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

UNITED STATES OF AMERICA	*	
v.	*	**Criminal No: *************
********** **********	*	

* * * * *

SENTENCING MEMORANDUM

The defendant, ********, through counsel, James K. Bredar, Federal Public Defender for the District of Maryland, and Paul D. Hazlehurst, Assistant Federal Public Defender, submits this memorandum in reference to the sentencing in the above-captioned case For the reasons stated below, the defendant asks this Court to depart downward under United States Sentencing Commission Guidelines Manual Section 4A1.3 from Criminal History Category VI and Offense Level 29 (as determined to apply in the Pre-Sentence Report prepared in this matter) to Criminal History Category IV and Offense Level 19 on the basis that Career Offender status under USSG §4B1.1 overstates the seriousness of Mr. ********'s past criminal conduct and his likelihood of recidivism. The defendant also asks that the Court depart downward four additional offense levels pursuant to USSG §5K1.1 based on the defendant's extensive assistance to authorities.

In support of this motion, the defendant offers the following memorandum of fact and law.

Memorandum in Support of Motion

I. *Career Offender Status*

Section 4B1.1 of the Sentencing Guidelines terms a defendant a career offender if: (1) he was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. USSG § 4B1.1. If these criteria are satisfied, the defendant's criminal history category is automatically elevated to VI and his offense level is raised to the higher of the offense level normally applicable or that set forth in a table which is geared to the maximum penalty for the offense of conviction.

A. *Purpose of Section 4B1.1*

The purpose of this guideline is to give effect to Congress' intent, as embodied in 28 U.S.C. § 994(h) "that certain career offenders receive a sentence of imprisonment 'at or near the maximum term authorized.'" USSG § 4B1.1 comment (backg'd). This dictate is tempered, however, by the existence of section 4A1.3 of the Guidelines Manual providing for a downward departure from the sentencing range if the criminal history employed in setting that range over-represents the seriousness of the defendant's criminal history or his likelihood of recidivism.

B. *Recognition of Authority to Depart Downward Under Section 4A1.3*

In *United States v. Adkins*, 937 F.2d 947 (4th Cir. 1991) and *United States v. Pinckney,* 938 F.2d 519 (4th Cir. 1991), the Fourth Circuit recognized the power of courts to sentence below the ranges prescribed by section 4B1.1 should career offender status

"[overstate] the seriousness of the defendant's past conduct." *U.S. v. Adkins,* 937 F.2d at 952. The Courts in each case cite section 4A1.3, where the Sentencing Commission "identified overstatement or understatement of the seriousness of the defendant's past conduct as a ground for departure from the raw criminal history score." *Id.* The court in *Adkins* found the directive of section 4A1.3 to be no less applicable to defendants classified as career offenders, noting "there is clearly a potential for wide discrepancy in the gravity of past antisocial conduct," for those in that category. *Id.*

C. *Bases for Departing Downward Under 4A1.3*

Courts considering the propriety of departure on the basis that career offender status over-represents criminal history have looked to several factors. In *United States v. Senior,* 935 F.2d 151 (8th Cir. 1991), the Eight Circuit approved the trial court's consideration of the defendant's "criminal career, including his age when he committed the offenses, the proximity in time of the [prior offenses], and the state's assessment of the seriousness of the [defendant's crimes] as reflected by the state court's handling of sentencing and by the length of time Senior actually served." *Id* at 151.[1] Similarly, the Tenth Circuit in *United States v. Bowser,* 941 F.2d 1019 (10th Cir. 1991), approved the trial court's evaluation of the defendant's age when he committed prior offenses, the proximity with which the offenses were committed and

[1] The defendant in *Senior* was convicted of possession with the intent to distribute cocaine and had three prior convictions for armed robbery as well as one for delivery of a controlled substance and another for possession of a controlled substance. *Senior,* 935 F.2d at 150. The robbery convictions came at age 20, those involving controlled substances at age 24, and his conviction in federal court at age 27. *Id.* For the robberies, the defendant received a total of 12 years; he received six years for the drug convictions. *Id.* Senior actually served three years on the robbery sentences and two on those involving controlled substances before being paroled. *Id.*

the relative sentences imposed in determining whether it was proper to depart downward from career offender status. *Id.* at 1024-1026.[2] The Third Circuit has noted that in the context of Section 4A1.3 district courts may consider "factors which the [Sentencing] Commission may have otherwise considered in promulgating other provisions of the Guidelines," to determine whether a defendant's criminal history category overstates the seriousness of his criminal history or likelihood of recidivism. *United States v.Shoupe,* 988 F.2d 440, 447 (3rd Cir. 1993).

D. *Downward Departure in Both Criminal History and Offense Level as Determined Under Career Offender Status Under Authority of Section 4A1.3*

Reduction in both criminal history category and offense level may be made when departing under 4A1.3. *United States v. Shoupe,* 35 F.3rd 835, 838 (3rd Cir.1994). To depart downward only in the criminal history category "ignores the nexus between criminal history and career offender status." *Id.* "Because career offender status enhances both a defendant's criminal history category and offense level, a sentencing court may depart in both under proper circumstances." *Id.*[3] It has been further held that it is reasonable, when departure is warranted, to apply the offense level and criminal history category that would apply absent

---

[2] The defendant in *Bowser* had committed two armed robberies at the age of 20 for which he received concurrent sentences of five to 20 years (but was released to probation). *Bowser.* 941 F.2d at 1022. The Tenth Circuit found the trial judge to be well within his discretion in departing under section 4A1.3 and not sentencing the defendant as a career offender upon his conviction of a drug felony six years later. *Id.* at 1022-1023.

[3] Such bi-fold departures in the face of career offender status have been granted in the United States District Court for the District of Maryland. *See United States v. Phillip Pridgen,* 1CR9400151 (Judge Nickerson), *United States v. Darryl Toomer,* 1CR9500243 (Judge Smalkin) and *United States v. Dana Marshall*, 1CR9500459 (Judge Smalkin)

career offender status. *United States v. Bowser, supra* at 1026; *United States v. Senior, supra* at 151; *United States v. Clark,* 8 F.3rd 839, 846 (D.C. Cir.1993).

E. *Application of Law to Facts of Mr. ********** Case*

Mr. ******** qualifies as a career offender under the technical requirements of section 4B1.1 of the Sentencing Guidelines. A closer examination of the nature, number and treatment of his prior offenses, however, leads to the conclusion that the career offender label clearly overstates the seriousness of Mr. ********'s criminal history and his likelihood of recidivism.

Mr. ******** is currently 45 years old. Prior to the age of 38, he had never been convicted of a crime and had steadily worked at a series of jobs, including employment as a correctional officer and a postal worker. *See* Presentence Report, ¶¶ 58-60. To date, he has only three prior convictions.

1. *Career offender status over-represents the seriousness of Mr. ********'s prior record*

Mr. ******** has two prior convictions in the Circuit Court for Baltimore City for distribution of cocaine and related charges dating from 1989 and 1990.[4] The charges arose from Mr. ********'s street sale of narcotics. An examination of the sentences imposed in the cases reveals that though the charges are of a serious nature -- a maximum of 25 years could have been imposed on the charge of distribution of cocaine -- the sentencing court's view of Mr. ********'s conduct was lenient. As in the *Senior* case, the court in Mr. ********'s cases

[4] These are the only two convictions for which Mr. ******** has been sentenced. He is currently awaiting sentencing on June 3, 1997 before the Honorable Roger W. Brown, Jr., of the Circuit Court for Baltimore City for a robbery committed in February 1995 with Andre Allen, Mr. ********'s co-defendant in the instant case.

appeared to treat his actions as "'more or less one criminal episode.'" *Senior,* 935 F.2d 151. The cases were consolidated for sentencing, the sentences imposed were concurrent, and Mr. ******** was ordered to serve only two years with credit for almost seven months in custody awaiting trial. Further, Mr. ******** was paroled approximately eight months after imposition of the sentences, and drug screening and treatment was ordered as a condition of probation. PSR, ¶¶ 30-31. Each of these facts erodes the notion of Mr. ******** as a career offender and supports the characterization that he was -- and was treated by the sentencing court -- not as a professional criminal but as an addict in need of treatment for his addiction.

There is no sentence, as yet, to examine to determine the sentencing court's view of Mr. ********'s conduct as to the February 1995 robbery.[5] A review of Mr. ********'s level of participation in that crime is inconsistent, however, with a view of him as a career offender. Much as in the instant case, Mr. ********'s role was peripheral to that of Mr. XXXXX. In the February 1995 robbery, Mr. ******** was present as a passenger in a car when Mr. Allen stopped the car, and, in view of Mr. ********, robbed a parking attendant. Mr. ******** then received a portion of the crime's proceeds to purchase narcotics.

These three convictions, two for distribution of cocaine and one for robbery, form Mr. ********'s criminal history. Nominally, they are serious offenses that make him eligible for career offender status. An examination of the substance of the crimes, Mr. ********'s culpable conduct and the sentences he has received do not support such status, however.

---

[5] *See supra* note 4. The plea agreement between the parties and accepted by the court calls for Mr. ******** to receive no more than five years incarceration, concurrent to any sentence imposed in the instant case. Admittedly, this agreement, and its acceptance by the court was largely influenced by Mr. ********'s cooperation with state and federal authorities.

2. *Career offender status over-represents Mr. ********'s likelihood of recidivism*

Drug dependence or abuse "is not ordinarily relevant in determining whether a sentence should be outside the applicable sentencing range," USSG §5H1.3., p.s.. As the Third Circuit has noted, however, in the context of Section 4A1.3, courts may consider such "otherwise considered" factors in determining whether criminal history over-represents the likelihood a defendant will commit other crimes. *Shoupe,* 988 F.2d at 447. *See supra* p.4. Certainly, from the sentences previously imposed for the drug offenses and the use of the fruits of the robbery, it appears that Mr. ********'s criminal activity has historically been motivated by his drug abuse, and it appears equally certain that his likelihood of recidivism would be significantly decreased, if not eradicated, by effective treatment of that problem. Further, as Mr. ******** is 45 years old, his likelihood of committing future criminal activity is even further diminished, statistically, by virtue of his increasing age.

3. *The Court should employ the offense level and criminal history category that would apply absent career offender status.*

While offense level 29 and criminal history category VI, as a result of career offender status, clearly exaggerates the impact of Mr. ********'s criminal history, offense level 19 and criminal history category IV are a realistic barometer of his past conduct and set a proper range for punishment commensurate with his actions in the instant case.

II. *Departure for Substantial Assistance*

In paragraph 5(b) of the plea agreement between the parties, the Government stipulates that if "[i]n the event your client provides substantial assistance in the investigation or prosecution of others who have committed an offense" it will move for a two-level downward

departure under Section 5K1.1 of the Sentencing Guidelines. *See* plea agreement of 9/19/95, ¶5(b). The same paragraph further states that "defense counsel is not bound by the departure level recommended by the government." *Id.*

This Court has had full opportunity to witness the level of Mr. ********'s cooperation and its effect in the prosecution and conviction of Mr. XXXXX and YYYYYY. The Court should be aware, however, that Mr. ******** was not a late convert in choosing to help the Government. Prior to his first meeting with undersigned counsel in August 1995, Mr. ******** had already embarked on a course to fully admit his wrongdoing and make all possible amends. His testimony in the trial of Mr. XXXXX and YYYYYY was only the culmination of a long series of meetings over the course of a year in which Mr. ******** willingly provided information which otherwise might have remained unknown to the government. (Similarly, Mr. ********'s cooperation with the State's Attorney for Baltimore City and testimony at trial made possible Mr. XXXXX's prosecution and conviction for homicide.) Further, during the period of his cooperation, Mr. ******** has been the subject of a separation order to protect him from physical harm at the hands of XXXXX or his associates.

All of these facts fulfill the criteria stated under Section 5K1.1 to be employed by a sentencing court in determining whether to award a downward departure for cooperation. It is the extraordinary extent of Mr. ********'s cooperation, however, that warrants an extraordinary departure.

Conclusion

For the foregoing reasons as well as for any other reasons set forth at a hearing on the

matter, Mr. ******** asks this Court to depart downward under United States Sentencing Commission Guidelines Manual Section 4A1.3 from Criminal History Category VI and Offense Level 29 (as determined to apply in the Pre-Sentence Report prepared in this matter) to Criminal History Category IV and Offense Level 19 (the criminal history category and offense level that would apply absent career offender status) on the basis that Career Offender status under USSG §4B1.1 overstates the seriousness of Mr. ********'s past criminal conduct and his likelihood of recidivism. The defendant also asks that the Court depart downward four additional offense levels pursuant to USSG §5K1.1 based on the defendant's extensive assistance to authorities.

Should the Court grant such departures, the sentencing range for the offense of bank robbery would be 30-37 months. The sentencing range for the offense of use of a firearm in relation to a crime of violence would remain 60 - 60 months and would have to be imposed consecutively to any sentence imposed for the offense of bank robbery.

Respectfully submitted,

_____

Paul D. Hazlehurst
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of April, 1997, a copy of the foregoing Motion was delivered to ZZZZZZZZZZZ, Assistant U.S. Attorney, 6th Floor, United States Courthouse, 101 W. Lombard St., Baltimore, Md. 21201

_____
Paul D. Hazlehurst
Assistant Federal Public Defender