

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES,

Plaintiff,

v.

NOAH ROBINSON,

Defendant.

NO. 89 CR 908-31

Judge James B. Zagel

**DEFENDANT'S OBJECTIONS TO
PRESENTENCE REPORT AND GOVERNMENT'S AMENDED VERSION OF OFFENSE**

NOW COMES the defendant Noah Robinson, by his attorney John M. Beal, and, pursuant to Fed. R. Crim. P. 32, submits the following objections to the Supplemental Presentence Report and the Government's Amended Version of the Offense in this case:

1. Applicable Guidelines. As stated on page one of the Government's Amended Version of the Offense, the indictment in this case was returned on October 26, 1989. That is six days before the 1989 version of the Guidelines became effective. Defendant asks that the 1987 version of the Guidelines with the 1988 amendments be applied to him. See, *United States v. Seacott*, 15 F.3d 1380, 1383 (7th Cir. 1994).

2. Non-conspiracy Counts. The Supplemental Presentence Report appears to suggest that the five substantive counts are appropriate for sentencing under the Guidelines. Defendant Robinson objects. The acts that give rise to liability for those counts ended before the effective date of the Guidelines, November 1, 1987. Judge Marvin Aspen imposed non-guideline sentences on all of those

counts. Defendant urges that this Court do likewise, and argues that to impose a Guidelines sentence would violate defendant Robinson's rights under the ex post facto and due process clauses, for the reasons set forth below.

3. Application of Statutory Maximums to RICO Predicate Acts.

The probation officer and the government assert that the applicable penalties for the predicate acts are those in effect at the end of the conspiracy, presumably the date of the indictment. That is based on the "straddle" doctrine applicable to conspiracy cases: "the ex post facto clause is not applicable to offenses which began before the effective date of a statute and continue thereafter." *United States v. Couch*, 28 F.3d 711, 715. (7th Cir. 1994). Defendant submits that the application of the straddle doctrine to RICO predicate offenses violates his rights under the Ex Post Facto and Due Process clauses of the Constitution where the statutory maximum penalties for the substantive offenses increased after the offenses were completed.

The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic." *Lynce v. Mathis*, ___ U.S. ___, 117 S.Ct. 891, 895 (1997).

This prohibition has long been applied to "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798). The ex post facto

prohibitions are also embodied in the due process clause, applicable to the executive and judicial branches. *United States v. Brown*, 555 F.2d 407, 419-420 (5th Cir. 1977). To the extent that the guidelines are not purely legislative in nature, they are nevertheless still constrained by ex post facto limitations.

Defendant Robinson submits that RICO predicate acts constitute criminal conduct that is completed at the time of the conclusion of each predicate act itself. As the Seventh Circuit stated in *Couch*, there are three prongs to the ex post facto test: 1) the provision involved must be penal or criminal in nature; 2) it must be retrospective; and 3) it must disadvantage the defendant. This is because "(t)he ex post facto clause allows individuals to rely on existing law regarding criminal conduct and prevents retrospective punishment for crimes committed before any changes in the law." *United States v. Couch*, 28 F.3d at 713.

The statutory maximum penalties for the racketeering acts at the time they were completed were the sentences imposed by Judge Aspen: Racketeering Act #23, attempt murder of Robert Aulston, five years (18 U.S.C. §1952A, now 1958); racketeering act #24, murder of Leroy Barber, life (18 U.S.C. §1952A, now 1958); racketeering act 27, attempt murder of Janice Rosemond, 20 years (18 U.S.C. §1512); and narcotics conspiracy, life (28 U.S.C. §846). Only the narcotics conspiracy continued past November 1, 1987.

RICO has been held to be a straddle offense. See, *United*

States v. Masters, 978 F.2d 281 (7th Cir. 1992); *United States v. Robertson*, 73 F.3d 249, 251 (9th Cir. 1996). However, defendant Robinson objects to the utilization of the straddle doctrine to allow the statutory maximums at the time of the completion of particular predicate acts to be overridden by higher statutory maximums adopted after the effective date of the guidelines. Defendant Robinson is unaware of any case that directly resolves this issue.

4. Section 2A2.1(b) (4) Enhancements for Attempted Murders of Robert Aulston and Janice Rosemond. Defendant Robinson objects to the imposition of two points for "a conspiracy or assault motivated by a payment or offer of money..." Defendant Robinson was not motivated by a payment or offer of money being made to him, so this enhancement should not be applied to him. This court may have interpreted this provision differently in the *Masters* case (see, *United States v. Masters*, 978 F.2d 281, 283, 7th Cir. 1992). If so, defendant Robinson asks the Court to reconsider its application to the facts of this case.

5. Aggravating Role. Defendant Robinson objects to the imposition of four points for a role as an organizer or leader. "The government has the burden of proving by a preponderance of the evidence the existence of the aggravating role." *United States v. Yates*, 990 F.2d 1179, 1182 (7th Cir. 1993). In its amended version of the offense, the government characterizes defendant Robinson's

role as being "to provide narcotics sources to the gang." (page 7) The government states that he introduced the El Rukns to numerous drug dealers. The government further states that he assisted in setting up the People's Choice Restaurant; he demonstrated a close association with Jeff Fort; and he solicited the El Rukns to murder Robert Aulston and Leroy "Hambone" Barber.

The Seventh Circuit originally interpreted Guideline 3B1.1 as meaning "that the Sentencing Commission intended §3B1.1 to apply only to situations where the offender organizes or leads criminally responsible individuals." *United States v. Decicco*, 899 F.2d 1531, 1535 (7th Cir. 1990). That approach was modified, with the court stating,

a significant factor to be considered is whether the defendant exercised authority or control over others in the criminal operation..The fact that the defendant did not exercise such control, in the sense of having the power to tell others what to do, does not necessarily disqualify the defendant for a section 3B1.1 increase..Rather, in some cases it may be enough that the defendant "orchestrated" or simply "coordinated" the activities of others...Less than that, however, will not do. *United States v. Vargas*, 16 F.3d 155, 160 (7th Cir. 1994).

However, more recently the court has recognized a 1993 amendment to the guideline notes which requires that a defendant control at least one other participant in the conspiracy before he can be classified as a leader, organizer, supervisor or manager for purposes of §3B1.1. *United States v. Fones*, 51 F.3d 663, 668 (7th Cir 1995). Because this is a clarifying, rather than substantive, change, it applies even if an earlier version of the guidelines is

being applied. See *Fones*, 51 F.3d at 669.

This clarification is actually consistent with many earlier cases, such as a First Circuit case in which the Court wrote, "here Sostre's activities revolved around bringing together the potential buyers and sellers...There is nothing in the record to show that he exerted control over any of the other codefendants...While appellant certainly played an essential role in the overall criminal conduct, we do not think that he acted in a managerial or supervisory capacity." *United States v. Sostre*, 967 F.2d 728, 733 (1st Cir. 1992). Similarly, the Seventh Circuit ruled that a distributor who passed drugs from the wholesaler to the street dealers did not qualify for even a two point enhancement under 3B1.1 because to receive the enhancement a defendant "must have exercised some control over others involved in the commission of the offense or he must have been responsible for organizing others for the purpose of carrying out the crime." *United States v. Brown*, 944 F.2d 1377, 1381 (7th Cir. 1991). Finally, a defendant who recruited members of the conspiracy and negotiated for supplies of cocaine was found by the Seventh Circuit to not have exercised any control over the other members of the conspiracy, and therefore the imposition of four points for being a leader or organizer was reversed. *United States v. Carson*, 9 F.3d 576, 591 (7th Cir. 1993).

The government contends that defendant Robinson introduced the El Rukns to drug suppliers and that he essentially contracted with

them to attempt certain murders or assaults. However, the government has not shown that defendant Robinson acted in the capacity of directing or otherwise controlling other members of the conspiracy. The issue is not how "important" defendant Robinson is. Thus, no matter how friendly he may have been with Jeff Fort, under Fones defendant Robinson simply does not qualify for any enhancement under §3B1.1 of the Guidelines.

6. Quantity of Drugs. Defendant Robinson objects that the quantity of drugs urged by the government is not supported by the record. Moreover, the government bears the burden of showing by a preponderance of the evidence the amount of drugs reasonably foreseeable by a conspiracy defendant, and the very case cited by the government recognizes that in determining that amount "a court must err on the side of caution." *United States v. McMillen*, 8 F.3d 1246, 1250 (7th Cir. 1993).

7. Concurrent vs. Consecutive Sentences. The government asks the Court to impose non-guideline sentences that run consecutively to the Guideline sentences on the first two counts. Judge Aspen imposed concurrent sentences for the non-guideline counts. The government cites to Guideline 5G1.2(d) but gives no explanation as to either its applicability or why the Court should depart from Judge Aspen's determination. While the Court is not bound by Judge Aspen's ruling on this issue, the ruling should be accorded substantial deference. In the absence of convincing argument by

the government the ruling should be adhered to. Moreover, the consecutive sentences sought by the government would use non-life sentences to create an overall sentence in excess of the life expectancy of defendant Robinson, running afoul of *United States v. Martin*, 63 F.3d 1422, 1434 (7th Cir. 1995). See also, *United States v. Prevatte*, 66 F.3d 840, 846 (7th Cir. 1995, Judge Posner concurring). In addition, consecutive sentences would implicate double jeopardy concerns. See the conflicting Seventh Circuit cases *United States v. Randall*, 947 F.2d 1314, 1320 (7th Cir. 1991) and *United States v. Morgano*, 39 F.3d 1358, 1368 (7th Cir. 1994). Defendant Robinson submits that he would be twice punished for the same conduct in excess of the statutory maximum at the time the conduct occurred, in violation of his double jeopardy rights.

Respectfully submitted,

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