# IN THE UNITED STATES DISTRICT COURT
# FOR THE SOUTHERN DISTRICT OF ILLINOIS

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IL
EAST ST. LOUIS OFFICE

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 98-CR-30136-002 (GPM) |
| | ) | |
| NICHOLE K. KERINS, | ) | |
| | ) | |
| Defendant. | ) | |

## DEFENDANT'S AMENDED SENTENCING MEMORANDUM

As the Court is aware, Nichole (Nikkie) Kerins is scheduled to be sentenced on February 16, 1999, as a result of her pleading guilty to Distribution of Cocaine in violation of 21 USC 841 (a)(1).

On December 28, 1998 Nikkie filed her objections to the Presentence Investigation Report (PSI), and said objections revolve around her relevant conduct as well as her exaggerated criminal history. Nikkie has also filed the following Motions which will impact her sentencing: (1) Motion for Downward Departure; (2) Defendant's Motion to be Eligible for U.S.S.G. Section 5C1.2; (3) Defendant's Motion for U.S.S.G. Section 5K2.0 Downward Departure; and (4) Defendant's Motion for Downward Departure for Over-Representation of Criminal History.

The purpose of this Memorandum is to assist the Court in determining an appropriate sentence, as well as an appropriate facility for Defendant to be incarcerated, and as such will be divided into four parts: (a) background information concerning Nikkie and the offense; (b) a discussion of her objections to the PSI; (c) a discussion of her sentencing Motions including the relevant legal principles regarding downward departures; and (d) the recommended sentence and facility.

## A. BACKGROUND

The Presentence Investigation Report (PSI) provides a great deal of information about Nikkie and this offense, and the following points, bear emphasis for supplemental discussion.

1. Personal. Nikkie was 24 years old when the acts charged in the indictment were committed. See PSI, cover sheet.

The *only* vehicle she owns is a 1990 Geo Prism which is in need of repair, and she owes a total of almost $2,000.00 for a judgment which has been entered against her as well as outstanding medical and utility bills (paragraph 99).

She dropped out of high school after being raped in 1991, but obtained her G.E.D. in 1992, and went to Belleville Area College for a semester in 1995 (paragraphs 88, 91, & 92).

2. Psychological condition: In 1987, when Nikkie was only ***13 years old***, she was sexually molested by a friend of her stepfather's, and subsequent to that time, she began having suicidal thoughts (paragraph 74).

A short time thereafter, in 1990, Nikkie learned that the man she thought was her biological father was in fact not her biological father, and was seen by a psychologist that same year because she was understandably having problems getting along with her stepfather.

Before the news regarding her biological father could sink in, she was raped by a "friend" in 1991 (paragraph 74).

These three chilling events led Nikkie to run away to Florida, and after being returned to her mother, was committed to the Spirit of St. Louis Hospital for psychiatric care.

Nikkie's psychiatric report indicated among other things that she had trouble sleeping as a result of graphic nightmares of perpetrators trying to kill her. She told the psychiatrist that she "often felt she was not good, she was a tramp, and if everybody was going to treat her like a tramp she might as well be on." She also stated that she "felt like her future was hopeless and that nothing could change (paragraph 77)."

The psychological testing revealed that Nikkie had been "significantly damaged by a past history of molestation and rape, with a lot of intrusive thinking, a lot of preoccupation with the abuse, and with flashbacks. It was determined that in 1991 Nikkie suffered from "major depression, alcohol abuse and post traumatic stress disorder secondary to molestation and rape."

The psychologist noted (paragraph 80) that Nikkie was quite troubled, depressed and "***her good psychological resources were simply overwhelmed by her distress.***"

3. Drug Abuse: Nikkie's drug abuse began when she was only 14 years old, (paragraph 83) and actually her mother used alcohol and drugs heavily when she was pregnant with Nikkie (paragraph78).

In 1995, Nikkie learned who her biological father was, and around the time she commenced a relationship with him, became addicted to powder cocaine, and after using crack cocaine became overwhelmingly addicted (paragraph 85), and used crack cocaine on a daily basis, including July 16, 1998 (paragraphs 21 & 85).

4. July 16, 1998 Statement: On July 16, 1998, she made an inculpatory statement regarding her involvement in cocaine when "she was under the influence of crack cocaine and does not believe that some of the statements she made were fully accurate (paragraph 44)." The fact that the $50.00 "rock" of crack cocaine she purchased on July 16, 1998 was not seized by police leads credence to the fact that Nikkie smoked it, and therefore impaired her condition on July 16, 1998.

Nevertheless, in said statement, she allegedly admitted to distributing rather large quantities of crack and powder cocaine since she began using these drugs in 1995.

But, it cannot be determined what quantity of drugs were consumed by Nikkie or sold by her and this is something the Sentencing Court will have to determine since it will impact the sentence she ultimately receives.

On February 11, 1999, the date the undersigned entered his appearance as *pro bono* co-counsel for Nikkie, he requested from the Assistant U.S. Attorney handling this case any

and all rough notes taken in this matter (See Exhibit A), which would obviously include the July 16, 1998 proffer.

5. Cooperation: A "Special Federal Officer" (SFO) is in reality nothing more than a local police officer who goes through a short training program, and is given a federal badge and identification, but is ***not*** a "real" F.B.I., D.E.A., or A.T.F. agent with regard to the stringent training those federal agents go through.

On July 16, 1998, Nikkie agreed to become a confidential informant (c/i) at the behest of the SFO, and subsequently assisted in a "successful" controlled buy for the Government, where her life was put in peril.

At sentencing, Nikkie will show that the inhabitants of the "crack house" became suspicious of her being a possible c/i and that a high speed chase ensued between the "crack" dealers and the vehicle Nikkie was traveling in with the SFO. She will show that these SFO's did not follow any sort of procedure to ensure her safety or that of the driver, and that her decision not to continue acting as a c/i was understandable since her "cover" had been blown as a result of the SFO's failure to follow the aforesaid procedures.

After the high speed chase, where Nikkie could easily have been murdered, the SFO's amazingly requested that Nikkie return to the "crack house" and attempt to purchase more crack cocaine, or alternatively to go to East St. Louis to purchase crack cocaine.

When Nikkie refused to do this, she feels that the agents became angered at her, and for that reason refused to accept the two proffers she gave which totaled approximately 10 hours.

6. The Offense: Which brings us to the offense in this case, where the Government has determined to put Nikkie at the highest Offense Level possible. It would seem that the Government's hope of placing Nikkie at such a high level would be dashed by the simple fact that this "big distributor" of cocaine had to drive elsewhere to get it on the two occasions that the confidential informant purchased cocaine from her.

It is crucial to point out that this is ***NOT*** a conspiracy, and as will be explained more

fully below, it is Nikkie's position that her relevant conduct should only include those occasions where she directly dealt with co-defendant Sharkey.

Looking at her July 16, 1998 proffer, where she was obviously under the influence of crack cocaine, in the light most conducive to the Government regarding Nikkie's dealings with co-Defendant Sharkey, would mean that she purchased 4 ounces of powder cocaine from him (paragraph 16), which would be 114 grams. This would give a total of 169 grams of powder cocaine when the 55 grams in the indictment are included which when converted to the marijuana equivalency (169 grams X 200 grams) would be approximately 34 kilograms of marijuana. Adding the 2.6 grams of crack cocaine (2.6 X 20) to the powder cocaine, Nikkie's relevant conduct would be 86 kilograms of marijuana for a Base Offense Level 24.

## B. NIKKIE'S OBJECTIONS TO THE PSI

As was stated supra., Nikkie objected to the PSI regarding her exagerrated criminal history and relevant conduct.

### *1. Criminal History*

Nikkie has filed two pleadings regarding her criminal history, namely her Motion to be Eligible for U.S.S.G. Section 5C1.2 and her Motion for Downward Departure for Over-Representation of Criminal History.

Admittedly, any hope of being "safety valve" eligible rests on this Court determining that Nikkie's relevant conduct does not include anything prior to July 25, 1997, which is the date her DUI supervision ended (paragraph 58) so that she will not be assessed any criminal history points for the DUI. Her July 16, 1998 statement indicated that the *earliest* she began dealing with co-defendant Sharkey was in April of 1998, or nearly one full year after the DUI supervision ended.

If the Sentencing Court determines that her relevant conduct began subsequent to July 25, 1997, Nikkie will then have to show why the operating an uninsured vehicle (paragraph 59) should not be counted, and as the Motion to be Eligible for U.S.S.G. Section 5C1.2

Motion accurately points out, the sentence imposed was illegal since the $250.00 fine did not comport with 625 Illinois Compiled Statutes Section 5/3-707, which states "Any operator of a motor vehicle subject to registration under this Code who is convicted of violating this Section is guilty of a business offense and shall be required to pay a fine ***in excess of $500.00***, but not more than $1,000.00." (emphasis added)

So, if the Court determines that Nikkie's relevant conduct commenced in April of 1998, the DUI conviction would not be counted toward her criminal history, and likewise if the Court determines that the uninsured motorist conviction was illegal, she would have no criminal history points, and would be a Criminal History Category I. Her eligibility for U.S.S.G. Section 5C1.2 (the Safety Valve) will be discussed in the next section.

If these arguments fail, there is no doubt whatsoever that her Motion for Downward Departure for Over-Representation of Criminal History should be granted. A great deal of time and energy could be devoted to the argument that Nikkie's criminal history is over represented, but common sense would hopefully dictate that someone with a minor traffic violation and who is a first time DUI offender would not warrant being placed in a Criminal History Category III. After having represented approximately 300 individuals in federal criminal cases, the undersigned believes that someone with Nikkie's minor violations should be a Criminal History Category I, and will argue for this at her sentencing.

*2. Relevant Conduct*

"The mere fact that the defendant has engaged in other drug transactions is not sufficient to justify treating those transactions as 'relevant' conduct for sentencing purposes." Those words, uttered by Circuit Judge Cudahy, in U.S.A. v. Crockett, 82 F.3d 722, 730 (7th Cir. 1996), upholding a Defendant's relevant conduct are nevertheless informative here, since Nikkie's relevant conduct regarding the indictment amount to a measly 55.5 grams of powder cocaine and 2.6 grams of crack cocaine.

As has been stated supra., it is Nikkie's position that as an addict, there was no common scheme or plan for the offense which she pleaded guilty to, and her July 16, 1998

voluntary statement should not be used to determine her relevant conduct as it relates to any individual other than co-defendant Sharkey. Her mention of Deb Kyle, "D," "Tommy," "T," John Michael Williams, (paragraphs 17-21) or anyone else would only show that as an addict, she purchased drugs from various individuals. See U.S.A. v. Bacallao, 98-1443

Her addiction forces the Court to focus on what her relevant conduct would be since U.S.A. v. Wyss, 147 F.3d 631 (7th Cir. 1998) mandates that the Court should not include in relevant conduct the drugs Nikkie personally consumed. Wyss is illustrative of the argument the Government is attempting to propound to this Court regarding the obvious fact that Nikkie sold drugs to support her habit, and it is impossible to know the exact amount she personally consumed. However, it would not be outlandish for her to have personally consumed one-half of the drugs she purchased, while selling the rest to support her habit, which would again place her squarely within a Base Offense Level 24, since her relevant conduct would be between 80 and 100 kilograms of marijuana, and *beyond the reach of the five year mandatory minimum sentence mentioned in 21 U.S.C. Section 841 (b)(1)(B)(vii).*

This case is similar to U.S.A. v. Robinson, No. 97-30025, which was decided by the Seventh Circuit on January 12, 1999, and where the Court held that hearsay statements "fail to establish the kind of "indicia of reliability"upon which a sentencing judge could comfortably rely." For this Court to be comfortable with using Nikkie's drug induced statements against her for the ***full amount of her relevant conduct*** would be inappropriate, and with the hope that he will be able to conduct vigorous cross-examinations of the Government's witnesses, the undersigned requested on February 11, 1999 (Exhibit A) material which will be necessary to cross-examine these witnesses.

The Government has the burden to prove the amount of drugs constituting Nikkie's relevant conduct since it is attempting to attribute amounts of uncharged drug related misconduct to her. U.S.A. v. Acosta, 85 F.3d 275, 279 (7th Cir. 1996),and U.S.A. v. Duarte, 950 F.2d 1255, 1263 (7th Cir. 1991) There is no doubt that at sentencing, the Government's "poster boy" to show that Nikkie was a big drug dealer will be co-Defendant Sharkey, whose

***only*** hope of a reduced sentence at the present time is by way of a Rule 35 Motion being filed by the Government since this Court previously denied the Government's 5K1.1 Motion for a Downward Departure at the time of poster boy Sharkey's sentencing.

Actually, the one thing ***every*** convicted witness will have in common at sentencing is that like poster-boy Sharkey, their testimony will come within one year of being sentenced so that they will be eligible for Rule 35 consideration. Alternatively, some sort of promise will be made that if they testify "truthfully" regarding Nikkie's involvement in drug dealing, a consideration will be made for a Rule 35. Like poster-boy Sharkey, each and every convicted witness will express some sort of "hope" or "expectation" that they have regarding a Rule 35 Motion being filed by the Government. This is the "velvet sledgehammer" the Government enjoys in situations like this, and hopefully this Court will not be swayed by poster boy Sharkey and his fellow convicts' testimony and will wonder why the Government was unable to find a convicted witness who would be willing to testify ***truthfully*** without any "hope" or "expectation" of the Government doing anything on their behalf.

There is little doubt that the Government will try to increase Nikkie's relevant conduct to an unimaginable amount, probably a Level 38, which the Robinson Court correctly stated is "reserved for big-time drug offenders who are involved with huge quantities: more than 30 kilos of heroin, 150 kilos of cocaine, and 30,000 kilos (a whopping 33 tons) of marijuana. . . " and a "spot one usually thinks of as being reserved for the kind of big-time drug dealers depicted in "The French Connection." In other words a Level 38 would not be for drug addicts who have to drive to other locations to purchase small quantities of drugs, who drive a broken down 1990 Geo Prism and who owe approximately $2,000.00 to creditors.

## C. DOWNWARD DEPARTURES

### *1. General Principles*

1. With the promulgation of the U.S. Sentencing Commission's Federal Sentencing Guidelines many District Judges incorrectly assumed that there was very little that they could

do to alleviate some of the harshness contained in the Guidelines, and for that reason it is crucial to set out and explain some basic aspects of sentencing.

2. Pursuant to 18 USC Section 3553 (a), a sentencing court is to impose a sentence "sufficient, but not greater than necessary," to comply with the statutorily enumerated purposes of sentencing, namely, ***general and special deterrence, retribution, rehabilitation, and incapacitation.*** (Emphasis added)

Likewise Chapter 1A (4)(b)directs the sentencing court to treat each "guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds any atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." And in drafting the Guidelines, the Commission "did not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."

As will be shown below, the totality of Nikkie's situation is unique and warrants downward departures so that she can be punished for her crime, but not in a way which excessive.

3. As the legislative history makes clear, Section 3553 (a) "deliberately [does] not show a preference for one purpose of sentencing over another." S.Rep. No. 98-225, 98th Cong., 1st Sess., at 77 (1983). In including several purposes of sentencing without favoring any of them, Section 3553 (a) thus reflects what has been characterized as "the inclusive theory of punishment." J. Hall General Principles of Criminal Law 308 (2nd ed. 1987). Of course, these different purposes of sentencing may not all point in the same direction in any given case. See, e.g., H.L.A. Hart, Punishment and Responsibility 1 (1968) ("[A]ny morally tolerable account of [criminal punishment] must exhibit it as a compromise between distinct and partly conflicting principles."); H. Packer, The Limits of the Criminal Sanction 143 (1968) (punishment presents a 'very complicated . . . problem in a system that attempts to pursue more than one goal of punishment'); W. LaFave & A. Scott, Jr., Criminal Law 27

(2nd ed. 1986) (The "various theories of [criminal punishment] tend to conflict with one another at several points.").

However, Section 3553 (a) allows for "different purposes ... [to] play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants." S. Rep. No. 98-225, 98th Cong., 1st Sess., at 77 (1983). The intent of Section 3553 (a) "is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case." Id. Put another way, there is a difference between, on the one hand, the general purposes of sentencing and, on the other, the particular purposes that are to be achieved by a particular sentence. See N. Morris & M. Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System 90-91 (1990); M. Miller & D. Freed, Editors' Notes 3 Fed. Sent. Rptr. 294 (1991).

Here, the denial of downward departures would have the effect of "generalizing" Nikkie's situation instead of developing a particular purpose for the sentence. She deserves to be punished for what she did to show her and others similarly situated that there are consequences to illegal actions, but not in such a way that a drug addict is treated in the same way as a big drug dealer.

4. Pursuant to statutory directive, the "guidelines reflect the inappropriateness of imposing a sentence or a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 USC Section 994 (k).

Nikkie needs to be rehabilitated so that she can hopefully become a productive member of society, and hopefully a reasonable jail sentence will make her realize that she needs to reform her ways.

*2. Truthfulness to Government & Sentence Manipulation*

Nikkie originally filed a Motion requesting this Court to depart downward based on U.S.S.G. Section 5K1.1. This Motion in reality dealt with the Government's desire to have

its cake and eat it too, insofar as on the one hand it will argue that everything Nikkie said in her drug induced July 16, 1998 statement should be viewed as totally truthful, while at the same time claiming that she was not truthful in her approximately 10 hours of proffered testimony, which is a ludicrous position to take. If on July 16, 1998 Nikkie was truthful with the SFO, then her argument for Safety Valve eligibility is immensely strengthened since if the Court grants her criminal history objections and determines she is a Criminal History Category I, she would meet the five criteria enunciated in U.S.S.G. Section 5C1.2.

What the agents did on July 16, 1998 appears to be a form of "sentencing entrapment" whereby they allowed a drug induced "target" to give an alleged voluntary statement knowing that the more she spoke about illicit drug dealing the higher her ***federal*** sentence would be. Nikkie will attempt to elicit at Sentencing that she was led to believe that the ***MORE*** she told the agents the less her sentence would be, which obviously is not the case.

While the Seventh Circuit does not recognize a defense of sentencing manipulation, it does recognize that the Sentencing Judge has the authority to depart downward based on the agent's entrapment. Even though U.S.A. v. Steels, 38 F.3d 350 (7th Cir. 1994) ruled against Nikkie's position, it is still instructive to read, especially Judge Ripple's concurrence which accurately expresses concern that the undercover agent had attempted to increase the amount of the drug sale to ensure that the defendant would be prosecuted federally.

*3. 5K2.0*

The Government has struggled mightily to try to claim that this Court is powerless to reduce Nikkie's sentence as a result of her substantial cooperation with agents. While it is true that In re Sealed Case, 159 F. 3d 1362 (D.C. Cir. 1998) was vacated, the Fifth Circuit in U.S.A. v. Solis, No. 97-20273 breathed new life into the rationale that a District Court can depart downward under U.S.S.G. Section 5K2.0 based on a Defendant's substantial assistance, even in the absence of a government motion.

Nikkie intends to present evidence at her sentencing to show the exact nature of her cooperation with the Government and the danger she placed herself in hoping to receive

some sort of benefit for this cooperation, and it is her hope that this Court will realize that she deserves a 5K2.0 departure based on this cooperation.

*4. Totality of the Circumstances*

Finally, the PSI clearly shows that Nikkie falls outside the "heartland" of cases, because of her tortured life. She grew up in a small town where she was tormented as a result of being bi-racial and never felt like she belonged to any group.

Her youth was stolen from her by a supposed friend of the family who sexually molested her when she was 13. From that point it seemed as if nothing went right in her life, and the PSI reveals an incredibly depressed woman whose addiction to drugs only made things worse.

There is no doubt whatsoever that Nikkie should go to jail, but the door should not be locked and the key thrown away.

By granting Nikkie's Motion for U.S.S.G. Section 5K2.0 Downward Departure, this Court will be able to sentence Nikkie to the sentence she was promised, three years, or less.

**D. THE RECOMMENDED SENTENCE AND FACILITY**

Nikkie's relevant conduct should be between 80 and 100 kilograms of marijuana and her Criminal History is I, which would give a sentencing range of 37 to 46 months.

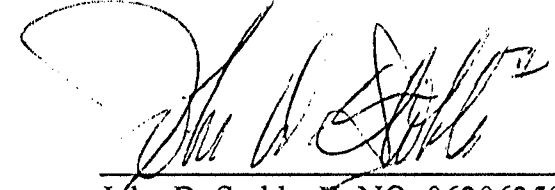
If the Court determines that her Base Offense Level is higher than a 24, Nikkie would request that her Motions for Downward Departure be granted so that she ultimately receives a sentence of between two and three years.

Hopefully, even the Government recognizes that as a drug addict, a recommendation should be made that she serve her sentence in a Bureau of Prison facility which offers the 500 hour drug rehabilitation program, so that when she leaves jail she can get off of drugs and be a productive member of the community.

NICHOLE K. KERINS,

STOBBS LAW OFFICES

BY:



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## CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of February, 1999, a copy of the attached ***DEFENDANT'S AMENDED SENTENCING MEMORANDUM*** was served on the following persons by FAXing and depositing a copy of same in an envelope with postage prepaid in the United States Mails in the Post Office in East Alton, Illinois addressed as set out, namely:

Mr. Randy Massey
Assistant U.S. Attorney
Nine Executive Drive, Suite 300
Fairview Heights, Illinois 62208

STOBBS LAW OFFICES

346 W. St. Louis Ave.
East Alton, IL 62024

# STOBBS LAW OFFICES

346 West St. Louis Avenue
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Exhibit A

**JOHN D. STOBBS, II**
(Licensed in Illinois & Missouri)

(618) 259-7789
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February 11, 1999

Mr. Randy Massey
Assistant U.S. Attorney
Nine Executive Drive, Suite 300
Fairview Heights, IL 62208

***Sent Via FAX #628-3772***

RE: U.S.A. v. Nichole K. Kerins
No. 98-CR-30136-002 (GPM)

Dear Randy:

Enclosed please find my Entry of Appearance, and since this will obviously be a contested sentencing, we would appreciate it if you would have the agents bring to Court on Tuesday, February 16, 1999 any rough notes made or taken which are still in existence.

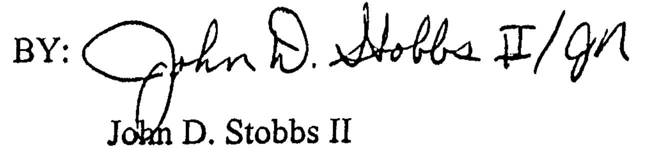
Furthermore, we would appreciate it if at the time of sentencing we could be provided with a criminal history of any witnesses who will testify, and likewise any sort of promises which have been made to them by way of Plea Agreements or otherwise. We would also request for these individuals any investigative reports which have been prepared by any Government agency, including any special Federal Officer, as well as any contracts the individual would have entered into as a confidential informant or otherwise with any Governmental agency.

Finally, we would request that at the time of the Hearing we be provided with the transcripts of any previous testimony the witness has given under oath, and any consideration such as cash paid to the witness by any Government agency.

I will be out of the office all of today, and will try to get ahold of you tomorrow in the event you have any questions regarding the foregoing.

Very truly yours,

STOBBS LAW OFFICE

BY: 

John D. Stobbs II

JDSII:jn
enclosure