

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION**

**THE UNITED STATES OF AMERICA**

**v.**

**JOHN DARRYL MOORE**

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**Criminal No. AMD-99-0177**

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**MOTION BY DEFENDANT FOR PRESENTENCE  
DETERMINATION THAT MAXIMUM SENTENCE CANNOT  
EXCEED TEN YEARS IMPRISONMENT, OR IN THE  
ALTERNATIVE, MOTION TO WITHDRAW GUILTY PLEA**

Defendant John Darryl Moore, by and through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Michael T. CitaraManis, Assistant Federal Public Defender, respectfully asks that this Court find that the maximum term of imprisonment which can be imposed herein at sentencing is ten (10) years imprisonment, or in the alternative, to withdraw his guilty plea. In support of this request, undersigned defense counsel submits the following:

**I. INTRODUCTION**

In the instant case, John Darryl Moore was indicted on charges of possessing a firearm and possessing ammunition after having previously been convicted of a felony, in violation of 18 U.S.C. §922(g)(1). On December 7, 2000, Moore pleaded guilty before this Court to Count Two, charging him with possession of the ammunition. In the plea agreement with the government, government counsel, undersigned counsel, and Moore agreed that the maximum term of imprisonment which could be imposed was ten (10) years imprisonment. At Moore's re-arraignment and guilty plea, this Court similarly advised Moore in reviewing with him the

maximum penalties he faced.

Subsequently, the pre-sentence investigation by the United States Probation Office (“Probation”) revealed that Moore qualifies as an “Armed Career Criminal” (“ACC”) under 18 U.S.C. §924(e), by virtue of prior convictions for possession with intent to distribute drugs, assault, and battery.

In entering into the plea agreement, undersigned counsel and counsel for the government were under the impression that the drug conviction was for simple possession which would not qualify as a predicate conviction for ACC purposes. This impression was based on a pre-plea criminal history report prepared by Probation. Based on the information now contained in the pre-sentence report (“PSR”), this initial information was incorrect. In the PSR, Probation concludes that Moore has the requisite predicate convictions to qualify for the enhanced penalty under §924(e).<sup>1</sup>

Therefore, if subjected to the enhancement provided for under §924(e), Moore is facing a statutorily mandated fifteen (15) prison term and a sentence within the range ascertained under

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<sup>1</sup>

The (“PSR”) lists four qualifying convictions: (1) 1983 battery; (2) 1984 assault; (3) 1994 battery; and (4) 1995 possession with intent to distribute heroin. Because assault or battery can be committed with or without force, a determination of whether Moore’s convictions in the assault and battery cases qualify as “violent felony” convictions under §924(e) depends on a review of the charging documents in those cases. *See* The pre-plea investigation by Probation revealed that the court file in the 1983 battery case had been stripped of its contents, including the charging documents. In view of this fact, undersigned counsel and counsel for the government agreed that the 1983 battery conviction could not be shown to be a “violent felony” and thus cannot qualify as a predicate conviction under §924(e). Undersigned counsel therefore objects to this conviction being counted for ACC purposes. This leaves the 1984 assault and 1994 battery convictions, for which charging documents are available, and the 1995 heroin conviction, the confusion surrounding which has precipitated the instant motion.

the applicable Sentencing Guideline provisions of U.S.S.G. §4B1.4, instead of a maximum ten (10) year term as previously thought.

However, for the reasons expressed below, undersigned counsel submits that Moore cannot be sentenced to more than the ten (10) year term. Counsel therefore asks that sentencing proceed at which this Court find it cannot sentence Moore to a term of imprisonment exceeding ten (10) years.

In the event this Court disagrees, then in the alternative, Moore, through undersigned counsel, asks that he be allowed to withdraw his guilty plea.

## **II. ARGUMENT**

### **A. UNDER *Apprendi v. New Jersey*, 530 U.S. 466 (2000) , MOORE CANNOT BE SENTENCED TO MORE THAN TEN YEARS IMPRISONMENT.**

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court ruled that any factor which results in a mandatory minimum sentence of imprisonment greater than the maximum sentence which otherwise would apply, must be alleged in the indictment as an element of the offense. Unquestionably, that is the case in the context of the ACC provisions of §924(e).

To date, there has been no published Fourth Circuit decision on point. There has been one unpublished Fourth Circuit opinion finding that *Apprendi* is not applicable to ACC cases. See *United States v. Jones*, 2001 WL 123665 (Feb. 14, 2001), relying on *United States v. Dorris*, 236 F.3d 582 (10<sup>th</sup> Cir. 2000).

However, this Court is free to make the finding it sees as correct and undersigned counsel submits that the rational expressed in *Dorris* and relied on in *Jones* should not be followed.

The reason is that the Supreme Court's previous ruling in *Almendarez-Torres v. United*

*States*, 523 U.S. 224 (1998) has effectively been overruled by *Apprendi*, or at a minimum, the continued vitality of *Almendarez-Torres* is now questionable in light of *Apprendi*.

In *Almendarez-Torres*, the Supreme Court held that prior felony convictions need not be pled and proven as elements of an offense in order for the sentencing court to impose an “enhanced” penalty greater than the otherwise applicable statutory maximum penalty.

However, *Almendarez-Torres* was decided by a bare 5-4 majority and in Justice Thomas’ concurring opinion in *Apprendi*, Justice Thomas notes that he was in error in joining the majority in the *Almendarez-Torres* opinion.

Secondly, although as pointed out in *Dorris*, *Apprendi* carved out an “exception” when it comes to previous convictions, more than a mere conviction needs to be proven

**B. AN ENHANCED PENALTY CANNOT BE IMPOSED IN THE ABSENCE OF GOVERNMENT NOTICE OF ITS INTENTION TO SEEK AN ENHANCED PENALTY AND THE GOVERNMENT SUSTAINING ITS BURDEN OF PROOF.**

If this Court finds that *Apprendi* is inapplicable, the maximum term of imprisonment it can impose in this case is nonetheless ten (10) years for the reason that the government has chosen not to seek the enhanced penalty under §924(e).

The Fourth Circuit Court of Appeals has ruled (pre-*Apprendi*) that there is no requirement that the government provide “formal notice” of any prior convictions on which it will rely in seeking an enhanced penalty under §924(e). *United States v. O’Neal*, 180 F.3d 115, 125 (4<sup>th</sup> Cir. 1999).

However, it is the government’s prerogative in the first instance whether to seek the enhanced penalty. As the Fourth Circuit in *O’Neal* also pointed out, “a defendant does have a

right to adequate notice of *the government's plan* to seek such an enhancement [citations omitted].” *Id.* (Emphasis added.) *Also see United States v. Mobley*, 40 F.3d 688, 691 (4<sup>th</sup> Cir. 1994) (referring to the government “having provided proper notice” of its intent to invoke §924(e)).

At least one other Circuit Courts of Appeal has adopted or approved of the notion that it is up to the government to invoke §924(e). *See United States v. Barney*, 955 F.2d 635, 639 (10<sup>th</sup> Cir. 1992) (“To the extent that the district court considered convictions of Mr. Barney not noticed and only mentioned in the presentence report, it erred.”); *United States v. Jackson*, 903 F.2d 1313, 1321 (10<sup>th</sup> Cir. 1990) (“In this case, Jackson, by virtue of a very favorable plea arrangement, avoided being charged as a career criminal under 18 U.S.C. §924(e)(1).”). *Compare United States v. Anderson*, 921 F.2d 335, 337, n.2 (“While it is true that Jackson could apparently have been charged and sentenced as a career criminal under 18 U.S.C. §924(e)(1), and was not, that was part of a ‘very favorable plea arrangement’ between the defendant and the prosecutor. . . . Here, . . . there was no such plea arrangement. . .”). *Cf. United States v. Cobia*, 41 F.3d 1473 (11<sup>th</sup> Cir. 1995).

Because the government in this case is not seeking an enhanced penalty under §924(e) and has agreed as part of the plea agreement with Moore that the maximum term of imprisonment he faces is ten (10) years, ten years imprisonment is the maximum term this Court can impose.

**C. IF THIS COURT FINDS THAT MOORE IS SUBJECT TO THE ENHANCEMENT UNDER §924(e), MOORE MUST BE GIVEN THE OPPORTUNITY TO WITHDRAW HIS GUILTY PLEA.**

If this Court disagrees with undersigned counsel and finds that Moore is subject to the enhanced penalty under §924(e), then he must be given the opportunity to withdraw his guilty

plea.

Under Federal Rule of Criminal Procedure 11(c), a defendant pleading guilty must be informed, amongst other things, of “the mandatory minimum penalty provided by law, if any, and the maximum penalty provided by law.”

The Fourth Circuit has made clear that when a defendant is not properly informed of the possible penalties he faces and his decision to plead guilty was thus impaired, he must be given the opportunity to withdraw his guilty plea. *See United States v. Goins*, 51 F.3d 400, 401-03 (4<sup>th</sup> Cir. 1995) (where a mandatory minimum sentence under 21 U.S.C. §841 was not mentioned in the indictment, plea agreement or plea proceeding, sentence vacated and case remanded so defendant could be given an opportunity to replead); *United States v. Feurtado*, 191 F.3d 420, 427-28 (4<sup>th</sup> Cir. ) (plain error found where defendants were not advised that they faced a five-year term of supervised release in addition to the sentence of imprisonment stipulated in plea agreement); *United States v. Thorne*, 153 F.3d 130, 133 (4<sup>th</sup> Cir. 1998) (similar ruling as in *Feurtado*). *Also see* unpublished opinion in pre-*Apprendi* case of *United States v. Rodriguez*, 205 F.3d 1336 (Table), 2000 WL 227421 (4<sup>th</sup> Cir. 2000) (where defendant was not advised of minimum fifteen (15) year prison term under §924(e), judgment vacated and case remanded so defendant could plead anew).

At a minimum, such an opportunity should be also given Moore.

### **III. CONCLUSION**

For the foregoing reasons, undersigned counsel asks this Court to find that defendant herein, John Darryl Moore, faces a maximum term of imprisonment of ten (10) years, and if this Court disagrees, then in the alternative, Moore asks that he be allowed to withdraw his guilty

plea.

Respectfully submitted,  
JAMES WYDA  
Federal Public Defender

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of July 2000, a copy of the foregoing Motion For Preparation of A Pre-Plea Presentence Report was delivered via courthouse courier to Andrew G. W. Norman, Assistant United States Attorney, 101 W. Lombard Street, 7<sup>th</sup> Floor, Baltimore, Maryland, and to the United States Probation Office, 250 W. Pratt Street, Suite 400, Baltimore, Maryland.

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MICHAEL T. CITARAMANIS  
Assistant Federal Public Defender

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**ORDER**

Upon consideration of the defendant's motion for an order authorizing the United States Probation Office to prepare a pre-plea presentence report. It is this \_\_\_\_\_ day of July 2000, ORDERED, that the motion be, and hereby is, GRANTED; and it is further ORDERED, that the United States Probation Office is authorized and directed to prepare a pre-plea presentence report for defendant John Darryl Moore, limited to Mr. Moore's criminal record.

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ANDRE M. DAVIS  
UNITED STATES DISTRICT JUDGE

cc: AUSA Andrew G. W. Norman  
AFPD Michael T. CitaraManis  
United States Probation Office

**CERTIFICATE OF SERVICE**

\_\_\_\_\_ I HEREBY CERTIFY that on this 16th day of June 2000, a copy of the foregoing Motion  
to Suppress Evidence was

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MICHAEL T. CITARAMANIS  
Assistant Federal Public Defender