

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

UNITED STATES OF AMERICA

*

v.

*

Criminal No: #####

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* * * * *

SENTENCING MEMORANDUM

The defendant, *****, through counsel, Beth M. Farber, Acting Assistant 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 from offense level 29¹ and criminal history category VI as set forth in the presentence report on the bases that:

- a. Career Offender status under USSG §4B1.1 overrepresents Mr. *****'s likelihood of recidivism,
- b. Mr. ***** committed the instant offense while suffering from a significantly reduced mental capacity,
- c. Mr. *****'s has exceptional family ties and responsibilities; and,
- d. a combination of these mitigating circumstances.

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

¹ The offense level determined to apply after adjustment for acceptance of responsibility under USSG §3E1.1.

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. 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 otherwise prescribed guideline ranges where the “computed criminal history ‘significantly under-represents’ or ‘significantly over-represents’ the seriousness of the of the defendant’s criminal history score or the likelihood that the defendant will commit further crimes.” *U.S. v. Pinckney*, 938 F.2d at 521. The court in *Adkins* found 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.*

Though the Fourth Circuit has not addressed the issue, other circuits have held that reduction in both criminal history category and offense level may be made when departing

under 4A1.3 in career offender cases. *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.* The *Shoupe* court further noted that: "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.* 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 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).

C. Age as an indicator of recidivism

Age is the most accurate factor in determining recidivism. Susan Lundstrom, *Dying to Get Out: A Study on the Necessity, Importance, and Effectiveness of Prison Early Release Programs for Elderly Inmates Suffering from HIV Disease and Other Terminal-Centered Illnesses*, 9 BYU J. Pub. L. 155, 163 (1994). The United States Parole Commission employs age as "its most reliable predictor of recidivism," and a federal government study has shown that inmates over 55 may have as low a rate of reoffending as 15 percent. *Id.* See also U.S. Department of Justice, *Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses*, (Dec. 1993), United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1985*, (April 1989). This estimate is generally supported by a study conducted by the state of Illinois, which set the recidivism rate for those over 55 at 17 percent as compared with 42 percent for the entire inmate population. *Id.*

Age, and its relationship with recidivism, has been employed by at least one circuit as basis for departure in the case of a career offender. In *United States v. Collins*, 122 F.3d 1297, 1307 (10th Cir.1997), the Tenth Circuit held that a district court had been correct in departing downward from career offender status in the case of a 64-year-old man who was in ill health at the time of sentencing.² The defendant had been convicted of one count of distribution of cocaine. Based on the weight of the drug, Collins' offense level was 17 (following a three-point deduction for acceptance of responsibility) and his criminal history was IV. The resulting range was 37-46 months. Because of his prior record, however, the defendant was deemed a career offender and his offense level was elevated to 29 and his criminal history category to VI. The resulting range was 151-188 months.

The district court departed downward to the range that would have applied absent career offender status, imposing a sentence between 37-46 months. In doing so, the district court noted that “the application of the career offender category would effectively change [the] sentence from a little more than three years to . . . possibly life.” *Id.* At 1300. The sentencing court also stated that “[career offender] categorization significantly over represents the likelihood that the defendant will commit future crimes.” *Id.*

D. Mr. ***'s likelihood of recidivism is severely diminished by his age and ill health.**

² Before approving the departure from career offender status under section 4A1.3, the *Collins* court determined whether the factors supporting overrepresentation, such as the defendant's age and infirmity and the age of the predicate convictions, brought the case outside the heartland of cases under section 5K2.0. This analysis, as noted in *Collins*, is inconsistent with that specified by the Fourth Circuit in *Pinckney* which recognizes separate authority for departures under 5K2.0 and 4A1.3. *Collins*, 122 F.3rd at 1306.

It is indisputable that Mr. ***** qualifies as a career offender under the requirements of section 4B1.1. At the same time, he is currently 57 years old and suffers heart problems, high blood pressure and associated difficulties with his vision as well as the effects of a long history of alcohol abuse. *See* Presentence Report, ¶¶ 66 -68. Based on the medical examination that was performed at the Federal Correctional Institution at Butner, N.C., it is apparent that surgical intervention may be necessary to correct the heart defect.

Even should Mr. ***** serve half of the sentence specified by the bottom of the career offender guideline range (151 months), he would be 63 years old at the time of his release. Given the statistical rarity of someone of that age reoffending, notwithstanding Mr. *****'s medical problems or the prospect that he should -- for the first time -- receive substantive mental health treatment in the Bureau of Prisons to deal with his gambling addiction, it is clear that career offender status overstates his likelihood of recidivism and a downward departure is warranted under 4A1.3.

II. Diminished Capacity

Guidelines Section 5K2.13 permits departure “if a defendant commits a non-violent offense while suffering from a significantly reduced mental capacity not resulting from voluntary use of drugs or intoxicants.” USSG §5K2.13, p.s. Other than the caveat that the offense must be non-violent, the section permits a reduction in sentence to account for the effect of the mental incapacity as long as the defendant’s criminal history does not “indicate a need for incarceration to protect the public.” *Id.*

The Fourth Circuit in *United States v. Weddle*, 30 F.3d 532, 539 (1994) adopted the definition of non-violent offense -- in the context of 5K2.13 -- articulated by Judge

Easterbrook of the Seventh Circuit in his dissent in *United States v. Poff*, 926 F.2d 588 (7th Cir. 1993). In that case, Judge Easterbrook stated that a non-violent offense “in ordinary legal (and lay) understanding is one in which mayhem did not occur. The prospect of violence . . . sets the presumptive range; when things turn out better than they might, departure is permissible.” *Weddle*, 30 F.3d at 539, quoting from *Poff*, 926 F.2d at 593. In embracing this position, *Weddle* set the purpose of 5K2.13 as being “to create lenity for those who cannot control their actions but are not actually dangerous.”³

A. The attempted bank robbery in this case was a non-violent offense for purposes of 5K2.13 analysis.

The bank robbery contemplated by Mr. ***** was never consummated. Though it could be posited that the robbery did not occur because of the intervention of law enforcement officers, the Government accepts Mr. *****’ s assertion that he had not actually decided to commit the robbery and would have decided whether to do so only after arriving at the bank. PSR, ¶ 7. Further, the firearm found in the car with Mr. ***** had the firing pin removed and could not be fired. Though the circumstances of Mr. *****’s

³ In employing the words “cannot control their conduct,” the *Weddle* court clearly recognizes a volitional criteria in analyzing the conduct of defendants seeking a departure under 5K2.13. On the other hand, the Fourth Circuit in *Goosens* concentrated on the issue of whether the defendant in that case was able to “process information or reason” while failing to comment on the language in *Weddle* regarding the inability of the offender to control their conduct. In the most recently published decision regarding this issue, the Third Circuit ruled departure is possible under 5K2.13 if a defendant suffers from either a significant cognitive disability affecting his ability to reason, or a volitional impairment affecting the ability to control his actions. *United States v. McBroom*, 124 F.3d 533, 548 (3rd Cir. 1997) The court in *McBroom* further commented, specifically referring to *Goosens*, that “[our sister courts apparent focus on [cognitive disability] may be more the result of the arguments raised by the offenders in each specific case than of a conscious decision to disregard volitional impairment.” *Id.* at 547.

offense, to paraphrase Judge Easterbrook in *Poff*, suggested the prospect of violence, things turned out better, no violence occurred, and departure would appear to be possible under 5K2.13.

B. Mr. **'s pathological addiction to gambling significantly reduced his mental capacity.***

In both the competency evaluation performed at FCI-Butner as well as an examination performed by Dr. Neil Blumberg, M.D., at the request of defense counsel. Mr. ***** is diagnosed as suffering from pathological gambling disorder. *See* attached Exhibits 1, FCI-Butner Forensic Evaluation, p.10, and 2, Psychiatric Evaluation by Dr. Blumberg, pp.8-9. The “essential feature” of this disorder, according to the Butner report, “is persistent and recurrent maladaptive gambling behavior that disrupts personal, family or vocational pursuits.” Butner Report at p.10. Mr. ***** has a lengthy and troubled history of gambling which illustrates this definition. It has further been made clear through Mr. *****'s statements as recorded by government agents prior to his arrest, his post-arrest statements to the same agents, the history taken by both the doctors at Butner and Dr. Blumberg, anecdotal accounts by Mr. *****'s family members and Mr. *****'s representations to Ms. Tavik and the Court, that his undertaking of the instant offense was tied to his need to fuel this addiction. The sum total of the evidence supports Dr. Blumberg's conclusion that:

Mr. ***** [suffers] from a severe gambling problem which has directly resulted in his choosing illegal means in order to obtain funds to continue gambling. The severe impairment in his impulse control over his gambling extends to generalized problems with impulsivity in terms of his alcohol use, work behavior and interpersonal interactions.” Report of Dr. Blumberg, p.9.

Mr. *****'s statement that he had not decided whether to rob the bank at the time of his arrest appears indicative of his struggle to control the impulsivity noted by Dr. Blumberg. Mr. ***** was clearly seeking to perpetuate his gambling through the planned robbery and, apparently, somehow expected that if he obtained enough money in that endeavor, he could then win enough gambling to also clear his debts and take care of his family. Some last remnant of rational thought may have actually prevented Mr. ***** from robbing the bank. But the overwhelming impulse to satiate his gambling addiction led him into the ridiculous scheme and significantly reduced his mental ability to check himself. For these reasons, departure under 5K2.13 is appropriate in this case.

C. Schizophrenia may also have diminished Mr. **'s mental capacity.***

Mr. ***** was first diagnosed with schizophrenia in 1969, PSR, ¶ 59, a disease characterized by “hallucinations or delusions concurrent with cognitive and emotional dysfunctions.” Butner Report, p. 9. . The doctors at Butner found the disease to be in full remission, and Dr. Blumberg did not even include the impairment among his diagnoses. Given undersigned counsel's experience with Mr. *****, however, and the marked improvement in Mr. *****'s ability to communicate ideas and maintain focus since their first meeting, it not unthinkable that Mr. *****'s cognitive, as well as his volitional, abilities were impaired at the time the instant offense was committed by schizophrenia. If so, the basis for departure under 5K2.13 is strengthened by such evidence.

D. Mr. **'s criminal history does not show such need for incarceration to protect the public as to prohibit departure under 5K2.13.***

Section 5K2.13 limits departure if the defendant's criminal history indicates “a need for

incarceration to protect the public.” For the reasons set forth in section **I**, subsection **D** of this memorandum, *infra*, Mr. *****’s likelihood of recidivism is so remote as to pose no bar to departure under 5K2.13.

III. Family Ties and Responsibilities

The family ties and responsibilities of a defendant have been deemed “not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. USSG §5H1.6, p.s. The United States Supreme Court has articulated a process for analyzing the propriety of departure based on such “discouraged factors,” permitting a sentence reduction only if the factor is “present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.” *United States v. Koon*, 116 S.Ct. 2035, 2045 (1996).

A. The disabilities of Mr. **’s wife and son distinguish this case from the ordinary case involving family ties and responsibilities.***

Mr. *****’s wife, Doris, suffers from a series of medical ailments which have left her unable to work, including diabetes, pulmonary disease and carpal tunnel syndrome. *See* Exhibit 3, attached and PSR, ¶ 55. Mr. *****’s son, YYYYYYY, Jr., 21, suffers from cerebral palsy, is confined to a wheelchair, unable to communicate through conventional methods and requires daily bathing and feeding by others. PSR, ¶ 56. Despite his own health problems, Mr. ***** worked at a variety of jobs, and was the sole means of support for his family prior to his arrest. Since that time, Mrs. ***** and YYYYYYY, Jr., have been permitted to move in temporarily with her ex-husband, an accommodation that will soon end, and otherwise subsist on approximately \$400 a month in welfare payments with no expectation

of any increase.

Incarceration of the length contemplated by even the low end of the career offender guidelines would work a tremendous hardship on both YYYYYYYY, Jr., and Mrs. ***** and could result in the placement of YYYYYYYY, Jr., in a care facility. Mr. *****'s son has always been cared for by his mother and Mr. *****, and is able to communicate and interact with both parents. A long period of imprisonment for Mr. ***** could damage this bond in ways that may not be capable of repair.

Even a sentence cutting in half the low end of the career offender guidelines would probably provide Mr. ***** with sufficient mental health treatment of the type recommended by Dr. Blumberg to control his gambling problem. Mr. *****'s recognition of his disease and desire to control it predates this case, as evidenced by his attempt to enter the Compulsive Gambling Center at Harbor Hospital in 1996. PSR, ¶ 64. Ironically, he could not enter the program because of his inability to pay for the treatment. *Id.* If Mr. ***** is able to stifle his urge to gamble, given his work habits since his last incarceration, he could provide sufficiently for his wife and son. A relatively short prison sentence for Mr. ***** may be the only salvation for his family.

IV. Combination of Factors

It has been held that, in an extraordinary case, a district court may depart downward “when a number of factors that, when considered individually, would not permit a downward departure, combine to create a situation that ‘differs significantly from the ‘heartland’ cases covered by the guideline.’” *United States v. Rioux*, 97 F.3d 648, 663 (2d Cir.1996), quoting USSG § 5K2.0. This opportunity for departure is recognized by the Fourth Circuit. *United*

States v. Goff, 907 F.2d 1441, 1447 (4th Cir.1990). The rationale behind the rule was explained by the Ninth Circuit in *United States v. Cook*, 938 F.2d 149 (9th Cir.1991):

In making a decision in any particular case, a good judgement will often require the evaluation of a complex of factors. No single factor will be enough to point to the wise course of decision. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision.

Mr. ***** submits that each of the factors previously discussed are capable of standing alone as bases for reduction of his sentence. Taken in concert, however, the factors certainly remove the instant case from the heartland of cases considered by the sentencing guidelines.

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 from Criminal History Category VI and Offense Level 29 to impose a sentence at or below 84 months. Such a sentence would take into account Mr. *****'s extensive criminal history and deter future involvement in like activity. Yet it would also diminish the artificial and inappropriate inflation of Mr. *****'s guideline range caused by career offender status and recognize that much of his past criminal history may have been caused by the same mental problems which have placed him before the Court in this case and gone largely untreated in the past. Finally, it would permit Mr.***** to return much more quickly to a family that, because of its special circumstances, is in dire need of his assistance.

Respectfully submitted,

Paul D. Hazlehurst
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February, 1998, a copy of the foregoing Motion was delivered to ZZZZZZZZZZ, Assistant U.S. Attorney, 6th Floor, United States Courthouse, 101 W. Lombard St., Baltimore, Md. 21201

Paul D. Hazlehurst
Assistant Federal Public Defender

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3