No. 09-30441
[NO. CR07-0344RSL, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLAYTON ROUECHE,

Defendant-Appellant.

ANSWERING BRIEF OF PLAINTIFF-APPELLEE

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable Robert S. Lasnik
Chief United States District Judge

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I. PRELIMINARY STATEMENT AND ISSUES OF ARGUMENT

In this appeal, Clayton Franklin Roueche asks this Court to vacate the sentences imposed by the district court for his leadership role in conspiracies involving the importation of thousands of pounds of marijuana into the United States, and the laundering of the proceeds of that marijuana through the purchase of thousands of pounds of cocaine that was then exported into Canada. Although the district court stated that it was only considering "the things [Roueche] personally did, things he personally said on the wiretaps, the things that he has personally admitted to in entering his guilty pleas," ER 44, and adopted the Guidelines range as calculated by the defense, the defense argues that the district court failed resolve factual disputes and thereby failed to comply with the requirements of Federal Rule of Criminal Procedure 32(i)(3)(B). As the court's statement shows, however, the district court carefully limited the scope of the information it considered.

Moreover, although the defense now suggests the existence of an extensive factual dispute, the defense memorandum filed prior to sentencing narrowed the scope of the dispute to essential one

paragraph of the presentence report and the contents of two declarations. In any event, the defense did not object to the district court's failure so the issue is subject only to plain error review and the record establishes that this standard has not been met.

In a similar vein, the defense argues that the court relied on unreliable hearsay in formulating Roueche's sentence. The record again undermines that claim. The statements in the declaration that Roueche disputes are corroborated by other unchallenged facts in the record. Thus, the district court did not abuse its discretion, if this information was in fact considered.

Lastly, the defense argues that the district court improperly based its sentence on extraterritorial conduct. That claim also must fail. This court has made clear that where extraterritorial conduct is relevant to the offense of conviction it may be considered by the district court to fashion its sentence.

II. ISSUES ON APPEAL

A. Where the defense failed to object at the time of sentencing, and did not seek an evidentiary hearing, the district court expressly stated the scope of what it was considering for purposes of sentencing, did the district court plainly err when it imposed sentence without addressing disputed facts?

B. Where the declarations in question were corroborated by other uncontested evidence in the record, did the district court abuse its discretion by considering hearsay?

C. Where actions committed in Canada are relevant to the offenses of conviction that involved the importation and exportation of controlled substances, could the district court consider extraterritorial conduct in fashioning its sentence?

III. STATEMENT OF JURISDICTION

Defendant-Appellant Clayton Franklin Roueche appeals the sentence imposed by the district court following his pleas of guilty the following charges: Conspiracy to Export Cocaine (5 kilograms or more), in violation of 21 U.S.C. §§ 953(a), 960(a)(1), 960(b)(1)(B), and 846; Conspiracy to Import Marijuana (1,000 kilograms or more), in violation of 21 U.S.C. §§ 953(a), 960(a)(1), 960(b)(1)(G), and 846; and Conspiracy to Engage in Money Laundering, in violation of 18 U.S.C. § 1956(h). The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction to review Roueche's procedural challenge to his sentence under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

On December 16, 2009, Roueche was sentenced to a 360-month prison term and the judgment was entered on the docket. CR 353;

ER 1-6.[1] On December 22, 2009, Roueche filed a timely notice of appeal. CR 354; ER 51.

IV. BAIL STATUS OF THE DEFENDANT

Roueche is currently serving the 360-month sentence imposed by the district court. His projected release date is July 5, 2034.

V. STATEMENT OF FACTS AND PROCEDURE

A. Facts Leading to Roueche's Prosecution.

Roueche, a Canadian citizen, is the founder and leader of a Canadian gang known as the United Nations Gang ("UN Gang"), which operated primarily in British Columbia. PSR ¶¶ 30, 110. The UN Gang was heavily involved in illegal drug trafficking and had a reputation for employing "extreme violence" to further its activities. PSR ¶ 31. Although Roueche denied involvement in any acts of violence, illegal handguns were found in his vehicle and apartment in

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[1] "CR_" refers, by page number, to the United States District Court Clerk's record of the case; "ER_" refers, by page number, to Appellant's Excerpts of Record; "ERS _" refers by page number to Appellant's Sealed Excerpts of Record; "PSR" refers, by paragraph number, to the Presentence Report submitted by Appellant under seal; "SER_" refers, by page number, to Appellee's Supplemental Excerpts of Record; and "SSER_" refers, by page number, to Appellee's Supplemental Excerpts of Record filed under seal.

Canada. PSR ¶ 33, 77; ER 38. Roueche also routinely surrounded himself with armed guards for protection, PSR ¶¶ 33, and as acknowledged by his counsel, drove an armored vehicle for protection because of the violent world in which he existed. ER 38-39; PSR ¶ 77.

In December 2005, Roueche became the target of a long-term federal investigation into the UN Gang's drug-trafficking activities and was identified as being at the center of these activities. PSR ¶ 29; ER 115-18. A few months after the United States began its investigation, a similar investigation was launched by Canadian authorities. PSR ¶ 29.

The UN Gang's drug-trafficking involved marijuana, cocaine, ecstasy, and methamphetamine. PSR ¶ 34. At issue in this prosecution, however, are the UN Gang's marijuana and cocaine operations. These operations were "vast and sophisticated" and involved participants in Canada, the United States, Mexico, and Central and South America. The operation involved the transportation of drugs through a variety of means including helicopters and aircraft and the use of Blackberries and code to communicate. PSR ¶¶ 35, 37. Nonetheless, the object of these conspiracies was simple—profits from

Canadian marijuana exports financed the UN Gang's importation of cocaine for sale in Canada. PSR ¶¶ 35-36, 53.

The UN Gang smuggled marijuana into the United States by helicopter. The marijuana would be flown from Canada and dropped off at locations in Eastern and Western Washington, primarily at landing zones in the Okanagan National Forest in Washington State. PSR ¶ 38. The marijuana would then be delivered by automobile for sale throughout the United States. PSR ¶ 39. As evidenced by seizures made during the underlying investigation, the weight of these marijuana "loads" was routinely in the hundreds of kilograms. PSR ¶¶ 40-52. All told, more than 3,500 kilograms of marijuana were seized during this investigation. PSR ¶ 37.

The proceeds of these marijuana sales would be delivered to Los Angeles, California, where a portion would be used to purchase cocaine from the UN Gang's Mexican suppliers. PSR ¶¶ 34-36, 53-55, 69-74. Once those purchases were arranged, the UN Gang would then dispatch one of the planes it owned to fly from Canada to Southern California. PSR ¶ 53, 56, 57. The cocaine would be loaded onto this plane and flown to Canada "through the state of Washington."

PSR ¶¶ 36, 56, 58-59, 64. In total, some 365 kilograms of cocaine and $1.5 million were seized during the underlying investigation. PSR ¶ 37. Law enforcement officers also seized three separate aircraft that were used in this smuggling enterprise. PSR ¶ 37.

B. The Indictment and Roueche's Arrest.

On October 11, 2007, a grand jury in the Western District of Washington indicted Roueche and several co-defendants in connection with their drug-trafficking activities, and a bench warrant was issued for his arrest. CR 1. That warrant was finally executed on May 19, 2008. CR 28. Roueche was arrested after investigating officers learned Roueche was planning to attend the wedding of a UN Gang member in Mexico. PSR ¶ 75. At the request of United States and Canadian authorities, Roueche was denied entry into Mexico, and Mexican officials placed him on a return flight to Vancouver that connected through Dallas-Fort Worth. PSR ¶ 75. When the plane landed in Texas, Roueche was arrested.[2] PSR ¶ 76. At the time of his arrest,

[2] Following Roueche's arrest, Canadian authorities searched his home and automobile in Coquitlam, British Columbia. In the home, the officers recovered a 9mm Glock handgun with extended magazine, night vision goggles, two Balaclava masks, handcuffs, pepper spray, (continued...)

Roueche was wearing approximately $125,000 in jewelry, including a UN Gang insignia ring. PSR ¶ 76. After an initial appearance in the Northern District of Texas, Roueche was transported to the Western District of Washington for prosecution.[3] CR 12, 32.

On July 31, 2008, a five-count Superseding Indictment was filed against Roueche and nine co-defendants. CR 49. Roueche was named in all five counts. The charges included: Conspiracy to Export Cocaine (5 kilograms or more) (Count 1); Conspiracy to Distribute Cocaine (5 kilograms or more) (Count 2); Conspiracy to Import Marijuana (1,000 kilograms or more) (Count 3); Using and Carrying a Firearm During a Drug Trafficking Offense (Count 4); and Conspiracy to Engage in Money Laundering (Count 5).

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[2](...continued)
and photographs of a rival gang member. PSR ¶ 77. In Roueche's armored car, they recovered a second loaded handgun in a hidden compartment. PSR ¶ 77.

[3] During his transport from Texas to Seattle, Roueche made "approximately three dozen telephone calls" from various federal prison facilities. PSR ¶78. One of those calls ordered a mandatory meeting of UN Gang members at Roueche's parents' home on May 31, 2008. PSR ¶ 78. That call was intercepted by Canadian law enforcement, who later observed twenty UN Gang members arrive for that meeting. PSR ¶ 78.

Several months later, after a few co-defendants elected to plead guilty, CR 72-75, 91, 149-52, 166, 184-87, 216, Roueche, too, decided to enter guilty pleas. CR 241-44, 253.

C. Roueche's Plea Agreement and Guilty Plea.

On April 28, 2009, Roueche entered guilty pleas to Counts 1, 3, and 5 of the Superseding Indictment, pursuant to the terms of a written Plea Agreement. ER 275. As part of that agreement, Roueche acknowledged that the two drug conspiracies to which he was pleading guilty involved in excess of five kilograms of cocaine and in excess of 1,000 kilograms of marijuana, respectively. ER 279-80.

In exchange for Roueche's guilty pleas to the three specified counts, the government agreed that it would dismiss the remaining two counts in the Superseding Indictment. ER 280. The United States also agreed that Roueche would not be prosecuted for any additional offenses, based on evidence already known to the government, that had been committed in the Eastern, Central, and Northern Districts of California, the Eastern and Western Districts of Washington, and the Districts of Idaho and Oregon. ER 280.

No agreement was reached with regard to sentencing; rather, the parties acknowledged that the district court retained "full discretion" with respect to the appropriate sentence, limited only by the applicable statutes. ER 279. The agreement also did not address the Sentencing Guidelines calculations, except to state that if Roueche qualified for a downward adjustment for acceptance of responsibility under USSG § 3E1.1(a), the government would agree that a three-level adjustment should be applied. ER 280-81.

At the change of plea hearing on April 28, 2009, the court confirmed that Roueche had read and understood the written Plea Agreement, and that he had conferred with his counsel regarding its terms. ER 244-45. During a review of the rights Roueche would be waiving by pleading guilty, defense counsel raised the subject of the right to cross-examine witnesses during any sentencing hearing. ER 252. In response, the court informed Roueche that although Roueche would have the right to cross-examine any witnesses the government chose to present, the government was not required to present witnesses at the sentencing hearing and, because the rules of evidence did not apply, could proceed by presenting affidavits or

declarations. ER 252-53. The court also explained the sentencing process, including the fact that Roueche could call witnesses on his own behalf, that the court was required to calculate the applicable Sentencing Guidelines range, and that the court would then consider the factors in 18 U.S.C. § 3553(a) in fashioning the appropriate sentence. ER 253-56. The court also made clear that it was not bound by any recommendations regarding the applicable Guidelines range or appropriate sentence offered by the parties or the United States Probation Office. ER 256.

After reviewing the factual statement contained in the Plea Agreement and receiving Roueche's acknowledgment that these facts were correct, the court confirmed that, for purposes of sentencing, the government intended to present the court with a complete picture of the extent of Roueche's involvement in the criminal activity. ER 259-60. The court noted the government was not limiting its presentation to five kilograms of cocaine and 1,000 kilograms of marijuana but that, by pleading guilty, Roueche also was not admitting to more. ER 260. Sentencing was then scheduled for September 18, 2009. ER 266.

D. Post-Plea Proceedings—the Transfer of Roueche from the Sea-Tac Detention Center to United States Penitentiary in Marion, Illinois.[4]

On June 16, 2009, prior to sentencing, Chief Judge Robert Lasnik entered an order, requested by the Bureau of Prisons, which authorized Roueche's transfer from the Sea-Tac Detention Center to the United States Penitentiary at Marion, Illinois. ER 175. The court entered the order based on information, provided to the court *ex parte* by the Bureau of Prisons, that suggested Roueche presented a "security and safety risk to the orderly running" of the institution. ER 175. Pursuant to that order, Roueche was transferred from the district on June 18, 2009. ER 209. The following day, government counsel informed Roueche's counsel of Roueche's transfer. ER 203.

Four days after the transfer, counsel for Roueche filed a motion seeking disclosure of all information presented to the court by the Bureau of Prisons. ER 210. To address this situation, Chief Judge Lasnik held a hearing in chambers. ERS 375-98. During the hearing,

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[4] Although the Opening Brief includes a lengthy discussion of these events, *see* Appellant's Opening Brief at 5-8, the arguments presented do not related to these facts. Nonetheless, for completeness, a description of what occurred is included here.

the court stated that it would not disclose the information received to the defense until it received input from the Bureau of Prisons. ERS 379. Nonetheless, the court made clear that the security problem resulting in Roueche's transfer was based on the need to return another inmate, Luke Sommer, to the district to face a charge regarding an assault on another inmate. ERS 376. Sommer was also under investigation for attempting to solicit the murder of the Assistant United States Attorney who had prosecuted him.[5] ERS 376.

The court informed counsel that another inmate had provided information suggesting Sommer was seeking assistance from Roueche and the UN Gang to carry out this murder, and that in return, Sommer would provide the UN Gang members with automatic weapons and other devices that would permit them to help Roueche escape from the institution. ERS 377. The court also informed counsel that Sommer had been interviewed and, although Sommer admitted he was soliciting

[5] At that time, Luke Sommer was in custody serving the twenty-five year sentence for his role as the master-mind of an armed bank robbery. *See United States v. Luke Sommer*, CR06-5528FDB, W.D. WA. at Tacoma.

the murder of the Assistant United States Attorney,[6] Sommer denied allegations that Roueche was involved in the plot and did not implicate Roueche in any way. ERS 380. The court also noted that it was unclear from the limited information received whether Roueche was even a suspect in these events.[7] ERS 389. Nonetheless, the inmate who provided the information claimed Roueche had informed this inmate that Roueche expected the following events to occur in the near future: the murder of the Assistant United States Attorney who had prosecuted Luke Sommer, the murder of the Assistant United States Attorney prosecuting Roueche, the murder of the then-United States Attorney for the Western District of Washington, the murder of the warden of the Sea-Tac Detention Center, and the escape of Roueche with the help of UN Gang members. ERS 391.

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[6] The court also noted that the wife of the Assistant United States Attorney in question was employed as a law clerk for Judge Barbara Jacobs Rothstein. ERS 382.

[7] Roueche was never charged in connection with these events. However, on January 24, 2010, Luke Sommer entered a plea of guilty to an information charging him both with an assault on an inmate and his plot to murder the Assistant United States Attorney. *See United States v. Luke Sommer*, CR09-0257JLR, W.D. WA. at Dkt. # 25. Roueche is not mentioned in the statement of facts in support of Sommer's guilty plea.

The court noted that although it applied a very low standard of proof when considering a request by Bureau of Prisons to transfer an inmate because of security concerns, it "would not consider the same information for sentencing purposes because there needs to be a higher threshold, obviously, than just rumor, innuendo and the like." ERS 377. The court also noted that it was capable of sentencing Roueche for the conduct to which Roueche had pleaded guilty. ER 394.

Finally, government counsel stated, that for purposes of sentencing, it would focus on the acts to which Roueche pleaded guilty and not allegations of conduct in Canada. ERS 394.

On July 6, 2009, the government filed its response to the motion for access to the documents provided by the Bureau of Prisons. ER 198-201. The response states the strong objection by the Bureau of Prisons to the release of the documents. ER 199.

A second hearing regarding this matter took place on August 24, 2009, during which the court also discussed sentencing. ER 179-197. The court first asked whether the government intended to raise matters outside the scope of the crimes of conviction to support its sentencing recommendation. ER 180. In response, government counsel

stated it would limit the presentation to conduct relevant to the counts of conviction and that it would not address information presented by the Bureau of Prisons or related to any on-going investigation of other possible criminal activity. ER 181, 185. Counsel specifically stated the government would not rely on information that had not been provided to the defense, and noted that although generally aware of the reasons why Roueche had been transferred, she had not seen much of what had been submitted to the court, a fact confirmed by Bureau of Prisons' counsel. ER 187-88.

The court then stated that two issues were presented by the defendant's motion: (1) whether the law required that the defense be provided with all the information that the court had seen; and (2) if the defense was so entitled, and the court would not provide the information to the defense, whether Roueche's case should be referred to another judge for purposes of sentencing. ER 185-86. The court stated it was "confident" that it could set aside the information leading to the order to transfer Roueche, and that this would not affect its sentencing decision. ER 186. Nonetheless, because Roueche was not

present, the court observed that Roueche needed to be consulted about reassigning the case to a different judge. ER 196-87.

In response to the court's various observations, defense counsel observed that the issue of whether disclosure was required turned on whether the information was of a type reasonably relied upon by a court for purposes of sentencing. ER 191. Defense counsel then stated:

> [b]ut by the same token I have all the confidence in the world that the government says they're not going to ask you to rely upon it and you're going to do everything in your power to set it aside.

ER 191.

At the conclusion of the hearing, the court denied the motion but stated that defense counsel would be permitted to revisit the issue after consultation with his client. ER 192-93. The court later entered a written order reiterating the denial of the motion. ER 175-78.

E. The Presentence Report and the Defense Objections.

An initial presentence report was submitted to the parties on October 5, 2009, and a revised report submitted on December 7, 2009, after the parties provided objections to the initial report. *See* PSR at 1. The Sentencing Guidelines calculations are the same in both reports. Specifically, pursuant to USSG § 2D1.1, the probation officer calculated

the applicable base offense level as 38. PSR ¶ 86. This calculation began with USSG § 2S1.1, the Guideline applicable to the money laundering conspiracy, which, in turn, requires a cross-reference to the Guideline applicable to the drug offenses from which the laundered funds were derived, in this case USSG § 2D1.1. PSR ¶ 86. Based on the information obtained during the presentence investigation, the probation officer concluded Roueche was responsible for the smuggling, transporting, and distributing over 1,290 kilograms of marijuana and over 418 kilograms of cocaine, which translates to a marijuana equivalency of 83,756 kilograms, and a base offense level of 38. PSR ¶ 86. The defense did not offer any objection to this base offense level or the drug amounts used.[8] *See* ERS 334-38.

The defense did not object to the two-level enhancement applied by the probation officer pursuant to USSG § 2D1.1(b)(2) because the offense involved the use of unscheduled aircraft to import and export the drugs. PSR ¶ 88. Further, and more importantly, the probation officer applied a four-level upward adjustment pursuant to USSG

[8] This calculation did not involve drugs other than marijuana and cocaine. PSR ¶ 86.

§ 3B1.1 based on Roueche's role as "the founder and operational leader of the UN Gang" and the fact that he was "involved in, organized, and facilitated every aspect of this conspiracy." PSR ¶ 92. The defense also did not object to this enhancement or paragraph of the presentence report, *see* ERS 334-38; ER 68, and, at various times, affirmatively acknowledged Roueche's leadership role. *See, e.g.,* ER 26-27.

The defense objected only to two Guidelines calculations contained in the report. Specifically, the defense objected to the two-level enhancement under USSG § 2D1.1(b)(1) for possession of a dangerous weapon. ER 337. This enhancement was based on the 9mm Glock handgun with extended magazine that the defense did not dispute was found in Roueche's home, ER 38, and the second loaded firearm found in Roueche's armor-plated vehicle. PSR ¶ 87. The probation officer noted that, in light of the drug trafficking and its inherent dangers, it was reasonably foreseeable that Roueche's co-defendants possessed firearms and, indeed, that several of those individuals were in possession of loaded firearms at the time of their

arrest. PSR ¶ 87.[9] The defense also objected to the application of the two-level adjustment under USSG § 2S1.1(b)(2)(B).[10] ER 337. The probation officer included this enhancement because of Roueche's conviction for conspiracy to commit money laundering.

Based on these calculations and a three-level downward adjustment for acceptance of responsibility, the probation officer concluded that Roueche's total offense level was 45. With a Criminal History category of I, the resulting Guidelines range as calculated by the probation officer was life imprisonment. Nonetheless, the probation office recommended a sentence of 336 months.

In addition to the two Guidelines enhancements, the defense offered a variety of other objections to the contents of the presentence

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[9] The defense argued that the enhancement should not be applied because the government had agreed to dismiss Count 4, charging a violation of 18 U.S.C. § 924(c), that there was no evidence that Roueche possessed a firearm during his relevant conduct, and that Roueche should not be held accountable for the conduct of his co-conspirators because there was no evidence that he knew they were in possession of firearms. ERS 334, 337.

[10] With respect to this enhancement, the defense merely argued that because the maximum penalty for the money laundering conspiracy was twenty-years, the Guideline calculation should be reevaluated, and the two-level enhancement should not be applied. ERS 334, 337. Even if this enhancement was not applied, the resulting Guidelines range was life imprisonment.

report. Although Roueche acknowledged that he was "directly involved in the transportation of marijuana and money laundering offenses" and was involved "albeit to a lesser extent, with the transportation of cocaine," Roueche objected to the aspects of the report that involved what Roueche deemed to be unrelated persons and events. ERS 334. He objected to PSR ¶¶ 15, 17-21, and 25[11] because these paragraphs involved a discussion of cases in which he claimed he was not involved. ERS 335. Because he faced possible prosecution in Canada, he also refused to discuss matters related to the UN Gang and objected to PSR ¶ 31, arguing that "it is unfair to impose sentence based upon the 'reputation' of some group." ERS 335. Similarly, Roueche objected to the inclusion of the information in PSR ¶ 33, regarding the discovery of firearms and other items during a search of Roueche's car in 2007, claiming that he was not in possession of the vehicle at the time because he was out of town. ERS 336.

[11] These paragraphs are part of a listing of the related cases and defendants and describes the sentences imposed, or current status of these cases and defendants.

With regard to drugs, Roueche disclaimed any involvement with trafficking in ecstasy or methamphetamine[12] and claimed that he was less directly involved with the cocaine transportation than was suggested in the presentence report. ERS 336. He also claimed that he was not responsible for all of the drugs, currency, and aircraft seized during the investigation, ERS 336, but did not dispute the accuracy of the information regarding the amounts and nature of the seizures as described in the presentence report. Similarly, Roueche objected to any reference to the drugs, guns, and currency found during searches of vehicles and property associated with co-conspirators because he was not responsible for "all of the drugs, currency and guns that were seized," without disputing the fact that the items had been seized. ERS 336.

Finally, regarding PSR ¶ 77, although he did not deny the items were discovered, Roueche objected to the use of the term "kit for kidnaping or murder,"as applied to a collection of items found in a search of his house following his arrest. ERS 336. These items

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[12] The presentence report specifically states that methamphetamine and ecstasy were not used as a part of the Guidelines calculations. PSR ¶¶ 67, 86.

included night vision goggles, two Balaclava masks, handcuffs, pepper spray, a 9mm firearm with an extended magazine, and the pictures of rival gang members. PSR ¶ 77. He also disclaimed any knowledge that a firearm was found in his car during the search conducted at that time. ERS 336.

F. The Government's Sentencing Memorandum.

On October 27, 2009, the United States filed its Sentencing Memorandum in anticipation of a sentencing hearing on November 5, 2009.[13] ER 112-23. In that memorandum, the government described that fact that Roueche oversaw the movement of tens of thousands of kilograms of marijuana into the United States for distribution and sale, and export from the United States to Canada of thousands of kilograms of cocaine purchased with the monies from the sale of the marijuana. ER 112. The memorandum describes the activities of the UN Gang and focused on the nature and extent of these drug conspiracies and what was known about Roueche's role at the center of these activities.

[13] Two days later, a minute entry was filed rescheduling the sentencing for December 16, 2009. CR 335.

To support its recommendation of a 360-month sentence of imprisonment, the government submitted several items to the court. First, the government submitted a CD containing a summary of the various activities that supported the conspiracy charges to which Roueche pleaded guilty. SER 1; ER 109-110.[14] This summary was supported by a declaration of Special Agent Peter Ostrovsky, who described the development of the investigation. The government also submitted a DVD containing recordings of various telephone calls intercepted by Canadian law enforcement, along with a document that summarized the calls and associated surveillance information, with links in the document that allow the reader opening the DVD to listen to the calls summarized and to review the referenced surveillance reports. ER 109-110; SER 18.[15]

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[14] The Supplemental Excerpt of Record contains a hard copy of the Excel spread sheet contained on the CD.

[15] The Supplemental Excerpts of Record includes both a printed version of the summary contained in the DVD, SER 19-47, and a copy of the complete DVD, SER 18, that was submitted to the Court. ER 109-110.

The United States also filed four declarations[16] under seal. These declarations, made by Roueche's co-conspirators, address the extent of Roueche's involvement in the drug conspiracy and the UN Gang. These affidavits include information about the amount of drugs transported, the means by which the drugs were transported and distributed, the threats used to control individuals who associated themselves with the conspiracy, ERS 351-374, and a variety of other acts, including the purchase of firearms in the United States to be smuggled into Canada and the fact that Roueche and other members of the UN Gang carried firearms and maintained secret compartments in their car in which to hide firearms. SSER 8.

G. The Defense Sentencing Memorandum and Related Pleadings.

On December 3, 2009, before the filing of its Sentencing Memorandum, the defense filed a motion seeking to strike the declaration of Daniel LeClerc, one of the declarations attached to the government's Sentencing Memorandum. *See* ER 100-108. In that

[16] Two of the declarations were included as Sealed Excerpts of Record filed by the defense. ERS 351-374. The third is included in the governments Sealed Supplemental Excerpts of Record. SSER 1.

motion, the defense suggested there may be significant factual disputes to be resolved at the sentencing hearing but did not state precisely what these would be, even though it had the government's sentencing materials for over one month. ER 101. To support its motion, the defense simply asserted its belief that LeClerc's declaration was unreliable because LeClerc would likely seek further reduction in his sentence based on the declaration, and that LeClerc "may have lied" when he claimed he was pressured, intimidated, and threatened by Roueche. ER 101. At that time, it offered nothing to contradict the statements.

The defense further claimed that the declaration should be stricken because LeClerc would not agree to meet with Roueche's counsel and the government would not condition any further reduction in LeClerc's sentence on such a meeting. ER 97, 101-02. The motion suggests that the court should order that LeClerc be made available for cross-examination, ER 105-06, although the defense never sought to subpoena LeClerc for that purpose. ER 56. Finally, the defense suggested that LeClerc should be treated as having waived his attorney-client privilege regarding any conversation he had with

Ron Richards, a lawyer from Los Angeles, mentioned in paragraph 41 of the LeClerc declaration. ER 106-07.

On December 10, 2009, the defense filed its Sentencing Memorandum, ER 60-78, and a related Memorandum on Sentencing Disputes. ERS 339-49. In the Memorandum on Sentencing Disputes, although noting that various objections had been made to the presentence report, the defense nonetheless assumed that "most of these factual matters should not impact the Court's ultimate decision on sentence. . . ." ERS 342. Instead, the defense focused on one paragraph only, that is paragraph 31 discussing the UN Gang's involvement in acts of violence in Canada. ERS 342. The defense argued there was no evidence that Roueche was directly involved in this activity and that much of this activity occurred after Roueche's arrest. ERS 342.

The defense again raised the subject of LeClerc's declaration and argued that this declaration constituted unreliable hearsay and that it should be obvious that it contained claims that are false and self-serving. ERS 342. In support, the defense offered a declaration provided by a woman who dated LeClerc from June 2006, until his

arrest in September 2006.[17] ERS 310-312. She claimed that LeClerc did not appear to fear any of Roueche's co-defendants; that in her view, no one pressured LeClerc into engaging in the activities for which he was arrested; and that LeClerc had never mentioned Roueche to her and she had never met Roueche. ERS 312.

The defense also offered a declaration from a defense investigator who purported to provide the statements of two unidentified witnesses.[18] ERS 315-22. Witness one, who claimed to be a close friend of LeClerc's, purportedly expressed the view that LeClerc was not forced into any criminal activity, that LeClerc never claimed he was threatened or intimidated, and never suggested that he wanted to get out of the illegal activities in which he was involved. ERS 317. This unnamed witness also asserted that the pressure to increase the size of the loads came from LeClerc, not the other way around. ERS 317. This witness did not believe LeClerc had contact with Roueche, presumably

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[17] This individual was identified by name in the declaration. ERS 310.

[18] The defense suggested that the government should be able to discover the identity of the two witnesses from the information provided in the investigator's declaration and the DVD submitted by the defense because one of the witnesses identified himself in the video. ERS 345, 319.

because he did not mention Roueche to the witness, because no other information was offered to support this belief. ERS 318. The declaration also noted this unnamed witness did not recall seeing LeClerc with Roueche. ERS 318.

Although the second, unnamed witness claimed that he knew LeClerc, this unnamed witness apparently also claimed that he did not know what LeClerc did for money. ERS 320. The witness is purported to have expressed the view that LeClerc would not be intimidated by anyone. ERS 320.

With respect to the Declaration of Ken Davis, the defense acknowledged that Roueche "did work with Davis in certain illegal activities." ERS 347. However, Roueche denied the claims made in paragraphs 15 and 26 of Davis' declaration. ERS 347. In paragraph 15, Davis discussed an event involving the loss of a load of marijuana and the fact that Roueche and the other Canadians directed Davis to put a gun in the driver's mouth to force him to disclose the whereabouts of the load. ERS 371. In paragraph 26, Davis describes the fact that Roueche claimed that he was an enforcer who once beat an individual with dull machetes. ERS 373. In this same paragraph,

Davis also stated that he never saw Roueche "beat anyone up." ERS 373.

The defense did not address or object to the contents of the affidavits provided by Special Agent Peter Ostrovsky, ER 126 or that provided Birgis Brooks, *see* SSER 1, or to the contents of any other materials presented by the government for purposes of sentencing.

In its Sentencing Memorandum, the defense reiterated that it was not objecting to the Sentencing Guidelines base offense level as calculated by the probation officer or the enhancement for leadership role. ER 68. Although acknowledging that, by its calculation, the advisory Guidelines range was 324-405 months, the defense argued that based on all of the relevant sentencing factors, the court should impose a sentence in a range of between 15 and 20 years. ER 69. In addition to reiterating its position regarding LeClerc's declaration, the defense memorandum is primarily focused on the nature of sentencing post-*Booker*, and drawing analogies between Roueche and other defendants sentenced in connection with significant drug cases in the Western District of Washington in an effort to demonstrate

that the case warranted the sentence the defense was recommending. ER 65-66, 68-77.

H. The Sentencing Hearing.

Roueche's sentencing hearing took place on December 16, 2009. At the start of the hearing, the district court noted that in preparation for hearing it had reviewed the materials for sentencing provided by the government and the defense. ER 8. The Court noted that the government had earlier agreed not to rely on the information provided to the court by the Bureau of Prisons supporting the transfer to Marion, and that the court already assured the defense this information would not be used to arrive at Roueche's sentence. ER 9. The court further noted the declarations provided by the United States included, self-serving statements in which the declarants attributed everything to Roueche, and that the court was well aware of that fact, and would "take some of the declarations with a large grain of salt" although it would not strike any declarations submitted by the government. ER 9. The court also noted that the defense had submitted a number of declarations and a video to support its position which the court had also reviewed. ER 9.

Government counsel began the hearing by noting that it agreed with the defense that the two-level enhancement related to the money laundering count should not be applied as a part of the Guidelines calculation, but that the two-level enhancement for use of a firearm was applicable. ER 10. Counsel then addressed the reasons why Roueche should receive a sentence of 360 months. In support of that recommendation, counsel pointed to the fact that Roueche had organized a group of people who, acting under his supervision, had smuggled and distributed thousands of pounds of drugs and laundered millions of dollars. ER 11. Counsel pointed to the size and scope of the criminal activity, ER 14-15, 20, the manner in which the conspiracies were conducted, and the discoveries of drugs, currency, and firearms during the investigation. ER 15-18. Counsel painted a portrait of an accomplished businessman who turned the drug enterprise into a business opportunity using many of the tools of a legitimate business. ER 19.

Counsel also pointed to Roueche's use of violence, pointing to the fact that Roueche had one of his co-conspirators purchase firearms in the United States that were smuggled into Canada, including the

firearm found in Roueche's house. ER 20-21; SSER 8. Counsel also pointed to the discussion of violence contained in the recorded telephone calls submitted to the court. ER 20-23.

At the start of the defense presentation, the defense did not request an evidentiary hearing. *See* ER 24-25. Rather, the defense noted that regardless which Guidelines calculation is considered, the Guidelines ranges were very high for a defendant with no prior criminal history. ER 26. The defense then asked the court to impose what is a more proportional sentence in the range of 15 to 20 years. ER 26.

Later in the presentation, counsel simply stated

> I'm not going to go into the factual disputes because it seems to me that unless the court has any particular factual disputes that the court wants to discuss, it seems to me that the court would like that the speech arrays are not going to be—they're not going to affect dramatically how the court imposes sentence. . . . suffice it to say, I think the declarations we submitted raise extraordinary doubt about some of those informants that they're relying upon.

ER 30.

When asked by the court about the firearms enhancement, counsel pointed to the fact that the government was willing to dismiss the firearms count contained in the Superseding Indictment, although

acknowledging again that a firearm was found during a search of Roueche's home after arrest. ER 38. The defense then argued there was no direct evidence that Roueche ever used a gun during the relevant activity and no evidence that he killed anyone, ER 38-39, but acknowledged that Roueche lived in a violent world in Canada requiring him to maintain an armored car. ER 39.

The defense then argued that although there was a substantial amount of drugs involved in the case, the drugs were not owned by Roueche; rather, he brokered and transported loads of drugs for others. ER 26. Nonetheless, the defense did not dispute the quantity of drugs supporting the base offense level or that Roueche had played a supervisory role in the conspiracies. The defense merely objected to the suggestion that Roueche was running the entire operation. ER 26-27.

The defense again raised its due process concerns, noting that almost all of the evidence relates to events in Canada, that the Canadian government had denied the defense requests for certain information, and only provided selected conversations recorded during a year-long wiretap. ER 28-29. The defense also claimed that it was limited in its ability to respond because the Canadian government had

indicated that Roueche might be prosecuted in Canada and that, regardless of the fact that this would not implicate Double Jeopardy concerns, it would be unfair for the court to punish Roueche based on conduct that would give rise to a new prosecution. ER 29-30.

The defense then reiterated the points it made in its Sentencing Memorandum regarding the sentences imposed on other defendants and pointed to the support Roueche had received from his family and friends, and Roueche's devotion to his children.

When addressing the court, Roueche simply apologized to his family, and thanked those who submitted letters on his behalf. He then stated, "[w]hen a person is subject to horrible circumstances, they find out who their friends are. I'm proud to say I have some of the best friends in the world." ER 40.

I. The District Court's Statements at Sentencing.

Before addressing the Sentencing Guidelines range or the sentence to be imposed, the district court noted that Clay Roueche was considered a monster by some who held him accountable for the carnage resulting from the drug trade in British Columbia but also was revered as someone who personified honor, loyalty, and respect. ER 42.

The court observed that law enforcement considered Roueche to be the "prototypical drug kingpin" involved in a multi-million dollar drug trade that used sophisticated weaponry and modes of transportation, such as helicopters and planes, to bring cocaine and drugs into Canada and marijuana and sometimes ecstacy into the United States.

ER 42-43. At the same time, the court observed Roueche was a devoted father to his children and was a person who would go to great lengths to help his friends with generosity and kindness. ER 42-43.

With respect to the Sentencing Guidelines, the court concluded the Probation Officer had correctly scored the Guidelines by applying an enhancement both for money laundering and firearms. Nonetheless, the court then stated:

> I am going to operate on the assumption that [the defense] is correct and that the proper guideline range is 324 to 405, because the guideline range for the other levels is life, and that doesn't really constitute a range at all, and I've not seriously considered a life sentence for Mr. Roueche. But the range that is at level 41 of 27 to 33 [years] is a conceivable range of punishment for someone who has done what Mr. Roueche has done.

ER 44.

The court then considered the factors in 18 U.S.C. § 3553(a) to arrive at "the appropriate sentence that is sufficient but not greater

than necessary to fulfill the principles embodied in the statutory sentencing factors." ER 44. As aggravating factors, the court considered "the massive amounts of drugs, the highly sophisticated means of transportation, the huge amounts of money, and the pervasive presence of weapons" involved in these conspiracies. ER 44-45. The court made note of Roueche's role in starting the UN Gang and his leadership role in the criminal enterprise. ER 45. Although the court observed that it was certain that "Mr. Roueche feared no one, took orders from no one, and was the one making the decisions," ER 45, the court also noted that this was not to say that he was responsible for everything done in the United States in the name of the UN Gang, observing that others were from time to time "pursuing their own agenda[s]" and that it was "convenient to blame everything on Mr. Roueche." ER 46.

At that point in the hearing, the court specifically stated,

> I want to be very clear here. I'm only punishing Mr. Roueche for the things he personally did, things he personally said on the wiretaps, the things that he has personally admitted to in entering his guilty pleas on these three counts. But those things alone, in this court's view, clearly do justify an imposition of a 30-year sentence. It is approximately at the midpoint of the guidelines, and it is sufficient but not longer than necessary to give meaning to

> the principles of the United States justice embodied in the acts of Congress, the decisions on sentencing in the Ninth Circuit Court of Appeals and in the United States Supreme Court.

ER 46. The sentence thus imposed was thirty-years of imprisonment to be followed by a five-year period of supervised release with a variety of conditions to be applied if Roueche was not deported upon completion of his sentence or was granted permission to reenter the United States. ER 47. This appeal follows.

VII. ARGUMENT

A. The District Court Complied with the Requirements of Rule 32(i)(3).

The first issue raised by the defense on appeal is a claim that the district court violated the requirements of Federal Rule of Criminal Procedure 32(i)(3)(B) by failing to resolve a factual dispute. The defense makes this claim despite the fact that the district court adopted, for purposes of the sentencing, the Guidelines range as calculated by the defense, that Roueche did not challenge the amount of drugs used to calculate the Guidelines range or his extensive leadership role in the charged conspiracies, and, most importantly, that the court explicitly stated that it was basing its sentence *only* on what Roueche

personally did, what was heard on the wiretaps, and on Roueche's admitted conduct for purposes of his guilty pleas. Therefore, there simply is no basis for this claim.

1. Standard of Review.

Ordinarily, this Court reviews the question of a sentencing court's compliance with the requirements of Federal Rule of Criminal Procedure 32 *de novo*. *United States v. Saeteurn*, 504 F.3d 1175, 1178 (9th Cir. 2007). "If the district court fails to make the required Rule 32 findings or determinations at the time of sentencing, the sentence must be vacated and the defendant resentenced." *United States v. Herrera-Rojas*, 243 F.3d 1139, 1142 (9th Cir. 2001) (internal quotation marks omitted).

Where, however, a defendant fails to object at the time of sentencing, the claim is not preserved, and review is only for plain error. *See United States v. Waknine*, 543 F.3d 546, 551-551 (9th Cir. 2008); *cf. United States v. Berry*, 258 F.3d 971, 976 (9th Cir. 2001) (failure to hold an evidentiary hearing to resolve a factual dispute as required under Rule 32(c)(1) [now Rule 32(i)(3)] is reviewed for plain error, where the defendant did not request a hearing). Under plain

error review, a defendant is not entitled to any relief unless he can demonstrate: (1) an error, (2) that was plain, and (3) that affected his substantial rights. *See Jones v. United States*, 527 U.S. 373, 389 (1999). If these three conditions are met, the Court may exercise its discretion to notice such error, but only if (4) "the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Marcus*, _ U.S. _, 2010 WL 2025203 *3 (May 24, 2010) (quoting *Puckett v. United States*, 556 U.S. _, 129 S. Ct. 1423, 1429 (2009) (internal quotation marks omitted)). No error, plain or otherwise, occurred in this case.

2. The Rule 32 and the Applicable Cases.

Rule 32(i)(3)(B) of the Federal Rules of Criminal Procedure provides that, at sentencing, a court:

> must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.

To trigger this requirement, however, only a specific factual objection will suffice. *United States v. Stoterau,* 524 F.3d 988, 1011 (9th Cir. 2008); *United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007).

Moreover, this Court has held that the application of Rule 32(i)(3)(B) "is limited to factual disputes which affect the temporal term of the sentence the district court imposes." *Saeteurn*, 504 F.3d at 1181; *United States v. Lindholm*, 24 F.3d 1078, 1085 n.7 (9th Cir. 1994) (holding that Rule 32(c)(3)(D), Rule 32(i)(3)(B)'s predecessor, "only applies to factual inaccuracies, not to recommendations, opinions or conclusions not factual in nature").

Moreover, the Advisory Committee Notes accompanying the 2002 Amendment to make this rule clear that part of Rule 32 is not intended to have broad application. To the contrary, the amendments creating Rule 32(i)(3) revised former Rule 32(c)(1), which had provided that a court was obligated "to rule on any unresolved objections to the presentence report." The Advisory Committee Notes observe that the prior rule left unclear whether the rule should be read to require a resolution of only those objections that affected sentence, or all objections to any part of the presentence report. The 2002 amendment was meant to address this potential ambiguity and thus to "narrow the requirement for court findings to those instances when the objection

addresses a 'controverted matter'" concerning the presentence report. Fed.R.Crim.P. 32, Advisory Committee Notes (2002).

Thus, the majority of cases in which this Court has addressed violations of this subpart of Rule 32 (or its predecessor) pertains to factual disputes which affect the Sentencing Guidelines calculations at a time when the Guidelines range was mandatory and dictated the sentencing range to be imposed. Generally, these are the cases from this Court on which the defense now relies. *See, e. g., United States v. McClain*, 30 F.3d 1172, 1174 (9th Cir. 1994) (challenge to criminal history and weight of the drugs used to calculate the base offense); *United States v. Houston*, 217 F.3d 1204, 1207 (9th Cir. 2000) (whether defendant made the threats of death used to enhance by two levels the defendant's total offense level); *United States v. Carter*, 219 F.3d 863 (9th Cir. 2000) (failure to make findings regarding role adjustment). These cases do not support a finding of plain error, or even error, where a defendant did not object at sentencing and specified only those things on which the court explicitly did not rely at sentencing.

By this argument, the government does not mean to suggest that the mandate in Rule 32(i)(3)(B) is limited solely to facts pertaining to

Sentencing Guidelines calculations, although these are the most obvious facts affecting sentence. That said, however, this Court has clearly stated that the fact in dispute must have some affect on the length of a defendant's sentence. *See Saeteurn*, 504 F3d at 1179.

Finally, where a district court chooses not to rely on a disputed fact, this Court has made plain that it need not resolve the factual dispute. *Id.* In such a case, however, the district court must state for the record that it did not take disputed facts into account. *Id.* Applying these rules here, it is clear that there simply was no error.

3. The Court Did Not Fail to Resolve a Specified Factual Dispute.

In its opening brief, the defense makes only a general claim that the district court failed to resolve factual disputes "concerning Mr. Roueche's violence and leadership during his conduct of the conspiracies" and failed to make factual findings regarding these disputes.[19] Appellant's Opening Brief at 24. This claim, and the

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[19] The defense also claims that the district court failed to hold an evidentiary hearing. *See* Appellant's Opening Brief at 24. This claim, however, ignores the fact that the defense did not request an evidentiary hearing but rather stated that it would not address the disputes since the court would likely not rely on disputed matters.

(continued...)

arguments that follow, ignore the fact that although the defense made a variety of objections to the presentence report, it did not dispute the factual accuracy of its contents; rather, the defense objected to allowing the court to attribute to Roueche specific portions of the presentence report describing the conduct of co-defendants. ERS 334-38.

Moreover, in the memorandum describing sentencing disputes filed shortly before sentencing, citing *United States v. Saeteurn*, 504 F.3d 1175, 1178 (9th Cir. 2007), the defense identified those matters it believed "may bear upon the temporal component of the sentence." ERS 324-35. Specifically, the only issues raised were paragraph 31 of the presentence report, to the extent that the assertion that the UN Gang was engaged in violent activities was interpreted as suggesting that Roueche was involved in these activities;[20] the

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[19](...continued)
ER 30. Moreover, Rule 32 of the Federal Rules of Criminal Procedure "does not create a 'general right to an evidentiary hearing at sentencing.'" *United States v. Stein*, 127 F.3d 777, 780 (9th Cir. 1997). *See also United States v. Real-Hernandez*, 90 F.3d 356, 262 (9th Cir. 1996). The rule simply provides that a court may permit the parties to introduce evidence on objections to the presentence report. *See* Fed.R.Crim.P. 32(i)(2); *see also* USSG § 6A1.3.

[20] The defense offered no suggestion that this characterization of the actions of the UN Gang, as opposed to Roueche himself, was
(continued...)

declaration of Daniel LeClerc with particular focus on LeClerc's description of the extent of Roueche's involvement in the cocaine conspiracy and the description of Roueche's threats and his fear of Roueche; and paragraphs 15 and 26 of Ken Davis' declaration. ERS 325-31; 342-49. These objections did not preserve factual disputes of any relevance to the temporal component of Roueche's sentence.

Indeed, what the defense did not object to was the leadership role adjustment applied for purposes of the Sentencing Guidelines range, or the description of the basis for this enhancement contained in paragraph 92 of the presentence report. That paragraph describes Roueche as the "founder and operational leader of the UN Gang," an organization "determined to control much of the trafficking of narcotics in British Columbia, Canada and into the United States." PSR ¶ 92. It describes Roueche's role as "coordinat[ing]" the importation of marijuana into the United States, "orchestrat[ing] the smuggling of criminal proceeds,"and "order[ing]/purchas[ing], organiz[ing], and

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[20](...continued)
anything other than accurate. Indeed, counsel acknowledged that individuals associated with the UN Gang had died and that "it was a violent [roueche] was living in in Canada." ER 39.

orchestrat[ing] the exportation of cocaine into Canada." PSR ¶ 92. This paragraph also observes that Roueche recruited others and appeared "to have final decision making authority." PSR ¶ 92. Given that Roueche did not object to this characterization, there surely could be any dispute regarding his leadership role or the Court's consideration of his role for purposes of sentencing.[21]

With regard to any acts of violence, the defense also did not, and could not, object to Roueche's words captured in wiretap conversations. These reflect both the extent of his involvement in the conspiracy and his views related to violence. Roueche also acknowledged the fact that a firearm was found in his residence in Canada during a search conducted immediately after his arrest. E 38. Further, Roueche did not make any objection to the third declaration provided by the government in which the witness describes obtaining firearms to be smuggled into Canada at Roueche's direction and the fact that Roueche and other members of the conspiracy were armed and maintained

[21] Moreover, the district court adopted the defendant's Guidelines range for purposes of determining the appropriate sentence after consideration of the factors in 18 U.S.C. § 3553(a). Thus, there can be no suggestion that the district court failed to resolve factual disputes relevant to the Guidelines calculations.

secret compartments in their cars to hide firearms. SSER 8. Thus, the violent nature of the UN Gang, the extent of drug trafficking and the possession of firearms by Roueche and his co-defendants simply were not in dispute.

Most importantly, the defense has ignored the district court's statements at sentencing. These statements made clear that the court was basing its sentence only on the "things [Roueche] personally said on the wiretaps, the things that he has personally admitted to in entering his guilty pleas on these three counts." ER 44. In the court's view, these things *alone* justified the thirty-year sentence imposed.[22] ER 44. Although the court did not expressly state that it was disregarding all disputed facts, that fact is implied by its statements regarding the limits of what it considered in crafting the sentence. Simply because the court expressed these limitations in a positive and rather than a negative manner, should not change the analysis. The district court's statements alone establish that there was no violation of

[22] The defense has not raised a claim that this sentence is substantively unreasonable so that issue has been waived.

Rule 32(i)(3)(B), regardless of what standard of review this Court applies.

As noted above, however, because the defense not only failed to object at the time of sentencing to the court's failure to resolve a distributed fact, and affirmatively stated that it need not address any sentencing disputes, ER 30, the plain error standard of review applies in this case. As set forth above, there was no error, much less plain error. More importantly, even if the district court were to consider any part of LeClerc's declaration, or the disputed paragraphs of Davis' declaration, this certainly did not affect Roueche's substantial rights since these do little more than provide more details regarding matters that were uncontested. The claims raised on appeal simply do not constitute plain error requiring this Court to vacate Roueche's sentence.

B. The District Court Did Not Rely Upon Unreliable Hearsay.

The second claim raised on appeal is that the district court relied upon unreliable, uncorroborated hearsay in fashioning its sentence. That simply is not the case.

1. Standard of Review.

This Court reviews for abuse of discretion a claim that the district court relied upon unreliable evidence at sentencing. *United States v. Felix*, 561 F.3d 1036, 1040 (9th Cir.), *cert. denied*, 130 S. Ct. 256 (2009).

2. The District Court Did Not Rely Upon Unreliable Evidence.

As a starting matter, it is well-established that a district court may consider hearsay information in sentencing a defendant. *See United States v. Ingham*, 486 F.3d 1068, 1076 (9th Cir. 2007); *see also United States v. Littlesun*, 444 F.3d 1196, 1200 (9th Cir. 2006). "[H]earsay is admissible at sentencing, so long as it is accompanied by some minimal indicia of reliability." *Littlesun,* 444 F.3d at 1200 (internal citation and quotation marks omitted); *see also Williams v. New York*, 337 U.S. 241, 246-47 (1949). A district court may consider a wide variety of information at sentencing, *see* 18 U.S.C. § 3661, and is not bound by the rules of evidence, see Fed.R.Evid. 1101(d)(3). Indeed, this Court has recently observed that "'[H]earsay evidence of unproved criminal activity not passed on by a court,' for example, 'may be considered in sentencing.'" *United States v. Vanderwerfhorst,* 576 F.3d

929, 935 (9th Cir. 2009) (quoting *Farrow v. United States*, 580 F.2d 1339, 1360 (9th Cir. 1978). Indeed, to the extent that Roueche is raising a due process claim, the *Vanderwerfhorst* Court noted that a defendant must first establish the "challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence." *Vanderwerfhorst*, 576 F.3d at 936. "Challenged information is deemed false or unreliable if it lacks 'some minimal indicium of reliability beyond mere allegation.'" *Id.* (internal citations omitted).

Here, the defense claim appears to be directed at the fact that the court did not strike the declaration of Daniel LeClerc or address the paragraphs to which the defense objected in the declaration of Ken Davis. Regardless, however, as set forth above, there is no basis to find that the district court relied on these declarations in determining the appropriate sentence to be imposed in this case. Therefore, applying the factors set out in *Vanderwerfhorst,* Roueche cannot meet his burden.

Moreover, in challenging LeClerc's declaration, the defense does not address the information that corroborates that declaration, and ignores the fact that, with one exception, its own declarations

submitted to challenge LeClerc's statements contain no indicia of reliability. Indeed, it is difficult to think of anything more unreliable than a declaration that purports to establish the words of an unidentified individual whose statements consist of assumptions and beliefs presented with little to establish the validity of those beliefs. These claims are not aided by the declaration of the woman LeClerc once dated. Although she is identified by name, the document also suggests that she would be someone that LeClerc would likely have introduced to Roueche, an assumption that is not in any way supported.

In contrast, to corroborate LeClerc's affidavit, the district court had before it the declarations of Special Agent Peter Ostrovsky and Birgis Brooks. Ostrovsky's affidavit details the investigation and the fact that LeClerc revealed his involvement with "Pittbull" before his involvement with this individual was discovered by investigators. *See* PSR ¶¶ 57-62.[23] The declaration also details the fact that another witness admitted to smuggling cocaine into Canada on Roueche's

[23] These paragraphs of the presentence report were not objected to by the defense. *See* ERS 336.

behalf. ER 131. Thus, LeClerc's statements regarding the cocaine smuggling did have the necessary indicia of reliability.

With respect to Davis, the defense objections were limited to paragraphs 15 and 26, pertaining to instructions Davis received regarding a means of determining whether another transporter was lying about losing a load of drugs (putting a gun in his mouth) and statements made by Roueche about acting as an enforcer. ER 373. The argument ignores the fact that Roueche himself acknowledged much of what was in Davis' declaration, without consideration of how the declaration was corroborated by other evidence in the record to which the defense did not object. Thus, there simply is no basis to find that the district relied upon unreliable evidence in reaching its sentencing determination.

C. The District Court Did Not Improperly Rely on Extraterritorial Foreign Criminal Acts.

The final claim raised on appeal is that the court improperly relied on extraterritorial conduct to arrive at its sentence. That simply is not the case.

1. Standard of Review.

To that extent, that the question presented is whether the court considered reliable evidence at sentencing, as stated above, the standard of review for this question is abuse of discretion. *United States v. Felix*, 561 F.3d 1036, 1040 (9th Cir.), *cert. denied*, 130 S. Ct. 256 (2009).[24]

2. The District Court Did Not Abuse Its Discretion.

This Court has observed that "[g]enerally there is no constitutional bar to the extraterritorial application of the United States penal laws." *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994); *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002). Nonetheless, Acts of Congress generally are not construed to have extraterritorial application unless Congress clearly so intends. *Id.; Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 173 (1993).

This Court has adopted a two-step process to determine whether extraterritorial jurisdiction is proper. *Neil*, 312 F.3d at 421. First, this

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[24] The defense has made no effort to suggest a standard of review for this issue, but rather simply suggests, in the title of this section, that the remedy for error is resentencing.

Court looks to the extent of the statute to determine whether Congress intended it to apply extraterritorially. *Id.* Second, where the Court determines that Congress intended for a statute to have extra-territorial reach, this Court determines whether the exercise of extraterritorial jurisdiction is consistent with the principles of international law. *Id.* *See also United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002). Where, however, the Congressional intent to exercise extraterritorial jurisdiction of the subject offense is plain from the face of the statute, this Court has noted that there generally is no need to reach the question of whether the operation of the statute comports with international law. *Neil*, 312 F.3d at 422.

There is no doubt that by its terms the statute making it a crime to conspire to import or export drugs to and from the United States, *see* 21 U.S.C. §§ 953 and 960, has application to extra-territorial activities. By extension, conduct that is directly relevant to these offenses may be used as relevant conduct for purposes of sentencing.

The cases cited by the defense do not require a contrary result. For example, in *United States v. Azeem*, 946 F.2d 13 (2d Cir. 1991), the Second Circuit held the district court could not consider, for purposes of

calculating the base offense under USSG § 2D1.1, the three kilograms of heroin that the defendant had smuggled from Pakistan to Cairo, Egypt, where he supplied it to another individual who was then arrested. *Id.* at 14, 17. There is no indication that this shipment of heroin was destined for the United States and it certainly did not move beyond Egypt. Thus, as the *Azeem* Court noted, "was not a crime against the United States." *Id.* at 16. This standard is in contrast with the facts here, where the district court, without objection from the defense, addressed only drugs that were either imported into, or exported from, the United States to determine the base offense level.[25]

Moreover, taking into account conduct related to the offense of conviction in sentencing is not the same thing as holding the defendant criminally culpable for that conduct. *See United States v. Watts*, 519

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[25] The defense citation to *United States v. Chunza-Plazas*, 45 F.3d 51 (2d Cir. 1995), is similarly unavailing. There, the Second Circuit concluded that under USSG § 4A1.1, the district court should not have considered, for purposes of criminal history, acts committed in Columbia for which the defendant had not been convicted. *Id.* at 56. There is no evidence here that the district court enhanced Roueche's sentence for any foreign criminal conduct for which has not been convicted. To the contrary, the district court expressly limited its consideration for purposes of sentencing to the conduct underlying his convictions.

U.S. 148, 154 (1997) (per curiam). Surely, for example, in a case involving a foreign defendant, information regarding the defendant's behavior outside the United States remains relevant for determining the defendant's history and characteristics. Were it not so, Roueche's conduct in providing loving care for his children could not be considered by the Court.

Moreover, where related to the offense of conviction, evidence of conduct outside the United States is directly relevant to the sentence to be imposed. For example, in cases involving possession of child pornography, this Court and others have upheld use of the cross-reference in USSG § 2G2.1 to USSG § 2G2.2(c)(1), the Guideline applicable to the manufacture of child pornography, even where the production of the child pornography occurred outside the United States. *See, e.g., United States v. Speelman,* 431 F.3d 1226, 1232 (9th Cir. 2005); *United States v. Harvey*, 2 F.3d 1318 (3d Cir. 1993), *United States v. Dawn*, 129 F.3d 878, 884 (7th Cir. 1997). Consideration of the conduct relevant to Roueche's crimes that occurred in Canada is not punishment for extraterritorial conduct, it is punishment for the crimes that he committed. Thus, there simply is no

support for the defense claim even if the court had considered such conduct that to do so was error.

VIII. CONCLUSION

For the reasons set forth above, the thirty-year sentence imposed by the district court on Clayton Roueche should be affirmed.

DATED this 23rd day of June, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionately spaced, has a Century Schoolbook typeface of 14 points, and contains 11240 words.

Dated this 23rd day of June, 2010.

s/Helen J. Brunner
HELEN J. BRUNNER
Assistant United States Attorney

STATEMENT OF RELATED CASES

Counsel for the government is not aware of any related cases which should be considered with this matter.

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2010, I electronically filed the foregoing Appellee's Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and transmitted via Federal Express four copies of the Supplemental Excerpts of Record and Sealed Supplemental Excerpts of Record to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. One copy of the documents named herein were transmitted via United States Mail to counsel for the Appellant-Defendant at:

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I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 23rd day of June, 2010.

s/Helen J. Brunner
HELEN J. BRUNNER
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