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January 10, 1997

The Honorable Marvin J. Garbis
United States District Judge
101 W. Lombard Street
Baltimore, Maryland 21201

RE: United States v.
Case No.

Dear Judge Garbis:

Sentencing in the above-referenced case is scheduled for January 16, 1997 at 9:30 am. This letter sets forth defendant's objections to the presentence report (hereinafter "PSR") and his request for a 2 level downward departure as contemplated by the plea agreement. See Plea Agreement, paragraph 14(b).

I. Mr. L. has earned the 2 level reduction for Acceptance of Responsibility.

The probation officer recommends that Mr. L. should be denied acceptance of responsibility having concluded that he made "misrepresentations" as set forth in paragraphs 13-18 and 25 of the presentence report. We disagree with this recommendation and object to paragraphs 13-18, 25 and 31 in this regard.[1]

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[1] As set forth herein, the defense position is that the information contained in these paragraphs, specifically paragraphs 13-18, is not sufficient to deny the two level adjustment for acceptance of responsibility in this case. If the court agrees, there will be no need to address the merits of the allegations. However, if the court disagrees, the defense reserves the right to contest the merits of the allegations.

The guidelines provide a framework to evaluate whether a downward adjustment for acceptance of responsibility should be granted. Application Note 1(a) of USSG § 3E1.1 discusses appropriate considerations relevant to this determination:

> [T]ruthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.

USSG § 3E1.1, comment. (n.1(a)) (emphasis added). Other relevant considerations include "post-offense rehabilitative efforts (e.g., counseling or drug treatment), id. at comment. (n.1(g)); and "the timeliness of the defendant's conduct in manifesting the acceptance of responsibility." Id. at comment. (n.1(h)). Thus, it appears the reasons cited by the probation officer are not considerations which the Commission contemplated.

The alleged misrepresentations cited in the PSR are not sufficient to deny Mr. L. the 2 level adjustment for acceptance of responsibility. None of the alleged misrepresentations was related to the offense conduct or to relevant conduct. Furthermore, none pertains to a material issue necessary to determine the proper guidelines sentence. cf. United States v. Cross, 900 F.2d 66,70 (6th Cir. 1990) (reduction properly denied for refusal to provide financial information needed by the court to determine the fine for the offense of conviction). Further, none reflects a lack of true and sincere acceptance of responsibility as further discussed below. Thus, any alleged misrepresentations should not preclude the grant of the 2 level adjustment.

Mr. L. has sufficiently expressed his acceptance of responsibility. Mr. L. accepted responsibility for the 12/19/85 conduct comprising the offense of conviction and further admitted to the 12/5/95 relevant conduct. He showed true remorse when he communicated to the probation officer his regret over his conduct and explained circumstances which led to his actions. He explained that his conduct was prompted by learning that his ex-wife was getting remarried when she sent notice of this via a wedding invitation to his parents' home. This information caused him severe grief. The threats were made when he was intoxicated and depressed.[2] Further, Mr. L. has

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[2] Mr. L. admitted himself to Union Memorial Hospital psychiatric ward on February 1, 1996 and remained until February

acted in a manner consistent with his expression of remorse, honoring the Wingets' wish that he resolve the case in Maryland, rather than exercising his right to return to Utah to resolve it.

Mr. L.'s acceptance of responsibility in this case was timely, broad, and sincere. His immediate agreement to resolve this case by pleading guilty in Maryland further reflects his timely acceptance of responsibility. Applying the considerations set forth in the guidelines to this case, there is ample evidence of Mr. L.'s acceptance of responsibility.

II. Mr. L. should be granted a 2 level downward departure pursuant to 18 U.S.C. § 3553(b), USSG § 5K2.0, and USSG § 2A6.1 because there was only a "single instance" of a threat against a person.

USSG § 2A6.1 provides for a base offense level of 12. The provision calls for a specific offense characteristic increase of 6, if the conduct evidenced an intent to carry out the threat, and for a decrease of 4, if the conduct did not evidence an intent to carry out the threat and "the offense involved a single instance evidencing little or no deliberation." See USSG §2A6.1.

In this case, the parties agree that the base level of 12 applies and that neither specific offense characteristic applies. See Plea Agreement, par. 14(b). On 12/5/95, Mr. L. made threatening phone calls to his ex-in-laws Mr. and Mrs. Winget; the threats were against property. On 12/19/95, Mr. L. made threatening calls to the Wingets; this was the only threat made against the person of another. The government does not oppose the defendant's request for a 2 level downward departure because the threats that comprise the relevant conduct (12/5) were threats against property rather than against persons, thus indicating that the "offense" only involved a "single instance" of threats against the person (12/19/95). The commentary and background to 2A6.1 and the language of 5K2.0 support this requested departure.

In fashioning the threatening communications guideline, the Commission attempted to punish according to degrees of culpability determined by the seriousness of the threat. As set forth above, the Commission approved three gradations (offense levels 12, 18, and 8), while still recognizing that the single guideline covered a wide range of conduct. USSG § 2A6.1. comment. (n.1) ("The Commission recognizes that this offense includes a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K"); id. comment. (backg'd.). Accordingly,

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9. He was diagnosed with severe depression. (The PSR incorrectly states he was admitted in March 1996.) See PSR, par. 59. He is currently receiving treatment at North Baltimore Center. See PSR, par. 60.

the Commission explicitly recognized the need for flexibility within this broad-reaching guideline.

The guidelines also provide for a departure where factors not considered by the Commission so warrant, or, even if the Commission considered the factor, where an unusual scenario warrants a departure. USSG § 5K2.0 provides that a departure may be warranted if "there exists [a] . . . mitigating circumstance . . . of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating a guidelines that should result in a sentence different from that described." This guideline also recognizes that "the court may depart from the guidelines even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate." See also 18 U.S.C. § 3553(b).

Applying these principles, the two level requested departure is warranted. Mr. L. is charged in a one count Indictment with threatening communications against the person of another on 12/19/95. There was only a "single instance" of this "kind" of threat. Further, this single instance alone comprises the offense of conviction. The relevant, uncharged conduct is different "in kind," as it involved a threat against property, not a person. USSG § 5K2.0 (a departure may be warranted if "there exists [a] . . . mitigating circumstance . . . of a kind, not adequately taken into consideration by the commission"). Unlike a situation where an individual's conduct did not evidence an intent to carry out a threat but involved multiple instances of threats against a person, in which case the base offense level remains at a 12 and no decrease applies, in this case, Mr. L.'s acts did not involve any conduct evidencing an intent to carry out his threats and there was only a single instance of a threat against a person. The unusual situation in this case can be adequately addressed by denying the full 4 point decrease as provided by § 2A6.1(b)(2) and downwardly departing 2 points as contemplated in such a case by the commentary, background, and language of § 5K2.0.

Conclusion

The base offense level is 12, pursuant to USSG § 2A6.1. For reasons stated above in section I, the court should grant the 2 level downward adjustment for acceptance of responsibility, pursuant to USSG § 3E1.1. For reasons stated above in section II, the defendant requests a 2 level downward departure. Thus, the final offense level would be 8. The criminal history category is II. The guideline range would be 4-10 and we request a sentence of probation[3] with the condition of home

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[3] The Plea Agreement provides, at paragraph 14(d), that the government "will not oppose a sentence at the low end of the sentencing guidelines, including a sentence of probation rather

detention for at least 4 months, and continuation of mental health treatment as directed by the probation office.

Respectfully submitted,

KATHRYN R. FREY
Assistant Federal Public Defender

KRF:dls

cc: Matthew Howell, Esq., AUSA (District of Utah)
James Warwick, Esq., AUSA
Eileen Hall, USPO

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than incarceration if such is consistent with the sentencing guidelines."