IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No. 5:01CR030
	)	
Plaintiff,	)	Senior Judge John M. Manos
	)	
v.	)	
	)	
LONNIE B. THOMPSON,	)	GOVERNMENT'S SENTENCING
	)	MEMORANDUM AND
Defendant.	)	OBJECTIONS TO PRESENTENCE REPORT

Now comes the United States of America, by and through counsel, Emily M. Sweeney, United States Attorney for the Northern District of Ohio, and Linda M. Betzer and Benita Y. Pearson, Assistant United States Attorneys, and respectfully submit the following memorandum for sentencing and as objections to the Pre-Sentence Report pursuant to F.R.Crim.P. 32(b)(6). The United States is asking this Court to impose a substantially longer sentence than that called for under the Sentencing Guidelines'

calculations done by the Probation Department. The reasons for this request are set forth below.

I. BACKGROUND

The indictment was returned in this matter on January 17, 2001 charging the defendant with multiple violations of Title 18, U.S.C. §1344, Bank Fraud, in connection with a scheme to defraud several area banks by manufacturing and passing counterfeit checks.

Trial began on June 25, 2001, and concluded on June 28, 2001 with a return of guilty verdicts on counts one, two, three and five. Each count carries a possible penalty of up to 30 years imprisonment.

In a presentence disclosure notice dated September 10, 2001, the probation officer calculated that the sentencing range would be 63 to 78 months based upon a criminal history of VI and an offense level of 19. The probation officer noted two factors which could warrant an upward departure:

1) U.S.S.G. §5K2.0, this defendant was involved in the murder of a witness against him, and

2) U.S.S.G. §4A1.3, the criminal history does not reflect the seriousness of the defendant's conduct or the likelihood that he will commit future crimes.

II. THE GOVERNMENT'S POSITION ON SENTENCING

A. Upward Departure for the Murder of Gerald Sykes

In Koon v. United States, 116 S. Ct. 2035, 2045 (1996), the Supreme Court agreed with the analysis set forth in United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993), and held that a court considering departure must ask the following four questions:

1) What features of this case, potentially take it outside the Guidelines' 'heartland' and make it a special, or unusual, case?

The government argues that the Court should depart upwards based upon the murder of Gerald Sykes pursuant to U.S.S.G. §5K2.1. The murder of a material witness takes this case out of the "heartland" of bank fraud cases for purposes of sentencing.

Section 5K2.0 states:

> Grounds for Departure (Policy Statement)
>
> Under 18 U.S.C. §3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing commission in formulating the guidelines that should result in a sentence different from that described." . . . this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. . .

2) Has the Commission forbidden departures based on those features?

"Forbidden factors" cannot be used as a basis for departure. These factors are listed in USSG §5H1 and include race, sex, national origin, creed, religion, socio-

economic status, lack of youthful guidance and circumstances indicating disadvantaged background, drug or alcohol dependence, and economic hardship, personal financial difficulties or economic pressure upon trade or business. These questions are not pertinent to our proceedings.

3) Has the Commission encouraged departures based on those features?

Encouraged factors are those the Commission acknowledged that it was unable to take into account fully in formulating the guidelines. Koon, 116 S. Ct. at 2045. Encouraged factors are those listed in §5K2.1 *et seq.* and include death, USSG § 5K2.1; serious physical injury, USSG § 5K2.2; and the defendant's criminal purpose, that is, if the defendant committed the offense to facilitate or conceal the commission of another offense, USSG § 5K2.9. If the factor is an encouraged factor, the court is authorized to depart only if the applicable guideline does not already take it into account.

Section 5K2.1 provides a basis for an upward departure if a death results, and specifically states, "a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud."

4) Has the Commission discouraged departures based on those features?

Examples of discouraged factors are listed in §5H1 and include defendant's family ties and responsibilities, defendant's education and vocational skills, defendant's military, civic, charitable, or public service record, defendant's age, including youth,

mental and emotional conditions, physical condition, and employment record. grounds not mentioned in the guidelines should be "highly infrequent." Id.

Thus, both death and criminal history are factors which both the Supreme Court and the Sentencing Commission encourage the Court to carefully consider.

Evidentiary Hearing - The United States prays leave of Court to offer more specific evidence at the sentencing hearing to support a finding that this defendant participated in the murder and burial of Gerald Sykes because Mr. Sykes was assisting in a Federal investigation.

The Court must make particular findings justifying departure. United States v. Barajas-Nunez, 91 F.3d 826, 834-34 (6th Cir. 1996). The evidence to be presented will enable the Court to do so.

After the Court finds that departure is warranted, the United States will suggest that the most appropriate guideline to follow is U.S.S.G. §2A1.1, Homicide.

B. The Defendant's Criminal History Fails to Adequately Reflect the Seriousness of the Defendant's Past Criminal Conduct and the Likelihood the Defendant Will Commit Other Crimes

The government agrees with the probation officer that a criminal history of VI does not adequately reflect the defendant's past conduct, and suggests that there exists further facts to justify this conclusion.

First, this defendant participated in the murder of Sykes which was committed to

prevent Sykes from testifying against Thompson at trial and this crime is not reflected in his Criminal History score.

Second, the testimony at trial showed that Thompson's counterfeit checks had been negotiated in Toledo and Cincinnati, Ohio and in Virginia. Daniel Id-Deen and others negotiated these checks and Id-Deen was convicted in Virginia for doing so. These offenses are not reflected in Thompson's Criminal History, but should be reflected in a substantial upward departure.

Third, §5H1.9 of the Sentencing Guidelines states, "The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence." As this Court knows from the evidence at trial and the information provided in the Pre-Sentence Report, paragraph 80, this defendant has not engaged in gainful employment during his adult life.

III. THE GOVERNMENT'S FACTS AND ARGUMENT

A. The Murder of Gerald Sykes

On October 20, 1999, Special Agents Timothy Gallagher, FBI and Keith Verzi, Secret Service, interviewed Daniel Id-Deen in connection with their investigation of Lonnie Thompson and his counterfeit check scheme. Mr. Id-Deen, who was then in prison because he pleaded guilty to passing Thompson's counterfeit checks, told the agents that Gerald Sykes was also involved in passing Thompson's checks. On November 24, 1999, the agents interviewed Sykes who confessed his involvement and

stated that Thompson recruited him to help cash the checks and was the creator of the counterfeit checks.

On January 1, 2000, Gerald's family reported him missing.

On March 9, 2000, Thompson was arrested by the Mayfield Heights Police Department as he and a colleague were attempting to pass counterfeit checks in that suburb. During an interview, Thompson stated that he could show police the location of a dead body. Mayfield Heights Police notified the F.B.I., the Secret Service and the Akron Police Department.

On March 10, Thompson told the federal agents that he knew that Sykes had cooperated with the agents and would be a witness against him. He said that Stephen Vire had murdered Sykes a few days before Christmas. Thompson stated that he had been present and witnessed the killing but had not participated in it. He described how the murder was committed and the location of the body. The next day, police went to the Akron house which Thompson identified, removed discarded air conditioners and other debris which covered the grave, dug into the earth approximately 4 feet, and found the interred body of Gerald Sykes. Sykes' face and head had been covered with duct tape and his hands were taped behind his back. He was also dressed exactly as Thompson had described.

Stephen Vire had served time in the State of Ohio penal system and there met Thompson. Thompson has the name "Vire" tattooed on his shoulder. Thompson, a

homosexual, and Vire were "special friends" while in prison. Vire had previously lived in the house where the body was found.

Thompson was interviewed again by the federal agents on March 14, after Sykes' body was exhumed. Thompson stated that Sykes had told him that he had confessed to Sykes' and Thompson's involvement in the counterfeit check scheme. Thompson also admitted that he knew Sykes would be a witness against him.

At sentencing, the testimony will describe for the Court an incident which occurred in the holding cells in the basement of the courthouse during the trial of this case. Thompson threatened Id-Deen and that threat was overheard by a deputy U.S. Marshal.

C. Leader or Organizer

Section 3B1.1(a) of the Sentencing Guidelines calls for an increase of the Base Offense Level by 4 levels if the defendant is, " . . . an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive . . ." It is the government's contention that the proof at trial, supplemented by the prof at the sentencing hearing, showed that this defendant was the leader of the criminal activity in that he solicited others to procure the necessary materials and information for him and then produced the counterfeit checks. Other persons were recruited to pass those counterfeit checks to turn them into usable cash.

For a four-level enhancement to be applied to this defendant, there must be a total

of five or more participants in his scheme. USSG §3B1.1(a). The sentencing judge should identify those participants in the factual findings at sentencing. *United States v. Stubbs*, 11 F.3d 632 (6th Cir. 1993); *but see United States v. Elder*, 90 F.3d 1110 (6th Cir.), *cert. denied*, 519 U.S. 1016 (1996).

The other "participants" must be criminally responsible for commission of the offense (even if not convicted). *United States v. Haun*, 90 F.3d 1096 (6th Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997) (acquitted co-defendant and unindicted coconspirator could be participants); *United States v. Cohen*, 946 F.2d 430 (6th Cir. 1991) (uncharged cooperating cohort is a "participant").

Although there must be five or more participants for the four-level enhancements to apply, defendant need not supervise, etc., each of the other participants. *United States v. Bingham*, 81 F.3d 617 (6th Cir.), *cert.denied*, 519 U.S. 900 (1996); *United States v. Ward*, 68 F.3d 146 (6th Cir. 1995) (defendant can get 4-level enhancement if he leads at least one of four or more other participants), *cert. denied*, 516 U.S. 1151 (1996); *United States v. Dean*, 969 F.2d 187 (6th Cir. 1992) (enhancement proper even though defendant only supervised two participants), *cert.denied*, 507 U.S. 1033.

When counting the five or more participants required under §3B1.1(a) , the defendant may be counted as one of the five. *U. S. v. Paccione,* 202 F.3d 622, 625 (2d Cir. 2000); *U. S. v. Colletti* 984 F.2d 1339, 1346 (3d Cir. 1992) ; *U. S. v. Rodriguez* 981 F.2d 1199, 1200 (11th Cir. 1993) ; *U. S. v. Schweihs* 971 F.2d 1302, 1318 (7th Cir.

1992) ; *U. S. v. Fells* 920 F.2d 1179, 1182 (4th Cir. 1990) ; *U. S. v. Reid* 911 F.2d 1456, 1464 (10th Cir. 1990) ; *U. S. v. Barbontin* 907 F.2d 1494, 1498 (5th Cir. 1990); *U. S. v. Preakos* 907 F.2d 7, 10 (1st Cir. 1990) .

Courts have applied the adjustment in the following cases: *United States v. Green*, 202 F.3d 869 (6th Cir. 2000) (defendant recruited others to take part in prison riot); *United States v. Bahhur*, 200 F.3d 917 (6th Cir. 2000) (defendant was responsible for opening and closing bank accounts used in scheme and employed another person to take certain actions); *United States v. Owusu*, 199 F.3d 329 (6th Cir. 2000) (four-level enhancement upheld even with co-leader, and even though defendant led only one or two others); *United States v. Perkins*, 994 F.2d 1184 (6th Cir.) (organizer or leader enhancement applies to defendant who owned the vehicles used to transport the drugs, planned the shipments, drove those who processed the drugs to work and paid their wages and ran the processing operation); *United States v. Akrawi,* 982 F.2d 970 (6th Cir. 1993) (leader enhancement applies to defendant who negotiated structured transactions, supplied money for cars bought in such transactions, and titled the cars in the names of his accomplices); *United States v. Feinman*, 930 F.2d 495 (6th Cir. 1991) (defendant complained of a two-level enhancement for leading an operation involving five or more participants; although there was no cross appeal, the Court remanded with directions to make it a four-level enhancement); *United States v. Castro*, 908 F.2d 85 (6th Cir. 1990) (both defendants were organizers or leaders where testimony showed that one directed

coconspirators to transport cocaine to various cities and the other employed coconspirators to bring cocaine to Detroit from Florida and directed others to sell the cocaine).

The persons who were participants in the criminal activity, among others, were:

1. Lonnie B. Thompson - Thompson has been found by a jury to be criminally involved in this conspiracy and related offenses.

2. Daniel Id-Deen - Id-Deen testified at trial that he was given counterfeit checks by Thompson, and that he cashed those checks and split the proceeds with the defendant.

3. Karen Guyton - Testified at trial that she secured account numbers for Thompson, and witnessed him using his computer to create the counterfeit checks.

4. Kelli Guyton - Same essential testimony as her sister.

5. Chico Rhasiatry - Rhasiatry testified at trial that he lived with Thompson and knew about his activities in making counterfeit checks. Rhasiatry helped Thompson repair his computer. On at least one occasion, Rhasiatry passed a counterfeit check which the defendant had made at the Sav-A-Lot grocery store.

6. Nichelle Snyder - Testimony at the sentencing hearing will show that Snyder passed Thompson's counterfeit checks in the Cleveland area. Does she put these checks on Thompson? If not, he did not supervise her.

7. Gerald Sykes - Made a full confession to federal law enforcement officials. Sykes told them that Thompson was the organizer of the counterfeit check ring, that Thompson gave him the counterfeit checks to cash, and that he split the proceeds with Thompson.

8. PROCEDURAL AND EVIDENTIARY ISSUES

A. THE COURT IS FREE TO CONSIDER UNCHARGED AND EVEN ACQUITTED CONDUCT FOR SENTENCING PURPOSES IF A FACTUAL BASIS IS ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE.

In *Nichols v. United States*, 511 U.S. 738, 747 (1994) the Supreme Court held that the sentencing court may consider criminal conduct even though there was never any conviction for such behavior. Later, the Supreme Court in *United States v. Watts*, 519 U.S. 148, 154 (1997) held that a sentencing court was free to consider conduct of which a defendant has been acquitted if the facts relevant to the sentencing are proven by a preponderance of the evidence.

In *United States v. Milton*, 27 F.3d 203, 208-09 (6th Cir. 1994) the defendant was convicted for being a felon in possession of a firearm. He had been earlier charged in state court with second degree murder and assault and was acquitted on the murder charge. Following his conviction in federal court on the firearm charge, the sentencing court sentenced the defendant to a sentence based upon a reference to the second degree murder guidelines. On appeal of this sentence, the Sixth Circuit affirmed saying,

> "This Circuit clearly allows district courts to consider acquitted conduct at sentencing. ...We consider acquitted conduct under the theory that a determination of guilt requires proof beyond a reasonable doubt while sentencing considerations only require proof by a preponderance of the evidence." *Milton,* at 209.

See, United States v. Masters, 978 F.2d 282 (7th Cir. 1992); *United States v. Melton*, 970 F.2d 1328 (4th Cir. 1992); *United States v. Ihegworo*, 959 F.2d 26 (5th Cir. 1992); *United States v. Cordoba-Murgas*, 233 F.3d 704, 708 (2nd Cir. 2000).

The Supreme Court in *Nichols, supra,* noted that in determining criminal history,

the sentencing court may use prior unconvicted conduct.

> One such important factor, as recognized by state recidivism statutes and the criminal history component of the Sentencing Guidelines, is a defendant's prior convictions. Sentencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior. We have upheld the constitutionality of considering such previous conduct ...

Nichols at p. 747.

In *United States v. Roberson*, 872 F.2d 597, 606-07 (5th Cir. 1989) the Fifth Circuit approved the sentencing court's departing upwards when it found the criminal history category inadequate to reflect the serious circumstances of the conduct (defendant had stolen credit cards from the body of his elderly employer, which he burned in the fear that he would be charged with murder). The credit card conviction by itself otherwise left the defendant in a level 12, criminal history VI, 30 to 37 months. The sentencing court increased the imprisonment to 120 months.

B. USE OF HEARSAY EVIDENCE

At the sentencing hearing, the government expects to introduce various evidence through hearsay statements of witnesses. The sentencing guidelines provide that sentencing judges are not restricted to information which is admissible at trial. U.S.S.G. §6A1.3, *Commentary*. Clearly, this means that the court may consider hearsay evidence so long as it is deemed to have sufficient indicia of reliability. *United States v. Silverman*, 976 F.2d 1502, 1512 (6th Cir. 1992).

C. LENGTH OF HEARING

The United States anticipates that it will call 11 witnesses to testify in this sentencing hearing.

Respectfully submitted,
EMILY M. SWEENEY
United States Attorney

By: _____

Linda M. Betzer
Assistant U. S. Attorney
Registration No. 0034217
600 Superior Avenue, East
Cleveland, Ohio 44114-2600
(216) 622-3878
(216) 522-3854 (FAX)
Linda.Betzer@usdoj.gov (E-Mail)

_____

Benita Y. Pearson
(Reg. No. 0065709)
Assistant U.S. Attorney
1800 Bank One Center
600 Superior Avenue, East
Cleveland, OH 44114-2600
(216) 622-3919
(216) 522-7357 (FAX)
benita.pearson@usdoj.gov (Email)

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Government's Objections to Presentence Report and Sentencing Memorandum was served via FAX and U.S. Mail on this 20th day of November, 2001 on:

MICHAEL J. O'SHEA (0039330)
Counsel for Defendant
323 West Lakeside Avenue
Suite 450
Cleveland, Ohio 44113

Linda M. Betzer
Assistant U. S. Attorney