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SENTENCING MEMORANDUM and
FORMAL OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT

Re: United States of America v. Sergio Patrick Rodriguez
Case No.: 1:13-cr-00109-1

Dear Judge O'Neill:

CASE STATUS

Defendant, Sergio Patrick Rodriguez, was found guilty by jury verdict of Counts 3 and 5 of the Indictment, to wit, 18 U.S.C. §32(a)(5) and (a)(8) and (2) and 18 U.S.C. §39A and 2. The parties have submitted informal objections to the draft PSR. Corrections were made and the final PSR has been received by the Defendant. Sentencing is scheduled for this Defendant on March 10, 2014 at 8:30 a.m.

OBJECTIONS BY PARAGRAPH NUMBER OF PSR

5. Informal objection was made to the phrase "during a critical flight phase" as being the time the EMS helicopter was struck by a laser beam. The probation response was that the language was a verbatim quote from the Indictment. It is true that language appears in the conspiracy allegation, but not the allegation of a violation of Count 3 or 5. Moreover, the EMS helicopter was traveling in a straight line going about 130mph at about 1,000 feet above ground level ascending to a cruising altitude of about 1,500 feet above ground level. There was no proof that the EMS helicopter was struck "during a critical flight phase." In addition, the jury acquitted on the conspiracy count and all counts having to do with the EMS helicopter.

8. A statement ascribed to Defendant Rodriguez should be attributed to Defendant Coleman.

19. This Defendant objects to establishing the base offense level at 30. The guidelines U.S.S.G. §2A5.2 contemplates crimes involving the use of nuclear or chemical weapons, firearms, murder or assault. Please see §§2A5.2 (a)(3), (b), (c). Absent those things, the base offense level is 9; that is doubled to 18, however, "if the offense involved recklessly endangering the safety of: (A) an airport or aircraft; or (B) a mass transportation facility or a mass transportation vehicle. 2A5.2 (a)(2). The jury in this case was instructed that one of the elements of 18 U.S.C. §32(a)(5) and (a)(8) was that the Defendant must have "acted with reckless disregard for the safety of human life." Because this element and 2A5.2 (a)(2) are very similar in language, the appropriate Base

Offense Level should be 18 and not 30. Moreover, the basic facts support the lower offense level. The evidence adduced at trial disclosed both adults and children handled and pointed the laser at one time or another during the evening in question. A neighbor saw the 5 year old daughter of the Defendants twirling the laser around just minutes before Defendant Rodriguez was arrested. There was testimony that the family considered the laser a play thing and not a weapon. Each of the Defendants told officers they were trying to see how far the laser would reach. No average person – certainly not one as unsophisticated as Mr. Rodriguez – would be sufficiently familiar with laser physics to know the properties of a laser and its beam. Nor could anyone be reasonably expected to know that the curvature of the helicopter cockpit glass refracts the light causing it to fill the entire cockpit. Mr. Rodriguez had no idea that the deceptively ordinary laser his wife purchased for less than $8.00 was powerful enough to distract and cause problems for a pilot flying a helicopter.

48. The word/number "seventeen" should be corrected to "thirteen."

71. Bobbie Flores did not testify at Defendant's trial.

101. This Defendant objects to the phrase "critical flight phase" for reasons set forth earlier in these objections. The EMT pilot likened the laser strike to an oncoming vehicle with its headlights on high beam. He described the event as an "annoyance."

103. The EMT helicopter was flying in a straight line and was neither landing nor taking off. Its destination was Porterville or Delano.

105. The PSR alludes to Defendant's history with law enforcement officers and says "it is convincing he was aware the second helicopter was that of law enforcement and the pilot was a sworn officer who was performing his official duties." In the draft PSR, the Probation Officer eliminated the "Official Victim" as a sentencing enhancement by saying, ". . . it does not appear the Defendant's actions were motivated by the pilot's status as a law enforcement officer as he (Defendant) was using the laser prior to the law enforcement helicopter's arrival."

Defendant objects to the reference that he failed to accept a plea agreement and instead demanded a jury trial. To use these facts to demonstrate a bad attitude toward law enforcement is inappropriate.

106. The Defendant objects to the recommended term of 168 months as being greater than necessary to accomplish the goals of 18 U.S.C. §3553 (a)(2). All goals of 18 U.S.C. §3553 (a)(2) can be accomplished by a sentence of 57 months or nearly 5 years. It is shocking that Defendant's crime should be punished by a term of imprisonment of 14 years.

Justification at Page 22 of the PSR

For reasons already stated, the Defendant objects to the recommendations of 168 months of imprisonment and instead urges the Court to sentence Defendant to 57 months in keeping with Base Offense Level 18.

Also, the PSR alludes to the EMS helicopter having to disengage from its service call temporarily. The EMS helicopter was proceeding straight at about 1,000 feet ascending to 1,500 feet going about 130mph. There was no evidence the helicopter disengaged from its service call.

SENTENCING MEMORANDUM

The facts of this case are known to the Court having presided over this jury trial lasting about 4 days. The central issue is whether the appropriate Base Offense Level is 30 as the PSR suggests or whether it is 18 as the defense proposes. The difference in months of imprisonment is significant – 168-210 and 57-71.

The defense asserts the jury's finding of guilt on Count 3 of the Indictment was necessarily based on their belief that the elements set forth in Instruction No. 33 had been proved beyond reasonable doubt. That Instruction says in pertinent part:

> Attempted Interference with Persons Engaged In The Operation Of An Aircraft – Air-One (18 U.S.C. §32 (a)(5), (a)(8); 18 U.S.C. §32)
>
> The Defendants are charged in Count Three with Attempted Interference with Persons Engaged in the Operation of an Aircraft – namely "Air-One" and Aiding and Abetting the Attempted Interference with Persons Engaged in the Operation of an Aircraft. In order to find a Defendant guilty of Attempted Interference with Persons Engaged in the Operation of an Aircraft, the government must prove the following elements beyond a reasonable doubt:
>
> First, the Defendant willfully attempted to interfere with or disable a person engaged in the authorized operation of an aircraft;
>
> Second, the Defendant acted with a reckless disregard for the safety of human life;
>
> Third, . . .;
>
> Fourth, ...

The jury was also instructed that the definition of willfully is as follows: An act is done willfully if a Defendant intentionally acted with knowledge that his or her conduct was unlawful.

The jury could have decided that Defendant Rodriguez intentionally pointed the laser at Air-One knowing that the act of doing so was unlawful. In U.S.S.G. §2A5.2 (a)(1), in order for a Base Offense Level of 30 to apply, the offense had to involve intentionally endangering the safety of: (A) an airport or an aircraft; . . .. Thus, the act of pointing the laser at the helicopter knowing that it was unlawful to do so involves a different mindset than doing an act that intentionally endangers the safety of an aircraft.

The recommendation of Base Offense Level 30 by the Probation Officer is based on the one word "intentionally." This word is not found in Instruction No. 33. It is found in the

Indictment, but the Indictment was not before the jury. The Indictment is referred to in Instruction No. 2, but the jury was told "The Indictment is not evidence and does not prove anything." The only place the word "intentionally" appears in the context of this argument is in the definition of willfulness which uses the word to describe a Defendant's mental state when he knows his conduct is unlawful.

More appropriately the offense involves the language of 2A5.2 (a)(2) in that the offense involved recklessly endangering the safety of an aircraft. This is very similar language to the second element as instructed to the jury in Instruction No. 33.

The defense has undertaken a research task in an attempt to find cases wherein a laser pointer was used to strike an aircraft. As expected, there were very few cases located which were similar in facts to the instant case. The object of the search was to discern the type of sentence imposed in a similar case. One case, *U.S. v. Gardenhire*, DC No. 2:12-cr-00345, is currently on appeal to the 9th Circuit. This case is still in the briefing stage, but facts gleaned from early filings disclose the following: Gardenhire, age 18, aimed a laser pointer at an aircraft in March, 2012. The pilot of a Cessna Jet flying from Van Nuys to Burbank (CA) reported being hit by a green laser light. A helicopter from the Pasadena Police Department was dispatched to investigate and it, too, was struck by a green laser light. The officers in the helicopter traced the laser beam to Gardenhire's home in North Hollywood. Shortly after police arrived at his home and questioned him, Gardenhire admitted to pointing the laser and was arrested. He further admitted that "he tried intentionally to hit the aircraft." Gardenhire was offered a guilty plea to a violation of 18 U.S.C. 39A which he accepted. The probation recommendation was based on Gardenhire's recklessly endangering the safety of an aircraft and thus used 18 of U.S.S.G. 2A5.2 as the Base Offense Level. Apparently, the probation recommended sentence was the range of 18-24 months which would have been commensurate with offense Level 15, three levels down from Offense Level 18 based on Gardenhire's Acceptance. The sentencing judge, because he was persuaded by reports of lasering aircraft becoming increasingly common and because in this case the "laser strikes were deliberate," upwardly departed and sentenced Gardenhire to 30 months imprisonment. Granted, Gardenhire appears not to have a criminal history, but had he been a Category VI as is Mr. Rodriguez, his range of incarceration based on the probation recommendation would have been 57-71 months without deduction for Acceptance..

In *United States v. Sasso*, 695 F.3d 25 (1st Cir. 2012) the Defendant went to trial on a charge of violating 18 U.S.C. §32 (a)(5) by using a laser to "hit [a helicopter], filling the cockpit with bright green light." The facts are as follows: On the night of December 8, 2007, two State Police Officers were flying a police helicopter when a laser strike occurred. As they flew toward the light source, the same beam struck the helicopter several times despite its zigzag pattern of flight. The officers determined where the light was coming from and notified ground units. Despite Defendant's initial denials that he had one, police found a laser which had a label reading "Danger laser radiation, avoid direct eye exposure, laser diode, wavelength 532 nm, maximum output 240 mw." (More powerful than the laser in the instant case.) The jury found Mr. Sasso guilty and the judge sentenced him to 36 months imprisonment. The First Circuit reversed because of an erroneous jury instruction.

Locally, three laser cases were surveyed to compare sentences with the recommendation in the instant case. Kendra Christine Snow and Jared James Dooley, 1:08-cr-00008-002 LJO, were convicted of §§32(a)(8) and 2. Snow was sentenced to 18 months imprisonment which was also the recommendation of the PSR. Apparently, Ms. Snow also qualified for Category IV due to her criminal history points. Jarod James Dooley was sentenced to 24 months imprisonment having an offense level of 15 and criminal history Category of III. Charles Mahaffey, 1:013-cr-00108-1 LJO, was convicted of a violation of 18 U.S.C. 39A by using a laser on a helicopter and was sentenced to 21 months of imprisonment. Apparently, Mr. Mahaffey was a Category II based on his criminal history points.

The point of this survey which admittedly was not exhaustive discloses that a sentence of 168 months is so far removed from the usual range of 18-36 months is shocking. Even 57 months is nearly 2 years longer than the highest of the surveyed cases.

Mr. Rodriguez has had an ongoing addiction to alcohol which has in large part contributed to his criminal history. He has 4 DUI's and the felony burglary conviction was committed while he was drunk. Aside from some nonresidential DUI programs, he has never been afforded a true alcohol abuse intensive program.

STATUTORY SENTENCING FACTORS

Pursuant to Title 18 U.S.C. §3553(a), the Court is required to impose a sentence which addresses the factors set forth therein. They are as follows:

The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

While the offenses of conviction are admittedly serious, the defense contends there was no intent to do harm to individuals in the helicopters or the aircraft. Rather, this was a young family in the front yard of their modest apartment playing with a laser that turned out to be a lot more dangerous than any family member thought. The laser in question was purchased on line for a nominal amount of money and by the testimony of Jennifer Coleman was primarily used as a play thing by the children. Perhaps this condonation was ill advised, but its tolerance belies the Defendant thinking it was a dangerous weapon. Both Defendants admitted shining the laser skyward to see how far it would reach. A neighbor saw the 5 year old daughter twirling the laser and shining it through her apartment window shortly before officers arrived and arrested the Defendant.

Mr. Rodriguez has a substantial criminal history, but almost all of it was occasioned by the use and abuse of alcohol.

The Need for the Sentence Imposed:

To Reflect the Seriousness of the Offense, To Promote Respect for the Law, and To Provide Just Punishment for the Offense

Sentencing Mr. Rodriguez according to Base Offense Level 18 instead of 30 will result in a sentence of 57 months if the low end of the range is used. To be in prison for nearly 5 years for this offense is sure to reflect the seriousness of the offense because no one has ever gotten a greater sentence for pointing a laser at an aircraft. Such a sentence is still harsh, but it is arguably a just punishment under these facts.

To Reflect Adequate Deterrence to Criminal Conduct

A sentence of 57 months imprisonment for this offense sends a message to all of us that laser pointers must be taken more seriously than once believed. However, the easy access and ubiquitousness of these devices demand more controls be placed on their importation and production. It is not enough to put people in prison for long terms when these objects are so easily available at inexpensive prices.

To Protect the Public from Further Crimes of the Defendant

The Defendant is 26 years old and in need of treatment for alcohol abuse. A prison term of 57 months is more than adequate to provide him rehabilitation. The Bureau of Prison's 500 Substance Abuse Program would be available to him. It is not necessary to order him to serve 168 months to rehabilitate himself.

To Provide the Needed Education or Vocational Training, Medical Care, or Other Correctional Treatment in a Most Effective Manner

Mr. Rodriguez has his GED, but more educational and vocational training is always a good thing. He suffers from Lupus and needs two kinds of medication currently. A sentence of 57 months is more than sufficient to meet these goals.

The Kinds of Sentences Available

Mr. Rodriguez understands he will be sentenced to a term in prison. He asks the Court to recommend the 500 hour substance abuse treatment program.

The Kinds of Sentence and the Sentencing Range Set Forth in the Guidelines

There is an issue of what Base Offense Level will be used to calculate the final sentence. The probation officer has used Base Offense Level 30, while the defense contends the appropriate level is 18. The arguments for the defense position have been set forth herein.

The Policy Statements Set Forth in the Guidelines

A period of 57 months imprisonment will fulfill the policies set forth in the guidelines and there is no policy statements which would preclude such a sentence.

The Need to Avoid Any Unwarranted Sentencing Disparities Among Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct

The defense has endeavored to show that other Defendants similarly situated as Mr. Rodriguez have received sentences 4.5 to 9 times lower than that recommended for Mr. Rodriguez. One of the surveyed Defendants was convicted of the same crime and had a criminal history of IV and received 18 months imprisonment. 18 U.S.C. §3553(a) directs the Court to impose a sentence sufficient, but not greater than necessary. Surely a sentence of 57 months is sufficient whereas 168 months is greater necessary.

The Need to Provide Restitution to Any Victims of the Offense

Restitution is not an issue in this case.

CONCLUSION

The Defendant respectfully requests the Court establish the Base Offense Level at 18 and sentence him accordingly.

Very truly yours,

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