IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 18-CR-86-CJW
	)	
vs.	)	
	)	
ROSSI LORATHIO ADAMS II,	)	
	)	
Defendant.	)	

GOVERNMENT'S BRIEF IN SUPPORT OF ITS SENTENCING MEMORANDUM

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Pursuant to the Court's Order (docket no. 131), the government provides the following brief in support of its contemporaneously filed Sentencing Memorandum:

I. THREAT OF BODILY INJURY OR DEATH

In Paragraph 29 of the Presentence Investigation Report ("PSR"), the probation office recommends a two-level increase, pursuant to §2B3.2(b)(1), because

defendant's offense involved an express or implied threat of death or bodily injury. Defendant has lodged a blanket objection to all specific offense characteristics in this case and has not identified the specific nature of his objection to Paragraph 29.

The probation office has correctly scored Paragraph 29, and the Court should overrule defendant's vague objection to the PSR. The trial evidence makes clear that defendant enlisted Sherman Hopkins to invade E.D.'s residence, at gunpoint, in order to force E.D. to transfer the doitforstate.com domain to defendant. TT v.2, pp. 311-12, 331-32. Defendant knew Hopkins had a gun, because defendant gave Hopkins a ride to E.D.'s residence and Hopkins' firearm was visible to defendant in Hopkins' lap. TT v.2, pp. 331-32. Defendant also provided Hopkins with a Taser, which Hopkins had placed in the center console of the car during the ride to E.D.'s residence, as well as detailed instructions on a paper note that told E.D. how to transfer the domain to defendant on the GoDaddy.com domain registrar website. TT v.2, pp. 323, 331-32, 335.

Hopkins entered E.D.'s residence armed with the firearm and Taser and wearing pantyhose on his head, a baseball cap, and sunglasses. TT v.3, p. 26.[1] Hopkins pointed the firearm at E.D. and ordered E.D. to transfer the domain. TT v.3, pp. 26-27; TT v.2, pp. 332-35. Hopkins put the firearm to the back of E.D.'s head and repeatedly pistol-whipped and Tased E.D. as E.D. tried to transfer the

[1]Indeed, defendant previously had sent one of E.D.'s acquaintances, Brandon Miller, "gun emojis" after defendant thought Miller was infringing upon defendant's social media empire. TT v.1, p. 108-111. After the home invasion, defendant told Miller, "You know what I want" or "You know what has to be done." TT v.1, p. 114.

domain. TT v.3, pp.30, 34-35; TT v.2, pp. 336-38. During part of the home invasion, defendant was on the phone with Hopkins and E.D., and Hopkins continued to hold E.D. at gunpoint as Hopkins and E.D. awaited further instructions from defendant about transferring the domain from E.D. to defendant on the GoDaddy website. TT v.2, pp. 36-37.

The probation office correctly scores the enhancement because, at a minimum, putting a firearm to E.D.'s head and ordering him to part with property against E.D.'s will clearly constitutes an express or implied threat of death. USSG §2B3.2(b)(1). Defendant is responsible for Hopkins' actions under the doctrine of relevant conduct, because those actions occurred during the commission of the offense of conviction and were, at a minimum, within the scope of the jointly undertaken criminal activity, were in furtherance of that criminal activity, and were reasonably foreseeable in connection with that criminal activity. USSG §1B1.3; *accord United States v. Medina*, 74 F.3d 413, 417-18 (2d Cir. 1996) (per curiam) (holding mastermind of armed invasion of corporate offices responsible for coconspirators' use of firearm under reasonable foreseeability test, where mastermind provided firearm to conspirator, and learned that the use of a firearm was a "forgone conclusion" immediately before the robbery, because, as the district judge had observed at sentencing, "it is hard to imagine that Medina's plan called for the ski-masked co-conspirators to burst into the construction company's offices and shout, "Give me your money or ... I will think ill of you!"); *United States v. Brumby*, 23 F.3d 47, 50 (2d Cir. 1994) ("Since Brumby was the mastermind of an

extortion scheme, an integral part of which was the threat of violence, it was reasonably foreseeable that a member of the conspiracy might display a firearm during the course of the conspiracy.").

II. DISCHARGE OR OTHER USE OF FIREARM

Section 2B3.2(b)(3) provides for a seven-level increase "[i]f a firearm was discharged" or, alternatively, a six-level increase "if a firearm was otherwise used." The guidelines do not define "discharged" but define "otherwise used" to include cases where "the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." USSG §1B1.1, cmt. n.1(J).

The government requests a seven-level increase in this case, because a firearm was discharged. In Paragraph 30, however, the probation office only recommends a six-level increase for a firearm "otherwise used." Again, defendant has lodged a vague, blanket objection to all specific offense characteristics in this case and has not identified the specific nature of his objection to Paragraph 30.

In this case, fearing for his life, E.D. managed to wrestle Hopkins' firearm away from Hopkins. TT v.3, pp. 39-42. During the five to ten second life-or-death struggle for the firearm, the firearm discharged into E.D.'s leg. TT v.3, pp. 39-42. Accordingly, a seven-level increase is appropriate under the plain language of the guideline, because a firearm was "discharged." USSG §2B3.2(b)(3).

Under USSG §1B1.3, and for reasons that are similar to those explained in the preceding section, it was reasonably foreseeable to defendant that sending

Hopkins into E.D.'s residence under the circumstances of this case might result in the discharge of a firearm. *See Dean v. United States*, 129 S. Ct. 1849, 1852 (2009) (holding that a defendant who carried a firearm during and in relation to a bank robbery is subject to a 10 year mandatory minimum pursuant to 18 U.S.C. § 924(c)(1)(A)(iii), because his "firearm [was] discharged" in the course of the robbery, even though "the gun [went] off accidentally," was not pointed at anyone when it discharged, and nobody was hurt). The guideline's plain language does not distinguish between accidental and purposeful discharges and does not require a finding that a coconspirator pulled the trigger. *See United States v. Lora-Pena*, 375 F. App'x 242, 246-47 (10th Cir. 2010) (unpublished per curiam) (construing similar provision in §2A2.2(b)(2)(A), focusing on the plain language of guideline, and holding, "[T]his language does not distinguish between accidental and purposeful discharges, and does not require a finding that defendant pulled the trigger."). The probation office wrongly declines to apply a seven-level enhancement because "it is unclear whether Hopkins or the victim" caused the firearm to discharge; as the foregoing analysis demonstrates, however, the probation office's stated reason for not applying the seven-level increase is not a relevant consideration under the guideline in question. All that matters here is the plain language of the guideline, which simply inquires whether a firearm was discharged. Because Hopkins' firearm "discharged," the seven-level increase is appropriate.

In the alternative, at a minimum, the six-level enhancement that the probation office suggests for "a firearm otherwise used" is appropriate. Hopkins not

only brandished, displayed, and possessed a firearm, but he also held the firearm against E.D.'s head and repeatedly pistol-whipped E.D. with the firearm. Accordingly, the lesser six-level increase would clearly apply if the seven-level increase did not apply. *See*, *e.g.*, *United States v. Elkins*, 16 F.3d 952, 953-54 (8th Cir. 1994) (holding placing knife against throat was a weapon "otherwise used" for purposes of §2B3.1(b)(2) and citing with approval *United States v. Johnson*, 931 F.2d 238, 240 (3d Cir. 1991) for the proposition that a "gun pointed at the head of robbery victim was "otherwise used"). Again, this conduct was reasonably foreseeable to defendant under the circumstances, and so defendant should be held responsible for Hopkins' criminal conduct inside E.D.'s residence. USSG §1B1.3.

III. SERIOUS BODILY INJURY

In Paragraph 31, the probation office recommends a four-level increase, pursuant to §2B3.2(b)(4), because a victim sustained serious bodily injury. Again, defendant has lodged a vague blanket objection to all specific offense characteristics in this case and has not identified the specific nature of his objection to Paragraph 31.

For similar reasons to those stated above, the Court should apply the four-level enhancement for serious bodily injury, because E.D. was shot in the leg with a firearm. The guidelines define "[s]erious bodily injury" to include "extreme physical pain" or "requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." USSG §1B1.1, cmt. n.1(M). Here, it is undisputed E.D. was (1) shot in the right leg and a bullet tore through it; (2) taken by ambulance to

a local hospital; and (3) treated at the hospital for two-and-a-half hours on account of (a) entry and exit wounds to his right leg (each 3cm across) and (b) a laceration to his head; and (4) received stitches for the bullet wounds and the laceration. PSR ¶ 18. Again, the enhancement should apply on relevant conduct grounds for reasons similar to those stated in the preceding sections. USSG §1B1.3; *see*, *e.g.*, *United States v. Moore,* 997 F.2d 30, 37 (5th Cir.1993) (affirming a serious bodily injury enhancement where the victim was shot in the leg, treated in the emergency room without a hospital stay, and suffered occasional leg pain).

IV. PHYSICAL RESTRAINT

Under §2B3.2(b)(5)(B), a two-level increase is appropriate if a person was physically restrained in the course of the offense. The guidelines define physical restraint to mean "the forcible restraint of the victim such as by being tied, bound, or locked up." USSG §1B1.1, cmt. n. 1(L). The phrase "includes" is "not exhaustive." *Id.*, cmt. n.2.

For reasons similar to those above, the Court should apply the physical restraint enhancement here, because Hopkins used his firearm, Taser, and brute violence to forcibly restrain E.D. at E.D.'s computer in order to transfer the doitforstate.com domain to defendant. *See*, *e.g.*, *United States v. Strong*, 826 F.3d 1109, 1117 (8th Cir. 2016) (collecting cases and citing with approval *Arcoren v. United States*, 929 F.2d 1235, 1246 (8th Cir. 1991) (upholding physical-restraint adjustment where a victim was pushed and grabbed to prevent her from leaving the bedroom) and *United States v. Aguilar*, 512 F.3d 485, 488 (8th Cir. 2008) (same,

where victim was held to floor, threatened with a weapon, and forcefully tattooed after being told he could not leave). Here, the physical restraint enhancement applies because Hopkins, at defendant's request, created a circumstance that allowed E.D. no alternative but compliance with the demands to transfer the doitforstate.com domain to defendant. *See United States v. Whatley*, 719 F.3d 1206, 1223 (11th Cir. 2013) (quoting *United States v. Jones,* 32 F.3d 1512, 1518-19 (11th Cir. 1994) ("[A] defendant physically restrains his victims if he creates circumstances allowing the persons no alternative but compliance.")). For example, E.D. was not free to leave so long as Hopkins had a firearm pointed at his head.[2]

V. ROLE

Defendant was an organizer, leader, manager, and supervisor in criminal activity, and thus a two-level increase for role in the offense applies under USSG §3B1.1(c). The trial evidence made clear that, after repeatedly failing to obtain the doitforstate.com domain from E.D., defendant originated the conspiracy and

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[2]The government previously objected to Paragraph 32 insofar as §2B3.2(b)(5) also provides for a four-level enhancement when the victim is "abducted." Section 1B1.1, note 1(A), in turn, defines "[a]bducted" to include whenever "a victim was forced to accompany an offender to a different location." In this case, Hopkins forced E.D. from his bedroom to the room in which E.D. kept his computer. In *Strong*, however, the Eighth Circuit remarked in *dicta* that "[m]erelyl dragging a victim from one room to another is not abduction." 826 F.3d at 1117 (citing *United States v. Cooper*, F. App'x 657, 659 (7th Cir. 2010) (unpublished)); *see also United States v. Whatley*, 719 F.3d 1206, 1221-23 (11th Cir. 2013) (identifying apparent circuit split and collecting cases). Out of an abundance of caution, therefore, the government intends to withdraw its objection to Paragraph 32 at the time of sentencing; this additional aggravating conduct of moving E.D. from one room to another, however, is an appropriate consideration when imposing sentence under 18 U.S.C. § 3553(a).

recruited Hopkins to obtain the domain by force. Defendant provided Hopkins with written instructions on how to transfer the domain, gave him a Taser, and drove Hopkins to E.D.'s residence. Accordingly, the two-level increase applies here. *See*, *e.g.*, *United States v. Garcia*, 512 F.3d 1004, 1005-06 (8th Cir. 2008) (affirming role enhancement where defendant was the leader of the conspiracy, recruited others to join the conspiracy, and directed others to package and distribute drugs); *United States v. Lincoln*, 956 F.2d 1465, 1475 (8th Cir. 1992) (affirming enhancement in perjury prosecution, where district court found defendant was "the initiator of the scheme, the composer of [the defendant's] perjury, and the author of every decision regarding its presentation to law enforcement and a jury").[3]

VI. FINE

The Court should order defendant to pay a fine. "The defendant bears the burden of proving both his inability to pay at the time of sentencing and that he is not likely to become able to pay a fine upon his release from his term of imprisonment." *United States v. Kelley*, 861 F.3d 790, 801 (8th Cir. 2017) (cleaned up). "The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." *United States v. Kay*, 717 F.3d 659, 665 (8th Cir. 2013) (quoting USSG §5E1.2(a)).

[3]Alternatively, a two-level increase for use of a special skill is appropriate under USSG §3B1.3. Defendant's special skill in social media promotion justifies such an enhancement. *See* USSG §3B1.3, cmt. n.4; *see*, *e.g.*, *United States v. Reichert*, 747 F.3d 445, 454 (6th Cir. 2014) (affirming enhancement in computer crime case, even though the defendant learned his special skill through the informal education of day-to-day experience).

"A sentencing court must make specific factual findings on the record demonstrating that it has considered the defendant's ability to pay the fine." *Id.* (quoting *United States v. Patient Transfer Serv., Inc.,* 465 F.3d 826, 827 (8th Cir. 2006)). "It is an incorrect application of the [G]uidelines to impose a fine that a defendant has little chance of paying." *Id.* (quoting *United States v. Granados,* 962 F.2d 767, 774 (8th Cir. 1992)).

The probation office incorrectly concludes that defendant has demonstrated he has an inability to pay a fine. Defendant is a skilled social media "influencer" who has amassed over one million followers. PSR ¶ 4; TT v.2, p. 261. As the Court recognized in its Order requiring defendant to repay $22,000 in court-appointed attorney fees, defendant demonstrated an ability to pay during the course of these very proceedings. PSR ¶ 66. Defendant owns companies and trademarks, and he has sold merchandise and promoted events across the nation. TT v.4, pp. 313, 326. Defendant is able-bodied and of working age. PSR ¶¶ 52-54.

Accordingly, the Court should find defendant has not met his burden to show he is unable to pay a fine, and fine him accordingly.

VII. SPECIAL CONDITION OF SUPERVISION

The probation office recommends the Court impose the special condition of supervision in Paragraph 77 of the PSR. The special condition would require defendant to participate in a substance abuse evaluation and complete any recommended treatment program. Defendant objects to this condition, but the Court should overrule the objection.

The Court unquestionably "has broad discretion to impose special conditions of supervised release, so long as each condition complies with the requirements set forth in 18 U.S.C. § 3583(d)." *United States v. Morais*, 670 F.3d 889, 895 (8th Cir. 2012). In relevant part, 18 U.S.C. § 3583(d)(1) and (2) mandate that each special condition of supervised release must be "reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)" and "involve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D). Those cited portions of § 3553(a)(2), in turn, require the Court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," § 3553(a)(1), "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B), "to protect the public from further crimes of the defendant," § 3553(a)(2)(C), and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," § 3553(a)(2)(D).

"'In fashioning a special condition of supervised release, a court must make an individualized inquiry into the facts and circumstances underlying a case and make sufficient findings on the record so as to ensure that the special condition satisfies the statutory requirements.'" *United States v. Schaefer*, 675 F.3d 1122, 1124 (8th Cir. 2012) (quoting *United States v. Springston*, 650 F.3d 1153, 1156 (8th Cir. 2011), *vacated and remanded on other grounds*, 132 S. Ct. 1905 (2012)). "A

special condition need not be related to all the factors; the factors are to be weighed independently." *Id.* (quoting *Springston*, 650 F.3d at 1155-56).

The Court should impose this proposed special condition of supervision over defendant's objection, because the special condition is rooted in defendant's individual history and characteristics. Defendant has a history of using marijuana, *see* PSR ¶ 56, and he was diagnosed while on pre-trial release with "cannabis use disorder—mild," *see* PSR ¶ 57. Defendant also received a disorderly conduct and public intoxication convictions after using alcohol to excess. PSR ¶ 41. Finally, as noted in the probation office's response to defendant's objection, the proposed special condition only requires an evaluation and any recommended follow-through by the professional that performs the evaluation—if the result of the evaluation is negative, then it would appear any restraint on defendant's liberty in the future would be *de minimis*.

VIII. RESTITUTION

Restitution in this case is mandatory, pursuant to 18 U.S.C. § 3663A. The order of restitution must reimburse E.D. (or his surety) for, among other things, damage to his property, the cost of his medical care, and lost income. 18 U.S.C. § 3663A(b).

Defendant objects to any award of restitution to E.D. for the reason that "these loss amounts are excessive, arbitrary, and not supported by any documentation." PSR ¶¶ 89-90. Defendant has not provided any further specific reasons for this objection to the probation office or the government.

The Court should overrule defendant's wholesale objection to the proposed restitution award to E.D. and his surety. The itemized list attached to the PSR explains in detail that the Iowa Crime Victim Compensation Fund actually expended $8,009.32 to reimburse E.D. for his losses. In addition to relying upon this itemized list, the government also intends to offer Exhibits 1 through 3 under seal at the hearing, which provide further detail concerning the other lost wages and property damage that E.D. incurred during the home invasion.

IX. CONCLUSION

The government respectfully requests that the Court find that defendant's total offense level is 35. Based upon a criminal history category I, defendant's advisory guidelines range, therefore, would be 168 to 210 months' imprisonment.[4] The Court should also impose the probation office's recommended condition of supervised release, fine defendant, and order defendant to make restitution.

Respectfully submitted,

PETER E. DEEGAN, JR.
United States Attorney

By, /s/ *Timothy L. Vavricek*

TIMOTHY L. VAVRICEK
Assistant United States Attorney
111 Seventh Avenue, SE, Box 1
Cedar Rapids, IA 52401
319-363-6333

[4]In Case No. 17-CR-59, Hopkins received a 20-year term of imprisonment, the statutory maximum for a violation of 18 U.S.C. § 1951, for his role in the instant offense.

319-363-1990 (Fax)
tim.vavricek@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2019, I electronically filed the foregoing and its attachments with the Clerk of Court using the ECF system which will send notification of such filing to the parties or attorneys of record.

UNITED STATES ATTORNEY

BY: /s/TV

Copy to:
Mr. Ray Scheetz
USPO