

JUDGE JOHN C. COUGHENOUR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)	NO. CR99-666C
)	
Plaintiff,)	DEFENDANT’S SUPPLEMENTAL
)	SENTENCING MEMORANDUM
vs.)	
)	
AHMED RESSAM,)	
)	
Defendant.)	
_____)	

Ahmed Ressam is scheduled to be sentenced on July 27, 2005. This supplemental sentencing submission responds to matters raised by the government on April 27, 2005, during the first portion of Mr. Ressam’s sentencing hearing, and further supports the defendant’s sentencing recommendation.

I. SENTENCING RECOMMENDATION

At the April 27, 2005 sentencing hearing there was discussion of post-conviction sentencing negotiations. Government counsel correctly noted that its initial recommendation of a sentence of not less than 27 years was directed out of Washington D.C. (Transcript p. 14.) The Court questioned that recommendation given the government’s pretrial assessment of the case and the level of Mr. Ressam’s post-trial cooperation. (Transcript p. 15). The

1 Court's questions were on point. Pretrial, the government proposed a 25 year sentence if Mr.
2 Ressam pled guilty. That penalty did not require cooperation.

3 After trial and after Mr. Ressam began cooperating, government counsel from Seattle
4 and the defense engaged in sentencing discussions. During those discussions, the defense
5 urged an agreement on a sentencing range between 10 and 15 years imprisonment given the
6 nature and likely extent of Mr. Ressam's information and cooperation. AUSA Jerry Diskin
7 was not convinced that the intelligence value of Mr. Ressam's cooperation constituted
8 "substantial assistance." At that point in time, he felt a range of 20 to 25 years was merited.
9 Further conversations were contemplated, but not consummated. The directive from
10 Washington D.C. for a longer recommendation, without notice to or discussion with the
11 defense team, ended negotiations. The circumstances surrounding the government's
12 recommendation have been amply documented in prior submissions. *See* Defendant's
13 Sentencing Memorandum, Attachment 8, Dkt # 365.

14 We recommend a sentence substantially lower than 20 years imprisonment. Our
15 position is simple. A fair and balanced look at the seriousness of Mr. Ressam's misconduct
16 resulted in a 25 year pretrial offer. Mr. Ressam decided to stand trial. Post-trial, he provided
17 substantial and important cooperation. If he had not gone to trial, that cooperation would not
18 have occurred. Under the unique circumstances of this case, he should not be penalized for
19 his trial decision. The proposed 25 year pretrial penalty should, we believe, be reduced due to
20 Mr. Ressam's cooperation. As emphasized by Special Agent Fred Humphries, Mr. Ressam's
21 information was shared with field agents throughout the world assisting them in their
22 investigations of suspected terrorists. (Transcript pp. 24-25, 46, 49-50.) As described by
23 AUSA Robin Baker, Mr. Ressam's information has contributed to the prosecution and
24 conviction of suspected terrorists in Europe and in the United States. (Transcript pp. 79-80,
25 84-85, 88.) In addition, Mr. Ressam's decision to talk has lead to changes in law enforcement
26 training, intelligence gathering and approaches to security here and abroad, changes designed

1 to promote world wide public safety.

2 Surely, Mr. Ressam has earned a sentence of less than 25 years imprisonment. We
3 respectfully submit that the extent and value of Mr. Ressam's cooperation support our
4 recommendation of a sentence of less than 20 years.

5 II. COOPERATION

6 A. The Testimony of Special Agent Fred Humphries

7 At the April sentencing hearing, Special Agent Fred Humphries was called as a witness
8 at the Court's request to describe his view of the importance of Mr. Ressam's cooperation.
9 Special Agent Humphries' testimony emphasized the importance of Mr. Ressam's assistance
10 to line agents in the world wide fight against terrorism.¹

11 The central and recurring theme of Agent Humphries' testimony was that Mr.
12 Ressam's unclassified, firsthand accounts of the workings of terrorist cells could be
13 distributed to field agents throughout the world. Mr. Ressam's information was "shared with
14 the people who have an interest and need to know." (Transcript p. 25). Agent Humphries
15 went on to describe the practical effect of this information being in the hands of law
16 enforcement officers who "need[ed] to know." He testified that law enforcement's
17 understanding of how terrorist cells operate was heightened. Training and interrogation
18 techniques were changed. Security at airports throughout the United States was altered to take
19 into account information Mr. Ressam had provided. (Transcript p. 28.)

20 Agent Humphries also cited positive, practical effects of Mr. Ressam's information.
21 Individuals suspected of terrorist activity were identified. (Transcript p. 58). Investigations
22 were expanded and intensified in Europe based on information provided by Mr. Ressam
23 (Transcript p. 40) and suspected terrorists were prosecuted using information supplied by Mr.

24 _____
25 ¹ Agent Humphries' testimony, while helpful, lacked the enthusiasm and insight provided in
26 previous conversations and meetings with counsel, perhaps due to internal pressure. (See sealed
document, filed along with this memorandum.)

1 Ressay. (Transcript p. 41). He confirmed that Abu Zubaydah is a person of extreme
2 importance in the fight against terrorism. (Transcript p. 56.) Mr. Ressay provided detailed
3 information concerning Abu Zubaydah prior to his capture after an extensive manhunt.²
4 Agent Humphries testified that Mr. Ressay provided the names of 123 to 130 suspected
5 terrorists, a fifth of which have been fully identified. (Transcript p. 58). He confirmed that
6 Mr. Ressay's information was used to defuse a potentially lethal accident following the arrest
7 of Richard Reid at the Boston Airport. (Transcript p. 22). He also stated that Mr. Ressay's
8 information was used to secure the freedom of an individual who the Department of Defense
9 wanted detained as an "enemy combatant." (Transcript pp. 26-27).

10 Because of Mr. Ressay's assistance, field law enforcement agents throughout the
11 world obtained first time, firsthand information concerning the identity and workings of
12 terrorist cells. Though trained in the investigation of terrorism, Agent Humphries repeatedly
13 noted that Mr. Ressay's information markedly enhanced his level of sophistication and
14 understanding. (Transcript pp. 27-28.) Ironically, Agent Humphries noted that some of what
15 Mr. Ressay provided was already known within the intelligence community, but had not been
16 shared with those who "need to know."

17 **B. Contributions of Mr. Ressay to Terrorism Prosecutions**

18 AUSA Robin Baker outlined the importance of Mr. Ressay's information to
19 investigations and prosecutions brought throughout Europe and in the United States. Her oral
20 submission tracked information contained in letters provided to the Court and defense counsel
21 on the eve of the April, 2005 sentencing hearing.³ Her submission confirmed our contention
22

23 ² See Unredacted version of Defense Summary of Debriefings, Proffers and Testimony, filed
24 under seal at pp. 10-11, Dkt # 359. Also, See Defendant's Sentencing Memorandum at pp. 20-22, Dkt
25 # 359.

26 ³ We have requested, but have not been provided or seen the original letters sent from foreign
countries in which assessment of the importance of Mr. Ressay's information is detailed.

1 that Mr. Ressam's cooperation contributed to the prosecution and conviction of terrorists.

2 Ms. Baker confirmed that information provided by Mr. Ressam was used in connection
3 with three separate German prosecutions. Convictions were achieved in each case, though a
4 retrial is required in one. Though Ms. Baker tended to down play the significance of Mr.
5 Ressam's contribution to these prosecutions, German authorities wrote that:⁴

6 The witness Ressam, **in depth and comprehensively**, answered
7 all questions therein contained, as well as a number of additional
8 questions of the German participants in the proceedings. It is true
9 that, due to a lack of his own knowledge, the witness was unable
10 to provide any information with regard to the Defendant El
11 Motassadeq, and other members of the Hamburg terrorist
12 organization grouped around Mohamed Atta. However, his
13 testimony was of **significant importance** for the German criminal
14 proceedings because he provided **detailed information**
15 concerning the setup of the training camps in Afghanistan, the
16 contents of the training there, his points of contact, and the
17 terrorist objectives of the responsible individuals in Afghanistan.
18 Not last, because of this information, the several-months stay of
19 the Defendant, El Motassadeq, which he had justified by stating
20 that every Muslim had the religious duty to learn how to shoot,
21 ride, and swim, could be evaluated in the right light and against
22 the background of the terrorist objective of the training conducted
23 there.

15 In the above case, the conviction was reversed, but German authorities wrote again in
16 praise of Mr. Ressam's cooperation.

17 The testimony of the witness Ressam, dated December 17 and 18,
18 2002, **was significant** to the proceeding because the information
19 supplied by him contributed to making it possible to view the
20 defendant's several-week stay in Afghanistan in the correct light
21 and before the background of the terrorist objectives of the
22 training that is provided there. The [written] decision of the
23 Hanseatic Higher Regional Court dated February 19, 2003, does
24 not contain any explanations relating to the testimony of the
25 witness Ressam. But this – as well as the revocation of the
26 decision by the Federal Court of Justice – has no impact on the

24 ⁴ This statement from German authorities was delivered to the government more than two years
25 ago, but withheld from the defense until the eve of sentencing. See Dkt # 371, p. 31; Dkt # 373, p. 2.
26 Our repeated requests for timely disclosure of this information is documented in Defendant's
Opposition to Government's Request to Continue Sentencing filed February 20, 2003. Dkt # 346, p.
14, C16-C22.

1 above-stated assessment of the testimony of the witness Ressam.

2 The importance of the background to investigator's information provided by Mr.
3 Ressam was repeatedly emphasized by the Germans, adding meaning to Agent Humphries'
4 testimony and the value he placed on getting Mr. Ressam's information to line investigators.

5 Mr. Ressam's information was used in prosecutions in France. There, background
6 information provided by Mr. Ressam concerning the operation of a cell located in Frankfurt,
7 Germany was used against individuals who were charged and convicted of plotting to bomb
8 the Christmas Market in Strasbourg, France. Mr. Ressam identified individuals associated
9 with that cell. Here too, the prosecution attempts to marginalize the significance of Mr.
10 Ressam's assistance. The plain fact is that Mr. Ressam courageously provided information
11 about individuals who were prosecuted in France where convictions were achieved.⁵

12 Ms. Baker also conceded that Mr. Ressam's cooperation contributed to prosecutions
13 and investigations in Italy. Ms. Baker contends that the defense has overstated the
14 significance of Mr. Ressam's contribution to authorities in Italy. (Transcript p. 88). Indeed,
15 she stated information provided by Mr. Ressam was not "useable" in court. (Transcript p. 88).
16 Italian authorities disagree.

17 Ressam was interviewed in June 2002 by investigators from the
18 Italian National Police, an officer from the Carabinieri, and two
19 Italian prosecutors. As a result of that interview, a "declaration"
20 was prepared by the interviewers, which was a detailed report of
21 the information by Ressam. **The declaration was then used**
22 **(read by a prosecuting magistrate to the judge) in court on one**
23 **of two occasions in connection with the Italian cases against**
24 **terrorist cells, specifically that of Sami Ben Khemais Essid.**
25 Ressam's information provided an overview of the operation and
26 methods of these cells in Italy and elsewhere. Specifically,
Ressam's information confirmed the existence of organized
Tunisian cells operating in Italy and Germany. It also provided
information concerning the organization and operation of al

25 ⁵ The government's redacted summary of the value of Mr. Ressam's assistance to French
26 authorities is based on a letter received from that country **more** than two years ago – before the trial of
the individuals involved in the Strasbourg Market case. Dkt # 371, p. 34.

1 Qaeda-run training camps in Afghanistan and attendance by 17
2 individuals associated with the cells in Italy and Germany. **This**
3 **information was considered to be useful, as convictions were**
4 **obtained in these cases.**

5 *See* Baker letter to Judge Coughenour dated April 25, 2005 at p. 4. Dkt # 373.

6 We have not overstated the significance of Mr. Ressam's assistance to the Italians.
7 Beyond use of Mr. Ressam's information in court proceedings, the Italians report that Mr.
8 Ressam's help was of "significant relevance" to the investigation of terrorist cells operating in
9 that country – again signaling the importance of getting that information to those "who need
10 to know." Dkt # 376, p. 1.

11 The government repeatedly attempts to marginalize the contributions of Mr. Ressam,
12 overlooking the fact that it was Mr. Ressam who began the process of getting critical
13 information to investigators in the field – information that indisputably furthered the
14 investigation and prosecution of suspected terrorists. The extent and worth of Mr. Ressam's
15 effort is not reflected in the government's recommended sentence.

16 We also know that Mr. Ressam's testimony was critical to the conviction of Mokhtar
17 Haouari in New York. Mr. Ressam's information prompted the arrest of Abu Doha in the
18 United Kingdom. The government contends that that prosecution is threatened because Mr.
19 Ressam no longer wishes to cooperate. Whether or not that prosecution moves forward
20 without Mr. Ressam remains to be seen. However, Ms. Baker's assertion that Mr. Ressam's
21 decision against further cooperation will allow Abu Doha "to go unpunished" (Transcript p.
22 97) seems highly unlikely. Because of Ahmed Ressam, Abu Doha is a marked man. He faces
23 potential prosecutions not just in the United States, but also in the United Kingdom, France
24 and Germany. Abu Doha is alleged to have been a participant in the planning of the
25 Christmas Market bombings. Mr. Ressam's information was used in France and Germany
26 against others connected with that plot. It follows that Mr. Ressam's information could be
 useful in future proceedings against Abu Doha brought in other countries.

1 C. Historical Considerations

2 The essence of Mr. Ressam's cooperation belies attempts to marginalize its importance.
3 Indeed, the significance of Mr. Ressam's effort is understood worldwide at the highest of
4 levels. On May 17, 2005, individuals participating in the Independent Task Force on the
5 Future of North America met to discuss their work and recommendations. A member of the
6 task force, former Deputy Prime Minister and Minister of Finance of Canada, John P. Manley,
7 discussed the importance of the arrest of Ahmed Ressam. He noted that Mr. Ressam's arrest:

8 . . . actually turned out to be a fortuitous arrest for a number of
9 reasons, in part because it avoided a calamity, which it would have
10 been, although not of proportion to 9/11, a very significant
11 incident, but secondly because it – through examination of him
12 and questioning of him, it provided security and intelligence
13 forces with a great [deal] of information about Al Qaeda and about
14 what was going on. **And from the Canadian point of view, it
15 led to quite a significant change in our approach in a whole
16 number of areas with respect to security and intelligence
17 matters.** It also revealed to us that Canada was on the target list
18 for possible terrorist attacks.

19 Council on Foreign Relations Meetings, Federal News Service (May 17, 2005).

20 The observations of Mr. Manley underscore the obvious and historical importance of
21 Mr. Ressam's information and cooperation. While placing his own life at risk forever, Mr.
22 Ressam provided information that has been used to design a safer world. He stepped forward
23 at a critical moment in time. While the practical effect of Mr. Ressam's assistance is seen in
24 its use in investigations and prosecutions, his greatest contribution may be in acts of terrorism
25 prevented or discouraged because of his decision to speak.

26 D. Mr. Ressam's Decision to Cooperate No Further

Mr. Ressam greatly appreciates the reason the Court continued his sentencing hearing.
After much thought, he has decided against cooperating further. He fully recognizes that his
decision will result in a longer sentence. He began cooperating because he regretted what he
did and wanted to make amends. He has never personally asked for or expected a particular
sentence. He has never expressed an opinion about government recommendations. He

1 listened as his lawyers shared disappointment over negotiations with officials in Washington
2 D.C., but he did not falter. He kept cooperating and investigators from Canada, the United
3 Kingdom, Italy, Germany and France kept visiting. He is now at a point where he feels he can
4 do no more. Mr. Ressam knows what he did was wrong and hopes the Court accepts his
5 statement that he is truly sorry.

6 In April, Mr. Ressam listened as the United States Attorney argued that “Ahmed
7 Ressam’s intention was to . . . kill as many men, women and children as he could with a
8 powerful bomb.” (Transcript p. 3). This was an unnecessary exaggeration. Mr. Ressam
9 knows his plan risked significant loss of life. However, he testified on behalf of the
10 government at Mokhtar Haouari trial:

11 (Questioning by AUSA Joseph F. Bianco)

12 Q. Now, by picking an airport as a target, Mr. Ressam, you realize that
13 many civilians would die; didn’t you?

14 A. Yes, I would have tried to avoid that as much as possible.

15 Q. But you knew no matter how you planned it, many would die; correct?

16 A. Yes.

17 See p. 574, Attachment 10 to Defendant’s Reply to Government’s Sentencing submission.

18 This testimony evidences why Mr. Ressam regrets what he did and why he has turned
19 his back on violence. He was a conflicted actor. Looking back, he sees how mistaken he was.
20 Thus, he has put his life at risk to make amends. He did the best that he could for the best of
21 reasons, with little acknowledgment or consideration from the government. He is prepared for
22 sentencing and the Court’s sentencing decision.

23 III. GUIDELINE CALCULATIONS

24 A. Introduction

25 At the April 27, 2005 hearing, government counsel stated that “Ressam does not
26 contest the [sentencing guideline] calculations undertaken by the government.” (Transcript p.

1 9). Counsel went on to state that “it is simply uncontested that the calculation based on the
2 nine counts for which Mr. Ressay was convicted results in a calculation under those
3 sentencing guidelines of 65 years to life in prison.” (Transcript p. 10).

4 The government is mistaken. The defense first lodged objections to guideline
5 calculations on January 31, 2003. (See Addendum to Presentence Report). Dissatisfaction
6 with the guideline calculations was amplified in both the defendant’s sentencing memorandum
7 of April 19, 2005, (Dkt # 365, pp. 42 -43), and the defendant’s reply dated April 25, 2005,
8 (Dkt # 374, p. 14). At the April 27th hearing, counsel for Mr. Ressay again objected to the
9 guideline calculations “particularly as . . . relates to the grouping of . . . counts.” (Transcript
10 p. 2). Because a final copy of the Presentence Report was not received by the defense until
11 just days before the April sentencing date, detailed objections were not possible. The
12 following argument supports our view that the guidelines have been grossly miscalculated and
13 that the applicable range is 42 to 44 years, not 65 years to life. The parties agree that Mr.
14 Ressay’s substantial assistance warrants a substantial downward departure.

15 **B. Guideline Calculation in Presentence Report**

16 *1. Grouping of counts*

17 The probation office considered each of the nine counts of conviction in preparing the
18 Presentence Report, and determined that, for purposes of determining the appropriate
19 guideline ranges, Counts I and IX may not be grouped pursuant to U.S.S.G. §§ 3D1.2 - 3D1.5.
20 PSR ¶ 38 at p. 9. Count I requires an independent guideline calculation because the term of
21 imprisonment imposed under Count I must run consecutively to any other sentence. PSR ¶
22 39, pp. 9-10, *citing* U.S.S.G. § 3D1.1(b). Count IX carries a statutorily imposed ten year
23 mandatory sentence and accordingly does not require any guideline calculation. As to the
24 remaining counts, the probation officer determined that Counts III, IV, and V should be
25 grouped together for guideline purposes because they each involve the victimization of
26 general societal interests. Counts II, VI, VII and VIII were grouped together because, like

1 Count I, they involve the attempted victimization of unknown individuals who might have
2 suffered if the planned attack had succeeded. PSR ¶ 41, p. 10.

3 *2. Upward adjustment to the offense level under § 3A1.4(a)*

4 The Sentencing Guidelines mandate a 12 level upward adjustment to a defendant's
5 offense level and an increase in the criminal history category for felonies that involve or were
6 intended to promote federal crimes of terrorism. U.S.S.G. § 3A1.4 (2000 Edition). The
7 Presentence Report applied this § 3A1.4(a) upward adjustment three times: first in
8 determining the offense level for Count I, next in calculating the guideline offense level for
9 Counts II, VI, VII, and VIII (Group 1), and finally in arriving at the offense level for Counts
10 III, IV, and V (Group 2). Accordingly, the offense level for Count I increased from twenty-
11 four to thirty-six, the offense level for Group 1 increased from twenty-seven to thirty-nine,
12 and the offense level for Group 2 increased from twenty-nine to forty-one. PSR §§ 45, 56 and
13 65, pp. 11-13.

14 *3. Criminal history calculation under § 3A1.4(b)*

15 The Presentence Report notes that, in determining Mr. Ressam's criminal history
16 category, provision U.S.S.G. § 3A1.4(b) is applicable. The probation officer concluded that §
17 3A1.4(b) places Ressam's otherwise non-existent criminal history into the highest criminal
18 history category, or Category VI. PSR ¶ 76 at p. 14. The probation officer did not confront
19 questions raised by the possibility that different criminal history categories may apply to
20 different counts because, as noted above, the § 3A1.4(a) upward adjustment was applied to all
21 three guidelines calculations.

22 **C. The Calculations in the Presentence Report Impermissibly Overuse §§**
23 **3A1.4(a) and (b)**

24 *1. U.S.S.G. § 3A1.4 cannot be applied multiple times to counts arising out of the*
same conduct.

25 Although each of Ressam's nine counts of conviction arose out of the same criminal
26 conduct, the probation office applied a § 3A1.4(a) upward adjustment for terrorism-related

1 felonies three times and the § 3A1.4(b) criminal history enhancement three times in
2 calculating the sentencing guideline ranges. While there is ample precedent suggesting that
3 double counting is generally permissible unless explicitly prohibited by the sentencing
4 guidelines, it is not permissible to apply the same enhancement multiple times to counts
5 arising out of the same criminal conduct.

6 The Fourth Circuit recently held in *United States v. Hammoud*, that the application of
7 two separate guideline provisions mandating upward adjustments for terrorism-related
8 offenses—§ 3A1.4 and § 2M5.3—did not constitute impermissible double counting. *United*
9 *States v. Hammoud*, 381 F.3d 316, 355-56, (4th Cir. 2004) (*en banc*) *vacated on Booker*
10 *grounds by* 73 U.S.L.W. 3436 (U.S. Jan. 24, 2005).⁶ This conclusion was echoed in an
11 Eleventh Circuit opinion noting that, “absent specific direction to the contrary, we presume
12 that the Sentencing Commission intended to apply separate guideline sections cumulatively.”
13 *United States v. Naves*, 252 F.3d 1166, 1168 (11th Cir. 2001). The *Hammoud* court also held
14 that the application of § 3A1.4 to a terrorism offense is permissible, as it was envisioned by
15 the application notes which define “federal crime[s] of terrorism” by reference to 18 U.S.C. §
16 2332b(g). *Hammoud*, 381 F.3d at 356. Neither of these conclusions, however, address the
17 question of whether § 3A1.4 can be applied three times to charges arising out of the same
18 conduct, resulting in three independent upward adjustments in the defendant’s offense level
19 and criminal history category.

20 While there does not appear to be conclusive authority on the application of § 3A1.4 to
21 multiple counts or groupings of counts arising out of one course of criminal conduct, opinions
22 evaluating similar questions raised by other enhancement provisions provide helpful guidance.

23 The Ninth Circuit has long recognized that a single sentencing enhancement should not
24 be applied repeatedly if the harm recognized by the enhancement was accounted for in its

25 ⁶The Fourth Circuit’s resolution of *Hammoud*’s guideline challenge was reinstated post-*Booker*.
26 *United States v. Hammoud*, 405 F.3d 1034 (2005).

1 initial application. *United States v. Martin*, 278 F.3d 988, 1004-05 (9th Cir. 2002); citing
2 *United States v. Calozza*, 125 F.3d 687, 692 (9th Cir. 1997). In *United States v. Syrax*, the
3 Ninth Circuit considered a defendant's claim that the same sentencing enhancement was
4 impermissibly applied to two separate counts of conviction. 235 F.3d 422, 428 (9th Cir.
5 2000). The court held that the alleged double counting was permissible because the criminal
6 activity underlying the two counts involved different harm and different victims. *Id* at 429.
7 The Ninth Circuit distinguished *Syrax* from an earlier case in which the court found that,
8 because the defendant's money laundering and fraudulent conduct involved the same abuse of
9 trust of the same vulnerable victims, it was inappropriate to apply enhancements for such
10 behavior to both counts. *Calozza*, 125 F.3d at 692. In other words, as the Ninth Circuit
11 articulated in a more recent opinion, double counting of sentencing enhancements is
12 appropriate when the "conduct supporting the counts is different and does not involve the
13 same wrong or victim." *Martin*, 278 F.3d at 1005; see also *United States v. Parker*, 136 F.3d
14 653, 654 (9th Cir. 1998) (concluding that double counting is appropriate "if it accounts for
15 more than one type of harm caused by the defendant's conduct, or where each enhancement of
16 the defendant's sentence serves a unique purpose under the guidelines.") Finally, the Ninth
17 Circuit has noted that the repeated application of a single guideline enhancement is
18 permissible when applied simply for the purpose of determining which grouping of counts has
19 a higher offense level for purposes of § 3D1.4, and the ultimate sentence thus reflects only one
20 of the enhancements. *United States v. Johnson*, 297 F.3d 845, 874 (9th Cir. 2002).

21 *2. Double counting the §3A1.4 upward adjustment in the Ressam case*

22 Case law addressing the double counting of enhancements demonstrates that § 3A1.4
23 has been over applied in the Presentence Report. As for its application to the grouped
24 counts—Groups 1 and 2—the *Johnson* opinion instructs that such double counting is an
25 appropriate method for determining which grouping leads to the higher guideline range, as
26 long as only one of these two enhancements is reflected in the ultimate sentencing calculation.

1 *Johnson*, 297 F.3d at 874. However, since guideline enhancements may not be applied to
2 separate counts involving the same harm and the same victim when both enhancements *will be*
3 reflected in the ultimate sentence, § 3A1.4 may not be applied both to Count I and to the two
4 groupings of counts. *Syrax*, 235 F.3d at 429.

5 As the Presentence Report notes, “there are no identifiable victims of the defendant’s
6 offense conduct.” PSR ¶ 31, p. 8. The probation officer nevertheless endeavored to split an
7 imagined group of victims into two categories: the “vaguely ... defined ... societal interests”
8 victimized by the false documents and statements, and the hypothetical “unknown ...
9 individuals [who would have suffered] loss of life ... as a result of the explosives,” had the
10 planned attack succeeded. PSR ¶ 41, p. 10. These loosely constructed, “non specific” and
11 “unknown” groups do not disguise the fact that there were no actual victims of Ressam’s
12 attempted attack: the potential victims, like the potential harm, are theoretical.

13 As noted above, sentencing enhancements may not be applied twice to counts
14 involving the same harm and the same victims. *Martin*, 278 F.3d at 1005. Ressam’s nine
15 counts of conviction reflect a single, unsuccessful scheme, and the § 3A1.4 Victim-Related
16 Adjustment should accordingly be applied only once. If Ressam had committed separate acts
17 of terrorism for the purpose of committing multiple terrorist attacks, multiple applications of
18 the enhancement would be appropriate. Adherence to the Presentence Report’s
19 recommendation would lead to a punishment identical to that of a defendant responsible for
20 plotting several different terrorist attacks. This result would be in direct conflict with the
21 principles underlying the Sentencing Guidelines.

22 One of the United States Sentencing Commission’s stated purposes in promulgating
23 grouping provisions is “to limit the significance of the formal charging decision and to prevent
24 multiple punishment for substantially identical offense conduct.” U.S.S.G. Ch. 3 Part D,
25 introductory commentary. Courts have understood this language as reflecting an aim to avoid
26 “excessive sanctions caused by blindly allowing a legally distinct, but realistically indistinct,

1 offense inherent in the principal count to gain sway,” resulting in “additional punishment for
2 conduct inextricably intertwined with the principal offense.” *United States v. Velasquez*, 304
3 F.3d 237, 246, 244 (3rd Cir. 2002). Indeed, the very purpose of grouping is to avoid
4 sentences that “pile on imprisonment for conduct that makes up the principal offense, but was
5 charged in separate fragments to increase punishment potential.” *Id* at 244. Notably, this
6 purpose was recognized by a federal court considering terrorism-related charges brought
7 against Osama Bin Laden and others for the bombing of the United States Embassy in Kenya.
8 *United States v. Bin Laden*, 126 F.Supp.2d 290 (SDNY 2001). In that case, the court’s
9 opinion acknowledged “the basic principle that additional punishment should not be imposed
10 for the same act.” *Id* at 299. Because Count I, An Act of Terrorism Transcending a National
11 Boundary, involves the same potential victims and potential harm reflected in each of Mr.
12 Ressay’s remaining counts of conviction, the application of the sentencing enhancement to
13 Count I and to the remaining counts would lead to additional punishment for “realistically
14 indistinct conduct.” *Velasquez*, 304 F.3d at 246. Such a result would amount to
15 impermissible double counting.

16 3. *Different criminal history categories should apply to different charges*

17 While there is no obvious precedent for applying different criminal history categories
18 to different counts for the purpose of arriving at a defendant’s ultimate sentence, related
19 authority logically suggests that such a split calculation is appropriate in this case. In *United*
20 *States v. Carvajal*, the court determined a defendant’s guideline range for his counterfeiting
21 offense separately from his drug-related offense, and the drug-related offense triggered a
22 ‘career offender’ adjustment to his criminal history category. *United States v. Carvajal*, 2005
23 U.S. Dist. LEXIS 3076 (SDNY); U.S.S.G. § 4B1.1. Since the two counts did not mandate
24 consecutive sentences, the ultimate sentence did not reflect the counterfeiting charge with the
25 lower criminal history category, but only the drug-related offense with the enhanced criminal
26 history category. *Id.* at 15. Presumably, had the offenses called for consecutive sentences, the

1 sentence for the counterfeiting charge—utilizing a lower criminal history category—would have
2 been stacked on top of the sentence for the Category VI drug-related offense.

3 4. §§ 3A1.4(a) and (b) should be applied to only Count I and not to Counts II–
4 VIII

5 In order to establish that a § 3A1.4 terrorism enhancement is warranted, the
6 government must prove that each count to which it is applied “involved, or was intended to
7 promote” a “federal crime of terrorism” as defined by 18 U.S.C. § 2332b(g). U.S.S.G. §
8 3A1.4, Application Note 1. An offense does not amount to a “federal crime of terrorism”
9 unless it is among the statutes listed in 2332b(g)(5)(B) and is committed with the purpose of
10 influencing or retaliating against government conduct. 18 U.S.C. § 2332b(g)(5)(A). The
11 Fourth Circuit in *Hammoud* noted that “the word ‘involved’ ... is typically employed to mean
12 ‘included,’” and therefore concluded that a conviction for violating an statute listed in §
13 2332b(g) satisfies § 3A1.4, so long as the listed offense was committed with “the intent to
14 influence or coerce government conduct.” *Hammoud*, 381 F.3d at 356 (internal quotations
15 omitted). In a case cited by the *Hammoud* court, the Sixth Circuit held that, alternatively, an
16 offense may satisfy § 3A1.4 without directly violating one of the statutes listed in § 2332b(g)
17 if the offense of conviction was “intended to promote” one of the enumerated federal crimes
18 of terrorism. *United States v. Graham*, 275 F.3d 490, 517 (6th Cir. 2001).⁷ In such a case,

19 _____
20 ⁷ This conclusion was strongly disputed in a lengthy dissent opining that “there must be a
21 conviction of one of the enumerated offenses in 18 U.S.C. § 2332b(g)(5)(B) before there can be an
22 enhancement under § 3A1.4,” 275 F.3d at 525 (Cohn, J., dissenting). The dissent includes a long and
23 thorough history of § 3A1.4, which quotes a Senate Conference Report describing what would become
24 the provision as “applicable only to those specifically listed federal crimes of terrorism, upon conviction
25 of those crimes with the necessary motivational element to be established at the sentencing phase of the
26 prosecution” *Id.* at 535. The dissent further concludes that there is nothing in the legislative history
suggesting that either Congress or the Sentencing Commission intended to create a distinction between
a felony that “involved” and a felony that “intended to promote” a federal crime of terrorism. *Id.*
Finally, the dissent notes that in five out of the six times that the enhancement was utilized 1999 and
2000, the offense of conviction to which it was applied was one of the statutes listed in 18 U.S.C. §
2332b(g)(5)(B). *Id.* at 130.

1 the court instructed, the district court must identify which of the listed offenses the
2 defendant's conduct sought to promote, and again, the court must find that the mens rea
3 element set forth in § 2332b(g)(5)(A) is satisfied. In Ressam's case, only one of the eight
4 counts to which the probation office applied the § 3A1.4 enhancement provision "involved" a
5 "federal crime of terrorism."⁸ Counts II through VIII did not "involve" a "federal crime of
6 terrorism," as this phrase is understood by the Sixth Circuit, because these counts are not
7 among those listed under § 2332b(g)(5)(B). In order to assure no impermissible double
8 counting, we respectfully suggest § 3A1.4 should be applied to Count I and not the grouped
9 counts because the provision more closely fits Count I than it fits the remaining counts.

10 **D. Conclusion**

11 The above authority supports our view that the Probation Department incorrectly
12 determined that § 3A1.4 could be utilized three different times even though Mr. Ressam was
13 involved in a single act that did not include separate and distinct harms or victims. The single
14 act risked a single harm. Accordingly, § 3A1.4 should have been applied only once. Because
15 Count I is a federal crime of terrorism and Counts II through VIII are not, it makes sense to
16 apply § 3A1.4 to Count I. Proper use of § 3A1.4 produces the following guideline
17 calculations. The guideline "range" for count I with use of § 3A1.4 is 300 months, the
18 statutory maximum, because that term is less than the guideline range. The guideline
19 calculations in the Presentence Report for groups I and II are each reduced by twelve levels
20 because § 3A1.4(a) does not apply. After applying an upward adjustment pursuant to
21 U.S.S.G. § 3D1.4 for multiple counts, a total offense level for the grouped counts, II through
22 VIII, is 29 with a Criminal History Category of 1. The sentencing range for these grouped
23 counts is therefore 87 to 108 months. Count IX requires imposition of a ten year consecutive
24 penalty. Adding these figures, the combined sentencing range is 507 to 528 months or 42 to

25
26 ⁸Count I, An Act of Terrorism Transcending a National Boundary in violation of 18 U.S.C. §§
2332b(a)(1)(B) and 2332b(c), is the only one of the eight counts listed under § 2332b(g)(5)(B).

1 44 years imprisonment. Our view that this is the correct analysis is underscored by a sensible
2 look at the numbers. Were the government and the Probation Department correct, the grouped
3 counts which involve identity fraud and other comparatively less serious crimes carry a
4 potential of life imprisonment, despite its statutory impossibility, while the more serious
5 charges of terrorism and intended use of an explosive device carry a combined maximum
6 possible penalty of 35 years imprisonment. This simply makes no sense. The range of 42 to
7 44 years imprisonment adds an appropriate incremental punishment for the less serious
8 grouped counts.

9
10 DATED this 25th day of July, 2005.

11 Respectfully submitted,

12 s/ Thomas W. Hillier
13 WSBA No. 5193
14 Attorney for Ahmed Ressam
15 Federal Public Defender
16 1601 Fifth Avenue, Suite 700
17 Seattle WA 98101
18 206/553-1100 voice
19 206/553-0120 facsimile
20 Tom_Hillier@fd.org

21 s/Michael Filipovic
22 WSBA No. 12319
23 Assistant Federal Public Defender
24 Attorney for Ahmed Ressam
25
26

1
2 **CERTIFICATE OF SERVICE**

3
4 I hereby certify that on July 25, 2005, I electronically filed the foregoing with the Clerk
5 of the Court using the CM/ECF system which will send notification of such filing to the
6 following:

7 John McKay
8 United States Attorney
9 700 Stewart Street, Suite 5220
10 Seattle, WA 98101

11 Mark Bartlett
12 Assistant United States Attorney
13 700 Stewart Street, Suite 5220
14 Seattle WA 98101

15 Michael Lang
16 Assistant United States Attorney
17 700 Stewart Street, Suite 5220
18 Seattle, WA 98101

19 and I hereby certify that I have mailed by United States Postal Service the document to the
20 following non CM/ECF participants:

21 Rick Cowan
22 United States Probation Office
23 700 Stewart St., Ste. 11101
24 Seattle, WA 98101

25 Robin Baker
26 Assistant U.S. Attorney
U.S. Attorney's Office for the Southern District of New York
One St. Andrews Plaza, New York, NY 10007.

s/ Charlotte Ponikvar
Legal Assistant
Federal Public Defender
1601 Fifth Avenue, Suite 700
Seattle WA 98101
206/553-1100 voice
206/553-0120 facsimile
Charlotte_Ponikvar@fd.org

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26