UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**3:01-CR-011-H**
	)	
v.	)	
	)	
XXX,	)	
	)	
Defendant.	)	
	)	

OBJECTIONS TO THE PRESENTENCE REPORT

Defendant, XXX, hereby files the following objections to the Presentence Report (the "PSR") prepared by the United States Probation Office for the Northern District of Texas.

I. LOSS AMOUNT

The PSR suggests a loss amount of $14,035,440. This is incorrect for a myriad of reasons. First, the purported loss amount includes $13,910,040 in loss that is alleged to be "relevant conduct," nevertheless, such loss does not fall within the definition of "relevant conduct" as set forth in U.S.S.G. § 1B1.3. Second, the use of such a loss amount violates the due process clause to the United States Constitution. Finally, even assuming that such "loss" does, in fact, qualify as relevant conduct and that the use of such a loss amount does not offend the due process clause, the computation of such loss is grossly incorrect.

A. Alleged Fraudulent Loan Scheme Not Relevant Conduct

XXX pleaded guilty to Count 1 of the indictment filed in this case. Count 1 accuses him of taking a loan check in the amount of $50,000 made payable to XXX, forging her signature, cashing it for himself and using the proceeds without XXX's permission. The other count in the

indictment accuses him of doing the identical thing with a loan check in the amount of $75,000 made payable to Sun Hui Kim. In short, the appropriate loss amount in this case is $125,000.

Nevertheless, the PSR, without any explanation, adds an additional loss of $13,910,040 to this loss amount. This amount comes from an alleged scheme wherein would obtain loans for individuals in the Korean community by assisting the individuals in submitting false loan applications. Although the PSR does not explicitly state, it appears that it considers this alleged false loan application scheme to be "relevant conduct" to the forgery scheme set forth in the count of conviction.

To be considered "relevant conduct," an additional loss figure must be determined to be "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). "Common scheme or plan" requires that the conduct set forth in the count of conviction and the conduct at issue "must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." U.S.S.G. § 1B1.3 (Application Note 9). "Same course of conduct" requires that the conduct set forth in the count of conviction and the conduct at issue be "sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *Id*. Relevant to the "same course of conduct" inquiry is whether the conduct can "readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing." *Id.* U.S.S.G. § 1B1.3 (Background). For U.S.S.G. § 1B1.3(a)(2) to apply, "the government must demonstrate a connection between [the alleged relevant conduct] and the *offense of conviction*...." *United States v. Pinnick*, 47 F.3d 434, 438, 39 (D.C. Cir. 1995) (emphasis in original).

Clearly the alleged scheme to obtain false loans for clients by submitting false loan applications to banks is not "part of the same course of conduct or common scheme or plan" as the scheme to essentially steal loan checks from the two XXXs. Indeed, the two schemes do not involve common victims, common accomplices, common purposes (other than the general purpose to obtain money) or similar *modus operandi* and, therefore, the two schemes do not

qualify as "common schemes." Likewise, the two schemes can "readily be broken into, discrete, identifiable units that are meaningful for purposes of sentencing" and, therefore, cannot be said to involve the "same course of conduct."

The United States Court of Appeals for the District of Columbia faced a similar case in *Pinnick*. There, Pinnick was indicted on four counts of fraud in a single indictment. *Pinnick*, 47 F.3d at 436. Counts one, two and four alleged he used different aliases in order to cash counterfeit checks. *Id.* Count three alleged that he used an alias to file a fraudulent application for a credit card and make purchases of almost $ 5,000 using the credit card. *Id.* Pinnick pleaded guilty to Count 4, however, the District Court included the other counts as relevant conduct. *Id.* The Court of Appeals held that the inclusion of Count 3 as relevant conduct was "clear error."

> We do not agree...that the credit card fraud alleged in count three constitutes part of the same course of conduct as count four, the offense of conviction. Unlike counts one, two, and four, count three did not involve counterfeit checks. Like the embezzlement count in *Jones*, count three is both separately identifiable from count four and of a different nature. That counts three and four both involved fraud to obtain money is not enough....The credit card fraud in count three is thus not part of the same course of conduct as the offense of conviction. The district court committed clear error in treating it as relevant conduct.

Id. at 439.

> Likewise *United States v. Moored*, 997 F.3d 139 (6th Cir. 1993). In that case:
> Defendant applied for loans in the total amount of $1,750,332 from various private lenders. Defendant indicated to the lenders that $400,000 of the loan proceeds would be used to pay a debt owed†to Jordan College.... He had engaged in various financial transactions with the college, including loans, donations, and real property transactions, based in part on promises that he failed to keep and representations that proved untrue.
>
> The debt to Jordan College was comprised of a $100,000 loan that the college made to Defendant, a $ 50,000 undisclosed lien on property that Defendant sold to the college, and a $ 175,000 downpayment on that same property that Appellant had promised to return to the college.

Id. at 140. The District Court included the $325,000 owed to Jordan College in the loss amount. *Id*. at 141 ("[T]he loss to Jordan College...was so intertwined in this particular transaction as to find great difficulty in segregating it or separating it. I find they were all part of the scheme and plan of this Defendant to aggrandize himself and his enterprises at the expense of other persons and other entities."). The Sixth Circuit found this to be "clearly erroneous." *Id.* at 143-44 ("We cannot agree with the district court's determination that Defendant's activities with the college were part of the same course of conduct as the offense conduct or of a common scheme or plan. The connection between the events is simply too tenuous for the district court to have properly included the potential loss to the college in the computation of the total loss. As did the *Kappes* panel, we find that the district court's reasoning impermissibly stretches the imagination.").

Just as in *Pinnick* and *Moored*, it would be clearly erroneous to conclude that the alleged scheme to obtain false loans for clients by submitting false loan applications to banks was "part of the same course of conduct or common scheme or plan" as the scheme to steal and negotiate loan checks made payable to other individuals. Reasoning to the contrary "impermissibly stretches the imagination." *Id*. at 44.

B. One Hundred Fold Increase in Loss Amount as a Result of "Piling On" Offends Due Process

As discussed above, the loss amount for the count of conviction was $50,000 and the defense agrees that an additional $75,000 should be included as relevant conduct pursuant to U.S.S.G. §1B1.3. Nevertheless, the use of $13,910,040 as additional relevant conduct increases the loss amount **more than one hundred times.** Likewise, it takes 's guideline imprisonment range from 15-21 months to 51-63 months.

The United States Court of Appeals for the Eight Circuit recognized that a defendant can be denied due process when relevant conduct is so disproportionate that it becomes the 'tail that wags the dog.' *United States v. Wise*, 976 F.2d 393, 401 (8th Cir. 1992) (*en banc*), *cert. denied,* 507 U.S. 989 (1993), *citing*, *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986). Indeed, prosecutors should not be able to indict for a relatively minor offense only to "pile on"

disproportionate relevant conduct. *United States v. Bacallao*, 149 F.3d 717, 721 (7th Cir. 1998). ("[W]e again remind prosecutors 'not to indict defendants on relatively minor offenses and then seek enhancement sentences later by asserting that the defendant has committed other more serious crimes for which, for whatever reason, the defendant was not prosecuted and has not been convicted.'") (citation omitted).

In this case, was never charged with the alleged scheme to fraudulently obtain loans nor was he afforded a jury determination regarding his guilt or innocence on these charges. *Cf. Apprendi v. New Jersey*, 530 U.S. 466 (2000). The government, instead, chose to indict for one scheme involving a loss of $125,000 and then "pile on" and sentence for another scheme involving an alleged loss of almost $14 million. The resulting three fold increase in his imprisonment range under the United States Sentencing Guidelines violates the Due Process Clause to the United States Constitution.

C. Loss Amount Not Calculated Correctly[1]

When one looks at the PSR, especially the restitution amounts, it is obvious that the Probation Department did no independent investigation of the transactions in this case and, instead, blindly relied upon information given to it from the government. Unfortunately, as the government agents will candidly admit, the government did not itself individually investigate the 287 loans alleged to be at issue. Instead, the government simply relied upon charts provided to them by Compass Bank and Bank of Texas which purport to list *every* loan that was connected to at the two banks.[2]

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[1] Of course, the burden is on the government to prove the correct loss amount. *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990) ("[T]he party seeking an adjustment in the sentence level must establish the factual predicate justifying the adjustment.").

[2] Given that the Probation Department nor the government conducted independent reviews of the loan files in question, it will be necessary to have a full blown sentencing hearing wherein each loan is evaluated. The PSR states that there are 287 loans. If, on average, direct *and* cross examination on each loan file is limited to three minutes, the sentencing hearing would take *at least* **fourteen hours**.

The end result is that the loss figure set forth in the PSR bears no relationship to the actual loss in this case. First, as noted in the PSR, 's obtained loans on behalf of individuals in the Korean Community and dealt solely with Mike Choate and Barry Rooney. **Nevertheless, the bank charts list numerous loans made to Americans with whom does not recall any relationship, loans made with officers other than Mike Choate and Barry Rooney which does not recall and, remarkably, two loans made before moved to Dallas and while he was working at a Japanese restaurant in Seattle Washington.** Clearly, these problems are indicative of the PSR's unreliability. Second, neither the Probation Department nor the government made any attempt whatsoever to determine which loans were obtained by providing materially false information. It is simply not proper to total any loan that was connected to, even if the loan was not obtained by providing materially false information. Third, as to the loans that were, in fact, obtained by providing materially false information, neither the Probation Department nor the government made any attempt whatsoever to determine whether knew the information was false or whether he was simply relying upon information provided to him by his clients.

Likewise, the loss figure set forth in the PSR ignores Application Note 8(b) to the U.S.S.G. § 2F1.1. That Application Note provides:

> In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

Nevertheless, the PSR includes loans that were declined. Likewise, it fails to account for loans that were repaid and amounts that the banks "can expect to recover" either through future payment os securities. Finally, the PSR acknowledges that the result of any false statements on the fraudulent loan applications were that a loan was approved "for an amount *in excess* of that

Cho knew the banks would approve." *See* PSR ¶ 22 (emphasis added). Therefore, when all is said and done, any loans that were properly included in the loss amount would be limited to the difference between the loan as made and the loan amount that would have been approved absent the false information.[3]

1. The PSR includes sixty-nine loans with which had no connection.

As noted above, the Bank of Texas chart which the government and the Probation Department simply accept at face value contain numerous loans with non-Korean businesses with which had no connection:

- James Norton Tompkins
- Mark E. Segal, MD PA
- Technology Representatives, Inc
- Capri International, Inc.
- Icom, Inc.
- Ben Bortnem
- Martin B. Monjaras
- Jesus r. Trevizo
- David Randhawa
- Jtinder Singh
- Season Flower International, Inc.
- Charles S. Kang
- Tommy Wan
- Suleman Raheemani
- Industrial Sales Consultants
- Gene P. Fritts, Inc
- Don G. Jones
- Charles Less
- Richard Tang
- Beata Lama
- Maru Bakery
- Quin Ming Trading Co, USA, Inc.
- Shaxs Enterprises, Inc.
- Ekram & Nasir Corporation
- Rawlinger Corporations
- Fast Fashion Trading Corp
- Finest Products, Inc.
- Dal Park Enterprise, Inc.
- Thomas C. Sheils
- Pogue Engineering
- Randall C. Doty
- Residential Homes of Dallas
- Triple Way Construction
- Hwan Hurh
- Fibya International, Inc.
- The Outlaw Corporation
- Charles M. Hunt & Company
- Trung Lam
- Mark R. Smith Company, Inc.
- Odyssey Watches, Inc.
- Dallas D&K Corporation
- Patrice Morin Spatz
- Duane G. Toone
- Durango Motors
- Eskender Alex Berhe
- Ayaz, Inc.
- Asia World, Inc.
- Lorele Vanazant[4]
- Jean Connections, inc.
- Weckerling Scientific

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[3] In preparing these objections, it must be remembered that all of these loans were made one to three years ago. Nevertheless, kept detailed records and bases these objections on his memory and records.

[4] It appears that this loan might have been included in the Bank of Texas chart twice.

- •Mona Lisa Dermatology
- •Magnolia Retailers, Inc.
- •NWH, Inc.
- •Sunbelt Tile & Marble
- •Elegant Hardwoods, Inc.
- •Diversified Reimbursement Systems
- •Tatari
- •Lingle Corporation
- •Sham Ahn Constructions, Inc.
- •Lorele Vanzanat
- •Tex Star Contracting Services
- •Rick J. Mullen
- •Dr. Hun K. Lee
- •Redmond Sales Company
- •Lilika M. Barina
- •The Special Photo Store, Inc.
- •Saleem K. Raheemani
- •Ali Moolji
- •Brianna, Inc.
- •Aeroscape Landscape, LLC
- •Econo Lube Parts Supply
- •Sharmeen International, inc.
- •Michael Hailemariam
- •Carol Hermanovski
- •North Texas Auto Salon, Inc.
- •Mohammad I. Banna[5]
- •TD Engraving Services, Inc.
- •The Ruben Company, Inc.
- •Crainco, Inc.
- •Owners Management Company
- •QC Plus Computer, Inc.
- •ROC Rawlings
- •Kirk Hoffman
- •Tiles Plus, Inc.
- •Ressan, Inc.
- •Lialuca Investments, Inc.
- •Vajubhal Vaghela
- •Al Banna & Al Banna Enterprise
- •Richman Petroleum, Corp.
- •Karim Sachwani
- •Southwest Auto Textiles, Inc.
- •Denise K. McNamara, Inc.
- •Key Company Printing, Inc.
- •David Dunaway
- •Weatherguard Industries, Inc.
- •Strican, Inc.
- •Vinni Walia
- •Jeff Forrest Smith, P.C.
- •Altaf Sachwani
- •Hong Kong Realty Corp.
- •MP Market Development Corp.

In addition, the Compass Bank chart contains loans from loan officers other than Mike Choate and Barry Rooney. does not recall having any connections with these loans.

- •A1 Gift Shop
- •Ace Mart
- •Crossroad Donuts

Remarkably, the Compass Bank chart also contains two loans made before came to Dallas and while he was working in a Seattle, Washington restaurant

- •King Sport (3/3/99)[6]
- •Sun Art Gallery (1/18/99)

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[5] Some of the name on this list are Asian names, but <u>not</u> Korean names. Two of the names are Korean names (Sham Ahn Constructions, Inc. and Dr. Hun K. Lee), however these were not loans with which was associated.

[6] This loan also involves a broker other than Rooney or Choate.

Finally, there are several loans on the Compass Bank chart which has no record of and, therefore, is of the opinion that the loans were not connected with him.

- •Baker's Square & Donut
- •Comet Cleaners
- •LB Nail Times
- •Oh Jewelry
- •Shoes & Jewelry
- •Super Wash & Dry
- •Wig Place of Texas
- •Payless Supply
- •4 Seasons Cleaners

These sixty-nine loans, using the line of credit applied for, amount to $3,535,040.81.

2. The PSR includes 180 loans that were based on valid information or which thought to be valid information.

The Probation Department, again relying upon the bank charts without conducting any independent investigation, includes all loans with which was connected (and, as noted above, numerous loans with which he was not connected), in the loss amount. It makes no attempt to separate out the loans that were based on valid information.[7] Likewise, it includes loans where, if false, the false information was given to by others, including his clients, and where had no knowledge that the applications contained material false information. Apparently the FBI argues that *should* have known the information was false through due diligence, but the criminal justice system is not based upon a negligence standard. can only be held responsible for the loan applications that he *wilfully* submitted *knowing* they contained false information. After the sixty-nine loans noted above are separated out, 218 remain. Attached hereto as Attachment A and Attachment B are charts of the thirty-nine loans that concedes were obtained using applications he knew contained false information.

3. The PSR loss figure should be based upon actual loss to the bank.

Application Note 8(b) to U.S.S.G. § 2F1.1 provides that fraudulent loan cases are to be treated differently than other fraud cases encompassed by that guideline. Indeed, the loss figure is obtained by using the actual or expected loss unless the intended loss is shown to be greater.

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[7] For example, the Compass Bank list includes a loan to 's wife that was based upon legitimate information *and* secured by a certificate of deposit.

In this case, had every expectation that the loans based upon false applications would be paid off. Indeed, although admits increasing the client's income and years in business on some applications, none of these loans would have been approved without the client having an excellent credit history as verified by the banks' underwriting department. Likewise, many of these loans were collateralized. In short, the intended loss in this case was $0. As for the actual loss, that figure should be calculated under Method#1 below. Alternatively, although it leads to an exaggerated loss amount, the loss could be figured based upon Method#2.

METHOD #1: Amount Written Off + Amount Past Due-Amount that Would have been

METHOD #2: Amount Written Off + Amount Outstanding +Rewritten Loans- Amount

Based upon undersigned counsel's calculations, the loss amount is as follows:

	COMPASS BANK[9]	**BANK OF TEXAS**[10]
METHOD #1:	$172,013 + $88 - ?=< $172,102	? + ? - ?=?
METHOD#2:	$172,013+ $232,052 + $177,671 - ? - ?=<$753,749	? + $642,362 + ? - ? - ?=?

Given the Court's power to "make a reasonable estimate of the loss, given the available information" when the loss cannot "be determined with precision" (*see* U.S.S.G. § 2F1.1 (Note 9), undersigned counsel submits that, unless more accurate figures can be provided by the banks, the loss be set at between $300,000. Therefore, even assuming that the Court believes the loan scheme to be relevant conduct and that the inclusion of such losses would not violated the Due Process Clause, the total loss amount for the forged checks and the loans should be held to total $425,000.

II. LEADERSHIP ENHANCEMENT

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8 All figures should be determined on or about the sentencing date and should only include those loans which are connected with Mr.Cho and which knew were based on false application.

9 Compass Bank figures are based upon the amount of loans outstanding as of April 16, 2001.

10 Bank of Texas figures are based upon the amount of loans outstanding as of December 31, 2000.

The PSR, without any explanation whatsoever, assigns a two point leadership enhancement pursuant to U.S.S.G. § 3B1.1(c). Defense counsel is left to surmise that the Probation Department believes that was an "organizer, leader, manager, or supervisor" of Barry Rooney and/or Mike Choate. This does not support a leadership enhancement.

First, as noted above, the alleged scheme involving the fraudulent bank loans does not constitute "relevant conduct" in this case. *See supra*. pp. 1-5. Second, while it is true that paid Rooney and Choate to "grease the skids" for the fraudulent bank loans, there is no evidence presented that was their "organizer, leader, manager, or supervisor." *See United States v. Jobe*, 101 F.3d 1046 (5th Cir. 1996) (Enhancement under U.S.S.G. § 3B1.1 was error in case of check kiting defendants who used other defendants who were bank employees to assist them in getting kited checks approved), *cert. denied sub. nom., Sutton v. United States*, 522 U.S. 823 (1977). Indeed, it was Choate that recruited to become a loan broker for Bank of Texas having full knowledge of false loan applications. Finally, the leadership enhancement requires a finding that was the organizer, leader, manager or supervisory of at least one "criminally responsible" participant. U.S.S.G. § 3B1.1 (Application Notes 1 and 2). Nevertheless, it was through 's cooperation that the government determined that Rooney and Choate were "criminally responsible" participants in the fraudulent loan scheme. This information is protected under U.S.S.G. § 1B1.8.

III. RESTITUTION

Nowhere is the Probation Department's blind reliance on what it was told by the government (who, in turn, simply provided the Probation Department figures obtained from Compass Bank and Bank of Texas) more evident than the Restitution portion of the PSR. Indeed, the PSR claims that restitution should be ordered in the amount of $6,560,020 to Compass Bank and $5,013,392.81 to Bank of Texas. Nevertheless, as of April 16, 2001, the loan balances of all the loans (including even the sixty-nine with which had not connection) totaled $1,518,244 at Compass Bank and, as of December 31, 2000, the loan balances (including even the sixty-nine with which had not connection) totaled $4,717,858.57 at Bank of Texas. Presumably,

the loan balances were even lower at the time the Presentence Report was prepared and will be lower at the time of sentencing. Additionally some of the loans were made prior to January 1, 2000 and, therefore, are not subject to a restitution order. *See* Plea Agreement at ¶ 4. In short, the PSR's restitution figure is off ***at least*** **$5,337,310**.

In addition, the PSR fails to make the Court aware that many of the loans are still being paid on by the loan beneficiaries and that several of the loans were rewritten by the banks. Therefore, any restitution will have to be offset by the amounts that the banks continue to collect on the loans and any loans rewritten. As of April 16, 2001, Compass Bank had only charged off $455,742 in loans and had $4,712 in past due balances. Similar figures were not provided by Bank of Texas. Moreover, if one limits the loans to those that knew were based upon fraudulent applications, Compass Banks had charged off only $172,013 and had $88 in past due balances; again, similar figures were not provided by Bank of Texas.

Respectfully submitted,

F. Clinton Broden
Tx. Bar 24001495
Broden & Mickelsen
2715 Guillot
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

Attorney for Defendant

XXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on August 2, 2001, I caused the foregoing document to be served by hand delivery on:

Michael Snipes
Assistant United States Attorney
1100 Commerce Street, Third Floor
Dallas, Texas 75242

Casey Kimble
United States Probation Department
1100 Commerce Street
Dallas, Texas 75242

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F. Clinton Broden