

No. _____

In The
Supreme Court of the United States

LAJBAR LAJAWARD KHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit**

**PETITION FOR A WRIT OF CERTIORARI
WITH APPENDIX**

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QUESTION PRESENTED

Whether the District Court's findings as to drug weight and role were clearly erroneous.

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OPINION BELOW

The Second Circuit Court of Appeals decision can be found at ___ Fed.Appx. ___, 2019 WL 6358694 (2d Cir. 2019) and a copy of it is attached as Appendix 1.

JURISDICTION

The Second Circuit filed its decision and order on November 27, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on writ of certiorari.

STATEMENT OF FACTS

The Indictment and Guilty Plea

Mr. Lajaward, Amal Said (“Said”), and Habibullah Haji Jan (“Habibullah”) were charged with international narcotics conspiracy, in violation of 21 U.S.C. §§959(c), 960(b)(1)(A) and 963. Mr. Lajaward and Said were also charged individually with attempted international distribution of heroin, in violation of the same statutes. Both pleaded guilty to the charges without a plea agreement. To establish a factual basis for the plea, Mr. Lajaward said that he and Said “agreed in 2014 and 2015 to bring . . . a little more than 1 kilo of heroin into the United States and sell it.”

The Sentencing Guidelines as Determined by the Probation Office

As to offense conduct, the Probation Office concluded that Mr. Lajaward and Said were members of an Afghanistan-based drug trafficking organization that moved multi-kilogram quantities of heroin internationally. In August 2014, Mr. Lajaward was introduced to “Omar,” a DEA undercover agent.

On October 30, 2014, Mr. Lajaward met Omar in Dubai and it was agreed that Mr. Lajaward would provide a sample of heroin. Accompanying Mr. Lajaward to the meeting was his brother,

Quadrat, and one other.

On January 15, 2015, in Kabul, an “associate” of Mr. Lajaward’s, Salamat, delivered the sample to a different undercover agent. At the same time, Habibullah met with Omar in Dubai. Mr. Lajaward notified Omar of the completed delivery of the sample and Omar paid Habibullah \$10,500.

On January 28, 2015, Said met with Omar in Dubai. He agreed to supply wholesale quantities of heroin. They met again in Dubai on April 2, 2015, and discussed a 100 kilogram shipment.

In June 2015, Mr. Lajaward and Said traveled to Bangkok to meet Omar purportedly for payment of the balance owed on the sample and to finalize the 100 kilogram shipment. They were arrested at that time.

Based on these allegations, the Probation Office determined that the base offense level was 38 (the highest on the drug table) for distribution of more than 90 kilograms of heroin. Mr. Lajaward and Said were also deemed managers or supervisors, warranting a 3-level enhancement. In this regard, the Probation Office listed the following participants in the scheme: Mr. Lajaward and Said, Salamat, Habibullah, Quadrat and one other who accompanied Mr. Lajaward to the October 30, 2014 meeting in Dubai, factory workers involved in the production of heroin, and “numerous other individuals necessarily involved in the defendants’ cross-border heroin operation.”

Objections to the Probation Office’s Guidelines Calculation

Mr. Lajaward objected to the role enhancement and argued that, absent the enhancement, he was safety-valve eligible, resulting in a 2-level decrease in the total offense level and removal of the ten-year mandatory minimum.

Relevant to these matters, he provided a statement of the offense noting:

- In 2014, Mr. Lajaward and Said were believed to obtain heroin in Afghanistan and distribute it in India.
- In August 2014, when Omar sought “work” in the United States, Mr. Lajaward said he would not dare and asked if “work” could be done in Holland, instead. In further discussions in September and October, Mr. Lajaward continued to favor the Netherlands.
- Omar and Mr. Lajaward met in person for the first time on October 30, 2014, in Dubai. Mr. Lajaward was accompanied to the meeting by his brother Quadrat and a driver (who was familiar with the area). Neither Quadrat nor the driver participated in the meeting with Omar and they were not told the nature of the meeting.
- At the October 30 meeting, it was agreed that Mr. Lajaward would provide a sample of heroin. Omar asked that it be “white” and 100% pure. The ultimate destination of the sample was not agreed upon.
- From November 2014 through early January 2015, Mr. Lajaward worked out further logistics regarding the sample. Mr. Lajaward sought to deliver one kilogram but at Omar’s insistence agreed to provide three kilograms. He claimed he could do so on three or four days’ notice.
- Omar gave notice on December 10 and December 19 to get the sample ready in the “next few weeks.”
- In mid-January, Mr. Lajaward repeatedly advised that the sample would be ready “in a couple of days” but it was not. In addition, he asked for an upfront payment for the sample because he and Said sent all their money to Japan and were in a financial

crisis.

- A firm date of January 14 was established for the sample delivery. It did not happen that day, however. Mr. Lajaward claimed that the heroin had not yet “dried.”
- There were further delays on January 15, but, late in the day, in Kabul, Salamat delivered a sample to Omar’s assistant. The sample would prove to weigh slightly less than three kilos, it was brown, not white, and it was only 67% purity.
- Subsequent negotiations with Omar were conducted by Said. In late January, Omar said that the sample had not yet reached its United States destination but still Omar’s buyers were prepared to make a 100 kilogram purchase. When Said counter-offered to produce just “four, five, ten or twenty” kilograms, Omar said there was no profit in those quantities.
- During subsequent negotiations, Said said that he did not know anyone in the United States and that he is “not in this line.” He asked Omar, if “they catch you with this, is that a big crime?”
- Omar lured Mr. Lajaward and Said to Bangkok for payment of the balance on the sample and possible prepayment for the larger shipment. There, in a face-to-face meeting, Mr. Lajaward told Omar that the January 15 sample exchange marked the first time he had ever taken “such a risk.” When asked, he also explained that he had not thinned the sample and because it was a small quantity he could not open a dedicated factory and command a certain level of purity.
- Mr. Lajaward and Said were arrested in Bangkok.
- Based on these facts, it was argued that Mr. Lajaward was a) cajoled against his

better judgment to attempt a shipment of heroin to the United States and b) was not a reliable source of large shipments of quality heroin, indeed, he barely scraped together the low-grade, off-color sample. Further, after the January 15 exchange, he and Said continued to talk a “good game” as to future transactions only to be paid for their share of profits on the sample.

Also as part of his objections, Mr. Lajaward cited statements he made in a proffer session, including the following:

- Mr. Lajaward and Said had been partners in the heroin trade from Kabul to India for approximately 18 months at the time of their arrest.
- As to the sample, Salamat delivered it to Omar’s associate. Mr. Lajaward purchased the sample on consignment from one “Ghafar” who, he believed, obtained it from one “Quai,”³ whom Mr. Lajaward did not know. He assumed the opium used to produce the sample was grown in Jalalabd, where heroin was plentiful and trade active. After paying Ghafar, and other expenses, Mr. Lajaward and Said split a \$4,500 profit.
- At some point, Omar expressed interest in obtaining 100 kilograms. Mr. Lajaward stated that “if” he were able to obtain that amount it would be through one “Naqib,” who, he said, owned a lab and is a chemist.
- The government deemed these proffer statements to be truthful.

In his original sentencing letter, Mr. Lajaward did not object to the base offense level but

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“Quai” is refer to as “Qari” in later references.

asked for a downward departure or variance because the “sting” in which Omar solicited and, indeed, insisted on top-level amounts was “sentencing entrapment.” In this regard, Mr. Lajaward noted that he sought only to deliver a one-kilogram sample and Said asked only to deliver a post-sample shipment of as little as four or five kilograms. Thus, he reasoned, a departure or variance should be employed to reduce the intended weight to the sum of the sample and the four or five kilograms Said asked to produce, in the range of 3-10 kilograms, warranting a base offense level down from 38 to 32.

Mr. Lajaward’s Declaration in Advance of a Fatico Hearing

The district court ordered a Fatico hearing and asked that Mr. Lajaward file in advance a sworn statement as to his expected testimony. He did so, detailing his relationship with Salamat, Habibullah, Quadrat and the driver to the October 30, 2014 meeting in Dubai, heroin factory workers and the alleged “numerous others” involved in his heroin operation.

Mr. Lajaward stated that Salamat was a man for hire, known locally to run errands for money. He was not Mr. Lajaward’s employee or worker. In mid-January 2015, in an effort to comply with Omar’s request for a three-kilogram sample, Mr. Lajaward contacted Salamat. He said that he did not have money to pay for heroin up-front but was looking to purchase on consignment. Salamat connected him to Ghafar, whom Mr. Lajaward had not known. Mr. Lajaward and Ghafar negotiated a price. Ghafar said that the heroin was coming from Qari, a man Mr. Lajaward also did not know.

Salamat agreed to make the actual exchange. On January 15, Omar told Mr. Lajaward that his associate was prepared to receive the sample in Kabul. Mr. Lajaward arranged to meet the associate prior to the exchange so that he would later recognize him and his car (A. 93). Salamat surveilled that meeting.

Thereafter, Salamat drove Mr. Lajaward (in his car) to Ghafar's to collect the sample. Mr. Lajaward drove to a gas station near the place of the planned exchange. Salamat took a taxi back to the City Center, and made the exchange. Salamat met Mr. Lajaward at the gas station and Mr. Lajaward paid him the equivalent of \$200 (US) in rupees. Three or four days later, Mr. Lajaward gave Salamat the equivalent of \$5,400 (US) in rupees to pass on to Ghafar for payment on the sample.

Habibullah was Mr. Lajaward's brother. He lived near Dubai and traded in auto parts. He was uninvolved in Mr. Lajaward's heroin trade.

Because Omar planned to be in Dubai at the time of the sample exchange and Mr. Lajaward was in Kabul, Mr. Lajaward asked Habibullah to collect payment on his behalf. Mr. Lajaward told Habibullah that the payment represented proceeds of a heroin transaction, but he did not inform him that the heroin was destined for purchasers in the United States. Habibullah collected the payment and forwarded it to Mr. Lajaward. Habibullah was not paid for this favor.

As to Quadrat and the driver, Mr. Lajaward explained that their participation was unknowing. Omar requested an in-person meeting in Dubai, a city Mr. Lajaward had never visited. His brother, Quadrat, lived near Dubai and had a friend, the driver, who knew the city well. Quadrat and the driver accompanied Mr. Lajaward to the meeting with Omar. They did not participate in the meeting and sat out-of-earshot. Mr. Lajaward only told them that he and Omar had a "business" meeting.

As noted, Mr. Lajaward obtained the sample from Ghafar, who allegedly obtained it from Qari, neither of whom Mr. Lajaward knew. Further, Mr. Lajaward did not know how or where the heroin was produced. He had no role in directing "factory workers" in its production.

Last, as to the "numerous others," Mr. Lajaward stated that the sample constituted his lone

effort to export heroin to the United States. He did not intend to produce more than the sample and was hoping to make a substantial profit on the sample alone. Post-sample negotiations were to secure the balance on the sample and, perhaps, to secure an advance on a purported large shipment to follow, but he did not intend to deliver on the large shipment.

The Fatico Hearing

Said testified at the Fatico hearing. He said that he partnered with Mr. Lajaward, his cousin, a year or two prior to their arrest. At some point in 2014, Mr. Lajaward introduced Said to Omar because he believed Said had more business savvy, having traveled overseas and having conducted international sales of precious stones and automobile parts.

A heroin sample of roughly three kilograms was provided to Omar. Said and Mr. Lajaward were paid approximately \$10,000 and were awaiting their share of the profits following the sale of the sample in the United States.

He said that he met with Omar in Dubai in late January 2015. At the meeting, Omar asked that Said produce 90-100 kilograms of heroin and that he would pay an advance of \$300,000. The “A Plan” was to “just get the money” but not to give Omar any heroin. With the money, Said and Mr. Lajaward would then disappear . . . to my area [where h]e cannot come.”⁴ If the A Plan failed, Said said that Mr. Lajaward would “find heroin” for Omar.

During his negotiations with Omar, Said tried to convince him that he was a “major dealer” and that he could “deal with a lot of stuff.” He lied, bragged and exaggerated to instill trust in Omar that he could deliver. As to the lies, Said told Omar that he used labs and factories to produce heroin

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Said further explained that he and Mr. Lajaward lived in a frontier area occupied by Pashtuns. Omar, who spoke Farsi only, would not have been able to penetrate the area to find them.

and paid taxes to the Taliban to do so. He also told Omar that he purchased \$450,000 worth, and 6,000 liters, of acid in China to aid in the production of heroin. He also said that he bribed soldiers to get the acid out and that he had been arrested in China. He lied in telling Omar that he sold heroin in Thailand. He also lied in telling Omar that he imported ecstasy to Afghanistan and could work with him to distribute that drug, and that he stored 3,000 kilograms of hashish in Japan.

Said agreed that he was willing to lie for money. He would not lie under oath, however, "not even one word."

Mr. Lajaward's Post-Hearing Submission

As to base offense level, Mr. Lajaward argued in his post-hearing submission that all of the relevant evidence indicated that Mr. Lajaward did not intend to provide a large shipment of heroin to Omar and therefore the sample size should be used to set the base offense level. Because the sample was less than three kilograms, the base offense level should have been 30, as per USSG §2D1.1(c)(5), he argued. In the alternative, were the court to apply the maximum base offense level on account of the discussed 100-kilogram shipment, a downward variance was appropriate because Omar set the bar in this sting operation and though Said tried to lower the amount to as little as four or five kilograms, Omar rebuffed him claiming there was not profit in those amounts. Using four or five kilograms, and adding that to the just-shy-of-three kilograms sample, the court should have started, thus, at level 32, as per USSG §2D1.1(c)(4).

Sentencing

The court found that Mr. Lajaward intended to distribute 90 kilograms or more warranting a base offense level of 38. The court also found that he "directed" Salamat and the overall venture was "otherwise extensive." The total offense level was therefore 39. Mr. Lajaward was sentenced

to a term of 180 months' imprisonment and five years of supervised release.

REASONS FOR GRANTING THE PETITION

WHETHER THE DISTRICT COURT'S FINDINGS AS TO DRUG WEIGHT AND ROLE WERE CLEARLY ERRONEOUS

A district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range . . . [T]he guidelines," while not the only consideration, "should be the starting point and the initial benchmark." Gall v. United States, 552 U.S. 38, 49 (2007). The court should then, "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, . . . consider all of the §3553(a) factors to determine whether they support the sentence requested by the party. Id. at 49-50.

Courts of Appeals review a sentence for both procedural and substantive reasonableness.

They

must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §3553(a) factors, [or] selecting a sentence based on clearly erroneous facts.

Id. at 51. If the sentencing decision is procedurally sound, an appellate court considers the substantive reasonableness of the sentence under an abuse-of-discretion standard. Id.; United States v. Cavera, 550 F.3d 180, 188 (2d Cir. 2008) (en banc). A district court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. United States v. Delacruz, 862 F.3d 163, 179 (2d Cir. 2017).

As set forth below, the lower court's findings as to drug weight and role were clearly

erroneous.

Drug Weight

Base offense levels in drug cases are generally set by drug type and weight. USSG §2D1.1(a)(5). As per Application Note 5, “In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level. However, as per that same Application Note: “If . . . the defendant establishes that the defendant did not intend to provide . . . or was not reasonably capable of providing . . . the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide . . . or was not reasonably capable of providing.”

Based on all the evidence before the Court, Messrs. Lajaward and Said did not intend to provide 100 kilograms of heroin to Omar. Their principal goal was to get paid for the un-paid profits on the three-kilogram sample and to secure a significant retainer, if not a total up-front payment, on the discussed 100 kilogram deal. To be sure, they considered a Plan B (or the “if” plan (in keeping with Mr. Lajaward’s proffer)), as to which Mr. Lajaward said he could fully supply. It was wholly unknown what would have happened as both men were arrested in Thailand before any efforts at production. Because the government bore the burden of proof, Lajaward and Said should have been sentenced on a base offense level of 32, corresponding to the sample alone. See USSG §2D1.1(C)(4)(3-10 kilograms of heroin).

Role

A role enhancement as per USSG §3B1.1(b) requires a finding that the defendant acted as a manager or supervisor of the criminal activity at issue and that said activity involved five or more

participants or was otherwise extensive. There must be evidence that the defendant acted specifically as a manager or supervisor and not simply that he was more culpable than others. See United States v. Woods, 335 F.3d 993 (9th Cir. 2003) (noting that government failed to show that the defendant supervised or managed others in telemarketing scheme who had different roles). “A ‘participant’ is a person who is criminally responsible for the commission of the offense.” USSG §3B1.1, App. Note 1.

In determining whether a criminal activity involved five or more participants, the defendant is included. United States v. Rodriguez, 981 F.2d 1199 (11th Cir. 1993); United States v. Schweihs, 971 F.2d 1302 (7th Cir. 1992); United States v. Fells, 920 F.2d 1179 (4th Cir. 1990); United States v. Preakos, 907 F.2d 7 (1st Cir. 1990). In assessing whether an organization is “otherwise extensive,” all persons involved during the course of the entire offense are to be considered. USSG §3B1.1, App. Note 3. A scheme is “otherwise extensive” if it is “the functional equivalent of one involving five or more knowing participants.” United States v. Carrozzella, 105 F.3d 796, 803 (2d Cir. 1997). In this regard, the Court should consider: 1) the number of knowing participants; 2) the unknowing participants who were organized or led by the defendant; and whether the services they provided were peculiar and necessary. See United States v. Kent, 821 F.3d 362, 369 (2d Cir. 2016). As to these factors, the Court is advised to assess how instrumental the unknowing participants were, and the quantity and quality of their services. Id. at 371.

The government has the burden to show that a defendant qualifies for an aggravating role increase. United States v. Archer, 671 F.3d 149, 161 (2d Cir. 2011); United States v. Al-Rikabi, 606 F.3d 11 (1st Cir. 2010); United States v. Milton, 153 F.3d 891 (8th Cir. 1998).

There was no evidence at the Fatico hearing that Mr. Lajaward supervised or managed

anyone. Dispensing of the obvious, Mr. Said was his partner, not his underling.

In his proffer statements and declaration, Mr. Lajaward admitted to the involvement of others leading up to and including the three-kilogram sample. He did not supervise or manage these people, either. As to Quadrat and his acquaintance, the driver, who escorted Mr. Lajaward en route to a meeting with Omar in Dubai in October 2014, neither man knew the “business” at hand, they were clearly not “participants.” As to the sample, three others were arguably involved: Qari, Ghafar and Salamat. Mr. Lajaward does not know and never met Qari. He spoke with Ghafar to negotiate the price and obtain the sample, but he certainly did not supervise or manage him. The record evidence suggested that Salamat was a freelancer, running errands for anyone who would pay. Salamat referred Mr. Lajaward to Ghafar, and Salamat offered to make the exchange with Omar’s assistant and devised the plan to disguise the bag with tomatoes. Mr. Lajaward did not direct him, in fact, the evidence suggested that Salamat was more in control of the logistics of the exchange of the sample. Last, Habibullah was told to collect payment for a heroin transaction because he lived in the Dubai area, where Omar said he would be at the time. Habibullah had never participated in a heroin deal before and Mr. Lajaward did not tell him the heroin at issue was headed for the United States. This was a one-off favor; there was no showing of supervision or management.

Further, there was no proof of supervising or managing factory workers. Mr. Lajaward scrambled to find the three-kilogram sample, which was off-color and low-purity and maybe even stale. When confronted about the low quality, he told Omar the truth: he took leftovers and had no authority to demand anything from a dedicated factory. Mr. Said backed him up in this regard, noting in his testimony that he had no “relationship” with heroin factories.

Thus, there was no showing that Mr. Lajaward supervised or managed other participants.

Further, the record did not support the conclusion that the criminal activity was somehow extensive. Messrs. Lajaward and Said made approximately \$2,000 each on a three-kilogram sample that they were lucky to find through an errand runner and others unknown to them. The knowing participants were at best one (though Mr. Lajaward did not tell Habibullah the heroin was to be exported to the United States). The unknowing participants (Qari, Ghafar and maybe factory workers) were not organized or led by either defendant and the services they provided were by no means peculiar.

No role enhancement was warranted.⁵

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,



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In which case, Mr. Lajaward is safety-valve eligible.