IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
DAVID E. NAPIER	:	NO. 97-214

MEMORANDUM

J. M. KELLY, J. **JANUARY 7, 1999**

In May 1997, a grand jury in the Eastern District of Pennsylvania returned an indictment charging Defendant, David E. Napier ("Napier") with four counts of bank fraud. Trial was set to commence on October 27, 1997, when Napier pled guilty to all four counts of bank fraud. Napier was sentenced on December 17, 1998, and filed a Notice of Appeal of his sentence on December 28, 1998.

On December 16, 1998, the day prior to Napier's sentencing hearing, the Court received a hand delivered copy of Napier's Objections to a Presentence Investigation Report ("PIR") at approximately 5:00 p.m. Napier's attorney, Robert Welsh ("Welsh"), represented at the sentencing hearing that a copy of the Objections had been faxed to Anita Eve ("Eve"), the Assistant United States Attorney, at the same time. Eve stated at the sentencing hearing that she had not received the Objections, and was given time to review them prior to the hearing. The Court does believe that the Objections were faxed to Eve as stated by Welsh.

The Court believes that, despite the late filing of the

Objections,[1] Eve was generally able to present the Government's position and the Court was able to adequately review most of Napier's Objections. The Court feels compelled, however, to clarify the record concerning one objection raised by Napier. Accordingly, the Court issues this Memorandum pursuant to United States Court of Appeals Local Rule 3.1.

The PIR added two criminal history points towards Napier's criminal history category determination for committing part of one of the instant offenses while he was sentenced and awaiting imprisonment on a conviction in United States District Court in Trenton, New Jersey. The two points are added pursuant to U.S.S.G. § 4A1.1(d). Napier was sentenced by Judge Ackerman in the New Jersey case on February 13, 1991. At the sentencing hearing, Napier produced a photocopies of two loan applications dated February 5, 1991, and argued that they proved that the fraud had been committed prior to Napier's New Jersey sentencing. In addition, two other Applications were produced, dated February 15, 1991. Finally, one of the February 15 Applications has "guarrantor for Medi Lab 2/6" written in the section where vehicle cost information would normally be placed. Napier argued

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[1]The Court is concerned that the late filing of the Objections may have been an ambush tactic designed to raise sentencing issues without giving the United States adequate time to prepare for the issues raised. If this is true, it is the only instance in Welsh's representation of Napier where there is even a hint of anything less than a zealous, effective and ethical representation of Napier by Welsh.

further that this date showed that he, as guarantor for Medi-Lab, had completed his participation in the transaction prior to sentencing.

Eve and the Court were hampered in analyzing these documents by their initial presentation at the sentencing hearing. Napier presented no testimony to authenticate these copies or to prove what form they were in on the relevant dates. At that time, the Court believed that the Government had proved by a preponderance of the evidence that the fraud took place upon taking possession of the cars on February 19 and 21, 1991. That date was not essential to the sentencing, however, because without this addition of two points, Napier’s criminal history level is four. Either way, The guideline sentence range for Napier was 27 to 33 months.

Upon review of the four Applications, the Court is now prepared to make the following findings of fact concerning the four Applications: On February 5, 1991, Napier made credit applications for financing a 1990 Lincoln Continental and a 1991 Chevrolet Lumina. These applications were made in the name of Medi-Lab and were intended to be company cars. Subsequently, Napier was required to provide a personal guarantee to secure financing for these automobiles. He filed his personal guarantees on February 15, 1991, two days after he was sentenced in New Jersey. It is the personal guarantees that are the

subject of his fraud convictions. The reference to “2/6" on one of the personal guarantee Applications refers to the previous application for credit on the Lumina and is most likely the date the initial application was reviewed. Accordingly, if the credit application ends the fraud, as Napier argued, the fraudulent credit applications were filed after the sentencing before Judge Ackerman and the two points towards criminal history are appropriate.

BY THE COURT:

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JAMES McGIRR KELLY, J.