IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	
v.	*	**CRIMINAL NO. PWG-17-661**
	*	
CARLSON CHO	*	
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GOVERNMENT'S RESPONSE TO DEFENDANT CHO'S SENTENCING MEMORANDOM

The United States of America, by and through its undersigned counsel, hereby submits its response to defendant Carlson Cho's sentencing memorandum dated December 28, 2018 (ECF No. 135).

Background

As set forth in the government's sentencing memorandum dated December 27, 2018, and incorporated here, Cho was a member of a large-scale business email compromise scheme during which Cho and his co-conspirators victimized at least 13 individual and business victims located throughout the United States, obtaining over $4.2 million and attempting to obtain over $10.9 million. Cho's conduct was especially egregious in that he was a Bank of America employee, a position which allowed him to fraudulently authorize large wire transactions to launder (or attempt to launder) victim funds to bank accounts outside the United States, including South Africa, Cameroon, the Czech Republic and Poland. In addition, while Cho was initially recruited by Fomukong to assist with these wire transactions, Cho also recruited others to open drop accounts and, eventually, began communicating directly with the co-conspirators in South Africa

in order to perpetrate the fraud without Fomukong acting as the middle man. In total, Cho laundered over $1 million of victim funds out of the country using his position as a Bank of America employee and caused an intended loss to Victims C, D, L and M of over $3.3 million.

The Guidelines

The government, the U.S. Probation Office, and the defendant all agree that the base offense level is 6, plus an additional 16 levels due to the amount of loss in this case. In addition, all three agree that an additional 2 levels is added because there was substantial activity outside the United States and 2 more levels are added because Cho was convicted of 18 U.S.C. § 1956. As such, the parties agree that the adjusted offense level is (after a 3 level decrease for acceptance of responsibility) at least 23. Because Cho is a criminal history category I, the guidelines range at this base offense level is 46 - 57 months imprisonment.

The parties disagree as to the application of both a 2 level enhancement because the offense resulted in a substantial hardship to at least one victim and a 2 level enhancement because the offense involved sophisticated laundering. Because both enhancements apply under the facts of this case, the defendant's adjusted offense level should be 27 (after acceptance of responsibility). The guidelines range for this base offense level is 70-87 months imprisonment.[1]

A. Legal Standard

Unlike a trial, at sentencing the standard of proof is a preponderance of the evidence. *United States v. Brooks*, 957 F.2d 1138, 1148 (4th Cir. 1992). The Fourth Circuit has repeatedly held, post-*Booker*, that the standard of proving sentencing guideline factors remains by a

[1] The PSR also calculates a 2-level enhancement for Cho's abuse of position of trust. Because this was not contemplated in the plea agreement, the government does not advocate for this enhancement.

preponderance. *See, e.g., United States v. White*, 405 F.3d 208, 219 (4th Cir. 2005) ("In any given case after Booker, a district court will calculate, consult, and take into account the exact same guideline range that it would have applied under the pre-*Booker* mandatory guidelines regime."); *United States v. Morris*, 429 F .3d 65, 72 (4th Cir. 2005) (holding that, post-*Booker*, district courts should apply a preponderance of the evidence standard, taking into account that the resulting guideline range is advisory).

Moreover, it is undisputed that at a sentencing hearing, the court may consider a "broad scope" of information. *United States v. Falesbork*, 5 F.3d 715, 722 (4th Cir. 1993). Since before the founding of our Nation, sentencing judges have relied upon a wide array of "'sources and types of evidence . . . to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law.'" *Witte v. United States*, 515 U.S. 389, 397-98 (1995) (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949)). As the Supreme Court articulated in *Witte*, "a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id*. at 398 (internal quotations and citations removed).

This broad view as to the admissibility of evidence during sentencing is mandated in 18 U.S.C. § 3661, which states, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Both the U.S. Sentencing Guidelines and the Federal Rules of Evidence reiterate the broad range of evidence available for a court's consideration at sentencing, with the Guidelines permitting all relevant and reliable evidence. U.S.S.G. § 6A1.3(a) ("sentencing judges are not

restricted to information that would be admissible at trial."); Fed. R. Evid. 1101(d)(3) (exempting sentencing proceedings from the Federal Rules of Evidence). The Fourth Circuit's statement in *United States v. Bowman*, 926 F.2d 380, 381 (4th Cir. 1991), aptly summarizes this principle: "[t]he type of information to be considered by a sentencing judge is unlimited." Thus, a sentencing judge may consider any relevant and reliable evidence in determining a defendant's sentence.

In accord with this broad view of the admissibility of evidence, the Fourth Circuit has specifically held that reliable hearsay evidence is admissible at a sentencing hearing. *E.g.*, *Bowman*, 926 F.2d at 381 (holding uncorroborated testimony was sufficiently reliable to be admissible at sentencing). For example, the Fourth Circuit has upheld a sentencing judge's reliance upon the testimony of officers who testify as to the content of interviews they conducted with individuals whose statements implicated the defendant. *E.g., United States v. Marshal*, 39 Fed. Appx. 903, 904 (4th Cir. 2002) (holding the sentencing judge's reliance upon a detective's testimony as to an individual's incriminating statements regarding the defendant was not clearly erroneous because other evidence corroborated the statements); *United States v. Randall*, 171 F.3d 195, 211 (4th Cir. 1999) (holding the district court did not err in relying upon a detective's testimony regarding a co-conspirator's statements because the sentencing judge believed that the statements were reliable); *United States v. Jackson*, 208 F.3d 210 (4th Cir. 1999) (holding the sentencing judge did not err in considering "testimony from a federal agent who summarized statements taken from co-conspirators charged in an earlier indictment.").

While *Crawford v. Washington*, 541 U.S. 36 (2004), bars the admission at trial of out-of-court testimonial statements made by individuals not subject to cross-examination, every Court

of Appeals has held that the Confrontation Clause is not applicable to sentencing proceedings. *United States v. Bras*, 483 F.3d 103, 109 (D.C. Cir. 2007) ("Nothing in Crawford suggests that the Court intended to overturn its precedents permitting the use of hearsay at sentencing. We are certainly not at liberty to do so."); *Luciano*, 414 F.3d at 179 (holding "[n]othing in Crawford requires us to alter our previous conclusion that there is no Sixth Amendment Confrontation Clause right at sentencing."); *United States v. Martinez*, 413 F.3d 239, 242-44 (2d Cir. 2005) (holding that Crawford and Booker "provide no basis to question prior Supreme Court decisions that expressly approved the consideration of out-of-court statements at sentencing."); *United States v. Wynn*, 214 Fed.Appx. 118, 121 (3d Cir. 2007) (holding "sentencing court's consideration of hearsay" did not violate the Confrontation Clause) (unpublished); *United States v. Fields*, 483 F.3d 313, 332 (5th Cir. 2007) (holding the "Confrontation Clause does not operate to bar the introduction of testimonial hearsay at noncapital sentencing."); *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006) ("there is nothing specific in . . . Crawford that would cause this Court to reverse its long-settled rule of law that [the] Confrontation Clause permits the admission of testimonial hearsay at sentencing proceedings."); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005) (holding the Confrontation Clause is not applicable at sentencing because "witnesses providing information to the court after guilt is established are not accusers within the meaning of the confrontation clause."); *United States v. Brown*, 430 F.3d 942, 944 (8th Cir. 2005) (holding that Crawford "does not alter the pre-Crawford law that the admission of hearsay testimony at sentencing does not violate confrontation rights."); *United States v. Littlesun*, 444 F.3d 1196, 1200 (9th Cir. 2006) ("the law on hearsay at sentencing is still what it was before Crawford: hearsay is admissible at sentencing . . . ."); *United States v.*

Bustamante, 454 F.3d 1200, 1202 (10th Cir. 2006) ("We see nothing in Crawford that requires us todepart from our precedent 'that constitutional provisions regarding the Confrontation Clause are not required to be applied during sentencing proceedings.' (quoting *United States v. Hershberger*, 962 F.2d 1548, 1554 (10th Cir. 1992) . . . ."); *United States v. Chau*, 426 F.3d 1318, 1321-23 (11th Cir. 2005) (holding the admission of hearsay evidence at sentencing was not plain error because it did not violate the Confrontation Clause).

Unpublished opinions from the Fourth Circuit are harmonious with these decisions. *E.g., United States v. Debreus*, 255 Fed. Appx. 725, 727 (4th Cir. 2007) (holding defendant's argument that Crawford applies at sentencing is without merit) (unpublished); *United States v. Newbold*, 215 Fed.Appx. 289, 299 (4th Cir. 2007) (holding the sentencing judge's reliance upon testimonial hearsay at sentencing did not violate the Confrontation Clause) (unpublished).

Consistent with these principles, it is proper for the government to submit affidavits to the Court as a result of a federal investigation and for the Court to rely on such affidavits.

B. The Disputed Guidelines

1. *Substantial Financial Hardship*

U.S.S.G. § 2S1.1(b)(2)(A)(iii) provides for a 2-level enhancement where the defendant's offense "resulted in substantial financial hardship to one or more victims." The Guideline commentary, at Application Note 4(f) states that the non-exclusive factors to consider is whether the offense resulted in the victim: "(i) becoming insolvent; (ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code); (iii) suffering substantial loss of a retirement, education, or other savings or investment fund; (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans; (v) making substantial changes to

his or her living arrangements, such as relocating to a less expensive home; and (vi) suffering substantial harm to his or her ability to obtain credit." Applying these factors, it is clear that Victims C and D, as well as Victim M, suffered substantial financial hardship due to Cho's fraudulent conduct.

Pursuant to the defendant's plea agreement, Cho was involved in three main fraudulent transactions. First, Cho assisted with wiring or attempting to wire funds obtained from Victim C and Victim D to accounts in Cameroon and South Africa. Specifically, Cho *successfully* wired $350,000 to a bank account located in South Africa in the name of Business 2. *See* Exhibit ("Ex.") A at ¶ 5 (Affidavit in Support of the Government's Response to Defendant Cho's Sentencing Memorandum). Cho unsuccessfully attempted to wire $393,750 to Fomukong's mother in Cameroon. *Id.* ¶ 5. As such, the total loss to Victim C and Victim D is $350,000.

Law enforcement spoke with Victim C (who is a resident of Nevada) on January 3, 2019. Victim C indicated that Cho's and his co-conspirators' conduct resulted in substantial financial hardship for her and her husband (Victim D).[2] *Id.* ¶ 6. Specifically, Victims C and D had saved for over 15 years to purchase their first home, which they believed they were doing when they sent the fraudulent wires to Individual 3's drop account (which was opened at the direction of Cho). *Id.* The stolen funds were a significant portion of their savings. *Id.* Fortunately, a family member was able to provide the balance of the stolen amount, or else Victims C and D would not have been able to complete the purchase of their first home. *Id.* Clearly, the defendant's conduct

[2] Notably, Victim C also provided a Victim Impact Statement in which she discusses the mental and emotional toll the fraud has had on her, as well.

thus caused Victims C and D a substantial loss of a savings fund, as well as significant hardship in purchasing their first home.

Moreover, Cho's conduct resulted in substantial financial hardship to Victim M. Specifically, Cho initiated four wire transfers of Victim M's stolen funds to four separate accounts abroad: (l) a $250,000 wire to a bank account in the Czech Republic; (2) a $500,000 wire to a bank account in South Africa; (3) a $574,955 wire to a bank account in Poland; and (4) a $760,000 wire to a second bank account in Poland. Of the original $2,085,000 total attempted wires, the bank was able to stop and recover $1,509,985. *Id.* ¶ 7. However, the remainder went unrecovered and resulted in a loss of $575,015. *Id.* Advantage Bank and Victim M negotiated a settlement in which Victim M received $318,000 from Advantage Bank's insurer. *Id.* The remaining $257,015 is a loss for Victim M. *Id.*

Law enforcement spoke with Victim M on January 3, 2019. *Id.* at ¶ 8. Victim M is a small business owner whose business lost significant profit and a major investor to the business due to the defendant's fraudulent conduct. *Id.* Indeed, Victim M had to recruit new individuals and businesses to invest in his business in order to keep it afloat. *Id.* This impact on his business constitutes a substantial financial hardship.

As such, there is reliable evidence that, by a preponderance of the evidence, the defendant's offense caused a substantial financial hardship to at least one victim, and a 2-level enhancement applies.

2. *Sophisticated Laundering*

U.S.S.G. § 2S1.1(b)(3) provides for a 2-level enhancement where a defendant was convicted under 18 U.S.C. § 1956 and "the offense involved sophisticated laundering." The

Guideline commentary, at Application Note 5, explicates that "sophisticated laundering" "means complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1956 offense" and typically involves the use of fictitious entities, shell corporations, two or more layering of transactions, or offshore financial accounts.

Here, the defendant's plea agreement (as well as the plea agreements for Cho's co-conspirators, including Fomukong, Eyong, and Ganda) specifies that each of these factors occurred here. First, Cho and his co-conspirators registered fictitious businesses in Maryland and elsewhere, and then opened corresponding drop accounts. In addition, Cho and his co-conspirators made out cashier's checks to fictitious businesses, which were thereafter negotiated in Texas, and layered the withdrawals and other transactions. Crucially, Cho also was responsible for wiring the funds to various offshore financial accounts, including accounts in Cameroon, South Africa, the Czech Republic, and Poland. The 2-level enhancement for sophisticated laundering clearly applies.

Conclusion

At sentencing, the government anticipates that, based on the government's calculation of the guidelines (which does not include a 2 level enhancement for abuse of position of trust), the advisory guidelines range will be 70-87 months imprisonment. The government further anticipates that it will recommend a sentence of 87 months imprisonment—regardless of the guidelines calculations. In addition, the government will seek both a restitution and forfeiture order in the amount of $1,128,387, comprised of the following:

- $350,000 to Victims C and D;
- $318,000 to Advantage Bank's insurer;

- $257,015 to Victim M; and
- $203,372 to Victim L.

The government respectfully contends that such a sentence is sufficient but not greater than necessary to achieve the purposes of sentencing pursuant to 18 U.S.C. § 3553(a).

Respectfully submitted,

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