

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

DAVID LEE JUDD

Defendant.

Case No. 21-cr-40-TNM-3

GOVERNMENT’S RESPONSE TO DEFENDANT’S SENTENCING MEMORANDUM

The United States of America respectfully submits this response to the defendant’s memoranda in aid of sentencing, ECF No. 529.

The defendant, David Judd, argues that the pyrotechnic device he lit and then threw at police officers who were guarding the United States Capitol on January 6, 2021 was not a “dangerous weapon.” From there, Judd argues that U.S.S.G. § 2A2.2 does not apply, because his conduct did not constitute “aggravated assault.” Respectfully, the defendant is wrong.

As explained in our sentencing memoranda, U.S.S.G. § 2A2.2 applies to Judd’s conviction under 18 U.S.C. § 111(a) because his conduct constituted “aggravated assault.” As a starting point, U.S.S.G. Appendix A provides that the appropriate guideline for 18 U.S.C. § 111 can be either Section 2A2.2 or Section 2A2.4. These guidelines in turn explain which one applies to a particular assault. Section 2A2.4 provides that, “[i]f the conduct constituted aggravated assault, apply § 2A2.2 (Aggravated Assault).” U.S.S.G. § 2A2.4(c). And Section 2A2.2 defines “Aggravated Assault” as “a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony.” U.S.S.G. § 2A2.2

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA UNITED STATES OF AMERICA v. Case No. 21-cr-40-TNM-3 DAVID LEE JUDD Defendant. GOVERNMENT'S RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM The United States of America respectfully submits this response to the defendant's memoranda in aid of sentencing, ECF No. 529. The defendant, David Judd, argues that the pyrotechnic device he lit and then threw at police officers who were guarding the United States Capitol on January 6, 2021 was not a "dangerous weapon." From there, Judd argues that U.S.S.G. § 2A2.2 does not apply because his conduct did not constitute aggravated assault. Respectfully, the defendant is wrong. As explained in our sentencing memoranda, U.S.S.G. § 2A2.2 applies to Judd's conviction under 18 U.S.C. § 111(a) because his conduct constituted "aggravated assault." As a starting point, U.S.S.G. Appendix A provides that the appropriate guideline for 18 U.S.C. § 111 can be either Section 2A2.2 or Section 2A2.4. These guidelines in turn explain which one applies to a particular assault. Section 2A2.4 provides that, "[i]f the conduct constituted aggravated assault, apply § 2A2.2 (Aggravated Assault) to the U.S.C. offense. If not, apply § 2A2.4 (Interfering with the Administration of Justice)." Section 2A2.2 (Aggravated Assault) defines "Aggravated Assault" as "a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony." U.S.S.G. § 2A2.2-1 Application Note 1. Here, Judd's assault qualifies as an "aggravated assault" independently under both subsections (A) and (D). First, under (A), Judd's assault was in furtherance of his overall goal of interfering with the certification of the election, and thus was committed with "an intent to commit another felony," namely 18 U.S.C. § 1512(c)(2), the other crime for which Judd convicted. Accordingly, Section 2A2.2 applies regardless of whether the device was a dangerous weapon. Second, and independently, Judd's assault was an "aggravated assault" under (A) because it involved a dangerous weapon with intent to cause bodily injury. The Sentencing Guidelines define "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[.]" U.S.S.G. § 1B1.1, Application Note 1(E). This definition includes "any instrument that is not ordinarily used as a weapon (e.g., a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury." U.S.S.G. § 2A2.2, Application Note 1. The device Judd lit and then threw was undoubtedly a dangerous weapon. In fact, Judd has stipulated to it. "[a]t approximately 5:07 p.m., defendant Judd entered the tunnel, lit an object that appeared to be a firecracker, and threw it at the police line. The object landed in between the double doors at the building entrance, where at least ten law enforcement officers were fighting with other rioters to keep them out of the building. While the exact object was not recovered, the object was capable of inflicting serious bodily injury, closely resembled such an object, or was used in a manner that created the 2 impression the object was such an instrument." ECF 433 at 7 (emphasis added). After stipulating that pyrotechnic device was a deadly or dangerous weapon under U.S.S.G. § 1B1.1, Application Note 1(E), and obtaining the benefits of a stipulated trial (including a 3-level downward adjustment for acceptance of responsibility), Judd should not be heard to do an about-face and contradict that stipulation. See *In re Sealed Case*, 936 F.3d 582, 592, 594 (D.C. Cir. 2019) ("we may not consider such arguments when, as here, they contradict the admissions made in the defendant's plea agreement"); *Appellant* may not ordinarily argue that his conduct failed to affect foreign commerce without contradicting the terms of his plea agreement"); *United States v. Cianci*, 154 F.3d 106, 110 (3d Cir. 1998) (where defendant stipulated in his plea agreement that his offense involved "sophisticated means," he could not renege on that stipulation in challenging his sentence, which would allow him to "seek the benefit of his [plea agreement] without its burdens"). There is also no doubt that Judd had the "intent to cause bodily injury." As a participant in a violent mob which was violently actively attacking police officers, Judd lit a pyrotechnic device, looked directly at police officers crowded in a narrow tunnel, and threw the pyrotechnic device at the officers. He then scurried out of the tunnel. Judd's self-serving claims that he did not intend to cause harm by throwing the pyrotechnic device defies logic. There would have been little utility in throwing a pyrotechnic towards police officers with whom you are actively struggling other than to cause harm. Therefore, and as explained in our sentencing memoranda, U.S.S.G. § 2A2.2 applies to Judd's 3 assault. Judd also now argues that, contrary to his trial stipulation, the device was not a dangerous weapon. As noted above, Section 2A2.2 applies based on Judd's intent to commit another felony, regardless of whether the device was a dangerous weapon. In any event, the Court should reject Judd's effort to undermine his factual stipulation for several reasons. First, the defense relies on the D.C. Code's definition of dangerous weapon as applied in *United States v. Broadie*, 452 F.3d 875, 881-82 (D.C. Cir. 2006). ECF 529 at 19 n.23. But the D.C. Code does not apply here because the relevant definition of "dangerous weapon" is the one in the Sentencing Guidelines. And case law interpreting the D.C. Code is not persuasive because the D.C. Code's definition of "dangerous weapon" is more limited than the Guidelines definition. Compare Instruction 6.500, Carrying a Dangerous Weapon, Criminal Jury Instructions for the District of Columbia 2021 Release ("Redbook") (defining dangerous weapon as "any object likely to produce death or great bodily injury by the use made of it") (emphasis added) with U.S.S.G. § 1B1.1, Application Note 1(E) (defining dangerous weapon as "an instrument capable of inflicting death or serious bodily injury") (emphasis added). Second, Judd's reliance on Mr. Taylor's purported expert opinion, ECF No. 529-2, is unavailing. As explained above, the proffered opinion conflicts with Judd's stipulation that the pyrotechnic device he threw at police officers met the Sentencing Guidelines definition of "Deadly or Dangerous Weapon." See ECF 433 at 7. On its merits, the proffered opinion falls short of the standard for expert testimony. There is no showing that the proffered expert has ever made a determination about the nature of an explosive device based solely on reviewing video, or that this 4 methodology is generally accepted as a reliable means of identifying explosive devices. Nor does he claim any experience with the device involved in this case, as opposed to weapons of mass destruction or improvised explosive devices. Tellingly, the expert reviewed the definition of "serious bodily injury" under 18 U.S.C. § 1365, which is not at issue, but has not reviewed any portion of the Sentencing Guidelines or any caselaw defining "dangerous weapon." Finally, even if the pyrotechnic device that Judd lit and threw at police officers was the type of device that Mr. Taylor opines—something "indicative of a small sparkler/fountain," ECF 529-2 at 3—it still constitutes a deadly or dangerous weapon under the Sentencing

Guidelines. Mr. Taylor described a pyrotechnic device as one that produces "a brief and brilliant light, sometimes accompanied by smoke and then is consumed." Id. Mr. Taylor also referenced the same device, in another section of the report, as "a modified sparkler or fountain that produced a short but brilliant light accompanied with some smoke." Id. at 4 (emphasis added). Thus, according to Mr. Taylor, the item was likely a small sparkler, a fountain, or a modified version of either of these items. Such an item still qualifies as a dangerous weapon. The Consumer Product Safety Commission (CPSC) regulates consumer pyrotechnics. 16 CFR § 1500.14(b)(7) includes "minimum cautionary wording" required for certain classes of pyrotechnic devices. 2018 American Pyrotechnic Association Standard 87-1A at 85, available at <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2021-09/2018%20APA%2087-1%20A.pdf>. 5 All categories of fountains, for example, must bear the following label: CAUTION EMITS SHOWERS OF SPARKS USE ONLY UNDER CLOSE ADULT SUPERVISION FOR OUTDOOR USE ONLY Id. at 86 (common warnings for Base Fountain (cylindrical or cone type), Handle Fountain, and Spike Fountain). Similarly, the minimum cautionary warning for sparkler devices must include the following language: CAUTION FLAMMABLE USE ONLY UNDER CLOSE ADULT SUPERVISION FOR OUTDOOR USE ONLY KEEP BURNING END OR SPARK AWAY FROM WEARING APPAREL OR OTHER FLAMMABLE MATERIAL Id. at 87 (common warnings for Sparkler (Wooden Stick) and Sparkler (Wire Stick)). The CPSC also warns that "[s]parkler burn rates are between 2,000 degrees Fahrenheit—hot enough to melt some metals." CPSC Fireworks safety tips, available at <https://www.cpsc.gov/Safety-Education/Safety-Education-Centers/Fireworks>. Additionally, users should "move to a safe distance immediately after lighting fireworks" and "[n]ever point or throw fireworks (including sparklers) at anyone." Id. In June 2022, the CPSC published its 2021 Fireworks Annual Report, available at <https://www.cpsc.gov/s3fs-public/2021-Fireworks-Annual-Report.pdf> ("2021 CPSC Report"). In it, the CPSC estimated that for calendar year 2021, there were 11,500 fireworks injuries treated in U.S. Hospital emergency departments. 2021 CPSC Report at 2. The report focused on a special study period between June 18 and July 18, 2021, in which 8,500 of these fireworks-related injuries treated in hospitals occurred. Of those 8,500 injuries, 1,100 were caused by sparklers, 100 were caused by homemade/alterd devices, and 4,500 were caused by unknown devices. Id. at 18. Therefore, defense's belated argument that the pyrotechnic device that Judd lit and threw at police officers was not dangerous defies common sense. If the item was a commercially-regulated and lawfully-purchased sparkler/fountain, it would bear warning labels and would have been of a type that caused more than 1,000 injuries requiring hospital treatment in a one-month period in the United States in 2021. Perhaps because no such warnings are visible in any of the footage he reviewed, the defense expert speculates that this item could have been a "modified" sparkler/fountain, likely a homemade or otherwise unregulated device. Such devices were responsible for 100 injuries in the CPSC's one-month special study period. These pyrotechnics are flammable and/or burn at incredibly high temperatures (2,000 degrees Fahrenheit for sparklers) and the CPSC specifically cautions against using them inside or throwing them. Judd purportedly picked this item off the ground, lit it, and threw it into a tightly packed group of police officers who were under assault in a confined space. Although it did not injure anyone, this device was capable of doing so. Consistent with this fact, on both of his written statements, Judd acknowledged how "dangerous" the situation was, and as noted, Judd stipulated at trial that the device was "capable of inflicting serious bodily injury." For all of these reasons, Section 2A2.2 applies to Judd's assault and the specific offense characteristic for use of a dangerous weapon applies. Respectfully submitted, MATTHEW M. GRAVES 7 UNITED STATES

ECR 1914 (emphasis added). A plea stipulating that a pyrotechnic device was a deadly or dangerous weapon and sparkler (Wire Stick) The CPSC also warns that "[s]parkler burn rates are between 2,000 degrees Fahrenheit—hot enough to melt some metals." CPSC Fireworks safety tips, available at <https://www.cpsc.gov/Safety-Education/Safety-Education-Centers/Fireworks>. Additionally, users should "move to a safe distance immediately after lighting fireworks" and "[n]ever point or throw fireworks (including sparklers) at anyone." Id. In June 2022, the CPSC published its 2021 Fireworks Annual Report, available at <https://www.cpsc.gov/s3fs-public/2021-Fireworks-Annual-Report.pdf> ("2021 CPSC Report"). In it, the CPSC estimated that for calendar year 2021, there were 11,500 fireworks injuries treated in U.S. Hospital emergency departments. 2021 CPSC Report at 2. The report focused on a special study period between June 18 and July 18, 2021, in which 8,500 of these fireworks-related injuries treated in hospitals occurred. Of those 8,500 injuries, 1,100 were caused by sparklers, 100 were caused by homemade/alterd devices, and 4,500 were caused by unknown devices. Id. at 18. Therefore, defense's belated argument that the pyrotechnic device that Judd lit and threw at police officers was not dangerous defies common sense. If the item was a commercially-regulated and lawfully-purchased sparkler/fountain, it would bear warning labels and would have been of a type that caused more than 1,000 injuries requiring hospital treatment in a one-month period in the United States in 2021. Perhaps because no such warnings are visible in any of the footage he reviewed, the defense expert speculates that this item could have been a "modified" sparkler/fountain, likely a homemade or otherwise unregulated device. Such devices were responsible for 100 injuries in the CPSC's one-month special study period. These pyrotechnics are flammable and/or burn at incredibly high temperatures (2,000 degrees Fahrenheit for sparklers) and the CPSC specifically cautions against using them inside or throwing them. Judd purportedly picked this item off the ground, lit it, and threw it into a tightly packed group of police officers who were under assault in a confined space. Although it did not injure anyone, this device was capable of doing so. Consistent with this fact, on both of his written statements, Judd acknowledged how "dangerous" the situation was, and as noted, Judd stipulated at trial that the device was "capable of inflicting serious bodily injury." For all of these reasons, Section 2A2.2 applies to Judd's assault and the specific offense characteristic for use of a dangerous weapon applies. Respectfully submitted, MATTHEW M. GRAVES 7 UNITED STATES

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All categories of fountains, for example, must bear the following label:

CAUTION
EMITS SHOWERS OF SPARKS
USE ONLY UNDER CLOSE ADULT SUPERVISION
FOR OUTDOOR USE ONLY

Id. at 86 (common warnings for Base Fountain (cylindrical or cone type), Handle Fountain, and Spike Fountain). Similarly, the minimum cautionary warning for sparkler devices must include the following language:

CAUTION
FLAMMABLE
USE ONLY UNDER CLOSE ADULT SUPERVISION
FOR OUTDOOR USE ONLY
KEEP BURNING END OR SPARK AWAY FROM WEARING APPAREL OR OTHER
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Id. at 87 (common warnings for Sparkler (Wooden Stick) and Sparkler (Wire Stick)). The CPSC also warns that “[s]parklers burn at temperatures of about 2,000 degrees Fahrenheit—hot enough to melt some metals.” CPSC Fireworks safety tips, available at <https://www.cpsc.gov/Safety-Education/Safety-Education-Centers/Fireworks>. Additionally, users should “move to a safe distance immediately after lighting fireworks” and “[n]ever point or throw fireworks (including sparklers) at anyone.” *Id.*

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