06-4983-cr

To Be Argued By:
EDWARD T. KANG

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4983-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JEFFREY GRAY, WILLIE WRIGHT,
ERIC VARGAS, AARON ROBINSON,
Defendants,

JONAS NELSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

EDWARD T. KANG
WILLIAM J. NARDINI
Assistant United States Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on October 20, 2006. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on October 27, 2006. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred in counting the defendant's prior youthful offender adjudication, for which he had received a three-year term of probation, as a "prior sentence" and classifying the defendant in criminal history II, thus precluding him from "safety valve" relief.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On January 24, 2006, a federal grand jury indicted defendant-appellant Jonas Nelson in a multi-defendant narcotics trafficking case arising out of a long-term FBI investigation that included the use of evidence obtained from a four-month court-authorized wiretap. Four months later, Nelson pleaded guilty to possession with the intent

to distribute 5 grams or more of cocaine base ("crack cocaine"), based upon an incident on November 18, 2005, in which he was seen by law enforcement officers engaging in a hand-to-hand narcotics transaction.

Less than three years earlier, on March 26, 2003, Nelson had pleaded guilty in Connecticut Superior Court to being a youthful offender by way of a charge of Larceny in the Third Degree. That guilty plea stemmed from an incident on December 16, 2002, in which Nelson, then 17 years old, was arrested for stealing a car. Nelson was sentenced to three years' imprisonment, execution suspended, and three years of probation, which was to expire on March 26, 2006.

At sentencing in the instant case, the district court (Ellen Bree Burns, J.) concurred with the Government's position that one criminal history point be assigned pursuant to U.S.S.G. § 4A1.2(d)(2)(B), given that the defendant's prior "juvenile sentence [was] imposed within five years of the defendant's commencement of the instant offense." A-62, 63, 71. The district court also concurred with the Government's position that an additional two criminal history points be assigned pursuant to U.S.S.G. § 4A1.1(d) on the basis that the defendant "committed the instant offense while under any criminal justice sentence." A-63, 71. The district court thus agreed with the Government's position that Nelson had a total of three criminal history points and that his criminal history category was II. A-62, 63, 71. The district court correctly concluded that it had "no discretion . . . to go below the mandatory minimum" 60-month term of imprisonment,

based on Nelson's ineligibility for the "safety valve" provisions of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2(a). A-71, 72.

In this appeal, the defendant contends that the district court erred in determining his criminal history category to be II. According to the defendant, his youthful offender adjudication is not countable as a "prior sentence," nor is the probation resulting from that adjudication countable as a "criminal justice sentence." The defendant contends that he has zero criminal history points, that his resulting criminal history category is I, and thus, that he should have been deemed eligible for "safety valve" relief. The Court should reject this argument, as did the district court below. A plain reading of U.S.S.G. §§ 4A1.1(d) and 4A1.2(d)(2)(B), as well as a review of case law that supports that plain reading, demonstrates that the district court's calculation of the defendant's criminal history category was correct.

Accordingly, the Court should affirm the district court's judgment.

STATEMENT OF THE CASE

On January 24, 2006, a federal grand jury returned a ten-count indictment against defendant Jonas Nelson and four co-defendants, alleging violations of the federal narcotics laws. A-106, 107. Nelson was charged in two counts of that indictment, for conspiring to possess with the intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1), and

841(b)(1)(B), and for possessing with the intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

On May 24, 2006, the defendant entered a plea of guilty to possessing with the intent to distribute 5 grams or more of cocaine base. A-11-A-19. The defendant's plea was entered pursuant to a written plea agreement with the Government. *Id.*

On October 19, 2006, the district court imposed a sentence of 60 months and 1 day – just above the applicable 60-month mandatory minimum term of imprisonment – to be followed by a supervised release term of four years. A-1, 2. Judgment entered on October 20, 2006. *Id.*

Following imposition of sentence, the defendant filed a timely notice of appeal. The defendant is incarcerated.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Investigation and Indictment

During the spring of 2005, a joint federal and state drug task force began a long-term investigation into an organization distributing crack cocaine and using violence in furtherance of narcotics trafficking activities in the North End section of Hartford. That investigation included the use of wiretap surveillance for a four-month period between September 2005 and December 2005 on a

cellular telephone used by co-defendant Jeffrey Gray. A-106, 107. Intercepted communications revealed that Mr. Gray was supplying cocaine base to numerous individuals, including defendant Nelson, and that those customers would thereafter re-sell the cocaine base purchased from Gray. *Id.*

Based on the information obtained from the wiretap, law enforcement officers were able to observe, during the evening of November 18, 2005, defendant Nelson enter the passenger side of a car, which was driven by a female occupant. A-107. Officers followed the car, as it circled the area and parked a short while later in the same location where the defendant had entered the car. *Id.* Law enforcement officers then pulled up behind the parked car and saw the defendant and the driver of the car engage in what appeared to be a narcotics transaction. *Id.*

Law enforcement officers then conducted a stop of the vehicle. *Id.* Both the defendant and the female occupant consented to the officers' search of the vehicle. A-107, 108. The officers also conducted a pat-down of the defendant, which resulted in the recovery of a substance which was subsequently confirmed through chemical analysis as being approximately 9 grams of crack cocaine. A-108.

Defendant Nelson was eventually indicted by a federal grand jury on January 24, 2006, for conspiring to distribute 5 grams or more of cocaine base and for possessing with the intent to distribute 5 grams or more of cocaine base.

B. Plea Negotiations and Guilty Plea

During the ensuing four months, counsel for the defendant and the Government negotiated the terms of a plea agreement. Those negotiations included discussion regarding the defendant's criminal history category. The parties ultimately concluded that the defendant's criminal history category was I, and that the defendant "may qualify under U.S.S.G. § 5C1.2 (Limitation on Application on Statutory Minimum Sentences in Certain Cases) if the prerequisites of that provision are satisfied." A-15. The parties stipulated that the applicable Guideline range was a term of imprisonment of 60 months. A-14. Notwithstanding that stipulation, the parties agreed in the written plea agreement that:

> The defendant expressly understands that the Court is not bound by this agreement on the Guideline and fine ranges specified above. The defendant further expressly understands that he will not be permitted to withdraw the plea of guilty if the Court imposes a sentence outside the Guideline range or fine range set forth in this agreement.

A-15.

On May 24, 2006, the parties executed the aforementioned plea agreement in open court and the district court accepted the plea. A-111, 113.

C. The Pre-Sentence Report and Youthful Offender Records

The Probation Office thereafter prepared a pre-sentence report ("PSR"), in which the defendant was assigned a criminal history category of II. *See* Def. Br. at 5. The PSR assigned one criminal history point pursuant to U.S.S.G. § 4A1.2(d)(2)(B) on grounds that the defendant's adjudication as a youthful offender was a "juvenile sentence imposed within five years of the defendant's commencement of the instant offense." The PSR assigned two additional criminal history points pursuant to U.S.S.G. § 4A1.1(d) on grounds that "the defendant committed the instant offense while under any criminal justice sentence, including probation." Thus, according to the PSR, the defendant had a total of three criminal history points, resulting in a criminal history category of II. If accepted by the district court, the PSR's criminal history calculation rendered the defendant ineligible for protection under the "safety valve," given the requirement that the defendant "not have more than 1 criminal history point" to be afforded such relief. U.S.S.G. § 5C1.2(a)(1).

Upon receiving the PSR and conducting research into the countability of the defendant's youthful offender adjudication in the calculation of his criminal history category, the Government concluded that the PSR's calculation was correct and communicated its position to defense counsel. A-64, 65. Given the Government's position that the defendant was no longer eligible for relief under the "safety valve," as had been contemplated by the

parties in executing the plea agreement, the Government afforded an opportunity for the defendant to withdraw his guilty plea, notwithstanding the plea agreement's express provision that the defendant would not be entitled to withdraw his plea even if the district court sentenced him to a greater sentence than what had been stipulated. A-65, 66. Defense counsel indicated that the defendant did not wish to withdraw his guilty plea. A-66.

Prior to sentencing, the defendant filed a sentencing memorandum, in which he argued, *inter alia*, "[b]ecause the records of that [youthful offender] adjudication are confidential and sealed, *it is entirely possible that the YO adjudication arose from his operating a motor vehicle without a license, as opposed to the more serious larceny offense with which he was charged*." A-53 (emphasis added). The clear implication of this argument was the suggestion that the defendant's youthful offender adjudication was based upon an offense of the type that is excluded from computation of criminal history, *see* U.S.S.G. § 4A1.2(c), and thus, the youthful offender adjudication could not be counted in determining the defendant's criminal history.

Given the defendant's decision to open the door to the nature of the offense underlying his youthful offender adjudication, the Government sought to obtain the defendant's youthful offender records. Although Connecticut law allows disclosure of sealed youthful offender records to "law enforcement officials," "state and federal prosecutorial officials," and "the attorney representing the youth, in any proceedings in which such

records are relevant" even without a court order, the Government, out of an abundance of caution, filed a motion with the district court for an order to unseal the defendant's youthful offender records. Conn. Gen. Stat. § 54-76*l*(b) (2006); A-51-A-54.

The Government obtained the defendant's youthful offender records and disclosed those records to the district court as well as to defense counsel. Government's Appendix ("GA") 1-2. Those records of his youthful offender adjudication, as discussed more fully in the Government's attached supplemental memorandum, contradicted the defendant's argument that his youthful offender adjudication arose out of his operation of a motor vehicle without a license.[1]

D. Sentencing

On October 19, 2006, the district court held a sentencing hearing for the defendant.[2] At the outset of that

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[1] Although Connecticut law allows for disclosure of sealed youthful offender records to "court officials," "state and federal prosecutorial officials," and "the attorney representing the youth," the law also requires that those records "shall not be further disclosed." *See* Conn. Gen. § 54-76*l*(b). Thus, the Government attaches copies and discusses the youthful offender records in a supplemental memorandum that the Government has requested to be filed under seal.

[2] The district court used the 2005 version of the Sentencing Guidelines in its calculations, the selection of which (continued...)

hearing, the district court afforded the defendant an opportunity to withdraw his guilty plea, given the position of the Probation Office and the Government that he did not qualify for "safety valve" relief. The following exchange took place:

> THE COURT: Okay. You entered your guilty plea in the expectation that you would be able to have a safety valve apply to your case. And unfortunately, that does not appear to be appropriate.
>
> I'm inclined to ask you, sir, if you want to withdraw your guilty plea under those circumstances? You've entered your guilty plea expecting that that would be applicable to you. And although I think at the time that I canvassed you on your plea, I told you that the ultimate decision as to your sentencing guideline would be mine. I think I also told you that if it were different from what you expected, you couldn't withdraw your guilty plea.
>
> But I think, under the circumstances, I would be willing to permit you to do that, if you want to. That would mean you would go to trial on this case, sir.
>
> THE DEFENDANT: No.

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[2] (...continued)
was uncontested by the parties.

> THE COURT: You sure you will.
>
> THE DEFENDANT: No I've said my –
>
> THE COURT: Well, I had heard that you had discussed this matter with your attorney and that that was your conclusion; that you didn't want to withdraw your guilty plea. But I want to be sure that I have it on the record that that's the case.
>
> MR. TALLBERG: And for the record, your Honor, the Government did make that suggestion that the plea could be withdrawn. I did confer with Mr. Nelson about that. It's my understanding that he understands the ramifications of that and he does not wish to withdraw the plea.
>
> THE COURT: That's correct, sir?
>
> THE DEFENDANT: Yes.

A-30, 31.

The parties then discussed at length the impact of the youthful offender adjudication on the defendant's criminal history category and, as a corollary, whether the defendant would qualify for "safety valve" relief under U.S.S.G. § 5C1.2(a). Defense counsel argued, *inter alia*, that it was unfair "for the Government to enter into a plea agreement that would have allowed Mr. Nelson to have the benefit of the safety valve" and to "then spin around and come into

court and ask for a sentence of 60 months." A-67. The district court responded as follows:

> THE COURT: Well, the fairness issue is resolved by offering your client an opportunity to withdraw his guilty plea, sir.
>
> MR. TALLBERG: With all due respect, Judge –
>
> THE COURT: If the Government and defense counsel were in error with respect to the youthful offender statute, that doesn't bind the court. And I think your client was informed at the time he entered his plea that I might come to a different conclusion.
>
> I think once the probation officer had alerted us to the youthful offender question, that it was incumbent on somebody to provide the court with information that would enable me to make a decision about this.

A-67, 68.

After considering the parties' written submissions and oral arguments, as well as the recommendations of the Probation Office, the district court imposed a sentence of 60 months and 1 day – just above the statutory mandatory minimum term of 60 months' imprisonment – to be

followed by a term of supervised release of 4 years.[3] In reaching that conclusion, the district court reasoned as follows:

> However, I do believe that the position of the Probation Office and of the Government is the correct interpretation of both the guidelines and the Connecticut statute. And I feel that I have no discretion, under those circumstances, to go below the mandatory minimum. I take no joy in this. I've had the same problem with other young men who – not all of them show promise unfortunately. Mr. Nelson does, as do a couple of the other young men I'm dealing with. And it's mornings like this that make my job very difficult.
>
> Nevertheless, I believe that I have not the discretion to give Mr. Nelson any relief below the mandatory minimum of 60 months. And therefore, I'm committing him to the custody of the Bureau of Prisons for a period of 60 months.

A-71, 72.

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[3] The plea agreement contained an appellate waiver provision precluding the defendant from appealing the conviction or sentence if that sentence did not exceed 60 months. A-15. The sentence of 60 months and 1 day was imposed to preserve the defendant's appeal on the issue of whether his youthful offender adjudication was countable for purposes of the defendant's criminal history category. A-77.

SUMMARY OF ARGUMENT

The district court did not err in concluding that the defendant was ineligible for "safety valve" relief pursuant to U.S.S.G. § 5C1.2(a) because of the sentence imposed on his prior youthful offender adjudication.

The three-year term of probation resulting from the defendant's youthful offender adjudication was countable as a "juvenile sentence imposed within five years of the defendant's commencement of the instant offense," thus resulting in one criminal history point pursuant to U.S.S.G. § 4A1.2(d)(2)(B). Moreover, the defendant was serving that probationary term at the time of his commission of the instant offense and thus, an additional two criminal history points were correctly added pursuant to U.S.S.G. § 4A1.1(d) because "the defendant committed the instant offense while under any criminal justice sentence, including probation."

The defendant's prior youthful offender adjudication was neither expunged, pursuant to U.S.S.G. § 4A1.2(j), nor was it a diversionary disposition, pursuant to U.S.S.G. § 4A1.2(f). The defendant thus had a total of three criminal history points, which made him ineligible for "safety valve" relief. *See* U.S.S.G. § 5C1.2(a)(1) (requiring that to be eligible for such relief, the defendant must "not have more than 1 criminal history point"). Moreover, there was no error in the district court's consideration of the defendant's youthful offender records in tailoring an appropriate sentence.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT THE DEFENDANT WAS INELIGIBLE FOR "SAFETY VALVE" RELIEF

A. Governing Law and Standard of Review

Since 1984, Congress has enacted a series of laws that establish mandatory minimum penalties for certain crimes,[4] "the aim of which was to provide a meaningful floor in sentences for certain serious federal controlled substance and weapons-related offenses." H.R. Rep. No. 103-460 at 3 (1994). For example, in the case of a defendant like Nelson who is convicted of possessing with the intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. § 841(b)(1)(B), "such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . ." When

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[4] This Court has held that imposition of the mandatory minimum sentences set forth in § 841(b) does not violate the Sixth Amendment. With respect to drug quantity, the Court has held that it "is an element of the offense that must be charged in the indictment and proved to a jury beyond a reasonable doubt or admitted by the defendant where the quantity triggers a change in both the mandatory minimum sentence and the maximum sentence," *United States v. Estrada*, 428 F.3d 387, 389 (2d Cir. 2005) (citing *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005)), but that it is not such an element when it increases only the mandatory minimum, and not the statutory maximum sentence, *Estrada*, 428 F.3d at 389-90.

the Guidelines were first promulgated in 1987, the Sentencing Commission designed the guidelines governing drug offenses to work in concert with the mandatory minimum sentences already established by statute. *Id.* In general, "sentences for offenses involving drug quantities that would trigger a mandatory minimum equate with a guideline sentence of at least that length," and the presence of aggravating factors leads to longer sentences under the Guidelines. *Id.*

Congress later recognized, however, that this system did not always leave room for recognition of mitigating factors (such as acceptance of responsibility or reduced role in the offense) in cases involving the lowest-level offenders whose guideline sentences were at the mandatory minimum. *Id.* In 1994, in order to remedy this defect, Congress enacted 18 U.S.C. § 3553(f), commonly known as the "safety valve."

Section 3553(f) lists five criteria that must be satisfied in order for a court to impose a sentence below a mandatory minimum sentence in certain narcotics cases. The subsection reads in its entirety as follows:

> (f) Limitation on applicability of statutory minimums in certain cases. – Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to

guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that –

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of

> a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.[5]

U.S.S.G. § 5C1.2 incorporates each of these statutory requirements nearly verbatim. The Guidelines also define what can be considered in calculating a defendant's criminal history score. For example, Section 4A1.2(d) of the Sentencing Guidelines, which pertains to how offenses committed prior to age eighteen are to be counted for purposes of computing criminal history points, states as follows:

> (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence.
>
> (2) In any other case,
>
> (A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from

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[5] This Court has held that the safety valve provisions – which call for judicial factfinding by a preponderance of the evidence – comport with the Sixth Amendment. *See United States v. Holguin*, 436 F.3d 111, 117 (2d Cir.), *cert. denied*, 126 S. Ct. 2367 (2006).

> such confinement within five years of his commencement of the instant offense;
>
> (B) add 1 point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

Section 4A1.2(a)(1) of the Sentencing Guidelines defines the term "prior sentence" as being "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense."

Moreover, Section 4A1.1(d) of the Sentencing Guidelines instructs that two additional criminal history points are to be added "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status."

When a district court's application of the Guidelines to the facts is reviewed, this Court takes an "either/or approach." *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004). De novo review is applied to determinations that "primarily involve issues of law" and "clearly erroneous" review is applied to determinations that "primarily involve issues of fact." *Id.* More particularly, if this Court's inquiry is "essentially factual," that is "founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," the district court's determination should be under the clearly

erroneous standard. *Id.* at 75. Conversely, if the question requires a consideration of "legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," then the standard should be as one of law and reviewed de novo. *Id.* In those circumstances where it is difficult to classify the nature of the inquiry, this Court will resolve it "in favor of the plenary standard." *Id.*; *see also United States v. Roberts*, 442 F.3d 128, 129 (2d Cir. 2006) ("We review a district court's interpretation of the United States Sentencing Guidelines *de novo* and its findings of fact for clear error.").

This Court has held that "[w]e review a sentencing court's interpretation of the safety valve provisions de novo." *United States v. Cruz*, 156 F.3d 366, 371 (2d Cir. 1998) (citing *United States v. Ortiz*, 136 F.3d 882, 883 (2d Cir. 1997)); *see also United States v. Tang*, 214 F.3d 365, 370 (2d Cir. 2000) (the availability of safety valve relief is "a question of law subject to *de novo* review."); *United States v. Milkintas*, 470 F.3d 1339, 1343 (11th Cir. 2006) ("'When reviewing a district court's safety-valve decision, we review for clear error a district court's factual determinations, . . . [and] de novo the court's legal interpretation of the statutes and sentencing guidelines.'") (quoting *United States v. Poyato*, 454 F.3d 1295, 1297 (11th Cir. 2006)).

B. Discussion

The district court did not err in concluding that the defendant was ineligible for "safety valve" relief and thus,

that the court had "no discretion . . . to go below the mandatory minimum" term of imprisonment of 60 months. A-71. A plain reading of U.S.S.G. §§ 4A1.1 and 4A1.2, as well as the case law discussing these provisions, demonstrates that one criminal history point was properly added, given that the defendant's youthful offender adjudication is countable as a "prior sentence" and that the defendant received a three-year probationary sentence on that adjudication within five years of the defendant's commencement of the instant offense; and two criminal history points were properly added, given that the defendant committed the instant offense while he was serving his three-year term of probation for his youthful offender adjudication.

1. The District Court Properly Added One Criminal History Point Pursuant to U.S.S.G. § 4A1.2(d)(2)(B)

On appeal, the defendant argues, just as he did in the district court, that his prior youthful offender adjudication cannot be used to add one criminal history point pursuant to U.S.S.G. § 4A1.2(d)(2)(B). For the reasons that follow, this Court should reject the defendant's argument.

Section 4A1.2(d)(2)(B) states that for offenses committed prior to age eighteen, "add 1 [criminal history] point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense . . ."

Application Note 7 to Section 4A1.2 states:

> Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.

Thus, to "reduce disparity caused by varying state juvenile systems and varying availability of juvenile records among the states," *United States v. McKoy*, 452 F.3d 234, 237 (3d Cir. 2006), the Sentencing Commission has provided that one criminal history point is to be added for each juvenile sentence (sentences for offenses committed prior to age eighteen) imposed within five years of the defendant's commencement of the instant offense. U.S.S.G. § 4A1.2(d)(2)(B).

In this case, the requirements of U.S.S.G. § 4A1.2(d)(2)(B) are clearly satisfied. First, the defendant's youthful offender adjudication resulted in a "juvenile sentence" – the defendant was sentenced to a term of three years' probation for an offense that he

committed when he was seventeen years old. Second, that sentence was imposed within five years of the defendant's commencement of the instant offense – the juvenile sentence was imposed on March 26, 2003, and the defendant committed the instant offense on November 18, 2005. Thus, under the plain language of Section 4A1.2(d)(2)(B), the district court properly added one criminal history point for the sentence imposed upon his youthful offender adjudication. *See United States v. Sash*, 396 F.3d 515, 522 (2d Cir. 2005) ("[W]hen the language of the Guidelines provision is plain, the plain language controls.") (internal quotation marks omitted); *see also Roberts*, 442 F.3d at 129 ("When interpreting the Guidelines, we employ basic rules of statutory construction and give all terms in the Guidelines their ordinary meaning unless there are persuasive reasons not to do so.").

In response, the defendant argues that his youthful offender adjudication was not a "prior sentence" under the definition of Section 4A1.2(a) and thus, the district court's addition of one criminal history point was error. Once again, a plain reading of the applicable Guidelines provision demonstrates that the district court was correct. Under Section 4A1.2(a)(1) of the Guidelines, a "prior sentence" is "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." The *sine qua non* of a "prior sentence" is an adjudication of guilt. The Guidelines do not qualify the type of offense the adjudication of guilt was for; rather, as long as (1) there was an adjudication of guilt for conduct

not part of the instant offense and (2) a resulting sentence was imposed, then the definition of "prior sentence" is satisfied. Here both of those criteria are satisfied.

First, the youthful offender sentence was imposed upon an adjudication of guilt for conduct not part of the instant offense. The record, including the youthful offender documents that are more fully described in the Government's supplemental memorandum, reflects that the defendant knowingly and voluntarily pleaded guilty on March 26, 2003, to being a youthful offender based on an underlying charge of Larceny in the Third Degree. A-58; *cf.* Def. Br. at 17. Indeed, on appeal, the defendant admits the fact of his guilty plea. *See* Def. Br. at 13 ("Mr. Nelson, although charged with several offenses, ultimately pleaded guilty only to being a youthful offender"). Based on the record and the defendant's own admission, there is little question that the youthful offender adjudication constituted an adjudication of guilt. Moreover, that adjudication was for conduct not part of the instant offense. The prior adjudication was based upon an incident on December 16, 2002, in which the defendant was alleged to have stolen a car in Hartford. The instant offense occurred almost three years later, on November 18, 2005, in which the defendant admitted to having possessed with the intent to distribute 5 grams or more of crack cocaine.

Second, the record reflects that a sentence of three years' probation was imposed as a result of the youthful offender adjudication. A-58. For the foregoing reasons, it is clear that the three-year term of probation imposed

upon the defendant's youthful offender adjudication meets the Guidelines' definition of a "prior sentence."

The defendant argues, in response, that his youthful offender adjudication is not a "prior sentence" because "[t]here is no evidence that Mr. Nelson was guilty of the larceny charge upon which the District Court based its decision to give him three criminal history points." Def. Br. at 26. Moreover, the defendant attempts to distinguish the numerous Second Circuit cases holding that sentences arising from youthful offender adjudications qualify as "prior sentences" by arguing that those cases interpreted the New York youthful offender statutes, which grant "youthful offender status only after being convicted of the underlying offense." Def. Br. 24; *see United States v. Matthews*, 205 F.3d 544, 545-49 (2d Cir. 2000) (rejecting defendant's contention that his youthful offender adjudication was an "expunged" conviction and affirming the sentencing court's addition of three points to the defendant's criminal history score for his youthful offender adjudication); *United States v. Reinoso*, 350 F.3d 51, 53-56 (2d Cir. 2003) (upholding district court's use of a prior youthful offender adjudication for armed robbery to increase the defendant's offense level by 16 points pursuant to U.S.S.G. § 2L1.2); *United States v. Cuello*, 357 F.3d 162, 165-68 (2d Cir. 2004) (affirming sentencing court's decision to count the defendant's youthful offender adjudication as a relevant prior felony conviction for an enhanced base offense level under U.S.S.G. § 2K2.1(a)(2)); *United States v. Jones*, 415 F.3d 256, 260-64 (2d Cir. 2005) (affirming a sentencing court's decision that youthful offender adjudications constitute "prior

felony convictions" for purposes of the career offender guidelines); *United States v. Sampson*, 385 F.3d 183, 194-95 (2d Cir. 2004) (affirming use of defendant's youthful offender adjudication for purposes of increasing the defendant's statutory mandatory minimum term of imprisonment pursuant to 21 U.S.C. §§ 841(b) and 851). The defendant argues that in contrast to New York law, where "there is a reliable indicator that a defendant who has been adjudicated a youthful offender has been found guilty of the underlying conduct," there is (he claims) no indication that "this type of process is generally followed in Connecticut." Def. Br. at 24; *see also id.* at 13-14 ("Mr. Nelson, although charged with several offenses, ultimately pleaded guilty only to being a youthful offender; there is no evidence in the record that he pleaded guilty to the underlying offense.").

These arguments fail on the law, the facts, and on policy grounds.

First, the plain language of Sections 4A1.2(a) and 4A1.2(d) imposes no requirement that the defendant be adjudged guilty of an underlying criminal offense in order for a prior juvenile sentence to be counted in calculating criminal history. All that the Guidelines require is an "adjudication of guilt." For the reasons stated above, an adjudication of guilt did occur in this case, through the defendant's knowing and voluntary guilty plea to being a youthful offender.

Second, even if the Guidelines did require an adjudication of guilt to the underlying criminal offense,

which they do not, the defendant, by pleading guilty to being a youthful offender, was, as a matter of law, found to have committed the underlying offense. Connecticut law requires proof that the youth committed an underlying offense before being adjudged a youthful offender. Thus, Conn. Gen. Stat. § 54-76g provides that unless a defendant pleads guilty to a "charge of being a youthful offender," the court must hold a trial to determine if "he committed the acts charged against him in the information or complaint." Connecticut case law illustrates this requirement. For example, in *State v. Sandra O.*, 724 A.2d 1127 (Conn. App. Ct. 1999), the defendant appealed from a judgment of the trial court adjudicating her to be a youthful offender under Connecticut law. Specifically, the defendant claimed that the evidence presented was insufficient to sustain her conviction of the underlying offense, reckless driving in violation of Conn. Gen. Stat. § 14-222. 724 A.2d at 1128. The appellate court reviewed the testimonial evidence that had been presented to the trial court and concluded that "it was sufficient to justify the trial court's finding that the state had proven, beyond a reasonable doubt, a violation of the reckless driving statute. . . . We conclude, therefore, that there was sufficient evidence for the trial court to have found the defendant guilty of reckless driving." *Id.* at 1129. The appellate court then affirmed the judgment adjudicating the defendant of being a youthful offender. *Id.* It is therefore clear that an adjudication of guilt to being a Connecticut youthful offender requires a finding that the youth was guilty of the underlying crime charged.

That such a finding was made in the case of the defendant is further reflected in his youthful offender records, which are discussed more fully in the Government's supplemental memorandum. Those records demonstrate that the Connecticut Superior Court did in fact find, as a factual basis for the defendant's plea, that he committed the underlying larceny charge.

Third, the defendant's proposed ruling, that this Court interpret federal sentencing laws differently in Connecticut and New York due to differences in those states' youthful offender statutes, would contradict the basic purpose of Section 4A1.2(d) – to reduce disparity caused by varying state juvenile systems. On this point, the facts and rationale of *United States v. McKoy*, 452 F.3d 234 (3d Cir. 2006), are directly on point.

In *McKoy*, the defendant pleaded guilty to conspiracy to distribute crack cocaine and stipulated that the amount of cocaine base involved was between 50 and 150 grams, thus triggering a minimum sentence of ten years. The presentence report prepared in that case calculated that the defendant was not eligible for "safety valve" relief from the ten-year mandatory minimum sentence, based upon four criminal history points that resulted from adjudications of juvenile delinquency. The district court concurred with the probation officer's criminal history calculation and sentenced the defendant to the 120-month minimum sentence.

On appeal, McKoy argued that the district court had incorrectly treated his juvenile court dispositions as

"sentences" for purposes of calculating criminal history. 452 F.3d at 236. Citing N.J. Stat. Ann. § 2A:4A-41, McKoy argued that his juvenile record consisted only of "dispositions" and not "sentences," as is required by the language of the Sentencing Guidelines. The appellate court rejected McKoy's argument and held that "[i]n determining what constitutes a 'prior sentence' under the Sentencing Guidelines, courts must look to federal, not state law." 452 F.3d at 237. In reaching that conclusion, the court reasoned:

> The Application Notes to the Sentencing Guidelines explain that § 4A1.2(d) is intended to reduce disparity caused by varying state juvenile systems and varying availability of juvenile records among the states. The Sentencing Guidelines intended to encompass all juvenile offenses meeting the criteria of § 4A1.2(d).
>
> Accepting Mr. McKoy's argument would undermine the larger goal of the Sentencing Guidelines to accomplish uniformity in sentencing. As the Government correctly points out, if New Jersey juvenile court "dispositions" are not treated as "sentences" under the Sentencing Guidelines, defendants would be immune from receiving criminal history points for juvenile offenses committed in New Jersey, yet would receive points for juvenile offenses committed in other states.

> The District Court properly considered Mr. McKoy's juvenile "dispositions" as "sentences" under the Sentencing Guidelines and [18 U.S.C.] § 3553(f). In accordance with federal law, the punishments Mr. McKoy received as a juvenile were sentences "imposed upon adjudication of guilt" regardless of the terminology New Jersey used to describe them.

452 F.3d at 237-38 (internal citation omitted).

Defendant Nelson's argument on appeal is virtually identical to that addressed and rejected in *McKoy*. Nelson argues for differential treatment under federal law between a youthful offender adjudication in New York and Connecticut because "in New York, a defendant is granted youthful offender status only after being convicted of the underlying offense" whereas "[t]here is no evidence in the record that this process is generally followed in Connecticut." Def. Br. at 24. If the defendant's proposed rule were adopted, then a defendant with prior youthful offender adjudications in Connecticut would be immune from receiving federal criminal history points on those adjudications, yet a similarly situated defendant in New York would receive federal criminal history points. That, according to the *McKoy* court, is precisely the type of disparity that the Sentencing Commission was attempting to curb in enacting U.S.S.G. § 4A1.2(d).

Thus, the defendant's focus on the differences between Connecticut and New York law is incorrect and irrelevant for purposes of the federal sentencing laws. *See McKoy*,

452 F.3d at 237 ("In determining what constitutes a 'prior sentence' under the Sentencing Guidelines, courts must look to federal, not state law."); *United States v. Kirby*, 893 F.2d 867, 868 (6th Cir. 1990) (per curiam) (over defendant's objection that an adjudication of delinquency by a juvenile court cannot be deemed a conviction under Kentucky law, the appellate court affirmed the use of prior juvenile delinquency adjudication in adding criminal history points pursuant to Section 4A1.2(d)(2) and held that "[f]ederal law, not Kentucky law, controls sentencing disposition in the event of convictions for federal offenses."); *United States v. Gray*, 177 F.3d 86, 93 (1st Cir. 1999) ("Whether a particular offense falls within the federal guidelines' criminal history framework 'is a question of federal law, not state law.' States enjoy a broad range of flexibility in choosing how they will treat those who offend their laws. But they may not dictate how the federal government will vindicate its own interests in punishing those who commit federal crimes.") (citations omitted); *United States v. Holland*, 26 F.3d 26, 28 (5th Cir. 1994) (affirming district court's inclusion of sentence on a youthful offender adjudication in computing federal criminal history score and noting that "[i]f a juvenile offender turns into a recidivist, the case for conferring the [set aside] benefit dissipates. Society's stronger interest is in punishing appropriately an unrepentant criminal.") (citation and internal quotation marks omitted; second alteration in original).

In various contexts, numerous federal appeals courts have upheld, for purposes of calculating a federal criminal history score, the use of sentences imposed on juvenile

adjudications. Although these cases do not consider the issue raised on this appeal nor do they address the framework of the underlying juvenile adjudication statute, these cases are noteworthy examples of decisions in which criminal history points were awarded based upon juvenile adjudications arising out of states which, like Connecticut, do not require a juvenile to enter a formal plea of guilty to the underlying offense. *See McKoy*, 452 F.3d at 237-38 (adding federal criminal history points based upon a juvenile adjudication under New Jersey law, N.J. Stat. Ann. § 2A:4A-41, 43; *see also id.* § 2A:4A-24 (permitting disposition "[u]pon the determination that a juvenile has committed an act of delinquency")); *United States v. Gonzalez-Arimont*, 268 F.3d 8, 14-15 (1st Cir. 2001) (defendant's juvenile adjudications under Puerto Rico law, P.R. Laws Ann. tit. 34, §§ 2201 *et seq.*, were not expunged and countable in calculating federal criminal history score; *see also id.* § 2222 (permitting disposition upon determination that juvenile has "incurred" the offense for which he is charged)); *United States v. DiPina*, 230 F.3d 477, 482-85 (1st Cir. 2000) (defendant's juvenile dispositions under Rhode Island law, R.I. Gen. Laws §§ 14-1-1 *et seq.*, were not diversionary and countable in calculating federal criminal history score; *see also id.* § 14-1-32 (requiring court to make a finding that child is "delinquent, wayward, neglected, dependent, or otherwise within the provisions of this chapter")); *United States v. Gray*, 177 F.3d 86, 93 (1st Cir. 1999) (defendant's juvenile adjudication under Maine law, Me. Rev. Stat. Ann. tit. 15, §§ 3001 *et seq.*, was countable in calculating federal criminal history score; *see also id.* § 3310 (permitting juvenile disposition where the allegations of a

juvenile crime are "supported by evidence beyond a reasonable doubt")); *United States v. Gilkey*, 118 F.3d 702, 706-07 (10th Cir. 1997) (defendant's juvenile adjudications under Kansas law, Kan. Stat. Ann. §§ 38-1601 *et seq.* (now repealed), were countable in calculating federal criminal history score; *see also id.* § 38-1655 (permitting juvenile adjudication where court finds that the juvenile "committed the offense charged"); *United States v. Carney*, 106 F.3d 315, 317-18 (10th Cir. 1997) (defendant's juvenile adjudication under Oklahoma Law, Okla. Stat. Ann. §§ 7301 *et seq.*, was countable in calculating federal criminal history score; *see also id.* § 7303-4.6 (permitting juvenile adjudication where the "court finds that the allegations of a petition alleging a child to be delinquent or in need of supervision are supported by the evidence")); *United States v. Johnson*, 28 F.3d 151, 154-56 (D.C. Cir. 1994) (defendant's juvenile adjudication under District of Columbia law, D.C. Code §§ 16-2301 *et seq.*, was countable in calculating federal criminal history score; *see also id.* § 16-2317 (requiring finding that juvenile committed delinquent act)); *Holland*, 26 F.3d at 28 (defendant's juvenile adjudications under Texas law, Tex. Family Code Ann. §§ 51.01 *et seq.*, were countable in calculating federal criminal history score; *see also id.* § 54.03 (requiring finding that child engaged in specified conduct)); *United States v. Chanel*, 3 F.3d 372, 373-74 (11th Cir. 1993) (per curiam) (defendant's juvenile adjudication under Florida law, Fla. Stat. §§ 985.01 *et seq.*, was countable in calculating federal criminal history score; *see also id.* § 985.35 (requiring finding beyond a reasonable doubt that juvenile committed a delinquent act or violation of law)); *United States v. Inglesi*, 988 F.2d

500, 502-03 (4th Cir. 1993) (finding no constitutional violation in the use of a juvenile adjudication under Ohio law, Ohio Rev. Code Ann. § 2151.35, in calculating federal criminal history score); *United States v. Hanley*, 906 F.2d 1116, 1120 (6th Cir. 1990) (defendant's juvenile adjudication under Michigan law, Mich. Comp. Laws §§ 712A.1 *et seq.*, was countable in calculating federal criminal history score; *see also id.* § 712A.18); *United States v. Rangel-Navarro*, 907 F.2d 109, 110 (9th Cir. 1990) (defendant's juvenile adjudication under California law, Cal. Welf. & Inst. Code §§ 602 *et seq.*, was countable in calculating federal criminal history score; *see also id.* § 702 (indicating procedures preliminary to "disposition" where court finds defendant guilty of offense)).

The defendant's rule, if accepted, would thus invite this Court to deviate from these decisions and to propagate the very disparity that Section 4A1.2(d) seeks to eliminate. This Court should refrain from so doing and reject the defendant's argument.

For all of these reasons, the three-year term of probation imposed upon defendant's prior youthful offender adjudication is a "prior sentence" under U.S.S.G. § 4A1.2(a)(1) and the district court correctly added one criminal history point for that sentence under U.S.S.G. § 4A1.2(d)(2)(B).[6]

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[6] The cases cited by the defendant are inapposite. In *United States v. DiPina*, 178 F.3d 68 (1st Cir. 1999), the court held that the sentencing court had improperly added criminal (continued...)

2. The District Court Properly Added Two Criminal History Points Pursuant to U.S.S.G. § 4A1.1(d)

The district court's addition of two criminal history points pursuant to Section 4A1.1(d) was proper given that the defendant committed the instant offense while he was under a "criminal justice sentence," for his youthful offender adjudication.

Section 4A1.1(d) instructs that the sentencing court "[a]dd 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status."

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[6] (...continued)
history points based on two of the defendant's prior juvenile dispositions, in which the defendant merely "admit[ted] sufficient facts" for the charged offenses. *Id.* at 70. In *United States v. Roberts*, 39 F.3d 10 (1st Cir. 1994), the court held that the sentencing court erred in adding a criminal history point based on a state court conviction in which there was no formal finding of guilt. *Id.* at 11 ("There is no evidence that the judge in Roberts' 1986 proceeding made a formal finding of guilt. There is also no indication that Roberts made an 'admission of guilt' in the sense of pleading guilty or using the word 'guilty' or saying 'yes' when asked whether he admitted his guilt."). In contrast, here, defendant did much more than plead that there were sufficient facts to support his youthful offender charge; he knowingly and voluntarily pleaded guilty to that offense. Thus, the concerns expressed in both *DiPina* and *Roberts* are simply not present here.

As discussed earlier, the defendant was sentenced to a term of three years' probation for his youthful offender adjudication that began on March 26, 2003, and was to expire on March 26, 2006. The defendant committed the instant offense on November 18, 2005, while he was still serving his term of probation. Thus, applying the plain language of Section 4A1.1(d), the defendant committed the instant offense while under a "criminal justice sentence."

On appeal, the defendant does not argue that he was not on probation at the time he committed the instant offense. Rather, he maintains that "the probation resulting from the youthful offender adjudication cannot be considered a 'criminal justice sentence,' because it did not result from an adjudication of guilt." Def. Br. at 11-12. That, in essence, is the same argument that he relies upon in objecting to the district court's addition of one criminal history point pursuant to U.S.S.G. § 4A1.2(d)(2)(B). For the reasons discussed earlier, the youthful offender adjudication was an adjudication of guilt, and thus, the probation resulting from that adjudication was a "criminal justice sentence."

This Court should affirm the district court's addition of two criminal history points pursuant to U.S.S.G. § 4A1.1(d).

3. The Defendant's Youthful Offender Adjudication Was Not Expunged

Relying upon *United States v. Beaulieau*, 959 F.2d 375 (2d Cir. 1992), the defendant suggests, as he did in the court below, that his youthful offender adjudication should not be considered in calculating his criminal history because it was expunged under Connecticut law. *See* Def. Br. at 21-23, 25-26.

Section 4A1.2(j) of the Sentencing Guidelines states that "[s]entences for expunged convictions are not counted." Thus, even if the defendant's sentence for his youthful offender adjudication is a "prior sentence," that sentence cannot be counted if his youthful offender adjudication was expunged. The Guidelines do not expressly define the term "expunged." However, in making that determination, this Court has instructed that the sentencing court examine the language of the applicable state statute to determine whether the legislature intended "wholly to eliminate any trace of the past proceeding [and] wholly to erase [the defendant's] prior conviction from [the state's] criminal records." *Matthews*, 205 F.3d at 546 (quoting *Beaulieau*, 959 F.2d at 381) (first two alterations in *Matthews*).

The defendant's argument that his youthful offender adjudication may be expunged or nullified without taking any affirmative steps is incorrect. *See* Def. Br. at 23. Section 54-76o of the Connecticut General Statutes sets forth the specific steps that a defendant must take in order to have his youthful offender adjudication expunged, and

the defendant failed to meet those requirements. Given the defendant's failure to satisfy the requirements of expungement, this case is distinguishable from *Beaulieau*.

In *Beaulieau*, co-defendant Townsend argued that the district court improperly considered his prior burglary conviction which had been sealed pursuant to a Vermont state juvenile statute. Under Vermont's statute, a state court may seal all files and records of a prior juvenile conviction either on the child's motion or on motion of the court. Moreover, the statute provides that after the file is sealed, "the proceedings in the matter under this act shall be considered never to have occurred, all index references thereto shall be deleted, and the person, the court, and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such person upon inquiry in any matter." 959 F.2d at 380 (quoting 33 Vt. Stat. Ann. § 665(c)). The Second Circuit held that because Townsend had taken "all of the required steps to remove his prior burglary conviction from his record by moving to have that record sealed," Townsend's juvenile conviction should have been deemed "expunged." *Id.*

Similarly, Connecticut law has a provision for the expungement of youthful offender adjudications and sets forth certain requirements that must be satisfied before a youthful offender adjudication may be expunged. Section 54-76o of the Connecticut General Statutes, entitled "Erasure of police and court records of youthful offender," states that:

> Whenever any person has been adjudicated a youthful offender *and has subsequently been discharged from the supervision of the court or from the care of any institution or agency to whom he has been committed by the court*, all police and court records pertaining to such youthful offender shall be automatically erased when such person attains twenty-one years of age, provided such person has not subsequent to being adjudged a youthful offender been convicted of a felony, as defined in section 53a-25, prior to attaining such age.

Conn. Gen. Stat. § 54-76o (emphasis added).

Thus, if a Connecticut youthful offender is (1) discharged from the supervision of the court and (2) attains the age of 21 without being convicted of a felony after his youthful offender adjudication, then the youthful offender adjudication is completely erased.

Just as in *Beaulieau*, defendant Nelson had to meet certain requirements before his youthful offender adjudication could be expunged under state law. However, unlike the *Beaulieau* defendant, Nelson failed to satisfy the requirements for expungement of his youthful offender conviction. He pleaded guilty, was adjudicated a youthful offender and was sentenced to a three-year term of probation. Under Connecticut law, Nelson was required to complete his term of probation and not to be convicted of a felony until his 21st birthday (March 3,

2006) in order to have his youthful offender adjudication expunged. Conn. Gen. Stat. § 54-76o.

The defendant, however, did not complete his term of probation. The record reflects that he was arrested on November 18, 2005, and that he was not discharged from his probation in Connecticut Superior Court as a result of that arrest. A-61, 62. Thus, he failed to meet the requirement of being "discharged from supervision of the court." Conn. Gen. Stat. § 54-76o. The defendant's conviction was therefore not expunged by operation of Connecticut law.[7]

The defendant's citation of *United States v. Mortimer*, 52 F.3d 429 (2d Cir. 1995), is unavailing. There, the defendant argued that the sentencing court's assignment of criminal history points for a New York State felony conviction for the possession of marijuana was improper because that offense was no longer classified by New York as a felony. This Court rejected that argument, holding that a "district court counting criminal history points should consider the state sentence that is actually imposed upon a defendant . . . without regard to whether the offense has subsequently been reclassified by the

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[7] The defendant did satisfy the second requirement, since both his guilty plea (May 24, 2006) and his sentencing (October 19, 2006) post-dated his 21st birthday. Based on discussions with state authorities, the Government understands that defendant Nelson's probation revocation remains pending, so that he still has not been discharged from the supervision of the state courts.

state." *Id.* at 434. In a footnote following the decision's holding, this Court noted:

> The Government emphasizes that Mortimer did not take steps in state court to vacate or expunge his 1976 sentence, a failure the Government deems significant in light of *United States v. Beaulieau*, 959 F.2d 375, 380-81 (2d Cir. 1992). In *Beaulieau*, the district court considered a prior sealed juvenile criminal conviction in computing a sentence under the Guidelines. In reversing the district court, this Court held that the reversal was based on the fact that, by seeking to seal the record in the juvenile case, the defendant had done all he could to vacate or expunge the conviction.
>
> The Government's argument may overstate the significance of *Beaulieau*. While the *Beaulieau* Court considered the defendant's success in taking every possible step to eliminate the effect of his juvenile conviction, the Court did not address the issue of how it would rule if every step had not been taken. Furthermore, it is not altogether clear what Mortimer might have done to vacate a sentence legally entered in 1976. In doing nothing, Mortimer may have done all he could.

Id. at 434 n.6.

The defendant's reliance on the above-referenced footnote to advance his proposition that "the affirmative steps taken in *Beaulieau* may not be necessary to exclude the conviction from consideration under the Sentencing Guidelines," Def. Br. at 23, fails for two important reasons.

First, the quoted footnote passage from *Mortimer* was dictum and is not binding on this Court's decision. *See, e.g., United States v. Gotti*, 451 F.3d 133, 138 (2d Cir. 2006). The holding of *Mortimer* had nothing to do with expungement of prior convictions or, more specifically, the expungement of prior youthful offender adjudications.

Second, *Mortimer's* dictum, even if considered, relied on the finding that "it is not altogether clear what Mortimer might have done to vacate a sentence legally entered in 1976." 52 F.3d at 434 n.6. In contrast to Mortimer, who "may have done all he could" to vacate his sentence, defendant Nelson was required to take certain steps to expunge his youthful offender adjudication – *i.e.*, completing his three-year term of probation – but simply failed to do so. *Id.* Thus, the quoted passage from *Mortimer* is neither binding nor applicable to the facts presented in this case.

For all these reasons, the defendant's youthful offender adjudication was not expunged.

4. The Defendant's Youthful Offender Adjudication Is Not a Diversionary Disposition

The defendant asserts that his youthful offender adjudication was a diversionary disposition and, in support, relies upon the same arguments that were addressed and rejected by the court below. For the following reasons, this Court should likewise reject the defendant's claim.

Section 4A1.2(f) of the Sentencing Guidelines states:

> Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

First, the defendant's three-year term of probation, imposed on the day that his guilty plea to being a youthful offender was accepted, was not a "diversionary disposition." In *United States v. DiPina*, 230 F.3d 477 (1st Cir. 2000), the appellate court provided two examples of what would constitute a diversionary disposition: (1) a "continuance without a finding" disposition, based on a defendant's admission of facts sufficient for a guilty finding on charges of violating a domestic violence restraining order and threatening to commit a crime, 230

F.3d at 483 (citing *United States v. Morillo*, 178 F.3d 18, 21 (1st Cir. 1999)); and (2) an "adjudication withheld" battery conviction, *DiPina*, 230 F.3d at 483 (citing *United States v. Cadavid*, 192 F.3d 230, 235 (1st Cir. 1999)). The First Circuit found that these dispositions were diversionary because "either the adjudication or sentence was deferred in some way; in none did the court immediately impose a sentence of imprisonment." *DiPina*, 230 F.3d at 483.

In contrast, the record reflects that there was no deferral in defendant Nelson's youthful offender adjudication or his sentence. The youthful offender records reflect that the defendant pleaded guilty, was adjudged guilty, and was sentenced by the court all on the same day – March 26, 2003. Those records further reflect that the defendant's three-year term of probation was to begin immediately. Based on these facts, there was no deferral of either the defendant's adjudication or his sentence. *See DiPina,* 230 F.3d at 483; U.S.S.G. § 4A1.2(f) ("Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted.").[8]

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[8] Connecticut law provides a diversionary program called accelerated rehabilitation for individuals who, like Nelson, are charged with crimes for which a sentence of imprisonment may be imposed but which are not crimes of a serious nature. *See* Conn. Gen. Stat. § 54-56e. The fact that defendant Nelson was not afforded this diversionary program and was instead adjudicated a youthful offender further demonstrates that his (continued...)

Second, even if the defendant's youthful offender adjudication were diversionary, which it is not, the resulting sentence would still be countable in the defendant's criminal history score because "it result[ed] from a finding or admission of guilt." U.S.S.G. § 4A1.2(f). For reasons discussed earlier, the defendant falls squarely within this language, as the record reflects that his youthful offender adjudication was the result of a knowing and voluntary plea of guilty.[9]

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[8] (...continued)
adjudication was not diversionary. *See, e.g., DiPina*, 230 F.3d at 484 (that Rhode Island law has specific provisions for diversion of juvenile offenders that were not applied to the defendant's case further suggests that the defendant's adjudication was not diversionary).

[9] Moreover, the defendant's youthful offender adjudication was not a "diversion from juvenile court." U.S.S.G. § 4A1.2(f). The record reflects that the defendant was adjudicated guilty and received a sentence from the Connecticut Superior Court. Simply put, there was no diversion *from* a juvenile court. *See, e.g., United States v. Bell*, 1999 WL 1485773, at *2 (S.D. Ohio July 28, 1999) ("In the present case . . . the Defendant was not diverted *from* the juvenile court. The juvenile court adjudicated him delinquent and proceeded fully through the final phase or disposition of 'admonished.'") (emphasis in original).

For these reasons, the defendant's youthful offender adjudication is not a diversionary disposition, as defined in the Sentencing Guidelines.[10]

5. The District Court Did Not Err in Considering the Defendant's Youthful Offender Records

The defendant argues that the youthful offender records provided by the Government to the district court as an aid in tailoring an appropriate sentence was "improper ex parte conduct," and that those records thus "should not have been considered by the District Court." Def. Br. at 16 n.

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[10] The cases cited by the defendant, *United States v. Porter*, 51 F. Supp. 2d 1168 (D. Kan. 1999), and *United States v. Kozinski,* 16 F.3d 795 (7th Cir. 1994), are unavailing. The courts in both cases found that the dispositions at issue were diversionary because there were no findings of guilt made against the defendants in the prior adjudications. *See Porter*, 51 F. Supp. 2d at 1173 ("The defendant's stipulation of facts is little more than a term of the written diversion agreement between the defendant and the prosecuting attorney. . . . Neither the diversion agreement nor the stipulation is made in open court. . . . The formality of the stipulation procedure bears little or no semblance to the formality of a guilty plea."); *Kozinski*, 16 F.3d at 812 ("[W]e must conclude that the sentencing court in Illinois did not make a finding of guilt against Havelka."). In contrast, here, there was a formal finding of guilt against the defendant, made in open court with counsel present, and which was found to be voluntary after the defendant was advised of the penalties of his guilty plea.

4. That argument was rejected below and this Court should likewise reject the claim.

First, as the Government detailed at sentencing, the youthful offender records were not unlawfully or improperly obtained. *See* A-51-A-55. Conn. Gen. Stat. § 54-76*l*(a) states that "[t]he records or other information of a youth . . . shall be confidential and shall not be open to public inspection or be disclosed *except as provided in this section* . . . ." (emphasis added).

Section 54-76*l*(b) sets forth those exceptions and provides, in pertinent part, that youthful offender records may be disclosed to "law enforcement officials," "state and federal prosecutorial officials," "court officials," and "the attorney representing the youth, in any proceedings in which such records are relevant." That section has no requirement that the aforementioned individuals obtain a court order to obtain such records. Thus, it is clear that the district court, as well as Government and defense counsel were entitled to access to defendant Nelson's youthful offender records without presenting a court order. Consequently, whether the court order was obtained ex parte is irrelevant.

Second, even if the youthful offender records were obtained improperly, which they were not, the district court was still entitled to consider those records in tailoring an appropriate sentence. Title 18, United States Code, Section 3661, captioned "Use of information for sentencing," states that: "No limitation shall be placed on the information concerning the background, character, and

conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." *See also* 21 U.S.C. § 850 (repeating language of 18 U.S.C. § 3661 for sentences imposed under the Controlled Substances Act); U.S.S.G. § 1B1.4.

The Sentencing Guidelines also discuss the wide range of information that a sentencing court may consider in tailoring an appropriate sentence:

> When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

U.S.S.G. § 6A1.3.

The Supreme Court has also commented on a district judge's latitude on the type of information that may be considered for sentencing. In *Williams v. New York*, 337 U.S. 241, 246 (1949), the Court found that "a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed. . . ." In

United States v. Tucker, 404 U.S. 443, 446 (1972), the Court held that "before making [a sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."

Indeed, the sentencing court's latitude in considering all relevant information at sentencing is so wide that this Court has held that "[a]bsent a showing that officers obtained evidence expressly to enhance a sentence . . . district judges normally *should* consider illegally seized evidence at sentencing." *United States v. Tejada*, 956 F.2d 1256, 1263 (2d Cir. 1992) (emphasis added) (collecting cases).

The primary issue at sentencing, and the only issue on appeal, was whether the sentencing court should consider the defendant's prior youthful offender adjudication in calculating his criminal history score. In that context, defense counsel argued in his sentencing memorandum that "Because the records of [the defendant's youthful offender] adjudication are confidential and sealed, it is entirely possible that the Y.O. adjudication arose from his operating a motor vehicle without a license, as opposed to the more serious larceny offense with which he was charged." A-53. Thus, a dispute arose as to the nature of the crime underlying the defendant's youthful offender adjudication and resolution of this issue was central to the district court's sentencing determination and, more specifically, whether the defendant was eligible for safety valve relief. *Id.*; *cf.* U.S.S.G. §§ 5C1.2; 6A1.3.

Therefore, even if the youthful offender adjudication records were improperly obtained, the district court, applying *Tejada*, was correct to consider those records in fashioning the defendant's sentence. *See Tejada*, 956 F.2d at 1263 ("district judges normally *should* consider illegally seized evidence at sentencing").[11]

Lastly, even if defense counsel had been entitled to a hearing to object to the release of the youthful offender records (an issue to which defense counsel opened the door), the district court made remarks indicating that it would have denied such objection. At sentencing, the court stated: "I think once the probation officer had alerted us to the youthful offender question, that it was incumbent on somebody to provide the court with information that would enable me to make a decision about this." A-68. Therefore, even assuming *arguendo* that the defendant had been entitled to a hearing and had objected to a court order to obtain his youthful offender records, the district judge's remarks at sentencing demonstrate that his objection would have been overruled.

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[11] The youthful offender records at issue here were not "obtained expressly to enhance a sentence." *Tejada*, 956 F.2d at 1263. As discussed earlier, these records were sought by the Government to respond to an issue that the defendant had raised regarding the nature of the charge underlying his youthful offender adjudication, as well as to comply with the requirements of 18 U.S.C. § 3661 and 21 U.S.C. § 850 by apprising the district court of all relevant information concerning the defendant's background and character.

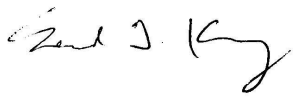
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 9, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

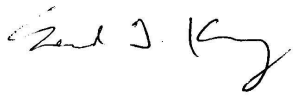


EDWARD T. KANG
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,533 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



EDWARD T. KANG
ASSISTANT U.S. ATTORNEY

GOVERNMENT'S APPENDIX

U.S. Department of Justice

United States Attorney
District of Connecticut

Connecticut Financial Center

157 Church Street
P.O. Box 1824
New Haven, Connecticut 06510

(203) 821-3700
Fax (203) 773-5376
www.usdoj.gov/usao/ct

October 16, 2006

The Honorable Ellen Bree Burns
Senior United States District Judge
United States District Court, District of Connecticut
141 Church Street
New Haven, Connecticut 06510

Re: United States v. Jonas Nelson
Case No. 3:06cr19 (EBB)

Dear Judge Burns:

As you are aware, Jonas Nelson is scheduled to be sentenced on October 19, 2006, at 9:00 a.m. The government received a copy of the defendant's sentencing memorandum, in which the defendant asserts, inter alia, "There is no information publicly available regarding the disposition of those charges, except that Jonas was apparently adjudged a youthful offender. It is possible, however, that certain charges were dismissed and that his YO adjudication was based on a petty offense like driving without a license." Defendant's Sentencing Memorandum, at 21.

On October 13, the government obtained an order from the Honorable Joan Margolis directing the Connecticut Superior Court Records Center to disclose the youthful offender records of Jonas Nelson, pursuant to Conn. Gen. Stat. 54-76l(e), which states that "[t]he records of any youth adjudged a youthful offender, or any part thereof, may be disclosed upon order of the court to any person who has a legitimate interest in the information and is identified in such order."

I have enclosed with this letter the documents that the government received pursuant to that order. Specifically, the attached information indicates that the defendant pleaded guilty on March 26, 2003, to the charge of being a youthful offender based on his commission of Larceny in the Third Degree, which is a class D felony under Connecticut law.

The government will promptly submit a sentencing memorandum. However, given the applicable confidentiality requirements of youthful offender records, the government will not attach to its memorandum the documents that it received pursuant to Judge Margolis's order.

As always, please feel free to contact me if you have any questions.

Very truly yours,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY

EDWARD T. KANG
ASSISTANT UNITED STATES ATTORNEY

Enclosures

BY FACSIMILE

cc: James Tallberg, Esq. (w/encls.)
Jacqueline Carroll, U.S.P.O. (w/encls.)

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Nelson

Docket Number: 06-4983-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/9/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: July 9, 2007