

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA,)	CRIMINAL ACTION NO.
)	
Plaintiff,)	3:06-CR-109-G
)	
v.)	
)	
MELVIN EUGENE XXX, II,)	
)	
Defendant.)	
<hr/>)	

OBJECTIONS TO THE ADDENDUM PRESENTENCE REPORT

Defendant, Melvin Eugene XXX, II, reiterates his Objections to the Presentence Report (the “Objections”) as if fully set out herein and made a part hereof. In addition, Mr. XXX sets forth the following specific objections to the Addendum to the Presentence Report (the “Addendum”).

1.Introduction. Despite being released three days late, the Addendum certainly does *not*, as it claims, “fairly state” the Objections to the Presentence Report. In fact, the Addendum deletes case law that is on point as well as commentary from the Sentencing Guidelines. More importantly, in some areas it completely ignores Mr. XXX’s arguments. Consequently, Mr. XXX respectfully requests the Court to review his Objections in full.

2. Response to I. The only thing that the Addendum addresses is the argument that Mr. XXX acknowledged was foreclosed by Fifth Circuit precedent and which he explained he was raising simply because there was a split in the circuits and he wanted to preserve the argument for higher court review. See Objections at 2 n. 1 (“Mr. XXX also submits that actual

environmental contamination is a prerequisite to the application of U.S.S.G. § 2Q1.2(b)(1). *See United States v. Ferrin*, 994 F.2d 658, 662-64 (9th Cir. 1993). Nevertheless, for the purposes of this Court, Mr. XXX recognizes that his argument is foreclosed by *United States v. Goldfaden*, 959 F.2d 1324, 1331 (5th Cir. 1992).”).

The Addendum does *not* address:

- Mr. XXX’s objection to PSR’s statement “[t]he asbestos abatement project lasted over the course of *three* weekend days....” when the testimony at trial established that the asbestos tile which the government alleged was illegally removed took place over *two* weekends.
- Mr. XXX’s submission that, for the reasons set forth in his Objections, a four level enhancement, rather than a six level enhancement, is more appropriate under U.S.S.G. § 2Q1.2(b)(1).
- Mr. XXX’s submission that Application Note 5 to U.S.S.G. § 2Q1.2(b)(1) should be applied and, therefore, if the Court were to decide to apply U.S.S.G. § 2Q1.2(b)(1)(A), it should grant a two level downward departure. Likewise, the PSR does not acknowledge the discussion in *United States v. Pearson*, 274 F.3d 1225, 1229 (9th Cir. 2001) regarding such a departure. Mr. XXX does note that in the Government’s Response to Defendant’s Objections to the Presentence Report, the government agrees that, in the event the Court applies U.S.S.G. § 2Q1.2(b)(1)(A) rather than U.S.S.G. § 2Q1.2(b)(1)(B), a downward departure pursuant to Application Note 5 **is appropriate**. *See* Government’s Response to

Defendant's Objections to the Presentence Report at 1.

3. Response to II. In the original PSR, the Probation Department told this Court that “[t]rial testimony [made clear that the estimated 12 workers of defendant were considerably more likely...to develop asbestos related disease....” See PSR at 8. In his Objections, Mr. XXX invited the Probation Department to locate such testimony. The Addendum ignores this invitation.

The Addendum also fails to contain the citations to cases where an enhancement under much more egregious conduct was *not* enhanced under U.S.S.G. § 2Q1.2(b)(2). See *Objections* at 3-4, citing, *United States v. Kung-Shou Ho*, 311 F.3d 589, 593-94 (5th Cir. 2002); *United States v. Liebman*, 40 F.3d 544, 546-47 (2d Cir. 1994); *United States v. Weintraub*, 96 F.Supp. 2d 135, 136 (D. Con.. 2000). Likewise, the Addendum does not discuss the Court's obligation under 18 U.S.C. 3553 (a)(6) to avoid unwarranted sentence disparities viz-a-viz the non-application of U.S.S.G. § 2Q1.2(b)(1) in *Kung-Shou Ho*, *Liebman*, or *Weintraub*. Instead, the Addendum cites to *United States v. Thorn*, 317 F.3d 107 (2d Cir. 2003).¹ *Thorn* involved illegal asbestos abatement in 130 commercial projects and over 1,000 residential projects over a nine year period involving approximately 700 workers. *Id.* at 112-13. *Thorn* is hardly an apt comparison to this case. In point of fact, the best comparison to this case is the Texas case of *Kung-Shou Ho* where the enhancement was *not* applied.

¹The government cites *Pearson* in support of its response to this objection (see Government's Response to Defendant's Objections to the Presentence Report at 1-2) without noting that the Court in *Pearson* also granted a *five level* downward departure under Application Note 6 to ameliorate the effects of this draconian application.

Finally, the Addendum completely ignores Application Note 6 to U.S.S.G. § 2Q1.2(b)(2) and the discussion of that Application Note in Mr. XXX's Objections.

4. Response to III. In his Objections, Mr. XXX cited *United States v. Rubenstein*, 403 F.3d 93, 100-01 (2d Cir. 2005; *United States v. Chau*, 293 F.3d 96, 102 (3rd Cir. 2002) and *Weintraub*, as support for his argument that a U.S.S.G. § 2Q1.2(b)(4) enhancement was not appropriate. The thrust of the Addendum's and government's response is that the *State of Texas* did require a permit for the disposal of asbestos waste and Mr. XXX did not obtain one when one was required. The Addendum cites *United States v. Cooper*, 173 F.3d 1192 (9th Cir. 1999) and *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005) in support of the § 2Q1.2(b)(4) enhancement. Nevertheless, as explained below, these cases involved the Clean Water Act which does require *federal* permits. Here, no *federal* permit was required.

Notably, neither the Addendum nor the government cite to the relevant and extensive discussion of this issue in *Weintraub*, 96 F.Supp. 2d at 136-40. There, "the Government contend[ed] that the U.S.S.G. § 2Q1.2(b)(4) enhancement may be based on the violation of the state regulations which require: 'Disposal of asbestos waste shall be at an authorized asbestos disposal facility. If the authorized asbestos disposal site is located within Connecticut, written authorization for disposal shall be obtained from the Department of Environmental Protection, Bureau of Waste Management.'" *Id.* at 136. On the other hand, the "Defendant read[] the enhancement as only applying U.S.S.G. § 2Q1.2(b)(4) if there is a permit system or requirement imposed under federal law." *Id.* In short, the *Weintraub* court defined the issue before it as follows: "Even assuming arguendo that the Connecticut authorization requirement constitutes a

permit requirement, the Court must determine whether this state regulatory requirement can be the basis for this Sentencing Guideline enhancement.” *Id.* The Court ruled as follows:

In contrast to the federal regulatory scheme for asbestos handling under the Clean Air Act's regulations, several other environmental statutes contain an express federal permit requirement, see e.g., 43 U.S.C. § 1350(c) (creating criminal liability for violating a permit issued under chapter governing submerged lands near continental shelf); 7 U.S.C. § 136j (making it unlawful to exceed the "experimental use permit" issued by EPA for a pesticide); or delegate the permitting function to the states, see 33 U.S.C. § 1319(c)(1) & (2) (prohibiting negligent and knowing violation of any permit condition or limitation in an effluent discharge of pollutant permit issued under Section 1342 which creates permitting scheme under EPA or the states if approved by EPA). Therefore, absent any federal requirement of any permit related to asbestos handling under the Clean Air Act, expressly or by delegation to state regulatory schemes, Weintraub's offense of conviction is unrelated to his non-compliance with the state prior authorization requirement and the Court concludes that Section 2Q1.2(b)(4) is therefore inapplicable to Weintraub's offense.

Id. at 138.²

Likewise, in *Rubenstein*, the sentencing court applied the enhancement based upon “the defendants' violation of two state regulations requiring *a transporter of asbestos to have a permit and to inform landfill operators of his intent to dispose of asbestos.*” *Rubenstein*, 403 F.3d at 100. Nevertheless, the Court of Appeals reversed and held that it was error to base the U.S.S.G. § 2Q1.2(b)(4) on a *State* of New York permit requirement. *Id.*³ This answers the Addendum’s and government’s contention that this Court should apply the enhancement based upon a *State* of

² 33 U.S.C. § 1319 distinguished in *Weintraub* is the Clean Air Act that was the focus of the inapposite *Cooper* and *Ortiz* cases cited in the Addendum.

³ *Cf. Chau*, 293 F.3d at 102 (U.S.S.G. § 2Q1.2(b)(4) could not be based upon the failure to obtain a *City of Philadelphia* permit.)

Texas permit requirement.⁴

⁴At trial, Wayne Harry, who works in the permit section of the Texas Commission on Environmental Quality, explained that the *State of Texas* licenses waste disposal sites in the state for solid waste and that an EPA license involves “other items” (*i.e.* not solid asbestos waste). *See* Trial Testimony at 289-90.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on January 22, 2007, I caused the foregoing document to be served by first-class mail postage prepaid on:

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