UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	**No.3:05-00213**
vs.	)	
	)	**JUDGE CAMPBELL**
	)	
RONALD FENDRIX SMITH	)	

DEFENSE SENTENCING MEMORANDUM

Mr. Smith pled guilty to possession of an unregistered machine gun in violation of 26 U.S.C. Section 5861(d) (this offense is a Class C felony because of a separate statute which provides that an offense with a ten-year maximum is a Class C felony). The statutory sentencing range is from zero months incarceration (which may include full probation since it is not a Class A or B felony) to a maximum of ten years incarceration.

For the reasons set forth in this memorandum counsel suggests a sentence of a year and a day incarceration followed by an extended period of supervised release. Such a sentence is "reasonable" and is in harmony with the guidelines which appear to compel some period of incarceration for this regulatory offense.

A.

District courts have discretion in determining sentences according to the provisions of 18 U.S.C. § 3553(a). *United States v. Booker*, 543 U.S. 220, at 259-60(2005). Section 3553(a)(2) states that a district court should impose a sentence sufficient, but not greater than necessary . . . (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed . . . training, medical care, or other correctional treatment . . ..

Section 3553(a) further provides that the district court should weigh factors such as "the nature and circumstances of the offense and the history and characteristics of the defendant;" "the kinds of sentences available;" "the [applicable] sentencing range[;]" the articulated policy goals of the guidelines; "the need to avoid unwarranted sentence disparities" among similar defendants; and "the need to provide restitution to any victims of the offense." § 3553(a)(1), (3)-(7).

The guidelines are now merely one of the factors that the Court must consider in sentencing:

> Now when a district court imposes and we review a sentence for reasonableness, the focal point is on 18 U.S.C. §

> 3553(a) (footnote omitted). In Section 3553(a), there are numerous factors for a court to consider and under *Booker's* remedial holding, the sentencing guideline range is one of those factors. That is, while the guidelines remain important, they are now just one of the numerous factors that a district court must consider when sentencing a defendant. See e.g., *United States v. Webb*, 403 F.3d 373 (6th Cir. 2005) ("While a district court must still give some consideration to the appropriate guideline range when making a sentencing determination, a court is no longer bound by the applicable guidelines.) . . .
>
> Once the appropriate advisory guideline range is calculated, the district court throws this ingredient into the Section 3553(a) mix. Considering, as *Booker* requires, all of the relevant Section 3553(a) factors, including the guideline range, the district court then imposes a sentence.

United States v. McBride, 434 F.3d 470, 475-76 (6th Cir. 2006).

Any analysis of a proper sentence must begin with what the accused did to violate the law. The facts of our case are reflected in paragraph 9 of the pre-sentence report:

> Despite his initial denials, Smith had been very cooperative throughout the investigation and stated he was sorry that he lied, but said he simply did not want to give up his "toy" as he referred to the M16 that the agents had seized. Smith said that the M1 carbine had belonged to his former brother-in-law, who was deceased. Smith stated the firearm he received was illegal to possess but had come into his custody when he had become the executor of his brother-in-law's estate. With respect to the M16, Smith informed the agents that he purchased it in 2002 from Terry, whose last name he could not recall, but that he paid the man $1,000 by check. Smith later produced the check which he stated was the one he used to purchase that firearm. As previously noted, the firearms were not properly registered, and Smith knew that it was illegal to possess them at the time.

Defense counsel took photographs of these weapons:


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Paragraph 8 of the pre-sentence report recites that: "**Both of the firearms would have been legal to possess had they been properly registered as required by 26 U.S.C. § 5841.**" This is absolutely correct. One need only obtain proper registration (see the forms in the appendix) and pay a $200 fee and almost any citizen in most of the states (including Tennessee, Tenn. Code. Ann. § 39- 17-1302 (B)(7)) can acquire his or her own machine gun. These weapons (called Class III weapons) are for sale over the internet. Pay the purchase price, have it shipped to a gun dealer, present the proper registration and virtually any non-felon can have a fully automatic weapon such as the following firearms identical to the one Mr. Smith turned over to the BATF.

These and a host of other, similar weapons (albeit costing many thousands of dollars) can be seen for sale on the following web sites:

http://www.westernfirearms.com/wfc (click on "inventory" INDEX drop-down box for weapon of choice)

http://www.urban-armory.com/class3.htm (scroll down for machine guns for sale)

http://www.onlythebestfirearms.com/nfa1.html

http://www.gunsamerica.com/1259/1259-random-1.htm

http://www.onlythebestfirearms.com/nfa1.html

“National Firearms Act (NFA)

“The National Firearms Act of 1934 makes it illegal for civilians to own machine guns without permission from the Federal Government. The National Firearms Act of 1934 levies a $200 tax on each newly manufactured machine gun and a $200 tax each time the ownership of the machine gun changes. In addition, each machine gun is registered with the Bureau of Alcohol Tobacco and Firearms (BATF) in the National Firearms Registry.

To purchase an NFA weapon, you must submit two sets of fingerprints, a recent photo, a sworn affidavit that transfer of the NFA firearm is of “reasonable necessity,” and that sale to and possession of the weapon by the applicant “would be consistent with public safety” and endure a background investigation. In addition, the application must be signed by a chief law enforcement officer with jurisdiction in the applicant's residence.

The National Firearms Act also regulates shotguns with barrels less than 18” or less than 26” overall length and rifles with barrels less than 16” or less than 26” length overall. The National Firearms Act also regulates firearm silencers. In addition the National Firearms Act

regulates destructive devices such as bombs, grenades, rockets, missiles, and mines."

http://www.westernfirearms.com/

"Class III Sales

Western Firearms Company (WFC) is a Texas-based Class 3 business located just north of the Dallas/Fort Worth airport. Not only have we been dealing in machine guns for 20 years, but our association with the weapons business in general stretches back to 1971. As specialists in Class 3 weapons and military weapons of all types, WFC boasts one of the largest inventories of collector-grade arms in the state of Texas.

In 1986, the United States government banned the importation and domestic manufacture of machine guns for civilian consumption, and the already limited inventory of Class 3 weapons has since diminished substantially. At a rate now more accelerated than ever, these weapons are ending up in the hands of collectors who have no intention of ever selling them. The effect is twofold: Class 3 arms are growing increasingly scarce, and their prices are rising accordingly. Further Federal bans in 1989 and 1994 relating to semiautomatic clones of military weapons have spurred similar trends in that arena as well. Thus, the price of a quality, collector-grade Class 3 or semiautomatic weapon has spiraled beyond the comprehension of the average buyer.

We have found, though, that high-end collectors' appetites for the best are rarely fulfilled, and it is to them that we cater. These people are often first-time owners whose efforts to find and acquire a particular arm of choice have been frustrated by their inability to locate that weapon or by a lack of information on what is involved in a legally-conducted Class 3 transfer. The images that you are viewing on the Web pages are photographs of the actual weapons, not representative examples. These will include right, left and detailed views in most cases. If you see something that interests you, please call us. WFC excels at finding whatever we do not already have, and we can make it yours "right and proper".

How to Own Class III Weapons Basic Guidelines

Owning a class 3 weapon (machine gun / silencer) is relatively simple. There are several rules and regulations that individuals must comply

with. They are very simple and one should not be intimidated by paperwork. First let me address a few questions, before you ask them.

You may only own a machine gun that was manufactured and registered with the BATF before May 19, 1986. Weapons manufactured after that date are restricted for Military and Law Enforcement use only. Economics 101, the law of supply and demand should start coming to mind by now. This is why these weapons are somewhat “pricey”, when compared to current production weapons. “Simply”, the reserves not being available, controlled commodities always make for an excellent investment. The price is only going one place, Up!

An individual purchasing a “ National Firearms Act Weapon “, NFA weapon or class 3 weapon is required to pay a one time, $200 Federal Excise Tax fee. This fee has been the same, since 1934. It has never changed or has the simple requirement for owning a NFA weapon. These rules and regulation were set forth in 1934, because of the readily availability of machine guns to people like, Bonnie & Clyde, Dillinger, etc.. They permitted the Department of Justice to prosecute criminals under Federal Law. This had a little more “bite” than local laws.

To obtain an NFA weapon, you must first select one. The reason is, forms are required to transfer the weapon from seller to buyer, requiring specific information. There are several types of forms to accommodate these transfers. A form “3”, accommodates dealer to dealer transfers (Class 3, in or out of state). A form “4”, accommodates dealer to individual transfers, within the state. Unlicensed individuals may not transfer class 3 weapons directly into their state. An active Class 3 license is required to execute the transfer. If you hold an active standard FFL, you may transfer the weapon in directly, however the law enforcement signature, photographs, and fingerprint cards are still required, as well as the $200 FET. We will be happy to help you in the selection of a reputable Class 3 dealer in the state that you live in, however, the final decision will be yours.

The form “4” is quite simple. It will be filled out in duplicate by your Class 3 dealer, showing the current owner of the weapon and address, your name and address, description of the weapon and serial number, etc.. You will be given the forms, along with a set of fingerprint cards. On the back of the form is a place for your photograph and your local law enforcement official’s signature. If you are transferring the NFA

weapon to your corporation, this Law Enforcement signature is not required. See “Corporate Transfers” or contact us for more details.

The required signature may come from a multitude of sources. The Chief of Police, the Sheriff, District Attorney, a Federal judge, State Chief of Police, etc.. Typically the person signing this form “4”, will conduct a background check on you, insuring that you are a person in good standing, within your community. If you have a criminal background or questionable past, you will be denied a signature at this point. In fact, even if you are a fine upstanding member of the community, you will find this part of the NFA weapon acquisition, the most difficult. Why? Most of the local law enforcement officials today, are no longer police officers, but unfortunately, appointed politicians. You will find that they typically do not sign such documents, with their eyes closed and will generally give a “no” response via a “clerk”, when you call up like “Lever Action Bubba” screaming that he has to sign this form, so you can have your machine gun. The “no” answer is to slow down 99% of the individuals that just think they want a class 3 weapon. If you are dealing with a clerk and not him directly, this is what you deserve. However, there is the remaining 1%, that will do something intelligent, like make an appointment to talk about the signature, maybe have a cup of coffee, etc..

After you have obtained an official signature, return the forms along with your photographs (taped to the back), your fingerprint cards, and your check for $200, (payable to The Department of the Treasury) to your dealer. All of this information, along with the FET fee, will be forwarded to the BATF and they will begin the process of transferring the ownership of the weapon to your name or corporation. No, you don’t give up all your rights at this point. It is the question that I get asked the most at this point. Search warrants are still required by law, these days, even for an individual that owns a class 3 weapon. These are “bubba” stories.

If you are really sincere about owning one of these very rare weapons, please feel free to contact us. We will show you how to legally obtain one. That is what we get paid for. All transactions are confidential, that is Federal Law!”

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It might seem that securing the signature of a law enforcement official could be a stumbling block to the acquisition of the proper form. Tennessee removed this obstacle in 2004:

> **Tenn. Code Ann. § 39-17-1361. Purchase of firearms; requests for documentation from law enforcement officials**
>
> The sheriff or chief of police of the city of residence of a person purchasing any firearm, defined by the National Firearms Act, 26 U.S.C. § 5845 et seq., **shall** execute within fifteen (15) business days of any request all documents required to be submitted by the purchaser if the purchaser is not prohibited from possessing firearms pursuant to § 39-17-1316.

Given this statute and this state's toleration – indeed, fascination – with firearms it is not unreasonable to suggest that Mr. Smith could have lawfully acquired a fully automatic weapon and been able to play with his "toy" out there on Buck Hollow Road in Chapmansboro, Tennessee. Thus, Mr. Smith's crime was not in having a fully automatic weapon but having one without the proper $200 tax stamp.

B.

Where one ends a journey is frequently dictated by where one begins. The sentencing guidelines for this offense inexplicably start with a base level of 18 points which translates to 27 to 33 months. The mid-point of 30 months is exactly 25% of the maximum sentence of ten years. If one pleads

guilty and accepts responsibility the level goes to 15 points and a sentence of 18 to 24 months which, even at the minimum of 18 months, is still 15% of the statutory maximum.

One can find pre-guideline cases where defendants were sentenced to 18 months. *United States v. Williams*, 446 F. 2d 486 (5th Cir. 1971) (imposition of a sentence of 18 months for offense of possessing an unregistered firearm was well within statutory maximum of 10 years and did not constitute cruel and unusual punishment in violation of Eighth Amendment). However, sentences prior to the guidelines permitted parole, something which has been abolished. There is less than accurate data to show that 18 months of actual incarceration was the "baseline" for pre-guideline convictions.

It is more reasonable to suppose that the baseline was fixed to prevent any consideration of probation. Even with an extraordinary number of downward adjustments one could seldom fall with zones B or C permitting something other than full incarceration.

Be that as it may, Mr. Smith's base number is further enhanced by a number of prior misdemeanor convictions, placing him in Criminal History Category III. He is "just barely" into this category by virtue of a 90-day DUI sentence for which he is assessed 2 rather than 1 point. Had the sentence

been 59 days he would be in Category II. Certainly the Court can "depart" downward by finding that even a criminal history category of II "over-represents" Mr. Smith's defendant's criminal history or recidivist tendencies particularly since the prior misdemeanors are totally unrelated to his conviction here. U.S.S.G. § 4.A 1.3 (b)(1). Moreover the Criminal History Category III is the same as if Mr. Smith has two prior felony convictions. A Criminal History of I — which permits some prior record — is more in keeping with the types of prior convictions Mr. Smith has sustained as a result of his alcohol and drug abuse.

Even reducing the "points" for acceptance of responsibility and declining to give full impact for the prior misdemeanors still leaves Mr. Smith with an incarceration minimum of 18 months which is unnecessarily punitive and does not consider all the factors pertinent to sentencing.

C.

Good works are not a ticket to heaven or a reduction of sentence under the guidelines *per se*. However, such matters are now a valid consideration under 18 U.S.C. § 3553(a). There are no limitations on the information the Court may consider at sentencing "concerning the background, character, and conduct of a person convicted of an offense." 18 U.S.C. § 3661. As part of its consideration of these factors, the court must

recognize "that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

18 U.S.C. § 3553(a) does not direct the Court to give greater weight to some factors over others, and the Court may now consider factors that previously were considered "prohibited factors" or "not ordinarily relevant" under the sentencing guidelines, such as family circumstances, age of the defendant, mental and emotional conditions, physical condition, employment record, and lack of guidance as a youth. See U.S.S.G. § 5H1.1-.12 (listing the relevance of certain offender characteristics). See *United States v. Briceno*, No 04-4493, (6th Cir. June 22, 2005):

> In a similar case, this Court recently examined a district court's downward departure from the applicable guideline range based on factors previously discouraged under the mandatory guidelines. *See United States v. Jackson,* 408 F.3d 301, 304 (6th Cir.2005). We observed in *Jackson* that although the downward departure based on previously discouraged and prohibited factors "would almost certainly have been problematic under the Guidelines" prior to the Supreme Court's decision in *Booker,* the court's departure may be reasonable under the now-discretionary guidelines. *Id.* at 304.

Recent Sixth Circuit cases clarify that the advisory guidelines sentencing range is **not**, the *per se* reasonable sentence. *United States v. Webb*, 403 F.2d 373, 385 (6th Cir. 2005) (noting that such a rule would be "not only inconsistent with the meaning of reasonableness, but is also inconsistent with the Supreme Court's decision in *Booker*, as such a standard

'would effectively re-institute mandatory adherence to the guidelines.'" *United States v. Williams* 436 F.3d 706 (6th Cir. 2006) held that on appeal "sentences properly calculated under the guidelines will be credited with a rebuttable presumption of reasonableness"). The holding in *Williams* was clarified in *United States v. Marco Eugene Foreman* 436 F.3d 638 (6th Cir. 2006), in which the court explained:

> "although this statement seems to imply some sort of elevated stature to the guidelines, it is in fact rather unimportant. *Williams* does not mean that a sentence outside of the guideline range—either higher or lower—is presumptively unreasonable, it is not. *Williams* does not mean that a guideline sentence will be found reasonable in the absence of evidence in the record that a district court consider all of the relevant 3553(a) factors . . . moreover, *Williams* does not mean that a sentence within the guidelines is reasonable if there is no evidence that the district court followed its statutory mandate to "**impose a sentence sufficient, but not greater than necessary"** to comply with the purposes of sentencing in Section 3553(a)(2).

Id. at 644. (Emphasis added).

At the sentencing hearing this Court will hear testimony that Mr. Smith is highly committed to his family and friends. He has undertaken work in the storm ravaged area of Mississippi to help rebuild homes of his relatives destroyed by the recent hurricanes. Mr. Smith rebuilt a factory destroyed by probable arson to give employment to residents of his community here in Tennessee.

Unfortunately, Mr. Smith suffers from various mental illnesses that have plagued him all his life. His physician has provided a letter to this Court and the pre-sentence report confirms the Bipolar disorder diagnosis.

Mr. Smith also suffers from alcohol abuse for which he is now, finally, receiving treatment on an out-patient basis at the Foundations Associates in Nashville. The pre-sentence officer has wisely recommended further treatment on supervised release for these multiple maladies,[1] but this should not be inordinately delayed by prolonged incarceration. This Court is certainly aware "that in determining the length of the term..... imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582. Accordingly, rehabilitative programs can be a justification for a somewhat reduced period of incarceration.

D.

18 U.S.C. § 3553(a)(6) asks the Court to avoid unwarranted sentence disparities. There are a host of cases where defendants convicted of weapon offenses have received sentences far in excess of the year and a day

[1] When a person is affected by both an emotional or psychiatric illness and chemical dependency, they are suffering from co-occurring conditions. Psychiatric illness and chemical dependency affect an individual physically, psychologically, socially, and spiritually. Although the two conditions are separate and independent, they interact in ways that make diagnosis, treatment, and recovery more complex. Foundations Associates provides treatment and education of individuals and families affected by co-occurring conditions.

recommended here. Invariably these other cases involve the tinge of drugs or gang-related activity. This suggests that perhaps the high base number of the weapon sentencing guideline is to "get at" drug dealers even though the drug connection may not be readily provable.

There is unquestionably a high correlation between automatic weapons and drugs. See, *United States v. Jones,* 102 F.3d 804, 806 (6th Cir.1996) (cocaine dealers attempt to sell federal agents a MAC-10, a MAC-11, and an AK-47, two of which have obliterated serial numbers); *United States v. Cannon,* 88 F.3d 1495, 1505 (8th Cir.1996) ("The record in this case contains evidence that a machine gun is a drug dealer's most prized possession."); *United States v. Thomas,* 12 F.3d 1350, 1361-62 (5th Cir.1994) (AR-15 rifle modified to fire as a machine gun used by defendant for protection because of "his line of business" in conspiracy to distribute cocaine, amphetamine, methamphetamine and marijuana), *United States v. Sims,* 975 F.2d 1225, 1230 (6th Cir.1992) (ATF agents discover two AR-15 rifles, converted to fire fully automatically, and 257 rounds of ammunition in the back seat of a car in connection with the arrest of defendants attempting to buy $337,500 worth of cocaine).

There is no suggestion here that Mr. Smith did anything other than "play" with his modified rifle. As the Court will hear at the sentencing

hearing, Mr. Smith succeeded only in shooting his lawnmower. The tinge of drugs and gang activity is not in record or even in the remotest imagination of the BATF agent who investigated the case.

District courts impose sentences considerably under the guidelines in firearm prosecutions where there is some mitigation to the case. *United States v. Doucet*, 994 F.2d 169, 170 (5th Cir. 1993) (defendant convicted of possession of an unregistered firearm – an AR15 – modified to fire as a machine gun, district court properly sentenced him to twelve months of unsupervised probation and a $5,000.00 fine); *United States v. Hopper*, 941 F.2d 419 (6th Cir. 1991) (ten-month sentence imposed on defendant convicted of selling AR7 rifle which had been converted to fully automatic did not violate Eighth Amendment's guarantee against cruel and unusual punishment; case arose in this District and was imposed by Judge L. Clure Morton). See also, *United States v. Williams*, 432 F.3d 621 (6th Cir. 2005) (imposition of departure sentence of 24 months' imprisonment for conviction of being felon in possession of firearm was reasonable, even though recommended sentencing range under Sentencing Guidelines was 46 to 57 months,); *United States v. Briceno*, No 04-4493, (6th Cir. June 22, 2005) (in a prosecution for possession of a weapon by a convicted felon, the district court granted a six-level departure and sentenced the defendant to five

months of imprisonment, five months of home confinement, and two years of supervised release; affirmed as reasonable). The suggested sentence of a year and a day here is not inconsistent with these cases.

E.

Earlier, it was noted that even with all the favorable adjustments the guidelines dictate a sentence of 18 months of incarceration which is 15% of the maximum sentence. The defense suggests that the other favorable factors eschewed by the wooden guidelines – but allowed by 18 U.S.C. § 3553(a) – will permit a sentence of incarceration which is still 10% of the maximum statutory range Congress decreed for the crime of possessing a fully automatic weapon without the proper $200 tax stamp. Such a sentence is reasonable.[2]

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[2] See the extensive rationale justifying the 43-month (!) upward *Booker*-variance in *United States v. Barton*, 6th Cir.(August 3, 2006). See also, *United States v. Eric Jones*, 2nd Cir. (August 2, 2006):

> In the pending case, the sentence of 15 months is 15 months less than the bottom of the calculated Guidelines range. In [*United States v. Fairclough*, 439 F.3d 76 (2d Cir. 2006)] the non-Guidelines sentence was 21 months above the top of the calculated Guidelines range. If we are to be deferential when the Government persuades a district judge to render a non-Guidelines sentence somewhat above the Guidelines range, we must be similarly deferential when a defendant persuades a district judge to render a non-Guidelines sentence somewhat below the Guidelines range. Obviously, the discretion that *Booker* accords sentencing judges to impose non-Guidelines sentences cannot be an escalator that only goes up.

The important message sent by the suggested sentence here can be accomplished not as much by the length of incarceration as by the fact of incarceration. 18 U.S.C. §3553(a)(2) requires that a sentence reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense. It must also serve to afford adequate deterrence to criminal conduct. These important sentencing goals can be attained by a sentence of a year and a day of incarceration (followed by an extended period of supervised release).

As the Court has gleaned from the many letters of support Mr. Smith is highly regarded in his community. He is also well known and thus his incarceration will be well known by everyone. A year and a day in a federal prison will send the necessary message that possession of a fully automatic weapon will result in inevitable incarceration: a machine gun is **not** a toy, even on rural Buck Hollow Road.

F.

18 U.S.C. § 3621(e) provides a basis for what, in effect, is a reduction in a defendant's sentence for successful completion of the Bureau of Prisons' Residential Drug Abuse Program (RDAP). The Court should be aware that in light of BOP Directive 5331.01 concerning "early release," the BOP will not allow Mr. Smith to participate in the RDAP program because

he has been convicted of a "violent offense." BOP Directive 5162.04(6)(3) provides that convictions for any of the subsections of 26 U.S.C. 5861 are "crimes of violence," which automatically exclude participation in the Bureau of Prisons' Residential Drug Abuse Program. Thus, this Court's sentencing determination should not assume eligibility for RDAP and any judicial recommendation for such will be ignored by the BOP.

So that he can take advantage of more of his current outpatient treatment program, this Court should permit Mr. Smith to self-report for the incarceration component of his sentence. Finally, the Court may make a recommendation as to place of incarceration with the understanding that it is not binding on the BOP. Counsel asks that the Court recommend FCI Memphis (a/k/a Millington).

Respectfully submitted,

s/ David L. Raybin
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon Assistant United States Attorney Robert J. Washko, 110 Ninth Ave. South, Suite A-961, US Courthouse, Nashville, Tennessee, 37203, via electronically through the Electronic Filing System, this **4th** day of August, 2006.

s/ David L. Raybin
David L. Raybin

APPENDIX FOLLOWS