

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,
v.
[REDACTED]
Defendant.

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ECF

[REDACTED]

OBJECTIONS TO THE PRESENTENCE REPORT

Defendant [REDACTED] through her counsel, Assistant Federal Public Defender Michael Kawi, makes the following objections to the Presentence Report (PSR):

- I. First Objection: The Defense objects to the PSR’s categorization of the methamphetamine as “Ice” for the purpose of determining [REDACTED] base offense level.**

The defense objects to paragraphs 16 and 31 of the PSR on the basis that it improperly categorizes all of the methamphetamine used to calculate the drug quantity as “Ice” for purposes of determining the base offense level. The PSR does this despite acknowledging that there is no lab report pertaining to the methamphetamine actually recovered from the residence where the co-defendants, including [REDACTED] were initially encountered by law enforcement. See PSR ¶ 16. The PSR concludes that the methamphetamine in the amount of 15 kilograms, an amount never recovered but merely discussed by a cooperating codefendant, should all be treated as Ice for the purposes of the guidelines because “[t]he investigation revealed other transactions, within the same timeframe, pertaining, to [REDACTED] [REDACTED] [REDACTED] and Weir, where methamphetamine was seized” and that this seized methamphetamine had “purity levels constituting it as methamphetamine ‘ice.’” See id.

Without additional evidence, this assessment is a conclusory statement and cannot be relied upon by the Court. It is well established that “bald, conclusory statements in a PSR are not sufficiently reliable.” See United States v. Zuniga, 720 F.3d 587, 591 (5th Cir. 2013). Conclusory statements “do not acquire the patina of reliability by mere inclusion in the PSR.” United States v. Elwood, 999 F.2d 814, 817-18 (5th Cir. 1993). A district court may only adopt facts contained in a PSR without further inquiry “if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable.” See United States v. Harris, 702 F.3d 226, 230 (5th Cir. 2012). If the factual recitation in the PSR “lacks sufficient indicia of reliability, then it is error for the district court to consider it at sentencing – regardless of whether the defendant objects or offers rebuttal evidence.” See Zuniga, 720 F.3d at 591. Generally, “the proponent of a sentencing level adjustment... bears the burden of establishing the factual predicate justifying that adjustment.” See United States v. Guevara, 595 Fed.Appx. 273, 276 (5th Cir. 2014) (citing United States v. Rabanal, 508 F.3d 741, 743 (5th Cir. 2007)).

The government disclosed three laboratory reports in discovery. Exhibit 1. Two of these reports appear to be the results of tests on methamphetamine which result in high purity levels. However these lab reports do not sufficiently connect these tested drugs to any part of [REDACTED] case. The PSR does not give any detail regarding where these drugs were found before they were tested, when they were found, how they were collected, who was in possession of them at the time they were confiscated, or how they had come to be in that person’s possession. Because they PSR lacks this information there is no evidence the Court could rely on to connect these lab reports to the conspiracy for which [REDACTED] [REDACTED] is to be sentenced and therefore no way

for the Court to determine that they are 1) relevant conduct in [REDACTED] Gutierrez' case and 2) that even if they were relevant conduct that the purity levels should be imputed to a hearsay estimate of unrecovered methamphetamine.

The 5th Circuit has held that, for the purposes of a Guidelines enhancement, criminal liability is broader than sentencing accountability. See United States v. Carreon, 11 F.3d 1225, 1235 (5th Cir. 1994). The application notes to USSG § 1B1.3 make this explicitly clear: "The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability." USSG § 1B1.3 cmt. n.1 (2014).

The Guidelines limit relevant conduct, "in the case of a jointly undertaken criminal activity," to "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." USSG § 1B1.3(a)(1)(B). This breaks down into two necessary elements: (1) in furtherance of the jointly undertaken criminal activity (scope); and (2) all reasonably foreseeable actions and omissions (foreseeability). USSG § 1B1.3 cmt. n.2. So while [REDACTED] [REDACTED] is criminally liable to the same extent as her co-conspirators, she should not necessarily be accountable for everyone else's conduct at sentencing.

The lack of specificity in the PSR regarding the tested methamphetamine precludes any determination that it is relevant conduct, and therefore it is improper to extend the purity levels of the lab reports to the entirety of all drugs accounted for in [REDACTED] [REDACTED] PSR.

The defense notes that there could conceivably be circumstances that connect them, and if such evidence exists it would need to be described in sufficient detail for the Court to determine that fact, or brought forth at sentencing in the form of other evidence.

Because there is not currently evidence connecting the lab reports to [REDACTED] [REDACTED] relevant

conduct, the statements in the PSR are conclusory and cannot be relied upon by the Court; the purity levels should not be imputed to her base offense level, and the Court should utilize the base offense level for methamphetamine rather than methamphetamine (actual) or methamphetamine (ice). Even accepting the amount of 15 kilograms of methamphetamine (an amount that will be challenged in a separate objection) the base offense level would fall from 38 to 36.

II. Second Objection: The Defense objects to the PSR's use of unreliable statements to determine the amount of drugs when determining [REDACTED] base offense level.

The Defense objects to paragraphs 17, 18, 19, 20, 23, 24, 25, and 31 on the basis that the PSR improperly calculates the amount of methamphetamine that should be included in her base offense level.

The PSR in the above cited paragraphs uses estimates given by unreliable witnesses to increase [REDACTED] base offense level significantly. In her factual resume, [REDACTED] admits to participating in a conspiracy involving 2 ounces of methamphetamine per day for the length of the conspiracy, which as charged was 51 days. This would amount to 102 ounces of methamphetamine, or approximately 2,856 [REDACTED]. This is a substantial amount, nearly three kilograms, and would place [REDACTED] at a base offense level of 32.

While the defense is aware that the factual resume does not control relevant conduct, the Court must have reliable information in order to increase a base offense level when the conduct has not been stipulated to, such as in a factual resume.

As noted above conclusory or unreliable statements cannot be relied upon to increase an individual's guidelines. A district court may only adopt facts contained in a PSR without further

inquiry “if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable.” See United States v. Harris, 702 F.3d 226, 230 (5th Cir. 2012). If the factual recitation in the PSR “lacks sufficient indicia of reliability, then it is error for the district court to consider it at sentencing – regardless of whether the defendant objects or offers rebuttal evidence.” See Zuniga, 720 F.3d at 591.

Here, the facts that the PSR would have the court rely on are not reliable for several reasons. First, the sources of the information in the PSR are unnamed cooperating defendants. Whenever a source is unnamed the Court is deprived of the ability to evaluate the individual’s criminal history or characteristics that may make them unreliable. Here we at least know that they are defendants, and this gives the Court several indications that their statements should not be relied upon. A defendant who is cooperating has every incentive to minimize their own involvement, maximize the involvement of others, and tell the government what they think the government wants to hear. Their statements even when against self-interest are often not held against them if given in the context of cooperation.

To be sure, statements made by inherently unreliable persons can in many cases lead to reliable evidence, but this does not mean that the statements themselves should be accepted without question and without additional evidence. Here the PSR would have the Court accept an unnamed individual’s estimate of 15 kilograms, despite the fact that this person had an incentive to inflate the crimes of their co-defendant, and is attempting to minimize the time they will be incarcerated.

Additionally, the circumstances of the co-defendants in this case strongly suggest that they were using drugs while trespassing in an apartment that at least one of them broke into. So even

if the Court were to accept the statements of unnamed, highly incentivized individuals, as credible, their drug use during the time period in question makes them unreliable even if they wanted to tell the truth.

The PSR makes the claim that these co-defendant statements are corroborated by text messages. When we look at the messages however, we find that they contradict the amounts given by the cooperating defendants. In paragraph 20 CD2 claims that when Weir would purchase methamphetamine he would do so in amounts ranging from 4-10 ounces and then claimed that on at least two occasions Weir purchased 8-10 ounces. These amounts are of course two to five times the amount in [REDACTED] [REDACTED] factual resume. However, in paragraphs 21 and 22 the PSR discusses messages detailing the actual amounts Weir was purchasing, and all are smaller than the 4-10 ounces claimed. Weir purchases methamphetamine in one or two ounce amounts each time, contradicting CD2's claim, and corroborating the amount stipulated to in [REDACTED] [REDACTED] factual resume.

In paragraph 18 CD1 claims "Weir bought ounce quantities of methamphetamine daily and sometimes several times per day." Yet in the same paragraph, when the PSR attempts to corroborate this claim, the cellular messages reveal seven ounces provided by CD1 between July 26, 2018 and August 8, 2018; this amount according to CD1s claims should have been more than double that for that time period.

Given this combination of anonymity, self-interest, and contradiction, the Court should not and cannot rely on these statements to increase [REDACTED] [REDACTED] base offense level. Accordingly the base offense level should be set at 32 rather than 38 or 36.

III. Third Objection: The Defense objects to the PSR's determination that [REDACTED]

██████████ was an organizer, leader, manager, or supervisor of the conspiracy.

The PSR adds 2 additional levels based on the assertion that ██████████ ██████████ acted as an organizer, leader, manager, or supervisor in the conspiracy. See PSR ¶ 34. The defense objects to the addition of this enhancement on the grounds that 1) the statements relied on by the PSR are inherently unreliable and there cannot be the basis for the enhancement and 2) that even if the statements could be relied on they do not rise to the level of proof needed to establish ██████████ ██████████ as an organizer, leader, manager, or supervisor.

The defense has discussed in previous objections the well-established case law that conclusory statements cannot alone be the basis for an enhancement under the sentencing guidelines. The same argument applies to this enhancement. The PSR explicitly states that the basis for adding this enhancement is the statements of cooperating defendants. See PSR ¶ 11. These statements, for reasons already discussed in this filing, are inherently unreliable and should not be accepted by the Court as a means to increase an individual's guideline range when they have not been subject to cross-examination or bolstered by corroborating evidence.

Even if the Court were to accept the statements of these individual's as reliable, the evidence contained in the PSR still would not warrant an enhancement under 3B1.1(c). First, their statements alone do not show that ██████████ ██████████ had a superior role in the conspiracy. It is the legal foundation of any conspiracy that a group of people are working together. The nature of any endeavor with others, whether it be legal or illegal, is to divide the labor in service of a common goal. It follows that any member of such a group can ask another member to do something related to their collective aim; this act alone does not mean that as a general matter a person is a leader, organizer, manager, or supervisor. For example, an attorney is clearly the leader, organizer,

manager, and supervisor of her or his legal assistant. And yet, in service of their common goal of efficiently managing the legal work of their office, the legal assistant may frequently ask the attorney to do something, whether it be by alerting them to a deadline on a pending motion, or signing a document which needs to be released or filed. These acts of course do not convert the legal assistant instantaneously into the leader, organizer, manager, or supervisor of the attorney – it is merely how people operating as a group see that steps are taken to achieve their goals.

In the instant case, the illegal collective goal was the selling of contraband substances. In service of this goal the conspirators, now co-defendants, spoke to each other and took steps with each other to accomplish this goal. The non-conclusory evidence shows that they were all working together, not being led, organized, managed, or supervised by [REDACTED] [REDACTED]

Several instances from the PSR demonstrate that [REDACTED] [REDACTED] was not an organizer, leader, manager, or supervisor as described in 3B1.1. In paragraph 14 the PSR details the contraband found inside of the residence where [REDACTED] [REDACTED] Weir, and [REDACTED] were first encountered. If [REDACTED] was a leader, organizer, manager, or supervisor it would stand to reason that she would be found in control of the contraband. This was not what the evidence revealed to law enforcement that day. The contraband was largely found in [REDACTED] backpack, along with prescription bottles with [REDACTED] name on them. This concentration of contraband in [REDACTED] control indicates he was in control of a larger portion of the conspiracy than others.

[REDACTED] aggravated role is corroborated by CD1's description of his actions in paragraph 17 or the PSR. CD1 describes [REDACTED] as a supplier of [REDACTED] and "advised that [REDACTED] worked for [REDACTED] Id. Although the PSR would have the Court rely on cooperating defendant statements to assess this enhancement, here we see that those same cooperating defendant's

describe a conspiracy in which [REDACTED] is not a leader, but rather an employee of [REDACTED]

For these reasons the Court should determine that [REDACTED] does not qualify as an organizer, leader, manager, or supervisor under U.S.S.G. § 3B1.1.

Respectfully submitted,

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/s/ Michael W. Kawi

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CERTIFICATE OF SERVICE

I hereby certify that on [REDACTED], I electronically filed the foregoing document using the Court's CM/ECF system, thereby providing service on all parties of record.

/s/ Michael W. Kawi

MICHAEL W. KAWI