

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

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	CRIMINAL NO. 1:10cr395
)	
ZACHARY ADAM CHESSER)	

POSITION OF THE UNITED STATES
WITH RESPECT TO SENTENCING FACTORS

The United States hereby submits its position on the sentencing of the defendant Zachary Chesser. According to the Presentence Report (“PSR”), the defendant’s Sentencing Guidelines range is 360 months to life in prison. Inasmuch as the total of the statutory maximums for the counts of conviction is 360 months, the Guidelines sentence in this case is 360 months - - the bottom of the applicable Guideline range. In accordance with the calculations of the PSR, we request that the Court sentence the defendant to that term of imprisonment.

A. Guideline Calculation

1. The Total Offense Level is 39 Rather than 37

The PSR correctly calculated the sentencing range as 360-life, but underestimated the Offense Level Total from Worksheet D at 37 instead of 39 because it failed to calculate the offense level correctly for Count 1. Even though Chesser pled guilty in Count 1 to communicating threats, in violation of 18 U.S.C. § 875, he admitted in the Statement of Facts incorporated into his plea agreement that he also solicited murder, in violation of 18 U.S.C. § 373, § 2332b and 18 U.S.C. § 2261A(1). The offense level for Count 1 should have been calculated on the basis of the murder solicitation offense that was admitted in the Statement of

Facts instead of the communicating threats charge to which Chesser pled guilty. Regardless of whether the Offense Level Total is 39 or 37, however, the guideline range is still 360 - life, and the applicable guideline sentence in this case is still 360 months, because in either event the bottom of the applicable guideline range is also the statutory maximum sentence.

In the addendum to the PSR, the Probation Officer recorded our contention that the offense level for Count 1 should be calculated on the basis of soliciting murder instead of communicating threats but declined to accept it. In doing so, the Probation Officer noted that a defendant's guidelines cannot be enhanced on the basis of information contained in his plea agreement or Statement of Facts unless the government and defendant both explicitly agree that the factual statement or stipulation is a stipulation for such purposes.¹ Apparently, the Probation Officer did not recognize that, in this case, the parties did exactly that in Paragraph 2 of Chesser's plea agreement.

As noted in Paragraph 31 of the PSR, Chesser agreed in the Statement of Facts incorporated into his plea agreement that he solicited others to kill individuals identified as MS, TP, and JG, in violation of 18 U.S.C. § 373, § 2332b and § 2261A(1). The details of those solicitations are included at PSR Paragraphs 32 through 41. Accordingly, Chesser's Statement of Facts establishes that he committed a more serious offense than the offense of conviction in

¹ In its addendum, the PSR suggested that this reasoning was mandated by *Booker*. To the contrary, it was in the *pre-Booker* world (when the guidelines were mandatory) in which - - absent a stipulation - - a guideline calculation could not be enhanced on the basis of facts establishing a more serious uncharged offense without violating the Sixth Amendment. Now, where the Guidelines are merely advisory, there is no longer any constitutional problem raised by considering conduct outside of the count of conviction. Nevertheless, the point is moot in this case because, as explained herein, the parties *did*, in fact, explicitly agree that the Statement of Facts *would* constitute a stipulation for purposes of Section 1B1.2(a) of the Guidelines.

Count 1. The Guidelines specifically instruct that, under certain circumstances, the offense level should be calculated on the more serious offense. Those circumstances are met here.

In pertinent part, Section 1B1.2(a) of the Sentencing Guidelines states:

Determine the offense guideline section in Chapter Two (Offense Conduct) 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). However, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two applicable to the stipulated offense.

In short, the Guidelines provide that the offense level should be determined on the basis of an offense more serious than that of the offense of conviction when the plea agreement contains a stipulation that specifically establishes a more serious offense.

The plea agreement in this case contained such a stipulation. In Paragraph 2 of his plea agreement, Chesser agreed that the statement of facts “constitutes a stipulation of facts for purposes of Section 1B1.2(a) of the Sentencing Guidelines.” Accordingly, pursuant to Paragraph 2 of his plea agreement and Section 1B1.2(a) of the Sentencing Guidelines, Chesser’s guidelines for Count 1 correctly should be calculated on the basis of his solicitation of murder instead of communicating threats.

Solicitations are covered under Section 2S1.1 of the Guidelines. Section 2S1.1(b)(3)(A) provides that the guideline for a solicitation to commit murder should be three levels less than the guidelines for the crime of murder itself. The applicable guideline section for first degree murder, in violation of 18 U.S.C. § 2332b, is 2A1.1. Section 2A1.1 provides a base offense level of 43. Accordingly, the offense level for soliciting murder in violation of Section 2332b is 40 (three levels less than 43).

While the correction to level 40 for Count 1 does not change the final guideline range as calculated in the PSR, it does change the Total Offense Level in Paragraph 121 of the PSR because it affects the “Adjusted Offense Level for the Second Group of Closely Related Counts” on Line 2 of Worksheet B - - and therefore also the “Combined Adjusted Offense Level” on Line 9 of Worksheet B, and the “Adjusted Offense Level” on Line 1 of Worksheet D. As calculated in the PSR, the offense level for Count 3 already is 40. Properly calculated, therefore, the adjusted offense levels for the convictions on Counts 1 and 3 are both Level 40. As a result, the “Adjusted Offense Level for the Second Group of Closely Related Counts” on Line 2 of Worksheet B (for Count 3) should also be Level 40 (not 24).

Accordingly, the “Total Units” on Line 6 of Worksheet B should be 2 (not 1), and the “Increase in Offense Level Based on Total Units” on Line 7 of Worksheet B should be 2 (not 0). As a result, the “Combined Adjusted Offense Level” on Line 9 of Worksheet B - - and on Line 1 of Worksheet D - - should be 42 (not 40). With three points off for acceptance of responsibility pursuant to Line 2 of Worksheet D, the “Offense Level Total” should be 39 (not 37).

As noted above, the guideline range from the Sentencing Table is 360 - life for both Levels 39 and 37. The correct calculation of the offense level for Count 1 is significant, however, because Chesser argues that he should not be awarded two points for obstruction of justice. The PSR was correct in awarding the two points for obstruction, but the obstruction points have no impact on the final guideline sentence once the offense level for Count 1 is calculated correctly because the final Offense Level Total would still be 37.

2. The Obstruction Enhancement Was Properly Awarded

That being said, the obstruction enhancement was properly awarded. Chesser argues that his conduct in directing his wife to lie to law enforcement officials about his travel plans constitutes conduct that is *not* covered under Section 3C1.1 of the Guidelines by reason of Application Note 5. In particular, Note 5(b) indicates that making a false statement to law enforcement is insufficient to trigger the obstruction enhancement unless the statement significantly obstructed or impeded the investigation or prosecution.

The obstruction enhancement in this case, however, was not based on any finding that Chesser made false statements to law enforcement. Instead, it was based on Chesser's admission - - in Paragraph 45 of his plea agreement - - that more than a month before he was arrested, he instructed *his wife* to make a false statement if she ever were asked about his plans to fight in Somalia. That conduct is plainly covered in Application Note 4(A), which provides that the obstruction enhancement *does* apply where the defendant unlawfully influenced a co-defendant or witness. *See, e.g., United States v. Atkinson*, 966 F.2d 1270, 1277 (9th Cir.1992) (affirming district court's application of a two-level enhancement for obstruction of justice because defendant instructed co-defendants to lie to federal agents during investigation). Encouraging a co-defendant to "not spill the beans" constitutes an obstruction of justice. *See, e.g., United States v. Robinson*, 14 F.3d 1200, 1204 (7th Cir.1994); *United States v. Cherif*, 943 F.2d 692, 703 (7th Cir.1991).² Here, the PSR properly concluded that Chesser's instruction to his wife in June 2010

² Here, Chesser's wife complied with his instructions and lied to investigators about Chesser's travel plans four months after he instructed her to do so. The fact that she followed his instructions in attempting to cover up his unlawful conduct suggests that a two-level enhancement for "role in the offense" could have been awarded, pursuant to § 3B1.1(c).

to lie to law enforcement authorities if later questioned about his travel plans suffices to trigger the obstruction enhancement.

B. Factors Articulated in 18 U.S.C. § 3553(a)

The sentencing factors of 18 U.S.C. § 3553(a) indicate that 360 months in prison as recommended by the PSR is appropriate in this case. The nature and circumstances of the defendant's offenses, as well as the value of general deterrence, warrant the maximum penalty allowable under the law.

As Chesser admitted in Count 3, he attempted to provide material support to a designated terrorist organization. He attempted to travel to Somalia to fight for an organization that he knew was designated by his country as a terrorist organization, and that he also knew considered his country an enemy. Indeed, in doing so, he brought his infant son with him as "cover." This attempt was not an isolated or uncharacteristic act; indeed, it was undertaken as part of a consistent and longstanding course of conduct that included exhorting others to raise children to support al-Qaeda, help the mujahideen and fight against "disbelievers," as well as distributing the speeches of terrorist Al-Awlaki's calls for jihad against the United States, and posting on-line the al-Qaeda manual - - including "Guidelines for Beating and Killing Hostages" - - for the explicit purpose of aiding would-be jihadis around the world. Americans who consider providing assistance to terrorist organizations may be deterred by a demonstration that harsh punishment awaits anyone who is caught attempting to do so. For that offense, alone, Chesser should receive substantial punishment. For that offense, alone, the Guidelines call for a 360-month sentence. That offense, alone, however, is just the *least* of what he did.

As Chesser admitted in Count 2, he solicited others to leave suspicious packages in public places to desensitize law enforcement authorities to the threat posed by such packages. He did so with the explicit goal of hindering authorities from protecting his fellow citizens from terrorist bombs. He openly explained that, after law enforcement had become sufficiently “desensitized” to the possible danger of such packages, real explosives could then be substituted. As he explained to an audience that he believed was interested in killing his fellow citizens, those real explosives could then explode upon being discovered by a law enforcement officer, with the result “[b]oom! No more kuffar.”

As Chesser admitted, he posted on the internet information pertaining to the manufacture and use of explosives and weapons of mass destruction, with the intent that such information be used against civilians, law enforcement authorities, and the military forces of the United States in America and overseas. With the same intent, he posted the TSA manual setting forth procedures used to prevent the smuggling of explosives and weapon onto commercial airplanes. Regardless of whether Chesser recognizes the error of his ways now or in the years to come, that information will continue to circulate among those who wish to kill his fellow citizens. For these offenses, alone, Chesser should receive substantial punishment. These offenses, alone, however, also pale in significance in comparison to the other crimes he committed.

As described in detail in Count 1 of the Criminal Information and in the Statement of Facts, Chesser solicited the murder of his fellow citizens because he believed that they had insulted his religion. In doing so, he solicited violence from an audience that he knew was inclined to engage in violent jihad against those they believed to be the enemies of Islam. In doing so, he knew that his audience would understand his messages as requests to attack the

victims he named, and he knew that his audience was potentially willing and capable to attack those victims. He justified his actions on the grounds that, “[a]s Osama bin Laden said with regard to the cartoons of Denmark, 'If there is no check in the freedom of your words, then let your hearts be open to the freedom of our actions.'" In other words, Chesser solicited the murder of his fellow citizens for engaging in free speech because he believed that he could not convince them to change their minds about his religion by the force of his arguments.

Chesser’s solicitation of the murder of the writers of the South Park television show is beyond reprehensible, but even that crime is probably less offensive than his solicitation of the murders of his fellow citizens who drew his wrath because they apparently expressed a desire to participate in "Everyone Draw Muhammad Day" on Facebook. Chesser marked them for death for engaging in free expression that he found insulting as well; these victims included a teenager in Mississippi and a young man from Texas depicted in a photo with his parents and a brother, along with the address of his “possible church/school.” As Chesser pointed out for the killers in his audience on the Ansar AlJihad Network, "Just a place to start."

Chesser may sincerely regret his actions today, and we hope he does.³ Nevertheless, the solicitations for murder that Chesser posted on multiple internet sites patronized by mujahideen and their supporters likely will never disappear. On May 15, 2010, Chesser himself posted to the AlQimmah website a news article he titled “Home of Lars Vilks Firebombed – Kafir News”

³ We hope that any change of heart that Chesser may have experienced since his arrest will not be as short-lived as the similar one he claimed to have experienced in May 2009. As FBI Special Agent Kinder explained in her affidavit in support of the Complaint issued against Chesser in July 2010, Chesser told the FBI in May 2009 that he *used* to be very extremist, but had moderated his views. He said that he *used* to support jihad propaganda and that he *recently* wanted to go fight - - but that he no longer did. As evidenced by his later conduct, the change of heart he described in May 2009 was only fleeting - - or his assertion of it was insincere.

regarding the firebombing of the home of Lars Vilks that day, as well as an attack on him at a lecture earlier that week. That news followed the March 2010 indictment of Colleen LaRose in Philadelphia with attempting to recruit others to murder Vilks. Of particular interest here is the fact that Vilks committed his “offense” in the eyes of Chesser, LaRose (and others) nearly three years earlier.

Similarly - - as David Headley admitted in pleading guilty to terrorism charges in Chicago in March 2010 - - Headley helped the terrorist group Lashkar-e-Taiba in November 2008 plan a terrorist attack on the offices of a Danish newspaper in retaliation for its publication of cartoons that he found offensive in 2005. As explained by Ayaan Hirsi Ali in her article, “*South Park*” and the *Informal Fatwa* - - attached to this pleading - - a Somali man broke into the home of a Danish cartoonist in January 2010 to try to kill him in retaliation for his drawing of those cartoons in 2005. Indeed, as explained by Hirsi Ali, she *still* lives with protection as a result of the designation of her as an “enemy of Islam” for making the film *Submission* in 2004 - - the very film over which Theo van Gogh was murdered (as so vividly depicted in the photograph posted by Chesser in the course of his messages about the *South Park* writers to make his intentions crystal clear).

In short, there is nothing that Chesser can ever do that can ever undo what he already has done. As Al-Awlaki explained in the speech that Chesser posted on the RevolutionMuslim.com and themujahidblog.com websites, “The Dust will Never Settle Down.” Now that Chesser publicly targeted them, the writers of *South Park* and the private citizens whose information Chesser obtained from Facebook will be at risk for murder inspired by Chesser indefinitely. Like

Hirsi Ali, they will have to wonder whether someone will accept Chesser's solicitation to kill them indefinitely.

There is no way out for Chesser victims, for - - as both Salman Rushdie and Mollie Norris found - - even publicly apologizing for taking actions deemed by the likes of Chesser to insult Islam will not abate the danger accruing to one already branded an enemy of Islam. As a result, the people whose murders Chesser solicited will always be marked as enemies of Islam and targets for those who seek to gain entrance to heaven by killing one - - and this is true regardless of whether Chesser is sincerely remorseful now or becomes sincerely remorseful in the future. His victims will continue to be at risk of kidnapping and beheading for years (if not the rest of their lives) because of his actions.

And yet, even *that* is not all the harm that Chesser caused.

Chesser not only endangered the lives of innocent people, but he also contributed to the destruction of the very freedoms on which our society is based. The natural consequence of Chesser's actions is for people throughout the country to fear speaking out - even in jest - lest they also be labeled as enemies who deserve to be killed. The role of Muslims in the United States, the relationship between the United States and the Muslim world, and the existence of links between Islam and terrorism are issues of major public importance. Yet, anyone choosing to address them publicly must carefully weigh the risk of being marked for death by the likes of Chesser for saying or writing something perceived as insulting while doing so. Left unchecked, that risk will hamper public policy decision making by dampening public discourse over some of the most consequential issues of our age.

This case is like no other. While others have been sentenced for attempting to provide material support to a designated terrorist organization, that is but one facet of Chesser's illegal activity. Indeed, while deserving of serious punishment in its own right, it is not nearly as serious as his other offenses. The punishment that Chesser deserves is that which is appropriate for attempting to assist a designated terrorist organization, *plus* that which he deserves for soliciting others to desensitize law enforcement authorities to make terrorist bombs in public places more deadly, *plus* that which he deserves for soliciting others to murder the South Park writers, *plus* that which he deserves for soliciting others to murder the individuals he found on Facebook. The punishment that Chesser deserves is all that - - *plus* that which he deserves for chilling the ability of every citizen in this country to benefit from free expression and candid discussion about important issues of the day.

While the drafters of the Sentencing Guidelines may have contemplated the kinds of harm that Chesser caused to the particular victims he targeted, we doubt that they ever contemplated a harm of the magnitude that Chesser caused our society as a whole by making people shrink back from expressing their opinions - - or even telling a joke - - lest they be accused of being an enemy of Islam for whom beheading is the only appropriate punishment. There is nothing that Chesser can ever do or say that will remedy the tremendous harm that he already has caused to our society as a whole. Regardless of the need to punish him for his other offenses, the maximum sentence available under the law is needed to deter others from engaging in similar conduct that would chill free expression in our society.

Conclusion

For the foregoing reasons, a term of imprisonment of 360 months in prison - - the low end of the Sentencing Guidelines as calculated in the PSR - - is necessary to reflect the seriousness of the defendant's offenses, promote respect for the law, provide just punishment for the defendant's offenses, and afford adequate deterrence to criminal conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2011, I electronically filed the foregoing POSITION OF THE UNITED STATES WITH RESPECT TO SENTENCING FACTORS with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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'South Park' and the Informal Fatwa

The veiled threats against the Comedy Central show's creators should be taken very seriously.

By AYAAN HIRSI ALI

'South Park' is hilarious, right? Not any more.

Last week, Zachary Adam Chesser—a 20-year-old Muslim convert who now goes by the name Abu Talhah Al-Amrikee—posted a warning on the Web site RevolutionMuslim.com following the 200th episode of the show on Comedy Central. The episode, which trotted out many celebrities the show has previously satirized, also "featured" the Prophet Muhammad: He was heard once from within a U-Haul truck and a second time from inside a bear costume.

For this apparent blasphemy, Mr. Amrikee warned that co-creators Trey Parker and Matt Stone "will probably end up" like Theo van Gogh. Van Gogh, readers will remember, was the Dutch filmmaker who was brutally murdered in 2004 on the streets of Amsterdam. He was killed for producing "Submission," a film that criticized the subordinate role of women in Islam, with me.

There has been some debate about whether Mr. Stone and Mr. Parker should view the Web posting as a direct threat. Here's Mr. Amrikee's perspective: "It's not a threat, but it really is a likely outcome," he told Foxnews.com. "They're going to be basically on a list in the back of the minds of a large number of Muslims. It's just the reality." He's also published the home and office addresses of Messrs. Stone and Parker, as well as images of Van Gogh's body.

According to First Amendment experts, technically speaking this posting does not constitute a threat. And general opinion seems to be that even if this posting was intended as a threat, Mr. Amrikee and his ilk are merely fringe extremists who are disgruntled with U.S. foreign policy; their "outrage" merits little attention.

This raises the question: How much harm can an Islamist fringe group do in a free society? The answer is a lot.

Mohammed Bouyeri, a Dutch-Moroccan Muslim first thought to have been a minor character in radical circles, killed Theo van Gogh. Only during the investigation did it emerge that he was the

ringleader of the Hofstad Group, a terrorist organization that was being monitored by the Dutch Secret Service.

The story was very similar in the case of the Danish cartoons of the Prophet Muhammad. The cartoons, drawn by Kurt Westergaard, were published in September 2005 to little notice but exploded five months later into an international drama complete with riots and flag-burnings. The man behind this campaign of outrage was an Egyptian-born radical imam named Ahmed Abu-Laban.

Prior to this conflagration, Mr. Abu-Laban was seen as a marginal figure. Yet his campaign ended up costing Denmark businesses an estimated \$170 million in the spring of 2006. And this doesn't include the cost of rebuilding destroyed property and protecting the cartoonists.

So how worried should the creators of "South Park" be about the "marginal figures" who now threaten them? Very. In essence, Mr. Amrikee's posting is an informal fatwa. Here's how it works:

There is a basic principle in Islamic scripture—unknown to most not-so-observant Muslims and most non-Muslims—called "commanding right and forbidding wrong." It obligates Muslim males to police behavior seen to be wrong and personally deal out the appropriate punishment as stated in scripture. In its mildest form, devout people give friendly advice to abstain from wrongdoing. Less mild is the practice whereby Afghan men feel empowered to beat women who are not veiled.

By publicizing the supposed sins of Messrs. Stone and Parker, Mr. Amrikee undoubtedly believes he is fulfilling his duty to command right and forbid wrong. His message is not just an opinion. It will appeal to like-minded individuals who, even though they are a minority, are a large and random enough group to carry out the divine punishment. The best illustration of this was demonstrated by the Somali man who broke into Mr. Westergaard's home in January carrying an axe and a knife.

Any Muslim, male or female, who knows about the "offense" may decide to perform the duty of killing those who insult the prophet. So what can be done to help Mr. Parker and Mr. Stone?

The first step is for them to consult with experts on how to stay safe. Even though living with protection, as I do now in Washington, D.C., curtails some of your freedom, it is better than risking the worst.

Much depends on how far the U.S. government is prepared to contribute to their protection. According to the Danish government, protecting Mr. Westergaard costs the taxpayers \$3.9 million, excluding technical operating equipment. That's a tall order at a time of intense fiscal pressure.

One way of reducing the cost is to organize a solidarity campaign. The entertainment business, especially Hollywood, is one of the wealthiest and most powerful industries in the world. Following the example of Jon Stewart, who used the first segment of his April 22 show to defend "South Park," producers, actors, writers, musicians and other entertainers could lead such an effort.

Another idea is to do stories of Muhammad where his image is shown as much as possible. These stories do not have to be negative or insulting, they just need to spread the risk. The aim is to confront hypersensitive Muslims with more targets than they can possibly contend with.

Another important advantage of such a campaign is to accustom Muslims to the kind of treatment that the followers of other religions have long been used to. After the "South Park" episode in question there was no threatening response from Buddhists, Christians and Jews—to say nothing of Tom Cruise and Barbra Streisand fans—all of whom had far more reason to be offended than Muslims.

Islamists seek to replace the rule of law with that of commanding right and forbidding wrong. With over a billion and a half people calling Muhammad their moral guide, it is imperative that we examine the consequences of his guidance, starting with the notion that those who depict his image or criticize his teachings should be punished.

In "South Park," this tyrannical rule is cleverly needled when Tom Cruise asks the question: How come Muhammad is the only celebrity protected from ridicule? Now we know why.

Ms. Ali, a former member of the Dutch parliament, is the author of "Nomad: From Islam to America—A Personal Journey through the Clash of Civilizations," which will be published next month by Free Press.

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