

## **JURISDICTIONAL STATEMENT**

On March 12, 2002, the United States of America charged defendant Warren Sanders<sup>1</sup> (hereafter “Sanders” or “Defendant”), in a multi-defendant, multi-count, indictment with conspiracy to distribute more than fifty grams of cocaine base, distribution of cocaine base, and aiding and abetting the distribution of cocaine base, pursuant to 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 2. On April 28, 2003, the United States filed a single-count indictment against Sanders alleging distribution of more than five grams of cocaine base. J.A. 6-9.<sup>2</sup> Pursuant to a previously negotiated plea agreement, Sanders entered a guilty plea to the information on May 27, 2003. J.A. 10-13. Sanders was sentenced on August 25, 2003, and the final Judgment was entered on August 27, 2003. J.A. 44-50. Appellant timely filed his *Notice of Appeal* on September 2, 2003. J.A. 51-52. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## **STATEMENT OF ISSUE**

Did the District Court err in attributing one criminal history point to Sanders for his May 12, 2000, misdemeanor conviction of “fleeing?”

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<sup>1</sup> The original indictment referred to Mr. Sanders as “William McKinney, a/k/a, New York Mike, a/k/a, Charlie Brown.” For ease of reference, appellant shall be referred to as “Sanders” or “Defendant” throughout.

<sup>2</sup> Throughout appellant’s brief, reference to the joint appendix shall be referred to as “J.A.”

## **STATEMENT OF CASE**

On March 12, 2002, Sanders and numerous others were charged in a multiple count indictment with various violations of federal narcotics laws. On April 28, 2003, the United States filed a single count information charging Sanders with one count of distribution of more than five grams of cocaine base. J.A. 6-9. On May 14, 2003, Sanders entered into a plea agreement with the United States and, in accordance with that plea agreement, pled guilty on May 27, 2003, to the single-count information. Thereafter, the United States dismissed the original multi-count indictment.

Sanders was sentenced on August 25, 2003. J.A. 38-42. At sentencing, Sanders asserted three objections to the pre-sentence report. One objection was to the addition of a single criminal history point for a May 12, 2000, misdemeanor conviction of “fleeing.” J.A. 24. The Court rejected Sanders’ objection, finding that “fleeing” was a more serious criminal offense than the excludible offenses listed in U.S.S.G. § 4A1.2(c). J.A. 27-28. Final judgment was entered on August 27, 2003, and defendant timely filed his notice of appeal on September 2, 2003. Defendant now appeals from the district court’s decision to count Sanders’ previous conviction of “fleeing” in appellant’s criminal history computation.

## **STATEMENT OF FACTS**

On March 12, 2002, a federal grand jury sitting in Huntington, West Virginia handed down an indictment charging Sanders and others with various criminal violations of federal narcotics laws. J.A. 57. On May 14, 2003, the United States and Sanders entered into a plea agreement wherein Sanders agreed to waive his right, pursuant to Rule 7 of Federal Rules of Criminal Procedure, to be charged by an indictment and consented to the use of an one-count information. Previously, on April 28, 2003, the single-count information was filed with United States District Court for the Southern District of West Virginia located in Huntington, West Virginia. J.A. 6-9. The information charged Sanders with distributing more than five grams of cocaine base on March 6, 2001. On May 27, 2003, Sanders, in accordance with the plea agreement, pled guilty to the single count of distributing more than five grams of cocaine base contained in the information. J.A. 10-13. Thereafter, on May 30, 2003, the Government dismissed the original indictment.

On August 25, 2003, Sanders appeared before the District Court for sentencing. Sanders asserted three objections to the Presentence Investigation Report. First, he objected to the assessment of a base offense level of 38, due to the generality of the relevant conduct information credited

by the probation officer. J.A. 16-18. The Government did not oppose reducing the base offense level to 36 and, consequently, the District Court reduced the offense level. *Id.*

Next, Sanders objected to the three point upward adjustment he received for his role in the offense. Sanders asserted his role was no greater, or perhaps less, than individuals listed in the original indictment who previously received a two-point upward adjustment. After considering this argument, the District Court disagreed and upheld the three-point adjustment. J.A. 18-24.

Finally, Sanders objected to the addition of a single criminal history point for a May 12, 2000, misdemeanor conviction of fleeing in Huntington, West Virginia. J.A. 24. The record reflects that on May 12, 2000, at approximately 10:37 p.m., law enforcement officers attempted to stop and question Mr. Sanders. J.A. 74. Upon the officers' approach, Sanders ran and the officers gave chase, ultimately arresting Mr. Sanders. Sanders pled guilty to the misdemeanor offense of "fleeing." *Id.* He received a sentence of seven days in jail; credit for time served and a fine of \$87.00. He also forfeited the money on his person and in his hotel room. *Id.*

At sentencing, appellant asserted that fleeing is similar to resisting arrest, which is listed in United States Sentencing Guidelines §

4A1.2(c)(1)(2002), as an offense that is excluded from a defendant's criminal history computation. The District Court noted Sanders asserted a strong argument, but the District Court felt obligated to be consistent with its previous rulings, *United States v. William H. Johnson*, which found fleeing was not excludable under U.S.S.G. § 4A1.2(c)(1). J.A. 24-26. In addition, the District Court found that *United States v. Harris*, 128 F.3d 850 (4<sup>th</sup> Cir. 1997), required it to primarily consider the literal elements of the offenses. J.A. 26, 28. Consequently, the District Court ruled that fleeing was a more serious criminal offense than resisting arrest and that the elements of fleeing were distinct enough that fleeing was not an excludable "similar offense" under U.S.S.G. § 4A1.2(c). J.A. 27-28.

By excluding the misdemeanor conviction of fleeing in the criminal history computation, the Court moved Sanders from Criminal History Category III to Category IV. His sentencing range rose from 235-243 months to 262-327 months.

Judgment was officially entered on August 27, 2003. Thereafter, on September 2, 2003, Sanders timely filed his *Notice of Appeal*.

### **SUMMARY OF ARGUMENT**

The District Court erred when it assessed, over Sanders' objection, a criminal history point for Sanders' May 12, 2000, misdemeanor conviction

of fleeing. The District Court was obligated to use U.S.S.G. § 4A1.2(c) when determining whether the offense of fleeing was excludable from Sanders' criminal history. U.S.S.G. § 4A1.2(c) provides that offenses delineated therein or offenses similar thereto are to be excluded from a defendant's criminal history.

Sanders asserted that fleeing is similar to both resisting arrest, which is charged as obstruction under West Virginia Law, and hindering. The District Court's analysis of whether the offenses are similar was governed by *Harris*, 128 F.3d 850. *Harris, supra*, utilizes the "elements test" to determine whether offenses are similar. The "elements test" requires that a defendant demonstrate that the essential elements of the offenses being compared resemble each other in many aspects. Pursuant to *United States v. Matheny*, 151 F.3d 1031, 1998 WL 391517 (4<sup>th</sup> Cir. (W.Va.)) (unpublished), the comparison of elements must be conducted using the law of the jurisdiction where the defendant received his conviction for the offense he asserts is similar. In this case, West Virginia's law must be used.

In West Virginia, the offenses of fleeing, resisting arrest, obstruction, and hindering were originally all contained in W. Va. Code § 61-5-17 and, therefore, all the offenses had identical elements. However, when Sanders

was arrested on May 12, 2000, fleeing was set forth in a separate subsection of § 61-5-17. *See* W. Va. Code § 61-5-17(b)(1998).

The elements for fleeing are similar to both the offenses of resisting arrest and hindering, which still have identical elements under W. Va. Code § 61-5-176 (1999). Two of the three essential elements of the offenses are identical: (1) the requirement that an individual take an action to impede a law enforcement officer from completing a task initiated in the officer's official capacity; and (2) that an action be taken by the perpetrator. The fact that such similarities exist between the elements of these offenses allows this Court to consider the fact that all the penalties for the offenses are identical. *Harris*, 128 F.3d at 855.

The District Court erred when it assessed Sanders an additional criminal history point for his May 12, 2000, fleeing conviction because Sanders established that fleeing is similar to both resisting arrest and hindering, and therefore U.S.S.G. § 4A1.2(c) requires that his fleeing conviction be excluded from his criminal history.

## **ARGUMENT**

### **I. Standard of Review.**

An appellate court must give due deference to a district court's determination regarding the U.S.S.G.; however, the amount of deference

varies with the type of question being reviewed. “If the [appellate] court is reviewing a factual determination, the court should only overturn the trial court’s determination if the decision is clearly erroneous.” *United States v. Nale*, 101 F.3d 1001, 1003 (4<sup>th</sup> Cir. 1996); See also *United States v. Colton*, 231 F.3d 890, 911 (4<sup>th</sup> Cir. 2002). However, if the issue turns primarily on the legal interpretation of the U.S.S.G., then the appellate court reviews de novo. *Nale*, at 1003; *Colton*, at 911. Finally, if there is a mixed question of law and fact, then the appellate court applies a due deference standard to its review. *Nale*, at 1003; *United States v. Daughtrey*, 874 F.2d 213, 217 (4<sup>th</sup> Cir. 1989). In this case, the issue turns primarily on a legal interpretation: that is, is “fleeing” similar to “resisting arrest,” as defined by the West Virginia Code. Accordingly, this Court should review the District Court’s decision *de novo*<sup>3</sup>.

**II. The District Court Erred in Assessing Sanders an Additional Criminal History Point for his May 2000, Conviction for Fleeing Because the Offense is Similar to Offenses Delineated in U.S.S.G. § 4A1.2(c)(1).**

U.S.S.G. § 4A1.2(c), in the relevant portion, provides:

*Sentences Counted and Excluded*

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<sup>3</sup> “We review the District Court’s interpretation and application of § 4A1.2(c) *de novo*.” *United States v. Sanders*, 205 F.3d 549, 552 (3<sup>rd</sup> Cir. 2000); See *United States v. Wakefield*, 187 F.3d 633, 1999 WL 511069, 2 (4<sup>th</sup> Cir. S.C.) (unpublished). In accordance with the Third Circuit’s ruling, this Court’s unpublished opinion, and because the issue addressed by this appeal deals primarily with the District Court’s legal interpretation of the scope of U.S.S.G. § 4A1.2(c), this Court must review this issue *de novo*.

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and **offenses similar to them, by whatever name they are known**, are counted only if (A) the sentence was a term of probation at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

- Careless reckless driving
- Contempt of court
- Disorderly conduct or disturbing the peace
- Driving without a license or with a revoked or suspended license
- False information to a police officer
- Fish and game violations
- Gambling
- Hindering** or failure to obey a police officer
- Insufficient funds
- Leaving the scene of an accident
- Local ordinance violations (excluding local ordinance violations that are also criminal offenses under state law)
- Non-support
- Prostitution
- Resisting Arrest**
- Trespassing.

U.S.S.G. § 4A1.2(c)(2002) (Emphasis added).

Pursuant to U.S.S.G. § 4A1.2(c), the offenses listed therein or ones similar to those offenses are to be excluded from a defendant's criminal history unless: (1) the defendant received a sentence of probation with a duration of one year or more, or the defendant received a sentence of imprisonment of thirty days or more; or (2) the prior offense was similar to the instant offense. *Id.*

Sanders' previous misdemeanor conviction for fleeing should not be counted under subsection (A) of § 4A1.2(c). He received a sentence of seven days in jail, credited for time severed, and a monetary penalty of \$87.00 for his fleeing conviction. Clearly, subsection (A) of § 4A1.2(c) is inapplicable.

Likewise, subsection (B) of § 4A1.2(c) is not applicable to this case. Here, Sanders has pled guilty to distributing more than five grams of cocaine base. There is no logic to the argument that running from the police is similar to distributing narcotics. Obviously, the elements of the two offenses are completely unrelated. Accordingly, the final question is whether "fleeing," as defined by the W. Va. Code, is "similar to" any of the offenses listed in § 4A1.2(c) of the U.S.S.G.

The U.S.S.G. fails to provide any guidance as to what constitutes "similar" for purposes of U.S.S.G. § 4A1.2(c)(1); thus, the determination of what constitutes "similar" for purposes of U.S.S.G. § 4A1.2(c)(1) is left to judicial interpretation. This Court addressed the issue in *Harris*, 128 F.3d 850. In *Harris*, the defendant contended that the offense of selling alcohol to minors was similar to the offenses delineated in U.S.S.G. § 4A1.2(c) because the offenses all share similar punishments. *Id.* This Court disagreed with that analysis and determined that the "elements test"

was to be used in determining whether an offense is similar to the offenses listed in U.S.S.G. § 4A1.2(c)(1). *Id.* at 854. In defining the “elements test,” this Court noted the definition of “similar”, as defined by Black’s Law Dictionary at 1240 (5<sup>th</sup> ed. 1979), and concluded that “... when two offenses are similar, their essential elements are ‘nearly corresponding’ or ‘resembling in many respects.’” *Id.*

This Court applied the “elements test” to the defendant in *Harris* and found that the defendant’s offense was not similar to any of the offenses listed U.S.S.G. § 4A1.2(c) because no offense in U.S.S.G. § 4A1.2(c) had elements resembling the combination of elements found in selling alcohol to a minor. *Id.* at 855. This Court concluded, “Absent any similarity between the elements of Harris’ prior offense and the elements of the offenses listed in Section 4A1.2(c), we do not need to consider possible similarities in the punishments.” *Id.* Thus, following this Court’s ruling in *Harris*, a defendant must demonstrate that the offense with which he is charged has essential elements that resemble in many aspects the elements of an offense listed in U.S.S.G. § 4A1.2(c).

However, before a comparison of elements may be conducted, one must determine whose definition of the offenses is to be used for the comparison. In *Matheny*, 151 F.3d 1031, 1998 WL 391517, this Court was

asked to compare a defendant's conviction for brandishing a weapon with the offense of disorderly conduct or disturbing the peace, offenses that are listed in U.S.S.G. § 4A1.2(c)(1). *Id.* at 1. To compare the two offenses, this Court chose to examine the elements of the offenses as defined by the jurisdiction in which the defendant was convicted of brandishing; consequently, this Court compared the elements of W. Va. Code § 61-7-11, brandishing, and W. Va. Code § 61-7-11a, disorderly conduct or disturbing the peace. *Id.*; *See Harris*, at 855.<sup>4</sup> Hence, the relevant comparison, when determining whether an offense is similar to an offense listed under U.S.S.G. § 4A1.2(c), is between the offense of which the defendant was convicted and an offense listed under U.S.S.G. § 4A1.2(c)(1), as defined by the jurisdiction where the defendant was convicted for the offense he asserts is similar. *Id.* *See Methany* at \* 1.

**A. Resisting Arrest.**

The West Virginia Code does not provide a specific criminal code section dedicated to resisting arrest; instead, West Virginia has a general criminal code section that addresses all criminal conduct constituting interference with law enforcement. Thus, in West Virginia, one who

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<sup>4</sup> In *Harris*, the defendant was convicted in Florida of selling alcohol to a minor and asserted that the offense was similar to offenses listed under U.S.S.G. § 4A1.2(c); consequently, this Court used Fl. Stat. Ann. § 562.11(1)(a)'s listing of elements to determine whether the offense was similar to any offenses contained in U.S.S.G. § 4A1.2(c)(1).

commits the offense of resisting arrest will be charged pursuant to W. Va. Code § 61-5-17 for obstruction. As an example, in *State v. Forsythe*, 194 W.Va. 496, 460 S.E.2d 742 (1995)(per curiam), a defendant was tried and convicted under W. Va. Code § 61-5-17 for resisting the efforts of three police officers attempting to arrest him. In addition, the Supreme Court of Appeal of West Virginia noted in *Isenhert v. Vasiliou*, 187 W.Va. 357, 358, 419 S.E.2d 297, 298 fn. 1 (1992) (per curiam) and *State ex rel. Riley v. Rudloff*, 212 W.Va. 767, 770, 575 S.E.2d 377, 380 (2002) that one's actions in resisting arrest resulted in the individual being charged with obstructing a police officer.

The concept of treating the offense of “resisting arrest” as a type of obstruction is not exclusive to West Virginia; in fact, Black’s Law Dictionary (6<sup>th</sup> ed. 1990) defines resisting arrest as “[t]he crime of **obstructing** or opposing a police officer making an arrest.” *Black’s Law Dictionary* at 1310 (6<sup>th</sup> ed. 1990). (Emphasis added). Furthermore, American Law Reports provides that the acts of resistance, obstructing, and resisting are alike because they all imply some sort of physical act. Christopher Hall, J.D., Annotation, *What Constitutes Obstructing or Resisting Officer, In absence of Actual Force*, 66 ALR 5<sup>th</sup> 397 (1999).

Accordingly, the applicable statute to ascertain the elements of

resisting arrest in West Virginia is found in W. Va. Code § 61-5-17(a), which is dedicated to all forms of obstructing and hindering a police officer, including resisting arrest. West Virginia. Code § 61-5-17(a) (1999)<sup>5</sup> provides:

Any person who by threats, menaces, acts or otherwise, forcibly or illegally hinders or obstructs, or attempts to hinder or obstruct, any law – enforcement officer acting in his or her official capacity is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, and may, in the discretion of the court, be confined in the county or regional jail not more than one year.

In accordance with W. Va. Code § 61-5-17(a) (1999), the elements of any form of obstruction, including resisting arrest, are:

- (1) an action taken;
- (2) that forcibly or illegally hinders or obstructs;
- (3) a law enforcement officer acting in his or her official capacity.

*See Id.*

These are the essential elements that this Court must compare to the essential elements of the criminal offense of fleeing as defined by West Virginia Law.

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<sup>5</sup> W. Va. Code § 61-5-17 had been amended twice since 1999; however, as Sanders committed the offense of fleeing in May of 2000, therefore, the revisions to the code section are not applicable to Sanders. Moreover, the alterations do not affect the code section as to its application in this case.

## **B. Fleeing.**

Fleeing, under West Virginia Law, has an interesting history. Until the 1995 amendments to W. Va. Code § 61-5-17(1994), there was no specific criminal offense of fleeing. *See* W. Va. Code § 61-5-17(1995). Consequently, in *State v. Jarvis*, 172 W.Va. 706, 310 S.E.2d 467(1983), the Supreme Court of Appeals of West Virginia was asked to determine whether an individual, who fled from police officers, could be convicted of hindering or obstructing a police officer in accordance with W. Va. Code § 61-5-17 (1982).<sup>6</sup>

In *Jarvis*, the defendant was informed by officers that they possessed a warrant for his arrest and that they intended to execute the warrant. *Id.* 172 W.Va. at 708, 310 S.E.2d at 469. In response, the defendant expressed concerns for what would happen to his vehicle, and consequently the police gave the defendant permission to drive the vehicle to a wrecker service that was further down the road. However, when the defendant came to the wrecker service he did not stop, but instead continued to his home. As a result, he was charged with obstructing a police officer. *Id.*

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<sup>6</sup> From 1866 until 1995 W. Va. Code § 61-5-17, in its entirety, provided :

Any person who by threats, menaces, acts or otherwise, shall forcibly or illegally hinder, obstruct, or oppose, or attempt to obstruct or oppose, or shall counsel, advise or invite others to hinder, obstruct or oppose any officer in this State (whether civil or military) in the lawful exercise or discharge of his official duty, shall, for every such offense, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, and may, in the discretion of the court, be imprisoned not exceeding one year.

In analyzing whether fleeing constitutes an offense pursuant to W. Va. Code § 61-5-17, as it then appeared, the West Virginia Supreme Court examined *State v. Merrifield*, 180 Kan. 267, 303 P.2d 155 (1956). In *Merrifield*, the Kansas Court concluded that an individual who was told he was under arrest and ignored the statement by proceeding into his home was guilty of obstruction. *Jarvis*, 172 W.Va. at 709-10, 310 S.E.2d at 470. Thus, the Kansas Court ruled that an individual who flees from law enforcement is guilty of obstruction. After examining *Merrifield, supra*, and other similar cases<sup>7</sup>, the West Virginia Supreme Court held:

We agree with the state that Jarvis' act of unlawfully fleeing to avoid a lawful arrest illegally hindered a state trooper in the lawful exercise of his official duties. His actions constitute a violation of the statute [W. Va. Code § 61-5-17(1982)].

*Jarvis*, 172 W.Va. at 709, 310 S.E.2d at 470.

Thus, from 1983 until the 1995 amendments to W. Va. Code § 61-5-17, an individual guilty of fleeing was charged with hindering and obstructing pursuant to W. Va. Code § 61-5-17. For, at least, twelve years the elements of fleeing and obstruction did not only resemble each other in many ways, but instead were identical. The West Virginia Supreme Court ruled that fleeing, just like resisting arrest, was a type of hindering or

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<sup>7</sup> *Tankersley v. State*, 155 Ga.App. 917, 273 S.E.2d 862 (1980); *City of Chicago v. Brown*, 18 Ill.Dec. 395, 61 Ill.App.3d 266, 377 N.E.2d 1031 (1978). See *Jarvis*, 172 W.Va. at 710, 310 S.E.2d at 470.

obstructing law enforcement, and consequently was to be prosecuted under W. Va. Code § 61-5-17.

West Virginia is not the only jurisdiction to recognize that fleeing is a type of obstruction. For example, the Appellate Court of Georgia noted that flight from an officer, while he is acting in accordance with his official duties, can constitute the offense of obstructing an officer. *Okongwu v. State*, 220 Ga. App. 59, 62, 467 S.E.2d 368, 372 (1996). In addition, the Florida Supreme Court found that the act of fleeing could constitute obstruction of an officer, if the individual fleeing knows the officer intended to detain him, and the officer was justified in making the stop. *Mosleg v. State*, 739 So.2d 672, 675 (Fla. 1999); *See also Tankensky v. State*, 155 Ga App. 917, 919-20, 273 S.E.2d 862, 866 (1980); *State v. Chamberlin*, 872 S.W.2d 615 (Mo. 1994) (wherein the Missouri Court of Appeals concluded that the act of fleeing may result in a conviction for resisting arrest). Each of these courts has reached the same conclusion that the West Virginia Supreme Court did in *Jarvis, supra*; the act of fleeing is a type of obstruction.

Although historically the elements of fleeing were identical to all other forms of obstruction, including resisting arrest, such was not the case when Sanders was arrested. By May 12, 2000, the date Sanders was arrested

for fleeing, West Virginia had a specific criminal offense of fleeing. W. Va. Code § 61-5-17 (1999), the statute in effect when Sanders was arrested, provides, in the pertinent part:

(a) Any person who by threats, menaces, acts or otherwise, forcibly or illegally hinders or obstructs, or attempts to hinder or obstruct, any law- enforcement officer acting in his or her official capacity is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, and may, in the discretion of the court, be confined in the county or regional jail not more than one year.

(b) Any person who intentionally flees or attempts to flee by any means other than the use of a vehicle from any law-enforcement officer acting in his or her official capacity who is attempting to make a lawful arrest of the person, and who knows or reasonably believes that the officer is attempting to arrest him or her, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, and may, in the discretion of the court, be confined in the county or regional jail not more than one year.<sup>8</sup>

Obviously, the new specific criminal offense of fleeing remains a subsection of the general obstruction statute. The West Virginia Legislature could have created a new statute, but instead recognized the clear relationship between the offenses of fleeing and obstruction, and thus kept both offenses in the same section. Appellant recognizes that the relevant

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<sup>8</sup> W. Va. Code § 61-5-17 (1999) subsections (c) through (g) also deal with the offense of fleeing; however, each of these offenses require that the perpetrator use a vehicle. These subsections are inapplicable to Sanders because, as clearly stated in the Presentence Investigation Report, Sanders did not use of vehicle to flee from law enforcement.

inquiry, under *Harris*, supra, is whether the offenses of fleeing and resisting arrest have elements that resemble each other in many aspects; however, the fact that these two offenses were once a single offense and, when separated, remained together as subsections of the same code section, demonstrates the West Virginia Legislature's intentions and should be considered when the Court compares the elements of the two offenses.

In accordance with W. Va. Code § 61-5-17(b) (1999), the elements of fleeing from a law enforcement officer, by means other than a vehicle, are:

- (1) the act of fleeing or attempting to flee;
- (2) from a law enforcement officer acting in his official capacity who is attempting to make an arrest; and
- (3) when the individual who commits the act of fleeing or attempts to flee knows or reasonably believes the law enforcement officer is attempting to make an arrest.

These are the essential elements that must be compared with the essential elements of resisting arrest, which were previously delineated, to determine whether fleeing is similar to resisting arrest under U.S.S.G. § 4A1.2(c).

As previously stated, both resisting arrest and fleeing are addressed in W. Va. Code § 61-5-17(a) and (b) respectively and are found in Chapter 61, Article 5 of the West Virginia Code, which is dedicated to criminal offenses against public justice. Both crimes seek to protect the strong public interest in assuring that law enforcement officers are permitted to complete tasks

initiated as part of their official capacity. Thus, the key element of both resisting arrest and fleeing is that an individual has impeded a law enforcement officer acting in his official capacity from quickly completing a task designed to protect the public. If this element was missing from either offense, then the offense could not be found in Chapter 61, Article 5, as a necessary element of offenses contained in that Article is that an action be taken against the public interest and not just an individual. Consequently, the key element of each offense is identical between the offenses. The fact that both offenses share their most essential of the essential elements should be sufficient to satisfy the requirements of this Court's "elements test." However, the two offenses have other essential elements in common.

Both resisting arrest and fleeing require that an individual to take an action to impede a law enforcement officer from completing a task initiated in his official capacity. The only difference between the two offenses, as to this element, is that the offense of fleeing requires that the action be fleeing or attempting to flee, while resisting arrest does not describe a particular action. This slight difference connects W. Va. Code §61-5-17 (1999), to its historic predecessors. As previously stated, fleeing was once considered a form of hindering and obstruction, and thus prosecuted under the general obstruction statute. *Jarvis*, 172 W.Va. at 709, 310 S.E.2d at 470. On May

12, 2000, when Sanders was arrested for fleeing, there was a specific crime of fleeing; however, had the police not charged him with fleeing, they could have charged him with obstruction or hindering. As such, it is difficult to fathom how one could conclude that resisting arrest's element of taking an action is not essentially the same as fleeing's element of taking the action of fleeing because the State of West Virginia could alternatively charge someone who flees with obstruction. In addition, the elements are the same because both simply require an action be taken that affects a law enforcement officer acting in his official capacity.

Sanders has established that two of the three elements of resisting arrest and fleeing are essentially identical. *Harris, Id. at 854*, does not require that all elements need to be substantially similar. Instead, *Harris*, pursuant to the "elements test", requires that the elements be *nearly corresponding*. *Id.*, at 854. This position is further solidified by the United State Court of Appeals for the First Circuit, which noted that not all essential elements need to be in common. *United States v. Spaulding*, 339 F.3d 20, 22 (1<sup>st</sup> Cir. 2003). Therefore, it is sufficient that Sanders has established that two of the three elements of the offense of resisting arrest and fleeing are common for purposes of establishing that the two offenses are similar.

Furthermore, in *Harris, supra.*, this Court did not consider the penalties for the criminal offenses being compared because there were no similarities between the offenses in question. *Id.* at 855. That is not the situation in the instant case. Here the offenses have similarities; in fact, two of the three elements of each offense are essentially identical. Therefore, with the reasoning provided in *Harris*, this Court should consider the similarity between the penalties for resisting arrest and fleeing. The penalties for each offense are identical! The penalty for both offenses provides:

[An individual] is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, and may, in the discretion of the court, be confined in the county or regional jail not more than one year.

*See* W. Va. Code § 61-5-12(a) and (b) (1999). Consequently, when considering whether the offense of fleeing is similar to that of resisting arrest this Court should also consider that the penalties for both offenses are identical. The fact the two penalties are identical further strengthens Sanders' argument that he has met the *Harris*' "elements test."

In conclusion, U.S.S.G. § 4A1.2(c) requires, for the exclusion of an offense from one's criminal history, that one demonstrate that an offense is contained in the section's list of excludable criminal offenses, or is similar to

an excludable offense; establish that the punishment levied against the individual is below the limits set-forth in U.S.S.G. § 4A1.2(c)(1)(A); and establish that the offense is not similar to the instant offense. Sanders has established that fleeing is similar to resisting arrest, an offense listed in U.S.S.G. § 4A1.2(c)(1), in accordance with the requirements *Harris*' "elements test." Furthermore, Sanders has demonstrated that his seven day incarceration is less than the thirty days of incarceration and one year of probation limit set by U.S.S.G. § 4A1.2(c)(1)(A) to permit exclusion of offenses enumerated under U.S.S.G. § 4A1.2(c)(7). Finally, Sanders has demonstrated that his conviction for fleeing is not similar to the instant offense of distributing more than five grams of cocaine base. Consequently, the District Court clearly erred when assessing Sanders an additional criminal history point for his May 12, 2000, fleeing conviction because U.S.S.G. § 4A1.2(c) requires its exclusion.

**C. Hindering or Failure to Obey a Police Officer.**

As previously stated, Sanders asserts that his May 12, 2000, fleeing conviction in Huntington, West Virginia is similar to hindering or failure to obey a police officer, which is an offense that is excludable from a defendant's criminal history, pursuant to U.S.S.G. § 4A1.2(c).

The criminal offense of hindering is found in W. Va. Code § 61-5-17(a)(1999), which also contains the criminal offense of obstruction in all its forms, including resisting arrest. Therefore, the elements of both hindering and obstruction are identical and include:

- (1) an action taken;
- (2) that forcibly or illegally hinders or obstructs;
- (3) a law enforcement officer acting in his or her official capacity.

Further, the penalties for obstruction and hindering are identical. The fact that the elements and penalties of obstruction and hindering are identical necessitates that the analysis applied to comparing fleeing with obstruction will be the same analysis used to compare fleeing and hindering. As it would be redundant to repeat the same analysis; Sanders hereby adopts and incorporates by reference the analysis used to compare obstruction and fleeing for the comparison of hindering and obstruction. This identical analysis results in the conclusion that Sanders has complied with each of the three requirements provided in U.S.S.G. § 4A1.2(c) for the exclusion of his May 12, 2000, fleeing conviction from his criminal history.

### **CONCLUSION**

In the instant case, the District Court erred by refusing to sustain Sanders' objection to the inclusion of his May 12, 2000, fleeing conviction

in this criminal history, thereby elevating Sanders' criminal history category from Level III to Level IV. Sanders established that his fleeing conviction, for the reasons articulated above, is similar to the offenses of resisting arrest and hindering, which are offenses that are to be excluded from a defendant's criminal history in accordance with U.S.S.G. § 4A1.2(c). Accordingly, Sanders respectfully requests that this Court remand this case to the trial court for resentencing with instructions that Sanders be sentenced in accordance with U.S.S.G. § 4A1.2(c).

**REQUEST FOR ORAL ARGUMENT**

Appellant respectfully requests that this appeal be set for oral argument.

**WARREN SANDERS**

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