

**OFFICE OF THE FEDERAL PUBLIC DEFENDER
DISTRICT OF MARYLAND**

NORTHERN DIVISION
TOWER II, SUITE 1100
100 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201-2705
TEL.: (410) 962-3962
FAX: (410) 962-0872

BETH M. FARBER
ACTING FEDERAL PUBLIC DEFENDER

RICARDO D. ZWAIG
ASSISTANT FEDERAL PUBLIC DEFENDER

April 13, 1998

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

Re: United States v. MC
Criminal No. S-97-xxxx

Dear Judge Smalkin:

Sentencing in the above-referenced case is scheduled for Friday, April 17, 1998 at 10:00 a.m. I am writing to set forth Mr. C.'s request for a downward departure from the guideline range established in the Presentence Report (hereinafter "PSR").

GUIDELINE RANGE

The guideline range of imprisonment established in the presentence report is 46-57 months, based on an offense level 22 and a criminal history category II, as set forth in paragraph 56 of the PSR. We are requesting a downward departure from this offense level and guideline range for two reasons. First, because of Mr. C.'s exceptional and extraordinary efforts at post-offense rehabilitation warrant it. And, second because Mr. C.'s Federal Youth Corrections Act sentence significantly over-represents his criminal history. The first departure request is justified by the holding in Brock v. United States, 108 F.3d 31 (4th Cir. 1997), and United States Sentencing Guideline (USSG) §§3E1.1 and 5K2.0. The second request is based on USSG § 4A1.3 (Policy Statement).

EXCEPTIONAL AND EXTRAORDINARY EFFORTS AT
POST OFFENSE REHABILITATION

A downward departure is warranted when the Court finds that, in accordance with 18 U.S.C. §3553 (b), there exists a factor which has not been forbidden by the United States Sentencing Commission and that factor is present to such an extent that it essentially takes the case out of the heartland of cases to which the Guidelines were designed to apply. Brock, supra at 34-35.

Here, Mr. C. committed several bank robberies in order to be able to satisfy his long standing and untreated heroin addiction. (See PSR paragraphs 12, 16, 65, 68 and 69). Although Mr. C. had made several attempts to enter into long-term treatment programs, he was rebuffed each time he tried. This was confirmed by Mr. C.'s mother, who had on several occasions accompanied him to seek such treatment. The first intervention that has ever been made available to him was that which was provided by the Court as part of his pre-trial release conditions, namely xxxxxxxxxxxx. Although many defendants are referred to this 28-day intensive in-patient facility, few are able to withstand its rigorous regimen. Many of those individuals who make it through the in-patient phase often relapse during the aftercare phase.

Mr. C. was jailed for the instant offense on October 21, 1997. On November 12, 1997, as a condition of his pre-trial release Order, he was released to XXXX the 28-day in-patient drug treatment program, and was discharged after having successfully completed this program, on or about December 10, 1997. Mr. C. continued with aftercare treatment at the XXXX until the end of January 1998, when he entered the aftercare program at XXXX. From the time Mr. C. entered the XXXX on November 12, 1997 to the present, he has been under mandatory urinalysis testing and never tested positive for any illicit narcotics/drugs. During this period of time he has been under the custody of Trent Cornish, United States Pre-Trial Services Officer, who has authorized undersigned counsel to inform the Court that Mr. C. has been a "model defendant" "whose adjustment to supervision has been exemplary." Mr. C. is one of those rare individuals who has been able to get a hold of his addiction by taking advantage of, and not squandering, the opportunity which was extended to him by the Court to deal with his drug addiction. Moreover, Mr. C., upon finishing the in-patient treatment at the XXXX, made the additional commitment of being a member of the XXXX Alumni Association and was elected to serve as the financial director and chief fund raiser of the Association. See attached Newsletter.

OVER-REPRESENTATION OF CRIMINAL HISTORY

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).

Mr. C. has one prior conviction which generates three criminal history points. See PSR paragraph 50. It is a sixteen-year-old conviction for bank robbery under the Youth Corrections Act when Mr. C. was 18 years old. Although we are not arguing that the sentence may not be counted we do maintain that the fact that it is so old and that, but for the instant offense, Mr. C. has not re-offended since then. See United States v. Hazel, 928 F.2d 420 (D.C. Cir. 1991) (Court held that District Court could depart from a Criminal History Category VI to IV because of over-

representation of criminal history, even though Federal Youth Corrections Sentence counted and made defendant a career offender).

Furthermore, Mr. C. believes that the 5/2/81 arrest reflected in paragraph 49 of the PSR was not a conviction, but was instead placed on the Stet Docket. Attached is a copy of "page 3" of the PSR prepared in the prior Youth Corrections Act offense supra, which indicates that this information was obtained from the Baltimore City Police Department, not the Maryland District Court, which would corroborate Mr. C.'s memory that he believes it was placed on the Stet Docket. Mr. C. believes that he had one year to pay the restitution in the case, which he did, and thereafter the case would be closed, and that the year during which restitution was to be paid was to be unsupervised. Lastly, undersigned counsel spoke the Ilene Hall, United States Probation Officer, who agreed that this may not have been a conviction, and may, in fact, have been placed on the Stet Docket, and has agreed to not treat it as a conviction.

CONCLUSION

We therefore request that this Honorable Court grant a downward departure for the reasons stated above because of Mr. C.'s exceptional and extraordinary efforts at post-offense rehabilitation and because his Criminal History Category significantly over-represents the seriousness of his criminal history. We respectfully request a four level downward departure from an offense level of 22 (guideline range of 46-57 months) to an offense level of 18 with a guideline range of 30-37 months, for Mr. C.'s exceptional and extraordinary efforts at post-offense rehabilitation; and, a departure of one Criminal History Category (CHC) from CHC II (guideline range 30-37 months) to CHC I, for a final Guideline Range of 27-33 months. Lastly, we would respectfully request a sentence of 27 months, the low end of the final guideline range.

Respectfully submitted,

Ricardo D. Zwaig
Assistant Federal Public Defender

cc: Andrew White, AUSA
Ilene Hall, USPO
MC, Defendant