UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-20373-CR-LENARD/TORRES

UNITED STATES OF AMERICA

v.

NARSEAL BATISTE, et al.,

Defendants.

_____/

NARSEAL BATISTE'S OBJECTIONS TO PRE-SENTENCE INVESTIGATION REPORT AND INCORPORATED SENTENCING MEMORANDUM OF LAW

II: **INTRODUCTION**

Mr. Batiste was convicted on May 12, 2009 after the third trial of this matter. On December 12, 2007 the first trial resulted in declaration by this Court of a mistrial after several days of deliberation and heated debate between jurors failed to result in a unanimous verdict. In preparation for the second trial of this matter, the government successfully sought to change, over defense objections, the grandiose factual allegations in the original indictment describing the actions and motives of Mr. Batiste and that of the co-defendants as those of extreme radical Muslim *Jihadists*.

On January 20, 2008 the second trial of the action commenced. On April 12, 2008 again after several days of deliberations this Court declared another mistrial. Thereafter, the government once again announced it's intent to proceed with a third trial. On January 27, 2009 the third trial of this action commenced. This time the Government's spectacular theory of "radicalization" was abandoned. Gone was the Government's self-proclaimed "radicalization" expert. The Government

exchanged it's theory of "radicalization" for that of a theory of a *wanna be* violent gang with the six defendants, six poor, hard working individuals from Liberty City, bent on bringing down the United States Government.

Mr. Batiste maintains his innocence of the charges and inspite of his disagreement with the verdict, he recognizes that his objections to the verdict is not before the Court at this time. Nevertheless, the foregoing objections are lodged in order challenge any factual inaccuracies and/or mis-characterizations of facts as presented at trial.

II) OBJECTIONS TO PSI

Objections to references throughout PSI:

Mr. Batiste objects to all references throughout the PSI wherein it states that he agreed to work under the direction and control of al-Qaeda. He further objects to all references in the PSI to his "mission" as being a mission with the intent was to engage in any violent actions. Mr. Batiste further objects to all references imputing knowledge to Mr. Batiste of al-Qaeda being affiliated with the two informants as early as September of 2005 and continuing on through late January of 2006. Finally, Mr. Batiste objects to any references in the PSI which state that his intent in obtaining money from the informants was for any reason other than to finance his company and further his desire to form a local religious and civic organization.

a) Offense Conduct:

Page 4, ¶ entitled "Alias":

Mr. Batiste has never used the alais of "Maxwell Batiste."

Page 5, ¶3:

Mr. Batiste objects to the allegations herein where it states that Mr. Batiste and others agreed to "work under al Qaeda's direction and control, ...". Indeed, the evidence introduced by the Government indicates otherwise in the Government's own exhibits.

Page 5, ¶5:

Objections are raised to this paragraph wherein it improperly states that conversations took place in early September 2005 regarding "Batiste and his group" wanting to establish an army and wage violent *Jihad* as well as the "destruction of the Sears Tower". The Government's own evidence contradicts the allegation that Mr. Batiste spoke about the Chicago Sears Tower at any time before December 21, 2005. Indeed, reference is made to ¶21, where the PSI outlines the insistence by the informant, al-Saidi to Mr. Batiste that "peoples, places, and missions" are needed. It was then, and only then, that Mr. Batiste mentioned the Sears Towers, and indeed other buildings, such as the Empire State Building.

Page 6, ¶7:

Objection is raised to reference to an AK-47, and instructions allegedly provided by law enforcement to confidential informant Abbas al-Saidi.

Page 6, ¶7:

Batiste and others did not "unexpectedly make their way to al-Saidi's hotel room after Hurricane Wilma. The Government's own evidence is in direct contradiction of this assertion.

Page 7, ¶9:

Objection. al-Saidi never told Batiste that the Moorish Paradigm would be "turned over to al-Qaeda". Nor is the Moorish Paradigm a documents that explains the background of the Moorish Science Temple.

Page 8, ¶10:

Objection: There is no evidence of record to support the allegation that on November 5, 2005 co-defendant Burson Augustin and confidential informant al-Saidi "eventually drove by the FBI offices before returning to the Embassy,..."

Page 9, ¶13:

Objection to the reference that al Qaeda was the organization referenced by Mr. Batiste as the organization that al-Saidi's uncle from back home was affiliated with or that Mr. Batiste would be willing to wait "patiently" for the arrival of an "al Qaeda representative." Objection to the term "back home" equating to "al Qaeda". Neither Mr. Batiste nor co-defendant had any idea who would be coming to the United States. Indeed, the Government's own evidence indicated that neither Mr. Batiste or co-defendant, Mr. Patrick Abraham, nor any other co-defendant knew anything about the individual that was allegedly to come to the United States.

Page 10, ¶15:

Objection: There is no evidence of record in this trial regarding proffers or testimony offered at acquitted defendant's Lygenson Lemorin's pre-trial detention hearing in Atlanta, Georgia. Moreover, the Government's own evidence demonstrates that the idea of introducing a second informant at least, was born in early as September of 2005 as part of the Government's sting

operation.

Page 10, ¶16:

Objection to the absence of a date of the alleged conversation attributed to mr. Batiste in this paragraph. It appears that this paragraph has mixed in various conversations from different dates.

Page 10, ¶17:

Objection: At no time did Mr. Batiste ask al-Saidi or Assad regarding the status of the arrival of the "al-Qaeda representative". Moreover, it was al-Saidi that initiated the conversation regarding the arrival of someone from "back home" as opposed to an "al Qaeda" representative". Objection to the reference of "al Qaeda". The evidence in this record negates any knowledge on the part of Mr. Batiste or any of the co-defendants regarding the identity of the individual allegedly coming from overseas. This was not disclosed until January 28, 2006.

Page 11, ¶19:

Objection: "Mr. Batiste again reiterated his plan of "creating chaos, confusion, with the ultimate demise of the United States." There was no such conversation on December 16, 2005. Mr. Batiste was provided a cellular telephone on December 22, 2005, as opposed to December 16, 2005. (See page 12, ¶22 of PSI). Mr. Batiste also indicated that he needed all of the items requested on December 16,2005 and, his declared intent once obtained, he would march to the offices of Jeb Bush to announce, "I am here".

Page 12, ¶20: Objection to the characterization.

Page 12, ¶21:

Objection. This is a mis-characterization. At no time did Mr. Batiste tell al Saidi that he was not going to "let al-Qaeda down". Moreover, at no time during the course of the many rambling conversations, did the conversations reveal any definitive "mission." It was in this paragraph where for the first time, Mr. Batiste mentions the Sears Tower after al-Saidi instructed what Mr. Batiste needed to show the individual who was coming to the US, i.e., "people, places, missions" before any money would be forthcoming.

Page 16, ¶33:

Objection to the characterization. The issue of fear of law enforcement was introduced by al-Saidi, as early as November 7, 2005, during a two and a half hour conversation with Burson Augustin. Excluding the countless references by al-Saidi, about his fear of law enforcement and being stopped or followed by law enforcement in the context of this sting operation serves to mis-characterize the facts as developed throughout the eight months of this sting operation.

Page 17, ¶33:

Objection as to the characterization wherein it states, "...even though his actions appeared to contradict his desire for the money, as he had not returned multiple telephone calls placed to him the previous month by al-Saidi and Assaad."

Page 17, ¶34:

There was no meeting in December wherein Mr. Batiste had talked about more powerful explosives.

Page 20, ¶41:

Only one warehouse was shown to Mr. Batiste . The was one previous occasion in February where Assaad took Mr. Batiste to a location where a warehouse existed but they never entered the building. The Government's own witnesses, Assaad and Agent Velazquez confirmed this fact during their testimony.

Page 20, ¶42:

Objection to the characterization. The sequence of events on March 16, 1006 was that Assaad, requested that an oath be taken. Then, Assaad inquired of Mr. Batiste whether it was ok to speak in the presence of the other co-defendants, Mr. Batiste said that it was, and after Mr. Batiste agreed that Assaad could speak in the presence of the others, Assaad began to speak about the al-Qaeda plan to blow up FBI buildings. Moreover, after the FBI planned was discussed, informant Assaad assured Mr. Batiste that no FBI plans would go forward prior to the Chicago plan.

Page 21, ¶46:

Objection. Mr. Batiste and Mr. Abraham and informant Assaad did not drive past another Jewish Synagogue.

Page 22, ¶47:

Objection. Law enforcement did not intercept "several calls between Batiste, Phanor and Rotschild Augustine, in which the three talked about videotaping and photographing the federal courthouse complex buildings and the detention center across from Miami-Dade College.

Page 22, ¶48:

Objection. On March 26, 2006, "Assaad (informant) met with Batiste and Burson Augustin

at the UC warehouse, where Batiste provided Assaad with the 'pictures and the surveillance of the building - FBI building and downtown building, the same building where Padilla, Noreiga and other inmates were found." During the course of this conversation, which lasted in excess of one hour, Mr. Batiste informed Assaad that he did "not want the Brothers involved." This conversation, like several other conversations, clearly show an aggressive informant driving the words of Batiste under the guise of making good on his continuing representations of providing financial assistance to Mr. Batiste. During this conversation, Mr. Batiste attempts to make it clear to Assaad that none of the Brother will be involved and the informant, again, turns Batiste's words around.

Page 22, ¶50:

Objection. Characterization and context.

Page 23, ¶52;

Objection to the statement, "Thereafter, Khanbey learned about the informants,...". This is vague and misleading. There is no conversation wherein Khanbey states, "you're dealing with the FBI. Wake up."

Page 23-24, ¶53:

Objection to the omissions and characterizations. There were numerous attempts by law enforcement throughout the course of the eight month period in which the informants were engaging Mr. Batiste and asking, indeed, begging Mr. Batiste to meet with a bomb expert. At no time did Mr. Batiste agree to meet with an explosives expert. Indeed, the evidence demonstrated that in spite of the aggressive efforts by law enforcement, including promises of more money if Mr. Batiste would

meet with an explosives expert, Mr. Batiste refused to do so.

Page 24, ¶55:

Mr. Batiste maintains that he was the leader of a religious organization. Objection to characterization of Mr. Batiste as being a leader to "several unindicted individuals." Objection as to characterization of Mr. Batiste's attempts to "obtain weapons related accessories and vehicles that he intended to use to commit acts of violence..."

Page 25, ¶59:

No Adjustment for Obstruction of Justice is warranted. Mr. Batiste's testimony was aptly supported and corroborated by the audio and video recordings introduced into evidence, as well as the countless recordings not introduced into evidence contained in the three months of Title III interceptions.

Page 25, ¶63:

Objection. §2M1.1(a) is inapplicable to this case.

Page 26, ¶64:

Same objection as ¶63.

Page 26, ¶66:

Mr. Batiste objects to the 12-point enhancement under §3A1.4(a) for an offense which intends to "promote a federal crime of terrorism". At no time during the course of the Government's sting operation was it Mr. Batiste's intent to engage in any terrorist act. It was Mr. Batiste's intent to obtain money from al-Saidi and Assaad. to promote his business and the non-violent objectives

of his religious group.

Page 26, ¶67:

Mr. Batiste was a leader of a small religious group of individuals. He further was the president of a Azteca Corporation.

Page 26, ¶72.

Objection to the total base offense level of 59.

Page 27, ¶76:

Objection to the characterization of the facts. The alleged "victim" in this matter was armed with a firearm which he discharged at Mr. Batiste and Mr. Abraham. Subsequent to the charges being dropped, the court record in this case shows that the victim, whose gun was confiscated, was returned to him by the court.

III. LEGAL OBJECTIONS TO PSI

Pages 25 & 26, ¶'s 62, 63 & 64 respectively:

Mr. Batiste objects to the recommendation by Probation that the "treason" guideline pursuant to §2M1.1(a) shall be used as the most analogous guideline for offense of conspiracy to wage war against the United States as charged in Count Four.

Paragraph 63 of the PSI states as follows:

"In accordance with §2X5.1, since Count Four is a felony offense for which no guideline expressly has been promulgated, the application of the most analogous guideline shall be used. Count Four is a violation of 18 U.S.C. §2384, conspiracy to levy war against the U.S. Government.

The most analogous guideline for this offense of conviction is found in §2M1.1(a)."

However, the Government has previously indicated that "treason" played no part in the conduct charged under Count 4 (18 USC §2384). Indeed, the Government indicated in opposing memorandums filed by the Defense in opposition to the Government's "redaction" of the indictment that "...we did not charge treason....We charged a seditious conspiracy and different conspiracies other than treason." The Government went on to argue, *vehemently*, that "this is not a treason case. It is completely different." (Volume XIV, trial transcript of Second trial, February 14, 2008, pg.90).

Moreover, this Court in ruling on issues raised by the pleadings filed regarding what the government characterized as "surplusage" and what the defense characterized as a constructive amendment to the indictment, referenced the distinctions between title 18 U.S.C. §2384 (seditious conspiracy) and title 18 U.S.C. §2381 (Treason), a critical distinction is the element of "owing of allegiance to the United States" and the "punishment" appropriated by the Congress. Clearly, it cannot be said that §2M1.1(a), the sentencing guideline offense for "Treason" which carries a maximum sentence of death is the appropriate guideline range to follow for a violation of the seditious conspiracy statute which carries a maximum penalty of 20 years.

In sum, this Court has previously determined that the "charges" in this case were not analogous to a "treason" charge. (Volume XIV, trial transcript of Second trial, February 14, 2008, pg.142,90; see also D.E. 898, pg., 10, fn. 3).

There have been cases where §2M1.1(a) has been found to be a "sufficiently analogous" offense guideline. For example, in *United States v. Rahman*, 189 F.3d 88, 142-143 (2nd Cir. 1999) the court found that the conduct at conviction was "sufficiently analogous" to that which is

proscribed under §2M1.1(a). The charges in *Rahman* as well as the jury's verdict in that case makes the Rahman case inapplicable to the offense conduct in the case before this court. In *Rahman* all defendants were charged with seditious conspiracy and all were convicted, no defendants were charged with conspiracy to provide material support to foreign terrorist organization. All defendants had taken significant steps during the course of a four (4) year period to effectuate their goal to wage war against the United States. Indeed, most of these plans had been in existence prior to the introduction of informants into the case. Some of the defendants were linked directly to the 1993 bombing of the World Trade Center which resulted in six deaths. Moreover, the defendants were actively engaged in military training, during the course of the execution of search warrants for the home, work locker and vehicle belonging to co-defendant El Sayid Nosair, a hand-written notebook memorializing his intent to create an Islamic state, on November 5, 1990 Rabbi Meir Kahane, a former member of the Israeli parliament and founder of the Jewish Defense League was assassinated, countless visits were had between the co-conspirators detailing each and every detail of the plans to wage war. Plans were made to assassinate the President of Egypt, Hosni Mubarek. Co-defendants had purchased fuel and timers to make bombs. They were also actively engaged in acquiring detonators for the bombs. Contact was made with at least one engineer in order to assess the weak points of certain tunnels in order to effectuate part of the plans. Videotapes were acquired of some of the co-defendants actually making bombs with fertilizer and fuel. It was shortly after this video that defendants were arrested.

Despite the Government's best efforts to get Mr. Batiste to meet with an explosives expert, Mr. Batiste continually and unequivocally refused. Despite the Government's best and persistent

efforts to get Mr. Batiste to obtain weapons, Mr. Batiste refused. Despite the Government's best efforts to get Mr. Batiste to meet with an explosives expert, Mr. Batiste refused. Indeed, unlike the situation in *Rahman* were the defendants were all to eager to undertake the detailed and significant planning–in the absence of informants, Mr. Batiste stalled and stalled the informants in this case.

Page 27, ¶75 and Page 33, ¶'103: Mr. Batiste has zero criminal history points. Nevertheless, pursuant to §3A1.4(b) of the advisory guidelines, there is a "presumptive criminal history category of VI". see United States v. Aref, 3007 U.S.LEXIS 17926 (March 27, 2007). The courts have previously held that notwithstanding the applicability of §3A1.4(b), the courts have the authority and the discretion to horizontally depart downward when the criminal history of VI substantially over-represents the seriousness of the defendants criminal history. Id. at pg. 7 citing to United States v. Meskini, 319 F.3d 88, 92 (2d Cir. 2003). The impact of this advisory guideline cannot be overstated. The court heard testimony during the course of the defense case from numerous witnesses attesting to Mr. Batiste's good works. His work ethic. His strong family ties and values. Previous to the verdict in this case, Mr. Batiste has never been convicted of any offense, let alone any violent offense. A horizontal departure from a criminal history category of VI is warranted in this case and Mr. Batiste respectfully requests that this Court exercise it's discretion and depart downward.

Page 34, ¶110: DOWNWARD DEPARTURE FROM ADVISORY GUIDELINES

Mr. Batiste respectfully disagrees with the PSI wherein it states that there is no basis for a downward departure from the advisory guideline range. There are several statutory sections under the advisory guidelines which call for a favorable exercise of discretion resulting in a downward departure from the advisory guidelines:

INCHOATE OFFENSE REDUCTION UNDER §2X1.1(b)(2)

§2X1.1(b)(2): In relevant part, this section of the advisory guidelines reads as follows:

> If a conspiracy, decrease by **3** levels unless the person solicited to commit or adit the substantive offense completed all of the acts he believed necessary for **successful completion** of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for the apprehension or interruption by some similar event beyond their control.(emphasis added)

Of particular significance to this case is the following "Background" commentary in this Guideline:

> In most prosecutions for conspiracies or attempts, the substantive offense was substantially completed or was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim. In such cases, no reduction of the offense level is warranted. Sometimes, however, the arrest occurs well before the defendant or any coconspirator has completed the acts necessary for the substantive offense. Under such circumstances, a reduction of 3 levels is provided under ¶2X1.l(b)(1) or (2).

There is no question that the alleged offenses for which Mr. Batiste and his co-defendants (excluding, of course acquitted defendants, Lyglenson Lemorin and Naudimar Herrera) were convicted were not anywhere near completion. Indeed, during the course of a nationally broadcast

news conference given by the then attorney general of the United States, Alberto Gonzales, the deputy director for the Federal Bureau of Investigation, the prosecuting agency in this case, stated that the conduct of the indicted defendants was "more aspirational than operational". (see June 23, 2006, Washington Post Article, quoting Alberto Gonzales and John Pistole, Deputy Director for the Federal Bureau of Investigation).

The facts, as it relates to this issue are not in dispute. At no time did law enforcement find the defendants in possession, at any time, of any items that would be necessary for the completion of the offenses charged in this case. The Eleventh Circuit has previously held that a 3-point reduction under §2X1.1 is warranted when a defendant has not completed or was not close to completed all of the acts they believed necessary for the completion of the offense. See United States v. Puche, 350 F.3rd 1137, 1155 (11th Cir. 2003).

§5K2.0:

Under §5K2.0 a court may depart from the applicable guideline if there exists circumstances that were not adequately taken into account when the guidelines were promulgated.

Section (b) of §3553 directs itself to the role of the USSG: In particular, Section (b) states in pertinent part as follows: "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

The Introduction of the United States Sentencing Guideline Manual

, Chapter 1 Pt. A(b) entitled Departures states as follows:

> The sentencing statue permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result. . . The Commission intends the sentencing courts to treat each guideline as carving out a "heartland", a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. . .

The following are the considerations to be had by the Court when considering whether to depart from the advisory guidelines:

(1) What features exist that would take it outside the Guidelines "heartland"?
(2) Has the Sentencing Commission prohibited departures based on these particular features?
(3) Are these features encouraged by the Sentencing Commission?
(4)If the features are not encouraged by the Commission, does the Commission discourage the feature?

Koon, adopted the aforementioned considerations from the case of United States v. Rivera, 994 f.2d 942 (1st Cir. 1993). The courts have ruled that although one factor alone, may not rise to a sufficient level of mitigation, a combination of factors, may when taken together constitute a 'mitigating circumstance not adequately taken into consideration' by the Sentencing Commission. See United States v. Cook, 938 F.2d 149 (9th Cir. 1991), and United States v. Alba, 38 Fed. Appx. 707 (3rd Cir. 2002) citing to United States v. Iannone, 184 F.3d. 214, 226 (3rd Cir. 1999).

There are several factors present in this case that take this case outside of the "heartland" and which warrant a departure from the advisory guideline sentence. The factors are as follows:

1. The efforts by Mr. Batiste at encouraging individuals to be gainfully employed by acquiring skills and pursuing habits of self-discipline, physical activity and family unity.

2. The over-reaching by the Government in two forms: (1) by employing a plan to provide, and indeed, providing large amounts of money to Mr. Batiste and his co-defendants who were from impoverished individuals, as in inducement to commit a crime through the use of two unscrupulous informants and (2) engaging the services of an informant who resorted to, with the express approval of law enforcement, in constant manipulative tactics in order to induce Mr. Batiste into committing a crime. See United States v. Nolan-Cooper, 155 F.3d 242 (3rd Cir. 1998).

> It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.
>
> Koon v. United States, 116 S.Ct. 2035 (1996)

Under 28 U.S.C. § 991(b)(1)(B), the sentencing court is directed to:

provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices. . .

Additionally, Title 18 U.S.C. § 3553(a) directs itself to the what is to be considered by the sentencing court when imposing sentence.

(a) **Factors to be considered in imposing a sentence**.- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

IV. CONCLUSION:

Judge Weinstein, Senior District Judge from the Eastern District of New York, in an opinion he authored in United States v. Naugle, 879 F.Supp. 262 (E.D.N.Y. 1995) wrote as follows: "Under the present Guidelines system, only the district judge is in a position to put a human face on sentencing." Mr. Batiste stands convicted of some of the most egregious violations that a defendant can be convicted of. However, the circumstances of the facts giving rise to the charges and the

convictions should give this court pause. It is respectfully submitted that the advisory guidelines as applied to Mr. Batiste are not proportionate to his actions. Moreover, it is respectfully requested that this Court exercise its discretion favorably and depart from the advisory guideline.

Finally, in addition to a downward departure, a variance is warranted pursuant to the 3553 factors.

I HEREBY CERTIFY that a copy of the foregoing was furnished via EC-CMF to all of the foregoing counsel listed below and via email to Ricardo Garcia, United States Probation on this 10th Day of November 2009.

RESPECTFULLY SUBMITTED,

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