IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1076

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IRVING A. RUBIN

and

ROBERT BONCZYK,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

RESPONSE OF THE UNITED STATES IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR RELEASE PENDING APPEAL

The United States submits this response in opposition to the motion of defendants-appellants Irving A. Rubin and Robert Bonczyk for release pending appeal pursuant to 18 U.S.C. §3143(b). Appellants each pled guilty to one count of price fixing in violation of section 1 of the Sherman Act, 15 U.S.C. §1, and two counts of mail fraud in violation of 18 U.S.C. §1341. Their contention that the Sentencing Guidelines provision applicable to their mail fraud convictions was the antitrust offense guideline, U.S.S.G. §2R1.1, rather than the fraud and

deceit offense guideline, §2F1.1, which the district court applied in sentencing them, does not raise a substantial question within the meaning of the Bail Reform Act of 1984, 18 U.S.C. §3143(b), i.e., a close question that could go either way. Accordingly, appellants' motion must be denied.[1]

STATEMENT OF THE CASE

A. The Price Fixing and Mail Fraud Offenses

Rubin was the principal owner, board chairman and CEO of Container Products, Inc. ("CPI"), a Michigan corporation that operates steel drum plants in Ohio and in Missouri, Louisiana and Oklahoma; Bonczyk was CPI's executive vice-president and treasurer. Steel drums are large containers (ranging in size from about 13 gallons to about 57 gallons) used most frequently to package chemical and petroleum products for storage or transport.

The superseding indictment returned on March 6, 1991, charged Rubin, Bonczyk, CPI, two other corporations, and three other individuals each with one count of criminal antitrust conspiracy, in violation of the Sherman Act, 15 U.S.C. §1, and two counts of mail fraud, in violation of 18 U.S.C. §1341.[2]

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[1]Appellants' co-defendant, James P. Heffernan, also appealed and moved for release pending appeal. United States v. Heffernan, No. 93-1077 (7th Cir.). His appeal has been consolidated with this case. Heffernan's arguments are very similar to Rubin and Bonczyk's; the United States also is filing a response in opposition to the motion in No. 93-1077.

[2]The Midwest Steel Drum Manufacturer's [sic] Association ("MSDMA"), a trade association formed by the conspirators, was indicted on Count One only.

Count One of the superseding indictment, the Sherman Act count, charged that, beginning at least as early as October 1988 and continuing at least through March 1990, the defendants and their co-conspirators participated in a conspiracy to raise and fix prices for new steel drums sold in Ohio, Michigan, western New York, western Pennsylvania and West Virginia ("the East Central Region"). Counts Two and Three charged that the defendants and their co-schemers devised and participated in a related scheme to defraud East Central Region new steel drum purchasers of money and property by concealing and making false statements about the noncompetitive and collusive nature of their steel drum prices, and that, for the purpose of executing that scheme, they caused collusive price lists to be mailed to a customer (Count Two) and a co-schemer (Count Three).

B. Appellants' Sentences

On the eve of trial, defendants-appellants Rubin and Bonczyk pled guilty to all three counts of the indictment. The district court (Lindberg, J.), held a four-day sentencing hearing, and, applying the United States Sentencing Commission Guidelines ("Guidelines"),[3] sentenced Rubin to 27 months imprisonment, three years supervised release and a $250,000 fine (Sent. Tr. 496[4]),

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[3]All citations in this brief are to the Guidelines, effective November 1, 1989, which the district court applied on the recommendation of the probation officer and with the consent of the government and the defendants. See United States v. Scott, 914 F.2d 959, 961 n.2 (7th Cir. 1990).

[4]"Sent. Tr." refers to the transcript of the district court sentencing hearing, December 9, 10, 11 and 14, 1992.

and Bonczyk to 18 months imprisonment, three years supervised release and a $50,000 fine (id. at 521).

The district court determined that the antitrust offense guideline, U.S.S.G. §2R1.1, applied to Count One, appellants' Sherman Act convictions, and that the fraud and deceit offense guideline, §2F1.1, applied to Counts Two and Three, the mail fraud convictions. In doing so, the court considered and rejected appellants' argument that §1B1.2(a) and Note 13 to the fraud and deceit offense guideline required that the antitrust offense guideline rather than the fraud and deceit offense guideline be applied to the mail fraud counts. (See Sent. Tr. 9-61.) The court explained that "the authority and principles upon which defendants rely and the factual basis underlying the pleas of guilty support the convictions for both antitrust and mail fraud" (id. at 59), and the "convictions . . . for antitrust conduct and [the] convictions here for mail fraud conduct . . . stand alone until such time as they are grouped" (id. at 60). As to the mail fraud counts, "the conduct underlying the mail fraud convictions dictates to this Court the application of 2F1.1 to be the appropriate guideline." (Id. at 61.)[5]

The one antitrust count and two mail fraud counts were grouped under U.S.S.G. §3D1.2(b) because they "involve[d] the same victim[s]" (purchasers of steel drums), and "two or more acts or transactions connected by a common criminal objective or

[5]The pages of the sentencing hearing transcript containing Judge Lindberg's statement of his ruling and the reasons therefor are Attachment A to this response.

constituting part of a common scheme or plan." The court used the fraud and deceit offense guideline to determine each appellant's base offense level,[6] because mail fraud was "the most serious of the counts, . . . i.e., the highest offense level of the counts in the Group." §3D1.3(a). It made appropriate adjustments,[7] and sentenced Rubin and Bonczyk to the minimum term of imprisonment within the range specified for their respective offense levels[8] in the Guidelines Sentencing Table, Ch.5, Pt.A.

Judgment against Rubin was entered on December 18, 1992; judgment against Bonczyk was entered on December 24, 1992. The court ordered Rubin and Bonczyk to surrender on February 1, 1993; it later extended Bonczyk's surrender date to April 1, 1993.

C. The Motions for Release Pending Appeal

At the conclusion of the sentencing hearing, Rubin and Bonczyk moved the district court to release them pending appeal pursuant to 18 U.S.C. §3143(b). Their main contention was that the district court had erred by applying the fraud and deceit offense guideline to their two mail fraud convictions before

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[6]The stipulated fraud loss was at least $500,000 (see Sent. Tr. 172), therefore, the offense level, adjusted for loss, was 15. U.S.S.G. §§2F1.1(a), 2F1.1(b)(1)(J).

[7]Each appellant received an upward adjustment of two levels for more than minimal planning or a scheme to defraud more than one victim, U.S.S.G. §2Fl.1(b)(2), and a downward adjustment of two levels for acceptance of responsibility, §3El.l(a). In addition, Rubin received an upward adjustment of three levels for his role as a supervisor, §3Bl.1(b). (Sent. Tr. 230.)

[8]Rubin's adjusted offense level was 18, Bonczyk's was 15.

grouping those convictions with their antitrust conviction.[9] The court denied the motion, concluding that "there is no substantial question presented." (Sent. Tr. 528.[10]) The court explained that "the language of the guidelines more than adequately supports the analysis of the Court" and that "the cases cited to the Court" by appellants in support of their motion for release "are inapposite and distinguishable." (Id.)

Rubin and Bonczyk filed notices of appeal on December 28, 1992. Their appeals were docketed in this Court and the motion for release pending appeal was filed on January 13, 1993.

ARGUMENT

I. THE BAIL REFORM ACT OF 1984 PROHIBITS RELEASE PENDING APPEAL UNLESS THE APPELLANT RAISES "A SUBSTANTIAL QUESTION OF LAW OR FACT"

A. The Statutory Standard

Under the Bail Reform Act of 1984, a convicted defendant "shall . . . be detained," not released, pending appeal, unless that defendant establishes that he is not likely to flee or pose a danger to others; and

> that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in . . . a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

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[9] It was undisputed that appellants did not pose a danger and were not likely to flee.

[10] The sentencing transcript page recording the court's ruling is Attachment B to this response.

18 U.S.C. §3143(b)(1) (emphasis added).[11] The Act thus "reverses the prior presumption in the Bail Reform Act of 1966" (former 18 U.S.C. §3148) that a defendant who was not likely to flee or pose a danger "would be entitled to bail unless `it appears that an appeal is frivolous or taken for delay.'" United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir. 1985); United States v. Jacob, 767 F.2d 505, 507 (8th Cir. 1985).

A "substantial question" for purposes of the Bail Reform Act is "a close question or one that could very well be decided the other way." United States v. Bilanzich, 771 F.2d at 298 (internal quotations omitted) (quoting United States v. Molt, 758 F.2d 1198, 1200 (7th Cir. 1985)); accord, e.g., United States v. Thompson, 787 F.2d 1084, 1085 (7th Cir. 1986); United States v. Greenberg, 772 F.2d 340, 341 (7th Cir. 1985). "Substantial" means more than merely "nonfrivolous" because "to define substantial as nonfrivolous would allow bail pending appeal to be granted as a matter of course, which Congress obviously did not want." United States v. Greenberg, 772 F.2d at 341; see also United States v. Shoffner, 791 F.2d 586, 589, 590 (7th Cir. 1986) ("harm results not only when someone is imprisoned erroneously, but also when execution of sentence is delayed because of arguments that in the end prove to be without merit").

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[11]The United States does not contend that appellants are likely to flee or pose a danger. If appellants were sentenced under the antitrust guideline, §2R1.1, their offense levels would be lower and, therefore, their sentences presumably would be shorter, absent departures.

In deciding motions for release pending appeal, this Court also applies the §3143 criteria. Fed. R. App. P. 9(c). Its review of detention orders is "independent," but it "owe[s] some deference to the district court's firsthand judgment of the situation." United States v. Shoffner, 791 F.2d at 590 (internal quotations omitted). Because the district court is most familiar with the issues to be presented for review, its "comments on the issues will be most helpful" to the appellate court, United States v. Thompson, 787 F.2d at 1085, which rules on the motions for release "prior to full consideration and briefing on the merits," United States v. Bilanzich, 771 F.2d at 298 n.2.

In appeals involving the Sentencing Guidelines, "the district court's determination of which Guideline section to apply is a question of law [which this Court] review[s] de novo." United States v. Johnson, 965 F.2d 460, 468 (7th Cir. 1992); see also United States v. DeCicco, 899 F.2d 1531, 1535 (7th Cir. 1990) (interpretation of the scope of an offense guideline provision is a question of law subject to de novo review). The Court, however, "give[s] due deference to the district court's application of the guidelines to the facts." 18 U.S.C. §3742(e); United States v. Ramos, 932 F.2d 611, 617 (7th Cir. 1991).

B. The District Court Conformed to Rule 9(b)

Appellants contend that the district court violated Rule 9(b), Fed. R. App. P., which requires a district court to "state in writing the reasons" for denying a motion for release. (Defendant-Appellants Irving A. Rubin and Robert Bonczyk's

Memorandum of Law in Support of Their Motion for Release Pending Appeal, dated Jan. 12, 1993 ("R&B Mem.") at 10, 27-28.) This contention is frivolous.

In United States v. Hooks, 811 F.2d 391 (7th Cir. 1987), this Court held that Rule 9(b) is satisfied "either by a written opinion or by the transcript of an oral opinion." Moreover, this Court "do[es] not ask for prolixity, but merely for enough detail to enable [the court of appeals] to determine why the district judge denied the application for bail pending appeal." Id. In this case, while the district court did not write an opinion, it clearly stated on the record its reasons for denying release. Specifically, after hearing appellants repeat arguments that they had already made at length during the sentencing process, as well as in pretrial briefs and arguments, the court found that "there is no substantial question presented" because "the language of the guidelines more than adequately supports" the decision to apply the fraud and deceit guideline, and the cases relied on by appellants "are inapposite and distinguishable." (Sent. Tr. 528.) These statements fully satisfy the standards of Rule 9(b) and Hooks.

II. APPELLANTS' CONTENTION THAT THE DISTRICT COURT ERRED IN SENTENCING THEM UNDER THE FRAUD AND DECEIT OFFENSE GUIDELINE RATHER THAN THE ANTITRUST GUIDELINE IS CONTRARY TO THE GUIDELINES' PLAIN MEANING AND UNSUPPORTED BY JUDICIAL PRECEDENT

A. The Offense Guideline "Most Applicable" to the Mail Fraud Counts Is the Fraud and Deceit Guideline

Appellants' contention that the district court erred in applying the fraud and deceit offense guideline to their mail fraud counts -- and thus to the grouped counts of conviction (R&B Mem. at 1-2) -- is not supported by the Guidelines provisions on which they rely, §1B1.2 and §2F1.1, comment. (n.13) ("Note 13") (see R&B Mem. at 12). Thus, their appeal does not present a substantial question, i.e., a question that is legally or factually "close" or that "very well could be decided the other way," United States v. Bilanzich, 771 F.2d at 298.

The first step in applying the Guidelines is to determine "the offense guideline section . . . most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)," §1B1.2, for each count on which a defendant has been convicted. The statutory index (Appendix A) provides "a listing to assist in this determination," §1B1.1; see also §1B1.2, comment. (n.1), "specif[ying] the guideline section or sections ordinarily applicable to the statute of conviction," App. A, intro. comment.

The commentary to the statutory index, however, is not controlling if the result would be inconsistent with §1B1.2.

Thus, "[i]f, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved," the sentencing court should "use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. (See §1B1.2)." App. A., intro. comment. (emphasis added). In addition, the commentary to the Guidelines Application Instructions requires that "[w]here two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision," the sentencing court must "use the provision that results in the greater offense level." §1B1.1, comment. (n.5).

In this case, appellants were convicted of one count of price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, and two counts of mail fraud in violation of 18 U.S.C. §1341. The statutory index provides that §2R1.1, the antitrust guideline, is ordinarily applicable to Sherman Act violations and that §2F1.1, the fraud and deceit guideline, is ordinarily applicable to violations of the mail fraud statute. Nothing in the Guidelines supports appellants' contention that the district court erred in following the statutory index and concluding that the fraud and deceit guideline -- and not the antitrust guideline -- was the offense guideline "most applicable" to their mail fraud convictions.

Counts Two and Three alleged the essential elements of mail fraud: a scheme to defraud -- in this case, a scheme to deceive

customers into believing that prices fixed in violation of the Sherman Act were competitive rather than collusive -- and use of the mails in furtherance of that scheme. By pleading guilty to mail fraud, appellants admitted the essential elements of that crime as charged in the indictment. United States v. Broce, 488 U.S. 563, 570 (1989)("By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime."). Having pled to a fraud offense, appellants were appropriately sentenced under the fraud and deceit guideline, although they also admitted an antitrust offense by pleading guilty to Count One. See Schetz v. United States, 901 F.2d 85, 86 (7th Cir. 1990) (defendant who pled guilty to conspiracy to distribute controlled substance that he was trying to steal was properly sentenced under guideline for conspiracies involving controlled substances, §2D1.4, instead of guideline relating to theft of a controlled substance §2B1.1(b)(2)).[12]

[12]In contrast, in United States v. Shriver, 967 F.2d 572, 575 (11th Cir. 1992), the offense guideline referenced in the statutory index did not describe defendant's offense conduct. Defendant was convicted under 26 U.S.C. §7212(a), "which proscribes interference with the IRS by corrupt or forcible means." 967 F.2d at 574. The statutory index referenced the assault guideline. But the indictment alleged and the evidence at trial proved that defendant had violated the statute only by fraud and not by assault. In that situation, the assault guideline was "inappropriate because of the particular conduct involved," App. A., intro. comment., and the court of appeals, therefore, affirmed the district court's holding that the fraud and deceit guideline applied.

Contrary to appellants' contention (R&B Mem. at 17), the mail fraud counts were not "virtually identical to" the antitrust counts to which appellants also pled guilty. Nor do the mail fraud counts establish an offense that is covered, much less "more aptly covered," by the antitrust guideline. Count One alleged the essential elements of price fixing, a combination and conspiracy to restrain trade by fixing steel drum prices and an effect on interstate commerce; it did not allege a scheme to defraud. A guilty plea to only that count would not have been sufficient to establish mail fraud, which requires proof that the defendant participated in a fraudulent scheme and used the mails to further that scheme. In contrast to Count One, Counts Two and Three did allege the additional facts necessary to establish those essential elements of a mail fraud offense.

The fact that the same acts were alleged in furtherance of both the antitrust conspiracy and the scheme to defraud (see Count One, ¶4; Count Two, ¶4) did not make the fraud counts antitrust offenses -- or vice versa. As this Court has held, even when mail fraud and antitrust violations are committed as part of a single course of conduct, "the two crimes require[] proof of different facts, [and] conviction of one d[oes] not preclude simultaneous conviction for the other." United States v. Azzarelli Constr. Co., 612 F.2d 292, 298 (7th Cir. 1979), cert. denied, 447 U.S. 920 (1980); United States v. Climatemp, Inc., 482 F. Supp. 376, 381-82, 384-85 (N.D. Ill. 1979), aff'd,

705 F.2d 461 (7th Cir.), cert. denied, 462 U.S. 1134 (1983).[13] Indeed, appellants concede that price fixing and mail fraud are separate crimes (R&B Mem. at 7 n.8). See also Albernaz v. United States, 450 U.S. 333, 338-39 (1981)(Congress can impose multiple punishment for a single act that violates more than one statute).

Neither the antitrust offense guideline, §2R1.1, nor Note 13 to the fraud and deceit offense guideline, nor the caselaw supports appellants' contention that the district court should have applied the antitrust guideline to their mail fraud convictions. The antitrust guideline simply states that it applies to "bid-rigging, price-fixing or market-allocation agreements among competitors," i.e., per se violations of the Sherman Act, §2R1.1; id., comment. (backg'd). It does not mention related fraud or false statement offenses. Accordingly, it has no application to mail fraud offenses.

Note 13 to the fraud and deceit offense guideline simply reaffirms the basic §1B1.2 principle[14] -- the sentencing court must apply the offense guideline that is "most appropriate" or that "most aptly covers" each offense of conviction.[15] As

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[13]Mail fraud is charged more often in indictments that also charge bid rigging than in indictments that also charge price fixing, but the same legal analysis applies to a mail fraud conviction that is related to price fixing.

[14]As this Court held in United States v. Woods, 976 F.2d 1096, 1102 (7th Cir. 1992), "[a]pplication notes are entitled to substantial weight . . . and should be followed unless they conflict with the [Guidelines] text."

[15]Note 13 provides (emphases added):

(continued...)

Note 13 indicates, in some cases a mail fraud count in an indictment might actually establish "an offense more aptly covered by another guideline" than by the fraud and deceit guideline. The mail fraud counts at issue in this case, however, do not fit either of the situations described in Note 13. The Sherman Act is not "a more specific statute" that "also covers" mail fraud; it covers a different offense. Nor were the mail fraud counts used "primarily as jurisdictional bases for the prosecution of other offenses." Federal jurisdiction over price fixing that affects interstate commerce is undisputed, and appellants did not contest the interstate commerce effects of the conspiracy alleged in this case. While Note 13 is not limited to

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[15](...continued)
Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. §1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered.

the examples given in that note (see R&B Mem. at 20-21), it is limited, consistent with §1B1.2, to cases in which the fraud offense of which the defendant is convicted constitutes an offense more aptly described in another offense guideline. The antitrust guideline does not more aptly describe or cover the fraud offenses at issue in this case.

In contrast, this Court's decision in United States v. Obiuwevbi, 962 F.2d 1236 (7th Cir. 1992), on which appellants primarily rely, involved the very statutory and Guidelines provisions used as examples in Note 13. The defendant falsely stated to customs officers that he was not taking more than $10,000 in cash out of the country, and he was convicted under the general fraud statute, 18 U.S.C. §1001. This Court upheld his sentence under the offense guideline applicable to currency reporting crimes: §2S1.3(a)(1)(B), as then in effect, "applied to defendants who `made false statements to conceal or disguise the evasion of reporting requirements.'" 962 F.2d at 1242. That guideline more aptly, indeed, very precisely described what defendant had done to violate 18 U.S.C. §1001.

The other cases on which appellants rely also support only the general and undisputed proposition that §1B1.2 and Note 13 require sentencing under the guideline most applicable to the offense of conviction.[16] None of these cases supports

[16]In United States v. Castaneda-Gallardo, 951 F.2d 1451 (5th Cir.), cert. denied, 112 S.Ct. 1990 (1992), defendant-appellant pled guilty to "falsely and willfully representing himself to be a citizen of the United States to a border patrol agent," a (continued...)

appellants' contention that the mail fraud offenses to which they pled were most aptly covered by the antitrust guideline.[17]

Contrary to appellants' contention (R&B Mem. at 22-24) the rule of lenity does not require that they be sentenced under the antitrust guideline because the Guidelines are not ambiguous. See United States v. Cambra, 933 F.2d at 755-56. The fraud and deceit guideline is most applicable to mail fraud, and Note 13 plainly does not permit a fraud offense to be sentenced under

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[16](...continued)
violation of 18 U.S.C. §911, for which the statutory index referenced §2F1.1 and §2L2.2. The Fifth Circuit upheld sentencing under §2L1.2, the subsection of the immigration offense guideline for "unlawfully entering or remaining in the United States," because "[c]omment 13 . . . explicitly grants the district court the discretion to look for the most applicable guideline when the Statutory Index refers the court to §2F1.1," and §2L1.2 "aptly describe[d] the offense to which [defendant] pled guilty." 951 F.2d at 1452.

In United States v. Carrillo-Hernandez, 963 F.2d 1316 (9th Cir. 1992), appellants were convicted under 18 U.S.C. §1001 for making false statements to a customs official. The Ninth Circuit held that they were erroneously sentenced under §2S1.3, which refers to "false entries regarding currency transactions," and should have been sentenced under §2T3.1, the guideline for "false statements to a customs official."

In United States v. Cambra, 933 F.2d 752 (9th Cir. 1991), the Ninth Circuit upheld sentencing under the fraud and deceit guideline of a defendant who "had pled guilty to two counts alleging an intent to defraud" by selling counterfeit drugs. 933 F.2d at 755. Although the fraud and deceit guideline was not specified in the statutory index for the statute under which that defendant was convicted, it was "most applicable to the offense charged." Id.

[17]Further, consistent with §1B1.1, comment. (n.5), all the reported cases holding that an offense guideline other than the fraud and deceit guideline applies to a fraud offense appear to have applied a guideline that would give a higher offense level than the fraud and deceit guideline. In contrast, appellants seek to avoid the most applicable guideline in favor of one that likely would lower their offense levels.

another guideline unless the alternative is not just arguably apt, but "more apt," which the antitrust guideline is not.

B. The Grouping Rules Protected Appellants from "Charge Manipulation," and Sentences Imposed on Others Are Irrelevant

Appellants' arguments about "count manipulation" (see R&M Mem. at 22) are both incorrect and irrelevant in determining the offense guideline applicable to their mail fraud convictions. The Sentencing Guidelines grouping rules "limit the significance of the formal charging decision and . . . prevent multiple punishment for substantially identical offense conduct," by treating multiple closely related counts "as constituting a single offense for purposes of the guidelines." Ch.3, Pt.D., intro. comment. Because appellants' antitrust offense and mail fraud offenses were part of the same course of anticompetitive and deceptive conduct, the three counts were grouped under U.S.S.G. §3D1.2(b), and appellants were sentenced based on the applicable guideline for the count in the group having the highest offense level, §3D1.3(a). Appellants' offense levels and sentences were no higher than they would have been had appellants been convicted only on a single count of mail fraud and no antitrust counts.

Appellants do not argue that the district court erred in applying the grouping rules (see R&B Mem. at 19).[18] But there is

[18]The commentary to the grouping rules gives as one example "bid rigging (an antitrust offense) and . . . mail fraud for mailing a false statement that the bid was competitive." §3D1.2(a), comment. (n.3, example). In the present case, the (continued...)

no basis in the Guidelines or the caselaw for appellants' contention that because the mail fraud counts "arose out of" and were "related to" the antitrust counts, the court erred in holding that the fraud and deceit offense guideline was most apt for the mail fraud counts (see R&B Mem. at 17). The Guidelines do not permit or require the court to determine what offense guideline would be "most applicable" to the entire course of conduct comprised of the grouped counts. Nor do they support appellants' inherently illogical argument that their offense levels should be lower because they were convicted of mail fraud and a related antitrust offense than if they had been convicted only of mail fraud.

Finally, appellants assert that sentencing them under the fraud and deceit guideline is improper or unfair because others engaged in the same conspiracy and scheme to defraud were sentenced under the antitrust guideline. (See R&B Mem. at 24-26.) This, too, is wrong. The essential difference between appellants and the individuals to whom they refer is that the latter were charged with and pled only to antitrust offenses. Because they were not convicted of any fraud offense and did not stipulate to facts establishing fraud, they could not have been sentenced under the fraud and deceit offense guideline. The government's decision not to charge other defendants with mail

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[18](...continued)
§3D1.2(b) grouping was more appropriate than §3D1.2(a), but the principle -- group related counts and apply the highest offense level -- is the same.

fraud is not reviewable in the context of appellants' sentencing appeals. In any event, appellants' sentences, which were imposed in conformity with the Guidelines, would have to be affirmed even if codefendants erroneously had been given lighter sentences. United States v. Smith, 897 F.2d 909, 911 (7th Cir. 1990); United States v. Guerrero, 894 F.2d 262, 267 (7th Cir. 1990).

CONCLUSION

The Court should deny the motion for release pending appeal.[19]

Respectfully submitted,

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[19]The United States submits that, in accordance with this Court's usual practice, see Rule 27 (7th Cir.), the motion should be denied without argument.

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 1993, the foregoing RESPONSE OF THE UNITED STATES IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR RELEASE PENDING APPEAL was served by Federal Express next day delivery, on counsel for appellants:

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