

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HECTOR VARGAS,

Defendant.

Case No. 1:21-cr-00047-RDM

DEFENDANT'S OBJECTIONS TO DRAFT PRESENTENCE INVESTIGATION REPORT

Defendant Hector Vargas, through undersigned counsel, respectfully submits the following objections to the Draft Presentence Investigation Report (Feb. 17, 2023) [ECF No. 76] (the "Draft PSR").

Paragraph 17: Defendant objects to the statement in Paragraph 17 of the Draft PSR that the Defendant "held open" one of the East Rotunda doors "as the crowd overpowered the US Capitol Police officers in the entryway." As the videotape of these events indicates, the door in question had been propped open for some time before the Defendant reached it, and rather than holding the door open, Defendant grips the door in an effort to avoid being pushed into the building by the crowd. See Gov't Exhs. 103, 104; Def. Exhs. 103-105, 402; Objection to Paragraphs 18, 20, 33 & 39, *infra*.

Paragraph 17: Defendant objects to the statement in Paragraph 17 of the Draft PSR that after entering the Capitol, the Defendant "quickly moved through the crowd toward the police line guarding the entrance to the Grand Rotunda." As the videotape of these events indicates, the Defendant does not move "through" the crowd, but is borne along by the crowd pushing into the building. *Id.*

Paragraph 17: Defendant objects to the statement in Paragraph 17 of the Draft PSR that the Defendant “recorded a video of himself and posted it to social media” while in the Grand Rotunda. Although the Defendant recorded a video of himself while in the Grand Rotunda, that video was not posted to social media until after leaving the Capitol Building. See Gov’t Exhs. 106, 107, 701 at 5. The government concedes as much. See Letter of Kyle Mirabelli and Kimberly Paschall to USPO Robert Walters (March 2, 2023) [Exh. A hereto] (“Gov’t Obj.”) at 3 (after being “escorted out of the Memorial Doorway . . . [the Defendant] posted the video from the Rotunda to Facebook”).

Paragraphs 18, 20, 33 & 39: Defendant objects to the statement in Paragraph 18 of the Draft PSR that “social media pages associated with defendant Vargas that were discovered during the FBI investigation, including HectorGPuertoRico (Facebook) and hectorgsourpr (Instagram), were disabled by the defendant during the investigation,” and with the Draft PSR’s suggestion, in Paragraphs 20, 33, and 39, that a two-level enhancement for obstruction of justice pursuant to U.S.S.G. §3C1.1 is warranted on that basis. In fact, as the government concedes, “no evidence was presented at trial regarding the deletion of the defendant’s social media accounts.” Gov’t Obj. at 1.

The Draft PSR claims to base this statement and this suggestion on the Complaint originally filed against Mr. Vargas, Draft PSR ¶ 18, but the Complaint does not support the statement or suggestion. The Complaint states that “social media pages associated with VARGAS that were discovered during the FBI investigation . . . no longer exist.” Complaint (Jan. 14, 2021) [ECF No. 1-1] at 7. It does not explain what is meant by the statement that the accounts “no longer exist,” and although it states that the accounts were “discovered” during the investigation of Defendant, it does not state *when* the accounts ceased to exist.

Finally, and most importantly, it does not include *any* information suggesting that the Defendant took any steps to prevent the FBI or anyone else from accessing them.

The Complaint also provides no basis from which to conclude that Defendant took any steps to prevent investigators from accessing the GoFundMe page. The Complaint does not state that the GoFundMe page “no longer exists;” rather, it states that the page was “disabled” when agents attempted to access it. *Id.* This suggests that while agents could view the page, it was no longer functioning – *i.e.*, accepting donations. This is consistent with the fact that the tweet referencing the GoFundMe page is dated January 1, 2021, and seeks donations for the purpose of enabling individuals to travel to Washington, DC on January 6. *Id.* Thus, the “disabling” of the GoFundMe page is as likely – if not more likely – to be attributable to the fact that that date had already passed when the agents attempted to access it, as it is to any effort to thwart investigation.

Although the government concedes that the Draft PSR’s justification for the obstruction enhancement is inapplicable, it goes to extraordinary lengths to contend that the Court should apply the enhancement because of Defendant’s “materially false and misleading testimony during trial.” Gov’t Obj. at 1. But the government fails to show that any of Defendant’s testimony was, in fact, materially false or misleading.

First, the government suggests that Defendant’s testimony that he wore a vest over his jacket because of the cold was false because he wore the same vest during another protest in the summer of 2020. Gov’t Obj. at 1. The government offers no evidence that the Defendant wore the vest for any other reason, and the afternoon of January 6, 2021, was cold, with the temperature ranging from 38-43 degrees Fahrenheit. Washington DC Weather history, January 2021, wunderground.com, available at

<https://www.wunderground.com/history/monthly/us/dc/washington/KDCWASHI287/date/2021-1>.

Second, the government alleges that the Defendant “attempted to give the jury the impression that he was a peaceful community activist, who attended a lot of political rallies.” Gov’t Obj. at 2. This testimony was accurate – the Defendant did attend multiple rallies, and there is no evidence that he was anything other than peaceful at them. Even if, as the government suggests, the Defendant did not “really” support these causes in his mind, see Gov’t Obj. at 2 (Defendant “expressed his disdain” for “Black Lives Matter,” and “hatched a plan to paint over” a Black Lives Matter mural), the government offers nothing to show that the testimony itself – that Defendant attended the rallies and was peaceful – was inaccurate.

Third, although the government concedes that the video footage shows the Defendant “briefly holding on to the door,” it claims that he “used his hands and forearms to maneuver around, and press open, the East Rotunda door,” in order to “maneuver[] his body into the entryway.” Gov’t Obj. at 2. But the video speaks for itself. Defendant did not “press open” the door – which had been opened before Defendant arrived at it, and remained so. Moreover, rather than “press[ing] open” the door, the video clearly shows the Defendant being turned so that his back faced the entryway before he was pushed in.

Fourth, the government claims that Defendant’s testimony that he admired the Capitol and its architecture was “materially false” because he later referred to the Capitol as a “motherfucker” that he “took over.” Gov’t Obj. at 2. Even if the Defendant’s subjective state of mind toward the Capitol building – admiration or contempt – could possibly be “material,” the government offers no evidence to show that his testimony is inconsistent with his recorded statements. Whether or not Defendant actually “took over” the Capitol, the expression of a desire to “take over” a building is not in any way inconsistent with admiration for the building,

and the term “motherfucker” “can be used as a compliment just as easily as it can be used as an insult,” Urban Dictionary Definition of “motherfucker,” available at <https://www.urbandictionary.com/define.php?term=mother%20fucker>.

Finally, the government argues that the Defendant’s testimony that he asked police the way out of the Rotunda is “not supported by any view of the evidence.” Gov’t Opp. at 2. But even if there is no affirmative evidence that the Defendant did ask for directions, the government does not purport to have recorded every word Defendant spoke while in the Capitol, and points to no evidence that he did not.

Paragraph 28: Defendant objects to the suggestion in the Draft PSR that Counts 1 and 2 should not be grouped pursuant to USSG §3D1.2, because “the conduct in Count 1 does not involve the same harm as the conduct in Count 2.” Count 1 charges unauthorized entry into the Capitol in violation of 18 U.S.C. §1752(a)(1), and Count 2 charges disorderly or disruptive conduct, in violation of 18 U.S.C. §1752(a)(2). But these categories do not describe different harms on the facts of this case, where the government asserted that the Defendant’s mere presence inside the Capitol was disruptive conduct. See, e.g., United States’ Trial Brief (Nov. 28, 2022) [ECF No. 44] at 19. In sum, on the facts of this case, the harm caused by Counts 1 and 2 is precisely the same harm, and the two Counts should be grouped. In fact, the government itself states that “Counts One and Two should group because they involve the same harm and the same victim.” Gov’t Obj. at 2.

Paragraph 35: The Draft PSR asserts that U.S.S.G. §2A2.4 – which applies to convictions for “obstructing or impeding officers” – applies to Defendant’s conviction on Count 2. The government agrees, but its assertion that U.S.S.G. §2A2.4 should be used because “[t]here is no applicable Chapter Two Guideline for this offense in the Statutory Appendix,” Gov’t Obj. at 2, is wrong. The Statutory Index identifies two Guidelines as applicable to

violations of 18 U.S.C. §1752 - §2A2.4 and 2B2.3. United States Sentencing Guidelines (2021) at 567, available at https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/APPENDIX_A.pdf. The former applies to convictions for obstructing or impeding an officer, while the latter applies to offenses for trespassing. Here, the Defendant was not charged with obstructing or impeding any officer, and the government produced no evidence that he did so. Instead, the government argued that the Defendant's mere presence at the Capitol on January 6, 2021, cause the expenditure of police resources, but if that rationale were sufficient to render U.S.S.G. §2A2.4 applicable, it would render U.S.S.G. §2B2.3 a dead letter in cases under 18 U.S.C. § 1752(a)(2), because trespass always implicates the expenditure of police resources.

The appropriate question to ask, in determining whether U.S.S.G. §2A2.4 or U.S.S.G. §2B2.3 applies, is whether the defendant took action, *in addition to the act of trespassing*, to interfere with police officers' performance of their duties. Here, Defendant took no such action, and U.S.S.G. §2B2.3 applies. Thus, the appropriate Base Offense Level is 4, rather than 10.

Paragraphs 36 & 40: The government takes issue with these paragraphs, asserting that "an additional three points should be added to the adjusted offense level, because under U.S.S.G. §2A2.4(b)(1)(A), the offense involved physical contact with officers guarding the Rotunda entrance." Gov't Obj. at 3. *First*, as discussed above, U.S.S.G. §2A2.4 is not applicable. *Second*, although the government describes the Defendant as a member of a "crowd" that "placed pressure" on police, and "close to" police, it does not identify any evidence that the Defendant himself made contact with any officer.¹

¹ Even if accurate, the government's claim that the Defendant ignored an order to get on the ground, Gov't Obj. at 3, it is inapposite, since it did not involve contact with an officer.

Paragraph 47: Defendant objects to the Draft PSR's calculation of the applicable Total Offense Level. When the errors addressed above are corrected, the appropriate Total Offense Level is 4, rather than 12.

Paragraph 89: Defendant objects to the Draft PSR's calculation of the applicable Guidelines' sentencing range. Based upon a total offense level of 4 and a criminal history category of I, the Guidelines' recommended sentencing range for Counts 1 and 2 is 0 to 6 months.

Dated: March 3, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 3, 2023, a copy of the foregoing Defendant's Objections to Draft Presentence Investigation Report was served upon the United States Probation Office by email and USPS First-Class mail, and was filed using the CM/ECF system, which will then send notification of such filing to all counsel of record.

Dated: March 3, 2023

Respectfully submitted,

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