

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. ) Case No. 4:10-CR-00162-FJG-4  
 )  
 BRICE HALE, )  
 )  
 Defendant. )

**DEFENDANT’S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT**

COMES NOW Defendant, Brice Hale, by and through undersigned counsel, and files the following objection to the presentence investigation report (“PSR”).

1. **Paragraph 50:** A violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) involves 500 grams or more of cocaine, as opposed to (b)(1)(a), which involves 5 kilograms or more of cocaine. A base offense level of 30 is required for offenses involving at least 3.5 kilograms, but less than 5 kilograms of cocaine. As Mr. Kern has pled guilty to a violation of 21 U.S.C. 841(b)(1)(B), and his base offense level should be **30**.

2. **Paragraph 55:** For the reasons stated above, Mr. Hale’s Adjusted Offense Level (Subtotal) should be **30**.

2. **Paragraph 58:** Based on a Adjusted Offense Level of 30, incorporating the reductions in Paragraphs 56 and 57, Mr. Hale’s **Total Offense Level before Chapter Four Enhancements** should be **27**.

3. **Paragraph 60:** For the reasons stated above, Mr. Hale’s **Total Offense Level** should be **29**.

4. **Paragraph 64:** Mr. Hale was assigned 1 criminal history point for his May 29

,2009 plea of guilty to the misdemeanor charge of Tampering, 2<sup>nd</sup> Degree, based on his application of temporary window tint to the windows of a rental car.

U.S.S.G. 4A1.2(c) states that certain prior offenses, and offenses similar to them, are not counted towards a defendant's criminal history, unless the defendant was sentenced to more than one year of probation or 30 days imprisonment, or the prior offense was similar to the charged offense. The commentary to 4A1.2 states that in determining if an unlisted offense is similar to the listed offenses for the purposes of exclusion, relevant factors are as a comparison of punishments imposed for the listed and unlisted offenses; the elements of the offense; and degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

In the instant matter, Tampering in the 2<sup>nd</sup> Degree is a class A misdemeanor. Other class A misdemeanors that are listed include Resisting Arrest (RSMo. 575.150), Peace Disturbance (2<sup>nd</sup> offense, RSMo. 574.010), and Hindering Prosecution (RSMo. 575.030). In Missouri, a class A offense is punishable by between 6 months and 1 year of jail time, or up to a \$1000 fine.

With regards to the elements of the instant offense, a person is guilty of Tampering 2<sup>nd</sup>, if they tamper with property of another for the purpose of causing substantial inconvenience to that person (RSMo. 569.090). Tampering is defined as "to interfere with something improperly, to meddle with it, displace it, make unwarranted alterations in its existing condition, or to deprive, temporarily, the owner or possessor of that thing," (RSMo. 569.010). In other words, if one hides or alters the property of another, intending to cause them a large degree of annoyance, they have committed Tampering 2<sup>nd</sup>.

In comparison, Leaving the Scene of an Accident, also a class A misdemeanor, which requires knowingly leaving the scene of property damage, is excludable under U.S.S.G. 4A1.2(c)(1). Property damage in the 2<sup>nd</sup> Degree, a class B misdemeanor and a "minor offense,"

*United States v. Agee*, 333 F.3d 864, 867 (8<sup>th</sup> Cir. 2003), similarly involves destruction of the property of another. St. Louis' general prohibition on vandalism, a local offense and therefore excluded under U.S.S.G. 4A1.2(c)(2), prohibits a person from "willfully destroy[ing], damag[ing], or injur[ing] any public or private property of any kind whatsoever which does not belong to said person." (St. Louis County Ord. 716.040). Tampering 2<sup>nd</sup>, on the other hand, involves the concealment or alteration of another's property with the purpose of inconveniencing them. Therefore, Tampering, 2<sup>nd</sup> is a less destructive, less blameworthy offense than the offenses listed in U.S.S.G. 4A1.2(c).

Finally, the commentary to the U.S.S.G. states that the court should look to the degree to which the offense indicates a likelihood of criminal contact. Again, the mental state necessary to be guilty of Tampering 2<sup>nd</sup> is the intent to inconvenience. Acting to inconvenience does not indicate any likelihood of future criminal conduct. Especially compared with other, listed crimes, which require the intent to destroy or damage, disturb the public, interfere with the police and the courts, and so on..

Because Tampering, 2<sup>nd</sup> is similar to the offense listed under U.S.S.G. 4A1.2(c)(1), then the second part of the inquiry is whether the prior offense is similar to the present offense, or resulted in a sentence of more than a one year term of probation or 30 days in jail. Facially, applying temporary window tint to the windows of a rental car is not similar to the instant offense, conspiracy to distribute narcotics. Finally, Mr. Hale was sentenced to a \$750 fine, and no probation or term of imprisonment.

Because Tampering 2<sup>nd</sup> is similar to the crimes listed under U.S.S.G. 4A1.2(c)(1), and because it is neither similar to the present offense or resulted in a term of probation or imprisonment, Mr. Hale's 2009 conviction should not result in an additional criminal history

point.

5. **Paragraph 65:** For the reasons stated above, Mr. Hale should have 1 Criminal History Point, and be placed in Criminal History Category I.
6. **Paragraph 91:** If the Court agrees with the above reasoning and places Mr. Hale in Criminal Category 1, then he would be eligible for the “safety valve” release from the statutory minimum of 5 years, pursuant to U.G.G.S. § 5E1.2.
7. **Paragraph 92:** For the reasons stated above, the **Total Offense Level** should be **27**, the **Criminal History Category** should be **I**. Given a Total Offense Level of 27 and a criminal history category of I, the **Sentencing Range** should be **70 to 87** months. Mr. Hale should be placed in Criminal History Category I. Therefore, given a Total Offense Level of 27 and Criminal History Category I, the Sentencing Range per the Guidelines should be **87** to **108** months.
8. **Paragraph 93:** For the reasons state above, a base offense level of 30 should be applied.
9. **Paragraph 100:** For the reasons stated above, the correct Offense Level is 27, the fine amount should be between **\$12,500** and **\$2,000,000**.
- 10.

Respectfully submitted,

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