IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

*

THE UNITED STATES OF AMERICA *

v. * Criminal No.

BH *

* * * * *

DEFENDANT'S SENTENCING MEMORANDUM
AND MOTION FOR DOWNWARD DEPARTURE

The Defendant, through his attorneys, James K. Bredar, Federal Public Defender for the District of Maryland, and Gary W. Christopher, Assistant Federal Public Defender, respectfully submits this memorandum with respect to his sentencing scheduled for January 9, 1998. For the reasons stated below, counsel for Mr. H moves for a downward departure pursuant to USSG §5K2.0.

INTRODUCTION AND BACKGROUND

On October 17, 1997, Mr. H entered a plea of guilty to Counts Two charging extortion in violation of 18 U.S.C. § 1951. The plea was entered pursuant to an agreement wherein the parties stipulated to a base offense level of 18 pursuant to USSG §2B3.2(a), an upward adjustment of two levels pursuant to §2B3.2(b)(1), an upward adjustment of one level pursuant to §2B3.2(b)(2), and a downward adjustment of three levels pursuant to §3E1.1, yielding an adjusted (predeparture) offense level of 18. The parties stipulated to a statement of facts and further agreed for purposes of sentencing that it "was not foreseeable to [Mr. H] that [the codefendant] R's conduct would be as extreme as it was and, specifically, that R would threaten the families of Mr. D and Mr. C." The government agreed to recommend that the Court impose a

sentence at the low end of the applicable guideline range.

Mr. H has reviewed the Presentence Report with his attorney and has no objection to any of the findings or factual averments contained within it, other than as set forth in counsel's December 22, 1997, letter to U.S. Probation Officer Hannigan (attached hereto as Appendix C). He agrees with the findings of the U.S. Probation Officer that the total (pre-departure) offense level is 18 (¶ 28); that Mr. H should be scored at Criminal History Category I (¶ 30); and that the guideline imprisonment range is 27-33 months (¶ 33).

The purpose of this memorandum is to summarize relevant facts which were not set forth in the presentence report and which will be the subject of testimony at sentencing, to set forth defendant's argument in support of its motion for downward departure from the adjusted offense level, and to bring to the Court's attention other pertinent information about Mr. H's background and character. In the latter connection, Mr. H attaches as Appendix B to this memorandum letters from several individuals who are familiar with Mr. H's character. Documents relating to Mr. H's contractual relationship with John E. D and Associates are attached as Appendix A.

SUMMARY OF ADDITIONAL FACTS

The conduct which gave rise to the charges in this case was the culmination of a business relationship between Mr. H and John E. D and Associates, Inc. ("JEDA"). JEDA secured a contract with Kindercare, Inc., to construct two facilities during 1996 -- one in Owings Mills, Maryland, and, thereafter, another in Falls Church, Virginia. On behalf of ANDCOR, Inc. (a company he owned with his brother), Mr. H submitted bids to provide labor and materials for ceiling and wall installations and painting at the two projects. (A1-A2). Their bid was accepted by JEDA. A contract was drawn setting a contract of price of $71,680 for the Owings Mills

project and $56,320 for the Fairfax project. (Apx. A3-A10). The anticipated start date for ANDCOR's work on the project was January 1996. Mr. H anticipated that both projects would be completed by the end of May or early June, 1996. This timing was critical, because ANDCOR was scheduled to begin an unrelated project at the West Virginia School of Osteopathic Medicine in June of 1996. The West Virginia project was regulated by the Davis Bacon Act, and advancing the necessary funds for the projects's payroll and materials would require all of ANDCOR's available finances.

For reasons unknown, the JEDA/Kindercare projects were delayed. When it became clear that the site would not be available to ANDCOR until after June 1, 1996, Mr. H advised Douglas C of JEDA that ANDCOR could not do the projects on the terms called for by the contract because of the conflict with its West Virginia project. Mr. H's letter of May 6, 1996, stated:

> "Due to the fact that we have another project starting at about the same time as the two Kindercares, and due to the fact that we must pay prevailing wage scale on the other job, we do not have the resources available to finance these projects simultaneously. Your company would need to have available and pay upon demand to ANDCOR, approximately $10,000 per week per contract." [Apx. A11].

Mr. C prevailed upon Mr. H not to back out. After some negotiating, JEDA agreed that if ANDCOR would do both projects, JEDA would allow ANDCOR to draw $5000 per week to cover payroll expenses and that it could charge all necessary materials to JEDA accounts, with the understanding that the materials charges would be "backcharged" against the contract prices. The balances due to ANDCOR on the projects would be paid according to the original contracts.

Over the course of Mr. H's performance of the contract, several change orders were

agreed upon adjusting the contract price, including orders dated June 13, 1996 (Apx. A14) and September 11, 1996 (Apx. A16) providing for increases of $6700 and $6848 in the contract price of the Owings Mills and Fairfax projects, respectively.

In accordance with that arrangement, ANDCOR completed its work satisfactorily at the Owings Mills project in August of 1996 and commenced work shortly thereafter on the Fairfax project. In accordance with the arrangement, materials were charged to JEDA accounts against the contract price, and JEDA made regular payments of $5000.

On or about October 29, 1996, however, Mr. C informed Mr. H that there would be no more payments. Mr. C explained that JEDA and Kindercare were going to court and that ANDCOR could expect no further payments until JEDA was paid by Kindercare. Mr. H responded that ANDCOR could not advance the labor costs and insisted that JEDA honor its promise to make the weekly payments. When Mr. C refused, Mr. H notified JEDA in writing as follows:

> "I need to inform you that we are unable to complete the job at Alexandria at this time. After checking with our bank, we have discovered that it will take two weeks to initiate a new credit line for us for this project. At the current time we are unable to staff this project without weekly draws, due to the fact that we have a large union scale project running concurrently. We will however, be able to resume after our credit line is processed." (Apx. A17).

JEDA responded that no delay would be tolerated and that if ANDCOR chose not to continue the job, they should leave the site. Mr. H therefore removed his workers from the project. According to the schedule of values submitted by Mr. H, which was never disputed, ANDCOR's portion of the Fairfax project was 100% completed at that time, with the exception of the vinyl wall and playground installations, which were 90% complete, and the trim carpentry, which was

95% complete. (Apx. A20).

Mr. H submitted invoices in November and December of 1996 and on January 28, 1997, for the unpaid contract amounts, less appropriate backcharges for materials and the portion of the Fairfax project left unfinished. The latter invoice is attached and details the basis for ANDCOR's demand for payment in the amount of $18,246 on the Owings Mills project and $17,717 on the Fairfax project. (Apx. A18-A20). That mailing also included a demand for payment of $1650 for certain extras which had been requested and approved by JEDA late in the project but had not been the subject of a change order. (Apx. A21).

Mr. H spoke with Mr. C thereafter and demanded payment of the balance due ANDCOR under the contract for the work completed. Mr. C responded that Mr. H would never be paid any portion of the balance due.

When Mr. D contacted the government in the wake of GR's threats to him and Mr. C, he provided the government with a schedule indicating that JEDA owed ANDCOR $2227.01 in connection with the two projects. (Apx. A22). Mr. H asserts that Mr. D's schedule

> omits $970 due in connection with a kitchen installation at Owings Mills which was added onto the original contract;
>
> omits $1270 for finishing exterior doors at Owings Mills (the original contract having contemplated installation of prefinished doors); (Apx. A-1)
>
> omits $6700 for a change order fully approved by JEDA reflecting material and labor increases caused by delay on the Owings Mills project; (Apx.
>
> omits $335 for a change order approved by JEDA to fix a window return at Owings Mills; (Apx. A25)
>
> omits $1830 inexplicably subtracted by JEDA from an approved change order for $6848 resulting in labor and materials increases caused by delay on the Fairfax project; (Apx. A16)

omits $2309 for a change order authorized by JEDA on May 31, 1996, regarding a plexiglass wall and bathrooms at the Fairfax project; (Apx. A26)

omits $1650 for the extras billed by ANDCOR on January 28, 1997, for certain extras requested by JEDA for the Fairfax project and installed but not included in a formal change order; (Apx. A21)

includes backcharges for work at Fairfax (pipe installation, FRP repair, etc.) which was not called for by ANDCOR's subcontract;

includes inappropriately high backcharges for work completed by other subcontractors after ANDCOR left the job;

includes as a backcharge the amount wired to Mr. H after GR's threat, for which Mr. H will be required to pay restitution.

After reviewing all of the data supplied by the government, Mr. H believes that the balance due ANDCOR from JEDA is $9325 for the Owings Mills project and $12,466 for the Fairfax project.

I. ARGUMENT IN SUPPORT OF DOWNWARD DEPARTURE

IN SEVERAL RESPECTS, MR. H'S CONDUCT WAS OUTSIDE THE "HEARTLAND" OF EXTORTIONATE CONDUCT CONTEMPLATED BY THE SENTENCING COMMISSION.

The U.S. Sentencing Commission made clear that it "intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." U.S.S.G. Ch.1, Pt.A(4)(b). In this case, Mr. H acknowledges that U.S.S.G. 2B3.2 "linguistically applies" to his case and dictates a base offense level of 18. In many respects, however, this was far from a typical Hobbs Act extortion case. There was no racketeering aspect of the sort which typically attends a Hobbs Act pRcution; the

demand, though improper and criminal in its effectuation, was for money which was legitimately due; and Mr. H's connection with the unforeseeable excesses of the principal actor, GR, was substantially attenuated. These and related factors in combination remove this case from the heartland of extortion cases and justifies a substantial downward departure.

A. The Money Demanded by Mr. H Was Legitimately Due Him.

While Mr. H in no way suggests that his resort to criminal means was legally justified, the fact that JEDA breached the agreement by unilaterally suspending payments to Mr. H's company sheds a moral light on Mr. H's efforts to secure payment that is not shared by the heartland violator of § 1951. Mr. H was wrong to take the steps he did; by the same token, however, fairness dictates that the wilful and provocative conduct of Mr. D and Mr. C in repudiating its obligations to Mr. H must figure as a sentencing factor.

The Eleventh Circuit encounter a very similar situation in *United States v. Dailey*, 24 F.3d 1323 (11th Cir. 1994), where the defendant was convicted of violating 18 U.S.C. § 1952 by threatening a business associate that he would "make sure you never walk again" if the victim did not repay money he owed the defendant. The Eleventh Circuit affirmed the conviction, but acknowledged that the victim's defrauding the defendant of tens of thousands of dollars "contributed significantly to provoking [the] offense" and accordingly upheld the downward departure granted by the District Court. *Id*. 15 1327. The parallels between this case and *Dailey* are plain. The heartland extortion case involves the offender who uses threats to acquire what does not belong to him. This is not such a case, and the distinction should be reflected in an appropriate downward departure.

B. The Limited Harm Actually Foreseen by Mr. H in Retaining GR's Services Was

Far Less Than is Present in Typical Hobbs Act Extortion PRcutions.

Mr. H retained GR to collect what he regarded as a legitimate debt owed by J E D & Associates. He was wrong to do so. Bearing in mind that a Hobbs Act pRcution will lie even where the threats involved are "subtle and indirect," *U.S. v. Blanton*, 793 F.2d 1553 (11th Cir. 1986), *cert. denied* 479 U.S. 1021 (1986), Mr. H acknowledges that his conduct crossed the line and that his conduct was criminal. It is critical to recall, however, that Mr. H neither anticipated nor condoned the full extent of GR's conduct or the threats as they were ultimately conveyed. As the parties have stipulated:

> "Mr. H explicitly confirms that he hired GR to collect what he alleges to have been a legitimate debt from the principals of John E. D Associates, Inc. He admits that, given all of the circumstances, it was objectively foreseeable to him that R's methods might include R's wrongful use of fear or threatened force, and therefore that those methods would be extortionate and a violation of 18 U.S.C. § 1951. What was not foreseeable to him, however, was that R's conduct would be as extreme as it was and, specifically, that R would threaten the families of Mr. D and Mr. C." [Letter of Gary Christopher to Thomas DiBiagio, Esquire, dated September 23, 1997].

But for Mr. R's terrifying escalation of this offense, it is conjectural whether federal charges would have resulted at all. Moreover, once he learned the nature of the threats made by Mr. R, Mr. H prevailed upon him to stop. In enacting the Hobbs Act, 18 U.S.C. §1951, Congress was plainly prompted by levels of misconduct higher than what Mr. H contemplated. Indeed, the principal motive of Congress was to curb racketeering, [1] which does not remotely figure in this

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[1] The enactment was "broadly conceived of as part of a legislative plan to deter professional gangsterism." *Carbo v. United States*, 314 F.2d 718, 732, n.10, *cert. denied* 377 U.S. 1625 (1963). See S. Rep. No. 1440, 73d Congress, 2d Session. Though racketeering is not a required element of a Hobbs Act offense, *United States v. Culbert*, 435 U.S. 371 (1978), the Hobbs Act itself was a restatement of the Anti-Racketeering Act of 1934, and its framers repeatedly referred in their debates to "racketeers" and "racketeering." See, e.g. 91 Cong.Rec. 11906 (remarks of Rep.Robinson); *id.* at 11908 (remarks of Rep. Andersen).

case.

Under the United States Sentencing Guidelines, offenders involved in jointly undertaken criminal activity are to be punished for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." USSG §1B1.3(a)(1)(B). Given the government's own understanding of this offense as one where the conduct foreseen was substantially less serious than the conduct committed by the principal, it follows that an appropriate downward departure is called for.

C. The Foregoing Factors Justify a Downward Departure of Six Offense Levels.

In determining the extent of a departure, the Court's duty is to "link the extent of departure to the structure of the guidelines." *United States v. Ferra*, 900 F.2d 1057, 1062 (7th Cir. 1990). The defense suggests that a rational Guidelines-context analysis of Mr. H's culpability marks this case for a downward departure of at least six levels.

That the offense was provoked by JEDA's cavalier repudiation of a legitimate debt implicates the loss components of USSG §3B3.2, which governs this case. A threat accompanying a demand for payment of a *legitimate* debt is akin in many respects to the sort of threat covered by USSG §2A6.1, which carries a base offense level of 12 -- six levels lower than §2B3.2. Even more clearly, the one-level enhancement under §2B3.2(b)(2) relating to the amount of the demand made the offender is intended to target illegitimate demands, and therefore has little relevance to a case where the amount demanded was legitimately due. It follows that a downward departure of four levels would appropriately reflect the difference between this case and a heartland case where genuine loss to the victim is an appropriate aggravating circumstance.

That Mr. H did not subjectively foresee or anticipate Mr. R's excesses should be reflected

by no less than a two-level departure. Indeed, though the two-level §2B3.2(b)(2) enhancement required arising from GR's threat to kill Mr. D and his family literally applies to Mr. H's case, it must be observed that Mr. H gave no such instructions to Mr. R, and nothing in the agreed statement of facts suggests to the contrary. In that and other respects, Mr. H's conduct was simply not as serious as that of Mr. R. A two-level departure would credit him for his lesser culpability, while still punishing him for that harm that was inflicted.

II. GUIDELINE LEVEL COMPUTATION

The defense suggests the following guideline level computation.

Count Two

Adjusted (pre-departure) offense level per PSR ¶ 27. 18

Departure relating to the legitimacy of the amount demanded. . . . . -4

Departure relating to lack of foreseeability of R's conduct. . . . . -2

Final offense level. 12

Offense level 12 at Criminal History Category I yields a sentencing range of 10-16 months. Pursuant to USSG §5C1.1(D)(2), the defense recommends a sentence of imprisonment for five months, to be followed by a term of supervised release with a condition of home detention for an additional five months.

III. ADDITIONAL RECOMMENDATIONS RELATIVE TO CONFINEMENT AND DESIGNATION

For reasons which will be addressed at the sentencing hearing in this case, the Defense requests that the Court in its judgment and commitment make the following recommendations to the United States Bureau of Prisons:

1. That Mr. H be permitted by the Court to surrender voluntarily for service of his sentence.

2. That the Court affirmatively recommend that Mr. H be designated to a minimum security Federal Prison Camp. In this connection, counsel's review of the Bureau of Prisons Security Designation and Custody Classification Manual suggests that Mr. H would probably be placed in a minimum security camp in any event but for the fact that extortion is classified as a crime of violence, which places it in the "greatest severity" range and therefore constitutes a "public safety factor" precluding his placement in minimum security facility unless the public safety factor public safety factor is waived by the Bureau. The recommendation requested will likely have great influence on whether the public safety factor will be waived.

3. That the Court specifically recommend placement of Mr. H at the Federal Prison Camp at El Reno, Oklahoma, where he will be close to his wife and child, who will live with her parents in Sand Springs, Oklahoma.

CONCLUSION

The defense suggests that imposition of the sentence recommended would be "sufficient, but not greater than necessary, to comply with the purposes [of federal sentencing]" 18 U.S.C. § 3553(a).

Respectfully submitted,

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Federal Public Defender

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th D of January, 1998, a copy of the foregoing Motion and Memorandum was delivered to Thomas M. DiBiagio, Esquire, Assistant United States Attorney, 6625 United States Courthouse, 101 W. Lombard Street, Baltimore, Maryland 2l20l and to John W. Hannigan, III, U.S. Probation Officer.

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GARY W. CHRISTOPHER
Assistant Federal Defender