltimore. Indeed, Dr. X's rehabilitation efforts, and her general compliance with Pretrial, were so extraordinary that XXXX took the unusual step of requesting that Dr. X be removed **completely** from supervision as of June 16, 2004. *See Consent to Modify Conditions of Release as Exhibit B*. Dr. X's total removal from supervision is especially extraordinary when considering the severity of her initial conditions of home detention with electronic monitoring, drug treatment and testing, and a residence restriction.

In addition to Dr. X's exceptional performance on Pretrial supervision, she voluntarily availed herself of numerous other rehabilitation programs to ensure her continued recovery. In May of 2003, she enrolled in a program offered by the Maryland XXXXX Committee ("Wellbeing Committee"). The Wellbeing Committee is a group of practicing dentists and other rehabilitation professionals who work with dentists suffering from addictions. Specifically, the Wellbeing Committee evaluates and establishes a treatment plan for afflicted dentists. If the dentist complies with the treatment plan set out by the Wellbeing Committee, the Committee, in exchange, advocates for the re-licensure or continued licensure of the afflicted dentist. *See Wellbeing Committee Information Sheet at Exhibit C*.

In Dr. X's case, she agreed to be monitored by the Wellbeing Committee for a period of 5 years. *See Agreement at Exhibit D*. Dr. X further agreed to attend an outpatient drug treatment program, submit weekly urinalyses, and meet with a Wellbeing Committee representative each week to chart her progress. One year and nine months later, the Committee Chairman, Dr. XXXX, reports Dr. X's complete compliance with the program and comments that Dr. X "has shown a sincere determination to maintain her recovery despite many legal problems and stressors in her life." *See Dr. XXXX Letter at Exhibit E*. As a testament to Dr. X's exceptional performance in the Wellbeing Committee program, the Committee has advocated for Dr. X to the Maryland the Dental Board for reinstatement of her license, albeit with continued monitoring per her agreement. *See Board Letters at Exhibit F*.

As part of her agreement with the Wellbeing Committee, Dr. X entered the XXXXX Treatment Center in August 2003. There, she was again evaluated and placed in a program requiring at least one weekly meeting with her treatment counselor, XXXXX, RN, CAC-AS. She was also required to attend at least two 12-step meetings every week and submit to weekly random toxicology screens. Again, Dr. X's urinalyses were all negative for drugs. She further participated with great vigor in her treatment programming, not only attending her meetings and

counseling sessions, but also taking a leadership role in the meetings. According to Ms. XXXX, Dr. X's "attendance and response to our treatment plan **have been excellent**" and her prognosis is "very good if she continues on course." *See XXXX Letter and Sample XXXXX Records at Exhibit G.*

During this time, Dr. X has also responded well to treatment sessions with Dr. XXXX. Dr. XXXX is a licensed psychiatrist specializing for over twenty years in the treatment of chemically dependent patients. Currently, he is on the faculty at the University of Maryland School of Medicine and acts as a consultant for the Wellbeing Committee. Since February 2004, Dr. X has voluntarily sought Dr. XXXX's assistance as part of her Wellbeing Committee agreement. Dr. XXXX has confirmed that Dr. X suffers from Major Depression and Opiate Dependency which are both currently in remission. *See XXXX Letter and CV at Exhibit H, p. 1.* Based on his extensive treatment of Dr. X, he further concludes that "she has responded well to [her] treatment plan" and that "she has very good prognosis for continued remission given her compliance with her current treatment plan." *Id.*

Most notably, Dr. XXXX opines that Dr. X's progress is even more remarkable given the heavy familial responsibilities she bore during her recovery. *See id.* For example, Dr. X had cared for her own severely ill mother, DDDD, for nearly all of 2004 while also being a single mother to her two adolescent children. Although Dr. X had cared for Ms. DDDD on and off for many years, she became Ms. DDDD's sole and exclusive caretaker since February 2004. Ms. DDDD suffered from significant physical ailments such as high blood pressure, diabetes, cataracts and heart disease. She also had equally complicating psychological disorders which caused her to hallucinate, become disoriented, mute, and paranoid. *See XXXX Treatment Records at Exhibit I.* As her diseases progressed, Ms. DDDD could not perform even the most basic tasks of eating and bathing. Ms. DDDD also became incontinent, requiring Dr. X to feed, change, bathe and clean Ms. DDDD daily until her death on December 1, 2004. *See Video Testimony of J.X.*²

At the same time, Dr. X had badly injured her knee falling on the ice in February 2004. Because she had torn her medial meniscus, she underwent surgery in April 2004. *See Sample Records of Drs. XXXX and XXXX at Exhibit J.* Thereafter, Dr. X experienced severe pain in her

²Undersigned counsel has submitted a CD-Rom video of three interviews with Dr. X's children, J.X, D.C. and E.C. Counsel submits these interviews in advance to avoid unnecessarily prolonging Dr. X's sentencing hearing. Counsel has also edited the interviews to minimize redundancy. Finally, counsel has provided the unedited version to the Court should it wish to review the interviews entirely.

back and knee for several months and underwent physical therapy. *See id.*³ Nonetheless, she provided round-the-clock care for her mother, a responsibility which required her to walk several times a day up and down three flights of stairs⁴ to launder Ms. XXX's soiled clothes. *See Video Testimony of J.X.*

While nursing her own ailments as well as her mother's, Dr. X also maintained active involvement in the special educational needs of her own 12-year old daughter, D.C. In 2001, D.C. developed severe migraine headaches. After much testing, D.C was diagnosed with significant deficiencies in reading and math. *See School Records at Exhibit K.* From that time, Dr. X intensified her tutoring efforts with D.C. She worked with D.C daily on her reading, phonics and math as well as meeting regularly with her teachers. *See Video Testimony of D.C.*

Dr. X also remained gainfully employed and even managed to volunteer some of her time prior to her knee injury. She has worked as a state educational test grader as well as a substitute teacher. In the spare moments that she had, she also volunteered at the nurses office of Scott's Branch Elementary School, where she could be closest to her children and provide a much needed hand. *See Letter of K.V., RN at Exhibit L.*

Although skeptics may say that Dr. X's familial duties, while admirable, are not extraordinary, experts would disagree when placing Dr. X's progress in the context of her own recovery from a prolonged addiction. Indeed, Dr. XXX notes that as a testament to Dr. X's significant progress,

Dr. X remained abstinent during her recent bout with homelessness and the death of her mother. These would be considered some of the most potent relapse triggers (second only to the loss of a spouse or death of a spouse). She also had a knee injury and subsequent knee surgery which are high risk situations given someone addicted to pain medication. She did well throughout this painful situation.

XXXX Letter at Exhibit H.

³ Although narcotics had been prescribed post operatively, Dr. X initially took none. Then, under close supervision by her counselor, XXXX, she took only one Percocet per day for six days, well below the quantities prescribed to alleviate her post-operative pain.

⁴Dr. X remained in this living arrangement until she was forced to leave that apartment this fall due to significant mold. She and her two children moved in with a family member.

In sum, Dr. X's extraordinary post-offense rehabilitation would warrant a departure under the Sentencing Guidelines. Before her arrest, she admitted herself to an intensive drug treatment program. Then, after her arrest, and for the next two-and-a-half years she pursued numerous courses of treatment and succeeded in all of them. This included the outpatient programs provided by Pretrial Services as well as the XXXX program and one- on-one sessions with psychiatrist Dr. XXXX. She succeeded despite the challenges of caring for her severely mentally and physically ill mother, tutoring her daughter and nursing her own long term knee injury. Indeed, her progress has been so remarkable that this Court approved her complete removal from Pretrial Supervision in XXXX 2004. To adequately account for her extraordinary post-offense rehabilitation, therefore, a two-level downward departure under the Sentencing Guidelines is warranted. Should the Court grant this departure, Dr. X's final offense level would be 23, providing for a low-end sentence of 37 months incarceration.

III. The Remaining Factors Under 18 U.S.C. § 3553(a) Counsel in Favor of a Shorter Rather than Longer Prison Sentence for Dr. X When Balancing the Seriousness of the Offense against Her Demonstrated Ability to Remain Respectful of the Law, Drug Free and Crime Free.

Even if a departure for post-offense rehabilitation were not strictly proscribed under the Sentencing Guidelines, a shorter prison sentence than that advised by the sentencing guidelines is nonetheless warranted because it reasonably and appropriately achieves the goals set forth in 18 U.S.C. § 3553. As the Supreme Court in *Booker/Fan Fan* made clear, this Court must consider all of the factors enumerated in 3553(a) when fashioning appropriate punishment. The following section addresses Dr. X's case under each of the § 3553(a) factors.

A. When Accounting For Dr. X's Personal Struggle with a Raging Addiction and Its Impact on Her Role in this Offense, a Shorter Rather than Lengthier Prison Sentence Reflects the Seriousness of the Offense, Promotes Respect for the Law and Provides Just Punishment as Required Under 18 U.S.C. § 3553(a)(2)(A).

It is undisputed that Dr. X's severe and gripping addiction that prompted her participation in the first place. Unlike Mr. XXXX or many other defendants who illegally sell drugs, Dr. X wrote false prescriptions for herself and others to feed her raging oxycodone habit. As she testified in the XXXX trial, the entire time she was obtaining narcotics from Mr. XXXX, her addiction was spiraling out of control. Because Dr. X's addiction fueled her participation in this offense, it is no surprise that she has committed **no other crimes** while she has been drug free. In fact, Dr. X's only tangle with the criminal system in her 52 years stems from this incident. While this offense undoubtedly is very serious, and her addiction does not excuse her conduct, Dr. X's

case is atypical in that she has been successfully combating the drug addiction that drew her into the conspiracy in the first instance.

As for promoting respect for the law and providing just punishment, Dr. X's own immediate contrition, remorse, and cooperation demonstrates that these goals have been achieved prior to incarceration. Dr. X's efforts in assisting the Government further reflect her awareness of the gravity of her situation and her desire to make amends. Her respect for the law is also reflected in her otherwise law abiding life apart from this offense. Likewise, given how much Dr. X has already punished herself - in losing her license, her practice, her home, her dignity - it is hard to imagine how a lengthy prison sentence would be necessary to achieve a just punishment.

B. Dr. X's Longstanding Rehabilitation Affords Adequate Deterrence and Protects the Public From Further Crimes of the Defendant. 18 U.S.C. § 3553(a)(2)(B) & (C).

Because Dr. X's role in this offense stemmed from her longstanding addiction - an addiction for which she has spent nearly three years successfully combating - a lengthy prison sentence would provide no greater deterrence or protection from the public than her remaining on her current rehabilitation course. Dr. X's own extraordinary recovery itself has improved public safety. She has remained drug-free without relapse; she has cared for her family, held down work, and sustained an overall productive life. She has, in short, demonstrated a sincere and extraordinary ability to combat the addiction that prompted her illegal conduct. Put another way, the public would be better served by Dr. X's continued progress in her current program - a program that is successful - than it would be if Dr. X were incarcerated for an extended period of time.

C. Dr. X's Own Abstinence and Success in Treatment Counsel's in Favor of a Short Rather than Long Period of Incarceration Pursuant to 18 U.S.C. § 3553(a)(2)(D).

Section D of 3553(a)(2) requires this Court to fashion a sentence that provides the defendant with needed "medical care, or other correctional treatment in the *most effective manner*." *Id.* (Emphasis added). It is clear that Dr. X will require ongoing drug rehabilitation and therapy to ensure her continued abstinence. Her success in rehabilitation demonstrates that her current therapeutic program **is working**. Indeed, it is working so well that she has maintained her sobriety while shouldering significant family burdens. Lengthy incarceration would interfere completely with her ability to continue her current programming and likely would retard her progress. At a minimum, no evidence exists that any programming offered in prison could be

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nearly as successful as her current treatment regime. In fact, Dr. X may not be eligible for extended BOP drug treatment given the increasingly long waiting lists for that program, and the possibility that BOP would exclude Dr. X based on her superior performance while on pretrial release. Accordingly, Dr. X urges this court to fashion a sentence that would permit Dr. to more quickly resume her current successful, proven-effective program.

Thank you for your attention to this matter. Should you require further information, please do not hesitate to contact me.

Sincerely,

Paula Xinis
Assistant Federal Public Defender

cc: AUSA
USPO