

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
v.	)	<b>Criminal No. 91-9-P-C</b>
	)	<b>(Civil No. 96-101-P-C)</b>
<b>EMIL P. DILL,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION  
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Emil P. Dill moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Dill was convicted of possession with intent to distribute in excess of ten grams of LSD, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). His motion alleges ineffective assistance of counsel in connection with his entry of a guilty plea and subsequent sentencing, challenges the court’s findings at sentencing concerning the quantity of LSD involved in the case, raises the issue of entrapment and complains of his treatment during incarceration.<sup>1</sup> In two pleadings filed subsequent to his initial motion, Dill avers that he has completed his incarceration and has commenced his court-imposed period of supervised release; he therefore seeks to have the court intervene in certain disagreements he is having with his probation officer.

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as

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<sup>1</sup> The government has moved pursuant to Local Rule 19(e) for leave to file a response in excess of 20 pages to Dill’s motion. In view of the length of Dill’s memorandum in support of his request for collateral relief, the government’s motion is granted.

true because ‘they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.’” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that Dill’s allegations are insufficient to justify relief even accepted as true, and accordingly I recommend that his motion be denied without an evidentiary hearing.<sup>2</sup>

## I. Background

The grand jury returned an indictment on February 13, 1991 charging Dill with possession with intent to distribute in excess of ten grams of LSD. Indictment (Docket No. 1). On July 17, 1991 Dill entered a plea of guilty pursuant to Fed. R. Civ. P. 11. Transcript of Rule 11 Proceedings and Sentencing Proceedings (“Tr.”) (Docket No. 28) at 2-3. He was represented at that stage by attorney Marshall Waldron. *Id.* at 1.

During his colloquy with the court at the Rule 11 hearing, Dill affirmatively indicated his wish to plead guilty because he was, in fact, guilty as charged. *Id.* at 3. He stated that he understood, in light of his guilty plea, that he would be subject to a fine of up to four million dollars and/or a term of imprisonment ranging from ten years to life. *Id.* at 8. He also acknowledged that he would be subject to a mandatory minimum term of five years of supervised release following his incarceration. *Id.*

The government thereupon presented a summary of its case to the court. According to the

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<sup>2</sup> It is therefore not necessary to address the government’s contention that the court cannot credit certain factual allegations that appear in Dill’s unsworn memorandum accompanying his motion. *See United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995) (application for collateral relief “must rest on a foundation of factual allegations presented under oath”), *cert. granted*, 135 L.Ed. 2d 1066 (1996). Apparently reacting to the government’s argument, Dill has submitted a sworn affidavit stating that “the contents of this document [i.e., the memorandum accompanying his section 2255 motion] were true and correct as I know them to be [when filed].” Affidavit (Docket No. 32).

government version, a postal inspector intercepted two parcels on January 23, 1991 -- one addressed to Dill and another addressed to “Cory Anderson,” an alias used by Dill. Prosecution Version (Exhibit 1 to Tr.) at 1. Opened pursuant to a search warrant, each parcel contained 2,000 dosage units of blotter-paper LSD. *Id.* A chemist determined that the total net weight of this LSD, including the carrier medium, was 63.65 grams. *Id.* Agents repackaged one of the parcels, placed it in Dill’s post office box, notified him that he had a parcel for pickup, and arrested him when he retrieved the package. *Id.* at 1-2.

Dill indicated at the Rule 11 hearing that he had read the government’s version of the case and had conferred with counsel concerning its contents. Tr. at 10. Other than disputing the government’s assertion that he initially identified himself as Cory Anderson when arrested, Dill indicated that the government’s version of the case was true and that he did, in fact, commit the offense alleged in the indictment. *Id.* at 13-14.

The government represented that in exchange for Dill’s guilty plea it had agreed orally to seek a downward departure pursuant to the Sentencing Guidelines.<sup>3</sup> *Id.* at 14-15. Dill stated he understood that the final sentencing decision rested exclusively with the court, which had not then determined the appropriate sentence, and that any such determination would be governed by the Sentencing Guidelines. *Id.* at 16. He indicated that his attorney had explained the likely application of the Guidelines to his case, and that he understood he would be bound by his plea of guilty even if his sentence turned out to be more severe than he expected. *Id.* at 16-17. Asked whether anyone had made any promises to him concerning the sentence to be imposed by the court, Dill replied, “Of

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<sup>3</sup> All references herein to the Sentencing Guidelines are to the November 1, 1991 edition. *See Memorandum of Sentencing Judgment (Docket No. 8) at 1 n.1.*

course not.” *Id.* at 18.

Dill, now represented by attorney David Beneman, appeared for sentencing on November 19, 1991. *Id.* at 20. At the sentencing, the government withdrew its previously asserted request for an increase of two points in the base offense level, pursuant to section 3B1.1 of the Guidelines (hereinafter sometimes referred to as “U.S.S.G.”), for the exercise of managerial authority in connection with the offense conduct. *Id.* at 24-25. The court therefore calculated a base offense level of 36, with an adjusted base offense level of 34 to reflect a decrease for acceptance of responsibility. *Id.* at 25. Based on a criminal history category of I, the court calculated the applicable Sentencing Guideline range as 151 to 188 months. *Id.* The court also noted that Dill was subject to a mandatory minimum sentence of 120 months.<sup>4</sup> *Id.* at 26.

Through counsel, Dill had asserted 24 objections to the presentence report, which set the quantity of LSD involved at 362.56 grams. Presentence Report (Revised) (“PSR”) at ¶ 43 and pp. 18-26). As a result of negotiations concerning these objections, the parties reached a stipulation of 297.86 grams for the amount of LSD involved in the case. Tr. at 25; Memorandum of Sentencing Judgment at 1. At his sentencing hearing, Dill affirmatively indicated that he had made all of his objections to the presentence report known to the court. Tr. at 23.

The only issue that was in dispute at the sentencing hearing itself was the question of a downward departure. In light of what the government characterized as Dill’s significant cooperation and its substantial impact on other LSD-related prosecutions, the government recommended a

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<sup>4</sup> A downward departure below the 120-month level was nevertheless permissible in light of Dill’s cooperation with the government, as discussed, *infra*. See U.S.S.G. § 5K1.1 comment (n.1) (Nov. 1991) (court may impose less than mandatory minimum sentence in cases of “substantial assistance in the investigation or prosecution of another person”) (statutory citations omitted).

downward departure of “30 months,” i.e., of two offense levels -- which would have yielded a sentencing range of 121 to 151 months. *Id.* at 27; Sentencing Table. Dill’s attorney argued for a nine-level downward departure, which would have placed him in the 57- to 71-month range. *Id.* at 40; Sentencing Table. Ultimately, the court ordered a downward departure of six levels (to 28) and sentenced Dill to incarceration for 78 months, which was at the low end of the applicable Guideline range. *Id.* at 46-47. In so doing, the court was careful to stress that it normally defers to the government’s recommendations concerning downward departures, and to characterize defense counsel’s effort in successfully arguing for an additional downward departure as “commendable” and “a credit to the bar.” *Id.* at 50-51.

On November 1, 1993 certain amendments to the Sentencing Guidelines with significant bearing on this case took effect. U.S.S.G. App. C (Nov. 1995), Amd. 488 at 380-82. The amendment directed sentencing courts not to include the weight of the carrier medium (such as blotter paper) in a case involving LSD furnished in such a medium. *Id.* at 380. Instead, courts are directed to treat each dose of LSD on the carrier medium as equal to 0.4 milligrams of LSD. *Id.* at 380-81. The commentary to this amendment noted that the change was directed toward eliminating unwarranted disparity in sentences based on variations in the weight of the carrier medium.<sup>5</sup> *Id.* at 381. Pursuant to 28 U.S.C. § 994(u), the Sentencing Commission explicitly listed Amendment 488 as one that is appropriate for retroactive application. U.S.S.G. App. C (Nov. 1995), Amd. 502 at

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<sup>5</sup> Amendment 488 also provides that in cases of LSD in liquid form, i.e., not placed onto a carrier medium, “using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.” Amd. 488 at 381. Although Dill complains in his petition that the government improperly calculated the liquid LSD that comprised some of the contraband involved in his case, the government did not invoke this provision of amendment 488 in seeking modification of Dill’s sentence and the court did not apply it.

407. Accordingly, on November 1, 1993 the government moved that the court revise its finding as to the amount of LSD involved in this case to 62.16 grams. Government's Comprehensive Pleading Respecting Amendment of Sentencing Judgment (Docket No. 13) at 2. In light of the six-level departure in the original judgment, the government recommended a revised sentence of 63 months. *Id.* Counsel for Dill expressed agreement with this recommendation, Defendant's Response to Government's Pleading, etc. (Docket No. 14), and accordingly the court revised the sentence to 63 months of incarceration on November 10, 1993, Amendment to Memorandum of Sentencing Judgment (Docket No. 15). Five days later, attorney Beneman wrote the court and indicated that his client did not agree that a revised sentence of 63 months was appropriate and desired a testimonial hearing. Letter of David Beneman (Docket No. 17). Attorney Beneman suggested that appointment of new counsel might be appropriate. *Id.* The court treated the letter as a motion for a hearing and denied it. *Id.* (endorsement by court). The court formally entered an amended judgment on November 17, 1993 to reflect its determination that Dill would now serve a 63-month sentence. Amended Judgment (Docket No. 18). On November 18, 1993 the court received a letter from Dill reiterating that attorney Beneman acted without authority from the defendant in agreeing to the reduction to 63 months. Letter of Emil P. Dill (Docket No. 19). The court endorsed this letter with a notation that it amended the judgment on its own determination as to the applicable law, "without any reliance upon any alleged agreement between counsel." *Id.* (endorsement by court).

Dill filed his section 2255 motion on April 18, 1996, while still incarcerated. He states that he has subsequently completed his period of incarceration and is now serving his five-year term of supervised release. Supplement to § 2255 (Docket No. 34) at 1; New Matter (Docket No. 35) at 1. Because a favorable result in response to Dill's contentions would advance the onset date (and thus

the termination date) of his supervised release, his motion is not moot. *See, e.g., United States v. Smith*, 991 F.2d 1468, 1470 (9th Cir. 1993).

## **II. Ineffective Assistance of Counsel**

Although it is not the first ground asserted, central to Dill's motion is his contention that he suffered the ineffective assistance of counsel. He first complains that counsel's assistance was ineffective because attorney Waldron withdrew from the case prior to sentencing to accept a job with the Cumberland County District Attorney. According to Dill, during all of the discussions attorney Waldron had with Dill and with representatives of the government there was agreement that Dill's sentence would ultimately come out in the one-to-two-year range given the likelihood of a downward departure. Dill also avers that during this phase of the case he and attorney Waldron had reached an agreement with the government that certain drug purchases Dill had made at the behest of a government informant -- including all of his purchases of liquid LSD -- would not be used as evidence against him.<sup>6</sup>

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<sup>6</sup> Although not made known to the court at the Rule 11 hearing when the government presented its version of the case, the record suggests that Dill actually received three packages containing contraband at the time of his arrest. *See* PSR at ¶¶ 23-26; *see also* Defendant's Memorandum (Docket No. 26) at 10, 12 and Government's Memorandum at 7-8 (both referring to three packages). Dill states that 12 vials of liquid LSD were contained in the third package that he received at the time of his arrest, but that he and Waldron had reached an agreement with the government that this evidence would not be used against him because it had not been covered by the search warrant that described the other two packages seized on that occasion. According to Dill, he executed a written agreement waiving the search-warrant requirement in exchange for the government's commitment not to use the evidence.

Dill further states that these 12 vials constitute "all of the liquid LSD in Dill's case to be used as evidence against Dill." Defendant's Memorandum at 12. This is incorrect. The presentence report makes clear that an additional 12 vials of liquid LSD were seized. *See* PSR at ¶ 26 (referring to 55.16 grams of liquid LSD, contained in 12 vials that were boxed and received along with 2,000 dosage units of blotter LSD in "[t]he other two envelopes received by Dill.")

Then, Dill states, attorney Beneman entered his appearance and the scenario shifted drastically. According to Dill, attorney Beneman's prediction was for a ten-year prison sentence rather than the much shorter period that had been suggested by attorney Waldron. Dill also contends that the prosecutor initially told attorney Beneman he would be seeking a five-year sentence and then, at sentencing, argued for ten years of incarceration. Dill further states that attorney Beneman coerced him into entering the stipulation as to the amount of drugs involved, thereby giving up legitimate objections based on the government's conduct during its investigation, and then coerced him into waiving a direct appeal.

In support of his position Dill appropriately invokes the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.* at 687. The *Strickland* test applies to cases that are resolved by guilty plea rather than trial. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). To satisfy the "prejudice" requirement in such a context, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. In a case alleging ineffective assistance in connection purely with the sentencing phase of a criminal proceeding, the First Circuit has recently described the "prejudice" requirement as one demanding a showing of "a

reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Smullen v. United States*, 94 F.3d 20, 23 (1st Cir. 1996).

In complaining about the events surrounding the transition from attorney Waldron to attorney Beneman, it is not completely clear which aspect of counsel's assistance Dill contends was ineffective. The bare fact that one defense attorney withdraws in favor of another, for reasons extraneous to the case, does not meet either prong of the *Strickland* test; it is neither an unreasonable act by either attorney nor outcome-determinative. If one of Dill's points is that either lawyer made an incorrect prediction of Dill's likely sentence, such a claim must fail. "An attorney's inaccurate prediction of his client's probable sentence, standing alone, will not satisfy the prejudice prong of the ineffective assistance test." *LaBonte*, 70 F.3d at 1413 (citation omitted). Dill nowhere states that, but for erroneous advice about the likely sentence, he would have entered a plea of not guilty and insisted upon a trial. And even if he made such an assertion here, such a protestation would be inadequate unless accompanied by a claim of innocence or the articulation of a plausible defense that he could have raised at trial. *Id.* (citations omitted).

Dill's other contention concerning attorney Beneman -- that he was ineffective in counseling his client to enter into the stipulation as to the amount of LSD involved in the case -- fails the first prong of the *Strickland* test. Dill maintains that the government entrapped him into acquiring liquid LSD and that an effective attorney would therefore have successfully pressed the government to delete all of the liquid LSD from the amount of drugs that formed the basis of his base offense level pursuant to the Sentencing Guidelines. To the contrary, a careful review of what occurred at sentencing demonstrates that attorney Beneman was thoroughly effective in resolving this issue by stipulating to 297.86 grams of LSD. According to the then-applicable version of the Guidelines, a

base offense level of 38 would have been required in a case involving at least 300 grams but less than 1 kilogram of LSD. U.S.S.G. § 2D1.1(c)(3). Bringing the total below 300 grams had the effect of reducing the base offense level to 36. *Id.* at (4) (applying to cases involving at least 100 grams but less than 300 grams). Therefore, by successfully negotiating with the government to eliminate 58.7 grams of liquid LSD<sup>7</sup> and 6 grams of blotter LSD, attorney Beneman won his client a two-point reduction. Pressing the entrapment issue further, in an effort to cause the calculation to be reduced by the remaining 55.16 grams of liquid LSD, would have had no effect, since the resulting total would have been well above the 100 grams required to bring Dill within subsection (c)(3).<sup>8</sup> Given that entering into the stipulation as to the amount of LSD was a sound exercise of strategy, and given that it also had the effect of waiving the issue for purposes of appeal, there of course can be no merit to Dill’s contention that his attorney should have pressed the issue of the liquid LSD by appeal. *See Strickland*, 466 U.S. at 689 (defendant alleging ineffective assistance must overcome “strong presumption” that challenged attorney action was exercise of “sound trial strategy”).

When the court commended attorney Beneman at the sentencing hearing for the quality of his advocacy, it is apparent the court was referring only to his success in winning a significant

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<sup>7</sup> It is clear from reviewing the presentence report that this 58.7 grams of liquid LSD represents the quantity of the drug obtained from the 12 vials that were found in the package that was apparently not covered by the search warrant. *See* PSR at ¶ 26. This is the LSD that Dill contends the government agreed not to use as evidence against him in exchange for his waiver of the warrant requirement.

<sup>8</sup> It is, of course, true that as the result of the retroactive amendment to the Guidelines discussed, *supra*, the liquid LSD now forms the bulk of the LSD for which Dill has been sanctioned. That knowledge, were it available at the time of sentencing, might have suggested a different strategy. But the performance standard set forth in *Strickland* does not require an attorney to predict that two years hence the applicable law will be amended retroactively. It is therefore not necessary for the court to determine whether these circumstances meet the prejudice prong of the *Strickland* test.

downward departure for Dill. But, notwithstanding Dill's contentions, the facts in the record concerning the negotiations that led to the stipulation yield nothing that now requires the court to amend its assessment of attorney Beneman's effectiveness in this case.

### **III. Calculation of the LSD Quantity**

Separate from his claim of ineffective assistance of counsel, Dill challenges the determination of the amount of LSD involved in his case. This argument raises no constitutional issue, but rather accuses the government of punishing Dill excessively because it "does not understand LSD." Defendant's Memorandum at 5-6. Dill's contention is that the Guideline provisions concerning liquid LSD overestimate the amount of actual contraband involved by counting as LSD a substance that consists mostly of harmless solvents like water or alcohol.

Section 2255 authorizes vacation, setting aside or correction of a sentence that was "imposed in violation of the Constitution or laws of the United States," a sentence imposed by a court that was without jurisdiction, or a sentence that "was in excess of the maximum authorized by law[] or is otherwise subject to collateral attack." An argument that raises no constitutional or jurisdictional infirmities, but simply reflects a defendant's policy disagreement with a provision of the Sentencing Guidelines, is well beyond the proper scope of a section 2255 motion. *See Knight v. United States*, 37 F.3d 769, 772-73 (1st Cir. 1994) (non-constitutional, non-jurisdictional section 2255 claims only cognizable in cases of "miscarriage of justice").

### **IV. Sentencing Factor Manipulation**

Dill next contends that he was improperly sentenced because the government entrapped him into acquiring liquid LSD -- something he had never done previously and would not have done but

for the government's inducement. In support of his position he relies principally on *United States v. Stauffer*, 38 F.3d 1103 (9th Cir. 1994). The Ninth Circuit held in *Stauffer* that, when the government entraps a defendant into committing a more serious offense that he would have otherwise committed, this may become the basis for a downward departure under the Sentencing Guidelines. *Id.* at 1106, 1108. In this circuit, the operative phrase is "sentencing factor manipulation," see *United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992) (criticizing "sentencing entrapment" as misleading), and a defendant faces a very high hurdle to justify such a downward departure based on this theory. He cannot simply show that the idea for the conduct in question originated with or was encouraged by the government, that the crime was prolonged beyond the first criminal act, or that it "exceeded in degree or kind what the defendant had done before." *United States v. Montoya*, 62 F.3d 1, 3-4 (1st Cir. 1995) (citations omitted). "What the defendant needs in order to require a reduction are elements like these carried *to such a degree* that the government's conduct must be viewed as 'extraordinary misconduct.'" *Id.* at 4 (emphasis in original) (§ citation omitted); see also *United States v. Egemonye*, 62 F.3d 425, 427, 428 (1st Cir. 1995) (applying *Montoya* test and finding no manipulation even if "agents' motives were mixed and not of crystalline purity").

It is not necessary to determine whether the government committed such extraordinary misconduct in connection with Dill's acquisition of liquid LSD. *Stauffer*, *Connell*, *Montoya* and *Egemonye* were all decided on direct appeal, which is the appropriate juncture for addressing any failure of the sentencing court to find sentencing factor manipulation. As the First Circuit noted in *Smullen*, the general rule is that failure to raise claims on direct appeal ordinarily constitutes a waiver and such claims are inappropriate for collateral review absent a showing of cause for the failure and

actual prejudice. *Smullen*, 94 F.3d at 23 (citations omitted). When the “underlying claim” alleges ineffective assistance of counsel, “cause and prejudice need not be shown.” *Id.* (citing *Knight*, 37 F.3d at 774). Instead, the court must apply the two-prong *Strickland* test previously discussed. See *Smullen*, 94 F.3d at 23 and n.3 (so analyzing claims of erroneous Guideline application when counsel allegedly ineffective). As I have already noted, any failure to raise the issues concerning the liquid LSD was a reasonable exercise of strategy in light of the stipulation negotiated with the government. That necessarily includes the argument that Dill was a victim of sentencing factor manipulation. Given the Guidelines as they existed in 1991, any assertion of the sentencing factor manipulation issue would not have won Dill anything. His claim of sentencing factor manipulation must therefore fail here.

#### **V. Other Post-Sentencing Guideline Amendments**

Dill’s motion asserts as a ground for relief the promulgation of the “safety valve” provisions contained in Amendment 509 to the Guidelines (creating section 5C1.2, effective September 23, 1994). Likewise, the motion invokes Amendment 459 (effective November 1, 1992), which provides for an additional decrease of one base offense level in certain circumstances involving cooperation with the government. Unlike Amendment 488, of which Dill received the benefit, neither of these amendments is retroactive by its terms. Since they involve substantive changes to the Guidelines, Dill may not properly claim their benefit. *United States v. Sanchez*, 81 F.3d 9, 12 (1st Cir. 1996).

#### **VI. Other Issues**

The remaining contentions raised by Dill involve complaints about the conditions of his

confinement during his period of incarceration and his relationship with his probation officer since beginning his period of supervised release. He raises the latter issue via two supplementary memoranda, to which the government has not objected or responded. Both of these issues concern the execution, as distinct from the imposition or legality, of Dill's sentence. The court is therefore without jurisdiction to consider these matters on section 2255 review. *United States v. DiRusso*, 535 F.2d 673, 674 (1st Cir. 1976).

## VII. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 28th day of October, 1996.*

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*David M. Cohen  
United States Magistrate Judge*