

STATE OF MINNESOTA  
COUNTY OF BELTRAMI

DISTRICT COURT  
NINTH JUDICIAL DISTRICT

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State of Minnesota,

Court File No.: 04-CR-10-1402

Plaintiff,

vs.

**MEMORANDUM IN SUPPORT  
OF MR. S [REDACTED]'S MOTION  
FOR A DOWNWARD DEPARTURE**

J [REDACTED] H [REDACTED] S [REDACTED],

Defendant.

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TO: THE HONORABLE [REDACTED], JUDGE OF THE BELTRAMI DISTRICT COURT; MR. D [REDACTED] P. F [REDACTED], BELTRAMI COUNTY ATTORNEY'S OFFICE; BELTRAMI COUNTY DISTRICT COURT, CRIMINAL FILING.

**INTRODUCTION**

The above-entitled matter comes before this Court for sentencing on September 7, 2010 before the Honorable [REDACTED]. Mr. S [REDACTED] entered a plea of guilty to Count I, Controlled Substance Crime in the First Degree in violation of Minnesota Statute Section 152.021, Subd. 1(1). First, per the plea agreement, the State agreed to recommend the low end of the sentencing guidelines box, which with a criminal history score of zero equals 74 months. Second, the State agreed it would not object if Mr. S [REDACTED] argued for a downward dispositional departure. Third, the State agreed to make a statement on the record that if the Court did not depart downward it would recommend the Challenge Incarceration Program.

**STATEMENT OF THE FACTS**

In January and February of 2010, state and federal agents with the Paul Bunyan Drug Task Force arranged six controlled buys from Mr. S [REDACTED] using a confidential informant. The confidential information, a well-known drug user in the community, purchased methamphetamine from Mr. S [REDACTED] with weights ranging from 0.1 grams to 3.1 grams. The

total weight of all six sales equaling 11.7 grams, a mere 1.7 grams over the 10-gram weight necessary for First Degree Controlled Substance.

On April 26, 2010, Mr. S [REDACTED] was charged via criminal complaint with Controlled Substance Crime in the First Degree (Sale). Mr. S [REDACTED] admitted his responsibility and pled guilty as charged on July 27, 2010. Mr. S [REDACTED] moves this Court for a dispositional departure from the Minnesota Sentencing Guidelines as well as to allow him to complete the inpatient Minnesota Teen Challenge Program. Mr. S [REDACTED] has been accepted into the Teen Challenge Life Care Program, a minimum 13-month program with Teen Challenge in Brainerd. *See attached letter from MN Teen Challenge dated July 26, 2010.*

### **BASIS FOR DEPARTURE**

#### **I. SUBSTANTIAL AND COMPELLING REASONS SUPPORT A DISPOSITIONAL DEPARTURE IN THIS CASE**

The decision whether to depart from the presumptive guidelines sentence rests within the district court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Trog, 323 N.W.2d 28, 31 (Minn. 1982)*. A sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present. *State v. Spain, 590 N.W.2d 85, 88 (Minn. 1999)*. The Court must impose the presumptive guidelines sentence unless "substantial and compelling circumstances" warrant a departure. *Id.*; *Minn. Sent. Guide II.D*.

In determining whether a dispositional departure is appropriate, the court should focus upon the defendant as an individual and whether the presumptive sentence would be best for him and for society. *State v. Heywood, 338 N.W.2d 243, 244 (Minn. 1983)*; *State v. Allen, 706 N.W.2d 40, 45 (Minn. 2005)*; *State v. Wright, 310 N.W.2d 461, 462 (Minn. 1981)*. A district court may depart dispositionally from the presumptive sentence by imposing probation instead of an executed sentence when a defendant is amenable to probation. *Trog, 323 N.W.2d at 31*.

Amenability to probation includes several factors such as: age, prior record, remorse, cooperation, attitude in court, and support of friends and family. *Id*

In this case, substantial and mitigating factors warrant a departure.

#### **A. Age and Prior Record**

Mr. S [REDACTED] is a 32-year old male with very limited criminal history. *See the PSI*. The instant offense is his first felony level offense and he has zero criminal history points. *Id*. The majority of Mr. S [REDACTED]'s prior record consists of traffic violations such as "no seat belt" and speed violations. *Id*. He is a good father and his parents are caring for his son while Mr. S [REDACTED] is in custody.

Regarding his background, Mr. S [REDACTED] was born and raised in Bemidji, Minnesota, and attended the local area schools, including Horace May Elementary School, Bemidji Middle School, and Bemidji High School. He was an excellent student and athlete and graduated in 1996 as an honor student. He was granted an athletic scholarship from Bemidji State University where he attended school as an honor student while playing basketball through his sophomore year. His life changed on December 21, 1999, when methamphetamine entered Mr. S [REDACTED]'s life at a bachelor party in Minneapolis. Like so many other affected by this drug, after his first introduction with methamphetamine, he immediately became addicted.

Mr. S [REDACTED] has strong family ties throughout the area, all of who support him with his recovery in this case. He was raised in a positive upbringing, and his parents led responsible lives and were committed to maintaining a healthy household environment. *PSI*, p. 3. His family in the local area includes J [REDACTED] and E [REDACTED] S [REDACTED] (parents), S [REDACTED] S [REDACTED] (21 month old son), D [REDACTED] and A [REDACTED] H [REDACTED] (grandparents), W [REDACTED] and L [REDACTED] S [REDACTED] (uncle and aunt), B [REDACTED] and D [REDACTED] S [REDACTED] (uncle and aunt), D [REDACTED], Jr. and O [REDACTED] L [REDACTED] H [REDACTED] (uncle and

aunt) and B [REDACTED] S [REDACTED] (cousin). He also has many community friends and supporters, many of who have written letters on his behalf, which are attached to this memorandum.

Mr. S [REDACTED] is anxious to beat the disease of addiction and return to his son. His son's mother had many drug problems of her own, is involved in significant legal problems and was released from prison. Mr. S [REDACTED]'s parents currently have custody of his son.

### **B. Remorse, Cooperation, and Attitude in Court**

First, Mr. S [REDACTED] has been cooperative and respectful towards law enforcement and the judicial system. From the very beginning of this case Mr. S [REDACTED] expressed his remorse and accepted full responsibility for his actions. His remorse and acceptance of responsibility are evidenced by his actions while incarcerated as well as the letter he has attached to this memorandum. *See attached letter by Mr. S [REDACTED]*. Mr. S [REDACTED] does not make excuses for his behavior, but rather he recognizes the mistakes he made and wants to move forward. *See PSI*. Mr. S [REDACTED]'s confession to the police and all of the evidence indicates that he did not understand the gravity of what he was doing at the time. He now understands the negative impact his addiction has had on his life, the community and his family.

Second, Mr. S [REDACTED] cooperated fully with the PSI and provided an honest assessment of his role in this crime. There is nothing to indicate that he minimized his behavior or blamed outside influences for his actions. He admitted "he was selling methamphetamine for the sole purpose of supporting his own addiction..." *PSI at pg. 2*. From December of 2009 to the date of the arrest, he was living on the streets with the sole objective of obtaining and using methamphetamine. *Id.* The agent noted that Mr. S [REDACTED] is "clearly concerned about his future" and is experiencing "an epiphany about his current situation." *PSI at pg. 3*.

Third, and perhaps most importantly, Mr. S [REDACTED] has demonstrated a positive attitude to change his life while incarcerated at the Bemidji jail. He is involved with and has almost completed the “Bemidji Area Program for Recovery.” *See attached enrollment letter.* Mr. S [REDACTED] is described to be “friendly, serious in examining himself, wants help and is making good progress.” *Id.* He enrolled in the local program on May 25, 2010 and is expected to complete the program on September 25, 2010. L [REDACTED] R. K [REDACTED], M.A., LICSW, LADC stated that J [REDACTED]:

...has consistently attended every activity offered and has been a cooperative and engaged group member. He has made satisfactory progress on personal and treatment goals during this time. The critical time for J [REDACTED] will occur when he is released and will need to make a transition to community based treatment and support.

Moreover, in an August 31, 2010 letter, counselor A [REDACTED] S [REDACTED], BS, LSW, LADC, stated:

J [REDACTED] is making great progress and is taking this opportunity to make changes in his cognitive structuring. **It is my recommendation that J [REDACTED] continue to work on his substance dependency issues in a more therapeutic environment** ... It has been brought to my knowledge that J [REDACTED] has been accepted to Minnesota Teen Challenge and Restore House (located in Bemidji). I feel that he would benefit from the structure and programming offered in both programs.

In addition to taking advantage of the recovery program, Mr. S [REDACTED] has attended and completed the “Bemidji Early Childhood Family Education” program. *See attached.* V [REDACTED] W [REDACTED], the leader of the program, stated:

This summer J [REDACTED] S [REDACTED] attended seven one-hour sessions of the parenting group I taught at the jail from June 22-Aug. 4. During this class he actively and respectfully participated in the discussion. He asked questions about skills to learn to be a better parent. He shared strategies that he could do in parenting his son to help his son develop in a healthy, positive way. His attitude was positive and he appeared committed to making changes in his life in order to better meet the needs of his son.

*Id.* Finally, Mr. S [REDACTED] completed both a chemical health assessment with Bemidji County Probation as well as Minnesota Teen Challenge. It is clear that Mr. S [REDACTED] has taken advantage of every opportunity while in custody to help himself recover from his horrible addiction as well as learn tools that will make him a better parent and member of society. The same cannot be said for most inmates at the Bemidji County Jail. He was taken a horrible situation and tried to make the best of it. It is also evident by the comments of his supervisors that he took these matters seriously and completed the programs in good faith with a clear desire to move forward. These programs were not a means to an end but rather a sincere desire to better his life.

### **C. Support of Friends and Family**

Mr. S [REDACTED]'s support from his family, friends and community members is staggering as evidenced by the twenty support letters addressed to Your Honor. *See Attached Letters.* The individuals that know Mr. S [REDACTED] best have made some very powerful statements in their letters. Pastor N [REDACTED], who has known J [REDACTED] for 15 years, has been visiting Mr. S [REDACTED] in jail and notes that over the last few months "he's given me every indication that he desires a new and different life and wants to be free from the drugs that have enslaved him." *See Pastor S [REDACTED] N [REDACTED]'s Letter dated July 15, 2010.* A friend that has known Mr. S [REDACTED] since grade school also met with Mr. S [REDACTED] recently and "found him to be honest, contrite, and accountable." *See B [REDACTED] C [REDACTED]'s Letter dated June 14, 2010.* This same friend also noted how Mr. S [REDACTED] spoke of wanting to change with the support of his faith, family, and friends. *Id.* Mr. S [REDACTED]'s mother sums it up best by saying, "J [REDACTED] is an addict not a criminal..." *See E [REDACTED] S [REDACTED]'s Letter dated July 19, 2010.* While his mother is perhaps mistaken about the elements of the crime to which J [REDACTED] pled guilty, there is certainly no argument that Mr. S [REDACTED] was dealing drugs to support his own habit, and her comment is how she expresses her concerns and love for

her son. D█████ N█████, familiar with J█████'s ability as a father, stated "he was so proud of his son and took good care of him. If J█████ is given the opportunity for long-term drug treatment, his life could be turned around. See D█████ N█████ letter dated July 8, 2010. D█████ and E█████ M█████, whom are both productive members of the community and also recovering addicts, stated about Teen Challenge, "we have a dear friend who attended treatment there and can site scripture for every adversity in life. She came through the program a very strong Christian, but most importantly, she came through the program with a clear purpose in life...we hope that you will find it in your heart to give him [J█████] the sentence to a good future in choosing Teen Challenge over any other option." See attached.

#### **D. Amenability to Probation.**

Amenability to probation itself may support a downward dispositional departure. *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001). The court must deliberately consider factors for departure by comparing them side to side with factors for non-departure. *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), rev. denied April 16, 2002. There must be a balancing of the probationer's interest in freedom and the state's interest in ensuring his rehabilitation and the public safety. *Gagnon v. Sarpelli*, 411 U.S. 778, 785 (1973). The appellate court has determined there is a greater leverage for treatment through the stricter terms of probation than executing a presumptive sentence. *State v. Dokken*, 487 N.W.2d 914, 918 (Minn. App. 1992).

Here, there is no concern for public safety in that the Court could order Mr. S█████ to complete Teen Challenge which is an inpatient treatment program, without release, that lasts a minimum of 13 months. Any violation or escape would automatically result in his arrest and an executed sentence. There is simply no legitimate reason besides "punishment" to not give Mr. S█████ this chance. It is clear that Mr. S█████ was involved in the drug business strictly to

support his own drug habit. There is no position from the State that he was the lynchpin of the Bemidji drug-dealing world. He has absolutely no assets, did not even drive a car, and did not present himself to the community as a drug dealer but rather a drug user who would cut the confidential informant in on his stash. The evidence in this case overwhelming supports the position that Mr. S [REDACTED] was an addict who was supporting his own addiction. Special Agent M [REDACTED] stated in his police reports that Mr. S [REDACTED] was “cooperative during the interview process ... and recognizes the fact that he needs treatment since he has been an addict since December 21, 1999. S [REDACTED] hopes to get clean so that he can eventually interact with his child again. *See attached report.* He stated to Agent M [REDACTED] that, “I’m an addict who was trying to get high, that’s all.” (April 23, 2010 Transcript, p. 2) and, “I’m just an addict man” (April 23, 2010 Transcript, p. 6). Consider the following exchange between Agent M [REDACTED] and Mr. S [REDACTED]:

JM: Were, why were you selling?

JS: To support my habit I guess.

JM: Okay, all right.

JS: *To get a little bit of free dope.*

.....

JM: ... you’re selling to earn extra money to, to get, to get some extra dope or you, are you getting the dope?

JS: I just take the dope right off the top.

(April 26, 2010 Transcript, p. 2)

Mr. S [REDACTED] is certainly not trying to undermine the gravity of the offense. He pled guilty without challenging or moving this Court to suppress any evidence. However, despite his

criminal behavior, Mr. S [REDACTED] has demonstrated to this Court his amenability to probation and consequently treatment is more appropriate than prison incarceration. The sole reason he engaged in drug dealing was to keep up his habit, and consequently prison is certainly no place for Mr. S [REDACTED]. Mr. S [REDACTED] has been accepted into the Life Care Program per the Brainerd Teen Challenge assessment. This program takes a minimum of 13 months to complete and is very structured. *See Minnesota Teen Challenge Letter dated July 26, 2010.* The Teen Challenge Program will be extremely beneficial for Mr. S [REDACTED] and eliminate any concerns about public safety.

Furthermore, society would be best served by allowing Mr. S [REDACTED] to complete the Program. Treatment will assist him in addressing his problems and ***it is only after treatment has been proven to fail should incarceration be used.*** *State v. Austin, 295 N.W.2d 246, 250 (Minn. 1980).* The sentencing guidelines permit and case law resounds with examples of individuals and circumstances just like the facts of this case where the Court agreed to depart from the guidelines and allow the defendant the opportunity to give treatment a chance.

Specifically, “First Degree Controlled Substance Crimes” of this nature have a higher rate of departures than other offenses. *See Attached, Minn. Sent. Guide Commission, Sentencing Practices for Controlled Substance Offenses, 2009.* Mitigated dispositional departures were higher for the sale and possession of meth with 53% of defendants placed on probation rather than prison incarceration. *Id. at 23.* 67% percent of drug offenders with a criminal history score of 0 received a mitigated dispositional departure. *Id.* In fact, “departure rates are now so high that, among offenders recommended a prison sentence under the Sentencing Guidelines, a greater number of offenders receive departures than receive the recommended sentence. *Id. at 26.* The total incarceration rate for drug offender sentences was 91 percent, with 25 percent

receiving a prison sentence and 66 percent having local jail time imposed as a condition of probation. *Id. At 4*. Most importantly:

Only 33 percent of first-degree (most serious) drug offenders received the recommended guidelines sentence. *For first degree sale and possession of meth, 32 percent received the recommended sentence.*

*Id. at 4*. In 2008, the total downward departure rate for first-degree drug offenses was 67 percent! *Id. at 15*. Only 25% of all drug cases were sent to prison. *Id. at 12*. In other words, in 2008, in 7 out of 10 cases similar to Mr. S█████'s case, the defendants' guideline sentence was not executed. *Id.* These statistics are staggering. Mr. S█████'s case is not the type of first-degree sale charge (11.7 grams) that should make it fall in the 32% of cases where prison is executed.

The fundamental principle underlying the Minnesota Sentencing Guidelines is that “sanctions used in sentencing convicted felons should be the least restrictive to achieve the purposes of the sentence.” *Minn. Sent. Guide I.2*. “Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to the convicted of more serious offenses...” *State v. Garcia, 302 N.W.2d 643, 646 (Minn. 1981)*. The ability of the court to grant sentence departures is used to “avoid sentencing that is either mechanical or callous.” *State v. Curtiss, 353 N.W.2d 262, 264 (Minn. App. 1984)*. The courts have reduced sentences when it has been to “serve the interests of justice.” *State v. Gilbert, 448 N.W.2d 875, 876 (Minn. 1989)*.

The interests of justice are better served by granting Mr. S█████'s motion for a departure and allowing him to complete the inpatient Teen Challenge program. This program will implement Mr. S█████ with the skills necessary to become a productive member of society. He simply has never been granted this opportunity. Mr. S█████ is eager to begin the next

chapter in his life and to finally put his addiction behind him. By successfully addressing Mr. S█████'s addiction directly, he will no longer be a threat to society or himself. Moreover, Mr. S█████ is unable to leave the Teen Challenge program without direct supervision. This Court can rest assured that if Mr. S█████ were to leave Teen Challenge, the probation department would be notified immediately, and his stayed prison sentence could be executed. This is a case where treatment rather than a prison sentence would better serve both Mr. S█████ and society. Mr. S█████'s desire to complete treatment along with his evidenced amenability to probation warrants a dispositional departure.

### CONCLUSION

Based upon the foregoing reasons, Mr. S█████ respectfully requests this Court grant his motion for a downward dispositional departure and place Mr. S█████ on probation.

Respectfully submitted,

**RYAN GARRY, ATTORNEY AT LAW, L.L.C.**

Dated: \_\_\_\_\_

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