UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
v.	:	Case No. 22-CR-184 (DLF)
BARRY BENNET RAMEY,	:	Honorable Judge Dabney Friedrich
Defendant.	:	

DEFENDANT'S RESPONSE TO GOVERNMENT'S SENTENCING MEMORANDUM

COMES NOW, Barry Ramey, by and through counsel, and respectfully provides the Court with his response to the Government's sentencing memorandum filed on May 25, 2023.

The Government's request for 108 months for Mr. Ramey is vindictive, does not meet the ends of justice, and is not in line with requests in other, similar cases. To avoid sentencing disparity, meet the ends of justice, and provide an individualized sentence based on the facts of Mr. Ramey's case, he respectfully requests a sentence in the range provided by the original PSR (36-41 months).

Argument

A. The Government severely inflates Mr. Ramey's involvement with the Proud Boys on January 6th to justify its request for a harsh punishment.

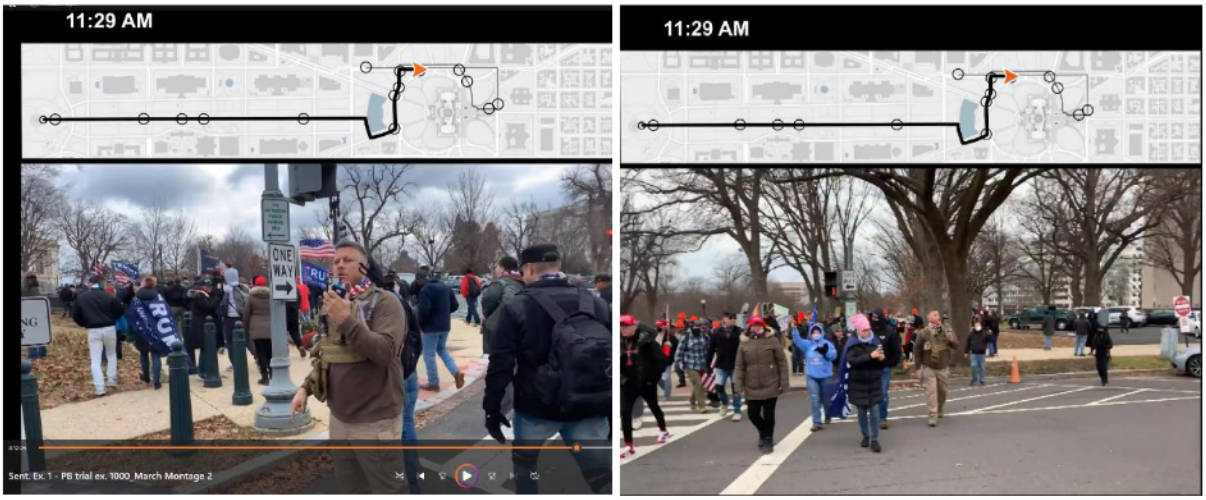
The Government spends 8 out of 41 pages discussing what the Proud Boys and others charged with crimes did on January 6th. It then conflates the actions of those to Mr. Ramey because Mr. Ramey happened to be near them as they walked up to the Capitol. The Government then makes the assertion that Mr. Ramey was not only near the Proud Boys that day but also colluded with and worked alongside them in their "mission." *See* Gov's Sentencing

Memorandum at 1-9. The Government accuses Mr. Ramey of a conspiracy with other Proud Boy leaders such as Ethan Nordean, Milkshake, and Christopher Worrell and repeatedly refers to them as Mr. Ramey's "fellow proud boys." They further contend that Mr. Ramey "understood the mission" on January 6th to be disrupting certification of the Electoral College and certification and confront police because he happened to be walking by Christopher Worrell at 11:29 a.m. *Id* at 6. Mr. Ramey does not stop to engage with Mr. Worrell, he does not encourage him, in fact he does not seem to even pay attention to him as he briefly walks by.

The Government prosecuted over 1000 people related to January 6th. Many trials that have gone forward have been multi-defendant trials. The Government, to increase judicial efficiency, has tried defendants together when they have acted in concert. For example, the Government charged and tried Mr. Brown, Mr. Maly, and Mr. Schwartz together because they all acted in concert (Mr. Maly and Mr. Schwartz handed Mr. Brown a cannister which he then used to spray the officers). *US v. Schwartz* et al, 21-cr-178-APM. Despite now making accusations of collusion for the first time at sentencing, the Government did not try Mr. Ramey with other Proud Boy members because there was no concert of action nor could there have been. Mr. Ramey was not a member of the Proud Boys prior to January 6th and the Government is well aware of this fact. To now represent that Mr. Ramey was a foot soldier for the Proud Boys on January 6th and thus a sentence request of 108 months is fair is disingenuous and remarkable.

The Government provided the Court with a 20-minute montage of the Proud Boy's activities and narrates the same in their memorandum. *See* Government's Sentencing Exhibit 1. The montage is the same exhibit used in other Proud Boy trials to show the pre-planning, concert of action, and collusion by actual Proud Boy members prior to January 6th and on the day of.

This is entirely irrelevant to Mr. Ramey as he was not a member of the Proud Boys, did not know their plans for the day of, nor did he go to January 6th with the group. The exhibit follows the actual members of the Proud Boys on January 6th, their movement, their agenda, and their activities. Mr. Ramey appears in a few frames of the video clearly alone, just like many others who were unknowingly walking alongside the Proud Boys.



Id.

Further, the Proud Boys were not wearing their colors that day, were not displaying any signs or insignia of the club and were not trying to be identified. *Id* at :06. Prior to January 6th, many of the now-infamous leaders of Proud Boys were not as easily identifiable. To assume that Mr. Ramey not only knew who they were, knew of their "mission" and was allowed to join in the activities is simple false. Gov's Sentencing Memo at 5. Next the Government asserts that because Mr. Ramey was "next to Worrell while he made these statements demonstrates that Ramey understood that the mission on January 6 was to obstruct police, if not Congress." *Id* at 6. At 12:25, Mr. Ramey can be seen walking past Mr. Worrell as he speaks to a line of officers. Gov's Sentencing Ex 1. Mr. Ramey does not stop, does not repeat, nor does he seem to indicate in any way that he even understood what Mr. Worrell was saying. *Id.*

The Government's best argument for Mr. Ramey's collusion with the Proud Boys is brief spatial proximity to other Proud Boys members. It is clear from the exhibits presented at trial that Mr. Ramey was alone for most of the day. He came alone, he walked around the Capitol alone, he left alone. He is not a part of a pack. He alone stands, with full and absolute responsibility for his actions. He does not place blame on anyone else, including the then-President for his actions. He is soberly aware of exactly why he stands before this court for sentencing and this was evident throughout trial.

The Government suggests, without any proof, that Mr. Ramey was with the Proud Boys from 11:00 a.m. to 2:00 p.m. while their own evidence presented at trial shows otherwise. *See generally* Gov's trial exhibits 200-204. The Government further asserts that whether he knew who the Proud Boys were or not, he was with them when they "cased the Capitol, taunted police, shouted Proud Boy chants, agitated the crowd at Peace Circle, and ultimately collectively assaulted police at the base of the Northwest Stairs." Gov's Sentencing Memo at 5. This claim is as remarkable as it is untrue. The Government presented many videos at trial that tracked Mr. Ramey throughout the day to account for his participation in January 6th. They keenly pointed out his criminal behavior through these videos. Not one video showed Mr. Ramey "casing the Capitol, taunting police, shouting Proud Boy chants, or agitating the crowd." As the Government knows through its prosecution of many other Proud Boys, they are not a group that is welcoming to outsiders. It is not a group that shares its plans with those not in their inner circle. *Id* at 13:58.

This is evident in when Ethan Nordean reprimands some of the other inner circle members for not being careful enough of what they say and who they say it around. *Id* at 13:55. The camera shows non-Proud Boy members marching too close to the inner circle members and the Proud Boys immediately shuffle the non-members out from their ranks. Mr. Ramey was not a

Proud Boy member that day. He was not allowed in the inner circle nor was he a part of any plan. If the Government had proof otherwise, they would be able to present it to the court instead of relying only on speculation. The Government's claims, unsupported by evidence, are distasteful and seem to be made to obtain a higher-than-usual sentence.

B. The Sentencing Enhancement Under U.S.S.G.§ 2A2.2(b)(2)(B) For Use of a Dangerous Weapon is Inapplicable Since it is Not Supported by Evidence.

The Court should reject the government's request for a 4-level enhancement under U.S.S.G. § 2A2.2(b)(2)(B) for use of a deadly or dangerous weapon as it is not supported by evidence. While the burden of proof is different at sentencing as opposed to a trial, the Government still did not provide evidence necessary to prove that the spray used by Mr. Ramey constituted a deadly or dangerous weapon. In fact, testimony from the Government's own witnesses shows that Mr. Ramey did not use the spray in a manner that would constitute it deadly or dangerous. The underlying conduct (spraying Officer Riggleman and attempting to spray Officer Williams) is already punished by the statute. There aren't additional facts that would support a finding for the enhancement.

To bolster its claims, the Government regurgitates its arguments from closing. The arguments primarily are that the officers felt a burning sensation, were temporarily unable to see, had to decontaminate before appearing back on the line to continue to do their jobs. Lastly, the Government cites to testimony by an expert in the *Worrell* case who testified about the dangerousness of pepper spray gel in general. It is obvious that objects can be turned dangerous or deadly depending on their use. But the use has to be such that it turns an ordinary object like a bat or a fist into a deadly or dangerous weapon. The question is not whether the weapon is inherently dangerous or can cause significant injury. Rather the analysis is whether the object in

question was used in such a manner that it could have. The facts at trial did not support a finding that the spray was used in a manner to produce significant injuries to constitute a deadly or dangerous weapon.

Moreover, the Government's expert testimony is disputed by a report from another expert the Government provided to the defense. *See* Defense Exhibit 1 and 2. This report was created in *United States v. Johnson,* cr-22-011-RJL. Mr. Johnson was also charged with 18 U.S.C. § 111(b) similar to Mr. Ramey. Based upon the findings of this report along with the facts of his case, Mr. Johnson is now set to plead guilty to 18 U.S.C. §111(a)

According to a report that the Government sent that was prepared for another January 6 case, Mr. Kapelsohn, a law enforcement weapons and use of force training expert, found that the spray used in that case was not a deadly or dangerous weapon and that OC or pepper spray is completely non-toxic and safe. *Kapelsohn Report* at 15. Mr. Kapelsohn also noted that eye exposure to OC is not harmful, and exposure does not cause long-term vision problems. *Id.* As far as retina needling, or "ballistic needle effect" as it is referenced in the report, any liquid that is highly pressurized and sprayed at a very close range can cause this injury; this is not unique to pepper spray. *Id.* In short, Mr. Kapelsohn found that OC spray is not inherently a deadly or dangerous weapon, and the facts from this case support that finding.

The Government next cites to cases with facts dissimilar to Mr. Ramey and argues that this Court should apply the enhancement because other Judges in other cases have found it to be deadly or dangerous. Again, the Government misses the point that this analysis is fact-specific. It is not a generalized enhancement that applies regardless of the facts. Further, many of the cases the Government cites to are pleas not trials where the Court did not have to fact-find the issue as the defendants agreed to the enhancement.

The DC Circuit provides guidance on the statutory application of the deadly or dangerous weapon in 18 U.S.C. § 111(b), *See United States v. Arrington*, 309 F.3d 40 (DC Cir. 2002), and District Court Judge Cooper recently applied the *Arrington* analysis to a sentencing enhancement in *United States v. Hernandez*, 2022-cr-42 where the Court refused to apply the 4-level enhancement for deadly or dangerous weapon to a flag pole used by Mr. Hernandez. Both *Arrington* and *Hernandez* and decisions from sister circuits provide insight into this issue. In *Arrington*, the DC Circuit held that in order to prove the deadly or dangerous weapon element of 18 U.S.C. § 111(b) for use of an object that is not inherently deadly, the Government must prove that the object is capable of inflicting death or serious bodily injury and the defendant must use it in such a manner as to make it capable of inflicting death or serious bodily injury. *Arrington, 309 F.3d.* at 45. The testimony from the officers, however, makes clear that Mr. Ramey did not use the spray in a way that the Court could consider it to be a deadly or dangerous weapon.

The analysis that different Circuits used to the applicability of the deadly or dangerous weapon sentencing enhancement looks much like the analysis for the statutory deadly or dangerous weapon enhancement found in *Arrington*. Although at first glance it appears that circuits have come to different conclusions, really the circuits agree that, much like *Arrington*, the application of the deadly or dangerous weapon sentencing enhancement turns on whether or not the government made a sufficient showing that the object, as used by the defendant, was deadly or dangerous. *See, United States v. Perez*, 519 F. App'x 525, 527 (11th Cir. 2013) (finding that pepper spray was not a deadly or dangerous weapon when there were no factual findings that support that it was capable of causing serious bodily injury when used in the same manner as the defendant); *United States v. Neill*, 166 F. 3d 943, 949-50 (9th Cir. 1999) (finding that pepper spray was a deadly or dangerous weapon because the victim's ability to breathe was

impaired for two weeks and is required to take five asthma relief pills a day for the rest of her life was sufficient to find protracted impairment); *United States v. Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998) (finding that mace was a deadly or dangerous weapon as used since it caused the victim to develop chemical pneumonia, miss almost two weeks of work, and begin taking daily shots for months and pills for a year to clear the mace from her body); *United States v. Harris*, 44 F.3d 1206, 1216 (3d Cir. 1995) (finding that promotional pamphlets for a mace used in a robbery in the bank teller's face was not sufficient for the court to add on a 4-level enhancement for deadly or dangerous weapon nor a 2-point enhancement for bodily injury).

In Harris, the defendant robbed a bank armed with mace and sprayed two bank tellers in the face at close proximity. *Id.* The mace that the defendant used was identified and the Government presented promotional bulletins from the company itself and how it has been "used safely by law enforcement for more than a decade." *Id* at 1214-1215. Other evidence presented on this issue was the FBI agent who arrived on the scene and spoke with the bank tellers. *Id.* He testified that one required medical attention and one had problems breathing due to asthma. *Id.* When pressed the agent did not know what type of medical attention the tellers actually received. *Id.* The court on appeal found that the lower court did not meet the lower standard of preponderance and overturned the 4-level enhancement for dangerous weapon. *Id* at 1216. The court found that while the mace in its promotional material describes symptoms such as "choking" "disorientation," and a "feeling of panic," all of this is temporary and lasts only 10-15 minutes and leaves no residual incapacity. Similarly, in our case, Captain Mendoza testified that the effects last usually 10-15 minutes and at worst can last for a couple of hours. Both officers testified that they were able to come back to the line and continue their jobs within a few minutes.

Rather than a categorical finding that pepper spray is always dangerous, the *Harris* court emphasizes that it is important to ensure that the enhancement only apply based on the specific facts and circumstances of each case.

This case-by-case analysis is appropriate for when an object should be considered a deadly or dangerous weapon. For example, a categorical finding that a pillow is not a deadly or dangerous weapon would make it impossible to apply the enhancement to an attacker who uses a pillow to suffocate and cause brain damage to his victim. On the other hand, a categorical finding that pepper spray, no matter how it is used, always constitutes a deadly or dangerous weapon would cause the enhancement to be unnecessarily applied to cases like Mr. Ramey's based solely on facts from other cases rather than the particular circumstances of his own conduct.

Here, the Government has been silent as to the nature of the spray, its chemical composition, the strength or concentration of any active agent contained therein, the size of the cannister, and the distance or velocity the spray mechanism was designed to achieve. Instead, it relies on generalizations about the potential capability of pepper spray and testimony from other cases rather than offering facts regarding the spray in this case – which the Court already found to be insufficient to support the statutory enhancement for use of a deadly or dangerous weapon under 18 U.S.C. § 111(b).

Not only that, the testimony elicited from the Government's witnesses in this case show that the spray, as used by Mr. Ramey, cannot be considered a deadly or dangerous weapon. Officer Williams indicated that during his training as an officer, he learned that retina needling could occur when OC spray is used improperly within close ranges of about three feet or less. Transcript at 149-50. But here, the Government did not prove that Mr. Ramey was at such a close distance to either Officers Riggleman or Williams. In fact, Officer Riggleman estimated

that Mr. Ramey was at least six to ten feet away from him when he was sprayed. Transcript at 162. Further, Officer Riggleman testified that during his training, he learned that in order to deploy OC spray safely, he should remain about six feet away from the subject that he is spraying, Transcript at 179, which is at least how far away he estimated Mr. Ramey to be. Prior cases make clear that the deadly or dangerous weapon enhancement is not dependent on some categorical finding that a particular object is or is not dangerous generally; rather, the enhancement can only be applied after a specific factual finding has been made in the instant case that the object, as used by the defendant, was deadly or dangerous. Again, no such findings have been made in this case.

Similar to *Perez* where the Eleventh Circuit found that the district court committed legal error when it enhanced Perez's sentence for possession of a deadly weapon since there was not sufficient evidence on which to base such a conclusion, there is no evidence that the spray used by Mr. Ramey and as used by Mr. Ramey is capable of inflicting death or serious bodily injury. *See* 519 Fed. Appx. 525, 528 (11th Cir. 2013) ("The fact that someone may have to wash an affected area for 15 minutes or seek medical attention does not establish that the spray could cause 'extreme physical pain or protracted impairment of a function of a bodily member, organ, or mental facility; or requir[e] medical intervention such as surgery, hospitalization, or physical rehabilitation.'"). The Government provided no evidence that the spray is inherently deadly or dangerous, that it could cause death or serious bodily injury, or that Mr. Ramey used it in such a manner. The fact that Officer Riggleman went to flush out his eyes does not establish that the spray was deadly or dangerous. Moreover, the testimony elicited about the potential danger of OC spray when used in a certain manner was not the manner in which Mr. Ramey used the

spray. Therefore, the Court should reject the Government's request to apply the deadly or dangerous weapon enhancement under U.S.S.G. § 2A2.2(b)(2)(B).

C. The Sentencing Enhancement Under U.S.S.G.§ 2A2.2(b)(3) For Bodily Injury is Inapplicable Since it is Not Supported by Evidence

The Court should reject both the Government's request for a 4-level enhancement under U.S.S.G. § 2A2.2(b)(3)(D) for a degree of injury between bodily injury and serious bodily injury and the PSR's recommendation for a 3-level enhancement under U.S.S.G. § 2A2.2(b)(3)(A) for bodily injury. The Guidelines define "bodily injury" as "any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." U.S.S.G. § 1B1.1, comment. (n. B). Moreover, the Guidelines define "serious bodily injury" as "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1, comment. (n. M). Because the Government could not prove serious bodily injury before sentencing, it attempts to split the difference by arguing that Officers Riggleman and Williams' injuries fall somewhere between bodily injury and serious bodily injury. Nevertheless, the Court should reject this argument for the counts involving both Officers Riggleman and Williams.

1. Officer Riggleman Suffered Neither Serious Bodily Injury nor Bodily Injury for Purposes of the Sentencing Guidelines

While Officer Riggleman recalled a burning sensation before he flushed his eyes, this does not amount to serious bodily injury, or even bodily injury, for purposes of the Sentencing Guidelines. The definition for "bodily injury" is broad, but not all-encompassing. The drafters of the Guidelines did include *any* in the definition, but then carefully included

that any injury that is painful and obvious or is of a type for which medical attention would ordinarily be sought must be *significant*. In other words, an injury can be painful and obvious, but still not qualify as bodily injury under the Guidelines if it is not significant. Here, Officer Riggleman's injury to his eyes was not significant. Although he did describe a burning sensation, this was an ephemeral feeling that lasted but a few minutes, and he was able to return to work immediately after he flushed his eyes. Not only that, he did not require any medical attention to treat the burning sensation.

Cases decided by numerous circuits indicate that in order for a district court to properly find that an injury is significant, the injury must last for some meaningful period, it must not be momentary, and there must be evidence to support that it is significant. *See, United States v. Lancaster*, 6 F.3d 208, 209 (4th Cir. 1993), *United States v. Lewis*, 18 F.4th 743 (4th Cir. 2021), *United States v. Mejia-Canales*, 467 F.3d 1280 (10th Cir. 2006). Courts have found that district courts find that an injury is significant and therefore that they applied the bodily injury enhancement properly when, for example, the injury sustained by the victim lasted for a week, that the injury sustained by the victim lasted several hours, and when evidence supported these injuries. *See, United States v. Greene*, 965 F.2d 911 (9th Cir. 1992), *United States v. King*, 2000 U.S. App. LEXIS 19093 (10th Cir. 2000), *United States v. Douglas*, 957 F.3d 602 (5th Cir. 2020).

In *Lancaster*, the defendant robbed a truck outside a bank and during the robbery, he sprayed mace into the eyes of the guard protecting the truck. 6 F.3d 208, 209 (4th Cir. 1993). While the guard described that the mace caused severe burning in his eyes and cheeks, the government did not present any evidence that the mace caused lasting health problems. *Id.* On appeal, the Fourth Circuit found that while the "burning in [the guard's] eyes and cheeks

caused by the mace was undoubtedly unpleasant, and could not be described as wholly trivial, it was only momentary and the mace produced no lasting harm." *Id.* Similarly, in *Lewis*, the defendant robbed a pawn shop and struck the manager of the store in the back of the head three times with a firearm which caused the manager to feel dizzy, fall to the floor, and caused a red spot on the back of the manager's head. 18 F.4th 743 at 746. Because the government only presented speculation to argue that the manager's injuries were more than momentary, and because the government did not provide evidence that the injuries lasted for a meaningful period, the circuit court held that the district court erroneously applied the bodily injury enhancement and vacated and remanded the defendant's sentence. *Id.* at 752-53. In *Mejia-Canales*, the defendant, an incarcerated federal inmate, struck an officer twice with his fist, hitting the officer once in the mouth and once on the forehead. The PSR added the two-level enhancement for bodily injury, and after the defendant objected to the recommended enhancement, the district court applied the enhancement based on evidence that the officer had a small cut on the inside of his mouth and a red mark on his forehead. 467 F.3d 1280 at 1281. The Tenth Circuit reversed the sentence and remanded after finding that the district court committed a clear error in finding bodily injury. *Id.* at 1285. The Court noted:

> Our reversal of the sentence enhancement in this case should not be construed as downplaying the serious nature of [the defendant's] offense. Jail personnel operate in an environment fraught with danger and risk to their physical well-being. An assault on an officer triggered by a prisoner's disagreement with the officer's orders is an inexcusable act that Congress has appropriately criminalized, and for which the punishment is substantial. We hold only that the evidence presented in this case was not sufficient to *enhance* this sentence based on infliction of bodily injury.

Id. Because of the lack of evidence that the injuries were nontrivially painful or lasting, the Court held that the PSR's cursory description of the injury and two poor quality photographs

of the officer's mouth were insufficient to support a factual finding that the injuries were significant. *Id.*

Comparatively, the Ninth Circuit upheld a district court's application of the bodily injury enhancement when a bank teller was slapped in the face so hard that she suffered a swollen cheek and pain for a week. *United States v. Greene*, 964 F.2d 911, (9th Cir. 1992). The *Greene* Court held that the bank teller's injuries were significant for purposes of the Guidelines and alternatively held that "at least where the pain lingers for twenty-four hours, repeated blows to the head represent the type of injury 'for which medical attention ordinarily would be sought.' U.S.S.G. § 1B1.1 commentary note 1(b)." *Id.* at 912. In *United States v. Douglas*, the defendant, a corrections officer, took five inmates he believed to be affiliated with a gang to an area of the prison with no security cameras, had them kneel down while they were handcuffed, and asked if they were in a gang. 957 F.3d 602 at 604 (5th Cir. 2020). When the first inmate denied involvement in a gang, the defendant sprayed the handcuffed inmate directly in his eyes, then moved onto the next inmate and sprayed him in the eyes. *Id.* While the defendant argued that the pepper spray was not a dangerous weapon and that the victims did not sustain bodily injury, the district court rejected both arguments since the pepper spray was capable of causing death or serious bodily injury when used at close range and each victim was treated by an on-site nurse and some required subsequent hospital visits. *Id.* at 605-06. On appeal, the Fifth Circuit held that the district court's application of each enhancement survived appellate review based on the facts presented in the case. *Id.* at 607.

Here, the injuries to Officer Riggleman were not significant for the purposes of the Guidelines. The Government has not submitted any evidence that would support the bodily

injury enhancement, and even if they would have, the burning sensation that Officer Riggleman felt was momentary and was not felt for a meaningful period. Officer Riggleman's injuries did not last hours or weeks like they did when the *King* and *Greene* Courts upheld the district courts' application of the bodily injury enhancement; rather, the burning sensation experienced by Officer Riggleman was fleeting and overcome in a matter of minutes. In short, there is no doubt that Officer Riggleman felt discomfort in his eyes, and Mr. Ramey does not attempt to downplay his actions on January 6, but the discomfort felt by Officer Riggleman is not significant enough to sustain the bodily injury enhancement. The seriousness of Mr. Ramey's actions towards Officer Riggleman are already captured by the statute under which he was convicted.

Similarly, Officer Riggleman's injury clearly fails to amount to serious bodily injury. In *United States v. Clay*, the Sixth Circuit upheld the district court's application of the serious bodily enhancement when the defendant pistol-whipped the victim several times which caused the victim to lose consciousness "because his brain was temporarily impaired by the repeated blows." 90 Fed. Appx. 931, 933 (6th Cir. 2004). Moreover, the victim was taken to the hospital and his injuries required sutures which also qualified those injuries as serious under the Guidelines. *Id.* In *United States v. Belt*, the Eleventh Circuit upheld the district court's application of the serious bodily injury enhancement when the defendant's assault on a corrections officer necessitated surgery, which qualified as serious. 786 Fed. Appx. 177, 178 (11th Cir. 2019). Here, Officer Riggleman's injuries are not serious for purposes of the sentencing enhancement. Again, he required no medical intervention and was able to wash his eyes out and continue working in a matter of minutes.

Officer Riggleman's injuries are not significant enough to be considered bodily injury under the Guidelines, so necessarily they are not serious under the Guidelines either and any attempt to split the difference by suggesting that Officer Riggleman's injuries fall somewhere between the two must fail. Therefore, the Court should reject the Government's recommendation for a four-level increase for a degree of injury that is between bodily injury and serious bodily injury under U.S.S.G. § 2A2.2(b)(3)(D) and it should reject the PSR's recommendation for a three-level increase for bodily injury under U.S.S.G § 2A2.2(b)(3)(A).

2. The Government Did Not Prove That Officer Williams' Injuries Were Caused by Defendant.

The Court did not find beyond a reasonable doubt that Mr. Ramey's spray made contact with Officer Williams and rather found him guilty of attempted assault on Officer Williams.

Because the Court could not find that Mr. Ramey actually assaulted Officer Williams, the injuries to Officer Williams cannot be attributed to Mr. Ramey. Even if the Court had found that Mr. Ramey made contact with Officer Williams, the only lasting impact Officer Williams suffered was decrease in eyesight and the court rejected the argument made by the Government that this was due to Mr. Ramey's spray as there was no evidence to suggest it.

Government Exhibit 200 shows a group of protestors converging near a staircase secured by a police line. Mr. Ramey was in the group of protesters and Officers Riggleman and Williams were among the officers holding the line. Before Mr. Ramey even outstretched his arm to deploy the spray in his hand, Officer Williams was already hit in the face with a flagpole, he struggled with a person in a white hoodie, a substance was sprayed by someone other than Mr. Ramey near Officer Williams, and Officer Williams hid his face as if he was impacted by the spray. This was all before Mr. Ramey even deployed the spray that the

Government alleged to have hit Officer Williams. As such, any enhancement for bodily injury to Officer Williams should not be applied.

D. The Sentencing Adjustment Under U.S.S.G. § 3C1.1 is Inapplicable Since Mr. Ramey Did Not Know Agent Nourgaret Was an FBI Agent and He Did Not Intent to Obstruct Justice

For the obstruction or impeding justice sentencing adjustment to apply, a defendant must willfully obstruct or impede, or attempt to obstruct or impede, the administration of justice. U.S.S.G. § 3C1.1. The Guidelines commentary indicates that "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, juror, directly or indirectly, or attempting to do so" can be considered conduct to which the adjustment applies. U.S.S.G. § 3C1.1. comment. note 4(A). Nevertheless, the adjustment does not blindly apply to any defendant that exhibits such behavior; rather, there is clearly a *mens rea* aspect to the adjustment. The DC Circuit has consistently held that the 3C1.1 adjustment is only appropriate when a defendant acts with the intent to obstruct justice. *United States v. Henry*, 557 F.3d 642, 646 (D.C. Cir. 2009); *United States v. Monroe*, 990 F.2d 1370, 1376 (D.C. Cir. 1993) (quoting *United States v. Thompson*, 962 F.2d 1069, 1071 (D.C. Cir. 1992) ("[the intent requirement' flow[s] logically from the definition of the word 'willful,' which, this court has suggested, 'requires that the defendant consciously act with the purpose of obstructing justice.'"). While the Court does not need to have a separate factual finding as to the specific intent to obstruct justice when a defendant willfully engages in behavior that is inherently obstructive, *United States v. Maccado*, 225 F.3d 766, 769 (D.C. Cir. 2000), the Court must nevertheless evaluate evidence proffered by the defendant that he acted without

any subjective motivation to obstruct justice, and it can only apply the adjustment upon finding that the defendant did act to obstruct justice. *Monroe*, 990, F.2d at 1376.

In *Henry*, the defendant was being investigated for Medicare fraud. After requesting documents in person and being the affiant on a search warrant for the defendant's business, the defendant left several messages on the agent's voicemail. Henry also contacted the agent's two daughters and his wife when, in a Caribbean accent, he claimed to be an agent with the Justice Department investigating the agent for abuse of power. While the district court concluded that these calls sent a message to the agent that "I can get to you through your family," Henry argued that he did not intend to obstruct justice when making the harassing phone calls. 557 F.3d at 644. The DC Circuit held that on the record, the defendant's conduct in making the harassing calls were not inherently obstructive. *Id* at 648. In making this determination, the DC Circuit noted that, as compared to a case the Government cited where a defendant who properly received the 3C1.1 adjustment because he made gruesome threats to his arresting officer which left no doubt that the threat was directly tied to that particular case, Henry's calls were anonymous and not "of such number or severity that could have affected [the agent's] investigation of Henry." *Id* at 649.

Here, like Henry, Mr. Ramey has offered evidence that he did not have the subjective intent to obstruct justice. To be sure, Mr. Ramey's conduct is not completely analogous to Mr. Henry's because, unlike Mr. Henry who knew he was contacting the family members of an agent he knew to be investigating him, Mr. Ramey did not know Agent Nougaret was investigating his actions on January 6. Nevertheless, Mr. Ramey's conduct is similar to Mr. Henry's insofar as he lacked the subjective intent to obstruct justice, his conduct was not inherently obstructive, and he remained anonymous.

To reiterate, Mr. Ramey believed that the person he reached out to was a member of Antifa who was harassing him at his workplace. When Agent Nougaret called Mr. Ramey's place of employment, Agent Nougaret did not identify himself, did not say what he was calling about, and did not mention any sort of investigation. Detention Hearing Transcript 43-45. Because Mr. Ramey knew of instances where individuals with his political ideology had their information exposed online for harassment, Mr. Ramey reverse-searched the number on TruthFinder.com to see who called and Mr. Nougaret's name appeared. Mr. Ramey's fiancé, Desiree, did receive a business card from Agent Nougaret, but she did not give that business card to Mr. Ramey. Instead, she gave it directly to Mr. Ramey's attorney at the time who then called Agent Nougaret the next day. Mr. Ramey had no reason to expect that an FBI agent would be calling him because his attorney at the time told him that all communications from investigators would go to him, not Mr. Ramey. Moreover, similar to the communications in *Henry*, Mr. Ramey's communications with Mr. Nougaret remained anonymous. Although it was inappropriate for Mr. Ramey to reach out to someone he believed to be a member of Antifa, he did not have the subjective intent to obstruct justice. He genuinely believed that a member of Antifa was calling him to harass him; he had no reason to believe it was an FBI agent. Therefore, it would be inappropriate for the Court to apply the 3C1.1 adjustment to Mr. Ramey's case.

E. A Sentence Within the Range Requested by the Government Would Create an Unwarranted Sentencing Disparity

The Government requests a sentence of 108 months' imprisonment with little to no justification and such a sentence would create an unwarranted sentencing disparity and is not required to meet the ends of justice.

1. **The Government Requests a Sentencing Range that Far Exceeds Other Similarly-Situated January 6 Defendants**

Dozens of January 6 defendants who were convicted of 18 U.S.C. § 111(a) offenses received significantly lower sentences than the Government recommends here. Moreover, there are many cases where the defendants were engaged in even more egregious conduct than Mr. Ramey and were sentenced below the government's recommendation and well below the sentence being suggested for Mr. Ramey. 18 U.S.C. § 3553(a)(6) directs a sentencing court to "consider … the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." The Department of Justice's most recently updated spreadsheet containing the sentences for January 6 defendants reveals that the average sentence for January 6 defendants convicted of 18 U.S.C. § 111(a) offenses is 45 months.[1] Based on the available information found on the Department of Justice's Capitol Breach website, when the sentencing enhancements for bodily injury and use of a deadly and dangerous weapon are applied, the average sentence among January 6 defendants convicted of 18 U.S.C. § 111(a) offenses is 60 months. Despite the lack of evidence that Mr. Ramey acted in a particularly heinous way as compared to other January 6 defendants who were convicted of 18 U.S.C. § 111(a) offenses, the Government is requesting nearly twice the average sentence for defendants where both enhancements applied and nearly three times the average sentence for defendants where no enhancements were found to apply. Nothing in the record supports such a stark disparity.

[1] DEP'T OF JUSTICE, SENTENCES HANDED DOWN IN CAPITOL BREACH CASES (2023), https://www.justice.gov/file/1586716/download (last visited Jun. 7, 2023).

A few cases that are noteworthy for the Court to consider are highlighted below. A separate table of cases 111(a) cases that have been sentenced is included which includes pertinent facts, Government's recommendation, and the sentence received, is attached as Exhibit 2.

***United States v. Logan Barnhart*, 1:21-035-EGS**:

- Convicted of 111(b)
- Government requested 63 months, Judge imposed 36 months
- Mr. Barnhart was in the archway leading to the Lower West Terrance Entrance
- When a law enforcement officer was being attacked by another rioter, he jumped in to help
- He grabbed the officer's ballistic vest and dragged the officer down the steps into a prone position
- This allowed other rioters to beat the officer with flagpoles and batons
- He then went back to the archway and helped others push against the police line
- Finally, he struck the officers with the metal part of a flagpole

***United States v. Robert Gieswein*, 1:21-mj-085**:

- Convicted of 111(b)
- Received 48 months of incarceration, Government requested 60 months
- Came to January 6th in a full camouflage paramilitary kit, including helmet
- He came to the Capitol with a bat in hand
- He encountered the Proud Boys when he arrived and at some point they gave him an orange sticker to put on his helmet to identify him as a "friendly."
- He made statements to a reporter that the solution to the riots was to "execute the fascists."
- He sprayed three different officers with chemical irritant at the top of the stairs leading up to the Upper West Terrace
- He sprayed again at the line of officers he encountered and was one of the first rioters to reach the façade of the building
- He entered the Capitol through a broken window adjacent to the Senate Wing Door and was one of the first to enter
- While inside, he continued to spray at officers attempted to keep rioters out
- He then sprayed another set of officers attempting to arrest a rioter
- He then tried to punch Officer F.M.

***United States v. Mitchell Gardner*, 1:21-cr-622-APM**

- Convicted of 111(b)
- Received 55 months of incarceration when Government requested 71 months and a terrorism enhancement
- Helped break a senate window with a large cannister of spray

- Sprayed officers in the west Tunnel with the spray while they were attempting to hold the line
- Went inside the Capitol and passed a broken leg table to another rioter who then used it on a police officer
- Judge Mehta found him to be a leader amongst the rioters and found that the influenced others to act in a similar manner

***United States v. Jeffrey S. Brown*, 1:21-cr-178-APM**

- Government requested 70 months, Judge imposed 54 months
- Judge Mehta found the Government's request of 70 months to be unjustified
- Was a part of several planning groups prior to J6
- Sprayed several officers with a large cannister of OC spray in the Lower West tunnel at a critical point
- Stayed and participated in the heave ho line in the tunnel, incapacitating officers from holding the line
- Court found the pepper spray to be dangerous here because it was inside the tunnel, officers had nowhere to go to decontaminate, and it was a larger capacity spray, sprayed from a much closer distance

***United States v. Geoffrey William Sills*, 1:21-cr-040-TNM**

- Convicted of 111(b)
- Government requested 108 months; Judge imposed 52 months
- Entered the Capitol and joined in the violence in the Tunnel
- He fought officers inside the tunnel and helped push police back
- He threw several pole-like objects at the officers and filmed the event and posted it to social media
- He then followed the officers who were attempting to retreat and wrested away a baton from an officer
- He pointed a strobe light at the officers to disorient them
- He also struck several officers with the baton

These are just some cases that are either 111(b) or 111(a). A more comprehensive list is attached as Exhibit 3. Their sentences are all starkly lower than the one requested by the Government in Mr. Ramey's case. Not only will following the Government's recommendation create deep disparity amongst like-cases, it will not meet the ends of justice.

2. The Grouping Analysis Proposed by the Government is Inappropriate

The Government proposes grouping the two 18 U.S.C. § 111(a) counts together, but this is inappropriate because Mr. Ramey's conduct does not involve the same victim, one of the counts is not treated as a specific offense characteristic or adjustment to the guideline of another offense, and the offense level is not determined on the basis of total harm or loss. The 18 U.S.C. § 111(a) counts cannot be grouped together under U.S.S.G. § 3D1.2(a) because, although they may be considered to be a part of a single episode of criminal activity, Officers Riggleman and Williams are separate and distinct victims. Similarly, the 18 U.S.C. § 111(a) counts cannot be grouped together under U.S.S.G. 3D1.2(b) because Officers Riggleman and Williams are two different victims, not one. Further, the 18 U.S.C. § 111(a) counts cannot be grouped together under U.S.S.G. § 3D1.2(c) because the two 18 U.S.C. § 111(a) counts are not being treated as specific offense characteristics or adjustments to each other. Finally, the 18 U.S.C. § 111(a) counts cannot be grouped together under U.S.S.G. § 3D1.2(d) because the offense level for 2A2.2 is not determined by the total amount of harm or loss and because all offenses in Chapter Two, Part A (except for 2A3.5) are specifically excluded from grouping under U.S.S.G. § 3D1.2(d).

The Government attempts to get the best of both worlds, so to speak, by grouping the counts the way it did in its sentencing memorandum. Because Officer Riggleman was sprayed by Mr. Ramey but suffered no injuries, and because Officer Williams was not sprayed by Mr. Ramey but did suffer injuries as a result of the conduct of others, the Government tries to lump the enhancements for both situations together in order to achieve a higher total offense level. Even assuming *arguendo* that the other specific offense characteristics the Government proposes should apply, when the 18 U.S.C. §

111(a) counts are counted separately as their own count groups, the total offense level is 28, not 31, which renders a range of 78-97 months, not 108 to 135 months. For the reasons discussed above, the Government's grouping analysis is inappropriate under the Guidelines and Mr. Ramey respectfully requests that the Court apply the grouping as correctly proposed by the probation officer in the PSR.

Conclusion

For these reasons, Defendant respectfully requests that the Court reject the application of enhancements for use of deadly or dangerous, bodily injury, and obstruction and apply the correct sentencing range as in the draft PSR and sentence Defendant to a range of 36-41 months along with other conditions this Court sees appropriate.

Respectfully submitted,

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By Counsel

/s/
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Exhibits:
1) OC Spray Report
2) CV
3) Table of Cases
4) Police Report from Florida

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2023, I electronically filed the foregoing with the Clerk of Court Using the CM/ECF system, which will then send a notification of such filing (NEF) to:

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