

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

UNITED STATES OF AMERICA )  
 )  
 v. ) CRIMINAL ACTION  
 )  
 APOLLO EDWARD NIDA, ) 1:14-CR-00134-1-CAP  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**DEFENDANT APOLLO E. NIDA’S MOTION  
FOR DOWNWARD DEPARTURE**

COMES NOW the defendant, Apollo E. Nida, and hereby moves this Court for a downward departure from Criminal History Category V to Criminal History Category IV, pursuant to Section 4A1.3 of the United States Sentencing Guidelines. For the reasons set forth herein, a criminal history category of V substantially overstates the seriousness of Mr. Nida’s criminal past, thus warranting a departure from the Guidelines range.

Section 4A1.3 of the Guidelines grants sentencing courts the discretion to depart where the criminal history calculation overstates the seriousness of a defendant’s criminal record. The PSR has calculated a criminal history category of V, based on a total of 11 criminal history points. Mr. Nida respectfully submits that

a criminal history category of V overstates the seriousness of his past criminal conduct.

Criminal History Category V, which applies to defendants who have accrued 10 or more criminal history points, is one of the most serious classifications and is thus designed to encompass the worst criminal offenders who have lengthy and substantial histories generally involving drugs, severe violence, or firearms.

Mr. Nida, who is 35, received criminal history points for, *inter alia*, (1) a probation revocation when he was 19 years old, PSR ¶ 141 (3 points); (2) a probation revocation when he was 23 years old, PSR ¶ 142 (1 point); (3) driving under the influence when he was 23 years old, PSR ¶ 144 (1 point); and (4) giving a false name to law enforcement and obstruction when he was 23 years old, PSR ¶ 145 (1 point).<sup>1</sup> These relatively minor offenses, which occurred well over ten years

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<sup>1</sup> The PSR erroneously counted the prior sentences imposed on these charges. According to the PSR, Mr. Nida gave the false name of William Spearman to police and ran from police when they attempted to place him under arrest. PSR ¶145. U.S.S.G. § 4A1.2(c)(1) provides that sentences for, *inter alia*, false information to a police officer and resisting arrest, “and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense.” The PSR further notes that Mr. Nida received 12 months’ probation on both counts, to be served concurrently. Because Mr. Nida’s offenses are among those excluded under § 4A1.2 and he did not receive more than a year of probation, no criminal history points should have been assessed. See also U.S.S.G. § 4A1.2(a) (“For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are counted as a single

ago, account for 50% of Mr. Nida's total criminal history points (before the addition of two points under § 4A1.1(d)), and have thus artificially inflated Mr. Nida's criminal history score. See, e.g., United States v. Summers, 893 F.2d 63 (4th Cir. 1990) (upholding U.S.S.G. § 4A1.3 departure for defendant with criminal history that "included convictions for grand larcenies, possession of narcotics, a weapons violation, driving with a suspended license violations, and probation revocation," where district court found that a sentence below Guidelines range was appropriate "because of [defendant's] age and because of some of the aggravation, or the increase that has been caused by these driving without a license charges as they relate to the defendant's criminal history"). Mr. Nida's lengthy but early 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 V was designed to address. United States v. Paulino-Duarte, 2001 WL 290047 (S.D.N.Y. Mar. 26, 2001) (noting that "[t]here are only six criminal history categories, and criminal history category V is just short of the one reserved for career criminals," and finding that defendant, who had not been

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sentence, use the longest sentence of imprisonment if concurrent sentences were imposed.").

convicted of a violent crime, “[did] not resemble the typical category V defendant as envisaged by the Sentencing Commission”).

A downward departure pursuant to U.S.S.G. § 4A1.3 does not ignore Mr. Nida’s prior convictions, but, rather, carries out the Sentencing Commission’s recognition that in some cases a defendant’s criminal history category over-represents the seriousness of his criminal history. As the foregoing demonstrates, Criminal History Category IV would more accurately reflect Mr. Nida’s criminal history. A departure to Criminal History Category IV acknowledges that Mr. Nida has a criminal history that is more serious than the criminal histories of defendants typically falling in Criminal History Category III, while at the same time recognizes that Mr. Nida is not the type of criminal (i.e., one with at least some violent or drug-related past offenses for which significant periods of incarceration were imposed) who usually falls within the highest criminal history categories.

For the foregoing reasons, Mr. Nida respectfully requests that the Court depart downward from the advisory guidelines pursuant to Section 4A1.3 and find that a criminal history category of V significantly over-represents the seriousness of his criminal history.

Respectfully submitted this 3rd day of July, 2014.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to L.R. 5.1B and 7.1D of the Northern District of Georgia, that the foregoing *Motion for Downward Departure* complies with the font and point selections approved by the court in L.R. 5.1B. The foregoing pleading was prepared on a computer using 14-point Times New Roman font.

Prepared this 3rd day of July, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have electronically filed the foregoing *Motion for Downward Departure* with the Clerk of Court using the CM/ECF system, which will send electronic notification to the following counsel of record.

This 3rd day of July, 2014.

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