

Pickard LSD Case/Court Transcripts

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11	GOVERNMENT EX. NO.:	OFFERED	RECEIVED
12	5 A, B, C, and D	336, 409	--
13	918 A	374	374

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1 THE COURT: All right. We're ready
2 to proceed further on this matter. Where are
3 we, on any other witnesses or--

4 MR. RORK: Judge, Mr. Pickard would
5 like to call Mr. McKibben for three areas of
6 three questions.

7 THE COURT: All right.

8 MR. HOUGH: Judge, we'd object to
9 further testimony by Mr. McKibben. If you'll
10 recall late yesterday Mr. McKibben was
11 released. We spent all day Thursday with Mr.
12 McKibben. We would submit that absent some
13 proffer of relevance and some proffer that this
14 would not be cumulative, it would be
15 inappropriate.

16 MR. RORK: Well, Judge, we took a
17 break, the Court gave us time to consider
18 questions to eliminate witnesses and we
19 determined it down to three questions that we
20 need to ask Mr. McKibben under oath that
21 haven't been asked before.

22 THE COURT: Well, let's go ahead and
23 take the stand and you're under oath and let's
24 ask three questions and see where we are.

25

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1 TIMOTHY McKIBBEN,
2 called as a witness on behalf of the Defendant
3 Pickard, was previously sworn, and testified as
4 follows:

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6

DIRECT EXAMINATION

7

BY MR. RORK:

8

Q. Mr. McKibben, did you at the time of testing
9 any of the exhibits check for
10 N-Methylisopropylamide?

11

MR. HOUGH: Objection. Irrelevant and

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12 immaterial. The Court's determination is
13 limited to the presence of LSD.

14 MR. RORK: Your Honor, I understand
15 that's the Court's-- inquiry is limited to it,
16 but I want to ask him if he checked for that,
17 then if he did I'm going to ask about the
18 instrumentation if it reads the same as LSD or
19 how does it differentiate.

20 THE COURT: Give the question again,
21 please?

22 Q. (BY MR. RORK) During the testing of all the
23 exhibits did you test for
24 N-Methylisopropylamide?

25 THE COURT: You may answer that.

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1 A. The chemical in Methylisopropylamide.

2 Q. Yes.

3 A. You've got it--

4 MR. PICKARD: Yeah, lysergic acid.
5 N-Meth. Lysergic acid and
6 N-Methylisopropylamide.

7 A. No, that material wasn't specifically tested
8 for.

9 Q. (BY MR. RORK) Do you know whether that
10 material gives the same instrument reading as
11 LSD?

12 A. It would not give the same instrument reading.
13 There are slight variations depending on
14 structure. There would be a difference in
15 the-- IR and UV characteristics would be
16 different.

17 Q. Are you familiar with DNL isomers?

18 A. You mean, D and L isomers.

19 Q. I guess D and L. Is that--

20 A. Yes, I am.

21 MR. HOUGH: Objection, again. This
22 is irrelevant and immaterial, Judge.

23 THE COURT: Overruled. Go ahead.

24 Q. (BY MR. RORK) And is only the D isomer the one
25 that's scheduled under the DEA regulations?

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1 A. Under the-- under the guidelines for schedule
2 one, hallucinogenics all isomers including
3 stereo isomers are controlled.

4 Q. So would the answer--

5 A. It doesn't matter if it's D, DL, or L.

6 Q. And then I'll hand you Exhibit NO. 3, which is
7 previously entered into evidence. Does that
8 exhibit reflect the containers in their
9 condition they were on November 6th, 2000?

10 MR. HOUGH: Judge, we'll object.

11 This is cumulative to his prior testimony. He
12 was asked at length about Exhibits 1, 2, 2 A, 2

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13 B, and 3.

14 THE COURT: Overruled. Go ahead.

15 A. This was-- as far as the condition of these
16 exhibits and as to what condition they were for
17 a particular date, this was taken off of the
18 inventories. So the descriptions would come
19 from the inventories and you'd have to see what
20 date that was. I didn't put dates on here
21 because that's not what this document was made
22 for. It was to determine how much material was
23 dumped.

24 Q. (BY MR. RORK) So that document then-- we can't
25 tell from that document the date that the-- for

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1 your corresponding entries, is that your
2 answer?

3 A. The answer is it came off the existing exhibits
4 and/or the government's exhibits. I didn't put
5 dates on here, I just got the item numbers and
6 the descriptions.

7 Q. And just so the record is clear, it came off
8 the government exhibit, that would be an
9 exhibit from October 31, 2000, through November
10 7th 2000?

11 A. The ones that were previously entered the other
12 day.

13 MR. RORK: Thank you, sir. I have
14 nothing further.

15 THE COURT: You may step down.

16 MR. RORK: Judge, that would conclude
17 the evidence that we have absent arguments with
18 respect to the quantity.

19 MR. HOUGH: Judge--

20 (THEREUPON, a discussion was
21 had out of the hearing of the court reporter)

22 MR. RORK: And identification.

23 Quantity and identification.

24 MR. HOUGH: Judge, both the
25 defendants have challenged the government's

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1 position regarding role and obstruction and
2 various matters. And in support of those, in
3 addition to the trial testimony that the Court
4 heard, we would offer as Government Exhibits 5
5 A and B, copies of the reports that were
6 disclosed in the discovery relative to the
7 statements of Mr. Skinner and other witnesses
8 relative to those matters, as well as Exhibits
9 5 C and D, which are the actual transcripts of
10 the recordings that were played to the jury in
11 this matter. We realize that the transcripts
12 of the recordings would be duplicates of what
13 was offered at trial. Although, as Court will

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14 recall, they were not admitted because the jury
15 was instructed that they were not evidence, but
16 the tapes were. And as a matter of record if
17 this matter were to see the Tenth Circuit, we
18 believe it appropriate for these to be admitted
19 into evidence as a matter of record. It
20 supports the government's position relative to
21 those issues. So we'd offer Exhibits 5 A, B,
22 C, and D.

23 MR. RORK: On behalf of Mr. Pickard,
24 I'd ask a chance to look at them before we make
25 an objection or agree.

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1 MR. BENNETT: Well, Judge, without
2 looking at them I would object. They weren't
3 admitted into the trial and I don't know how
4 they would be appropriate to the-- for the
5 Tenth Circuit to look at if it wasn't part of
6 the trial. It's not something that, as I
7 understand the procedure, that the-- that would
8 be a part of the record, an appropriate part of
9 the record on appeal. So I would object to all
10 of those.

11 MR. RORK: Judge, on behalf of Mr.
12 Pickard, number one, I would object to Exhibit
13 5 C and 5 D, the transcript. As the court
14 instructed the jury and as the facts are, the
15 transcripts aren't evidence, it's what's on the
16 tape. The Tenth Circuit has a lot of staff,
17 they can listen to the tape, that's the
18 evidence. And for the transcript to be offered
19 for the truth of it I would object.

20 With respect to 5 B and 5 A, the Court
21 can recall the testimony at trial. The reports
22 contained a lot of information, Judge-- I mean,
23 a lot of information that you excluded at
24 trial, that you did not allow at trial. And to
25 now allow these reports in to bootleg them in

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1 the back door as far as this goes showing
2 obstruction and to get in the record a
3 substantial amount of facts that were never
4 introduced at trial, we would object to
5 strenuously.

6 MR. HOUGH: May it please the Court,
7 Your Honor, the fundamental flaw to counsel
8 merely by matters educed at trial for purposes
9 of sentencing, relevant conduct can include the
10 matters that we are offering.

11 THE COURT: Well, I think I have
12 enough material that's been introduced here. I
13 have numerous objections I'm going to need to
14 rule on and have objections here. So I'm going

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15 to decline to admit these documents into
16 evidence. All right. I think then I'm ready
17 to proceed in the matter of sentencing in this
18 case and I--

19 MR. HOUGH: Judge?

20 THE COURT: Yes, sir.

21 MR. HOUGH: Before the Court does
22 that if I may address the Court as one matter
23 of clarity. In Mr. Bennett's reply to our
24 objections to the presentence report he had
25 concerns about the representation of the

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1 government relative to the handling of an
2 affidavit that was filed. And I would like the
3 record to reflect clearly it was not the
4 government's intent or my intent to somehow
5 implicate him in any type of a conspiracy at
6 all, any type of criminal or inappropriate
7 conduct at all.

8 My recollection of the situation was that
9 the day the Court first saw the affidavit of
10 Mr. Pickard, Mr. Bennett took a typewritten
11 document, handed it to Mr. Pickard, who then
12 signed it, handed it back to Mr. Bennett, and
13 then it was presented to the Court. And that's
14 why my response indicated, based on those
15 observations, that he assisted in the filing
16 with the Court. And to the extent that my
17 response could be read otherwise, we would deny
18 and ask the Court to not consider it for any
19 purpose beyond its intended purpose. And I
20 would express my apologies to the Court and to
21 counsel to the extent that it could be read
22 that way.

23 THE COURT: All right. You put that
24 in the record, that will be adequate I think.
25 I'm going to start first as far as the

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1 sentencing is concerned and I'm going to make
2 certain rulings as to the numerous objections
3 that were filed.

4 MR. RORK: Judge, may I just ask the
5 Court a preliminary inquiry? Are you going to
6 have us-- at the time the Court gets done with
7 what you're doing now, then are we going to be
8 able to make arguments about the evidence that
9 was presented.

10 THE COURT: Yes. I was assuming that
11 you were going to argue and that Mr. Pickard
12 was going to argue, is that what you're
13 thinking about? I just thought we'd do it not
14 now, but at a different time.

15 MR. RORK: That's fine, Judge. I

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16 just didn't want to waive it.
17 THE COURT: I have the presentence
18 report here on Mr. Pickard and I'm going to
19 start with that case first. And I'm going to
20 first ask-- as far as the presentence report on
21 Mr. Pickard I'm going to ask the government
22 whether they have reviewed the presentence
23 report and whether there's anything else they
24 want to offer, any additional-- they've made
25 certain objections, any additional objection

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1 that you want to make before we proceed here?

2 MR. HOUGH: Solely as to Mr. Pickard
3 or as to both defendants?

4 THE COURT: I'm asking this to you
5 first.

6 MR. HOUGH: Judge, we've reviewed the
7 PSI, we've reviewed the addendum, we have filed
8 formal responses to the defendant's objections
9 to the presentence report as to both defendants
10 and we have filed our own objections as to both
11 defendants. We believe that as a matter of law
12 applying the facts educed at the trial of this
13 matter our position is correct and we would ask
14 court to adopt that position as to both
15 defendants. We have nothing to add beyond what
16 has been provided to the Court as it relates to
17 Mr. Pickard. Thank you.

18 THE COURT: Mr. Rork, I'm asking you
19 about the presentence report generally. I have
20 noticed the numerous objections that you have
21 offered and anything further-- any additional
22 objections you want to offer? I understand
23 that both you and Mr. Pickard want to make some
24 additional arguments here eventually, but tell
25 me where we are as far as any additional

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1 objections are concerned.

2 MR. RORK: Judge, just for purposes
3 of the record Mr. Pickard would ask me to
4 advise the Court and note that on September 22,
5 2003, he wrote to Mr. Deters and requested,
6 because of the length of the presentence report
7 the objections and the addendum, that he needed
8 additional time in which to address those. I
9 filed a motion on his behalf requesting
10 additional time to continue for a variety of
11 reasons. One was to allow him to finish his
12 responses to the PSI-- excuse me, to the U.S.
13 Probation addendum. Mr. Pickard advised me he
14 has not finished those. In light of the
15 Court's ruling that the matter would not be
16 continued, I can only state, Judge, that Mr.

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17 Pickard hasn't had a chance to respond to the
18 probation addendum. He will attempt to make
19 such responses at a later date, but just wants
20 to note that those responses would not have
21 been as complete as he would have wished if he
22 had been given time to do them in writing. Is
23 that correct, Mr. Pickard.

24 MR. PICKARD: Yes.

25 THE COURT: All right. Thank you.

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1 All right. Eventually I'm sure we'll hear some
2 arguments here on both sides, but before ruling
3 on the objections I need to advise Mr. Pickard
4 that the government has filed an information
5 pursuant to 21 U.S.C. Section 851. Now, this
6 matter that has been filed is an information
7 filed pursuant to 21 U.S.C. Section 851. And
8 it goes on to say that at the time this was
9 filed it said that William Leonard Pickard was
10 charged at that time with a violation of Title
11 21 United States Code part D, Sections 846 and
12 841 in a second superseding indictment filed on
13 June 20th, 2001.

14 Now, they then go into number two on this
15 information and it reads that the United States
16 Attorney charges that William Leonard Pickard,
17 upon conviction of any of counts one and two of
18 the second superseding indictment, shall be
19 sentenced to increased punishment by reason of
20 the following: Prior final criminal
21 convictions for a felony under the provisions
22 of sub chapter one Title 21 of the United
23 States Code. And A of that, on or about the
24 26th day of June, 1978, William Leonard Pickard
25 was convicted of attempted manufacture of MDA

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1 in violation of Sections 664 11379 of the
2 health and safety code of the State of
3 California in the superior court in and for San
4 Mateo County, California, Case No. C 7810, a
5 felony drug offense.

6 B, on or about the 4th day of September,
7 1992, William Leonard Pickard was convicted of
8 manufacturing LSD in violation of Section
9 11379.6 of the health and safety code of the
10 State of California, also possession for the
11 sale of LSD in violation of Section 11378 of
12 the health and safety code of the State of
13 California. And, three, possession for sale of
14 mescaline in violation of Section 11351 of the
15 health and safety code of the State of
16 California all in the Superior Court of
17 California County Santa Clara, San Jose branch,

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18 Case No. 15,8899 (sic) felony drug offenses.
19 Now, under the statute I have the duty to ask
20 Mr. Pickard if he affirms or denies the
21 convictions that are presented in this
22 information.

23 Now, let me also call to your attention
24 the fact that the defendant actually has no
25 right to challenge either of the convictions

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1 contained in the information because they are
2 both over five years old and so there is a
3 statute of limitations on this which is five
4 years. And you'll note both of these counts
5 and these convictions were before five years.
6 The five years has expired on that particular
7 statute-- that particular statute and those
8 particular convictions.

9 Now, I want to ask the government at this
10 time if you wish to produce anything else on
11 those convictions? I've told what you have
12 filed down to this time.

13 MR. HOUGH: Judge, the answer is yes.
14 If Court will recall from trial certified
15 copies of those journal entries were offered
16 and admitted. We'd ask the Court to take
17 judicial notice of those from the trial record.
18 The Court may also recall the defendant's
19 testimony relative to those prior convictions
20 and we believe on the one hand while the
21 requirement is it need only be shown by a
22 preponderance of the evidence, the Court has
23 already had those before it at the trial of
24 this matter and we would ask the Court to take
25 judicial notice of those matters that were

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1 offered and admitted and considered by the
2 Court at trial.

3 THE COURT: Now, Mr. Pickard I need
4 to also ask you whether you affirm or deny
5 these convictions?

6 MR. PICKARD: I affirm the
7 convictions with a few comments. The comments
8 would be in terms of the '92 case I would refer
9 the Court to notice my testimony at trial
10 concerning the circumstances of the '92 event,
11 particularly in relation to the East Bay Firm.
12 The '78 case I would bring the Court's notice
13 to the fact that a limited amount of equipment
14 was seized, a very small amount of equipment
15 which had traces of the MDA on that and that
16 equipment was derived from a previous encounter
17 similar to the circumstances of the '92 trial
18 in 1976 on behalf of DEA.

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19 THE COURT: I'm not sure I understand
20 all that. Let me ask you again, I asked you if
21 you affirmed or denied these convictions, you
22 said you affirmed these convictions, but then
23 would you summarize what you said after that.

24 MR. PICKARD: I affirm the
25 convictions and I refer the Court to my

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1 testimony at trial concerning the circumstances
2 surrounding the '92 conviction and also state
3 that the '78 conviction for MDA involved traces
4 of MDA on equipment and circumstances similar
5 to the '92 conviction. That is to say the
6 investigation was being conducted with DEA in
7 '74, that's when Mr. Nichols was about ten
8 years old, it involved a very large LSD lab.

9 THE COURT: All right. Thank you.

10 MR. PICKARD: Yes.

11 THE COURT: All right. Now, going on
12 from here let me now give you my rulings on all
13 of the objections that have been filed up to
14 this time and it's going to take me a little
15 time, but we-- I want to get this out in front
16 of every one here. And we're only dealing now
17 with Mr. Pickard we're not dealing with Mr.
18 Apperson at this time, except as they come
19 together under a conspiracy to some extent.

20 All right. Let me look first at the
21 objections by the government. The government
22 contends that the defendant's offense level
23 should be increased by two levels pursuant to
24 United States Sentencing Guidelines section
25 2D1.2(a)(1) because he used a pregnant woman,

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1 Natatia Cadova, in the conspiracy for which he
2 was convicted. The government further argues
3 that the defendant's offense level should be
4 increased by three levels pursuant to United
5 States Sentencing Guidelines Section 2D1.10(a)
6 because he endangered the lives of several
7 individuals during the manufacture and cleanup
8 of his LSD manufacturing location. The
9 defendant, without providing any reasons,
10 disagrees with the argument of the government.
11 The probation office contends that the
12 government is misapplying the guideline. The
13 probation officer suggests the United States
14 Sentencing Guideline Section 2D1.1 is the
15 appropriate guideline to determine the
16 defendant's base offense level and that the
17 conduct here is not sufficient to warrant the
18 use of Section 2D1.2 or 2D1.10.

19 The court believes that the probation

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20 officer and the probation office has properly
21 calculated the defendant's base offense level
22 through the use of United States Sentencing
23 Guideline Sections 2D1 and the Court rejects
24 the government's argument that section 2D1.2 or
25 2D1.10 should be applied here. And that's

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1 going to be the ruling of the Court on that
2 matter.

3 Now, by the defendant. The defendant has
4 raised a number of objections to the
5 presentence report. The probation officer has
6 categorized them into 22 objections. The Court
7 will consider them as grouped by the probation
8 officer. Number one, the defendant initially
9 objects to the wording of the charges and
10 convictions in this case as stated in
11 paragraphs 9, 10, 11, and 12 of the presentence
12 report. The Court need spend little time with
13 this contention since it is clearly frivolous.
14 The presentence report accurately sets forth
15 the charges and convictions in this case. As
16 stated by the probation officer, this objection
17 does not affect the defendant's sentence.

18 Two, the defendant next objects to the
19 number of facts stated in the presentence
20 report. The defendant also objects to the drug
21 quantities found in the presentence report.
22 The government and the probation officer assert
23 the facts stated in the presentence report are
24 accurate. They also contend that the drug
25 quantities in the presentence report accurately

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1 reflect the trial testimony of DEA Forensic
2 Chemist Tim McKibben. The Court has undertaken
3 a thorough review of the facts as set forth in
4 the presentence report. The Court has always
5 carefully considered the objections made by the
6 defendant. The defendant has quibbled with
7 some facts suggesting that others were not
8 supported by the record and argues that some
9 facts lack corroboration of Skinner's
10 testimony. He also suggests at times that the
11 probation office was biased in the presentation
12 of the facts. The Court finds that the facts
13 contained in the presentence report accurately
14 reflect the evidence provided at trial.
15 Accordingly, these objections shall be denied.

16 The Court shall next consider the
17 defendant's arguments concerning the drug
18 quantities. Drug quantities attributable to
19 the defendant convicted of a conspiracy are
20 established on the basis of the quantity of

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21 drugs, which the defendant reasonably foresaw
22 or which fell within the scope of the
23 defendant's agreement with the conspirators.
24 That's United States versus Roberts, 14 F.3d
25 502, 522, that's the Tenth Circuit, 1993.

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1 Citations, quotations, and emphasis omitted.
2 For sentencing purposes the government bears
3 the burden of proving the quantity of drugs by
4 a preponderance of the evidence. That's United
5 States versus Hooks 65 F.3d 850, 854, the Tenth
6 Circuit, 1995, certiorari denied, 516 U.S.
7 1083. The district court may estimate the
8 quantity provided the information underlying
9 assessment as minimum indicia of reliability.
10 United States versus Browning, 61 F.3d 752,
11 Tenth Circuit, 1995.

12 The presentence report indicates that the
13 following substances were seized from vehicles
14 driven by Pickard and Apperson on November 5th,
15 2000. 41.3 kilograms of LSD. 23.6 kilograms
16 of Iso LSD, a byproduct of the reaction that
17 can be converted back to LSD. 97 kilograms of
18 a lysergic acid, the immediate precursor in the
19 manufacturing process. And 6.5 kilograms of
20 ergocristine, a commercially available
21 precursor. The evidence further showed that an
22 additional of 13 kilograms of ergocristine that
23 belonged to the defendants was subsequently
24 recovered.

25 In arriving at a base offense level of 38

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1 under U.S. Sentencing Guidelines 2D1.1, the
2 probation officer relied solely on 40.-- 41.3
3 kilograms of LSD. In doing so the probation
4 office relied on the total liquid amount of the
5 LSD. The weight of the pure LSD found in 41.3
6 kilograms was determined to be 198.9 grams.

7 The Court shall begin by considering the
8 issue of how the amount of LSD is to be
9 determined. The weight of the liquid LSD or
10 the weight of the LSD in pure form. Every
11 circuit court that has considered this issue
12 has determined that when LSD is contained in a
13 liquid solution, the weight of the pure LSD
14 alone should be used to determine the offense
15 level. I refer you to United States versus
16 Morgan, M-O-R-G-A-N, 293 F.3d at 460, this is
17 the Fifth Circuit, 2002. United states versus
18 Camacho, C-A-M-A-C-H-O, 261 F.3d 1071 at page
19 1074 Eleventh Circuit, 2001. United States
20 versus Sia, S-I-A, number 96-1808, 1996, WL
21 728191, First Circuit, 1996, that was

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22 unpublished. United States versus Ingram, 67
23 F.3d 126 at page 128, the Sixth Circuit, 1995.
24 And United States versus Turner, 59 F.3d 481 at
25 page 485 the Fourth Circuit, 1991. Although we

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1 have some concerns about the merit of these
2 decisions we shall apply this rule to this
3 case.

4 The Court has carefully considered the
5 testimony provided by DEA Chemist Timothy
6 McKibben and the defendant's expert witness
7 Doctor Peter Lott. The Court recognizes the
8 various flaws noted by Doctor Lott.
9 Nevertheless, the Court finds that the
10 procedure used by-- the procedures used by the
11 DEA were proper and the results obtained were
12 reliable. Given the testimony presented during
13 the sentencing hearing, the Court is convinced
14 that the total amount of LSD involved in this
15 case exceeds 300 grams by a large amount. This
16 amount includes the actual LSD. The iso LSD,
17 and lysergic acid, as well as the ergocristine.
18 The evidence is clear that the amount of actual
19 LSD complied-- coupled with the amounts that
20 could be produced through the use of the
21 ergocristine rise far above the 300 gram
22 threshold. Accordingly, the Court shall apply
23 a base offense level of 38. Of course, this
24 amount does not include the LSD that was
25 manufactured by the defendants at Aspen, Santa

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1 Fe, and Ellsworth. The evidence is very strong
2 that considerable amounts of LSD were produced
3 at Santa Fe and Ellsworth. Some or all of
4 these drug amounts from these activities could
5 be considered relevant conduct here. See
6 United States Sentencing Guidelines Section
7 1B1.3. In sum, the Court is thoroughly
8 convinced the drug amounts attributable to the
9 defendant are extremely conservative.
10 Accordingly, this aspect of the defendant's
11 objection shall be denied.

12 Three, the defendant objects to the
13 portion of the presentence report concerning an
14 adjustment for obstruction of justice.
15 Paragraphs 91 to 97 and 108. The defendant
16 argues that there's no factual or legal basis
17 for a two-level enhancement under United States
18 Sentencing Guidelines 3C1.1. The government
19 and the probation officer contend that the
20 enhancement has been properly applied. The
21 probation points out in the presentence report
22 that the enhancement is appropriate because the

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23 defendant, one, filed a false affidavit prior
24 to travel-- prior to trial in support of
25 co-defendant Apperson. Two, testified falsely

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1 at trial concerning codefendant Apperson's lack
2 of knowledge of the LSD laboratory. Three,
3 directed to Lova (spelled phonetically) to
4 provide certain material to Alfred Savinelli in
5 an effort to threaten him. Four, contacted
6 government witnesses and others prior to trial
7 in an attempt to influence their testimony or
8 learn the nature of it. Five, presented one of
9 the witnesses Brandon Valerius with a false
10 affidavit. And, six, testified falsely
11 concerning the return of Stinger missiles with
12 Afghanistan. The Court believes that the
13 adjustment is appropriate here for several
14 reasons. However, the Court shall focus only
15 on the allegations concerning the defendant's
16 perjury. The Court believes that the two-level
17 enhancement is proper because the defendant
18 filed a false affidavit prior to trial and
19 testified falsely during the trial concerning
20 the knowledge of his codefendant of the LSD
21 laboratory. Reasonably in United States versus
22 Sarracino, S-A-R-R-A-C-I-N-O, 340 F.3d 1148 at
23 page 1172, the Tenth Circuit, 2003, the Tenth
24 Circuit outlined the requirements for
25 application of the adjustment for obstruction

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1 of justice based on perjury as false. The
2 district court must enhance a defendant's base
3 offense level by two levels if it finds that
4 the defendant willfully obstructed or impeded
5 or attempted to obstruct or impede the
6 administration of justice during the course of
7 the investigation, prosecution, or sentencing
8 of the instant offense of conviction. And the
9 obstructive conduct related to the defendant's
10 offense of conviction and any relevant conduct.
11 That's United states Sentencing Guideline 3C1.1
12 A to B. Section 3C11, enhancement predicated
13 upon perjury is appropriate when the sentencing
14 court finds that the defendant has given false
15 testimony, one. Two, on a material matter.
16 Three, with the willful intent to provide false
17 testimony rather than a result of confusion,
18 mistake, or faulty memory. See United States
19 versus Mounkes, M-O-U-N-K-E-S 204 F.3d 1024,
20 the Tenth Circuit, quoting United States versus
21 Dunnigan, D-U-N-N-I-G-A-N, 507 U.S. page 87.

22 Material evidence as used in Section
23 3C1.1 means evidence that it believes would

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24 tend to influence or affect the issue under
25 determination. United States Sentencing

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1 Guidelines 3C1.1 comment note six. The mere
2 fact the defendant testifies to his innocence
3 and is later found guilty, does not
4 automatically warrant a finding of perjury.
5 United States versus Markum, 4 F.3d 891, the
6 Tenth Circuit, 1993. To make a finding of
7 perjury every time the defendant testifies and
8 is convicted would impinge upon his
9 constitutional right to testify on one's own
10 behalf. Mere disagreement between the
11 defendant's testimony on a jury's verdict is
12 insufficient to support a finding of perjury.
13 United States versus Weller 238 F.3d 1215, the
14 Tenth Circuit, 2001. The sentencing court is
15 required to carefully review the evidence and
16 make findings independent of the jury's verdict
17 and specifically identify the testimony at
18 issue and establish that if it, in fact,
19 constitutes perjury. The result, the required
20 finding must cover all the factual criteria of
21 perjury. That's United States versus Anderson,
22 189 F.3d 1201, the Tenth Circuit, 1999.

23 In an affidavit submitted to the Court on
24 January 10th 2001, the defendant stated his
25 codefendant Clyde Apperson accompanied him to

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1 Kansas for the purpose of moving some
2 industrial equipment belonging to a friend. He
3 never advised Apperson the equipment he was
4 moving was or could be used for the purpose of
5 manufacturing LSD. He never advised Apperson
6 that the equipment he was moving could be used
7 for illegal purposes. And, four, Apperson
8 never participated or engaged in any
9 conspiratorial agreement with him or anyone
10 else to manufacture or distribute LSD or any
11 other illegal substance. At trial the
12 defendant testified that Apperson had no
13 knowledge of the LSD equipment and had never
14 engaged in any conspiracy to manufacture or
15 distribute LSD.

16 The statements contained in the affidavit
17 and the testimony offered at trial by the
18 defendant concerning the lack of knowledge and
19 involvement by his codefendant were clearly
20 false. The evidence at trial, particularly the
21 tape-recordings, demonstrated that the
22 defendant's statements were false on material
23 matters and made with the willful intent to
24 provide false testimony. There can be little

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25 dispute that Apperson was actively involved in
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1 the charged conspiracy and fully aware of the
2 mission to move the LSD lab when he arrived in
3 Kansas. Accordingly, for these reasons the
4 Court finds the defendant committed perjury and
5 enhancement to the obstruction of justice is
6 appropriate.

7 Four, the defendant next objects to
8 paragraphs 98 and 99 concerning an adjustment
9 of the acceptance of responsibility. The
10 defendant apparently believes that he is
11 entitled to a reduction for acceptance of
12 responsibility. He points out that he has not
13 benefited from having transcripts of the trial
14 and wishes to preserve this objection until he
15 reviews the transcript. The government and the
16 probation officer assert that acceptance of
17 responsibility has properly been denied. A
18 defendant is entitled to a reduction in offense
19 level if he clearly demonstrates acceptance of
20 responsibility for his or her offenses. United
21 States Sentencing Guidelines 3E1.1(a). A
22 defendant who requires the government to prove
23 his or her guilt at trial may qualify for
24 acceptance of responsibility only in rare
25 situations. See the comment in note two. A

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1 defendant has acted in a matter inconsistent
2 with acceptance of responsibility if he or she
3 falsely denies relevant conduct. That's
4 comment note 1(a). Although a defendant who is
5 convicted at trial is not precluded
6 automatically from receiving an acceptance of
7 responsibility adjustment. A defendant who
8 goes to trial only to require the government to
9 prove his or her factual guilt generally would
10 not be entitled to the adjustment. That's the
11 comment at note two. In addition, false
12 testimony that results in an enhancement for
13 obstruction of justice generally is
14 inconsistent with an adjustment for acceptance
15 of responsibility. That's comment note four.
16 The Court agrees wholeheartedly with the
17 government and the probation officer. Any
18 suggestion by the defendant that he is entitled
19 to acceptance of responsibility is laughable.
20 He has contested every factual matter in this
21 case. Acceptance of responsibility under
22 United States Sentencing Guideline Section
23 3E1.1 is clearly not appropriate here. As
24 accurately pointed out by the probation officer
25 the transcripts of the Court's proceedings are

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1 certainly not necessary to conclude that the
2 defendant is not eligible for this protection.
3 Five, the defendant objects to paragraph
4 104 concerning the unlawful discharge,
5 emission, or release into the environment of
6 hazardous or toxic substance. He contends that
7 the facts do not support a two-level
8 enhancement under United States Sentencing
9 Guidelines 2D1.1(b)(5)(a) the government and
10 probation office asserts that the enhancement
11 has been properly applied. The probation
12 office contends that the enhancement is
13 appropriate based upon the defendant's, one,
14 dumping of LSD and LSD related substances on
15 the ground at the Wamego missile base on
16 November 5th, 2000. And, two, transportation
17 of those same substances in and around various
18 locations around the country. In order to
19 apply this enhancement the Court need only
20 focus on the first basis for the enhancement.
21 The evidence is clear that on November 5th,
22 2000, Pickard dumped many gallons of liquid
23 containing LSD and LSD byproducts onto the
24 ground of the Wamego missile base. This
25 evidence requires the application of the

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1 enhancement. Accordingly, this objection shall
2 be denied.

3 Six, defendant next objects to the
4 four-level enhancement applied in paragraph 106
5 for his role in the offense. He suggests that
6 a four-level enhancement under United States
7 Sentencing Guideline 3B1.1(a) is not supported
8 by the facts or the law. He concedes, however,
9 that a one-level enhancement might be
10 appropriate. The government and the probation
11 office assert that a four-level enhancement
12 under 3B1.1 (a) is proper here.

13 United States Sentencing Guidelines 3B1.1
14 (a) provides that a defendant's offense level
15 shall be increased by four points if the
16 defendant was an organizer or leader of a
17 criminal activity that involved five or more
18 participants or was otherwise extensive. The
19 government bears the burden of proving by a
20 preponderance of the evidence the facts
21 necessary to establish the applicability of
22 this enhancement. See United States versus
23 Cruz Camacho, C-A-M-A-C-H-O, 137 F.3d 1220,
24 Tenth Circuit, 1998. In determining whether a
25 defendant is a leader or organizer a Court

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1 shall consider the following factors. The
2 exercise of decision making authority, the
3 nature of participation in the commission of
4 the offense, the recruitment of accomplices,
5 the claimed right to a larger share of the
6 fruits of the crime, the degree of
7 participation in planning or organizing the
8 offense, the nature and scope of the illegal
9 activities, and the degree of control and
10 authority exercised over others. United States
11 Sentencing Guidelines 3B1.1, comment note four.

12 In considering these factors the
13 sentencing Court shall remain conscious of the
14 fact that the gravamen of this enhancement is
15 control, organization, and responsibility for
16 the actions of other individuals because
17 3B1.1(a) is an enhancement for organizers or
18 leaders, not for important or essential
19 figures. That's United States versus Torres,
20 53 F.3d 1129, Tenth Circuit, 1995, citations
21 and quotations omitted.

22 Nevertheless, the guidelines do not
23 require that each of the factors be satisfied
24 for a 3B1.1(a) to apply. United States versus
25 Bernaugh, B-E-R-N-A-U-G-H, 969 F.2d 858, the

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1 Tenth Circuit, 1992. There's no question that
2 this enhancement must be applied. The
3 defendant was the primary organizer of the
4 operation that produced substantial amounts of
5 LSD. He was the individual who possessed
6 control over the operation, made important
7 decisions, and recruited accomplices. Any
8 suggestion to the contrary is completely
9 against the evidence in this case.
10 Accordingly, this objection must be denied.

11 Seven, the defendant objects to the
12 two-level enhancement imposed in paragraph 107
13 for abuse of a position of trust or use of
14 special skill under United States Sentencing
15 Guideline, Section 3B1.3. The defendant again
16 suggests that there's no factual or legal
17 basis for this adjustment. The government and
18 probation officer contend that the enhancement
19 has been properly applied. The probation
20 office asserts that this enhancement is proper
21 because the defendant used his position at
22 Harvard and UCLA to further his involvement in
23 the manufacturing of LSD. And, two, used his
24 special skills as a chemist to manufacture LSD.
25 The court is persuaded that this enhancement is

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1 appropriate because the defendant used his

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2 special skill as a chemist to manufacture LSD.
3 A special skill is one not possessed by the
4 members of the general public and usually
5 requiring substantial education, training, or
6 licensing. United States Sentencing Guideline
7 Section 3B1.3, comment note two. Because the
8 comment adds the word usually there's no basis
9 for limiting the increase to only those with
10 formal education or professional skills. See
11 United States versus Hummer, 916 F.2d 186, the
12 Fourth Circuit, 190. Finding that use of the
13 word "usually" in the note to U.S. Sentencing
14 Guideline 3B1.3 applies that substantial
15 training is not a mandatory prerequisite to the
16 making of a special skill adjustment.
17 Certiorari was denied in that case at 499 U.S.
18 970. The defendant used his special skills as
19 a chemist to produce vast quantities of LSD.
20 His special knowledge and research allowed him
21 to produce quantities that exceeded normal
22 production. Accordingly, this enhancement is
23 proper. See United States versus Carlson, 87
24 F.3d 440, the Eleventh Circuit, 1996 and United
25 States versus Spencer, 4 F.3d 115, the Second

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1 Circuit, 1993.
2 Eight the defendant objects to the
3 adjusted base offense level contained in
4 paragraph 109 based on his affirmation and
5 objection. Since the Court has found no merit
6 to any of the defendant's previous objections,
7 the Court finds no basis to alter the adjusted
8 base level-- base offense level contained in
9 paragraph 109. The Court notes that even if
10 the Court had erred in the application of one
11 or more of the aforementioned enhancements so
12 that defendant's guideline range would drop to
13 360 months to life, I would still impose a
14 sentence of life.

15 Nine and twelve, the defendant has raised
16 various objections to the criminal history
17 portion of the presentence report. The
18 defendant contends, one, that the information
19 concerning his 1998 false statement in a
20 passport conviction is incorrect. Paragraph 11
21 that's 1170-- that's 117. Two, the addition of
22 one point for his 1988 false identification to
23 a police officer conviction is inappropriate,
24 paragraph 118, and the charge of carrying a
25 concealed weapon in 1986, does not indicate

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1 that it was not prosecuted due to the age of
2 the case. The government and the probation

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3 office assert that the defendant's criminal
4 history is accurately and properly calculated
5 under the guideline. The Court has considered
6 each of the defendant's objections to the
7 criminal history portion of the presentence
8 report. The Court finds no merit to any of
9 them. The Court finds that the information is
10 accurate and the analysis provided by the
11 probation officer is correct. Accordingly,
12 these objections shall be denied.

13 13 to 18. The defendant has raised
14 various objections to the offender
15 characteristics portion of the presentence
16 report. The government has not responded to
17 any of these objections. The probation officer
18 asserts that the information contained in
19 presentence report is accurate. The Court
20 finds it unnecessary to make any ruling on
21 these objections because they do not impact the
22 application of the guideline.

23 19, the defendant objects to paragraph
24 152 where the probation office indicates the
25 defendant failed to complete the necessary

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1 forms to determine if a fine should be imposed.
2 The defendant asserts that the probation office
3 has enough information in its possession or can
4 obtain the necessary information to determine
5 if a fine should be imposed. The government
6 has not responded to this motion. The
7 probation office acknowledges it has some
8 information on the defendant, but it also
9 reiterates the defendant has not submitted the
10 forms submitted to him. The probation officer
11 contends without the submission of the form,
12 the defendant has not met his burden of proving
13 that a fine should be waived here. The Court
14 has reviewed prior documents submitted by the
15 defendant on his financial condition. The
16 Court has determined the defendant has met his
17 burden of proving that a fine should be waived
18 here. The Court does not intend to impose a
19 fine.

20 20, the defendant objects to paragraph
21 171, 172, and 173 concerning the possibility of
22 an upward departure. He argues that a
23 departure based on the possession of liquid LSD
24 is not appropriate. The government has filed
25 no response to this objection. The probation

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1 office suggests that the information contained
2 in these paragraphs is an accurate
3 interpretation of the sentencing guideline.

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4 But the Court finds it unnecessary to decide
5 this objection because it does not intend to
6 depart upward.

7 21, the defendant seeks a downward
8 departure based on prosecutorial misconduct and
9 improper investigation techniques. The
10 defendant has noted a variety of examples where
11 the government engaged in misconduct. The
12 defendant also suggests that the Court should
13 depart downward because of his effort to
14 provide substantial assistance to the
15 government. The government and the probation
16 office assert that there are no grounds for a
17 downward departure. Before granting a downward
18 departure the district court must find that
19 there exists mitigating circumstances of a kind
20 not adequately taken into consideration by the
21 sentencing commission in formulating the
22 guidelines that should result in a sentence
23 different from that described. 18 U.S.C.
24 Section 3553(b). See also United States
25 Sentencing Guideline Section 5K2.0. United

0370

1 States versus Ziegler, Z-I-E-G-L-E-R, 39 F.3d
2 1058, the Tenth Circuit, 1994. The government
3 recognizes that a downward departure can be
4 applied based on government misconduct. See
5 United States versus Nolan Cooper, N-O-L-A-N,
6 C-O-O-P-E-R, 155 F.3d 221, the Third Circuit,
7 1998. Nevertheless, the Court is not persuaded
8 that a downward departure is appropriate here.
9 The Court has not found sufficient evidence of
10 governmental misconduct to justify a downward
11 departure.

12 In considering the defendant's motion for
13 a new trial the Court addressed the defendant's
14 allegations of governmental misconduct and
15 improper investigative techniques. There the
16 government found no evidence-- there the Court
17 found no evidence of any substantial misconduct
18 by the government. Accordingly, the court
19 shall not depart downward on this basis. The
20 defendant has also suggested that the Court
21 should depart downward because he has
22 cooperated with the government and the
23 government has refused to file a motion
24 pursuant to United States Sentencing Guideline
25 5D1.1. In the absence of a governmental motion

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1 of substantial assistance for downward
2 departure, a Court may review the prosecutor's
3 decision not to move for a departure only if
4 the refusal is based on an unconstitutional

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5 motive, such as race or-- race or religion or
6 if the government's stubborn refusal presents
7 an egregious case because of overwhelming
8 evidence that the accused's assistance has been
9 so substantial as to cry out for meaningful
10 relief. United States versus Cerrato,
11 C-E-R-R-A-T-O, Ries, R-I-E-S, 176 F.3d 1253,
12 the Tenth Circuit, 1999. The Court finds no
13 evidence of any improper motive by the
14 government in not filing such a motion. The
15 Court also does not find that the circumstances
16 here suggest a stubborn refusal by the
17 government and an egregious case having
18 concluded that the government has not
19 improperly failed to file a motion pursuant to
20 5K1.1, the Court has no power to depart on this
21 basis. This is United States versus Maldonado,
22 M-A-L-D-O-N-A-D-O, dash, Acosta, A-C-O-S-T-A,
23 210 F.3d 1128, the Tenth Circuit, 2000. United
24 States Sentencing Guidelines 2K2-0 does not
25 authorize a sentencing court to grant departure

0372

1 for substantial assistance without a motion
2 from government requesting the departure to
3 5K1.1. Now, those are the rulings that we have
4 made on the objections that were filed up to
5 now and we will eventually put this in an order
6 and file that order in this case.

7 All right. Now, we're ready to proceed
8 back. Let me just say, though, with these
9 rulings the Court's offense level is 48 and the
10 defendant's criminal history category is four.
11 Moreover, pursuant to 21 U.S.C. Section
12 841(b)(1)(A), the Court must sentence the
13 defendant to a mandatory term of life
14 imprisonment.

15 Now, let me now recognize the defendant's
16 attorney for remarks or any further objections
17 or for remarks on behalf of the defendant and I
18 will also recognize the defendant for any
19 remarks he would like to make.

20 MR. RORK: Judge, I thought the Court
21 would allow with all of the Court has done, I
22 would just like to have some time to decide for
23 the same and make some remarks may be at a
24 later point today.

25 THE COURT: That's agreeable with the

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1 Court. I realize that we gave you lot of
2 material there that we have worked on within
3 the last few days. And also I was eventually
4 going to recognize the government for any
5 remarks on behalf of the government, but--

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6 MR. HOUGH: Judge, the one thing that
7 I would ask the Court, the certified copy of
8 the journal entry of conviction from San Mateo
9 County relative to the 851 enhancement was
10 offered and denied at trial. The other one,
11 for the record, that's referenced in the 851
12 was Trial Exhibit 918. So for purposes of this
13 hearing we would offer as Exhibit 918 A the
14 certified copy of the journal entry of the San
15 Mateo County conviction so that the record is
16 clear as to that. We'd also note the absences
17 of denial of the conviction during the colloquy
18 of the Court.

19 THE COURT: Tell me what 918 A is
20 again.

21 MR. HOUGH: 918 A is a certified
22 authenticated copy of the journal entry of
23 conviction from San Mateo County, California,
24 which is referenced in the 851 information.
25 The Court did not allow that at trial. The

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1 Court did allow the other one, which is
2 Government's Exhibit 918. And so we'd ask that
3 this be marked as 918 A just for purposes of
4 simplicity.

5 THE COURT: And be admitted?

6 MR. HOUGH: Yes, sir.

7 MR. RORK: With respect to Mr.
8 Pickard, as Mr. Hough recalls we'd asked for
9 copies of those before. As long as we get a
10 copy of that, we have no objection.

11 THE COURT: All right. 918 A-- Mr.
12 Bennett, do you want to say anything about
13 that?

14 MR. BENNETT: No, Your Honor, I have
15 nothing at all.

16 THE COURT: 918 A will be admitted.
17 All right. Let's take a recess at this time
18 and let me ask you, Mr. Rork, how much time do
19 you want, do you want to-- and Mr. Hough?

20 MR. RORK: Judge, I think if the
21 Court wouldn't mind that after you get done
22 with the other defendant then get done with the
23 reading there perhaps we can make all arguments
24 at that point in time, at least it would be
25 after the lunch break.

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1 THE COURT: Well, I would like to
2 move this along as rapidly as we can. And if--
3 I could-- well, we probably need to take a
4 break anyway because we've been here for a long
5 period of time. So why don't we take about a
6 15-minute break at this time and then we'll

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7 come back. And, Mr. Hough-- and if any of the
8 attorneys are ready to say anything why or--
9 MR. HOUGH: Judge, I can tell you
10 right now the government will offer no more.
11 The record notes our position. And in light of
12 the proposed findings, we would just
13 incorporate by reference what we have
14 previously stated to the Court, offer nothing
15 more, and ask the Court to proceed to sentence
16 the defendant to life imprisonment.

17 THE COURT: All right.

18 MR. HOUGH: And I understand Mr. Rork
19 would like an opportunity after the recess.
20 I'm just informing the Court I'm not going to
21 have anything more.

22 THE COURT: Well, let's take a
23 15-minute recess and then we'll come back. Mr.
24 Bailiff.

25 (THEREUPON, a short recess was had).

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1 THE COURT: All right. I guess, Mr.
2 Hough, you told me that you had said everything
3 you wanted to say. Was that correct?

4 MR. HOUGH: Yes, Your Honor.

5 THE COURT: All right. Mr. Rork?

6 MR. RORK: Judge, I just have a few
7 housecleaning matters. First of all, the
8 Court-- in response to the Court's findings and
9 objections, specifically with the statutory
10 finding of life and the guideline sentence of
11 life, I would just recall the Court back to
12 November 6th, 2000 when this case began until
13 January 13, 2003 when the trial started for
14 selection of the jury, this has been the most
15 disappointing case with respect to the
16 government in producing documents and exhibits.
17 And the Court-- I would ask you to take notice
18 of the records. The Court has made all of its
19 findings today on the objections. And I do
20 wish to point out to the Court that just as
21 during the Court's order of November 13, 2003
22 and then when Mr. McKibben is on the stand
23 November 20, 2003, at which time the evidence
24 is noted as needing to be provided, the
25 government then produces the Exhibit 2 B, which

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1 was something that we would have liked to have
2 had in response to the Court order.

3 And throughout the course of the trial
4 some of the findings that the Court has made
5 deal with the government in the allegations of
6 Mr. Pickard, it's been similar in that sense
7 that the production has been slow or not at all

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8 or it's when we find it, then we get it. But
9 this has been a life case for Mr. Pickard as
10 he's been aware of the statutes all along. And
11 in the findings of the Court I would just note
12 for the record that until the jury returned
13 their verdict on March 31, 2003, whenever a
14 motion was filed then there would be a hearing
15 and then there would be arguments and then the
16 Court would issue a ruling. And we should note
17 for the record that while the jury was
18 deliberating there was a question-- several
19 questions, but there was one question about
20 they wanted to have a copy of the government's
21 exhibit list. And as we were preparing the
22 government's exhibit list, once that was
23 completed, we started to finish up with some
24 motions that the defendant was orally making
25 that were supplementing what had been done in

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1 writing beforehand, the jury verdict came, the
2 Court was advised that the jury had a verdict,
3 Mr. Hough then told the Court that he needed to
4 rule on all the pending motions and they were
5 denied the Court indicated, and we hadn't
6 finished. But then we asked the Court for a
7 lot of time for motions, the Court did give us
8 additional time and we filed our motion for new
9 trial and renewed motion for judgment of
10 acquittal. We requested that those be
11 supplemented when there were transcripts. We
12 waited figuring there would be a court hearing.
13 We did receive the Court's lengthy ruling and
14 the comments of the Court in the ruling and
15 then at which time the Court denied the motion.
16 I did file, before the day of sentencing, a
17 renewed motion based upon correlation to the
18 transcripts that had been produced just within
19 the last three weeks, four weeks certain issues
20 for the Court to rule upon, whether or not
21 those prejudiced Mr. Pickard's right to a fair
22 trial. The morning we appeared there were
23 three orders on my desk denying the motion,
24 supplemental motion. One indicated it was
25 untimely. And I wish to address the Court that

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1 the only reason it was untimely was the
2 specific comments couldn't be made until the
3 transcripts were presented. I'd asked the
4 Court previously for help with an attorney
5 after the verdict. I asked for other help for
6 a sentencing specialist, the Court was very
7 gracious in authorizing a sentencing expert for
8 the chemist, but I'm a solo practitioner and I

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9 don't have extra staff, extra offices to call
10 upon to do the work, that is why it was
11 presented in the fashion that it was.

12 The rule-- the motion under 18 U.S.C.
13 3504 that will be addressed shortly, those were
14 both denied. We have some new information I'll
15 bring to the Court's attention. And the
16 statute does say at any hearing that can be
17 raised and I'll get to address that.

18 But, Judge, with respect to your-- the
19 calculations of the quantities that were
20 brought before the Court, it's our position
21 that in the Court's finding that those are
22 accurate we would draw the Court's attention
23 to-- and I know the Court said it carefully
24 considered all of the findings and you believe
25 that there's in excess of 300 grams. One of

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1 the things that the Court had to consider was
2 the testimony from the individuals about the
3 containers, whether they were full or how much
4 liquid was in those or what was within the
5 containers. And the expert witness on behalf
6 of the defense testified that in the scientific
7 community they weren't measured. But, Judge,
8 more importantly I'd recall your testimony,
9 first Mr. McKibben indicated that for the
10 weights there would be measurements they would
11 have been placed on a 3 by 5 index card and
12 then they would have the measurements on the
13 front or the back and that's how they were
14 measured. And then later he indicated that
15 they weren't measured, he found out at a break,
16 that it was done by sight. And the issue that
17 becomes involved, Judge, is one of credibility.
18 And when it comes to the issue of credibility
19 the other factors that are involved are the
20 essentials of what was left out. If you look
21 at Government Exhibit 2 B the information from
22 the standards there's blank dates and I would
23 incorporate all the testimony in the statements
24 that Doctor Lott made that challenge the
25 accuracy of those that there was no way.

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1 And what is significant about this,
2 Judge, is you will recall during the course of
3 the trial we started January 13th and went
4 until March 31st and during Agent Sorrell's
5 testimony it was learned, even though we had
6 requested-- I had requested motions for the
7 scientific reports and the lab reports back in
8 2001 and the government said then, as they've
9 said throughout, oh, Judge, we gave the defense

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10 everything we have. And the Court would make
11 in its finding the government says they've
12 given us everything they have, you have it,
13 that's all you're going to get. And just as
14 happened on November 20th when it was shown to
15 the Court, no, we weren't given everything that
16 we were supposed to have had, that has happened
17 throughout the course of the trial from January
18 13 to March 31st. And there were two instances
19 where in the testimony of Sorrell there came to
20 be facts involved with respect to KBI or LSD or
21 DEA and prior LSD and the Court would, during
22 the course of the trial, bend over the
23 government, well, look, this has been brought
24 up, show it to them. And that started about
25 January 18th and it continued until March 31st

0382

1 in multiple instances where the government
2 would then produce something and have an
3 explanation for the Court. But more
4 importantly was Government Exhibit 196 where
5 after Mr. Pickard fortunately was able to have
6 a copy of his hard drive made we showed to the
7 Court's satisfaction that note 196 had been
8 altered and what had been deleted was all the
9 reference to Mr. Pickard's DEA listings of
10 names and addresses. And up to that point in
11 time the government-- Mr. Hough would ask all
12 the government witnesses, well, other than Mr.
13 Pickard's word with respect to the DEA, do you
14 have any evidence of that and the witnesses
15 would say no. When that exhibit was then
16 found-- we were looking at it in the other
17 courtroom, one of the agents came up and said,
18 well, I have a copy of that with it. Another
19 agent came up, Hanzlik and Nichols. Well, I
20 have a copy of that with the names in it and
21 Mr. Hough didn't have. And Mr. Hough gave his
22 explanation, there was no further hearing or
23 foundation and the Court-- the matter
24 continued.

25 It's the same thing, Judge, with the

0383

1 buckets. What is the government afraid of?
2 Why do we have to fight to get what should be
3 rightfully brought to us when we're looking at
4 a life sentence? The government told you
5 repeatedly in my motions for scientific report
6 we've given them everything we have, they've
7 lost it, they misplaced and I indicated I
8 hadn't. And finally in the third motion I
9 showed the Court the government said, well,
10 they could just call the witnesses and ask

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11 them, he hasn't done that. Then I showed the
12 Judge a letter from the government that says
13 don't call the witnesses, they won't talk to
14 you. If they're going to say anything other
15 than they said at trial different, then you'll
16 have to subpoena them. And that's been the
17 course of production of documents in this case.
18 That's been the course of compliance with the
19 Court orders by the government.

20 We then get to all the calculations and
21 Doctor Lott testified what it was that he
22 needed. That there would have been computers,
23 dates, generated reports that would have showed
24 these quantities, but without them he could
25 give no validity. And, yes, there was LSD, but

0384

1 as to how much LSD there was he couldn't say.

2 The other facts that go to the court,
3 Judge, is once we pin somebody down on a
4 statement didn't you say at trial half full or
5 three-quarters full, again, there would be
6 reference there were photographs and the
7 government would say, Judge, we refer you to
8 the trial testimony. There were photographs
9 admitted that showed measurements. Well,
10 Judge, I have the search warrant return that
11 was filed with Judge O'Hara and the exhibits
12 that were taken on October 30th for sampling.
13 The liquid which all these measurements are
14 based on that comes to the form of the LSD,
15 they don't show anything about Exhibit 27 or
16 Exhibit 49. Those are powder substances. They
17 do, however, go through Exhibits 1 through 19
18 and Exhibit N 2 through and N 5, N 6, and N 7.
19 And again, Judge, the significance of that is,
20 as the Court will recall, the testimony of Mr.
21 Skinner and the agents were they didn't find
22 any ET. They weren't even told there was ET
23 there until after they had done the search
24 warrant in the inference of October 31st when
25 Mr. Skinner says, hey, come out here in the

0385

1 shed, I'll show you something I missed. There
2 have been hidden items, misplaced items
3 throughout. It wasn't until during the trial,
4 Judge-- remember we filed a motion to suppress
5 and we subpoenaed witnesses Hanzlik, Sorrell,
6 Nichols, Berry Wilkerson and the Court quashed
7 those. And the government at the time of the
8 motion to suppress-- there was never any
9 evidence presented to you that the agents went
10 there after October 31st and, quote, owned the
11 base and that they stayed there until November

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12 6th. There was never any testimony for you
13 that the agents used Mr. Skinner and had him
14 select 32 to 36 green military containers out
15 of approximately 140 green military containers.
16 There was no testimony at the suppression
17 hearing that the agents asked Mr. Skinner to
18 move those around and, in fact, helped him move
19 those around for two or three days so they
20 could be placed where they needed to be for the
21 sneak and peek. There has always been
22 repeatedly information that isn't brought out
23 unless another witness raises it, then the
24 government would concede to it.

25 And we come back to these calculations,
0386

1 Judge. The significance of the liquids and the
2 powder that the Court is considering, and it's
3 based upon the objections of Mr. Pickard, he
4 testified that he dumped what he believed to be
5 was chemicals of Mr. Skinner's and he dumped
6 those out. And what's even more significant,
7 Judge, is the findings that you have made are
8 all based upon information that was presented
9 by the government and 96 percent of the
10 information that wasn't allowed to be put into
11 evidence by Mr. Pickard.

12 Mr. Pickard repeatedly in questions of
13 the witnesses and the record will show it,
14 would make objections. The government would
15 say take it up on cross. When it came time for
16 cross examination we would ask, the government
17 would object, and often times it would be
18 excluded. We also showed, Judge, that when the
19 government put on exhibits in this case they
20 would bring out a newspaper article or a
21 handwritten note or some type of document and
22 say in the government's case look jury, this is
23 evidence that Mr. Pickard is a drug
24 manufacturer. When the time came for us to put
25 on evidence we would take those same exhibits

0387

1 and we would show to the Court, look this one
2 exhibit of the government was taken out of a
3 packet that Mr. Pickard presented to DEA and
4 other people. This exhibit was a part of a
5 presentation he made. And we would try to show
6 to the jury that the government's exhibits were
7 only shown for purposes of one purpose. And
8 when Pickard would try to show them in the
9 context they were taken, oftentimes the
10 evidence was excluded or not allowed.

11 We also know, Judge, that we're not
12 supposed to have a perfect trial. But I

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13 believe that the Court, just like Picasso, they
14 all are human and they're great people, but
15 they make mistakes. And I believe if the Court
16 reviews the records in this I don't believe the
17 Court would want to have someone close to them
18 consider was this trial fair, was what went on
19 in the trial during the course of it and what
20 Mr. Pickard was precluded from putting on and
21 why the government fought tooth and nail to
22 just let the jury get the facts, all of the
23 facts. And that didn't happen, Judge, and he
24 wasn't able to put those on.

25 There was repeated examples of other
0388

1 types of activities where when the evidence--
2 we also found out during trial that when there
3 was some dumping made, yes, there were people
4 put on the location that were observing it.
5 That wasn't found out before. We found out
6 during the trial, yes, there was recordings
7 going on site. It was denied, but then when
8 other witnesses would confirm that Mr. Skinner
9 had the base wired up, we'd get into evidence
10 there about the recordings. And, yes, there
11 was recordings going on some said they could
12 observe, some said they couldn't. But there
13 was always activities that came up that wasn't
14 brought out beforehand. All Mr. Pickard has
15 attempted to have Court do is to gather the
16 facts, to gather the circumstances, and allow
17 him to present his evidence.

18 With respect to the findings that the
19 Court made, for instance, in objections to the
20 quantity, we believe that the drug quantity--
21 the evidence clearly when taken and looked at
22 in light of all the other factors, why didn't
23 the government take photographs of the liquid
24 so you could look in the containers or someone
25 else, why didn't the government produce written

0389

1 DEA regulations saying this is acceptable.
2 Because if they didn't produce it there's
3 always the presumption that it doesn't exist.
4 And what you have before you is the balancing
5 factor of those. And when you take in all of
6 the other occurrences that have happened since
7 Mr. Skinner was at the cooperation with the
8 government in early October through the end of
9 the trial and even afterwards in the
10 prosecution refusing to comply with court
11 orders and produce documents, the only
12 inference that I can come up with, Judge, or
13 the only reasonable inference is why is that?

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14 And when it comes to the figures and the
15 calculations that the Court has used we know
16 you've made a ruling, you've made a ruling on
17 drug quantity. But in respect to that ruling
18 we believe that there is a serious question
19 whether there was more than 300 grams or less
20 than 300 grams based upon all the facts and
21 circumstances. So Mr. Pickard recognizes that
22 finding that you've made and disagrees with it.

23 Mr. Pickard also with respect to the
24 affidavits of what Mr. Pickard filed and this
25 is disjointed because I don't have a copy of

0390

1 the Court's written finding, which is fine.
2 But with respect to the findings that the Court
3 made that he should be-- have an enhancement
4 because he did more than just say he was
5 innocent. Well, as the Court recalled Mr.
6 Pickard tried repeatedly to put on evidence,
7 which was objected to by the government, not
8 allowed by the Court. One day it would be
9 allowed, the next day it may not be allowed.
10 It was taken out of context. And we would
11 stand by the record that a clear view of the
12 record, Mr. Pickard had previously had
13 activities with Mr. Marquardt, Mr. Skinner.
14 There was evidence that the jury wasn't allowed
15 to listen and there was evidence that was
16 produced that we believe the Court hasn't taken
17 into consideration as to whether Mr. Pickard
18 should be enhanced. We believe that had the
19 jury been given all of that evidence they could
20 have had the same results, they could have had
21 a different result. But Mr. Pickard has been
22 prejudiced by not allowing him to put on the
23 theory of his defense and by the repeated
24 objections by the government, even for items
25 taken from the locker.

0391

1 And in that regard, Judge, I must state
2 Mr. Pickard has been locked up from the time
3 the trial was taken. In this case the
4 discovery was not allowed to be with Mr.
5 Pickard, there was initial problems, and I gave
6 the discovery to the attorney who was supposed
7 to try the case. The government objected and
8 said you can only give it to the attorney
9 that's of record. Then the government, for
10 several months, would do nothing. Play sneak
11 and peek. You can view this, you can write
12 down what's there. And, Judge, we're talking
13 about hundreds of thousands of pages of
14 documents that I was allowed to take

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15 photographs. Then at trial-- a week before
16 trial we were allowed to look at the exhibits.
17 The exhibits were all in-- the exhibits that
18 were marked by the government were all in
19 sealed containers, in sealed plastic. We
20 couldn't open them. There were hundreds of
21 pages inside of them and that was our view of
22 the evidence. The evidence was also in
23 exhibits, some of them were copied, some of
24 them weren't. All of those issues were brought
25 about. The Court did let Mr. Pickard look at

0392

1 some exhibits on the Fridays we didn't have
2 court. But, again, I can't take down a car
3 load of exhibits to CCA and let him look at
4 them and then at the same time he's supposed to
5 prepare and he can't have his reports and he's
6 facing a life sentence. Then we get to the
7 point in time where the government exhibits--
8 or then after the trial the Court has them
9 sealed up, they're taken back to the DEA. And
10 the Court said if you need to look at those
11 make arrangements. I tried to make
12 arrangements with the government. The
13 prosecution they say you can't do it unless you
14 have a Court order. Again, Judge, just an
15 example of the process where every point in the
16 defense attempts to do what they need to do.
17 In some ways they're blocked. And all we've
18 asked for at this particular time is that we be
19 allowed to have what we're entitled to. And we
20 think the record will clearly reflect the
21 government is impeding the right to discovery.
22 The government is like pulling teeth in getting
23 the discovery. The government is not
24 complying. If we find it, then we get it. If
25 we didn't find it, then we don't get it. And

0393

1 with the Court's findings that are made here
2 with respect to the enhancements, we would just
3 like the record to reflect those are findings
4 based upon the limited amount of evidence that
5 either through Court ruling or over objection
6 by the government Mr. Pickard was not allowed
7 to introduce. And we would incorporate in
8 those findings, all of the proffers that were
9 made with respect to any evidence that was not
10 allowed in and we would respect the Court-- we
11 would proffer all of those factors that were
12 made during that period of time afterwards.
13 And we would show to the Court that we believe
14 that if consideration had been given to those
15 other factors your findings may have been the

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16 same, they may have been different. But what
17 we have here is no opportunity to do so. And
18 that even counted the 90 gallons of liquid.
19 The government alleged that Mr. Pickard
20 conspired to manufacture and distribute LSD.
21 The evidence clearly shows that the 90 gallons
22 of an estimated 100 gallons of liquid was
23 dumped. And we believe that in and of itself
24 shows there was no intent to distribute and
25 those quantities should not be considered.

0394

1 We further show to the Court that the
2 Court charged Mr. Pickard the enhancement for
3 the environment for dumping the items. That
4 didn't come into effect, we don't believe,
5 until January of 2001, number one. But more
6 importantly, Judge, number two, the government
7 knew there was LSD there, the government didn't
8 take any measures to prevent Mr. Pickard in not
9 dumping what they thought was a dangerous
10 chemical. And if it was this dangerous
11 chemical-- you heard all the testimony from the
12 government witnesses, oh, yeah, if you get LSD
13 it's so sensitive it will knock you out.
14 There's major massive quantities. Well, Mr.
15 Pickard wasn't knocked out. He didn't go to
16 the looney bin and get locked up. He showed no
17 effect of that substance and that draws even
18 more attention that cries out for calculations
19 saying what's the density, what's the purity.
20 If this was the LSD they said it was and it had
21 the dangerous effects they said it did, Mr.
22 Pickard should be a babbling idiot or he should
23 be dead. And he's neither. He's shown
24 absolutely no effect. He gave the government
25 an hour statement of facts and circumstances

0395

1 and a proffer of what was going on. He gave
2 the government the same statements on November
3 7, 2000, that he gave to the jury in January
4 through March of 2003. And he wasn't affected.
5 So we believe that a lot of the evidence cries
6 out and says it was not the quantity or the
7 weight that the Court attributes to the
8 government evidence. But you've made your
9 findings.

10 With respect to other matters Judge, Mr.
11 Pickard would again incorporate each and every
12 pretrial motion made and ruled upon and denied.
13 Mr. Pickard would also incorporate all
14 objections that were made by the expert witness
15 in this regard.

16 And he has one other issue under 18

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17 U.S.C. 3504 for the wire taps, electronic
18 surveillance. It says in any hearing or
19 procedure it's marked in the statute, he has
20 some supplemental information that just came to
21 him between the time of the filing and now that
22 he would like to proffer to the Court about the
23 illegal wiretap, about evidence that deals with
24 the challenges to the Title 3. And before I
25 get to that Judge another example I want to

0396

1 give you about exhibits, the government gives
2 you a copy of Exhibit No. 4 and they say this
3 is what was offered at trial by Mr. McKibben.
4 That consists of 72 pages. I have a copy of
5 Exhibit 4 that was given at trial by Mr.
6 McKibben and it's 32 pages. So somehow it
7 increased 40 pages from trial to this hearing.
8 And again, Judge, what's been marked and
9 compared-- and there are thousands and
10 thousands of pages of documents and I
11 understand the Court's concern and frustration.
12 But, Judge, you got to realize during the
13 course of this trial I was on crutches. Every
14 time we went from the courtroom to Mr. Pickard
15 to the confinement I would have to walk down
16 there, I was unaided. I would walk back up
17 here. And the Court has expressed some
18 statements that are in the record regarding my
19 actions or my activities, which I completely
20 disagree with. And I believe the record will
21 support that to the contrary. But, you know,
22 this is America, every one is entitled to their
23 opinions. I have great respect for this Court.
24 I've also had great respect for the Judge and I
25 still do now. I don't hold anything ill for

0397

1 what the Court's opinions are. But I do
2 believe, Judge, that this was a case that got
3 completely out of control, not through any
4 fault of any particular individual except for
5 the government who brought this case, who hid
6 information from this court from the beginning,
7 throughout the course of the discovery,
8 throughout the trial and even up until the day
9 of sentencing. And this is a type of a case
10 where, yes, the Court must take its frustration
11 out on someone. And Mr. Pickard would stand by
12 all of the grounds he's raised. At this point
13 in time he just has some additional new
14 evidence on the 3504. I don't know if you wish
15 me to do that by a proffer or by testimony by
16 Mr. Pickard or take that up later on, but
17 that's the last thing we have now, Judge,

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18 before imposition of sentence.
19 THE COURT: All right. Well, I think
20 we better recess and come back at 1:30. I'd
21 like to finish this whole matter up and get--
22 so we'll-- let's recess now until 1:30 and
23 we'll come back and let anyone else say
24 anything else they want to say at that time.
25 MR. RORK: And, Judge, it will

0398

1 probably take ten minutes and we'll be done.
2 THE COURT: Pardon me?
3 MR. RORK: It will take ten minutes
4 and we'll be done with what we have left.
5 THE COURT: That will be fine. I
6 think Mr. Hough has decided he wants to
7 eventually say something. Do you want to say
8 anything further or not? Yes, no? Anyway,
9 we'll recess until 1:30 and see what anyone
10 else wants to say. Mr. Bailiff.

11 (THEREUPON, a luncheon recess was
12 had).

13 THE COURT: Mr. Rork, did you finish
14 everything you wanted to do or do you have
15 something else?

16 MR. RORK: Thank you, Your Honor. I
17 have finished everything we'd like to do.

18 THE COURT: All right. Mr. Pickard,
19 do you want to say anything at this time?

20 MR. PICKARD: Just a word, Judge.
21 When I graduated from the Kennedy School of
22 Government in 1997.

23 THE COURT: I'm having a little
24 trouble hearing. Would you move up and use the
25 microphone?

0399

1 MR. PICKARD: I can speak a little
2 louder.

3 THE COURT: All right, please.

4 THE WITNESS: When I graduated from
5 the John F. Kennedy School of Government in
6 Harvard in '97 I've been led to believe by the
7 government that I had authority to contact and
8 communicate on matters of drug trafficking and
9 manufacturing with various individuals. When I
10 received appointment at UCLA and was named as a
11 government employee by the State of California
12 my job description specifically included the
13 contact and interviews of drug manufacturers
14 and traffickers. This eventually led me to
15 Gordon Todd Skinner.

16 As you may know from the recent news
17 articles, Mr. Skinner has been arrested for the
18 torture and kidnapping of a teenage boy over a

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19 six-day period in two states and drug
20 trafficking involving about a pound of MDMA.
21 When I was first interviewed by Mr. Nichols
22 three years ago I mentioned to Nichols that Mr.
23 Skinner was concealing the chemist and a
24 separate laboratory involving MDMA. No action
25 was taken. I then informed Mr. Hough of this

0400

1 on numerous occasions on breaks at trial and no
2 action was taken. I then on my web site Free
3 Pickard dot org, put up a page "Do you know the
4 answer to these questions" to the public. And
5 one of the questions was what drug activity was
6 or is conducted by Skinner, specifically
7 including methamphetamine and MDMA. Over the
8 course of two years I received numerous e-mail
9 messages from all over the United States from
10 parents stating that Mr. Skinner had been
11 giving their children LSD and MDMA and I
12 responded to them and encouraged them to report
13 Mr. Skinner to local narcotics divisions.

14 One parent located Mr. Skinner in Seattle
15 and reported his presence to the defense. So
16 the Pottawatomie County warrant was served on
17 Skinner due to an irate parent punching his
18 alias name of his father up located our web
19 site and contacted us. The same parent went in
20 to a Sergeant Freis and reported Skinner's MDMA
21 trafficking as we encouraged him to. This was
22 also reported to Mr. Hough. No action was
23 taken.

24 Shortly after trial Mr. Skinner was
25 finally arrested for a substantial quantity of

0401

1 MDMA. But the chemist has been supplying for
2 years and the laboratory, which would be a
3 laboratory equivalent in size to the one seized
4 in Wamego, is still unknown. I leave you with
5 those thoughts, sir. Thank you.

6 THE COURT: All right. I think we're
7 now ready to proceed with-- all right, Mr.
8 Hough, do you want to say something?

9 MR. HOUGH: Judge, I'd like to
10 respond briefly to the comments that Mr. Rork
11 made. I think that the Court can and should
12 find that Government's Exhibit 2 B that was
13 provided to the Court and counsel at this
14 hearing is not a report as contemplated by the
15 order of this Court granting the defendant's
16 third motion for discovery of scientific
17 evidence. It was, as the evidence and
18 testimony has shown, Mr. McKibben's bench
19 notes. It was not a report. Regardless,

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20 discovery was timely and appropriate. Doctor
21 Lott had adequate time to contemplate that at
22 the time of his testimony.

23 Furthermore, as to all of the allegations
24 of misconduct that were raised by Mr. Rork
25 against the Court and the government, we would

0402

1 ask that Court reaffirm its prior rulings as to
2 all discovery issues and all other matters
3 touching upon the allegations that Mr. Rork
4 made. That's all that we have, Judge.

5 THE COURT: I'm not sure what you
6 want me to do. Do you want me to issue some
7 sort of an order at this time? I think I have
8 ruled on almost all of those things.

9 MR. HOUGH: That's correct, Judge.
10 We just ask that you now for the record
11 reaffirm those prior orders.

12 THE COURT: Well, I'm willing to do
13 that and I will do it at this time. All right.
14 I think I'm now-- as far as Mr. Pickard is
15 concerned, I'm going to turn to the proposed
16 findings of fact and tentative sentence. I
17 think we've heard about everything that we can
18 possibly hear about this case. And my proposed
19 findings of fact and tentative sentence will be
20 as follows. Total offense level will be 48,
21 criminal history category will be four. The
22 custody, statutory provisions Counts 1 and 2,
23 Count 1 is life, Count 2 is life. The
24 tentative sentence in Count 1 will be life,
25 Count 2 will be life, concurrent with Count I.

0403

1 Probation is not applicable. Supervised
2 release will be Counts 1 and 2 five years on
3 each count, concurrent. Fine, there will be no
4 fine in this case. Restitution is not
5 applicable. Special assessment is Count 1 is
6 \$100 and Count 2 is \$100 under the Victim of
7 Crimes Act and that will be a total of \$200.
8 Denial of federal benefits, there will be no
9 denial of federal benefits. Those will be the
10 rulings of the Court. The mandatory conditions
11 of supervision will be that the defendant shall
12 refrain from any unlawful use of a controlled
13 substance and he shall submit to one drug test
14 within 15 days of commencing supervision and at
15 least two periodic drug tests thereafter. He
16 is prohibited from possessing or purchasing a
17 firearm, destructive device, or other dangerous
18 weapon. The defendant shall file truthful and
19 complete federal and state income tax returns
20 in a timely manner according to law and

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21 cooperate with the Internal Revenue Service and
22 the state tax authorities regarding any matter
23 relating to his past or present tax liability.

24 Now, in determining the sentence to be
25 imposed the Court actually had very little

0404

1 discretion in this case once we find the amount
2 of drugs and once we find that the government
3 filed the necessary papers to call to attention
4 of the Court the two previous sentences. Now,
5 the Court will not deny federal benefits.
6 However, the defendant is ordered to pay \$100
7 to the Crime Victim's Fund for each of the two
8 counts of conviction, which is a total of \$200.
9 The defendant has been in federal custody since
10 November 7th, 2002, and faces life in
11 imprisonment, he does not appear to be an
12 appropriate candidate for voluntary surrender.

13 Now, those are the preliminary findings.
14 The imposition of sentence will be as follows.
15 Pursuant to the Sentencing Reform Act of 1984
16 it is the judgment of the Court that the
17 defendant, William Leonard Pickard, is hereby
18 committed to the custody of the Bureau of
19 Prisons to be imprisoned for life for each of
20 Counts 1 and 2 to be served concurrently. If
21 released from imprisonment, the defendant shall
22 be placed on five years supervised release for
23 each of Counts 1 and 2 to be served
24 concurrently. Within 72 hours of release from
25 custody of the Bureau of Prisons, the defendant

0405

1 shall report in person to the probation office
2 in the district in which he is released. While
3 on supervised release the defendant shall not
4 commit another federal, state, or local crime
5 and shall comply with the standard conditions
6 that have been adopted by this Court and the
7 special and mandatory conditions of supervision
8 previously stated by the Court. It is ordered
9 that the defendant pay the United States a
10 special assessment of \$100 to the Crime
11 Victim's Fund on each of Counts 1 and 2 for a
12 total \$200 pursuant to 18 U.S.C. Section 3013.
13 Payment of the assessment is due immediately.
14 Denial of federal benefits are waived. The
15 defendant is denied voluntary surrender. He is
16 remanded to the custody of the United States
17 Marshall. Now, both government and the
18 defendant are advised of their respective
19 rights to appeal this sentence. An appeal
20 taken from this sentence is subject to 18
21 U.S.C. Section 3742 and subject to any waiver

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22 in any plea agreement in any case. The
23 defendant is advised that it is your right to
24 appeal this sentence and you can lose your
25 right of appeal if you do not file a timely

0406

1 notice of appeal in the district court. Rule 4
2 B of the federal rules of appellate procedure
3 give you ten days after the entry of judgment
4 to file a notice of appeal. If you so request
5 the clerk of the court shall immediately
6 prepare and file a notice of appeal on your
7 behalf. If you're unable to pay the cost of an
8 appeal, you have the right to apply for leave
9 to appeal in forma pauperis. That will be the
10 order of the Court in this case. That is the
11 sentence that I am declaring at this time.

12 MR. RORK: Judge, could I ask the
13 Court, Mr. Pickard understands it's a
14 recommendation, but could the Court recommend
15 that he be sentenced to L-O-M-P-O-C, Lompoc FCI
16 facility in California, not the Lompoc USP
17 facility. He specifically wants the FCI
18 facility.

19 THE COURT: That's agreeable with the
20 Court and I'm willing to make that
21 recommendation.

22 MR. PICKARD: Thank you.

23 THE COURT: And as you know it may
24 not have any weight, but I hope that it does.

25 MR. PICKARD: Thank you very much.

0407

1 MR. RORK: Thank you, Judge.

2 THE COURT: Now, with that I think
3 that would conclude this matter and I'm
4 wondering perhaps if we now need to go ahead
5 with Mr. Apperson. And I have his presentence
6 report here and let me-- let me ask, Mr. Rork,
7 do you think that you wish to have Mr. Pickard
8 removed from the courtroom at this time while I
9 go ahead with Mr. Apperson, what is the
10 situation on that?

11 MR. RORK: Judge, he has no objection
12 to remaining if Mr. Apperson has no objection.

13 THE COURT: Mr. Bennett, do you have
14 any problem with that?

15 MR. BENNETT: No, Your Honor.

16 THE COURT: What about the
17 government, any problem?

18 MR. HOUGH: We have no objection,
19 Judge, as long as the marshalls are okay with
20 it.

21 THE COURT: All right. We will-- we
22 will go ahead then with Mr. Apperson's

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23 situation. Now, Mr. Bennett, anything further
24 you want to say? There were numerous
25 objections also filed here and I have studied

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1 those over and made some rulings, but do you
2 want to say anything further about this?

3 MR. BENNETT: No, Judge, I don't
4 believe so. We've set out in some detail what
5 our objections are, the government has
6 responded to that. And I took particular
7 umbrage at certain of the things that were in
8 that response by way of a reply. I've heard
9 what Mr. Hough advised the Court early on in
10 this. I don't take issue with what he told
11 you, but I feel quite strongly about the
12 allegation that was made relative to the
13 obstruction of justice and my alleged
14 participation in a conspiracy with Mr. Pickard
15 and I just want the Court to be well aware of
16 that, if you aren't already. And I've set that
17 out in some detail in my reply to Mr. Hough's
18 response.

19 THE COURT: All right. Thank you.
20 Mr. Hough?

21 MR. HOUGH: Your Honor, relative to
22 the government's position on the role
23 enhancement, we believe that it would be
24 appropriate, for purposes of that, given the
25 fact the government bears the burden for us to

0409

1 reoffer at this time Exhibits 5 A, 5 B, 5 C,
2 and 5 D, which clearly show and support the
3 government's position of the defendant's
4 involvement in a leadership role within the
5 context of the conspiracy. We believe that the
6 trial evidence and those documents of which
7 were presented at trial, in fact, the
8 transcripts, show that Mr. Apperson was
9 responsible for the setup, the takedown, and
10 the cleanup of the lab wherever it may be. Mr.
11 Skinner, among other of his duties, recruited
12 people that facilitated and assisted that. And
13 that Mr. Apperson supervised namely Lupe,
14 Guinan, Hobbs and even Skinner at times. And
15 in addition to that, the defendant would have
16 supervised and been responsible for William
17 Truett Roberts during the course of money
18 laundering which the trial evidence showed. So
19 we believe that those five individuals, who the
20 evidence can show by name, were supervised by
21 the defendant. It's appropriate for the Court
22 to enhance his base offense level by four roles
23 for his role in the offense for that reason.

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24 And documents 5 A, B, C, and D, which we offer
25 again at this time, we believe bear that out

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1 particularly in light of the trial evidence.

2 MR. BENNETT: Well, Judge, I didn't
3 understand that when you opened the floor that
4 we were supposed to present arguments at this
5 time. I stand on what I said. I object to 5
6 A, B, C, and D just like I did previously for
7 the same reasons. And with regards to this
8 last statement by Mr. Hough, number one, I
9 don't think it's appropriate at this time.
10 But, number two, we filed a lengthy sentencing
11 memorandum and we addressed the very issues
12 that he's talking about and we stand on the
13 record that we've set out in those sentencing--
14 in that sentencing memorandum, the arguments,
15 and authorities that we've submitted in support
16 of the sentencing memorandum.

17 THE COURT: All right. Does Mr.
18 Apperson wish to say anything at this time?
19 I'll give him a chance later if he wants to.

20 MR. BENNETT: He doesn't want to say
21 anything at this time, Your Honor. We'll wait
22 and see about later.

23 THE COURT: Let me go ahead and make
24 some rulings then in regard to the objections
25 that were filed in this case. First, this is

0411

1 United States versus Apperson and we had
2 certain objections made by the government and
3 let me look at those first. The government
4 contends that the defendant's offense level
5 should be increased by two levels pursuant to
6 U.S. Sentencing Guidelines 2D1.2(a)(1) because
7 a pregnant woman, Natatia Kruglova was used in
8 a conspiracy for which he was convicted. The
9 government further argues that the defendant's
10 offense level should be increased by three
11 levels pursuant to United States Sentencing
12 Guidelines 2D1.10 because he and his
13 codefendant endangered the lives of several
14 individuals during the manufacture and cleanup
15 of these LSD manufacturing locations. The
16 defendant, without providing any reason,
17 disagrees with the argument of the government.
18 The probation office contends that the
19 government is misapplying the guidelines. The
20 probation office suggests that the United
21 States Sentencing Guidelines 2D1.1 is the
22 appropriate guideline to determine the
23 defendant's base offense level and that the
24 conduct here is not sufficient to warrant the

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25 use of Section 2D1.2 or 2D1.10.

0412

1 The Court believes the probation office
2 has properly calculated the defendant's base
3 offense level through the use of United States
4 Sentencing Guideline 2D1.1. The Court rejects
5 the government's argument that 2D1.2 or 2D1.10
6 should be applied here. The government
7 contends that the defendant's offense level
8 should be increased by four levels, that's
9 number two now, pursuant to the United States
10 Sentencing Guideline 3B1.1 because he was an
11 organizer or leader of the criminal activity
12 that involved five or more participants. The
13 defendant, without providing any reasons,
14 disagrees with the arguments of the government.
15 The probation office contends that a two-level
16 increase is all that is warranted under 3B1.1
17 because the defendant did not exercise equal
18 decision making authority with codefendant
19 Pickard and he did not share equally in the
20 fruits of the crime. The probation office
21 suggests that the defendant was Pickard's
22 right-hand man. United States Sentencing
23 Guidelines 3B1.1(a) provides that a defendant's
24 offense level should increase by four points if
25 the defendant was an organizer or leader of the

0413

1 criminal activity that involved five or more
2 participants or was otherwise extensive. The
3 government bears the burden of proving by a
4 preponderance of the evidence the facts
5 necessary to establish the applicability of
6 this enhancement. See United States versus
7 Cruz Camacho, C-A-M-A-C-H-O, 137 F.3d 1220, the
8 Tenth Circuit, 1998. In determining whether a
9 defendant is a leader or organizer the Court
10 should consider the following factors. The
11 exercise of a decision making authority, the
12 nature of participation in the commission of
13 the offense, the recruitment of accomplices,
14 and the claimed right to the larger share of
15 the futures of the crime, the degree of
16 participation in planning or organizing the
17 offense, the nature and scope of the illegal
18 activity, and the degree of control and
19 authority exercised over others. That's United
20 States Sentencing Guidelines 3B1.1 comment note
21 four.

22 In considering these factors the
23 sentencing Court should remain conscious of the
24 fact that the gravamen of this enhancement is
25 control, organization, and responsibility for

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1 the actions of other individuals because
2 Section 3B1.1(a) is an enhancement for
3 organizers or leaders not for the importance of
4 essential figures. United States versus
5 Torres, T-O-R-R-E-S, 53 F.3d 1129, Tenth
6 Circuit, 1995. Nevertheless, the Guidelines do
7 not require that each of the factors be
8 satisfied for a 3B1.1(a) to apply. United
9 States versus Bernaugh, B-E-R-N-A-U-G-H, 96
10 F.2d 85, the Tenth Circuit, 1992.

11 The Court agrees with the probation
12 office that a four-level enhancement under
13 3B1.1 is not appropriate here. The Court
14 further agrees that a two-level enhancement is
15 proper. The Court finds that the evidence
16 demonstrates that the defendant played a
17 significant role in the LSD operation. He did
18 not, however, have a status equivalent to that
19 of Mr. Pickard. Mr. Pickard was clearly the
20 leader and organizer of this conspiracy.
21 Defendant did provide substantial assistance to
22 Pickard and can properly be described as a
23 manager or supervisor under 3B1.1(c).
24 Accordingly, the government's objection shall
25 be denied.

0415

1 Now, certain objections by the defendant.
2 The defendant has raised a number of objections
3 to the presentence report. The probation
4 office has categorized them into five
5 objections. The Court will consider them as
6 grouped by the probation office. Number one,
7 the defendant objects to the number of factual
8 statements contained in the presentence report.
9 He argues that some portions of the report are
10 inaccurate and other portions are irrelevant.
11 The defendant also objects to the drug
12 quantities found in the presentence report.
13 The government and probation office assert that
14 the facts stated in the presentence report are
15 accurate. They also contend that the drug
16 quantities in the presentence report accurately
17 reflect the trial testimony of DEA Forensic
18 Chemist Tim McKibben. The Court has undertaken
19 a thorough review of the facts as set forth in
20 the presentence report. The Court has also
21 carefully considered the objection made by the
22 defendant-- the objections made by the
23 defendant. The Court finds that the facts
24 contained in the presentence report are
25 substantially accurate and reflect the evidence

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1 provided at trial. Accordingly, these
2 objections shall be denied.

3 The Court shall next consider the
4 defendant's arguments concerning drug
5 quantities. Drug quantities attributable to
6 the defendant convicted of a conspiracy are
7 established on the basis of the quality-- on
8 the quantity of drugs which the defendant
9 reasonably foresaw or which fell within the
10 scope of the defendant's agreement with the
11 conspiracy. United States versus Roberts, 14
12 F.3d 502, the Tenth Circuit, 1993. Citations,
13 quotations, and emphasis omitted. For
14 sentencing purposes the government bears the
15 burden of proving the quantity of drug by a
16 preponderance of the evidence. United States
17 versus Hook, 65 F.3d 850, Tenth Circuit, 1995,
18 certiorari denied, 516 U.S. 1083, 1996. The
19 district court may estimate the quantity
20 provided the information underlying its
21 estimate at minimum indicia of reliability.
22 United States versus Browning, 61 F.3d 752,
23 Tenth Circuit, 1995.

24 After the Court's careful review of the
25 evidence presented on this issue both at trial

0417

1 and during the sentencing hearing, the Court
2 has determined that the quantities stated in
3 the presentence report are accurate. In fact,
4 they may be low, if anything. The amount of
5 ergocristine alone when conservatively
6 converted to LSD produces an offense level at
7 the top of the drug quantity table. Moreover
8 the Court has not considered the LSD that was
9 manufactured by the defendant at Aspen, Santa
10 Fe, and Ellsworth in arriving at the drug
11 quantities contained in the presentence report.
12 The evidence is very strong that a considerable
13 amount of LSD was produced at Santa Fe and
14 Ellsworth. The law is clear that some or all
15 of the drug amounts from these activities could
16 be considered relevant conduct here. See
17 United States Sentencing Guidelines 1B1.3. In
18 sum, the Court is thoroughly convinced that the
19 drug amounts attributable and attributed to the
20 defendant are extremely conservative.
21 Accordingly, this aspect of this objection
22 shall be denied.

23 Two, the defendant objects to the
24 information contained in paragraph 93 and under
25 the heading "Adjustment for Obstruction of

0418

1 Justice." The defendant suggests that the

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2 information contained in those paragraphs is
3 incomplete and fails to reflect on what
4 actually occurred. The government and the
5 probation office assert that the information
6 contained in these paragraphs is factually
7 accurate. The Court agrees with the probation
8 office and the government and the Court finds
9 the information paragraphs 93 and 94 to be
10 factually accurate. Accordingly, this
11 objection shall be denied.

12 Number three, the defendant objects to
13 the base offense level established in paragraph
14 97. He argues that pursuant to United States
15 Sentencing Guideline 2D1.1 his base offense
16 level should be no greater than 30 because he
17 occupied a minor role as defined in United
18 States Sentencing Guideline 3B1.2(b). This
19 objection shall be denied because the Court has
20 previously determined that the defendant was a
21 manager or supervisor of the LSD manufacturing
22 operation. The evidence before the Court
23 certainly does not indicate that the defendant
24 had a minor role in the offense. Accordingly,
25 this objection must be denied.

0419

1 Four, the defendant objects to the
2 two-level enhancement contained in paragraph 98
3 for the unlawful discharge, emission, or
4 release of hazardous or toxic substance into
5 the environment. He asserts that Mr. Pickard
6 did the dumping of the substance and he had
7 nothing to do with it. He further argues that
8 the dumping of substances by Pickard was not
9 reasonably foreseeable to him. The government
10 asserts that the defendant has ignored the
11 Pinkerton theory of this conspiracy. The
12 probation office and the government contend
13 that this enhancement is appropriate here. The
14 Court is not persuaded that this enhancement
15 should be applied to the defendant. The Court
16 does not find sufficient evidence that it was
17 reasonably foreseeable that Pickard would take
18 the action that he did in dumping the toxic
19 liquid in this case. There is no evidence that
20 the defendant was aware of the actions taken by
21 Pickard concerning this dumping or that he
22 approved of them. Without such evidence the
23 Court shall not impose this enhancement upon
24 the defendant. The defendant's objection on
25 this issue shall be sustained.

0420

1 Five, the defendant objects to the
2 two-level enhancement contained in paragraph

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3 101 for obstruction of justice. The defendant
4 suggests that the facts do not support a
5 finding that he consciously attempted to
6 obstruct justice. The government and the
7 probation office assert that the obstruction of
8 justice enhancement is proper here. The Court
9 agrees with the probation office and the
10 government. And the defendant-- the defendant
11 used the affidavit authorized by Pickard at
12 several points during these proceedings,
13 including at the time of Pickard's testimony at
14 trial. The defendant's relied on these
15 statements contained in the affidavit despite
16 overwhelming evidence to the contrary
17 constitutes obstruction of justice as set forth
18 in United States Sentencing Guideline 3C1.1.
19 Accordingly, this objection shall be denied.

20 That statement constitutes the Court's
21 ruling on all of the objections made by the
22 government and-- I mean, all made by the
23 government and by the defendant.

24 Now, turning then to the presentence
25 report. Mr. Bennett, you've stated your views

0421

1 on the presentence report and if you want to
2 say anything further you may do so or Mr.
3 Apperson may feel free to say anything he wants
4 to say about the presentence investigation
5 report.

6 MR. BENNETT: Judge, I don't have
7 anything else to say. I think I've set it out
8 between the objections that were filed to the
9 presentence report and to the-- in the
10 sentencing memorandum and I don't think it-- my
11 position could be clearer with anything
12 additional. I don't believe Mr. Apperson has
13 anything that he wants to say at this time.

14 THE COURT: All right. I think I
15 will turn then to the sentencing as far as Mr.
16 Pickard (sic) is concerned.

17 MR. BENNETT: Mr. Apperson, Your
18 Honor.

19 MR. HOUGH: Mr. Apperson.

20 MR. BENNETT: You said Mr. Pickard.

21 THE COURT: I mean, Mr. Apperson.

22 I'm going to turn to Mr. Apperson's sentencing
23 presentence investigation report. Now, Mr.
24 Hough, do you wish to say anything further?

25 MR. HOUGH: Yes, Your Honor, at this

0422

1 time we would ask the Court to reconsider its
2 findings regarding the discharge of waste and
3 granting the defendant's objection as to that.

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4 The guideline itself applies equally to the
5 discharge and transportation of waste. As the
6 Court will recall the trial evidence, it was
7 Mr. Apperson who was loading the containers
8 into the Ryder truck, many of which were found
9 to have contained the toxic matters that were
10 seized then on the November date at the time of
11 his arrest. He was driving the vehicle, he
12 rented the vehicle, he actually loaded the
13 containers into the vehicle. And as he was
14 heard to say on the tapes when he came into
15 that Butler building or Morton building, if you
16 will, and observed these items they couldn't be
17 touched without gloves. Obviously he knew what
18 they were and the jury's findings would tend to
19 indicate he obviously knew what he was doing
20 here. The Court's other findings indicate he
21 knew what he was doing here. So as it relates
22 to the transportation contemplated by the
23 guidelines, we would respectfully submit the
24 Court should reconsider its ruling.
25 Additionally, as it relates to the discharge,

0423

1 if the Court will recall the trial evidence,
2 Mr. Pickard was dumping these containers out
3 within ten feet of Mr. Apperson. There was no
4 way that he could have possibly not known what
5 was going on and he did absolutely nothing to
6 intervene in that. And, additionally, some of
7 those containers that were then dumped out that
8 were later found to have just portions of
9 liquid matter in them were then loaded on to
10 the same truck Mr. Apperson was driving at the
11 time of his arrest. So we would, because of
12 the facts educed at trial in this case, ask the
13 Court to reconsider its ruling as to the
14 discharge of waste objection in paragraph 98
15 that defendant has made.

16 THE COURT: Mr. Bennett?

17 MR. BENNETT: Well, Judge, we would
18 oppose what Mr. Hough is suggesting and would
19 ask that the Court maintain its earlier
20 decision and-- you know, I hear Mr. Hough stand
21 up here and say this was going on within ten
22 feet of Clyde Apperson. Now, that wasn't the
23 testimony and that wasn't the evidence in this
24 trial. The evidence in the trial was Mr.
25 Apperson was inside of a closed building and

0424

1 that-- that Mr. Pickard or someone was observed
2 coming out of the building through the door,
3 it's-- no windows in the building and dumping
4 something out. And to suggest to this Court

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5 that Mr. Apperson saw or should have seen or
6 could have seen that is just not true.

7 THE COURT: All right. Thank you. I
8 assume no one else has anything they want to
9 say about that? The Court studied this matter
10 and I'm going to maintain the decision that I
11 have made in regards to whether he should bear
12 any responsibility for dumping out the
13 hazardous merchandise there.

14 (THEREUPON, the imposition of
15 sentence of Clyde Apperson was previously
16 ordered transcribed and is contained in a
17 separate binder).

18 THE COURT: Mr. Rork?

19 MR. RORK: Judge, I'd just ask the
20 Court, while we're here so there won't be any
21 confusion, I understand I'll probably be doing
22 the appeal, under Rule 11 of the Federal Rules
23 of Appellate Procedure would you ask and direct
24 that the record on appeal remain here in the
25 clerk of the court's office before it's

0425

1 transmitted to Denver. That would include the
2 exhibits and the other items that are going to
3 be designated. I know the Court previously let
4 the DEA take the trial exhibits back to be
5 locked up. But we're mainly concerned with the
6 documents that would be included in the trial
7 exhibits for the record on appeal so we don't
8 have to come back and get another order that
9 all of the documents that were in evidence,
10 exhibits, and the record on appeal remain here
11 in the clerk's office until it's transmitted to
12 Denver.

13 MR. BENNETT: Judge, we would join in
14 that request on behalf of Mr. Apperson.

15 MR. HOUGH: Judge, it's no problem at
16 all. The reason, if you'll recall, the DEA
17 took it back was because of lack of space in
18 the clerk's office. If they have space to
19 store that thousand exhibits, I'm sure DEA will
20 bring it right back.

21 THE COURT: Are you asking that all
22 of the exhibits come back?

23 MR. RORK: Judge, the document
24 exhibits come back because they'll be
25 transmitted to-- the Rule says the document

0426

1 exhibits, if they're bulky ones, the clerk can
2 handle that. I'm just asking that the record
3 on appeal and the trial exhibit documents,
4 including photographs, be kept here before
5 transmitted to Denver by your clerk wherever

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6 possible.

7 MR. BENNETT: And that's our
8 position, Your Honor.

9 MR. HOUGH: As you'll recall, Judge,
10 it's all documents and photographs.

11 MR. RORK: Well, there's a few
12 computer cases.

13 THE COURT: I'm willing to grant that
14 and I will order that they stay here until the
15 appeal is filed or whatever is going to happen
16 from here on out.

17 MR. HOUGH: Judge, tomorrow is the
18 eve of Thanksgiving, would it be okay if DEA
19 had until the Monday or Tuesday after
20 Thanksgiving to bring that stuff up here
21 because I don't know who all-- they'll have a
22 skeleton crew likely in the clerk's office and
23 DEA on the eve of Thanksgiving.

24 THE COURT: I'm sure that will be
25 adequate. I don't think there will be anything

0427

1 done before then. All right. This has been a
2 long and very difficult case and it's now
3 concluded and we'll see what happens from here.
4 Mr. Bailiff, let's recess the Court.

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1 UNITED STATES OF AMERICA)

2) ss:

3 DISTRICT OF KANSAS)

4 C E R T I F I C A T E

5 I, Jana L. Willard, Certified Shorthand

Reporter, in and for the State of Kansas, do

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6 hereby certify that I was present at and
7 reported in machine shorthand the proceedings
8 had the 25th day of November, 2003, in the
9 above-mentioned court; that the foregoing
10 transcript is a true, correct, and complete
11 transcript of the requested proceedings.

12 I further certify that I am not attorney
13 for, nor employed by, nor related to any of the
14 parties or attorneys in this action, nor
15 financially interested in the action.

16 IN WITNESS WHEREOF, I have hereunto set
17 my hand and official seal at Topeka, Kansas,
18 this day of 2004.

19
20
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22
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24
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Jana L. Willard
Certified Shorthand Reporter