UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-20913-CR-WILLIAMS

:
UNITED STATES OF AMERICA

v.

ALI ISSA CHAMAS,

Defendant.

_____/

UNITED STATES' OBJECTION TO THE PSR AND RESPONSE IN OPPOSITION TO DEFENDANT'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

The United States of America, through the undersigned Assistant U.S. Attorney, hereby submits this response in opposition to defendant Ali Issa Chamas' objections to the Presentence Investigation Report ("PSR"):

I. The Court should consider the history and characteristics of the Defendant.

The defendant objects to Paragraph 40 of the PSR, which summarizes some of his post-arrest, post-Miranda statements regarding his affiliation with Hezbollah. Under 18 U.S.C. § 3559(a), the Court should consider the history and characteristics of the defendant as a factor in determining what is a reasonable sentence. During post-Miranda interviews, the defendant has advised DEA agents that he was a global facilitator for Lebanese drug traffickers, that sending cocaine was easy, that he had done it many times from Sao Paolo, Brazil to Europe and Lebanon, and that he had sent too much cocaine to count.

The defendant also admitted to agents that some of his family members were Hezbollah

and that the Chamas Clan was powerful and allied with Hezbollah.[1] The defendant admitted to taking part in a shipment of 31 kilograms of cocaine that was seized by law enforcement in April of 2016 at Beirut-Rafic Hariri International Airport in Lebanon, and that he and his associates paid $10,000 per kilogram to facilitate entry of the cocaine into Lebanon via the airport, knowing that the money was going to Hezbollah.

Hezbollah is designated as a Foreign Terrorist Organization by the U.S. Department of State, in accordance with Section 219 of the Immigration and Nationality Act. The government is not seeking a terrorism enhancement for this case, but believes that the defendant's admissions regarding his drug trafficking activities, especially those that relate to support of Hezbollah, should be considered by the Court in arriving at an appropriate sentence.

II. The cocaine the defendant possessed in Paraguay and/or the attempted shipment of 39 kilograms to Turkey should be considered in the Defendant's sentencing.

The defendant objects to Paragraph 22 of the PSR, which holds the defendant accountable for 39 kilograms of cocaine. The government also objects to Paragraph 22 of the PSR. As discussed below, the government believes the defendant should be held accountable for 108 kilograms, or at least 42, instead of 39: 3 kilograms that the defendant arranged to send to the United States, 39 kilograms seized at the airport in Ciudad Del Este, Paraguay, and the cocaine the defendant possessed at that time, which he discussed with Kuku and had photographed on his phone.

The defendant's attempted shipment of 39 kilograms of cocaine seized at Guarani International Airport in Ciudad Del Este, Paraguay, is inextricably intertwined with the offense of conviction. The government believes that this amount, together with the additional cocaine that

[1] The government is not aware of the defendant stating that his entire family was part of Hezbollah.

the defendant had in his possession during the time of the offense, should be deemed relevant conduct or at least considered under the Section 3553(a) factors in determining the defendant's sentence.

Factual Background

On August 19, 2016, the defendant was arrested in Ciudad Del Este, Paraguay attempting to ship 39 kilograms of cocaine via air cargo to Istanbul, Turkey, concealed inside of plastic cellophane rolls. Upon the defendant's arrest, the defendant consented to a search of his cell phone, for which search law enforcement subsequently obtained a search warrant. From the defendant's cell phone, law enforcement recovered communications over a nearly two-month span from July to August of 2016, between the defendant and a co-conspirator in Houston, Texas, with the alias "Kuku." During the chats and voice messages between the defendant and Kuku, they discussed a plan to send a test shipment of cocaine to the United States via air cargo using a method that was "secure" and could go anywhere. The defendant told Kuku that it was a new method that was working well.

At the same time that the defendant was having these conversation with Kuku, the defendant was planning the shipment of cocaine to Turkey. On July 14, 2016, the defendant told to Kuku that he was traveling to Colombia in connection with the shipment to Turkey, and offered to talk to his (the defendant's) associates in Colombia to make arrangements for shipments involving Kuku and Kuku's associate. On July 18, 2016, the defendant told Kuku that after the "test" shipment, he could send 100 per month to the U.S.

On July 24, 2016, the defendant told Kuku how his contacts working at the airport were asking him if they were "going to send something." The defendant referred to a prior successful shipment to Turkey and said that it "doesn't make a difference to them where it is going . . . all

they want is to make money," referring to the airport personnel.

On August 16, 2016, the defendant advised Kuku that his shipment would go out that Saturday, which was August 20, 2016. The defendant was arrested on August 19, 2016, a day earlier, when the defendant was caught shipping to Istanbul, Turkey, via air cargo, 51 boxes with rolls of cellophane plastic that had 39 kilograms of cocaine secreted into the rolls. [2]

The chats and images discovered on the defendant's cell phone demonstrate that he was in possession of up to 108 kilograms of cocaine between the months of July and August 2016. On July 15, 2016, the defendant told Kuku that he had "43" in his hand, which was consistent with a photograph recovered from the defendant's phone that showed four stacks of ten rectangular-shaped packages with three additional packages facing the camera with the Eiffel Tower emblem. Another photograph depicted a single unwrapped package of a pressed white substance, consistent with cocaine, that had the imprint of the Eiffel Tower. Taken together, the photographs and chats indicate that the defendant was holding 43 kilograms of cocaine at that time. During a conversation with Kuku on August 1, 2016, the defendant advised that he was receiving "65" that day for a total of "108". When adding 65 plus 43, they equal 108, and suggest that the defendant had acquired 108 kilograms of cocaine by the beginning of August 2016; 39 of which he used in the shipment to Turkey, and three additional kilograms were going to be shipped to the United States.

Argument

"When calculating a defendant's sentencing range under the Guidelines, the sentencing court *must consider all* 'relevant conduct' as defined in § 1B1.3." United States v. Siegelman, 786 F.3d 1322, 1332 (11th Cir. 2015), cert. denied, ____ U.S. ____, 136 S. Ct. 798 (2016) (emphasis

[2] During a post-Miranda interview on November 23, 2016, the defendant told the DEA agent that he tried to send 39 kilograms of cocaine to Turkey, and the next time it could have been 100-200 kilograms because he plans it like that.

added). Whether an act '"qualifies as relevant conduct is a question of fact reviewed for clear error'" on appeal. Id. (quoting United States v. Valladares, 544 F.3d 1257, 1267 (11th Cir. 2008)). "[R]elevant conduct is broadly defined to include both uncharged and acquitted conduct that is proven at sentencing by a preponderance of the evidence." Siegelman, 786 F.3d at 1332. The Eleventh Circuit "broadly interpret[s] the provisions of the relevant conduct guideline." United States v. Bruce, 665 Fed. Appx. 852, 855 (11th Cir. Dec. 19, 2016) (citing United States v. Behr, 93 F.3d 764, 765 (11th Cir. 1996)).

Pursuant to Section 1B1.3 of the Guidelines, relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(1)(A), (a)(2). "Same course of conduct" and "common scheme or plan" are terms of art defined in the commentary to Section 1B1.3.

> For two or more offenses to constitute part of a common scheme or plan, the must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*.

U.S.S.G. § 1B1.3, Applic. Note 5(B)(i); Siegelman, 786 F.3d at 1333.

> Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity.

U.S.S.G. § 1B1.3, Applic. Note 5(B)(ii); United States v. Fuentes, 107 F.3d 1515, 1525 (11th Cir.

1997) (quoting the commentary to Section 1B1.3, the Court indicated that "the sentencing court should consider 'the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses.'").

The defendant relies on United States v. Maxwell, 34 F.3d 1006 (11th Cir. 1994), to argue that these are isolated, unrelated events, that are not part of the same course of conduct.[3] The facts indicate otherwise. The cocaine in the defendant's possession in Ciudad Del Este, Paraguay, the attempted shipment of cocaine to Turkey, and the attempted shipment of cocaine to the United States were part of a common scheme or plan by the defendant. It is clear from the chats that the defendant was acquiring cocaine in July and August of 2016 for overseas shipments he was planning. The defendant was planning both shipments to Turkey and the U.S. at the same time; they involved the same purpose, i.e., the distribution of cocaine; and they involved the same *modus operandi*, the shipment of cocaine via air cargo in a concealed fashion, from the airport at Ciudad Del Este, Paraguay, with the help of the defendant's contacts at the airport. Furthermore, the defendant discussed his intent to ship additional cocaine to the United States (as well as to Turkey) following the initial "test" shipment to Kuku, if successful.

The cocaine the defendant possessed in Paraguay as well as both attempted shipments are also part of the same course of conduct. As described above, the cocaine the defendant had in his

[3] In Maxwell, the Eleventh Circuit concluded that the uncharged conduct involving a cocaine distribution scheme did not have "any distinctive similarities" to the dilaudid distribution scheme that involved the counts of conviction to "signal that they are part of a single course of conduct." Id. at 1011. The Eleventh Circuit has distinguished Maxwell in subsequent cases, stating that the case involved two different schemes (of cocaine and dilaudid distribution), involving different parties, and being temporally remote (more than one year earlier), and the only similarity was that they both involved "drug distribution" in the general sense. United States v. Buchanon, 299 Fed. Appx. 903, 904 (11th Cir. Nov. 7, 2008) (explaining that 'distinctive similarities' are more than general abstractions of the conduct"); Bruce, 665 Fed. Appx. at 857 (same).

possession was surely the cocaine he was going to use in the shipments he was planning. Both attempted shipments were going to be carried out in a very similar fashion; the only difference was their respective destination. As for the repetitive nature of the conduct, it is unclear from the conversations how many times the defendant had successfully used this transportation method, aside from a prior successful shipment to Turkey, but he told Kuku that it was "working well." The fact that the defendant indicated on August 1, 2016, that he had acquired "108" kilograms suggest that other similar shipments were being planned. As for the interval of time, the defendant discussed being in possession of the cocaine in July and August of 2016, while he was discussing and planning the shipments to the U.S. and Turkey, which shipments were scheduled one day apart, on August 19th and August 20th, 2016.

Foreign Conduct/Crimes

The Eleventh Circuit has not addressed the issue whether foreign conduct or a foreign crime can be considered relevant conduct for the purpose of calculating the defendant's base offense level. The Second Circuit, however, has held that "foreign crimes" are to be excluded from the realm of relevant conduct. In United States v. Azeem, 946 F.2d 13, 16-17 (2d Cir. 1991), the Second Circuit upheld the district court's finding that the defendant's shipment of heroin from Pakistan to Cairo was part of the same course of conduct as his shipment of heroin from Pakistan to New York. The Court went on to hold, however, that the shipment of heroin to Cairo constituted a foreign crime, which could be considered in granting an upward departure but not to calculate the base offense level. Id. at 17. The Court noted that the Sentencing Guidelines' relevant conduct provision does not explicitly address the issue of foreign crimes. Azeem, 946 F.2d at 17. The Court further noted that the Guidelines expressly state that foreign sentences may not be used in computing a defendant's criminal history, but may be used for upward departures from the

otherwise applicable range. Id. The Court concluded from these provisions in the Sentencing Guidelines that "Congress has already shown that where it intends to include foreign crimes in sentencing, it will do so." Id.; see also, United States v. Chunza-Plazas, 45 F.3d 51, 57-58 (2d Cir. 1995); United States v. Chao Fan Xu, 706 F.3d 965, 992-93 (9th Cir. 2013).

Notwithstanding Azeem, in Carrasco v. United States, 820 F. Supp. 2d 562, 568 (S.D.N.Y. 2011), the Court considered conduct occurring overseas for sentencing enhancement purposes. The Court denied a motion to vacate under 18 U.S.C. § 2255, and determined that a 2-level enhancement for use of a weapon in Belize during the course of the offense was appropriate, noting that "the Sentencing Guidelines require a court to consider all of a defendant's conduct that was related to the offense, even where that conduct occurred outside the United States." See also, United States v. Greer, 285 F.3d 158 179 (2d Cir. 2000) (it did not matter that 98% of the hashish was going to Canada under the MDLEA; "nothing in the U.S.S.G. limits their application to 'activity undertaken against the United States.'").

The Seventh Circuit's decision in United States v. Dawn, 129 F.3d 878 (7th Cir. 1997) distinguished Azeem, and appears to have reached a contrary holding. In that case, the Court upheld the district court's application of a higher *base offense level* based on the defendant's production of child pornography, which conduct occurred exclusively outside of the United States, as it was relevant conduct to the offense of conviction, i.e., the defendant's possession of child pornography in the U.S. Id. at 881-83. The Court reasoned as follows:

> The Sentencing Commission's definitions of "offense" and "relevant conduct," as well as the terms of the cross-referencing [child pornography] provisions, focus instead upon the factual and logical relationship between the offense of conviction and the defendant's other acts, wherever they may have occurred. On their face, then, these guidelines would appear to permit (indeed, direct) the sentencing court to consider conduct that culminates in or is otherwise relevant to the offense of conviction, even if that conduct took place in another country. No other guideline specifies differently. Thus, unless some independent principle bars the

> consideration of foreign acts, the cross-reference was not only permissible, but required.

Id. at 882 (citation omitted).

The Court further said,

> The cases make clear that sentencing judges may look to the conduct surrounding the offense of conviction in fashioning an appropriate sentence, regardless of whether the defendant was ever charged with or convicted of that conduct, and regardless of whether he could be. Id. (citing United States v. Watts, 519 U.S. 148 (1997) (permissible to consider conduct underlying charges of which defendant was acquitted).

Id. at 884.

The Court distinguished the Second Circuit's decisions in Azeem and Chuza-Plazas, explaining that the conduct in those cases occurred overseas and had "no link" to the offense of conviction, whereas in Dawn, the defendant's "domestic offenses were the direct result of his relevant conduct abroad; pragmatically speaking, they are inextricable from one another." Id. at 885. The pornography that the defendant produced overseas was pornography that the defendant possessed in the United States. Id.

In this case, the offenses were linked; the cocaine the defendant possessed in Paraguay, as depicted in photographs and chats with Kuku, was likely the cocaine that the defendant was attempting to ship to the U.S. and to Turkey. Furthermore, law enforcement would not have discovered the defendant's attempted shipment of cocaine to the United States had he not been arrested on the attempted shipment of cocaine to Turkey. The defendant indicated in the chats with Kuku that if the shipment to the U.S. was successful, he was going to send additional shipments of cocaine to the United States (as he indicated in chats and post-Miranda statements with respect to Turkey).

For these reasons, the government believes that the Court should consider as relevant

conduct the totality of the defendant's conduct, i.e., the amount of cocaine in the defendant's possession at the time he was planning and attempting to carry out the offense of conviction. This is the cocaine the defendant discussed and photographed on his phone, some of which was the cocaine that he was attempting to ship to the U.S., as well as the cocaine that was seized from him at Guarani International Airport in Ciudad Del Este, Paraguay.

Even if this Court is persuaded by the Azeem decision in the Second Circuit, the courts are consistent that foreign crimes or foreign conduct, whether or not they can be prosecuted in the U.S., can and should be considered in the defendant's sentence, whether for enhancement or upward departure or variance purposes, as appropriate. The government requests that when the Court analyzes the Section 3553(a) factors, particularly the nature and circumstances of the offense, the need to reflect the seriousness of the offense and to promote respect for U.S. law, that it consider the additional cocaine discussed here to arrive at a just and reasonable sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 1, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Aimee Jimenez
Aimee C. Jimenez
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