IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No.: 1:21-cr-00186-CRC
	:	
DAVID ALLEN BLAIR	:	
	:	
Defendant	:	

DEFENDANT DAVID ALAN BLAIR'S (CORRECTED) OBJECTIONS TO THE PRESENTENCE REPORT

David Allen Blair, Defendant, by and through his counsel, Terrell N. Roberts, III, pursuant to Rule 32(f) of F.R.Crim.P., files corrected objections to the Presentence Investigative Report ("Report") [Doc.# 58] and is intended to supplant the earlier filed objections [Doc.#59], which was filed prematurely without complete digestion of the Report. The Report itself was not filed until July 8, 2022.

I. THE REPORT'S RECOMMENDED SENTENCE UNDER THE SENTENCING GUIDELINES RESTS ON THE FALSE PREMISE THAT MR. BLAIR'S CONDUCT CONSITUTED AN AGGRAVATED ASSAULT.

The Presentence Investigation Report ("the Report") correctly determined the correct offense guideline to be applied, namely, U.S.S.G. § 2A2.4 **Obstructing or Impeding Officers**. Under that offense guideline, there is a Cross Reference, subparagraph (c), which states: "If the conduct constituted aggravated assault, apply § 2A2.2 (Aggravated Assault)." The Report went concluded that Mr. Blair's conduct constituted aggravated assault because he "used a dangerous weapon (lacrosse stick) with intent to cause bodily injury. Report, p. 11, ¶39. The Report reached this conclusion, which is erroneous, because the lacrosse stick as used in this case was not a dangerous weapon and because Mr. Blair lacked the intent to cause "bodily injury" anyway.

The Commentary to USSG § 2A2.2, Application Notes, 1, defines an aggravated assault as follows:

> "Aggravated assault" means a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with the weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony."

The Commentary's Application Notes under U.S.S.G. 1B1.1(E) defines a "dangerous weapon" as:

> (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun.)

The lacrosse stick as used by Mr. Blair does not meet the definition of a dangerous weapon. It is "not an instrument capable of inflicting death or serious bodily injury." The aluminum lacrosse stick is a lightweight object weighs approximately 12 oz. It is cylindrical in shape, hollow and has a 1-inch diameter. It measures 52-72 inches in length. In the sport of lacrosse, a net or glove attaches to the stick. An assemble lacrosse stick is used to throw a ball to another player or into the net for a goal. It is also used to strike or "check" another player. The sport of lacrosse has achieved wide acceptance in schools and colleges across many parts of the United States. Use of the lacrosse stick is not commonly known to cause serious bodily injury or death. Second, a lacrosse stick does not closely resemble an instrument capable of inflicting death or serious bodily injury. Third, the use of the lacrosse stick in this particular case does not create an impression that it was used as an instrument capable of inflicting death or serious bodily injury. This is evident from the available video footage, which was submitted under separate cover for the Court's review in connection with objections filed previously to the draft Report [Doc.#54.]. The footage show that Mr. Blair held the stick parallel to the ground and pushed it at the officer's center mass. The officer was wearing riot gear and was standing shoulder to shoulder with other officers in the line

when this happened. From the footage it appears that the lacrosse stick's contact lacked sufficient force to hurt the officer or produce an injury, and the government freely admits as much.

In a part of the Report which bears the heading, Probation Officer's Response, the author of the Report contends that the lacrosse stick was a dangerous weapon because Mr. Blair used it commit a bodily injury. The author admitted that Mr. "Blair did not handle the lacrosse stick in a way to frighten Officer K.P." and that "no information has been presented that Officer K.P. sustained bodily injury." And yet, the author of the Report concluded that Mr. Blair used "an instrument (lacrosse stick), which is not ordinarily used as a weapon, to commit bodily injury." She concludes that upon Mr. Blair's expression of obscenities at the officer and his encouragement to others to stand their ground is sufficient to show that intended to commit a bodily injury. It may prove that he was angry after being shoved. But that does not prove an intent to cause a bodily injury. What ultimately proves an intent to cause bodily injury is how Mr. Blair used the stick. A push or check with the stick to the center of mass of the officer dressed in riot gear does not prove that he had an intent to cause bodily injury.

The author of the Report does not refer to USSG's definition of "bodily injury." That term is defined 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, Commentary, n. 1(B)(*emphasis added*). The author's Response to the Defendant's objections does not address this definition. It does not explain how the push of a lightweight stick to the center mass of a police officer dressed in riot gear demonstrates an intent to cause "significant injury." Mr. Blair's use of the lacrosse stick is not consistent with an intent to cause a painful or obvious injury to the officer. If Mr. Blair used the pointed end of the stick to stab the officer, or struck the officer in the head or other vulnerable area, a good argument could be made that he had an intent to cause bodily injury. But that is not what happened.

If that wasn't enough, on June 21, 2022, Assistant United States Attorney Michael Liebman notified the author of the draft Presentence Report that he objected and disagreed with the Report's finding that the defendant's conduct constituted "aggravated assault." He stated that the evidence does not support a finding that Mr. Blair had the intent to cause bodily injury. He explained that Mr. Blair's conduct "did not involve: 'an intent to cause bodily injury … with that weapon'; a 'serious bodily injury'; or a 'strangling, suffocating or an intent to strangle or suffocate'; or "an intent to commit another felony.'" See Ex. 1 attached. In the Report, on p. 24, it states: "Counsel for the Government reviewed the presentence report. *No objections or inaccuracies were reported.*" The prosecutor's notice of receipt of the report and June 21, 2022 letter (Ex. 1) belie that claim.

In an astonishing turn around to the June 21st letter, the Government's Memorandum of Sentencing [Doc.#56] states that the Report "correctly uses USSG § 2A2.2 (Aggravated Assault) to determine the Base Offense Level, notwithstanding that the parties, in the plea agreement in this case, agreed that USSG 2A2.4 (Obstructing or Impeding Officers) determined the base offense level." Not only does the Government's assertion contradicts its June 21st objections to the Report, it is at odds with its duty in the plea bargain agreement to deal with the defendant fairly and in good faith. *See, Santabello v. New York*, 404 U.S. 257, 261 (1971)(plea bargaining is an "essential component of the administration of justice" and "presupposes fairness in securing the agreement between the accused and a prosecutor"). The late endorsement of the Report's erroneous calculation of the sentencing guidelines (which it knows to be inaccurate) undermines the fairness which Mr. Blair has a right to expect from the prosecutor.

Based upon a faulty conclusion that Mr. Blair's conduct constituted aggravated assault -- an offense by the way which Mr. Blair refused to plead guilty to-- the Report calculated the Base Offense Level to be **14** – a whopping 4 levels more than the parties' calculation of **10**. Second, a

finding that a "dangerous weapon" was used leads to the application of the Special Offense Characteristic of § 2A2.2 (b)(2)(B), which means an additional **4-**level increase of the total offense level of **15** (after deducting 3 points for acceptance of responsibility). This makes for a guidelines sentence of **18- 24** months -- substantially more than the Total Offense Level of **11,** which the government and defendant agreed to and which yields a recommended sentence of **8-14** months of imprisonment. The disparity in range of sentence is significant. Moreover, the Report's guidelines' estimate of 1**8-24** months of imprisonment removes Mr. Blair from Zone B in the Sentencing Table and adversely impacts his chances for a sentence to a term of probation.

II. THE REPORT'S INACCURACIES.

A. The Report Falsely Suggests that Mr. Blair was Part of the Mob which Broke into the Capitol.

Paragraph No. 33 of the Report states:

> The provisions of the Mandatory Victim Restitution Act of 1996 apply to these Title 18 offenses. *Although no specific individual was injured in this case as a result of the defendant's actions, this offense involved a large crowd of individuals who gathered outside the US Capitol and ultimately forced entry inside the building. Those individuals' actions including breaking of windows and assaulting members of law enforcement, as others in the crowd encouraged and assisted those acts, to gain entry into the US Capitol.* (*Emphasis added*.)

This statement is highly misleading. By asserting that Mr. Blair's "offense involved a large crowd involved a large crowd of individuals who gathered outside the US Capitol and ultimately forced entry inside the building," the Report is directly implicating that Mr. Blair was a part of breach of the Capitol. This is just false. Mr. Blair did not arrive at the West Lawn until approximately 10 minutes prior to his encounter with the police at 5:47 p.m. on January 6, 2021. The Government has not disputed this contention. The persons on the West Lawn at that time may or may not have been the same individuals who had forced entry to the Capitol building 3 and ½ hours earlier that day. But it is not accurate to say, as the Report does, that the persons who were on the West Lawn at 5:47 p.m., "ultimately forced entry inside the building." We

know that by 4:28 p.m., both the House and Senate Chambers were declared to be secure, and by 5:20 p.m., the DC National Guard had arrived.[1] CNN broadcast a report at 5:42 p.m. that "[t]he Sergeant at Arms has announced that the U.S. Capitol Building is now secure, according to press pool reporters." https://www.cnn.com/politics/live-news/congress-electoral-college-vote-count-2021/h_71a3aeeb0c13370d8d089e593c149fe8. Thus, no forced entry into the Capitol building occurred at 5:47 p.m. or after. Thus, the claim that Mr. Blair's offense involved a crowd which ultimately forced entry into the Capitol is false.

B. Inaccurate Medical Information Contained in the Report

In the Sentencing Recommendation [Doc.#58], there is inaccurate information stated about Mr. Blair's past medical history. Summarizing the medical records of Kaiser Permanente, the Sentencing Recommendation "note[s] a history of manic episodes since discovering his father['s] extra-marital affair." The Kaiser records (p. 37) do refer to refer to such a history obtained by an internist, Ke Sun, M.D., on January 29, 2021. Mr. Blair denies a history of manic episodes since he was 11 years old or since he discovered his father's extramarital affair, and the accuracy of the reported manic episodes at that time is called into question by other parts of the record. A note written by another physician, Amit Patel, D.O., on January 29, 2021 refers to a history of depression dating back to middle school, but does not mention a history of manic symptoms dating back to childhood. In his first visit with a psychiatrist at Kaiser on February 1, 2021, there is no mention of manic episodes commencing after age 11 or after discovery of the father's extramarital affair.

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[1] U.S. Senate Report of the Committees on Homeland Security and Governmental Affairs and Rules and Administration, p. 84. https://www.rules.senate.gov/imo/media/doc/Jan%206%20HSGAC%20Rules%20Report.pdf. The Senate Report stated: "DCNG (District of Columbia National Guard) personnel ultimately did not arrive at the Capitol until approximately 5:20 p.m., … . By that time, both the House and Senate chambers had already been declared secure."). It further stated that "the Senate Chamber was secure by 4:19 p.m. and the House Chamber was secure by 4:28 p.m." *Id.*, n.606, p. 84(*citing* U.S. CAPITOL POLICE TIMELINE OF EVENTS FOR JANUARY 6, 2021 ATTACK (2021) n. 61, p. 20).

The Sentencing Recommendation, p. 2, goes on to state that Mr. Blair was "hospitalized for seven to eight months due to a manic state." Although Kaiser's records do state as part of the patient's history that Mr. Blair "was hospitalized in high school for 7-8 months," that information is inaccurate. The defendant had counseling and therapy for anxiety and attention deficit disorder in 2011-12 through an organization called Blue Ridge Behavioral Health Services located in Frederick, Maryland. He was prescribed medication and attended therapy sessions, but he never was "hospitalized." Counsel has obtained Mr. Blair's medical records for all of his care and he has not seen records showing an admission to a hospital. Further, Mr. Blair's mother confirmed that her son has never been hospitalized.

The Report states that "Mr. Blair was referred to [a] speech therapist and neurologist, but no further information was provided. He missed neurology appointments (February 17, 2021 and March 19, 2021), and he did not follow through with an MRI scan." The author of the Report failed to disclose that the Kaiser records show that Mr. Blair provided good reasons for not making the appointment on February 17, 2021. He formally surrendered to Federal law enforcement on that day on an arrest warrant previously issued by this Court and that is why he didn't attend his appointment for February 17th. With respect to the March 19, 2021, the Kaiser records (p. 124) show that Mr. Blair did not miss his appointment. On that date, he met with Maria Llanes, M.D., a neurologist, for "follow up of post concussive syndrome and headache." As to the claim that Mr. Blair did not follow through with an MRI scan, that is false. Kaiser records show that Mr. Blair had an MRI brain scan on April 30, 2021. The scan was read as normal. Counsel will accept his responsibility for not furnishing this record to the probation officer. The MRI report came to counsel in a later delivery of records and counsel neglected to send it to the Probation Officer. However, Mr. Blair had signed an authorization for medical records with the Probation Officer, who was free to obtain the records on her own. Further the

probation officer did not contact Mr. Blair or counsel to confirm any details concerning whether he obtained an MRI or had missed appointments.

The Court should order that the foregoing factual inaccuracies are noted as such and that the Order be appended to the Report.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Defendant's Objections to the Presentence Report was electronically filed on July 11, 2022, via the CM/ECF File & Serve system and an electronic copy was e-served on:

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