No. 08-

IN THE

SUPREME COURT OF THE UNITED STATES

Christopher Michael Dean — PETITIONER
(Your Name)

VS.

United States — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):
11th Circuit - pursuant to 18 U.S.C. § 3006A (Criminal Justice Act)
U.S. District Court, Northern District of Georgia - same

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

No. 08-

IN THE
Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 11, 2008

QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who "discharge[s]" a firearm during a crime of violence, requires proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation. The petitioner's co-defendant, Ricardo Curtis Lopez, will file a separate petition.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reprinted at 517 F.3d 1224 and is reproduced in the Appendix to this opinion. Pet. App. 1a. The District Court for the Northern District of Georgia did not issue a written opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 2008. A timely petition for rehearing was denied on April 15, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 924(c)(1)(A) of Title 18 of the United States Code provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of

not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

INTRODUCTION

Section 924(c)(1)(A)(iii) of the United States Criminal Code states that a defendant who "discharge[s]" a firearm during a crime of violence is subject to a ten-year mandatory minimum term of imprisonment. 18 U.S.C. § 924(c)(1)(A)(iii). Implicit in this provision is a requirement that the discharge be intentional, not merely the result of mistake or accident. This interpretation is mandated by the purpose and structure of the statute and by prior decisions of this Court holding that, even in the absence of statutory language defining the necessary level of intent, it is presumed that a criminal statute requires proof that the defendant acted volitionally. See, *e.g.*, *Carter* v. *United States*, 530 U.S. 255, 269-70 (2000).

Despite this authority, the proper interpretation of § 924(c)(1)(A)(iii) has divided the circuits. Two circuits hold, in accordance with the plain meaning of the statute and the presumption of scienter, that § 924(c)(1)(A)(iii) requires proof that the defendant discharged the firearm intentionally, not merely by mistake or accident. *United States* v. *Brown*, 449 F.3d 154, 158 (D.C. Cir. 2006); *United States* v. *Dare*,

425 F.3d 634, 641 n.3 (9th Cir. 2005), *cert. denied*, 548 U.S. 915 (2006). Two other circuits hold to the contrary that a defendant may be found to have violated § 924(c)(1)(A)(iii) – and subject to the ten-year mandatory minimum sentence – even if the discharge was purely accidental and unintentional. *United States* v. *Dean*, 517 F.3d 1224, 1230 (11th Cir. 2008); *United States* v. *Nava-Sotelo*, 354 F.3d 1202, 1206-07 (10th Cir. 2003).

This case squarely presents the issue. Petitioner Christopher Michael Dean was sentenced to the mandatory minimum ten-year term of imprisonment under § 924(c)(1)(A)(iii) based on evidence that, during the bank robbery of which he was convicted, a firearm was discharged. There is no dispute that the discharge was accidental, and the lower courts accepted this fact as true in addressing Mr. Dean's sentence. Nevertheless, both the district court and the Eleventh Circuit held that proof of an intentional discharge was unnecessary and that the accidental discharge triggered the mandatory ten-year minimum sentence of § 924(c)(1)(A)(iii).

The divide among the courts of appeals means that similarly situated defendants convicted of the same crime will be subject to significantly different sentences merely because they were prosecuted in different jurisdictions. To remedy this situation, and address the clear circuit split on this issue, the petition should be granted.

STATEMENT OF THE CASE

A masked man entered a bank in Rome, Georgia during the late morning of November 10, 2004. Brandishing a small pistol, he told everyone to get on

the floor. Pet. App. 3a. He did not threaten anyone individually, or cause physical harm to any person. He simply walked behind the teller counter and started collecting money from the stations, picking up bills with his left hand and holding the pistol with his right. *Id.*

It was then that the accident occurred. As the perpetrator attempted to switch the gun from one hand to the other, it inadvertently discharged. The bullet went through a partition, ricocheted off a computer, and landed on the teller counter. The perpetrator was visibly shocked, as bank employees later testified. See Trial Tr., vol. 1, at 13, 36-37, 44-45, 107. He uttered an expletive and immediately left the bank, taking approximately $3,642.00. None of the persons inside the bank were harmed. *Id.*; see Pet. App. 3a-4a.

Local police soon arrested two suspects in the robbery: Christopher Michael Dean and Ricardo Curtis Lopez. These men were brothers-in-law, and they lived in the same apartment, along with Mr. Lopez's wife (Mr. Dean's sister). Both of them roughly matched the description of the perpetrator, and both were apprehended at or near the car used during the robbery. See Pet. App. 3a.

The investigation then took an odd turn: both men confessed to the crime and exonerated the other. At first, Mr. Lopez said that he had committed the robbery, and that Mr. Dean had not been involved. Later, however, Mr. Dean admitted that he had committed the theft, without the knowledge of Mr. Lopez. Trial Tr., vol. 3, at 31, 98. He explained that Mr. Lopez was trying to take the blame for the crime in order to protect Mr. Dean and his family from the stress of a lengthy period of incarceration. Mr. Dean said that he was coming forward now because he

"couldn't have [Mr. Lopez] going to prison for 10 years for something that [Mr. Lopez] was not guilty of." *Id.* Mr. Lopez subsequently acknowledged that Mr. Dean had in fact committed the offense. *Id.*

Notwithstanding these confessions, prosecutors charged both Mr. Dean and Mr. Lopez with conspiracy to commit bank robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and aiding and abetting another in carrying, possessing, or discharging a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). Following a jury trial, both defendants were convicted on both counts. Pet. App. 4a-5a.

The presentence report recommended that the defendants were subject to the mandatory ten-year minimum term of imprisonment under § 924(c)(1)(A)(iii). Citing *United States* v. *Brown*, 449 F.3d 154 (D.C. Cir. 2006), the defendants objected on the ground that the discharge of the firearm had been accidental. See Pet. App. 41a. The district court did not disagree with the defendants' characterization of the record, but held that § 924(c)(1)(A)(iii) applied even when the discharge was unintentional. It therefore sentenced each of the defendants to the mandatory minimum term of imprisonment of 120 months, under § 924(c)(1)(A)(iii).[1] *Id.* at 51a-52a, 60a, 69a.

The Eleventh Circuit affirmed. It acknowledged that "[t]estimony at trial supports [the] assertion that the discharge of the firearm . . . was likely accidental" – a finding the government did not dispute. *Id.* at 9a.

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[1] Mr. Dean was also sentenced to a 100-month term of imprisonment, to run consecutive to the ten-year term imposed under § 924(c)(1)(A)(iii), for his conviction under the Hobbs Act of conspiracy to commit bank robbery. Pet. App. 4a-5a.

Nonetheless, it held that, because "§ 924(c)(1)(A)(iii) does not contain a separate intent requirement," the "mere discharge of [a firearm] is controlling" and mandates application of the ten-year mandatory minimum sentence. *Id.* at 2a-3a.

REASONS FOR GRANTING THE PETITION

This case presents a discrete and significant issue: whether 18 U.S.C. § 924(c)(1)(A)(iii) should be interpreted to include a general intent element. This Court has held in several cases, including *Carter* v. *United States*, 530 U.S. 255 (2000), that in the absence of contrary statutory language a criminal statute is presumed to require proof that the criminal act was committed volitionally, not merely by mistake or accident. *Id.* at 267-70. Nevertheless, the circuit courts are divided over whether § 924(c)(1)(A)(iii) may be violated by purely accidental conduct. This conflict has resulted in similarly situated defendants convicted of the same offense receiving substantially different sentences, based solely on the jurisdiction in which they happen to be prosecuted. The petition should be granted to address this conflict and resolve this discrepancy.

I. REVIEW IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER § 924(C)(1)(A)(III) INCLUDES A GENERAL INTENT REQUIREMENT.

The federal courts of appeals are squarely divided over whether proof of intent is required to impose the ten-year mandatory minimum sentence under § 924(c)(1)(A)(iii). Such fundamental disagreement on the requirements for imposing a lengthy,

mandated term of imprisonment compels this Court's review.

1. Two courts of appeals, the District of Columbia Circuit and the Ninth Circuit, hold that proof of general intent is required under § 924(c)(1)(A)(iii). *Brown*, 449 F.3d at 158; *Dare*, 425 F.3d at 641 n.3. This holding finds support in the language and structure of the statute. *Brown*, 449 F.3d at 156-57. The three subsections of § 924(c)(1)(A) set forth a "progression" of increasingly severe penalties for different criminal acts: a mandatory five-year term of imprisonment for "us[ing]" a firearm during a crime of violence, 18 U.S.C. § 924(c)(1)(A)(i), a seven-year term if the firearm is "brandished," *id.* § 924(c)(1)(A)(ii), and a ten-year term if the firearm is "discharged," *id.* § 924(c)(1)(A)(iii). *Brown*, 449 F.3d at 156-57. There is no dispute that the first two subsections of the statute, the "use" and "brandish" provisions, require proof that the defendant committed the act intentionally, not merely by mistake or accident. *Id.* It follows that the third subsection, which is phrased in the same manner, should likewise be interpreted to include a scienter requirement. *Id.*

This reading accords with the purpose of the statute. The reason why the third subsection of § 924(c)(1)(A) prescribes an additional three-year term of imprisonment for an individual who "discharge[s]" a firearm during a crime of violence is because that individual is more morally culpable that one who merely "use[s]" or "brandishe[s]" a firearm. *Id.* However, when the discharge is involuntary or merely accidental, the rationale for a higher sentence disappears, since an individual cannot be deemed morally responsible for an unintentional act. *Id.* In other words, "as between an intentional brandishing

and a purely accidental discharge, the increment in risk, given the less reprehensible intent, seems inadequate to explain a congressional intent to add three years." *Id.* at 157.

This interpretation is further bolstered by the presumption of *mens rea* and the rule of lenity. *Id.* at 156-57. "[L]aws that deprive an individual of his liberty should be strictly construed" and are presumed to require proof of intent. *Id.* at 157 (quoting *United States* v. *Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989)). Under these doctrines, § 924(c)(1)(A) must be interpreted to require proof that the discharge was intentional, not merely accidental. *Id.*

2. In direct conflict with the interpretation followed by the District of Columbia and Ninth Circuits, the Tenth and Eleventh Circuits hold that proof of intent is not required under § 924(c)(1)(A)(iii). *Dean*, 517 F.3d at 1230; *Nava-Sotelo*, 354 F.3d at 1206-07. In these jurisdictions, "the mere fact that the weapon discharged is controlling," requiring imposition of the ten-year mandatory minimum sentence. *Nava-Sotelo*, 354 F.3d at 1206-07.[2]

These courts acknowledge the presumption favoring *mens rea* in criminal statutes, but they hold that this presumption simply does not apply to

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[2] The Sixth Circuit has held in an unpublished opinion that § 924(c)(1)(A)(iii) "does not expressly require a specific intent to discharge the weapon." *United States* v. *Tunstall*, 49 F. App'x 581, 582 (6th Cir. 2002). However, in a more recent unpublished opinion, the same court said that "[t]he *mens rea* issue is one on which the Sixth Circuit has not taken a position." *United States* v. *Nelson*, No. 06-1928, 2008 WL 1836732, at *2 (6th Cir. Apr. 24, 2008) (per curiam).

"sentencing enhancements," such as § 924(c)(1)(A)(iii). *E.g.*, *id.* In support of this conclusion, they rely on *Harris* v. *United States*, 536 U.S. 545 (2002). While *Harris* did define § 924(c)(1)(A)(iii) as a sentencing "enhancement," it did not address the presumption of *mens rea* or suggest that the presumption was inapplicable to that subsection, or to sentencing enhancements generally. See *id.* at 555-57.

The Tenth and Eleventh Circuits reject the conclusion that Congress intended for increasingly severe penalties to be meted out only for increasingly culpable conduct. *E.g.*, *Dean*, 517 F.3d at 1230. They conclude that "discharging a firearm, regardless of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it," justifying a higher sentence. *Id.* They also find that the rationale for requiring intent – "to avoid criminalizing apparently innocent conduct" – is absent with respect to sentencing factors because the individual has demonstrated a "vicious will" by committing the underlying offense. *Id.* (citing *Nava-Sotelo*, 354 F.3d at 1207).

3. The circuit conflict is thus entrenched and deep. The courts of appeals disagree over both the plain meaning of § 924(c)(1)(A)(iii) and the purpose of that provision. They further disagree over the fundamental question of whether the presumption in favor of scienter in criminal statutes can *ever* apply to sentencing enhancements. This Court's review is necessary to bring predictability and consistency to this area of criminal law.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

Decisions of this Court make clear that, absent evidence of a contrary congressional intent, criminal statutes should be read to require proof that the defendant engaged in the conduct at issue intentionally, not merely by accident or mistake. *E.g.*, *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978). This principle flows from two related doctrines: the presumption in favor of *mens rea* and the rule of lenity. See *id.* at 436-37. The decision of the Eleventh Circuit contravenes both of these doctrines and conflicts with this Court's precedent, warranting review.

A. The Decision Below Is Inconsistent With Precedent Applying The Presumption In Favor Of *Mens Rea*.

This Court has held in numerous cases that "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 436 (quoting *Dennis* v. *United States*, 341 U.S. 494, 500 (1951)); see *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994); *Staples* v. *United States*, 511 U.S. 600, 605-06 (1994); *Liparota* v. *United States*, 471 U.S. 419, 426 (1985); *Morissette* v. *United States*, 342 U.S. 246, 273-75 (1952). A criminal statute will be read to require proof of at least general intent – *i.e.*, proof that the criminal act was committed volitionally and not merely by accident or mistake – "absent a clear statement from Congress that *mens rea* is not required." *Staples*, 511 U.S. at 605-06, 618. "[F]ar more than the simple omission of the appropriate phrase from the statutory definition is necessary to

justify dispensing with an intent requirement." *Gypsum*, 438 U.S. at 438.

The presumption of *mens rea* was addressed most recently in *Carter*. The Court held that 18 U.S.C. § 2113(a), which criminalizes the taking of property from a bank by force or intimidation, is satisfied by proof that the defendant engaged in the proscribed conduct intentionally, without regard to whether the defendant acted with an actual felonious purpose. 530 U.S. at 268-70. It distinguished between two levels of intent: (i) "specific intent," meaning the defendant engaged in criminal conduct with the actual purpose of violating criminal law, and (ii) "general intent," meaning the defendant engaged in criminal conduct volitionally – not by mere accident or mistake – but not necessarily with the specific purpose of violating the law. *Id.* Although criminal statutes are always presumed to require proof of "general intent" (absent contrary statutory language), they will be presumed to incorporate a "specific intent" element only when necessary "to separate wrongful from 'otherwise innocent' conduct." *Id.*

The Court concluded that, because the intentional taking of bank property by force is wrongful in and of itself, there was no need to engraft onto the statute a "specific intent" element. *Id.* Proof of general intent, mandated by the presumption of *mens rea*, satisfied the purpose of the statute. *Id.*

The reasoning in *Carter* (not cited by the Eleventh Circuit) controls this case, and compels an outcome contrary to that of the Eleventh Circuit. The presumption of *mens rea* dictates that a criminal statute should be read to include at least a general intent element: at the very minimum, the defendant must act volitionally, and not merely by mistake or

accident.[3] See *id.* In other words, under *Carter* and other opinions addressing the presumption of *mens rea*, even if § 924(c)(1)(A)(iii) does not require proof of *specific* intent, it at least demands proof of *general* intent.

None of this Court's decisions has adopted the Eleventh Circuit's view that the presumption of *mens rea* applies only to offense "elements" and not to "sentencing enhancements." To the contrary, the Court's opinions have contemplated universal application of the presumption, holding that it will compel a *mens rea* requirement (of at least general intent) in all cases except those few in which Congress plainly intended to create a strict liability crime (as in the case of certain "public welfare" offenses, see *supra* note 3). See, *e.g.*, *Carter*, 530 U.S. at 268-70; see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 (2000) (rejecting distinction between "elements" and "sentencing factors" in Fifth Amendment analysis); *Mitchell* v. *United States*, 526 U.S. 314, 327 (1999) (the Fifth Amendment applies equally to issues concerning "the severity of . . . punishment" as to those concerning "guilt or innocence"). The contrary judgment of the Eleventh Circuit in this case conflicts with this Court's precedent, calling for further review.

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[3] The presumption of scienter does not require proof of intent, specific or general, in a small category of "public welfare" crimes. *Staples*, 511 U.S. at 617-18. These offenses are limited to those for which "penalties . . . are relatively small, and conviction does no grave damage to an offender's reputation." *Id.* (quoting *Morissette*, 342 U.S. at 256). Neither the government nor any of the courts addressing § 924(c)(1)(A)(iii) has suggested that this provision – with its ten-year mandatory minimum term of imprisonment – is merely a "public welfare" offense.

B. The Decision Below Is Inconsistent With Precedent Applying The Rule Of Lenity.

The decision below also conflicts with the rule of lenity, as adopted by this Court in several cases. "[T]he touchstone of the rule of lenity is statutory ambiguity." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (internal quotation marks omitted). It "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States* v. *Shabani*, 513 U.S. 10, 17 (1994). The rule requires that "ambiguous criminal statute[s] be construed in favor of the accused." *Staples*, 511 U.S. at 619 n.17; *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in the defendant's favor."). In short, "[u]nder a long line of [this Court's] decisions, the tie must go to the defendant." *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion).

Importantly, the Court has recognized that this rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958); see also *Santos*, 128 S. Ct. at 2025 ("This venerable rule . . . vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed.").

At a minimum, § 924(c)(1)(A)(iii) is ambiguous as to the intent requirement. Unlike the definitions of the relevant terms in *Burgess* v. *United States*, 128 S. Ct. 1572 (2008), Congress clearly has not defined the intent requirement contained in the discharge provision of § 924(c)(1)(A) in a "coherent, complete, and . . . exclusive" manner. See *id.* at 1580. To the contrary, the statute is silent as to the intent requirement. Indeed, the very existence of a circuit split on this question of law indicates the statutory ambiguity. Obviously, reasonable minds differ as to what Congress intended in § 924(c)(1)(A)(iii).[4]

Absent clear evidence that Congress intended to abrogate the common law requirement of *mens rea*, and impose a more severe penalty without increased culpability, the rule of lenity requires that any ambiguity in § 924(c)(1)(A)(iii) be resolved in favor of the accused. The Eleventh Circuit's decision to the contrary conflicts with this Court's precedent and warrants review.

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[4] Additionally, if a court is unsure if statutory ambiguity exists, then this uncertainty should be resolved in favor of finding ambiguity. *Scheidler* v. *Nat'l Org. for Women Inc.*, 537 U.S. 393, 408 (2003) ("[T]his being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity.") (internal quotation marks omitted); *see also Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court.").

III. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

The inevitable result of the split among the circuits on the interpretation of § 924(c)(1)(A)(iii) is serious disparity in the sentences of similarly situated defendants. A defendant sentenced in the District of Columbia Circuit will be subject to a seven-year mandatory minimum term of imprisonment, while a defendant sentenced in the Eleventh Circuit *for the same conduct* will be subject to a ten-year term. This result is not only contrary to congressional intent, see S. Rep. No. 98-225, at 65 (1983) (noting that the purpose of the Sentencing Reform Act was to eliminate "shameful disparity in criminal sentences" among jurisdictions); see also 18 U.S.C. § 3553(a)(6) (requiring consideration of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); *United States* v. *Booker*, 543 U.S. 220, 252-54 (same), but is also fundamentally unfair and implicates constitutional due process and equal protection concerns, see *Salsburg* v. *Maryland*, 346 U.S. 545, 550-53 (1954) (noting that territorial discrepancies in criminal procedure may raise such concerns).

The disparity is evident in this case. Mr. Dean was convicted of participating in a bank robbery in which a firearm was accidentally discharged. As a result, he was sentenced to a mandatory minimum ten-year term of imprisonment under § 924(c)(1)(A)(iii). A similarly situated defendant in *Brown* was likewise convicted of participating in a bank robbery in which a firearm was discharged accidentally. 449 F.3d at 155. Yet, the defendant in *Brown* was subject to only

a seven-year mandatory term of imprisonment under § 924(c)(1)(A)(ii). *Id.*

The sole reason for the difference in the sentences imposed in this case and in *Brown* is the differing interpretations of § 924(c)(1)(A)(iii) adopted by the District of Columbia and Eleventh Circuits. In short, Mr. Dean is facing three more years in prison based on nothing more than the happenstance of where the crime was committed.

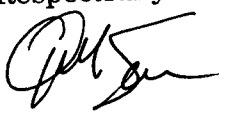
Defendants subject to § 924(c)(1)(A) almost invariably receive the applicable mandatory minimum sentence. *Harris*, 536 U.S. at 578 (Thomas, J., dissenting) ("almost all persons sentenced for violations of 18 U.S.C. § 924(c)(1)(A) are sentenced to 5, 7, or 10 years' imprisonment"). In most instances, therefore, the mandatory minimum functions effectively as the final sentence. *Id.* The conflict among the circuits concerning the interpretation of § 924(c)(1)(A) thus has the direct effect of producing sentencing disparities among similarly situated defendants.

This result is contrary to the purpose of the Sentencing Reform Act and to the notion of a fair and uniform national sentencing system. Review by this Court is necessary to address these fundamental discrepancies and to ensure that the constitutional rights of defendants are preserved.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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July 11, 2008

RULE 33.1(h) CERTIFICATE OF COMPLIANCE

No. 08-

Christopher Michael Dean,

Petitioner,

v.

United States of America,

Respondent.

As required by Supreme Court Rule 33.1(h), I, Quin M. Sorenson, certify that the Petition for a Writ of Certiorari in the foregoing case contains 4,119 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 11, 2008.

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CERTIFICATE OF SERVICE

No. 08-

Christopher Michael Dean,

Petitioner,

v.

United States of America,

Respondent.

I, Quin M. Sorenson, do hereby certify that, on this 11th day of July, 2008, I caused three copies of the Petition for a Writ of Certiorari in the foregoing case to be served by first class mail, postage prepaid on the following party:

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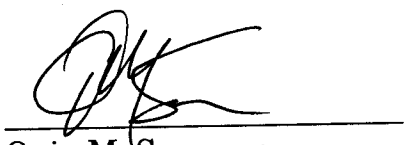

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PETITION APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEBRUARY 20, 2008
THOMAS K. KAHN
CLERK

No. 06-14918

D.C. Docket No. 04-00072-CR-HLM-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER MICHAEL DEAN,
RICARDO CURTIS LOPEZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(February 20, 2008)

Before HULL and PRYOR, Circuit Judges, and MOORE,* District Judge.

*Honorable K. Michael Moore, United States District Judge for the Southern District of Florida, sitting by designation.

MOORE, District Judge:

There are two main issues involved in this appeal. First, this Court reviews whether there was sufficient evidence to convict codefendants Christopher Michael Dean and Ricardo Curtis Lopez ("Appellants") for conspiracy to interfere with interstate commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a). Second, this Court also examines whether 18 U.S.C. § 924(c)(1)(A)(iii), a sentencing enhancement for discharge of a firearm, includes an intent element. Lopez also raises separate issues involving a claimed erroneous jury instruction and the consolidation of his juvenile offenses.

Appellants claim insufficient evidence was presented as to the victim bank's Federal Deposit Insurance Corporation insured status. However, 18 U.S.C. § 1951(a), unlike 18 U.S.C. § 2113, requires no such proof. Consequently, the government needed to prove only that Dean and Lopez committed a robbery that had an effect on interstate commerce. The government met this burden through the testimony of an AmSouth Bank branch manager; consequently, we deny Dean and Lopez's § 1951(a) insufficient evidence argument.

Further, given that § 924(c) is a sentencing enhancement, not an element of an offense, this Court holds that § 924(c)(1)(A)(iii) does not contain a separate intent requirement. The mere discharge of a firearm during any crime of violence or drug trafficking, even accidental, is subject to the sentencing enhancement

requiring a minimum of ten additional years of imprisonment. Therefore, Appellants' discharge of firearm argument is likewise denied.

I.BACKGROUND

Dean and Lopez were brothers-in-law who cohabitated at the Hidden Glen complex, which is located in or around Rome, Georgia. According to the testimony of Jimmy Tanner, the former manager of AmSouth Bank's Rome, Georgia branch, on November 10, 2004, a masked man entered the bank around 10:00 a.m. The individual, later identified as Christopher Michael Dean, through his own confession, carried a pistol and yelled at everyone to get on the ground. Dean approached the teller stations, opened the security gate, and gained access to the teller area. Once inside the teller area, Dean removed bills of currency from the drive-through teller drawer with his left hand, while holding the pistol with his right hand. Next, Dean approached the head teller station. The head teller was on her knees below the station. Dean reached over the crouched teller and with his left hand started taking money from the teller drawer. As he was grabbing the money, Dean discharged the gun in his right hand, leaving a bullet hole in the partition between the two teller work stations. Upon discharge, Dean cursed himself as if the shot was inadvertent. Immediately after the shot, Dean grabbed as much money as he could from the head teller drawer and ran out of the bank.

Manager Tanner observed Dean exit the bank and enter a silver Ford Taurus without licence plates. In all, Dean stole $3,642.00.

Through further trial testimony, it was established that AmSouth Bank is headquartered outside of Georgia in Birmingham, Alabama. After the robbery, the Rome, Georgia branch remained closed for the remainder of the day. Also during the course of Tanner's trial testimony, the government moved for admission of AmSouth's FDIC certification, which revealed that AmSouth operated in numerous states and was FDIC insured. Defense counsel objected and argued that the certificate was testimonial and not self-authenticating. The document was admitted over objection.

After their arrest, both Lopez and Dean, at different times, claimed responsibility for the robbery. The government maintained that the evidence supported finding that Dean and Lopez conspired to rob AmSouth based upon (1) their cohabitation; (2) joint drug debt; (3) Lopez's knowledge of the robbery's factual details; (4) and Lopez's possession of the firearm used in the bank robbery. Ultimately, the jury found both Dean and Lopez guilty of conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a) (count one); and aiding and abetting each other in the discharge of a pistol during an armed robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) and 18 U.S.C. § 2 (count two). The district court sentenced Dean to 100 months as to

count one and 120 months as to count two, consecutive to count one, whereas Lopez was sentenced to 78 months on count one and 120 months as to count two, consecutive to count one.

II.STANDARDS OF REVIEW

This Court reviews the first issue, sufficiency of the evidence for Appellants' Hobbs Act violations, under a de novo standard of review. See United States v. Yates, 438 F.3d 1307, 1311 (11th Cir. 2006). The Court also employs a de novo standard of review in analyzing the district court's legal conclusion that 18 U.S.C. § 924(c)(1)(A)(iii) did not contain a separate mens rea requirement. King v. Moore, 312 F.3d 1365, 1366 (11th Cir. 2002).

III.DISCUSSION

Appellants each contend that the government failed to prove that AmSouth's deposits were insured by the FDIC, which they maintain requires this Court to vacate their convictions. In support of their argument, Appellants claim that exhibit 6, which is the FDIC certification and affidavit of the Assistant Secretary of the FDIC, was testimonial evidence admitted in violation of the Confrontation Clause as set forth in Crawford v. Washington, 541 U.S. 36 (2004).

To obtain a conviction for conspiring to interfere with interstate commerce through robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), the

government need only prove a robbery and effect on commerce. United States v. Rodriguez, 218 F.3d 1243, 1244 (11th Cir. 2000) (holding "[t]wo elements are essential for a Hobbs Act Prosecution: robbery and an effect on commerce"). At trial, Dean admitted to committing the robbery; thus, the only remaining issue is whether the government sufficiently proved that the robbery affected commerce. Appellants argue that the government did not meet its burden in proving an effect on commerce because the FDIC certificate and supporting affidavit were improperly admitted.

Before turning to the issue of its admissibility, we address whether the FDIC certificate was even necessary to prove a Hobbs Act violation. As discussed supra, a Hobbs Act violation requires proof of a robbery and an effect on commerce. Id. To prove an effect on commerce, however, the government is only required to establish "a minimal effect on interstate commerce." Id. This Court has held that a "mere depletion of assets" is sufficient proof of an effect on interstate commerce. Id.

AmSouth Branch Manager Tanner testified that AmSouth's headquarters were located outside the state of Georgia in Birmingham, Alabama. Tanner also stated the Rome, Georgia branch remained closed following Dean's 10:00 a.m. robbery of $3,642.00. The robbery forced the Rome branch to close and prevented any additional patrons from transacting business for the remainder of the day.

This case is similar to United States v. Guerra, where an individual stole $300 dollars from a service station, which was subsequently forced to close for two hours. There, this Court found an effect on interstate commerce and labeled the case a "classic 'depletion of assets' scenario." 164 F.3d 1358, 1361 (11th Cir. 1999). In Rodriguez, this Court found an effect on commerce where the perpetrator had robbed a motel because some of the motel guests were from out of state. 218 F. 3d at 1244. Given our Hobbs Act sufficiency of evidence jurisprudence, the government's evidence, which included the stealing of $3,642.00 from a bank with interstate branches and that is open to out of state customers, was sufficient to establish an effect on commerce. Further, the stealing of the money depleted AmSouth's cash reserve and thereby affected commerce. This evidence was sufficient to sustain Appellants' convictions for violation of 18 U.S.C. § 1951(a).

Appellants argue that the FDIC certificate and accompanying affidavit were improperly admitted in violation of the Confrontation Clause. Proof of a Hobbs Act violation does not require proof of FDIC insurance. FDIC insured status is an element of armed bank robbery under 18 U.S.C. § 2113, but not of 18 U.S.C. § 1951(a). See Poole v. United States, 832 F.2d 561, 564-65 (11th Cir. 1987). Appellants claim that United States v. Sandles requires reversal based upon the government's alleged erroneous use of the FDIC certificate and accompanying

affidavit. 469 F.3d 508 (6th Cir. 2006). The situation in Sandles is inapposite because there the defendant was charged with armed bank robbery, which, as stated above, requires proof of FDIC insurance. Therefore, it is not necessary for this Court to address Appellants' Confrontation Clause claim surrounding admission of the FDIC certificate and affidavit. Even if the FDIC certificate and affidavit were admitted in error, the error was harmless, as no proof of FDIC insured status was needed and the government provided separate evidence establishing the Hobbs Act violation. See United States v. Ndiaye, 434 F.3d 1270, 1286 (11th Cir. 2006) (stating "denial of a defendant's Confrontation Clause right to cross-examination is examined for harmless error").

Furthermore, Appellant Lopez argues that proof of FDIC insured status was necessary for the government to meet its burden with respect to the Hobbs Act's effect on commerce prong. A bank's FDIC status could be relevant to the effect on commerce inquiry, see United States v. Spinello, 265 F.3d 150, 156-57 (3d Cir. 2001) (bank robbery case), but it is not required here. As discussed above, a mere depletion of assets is sufficient to prove an effect on commerce. Here, the depletion was proven; consequently, proof of FDIC insured status was not necessary because the trial testimony established depletion of assets, bank closure, and out of state branches, which proved the requisite effect on commerce.

Appellants next claim that 18 U.S.C. § 924(c)(1)(A)(iii) requires that the

sentencing enhancement for discharge of a firearm applies only to intentional firearm discharges. Testimony at trial supports Dean's assertion that the discharge of the firearm inside the bank was a surprise even to Dean and, thus, was likely accidental. Our Court has not squarely addressed in any published opinion whether a firearm discharge must be intended before the sentencing enhancement is applicable. We now hold that nothing in the language of the statute requires separate proof of intent before applying the sentencing enhancement.

Section 924(c)(1)(A)(iii) is a sentence enhancement and merely reflects factors that will enhance sentencing, not elements of an offense. Harris v. United States, 536 U.S. 545, 556 (2002). Section 924(c)(1)(A)(iii) states in pertinent part, "any person who . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime[,]– (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." The plain language of § 924(c)(1)(A)(iii) requires only a person to "use[] or carr[y] a firearm" to be subject to the sentence enhancement; there is no reference to any mens rea requirement. Looking to our case law, we analyzed a similar mens rea sentencing enhancement claim in United States v. Brantley, 68 F.3d 1283, 1290 (11th Cir. 1995).

Brantley involved possession of a semi-automatic firearm that, unbeknownst to its carrier, had been illegally altered into a fully automatic

weapon. Id. at 1289. This Court held that the carrier had to have known of the firearm's altered status to be found guilty of carrying an illegal firearm under 26 U.S.C. § 5861(d). Id. at 1290. We, however, found that the defendant's conviction under § 924(c) did not require any separate intent. Id. This Court differentiated the intent requirements of § 5861 and § 924(c) because it was concerned that removing the mens rea requirement from § 5861 could punish an innocent individual who did not realize the firearm was prohibited. We did not have the same fear of punishing an unknowing individual under § 924(c) because imposition of that sentence enhancement first demands the government prove the defendant engaged in an underlying violent or drug trafficking crime, which will have its own mens rea requirement. Id. at 1289-90 (stating "unlike the law abiding individual who unknowingly comes into possession of an illegal firearm, the §924(c) defendant whose sentence is enhanced based upon the type of weapon he carried has demonstrated a 'vicious will' by committing the principal offense").

In addition to our Brantley decision, this Court is also persuaded by the Tenth Circuit's reasoning in United States v. Nava-Sotelo, 354 F.3d 1202 (10th Cir. 2003). In that case, the brother of an inmate attempted to rescue the inmate on his way back from receiving dental treatment outside of the prison. Id. at 1203. In a struggle between the defendant and one of the prison transporting officers, the prison officer grabbed the defendant's gun and as the two were fighting over it, the

defendant accidentally discharged the weapon into the ground. Id. The Tenth Circuit supported its finding that § 924(c)(1)(A)(iii) did not have an additional mens rea requirement by finding the plain language of the statute did not include any requirement of intent. Id. at 1207. Further, the Tenth Circuit stated § 924(c)(1)(A)(iii) lists sentencing enhancements, not elements of an offense, and when the underlying offense requires a vicious will the danger of imposing punishment upon an innocent party is absent. Id. Given this reasoning, the Nava-Sotelo Court succinctly concluded "[a]ccountability is strict; the mere fact that the weapon discharged is controlling." Id. at 1206.

Appellants urge this Court to adopt the D.C. Circuit's reasoning in United States v. Brown, 449 F.3d 154 (D.C. Cir. 2006), which found § 924(c)(1)(A)(iii) did require intent to discharge in order for a defendant to receive the ten year sentencing enhancement. The D.C. Circuit found that the three subsections of § 924(c) worked in concert to impose increasingly heavier penalties as the defendant's conduct became more egregious. Id. at 156. The D.C. Circuit, therefore, reasoned that § 924(c)(1)(A)(iii) [discharge] must contain an intent requirement because it contains a harsher penalty than § 924(c)(1)(A)(ii) [brandishing]. Id. This reasoning is not persuasive because discharging a firearm, regardless of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it. The penalty is an enhancement for conduct that

occurred, not intent. The D.C. Circuit also found a mens rea requirement because of the general presumption against strict liability in criminal statutes. This reason is equally unpersuasive as there is a distinction between elements of an offense and sentencing enhancements for conduct during perpetration of a violent criminal act.

Here, despite the evidence that Dean accidentally discharged his pistol during the AmSouth robbery, the district court correctly found that he remained subject to the § 924(c)(1)(A)(iii) sentencing enhancement. Consistent with our reasoning in Brantley, Appellants had the vicious will to conspire to commit the underlying crime of robbery in violation of the Hobbs Act, which ensures that they are not innocent individuals unfairly held to a strict liability offense. Finally, adopting the Tenth Circuit's reasoning, Dean's mere discharge of the pistol is controlling. Therefore, the district court did not err in holding that § 924(c)(1)(A)(iii) lacks a separate mens rea requirement.

On appeal, Lopez levied two additional arguments not raised by his codefendant. First, Lopez claims that the district court's jury instruction created an unconstitutional mandatory presumption. Second, he argues that the district court erroneously found that his prior juvenile armed robbery convictions were not functionally consolidated.

Lopez raises his objection to the district court's jury instruction for the first

time on appeal; consequently, this Court reviews the instruction for plain error. United States v. Vasquez, 53 F.3d 1216, 1221 (11th Cir. 1995). Further, we must review the challenged jury instruction in its entirety. United States v. Myers, 972 F.2d 1566, 1573 (11th Cir. 1992).

Lopez finds error with the district court's following instruction: "You may find the requisite effect upon interstate commerce has been proven if you find beyond a reasonable doubt that the bank described in the indictment was engaged in doing business both within and without the state of Georgia." Lopez contends that this jury instruction lowers the standard of proof by creating the mandatory presumption that the robbery of the Rome, Georgia branch affected interstate commerce.

A jury instruction which creates a burden shifting presumption or a conclusive presumption deprives a defendant of his right to the due process of the law. See Sandstrom v. Montana, 442 U.S. 510, 524 (1979). An instruction must not relieve the government of its burden of proving each and every element of an offense. Id. "The threshold inquiry in evaluating whether a jury instruction impermissibly shifts the burden of proof is whether the instruction is a permissive inference or a mandatory presumption." Baxter v. Thomas, 45 F.3d 1501, 1509 (11th Cir. 1995). Further, "[a] permissive presumption merely allows an inference to be drawn and is constitutional so long as the inference would not be irrational."

Id. This Court, in Myers, held a permissive inference permits the jury to make an inference from the evidence proven by the prosecution, but does not mandate any such finding. United States v. Myers, 972 F.2d 1566, 1573 (11th Cir. 1992) (stating "[t]he district court explicitly informed the jury that it 'may' infer that a person ordinarily intends all the natural and probable consequences of an act . . . . This circuit has approved similar jury instructions that allow the jury to infer intent from the natural and probable consequences of any act.").

In the instant case, the district court similarly instructed the jury that it "may" find an effect upon interstate commerce. Id. The court did not create a mandatory presumption through the use of unqualified language such as must or shall. The court also did not relieve the prosecution of its burden because it still required the jury to "find beyond a reasonable doubt that the bank described in the indictment was engaged in doing business both within and without the state of Georgia." The government put into evidence the testimony of Branch Manager Tanner that revealed AmSouth's out of state headquarters and its half-day closure, which provided the jury with the opportunity to reasonably infer an effect upon interstate commerce. Further, the instruction resembles the one we previously upheld in Myers. Accordingly, this Court finds that the challenged instruction created a permissive inference, did not relieve the prosecution of proving each and every element beyond a reasonable doubt, and, thus, did not constitute plain error.

Defendant Lopez pled guilty to four counts of armed robbery in the Georgia juvenile court system. Lopez committed five armed robberies over a span of four days in late July, 1997. After the final robbery, Lopez was arrested and charged separately for the four crimes.[1] Each charge of armed robbery was assigned a separate case number, but one lawyer represented Lopez in each case and a single plea agreement was reached covering all four offenses. In addition, the juvenile court imposed a single sentence for all four robberies at one proceeding. Lopez, based upon these facts, argues his underlying armed robbery adjudications were functionally consolidated and the district court should have treated them as related cases under U.S.S.G. § 4A1.2, Application Note 3(C).

In calculating Lopez's criminal history score, the probation officer assessed two criminal history points for each of the four juvenile armed robberies. These eight points, along with a single point for an adult battery conviction, gave Lopez a total criminal history score of nine, which establishes a criminal history category of IV. Based upon his criminal history category and total offense level, Lopez's guideline range, as to count one, was 77-96 months. On count one, the district court sentenced Lopez to 78 months imprisonment. At sentencing, the district court judge also stated that he still would have imposed a term of 78 months

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[1]Two of the robberies were charged in a single petition, which made the two charges proper for consolidation as one armed robbery.

imprisonment as a reasonable sentence, regardless of any guidelines miscalculation, because of the facts of the case and defendant's misleading and shifting testimony offered in an effort to hide the truth. Lopez contends that he should have received only two points for the four armed robberies because he was sentenced only once. This one robbery charge, in addition to the adult battery charge, would have given him a criminal history score of 3, a criminal history category of II, and a guideline range of 57-71 months.

This Court need not address Lopez's specific arguments surrounding the alleged failure to consolidate his juvenile offenses because, as we held in United States v. Keene, where the district court imposes a reasonable sentence and states that it would impose the same sentence irrespective of any sentencing calculation errors, this Court will uphold the sentence rather than "send the case back to the district court since it has already told us that it would impose exactly the same sentence, a sentence we would be compelled to affirm." 470 F.3d 1347, 1350 (11th Cir. 2006).

Here, like Keene, the district court stated it would have imposed 78 months as a reasonable sentence based on the 18 U.S.C. § 3553(a) imposition of a sentence factors. According to our decision in Keene, the relevant analysis is as follows: "the question then is whether the [78-month] sentence the court imposed is reasonable, assuming exactly the same conduct and other factors in the case, but

using an advisory range of [57-71] months."[2] 470 F.3d at 1350. In this case, Lopez's 78-month sentence was reasonable under the § 3553(a) factors because his criminal record and current offense show a disregard for the law, obstruction of justice and falsity, danger to the public, and a need to deter future transgressions. Therefore, the district court's imposition of Lopez's 78-month sentence was reasonable and stands despite the disputed guidelines issue.

IV.CONCLUSION

The district court judgment is **AFFIRMED**.

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[2] This analysis assumes that the district court should have awarded Lopez a criminal history score of 3, which would have generated a criminal history category of II, leaving him with a guideline range of 57-71 months imprisonment.

United States Court of Appeals

For the Eleventh Circuit

No. 06-14918

District Court Docket No.
04-00072-CR-HLM-4

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Feb 20, 2008
THOMAS K. KAHN
CLERK

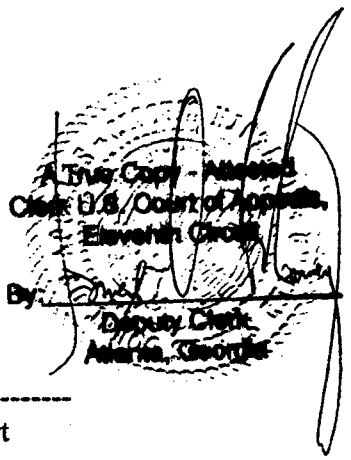
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER MICHAEL DEAN,
RICARDO CURTIS LOPEZ,

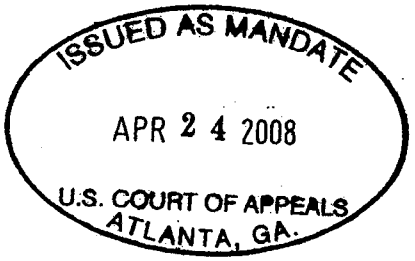
Defendants-Appellants.



Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.



Entered: February 20, 2008
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA

-vs- **Case No. 4:04-CR-72-02-HLM**

CHRISTOPHER MICHAEL DEAN **Defendant's Attorney: SCOTT J. FORSTER, ESQ.**

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty by a jury on **Count(s) One and Two (2) of the Indictment**.

Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense:

Title & Section	Nature of Offense	Count No.
18 U.S.C. 1951(a)	**Armed Bank Robbery**	**1**
18 U.S.C. 924(c)(1)(A)(iii) and 2	**Discharge of a Firearm During an Armed Robbery**	**2**

The defendant is sentenced as provided in pages 2 through of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay the special assessment of **$ 200.00** which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

The Court finds that the defendant does not have the ability to pay a fine and a cost of incarceration. The Court will waive the fine and the cost of incarceration in this case.

Defendant's Soc. Sec. No. 8829 Date of Imposition of Sentence:
Defendant's Date of Birth: 1986 August 31, 2006
Defendant's Mailing Address:
Kingston, Georgia 30145

Signed this the 5 2 day of September, 2006.

HAROLD L. MURPHY
UNITED STATES DISTRICT JUDGE

4:04-CR-72-02-HLM : CHRISTOPHER MICHAEL DEAN

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **One Hundred (100) months** on Count One (1), and a term of **One Hundred Twenty (120) months** on Count Two, to be served consecutive to the term imposed on Count One (1) to produce a total term of **Two Hundred Twenty and 00/100 (220) months**. This sentence shall run consecutive to the sentence imposed in docket number 05-CR-28516-JFL002 in Floyd County Superior Court.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

4:04-CR-72-02-HLM : CHRISTOPHER MICHAEL DEAN

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Five (5) years.** This term consists of terms of three (3) years on Count One (1) and a term of Five (5) years on Count Two (2), with both such terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard and special conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall make restitution to the victim listed in the presentance report, jointly and severally with the co-defendants in this case to the following entity in the following amount:

   ASB $2,605.00.

3. The defendant shall notify the United States Attorney for this district within thirty (30) days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

4. The defendant shall submit to one (1) drug urinalysis within fifteen (15) days after being placed on supervision and at least two (2) periodic tests thereafter.

4:04-CR-72-02-HLM : CHRISTOPHER MICHAEL DEAN

5. The defendant shall participate in a drug/alcohol treatment program under the guidance and supervision of the United States Probation Officer and if able, contribute to the cost of services for such treatment.

6. The defendant shall make a full and a complete disclosure of his finances and submit to an audit of financial documents, at the request of the United States Probation Officer.

7. The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release at a rate to be established by the United States Probation Officer in accordance with the Court Approved Payment Schedule, but in no event less than Two Hundred and 00/100 Dollars ($200.00) monthly.

8. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the United States Probation Officer and unless the defendant is in compliance with the installment payment schedule.

9. The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device.

10. The defendant shall submit to a search of his person, property (real, personal, or rental), residence, office and vehicle, at a reasonable time and in reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search my be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to search pursuant to this condition.

11. Pursuant to 42 U.S.C. §14135a(d)(1) and 10 U.S.C. §1565(d), which requires mandatory DNA testing for federal offenders convicted of felony offenses, the defendant shall cooperate in the collection of DNA as directed by the United States Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;

4:04-CR-72-02-HLM : CHRISTOPHER MICHAEL DEAN

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

4:04-CR-72-01-HLM : CHRISTOPHER MICHAEL DEAN

RESTITUTION

The defendant shall make restitution to the victim listed in the presentance report, jointly and severally with the co-defendants in this case to the following entity in the following amount:

ASB $2,605.00.

The defendant shall notify the United States Attorney for this district within thirty (30) days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release at a rate to be established by the United States Probation Officer in accordance with the Court Approved Payment Schedule, but in no event less than Two Hundred and 00/100 Dollars ($200.00) monthly.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-14918-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER MICHAEL DEAN,
RICARDO CURTIS LOPEZ,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

---

BEFORE: HULL and PRYOR, Circuit Judges, and MOORE,* District Judge.

PER CURIAM:

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable K. Michael Moore, United States District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA)	DOCKET NO. 4:04-CR-0072
)	
)	ATLANTA, GEORGIA
)	AUGUST 31, 2006
V.)	
)	
RICARDO CURTIS LOPEZ,)	
CHRISTOPHER MICHAEL DEAN,)	
)	
DEFENDANTS.)	

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE HAROLD L. MURPHY,
UNITED STATES DISTRICT JUDGE

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT:	WILLIAM G. TRAYNOR ASSISTANT U. S. ATTORNEY
FOR THE DEFENDANT LOPEZ:	GILES JONES
FOR THE DEFENDANT DEAN:	SCOTT FORSTER
COURT REPORTER:	ANDY ASHLEY 1949 U. S. COURTHOUSE ATLANTA, GEORGIA 30303-3361 (404) 215-1478

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

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P R O C E E D I N G S

(ROME, FLOYD COUNTY, GEORGIA; AUGUST 31, 2006 IN OPEN COURT.)

THE CLERK: I'LL SOUND THE CASES OF THE UNITED STATES OF AMERICA VERSUS RICARDO CURTIS LOPEZ AND CHRISTOPHER MICHAEL DEAN.

MR. TRAYNOR: WILL TRAYNOR FOR THE UNITED STATES, YOUR HONOR.

MR. FORSTER: SCOTT FORSTER FOR CHRISTOPHER DEAN.

MR. JONES: CHARLES JONES ATTORNEY FOR RICARDO CURTIS LOPEZ.

THE COURT: IS IT SATISFACTORY WITH COUNSEL AND THE PARTIES THAT WE HANDLE THESE CASES TOGETHER TO THE EXTENT APPROPRIATE?

MR. FORSTER: THAT'S FINE, YOUR HONOR.

MR. JONES: NO OBJECTION FOR MR. LOPEZ.

THE COURT: ALL RIGHT. IS THAT SATISFACTORY WITH YOU, MR. TRAYNOR?

MR. TRAYNOR: YES, YOUR HONOR.

THE COURT: MR. LOPEZ, HAVE YOU READ THIS PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER AND BEEN OVER WITH IT YOUR LAWYER?

DEFENDANT LOPEZ: YES, SIR.

THE COURT: YOU UNDERSTAND IT FAIRLY WELL?

DEFENDANT LOPEZ: YES, SIR.

THE COURT: MR. DEAN, HAVE YOU READ THE PRESENTENCE

REPORT IN YOUR CASE AND BEEN OVER IT WITH YOUR LAWYER?

DEFENDANT DEAN: YES, SIR.

THE COURT: DO YOU UNDERSTAND IT FAIRLY WELL?

DEFENDANT DEAN: YES, SIR.

THE COURT: THE COURT HAS REVIEWED THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER IN THE CASE OF THE UNITED STATES AGAINST MR. LOPEZ, AND THE COURT HAS ALSO REVIEWED ATTACHMENTS TO THAT PRESENTENCE REPORT WHICH CONSIST OF COPIES OF VARIOUS APPELLATE COURT CASES, THAT IS, DECISIONS, AND ALSO ATTACHED TO THE PRESENTENCE REPORT IS A COPY OF THE INDICTMENT IN THIS CASE, AND ALSO IS ATTACHED A COPY OF THE OBJECTIONS AND COMMENTS AS TO THE PRESENTENCE REPORT FILED ON BEHALF OF MR. LOPEZ BY MR. JONES.

THE COURT HAS ALSO REVIEWED THE ADDENDUM TO THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER. THE COURT HAS FURTHER REVIEWED THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER, AND THE COURT MAKES ALL OF THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT AS TO MR. LOPEZ THE FINDINGS OF FACT AND CONCLUSIONS OF THE COURT IN ALL RESPECTS EXCEPT AS TO UNRESOLVED GUIDELINE ISSUES.

THE COURT PUTS INTO EVIDENCE FOR THE PURPOSES OF THE RECORD IN THIS CASE ALL THESE DOCUMENTS THAT I HAVE THUS FAR REFERRED TO. PLUS, THE COURT HAS RECEIVED AND REVIEWED A

TRANSCRIPT OF A PORTION OF THE TRIAL TESTIMONY IN THIS CASE CONSISTING OF THE TESTIMONY OF BOTH OF THE DEFENDANTS AT THE TRIAL AND THE TESTIMONY OF ONE OF THE INVESTIGATIVE OFFICERS WHO WAS A MAJOR INVESTIGATOR OF THIS INCIDENT, AND THAT IS PUT INTO THE RECORD.

THE COURT HAS ALSO RECEIVED FROM THE GOVERNMENT ITS RESPONSE TO THE OBJECTIONS FILED TO THE PRESENTENCE REPORT BY MR. LOPEZ AND BY MR. DEAN AND THAT'S PLACED INTO THE RECORD.

IN MR. DEAN'S CASE, THE COURT, OF COURSE, HAS REVIEWED THESE TRIAL TRANSCRIPTS I'VE JUST REFERRED TO THAT WERE TYPED UP BY THE COURT REPORTER, THAT IS, THE TESTIMONY AT TRIAL OF MR. LOPEZ AND MR. DEAN AND THE INVESTIGATIVE OFFICER THAT I JUST IDENTIFIED A MOMENT AGO.

THE COURT HAS REVIEWED THE INDICTMENT ATTACHED TO THE PRESENTENCE REPORT, SEVERAL CASES, APPELLATE COURT CASES ATTACHED TO THE PRESENTENCE REPORT AS TO CERTAIN ISSUES MADE AS OBJECTIONS TO THE PRESENTENCE REPORT.

THE COURT HAS ALSO REVIEWED AND THERE IS ATTACHED TO THE PRESENTENCE REPORT THE OBJECTIONS OF THE DEFENDANT IN SOMEWHAT DETAIL TO THE PRESENTENCE REPORT. ATTACHED ALSO IS THE ADDENDUM TO THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER AND THE PRESENTENCE REPORTED ITSELF.

THE COURT HAS REVIEWED ALL OF THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT PREPARED BY

THE UNITED STATES PROBATION OFFICER IN MR. DEAN'S CASE, AND THE COURT ADOPTS ALL THOSE FINDINGS OF FACT AND CONCLUSIONS AS CONTAINED IN THE PRESENTENCE REPORT AND MAKES THOSE FINDINGS OF FACT AND CONCLUSIONS THOSE OF THE COURT IN ALL RESPECTS EXCEPT AS TO UNRESOLVED GUIDELINE ISSUES.

AGAIN, THE COURT NOTES FOR THE PURPOSES OF THE RECORD THAT IT HAS RECEIVED AND REVIEWED THE MEMORANDUM IN RESPONSE TO DEFENDANT'S VARIOUS OBJECTIONS TO THE PRESENTENCE REPORT AND THAT IS MADE A PART OF THE RECORD IN THIS CASE.

THE COURT HAS REVIEWED IT AND HAS REVIEWED AN ELEVENTH CIRCUIT UNPUBLISHED APPELLATE COURT DECISION HAVING TO DO WITH ONE OF THE ISSUES TO WHICH EACH DEFENDANT HAS OBJECTED IN REFERENCE TO THE PRESENTENCE REPORT.

SO THE COURT PUTS ALL OF THESE DOCUMENTS INTO THE RECORD FOR THE PURPOSES OF THIS HEARING AND ANY LATER REVIEW OF THE COURT'S ACTIONS IN THIS CASE.

IN MR. LOPEZ' CASE AS IN MR. DEAN'S CASE, DEFENSE COUNSEL HAS FELT AT EASE TO MAKE ALL OBJECTIONS AND CRITICISMS OF THE PRESENTENCE REPORT THAT HE THOUGHT WOULD BE HELP HELPFUL TO HIS CLIENT IN ANY WAY.

MR. LOPEZ OBJECTS TO THE ENHANCEMENT FOR OBSTRUCTION OF JUSTICE AND OBJECTS TO THE CONCLUSION OF THE UNITED STATES PROBATION OFFICER AS TO THE MINIMUM SENTENCE REQUIRED, AND OBJECTS TO THE CRIMINAL HISTORY COMPUTATION AS BEING EXCESSIVE FOR CHARGING POINTS FOR RELATED CASES THAT SHOULD NOT HAVE BEEN

CHARGED TO THIS DEFENDANT. MR. FORSTER CARRIES ON THE VIEW OF MR. JONES AND SUPPLIES HIS LIST OF OBJECTIONS IN HIS CLIENT'S CASE.

IN MR. DEAN'S CASE, MR. FORSTER POINTS OUT THAT THE PROBATION OFFICER HAS ERRED IN MANY RESPECTS IN IMPOSING A -- WELL IN NOT GIVING ANY KIND OF CREDIT FOR A MITIGATING ROLE. HE COMPLAINS THAT THE PROBATION OFFICER HAS FOUND AND SUGGESTED THAT HIS CLIENT OBSTRUCTED JUSTICE.

HE THINKS THAT HIS CLIENT IS IMPROPERLY BEING DENIED ACCEPTANCE OF RESPONSIBILITY. HE DISAGREES WITH THE MINIMUM SENTENCE SUGGESTION MADE BY THE PROBATION OFFICER AS TO WHAT HE BELIEVES TO BE A CORRECT ENHANCEMENT.

HE ALSO DOES NOT AGREE WITH THE CRIMINAL HISTORY CATEGORY COMPUTATIONS. HE SAYS THEY ARE EXCESSIVE, AND HE ALSO SAYS THAT THEY OVERREPRESENT THE CRIMINAL HISTORY OF THE DEFENDANT, AND HE HAS COMMENTS AND OBJECTIONS AS TO THE STRUCTURE OF THE SENTENCE AS TO HIS PARTICULAR CLIENT.

MR. JONES, YOU WANT TO SPEAK TO YOUR CLIENT'S POSITIONS FIRST?

MR. JONES: YES, SIR. MAY IT PLEASE THE COURT, MR. TRAYNOR AND MR. FORSTER AND MY CLIENT RICARDO CURTIS LOPEZ, MR. LOPEZ DOES OBJECT TO THE THREE AFOREMENTIONED UNRESOLVED GUIDELINE ISSUES THAT THIS COURT HAS PREVIOUSLY POINTED OUT.

WITH REGARDS TO THE OBSTRUCTION OF JUSTICE, I'LL RELATE BACK TO MY MAIN ARGUMENT BACK IN THE OBJECTIONS TO THE

PRESENTENCE REPORT. INASMUCH AS MR. LOPEZ DID MAKE A COUPLE OF RATHER INCRIMINATING STATEMENTS AT THE TIME OF HIS ARREST, HOWEVER, HE DID PLEAD NOT GUILTY AT THE TIME OF ARRAIGNMENT, ADVISED ME OF THE ACTIONS OR THE POTENTIAL EXCULPATING EVENTS OF MR. DEAN AND WENT TO TRIAL AND TESTIFIED RIGHT THERE ON THAT STAND AS TO WHAT HE DID AND WHAT HE DID NOT DO.

IN REGARDS TO ANY ASPECTS ASSOCIATED WITH THE OBSTRUCTION OF JUSTICE AND THE COMMENTARY NOTES THAT WERE ADDRESSED IN THE APPLICATION NOTES FROM THE UNITED STATES SENTENCING GUIDELINES SECTION 3C1.1, MR. LOPEZ EXERCISED HIS CONSTITUTIONAL RIGHTS TO PLEAD NOT GUILTY, TO TESTIFY UNDER OATH THAT HE WAS NOT THE ONE INVOLVED, WAS NOT THE PERSON THAT DID WHAT HE DID.

WHETHER OR NOT HE MADE STATEMENTS AT ONE POINT TO IN PARTICULAR LAW ENFORCEMENT OFFICER CHUCK REID OF THE FBI, IT CERTAINLY DID NOT PRECLUDE SPECIAL AGENT REID FROM FURTHERING AND FOLLOWING UP ON THE INVESTIGATION AS TO WHAT MIGHT HAVE BEEN MR. DEAN'S INVOLVEMENT IN THIS ASPECT.

SIMPLY PUT HE DID NOT WILLFULLY OBSTRUCT OR IMPEDE. HE DID MAKE STATEMENTS AT THE BEGINNING OF THE INVESTIGATION. HE DID EXERCISE HIS CONSTITUTIONAL RIGHT OF PLEADING NOT GUILTY AND GOING TO TRIAL, AND HE DID GET UP ON THE STAND, AND HE WAS CONVICTED, AND OBVIOUSLY THE 12 JURORS THAT SAT IN JUDGMENT DID NOT BELIEVE HIS STORY, AND THAT'S THE ULTIMATE BASIS FOR HIS BEING FOUND GUILTY.

BUT I WOULD ASK AND WOULD SUPPLEMENT THAT HE DID NOT PROVIDE ANY MATERIALLY FALSE INFORMATION TO THE JURY. HE DIDN'T LIE. HE STATED WHAT HE STATED. NOW THEY JUST DID NOT BELIEVE HIM, AND I WOULD HOPE AND EXPECT THERE IS A FANTASTIC DIFFERENCE BETWEEN THAT IS WHAT IS NOT BELIEVED AND WHAT IS BELIEVED. SO IT GOES TO, I WOULD SAY, AN ISSUE OF CREDIBILITY INSTEAD OF AN ISSUE OF LYING OR PROVIDING MATERIAL FALSE INFORMATION TO YOUR HONOR AND TO THE COURT INCLUDING THE JURORS THAT SAT IN JUDGMENT.

THE SECOND ASPECT THAT I WOULD ARGUE IS THAT THE PROPER SENTENCE UNDER THE FIREARM PROVISION OF SECTION 924(C) IS THE 7-YEAR MINIMUM FOR HE DID BRANDISH A FIREARM. I WOULD POINT TO THE CASE OF THE UNITED STATES DISTRICT OF COLUMBIA WHICH IS THE UNITED STATES OF AMERICA VERSUS KEVIN PATRICK LUKE BROWN. I BELIEVE YOU'VE GOT A COPY AFTER THAT CASE, AND CERTAINLY WON'T GO BACK INTO THE FACTS, BUT THAT CASE IS THE ULTIMATE CASE ON POINT.

THOUGH IT'S NOT IN THE ELEVENTH CIRCUIT, IT IS A SITUATION WHERE IT WAS AN ACCIDENTAL DISCHARGE, AND THE D.C. DISTRICT COURT FOUND THAT THE PROPER DETERMINATION WAS A 7-YEAR MINIMUM SENTENCE.

I HAVE REVIEWED WHAT MR. TRAYNOR HAS PRODUCED IN HIS OBJECTIONS, MAINLY THE BRANTLEY CASE AND THE UNPUBLISHED CASE OF -- I FORGET WHAT CASE THAT IS. I'M NOT SURE HOW AN UNPUBLISHED CASE COMES INTO PLAY IN THIS REGARDS, BUT I

UNDERSTAND THAT THE ELEVENTH CIRCUIT UNDER BRANTLEY LOOKS AT THIS AS BEING A STRICT CONSTRUCTION. YOU DON'T NEED TO HAVE GENERAL KNOWLEDGE.

I WOULD POINT OUT THAT IN THE BRANTLEY CASE THAT WAS AN ISSUE OF I DIDN'T KNOW THAT THE GUN I WAS HANDLING AT THE TIME HAD BEEN MANIPULATED TO MAKE IT A FULLY AUTOMATIC ASSAULT RIFLE. IN THIS SITUATION IT'S MORE OF AN ASPECT OF THE ACCIDENTAL DISCHARGE OF A FIREARM DURING THE COMMISSION OF THIS BANK ROBBERY.

AGAIN, EVEN THE TESTIMONY FROM, I BELIEVE IT WAS NORA HALL AND HER STATEMENT IN THE PRESENTENCE REPORT, IN THE FINAL PRESENTENCE REPORT THAT SHE DID NOT BELIEVE THAT IT HAD GONE OFF WAS, I BELIEVE, THE MOST TELLING TESTIMONY OF THE WHOLE SITUATION.

CERTAINLY THE ELEVENTH CIRCUIT HAS THE BRANTLEY DECISION, AND I DON'T KNOW IF THE CLARET CASE, WHICH IS NONPUBLISHED, I DON'T -- AGAIN I'M NOT CERTAIN AS TO HOW A NONPUBLISHED CASE CREATES STARE DECISIS, BUT I WOULD HOPE THAT IT DOES NOT, AND IF IT DOES NOT, THE PROPER CASE ON POINT IS THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA, AND I WOULD ASK THAT THE 7-YEAR MINIMUM OR THE 7-YEAR ENHANCEMENT WOULD BE PROPER VERSUS THE 10-YEAR ENHANCEMENT.

FINALLY, SIR, THE ARGUMENT THAT IS ASSOCIATED WITH HIS CRIMINAL HISTORY, THE EVENTS THAT OCCURRED BACK IN, I WANT TO SAY, JULY OF 1997 IN NEWTON COUNTY WHERE THERE WAS FOUR OR

FIVE DAY SPREE BY MY CLIENT, MAYBE IT WAS A THREE TO FOUR DAY SPREE WHERE HE USED THE SAME WEAPON, WHICH I THINK WAS A BB GUN, HE WENT TO I THINK AN INDIAN-OWNED CONVENIENCE STORE AND ON SUCCESSIVE DAYS ROBBED THROUGH AN ACT OF VIOLENCE THESE THREE I WANT TO SAY, NO MORE THAN FOUR CONVENIENCE STORES.

THE PROBATION OFFICER JEFFERS KINDLY POINTS OUT THE UNITED STATES VERSUS SMITH, WHICH IS 385 F.3D, 1342, AS THE CASE THAT STATES THAT WITHOUT A FORMAL CONSOLIDATION ORDER THAT THE EVENTS SHOULD BE CONSIDERED SEPARATELY.

AGAIN, THERE ARE FACTS IN THIS SMITH CASE THAT ARE COMPLETELY DIFFERENT FROM THIS CASE. THE SMITH CASE DEALS WITH OVER A THREE-DAY PERIOD OF TIME WHERE THERE WAS MORE RANDOMNESS IN DEFENDANT SMITH'S ACTIONS DURING HIS COURSE OF CRIMINAL CONDUCT AND ENTERPRISE.

FORTUNATELY FOR MR. LOPEZ THE EVENTS THAT OCCURRED WERE BASICALLY OF THE SAME OCCASION, OF THE SAME EVENT, OF THE SAME TRANSACTION, OF THE SAME VICTIMS AND OF THE SAME VICTIMS'S LOCATIONS.

I WOULD ALSO ADD THAT THROUGH THE COURT, THE JUVENILE COURT HE WAS SENTENCED TO AN -- I THINK THE PRESENTENCE REPORT SHOWS A FOUR-YEAR COMMITMENT. MY CLIENT IS ADAMANT THAT IT WAS A FIVE-YEAR COMMITMENT, AND TO FURTHER SHOW THAT THIS IS ONE SIMILAR TRANSACTION, HE WAS SENTENCED TO ONE OFFENSE UNDER ONE SENTENCING AND BASED UPON O.C.G.A. SECTION 15-11-63, WHICH IS THE DESIGNATED FELONY ACTS AND RESTRICTED CUSTODIES, THAT THE

LONGEST PERIOD OF TIME THAT A JUVENILE AS IN MR. LOPEZ' CASE AT THAT TIME COULD BE SENTENCED FOR NO MORE THAN 60 MONTHS.

SO THE THREE OR FOUR EVENTS THAT OCCURRED BACK IN JULY OF 1997 WAS NOT TAKEN UP BY THE SUPERIOR COURT IN NEWTON COUNTY, WAS A JUVENILE COURT MATTER, WHETHER IT WAS OUT OF ADMINISTRATIVE CONVENIENCE THAT THEY SENTENCED MR. LOPEZ, THEY DID SENTENCE HIM TO ONE SENTENCE COMBINING ALL FOUR OF THE THREE OR FOUR -- I THINK IT'S FOUR CRIMINAL ACTIONS, BUT I WOULD ALSO ADD, AS HOPEFULLY A LITTLE EXTRA BITE TO THE ARGUMENT, THAT THE STATUTE, AGAIN THAT IS O.C.G.A. SECTION 15-11-63, ONLY ALLOWS FOR A FIVE-YEAR COMMITMENT IN THE DEPARTMENT OF JUVENILE JUSTICE SYSTEM.

I WOULD ASK THAT YOU INCORPORATE THOSE ARGUMENTS AND DETERMINE THAT MR. LOPEZ' PROPER CRIMINAL OR HIS PROPER -- EXCUSE ME, SIR, HIS PROPER OFFENSE LEVEL SHOULD BE A 22, AND HIS CRIMINAL HISTORY SHOULD BE A CATEGORY 2 WITH COUNT 2 RUNNING CONSECUTIVE BEING A 7-YEAR CONSECUTIVE SENTENCE INSTEAD OF A 10-YEAR CONSECUTIVE SENTENCE.

I'D ALSO ADD -- I'M PROBABLY JUMPING AHEAD. I'LL WAIT FOR THE ISSUE OF RESTITUTION TO BE ADDRESSED, BUT I WOULD ASK THAT THOSE THREE ISSUES BE RULED UPON IN MR. LOPEZ' FAVOR.

THANK YOU, SIR.

THE COURT: THANK YOU, MR. JONES. MR. TRAYNOR, DO YOU WANT TO REPLY NOW OR YOU WANT TO WAIT UNTIL WE HEAR FROM MR. FORSTER?

MR. TRAYNOR: YOUR HONOR, GIVEN THE SIMILARITY BETWEEN MANY OF THEIR OBJECTIONS, I'D BE GLAD TO WAIT FOR MR. FORSTER.

THE COURT: THAT MIGHT BETTER FOR BOTH CASES THAT WE HANDLE IT THAT WAY.

YOU WANT TO SPEAK TO HIS SITUATION THEN, MR. FORSTER?

MR. FORSTER: IF IT PLEASE, YOUR HONOR, I'VE FILED SEVERAL OBJECTIONS. I SUPPOSE JUST THE ORDER I WROTE THEM. THEY HAVE AN INCREASE FOR TWO LEVELS IN OBSTRUCTION OF JUSTICE IN PARAGRAPH 32 OF THE PSR, WE OBJECT TO THAT. HE CONFESSED. HE'S GOING TO GET -- HE'S BRINGING A LOT MORE JUSTICE ON HIMSELF AT THIS POINT BASED ON HIS CONDUCT. TO SAY HE HAS OBSTRUCTED JUSTICE, HE HAS OFFERED TO PLEAD GUILTY FROM DAY ONE. HE HAS CONFESSED.

IT'S INCOMPREHENSIBLE TO SAY THAT WITH REGARDS TO HIS OWN CONDUCT, HE HAS OBSTRUCTED JUSTICE. I THINK HE'S SUBJECTING HIMSELF TO FAR MORE JUSTICE BECAUSE OF HIS OWN CONDUCT. I DON'T THINK IT'S OBSTRUCTION.

THIS PSR DOES NOT GIVE HIM ANY ACCEPTANCE OF RESPONSIBILITY. THE APPLICATION NOTES UNDER ACCEPTANCE TALK ABOUT GOING TO TRIAL DOES NOT PER SE MEAN YOU DON'T GET ACCEPTANCE.

THE APPLICATION NOTE 2, A DETERMINATION THAT A DEFENDANT HAS ACCEPTED RESPONSIBILITY WILL BE BASED PRIMARILY

UPON PRETRIAL STATEMENTS AND CONDUCT.

IN THIS CASE HE WROTE THE COURT LETTERS WANTING TO PLEAD GUILTY. HE WROTE THE U.S. ATTORNEY'S OFFICE WANTING TO PLEAD GUILTY. HE TOLD ME ENOUGH TIMES HE WANTED TO PLEAD GUILTY, AND THEN HE GETS ON THE WITNESS STAND AND CONFESSES TO A JURY OF HIS CONDUCT. I DON'T KNOW HOW YOU CAN ACCEPT RESPONSIBILITY ANY MORE THAN HE DID.

TO THE EXTENT HE DID NOT ACKNOWLEDGE THE GOVERNMENT'S VERSION OF THE FACTS IN THIS CASE BUT HE ACCEPTED A WHOLE LOT MORE RESPONSIBILITY IN THIS CASE THAN I WISH HE HAD, AND I JUST DON'T HOW HE COULD ACCEPT ANYMORE, JUDGE, SO WE WOULD ASK FOR TWO LEVELS FOR ACCEPTANCE.

I DO PUT IN THERE THAT EVEN ASSUMING SOME OBSTRUCTION, WHICH I DON'T ASSUME, BUT EVEN IF I ADMITTED THAT, HE CAN STILL GET OBSTRUCTION AND ACCEPTANCE, AND THAT'S APPLICATION NOTE 4, CONDUCT RESULTING IN THE OBSTRUCTION ENHANCEMENT ORDINARILY INDICATES THAT A DEFENDANT HAS NOT ACCEPTED RESPONSIBILITY FOR HIS CRIMINAL CONDUCT, THERE MAY, HOWEVER, BE EXTRAORDINARY CASES IN WHICH ADJUSTMENTS OF BOTH ACCEPTANCE AND OBSTRUCTION APPLY.

THE COURT: I'VE SEEN A CASE LIKE THAT. I AGREE WITH THAT.

MR. FORSTER: I THINK AT THE VERY WORST THAT'S WHAT THIS IS. I DON'T THINK YOUR HONOR SHOULD GIVE HIM ANY OBSTRUCTION, AND I DO THINK YOU SHOULD GIVE HIM A COUPLE OF

POINTS FOR ACCEPTANCE.

THE COURT: MR. TRAYNOR MAY BE WILLING TO MAKE A RECOMMENDATION AS TO THE THIRD POINT. WE'LL SEE WHAT HE HAS TO SAY.

MR. FORSTER: I WOULDN'T OBJECT IF THAT'S WHAT HE WANTED.

THE COURT: GO AHEAD. I DIDN'T WANT TO INTERRUPT YOUR FLOW.

MR. FORSTER: LET'S SEE, I OBJECT TO THE SEVEN YEARS VERSUS THE TEN YEARS. WE CITE THAT D.C. CIRCUIT CASE U.S.A. VERSUS BROWN. I DON'T THINK THERE'S ANY REAL DISPUTE THAT THE GUN IN THIS CASE WENT OFF ACCIDENTALLY.

THEY COULDN'T FIND THE BULLET. I REMEMBER IN SOME OF THE EVIDENCE THAT WHEN THEY WERE ASKING MR. LOPEZ IN HIS INTERVIEW ABOUT THE GUN, HE GOT ALL NERVOUS, AND THEY TALKED ABOUT THAT. HE WASN'T SURE WHETHER HE ALMOST SHOT HIMSELF. SO I THINK THERE'S NO REAL DISPUTE THAT THE GUN WENT OFF ACCIDENTALLY.

I HAVE BEEN PROVIDED THIS UNPUBLISHED ELEVENTH CIRCUIT OPINION. WE PROVIDED THE D.C. CIRCUIT FROM JUNE OF 06, AND WE WOULD ASK THE COURT TO ACCEPT THE LEGAL CONCLUSIONS OF THE D.C. CIRCUIT, SEVEN YEARS CONSECUTIVE RATHER THAN TEN.

LET'S SEE, I MAKE SOME OBJECTIONS REGARDING CRIMINAL HISTORY. THE FIRST ONE IS THAT IT WASN'T PROVED TO A JURY. I AM DOING THAT TO PRESERVE AN ISSUE. I UNDERSTAND WHAT THE LAW

IS, THAT WHOLE LINE OF EXCEPTIONS ON ALMENDAREZ-TORRES. I'M AWARE OF ALL THAT. I'M JUST PRESERVING AN ISSUE ON THE CHANCE THAT THAT LAW CHANGES. I DON'T EXPECT THAT IT WILL, BUT I WANT TO AT LEAST PRESERVE MY ISSUE.

I OBJECT TO PARAGRAPH 44 FOR TWO CRIMINAL HISTORY POINTS -- WAIT A MINUTE, LET'S SEE, NO, YOUR HONOR, I WROTE THE WRONG NUMBER DOWN. I WROTE 44 BUT THEY DIDN'T GIVE HIM TWO POINTS FOR 44, YOUR HONOR.

THE PROBATION OFFICER: YOUR HONOR, IF I MAY, HE DID IN FACT OBJECT TO 44. TWO POINTS WERE ASSESSED IN THE INITIAL REPORT. THOSE WERE LATER REDACTED.

MR. FORSTER: OKAY. I WIN THEN. I'LL MOVE ON. I ARGUE THAT THE -- WELL, LET'S SEE. YOUR HONOR, I ALSO SUGGEST TO THE COURT THAT THE ENTIRETY OF THE CRIMINAL HISTORY OVERSTATES. SOME OF THIS, A GOODLY AMOUNT OF THIS CRIMINAL HISTORY WAS JUVENILE. SOME AMOUNT OF THIS CRIMINAL HISTORY OCCURRED AFTER THE INCIDENT THAT THEY GOT ARRESTED FOR. IT WAS A JAIL ISSUE THAT THEY HAD. IT'S CITED IN HERE.

MY CLIENT GOT A SPLIT SENTENCE. THAT'S WHAT HE GOT IT FROM WAS SOMETHING THAT IN THE PRESENTENCE REPORT LEADS TO THREE CRIMINAL HISTORY POINTS.

I WOULD THINK JUST THE ENTIRETY OF THE CRIMINAL HISTORY POINTS AND THE WAY I READ THAT, SOME OF IT BEING JUVENILE, SOME OF IT BEING AFTER THE INCIDENT THAT TOOK PLACE HERE, WE WOULD JUST ASK THE COURT TO GO FROM SIX TO FOUR ON

CRIMINAL HISTORY. I THINK YOUR HONOR WOULD HAVE AUTHORITY TO DO THAT, AND I THINK THAT'S WHAT WE WOULD SAY IS THE PROPER CRIMINAL HISTORY LEVEL TO END UP AT.

OKAY. LET'S SEE, REQUEST FOR CONCURRENT SENTENCE, WHICH IS MY NUMBER 4, I ADMIT THAT COUNT 2 HAS TO RUN CONSECUTIVE. HE IS SERVING STATE TIME NOW, A 25 TO DO 12, THAT'S THE SPLIT SENTENCE THAT I TALKED ABOUT.

I UNDERSTAND THAT THE 924(C) COUNT HAS TO RUN CONSECUTIVE TO THE STATE COURT. THE SUPREME COURT IS CLEAR ON THAT AND CONSECUTIVE TO COUNT 1, FEDERAL CHARGE. THE COUNT 1, THE BANK ROBBERY, DOES NOT HAVE TO RUN CONSECUTIVE TO THE STATE CHARGE.

SO I'M ASKING -- THE PRESENTENCE REPORT SAYS HE CAME INTO FEDERAL CUSTODY ON, I THINK IT SAID NOVEMBER 10TH OF 04 IS THE ARREST DATE AND IN FEDERAL CUSTODY THE ENTIRE TIME.

WE WOULD ASK FOR THE COURT'S SENTENCE ON COUNT 1 TO RUN CONCURRENTLY WITH THE STATE SENTENCE. COUNT 2 THE COURT DOESN'T HAVE ANY AUTHORITY, I ACCEPT THAT, BUT 5G1.3, THE COURT HAS THE AUTHORITY TO RUN THE SENTENCE CONCURRENT. WE ARE ASKING YOU TO DO THAT.

AND THE LAST ARGUMENT I MAKE, I WASN'T SURE HOW TO COUCH IT OTHER THAN TO SAY MITIGATING ROLE. I UNDERSTAND WHAT THE VERDICT WAS. YOUR HONOR SAT THROUGH THE EVIDENCE FOR THREE DAYS, JUST LIKE EVERYBODY ELSE DID. I THINK THAT IF THIS CASE WERE TRIED TODAY, THERE MIGHT BE A DIFFERENT RESULT.

I COULDN'T EVER LOOK AT A JURY WITH A STRAIGHT FACE AND SAY SOMEBODY CONFESSED TO A CRIME THEY DIDN'T DO. I'D SAY THAT TO MY PARENTS, BUT THEY'D LOOK AT ME LIKE I'M CRAZY, AND THEN THIS JON BENET RAMSEY THING HAPPENS, AND PEOPLE DO CONFESS TO CRIMES THEY DIDN'T DO. IT DOESN'T HAPPEN OFTEN BUT IT DOES HAPPEN.

THIS NEVER WAS A CONSPIRACY CASE, JUDGE. AS I SAY THIS IS THE POINT WHERE UNDER THE SENTENCING STATUTE THE COURT HAS TO GIVE A SENTENCE SUFFICIENT BUT NOT GREATER THAN NECESSARY TO MEET ALL THE REQUIREMENTS, AND YOUR HONOR HEARD THE EVIDENCE.

THEY ARE NOT -- MY ONLY PERSONAL OPINION IS I DON'T THINK CHRIS EVER DID THIS THING BUT HE CONFESSED AND I UNDERSTAND ALL THAT, BUT EVEN THE GOVERNMENT'S RECITATION OF WHAT HE THINKS THE FACTS WOULD BE WOULD MEAN THAT MY CLIENT IS LESS CULPABLE.

ARGUABLY HE DROVE THE CAR. AGAIN I DON'T THINK THERE WAS ANY EVIDENCE ON THAT, BUT THAT'S HOW THE GOVERNMENT ARGUED THAT THIS WAS A CONSPIRACY. WHICH MEANS IT'S VERY POSSIBLE THAT EVEN IF HE KNEW OF A GUN, HE DIDN'T KNOW IT WOULD BE DISCHARGED.

I DIDN'T KNOW ANOTHER WAY TO COUCH THIS OTHER THAN LESSER ROLE, AND THE COURT HAS AUTHORITY. SO WE'RE ASKING FOR -- I MEAN YOUR HONOR HEARD THE EVIDENCE. SENTENCE THEM ACCORDING TO WHAT THE EVIDENCE CALLS FOR.

WE WOULD ASK FOR ACCEPTANCE. WE WOULD ASK FOR NO OBSTRUCTION. WE WOULD ASK FOR A CONCURRENT SENTENCE. WE WOULD ASK FOR CRIMINAL HISTORY 4 AND SEVEN YEARS RATHER THAN TEN. I THINK THAT'S COVERS IT. THANK YOU, YOUR HONOR.

THE COURT: THANK YOU, MR. FORSTER. YOU, GENTLEMEN, HAVE VERY THOROUGHLY REVIEWED THESE CASES AND SUBMITTED OBJECTIONS THAT I COMMEND YOU FOR YOUR THOROUGHNESS, BOTH OF YOU, IN HANDLING THIS.

MR. TRAYNOR.

MR. TRAYNOR: GOOD AFTERNOON, YOUR HONOR. YOUR HONOR, I WOULD REPLY PRIMARILY ON OUR WRITTEN RESPONSE TO THE DEFENDANT'S OBJECTIONS.

OUR POSITION IS THAT THE NORTH STAR IN THIS CASE IN THIS SENTENCING HEARING IS THE DEFENDANTS WERE CHARGED WITH AND CONVICTED OF CONSPIRACY AND AIDING AND ABETTING. THOSE ARE THE CHARGES THAT THE GRAND JURY INDICTED THEM ON. THOSE ARE THE CHARGES THEY HAVE BEEN CONVICTED OF.

NOW AS FAR AS ACCEPTANCE OF RESPONSIBILITY, NEITHER OF THEM HAVE EVER ACCEPTED RESPONSIBILITY FOR THE CONSPIRACY AND THE AIDING AND ABETTING. THEY HAVE NEVER -- THEY BOTH GOT ON THE STAND AND CONTINUED TO DENY THAT, AND SO WE CAN'T SEE HOW THEY SHOULD GET ANY CREDIT FOR ACCEPTING RESPONSIBILITY WHEN THEY HAVE DENIED AND CONTINUE TO DENY THE CHARGES THEY WERE CONVICTED OF.

NOW ON THE OBSTRUCTION OF JUSTICE, MR. LOPEZ FIRST

TOOK SOLE RESPONSIBILITY FOR THE ROBBERY. THEN HE RECANTED AT TRIAL AND TOLD US ALL ABOUT THIS CHOPSHOP OPERATOR AND THIS DRUG DEALER WHO HE NEVER WOULD NAME.

PEOPLE ARE CERTAINLY ENTITLED TO PLEAD NOT GUILTY, GO TO TRIAL AND TESTIFY AND TESTIFY AND HAVE THE JURY NOT BELIEVE THEM, AND I CERTAINLY UNDERSTAND THAT NOT EVERY DEFENDANT WHO IS IN THAT SITUATION SHOULD GET THE ENHANCEMENT FOR OBSTRUCTION OF JUSTICE.

BUT IN THIS CASE BOTH MR. LOPEZ AND MR. DEAN HAVE REALLY GONE FAR BEYOND THAT, FAR BEYOND JUST GETTING UP AND DISAGREEING WITH OTHER FACT WITNESSES IN THE CASE. THEY'VE JUST TRIED TO MANIPULATE THE INVESTIGATORS INTO TRYING TO GET THE OUTCOME OF APPARENTLY WHAT THEY WANTED IS MR. LOPEZ TO BE COMPLETELY EXCULPATED AND THEN MR. DEAN WOULD TAKE THE ENTIRE HIT FOR THEM.

SO IN THIS CASE WE THINK THEY HAVE GONE FAR BEYOND JUST GIVING FALSE TESTIMONY AT TRIAL AND THAT THEY BOTH SHOULD RECEIVE THE ENHANCEMENT FOR OBSTRUCTION OF JUSTICE.

ON THE 924(C) ISSUE, THE IMPORTANT PART OF THE UNPUBLISHED CASE, THE CLARET CASE, IS THAT THEY APPLY THE ELEVENTH CIRCUIT PUBLISHED DECISION IN BRANTLEY, AND BRANTLEY IS THE CASE MR. JONES DISCUSSED A MINUTE AGO ABOUT THE POSSESSION OF THE MACHINE GUN, AND IN THE BRANTLEY CASE, THE ELEVENTH CIRCUIT DISTINGUISHES BETWEEN SUBSTANTIVE OFFENSES WHICH REQUIRE A SEPARATE MENS REA AND SENTENCE ENHANCEMENTS,

AND IT FOUND THAT THESE DIFFERENT DIVISIONS IN 924(C) WERE SENTENCE ENHANCEMENTS THAT DID NOT REQUIRE A SEPARATE MENS REA, AND THEN THAT'S WHAT THEY APPLY IN CLARET TO REJECT THE DEFENDANT'S ARGUMENT THAT THEY SHOULD NOT RECEIVE THE TEN YEARS BECAUSE THE FIREARM DISCHARGE WAS ACCIDENTAL.

SO WE THINK THAT THE CLARET DECISION IN ITSELF BEING AN UNPUBLISHED OPINION IS A GOOD INDICATOR OF WHAT THE ELEVENTH CIRCUIT WOULD DO IN THIS APPEAL WITH THIS ISSUE, AND THEN THE CLARET OPINION ALSO SHOWS US HOW THE ELEVENTH CIRCUIT WOULD APPLY THE PUBLISHED PRECEDENT OF BRANTLEY IN ACCORD WITH THE TENTH CIRCUIT OPINION THAT REJECTS THE DEFENDANT'S ARGUMENT. SO WE THINK THE PROBATION OFFICER IS RIGHT IN RECOMMENDING THE 10-YEAR SENTENCE UNDER 924(C).

MR. LOPEZ' OBJECTIONS ABOUT THE CRIMINAL HISTORY, AGAIN WE BELIEVE THE PROBATION OFFICER HAS GOT IT RIGHT UNDER THE SMITH CASE. THERE WERE SEVERAL ROBBERIES IN A SHORT PERIOD OF TIME WHERE THEY WERE DIFFERENT OCCASIONS, DIFFERENT ROBBERIES, DIFFERENT VICTIMS, IT'S NOT A COMMON SCHEME, THEY WEREN'T CONSOLIDATED, THERE'S NOTHING THAT APPEARS THEY WERE FUNCTIONALLY CONSOLIDATED, SO WE THINK UNDER CHAPTER 4 OF THE GUIDELINES THEY ARE SEPARATE OFFENSES.

MR. DEAN'S OBJECTIONS, HE CONTESTS THE CRIMINAL HISTORY SCORE BECAUSE THE SENTENCE FOR SOME OF THE THINGS -- THE JAIL RIOT HAPPENED AFTER HE WAS ARRESTED IN THIS CASE. CHAPTER 4 OF THE SENTENCING GUIDELINES, AND ESPECIALLY

APPLICATION NOTE 1.2, FOCUS OF PRIOR SENTENCES NOT PRIOR CONVICTIONS. THESE ARE ALL PRIOR SENTENCES BEFORE THIS CASE, AND SO WE BELIEVE THAT THE PSR IN CORRECT IN ASSESSING MR. DEAN'S CRIMINAL HISTORY.

AND THEN FINALLY THE REQUEST FOR A CONCURRENT SENTENCE, I THINK THE COURT KNOWS I'VE HAD CASES WHERE I'VE RECOMMENDED CONCURRENT SENTENCES. I WAS THINKING ABOUT MR. CRAWFORD, THE MAN WHO WAS DIGGING HOLES OUT IN THE BATTLEFIELD, AND THEN MR. GLOVER, THE MAN WHO WAS -- HE WAS FISHING AND HE HAD A PISTOL. HE WAS A CONVICTED FELON. HE HAD A PISTOL ALLEGEDLY TO SHOOT SNAKES AND HE ALSO HAD A BACKPACK WITH A LITTLE VIAL FULL OF METHAMPHETAMINE.

THOSE WERE CASES WHERE THEY ALREADY HAD BIG STATE SENTENCES LIKE MR. DEAN AND THE FEDERAL SENTENCE WASN'T GOING TO ADD MUCH, AND UNDER THE SENTENCING FACTORS OF 3553, IT SEEMED TO BE JUST THAT THEY SHOULD BE CONCURRENT SENTENCES AND I RECOMMENDED THAT.

IN THIS CASE WE HAVE A 19-YEAR-OLD MAN WHO I THINK THE REMARKABLE THING ABOUT THIS CASE IS AT 19 HE'S ALREADY WORKED HIS WAY TO CRIMINAL HISTORY 6, AND SO UNDER THE SENTENCING FACTORS OF 3553 THE COURT NEEDS TO -- HIS CRIMINAL HISTORY MAKES IT ESPECIALLY IMPORTANT FOR THE COURT TO CONSIDER HIS FUTURE DANGEROUSNESS AND THE NEED TO PROTECT THE PUBLIC FROM SOMEONE WHO HAS SUCH VIOLENT TENDENCIES.

IN ADDITION, PART OF HIS SENTENCE IN THE CONVICTION

HE GOT FOR THE JAIL RIOT WAS FOR VIOLATING HIS PROBATION, WHICH ESPECIALLY AT THAT STAGE OF THE GAME SHOWS A TREMENDOUS DISREGARD FOR COURT ORDERS IN HIS SENTENCES, AND SO UNDER THE SENTENCING FACTORS OF 3553 WE CANNOT RECOMMEND A CONCURRENT SENTENCE FOR MR. DEAN ON THE BANK ROBBERY COUNT.

THANK YOU.

THE COURT: DO ANY OF YOU WANT TO PUT IN EVIDENCE THE RECORDS THE PROBATION OFFICER HAS CONCERNING MR. LOPEZ' VARIOUS TRIALS OR TRIBULATIONS IN THE JUVENILE COURT SYSTEM.

MR. JONES: I HAVE NOT SEEN IT, SIR.

THAT'S FINE.

THE COURT: THE COURT HAD ASKED FOR THESE DOCUMENTS AND REVIEWED THEM, AND I'LL PUT THEM IN THE RECORD. THEY NEED TO BE IN THE RECORD FOR THE BENEFIT OF THE PARTIES.

THE TESTIMONY THAT WAS TRANSCRIBED BY ONE OF THE LAW ENFORCEMENT OFFICERS THAT I REFERRED TO EARLIER WAS AGENT REID, THE COURT INDICATED IT HAD REVIEWED IT.

EACH OF THE DEFENDANTS IN THIS CASE HAS OBJECTED TO THEIR RESPECTIVE PRESENTENCE REPORT ON THE GROUNDS THAT THE PROBATION OFFICER ADDED A TWO-POINT ENHANCEMENT FOR OBSTRUCTION OF JUSTICE.

THE COURT OVERRULES THE OBJECTION OF EACH DEFENDANT AS TO THAT ENHANCEMENT AND ACCEPTS THE POSITION OF THE PROBATION OFFICER AND THE POSITION OF THE GOVERNMENT.

I WILL POINT OUT FOR THE PURPOSE OF THE RECORD AND

FOR THE BENEFIT OF THE PARTIES AND COUNSEL THAT THIS IS A CASE IN WHICH EACH DEFENDANT CLEARLY, PURPOSELY, INTENTIONALLY OBSTRUCTED JUSTICE.

MR. LOPEZ GAVE GREAT DETAILS ABOUT THIS ROBBERY SHORTLY AFTER IT OCCURRED. THEN HE TOOK THE WITNESS STAND AND TESTIFIED EXACTLY OPPOSITE.

MR. DEAN, AFTER HE GOT A SENTENCE OF CONSIDERABLE LENGTH IN THE STATE COURT SYSTEM HERE IN FLOYD COUNTY, APPARENTLY DECIDED THAT HE WOULD TAKE THE FALL FOR HIS BROTHER-IN-LAW SINCE HE ALREADY HAD TIME TO SERVE, AND I SUSPECT HE FELT SURE THAT ANY SENTENCE IN THIS COURT WOULD BE CONCURRENT WITH ANY SENTENCE HE HAS IN THE STATE COURT SYSTEM OR LIKELY THE OTHER AUTHORITIES OTHER THAN THE COURTS WOULD SEE THAT THEY RAN CONCURRENT, SO HE WOULD PROTECT HIS BROTHER-IN-LAW AGAINST HAVING ANY TIME TO SERVE. SO HE TOOK THE WITNESS STAND, TESTIFIED ABOUT HOW HE COMMITTED THIS OFFENSE.

BOTH THE -- I WOULD USE A WORD WITH REFERENCE TO EACH OF THESE DEFENDANTS THAT I SELDOM USE AS TO ANY WITNESS THAT TESTIFIES, AND I'VE HEARD TESTIMONY IN COURT FOR MANY YEARS, TESTIMONY MANY TIMES OF A LAWYER, AND I DON'T EASILY CALL PEOPLE LIARS, BUT EACH OF THE DEFENDANTS IN THIS CASE PURPOSELY LIED WITH AN INTENT TO OBSTRUCT JUSTICE. SO THE ENHANCEMENT IS APPROPRIATE FOR BOTH OF THEM.

NEITHER OF THEM IS ENTITLED TO CREDIT FOR ACCEPTANCE

OF RESPONSIBILITY. AS POINTED OUT BY MR. TRAYNOR, NEITHER OF THEM HAVE EVER ACCEPTED RESPONSIBILITY FOR WHAT THEY REALLY DID AND HOW THEY DID IT AND THE SPECIFICS OF WHAT THEY DID.

THEY ARE NOT BEING PUNISHED BY THE COURT FOR GOING TO TRIAL. THAT'S THEIR RIGHT UNDER THE CONSTITUTION. I SEE THAT RIGHT EXERCISED REGULARLY, AND I EXERCISED IT MANY TIMES ON BEHALF OF MY CLIENTS WHEN I WAS PRACTICING LAW AS DO MANY LAWYERS SIMPLY FOR THE REASON THAT IT IS RIPE UNDER THE CONSTITUTION, AND IF A CITIZEN DESIRES IT, HE OR SHE IS ENTITLED TO IT, BUT HERE THERE WAS NO ACCEPTANCE OF RESPONSIBILITY, AND THERE'S NOT YET BEEN AS OF TODAY EVEN. SO THE COURT DOES NOT GRANT EITHER OF THESE DEFENDANTS CREDIT FOR ACCEPTANCE OF RESPONSIBILITY.

THE COURT HAS REVIEWED THE CASES YOU, GENTLEMEN, SUBMITTED ON WHAT IT BELIEVES ARE APPLICABLE AUTHORITIES CONCERNING THE ENHANCEMENT PROVISIONS, AND THE COURT CONCLUDES THAT THE REASONING AND LOGIC OF THE ELEVENTH CIRCUIT IN THE UNPUBLISHED OPINION SUBMITTED BY MR. TRAYNOR KNOWN AS THE CLARET DECISION IS LOGICAL AND IS A CORRECT INTERPRETATION OF THE STATUTE AT ISSUE.

IT HAS TO DO WITH A SENTENCING PROVISION AND A SENTENCING ENHANCEMENT AND DOES NOT REQUIRE A SPECIFIC INTENT TO DISCHARGE A FIREARM BEFORE THE TEN-POINT ENHANCEMENT IS APPROPRIATE, AND THE COURT BELIEVES PREVIOUS ELEVENTH CIRCUIT AUTHORITY SUPPORTS THE COURT'S VIEW THAT THE CLARET DECISION IS

CORRECT, AND THE COURT WILL ENHANCE THE SENTENCES AS TO EACH OF THESE DEFENDANTS TEN POINTS FOR THE FIRING -- FOR THE DISCHARGE OF A FIREARM DURING THIS ARMED ROBBERY.

THE COURT IN MR. LOPEZ' CASE CONCLUDES THAT THESE CASES ARE NOT RELATED, THAT IS THE CASES FOR WHICH THE DEFENDANT WAS SENTENCED IN JUVENILE COURT SOME YEARS AGO. THEY ALL WERE SEPARATE ARMED ROBBERIES. THEY WERE NOT A SERIES OF DRUG TRANSACTIONS OR EMBEZZLEMENT TRANSACTIONS OR SHOPLIFTING TYPE INFRACTIONS OF THE LAW THAT OCCUR. THESE WERE EACH CRIMES OF VIOLENCE AND INDEPENDENT ARMED ROBBERIES DONE BY THIS PERSON AS A JUVENILE.

THE CASES WERE ALL SENT OVER TO ONE COURT AND ONE JUDGE HANDLED THEM, BUT THEY ALL MAINTAIN THEIR IDENTITY, EACH CASE DID, FOR THE PURPOSES OF THE RECORD, AND EACH CASE WAS INDEPENDENTLY ADJUDICATED. SO THE COURT CONCLUDES THAT THEY ARE NOT RELATED.

THE COURT FURTHER FINDS THAT IF THEY ARE RELATED AND THE COURT IS WRONG IN ITS CONCLUSION THAT THEY ARE RELATED, THEN THE PROPER GUIDELINE FOR CONSIDERATION IS SECTION 4A1.1F, AND I WOULD POINT OUT THAT THESE CRIMES ARE CRIMES OF VIOLENCE, AND THEY DID NOT OCCUR ON THE SAME OCCASION.

IF THEY ARE NOT CONSIDERED RELATED TO EACH OTHER PURSUANT TO EITHER SUBSECTION A, B OR C OF GUIDELINE SECTION 4A1.1, THEN THE PROPER COMPUTATION FOR THE OFFENSE IN PARAGRAPH 53, I BELIEVE, WOULD BE TWO POINTS. THE NEXT TWO PARAGRAPHS

WOULD ONE POINT EACH WHICH WOULD CHANGE THE TOTAL COMPUTATION BY TWO POINTS AND WOULD CHANGE THE DEFENDANT'S CRIMINAL HISTORY CATEGORY FROM A FOUR TO A THREE.

I HAVE NOT DETERMINED AND DO NOT DETERMINE AT THIS POINT THAT THAT IS THE APPROPRIATE GUIDELINE SECTION IN THIS CASE SINCE THE COURT HAS FOUND BASED ON THE DOCUMENTS BEFORE IT THAT THESE CASES ARE NOT RELATED CASES. SO THE COURT OVERRULES THE OBJECTION BY MR. JONES TO THOSE CONCLUSIONS OF THE PROBATION OFFICER.

THE COURT HAS SPOKEN TO MR. FORSTER'S OBJECTIONS ON BEHALF OF MR. DEAN TO THE ACTIONS OF THE PROBATION OFFICER IN DENYING A MITIGATING ROLE IN THE PRESENTENCE REPORT TO MR. DEAN A FINDING THAT HE OBSTRUCTED JUSTICE, THE DENIAL OF THE GRANTING OF ACCEPTANCE OF RESPONSIBILITY. I HAVE SPOKEN TO THE ISSUE OF THE MINIMUM SENTENCE REQUIRED.

THE CRIMINAL HISTORY COMPUTATIONS I BELIEVE ARE AT NO ISSUE AT THIS POINT, SO I'LL DENY THE OBJECTION BECAUSE THEY ARE CORRECTLY COMPUTED, EVEN THOUGH SOME OF THE SENTENCES OCCURRED AFTER THE DATE OF THIS OCCURRENCE FOR WHICH THE DEFENDANT IS BEFORE THE COURT TODAY. THE COURT FINDS THAT THE CRIMINAL HISTORY CATEGORY WAS PROPERLY CALCULATED.

NOW, THERE'S A CLAIM OF OVERREPRESENTATION OF THE CRIMINAL HISTORY. THE COURT NOTES THAT IN THE DEVELOPMENT OF CRIMINAL HISTORY CATEGORIES UNDER THE UNITED STATES SENTENCING GUIDELINES VERY CAREFUL CONSIDERATION APPEARS TO HAVE BEEN

GIVEN WHEN YOU LOOK AT THE STRUCTURE AS TO HOW A CRIMINAL HISTORY CATEGORY IS ULTIMATELY DETERMINED.

WHEN YOU LOOK AT THE STRUCTURE OF THE SENTENCING GUIDELINES AND YOU SEE THAT UNDER CERTAIN CIRCUMSTANCES WHERE A PERSON IS PARTICULARLY VIOLENT, CLEARLY AN INDIVIDUAL WITH NO REGARD FOR THE LAW, THERE IS A METHOD BY WHICH IT IS DETERMINED WHETHER OR NOT HE OR SHE IS A CAREER OFFENDER.

YOU BECOME A CAREER OFFENDER WHEN YOU COMMIT A COUPLE OF CERTAIN TYPE VIOLENT CRIMES AND DRUG CRIMES. THERE IS A -- I BELIEVE THAT PEOPLE WHO SERVE TIME IN THE PENAL INSTITUTION OUGHT TO NOT VIOLATE THE LAW FOR A LITTLE WHILE AFTER THEY GET OUT OR AFTER THEY COMPLETE A SENTENCE.

SO IF WITHIN TWO YEARS AFTER YOU ARE RELEASED FROM CONFINEMENT YOU GET IN TROUBLE AGAIN WITH THE LAW, YOU GET AN ENHANCEMENT. THERE IS NOTHING ILLOGICAL ABOUT THAT. IF YOU'RE ON PROBATION AND YOU GET IN TROUBLE WITH THE LAW AGAIN, YOU GET AN ENHANCEMENT. NO PERSON COULD ARGUE WITH ANY JUSTIFICATION THAT THAT'S NOT APPROPRIATE.

IF YOU ARE IN PRISON AND YOU COMMIT A CRIME WHILE YOU ARE IN PRISON AND YOU GET A SENTENCE FOR A CRIME YOU COMMIT WHILE YOU'RE IN PRISON, NO PERSON COULD JUSTIFIABLY ARGUE THAT THAT SHOULD EXCUSE YOU FROM GETTING AN INCREASE IN YOUR CRIMINAL HISTORY CATEGORY JUST BECAUSE YOU DID IT WHILE YOU WERE IN PRISON.

SO ALL THOSE TYPE OF THINGS EACH HAD -- MOST OF THE

THINGS I MENTIONED EACH HAD A LITTLE BIT TO DO WITH THE DEVELOPMENT OF THIS HIGH CRIMINAL HISTORY CATEGORY THIS DEFENDANT MR. DEAN HAS, PLUS SOME JUST PLAIN OLD CRIMES HE COMMITTED. SO THE COURT FINDS THAT HIS CRIMINAL HISTORY CATEGORY IS NOT OVERREPRESENTED.

THE LAST OBJECTION MR. FORSTER MADE OR POSITION HE TOOK WAS THE STRUCTURE OF THE SENTENCE, AS TO HOW THE COURT SHALL STRUCTURE THE SENTENCE, AND I TAKE THAT AS ARGUMENT AND POSITIONS TAKEN THAT THE COURT OUGHT TO CONSIDER AND WILL CONSIDER WHEN IT HEARS FROM THE DEFENDANT AND HIS LAWYER AT THE ARTICULATION POINT IN THE SENTENCING HEARING.

SO THE COURT DENIES ALL THE OBJECTIONS MADE ON BEHALF OF THE DEFENDANT MR. DEAN TO THE PRESENTENCE REPORT IN HIS CASE AND ADOPTS ALL OF THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT IN MR. DEAN'S CASE AND MAKES ALL OF THOSE FINDINGS OF FACT AND CONCLUSIONS THOSE OF THE COURT IN ALL RESPECT EXCEPT AS MODIFIED ORALLY IN THE COURT'S FINDINGS AND CONCLUSIONS HERE THIS AFTERNOON.

THE SAME IS TRUE IN MR. LOPEZ' CASE. THE COURT DENIES ALL OF THE OBJECTIONS MADE BY DEFENSE COUNSEL ON BEHALF OF MR. LOPEZ AND ADOPTS ALL OF THE FINDINGS OF FACT AND CONCLUSIONS CONTAINED IN THE PRESENTENCE REPORT AS PREPARED BY THE UNITED STATES PROBATION OFFICER AND MAKES ALL OF THESE FINDINGS OF FACT AND CONCLUSIONS THOSE OF THE COURT IN ALL RESPECTS EXCEPT AS ORALLY MODIFIED BY THE COURT'S FINDINGS AND

CONCLUSIONS AT THIS HEARING THIS AFTERNOON.

SO THE COURT'S SENTENCING OPTIONS ARE AS FOLLOWS, EXCEPT FOR THE ISSUE OF RESTITUTION WHICH I'LL NEED TO HEAR FROM COUNSEL ABOUT:

ON COUNT 1, THE SENTENCING RANGE BY THE STATUTE IS NOT MORE THAN 20 YEARS AND A 250,000 DOLLAR FINE. ON COUNT 2 WOULD BE FIVE YEARS UP TO LIFE IMPRISONMENT AND A 250,000 DOLLAR FINE DEPENDING ON FACTS FOUND BY THE COURT, AND THE COURT HAS FOUND FACTS THAT WILL MEAN A MINIMUM MANDATORY TEN YEARS UP TO LIFE IMPRISONMENT AND A 250,000 DOLLAR FINE. THESE CONCLUSIONS ARE THE SAME IN THE PRESENTENCE REPORT WITH REFERENCE TO EACH OF THESE DEFENDANTS.

AT THIS POINT THEY BEGIN TO DIFFER. MR. DEAN'S CRIMINAL TOTAL OFFENSE LEVEL IS 24. HIS CRIMINAL HISTORY CATEGORY IS 6. HIS CUSTODY GUIDELINE RANGE ON COUNT 1 IS 100 TO 125 MONTHS AND 10 YEARS CONSECUTIVE ON COUNT 2. THE FINE GUIDELINE RANGE IS 10,000 DOLLARS TO A HUNDRED THOUSAND DOLLARS. THE RESTITUTION WE WILL TALK ABOUT IN A MOMENT. SPECIAL ASSESSMENT OF 200 DOLLARS IS REQUIRED AS A PART OF THE SENTENCE. COST OF CONFINEMENT IS ESTIMATED AT $23,431.92 A YEAR. SUPERVISION IS ESTIMATED AT 3450 DOLLARS A YEAR. PROBATION IS NOT AUTHORIZED. SUPERVISED RELEASE OF TWO TO THREE YEARS IS REQUIRED AS TO EACH SENTENCE IN THIS CASE.

IN MR. LOPEZ' CASE, THE STATUTORY PENALTY IS NOT MORE THAN 20 YEARS AND A 250,000 DOLLAR FINE. COUNT 2 FROM FIVE

YEARS TO LIFE IMPRISONMENT AND A 250,000 DOLLAR FINE. BASED UPON THE CONCLUSIONS THAT THE COURT HAS MADE IN RESPONSE TO OBJECTIONS TO THE PRESENTENCE REPORT, THE MINIMUM MANDATORY WOULD BE 10 YEARS TO LIFE. THE TOTAL OFFENSE LEVEL HERE FOR HIM IS 24. HIS CRIMINAL HISTORY CATEGORY IS 4. CUSTODY GUIDELINE RANGE ON COUNT 1 IS 77 TO 96 MONTHS AND 10 YEARS CONSECUTIVE ON COUNT 2. FINE GUIDELINE RANGE IS 10,000 DOLLARS TO A HUNDRED THOUSAND DOLLARS. RESTITUTION WE WILL HAVE TO SEE ABOUT. A SPECIAL ASSESSMENT OF 200 DOLLARS IS REQUIRED AS A PART OF THE SENTENCE IN THIS CASE. COST OF CONFINEMENT IS ESTIMATED AT $23,431.92. 3450 DOLLARS IS ESTIMATED AS COST OF SUPERVISION. PROBATION IS NOT AN OPTION. SUPERVISED RELEASE OF FROM TWO TO THREE YEARS IS REQUIRED ON EACH COUNT.

WHAT'S THE GOVERNMENT'S POSITION ON RESTITUTION? THE COURT HAS RECEIVED NOTHING ON RESTITUTION EXCEPT THE BANK'S CLAIM, I BELIEVE, FOR 2605 DOLLARS.

MR. TRAYNOR: THAT WOULD BE IT, YOUR HONOR. ABOUT 3600 DOLLARS WAS TAKEN IN THE ROBBERY. THEY GOT A THOUSAND THIRTY-SEVEN OUT OF MR. LOPEZ' PANTS POCKET WHICH LEAVES THE 2600 DOLLARS. THE BANK HAD TO DO A FEW REPAIRS BUT NOTHING SUBSTANTIAL. SO OUR POSITION WOULD BE THAT THEY WOULD BE JOINT AND SEVERALLY LIABLE FOR THE 2600 DOLLARS.

THE COURT: DO YOU, GENTLEMEN, TAKE ANY ISSUE WITH THAT?

MR. FORSTER: YOUR HONOR, THAT IS WHAT THE EVIDENCE

SHOWED. THEY DID RECOVER SOME PORTION OF IT. THAT RESTITUTION AMOUNT IS STRICTLY THE MONETARY LOSS. THAT'S WHAT THE EVIDENCE SHOWED.

THE COURT: ALL RIGHT.

MR. JONES: I CONCUR WITH MR. FORSTER, 2600 DOLLARS WOULD BE THE FAIR --

THE COURT: WELL, THERE WAS SOME ISSUE OR CONCERN ABOUT JACKS AUTO SALE. THE COURT HAS NOT BEEN PROVIDED ANY DOCUMENTATION. THERE'S BEEN NO RESPONSE TO THE PROBATION OFFICE REQUEST FOR DOCUMENTATION. SO THE COURT CONCLUDES AS TO THE ISSUE OF RESTITUTION FOR JACKS AUTO SALES, THERE IS NOTHING BEFORE THE COURT THAT IT CAN UTILIZE TO MAKE A DETERMINATION ON THAT ISSUE AND WILL NOT FURTHER CONCERN ITSELF WITH THAT PART OF THE CASE.

YOU WANT TO COME AROUND WITH MR. LOPEZ AND LET ME HEAR FROM YOU, MR. JONES, AND FROM HIM AS TO WHAT COURT OUGHT TO DO?

MR. JONES: YOUR HONOR, SPEAKING ON BEHALF OF MR. LOPEZ, WE'D LIKE TO -- FIRST, HE'S BEEN IN CUSTODY SINCE NOVEMBER 10TH, 2004. WE'D FIRST ASK THAT WHATEVER SENTENCE YOU DO IMPOSE THAT YOU GIVE HIM CREDIT FOR THE TIME THAT HE HAS BEEN INCARCERATED. HE WAS DENIED BOND OR BAIL OR ANYTHING OF THAT NATURE. SO HE HAS BEEN IN CUSTODY SINCE NOVEMBER 10TH OF 2004.

SECOND ISSUE THAT I WOULD ASK THAT THE COURT TO RULE

UPON OR TO ORDER IS THAT HE BE ENTITLED TO THE DRUG TREATMENT PROGRAMS THAT ARE AFFORDED TO HIM BY THE BUREAU OF PRISONS FOR THE MERE FACT THAT I BELIEVE HIS -- NOT ONLY HIS PRESENTENCE REPORT AND HIS FINAL PRESENTENCE SCREAM OUT THAT HE NEEDS CONTROLLED SUBSTANCE HELP.

HE SEEMS TO BE INCREDIBLY DEPENDENT UPON MAINLY MARIJUANA WHICH MAY HAVE BEEN THE UNDERLYING REASON FOR THE PROBLEMS THAT THEY'RE IN TODAY. I WOULD ASK THAT THAT BE GIVEN GIVING HIM THE OPPORTUNITY TO SEEK THAT TREATMENT WHILE IN THE FACILITY AND TO HOPEFULLY COMPLETE IT AND MOST IMPORTANTLY JUST BE ENTITLED TO RECEIVE THAT NEEDED TREATMENT.

ALSO I WOULD ASK THAT AT THIS PRESENT STAGE BASED UPON THE FINDINGS OF THIS HONORABLE COURT THAT YOU WOULD SENTENCE HIM TO THE LOW END OF THE GUIDELINE RANGE. HE WILL BE LOOKING AT I THINK ON THE LOW END, IF MY MATH SERVES ME CORRECTLY, I THINK 197 MONTHS WHICH WOULD BE A MORE THAN FAIR SENTENCE UNDER THE FACTS, UNDER THE CIRCUMSTANCES, UNDER THE SITUATIONS THAT THIS CASE PRESENTS ITSELF.

I'LL LET MR. LOPEZ FOLLOW UP ANY CONCLUDING REMARKS THAT I --

THE COURT: YES, I'D LIKE TO HEAR WHAT YOU HAVE TO SAY, MR. LOPEZ, BEFORE SENTENCE IS IMPOSED.

DEFENDANT LOPEZ: YOUR HONOR, I CAN'T MAKE AN EXCUSE FOR WHAT HAPPENED. I MEAN WE COULD -- I COULD SAY IT WAS DRUGS, I COULD SAY IT WAS THE DEBT, I COULD SAY IT WAS PLENTY

OF THINGS. THERE'S NO EXCUSE FOR IT, AND I'M JUST GLAD THAT NOBODY WAS PHYSICALLY HURT IN WHAT TOOK PLACE.

I JUST ASK THE COURT -- I CAN'T EVEN ASK THE COURT TO BE LENIENT. WITH MY RECORD AND WHAT HAPPENED, I CAN'T ASK THE COURT TO BE LENIENT. ALL I'D JUST LIKE TO SAY IS I'M JUST GLAD NOBODY WAS HURT. THAT'S IT.

THE COURT: THANK YOU VERY MUCH. MR. TRAYNOR.

MR. TRAYNOR: YOUR HONOR, GIVEN THE MINIMUM MANDATORY SENTENCE IN THIS CASE, WE'RE GOING TO AGREE TO A LOW END SENTENCE ON COUNT 1.

THE COURT: PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT'S THE JUDGMENT OF THE COURT THAT THE DEFENDANT RICARDO CURTIS LOPEZ BE AND IS HEREBY COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF 78 MONTHS ON COUNT 1 AND A TERM OF 120 MONTHS ON COUNT 2 WITH COUNT 2 TO BE SERVED CONSECUTIVE TO THE TERM IMPOSED ON COUNT 1 FOR A TOTAL SENTENCE OF 198 MONTHS.

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL PAY TO THE UNITED STATES A MANDATORY SPECIAL ASSESSMENT OF 200 DOLLARS WHICH SHALL BE DUE IMMEDIATELY.

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL MAKE RESTITUTION JOINTLY AND SEVERALLY WITH THE CODEFENDANT IN THIS CASE TO THE FOLLOWING PERSONS IN THE FOLLOWING AMOUNT TO AMSOUTH BANK IN THE AMOUNT OF 2605 DOLLARS.

THE COURT HAS NOT ORDERED RESTITUTION AS TO JACK'S

AUTO SALES FOR THE REASONS PREVIOUSLY SET FORTH IN THE RECORD.

THE DEFENDANT SHALL NOTIFY THE UNITED STATES ATTORNEY FOR THIS DISTRICT WITHIN 30 DAYS OF ANY CHANGE OF MAILING OR RESIDENCE ADDRESS THAT OCCURS WHILE ANY PORTION OF THE RESTITUTION REMAINS UNPAID.

THE COURT FINDS THE DEFENDANT DOES NOT HAVE THE ABILITY TO PAY A FINE AND THE COST OF INCARCERATION. THE COURT WILL WAIVE A FINE AND THE COST OF INCARCERATION IN THIS CASE.

UPON RELEASE FROM IMPRISONMENT, THE DEFENDANT SHALL BE PLACED ON SUPERVISED RELEASE FOR A TERM OF THREE YEARS. THIS TERM CONSISTS OF THREE YEARS ON COUNT 1 AND A TERM OF THREE YEARS ON COUNT 2. BOTH OF THESE TERMS TO RUN CONCURRENTLY.

WITHIN 72 HOURS OF RELEASE FROM THE CUSTODY OF THE BUREAU OF PRISONS, THE DEFENDANT SHALL REPORT IN PERSON TO THE UNITED STATES PROBATION OFFICE IN THE DISTRICT TO WHICH THE DEFENDANT IS RELEASED.

WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL NOT COMMIT ANOTHER FEDERAL, STATE OR LOCAL CRIME; SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT AND SHALL COMPLY WITH THE FOLLOWING ADDITIONAL CONDITIONS:

THE DEFENDANT SHALL SUBMIT TO ONE DRUG URINALYSIS WITHIN 15 DAYS AFTER BEING PLACED ON SUPERVISION, AND AT LEAST TWO PERIODIC TESTS THEREAFTER.

THE DEFENDANT SHALL PARTICIPATE IN A DRUG/ALCOHOL

TREATMENT PROGRAM UNDER THE GUIDANCE AND SUPERVISION OF THE UNITED STATES PROBATION OFFICER, AND IF ABLE CONTRIBUTE TO THE COST OF SERVICES FOR SUCH TREATMENT.

THE DEFENDANT SHALL MAKE A FULL AND COMPLETE DISCLOSURE OF FINANCES AND SUBMIT TO AN AUDIT OF HIS FINANCIAL DOCUMENTS AT THE REQUEST OF THE UNITED STATES PROBATION OFFICER.

THE DEFENDANT SHALL PAY ANY FINANCIAL PENALTY THAT'S IMPOSED BY THIS JUDGMENT AND THAT REMAINS UNPAID AT THE COMMENCEMENT OF THE TERM OF SUPERVISED RELEASE AT A RATE ESTABLISHED BY THE UNITED STATES PROBATION OFFICER IN ACCORDANCE WITH THE COURT-APPROVED PAYMENT SCHEDULE BUT AT NO LESS THAN 200 DOLLARS A MONTH.

THE DEFENDANT SHALL NOT INCUR NEW CREDIT CHARGES OR OPEN ADDITIONAL LINES OF CREDIT WITHOUT THE APPROVAL OF THE UNITED STATES PROBATION OFFICER UNLESS THE DEFENDANT IS IN COMPLIANCE WITH HIS PAYMENT SCHEDULE.

THE DEFENDANT SHALL NOT OWN, POSSESS OR HAVE UNDER HIS CONTROL ANY FIREARM, DANGEROUS WEAPON OR OTHER DESTRUCTIVE DEVICE.

THE DEFENDANT SHALL SUBMIT TO A SEARCH OF HIS PERSON AND PROPERTY, BOTH REAL AND PERSONAL, RESIDENCE, OFFICE, MOTOR VEHICLE AT REASONABLE TIMES IN A REASONABLE MANNER BASED UPON REASONABLE SUSPICION OF CONTRABAND OR EVIDENCE OF A CONDITION -- OF A VIOLATION OF A CONDITION OF RELEASE, AND

FAILURE TO SUBMIT TO SUCH SEARCH MAY BE GROUNDS FOR REVOCATION, AND THE DEFENDANT SHALL INFORM ANY OTHER RESIDENTS OF THE PREMISES THAT IT MAY BE SUBJECT TO SEIZURES AND SEARCHES SUBJECT TO THIS CONDITION.

PURSUANT TO THE LAW REQUIRING MANDATORY DNA TESTING FOR FEDERAL OFFENDERS CONVICTED OF FELONY OFFENSES, THE DEFENDANT SHALL COOPERATE IN THE COLLECTION OF A DNA SAMPLE AS DIRECTED BY THE PROBATION OFFICER.

ON COUNT 2 I INITIALLY THOUGHT THE SUPERVISED RELEASE TERM WAS UP TO THREE YEARS, IT'S UP TO FIVE YEARS. SO THE COURT VACATES ITS ORDER AS TO THE TERM OF SUPERVISED RELEASE FOR COUNT 2 FOR THREE YEARS AND IMPOSES A TERM OF FIVE YEARS SUPERVISED RELEASE WITH THAT TERM TO RUN CONCURRENT WITH THE TERM OF SUPERVISED RELEASE OF THREE YEARS IMPOSED ON COUNT 1.

THE COURT HAS IMPOSED THE SENTENCE THAT IT HAS IN THIS CASE BECAUSE IT'S APPROPRIATE UNDER THE LAW. IT'S APPROPRIATE UNDER THE UNITED STATES SENTENCING GUIDELINES, AND IT'S APPROPRIATE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

THE COURT IN REVIEWING THE UNITED STATES SENTENCING GUIDELINES, HEARING THE POSITION OF DEFENSE COUNSEL, HEARING THE STATEMENT OF THE DEFENDANT HIMSELF CONCLUDED THAT IT WAS APPROPRIATE THAT THE COURT SENTENCE THIS DEFENDANT AT THE BOTTOM AREA, BOTTOM PORTION OF THE GUIDELINE RANGE WHICH THE COURT HAS DETERMINED WAS APPROPRIATE UNDER THE CIRCUMSTANCES OF

THIS CASE AND UNDER THE UNITED STATES SENTENCING GUIDELINES.

THE COURT IN CONSIDERING THE UNITED STATES SENTENCING GUIDELINES IN THIS CASE DISCUSSED WITH COUNSEL THE PROVISIONS AND ITS CONCLUSIONS AS TO WHAT WOULD BE AN APPROPRIATE DETERMINATION OF THE DEFENDANT'S CRIMINAL HISTORY CATEGORY IF THE COURT WAS INCORRECT IN ITS VIEW OF RELATED OFFENSES AND IF IT SHOULD HAVE RULED OTHERWISE, THE CRIMINAL HISTORY CATEGORY WOULD HAVE BEEN DIFFERENT. IT WOULD HAVE BEEN THREE INSTEAD OF FOUR.

HAD HIS CRIMINAL HISTORY CATEGORY BEEN DETERMINED BY THIS COURT TO BE THREE, THE COURT STILL WOULD HAVE SENTENCED THIS DEFENDANT AT A LEVEL 28 ON COUNT 1.

THE COURT MADE THE DETERMINATION THAT THE APPROPRIATE LEVEL WAS LEVEL 4 AND SENTENCED THE DEFENDANT AT THE BOTTOM OF THAT GUIDELINE RANGE, AND HAD I DETERMINED IT TO BE A LEVEL 3, I WOULD HAVE SENTENCED HIM AT THE TOP OF THE GUIDELINE RANGE, AND NOT FAR OF YOUR REQUEST ON BEHALF OF YOUR CLIENT, MR. JONES, OR THE GOVERNMENT'S RECOMMENDATION.

ALSO, THE COURT IN DETERMINING WHAT'S AN APPROPRIATE SENTENCE IN THIS CASE ULTIMATELY HAS IMPOSED A SENTENCE REGARDLESS OF ANY MISCALCULATION OR IMPROPER DETERMINATION OF ANY GUIDELINE LEVEL OR ANY GUIDELINE DETERMINATION, THE COURT HAS IMPOSED A SENTENCE THAT IT THINKS IS RIGHT AND FAIR AND PROPER RECOGNIZING THAT THE UNITED STATES SENTENCING GUIDELINES ARE ADVISORY BUT HIGHLY ADVISORY, AND THE COURT HAS IMPOSED A

SENTENCE IN THIS CASE THAT MEETS THE MANDATORY REQUIREMENTS OF THE LAW WITH REFERENCE TO THE SENTENCING REQUIREMENTS WITH REFERENCE TO COUNT 2 IN THIS INDICTMENT, AND THE OVERALL SENTENCE IN THIS CASE IS IMPOSED FOR THE PURPOSE OF AND DOES CONSIDER THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT IN THIS CASE.

THE SENTENCE IMPOSED IS INTENDED TO REFLECT THE SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT FOR THE LAW AND PROVIDE JUST PUNISHMENT FOR THE OFFENSE.

IT IS ALSO DONE TO AVOID -- TO PROVIDE ADEQUATE DETERRENCE TO CRIMINAL CONDUCT AND TO PROTECT THE PUBLIC FROM FURTHER CRIMES OF THIS DEFENDANT.

NOW WHILE THE COURT DOES NOT BELIEVE YOUR CLIENT WILL BE ENTITLED TO OR ABLE TO PARTICIPATE IN THE BUREAU OF PRISONS 500 HOUR ALCOHOL AND DRUG PROGRAM BECAUSE OF THE USE OF A GUN IN CONNECTION WITH THIS OFFENSE, I'LL STILL GRANT YOUR RECOMMENDATION AND REQUEST, AND THE COURT RECOMMENDS THAT HE BE ALLOWED TO PARTICIPATE IN THE FEDERAL BUREAU OF PRISONS INTENSIVE DRUG AND ALCOHOL TREATMENT PROGRAM.

MR. LOPEZ, YOU HAVE A RIGHT TO APPEAL TO A HIGHER COURT FROM EVERYTHING THE COURT HAS DONE IN THE CASE ALMOST. IF YOU DO WANT TO APPEAL TO A HIGHER COURT, YOU HAVE TO DO SO WITHIN TEN DAYS FROM TODAY OR YOU FOREVER LOSE YOUR RIGHT TO APPEAL TO A HIGHER COURT.

IF YOU DO WANT TO APPEAL TO A HIGHER COURT AND YOU

DON'T HAVE THE MONEY TO HIRE A LAWYER TO HANDLE YOUR CASE ON APPEAL, THE COURT WILL APPOINT COUNSEL TO REPRESENT YOU ON APPEAL, AND YOU CAN APPEAL TO A HIGHER COURT WITHOUT ANY COST WHATSOEVER TO YOURSELF.

DO YOU WANT TO PUT ANY EXCEPTIONS IN THE RECORD, MR. JONES?

MR. JONES: CAN I RESERVE THOSE?

THE COURT: NO, YOU HAVE TO PUT THEM IN HERE.

YOU CAN OBJECT TO EVERY RULING I'VE MADE OF THE GUIDELINES WITH REFERENCE TO YOUR CLIENT IF YOU WANT TO, BUT YOU DO HAVE TO PUT THEM IN THE RECORD.

MR. JONES: SIR, I WOULD OBJECT TO YOUR RULING AS TO, FIRST OF ALL, THE OBSTRUCTION OF JUSTICE. I WOULD ALSO OBJECT TO THE FINDINGS OF THE MINIMUM SENTENCE OF 10 YEARS INSTEAD OF 7. I WOULD ALSO OBJECT TO CONSIDERING THE JUVENILE OFFENSES FROM NEWTON COUNTY AS UNRELATED FOR PURPOSES OF MR. LOPEZ' APPEAL RIGHTS.

THE COURT: ALL RIGHT. MR. TRAYNOR.

MR. TRAYNOR: NO OBJECTIONS, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH FOR HANDLING THIS CASE, MR. JONES.

MR. JONES: IT'S BEEN MY PLEASURE, SIR.

THE COURT: MR. FORSTER, IF YOU'D COME AROUND WITH YOUR CLIENT.

ANYTHING YOU WANT TO SAY BEFORE SENTENCE IS IMPOSED

IN HIS CASE?

MR. FORSTER: YOUR HONOR, I WOULD CONTINUE TO OBJECT TO THE RULINGS WITH REGARDS TO OBSTRUCTION, BUT YOU'LL ASK ME THAT IN A MINUTE, BUT GIVEN THAT THE RULINGS THAT THE COURT HAS MADE, THE GUIDELINE WOULD BE A HUNDRED TO 125 WITH A 120 THEN CONSECUTIVE, WE WOULD ASK FOR THE MINIMUM GUIDELINE SENTENCE GIVEN THE COURT'S RULINGS.

WE WOULD ASK FOR HIM -- THE PSR INDICATES THAT HE HAS BEEN IN FEDERAL CUSTODY SINCE NOVEMBER 10TH OF 04. WE WOULD ASK FOR THE COURT TO GRANT HIM CREDIT FOR ALL OF THAT TIME THAT HE HAS SERVED.

I ASKED IN MY PLEADINGS FOR A CONCURRENT SENTENCE WITH REGARDS TO COUNT 1 AND HIS STATE CHARGE. I THINK THAT WOULD BE ACCOMPLISHED -- I WOULD ASK FOR IT SPECIFICALLY, BUT I BELIEVE THAT WOULD STILL BE ACCOMPLISHED IF THE COURT GIVES HIM CREDIT FOR THE ENTIRETY OF HIS TIME IN FEDERAL CUSTODY.

HE IS SERVING A STATE SENTENCE NOW THAT HE HAS BEEN IN THE CUSTODY OF THIS COURT, AND WE WOULD ASK FOR HIS TIME TO COUNT FROM NOVEMBER OF 04 THROUGH TODAY AND THEN COUNT 1 TO RUN CONCURRENT WITH THAT SPLIT STATE SENTENCE, AND THEN, AGAIN, I WOULD REASSERT THE OBJECTIONS THAT I MADE AND THAT I HAVE ARGUED TO THIS POINT.

THE COURT: ANYTHING YOU WANT TO SAY, MR. DEAN?

DEFENDANT DEAN: YES, SIR, FIRST OFF I WOULD LIKE TO APOLOGIZE TO THE COURT FOR MY ACTIONS AND CAUSING PROBLEMS. I

WOULD LIKE TO ASK YOU TO TAKE INTO CONSIDERATIONS MY REQUEST OF MY TIME THAT I'VE ALREADY DONE AND EVERYTHING, SIR.

THE COURT: MR. TRAYNOR.

MR. TRAYNOR: YOUR HONOR, I'M LOOKING FOR THE STATUTE. I BELIEVE THE BUREAU OF PRISONS -- OUR POSITION WOULD BE THAT MR. DEAN CAME INTO STATE CUSTODY IN NOVEMBER 04, AND HE HAS BEEN WRITTED HERE, AND SO EVERY DAY HE'S HERE HE'S GETTING CREDIT AGAINST HIS STATE SENTENCE.

SO THE BUREAU OF PRISONS WILL SAY -- AND I CAN FIND THE STATUTE IN A MINUTE -- THAT THEY CANNOT GIVE HIM CREDIT BACK TO NOVEMBER 04 IN THIS SENTENCE BECAUSE HE'S ALREADY GETTING IT IN HIS STATE SENTENCE. SO I CAN'T CONCUR WITH COUNSEL'S RECOMMENDATION ON THAT.

AGAIN, IN LIGHT OF THE HIGH MINIMUM MANDATORY, WE AGREE THAT A LOW END SENTENCE IS APPROPRIATE IN THIS CASE, BUT FOR THE REASONS I STATED BEFORE, I CANNOT AGREE THAT THE COUNT 1 SENTENCE SHOULD BE CONCURRENT. WE THINK THE WHOLE FEDERAL SENTENCE SHOULD BE CONSECUTIVE TO THE SENTENCE HE'S NOW SERVING.

THE PROBATION OFFICER: YOUR HONOR, THE DEFENDANT WAS ARRESTED ON NOVEMBER 10TH, 2004. HE WAS ARRESTED ON STATE CHARGES RELATING TO THE INSTANT OFFENSE. IT'S MY UNDERSTANDING THAT HE CAME TO FEDERAL CUSTODY PURSUANT TO A WRIT. THE UNDERLYING STATE CHARGES WERE DISMISSED OR DEAD DOCKETED DECEMBER 13TH 2005.

WHENEVER THE BOP GETS THE INFORMATION AND HAS THE MARSHALS' INFORMATION, THEY WILL APPLY THE CORRECT DATE DEPENDING ON HOW YOUR HONOR RULES ON WHETHER IT'S CONCURRENT VERSUS CONSECUTIVE.

WHENEVER HE WAS IN STATE CUSTODY APPEARING FOR THE STATE CHARGES, THEY WILL PROBABLY RULE THAT A STATE DAY RATHER THAN A FEDERAL DAY.

THE COURT: ALL RIGHT. ANYTHING MORE?

MR. FORSTER: NO, SIR.

THE COURT: PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT'S THE JUDGMENT OF THE COURT THAT THE DEFENDANT CHRISTOPHER MICHAEL DEAN BE AND IS HEREBY COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF 100 MONTHS ON COUNT 1 AND A TERM OF 120 MONTHS ON COUNT 2 WITH THE SENTENCE ON COUNT 2 TO RUN CONSECUTIVE TO THE TERM IMPOSED ON COUNT 1 IN THIS COURT TO THE EXTENT NECESSARY TO PRODUCE A TOTAL TERM OF 220 MONTHS.

THIS SENTENCE SHALL ALSO RUN CONSECUTIVE, THAT IS, HIS TOTAL SENTENCE SHALL ALSO RUN CONSECUTIVE TO THE SENTENCE IMPOSED IN FLOYD SUPERIOR COURT IN CASE NUMBER 05-CR-28516-JFL-002.

IT IS FURTHER ORDERED THE DEFENDANT SHALL PAY TO THE UNITED STATES A MANDATORY SPECIAL ASSESSMENT OF 200 DOLLARS WHICH SHALL BE DUE IMMEDIATELY.

IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL MAKE

RESTITUTION JOINTLY AND SEVERALLY WITH HIS CODEFENDANT IN THIS CASE TO THE FOLLOWING ENTITY IN THE FOLLOWING AMOUNT AMSOUTH BANK, 2605 DOLLARS.

FOR THE REASONS STATED HERETOFORE IN THIS SENTENCING HEARING, THE COURT IN THIS CASE HAS NOT IMPOSED A RESTITUTION REQUIREMENT TO JACK'S AUTO SALES.

THE DEFENDANT SHALL NOTIFY THE UNITED STATES ATTORNEY FOR THIS DISTRICT WITHIN 30 DAYS OF ANY CHANGE OF MAILING OR RESIDENCE ADDRESS THAT OCCURS WHILE ANY PORTION OF THE RESTITUTION REMAINS UNDERPAID.

THE COURT FINDS THE DEFENDANT DOES NOT HAVE THE ABILITY TO PAY A FINE AND THE COST OF INCARCERATION AND THE COURT WILL WAIVE A FINE AND THE COST OF INCARCERATION IN THIS CASE.

UPON RELEASE FROM IMPRISONMENT, THE DEFENDANT SHALL BE PLACED ON SUPERVISED RELEASE FOR A TERM OF FIVE YEARS ON COUNT 2 AND A TERM OF THREE YEARS ON COUNT 1 WITH THOSE TERMS TO RUN CONCURRENTLY.

WITHIN 72 HOURS OF RELEASE FROM THE CUSTODY OF THE BUREAU OF PRISONS, THE DEFENDANT SHALL REPORT IN PERSON TO THE UNITED STATES PROBATION OFFICE IN THE DISTRICT TO WHICH THE DEFENDANT IS RELEASED.

WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL NOT COMMIT ANOTHER FEDERAL, STATE OR LOCAL CRIME; SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS COURT

AND SHALL COMPLY WITH THE FOLLOWING ADDITIONAL CONDITIONS:

THE DEFENDANT SHALL SUBMIT TO ONE DRUG URINALYSIS WITHIN 15 DAYS AFTER BEING PLACED ON SUPERVISION AND AT LEAST TWO PERIODIC TESTS THEREAFTER.

THE DEFENDANT SHALL PARTICIPATE IN A DRUG/ALCOHOL TREATMENT PROGRAM UNDER THE GUIDANCE AND SUPERVISION OF THE UNITED STATES PROBATION OFFICER, AND IF ABLE CONTRIBUTE TO THE COST OF SERVICES FOR SUCH TREATMENT.

THE DEFENDANT SHALL MAKE A FULL AND COMPLETE DISCLOSURE OF FINANCES, SUBMIT TO AN AUDIT OF FINANCIAL DOCUMENTS AT THE REQUEST OF THE UNITED STATES PROBATION OFFICER.

THE DEFENDANT SHALL PAY ANY FINANCIAL PENALTY THAT'S IMPOSED BY THIS JUDGMENT AND THAT REMAINS UNPAID AT THE COMMENCEMENT OF THE TERM OF SUPERVISED RELEASE AT A RATE ESTABLISHED BY THE UNITED STATES PROBATION OFFICER IN ACCORDANCE WITH THE APPROVED PAYMENT SCHEDULE BUT IN AN AMOUNT NOT LESS THAN 200 DOLLARS MONTHLY.

THE DEFENDANT SHALL NOT INCUR NEW CREDIT CHARGES OR OPEN ADDITIONAL LINES OF CREDIT WITHOUT THE APPROVAL OF THE UNITED STATES PROBATION OFFICER, AND THE DEFENDANT IS IN COMPLIANCE WITH THE PAYMENT SCHEDULE.

THE DEFENDANT SHALL NOT OWN, POSSESS, HAVE UNDER HIS CONTROL ANY FIREARM, DANGEROUS WEAPON OR OTHER DESTRUCTIVE DEVICE.

THE DEFENDANT SHALL SUBMIT TO A SEARCH OF HIS PERSON, PROPERTY, BOTH REAL AND PERSONAL, RESIDENCE, OFFICE, VEHICLE AT A REASONABLE TIME IN A REASONABLE MANNER BASED UPON REASONABLE SUSPICION OF CONTRABAND OR EVIDENCE OF A VIOLATION OF A CONDITION OF RELEASE.

FAILURE TO SUBMIT TO SUCH A SEARCH MAY BE GROUNDS FOR REVOCATION, AND THE DEFENDANT SHALL INFORM ANY OTHER RESIDENTS OF THE PREMISES THAT IT IS SUBJECT TO THIS CONDITION.

PURSUANT TO THE LAWS WHICH PROVIDE FOR MANDATORY DNA TESTING FOR FEDERAL OFFENDERS CONVICTED OF CERTAIN FELONY OFFENSES, THE DEFENDANT IS REQUIRED AND ORDERED TO COOPERATE IN THE COLLECTION OF A DNA SAMPLE AS DIRECTED BY THE UNITED STATES PROBATION OFFICER.

THE COURT HAS IMPOSED THE SENTENCE THAT IT HAS IN THIS CASE FOR SEVERAL REASONS. FIRST, IT COMPLIES WITH THE LAW. IT COMPLIES WITH THE PROVISIONS OF THE UNITED STATES SENTENCING GUIDELINES WHICH THE COURT RECOGNIZES ARE ADVISORY BUT HIGHLY ADVISORY.

IT COMPLIES WITH THE SENTENCING REQUIREMENTS AS TO COUNT 2. IT COMPLIES WITH THE PROVISIONS OF THE UNITED STATES SENTENCING GUIDELINES ALSO AS STATED AND FOUND TO BE APPROPRIATE WITH REFERENCE TO COUNT 1 OF THIS INDICTMENT.

THE COURT ULTIMATELY HAS ENDEAVORED TO IMPOSE A SENTENCE IN THIS CASE THAT DOES COMPLY WITH THE SPIRIT AND WORDING OF THE UNITED STATES SENTENCING GUIDELINES, BUT

ULTIMATELY IN DETERMINING WHAT SENTENCE IT SHALL IMPOSE IN THIS CASE, THE COURT HAS CONSIDERED AND UTILIZES THE MANDATE OF THE CONGRESS OF THE UNITED STATES WHICH SAYS:

IN DETERMINING WHAT IS AN APPROPRIATE SENTENCE THE COURT SHALL CONSIDER THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT.

TWO, THE NEED FOR THE SENTENCE IMPOSED TO REFLECT THE SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT FOR THE LAW AND THE PROVIDE JUST PUNISHMENT FOR THE OFFENSE, TO AFFORD ADEQUATE DETERRENCE TO CRIMINAL CONDUCT, TO PROTECT THE PUBLIC FROM OTHER CRIMES OF THE DEFENDANT AND TO PROVIDE THE DEFENDANT WITH NEEDED BOTH EDUCATIONAL OR VOCATIONAL TRAINING, MEDICAL CARE OR OTHER CORRECTIONAL TREATMENT IN THE MOST EFFECTIVE MANNER AND IN THIS PARTICULAR CASE ALSO THE KINDS OF SENTENCES AVAILABLE.

THE COURT STATES FOR THE PURPOSES OF THE RECORD THAT WITHOUT UTILIZING THE UNITED STATES SENTENCING GUIDELINES IN THIS CASE BUT IN DETERMINING WHAT IS AN APPROPRIATE SENTENCE IN THIS CASE BASED UPON THE EVIDENCE IN THE CASE, BASED UPON THE STATUTES THE DEFENDANT HAS BEEN FOUND BY A JURY TO HAVE VIOLATED, BASED UPON THE SENTENCING FACTORS SET OUT IN TITLE 18 OF THE UNITED STATES CODE, SECTION 3553(A) THAT I STATED IN THE RECORD, BASED UPON THE COURT'S EXPERIENCE, BEEN A PRACTICING LAWYER, SUPERIOR COURT JUDGE AND UNITED STATES DISTRICT JUDGE, ALL FOR SOME YEARS, THE COURT HAS IMPOSED THE SENTENCE THAT IT

HAS IN THIS CASE AS BEING THE SENTENCE REQUIRED IN ORDER TO DO JUSTICE BETWEEN THE PEOPLE AND THE DEFENDANT.

NOW, MR. DEAN, TO THE EXTENT YOU'VE NOT WAIVED -- WELL, YOU HAVEN'T WAIVED ANYTHING IN THIS CASE. YOU HAVE AN ABSOLUTE RIGHT TO APPEAL TO A HIGHER COURT THE MANY THINGS THIS COURT HAS DONE IN THIS CASE.

IF YOU DO WANT TO APPEAL TO A HIGHER COURT, YOU HAVE TO DO SO WITHIN TEN DAYS FROM TODAY OR YOU FOREVER LOSE YOUR RIGHT TO APPEAL TO A HIGHER COURT.

IF YOU DO WANT TO APPEAL TO A HIGHER COURT, THOUGH, AND YOU DON'T HAVE THE MONEY TO HIRE A LAWYER TO HANDLE YOUR CASE ON APPEAL, THE COURT WILL APPOINT COUNSEL TO REPRESENT YOU ON APPEAL, AND YOU CAN APPEAL TO A HIGHER COURT WITHOUT ANY COST WHATSOEVER TO YOURSELF, BUT IF YOU DO WANT TO APPEAL TO A HIGHER COURT, REMEMBER YOU MUST FILE THAT APPEAL WITHIN TEN DAYS FROM TODAY OR YOU FOREVER WILL LOSE YOUR RIGHT TO APPEAL TO A HIGHER COURT.

DO YOU WANT TO PUT ANY EXCEPTIONS IN THE RECORD, MR. FORSTER?

MR. FORSTER: YOUR HONOR, I WOULD OBJECT TO THE COURT'S SUSTAINING OF THE PSR'S TWO POINTS FOR OBSTRUCTION. I OBJECTED TO THAT.

I WOULD OBJECT TO THE COURT'S FAILURE TO GIVE A REDUCTION OF TWO POINTS FOR ACCEPTANCE, AND I OUTLINED ALL THAT.

I WOULD CONTINUE TO OBJECT TO THE TEN YEARS CONSECUTIVE VERSUS THE SEVEN YEARS ON THE 924(C) COUNT, THE ACCIDENTAL DISCHARGE, AND I SET FORTH MY ARGUMENTS ON THAT.

I WOULD OBJECT TO THE COURT'S SENTENCING MR. DEAN IN A CRIMINAL HISTORY 6 FOR THE REASONS THAT I HAVE ALL SET FORTH. SO I WILL CONTINUE TO LODGE THOSE SAME OBJECTIONS.

THE COURT: ALL RIGHT. WELL THANK YOU.

MR. TRAYNOR.

MR. TRAYNOR: I HAVE NO OBJECTIONS, YOUR HONOR.

THE COURT: WELL, MR. FORSTER, THANK YOU VERY MUCH FOR REPRESENTING THIS GENTLEMAN.

MR. FORSTER: MY PLEASURE, JUDGE.

THE COURT: ALL RIGHT. IF THERE IS NOTHING FURTHER, WE'LL BE IN RECESS.

MR. TRAYNOR: NOTHING FURTHER, YOUR HONOR.

(PROCEEDINGS CONCLUDED.)

C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, ANDRE G. ASHLEY, DO HEREBY CERTIFY THAT I AM A U.S. DISTRICT REPORTER FOR THE NORTHERN DISTRICT OF GEORGIA, THAT I REPORTED THE FOREGOING AND THE SAME IS A TRUE AND ACCURATE TRANSCRIPTION OF MY MACHINE SHORTHAND NOTES AS TAKEN AFORESAID.

IN TESTIMONY WHEREOF I HAVE HEREUNTO SET MY HAND ON THIS 16TH DAY OF NOVEMBER, 2006.

ANDRE G. ASHLEY
OFFICIAL COURT REPORTER
NORTHERN DISTRICT OF GEORGIA