

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

ADELAIDA YUDIT GARIBAY

Defendant

CRIMINAL No. 21-cr-10322-MLW

GOVERNMENT'S SENTENCING MEMORANDUM

The defendant traveled by car from her home in Burbank, California, to Boston—a distance of approximately 3,000 miles—to pick up two kilograms of fentanyl (worth \$82,000) and deliver them to a buyer. On September 29, 2021, the defendant met with two unidentified women in Jamaica Plain to retrieve the two kilograms. The defendant had been communicating directly with the buyer, who was in fact an undercover officer (the “UC”), to arrange the time and place that she would deliver the two kilograms to him. She then boarded a rideshare vehicle and was arrested on her way to meet the UC. This was not this 46-year-old defendant’s first time traveling within the United States for the purpose of trafficking drugs, having been twice convicted (at ages 20 and 21) of similar conduct (marijuana trafficking).

On October 28, 2021, a federal grand jury returned an indictment charging the defendant with one count of Possession with Intent to Distribute 400 Kilograms or More of Fentanyl, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). The single count provides for a ten-year mandatory minimum prison sentence. The government believes that the defendant has met all criteria under 18 U.S.C. § 3553(f), and the Court may therefore sentence the defendant pursuant

to the Sentencing Guidelines without regard to any statutory minimum sentence. There is no plea agreement.

As discussed in greater detail below, the government disagrees that the defendant was a “minor participant” entitling her to a two-level role reduction pursuant to § 3B1.2. The defendant is therefore also not entitled, in the government’s view, to the two-level reduction under § 2D1.1(a)(5)(A)(i). The government therefore believes the total offense level should be 27, not 23 as calculated by the U.S. Probation Office. The government recommends a sentence of 70 months incarceration, the low end of the Guidelines range as calculated by the government.

A. The Defendant is Not a “Minor Participant” Under USSG § 3B1.2

“A defendant who seeks a mitigating role adjustment bears the burden of proving, by a preponderance of the evidence, that [defendant] is entitled to the downward adjustment.” *United States v. Arias-Mercedes*, 901 F.3d 1, 5 (1st Cir. 2018). Section 3B1.2 requires that the defendant show that the defendant is “substantially less culpable than the average participant in the criminal activity in which [the defendant] was involved.”¹ *Id.* At 5-6 (citing U.S.S.G. § 3B1.2, cmt. n.3(A)) (internal quotation marks omitted). This is a fact-based determination that requires the Court to consider the various factors listed in Application Note 3(C).

As an initial matter, the relevant conduct for purposes of § 3B1.2 analysis is defendant’s possession of two kilograms of fentanyl in Boston on September 29, 2021, with the intent to distribute the fentanyl to the UC. To the extent the defendant argues there was some wider

¹ The current focus on other participants in the *instant* offense results from an amendment promulgated in 2015. Prior to that, courts undertook a two-part analysis under which they first determined whether the defendant was “less culpable than *most of those involved in* the offenses of conviction” and, if so, determined whether the defendant was less culpable than “*most of those who have perpetrated* similar crimes.” *Arias-Mercedes*, 901 F.3d at 5-6 (emphases added).

conspiracy involving additional amounts of narcotics, defendant was not charged with any conspiracy nor held accountable for any such amounts. Indeed, even if the government had charged such a conspiracy the relevant conduct would be defendant's own trafficking activities and not those of the broader conspiracy. *See Arias-Mercedes*, 901 F.3d at 5-9 (affirming denial of § 3B1.2 role reduction where relevant conduct was defendant's own maritime shipment of drugs, not some broader uncharged conspiracy). Accordingly, the conduct as to which defendant's relative culpability is to be assessed is narrow.

i. The degree to which defendant understood the scope and structure of the criminal activity

Defendant was not a naïve one-timer doing someone a favor. Rather, [REDACTED] she drove 3,000 miles to pick up and deliver drugs in Boston. [REDACTED]

[REDACTED]

In addition, defendant's prior commission of similar crimes demonstrates her knowledge. Defendant was previously convicted twice (ages 20 and 21) of transporting narcotics. In the age-20 offense defendant was caught on a train in Kansas City transporting marijuana to Massachusetts, the same place as the instant offense. Defendant is well-equipped to understand what it means to transport narcotics.

² References are to the Pre-Sentence Report dated August 3, 2022.

- ii. The degree to which the defendant participated in planning or organizing the criminal activity
- iii. The degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority

These two factors also militate against a role reduction. As discussed above, defendant coordinated directly with the UC about when and where she would deliver the two kilograms of fentanyl to him. She even argued with the UC about the logistics. PSR ¶ 18. Defendant may not have conceived the idea of selling drugs in Massachusetts but she participated in coordinating it and executing it.

- iv. The nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts

Defendant was a major player in the offense of conviction. She was the one who drove 3,000 miles in a car to pick up the drugs, picked them up in Jamaica Plain, coordinated directly with the UC, and got in the rideshare to meet the UC. PSR ¶¶ 9-23. She also had significant responsibility in that she was entrusted with \$82,000 worth of product.

- v. The degree to which the defendant stood to benefit from the criminal activity

This factor weighs against the reduction as well. [REDACTED]

[REDACTED]

For these reasons, the two-level role reduction for minor participant, and the further two-level reduction of § 2D1.1(a)(5)(A)(i), do not apply.

B. Sentencing Factors Under 18 U.S.C. § 3553(a)

Considering the § 3553(a) factors, a sentence of 70 months is sufficient but not greater than necessary to achieve the goals of sentencing.

i. *Nature of the Offense*

The defendant sold a significant amount of fentanyl, two kilograms, to the UC in this case. The danger of fentanyl is well-documented. *See, e.g., United States v. Simms*, No. 1:19-CR-423, 2019 WL 7049930, *6 (N.D. Ohio Dec. 23, 2019) (“The distribution of fentanyl, one of the most deadly illegal drugs on the black market, poses an incredible threat to community members.”); *United States v. Brown*, No. 17-00219-02, 2017 WL 4883375, *3 (W.D. Penn. Oct. 30, 2017) (“The Court is mindful that the distribution of fentanyl, in particular, has recently resulted in serious harm to the community—with multiple reports of overdoses and deaths resulting from that particular drug being reported in the news.”). Fentanyl is a deadly drug that has wreaked havoc in the United States, and more specifically in Massachusetts, over the past several years. Fentanyl is an extremely potent synthetic opioid that has become increasingly intertwined with heroin, both literally as an additive to make heroin more potent, and in terms of the overall drug marketplace.³ “Fentanyl remains the primary driver behind the ongoing opioid crisis, with fentanyl involved in more deaths than any other illicit drug.”⁴ New England has been especially hard hit by the opioid crisis, and the DEA’s data shows that fentanyl availability remains high in the region and increased from 2017 to 2018.⁵ “2018 data shows that every day,

³ U.S. Department of Justice Drug Enforcement Administration, 2019 National Drug Threat Assessment, available at <https://www.dea.gov/sites/default/files/2020-02/DIR-007-20%202019%20National%20Drug%20Threat%20Assessment%20-%20low%20res210.pdf>, at 9-11 (last visited August 24, 2022) (hereinafter “DEA 2019 Assessment”).

⁴ DEA 2019 Assessment at 9.

⁵ DEA 2019 Assessment at 9.

128 people in the United States die after overdosing on opioids.”⁶ Synthetic opioids (such as fentanyl) were involved in 59.8% of all opioid-involved overdose deaths.⁷

In 2017, Massachusetts was among the top five states for fentanyl reports to the National Forensic Laboratory Information System.⁸ Massachusetts was also among the top-five states in age-adjusted rates of fentanyl involved overdose deaths.⁹ These statistics are not hypothetical; they describe the opioid overdose crisis occurring right now in this District. The epidemic is real and being felt every day by families across Massachusetts and New England. The defendant’s crime played a role in fueling this epidemic.

ii. *Specific and General Deterrence*

A significant sentence of imprisonment is warranted to deter others from becoming involved in any way, role, or capacity in the trafficking of fentanyl as the dangers associated with this deadly drug cannot be overstated. Individuals tempted to engage in drug trafficking must understand that any involvement with fentanyl, no matter how minimal, will have immediate and harsh consequences. Imprisonment is necessary to send a strong warning to others who might otherwise consider possessing or distributing this deadly drug.

There is also a need for this defendant to be specifically deterred. She was caught twice in her youth transporting narcotics in the United States, including a large shipment of marijuana bound for Massachusetts. For the second of those offenses she received an incarcerative

⁶ National Institute on Drug Abuse, Opioid Overdose Crisis (Revised May 2020), available at <https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis> (last visited on August 24, 2022).

⁷ Lawrence Schol et al., “Drug and Opioid-Involved Overdose Deaths – United States, 2013-2017,” *Morbidity and Mortality Weekly Report* (January 4, 2019), Centers for Disease Control and Prevention, available at https://www.cdc.gov/mmwr/volumes/67/wr/mm675152e1.htm?s_cid=mm675152e1_w (last visited on August 24, 2022).

⁸ DEA 2019 Assessment at 10-11.

⁹ DEA 2019 Assessment at 14.

sentence of ten months incarceration and three years of supervised release. Nonetheless she was undeterred and many years later, at age 45, she decided to do it again.

A significant prison sentence is necessary to deter the defendant from ever engaging in drug trafficking after her release.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants .

/s/ Samuel R. Feldman

Samuel R. Feldman

Assistant United States Attorney

Date: August 24, 2022