

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

CRIMINAL NUMBER:

-VS-

1:14-cr-00050-NLH

MALIK DERRY

Sentencing

Defendant.

Mitchell H. Cohen United States Courthouse
One John F. Gerry Plaza
Camden, New Jersey 08101
Friday, June 17, 2016

B E F O R E: HONORABLE NOEL L. HILLMAN
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S .

18 PAUL J. FISHMAN, UNITED STATES ATTORNEY
BY: PATRICK C. ASKIN, AUSA
19 JUSTIN C. DANILEWITZ, AUSA
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22 Attorneys for Defendant Malik Derry

24 Certified as true and correct as required by Title 28, U.S.C.,
Section 753.

/S/ Robert T. Tate

APPENDIX D

1 ALSO PRESENT:

2
3 U.S. PROBATION OFFICE
BY: JOSHUA MacAVOY

4
5 FBI SPECIAL AGENT CHRISTOPHER KOPP

6 MALIK DERRY, DEFENDANT

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1 (Defendant present.)

2 (In open court at 10:10 a.m.)

3 THE DEPUTY COURT CLERK: All rise.

4 THE COURT: All right. Thank you. Good morning.

5 MR. MARKOWITZ: Good morning, your Honor.

6 THE COURT: Please be seated except for counsel.

7 This is United States versus Malik Derry. May I have
8 appearances, please?

9 MR. ASKIN: Yes. Good morning, your Honor. Patrick
10 C. Askin, Assistant U.S. Attorney, for the United States.

11 MR. MALLQUI-BURGOS: Good morning, your Honor.

12 Special Assistant United States Attorney Edmund Mallqui-Burgos
13 for the Government.

14 MR. DANILEWITZ: Good morning, your Honor. Assistant
15 U.S. Attorney Justin Danilewitz for the United States, and
16 joining us at counsel table is Special Agent Chris Kopp from
17 the FBI.

18 THE COURT: All right. Welcome to you all.

19 MR. DANILEWITZ: Thank you.

20 MR. MARKOWITZ: Good morning, your Honor. Joshua
21 Markowitz, Markowitz & O'Donnell, and behind me is my
22 associate Greg Corcoran, who assisted me, along with Michael
23 O'Donnell, in preparing the sentencing memo.

24 THE COURT: Yes. Welcome.

25 All right. We have I guess three main things to

1 address here, each with multiple subparts. The first thing I
2 want to address, because of its potential relevance to the
3 pending Rule 29 and Rule 33 motion, is the letter I received
4 from Mr. Derry last month, and I don't know that I've received
5 any additional correspondence from anyone concerning this
6 matter, but I feel an obligation to make inquiry about it.

7 Mr. Derry wrote to me, it's not dated and I don't have
8 the envelope, but I conveyed it to counsel by letter dated May
9 23rd of this year. He indicates to me that he had, he says,
10 "Sometimes after my trial was ended, one of the Government's
11 witnesses, Jodi Brown, mentioned that she made statements
12 concerning the incident which implies," referring to the --
13 this sentence refers to the murder of Tyquinn James.

14 "Sometimes after my trial was ended, one of the
15 Government's witnesses, Jodi Brown, mentioned that she made
16 statements concerning the incident which implies guilt but
17 with an alternative version that the Government alleges in the
18 indictment."

19 And it indicates efforts to obtain these materials.
20 Mr. Derry claims to have been stonewalled in obtaining them.
21 And he suggested that perhaps there should be some in camera
22 inspection of such materials.

23 I guess my first question is for Mr. Markowitz as to
24 whether he has any further information about this, is it
25 something that he's concerned about or was this a matter of

1 confusion?

2 MR. MARKOWITZ: Your Honor, when I received that
3 letter from Mr. Derry, of course, it was of great concern for
4 me on behalf of Mr. Derry. I contacted Mr. Askin.

5 I had received the original 302 from Jodi Brown where
6 it makes just a slight reference, and Mr. Askin will correct
7 me if I'm wrong, but as I recall from that 302 with some
8 clarity that she didn't know who killed Tyquinn James. Then
9 we asked would Special Agent Kopp review his notes to see when
10 he interviewed her, was there any exculpatory evidence, and
11 that was also negative.

12 And Mr. Askin sent me both those documents. I believe
13 that they were forwarded to Mr. Derry. I'll quote, this is
14 the e-mail that we received from -- it's to Pat Askin from
15 Christopher Kopp.

16 There is just one discussion regarding Malik in Jodi
17 Brown's statement which is in the 302. She has no firsthand
18 knowledge of the TY shooting. Heard Mykal did it but thought
19 Malik was the one with the anger issues, said Malik was raised
20 in the system, been in custody, you know, more than not.

21 And I was aware of this prior to trial and I --

22 THE DEFENDANT: I wasn't. I wasn't aware of it. I
23 just got that last week.

24 MR. MARKOWITZ: But you got this, but we -- I had
25 discussed, maybe not in particular to this issue, whether we

1 would want to call Jodi Brown or not based on her 302, and we
2 made a joint discussion. He did probably not have this
3 because I don't think we received it.

4 MR. ASKIN: That was afterwards.

5 MR. MARKOWITZ: That was afterwards. But I was aware
6 of her statement, and this is the statement that's basically
7 in her 302.

8 THE DEFENDANT: But if I was aware of it, I would
9 have used it for my trial.

10 THE COURT: Mr. Derry, Mr. Markowitz will speak on
11 your behalf.

12 THE DEFENDANT: I apologize.

13 THE COURT: If you want a moment to speak with him,
14 I'll grant you that.

15 MR. MARKOWITZ: Mr. Derry's position is if he had
16 this particular document, he would have used it, he would have
17 wanted to call her at trial. We'll just place that on the
18 record.

19 THE COURT: All right. Is it fair to say that with
20 knowledge of that, you, in your professional discretion, were
21 aware of that option and for whatever reason chose not to
22 exercise it?

23 MR. MARKOWITZ: That is correct, your Honor, with
24 discussing. I make no moves in this case without Mr. Derry
25 being aware of it.

1 THE COURT: All right. Thank you, sir.

2 Mr. Askin, do you wish to be heard?

3 MR. ASKIN: Yes, your Honor. I apologize to the
4 Court and to counsel. I was aware of this issue and I dealt
5 with this issue with Mr. Markowitz, but I didn't bring that
6 section of the file down with me, and now the Court wants to
7 cover it first. I'm wondering if we could -- I'll make some
8 comments, but I can clarify the record a lot more and show you
9 exhibits of what we've given Mr. Markowitz and the e-mails
10 that I've sent Mr. Markowitz and the dates and times of all
11 that, but I neglected to bring that down with me and I
12 apologize.

13 THE COURT: I'm not asking to review anything.

14 Mr. Markowitz has explained matters from his perspective. I'm
15 just interested in yours.

16 MR. ASKIN: Yes, my perspective is that prior to the
17 trial in this matter, okay, I provided Mr. Markowitz and Mr.
18 Madden, as I recall, with a letter that was sent to counsel in
19 the first trial that occurred with the other four defendants
20 that went to trial before Judge Irenas, and there was a 302
21 and a letter sent to the other counsel, because -- and the
22 reason for that was Jodi Brown, when interviewed, and she was
23 attempting I think to cooperate with us, but she made some
24 statements about the other four males that the Government
25 viewed as exculpatory.

1 For example, she said that one of those males or one or
2 more of those males, she knew them to be involved in selling
3 drugs, but cocaine, and didn't know anything about them
4 selling heroin, and since she seemed to be in a position to
5 know that, we viewed that as exculpatory and turned it over to
6 the first four counsel. Okay?

7 Then I believe Mr. Madden and Mr. Markowitz were asking
8 us or may have been asking us about Jodi Brown or I don't know
9 if it was on her own -- our own inclination or volition that
10 we decided to turn over her 302, that letter, and I believe
11 there was a detailed e-mail that went with it where I went
12 into Jodi Brown and what the kind of things she was saying. I
13 even went into --

14 THE COURT: I'm sorry to interrupt you, but did that
15 include her, it sounds like almost an opinion that Mykal was
16 the shooter?

17 MR. ASKIN: She didn't say he was the shooter. She
18 said she heard Mykal did it, and I remember that she was
19 asked -- she didn't know who it was from. It was hearsay.
20 And she didn't know who it was from. There were no details.
21 I believe we tried to probe into what she knew.

22 THE COURT: My question is whether that, her
23 statement in that regard was at some point prior to trial
24 conveyed to Mr. Madden and Mr. Markowitz?

25 MR. ASKIN: I'd have to review the materials

1 specifically to say that. I know that after the trial, I was
2 asked by Mr. Markowitz to review it again. I had gone over my
3 notes. In Special Agent Kopp's notes he had that notation,
4 and that e-mail that he's talking about was turned over after
5 trial, not before trial. But I believe there was some
6 statement that I made to the defense about her statements
7 about what I had in my notes about the murder, that she didn't
8 have any information about the murder. Okay?

9 I don't believe I even had it in my notes that she
10 said, you know, Mykal -- she heard Mykal was involved in it,
11 but she had no details of that, and there was nothing -- and,
12 you know, it's the Government's position that none of that was
13 in any way admissible. Like, she couldn't have -- she
14 couldn't have testified about that.

15 She did not say, like, Mykal Derry -- if she had said
16 Mykal Derry, she knew that Mykal Derry was the shooter or, you
17 know, X witness said Mykal Derry was the shooter, that
18 argument would have been exculpatory in some way and that I
19 think would have been turned over, but there was nothing to
20 that effect.

21 THE COURT: Well, it just raises an issue, raises the
22 question as to whether or not, if it was disclosed or
23 otherwise known to the defense that she had heard that Mykal
24 was the shooter, then the defense could interview her and find
25 out more about what the source of that information might have

1 been. That might have led to something exculpatory as it
2 relates to Mr. Derry. I think the larger issue here is that
3 Mykal Derry took the stand and said he did it and the jury
4 rejected it.

5 MR. ASKIN: Right.

6 THE COURT: So, it's difficult to say how someone
7 hearing something or even having him say, admitting that he
8 did it would be any more persuasive than Mr. Derry's own
9 statement that he did it. So, it may be angels dancing on the
10 head of a pin. I just want to make sure that -- Mr. Markowitz
11 has told me he was aware of her statements in that regard.

12 MR. ASKIN: Right. I'd like to clarify the record on
13 this before the end of the day, Judge. I think I should have
14 brought this stuff down with me. You may say you don't have
15 to review it all, but I'd like to put on the record exactly
16 what happened in case some court reviews this in the future.
17 I should have done that and I apologize for not doing it
18 earlier.

19 With respect to, though, the one point I would like to
20 make is, it's very clear, and Special Agent Kopp can correct
21 me if I'm wrong, there was no statement by Mykal Derry that --
22 no statement by Jodi Brown that she even heard from someone
23 that Mykal Derry was the shooter. She heard Mykal did it or
24 heard Mykal was involved in it. Okay? Which he was involved
25 in it, and he orchestrated the whole thing and provided the

1 firearm. So, I think that is sort of a distinction I'd like
2 to make. But I can clarify the record on this if the Court
3 gives me a few minutes at some point in the proceedings.

4 THE COURT: All right. One question will be, to what
5 extent was her statement in that regard, which I believe the
6 Government attributes to her, documented and conveyed, if
7 conveyed to Mr. Markowitz? Mr. Markowitz, you tell me that
8 you were aware of this prior to trial?

9 MR. MARKOWITZ: Your Honor, let me clarify that. My
10 request from Mr. Askin by way of Malik Derry was after the
11 trial, and I was looking for specific exculpatory evidence
12 with regard to Tyquinn James. This e-mail that I got, I am
13 not positive that that's what was in the original 302. I had
14 the -- when I said that we discussed it, I discussed the
15 original 302 with Mr. Derry.

16 THE COURT: Jodi Brown's original 302?

17 MR. MARKOWITZ: 302, and that was the decision that
18 we made whether or not we wanted to call her. With regard to
19 the e-mail we got, if it's the same as what was in the 302,
20 then we discussed it. If it's not, then it's -- you know,
21 we're back to the problem, was that -- would that exculpatory,
22 would I use that as corroboration for what Mykal Derry said on
23 the stand or whatever? And Mr. Askin can clear it up. If the
24 302 is similar to that e-mail, then Mr. Derry and I had the
25 discussion. If it's not, then we didn't have the discussion.

1 But I believe that Mr. Derry found out through, whether it was
2 directly from Jodi Brown or somebody else, that there was a
3 particular statement we were looking for with regard to
4 Tyquinn James. Is that a fair --

5 THE DEFENDANT: Directly from her.

6 MR. MARKOWITZ: Okay, directly from her. So, my
7 request to Mr. Askin was based on, was there exculpatory
8 evidence or was there newly discovered evidence, and that's
9 what precipitated me writing to Mr. Askin after the trial.

10 THE COURT: All right.

11 MR. ASKIN: And, Judge, I can't say what was in the
12 302. That may well not have been in the 302. I don't know
13 what was in it, recall specifically on that without looking at
14 it, but we do have the 302. That's why I want to get these
15 documents eventually.

16 THE COURT: All right. So, we'll take that up later
17 then.

18 All right. Does either side wish any additional
19 argument with regard to the Rule 29 and Rule 33 motions by
20 Mr. Markowitz? Mr. Markowitz?

21 MR. MARKOWITZ: Your Honor, I'm going to rely on my
22 papers because some of those arguments, I'm going to revisit
23 them in my sentencing colloquy, and so I don't want to be
24 redundant. I think we laid it out very clearly, our position,
25 and cited to the record, that the Court knows our position.

1 THE COURT: Yes. It was laid out clearly and I
2 appreciate your memorandum in that regard.

3 Mr. Askin, do you wish to be heard further on it?

4 MR. ASKIN: No, your Honor. I think the Government
5 will just rely on its written submission.

6 THE COURT: All right. I've reviewed the written
7 submissions. The parties will recall that I reserved on the
8 Rule 29 motion at the end of the Government's case and again
9 at the end of the trial. The standard with regard to that
10 particular motion is different than the Rule 33 motion, and
11 I'll address that in a moment.

12 The argument from the defense is that the jury's
13 verdict on count 1, which charged Mr. Derry with conspiracy to
14 distribute a kilogram of heroin, should be vacated because
15 there is insufficient evidence to support that conviction. A
16 large measure of this argument is, as the Government points
17 out, one that was asserted by the defense and rejected by the
18 jury.

19 Again, with regard to Rule 29, however, I look at this
20 at the, the state of the evidence, at the close of the
21 Government's case. But essentially what the defense is
22 arguing is that there's a legal distinction between a
23 buyer-seller relationship and a conspiratorial relationship.
24 That principle is true. But here -- and in looking into to
25 determine whether or not it's a buyer-seller relationship,

1 there are a number of different factors that the Court should
2 consider, the length of the affiliation, the manner in
3 which -- the financial arrangements between the parties,
4 whether there was common planning and concealment of
5 activities, and I'll address all those arguments in a moment.

6 The second prong, if you will, of the defense argument
7 here is that there's insufficient evidence to support the
8 conviction under 924(c), the possession of a firearm in
9 furtherance of a drug trafficking conspiracy, and whether it's
10 direct or under a *Pinkerton* theory. And lastly, that because
11 the evidence was insufficient to establish that Mr. Derry was
12 part of the conspiracy, the phone counts as well must fall in
13 that they are, in essence, transactions, communications in
14 furtherance of the conspiracy.

15 I am convinced, after a review of the evidence at the
16 end of the Government's case, that there is sufficient
17 evidence on, more than sufficient evidence, indeed I agree
18 with the Government's characterization that there was
19 overwhelming evidence that there was both a conspiracy in this
20 matter and that Mr. Derry, Malik Derry, was a knowing and
21 active participant in that conspiracy.

22 Rule 29(a) provides that after the Government closes
23 its evidence or after the close of all the evidence, the
24 Court, on the defendant's motion, must enter a judgment of
25 acquittal of any offense for which the evidence is

1 insufficient to sustain a conviction. The defendant has a
2 heavy burden in this matter, in such an application, and the
3 reviewing court will affirm the judgment if there is
4 substantial evidence from which a rational trier of fact would
5 find guilt beyond a reasonable doubt. That's the appellate
6 standard. I should view the evidence at the end of the
7 Government's case in a light most favorable to the Government.

8 In its review under Rule 29, the Court should take
9 care, after having reserved, not to invade the jury's
10 province, and, therefore, a verdict will be overruled only if
11 no reasonable juror could accept the evidence as sufficient to
12 support the conclusion of the defendant's guilt beyond a
13 reasonable doubt.

14 Rule 33 sets a higher standard. Upon the defendant's
15 motion, the Court may vacate any judgment and grant a new
16 trial if the interest of justice so requires.

17 There is sufficient evidence to support the jury's
18 verdict on count 1. The Government recites in its motion any
19 number of different things. I'm not going to recite all of
20 them, all of which are true. But I reject the
21 characterization of Mr. Malik Derry's relationship to his
22 brother and the other members of this conspiracy as merely one
23 of buyer-seller.

24 A couple of things come to mind. There is the evidence
25 that Mykal Derry directed various co-conspirators to deliver,

1 including Malik, to deliver heroin to Mykal Derry's customers
2 and to pick up money that was owed to Mykal and return it to
3 him.

4 There is evidence that part of the organization here
5 was to pool money together, and this, the evidence included
6 evidence that Saeed Zaffa, Malik Derry and Aree Toulson were
7 part of that collective effort to pool money to buy drugs at a
8 lower amount.

9 Mykal asked Malik for information about whether
10 customers were satisfied. This is important in deciding
11 whether or not to buy additional drugs from the source in
12 Paterson and to seek particular brand names, as the evidence
13 established, or stamped heroin, because customers of heroin
14 often attribute the stamp to a particular quality or potency
15 or reliability.

16 And Malik was involved in listening to the scanner.
17 There are numerous instances of him providing
18 counter-surveillance for police operations, that he contacted
19 Jodi Brown to test the heroin supply to determine its
20 satisfaction of the customers.

21 I recall specifically Mykal trying to inspire Malik to
22 get up out of bed and get on the corner and sell drugs.
23 That's not a buyer-seller relationship. That's someone who is
24 an employee, basically a co-conspirator, employee of the
25 organization being directed by Mykal.

1 And I recall also that Mykal, in receiving instances of
2 requests for supply, directed buyers to Malik. Malik had
3 access to the trap houses, which is indicative of being a
4 member of the conspiracy. You would not let someone into such
5 a sensitive area unless they were a trusted member.

6 And then there's, of course, the murder of Tyquinn
7 James, and I'll have more to say about that later. But it's
8 clear to me that this was done in furtherance of the drug
9 trafficking conspiracy, and then Malik Derry, the evidence I
10 think will clearly establish, pulled the trigger, and that
11 really informs my judgment as to count 10.

12 But for a little bit of evidence in which Mykal said
13 that Malik would be strapped, the Government's theory in this
14 case and the overwhelming evidence as it relates to Malik
15 Derry's possession of a firearm centered on the shooting of
16 Tyquinn James. The wire established that Malik Derry knew
17 what was kept in the stash houses, including weapons, that he
18 asked his brother to bring him that thing, that his brother
19 said, oh, you're on the bicycle, that a person wearing a ski
20 mask and appearing to resemble Mr. Malik Derry in a
21 premeditated fashion executed Tyquinn James in front of the
22 Red Klotz liquor store.

23 That they talked about it afterwards, that Mykal told
24 one of the other co-conspirators that Malik had splashed
25 Tyquinn, TY, code for the murder, that when the discussion was

1 had about the need for Malik to go to the shooting range the
2 next day, Kimberly Spellman and Mykal laughed about Malik not
3 needing to go. When the gun is found, Malik says I'm going to
4 get the roof to the max. The evidence -- the gun is found in
5 the stash house with the bicycle.

6 I think that the evidence that the jury heard and the
7 conviction on count 10 is consistent with -- the evidence
8 presented in this trial is consistent with that verdict and is
9 more than sufficient to sustain it, the ramifications of that
10 to be discussed later.

11 And the phone counts are simply supportive of Malik
12 Derry's active involvement as a, one of the sellers or
13 distributors of heroin on behalf of the overall organization.
14 So, whether construed at the end of the Government's evidence
15 or after all of the evidence, I'll deny the motions under Rule
16 29 and Rule 33 and I'll ask the Government to submit an order.

17 So, the question now is whether I should address this
18 potential *Brady* issue now before sentencing, take a short
19 break and obtain that information?

20 MR. ASKIN: That's fine, your Honor.

21 THE COURT: Because I really think that's a separate
22 application on the sufficiency of the evidence, but I would
23 not want to proceed to sentencing until I was sure that
24 this -- that matter was handled properly, and I'm not
25 suggesting it wasn't, and I do think there is a question of

1 whether, even if it wasn't disclosed, whether it would even be
2 material. But the Government has a very high obligation in
3 that regard, and I know from counsel in this matter that they
4 take these obligations seriously, and it's something I
5 shouldn't gloss over or ignore.

6 So, I would encourage the United States to find out as
7 much as they can for me now before I go to the process of
8 sentencing. So, I propose taking a short break, we can
9 reconvene at 11:00, and at which time we'll take up the
10 sentencing in this matter.

11 MR. ASKIN: That's fine, your Honor.

12 MR. MARKOWITZ: Thank you, your Honor.

13 THE COURT: Anything else, Mr. Markowitz, you wish me
14 to address at this moment?

15 MR. MARKOWITZ: No, your Honor.

16 MR. ASKIN: Just one thing on the record, and I'm not
17 sure, I think this is what the Court meant, but with respect
18 to, when your Court was making your findings, which the
19 Government completely agrees with, the Court made a statement
20 that the gun was found and the bike was found, it sounded like
21 they were found together in the same location. They were in
22 two different locations.

23 THE COURT: Right.

24 MR. ASKIN: The bicycle was found at 307 MLK
25 Boulevard, which was a trap house that we connected to Malik

1 Derry and Mykal Derry in the organization, so the bike used in
2 the murder was found in their trap house the next day,
3 February 11, 2013, on a state search warrant. The weapon, as
4 it's very clear from the record, was a Beretta .380 caliber
5 semiautomatic handgun, which was ballistically matched, both
6 the shell casings and the bullets taken from, the projectiles
7 taken from Tyquinn James's body after autopsy, those were
8 found in a drop ceiling of 727, the weapon, the firearm was
9 found in the drop ceiling of 727 Green Street, which was the
10 residence of Kim Spellman and also Mykal Derry.

11 THE COURT: All right. Thank you for that
12 clarification.

13 MR. MARKOWITZ: One moment, your Honor.

14 THE COURT: Yes.

15 (Brief pause.)

16 MR. MARKOWITZ: Mr. Derry would like to address the
17 Court on two motions that --

18 THE DEFENDANT: Two arguments.

19 MR. MARKOWITZ: Two arguments. Would the Court want
20 to hear it when it's time for him to make whatever remarks and
21 present whatever evidence he would like to report to the Court
22 at that time?

23 THE COURT: That would be the appropriate time.

24 MR. MARKOWITZ: That's what I figured.

25 THE COURT: Mr. Derry, you're represented by counsel

1 in this matter. He will speak on legal matters on your
2 behalf. I will provide you any time that you need to discuss
3 with him, the two of you can discuss what arguments should be
4 made. Your opportunity to address the Court will come at
5 sentencing and I'll be very happy at that time to hear
6 anything you want to tell me.

7 THE DEFENDANT: I apologize.

8 THE COURT: You should seek -- you should consult
9 with Mr. Markowitz about that statement and any other
10 arguments that are made to the Court, and you don't need to
11 apologize to me, sir.

12 THE DEFENDANT: All right.

13 THE COURT: I understand these are important matters
14 for you and I appreciate your consulting with counsel.

15 There is one issue I wanted to raise with counsel
16 before we begin the step one process of calculating the
17 guidelines. I've read the *Anin* case and the *Fletcher* case
18 that were cited to me by the Government, and I just want to
19 tell you that my, notwithstanding the legal question of
20 finding, my finding that there was sufficient evidence to go
21 to the jury on the issue of an existence of the conspiracy and
22 Malik Derry's participation in it, that decision
23 notwithstanding and that argument notwithstanding, there is
24 also -- there is a separate issue, under the guidelines, as to
25 whether or not it is fair to attribute to Mr. Derry all of the

1 amounts of the drugs of this conspiracy.

2 I don't find *Fletcher* to be dispositive on this issue.
3 It states the general rule. It appears that Mr. *Fletcher* was,
4 at least on the limited facts that are given, much more
5 involved in the conspiracy than I think Malik Derry was.
6 There were significant periods of time in which he was not
7 around. He was I think more than anything else, putting the
8 enforcer role aside, he was out on the corner hustling sales
9 to users and lower level distributors.

10 MR. ASKIN: That's correct, although the Government
11 does believe he's an enforcer, which takes on a different
12 meaning.

13 THE COURT: I understand that and we'll have argument
14 about that.

15 MR. ASKIN: Right.

16 THE COURT: But I also want to just encourage the
17 Government to be, and I know you are, intellectually honest
18 and consistent about these things. There were a number of
19 pleas in this case, a number of 11(c)(1)(C)s and a lot of
20 people who received cooperating agreements in which their --
21 they received the benefit of looking at this through a lens
22 different than *Fletcher*, and I think --

23 MR. ASKIN: I would agree with that.

24 THE COURT: I don't think that we should be in a
25 world in which, at least within the same case, that principle

1 changes when someone is convicted after a jury, because I'm
2 concerned about the impression, and I'm not accusing you of
3 anything, that there's somehow a penalty for going to trial.
4 We should apply the same principles of conspiratorial
5 liability and attributing the amount of drugs to someone
6 whether or not they go to trial or not, and so I just want you
7 to know, and I want you to think about this before we come
8 back and look -- and if I accept the 2A1.1 reference, it will
9 be somewhat of a Pyrrhic victory, but if that's wrong and it
10 comes back, it's important that if only a drug conspiracy
11 withstands scrutiny, that I apply the same principles to Malik
12 Derry that I would apply to any other co-conspirator in this
13 particular case. So, I have to be convinced that I would
14 attribute all the drugs to him for sentencing purposes, and as
15 I sit here now, I'm not convinced.

16 MR. ASKIN: Well, there's a couple things I'll say,
17 and I understand we're all going to get into more detail with
18 this later.

19 THE COURT: Yes, I just want you to think about it
20 while we're taking this break. I'll give you to quarter after
21 to give you a little more time.

22 MR. ASKIN: Okay. Thank you, your Honor. There's a
23 couple things I will say. One is, and I discussed this with
24 Mr. Markowitz before, we were just chatting about sort of the
25 legal issues, there's the issue that the courts have held even

1 I think post Alleyne, that the conspiracy has to be -- the
2 quantity for the conspiracy that triggers the mandatory
3 minimum on count 1 has to be proven as to the conspiracy as a
4 whole, not as to each separate defendant.

5 THE COURT: Right.

6 MR. ASKIN: So, that sort of triggers that 10-year
7 mandatory amount.

8 THE COURT: I understand that. I'm not
9 questioning --

10 MR. ASKIN: I don't think we're asking --

11 THE COURT: This is not whether or not there was
12 sufficient -- the jury found that he was a member of the
13 conspiracy that had as its intent a kilogram or more. That
14 stands.

15 MR. ASKIN: Right.

16 THE COURT: I'm not questioning that.

17 MR. ASKIN: Right.

18 THE COURT: But I think there's a separate guidelines
19 issue, separate and distinct from whether or not he is
20 properly convicted of being a member of a conspiracy that
21 overall had that amount and, therefore, subjects him to a
22 mandatory minimum and an increased maximum. It's a separate
23 guidelines issue.

24 MR. ASKIN: But I don't think the Court can, and I
25 could be wrong about this, and I'm just talking out loud, I

1 don't think the Court can revisit the 10-year mandatory
2 minimum in count 1.

3 THE COURT: I'm not suggesting that.

4 MR. ASKIN: But I don't think the Government is
5 seeking to go beyond that 10-year mandatory minimum quantity.
6 The only thing that's bumping him up, and I've got to look at
7 this again --

8 THE COURT: I think it is a level 34.

9 MR. MARKOWITZ: He's a level 34, your Honor.

10 THE COURT: And that's more than 120 months.

11 MR. ASKIN: Okay. But the one thing that's in there
12 is the school zone is two levels there, I think.

13 THE COURT: Okay. Well, look at it.

14 MR. ASKIN: I'm sorry, the housing zone. I'll take a
15 look at it, your Honor.

16 THE COURT: Even if I only attribute the minimum
17 amount, the mandatory minimum to him and it's a wash, then
18 tell me that.

19 MR. ASKIN: I don't think we're going to be asking
20 for more than that, the mandatory minimum amount plus the two
21 levels for public housing.

22 THE COURT: All right.

23 MR. ASKIN: But I'll take a look at that.

24 THE COURT: All right. Take a look at it and we'll
25 see what the numbers turn out to be.

1 MR. ASKIN: I will, your Honor.

2 THE COURT: All right.

3 MR. ASKIN: Thank you. Quarter after?

4 THE COURT: Let's take a break, and if it takes you a

5 little longer, just let me know. I'll be ready when you are.

6 MR. ASKIN: All right. Thank you.

7 THE COURT: Thank you for your patience.

8 THE DEPUTY COURT CLERK: All rise.

9 (Recess at 10:44 a.m.)

10 (In the robing room at 11:30 a.m.)

11 THE COURT: Gentlemen.

12 MR. ASKIN: Good morning, your Honor.

13 MR. MARKOWITZ: Good morning, your Honor.

14 THE COURT: Tell me what you want me to know.

15 MR. MARKOWITZ: I just have one request. It would be

16 very helpful to me if we would just allow Malik Derry to

17 address whatever issues. For three years, there comes times

18 in our relationship, I really can't follow what he says. I

19 can't make the arguments. And no matter how this sentencing

20 goes, I just think he'll feel better having that opportunity.

21 That's all.

22 THE COURT: I'm happy to do that.

23 MR. MARKOWITZ: Thank you, your Honor.

24 MR. ASKIN: That's fine, your Honor.

25 THE COURT: I'm happy to do that. I was trying to,

1 to some extent, help you.

2 MR. MARKOWITZ: But then you would say,
3 Mr. Markowitz, make the argument, and I would say, your Honor,
4 go over my bills, you know why I was at the jail -- I would
5 call Pat almost like we were colleagues.

6 MR. ASKIN: Constantly.

7 MR. MARKOWITZ: I can't get through. I started to
8 get like, I felt like a --

9 THE COURT: I know. I get it. I will let him speak.

10 MR. MARKOWITZ: Thank you, your Honor.

11 MR. ASKIN: Judge, I have the documents or all the
12 documents I could gather at this point, which I think is
13 everything that's relevant.

14 THE COURT: Okay.

15 MR. ASKIN: There is one issue that I'm not clear on,
16 but I'll make it clear what we are clear on, which is that a
17 302 was prepared at some point and there was a date to it, as
18 you know, and that would have been clearly before trial. The
19 302 does have statements in there about the homicide, but just
20 that Mykal Derry -- that several individuals had told Jodi
21 Brown that Mykal Derry killed TY, no further description, like
22 who is the shooter or whatever.

23 THE COURT: Well, why isn't that enough disclosure?

24 MR. ASKIN: Well, I'm not --

25 THE COURT: You gave the 302 over before trial,

1 right?

2 MR. ASKIN: I don't believe -- I don't know that I
3 did. And here's the situation. I turned over, and actually
4 when I turned this over to Mr. Markowitz -- I mean, when I
5 recently looked at this, I thought the 302 was attached. What
6 was attached was the earlier letter to counsel in the first
7 group. Okay? Which didn't mention that about the homicide.

8 Now, there was a long e-mail attached to that, which
9 you'll see, but I also don't mention this. Now, I've reviewed
10 my own notes and I have no problem with the Court's reviewing
11 my notes. My practice is, and maybe I should revise my
12 practice, but my practice is I take copious notes in every
13 proffer, in every interview myself, I don't rely on just the
14 agent to do so, and I trust my notes as long as I've been, as
15 long as I know I've been in every one, which is my practice to
16 be in every one if I can. And it wasn't in my notes that she
17 said that. It's in Special Agent Kopp's notes. He put it in
18 the 302.

19 I'm not sure I was even fully aware of it, not whether
20 I should be -- should be aware of it and was aware of it are
21 two different things. But what was in my notes is that I
22 asked about Malik Derry and she says they don't know, it's in
23 my notes, and I'll put this on the record out there, that she
24 doesn't know why they killed TY. And then there's a separate
25 note where I drew a thing, a circle that said she was in the

1 hospital, said she was in the hospital when the homicide
2 happened. Okay?

3 THE COURT: Okay.

4 MR. ASKIN: And there's no further indication in my
5 notes as to anything. But there is the 302 that says what I
6 just said it said, and that's what is reflected in Special
7 Agent Kopp's notes, when we go back after trial and ask, and
8 that's the e-mail that I forwarded to Josh. Now, we don't
9 believe this is --

10 THE COURT: Let's have the hearing.

11 MR. ASKIN: We'll do that out there.

12 THE COURT: I appreciate you checking, and I'll hear
13 you on it and Mr. Markowitz.

14 MR. ASKIN: Yes, and I don't -- I suppose there --
15 I'm not saying I definitely know that it wasn't turned over,
16 but there's no record of it being turned over as far as I
17 could tell at this point. If it became relevant, I could
18 revisit that, but I can't find a record of it at this point.

19 THE COURT: Okay. I'll hear you on it. And then --
20 well, we'll talk about --

21 MR. ASKIN: The drug quantity?

22 THE COURT: -- the drug quantity.

23 MR. ASKIN: I was doing this, so I didn't look at
24 that.

25 THE COURT: Do you want a few minutes to talk to the

1 agent? It's paragraph 206 in the report, 206 and 207.

2 MR. ASKIN: Okay. I'll look at that. Thank you.

3 (Brief pause.)

4 (In open court at 11:39 a.m..)

5 THE DEPUTY COURT CLERK: All rise.

6 THE COURT: All right. Thank you. Please be seated.

7 First, on this issue of the letter of Mr. Derry, on
8 reflection, Mr. Derry has indicated that he wishes to speak to
9 me about some of these legal issues, and I'm inclined to let
10 him speak independent of his allocution if he is inclined, but
11 I want to probably wait until after this particular issue is
12 discussed by counsel, and then, Mr. Derry, I'll invite you to
13 address the Court directly if you are inclined to do so. All
14 right? You should consult with Mr. Markowitz about the wisdom
15 of that, but if you want to, then I'm happy to hear from you.
16 All right, sir?

17 THE DEFENDANT: Thank you.

18 THE COURT: All right. Very good.

19 Mr. Askin.

20 MR. ASKIN: Your Honor, I put a blank folder in front
21 of you with some of the documents that are loose that I have
22 that are related to this. If you could put the notes -- this
23 is one page of my notes that I will put aside for the moment
24 and start with, there's a March 23rd, 2014 proffer letter
25 signed on that date, March 23rd -- I'm sorry, it's signed

1 March 27, 2014, it's dated March 23rd, 2014, by Jodi Brown and
2 her counsel, Roland Jarvis, and by myself for the Government.
3 I just included that because I wanted to indicate that that
4 was I believe the first time we met with her to interview her,
5 and I thought we could establish that date, and there were
6 other dates which I can establish in a minute. I believe
7 there was September the 8th of 2014 and another meeting in
8 October of 2014, I believe October 2nd of 2014.

9 There is a 302 report, Judge, that I have included.
10 It's prepared by Special Agent Chris Kopp, Christopher Kopp.
11 It's dated 10/28/2014, and it's several pages long. It looks
12 like it's six pages long, six pages, just one paragraph, but
13 on page 4 of 6, if you go to page 4 of 6, about the middle of
14 the page, there is a paragraph that starts out with the
15 sentence "Malik Derry is Mykal Derry's brother." That is a
16 paragraph that's, if anything is pertinent to this, that's the
17 paragraph that's pertinent, and this was typed from Special
18 Agent Kopp's notes, and in it it says, "Brown had heard from
19 several individuals that Mykal Derry had murdered Tyquinn
20 James, but Brown felt that Mykal doesn't have the heart for
21 it, but that Malik had anger issues and had beat individuals
22 on at least three occasions in front of her, including his own
23 associates. Brown did not know the reason James was
24 murdered."

25 And then she said, "Brown knew James as well as Trevin

1 Allen a/k/a Kadaf from when they were young children. Brown
2 never saw Malik with a firearm; however, Brown's nephew Cory
3 Green warned Brown to be careful around Malik because he plays
4 with them things, meaning firearms, and that someone could
5 blow your head off going for Malik." That was a paragraph.

6 Now, Judge, I can't say for sure that the 302 was
7 not -- I question as to whether the 302 was turned over prior
8 to the trial. All I can say with respect to that is at this
9 point I can locate no record that it was. I can do a further
10 search to determine if it might have been turned over if
11 counsel requested it, but there's no record I could find at
12 this point to show that that 302 was turned over.

13 What was turned over is, and if you go to the e-mails,
14 they're sort of in reverse order, there's one Friday, May
15 27th, 2016, to Mr. Markowitz where I characterize what we had
16 turned over. There is an e-mail that I sent on February 25th,
17 2016, about a review of my notes. This is, of course, after
18 trial. And there's an e-mail Sunday, July 26th, 2015, which I
19 believe was prior to trial or maybe during trial. I'm trying
20 to remember the date the trial began. Do you remember the
21 date trial began?

22 MR. MARKOWITZ: Yes, right after the 4th of July.

23 MR. ASKIN: So, this may have been during the trial.

24 MR. MARKOWITZ: July 7th.

25 MR. ASKIN: So, this was during the trial. Sunday,

1 July 26th at 4:31 p.m., I sent an e-mail to Emmett Madden, my
2 colleagues, Mr. Danilewitz, Mr. Burgos, and to Josh Markowitz,
3 of course, and cc'd Mr. Darragh, who is our paralegal,
4 regarding Jodi Brown. I wrote them a detailed e-mail which I
5 lay out there, and the relevant portion of this says, "Ms.
6 Brown also told us that she had a sexual relationship with
7 Malik Derry for a period of time. She does not know why
8 they," and I put "they" in quotes, "the Derry brothers,"
9 that's my interpretation in parentheses, the Derry brothers,
10 "she does not know why they killed TY. She was in the
11 hospital when the homicide occurred. Has seen Malik Derry
12 getting violent with at least three other individuals, and
13 while she didn't tell us about seeing Malik in direct
14 possession of guns, she was told by another individual that he
15 was someone to be careful with because he was someone who
16 could blow your head off, a reference to Malik playing with
17 guns."

18 That's, if you look at the notes that I gave you,
19 Judge, it's just one page from my notes, the handwritten
20 notes, this is what's in my notebook that I have for the
21 proffers of Jodi Brown, the handwritten notes, and I have in
22 the middle of the page a reference "Malik Derry," and I draw a
23 little arrow, sort of meaning that this is some information
24 she provided about Malik Derry, had a relationship, it looks
25 like long-time or long-term on-and-off relationship, doesn't

1 know why they killed TY, and then I have a note on the side
2 there, was in the hospital when the homicide happened.

3 THE COURT: Okay. So, you've reviewed your notes and
4 that's the basis for your e-mail.

5 MR. ASKIN: Correct, my notes, that's the basis for
6 my e-mail. I don't know that I was, not that it matters
7 legally, I don't think, but I don't know that I was
8 particularly aware of the exact statement in Special Agent
9 Kopp's notes and in the 302, that several individuals had told
10 her that Mykal Derry was involved in the murder. But, I mean,
11 I don't know -- I think first we want to get out the facts. I
12 don't know if the Court wants me to get into argument on this,
13 but the --

14 THE COURT: Well, hold on one minute for me just
15 so -- you said there was a letter attached to the e-mail?

16 MR. ASKIN: Yes, there was a letter attached to the
17 e-mail which -- do you have the letter?

18 MR. MARKOWITZ: I have whatever you provided. I just
19 have e-mails, I think.

20 MR. ASKIN: Oh, sorry.

21 THE COURT: This was a letter to original counsel, I
22 guess.

23 MR. MARKOWITZ: You mean the Mr. Jarvis letter?

24 MR. ASKIN: No, the letter to original counsel, which
25 I have here but I may not have copied. Can I have a moment to

1 show it to counsel, your Honor?

2 THE COURT: Yes.

3 (Brief pause.)

4 MR. ASKIN: Judge, this is the letter. I don't
5 believe it references the homicide information.

6 THE COURT: All right.

7 MR. ASKIN: It's essentially a letter that we viewed
8 as reporting on *Brady* information about the four individuals.

9 THE COURT: Is this, the reference to the witness, is
10 this a reference to Jodi Brown?

11 MR. ASKIN: Yes.

12 THE COURT: All right.

13 MR. ASKIN: Also in my notes, Judge, from the
14 September 8th is that Jodi Brown asked me during the proffer
15 if we could just downplay, I think this may be in some of
16 the -- I don't know if that's in the letter.

17 THE COURT: It is.

18 MR. ASKIN: If we could just downplay some of these
19 guys, referring to the Dirty Block defendants. She was being
20 asked about the first four guys I believe at that time, and
21 then she said to me you got the main guys, and she was
22 referring to Koose and Buck, who is Shaamel Spencer. I don't
23 know which guys she was referring to other than maybe some of
24 the individuals from the first trial. I mean, there was no
25 specific reference to Malik in that. But she asked me to

1 downplay some of the guys.

2 THE COURT: All right. Well, a fair reading of the
3 302 is that Jodi Brown doesn't, herself, doesn't believe the
4 rumors that she heard. She said Mykal doesn't have the heart
5 for it and kind of suggests that it was Malik because he had
6 anger issues and was capable of violence.

7 MR. ASKIN: Correct.

8 THE COURT: But let me just ask Mr. Markowitz what he
9 thinks I should make of this.

10 MR. MARKOWITZ: Your Honor, the first thing, I just
11 want to correct the record. The letter or the e-mail from Pat
12 dated July 26th, 2015, 4:30, that's what I was referring to as
13 the 302 that I thought I received that I had discussed with
14 Malik Derry. I'm trying to see --

15 THE COURT: It really appears to be a summary of Mr.
16 Askin's review of his notes, which clearly say she doesn't
17 know why they.

18 MR. MARKOWITZ: Right. And then in the 302, your
19 Honor, where -- I don't know where it went. Maybe it's still
20 in here. Here, I have it. If Mr. Madden and I had this 302,
21 maybe the strategy comes out different. Maybe we do call her.
22 You know, maybe we do probe it. I at least would say that it
23 would have been very important for us to have received this,
24 just to that one paragraph of the brothers, you know, to
25 really get into it, you know.

1 And it's also very important that she doesn't know why
2 Tyquinn James was murdered. As you know, Mr. Madden developed
3 that theory that nobody knew, and I have adopted it and it's
4 relevant, that nobody knew why Tyquinn James was murdered.
5 Now, here is Jodi Brown, a member of the conspiracy, a close,
6 well, closer than a confidant of Malik Derry, they have sexual
7 relations, that could be very relevant, because as you know,
8 and I'm going to make the argument, Mr. Madden and myself have
9 pounded this, I put it in all of my sentencing memos and
10 stuff, is that the Tyquinn James murder, there's a quantum
11 leap to show that it was in furtherance of the conspiracy.

12 So, I think it's very relevant. And counsel is in a
13 difficult position because I'm asked to do Monday morning
14 quarterbacking, and I could come up with a million ideas of
15 why I wanted it or why I didn't want it. But I will say that,
16 in fairness to Mr. Derry's and my relationship, we discuss
17 every document ad nauseam, and that's why I remembered it so
18 vividly that when I represented to the Court that, yes, we did
19 get a 302, it wasn't the 302, it was this letter, and we went
20 over it in great detail.

21 So, if this was provided, I think it could have been,
22 you know, especially with regard to the Tyquinn James, as was
23 laid out by Mr. Madden and myself in my sentencing memo,
24 neither Mr. Kopp nor anybody else knew, and they had been
25 listening to all these tapes, what the reason was for the

1 Tyquinn James until Kareem Young comes up, you know, in July
2 and offers an explanation. So, I think it could be very
3 relevant.

4 THE COURT: Isn't it true that that part, they don't
5 know why they killed, that part was conveyed during the trial,
6 yes?

7 MR. ASKIN: It was, your Honor, because right in the
8 e-mail I say -- because that part was in my notes. I remember
9 that I went through my notes in detail, so I sent them a
10 letter from the first trial and then I went through my notes
11 and then I sent them the e-mail, the detailed e-mail on top of
12 my notes, and that's why I put, also told us she had a sexual
13 relationship with Malik Derry for a period of time, right in
14 this e-mail which is on July 26th of 2015, she does not know
15 why they, and that's my interpretation in parentheses, she
16 didn't say the Derry brothers, she doesn't know why they, I
17 interpret that as the Derry brothers, killed TY. She was in
18 the hospital when the homicide occurred.

19 And then she gets into that she's seen Malik be
20 violent, and I get into the fact that she hasn't seen him in
21 possession of guns, but she's seen these other things of
22 violence and other people have told her to stay away from him
23 because of the violence.

24 So, the only thing, I think the record should be clear
25 that the only thing that may not have been conveyed, that

1 there's no record was conveyed at this point, at least, is
2 that statement in the 302, I mean prior to trial, that
3 statement in the 302 that she heard from I believe it was
4 multiple individuals that --

5 THE COURT: Several.

6 MR. ASKIN: Excuse me?

7 THE COURT: I think it says several.

8 MR. ASKIN: Several individuals that Mykal Derry --
9 let me get this right.

10 MR. MARKOWITZ: What page was that, Patrick?

11 MR. ASKIN: It was on page 4, I believe.

12 THE COURT: It doesn't say "they." "They" is
13 consistent with your notes, but the agent heard something else
14 or wrote down something else.

15 MR. ASKIN: Right. I'm sorry. I wanted to quote
16 this directly. "Brown had heard from several individuals that
17 Mykal Derry had murdered Tyquinn James, but Brown felt that
18 Mykal doesn't have the heart for it but that Malik had anger
19 issues and had beat individuals," et cetera.

20 THE COURT: I think a fair reading of that is that
21 she heard a rumor that Mykal did it, but she thinks it's more
22 likely that Malik did it.

23 MR. ASKIN: Right.

24 THE COURT: So, that raises a question as to whether
25 it is truly exculpatory at all. The question is it could --

1 my thought is that if called to simply testify to what she
2 heard, that that would likely have been excluded as hearsay.

3 MR. ASKIN: Well, she absolutely couldn't get in what
4 she heard, Judge.

5 THE COURT: The question is whether or not disclosure
6 of the 302 would have led to an interview of Jodi Brown in
7 which she would have been asked who did you hear this from and
8 whether those individuals might be available to the defense
9 and have information, and that, of course, begs the question
10 as to whether Jodi Brown would even acknowledge who they were
11 or remember who they were.

12 MR. ASKIN: Or waive her Fifth Amendment right or
13 whatever. Actually, I'm sorry, you're talking about getting
14 other individuals.

15 THE COURT: I question whether it was a lead that
16 might lead to exculpatory information.

17 MR. ASKIN: Correct. I understand that. And I think
18 the Court is right about that. However, I also would point
19 out, Judge, that we had told them she didn't know why they
20 committed the murder. Jodi Brown was clearly a
21 co-conspirator. They're saying it was important,
22 Mr. Markowitz said today, hey, it was important because it was
23 consistent with our theory that she didn't know why they were
24 going to murder him, but they were told that.

25 And by the way, I said, again, not much to add in the

1 letter, but I thought I would make you aware of it. If you
2 have any further questions, you can ask me about it, but given
3 the time frame, if you want to interview or call her, please
4 contact her attorney, Roland Jarvis, Esquire, Philadelphia, to
5 see if they will agree to talk to you and/or testify if you
6 request. If you have trouble reaching Roland, please let me
7 know.

8 And I don't remember any indication from Roland or from
9 defense counsel that they were trying to reach her or anything
10 of that nature.

11 I mean, they did, don't forget, this is a group of
12 defendants, I mean, Mykal Derry particularly, who wanted to
13 bring in here the informants, wanted the names of the
14 informants, we gave him the names of the informants, wanted to
15 subpoena these individuals, wanted to drag Mark Frye in here,
16 wanted to drag Tyrone Ellis, with no indication that any of
17 those individuals could help him, and they were told -- now,
18 granted, they weren't told that one thing that was in the 302,
19 but they were told she doesn't know why they killed this guy,
20 and she is a co-conspirator, and they could have explored that
21 by contacting the attorney, and they didn't.

22 I don't believe, I don't believe it's material, but I
23 also think that they were sort of put on notice that she's
24 heard things about the homicide or hasn't heard things and
25 maybe you want to talk to her, and they didn't talk to them.

1 So, I think we have to realize the evidence here,
2 though, too. The evidence was that in the Government's mind,
3 and the Government's theory is, Malik Derry didn't kill
4 Tyquinn James, Mykal Derry didn't kill Tyquinn James, they
5 both killed Tyquinn James, and she never once said I heard
6 that Mykal Derry was the shooter. In the Government's
7 estimation, Mykal Derry did kill Tyquinn James, and they're
8 both responsible for it, and the evidence, what evidence could
9 the defense have gotten to that -- and think about it, I don't
10 think it legally matters who the shooter is in a way. If
11 you're a member of the conspiracy, if Malik Derry is a member
12 of the conspiracy and he says on the phone, which he clearly
13 did, he doesn't, he doesn't claim, the defense never claimed
14 that it's not him on that phone and says, hey, you got to
15 bring that thing down here, I got TY, I got TY, is it
16 reasonably foreseeable?

17 Let's say Mykal is on the bike, let's say
18 hypothetically, it's clear that Mykal wasn't on the bike,
19 let's say Mykal was on the bike and he shoots him to death, is
20 he not responsible for that? Is that not reasonably
21 foreseeable to him under 924(c)? Clearly, if you take all the
22 other facts in the case, it's clear that they conspired,
23 regardless of who rode up on the bike and shot him, they
24 conspired to kill Tyquinn James. It wasn't some stranger.
25 There was no argument.

1 THE COURT: And there's also Kareem Young's testimony
2 that they were under instructions to shoot on sight on orders
3 of Mykal.

4 MR. ASKIN: Correct.

5 THE COURT: So, I'm not suggesting that Mykal -- that
6 this statement that she had heard that Mykal killed him, I
7 believe that there is -- the Government's theory is consistent
8 with that, could be considered to be consistent with that in
9 the sense that he was part of a conspiracy to kill him. But I
10 think you would agree with me that in a better world or in a
11 perfect world, the 302 would have been turned over.

12 MR. ASKIN: Judge, I will absolutely concede this
13 point. If I had been reading the 302 probably at the time,
14 you know, shortly before I wrote the e-mail and sent them
15 stuff, I probably would have sent them the 302 or would have
16 redacted or taken that out of the 302 and put that additional
17 sentence in there.

18 THE COURT: Right.

19 MR. ASKIN: The fact that I didn't when I'm making
20 all sorts of disclosures -- by the way, I'm making disclosures
21 about sentencing mitigation, that his -- you know what I mean?
22 Like, I'm trying to find --

23 THE COURT: I'm not suggesting that there was any
24 intent to hide anything.

25 MR. ASKIN: That's what I'm saying, but I have to

1 concede and I should concede that I obviously -- Special Agent
2 Kopp's notes and I on this differ a little bit, and I'm not in
3 any way suggesting that his notes aren't accurate. Okay? I
4 want to say that because I think his notes are sort of --
5 they're not in conflict, it's sort of in addition to, it's
6 something that's not in my notes, but it's something that's
7 additional to and it probably was said in some fashion, and I
8 don't think that we're saying that it is inaccurate, although
9 the two notes are somewhat different. But I obviously didn't
10 have that in front of me when I made the disclosures, and it
11 obviously wasn't on my mind that I was aware of it.

12 That being said, I don't think that changes the
13 materiality issue or the fact that would have changed the
14 outcome when there's such incredibly strong evidence that
15 Malik and Mykal participated in the murder and that Malik did
16 so by riding the bike and shooting and executing Tyquinn
17 James.

18 THE COURT: Well, procedurally, I'm thinking about
19 whether or not this ought to be the subject of a separate
20 round of briefing and oral argument before I pronounce
21 sentence. I don't know if procedurally, other than a 2255,
22 which I don't necessarily want to invite, not that I would
23 deny to Mr. Derry or anyone else the right to make such an
24 application, it just seems to me the issue is joined now. I'm
25 wondering whether it would make more sense for me to have a

1 short brief from each side as to whether or not this --
2 whether the nondisclosure of the 302 was material in any way,
3 hear some brief argument on it and rule on it before I
4 pronounce sentence. I think procedurally it makes more sense
5 because I don't know of a procedural mechanism for me to
6 resolve that issue post-sentencing other than a 2255.

7 Mr. Askin? Mr. Markowitz, would you like that
8 opportunity to argue as to why this --

9 MR. MARKOWITZ: I would like that opportunity, your
10 Honor. I would feel good if I did that for Mr. Derry.

11 THE COURT: I think it is appropriate. I know that
12 people anticipated something else today, but this is -- the
13 Government has asked for life in this matter. The guidelines,
14 if I adopt the cross-reference, are in fact life. I think
15 that as a matter of procedural propriety, I ought to first
16 address any issue that may have arisen about the proper --
17 about disclosure, and again, I'm not suggesting that there was
18 any intent or desire to hide anything. I may or may not find
19 it material. I think a fair reading of the 302 is an
20 expression of an opinion that between the two it was more
21 likely that Malik was the shooter.

22 The question for me -- I'm less concerned about that
23 she doesn't know why they killed, because I think that was
24 disclosed with sufficient time for it to be utilized by the
25 defense. The question is whether or not Agent Kopp's

1 recollection that she said she had heard Mykal killed him
2 could be read to mean that he was the shooter and whether or
3 not that would have been a lead that could have led to
4 disclosure of information or witnesses that might have been
5 helpful to the defense.

6 There just may be -- there may be too many layers for
7 that to be material. I don't know that if Mr. Jarvis were
8 called, whether Ms. Brown would have even been willing to say
9 anything to anyone other than the Government concerning her
10 own situation. She may have very well been at that point
11 awaiting sentencing. At what point did -- in other words --

12 MR. ASKIN: Prior, I believe she pled guilty, I
13 believe she had pled guilty, I have to look at the records,
14 but I'm almost positive she had pled guilty prior to the trial
15 of Mykal and Malik in this case but was awaiting sentencing.

16 THE COURT: She has not been sentenced yet.

17 MR. ASKIN: Correct.

18 THE COURT: She pled before me in March of 2014. So,
19 she was, during this relevant time period, awaiting
20 sentencing.

21 MR. ASKIN: Correct.

22 THE COURT: And the question becomes whether or not
23 she would have been willing to talk to anybody other than her
24 own lawyer until such time. So, whether she was even
25 available to the defense I suppose is one issue. So, there's

1 so many, there's too many layers to this onion for me to rule
2 on the fly on this. I think I need a round of briefing and
3 opportunity to provide Mr. Derry through Mr. Markowitz an
4 opportunity to argue to me that this was somehow meaningful.
5 Does the Government concede that that should be the next step?

6 MR. ASKIN: I do think --

7 THE COURT: Without --

8 MR. ASKIN: Without conceding any of the substantive
9 issues, I do think that that's probably the appropriate thing
10 to do here, yes, your Honor.

11 THE COURT: All right. Mr. Markowitz, do you make
12 that request?

13 MR. MARKOWITZ: I do, your Honor.

14 THE COURT: I invited Mr. Derry to discuss any issues
15 he wishes to raise with me. Perhaps this is an opportunity to
16 remind him it's probably best to wait until --

17 MR. MARKOWITZ: We're going to wait until we resolve
18 this issue.

19 THE COURT: All right. There's also an issue about
20 whether or not, if Jodi Brown had had a romantic relationship
21 with Malik, whether that might make her more available to the
22 defendant. I don't know. I don't know. That's an issue as
23 well. So, I'm going to invite -- and I don't know that this
24 needs to be teed up as a motion in any way, Mr. Markowitz. I
25 think you should just --

1 MR. MARKOWITZ: A letter brief, your Honor?

2 THE COURT: A letter brief to the Court. And then

3 how much time would you like, sir?

4 MR. MARKOWITZ: One second, your Honor.

5 (Brief pause.)

6 MR. MARKOWITZ: What is the Court looking for, your

7 Honor?

8 THE COURT: I think -- you mean in terms of length?

9 MR. MARKOWITZ: Yes.

10 THE COURT: I would not set an artificial limit. I

11 just think a letter brief, that you could probably address all

12 these issues in 10 pages or less, single space.

13 MR. MARKOWITZ: Are you thinking a week, your Honor,

14 is that --

15 THE COURT: I'll give you whatever time you think you

16 need. Do you want three weeks? That's fine with me.

17 MR. ASKIN: May I have a moment to talk to counsel?

18 THE COURT: Yes. The Government will obviously want

19 to respond.

20 (Brief pause.)

21 THE COURT: If I could interrupt counsel for just one

22 moment, that I have dates available 30 days out and 60 days

23 out, if you wanted to use those as a marker, and then arrange

24 among yourselves the briefing schedule, that's fine.

25 MR. ASKIN: Okay.

1 (Brief pause.)

2 MR. ASKIN: Your Honor, the parties through counsel
3 have I think reached an agreement, if the Court is okay with
4 this, that the defense would file a letter brief on or before
5 the 11th of July, and that the Government would take two weeks
6 to respond and would respond on or before the 25th of July.

7 THE COURT: All right.

8 MR. ASKIN: And then we can set sentencing for some
9 time thereafter. I would point out that our appellate counsel
10 are a little concerned that Mykal Derry has filed a brief in
11 the Third Circuit, which the Court may be aware of, and I
12 guess the Government has asked to suspend briefing in the
13 Third Circuit on Mykal Derry's brief until Malik Derry's case
14 proceeds. So, the Government really wanted to proceed today,
15 but the Government agrees that this is necessary. So, I think
16 Mr. Gross, who is handling the appellate matters, will just
17 write a letter, as long as we get a date certain here in 60
18 days or so, he'll just write a letter to the Third Circuit
19 Court of Appeals and tell them the status of what's going on
20 in this case.

21 THE COURT: All right. Well, I'm going to set the
22 matter down for August 5th at 10:00 a.m., it's a Friday, and
23 I'll have the briefing by then, and if I determine that
24 there's been no material nondisclosure, I would be prepared to
25 go to sentencing. I don't want to presume to rule on the

1 issue. I could decide at that point that I want -- I see
2 more, hear more, whatever, but I think Mr. Gross would be
3 within his rights to inform the Court of Appeals that the
4 Court has adjourned sentencing until August 5th to consider an
5 issue raised by the defense concerning pretrial discovery and
6 to address a sentencing guideline issue, because I'd like, on
7 the same schedule but reversed, I would like the Government to
8 address Probation's conclusion in paragraph 207 that Mr.
9 Derry, without a cross-reference, is responsible for 1
10 kilogram, between 1 and 3 kilograms of heroin based on the
11 jury verdict of his membership in that conspiracy.

12 I'm of the view now that Third Circuit law would
13 suggest that, although that was the jury's verdict, that he
14 was a member of that conspiracy, and, therefore, the mandatory
15 minimum applicable to that amount applies, that the Court
16 should engage in a separate analysis as to the quantity
17 attributable to him, even if it were to conclude that it's
18 trumped by a mandatory minimum or to calculate it separate and
19 apart from the cross-reference if it's in excess of the
20 mandatory minimum, because I think, I think the law is clear
21 that I should calculate the guidelines accurately, and the
22 cross-reference comes at the end, and it's a factor to be
23 considered at step three, I'm sure I'm going to get a variance
24 application if I adopt the 2A1.1 reference.

25 MR. ASKIN: Yes, your Honor.

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1 THE COURT: And putting aside the issue of enforcer,
2 his overall role in the conspiracy might be relevant to the
3 issue of whether I should vary, even if I adopt the murder
4 cross-reference. So, I think it is important for me to
5 calculate that, and I would like the Government to consider
6 whether it stands by Probation's calculation as to paragraph
7 207, and if I am to adopt a different number because I view
8 his role in the conspiracy to be a lesser one, that a
9 calculation by the Government as to what amount might be
10 fairly attributable to him concerning the counts of
11 conviction, for example, the phone counts, any other evidence
12 from the wire that puts him directly involved in certain
13 transactions, it would be helpful to me.

14 If you don't want to do that, I'm not going to compel
15 you to do it, but as much drugs as you can directly attribute
16 to him or argue that his role in the conspiracy was sufficient
17 under *Fletcher* and *Anin* to attribute the overall amount would
18 be helpful to me in determining how I calculate the count 1
19 conviction without the cross-reference. Is that clear?

20 MR. ASKIN: I think so, your Honor. I also can
21 discuss this with counsel.

22 THE COURT: Imagine a world in which he's only
23 convicted under count 1 and there's no proof as to any kind of
24 murder, just convicted of being a member of a conspiracy, what
25 would you argue should be his sentence for an 846?

1 MR. ASKIN: Right. Now, I could discuss that with
2 counsel.

3 THE COURT: Then you might come up with a stipulation
4 or something.

5 MR. ASKIN: Right.

6 THE COURT: We agree that if the cross-reference
7 doesn't apply and if the Court rejects the argument that he
8 should be, under *Fletcher* and similar cases, responsible for
9 the entire amount of the conspiracy, here is the amount of
10 drugs which we think are directly attributable to him or
11 fairly attributable to him. He doesn't have to be directly
12 involved. *Fletcher* or *Anin* itself involved a case where the
13 person never touched the drugs but he was directly involved in
14 having 2 kilograms delivered. That's drugs fairly
15 attributable to you.

16 I'm not suggesting that he has to sell them himself or
17 personally touch them or pick them up or deliver them to be
18 attributable to him, but I think your office has consistently
19 taken the position that in a multi defendant conspiracy, that
20 it's often appropriate to look at their overall role for
21 sentencing guideline purposes in determining the amount of the
22 drugs attributable to him, and I think that if Malik Derry was
23 only convicted of count 1 without all the other stuff, that
24 it's very likely that I would consider a guidelines
25 calculation different than 1 to 3 kilograms, even though the

1 amount -- there was a finding he was a member of that
2 conspiracy and a mandatory minimum would apply. I assume you
3 agree with that. That's part of your sentencing argument.

4 MR. MARKOWITZ: That is my argument, your Honor.

5 THE COURT: So, I just feel the Government, if you're
6 going to plea somebody and say, okay, you're a member of this
7 conspiracy, but you only get this little amount of drugs, that
8 there shouldn't be a penalty to going to trial. I'm not
9 suggesting that you're doing that, but --

10 MR. ASKIN: There were big breaks given to people
11 that pled guilty. I'm not going to disagree with that. That
12 is true. Even many without cooperation. But the Government,
13 *Bordenkircher versus Hayes*, the Government does not view that
14 as a penalty for going trial. The Government views that as
15 individuals -- it is interesting here because they make the
16 argument that I accepted responsibility, which we think is
17 ludicrous, and they had every opportunity to accept
18 responsibility, I mean, meaning Mr. Malik Derry and his
19 counsel -- Malik Derry I should say, not his counsel -- and he
20 didn't accept responsibility in any way, and he, we're saying
21 if, if, if, you know, if ifs were horses, beggars would ride,
22 he was an enforcer and he didn't plead guilty.

23 THE COURT: You can make that argument. That's
24 fairly attributable to him. I just think I should be
25 consistent certainly within a case as best as I can.

1 MR. ASKIN: Right, but I would suggest that it's
2 not -- the Government's plea posture in other matters of the
3 same overall criminal case, I don't know that that's -- I
4 mean, maybe it's an appropriate thing for the Court to
5 consider under 3553, the need to avoid unwanted sentencing
6 disparities if the Court feels -- I mean, that's where it
7 might be relevant.

8 THE COURT: That's the only point that I'm making.

9 MR. ASKIN: And that's a fair point, your Honor, and
10 I'm not going to argue that point. So, I'll take a look at
11 it.

12 I do think one of the issues is, and counsel will
13 address this and I'll address this in my brief, is I don't
14 know -- I think there might be a legal issue with attributing
15 quantities to him before he became a member of the conspiracy,
16 but the way the Government has calculated this, it was
17 calculating it based on the wire evidence, which is the period
18 from October of 2012, now it might be early in October of
19 2012, through March of 2013.

20 THE COURT: One kilogram, because they were all
21 charged with the same conspiracy.

22 MR. ASKIN: Yes.

23 THE COURT: Whether they were in or out, correct?

24 MR. ASKIN: What I'm saying -- yes, absolutely. What
25 I'm saying is the 15 hundred and some odd grams, which comes

1 from 1 gram, we had that whole thing where 1 gram
2 approximately per brick, 15 hundred some odd bricks that did
3 include the Tyrone Ellis side of the conspiracy and the Malik
4 Derry.

5 Now, in the plea negotiations, I can tell you this for
6 a fact because I know I was sort of running it, many of the
7 defendants, because it was less than a kilo if you divided up
8 Mykal Derry's drugs from Tyrone Ellis's drugs, in other words,
9 coming down from Paterson, there were two sort of lines, there
10 was -- it's all part of the same 846 conspiracy and the law
11 established that and the jury verdict established that, but
12 you could say that, like, these guys I know in the Mykal Derry
13 group did not consider themselves on the street part of Tyrone
14 Ellis's group. Right? So, they wanted to argue that, and
15 this is where some of these pleas came in.

16 We conceded, okay, with a lot of these guys, 400 to 700
17 grams, because we were conceding that -- we basically said in
18 plea negotiations, we don't agree with you, that we'll be able
19 to prove this at trial, but okay, we'll hold you responsible
20 for the totality of the Mykal Derry drugs or the Tyrone Ellis
21 drugs but not both, depending on which group you were in. In
22 plea negotiations we did that a lot, where you see a lot of
23 pleas that were based on 400 to 700 grams when they were
24 guideline pleas, and that was probably taken into
25 consideration when we did some of the (C) pleas as well.

1 THE COURT: Okay. But in part that's an
2 acknowledgment that it's appropriate, and the Third Circuit
3 case law is clear that I'm to engage in an individualized
4 searching inquiry as to the role of any defendant in a
5 conspiracy to determine whether or not, for guidelines
6 purposes, what their role was and what amount of drugs is
7 fairly attributable to them. I think that's the law. I think
8 I have to follow it. And that calculation may have been
9 discussed with Mr. Markowitz, may have been discussed with
10 other defendants, but it's not in the presentence report. All
11 it is is a -- and I'm not faulting Probation -- it's just a
12 conclusion the jury found him part of the conspiracy of 1 to 3
13 kilograms and, therefore, that's the amount. And I think what
14 they were expressing or finding with a high degree of
15 confidence is that the cross-reference would apply.

16 But I think step one, *Gall* and so forth, the Third
17 Circuit case on sentencing procedure, suggests to me that I'm
18 to accurately calculate the guidelines, and I think the
19 cross-reference is potentially such a dramatic change here and
20 it comes at the end of the calculation process, that I should
21 engage in a separate guidelines calculation for count 1
22 independent of the cross-reference, just to calculate it
23 because it's what we would normally do.

24 And I may decide at the end of the day the
25 cross-reference applies and it's angels dancing on the head of

1 a pin, but I may be wrong there, or it's a factor to be
2 considered in the overall perspective of sentencing. If he
3 was less of a major player and this was, the shooting was a
4 spontaneous effort to please his brother, then maybe it's
5 somewhat -- maybe that's a mitigating argument that I should
6 take into consideration in determining whether I adopt the
7 sentencing guideline for the cross-reference, or I may say,
8 you know what, there's reason why he did it, because he was,
9 you know, part of this organization. I just don't know.

10 I think I just need to calculate it. I think it is
11 important for the record. I think it is important for the
12 Court of Appeals. I think I have been directed to follow that
13 process. So, that's what I think I'm going to do. And I
14 appreciate your patience.

15 MR. ASKIN: Yes, your Honor. If we need a little bit
16 more time to file that part of it because I'm going to be away
17 for a big chunk of the time frame --

18 THE COURT: Mr. Gross may not be happy, but I'm happy
19 to adjourn the date of the 5th.

20 MR. ASKIN: No, I don't mean -- I think we can play
21 with the dates with counsel, with Mr. Markowitz, and propose
22 something to the Court in a letter.

23 THE COURT: Yes, that would be fine.

24 MR. ASKIN: I'm sure we'll be able to work that out.

25 THE COURT: It will be the reverse.

1 MR. MARKOWITZ: The reverse.

2 THE COURT: Government first, Mr. Markowitz will
3 respond.

4 MR. ASKIN: Okay.

5 THE COURT: All right?

6 MR. ASKIN: All right. Thank you, your Honor.

7 MR. MARKOWITZ: Thank you, your Honor.

8 THE COURT: Anything else I should address?

9 MR. MARKOWITZ: Not at this time, your Honor.

10 THE COURT: Do you want to talk to Mr. Markowitz
11 first, or do you want to talk to me?

12 THE DEFENDANT: I told him about it before.

13 MR. MARKOWITZ: They're going to let you address
14 that, but we're saving the time in light of the two issues
15 that we want to brief.

16 THE DEFENDANT: No, this is a different issue.

17 (Brief pause.)

18 THE COURT: Mr. Derry, I'll allow you to address the
19 Court at the next hearing and address any issues that you wish
20 to address, and it will be before the allocution at sentencing
21 if we get to sentencing. So, please understand that I'll
22 allow you to be heard.

23 THE DEFENDANT: Thank you.

24 THE COURT: I think your wisest course, and I can't
25 give you advice, but I think Mr. Markowitz is wise in

1 suggesting to you that you should just let this process play
2 out, but understand that I'll give you an opportunity to be
3 heard. All right, sir?

4 THE DEFENDANT: All right.

5 THE COURT: All right. Very good.

6 All right. I appreciate everyone's thoughtful
7 consideration of these important issues. I appreciate your
8 patience very much. I'll look for the additional written
9 submissions. We'll set the matter down for August 5th at
10 10:00 a.m. If there's nothing else from the United States or
11 Mr. Markowitz, I'll wish you all a good rest of the day.

12 MR. MARKOWITZ: Thank you, your Honor.

13 MR. ASKIN: Thank you.

14 THE DEPUTY COURT CLERK: All rise.

15 (Proceedings concluded at 12:25 p.m..)

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