

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

UNITED STATES OF AMERICA)	CRIMINAL NO.: 15-po-11
)	
)	
vs.)	
)	
)	
CHARLES H. WILLIAMS,)	
JIMMIE AIKEN,)	
JOHN DANTZLER, and)	
ALEJANDRO RENTERIA NOYOLA)	
)	

GOVERNMENT’S SENTENCING MEMORANDUM

This memorandum is submitted to provide the Court with the factual basis for the charges to which the defendants are expected to plead guilty and to outline the Court’s sentencing options.

A. Background

On December 16, 2015, the United States Attorney filed an eight-count Information charging the defendants with violations of the Migratory Bird Treaty Act (“MBTA”). Each count carries a maximum term of imprisonment of six months, a fine of up to \$15,000, and a special assessment of \$10. In addition, a term of probation of up to 5 years may be imposed. 18 U.S.C. §3561. The defendants have indicated that they will plead guilty to the charges in their entirety without a plea agreement. The case is set for a change of plea and sentencing on June 6, 2016.

B. Factual Basis

On November 26, 2013, the South Carolina Department of Natural Resources (DNR) received a report from its Operation Game Thief hotline, that a hawk was trapped in a cage near a power line in Orangeburg County. DNR conservation officers went to the site and located and photographed the trap.¹ It was on a 1,790 acre parcel of property owned by Willcreek LLC. Defendant Williams is the registered agent for the LLC. The trap was a two-compartment box trap. The lower compartment held a live pigeon, the bait, and the upper compartment held a live Red-tailed hawk, both predator and prey. The DNR conservation officers installed a video camera at the site.

The take from the video camera included clips showing defendant Aiken removing and discarding the pigeon four days later, on the morning of November 30, and shooting the hawk with a handgun later in the afternoon.

From November 26, 2013, until February 21, 2014, a special agent from the United States Fish and Wildlife Service Office of Law Enforcement and DNR conservation officers collected video from the first camera and six others that were installed in the vicinity of other traps on the premises. They also located some raptor carcasses. The videos showed the four defendants tending the traps, setting them, providing water and food to the bait-pigeons, checking the traps for hawks, and killing hawks. The videos also showed quail-hunting parties walking the property. The videos

¹ There are several references to photos and video in this memorandum. With the Court's permission, the government will introduce photos and video clips at the sentencing. If the Court so directs, the exhibits can be submitted for review in advance of the hearing.

showed defendant Williams shooting three hawks; defendant Aiken one; defendant Dantzler one; and defendant Noyola, a bobcat.

As noted above, days often passed between the defendants' inspection of the traps. This meant that the hawks were often caged for extended periods of time, and accordingly suffered from dehydration, hunger and injuries suffered when they frantically tried to escape their metal enclosures. For example, a Red-tail hawk was observed in Trap 3 on February 17, 2014, showing signs of injury from attempts to free itself. Defendant Williams shot it on February 20, 2014. It was found in a ditch nearby Trap 3, still alive, by agents and officers executing a search warrant on February 21, 2014, the day after Williams shot it. It was taken to the Center for Birds of Prey, where it had to be euthanized due to the severity of its injuries.

Another hawk died in the trap after two days of captivity. On January 29, 2014, defendant Williams set Trap 6. On February 11, 2014, the trap captured a hawk, which died two days later, still in the trap, after a severe winter ice storm with cold temperatures. Williams checked the trap on February 16, 2014, and Aiken removed the carcass on February 19, 2014.

On February 21, 2014, agents and officers executed a search warrant on the premises. They seized a total of 15 box traps, all in use, and additional hawk carcasses. Later forensic autopsies would establish that the remains of a total of 28 different hawks and 3 different Great Horned Owls were collected during the investigation, all in the immediate vicinity of the box traps. Generally, the searching agents and officers did not

conduct a thorough search of the entire acreage, but confined their efforts to the vicinity of the traps. Finally, not all of the kills could be accounted for. On January 3, 2014, defendant Williams was filmed shooting a hawk in a trap and depositing the carcass in the bed of his pickup truck. The disposition of that carcass is unknown.

On March 26, 2014, defendant Dantzler was interviewed. He identified co-defendants Aiken and Noyola as employees of Willcreek. He admitted to killing raptors at the direction of defendant Williams and stated further that he notified Williams of his kills. He stated that Williams used the traps to help protect the pen-raised quail he purchased and released on the property. He said the trapping had been taking place for at least two years.

In fact, it is likely that the trapping project has been taking place for more than two years. Somewhere between 2005 and 2009, DNR conservation officers observed a trap on the Willcreek property with a live hawk in it. Believing that the trap was being used legally to trap other animals and that the hawk had been trapped inadvertently, the officers freed the raptor but took no additional action. In approximately 2009, another DNR conservation officer met with Williams and instructed him to stop trapping hawks on the property.

C. Manner of Death

Autopsies and forensic examinations established that 14 of the birds died of gunshot wounds. The cause of death for the remainder could not be determined. Only nine birds were sufficiently preserved to be able to establish nutritional robustness. Five

of those exhibited evidence of dehydration and fat/muscle loss, suggesting limited or prohibited access to food and water in the days preceding death.

D. Sentencing Options

Each violation of the Migratory Bird Treaty Act carries a maximum term of imprisonment of 6 months and a fine of \$15,000. 16 U.S.C. §703(a). Accordingly, the offense is classified as a petty offense and Class B misdemeanor, not subject to the provisions of the United States Sentencing Guidelines. 18 U.S.C. § 3559(a)(7); U.S.S.G. §1B1.9 (Class B misdemeanors exempt from the guidelines “[f]or the sake of judicial economy”). Traditional sentencing alternatives remain available to the sentencing court, including probation and restitution.

Fines

Although the purpose of fines and restitution are in most cases clearly distinct, in this case there is some overlap. Restitution, of course, is intended to compensate a victim for harm directly and proximately suffered as a result of the offense, and that includes harm to the government’s legitimate and substantial interest in protecting wildlife. *See United States v. Oceanpro Industries*, 674 F.3d 323, 331 (4th Cir. 2012). A fine, on the other hand, is intended to punish and typically goes to the U.S. Treasury. However, fines imposed for violations of Migratory Bird Treaty Act are different.

The North American Wetlands Conservation Act of 1989 authorizes fines collected in MBTA criminal cases to be applied to wetlands conservation projects. 16 U.S.C. § 4406(b). The Act authorizes appropriations to be used to encourage

partnerships among public agencies and other interests to protect, enhance, restore and manage wetland ecosystems and other habitats for migratory birds and other fish and wildlife; to maintain current or improved distributions of migratory bird populations; and to sustain an abundance of waterfowl and other migratory birds consistent with international treaty obligations. The government would therefore request that any fines imposed in this case be made payable to the “North American Wetlands Conservation Act Account.” In that case, the fine would not only be appropriately punitive, but would also serve to restore, in a general sense, resources that the defendants sought to diminish.

Restitution

If the Court agrees and directs any fines imposed in this case to the wetlands fund, the government will not be requesting a restitution order in addition to the fine, for the simple reason that the fine would be both compensatory and restorative in nature. However, restitution is one of the Court’s sentencing options.

The Victim and Witness Protection Act of 1984 (“VWPA”), 18 U.S.C. § 3663, and the Mandatory Victim Restitution Act of 1996 (“MVRA”), 18 U.S.C. 3663A, generally limit restitution to victims of offenses under Title 18. However, courts have ordered restitution for victims of the offenses of conspiracy, even where the object of the conspiracy is not a Title 18 offense. *United States v. Meredith*, 685 F.3d 814, 827 (9th Cir. 2012); *United States v. Bengis*, 631 F.3d 33, 41 (2d Cir. 2011); *United States v. Bruce*, 437 Fed.Appx. 357 (6th Cir. 2011); *United States v. Butler*, 694 F.3d 1177 (10th Cir. 2012).

Some courts have rejected attempts to impose restitution under the MVRA or VWPA where the only Title 18 charge was aiding and abetting, in violation of 18 U.S.C. § 2, noting that Section 2 does not establish an “offense” of which a defendant may be convicted. *United States v. Elias*, 269 F.3d 1003, 1021 (9th Cir. 2001) (later amended to permit restitution as a term of supervised release); *United States v. Snider*, 957 F.2d 703, 706 (9th Cir. 1991). Other courts have ordered restitution based only on Section 2. *United States v. West Indies Transport Inc.*, 127 F.3d 299, 315 (3d Cir. 1997) (restitution for Clean Water Act offense appropriate because defendant was also charged with aiding and abetting); *United States v. Ross*, No. 11-30101, 2012 WL 4848876, at *5 (D.S.D. Oct. 10, 2012).

Whether or not the MVRA or VWPA make restitution available for aiding and abetting violations of the Migratory Bird Treaty Act (MBTA), it is well settled that a court has the discretion to independently impose restitution as a condition of probation or supervised release for any criminal offense. *E.g.*, *United States v. Harrison*, 541 Fed.Appx. 290, 293 (4th Cir 2013). This includes violations of the MBTA. *See United States v. Ross*, No. 11-30101, 2012 WL 4848876, at *2–3 (D.S.D. Oct. 10, 2012). This authority would apply only to the counts of conviction, but should apply to all four defendants. Even though the government contends that the defendants overall sentences should reflect that they killed or caused to be killed many more raptors than those charged, the government acknowledges that “loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order.” *Hughey v.*

United States, 495 U.S. 411, 413 (1990).

Valuation of a raptor for purposes of restitution, by its very nature, involves estimation, since there is no established free market value in live (or dead) hawks.

Although inapplicable, the Sentencing Guidelines provide some guidance:

When information is reasonably available, “market value” under subsection (b)(3)(A) shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost or the acquisition and preservation (e.g., taxidermy) cost. Market value, however, shall not be based on measurement of aesthetic loss (so called “contingent valuation” methods).

If the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted.

U.S.S.G. § 2Q2.1, App. Notes 4 and 5 (2015).

In this case, one method of reasonably estimating the value of the birds is to examine the cost of rescuing and rehabilitating a bird suffering from a wound by gunshot, the method of extermination used by the defendants in this case. The amount that an entity is willing to spend to save a raptor measures the value of the bird unaffected by, say, an interest in litigation or reimbursement by an insurer. In fact, although using the *average* rehabilitation and veterinary costs might seem like a reasonable approach, it is really *the highest cost* that the rescuing entity is willing to pay that is the best measurement of value.

The Avian Conservation Center and The Center for Birds of Prey in Awendaw, South Carolina is an entity that rescues and rehabilitates raptors injured by, among other things, gunshots. According to the Center, it spends an average of \$3,530 to rehabilitate an injured bird. See Exhibit A. Again, the government is not seeking restitution in this case, but believes that the value of the victim resource is a significant factor for the Court to consider in deciding the amount of the fine to be imposed. After all, loss value is the most significant sentencing factor for any offense that feeds into the loss table of Sentencing Guideline 1B1.1, and this case should be no different even though the Guidelines do not apply.

Probation, Supervised Release and Imprisonment

As noted above, a term of probation of up to 5 years may be imposed. 18 U.S.C. §§ 3559(a) and 3561. Supervised Release is unavailable. 18 U.S.C. § 3583(b). The government does not contend that a term of imprisonment would be necessary to satisfy the sentencing objectives of 18 U.S.C. § 3553(a). However, the government requests that the defendants be prohibited from hunting, as a condition of probation, for a period of three years in the case of defendant Williams, who was primarily responsible for the hawk eradication project, and one year for the remaining defendants, who acted at his direction.

These crimes were committed for the purpose of facilitating sport – the hunting of pen-raised quail -- and protecting an investment of thousands of dollars in that sport – the cost of purchasing and maintaining the quail. Accordingly, a

hunting ban would be just punishment uniquely befitting the offense while addressing the twin objectives of general and specific deterrence as set forth in § 3553(a)(2).

Similar Cases

Mackay Point Plantation

This case is remarkably similar, except that the individual private owner of Mackay Point was not involved in the raptor eradication project and accordingly was not charged. More than 30 raptor carcasses were recovered from the property, all illegally trapped and killed. The raptors were killed to prevent them from killing pen-raised quail that were released for hunting.

Three employees of the plantation were charged with a single count. *United States v. Martin et al*, Case No. 9:14-po-9. Each entered guilty pleas and were sentenced to 6 months' probation, community service, a \$1,000 fine, and a one-year trapping ban. The Mackay Point owner, a limited liability corporation, paid \$250,000 in community restitution, but was not charged.

The Sowinskis

Alvin and Paul Sowinski, father and son, owned 8,000 acres of land in northern Wisconsin. In order to improve the recreational hunting for pen-raised pheasants, grouse and deer, Alvin Sowinski put out poison for predators, ultimately killing seven bald eagles, a black bear, and numerous other birds and animals. *United States v. Sowinski*, Case No. 3:14-30, Dkt. #4 at 5-7, Feb. 12,

2014 (Exhibit B). Both men pled to a single one-year misdemeanor for possessing a bald eagle. Alvin received a \$30,000 fine, a seven-year ban on hunting, \$100,000 in restitution, one year of probation, and four months of home confinement; Paul a \$10,000 fine, \$100,000 in restitution, a five-year hunting ban, and one year of probation.

The Court expressed an interest in the dispositions of similar cases. The above two cases are such examples. In the *Sowinski* case, the defense compiled a spreadsheet of wildlife-related cases with their dispositions. The spreadsheet is attached as Exhibit C.

Government's Recommendation

For reasons stated above in addition to argument to be advanced at the sentencing hearing, the government will recommend a \$100,000 fine for Defendant Williams, with a three-year term of probation and ban on hunting, and for the remaining defendants, a \$1,000 fine and one-year term of probation and hunting ban.

Respectfully submitted,

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