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1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF VIRGINIA  
3 Norfolk Division

4 UNITED STATES OF AMERICA )  
5 V. ) CRIMINAL ACTION  
6 DERRICK KIMBROUGH, ) NO. 2:04cr185  
7 Defendant. )

8  
9 TRANSCRIPT OF PROCEEDINGS

10 Norfolk, Virginia

11 April 11, 2005

12 (Sentencing Hearing)

13  
14  
15 Before: THE HONORABLE RAYMOND A. JACKSON  
16 United States District Judge

17 Appearances:

18 UNITED STATES ATTORNEY'S OFFICE  
19 BY: WILLIAM D. MUHR, ESQUIRE  
20 Assistant United States Attorney  
21 Counsel for the United States

22 OFFICE OF THE FEDERAL PUBLIC DEFENDER  
23 BY: GRETCHEN LYNCH TAYLOR, ESQUIRE  
24 Counsel for the Defendant

25 The defendant appearing in person.

Also Present:

Sean C. Mitchell, Probation Officer

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1 THE DEPUTY CLERK: Case No. 2:04cr185, United States  
2 of America versus Derrick Kimbrough.

3 Mr. Muhr, is the government ready to proceed?

4 MR. MUHR: The government is ready, Your Honor.

5 THE DEPUTY CLERK: Ms. Taylor, is the defendant ready  
6 to proceed?

7 MS. TAYLOR: Yes, we are ready. Good morning, Your  
8 Honor.

9 THE COURT: Good morning, ladies and gentlemen.  
10 Have you had adequate time to prepare Mr. Kimbrough  
11 for the hearing?

12 MS. TAYLOR: Yes, Your Honor.

13 As the Court knows, Mr. Riley Ross has been  
14 representing Mr. Kimbrough throughout the pendency of this  
15 case. Mr. Ross is out of the country, and I am prepared to go  
16 forward today on his behalf.

17 THE COURT: Mr. Kimbrough, are you fully satisfied  
18 with the advice and counsel of Ms. Taylor in the case?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. You may have a seat.

21 The Court notes in examining the presentence report,  
22 which is the first matter the Court needs to address, there is  
23 an objection to the presentence report to the two-point  
24 enhancement for obstruction of justice and for the failure to  
25 attribute any points to the defendant for the acceptance of

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1 responsibility. Have you, Mr. Muhr and Ms. Taylor, resolved  
2 these two objections?

3 MR. MUHR: No, Your Honor.

4 THE COURT: All right. Mr. Muhr, the government has  
5 the burden of proof by a preponderance of the evidence on the  
6 obstruction enhancement. Is there anything you wish to say  
7 about the obstruction enhancement?

8 MR. MUHR: Yes, Your Honor. I mean, obviously the  
9 Court heard the trial of Mr. Flowers and heard Mr. Kimbrough  
10 testify at that particular trial. Your Honor, it's the  
11 government's opinion that Mr. Kimbrough committed perjury when  
12 he testified at that particular trial. I listed -- and I don't  
13 want to take up the Court's time, but I listed a number of  
14 things in my written brief to the Court of examples of where he  
15 was not truthful in what he was trying to tell the jury.

16 What it basically boiled down to is he was trying to  
17 tell the jury that all the evidence belonged to him; he, alone,  
18 was guilty; and that Mr. Flowers -- none of the evidence  
19 belonged to him. He was innocent and knew nothing of this  
20 evidence. I think the evidence spoke to the contrary in this  
21 case, and of course, the jury verdict also came down on the  
22 side of guilt of Mr. Flowers, that they also did not believe  
23 Mr. Kimbrough in this.

24 Your Honor, in *United States versus Dunnigan*, as I  
25 stated in my written response on this, is perjurious, false

1 testimony concerning a material matter with the willful intent  
2 to provide false testimony, and I think that's what he has  
3 done, Your Honor. He has willfully presented false testimony  
4 in this Court in trying to deceive a jury in getting a jury to  
5 acquit Mr. Flowers, and clearly under, I think it's paragraph 4  
6 of 3C1.1, that giving perjury is clearly an example of a case  
7 in which the defendant should be assessed a two-point  
8 enhancement for obstruction of justice.

9           Of course, obstruction of justice can occur during  
10 any portion of a case. It can occur during the investigation,  
11 during the actual trial or during the sentencing, and I think  
12 that he committed perjury in this case, Your Honor, and I would  
13 ask that the Court also find that he committed perjury and  
14 assess him a two-point enhancement.

15           THE COURT: Okay. Ms. Taylor.

16           MS. TAYLOR: Would you like me to just address the  
17 obstruction of justice issue independently?

18           THE COURT: I would like you to address the  
19 obstruction of justice issue, yes.

20           MS. TAYLOR: Yes, Your Honor.

21           Your Honor, of course, now, I wasn't present for the  
22 trial of Joel Flowers, as the Court and counsel for the  
23 government was, so I'm relying on Mr. Ross's notes, but I do  
24 know, and Mr. Muhr just basically said, that Mr. Kimbrough, the  
25 substance of his testimony was that he was accepting

1 responsibility for the evidence that the police found, for the  
2 gun, for the drugs, that sort of thing. It is his position, of  
3 course, that he did not commit perjury, that he told the truth  
4 and he didn't want to see an innocent man convicted, which, of  
5 course, Mr. Flowers was convicted of everything but, I believe,  
6 count two, if I'm not mistaken, one of the possession with  
7 intent to distribute counts.

8           So it would be Mr. Kimbrough's position that he did  
9 not commit perjury. He merely tried to do his civic duty and  
10 not let an innocent man get convicted. Unfortunately, he was  
11 not successful in that endeavor. He would ask the Court not to  
12 assess him two points for obstruction of justice. He never  
13 denied his culpability in the offense. He merely told his  
14 position on the evidence before the Court, and he would ask you  
15 to not deem that to be perjury.

16           THE COURT: Mr. Muhr, the substance of your brief is  
17 that Mr. Kimbrough told the jury that all the evidence belonged  
18 to him and not to Mr. Flowers in this case, right? Now, the  
19 jury convicted Mr. Flowers of conspiracy. Is a conviction of  
20 Mr. Flowers for conspiracy inconsistent with them rejecting the  
21 testimony of Mr. Kimbrough that all the evidence was his? In  
22 other words, merely because they found that there was a  
23 conspiracy doesn't mean that the jury determined that all of  
24 the evidence did not belong to Mr. Kimbrough.

25           MR. MUHR: Well, Your Honor, I think it was more than

1 just some general statement that he said up there. He gave a  
2 lot of specifics, and basically what he was doing is he was  
3 trying to take every fact that could possibly incriminate  
4 Mr. Flowers and explain it away is what he was doing, and he  
5 was doing that consistently throughout.

6 THE COURT: I understand exactly what he did. I  
7 heard his testimony. I also heard his testimony and heard the  
8 testimony of the police officers, and as the Court recalls the  
9 testimony here, the testimony, there was a conflict in the  
10 police officers's testimony about what happened here between  
11 the two police officers as well as a conflict with  
12 Mr. Kimbrough here. So it wasn't a clean-cut he said, she said  
13 type of case that the Court had here.

14 Also, the Court is concerned on this enhancement that  
15 apparently the jury believed something he said because they  
16 also acquitted at the same time Mr. Flowers of one of the key  
17 charges here, that is, his possession with the intent to  
18 distribute the crack cocaine that was also in the car. So it's  
19 not as clean-cut and clear as the Court would certainly want it  
20 to be in looking at what the jury believed in terms of what  
21 Mr. Kimbrough told them.

22 The Court's been thinking about this thing. That's  
23 what concerns the Court, trying to parse out what the jury  
24 rejected, what the jury believed in view of the fact the jury  
25 appeared to have credited some of his testimony about what

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1 happened out there.

2 MR. MUHR: Well, Your Honor, clearly the main charge  
3 in this thing is the conspiracy charge, and Mr. Kimbrough was  
4 clearly, I think without a doubt, trying to convince the jury  
5 that Mr. Flowers was not in this conspiracy with him; that he  
6 didn't know anything about any of these drugs. He didn't even  
7 know anything about the gun. He's also got the 924(c) count  
8 with him saying that he was the one that had the gun. Of  
9 course, there was a lot of conflict with that. At one point he  
10 says he knew he dropped it. Then later he says no, he didn't,  
11 though he pointed out where he dropped it.

12 I think he clearly was trying to convince the jury  
13 that Mr. Flowers had nothing to do with any of those counts in  
14 that indictment and was trying to explain away all the evidence  
15 that would incriminate Mr. Flowers. In doing that, I think he  
16 committed perjury by doing that, by telling them that he had  
17 nothing to do with it, by saying the various things,  
18 particularly like, say, regarding that gun.

19 If you remember, on direct he said he felt it slip  
20 and hit the ground. He actually heard it hit the ground. Then  
21 he said because it was a rip in the holster. Well, there was  
22 no rip in the holster. Then when I cross-examined him, then he  
23 says, well, no, I didn't know it dropped out then. The only  
24 time I recognized it was gone is when that strange guy was by  
25 my door and I pulled the gun out. But yet at the same time

1 when he was on direct, he pointed out exactly where he dropped  
2 it, though later he says he didn't know he dropped it. So he's  
3 trying to separate that gun from Mr. Flowers who had that gun  
4 in his possession when he was running from the police, along  
5 with all the drugs and all the other evidence, and I think in  
6 doing that, Your Honor, he tried to convince the jury of  
7 something that wasn't true, and in that he committed perjury.

8 THE COURT: All right. So the specific statement you  
9 now identify is the fact that Mr. Flowers -- Mr. Kimbrough  
10 testifies that he had the firearm, that he dropped the firearm  
11 here, and Mr. Flowers did not have the firearm.

12 MR. MUHR: He clearly said to that, and I gave the  
13 example -- in my written response I gave various examples, and  
14 that was one of them in there.

15 THE COURT: Well, that's one of the clearest ones,  
16 and I think Mr. Flowers was convicted of being in possession of  
17 the firearm.

18 MR. MUHR: Yes, he was. He was convicted of the  
19 924(c), Your Honor.

20 THE COURT: Okay. Thank you.

21 In order to make a determination that perjury  
22 occurred here, the government has to establish by a  
23 preponderance of the evidence that the defendant gave testimony  
24 under oath concerning a material matter with willful intent to  
25 deceive. Okay? And the Court has to in the sentencing

1 identify what the specific factual statements are.

2 I think the record will reflect for the purposes of  
3 this perjury enhancement here that the defendant did provide  
4 testimony under oath. His testimony did concern a material  
5 matter that had to do with who possessed the firearm at the  
6 scene of the crime. That's inescapable.

7 The next element is whether he did it with willful  
8 intent to deceive rather than as a result of confusion, mistake  
9 or faulty memory. There is no mistake about Mr. Kimbrough's  
10 testimony here. The Court heard Mr. Kimbrough's testimony very  
11 clearly. He was not confused. He did not have any faulty  
12 memory. The Court is persuaded that Mr. Kimbrough did want to  
13 persuade the jury that he in fact had this firearm and not  
14 Mr. Flowers. To that extent, the Court would have to find, and  
15 the Court will conclude, that he did in fact intend to deceive  
16 or mislead the jury. The jury specifically rejected that  
17 testimony.

18 The Court struggled with this whole issue here,  
19 whether the Court should find he in fact committed perjury, but  
20 in this instance, the Court has just simply come to the  
21 conclusion, in looking at these elements, that he committed  
22 perjury on that particular point, and so the Court is going to  
23 find that he did in fact commit perjury with respect to who had  
24 the firearm.

25 For that reason, the Court is going to overrule the

1 objection to the two-point enhancement for obstruction of  
2 justice. However, that does not end the Court's inquiry,  
3 because the Court next has to determine whether he should be  
4 denied two points for acceptance of responsibility.

5           As the law goes, it is generally inconsistent with  
6 acceptance of responsibility to have two points or any points  
7 for obstruction of justice in this case. And in this case, the  
8 Court has said that the two points for obstruction of justice  
9 should remain.

10           The Court is aware of *United States versus Murray*  
11 wherein the issue of one receiving points for acceptance of  
12 responsibility in the face of obstruction was considered. The  
13 question becomes, and I will give counsel a chance to comment  
14 on it, whether the defendant still should receive the two  
15 points for acceptance of responsibility notwithstanding the  
16 obstruction enhancement.

17           All right. Mr. Muhr. -- no, you don't go first. I  
18 think it's Ms. Taylor who goes first.

19           MS. TAYLOR: Your Honor, I think this case does  
20 present an extraordinary circumstance. I can't think of a case  
21 and in doing an informal poll of my office, no one else in my  
22 office could think of a case where someone who intended to  
23 plead guilty turned down a government offer to drop a 924(c)  
24 mandatory minimum 60-month charge and still pled guilty to it.  
25 It's one thing if they wanted to try to go to trial and try to

1 prove their innocence, but Mr. Kimbrough has maintained from  
2 the beginning that, no, he was guilty of each and every one of  
3 his charges. He maintained also that Mr. Flowers was not.

4           But I think this is a case that although obstruction  
5 of justice and acceptance are linked in a lot of cases, in this  
6 case it's different, because his obstruction basically is due  
7 to the fact of him accepting responsibility. Because he wanted  
8 to go on that stand and tell the jury, no, he was responsible  
9 for everything. He turned down a government offer to plead  
10 guilty, just so he could plead guilty to each and every count  
11 because he felt that he was guilty and that was the right thing  
12 to do.

13           So I think this does present an extraordinary case  
14 here, a case where a defendant has gone out of his way to not  
15 only plead guilty to every count, but then also give testimony  
16 that he was guilty of each and every count.

17           THE COURT: But in doing that, then, the government  
18 is going to argue, yes, that's true, he wants to accept of  
19 responsibility, but he in fact misled the jury in trying to  
20 accept responsibility.

21           MS. TAYLOR: I know that's their position, Your  
22 Honor, and I think the probation officer in the presentence  
23 report makes it very clear that one hinges on the other. You  
24 know, the whole point of denying Mr. Kimbrough acceptance of  
25 responsibility is obviously that testimony, but we would

1 maintain that that testimony does demonstrate further his  
2 extraordinary responsibility here, because that was the  
3 substance of his testimony, to take credit for absolutely  
4 everything. So this presents a unique case, Your Honor, and I  
5 ask you to grant him a two-level reduction.

6 THE COURT: Okay. Fine.

7 MR. MUHR: Your Honor, as the Court noted on this,  
8 the guideline purely does say when one receives obstruction of  
9 justice that to receive acceptance of responsibility is not the  
10 normal course of how it should be done.

11 I think what the defendant is doing in this is he's  
12 calling his case an extraordinary case because he pled guilty  
13 to everything while in a plea agreement he would not have to  
14 have pled guilty; so, therefore, he really accepted  
15 responsibility. But you can't view these things separate from  
16 each other, you have to view them together. He clearly got up  
17 there and in supposedly accepting responsibility misled the  
18 jury in his testimony in this.

19 I think, Your Honor, in *United States v. Murray* it's  
20 a case that's almost on point in this. It just has to do with  
21 a different offense than this, being a bank robbery. In that  
22 case, Your Honor, when Johnson took the stand in testifying at  
23 Murray's trial, earlier she had given a written confession  
24 about her involvement in the bank robberies and then his  
25 involvement in the bank robberies, and then denied those

1 confessions later on the stand and denied her signature on that  
2 written confession, and it was found that, therefore, she did  
3 not admit to all relevant evidence in this case. And I think  
4 that's what the defendant has done here, too.

5           In acceptance of responsibility, you have got to  
6 admit to all relevant evidence in this case, and that includes  
7 his conspiracy with Mr. Flowers, his involvement with  
8 Mr. Flowers involving the drugs and the guns and the other  
9 incriminating evidence, and I think the Court in *Murray* got it  
10 correct in not giving the defendant Johnson acceptance of  
11 responsibility for committing perjury on the stand, and I would  
12 ask in this case also, Your Honor, that he not receive  
13 acceptance of responsibility. One should not be rewarded, Your  
14 Honor, for committing perjury.

15           THE COURT: All right. Anything further you wish to  
16 say in rebuttal, Ms. Taylor?

17           Ms. Taylor, do you have any case law you want to cite  
18 to the Court?

19           MS. TAYLOR: No, sir, just the guidelines itself,  
20 that this would be an extraordinary case where the defendant  
21 has accepted responsibility.

22           THE COURT: Mr. Muhr, are you aware of exceptions to  
23 the situation where the defendant gets an enhancement for  
24 obstruction of justice yet receives acceptance of  
25 responsibility? Are you aware there are exceptions to that

1 general rule?

2 MR. MUHR: Your Honor, I know that the guidelines  
3 speak of that. It does not give an example, but as I said in  
4 my written brief, I think an example would be where somebody,  
5 say, committed obstruction of justice and then later did an act  
6 in order to try to amend for it. For example, if you committed  
7 obstruction at the investigation stage of a case but then  
8 pleaded guilty and testified against your codefendant, that  
9 would be an extraordinary case, I think, where one could then  
10 receive both. But in this case, there was no amends of any  
11 kind, and I don't see where it would fall out of the  
12 extraordinary in this case.

13 THE COURT: Okay. The case law doesn't offer a whole  
14 lot of guidance on when the Court should deem it appropriate to  
15 grant acceptance of responsibility notwithstanding obstruction  
16 of justice in a case.

17 In this case, the defendant apparently was confronted  
18 with a four-count indictment and had an opportunity to plead  
19 guilty pursuant to a plea agreement to counts in the indictment  
20 which did not include consecutive imposition of punishment for  
21 the gun count. The defendant rejected that plea agreement.  
22 Instead, came in and entered a plea of guilty to all four  
23 counts and indicated that he wished to accept responsibility  
24 for the entire offense and came forward and testified on behalf  
25 of the codefendant.

1           In testifying for the codefendant, the defendant did  
2 in fact indicate that he accepted responsibility for all of the  
3 criminal conduct involved, but in the process of doing it, the  
4 Court found that the defendant in fact misled the jury, that he  
5 in fact committed perjury about part of what he did.

6           The notion of acceptance of responsibility includes  
7 the proposition that one fully accepts the role he or she  
8 played in the commission of an offense. It is inconsistent  
9 with acceptance of responsibility to misled or otherwise commit  
10 perjury in relating the material matters involved in the  
11 offense.

12           The Court's determined that the Court is not going to  
13 grant the two points for acceptance of responsibility. Once  
14 again, the Court labored with the thoughts of doing just that,  
15 going the opposite direction, before it came in here, but the  
16 Court has determined the Court is not going to do that. On  
17 balance, the Court is not going to grant the two points for  
18 acceptance of responsibility. So the Court is going to  
19 overrule the objection.

20           All right. Any more objections to the presentence  
21 report?

22           MS. TAYLOR: No objections, Your Honor. I would just  
23 have further argument as to the appropriate range, but no more  
24 objections.

25           THE COURT: Okay. Well, we will get to that.

1           The Court wants to make a finding here in this case  
2 with respect to the advisory sentencing guidelines in this  
3 case. Having overruled the objections to the presentence  
4 report, the Court finds that the criminal history category of  
5 the defendant in this case is II and the offense level is 34.

6           Now, the guideline range with respect to these counts  
7 indicate that the guideline sentencing range is 168 to 210,  
8 plus 60 months consecutive.

9           Would you stand up for a second, please,  
10 Mr. Kimbrough.

11           Mr. Kimbrough, the Court has just articulated the  
12 advisory sentencing guidelines in this case, but the Court  
13 wishes to advise you that's just one factor of many the Court  
14 is to consider in this case. The Court will have more to say  
15 about the advisory guideline range in a few minutes.

16           You have a right to call witnesses this morning to  
17 testify in this case about what the appropriate sentence should  
18 be. You have a right to put on witnesses or to testify  
19 yourself, if you desire to do so. If you testify under oath,  
20 you will be subject to cross-examination. If you make an  
21 unsworn statement from the podium, you will not be subject to  
22 cross-examination. You have an opportunity to remain silent,  
23 if you wish to do so.

24           Does he have witnesses he wishes to call, Ms. Taylor?

25           MS. TAYLOR: No, Your Honor.

1 THE COURT: Does he wish to make a sworn or unsworn  
2 statement?

3 MS. TAYLOR: I don't believe he has any statements he  
4 needs to make, Your Honor.

5 THE DEFENDANT: No.

6 THE COURT: Are we certain of that?

7 MS. TAYLOR: Yes, Your Honor. He doesn't have any  
8 statements he wishes to make.

9 THE COURT: All right. Do you have any arguments you  
10 wish to make, Mr. Muhr?

11 MR. MUHR: Your Honor, I would ask that the Court  
12 adopt the recommendation of the guidelines in this case. The  
13 guidelines themselves, I mean, they take in many factors,  
14 including many of the factors in section 3553, which the Court  
15 also has to consider, without question, in this case, and I  
16 would ask that the Court do adopt that. I think that would be  
17 a reasonable sentence in the case so that I would ask the Court  
18 to sentence him somewhere within the guideline range, and of  
19 course, plus the 60 months for the 924(c).

20 THE COURT: Anywhere from 19 and 22 years.

21 MR. MUHR: Yes, sir.

22 THE COURT: You think that's an appropriate sentence?

23 MR. MUHR: I think it's a reasonable sentence, Your  
24 Honor.

25 THE COURT: All right. Thank you.

1 All right. Ms. Taylor.

2 MS. TAYLOR: Your Honor, the defendant would ask you  
3 to sentence him to no more than the statutorily minimum  
4 required sentence of 180 months, and he does this based on  
5 several reasons.

6 The first reason, I think Mr. Ross did a good job of  
7 outlining in his position paper, and that is the crack versus  
8 powder disparity. Even the U. S. Sentencing Commission  
9 admitted in its 2002 report to Congress that the current drug  
10 penalties exaggerate the relative harmfulness of crack cocaine,  
11 that they sweep too broadly and apply most often to lower-level  
12 offenders, they overstate the seriousness of most crack cocaine  
13 offenses and fail to provide adequate proportionality, and the  
14 current penalty's severity mostly impacts minorities, which, of  
15 course, for the record Mr. Kimbrough is one.

16 We would ask you if the Sentencing Commission finds  
17 that the current penalties for crack cocaine are unduly harsh,  
18 then that I think goes right to the 3553 factors, and which of  
19 those factors would then apply to that? Perhaps the need to  
20 avoid unwarranted sentencing disparity because if --  
21 Mr. Kimbrough, he had actually more powder cocaine than he had  
22 crack cocaine in his possession, and certainly if he had had  
23 all powder cocaine, then he would be treated much less harshly  
24 under the guidelines. I believe Mr. Ross calculated that the  
25 guideline range would be 30 to 37 months. I guess that would

1 not include, obviously, the 60 months in addition on the  
2 924(c). But obviously that's a tremendous disparity here.

3 I think it also goes to the factor of needing to  
4 promote respect for the law, because why would it promote  
5 respect to give someone a sentence so much harsher because some  
6 of the cocaine in his possession had been cooked up into crack  
7 form? So I would ask the Court to take that into account in  
8 fashioning a just punishment for Mr. Kimbrough.

9 In addition, when we look at Mr. Kimbrough's  
10 presentence report, as far as the nature and characteristics of  
11 this defendant, we look at his criminal history. He's got a  
12 couple minor driving offenses, a couple failure to appears and  
13 two misdemeanor drug offenses. He was not a convicted felon  
14 until this case. So I think taking that into account also  
15 warrants a lesser punishment.

16 If you look at his presentence report, you can see  
17 that he has a work history, trade history. It's actually  
18 pretty unremarkable, his presentence report, and I think that's  
19 something to be commended. The less said the better in some of  
20 these reports. It's when you get the ones that are two inches  
21 thick that you have something to worry about.

22 Mr. Kimbrough's record, he's been essentially a  
23 law-abiding citizen for most of his life, so I would ask the  
24 Court to take that into account as well, and the fact that this  
25 was basically a state drug interdiction, a state case where the

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1 police officers approached a car and because they saw someone  
2 crouched near it, and then uncovered cocaine and a firearm that  
3 fell from a codefendant's possession.

4           And finally, I think you could take into account,  
5 even if it technically didn't qualify for acceptance of  
6 responsibility under the guidelines purposes, you know,  
7 Mr. Kimbrough did come in here and plead guilty to every single  
8 one of these charges. Even when perhaps the gun charge would  
9 have been the weakest, he still accepted responsibility on that  
10 charge as well. So what I would ask you to do, Your Honor, is  
11 sentence him to 120 months on the drug charges concurrently and  
12 then consecutively 60 months on the 924(c).

13           Thank you.

14           THE COURT: All right. If you will come to the  
15 podium with Ms. Taylor, Mr. Kimbrough.

16           Is there anything you wish to say? No, that's  
17 right. Mr. Kimbrough is not making a comment. Sorry.

18           MS. TAYLOR: Yes, sir.

19           THE COURT: All right. The Court is required to  
20 impose a sentence in this case to do several things: To  
21 reflect the seriousness of the offense, to afford adequate  
22 deterrence to Mr. Kimbrough's criminal conduct, to protect the  
23 public from further crimes committed by the defendant, to  
24 provide the defendant with needed educational or vocational  
25 training, medical care or other correctional treatment in the

1 most effective way.

2           One thing the statute tells the Court to do. That in  
3 fashioning a sentence, the Court is not to impose a sentence  
4 that is greater than necessary to accomplish the factors I just  
5 outlined. It is the Court's humble view that to impose a  
6 sentence of 19 to 22 years in this case is ridiculous. It  
7 imposes more punishment, given the record here, than is  
8 necessary to accomplish what needs to be done.

9           While the Congress, the Sentencing Commission  
10 recognizes that crack cocaine has not caused the damage that  
11 the Justice Department alleges it has, the Justice Department  
12 has yet to recognize the disproportionate and unjust effect  
13 that crack cocaine guidelines have in sentencing. This case is  
14 another example of how the crack cocaine guidelines are driving  
15 the offense level to a point higher than is necessary to do  
16 justice in this case.

17           In fashioning its sentence, the Court has considered  
18 the nature and the circumstances of this offense. Number one,  
19 this defendant and another defendant were caught sitting in a  
20 car with some crack cocaine and powder by two police  
21 officers -- that's the sum and substance of it -- with a  
22 firearm. The Court understands how the offense was committed.  
23 The Court heard the facts in this particular case.

24           The Court has considered the history and  
25 characteristics of the defendant. The defendant in this case

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1 does have a record of criminal violations, but it's a record  
2 involving misdemeanors, and as counsel points out, until this  
3 case, he has not had a felony conviction.

4           The Court is required to consider factors other than  
5 what the sentencing guidelines recommend because the sentencing  
6 guidelines constitute only one factor. The sentencing  
7 guidelines as calculated excludes consideration of a number of  
8 factors that Title 18, United States Code, 3553(a) tells the  
9 Court that the Court should consider.

10           The sentencing guidelines do not consider, in coming  
11 up with that range of 14 to 19 months, plus 60 months  
12 consecutive, do not consider the history and characteristics of  
13 the defendant. The sentencing guidelines do not consider the  
14 education and vocational skills of the defendant. It does not  
15 look at family ties and background. It does not look at  
16 military contributions. It excludes all of those. Yet the  
17 sentencing factors other than the guidelines says the Court  
18 should consider those.

19           Given the fact that the sentencing guidelines has  
20 come up with this guideline range excluding all the factors the  
21 law says the Court should consider, the Court cannot follow in  
22 rote fashion the sentencing guideline recommendation, and the  
23 Court will not follow it.

24           First of all, in terms of the defendant's criminal  
25 history, the Court has considered the criminal history, what it

1 was before he got involved in this case.

2           The Court also considers that this defendant at one  
3 time served in combat in Desert Storm and honored his country  
4 and received an honorable discharge, and that for most part  
5 since he was honorably discharged, the defendant has been a  
6 construction worker and has found meaningful employment  
7 someplace. The sentencing guidelines say don't consider that,  
8 but the statute says consider it, so the Court will consider  
9 it.

10           The Court will also consider his employment record,  
11 his military contributions, his past history. The Court also  
12 considers significantly the fact that the crack cocaine  
13 involved in this case does in fact exaggerate the advisory  
14 sentencing guideline involved in this case.

15           It's amazing that when the Court goes back and  
16 calculates the offense in this case using powder cocaine,  
17 because we are dealing with cocaine at the end of the day in  
18 this case, the level, the guideline range comes down so  
19 significantly that it's unbelievable, so the Court has noted  
20 that in imposing the penalties in this case. So the Court  
21 believes should it follow the advisory guidelines, the penalty  
22 imposed would be clearly inappropriate and greater than  
23 necessary to accomplish what the statute says you should in  
24 fact accomplish in this case.

25           Given all of those factors and the Court's need to

1 avoid imposing an unwarranted disproportionate sentence, the  
2 Court will sentence this defendant as follows:

3           Pursuant to the Sentencing Reform Act of 1984, it's  
4 the judgment of the Court the defendant, Derrick Kimbrough, is  
5 hereby committed to the custody of the United States Bureau of  
6 Prisons to be imprisoned for a total of 180 months. That's 15  
7 years, which is clearly long enough under the circumstances.  
8 As a matter of fact, it's the Court's view that it's too long,  
9 but the Court is bound by the mandatory minimum of ten years on  
10 three of these counts.

11           This 180 months consists of 120 months on count one,  
12 120 months on count two, 120 months on count three, to be  
13 served concurrently, and a term of 60 months on count four to  
14 be served consecutively.

15           Upon release from imprisonment, the defendant shall  
16 be placed on supervised release for a term of five years. This  
17 term consists of five years on count one, two and four, and  
18 three years on count three, all to run concurrently.

19           You shall refrain from any unlawful use of a  
20 controlled substance and submit to one drug test within 15 days  
21 of release on supervised release and at least two periodic drug  
22 tests thereafter as directed by the probation officer.

23           You shall also comply with the following additional  
24 conditions: You shall participate in a drug education program  
25 approved by the United States Probation Office with partial

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1 cost to be paid by you, as directed by the probation officer.

2           You shall pay for the support of your minor children,  
3 as directed by the probation officer. In the absence of any  
4 court-ordered child support payments, the Court will establish  
5 an amount or schedule of payments based upon your financial  
6 circumstances.

7           The Court has looked at your negative net worth; your  
8 lack of liquid assets and earning potential, and the Court  
9 finds you are not capable of paying a fine, but you are  
10 required to pay the mandatory special assessment of \$100 on  
11 each count of conviction. Accordingly, you shall pay a \$100  
12 special assessment on each of counts one, two, three and four,  
13 for a total special assessment of \$400.

14           No restitution is involved. No fine is involved  
15 here.

16           Any balance remaining unpaid on your special  
17 assessment at the inception of your supervision shall be paid  
18 by you in installments of not less than \$50 per month until  
19 paid in full. Said payments shall commence 60 days after your  
20 supervision begins.

21           You waived your right to appeal the sentence in this  
22 case as long as it was within the statutory maximum.

23           Is that still the case, Ms. Taylor?

24           MS. TAYLOR: He didn't waive --

25           MR. MUHR: He did not have a plea agreement.

1 THE COURT: Oh, I'm sorry. That's right. He pled to  
2 everything.

3 Mr. Kimbrough, you have the right to appeal this  
4 sentence imposed upon you by this Court. If you wish to  
5 appeal, you must talk to Ms. Taylor and note your appeal of the  
6 Court's judgment within 10 days of the date the Court imposes  
7 it, which is today.

8 Are there any other matters to come before the Court,  
9 Mr. Muhr?

10 MR. MUHR: Your Honor, in all due respect, I have to  
11 put on the order the objection of going outside the guidelines  
12 as being unreasonable.

13 THE COURT: Mr. Muhr, you know, it almost -- sure,  
14 Mr. Muhr

15 MR. MUHR: Yes, sir.

16 THE COURT: Going outside the guidelines? This is  
17 post-Booker. The guidelines are advisory. Any sentence  
18 outside the advisory guidelines are not automatically  
19 unreasonable.

20 I realize you are doing your job, but I find it  
21 absolutely ridiculous the Department of Justice demands the  
22 heart and lungs, feet, and everything else in a case on these  
23 facts.

24 MR. MUHR: Yes, sir.

25 THE COURT: Anything else, Ms. Taylor?

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MS. TAYLOR: No, sir, Your Honor. Thank you.

THE COURT: All right. Court will be in recess until further notice.

(This hearing concluded at 12:15 p.m.)

\* \* \*

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

X Sharon B. Borden X

Sharon B. Borden, RMR, FCRR

X June 8, 2005 X

Date