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A-1
Sixth Circuit Opinion, United State v. Ferguson,
No .17-1176 (6th Cir. Jan 8, 2028 (APP 001)

NOT RECOMMENDED FOR PUBLICATION
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No. 17-1176

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 08, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA Plaintiff-Appellee, v. MICHAEL HOWARD FERGUSON, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN OPINION

BEFORE: GRIFFIN, KETHLEDGE, and BUSH, Circuit Judges.

JOHN K. BUSH, Circuit Judge. Michael Ferguson pleaded guilty to a state charge of being a felon in possession of a firearm based on law enforcement's finding guns at his home from a search conducted during a murder investigation. The state court sentenced Ferguson to twenty-four months of imprisonment. Separately, Ferguson pleaded guilty to a federal felon-in-possession charge when he was caught selling guns (and drugs) to an undercover officer. The court below sentenced Ferguson to 105 months of imprisonment, which was within the recommended Guidelines range of 84 to 105 months, and ordered this sentence to run consecutively to Ferguson's undischarged state sentence.

Ferguson appeals, arguing that his sentence is procedurally and substantively unreasonable because the district court did not adequately explain its reasoning for ordering a consecutive sentence, relied on unreliable and inaccurate information in reaching its decision, and erroneously added two points to Ferguson's criminal-history score. But because the district

court discussed the factors of 18 U.S.C. § 3553(a) in deciding the length of Ferguson's sentence and whether it should run consecutively, we affirm the district court's imposition of a consecutive sentence. The district court also did not rely on inaccurate or unreliable information when it sentenced Ferguson. And even if such reliance were deemed erroneous, it would be harmless error. So we affirm the district court on this issue as well. We also affirm the district court's adding two points to Ferguson's criminal-history score because Ferguson was still under probation when he sold one of the guns to the officer on May 19, 2015. We therefore affirm the district court's order in all respects.

I

This case arises out of four transactions between Ferguson and an undercover officer conducted from within the officer's car at a McDonald's parking lot in Clinton Township, Michigan. Ferguson first sold a firearm to the officer in May 2015. In June 2015, Ferguson sold Vicodin pills to that same officer. The officer noticed that a young child was in Ferguson's car during this transaction. In July 2015, Ferguson sold the officer another firearm and two 17-round magazines. Finally, Ferguson sold yet another firearm to the officer in September 2015.

Also in September 2015, the Detroit Police Department investigated Ferguson for his possible involvement in the murder of a man named Osean Lockett. A witness named William McKithen reported that he saw Ferguson, wearing a mask and brass knuckles, approach Lockett from behind and punch Lockett in the back of his head. According to McKithen, Ferguson then dragged Lockett to Ferguson's backyard, and McKithen heard gun shots shortly thereafter.

McKithen's account of events led to a search of Ferguson's home, during which law enforcement found a black mask, brass knuckles, and three loaded guns. Ferguson admitted to owning brass knuckles and a black mask, but he denied being involved in Lockett's murder and

denied ever selling firearms after July 6, 2015. Ferguson was charged in state court for murdering Lockett and with a felony firearms count. The state prosecutor later dropped the murder charge, and Ferguson pleaded guilty to the felony firearms count for possessing one of the guns found in his home during the search. He received a two-year state prison sentence.

As for the three guns that Ferguson sold to the undercover officer, Ferguson was charged federally for being a felon in possession of a firearm. He pleaded guilty. The presentence investigation report ("PSR") recommended a Guidelines range of 84 to 105 months. Ferguson objected to certain findings in the PSR, arguing that his criminal history was overstated and that the probation department erroneously added two points to his criminal history under the assumption that he was on probation at the time he sold one of the guns. At sentencing, Ferguson argued for a "downward departure or a downward variance" and a sentence of forty months. Also, Ferguson briefly asked that his sentence be offset by the six months that he had already served on his state-court sentence. The government argued for an upward variance and a sentence of 120 months, adding that such a sentence should run consecutively with Ferguson's two-year state sentence because each sentence involved separate crimes.

The district court rejected both parties' arguments, while commenting that the government likely had "better" support for an upward variance. As part of this discussion, the district court expressed concern that Ferguson was apparently "taking his daughter to work" and that he was selling not just guns but also drugs. The district court noted that it would not rely on McKithen's statements to make a variance determination, but that it would rely on "information provided to the police by McKithen before he testified" and acknowledged the items found at Ferguson's residence and their consistency with the witness's report of the murder of Lockett.

Despite noting these considerations, the district court, as discussed, still rejected the government's request for an upward variance.

Ultimately, the district court concluded that the probation department had correctly calculated a Guidelines range of 84 to 105 months and sentenced Ferguson to 105 months of imprisonment that would run consecutively to Ferguson's state sentence. In doing so, the district court discussed the § 3553(a) factors, specifically noting the seriousness of Ferguson's offense and his apparent lack of respect for the law and failure to learn from previous violations. Ferguson filed a timely notice of appeal on February 16, 2017.

III

We must vacate a sentence by a district court if the district court abused its discretion and imposed an unreasonable sentence. *Gall v. United States*, 552 U.S. 38, 56 (2007). A sentence may be unreasonable either procedurally or substantively, or both. *United States v. Houston*, 529 F.3d 743, 753 (6th Cir. 2008). A sentence is procedurally unreasonably if the district court incorrectly calculates the Guidelines range, "treat[s] the Guidelines as mandatory, fail[s] to consider the § 3553(a) factors, select[s] a sentence based on clearly erroneous facts, or fail[s] to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51 (2007). "A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent § 3553(a) factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Brown*, 501 F.3d 722, 724 (6th Cir. 2007). Ultimately, a sentence imposed must, among other things, be "sufficient, but not greater than necessary . . . , to reflect the seriousness of the offense, to promote the respect for the law,

and to provide just punishment for the offense." 18 U.S.C. § 3553(a); *see United States v. Robinson*, 778 F.3d 515, 519 (6th Cir. 2015).

Ferguson contends that the district court did not adequately explain its reasoning for ordering a consecutive sentence, decided his sentence based on unreliable and inaccurate information, and erroneously added two points to his criminal-history score. He also argues that his sentence is substantively unreasonable. For the reasons that follow, we find his arguments unpersuasive.

A. The Consecutive Sentence

Ferguson argues that the district court did not adequately explain its reasons for imposing a consecutive sentence on him, pointing out that "the district court did not mention USSG § 5G1.3 even once." But Ferguson did not object at the sentencing hearing to the district court's explanation for imposing a consecutive sentence. We therefore review for plain error. *See United States v. Harmon*, 607 F.3d 233, 236 (6th Cir. 2010).

"[I]n determining whether the terms imposed are to be ordered to run concurrently or consecutively, [the court] shall consider . . . the factors set forth in [18 U.S.C. §] 3553(a)." 18 U.S.C. § 3584(b). When imposing a consecutive sentence, a district court does not abuse its discretion, let alone plainly err, if it "makes generally clear the rationale under which it has imposed the consecutive sentence and seeks to ensure an appropriate incremental penalty for the instant offense." *United States v. Berry*, 565 F.3d 332, 342 (6th Cir. 2009).

Here, the district court did not explicitly mention §5G1.3, the Guideline on consecutive sentences. But this is not dispositive, which Ferguson himself concedes. The district court made clear its rationale for imposing a consecutive sentence when it discussed the § 3553(a) factors' relation to Ferguson. *See United States v. Williams*, 664 F. App'x 517, 520 (6th Cir. 2016).

Moreover, the district court's rationale was consistent with the relevant commentary for USSG §5G1.3, so Ferguson was not prejudiced by any error, assuming one even occurred. *See United States v. Olano*, 507 U.S. 725, 734 (1993).

Ferguson's state felon-in-possession conviction involved unrelated conduct to his federal felon-in-possession conviction: the state conviction resulted from a different gun possession (the guns found during the search of his home) than the one underlying the federal conviction (the guns sold in the summer of 2015). Accordingly, the Guidelines advised the district court here to "achieve a reasonable incremental punishment for [Ferguson's] instant offense" when deciding between concurrent and consecutive sentences. *See* USSG §5G1.3(d); §5G1.3(d), comment. (n.4). The commentary to §5G1.3(d) lists various factors for district courts to consider in reaching a "reasonable incremental punishment." Among those factors are the § 3553(a) considerations themselves, which we have held are sufficient to support a consecutive sentence. *Williams*, 664 F. App'x at 521 (citing *Berry*, 565 F.3d at 343). Although the district court here did not repeat its § 3553(a) analysis for its decision to impose a consecutive sentence, we have never held that such repetition is necessary. *Id.* Rather, the district court's determination of the length of Ferguson's sentence and its decision to impose a consecutive sentence "were intertwined." *See United States v. Johnson*, 640 F.3d 195, 209 (6th Cir. 2011).

The district court first noted that it could settle on a sentence within the Guidelines range that was, as required, "sufficient but not greater than necessary to reflect the seriousness of this offense conduct." It took "into account the offense conduct and the offender's background," as well as the factors of deterrence and incapacitation. It discussed that Ferguson had "not learned from previous encounters with courts" and that his history "reveals increasingly concerning

behavior." Finally, in light of those considerations, the district court went on to order the length of Ferguson's sentence and whether it would run consecutively:

> [T]he Court, having considered the sentencing guidelines and the factors contained in Section 3553(a) of Title 18, hereby commits the defendant, [] Ferguson, to the custody of the United States Bureau of Prisons for a term of 105 months. This term shall be served consecutively to the term of imprisonment the defendant is currently serving with the Michigan Department of Corrections.

The foregoing is a sufficient explanation for imposing a consecutive sentence. Therefore, we hold that the district court did not plainly err in ordering Ferguson's sentence to run consecutively with his undischarged state sentence.

B. The Evidence

When challenging the evidence considered by a district court at sentencing, "the defendant must establish that the challenged evidence is materially false or unreliable, *and that such false or unreliable information actually served as the basis for the sentence*." *United States v. Robinson*, 898 F.2d 1111, 1116 (6th Cir. 1990) (emphasis added). Ferguson argues that the district court relied on three allegedly untrue premises: (1) that he had been involved in the murder of Lockett, (2) that his bare arrest records supported that he acted violently in the past, and (3) that he took his daughter with him to the gun sales. But the district court does not appear to have actually relied on any of these premises when it sentenced Ferguson. Even if it did, these facts were not materially false or unreliable, and any reliance on them by the district court would have been harmless.

Ferguson first contends that the district court erroneously relied on McKithen's statement that he saw Ferguson punch Lockett with brass knuckles while wearing a mask. According to Ferguson, this statement constitutes "double hearsay" and the district court did not find sufficient corroborating evidence to accept the statement.

District courts are free to consider hearsay and facts relating to unconvicted conduct at sentencing. *See United States v. Davis*, 170 F.3d 617, 622 (6th Cir. 1999) (explaining that hearsay is admissible at sentencing); *United States v. Milton*, 27 F.3d 203, 208 (6th Cir. 1994) ("This circuit clearly allows district courts to consider acquitted conduct at sentencing."). Hearsay evidence, however, must still "bear some minimal indicia of reliability." *United States v. Silverman*, 976 F.2d 1502, 1512 (6th Cir. 1992).

When considering the government's argument for an upward variance, the district court expressly stated that it would not rely on McKithen's statements. But the district court did explain that it would rely on the information McKithen provided to the police "indicating that he saw a man he recognized to be the defendant with brass knuckles," that the man was wearing a mask, and that brass knuckles and a mask were found at Ferguson's home. This information, according to the district court, gave it "that much greater concern about the defendant's criminal trajectory." Nonetheless, the district court rejected the requested upward variance. Later, when the district court actually sentenced Ferguson, it did not even mention McKithen's statements. At any rate, even if the district court had relied on McKithen's statements, and even if they were hearsay, the mask and brass knuckles found in the search of Ferguson's home provide sufficient indicia of reliability to support the statements. We therefore hold that the district court did not abuse its discretion, even assuming it relied on McKithen's statements.

Ferguson also takes issue with the district court's treatment of four dismissed charges from his arrest records. Ferguson was charged with five counts in November 2012 arising from a single incident: assault with a dangerous weapon; assaulting, resisting, and obstructing a police officer (comprising two counts); felony firearm possession; and carrying a concealed weapon. Ferguson pleaded guilty to carrying a concealed weapon, and the other four charges were

dismissed. At sentencing in this case, when arguing for a downward departure, Ferguson's lawyer contended that "none of Ferguson's prior conduct involved crimes or even *allegations* of violence" (emphasis added). In response, and again in arguing against a downward departure, the government referenced the four dismissed charges from November 2012 as an example of at least *alleged* violent conduct. Ferguson now argues that the district court "appeared to accept" this claim by the government regarding his history of violent conduct when the court stated that "[t]he trajectory of offenses here is disturbing." Because, according to Ferguson, due process does not allow the use of bare arrest records for sentencing, the district court erred in making such a conclusion.

Prior arrest records may be considered when there are specific facts available concerning the arrests. *See United States v. Matheny*, 450 F.3d 633, 642 (6th Cir. 2006). And as already discussed, district courts may consider unconvicted conduct at sentencing. But more importantly, the district court made this statement only in the context of considering and rejecting Ferguson's request for a downward departure. When the district court sentenced Ferguson and explained its reasoning, the court made no mention of these four dismissed charges. Ferguson therefore cannot establish that these records formed a basis of his sentence, and his argument for improper reliance fails accordingly.

We now turn to the district court's discussion of the presence of Ferguson's daughter at the illegal sales. When considering the government's argument for an upward variance, the district court commented that Ferguson's "[t]aking his daughter to work is not supposed to include having her in the back seat when he's selling guns on the street. And he was selling not just guns, but whatever illegally came into his possession that might have value." The district

court then noted that this fact, along with others, "reveal[s] history and characteristics of the defendant," but still rejected the government's argument for an upward variance.

Ferguson latches on to the district court's statement here, arguing that the transaction at which a young girl was alleged to be present was the drug sale, not the gun sale, and that the young girl seen at the transaction was never proved to be his daughter. Therefore, according to Ferguson, a remand for resentencing is necessary because "the record provides no clue about whether this factual difference would have made a difference to this district judge." We disagree.

A district court's findings of fact are reviewed for clear error. *United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016). But under the harmless error rule, any such error that "does not affect substantial rights must be disregarded." *See* Fed. R. Crim. P. 52(a); *United States v. Kilpatrick*, 798 F.3d 365, 378 (6th Cir. 2015). The district court made the statement about Ferguson's daughter when considering, and ultimately rejecting, the government's argument for an upward variance. The court did not mention Ferguson's bringing his daughter to one of the gun sales when it sentenced him. Regardless, assuming that this young girl was not actually Ferguson's daughter, such a fact seems more troubling than if she had been his actual daughter. And as for the distinction between gun and drug sales, although the district court mentioned gun sales, in its very next sentence it noted that the sales were not just gun sales, but also illegally possessed items, such as drugs. In other words, the pertinent fact relied upon by the district court, to the extent the court even relied on it, was that Ferguson took a young girl to one of his illegal sales. Whether she was his daughter and whether the sales were of a gun as opposed to drugs are issues that did not affect the sentence. Therefore any finding as to those issues, even assuming it was clearly erroneous, was harmless.

C. The Criminal-History Points

Under USSG §4A1.1(d), two points are added to a defendant's criminal history "if the defendant committed the instant offense while under any criminal justice sentence, including *probation*, parole, supervised release, imprisonment, work release, or escape status" (emphasis added). The commentary to §4A1.1(d) adds that "[f]or the purposes of this subsection, a 'criminal justice sentence' means a sentence countable under §4A1.2 . . . having a custodial or supervisory component, although active supervision is not required for this subsection to apply."

On September 18, 2014, Ferguson was sentenced by a Michigan state court to eight months of probation. On May 19, 2015, eight months and one day later, Ferguson sold one of the guns to the undercover officer. Ferguson's probation officer reported in the PSR that Ferguson's case was "officially closed" on May 20, 2015, and stated that "a copy of that discharge order was requested, received and is available for [the district court's] review." During the sentencing hearing, the district court, relying on the state court's records, found that "reasonably reliable information" supported the finding that Ferguson was still under probation as of May 19, 2015, and explained that it was "confirm[ing] the probation officer's report as stated." So the district court added two points to Ferguson's criminal-history score, which the PSR recommended. We generally review sentencing enhancements de novo. *See United States v. Groenendal*, 557 F.3d 419, 422 (6th Cir. 2009). *But see id.* (explaining that if a sentence adjustment "depends heavily on factual determinations," we review only for clear error). Under de novo review, we affirm the district court's adding two criminal-history points to Ferguson's criminal history.

Michigan Compiled Laws § 771.2(5) provides that the trial court "shall, by order . . . fix and determine the period" of probation. Under § 771.5(1), even though that initial probationary *period* terminates, the court retains discretion to amend or extend the probationary period so long

as the extension does not exceed the maximum period of probation allowed. *See id.*; *People v. Marks*, 65 N.W.2d 698, 701–02 (Mich. 1954). Or "the court may discharge the probationer from further supervision." Mich. Comp. Laws § 771.5(1). The court may even extend the probationary period ex parte without giving the probationer notice or an opportunity to be heard. *People v. Kendall*, 370 N.W.2d. 631, 632 (Mich. Ct. App. 1985). When the initial period of probation set by the court under § 771.2(5) terminates, the probation officer must "report that fact and the probationer's conduct during the probationary period to the court." Mich. Comp. Laws § 771.5(1). Michigan's manual for probation officers instructs them to "review the probationer's file in a timely fashion." *Manual for District Court Probation Officers*, § 7-08 Discharge, http://courts.mi.gov/administration/SCAO/Resources/Documents/Publications/Manuals/prbofc/prb.pdf (last visited Dec. 18, 2017). If the probation officer determines that the probationer has met the conditions of his probation, the officer "should prepare a Motion and Order for Discharge *from Probation*" and give it to the judge. *Id.* (emphasis added). According to the Michigan Attorney General in 1920, even if the probation officer fails to submit his report, the probationer is "a ward of the court" until he is discharged:

> The question is raised as to the failure of the probation officer to make such report to the court on or before the day the probation period ends. It is our opinion that this has no effect whatever on the relation of the court to the parties involved. The person under probation is, in a sense, a ward of the court *until such time as he is discharged* from such probation by the court . . . . The person under probation is entitled to a hearing on his discharge, but not as a matter of right on the very day that his probation period may expire, but at such time after the expiration of his probation period as may be reasonable and at the convenience of the court.

Op. Att'y Gen. Mich., No. 61 (Aug. 12, 1920) (emphasis added). When a probationer is discharged from probation, an entry of discharge must be filed with the court and the probationer is entitled to a certified copy of the entry of discharge. Mich. Comp. Laws § 771.6.

Accordingly, under Michigan law, the relevant date for determining whether a probationer is still under probation for purposes of a two-point enhancement under the Guidelines, or under a "criminal justice sentence" having a "custodial component," appears to be the discharge date. Under § 771.5(1), upon the entry of discharge *from probation*, the probationer is being "discharged from further supervision," implying that, till that point, the probationer is still under supervision. The text of § 771.5(1) even uses the term "probationer" to refer to a defendant whose initial probation period has already ended. And the required action in § 771.6—the entry of a discharge—is conditioned on the probationer's actual discharge, rather than the expiration of the probation period. That is, § 771.6 does not require an entry of discharge simply upon the expiration of the probation period, but rather upon the actual discharge. The probation period's expiration has no effect in and of itself. But even if the discharge date is not the operative date upon which probation terminates, the statutory scheme confirms that, at a minimum and contrary to Ferguson's argument, probation does not end automatically upon the expiration of the initial probationary period.

Here, the state court did not close Ferguson's case until May 20, 2015. The probation officer referred to this closure as a discharge order. And the district court affirmed the probation officer's report "as stated" after having this discharge order available to it. The district court, therefore, did not err in construing the facts available to it to hold that Ferguson was still under probation when he sold the gun on May 19, 2015. We note further that to hold that Ferguson was not at least under a criminal justice sentence "having a custodial" component would contradict the sentencing court's statutorily granted authority to amend or extend Ferguson's probationary period. We therefore affirm the district court's adding two points to Ferguson's criminal-history score.

D. Substantive Reasonableness

Finally, Ferguson contends that his sentence is substantively unreasonable because of his history, his characteristics, and the nature of the offense. He attempts to characterize his total time in both federal and state prisons—his 105-month (or eight-years-and-nine-months) federal sentence that must run consecutively to his undischarged two-year state sentence—as a "nearly eleven-year sentence" that is "well above the national average." We review for an abuse of discretion. *See Gall*, 552 at 51. Sentences within the Guidelines range are presumptively reasonable. *United States v. Vowell*, 516 F.3d 503, 509 (6th Cir. 2008). Ferguson's federal sentence was within the Guidelines range, despite his attempt to cobble together his federal and state sentences to create a cumulative, above-Guidelines sentence. And, as already discussed, the district court explicitly considered Ferguson's background, his failure to "learn[] from previous encounters with the courts," and the § 3553(a) factors. The district court then deliberately chose a sentence "sufficient but not greater than necessary to reflect the seriousness of [Ferguson's] offense conduct." Such a decision was not an abuse of discretion. *See* 18 U.S.C. § 3553(a); *Robinson*, 778 F.3d at 519.

IV

In light of the foregoing, we **AFFIRM**.

A-2
Sixth Circuit Order Denying Rehearing En Banc,
United States v Ferguson, No 17-1176
(6th Cir. Fe. 13, 2018) App 015

No. 17-1176

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 13, 2018
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL HOWARD FERGUSON,

Defendant-Appellant.

O R D E R

BEFORE: GRIFFIN, KETHLEDGE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: February 13, 2018

Ms. Colleen P. Fitzharris
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613 Abbott Street
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Re: Case No. 17-1176, *USA v. Michael Ferguson*
Originating Case No. : 2:16-cr-20535-1

Dear Ms. Fitzharris,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Brandy Yolanda Robinson
Ms. April Nicole Russo

Enclosure

A-3
Appellant's Brief, United States v. Ferguson,
No. 17-1176 (APP 017)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 17-1176

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL HOWARD FERGUSON,

Defendant-Appellant.

_____

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
No. 16-CR-20535

_____

APPELLANT'S BRIEF

_____

FEDERAL DEFENDER OFFICE

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s/Brandy Y. Robinson
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STATEMENT OF JURISDICTION

Defendant-Appellant Michael Ferguson pleaded guilty to violating 18 U.SC. § 922(g) (2012), a federal crime. (R. 29, Judgment, PageID #291.) The Eastern District of Michigan had jurisdiction to impose judgment and sentence pursuant to 18 U.S.C. § 3231 (2012). On February 12, 2017, the district court entered judgment and sentenced Mr. Ferguson to a 105-month term of imprisonment and a three-year term of supervised release. (R. 29, Judgment, PageID #293.) On February 16, 2017, Mr. Ferguson filed a timely notice of appeal. (R. 30, Notice of Appeal, PageID #298); Fed. R. App. P. 4(b)(1), (b)(6). This Court therefore has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2012) and 18 U.S.C. § 3742 (2012).

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal presents important questions about the procedural and substantive reasonableness of Mr. Ferguson's sentence of nearly eleven years for being a felon in possession of a firearm. In fashioning a sentence, the district court relied on inaccurate information in violation of due process and erred calculating the guidelines. In addition, the district court failed to offer any reason for its decision to impose a consecutive federal sentence to the two-year state sentence that Mr. Ferguson was serving for the exact same conduct. Mr. Ferguson requests oral argument to ensure a full and fair hearing on these issues.

ISSUES PRESENTED

1. The district court ordered that Michael Ferguson's federal sentence run consecutively to his undischarged two-year state sentence without providing any explanation. Did the district court commit procedural error?
2. The district court opted to incarcerate Mr. Ferguson for nearly eleven years based on three unreliable or erroneous allegations: (1) that Mr. Ferguson was involved in the assault and murder of Osean Lockett; (2) that Mr. Ferguson's criminal history includes acts of violence; and (3) that Mr. Ferguson's daughter accompanied him to firearms sales. In reaching these conclusions, the district court relied on hearsay instead of sworn testimony, bare arrest records, and speculation. Did the district court abuse its discretion and violate Due Process by relying on such unreliable and inaccurate information?
3. The district court increased Mr. Ferguson's criminal history score by two after concluding that he committed relevant conduct before his probationary term expired. Did the district court calculate the guidelines range inaccurately?
4. Mr. Ferguson received an aggregate sentence of 127 months for being a felon in possession of a firearm—a sentence that 22 months higher than the guidelines range and 55 months longer than the national average sentence for his crime. Was the sentence substantively unreasonable?

STATEMENT OF THE CASE

Michael Ferguson is a loving father, brother, and son, a high school graduate, and an employable young man. (*See* PSR ¶ 41–43, 54–62.) He has certainly made mistakes—chief of among them his decision to possess firearms despite having been convicted of a felony. Yet the district court condemned Mr. Ferguson to over ten years in prison because it believed that Mr. Ferguson got away with murder. Although he was charged with assault and first-degree murder, the state prosecutor dismissed these charges because, as he said, the case against Mr. Ferguson was "as thin as the broth made from the shadow of the bones of a pigeon that starved to death." (R. 33, Sentencing Hr'g Tr., PageID #345.)

Mr. Ferguson is not a cold-blooded murderer. He is a loving father and son, who continues to have the love and support of his family despite his flaws.

A. Michael Ferguson's Background.

Because of his father's absence and mother's busy schedule, thirty-one-year-old Mr. Ferguson was a father figure to his younger brothers—making them breakfast, helping them with homework, and walking them to and from school. Although he grew up with limited means and without a father, he had the love and support of his mother, grandmother, and half-siblings. (PSR ¶¶ 40–42.) His mother, Brenda Tutton, has worked as a letter carrier for the U.S. Postal Service and courier

for Federal Express. (R. 26-6, Letter from Brenda Tutton, Ex. E, PageID #156.) She and her mother raised Mr. Ferguson and his four half-siblings. (PSR ¶ 41.) (R. 26-5, Letter from Antonio Stewart, Ex. D, PageID #155.) While in school, Mr. Ferguson was a member of the marching band, ran track and played football, and participated in academic games. (PSR ¶ 53.)

In 2003, Mr. Ferguson graduated from high school and went to work in the construction and forestry business. (PSR ¶ 56, 62.) For four years, Mr. Ferguson worked for his uncle's forestry service and construction business before moving on to put his skills to work in home-improvement and factory jobs. On the side, Mr. Ferguson started working as a personal trainer and developing skill in mixed martial arts. (PSR ¶¶ 55, 59.)

In 2012, Mr. Ferguson's daughter was born. (PSR ¶ 43.) He describes his daughter as his "life's joy." (*Id.*) Since her birth, Mr. Ferguson has cared for her daily. (*Id.*) He also helped Pamela Walker, his daughter's mother, care for her older daughter from a previous relationship. (*Id.*; R. 26-3, Letter from Pamela Walker, Ex. B, PageID #153; R. 26-4, Letter from Briauna Walker, Ex. C, PageID #154.) Just as he had cared for his brothers, he has provided his children with love and support by helping them with school work, tending to their needs, and making them laugh. (R. 26-3, Letter from Pamela Walker, Ex. B, PageID #153; R. 26-4, Letter

from Briauna Walker, Ex. C, PageID #154.)

Mr. Ferguson's family is loving and supportive. They miss him. And they will continue to miss him as he serves nearly ten and a half years in prison for possessing firearms.

B. The Federal Offense.

Mr. Ferguson became ensnared in the federal criminal system when an undercover agent reached out to Mr. Ferguson about purchasing firearms. The agent had learned from a confidential informant that someone named "Mike" might be able to sell firearms. (PSR ¶ 7.) No actual transfer took place, however, until May 19, 2015, when an undercover agent arranged a meeting to buy a firearm. (PSR ¶ 8.) In total, the agent met Mr. Ferguson four times between May and September 2015, during which Mr. Ferguson sold the agent three firearms. (PSR ¶ 8–12.)

In July 2016, a grand jury issued a one-count indictment accusing Mr. Ferguson of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (2012). (R. 1, Indictment, PageID #1–2.) In October 2016, Mr. Ferguson accepted responsibility for his actions and pleaded guilty without a plea agreement. (PSR ¶ 4.)

C. The Guidelines Calculations.

In preparation for sentencing, a United States Probation Officer prepared a

pre-sentence report and calculated an advisory guideline range of 84–105 months. (PSR ¶ 66.) This calculation drew two objections—only one of which is relevant to this appeal.

The probation officer added two points to the total criminal history score on the basis that Mr. Ferguson was still on probation when he committed the offense. (PSR ¶ 34; R. 26, Def. Sentencing Mem., PageID #123.) On September 18, 2014, a state court imposed an eight-month probationary sentence set to expire on May 18, 2015. Due to an unexplained administrative delay, Mr. Ferguson's file was not officially closed until two days later, May 20, 2015. (PSR ¶ 30.) Mr. Ferguson's first contact with the undercover agent occurred on May 19, 2015, one day after his probationary term expired. (PSR ¶ 8.) Thus, Mr. Ferguson's probation ended before he met with the undercover agent.

At the sentencing hearing, the district court acknowledged that everyone was merely speculating about whether Mr. Ferguson committed any criminal acts within the probationary period. (R. 33, Sentencing Hr'g Tr., PageID #337.) The best argument the government make was that the confidential informant's claim "regarding the ability to purchase firearms from a man named 'Mike.'" (PSR ¶ 7.) Nevertheless, the district court concluded that Mr. Ferguson's criminal history category was V, not IV. (R. 33, Sentencing Hr'g Tr., PageID #338.)

The second point of disagreement revolved around the calculation of the total offense level. At the government's urging, the probation department increased the total offense level by four, pursuant to U.S.S.G. § 2K2.1(b)(5) (2016). (R. 26, Def. Sentencing Mem., PageID #123–24.)

The district court rejected both objections, resulting in an advisory guideline range of 84–105 months. (*Id.*) Had the district court accepted Mr. Ferguson's guidelines calculation, the total offense level would have been 19, the criminal history category would have been IV, and the advisory range would have been 46–57 months. (R. 26, Def. Sentencing Mem., PageID #124.) Without the two additional criminal-history points, Mr. Ferguson's guideline range would have been 70–87 months.

D. Mr. Ferguson's Motion for a Downward Departure.

The probation department scored Mr. Ferguson's criminal history category at V. (PSR ¶ 35.) Mr. Ferguson believed the correct category was IV because the probation department erroneously added two criminal-history points for the commission of a new offense while on probation. (R. 26, Def. Sentencing Mem., PageID #123–24.) None of his previous convictions involve assaultive conduct, with the exception of two weapons convictions, and all other prior convictions involved simple possession of marijuana, drug paraphernalia, or alcohol, and one

conviction for driving while intoxicated. (*See* PSR ¶¶ 28–32.)

The two criminal-history points Mr. Ferguson received for his 2016 convictions are particularly at issue. Mr. Ferguson was a passenger in car that police officers stopped for traffic violations. (PSR ¶ 31.) During the stop, the officers saw a liquor bottle and wine bottle and smelled marijuana. (*Id.*) When the officers searched Mr. Ferguson, they found a four-inch butterfly knife and a straw with a small quantity of marijuana. (*Id.*) This incident resulted in four criminal charges: (1) possession of drug paraphernalia and (2) a dangerous weapon, (3) loitering where drugs are kept, and (4) possessing an open container in a vehicle. (*Id.*) In an effort to resolve the case quickly, Mr. Ferguson opted to plead guilty to all four offenses by mail while he was incarcerated for a probation violation, and thus could not appear for his sentencing hearing. (R. 26, Def. Sentencing Mem., PageID #125; PSR ¶ 31.) As a result, the court sentenced Mr. Ferguson to time served—ninety days in jail. (PSR ¶ 31.) Had Mr. Ferguson appeared or contested some of the charges, he may have received a shorter sentence.

For this reason, Mr. Ferguson requested a downward departure from the guidelines on the basis that his criminal history score did not reflect the true nature of his past conduct, as permitted by U.S.S.G. § 4A1.3 (2016). (R. 26, Def. Sentencing Mem., PageID #125–26; R. 33, Sentencing Hr'g Tr., PageID #360–62.)

The defense noted that there was that reliable information that Mr. Ferguson committed any assaultive acts. Mr. Ferguson has been *charged* with only two assaultive acts—one in 2012, and one in 2015. (PSR ¶¶ 29, 32). Both charges were dismissed without conviction. (*Id.*) In any event, Michigan does not prohibit possession of butterfly knives.

But the district court rejected the argument for a lower criminal-history category, claiming Mr. Ferguson had been "given a break," had engaged in assaultive conduct, and that the butterfly knife was an assaultive weapon. (R. 33, Sentencing Hr'g Tr., PageID #365–67.)

E. The Motions for Downward and Upward Variances.

Mr. Ferguson and the government sought variances from the guidelines. The government requested 120 months' incarceration, the statutory maximum—a fifteen-month variance from the guidelines—to be served consecutively with Mr. Ferguson's state firearms conviction. (R. 22, Gov't Sentencing Mem., PageID #60.) In total, the government hoped to incarcerate Mr. Ferguson for twelve years. Mr. Ferguson suggested a forty-month sentence to be served concurrently with his state sentence—three years and four months total. (R. 26, Def. Sentencing Mem., PageID #125.)

In support of the argument for an upward variance, the government pointed to

Mr. Ferguson's criminal history, speculation that he brought his daughter to multiple firearms sales, and the fact that he sold the undercover officer Vicodin pills. (*See* R. 22, Gov't Sentencing Mem., PageID #56–58.) But the thrust of the government's argument was that the federal prosecutor believed Mr. Ferguson committed or participated in the first-degree murder of Osean Lockett.

In July 2015, Mr. Lockett went missing. (R. 26-10, Prelim. Hr'g Tr., PageID #172.) Nearly two months later, Mr. Lockett's body was found in a sewer. The Detroit Police Department began investigating Mr. Ferguson after speaking with William McKithen, Jr. (PSR ¶ 32.) The police officers wrote about that conversation in a police report. Mr. McKithen claimed that he saw Chaka Franklin and a man in black ski mask hit Mr. Lockett in the head with a pair of shiny brass knuckles, kick him on the ground, and then carry him to Mr. Ferguson's backyard. (*Id.*) Mr. McKithen told the police that he believed the masked man was Mr. Ferguson. (*Id.*)

Based on this information, DPD searched Mr. Ferguson's home and found a black mask, two pairs of brass knuckles, and three firearms. (R. 26-10, Prelim. Hr'g Tr., PageID #249.) The police did not connect even one of the firearms to Mr. Lockett's murder. (*Id.*) Nor did the officers uncover any forensic evidence from Mr. Ferguson's house tying him to Mr. Lockett's murder. (*Id.*, PageID #259.)

Subsequently, the Wayne County Prosecutor's Office charged Mr. Ferguson with homicide in the first degree, possession of a firearm by a felon, felony firearms possession, and assault with intent to do great bodily harm less than murder. Mr. Ferguson denied and continues to deny any involvement in Mr. Lockett's murder. The prosecution's primary witness was Mr. McKithen.

At the preliminary examination, Mr. McKithen testified that he was out and about when he learned that someone had broken into his house. (R. 26-10, Prelim. Hr'g Tr., PageID #184.) When he returned to his house, he saw that the window had been broken, and Mr. Lockett was inside. (*Id.*, PageID #185.) After Mr. McKithen escorted Mr. Lockett outside, Mr. Franklin and a man named "Frazo" came to the house to see if everything was fine. (*Id.*, PageID #187.) Eventually, Mr. McKithen left for seven to ten minutes to take his guest home. (*Id.*) When he returned, he saw Mr. Franklin and Mr. Lockett arguing. (*Id.*, PageID #188.) While they were still arguing, Mr. McKithen left again for approximately five minutes to get materials to board up the broken window. (*Id.*)

When Mr. McKithen returned, he saw another man wearing all black and a face mask. He believed the masked man was Mr. Ferguson based on the man's build. (*Id.*, PageID #188, 222.) The masked man had something "shiny and silver" in his hand, which Mr. McKithen believed to be brass knuckles. (*Id.*, PageID #190.)

Mr. Lockett was on the ground. (*Id.*) Mr. McKithen saw Mr. Franklin and the masked man carry Mr. Lockett away from the driveway into the alley, and then Mr. McKithen went inside his home. (*Id.*, PageID #190–91.) Once inside the house, Mr. McKithen looked out the window, but he could not see the direction everyone went because it was dark. (*Id.*, PageID #192–94.) He could not hear what was going on either because his television was on and dogs were barking. (*Id.*, PageID #195.)

Later in the evening, after Mr. McKithen had closed his window and fallen asleep, he heard gunshots. (*Id.*, PageID #195.) He could not hear where the gunshots were fired. (*Id.*, PageID #195–96.) He did not know who shot the firearm, who the victim was (if there was a victim), or the type of firearm shot. (*Id.*, PageID #195–96, 223.)

At the preliminary hearing and under oath, the prosecutor tried unsuccessfully to prove that Mr. Ferguson was the masked man who struck Mr. Lockett. When asked directly, Mr. McKithen denied seeing Mr. Ferguson strike Mr. Lockett in the head:

> [Prosecutor:] Okay, did you see Mr. Ferguson strike Mr. Lockett at all?
>
> [McKithen:] No, out of my eyes, no.
>
> [Prosecutor:] Okay. Did you hear anything?
>
> [McKithen:] No, I didn't hear anything as I was coming back. No I

didn't[.]

(R. 26-10, Prelim. Hr'g Tr., PageID #189.) Even when confronted with the police report, Mr. McKithen still denied seeing Mr. Ferguson strike Mr. Lockett:

> [Prosecutor:] Did you eventually make a statement to the police?
>
> [McKithen:] Yes, I did.
>
> . . .
>
> [Prosecutor:] Near the bottom of the page, does the following appear? " . . . I was walking back with the board and seen Mike coming down my driveway and he hit him with shiny chrome brass knuckles and knocked Ham down . . ." Is that what's on there?
>
> [McKithen:] Yes, it is.
>
> . . .
>
> [Prosecutor:] So you did see it?
>
> [McKithen:] I did not, I didn't exactly see it. No, I didn't exactly see it but he had the chrome knuckles and that's the only person that could have hit him so that's why I said that.

(R. 26-10 Prelim. Hr'g Tr., PageID #196–97.) At the preliminary hearing, Mr. McKithen also retracted his previous statement that he heard Chaka tell Mr. Ferguson to "chill out." (*Id.*, PageID #197–98.)

Faced with this contradictory sworn testimony, the prosecutor tried to get Mr. McKithen to agree that the statements he made to the police were correct. (*Id.*, PageID #219–20.) When subjected to cross-examination, however, Mr. McKithen again explained that he did not actually see Mr. Ferguson hit Mr. Lockett; he just guessed:

[Defense Counsel:]	[T]hat's not what you're testifying to today, is it sir, that you actually saw Michael Ferguson strike him?
[McKithen:]	As I was coming back he, Osean, Osean was already laying on the ground, so he had to be, that was the only person—
[Defense Counsel:]	You guessed that Michael Ferguson hit him?
	. . .
[McKithen:]	Yes.
[Defense Counsel:]	Not you saw it?
[McKithen:]	I didn't see him out of my eyes, no.

(*Id.*, PageID #220–21.)

Finally, the trial court recognized the need to figure out exactly what Mr. McKithen saw with his own eyes. It clarified that there were two people outside the night Mr. Lockett was seen last—Chaka and Michael Ferguson. The court then

asked a clarifying question: "And what did you see Mr. Ferguson doing . . . [w]ith your own eyes?" Mr. McKithen answered:

> With my own eyes the guy Chaka told Mike, "Help me with this nigga." And that's when I see as I was coming back, I didn't see Mike doing anything after that. I seen the guy Chaka pick him up on his arm and told Mike to help him, help me with him. Help him carry him through the driveway because as I was coming back they had already started carrying him through the driveway because I came back they were gone.

(*Id.*, PageID #221–22.)

At the conclusion of the preliminary hearing, the prosecutor moved to bindover, but acknowledged that the case against Mr. Ferguson was "a thinner case than most." (*Id.*, PageID #249.) The trial court cut to the chase: the evidence showed that Mr. Franklin was the person angry with Mr. Lockett, and there was no evidence that Mr. Ferguson had a handgun ever, let alone on the day of the shooting. (*Id.*, PageID #250–51.) For that reason, the trial court called the case against Mr. Ferguson "one of the thinnest cases [he had] seen" because, even if Mr. McKithen's inconsistent testimony was believable, there was not much evidence that Mr. Ferguson possessed a weapon the night of the murder, was present during the shooting, or shot the gun. (*Id.*, PageID #259–60.) Ultimately, the judge bound the case over "with great reservation," but only "because the standard of proof is so low at [a preliminary hearing]." (*Id.*, PageID #262.)

Ultimately, the prosecutor concluded there was too little evidence to support the conclusion that Mr. Ferguson aided and abetted anyone in murdering Mr. Lockett and decided to dismiss the homicide and assault charges against Mr. Ferguson. (R. 26-11, Plea Hr'g Tr., PageID #269–70.) Mr. Ferguson then pleaded guilty to committing the two firearms offenses. (*Id.*, PageID #270.) During the plea hearing, the trial court clarified that the prosecutor dismissed the charges because of lack of evidence:

> The Court: [W]ith regards to the People's motion to dismiss Count One, murder in the first degree, premeditated murder and also the Count, additional Count of assault with intent to do great bodily harm, that's being dismissed by the People because the People feel they will not be able to meet their burden. Would that be fair?
>
> [Prosecutor]: There is t[o]o good a likelihood of that, yes.

(*Id.*, PageID #271.)

When the probation officer wrote the PSR, she wrote the report as if Mr. McKithen's original statement to the police reflected what actually occurred on the night Mr. Lockett disappeared. (*See* PSR ¶ 32; R. 33, Sentencing Hr'g Tr., PageID #341–42.) Mr. Ferguson objected to the characterization of events because the statements included were unreliable—entirely based on uncorroborated double hearsay, and not sworn testimony. (R. 33, Sentencing Hr'g Tr., PageID #341–47.)

At the outset, the district court made clear it believed Mr. McKithen's story

"went south"—not because the witness had been mistaken before, but because he felt some external pressure. (*See id.*, PageID #349.) The district court further concluded that there was corroborating evidence of Mr. Ferguson's involvement—the black ski mask, the brass knuckles, and the firearms found in Mr. Ferguson's home. (*Id.*, PageID #347.) But the district court ignored the fact that the police could never connect ski mask and firearms to Mr. Lockett's murder. Nor were the brass knuckles found in Mr. Ferguson's home shiny or chrome, as Mr. McKithen had described. (*See* R. 26-10, Prelim. Hr'g Tr., PageID #190 (describing the object in the masked man's hands); R. 22-10, Gov't Ex. I, PageID #90 (photo of the brass knuckles found).)

Nonetheless, the government seized on the district court's suggestion that Mr. McKithen's testimony had changed because of external pressure, and not because his previous statements or the police report were inaccurate. (R. 33, Sentencing Hr'g Tr., PageID #349.) When advocating for an upward variance of ten years' incarceration, the prosecutor repeatedly alluded to the dismissed murder and assault charges. (*Id.*, PageID #349, 364, 380.)

The district court ultimately overruled Mr. Ferguson's objection to the wording of the PSR, but agreed to amend the report to reflect that Mr. McKithen's story changed. (*Id.*, PageID #356–58.) The court ultimately agreed, however, to

amend the PSR to reflect that Mr. Ferguson lived in the neighborhood, even if he was not necessarily in the neighborhood that night. (*Id.*, PageID #358.)

Defense counsel repeatedly objected to the report's inclusion of information about the Lockett investigation, reliance on the uncorroborated statement by McKithen to the police, and any suggestion that Mr. Ferguson was involved in a murder. These objections were always grounded in due process and the need for sentencing determinations to be made based on reliable information. (*See* R. 33, Sentencing Hr'g Tr., PageID #368.) Nonetheless, the district court opted to "rely upon [the] information provided to the police by McKithen before he testified, indicating that he saw a man he recognized to be [Mr. Ferguson] with brass knuckles, or what he believed to be brass knuckles used in this attack on the decedent." (*Id.*, PageID #394.)

F. The Rejection of Mr. Ferguson's Motion for a Downward Variance.

Mr. Ferguson urged the district court to vary downward from the recommended guidelines sentence. (R. 26, Def. Sentencing Mem., PageID #125–31.) Citing evidence that lengthy terms of imprisonment harm families and communities, Mr. Ferguson argued that his close ties with his daughter and nuclear family should militate in favor of a shorter sentence. (*Id.*, PageID #126–27 (citing *Shared Sentence: the devastating toll of parental incarceration on kids, families*

and communities: The Annie E. Cassie Foundation, April 2016, *available at* http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf).) The loving support of Mr. Ferguson's close family and past history of employment indicate a low risk of recidivism. (R. 33, Sentencing Hr'g Tr., PageID #371–76.)

Mr. Ferguson also referenced numerous studies—including one by the Department of Justice—which conclude lengthy terms of incarceration have limited deterrent effects—to explain why a below-guidelines sentence was appropriate. (R. 26, Def. Sentencing Mem., PageID #128–29 (citing *Five Things About Deterrence*, United States Department of Justice, Office of Justice Programs, National Institute of Justice, *available at* http://nij.gov/fivethings/pages/deterrence.aspx).) Finally, he noted that at least one study found that the guidelines do not actually reflect community values. (*Id.*, PageID #129 (citing Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. & Pol'y Rev. 173 (2010)).

Despite these references and arguments, the district court rejected Mr. Ferguson's request for a downward variance. In doing so, the district court suggested Mr. Ferguson's sound background may be reason to vary upwards: "[I]t would seem to me that somebody who offends serially, in spite of having a

presumptively sound family, a supportive family, a good family, who sets a good example, is more likely a candidate for upward variance than for downward variance." (R. 33, Sentencing Hr'g Tr., PageID #391.)And the court dismissed Mr. Ferguson's employment history, stating "[t]o say that he's self-employed in home repairs is basically to say that he's not employed at much of anything, it seems to me." (*Id.*, PageID #392.) In the end, the district court rejected all bases for a downward variance. (*Id.*) In response to the *Bostic* question, defense counsel clarified that Mr. Ferguson's family history and connections were important factors with respect to the risk of recidivism and need for deterrence, but the district court did not alter its position. (*Id.*, PageID #401.)

G. The Implicit Acceptance of the Government's Recommended Upward Variance.

Seeking a twelve-year sentence, the government pointed to eight factors: (1) that Mr. Ferguson sold firearms to an undercover agent; (2) his (arguable) probationary status; (3) that he sold some Vicodin pills to the undercover agent; (4) that he used multiple cell phones; (5) the capacity of the firearms sold; (6) the allegations of Mr. Ferguson's involvement in Mr. Lockett's murder; (7) the claim that Mr. Ferguson's daughter was present during a firearm sale; and (8) that Mr. Ferguson denied selling firearms when DPD officers interviewed him. (*See* R. 33, Sentencing Hr'g Tr., PageID #378–381.) The guidelines addressed points (1),

(2), and (5), (*see* PSR ¶¶ 17–19, 34), and so the only factors the guidelines did not already account for are (3), (6), (7), and (8).

Mr. Ferguson never contested that he made a poor choice and sold pills to the undercover agent. But the prosecutor speculated, claiming that Mr. Ferguson sold firearms while his daughter was present. A young girl was in another car when Mr. Ferguson met with the undercover agent and sold pills, but she was never there when any firearms were exchanged. (PSR ¶ 9; R. 33, Sentencing Hr'g Tr., PageID #400.) Anyway, there is no evidence that the child was his daughter. Nonetheless, the government went further, suggesting (without proof) that Mr. Ferguson's daughter accompanied him during additional unidentified sales. (*See* R. 22, Gov't Sentencing Mem., PageID #58, 72, 76.)

The government made much of the fact that police officers found multiple cell phones in Mr. Ferguson's home, claiming these phones and Mr. Ferguson's use of different phone numbers indicated that he was a sophisticated firearms dealer. (R. 33, Sentencing Hr'g Tr., PageID #379–80.) Yet nothing in the record connected any of the phones found to firearms trafficking. And the government did not explain why switching cell phone numbers qualifies a person as a sophisticated dealer.

Finally, during the sentencing hearing, the government referenced the deterrence benefits of imposing stiff penalties for firearms offenses by discussing a

program initiated in Richmond, Virginia. (R. 33, Sentencing Hr'g Tr., PageID #386–87.) The government provided no documentary support for its claims about the success of the Richmond program. (*See* R. 22, Gov't Sentencing Mem. (failing to reference and corroborate the success of the Richmond program); R. 33, Sentencing Hr'g Tr., PageID #386–87.) Nor did the government offer any reason to believe any such program has benefitted Detroit—a fact defense counsel pointed out. (*See* R. 33, Sentencing Hr'g Tr., PageID #386–87, 400.) Instead, the government relied on its general belief that lengthy sentences effectively deter conduct, despite a large and growing body of research finding the opposite.

When the time case to impose a sentence, the district court implied that this case warranted an upward variance. (*Id.*, PageID #392–93 ("The Government's suggestion about varying upward and pointing out aggravating factors find a better support in the most, for the most part in the record and in the facts.").) Indeed, the only reason the district court did not impose an above-guidelines sentence was because it believed Mr. Ferguson's criminal history was slightly overstated, even if calculated correctly. (*Id.*, PageID #394 ("[Category V is] not in and of itself over-representative of the defendant's criminal history, but it's very close to a Category IV, and on the margin, I am persuaded that it mitigates some, the Government's argument about upward variance."). And so the district court settled for a sentence

at the very top of the recommended guidelines range: 105 months' incarceration. (*Id.*, PageID #396.)

The district court identified the fact that Mr. Ferguson sold firearms as one of the factors for the selected sentence. (*See id.*, PageID #393.) But the other reasons the district court identified had questionable bases in fact. First, the district court believed Mr. Ferguson took "his daughter to work" and had "her in the back seat when [he was] selling guns on the street." (*Id.*) Second, the court believed Mr. Ferguson's criminal history indicated a "troubling trajectory." (*Id.*) With respect to this point, the district court said the following:

> The homicide investigation and the statements of witnesses and so forth indicate a resort to violence, but I am not going to rely upon the statement of a witness in Mr. McKithen's position to make formal determinations of variance.
>
> What I will rely upon is information provided to the police by McKithen before he testified, indicating that he saw a man he recognized to be the defendant with brass knuckles, or what he believed to be brass knuckles used in this attack on the decedent. A mask, he said, was worn. The house was searched. It was the defendant's house. A mask is found. Brass knuckles are found. I mean, the convergence is undeniably relevant. That's not the same as providing information that is sufficient to charge nor convict an individual of homicide, but it's — but they are certainly relevant and potentially powerfully relevant items of evidence that were located.

(*Id.*, PageID #394–95.)

Finally, the district court apparently adhered to the belief that lengthy prison sentences will deter future criminal conduct:

> Deterrence and incapacitation are important factors here. Mr. Ferguson has not learned from previous encounters with courts, possibly because of overly lenient probationary sentences, possibly it's other things, I'm not sure. But it's clear his history reveals increasingly concerning behavior. And he must stop.

(*Id.*, PageID #396.) Not once did the district court mention or offer reason to dispute the studies finding minimal deterrence benefits to long prison sentences.

H. The Nearly Eleven-Year Sentence.

Before the sentencing hearing, Mr. Ferguson's counsel and government counsel filed motions for variances. Mr. Ferguson requested a downward variance from the guidelines he believed to be correct—forty months' imprisonment to be imposed concurrent to the state term of imprisonment Mr. Ferguson was serving for a weapons offense. The government sought the statutory maximum—ten years—consecutive to Mr. Ferguson's two-year state sentence. Essentially, the government suggested Mr. Ferguson should be incarcerated for a total of twelve years, 134 months.

The PSR noted that the district court had discretion to impose a sentence that is concurrent, partially concurrent, or consecutive to Mr. Ferguson's two-year sentence from the state court pursuant to U.S.S.G. § 5G1.3. (PSR ¶ 66.) The government advocated for a fully consecutive sentence. (R. 22, Gov't Sentencing Mem., PageID #71.) Mr. Ferguson requested a concurrent sentence. (R. 26, Def.

Sentencing Mem., PageID #129.)

Yet when the time came for the district court to resolve the consecutive-vs-concurrent question, it offered no explanation. (*See id.*, PageID #390–96.) The district court did not reference § 5G1.3 of the sentencing guidelines, which is supposed to guide district court's discretion. (*See id.*) Nor did the district court even comment on the parties' dispute about this issue. (*See id.*) And not once did the district court address the scientific research about the diminishing returns and deterrent effects of lengthy terms of imprisonment. (*See id.*)

In the end, the district court imposed what effectively amounted to a nearly eleven-year sentence—a sentence that exceeded the proposed guideline range by twenty-two months and the statutory maximum by seven months. (R. 33, Sentencing Hr'g Tr., PageID #396.)

SUMMARY OF THE ARGUMENT

Michael Ferguson is a loving father, son, and brother. He is not a cold-blooded murderer who got away with it even though the state prosecutor believed the evidence was lacking and the state judge said the murder case barely passed the low probable-cause standard. Yet the district court second-guessed both the state prosecutor and the state judge and sentenced Mr. Ferguson as a murderer, imposing a 105-month federal sentence to run consecutively to Mr. Ferguson's undischarged state sentence. In the aggregate, the district court decided Mr. Ferguson should spend nearly eleven years in prison, away from his daughter, mother, siblings, and loved ones.

When imposing this substantively unreasonable sentence, the district court committed numerous procedural errors that also violated due process. In reaching its decision to incarcerate Mr. Ferguson for nearly eleven years, the district court relied on three untrue premises:

(1) Mr. Ferguson had been involved in the murder of Osean Lockett;

(2) That Mr. Ferguson's bare arrest records support the inference that he has acted violently in the past; and

(3) That Mr. Ferguson's daughter accompanied him to firearms sales.

Each of these premises is not supported by sufficient reliable evidence. In

deciding Mr. Ferguson was culpable for the assault and murder of Mr. Lockett, the district court opted to rely on the uncorroborated hearsay statements of an interested witness instead of the witness' sworn testimony. The remaining shaky factual findings have no sound basis in the record and were clearly erroneous.

In addition, the district court calculated Mr. Ferguson's criminal history incorrectly—a prejudicial procedural error. It found that Mr. Ferguson committed the instant offense while he was on probation, when the probationary period had, in fact, ended the day before the first criminal act.

The resulting almost eleven-year sentence was substantively unreasonable. Nothing in the record suggests Mr. Ferguson's conduct and background are such that he should remain in prison significantly longer than the average felon in possession of a firearm.

ARGUMENT

A. Standard of Review

Courts of appeals must vacate a sentence if the district court abused its discretion and imposed an unreasonable sentence. *Gall v. United States*, 552 U.S. 38, 56 (2007). Sentences may be procedurally or substantively unreasonable. *United States v. Houston*, 529 F.3d 743, 753 (6th Cir. 2008). A sentence is procedurally unreasonable if the district court commits a "significant procedural error," such as improperly calculating the guidelines, selecting a sentence based on clearly erroneous facts, failing to consider the factors outlined in 18 U.S.C. § 3553(a) (2012), or providing an inadequate explanation for imposing a particular sentence. *Gall*, 552 U.S. at 51.

Review of preserved challenges to the district court's calculations of the guidelines involves two levels of review. First, the district court's findings of fact are reviewed for clear error. *United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016), *abrogated on other grounds by Beckles v. United States*, 137 S. Ct. 886 (2017). Second, this Court reviews de novo whether specific facts warrant an enhancement under the guidelines. *Id.* All facts supporting application of a guideline enhancement must be supported by a preponderance of the evidence. *United States v. Freeman*, 640 F.3d 180, 188 (6th Cir. 2011) (discussing U.S.S.G.

§ 2K2.1(b)(5)). This Court reviews determinations about the reliability of statements for an abuse of discretion. *United States v. Moncivais*, 492 F.3d 652, 658 (6th Cir. 2007).

To facilitate appellate review of sentencings, the Sixth Circuit requires district courts, at the end of the sentencing hearing, to "ask the parties whether they have any objections to the sentence . . . that have not previously been raised." *United States v. Bostic*, 371 F.3d 865, 872 (6th Cir. 2004). This Court "preserved procedural-reasonableness claims for abuse of discretion." *United States v. Taylor*, 800 F.3d 701, 713 (6th Cir. 2015).

Section 3553(a) guides appellate review of the substantive reasonableness of a sentence. *United States v. Robinson*, 778 F.3d 515, 519 (6th Cir. 2015). "A sentence is substantively reasonable if it is proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary, to comply with the purposes of § 3553(a)." *Id.* (internal quotation marks omitted). A district court's sentence is therefore substantively *un*reasonable if it "selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent § 3553(a) factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Anderson*, 375 F. App'x 445, 447 (6th Cir. 2010) (citing *United States v. Ferguson*, 456 F.3d 660, 664 (6th Cir. 2006)) (internal

quotation marks and alterations omitted). Although a sentence within the advisory guidelines range is presumptively reasonable, a defendant may rebut that presumption. *United States v. Brown*, 579 F.3d 672, 677 (6th Cir. 2009).

Mr. Ferguson preserved all procedural and substantive errors the sentencing court committed, and therefore this Court reviews all claims for abuse of discretion. (R. 33, Sentencing Hr'g Tr., PageID #334–36 (preserving objection to the guidelines calculation); #341–47, #352–58, #368 (objecting to the description of Mr. Lockett's death as based on unreliable information); #398–401 (responding to the *Bostic* question).) This Court gives fresh review to claims that the district court violated due process. *Moncivais*, 492 F.3d at 658.

B. The District Court Did Not Adequately Explain the Reasons to Impose a Consecutive Sentence.

At the sentencing hearing, Mr. Ferguson and the government disagreed vehemently about whether the federal sentence should run concurrently with his undischarged two-year state sentence. District courts have discretion to order a term of imprisonment to run concurrently or consecutively "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." 18 U.S.C. § 3584(a) (2012). "[I]n determining whether the terms imposed are to be ordered to run concurrently or consecutively, [the court] shall consider . . . the factors set forth in section [18 U.S.C. §] 3553(a)." *Id.* § 3584(b).

In accordance with 18 U.S.C. § 3553(a)(4), district courts must also consult the relevant guidelines recommendations and policy statements, such as U.S.S.G. § 5G1.3 (2016), when deciding whether to impose a consecutive or concurrent sentence. *United States v. Berry*, 565 F.3d 332, 342 (6th Cir. 2009).

Although the district court need not address every section § 3553(a) factor, "the record on appeal should show that the district court turned its attention to [the guidelines] and the relevant commentary in its determination of whether to impose a concurrent or consecutive sentence." *United States v. Johnson*, 553 F.3d 990, 998 (6th Cir. 2009) (internal quotation marks omitted). "What the district court may not do is say nothing at all." *United States v. Cochrane*, 702 F.3d 334, 346 (6th Cir. 2012). To facilitate meaningful appellate review of the decision to impose a consecutive or concurrent sentence, "a district court must indicate on the record its rationale, either expressly or by reference to a discussion of relevant considerations contained elsewhere." *Id.* And the complete failure to state reasons for the imposition of a consecutive sentence is an abuse of discretion. *Id.* at 347; *see also United States v. Nikolovski*, 565 F. App'x 397, 403–04 (6th Cir. 2014) (vacating a sentence because the district court did not explain its decision to impose a consecutive sentence, which raised the sentence to twice the maximum guideline range); *United States v. Martin*, 371 F. App'x 602, 604–07 (6th Cir. 2010) (vacating

a sentence and remanding for resentencing because the district court did not provide a thorough explanation for imposing a sentence to run consecutively to a state sentence).

"A challenge to a court's decision to impose a consecutive or a concurrent sentence is not easily classified as 'substantive' or 'procedural'" because the substantive reasonableness of that decision is intertwined with the court's reasoning. *Berry*, 565 F.3d at 342. When the defendant clearly requests that a sentence be imposed concurrently, this Court treats that request as sufficient to preserve any challenge to the district court's decision to impose a consecutive sentence. *See Cochrane*, 702 F.3d at 340, 346–47 (concluding the district court abused its discretion by providing no rationale for imposing a consecutive sentence after the defendant requested a concurrent sentence); *Martin*, 371 F. App'x at 604 ("[G]iven [the defendant's] explicit request for a concurrent sentence, . . . the district court was required to rule explicitly on whether his federal and state sentences were to run concurrently and to provide a more thorough explanation for that ruling.").

The district court offered no explanation whatsoever for why Mr. Ferguson's federal sentence should run consecutively with his state sentence. During the sentencing hearing, the district court did not mention U.S.S.G. § 5G1.3 even once, despite the fact that the government, Mr. Ferguson, and the probation department

each alerted the district court to the issue. (*See* PSR ¶ 66; R. 33, Sentencing Hr'g Tr., PageID #373, 390; R. 26, Def. Sentencing Mem., PageID #129; R. 22, Gov't Sentencing Mem., PageID #60, 71.) Although district courts need not expressly refer to § 5G1.3, such mentions are the most common evidence that a district court has considered the relevant guideline provision. *Martin*, 371 F. App'x at 604–05.

The district court's apparent failure to consider § 5G1.3 and the accompanying commentary is significant. If the district court believed the state felony firearms charges were relevant conduct as defined by U.S.S.G. § 1B1.3 (2016), then the guidelines recommend "adjust[ing] the sentence for any period of imprisonment already served on the undischarged term of imprisonment" if the Bureau of Prisons will not credit such time, and ordering that "the sentence for the instant offense . . . run concurrently to the remainder of the undischarged term of imprisonment." U.S.S.G. § 5G1.3(b)(1)–(2). The commentary for § 5G1.3(b) provides an illustration of how the guideline should apply that is remarkably similar to the facts of Mr. Ferguson's case. *See* U.S.S.G. § 5G1.3 cmt. n.2(D). In contrast, if the district court did not believe that the state offenses constitute relevant conduct, then U.S.S.G. § 5G1.3(d) and corresponding application note 4 should have guided the court's sentencing decision.

But the transcript of the sentencing hearing offers this Court no indication that

the district court even considered these guidelines. This Court is left guessing about whether the district court believed the state firearms offenses were relevant conduct. This omission is particularly troublesome given that the imposition of a consecutive sentence resulted in a sentence that exceeds the statutory maximum penalty by seven months and the top of the guidelines range by twenty-two months. *Cf. Nikolovski*, 565 F. App'x at 404 ("[T]he reasons for imposing a consecutive sentence are particularly important when the effect of imposing a consecutive sentence is to vary so significantly from the advisory guidelines.").

This is not the case where the district court acknowledged its discretion to impose concurrent sentences, as in *Berry*, 565 F.3d at 342–43. Nor did the district court make "*generally* clear the rationale under which it has imposed the consecutive sentence." *Johnson*, 640 F.3d at 208–09. Rather, the only statement the district court made at the sentencing hearing about whether to impose a sentence to run consecutively or concurrently was when it pronounced Mr. Ferguson's sentence. (R. 33, Sentencing Hr'g Tr., PageID #396.) Thus, just as in, *Nikolovski*, 565 F. App'x at 403–04, and *Martin*, 371 F. App'x at 604–07, where district courts offered no explanation for the imposition of consecutive sentences, this Court should vacate Mr. Ferguson's sentence.

C. The District Court Violated Due Process by Relying on Inaccurate and Unreliable Information.

When the district court sentenced Mr. Ferguson to serve nearly eleven years in prison, it relied upon three unsupported, unreliable, and inaccurate conclusions of fact. First, the district court rejected sworn testimony and accepted hearsay to conclude Mr. Ferguson was involved in Mr. Lockett's murder. Second, the court inferred Mr. Ferguson committed violent acts in the past based on a bare arrest record. Third, the district court erroneously believed Mr. Ferguson's daughter was present during the firearms sales. Each of these unsupported facts influenced the district court's ultimate sentence in violation of due process and in contravention of the policy statement found at U.S.S.G. § 6A1.3 (2016).

1. Uncorroborated Double Hearsay.

"While many of the protections, constitutional or otherwise, that guard a criminal defendant's procedural rights at trial have not historically applied at sentencing or to this type of case," the Fifth Amendment's guarantee of due process still has force and effect at sentencing. *United States v. Hamad*, 495 F.3d 241, 247 (6th Cir. 2007). Chief among these rights is a defendant's right to be sentenced based on accurate information. *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Stevens*, 851 F.2d 140, 143 (6th Cir. 1988). Courts of appeals must

vacate a sentence based in part on false or unreliable information. *Stevens*, 851 F.2d at 143; *see also United States v. Jones*, 40 F. App'x 15, 17 (6th Cir. 2002).

To that end, there are limits on a district court's ability to rely on hearsay when determining a sentence. Although the Federal Rules of Evidence do not apply at sentencing hearings, Fed. R. Evid. 1101(d)(3), due process nonetheless requires that hearsay evidence "bear[s] some minimal indicia of reliability." *United States v. Silverman*, 976 F.2d 1502, 1512 (6th Cir. 1992) (en banc); *accord United States v. Bates*, 315 F. App'x 591, 594 (6th Cir. 2009); *Hamad*, 495 F.3d at 247; *Moncivais*, 492 F.3d at 658. Section 6A1.3(a) of the sentencing guidelines expresses the Sentencing Commission's view that any factor in dispute must be supported by sufficient indicia of reliability.

District courts must "rigorously" consider whether the hearsay offered is sufficiently reliable. *United States v. Brothers*, 75 F.3d 845, 848 (3d Cir. 1996). District courts must take extra care to consider whether other evidence corroborates a hearsay statement when the statements could significantly impact a defendant's sentence. *Id.* at 849 (regarding drug quantity); *United States v. Edwards*, 994 F. Supp. 2d 11, 15–21 (D.D.C. 2014), *aff'd sub nom.*, *United States v. Williams*, 827 F.3d 1134 (D.C. Cir. 2016) (when considering whether the defendant participated in a murder).

But the district court did not apply the appropriate level of rigor or find sufficient corroborating evidence when it chose to accept as true the double hearsay statements Mr. McKithen made to the police instead of the sworn testimony he gave that was also subject to cross examination. (R. 33, Sentencing Hr'g Tr., PageID #394–95.) There were only two pieces of corroborating evidence, each of which independently and together are insufficient to connect Mr. Ferguson to Mr. Lockett's murder or an assault. The first allegedly corroborating fact is that Mr. McKithen claimed he saw Mr. Ferguson wearing a black ski mask on the night Mr. Lockett disappeared, and the police found a black mask in Mr. Ferguson's home. (*Id.*) But the district court never even acknowledged that the mask found in Mr. Ferguson's home did not have any blood, fibers, gunpowder residue, or any other forensic evidence linking it to Mr. Lockett's murder. That a man who lives in Detroit, Michigan owns a ski mask that provides warmth during the cold winter months is hardly surprising or indicative of criminal wrongdoing.

Second, the district court relied on Mr. McKithen's claim that the masked man had shiny, chrome brass knuckles in his hand, and the police's recovery of two pairs of brass knuckles in Mr. Ferguson's home. (*Id.*) Again, the district court ignored the complete absence of forensic evidence tying the brass knuckles found in Mr. Ferguson's home to the assault and murder of Mr. Lockett. The district court

also assumed the brass knuckles found in Mr. Ferguson's home matched Mr. McKithen's description of those carried by the masked man. (*See id.*) But the government's evidence showed that the brass knuckles in Mr. Ferguson's home were neither chrome nor shiny. (*See* R. 22-10, Photos, PageID #90.)

The district court also apparently presumed Mr. McKithen was a credible witness without sufficient information to draw that conclusion. Mr. McKithen did not testify at Mr. Ferguson's sentencing hearing, and so the district court could not assess his credibility in person. *Cf. Edwards*, 994 F. Supp. 2d at 20 ("[T]he Court had no opportunity to observe Butler testify and gauge his credibility as to Defendant's alleged admission. Accordingly, the Court finds at most that the evidence as to Defendant's involvement in the 2001 Neal murder is in equipoise."). Moreover, Mr. McKithen's identification was weak. He stated that he believed the masked man was Mr. Ferguson because of the man's "body build," but he did not mention seeing more reliable identifying features, such as tattoos, scars, eye color, voice, or mannerisms. (R. 26-10, Prelim. Hr'g Tr., PageID #222.) Added to this weak identification is the fact that the entire incident took place in the late evening and early morning. (*See id.*, PageID #184.)

Finally, the district court ignored Mr. McKithen's incentives to lie. Mr. McKithen was or could have been a suspect in the investigation of Mr. Lockett's

murder. Mr. Lockett broke into Mr. McKithen's home and was a friend of Mr. Franklin. (*See id.*, PageID #253–56 (defense counsel pointing out the possibility that Mr. McKithen was not truthful because he was a potential suspect).) But the district court never entertained these possibilities and chose, instead, to speculate about why Mr. McKithen's testimony changed. (*See* R. 33, Sentencing Hr'g Tr., PageID #342–43, 347.)

The district court should not have blindly relied on McKithen's hearsay statement contained in a police report. As the Ninth Circuit recently observed, the general rule that "'a codefendant's confession inculpating the accused is inherently unreliable, . . . is equally applicable in the sentencing as in the conviction context." *United States v. Pimentel-Lopez*, 859 F.3d 1134, No. 14-30210, 2016 WL 9076502, at *9 (9th Cir. June 1, 2017), *amending and superseding*, 828 F.3d 1173 (9th Cir. 2016) (quoting *Lee v. Illinois*, 476 U.S. 530, 546 (1986)). This "time-honored teaching" should also be considered and honored when the absent declarant is a suspect. *Cf. id.*

For all these reasons, this case aligns with other cases where courts concluded hearsay statements were insufficiently reliable to use at sentencing. In *Pimentel-Lopez*, the Ninth Circuit concluded the uncorroborated hearsay statements of co-defendants lacked sufficient indicia of reliability to conclude the defendant was a

leader in a conspiracy. *Id.* at *8–9. In *Brothers*, the Third Circuit found that the district court committed clear error and abused its discretion by relying on a hearsay statement that contradicted sworn testimony to find the drug quantity. 75 F.3d at 853. There, the only supposedly corroborating evidence were the facts that (1) the defendant and the declarant had a relationship; and (2) that the defendant had a significant sum of money. *See id.* at 851–53.[1] The Tenth Circuit also has shown deference to a state prosecutor's charging decision to conclude a sentencing court's reliance on uncorroborated hearsay was improper. *See United States v. Fennell*, 65 F.3d 812, 813 (10th Cir. 1995) (holding the state prosecutor's decision to charge the defendant with a misdemeanor, and not a felony, indicated that guidelines enhancement was inappropriate). Finally, in *Edwards*, a district court refused to find the defendant had participated in multiple murders because the hearsay statements proffered by the government contained "layers of hearsay" with insufficient detail about the defendant's involvement. *See* 994 F. Supp. 2d at 18–21.

[1] Mr. Ferguson acknowledges that this Court has been unable to find cases applying the logic of *Brothers* to cases not involving convictions for drug possession. *United States v. Woodard*, 337 F. App'x 534, 540 (6th Cir. 2009). Nonetheless, this Court should turn to *Brothers* for guidance because the district court's conclusions about Mr. Ferguson's alleged participation in Mr. Lockett's murder had an extraordinary impact on the final sentence.

This case presents each one of these flaws. The district court therefore never should have credited Mr. McKithen's hearsay statement or used that statement to impose sentence. In doing so, the district court violated due process. This Court must accordingly vacate Mr. Ferguson's sentence.

2. Bare Arrest Records.

In November 2012, Mr. Ferguson was charged with five counts seemingly arising out of a single incident. (PSR ¶ 29.) Assault with a dangerous weapon and assaulting, resisting, or obstructing a police officer were among the charges filed. (*Id.*) In the end, however, Mr. Ferguson pleaded guilty to only one count of felony firearms possession, and the remaining four charges were dismissed. (*Id.*) The PSR does not contain any facts about why the other four charges were filed or dismissed. (*See id.*) Yet, at the sentencing hearing, the government contended these allegations and the Lockett assault and murder suggest Mr. Ferguson has a history of violent conduct. (*See* R. 33, Sentencing Hr'g Tr., PageID #364.) And the district court appeared to accept this claim when it concluded Mr. Ferguson's criminal history presented a "disturbing" trajectory. (R. 33, Sentencing Hr'g Tr., PageID #367.)

The district court's apparent use of a bare arrest record does not, however, comport with due process. All facts considered at sentencing must be proved by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 156 (1997)

(per curiam). "[A]n arrest, without more, is quite consistent with innocence," and therefore insufficient to establish any facts by a preponderance of the evidence. *United States v. Johnson*, 648 F.3d 273, 277–78 (5th Cir. 2011) (internal quotation marks omitted). The Sentencing Commission has acknowledged the unreliability of an arrest record by prohibiting sentencing courts from considering "[a] prior arrest record itself . . . for purposes of an upward departure." U.S.S.G. § 4A1.3(a)(3) (2016). Relying on this provision, the Sixth Circuit has limited sentencing courts' use of arrests to depart upward to circumstances when the PSR provides specific details about the arrest and ultimate disposition. *United States v. Matheny*, 450 F.3d 633, 642 (6th Cir. 2006).

The Third and Fifth Circuits have taken an appropriately strong stance against the use of arrest records for any purpose. They both did so based on the knowledge that "arrest happens to the innocent as well as the guilty," and therefore bare arrest records provide insufficient proof of guilt. *United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) (internal quotation marks omitted); *Johnson*, 648 F.3d at 277–78. But the Third Circuit offered an additional compelling reason to eschew any consideration of a person's arrest record: the need to avoid unwarranted sentencing disparities. In particular, numerous studies, research, and commentary have noted that police are more likely to arrest people who live in impoverished neighborhood

than those who live in affluent ones. *See Berry*, 553 F.3d at 285 (citing Barbara Bennett Woodhouse, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DePaul L. Rev. 743 (2002); Jane W. Gibson–Carpenter & James E. Carpenter, *Race, Poverty, and Justice: Looking Where the Streetlight Shines*, 3–SPG Kan. J.L. & Pub. Pol'y 99, 101 (1994)). For that reason, "[a] record of a prior arrest may . . . be as suggestive of a defendant's demographics as his/her potential for recidivism or his/her past criminality." *Id.* In *United States v. Mateo-Medina*, 845 F.3d 546, 552–53 (3d Cir. 2017), the Third Circuit found subsequent studies that reinforced this fear. In particular, the court was persuaded by a report by The Sentencing Project, which found that "police are more likely to stop, and arrest, people of color due to implicit bias." *Id.* at 553. This report gave additional weight to its concern about the undesirable consequences of using arrest records as evidence of criminality. *Id.*

A prosecutor's decision not to file charges after an arrest or to dismiss any filed charges provides no information about the events leading to the events. The district court's apparent conclusion that Mr. Ferguson had engaged in violent conduct in the past was unsupported by the preponderance of the evidence, and therefore it could not form the basis of any portion of Mr. Ferguson's sentence.

3. Daughter's Presence.

Before and during the sentencing hearing, the prosecutor repeatedly claimed that Mr. Ferguson's daughter accompanied him to sell firearms to an undercover agent. (R. 22, Gov't Sentencing Mem., PageID #71; R. 33, Sentencing Hr'g Tr., PageID #380–81.) The government even suggested Mr. Ferguson took his daughter to multiple firearms sales despite the dearth of any evidence to support that claim. (R. 22, Gov't Sentencing Mem., PageID #58.) Yet the only instance the government could cite in support of this claim was the fact that a young girl was in another car when Mr. Ferguson sold the undercover agent pills. (PSR ¶ 9.) Nonetheless, the district court referenced Mr. Ferguson's supposed tendency to take his daughter to dangerous gun sales as a reason to impose a lengthy sentence. (R. 33, Sentencing Hr'g Tr., PageID #393.)

The record provides no clue about whether this factual distinction would have made a difference to this district judge. But any sentence the district court imposes must be based on accurate information, and therefore a remand for resentencing is necessary. *Stevens*, 851 F.2d at 143.

D. The District Court Erred by Finding Mr. Ferguson Was on Parole at the Time of the Offense.

In accordance with the probation department's recommendation, the district court added two points to Mr. Ferguson's total criminal history, relying on U.S.S.G.

§ 4A1.1(d). (R. 33, Sentencing Hr'g Tr., PageID #338.) It should not have done so because Mr. Ferguson was not on probation at the time of the offense, and no reliable evidence supports the conclusion that the engaged in relevant conduct before his term of probation expired.

That provision requires adding two points "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." *Id.* The commentary clarifies that if any "relevant conduct." U.S.S.G. § 4A1.1(d) cmt. n.4. Section 1B1.3(a)(1) defines "relevant conduct" as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."

Mr. Ferguson's term of probation expired on May 18, 2016. (*See* PSR ¶ 30.) For unknown reasons, Mr. Ferguson's court file was not officially closed until May 20. (*See id.*) Despite this fact, the district court added the two points because an unidentified confidential informant told the undercover officer he could buy firearms from "Mike." (*Id.*; R. 33, Sentencing Hr'g Tr., PageID #337–38.) The district judge even acknowledged the source of this information was speculative, but nonetheless

concluded Mr. Ferguson engaged in relevant conduct while on probation—an equally speculative assumption. (R. 33, Sentencing Hr'g Tr., PageID #337–38.) The PSR provided no information about the reliability of the confidential informant or why he or she believed Mr. Ferguson sold firearms. (*See id.*) Thus, there was no reliable evidence that he committed any part of the offense while on probation, and the district court calculated the guidelines incorrectly. Properly calculated, the recommended guidelines range is 70–87 months.

E. Mr. Ferguson's Nearly Eleven-Year Sentence is Substantively Unreasonable.

Mr. Ferguson admits that he possessed and sold firearms. He committed a crime. But an almost eleven-year sentence is wholly disproportionate when one considers the accurate information available about Mr. Ferguson's history and characteristics and the nature of the offense. The sentence the district court imposed is well above the national average sentence for § 922(g) offenses—seventy-two months. *See* U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of Firearms* (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY15.pdf. The facts of this case simply do not warrant an exceptional above-average sentence.

Although the district court technically fashioned this sentence as one within the recommended guidelines range, it effectively sentenced Mr. Ferguson to spend twenty-two months longer in custody than the sentencing guidelines recommend.

Many of the reasons the district court mentioned are factors the guidelines already take into consideration. Thus, there was nothing extraordinary about this case to justify such an extraordinarily long sentence. One such factor mentioned at the hearing was Mr. Ferguson's possession of high-capacity firearms. (R. 33, Sentencing Hr'g Tr., PageID #364, #380, #382.) Section 2K2.1(a)(4)(B)(i)(I) already provides that the base level for this offense is 20, which is at the midpoint of the possible base levels available for this offense. The district court also suggested the trafficking of firearms further supported a lengthy sentence—and even a sentence above the guidelines range. (R. 33, Sentencing Hr'g Tr., PageID #392–93.) But § 2K2.1(b)(5) recommends a four-level upward adjustment for those who traffic firearms. Section 2K2.1(b)(1)(A) further counsels adding two levels if the defendant sold at least three, but not more than seven, firearms. Mr. Ferguson's total offense level took each of these factors into account, and therefore these facts alone are not so extraordinary to warrant a sentence above the statutory maximum.

All other aggravating factors the district court discussed—the Lockett murder, the presence of his daughter during sales, and a violent criminal passed—were based on erroneous beliefs or unreliable facts, as discussed above.

When the district court turned to the question of deterrence, it expressed the view that lengthy sentences, rather than short or probationary sentences, are necessary to deter criminal conduct. (R. 33, Sentencing Hr'g Tr., PageID #396.) It never addressed the growing body of research finding the opposite to be true. In doing so, it imposed a substantively unreasonable sentence.

To make matters worse, when the time came to consider Mr. Ferguson's positive attributes, the district court gave them short shrift for impermissible reasons. It rejected the idea that Mr. Ferguson's stable, loving family and the relationship he has with his daughter mitigated any need to impose a lengthy sentence. Reasoning that federal public defenders "consistently point to the lack of family guidance, troubled childhood as a reason to mitigate sentence," the court said Mr. Ferguson's good family may be reason to vary upward. (*Id.*, PageID #391–92.) Thus, the district court set up a dichotomy where a troubled upbringing is a mitigating factor, and a healthy home life is an aggravating factor. That rigid framework flies in the face of the Supreme Court's and Congress' insistence that sentencing courts "consider every convicted person as an individual and every case as a unique study

in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). Instead of doing that, the district court placed Mr. Ferguson into one of these two oversimplified categories, while ignoring the valid reasons to consider a supportive family a plus factor. The district court was wrong to reject Mr. Ferguson's mitigation evidence and to ignore the negative impact lengthy terms of imprisonment have on families and communities.

"Additional months in prison are not simply numbers. Those months have exceptionally severe consequences for the incarcerated individual. They also have consequences both for society which bears the direct and indirect costs of incarceration and for the administration of justice . . . ." *United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017) (footnote omitted). For the other reasons discussed throughout this brief, the nearly eleven-year sentence imposed is substantively unreasonable and must be vacated.

CONCLUSION

This Court should vacate Mr. Ferguson's sentence and remand to the district court for resentencing because his nearly eleven-year sentence is procedurally and substantively unreasonable.

Respectfully submitted,

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Dated: July 12, 2017

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains fewer than 13,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief contains 10,709 words.

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CERTIFICATE OF SERVICE

I certify that on July 12, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification to opposing counsel of record.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Mr. Ferguson designates the following filings in the District Court's record as relevant documents:

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A-4
Appellant's Reply Brief, United States v. Ferguson,
No. 17-1176 (APP 078)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

_____

No. 17-1176

_____

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL HOWARD FERGUSON,

Defendant-Appellant.

_____

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
No. 16-CR-20535

_____

APPELLANT'S REPLY BRIEF

_____

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ARGUMENT

A. The district court used unreliable information to sentence Mr. Ferguson.

The government contends the district court did not violate due process and offers a variety of excuses for the inadequacies and inaccuracies in the record. Four points warrant addressing. First, the government equates use of acquitted conduct (which may still be reliable) with use of uncorroborated hearsay (which is not reliable). Second, the government insists the district judge did not rely on Mr. McKithen's hearsay statement contained in a police report when, in fact, he expressly did. Third, the government's attempt to mitigate the district court's reliance on a bare arrest record is unavailing. Finally, the government continues to misrepresent the facts in the record. That pattern further bolsters Mr. Ferguson's concern about the district court's use of unreliable information to settle on an appropriate sentence.

1. There is significant difference between a district court's decision to use acquitted conduct at sentencing and to rely on uncorroborated hearsay.

The Supreme Court has explained that sentencing judges may use a defendant's acquitted conduct when fashioning an appropriate sentence. *United States v. Watts*, 519 U.S. 633, 156 (1997) (per curiam). This practice does not offend due process because an acquittal is not a finding of fact, and therefore has no

preclusive effect. *Id.* at 155.[1] To use acquitted conduct at sentencing, however, the record still must support a finding that the defendant committed such conduct by a preponderance of the record. *Id.* at 157.

But the logic underlying *Watts* does not extend to cases where the evidence barely supports a finding of probable cause. The "finely tuned standard[]" of proof "by a preponderance of the evidence" is quite different from the standard for probable cause. *Florida v. Harris*, 568 U.S. 237, 243–44 (2013) (internal quotation marks omitted). Probable cause is only a "fair probability on which reasonable and prudent people, not legal technicians, act." *Id.* at 244 (internal quotation marks and alteration omitted). Indeed, the First Circuit expressly rejected an attempt to equate "probable cause" to the "preponderance of the evidence" standard of proof. *United States v. Melvin*, 596 F.2d 492, 495 (1st Cir. 1979). The government cannot use *Watts* or its underlying logic to condone the district court's conduct here.

2. The district court expressly relied on the "information provided to the police by McKithen before he testified."

Hearsay—particularly uncorroborated hearsay—is presumptively unreliable. Indeed, the whole theory of the rule against hearsay is that there are too many

[1] This is why a criminal jury can acquit O.J. Simpson of first-degree murder, and a civil jury can hear the same evidence and find him liable for the murders by a preponderance of the evidence.

possible "'sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness." *Idaho v. Wright*, 497 U.S. 805, 819 (1990) (quoting 5 J. Wigmore, Evidence § 1420, p. 251 (J. Chadbourn rev. 1974)). For that reason, they are "presumptively unreliable." *Id.* at 823. Thus, although sentencing courts may rely on hearsay, such evidence should be treated delicately. *See United States v. Brothers*, 75 F.3d 845, 848 (3d Cir. 1996).

What makes the district court's decision to credit Mr. McKithen's statements to the police all the more troubling is the fact that he disowned them once he was under oath and subject to cross-examination. (R. 33, Sentencing Hr'g Tr., PageID #394.) The government attempts to mitigate the harm in this by quoting the district court's statement that it would not "rely upon the statement of a witness in [Mr. McKithen's] position to make formal determinations of variance." (Appellee Br. at 9 (quoting R. 33, Sentencing Hr'g Tr., PageID #394).) But the government ignores the very next statement the district court made: "What I will rely upon is information provided to the police by McKithen before he testified . . . ." (R. 33, Sentencing Hr'g Tr., PageID #394.) The record is therefore quite clear that the district court, in fact, relied on hearsay to make a sentencing determination.

Finally, the government maintains that there was sufficiently strong corroborating evidence in the record to support the district court's conclusion that

Mr. McKithen's hearsay statement was reliable. All the evidence district court had to look at were two documents: the report that a ski mask was found in Mr. Ferguson's house and a photo of brass knuckles that are neither shiny nor chrome. The record just does not support the district court's conclusion that this evidence was sufficiently corroborative.[2]

3. The "troubling trajectory" of Mr. Ferguson's criminal history is related to the unreliable information contained in his bare arrest records and the murder investigation.

The seriousness of Mr. Ferguson's criminal history was a significant focus of the sentencing hearing. At various times in the proceeding, the district court made reference to Mr. Ferguson's "criminal trajectory," which was simply another way to say his history of convictions and arrests. (R. 33, Sentencing Hr'g Tr., PageID #395.) Indeed, that precise expression followed the district court's acknowledgement that there was not enough evidence to convict Mr. Ferguson for murder, showing that the district court believed arrest records and dismissed charges

[2] The government claims this argument is subject to plain-error review and complains that it did not have an opportunity to include a better photo. Further, the government inappropriately contends it has a photo that is better corroborating evidence than the one it selected to submit at the sentencing hearing. (Appellee Br. at 14 n.1.) The government's attempt to supplement the record on appeal is completely improper. This is not a situation where the error is invisible on appeal. *See United States v. Caldwell*, 518 F.3d 426, 431 (6th Cir. 2008). Rather the supposedly corroborating evidence was invisible to the district court, and yet the district court made an unsupported conclusion in any event.

were "powerful evidence" of a tendency for violence. (*Id.*) In another instance when the court used the same expression, it said there was at least "one report" that Mr. Ferguson's conduct "erupted into the actuality of violence." (*Id.*, PageID #367.) Thus, the record reveals that the district court used arrest records and dismissed conduct to fashion a sentence.

In addition, the government argues that the prohibition on using bare arrest records at sentencing only applies when the district court grants an upward variance. (Appellee Br. at 15 (citing *United States v. Matheny*, 450 F.3d 633, 642 (6th Cir. 2006); *United States v. Johnson*, 648 F.3d 273, 277–78 (5th Cir. 2011).) That simply is not true. Although *Matheny* court discussed U.S.S.G. § 4A1.3(a)(3), which relates to departures from the guidelines, it never drew any distinction between the use of bare arrest records to support an upward variance and such use to support a sentence within the Guidelines. *See* 450 F.3d at 642–43. Moreover, in *Johnson*, the Fifth Circuit made plain that its concern about reliance on bare arrest records is grounded in due process. *See* 648 F.3d at 278 ("[W]e now hold that for a non-Guidelines sentence, just as for a Guidelines sentence, it is error for a district court to consider a defendant's 'bare arrest record' at sentencing."). Bare arrest records lack sufficient indicia of reliability for use at sentencing hearings, and thus the district court's reliance upon them was wrong.

Finally, the government suggests that its reference to and the district court's reliance on Mr. Ferguson's arrest records was appropriate because defense counsel somehow invited it. (Appellee Br. at 15 n.2.) Defense counsel remarked that Mr. Ferguson's criminal history was overstated because the conduct covered by his *convictions* did not harm other people. (R. 33, Sentencing Hr'g Tr., PageID #362.) The difference between convicted conduct and alleged conduct underlying an arrest or charge is apparent: one indicates sufficient proof the conduct occurred; the other "is quite consistent with innocence." *See Johnson*, 648 F.3d at 277–78.

4. The district court accepted the government's inaccurate statements of fact.

The most obvious misstatement of fact the government made and the district court accepted is that Mr. Ferguson brought his daughter to firearms sales. That finding of fact featured prominently in the district court's questioning and discussion of the sentencing factors. (*See* R. 33, Sentencing Hr'g Tr., PageID #380–81, 384, 388, 393.) Yet there is no evidence in the record that the child in a different car during the sale of pills was *his* daughter. There is also no evidence in the record that even hints that Mr. Ferguson took his daughter to multiple sales.

The government insists there is no difference between a gun sale and a drug sale. (*See* Appellee Br. at 16.) Perhaps a district court could draw that conclusion. But serious due-process concerns arise when a district court is laboring under a

number of misimpressions about what a defendant actually did, as the district court did here. For example, when stressing the importance of this fact, the government speculated about the "vigilante justice" that might ensue during "$750 sale" with firearms present. (R. 33, Sentencing Hr'g Tr., PageID #388.) But not one of Mr. Ferguson's sales were for that sum of money. (PSR ¶¶ 8–11.) And there is no evidence that any firearms were present during the sale of pills. (PSR ¶ 9.) At the end of the day, these differences between fact and fiction may not have had any effect the district court's judgment. What matters, however, is that the district court make that judgment with *accurate* information.[3] *See Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Stevens*, 851 F.2d 140, 143 (6th Cir. 1988).

B. This Court should vacate and remand Mr. Ferguson's case for resentencing because the district court failed to provide any reason to impose a consecutive sentence.

The government insists the district court's failure to state any reason for the imposition of a consecutive sentence is not plain error. It also contends the district

[3] Although this fact is not relevant to resolution of this appeal, the government's additional misstatements of fact on appeal warrant a response. The government claims that Mr. Ferguson advised the undercover officer where to buy firearms without having to register. (Appellee Br. at 2.) In fact, that conversation was about where the officer could go to a firing range without having to disclose felon status. (R. 22, Gov't Sentencing Mem. Ex. A.) Perhaps a judge or this Court views both actions as equally reprehensible. But the district court and this Court should have an accurate picture of what actually happened.

court's discussion of the 18 U.S.C. § 3553(a) (2012) factors was sufficient to satisfy the procedural requirement that district courts explain why a consecutive sentence is appropriate. Each argument is unpersuasive.

1. *The district court's failure to offer any reason to impose a consecutive sentence is reversible plain error.*[4]

At the end of the day, the standard of review matters little in this case because the district court's failure to offer any reason for the imposition of a consecutive sentence was plain error. This Court must vacate and remand for resentencing when the district court committed an error, i.e., "some sort of deviation from a legal rule," that was "clear or obvious." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (internal quotation marks and alteration omitted). In cases where the error "affected the appellant's substantial rights," courts of appeals have discretion to remedy the

[4] Mr. Ferguson's opening brief explains why abuse of discretion is the proper standard of review. (Appellant Br. at 33.) He raised the issue of concurrent sentences before and at the sentencing hearing. Defense counsel's reference to credit for time served in the custody of the Michigan Department of Corrections ("MDOC") was clearly a reference to the question of concurrent or consecutive sentences. (R. 33, Sentencing Hr'g Tr., PageID #376.) Nonetheless, he acknowledges *United States v. Harmon*, 607 F.3d 233, 237–38 (6th Cir. 2010), requires counsel to object to inadequate explanations to avoid plain-error review. *Harmon* draws a distinction, however, between this court's review of an inadequate explanation for a concurrent sentence and the substantive reasonableness of the sentence. *Id.* at 238. In these circumstances, this Court must should review the district court's choice to impose consecutive sentences for an abuse of discretion. *Id.*

error "if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks and alteration omitted).

A district court's utter failure to offer any reason for imposing a consecutive sentence is not only an error, it is an obvious one. The Sixth Circuit has been emphatic on this point: "When deciding to impose consecutive sentences, . . . a district court must indicate on the record its rationale, either expressly or by reference to a discussion of relevant considerations contained elsewhere." *United States v. Cochrane*, 702 F.3d 334, 346 (6th Cir. 2012).

In slightly different circumstances, this Court's guidance to district courts has been similarly direct. If a judge imposes a sentence above the advisory guideline range, 18 U.S.C. §3553 (c)(2) demands that district courts provide "specific reasons for an upward departure or variance at the time of sentencing or in the written judgment and commitment order." *United States v. Blackie*, 548 F.3d 395, 402–02 (6th Cir. 2008). Even when the district court imposes a sentence within the recommended guidelines range, 18 U.S.C. § 3553(c)(1) mandates that when either party presents nonfrivolous arguments for or against a sentence, "[a] district judge 'must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.'" *United States v. Wallace*, 597 F.3d 794, 804 (6th Cir. 2010) (quoting *Gall v. United States*, 552 U.S. 38, 50

(2007)). That a district judge must provide a reason—any reason allowed by § 3555(a)—for imposing a consecutive sentence is clear.

Turning to the question whether the district judge's failure to provide any reason to compel Mr. Ferguson to serve a consecutive sentence affected his substantial rights, this Court has provided an answer. In *Blackie*, this court held that "[d]efendants have a right to meaningful appellate review of their sentences and § 3553(c) facilitates such a review by requiring district courts to state its specific reasons for imposing a particular sentence." 548 F.3d at 402. The right to meaningful appellate review is a substantial right regardless of whether the ultimate sentence is within the guidelines, above the guidelines, consecutive, or concurrent. *Wallace*, 597 F.3d at 807. And "the right to meaningful appellate review necessarily encompasses another right: the right to be sentenced pursuant to § 3553(c)," meaning "a record for appeal that adequately discloses the judge's reasons for sentencing a defendant." *United States v. Cabrera*, 811 F.3d 801, 813 (6th Cir. 2016).

"Without this requirement, the right to meaningful appellate review is, put simply, not meaningful." *Id.* There must, after all, be some way for an appellate court to decide if the reasons for imposing a consecutive sentence are permissible. *See id.* 18 U.S.C. § 3584(b) (2012) requires district courts to consider "the factors

set forth in section § 3553(a)" when deciding "whether the terms imposed are to be ordered to run concurrently or consecutively" so that appellate courts can decide whether the reasons for the imposition of the sentence are permissible. *Cf. Cabrera*, 811 F.3d at 813.

The "final plain-error step is straightforward: failure to comply with § 3553(c) affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 814. The requirement that judges state their reasons for imposing a consecutive sentence—particularly one that pushes the total term of imprisonment above the statutory maximum penalty—is "sound judicial practice." *Rita v. United States*, 551 U.S. 338, 356 (2007). "Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates trust." *Id.* "Compliance with § 3553(c) thus promotes the perception of fair sentencing," and the failure to state reasons for a sentence "undermine[s] that perception." *Cabrera*, 811 F.3d at 814 (internal quotation marks and alteration omitted). Because the district court plainly erred, this Court must vacate Mr. Ferguson's nearly eleven-year sentence.

2. The district court's discussion of the § 3553(a) factors did not provide any information about why a consecutive sentence is appropriate in this case.

The government contends the district judge's discussion of the § 3553(a)

factors was sufficient to inform Mr. Ferguson and the public of why he believed the federal sentence should run consecutively to the state sentence. (*See* Appellee Br. at 21.) True, in *United States v. Williams*, 664 F. App'x 517, 520–21 (6th Cir. 2016), this Court acknowledged that some panels "have held that considering the § 3553(a) factors alone suffices to support the decision to impose a consecutive sentence, and that a district court need not repeat the § 3553(a) analysis it conducted when setting the sentence for the underlying offense." *Id.* (citing *United States v. Berry*, 565 F.3d 332, 343 (6th Cir. 2009)). This case is markedly different, however, from both *Williams* and *Berry*. In *Berry*, the district court acknowledged that the PSR recommended the imposition of a consecutive sentence and referenced the U.S.S.G. § 5G1.3 guideline (if not by name). 565 F.3d at 342–43. The district court further explained that it did not see any reason to deviate from the Guidelines' recommendations, and so its failure to offer any other explanation for the imposition of consecutive sentences was unnecessary. *Id.* In *Williams*, "[a]lthough the district court made no mention of § 5G1.3, it gave a clear rationale for its decision and its analysis was consistent with the Guidelines' advice on whether to impose a concurrent sentence." 664 F. App'x at 521. The state convictions were clearly unrelated to the federal conviction, and so the district court's failure to explain why it chose to impose consecutive sentences fell in line with the Guidelines' advice. *Id.*

The same cannot be said in Mr. Ferguson's case. The words "consecutive" and "consecutively" appear only twice in the eighty-five page transcript of the sentencing hearing. (R. 33, Sentencing Hr'g Tr., PageID #390, 396.) The first instance was when the government addressed "the MDOC custody issue." (*Id.*, PageID #390.) The second instance was when the district judge imposed sentence. (*Id.*, PageID #396.) The district court did not offer any explanation whatsoever for a consecutive sentence, reference § 5G1.3, or even acknowledge that he had the discretion to choose one or the other. (*See id.*, PageID #390–96.) Nor did the PSR take any position on whether the federal and state terms should be served consecutively or concurrently. (PSR ¶ 65.) Thus, when the district court evaluated whether the Guidelines' recommendation adequately serves § 3553(a)'s purposes, it did not incorporate any portion of the § 5G1.3 analysis.

Moreover, the record provides no indication about whether the district court believed Mr. Ferguson's state weapons conviction was relevant conduct for the purposes of this offense. Although the government claims there was an express agreement on that subject, (Appellee Br. at 22), the record does not bear out that contention. The investigation into Osean Lockett's death was the subject of considerable discussion at the sentencing hearing. The government's sentencing presentation focused extensively on the allegations that Mr. Ferguson was involved.

But the government now claims that investigation and the disputed facts underlying are completely unrelated to Mr. Ferguson's federal weapons offense. In short, the government wants to eat its cake and have it too.[5] At the end of the day, nobody knows whether the district court treated the murder investigation as relevant conduct because it did not say anything about its decision to impose a consecutive sentence. Its failure to do so was plain error that affected Mr. Ferguson's substantial rights and undermined the fairness and integrity of the proceeding. A remand and resentencing are necessary.

C. The § 3553(a) factors do not justify a nearly eleven-year sentence.

Sentences within the recommended guidelines range can be substantively unreasonable. *United States v. Jenkins*, 854 F.3d 181, 188 (2d Cir. 2017). "[E]very Guidelines sentence is limited by § 3553(a)'s 'parsimony clause,' which instructs a district court to impose a sentence 'sufficient, but not greater than necessary,' to achieve § 3553(a)(2)'s goals." *Id.* at 190. This sentence does not achieve those goals.

The government continues to believe this case is out of the ordinary. It is not. To the extent it differs from the run-of-the-mill felon-in-possession case, the

[5] The government has made plain its belief that the murder investigation is or could be relevant conduct by claiming that "the items found at Ferguson's home" are among the reasons it sought an upward variance. (Appellee Br. at 13.)

Guidelines account for those differences by ratcheting up the starting point for Mr. Ferguson's sentence. The government resists this conclusion by pointing to "the frequency" of sales, the high capacity firearms, "efforts to avoid law enforcement protection," and "lies to law enforcement." (Appellee Br. at 13.)

But neither the district court nor the government ever explained why the facts of this case are so different from any other case. The Guidelines account for the number of sales (which were not unusually frequent) and the type of firearms sold. *See* U.S.S.G §§ 2K2.1(a)(4)(B)(i)(I) (2016); *id.* § 2K2.1(b)(5). Although the Guidelines also account for the willful obstruction of justice, U.S.S.G. § 3C1.1, they specifically exempt "making false statements, not under oath, to law enforcement officers," U.S.S.G. § 3C1.1 cmt. 5(G). "The upshot is that a lie to an investigator by itself does not usually warrant an enhancement unless it substantially interferes with the government's investigation." *United States v. Brown*, 857 F.3d 334, 341 (6th Cir. 2017). Essentially, the Sentencing Commission wisely concluded that many people lie to the police, and such common conduct does not justify extra punishment. The probation department rightly concluded no such enhancement should apply in this case. And there is nothing in the record to suggest Mr. Ferguson's reactionary lie about not selling guns warrants a high sentence. Finally, there is nothing unusual about a person trying to avoid detection when engaging in criminal conduct; that is

just what people do.

Nothing about this case suggests just punishment for Mr. Ferguson's crime is nearly eleven years in prison. *Cf. Jenkins*, 854 F.3d at 192 (noting that facts true in every child-pornography case do not warrant sentences near the top of the Guidelines). Nor do the facts of this case suggest that Mr. Ferguson's total sentence should exceed the statutory maximum when he is not "the worst of the worst." *Cf. id.* at 192–93 ("District courts should generally reserve sentences at or near the statutory maximum for the worst offenders.").

D. This Court does not review Mr. Ferguson's challenge to the guideline calculation for plain error.

The government writes that the district court's determination that a two criminal history points should be assessed for committing the instant offense while on parole "was not plainly erroneous." (Appellee Br. at 25.) If the government is arguing that this Court should review this dispute for plain error, it is incorrect. Mr. Ferguson raised this very Guidelines issue before the sentencing hearing in objections, in the sentencing memorandum filed with the court, and at the sentencing hearing. (R. 26, Def. Sentencing Mem., PageID #123; R. 33, Sentencing Hr'g Tr., PageID #334–36 (preserving objection to the guidelines calculation). The issue is preserved.

CONCLUSION

This Court should vacate Mr. Ferguson's sentence and remand to the district court for resentencing because his nearly eleven-year sentence is procedurally and substantively unreasonable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains fewer than 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief contains no more than 4,369 words.

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CERTIFICATE OF SERVICE

I certify that on August 24, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification to opposing counsel of record.

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Dated: August 24, 2017

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Mr. Ferguson designates the following filings in the District Court's record as relevant documents:

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33	Sentencing Hearing Transcript	334–36, 362, 367, 376, 380–81, 384, 388, 390–96

A-5
Sentencing Transcript, United States v. Ferguson No. 16-cr-20535 (Feb. 7, 2017) (APP102)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, **Case No. 16-20535**

-v-

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

SENTENCING HEARING

BEFORE THE HONORABLE **ROBERT H. CLELAND**
United States District Judge
Federal Building
526 Water Street
Port Huron, Michigan
February 7, 2017

APPEARANCES:

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Proceedings produced by mechanical stenography.
Transcript produced by computer-aided Transcription.

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Port Huron, Michigan
February 7, 2017
11:06 a.m.

(Call to Order of the Court; all parties present.)

* * *

THE CLERK: Now calling case No. 16-20535. The United States of America vs. Michael Howard Ferguson.

Counsel for parties, please state your appearance for the record.

MS. RUSSO: Forgive me, your Honor. April Russo on behalf of the United States. With me at counsel table, Megan O'Connor, a paralegal with our office, and ATF Mark Jackson.

MS. ROBINSON: Good morning, your Honor. Brandy Robinson on behalf of Mr. Ferguson.

THE COURT: You may be seated. Thank you.

The matter is before the Court for sentencing. There is a presentence report that's been prepared and the probation officer is also present in court, we should note, Ms. Connolly, the author of the report. The report is drawing some objections which need to be resolved before we go any further. Also there's a motion for variance/departure by the Government, and motion for variance or departure by the defendant. So those need to be discussed, or an opportunity given for discussion, possible resolution before we impose sentence as well.

The first objection unresolved is by the defendant. The Government's objection -- did pose objections but they were accepted and resolved, contrary to the drift that the defendant would have sought, but the probation officer concurred with the Government's position in both these instances.

I suppose we should take the Government -- the defendant's response to those Government objections as being the equivalent of a defendant's objection, Ms. Robinson. So if you'd like to comment further, I suppose you may.

The first Government objection was as to the base offense level, the high capacity firearm, two 17-round magazines were found. And you pose a response to that, I guess you agreed, doesn't it, now that I read it. I think you say the defense would agree that the proper offense level is 20, assuming that the firearm was accompanied by 17-round magazines, which apparently it was, right?

MS. ROBINSON: Your Honor, is it okay for me to address the Court from the table or do you prefer the lectern?

THE COURT: From the table is fine. You have your electronic information. Yeah, probably would be a good idea stand up, though. Thank you.

MS. ROBINSON: So your Honor, yes, we understand that one of the weapons, a 9 millimeter in particular was conveyed along with two magazines that had the capacity to carry 17 rounds of ammunition. And by that definition under the

guidelines, it would meet the definition of a high capacity magazine, and therefore, the offense level of 20 would be appropriate.

THE COURT: And so the Government's objection was sound and the Probation Department's report is correct in that regard, right?

MS. ROBINSON: Yes, your Honor.

THE COURT: Okay. So stated.

The second Government objection is as to the adjusted offense level, four levels, trafficking in firearms. And you had a corresponding response to that suggesting that the defendant's serial sale of firearms did not qualify as trafficking because what?

MS. ROBINSON: Your Honor, the way the Government posed this objection to the presentence report was on grounds that the sale, essentially that the guidelines should be scored because Mr. Ferguson was involved in the trafficking of firearms, and they went forward and explained that there is no need under that enhancement for there to be any evidence that an individual who is selling a firearm know that a person has been convicted of any particular type of crime.

And our response to that objection is supported by the language of the guideline which require that in the finding of prohibited person, and this is application note -- I think I may have misstated in my response, but it's application note --

one moment, please. It's application note 13 to subsection (b)(5). And what it says is that in subsection (b) --

THE COURT: (2)(b)?

MS. ROBINSON: I'm sorry?

THE COURT: That's not section (2)(b)?

MS. ROBINSON: So it's 2K2.1.

THE COURT: 2K.

MS. ROBINSON: 2.1 and then subsection (b). And then the enhancement applies as subsection (5) of subsection (b). So it says the defendant engaged in the trafficking of firearms increase by four levels.

When you turn to the application note that appears at number 13, it says that subsection (b)(5) applies, if the defendant, and if you go to subsection (2), it says the defendant knew or had reason to believe that such conduct will result in the transfer, transfer or disposal of a firearm to an individual whose possession or receipt of the firearm would be unlawful or who intended to use or dispose of the firearm unlawfully.

Their characterization was that there was no requirement that in meeting that first prong, that a person whose possession or receipt of the firearm would be unlawful, that there be no requirement essentially that that person be convicted of particular crimes, and that is just inconsistent with the language of the application note under subsection (b)

--

THE COURT: Where does the application note speak to the knowledge of a particular criminal status and so forth?

MS. ROBINSON: And so application note 13 has two provisions, or actually multiple provisions, A through D. But subsection (B) of that application note, it defines an individual whose possession or receipt of the firearm would be unlawful.

And it says there that this language is meant to refer to an individual who, number one, has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence, or number two, at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. And then it goes on to give additional language that isn't pertinent.

Our point simply is that there is no evidence in this case that Mr. Ferguson knew or had reason to believe that the person to whom he was transferring it had any of those particular convictions and the language is specific, we can't just ignore it. And my, my point in lodging my response was that their objection really glossed over that language and didn't address it at all and pointed to case law that said, well, you know, it doesn't really matter. But I do think this language matters. It's clear.

THE COURT: The case law says what?

MS. ROBINSON: Well, I would defer to the Government's perspective on why they think it's relevant. My view of that case law is that it is pretty clear that if you're going to hold a person accountable under that particular prong, that you have to have proof, you have to have some reason to believe that the person that you're selling to actually had that crime of violence, or misdemeanor crime of domestic violence, or had some sort of criminal justice sentence. And that is just not the case here.

THE COURT: So in two hypothetical transactions, in one of which the seller knows the criminal history, seen the rap sheet, he knows the criminal history of the purchaser and cannot deny that the individual is, let's say, a convicted felon and prohibited.

The other hypothetical, everything else is the same, except that knowledge is absent, but the seller hears the communication from the purchaser, you know, I've got a problem, I can't really possess firearms. And the seller says why is that? And the guy said I'm not talking about it, I'm not talking about my rap sheet. I just, you know, I just, I got a problem with it, that's why I need to come to you. I can't go to a gun dealer.

So on the one hand, the individual is trafficking in example 2 because the purchaser doesn't want to talk about his

rap sheet. The seller, everything else being the same, is not trafficking to that individual, right?

MS. ROBINSON: No, your Honor. I would actually disagree and say that in both of those circumstances, the trafficking enhancement could not apply. This is not language that the defense chose. This is language that appears right in the guideline itself.

And what it says is that it can't -- it's not enough that the person that you're selling to has a, has a felony, which is essentially what was reasonably known to Mr. Ferguson at this time. The person said, listen, you know, I got in trouble back in the day for stealing some things. So it's just this general allegation that there was a theft conviction on this person's record.

The guideline requires that it be a crime of violence, or that it be -- that not just that the person have a conviction, but that it be a conviction for a prior crime of violence, or a controlled substance offense, or misdemeanor crime of domestic violence, or that at the time the person is on probation, parole, some sort of prohibited criminal justice status. That language is, it's clear. It clearly applies, your Honor. So that was the basis of our response. And I think it is inappropriate under the circumstances to hold him accountable without there being any reason for him to have believed that the person to whom he was selling met that

particular definition.

THE COURT: Ms. Russo?

MS. RUSSO: Yes, your Honor. First of all, I think that the enhancement applies for two independent reasons. We've been focusing a lot on whose possession or receipt of the firearm would be unlawful. And the Government's position is that the enhancement absolutely applies under prong one, but also independent reason to apply it, your Honor, is prong 2, which says that if a person knew or had reason to believe that such conduct would result in the transport, transfer or disposal of a firearm to an individual who intended to use or dispose of the firearm unlawfully, and I think that applies here too, your Honor. So either one, we would say warrants the enhancement.

Now, with respect to the language that was cited in the application note to subsection (b)(5), defining individual whose possession or receipt of the firearm would be unlawful, the Sixth Circuit has not interpreted this language, your Honor, to require that someone's purchasing a firearm from a seller say, well, in 1998, I was convicted of a controlled substance offense.

In fact, the Sixth Circuit has said that what this really is, is a totality of the circumstances type test, where you're looking at whether the purchaser, if the defendant has reason to believe that the purchaser cannot unlawfully possess

the firearm, that's the consideration. And a lot of things go into that test.

THE COURT: Do you mean cannot lawfully?

MS. RUSSO: I mean -- right. I mean cannot lawfully possess a firearm, the purchaser.

And when the Sixth Circuit has looked at this, they've talked about what time of day the sales are made, whether the sales happen in a parking lot or in a concealed location, whether the firearm is concealed on the seller's person before the sale happens. And they've looked at all these different factors.

Here, your Honor, we have an incredibly strong case, I would submit, because in the very first sale that occurs between the undercover and the defendant, the undercover states that he can't unlawfully possess a firearm and he says that he has some conviction in his past for stealing items, I believe, that he can't possess a firearm. And the defendant then tells him, well, here, there's another place I know where you can go and you can get firearms, even when you're a prohibited person. I mean, this conversation happens and that's incredibly specific, and frankly, more than what the case law requires in terms of applying this enhancement. The defendant certainly had reason to believe that the undercover could not lawfully possess a firearm.

And what the Sixth Circuit says is it doesn't matter

whether the undercover actually could lawfully possess a firearm. And it also, according to the case law, isn't that the undercover has to specifically state what his prior convictions are that make him a prohibited person. And so in this case, I think the enhancement applies for that reason with respect to the first prong.

But then, your Honor, I also think it applies independently under the second prong, and this is particularly because of the second undercover transaction where the defendant sells the firearm to the undercover. During that transaction, the undercover says that he is planning on trying to re-sell these firearms to his biker friends, and he says that he needs to make at least a $50 profit on these firearms. So clearly the defendant had reason to believe that the undercover was going to transfer these firearms unlawfully; that he was going to re-sell them to biker friends to make a $50 profit of them.

And when you look at that and you add in the totality of the circumstances for each of these sales and each of the interactions between the defendant and the undercover, I think that it's very clear the enhancement applies.

So the third thing I just want to address with respect to it is what are the totality of the circumstances for these sales, your Honor, all of the sales happen in a parking lot. All of the sales happen where the defendant had the firearm

concealed under his waistband. There were no gun cases, there were no receipts. All the payments were made in cash. The defendant actually got into the undercover's vehicle to make all the transactions instead of making them in the open parking lot where people might be able to see.

The defendant was switching cell phone numbers. He switched cell phone numbers three times and reached out to the undercover each time to make these transactions and meetings take place.

The second sale that involves the undercover involved a sale of controlled substances. So the undercover bought controlled substances from the defendant. The defendant reached out to him and offered to sell him Vicodin. And the undercover, clearly believing that this is an individual who would purchase Vicodin, right? Otherwise, why do you reach out to the undercover and say, hey, I have some Vicodin, do you want to purchase it for this price. You're doing that because you believe the person cannot lawful -- is going to engage in unlawful activity. And so they met and they, they made that transaction.

And when you look at all the circumstances, your Honor, it's very clear that, one, the defendant had reason to believe that the undercover could not lawfully possess a firearm; the undercover even told him that. And two, that he had reason to believe that the undercover would dispose of these firearms

unlawfully. And so for those reasons, the Government feels the enhancement does apply.

THE COURT: Well, if this is thought of in a generic sense, the concept of trafficking, there is no question the defendant was acting as a clandestine surreptitious gun dealer, illegally acquiring, illegally possessing, and illegally selling firearms on the serial basis. He's making a profit on this. If he does it often enough and at a high enough margin of profit, he can make a living doing this. There is no question in the common sense way of thinking about trafficking firearms that's what the defendant was doing.

The fly in the ointment may be the extent to which the application note limits the Court's determination of trafficking to a defendant who sold firearms to somebody who he had reason to believe quite specifically was prohibited because of the crime of violence, of drug trafficking, or domestic violence, misdemeanor or felony.

Without wading into an analysis of that, I believe that it's sufficient to determine that the defendant clearly, under the circumstances, was selling to an individual who he knew, based upon the conversation and the statements would be attempting the re-sell the guns in an illegal fashion. And that is a sufficient determination under application note 13 (B) -- sorry, (a)(ii), an individual who intended to use or dispose of the firearms unlawfully.

The UC purchaser was clearly, he was intending to do exactly as Mr. Ferguson was doing, that is, to sell illegally for a profit to people that were interested in acquiring firearms. You can't do that without a firearms license without being a legitimate -- you can't sell firearms legitimately without being a legitimate owner and possessor and intended transferor of such an item.

So if, for no other reason under the last of these analytical reasons, the trafficking enhancement does apply and the probation officer's determination is confirmed.

MS. ROBINSON: Your Honor, may I make one, just one remark for purposes of the record? And it's really a brief one.

The Government presented its analysis in the objection under the first subsection. And I think that's important for purposes of waiver. Their emphasis all along was on the fact that this did not have to be a sale to someone who had these particular convictions. So I would just like the record to reflect that, that was, that was the tenor of their objection and that has now shifted. It was shifted in their sentencing memo, it has shifted now. We respect the Court's ruling, but I think that's just something I want to note for the record.

THE COURT: Does it matter? Why can't things come up at sentencing that had not previously been contemplated on behalf of either the defense or the Government?

MS. ROBINSON: Your Honor --

THE COURT: Aren't we involved in a quest for an accurate calculation of the guideline ranges?

MS. ROBINSON: We are, your Honor. I just wanted that to be noted for the record, and that's all. Thank you.

THE COURT: I believe that it's utterly irrelevant, but it is noted for the record. Thank you.

The next matter is the question of Mr. Ferguson's probation. I believe the probation officer's information, which includes a discharge date from the Third Circuit Court, I'm not sure the court that generated it, indicates as the probation officer noted that the probation was discharged on the 20th of May. The first transaction was on the 19th of May. He was still on probation and would be for another roughly 24 hours when the first of these transactions occurred. So he was on probation and the enhancement applies, according to the probation officer.

Is there something wrong with that, as far as the defendant is concerned?

MS. ROBINSON: Your Honor, it's our position as we stated in the objection that an eight month sentence is an eight month sentence. I did speak with the docketing clerk at the 42-2 District Court in New Baltimore a few weeks back when I was preparing these objections, and she did indicate that it is customary that it takes a day or two or three sometimes

depending on when the court can bring a matter up to its docket for the paperwork to be formally entered. And I'm just saying that as a matter of practicality, an eight-month sentence is not the same as an eight-month sentence and a two-day sentence. An eight-month sentence should be an eight-month sentence.

And for, I think under that rationale, the same would be true here, if you were to sentence Mr. Ferguson today, to a five-year term but the judgment not be entered until, you know, two weeks later for whatever reason may come up, the truth of the matter is that his, his term will expire at the end of -- at the exact date that your sentence was imposed, whatever the term is that you imposed. If you said it's a five-year sentence, I can't remember what I just said, but you said it was a five-year sentence, his sentence should expire five years to the day from the date that you imposed the sentence, not five years and two weeks because the docketing clerk had some delay in putting that judgment into place.

So I think there is a similar logic there. And for that reason, we don't think that he should be enhanced by two points for being on probation because an eight-month sentence should be an eight-month sentence.

THE COURT: Does the Government have a view in this regard?

MS. RUSSO: Yes, your Honor. I just have two comments. One is the defendant was -- the relevant conduct for this

offense begins in April. And so one is I don't really think it matters because the defendant begins selling firearms, according to the confidential informant, in April of 2015. Now, the first sale he made to the specific undercover was May 19, but the conduct started in April.

Second, your Honor, with respect to the scheduling, certainly the defendant knew that he was still on probation until it was closed out by the court. And the court could have picked a date a week earlier, or could have picked a date a week later. We don't know -- we, right here, cannot understand why the probation officer and the case closed out on the date it did, and we have to go based on the docket. It could have been any number of reasons. Perhaps the probation officer wanted him to be a probation a couple weeks longer. We don't know what that reason is. And so the probation is closed after the sale occurred. The defendant set up the sale prior to his probation closing, and he was selling firearms in April. So we believe the two points are appropriate.

MS. ROBINSON: Your Honor, I just need to respond to that briefly. You know, I respect sister counsel in her, her advocacy, but the one thing that I think is just really important is that we not be loose with the facts. There is no evidence in any of the discovery that was submitted that Mr. Ferguson was selling firearms prior to the date that's alleged in the indictment.

The information says that a confidential informant approached an officer and said you can get guns from this guy in April, but that does not support the statement that she just made, which is that he was actively involved in the sale at that time. So I think that's important to note.

And at the end of the day, we stand on the remainder of our objection as submitted.

THE COURT: I would --

MS. RUSSO: Do you want me to respond, your Honor?

THE COURT: You may if you wish.

MS. RUSSO: I mean, I'll just say clearly the confidential informant was saying they could get firearms from Mr. Ferguson and purchase firearms from Mr. Ferguson in April of 2015. So to me, that is relevant conduct.

THE COURT: It indicates that something had come to the informant's attention that related to the availability of firearms. It might have been statements, it might have been activity, it might have been the UC or the informant witnessing acts involved with the possession of the disposition of firearms. Those are matters of some speculation.

I would say this, that the defendant's probationary status is, is uncontested during the time, at least up and including until the 18th of May. If it were not taken into account in the calculation of the criminal history, it certainly would be taken into account under 3553(a), one way or

another. The defendant was engaging in and prepared, ready, willing and able to engage in serious criminal conduct while he was under an obligation to the court. He was either doing it, preparing to do it, he was showing no hesitation in the May 19th endeavor, and the status of probation, I think, is supported by reasonably reliable information, the docket date being the 20th of May.

But as I said before, if it weren't counted formally in the calculation of criminal history -- of offense conduct and criminal history, it would be taken into account, the defendant's ready, willing and able status during the time that he was under an obligation to the 42nd District Court. So I'm going to confirm the probation officer's report as stated and accept the Government's objection and reject the defendant's reaction.

Defendant's objection, let's see, we'll start with your number one, Ms. Robinson. Defendant's objection -- well, that's the same thing as the Government's objection that has only to do with the May 20th, May 19th date. All right.

So moving on to your labeled objection number 2, focusing on paragraph 9, you say this paragraph should be stricken from the report. Why?

MS. ROBINSON: Your Honor, because the conviction, the offense of conviction here is felon in possession of a firearm. If you will give me a moment, your Honor, I just need to catch

up where you are in the actual language of the report.

Essentially, the offense, the offense of conviction here is felon in possession of a firearm. I don't think the language reflects anything having to do with that offense. And so for that reason, I ask that it not be included in the report.

THE COURT: It's relevant conduct. He was selling, as Ms. Russo said, Vicodin or offering it for sale to the UC simultaneously with all of these firearm transactions. That's relevant conduct at a minimum under 3553(a), history and characteristics of the defendant.

MS. ROBINSON: I understand, your Honor's rulings, but we disagree. We accept the Court's ruling.

THE COURT: You disagree that it's relevant conduct?

MS. ROBINSON: I do.

THE COURT: Well, I rather firmly disagree with your disagreement. It's absolutely -- I should have said with your disagreement. It is absolutely relevant conduct, relevant to the defendant's history and characteristics, and it will remain.

Defendant's objection number 3 focuses upon paragraph 30. The objection resulted in the probation officer adding language that indicated that it was Richardson, the driver of the car, I think it was the driver was the one who was charged with possession of the drugs found in the car and not the

defendant. And that language, I think, was added at your suggestion, I think that that's substantially resolves your concern, but let's make sure of that.

Ms. Robinson, is there anything more to this?

MS. ROBINSON: No, your Honor. I believe the Probation Department's response does satisfy --

THE COURT: All right.

MS. ROBINSON: -- our concern.

THE COURT: So that objection is mooted.

Objection No. 4 by the defendant focuses on paragraph 31, which is a description of his 2015 conviction for possession of paraphernalia, possession of a dangerous weapon, loitering, open intoxicants. He got 90 days. This is the Richardson traffic stop referenced in paragraph 30, apparently.

What's the complaint about this paragraph, Ms. Robinson?

MS. ROBINSON: Just one moment, your Honor. I think my objection was tied to -- we are at objection number --

THE COURT: Your objection No. 4, which points to Paragraph 31.

MS. ROBINSON: Right. So Paragraph 31 of the original report, which --

PROBATION OFFICER: Your Honor, if I may?

THE COURT: Ms. Connolly?

PROBATION OFFICER: In the revised report, it's now

paragraph 32.

THE COURT: 32. All right. That relates to a December 2015 firearms possession by a felon, felony -- and commission of a felony firearm. Let's see. This is the one with the death of Osean Lockett and the circumstances reported by a witness or perhaps two witnesses. And your objection is to this language, apparently?

MS. ROBINSON: Yes. Our objection is essentially that any language relating to the death of Mr. Lockett be stricken from this report. Mr. Ferguson was convicted of weapons offenses in the Wayne County Circuit Court. And --

THE COURT: But the witnesses did say what they said as reported in the paragraph, didn't they?

MS. ROBINSON: Your Honor, so the problem here is it's actually multilayered. So this is a witness who made a statement to the police, and that is the version of the statement that appears in the report, and that's the version that the Government is relying upon.

After that, the witness made a statement to the prosecutor in some sort of sworn deposition before the case was actually charged. And then the case was formally charged, and the witness for the first time in open court then testified to a set of facts that mark -- that differed in the most significant ways from what he originally said to the police. And that ultimately is the testimony that was tendered under

cross-examination, under oath in open court before the light of day. It did not contain any of the same language that, that was offered to the police department when the witness first made the report.

So specifically I think the, the language in the presentence report makes reference to this witness, William McKithen, saying my client ran up behind the decedent, punched him with brass knuckles, continued to strike him, dragged him into the backyard. And then that Chaka Franklin, who is now deceased, told Mr. McKithen, the witness, that it was our client who was involved with that shooting. That never bore out in court.

THE COURT: The witnesses went south and the charge was dismissed in favor of a firearm possession count?

MS. ROBINSON: Well, I think it's more, it's more than that, your Honor. So --

THE COURT: Is it?

MS. ROBINSON: Yes, it is. Because the prosecutor is asking the Court to rely on a version that was reported in a police report, and to put that into the presentence report and which is going to follow Mr. Ferguson all the way through his time in the Bureau of Prisons.

THE COURT: The paragraph should include information which I think it probably does not include it now, that the witness went south, so to speak. I'm using a term of art

there. The witness did not maintain the original version when placed under oath and subject to cross-examination.

MS. ROBINSON: Frankly, your Honor --

THE COURT: But the witness did say what is reflected in the report.

MS. ROBINSON: Well, your Honor, I think this is -- so my concern is that this information, given its marked difference, it's not enough to say the witness changed his testimony in some respects and to move on from there. This was testimony that was just simply unreliable. It is inaccurate.

And, you know, it's not often that I pick up the phone and talk to the Government about, about cases that don't occur in this court. But in this Court -- I mean in this case, I felt it was important to get perspective on this. So I had a couple of conversations.

I talked with defense counsel who was absolutely of the opinion that Mr. Ferguson had nothing to do with the murder. But I also talked to the prosecuting attorney in this case. His name is Michael Reynolds. And as I indicated in my memo, Mr. Reynolds is a very experienced, very seasoned, very well respected, very vigorous prosecutor in the Wayne County Prosecutor's Office. He enjoys a reputation of not backing down from cases where, where a case can be made.

And I had a lengthy conversation with Mr. Reynolds. And what he said is that this was not a case where he was

concerned that the witness was retracting his testimony because, as happens in some cases, the witness is afraid or the witness has been threatened. There was no indication of that, as far as he could tell.

He believed that the witness just simply made some assumptions based on what he saw, and that when he came to court, it was clear that those assumptions were not valid; that he did not witness my client touching this person at all. And that he certainly, he certainly did not say in open court somebody told me that your client shot him. That just, that did not bear out at all. And it was for that reason, according to this prosecutor, that they had great pause.

And I'm going to just, if you'll indulge me, Judge, I took some notes during that conversation because I thought it was pretty, pretty telling. He told me that, he told me that there -- he said that in his opinion, the best version of what happened in this case is the version that was given live and subject to the cross-examination.

He told me that the witness had backed off on being able to identify Mr. Ferguson in his voices and a lot of other important facts. He said that the burden of proof at the preliminary exam, as everybody knows, is probable cause. And he said he didn't make it -- this is a direct quote he didn't make it with a scintilla of cause. He said that, he ran this quote to me from Abraham Lincoln, which I had not come across

before, but that he's saying this in relationship to his own case I think is telling. He said have you ever heard the phrase that your case is as thin as the broth made from the shadow of the bones of a pigeon that starved to death? Those are the words from that prosecutor about his own case.

He told me that, you know, while it might have been his, his hunch or his own opinion that there may have been some misconduct by Mr. Ferguson in this case, he had nothing else to base that on, and so that is why they dismissed these charges. And it was not a bargained-for exchange as part of some deal with the defense. A motion to dismiss the murder case, and so forth, had been filed by the defense and it had been teed up for a motion hearing at the final conference.

But when the parties reached the final conference, the prosecutor said you know what, we are going to dismiss the murder charge and the assault with intent to do great bodily harm charge, and lest there be any doubt, Judge Kenny, who is also a very respected jurist there clarified with the prosecutor and said is this because you don't think you're going to be able to meet your burden? He said yes.

I think that absolutely communicates that this was a prosecutor who felt like he did not have reliable enough information to even put a case in front of a jury.

There are sometimes where we are here talking about acquitted conduct. In those instances, there's a determination

by everybody that there is enough there for the case to go forward to a jury. But here, we don't have that. We don't have anything approaching that. And I think it is -- it places inaccurate information and unreliable information into this record for these allegations to continue to appear. They do not have proof that my client was involved with this killing.

I think that it was, again, you know, with all respect to sister counsel for her advocacy, I think it is improper for the pictures that were included with the Government's memorandum to be included as part of her, her -- as part of this record. I think it was meant to inflame the disgust of this Court.

It is unfortunate, I am very sorry to Mr. Lockett's family that they have not been able to seek justice, but justice is actually finding the right person who did it. It's not grasping at straws and trying to pin this on anybody who may have had some possible connection. That is not justice.

And I ask those records be stricken from the document. I ask that -- from the record, from the Government's memo. I ask that the reference to the murder be stricken from the presentence report in its entirety. And for reasons, for all the same reasons, I'm going to ask the Court to not consider it in rendering a sentence because it is simply unreliable, unsubstantiated information.

His own witness walked back its own words on the heart

what they are asking you to rely upon. And I think nothing could be further from seeking justice in this case.

THE COURT: Well, I do want to hear from Ms. Russo, but I would observe just at the moment that what you said is pretty much what I said. Let me remind you. What I said is they got a statement from the witness or witnesses. The witness went south, a term of art meaning changed his testimony, wouldn't repeat what he had said earlier in his statement. The case fell apart. The defendant entered a plea to what appears to have been an undeniable charge of firearm possession which emerged from a search that was done predicated upon the report of the witness, that brass knuckles were allegedly part of the assault. Brass knuckles were found in the defendant's possession. A firearm was part of the assault. A firearm was found, I think that's correct, because he entered a plea of guilty to it. I don't know whether the ballistics matched or didn't match, perhaps they didn't.

But in any event, it's clear enough to me that, that the witness did not maintain his initial statement, and that's an all too familiar proposition. It happens, it's probably happening right now somewhere in a court in the state of Michigan, and charges are being reassessed and cases are being diminished. The defense is being strengthened, the prosecution being weakened by surprising witness statements, and sometimes the opposite occurs.

And by the way, there's nothing inflammatory about the record with respect to the photographs, the search result and so on that was submitted by the Government. It was entirely ordinary criminal investigation photographs. Nothing upsetting or disturbing about any of it, as far as I'm concerned.

Ms. Russo, you're up to address some of these things.

MS. RUSSO: I do, your Honor. First of all, I just want to say Sergeant Kostanko, who is the lead investigator on the homicide is here. I --

THE COURT: Do you -- are you preparing to present evidence?

MS. RUSSO: Well, no, your Honor. He is happy to, to clear up some of the issues that have been raised by Ms. Robinson. I, I want to, I want to say that when we talk about the witness going south, I agree that his account in the preliminary examination transcript is not identical to his account earlier. However, he still talks about Mr. Ferguson being on the scene, having brass knuckles, seeing Mr. Lockett get beat up. He just says he can't actually see the moment when Mr. Ferguson punches him with the brass knuckles, that he didn't actually see that happen, he saw him get beat up. He saw Mr. Ferguson with brass knuckles in a black mask. In addition he talks about hearing gunshots. All of those things are still in the preliminary examination. So to, to say that he went south is almost -- is not entirely accurate because it

does appear to me that he, he mitigated some of what he had said before about Mr. Ferguson.

THE COURT: Let's put it this way: He backed off to some degree.

MS. RUSSO: Yes. Yes. And that's fair, your Honor. And like you said, that's not uncommon. In fact, Counsel mentioned Chaka who was the other individual involved in this murder, we believe, allegedly. And I will just say he is deceased not because he died of natural causes. He was murdered, law enforcement believes, in retaliation for this incident. And retaliation out on the streets is a common practice. Detroit is an incredibly dangerous place to testify against someone, especially someone who has potentially committed a homicide. So you could understand how someone might be afraid in open court to say everything that's on their mind.

That said, the things that I tried to present in my sentencing memo are the factual things. I never said once that Mr. Ferguson committed this homicide. What I do think is important for the Court to know is that he had brass knuckles in his house when they did the search warrant; that he had a black mask in his house; that the ME report shows that Mr. Lockett suffered the type of cranial injury that would occur if someone hit him with brass knuckles in the head. He died of the gunshot wound, but the ME report is consistent with what

the witness said.

And in addition to that, we know the defendant is in the vicinity of where the murder takes place on the night of the murder from the defendant's own statement, right? Where the defendant admits that. Where the defendant said one he didn't steal -- he's not selling any firearms, and two, he didn't kill Mr. Lockett in the same breath.

Both -- we know one of those statements is certainly false. He was selling firearms at the time he told law enforcement he wasn't selling them. We don't know about the other statement.

The other thing that Sergeant Kostanko could talk about is the number of interviews he had with Mr. McKithen and the fact there was another individual that came forward. There's a lot that goes on behind the scenes here that, you know, wasn't presented in court at that PE hearing.

And Ms. Robinson speaks at length about Mike Reynolds, the prosecutor, and says in her memo and today that he's just an excellent prosecutor and he didn't feel this case had merit. That's not true, your Honor. And this is the problem with quoting someone.

THE COURT: Which part? It was a multi-prong --

MS. RUSSO: That it didn't have merit. I'm not saying he's not an excellent prosecutor, I don't know. But I will tell you that this is the problem with having a phone

conversation with someone, and then citing what they said in a memo, and then in court. And the reason I say that is because I also spoke to Mike Reynolds, your Honor. Obviously, that's something I'm going to do when I'm looking at this incident and this objection by the defense.

And what he told me was that he absolutely believes that Mr. Ferguson is guilty of homicide, but he didn't feel like he had enough to bring the case forward in light of the fact that his witness was backing off of his case, and in light of the fact that there was another individual, Chaka, who was involved who was murdered and things of that nature.

And I'm not going to go into all of the evidentiary things that he had to consider to decide not to go ahead, and offer a plea to Mr. Ferguson to something less than that. But I do think it's problematic to, to put Mike Reynolds in the courtroom when he's not in the courtroom. And I think it's unfair to represent that he offered this plea because he didn't think the case had merit because I don't think that that's the case.

So all that said, your Honor, I, I could easily call on Sergeant Kostanko who can talk about all the evidence that was gathered in the case and all the different witness interviews that he conducted with Mr. McKithen and others, but I have proffered what I think he would testify to. And so that's where the Government is right now. If you would like to hear

from him, he is prepared to testify if you would like to hear from him.

THE COURT: Well, there's a proffer on the floor, Ms. Robinson. Do you, do you suggest that there should be testimony?

MS. ROBINSON: I don't think -- your Honor, so a couple of things. As to that particular question, no, because what this officer is going to do is stand here and present on some of the most pertinent points hearsay that adds another level of distance between the actual testimony from the person who made this accusation and the person himself, right? So I don't think that hearing from this officer is going to satisfy the objection that we've made here.

I did not say that Mike Reynolds said this case had no merit. He said that he didn't have anything other than his hunch to base it on, and so that's why they did not go forward with the charges.

And frankly, I spoke with Mr. Reynolds within the last couple of days. But for the fact that he is in a murder trial in Wayne County, a double homicide trial in Wayne County, he would be happy to speak with this Court by phone to answer any questions that the Court may have. And he was, we're trying to see if that might be a possibility there, but they've got multiple defendants and he hasn't, he hasn't been able to respond. So I suspect that he's not available. But he was

happy to answer questions.

I'm not afraid of what Mike Reynolds would say, because I think again that is the wisdom, the insight of a prosecutor who recognizes when and how justice should be sought. And in this case, he felt like it would not serve the interest of justice, it would not serve this decedent's family to try to hold Michael Ferguson accountable for this case. So --

THE COURT: I think it's fair to include language in the presentence report indicating that the witness, McKithen is the potential witness; is that right?

MS. RUSSO: Yes, your Honor.

THE COURT: That he "backed off his testimony" and led the assistant prosecutor to conclude that he would not be able to make a case, he, therefore, voluntarily dismissed the case, but as a result of what was found in the search of the defendant's home, the firearm possession portion was pressed and the defendant entered a plea as charged, I think, wasn't it?

MS. ROBINSON: He entered a plea as charged to felony firearm, being a felon in possession of a firearm.

THE COURT: Right.

MS. ROBINSON: Your Honor, I would ask if that is going to be your resolution of that objection, that the language be more specific.

In the presentence report, currently in paragraph 32,

in the second main paragraph is where the main allegations appear. It says that "shortly thereafter, Ferguson, who was wearing a black mask reportedly ran up behind the victim and punched him with brass knuckles. The defendant reportedly continued to strike him in the head and body while he lay on the ground. He reportedly dragged him." And then it goes on to say that Chaka, I'm sorry, Chaka spoke with McKithen later that evening and told him Ferguson had shot Lockett.

I would ask that the report reflect that at the preliminary examination, Mr. McKithen did not testify that he saw Mr. Ferguson punch the victim with brass knuckles. I would also ask that it say specifically that at the preliminary examination, Mr. McKithen did not testify that he spoke with -- that he spoke with Chaka later that evening, and that he did not testify that Chaka told him that Mr. Ferguson had shot the decedent.

I ask it be very, very specific, because that is the heart of what's damning about this language, and it was not borne out in open court. So if it's going to say the witness changed his testimony, I ask that it be very specific about the ways in which he changed his testimony.

THE COURT: I'm going to have a problem with that, Ms. Robinson. Just going through some of this examination transcript that's been provided, and for example, at page 31, line 13 he was asked:

"Did you see anything in his hands?"

He answered, "He had something shiny in his hands."

"Could you tell what it was?"

"It was most likely brass knuckles, shiny and silver."

So you're suggesting that I should direct the probation officer to say that McKithen denied seeing anybody with brass knuckles; that's just not the case.

MS. ROBINSON: That was not my request, your Honor. My request was that the report reflect that the witness did not testify that Mr. Ferguson -- he saw Mr. Ferguson strike the decedent with brass knuckles. That was not his testimony. He was not able to substantiate that.

The witness did not testify that Mr. Ferguson or that he was told by anybody Mr. Ferguson killed this man, shot this man. I think the report, if it's going to contain this language, needs to be as accurate as it can be.

Again, my first preference is that it not appear. But to the extent the Court is overruling that, I ask it be a very specific representation of what the witness said with reference to the preliminary exam transcript.

MS. RUSSO: I don't know that he was even asked specifically about Chaka. And I apologize, I could be -- I could be missing it if it was asked, but I don't remember reading that. And so I think it's very misleading to say that he did not testify to it if he was not asked about it. And I

think saying that the witness did not see Mr. Ferguson punch the decedent with brass knuckles is very misleading, because the witness says that he saw him get beat up; that Mr. Ferguson was there; and that he didn't actually see Mr. Ferguson's hand, although he may have saw him with brass knuckles, didn't actually see the hand make contact with Mr. Lockett. So I prefer the Court's initial suggestion.

THE COURT: I'm going to confirm my initial suggestion. We're getting into an exercise where we're splitting hairs. To a certain extent, that's what these objections often amount to, the niceties of phrasing and things of that sort.

Here, it is sufficient to express the background information as stated by the probation officer with the addition that I, something similar to what I offered. And I'll approve that when the probation officer submits a suggested alteration again indicating that McKithen sufficiently backed off his testimony in terms of the specificity of seeing what he had initially apparently indicated that he saw, and again, sufficient to motivate the assistant prosecutor to dismiss the homicide charge. There's no -- there's to be no language about assistant prosecutor's hunch or anything of that sort.

The fact of the matter remains that a witness, a witness of Mr. McKithen's character and background, whatever that may be, reported the defendant being there, the defendant admitted being in the area. A man wearing a black mask with

brass knuckles engaged in an attack of an individual. A search of the defendant's house located a black mask, brass knuckles. And the background information is relevant to history and characteristics of the defendant. It is at a minimum sufficiently reliable to be included as it is included in the presentence report.

It's also clearly indicated that the homicide charge did not eventuate, it did not progress. I think that a little additional information is fair to include as to the witness backing off, as I've stated it. And that's the resolution. It's going to be essentially as proffered by the probation officer.

MS. ROBINSON: Your Honor, may I ask --

THE COURT: What's next?

MS. ROBINSON: I just have a clarifying question about a factual finding the Court made, and that is Mr. Ferguson admitted to being in the area. I don't know what the basis for that is. And I just want the record to --

THE COURT: He was interviewed. That's the interview in which he denied selling firearms and denied killing the individual.

MS. ROBINSON: I don't see reference to that, but he says were you living at your address on the July 4th weekend, he said yes. Is that the basis?

THE COURT: Wasn't that, wasn't that the, wasn't that

the locale or next door to the locale of the murder?

MS. ROBINSON: So the fact he lived next door to where this happened, or where this alleged to be happened, I just want to be clear that's the basis, that's the source of that factual finding?

THE COURT: I can't be certain of that.

Ms. Russo, do you have anymore specific reference?

MS. RUSSO: If the Court could just give me one moment.

THE COURT: Certainly.

(Brief pause.)

MS. RUSSO: Your Honor, I don't see anything else other than that at this moment. I do see something I will let the Court know.

THE COURT: All right. Well, if there's not a specific factual basis for the phrase admitted that he was in the area, I'll amend that to indicate that he admitted that he lived in the area, in the immediate vicinity of the action that was described by McKithen. So living in the area, being present in the area are perhaps not exactly the same thing, but they are closely enough related to the observable facts proffered here.

And I would further note that the proffer of Ms. Russo is uncontested and, therefore, accepted to the extent that it, that it provides information for the Court on a background basis as to what the officer, the investigating officer in the homicide would indicate.

We'll pause for a moment.

(Brief pause.)

THE COURT: All right. So that's that objection. And number 5 objection by the defendant is an observation on the mathematics of calculating the guideline level and has been resolved by a determination of the on bond May 19th/May 20th asserted discrepancy.

And I shall confirm the probation officer's report at that rate. And it is an offense level of 23 and criminal history of five.

This is, as I understand it, the defendant's tenth conviction, adult felony and misdemeanor conviction for controlled substance, possession of marijuana, weapons carrying concealed, operating while impaired, possession of paraphernalia, weapons violations, possession of a dangerous weapon and others. Firearm possession, most recently with the homicide investigation results 23 and Five.

The guideline range is 84 months to 105 months. The defendant has submitted in addition a motion for downward departure. I understand and would accept a downward variance argument. I'm not sure that there's been any identification of a guideline based departure. But I'd like to hear about that before we get into questions of variance.

Ms. Robinson, do you have a guideline oriented departure that would call into question the accuracy of the

calculated range?

MS. ROBINSON: Your Honor, if I might have a moment?

THE COURT: And I'll be asking Ms. Russo the same about her upward -- well, I think it's strictly upward variance, not upward departure.

And here is the difference, just to be a little more clear. It's my view that the guideline range needs to be solidified before we start talking about variances.

A departure is a lot closer to a guideline calculation alteration than a variance. A variance -- variances have very sort of soft and foggy edges. Guideline departure is a lot less so. They are a lot more solidified and regimented. They find their origin in the guidelines themselves or in, in the application notes about departures and so forth. And they often result in what amounts to a re-calculation of the guideline range, variances less so.

So do we have any actual departure basis identified here, Ms. Robinson? Or is it, as you reflect upon it, basically all variance oriented, 3553(a) base?

MS. ROBINSON: Well, your Honor, we did in the memo make reference to the departure based on 4A1.3.

THE COURT: Well, let's look at it. 4A1.3. And that's inadequacy, over adequacy presumably of criminal history category. 4A1.3 allows for upward departures, as well as downward departures.

MS. ROBINSON: That's correct, your Honor. And under subsection (b), it was our position that Mr. Ferguson's criminal history category of Five substantially overrepresents the seriousness of his criminal history.

THE COURT: Tell me how that, how that squares with somebody who is here before the Court on his 10th conviction?

MS. ROBINSON: Well, your Honor, as I noted in the memorandum, many of those convictions are for misdemeanor based conduct that posed no threat of harm to any -- it's not true for all of them. But for instance, when you look at the conviction that he acquired in, what was original, I guess it's now Paragraph 31, there are 1, 2, 3, 4 of his state convictions are wrapped up in that offense. And essentially, those offenses -- that offense, which occurred on October 5th of 2015 was for possession of a weapon, a butterfly knife essentially that was given to him by a family member. It was possession of drug paraphernalia. It was loitering, where drugs are kept, and it was I think he was found with a bottle of wine on the floorboard and a, and a cap to a liquor bottle in his lap.

I don't mean to suggest that that conduct didn't warrant correction by the Court. He, he was arrested for it. He was charged with it. He pled guilty to it. He accepted responsibility essentially for those offenses. He was incarcerated at the time that he actually went through the process of adjudicating those crimes and was not present to

argue for a specific sentence and that resulted in a 90-day penalty which resulted in a two-point enhancement. Presumably, had he been present it may have been possible, had he been present and had the assistance of counsel present, it may have been possible for him to argue for a lesser sentence.

I think for those, to say generally this person has 10 convictions without regard to what the nature of those convictions were, and the extent to which those convictions may have caused harm to other people, I think would be superficial. And so I think that's a clear example of one of his priors that has him in the same criminal history category as somebody with substantially more serious conduct, but that it may not be warranted.

And again, I think the other argument that we raise in our memo is that none of his prior conduct involved crimes or even allegations of violence. And so for that reason, we ask the Court to reduce the guideline calculation. And in combination with the variance that we were seeking, we were asking for a sentence that would place him in a criminal history category III instead of his current criminal history category of five, which would suggest that he's in a class of the most serious kind of offender. And I don't think given the nature of his convictions that that necessarily bears out his record.

THE COURT: The Government has a point of view on this?

MS. RUSSO: Yes, your Honor.

So I guess I'll speak first about the conviction in October of 2015. So that would have been kind of around the same time of this conduct is occurring with him selling these firearms, right? That conduct starts in May and goes forward.

There were two points assessed because it was a 90-day sentence in that case. And the Government believes that 90 days is completely reasonable, and certainly, if anything, almost a lenient sentence for Mr. Ferguson, when you consider his prior conduct, his prior criminal history, and the nature and circumstances of that offense.

So the nature and circumstances of that offense were the defendant was in the front seat of a car. He had wine, he had a knife, a butterfly knife as stated by defense, and then there was the smell of marijuana in the vehicle, and there were marijuana grinders, a scale, 7.8 grams of marijuana in the vehicle.

Mr. Richardson, who was the driver was charged with the marijuana ultimately, but certainly the nature and circumstances of the offense and the fact that there were those items that were in the vehicle and in addition to the fact that Mr. Ferguson did have a weapon on his person. And all of that, your Honor, I think 90 days was completely reasonable. And you look at the history of Mr. Ferguson, and he has a history with marijuana, with a conviction for marijuana. And in fact, that

was a conviction that he, where he violated his, his conditions of release and didn't comply with the conditions in that incident. So 90 days seems completely reasonable in that case, and I don't think two points overstates.

With respect to the other argument that defense makes, which is that not one of his prior convictions involves an allegation of violence, that's just not true. So in fact, not only do we have the incident with the firearm that he just pled guilty to, where he had three very high-power firearms in his home, and the brass knuckles and the black mask and there was an underlying allegation where a witness came forward and said he had been involved in a homicide, that certainly involved an allegation of violence, your Honor.

But the 2012 incident, which there are no facts in the presentence investigation report concerning that incident, but if you look at the initial charges, certainly there was an allegation of violence relating to this incident. The defendant was initially charged with assault with a dangerous weapon, police officer assault/resisting/obstructing, and weapons felony firearm, and ultimately he pled to the felony firearm. So there was certainly at least an allegation of that.

So for those reasons, your Honor, the Government does not believe that his criminal history is overstated. And we ask that you continue to have his criminal history category be

a five as calculated by probation.

THE COURT: The reason for 4A1.3 departure possibilities with respect to the calculation guideline range is that some guideline ranges may be the result of calculation of essentially a collection of minor, non-serious minor offenses that artificially and inappropriately inflate the appearance of strong criminal history, the criminal history being thought of as predictive of recidivism, repeat offenses over and over again.

And the criminal history here being level Five, less than the most serious, is the result of calculations that begin in -- only in 2012 with a weapons offense being the crime of conviction. Two points on an 18-month probation with a 12-month initial sentence were assessed.

The criminal history ignores offenses earlier than that. For example, the age of 17 possession of marijuana, 7411 disposition is ignored. No points are assessed.

The next is a 2014 operating while impaired supported by a report of a concerned citizen, saw a vehicle weaving in and out of traffic dangerously, Mr. Ferguson was the driver. And when a breathalyzer test was administered, he had a 0.13 blood alcohol level. He entered a plea of guilty to impaired driving. Obviously he was driving under -- the fact of the matter is he's driving under the influence, driving with an unlawful blood alcohol level. He was given a break. He got a

one point assessment. He had an eight-month probation on that. The case was closed without any further incident.

But shortly thereafter, 2015, in October he's charged with possession of paraphernalia, weapons possession, loitering, open intoxicants and so forth. He got 90 days for that offense. This is where Richardson was the driver and Ferguson, a passenger. Marijuana, liquor, and so forth, found in the vehicle. And this is the -- he was armed at the time, armed with a four-inch so-called butterfly knife, which I understand to be a readily accessible, non-spring activated, but roughly equivalent to a switch blade knife, readily deployable with minor physical manipulation. It's, in my view, an designed to be an offensive weapon. And it's fair to say that Mr. Ferguson was armed in that sense of the word when he was riding in the vehicle with Richardson in possession of, collectively in possession of the liquor and drugs that were there in the car. Up to no good would be a way to describe the activity in a concise way, it seems to me, from that arrest. I think points are quite reasonably assessed.

Firearm possession by a felon from the 2015 -- December 2015 event, three points are assessed. And that's the search as a result of the homicide report, all in that things found within the search in the defendant's possession in his home corresponding to reports of mask, brass knuckles and violence being visited upon the deceased. All of these things line up,

they match. They are certainly relevant conduct. The points that are assessed are accurately assessed and reasonably assessed.

The criminal history score results in a score of 10, and that's a degree of five. I think it's the beginning of Category V. It is 10 points. Subtracting one of those would result in a category IV. I see no persuasive reason to depart though from the calculated range.

The trajectory of offenses here is disturbing. The potential for violence by at least one report erupted into the actuality of violence. And the potential is from all the various weapons possessions over the years, there's, there's no persuasive reason for departure and I reject the suggestion.

Is there any other basis for departure that you wanted to mention, Ms. Robinson?

MS. ROBINSON: No, your Honor.

THE COURT: Ms. Russo, you have a motion for styled as a variance. You want to address that, I suggest, in allocution. And Ms. Robinson can address in allocution any thoughts that she has supported by the brief for downward variance, obviously motions that run in opposite directions and for different reasons. And we'll afford the defendant an opportunity for allocution as well.

So you can rise, Ms. Robinson, and state your case with respect to variance if you wish.

MS. ROBINSON: Yes, your Honor.

THE COURT: All right.

MS. ROBINSON: Your Honor, I just want to begin by saying ordinarily it would never be my preference as a defense attorney, having done this for some time, to begin a memo in allocution, a sentencing hearing at all with an emphasis on such concerning facts as we've had in this hearing. But as I indicated, I felt like it was important to do that because I believe that to the extent that these allegations do appear in this record, that it is unreliable information, it's inaccurate information. It is information that I think under *Townsend v. Burke*, and other due process principles should not form a part of this Court's sentencing at all. And because of the allegation is so serious and because it will have implications for how he is classified in the Bureau of Prisons, as well as potentially with this Court's sentencing, that I think it is more than proper to address them at the outset and with the rationale that I gave to the Court before.

So I would incorporate all of my previous remarks about the reason for my objections to that language and into my remarks and asking the Court to disregard that information in imposing a sentence here.

You know, the truth of the matter is that I believe an overemphasis on the facts that happened there really risk spoiling many truths about who Mr. Ferguson is as an

individual. I indicated in my memo that Mr. Ferguson is not like many defendants that come before this Court. And I tell you that based on my personal experience with him.

It's interesting, when I sat down with him probably during our very first meeting, we were going through a very lengthy set of information about his background, and how he came up and who his family was. And as I'm learning that he has a mother who is active and engaged and who cares for him and did her best to provide for three boys.

And as I hear him talk about the many talents that he had from a very young age, in being involved with music and the arts and his family deciding that Detroit was not the best environment for him to continue to be raised in, and moving them out to a neighboring community where he could attend a better school with better opportunities.

And then him having graduated from that school, and then having a family that he could go and work with and do substantial work with his hands learning different trades, learning different skills. I really became baffled by how Mr. Ferguson, in particular, ends up before this Court.

So the interview went on and I continued to dig deeper. And then he began to tell me about the car accident that he was involved in, where a family member of his was rendered paralyzed by the action of a very violent driver who hit them. And as he went on to explain what happened, he mentioned the

name of the individual who was injured, his cousin who was injured. And he said his name was Phillipe. And that struck out to me, or that, that struck me because I know very well, and very dear friends with a lawyer who has a nephew by the name of Phillipe who was injured in a very serious car accident.

As we went on, I recognized that Mr. Ferguson has the connection to me that is completely outside of the confines of this case. I know his family. I have been in his family's home. I have broken bread with them. His aunt, Desiree Ferguson was a colleague of mine for many years at the State Appellate Defender Office. She is a very seasoned and experienced lawyer. They work very hard as a family to expose the children to cultural opportunities to, to just make sure that they have a rounded world view.

When I finally came to the recognition that we had this close connection, it was, it was unnerving. It was unnerving for me. I think it was unnerving for Mr. Ferguson because from my perspective, he is a kid who, or not a kid, but he's a person who really, by all indications should not be here and yet here he is. And it's my job to try to persuade the Court to see that regardless of, or maybe not regardless of, but in addition to the things that he has done in his past, he is a human. And he is a human that isn't very different from you or from me in many ways.

Mr. Ferguson is supported by a loving family. Several of them are here today to express their support. He has the capacity to lead a productive life. He is a person who, as I said, he's got education, he has a work history. He has children that he cares for. He has the support of his family in making sure that he can return to a productive future.

And as I said, and maybe I misspoke in saying there were no allegations of violence. But I mean the reality is that Mr. Ferguson has not been convicted of any crimes of violence in the past. And I think that, that does count for something.

My personal observations of him in the time that I've gotten to know him, and I feel like I've gotten to know him well, I see a young man who has quite a bit of depth. He has quite a bit of intelligence and a fair amount of insight into himself. I found him to be very forthright about his behavior and the reasons why he has ended up where he is. And I explained some of that in the memo. It doesn't excuse behavior, and I don't think anybody coming before this Court would ask the Court to excuse behavior, but I think it's important for an individual to have insight and for the Court to also be able to understand that insight.

The other thing that I think is important for the Court to consider is that, you know, when your, when your only tool available to you is a hammer, you start to treat everything as

if it's a nail. And I think the sentence that's been requested by the Government here reflects that fallacy. This is not an individual who requires the full force of the law in order to bring his conduct in compliance with the law. It does not require the full force of the law for him to not return to this Court as a person who is recidivating.

Mr. Ferguson is a person who can make it, and he has the opportunity to do that. And I just ask the Court to keep that in mind, because while it is important for this Court and for the Government to address threats of public safety, that responsibility is one that has to be fashioned very carefully and it has to be fashioned efficiently and effectively. And if you accept the Government's proposition that the absolute maximum sentence is warranted in this case, I think this is going to be an instance where prison as a tool is just simply being overused.

I think Mr. Ferguson has the capacity to be safely supervised in this community. This Court is certainly going to impose a term of supervised release that he will have to comply with, and that, too, is a form of punishment.

You know, when it comes down to it, I think there is wide recognition in many circles, whether they be conservative, liberal or otherwise, that we do not have unlimited resources to spend incarcerating people year after year, and in cases where a very lengthy sentence is unnecessary, I think it's wise

to spend those resources elsewhere and on the back end. Mr. Ferguson is a person who I think is a perfect candidate for rehabilitation and for an ability to re-integrate into this community successfully.

He has a long-term partner that he would like to marry. He has been a father-figure to her children. And as I said, he's got a very stable work history and a family that supports him and loves him.

I think for those reasons, our requests for a downward variance are supported. I think this Court has an opportunity to reunite a family sooner rather than later. I don't think a 10-year sentence is necessary. And I think a 10-year sentence would place distance between Mr. Ferguson and his children in a way that is really irreparable, and it's not necessary.

I mentioned in the memo also that Mr. Ferguson has been in custody of the MDOC serving his felony firearm sentence. And that while this case has been pending for the last six months or so, he will not receive credit because he hasn't been in federal custody.

I would ask the Court to make an adjustment in its sentence to account for that time so again, we're not overusing government resources unnecessarily. I think that an offset to whatever sentence the Court imposes by about six months would be appropriate to account for that.

I would just rely on the remainder of the arguments

that are laid out in my memo and ask the Court to impose a sentence that reflects a downward departure or a downward variance, if the request for departure has been rejected and that it reflect a 40-month sentence in its totality.

THE COURT: Respond to your various arguments --

MS. ROBINSON: I'm sorry, Judge. I didn't hear you. I'm sorry.

THE COURT: I think the expectation is that the Court say something about the various points for a defendant's motion for variance, such points that have been proffered. And to say I rely on my memo is --

MS. ROBINSON: Your Honor --

THE COURT: -- that requires me to get into your memo, and perhaps I'll just perhaps do that.

MS. ROBINSON: I'm happy to go through them orally, your Honor.

I think based on Mr. Ferguson's history and characteristics, and the particular point is that he has a biological daughter and a daughter he is voluntarily raising, and that his absence is having a deleterious effect on the family. He's not blaming anybody else for his absence, but what we are saying is that a very lengthy sentence that will be in accordance with the guidelines here, would not serve the interest of justice and it would not reflect that he is a father who can help stabilize his family and his community. I

think a downward variance on that basis is, is warranted.

THE COURT: So family, family connections or relationships --

MS. ROBINSON: That's correct.

THE COURT: -- is one point.

MS. ROBINSON: My second point is Mr. Ferguson is a person who has education, he has family support, he has trade skills, and other attributes that would make it likely he would re-integrate into the community successfully if he was given that opportunity.

THE COURT: Remind me, was he employed during the time of these various offenses?

MS. ROBINSON: He has been self-employed off and on. He has background and training in martial arts and personal training and so forth. And so he was working in that capacity. And then there are also a couple of temporary jobs that he had worked off and on leading up to the time of this incident.

So I'm just going to reference the presentence report. He was doing home repair work and he did personal training work, and then he also worked for a factory for a time. And before that, there was a period where he was working for Hanson Windows. And as I said, there was a period before that, where he was working consistently with an uncle who does forestry work in the south. So yes, he is a person with what I would say is a history of employment, employability. And even if he

can't find work because of the felonies that are on his record, he has the capacity to be entrepreneurial and to create legal means of income for himself based on his skill set.

THE COURT: Okay. I have family effects, I have education connected with employability. Are there other?

MS. ROBINSON: I think the last, the last basis that is specifically -- I talk about the fact that, again, spending the $32,000 per year that it would take to incarcerate him is not necessary, given his background, but I think that's essentially related to the prior arguments.

I also specifically noted that the credit for the time that he has already served in MDOC custody will not be afforded to this sentence. So I ask the Court to make an adjustment to the sentence on that basis as well.

THE COURT: All right.

MS. ROBINSON: The last thing, well, I guess some of these are blending together as reasons for a general sentence. But I also just noted that there's really no -- there's really no verifiable basis for believing that an 84-month sentence is going to be or a 10-year sentence is going to be more effective at deterrence than an 84-month sentence. And so I think again, there comes a point of diminishing returns as a whole, and I would just ask the Court to keep that in mind.

I think Mr. Ferguson is ready to account for his crime, and he certainly is going to receive a significant sentence.

It will be the most serious sentence that he's ever received, regardless of where he's been. I don't think an 84-month sentence is necessary to accomplish the goals of sentencing. I think it would be longer than is necessary to achieve the 3553(a) factors. And I certainly don't think a 10-year sentence is warranted under the circumstances for the same reasons.

THE COURT: All right, Ms. Robinson. Thank you. I think I have your position.

Mr. Ferguson, do you want to make a statement also? You're not required to say anything, but if you have anything to add with respect to sentencing, this would be the appropriate time.

THE DEFENDANT: Yes. Good morning, your Honor.

I made some bad choices in my life, I also made a lot of good choices as well. My bad choices don't define me as a character wholly as a man, father, brother, son or a friend, or a leader. I accept responsibility for what I've done. I understand that my actions don't just affect me, they also effect my family and society as well. And I hope credit you have sincerity of my situation. Grant me with a reasonable opportunity to be reunited with my family and the opportunity to become a better man and better father for my family. I wasn't raised by my father. I don't want my girls to grow without their father in their house, because they miss their

major key in their life, like the love, support and guidance. And it's kind of getting emotional for me right now talking about it, because my daughter is missing me. They think I'm -- they think I'm at work right now.

And it's hard for my family. I lost my grandmother during this time, I lost my uncle. And they was a positive influence in my life. And I don't want to lose anybody else and I don't want nobody else to lose me to this sentence or lose me to my actions. I understand what I've done was wrong. It won't happen anymore, I can guarantee that. I understand the severity of the nature of the crimes and everything, but I'm asking you to just grant me some mercy, your Honor, please.

Thank you.

THE COURT: Is that it?

THE DEFENDANT: Yes, sir.

THE COURT: All right, Mr. Ferguson. Thank you.

Ms. Russo, if you want to engage in your allocution, which would be combined with your motion for variance.

MS. RUSSO: Thank you, your Honor.

So I guess I want to start by just saying this is the first and only time that I've asked for an upward variance in my career so far. The reason I did that is because as looking at the guidelines, we start at the heartland and we start at is, is this defendant, a felon in possession defendant, does he deserve a sentence within the guidelines within the heartland,

or are there aggravating factors or mitigating factors that suggest that a sentence either above or below the guideline range is appropriate. And in this case, there are a number of aggravating factors that take this case out of the heartland of felon in possession cases, and that's why I ask for an upward variance.

And I think those aggravating factors, your Honor, start with the fact that the defendant was a supplier of firearms. He was a source of firearms. He didn't just simply possess them, but he sold them to others who he knew likely could not -- well, he knew that they could not lawfully possess them. And even if he didn't know with some of the people that he was selling to but they could not lawfully possess them, certainly the circumstances suggest that he had reason to believe that.

Second, your Honor, the defendant did this crime, selling these firearms, he started it three months after his discharge from probation on a prior felon in possession case.

Third, your Honor, he wasn't just selling firearms, he was also selling narcotics as evidenced by the sale to the undercover agent.

Fourth, he took steps to actively avoid law enforcement. There was a level of sophistication to what he was doing, by switching cell phone numbers all the time, by switching vehicles at one point, your Honor. This was somebody

who this was very much a business for, and he had methods to continue to succeed in that business.

And if you look at the pictures from the search warrant that were included attached to the Government's sentencing memorandum, he had so many cell phones. If you look at there's one picture just of all the cell phones that are in the basement, because that's what he did. He had this business and he was actively trying to avoid law enforcement.

Fifth, your Honor, there were high capacity firearms involved in this incident. These were not five or six rounds. These were firearms that had extended magazines attached for the second sale of firearms to the undercover, that's the case. But also for the firearms that were later found in his house pursuant to the search warrant, the three firearms that were found there.

And in addition to that, your Honor, the next factor for variance, I think, is the other items, the brass knuckles, the black mask, the ammunition that were found in his residence along with those three firearms in the same year that he was making these sales.

An additional factor for variance and an aggravating factor in my mind, he lied to law enforcement about his conduct. He blatantly said that he was not selling firearms during his interview, and he said it twice, your Honor. Another aggravating factor is that he took his daughter, his

three-year-old daughter to one of these sales with this undercover putting her at risk, your Honor. And I think that that should be taken into account.

When you look at all of these things, your Honor, this is a defendant who, you know, we prosecute many felon-in-possession cases because of the problem of gun violence and the violent crimes that happen in Detroit, and we have tried to stop those problems and stop that violence one felon in possession case at a time. And while that's effective and important for us to do, I think the more important thing for us to do is to catch the people that are selling the firearms, and this defendant is that person. He's at the top of the pyramid. He's the person selling firearms that are enabling people to go out there and commit violent crimes who do not -- who are prohibited persons who cannot legally possess a firearm.

And so for those reasons, your Honor, I submit to you, these are undisputed facts that two sides agreed to you that I just read off, your Honor, and those support an upward variance of 120 months in this case.

With respect to the nature and the circumstances of the offense under 3553, and this would be getting into my argument, your Honor, I think I've already gone through those when I talked about the aggravating factors, but we have three different firearms sales within a 6-month period that the

defendant does to an undercover agent. He knows that person is a prohibited person. One of the firearms is a high capacity firearm.

During the same time frame, he has, he has a number of things at his home that he's keeping, including three additional firearms. Also during this same time frame, he is just getting off probation on the DUI when the first sale happens. It's before his probation gets off and he's just been discharged from probation on a gun offense.

THE COURT: I have a question. I have a question. You just passed by rapidly the firearms kept in his house. Focusing on that, that's the result of the search which sprang from the homicide.

MS. RUSSO: Yes, your Honor.

THE COURT: How many firearms were found in the house?

MS. RUSSO: Three, your Honor.

THE COURT: And what were they? And I've got another question about them.

MS. RUSSO: Yes, your Honor.

THE COURT: Were they loaded?

MS. RUSSO: And I don't know -- I don't know for certain how, whether they were all three loaded, your Honor, but if you look at the pictures from the search warrant, it appears that there was a lot of -- there was ammunition, there were magazines and in the home.

Your Honor, the three firearms, the first one was a loaded, it was a loaded .22 Marlin firearm, then there was a loaded Mossberg 500-A 12-gauge shotgun, and also a loaded National Ordinance .30 caliber rifle. In addition to those three, those are the only three firearms, there was also a BB gun. And residency documents are found in Ferguson's home. Obviously, he acknowledges that he lives there.

THE COURT: Where are -- I'm sorry. Say that one more time?

MS. RUSSO: Residency documents were found for Michael Ferguson in that home, your Honor, and in the statement, he acknowledges that that's his residence.

THE COURT: Okay. A .22 Marlin firearm sounds like a rifle. Is it?

MS. RUSSO: I honestly don't know a whole lot about firearms, your Honor, but it appears to be a rifle to me when I'm looking at it.

THE COURT: Okay.

MS. RUSSO: Yes. My ATF agent has confirmed that it is a rifle.

THE COURT: And it was loaded?

MS. RUSSO: Yes.

THE COURT: And the next one was a Mossberg, that's a shotgun and probably a pump action?

MS. RUSSO: Yes. 500-A 12-gauge shotgun.

THE COURT: Was that loaded?

MS. RUSSO: It is pump shot, your Honor, and it was loaded.

THE COURT: And then finally a .30 caliber National Ordinance, and that was a rifle long gun?

MS. RUSSO: Correct, your Honor.

THE COURT: And was that loaded?

MS. RUSSO: Yes, your Honor.

THE COURT: The home that you spoke of that the defendant acknowledged was his, where he lived. Was that also the home that was the residence of the child?

MS. RUSSO: I do not know whether the child was living with him, your Honor.

THE COURT: Does your investigator?

MS. RUSSO: We don't believe so, your Honor.

THE COURT: There's anywhere indication he was sharing that address with anybody else?

MS. RUSSO: If you could give me one moment, your Honor?

THE COURT: Sure. Go ahead and consult.

(Brief pause.)

MS. RUSSO: Your Honor, we know for certain that his mother was living there, and occasionally his brother might have stayed there.

THE COURT: Okay. Thank you. I interrupted you.

Please continue.

MS. RUSSO: So with respect to the nature and the circumstances of the offense, your Honor, the Government submits that they are incredibly serious and that they warrant an above-guideline range sentence.

The history and the characteristics of the defendant, your Honor, this defendant has multiple firearms convictions, and I think that that's significant. He has a history of doing this and in fact, had just gotten off supervision, as I mentioned several times, when he started selling these firearms in this case.

And with respect to his prior crimes also, your Honor, I think they show a lack of respect for the law and failure to comply with conditions that were placed on him to try to help him, he received multiple times very lenient sentences. As he moved forward, he received a probationary sentence for the firearm involved in the incident before that. The possession of marijuana incident, they tried to give him all sorts of substance abuse treatment, and Alcohol Anonymous meetings and things of that nature, your Honor, and he wasn't compliant with his conditions. And I think that shows a lack of respect for the law. And I think it shows someone that a significant period of incarceration is necessary in order to have -- in order to have -- in order to effect change and in order to protect the community from this defendant.

Next, I want to talk about deterrence. And one of the things that the defense mentions in their brief is that this is really, really shouldn't even be a factor, your Honor. And I really -- and statistically that it's not supported, that significant sentences in gun cases don't lead to change, don't lead others to not -- to think twice before possessing a firearm, and that's just not true.

One of the -- so right now, most of our gun cases in the U.S. Attorney's Office are, are prosecuted under a program called Project Safe Neighborhood. Where that generated from, if you will, your Honor, is in the 1980's, there was a homicide epidemic. And in Richmond, at that time, they were the third highest city in the country for homicides. And because of the incredibly high homicide rates there, they implemented a program that was called Project Exile. And the idea behind Project Exile was to take cases that maybe had traditionally stayed in the state and imposed stiffer penalties for felons who had firearms, and to advertise that, to put that on buses, to put that billboards, to make sure that people understood if they possessed a firearm as a felon, they were going to receive a significant sentence, that their case could be taken federal.

And the impact of that program, your Honor, within one year, Richmond experienced a 31 percent decrease in homicides, and an over 20 percent decrease in armed robberies. The second year they had an over 20 percent further reduction in their

homicide rates. And so what happened is that other cities across the country saw these results that Richmond was getting and wanted those results. And that's why other countries start implementing similar programs, having similar successes, and then that generated Project Safe Neighborhood. And that's why these stiffer penalties in some of these gun cases makes sense, because they do deter crime, they do reduce homicides, they do reduce violent crimes like armed robberies.

And prior to Project Exile in Richmond, there was public outcry for help. They wanted some intervention because what they were experiencing was that 50 percent of the homicide victims were people who had never committed a crime. 80 percent were African-American. The city of Richmond was asking for help from law enforcement and help from the prosecution. And when that occurred, your Honor, there was a dramatic impact for the better. And if you look at the homicides rates in Richmond now as compared to the '80s there's a dramatic reduction. Over the course of several years, it has continued to reduce.

And so deterrence is important, and especially for someone who is selling firearms, deterrence, both general and specific, should be considered by this Court. And I would submit that it warrants an upward variance in this case.

And finally, your Honor, protection of the public. Not only do I think that -- I think this is of particular import in

a case where the defendant was selling firearms to people that he had no idea what they would do with those firearms but he knew they couldn't legally get them, so he was their source. I think the problem with that is after they leave his presence, he has no idea what crimes they might commit, why they are getting a firearm in the first place, what's going to happen.

And that is the type of thing that leads whether -- he's, to this day, Mr. Ferguson does not know what people have done with those firearms, what homicides or crimes they may have committed. And that is why protection of the public is so paramount in this case.

And in addition, your Honor, when you talk about history and characteristics of the defendant, you look at the fact that he did put his daughter at risk during that sale and that he was so willing to do that. And I think putting his family at risk is another reason, and putting himself at risk frankly with these very dangerous sales is another reason.

This is a huge amount of cash that's being exchanged, and you can't call the police if a sale goes wrong. If a sale goes wrong and it's a $750 sale and the person doesn't give you the money, there's no calling the police. So what happens? It's vigilante justice. You have firearms. What do you do? There's a shootout. And that's why these sales are so dangerous in this case.

I want to respond last for three reasons for downward

variance submitted by defense and then I will close my argument. The first reason, your Honor, the defendant's family ties. I have to say that I agree that the defendant does have strong family ties and support, and I think that's great. Unfortunately, that support and the family ties have not helped him avoid crime. In fact, his criminal activity in the last, if you look at the last five years, has escalated and escalated and escalated until it got to this point.

Second, your Honor, his history of employment. I really don't think that this is something that warrants a downward variance at all. First of all, the defendant has been self-employed, as defense said, as a home repair person. There's no amount of money that's come in from that that's listed. We don't know how often he works or how many hours he works. But he says that he repairs people's homes and I'll give him the benefit of the doubt on that, but it's certainly not a stable employment situation.

Before that, he was self-employed as a personal trainer. Same problem, your Honor. I don't know if he had a paycheck that he was regularly getting, if he had money coming in, all that.

And then you go back to 2009, which is the last time that he had an employer that, outside of the self-employment situation, your Honor, and the two jobs he had there, he worked for one company for two weeks and was terminated because of his

lack of production, and they terminated him after two weeks. And then he went on to Forge Industrial where he worked for a four-year period. And during that four-year period, he made a total of $10,000. So the question in my head is just how many hours was he working in order to make that, that salary, your Honor, over the course of four years.

So the Government submits that his primary business wasn't any of the things that are listed in the PSR. It was selling firearms. That's where he was getting his money. That's where he was finding a way to support his family.

And finally, the MDOC custody issue, your Honor. We submit that the sentence should be imposed consecutively and that that is appropriate in this case because these are two separate crimes that were committed. And so for those reasons, your Honor, the Government submits that 120-month sentence is appropriate.

THE COURT: The obligation of the Court is to settle on a sentence that is sufficiently stringent to serve the purposes of sentencing, but not excessive. The parties differ by an order of magnitude in terms of what that sentence should be from something like three, a lower three years, argues the defendant and ten years argues the Government. Neither of those, it seems to me, are necessary in this case in order to provide a sufficiently stringent sentence as well as one that is not overly stringent.

The things for the Court to consider are the history and the characteristics of the offense, along with the circumstances of the offense conduct. Combined with this, the seriousness of the offense itself is to be taken into account and weighed.

In preparation for doing that, the Court should consider the suggestions that were made by either party for variance from what would otherwise be a sound sentence, a presumptively sound sentence within the guideline range.

The defendant argues that family impact, that is having a supportive family, a sound family, and a fiancee and a child and so forth are reasons to vary downward. Most often, though, the Court has been petitioned by defendants to vary downward based upon a lack of family support and an absence of a sound background, and the ill effects that naturally emerge from that.

So it would seem to me as a matter of logic, though, logic is not always the means of determining legal principles, it certainly is in many instances, and applying a little bit of logic to this standard, it would seem to me that somebody who offends serially, in spite of having a presumptively sound family, a supportive family, a good family, who sets a good example, is more likely a candidate for upward variance than for downward variance.

Ms. Robinson's colleagues in the Federal Defenders

Office consistently point to the lack of family guidance, troubled childhood as a reason to mitigate sentences. And I've received those suggestions, indeed, within the last few days and weeks, and probably the next time we have a round of sentencing, I'll hear it again. So I am not saying that it actually is, in this instance, a reason to vary upward from the guideline range, but it is, in this instance at least, based upon what's been presented, not a persuasive reason to vary downward either.

The defendant's education is better than average. His employability is perhaps better than average, although it's a little difficult to tell. To say that he's self-employed in home repairs is basically to say that he's not employed at much of anything, it seems to me.

His education may stand him in a good stead. It should have stood him in better stead, it seems. And similar to the having -- similar to having a sound and supportive family environment, having a sound and supportive employment history and offending nonetheless may not be so much of a mitigating factor.

Suffice to say the bases that have been proffered by the defendant here for variance downward from the guideline range, I do not find any of them persuasive.

The Government's suggestion about varying upward and pointing out aggravating factors find a better support in the

most, for the most part in the record and in the facts. It is I think a powerful argument, frankly, to point to the fact that this is a defendant who was not merely in possession of firearms, but was engaged actively and fairly enthusiastically, having listened to the CD's, in the provision of illegal firearms, surreptitiously and grossly illegally to willing purchasers, who had cash on hand. He had it in mind that the undercover investigator was not a proper person to whom a firearm should be entrusted or sold. And he had clear knowledge that the firearms that he was providing would fall into a plan of redistribution to other people that very likely should not be in possession of firearms.

So if there's a firearm problem in a municipality or city or urban environment, let's say, the man who is the arms dealer, the man who is supplying the arms is, if not at the pinnacle, near it in terms of responsibility for socially destructive and physically destructive attributes of having over-armed and trigger-happy population.

I spoke earlier of the defendant's trajectory through the various encounters of law enforcement, and it's a very troubling trajectory. Taking his daughter to work is not supposed to include having her in the back seat when he's selling guns on the street. And he was selling not just guns, but whatever illegally came into his possession that might have value. Basically the defendant reveals himself as somebody who

would turn a buck however it might benefit him, and the public does deserve to be protected from that kind of behavior. All of those things reveal history and characteristics of the defendant.

I will say this, though, about the Category V. It is not calculated incorrectly so as to deserve a downward departure. I dealt with that suggestion earlier. But it is true that one can arrive at a Category V with more troubling convictions than at least some of those that have produced points on this defendant's record. It's not in and of itself over-representative of the defendant's criminal history, but it's very close to a Category IV, and on the margin, I am persuaded that it mitigates some, the Government's argument about upward variance.

The homicide investigation and the statements of witnesses and so forth indicate a resort to violence, but I am not going to rely upon the statement of a witness in Mr. McKithen's position to make formal determinations of variance.

What I will rely upon is information provided to the police by McKithen before he testified, indicating that he saw a man he recognized to be the defendant with brass knuckles, or what he believed to be brass knuckles used in this attack on the decedent. A mask, he said, was worn. The house was searched. It was the defendant's house. A mask is found. Brass knuckles are found. I mean, the convergence is

undeniably relevant. That's not the same as providing information that is sufficient to charge nor convict an individual of homicide, but it's -- but they are certainly relevant and potentially powerfully relevant items of evidence that were located. And they give the Court that much greater concern about the defendant's criminal trajectory as I've cast it before.

The sentence needs to reflect the seriousness of the offense conduct and promote respect for the law, and provide objectively just punishment.

The defendant, I acknowledge again does enjoy a good relationship with family members. He appears to be in relatively good physical health. A few ailments related to the automobile accident, Ms. Robinson mentioned. He has a drug abuse history and alcohol abuse history, and prescription medication abuse history, as well, matters which will be taken up during his term of incarceration. And I'll recommend that that be attended to by the Bureau of Prisons.

He has a high school education. His skill seems to revolve around martial arts, which I suppose it's due a certain amount of applause as qualifying as a skill, but it's concerning to the Court that somebody who is as consistently armed with knives and firearms as Mr. Ferguson is one that has that skill in his, in his toolbox.

So the bottom line, so to speak, is that I do not think

that a variance from the guideline range, either downward or upward is due under the circumstances. And I think that I can locate a sentence within the guideline range that, in fact, is sufficient but not greater than necessary to reflect the seriousness of this offense conduct, taking into account the offense conduct and the offender's background at the same time. Deterrence and incapacitation are important factors here.

Mr. Ferguson has not learned from previous encounters with courts, possibly because of overly lenient probationary sentences, possibly it's other things, I'm not sure. But it's clear his history reveals increasingly concerning behavior. And he must stop.

Mr. Ferguson, would you rise, please. Stand up.

On Count 1 of the indictment pursuant to the Sentencing Reform Act of 1984, the Court, having considered the sentencing guidelines and the factors contained in Section 3553(a) of Title 18, hereby commits the defendant, Michael Howard Ferguson, to the custody of the United States Bureau of Prisons for a term of 105 months. This term shall be served consecutively to the term of imprisonment the defendant is currently serving with the Michigan Department of Corrections.

Defendant shall be placed on supervised release following his release from imprisonment for three years. The Court waives the imposition of a fine, however, or the cost of incarceration or supervision, but a special assessment of $100

is due forthwith if it has not already been paid. Mandatory drug testing is ordered.

While on supervision, the defendant shall abide by standard conditions of supervised release and the following special conditions.

I should note before I go to the special conditions that the defendant will receive a recommendation for a comprehensive drug therapy opportunities within the Bureau of Prisons, the so called RDAP program, to address his substance abuse issues.

In view of those substance abuse issues, as a special condition on supervised release, the Court directs that the defendant shall not use or possess alcohol in any consumable form, nor be in the social company of any other person the defendant knows to be in possession of alcohol or illegal drugs, or nor shall he frequent an establishment where alcohol is served for consumption on the premises with the exception of restaurants.

Defendant shall, number two, participate in a program approved by the Probation Department for substance abuse that may include testing to determine if the defendant has reverted to the use of drugs or alcohol.

Three, the defendant shall participate in any program approved by Probation for mental health counseling, as deemed necessary.

And finally, the defendant shall participate in any cognitive behavior therapy program as deemed necessary by the probation officer.

Ms. Connolly, from the Probation Department's perspective, are there any other terms or conditions that you would suggest I consider or any other statements or declarations before I close?

PROBATION OFFICER: No, your Honor. Thank you.

THE COURT: Thank you.

Are there any such misstatements or other suggestions with respect to the terms and conditions, Ms. Russo, from the Government's perspective?

MS. RUSSO: Your Honor, the only thing is there is a forfeiture agreement, there is a forfeiture agreement between the parties.

THE COURT: And there's forfeiture language that has been or will be supplied by the Government that will be included in the judgment and commitment order. Thank you.

MS. RUSSO: Thank you, your Honor.

THE COURT: From the defendant's perspective, including any possible *Bostick* objections or other matters that you need to state for the record, Ms. Robinson?

MS. ROBINSON: Yes, your Honor. I would note that -- we object to the sentence on procedural -- on grounds that it is procedurally unreasonable. We believe that the guideline

has been -- has been incorrectly scored and for the reasons that we stated.

We also, we would object to the Court's finding that the, the defense agreed to the proffer that was being offered to the Court by the Government. We actually were objecting to it on the basis that it wouldn't add anything to the analysis. So I just wanted the record to be clear for that purpose.

THE COURT: We can pause, restart the proceedings and take the testimony if you want.

MS. ROBINSON: I just want the record to reflect that we weren't agreeing to it, your Honor, and that was the Court's representation.

THE COURT: Well, what I was trying to do is to give you the opportunity of examining the, the evidence, the witnesses or the potential witnesses sitting here in court. He's still here.

MS. ROBINSON: I understand.

THE COURT: I don't want to -- I don't want to make this more a multi-day affair, but I want to be -- I want to give you a fair opportunity as well.

MS. ROBINSON: Your Honor, it's just that it was our position that there was nothing that the officer was going to say that would have met those specific elements. And so for that reason, I just want the record to be clear that we weren't objecting. We don't need to go back into it -- I mean, we

weren't acquiescing to their proffer.

On the question of substantive reasonableness, we would object that the sentence does not reflect a substantive reasonable determination. There are a couple of errors in the factual findings that I find important to layout.

Mr. Ferguson's daughter was not present in the car during the sale of any weapon; that there were four different transactions that were received evidence on and one of them involved an exchange of pills, and she was present for that, but she was not present during a sale that involved an exchange of weapons.

I would also say just generally this doesn't necessarily go to the sentence that was imposed, but, you know, all the evidence, all the factors about the city of Richmond are illuminating for the city of Richmond. These sales did not occur in the city of Detroit. And I think there was a reference to making the streets of Detroit safer.

I live in Detroit. And I can tell you that the minute that one person gets plucked up and sent away for a crime like this, another one is right back to replace it. I know the Government wants to believe that it's making a difference. I would suggest that the opposite is true. And what happens is that people are sent away for a really long time, and it disrupts communities. That's going to happen here. I think it is not necessary that it happen here.

And the factors related to his family were not being offered to say, you know, these are things that in the past should have made a difference. The point is that there is research to show that when a person does have a stable community network to return to, that their likelihood of recidivism is lessened. And so for that reason, we didn't think a lengthy sentence was necessary for deterrent purposes as to Mr. Ferguson.

So we just want the record to reflect those things.

THE COURT: All right. Have you been fully heard? Ms. Robinson, have you been fully heard?

MS. ROBINSON: Yes, your Honor.

THE COURT: Ms. Russo, have you been fully heard?

MS. RUSSO: Yes, your Honor.

THE COURT: Thank you. Mr. Ferguson, you have a right to appeal your plea and the conviction that was entered. You have a right to appeal your sentence, if you choose to do so. You have to start within the requisite time, 14 days from the entry of the judgment and commitment order. You will stay in touch with your attorney about your rights and your obligations in that regard. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Thank you.

Anything else, finally for the record, for the Government?

MS. RUSSO: Not from the Government, your Honor.

THE COURT: Or for the defendant?

MS. ROBINSON: No, your Honor.

THE COURT: All right. Court stands in recess. Thank you.

THE CLERK: All rise. Court is in recess.

(Proceedings concluded, 1:15 p.m.)

* * *

CERTIFICATE OF REPORTER

As a Federal Official Court Reporter for the United States District Court, appointed pursuant to provisions of Title 28, United States Code, Section 753, I do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

Dated this 7th day of February, 2017.

s/ Christin E. Russell
Christin E. Russell
RMR, CRR, FCRR, CSR
Federal Official Court Reporter

A-6
Judgment, United States v. Ferguson No. 16-cr-20535
(Feb. 7, 2017) (APP 187)

UNITED STATES DISTRICT COURT

Eastern District Of Michigan

UNITED STATES OF AMERICA

v.

Michael Howard Ferguson

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: 0645 2:16CR20535 (1)
§ USM Number: 54917-039
§ **Brandy Y. Robinson**
§ Defendant's Attorney

THE DEFENDANT:

☒	pleaded guilty to count(s)	**1 of the Indictment**
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18 U.S.C. 922(g)(1) Felon in Possession of Firearms	09/10/2015	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) «dismissed_counts» ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

02/07/2017
Date of Imposition of Judgment

s/Robert H. Cleland
Signature of Judge

Robert H. Cleland
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

February 13, 2017
Date

DEFENDANT: Michael Howard Ferguson
CASE NUMBER: 0645 2:16CR20535 (1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 105 months. This term of imprisonment shall be served consecutive to the undischarged state term of imprisonment which the defendant is currently serving.

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends placement in a facility with the comprehensive drug treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Michael Howard Ferguson
CASE NUMBER: 0645 2:16CR20535 (1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 years**.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work,are a student, or were convicted of a qualifying offense. (*check if applicable*)
6. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Michael Howard Ferguson
CASE NUMBER: 0645 2:16CR20535 (1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Michael Howard Ferguson
CASE NUMBER: 0645 2:16CR20535 (1)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not use or possess alcohol in any consumable form, nor shall the defendant be in the social company of any person whom the defendant knows to be in possession of alcohol or illegal drugs or frequent an establishment where alcohol is served for consumption on the premises, with the exception of restaurants.

2. The defendant shall participate in a program approved by the probation department for substance abuse, which may include testing to determine if the defendant has reverted to the use of drugs or alcohol.

3. The defendant shall participate in a program approved by the probation department for mental health counseling, if necessary.

4. The defendant shall enroll and participate in a Cognitive Behavior Therapy program (CBT) as approved by the probation officer, if necessary.

DEFENDANT: Michael Howard Ferguson
CASE NUMBER: 0645 2:16CR20535 (1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$100.00			

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

The Court waives the imposition of a fine, the costs of incarceration and the costs of supervision, due to the defendant's lack of financial resources.

DEFENDANT: Michael Howard Ferguson
CASE NUMBER: 0645 2:16CR20535 (1)

ADDITIONAL FORFEITED PROPERTY

The following property is forfeited to the United States pursuant to 18 U.S.C. §924(d):

- One (1) Marlin Firearms Co. 75, .22 Caliber Rifle, Serial Number: Unknown;
- One (1) National Ordance .30 Caliber Carbine Rifle, Serial Number: 5023;
- Ten (10) Rounds of Assorted .22 Caliber Ammunition; and
- Twenty-One (21) Rounds of Assorted .30 Caliber Ammunition

A-7
Defendant's Sentencing Memorandum and Exhibits,
United States v. Ferguson No. 16-cr-20535
(Feb. 13, 2017) (APP 194)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Criminal No. 16-20535
Hon. Robert H. Cleland

Combined Motion for Downward Variance, Downward Departure and Sentencing Memorandum

"Facts are stubborn things;
and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."

-John Adams, 1770

Michael Howard Ferguson is a man who represents many things. He is a son, a nephew, a brother. He is a father to two daughters. He is a drummer, an athlete and martial artist who loves pets and helps out his neighbors. At certain times during his adult life, he has also committed crimes.

The one thing Michael Ferguson decidedly is **not**, however, is a violent, calculating killer. In an apparent effort to score a higher sentence, Ms. Russo invites the Court to cloud this record with unproven tales of vengeance and murder. But it is an undeniable fact that the source of her information has been deemed unreliable. The Court should reject thus reject government's characterizations in considering the appropriate sentence.

In truth, this is an exceedingly simple case with a storyline that this Court has undoubtedly heard before and will hear again: Mr. Ferguson is a young man with a felony who, hard on his luck, sold a few weapons to make an easy buck. As a result, it is now time for him to serve his sentence and pay his debt to society. But how much does he owe?

According to the Sentencing Reform Act, the answer lies in part in Mr. Ferguson's "history and circumstances." 18 U.S.C. § 3553(1). Because those factors point towards leniency, Mr. Ferguson requests that the Court depart and/or vary downward from the sentencing guidelines and impose a penalty of no more than 40 months imprisonment.

I. Background

A. Personal Life

Mr. Ferguson is unlike many of the defendants who come before this Court. He completed his high school education. PSR ¶ 53. He is employable, as he has previously spent time (1) working in building trades, (2) training for two years in auto mechanics through his high school, and (3) engaging in forestry work for years with close family members. PSR ¶ 53-55, 61.

He also developed a number of extracurricular interests and talents as a student. This included playing in the school marching band, learning the African drum, running track, playing football, and participating in academic games:

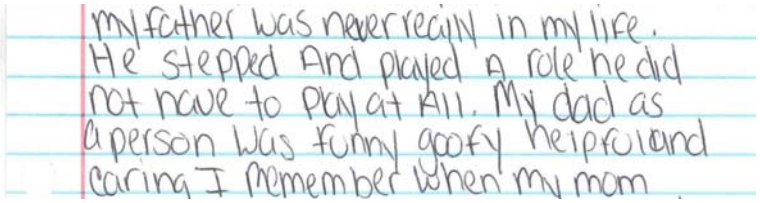


PSR ¶ 53; [Pictures and Accolades, Exhibit A].

Mr. Ferguson also enjoys a very stable, loving, and supportive family who collectively stand by him and recognize that he is more than the sum of his failures. For instance, the mother of his biological daughter, Pamela Walker, writes that Mr. Ferguson has played an active role in raising both their mutual daughter and Walker's oldest girl, and that he provides necessary love and stability for their development.

> football to boys that were ages 11 to 15. We had our own child in 2012. Mr. Ferguson never missed a doctor's appointment with me. Anything that he needed to do for the girls he did. It has been a struggle for our daughter not to see him. He has been there for her birthdays except for the last, which she was sad about. I am aware that Mr. Ferguson has plead guilty for the crimes he

His absence hurts them. [Sentencing Letter, Exhibit B]. Similarly, their older child, Briauna Walker, attests that Mr. Ferguson has been caring and willing to step up to the plate for her despite her own father's abandonment:

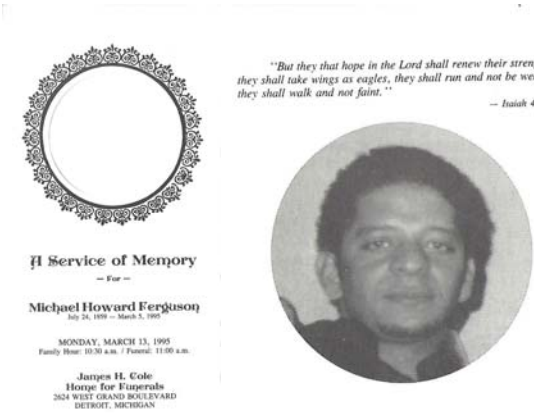

my father was never really in my life. He stepped And played A role he did not have to play at All. My dad as A person was funny goofy helpful and caring I remember when my mom

[Sentencing Letter, Exhibit C]. Antonio Stewart, Ferguson's brother, makes special note of the positive fatherhood example he provides and the material support he offers to elderly neighbors in their community:

> Michael is a father to his daughter, Bre, who is four years old. Michael helps Bre with her ABCs, counting, colors, and other things that preschoolers need to learn. They also dance, sing and play. I enjoy spending time with Michael and Bre because it's a wonderful time for bonding and learning some parenting skills for when I have my own children. In addition to being an active father, Michael is active in his community. He often helps his elderly neighbors by carrying in their groceries and fixing things around their houses. I have gone with him a few times to help with bigger projects such as installing handrails, repairing gates and fencing, and fixing porches.

[Sentencing Letter, Exhibit D]. Mr. Ferguson's mother, Brenda Tutton, indicates that he developed this instinct during his formative years in his role not only as a helpful big brother, but also as an engaged student, athlete, worker, and marching band member. [Sentencing Letter, Exhibit E].

None of this is to suggest that Mr. Ferguson experienced no hardship as a child. He most certainly did. His family was poor and he was raised without his father, who was largely absent and died from a drug overdose when Michael was nine:



A Service of Memory

— For —

Michael Howard Ferguson

July 24, 1959 — March 5, 1995

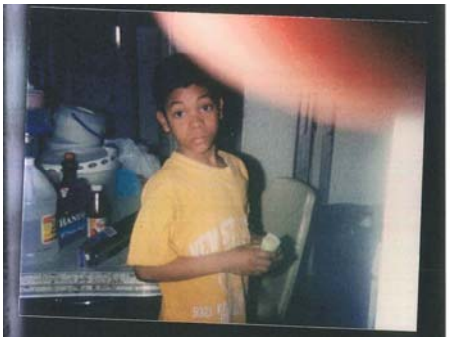
MONDAY, MARCH 13, 1995

Family Hour: 10:30 a.m. / Funeral: 11:00 a.m.

James H. Cole
Home for Funerals
2624 WEST GRAND BOULEVARD
DETROIT, MICHIGAN

"But they that hope in the Lord shall renew their strength, they shall take wings as eagles, they shall run and not be weary, they shall walk and not faint."

— Isaiah 40:31



[Obituary, Exhibit F; Nine-Year Old Michael, Exhibit G]. Michael and his family will tell you that being deprived of a positive father figure deprived him of the moral compass that so many young men so desperately need:

> I am an attorney who has represented indigent criminal defendants on appeal for over 25 years. I have also lived and worked in Detroit virtually all of my life. And I am the mother of three daughters, as well as innumerable "adopted" children whose parents were unavailable to them. This confluence of life experiences has afforded me keen insight into the ways in which living in the throes of poverty and fatherlessness can adversely affect one's life, but can also propel one to look out across the horizon. I believe Michael has a good heart and good intentions. He has sometimes fallen astray and crossed the line, but I don't believe he has ever hurt anyone. His desire to nurture his daughter and remain an active, visible and positive force in her life has motivated him to be a better man. I pray that you will find it in your heart to give him and his daughter this chance.

[Desiree Ferguson Letter, Exhibit H].

But how, exactly, did Michael Ferguson find himself before a federal Court, of all places? It is a somewhat confounding question, given the balance of his upbringing and background.

In Mr. Ferguson's view, the first two gun charges arose out of what he believed was a need to protect himself in the City's neighborhoods. His current crime, however, was one of convenience -- an extremely shortsighted attempt to make quick money and respond to the financial pressure that comes with being (1) a recently-released felon and (2) a new father wanting to provide for his family.

While expediency never offers a valid excuse for crime, it certainly provides a better understanding of why particular crimes are committed. Unfortunately for Mr. Ferguson, the shortcuts he took will cost him dearly in the form of lost liberty and the

pain of being away from his young daughter. He asks this Court for a sentence that will be sufficient but not greater than necessary to make him account for his conduct.

B. Health Issues

Like many people who grow up under difficult circumstances, Mr. Ferguson has struggled with substance use throughout his life. He drank alcohol regularly from the age of the 13 and also smoked marijuana, which he recognizes as a problem. PSR ¶ 13. He tried ecstasy but quit on his own, and also used both prescribed and un-prescribed Xanax as a method for dealing with stress, anxiety, and nervousness on his part.

Mr. Ferguson suffers from pinched nerves and herniated discs in his back, along with numbness in his left arm and hand. Both conditions stem from a violent car accident where Mr. Ferguson and his cousin were t-boned by another vehicle and Mr. Ferguson's cousin, Phillipe, was left paralyzed.

Mr. Ferguson also experiences regular depression and insomnia and recognizes the need for mental health treatment to address these issues and equip himself with cognitive tools that will enable him to make better choices in the future.

II. Discussion

At sentencing, courts should impose only what is necessary to achieve the Sentencing Reform Act's goals—and nothing more. *United States v. Alsante*, 812 F.3d 544, 551 (6th Cir. 2016) ("To be reasonable, a sentence 'must be . . . sufficient, but *not greater than necessary* . . . .'") (quoting 18 U.S.C. § 3553(a) (emphasis added)). Although guideline ranges are relevant, courts "may not presume that the Guideline range is

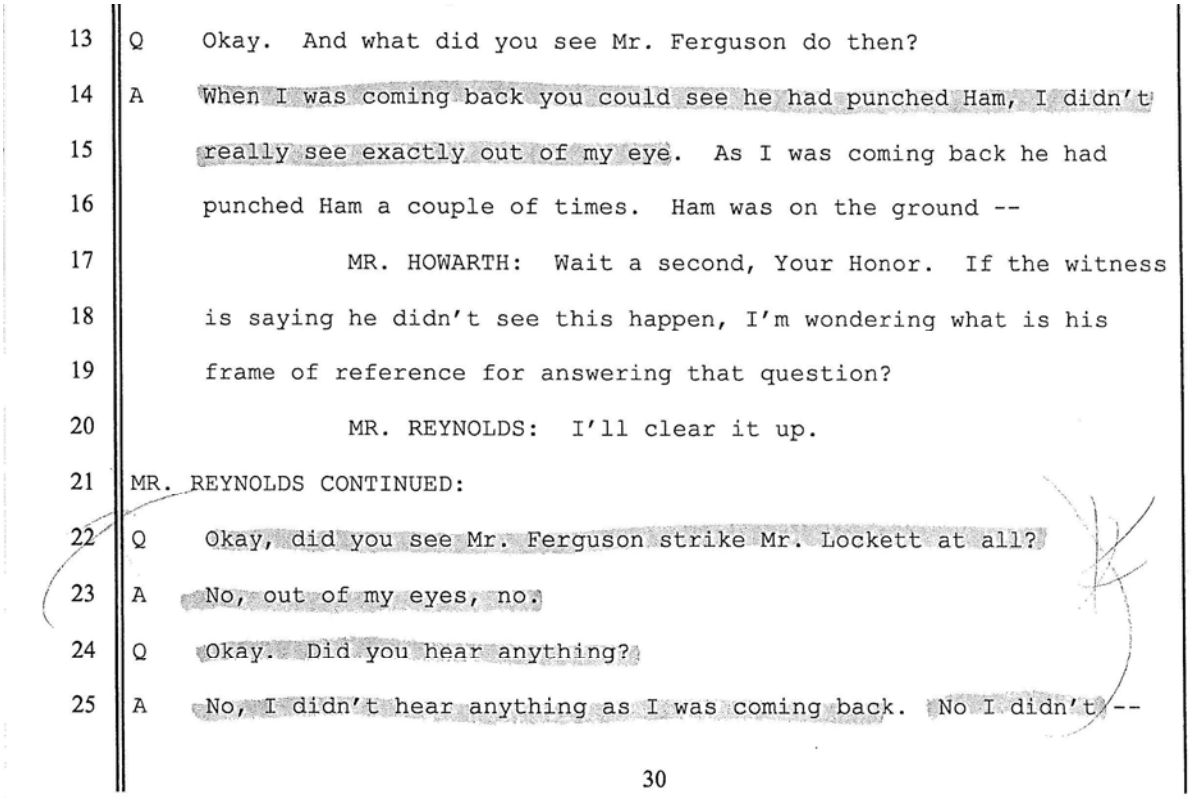
reasonable"; instead, they must focus on deterrence, incapacitation, correctional treatment, and the seriousness of the offense and just punishment. *See Gall v. U.S.*, 552 U.S. 38, 49–50 (2007); see also 18 U.S.C. § 3553(a)(2)(A)–(D).

This case involves straightforward allegations that Mr. Ferguson sold three weapons – one of them with two high capacity magazines – to an undercover police officer during the summer and early fall of 2015. Recognizing that he was placing his future on a destructive path, Mr. Ferguson has accepted responsibility for his crimes and now is ready to stand before the Court to accept a sentence.

As noted, however, this case is not at all about Mr. Ferguson's alleged role in a murder. And even if it were, the government and Probation Department's description of that offense is inaccurate and based on an unreliable witness who quickly discredited himself when pressed on his story.

A review of a copy of the preliminary exam transcript and other state court proceedings reveals that the prosecution's main witness – Will McKithen Jr. – was a person who himself (along with a now-deceased man named Chaka Franklin) was upset with the decedent for breaking into homes in the neighborhood, including both Franklin's and McKithen's house. McKithen gave highly conflicting accounts of what happened and ultimately did not testify in a manner that is at all consistent with the language that appears in the presentence report. [Preliminary Exam Transcript, Exhibit I].

For example, when questioned by both the state prosecutor and the defense attorney in open court about whether he saw Mr. Ferguson punching the decedent, Mr. McKithen repeatedly denied seeing Mr. Ferguson do so:



Q Okay. And what did you see Mr. Ferguson do then?
A When I was coming back you could see he had punched Ham, I didn't really see exactly out of my eye. As I was coming back he had punched Ham a couple of times. Ham was on the ground --
MR. HOWARTH: Wait a second, Your Honor. If the witness is saying he didn't see this happen, I'm wondering what is his frame of reference for answering that question?
MR. REYNOLDS: I'll clear it up.
MR. REYNOLDS CONTINUED:
Q Okay, did you see Mr. Ferguson strike Mr. Lockett at all?
A No, out of my eyes, no.
Q Okay. Did you hear anything?
A No, I didn't hear anything as I was coming back. No I didn't --

30

[Prelim Transcript, page 30; *See also* page 38, 56, 61-62)]. And even if it is true, as McKithen claimed, that he saw Chaka and Mr. Ferguson carrying the very much alive and conscious decedent out of the backyard, McKithen certainly never testified that Chaka or anyone else had told him that Mr. Ferguson had shot the decedent. Any suggestion otherwise stems from previously unchallenged testimony that the government and Probation Department now both urge the Court to accept. Yet, those lawyers who were closest to the litigation specifically declined to do so.

The state prosecutor in this matter (Michael Reynolds, a very highly regarded practitioner with nearly 40 years in practice) recognized as much and did what he believed best served the interests of justice: he dismissed the murder and assault-based charges. He did so not as part of a charge-bargain, but because he knew at bottom that the state lacked reliable evidence. Indeed, he freely agreed with Judge Kenny's clarification that the dismissal was forthcoming because "the People feel they will not be able to meet their burden," believing there was "t[o]o good a likelihood of that." [Plea Transcript at 5, Exhibit J].

Due process demands that Mr. Ferguson's sentence be based on accurate information. *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (reversing conviction where prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. "Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."); *See also, United States v. Maximo Mateo-Madina*, No. 15-2862, ___ F3d ___ (3rd Cir. Jan. 9, 2017) (reversing where district court plainly erred by considering defendant's bare arrest record in imposing sentence; court cited admonition from *United States v. Berry,* 553 F.3d 273, 281-84 (3d Cir. 2009) that a defendant "cannot be deprived of liberty based on mere speculation. . . . a bare arrest record—without more—does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity.") Because the murder allegations contained in the police reports were wholly

unsubstantiated, they deserve no place in Mr. Ferguson's presentence report or as part of the upcoming sentencing proceeding.

* * * *

Ultimately, the parties do not agree on the guidelines range. For the reasons stated in the Presentence Report objections and renewed below, the defense believes the proper guidelines range is 46-57 months. The argument is twofold.

First, the report indicates that Mr. Ferguson was on probation to the 42-2 District Court in New Baltimore, Michigan at the time of the offense, but the defense believes that to be incorrect. An eight-month sentence imposed on September 18, 2014 expires on May 18, 2015. Even if Court records indicate a technical discharge date that occurs more than a week later (for whatever administrative reason that may exist – volume of the court docket, human error / delay, etc), two points should not be assessed in this circumstance for a probationary term that Mr. Ferguson had already served in its entirety and without incident. For this reason, Mr. Ferguson believes the total criminal history score is 8, rather than 10, producing a criminal history category of IV rather than V.

Second, the defense disagrees with Probation's decision to apply a 4-point enhancement for trafficking under U.S.S.G. § 2K2.1(b)(5) in response to the government's PSR objection. This is because the officer's interpretation disregards the plain and unequivocal language of Application Note 13(B) to § 2K2.1(b)(5), which makes clear that the defendant must know or have reason to believe that the weapon will be transferred to an individual who (i) has a prior conviction for a crime of

violence, a controlled substance offense, or a misdemeanor crime of domestic violence, or (ii) was under some sort of criminal justice sentence, including probation, parole, supervised release, or the like.

To the extent that the government argues that Mr. Ferguson believed that the undercover was planning on disposing of the firearms unlawfully, it is telling that the evidence it cites in support of the enhancement does not involve a transaction when a firearm was actually exchanged or sold. By the government's own admission, the focus of that incident was the transfer of prescription pills only. Without more, the record does not support the application of an enhancement in connection with this offense.

Based on what the defense believes is the correct scoring, Mr. Ferguson's appropriate guideline range is 46-57 months, with a total offense level of 19 and a criminal history category of IV.

Nevertheless, the Probation Department and the government believe that the range is 84-105 months based on a total offense level of 23 and a criminal history category of V.

As the Supreme Court mandates, the Court should not presume that a sentence under either the 84-105 month range or the 46-47 month range would be reasonable. Indeed, here it would not be: both prescribed penalties over-represent the seriousness of Mr. Ferguson's criminal history, and fail to account for (1) the diminishing likelihood that imposing a costly and lengthy sentence will have a deterrent effect, (2) the dead-time he unfortunately has faced while incarcerated for this crime, and (3) the

staggering impact that an overly-lengthy sentence will have on Mr. Ferguson's family, particularly his two daughters.

A. The Court Should Sentence Mr. Ferguson to 40 Months in Custody and a 2-Year Term of Supervised Release.

Mr. Ferguson believes a sentence of 40 months and two years of supervised release satisfies the Sentencing Reform Act's goals and will ensure that he receives the mental health and substance abuse treatment through RDAP that he clearly needs.

1. Mr. Ferguson's Criminal History Substantially Overstates His Risk of Danger to the Community.

A sentencing court may vary downward on the basis that a defendant's criminal history over represents the seriousness of his past conduct. *United States v. Collington*, 461 F. 3d 805, 808-809 (6th Cir. 2006). Here, Mr. Ferguson believes that a criminal history category of either IV or V substantially over-represents the seriousness of his criminal history and the likelihood that he will commit other crimes.

The inflated criminal history calculation derives in large part from a two-point score for conduct arising out of an arrest in October of 2015 for what essentially amounted to the possession of open intoxicants and a pocket knife.

In an effort to resolve this offense and eliminate the existence of any warrants while he was in custody, Mr. Ferguson pled guilty by mail. Regrettably, the Court imposed a 90-day sentence without Mr. Ferguson being present. And because the sentence was more than sixty days, it led to the imposition of a two-point rather than a one-point enhancement under U.S.S.G. § 4A1.1(b). That notwithstanding, there is no indication here that Mr. Ferguson caused harm to any person with the pocket knife

or with the alcohol consumption. Moreover, the fact that the Court gave him credit for time served reflects a lack of severity relative to other, more concerning offenses.

Though Mr. Ferguson also has other convictions that contribute to his criminal history, it is significant that none of them involve violent or assaultive behavior, and at least half of those charges reflect misdemeanor-level conduct.

Under the circumstances, he asks the Court to impose a downward departure under U.S.S.G. § 4A1.3. His requested sentence of 40 months reflects this calculation, as it falls within the range of a person with a criminal history category of III.

2. A Downward Departure Is Warranted Based on Mr. Ferguson's History and Characteristics.

Several circumstances here support Mr. Ferguson's request for a downward variance. Chief among them is the growing recognition that in non-violent low-level cases like Mr. Ferguson's, over-incarcerating offenders is not the most efficient use of valuable government resources when viewed from the standpoint of (1) the disruption that occurs within families and communities, and (2) a counterproductive effect on deterrence.

As to the first point, although it is appropriate for the Court to focus on the sentence Mr. Ferguson deserves for his crime, it should also take into account his biological daughter and the daughter he is voluntarily raising. Toward that end, Mr. Ferguson has a strong desire to provide the type of stability for his babies that he did not have for himself. The Annie E. Cassie Foundation recently released a study

regarding the effects of incarceration on children and communities. "The saying is all too familiar: Do the crime, do the time. But in America's age of mass incarceration, millions of children are suffering the consequences of their parents' sentences and our nation's tough-on-crime practices.[1] The incarceration of a parent often is financially devastating: 65 percent of families with an incarcerated parent cannot meet basic financial needs and are more likely to end up homeless.[2]

In addition to the financial toll on the family, incarceration weakens the parental bonds that need to be formed when the child is young. Lengthy incarceration "creates an unstable environment for kids that can have lasting effects on their development and well-being."[3] Moreover, the stress of single motherhood means that women left behind with children while the father is incarcerated are more likely to suffer from anxiety, depression, and addiction.

Finally, it is not only the nuclear family that suffers when a parent is incarcerated. The incarceration of a parent also puts stress on what is often an already struggling community by taking away a wage earner and support system for a child. Indeed, "the absence of parents, most of them fathers, weakens neighborhoods and tears apart social networks, which, in turn, affects the local economy," continuing the cycle of poverty and crime.[4]

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[1] *A Shared Sentence: the devastating toll of parental incarceration on kids, families andommunities;The Annie E. Cassie Foundation*, April 2006, page 1, *available at* http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf.
[2] *Id.* at 3.
[3] *Id.* at 1.
[4] *Id.* at 4.

Second, while it may be effective to utilize prisons to incapacitate violent offenders and dangerous career criminals for lengthy periods of time, prisons are overused when nonviolent offenders who may be safely supervised in the community are given unnecessarily long sentences. As noted earlier, Mr. Ferguson has an education, along with family support, trade skills, and other attributes that make it likely that he can reintegrate into the community successfully if given a chance. These factors diminish the chance of recidivism, and indeed, the Department of Justice's own research shows that the certainty of being caught is far more important than the severity of the punishment imposed when trying to deter crime.[5]

Moreover, incarceration as a penalty provides diminishing returns when taxpayers are spending $32,000 per prisoner annually, with the impact being that offenders and their families emerge disillusioned by harsh penalties that do not advance the goals of sentencing and exact such a significant toll on their lives and communities.

While there is no one to blame for Mr. Ferguson's situation but himself, it need not end with a repeated cycle of single parenthood, financial distress, and undermined public confidence in the efficacy of the criminal justice system.

This conclusion is supported by a small study conducted by the Honorable James Gwin, United States District Judge for the Northern District of Ohio. The Court attempted to determine if the Federal Sentencing Guidelines were a good

[5] *See Five Things About Deterrence*, United States Department of Justice, Office of Justice Programs, National Institute of Justice, *available at* http://nij.gov/fivethings/pages/deterrence.aspx.

reflection of community sentiment regarding the appropriate punishment. Following 22 jury trials, district judges gave the jurors a short description of the offender's criminal history and asked the jurors to write their recommended sentences on a form. The recommended sentences were examined after the actual sentences were imposed on the defendants. Out of the 261 sentencing recommendations received, 229 of them were less than the bottom of the sentencing guideline range, often times dramatically below the range. It should be noted that the majority of cases examined by the study were drug or gun cases.[6]

Lastly, counsel notes that Mr. Ferguson will not receive credit for the roughly 6 months he has already served in MDOC custody during the pendency of this federal case. We ask that the sentence here be made concurrent to his current MDOC sentence. We further urge this Court to determine the appropriate sentence by considering all the above arguments for a departure and/or variance and then decide what total sentence would be appropriate for Mr. Ferguson. We ask that this Court then make an adjustment to that sentence to reflect the time already served for which Mr. Ferguson will not be credited, or that the Court grant a further variance in the sentence. If the Court accepts all of our arguments, the resulting sentence would reflect a penalty of 40 months.

[6] Judge James S. Gwin, Jury Sentiment on Just Punishment: Do the Federal Sentencing Guideline Reflect Community Values, Harvard Law and Policy Review, Vol 4.1, 2013, available at http://harvardlpr.com/wp-content/uploads/2013/05/4.1_9_Gwin.pdf.

3. The Suggested Sentence Sufficiently Deters Future Criminal Conduct, Protects the Public from Further Crime, and Provides Adequate Retribution.

The Sentencing Reform Act requires that courts impose sentences that are sufficient, but no more than necessary, to "deter[] . . . criminal conduct." 18 U.S.C. § 3553(1), (2)(B). A 40-month trip through the federal penal system will be sufficient to punish Mr. Ferguson and make him think twice about any future criminal proclivities. By the time he serves that sentence, his youngest daughter will be twice her current age, he will have been free of marijuana use for several years, he will have scored 3 criminal-history points (reminding him that if he breaks the law again, the penalties will be worse), and he will be known to law enforcement officers (and therefore more likely to be caught).

As for general deterrence—i.e., the idea of sentencing Mr. Ferguson to a harsher penalty to deter others—research suggests that it does not work. *See* Michael Tonry, Purposes and Functions of Sentencing, 34 Crime & Justice 1, 28–29 (2006) (citing articles published in 1980, 1998, 1999, and 2003).[7] And it runs counter to basic notions of justice. Immanuel Kant, The Science of Right 195 (1790) ("[I]n all cases," punishment must "be imposed only because the individual on whom it is inflicted has committed a crime," not "merely as a means subservient to the purpose of another.").

[7] While certainty of getting caught and punished deters crime, all empirical research shows that harsher sentences deter virtually nothing at all: "[I]ncreases in severity of punishments do not yield significant (if any) marginal deterrent effects . . . Three National Academy of Science panels, all appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence." *Id.*

Even if the Court disagrees and believes that general deterrence is served by a harsh sentence, there is no reasoned way to determine whether a 120-month or 84-month sentence "promotes" greater respect for the law than a 40-month sentence with an emphasis on rehabilitation. In fact, given the above-noted risks that a lengthy sentence may be just as likely to have the reverse effect—fostering disrespect for the law -- the public would be better served through swift, certain, proportionate, and fiscally responsible punishment.

III. Conclusion

Because, a 40-month cumulative sentence will proportionately punish Mr. Ferguson, protect the public, and deter Mr. Ferguson from repeating his poor choices, he asks the Court to grant his requests for a downward departure and/or downward variance and impose a 40-month penalty accordingly.

/s/ Brandy Robinson
Counsel for Defendant
613 Abbott Street, Fifth Floor
Detroit, Michigan 48226
brandy_robinson@fd.org
(313) 967-5834

Dated: January 24, 2017

CERTIFICATE OF SERVICE

On January 24, 2017, I electronically filed the foregoing document using the ECF system. I also served the document on opposing counsel for the government, April Russo.

s/Brandy Robinson
Attorney for Michael Ferguson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Index of Exhibits to
Combined Motion for Downward Variance, Downward Departure and Sentencing Memorandum

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Exhibit B: Pamela Walker Letter

Exhibit C: Briauna Walker Letter

Exhibit D: Antonio Stewart Letter

Exhibit E: Brenda Tutton Letter

Exhibit F: Obituary

Exhibit G: Nine-Year Old Michael

Exhibit H: Desiree Ferguson Letter

Exhibit I: Preliminary Examination Transcript

Exhibit J: Plea Transcript

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit A: Pictures and Accolades

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit B: Pamela Walker Letter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit C: Briauna Walker Letter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit D: Antonio Stewart Letter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit E: Brenda Tutton Letter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit F: Obituary

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit G: Nine-Year Old Michael

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit H: Desiree Ferguson Letter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit I: Preliminary Examination Transcript

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 16-20535
Hon. Robert H. Cleland

v.

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

Exhibit J: Plea Transcript

STATE OF MICHIGAN

Michigan Legislature

Certificate of Congratulations for Successfully completing the Course of Study prescribed for all State High Schools by the Board of Education of the State of Michigan

Awarded to

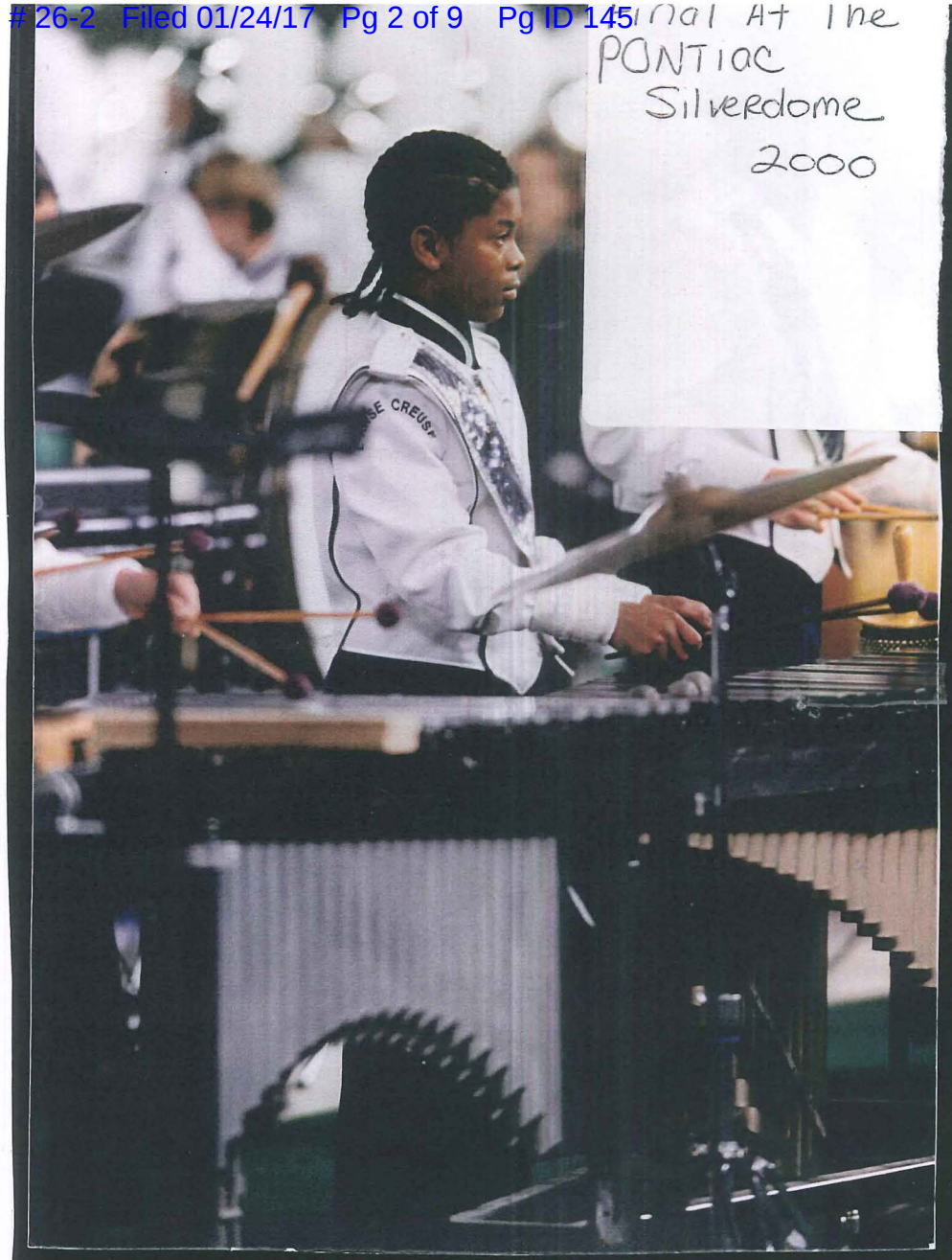
Michael Ferguson

in recognition of
Outstanding Achievement

2003

Jack Brandenburg
State Representative
Twenty-fourth District




inal At the
PONTIAC
Silverdome
2000



Macomb Daily staff photo by Ray J. Skowronek

The L'Anse Creuse marching band bundled up in its warmest winter apparel to march through the streets of Harrison Township on Tuesday in preparation for its upcoming appearance in the Hollywood Christmas Parade, in California. It will be one of nine bands from across the country to participate in the annual, internationally televised event.

L'Anse Creuse band is California bound

By Shekini Gilliam
Macomb Daily Staff Writer

Harrison Township residents peered out of their windows or stood in their yards despite the brisk cold to watch the L'Anse Creuse High School marching band practice down their streets Tuesday.

But, they may not have fully understood what they were really observing.

The Harrison Township band was preparing for something more than a high school football game or pep rally. It was getting ready to participate in the internationally televised 70th annual Hollywood Christmas Parade in California, which will take place Sunday.

The band last had the opportunity to be one of the annual California event's nine featured bands in 1996. It had to submit a resume and audition tape to be chosen. After that, it was invited to return to California each year if it desired.

But Russell Robinson, band director, wanted to space the visits so that a whole new group of students could experience it.

"This is a big adventure taking 200 people across the entire country 3000 miles from home," he said. "It's not something you can do every year. The job of a teacher is to prepare the kids as much as possible not just for now, but for life. So, it's important to provide them with exposure, memories and experiences that they'll carry with them for the rest of their life."

Traveling and reaching high goals are not new for the high school band. It earned second place in a field show at the Festival of States National Band Pageant in Florida last year. It has also been a state finalist in the Michigan Competing Bands Association for three out of the last four years and received superior rating at the District Marching Band Festival for the last six years.

To ensure that they would be able to add California to their list of achievements, band students have begun practicing and holding fund-raisers to pay for the $175,000 trip earlier this year. Some 170 students and 30 staff and chaperons will go on the 6-day trip, which will begin today.

Still about $4,000 short of its goal, the band compensated by using money earmarked for next year's activities.

But, with fund raising behind them and the trip before them, band members bundled up in their scarves, hats and gloves and fought the cold Tuesday to practice their uniform turns and upbeat renditions of God Rest Ye Merry Gentlemen and Winter Wonderland.

Jacob Alvaro, a senior, can't wait to perform these songs in a different climate.

"I'm looking forward to the heat after all this marching in the cold," he said. "I'm looking forward to getting out there in California and seeing the sights. I'm not nervous. I've been here for four years and I'm used to the parades and shows and such. I'm excited about being on TV in the parade."

The 70th annual Hollywood Christmas Parade will air at 4 p.m. Dec. 24 and again at 4 p.m. Dec. 24 on WKBD Channel 50.

L'Anse Creuse Public Schools
Pankow Vocational-Technical Center

SKILLS CERTIFICATE

This is to certify that

Michael Ferguson

has successfully completed a two-year program in

Auto Mechanics

and this certificate is being presented in recognition of t his achievement.

Signed this 13th day of **June 2003**

Gerry Hanna, Instructor

Dr. Chen L. Chang, Principal

Dr. DiAnne Pellerin, Superintendent

The L'Anse Creuse Pankow Vocational-Technical Center's Automotive Mechanics Program certifies that

_____

has successfully completed NATEF instructional performance objectives in the following areas:

✓ Lube/Oil Service	_____ Emission Controls	_____ Timing Gear & Chain
✓ Tires/Wheels	_____ Electrical Diagnosis	✓ Valve Service
✓ Cooling system	✓ Brake Safety Inspection	_____ Air Conditioning
✓ Starting System	✓ Brake System Servicing	✓ Tool Identification
_____ Charging System	✓ Suspension/Chassis	✓ Work Room Maintenance
_____ Exhaust System	✓ Rear Axle/Drive Lines	_____ Basic Welding
_____ Fuel system	✓ Transmission Installation	_____ Engine Rebuilding
✓ Basic Tune-up	_____ Clutch Service	_____ Sales/Inventory/Parts Management
_____ Ignition System Diagnosis	_____ Front End Alignment	

Additional information may be obtained by calling Mr. Gerald Hanna, Instructor at 586/783-6570.

Gerald Hanna, Automotive Mechanics Instructor

15 May 03
Date

African Methodist Episcopal Church

Certificate of Baptism

(Infants to 12 years)

Be it Known That Michael Howard Ferguson Jr., Child of
Michael Howard Ferguson Sr. and Brenda Ann Tutton
Father's Full Name Mother's Full Name

Born Hutzel Hosp. 9/27/85 at Detroit, Michigan 11:45 AM
has been presented for Christian Baptism; and HIS Parents and Godparents having confessed their faith in our Lord and Savior Jesus Christ, and therefore accepted as their bounden duty and privilege to live before this child a life that becomes the gospel, to exercise all godly care that HE be brought up in the Christian faith, that HE be taught as soon as HE shall be able to learn the nature and end of this Holy Sacrament, the Holy Scriptures, the Lord's Prayer, the Ten Commandments, the Apostle's Creed, the Catechism and all other things a Christian should know and believe to HIS soul's health, that HE learn to give reverent attendance upon the private and public worship of God; and having promised that they will endeavor to keep this child under the ministry and guidance of the African Methodist Episcopal Church until HE by the power of God shall accept for HIS self the gift of salvation and be confirmed as a full and responsible member of Christ's Holy Church; was this day baptized in the name of the Father, and of the Son, and of the Holy Spirit, and is now enrolled as a preparatory member

Witnesses: Tina Kellam

Godparents: Rev Fannie Lloyd

Brenda Tutton

March 15, 1990

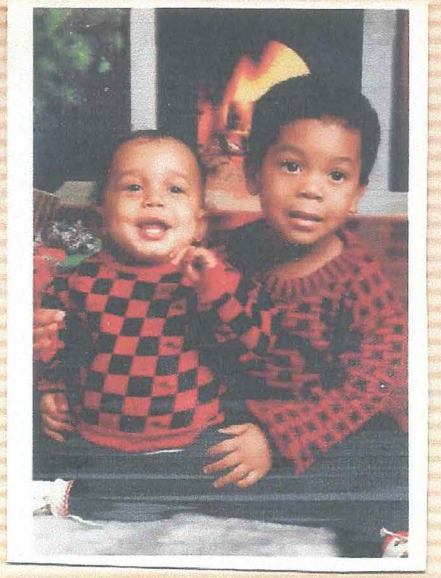
Rev Saundra L Mackey
Pastor

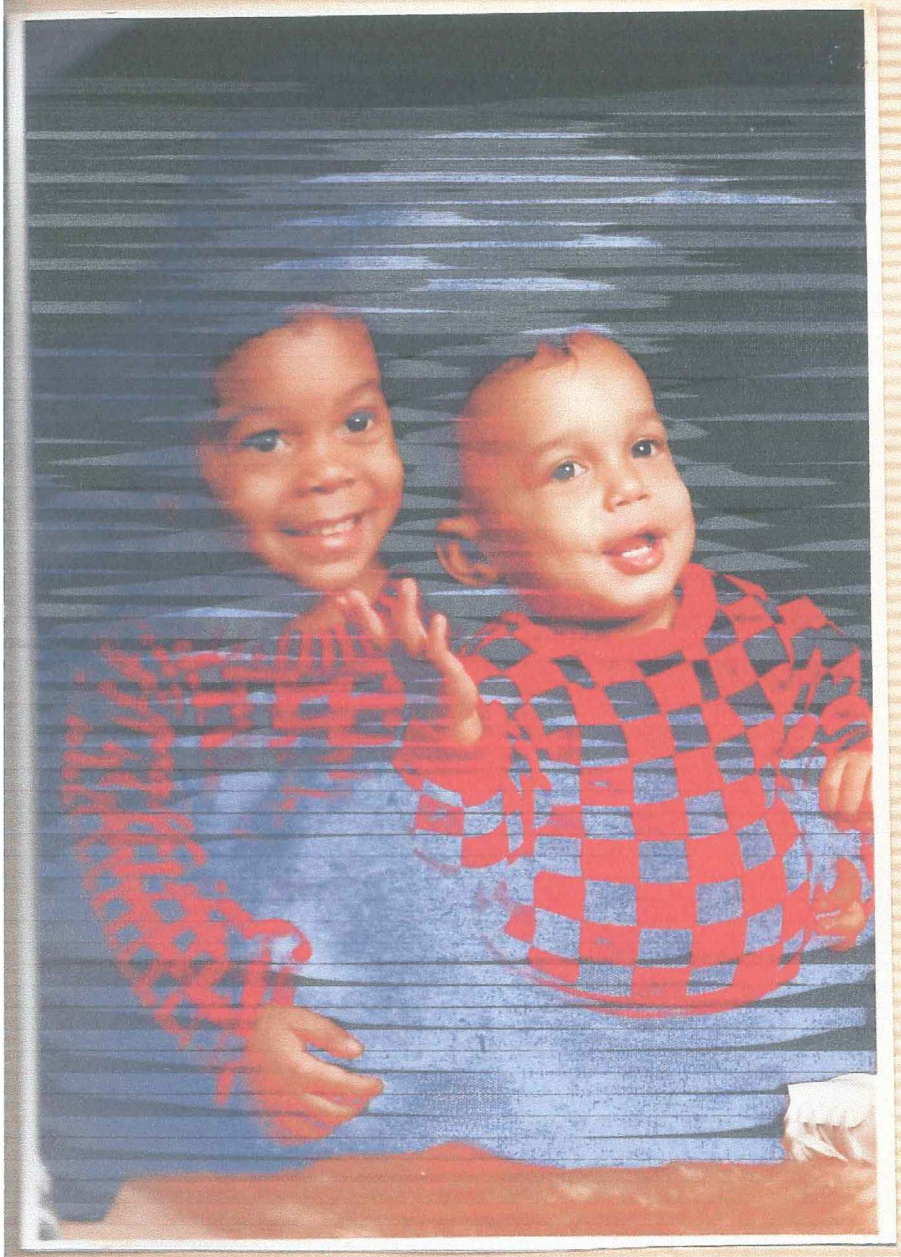
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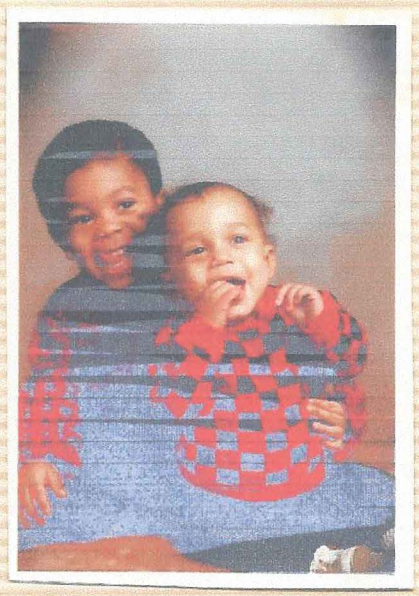
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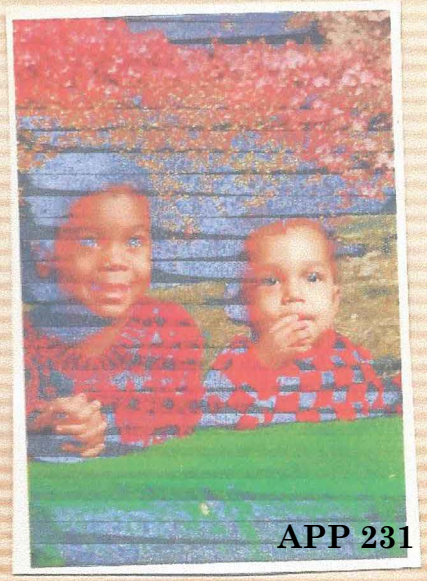
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Honorable Robert H. Cleland
United States District Court Judge
Federal Building and United States Courthouse
526 Water Street
Port Huron, Michigan 48060

Dear Judge Cleland,

I am Pamela Walker a stay at home mother. I have been knowing Mr. Ferguson for nine years. He and I dated from 2008 until 2012. We have a four year old daughter together. Before we had our own child Mr. Ferguson played an active role in my oldest daughter's life as a father figure. We started when she was nine. He was always there for her. He would fill in as parent when I was at work. He would take her to school activities. When she needed help with school work he was there. Mr. Ferguson helped me coach for the Police Athletic League. He coached football to boys that were ages 11 to 15. We had our own child in 2012. Mr. Ferguson never missed a doctor's appointment with me. Anything that he needed to do for the girls he did. It has been a struggle for our daughter not to see him. He has been there for her birthdays except for the last, which she was sad about. I am aware that Mr. Ferguson has plead guilty for the crimes he has committed. After the conversation we had about the length of time he can be facing it set in that he will miss out on a lot of vital moments in our child's life that cannot be repeated. At this time she is not aware of the situation. That will be a discussion that needs to be had. It will be a struggle to get through. Thank you for listening to me express my feelings about the situation.

Respectfully Yours,

Pamela L. Walker

Pamela L. Walker

Honorable Robert H. Cleland
United States District Court Judge
Federal Building and United States Courthouse
526 Water Street
Port Huron, MI 48060

Dear Judge Cleland I am Michael Ferguson's step daughter I have been around him since I was 7 years of age he helped me in Alot of ways and he Also helped me as a person and student MY father was never really in my life. He stepped And played a role he did not have to play at All. My dad as a person Was funny goofy helpful and caring I Remember When my mom Was so mad at me and michael saved me from getting Punished he Always mad a situation better even if it was the worst he always saw the better in every situation. He loved dogs he had so many as I think about it he got me over the fear of dogs. Don't get me wrong I understand my dad is in trouble I understand it completely but Also he has 2 beautiful girls that needs him. I support him one hundred persent. and what ever you guys decicde to do I will support either way.

Sincerely,
Briana Walker

January 21, 2017

Honorable Robert H. Cleland
United States District Court Judge
Federal Building and United States Courthouse
526 Water Street
Port Huron, Michigan 48060

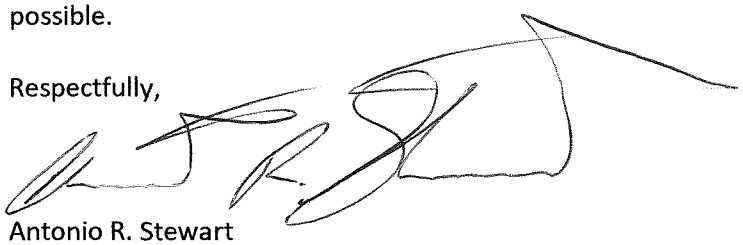
Dear Judge Cleland:

I am Antonio Stewart, Michael Ferguson's twenty-nine-year-old brother. I am a college grad and have earned an Associates Degree in Business Management of Small Business. I am employed by two companies; for Live Nation I do stage production and for ESS Event Support Services I do foundation construction work. I am involved in the community and volunteer my time to a non-profit organization called Volunteers Assisting the Disabled by spending a week each summer as an attendant to campers as well as participating in fundraising throughout the year.

My brother, Michael, was more than a brother to me growing up. Since I was six years old, Michael woke me up for school and cooked me breakfast, usually eggs, toast and potatoes. Michael walked me to and from school every day until I was in high school. Michael took care of me after school and made sure I did my homework. When I was in high school, Michael continued to support me going into sports and continuing to make sure I did my homework and graduate, which I did with a B average. Michael is a father to his daughter, Bre, who is four years old. Michael helps Bre with her ABCs, counting, colors, and other things that preschoolers need to learn. They also dance, sing and play. I enjoy spending time with Michael and Bre because it's a wonderful time for bonding and learning some parenting skills for when I have my own children. In addition to being an active father, Michael is active in his community. He often helps his elderly neighbors by carrying in their groceries and fixing things around their houses. I have gone with him a few times to help with bigger projects such as installing handrails, repairing gates and fencing, and fixing porches.

Your Honor, I understand that my brother, Michael Howard Ferguson, Jr., pleaded guilty and that there are consequences. When determining his sentence, I respectfully request that you consider that Michael's young daughter will be without his parenting and positive influence in her day-to-day life for the duration of his sentence, and that his community will be without his contributions while he is away. While I most likely will not be available to fix gates, carry groceries, or do the many other things that Michael does, I will do my best to step into his shoes and be a father figure to Bre, like he was for me, until Michael is able to return to her life in a meaningful way. I humbly ask that you take these things into consideration and sentence Michael in a way that returns him to a productive life as soon as possible.

Respectfully,



Antonio R. Stewart
24780 Glouchester Street
Harrison Township, Michigan 48045
(313) 778-4917

January 20, 2017

Honorable Robert H. Cleland
United States District Court Judge
Federal Building and United States Courthouse
526 Water Street
Port Huron, Michigan 48060

Dear Judge Cleland,

I am Brenda Tutton, the mother of Michael Ferguson. I am currently employed at the United States Postal Service as a city letter carrier over 3 years. I worked as a courier for Federal Express for 12 years. I am currently enrolled at University of Phoenix, working on my Bachelor in Accounting. I am a member of the City of Refuge Christian Church.

Michael is the oldest of 3 children. Michael always attended school and graduated from Lans'e Cruese high school in Harrison Township in 2003. Michael was always involved in band, football and track throughout his school years. Michael attended school regularly and was never any problem in school. Michael was raised up attending church every Sunday and was active in the youth program. He always played his role as a big brother, making sure his brothers got to school on time and walk them home from school, help them with their homework and fix afterschool snacks. Michael always has a passion of looking over his family. Michael biggest passion is helping people and protecting them. In the neighbor I live in there are a lot of elderly people, Michael will always help them and do odd jobs for them around the house. Michael is missed in the neighborhood. Michael grew up in a single parent home, as being the oldest he did his part as being the oldest child. After graduating from high school, Michael left Michigan and moved to Mississippi and worked with his uncles in 2004. Michael stayed in Mississippi until 2007 when he moved back to Michigan. He still continues to find employment and worked. In 2012, Michael was blessed with a beautiful angel named, Briayle Jeane Walker. Michael spent a lot of time with his daughter Briayle; he always worked and supported her. He still keeps communication with his daughter.

Michael understands that he is guilty of the crimes he has committed and pleads guilty. He is willing to do time for his crime but also want to get back to being a father with his daughter soon as possible without putting disbelief in her heart. Michael is greatly missed by his family and the community.

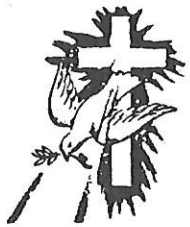
Respectfully

Brenda Ann Tutton

Brenda Ann Tutton
15052 Sorrento St
Detroit, Michigan 48227

Pallbearers
FRIENDS OF THE FAMILY

Interment
MOUNT HOPE MEMORIAL GARDENS
17840 Middlebelt Road
Livonia, Michigan 48152



Acknowledgment:

The family of the late Michael Howard Ferguson, wishes to acknowledge with deep appreciation the many comforting messages, floral tributes, prayers and many other expressions of kindness and concern evidenced at this time in thought and deed. A more personal acknowledgment will be made at a later date.

MAYS PRINTING CO., Inc. - 15800 LIVERNOIS - 861-1900

A Service of Memory

— For —

Michael Howard Ferguson

July 24, 1959 — March 5, 1995

MONDAY, MARCH 13, 1995
Family Hour: 10:30 a.m. / Funeral: 11:00 a.m.

James H. Cole
Home for Funerals
2624 WEST GRAND BOULEVARD
DETROIT, MICHIGAN

APP 237

The Obituary

"But they that hope in the Lord shall renew their strength, they shall take wings as eagles, they shall run and not be weary, they shall walk and not faint."

— Isaiah 40:31



Michael Howard Ferguson was born to Seraphine and Howard Ferguson on July 24, 1959.

He was an excellent student and as an adult, he became a well trained welder and auto mechanic. He was also a master of Mr. Fix-it tasks such as landscaping, gardening, carpentry and painting. His most recent skill mastery was that of machinist, which he learned in the Focus Hope Training Program. He was currently doing a job search to find an ideal place to begin his new career.

Michael had the perennial curiosity of a child and a deep love of nature and animals. His favorite sports were swimming, fishing and karate.

He has three children: a son, Michael Rayshawn Rimson, a daughter, Erica Smith and a son, Michael Howard Ferguson.

Wings

Oh, to catch the winds of flight
And soar where eagles go,
To leave the woes of troubled souls
Behind me far below.
I'd listen to the song of birds
And sail in endless flight,
Then chase the sun through cloudy paths
And play with stars at night.

The boundless heavens for my home,
The breeze to lift me high
To rise above my mortal bonds
And never have to die.
Knowing I had found the way
To trails where angels trod,
And when my wings could fly no more —
I'd take the hand of God!

— C. David Hay

The Obituary

Michael Howard Ferguson was born to Seraphine and Howard Ferguson on July 24, 1959.

He was an excellent student and as an adult, he became a well trained welder and auto mechanic. He was also a master of Mr. Fix-it tasks such as landscaping, gardening, carpentry and painting. His most recent skill mastery was that of machinist, which he learned in the Focus Hope Training Program. He was currently doing a job search to find an ideal place to begin his new career.

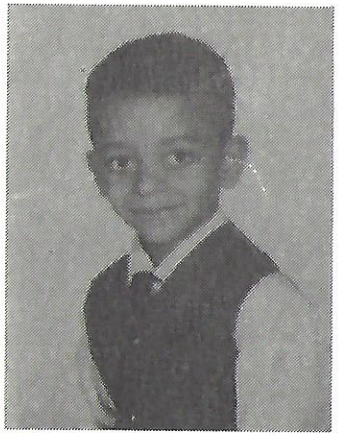
Michael had the perennial curiosity of a child and a deep love of nature and animals. His favorite sports were swimming, fishing and karate.

He has three children: a son, Michael Rayshawn Rimson, a daughter, Erica Smith and a son, Michael Howard Ferguson.

In addition to his parents, he is survived by his sisters: Pamela Latimore, Jennifer Ferguson Grant, Michelle Ferguson, Desiree Ferguson-Knight, Gabrielle Ferguson; and a number of nieces and nephews. All of the children will definitely miss being tussled around by Uncle Mike.

Michael committed himself to the Lord in 1990 and his parting this life will not go unnoticed by God and His hosts.

We will miss sharing life with him, but live with the confidence that we will be together again.



SOMETIMES I HAVE TO SING ALONE

Sometimes I have to sing alone,
Just like the bird in the green tree,
Inside my little world I find
The song God gave to only me.

A butterfly with orange wings,
A pebble or a little stone
That sparkles like a diamond makes
My heart start singing all alone.

I find it in the sun that keeps
Its smile of gold up in the sky,
I find it in each flower-face
And hills that keep on climbing high.

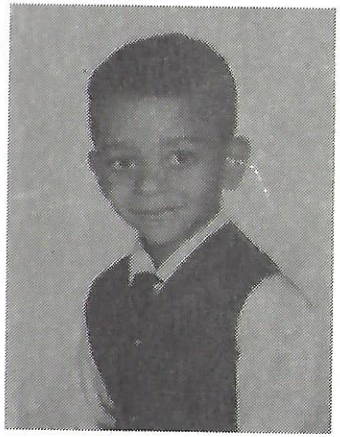
Each day there are so many things
That make me feel the world's my own
And so I'm thankful to my God
He gives me songs when I'm alone.

— Marion Schoeberlein

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The Order Of Service

†

Celebrating The Life Of
MICHAEL HOWARD FERGUSON

Organ Prelude . . . . . .

Video . . . . . .

Song . . . . . .Carolyn Hall
"His Eye Is On The Sparrow"

Scripture . . . . . .Pastor Haman Cross, Sr.

Prayer . . . . . .Pastor Haman Cross, Sr.

Song . . . . . .Ruth Agee

Acknowledgment of Cards, Telegrams
and Condolences . . . . . .

Remarks . . . . . .Open Forum

Obituary . . . . . .Read Silently

Eulogy . . . . . .Elder Harry Burwell

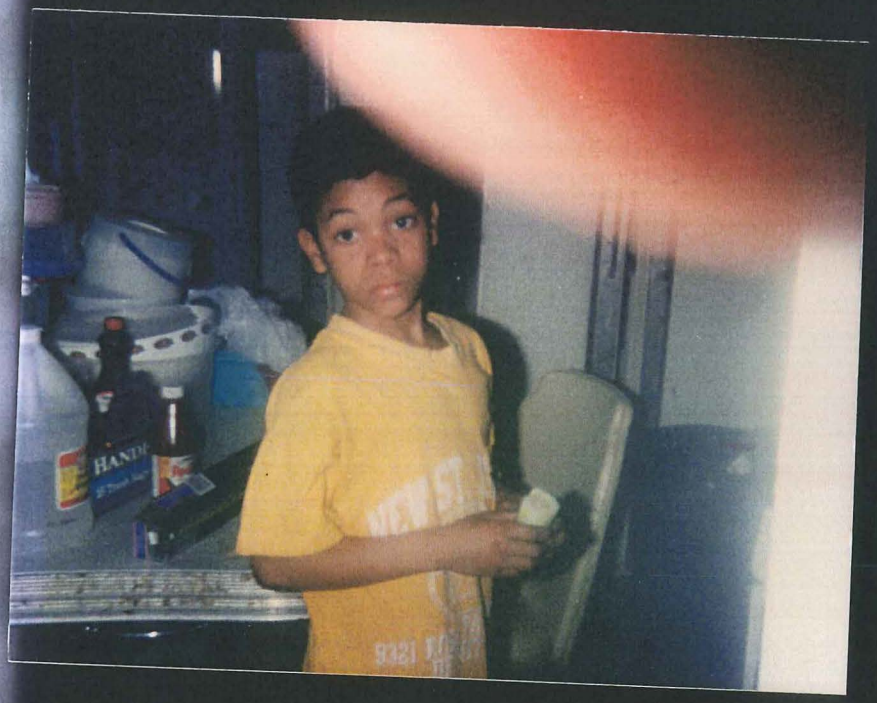
Recessional . . . . . .

Organ Postlude . . . . . .

(Drivers in the Funeral Procession,
please turn on headlights for safety.)



"I am the resurrection, and the life: he that believeth in me, though he were dead, yet shall he live: And whosoever liveth and believeth in me shall never die." — St. John 11:25-26



DESIREE M. FERGUSON

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DETROIT, MI 48235

(313) 319-8259

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January 23, 2017

Honorable Robert H. Cleland

United States District Court

Federal Building the United States Courthouse

526 Water Street

Port Huron, MI 48060

Re: Michael Howard Ferguson

Dear Judge Cleland:

I write to urge mercy and leniency on behalf of my nephew, Michael Howard Ferguson, who will appear before you for sentencing on February 7, 2017.

Michael is the youngest child and namesake of my deceased brother. Michael's father died when he was only ten years old. In truth, however, Michael's father was lost to him long before he actually died, because his father abandoned him due to drug addiction. Michael has struggled to overcome the pain of losing his father at such a young age, and it was only when his own baby girl was born that he finally began to resolve those feelings. Being a father has engendered in him a sense of connection and purpose in his life.

My own father was a diesel engine machinist, and my brother (Michael's dad) had begun training for that same career when he died. My mother gave me all of my father's and my brother's highly specialized precision tools, and I have kept them for Michael. When she did so, she said, "sometimes people can help you in death in ways they could not in life." Michael was very happy when I told him about the tools, and he subsequently enrolled in a training program in which he would eventually be able to use them.

I am an attorney who has represented indigent criminal defendants on appeal for over 25 years. I have also lived and worked in Detroit virtually all of my life. And I am the mother of three daughters, as well as innumerable "adopted" children whose parents were unavailable to them. This confluence of life experiences has afforded me keen insight into the ways in which living in the throes of poverty and fatherlessness can adversely affect one's life, but can also propel one to look out across the horizon. I believe Michael has a good heart and good intentions. He has sometimes fallen astray and crossed the line, but I don't believe he has ever hurt anyone. His desire to nurture his daughter and remain an active, visible and positive force in her life has motivated him to be a better man. I pray that you will find it in your heart to give him and his daughter this chance.

Sincerely,

Desiree M. Ferguson

STATE OF MICHIGAN

IN THE 36TH DISTRICT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN

vs

MICHAEL HOWARD FERGUSON,

DEFENDANT.

_____/

DISTRICT COURT
CASE NO. 15-62038-01

CIRCUIT COURT
CASE NO. 16-000431-01-FC

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE KENNETH J. KING

Detroit, Michigan - Friday, January 15, 2016

APPEARANCES:

For the People:
MICHAEL J. REYNOLDS (P30592)
Assistant Prosecuting Attorney
1441 Saint Antoine St., Fl 12
Detroit, Michigan 48226
(313) 213-1758

For the Defendant:
JAMES C. HOWARTH (P15179)
Law Offices of James C. Howarth
615 Griswold Street, Ste 820
Detroit, Michigan 48226
(313)963-1455

Reported By:
SHARI MORTON #6722
Certified Court Reporter
36TH District Court

Detroit, Michigan

Friday, January 15, 2016

- - -

THE COURT: Calling Case 15-62038, People of the State of Michigan versus Michael Howard Ferguson. Defendant is charged in Count 1, Homicide, Murder, first degree Premeditated; Count 2, Weapons, Firearms, Possession by a Felon: Count 3, Felony Firearms. Defendant has a habitual offender second offense notice.

Appearances for the record, please.

MR. REYNOLDS: Good afternoon, Your Honor, Assistant Prosecuting Attorney, Michael Reynolds for the People.

MR. HOWARTH: Good afternoon, Your Honor, James Howarth appearing on the behalf of Michael Ferguson.

THE COURT: Okay.

MR. HOWARTH: Your Honor, I noticed that Mr. Ferguson has been asked to sit facing away from me. And I understand normal circumstances and I don't know exactly what your rules are but it would be difficult for me to communicate with him if I can't see him face-to-face during the examination.

THE COURT: Well, please feel free to move about as you see fit but I leave security to the security experts.

MR. HOWARTH: I appreciate that.

THE COURT: And because of the large number of people here, I think I would prefer to have the Defendant on that side of

the table.

MR. HOWARTH: I don't mind being on that side of the table, I only like him to be able to look at me.

THE COURT: Oh, to look at you.

MR. HOWARTH: I mean so he can sit around facing me so that I can communicate back and forth. I'm now seated looking at the back of his head.

DEPUTY: He can sit right there counsel.

MR. HOWARTH: Okay --

DEPUTY: Okay.

MR. HOWARTH: -- thank you.

THE COURT: Yeah, like I said you're free to move wherever you like.

MR. HOWARTH: Okay.

THE COURT: Okay?

MR. HOWARTH: Thank you.

THE COURT: All right.

MR. REYNOLDS: Your Honor, I had an opportunity to talk to counsel and there're some stipulations to put on the record before we start taking testimony.

THE COURT: You may proceed.

MR. REYNOLDS: All for purposes of examination only. First, as it relates to the Defendant's felon in possession charge that the Defendant was convicted of carrying a concealed weapon on January 11, 2012 in Wayne County Circuit Court Case No. 12-11117.

Second, in lieu of the testimony of Assistant Wayne County Medical Examiner, Dr. Chantel Njiwaji regarding the autopsy she performed on the deceased in this case, Osean Lockett on September 6, 2015. Parties would stipulate to the admission of Wayne County Medical Examiner File No. 15-9977 as Exhibit No. 1. And I would just read into the record the summary and opinion from Exhibit No. 1, I'm sorry, not Dr. Njiwaji, Dr. Lokman Sung. And that would indicate that quote:

"It is my opinion that death was caused by multiple gunshot wounds. Per the investigation, Mr. Lockett's decomposed body was found inside of a manhole.

GUNSHOTS: There were three gunshot wounds to the head. Due to sever decomposition, evidence of close range firing could not be appreciated. Unless otherwise stated, the wound tracks are described when the body is viewed in the standard anatomical position. The gunshot wounds are arbitrarily numbered for ease of description and do not reflect the sequence of firing.

GUNSHOT WOUND NO. 1, Perforating Gunshot Wound to the Head: There was a through-and-through gunshot wound on the superior right frontal bone, near the top of the head. The wound track proceeded from this injury, perforated the brain, and ended at an exit wound located on the nasal area of the face. There was a linear fracture on the frontal bone that extended anteriorly from the entrance wound and comminuted

fractures of the facial bones associate with the exit gunshot wound. The wound track was from back to front, slightly right to left and sharply downward.

GUNSHOT WOUND NO. 2, Perforating Gunshot Wound to the Head: There was a through-and-through entrance gunshot wound to the right parietal bone, near the vertex of the head. This wound was located immediately right of the sagittal suture. The wound track proceeded from this injury, perforated the brain, fractured and ended at an exit wound on the left temporal bone. A minimally deformed, jacketed bullet was recovered from the superficial tissue of the left lateral neck and retained. There were radiating fractures of the left parietal and temporal bones associated with the exit gunshot wound. The wound track was right to left and sharply downward.

GUNSHOT WOUND NO. 3, Perforating, Penetrating, I'm sorry, Gunshot Wound to the Head: There was an entrance gunshot wound on the right mandible. The wound track proceeded from this injury, fractured the mandible, entered the thoracic cavity, and terminated in the left lung. The wound track was from right to left and sharply downward. A well-preserved, jacketed bullet was recovered from the left lung and retained."

And then he said, "Additionally, a defect opening to the right pleural cavity is on the upper right back."

And it was signed by Dr. Sung on October 5, 2015 in Wayne County Medical Examiner, Case No. 15-9977.

THE COURT: So stipulated for exam purposes only?

MR. HOWARTH: For exam purposes we would stipulate that if the doctor had been called that that would have been the substance of his testimony.

THE COURT: All right. Stipulation received. Would you like to publish that to the Court?

MR. REYNOLDS: Yes, Your Honor. And one last stipulation would be that the body of the deceased in this case, Osean Lockett, was identified through Donald Ruckers (ph).

THE COURT: Okay. Is that Osean or O'Sean?

MR. HOWARTH: I believe it's Osean.

COURT REPORTER: O-SEA-UM (ph).

MR. HOWARTH: O-sea-um.

THE COURT: Okay, thank you.

MR. REYNOLDS: Your Honor, at this time I'd call Brenda Burton and she's in the court now. I believe all of our witnesses have been sequestered except, with an exception for the officer in charge.

THE COURT: Any objection to the OIC remaining?

MR. HOWARTH: No, Your Honor.

THE COURT: All right. Ladies and gentlemen in the audience if there are any other witnesses who may testify in this matter either today or in a future hearing, please step into the

hallway until further notice. By remaining in the courtroom during testimony and you are a potential witness, you may preclude yourself from testifying at a later date.

Call your witness?

THE COURT: Ma'am, please step forward up here to this young lady and give her your name and the spelling of your name? Please raise your right hand? Do you swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?

MR. BURTON: I do.

THE COURT: Thank you, ma'am. Please have a seat right there. There's a microphone to your left, pull that around to you, all right, speak into that nice and clearly for us, okay?

You may begin when you're ready.

B-R-E-N-D-A B-U-R-T-O-N

After having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. REYNOLDS:

Q Good afternoon. Could you tell us your full name, please?

A Brenda Burton.

Q And Mrs. Burton --

THE COURT: Barton.

Q Pardon?

THE COURT: Barton.

A Burton, B-U-R-T-O-N.

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THE COURT: Burton.

Q Mrs. Burton, in his lifetime did you know Osean Locket?

A Yes.

Q Who was he to you?

A My son.

Q And as of the fourth of July weekend this year, how old was he?

A Nineteen.

Q Did you see him that weekend?

A Yes.

Q When do you last recall seeing him?

A When I dropped him off on July 6, 2015 at about 3:00 p.m. on my way to the store.

Q Okay --

A Maybe about, yeah about 4:00 p.m.

Q And where did you drop him off?

A At the BP gas station on the corner or Fenkell and Meyers in Detroit.

Q Okay. And what was your purpose for dropping him off there?

A Well, I went home to get my book bag and he was getting dressed, putting on his little Fourth of July outfit because he was couldn't wear it on the fourth, it was in the cleaners. And I was headed to school and he asked me if I could drop him there, he was going over his friend's house. He asked me to drop him at his friend's house on the corner of Keeler and Manor, but he said "Ma, let me out at the gas station". So I pulled into the gas station,

"You're making me late" and he reached over and gave me a kiss, he said, "Give me a kiss" and he got out the car and I said, "I'll call you when I get out of school."

Q And how far was the area you dropped your son off be from the area of Sorrento or Steel and Chalfonte?

A One block down, one block south and three short blocks or four short blocks west, about a quarter of mile if that.

Q Did your son have any friends, to your knowledge, in the area of Sorrento and Chalfonte?

A Friends, he knew everybody because he was born and raised right around the corner on Ward. Everybody knew him, he knew everybody but friends, I don't who, what I would call a 'friend' now.

Q Okay. Did you know a Will Kippen? (PH

A Yes.

Q And did you know by any --

A Yes, --

Q Did you know him by any nickname?

A His name is Gutter.

Q Like when you're bowling and you toss it in one of the gutters?

A Or like the gutter on the house, I wasn't (coughing), I know a gutter on the house.

Q Okay. Was he a friend of your son's?

A Yeah. He's been around for a long time, since they were all teenagers in pre-school.

Q Okay.

A But he's older than fourteen.
Q Did you know a Chaka?
A That's my lawn man. He had just cut my grass for the Fourth of July weekend, he do it every two weeks. And he stopped by almost every other day, Ma what'd you cook, what's your sides. I'd give him something to eat while he working and keep it moving.
Q Did you know the Defendant in this case, Michael Ferguson?
A Not by face and not by name, I just heard Mike throughout the neighborhood I guess maybe for the last year or so, but not personally, not like I knew Gutter or Chaka.
Q Okay. Now when did you last have contact with your son?
A With Osean?
Q Yes.
A When I dropped him off and he got out the car I went to school and when I came home -- I'm like really into prayer. When I came home, I prayed that day when I got home from school so like on the floor for like a half an hour for my sons, all of them and of course, I'm home alone and when I stood up I was so relieved. I cooked, took a shower and I lied across the bed. And I meant to call him to se if he wanted me or his dad to pick him up, but I fell asleep. When I woke up instantly out the blue, I get up every morning at about 5:45 but at 4:00 like, 4:02 or something like that I physically woke up and jumped up, grabbed my phone -- I didn't even go look in the room to see if he was there. I grabbed my phone and text, "Where are you" instantly. I never did

that before. And I got a text back saying, "I'm good, I'm with a girl with an apostrophes there, he's nineteen he don't put apostrophes, but I was sleepy. And so then I texted back, "Are you on Manor?" To this little girl who's on the corner house on Manor and Chalfonte that they had went to see that day, him and his little friends, his little friends on the other side not Sorrento. And I texted back, "Are you on Manor and is she old enough" because he's nineteen. And the person text me back, "Why do you ask?" That was the end of the texts. So I laid the phone down, went back to sleep. When I got to, on my way to work, dialed his number, it went straight to the voicemail. I'm like hmm, his phone is always on. I went on to work at 7:00. On my break at 10:00 o'clock I called his phone, it went to the voicemail. So now I start, I take a break and start calling everybody.

Q Now let me ask you. Did you eventually go looking for him in and around the area where you dropped him off?

A Yes. I punched out at two minutes to 5:00 after calling everybody even the little guy he was with, called the girls on Manor, I called everybody. So the little boy on Manor said, I walked home at about 3:30, Ham told me that --

MR. HOWARTH: Well, excuse me, excuse me, Your Honor --

A Okay.

MR. HOWARTH: -- I'm going to object to that as hearsay.

A Okay.

MR. REYNOLDS: Yep.

THE COURT: Sustained.

MR. REYNOLDS CONTINUED:

Q Ma'am, you went looking?

A Okay, I went a little far (ph), okay.

Q Okay.

A I went a little far, I was talking about me.

Q Is it fair to say --

A Okay.

Q -- you talked to a number of people?

A Okay. I went and looked for him, I took a leave of absence that day, I never went back to work from the day I left work on the seventh. I called my job, they told me to come sign the papers, I signed the papers --

Q Okay.

A -- I took a leave and looked for him --

Q Ma'am, let's just stay a little more focused --

A Okay.

Q -- okay? In the course of your looking for your son, did you go up and down Sorrento and Steel?

A Numerous times.

Q And did you end up coming into contact with Will McKithen?

A The first day when I left work. When the first day I left work I did. I seen him that day --

Q Was he with anyone at that time?

A I pulled up at his house, blew the horn and Chaka pulled up, jumped out his truck. I tried to -- I rolled the window down and I asked him, "Hey, you seen Ham?"

Q Now I don't want to you to say what anybody else said.

A You want me to say what I said, what I - me.

Q No. All I want to know is, did you in fact get some information from Mr. McKithen and from Chaka?

A Yes.

Q Okay. Now you continued looking for your son throughout July and August and into September?

A Yes.

Q At some point in time were you working with people that were involved in the missing persons portion of the Detroit Police Department?

A Yes.

Q And did you get any information for them?

A From them?

Q For them?

A (No verbal response)

Q Did you pick up some dental records of your son?

A Oh yes. I contacted the place in Ohio where they had sent his dental records because the dental office closed last year and they sent them to a dentist here and I went there and picked up his dental records and gave them to a lady at the Homicide, Ms. Olson.

Q Okay. Now, I want you to focus on September 5, 2015.

A Okay.
Q That day were you out looking for your missing son?
A No.
Q Okay. That day did you get some information that led you to the area of Sorrento and Chalfonte?
A Yes.
Q Okay. Was this like a tip of some kind?
A Well, I wasn't looking that day, I had kind of, like I'm not going to look today, it's a holiday weekend. My twenty-three year old had went to play basketball a couple of blocks from there and my phone rang and it was somebody saying, "Hey --

MR. HOWARTH: Excuse me, Your Honor, but she heard over the phone --

MR. REYNOLDS: It's not being admitted for the truth of the matter asserted --

MR. HOWARTH: I'll accept the --

MR. REYNOLDS: -- just to show what --

THE COURT: Overruled. You may proceed.

MR. REYNOLDS CONTINUED:
Q You can go ahead.
A I got a call saying somebody just read their Facebook, this is what I got a call and in my ear they said, "Hey somebody just read their Facebook page and it said Man, how I ironic is it I went to work today and found a body floating in the sewer on Chalfonte between Steel and Sorrento." So --

Q When you saw that or heard the information what did you do?

A I hung up the phone and called my twenty-three year old like "Are you still near Chalfonte, they said there's a body in the sewer over there". He's like, "I'm walking now because Butzel was closed." I said, "Can you go there, I'm on my way."

Q Did you arrive there?

A Yes. Yes.

Q And did you go to a sewer that's kind of at the mouth of the alley that runs parallel between Steel and Chalfonte?

A Yes, I went to the same -- the last place that I looked. That was the last place I stood four days before for twenty minutes talking about it stinks. Yes, I went there. I went to the sewer. The top was a little bit off, like a inch or two because I guess the body had floated up and back up somebody's stuff on one of those streets and they had to call the water board or the plumber, whoever. And they had to go to the sewer.

Q Okay.

A That was Gaton (ph) who put it on Facebook.

Q Okay, so you looked and you saw that the sewer was a little off line; is that right?

A Yeah, I did and my other two sons. The one that was walking and my oldest son, they went there with me. By the time I got there they were there. And I said well, I don't see any police anywhere.

Q Did you and your sons remove the lid to look down there?

A Yes. My oldest son said, "Well, I'm just going to move it." So we, they, them two slide it because it wasn't all the way on, they slide it. And when they slid it, all three of us looked down in there.

Q And what did you see?

A I seen a body that I thought was like a costume -- like something at the Halloween place or something like because it looked rubber and it was a arm up in the air like this and like this and I seen the naked arm but it was white like a piece of paper (indicating).

Q So you had the right arm extended up and the head kind of tipping down?

A Yes. Yes, and I just ran away. I ran a couple of feet from the sewer and my sons continued to look down in there. And my twenty-three year old son and Osean wear the same clothes so he could see the prints on the clothes and he kept saying, "Ma, that's him."

Q Okay. Did you call the police?

A Yes. As I walked away I called 911, yes.

Q And were you present when police and fire department personnel arrived?

A Yes, I never left.

Q Were you present when the body was removed from the sewer?

A Yes.

Q And were you able to recognize the person that was being removed from the sewer?

A Yeah, I recognized because I always made jokes with him about his

legs so, it was a thousand people there, so they tried to block it with fire trucks and they put this thing over him like a tarp thing down in the sewer so when they pulled him up people couldn't see. You know, people were up in the trees. But so people couldn't see but I laid -- they told me I could come over there but I didn't want to because I wanted to remember him like I do but I looked down and his shoes and his leg, his shoes.

Q Okay. When you looked down into the -- by the way what kind of shoes were they?

A Some type of -- They were gray leather and suede, they were before they were in the sewer. And they were like a maybe a, I don't know, I don't know the name, I'm not into designers but they were nice shoes. But they had gray leather and gray suede. And so the officer, I believe it was Officer Mackey, I'm not sure or the guy that don't work there anymore, took a picture. He said, Well, I'll go over there and take a picture of the shoe and I'll come back over here and show it to you guys. And he showed it to me an my sons and my husband. He was like, "Tell me if this is the shoe?" Excuse me, that was the shoe.

Q When you looked down into the sewer, were you able to see enough of the clothing to tell whether or not that was the same clothing that he was wearing the day that you dropped him off at the gas station?

A I looked at the whiteness -- When I seen how white he was, when I seen how white that person was in that sewer from bleach, I just

didn't want to look anymore.

Q Okay. Now, did your son have his shoes with drugs?

A With who, honey?

Q Drugs?

A He smoked weed, yes.

Q Okay.

A Yeah, he smoked weed.

Q Okay.

MR. REYNOLDS: I have no further questions for Mrs. Burton.

THE COURT: Cross-exam?

MR. HOWARTH: Thank you, Your Honor. I had just a second to talk with Mr. Ferguson?

CROSS-EXAMINATION

BY MR. HOWARTH:

Q Good afternoon, Ms. Burton.

A Hello.

Q Ms. Burton, you probably realized that I'm an attorney number one; is that right?

A Yes.

Q And it wouldn't be surprising that I represent Michael Ferguson who I'm pointing to with my left hand right now (indicating)?

A Okay.

Q All right. I want to ask you just a couple of questions. I'm not going to keep you up there because I understand all of the

whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. REYNOLDS:

Q Could you tell Judge King your full name and occupation please?

A Yes, Will McKithen, Jr. I work at Great Lakes Wine and Spirit Warehouse.

Q Okay. And Mr. McKithen, back in, on the Fourth of July weekend of this past year, where were you living?

A 15061 Steel.

Q And is that in the City of Detroit?

A Yes it is.

Q Did you know the Defendant Michael Ferguson then?

A Yeah, I knew him about a year.

Q And do you see him in court today?

A Yeah.

Q Where's he seated, what is he wearing?

A He's right on your --

MR. REYNOLDS: And for the record the witness has identified the Defendant, Mr. Ferguson.

THE COURT: So noted.

MR. REYNOLDS CONTINUED:

Q Where did Mr. Ferguson live in relation to your house?

A It was on Sorrento like right behind my house. It wasn't exactly behind but it was right behind it like a house over.

Q Kitty-corner?

A Yes.
Q Across an alley?
A Yes.
Q And on the evening of July 6 going into the early morning hours of July 7, were you out and about?
A Yeah, I was.
Q At some point in time did you get back to your neighborhood?
A Yes, I did.
Q And did you receive any information from anybody about something going on at your house?
A Yes, I did.
Q Who did you receive that information from?
A The guy stay on Sorrento, a guy named Frazo.
Q And do you know his real name?
A I believe it's DeFrazo, DeFrazo, I'm not sure.
Q Okay. When you got that information what did you do?
A I was in the car with a guy named Wayne and his girlfriend. We pulled around there and we pulled around there, the guy Roshawn (ph) he was in the house and also had company there too.
Q What information did Frazo provide you?
A Yeah, he was saying sound like somebody was breaking into my house.
Q Okay. So you went around to your house with Wade and his girlfriend?
A Yes.

Q Is that in the car or on foot?
A It was in the car.
Q And when you got there what did you see?
A When we got there we looked into the window, the side window was broke on the side of the house and the guy, Osean, was -- and I was screaming his name just to make sure see who it was. It was him and he was there and he was just saying my name like Gutter, yeah, it's me. And I was like what are you doing, and he was just saying he didn't have anywhere to go. So I opened the door and that's when he, you know, killing out. I went in the house wasn't nothing missing or anything so.
Q Okay. Now, so you saw a window broken on the side of your house?
A Yes, it was.
Q And --
A The bathroom window.
Q And Osean Lockett was in your house?
A Yeah, he was there.
Q And you said at least you didn't notice anything missing or torn up?
A Yeah, it wasn't nothing missing, it wasn't nothing rambled or nothing.
Q Now, was it your understanding that from time to time Mr. Lockett had broken into people's homes in the area?
A That's what was, that's what was going around the neighborhood, yes. I don't know for sure.

Q Mr. Lockett, did he have a nickname?
A They call him 'Ham'.
Q Okay. And when you saw Mr. Locket in your house, you said you went inside?
A Yeah.
Q What did you say to Mr. Lockett?
A No. I was just saying that he could have called me, he didn't have to bust the window or nothing like that. But he said he didn't have my number or anything. So, I wasn't afraid, I wasn't made at him or nothing like I just went upstairs, I had a female in the house, just to check to see if she was there, she was still sleep, so everything was fine. It wasn't no, it wasn't a big problem.
Q Okay. So did you escort Mr. Lockett out of your house?
A Yeah, he just walked, came out side. He came outside with me.
Q Who was there when he came out?
A When he came outside it was just me, him, it was this guy named Wayne and his girlfriend as well.
Q Okay. Did anybody come up to the house while you all were out there?
A Yeah, a guy named Chaka and Frazo, they pulled around there.
Q Okay.
A To check to see if everything was okay.
Q And Chaka, where did he live?
A He stay on Sorrento as well.
Q Where would his house have been in relation to Michael Ferguson's

house?
A It was across the street.
Q Okay. And where did Frazo live?
A I want to say he stayed right next to, right next to Mike, I believe so.
Q Okay. And did, when Frazo and Chaka showed up, did they come up to where you all were?
A They came around there, yeah, they came around they was trying to see if everything was okay.
Q Okay. Did DeWayne (SIC) and his girlfriend stick around?
A No. They made sure everything was okay and then I had company as well so, I told him before he went back just to take the female and drop her off because the window was broken and everything so she didn't want to stay there, so we took her home.
Q Okay. Now did you go with them?
A Yes I did.
Q And who was there with Mr. Lockett?
A He was there and the guy Chaka was there and Frazo was there as well. But as we were leaving Frazo asked Chaka was he going to come. Chaka said he was going to stay there and watch the house and then that's when Frazo caught up as well. So it was me and Wayne finally pulled off.
Q How long were you gone?
A It was probably like five to seven minutes top, probable ten at the most.

Q And were you dropped back off at your home?
A Yes, I was.
Q And what was going on when you got back to your home?
A When I came back Osean was walking back up to the house. Then Chaka and Ham they started arguing talking about it and I was just trying to calm it down, told them that it wasn't even worth it.
Q Okay. At some point did you leave your house again?
A Yes I did. I went down the street to put a, went to Daniel's house to get a board to try to cover up the side window.
Q The window that had been broken by Mr. Lockett?
A Yeah.
Q And how many houses down did you have to go?
A Probably like four or five houses tops.
Q How long were you gone?
A Probably like five minutes. It wasn't that long.
Q And as you're coming back what did you see happening?
A As I was coming back, as I was coming back with Osean and Ham they were still arguing and that's when I seen someone approach, peeling up the driveway in all black.
Q Okay. And were you able to recognize the person at that point?
A Yeah, I knew who it was?
Q Who was it?
A It was Mike.
Q Michael Ferguson?
A Yeah.

Q The fellow you identified in court?
A Yeah.
Q And you said he was dressed in all black, what do you mean by that?
A It was like a black suede shirt, had a little black mask covering his face.
Q Okay. How much of his face was covered?
A I want to say like over his nose.
Q From the nose down or the nose up?
A From the nose off.
Q Pardon?
A From the nose down.
Q Okay. And what did you see Mr. Ferguson do then?
A When I was coming back you could see he had punched Ham, I didn't really see exactly out of my eye. As I was coming back he had punched Ham a couple of times. Ham was on the ground --

MR. HOWARTH: Wait a second, Your Honor. If the witness is saying he didn't see this happen, I'm wondering what is his frame of reference for answering that question?

MR. REYNOLDS: I'll clear it up.

MR. REYNOLDS CONTINUED:

Q Okay, did you see Mr. Ferguson strike Mr. Lockett at all?
A No, out of my eyes, no.
Q Okay. Did you hear anything?
A No, I didn't hear anything as I was coming back. No I didn't --

Q Okay. As you were approaching, was Mr. Lockett standing up, sitting down or lying down on the ground?
A When I left he was standing up, when I came back he was on the ground.
Q Okay. And where was Mr. Lockett in relation to him?
A He was in the driveway when I came back.
Q Okay. And where was Mr. Ferguson in relation to Mr. Lockett?
A He was in the driveway as well.
Q Okay. And was he standing up, kneeling down, what was his position like?
A Oh, he was kind of like walking back towards like back through the driveway, back through the alley.
Q Okay. Did you see anything in his hands?
A He had something shiny on his hands.
Q Okay. Could you tell what it was?
A It mostly likely it was brass knuckles because it was shiny and silver.
Q Okay. So what happened when you saw this, what did you do?
A When I came back, I came back and said, "Well what are you all doing, all of this is not called for. You ought to chill out. That's when the guy, Chaka, he was kind of furious, he was like "Mike help me with this nigga." As he did that, I had the board in my hand, I carried it in the house to laid it back down. Once I came back out they were already carrying him back through the driveway so --

Q Who was carrying him?
A Chaka and Mike.
Q Mr. Ferguson?
A Yeah.
Q And did Mr. Ferguson still have those brass knuckles on?
A I'm not sure because like I said I went in the house and I came back out.
Q Okay.
A And he was already gone so I couldn't see him.
Q Were either Mr. Ferguson or Chaka saying anything as they're dragging him along?
A No, I didn't hear anything.
Q Did you hear Mr. Ferguson or Chaka say anything as you were coming back to the house with the board?
A No. I didn't hear anything because like I say I was quite a ways down. I was like closer to Fenkell coming back down towards Steel back to my home.
Q Okay. Now you said you saw the two of them dragging him; how were they dragging him?
A They were carrying him by his arms. Chaka had him by his arm.
Q Okay. Arms out or just underneath the armpits?
A Underneath the armpits.
Q When you came up to your house and you saw Mr. Lockett on the ground, did he appear to you to be conscious in any way?
A Yeah, he was conscious, he was holding his head. He was saying

"Like you all need to chill out". Just like the same things I was saying.

Q Okay. And as you saw him being carried away by Mr. Ferguson and Chaka was Mr. Lockett saying anything?

A No, I didn't hear him say anything. Like I say I was in the house, I was coming back out from carrying the board in the house so I didn't hear anything.

Q And where exactly were they carrying him?

A They were carrying him back through, back up the driveway through the backyard toward the alley.

Q Okay. And would there be anything that would prevent someone from going from your backyard into the alley?

A No, it was a backyard. We had a backyard where the gate you just pull it up and down you could just walk through.

Q Okay. And where did you last see them as they were carrying Mr. Ferguson, I'm sorry, where Mr. Ferguson and Chaka were carrying Mr. Lockett?

A Last time I seen him that's when they were carrying him through the alley, they was carrying him up there. And I tried to go upstairs because I stayed upstairs in a two-family flat. I tried to look out the window but it was pitch black so I really couldn't see anything, just heard dogs barking.

Q Okay. You saw them in the alley; is that right?

A I didn't see them in the alley, no.

Q Did you see them go into the alley?

A You could see them going through the alley because the gate was still open.

Q And did you see whether or not they went north or southbound in the alley?

A No I didn't see, I didn't see which way they went, no.

Q Okay. Now, are you familiar with Mr. Ferguson's house?

A I -- it's like right behind my house, I'm pretty familiar with it.

Q Okay. Did he keep dogs?

A Yeah, it was dogs back there.

Q And you know how many dogs he kept?

A It was quite a few like three, four of them if I'm not mistaken.

Q And were they little tiny dogs or like Pekingese or were they big dogs?

A No, they big healthy dogs.

Q Were they quite or loud?

A No, they were loud, they were barking.

Q Okay. And are there -- Your other neighbors have similarly loud dogs?

A Not to my knowledge, I'm not sure, no.

Q Okay. So, sorry, as they --

MR. HOWARTH: Got a bum knee, Judge.

Q As they were going into the alley could you hear the dogs?

A Yeah, the dogs were barking, yeah.

Q Could you tell where the barking was coming from?

A Yeah, his backyard, that's the only dogs back there.

Q Mr. Ferguson's backyard?
A Yeah.
Q And so you -- Where were you at the time you heard that?
A I was upstairs, I had went upstairs to look out my window in my back room with my back -- my room, where our room is, it's right upstairs in the back and you can look directly out the backyard and that's where I was at. I was trying peek out the window to look and see what was going on.
Q Okay. And you say you couldn't see anything because it was too dark; is that correct?
A Yeah, it's too dark and the tree kind of blocking my way it was actually looking at that trying to see what was going but you can't really see.
Q In addition to the dogs barking, did you hear anything else coming from that area of Mr. Ferguson's yard?
A Yeah, you could hear somebody saying, "Chill out, that's enough" but I'm not sure exactly whose mouth it was coming from.
Q Chill --

MR. HOWARTH: Your Honor, if we don't know who said it, I ask that that be stricken.

MR. REYNOLDS: It's not being offered for the matter asserted, it's just a statement by someone.

THE COURT: I'll sustain the objection.

MR. HOWARTH: Okay.

MR. REYNOLDS CONTINUED:

Q Could you tell where you were hearing someone talking?
A It was coming from the backyard where the dog was barking as well.
Q Okay.
A And the TV was on, I tried to cut the TV down to listen and see what was going on but couldn't, I heard, that's all I heard was the dogs barking, I heard that.
Q Now, so you weren't able to tell whose voice it was; is that what you're telling us?
A Yeah, not exactly, I couldn't really tell because I heard the dogs barking over it.
Q When -- Could you hear any other noises?
A Not really, no. No. I didn't really hear anything so I could tell what it was sounding like. He sounded like somebody was beating up a little bit, like I said the dogs were barking so loud, it seemed like three or four of them so you couldn't really tell exactly.
Q Now, later after you heard the barking and you heard a voice, did you hear anything else coming from that direction?
A No, I didn't hear it. So then after I heard that, that's when I got the phone, that's when I picked my phone up and called my friend and told him what I heard and what I seen.
Q Okay. And did you ever hear any gunshots that evening?
A A little like later on. Once I closed the window and laid down in the bed, I remember falling off to sleep I heard a couple of shots but it didn't sound exactly that backyard.

Q What did you say, I missed the last part?
A I said, yeah, I heard, I heard the gunshot but I said it didn't come from that backyard.
Q You know --
A That's normal in the neighborhood so, I didn't really think nothing of it.
Q Did you ever see Mr. Lockett again?
A No, I didn't see him again that night, no.
Q Are you familiar that would be at the end of the alley that runs parallel between Steel and Sorrento on Chalfonte north side of Chalfonte?
A Right off of Chalfonte, yeah, right off of Chalfonte.
Q How far would it be for Mr. Ferguson's yard to that sewer?
A I'm not sure. I don't know exactly how far it is.
MR. REYNOLDS: Just one second, Your Honor. All right, just one second.
Q Let me just ask a couple more questions before I take some time to look through. Did you eventually make a statement to the police?
A Yes, I did.
Q And when you spoke to the police, did you try your best to tell them the truth?
A Yes, I did.
Q Mr. McKithen, I want to take you to Page 2 of 3, that page has your signature at the bottom, correct?
A Yes.

Q Date of October 9, 2015 at 1:42 p.m.?
A Yes.
Q And you had a chance to look this over before signing it, correct?
A Yes.
Q Near the bottom of the page, does the following appear? "...I was walking back with the board and seen Mike coming down my driveway and he hit him with shiny chrome brass knuckles and knocked Ham down..." Is that what's on there?
A Yes, it is.
Q Is that truthful?
A Yes, it is.
Q So you did see it?
A I did, not, I didn't exactly see it. No. I didn't exactly see it but he had the chrome knuckles and that's the only person that could have hit him so that's why I said that.
Q Okay. On Page 3 of 3 this has your signature, date and time; is that correct?
A Yes.
Q Is this written on the page that you signed? "...I went inside and put the board in the kitchen and I went upstairs. I tried to see what was going on but I couldn't see. The dogs were barking and I could hear Chaka tell Mike to chill out and that was enough. Did you tell that or is that on the paper that you signed?
A Yeah. It's put on paper but that's not, I didn't say Chaka was

saying that, I said that was a, saying that. I couldn't tell exactly whose mouth it was coming from.

Q Okay.

MR. REYNOLDS: Question, permission -- Could I just have a couple of seconds to look through the -- Oh --

Q You came in and testified under oath on November 18, 2015 in this office, correct?

A Yes.

Q Up on the twelfth floor in this building?

A Yes.

Q And I was asking you questions under oath?

A Yes.

Q Okay.

MR. REYNOLDS: Could I have just a second, Your Honor?

THE COURT: You may.

MR. REYNOLDS: Thank you.

Q Okay. I'm just going to take you to the bottom of Page 14 up to the top of Page 15 --

A Um hmm.

Q -- on a transcript here and I'm going to ask you whether or not you were asked this question and gave this answer under oath:

"QUESTION: Okay. So could you hear what was going on besides dogs barking? ANSWER: Yeah, you could hear him like rough him up a little bit. You could hear -- It could like Osean telling him like ya'll come on ya'll chill, chill out.

And he was saying that the guy Chaka was telling him, Mike you're going to far, you don't have to do all that. All that is not necessary."

Was that the answer you gave under oath back on November 18 of this year?

A Yeah.

Q Okay.

MR. HOWARTH: Your Honor, I waited before objecting but the fact is that what this witness heard Chaka saying is inadmissible to prove the truth of the fact it was Chaka said.

MR. REYNOLDS: Well, Your Honor, it, the statement, is it not a statement of -- let me get that. A statement is an assertion under the rules of evidence for, that would apply here. And rule of evidence --

THE COURT: I think the objection is hearsay?

MR. HOWARTH: Yes, Your Honor.

THE COURT: So how is it not hearsay?

MR. REYNOLDS: Well, it's not hearsay because it's first of all, it's not a statement. A statement includes both law and written assertions. And non-verbal conduct is meant by a person as an assertion, saying 'chill, cool out, it's not all that' that's not an assertion, that's merely someone telling someone else stop what you're doing. And so --

THE COURT: You said it's not an assertion?

MR. REYNOLDS: -- it's not a statement.

THE COURT: You said that's not a statement?

MR. REYNOLDS: No, no.

THE COURT: Why isn't it a statement?

MR. REYNOLDS: I mean if I said sit down, that's not a statement. I'm not, I'm not, it doesn't, there's no way it would be judged as truthful or not truthful because it's not asserting any fact. The -- I mean it would be for instance, I asked a question and you give an answer. My question isn't a statement, my question just puts in a context your statement. This puts into context what he was hearing going on at that time. And so the statement of this other person who was dragging the deceased with him into the Defendant's backyard and there's only two people that were there and one of them is telling the other one to basically lay off, that's not an assertion. That's just the statement --

THE COURT: It sounds to me like an out-of-court statement offered for the truth of the matter asserted --

MR. REYNOLDS: There's --

THE COURT: -- unless it's offered for some other reason. If it's offered for the affect on the listener then you're talking about something different, but if you're trying to prove something by the statement that was given then it's a statement offered for the truth of the matter asserted and it's --

MR. REYNOLDS: What, what --

THE COURT: -- hearsay unless you have some exception --

MR. REYNOLDS: Well, what --

THE COURT: -- to the hearsay rule.

MR. REYNOLDS: The question that I got, the point is, is what was being said, it can't be offered for the truth of the matter asserted. You know, lay off, you know, cool it, stop, that's not --

THE COURT: That is offered for the truth of the matter asserted. That's asserting that something was going on that warranted this person to allegedly say, stop, cool off, he's had enough.

MR. REYNOLDS: The -- I, I don't think we have a statement here. In addition, given the circumstances of what he's hearing, if it is a statement, it's an excited utterance.

THE COURT: Then you have to lay a foundation for an excited utterance.

MR. REYNOLDS CONTINUED:

Q Mr. McKithen, when you heard those words being said, was the person talking calmly like you and I are?

A Like I said, dogs were barking so like I say, I couldn't really hear enough of him but that's exactly what I heard, to hear someone saying chill out, that's enough, he had enough.

Q They were talking loud enough to be heard over the dogs?

A I'm just saying you could hear him but I say you could hear him going in and out but yes, I did hear it over the dogs.

THE COURT: Sir, when you heard these statements, did the person sound excited at all or were they talking in a calm

voice or what?

WITNESS: No, it wasn't sounding excited.

THE COURT: They weren't sounding excited?

WITNESS: No.

THE COURT: Okay.

MR. REYNOLDS: Now that's a present sense impression.

THE COURT: The impression being what?

MR. REYNOLDS: It's a statement of their state of mind at that time. Something was going on that should be --

THE COURT: Thank you.

MR. REYNOLDS: -- that was effect under the point that they were telling someone to cool it.

THE COURT: Why don't you read that exception for present sense impression.

MR. REYNOLDS: Right.

"The statement describing or explaining an event or condition, made while the declarant was perceiving the event or condition immediately thereafter."

THE COURT: Let me see that.

MR. REYNOLDS: New Rules of Evidence 803.1.

THE COURT: Thank you. Response?

MR. HOWARTH: I don't agree that it's a present sense impression, Your Honor, it's nothing more than a straight up hearsay. There's a number of problems with it, I mean, we don't know --

THE COURT: Tell me one.

MR. HOWARTH: Well, this is a statement in which the person is saying stop doing that or cut it out or you've done too much.

THE COURT: They're perceiving an event.

MR. HOWARTH: All right. Which is being offered to prove that somebody was doing too much or doing anything of that nature.

THE COURT: That's the hearsay exception.

MR. HOWARTH: I don't --

THE COURT: There's hearsay but there's an exception that being that there's a present sense impression.

MR. HOWARTH: I don't believe that the rule has anything to do with that, Your Honor, as to explain what a person, the person that heard it impression was. He has no impression as to this matter. He hears two people talking in an alley, he doesn't even know who's talking. He hears a couple of voices that's down in the alley, we don't even know who's speaking, we don't know what the subject is. We know that he's hearing this over dogs barking --

THE COURT: I mean I have to take it for what it's worth, but if that's what he heard, that's what he heard. You can draw whatever inferences you can from that but like you said I'll give it whatever weight is to be attributed to it but I think the statement under that exception comes in.

MR. HOWARTH: I've made my objection and I won't argue--

THE COURT: Noted for the record, overruled. You may proceed.

MR. REYNOLDS CONTINUED:

Q After you heard those words being said by Chaka what did you do?

A Of course I called my friend Wayne and told him what I heard and what I saw. Then we was just talking and we was saying, why would they do something like that, that's stupid, it's going to cause a whole bunch of panic. And after that, that's when I laid down. That's when I let family (ph) off the phone, that's when I had closed the window, I laid down, figure (ph) fell asleep. And that's when I said I a little while because I was getting ready to fall into my deep sleep, that's when I heard the gunshots.

Q Okay. Now, I think I asked you this but just in case I didn't. Did you ever see Mr. Lockett again after that?

A No, I didn't.

Q And the following day did you have a conversation with Mr. Lockett's mother, Brenda Burton.

A Yes, she did. She pulled up to my home around the same time Chaka and Fazo did, they both pulled up at the same time. And as she was pulling up, she pulled up, she blew the horn, that's when the guy Chaka he ran up to my door, he was moving kind of fast. Then I was just waking up, she was blowing the horn, so I was waking up and then I -- all of the commotion was going on, so I'm startled looking at what's going on. And as I went outside to go talk to

her she was asking did I see him and so I told her I seen him last night. Then after that she was saying that she was looking for him and she was saying like he hadn't been answering his phone, she said and it wasn't like Ham which I agreed with it that it wasn't like him so.

MR. HOWARTH: Well, I'd ask that that be stricken, Your Honor.

THE COURT: Sustained.

MR. REYNOLDS CONTINUED:

Q Okay. So you had a conversation with her?

A Yes, I did.

Q Did you let her look around your house?

A Yeah, she came in and looked around my house.

Q Okay. And did you see her at other times in the neighborhood looking for her son at various other locations?

A Yeah.

Q And were you around when the body was removed from the sewer Labor Day weekend?

A No I wasn't.

MR. REYNOLDS: I have no further questions.

THE COURT: Cross-exam?

MR. HOWARTH: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HOWARTH:

Q Sir, would you please pronounce for me your first and last name?

A Will, last name McKithen I'm a junior as well.
Q Will McKithen, Jr.?
A Yeah, it's McKithen.
Q McKithen. I want to make sure I pronounce it right --
A Yeah.
Q -- and not insult you at all, sir.
A Okay.
Q Mr. McKithen, how old are you, sir?
A Yes, I'm twenty-eight.
Q Mr. McKithen, since you were -- turned seventeen --
A Yeah.
Q -- have you ever been -- And I want you to listen carefully to the question before you answer it. Have you ever been convicted sir, of any crime in the State of Michigan that's a felony, and I'll explain that if you want me to, that's a felony and involved either stealing something that is theft or making some kind of a false and untrue statement?
A No.
Q Mr. McKithen, on the evening of July 6, late in the evening, the night you've been talking about that your house was broken into?
A Yes.
Q Had you had any alcohol to drink within the twelve hour period before you saw that your house was broken into?
A I was smoking weed, I hadn't been drinking.
Q I'm sorry. You had or had not been drinking?

A I was smoking weed, I was not drinking.
Q Had you had more than one marijuana cigarette?
A Yeah.
Q Were you smoking blunts or were you smoking some other form of taking marijuana?
A Yes, smoking blunt.
Q All right. Were you at all high, sir?
A Yeah, I was high.
Q When you came home some time late in that evening of July 6, you had a conversation with Frazo; is that correct?
A Yes, I did.
Q I'm --
A I didn't have a conversation, he was just telling me that the house was being broken into.
Q Do you know his full name?
A No, I don't.
Q Does he live in your neighborhood?
A He stays on Sorrento.
Q How close to your house?
A He stayed only thing was like behind our house, it was like two or three houses over to the left, it was behind my house.
Q Sorrento runs north and south; am I correct?
A Yes.
Q And you live on Steel?
A Yes.

Q Which also runs north and south?
A Yes.
Q And the area that your house in is somewhere near Fenkell; am I correct?
A Yes, it is.
Q North or south of Fenkell?
A I want to say south, it's closer to Fenkell than it is Chalfonte.
Q And Steel and Sorrento, how far are they from one another going east and west?
A They're right behind each other.
Q They're two, one's street and then the other street, right?
A Yes, sir. Right.
Q And Monte Vista is another street that's right in that neighborhood; am I right?
A Yeah, Monte Vista is past Meyers, I want to say, on the other side of Meyers.
Q Now when Frazo came up and said something to you, it indicated to you, you understood either had been broken into or was being broken into?
A Yeah.
Q Did that upset you, sir?
A I mean not, no, not in anyway.
Q Not in any way, is your answer?
A Yes.
Q You didn't know who had broken in, did you?

A No, I did not.
Q So at the moment you had heard about it, you didn't know whether it could be an armed dangerous person, it could be a relative, friend, family member, you didn't know what broken in?
A No, I did not.
Q But would you agree with me there's nothing very good about having your house broken into?
A No, it's not.
Q And it tends to make people ~~make~~ MAD; does it tend to make you mad?
A I mean it would make you upset if your house is broken into, yeah.
Q So, is it fair to say when you heard that information, you were somewhat upset at whoever it was that was breaking into your house?
A I mean I wasn't kind of upset, no.
Q And how long was it after Frazo told you that somebody was breaking in that you found out that it was Osean who was actually breaking into the house?
A When we pulled around there that's when I found out it was him.
Q That's Mr. Lockett, was he inside the house when you found out that it was him that had broken in?
A Yes, it was.
Q When you yourself went up to the house did you go up and go in through the front door?
A I went to the side window first to make sure that it was him before I even went in.

Q Was the side window broken?
A Yes it was.
Q Was it glass?
A Yes.
Q Glass was broken out?
A Yes it was.
Q So glass was then inside your house from the break?
A Yes it was.
Q Was there some kind of a screen on the window?
A No, it wasn't a screen. It was a screen on the window but the screen was pushed up.
Q So the glass is broken and the person -- Did it appear to you from what you saw that some person had entered into the house through that break?
A Yeah.
Q So they must have broken glass out a considerable amount?
A Yeah.
Q And was there any damage whatsoever to the house?
A There wasn't no damage inside at all.
Q Okay.
A It was just the window was broken, that was it.
Q You told us that nothing was missing; is that right?
A Yes.
Q How long did it take you to figure out that nothing was missing?

A I walked through, I walked totally through the house because the house was already in foreclosure so a lot of things that was in the house was already gone, so there wasn't too much in the house.
Q Well, did you have anything of any value at all in the house?
A No, not at all. Like I say it wasn't really nothing in there besides like old clothes and old shoes and things in that nature.
Q But you kept the door locked?
A Yeah, the door was locked, yeah.
Q Kept the windows in a position that somebody would have to break them to get in?
A Yes.
Q You didn't want somebody coming in?
A No.
Q Now, you said when you saw that it was Ham or Osean that had broken in then you weren't bothered at all?
A No I wasn't.
Q And you had a conversation with him, did you not?
A Yes I did.
Q And is it your testimony that in this conversation you told him that he was going to have to change the way he was; would that be a fair statement?
A Yes. I was, I was telling him that he needed to change.
Q That he was doing bad things?
A Yeah.
Q And you wanted him to stop doing those bad things?

A Yes, I was telling him that because I looked at him like a little brother myself.
Q He was older or younger than you?
A He was younger than me.
Q By how much?
A I probably had almost probably well if he was nineteen, I probably had like nine years on him.
Q Nine years?
A Yeah.
Q So your little brother had made you angry; fair statement?
A I wasn't angry, I was upset, I wasn't angry at him.
Q You were upset rather than angry?
A Yeah, so --
Q He disappointed you?
A Yeah, just disappointed.
Q And you told him that?
A Yeah, I told him that.
Q And when you say that he's going to stop doing these bad things, by that did you mean drug use or did you simply mean breaking into people's houses or something else that I haven't mention?
A No, I was just telling him that he needed to change period.
Q You had in your mind at that time, did you not, Mr. McKithen that Osean had been breaking into people's houses at that time, in other words, July of last year?
A That's what was being said, yeah.

Q I don't really care what people said but, was in your mind that my friend, Osean, is kind of messing up, he's going around breaking into folks houses?
A Yeah.
Q And you know that's bad?
A Yeah.
Q That's bad for the person that does it, right?
A Yeah.
Q In your mind, bad for the people whose houses that get broken into, in your mind, right?
A Yeah.
Q But you tell us, nevertheless, you were not angry; am I correct?
A Yeah.
Q Now after you saw what was going on you left; am I correct?
A What do you mean?
Q You left the area of your house?
A Yeah, I had a female over there, we took her home.
Q And you left Osean there?
A Yeah, he was still there.
Q And you left him there with Chaka?
A He was in there.
Q Was, just from what you saw and what you observed, did it appear to you that Chaka was also upset with Ham?
A Yeah, Chaka was very, Chaka was upset.
Q More than you were?

A Yeah, well --
Q Chaka appeared to be angry about it; am I correct?
A Yeah.
Q And he was saying things, I'm not asking you what he said, but he was saying things to Ham that indicated as you saw it, Chaka's angry?
A Yeah, when I came back, yes.
Q Didn't you think it might be dangerous under those circumstances to leave Chaka there?
A I never thought in my mind that Chaka would do anything to him so.
Q All right. Now, the reason that you left was to get a board to cover up the window?
A Yes.
Q Because you didn't want anybody else to break in?
A Yeah, I didn't want to leave then because I work midnights so the house would be unattended while I'm going to work so.
Q I believe you testified earlier that because there was nothing of value in the house you didn't really care whether anybody broke in or did I misunderstand you?
A Yeah, you misunderstand me.
Q Oh, so you didn't want anybody breaking in?
A No. Don't nobody want anybody coming in your house unknown without you saying so.
Q And you wouldn't want Ham to do it again after that night if nothing had happened to him. You wouldn't want Ham coming back in

and breaking in again?
A I wouldn't want nobody to break in.
Q Did you tell Ham that, I don't want you breaking in here ever again?
A No I didn't.
Q All right. Now, when you came back you did see Mr. Ferguson in the area, right?
A When I came back, yeah, he was coming down the driveway.
Q You already testified that you did not see him hit Ham actually?
A No I didn't see, I didn't see him, no.
Q And when you heard the gunshots later that night that was when you were in your deep sleep?
A That was when I was almost in my deep sleep. I heard the gunshots, I jumped up but I didn't think nothing of it and I went to lay back down.
Q And you don't know where the gunshots came from?
A I don't know exactly where it came from, no.
Q But as a matter of fact you had the impression at that time that they did not come from Michael Ferguson's house?
A I was in the middle of sleep so, no, they did not come exactly from his house because I would have heard, it would have been louder than that. Know what it sounded like so it didn't come exactly from his house, no.
Q But, sir, if you had to judge then and you had to judge today, whether those bullets came from Mr. Ferguson's house, it would be

your position they did not come from Mr. Ferguson's house?
A I don't know.
Q Mr. McKithen, at any time on July 6 going into the next day, July 7 when you house was broken into and before you fell asleep, all right?
A Uh hmm.
Q Did you see Chaka, with your own eyes, in that neighborhood where you live in, with a gun?
A I didn't see him with the gun with my own eyes, no.
Q Well, did you make any kind of a statement to the police indicating that you saw Chaka with a .357, do you remember making any kind of a statement like that?
A Yes, that was the next day and we came, that's the next day we came over and Ms. Burton and Chaka came over --
Q Oh, I'm sorry.
A -- at the same time.
Q When exactly, if this was the night of July 6, going into July 7, was it the day of July 7 that you saw A--
A It was day, yeah, it was --
Q Please let me finish, okay?
A Go ahead.
Q -- that you saw Chaka with a gun?
A Yes, it was July 7.
Q About what time?
A I'm not sure of what time.

Q Well, was it the next morning, the next afternoon, the next night?
A It was around the next afternoon.
Q And Chaka came over to your house?
A Yes. He did, him and Brenda Burton and they both came at around the same time.
Q And Chaka had a .357 in his hands?
A Yes, he did.
Q And did Chaka make a statement to you?
A Yes, he did.

MR. HOWARTH: Hold on. If I may, Your Honor? I have no further questions, thank you.

THE COURT: Any redirect?

MR. REYNOLDS: Just a little bit.

REDIRECT EXAMINATION

BY MR. REYNOLDS:

Q Were, based on your observations with them, Chaka and Mr. Ferguson friends?
A Well yeah, they were pretty cool.
Q And did either of them complain about Ham or Mr. Lockett breaking into their homes?
A Yeah, it was Chaka, yeah.
Q Okay. Now you were asked if you'd ever seen Chaka with a gun in the neighborhood, did you ever see Mr. Ferguson with guns?
A I've never seen him with a gun with my eyes, no.
Q Okay.

A Not walking around, no.

Q Did you ever hear him discharging guns from his home?

A Yes, from time to time you hear him shooting out of the back window.

MR. HOWARTH: Well excuse me, Your Honor. I don't think you can hear another person shooting a gun.

MR. REYNOLDS: Judge --

MR. HOWARTH: So I would ask to have that stricken. I don't mind if he says he heard gunshots coming from his house and I don't mind if he says I saw him shooting.

THE COURT: Sustained.

MR. REYNOLDS: Okay.

MR. REYNOLDS CONTINUED:

Q So you heard shots being fired from his house?

A Yeah.

Q You just couldn't see who was firing them?

A No.

Q Okay. Now I asked you before about what you saw when you were coming from the, with the board and Mr. Ferguson, Mr. Howarth asked the questions, correct?

A Um hmm.

Q Well, I'm going to take you back to when you testified under oath before and I asked you whether you were asked these questions and gave the answers under oath.

MR. HOWARTH: I'd like to have a page, please counsel?

MR. REYNOLDS: Sure.

MR. REYNOLDS CONTINUED:

Q Back on Page 11, Line 22 and we're going to go to Page 12, Line 24.

MR. HOWARTH: All right, eleven --

Q Got it? Okay. Remember being asked these questions?

"Okay, as you're coming back with this board, where was Mr. Ferguson?

MR. HOWARTH: Can you tell me again where you are --

MR. REYNOLDS: Eleven, page --

MR. HOWARTH: Page 11, what line please?

MR. REYNOLDS: Twenty-two.

MR. HOWARTH: Twenty-two, thank you.

MR. REYNOLDS: Okay.

MR. REYNOLDS CONTINUED:

Okay. Quick question.

"Okay. ...And as you're coming back with this board where was Mr. Ferguson? ANSWER: He had to come from the alley coming from the back way because he was coming through the driveway. As I'm coming through with the board, I can see him crossing Osean Lockett and he punched him a couple of times. QUESTION: Okay. Was Mr. Ferguson wearing anything that obscured any part of his face? ANSWER: He had a little black thing over his face. QUESTION: How much was covering his face? ANSWER: It was like, like a little bit over the

nose and the mouth. QUESTION: And the mouth? ANSWER: Yes. QUESTION: Okay. You said that he hit Mr. Lockett a couple of times; is that right? ANSWER: Yeah. QUESTION: And did he have anything that he was hitting him with? ANSWER: It was a little shiny silver object, I'm assuming they were brass knuckles, it was on his face. QUESTION: Okay. ANSWER: Because Osean is kind of a big heavy guy, so I don't believe he would have been able to punch in the face, you know, that much. QUESTION: When he hit him where did Mr. Ferguson hit Osean Lockett? ANSWER: Hit him once in the back of the head and then he approached him, hit him a couple of times in the face as well."

Q And were those the answers you gave under oath when you testified back on November 18 in this building?

A Yes, it was.

Q Okay.

MR. REYNOLDS: I have no further questions.

THE COURT: That was, oh sorry.

RE-CROSS EXAMINATION

BY MR. HOWARTH:

Q However, that's not what you're testifying to today, is it sir, that you actually saw Michael Ferguson strike him?

A As I was coming back he, Osean, Osean was already laying on the ground, so he had to be, that was the only person--

Q You guessed that Michael Ferguson hit him?

A As in my --

Q Pardon me?

A Yes.

Q Not you saw it?

A I didn't see him out of my eyes, no.

Q Thank you.

THE COURT: How many people were out there at the time that Mr. Ferguson was on the ground --

WITNESS: Two.

THE COURT: I mean, the time Mr. Lockett was on the ground?

WITNESS: It was just, it was just, I was coming back, it was just Mike and the guy Chaka. It was just them two and Osean so it would be three.

THE COURT: What was Chaka doing?

WITNESS: Chaka was standing there. He was standing there.

THE COURT: Okay. And what did you see Mr. Ferguson doing?

WITNESS: As --

THE COURT: With your own eyes?

WITNESS: With my own eyes the guy Chaka told Mike, "Help me with this nigga." And that's when I see as I was coming back, I didn't see Mike doing anything after that. I seen the guy Chaka pick him up on his arm and told Mike to help him, help me

with him. Help him carry him through the driveway because as I was coming back they had already started carrying him through the driveway because I came back they were gone.

THE COURT: You say that Mr. Ferguson had something covering his face, how do you know it was Mr. Ferguson?

WITNESS: I know his body build.

THE COURT: You said that Mr. Lockett's mother came by your house, was that the next day?

WITNESS: Yes, it was.

THE COURT: And she was looking for her son?

WITNESS: Yes, she was.

THE COURT: Did you tell her what you knew about, what you seen and heard the previous day?

WITNESS: No, I didn't tell her at that time because Chaka was there. He just came in the house with his gun so I didn't want anything at the house to start at that time. As she pulled off, as she pulled off that's when the guy Chaka what all she was want. And I told him that she was looking for Osean and I'm like man what did ya'll do? And that's when the guy Chaka was like, "Sh --

THE COURT: Well, don't tell me what Chaka said --

WITNESS: Okay.

THE COURT: -- okay? All right. When this was going on, particularly when you heard the gunshots, you didn't look out to see what happened or anything?

WITNESS: I looked out the window but like I say I didn't hear anything. The dogs wasn't barking at that time or nothing so it didn't --

THE COURT: After you heard the shots --

WITNESS: Yeah.

THE COURT: -- you looked out the window?

WITNESS: Yes, I did.

THE COURT: And you didn't see anything?

WITNESS: I didn't see anything so I laid back down and went to sleep.

THE COURT: Where did the shots come from?

WITNESS: I don't know exactly where the shots came from?

THE COURT: Okay.

Any questions based on my questions?

MR. REYNOLDS: No, Your Honor.

RE-CROSS EXAMINATION

BY MR. HOWARTH:

Q Since a period of time approximately two weeks after all of this incident happened, since that time have you ever seen Chaka again?

A I didn't see him again, no.

Q So since approximately the later part of July, Chaka's been gone; am I right?

A I mean to my knowledge, yeah.

Q And you never seen him in the neighborhood by yourself?

A No.
Q Were you fairly close to Chaka?
A I wasn't fairly close, I knew of him. He was a close friend in the neighborhood.
Q And was he somebody you saw once every couple of days?
A Yeah, I seen him every other -- about one a day or something like that.
Q But in the last four months haven't seen him once, have you?
A No.

MR. HOWARTH: Thank you.

REDIRECT EXAMINATION

BY MR. REYNOLDS:

Q He's dead, correct?
A From what I was told, yes.
Q Okay.

MR. REYNOLDS: Nothing further.

THE COURT: I'm sorry, I didn't hear your question, what was it?

MR. REYNOLDS: He's dead?

THE COURT: Chaka's dead?

MR. REYNOLDS: Yes.

THE COURT: Oh.

MR. REYNOLDS: And that's what he said, that's why, that's what he's been told.

MR. HOWARTH: Well, Your Honor, if we're going to finish

that off.

RE-CROSS EXAMINATION

BY MR. HOWARTH:

Q Isn't it a fact that Chaka was killed in a drive-by shooting?

A I don't know that's what I was told.

Q He didn't have a heart attack --

A I don't know.

Q -- did he?

A I don't know.

Q Okay.

THE COURT: Thank you, sir. You may step down.

MR. REYNOLDS: Your Honor, the witness that Mr. Howarth wanted to question, that would be an Ursula Barrett. I have, I had made arrangements for her to testify telephonically. At least got permission from counsel as allowed by the court rule and she's a civilian witness, it's not like --

THE COURT: Do you have any other witnesses?

MR. REYNOLDS: I have some police witnesses, yes.

THE COURT: Okay.

MR. REYNOLDS: He's my last civilian witness.

THE COURT: Give me an offer of proof as to what you expect to get from this witness?

MR. REYNOLDS: Well, she would indicate that --

THE COURT: No, he's the one who's going to call her, right?

MR. REYNOLDS: Yeah.

THE COURT: Well, let me --

MR. HOWARTH: Your Honor --

THE COURT: -- find out from him why he wants to call her.

MR. HOWARTH: Actually, of course, I'm asking myself with this, to myself right now Your Honor, however, not knowing the nature of today's testimony. The reason that I wish to call this witness is that according the police report which she gave, she, the witnessed engaged Chaka in a conversation within a day or so of the killing and Chaka said that he, Chaka, did in fact kill Mr. Lockett.

THE COURT: All right and you --

MR. HOWARTH: And I intended to offer it as a declaration against penal interest and my concern, of course, with this is, if I'm hearing this witness is not necessarily down here today, I need that preserved unless Mr. Reynolds would be kind enough to stipulate as a matter of fact that she did tell that to the police.

MR. REYNOLDS: Your Honor, I had an opportunity to speak to Ms. Barrett and she did have a conversation with Chaka shortly after the disappearance of Mr. Ferguson (SIC) however, I think a portion of what is in the statement is what she told the police, a portion of what is in here she told me her surmise not something that had been actually stated to her by Mr., by Chaka.

THE COURT: By way of an offer of proof, tell me what portion she adopts?

MR. REYNOLDS: She says that she told or he asked, she'd ask him what had happened, if he knew what had happened to Ham and that he was, she was asked questions.

"... Did Chaka tell you where Ham was? ANSWER: No, when he told me about --

Oh, I'm sorry, let me go back to this, it says:

"... I asked Chaka if he had anything to do with Ham missing? And Chaka asked me if I knew who Jimmy Hoffa was? I said yes and Chaka told me that guy is Jimmy Hoffa."

And then she was later asked:

"... Did Chaka tell you where Ham was? ANSWER: No. When he told me about Hoffa I just drove off."

And she will agree that she said that, then the question she was asked is,

"... Did Chaka tell you who killed Ham? ANSWER: No, just that he killed him.

And she told me that --

THE COURT: I'm sorry.

MR. HOWARTH: I think it's how?

THE COURT: Who killed him knows just that he killed him, I don't get, I don't know if I understand that.

MR. REYNOLDS: That's the words that are on the paper.

MR. HOWARTH: I see. No, Your Honor, the words on the

paper are: "Did Chaka tell you how he killed --

MR. REYNOLDS: Oh.

MR. HOWARTH: -- "ANSWER: No, just that he killed him."

MR. REYNOLDS: And when I talked to her she said I didn't say that to the police. She said, I surmised from what he told me that he had killed him but that's not what he told me. She said I just, from the words he said, I surmised it.

THE COURT: I think we need to hear from this witness.

MR. REYNOLDS: Yeah.

THE COURT: And you have any objection to her testifying by way of telephone?

MR. REYNOLDS: No.

MR. HOWARTH: Well, Your Honor, he's the problem. I've been telling this to Mr. Reynolds since he proposed this to me several days ago. If the witness starts saying that's not what I said, I haven't got a document that I can show her.

MR. REYNOLDS: I --

MR. HOWARTH: I haven't got a signature that I can show her over a telephone.

MR. REYNOLDS: I scanned and sent her a copy of her statement so that she would be prepared to be able to answer questions along those lines.

THE COURT: Are you satisfied by that?

MR. REYNOLDS: And she acknowledged this morning that she had received it.

MR. HOWARTH: I'd need my client's permission to make that decision, Your Honor.

THE COURT: Go ahead.

MR. HOWARTH: Thank you. Your Honor, Mr. Ferguson has informed me that he will not pose an objection and I think he's making the correct call here to a telephone conversation.

THE COURT: Okay.

MR. HOWARTH: A telephone testimony.

THE COURT: Very well. Let's get her on the phone then.

MR. REYNOLDS: I'm trying to think, how do we do this. Call to put it up on the microphone?

THE COURT: Works for me as long as we can hear her and she can hear us. We have microphones.

MR. REYNOLDS: Okay.

Hello, Ms. Barrett.

MS. BARRETT: Hi.

MR. REYNOLDS: This is Mike Reynolds. This is Mike Reynolds from the Prosecutor's Office, I'm calling you from court. And we're about ready to take your testimony; are you ready?

MS. BARRETT: (No verbal response)

MR. REYNOLDS: Okay.

MS. BARRETT: (Can not hear her)

MR. REYNOLDS: Okay, and do you have a --

MS. BARRETT: (Can not hear her)

MR. REYNOLDS: The Judge will take care of that, but I just want to make sure you have a copy of that two-page statement you gave to the police also.

MS. BARRETT: (Can not hear her).

MR. REYNOLDS: Okay, good. Oh, okay, can you pull it up on your computer?

MS. BARRETT: (Can not hear her).

MR. REYNOLDS: Sure. Okay, no I'm just saying that the attorney is probably going to want to ask you questions about it and I will and so it will be just good if you had a copy of it right up there with you.

MS. BARRETT: (Can not hear her).

MR. REYNOLDS: Oh, okay. Well, let's see how we can do this here, okay?

THE COURT: Take the microphone, set it on top of the phone --

MR. REYNOLDS: Okay, on top of the --

THE COURT: Ask her to -- Oh, put it on speaker phone.

MR. REYNOLDS: Oh, I see. Just one second.

Can you hear me?

MS. BARRETT: (Can not hear her).

MR. REYNOLDS: Just one second. Okay, can you hear me?

MS. BARRETT: Yes, I can.

MR. REYNOLDS: Okay.

THE COURT: Okay, put it up to the microphone.

MR. REYNOLDS: Okay. I'm going to put you right up to the microphone here --

THE COURT: Tell her to speak --

MR. REYNOLDS: -- the phone.

MS. BARRETT: Yes.

THE COURT: Ask her to speak --

MR. REYNOLDS: Can you say hello?

MS. BARRETT: Hello.

THE COURT: Can you hear her --

MR. REYNOLDS: No, this microphone is not on.

MR. HOWARTH: It's for the court reporter.

MR. REYNOLDS: Oh, I'm sorry. Okay. Just a second I have to find a microphone that's broadcasting louder.

MS. BARRETT: Okay.

MR. REYNOLDS: Yeah, just a second.

MS. BARRETT: Okay.

MR. REYNOLDS: Okay. Could you just say hello?

MS. BARRETT: Hello.

THE COURT: Excellent.

THE COURT: Can you hear me?

MS. BARRETT: Yes, I can.

THE COURT: Okay. I'm going to ask you to swear or affirm to tell the truth the whole truth and nothing but the truth so help you God?

MS. BARRETT: Yes, I do.

THE COURT: Okay.

You may begin Mr. Reynolds.

MR. REYNOLDS: It's Mr. Howarth's witness, we're taking it out of order.

THE COURT: Okay, Mr. Howarth?

MR. HOWARTH: Thank you.

THE COURT: Oh, yes. Tell me your name for the record, ma'am?

WITNESS: Yes, my name is Ursula Barrett.

THE COURT: I'm sorry, once more?

WITNESS: Yes, my name is Ursula Barrett.

THE COURT: Can you spell that for us, please?

WITNESS: My first name is spelled U-R-S-U-L-A, my last name is spelled B-A-R-R-E-T-T.

THE COURT: Did you get that Madame Court Reporter? All right. Mr. Howarth.

MR. HOWARTH: Thank you, Your Honor.

U-R-S-U-L-A B-A-R-R-E-T-T

Witness called by the Defendant, sworn by the Court, testified telephonically as follows:

DIRECT EXAMINATION

BY MR. HOWARTH:

Q Good afternoon, Ms. Barrett.

A Yes.

Q Can you hear me?

A A little bit but, yes I can make out what you're saying?

THE COURT: Why don't you get the better microphone here.

MR. HOWARTH: This one?

THE COURT: Yeah.

MR. HOWARTH: I can go up there, that's no problem. I'll go where you tell me.

MR. REYNOLDS: Yes, come over here.

MR. HOWARTH CONTINUED:

Q Ms. Barrett. Ms. Barrett. Hello.

A Yes.

Q Are you still there?

A Yes, I'm now.

Q Okay. Ms. Barrett, my name is Jim Howarth ma'am, and I'm an attorney.

A Yes.

Q I don't think you and I have ever met; am I correct?

A No.

Q And I don't think you and I have ever spoken to each other; am I correct?

A (No verbal response)

Q As far as you know?

A This is -- You said your name was, I can't hear you. Your name was what again?

Q My name, my first name is Jim and last name is H-O-W-A-R-T-H, Howarth.
A No, I've never talked to you before, sir.
Q All right. Ms. Barrett, we're here to discuss in the courtroom some matters regarding the death of a man named Osean Lockett. Do you know who that person is?
A I don't know him personally, I've heard of him and seen him but I don't know him personally, no.
Q All right. Were you made aware that he may have been killed in July of last year in Detroit?
A That's correct.
Q Do you know a person by the name of Chaka Franklin?
A Yes, I do.
Q How do you know Chaka Franklin?
A He was a client of mine in Ohio.
Q You say he was; is that correct?
A He was my client from Ohio, yes.
Q Is Mr. --
A He was.
Q Do you know if Mr. Franklin is still living, ma'am?
A No, he's deceased.
Q All right. Ms. Barrett, I want to know if you, during the course of last year, that is 2015, if you had a conversation with Chaka Franklin about Osean Lockett being killed; did you ever have a conversation like that?

A I would say yes I had a conversation of, yes I did -- about him being missing, yes.
Q All right. And did you have a conversation where, in your mind, I don't want to ask you right now what you were told but, there was a discussion as to how Mr. Lockett may have been killed, did you have that kind of a conversation?
A No.
Q Did Mr. Franklin ever tell you anything about the death of Osean Lockett?
A The only thing that he told me --
Q Well, first of all --
A -- was to not call my house.
Q -- ma'am, ma'am. I just want to know whether you had that conversation?
A I'm sorry. You said that one more time?
Q Did you ever have a conversation with Chaka Franklin about how Osean Lockett got killed?
A No.
Q All right. Did you have a conversation with Detroit Police Officer approximately September 23, 2015?
A Yes.
Q And at that time did they ask you about a conversation you had with Chaka Franklin?
A Yes, they did.
Q And did you tell them that Chaka told you that somebody broke into

his house and stole an AK47 and his weed?
A Yes.
Q Did Chaka tell you that a guy named Ham and Ham's brother was stealing Chaka's property?
A Yes, I did.
Q Did Mr. Franklin, Chaka Franklin tell you or first of all, did you ask him if he had anything to do with Osean Lockett being missing?
A Yes.
Q And did Chaka Franklin say to you something like do you know who Jimmy Hoffa was?
A That's correct.
Q And did you say, 'Yes, I do know who Jimmy Hoffa was'?
A Yes.
Q And did Chaka then say to you, this is as close as I can come to it, tell me if I'm close or exact, 'That guy is Jimmy Hoffa'.
A He said, "That MF is Jimmy Hoffa" yes.
Q Meaning as far as you understood it, Osean Lockett is like Jimmy Hoffa?
A Gone, yes.
Q Gone. And did you -- Did he police officer ask you, I mean excuse me. When you were talking to the police officer did you tell them that you asked Chaka Franklin, do you know how Osean Lockett died. Do you remember that question?
A Yes, I do remember that question.
Q And did Chaka Franklin say 'I don't know how he died, I just

killed him'?

A No, he did not say that.

Q All right, do --

A He never answered the question.

Q All right. You have a police report in front of you that was sent to you by Mr. Reynolds, the Prosecutor?

A Yes, I'm looking at now.

Q All right. Does that appear to be a report of your conversation with Detroit Police on September 23, 2015?

A Yes.

Q Did the police on that day ask you questions?

A Yes, they did.

Q Did you give them honest, true answers to their questions as best you knew?

A Absolutely.

Q I want you to look at the last question on Page 2.

A Okay.

Q Would you first of all, just read the question and read the answer?

A Yes. Do you want me to read them for you now?

Q Yes, ma'am.

A Hold on, let me put my glasses on.

Q All right. I'm sympathetic.

A Can you hear me?

Q Yes, ma'am.

A Okay. "QUESTION: Did Chaka know Ham and Ham's brother?"
Q Wait a minute --
A "Yes. So"
Q Wait, wait --
A "ANSWER: Yes. Those guys have been stalkers --
Q Wait a minute, ma'am, ma'am.
A -- "they were all friends."
Q Ma'am, excuse me. I'm talking about the very last question on the last page.
A Yeah. "...Did Chaka tell you how he was killed? ANSWER: No. Does that steal from --..." Sir, I did not say that.
Q All right.
A So I don't know why they wrote that, but no I did not say that.
Q All right. You're saying that you did not write that?
A I did not say that, I did not answer that question that way.
Q If you --
A There's no way I could have said that because I did not have any knowledge.
Q Does your signature appear on that page?
A I know you don't recall tens of question case. The only page that I signed was the first page.
Q Does your --
A Where the second page came from, I'm not for sure but I did not answer the question that answered that way, sir, because that was not the information that was presented.

Q All right. Ma'am, looking at Page 2, the one where you just read the question?
A Um hmm.
Q I want you to look down to the very bottom of the page, would you do that please?
A I can see my name signed here, yes I do.
Q Is that your signature?
A Absolutely it is.
Q And does that indicate that you in fact on September 23 you had signed that?
A Sir, yes it does. I did not make that statement. I don't know how clearer I can be with you, I was not told he murdered that man, the only thing he told me was, "That MF is Jimmy Hoffa". So however you take that, please take it but I did not say that Chaka told me that he killed him, he did not say that.
Q All right. Just one question. Did you read Page 2 of that statement before you signed it?
A I don't remember this page. Could this have been a copy page? Could they have copied by signature as business or additional page, I don't know because like I said I would have never signed this paper had I saw that because it wasn't the truth.
Q All right. Do you dispute it is your signature on the bottom?
A No, I don't dispute it's my signature at all, no.

MR. HOWARTH: I have no further questions.

MR. REYNOLDS: One minute.

WITNESS: Is it all right to call my name I am still here.

CROSS-EXAMINATION

BY MR. REYNOLDS:

Q Ms. Barrett --

A Yes.

Q -- this Mike Reynolds, I have a --

A Yes.

Q -- couple questions for you?

A Sure.

Q When Chaka said to you that this fellow Ham was Jimmy Hoffa --

A Um hmm.

Q -- did you assume in your mind that Chaka had killed him?

A (No verbal response)

Q Are you there?

A I'm listening and I'm thinking. Can I think about the question that you just asked me, sir?

Q Sure.

A Okay. I tell you I -- When I said that, I'm not going to say that I assumed that he had killed him, I know what Jimmy Hoffa means but that was my opinion that if this guy is not here now following (inaudible) for what he did, I don't know but, if someone told you Jimmy, that MF is Jimmy Hoffa, what else could you think? Jimmy Hoffa has never returned, so what would you think yes, that he was dead, but he did not per se say I killed him. That's what I'm

trying to get you to understand.

Q Okay. So you're saying while you may have thought that Chaka had killed him, Chaka Franklin did not tell you that he killed him and you did not tell the police that Chaka Franklin told you that he had killed him?

A I spoke with police exactly what I said, that he said "That this MF is Jimmy Hoffa". That's what he said.

Q Okay. I'm just trying to clarify that. Did Chaka Franklin tell you directly that he had killed Ham?

A No, no. He said -- No, he did not tell me.

Q Okay. Did you tell the police that Chaka Franklin told you that he had killed Ham?

A No, I told the police that Chaka said he was Jimmy Hoffa.

Q Okay.

MR. REYNOLDS: I have no further questions.

THE COURT: Anything --

MR. HOWARTH: Nothing further.

THE COURT: Ms. Barrett, how long did you know Mr. Franklin?

WITNESS: For over seven years.

THE COURT: Okay. Did you know Mr. Franklin to carry a gun?

WITNESS: I'm sorry, say it one more time?

THE COURT: Did you know Mr. Franklin to carry a gun?

WITNESS: Not to carry one but I knew he had one. I've

never seen one on him.

THE COURT: How did you know he had one?

WITNESS: He told me. He told me that someone stole his gun out of his house. I seen him have guns in his house before but to say he carried it and he was out in the public with a gun, no, I never seen that. I seen one at his home, told me that someone stole his gun out of his house, that's all.

THE COURT: Did you know Michael Ferguson?

WITNESS: No, I don't.

THE COURT: Okay. You said that you did ask him did he have anything or did he kill --

WITNESS: I --

THE COURT: -- Mr. Lockett or Ham? You say you did ask him that question?

WITNESS: I'm sorry, can you say that one more time for me?

THE COURT: Did you say -- Did you ask Mr. Franklin if he killed Ham or Mr. Lockett?

WITNESS: Yes, I did look at him and I asked him that. I said, did you have anything to do with that boy being missing and once again, he looked at me and said that 'he was Jimmy Hoffa.' That's all he would say. He never admitted that he killed Ham, never to me any way.

THE COURT: Okay. And when you say you gave the police the information that was presented to you; is that the entirety of

the information that was presented to you that he just said that MF was Jimmy Hoffa, did he say anything else?

WITNESS: Right. Say that one more time, sir? I'm sorry.

THE COURT: Okay. I know this is very difficult, I appreciate your patience --

WITNESS: No, no --

THE COURT: Can you hear me?

WITNESS: -- at this point, sir, because this phone it's like you're very far away from it, it's hard to tell what you're saying.

THE COURT: Okay. I'll try it again.

WITNESS: Okay.

THE COURT: The information that you said was presented to you is what you told the police, correct?

WITNESS: Yes.

THE COURT: Did he say anything else about the disappearance of Ham or Lockett, Mr. Lockett?

WITNESS: In reference to him being murdered or in reference to him being missing, I was only asking because he told me a lot of other things but on his interest that --

THE COURT: The disappear --

WITNESS: -- he was --

THE COURT: The disappear --

WITNESS: -- or that he told them; is that what you're

saying?

THE COURT: The disappearance and/or murder.

WITNESS: That's all he said to me.

THE COURT: Okay.

Any questions based off my questions, gentlemen?

MR. REYNOLDS: No, Your Honor.

MR. HOWARTH: No.

THE COURT: Okay, thank you Ms. Barrett.

WITNESS: Thank you. Have a good day.

MR. REYNOLDS: Your Honor, now that the Court has had an opportunity to hear her testimony, I would object to it being admitted as an admission against penal interest by I would stipulate that Mr. Franklin is deceased. The reason I would say that is that the statement that she says was made that this guy is Jimmy Hoffa, I do not think meets the criteria. He is, he certainly is no longer with us, so he's unavailable. But under 804(b)(3), a statement against the penal interest, it says:

"A statement which was at the time was making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject to declarant to civil or criminal liability or to render invalid a claim by the declarant against another that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Excuse me. "A statement can induce to dispose a declarant to criminal liability in an offer to

exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

And I don't think that the statement itself, 'That guy is Jimmy Hoffa' is in fact so far against the penal interest of Chaka Franklin that Chaka Franklin would not have made that unless it was true. All he's indicating is the knowledge that the fellow is missing and probably won't be found in at least several decades --

THE COURT: Why wouldn't that be against his penal interest especially the corroborating facts being that he would have been one of the last persons to see him alive and then where he was found in the sewer --

MR. REYNOLDS: Well, it's equally consistent with being there when Mr. Ferguson committed the crime as with him committing the crime. We know from the testimony of Mr. McKithen that he heard from Mr. Ferguson's background as dogs are barking and there's other noise going on that Mr. Chaka Franklin is trying to calm down another person.

THE COURT: He doesn't say who made that statement.

MR. REYNOLDS: Yeah, he said it was Chaka Franklin when he testified under oath, which is admissible, because it's some piece from the prior sworn statement. So, in other words, it would be equally consistent with someone --

THE COURT: I thought, was when he testified here today though, that he didn't know who made that statement.

MR. REYNOLDS: That's correct.

THE COURT: Right.

MR. REYNOLDS: And he testified under oath before that it was Chaka who he heard making the statements. As Mr. Ferguson-

THE COURT: So, as in his -- You would conceded though that his statement was under oath as well?

MR. REYNOLDS: I would concede --

THE COURT: Okay.

MR. REYNOLDS: -- that's something the jury would have to decide was he telling the truth at the exam or telling the truth up on the twelfth floor.

THE COURT: Okay.

MR. REYNOLDS: But I'm just saying I don't believe that that rises to the level of something 'that guy is Jimmy Hoffa' rises to the level of something that would not have been said by Chaka Franklin if it were not true and to the extent that it merely shows he knows that the guy is missing and probably won't show up again. Which --

THE COURT: So, why wouldn't that come in then?

MR. REYNOLDS: Well, I don't think it's -- In other words, he's not -- Certainly, if he had said and I killed him --

THE COURT: Because what we're looking for, is to see whether or not how truthful this statement is, period.

MR. REYNOLDS: Right.

THE COURT: So if the, so if he's saying that this guy

is Jimmy Hoffa, he's not going to be found or never to re-surface again, what makes that statement unreliable?

MR. REYNOLDS: No, I'm not saying it's not reliable. What I'm saying is it's not so far against his penal interest to say that this fellow is missing and the fact that this fellow is missing and is never going to show up. Now if he had said the second part, I killed him, I wouldn't be up here arguing. But she said that was never said to her, she surmised it.

THE COURT: All he's seeking to do is introduce what was said.

MR. REYNOLDS: Okay.

MR. HOWARTH: It's said --

THE COURT: And we look to the reliability of the statement itself. Once again, you can attribute whatever you want to attribute to it but the statement itself is reliable.

MR. REYNOLDS: Okay. The -- We're just talking about the portion about the decedent, in our case, Ham being Jimmy Hoffa.

THE COURT: That's the only thing I have to go on.

MR. REYNOLDS: Okay. Well, I understand.

THE COURT: Okay. Anything else?

MR. HOWARTH: I have nothing.

THE COURT: The People?

MR. REYNOLDS: Nothing. I mean I have additional witnesses.

THE COURT: Okay. Give me an offer of proof as to what these witnesses are going to tell me?

MR. REYNOLDS: Okay. Sergeant Matthew would testify that he responded to that sewer on September 5 on 4:05 in the afternoon. That Brenda Burton was at the scene, he spoke with her, he approached the sewer, smelled the sincere (ph) odor of decomposition, saw a body, he was present when the fire department extracted the body using a rope and --

THE COURT: I got all of that --

MR. REYNOLDS: Well, just a minute.

THE COURT: -- so why do I need this witness to tell me that again?

MR. REYNOLDS: -- that the deceased was severely decomposed, obvious head trauma and he was wearing a dark shirt, brown shorts and gray shoes.

THE COURT: Why do I need any of that, I get that from the autopsy report and the other testimony.

MR. REYNOLDS: Well --

THE COURT: Why do I need that witness?

MR. REYNOLDS: I'll move on.

THE COURT: Okay.

MR. REYNOLDS: And then Sergeant Kostanko (ph) who's the officer in charge. He assisted an execution of the search warrant at Mr. Ferguson's house at 15052 Sorrento on October 5, 2015 approximately 12:56 p.m., that to protect the officers a pit bull

in the backyard was shot. That during the execution of the search warrant the police recovered a proof of residency at that location for Mr. Ferguson. A black face mask that would cover the lower portion of the face, several sets of brass knuckles, two rifles and one shotgun.

THE COURT: Two rifles and one shotgun?

MR. REYNOLDS: Correct.

MR. HOWARTH: None of which are connected to the crime.

MR. REYNOLDS: Yet.

MR. HOWARTH: Yet or not yet, they're not connected.

THE COURT: Would you stipulate to that testimony?

MR. HOWARTH: Sure.

THE COURT: Okay. So we don't need those witnesses.

MR. HOWARTH: Correct.

THE COURT: Okay.

MR. REYNOLDS: Then, Your Honor, at this time I like to move to bindover understand that it's a thinner case than most. But what we do have is we have the testimony that from the mother, this was holding her son was last wearing when he was, at least the shoes --

THE COURT: I don't think that's in dispute --

MR. REYNOLDS: Yes.

THE COURT: -- that the body that was --

MR. REYNOLDS: He was obvious --

THE COURT: -- recovered was that of Mr. Lockett.

MR. REYNOLDS: He was obviously missing the same day that she dropped her son off at the general area of Meyers and Fenkell.

THE COURT: Okay.

MR. REYNOLDS: We have the testimony from Mr. McKithen that Mr. Ferguson knocked the deceased down in his prior sworn testimony. And hit him several times with brass knuckles that he and Chaka then dragged the man through the backyard, through the fence into the alley that would lead kitty-corner to Mr. Ferguson's house. Then he went upstairs, then he heard dogs barking from the backyard there, that he heard the deceased asking for mercy, that he heard Chaka telling the other person that was there to cool, chill, don't need to do all that, that he then closed his window, slept for an undetermined period of time. Then he heard other shots coming from the location that he couldn't tell. And that the deceased was then found in a sewer down an alley not long distance from the Defendant's home.

THE COURT: Let's cut to the chase. Tell me how because I assume that the People's theory is that this Defendant either did the shooting himself or somehow aided and abetted Mr. Franklin in the murder of Mr. Lockett.

MR. REYNOLDS: Correct.

THE COURT: Tell me how you arrive at that?

MR. REYNOLDS: Well, the way I would arrive at that --

THE COURT: Because what I've heard so far, I've heard

that it was Chaka Franklin who was the person that was upset with the complainant, the victim Mr. Lockett for breaking into houses. I heard that it was Mr. Franklin who had a firearm. I heard that-

MR. REYNOLDS: That was the following day.

THE COURT: The following day.

MR. REYNOLDS: Yes.

THE COURT: But I haven't heard anything about the Defendant having a handgun, there was two rifles and a shotgun that would be inconsistent with what took place on July 6 going into July 7.

MR. REYNOLDS: Well, the gunshot wounds would be consistent with either a long gun or a handgun. There's no skin there --

THE COURT: Problem being that there was no testimony that anybody saw the Defendant with a long gun on this particular day or evening.

MR. REYNOLDS: That's correct.

THE COURT: Okay. That he had a mask and some brass knuckles.

MR. REYNOLDS: That were found in the, in his house.

THE COURT: Yeah, that's -- I don't think that's in dispute.

MR. REYNOLDS: Okay, and that's consistent with what Mr. McKithen said this man used to assault him.

THE COURT: Yeah.

MR. REYNOLDS: He was in the act of assaulting him when he was last heard, seen by --

THE COURT: So you have an assault but then that assault sometime afterwards escalates to a shooting --

MR. REYNOLDS: Correct.

THE COURT: But how do I tie this Defendant into the shooting as opposed to Mr. Franklin?

MR. REYNOLDS: Well, we know that he was never seen alive again and he was found stuffed down a sewer not far from Mr. Ferguson's home. And that --

THE COURT: And Mr. Franklin's home.

MR. REYNOLDS: -- Mr. Ferguson. I'm sorry? Yes. And Mr. McKithen's home.

THE COURT: Right.

MR. REYNOLDS: We also know that along with the mask and the brass knuckles were found firearms that could have also been used. We don't know yet, we don't have the firearms work --

THE COURT: But again there was no testimony that the Defendant was seen with a long gun that night.

MR. REYNOLDS: No there wasn't but --

THE COURT: But he did have the brass knuckles and the mask. So I would assume that if one of those weapons were used that the witness, Mr. McKithen would have probably seen it.

MR. REYNOLDS: No, he said he couldn't see into the yard from his --

THE COURT: Well, he seen him at some point in time, he saw him with the mask on --

MR. REYNOLDS: Yeah.

THE COURT: -- and saw he had on dark clothing.

MR. REYNOLDS: In front of his own, in front of Mr. McKithen's own home.

THE COURT: Okay.

MR. REYNOLDS: But then they went back through the alley into Mr. Ferguson's backyard --

THE COURT: So the gun was --

MR. REYNOLDS: -- where he said was too dark to see.

THE COURT: -- the People's theory is that the gun must have been laying in the alley, waiting on him.

MR. REYNOLDS: Well, he could have gone and gotten the gun, I mean Mr. -- at the time there was --

THE COURT: Okay, would of, could of, should of, but what do we have here on this record?

MR. REYNOLDS: Okay. Your Honor, I'm going to move to bindover on those charges and I'd also ask the Court to bind over on the charge of Assault with Intent to do Great Bodily Harm less than Murder.

THE COURT: Okay. Response?

MR. HOWARTH: Your Honor, it's certainly not a garden variety case. At the best case scenario for the Prosecution, there are three suspects that we can name and we got a fourth

suspect called the rest of the world. The three suspects -- Well, because it's somebody else that we haven't heard any talk about killed him, is a fourth suspect.

THE COURT: Who are you talking about?

MR. HOWARTH: I'm saying somebody killed Mr. Lockett. There are three suspects that we've talked about in court and if it's not one of them it could be just about anybody else in the world. It doesn't necessarily have to be one of those three.

But the three that we've talked about in court are first of all, we have Mr. McKithen. He's a suspect. His house was broken into. We have to be a little bit suspicious of his testimony that I wasn't even bothered or upset. It isn't like the guy opened the door and came in and sat down and you're bothered about hey, it's my house and I don't like people just walking into it. Somebody broke his window, push their way into his house and he's upset about it enough that he's not running a home for vagrants. As a matter of fact he's concerned enough that he takes, goes to the trouble to board the house up.

The next day when the deceased's mother comes by and is asking about her son and supposedly these are, folks that are a little bit close, he doesn't tell the mother, he hides the fact that he knew, supposedly that happened the night before. And then he's filled with suspicion.

THE COURT: Well he gave a reasonable explanation for that. He says that Mr. Franklin was there with the gun.

MR. HOWARTH: He had --

THE COURT: So, I probably wouldn't be too quick to say Mr. Franklin and Mr. Ferguson were with your son the last time I seen him and were beating him up and dragging him off.

MR. HOWARTH: Accepted. However he had all the time in the world after that to make up for the mistake of this dear friend of his who is so close to him that he's not bothered about him breaking into his house.

Your Honor, I may be an unusual person, I don't have such a friend that's it's okay that they break into my house that I'm not going to be very upset or when the next day their mother comes looking for him and I'm not going to tell them things that take me out of the game because I'm number one suspect at that moment. I'd like to take myself out of the game by telling them, wait a minute, I know who your guy is. Listen to what, I'll tell you what I saw. He doesn't.

Now, he's also a close friend of Chaka's. Now what do we know about Chaka. This is a person who is much more upset than the homeowner that his friend's house got broken into. The homeowner is saying mend your ways, go and sin no more, wonderful person. Wonderful person. But somebody who doesn't even live in that house is so angry that they're angry when it happens and they're still angry for a time after that. When Mr. McKithen says I left to go get something to board up --

THE COURT: Well, I don't think he was -- That's not

what I got. I don't think he was angry that he broke into Mr. McKithen's house, I think he was angry that he broke into his own house at some point in time.

MR. HOWARTH: Only makes the argument better, Your Honor, for a suspect.

THE COURT: I just wanted to clear up the record, that's all.

MR. HOWARTH: Okay, that's fine. I appreciate that. But as far as the suspect is concerned and then we have Suspect Number Two, Chaka saying to a woman. All right, let's take her current version as the true version, that's fine with me. He's telling her about the fact he, Chaka is telling her about the fact of this person breaking into his house and stealing his AK47 and stealing his weed. And he's telling her about that. And when she said well, do you know where that gentleman is, he comes up with the Jimmy Hoffa story. And if you're a Detroiter and you know the Jimmy Hoffa story, you might perhaps go to some place in the United States of America where they don't know. But you tell somebody, somebody's Jimmy Hoffa it means you got snatched, it means you got taken away and it means you got buried somewhere. That is intimate knowledge of exactly what happened to the deceased in this case.

If I were representing either Suspect Number One, Mr. McKithen or I was representing Suspect Number Two, Mr. Franklin who's dead so it would be hard to represent him, I'd argue that's

not enough, that's suspicion, that's fine. That gets you a little way along the road, police go out and prove your case. But the weakest of the three is that Mr. Ferguson who has no skin in the game, his house didn't get broken into, he's not friends with these people, he doesn't know what's going on. He all of a sudden according to --

THE COURT: Well, your argument kind of fails there because if that's in fact the case then why is he there with a mask on with brass knuckles hitting the man?

MR. HOWARTH: If he's there --

THE COURT: Since he has no skin in the game.

MR. HOWARTH: If he's there, Your Honor, even though it makes it all the more unusual --

THE COURT: Well, based on the testimony I have. Understand I'm working with, I'm working with what I have.

MR. HOWARTH: Of course, but you're talking --

THE COURT: And Mr. McKithen said that's exactly what happened.

MR. HOWARTH: Mr. McKithen, one of the three -- the two good suspects, that's what he says. Mr. McKithen who wants to take himself out of this. He comes up with this very unusual story about this neighbor from the back that we don't know that he has any --

THE COURT: But here's the thing. Mr. McKithen knows full well that Mr. Franklin is dead too. So if he wanted to put

himself out of the game and get himself totally out of the game, why not blame the dead guy who can't defend himself?

MR. HOWARTH: Well, I think that possibly, Your Honor, in the hood, if you will, that they live in, that that's not working right now. I think there's a lot of bad feelings. I think there's a lot of feelings that this may have been Chaka but it wasn't Chaka alone. And if you wanted me to solve the crime, I'm putting my money entirely on Chaka and McKithen working together on this. They were together all the way on this and I would certainly have them as dual suspects working together which would account for Mr. McKithen coming up with these things that create another person because Chaka may not be enough. It two people to drag him some place, it isn't easy to move a man who is inearthed (ph) or --

THE COURT: Well, the thing is that, he testified that both of these gentlemen were involved to some extent but then he says I didn't see what happened. So, if you want to absence yourself why not put it on the dead guy and say the dead guy is the one who did it, I saw him do it, I saw him with the gun, I heard him make these assertions and that type of thing.

MR. HOWARTH: Why do we --

THE COURT: In short, I don't find his testimony totally reliable, but I don't find it inherently incredible either.

MR. HOWARTH: If you give it to them and you say that we're going to believe a man who appears to not get his story

straight at all in this case. We're going to say that for some reason or another, Mr. Ferguson, who just happens to live in the neighborhood, we don't know anything more about him than that he happens to live in the neighborhood, decides to come over and be a vigilante and beat this guy up, that if, even if that didn't happen, I wouldn't conceded that for a second. But that he comes over and decides to beat him up and then drags him off all by himself, he takes this man who's unconscious and drags him up and carries him up over to his house and what? And shoots him?

Was there any forensic evidence in the house, apparently not. I don't think there's anything. I give the credit to Detroit Homicide. I think if it was forensic evidence in that house they would have found it. They got a search warrant, they went in there and they didn't come up with anything. They didn't come up with the murder weapon, they didn't come up with fiber evidence, they didn't come up with anything that would have attached itself to indicate that the deceased, Mr. Lockett had ever been in that house.

THE COURT: Well, what's interesting or it will be interesting because I hope that this alleged mask has been preserved for gunpowder residue, I'm not even sure when it was recovered, but it may still be some there, if he was in fact there when the weapon was shot. But as it relates to Count 1, Homicide, Murder in the first degree, Premeditated as counsel indicated this is one of the thinnest cases that I've seen because you have a

situation where the -- even if I'm to believe the witnesses that came forth to testify that these, that this Defendant was in fact there, what do I have this Defendant doing? I have this Defendant allegedly with the mask on who strikes the complainant with brass knuckles and he carries him off to somewhere. And that the other person this Chaka, Chaka Franklin who is no longer with us, with him and that's who he's helping carry. But then at some point in time there's gunshots, but I don't have any evidence that this Defendant at any time possessed a weapon.

What transpired during this unknown amount of time, I'm not sure how long a period of time supposedly went by, before he next heard these gunshots.

The question is, is there aiding and abetting to a first degree murder, because quite frankly I don't have any evidence on this record that this Defendant was the principal in the first degree, premeditated. So the only thing the People have to hang their hat on is whether or not this Defendant aided and abetted Chaka Franklin or someone else in the commission of first degree murder, premeditated.

There is thin evidence. If I was to bind this over on a first degree murder, I hope that you would keep this Mr. Reynolds because any other Prosecutor would be upset with you. That you got something like this bound over because when I say this case is thin, it's razor thin.

So, I'm talking out loud, I'm thinking out loud, does the

fact that the Defendant allegedly had on a mask and with brass knuckles and allegedly carried the victim, Mr. Lockett to another place, an isolated, an alley if you will, and sometime afterwards, later, gunshots were fired and his body was recovered in a sewer with three gunshots to the head, was that aiding and abetting. And you know the law says that any amount of aid or encouragement one gives to another in the commission of the crime, that person can be found as guilty as if they were the ones who committed it.

Could a rational trier of fact find that this Defendant aided and abetted a first degree Murder? Quite possibly. Quite possible.

What is the theory behind Count 2, is it the weapons that were found in the house or that he possessed the weapon because you have him charged with felon in possession of a firearm but I haven't heard any evidence of him possession a firearm.

MR. REYNOLDS: Both. He had possession of the firearms when the search warrant was executed. We had the testimony that gunfire had been heard coming from his house. I think that that's sufficient to show that --

THE COURT: I'm not necessarily sure that I buy the whole gunfire coming from the house. That's highly speculative as to where gunfire was coming from. And the witness when he testified, testified that he didn't know where the gunshots came from. Although I understand that under the investigative subpoena he may have testified differently but based on what I heard, I'm

not buying that.

Your other theory about the guns being found in the house and it being his home and so forth may suffice for felon in possession of a firearm and felony firearm. The Court has no issue in binding over on Count 2 and 3. On Count 1 it's with great reservation that I bindover but I do bindover finding that the -- because the standard of proof is so low at this particular hearing that the People have presented enough evidence that a rational trier of fact could find that the Defendant aided and abetted first degree Murder, premeditated. So the Court will bindover on Count 1 as well. Finding that the People have met their burden of probable cause as it relates to the charges contained in the complaint and warrant. The Court finding those charges were committed in the City of Detroit and there's at least probable cause to believe this Defendant committed them. The Defendant will be bound over to the Wayne County Third Circuit Court, Criminal Division for further proceedings.

The arraignment on the Information date and time will be January 22, 2016 at 9:00 o'clock a.m. Defendant will be remanded to the custody of the Wayne County Sheriff.

MR. REYNOLDS: Your Honor, as to the Count of Assault to do Great Bodily Harm may I ask --

THE COURT: Oh yeah, you added Assault with Intent to do Great Bodily Harm --

MR. REYNOLDS: Yes.

THE COURT: -- there was testimony that this Defendant assaulted the complainant with brass knuckles. The Court will also bindover on the added charge of Assault With Intent to do Great Bodily Harm less than Murder.

MR. HOWARTH: Excuse me, Your Honor, just for clarification. Was there testimony that he did that or was there testimony that the witness previously said that he did that? There was so much confusion going back and forth between that. My recollection --

THE COURT: I think a rational inference could be made because the witness did testify from the stand today that he saw the Defendant with a shiny something on his hand. I assume that they were, based on the evidence and the testimony that I heard, that they were in fact brass knuckles. There was People's Exhibit, I believe it's Exhibit No. 1 that is introduced that shows that there was an injury to the head as well consistent with being struck with the brass knuckles.

MR. HOWARTH: I surely don't remember that.

THE COURT: I thought that I saw that, let's see. Gunshot wound, gunshot wound, gunshot wound -- Okay. I guess I got that from the witness' testimony today as well as the sworn testimony at the investigative subpoena. In any event --

MR. HOWARTH: I'm suggesting that's not substantive evidence, that's impeachment evidence.

THE COURT: It's testimony taken under oath --

MR. HOWARTH: Not subject to cross-examination and therefore can only be used for impeachment and not as substantive evidence that it in fact happened.

THE COURT: Mr. Reynolds?

MR. REYNOLDS: No there's been case law, I think it's unpublished, is it People versus Jackson, decision that I know of and all it says is that former testimony, it says -- this is under Rule 804(b)(1):

"Testimony given as a witness at another hearing of the same or a different proceeding the party against who's testimony is now offered" -- Oh wait a minute, I'm sorry. I'm sorry, let me go to impeachment.

This would be, I'm sorry, 804(b)(5) Deposition Testimony.

"Testimony given" -- wait a minute, no, hold on. All right, just a minute. Okay, 801(d)(1)(a), Statements that are not hearsay.

"A statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is:" And then under Capital A --

"Inconsistent with the declarants testimony and was given under oath subject to the penalty of perjury at a trial hearing or other proceeding or in a deposition."

And that's investigative subpoena is and that's actually the purpose for the legislator putting it in place.

THE COURT: Could you read that one more time?

MR. REYNOLDS: Yes. A statement is not hearsay if -- under this is 801.(d)(1)(a):

"A declarant testifies at a trial or hearing and is subject to cross-examination concerning the statement and that statement is consistent with the declarant's testimony and it was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition."

THE COURT: Okay. So, the rule as I understand it and as Mr. Reynolds just read it, as long as the declarant of that statement was here and available for cross-examination here, regarding an inconsistent statement then it's suffices, so.

The Court will treat that as substantive evidence and I will bindover on the Assault with Intent to do Great Bodily Harm less than Murder as well.

Your objection is noted for the record. And the statute for a GBH is 750.83, is it or is that 84?

MR. REYNOLDS: I think it's 84 --

THE COURT: 84.

MR. REYNOLDS: I think 83 is -- 83 is Assault with Intent to do Great, yeah, to do Murder.

THE COURT: Okay.

MR. REYNOLDS: And yes, I'll be keeping it that case.

THE COURT: Your colleagues will thank you.

MR. HOWARTH: I got to -- he could give it away.

THE COURT: Thank you.

MR. REYNOLDS: Thank you, Your Honor.

(Whereupon this matter concluded)

****

CERTIFICATE

STATE OF MICHIGAN)

)ss

COUNTY OF WAYNE)

I, Shari Morton, Certified Court Reporter, do hereby certify that the foregoing pages 1 through 107, inclusive, comprise a complete, true and correct transcript of the testimony and proceedings taken in this matter on Friday, November 20, 2015.

Shari Morton

Shari Morton
421 Madison
Detroit, Michigan 48226

DATED: February 3, 2016

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs- Case No. 16-000431

MICHAEL FERGUSON,

Defendant.
_____/

PLEA

Proceedings had in the above-entitled cause before the HONORABLE TIMOTHY M. KENNY, Wayne County Circuit Judge, Room 602, Frank Murphy Hall of Justice, Detroit, Michigan, on Friday, March 18, 2016.

APPEARANCES:

MICHAEL REYNOLDS, Esq.,
Appearing on behalf of the People.

JAMES C. HOWARTH, Esq.,
Appearing on behalf of the Defendant.

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WITNESS:	PAGE
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EXHIBITS

Identification	Marked	Received
NONE		

Detroit, Michigan

Friday, March 18, 2016

Approximately 9:20 a.m.

PROCEEDINGS

THE CLERK: Case Number 16-0431, People of the State of Michigan versus Michael Ferguson.

Mr. Ferguson is here scheduled today for a Final Conference.

THE COURT: Appearances, please.

MR. REYNOLDS: Good morning. Assistant prosecuting attorney Michael Reynolds for the People.

MR. HOWARTH: Good morning, your Honor.

James Howarth on behalf of Michael Ferguson, who is present.

THE COURT: Good morning, Mr. Ferguson.

DEFENDANT FERGUSON: Good morning, your Honor.

MR. REYNOLDS: Your Honor, I have had an opportunity to speak to Mr. Howarth also to speak with Deputy Chief Stevens and with Brenda Burton, who is the mother of Osean Lockett, the deceased in this case.

At this time after having reviewed the transcript of the Preliminary Examination, we would be moving to dismiss the homicide and the assault with intent to do great bodily harm charges without

prejudice. That's part number one.

If the Court in fact does dismiss without prejudice, it is my understanding that the defendant would tender a plea to the remaining charges of felon in possession of a firearm and felony firearm, understanding that felon in possession of a firearm carries a five-year probationable sentence and that the felony firearm charges require a two-year mandatory sentence that is consecutive to anything that would be imposed on the felon in possession.

THE COURT: All right.

MR. HOWARTH: Your Honor, I have spoken with Mr. Ferguson about the offer. And I would state that we were very much prepared to go to trial. I'm saying this for Mr. Ferguson's benefit as well as for the record that because Mr. Ferguson has a previous felony conviction, which he can't argue, and because there was a search warrant issued in this case, which I can't find a way around.

He is put in a position where I don't see how he can deny being a previously convicted felon, who had firearms. And under Michigan law you pay the double price.

We understand that the murder charge will be dismissed and the assault charge will be dismissed. He

is willing to plead to the remaining charges, having been advised of his rights, and I would present him to the Court for inquiry.

THE COURT: All right.

MR. REYNOLDS: I've just given the form to Mr. Howarth and Mr. Ferguson.

THE COURT: Was there an amended Information filed in this case?

MR. REYNOLDS: Actually, no. At the Examination I added a Count of great bodily harm, and what I should do is get an amended Information.

THE COURT: If you can just submit that by the time of sentencing.

MR. REYNOLDS: Yes, I will.

THE COURT: That would be sufficient for me.

Let me back up for just a moment if I can with regards to the People's motion to dismiss Count One, murder in the first degree, premeditated murder and also the Count, additional Count of assault with intent to do great bodily harm, that's being dismissed by the People because the People feel they will not be able to meet their burden.

Would that be fair?

MR. REYNOLDS: There is two good a likelihood of that, yes.

THE COURT: All right.

So I'll grant that motion.

Mr. Ferguson.

MICHAEL FERGUSON,

called as a witness by the Court, having first been duly sworn by the Court Clerk, was examined and testified upon his oath as follows:

EXAMINATION BY THE COURT:

THE COURT: Mr. Ferguson, would you tell me your full name and tell me your age please.

DEFENDANT FERGUSON: Michael Howard Ferguson, Jr. I'm 30 years old.

THE COURT: You're a US citizen; is that true?

DEFENDANT FERGUSON: Yes, your Honor.

THE COURT: Mr. Ferguson, you're charged with felon in possession of a firearm. That carries up to five years in prison, minimum possibility of probation.

There is an additional Count of felony firearm, which carries a flat two-year prison sentence that's to be served before any other prison term may be imposed.

You understand that?

DEFENDANT FERGUSON: Yes, sir.

THE COURT: Am I correct in understanding

that you're pleading to those charges, and that's your understanding of the complete agreement?

DEFENDANT FERGUSON: Yes.

THE COURT: Yes?

DEFENDANT FERGUSON: Yes.

THE COURT: Anyone promise you any other deal or resolution of this case other than what I just told you?

DEFENDANT FERGUSON: No, sir.

THE COURT: Both sides agree that the complete agreement has been stated here on the record?

MR. REYNOLDS: Yes.

MR. HOWARTH I do.

THE COURT: Mr. Ferguson, are you currently on probation or parole?

DEFENDANT FERGUSON: No, sir.

THE COURT: By pleading here today you're giving up the right to have a jury trial or a trial by the Court without a jury.

You're giving up the right to be presumed innocent unless and until the prosecutor proved you guilty beyond a reasonable doubt.

You're giving up the right to have any of the witnesses against you come into open court and testify, and you through your attorney, Mr. Howarth, would have

the right to question any of those witnesses.

You're also giving up the right to have the Court order witnesses to come in and testify for you at your trial.

You are also giving up the right to get on the witness stand and tell your side of the story if you want to, but nobody can make do you that. If you wanted to remain silent at your trial, that would be your right. And if you chose to remain silent, I would tell the jury they couldn't consider that or hold that against you in any way when it came time for them to decide the case.

By pleading here today you're giving up the right to make any claim that this plea was the result of any promise or threat that wasn't disclosed on the record, or that it wasn't your own idea to plead.

And finally by pleading here today, you're giving up the right to have Michigan Court of Appeals, which is a higher court, automatically review your conviction and sentence. You can still ask them to hear your case, but it will be up to them to decide whether or not they want to hear it.

Do you understand these are all the rights you're giving up by pleading here today?

DEFENDANT FERGUSON: Yes, sir.

THE COURT: Mr. Ferguson, do you have any question about any of these rights as I explained them to you?

DEFENDANT FERGUSON: No, sir.

THE COURT: Has anybody forced you, threatened you or pressured you in order to get you to plead?

DEFENDANT FERGUSON: No, sir.

THE COURT: On or about July 6th of 2015 in the vicinity of Chalfonte and Sorrento Streets in the City of Detroit did you in fact have a handgun in your possession?

DEFENDANT FERGUSON: No, sir.

MR. HOWARTH: It was a long gun, your Honor.

THE COURT: What kind of long gun was it?

DEFENDANT FERGUSON: Shotgun.

THE COURT: And at the time that you had it in your possession, you had been previously convicted of carrying a concealed weapon; is that true?

DEFENDANT FERGUSON: Yes, sir, your Honor.

THE COURT: For purposes of the plea will both sides stipulate as of July 6th of 2015 Mr. Ferguson's rights to possess or use a firearm had not been restored pursuant to Michigan law?

MR. REYNOLDS: Yes, your Honor.

MR. HOWARTH: Yes.

THE COURT: Okay. All right.

Both sides satisfied there is that factual basis, and I've complied with the court rules.

MR. REYNOLDS: Yes, your Honor.

MR. HOWARTH: Yes.

THE COURT: Okay. I will accept the plea.

Schedule sentencing for?

THE CLERK: The 6th of April.

THE COURT: Is that a good date?

MR. REYNOLDS: Yes, your Honor.

MR. HOWARTH: No, because I am in federal court in a sentencing that morning, your Honor. It makes it difficult because that's at 10:30.

THE CLERK: April 8th?

MR. REYNOLDS: That's good.

MR. HOWARTH: That's fine. April 8th.

(Whereupon this matter was concluded).

-- -- --

REPORTER'S CERTIFICATE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

I, SHEDRIA L. BLACKMAN, CSR-0454, Official Court Reporter in and for the Third Judicial Circuit, Wayne County, State of Michigan, do hereby certify that the foregoing pages one through page 11 inclusive, was reduced to typewritten form by means of Computer-Assisted Transcription and comprise a true and accurate transcript of the proceedings taken in the above-entitled matter, on Friday, March 18, 2016.

Shedria L. Blackman
SHEDRIA L. BLACKMAN, CRS-0454
Certified Shorthand Reporter

DATED: This 26th day of April, 2016.

A-8
Government's Sentencing Memorandum and Exhibits,
United States v. Ferguson No. 16-cr-20535
(Jan. 23, 2017) (APP 358)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

NO. 16-20535

v. HON. ROBERT H. CLELAND

MICHAEL HOWARD FERGUSON,

Defendant.
_____/

GOVERNMENT'S COMBINED MOTION FOR AN UPWARD VARIANCE AND SENTENCING MEMORANDUM

The United States of America hereby moves this Court to grant an upward variance from the Defendant's sentencing guideline range of **84-105 months**, and requests a sentence at the statutory maximum of **120-months** imprisonment. Irrespective of the Court's findings as to the appropriate Guideline range, the Government submits that a sentence at the statutory maximum is appropriate for the following reasons and for the reasons outlined in the attached memorandum:

1. Three months after his discharge from probation on a felony firearms offense and while still on probation for a DUI, Ferguson chose not only to possess a firearm but chose to possess numerous high-power and

some high capacity firearms and to sell those firearms to others who he had reason to believe could not lawfully possess them;

2. Ferguson was not only selling firearms during this time period; he was also selling narcotics;

3. He was known in the community as a source of firearms and changed his cellphone number frequently (common practice for traffickers in order to avoid law enforcement detection), indicating that this was more than an occasional habit for him but was instead a business;

4. During the same time period as he was selling firearms in Clinton Township, Ferguson was charged with First Degree Homicide, Assault Great Bodily Harm Less Than Murder, and Felony Firearms possession in Detroit – although he pled guilty to only the firearms charge in exchange for the dismissal of the other two charges, a witness identified him as having been involved in the homicide, and items in his residence corroborated the witness's account;

5. Regardless of whether Ferguson committed the homicide, it is undisputed that he possessed two sets of brass knuckles, three firearms, ammunition, a BB gun, and a black mask – all during the same time period that he was selling firearms to an undercover officer in Clinton Township;

6. Moreover, Ferguson was interviewed about the homicide in December of 2015 and blatantly lied to them more than once about the fact that he was selling firearms, demonstrating a lack of respect for the law;

7. Ferguson took his young daughter (approximate age 3 years old) to at least one of the transactions between him and the undercover, putting her in danger and demonstrating a willingness to put others at-risk (unfortunately, this is likely not the only time he took her to a transaction);

8. Numerous cellphones were recovered from Ferguson's residence (as seen in the exhibits attached to the memorandum), again demonstrating that trafficking was a business for him and that the sales to the undercover were just a small part of that business.

WHEREFORE, the government requests an upward variance and a sentence of **120-months** imprisonment.

Respectfully submitted,

BARBARA L. McQUADE
United States Attorney

s / April N. Russo
April N. Russo
Assistant United States Attorney
General Crimes Unit
211 W. Fort Street, Suite 2001
Detroit, MI 48226-3211
(313) 226-9129

Date: January 23, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 16-20535

v. HON. Robert H. Cleland

D-1 MICHAEL HOWARD FERGUSON,

Defendant.

_____/

GOVERNMENT'S COMBINED MOTION FOR UPWARD VARIANCE AND SENTENCING MEMORANDUM

I. INTRODUCTION

On October 4, 2016, the defendant, Michael Howard Ferguson, entered a guilty plea to the crime of possession of a firearm by a convicted felon (Count One), 18 § U.S.C. 922(g), without the benefit of a Rule 11 plea agreement. For the reasons stated in this memorandum, the Government submits that the appropriate Guideline range in this case is **84-105 months** and asks for an upward variance and a sentence of **120 months'** imprisonment to be imposed consecutive to any sentence Ferguson is now serving**.** Such a sentence is "sufficient, but not greater than necessary, to

comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)." *United States v. Vowell*, 516 F.3d 503, 512 (6th Cir. 2008).

II. STATEMENT OF FACTS

A. Background

On January 21, 2015, Ferguson was discharged from his probation on a 2012 weapons carrying concealed offense. PSR ¶ 28. He had previously violated his probation by driving while under the influence (DUI). PSR ¶ 29. He was sentenced to eight months of non-reporting probation for the DUI offense.

In April of 2015, three months after he was discharged for the weapons offense, and while still on probation for the DUI, Ferguson was selling firearms. PSR ¶ 7. On May 19, Ferguson set up a meeting with an undercover officer at the McDonalds and BP parking lot in Clinton Township. Ferguson said he had a Colt .45 caliber handgun to sell and asked for $425. PSR ¶ 8. Once at the location, Ferguson got into the undercover's vehicle, removed the Colt handgun which was concealed in his waistband, and gave it to the undercover in exchange for $425. PSR ¶ 8. The two discussed how the undercover could not legitimately purchase firearms because of a past conviction. *See* Govt. Ex. A, Audio Recording Sale One; *Id.*at 10:30-11:30; Govt. Ex. B, Picture of Firearm 1. Ferguson gave the undercover advice about where to get firearms without having to register. *Id.*

On June 22, 2015, Ferguson texted the undercover "90 750s peach 3.50 o.b.o." The undercover was able to determine that Ferguson was offering to sell him 90 Vicodin pills. PSR ¶ 9. The two agreed to meet on June 24, 2015 at the same McDonalds/BP parking lot in Clinton Township. *Id.* Ferguson again got into the undercover's vehicle. He then retrieved a plastic baggie containing 30 Vicodin pills and gave them to the undercover in exchange for 100 dollars. PSR ¶ 9. The two then discussed handguns, and the undercover expressed that he had some "biker friends" he knew that he could resell guns to but he wanted to at least make 50 dollars a firearm. *See* Govt. Ex. C, Audio Recording Sale Two at 15:15-19:55. The undercover noticed a small child (approximate age three) in Ferguson's vehicle.

On July 16, 2015, Ferguson contacted the undercover and provided a new cellular telephone number. PSR ¶ 10. Ferguson sent a picture of a .9mm Ruger firearm to the undercover, asking for $400. PSR ¶ 10. On July 17, the two met up at the same parking lot where they had met on June 24 and May 19. Ferguson again conducted the sale in the undercover's vehicle, rather than doing it out on the street. PSR ¶ 10. He again retrieved the firearm from where it was concealed in his waistband. PSR ¶ 10. He also handed the undercover two 17 round magazines to the firearm (also concealed on his person). PSR ¶ 10; *see* Govt. Ex. D, Audio Recording Sale Three, at 44:50-end; Govt. Ex. E, Picture of Firearm 2.

In late July, Ferguson notified the undercover that he had another new cell phone number. PSR ¶ 11. On September 10, 2015, Ferguson and the undercover met at the same parking lot. PSR ¶ 11. Ferguson entered the undercover's vehicle and removed a concealed .380 handgun from his waistband, giving it to the undercover in exchange for 150 dollars. PSR ¶ 11; *see* Govt. Ex. F, Audio Recording Sale Four at 7:28-8:30; Govt. Ex. G, Picture of Firearm 3. Ferguson was driving a different vehicle than he had driven for the prior three sales.

In September of 2015, the same month as this final sale, the Detroit Police Department began investigating the homicide of Osean Lockett. Lockett had gone missing in July, but his body was discovered stuffed into a sewer drain in September. *See* Govt. Ex. H, Pictures from Sept. Investigation. An investigation revealed that Lockett had broken into a residence, leading to an argument in the neighborhood. PSR ¶ 31. A witness reported that Ferguson, wearing a mask and brass knuckles, ran up behind Lockett and punched him in the back of the head. PSR ¶ 31. The witness alleged that Ferguson struck Lockett numerous times on the head and body. PSR ¶ 31. Ferguson then dragged Lockett into his own backyard. PSR ¶ 31. The witness heard, but could not see, two gunshots. PSR ¶ 31. The witness reported that, later that evening, one of the persons present at the shooting told him that Ferguson had shot Lockett. PSR ¶ 31.

Law enforcement executed a search warrant at Ferguson's residence, discovering, amongst other things, brass knuckles, a black mask, a loaded .22 Marlin firearm, a loaded Mossberg 500A 12-gauge shotgun, a loaded national ordinance .30 caliber rifle, a BB gun, and residency documents in Ferguson's name. PSR ¶ 31; *see also* Govt. Ex. I, Search Warrant Photographs. On December 11, 2015, Ferguson provided a statement to law enforcement, admitting that he was present at or near the location of the homicide on the date it took place and that he owned brass knuckles and a black mask, but denying that he had ever sold firearms and denying involvement in the homicide. *See* Govt. Ex. J, Defendant's Statement.

> Q: At anytime after July 6, 2015, did you sell any guns handguns or rifles to anybody?
> A: No Sir.
> Q: Did you get rid of any guns that killed Osean Lockett?
> A: I didn't kill Osean Lockett. I didn't sell any guns to kill Osean Lockett. I didn't have any guns period. I didn't sell any guns. I didn't kill him. Period.

Id.

Ferguson was charged with First Degree Homicide, Felony Firearms Possession, and Assault with Intent to Do Great Bodily Harm Less Than Murder. He entered a guilty plea to the felony firearms charge for possession of one of the firearms found in his residence. PSR ¶ 31. The remaining counts were dismissed. Ferguson is currently serving a two-year custodial sentence

as a result of his guilty plea and is scheduled for discharge on his state case on December 10, 2017.

III. ADVISORY SENTENCING GUIDELINES

The Probation department calculated Defendant's Guideline range to be **84-105 months**, with a total offense level of 23 and a criminal history category of V. PSR ¶ 65. The Government has no objections to this calculation. Defense calculated the Guideline range as **46-57** with a total offense level of 19 and a criminal history category of IV. The primary disputes between the parties concern the application of the +4 trafficking enhancement under U.S.S.G. Section 2K2.1(b)(5) and the application of 2 criminal history points for committing the offense while under a probationary sentence.[1]

A. Guideline Range

1. The Trafficking Enhancement

U.S.S.G. Section 2K2.1(b)(5) provides for a 4 level enhancement "if the defendant engaged in the trafficking of firearms." Application Note 13 explains that

[1] In the event that this Court finds that the trafficking enhancement does not apply, the Government believes that an upward variance to the statutory maximum is still appropriate when considering the 3553(a) factors, particularly the nature and circumstances of the offense, the history and characteristics of the defendant, and the need to protect the public.

the enhancement is applicable where the Defendant sells two or more firearms (true in this case) and knows or has reason to believe that such conduct would result in the transfer of a firearm to an individual "whose possession or receipt of the firearm would be unlawful" and/or to someone "who [they had reason to believe] intended to use or dispose of the firearm unlawfully."

Note that the cases interpreting the enhancement for trafficking of firearms in the Sixth Circuit have not required the Government to prove that a defendant selling firearms to an individual actually believe they were convicted of a particular type of crime, nor have they required that the offender know exactly how the purchaser intends to dispose of the firearms – they have interpreted the enhancement more broadly, looking at the totality of the circumstances to determine whether the defendant had reason to believe that the firearms would be disposed of unlawfully and/or that the purchaser could not lawfully possess them. *United States v. Pawlak*, 822 F.3d 902, 911-913 (6th Cir. 2016); *see also United States v. Henry*, 819 F.3d 856, 870 (6th Cir. 2016) (finding that the district court appropriately applied the enhancement where an undercover agent told a defendant selling firearms that he had been convicted of a felony and could not possess a firearm, even though the undercover was not in fact a felon and even though the particular felony did not appear to be specified); *United States v. Torres*, 644 Fed. Appx. 663, 666-67 (6th Cir. 2016) (explaining that the Court had previously held that "furtive selling of

firearms in the wee hours of the morning was sufficient indirect evidence" to support the application of the trafficking enhancement) (citations and quotations omitted).

It is evident from listening to the recordings of the sales that Ferguson knew or had reason to believe he was selling to someone who could not legally possess a firearm (the undercover agent indicates as much) (*see, e.g.*, Govt. Ex. A, Audio Recording of Sale 1 at 10:30-11:30) (undercover agent says he cannot legally purchase a gun because of things he stole in the past and Ferguson advises him about a place that does not run background checks); *see also United States v. Grinnage*, 309 Fed. Appx. 334 (11th Cir. 2009) (finding that evidence was sufficient that the seller had reason to believe the firearms would be disposed of unlawfully); *United States v. Mena*, 342 Fed. Appx. 656 (2d Cir. 2009); *United States v. Marceau*, 554 F.3d 24 (1st Cir. 2009) (finding that the district court could rely on circumstantial evidence in applying the enhancement).

Moreover, it is evident that Ferguson knew or had reason to believe that the undercover was planning on disposing of the firearms unlawfully. *See* Govt. Ex. C, Audio Recording of Sale 2 at 15:15-19:55. The undercover, who is purchasing narcotics illegally from Ferguson at the time, tells Ferguson that he has some "biker friends" he can sell the guns to and he needs to make at least a "50 dollar" profit. He indicates that he can turn them over quickly. Any reasonable person listening to this conversation would conclude that the undercover is not planning on disposing

of the firearms in a lawful way.

Even without the recordings, the fact that the purchases were all cash payments in parking lots, and that narcotics were also sold by Ferguson to the same undercover agent, indicate that he had reason to believe that he was providing a firearm to someone who was not permitted to possess it and indicate that he had reason to believe the firearms would be disposed of or transferred in an unlawful manner. Ferguson concealed all of the weapons in his waistband and did not reveal them until he was in the undercover's vehicle. None of the firearms were sold in gun cases. Ferguson also changed his cell phone number two different times during the period of time he made sales to the undercover. All of his meetings with the undercover were set up via cellphone text message.

2. Criminal History Points

Under U.S.S.G. Section 4A1.1(d), two points are added to the defendant's criminal history category total if he committed any part of the instant offense, including relevant conduct, while on probation. Ferguson was on probation for a DUI until May 26, 2015. He was selling firearms using a particular cellphone number beginning at least as early as April of 2015. The undercover agent contacted him at that number and was able to set up their first meeting, which took place on May 19. Thus, these two points were properly applied by Probation. The appropriate Guideline range is **84-105 months**.

IV. SENTENCING FACTORS, TITLE 18 U.S.C. § 3553

Congress has provided, through 18 U.S.C. § 3553(a), the relevant objectives and factors to be considered by sentencing courts in imposing a "sentence sufficient, but not greater than necessary." Those objectives are: (1) the nature and circumstances of the offense, and the history and characteristics of the defendant; (2) the need for a sentence to reflect the basic aims of sentencing (including retribution, deterrence, incapacitation, and rehabilitation); (3) the kinds of sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need for restitution.

The most relevant factors are evaluated below, beginning with number 4, the sentencing guidelines.

A. The Advisory Guideline Range

In *United States v. Rita*, 551 U.S. 338 (2007), the Supreme Court restated that the goals of the United States Sentencing Commission in formulating the Sentencing Guidelines are to carry out the objectives of 18 U.S.C. § 3553(a). Despite their being advisory, rather than mandatory, the Guidelines remain an important factor in fashioning a just sentence. As the Supreme Court stated in *Rita*, "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve section 3553(a)'s objectives." *Id.* at 345.

In *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008), the Court in analyzing the holding in *Rita*, recognized that the guidelines represent the Sentencing Commission's attempt to reconcile the factors under § 3553(a), that these factors seek to balance Congress' competing interests in consistency and that a confluence between the national views of the sentencing commission and the independent views of a sentencing judge results in a "double determination" which significantly increases the likelihood that a sentence is reasonable.

In *United States v. Gall*, 128 S.Ct. 586, 601 (2007), the United States Supreme Court provided a template for sentencing proceedings in the district court. The Court held that a district court should begin sentencing proceedings by correctly calculating the applicable guidelines. *Gall*, 128 S.Ct. at 596.

B. Nature and Circumstances of the Offense, 18 U.S.C. § 3553(a)(1)

An upward variance and a sentence of **120 months**, consecutive to any sentence Ferguson is now serving, is sufficient but not greater than necessary to account for the nature and circumstances of the offense here. Three months after he was discharged for probation on a firearm offense and while he was still on probation for a DUI, Ferguson was out on the street selling firearms. All of the evidence indicates that this was not a casual, every now and again, activity. Members of the community knew him to be a source for these deadly weapons. Moreover, Ferguson routinely changed his cellphone number, indicating that he was well-versed in the business and knew what to do to avoid law enforcement detection.

There are numerous aggravating factors that take this case outside the heartland of the typical felon-in-possession case.

- Ferguson was selling narcotics as well as firearms;
- Ferguson took his daughter, a toddler, to an incredibly dangerous firearm transaction;
- Numerous high-power firearms (including a National Firearms Act firearm) were recovered from his residence during the relevant time frame, along with ammunition;

- Several other weapons were recovered from his residence, to include two sets of brass knuckles and a BB gun;
- Numerous cell phones were recovered from his residence indicative of trafficking activity;
- A black mask was recovered from his residence;
- Ferguson lied about selling firearms to DPD when interviewed about the Lockett homicide in December of 2015;
- A witness alleged that Ferguson was involved in the homicide of Lockett and his account was corroborated by the items found during the residential search warrant and by a Medical Examiner's report that showed damage to Lockett's skull consistent with someone hitting Lockett with brass knuckles.

Even apart from the allegations of the witness, the items found in Ferguson's residence, the way he conducted these sales, his willingness to put his small daughter in danger, and the fact that he lied to law enforcement so blatantly warrant the requested sentence.

C. History and Characteristics of the Defendant, 18 U.S.C. § 3553(a)(1).

Ferguson's history and characteristics warrant a sentence of **120 months.** Ferguson's criminal history dates back to the age of 17, when he was convicted of possession of marijuana. PSR ¶ 27. After he failed to comply with the terms of his initial sentence (counseling and narcotics and alcoholics anonymous meetings), he was sentenced to 120-days in custody. *Id.* In 2012, at the age of 27, Ferguson was convicted of carrying concealed firearms. PSR ¶ 28. He was initially charged with assault with a dangerous weapon and assaulting, resisting, obstructing police, but the other charges were dismissed pursuant to a plea agreement. Ferguson violated probation by committing a DUI in June of 2014 and was ultimately discharged in January of 2015. PSR ¶ 28. He was sentenced to nine months non-reporting probation for the DUI. Then, in October of 2015, (after the final sale involved in this case) he was convicted of possession of paraphernalia and sentenced to 90 days in custody. PSR ¶ 30. In April of 2016, Ferguson pled guilty to illegally possessing one of the firearms that was found during the execution of the search warrant on his residence. PSR ¶ 31. He was sentenced to two years imprisonment, and the homicide and assault great bodily harm less than murder charges were dismissed.

D. The Sentence Imposed Must Reflect the Seriousness of the Offense, Promote Respect for the Law and Provide Just Punishment, 18 U.S.C. §3553(a)(2)(A).

The Defendant has no respect for the law whatsoever. Three months after he was discharged from probation for a firearms offense, he chose not only to possess multiple high-power firearms (and other weapons), but he chose to sell firearms to others who could not lawfully possess them. He was also selling narcotics, and he put his daughter at risk while engaging in this criminal conduct.

Possessing firearms as a convicted felon is incredibly serious… but here Ferguson did much more than that. He sold firearms to others, enabling people he did not even know to possess firearms illegally. There's no telling how many firearms Ferguson sold from April to September of 2015, and there is no way to know what the buyers did with those firearms.

A sentence of **120-months imprisonment** is necessary in this case to promote respect for the law and ensure just punishment.

E. The Sentence Imposed Must Afford Adequate Deterrence to Criminal Conduct and Protect the Public from Further Crimes of the Defendant, 18 U.S.C. §3553(a)(2)(B) and (C).

A sentence of **120-months imprisonment** is necessary to afford adequate deterrence and protect the public from further crimes. The prison sentences the Defendant has received have not deterred his conduct. The 120-day sentence he received for possessing marijuana did not stop him from continuing to possess it (as evidenced by his October 2015 arrest). The year-long sentence he received for carrying a firearm also did nothing to deter him. Not only did he possess firearms three months after his discharge from probation for that offense, but he was actively selling them. And, these firearms were not just simple handguns with a five or six-round capacity. These were high power, high capacity firearms. Ferguson's criminal behavior has continued to escalate. In 2015, he committed three different criminal offenses that he has since been convicted of.

General deterrence is of particular import in this case. Someone like Ferguson, a convicted felon who has just been discharged from probation on a firearms offense and who then decides to sell high-capacity firearms and narcotics to persons who cannot lawfully possess them (and who are likely to use them to engage in criminal activity) while at the same time possessing a black mask, two sets of brass knuckles, a BB gun, and several high-power firearms, should know that they will face a sentence at the statutory maximum.

More importantly, a **120-month** sentence is needed to protect the public. The judicial system has failed the public when it comes to Ferguson. He has been granted incredible leniency time and time again. Numerous extremely serious charges have been dismissed on more than one occasion in exchange for guilty pleas. Ferguson is now a supplier of lethal weapons, and has been supplying them to the people in our community that are the most dangerous when it comes to these weapons. The items recovered from Ferguson's home, his willingness to lie to law enforcement, and his cavalier attitude when it comes to the safety of his daughter, demonstrate just how dangerous he is.

F. The Need to Avoid Unwarranted Sentence Disparities Among Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct 18 U.S.C. §3553(A)(6).

A Guideline sentence in this case fits comfortably within the range of sentences that similarly situated defendants receive. Sentencing Ferguson to **120 months**' imprisonment will not create any unwarranted sentencing disparities.

V. CONCLUSION

The government moves this Honorable Court to impose a sentence of **120 months'** imprisonment.

Respectfully submitted,

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UNITED STATES ATTORNEY

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Dated: January 23, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Brandy Robinson, Esq.

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Date: January 23, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

NO. 16-CR-20535

v. HON. ROBERT H. CLELAND

MICHAEL HOWARD FERGUSON,

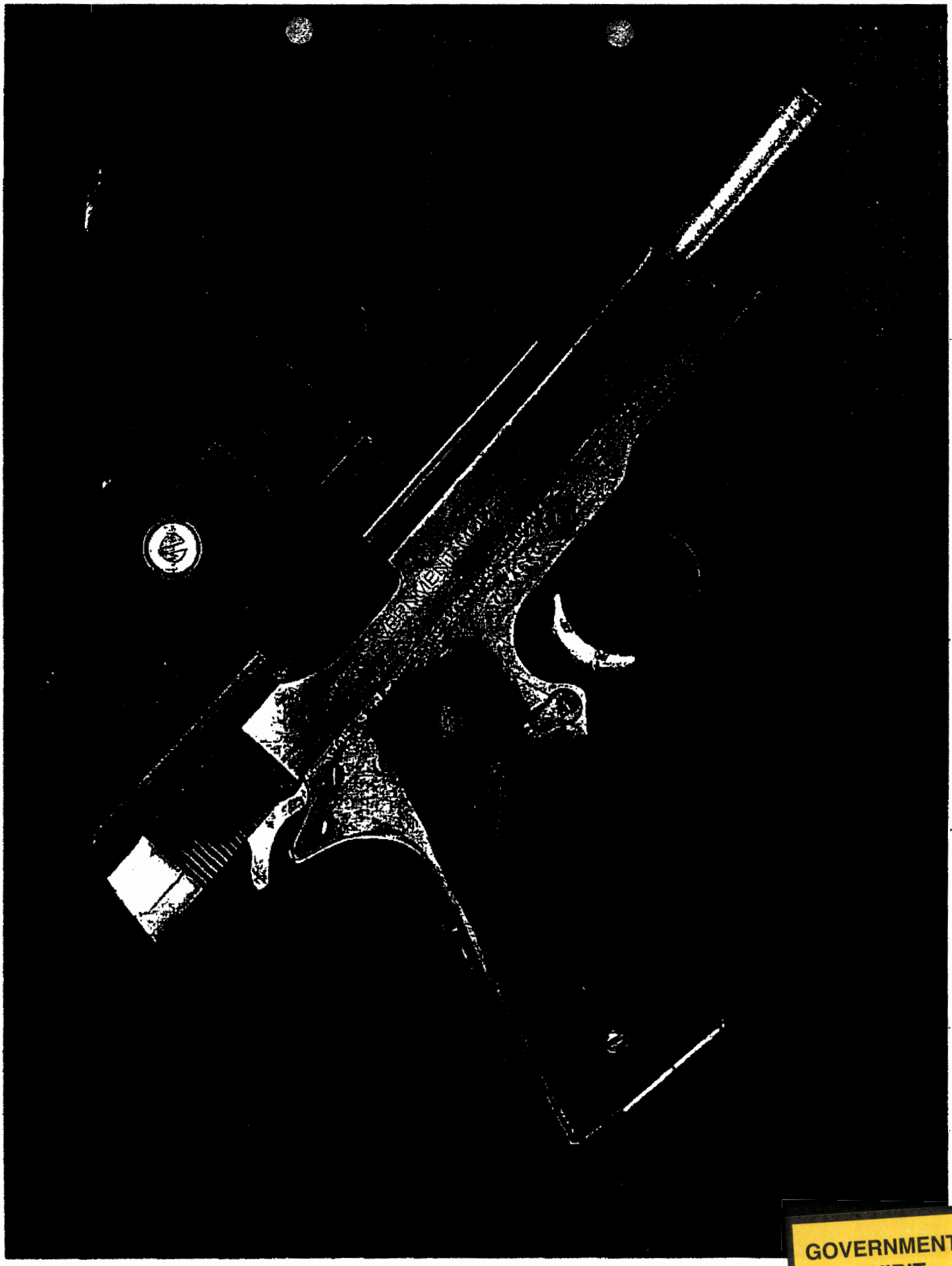
Defendant.
_____/

INDEX OF EXHIBITS

EX	Description
A	Audio Recording Sale One (filed under seal in the traditional manner)
B	Picture of Firearm 1
C	Audio Recording Sale Two (filed under seal in the traditional manner)
D	Audio Recording Sale Three (filed under seal in the traditional manner)
E	Picture of Firearm 2
F	Audio Recording Sale Four (filed under seal in the traditional manner)
G	Picture of Firearm 3
H	Pictures from September Investigation
I	Search Warrant Photographs
J	Defendant's Statement

EXHIBIT A

Audio Recording Sale One (filed under seal in the traditional manner)



GOVERNMENT EXHIBIT 3
APP 383

EXHIBIT C

Audio Recording Sale Two (filed under seal in the traditional manner)

EXHIBIT D

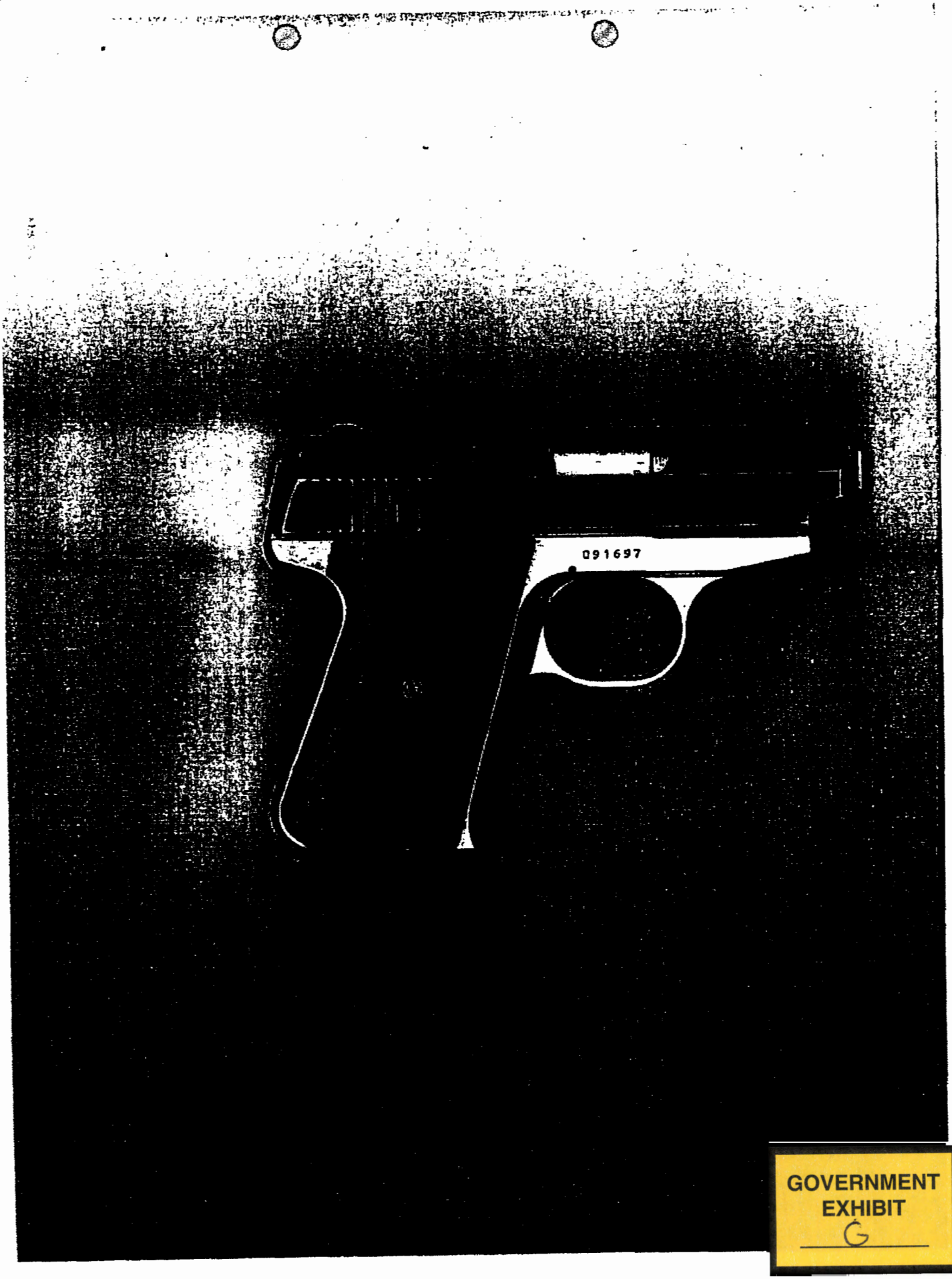
Audio Recording Sale Three (filed under seal in the traditional manner)



GOVERNMENT EXHIBIT
E

EXHIBIT F

Audio Recording Sale Four (filed under seal in the traditional manner)



GOVERNMENT EXHIBIT G



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GOVERNMENT EXHIBIT H



FERGUSON_0207

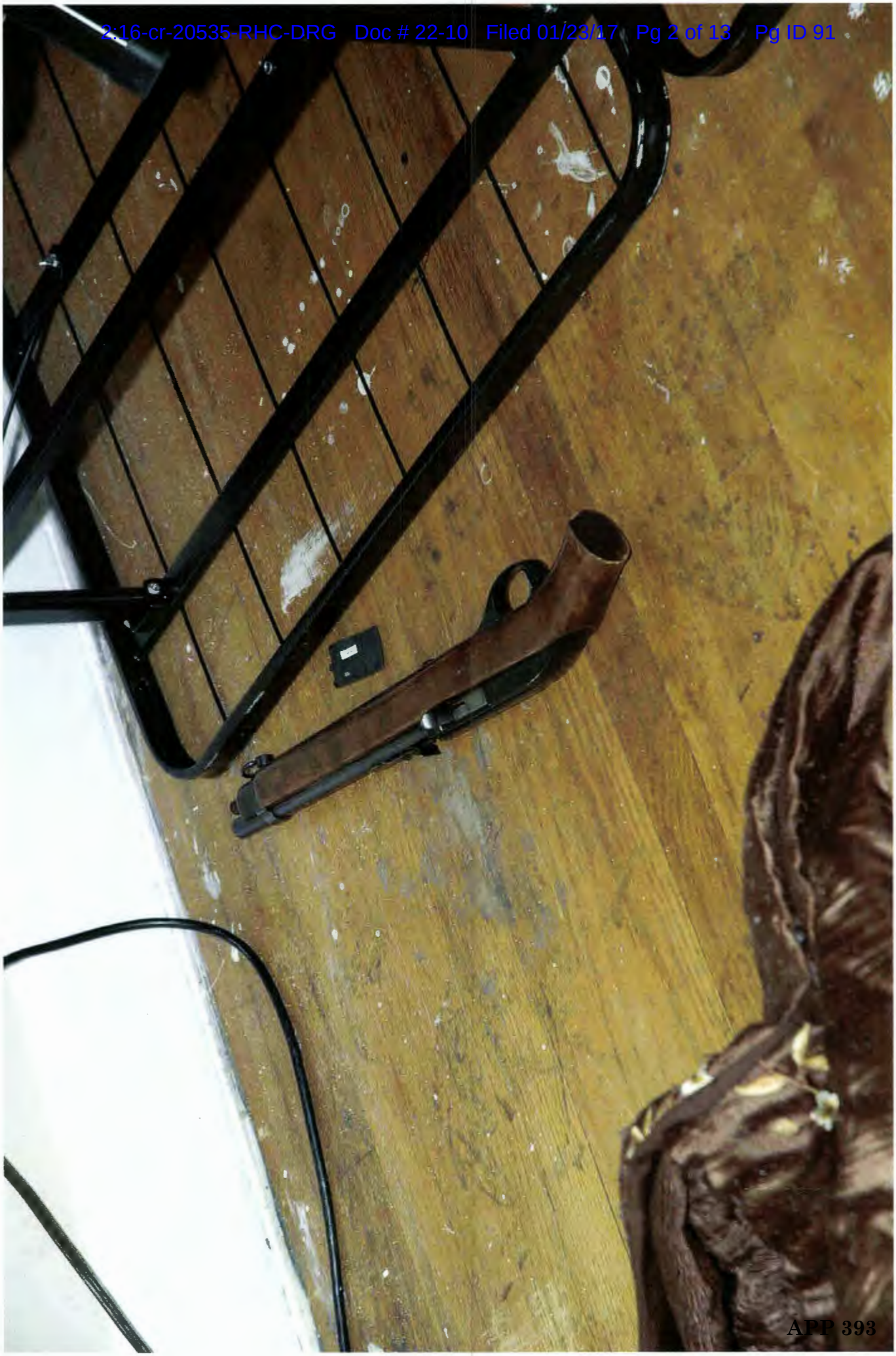


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GOVERNMENT EXHIBIT 1



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FERGUSON_0119



FERGUSON_0147



FERGUSON_0146



FERGUSON_0145



FERGUSON_0144



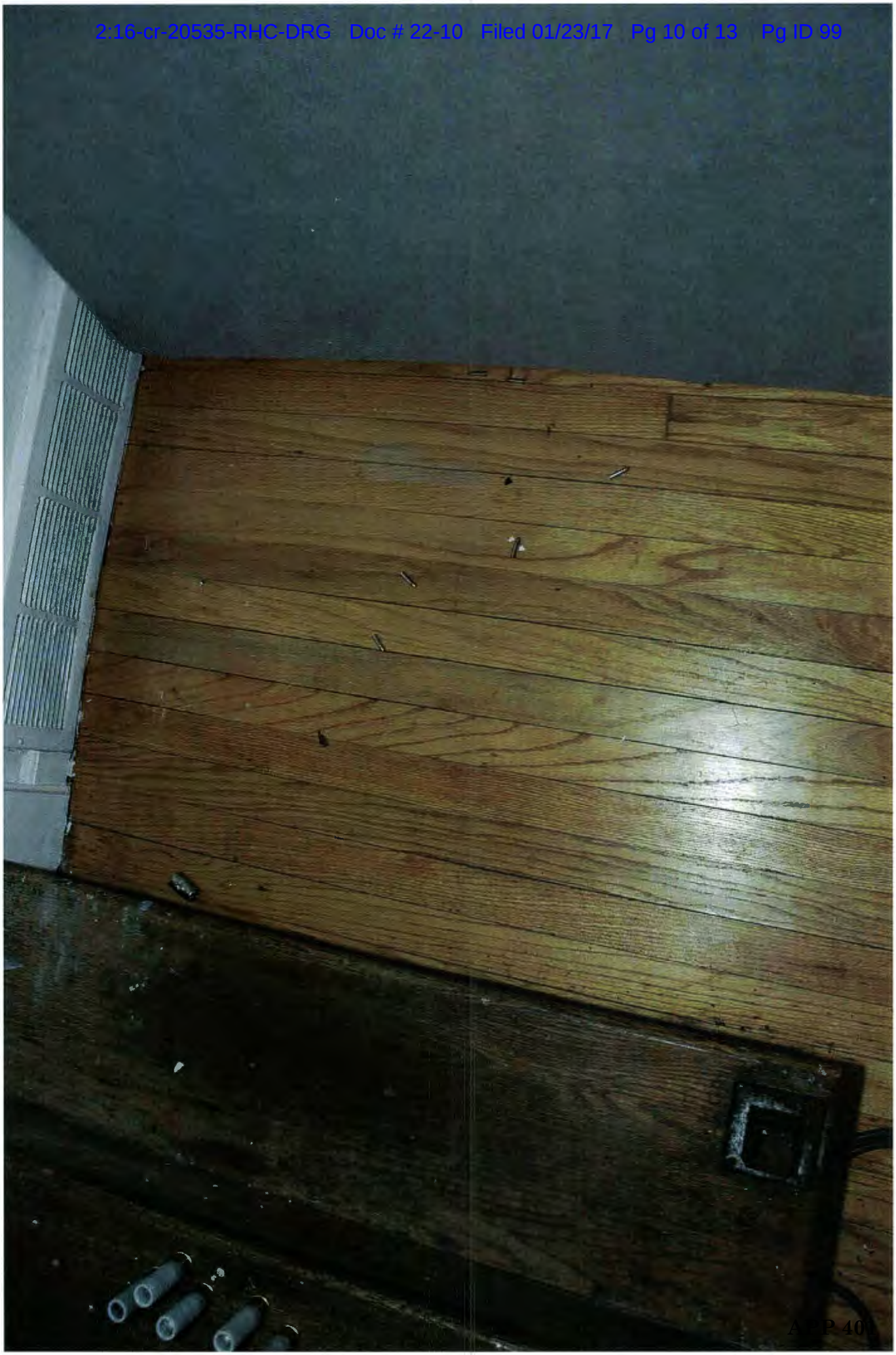
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FERGUSON_0141



FERGUSON_0140



FERGUSON_0139



FERGUSON_0115



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FERGUSON_0105

STATEMENT FORM

☐ INTERVIEW ☒ INTERROGATION

detroit police Page 1 of 5

Contact Location (Check One):

☐ Walk-In to Police Facility ☐ In Field/At Scene ☐ Hospital ☐ Conveyed by a DPD Member (Complete Witness Conveyance Form)

Location/Place: D. P. C.

Print Information:

FILE/CASE NO. 15-240

STATEMENT TAKEN BY: RANK, FIRST / LAST NAME, BADGE: Sgt. James Kostanko 5-61				PRECINCT/COMMAND Homicide		
DATE STATEMENT TAKEN: 12-11-15	START TIME 12:37 p.m.			END TIME 2 pm		
NAME OF PERSON PROVIDING STATEMENT Michael Ferguson	D.O.B. [redacted]	AGE 30	SEX M	RACE B	HGT. 5'6"	WGT. 185
SOC. SEC. NO. (LAST 4 DIGITS): [redacted]	RESIDENCE [redacted]			PHONE: BUS. RES. [redacted]		
EMPLOYER NONE	DEPARTMENT —			BADGE NO. —	SHIFT —	
RESIDING WITH: Brenda Te Hon	CHILDREN / SCHOOL: Diploma - Central High School					
RELATIVES / FRIENDS:	ADDRESS			PHONE:		
REVIEWING SUPERVISOR RANK, FULL NAME, BADGE (PRINT): [illegible]				SIGNATURE OF REVIEWING SUPERVISOR: Michael Bayles		
DATE: 12-11-15	TIME: 2 pm			PRECINCT/COMMAND: Homicide		

Q: Do you understand your Constitutional Rights?

A: Yes

Q: Have I threatened you or promised you anything to make this statement?

A: no

Q: Tell me what happened the morning of July 6th 2015?

A: Shit, I don't remember that morning man. I have no memory of the situation to even remember anything.

Q: Were you living @ [redacted] during July 4th Weekend.

A: Yes

Q: Do you know Ocean Corbett?

A: Yes that Him.

X [signature] 12/11/15

SIGNATURE OF PERSON PROVIDING STATEMENT / DATE AND TIME

GOVERNMENT EXHIBIT J

PRINT NAME Michael Ferguson (CONTINUED) Page 2 of 5

Q: Do you know Shaka Franklin?
A: Yes

Q: Do you know Will McKithen also known as Cutter?
A: Yes I know who Cutter is, you just told me his name.

Q: Do you own a shiney pair of Brass knuckles and a small black face mask?
A: Uh... yes

Q: Tell me what kind of guns you had in [redacted]
A: 22 rifle-sawed off, 12 guage Norsberg Shotgun, M-1 Carbine.

Q: Have you ever owned or fired any handguns?
A: Yes back in 2012 when I had a CCW case.

Q: At anytime after July 6th, 2015 did you sell any guns handguns or rifles to anybody?
A: No Sir.

Q: Did you get rid of any guns that killed Ocean Cokett?
A: I didnt Kill Ocean Cockett, I didnt sell any guns to Kill Ocean Cockett. I didnt have any guns period. I didnt sell any guns, I didnt kill him. Period.
Q: Is there any reason witness #1 would say you ran up behind Ocean, punch him w/ Brass knuckles while wearing a black mask and then drag him into your back yard?
A: Save their own ass, aint no way in Hell anybody coming into my back yard and they know that.

X Michael Ferguson 12/11/15 2:00pm
SIGNATURE OF PERSON PROVIDING STATEMENT / DATE AND TIME

PRINT NAME Michael Ferguson (CONTINUED) Page 3 of 3

Q: Are you a fighter?
A: Yes I fight and train, and train others.

Q: Why do you own Brass Knuckles?
A: I don't even use those bro, the looked sweet, I bought one pair @ Gibraltar and one pair @ the gas station

Q: Why did you say that you heard that Brandon Jackson may be looking for you.
A: Because people in the hood were saying that I supposedly had something to do with this.

Q: Did you ever here in the streets that Brandon Jackson killed Shakir?
A: I ain't got anything to do with that!

Q: Is there anything you want to say to Aaron Lockett's family?
A: I wish I could speak to her in the deepest sincerity and tell her I had nothing to do with this. The people that are talking about this, they need to look at them.

Q: Anything else you want to add?
A: I don't have anything to add. added - I didn't punch him, I didn't strike him.

X Michael Ferguson 12/11/16 2:00 p.m.
SIGNATURE OF PERSON PROVIDING STATEMENT / DATE AND TIME

APP 407
FERGUSON_0018