

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>Criminal No. 05-66 (PLF)</b>
	:	
v.	:	
	:	
<b>WALTER ANDERSON,</b>	:	
	:	
<b>aka Mark Roth,</b>	:	
<b>Defendant.</b>	:	

**GOVERNMENT'S SUPPLEMENTAL MEMORANDUM IN AID OF SENTENCING**

Comes now the United States, by its attorney, the United States Attorney for the District of Columbia, and submits this Supplemental Memorandum in Aid of Sentencing to restate its position with respect to the sentence this Court should impose for the District of Columbia fraud conviction.

As the government indicated in its Memorandum in Aid of Sentencing, the District of Columbia had an indeterminate sentencing system for offenses committed prior to August 5, 2000, and as such, the government advised the Court that the appropriate sentence in this case should be an indeterminate one. Specifically, the government requested the Court to impose a 40 month to ten year period of incarceration and an order of restitution based upon the tax loss resulting from defendant's conduct in the District of Columbia. See Exhibit 26A. The indeterminate system, however, changed to a determinate sentencing scheme for offenses committed on or after August 5, 2000. The fraud offense to which defendant pled guilty is a "straddle" offense; that is, the relevant conduct occurred both before and after the effective date for the new determinate sentencing system. See Count XI ("Beginning on or about January 1, 1999, and continuing through on or about October 23, 2000"). For the reasons set forth below,

the government believes defendant should be sentenced under the determinate sentencing system to an eight year period of incarceration and an order of restitution.<sup>1</sup>

### **LEGAL ARGUMENT**

Pursuant to 24 D.C. Code §403.01, for offenses committed on or after August 5, 2000, the Court must impose a determinate sentence and a period of supervised release. The statute further provides for a separate period of imprisonment should an offender violate the terms of supervised release. See 24 D.C. Code §403.01(b)(7). Unlike in the federal system, violations of supervised release are determined by the U.S. Parole Commission. The maximum period of incarceration the Court may impose is the statutory maximum less the period of imprisonment which may follow revocation of supervised release (so as to not exceed the maximum period of punishment prescribed by statute). 24 D.C. Code §403.01(b-1). Applied to the fraud charge at issue in this case, the maximum period of incarceration the Court may impose is 8 years. This is because the statutory maximum is 10 years and the period of incarceration the U.S. Parole Commission may impose upon revocation of supervised release is 2 years. See 24 D.C. Code §403.01(b)(7) (C). The Court must also impose a 3 year period of supervised release. 24 D.C. Code §403.01(b)(2)(B).

This determinate sentencing system was an outgrowth of a mandate from the United States Congress to impose a system of truth in sentencing for certain felony offenses. See 24 D.C. Code 111 (111 Stat. 741, Pub. L. 105-33 (August 5, 1997) (“D.C. Revitalization Act”). Congress mandated that a truth in sentencing commission be established to recommend a new

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<sup>1</sup>The government’s argument regarding aggravating circumstances still apply, and therefore, continues to urge this Court to sentence defendant outside the advisory guidelines to the maximum punishment permitted under law.

sentencing scheme for certain more serious felony offenses (not including fraud). Sentencing for these felony offenses were required to meet certain standards of truth in sentencing and were required to become effective for felonies committed on or after August 5, 2000. 24 D.C. Code § 112 (a) and (b). Congress also required that felony sentences meet truth in sentencing standards and that the Court, when imposing sentence, consider factors quite similar to those of 18 U.S. C. §3553(a). See 24 D.C. Code §112(b)(2) (requiring the sentencing court to consider seriousness of the offense, history of the offender, just punishment, deterrence, and the needs of the offender). The City Council later adopted a recommendation of the District of Columbia Advisory Sentencing Commission and concluded that it was a more prudent course to apply these standards to all felonies and not just to the specific offenses prescribed by Congress. See 24 D.C. Code §403.01; Report of the Council of the District of Columbia, Committee on the Judiciary, Bill 13-696, the “Sentencing Reform Amendment Act of 2000” (May 24, 2000); Report of the District of Columbia Advisory Sentencing Commission at 12-17 (April 5, 2000).

The issue posed by the facts in this case is which sentencing scheme – determinate or indeterminate – applies when the offense of conviction straddles the effective date for the determinate sentencing system. There is no authority from the D.C. Court of Appeals on this point, nor does the legislative history of the relevant statutes appear to shed any light on the issue. Federal courts considering whether offenses which straddled the effective date of the federal sentencing guidelines, however, uniformly have held that the guidelines apply to continuing offenses that were committed both before and after the effective date of the guidelines. Story v. United States, 891 F.2d 988 (2<sup>nd</sup> Cir. 1989); Hebeka v. United States, 89

F.3d 279 (6<sup>th</sup> Cir. 1996); Kohl v. United States, 972 F.2d 29, 297-298 (9<sup>th</sup> Cir. 1992) (and cases cited therein).

In Story, for example, the sentencing court was faced with a defendant who had been convicted of a narcotics trafficking conspiracy in which overt acts in furtherance of the conspiracy were committed both before and after November 1, 1987, the effective date of the federal sentencing guidelines. The Second Circuit first reviewed the legislative history and concluded that while it was contradictory, the prevailing purpose of the effective date provision appeared to be to avoid *ex post facto* Constitutional challenges. The Court of Appeals went on to note that since the guidelines did not increase punishment, application of the guidelines to straddle offenses did not implicate *ex post facto* concerns. Likewise, application of the guidelines did not necessarily translate to higher sentences imposed, although the court noted that might often be the case. Finally, the court observed that a primary purpose in imposing a guidelines system was to lessen disparity and provide greater consistency.

The rationale applied by the Second Circuit applies with near equal force in this case. While the legislative history is silent on the meaning and purpose of the effective date language of the determinate sentencing statute, the language used is similar to that used for the federal guidelines in that both require application of a new system for offenses committed after a certain date. The seeds for the determinate sentencing system now in effect in the District of Columbia were sown by the United States Congress in the Revitalization Act. Indeed, it was an act of Congress that first imposed a determinate sentencing scheme for certain felonies committed on or after August 5, 2000. See 24 D.C. Code §112(a). Accordingly, it is reasonable to construe the

determinate sentencing effective date language similarly to the way in which federal courts uniformly have interpreted the effective date language for the sentencing guidelines.

Moreover, just as with the federal sentencing guidelines, the determinate sentencing system in the District of Columbia did not increase punishment for offenses. Instead, it mandated truth in sentencing by requiring greater certainty and predictability in the sentences imposed and the time offenders actually would serve. Under the indeterminate sentencing system, an offender was sentenced to a range of imprisonment in which the minimum period of incarceration was one third of the maximum period of incarceration (40 months to 120 months, for example). Within this lengthy period, it was up to the D.C. Parole Board and not the sentencing judge to determine the length of actual imprisonment. In the determinate sentencing system, the judge sets the period of incarceration, just as in the federal system, and the only additional punishment is defined by statute and applies upon revocation of supervised release. Accordingly, applying the determinate sentencing scheme to straddle offenses promotes the purpose of the determinate sentencing scheme and in no way implicates ex post facto Constitutional concerns.

### **CONCLUSION**

For these reasons, the government believes the Court should impose a determinate sentence in this case. Because this issue has not been settled by either appellate court in this jurisdiction, the government urges the Court to state on the record the sentence the Court would impose were the indeterminate sentencing scheme applicable. This will make clear the Court's

intent in imposing sentence and will obviate the need for remand should the Court of Appeals conclude the indeterminate sentencing scheme applies to straddle offenses.

Respectfully submitted,

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