

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | CASE NO. 3:12-CR-107 |
| |) | |
| v. |) | JUDGES THAPAR/SHIRLEY |
| |) | |
| MICHAEL R. WALLI, |) | |
| MEGAN RICE, and |) | |
| GREG BOERTJE-OBED, |) | |
| |) | |
| Defendants. |) | |

**UNITED STATES CONSOLIDATED SENTENCING MEMORANDUM
AND RESPONSE TO DEFENDANTS' MOTIONS FOR DOWNWARD
DEPARTURE AND/OR VARIANCE**

The United States of America, by and through the United States Attorney for the Eastern District of Tennessee, hereby provides the following Consolidated Sentencing Memorandum and Response to Defendants' Sentencing Memorandum and Motions for Downward Departure and/or Variance.

INTRODUCTION

The defendants, Michael R. Walli, Greg Boertje-Obed and Megan Rice, have each filed a sentencing memorandum requesting a downward departure and/or variance from the Guideline range. (Docs. 258, 265, 269, 270.) The United States submits that all three of the defendants should be sentenced within the applicable guideline range as set forth in their respective Presentence Investigative Reports ("PSR").

DISCUSSION

I. A sentence within the Guideline range for the defendants' offenses is appropriate in light of factors set forth in 18 U.S.C. § 3553(c).

The defendants all move this Court for a departure and/or variance from the applicable Guideline range.¹ They contend that their conduct was outside the heartland of cases for sabotage, that their conduct was non-violent and that they have done prior good works. The United States contends that none of the defendants' arguments merit a downward departure or variance. The United States submits that applying Section 3553(a) factors to each defendant makes it clear that a sentence within the Guidelines is appropriate for each one of them.

A. Nature and circumstances of the offense and characteristics of the defendants.

1. Nature of circumstances of the offense.

The defendants have been found guilty of attempting to injure national defense premises in violation of 18 U.S.C. § 2155, and destroying United States property, in violation of 18 U.S.C. § 1361. Those are serious offenses as defined by Congress. The defendants all had the right to engage in legal protests against nuclear weapons. Despite that right, they chose to break into one of the most sensitive facilities in the country. The site manager at the Y-12 National Security Complex, Steve Erhart, testified at trial about Y-12's essential and unique role in the national defense of the United States. Erhart testified about Y-12's essential and unique role in the national defense of the United States. He testified that Y-12's primary mission is to support the nuclear deterrent for national security. (Doc. 192 at 48-49.) This is done by building components and completing the manufacture of the "secondary" portion of nuclear weapons.

(*Id.*) He also explained other missions of Y-12, such as, maintaining the safety and security of

¹ The PSRs in the instant case provide for the following: Defendant Walli has an offense level of 26 and a criminal history of IV for a guideline range of imprisonment of 92-115 months; Defendant Boertje-Obed has an offense level of 26 and a criminal history of III for a guideline range of imprisonment of 78-97 months; Defendant Sr. Rice has an offense level of 26 and a criminal history of II for a guideline range of imprisonment of 70-87 months.

enriched uranium, providing nuclear fuel for the Navy's nuclear submarine fleet, and certifying the nuclear arsenal stockpile. (*Id.* at 50-51.) Y-12 is a nuclear weapons production facility.

The defendants' actions caused a massive disruption to the operations at Y-12. On the day of the break-in, it was necessary for the facility to go "fully secure" and to guard the PIDAS fences where the breach occurred until those fences and sensors could be secured and repaired, and until security could sweep the entire premises and be sure there were no other intruders. (Doc. 192 at 75.) The defendants' intrusion resulted in a full "stand-down" of operations for fifteen days where all nuclear operations at the site were suspended. (Doc. 192 at 75-76.) The fifteen-day shutdown put everything related to nuclear operations at Y-12 behind schedule. (*Id.* at 85.) Production was delayed and the facility missed scheduled deliverables. (*Id.*) A shipment of components and materials from an Office of Secured Transportation convoy scheduled for the day of the intrusion was "substantially delayed." (*Id.* at 76-79.)

Erhart testified that one of Y-12's missions is to support nuclear nonproliferation efforts, and that Y-12 has historically received and stored nuclear materials recovered from nations around the world as a safe haven for these materials. (Doc. 192 at 49-50.) He testified that these efforts had an impact on nuclear deterrence, which affects our national defense. (*Id.* at 85-86.) Erhart further testified that the publicity from defendants' intrusion damaged Y-12's credibility, both in the U.S. and internationally, that is, to countries looking to give up their nuclear materials. (*Id.*)

1. History and Characteristics of the Defendants.

The defendants' extensive prior record accurately represents the seriousness of their criminal history. Defendant Walli's PSR reveals at least nine prior convictions related to his protest activities, including a felony offense in 2006. Defendant Walli was also convicted and sentenced to 8 months' imprisonment for criminal trespass at the Y-12 National Security

Complex in 2010. Defendant Boertje-Obed's PSR shows approximately twenty convictions related to his protest activities. One of those convictions in 2006 was for the felony offense of destruction of government property. Defendant Walli was a codefendant in that case. Many of Defendant Boertje-Obed's prior convictions did not result in any criminal history points due to the age of the convictions. Defendant Rice's PSR shows four convictions related to her protest activity.

Although the defendants are committed to nuclear disarmament, they have been anything but law-abiding in pursuing their cause. Their history shows that they are recidivists and habitual offenders when it comes to their protest activities.

Further, to the extent the defendants argue that they have accepted responsibility by admitting to the offense conduct, the Court should reject such contentions. Although the defendants have admitted to breaking into Y-12 on July 28, 2012 (which is no surprise since they were apprehended within the complex), they have continually denied that they had the intent to interfere with or obstruct the national defense, which was the critical element at trial. Thus, while acknowledging their physical acts, they have never remotely suggested that they accept responsibility for their *criminal* conduct. After their release from custody and their subsequent media tour, they repeatedly noted the fact that they committed the acts which led to their convictions as a protest against the criminal conduct of the United States of America – they have never uttered a word about the *criminal* conduct for which they were convicted. Indeed, they continue to deny that any of their acts were criminal. Instead, they have disingenuously contended throughout this case that Y-12's nuclear operations violate international law and that their actions were justified to uphold international law. They have made such arguments even though they knew that courts have uniformly rejected those contentions. Any argument by them that they have accepted responsibility for their actions is equally disingenuous.

Moreover, despite their massive letter writing campaign, it should be clear that the defendants' criminal offenses are very serious and warrant serious sentences. Contrary to any suggestion by the defendants that the letters sent to the Court reflect overwhelming community sympathy for their conduct, media outlets show that just as many people, if not far more, are appalled and offended by their criminal conduct and think they deserve significant sentences.

B. Seriousness of the offense, respect for the law, just punishment, and adequate deterrence, both general and specific.

The defendants in this case have continuously increased their level of protest – from misdemeanors to felonies, and now a very serious felony offense. They planned and prepared their intrusion of Y-12 for nearly a year before the offense. Defendant Walli committed a criminal trespass of Y-12 just two years before the instant case. The defendants have shown no remorse for their criminal conduct², but rather have publicized and celebrated it. At trial, Defendant Walli referred to Y-12 as a terrorist site and compared it to the Auschwitz Nazi concentration camps. (Doc. 193 at 63, 71.) Defendants Rice and Obed-Boertje testified that they believed the people who worked at Y-12 were psychologically damaged. (Doc. 193 at 41, 121.) By their statements and history, it is clear that the defendants are habitual offenders and the only thing that will deter them from similar unlawful conduct is imprisonment. They will likely resume their unlawful protest activities as soon as they are physically capable of doing so.

Further, the Y-12 National Security Complex is extremely important to this community and the nation. It is critically important to our national defense that other nuclear protestors who

² At trial, defendant Walli testified to the following: Q.: Do you have any remorse about what you did here on July 28, 2012, breaking into Y-12? A.: No. (Doc. 193 at 71.)

Defendant Boertje-Obed testified: Q.: Do you have any remorse about what you did on July 28, 2012, at Y-12? A.: No. Q.: Are you glad you did it? A.: Yes. (Doc. 193 at 128.)

Defendant Rice testified, "My guilt is that I waited seventy years to be able to speak what I knew in my conscience." (Doc. 193 at 35.)

might be inclined to engage in similar activity are deterred from doing so. As a result of the highly-publicized nature of this case a guideline sentence can have tremendous general deterrence. Due to the extensive publicity of this case, which was sought by the defendants, as well as the congressional hearings that resulted, a Guideline sentence will provide much greater general deterrence than most sentences in federal cases.

A Guideline sentence for each defendant is necessary to reflect the seriousness of the offense. The defendants not only intended to interfere with the national defense of the United States, as found by the jury, but their conduct caused real and substantial harm to Y-12, which affects our national defense. The defendants' actions caused a major disruption to the nuclear operations at Y-12, and those operations are an integral part of the defense of the United States. The negative publicity caused by the defendants' intrusion damaged Y-12's credibility, both in the United States and to other countries looking to give up their nuclear materials. This adversely affected Y-12's mission. A sentence below the guideline range would undermine the seriousness of the offenses, frustrate efforts to promote respect for the law, and afford little deterrence to commission of this crime in the future by the defendants or others. Considering the totality of the circumstances in this case, and all the facts listed in U.S.C. § 3553, the United States submits that each defendant should be sentenced within his/her respective guideline range as calculated in the PSRs. A sentence that includes a term of imprisonment within the guideline range will address the seriousness of the offenses, provide just punishment, and promote respect for the law.

II. A downward departure or variance is not warranted in the instant case.

The defendants contend that they qualify for a downward departure or variance based on two Tenth Circuit cases involving nuclear protestors convicted under 18 U.S.C. § 2155. In *United States v. Sicken*, 223 F.3d 1169 (10th Cir. 2000) and *United States v. Platte*, 401 F.3d

1176 (10th Cir. 2005), the district courts granted departures based on the finding that the cases were outside the heartland of cases, or atypical, and that the defendant's conduct did not present a significant risk of injury or threat to national security.

The United States does not believe that the instant case is outside of the heartland or atypical, and it believes that the heartland should not be defined by two cases out of the Tenth Circuit.³ In their sentencing memorandum, the defendants did not mention the case of *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986), which is also very factually similar to the instant case. In *Kabat*, four defendants – including two Catholic priests, Father Carl Kabat and Father Paul Kabat, were convicted under 18 U.S.C. § 2155 after they broke into and caused some damage to a military installation which supported the Minuteman II intercontinental ballistic missile. They entered the facility by cutting a padlock on a perimeter fence and proceeded to hang signs “bearing messages such as ‘Violence Ends Where Love Begins.’” *Id.* at 582. When security personnel arrived on the scene they found the defendants “sitting in a semicircle holding hands and singing or chanting.” *Id.* at 583. Security personnel also discovered a jackhammer, compressor, bread, wine, a book of prayers, pictures of children, and a baby bottle containing either blood or a similar-looking substance. *Id.* at 582-83. Father Paul Kabat testified that they did not know how much damage they would be able to do and they would have been satisfied with symbolic disarmament. *Id.* at 585.

At the sentencing in *Kabat*, the district court characterized the crimes committed by the defendants as “serious.” *Id.* at 583. The defendants' actions, the court suggested, constituted

³ As the Sixth Circuit held in *United States v. Chance*: “[D]eparting from the Sentencing Guidelines [pursuant to U.S.S.G. § 5K2.0] is a four-step process requiring the sentencing court to ask and answer the following questions: 1) What features of this case, potentially, take it outside the Guidelines' ‘heartland’ and make of it a special, or unusual, case? 2) Has the Commission forbidden departures based on those features? 3) If not, has the Commission encouraged departures based on those features? 4) If not, has the Commission discouraged departures based on those features?” *Id.* at 306 F.2d 356, 393 (6th Cir. 2002).

unilateral attempts to thwart the policies of elected decision makers, legitimized violence to emphasize personal disagreement, and reflected arrogance in the defendants' certainty in the rightness and righteousness of their own views. The court sentenced defendant Woodson and Father Carl Kabat each to nine years of imprisonment plus restitution on the sabotage count, nine years (to be served consecutively) and restitution on the destruction of property count, six months (to be served concurrently) on the trespassing count, and five years' probation (to begin at the time of unconditional release from jail) on the conspiracy count. (Woodson's sentence was later reduced to twelve years). Father Paul Kabat was sentenced similarly but with the consecutive sentences at five years each, the concurrent sentence at five months and the probation at four years. Defendant Cloud-Morgan was sentenced to terms of four years, four years, and four months respectively, with three years' probation. *Id* at 583.

It would be anomalous for this Court to find the present case atypical simply because the defendants were nuclear protestors when all of the cases cited herein and by the defendants (involving sabotage under 18 U.S.C. § 2155) involve the same type of defendants – nuclear protestors. Contrary to the defendants' assertion, there is nothing atypical at all about this case with regard to the sabotage conviction. The Tenth Circuit cases do not provide persuasive support for a downward departure or variance in the instant case. Certainly no more than *Kabat* provides support for an upward departure. Moreover, the defendants' crimes in the instant case appear to have caused far greater overall harm and disruption to Y-12 than the defendants' actions in *Sicken* and *Platte* caused to the facilities in those cases. The defendants' choice of a high-profile and extremely sensitive target here (home of the Manhattan Project) resulted in a significant disruption and huge publicity payoff for the defendants. To the extent that the *Sicken* court upheld the downward departure due to its perception that the defendants' conduct posed a low level risk of injury or threat to national security, it is distinguishable from the instant case.

Further, it should be noted that the sentences in *Platte* were not challenged or reviewed on appeal. The United States also submits that it was clearly improper for the district court in *Platte* to depart two levels based on U.S.S.G. § 5H1.11 for charitable works when such a departure is discouraged by the very terms of that provision.

The defendants have argued that a downward departure or variance is necessary to distinguish between nuclear protestors, such as the defendants here, versus terrorists. This argument, however, completely overlooks another provision of the guidelines that would provide for a much higher sentence in a case involving terrorists committing the same offense. Section 3A1.4 of the guidelines provides for a 12-level increase of the offense level and a criminal history category of VI for violations of 18 U.S.C. § 2155 that were intended to promote terrorism. With an offense level of 38 and a criminal history category of VI, the guideline range for a terrorist committing sabotage would be 30 years to life imprisonment. This, of course, does not even factor in any additional terrorism-related substantive offenses for which such terrorists could also be convicted. Thus, a terrorist who committed a violation of 18 U.S.C. § 2155 in connection with Y-12 would face a substantially higher sentencing guideline range than are the defendants.

III. Other Factors

The United States contends that an *upward* departure or variance from the guidelines would be authorized by U.S.S.G. § 5K2.7 – Disruption of Governmental Function, as the defendants’ conduct caused a significant disruption of the Y-12 National Security Complex. The United States has not moved for such a departure as it believes that sentences within the current Guideline ranges, as set forth in each defendant’s PSR, would provide just punishment. The United States submits, however, that the potential application of this provision militates against any downward variance or departure from the current Guideline ranges.

CONCLUSION

The defendants have been convicted of serious offenses that have caused real harm to the Y-12 National Security Complex. They have shown no remorse for their criminal conduct. To the contrary, they have reveled in their violations and used it to gain publicity for their cause. By penetrating the secure and sensitive premises of Y-12 and having a highly-publicized trial, the defendants accomplished their mission. Now that it is time for them to pay the price for their decision, the defendants ask for an incredible discount. The United States believes that the defendants should be held accountable for their deliberate choices and accept the appropriate consequences for their actions. The defendants should all be sentenced to imprisonment within the Guideline range as calculated in the PSRs.

WHEREFORE the United States respectfully requests that this Honorable Court deny the defendants' motions for downward departure and/or variance, and sentence the defendants within the applicable Guideline range.

Respectfully submitted this 15th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 15, 2014, the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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