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March 1, 1994

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Re: United States v. Alfred W. Trenkler, Cr. No. 92-10369-Z:  
Government's Objection to Pre-Sentence Report

The Government hereby objects to Paragraph 130 of the Pre-Sentence Report ("PSR"), which states, in pertinent part, that "a downward departure may be warranted" defendant Alfred W. Trenkler ("Trenkler"), purportedly under the language of Application Note 1 to § 2A1.1 of the Sentencing Guidelines. For reasons more fully set forth below, this is an absurd result, permitted by no reasonable reading of the pertinent sentencing provision. To the contrary, because Officer Hurley's death was, as charged in the Superseding Indictment, found by the jury and noted within the PSR, "perpetrated from a premeditated design", no lesser state of mind may be ascribed to Trenkler and thus no departure on any such claimed grounds is available.

A. APPLICATION NOTE 1 ADDRESSES TWO CATEGORIES OF FIRST DEGREE MURDER: PREMEDITATED KILLINGS AND "FELONY MURDER"

Application Note 1 to § 2A1.1 ("First Degree Murder") of the Sentencing Guidelines (hereinafter, "Application Note 1") reads, in pertinent part, as follows:

1. The Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing. However, this guideline also applies when death results from the commission of certain felonies. Life imprisonment is not necessarily appropriate in all such situations. For example, if in robbing a bank, the defendant merely passed a note

to the teller, as a result of which she had a heart attack and died, a sentence of life imprisonment clearly would not be appropriate.

If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, the Commission does not envision that departure below that specified in §2A1.2 (Second Degree Murder) is likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

The first paragraph of Note 1, therefore, explicitly addresses sentencing on two possible categories of First Degree Murder: 1) premeditated killing; and 2) felony murder (i.e., "However, this guideline also applies when death results from the commission of certain felonies"). Whereas "life imprisonment is the appropriate punishment for premeditated killing", Application Note 1 goes on to state that the same may not hold true in all cases of the latter category of murder (i.e., "Life imprisonment is not necessarily appropriate in all such [felony murder] situations").

The second paragraph of Application Note 1 addresses sentencing only as regards instances where "the defendant did not cause the death intentionally or knowingly" and thus deals solely with the latter category of First Degree Murder -- felony murder. Correspondingly, only in the felony murder category of § 2A1.1 (First Degree Murder) may a downward departure even possibly be considered.<sup>1</sup>

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<sup>1</sup> In such a case, the second paragraph of Application Note 1 indicates that the extent of any such departure should be based on, among other things, "the defendant's state of mind (e.g., recklessness or negligence), . . ." A fortiori, this inquiry has no application to premeditated killings, and therefore, the language appearing in the second paragraph of Note 1 can apply only to felony murder situations,

B. JEREMIAH HURLEY'S DEATH RESULTED FROM A PREMEDITATED DESIGN TO KILL ANOTHER

The PSR conducts its Offense Level Computation within ¶¶ 49 through 62; the Total Offense Level in these circumstances is determined (at ¶ 62) to be level 45.<sup>2</sup> In pertinent part, the PSR states that guidelines for the substantive offenses of conviction (Count Two: 18 U.S.C. § 844(d); and Count Three: 18 U.S.C. § 844(i)) are found at Guideline § 2K1.4. That guideline section, in turn, directs that "if death resulted, apply the most analogous guideline from Chapter TWO, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined by using the 2K1.4 guideline." (PSR, ¶ 51).

The PSR goes on to note (at PSR, ¶ 52) that "a death did result"; accordingly, the probation office went on to examine Title 18 U.S. Code § 1111(a) which defines "murder" as:

. . . the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; . . . or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

(See PSR, ¶ 53).

Most pertinent here, the PSR goes on to observe that:

The defendant was convicted on Counts One, Two and Three. Count One charges that Thomas A. Shay and Alfred W. Trenkler did knowingly combine, conspire and agree with one another to receive explosives in interstate commerce with the knowledge and intent that the same would be used to kill, injure and intimidate another individual . . . . The death of Jeremiah Hurley was premeditated; the bomb was built and placed under Thomas Shay Sr.'s car, to cause his death. Although, Jeremiah Hurley was not the intended victim in this case, his death resulted from a premeditated design to kill another, namely, Thomas Shay, Sr.

<sup>2</sup> Under "Part D: Sentencing Options", the PSR computes the guideline imprisonment range (Total Offense Level 45; Criminal History I) at life imprisonment. PSR, ¶ 113.

(PSR, ¶ 54).

Accordingly, the PSR determined that the "details of this offense fit the definition provided by Title 18 U.S. Code § 1111(a), and the most analogous guideline from Chapter Two, Part A is U.S.S.G. § 2A1.1, First Degree Murder." (PSR, ¶ 54).

C. BECAUSE JEREMIAH HURLEY'S DEATH RESULTED FROM A PREMEDITATED DESIGN TO KILL ANOTHER, THE "FELONY MURDER" LANGUAGE APPEARING IN GUIDELINE § 2A1.1 (SECOND PARAGRAPH) HAS NO APPLICATION TO THIS SENTENCING AND NO DOWNWARD DEPARTURE IS POSSIBLE

Notwithstanding the PSR's determinations: that First Degree Murder is the most appropriate guideline conforming to the circumstances underlying the substantive offense of conviction; and further, that Officer Hurley "was not the intended victim in this case" but whose death was "premeditated", the PSR states as follows:

As Alfred Trenkler did not intend the death of Officer Jeremiah Hurley, a downward departure may be warranted.

(PSR, ¶ 130).

In this respect, the PSR makes express reference to Application Note 1 to Guideline § 2A1.1:

Application Note 1 directs that if the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. . . . As Alfred Trenkler did not intend the death of Officer Jeremiah Hurley, a downward departure may be warranted . . . .

PSR, ¶ 130, citing Application Note 1 (emphasis supplied).

This result is a patent absurdity, reflecting a concern dealing solely with the identity of the ultimate victim, as opposed to the dispositive feature of the defendant's state of mind. Clearly, this result is one not contemplated by the drafters of the Guidelines and certainly not permitted under any reasonable construction of the language appearing in Application Note 1.

As is explained supra, the pertinent language from the second paragraph of Note 1, quoted above ("If the defendant did not cause the death intentionally or knowingly . . .") has potential application only with respect to non-premeditated/felony murder killings. By definition, that

language can have no application in circumstances, such as ours, dealing with death resulting from a premeditated design.

The difficulties arising from attempting to apply the "felony murder" language appearing in the second paragraph of Note 1 to our circumstances is plain from the outset: One clearly sees that the PSR's determination that a downward departure may be warranted is both wholly at odds with its own straightforward acknowledgement that Jeremiah Hurley's death was the result of premeditated design (see PSR, paragraph 51-54) and does violence to fundamental rules of construction. See, e.g., United States v. Ferryman, 897 F.2d 584, 589 (1st Cir. 1990) (statutes must always be interpreted with view toward avoiding absurd results and resolving internal inconsistencies), citing United States v. Turkette, 452 U.S. 576, 580 (1981); Hernandez-Colon v. Secretary of Labor, 835 F.2d 958, 960 (1st Cir. 1988).

The PSR's determination that a downward departure may be warranted in this case stems from erroneously applying, and then construing, Application Note 1 such that it reads: "If the defendant did not cause the death [of Jeremiah Hurley] intentionally or knowingly, a downward departure may warranted." Where, such as here, premeditation is involved, the identity of the ultimate victim can have no possible bearing on sentencing.

There is no dispute that Trenkler did not intend to kill Officer Hurley by means of the remote-controlled explosive device planted under the Buick automobile belonging to Shay Sr. Nor can there be any dispute, however, that Trenkler intended, by premeditated design, to kill Shay Sr. by means of that device. (See PSR, ¶¶ 29 and 54). The net result of the PSR's application and construction of this inapposite "felony murder" language to this case, then, is a potential reward to Trenkler for succeeding in killing one other than his target.

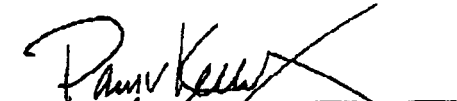
This is an absurd result, one which reflects the erroneous construction underlying it and which calls into question both the application and construction of Note 1 as appears in the PSR. For the foregoing reasons, the government objects. Under the


Offense Level determinations set forth within the PSR, the language of the applicable guideline and Application Note 1 thereto, no downward departure is permitted.

Very truly yours,

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