United States District Court
District of Columbia

United States of America, Plaintiff, v. Daniel Rodriguez, Defendant.	Case No. 1:21-cr-00246-ABJ-1

DEFENDANT'S REPLY TO THE GOVERNMENT'S SENTENCING MEMORANDUM

I. The government improperly relies on commentary that impermissibly expands on the plain language of §3A1.4 to seek an upward departure.

This Court should reject the government's request for a terrorism departure, which relies on Application Note 4 to §3A1.4, because Application Note 4 is policy commentary that expands §3A1.4 and is therefore not entrusted to the Sentencing Commission acting unilaterally via application notes. *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Stinson v. United States*, 508 U.S. 36 (1993). The Supreme Court has held that commentary "that interprets or explains a Guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that Guideline." *Id.* at 38. And, under a doctrine known as *Auer* deference, courts should defer to an agency's (the Commission's) reasonable reading (here, the commentary) of an ambiguous regulation (the Guidelines). *Kisor*, at 2408. However, the Supreme Court recently made clear that "a court should not afford *Auer* deference unless the regulation is *genuinely* ambiguous." *Id.* at 2415. (emphasis added).

After *Kisor*, the Third Circuit sitting *en banc* opined, "[i]f the Sentencing Commission's commentary sweeps more broadly than the plain language of the guideline it interprets, we must not reflexively defer. The judge's lodestar must remain the law's text, not what the [Sentencing] Commission says about that text." *United States v. Nasir*, 17 F. 4th 459, 472 (3rd Cir. 2021) (concurrence).[1] Post-*Kisor*, other courts have also acknowledged they are troubled by "[t]he commissions prior attempts to use its interpretive authority to improperly change the scope of a

[1] *United States v. Castillo,* --F.4th-- 2023 WL 3732587 *14 (9th Cir. May 31, 2023) *("*[T]he Sentencing Commission's lack of accountability in its creation and amendment of the commentary raises constitutional concerns when we defer to commentary…that expands unambiguous Guidelines, particularly because of the extraordinary power the Commission has over individuals' liberty interests.").

Guideline provision." *United States v. Kirilyuk*, 29 F.4th 1128, 1136–37 (9th Cir. 2022) (cleaned up).[2] The Third Circuit recently applied its rationale in *Nasir* to its holding in *United States v. Banks*, 55 F. 4th 246, 528 (3rd 2022). There, in the fraud guideline, the Third Circuit invalidated Note 3(A)'s definition of "loss" as "the greater of actual loss or intended loss" finding that because the commentary's "intended loss" alternative expanded the definition of loss, it deserves no weight. *Id.*

The same analysis holds true here as application note 4 expands the Guidelines. [3] The language of the § 3A1.4 text says a 12-level enhancement applies if the defendant's offense "involved, or was intended to promote, a federal crime of terrorism"—defined as an offense that *both* (1) satisfies § 2332b(g)(5)(A)'s motivational element, *and* (2) is a violation of a statute enumerated in § 2332b(g)(5)(B). § 3A1.4 n. 1. The plain meaning of the word "and" in § 2332b(g)(5) is conjunctive. *See United States v. Alhaggagi*, 978 F.3d 693, 699 (9th Cir. 2020) ("Both parts of § 2332b(g)(5) must be satisfied for the enhancement to apply.").[4] But application note 4 reads this conjunctive definition out of the guideline, rendering it disjunctive instead. Where a guideline requires the government to satisfy two criteria, an application note necessarily conflicts with the guideline if it permits the government to enhance a sentence based on satisfying only one of those criteria. *See United States v. Allen*, 909 F.3d 671, 674 (4th Cir. 2018) (explaining commentary is "inconsistent with the Guidelines when following the commentary would violate the dictates of the relevant Guidelines").

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[2] "The more demanding deference standard articulated in *Kisor* applies to the Guidelines' commentary." *Castillo,* at *7.

[3] *But see e.g. United States v. Doggart*, 2021 WL 5111912 (6th Cir. Nov. 3, 2021). There, the Sixth Circuit in *Doggart* declined to follow an argument similar to the one made here, however it did so without considering the Court's holding in *Kisor*.

[4] *But see e.g. United States v. Arnaout*, 431 F.3d 994, 1001 (7th Cir. 2005); s*ee also United States v. Kobito*, 994 F. 3d 696, 701-702 (4th Cir. 2021).

Although there appears to be a circuit split on whether both parts of § 2332b(g)(5) must be satisfied for the enhancement to apply, it appears that the D.C. Circuit, in dicta, recognizes that they do. In *United States v. Mohammed*, 693 F.3d 192, 201 (D.C. Cir. 2012), the court acknowledged, "[t]he definition of 'federal crime of terrorism' contains its own intent element, with an additional requirement only that the offense of conviction appear on the statutory list." *Id.* (emphasis added); *accord United States v. Abu Khatallah,* 314 F.Supp. 179, 197 n.19 (D.C.C. 2018) ("The offense must also be enumerated in the statute defining a federal crime of terrorism; damaging federal property and providing material support to terrorists are on the list. 18 U.S.C. § 2332b(g)(5)(B)(i).").

Tellingly, here, the government does *not* seek this enhancement based on the plain language of the guideline—likely because it knows making such a request puts it on shaky legal ground given the uncertain state of the law in this circuit because Mr. Rodriguez was not convicted of an offense enumerated under 18 U.S.C. § 2332b(g)(5). Instead, the government asks this Court to upward depart based on the commentary that impermissibly expands on § 3A1.4.

In sum, the text of § 3A1.4 is not at all ambiguous as to whether the government must prove both, or only one, of the elements in § 2332b(g)(5)'s "federal crime of terrorism" definition. The guideline is clear that to qualify as a "federal crime of terrorism," an offense must satisfy *two* criteria: the motivational element and the enumerated-statutes element, and it appears that the D.C. Circuit is inclined to recognize this conjunctive requirement. This text provides no license to apply § 3A1.4 where a defendant's offense involved or was intended to promote a crime that *either* (1) satisfies the motivational element *or* (2) is a violation of an enumerated statute. Application note 4 broadens the scope of §3A1.4, and the government's request for an upward departure should be denied.

II. The terrorism upward departure is not warranted in this case.[5]

Applying the terrorism departure is not justified in this case and would lead to unwarranted sentencing disparities. In considering this departure, this Court should apply the clear and convincing standard because specific intent is a statutory element. It appears the government has sought the terrorism departure against at least 14 defendants. Unlike those who received the terrorism departure, Mr. Rodriguez accepted responsibility for his actions on January 6 and opted not to go to trial. The 17 levels of sentencing enhancements he agreed and admitted apply to his assault on Officer M.F. more than account for his conduct. The upward departure creates unwarranted sentencing disparities amongst the several other January 6 defendants that have been sentenced—particularly with those defendants where courts decline to apply the terrorism departure.

Defendant	Demographics	Gov. Sentencing Request	Court imposed sentence	Upward Departure Imposed
Reffitt	White male	15 years	87 months	No
Wright	White male	60 months	49 months	No
Judd	White male	90 months	32 months	No
Gardner	White male	71 months	55 months	No
Rodriguez	Latino male	168 months	TBD	TBD

For example, in *United States v. Reffitt*, No. 1:21-cr-0032-DLF, ECF No. 158, the government focused on the violent nature of Mr. Reffitt's acts and noted he arrived to the capital carrying a firearm and clad in body armor. ECF No. 158 at 38-39. Judge Friedrich ultimately declined to apply the departure, citing to a number of other January 6 defendants and finding "there are a lot of cases where

[5] As an initial matter, the government waived its request when it failed to comply with FRCP 32.1 and Local Rules 32.2 requiring timely informal objections. The government never filed informal objections to the PSR addressing the terrorism departure. While notice was given in the plea agreement, this departure is in every plea agreement in the January 6 cases. No defendant who entered a guilty plea thus far has received the upward departure.

defendants committed very violent assaults and even possessed weapons in their cars or hotels that . . . did not receive the departure." Judge Friedrich went on to note there were several disturbing comments—"comments that are tied in with assaults and in some cases trespass on the Capitol, in some cases into the Capitol building, and in some cases pretty egregious physical assaults. In none of those cases did the government seek [the terrorism departure]." ECF No. 175 at 87: 1-5. Here, Mr. Rodriguez, like many other January 6 defendants, made several disturbing comments on that day and the days leading up to and after. But unlike Mr. Refitt, Mr. Rodriguez did not bring a firearm and body armor onto the Capitol grounds, nor was he an influential leader taking action and "directly leading to the very first breach of the Capitol building." ECF No. 158 at 37.

In support of its request, the government also cited to Elmer Rhodes and seven other Oath-Keeper defendants—all of whom went to trial. In the government's words, "[t]hese defendants are unlike any of the hundreds of others who have been sentenced for their roles in the attack on the Capitol." *United States v. Rhodes*, et al., No. 1:22-cr-0015-APM, ECF No. 565 at 2.

The government argues that Mr. Rodriguez engaged in "extensive preparation," but the government failed to provide any other evidence, beyond Mr. Rodriguez's chats and encouragement to other members, to establish his "extensive preparation." *See Rodriguez*, ECF No. 189 at 2-36. While there was discussion about bringing weapons to the Capitol, Mr. Rodriguez did not have a knife or firearm in his possession that day. The one weapon he had—the electroshock device he used in the assault against Officer M.F.—was given to him at the Capitol by Kyle Young, which shows he did not come to the Capitol with the intent to hurt anyone that day.

Additionally, Mr. Rodriguez's social media messages are far different from the actions taken by, for example, Kelly Meggs. *See Rhodes*, ECF No. 565 at 104 (describing coordination with other militia groups including the Proud Boys and Three Percenters). In addition to noting the active

coordination and communication with other militant groups, the government went on to describe Meggs as "indisputably in charge of all other members of the group, including co-defendants Harrelson, Hackett, and Moerschel" and "the boots-on-the-ground's liaison with the QRF" agreeing to "arrange for the QRF to have an extra AR-15 firearm." *Id.* at 104-106.

As for Mr. Rodriguez's conduct, the government places substantial emphasis on his assault conviction. But looking at the totality of the circumstances between the conduct engaged in by the Oath Keeper defendants and Mr. Rodriguez, applying the upward departure here would result in an unwarranted disparity. *See Rhodes*, ECF No. 565 at 8-9 (describing how defendants exploited their military training and experience and honed the group's tactics, to include using military-style gear, marching in "stack" formations, and preparing an armed Quick Reaction Force outside D.C.). In contrast, the government's description of Mr. Rodriguez's approach to the Capitol is of a single individual, not a leader of a group, making his way to the Capitol—weaponless and without any tactical gear. *Rodriguez*, ECF No. 189 at 12. Unlike the Oath Keepers, Mr. Rodriguez did not come to the Capitol with military-style gear and firearms, nor did he work with others to "hone" the tactics used to attack the Capitol. Instead, he engaged in the same amped up rhetoric that several other defendants employed, and he entered the Capitol grounds, not with a group, but on his own. Looking at Mr. Rodriguez's conduct, applying a three-level upward departure, the same departure given to Meggs, would result in an unwarranted sentencing disparity. Accordingly, this Court should reject the terrorism departure.

III. The government's restitution request is unwarranted.

For restitution to be issued, the court "shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order." 18 U.S.C. § 3664. Here, there is

insufficient information for the Court to impose restitution in the amount the government now seeks in either Mr. Rodriguez's presentence report (PSR) or any other report.

On April 13, 2023, the parties received a copy of the draft PSR. ECF No. 174. The PSR noted only what was in the plea agreement, providing no further information regarding restitution to Metropolitan Police Department. *Id.* at 11. No further restitution documentation appears in the final PSR, and the government did not supply federal probation with any further documents. ECF No. 180.

On June 9, 2023, the government filed its sentencing memorandum. ECF No. 189. In its filing, the government indicated the "plea agreement contemplates that Rodriguez *will* pay some or all" of the Metropolitan Police Department's reported loss amount as restitution—$96,927.11. ECF No. 189 at 68 (emphasis added). The government requested that Mr. Rodriguez be required to pay the entire $96,927.11. *Id.* at 69. The government did not include supporting restitution documents in its sentencing memorandum. However, on June 13, 2023, the government responded to Defendant's request and provided supporting paperwork.

A. This Court may order sufficiently documented restitution be paid joint and several or may apportion liability pursuant to 18 U.S.C. § 3664(h).

In accordance with 18 U.S.C. § 3664(h), this Court can order either joint and several liability or may apportion liability in circumstances where more than one defendant has contributed to the loss. In doing so, the Court may consider the "level of contribution to the victim's loss and economic circumstances of each defendant." *Id.*

1. Any restitution liability should be apportioned with defendants Albuquerque Head or Kyle Young.

This Court should apportion liability and require Mr. Rodriguez to be responsible for 70% of the total of any restitution judgment. Apportionment properly accounts for the harm Mr. Rodriguez caused while recognizing at least three other defendants (and possibly more) caused Officer M.F.'s

harm. In the event the government substantiates the total sum claimed, apportioning 70% to Mr. Rodriguez would result in a total restitution sum of $67,849.03.

The government previously represented Mr. Head and Mr. Young were responsible for 70% of the total harm to Officer M.F. in its Restitution Memorandum filed in *United States v. Thomas Sibnick*, 1:21CR00291, ECF No. 173. The government made its apportionment calculus in response to this Court's concern at Mr. Young's sentencing regarding restitution "when more than one individual bears responsibility for the same harm." *Sibnick*, ECF No. 170 at 66. The government suggested joint and several restitution was appropriate. *Sibnick*, ECF No. 173. Applying strict joint and several liability would mean that Mr. Head, Mr. Young, Mr. Rodriguez, and potentially Mr. Sibnick would all be responsible 100% of the restitution.

But the government acknowledged this Court has the statutory authority to apportion restitution liability, instead of using joint and several liability, using a hybrid method. *Id.* The government did not indicate what the appropriate apportionment would be, but did indicate that, together, Mr. Young and Mr. Head should be responsible for 70% of M.F.'s restitution. Given the level of contribution of these men to Officer M.F.'s injuries and as illustrated below, Mr. Rodriguez should likewise be deemed responsible for no more than 70% of Officer M.F.'s restitution.

Had the Court imposed restitution on Mr. Young and Mr. Head, each would have either been ordered to pay (1) $96,927.11 to satisfy the entire restitution amount based upon a theory of joint and several liability; or (2) approximately $68,849 based upon the hybrid 70% apportionment theory. The government requested restitution from Mr. Young and Mr. Head, but withdrew its request when it "did not provide sufficient notice" to either defendant. *Sibnick*, ECF No. 179.

The government's failure to provide proper restitution notice in resolving Mr. Young's and Mr. Head's cases resulted in neither of them being required to contribute to restitution either fully or

partially, leaving Mr. Rodriguez and Mr. Sibnick as the two defendants financially responsible. In addition to Mr. Rodriguez being financially responsible without contribution payments from Mr. Young and Mr. Head, the government requested Mr. Rodriguez receive a 168-month sentence of incarceration. ECF No. 189. Mr. Young and Mr. Head received substantially shorter sentences, allowing them to get out of custody and start making payment towards restitution much earlier than what the government requests for Mr. Rodriguez. And, Mr. Rodriguez has not started or profited from any crowd fundraising that would assist him in paying restitution.

2. Given the comparative of the conduct of Mr. Young, Mr. Head, and Mr. Rodriguez, Mr. Rodriguez should be required to pay restitution for an apportioned 70%.

A comparison of the conduct of the three defendants supports application of the same 70% apportionment for Mr. Rodriguez that the government stated was appropriate for Mr. Young and Mr. Head. To summarize, a chart has been included as Exhibit A.

3. Apportionment is appropriate pursuant to the government's representations in Mr. Young's Sentencing Memorandum.

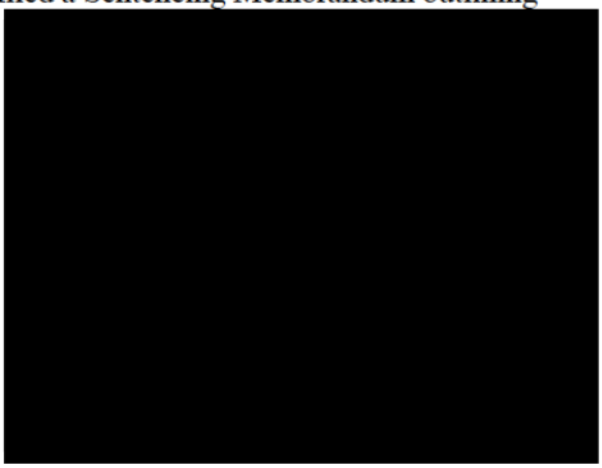
According to the government's Sentencing Memorandum, Officer M.F. screamed at three separate occasions that can be heard on his body-worn camera. *United States v. Kyle Young,* 1:21-cr-00291-ABJ, ECF No. 140. Further, he suffered burn marks from the "tasing" which resulted in scars. *Id.*

Exhibit 13 *(photo taken on March 3, 2021)*

The government circled three places on Officer M.F.'s neck using a photograph from approximately two months after sustaining the injuries. *Id.* Each circle indicating a separate "tasing" as they are not close enough to each other to be from one mark based upon the device

used. The implication is that Officer M.F. was "tased" three times, although that is not specifically stated.

In Mr. Rodriguez's case, the government also filed a Sentencing Memorandum outlining Officer M.F.'s injuries using different photographs that were not included in Mr. Young's case. To the right is one of the photographs used to show the injuries on Officer M.F.'s neck used in Mr. Rodriguez's case. ECF No. 189.



In Mr. Rodriguez's case, the government's Sentencing Memorandum also mentioned there were three separate times when Officer M.F. yelled out in pain on the body camera. *Id.* The government agrees that Mr. Rodriguez "tased" Officer M.F. twice. Mr. Rodriguez had already turned away from Officer M.F. when his last scream can be heard. Looking at the totality of the circumstances as presented by the government, there is evidence to suggest Mr. Rodriguez was not the only person who contributed to Officer M.F.'s injuries.

This Court can consider the totality of the circumstances if apportioning the restitution, including if there was another injury to Officer M.F. that contributed to his medical bills and medical leave.

If this Court determines restitution to Metropolitan Police Department is appropriate, Mr. Rodriguez submits the appropriate restitution amount is 70% of the total, $68,849, joint and several with any other contributor to Officer M.F.'s injuries.

Dated: June 20, 2023.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

By: */s/Rebecca A. Levy*
/s/Margaret W. Lambrose
/s/Katherine A. Tanaka
REBECCA A. LEVY
MARGARET W. LAMBROSE
KATHERINE A. TANAKA

Assistant Federal Public Defenders
Attorneys for Daniel Rodriguez

Certificate of Electronic Service

I hereby certify on the 20th day of June 2023 a copy of same was electronically filed using the CM/ECF system and thus delivered to the parties of record and in pursuant to the rules of the Clerk of Court.

/s/ Cecilia Valencia

Employee of the Federal Public Defender