IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

UNITED STATES OF AMERICA,

v. Case Number: XXXXXXX

XXXXXX,

Defendant.

DEFENDANT'S SENTENCING MEMORANDUM

DEFENDANT, XXXXXXXX, by and through undersigned counsel, pursuant to directive of this Court March 10, 2005, respectfully submits this memorandum in aid of sentencing.

PROCEDURAL BACKGROUND

Defendant, XXXXXXX, was named in the three count indictment returned in the Northern District of Florida on October 20, 2004. Count I of the indictment alleged that on or about April 12, 2004, the defendant threatened the use of a weapon of mass destruction, namely anthrax, against property owned or leased by the Untied States, in violation of section 2332a(a)(3), Title 18, United States Code. Count II of the indictment alleged the defendant mailed threatening communications via the United States Postal Service, in violation of section 876, Title 18, United

States Code. Count III of the indictment alleged the defendant did assault, resist, oppose, impede, intimidate or interfere with a federal officer while engaged in official duties, in violation of section 111a, Title 18, United States Code.

On December 7, 2004, the Government filed a Notice of Enhancement against the Defendant pursuant to section 3559, Title 18, United States Code, specifically informing the Court that if the Defendant was convicted of Counts I and/or III, he would be subject to increased penalties because of his two prior convictions for serious violent felonies.

On December 10, 2004, the Defendant voluntarily entered his pleas of guilty to all counts of the indictment. A Presentence Investigation Report was ordered by the Court, returnable for a sentencing date of March 10, 2005.

On February 14, 2005, Defendant raised objection to the Presentence Investigation Report wherein it called for a mandatory term of Life imprisonment pursuant to the Notice of Enhancement.

Rather than sentence Defendant on the specified date, the Court ordered both Government and Defendant to provide briefings as to the following two issues:

1. Whether the Court made sufficient inquiry of Defendant at plea colloquy to satisfy the elements of proof as it applies to Count I of the indictment, namely section 2332a(a)(3)?
2. Whether the crimes alleged in Counts I and III of the indictment are qualifying offenses for enhancement pursuant to section 3559, Title 18, United States Code?

METHODOLOGY

Defendant's counsel employed traditional research methods. However, the undersigned supplemented research by seeking assistance from the National Association of Criminal Defense

Lawyers, The Federal Pubic Defender for the Northern District of Florida and his association with Defenders nationwide, The Florida Association of Criminal Defense Lawyers, and Assocaion of Federal Defense Attorneys. The purpose of inquiry was to determine if any other counsel may have been presented a charge under section 2332a(a)(3), Title 18, United States Code. The undersigned's inquiries yielded no responses. The undersigned did contact trial counsel for Timothy McVeigh, Mr. Stephen Jones of Oklahoma. After a search of his files and the archives at the University of Texas School of Law, Mr. Jones provided a portion of the jury instructions as read by the Honorable Richard P. Matsch to jurors applying to the charge under section 2332a(a)(2 and 3). The undersigned attaches the submittal hereto as Attachment A.

ISSUE ONE

WHETHER THE COURT MADE SUFFICIENT INQUIRY OF DEFENDANT AT PLEA COLLOQUY TO SATISFY THE ELEMENTS OF PROOF AS IT APPLIES TO COUNT ONE OF THE INDICTMENT, NAMELY SECTION 2332a(a)(3), TITLE 18, UNITED STATES CODE

The facts to which the Defendant entered his guilty pleas are not in dispute, and may be relied upon in the Factual Summary In Support of Guilty Plea, as filed by the Government in this case. The statute to relied upon is derived from Pub. L. 107-188, Title II, section 231(d), June 12, 2002, 116 Stat. 661. The relevant statute to which the Defendant pled guilty has since been revised effective December 17, 2004.

There is scant reported precedent regarding the specific charge of "threatening the use of a weapon of mass destruction against property owned or leased by the Untied States." Perhaps the most infamous case is *United States v. Mc Veigh*, 153 F.3d 1166 (10th Cir. 1998), wherein Mc Veigh

was charged (among others) with Conspiracy to Use Weapons of Mass Destruction Against Persons and Property Owned by the United States. It is noted that Mc Veigh was charged with a pre-1996 version of 18 U.S.C. 2332a(a)(3). The Court opined that 18 U.S.C. 2332a(a) was not a strict liability crime, and the intent standard of "knowingly" is appropriate to establish as an element. Accordingly, the essential elements which must be proved to establish a violation of 18 U.S.C. 2332a(a)(3) are the Defendant; 1) knowingly used, or attempted, or conspired to use a weapon of mass destruction, and 2) knowingly did so against any property that is owned, leased or used by the United States or by any department or agency of the United States. *Id* at 1194. See also Attachment A. However, the Court gives little other application guidance as to 18 U.S.C. 2332a(a)(3) in its opinion, turning its attention towards the human death and destruction wrought by Defendant McVeigh.

A similar fact pattern to the case at hand is *United States v. Wise*, 221 F. 3d 140 (5th Cir. 2000), wherein the defendants were sending threatening e-mail messages to federal and state agencies to secure concessions on behalf of their "Republic of Texas" organization. However, the defendants were not charged with any "threatening the use of a weapon of mass destruction against property owned by the United States". While it is interesting that the Court determined their review of the relatively new statute may have been of first impression, their analysis did not touch upon 18 U.S.C. 2332a(a)(3). *Id* at 148. Their focus was upon whether the phrase "without lawful authority" was an essential element of proof or an affirmative defense to be established by a defendant. *Id* at 150. Their answer was as to the later.

In *United States v Polk*, 118 F. 3d 286 (5th Cir. 1997), the defendant was convicted at trial of attempted use of a weapon of mass destruction to destroy a federal building. However, the tenor of the opinion focuses more upon the "killing potential" of the assembled arsenal towards persons rather than towards destruction of buildings or property. Id at 297. The decision fails to provide any

specific guidance as to the application of 18 U.S.C. 2332a(a)(3).

A final factually similar case is *United States v. Slaughter*, 116 F.Supp 2d 688 (W.D. Va. 2000), wherein an inmate was convicted of threatening the use of a weapon of mass destruction (anthrax), and for mailing such threats through the U. S. Postal Service. The thrust of the opinion is the requirement to prove an interstate nexus in prosecutions of 18 U.S.C. 2332a(a)(2). The statute in the instant case was not alleged in the *Slaughter* indictment.

Without further direction, it appears as if the *McVeigh* standard is what may be applied to determine whether the elements of proof are sufficiently supported by the facts to which the Defendant entered his guilty plea as to Count I of the indictment.

ISSUE TWO

WHETHER THE CRIMES ALLEGED IN COUNTS ONE AND THREE OF THE INDICTMENT ARE QUALIFYING OFFENSES FOR ENHANCEMENT PURSUANT TO 18 U.S.C. 3559

The Defendant filed timely objection to the Government's suggestion of enhancement to a mandatory term of Life imprisonment. 18 U.S.C. 3559(c) (2) (F) (I), does not specifically reference 18, U.S.C. 2332a (a) (3), as a qualifying offense for a "serious violent felony." The undersigned is not aware of any reported cases where such an enhancement has been permitted. Historical and Statutory notes yield no insight as to Congressional intent upon this narrow issue. The result appears that had Congress intended the offense to be eligible for enhancement, surely it would have included it on the enumerated list. Defendant asserts, as to subsection (I), the enhancement suggested is improper, in the absence of any other controlling authority or guidance.

As to subsection (ii), of 18 U. S.C. Section 3559 (c) (2) (F), the enhancement qualifies

for "any other offense... that has an element, use, attempted use, or threatened use of physical force against another person." The Government deliberately chose in the indictment to charge Defendant with an offense against the **property** owned, leased , or used by the United States, not a person. The presumption is the Government made this election as it could not otherwise establish an interstate nexus to allow for a charge under 18 U. S. C. 2332a(a)(2). While the reasons are speculative as to Defendant, there can be no doubt that the drafter of the indictment must be strictly held to its writings using the traditional contract analogy. As the charge in Count I of the indictment is not alleged to have occurred against a person, subsection (ii) of 18 U. S. C. Section 3559 (c) (2) (F), is inapplicable.

The Court may apply the Rule of Lenity for ambiguous statutory construction after seizing everything from which aid may be derived and still arriving at a position where it may make no more than a guess as to what Congress intended. *United States v. Camacho-Ibarquen*, ___ F. 3d ___, W.L. 713597 March 30, 2005 (11th Cir. 2005); *See also, United States v. Jeter,* 329 F.3d 1229,1230 (11th Cir. 2003). In absence of any resource to the contrary, "(W)here there is ambiguity in a criminal statute, doubts are resolved in favor a defendant." *United States v. Bass*, 404 U. S. 336, 348, 92 S. Ct. 515 (1971); *United States v. Inclema,* 363 F. 3d 1177, 1182 (11th Cir. 2004).

The Supreme Court has defined the Rule of Lenity as meaning:

> that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be no more than a guess as to what Congress intended.

Bifulco v. United States, 447 U. S. 381, 387, 100 S. Ct. 2247, 2252 (1980), quoting *Ladner v. United States,* 358 U.S. 169, 178, 79 S. Ct. 209, 214 (1958).

> The rule embodies the instinctive distaste against men languishing in prison unless

the lawmaker has clearly said they should. *Id.,* at U.S. 348, at S.Ct. 523 (omitting internal citation).

The Defendant presents a similar argument as to 18 U. S.C. 3559 (c)(2)(F)(I), as it applies to Count III of the indictment. The crime of assault, 18 U. S. C. 111 (a) is not specifically found as an enumerated qualifying offense for enhancement in 18 U. S. C. 3559 (c) (2) (F), and the offense is not a "serious violent felony" within the express meaning of the statute. Accordingly, Count III should not qualify for enhancement, under a plain reading of the statute.

A different argument is advanced as to subsection (ii), of 18 U. S.C. 3559 (c) (2) (F). The offense specifically alleged and pled by the Government in its indictment is 18 U. S. C. 111 (a), which carries an enumerated penalty of a maximum sentence of imprisonment of not more than 8 years. The Government did not specifically allege or plead in its indictment the statutory enhanced penalties embodied in 18 U. S. C. 111 (b). Furthermore, the Defendant entered his plea to Count III with an express understanding in the Plea and Cooperation Agreement dated December 10, 2004, that the maximum penalty he faced as to Count III was, among others, a term of imprisonment up to eight (8) years. The Government did not author any reference to enhanced penalties in the Plea and Cooperation Agreement as to 18 U. S. C. 111.

Pursuant to 18 U. S. C. 3559 (c) (2) (F) (ii), enhancement may be had for any other offense punishable by a maximum term of imprisonment of ten (10) years or more that has elements similar to the assault alleged in the indictment. However, as the enhancement in 18 U. S. C. 111 (b) was not specifically alleged, it should not now be used by implication to trigger the more serious enhancement.

The undersigned is aware of adverse authority from outside this Circuit which the Court may

be instructive. The Tenth Circuit, in *United States v. Segien* , 114 F. 3d 1014 (10th Cir. 1997), did hold that "bodily injury" as found in 18 U. S. C. 111(b) referred more to a sentencing enhancement element and not an additional element of proof. This may obviate any charging defect, so long as Defendant is on notice of the crimes alleged. Defendant, in this case, has at all times acknowledged receipt of the indictment and Notice of Enhancement prior to entry of his guilty plea.

However, in *United States v. Hathaway* , 318 F. 3d 1001 (10th Cir. 2003), the Defendant made a similar argument as in this case, namely that as the indictment only charged a violation of 18 U. S. C. 111 (a), and as the indictment failed to distinguish between simple and non simple assault, he could not be convicted of felony assault. The Defendant in this case argues that as the indictment charged a violation of 18 U. S. C. 111 (a), and as his plea and cooperation agreement did not reference the enhanced penalty, he should not be subject to the enhancement under 18 U. S. C. 3559(c)(2)(F)(ii). The *Hathaway* Court seems to create a clear distinction between 18 U. S. C. 111(a) and (b). *Id.* At 1008, 1009.

The undersigned is unaware if the Eleventh Circuit has explored the distinction between 18 U. S. C. 111 (a) and (b), and the specificity of pleadings, for purposes of enhancement under 18 U.S.C. 3559.

I HEREBY CERTIFY that a true copy hereof has been furnished to XXXXXXX, Assistant United States Attorney, *Address*, by electronic mail, this 8th day of May, 2005.

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