

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

PHILLIP F. BERRIGAN,

Defendant

Criminal No. 97-9-03-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION RESOLVING SENTENCING ISSUES

This matter came before the Court on September 17, 1997, for a hearing on determination and imposition of sentence. Several issues were generated by counsel and the Court in the course of the hearing, which the Court took under advisement. The Court now considers the resolution of those issues.

I. Hearing on Amount of Loss

At the hearing, the Government sought, for the first time, an evidentiary hearing on the question of the amount of loss resulting from the offense conduct. The Court's determination of the amount of the loss resulting from the offense conduct is relevant in two respects to the determination of the elements of sentence. First, it drives the determination of the extent of the enhancement of the base offense level under U.S.S.G. § 2B1.3(b)(1) and the table in § 2B1.1(b)(1). If the loss

exceeds \$20,000 but is less than \$40,000, then the offense level is enhanced by only six levels (here, to Level 12). If the loss exceeds \$40,000, the offense level is enhanced by seven levels (here, to Level 13). The result is the difference between an incarceration Guideline range of 21-27 months and one of 24-30 months. Second, the determination of the amount of loss is relevant to determine the amount of any restitutionary award that may be found by the Court to be appropriate under 18 U.S.C. § 3664.

The Government proved at trial that the cost of repairing the loss resulting from the offense conduct was \$19,731.35 for repair or replacement of physical objects damaged, plus the value of 493.2 hours of labor required to accomplish the repairs. Government Trial Exhibits 40 and 33-39. The Government's witness, Aaron Scott, testified at trial that the value of the labor component of the repair is \$8,492. This indicates that the total cost of repair was \$28,223.39. Scott was not subjected to any cross-examination.

Defendant's PSR touches on the issue of the extent of the loss in only three paragraphs: 17, 23, and 97.¹ The PSR clearly

¹These paragraphs read as follows:

17. The United States Government, through the U.S. Navy, is the victim of this offense. A damage estimate provided by the U.S. Attorney's Office, estimates the cost of repairs to the ship to be \$42,605. The original estimate of damages exceeded \$80,000, however the Navy found that it could repair some of the components damaged by Stephen Kelly, rather than having to fully replace them.
23. **Specific Offense Characteristic:** Pursuant to § 2B1.3(b)(1), since the loss exceeded \$40,000 in this case, 7 levels are added from the table contained in U.S.S.G. § 2B1.1.

(continued...)

indicated the Government's position to be that the loss resulting from the offense conduct was in excess of \$40,000 and that that position was accepted by the officer preparing the report in making his recommended determination as to the extent of the enhancement of the base offense level under § 2B1.3(b)(1). He relied, in doing so, on a copy of Government Exhibit 2 provided to him by the Government in the course of the preparation of the presentence investigation. PSR at ¶ 17.

Defendant, in his only written reaction to the contents of the Presentence Investigation Report ("PSR") prior to the sentencing hearing (Docket No. 81), noted the "discrepancy" between the Government's proof at trial of the cost of repair of the damages resulting from the offense conduct at \$28,223.39 and the \$42,000 figure used in the PSR.² The Court treats this as an

¹(...continued)

97. **Statutory Provisions:** Pursuant to 18 U.S.C. § 3663, restitution may be ordered in this case. Because of a disparity in the costs for repairs to the U.S. Navy, between what the costs were to BIW and what they would charge the Navy under existing contracts, we are unsure of the total amount of restitution that is due. The U.S. Attorney's Office provided an estimate of cost regarding repairs that had been done as of April 21, 1997 and this estimate was used to set the offense level. We would expect the costs to become further refined as this case moves toward sentencing. Pursuant to 18 U.S.C. § 3663, restitution is due immediately. Any unpaid restitution shall become a condition of probation or supervised release, pursuant to 18 U.S.C. § 3663(g).

² The letter reads as follows:

Prince of Peace Plowshares
36 County Way
Portland, ME 03102

June 30, 1997

Dear Judge Carter:

We, members of the Prince of Peace Plowshares, wish to inform the court that, for reasons of conscience, we will not cooperate with any sentence of restitution or fines.

We all live voluntarily poor, and even if we had the money, we would not pay

(continued...)

objection to the PSR under Local Rule 132. At the hearing, it was stated to be Defendant's position that the amount of loss should be found to be, for sentencing purposes, \$28,223.39.

The Government contended at the hearing, on the other hand, as reflected in the PSR, that the loss for purposes of sentencing is \$41,016.00. What the Government sought to do by requesting a further evidentiary hearing was to increase its proof of the cost of repair made at trial to a figure in excess of \$40,000 in order require a seven-level increase in the offense level. The Government proffered at the hearing as evidence which it would offer if granted an evidentiary hearing on the issue:

- (1) Government Exhibit 2, a document entitled "Amendment of Solicitation/Modification of Contract" dated in August 1997;
- (2) Government Trial Exhibit 33, a record of a vendor charge;
- (3) Government Trial Exhibit 40, a summary of the charges for repairs proven by Government Trial Exhibits 33-39; and

²(...continued)

for the making of the USS The Sullivans back into a nuclear war-fighting vessel, or for the courts to continue to uphold the legality of weapons of mass destruction.

Neither will we report to a probation officer should we be sentenced to supervised release or probation. We will not cooperate with attempts to curb our nonviolent peacemaking once we are released.

Also of note is the discrepancy thus far between the \$28,000 of conversion proved during trial and the \$42,000 figure used in the report by probation.

Respectfully yours,

s/ Stephen M. Kelly, SJ
s/ Philip Berrigan
s/ Susan Crane
s/ Mark P. Colville
s/ Steve Baggarly

The Prince of Peace Plowshares

(4) Government Exhibit 1, a copy of Defendant's letter of June 30, 1997, to the Court (Docket No. 81). Thus, it appeared at the hearing that the Court would be required, in order to sentence each defendant, to resolve the issue of whether the loss involved in the offense conduct should be found to be \$28,223.39 or \$41,016.00 (in terms of cost of repair) in order to set the enhancement of the offense level under § 2B1.3(b)(1).

The Court is satisfied that at the sentencing hearing an issue was generated by Defendant as to the amount of the loss resulting from the offense conduct. The argument went forward at that hearing on the point of whether an evidentiary hearing was required in order for the Court to resolve the issue on a proper evidentiary predicate. The Government made its proffer, and it was understood by the Court that Defendant continued to contend that the loss was \$28,223.39, the amount proved at trial.

Since the hearing, the parties have made, as the Court permitted, additional written submissions on the issue of the amount of the loss and the need for an evidentiary hearing, which create a confusing morass of significant changes in the positions of each of them.³ After a full review of the entire sentencing record, including the written submissions of the parties filed since the sentencing hearing, it is apparent to the Court that a further evidentiary hearing on the issue of the determination of an accurate "cost of repair" figure is required. Such a hearing

³See Docket entries 92-98.

is required in the interest of fairness to all parties and in order to provide the Court with a full evidentiary record on which it may reliably resolve the issue of whether the proper figure is \$28,223.39 or some figure, as the Government now contends, in excess of \$40,000.

The bottom line of all the discussion that has been had on this issue is that: (1) Defendant contends that there is no damage figure that is appropriate because, in his view, the ship USS THE SULLIVANS is worthless; (2) if any loss figure is appropriate, the Defendant contends that it is the \$28,223.39 figure proven at trial; (3) the Government contends that the proper figure is the \$41,016 indicated by its evidentiary proffer; and (4) the evidence, weight, reliability, and persuasiveness of the Government's proffer cannot be accurately assessed by the Court without some explanation of Government's Exhibit 2, the "Amendment of Solicitation/Modification of Contract," which is the only evidentiary element of the record that supports a finding in excess of the cost of repair proven at trial. Accordingly, the Court will, forthwith, issue its Procedural Order scheduling a restricted evidentiary hearing on this issue.

II. A Term of Supervised Release

The next sentencing issue was raised by the Court at the hearing and concerned whether the Court could, on the facts of the case, depart from the imposition of the two (2) year term of

supervised release required by § 5D1.2(a)(2). The authority for such a departure is governed by Application Note 1 under § 5D1.1 which reads:

1. Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a sentence of imprisonment of more than one year is imposed or if a term of supervised release is required by a specific statute. The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.

The Court concludes that at least two of the listed factors require the Court, under the statutory mandate, to impose a term of supervised release.

The Court is satisfied that, as the Government's counsel contends, protection of the public welfare may be served by a term of supervised release in providing a mechanism to inhibit Defendant in executing his avowed intent to continue illegal conduct as a form of moral protest and to avoid further destruction of government property by Defendant. The Guideline language does not countenance the Court relinquishing these important potential benefits solely because a defendant professes that he will not comply with the terms and conditions of supervised release or even because he may have demonstrated that he will not do so. It is for the very purpose of motivating or

coercing compliance with the requirements of the sentencing process through supervised release that the Guidelines provide for revocation of supervised release and the imposition of additional incarceration and other forms of punishment. With these tools provided, it is not contemplated that a defendant can forestall the rehabilitation process contemplated by the mechanisms of the supervised release process by obstinately professing future noncompliance with them.

Further, as demonstrated infra, the Court is required here to impose a restitutionary award, and a term of supervised release may reasonably be believed to be a beneficial avenue of enforcing Defendant's payment of that award to the extent that his resources may make that reasonably possible.

Accordingly, the Court will impose a two-year term of supervised release on appropriate terms and conditions.

III. Restitution

It is the Government's position here that the Court must impose a restitutionary award on Defendant in the amount of the cost of repair as previously found by the Court. It is clear that the restitutionary award requirement is governed by 18 U.S.C. § 3663A because the offenses of conviction here are "offense[s] against property." 18 U.S.C. § 3663A(c)(1)(A)(ii). The statutory language is mandatory in requiring the imposition

of a restitutionary obligation.⁴ The statute goes on to specify in mandatory fashion the standard by which the amount of restitution shall be determined. The language of the statute here applicable⁵ states:

The order of restitution shall require that such defendant . . . pay an amount equal to -
- . . . the greater of -- (I) the value of the property on the date of the damage, loss or destruction; or (II) the value of the property on the date of sentencing, less . . . the value (as of the date the property is returned) of any part of the property that is returned.

18 U.S.C. § 3663A(b)(1)(B)(i) and (ii) (emphasis added). In essence, the statute appears to require that the Court order as restitution the return of the property subject to the damage resulting from the offense conduct or, if that is "impossible,

⁴Title 18 United States Code section 3663A(1) states in pertinent part:

Notwithstanding any other provision of law . . . the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense

(Emphasis added.)

Defendant argues, through stand-by counsel, that § 3663A(d) permits the Court to consider the imposition of a restitutionary award in a discretionary light under § 3664(f)(3)(B). The cited provision simply provides that an order issued under § 3663A "shall be issued and enforced in accordance with section 3664." Where the Mandatory Restitution Act, § 3663A, is applicable, it governs the determination of the substantive aspects of restitution. The cited language from § 3663A simply applies the enforcement mechanism available under § 3664 to those orders formulated under the Mandatory Restitution Act.

⁵Defendant's stand-by counsel asserts that the application of § 3663A should be barred by the "government's failure to bring [the issue of its application] . . . to the Court's and the Defendant's attention at the time objection to the presentence report [sic] were due or at any time before the scheduled sentencing dates" Memorandum in Aid of Sentencing (Docket No. 93) at 2. That contention is without merit. The statute, as shown in the text, supra, clearly applies to this case and is mandatory in its application. The Court must apply clearly applicable law in determining the elements of sentence, and the application of such law cannot be waived or obviated by failure, in these circumstances, to invoke the applicable law at any point prior to imposition of sentence.

It is clear that there is no prejudice here to this Defendant by the application of § 3663A which was clearly surfaced at the sentencing hearing and, as a result of the continuance thereof, the Defendant has had a full and fair opportunity to respond to the Government's contention that it has controlling effect in this case.

impractical or inadequate," § 3663A(b)(1)(B), order the payment of the amount by which the property has been diminished in value by the offense conduct.⁶ Further, Title 18 United States Code § 3664(f)(1)(A) provides:

In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

This provision mandates that the Court determine the amount of the total restitutionary award "without consideration of the economic circumstances of the defendant." Id. Such circumstances are to be considered by the Court, under the statutory scheme, only in setting the manner in which the amount of the restitutionary award is to be paid.⁷

⁶The Court notes that there is a potential issue available to be generated, in view of this statutory language, as to whether, for purposes of determining a restitutionary award, "cost of repair" is the same as the diminution in the value of the property where return of the damaged property is "impossible, impracticable, or inadequate." Section 3663A(b)(1)(B). The Court is aware that in the law of civil damages a cogent argument might be made that they are not analytically the same. No party has here generated that issue and the time for issue generation, under Local Rule 132(a), in this case is long past. Accordingly, the Court takes the Government's proof of "cost of repairs" as an appropriate predicate for determining loss in respect to a restitutionary award.

⁷Title 18 U.S.C. section 3664(f)(2) provides as follows:

Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of --

- (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
- (B) projected earnings and other income of the defendant; and
- (C) any financial obligations of the defendant; including obligations to dependents.

Thus, it is open to the Court to find that each Defendant contributed equally, or on some other causal basis, with the codefendants to causing the damage resulting from the offense conduct and that each Defendant should contribute in some proportion, therefore, with the other Defendants to satisfying the restitutionary award. In such case, each Defendant should be subject to a discrete share of the total restitutionary award. The Court may, accordingly, apportion any restitutionary award it makes among the Defendants at imposition of sentence after hearing arguments on the issue.⁸ Further, the restitutionary award may provide for Defendant to be obligated to make partial payments over the two-year period of supervised release to be imposed.⁹

So ORDERED.

GENE CARTER
District Judge

Dated at Portland, Maine this 8th day of October, 1997.

⁸Title 18 United States Code section 3664(h) places the authority for such apportionment of responsibility for the satisfaction of the restitutionary award within the discretion of the Court. It states:

If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

⁹Title 18 United States Code section 3664(f)(3)(A) provides:

A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.