

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

CASE NO. 15-CR-227-CJS

-vs-

RICHARD PETIX,

**PETIX’S STATEMENT WITH
RESPECT TO SENTENCING
FACTORS AND
OBJECTIONS TO PSR**

Defendant.

Defendant, Richard Petix, hereby submits, by and through his attorneys, Stephen M. Leonardo and Matthew R. Lembke, his statement with respect to sentencing factors and objections to the pre-sentence report (PSR), as follows:

THE OFFENSE CONDUCT

Petix objects to paragraphs 31, 32, 33, 34, 35, 36, and 42 of the PSR relating to “The Offense Conduct.”

Objection to Paragraph 31

Petix objects to the language in paragraph 31 beginning at the end of line 1 and continuing through the end of the paragraph. The language to which Petix objects is irrelevant to his case because, as we will set forth below, there is no evidence to support the allegation that Petix was involved in the use of bitcoin to facilitate illegal transactions.

Assuming, for the sake of argument only, that Court were to find that the government met its burden of establishing that Petix did, in fact, sell bitcoin, which he *knew* and *believed* was going to be used for an illegal purpose (to purchase

marihuana), the statements in the PSR that other people may use bitcoin to facilitate illicit transactions including controlled substances, engage in money laundering, and distribute child pornography are inflammatory and unduly prejudicial to Petix because they have nothing to do with his case.

Statements like these perpetuate the false implication that Petix was buying and selling bitcoin, principally, if not exclusively, for sinister illegal purposes. This is the bogus narrative the government has been promoting since the beginning of this prosecution. The government has repeatedly relied on this unsupported accusation in order to justify this prosecution, and in support of its various legal arguments, despite the fact that, as proven by the information contained in this PSR, it has no evidence to corroborate it.

Paragraph 31 should be modified to state, as follows: “Bitcoin is not inherently illegal and has known legitimate uses, much like cash.” The balance of this paragraph should be deleted from the PSR.

Objection to Paragraphs 32 and 33

Petix objects to paragraphs 32 and 33 of the PSR in their entirety. He requests that the Court order that they be deleted from the PSR.

Paragraphs 32 and 33 hold forth on the technical aspects and workings of various levels of the internet. But these paragraphs focus, primarily, on the “Deep Web,” which, apparently, includes the “Dark Web” and “Dark Web Marketplaces.” This is, admittedly, interesting. It would make for a fine topic on “Dateline” or on a

program on the True Crime Network. It has nothing to do, however, with Petix's case. There is no evidence, nor any allegations, that Petix was involved in activities on the "Dark Web" or that any of his transactions took place in a "Dark Web Marketplace."

Nor is there any evidence that Petix was accessing "The Onion Network" (TOR). Accordingly, there is no reason for information about TOR to be included in this PSR except to encourage speculation that Petix was engaged in this conduct. These unsupported (and unsupportable) suggestions are improper, and unfairly prejudicial to Petix.

Perhaps one day the government will prosecute a case in which there is evidence that the accused was doing business on the "Dark Web." The information in paragraphs 32 and 32 may, perhaps, be useful in that event. But they should be deleted from Petix's PSR.

Objection to Paragraph 34

Petix objects to paragraph 34 of the PSR because it contains, at best, an oversimplified, incomplete, and misleading definition of a critical factor in Petix's case: the circumstances under which a person (or entity) is required to register with the United States Treasury's Financial Crimes Enforcement Network ("FinCEN").

This is important because not every situation in which a person exchanges bitcoin for what we know as "cash" or "currency" (in this case, U.S. dollars) requires that person to register with FinCEN.

The PSR states that

[e]xchangers of virtual currencies, including Bitcoin, are considered money transmitters under federal law and are subject to the anti-money (AML) (*sic*) laundering regulations if they conduct substantial business in the United States. Specifically, federal regulations require a virtual currency exchanger to register with [FinCEN] as a Money Services Business (MSB) and to develop and maintain an effective AML program.¹

We are not sure from where, precisely, this information comes. In any event, part of it is accurate. It is true that “exchangers” of Bitcoin, can be money transmitters subject to the registering requirements. It is also true that a virtual currency “exchanger” is likely required to register with FinCEN.

We are less certain that an “exchanger” is required to register “as a Money Services Business (MSB) and to develop and maintain an effective AML program”² because it is irrelevant to Petix’s case.

This is because Petix is charged with operating “an unlicensed money transmitting business.”³

A “money transmitting business” is one of eight types of activities that fall under the broader definition of a “money services business.”⁴

The PSR fails to set forth that a money transmitter is defined, generally, as

¹ PSR ¶ 34

² PSR ¶ 34

³ Docket #16, p. 2 (Count 2)

⁴ CFR § 1010.100(ff)

[a] person that provides money transmission services. The term ‘money transmission services’ means the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means.⁵

In addition to failing to define “money transmitting,” the PSR fails to make any reference to, or effort to define a “money transmitting *business*,” which is the primary charge to which Petix pleaded guilty.

The Second Circuit has given us, in clear and unequivocal language, a precise and detailed definition of what a “money transmitting business” is and does. That definition is, as follows:

A money transmitting business receives money from a customer and then, *for a fee paid by the customer*, transmits that money to a recipient in a place that the customer designates, usually a foreign country. After the customer gives the money transmitter an amount to send to the designee, the transmitter notifies the “payer” with whom it has a contractual arrangement in the recipient country. The payer then notifies the designated recipient of the money, and pays the money to the designee at the payer’s office. The transmitter then remits to the payer the amount paid to the designee, plus the payer’s commission.⁶

⁵ 31 C.F.R. § 1010.100(ff)(5)(A) (Lexis Advance through the July 26, 2017 issue of the Federal Register. Pursuant to 82 FR 8346 (“Regulatory Freeze Pending Review”), certain regulations will be delayed pending further review. *See* Publisher’s Note under affected rules. Title 3 is current through July 7, 2017)

⁶ *United States v. Velastegui*, 199 F.3d 590, 592 (2d Cir. 1999) (italics added)

In short, a “money transmitting business” is a business that, for a fee, facilitates the transfer of money between two or more entities – other than itself – outside the usual financial system and is not a depository institution.⁷

As the Court will recall, at this plea colloquy, Petix admitted that on at least one occasion he facilitated the exchange of Bitcoin for currency for the benefit of a third party and received a fee for doing it.

Petix has maintained from the outset of this case that, with few exceptions, his conduct consisted of buying Bitcoin with U.S. dollars, which he later sold to willing buyers, who paid him in U.S. dollars, and that he made a profit from these transactions. Except as he indicated in his plea colloquy, these were two-party transactions between Petix and the buyers. They were “arm’s length” transactions. The terms of each purchase and sale were negotiated and agreed upon by Petix and each individual purchaser.

Therefore, Petix objects to paragraph 34 or the PSR.

Paragraph 35

Petix objects to paragraph 35 of the PSR because it has nothing to do with his case. We request that the Court order paragraph 35 be stricken in its entirety.

⁷ See, 31 U.S.C. § 5330 (d)(1); 31 C.F.R. § 1010.100(ff)(5)(i)(A)

Paragraph 36

Petix objects to paragraph 36 of the PSR, essentially, for the reasons set forth above concerning paragraph 34 of the PSR.

Petix requests that paragraph 36 be deleted in its entirety and replaced with the following paragraph:

The instant investigation revealed that Petix was involved in buying and selling Bitcoins in exchange for United States dollars using the internet. Petix did not register as a money transmitting business as required by federal law and regulations. Petix admitted – without further explanation or detail about the particular transactions to which he was referring – the extent to which these transactions constituted the operation of a money transmitting business. He did admit, at the time of his plea, that at least one of these transactions was made for the benefit of a third party and, therefore, he was engaged in a “money transmitting business.”

Paragraph 39

Petix objects to that portion of paragraph 39, which states that “CD-2 was primarily a customer of CD-1, but also sourced Bitcoins for PETIX. C-2 bought over \$100,000 in Bitcoins to pay for marihuana on dark net markets.”

Our objection is based on the fact that whether the buyer of the Bitcoins from Petix ultimately used the Bitcoins to engage in illegal activity (in this case, apparently, buying marihuana) is irrelevant to Petix’s case.

The only way this information is relevant is even possibly relevant is as it relates to whether the 2 point enhancement under U.S.S.G. § 2S1.1(b)(1) applies to

Petix based on the conclusion that Petix “knew or believed” that the Bitcoins he sold to CD-2 “were intended to promote unlawful activity.”

The PSR does not include any evidence – or even an allegation – that Petix was informed of what CD-2 was intending to do with the Bitcoins CD-2 purchased from Petix.

As a result of the complete lack of any hard evidence on this topic, the probation officer cobbles together allegations concerning Petix’s false statements to investigators at the time of his arrest and his failure to allow probation to install monitoring software on his computer and somehow concludes that these facts permit an inference that Petix knew CD-2 was going to use the Bitcoin Petix sold him to buy marihuana.⁸ This is not a permissible inference to draw from these facts. It is speculation.

Paragraph 41

Petix objects to paragraph 41 because, based upon our analysis of the bank records we have received, it is our conclusion and belief that the money Petix received from the transactions set forth in paragraphs 38, 39, and 40 of the PSR was deposited into his Bank of America account referenced in paragraph 37 or the PSR, and therefore make up part of the \$102,796.96 referenced in paragraph 37.

⁸ PSR ¶ 54

Paragraph 42

Petix objects to paragraph 42 of the PSR because the total amount of \$189,862.96 attributed to Petix in paragraph 42 of the PSR is the result of “double counting.” As set forth above, we believe the amounts set forth in paragraphs 38-40 are part of the \$102,796.96 alleged in paragraph 37. Paragraph 42 should be deleted in its entirety. The total amount of money attributable to Petix for purposes of sentencing, therefore, should be \$102,796.96.

OFFENSE LEVEL COMPUTATIONS

Paragraph 53

For the reasons set forth above, Petix objects to paragraph 53 of the PSR to the extent that it finds his base offense level to be 16 by increasing the initial base offense level of 6 by 10 levels based on a dollar value of \$189,862.96.

Petix’s base offense level of 6 should be increased by 8 levels under USSG § 2B1.1(b)(1)(E) because the total monetary amount attributable to Petix for purposes of sentencing is \$102,796.96. Petix’s adjusted base offense level should be 14.

Paragraph 54

Petix objects to paragraph 54 of the PSR for the reasons set forth above relating to his objection to paragraph 39.

Paragraph 58

As a result of the above, Petix objects to paragraph 58. Petix’s adjusted offense level is 14.

Paragraph 59

Petix objects to paragraph 59 because Count 1's adjusted offense level is 6. Count 2's adjusted offense level is 14. This means that, under U.S.S.G. § 3D1.4(b) the total number of units is 1/2. If there are 1 or less units under 3D1.4, then there is no increase in offense level.

Paragraph 65

Petix objects to paragraph 65 of the PSR. For the reasons set forth above, Petix's total offense level, after a 2 point reduction for acceptance of responsibility, is 12.

SENTENCING OPTIONS

Paragraph 73

Petix objects to paragraph 73 because, as set forth above, his total offense level is 12. With a total offense level of 12 and criminal history category of III, his advisory sentencing guideline range is 15-21 months.

OFFENDER CHARACTERISTICS

Paragraphs 91-104

Petix objects to paragraphs 91 through 104 on the grounds that the information in these paragraphs is unfairly prejudicial to Petix is completely irrelevant to the determination of this sentence in this case in connection with the pending indictment to which he pleaded guilty.

Dated: July 28, 2017

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