UNITED STATES DISTRICT COURT
**Sentenced 12/16/99** DISTRICT OF MAINE

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| UNITED STATES OF AMERICA |
| v. Criminal No. 98-61-P-C |
| COLEMAN BEELER |

[Indictment 3 Counts]

[Count I: Malicious Destruction of Vehicle by Explosive Materials B 18 U.S.C. § 844(i)

Count II: Conspiracy to Maliciously Destroy Vehicle by Explosive Materials B 18 U.S.C. § 371

Count III: Possession of Unregistered Firearm (Destructive Device), Aiding and Abetting B 26 U.S.C. §§ 5861(d), 5871, and 2]

# **AMENDED** MEMORANDUM OF SENTENCING JUDGMENT

## I. GUIDELINES COMPUTATION[1]

[1]U.S.S.G. § 3D1.2 requires that a count charging conspiracy and a count charging any substantive offense that is the sole object of the conspiracy be grouped together as a single group. Thus, in this case, Counts I and II are grouped together. There is no dispute between the parties to this proposition.

The Government contends, however, that Count III should not be grouped with Counts I and II. It contends, rather, that a multiple-count adjustment should be made, pursuant to § 3D1.4, consisting of one (1) unit for Count III and one-half (½) unit for Counts I and II, which would result in a one (1) level enhancement of the offense level. The Government's rationale is that the use of the destructive device as charged in Count III is a different element of criminal conduct than the simple possession of the device as charged in Count I and that that element of conduct does not involve the same harm as does the offense charged in Counts I and II.

The Court does not dispute the factual predicate for the Government's rationale. The Court concludes, however, that the rationale overlooks entirely the thrust of § 3D1.2(c):

> When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

"A principal purpose of § 3D1.2(c) is to combine like offenses so as to prevent multiple punishment or double counting for substantially identical offense conduct." *United States v. Gelzer*, 50 F.3d 1133 at 1143 (2d Cir. 1995). The Introductory Commentary to part 3D of the Guidelines states that the purpose of the part is "to provide incremental punishment for significant additional criminal conduct." It explains that those sections that concern grouping of offenses prevent "multiple

(continued...)

A. Base Offense Level[2]

The Court FINDS as follows:

Counts I and II - Malicious Destruction of Vehicle by Explosive Materials; Conspiracy

(a) Base Offense Level: The applicable United States Sentencing Commission Guideline for violation of 18 U.S.C. § 844(i) is found in U.S.S.G. § 2K1.4. The Court FINDS, for reasons stated on the record at the imposition of sentence, that the offense conduct involved the placement of a pipe bomb in the rear wheel well of a car parked outside an occupied multiple-family residence Defendant believed to be that of the intended victim of the bombing, thus creating a

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[1](...continued)
punishments for substantially identical offense conduct." Section 3D1.2 itself addresses grouping of "counts involving substantially the same harm" and subsection (c) is an effort to define such counts in part. The principal purpose of § 3D1.2 is to avoid punishment of defendants twice for the same underlying conduct. This commentary "is entitled to controlling weight from the Courts unless it violates the Constitution or a federal statute or is inconsistent with, or a plainly erroneous reading of, that guideline." *United States v. Chen*, 127 F.3d 286 at 291 (2d Cir. 1997).

Here, in computing the offense level on Count III, the Court will establish, pursuant to § 2K2.1(a)(4)(B), a Base Offense Level of "20." *See* Count III(b) at 2, *infra*. It will then impose a four (4) level enhancement of the offense level, pursuant to § 2K2.1(b)(5) for use of the destructive device "in connection with the felony offenses of drug trafficking and criminal mischief. *See* Count III(d) at 2, *infra*. Hence, the particular use made of the device while Defendant possessed the device is factored into the determination of the final offense level for Count III. Thus, in the words of § 3D1.2(c), the conduct embodied in Count I has been "treated as a specific offense characteristic in . . . [and] adjustment to, the guideline applicable to . . ." Count III. Ergo, Count III is a count "involving substantially the same harm" as Count I and shall be grouped with it pursuant to § 3D1.2 for purposes of determining the offense level.

Support for this result, by analogy, is to be taken from Application Note 5 to § 3D1.2, wherein it is stated ". . . use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under . . . [subsection (c)]." The rationale for this statement is easily demonstrated by referring to § 2B3.1, the guideline prescribing the requirements for setting the offense level for robbery. The guideline provides in subsection (a) a Base Offense Level of "20" for robbery. It then provides in subsection (b)(2)(A)-(C) for a series of graduated specific offense characteristics if a firearm is discharged, otherwise used, brandished, displayed, or possessed in the course of the offense conduct. Thus, the use or possession of the firearm is an element of offense conduct that is treated as a specific offense characteristic in and adjustment to the offense level for the crime of robbery. Hence, a separate count charging the defendant in the same case with the use or possession of the firearm in the course of the robbery must be, as stated in Application Note 5, grouped with the count charging the robbery. *United States v. Hines*, 26 F.3d 1469 at 1475 (9th Cir. 1994), *dicta*. The applicable rationale to be extracted from that circumstance is precisely applicable to the present case.

Accordingly, the Court CONCLUDES that Count III is to be grouped with Counts I and II for purpose of determining the offense level.

[2]The 1998 edition of the Guidelines Manual was used to determine sentence in this case.

substantial risk of death or serious bodily injury and endangering a dwelling. The Court FURTHER CONCLUDES that a Base Offense Level of Level "20" is required.

(b) Adjustment for Role in the Offense: The Court FINDS, for reasons stated on the record at imposition of sentence, that Defendant Beeler was an organizer and leader of the offense conduct involving himself and co-defendant Feyler and CONCLUDES that, pursuant to § 3B1.1(c), the Base Offense Level is to be increased by two (2) levels, to Level "22."

Count III B Possession of Unregistered Firearm (Destructive Device)

(c) Base Offense Level: The applicable United States Sentencing Commission Guideline for violation of 26 U.S.C. § 5861(d) is found in U.S.S.G. § 2K2.1(a)(4)(B). The Court FINDS that the Defendant is a "prohibited person" and that the offense conduct involved a firearm (destructive device) as described in 26 U.S.C. § 5845(a). The Court CONCLUDES that a Base Offense Level of Level "20" is required. There is no objection to this finding and conclusion.

(d) Specific Offense Characteristic: The Court CONCLUDES that pursuant to U.S.S.G. § 2K2.1(b)(3), the offense level is increased by two (2) levels, to Level "22," because the Court FINDS that the offense conduct involved a destructive device. There is no objection as to this finding and conclusion.

(e) Specific Offense Characteristic: The Court FINDS that Defendant used the destructive device in connection with the felony offenses of drug trafficking and aggravated criminal mischief and CONCLUDES that, pursuant to U.S.S.G. § 2K2.1(b)(5), the offense level is increased by four (4) levels, to Level "26."

(f) Adjustment for Role in the Offense: The Court FINDS, for reasons stated on the record at imposition of sentence, that Defendant Beeler was an organizer and leader of the offense conduct involving himself and co-defendant Feyler and CONCLUDES that, pursuant to § 3B1.1(c), the Base Offense Level is to be increased by two (2) levels, to Level "28."

(g) Adjustment for Obstruction of Justice: The Court DENIES the Government’s request for a two (2) level enhancement of the Base Offense Level, pursuant to § 3C1.1, for obstruction of justice, FINDING that the Government has failed to prove by a preponderance of the evidence that Defendant did the predicate acts with the intent to obstruct the course of the investigation conducted by Special Agent Robitaille or otherwise.

The Court CONCLUDES that the Adjusted Offense Level is Level "28."

The Court FURTHER FINDS that Defendant is eligible to have the Base Offense Level decreased to Level "26" under the provisions of § 3E1.1(a), based upon Defendant's acceptance of responsibility for the offense conduct. The Court FINDS that Defendant has accepted responsibility for the offense of conviction sufficiently to justify a two (2) level reduction in the Base Offense Level. The Court REJECTS Defendant's claim for a further one (1) level reduction pursuant to § 3E1.1(b), FINDING, for reasons stated on the record at imposition of sentence, that the Defendant's guilty plea was not timely entered.

The Court CONCLUDES that Defendant's Adjusted Total Offense Level is Level "26," and his Criminal History Category is Category V.

## II. ELEMENTS OF SENTENCE

### A. Findings

The Court FINDS the facts to be as set out in the factual paragraphs of the Report to which no objection has been taken, counsel advising the Court that there is no dispute as to the facts as therein stated.

### B. Custody

Based on an Adjusted Total Offense Level of Level "26," and a Criminal History Category of V, the Count CONCLUDES that the applicable Guideline range on Counts I and III is one hundred ten (110) to one hundred thirty-seven (137) months. On Count II, however, the statutory maximum sentence prescribed by 18 U.S.C. § 371 is sixty

(60) months, which becomes, by displacement, the Guideline sentencing range on Count II.

C. Supervised Release

The Court CONCLUDES that a minimum term of two (2)years of Supervised Release is mandated and a term of three (3) years of Supervised Release is authorized on each of Counts I, II, and III pursuant to Guideline § 5D1.2(a)(2) if a term of imprisonment of over one (1) year is imposed. The Court FINDS that a term of three (3) years Supervised Release is required for future protection of the public and to maximize this Defendant's potential for rehabilitation once released from incarceration.

D. Probation

The Court CONCLUDES that Defendant is not eligible for admission to probation under U.S.S.G. § 5B1.1(a)(1).

E. Findings With Respect to Fines

In respect to the fine determination, the Court makes the following findings: (1) that the Guideline range for a fine is Twelve Thousand Five Hundred Dollars ($12,500.00) to One Hundred Twenty-Five Thousand Dollars ($125,000.00) under Guideline § 5E1.2(c)(3); and (2) that Defendant is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of any fine, including the additional fine required by § 5E1.2(i), and such fines are hereby ORDERED to be WAIVED pursuant to the terms of subsections (i) and (f) of Guideline § 5E1.2. The

Court, having considered alternative sanctions in lieu of the waived fines, FINDS no sanction to be available.

## F. Restitution

Pursuant to 18 U.S.C. § 3663, restitution is appropriate and required. The Court FINDS that the amount of the loss subject to a restitutionary obligation is Ten Thousand Sixty-Five Dollars and Forty-Five Cents (10,065.45).[3]

## G. Departure

[3] The Court's determination of the joint and several restitutionary obligation of the two Defendants in this case has been accomplished by the following findings and analysis:

(a) With respect to the loss of the value of her automobile sustained by the victim, Dorothy Nickerson, as a result of the offense conduct, the Court accepts the Government's rationale as proposed on the final day of the sentencing hearing herein. That rationale is that her loss in the circumstances is the difference in the retail market value of the car (as determined by Exhibit 9) and the amount for which the victim could have purchased the vehicle pursuant to the lease at the end thereof. The Court FINDS the first figure to be $15,825.00 and the second to be $12,421.00, for a differential loss of $3,404.00. The Court FINDS that the victim's decision to return the bombed vehicle five months before the end of her current lease and to purchase a new car unrelated to the bombing incident to be reasonable and a foreseeable consequence of the offense conduct. Accordingly, the Court FINDS that the amount of $145.00, representing the amount of the increase in the victim's monthly car payments for the replacement vehicle over the five-month period remaining on the lease, is sufficiently connected causally to the offense conduct to also be the subject of restitution. The Court FURTHER FINDS that the victim's loss occasioned by the need to pay the $250.00 deductible amount under her car insurance policy in order to obtain the repair of the vehicle is also a loss attributable to the offense conduct properly subject to restitution by the Defendants.

(b) The Court FINDS that there is a sufficient causal link between the offense conduct and the victim's psychotherapy costs of $1,000.00 for treatments she underwent as a result of the offense conduct to justify their restitution to her by these Defendants.

(c) The Court DENIES the claim of the Government for inclusion in the restitutionary obligation the amount of $1,380.00 left due over the remaining five months of the victim's auto lease on the theory that the victim was, presumably, required by the lease, in any event, to pay that amount in order to obtain the right at lease-end to purchase the car for $12,421.00. The Court has awarded restitution for the difference between that amount and the car's retail market value at the end of the lease. To also award the balance of the required lease payment would be duplicative.

(d) The Court also DENIES the claim to include in the restitutionary obligation the victim's rental payment of $745.00 for the month she lived away from her apartment because of the psychic effect of the offense conduct upon her for the reason that this does not represent an actual pecuniary loss to the victim. Whether she lived in the apartment or not during the period of the lease, she was, presumably, obligated to make the monthly rental payments. Hence, living away from the apartment does not occasion a pecuniary loss.

(e) Hence, the Court has determined the restitutionary obligation to Dorothy Nickerson to be made up of the following elements of loss and amounts:

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| 1) Loss of Value of the Car: | $3,404.00 |
| 2) Increased Payment on New Car for five months | 145.00 |
| 3) D. Nickerson's Insurance Deductible Payment | 250.00 |
| 4) D. Nickerson's Psychotherapy Expense | 1,000.00 |
| Total | $4,799.00 |

(f) In addition, the Court AWARDS to the victim's insurance carrier, Progressive Insurance Company, the cost of obtaining the repair of the bombed vehicle in the amount of $5,266.45, to which there is no objection.

(g) The Court, on the foregoing rationale and findings, CONCLUDES that the total, joint and several, restitutionary obligation of the two Defendants in this case is S10,065.45.

The Court CONCLUDES that there is no reason to justify a departure from the Guideline range, neither party requesting such a departure.

## III. JUDGMENT

Pursuant to the Sentencing Reform Act of 1984, it is hereby ADJUDGED that on Counts I, II, and III of the Indictment herein, the Defendant, Coleman Beeler, be, and he is hereby, COMMITTED to the custody of the United States Bureau of Prisons to be imprisoned for a term of One Hundred Thirty-Seven (137) months on Count I, Sixty (60) months on Count II, and One Hundred Twenty (120) months on Count III (the upper limit of the Guideline range being displaced by the upper limit of ten (10) years specified in 26 U.S.C. § 5871), to be served concurrently with each other.

The Court intends that Defendant receive credit for any time he has spent in presentence detention.

It is FURTHER ADJUDGED that upon release from imprisonment, Defendant shall be placed on Supervised Release for a term of three (3) years on each of Counts I, II, and III, to be served concurrently.

It is ORDERED that within seventy-two (72) hours of release from the custody of the Bureau of Prisons, Defendant shall report in person to the probation office in the district to which Defendant is released.

It is FURTHER ADJUDGED that while on Supervised Release, Defendant shall comply with the standard conditions of Supervised Release that have been adopted by this Court, and shall comply with the following additional conditions:

(1) Defendant shall not commit another federal, state, or local crime.

(2) Defendant shall fully abstain from use or possession of all contraband substances and intoxicants during the period of his Supervised Release and shall participate in a program of drug and alcohol abuse therapy to the satisfaction of his supervising officer during the period of his Supervised Release, which may include testing to determine whether Defendant has made any use of drugs or intoxicants. Defendant shall pay/co-pay for services provided during the course of such treatment, to the supervising officer's satisfaction.

Defendant shall submit to one (1) drug test within fifteen (15) days of release from imprisonment and at least two (2) periodic tests thereafter, as directed by the supervising officer.

(3) Defendant shall provide the supervising officer with access to any requested financial information.

(4) Defendant shall not incur new credit charges or open additional lines of credit without the approval of the supervising officer.

(5) Defendant shall pay any balance of the restitution imposed that remains unpaid at the commencement of his term of Supervised Release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of the Judgment herein.

(6) Defendant shall not own or possess any firearm, as defined in 18 U.S.C. § 921, or other dangerous weapon, or knowingly be at any time in the company of any person known by him to possess any firearm or other dangerous weapon, during the period of Supervised Release.

(7) Defendant shall have no communication or contact with codefendant Bryant Feyler.

(8) Defendant shall participate in a program of mental health treatment, as directed by the supervising officer, until such time as Defendant is released from the program by the supervising officer. Defendant shall pay/co-pay for services provided during the course of such treatment, to the supervising officer's satisfaction.

It is FURTHER ORDERED that Defendant make restitution in the total amount of Ten Thousand Sixty-Five Dollars and Forty-Five Cents ($10,065.45), as follows:

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| Dorothy Nickerson | $ 4,799.00 |
| Progressive Insurance Company<br>P.O. Box 43258<br>Richmond Heights, OH 44143 | $ 5,266.45 |
| Total: | $10,065.45 |

There is no objection preserved to the restitutionary award to Progressive Insurance Company.

Said restitutionary obligation is joint and several with that of codefendant Bryant Feyler. Restitution shall be made in regular monthly payments (to be determined in amount by the supervising officer) to be paid to the United States District Court Clerk's Office for transfer to the payee. During the period that such restitutionary payments are made, Defendant shall submit annual financial reports fully detailing his financial condition to his supervising officer.

The Court ORDERS that all fines in this case be, and they are hereby, WAIVED.

The Court hereby ORDERS that no assessment be made against this Defendant to defray, or reimburse for, the costs of his incarceration.

IT IS FURTHER ORDERED that Defendant shall pay forthwith to the United States a special assessment of Three Hundred Dollars ($300.00).

## IV. CONCLUSION

The Court stated the reasons for this sentence on the record at imposition of sentence as follows:

> I shall be very brief in stating the reasons for this sentence. They may properly be briefly stated. It is the Court's well-considered view that the abysmal stupidity of this offense conduct is exceeded only by the malice, rage, and social irresponsibility of this Defendant which motivated that conduct. The actual harm to Ms. Nickerson and her son has been immense. The

> potential harm to her and others was even greater.
>
> Especially in this day and age, society cannot accept placidly the gratuitous, mindless violence of civil bombing, nor will the Court condone such conduct by any response that even smacks of leniency. This is conduct which warrants a zero tolerance response. There is no room for any treatment in sentencing in this case that even suggests leniency, within the precincts of effective and needed general deterrence, proper punishment for thoroughly reprehensible and dangerous conduct, and hopeful motivation of the rehabilitation of the sense of personal and social responsibility of the offender. This is absolutely outrageous conduct and fully warrants the maximum punishment the law permits. I have given this Defendant every consideration that I can conclude the law permits him to have under the sentencing guidelines. There is simply no credible reason for him to have any more.

Defendant is hereby REMANDED forthwith into the custody of the United States Marshal for the District of Maine in execution of the incarceration term of the sentence imposed above.

Defendant was ADVISED of his right to appeal the sentence imposed on Counts I, II, and III.

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GENE CARTER
District Judge

Dated at Portland, Maine this 20th of December, 1999.