IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
Plaintiff	*	
v.	*	**CRIMINAL NO.**
J.M.	*	
Defendant	*	

* * * * *

MEMORANDUM IN AID OF SENTENCING

The Defendant, J.M., 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 which is scheduled for September 7, 1994 at 4:00 p.m.

Background

Mr. M. has entered a plea of guilty pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure with the parties in agreement that the appropriate sentence is fifty seven (57) months based on an offense level of twenty one (21) and a criminal history category IV. The parties have agreed that Mr. M. may seek a downward departure of two offense levels and one criminal history category. See Plea Agreement, paragraphs 4(b), (c).

There is one disputed issue that has arisen between the probation officer and the parties. The probation officer believes that the final offense level is twenty three (23); however, both parties maintain and agree that the final offense level is twenty one (21). The probation officer's conclusion is contrary to the parties' conclusion and the anticipated result under the plea agreement. This issue is addressed below in Section I of this Memorandum.

There are several disputed issues between the defense and the probation officer. These issues are addressed below in Section II.

I. THE GOVERNMENT AND THE DEFENSE JOINTLY OBJECT TO THE PROBATION OFFICER'S OFFENSE LEVEL CALCULATION.

A. The information set forth in paragraphs six (6) and seven (7) is not relevant conduct, therefore the two point offense level enhancement in paragraph twelve (12) is erroneous.

The probation officer reported that Mr. M. possessed four firearms, in addition to the one firearm in Count Three to which he has pleaded guilty. See Presentence Report (hereinafter "PSI"), Paragraphs five (5), six (6), and seven (7). The probation officer believes that the four firearms are "relevant conduct." Based on this assessment, the probation officer enhanced Mr. M.'s offense level by two points pursuant to U.S.S.G. § 2K2.1(b)(1)(B). See PSI, Paragraph twelve (12).

The government and the defense disagree with the probation officer's assessment. The parties agree that the government could not prove by even a preponderance of evidence that Mr. M. in any way possessed, sought to obtain, or distributed any firearm other than the Olympic Arms rifle, which is the subject of Count Three of the Indictment for which Mr. M. accepts full responsibility and to which he has pleaded guilty. The information in paragraphs six (6) and seven (7) does not form the basis of either the offense conduct or of any relevant conduct in this case. Therefore, the assessment of two additional offense levels in paragraph twelve (12) is incorrect. The final offense level in this case is twenty one (21).

Paragraph thirty five (35) states that the final guideline range is seventy (70) to eighty seven (87) months based on a total offense level of twenty three (23). For reasons stated above,

the parties jointly object to this calculation; instead, they agree that the maximum guideline range is fifty seven (57) to seventy one (71) months, based on a total offense level of twenty one (21).

Paragraph sixty six (66) states that the guideline fine range is $10,000 to $100,000. This is based on an offense level of twenty three (23). For the same reasons set forth above, the parties agree that the proper guideline fine range is $7,500 to $75,000 based on an offense level of twenty one (21).

B. The information in paragraph eight (8) is not relevant for the reasons set forth above in sub-section A; in any event, the information is incorrect.

Paragraph eight (8) indicates that the five firearms[1] "are easily modified into fully automatic weapons." This is untrue.[2] The Colt, Olympic Arms, and Norinco rifles have factory blocks which prevent conversion. An attempted modification by an unauthorized individual would damage the rifle. A new trigger assembly unit is required for successful modification. A new trigger assembly can only be attained from the factory. Further, only class three licensed dealers can obtain the unit. This unit is costly, as is the complex process of conversion. Accordingly, modification of the rifles is not "eas[y]" and the information in paragraph eight (8) is factually inaccurate.

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[1] The five firearms are set forth in paragraph seven (7) of the report. It should be clear that neither the Davis pistol nor the Taurus handgun were seized from the apartment at 152 N. East Street. The government is not in possession of these weapons.

[2] Undersigned counsel spoke with the gunsmith at the Baltimore Gun Smith (410) 276-6908, who provided her with the information concerning paragraph eight (8).

In addition, the government does not claim, nor is there any evidence, that Mr. M. attempted or intended to convert to automatic capacity the firearms at issue. As the report correctly states, none of the three semi-automatic weapons confiscated by the government was actually modified into an automatic capacity. Since none was modified, the mere possibility that such a weapon could be modified is not germane to the offense conduct in this case.

The report indicates that "[a]ll of these weapons have few legitimate uses in an urban setting." The government does not claim the weapons were ever actually used. The offense to which Mr. M. pleaded guilty, and the other offenses for which he was indicted, do not have as an element actual use. In any event, there are legitimate uses for the firearms at issue. They are often used to hunt small game. They are also used for target practice. For all of the above reasons and for reasons set forth in subsection I.A. above, the information in paragraph eight (8) should not be considered by this Court in determining the appropriate sentence in this case.

II. ADDITIONAL DISPUTED ISSUES

A. Mr. M. has only three prior misdemeanor convictions

Paragraph twenty nine (29) states that Mr. M. has four prior criminal convictions. Undersigned counsel requested that the report be amended to accurately reflect that Mr. M. only has three prior misdemeanor criminal convictions. The offense set forth in paragraph twenty one (21) of the report resulted in a disposition of probation before judgment. Mr. M. completed that probation without incident and a judgment of conviction was therefore never entered against him for this conduct, as the presentence report accurately reflects. The probation officer denied Mr. M.'s request that paragraph twenty nine (29) be modified to properly reflect a total of only three, not four convictions. He refused on the ground that the criminal history is unaffected. The

defense does not maintain that the criminal history is affected; rather, the defense simply requests that this factual inaccuracy be clarified and the report reflect a total of three and not four misdemeanor convictions.

Paragraph twenty five (25) contains information pertaining to one of the three misdemeanor convictions. It correctly states that this charge was scheduled for adjudication on May 15, 1991 and that Mr. M. did not appear. However, the report should reflect that Mr. M. did not appear because he never received notice of the new court date. He did appear in court on these charges with counsel on every other scheduled occasion. In September 1990, Mr. M. appeared in court for the preliminary hearing with his attorney, Mr. Thomas Yost, Esquire. At the preliminary hearing a trial date was scheduled for February 1991. Mr. M. and his attorney appeared and were prepared for trial. The government requested a continuance and the court granted the request. The date was not scheduled at that time. Prior to the trial date which was ultimately set for May 15, 1991, two of the three charges were dismissed. Mr. M. was never given notice that the trial date was set for May 15, 1991.

B. Mr. M.'s constitutionally protected associational ties and abstract beliefs are not relevant to the present case and therefore may not be considered at sentencing.

References to Mr. M.'s alleged associational ties may not be considered in determining the appropriate sentence in this case. The United States Supreme Court has held that where evidence of an individual's membership in a particular group is not relevant to the issues at sentencing, consideration of such evidence is forbidden. Dawson v. Delaware, __ U.S. __, 112 S.Ct. 1093 (1992). In Dawson, the defendant was convicted of murder. The murder was not motivated by racial hatred. At the capital sentencing hearing, the State introduced, over defense

objection, evidence that the defendant was a member of the Aryan Brotherhood, a white racist prison gang. The Court reversed the sentence of death because "[the defendant's] First Amendment rights were violated by the admission of the Aryan Brotherhood evidence [ ], because the evidence proved nothing more than Dawson's abstract beliefs." Id. at 1098. Evidence of the defendant's associational ties was not relevant to any issue surrounding the murder for which the defendant was being sentenced. The Court's consideration of this evidence was constitutional error. Id. at 1099.

Associational ties and bigoted beliefs may be relevant to sentencing where they establish a motive for the underlying crime. Barclay v. Florida, 463 U.S. 939 (1983). In Barclay, the defendant's membership in the Black Liberation Army was relevant and admissible at sentencing where the defendant's beliefs and associational ties were directly related to the murder of the victim of the underlying crime. The court stressed that motive is an appropriate factor for a sentencing judge to consider. However, the Court cautioned that "abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." Id. at 2200.

In the present case, Mr. M. was not charged with, nor does he stand convicted of, any action in furtherance of a "Neo-Nazi" organization. There is no evidence that there is any connection between his beliefs and his conduct in the present case. Further, the government does not allege that there is any nexus between his purported associational ties and the actions in this case. Mr. M.'s political beliefs are constitutionally protected. For these reasons, consideration of the information in paragraphs forty five (45) through forty eight (48) at the sentencing hearing

in this case is constitutionally barred. Consideration of this information would be reversible error. Dawson, 112 S.Ct. at 1099.

The only purpose that references to associational ties could serve is to prejudice Mr. M. to this Court. The probation officer maintains that these facts are pertinent to Mr. M.'s "background, character, and conduct of the defendant." See PSI, Addendum page 3. However, the United States Supreme Court has ruled to the contrary. Dawson, 112 S.Ct. at 1093.

Traditionally, presentence reports do not contain information that a defendant is a member of a particular group, i.e., N.A.A.C.P., A.C.L.U. or a particular religious group. It is a hallmark of our judicial system not to discriminate against or look more favorably upon people because of their political or religious beliefs. Therefore, use of this information violates Mr. M.'s First Amendment associational rights and therefore may not be considered by this Court in imposing a sentence.

C. Supplemental employment information concerning paragraph sixty two (62).

Paragraph sixty two (62) correctly indicates that Mr. M. worked for Advanced Commercial, Inc. prior to his incarceration in the present case. The following additional details were provided to the probation officer but not included in the report. Mr. M. was employed with AC, Inc. for most of the two and one half years preceding his incarceration on the present offense. He was employed on a full-time basis and always sought out additional overtime hours. He worked with a diverse group of people and exhibited no problems interacting with others on a business or social level. Mr. Draper, the owner and president of the company, advised undersigned counsel that Mr. M. is, "without reservation," guaranteed a job with his company

upon his release from prison. Mr. Draper has been present at most of the court proceedings in this case and has maintained close contact with undersigned counsel concerning the status of the case and Mr. M.'s well being. A letter from Mr. Draper concerning Mr. M. is attached.

III. REQUESTS FOR A DOWNWARD DEPARTURE

There are several appropriate grounds for downward departure in this case. Each will be addressed in turn. After full consideration of the requested grounds for downward departure, the defense requests, in accordance with the plea agreement, a downward departure of two offense levels from a offense level of twenty one (21) to an offense level of nineteen (19) and a departure from criminal history category IV to a category III. See Plea agreement, Paragraphs (4)(b), (c). The resulting guideline range is thirty seven (37) to forty six (46) months and the defense requests a sentence of thirty seven (37) months. A sentence of thirty seven (37) months, after subtraction of the time served since April 1994, will make Mr. M. eligible for the federal shock incarceration program. See 18 U.S.C. § 4046; U.S.S.G. § 5F1.7.

A. Downward departure based on imperfect justification

Pursuant to § 5K2.0 of the Sentencing Reform Act and 18 U.S.C. § 3553(b), a downward departure is warranted on the grounds of imperfect justification. For the reasons stated in this section, "there exists a[] . . . mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); see also U.S.S.G. 5K2.12; United States v. Garza-Juarez, 992 F.2d 896, 910-913 (9th Cir. 1993); United States v. Cheape, 889 F.2d 477 (3d Cir. 1989) (imperfect coercion); United States v. David Young, No. H-

89-34 (D.Ct. 1989) (imperfect entrapment); United States v. Johnson, 956 F.2d 894 (9th Cir. 1992) (incomplete battered woman syndrome).[3]

Mr. M., a convicted "felon," possessed a firearm. However, he did not know he was prohibited from possessing firearms. He was unaware that he was considered a "felon" under federal law. He was unaware of his status as a felon because he has no prior felony convictions. Rather, he has three prior Maryland common law misdemeanor convictions. This common law misdemeanor satisfies the "felony" requirement under 18 U.S.C. § 922(g)(1) because the offense is punishable by a period of imprisonment exceeding one year. Mr. Walter Balint, the attorney who represented Mr. M. on the convictions stemming from the July 1990 and December 1990 conduct, told him that he was not prohibited from possessing firearms because he was only convicted of a misdemeanor. See Attachment B.

Mr. M. was not legally justified in possessing the firearm. The defense recognizes that knowledge of his status as a felon is not an element of the offense. However, ignorance of his status as a felon and of the prohibition that he not possess firearms mitigates the seriousness of his conduct because he was not affirmatively and knowingly breaking the law.

Where a defendant has an honest and good faith belief in the existence of certain circumstances, but where the actions he takes to combat his good faith belief are unreasonable, a defendant has an imperfect justification to his actions. In this case, Mr. M. honestly and in good faith believed he was not a felon and therefore believed he was not prohibited from

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[3] Though these cases differ factually from the present case, they support a downward departure where an "imperfect justification" exists.

possessing firearms. Though federal law may regard his lack of knowledge as irrelevant or unreasonable, his honest, good faith beliefs "imperfectly" justify his actions. Therefore, a downward departure is warranted.

B. Downward departure for over-representation of criminal history.

In paragraphs nineteen (19) through thirty three (33) of the presentence report, the probation officer determined that Mr. M. has nine (9) criminal history points resulting in a criminal history category IV. The defense does not challenge the scoring. However, the defense maintains that Mr. M. should receive a one level downward departure, from Category IV to Category III, pursuant to Section 4A1.3 of the Sentencing Reform Act because a criminal history category of IV significantly over-represents the seriousness of Mr. M.'s criminal history or likelihood that he will commit more crimes.

1. An upward departure is not warranted as set forth in paragraphs seventy (70) and seventy one (71).

In paragraphs seventy (70) and seventy one (71), the report indicates that an upward departure may be warranted based on under-representation of criminal history. The government and the defense jointly object to this recommendation. For reasons set forth below in sub-section 2, not only is an upward departure not warranted, but the facts of this case warrant a downward departure.

2. A downward departure is warranted based on over-representation of criminal history

Mr. M. has three prior convictions for misdemeanor offenses (March 1990, July 1990, December 1990). Each conviction was for common law battery in Maryland. These three

misdemeanor convictions generate nine criminal history points: two points for the March 1990 offense, three points for the July 1990 offense, one point for the December 1990 offense, two points for committing the present offense while on probation, and one point for recency. Nine points places Mr. M. in a criminal history category IV. However, Mr. M.'s criminal record is less serious than most defendants who fall within this criminal history category.

It is well settled that courts have the authority to downwardly depart if the criminal history category significantly over-represents the defendant's criminal history. 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 . . . 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).

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. Smith, 909 F.2d 1164, 1169 (8th Cir. 1990), cert. denied, 498 U.S. 1032 (1991). In Smith, the defendant had one prior conviction for burglary and one for participation in a drug conspiracy. The two convictions were within two months of each other. Further, the defendant was nineteen when he committed the prior offenses. For these reasons, the Court found that the criminal history category over-represented the defendant's criminal record and departed pursuant to § 4A1.3.

In United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991), the court granted a downward departure on similar grounds. The defendant had two prior convictions for robbery which were

committed in close proximity to each other. The defendant was twenty years old at the time of the robberies and the state court imposed concurrent sentences for both convictions. See also United States v. Shoupe, 988 F.2d 440 (3d Cir. 1993) (time span between prior convictions appropriate consideration and ground for downward departure); United States v. Senior 935 F.2d 149 (8th Cir. 1991) (over-representation where criminal record included three armed robberies committed while defendant was twenty years old, within a three week period, and for which defendant received concurrent sentences; though these convictions were for crimes of violence, and his criminal record also included two prior drug related convictions, the court granted a downward departure because of the proximity of the armed robberies and age at time of the offense).

Finally, in this district, the Honorable Judge Legg granted a downward departure for over-representation of criminal history where fifteen of sixteen criminal history points were derived from state misdemeanor convictions which occurred during a two and one half period. United States v. Garfield Smith, L-92-0425 (D.Md. May 26, 1993). The State misdemeanors included four handgun violations, two cocaine possession violations and one common law assault. In that case, like the instant case, the underlying offense was possession of a firearm by a felon.

In the present case, Mr. M.'s criminal record consists of three misdemeanor offenses. The offenses occurred four years prior to the instant offense when Mr. M. was nineteen years old. They all occurred within a nine month period of one another: March 1990, July 1990, December 1990. Mr. M. received a sentence of thirty days time served for the March 1990 offense and concurrent sentences on the July and December 1990 offenses. Finally, the prior convictions are different in kind from the present offense.

In addition to generating nine (9) criminal history points, the prior misdemeanor convictions increase Mr. M.'s offense level. Under U.S.S.G. § 2K2.1(b)(2), Mr. M.'s base offense level is twenty four (24) because he has "at least two prior felony convictions of . . . a crime of violence . . . ." If Mr. M.'s prior misdemeanor convictions did not qualify as felonies, he would have a base offense level of fourteen (14). Though Mr. M.'s prior convictions are categorized as misdemeanors in Maryland, as explained above, under federal law they qualify as felonies and thus enhance his base offense level. See 18 U.S.C. § 922(g)(1). The prior misdemeanor convictions not only result in nine criminal history points but they also cause a ten (10) point increase in Mr. M.'s base offense level. In United States v. O'Neil McGhee, No. MJG 92-0120 (D. Md. August 7, 1992), the Honorable Judge Garbis downwardly departed based on over-representation where the same offense increased both the defendant's base offense level by three (3) points and his criminal history points by five (5). An application of McGhee to this case further supports Mr. M.'s request for a downward departure for over-representation of criminal history.

Mr. M. pleaded guilty to possession of a firearm by a felon. This offense is not a crime of violence. Mr. M. has no prior firearm convictions. Mr. M. has committed no violent acts since December 1990. To the contrary, for most of the past two and one-half years Mr. M. maintained full-time employment. For the above stated reasons, the defense believes a downward departure from Category IV to Category III is appropriate.[4]

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[4] The government agrees in principle that Mr. M.'s criminal history category over-represents his criminal record under § 4A1.3. During plea negotiations, the parties tentatively (and erroneously) concluded that Mr. M. was a category V. The government agreed that

C. Downward departure based on a combination of each proffered ground

If the court finds a downward departure is not warranted on any single requested ground, the defense requests a downward departure on the strength of combination of all requested departure grounds. 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); United States v. Wooten, JFM-91-0445 (D. Md. 1992)(same); see also Proposed Amendments to 5K2.0 (effective November 1, 1994) ("The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances" a departure would be warranted).

In conjunction with the above-stated independent grounds for a downward departure (imperfect justification and over-representation of criminal history), the following two factors, when viewed in combination with the independent grounds, serve as additional support for the requested departures.

1. Downward departure based on custodial status

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the "defendant's criminal history category over-represents his criminal history." See Plea Agreement, Paragraph 4(b). The government agreed to stipulate that a category IV was appropriate to reflect the over-representation.

Pursuant to paragraph 4(b) of the plea agreement which authorizes the defense request for a one level downward departure based on over-representation, the defense is requesting a downward departure from a level IV to a level III based on over-representation. Though the government has not agreed to a criminal history level III, the plea agreement indicates the government's agreement, in principle, that this is a case which warrants a downward departure of one level for over-representation of criminal history.

during pretrial detention

Mr. M. has been incarcerated since April 22, 1994. From April 29, 1994 until approximately June 28, 1994, Mr. M. was in protective custody in the Baltimore City Detention Center after receiving death threats from within the institution. Protective custody required twenty three and one half hours a day lock down status, limited telephone privileges, and almost no human contact. He endured these oppressive conditions for more than two months.

The two months Mr. M. spent in protective custody, like all of the time Mr. M. has been incarcerated pre-trial, will count toward service of the sentence of imprisonment imposed by the Court. However, the nature of Mr. M.'s confinement during the two month protective custody period is unlike confinement in general population. One day in protective custody is significantly different from one day in general population. It could be said that one day in protective custody is the equivalent of ten days in general population. It can certainly be said that one day in isolated, protective custody is degrading, dehumanizing, punitive, and anxiety-ridden. This factor, in conjunction with the other requested grounds, supports a downward departure under U.S.S.G. § 5K2.0 and 18 U.S.C. § 3553(b).

2. Mr. M. faces significant "back up time" from State violations of probation.

Mr. M. was on probation for the July 1990 and December 1990 offenses at the time he committed the present offense. Two violation of probation warrants have been filed as detainer. Mr. M. faces five and one half years of back up time from the State probation violations. The State court will have the option of ordering the backup time to run consecutive to the federal time. It is likely that the sentence imposed in this case will be followed by a significant period of time resulting from the violation of state probation. The court should be aware of this fact in considering the ultimate sentence in this case.

CONCLUSION

For the reasons set forth herein, the defense requests that this Honorable Court grant a downward departure of two (2) offense levels from a base offense level of twenty one (21) to a base offense level of nineteen (19) on the grounds of imperfect justification in Section III.A. and the additional grounds set forth in Section III.C.1 and 2, and a departure from criminal history category IV to a category III on the grounds of over-representation of criminal history and for reasons set forth in Section III.C.1 and 2. The resulting guideline range would then be thirty seven (37) to forty six (46) months. The defense will request a sentence of thirty seven (37) months making Mr. M. eligible for the federal shock incarceration program.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August, 1994, a copy of the foregoing was mailed or hand-delivered to Jamie M. Bennett, Assistant United States Attorney, 820 U.S. Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201.

Kathryn R. Frey
Assistant Federal Public Defender