UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.: 4:01cr00914
	)	
DAVID KAY, *et al.*,	)	
	)	
Defendants.	)	

SENTENCING MEMORANDUM OF THE UNITED STATES

INTRODUCTION

The United States respectfully submits this Sentencing Memorandum for the sentencing of defendants David Kay and Douglas Murphy, which is scheduled to occur on June 29, 2005.

Defendants Kay and Murphy were convicted on October 6, 2004 of twelve counts of violating the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1(a) and 78dd-2(a), and one count of conspiring to violate the FCPA, 18 U.S.C. § 371. Defendant Murphy was also convicted on that date of obstruction of justice, 18 U.S.C. § 1505. Prior to the convictions, the defendants and the government entered into the following Sentencing Stipulations, which were filed with the Court on October 6, 2004: (1) the amount of the benefit obtained, or intended to be obtained, as a result of the offense is more than $500,000 but less than $800,000; (2) defendant Murphy was a leader of a criminal activity that

involved five or more participants or was otherwise extensive; and (3) defendant Kay was a manager or supervisor of a criminal activity that involved five or more participants or was otherwise extensive.

GOVERNMENT POSITION ON PRE-SENTENCE REPORTS

A. David Kay

In its Pre-Sentence Report ("PSR") for defendant Kay, the United States Probation Office ("USPO") recommended a total offense level of 23, with a Criminal History Category I, which equates to a sentencing range of 46-57 months. In so doing, the USPO recommended the following: (a) a base offense level of 8 (*see* U.S. Sentencing Guidelines Manual § 2B4.1 (1998)); (b) a ten-level increase due to a loss amount greater than $500,000 but less than $800,000 (*id.* § 2F1.1(b)(1)(K)); (c) a three-level increase for role in the offense as a manager (*id.* § 3B1.1(b)); and (d) a two-level increase based on abuse of a position of trust (*id.* § 3B1.3). The PSR did not provide any adjustment for acceptance of responsibility. The PSR also stated the fine range was $10,000-$4,962,230.

The government agrees with the PSR's recommendation of a base offense level of 8, a ten-level increase based on an intended loss amount greater than $500,000 but less than $800,000, and a three-level increase based on defendant Kay's role as a manager in the offense. The government takes no position on the

PSR's recommendation of a two-level increase for abuse of a position of trust with regard to defendant Kay, though, as stated further below, the government has reservations about applying that enhancement to Kay. The government agrees there should be no adjustment for acceptance of responsibility.

B. Douglas Murphy

In its Pre-Sentence Report ("PSR") for defendant Murphy, the United States Probation Office ("USPO") recommended a total offense level of 25, with a Criminal History Category I, which equates to a sentencing range of 57-71 months. In so doing, the USPO recommended the following: (a) a base offense level of 8 (*see* U.S. Sentencing Guidelines Manual § 2B4.1 (2000)); (b) a ten-level increase due to a loss amount greater than $500,000 but less than $800,000 (*id.* § 2F1.1(b)(1)(K)); (c) a three-level increase for role in the offense as a leader (*id.* § 3B1.1(b)); (d) a two-level increase based on abuse of a position of trust (*id.* § 3B1.3); and (3) a two-level increase for obstruction of justice (*id.* § 3C1.1). The PSR did not provide any adjustment for acceptance of responsibility. The PSR also stated the fine range was $10,000-$4,962,230.

The government agrees with the PSR's recommendation of a base offense level of 8, a ten-level increase based on an intended loss amount greater than $500,000 but less than $800,000, a three-level increase based on defendant

Murphy's role as a leader in the offense, and a two-level increase for obstruction of justice. The government takes no position on the PSR's recommendation of a two-level increase for abuse of a position of trust with regard to defendant Murphy, though, unlike defendant Kay, the government has no reservations about applying this factor to defendant Murphy. The government agrees there should be no adjustment for acceptance of responsibility.

FACTS

Because this Court heard the evidence presented at trial by the government and the defendants, the government will not recite at length any of that evidence. Instead, the government will recite only those facts relevant to its arguments in connection with this Sentencing Memorandum.

ARGUMENT

I. Defendant Kay

The Court may appropriately set defendant Kay's total offense level at 23, which is comprised of the following (based on the 1998 U.S. Sentencing Guidelines):

Base offense level	+ 8 (§ 2B4.1)
Loss Amount	+ 10 (§ 2F1.1(b)(1)(K)
Role in the Offense - Manager	+ 3 (§ 3B1.1(b))

Abuse of Position of Trust	+ 2 (§ 3B1.3)
Acceptance of Responsibility	- 0
	Total Offense Level: 23

As demonstrated further below, however, the government has reservations about applying the two-level enhancement to defendant Kay for abuse of a position of trust. The government agrees with the USPO that the Court retains the discretion to apply this two-level enhancement to defendant Kay. And the government disagrees with defendant Kay's rationale for not applying this enhancement. But the government believes the two-level enhancement for abuse of a position of trust, as applied to Kay, might appropriately be considered to be encompassed within the three-level enhancement for defendant Kay's role in the offense.

If the Court decides not to apply the two-level enhancement for abuse of position of trust, the total offense level would be 21 with a range of 37-46 months. The government recommends the low range of 37-46 months as an appropriate sentence for defendant Kay. Such a sentence is necessary given the seriousness of the offense, defendant Kay's position in the organization, the extended period of time over which the illegal conduct occurred, and the absence of any acceptance of responsibility by the defendant.

The illegal conduct at issue involved paying bribes to foreign government officials in violation of the FCPA. Despite the repeated claims by both defendants and their supporters about its purported vagaries and complexities, the FCPA has been the law of this country since 1977. Although the outer reaches of its boundaries may be complex, its core of criminality is simple: It prohibits paying money to foreign government officials to assist a company to obtain or retain business.

Here, Kay's conduct went to the core of the FCPA's criminality. As a well-educated and experienced American businessman, holding a high-ranking position in a publicly traded company, with ready access to corporate and outside counsel, he instructed his subordinates to generate false business records (and, in one case, to destroy them), and to pay foreign government officials, in cash, in tens of thousands of dollars, with no receipts, in sealed envelopes, without seeking any advice from any legal counsel at any time. Moreover, despite his repeated claims to the contrary, the witnesses in Haiti and Houston testified uniformly that the payments were made to assist Kay's employer, American Rice Incorporated ("ARI"), to obtain or retain business in Haiti.

Also contrary to Kay's assertion, this was not "one aberrant episode of misconduct." *See* Sentencing Memorandum at 6. This was not an episode – it was

a *conspiracy*. And the conspiracy, as charged and proved, lasted from 1991 through 1999. It only ended as to defendant Kay when defendant Murphy took complete control over the Haiti business in late 1999. In addition to spanning eight years, this conspiracy encompassed various methods and means of paying bribes to foreign government officials, including illegal "franchise" payments, bribes to reduce customs duties and bribes to reduce sales taxes in Haiti.

Contrary, again, to Kay's assertion, he does not appear to be a "genuinely remorseful offender who makes no excuses for his conduct." *Id.* at 6. As far as the government can tell, defendant Kay does not consider himself to be an "offender" of any sort. Instead, as at trial, Kay continues to try to excuse his conduct based on purportedly "extortionate" demands by the Haitian officials. The jury heard Kay's testimony, and its guilty verdicts on all counts can only be interpreted as a complete rejection of that excuse. The documentary evidence discrediting that excuse, together with the contrary testimony by the witnesses in Haiti (Messrs. Malebranche, Schwartz and Theriot) and Houston (Messrs. Watson and Sturdivant), fully supported the jury's decision to reject his excuse.

It was a bad situation in Haiti, but Kay put himself in it. Nobody forced Kay to work with defendant Murphy, or to remain in business with him for over eight years. By all accounts, including his own, Kay could have found a good job

elsewhere at any time. The government agrees with Kay that defendant Murphy, as Kay's superior, deserves more blame for the illegal conduct. But a person, such as defendant Kay, who will go along with bribing foreign government officials for several years in such blatant ways is making his escape from a bad situation much too slow. Ride with an outlaw, go to jail with him. It is a harsh code, admittedly, but it is a necessary one. Defendant Kay should be incarcerated for a minimum of 37 months.

The government does not seek restitution. The government recommends a fine in an amount that will, at a minimum, cover the cost of supervision and sentencing.

A. The base offense level is 8.

Kay does not dispute that the base offense level for his conviction is a level 8. *See* U.S. Sentencing Guidelines Manual § 2B4.1 (1998).

B. The base offense level should be increased by ten levels to account for a loss over $500,000 but less than $800,000.

Kay does not dispute that the base offense level should be increased ten levels for a loss greater than $500,000 but less than $800,000. *Id.* § 2F1.1(b)(1)(K).

C. The base offense level should be increased by three levels for his role as a manager in the offense.

Kay does not dispute that his base offense level should be increased by three levels for his role as a manager in the offense. *Id.* § 3B1.1(b).

D. Kay's offense level may be increased by two levels for abuse of a position of trust.

The PSR recommends a two-level enhancement for abuse of a position of trust, *id.* § 3B1.3, though the Addendum to Kay's PSR reflects that this "guideline application was a difficult decision." *See* Kay PSR, Addendum at 3. Defendant Kay objects to this two-level enhancement. The government agrees with the USPO that the Court has the discretion to enhance Kay's sentence for abuse of a position of trust. The government, however, has reservations about applying the two-level enhancement for abuse of a position of trust to Kay given that the three-level enhancement for Kay's role in the offense might properly encompass Kay's abuse of his position of trust under the facts of this case. In short, it appears that it was Kay's status as a manager, rather than any affirmative action by him, that would make the two-level enhancement applicable to him for abuse of a position of trust. Because his status as a manager already results in a three-level enhancement for his role in the offense, any additional enhancement based solely

on his status as a manager for abuse of a position of trust might unfairly double-count the same factor.

Nevertheless, the government disagrees with the defendant's factual objections to this proposed enhancement. First, Kay's repeated representations that he objected to the making of payments to Haitian customs officials until defendant Murphy threatened Kay with dismissal consists entirely of Kay's own testimony. Defendant Kay did not corroborate that testimony with a document or testimony from any other witness.

Further, contrary to defendant's suggestion, Kay did not have the exercise of discretion "removed from him" by defendant Murphy. Murphy neither removed Kay from his position at ARI nor removed Kay from his responsibilities over the business in Haiti. To the contrary, Kay retained managerial discretion over the operations of ARI's business in Haiti (or, at a minimum, the discretion to report actions that were contrary to the interests of shareholders, bondholders, and others to other officers, counsel, or the Board of Directors). Put simply, the exercise of discretion was not *removed* from Kay; it was *abdicated* by him when he knowingly and voluntarily joined the conspiracy to pay bribes.

In addition, Kay's disclosure of the customs payments to counsel for the company after Murphy was fired is irrelevant to whether he abused his position of

trust as a corporate officer under the prior regime. Moreover, as the government has been repeatedly denied access by the defendant to his statement to corporate counsel, neither the government nor the Court can evaluate either the context or the completeness of this disclosure.

E. Kay should receive no reduction in the base offense level for acceptance of responsibility.

Defendant Kay objects to the failure of the PSR to recommend a two-point decrease due to his purported acceptance of responsibility. Kay's continued assertion of factual and legal innocence prior to trial, throughout trial, and even to this date demonstrates that he has not accepted responsibility for his actions. Kay is willing to admit that he authorized at least the bribes to customs officials in 1998 and 1999, but he continues to deny (i) that the bribes were paid "to assist in obtaining or retaining business" and (ii) that he did so with the requisite "corrupt" intent, both of which are elements of the offense.[1]

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[1] Under § 3E1.1, Application Note 2, "a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct." Here, as stated above, the government has been repeatedly denied access by the defendant to his pre-trial statement to corporate counsel. Further, to the extent those pre-trial statements are consistent with defendant's trial testimony and post-trial statements that others were responsible for his criminal conduct, such as defendant Murphy for purportedly causing Kay to make the payments under "duress" and certain Haitian customs officials for purportedly extorting the payments from the company, the jury has already considered and rejected those excuses.

Nor should this Court apply any sort of downward departure under U.S.S.G. § 5K2.16 for "voluntary disclosure of offense." As an initial matter, § 5K2.16, a policy statement, applies only when a "defendant voluntarily discloses *to authorities* the existence of, and accepts responsibility for, the offense . . ." Kay has never made any statement to the Department of Justice, the U.S. Securities & Exchange Commission, or any other law enforcement or regulatory authority. Moreover, to this day he continues to deny personal responsibility for the offense. Accordingly, he is ineligible for a departure under this provision.

The defendant relies on his alleged disclosure of at least some of the payments to corporate counsel as grounds for departure since that disclosure led to an internal investigation and disclosure *by ARI* to the authorities. Kay himself, however, refused to disclose anything to the authorities. Indeed, despite requests by the SEC and the Department for interviews, he repeatedly failed to meet with the authorities or to disclose directly to them any facts or circumstances surrounding the offense or, until he testified in his own defense at trial, to provide information concerning other culpable individuals. Moreover, the undersigned understands that the defendant's alleged disclosure was made to corporate counsel handling litigation against Douglas Murphy and that the defendant refused to meet

with and be interviewed by separate corporate counsel hired by ARI's Board to investigate the bribery scheme.

Finally, it is worth noting that the defendant's alleged disclosure to corporate counsel is not supported by any evidence at trial. Although the government has repeatedly asked for copies of the defendant's statement or access to corporate counsel, the defendant has consistently, even at trial, asserted the attorney-client privilege. The one-paragraph affidavit of corporate counsel appended to defendant's objections does not describe the circumstances surrounding the disclosure nor does it establish whether the defendant's disclosure was complete and truthful, *i.e.*, whether he fully disclosed not just the customs bribes but *all* of the bribes paid by ARI in Haiti.

II. Defendant Murphy

As demonstrated below, Murphy's total offense level should be 25, which is comprised of the following (based on the 2000 U.S. Sentencing Guidelines):

Base offense level	+ 8 (§ 2B4.1)
Loss Amount	+ 10 (§ 2F1.1(b)(1)(K)
Role in the Offense - Manager	+ 3 (§ 3B1.1(b))
Abuse of Position of Trust	+ 2 (§ 3B1.3)
Obstruction of Justice	+ 2 (§ 3C1.1)

Acceptance of Responsibility - 0

Total Offense Level: 25

Unlike defendant Kay, the government has no reservations regarding the two-level enhancement to defendant Murphy for abuse of a position of trust. The government agrees with the PSR that the Court retains the discretion to apply this two-level enhancement to defendant Murphy. With a total offense level of 25, the applicable sentencing range is 57-71 months. The government recommends the high range of 57-71 months as an appropriate sentence for defendant Murphy. Such a sentence is necessary given the seriousness of the offense, the extended period of time over which the illegal conduct occurred, Murphy's position as CEO and President, his obstruction of justice, and the absence of any acceptance of responsibility by the defendant.

As with Kay, Murphy's illegal conduct involved paying bribes to foreign government officials in violation of the FCPA. Unlike Kay, however, Murphy was also convicted of obstructing justice for lying to the SEC and withholding documents from the SEC regarding the bribe payments. Although Murphy talks about the purported "vagaries of the FCPA proscriptions," *see* Defendant Murphy's Sentencing Memorandum at 1, Murphy (who did not testify at the trial) has never claimed to be unaware of the FCPA or its core prohibitions. Indeed, in

letters submitted to the Court on Murphy's behalf, one of Murphy's former business associates stated that Murphy was aware of the FCPA and made efforts to "strictly adhere[]" to that law:

> Since passage of the Foreign Corrupt Practices Act, it has been the policy of the company, insisted upon by Doug [Murphy], that this law be strictly adhered to and always, that all operations be conducted legally and in accordance with all existing law.

Letter from Lolan M. Pullen to Hon. David Hittner (May 17, 2005) (attached to Defendant Murphy's Sentencing Memorandum).

Similarly, one of Murphy's long-time attorneys stated that Murphy was aware of the FCPA and retained corporate and outside counsel to formulate "a detailed FCPA policy":

> Doug and his Board of Directors employed and followed the advice of sophisticated, experienced Washington counsel and professional advisers in all foreign jurisdictions. The company's hired professionals formulated a detailed FCPA policy managed by a senior control and audit officer and the company retained outside consultants for additional oversight.

See Letter from Richard L. Fuqua to Hon. David Hittner (June 6, 2005) (attached to Murphy's Sentencing Memorandum).

It is difficult to reconcile such purportedly responsible behavior with Murphy's decision, as a well-educated and experienced American businessman,

holding the top-ranking management position in a publicly traded company, with access to "sophisticated, experienced" outside counsel, to instruct his subordinates, over an eight-year period, to generate false business records and to pay cash, in tens of thousands of dollars, with no receipts, in sealed envelopes, to foreign government officials, without informing or seeking any advice from any audit officer or legal counsel at any time. Such behavior could not have complied with the "detailed FCPA policy" described by Murphy's supporter.

Murphy's own conduct demonstrates there was nothing vague in his mind about his wrongful behavior. When he testified before the SEC, Murphy demonstrated his consciousness of guilt by lying about his knowledge of *any* payments to Haitian government officials. He also demonstrated his consciousness of guilt by failing to provide incriminating documents to the SEC.

Nor should this Court reduce defendant Murphy's sentence in any way due to his purported humanitarian efforts in Haiti. *See* Murphy's Sentencing Memorandum at 4-5. The fact remains that the Haitian government, in the end, attempted to arrest Murphy when it discovered the bribe payments. Murphy's decision to flee from the Haitian authorities reflected his considered judgment that the Haitian authorities would not have shown him any leniency if they had been the ones to impose a sentence upon him.

Similarly, contrary to his contentions, Murphy's history and character do not support any leniency. *Id.* at 5-6. Instead, his history and character support *enhancing* his sentence. Defendant Murphy is one of the worst kinds of criminals. He is a criminal not by necessity or by circumstances, but by choice. He did not have to commit these crimes. By his own account, he had a stable upbringing, was educated at Harvard University and Harvard Business School, was always gainfully employed, and enjoyed many other privileges and opportunities unavailable to others. But as charged in the indictment, and as found by the jury, from 1991 until early 2000 he authorized bribes to Haitian government officials. His illegal conduct in bribing the Haitian officials ended only after he fled Haiti in the wake of the Haitian authorities' efforts to arrest him upon discovering the illegal payments.

Defendant Murphy did not authorize the bribes because his company had to pay them. No one forced him or his company to do business in Haiti. He authorized the bribes to obtain an unfair advantage. He was an opportunistic criminal.

But Murphy is not only a criminal, he has also displayed the attributes of a criminal at heart. When he got caught authorizing the bribes, he did not admit the payments. Instead, he obstructed justice by going into the SEC and lying under

oath about his knowledge of the payments, testifying that he knew of *no* payments to Haitian government officials.

During the trial, however, after the government proved beyond any doubt that there were, in fact, payments made to Haitian officials, Murphy changed his defense. After the government proved the existence of the payments, his theory of defense became that the payments were lawful because they were "facilitating" payments. Moreover, the written statement he submitted to the USPO admitted making payments to Haitian government officials. *See* Murphy PSR at ¶ 20. By his own admission, therefore, his testimony before the SEC was false.

And Murphy has continued to display the attributes of a criminal at heart: He has continued to scheme and to lie to his own friends. The letters submitted to the Court on Murphy's behalf talk about the vagaries and complexities of the FCPA. But there is not a word – *not one word* – in any of those letters about his conviction for obstruction of justice. It does not appear that Murphy told any of his supporters that he had lied to the SEC about the payments. There is no suggestion in any of those letters that Murphy informed his supporters that he told one (false) story to the SEC about the non-existence of the payments and, then, attempted to convince the trial jury of another (equally false) story about the

nature of the payments. It appears, instead, that he is still scheming and still trying to obtain an unfair advantage.

His behavior in this case makes it appear that he is either unwilling or unable to approach problems without attempting some sort of scheme or trying to obtain some sort of unfair advantage. In any event, one thing seems certain: He will not stop scheming if the Court rewards his scheming by showing leniency. The government, therefore, recommends a sentence of incarceration for defendant Murphy at the high end of the range of 57-71 months.

The government does not seek restitution. The government recommends a fine in an amount that will, at a minimum, cover the cost of supervision and sentencing.

A. The base offense level is 8.

Murphy does not dispute that the base offense level for his conviction is a level 8. *See* U.S. Sentencing Guidelines Manual § 2B4.1 (2000).

B. The base offense level should be increased by ten levels to account for a loss over $500,000 but less than $800,000.

Murphy does not dispute that the base offense level should be increased ten levels for a loss greater than $500,000 but less than $800,000. *Id.* § 2F1.1(b)(1)(K).

C. The base offense level should be increased by three levels for his role as a manager in the offense.

Murphy does not dispute that his base offense level should be increased by three levels for his role as a manager in the offense. *Id.* § 3B1.1(b).

D. The offense level may be increased by two levels for abuse of a position of trust.

The PSR recommends a two-level enhancement for abuse of a position of trust. Defendant Murphy objects to this two-level enhancement. The government agrees with the USPO that the Court has the discretion to enhance defendant's sentence for abuse of a position of trust. Unlike defendant Kay, the government has no reservations about applying this two-level enhancement to defendant Murphy for abuse of his position of trust. As the President and CEO of ARI, Murphy held the highest ranking management position in the company. The letters of support submitted on his behalf, moreover, reflect Murphy's affirmative efforts to persuade his fellow Board members, business associates, subordinates and counsel to trust his business judgment.

In addition, the government notes that Murphy's legal objections to this proposed enhancement are unfounded. First, contrary to defendant's argument, a position of trust is not "already adopted as an element of the offense," *see* Murphy's Objections to the PSR at 6, by virtue of the fact that the FCPA covers

officers and directors. *See* 18 U.S.C. §§ 78dd-1(a) and 78dd-2(a). Although the FCPA covers every officer or director of a publicly traded company, not every officer or director has the type of "professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)," contemplated by Section 3B1.3. *See* U.S.S.G. § 3B1.3, Application Note 1. Similarly, the mere status of a person as an officer or director of a company may not have "contributed in some significant way to facilitating the commission or concealment of the offense," as required by Section 3B1.3. *Id.* In the context of overseeing an American company's operations in Haiti, therefore, a company may give less discretion to a low-level officer than that given, for example, to a President and Chief Executive Officer, such as Murphy. And an officer's status as a President and Chief Executive Officer, rather than a lower level official, may make it more likely that his position contributed in some significant way to facilitating the commission or concealment of the offense. The ultimate determination of whether the enhancement applies, therefore, will be factual, and is not legally preempted by the text of the FCPA. As a result, the cases cited by the defendant to argue that application of the enhancement constitutes "double counting," *see* Murphy's Objections at 6-7, are inapposite.

E. Murphy's base offense level should be enhanced by two levels for obstruction of justice.

The PSR recommends a two-level enhancement for obstruction of justice. Although defendant Murphy raised objections to his conviction for obstruction of justice, which have been denied by this Court, he does not dispute that the two-level enhancement for obstruction of justice is applicable. The government agrees that this two-level enhancement is appropriate.

F. Murphy should receive no reduction in the base offense level for acceptance of responsibility.

Defendant Murphy objects to the failure of the PSR to recommend a two-point decrease due to his purported acceptance of responsibility. However, the defendant's continued assertion of factual and legal innocence prior to trial, throughout trial, and even to this date demonstrates that he has not accepted responsibility for his actions. The defendant is willing to admit that he authorized some "payments" at "some point," *see* Murphy PSR at ¶ 20, but he continues to deny (i) that the bribes were paid "to assist in obtaining or retaining business" and (ii) that he did so with the requisite "corrupt" intent, both of which are elements of the offense. Moreover, the defendant has still not admitted *any* involvement in (1) the bribes to obtain franchises, (2) the 1994 bribes to obtain favorable tax treatment, and (3) the 20/20 DGI bribes in 1998/1999.

In addition, defendant Murphy's false testimony to the SEC prior to his criminal trial further demonstrates that he does not qualify for the downward departure for acceptance of responsibility. Under § 3E1.1, Application Note 2, "a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct." Here, defendant Murphy lied to the SEC about his knowledge of *any* payments to Haitian government officials. Further, defendant's post-trial statements that the bribes were the result of "significant additional costs" and "costly delays" caused by Haitian Customs were belied by the evidence at trial demonstrating that any costs due to Haitian Customs were *de minimus* prior to the commencement of the 1998-1999 payments to the Customs officials. *See, e.g.*, Kay Exs. 93A, 93B, 93C and 94.

CONCLUSION

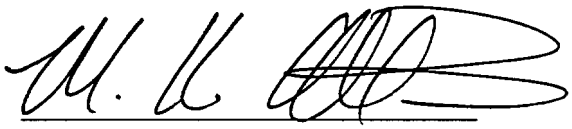
For the foregoing reasons, the government considers the most appropriate total offense level for defendant Kay to be a total offense level of 21. Under the Guidelines, such an offense level carries a term of imprisonment between 37 and 46 months. The government recommends the low-end of the range, with a minimum of 37 months, as an appropriate sentence for defendant Kay.

The Court should apply at Murphy's sentencing a total offense level of 25. Under the Guidelines, such an offense level carries a term of imprisonment

between 57 and 71 months. The government recommends the high-end of the range as an appropriate sentence of defendant Murphy.

DATED this 27th day of June, 2005.

Respectfully submitted:



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Certificate of Service

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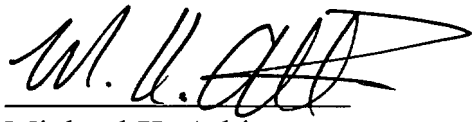

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