

FEDERAL PUBLIC DEFENDER

District of Connecticut
241 Main Street, 1st Fl S
Hartford 06106

#29

Thomas G. Dennis
FEDERAL PUBLIC DEFENDER

(203) 240-3357
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February 21, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Attn. Guideline Comment

To Whom This May Concern:

I have read the notice of proposed amendments to the sentencing guidelines, policy statements and commentary contained in the Federal Register, Vol. 57, No. 1, of January 2, 1992, wherein comments were solicited. I have a particular comment not to any proposed amendments but rather to the lack of a proposed amendment where, I believe, one is necessary. Specifically, Application Note 3 to the Commentary to §4A1.2 needs to be clarified because judges are finding it unduly vague.

The government has commenced "Operation Triggerlock" wherein many people convicted of state crimes are being prosecuted federally for possession of firearms discovered during the investigation of the state crime. A typical example is a recent client of mine. He was a native of Guyana who was living unlawfully as an alien in the United States. Specifically, he was living in an apartment in Hartford, Connecticut. At midnight one night the police, armed with a search warrant for narcotics, kicked down his door and found him in bed. Near his bed they found some narcotics and a firearm. He found himself arrested for the first time in his life. He was a "first offender" for the criminal justice system.

The firearm belonged to my client's father and was not possessed for any reason relating to the possession of the narcotics. My client was prosecuted in state court for possession of narcotics with intent to sell by a drug dependent person, pled guilty, and received a sentence of 7 years suspended after 4. He was thereafter prosecuted federally under 18 U.S.C. § 922(g) for being an illegal alien in possession of the firearm. He pled guilty to that offense as well. The United States Probation Officer assigned 3 criminal history points to my client based upon his state drug conviction. I objected in a letter dated January 30, 1992, a copy of which is enclosed. My point was that Application Note 3 to the Commentary to §4A1.2 clearly states that "prior sentences are considered related if they resulted from offenses that occurred on the same occasion." The prosecutor responded in a letter dated February 4, 1992, a copy of which is

enclosed. The prosecutor stated that the probation officer was correct because my client came into possession of the firearm before he came into possession of the drugs and therefore the offenses were not "related" despite the fact that the drugs and the gun were discovered by the police on the same occasion. The prosecutor thereafter argued on the day of sentencing that § 4A1.2(a)(2) only applies to construing whether two prior sentences are related to each other, not to a case such as my client's where the court is determining whether a prior sentence is related to the case at bar. The probation officer and the judge agreed with the prosecutor and, as a consequence, my client found himself in criminal history category II despite the fact that he was a first offender in the criminal justice system.

The case I have described is not an isolated or unusual case under "Operation Triggerlock" but rather illustrates the norm. My client could have been charged in a single federal indictment with one count of possession of narcotics and in another count with possession of the firearm, but instead due to circumstances completely beyond his control he was not. The judge, consistent with the practice of most judges in "Operation Triggerlock" cases, departed downward based upon a conclusion that the elevated criminal history score based on the drug conviction overrepresented the seriousness of the defendant's "criminal history." Neither side is appealing. Nevertheless, I remain convinced that judges are misconstruing §4A1.2(a) and Application Note 3 to the Commentary because they find those provisions to be unduly vague. In my view, the Commission did not intend to say that individuals such as the man whose case I described are more likely to become recidivists if they are prosecuted by separate sovereigns than if they are prosecuted by a single sovereign. I would therefore respectfully suggest that Application Note 3 to the Commentary to §4A1.2 should be amended to provide further examples to illustrate cases that are "related" for criminal history purposes.

Very truly yours,



Gary D. Weinberger
Asst. Federal Public Defender

GDW/aw

FEDERAL PUBLIC DEFENDER

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450 Main Street, Room 710
Hartford 06103

Thomas G. Dennis
FEDERAL PUBLIC DEFENDER

(203) 240-331
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January 30, 1992

Ms. Virginia Swisher
United States Probation Officer
450 Main Street
Hartford, CT 06103

Re: United States v. Malvin Joseph
Criminal No. 2:91CR61(EBB)

Dear Ms. Swisher:

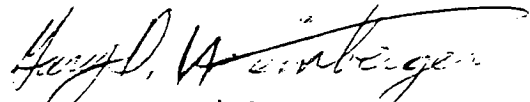
Please let this letter serve as my written objections to the Presentence Report in the above-entitled case. All of these objections stem from the fact that, due to circumstances completely beyond his control, the state of Connecticut and the federal government split one case into two and prosecuted the two aspects of this case separately. I object to the conclusion in paragraph 31 on page 4 that Mr. Joseph should receive three criminal history points for his state of Connecticut conviction on the drug aspect of this case. I would respectfully direct your attention to the commentary to Guidelines § 4A1.2. Application Note 3 states that, "prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." The drug conviction was "unrelated" in the sense that the drugs and the gun were not part of a common scheme or plan -- that is, the gun was not possessed to protect the drugs. However, the Guidelines do address the matter in the disjunctive through the use of the word "or" and thus consider offenses that occur on the same occasion to be related even if not part of a common scheme or plan. I therefore believe that Mr. Joseph should obtain zero criminal history points from the conviction on the drugs that were found on the same occasion as the gun which is the gravamen of this case. In discussing this objection with you, you have stated that the offenses did not "occur on the same occasion" because they did not begin on the same occasion. That is, Mr. Joseph came into possession of the gun before he came into possession of the drugs. I believe that you have misconstrued the meaning and intention of the sentencing commission in their use of the word "occur". Stepping back and looking at the broad picture as set forth in the Introductory Commentary to Chapter Four, Part A of the guidelines manual, it is clear that the purpose of the criminal history score is to distinguish the first offender from the repeat offender. Malvin Joseph is a first offender for the criminal justice system, the bifurcation of his offense

notwithstanding.

I object to paragraph 36 because I believe that Mr. Joseph's criminal history category is I because he has zero criminal history points and that, therefore, his guideline imprisonment range is 6-12 months. I object to paragraph 40 for the same reason.

I disagree with paragraph 64 because I believe that there is a mitigating factor that warrants a downward departure. Mr. Joseph has been incarcerated since May 22, 1991, as a result of the police kicking down his door in the middle of the night and, with his assistance, discovering a firearm and some drugs. But for the decision of the state and federal governments to bifurcate that incident into separate prosecutions, Mr. Joseph would receive credit toward the imposition of his sentence commencing May 22, 1991. Instead, he is now facing a concurrent sentence that is blind to the imprisonment that he has already suffered. As of the time of sentencing he will have been incarcerated approximately 9 months as to which he will receive no credit. I would respectfully submit that any sentence considered appropriate by the Court should be reduced 9 months, thereby deriving an effective guideline range of 0-3 months.

Very truly yours,



Gary D. Weinberger
Asst. Federal Public Defender

GDW/aw

cc: Nora Dannehy, AUSA



U.S. Department Justice

COPY

United States Attorney

District of Connecticut

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FEB 5 1992

OFFICE OF THE FEDERAL
PUBLIC DEFENDER
HARTFORD, CONNECTICUT

450 Main Street

Hartford, Connecticut 06103

FTS 203/244-3270

CONN 203/240-3270

February 4, 1992

Ms. Virginia Swisher
United States Probation Officer
450 Main Street
Hartford, CT 06103

RE: United States v. Malvin Joseph
Criminal No. 2:91Cr00061(EBB)

Dear Ms. Swisher:

The defendant has objected to the criminal history computation contained in the Presentence Report for Malvin Joseph. Specifically, he has objected to the conclusion in ¶ 31 that the defendant should receive three criminal history points for his drug conviction in the State of Connecticut. Based on the facts of the instant case, the Government is in agreement with the computation contained in the Presentence Report.

The defendant was arrested on May 22, 1991 and charged by the State of Connecticut with possession of narcotics and by the federal government as being an illegal alien in possession of a firearm. The defendant was convicted of possession of narcotics by a drug dependent person in state court. Subsequent to his state conviction, the defendant entered a plea of guilty to the firearms charge in federal court. You have indicated in your report that the defendant informed you that he did not possess the gun in connection with the drugs but rather used the gun over a period of time when closing his father's business.

In United States v. Banashefski, 928 F.2d 349 (10th Cir. 1991), the court affirmed the district court's assessment of three points for a prior conviction under facts very similar to the instant case. The defendant in Banashefski was arrested while driving a stolen vehicle. A firearm was found at the time of his arrest. He was arrested by the state on the stolen vehicle charge and indicted on the firearm charge by the federal authorities. The defendant was convicted on the stolen vehicle charge prior to being sentenced on the federal charge. For purposes of computing his criminal history, the defendant was assessed two points for the prior state conviction. On appeal the court noted that "the commentary to §4A1.2 explains that a sentence imposed after the

defendant's commencement of the instant offense, but prior to sentencing on the offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense." As in the instant case, there was evidence in Banashefski that the defendant had possession of the gun prior to the driving the stolen vehicle. Because the possessory acts were separable, the court held that the conduct was not part of the instant offense and did not occur on the same occasion. See U.S.S.G. §§4A1.2(a)(1), 4A1.2(a)(2). See also United States v. Garcia, 909 F.2d 389, 392 (9th cir. 1990); United States v. Cox, 934 F.2d 1114, 1125 (10th Cir. 1991). (state drug conviction properly included in computing criminal history because presence of cocaine, although seized with the guns, not part of the firearms charge).

Malvin Joseph was not charged by the government with a narcotics violation nor was he charged under 18 U.S.C. §924(c). The defendant's possession of narcotics is not part of the instant offense and should not be considered related for purposes of sentencing.

Very truly yours,

ALBERT S. DABROWSKI
UNITED STATES ATTORNEY


NORA R. DANNEHY
ASSISTANT UNITED STATES ATTORNEY

cc: Gary Weinberger, Esq.