

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 16-CR-20394

Honorable Sean F. Cox

-VS-

D-6 OLIVER SCHMIDT,

Defendant.

RESPONSE TO GOVERNMENT’S SENTENCING MEMORANDUM

One thing we can all agree on is that neither the defense nor the Government, and certainly not the Court, want Mr. Schmidt’s sentence to be based upon an inaccurate misunderstanding of the facts. While there are many things the parties agree upon, portions of the Government’s Sentencing Memorandum are at odds with the facts as admitted by Mr. Schmidt and as supported by other evidence. Even some facts that were contained in the PSR before it was amended as a result of a specific agreement between the Government and the defense have resurfaced in the Government’s Sentencing Memorandum.¹ But, that should not detract from the

¹ For example, the Government’s Memorandum reads: “During the course of the conspiracy, the defendant and his co-conspirators caused defeat device software to be installed in all of the approximately 500,000 VW 2.0 liter diesel vehicles sold in the United States from 2009 through 2015.” (Gov’t’s Sent’g Mem. at 7.) This language appeared in the original PSR authored by probation. (9/18/17 PSR ¶ 26 (“During the course of the conspiracy, the defendant and co-conspirators caused defeat device software to be installed in all of the approximately 500,000 VW

correctness of Mr. Schmidt's argument regarding his relatively limited role and brief involvement in what he has admitted is a very serious conspiracy developed and carried out over many years without his knowledge or involvement.² None of the Government's disputed factual assertions change the correctness of Mr. Schmidt's position that the proper sentence in this case is a forty (40) month custodial sentence and a fine in the amount of \$100,000.

The facts as set forth in Mr. Schmidt's Rule 11, and as admitted in this Court, are accurate. The facts set forth in Mr. Schmidt's Sentencing Memorandum are accurate. They set forth his role in this conspiracy and Clean Air Act ("CAA") violation case, and he readily admits his guilt for those actions and those offenses. But what Mr. Schmidt does not agree to are the assertions made by the Government

2.0 liter diesel vehicles sold in the United States from 2009 through 2015.".) Pursuant to a joint recognition that this language suggested that Mr. Schmidt was involved from 2009 onward, the language in the PSR was amended to clarify this point. The revised PSR now reads:

During the course of the conspiracy, *the defendants* caused defeat device software to be installed in all of the approximately 500,000 VW 2.0 liter diesel vehicles sold in the United States from 2009 through 2015. *During the defendant's participation* in the conspiracy, there were approximately 8,757 VW 2.0 liter diesel vehicles sold in the United States between July 2015 and August 2015.

(11/3/17 PSR ¶ 26(emphasis supplied).)

² The Government attempts to impute to Mr. Schmidt conduct taking place far in advance of his joining the conspiracy. For instance, the Government writes "the defendant's scheme caused serious harm to the environment and to the very air we breathe." This statement must relate to the nine-plus years over which this conspiracy occurred. And, as quoted in the previous footnote, 8,757 vehicle sales are being attributed to Mr. Schmidt's misconduct. And the fact is that the older model year vehicles (Gen 1 and Gen 2) impacted the "air we breathe" far more than the 8,757 Gen 3 vehicles for which Mr. Schmidt is being held accountable. (*See* Mr. Schmidt's Sent'g Mem., Ex. D.) The point here is that this was not Mr. Schmidt's scheme. Instead, it was VW's scheme.

that go well beyond those admitted and agreed upon facts. We therefore respectfully submit this Response to the Government's Sentencing Memorandum on behalf of Oliver Schmidt to rebut certain erroneous factual allegations in the Government's filing.

1. Mr. Schmidt was not aware of the defeat device until the summer of 2015.

The most serious error in the Government's Memorandum concerns the allegation made in a footnote that Mr. Schmidt was aware of the defeat device well before the date set forth in the Rule 11 and PSR. (*Compare* Gov't's Sent'g Mem. at 15, n.2 *with* Rule 11 at 6 ("During the summer of 2015, SCHMIDT was informed of the existence of cheating software in 2.0 liter diesel vehicles.") *and* 11/3/17 PSR at ¶ 18 (same).) This allegation is simply not true. In fact, as demonstrated by the discovery materials the Government provided to the defense, Mr. Schmidt did not know about the defeat device until months after he left his position at the Engineering and Environmental Office ("EEO") in the U.S. at the end of February 2015.

In support of its assertion that Mr. Schmidt knew of the defeat device in 2013, the Government points to a statement by Mr. Schmidt that the Government quotes out of context and two emails. First, the Government asserts that "Schmidt now claims that while he 'suspected' cheating in 2013, he was not sure at that point in time." Yet the Government fails to provide any context for Mr. Schmidt's

suspicious. Mr. Schmidt's comment that he was "suspicious" related to an isolated issue that arose in May 2013 when Mr. James Liang, a diesel expert, mis-fueled a diesel vehicle that was to be used for official EPA certification testing with gasoline. Although Mr. Liang and others used the mis-fueling incident as an opportunity to improve the defeat device, Mr. Schmidt did not know about or even truly suspect any defeat device at that time. Rather, he simply thought it was strange that a diesel expert put gasoline into a diesel engine. Indeed, Mr. Liang has repeatedly denied intentionally mis-fueling the vehicle. However, the Government's Sentencing Memorandum fails to provide any of this important context, instead suggesting that Mr. Schmidt's suspicions were much broader than they actually were.

Second, the Government cites an October 2013 email Mr. Schmidt sent to an employee of Audi AG. The Government writes: "[O]n October 17, 2013, [Mr.] Schmidt wrote an e-mail commenting on a power-point (*sic*) presentation prepared by employees of Audi AG, describing Audi's own cheating software." (Gov't's Sent'g Mem. at 15, n.2.)

As an initial matter, we note that the Government appears to be asserting that Mr. Schmidt commented upon a document that he never actually saw. In the actual email the government is citing, Mr. Schmidt writes the following to an Audi AG employee:

[REDACTED]

([REDACTED] .) The quoted language supports the fact that Mr. Schmidt never saw the document (which he did not), and thus, could not comment upon its contents. Mr. Schmidt was unaware of the presentation until he received a call notifying him of its existence. Mr. Schmidt's remark about documents he "[REDACTED]" implies that he never saw the document. Further, the email explicitly requested that the Audi AG employee "[REDACTED]" . Such a comment would be totally unnecessary if Mr. Schmidt had already seen it. Mr. Schmidt, who worked at EEO in the U.S. at the time of this email, wanted EEO removed from the cover page of a report he had no involvement in creating and, in fact, never saw.

In addition to the above-described problems with the October 17, 2013 email, the Government misquotes the text of the email. The Government writes: "In this e-mail, [Mr.] Schmidt wrote 'It would be good if you deleted us from the cover page. If such a paper somehow falls into the hands of the authorities, VW can get into considerable difficulties.'" (Gov't's Sent'g Mem. at 15, n.2.) The email does not mention VW; rather, it reads: "[REDACTED] [REDACTED]" .

This is not an instance where substitution of VW for a named individual is harmless or inconsequential, as it insinuates that Mr. Schmidt had knowledge of the defeat device much earlier than he did. (Rule 11 at 6 (“During the summer of 2015, SCHMIDT was informed of the existence of cheating software in 2.0 liter diesel vehicles.”).)

The third item cited in the Government’s footnote is a June 10, 2014 email. The Government indicates Mr. Schmidt “wrote to another VW employee and commented that with respect to documents relating to emissions issues, ‘I only have mentioned documents on a flash drive and do not want to load them on to the computer.’” (Gov’t’s Sent’g Mem. at 15, n.2.). The context for this email is as follows: Mr. Schmidt was asked to provide information to VWGoA’s former CEO & President. That information was provided to Mr. Schmidt by [REDACTED] [REDACTED] a VW AG Exhaust and After-Treatment specialist, who explained to Mr. Schmidt that it was his regular practice to put information he was delivering from Germany to the US on a USB stick. Further, [REDACTED] instructed Mr. Schmidt to do exactly that – maintain the information on the USB stick and not put it onto a computer. Mr. Schmidt’s June 10, 2014 email cited by the government is merely an acknowledgement that he complied with [REDACTED] request. Nothing nefarious and nothing more.

As asserted in Mr. Schmidt's initial filing, his involvement with the diesel issues while in the employ of EEO was minimal, as VW formed a task force to address questions from the regulatory authorities after publication of the ICCT Study. (*See* Mr. Schmidt Sent'g Mem. at 19.) Neither Mr. Schmidt nor anyone at EEO was a member of this task force. *See* [REDACTED]

[REDACTED] ([REDACTED]). A key Government witness acknowledged that EEO was in the proverbial dark about intentional cheating while Mr. Schmidt worked there as the general manager. *Id.* The same witness, an instrumental co-conspirator from day one, explained to the Government that he was not even aware of any discussions about including Volkswagen Group of America ("VWGoA") or EEO in discussions about the defeat device. [REDACTED] *see also* [REDACTED] ([REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]); [REDACTED]

([REDACTED])

[REDACTED]); [REDACTED] ([REDACTED])

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]").

To the extent the Government suggests that Mr. Schmidt's role in the certification process gave him knowledge of the diesel emissions problems or meant that he spoke to regulators about diesel emissions, this suggestion is unfounded.³ The VW diesel task force was formed for the purpose of communicating with regulators on this topic, and Mr. Schmidt was not a member of the task force.⁴

2. Obstruction of Justice

Although Mr. Schmidt has agreed to a sentencing enhancement for obstruction of justice, some factual assertions in the Government's Memorandum need to be addressed.

³ The Government insinuates Mr. Schmidt knew of VW's defeat device earlier than he did by writing that he "interacted with U.S. regulatory authorities on a regular basis, as one of his responsibilities was securing regulatory approval for VW vehicles to be sold on the U.S. market." (Gov't's Sent'g Mem. at 2.) As explained in Mr. Schmidt's opening brief, Mr. Schmidt, in his role as general manager of EEO, did have a role in obtaining certifications. (Mr. Schmidt Sent'g Mem. at 25, n.11.) That said, Mr. Schmidt had no knowledge of the cheating when these certifications were sought. Further, though EEO was in charge of submitting annual certification applications to regulators, EEO's role in the submission of these applications was more ministerial than substantive. EEO served as a liaison, facilitating the transfer of certification information received from Germany (where vehicles are designed, manufactured, and tested) to regulators in the U.S. VW AG in Germany sent certification information to EEO and the EEO certification employees extracted the information sent by VW AG and put it in the form required by the various agencies. This was explained by a VW AG Certification Department employee. See [REDACTED] [REDACTED]
[REDACTED]. Indeed, the former CEO & President of VWGoA said the same thing. See [REDACTED] [REDACTED]).".

⁴ It is important to point out that while Mr. Schmidt was the general manager of EEO, he had no oversight over VW's Oxnard Test Center (where Mr. James Liang) worked. The Oxnard Test Center (where VW's emissions testing took place) was "split" from EEO before Mr. Schmidt commenced his position in March 2012.

The Government first argues that Mr. Schmidt encouraged others to delete documents. (*See* Gov’t’s Sent’g Mem. at 5, 8-9.) This is inaccurate. The Government’s Memorandum and the PSR recount an incident in which Mr. Schmidt told a group of engineers including [REDACTED], that he kept documents on a portable storage device, and that he had a miniature toy baseball bat with which he could destroy the drive. (PSR ¶ 25; [REDACTED].) Interestingly, it is from [REDACTED] where the Government appears to have gotten the language that Mr. Schmidt “encouraged” data deletion. What [REDACTED] says is that due to Mr. Schmidt’s position ([REDACTED]) and his baseball bat remark, [REDACTED] felt what Mr. Schmidt said about the litigation hold “[REDACTED]” [REDACTED]. What the Government omits from its Memorandum are the statements of other engineers who interpreted the baseball bat remark for the joke that it was. [REDACTED] ([REDACTED]). Moreover, to the extent the Government is referring to Mr. Schmidt’s “joke” about destroying documents with his toy baseball bat, that

joke was about his hard drive (which he did not destroy), not witnessing others destroying documents.

The Government alleges in its Sentencing Memorandum that Mr. Schmidt encouraged others to destroy documents before receiving a litigation hold, and that some of his co-conspirators “literally [deleted documents] in front of Schmidt.” (Gov’t’s Sent’g Mem. at 8-9.) There is no factual basis for the assertion that Mr. Schmidt knew that others were destroying documents in front of him, though some individuals admitted to deleting documents from their laptops during the meeting in question. To the extent that these VW engineers were deleting documents “literally” in front of Mr. Schmidt, that at most means that Mr. Schmidt was in a conference room while others were deleting documents from their own personal laptops. Notably, neither the statement of facts nor the PSR asserts—and Mr. Schmidt denies—that he intentionally destroyed documents for the purpose of obstructing any government or internal investigation.

The Government also states repeatedly that Mr. Schmidt deleted documents relevant to the diesel emissions scheme but that he “now claims that his deletions were an ‘accident.’” (Gov’t’s Sent’g Mem. at 5, 9.) Yet the assertion that Mr. Schmidt deleted documents is not based on the Government’s own analysis but rather that of “VW’s internal forensic investigation.” (*Id.* at 9.) Importantly, though it was requested, defense counsel was never provided any information or results of

this forensic analysis so cannot speak further to something it has never seen.

Mr. Schmidt voluntarily met with several DOJ prosecutors and federal agents on November 14, 2015 in London. The parties stipulated that because some of what he said during that meeting was inconsistent with the factual basis in the Rule 11, the obstruction enhancement is applicable. (PSR ¶ 25.) But, that was a meeting where Mr. Schmidt did not have counsel and well before he has accepted responsibility and admitted his misconduct. Hardly an unusual situation before a person comes to accept responsibility at a later time.

At page 11, the Government advises the Court about Mr. Schmidt's parliamentary testimony in another country where he "den[ied] any similar diesel scheme in Europe." What possible relevance Mr. Schmidt's testimony in Europe – several months after the U.S. conspiracy concluded – has on these proceedings is unknown. The diesel engines sold in Europe are different than those sold in the U.S. and the applicable environmental regulations are also different.

3. Mr. Schmidt was not a decision-maker or a VW executive.

Mr. Schmidt was not a decision-maker; he was not someone who held a "leadership role"; and he was most certainly not "in a position to shape company policy" as it relates to the diesel emissions issues. (*See, e.g.*, Gov't's Sent'g Mem. at 17.) And, even if he were, the critical point here is that he was not involved in the conspiracy when the actual decision-makers implemented the policy to install the

defeat device into VW diesel engines. Mr. Schmidt was not a member of the conspiracy when VW employees – with knowledge of the defeat device – repeatedly year after year after year – certified and recertified diesel engine vehicles containing the illegal defeat device. And Mr. Schmidt was not a member of the conspiracy when VW engineers enhanced the functionality of the defeat device so as to evade detection. The “height” of the scheme was not at the very end – weeks before the defeat device was disclosed – but rather at these objectively critical periods during the decade long conspiracy.

Mr. Schmidt has no intention of creating a needless academic debate over factual assertions that do not change the analysis. Mr. Schmidt has pled guilty and admitted to a detailed factual basis. That was an accurate statement of what he did. There certainly is room for different parties in any litigation to see things differently and to interpret facts differently. However the facts from which those interpretations flow matter and where a person’s liberty is impacted, they matter immensely. This response, and Mr. Schmidt’s sentencing memorandum, are aimed at setting forth the

facts as he knows them and as they relate to his own activities. Those facts support his request for a custodial sentence of forty months and a fine of \$100,000.

Respectfully submitted,



Dated: December 1, 2017

/s/ David F. DuMouchel
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record. There are no unrepresented parties upon whom traditional service is required.

Respectfully submitted,

Dated: December 1, 2017

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