

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	
)	
Plaintiff,)	CR-16-8013-PCT-DJH
)	
vs.)	Phoenix, Arizona
)	March 15, 2017
Arlow Antone Kay,)	10:00 a.m.
)	
Defendant.)	
)	
)	

BEFORE: THE HONORABLE DIANE J. HUMETEWA, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SENTENCING

APPEARANCES:

For the Government:

U.S. Attorney's Office
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For the Defendant Kay:

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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

1 THE CLERK: This is case number CR 16-8013,
2 United States of America versus Arlow Kay, on for sentencing.

3 MR. DOKKEN: Good morning, Your Honor. Roger Dokken
4 appearing for the United States. Sitting at counsel table is
5 Vernon Nez, who's a criminal investigator with the Navajo
6 Nation.

7 THE COURT: Good morning.

8 MS. CISNEROS: Good morning, Your Honor. Milagros
9 Cisneros and Elisse Larouche on behalf of Arlow Kay, who is
10 present and in custody.

11 THE COURT: Good morning. And please proceed to the
12 podium with your client.

13 MS. CISNEROS: Yes, Your Honor.

14 THE COURT: Mr. Kay, this is the time set for entering
15 judgment and sentencing on your case. In a prior trial
16 proceeding before this Court, you were found guilty of
17 voluntary manslaughter, a lesser included offense of Count 1 of
18 an indictment which charged you with second degree murder.

19 Now, I have received a number of documents in your
20 case. They include the presentence report that was prepared by
21 the probation office. And the Court notes the presence of our
22 probation officer here today.

23 Mr. Kay, did you have an opportunity to review the
24 presentence investigation report?

25 THE DEFENDANT: Yeah.

1 THE COURT: Did you read the entire report?

2 THE DEFENDANT: Yes.

3 THE COURT: Did you go through that report with the
4 assistance of counsel?

5 THE DEFENDANT: Yes, I did.

6 THE COURT: And was your counsel able to answer all of
7 your questions about what is written in this report to your
8 satisfaction?

9 THE DEFENDANT: Yes.

10 THE COURT: Are you satisfied with the services of
11 both of your counsel?

12 THE DEFENDANT: Yes.

13 THE COURT: And I have no objections to the
14 presentence investigation report from you, Ms. Cisneros; is
15 that correct?

16 MS. CISNEROS: That is correct, Your Honor.

17 THE COURT: And I have no objections from the
18 government. Is that also correct?

19 MR. DOKKEN: Yes, Your Honor.

20 THE COURT: And I should note for the parties that
21 the -- there was an addendum to the presentence report that was
22 filed on March the 8th, and it essentially addresses a change
23 in Paragraph 43 as to the number of days spent in tribal
24 custody for Mr. Kay. Did both parties receive that addendum?

25 MS. CISNEROS: I believe so, Your Honor, yes.

1 MR. DOKKEN: Yes, Your Honor.

2 THE COURT: There being no objections to the
3 presentence investigation report, I will adopt the
4 guidelines -- sentencing guidelines calculated in that report.

5 Mr. Kay, your total offense level is 27. Your
6 criminal history category is category I. That results in an
7 advisory sentencing guideline range of 70 to 87 months in
8 custody. The statutory maximum sentence that you are facing,
9 however, is 15 years.

10 Now, before the Court hears from you, Mr. Kay,
11 Mr. Dokken, is there a victim or victim's representative who
12 wishes to be heard?

13 MR. DOKKEN: Yes, Your Honor.

14 THE COURT: And I'll have Mr. Kay, Ms. Cisneros, take
15 a seat.

16 MS. CISNEROS: Yes, Your Honor.

17 THE COURT: And please bring that person forward.

18 Now if you would please speak into the microphone and
19 first state your full name and spell your last name.

20 CYNTHIA YELLOWHAIR: My name is Cynthia Yellowhair.
21 Yellowhair is spelled Y-e-l-l-o-w-h-a-i-r.

22 MR. DOKKEN: And she is Danny's wife.

23 CYNTHIA YELLOWHAIR: I just want to say that -- excuse
24 my language -- that my life and my kids' life, my grandkids'
25 life, everybody else that knew Danny has been hellish.

1 On July 3rd, 2015, we were planning to go to a rodeo.
2 Danny and I, we were going to take our granddaughter. And
3 some -- he left. I mean, I told him I was going to go out to
4 the store to get some stuff. When I came back, he wasn't home.
5 And I didn't -- I didn't know where he went.

6 And he never came back. And later I got a call saying
7 that he's gone; he's been stabbed. But at that time I didn't
8 know how bad it was. But as the days went by, we just -- I
9 heard that he's been, you know, stabbed numerous times, which
10 was why he's gone.

11 And I'm asking the Court, I'm asking you that the
12 person that hurt him should go -- be sentenced 15 years, which
13 is the maximum, because our lives are just way too different
14 now. I'm having a hard time adjusting without him.

15 It seems every day I cry because I needed him there
16 for a lot of things, you know, even for little things.

17 And it's just so sad. I mean, I'm just sad all the
18 time. And my grandkids, I have seven. The little ones don't
19 understand. They know -- They called him papa. They know he's
20 gone. But it's so hard to explain to them. My older grandkids
21 know, they know about the crime, but they just don't understand
22 why, why it happened. And it's just so hard.

23 I guess I'm saying thank goodness that I'm a teacher.
24 I go to work, and I teach fourth grade, and those kids are
25 helping me. They don't know that they're helping me, but they

1 are. But as soon as I leave, as soon as I get home, I have to,
2 you know, think about him. That's all I do is just think about
3 him. And it's just so hard.

4 There are times when it feels like I don't know what
5 to do. I know what to do, but it's just hard without him.

6 So I don't -- I think this person that killed my
7 husband should -- he deserves to go to prison for a long time,
8 which is 15 years, because our lives will never be the same.
9 It's not fair. My husband's not here. I want justice for him.
10 He can't be here to defend himself, to speak for himself. So
11 that's why I'm asking you that he should be sentenced to the
12 fullest.

13 THE COURT: Thank you.

14 CYNTHIA YELLOWHAIR: That's all I have to say. Thank
15 you.

16 MR. DOKKEN: This is Danny's daughter.

17 THE COURT: Please state your full name.

18 CANDICE YELLOWHAIR: Good morning. My name is Candice
19 Yellowhair. I'm the daughter of Danny Yellowhair.

20 Sorry. It's been an emotional morning. I'm going to
21 go ahead and read a letter that I had did -- that I had
22 prepared for my -- on behalf of myself, my family, and my
23 brother and his family.

24 Unfortunately we all deal with our grief differently,
25 and my brother was unable to make it.

1 It says -- Well, like I said, we are the children of
2 Danny Yellowhair. As you know, our dad's life was taken in
3 July, 2015. The Court found Arlow Kay guilty of manslaughter
4 instead of second degree murder. This -- I'm sorry. This
5 decision is appalling. Arlow Kay stabbed our dad to death.
6 It's very painful to think about how our dad suffered and
7 desperately fought for his life.

8 Our dad at the time was 60 years old. He was no match
9 for Mr. Kay. This proves that Mr. Kay is a bully and enjoys
10 hurting helpless people.

11 And as my mother had stated that I also want full
12 justice for my dad and is requesting the full 15 maximum
13 sentence for Mr. Kay.

14 Mr. Kay is a dangerous person, and no one should trust
15 him. We don't believe he will ever change. He will never be a
16 good person. At his age, he should have understood that
17 stabbing someone 15 to 17 times is horrendous. Arlow Kay needs
18 to be held accountable to the fullest for taking our dad's
19 life.

20 He needs to be sentenced the maximum years required
21 and also at the family's request of 15 years.

22 Danny was our -- our father. We know in our hearts he
23 loved us, and we loved him. We admired our dad for his hard
24 work, for raising us. He did it with lots of love. We had a
25 deep understanding -- He had a deep understanding of being a

1 good father and a grandfather. It hurts so bad at times that
2 our father is no longer here, and we miss him very, very much.

3 It's hard to come to closure. Some days we are angry
4 and frustrated that our dad is not here anymore. Why is always
5 the question. Why is always on our minds. Some days we're
6 happy to talk about him. Of course we can no longer talk to
7 him directly anymore. Instead we remember him and all the
8 wonderful memories that we had with him.

9 My children, my brother's children are always asking
10 why their grandfather is gone. The older -- Our older children
11 know about the crime, but have a hard time understanding why it
12 happened. My younger children were confused, and it's hard to
13 explain to them the dreadful night of July 3rd still haunts us.
14 Our dad was killed. Our lives have changed. Certainly things
15 are different, and we don't know how long it will take for us
16 to overcome our grief or if we ever will. Things are
17 different. We don't know how long it will take us to overcome.
18 We just want justice for our dad.

19 Our dad is not here to defend himself or speak on his
20 behalf. Please understand us and what we are going through.
21 And I brought a picture of my dad. And I also wore his
22 favorite footwear today. He was always the type that would
23 dress western, wear boots, wear cowboy hats. But not since his
24 death has he ever seen me in his footwear that he loves to
25 wear. So that's how we have -- I have honored him today.

1 Like I said, it's been a very emotional morning. My
2 dad was my mom's best friend. And I always thought they would
3 grow old together and be old together and live old together.
4 But now a lot of his responsibilities, I and my significant
5 other take on helping my mom.

6 But like I said, all I ask and request for the maximum
7 sentence for my dad of 15 years.

8 THE COURT: Thank you.

9 CANDICE YELLOWHAIR: That's all I have.

10 MR. DOKKEN: Those are all the victim representatives
11 that desire to speak.

12 THE COURT: Thank you, Mr. Dokken.

13 Yes, please proceed to the podium.

14 MS. CISNEROS: Thank you, Your Honor.

15 THE COURT: Now, I should also mention in addition to
16 the presentence investigation report, I have also received,
17 Mr. Kay, your counsel's sentencing memorandum, and I have also
18 received the government's sentencing memorandum and all of the
19 documents attached to those memorandum.

20 I have also received a victim impact statement from
21 Cynthia Yellowhair, and I've also received a letter from
22 Ms. Yellowhair and a letter from Candice and Darryl Yellowhair,
23 which includes much of the same information that Ms. Candice
24 Yellowhair just provided to the Court.

25 Have the parties reviewed those documents as well?

1 MR. DOKKEN: Yes, Your Honor.

2 MS. CISNEROS: Yes, Your Honor.

3 Did Your Honor receive a series of eight letters on
4 behalf of Mr. Kay as well?

5 THE COURT: I was just going to mention that there are
6 a number of letters that I also received and reviewed from
7 Mr. Kay, your mother, that are written on behalf of your
8 grandmother, as well as from a number of your siblings. And I
9 have reviewed those letters as well.

10 Mr. Dokken, did you review those letters?

11 MR. DOKKEN: Yes, Your Honor.

12 THE COURT: Is there anything that the parties have
13 submitted that I have not mentioned?

14 MR. DOKKEN: I believe you have everything.

15 MS. CISNEROS: I agree, Your Honor.

16 THE COURT: All right. Now, before the Court imposes
17 a sentence, Mr. Kay, is there anything that you wish to say on
18 your own behalf?

19 MS. CISNEROS: Your Honor, I met with Mr. Kay this
20 morning in the lock-up, and he has indicated that he does not
21 wish to address the Court himself and would like me for me to
22 address the Court in his stead.

23 It's a difficult thing for him, and so he asked me to
24 convey.

25 In particular, to begin -- If it's all right for me to

1 proceed, Your Honor?

2 THE COURT: You may.

3 MS. CISNEROS: His regret for his participation in
4 this incident. He is sorry for what resulted in the loss of
5 life, the role that he played in that.

6 I would also note, Your Honor, that he did take some
7 steps after this incident to address the issue that likely in
8 large part resulted in what happened, which is his use of
9 alcohol. As you know from the information that we have
10 provided, Mr. Kay has essentially stopped drinking after this
11 incident. He was not arrested until later. He was arrested
12 tribally and spent about a month or so in tribal custody, was
13 directed to do anger management classes. He did so, completed
14 that.

15 Then he was arrested federally, came here, went to
16 Crossroads, completed 12 weeks of anger management along with
17 the substance abuse program at Crossroads, was allowed to live
18 on his own. He was living with his brother, which is one of
19 the individuals that wrote a letter to you, and at that time
20 was doing GED classes as well as trying to keeping up with his
21 sobriety in what's called a Welbriety program. I think those
22 are important things for the Court to -- for me to highlight
23 for the Court, because they do indicate a level of
24 understanding about what happened here and a level of remorse
25 on his part and a recognition that he needed to address

1 whatever was going on that resulted in his actions on that day.

2 I have already noted for the Court our concerns
3 regarding the nature and circumstances of the offense. I don't
4 want to repeat them here necessarily, but you know what those
5 are. We had a hearing about those regarding the care that was
6 provided to Mr. Yellowhair along with other preexisting
7 conditions. Our argument remains, and it's for the Court's
8 consideration as well.

9 But I did want to mainly highlight for you today also
10 with regards to that, I know Mr. Dokken has filed some -- is
11 requesting 180 months -- I understand that -- because of an
12 aggravating -- because of aggravating factors here in the case.

13 I would note, however, that although there were 15
14 stab wounds, two of those did reach vital organs. The others
15 were -- I wouldn't call them necessarily superficial, although
16 I would say that some of them probably were.

17 But Dr. Katz did indicate that there were two that did
18 reach vital organs while the others did not. And as you know,
19 Mr. Yellowhair probably bled more profusely because of other
20 preexisting conditions.

21 In addition, Your Honor, as you know, my client does
22 have some medical limitations that have resulted in some
23 medical conditions that are also perhaps mitigating here as
24 well and for the Court to consider in terms of the length of
25 sentence that the Court wishes to impose in this case.

1 But primarily what I wanted to note was that even
2 though there were 15 stab wounds, this wasn't a particularly
3 cruel or heinous type of circumstance. It is obviously a loss
4 of life. There is no question about that. Somebody's life was
5 lost.

6 But I would note that in order to aggravate the
7 sentence, that Your Honor would have to find that it was
8 particularly egregious. And I don't think we have those
9 circumstances here.

10 So, Your Honor, our request is for the 70 to 87
11 months, anywhere within that range. That is what the
12 guidelines indicate is appropriate for a conviction for
13 voluntary manslaughter.

14 My client has no countable criminal history. He has
15 some tribal history, which appears to also indicate that he's
16 not somebody who is out there constantly fighting with others.
17 It's essentially public intoxication. And there is one battery
18 charge from when he was 19 years old. But that's it.

19 And, you know, you've seen a lot of cases obviously
20 over the course of your career and here on the bench as well
21 where individuals have pages and pages and pages of tribal
22 history where they're constantly getting in fights and
23 constantly arrested for this or that.

24 That's not Mr. Kay. And so this in some ways is --
25 this instance, this incident, is odd and out of character for

1 him. And I would suggest, as he has recognized because of the
2 steps that he has taken to address the problem he has with
3 alcohol, that both Mr. Yellowhair and Mr. Kay were intoxicated
4 that day. And that played a big role in what happened.

5 This individual here is not -- Mr. Kay is not, when he
6 is sober, the person that acted on July 3rd, 2015. You've seen
7 letters from his siblings. They love him. He's the eldest in
8 the family. His mother's here. His aunt is here. They're
9 here to support him. He has a loving family. They have
10 provided letters of support for you.

11 So our request, Your Honor, again is for something
12 within the range, for you to take into consideration not only
13 the fact that this appears to be out of character for him but
14 also -- oh, that this is out of character for him but also the
15 steps that he took following the incident to address his
16 problem with alcohol.

17 And we also request, as the probation officer has
18 recommended, placement or recommendation for placement in the
19 Residential Drug Abuse Program with the Bureau of Prisons, the
20 500-hour program. I think my client would benefit tremendously
21 from that program, and he is motivated to participate.

22 And, in addition, if Your Honor could recommend
23 placement here in our district, I do believe that they do have
24 the RDAP program here in the facilities in Arizona, so for the
25 Bureau of Prisons to have those two as guidelines for placement

1 for Mr. Kay.

2 Thank you, Your Honor.

3 THE COURT: Thank you, Ms. Cisneros. As I've
4 indicated, I have read all of the documentation provided to me.

5 Mr. Dokken, do you wish to add anything more to your
6 sentencing memorandum, or do you have anything further to
7 state?

8 MR. DOKKEN: Yes, Your Honor.

9 MS. CISNEROS: Should we sit back down?

10 MR. DOKKEN: Yeah. If I could approach the clerk,
11 Your Honor?

12 THE COURT: You may.

13 MR. DOKKEN: As the Court is well aware from our
14 motion, we are requesting an upward departure because of
15 extreme conduct. Why is this so extreme? Well, it's pointed.
16 Of course there's a nine-inch height difference, 150 pound
17 bigger. He's also half the age of the victim. And as the
18 Court is well aware from the hearing with Dr. Katz, the victim
19 was suffering various maladies. It's an easy target.

20 So when you look at the physical evidence after the
21 commission of the homicide, it's easy to understand why there
22 is such a disparity in the injuries to the victim versus the
23 defendant. The defendant has none. The victim has 15 stab
24 wounds. So at some point all of those stab wounds become a
25 gratuitous infliction of injury.

1 And so to make -- What's even worse, I suppose, is
2 that five of them are in the back. What's even more, I guess,
3 disheartening is when you look at the autopsy report and you
4 look at the diagram. Ms. Cisneros and I flew to Albuquerque to
5 talk to the doctor, and her body diagram had a lot of writing
6 and notes on it, so it was difficult to read if you weren't a
7 doctor. So we had to make this showing where all of the
8 injuries were on it without having her notes on it so it was
9 easier for us to read. And what you see is there are no
10 defensive wounds on the hands.

11 This was a surprise attack. If Agent Nez and I were
12 having an argument, and she came at me with a knife, I'm going
13 to do something. She may win, and she may eventually kill me,
14 but I'm going to have marks on my hands. And thus I was
15 surprised.

16 But, you know, there's one thing that is even more
17 telling. You look at the picture, placard 15, that's the rock
18 that Danny Yellowhair was sitting on. And that bucket back
19 there in the back that's now knocked over, but that's where the
20 defendant was sitting. And he came over and started stabbing
21 him.

22 What's important about that rock? Why are there no
23 defensive wounds?

24 His knees are higher than his hips. He's overweight.
25 He's attacked straight on. Guess where this G&H came from?

1 His knees, they line up with the ones in his chest, right from
2 where the defendant's coming at him.

3 What are you going to do? You can't use your hands to
4 get -- You can't get up. You've got to use your hands. That's
5 why there are no injuries on his hands. What are you going to
6 do?

7 There's only one way to get up when your knees are
8 higher than your hips. You roll over so you can get up, use
9 your knees and your hands to get up.

10 What happens when you do that? You expose your back
11 to him. Five in the back. He's a coward. He stabbed a
12 person, an elderly person, five times in the back after he'd
13 already stabbed him ten times in the front. That's why this is
14 deserving of an upward departure.

15 And he stabbed a person that was vulnerable because of
16 his position. By vulnerable I mean his -- the way he was
17 sitting. He could not have his hands up to defend himself. So
18 that's one grounds.

19 Also when you can consider all of the homicide crimes,
20 if you put them all, like, in a line of range from a continuum
21 from a manslaughter, an involuntary, all the way up to a first
22 degree murder, you know, some crimes are a little bit closer to
23 another one. The fact situation falls closer to another, like
24 sometimes you'll see a second degree that seems like it, man,
25 might have been some premeditation, not quite, but it's a

1 pretty high end of a second, or you'll see something that's,
2 you know, maybe it's a voluntary, but it seems lesser than the
3 normal case.

4 If you look at this case and the continuum of cases,
5 this is a voluntary manslaughter that is really close to a
6 second. Because the degree of the argument, it's just a
7 verbal argument. This is a nothing argument. It is so
8 insignificant that his grandparents are sitting right there.
9 They didn't even know anything about it. Granted, they were
10 drinking, but they were able to talk and walk later. It wasn't
11 anything that stuck in anybody's mind. It wasn't a big deal.
12 It was just words.

13 So it seems to be, as far as alcohol-induced
14 arguments, this is pretty insignificant. It's not a mutual
15 combat kind of thing that usually comes up. This is a guy
16 sitting on a rock who can't defend himself. So I think that
17 when you get in this continuum, you're getting really close to
18 a second degree murder, and that's really a good basis for an
19 upward departure. Thank you so much.

20 THE COURT: Thank you, Mr. Dokken. And I wanted to
21 point out, Mr. Dokken, in the government's sentencing
22 memorandum, given the offense level finding here, is it my
23 understanding that you're seeking a seven-level upward
24 departure, not a five-level upward departure?

25 MR. DOKKEN: Yes, Your Honor. Well, that would be --

1 That depends on whether you give him acceptance.

2 THE COURT: Well, you didn't object to the presentence
3 report. The time to do so has passed.

4 MR. DOKKEN: Right, exactly.

5 THE COURT: Please proceed.

6 MR. DOKKEN: There wasn't a PSR when I filed the
7 motion.

8 THE COURT: Well, I'm not going to belabor the point,
9 but you had time --

10 MR. DOKKEN: That's why. It's not that I can't add.
11 It's that's why it makes -- You pointed out the little
12 inconsistency there. It's actually a seven-level.

13 THE COURT: Ms. Cisneros, Mr. Kay, please proceed to
14 the podium.

15 MS. CISNEROS: Thank you, Your Honor.

16 Your Honor, I neglected to ask for one more thing.
17 There were the 27 days of tribal custody credit, so we would
18 ask for a reduction of just one month for that tribal custody.

19 THE COURT: Well, Mr. Kay, the Court has a number of
20 sentencing factors to consider. I'm sure your counsel have
21 both explained to you what those factors include. They are
22 found in 18 U.S.C. 3553(a), and they include the nature of the
23 crime that you are convicted of, voluntary manslaughter, your
24 background and character, whether you have a criminal history,
25 whether you're in need of rehabilitation. Is there a sentence

1 that can be fashioned to prevent you from committing other
2 crimes of this nature? What is a sentence that will promote
3 respect for the law? And what is just punishment under the
4 facts and circumstances of you and your case?

5 It is also part of the law that I may consider and
6 begin with the sentencing guideline range but that I may
7 consider up to the statutory maximum of 15 years.

8 As for the nature of the crime, the Court has
9 considered the stipulated facts agreed to by the parties. They
10 include that you and the victim here, Mr. Danny Yellowhair,
11 were drinking together on July 3rd near the home of Mr. Gray.

12 At some point an argument ensued because
13 Mr. Yellowhair made some disparaging comments about your family
14 members, that the evidence would have shown that you and the
15 victim and others were drinking 40-ounce bottles of beer, and
16 that at some point you were seen walking up to Mr. Yellowhair,
17 you pulled out a knife, and began to stab him.

18 The facts also include that when you were found and
19 arrested --

20 MS. CISNEROS: My apologies, Your Honor. My client
21 wanted me to address something.

22 (The defendant and his counsel confer off the record.)

23 MS. CISNEROS: Yes, Your Honor. I'm sorry.

24 THE COURT: The stipulated facts also include that
25 when Mr. Kay was found, he had two knives on his person, and

1 one of those knives had blood on it.

2 That if testimony were provided by Dr. Dvorscak, that
3 she would have testified that Mr. Yellowhair sustained 15 stab
4 wounds, two of which punctured a vital organ, and she would
5 also testify that Mr. Yellowhair had cirrhosis of the liver,
6 which contributed to his inability to survive.

7 The facts that were provided by the government in the
8 sentencing memorandum the Court notes are more substantial than
9 those eight facts that were agreed to by the parties.

10 The Court finds the homicide itself to be a serious
11 offense even under the limited circumstance that the Court
12 understands by these few stipulated facts.

13 Now, as to Mr. Kay's background and character, Mr. Kay
14 appears to currently be 33 years old. He's a life-long
15 resident of the Navajo Nation. He has a tenth grade education.
16 He appears to suffer from an autoimmune disorder that affects
17 his nervous system, and this is apparently what led to his
18 inability to complete school or his ability to sustain
19 employment for any length of time. The Court does note that he
20 most recently did work in the fast food service industry. And
21 in essence Mr. Kay has lived on the Navajo Nation with his
22 family under these circumstances.

23 As to Mr. Kay's prior criminal history, as
24 Ms. Cisneros points out and as the parties know, there is
25 virtually no countable criminal history that the Court can

1 consider. That is why Mr. Kay is in criminal history
2 category I.

3 The Court does note that he does have numerous arrests
4 for public intoxication, but we don't know what the final
5 result of those arrests were because the records don't reflect
6 what occurred. And the only arrest for any sort of assaultive
7 conduct is as a result of this crime.

8 In terms of rehabilitation, it appears that Mr. Kay at
9 least self-reports that he began drinking at 18 years of age
10 and notably states that when he does drink or when he did
11 drink, he would drink until the point of passing out.

12 As Ms. Cisneros indicates, the presentence report
13 shows that after this crime, he stopped drinking altogether,
14 and while on pretrial release, he did complete a rehabilitation
15 program.

16 Nevertheless, the Court finds that you are in need of
17 rehabilitation, and the Court will recommend that, wherever you
18 are placed, that you participate in the prison's Residential
19 Drug Treatment Program, the RDAP program.

20 In terms of the level of dangerousness of Mr. Kay, the
21 Court does find that Mr. Kay does pose a danger, given the
22 circumstances of this case, and in particular when he is
23 drinking. And here clearly he did not -- he did not hesitate
24 to use the knife that he chose to carry or the knives that he
25 chose to carry and to use a knife at least on multiple

1 occasions.

2 Now, Ms. Cisneros on behalf of her client asks the
3 Court to consider the medical examiner's finding that a
4 contributing cause of death was, quote, the critical errors
5 made by the Kayenta medical clinical staff and Dr. Dvorscak's
6 statement that Mr. Yellowhair's cirrhosis of the liver was,
7 quote, a significant contributory condition as it relates to
8 his death. And the Court did hear testimony from Dr. Katz and
9 also relies on the number eight stipulated fact that
10 Mr. Yellowhair's death was the result of 15 stab wounds, two of
11 which punctured a vital organ.

12 While stipulated number -- stipulation number eight
13 states that the parties agree that Mr. Yellowhair's cirrhosis
14 was a contributing condition, here the Court finds that under
15 these facts, that had he not been stabbed multiple times and
16 vital organs hit, his cirrhosis of the liver would not be at
17 issue here.

18 Now, the government asks the Court to increase the
19 defendant's total offense level by seven and to sentence him to
20 the maximum sentence allowable under the law.

21 In essence the government asks this because, in
22 reading the sentencing memorandum, the government disagrees
23 with the Court's verdict. And in fact I understand that the
24 family disagrees with the Court's verdict. Yet the government
25 agreed to proceed to trial in this way on the eight stipulated

1 facts. And only on order of this Court did the government add
2 additional argument on the law. Otherwise, they would have
3 remained silent.

4 And the Court recalls throughout the course of this
5 case the government also opined at one hearing, characterizing
6 this case as one where no one would recall what actually
7 occurred. And in fact if you read the stipulated facts, that
8 is true.

9 So the parties can quibble with the verdict, but it is
10 the manner in which the parties chose to proceed.

11 In considering all of the pleadings, all of the
12 statements made to the Court by counsel for Mr. Kay, the
13 government and the family members, Mr. Yellowhair's widow and
14 daughter, and the letters written on behalf of Mr. Kay, I do
15 believe the circumstances of this case are complex in a number
16 of ways.

17 On the one hand, there is the mitigation about this
18 physical condition that Mr. Kay suffers from along with some of
19 the other ailments, health ailments, that he has. Given his
20 background and character and lack of criminal history, this
21 appears to be an aberrant incident. In other words, it's not
22 something that he has a pattern of violence in the community.
23 He has made attempts for rehabilitation already, and some would
24 argue it was too late to do so.

25 But here I do agree with the government and the

1 presentence report author that an upward variance is necessary
2 for the following reasons:

3 I've reviewed Sentencing Guideline 5K2.1 and 5K2.8.
4 They permit the Court to consider the means by which
5 Mr. Yellowhair's life was taken.

6 Two acquaintances drinking together, and an argument
7 ensues. Mr. Kay walks over to Mr. Yellowhair, stabs him not
8 once or twice but multiple times, 15 times. The Court finds
9 the infliction of 15 stab wounds to be extreme conduct. It is
10 conduct that when one looks at the medical examiner's exhibit,
11 it's degrading to the victim's body, and it is a gratuitous
12 infliction of injury to the victim.

13 The Court also believes that there is some merit to
14 considering the relative size of Mr. Kay to Mr. Yellowhair.
15 Mr. Kay is not a slight man. He is a very large man. He's a
16 youthful man.

17 Mr. Yellowhair, on the other hand, a very slight man.
18 60 years old. And so the Court will upward vary pursuant to
19 5K2.1 and 5K2.8.

20 Further, the Court has also reviewed guideline 5K2.6,
21 and it permits the Court to consider that a dangerous weapon
22 was used here. I need not repeat what the stipulated facts
23 show that Mr. Kay was armed with two knives, and obviously one
24 of those knives he used to inflict the gratuitous harm.

25 And so what is the range of sentencing option

1 available to it? I have already indicated I cannot accept the
2 recommendation of Mr. Kay that he be sentenced to essentially a
3 seven-plus-year term of incarceration.

4 But the Court does agree that the appropriate offense
5 level range of sentence to consider here is that recommended by
6 the presentence report writer, and that is to an offense level
7 of 33.

8 Is there any legal reason why sentence should not now
9 be imposed?

10 MR. DOKKEN: No, Your Honor.

11 MS. CISNEROS: No, Your Honor.

12 THE COURT: Pursuant to the Sentencing Reform Act of
13 1984, it is the judgment of the Court that you, Arlow Antone
14 Kay, are hereby committed to the Bureau of Prisons for a term
15 of 168 months as provided by the presentence report writer.

16 The Court will have to reduce that by 27 days,
17 permitting Mr. Kay to receive credit for the time served in
18 tribal custody.

19 The Court recommends that Mr. Kay participate in the
20 Bureau of Prisons Residential Drug Abuse Treatment Program if
21 eligible. He shall pay a special assessment of \$100, which
22 shall be due immediately. The Court finds that he does not
23 have an ability to pay a fine and orders that the fine be
24 waived.

25 Payment of criminal monetary penalties while

1 incarcerated is due at a rate of not less than \$25 per quarter,
2 and payments shall be made through the Bureau of Prisons Inmate
3 Financial Responsibility Program. And the Court hereby waives
4 the imposition of interest and penalties on any unpaid balance.

5 On release from custody, Mr. Kay, you shall be placed
6 on supervised release for three years, and while on supervised
7 release, you shall comply with the conditions of supervision
8 adopted by this Court in its General Order 16-23.

9 Of particular importance, you shall not commit another
10 federal, state, or local crime -- and that includes a tribal
11 crime -- while on supervised release.

12 Within 72 hours of being released from custody, that
13 is, in the district that you will be released from, you will
14 report to the U.S. Probation Office. You shall also comply
15 with the following additional conditions:

16 You shall participate as instructed by your probation
17 officer in a program of substance abuse treatment, which may
18 include testing for substance abuse. You shall contribute to
19 the cost of treatment in an amount to be determined by your
20 probation officer.

21 You shall submit your person, property, house, car,
22 papers, computer as defined in 18 U.S.C. 1030(e)(1), other
23 electronic communication devices, or data storage or media, to
24 a search conducted by your probation officer, and failure to
25 submit to such a search may be grounds for revoking your

1 supervised release.

2 You shall comply with the standard conditions of
3 supervision requiring full-time employment at a lawful
4 occupation. This may include participating in training,
5 counseling, daily job searching as directed by the probation
6 officer.

7 If you are not in compliance with this provision, you
8 may be required to perform up to 20 hours of community service
9 per week until you are so employed.

10 And you shall abstain from all alcohol and alcoholic
11 beverages.

12 You are prohibited from owning, maintaining, or using
13 a firearm, and you shall not contact the victim's family,
14 including but not limited to Cynthia Yellowhair, Candice
15 Yellowhair and Darryl Yellowhair, and the probation officer
16 will verify compliance.

17 Now, because you proceeded to a bench trial, Mr. Kay,
18 it is my understanding that you have preserved your appeal
19 rights. However, you must understand that if you intend to
20 appeal the verdict and the sentence here, you only have 14 days
21 in which to file your notice of intent to do so, and your
22 counsel can advise you with regard to that.

23 In addition to that, Mr. Kay, your counsel has
24 requested that you be placed in a facility, a Federal Bureau of
25 Prisons facility here in the State of Arizona. And the Court

1 will make that recommendation. However, the Court reminds
2 Mr. Kay that it is ultimately up to the Bureau of Prisons to
3 determine where you are placed.

4 Now, I also wanted to mention that while there was
5 some mention in the victim impact statement about restitution,
6 my understanding is there has not been a formal request made
7 for restitution or documentation to substantiate that. Is
8 that --

9 MR. DOKKEN: No, they did not have receipts to give to
10 the probation officer.

11 THE COURT: Do you wish to keep that portion open, or
12 is that a --

13 MR. DOKKEN: Could I have just a second to talk to the
14 advocate?

15 THE COURT: You may.

16 (Off-the-record discussion ensues.)

17 MR. DOKKEN: They would like to keep it open to see if
18 they can find receipts.

19 THE COURT: The Court will keep the issue of
20 restitution open for 30 days. And so the parties are to submit
21 whatever information they can to substantiate the claim that is
22 noted in the victim impact statement and the presentence
23 report.

24 MS. CISNEROS: Very well.

25 THE COURT: Is there anything further?

1 MR. DOKKEN: I have nothing. Thank you, Your Honor.

2 MS. CISNEROS: No, Your Honor. Thank you.

3 THE COURT: This matter's adjourned.

4 (Proceedings recessed at 11:01 a.m.)

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C E R T I F I C A T E

I, LINDA SCHROEDER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 20th day of April, 2017.

s/Linda Schroeder
Linda Schroeder, RDR, CRR