

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,)	
)	
v.)	Criminal No. 06-CR-42-A
)	
CHARLES UNDERWOOD,)	
)	
Defendant.)	

**DEFENDANT’S POSITION WITH REGARD TO SENTENCING FACTORS AND
MOTION FOR DOWNWARD DEPARTURE**

Pursuant to Title 18 U.S.C. § 3553(a), Rule 32, *Federal Rules of Criminal Procedure*, Section 6A1.3 of the *United States Sentencing Guidelines*, and this Court’s Policy Regarding Procedures to Be Followed in Guideline Sentencing, Defendant Charles Underwood, by counsel, hereby states that he has received and reviewed the Presentence Report (“PSR”) prepared in this case and that he has no objections to the Report. However, Mr. Underwood respectfully requests that the Court depart downward from the advisory guidelines pursuant to Section 4A1.3 and find that a criminal history category of VI significantly over-represents the seriousness of Mr. Underwood’s criminal history. Additionally, pursuant to 18 U.S.C. § 3553(a), Mr. Underwood respectfully requests that the Court impose a total sentence of 60 months, which is more than sufficient to comply with the purposes of sentencing under the statute.

BACKGROUND

This case involves three inept young heroin addicts who managed to obtain only \$881.00 through the commission of two bank robberies and an attempt at a third. Mr. Underwood entered a plea of guilty to count three of the indictment, which charged him with bank robbery in violation

of 18 U.S.C. §§ 2113 & 2, arising from an August 28, 2005, robbery in Sterling, Virginia. The advisory guideline range recommended by the PSR is 92-115 months, based on an offense level of 23 and a criminal history score of VI. The other individuals involved in the bank robberies, Amanda Pearson and Steven White, have already pleaded guilty and been sentenced. Ms. Pearson was sentenced to serve 38 months of incarceration and Mr. White received a sentence of 46 months.

ARGUMENT

I. The Court Should Depart Downward Based on Overstatement of Criminal History Because Almost All of Mr. Underwood’s 24 Total Criminal History Points Result from Traffic and Other Minor Offenses

Although Mr. Underwood has managed to accumulate 24 criminal history points, 18 of those points relate to traffic offenses and convictions for breaking into coca cola vending machines and parked vehicles to steal stereo equipment. These convictions are the consequence of Mr. Underwood’s longstanding addiction to alcohol and illegal drugs, and his commission of petty crimes to obtain alcohol and drugs. They do not reflect the criminal history of a defendant who ordinarily would fall within category VI.

Criminal History Category VI applies to defendants who have accrued 13 or more criminal history points, and is the most serious classification that a defendant can receive based on prior criminal history. As a general matter, “[r]ecidivism rates rise as criminal history points increase and as CHCs increase.” U.S. Sentencing Comm’n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 15 (May 2004).¹ Category VI is thus designed

¹ This report is available at: http://www.ussc.gov/publicat/Recidivism_General.pdf. Interestingly, the report found “no correlation between recidivism and guidelines’ offense level. Whether an offender has a low or high guideline offense level, recidivism rates are similar.” *Id.* at 15.

to encompass the most serious criminal offenders with lengthy and substantial histories generally involving drugs, severe violence, or firearms.

Nonetheless, the Sentencing Commission recognized that the Guidelines might not always account for cases like this one, and therefore designed § 4A1.3 to address situations where the defendant's history of traffic infractions and other relatively minor convictions place the defendant in a criminal history category usually reserved for those with substantially more serious criminal histories. Mr. Underwood respectfully asks that the Court depart below the applicable guideline range pursuant to this Section.

It is well-settled that a “departure under § 4A1.3 is specifically authorized by the Sentencing Guidelines whenever the computed criminal history ‘significantly under-represents’ or ‘significantly over-represents’ the seriousness of defendant’s criminal history or the likelihood that the defendant will commit further crimes.” *United States v. Pinckney*, 938 F.2d 519, 521 (4th Cir. 1991). As the Court of Appeals for the Fourth Circuit has explained:

“Criminal history” is, relatively, one of the most flexible concepts in the guidelines. While it is possible to classify the severity of current federal offenses with a reasonable degree of precision, mathematically accurate evaluation of the countless possible permutations of criminal history, involving offenses of high and petty committed in numerous jurisdictions, would be at best unwieldy. The Sentencing Commission recognized this difficulty, and though it prescribed a mathematical method to calculate criminal history, it specifically identified overstatement or understatement of the seriousness of the defendant’s past conduct as a ground for departure from the raw criminal history score.

United States v. Adkins, 937 F.2d 947, 952 (4th Cir. 1991); accord *United States v. Summers*, 893 F.2d 63, 67 (4th Cir. 1990) (affirming downward departure based on criminal history). Accordingly, a departure may be warranted based on a consideration of factors relevant to determine whether the

PSR calculation significantly over-represents a defendant's criminal history or the likelihood that the defendant will commit further crimes. *See* § 4A1.3. In *Summers*, for example, the Fourth Circuit affirmed a downward departure on the ground that the defendant's criminal history category overstated the severity of the defendant's criminal history, which included "convictions for grand larcenies, possession of narcotics, a weapons violation, driving with suspended license violations and probation revocation." 893 F.2d at 65.

Likewise, in *United States v. Nelson*, 166 F. Supp. 2d 1091 (E.D. Va. 2001), this Court granted a motion for a downward departure based on overstatement of criminal history from Level VI to Level III. In its discussion of the relative characteristics of defendants within criminal history categories, the Court identified a typical case involving a defendant who had been properly classified within criminal history category VI, and noted that the defendant's record in that case consisted of "possession of cocaine, three points for possessing cocaine with intent to distribute in a school zone, two points for assault, one point for possession of drugs, one point for assault, and three points for possession of cocaine" *Id.* at 1097.

The defendant's criminal record at issue in *Nelson*, this Court held, "does not reflect the history of narcotics distribution and violent behavior present in [that] criminal record." *Id.* at 1098. In fact, the Court ruled that Mr. Nelson's criminal history was much more in line with category III than category VI.

Mr. Nelson's criminal history is similar to and perhaps even more serious than Mr. Underwood's. Mr. Nelson had previously been convicted of (1) possession of marijuana and driving on a suspended license; (2) failure to return a video; (3) escape from custody and damage to a police vehicle; (4) trespassing; (5) driving after a habitual offender adjudication; (6) speeding to elude

police officers, reckless driving, and driving on a suspended license; and (7) malicious wounding. *Id.* at 1093. Mr. Nelson also received three criminal history points for committing the instant offense while under probation and less than two years after being released from a sentence of at least sixty days. *Id.* Other than the conviction for malicious wounding, for which Mr. Nelson received a sentence of three years, he had not received a sentence over sixty days--even though two of his convictions were explicitly for escape or fleeing from police.

Mr. Underwood received criminal history points for convictions of: (1) misdemeanor assault; (2) driving under the influence and on a suspended license; (3) tampering by attempting to break into a coca cola machine; (4) destruction of property and petty larceny for breaking into a coca cola machine; (5) threat-intimidate with property damage for a domestic incident; (6) driving while intoxicated second offense; (7) false report to police; (8) receiving stolen goods for stealing car stereos; (9) unlawful entry for stealing car stereos; (10) driving on a suspended license; (11) disorderly conduct; and (12) third degree burglary for breaking into a coca cola vending machine. Ten of these twelve convictions resulted in sentences of 90 days or less. Mr. Underwood, like Mr. Nelson, also received three criminal history points for committing the underlying offense while under a criminal justice sentence and less than two years from release on a serious offense.

Furthermore, while Mr. Nelson “served a mere twenty days of incarceration and paid \$120 in fines” for convictions that resulted in four criminal history points, 166 F. Supp. 2d at 1096, Mr. Underwood served twenty days of incarceration, was required to perform 60 hours of community service, and was assessed \$381.00 in court costs for convictions that resulted in four criminal history points. *See* PSR ¶¶ 40, 44, 46, 50. Accordingly, as in Mr. Nelson’s case, “Defendant’s minor non-violent offenses and traffic infractions artificially inflate the seriousness of his prior criminal record.”

166 F. Supp. 2d at 1096.

Like the defendant in *Nelson*, Mr. Underwood's lengthy but relatively small-time criminal history is simply not in the same league as the "violent offenders, drug kingpins and perpetrators of far more serious offenses" that Criminal History Category VI was designed to address. *See United States v. Paulino-Duarte*, S100CR686, 2001 U.S. Dist. LEXIS 3208, at *10 (S.D.N.Y. Mar. 26, 2001). Indeed, almost all of Mr. Underwood's criminal history points arise from traffic offenses or non-violent misdemeanors. In sum, a mechanical application of the Guidelines in this case significantly exaggerates the significance of Mr. Underwood's criminal history. For these reasons, Mr. Underwood respectfully requests the Court to grant the Motion for Downward Departure in this case to criminal history category III, a level that more accurately reflects the seriousness of his criminal history. Such a criminal history category would result in a recommended guideline range of 57-71 months.

II. The Court Should Impose a Sentence of 60 months, a Sentence that is Sufficient, But Not Greater Than Necessary to Comply With the Purposes of Sentencing under 18 U.S.C. § 3553(a)

As noted in this Court's Memorandum on the Policy Regarding Procedures to be Followed in Sentencing, the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and the Fourth Circuit's ruling in *United States v. Hughes*, 401 F.3d 540, 547 (4th Cir. 2005), require courts to consider not only the recommended guideline range, but also the sentencing factors under 18 U.S.C. § 3553(a), in determining the appropriate sentence.

The overriding principle and basic mandate of Section 3553(a) requires district courts to impose a sentence "*sufficient, but not greater than necessary*," to comply with the four purposes of sentencing set forth in Section 3553(a)(2): retribution (to reflect the seriousness of the offense, to

promote respect for the law, and to provide “just punishment”), deterrence, incapacitation (“to protect the public from further crimes”), and rehabilitation (“to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”). The sufficient-but-not-greater-than-necessary requirement is often referred to as the “parsimony provision.” This requirement is not just another factor to be considered along with the others set forth in Section 3553(a) — it sets an independent limit on the sentence.

In determining the sentence sufficient but not greater than necessary to comply with the § 3553(a)(2) purposes of sentencing, the court must consider several factors listed in § 3553(a). These are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of sentence available; (3) the guidelines and policy statements issued by the Sentencing Commission, including the advisory guideline range; (4) the need to avoid unwarranted sentencing disparity; and (5) the need to provide restitution where applicable. 18 U.S.C. § 3553(a)(3), (a)(5)-(7). Neither the statute itself nor *United States v. Booker* suggests that any one of these factors is to be given greater weight than any other factor.

A. History and Characteristics of Mr. Underwood and Nature of the Offense

As noted in the PSR, Mr. Underwood had a sad and terribly dysfunctional childhood. Given up by his mother at the age of six months, Mr. Underwood never had contact with his father and grew up largely in the care of other family members and foster families. PSR ¶ 80-81. Mr. Underwood had his first contact with the juvenile justice system when he was 8 years old, PSR ¶ 26, and had no stable residence beginning at age 13. PSR ¶ 83. Unsurprisingly, three of Mr. Underwood’s half-siblings are incarcerated by the Virginia Department of Corrections. *Id.*

Diagnosed with bi-polar disorder, Mr. Underwood also developed post-traumatic stress

disorder while caring for his biological mother who died of cancer in 2002. PSR ¶ 89. From Spring 2005 until his arrest for the underlying offense, Mr. Underwood used heroin on a daily basis. Between the ages of 18 and 23, Mr. Underwood consumed alcohol on a daily basis. Only 26 years old, Mr. Underwood's life has been marked by deprivation, severe drug and alcohol abuse, mental health issues, and numerous contacts with law enforcement followed by relatively short periods of incarceration.

The nature of the underlying offense involves several clumsy efforts to obtain money from three local banks. Although one robbery attempt was aborted, the other two netted \$275.00 and \$606.00 respectively. The motive for the robberies was to obtain money to buy drugs.

B. A Sentence of 60 Months Would Promote Respect for the Law, Provide a Just Punishment, Afford Adequate Deterrence, and Avoid Unwarranted Disparities in Punishment

Section 3553(a) also provides that courts should strive to impose a sentence that reflects the seriousness of the offense, promotes respect for the law, provides a just punishment, affords adequate deterrence, protects the public, and allows for rehabilitation. The Court must also consider the need to avoid unwarranted sentencing disparities between defendants who have engaged in comparable conduct. A sentence of 60 months would be more than sufficient to accomplish those goals in this case.

As an initial matter, the other two individuals who committed the underlying offense along with Mr. Underwood received sentences of 38 months and 46 months, respectively. A sentence of 60 months in this case therefore would be much more in line with the sentences received by Mr. Underwood's cohorts than a sentence within the recommended guideline range.

In addition, given that Mr. Underwood has never before received a sentence of more than 12

months at one time, *see* PSR ¶ 47, a sentence of 60 months would serve as a significant punishment while at the same time taking into account Mr. Underwood’s obvious need for rehabilitation. Notwithstanding Mr. Underwood’s lengthy criminal history, he remains a young man who still has the ability to turn his life into a productive one.

Considering all of these factors, Mr. Underwood respectfully requests the Court to impose a total sentence of 60 months. Such a sentence would take into account the gravity of Mr. Underwood’s conduct and would amount to the most serious sentence that Mr. Underwood has ever received. In sum, such a sentence would more than adequately serve the needs outlined in § 3553(a)(2), and thereby satisfy the “parsimony provision” of that section.

WHEREFORE, the Mr. Underwood prays that this Honorable Court grant his motion for a downward departure, recommend that he be admitted to the 500 drug treatment program, and recommend that he be designated to a facility as near the Washington metropolitan area as possible.

Respectfully submitted,
Charles Underwood

By _____
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered this 21st day of July, 2006, to the U.S. Attorney's box in the Clerk's Office at the United States District Court Clerk's Office in Alexandria and addressed to:

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