IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA *

v. **Cr. No. MJG-95-0182**

WB *

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MEMORANDUM IN AID OF SENTENCING

The Defendant, WB, through counsel, James K. Bredar, Federal Defender for the District of Maryland, and Kathryn R. Frey, Assistant Federal Public Defender, submits this memorandum to aid the Court in sentencing.

Background

Mr. B. entered a plea of guilty to a one-count information charging him with bank robbery pursuant to a written plea agreement. The plea agreement provides that the defense may request a downward departure. See Plea Agreement par. 4(a)2. The agreement also provides that the government will recommend a sentence at the low end of the guideline range found applicable by this Court. See Plea Agreement par. 5(a).

The defense does not dispute the probation officer's guideline calculations summarized in paragraph 82 of the Presentence Report (hereinafter PSR) which deem Mr. B. eligible for the Career Offender enhancement in USSG 4B1.1, thus increasing his offense level from a 25 to a 29 (after the stipulated reduction for acceptance of responsibility) and increasing his guideline range from 110-137 months to 151-188 months.

However, the defense requests a downward departure on two grounds: First, the career

offender enhancement places Mr. B. in a criminal history category and offense level which over-represent both his criminal history and his likelihood of recidivism. Therefore, pursuant to USSG 4A1.3, the defense seeks a four level downward departure from offense level 29 to level 25. Second, the defense requests a further one point reduction in offense level from 25 to a 24 based on Mr. B.'s extraordinary acceptance of responsibility pursuant to 18 U.S.C. § 3553(b), USSG 5K2.0, and USSG 3E1.1(b). Alternatively, the combination of both grounds warrants a downward departure. The defense requests a total downward departure of five offense levels, from a level 29 to a level 24. The guideline range based on a level 24 and a category VI is 100-125 months. The defense requests a sentence of 100 months. Reasons in support of these requested departures are set forth below.

I. A Downward Departure is Warranted Based on Over-Representation of Criminal History

It is well settled that courts have the authority to downwardly depart if the Criminal History Category overstates the defendant's criminal past and likelihood of recidivism. Section 4A1.3 reads in part that "… [T]here may be cases where the court concludes that a defendant's Criminal History Category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes …. The Court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same Criminal History Category, and therefore consider a downward departure from the guidelines." See United States v. Adkins, 937 F.2d 947 (4th Cir. 1991). A departure may be made either from criminal history or the offense level category. United States v. Shoupe, 35 F.3d 835, 836 (3d Cir. 1994). As in Shoupe, the over-representation in this case affects Mr.

B.'s offense level by increasing it four points from a 25 to a 29. Pursuant to USSG 4A1.3, the defense requests a four point reduction in Mr. B.'s offense level from a 29 to a 25.

Mr. B. has two qualifying predicate convictions: a 1986 burglary (PSR paragraph 69) and a 1986 robbery (PSR paragraph 71). The two predicate convictions occurred almost ten years ago in 1986. The burglary (paragraph 69) occurred on March 13, 1986 and the robbery (paragraph 71) occurred on July 25, 1986. These two convictions result in a four level increase in Mr. B.'s offense level. A four level increase translates into an additional 3 years and 5 months incarceration. Neither conviction merits this severe increase.

a. The two predicate convictions occurred nine years ago when Mr. B. was 18 and 19 years old, and the court originally imposed suspended sentences of incarceration for each.

Nine years ago Mr. B. was convicted of burglary. See PSR par. 69. He did not receive a sentence of incarceration. Instead, the Court sentenced him to three years' imprisonment, 3 years' suspended, 3 years' probation. Mr. B. violated his probation and therefore receives 3 criminal history points.

A few months after the burglary, Mr. B. committed and was subsequently convicted of a robbery. See PSR par 71. The court determined that the case did not warrant incarceration. Instead, it imposed a two year sentence of incarceration, all suspended, 18 months' probation. Mr. B. receives only 1 criminal history point for this conviction. The robbery occurred when Mr. B. took $185.00 from a man in a McDonald's parking lot. He did not use a weapon to commit the robbery. No one was hurt.

i. Remoteness

A downward departure for over-representation is appropriate where a qualifying prior

conviction significantly pre-dates the present offense. See United States v. Fletcher, 15 F.3d 553 (6th Cir. 1994) (priors which occurred in 1976 and 1985 were so remote from present bank robbery offense thereby justifying a downward departure from career offender status); United States v. Senior, 935 F.2d 149 (8th Cir. 1991) (remote nature of priors factor to consider in determining downward departure from career offender status); United States v. John Hinman, No. N-89-36 (D. Conn. 1989) (prior convictions occurred eight years and nine and one-half years before the underlying offense). In each of these cases, the courts found that the relative age of the qualifying predicates distorted the seriousness of the defendants' criminal histories. These courts downwardly departed under their authority pursuant to U.S.S.G. § 4A1.3 to correct the over-representation. Application of these cases to the present case which involves prior convictions occurring nine years ago, justifies the requested downward departure.

ii. Age and Family Structure

Another factor warranting a downward departure is the defendant's age at the time of the prior conduct. A defendant's youth at the time of the prior conviction may justify a downward departure. United States v. Brown, 985 F.2d 478, 481 (9th Cir. 1993); see also United States v. Shoupe, 988 F.2d 440 (3d Cir. 1993) (age and immaturity at time of prior offense a factor to consider in determining whether to downwardly depart); United States v. Barry Miller, No. JFM-92-0105 (D. Md. October 2, 1992) (departure from career offender status where prior rape conviction occurred when defendant was quite young and where other mitigating circumstances were present); United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991) (age a factor in determining a downward departure under § 4A.13); United States v. Smith, 909 F.2d 1164 (8th

Cir. 1990), cert. denied, 498 U.S. 1032 (1991) (same).

Mr. B. was eighteen and nineteen when he was convicted of the two predicate offenses. In addition to his youth, at that time , and throughout his lifetime, Mr. B. was without any positive parental guidance or support. Mr. B. was conceived as the result of an act of prostitution. See PSR par. 87-92. His mother, Ms. Vicky Logan, was a drug addict and a prostitute with a criminal record including convictions for solicitation and manslaughter. Barely able to care for herself, it is not surprising that she could not offer Mr. B. structure or role modeling. Mr. B. was "raised" by a series of "caretakers," beginning with his mother, then his step-father, and then his step-father's mother, and ultimately, by himself. Mr. B. lived with his step-father for most of his youth. According to Mr. B., as confirmed by Mr. Goldsmith, State Probation Officer, Mr. B.'s stepfather "abandoned and neglected both Wesley and his brother." See PSR par. 90. Mr. B. grew up without any adult role model, with no parental expectations or limitations, and, as he describes, without love. Nonetheless, when not on drugs, he is a young man with a remarkable capacity for self-reflection, as described below in Section II.

On a more hopeful note, Mr. B.'s mother, Ms. L., has made attempts to salvage her relationship with Mr. B. since his arrest in this case. She has spoken with Mr. B. and with undersigned counsel in an attempt to offer encouragement. It is heartening that this new relationship may aid in Mr. B.'s rehabilitation and decrease the chances of his recidivism. Mr. B.'s family history, set forth in detail in the PSR at paragraphs 87-92, bears on Mr. B.'s conduct in both of the predicate offenses. He was born as a result of crime, he grew up in the world of crime, and sadly he practiced what he learned. Mr. B.'s age, maturity, and judgment, as they were affected by his lack of a family structure and his exposure to crime, are factors to consider

in determining whether there is over-representation in this case.

iii. Proximity of predicates

The proximity in time between prior convictions is a factor bearing on whether the Criminal History Category over-represents the seriousness of a defendant's criminal record. United States v. Shoupe, 988 F.2d 440 (3d Cir. 1993) (close time span between prior convictions appropriate factor supporting downward departure); United States v. Smith, 909 F.2d 1164, 1169 (8th Cir. 1990), cert. denied, 498 U.S. 1032 (1991) (burglary and drug conspiracy occurred within two months of each other); United States v. Garfield Smith, L-92-0425 (D.Md. May 26, 1993) (downward departure where seven prior convictions occurred during a two and one-half year period). In this case, the predicate convictions occurred within four months of each other and were of a similar nature, each involving theft of money and/or property. Accordingly, this factor also supports the downward departure request.

iv. Leniency of predicate conviction sentences

Imposition of a lenient sentence for a prior conviction is an important factor because it bears on the sentencing court's determination of the seriousness of that offense. United States v. Leonard Heath, No. S-92-0465 (D.Md. April 28, 1993) (over-representation in part because of the nature of the prior drug offenses as determined by the minimal sentence that was imposed by the state court); United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991) (downward departure from career offender status where priors were committed two months apart and defendant received concurrent sentences for both convictions); United States v. Senior, 935 F.2d 149, 151 (8th Cir. 1991). In the present case, both sentencing courts originally imposed lenient sentences. Mr. B. received a three year suspended sentence for the first offense and a two year suspended sentence

for the second offense. He received a sentence of probation for each offense.

A downward departure is warranted because these felony convictions significantly inflate Mr. B.'s guideline range. The degree to which these convictions affect his offense level is disproportionate to the weight they should be given. The remoteness of the prior convictions, Mr. B.'s age, maturity, and lack of a family structure at the time of the prior convictions, proximity of the predicates, and the lenient sentences imposed in each case all support a downward departure for over-representation.

b. Over-Representation based on minimal likelihood of recidivism.

A downward departure from career offender status is appropriate where it is unlikely that upon defendant's release he will commit more crimes. U.S.S.G. § 4A1.3; United States v. Garrett, 712 F.Supp 1327 (N.D. Ill. 1989), aff'd, 903 F.2d 1105 (7th Cir.), cert. denied, 111 S.Ct 272 (1990). Mr. B. is presently twenty-eight (28) years old. If he is sentenced as a career offender he will not be released, at minimum, for one hundred and fifty-one (151) months. At that time he will be 43 years old. Even if he is sentenced to 100 months, as the defense is requesting, he will be 36 years old upon his release. Studies show that recidivism significantly decreases as age increases. Garrett, 712 F.Supp at 1335, citing, FBI, Crime in the United States: Uniform Crime Reports (1987). In this particular case, in addition to Mr. B.'s age upon his release, chances for recidivism are also minimal as displayed by his actions and attitudes in connection with this case as detailed in Section II below and in Section I(a)ii (recent reconciliation between Mr. B. and his mother).

II. Mr. B. exhibited extraordinary acceptance of responsibility.

A court may grant a downward departure where acceptance of responsibility is exceptional.

United States v. Brown, 985 F.2d 478, 482 (9th Cir. 1993); United States v. Rogers, 972 F.2d 489 (2d Cir. 1992); United States v. Crumb, 902 F.2d 1337 (8th Cir. 1990) (voluntary surrender to authorities was a mitigating factor justifying departure); United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992) ("a defendant's ameliorative post-arrest conduct may justify a departure").

In this case, the parties agree that Mr. B. has earned a three point reduction from his offense level pursuant to U.S.S.G. 3E1.1(b). See PSI par. 4(a)2. However, in this case, Mr. B.'s acceptance of responsibility and immediate cooperation with law enforcement differed in kind and degree from the norm, thus warranting an additional one point reduction. 18 U.S.C. § 3553(b); USSG 5K2.0; see also USSG 5K1.16.

Mr. B.'s acceptance of responsibility was more extreme than the normal case. It began before his arrest when Mr. B. contacted Detective David Elliott of the Harford County Sheriff's Office for the purpose of turning himself in. Undersigned counsel interviewed Detective Elliott and he provided the following information. He recalled receiving four phone calls within a three to four day time frame, sometime between March 18 or 19 and March 21, 1995. (The last robbery was on 3/17/95). The first telephone message indicated that Mr. B. just wanted to talk. The second message said he wanted to talk to Elliott because he wanted "to turn himself in on some robberies." The third message said that "he was losing his mind and needed to turn himself in." The fourth and final message was similar to the third message. Det. Elliott was aware that the FBI was in charge of the case, therefore he tried to seek special permission from his supervisor in Harford County allowing him to arrest Mr. B. by himself. Mr. B. was arrested by the FBI before Det. Elliott got permission.

His acceptance continued once he was arrested. He waived his Miranda rights and

immediately cooperated with law enforcement by confessing to the four bank robberies he had committed. Mr. B. was candid. He came clean immediately. His candor substantially assisted law enforcement yet he has not received any benefit for his cooperation, whereas a person who exhibits the same amount of candor, and offers the same detail about a crime, where the information will assist in prosecuting another individual would receive a more lenient sentence for their cooperation.

Mr. B. further exhibited extraordinary acceptance of responsibility upon his initial encounter with the judicial system. Upon his arrest he was going through an acute withdrawal from heroin and cocaine. His addiction was so severe that on March 8, 1995, 13 days before his arrest, Mr. B. was treated at Johns Hopkins University Hospital for severe drug overdose. Upon his initial appearance he was advised that he was entitled to a detention hearing. After lengthy discussion with undersigned counsel, who strongly advised in favor of the hearing, Mr. B. maintained that he did not feel that he could handle his drug problem if he were released to anywhere short of an intensive, lock-down, in-patient drug program. He chose to remain detained, knowing his limitations, and already anxious to accept full responsibility for his conduct.

Next, Mr. B. insisted from the start that he did not want to contest the charges, that he had to face the consequences for his conduct. He wished to enter into a plea of guilty and cooperate with the government in all aspects of the case. Accordingly, he waived his right to be charged by a Grand-Jury Indictment, and instead agreed to be charged in an Information. This waiver saved the government and the judicial system both time and money. For all of these reasons, an additional one point downward departure is warranted to award Mr. B. for his decision to come forward from his March 1995 crime-spree and his history of crime.

III. Downward departure based on a combination of grounds.

If the court finds a downward departure is not warranted based on either over-representation or extraordinary acceptance of responsibility standing alone, a downward departure on the strength of a combination of both, and the additional grounds stated below is warranted. See, e.g., United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (downward departure based on combination of factors); United States v. Morris, 781 F.Supp. 428 (E.D. Va. 1991)(same); see also 5K2.0, comment. (backg'd.).

In conjunction with the independent grounds set forth above, the following factor serves as additional support for the requested departures.

A. Mr. B. faces "back up time" from State violations of probation.

Mr. B. was on probation for a April 1994 misdemeanor theft at the time he committed the present offense. See PSR par. 76. He faces 21 months' back up time which may run consecutive to the federal time. This factor, in conjunction with the other requested grounds, should be considered in determining the ultimate sentence, as it also supports a downward departure under U.S.S.G. § 5K2.0 and 18 U.S.C. § 3553(b).

CONCLUSION

For the reasons set forth herein, the defense requests that this Court grant a total downward departure of five offense levels, after the reduction for acceptance of responsibility, from a level 29 to a level 24. Four points are justified because of the over-representation of the career offender enhancement and the fifth point is justified by nature of Mr. B.'s extraordinary acceptance of responsibility. The resulting guideline range is 100 to 125, based on a Criminal

History Category VI and an offense level 24. The defense will request a sentence of 100 months.

Respectfully submitted,

JAMES K. BREDAR
Federal Public Defender

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Kathryn R. Frey
Assistant Federal Public Defender
1100 Nations Bank Ctr. Tower II
100 S. Charles Street
Baltimore, Maryland 21201
(410) 962-3962

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of August, 1995, a copy of the foregoing was mailed to John Gephart, Assistant United States Attorney, 604 U.S. Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201 and William Tavik, United States Probation Officer, Suite 400, 250 W. Pratt Street, Baltimore, MD 21201.

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Kathryn R. Frey
Assistant Federal Public Defender