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February 18, 1997

The Honorable Frederic N. Smalkin
United States District Judge
101 W. Lombard Street
Baltimore, Maryland 21201

Re: United States v. MT
Case No. S-xx-xxxx

Dear Judge Smalkin:

Sentencing in this case is scheduled for February 26, 1997 at 9:30 a.m. This sentencing letter sets forth Mr. T.'s objections and corrections to the presentence report (PSR) and his request for a downward departure which he will make only if the Court determines that he is an Armed Career Criminal pursuant to 18 U.S.C. §924(e). For the sake of convenience, this letter will track our objections as set forth in the Addendum to the final draft of the PSR.

I. Objections to Mr. T.'s Status as an Armed Career Criminal

Paragraphs 24-26 of the PSR indicate that Mr. T. qualifies for a sentencing enhancement pursuant to USSG §4B1.4 and 18 U.S.C. §924(e), the Armed Career Criminal Act (hereinafter "ACCA"), whereby he is subject to a base offense level 33 under the guidelines and a fifteen year mandatory minimum sentence under Title 18. In the probation officer's letter dated January 21, 1997, she indicated the following convictions qualify as predicates under the ACCA: paragraphs 38, 42, 44, 50, 58, and 60. See Attachment A. She orally advised that she also deemed the conviction in paragraph 52 a predicate. We object to the determination that Mr. T. is an Armed Career Criminal on the following grounds.

A. Paragraph 38 (Addendum Objection #1)

This paragraph should reflect a conviction for housebreaking, under Md. Code Ann. art. 27, §30(b), and not for burglary, under Md. Code Ann. art. 27, §30(b). Furthermore, housebreaking is not categorically a crime of violence under the ACCA.

While this paragraph reflects a conviction for burglary in case no. CT-81-371, we believe this is a conviction for housebreaking, Md. Code Ann. art. 27 §30(b). See Attachment B (commitment record) and Attachment C (docket entry (40)). The commitment record, attachment B, is ambiguous as to whether this was a conviction for Burglary, §30(a), or Housebreaking, §30(b). The "Charge or Offense" section of this document provides, "(ct.1) Burglary, Sec. 30(a), (ct.2) Housebreaking, Sec. 30(b) . . ."; the "Verdict" section provides that Mr. T. was convicted of "Ct. 1 - Housebreaking." The docketing sheet at entry 40, attachment C, provides that on March 9, 1982 Mr. T. pleaded guilty to "Count 1 - Housebreaking." Thus, both the face of the commitment record and the docketing sheet are unclear as to whether he was convicted of burglary or housebreaking. Moreover, Mr. T. recalls being convicted of housebreaking, not burglary. The rule of lenity requires that the ambiguity be resolved in favor of Mr. T.. Bifulco v. United States, 447 U.S. 381 (1980).

Housebreaking in violation of Md. Ann. Code art. 27 § 30(b) is not an ACCA predicate. Under Taylor v. United States, 495 U.S. 575, 598 (1990), to qualify as an ACCA predicate a burglary conviction must contain "at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." The elements of section 30(b) include only: (a) a breaking; (b) of a dwelling house in the daytime; (c) with the intent to commit murder or felony therein, or with the intent to steal, take or carry away the personal goods of another of any value. Under Taylor's categorical analysis, the elements of the Maryland housebreaking statute do not meet the generic definition of burglary, as §30(b) does not require an unlawful or unprivileged entry, rather it only requires a breaking. See Reagan v. State, 2 Md. App. 262, 267, n.2, 234 A.2d 278, 281 (1967) ("sub-section (b) requires a breaking but makes no specific mention of an entering); Reagan v. State, 4 Md. App. 590, 594, 244 A.2d 623, 626 (1968) ("the offense proscribed by s 30(b) includes the essential elements of both burglary and statutory burglary with two exceptions: (1) . . . merely a breaking is required rather than a breaking and entering); Ball v. State, 7 Md. App. 219, 224, 254 A.2d 367, 370 (1969) (referring to the similarly worded storehouse breaking statute, §32, and stating that "no reference is made anywhere in the statute to 'entering' or 'entry.'"). Thus, Md. Code Ann. art. 27 §30(b) is not categorically a crime of violence under the ACCA.

B. Paragraph 42 (Addendum Objection #2)

The PSR addendum concedes that the conviction for Possession with intent to Distribute Marijuana may not qualify as a predicate under the ACCA. Though the report cited our position with respect to the state law, it neglected to include our federal law analysis, which also supports the conclusion that this conviction is not a predicate.

Under 18 U.S.C. §924(e)(2)(A)(i), (ii), a "serious drug offense" means "an offense under the Controlled Substances Act (21 U.S.C. 801 et. seq.) . . . for which a term of imprisonment of ten years or more is prescribed by law" or "an offense under State law, involving . . . possessing

with intent to . . . distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law."

The Controlled Substances Act does not provide for a term of imprisonment of ten years or more for the Possession with Intent to Distribute Marijuana charge in this case. Title 21 section 841(b)(1)(D) provides for a sentence of not more than 5 years, if the offense involved less than 50 kilograms of marihuana. Section 841((b)(4) provides that notwithstanding section (1)(D), distribution of "a small amount of marihuana for no remuneration" is punishable under section 844, which provides for a sentence of not more than one year. Under either section, Mr. T.'s conduct is not a "serious drug offense" under the federal law because it is not punished by a sentence of ten years or more.

Similarly, under the State law, Mr. T.'s conduct is not a "serious drug offense." Md. Code Ann. art. 27, §286(b)(3) provides for a sentence of not more than five years for possession with intent to distribute marihuana. Accordingly, this conviction is not an ACCA predicate under state law because it is not punished by ten years or more.

C. Paragraph 44

The PSR addendum neglected to include our objection to paragraph 44 which was set forth in our letter to the probation officer dated February 6, 1997.

According to its January 21 letter, see attachment A, the conviction in paragraph 44 is an ACCA predicate. We disagree for the same reasons set forth above in our objections to paragraphs 38. The storehouse breaking statute, Md. Ann. art 27, §32, requires only a breaking and no entry. Thus, it does not satisfy the generic elements of burglary as required by Taylor v. United States, 495 U.S. 575 (1990). See also Reagan I, supra; Reagan II, supra; Ball v. State, 7 Md. App. 219, 224, 254 A.2d 367, 370 (1969) (the storehouse breaking statute, under section 32, makes no reference to entering or entry).

D. Paragraph 50 (Addendum Objection #3)

We disagree that the conviction in paragraph 50 for housebreaking under Md. Code Ann. art. 27, §30(b) is an ACCA predicate for the same reasons stated above in objection to paragraph 38. The unpublished Mattison case, referred to in the addendum by the probation officer is not dispositive of the issue, as it refers to a North Carolina statute for breaking and entering.

E. Paragraph 52 (Addendum Objection #4)

While the report reflects a conviction for housebreaking, the attached records reflect that this was a conviction for theft. See Attachment D (judgment order); Attachment E(1-3) (Baltimore County presentment, counts 1-5). As reflected in attachments D and E, on October

5, 1982, Mr. T. pleaded guilty to count 3 of the presentment, charging him with theft (art. 27, §342) and received a sentence of eight years, concurrent to the sentences he received in the preceding paragraphs 38-50.

In the addendum, the probation office maintains that the documentation from Baltimore County reflects a conviction for housebreaking. However, based on documentation provided to me by the probation office at my request, its support for this position only consists of the docketing sheet, see Attachment F (one sheet from the docketing record), which does not settle the question. Rather, the documentation attached at D and E, resolves that he was convicted of theft.

Thus, this conviction for theft is not an ACCA predicate. Even if it were a housebreaking conviction, for the reasons set forth above at I.A. pertaining to paragraph 38, the conviction is not an ACCA predicate.

F. Paragraph 58 (Addendum Objection #5)

The probation office concedes that this conviction was for Conspiracy to Possess Cocaine and that therefore it is not an ACCA predicate. Under the Controlled Substances Act, this offense is punishable by no more than one year, pursuant to 21 U.S.C. §§ 846, 844. Under state law, this offense is punishable by no more than four years, pursuant to Md. Code Ann. art. 27 §§ 287(a), 38. Accordingly, this offense is not an ACCA predicate because it is not punishable by a term of ten years or more, as required by the ACCA. 18 U.S.C. §924(e)(2)(A)(i), (ii).

II. Criminal History: Assessment of Points under USSG§ 4A1.1

A. Paragraph 60 (Addendum Objection #6)

The defense had originally questioned whether the documentation supported the determination that this conviction was an ACCA predicate, and further questioned the points assessed under 4A1.1. After further consideration, we withdraw our objections with respect to this conviction.

B. Paragraphs 38, 40, 42, 44, 46, 48, and 50 (Addendum Objection #7)

After review of the second draft of the PSR, we objected to the assessment of two points for each of these convictions. As a result, in the third and final draft, the probation office has changed its position. The report is now satisfactory in that it properly attributes zero points to each of these convictions.

C. Paragraph 52 (Addendum Objection #8)

Upon having retrieved the attached documentation, see Attachments D and E(1-3), it is our position that this conviction is for theft, not housebreaking, as set forth above in Section I.E., and that the report correctly attributes three points to this conviction.

Under the Response to this Objection in the Addendum in the section indicated "Note," the report indicates that "paragraph 62" contained an error which it corrected. Please note that the correction appears to pertain to paragraph 71, not paragraph 62.

D. Paragraph 62 (Addendum Objection #9)

Upon review of the response to this objection, I have requested of the USPO the documentation supporting the contention that Mr. T. did receive additional time in addition to the original sentence which exceeded 1 year, 1 month. I reserve the right to object to the determination that he should be assessed 3, rather than 2 points under 4A1.1, pending review of the supporting documentation.

III. Offense Level Objections

A. Paragraphs 17 and 23 (Addendum Objection #10 and 11)

Paragraph 17 adds 4 offense levels pursuant to USSG §2K2.1(b)(5) because Mr. T. "possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony." We disagree. In support, the report relies on "information contained in the Anne Arundel County Police report [which indicated that] the defendant possessed the firearm and was en route to purchase unknown quantities of crack cocaine prior to being stopped by Anne Arundel Authorities." This "information" does not rise to the required level of a "preponderance of evidence." United States v. Urrego-Linares, 879 F.2d 1234, 1238 (4th Cir), cert. denied, 493 U.S. 943 (1989).

First, we deny the allegations. Second, there is not any, much less a preponderance of, evidence of "another felony." The officer conceded that when the car was stopped, no drugs were found; this negates the allegation of the existence of another felony. It also diminishes the reliability of the officer's source of information (an informant who never testified, and thus, whose reliability was never tested). It is uncontroverted that no drugs were found. It is uncontroverted that Mr. T. never gave anyone drugs on December 19, 1994. It is uncontroverted that there exists no evidence that Mr. T. purchased drugs on December 19, 1994. Thus, the evidence does not establish "another felony" by a preponderance of the evidence.

Further, there is no preponderance of evidence that Mr. T. had knowledge, intent or reason to believe the firearm in question was possessed "in connection with" another felony. The only evidence pertaining to the gun was that when the car was stopped, Mr. T. was searched and a gun was found on his person. There was no evidence of any connection between the gun and any alleged drugs. Thus, he should not receive the four level upward adjustment under USSG

§2K2.1(b)(5) and his total offense Level, in paragraph 23, should only be 26.

IV. Offense Conduct

A. Paragraphs 6-11 (Addendum Objection #12)

We generally object to all of the facts set forth in these paragraphs. We specifically object to paragraph 8 as it states that Mr. T. was using an assumed name. The government did not introduce any evidence of this at trial nor did discovery contain any such information, thus it should be excluded from the report. Further, we object to paragraph 9 as it states that on October 3, 1994 Mr. T. sold an undercover officer 1/16 of an ounce of cocaine. The government did not introduce any evidence of this at trial and thus it should be excluded from the report. Finally, paragraph 11 should include the following: "A thorough search of the defendant, the two other passengers, and the car was conducted. No drugs were found."

Our specific objections to paragraphs 8 and 9 should not be deemed to waive our general objection to all of the facts in paragraphs 6-11.

V. Guideline Range

A. Paragraph 92 (Addendum Objection #13)

Based on the above criminal history and offense level objections, if Mr. T.'s criminal history category is a VI, and if he is not an ACCA, and his offense level is 26, his guideline range is 120-150.

VI. Guidelines Departure

A. Departure Request

If the Court determines that Mr. T. is not an Armed Career Criminal, we will not seek a downward departure. However, if the Court determines Mr. T. is an Armed Career Criminal, we will request a departure of three offense levels (33 to 30) which will result in a guideline range of 168-210, based on a level 30 and Criminal History Category VI on the grounds that the level 33 overrepresents his criminal history under USSG § 4A1.3. We will request a sentence of 180 months, the statutory mandatory minimum sentence.

Background

Mr. T. receives 18 criminal history points under USSG 4A1.1, resulting in a criminal history category VI. PSR, par. 67. If Mr. T. is not an Armed Career Criminal his offense level under 2K2.1 is 26, resulting in a guidelines range of 120-150.¹ If Mr. T. is an Armed Career Criminal (based on paragraphs 38, 44, 50, 52,² and 60), he will receive an additional 7 offense levels, for a total offense level 33, as a direct result of his criminal history, resulting in a significantly increased guidelines range of 235-293. USSG § 4B1.4.

While we concede Mr. T.'s record is lengthy, a closer examination reveals several reasons why a 7 level increase from a level 26 to a level 33 significantly over-represents his criminal history: (1) the offenses occurred primarily during two distinct periods of time; (2) the majority of the predicate convictions significantly pre-date the instant offense; (3) the first time period, which includes the majority of the convictions, occurred when Mr. T. was quite young; and (4) he received lenient sentences for the majority of the predicate convictions.

The convictions set forth in paragraphs 38, 40, 42, 44, 46 and 48, 50 and 52 all occurred

¹ The PSR deems him an offense level 30. See PSR, par. 15-23. We disagree for reasons stated above in Section III.A (no four level increase under 2k2.1(b)(5)). Even if he were a level 30, the offense level of 33 under the ACCA still over-represents the seriousness of his criminal history.

² As noted above in Section I.E., we strongly contest that this conviction was for housebreaking and instead have submitted documentation showing that it was for a theft. See Attachments D, E(1-3). Thus, if the court deems Mr. T. an ACC, it should evaluate his request for a downward departure with only the qualifying convictions in mind.

between December 31, 1980 and November 17, 1981, when Mr. T. was 18 and 19 years old.³ This conduct occurred 16 and 17 years ago. Of these conviction, the PSR designates paragraphs 38, 44, 50, and 52 as ACCA predicates. The convictions set forth in paragraphs 54, 56, 58, and 60 all occurred between January 1, 1991 and July 10, 1991, when Mr. T. was 28 -29 years old.⁴ These convictions occurred 6 years ago. Of these convictions, the conviction in paragraph 60 is an ACCA predicate. One additional conviction for Distribution of Non-CDS occurred within one year of July 10, 1991, on July 30, 1992 (par. 62). This is not an ACCA predicate.

Legal Support

It is well settled that courts have the authority to downwardly depart if the Criminal History Category overstates the defendant's criminal past. 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). Where criminal history is over-represented in the offense level, a §4A1.3 departure is also warranted. See United States v. Shoupe, 35 F.3d 34 (3rd Cir. 1994).

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) (departure supported where 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 period). In this case, the first group of offenses occurred within eleven months of each other, during 1980-1981, and the second occurred within seven months of each other (the predicate occurred in July 1991). Accordingly, this factor supports the downward departure request.

³ The following is a list of the dates the offenses occurred: paragraph 38 - December 31, 1980; par. 42 - July 20, 1981; par. 44 - July 28, 1981; par. 46 - October 2, 1981; par. 48 - August 20, 1981; par. 50 - August 20, 1981; and par. 52 - November 11, 1981.

⁴ The following is a list of the dates of the offense: par. 54 - January 1, 1991; par. 56 (date of arrest) March 19, 1991; par. 58 - May 17, 1991; par. 60. July 10, 1991.

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. Shoupe, 988 F.2d 440 (3rd Cir. 1993) (downward departure where prior conviction occurred almost fifteen years ago); 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, where the offenses which qualify as predicate convictions occurred 17, 16, and 6 years ago, supports the same result. See pars. 38, 44, 50, 52, and 60.

Another factor warranting a downward departure is the defendant's youth at the time of the prior conduct. 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. 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). Here, Mr. T. was 18 when he committed the first felony which qualifies as an ACCA predicate, and was 19 when he committed the next three. (pars. 38, 44, 50, and 52). He was 29 when he committed the final felony ACCA predicate (par. 60).

A lenient sentence for a prior conviction should be considered because it bears on the 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). Here, the potential ACCA predicate offenses resulted in sentences of at least one year, and at most 4 years: Pars. 38, 44, 50, (five years, four years suspended for each); Par. 60 (4 years).⁵

⁵ If the court deems the conviction in paragraph 52 an ACCA predicate, then it must also consider the eight year concurrent sentence imposed in that case. See United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991) (downward departure from career offender status where priors were committed in close proximity and defendant received concurrent sentences for both); United States v. Senior, 935 F.2d 149, 151 (8th Cir. 1991).

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A downward departure is warranted because these felony convictions significantly inflate Mr. T.'s guideline range under the ACCA guidelines. The close proximity in time, remoteness, Mr. T.'s age, and the lenient sentences imposed on the majority of the predicate convictions, all support a downward departure for over-representation.

USSG § 4A1.3 is designed to correct skewed results like those which present itself in this case. For the reasons set forth herein, the defense requests that this Court grant a downward departure of three levels from 33 to a 30. The defense will request a sentence of 180 months.

We object to an upward departure as outlined in paragraph 121.
Thank you for your attention to these matters.

Very truly yours,

KATHRYN R. FREY
Assistant Federal Public Defender

KRF:dls

cc: Phillip Jackson, AUSA
Michelle Merrett, USPO