IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

UNITED STATES OF AMERICA	*	
v.	*	**Crim. No. xxxxxxxxxxxx**
xxxxxxxxxx	*	

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DEFENDANT'S MEMORANDUM IN AID OF SENTENCING

Defendant xxxxxxxxxx, through counsel, James Wyda, Federal Public Defender for the District of Maryland, and Daniel W. Stiller, Assistant Federal Public Defender, submits this memorandum to aid the Court in sentencing.

I. FACTUAL BACKGROUND

xxxxxxxx appeared before this Court on December 14, 1999 and pleaded guilty to the offense of unlawfully reentering the United States following conviction for an aggravated felony in violation of 8 U.S.C. § 1326(a), (b)(2). Under the plea agreement, xxxxxxxx reserved the right to seek a downward departure from his offense level on the grounds that the 16-level enhancement in xxxxxxxxxx offense level due to his prior aggravated felony conviction, a Maryland battery conviction, overrepresented the seriousness of his offense. *See Sanchez-Rodriguez*, 161 F.3d 556, 561-62 (9th Cir. 1998)(en banc)(approving downward departure from offense level in unlawful reentry case based on nature and circumstances of the underlying aggravated felony used to enhance defendant's sentence under § 2L1.2). Sentencing is scheduled for March 10, 2000.

The applicable guideline is U.S.S.G. § 2L1.2. The base offense level for this offense is a level 8. U.S.S.G. § 2L1.2(a). Pursuant to § 2L1.2(b)(1)(A), the pre-sentence report writer increased the offense level by 16 levels based on a prior conviction for an "aggravated felony." *See* Pre-sentence report at 4, ¶ 12. The "aggravated felony" specified in the pre-sentence report as the predicate for this 16-level enhancement is a 1995 Maryland misdemeanor conviction for common law battery for which xxxxxxxx received a 2 year suspended sentence.

For the reasons stated below, xxxxxxxx respectfully requests this Court to depart 11 levels based on the nature and circumstances of the "aggravated felony" that forms the basis for the 16-level enhancement in xxxxxxxxxx offense level. Specifically, xxxxxxxx submits that a downward departure is warranted to eliminate the disparity in sentencing that arises from Maryland's unique sentencing scheme. Under Maryland law, an individual who commits the offense of misdemeanor battery is automatically subject to the 16-level enhancement because the offense is punishable by a term of imprisonment in excess of one year. However, as demonstrated below, in the overwhelming majority of states, a defendant who has the same predicate offense would not be subject to the enhancement because it is not punishable by a term of imprisonment in excess of one year. Mr. xxxx submits that a downward departure is necessary to eliminate this disparity.

II. ARGUMENT

A. Introduction

Mr. xxxx has pleaded guilty to unlawfully re-entering the United States after having been convicted of an aggravated felony in violation of 8 U.S.C. § 1326(a), (b)(2). The term

"aggravated felony" includes "a crime of violence (as defined in section 16 of Title 18,[1] but not including a purely political offense) for which the term of imprisonment [is][2] at least one year." 8 U.S.C. § 1101(a)(43)(F). Title 8 defines "term of imprisonment" as "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B).[3] Thus, Mr. xxxxxx sentence of a two-year suspended sentence constitutes a "term of imprisonment" for purposes of Title 8 even though no sentence of imprisonment was imposed.

However, the unlawful re-entry statute and the Sentencing Guidelines are not co-extensive. As noted above, the guideline applicable to 8 U.S.C. § 1326 is U.S.S.G. § 2L1.2. Pursuant to U.S.S.G. § 2L1.2(b)(1)(A), a defendant's sentence is increased 16 levels if he has a prior conviction for an aggravated felony. Application Note 1 to § 2L1.2 states that "'aggravated felony' is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the

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[1] Section 16 of Title 18 defines "crime of violence" as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[2] Legislative history reveals that the word "is" was mistakenly left out of this subsection.

[3] The manner in which sentences are calculated for purposes of Title 8 thus differs from the manner in which sentences are calculated for criminal history purposes under the Guidelines. *See* U.S.S.G. § 4A1.2(b)(2)(stating that "[i]f part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers that to the portion that was not suspended").

aggravated felony." In addition to referencing this statutory provision, this application note further states that, "for purposes of this guideline . . . '[f]elony offense' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year."

Thus, the definition of what constitutes a "felony" under § 2L1.2 -- an offense punishable by imprisonment for a term exceeding one year -- is narrower than the definition of what constitutes a "felony" under Title 8 -- a sentence of at least one year, regardless of whether the sentence was suspended in whole or in part. In other words, an offense may be sufficient to establish the "aggravated felony" component under the unlawful re-entry statute, but insufficient to trigger the 16-1evel sentencing enhancement because it does not meet the definition of "felony" under the Guidelines.

The only reason that the 16-level enhancement has been imposed in xxxxx case is because his Maryland common law misdemeanor battery conviction is deemed an "aggravated felony" for guidelines purposes because it is punishable by a term of imprisonment in excess of one year. Under Maryland law, the maximum term of imprisonment for a common law offense, regardless of whether it is a misdemeanor, is the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and Articles 16 and 25 of the Maryland Declaration of Rights. *Robinson v. State*, 353 Md. 683, 693 n. 6 (Md. 1999). This is not the case in other states.[4] Indeed, a survey of other states' counterparts to the Maryland offense of battery reveals that a defendant who had been convicted of the same offense

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[4] The overwhelming majority of states have abolished common law crimes long ago. The few states that have not specifically abolished common law crimes have provided that an individual may not be charged with a common law offense if there is a statute which covers the offense. However, these states all have statutory battery provisions, so resort to the common law would not be necessary.

as xxxxxxxx in virtually every state other than Maryland would not be subject to the 16-level enhancement.[5] This is because, unlike the case in Maryland, it is virtually impossible in other states to commit this offense and be subject to a term of imprisonment in excess of one year.[6]

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[5] Common law battery in Maryland is defined as "[a]ny unlawful injury whatsoever, however slight, actually done to the person of another, directly or indirectly, in an angry, revengeful, rude, or insolent manner." *Lamb v. State*, 93 Md. App. 422, 447 (Md. Ct. Spec. App. 1992). Some states refer to the conduct that constitutes this offense as "assault" rather than "battery." Thus, the comparison among states was based on the elements of the offense committed by xxxxxxxx, not on the term the state chose to describe the offense.

[6] *See, e.g.* Ala. Code §§ 13-A-6-22, 13A-5-7 (not more than one year); Alaska Stat. §§ 11.41.230, 11.81.610, 12.55.135 (not more than one year); Ariz. Rev. Stat. §§ 13-707, 13-1203 (not more than six months); Ark. Code Ann. §§ 5-4-401, 5-13-203 (not more than one year); Cal. Penal Code, §§ 242, 243 (not more than one year); Conn. Gen. Stat. § 53a-61 (not more than one year); Del. Code Ann. tit. 11, §§ 611, 4206 (not more than one year); D.C. Code Ann. § 22-504 (not more than 180 days); Fla. Stat. ch. 775.082, 784.03; Ga. Code. Ann §§ 16-5-23, 17-10-3 (not more than one year); Haw. Rev. Stat. §§ 706-663, 707-712 (not more than one year); Idaho Code §§ 18-903, 18-904 (not more than six months); Ill. Comp. Stat. 5/5-8-3, 5/12-3 (not more than one year); Ind. Code § 35-42-2-1, 35-50-3-2 (not more than one year); Iowa Code §§ 708.1, 708.2, 903.1 (not more than one year); Kan. Stat. Ann. § 21-3412 (not more than six months); Ky. Rev. Stat. Ann. §§ 508.030, 532.090 (not more than one year); La. Rev. Stat. Ann. §§ 33, 35 (not more than six months); Me. Rev. Stat. Ann. tit. 17-A, §§ 207, 1252 (not more than one year); Mich. Comp. Laws § 750.81 (not more than 90 days); Minn. Stat. § 609.224 (not more than one year); Miss. Code Ann. § 97-3-7 (not more than six months); Mo. Rev. Stat. §§ 565.070, 558.011 (not more than one year); Mont. Code Ann. § 45-5-201(2)(not more than six months); Neb. Rev. Stat. §§ 28-106, 28-310 (not more than one year); Nev. Rev. Stat. §§ 193.150, 200.481 (not more than six months); N.H. Rev. Stat. Ann. §§ 631:2-a; 651:2; N.J. Stat. Ann. §§ 2C:12-1, 2C:43-8 (not more than six months); N.M. Stat. Ann. §§ 30-1-6, 30-3-4 (not more than six months); New York Penal Law §§ 70.15, 120.00 (not more than one year); N.C. Gen. Stat. §§ 14-33, 15A-1340.23 (not more than 150 days); N.D. Cent. Code § 12.1-17-01 (not more than thirty days); Ohio Rev. Code Ann. §§ 2903.13, 2929.21 (not more than six months); Okla. Stat. tit. 21, §§ 642, 644 (not more than 90 days); Or. Rev. Stat. §§ 161.615, 163.160 (not more than one year); R.I. Gen. Laws § 11-5-3 (not more than one year); S.C. Code Ann. § 22-5-560 (not more than thirty days); S.D. Codified Laws §§ 22-6-2, 22-18-1 (not more than one year); Tenn. Code Ann. §§ 39-13-101, 40-35-111 (not more than eleven months, twenty-nine days); Texas Penal Code Ann. §§ 12.21, 22.01 (not more than one year); Utah Code Ann. §§ 76-3-204, 76-5-102 (not more than one year); Vt. Stat. Code Ann. tit. 13, § 1023 (not more than one year); Va. Code Ann. §§ 18.2-57, 18.2-11 (not more than one year); Wash. Rev. Code §§ 9.92.020, 9A.36.041 (not more than one year); W. Va. Code. § 61-2-9 (not more than one year); Wis. Stat. Ann. §§ 939.51, 940.19 (not more than nine months); Wyo. Stat. Ann. § 6-2-501 (not

Accordingly, defendants in forty-six states with the same predicate offense as xxxxxxxx would not be subject to the 16-level enhancement.[7]

This disparity in sentencing that arises from Maryland's unique sentencing scheme supports xxxxxxxxxx request for a downward departure.

B. The Departure Framework

In establishing a process by which a sentencing judge may depart outside the guideline range, the Sentencing Commission recognized that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." U.S.S.G. ch. 1, pt. A, intro. comment 4(b). Cognizant of the fact that unusual or

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more than six months); *But see* Colo. Rev. Stat. §§ 18-1-106, 18-3-204 (not more than eighteen months); Mass. Gen. Laws. ch. 265, § 13A (not more than two and one half years); Pa. Cons. Stat. §§ 1104, 2701 (not more than two years).

[7] According to the pre-sentence report, the underlying "aggravated felony" that forms the basis for the 16-level enhancement under § 2L1.2(b)(1)(A) is the 1995 common law misdemeanor battery conviction. xxxxxxxx was that convicted in 1997 of second degree misdemeanor assault in violation of Md. Ann. Code art. 27A, § 12A. He received a sentence of 1 year, suspended all but 39 days. The offense of second degree misdemeanor assault is the same offense as common law misdemeanor battery under Maryland law: In 1996, the Maryland legislature "established a two-tiered structure that defines all assaults and batteries as either first or second degree assault." *Robinson*, 353 Md. at 692. The legislature also set forth maximum penalties for these offenses. The maximum penalty for second degree misdemeanor assault is ten years' imprisonment. Md. Ann. Code art. 27A, § 12A(b). While the legislature reduced the maximum penalty from the limit imposed by the constitutional ban against cruel and unusual punishment to ten years, it did not change the elements of the offense of assault or battery. *See* Md. Ann. Code art. 27A, § 12(b)(providing that "'assault' means the offense of assault, battery, and assault and battery, which terms retain their judicially determined meanings").

This legislative "reform" still does not make xxxxxxxxxsimilarly situated to defendants with similar convictions from other states. As the review of other states' statutes makes plain, no state statute punishes this offense by a term of imprisonment of anywhere near ten years. Thus, even if this conviction is deemed an "aggravated felony" for purposes of the 16-level enhancement, it, like xxxxxxxxxx convicted for common law misdemeanor battery, is still outside the heartland of offenses that typically trigger this enhancement.

atypical cases would arise, the Sentencing Commission explicitly reserved a certain degree of flexibility to the sentencing court: "The Commission 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." *Id.* However, a departure may be warranted where "a particular guideline linguistically applies but where conduct significantly differs from the norm." *Id*. Unless specifically forbidden, the Commission, in creating the Sentencing Guidelines, did "not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." *Id. See also Koon v. United States*, 518 U.S. 81, 98 (recognizing departure decisions as "embod[ying] the traditional exercise of discretion by a sentencing court").

In *Koon*, the Supreme Court set forth the factors that a court should consider when deciding whether to depart from the applicable Sentencing Guideline range:

> 1.) What features of the case, potentially, take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case?
> 2.) Has the Commission forbidden departures based on those features?
> 3.) If not, has the Commission encouraged departures based on the features?
> 4.) If not, has the Commission discouraged departures based on those features?

518 U.S. at 95.

The unusual feature in this case is the drastic sentencing disparity that results due to Maryland's unique sentencing scheme.[8] This feature is not a forbidden, encouraged, or

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[8] The Fourth Circuit has acknowledged that Maryland's sentencing scheme is "rather unique." *United States v. Hassan-El*, 5 F.3d 726, 733 n. 6 (1993). In *Hassan-el*, the defendant sought to avoid application of the Armed Career Criminal Act, contending that his Maryland common law misdemeanor assault subjected him to statutory penalties that defendants with convictions from other states would not have received. Unlike the defendant in *Hassan-el*,

discouraged basis for departure.[9] Rather, it is unmentioned by the Guidelines. "If a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines as a whole,' decide whether it is sufficient to take the court out of the Guideline's heartland." *Id.* at 96 (citation omitted).

1. The individual guideline -- § 2L1.2

The structure and theory of the applicable guideline, § 2L1.2, supports the requested downward departure in this case.

In determining which defendants should be subjected to the 16-level enhancement under § 2L1.2, the Commission chose the nature of the prior offense, based upon the maximum

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xxxxxxxx does not seek to avoid application of statutory penalties; rather, he contends that the underlying conviction that enhances his sentence *under the Guidelines* is outside the heartland of offenses that typically trigger this enhancement. Applying the enhancement in xxxxxxxxxx case, without an adjustment via a downward departure, thus overrepresents the seriousness of his offense.

[9] The Government contends that xxxxxxxx should not receive a downward departure because he does not meet all the requirements of Application Note 5 to §2L1.2. While the Government correctly notes that, pursuant to this Application Note, a downward departure based on the seriousness of the predicate aggravated felony is an encouraged departure, it misunderstands the nature of the downward departure sought here: While xxxxxxxx submits that a downward departure should be granted because of the seriousness of the aggravated felony, xxx xxxx is not seeking a downward departure based on Application Note 5. Rather he contends that Maryland's unique sentencing scheme subjects him to this enhancement while similarly situated defendants in other jurisdictions would not be subject to the enhancement.

Moreover, the Government's argument that the only potential basis for departure is that which is set forth in Application Note 5 is at odds with the fundamental principle, noted above, that the Sentencing Commission did "not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." U.S.S.G. ch. I, pt. A, intro. comment 4(b); *See also Koon*, 518 U.S. at 106 (rejecting Government's argument that basis for downward departure was categorically prohibited, emphasizing that "[t]he Guidelines . . . 'place essentially no limit on the number of potential factors that may warrant a departure.'").

available sentence, to be the single greatest influencing factor. However, the quirk of Maryland law and the application of 2L1.2(b)(1)(a) renders the location of the prior offense and not the nature of the offense the single greatest factor influencing the sentence xxxxxxxx receives.

Under § 2L1.2, a non-citizen who was previously deported after being convicted of misdemeanor battery in 46 states does not qualify for the 16-level enhancement. In contrast, if a previously deported non-citizen has a prior Maryland misdemeanor conviction for battery, he will automatically receive the 16-level enhancement. Thus, xxxxxxxx, a Maryland misdemeanant, is given the same sentence that individuals who commit felonies, ranging from aggravated assaults, robberies, rape and murder, in other states and are prosecuted under § 1326 receive. xxxxxxxx does not wish in any way to minimize the severity of his predicate offense; rather, he wishes to emphasize the anomaly of increasing his sentence so drastically when similarly situated defendants would not receive the same sentence enhancement. xxxxxxxx submits that his sentence should be comparable to the sentence imposed on other defendants who are sentenced under this Guideline. *See Sanchez-Rodriguez*, 161 F.3d at 561 (stating that in deciding whether to depart downward based on overrepresentation of seriousness of aggravated felony, "the proper comparison is among all defendants who are sentenced pursuant to the same Guideline")(*citing Koon*, 518 U.S. at 104-05); *See also United States v. Craig Leach*, AMD-98-0026 (departing downward based in part based on grounds that conviction being used to enhance defendant's sentence under U.S.S.G. § 2K2.1 was Maryland common law battery which, due to Maryland's unique sentencing scheme as compared to other jurisdictions, was outside the heartland of predicate offenses that normally trigger the enhancement).

This court's consideration of the disparity in sentencing that arises from Maryland's

unique sentencing scheme is consistent with the premise underlying § 2L1.2 -- that an individual's criminal history -- not the location of the predicate offense -- will result in a more severe sentence.

2. The Guidelines as a whole

The Guidelines as a whole also support xxxxxxxxxx request for a downward departure.

One of the primary goals of the Sentencing Guidelines was to reduce sentencing disparity. The purpose of the Sentencing Commission was to establish guidelines that "avoid[ed] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . . " 28 U.S.C. § 991(b)(1)(B); See also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 4-5 (1988)(stating that, prior to the guidelines, the region in which a defendant was convicted was largely determinative of the sentence he would receive and that Congress created the Sentencing Commission to remedy this problem). Indeed, the introductory comments to the guidelines state that "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." U.S.S.G. ch. 1, pt. A, intro. comment. 3; *See also* 18 U.S.C. § 3553(a)(6)(directing courts, in imposing sentences to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct). In addition, in providing for the establishment of sentencing guidelines, "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." U.S.S.G. ch. 1, pt. A, intro. comment. 3.

Other guideline provisions recognize that defendants with similar records should be

treated similarly and specifically authorize departures to achieve this goal in the event defendants are grouped with others who have dissimilar records. *See, e.g.,* U.S.S.G. § 4A1.3 (authorizing departure based on underrepresentation or overrepresentation of defendant's criminal history).

Federal sentences that can quadruple in severity solely because the state in which a defendant had previously been convicted has a sentencing scheme that differs dramatically from the rest of the nations' states not only overrepresents the seriousness of the defendant's offense but runs counter to the goal of achieving reasonable uniformity in sentencing. xxxxxxxx submits that the requested downward departure in this case will result in a sentence that is proportional to the sentences other defendants with similar records would receive.

III. CONCLUSION

xxxxxxxx respectfully requests this Court to depart downward 11 levels to a level 10 and impose a sentence a the low end of the guideline range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of February, 2000, a copy of the foregoing Memorandum in Aid of Sentencing was hand-delivered to Gina L. Simms, Assistant United States Attorney, United States Courthouse, 6500 Cherrywood Lane, Greenbelt, Maryland, 20770.

I further certify that, on that same date, a copy of the foregoing memorandum was delivered via courthouse courier to U.S. Probation Officer Nicole R. Blanche, 100 United States Courthouse, 6500 Cherrywood Lane, Greenbelt, Maryland 20770.

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DANIEL W. STILLER
Assistant Federal Public Defender