

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3
4 UNITED STATES OF AMERICA

5 CRIMINAL NUMBER:

6 -vs-

7 1:14-cr-00050-NLH

8 MALIK DERRY,

9 Sentencing

10 Defendant.

11
12 Mitchell H. Cohen United States Courthouse
13 One John F. Gerry Plaza
14 Camden, New Jersey 08101
15 Friday, August 19, 2016

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

18 A P P E A R A N C E S:

19 PAUL J. FISHMAN, UNITED STATES ATTORNEY
20 BY: PATRICK C. ASKIN, AUSA
21 JUSTIN C. DANILEWITZ, AUSA
22 EDMUND MALLQUI-BURGOS, AUSA

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Attorneys for Defendant Malik Derry

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

/S/ Robert T. Tate

APPENDIX E

United States District Court
Camden, NJ

0000157

1 A L S O P R E S E N T:

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U.S. PROBATION OFFICE
BY: JOSHUA MacAVOY
KELLY SULLIVAN

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FBI SPECIAL AGENT CHRISTOPHER KOPP

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MALIK DERRY, DEFENDANT

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1 (Defendant present.)

2 (In open court at 10:02 a.m..)

3 THE DEPUTY COURT CLERK: All rise.

4 THE COURT: All right. Thank you. Please be seated
5 except for counsel. This is a continuation of a post-trial
6 motions hearing and sentencing hearing, United States versus
7 Malik Derry. May I have appearances, please?

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

10 MR. DANILEWITZ: Good morning, your Honor. Assistant
11 U.S. Attorney Justin Danilewitz, for the United States.

12 MR. CORCORAN: Good morning, your Honor. Edmund
13 Mallqui-Burgos, Special Assistant United States Attorney, for
14 the United States. Also at counsel table is FBI Special Agent
15 Christopher Kopp.

16 THE COURT: All right. Thank you. Welcome to you
17 all.

18 MR. MARKOWITZ: Good morning, your Honor. Joshua
19 Markowitz, Markowitz O'Donnell, on behalf of defendant, Malik
20 Derry.

21 MR. CORCORAN: Good morning, your Honor. Gregory
22 Corcoran also of Markowitz O'Donnell also for the defendant.

23 THE COURT: All right. Welcome to you both as well.

24 Counsel will recall that last time we first addressed
25 the defense motion under Rule 29 and Rule 33. I ruled on

1 those, that motion except to the extent that my concerns,
2 triggered in part by Mr. Derry's letter to the Court regarding
3 an allegation of nondisclosure of materials that might be
4 considered within the scope and breadth of *Brady*, had not been
5 turned over and it raised the issue of whether some additional
6 motion practice might be appropriate, and indeed Mr. Markowitz
7 has since filed a motion asking for certain relief alleging
8 that a *Brady* violation has occurred.

9 So, first things first, I'm going to ask the United
10 States to submit an order on the original Rule 29 and Rule 33
11 motion consistent with my oral ruling denying those motions.

12 Now, I have received Mr. Markowitz's brief. I've
13 received an opposition from the United States and a reply. I
14 have also received in the last day or so an additional 302
15 from the United States. Do I understand correctly Ms. Brown
16 was re-interviewed?

17 MR. ASKIN: Yes, Ms. Brown was re-interviewed by
18 Special Agent Kopp and myself, your Honor, earlier this week,
19 and a 302 at our direction was produced, drafted by Special
20 Agent Kopp quickly and produced, and that was turned over to
21 Mr. Markowitz by e-mail I believe the day before I sent it to
22 the Court, which I think was yesterday.

23 MR. MARKOWITZ: That is correct, your Honor.

24 THE COURT: All right. To be honest with you, I read
25 it and I didn't think it really advanced the ball either way

1 very much. What's the position of the United States on this
2 additional submission?

3 MR. ASKIN: Well, the position of the United States
4 is that, generally speaking, the defense can't -- this, what
5 they're claiming, the two things they're claiming were *Brady*
6 material were, A, arguably not exculpatory, and B --

7 THE COURT: Go ahead, I'm sorry.

8 MR. ASKIN: That independent of what Jodi Brown said
9 the other day, earlier this week, that what they're claiming
10 was exculpatory was arguably not exculpatory and what they're
11 claiming was material was clearly not material. That being
12 said, to get to Jodi Brown's interview this week, one of our
13 arguments about materiality is they have to show, if I
14 understand the law correctly, that when it's inadmissible
15 hearsay that they are referring to, someone told me, I heard
16 that Mykal was the shooter or Mykal killed Tyquinn James,
17 that's inadmissible hearsay clearly. They have to show that
18 it would have led to, it was likely to lead to admissible
19 evidence that was exculpatory. Okay? And it can't be, the
20 case law is clear, and this is in the Government's response
21 brief, that can't be speculative. Okay?

22 And so what I suspected was true turns out to be true
23 if you believe Jodi Brown's statements this week. She's
24 asked, hey, how did you hear this? Well, I was in Brown's
25 Park, a bunch of people were getting high in Brown's Park and

1 they're talking. And who told you this? This guy Ya-Ya.
2 Now, we didn't have a photo of Ya-Ya, but it's clear that
3 Ya-Ya probably could have been identified to the FBI. The FBI
4 agents believe they know the identity of Ya-Ya, and the agent
5 put a note in there as to who they believe to be his real
6 name, although it should be clear that she didn't identify him
7 because there was no photo.

8 But essentially what Jodi Brown says is we're having
9 this conversation in the park, these several individuals,
10 there's several individuals that are chatting, but the only
11 one who said something about this that's relevant is Ya-Ya,
12 and he said that, yeah, Mykal shot Tyquinn James. And I said,
13 okay, well, what's the basis for Ya-Ya's knowledge? And she
14 said the only thing that he said was that, something to the
15 effect that Shaamel Spencer got that because it came over a
16 scanner.

17 And if you remember, there was the testimony in the
18 trial, there was that call right after the murder, within a
19 minute of the murder, where Mykal Derry called Shaamel Spencer
20 and says turn on your scanner, you already F'ing know, Lik
21 just splashed TY.

22 So, this is like double or triple hearsay that we're
23 talking about, and in that sense I think it goes from you
24 can't prove that you would have gotten to admissible evidence
25 defense, you know, it's speculative, which if you don't

1 have Jodi or if you don't consider Jodi Brown's interview from
2 this week, that's where it lies. It's completely speculative
3 they would have gotten to any kind of admissible evidence that
4 was exculpatory and that doesn't meet the burden.

5 But if you consider Jodi Brown's, it gives it a little
6 more flavor that this is double hearsay, which we suspected.
7 Jodi Brown is repeating hearsay she heard from Ya-Ya, who is
8 repeating hearsay that he heard through something about a
9 police canner and Shaamel Spencer. It's like double or triple
10 hearsay.

11 THE COURT: So, you're saying that basically this
12 additional 302 or the additional interview of Jodi Brown is in
13 essence an example -- is what would have happened if the
14 several hurdles that you have described were overcome, that
15 is, that Mr. Markowitz had decided as a matter of trial
16 strategy that he would indeed want to talk to Jodi Brown, that
17 Jodi Brown, represented by counsel, would have spoken to him,
18 and that if those two hurdles were overcome, that Ms. Brown
19 simply would have said at the time what she has now said to
20 the 302, which instead of leading to something that was truly
21 admissible or potentially admissible -- for example, if Jodi
22 Brown had been interviewed and said I spoke to, the day after
23 the murder, I spoke to Mykal and Mykal said I did it, that
24 might be admissible, but indeed that's not what she ultimately
25 -- it is not the source of her information.

1 MR. ASKIN: Right.

2 THE COURT: It is another series of rabbit holes.

3 MR. ASKIN: Nor did she just hypothetically say I
4 talked to a guy who was an eyewitness. Now, we think the
5 evidence of the homicide, that Malik was the shooter is
6 irrefutable anyway, but it's not like, in terms of admissible
7 evidence, she said, oh, yeah, I heard that from this guy and
8 this guy was an eyewitness to the homicide.

9 THE COURT: Right, I saw Mykal do it.

10 MR. ASKIN: Right.

11 THE COURT: All right.

12 MR. ASKIN: And there's one other point, Judge, that
13 I think goes to what she said, which I don't think -- I think
14 I did a poor job of making this argument. We may have made
15 it, but if we did, we didn't make it that clearly. The
16 defense is also saying, their argument really is twofold as to
17 why Jodi Brown's statements were exculpatory and should have
18 been turned over. One is the statement that Mykal going to --
19 that she heard that Mykal was actually the shooter. That's
20 one. But their second claim is, hey, Judge, we -- one of key
21 issues in this case is whether or not these shootings under
22 924(c), specifically the murder of Tyquinn James as to their
23 client Malik Derry, was in furtherance. Okay?

24 Now, circumstantially, the Government put on a lot of
25 evidence through Kareem Young's testimony, which I don't even

1 know if that's circumstantial or more direct, but the
2 inferences from Kareem Young's testimony that Mykal Derry was
3 giving the orders, put him down, they were rival drug
4 traffickers, they were trying to keep him out of Stanley
5 Holmes, and the supporting evidence, but they're saying, I
6 believe, if I understand their argument, that, well, that
7 wasn't as strong and we could have used her, Jodi Brown, to
8 say she was an integral member of the conspiracy, a critical
9 member of the conspiracy, she was around these guys, and she
10 didn't know why Tyquinn James was killed, and that's
11 exculpatory. We don't find that exculpatory, but that's an
12 argument they're making.

13 Well, one of the factual things that we didn't bring up
14 or that maybe I didn't bring up as clearly as I would have
15 liked to in our brief, which is in the Jodi Brown 302, and
16 it's clear from the evidence in the record, is she's picked up
17 on the wire. The wires start on October 2nd, 3rd or 4th?
18 2nd? October 2nd, Judge Irenas signs the order, October 2nd
19 we go up on the wires.

20 THE COURT: What year?

21 MR. ASKIN: 2012. The wires continue on Mykal
22 Derry's phones through February 11th, approximately, which is
23 the day after the murder, when they're arrested. Okay? And
24 they continue on Tyrone Ellis's phones until March, end of
25 March of 2013.

1 Now, on December 17th, 2012, there's a critical
2 incident in this investigation of this case. Derreck Mack,
3 you recall, and Davis, Terry Davis are with Mykal Derry
4 outside those trap houses at 236 and 238 Rosemont Place in the
5 first village of Stanley Holmes. Special Agent Marcus Perry
6 and a task force officer are conducting video surveillance,
7 which we played at trial. They see Derreck Mack with a loaded
8 semi-automatic -- well, with a semi-automatic handgun in his
9 waistband, and the call is made I believe by Special Agent
10 Kopp and others, and this was discussed, you know, this was
11 part of the trial testimony, to send in Atlantic City Police
12 officers to approach and confront Derreck Mack because he's
13 carrying a firearm. When they do that, there's a police chase
14 that ensues, and Mack refuses to drop the gun, runs behind a
15 bush, and he's shot to death by an Atlantic City Police
16 officer.

17 After that Mykal Derry makes the comment on the wire,
18 you know, laughing about this guy and then he says you're
19 fucking up my trap spot. Okay? After that, they, shortly
20 thereafter, they switch the location where the drugs are
21 stored and distributed from 238, Jodi Brown's place, to
22 Kadijah, Brenda Solomon, they called her Kadijah's place at
23 307 MLK Boulevard, which is in Stanley Holmes, but it's in a
24 different village, it's in the third village -- second
25 village, as opposed to the first village. Right?

1 So, after that, and then she says in the 302, but this
2 is clear from the other evidence, she has almost no contact
3 with these guys after that. She says she talks to Malik to
4 see how he's doing once in a while, but she's no longer part
5 of it.

6 And by the way, the other thing which we did argue, is
7 she's in the hospital when this happens. She goes through
8 like a -- she's trying to go through like a detoxification
9 process, which is corroborated by her own statements on the
10 wire. I don't know if you remember, we played a call where
11 she says I'm trying to get into detox and she's telling Mykal
12 Derry that, and he's like, yeah, whatever, come back here
13 because they needed to get in and get this gun.

14 So, looking at that as exculpatory, the Government
15 views it as it's not exculpatory. The fact that she didn't
16 know -- in other words, there are situations where you and I
17 are in a conspiracy with some other people and we're so
18 involved and we're right there when things are happening and
19 we don't see them, I could see where the mere fact that we
20 don't know something could be viewed as exculpatory, but in
21 these facts, Judge, I don't believe that's the situation.

22 I think that was clear before we had the 302 from Jodi
23 Brown from this week, but I think it's even more clear with
24 her 302. She just wasn't involved with these guys basically
25 at all after December 17th of 2012, and this murder happened

1 on February 10th of 2013. And I believe that's backed up by
2 the calls or the lack of calls and text messages with Jodi
3 Brown after that time frame, because we have a continuing
4 wiretap, Judge, and she's not being picked up on the wiretap
5 after that, if I understand correctly.

6 THE COURT: All right.

7 MR. ASKIN: She did say, also, Judge, that, although
8 I don't think this was in the 302, that she would not have
9 spoken with the defense. She said to us that, look, you know,
10 I told my lawyer, Mr. Jarvis, who was sitting there at the
11 time of this interview, of course, throughout the interview,
12 Roland Jarvis, her attorney, was present, that I told my
13 lawyer that I wouldn't have met with anyone else, but I don't
14 really know that that's even here or there because they could
15 have brought her over here and determined whether or not she
16 would talk to them or -- which is, of course, another point
17 I'm going to make later, is that that wasn't too late, they
18 could have had her brought over here, and just like they did
19 with Tyrone Ellis, just like they did with Mark Frye, just
20 like they asked us to do before they changed their mind with
21 those informants, and we would have produced Jodi Brown.

22 She was in the FDC represented by counsel. If they had
23 knowledge during the trial that she was someone who could have
24 said she didn't know why, and they knew that she didn't see
25 Malik and others with firearms, they could have brought her

1 over here if they chose to do so and asked the Court to
2 conduct a 104 hearing. They chose not to as a matter of trial
3 strategy. Of course, we'll make that argument later.

4 Thank you, your Honor.

5 THE COURT: All right. Mr. Markowitz.

6 MR. MARKOWITZ: A couple things, your Honor. The 302
7 that was just prepared, you know, I think that's Monday
8 morning quarterbacking. I think we have to look at this *Brady*
9 issue had it been given to us at the proper time. We wouldn't
10 have even known about this *Brady* issue, and in her statement
11 she said she hadn't talked to Malik or anything. She's the
12 one who told Malik Derry at the FCC that did you get my
13 statements. That's how we knew about it and that's what made
14 me write to Pat Askin and request it.

15 More importantly, this thing about the famed December
16 17th date, in one of the things the Government sent me, I
17 think they said that Ms. Brown and Mr. Derry had a
18 relationship, and that is in fact correct, and they did have a
19 relationship and they did see each other during this time
20 frame and past December 17th. Had we had it, number one, I
21 think it could have certainly, I thought it was critical, I
22 think it is exculpatory in the sense that I could have used it
23 as *Brady* and its progeny to put forth for impeachment purposes
24 of Kareem Young, and we sat in trial and your Honor certainly
25 reiterated more than once to advise Mr. Askin that the Court

1 was concerned whether or not this Tyquinn James murder was in
2 furtherance of the conspiracy.

3 You know, Agent Kopp, who honestly, I've never seen an
4 agent know a case better than he knew this case, was a little
5 surprised as to Emmett Madden's cross-examination that up
6 until this point you didn't know why Tyquinn James was
7 murdered. Kareem Young was not that specific. It was very
8 hazy. He remembered a meeting. He wasn't sure if Malik was
9 there. I cross-examined him. He said one thing in the grand
10 jury, another thing at trial, another thing in his proffer.
11 That's a critical piece of evidence that we could have used
12 that, you know, who was at the meeting, the Jodi Brown. I
13 could have cross-examined him and said and was Jodi Brown
14 there, and he might have said yes. Well, maybe Jodi Brown
15 wasn't there. All kinds of things that would go that this was
16 not in furtherance of the conspiracy.

17 And as I have maintained, to say that the Tyquinn
18 James, that this beef went on and on and on, because McNamara
19 said you've got to get rid of rival drug dealers, take this
20 one piece in her 302 where she says -- I'm only saying this
21 for purposes of our argument, your Honor, I'm not conceding
22 anything as to Mr. Derry, but she says I don't think it was
23 Mykal Derry, I think it was Malik, he's angry, he's a very
24 angry person.

25 And you remember in the beginning of the trial, I think

1 one of the first tapes, it's pointed out he's at a dice game,
2 he says, and they tied this up to the night of the murder,
3 bring me that thing, you know, not because it was about a drug
4 trade, transaction, it was he was angry at a dice game and he
5 wanted to show, you know, you're not going to screw around
6 with Malik Derry.

7 That anger, you know, we've heard so much testimony
8 through experts and the hazy testimony of Kareem Young that it
9 was in -- Mykal Derry said put him down, that I'm sending out
10 an order, but other than that, we had no corroboration, no
11 text messages as we've got to get Tyquinn James. There was no
12 other corroborating evidence from witnesses or anything to
13 that nature.

14 It could be that, and we've never discussed it, but did
15 anyone ever think that you shoot at my family, we're going to
16 shoot back at you? Not that it's in furtherance. This goes
17 on all the time. It went on in my neighborhood, somebody
18 punched you, you punched him back. It wasn't in any
19 furtherance. You know, I'll get picked on for the rest of my
20 life in my neighborhood. Excuse me, your Honor.

21 THE COURT: Yes, Mr. Markowitz.

22 (Brief pause.)

23 MR. MARKOWITZ: Mr. Derry must have missed my opening
24 statement where I said that Ms. Brown communicated to him
25 directly about her statements.

1 THE COURT: Yes. I recall that. I think it's in his
2 letter to me.

3 MR. MARKOWITZ: Yes. So, I think that that 302 is
4 exculpatory in both ways. And what goes on a year later,
5 we're a year past the conviction, your Honor, who knows what
6 she testifies when we bring her if we have the 302? He's
7 right, when I saw it, I might have made a different decision.
8 When we got the little e-mail, we had made a decision that it
9 really wasn't worthwhile to bring her in. I didn't think it
10 would lead anywhere. Had I seen the 302, I might have felt
11 differently. Okay?

12 And remember, I get that little statement three days
13 before Kareem Young testifies. If I had gotten the 302 before
14 he testifies, I would have seen things differently. Because
15 remember, although Mr. Madden and I were co-counsel, he had a
16 theory of how he wanted to try the case and I had a theory
17 that I wanted to try, and luckily, we weren't in opposition to
18 each other, but we were certainly not in the same direction as
19 to what our defenses were.

20 And I think you have to look at the Brady question not
21 now, not would have, could have, should have, but are those
22 statements exculpatory? I believe they are. Are they
23 necessary that we could have used them to impeach the one
24 witness? I can assure you that when Mr. Askin gets up and
25 talks about the 5K1 for Kareem Young, he's going to tell you

1 how critical that testimony was, because I don't think that
2 the Government really saw the issue of in furtherance of the
3 conspiracy until it developed, and that's just my own personal
4 opinion. I'm sure they would deny that. But I was certainly
5 taken aback by it. I think Mr. Madden hit on it by chance and
6 then tried to develop it.

7 So, that is a -- the whole case, why we're here is
8 because was that shooting in furtherance of the conspiracy,
9 and I think that's a critical piece of evidence and we should
10 have had it, and for those reasons, your Honor, I ask that Mr.
11 Derry be granted a new trial.

12 THE COURT: All right. I managed to leave the new
13 302 upstairs.

14 MR. MARKOWITZ: We have one, your Honor.

15 MR. ASKIN: I have another copy of it, your Honor.

16 MR. CORCORAN: Your Honor, can I approach?

17 THE COURT: Yes. Thank you.

18 All right. I'm prepared to rule on this matter. It
19 has long been the law since at least *Brady versus Maryland*,
20 1963, that the suppression by the prosecution of evidence
21 favorable to the accused upon request violates due process
22 where the evidence is material either to guilt or to
23 punishment, irrespective of the good faith or bad faith of the
24 prosecution.

25 And I'll just pause here a moment and reiterate my

1 belief that there is no evidence here that the Government
2 acted in bad faith in not disclosing the 302 of Jodi Brown. I
3 think the Government recognizes that it would have been the
4 better course to do so, and indeed this case kind of
5 highlights what I think is the general proposition that even
6 in the most complicated case, an open file approach avoids any
7 number of different potential complications.

8 So, the issue of whether or not this was done in good
9 faith or bad faith is not material to my analysis here. I
10 would say that it appears to me that there was an effort to
11 disclose the Government's perception of the contents, that
12 there appeared to have been a desire and intent to follow up,
13 and for reasons that are not entirely clear to me, that the
14 actual disclosure of the 302, which was currently intended,
15 never occurred, probably through what I'll call the fog of
16 trial rather than anything else.

17 The *Brady* standard requires that the -- for the Court
18 to conclude, based on the application of the defendant, that
19 the evidence was suppressed, one, suppressed, two, that it was
20 favorable, and three, that it was material to the defense.
21 And materiality is defined as whether or not the failure --
22 that in order to determine materiality, the Court must find
23 that there exists a reasonable probability that had the
24 evidence been disclosed, the result of the trial would have
25 been different.

1 As the parties know and the record should reflect, the
2 allegation and the basis for Mr. Derry's motion in this matter
3 is the Government's failure to disclose the full Jodi Brown
4 302 that the Government was aware of and summarized but did
5 not disclose, and ultimately, therefore, the question is
6 whether that failure violates the rule in *Brady*.

7 I conclude that there has been no *Brady* violation in
8 this matter for essentially three reasons. To the extent that
9 there was anything in the 302 that was material, that was
10 exculpatory and material, it was not suppressed, it was
11 disclosed. To the extent that any additional materials in the
12 302 were not disclosed, they were neither exculpatory nor
13 ultimately material in this matter.

14 The argument here is that, in essence, that Ms. Brown's
15 statement to the FBI that she did not know why Tyquinn James
16 was murdered was exculpatory or could lead to exculpatory
17 information. I don't think that that's a fair
18 characterization of what she said.

19 It's clear that Jodi Brown, like a number of the other
20 women who had roles in this conspiracy, had a relatively
21 minimal or minor role in the conduct or activities of this
22 drug conspiracy. She was not an organizer or leader. She
23 simply, during one period of the time, allowed her residence
24 to be used as one of the multiple stash houses in this
25 particular matter. And she later disassociated herself for

1 any number of good reasons, what was apparently her own desire
2 to kick drugs and the Derreck Mack incident which resulted in
3 the death of an individual at police hands outside of her
4 home.

5 It is simply not reasonable to conclude that she had
6 any particularized knowledge of information that would be
7 deemed exculpatory as to whether or not Malik Derry was the
8 shooter of Tyquinn James. What she heard later were a series
9 of statements which, based on the most recent 302, can only be
10 fairly characterized as what one normally gets from the old
11 children's game of Telephone, there is some aspect of it
12 that's true, but certain aspects of it that are not true or
13 misleading.

14 The subsequent boring down by the Government into what
15 Ms. Brown had heard suggests that, even if Ya-Ya had testified
16 about what Shaamel Spencer had heard through the scanner, it
17 would simply be viewed in the context of the other evidence,
18 that is, Mykal Derry's call to Spencer saying listen to the
19 scanner, that indeed Mykal had facilitated Malik's shooting,
20 that he became aware of it as soon as it happened, that he
21 alerted other members of the conspiracy to it, and that they
22 would learn through the police scanner that a shooting had
23 occurred and that Malik, indeed, Malik had done it.

24 This would not, in other words, boring down into what
25 Jodi Brown had heard, would not lead to information that was

1 exculpatory. On the other hand, it would have led to material
2 that was inculpatory as to Malik Derry since it would have
3 confirmed and corroborated what was clear on the intercepts,
4 that Malik had obtained the gun from Mykal, that Mykal had
5 facilitated the murder by arranging to deliver the weapon and
6 recover it and facilitated the later hiding of it, and that he
7 communicated to other members of the conspiracy that Malik had
8 done what Mykal had always wanted him or any other enforcer to
9 do for the drug organization, to kill anyone associated with
10 Trevin Allen and, in particular, Tyquinn James.

11 So, I don't believe that this information is
12 exculpatory in any way.

13 Secondly, it doesn't appear that even if the rules of
14 hearsay could be overcome and somehow Ms. Brown or Ya-Ya or
15 someone else could testify that they had heard that Mykal
16 Derry was the shooter, that there's any reasonable probability
17 that that information would have changed the result in this
18 case. It's simply not material.

19 The evidence that Malik was the shooter and that Mykal
20 was not the shooter was overwhelming. The image on the video
21 matches Malik, not Mykal. Mykal's own statements on the wire
22 to Kimberly Spellman and others and the entire circumstances
23 caught on the wire demonstrate that Malik was the shooter.

24 Going back to the 302, it's clear to me that actually
25 would have hurt more than helped because it included

1 inculpatory information that Jodi Brown believed that Mykal
2 didn't have the heart to be the shooter and that Malik had
3 beaten other individuals in her presence and was prone to
4 anger and, therefore, more likely to be the shooter.

5 And it's clear to me, and this is not meant to suggest
6 that Mr. Markowitz is not being honest with me, I know that he
7 would always do so, when he says that he would have followed
8 up if he had the full 302, I think that that's speculation in
9 the sense that ultimately any evidence or statements, hearsay
10 statements that Mykal was the shooter simply are eclipsed by
11 Mykal's decision, which must have been known to the defense,
12 that he was going to take the stand and confess that he was
13 the shooter of James and that it was over a girl.

14 The decision to have the jury hear that from Mykal
15 renders any other testimony in that regard simply irrelevant,
16 cumulative, and likely from a strategic point of view to even
17 deter or distract from the force of Mykal's own very
18 testimony. Stated differently, it's unlikely in my mind that
19 the jury would have found differently, having rejected Mykal's
20 own confession, if they had heard some evidence that he had
21 made such statements earlier. And indeed there is no such
22 evidence that -- no reason to believe that he made such
23 statements earlier, Jodi Brown's trail of hearsay leading back
24 to Mykal's statement apparently to Spencer, listen to the
25 scanner, Lik just splashed TY.

1 So, I think that any possible use of this testimony
2 would not have occurred because Jodi Brown was likely
3 unavailable, her testimony would not have been exculpatory.
4 To the extent that it could be through a chain of inferences
5 and speculation deemed such, it was indeed that, mere
6 speculation, and indeed that speculation seems would have been
7 unwarranted in light of what Jodi Brown has now said. *Wood*
8 *versus Bartholomew* teaches us that merely speculative evidence
9 is not ultimately material, and ultimately the evidence must
10 be material in order to meet the standard in *Brady*.

11 The evidence here was overwhelming. The speculation
12 that the jury might have heard Mykal confess to being the
13 shooter is eclipsed by their -- by Mykal's own confession,
14 clearly unbelievable to the jury, which rejected it and
15 convicted Malik on all of the counts and the Government's
16 theory that Malik indeed was the shooter.

17 So, I find that there's no *Brady* violation in this
18 matter for three reasons. The Government disclosed what was
19 at the heart of the 302, that Jodi Brown did not have any
20 direct knowledge or knowledge about why TY was shot, that
21 ultimately is not favorable to the defense and ultimately not
22 material to the jury's resolution of the case.

23 I'll ask the Government to submit an order denying Mr.
24 Markowitz's *Brady* motion.

25 MR. ASKIN: Yes, your Honor.

1 THE COURT: All right. We now should proceed to the
2 three-step sentencing process, which I'm prepared to do so
3 here today. I assume that the parties know of no reason why I
4 should delay that.

5 MR. ASKIN: No, your Honor. May I just put two
6 comments on the record with respect to the Court's ruling, and
7 this is isn't quibbling with the Court's ruling, of course the
8 Government agrees with the Court's ruling, but there's just
9 two things.

10 One of the things the Court said, and I understand the
11 Court understands this, is the Court found that this was I
12 believe inadvertent on our part, not intentional, and
13 certainly that's the case. But I would say, at one point the
14 Court said that it's not clear why the 302 wasn't turned over
15 and that you thought it was the fog of trial, which I
16 actually, you know, it was my responsibility, my mistake, and
17 I would have turned it over, not because it was *Brady*, but
18 because of, as the Court said, I don't know if I would use the
19 term "open file" because there are security concerns,
20 et cetera, but however, a broader, much broader than *Brady* --

21 THE COURT: It's not for me to judge what your -- my
22 job is to apply the *Brady* standard, not to tell the Department
23 of Justice how it discloses in cases, discloses information in
24 cases. I would just say that I would hope that the Government
25 would, wherever possible, be as open as it can be simply

1 because it creates issues where issues don't have to be
2 created.

3 MR. ASKIN: I completely agree, your Honor, and this
4 was inadvertent.

5 THE COURT: And here we had an instance in which, if
6 I recall correctly, there's a letter or an e-mail stating your
7 intention to turn it over.

8 MR. ASKIN: That's the point.

9 THE COURT: It's not yet available, I think was the
10 phrase.

11 MR. ASKIN: That's exactly right, and Mr. Markowitz
12 and Mr. Madden were given that letter at the same time as
13 counsel for the first four guys who went to trial were given
14 that letter.

15 THE COURT: Isn't that an expression of intent,
16 future intent?

17 MR. ASKIN: It absolutely was, and then it was
18 inadvertent. But what I wanted to point out is when the Court
19 said that I was summarizing, it just wasn't clear. I wasn't
20 summarizing the 302. We did a little investigation to
21 determine whether or not -- because I think Mr. Markowitz and
22 I both at one time thought that the 302 was turned over to the
23 defense, and it turns out that it wasn't and certainly that
24 letter --

25 THE COURT: I'm sorry. In fact, the letter says it's

1 not yet available, meaning it was not yet prepared, I assume.

2 MR. ASKIN: It wasn't yet prepared because that was
3 in September of 2014, and she had just been interviewed for
4 the first time, was interviewed shortly after that a second
5 time. So, what happened was the 302 wasn't turned over in the
6 first batch of all the discovery Special Agent Kopp gave to us
7 because it wasn't done at that time. Then I said to the first
8 group and to Mr. Markowitz and Mr. Madden through that letter
9 that we would turn it over. We later disclosed that that was
10 Jodi Brown. But I never had the 302.

11 Now, I had a responsibility to have the 302, but we
12 were compiling electronic Jencks files of all of our witnesses
13 that we thought we were going to call, and also we were
14 thinking about Brady, whatever, but I didn't realize that this
15 hadn't been turned over. What I summarized in the e-mail was
16 my notes. I was actually looking at my notepad and
17 summarizing my notes, and while I thought my notes were
18 thorough, some of the things that Special Agent Kopp, I think,
19 I believe, accurately wrote down weren't in my notes.

20 So, I just want to make it clear for the record as to,
21 when the Court says, you're not sure why this happened, I
22 believe that that's how it happened. That's my one point. I
23 don't think it changes anything, but I want to make it clear
24 for the record. The second -- had we known that we didn't
25 have the 302, we would have got it and looked at it and I

1 believe turned it over in an abundance of caution.

2 The second point, and this is really just in case there
3 is an appeal, there is some issue, I believe, and Mr.
4 Danilewitz thoughtfully researched this matter the other
5 night, as to whether or not co-conspirator statements, that
6 exception to the hearsay rule, is a two-way street or one-way
7 street, and I believe he found some case law that suggests
8 that it's only a one-way street. And so that I just want to
9 preserve that argument for appeal, that it may have been even
10 more unlikely that they could have got in any of those
11 statements from Jodi Brown or Ya-Ya or anyone like that.

12 THE COURT: Well, I'm not sure ultimately -- I mean,
13 I think the extra 302 helps in the sense that it explains
14 what -- it eliminates some of the ambiguity about what she had
15 heard.

16 MR. ASKIN: Yes, your Honor.

17 THE COURT: But I would -- Mykal took the stand and
18 said I did it, and isn't it fair to say there was some
19 suggestion that he's just -- he was just making that up to
20 save his brother?

21 MR. ASKIN: Well, that was my cross-examination, I
22 believe.

23 THE COURT: Right.

24 MR. ASKIN: Or part of my cross-examination.

25 THE COURT: And wouldn't it be fair to say that the

1 defense might want to call someone who would rebut that by
2 showing that it wasn't recently fabricated?

3 MR. MARKOWITZ: My point exactly, your Honor.

4 THE COURT: So --

5 MR. ASKIN: Yes, but that was my point, is that they
6 might not have had the ability to do that. I don't think
7 anything that's come out -- sorry for sitting.

8 THE COURT: And also it could be a statement against
9 penal interest as well. It could fall under the hearsay
10 exception. If Mykal Derry is walking around saying I killed
11 somebody, why wouldn't that be an exception under 804
12 something?

13 MR. ASKIN: It's possible, it's possible. I don't
14 know exactly how that would have played out, but I think
15 there's a real question as to whether or not anything that
16 Jodi Brown said or that Ya-Ya said would have even been
17 admissible in the case.

18 THE COURT: Based on what we now -- I agree with that
19 based on what we now know Jodi -- what we now believe to be
20 Jodi Brown's source of information.

21 MR. ASKIN: Correct, and I think that's one more way
22 that the recent 302 is helpful. Before it was like completely
23 speculative and now this takes some of the speculation and
24 turns it into even less likely that something would have been
25 exculpatory and material and admissible.

1 THE COURT: All right. I just think that ultimately
2 the issue of whether or not anything that she said could
3 have led -- this issue of whether it could have led to
4 admissible evidence is ultimately speculation, but it's not
5 frivolous, and depending on what she would have said, what she
6 ultimately said, it could very well have been potentially
7 exculpatory. But I want to be clear that even if it had been
8 exculpatory, I'm not sure it would have -- I am convinced it
9 would not have been material, and it has to be both, because I
10 think the evidence that Malik was the shooter is overwhelming,
11 that any statement by Mykal I had him -- I killed him, really
12 was a statement of I had him killed, and that's true, I
13 believe, and I believe the jury found that.

14 All right. Mr. Markowitz, you should have an
15 opportunity to respond both to my comments, to Mr. Askin's,
16 and add anything else you wish to on the record on this issue.

17 MR. MARKOWITZ: My only response, your Honor, is I
18 believe that the Government is focusing on the actual shooting
19 and how that 302 would play into that, where I believe, and
20 maybe I wasn't clear, that I think it was more important with
21 regard to my position as to the motive and in furtherance of
22 the conspiracy, and that's why I think it was both exculpatory
23 and material.

24 THE COURT: Yes, and that's an important distinction.
25 To be clear, and I'll have more to say on this issue, I've

1 already ruled that I believe that the -- on the motion to
2 dismiss the 924(c) count, which requires a finding by the
3 jury, and this Court should scrutinize the evidence to ensure
4 that it was justified, that the shooting of Tyquinn James,
5 which is basically the basis for the 924(c), was in
6 furtherance of the drug trafficking conspiracy. There was
7 discharge, the weapon was discharged in furtherance of the
8 drug trafficking conspiracy. I've concluded that it was, and
9 I have some further thoughts on this issue of the
10 cross-reference, on that issue.

11 So, the question is whether or not Jodi Brown's hearing
12 statements that Mykal killed TY would be supportive of the
13 defense theory that the shooting was for something other than
14 -- or was evidence -- was exculpatory because it was evidence
15 in the possession of the Government that the shooting was for
16 something other than in furtherance of the drug conspiracy
17 because Jodi Brown, being a member of it, would have likely
18 heard that that was the reason why, I believe ultimately that
19 that's mere speculation, that it doesn't in a material way
20 undermine the Government's theory that the shooting was in
21 furtherance of the conspiracy for reasons I have articulated
22 and will articulate, and ultimately doesn't change the
23 evidence in the case, which supported the, not only the notion
24 that Malik was the shooter, but that based on the jury's
25 conviction under count 10, that it was done in furtherance.

1 I'm not going to articulate now the reasons that I
2 believe support that, but my finding on materiality, to be
3 clear, is twofold: That ultimately any statement by Ms. Brown
4 or any of the individuals that she was thinking of when she
5 made her statements, there's no reasonable certainty that such
6 testimony would have undermined the jury's finding both that
7 Malik was the shooter and, second, that it was done in
8 furtherance of the drug conspiracy.

9 All right. Anything else?

10 MR. ASKIN: No, your Honor.

11 MR. MARKOWITZ: No, your Honor.

12 THE COURT: Mr. Markowitz, do you wish to take a
13 break around this time?

14 MR. MARKOWITZ: Yes, that would be perfect, your
15 Honor.

16 THE COURT: All right. What time would you like to
17 reconvene?

18 MR. MARKOWITZ: Could we reconvene at 11:15?

19 THE COURT: Let's do that. Let's reconvene at 11:15
20 and I'll start the step one sentencing process. I believe
21 that there is some clarity on that. I've read the *Collado*
22 briefs as well and appreciate those additional submissions.
23 We'll address that after the break.

24 THE DEPUTY COURT CLERK: All rise.

25 MR. MARKOWITZ: Your Honor, just one brief point. As

1 you know, the last time we were here, Mr. Derry has a motion
2 that he wishes to address the Court. So, whenever the Court
3 thinks that's appropriate, he's prepared.

4 THE COURT: All right. Very good. And I indicated
5 at the time that I would allow him to speak, and I think it is
6 appropriate and I'll do so based on the time he thinks
7 appropriate. Do you want to do that at 11:15, or do you want
8 to do that sometime thereafter?

9 MR. MARKOWITZ: That would be perfect, your Honor.

10 THE COURT: All right. Very good. I'll hear Mr.
11 Derry at 11:15.

12 (Recess at 10:52 a.m..)

13 (In open court at 11:22 a.m..)

14 THE DEPUTY COURT CLERK: All rise.

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

16 All right. I had indicated last time and it's been
17 reiterated here that Mr. Derry, although he's represented by
18 counsel, wishes to speak to the Court directly. I perhaps
19 should just say to Mr. Derry that, and this is not intended to
20 chill anything you want to tell me, but you have an
21 opportunity to allocute at step three of the sentencing
22 process and you will be offered that opportunity. You're not
23 obligated to do it, but I'm happy to hear anything that you
24 wish to tell me at that time.

25 But everything you say to me, I will consider at the

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1 sentencing here today, and there are profound issues that must
2 be resolved. Ultimately, this Court must impose a sentence
3 that's sufficient but not greater than necessary to advance
4 certain statutory factors, and you may know the Government is
5 asking for a life sentence, you should know that.

6 So, understand that anything you say to me, after you
7 have had a conversation with Mr. Markowitz about whether
8 that's wise or not, I'm going to consider in all respects.
9 So, with that understanding, sir, I'm happy to hear anything
10 you wish to say.

11 MR. MARKOWITZ: Your Honor, just to put the Court at
12 ease, this is really just a legal argument that he wanted me
13 to put forth.

14 THE DEFENDANT: On the conviction.

15 MR. MARKOWITZ: Yes. So, I'm not concerned that he
16 will in any way hurt himself with regard to the latter part of
17 our sentencing. Otherwise, I would have advised him not to,
18 unless I heard what he was going to say.

19 THE COURT: All right. Very good. I appreciate that
20 clarification.

21 All right. Mr. Derry. Good morning, sir.

22 THE DEFENDANT: Good morning, Mr. Hillman. With the
23 result of my conviction for the 924(c) count, I got convicted
24 of a statute that wasn't criminalized by 924(c) because the
25 jury had been misinstructed on. It said that I could be

1 convicted or found guilty for using or carrying in furtherance
2 of a drug trafficking crime, and that's not criminalized by
3 924(c) because the statute says that you can use and carry and
4 during and in relation to. So, it makes it two prongs.

5 THE COURT: All right.

6 THE DEFENDANT: That's in the verdict form and that's
7 in the jury instruction, also. So, the jury had been
8 misinstructed on that count alone.

9 THE COURT: Because they were -- I'm sorry, I don't
10 quite understand your argument. Could you articulate it again
11 for me?

12 THE DEFENDANT: Because the using and carry prong
13 goes to during and relation to, and it says in the jury
14 instruction and the verdict form that I used and carried in
15 furtherance of a drug trafficking crime. So, it's two prongs
16 mixed. And that's not a crime that's criminalized under
17 924(c) because the statute says that you can use and carry
18 during and in relation to or you can possess in furtherance
19 of. That's two different prongs that have been mixed up. So,
20 the jury has been misinstructed. And my due process rights
21 were violated because --

22 THE COURT: Because it was not clear which of those
23 two theories the government was proceeding upon?

24 THE DEFENDANT: Yes. And the prosecution has the
25 burden of proving every element of the crime beyond a

1 reasonable doubt. Accordingly, when a trial judge omits an
2 element of the offense charged from the jury instructions, it
3 deprives the jury of its fact finding duty and violates the
4 defendant's due process rights.

5 THE COURT: All right.

6 MR. CORCORAN: Your Honor, if I might, because he
7 sort of explained it to me.

8 THE COURT: Yes.

9 MR. CORCORAN: So, essentially what's being argued is
10 that possession of a firearm is a lower standard than use, but
11 being during and relation to is a lower standard than in
12 furtherance of, and that the standards were confused so that
13 the higher standard was used for the higher standard when
14 really those elements are more mixed, and in creating -- in
15 doing so, it actually created a third prong of 924(c) as an
16 addition to the two prongs that are already there.

17 This is most clearly set out I think, your Honor, in
18 *U.S. v. Hunter*, 558 F.3d 495 from the Sixth Circuit in 2009,
19 and I believe it's been recognized in the Third Circuit in
20 *U.S. v. Jenkins*, 347 Fed. Appx. --

21 THE COURT: I'm sorry, 347?

22 MR. CORCORAN: I'm sorry, 347 Fed. Appx. 793, 2009
23 Third Circuit.

24 THE COURT: So, that's a non-precedential opinion?

25 MR. CORCORAN: I did not see, your Honor --

1 THE COURT: Its presence in the appendix suggests
2 it's not.

3 MR. CORCORAN: Yes, I agree, but I just can't say
4 with surety.

5 MR. ASKIN: Your Honor, could we get those cites
6 again, if we may?

7 THE DEFENDANT: I'd like to cite a case. I've got a
8 case right here. It stems from me searching *Alfonso Mendoza*
9 from the Ninth Circuit where they mixed the prongs together
10 and it results in reversible error. Then traced it back to a
11 Third Circuit case, which is *United States versus Jose Alberto*
12 *Rosa* and the statute number is 399 F.3d.

13 THE COURT: I'm sorry. 399 F?

14 MR. CORCORAN: 399 F.3d 283, 2005.

15 THE COURT: All right. I don't have the -- do you
16 have the verdict form on the docket? Can you print it for me?
17 I don't remember off the top of my head exactly what the
18 verdict form said.

19 MR. CORCORAN: The verdict form, your Honor, the
20 verdict form for count 10 said *that* with respect to count 10,
21 which charges defendants Mykal and Malik Derry with
22 brandishing a firearm in furtherance of the drug trafficking
23 conspiracy, number 7 says, discharging in furtherance. Number
24 11 said aiding and abetting the use, carrying or possession in
25 furtherance, and aiding and abetting, question 9, aiding and

1 abetting the brandishing in furtherance of the drug
2 trafficking. So, it's pretty clear that in every instance
3 they used in furtherance of and also used all of the use,
4 possession, brandishing or --

5 THE DEFENDANT: Discharge.

6 MR. CORCORAN: -- discharge together.

7 THE COURT: But they acquitted on brandishing.

8 THE DEFENDANT: But the Government was still seeking
9 10 years.

10 THE COURT: Based upon a finding that the weapon was
11 discharged. Bear with me just one moment.

12 MR. CORCORAN: Your Honor, if I might, also, in the
13 jury instructions, number 53, count 10 charges both defendants
14 with using, possessing or carrying in furtherance, that the
15 defendant possessed, used or carried during and in relation.
16 So, it was sort of all over the place. But in most instances,
17 it's all of the potential violations in furtherance of the
18 drug conspiracy.

19 THE COURT: All right. My recollection is the "in
20 furtherance" language was added after a Supreme Court case
21 when the statute previously had read "uses, carries or
22 possesses," and the Court had held that mere possession had to
23 be in furtherance in order to be different than the other
24 statutory definitions. So, mere possession is not enough.
25 One has to possess in furtherance of, or use it or carry it,

1 carrying being a more specific version or example of possess.
2 One can possess but not use or carry, and this is why Congress
3 added the additional element that the possession, which could
4 be, it could be in a closet, for example, and it raises a
5 factual question of whether or not that possession is in
6 furtherance of the crime, and you then delve into things like
7 accessibility and so forth.

8 MR. CORCORAN: Your Honor, if I might.

9 THE COURT: Yes.

10 MR. CORCORAN: But the conclusion of *Hunter* that Mr.
11 Derry is talking about is that by mixing the prongs, quote,
12 the jury charge constructively amended the 924(c) count when
13 mixing the higher standard with the lower standard, one with
14 the higher standard, another vice versa.

15 THE COURT: And why isn't that cured by the
16 interrogatories, which --

17 MR. CORCORAN: Because they used the same language
18 where use and possession also are referred to as in
19 furtherance of as opposed to use having a different -- or
20 possession having a different standard.

21 THE COURT: Well, here they were instructed that,
22 with respect to count 10, they could find that he used, he
23 carried or he possessed a firearm in furtherance.

24 THE DEFENDANT: And brandish and discharge goes to
25 during and in relation to.

1 THE COURT: Hold on, Mr. Derry.

2 THE DEFENDANT: I apologize.

3 THE COURT: Hold on one second. Putting aside aiding
4 and abetting liability, which is separate, the jury was asked
5 to find separately that there was a discharge of the weapon in
6 furtherance, which actually, arguably, is more than the
7 Government had to prove. They could have found that he used
8 or carried under special interrogatory 5 and not possessed in
9 furtherance. Such a use or carrying during and in relation to
10 the drug trafficking crime would have sustained a conviction
11 under 10 without a finding of in furtherance, and that a
12 further finding that it was discharged would have resulted in
13 the mandatory minimum.

14 But here they made a finding that the discharge was in
15 furtherance. That finding suggests that, on count 5, that
16 they made a determination that he possessed in furtherance,
17 which is the higher standard, the highest standard, the
18 standard Congress added after the Supreme Court said you can't
19 conflate the two. To the extent that there was any confusion,
20 that suggests that it was in Mr. -- the Government set for
21 itself a higher standard than it needed to set, and the jury
22 found under that heightened standard guilt beyond a reasonable
23 doubt.

24 THE DEFENDANT: But see, my argument was that using,
25 carrying, brandishing and discharging goes to one prong. It

1 says in Congress that it can go to in furtherance of, only
2 possess can go in furtherance of.

3 THE COURT: Right.

4 THE DEFENDANT: So, then two elements, which is
5 brandishing and discharging, goes to a whole separate prong of
6 924(c).

7 THE COURT: True, but then the Government has less of
8 a burden. The confusion actually, if there was confusion at
9 all, benefited from you because -- benefited you, arguably, in
10 that the failure of the Government to separate out those two
11 different prongs meant that they assumed for themselves the
12 higher burden of proving that the use, carrying and possessing
13 any of those were in furtherance, even though the statute only
14 requires that the possession be in furtherance. Correct, Mr.
15 Askin?

16 MR. ASKIN: I believe so, your Honor. I understand
17 the defendant or the defense point that use and carry is
18 generally, the language there is during and in relation to.

19 THE COURT: Yes.

20 MR. ASKIN: Whereas possession is in furtherance of,
21 and I hadn't really thought about where brandishing and
22 discharge comes in as to where that standard is because
23 obviously we haven't briefed this. I wasn't aware we were
24 going to have this argument today.

25 THE COURT: Well, you start with the language of the

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1 statute. Discharge is the sentencing provision, which is an
2 element, has to be an element because it has the effect of
3 both -- of imposing a mandatory minimum. We know after --

4 MR. ASKIN: Alleyne.

5 THE COURT: -- Alleyne that that's a requirement.

6 MR. ASKIN: Correct.

7 THE COURT: But it's not part of the operative --
8 it's not part of the elements as set forth in (c)(1)(A).

9 MR. ASKIN: Right.

10 THE COURT: It becomes an element because of the
11 enhanced penalty, but it -- I think a fair construction of the
12 statute is that one can use during and in relation and
13 discharge and get the mandatory minimum.

14 MR. ASKIN: Right, the 10-year mandatory minimum
15 you're talking about?

16 THE COURT: Yes.

17 MR. ASKIN: Right. I do think, and I'll have to take
18 a closer look at it, but there's a few things here. One, that
19 if possession in furtherance is a higher standard for the
20 Government, and that does seem to be where the confusion is,
21 that the Government is saying use, carry, possess, brandish,
22 discharge in furtherance, then if we took on a higher
23 standard, there's no prejudice to the defendant.

24 And also I think that this has to be construed not on
25 the facts of those cases, but on the facts of this case where

1 the evidence is clear that the defendant actually carried the
2 gun, he used the gun, he discharged the gun. They found that
3 he didn't brandish it, and there was a very clear -- I mean,
4 the jury seemed smarter on that issue than any of us, at least
5 I shouldn't talk for the Court, but than any of us, we didn't
6 recognize that, so they followed this very closely. I think
7 if we took on a higher standard, if that's true that we took
8 on a higher standard, and I think it is, I'll have to look at
9 this more closely, in furtherance of, then there's no
10 prejudice to the defendant.

11 I would also point out that this is a situation where I
12 recall, during the Court's charge conference, that this was
13 sort of a collective effort, and I don't believe there was any
14 objection whatsoever to the Court's instruction, nor was there
15 any effort to distinguish these prongs during arguments in
16 opening or closing, I believe.

17 So, I think this is sort of a point error type of
18 thing, and I don't think the defendant can show that he has
19 been prejudiced by any of this. Of course, my remarks are
20 from what I can see right now without fully researching this,
21 and obviously this issue hasn't been briefed, but I don't see
22 any circumstance where the defendant, having not objected to
23 these instructions, can say that the, on these facts, that it
24 would have changed the outcome.

25 THE COURT: All right. Anything else?

1 MR. MARKOWITZ: Nothing, your Honor.

2 THE COURT: All right. I'm going to deny the motion.
3 I do believe that there may very well be a waiver of any
4 objection to the instructions in light of the dialogue that
5 occurred, the opportunities to object, and the general
6 acquiescence in the instructions that the Court gave.

7 Beyond that, it does not appear that, to the extent
8 that any of these different statutory crimes, the divisible
9 crimes found in (c)(1)(A) were conflated in any way, led to an
10 improper verdict or a misleading of the jury. Indeed, I
11 believe that the Government undertook a burden higher than
12 they needed to.

13 I focus on special interrogatory 7, in which the jury,
14 "With respect to count 10, which charges defendant Mykal Derry
15 and Malik Derry with discharging a firearm in furtherance of
16 the drug trafficking conspiracy charged in count 1 of the
17 indictment, we, the unanimous jury, find defendant Malik Derry
18 guilty." Here, therefore, the jury found beyond a reasonable
19 doubt that Mr. Derry discharged a firearm in furtherance of
20 the drug trafficking conspiracy.

21 As Mr. Derry points out, (c)(1)(A) has several
22 divisible crimes, and discharging a firearm in furtherance is
23 not required by the statute. Indeed, one could discharge the
24 firearm while one was using, during and in relation to the
25 crime, a lesser standard; could have discharged carrying a

1 firearm during and in relation to, a lesser standard; and yet
2 they found that he discharged a firearm in furtherance of the
3 drug trafficking conspiracy.

4 This presumes and incorporates a finding of use and
5 carrying -- if one discharges, one is using; if one
6 discharges, one is carrying -- and eliminates any of the
7 ambiguity that the Supreme Court found in the earlier language
8 of the statute addressing or concerning the issue of
9 possession. There is no doubt that the elements of the
10 offense as found in (c)(1)(A) were found by this jury beyond a
11 reasonable doubt and that no confusion occurred.

12 If we had not had these special interrogatories, a
13 larger issue may have been -- may have presented itself, but
14 it's not here in this case on this finding by the jury. I
15 reject the argument that the issues were confused and
16 conflated and that the jury could have found lesser facts
17 which do not sustain the conviction that was ultimately
18 returned.

19 All right. Step one. The presentence report in this
20 matter does not make a detailed separate calculation as to
21 the -- as to count 1, and this is not to fault a report that's
22 extremely well done and comprehensive. The reason for this I
23 think is that ultimately, I think the reason is clear,
24 Probation concludes that the cross-reference in 2D1.1 applies
25 in this matter, and, therefore, does not separately engage in

1 a calculation at step one except in a conclusory fashion. I
2 shouldn't be heard to say it doesn't do it at all. It just
3 doesn't lay it out in the way that we normally see. In fact,
4 there is a calculation, and I believe it's --

5 MR. MacAVOY: It begins at page 58, your Honor.

6 THE COURT: Thank you, on page 58. We'll see in
7 paragraph 206, without the cross-reference to murder, the
8 guideline for a violation of 21, United States Code, 860 is
9 2D1.2(a)(1). So, maybe I was using the wrong guideline here.
10 So, let's take through -- let's go through the steps as the
11 Government argues for the calculation as if no cross-reference
12 is adopted by the Court. If I were to apply that
13 cross-reference and to be wrong, I think the record should
14 establish what the sentence would be on counts 1 and 10
15 sentenced without the cross-reference.

16 MR. DANILEWITZ: Your Honor, the United States
17 submitted its brief at docket number 874 dated July 13th, and
18 in sum and substance, the Government's position on further
19 reflection is that we think that a fair and reasonable
20 specific attribution of a quantity to Mr. Derry is in the
21 range of 400 to 700 grams, and that's after taking a searching
22 and individualized inquiry into the specific facts of his role
23 in the case, as we are required to do by the Third Circuit's
24 *Collado* decision.

25 The Government sets forth in some detail in bullet

1 points at pages 5 and 6 of its letter brief a summary of the
2 ways in which Mr. Malik Derry functioned as a distributor and
3 enforcer on behalf of the drug gang, and in light of that
4 degree of participation, it seems, it seems fairly clear that
5 he is on the hook, so to speak, for the entirety of that 400
6 to 700 gram quantity.

7 The Government is not waiving an argument as to the
8 possible attribution of additional quantities of heroin to Mr.
9 Derry. Nonetheless, we feel that it is entirely fair and
10 conservative to attribute the 400 to 700 gram range to him.

11 All of this obviously becomes academic, as the Court
12 points out, if the cross-reference is applied, and the
13 Government believes that it should be applied, but
14 nonetheless, that's the Government's view, that in light of
15 his role as a distributor and enforcer, specifically for all
16 the reasons set forth in the brief, that 400 to 700 gram
17 quantity applies, and that triggers a starting base offense
18 level of 26.

19 With respect to, we did in a footnote, with not a lot
20 of, admittedly, a lot of detailed analysis, we did set forth
21 an attribution of two points under 2D1.1(b)(2) for violence or
22 credible threats of violence. I think that the defense
23 correctly points out that in the commentary to 2K2.2, the
24 924(c) provision, the specific offense characteristics under
25 2D1.1 would not apply as a result of the 924(c) offense. So,

1 our position on further reflection is that those two points
2 should probably not apply.

3 THE COURT: Well, they only apply -- well, I agree
4 with your legal analysis, but I think as a practical matter,
5 I've said and I'll make it clear now that my -- if I adopt the
6 cross-reference, this calculation under count 1 is merely, and
7 I shouldn't be issuing advisory opinions, but it's merely to
8 say what I would have -- what I would do or would have
9 concluded or would find if I didn't apply the cross-reference.

10 MR. DANILEWITZ: Correct.

11 THE COURT: So, it would be double counting to apply
12 the cross-reference and add the two points.

13 MR. DANILEWITZ: Yes, that's exactly right.

14 THE COURT: I agree.

15 MR. DANILEWITZ: And again --

16 THE COURT: But I'm assuming that I'm not -- I'm
17 assuming for this purpose, for the purpose of calculating
18 count 1 and count 10 now, that I'm not applying the
19 cross-reference.

20 MR. DANILEWITZ: Correct, your Honor.

21 THE COURT: I think I should go through the analysis
22 of what it would be.

23 MR. DANILEWITZ: Understood, that's my assumption,
24 too, and that's why I preface this by saying, this becomes
25 somewhat academic, although nonetheless I think it is

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1 important for the fairness of the record to go through this
2 analysis, but this assumes, again, that the cross-reference
3 would not apply. The Government believes that it would.

4 So, continuing with the analysis assuming the
5 cross-reference does not apply, the first bullet point under
6 footnote 1 on page 2 of our submission, we withdraw and
7 retract. We think that would be double counting.

8 Similarly, with respect to the third bullet point,
9 2D1.1(b)(12), maintaining a premises, which would trigger an
10 additional two points, we think that the issue could be
11 arguable, but it's not the strongest argument, candidly, under
12 these facts that Mr. Malik Derry should be -- should have the
13 attribution of those two points for maintaining a premises.
14 His brother Mykal was convicted of a separate count charging
15 maintaining a premises. Malik Derry was not charged with that
16 count.

17 Now, obviously, that's a separate issue from whether it
18 could be applied for sentencing purposes, but the evidence
19 that we have relating to his access to the trap houses is of a
20 very different kind to what we have in the case of Mykal
21 Derry. There we had him, there was a search of Kim Spellman's
22 residence. We have the testimony of expert DEA Special Agent
23 Dave McNamara, if I recall correctly, was that it appeared to
24 him to be something of a drug mill. He clearly had control
25 over those premises in the sense that he had regular access to

1 them. He wasn't the lessee, I guess, of the premises, but he
2 had regular access to them.

3 The situation with Malik Derry is quite different in
4 that his access to the trap houses is not too different from
5 that of many of the other co-conspirators. We saw video of
6 him inside one of the trap houses at 307 MLK. We saw video of
7 him outside 238 and 236 Rosemont Place in the Stanley Holmes
8 project. But beyond that, there's nothing really to show that
9 he exercised anything more than the kind of control or access
10 that any of the other co-conspirators did separate from Mykal
11 Derry. So, that leaves us at a level 26 at this point in the
12 Government's calculation.

13 The final bullet point relates to the drug trafficking
14 in a protected location. That we think clearly does apply
15 because there's ample evidence of all of this activity going
16 on in the Stanley Holmes --

17 THE COURT: He's actually convicted of it.

18 MR. DANILEWITZ: Correct, going on in the Stanley
19 Holmes public housing project, and in light of that, we think
20 that's a pretty easy call, so two points should be applied for
21 that.

22 The result of that is an offense level of 28, again,
23 all of us assuming that we're talking about in the absence of
24 a cross-reference, and the offense level of a 28, combined
25 with a criminal history category of III, takes us to an

1 advisory guideline range at step one of 97 to 121 months. So,
2 in the Government's view, that would be the appropriate
3 advisory range at step one.

4 THE COURT: I read your brief differently.

5 MR. DANILEWITZ: I'm sorry, your Honor?

6 THE COURT: I read your brief differently. It's
7 2D1.1 -- I mean, 2D1.2 is two plus the amount of drugs,
8 correct?

9 MR. DANILEWITZ: Correct.

10 THE COURT: And the Government argues to me that the
11 amount of heroin fairly attributable to Mr. Malik Derry, when
12 one excludes the transactions after his arrest in February
13 when it subtracts the, what I'll call the Ellis deals and
14 subtracts the period during which he was incarcerated, October
15 2010 through October 2012, concludes, the Government concludes
16 that it's 400 but less than 700 grams of heroin.

17 MR. DANILEWITZ: Correct.

18 THE COURT: That's 26 plus two.

19 MR. DANILEWITZ: That's right.

20 THE COURT: Plus two for violence would be 30.

21 MR. DANILEWITZ: Well --

22 THE COURT: If I reject, which I'm frankly prepared
23 to do, I hear you to say that you are withdrawing your -- any
24 argument that Mr. Malik Derry maintained a premises. I think
25 that's right.

1 MR. DANILEWITZ: Right, that's correct. So, putting
2 the premises argument aside, as I read the commentary to
3 2K2.2, which the defense brings to our attention in their
4 submission, I see that as quite clearly saying if there's a
5 conviction -- this is where it becomes a little bit difficult
6 to put these out of our head. If there's a conviction on
7 924(c), then the instruction, based on the commentary under
8 2K2.2, and I can point the Court to the page, is that you do
9 not apply the specific offense characteristics of the
10 underlying offense that the 924(c) relates to. So, you would
11 not apply 2D1.1(b)(2), which is the violence or credible
12 threats of violence specific offense characteristic, if you
13 are basing that on the 924(c) conviction.

14 THE COURT: All right. Well, what I would hold is
15 that I calculate the conviction under count 1 in the following
16 way, level 28, criminal history category III, and an advisory
17 guideline range of 97 to 121 months, if I also apply the
18 cross-reference. If I don't apply the cross-reference, I am
19 calculating it as a level 30, criminal history category III,
20 of 121 to 151 months.

21 MR. DANILEWITZ: And, your Honor, so I'm just trying
22 to follow the Court. You're adding the 2D1.1(b)(2) violence
23 specific offense characteristic you're saying --

24 THE COURT: I'm saying, if I find the
25 cross-reference, I can't add two points for violence. It's

1 double counting.

2 MR. DANILEWITZ: Right.

3 THE COURT: In such a circumstance, and I haven't
4 ruled on that yet, I would calculate as a separate calculation
5 count 1 to be a level 30, because the absence of a
6 cross-reference would allow the application of the two points
7 for violence because the Court concluded he discharged a gun
8 in furtherance. If I apply the cross-reference, I would
9 still, just for the clarity of the record, I would calculate
10 it at a level 28.

11 MR. DANILEWITZ: Understood. So, if you do not apply
12 the cross-reference, I guess the issue is that if you do not
13 apply the cross-reference but the 924(c) conviction remains,
14 obviously the jury has found that, so I mean I guess --

15 THE COURT: I would consider arguments as to where
16 within -- whether or not I would adopt a guideline of 121 --
17 let's say I make that calculation. Then I would hear argument
18 at step three, assuming no departures, as to whether that --
19 what I should add 10 years to. Should I add 10 years to a
20 month, a day, life, the statutory max; should I adopt the
21 guidelines, 121 to 151; should I pick one within those
22 guidelines; should I vary up or down?

23 MR. DANILEWITZ: I guess, your Honor, the way --

24 THE COURT: That's what I would do. That's why I
25 think it is important for me to -- I just think it's important

1 for me to do it, period.

2 MR. DANILEWITZ: Sure. No, I agree. I think it is
3 important to be thorough for the record. I just want to be
4 clear, though, the way I'm reading 2K2.2, the conviction on
5 924(c) essentially precludes you from adding those two points
6 to the 2D1.1 calculation on count 1. I might be misreading
7 that, but that's the way I'm reading it.

8 THE COURT: Oh, I'm sorry. That's a different
9 argument. In other words, the violence is captured within --

10 MR. DANILEWITZ: The 924(c).

11 THE COURT: -- the 924(c), and I can't add it in as a
12 specific offense characteristic to the count I'm adding it to.

13 MR. DANILEWITZ: Exactly right.

14 THE COURT: All right. And you concede that?

15 MR. DANILEWITZ: I do. I believe that's the
16 defense's argument. I think that's the correct reading of the
17 commentary.

18 THE COURT: All right. That was lost on me and I
19 appreciate you pressing the issue, because that does sound
20 right. It's a finding of discharging a weapon in furtherance
21 of a drug trafficking conspiracy, drug trafficking crime, and
22 it's not nothing, as one would say, 10 years.

23 MR. DANILEWITZ: Right.

24 THE COURT: So, it kind of makes the two points
25 sound --

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1 MR. DANILEWITZ: Duplicative.

2 THE COURT: -- duplicative.

3 MR. DANILEWITZ: It does, because if you are relying
4 on the same conduct and you're separately sentencing on
5 924(c), you're kind of relying on that to add the two points
6 on count 1, it does have a feel of just being duplicative.

7 So, for that reason, the Government believes that
8 there's the 2D1.1(a)(5) and 2D1.1(c)(7) base offense level of
9 26, coupled with the protected location enhancement of two
10 points under 2D1 -- I have it cited as 2D1.2(a)(1), but I
11 think there may also be a provision under 2D1.1.

12 THE COURT: Where is the application that says this
13 would be double counting?

14 MR. DANILEWITZ: Under 2K2.2, your Honor, in the
15 commentary. If you have the 2015 version of the guidelines
16 manual, that's comment 4, which appears on --

17 THE COURT: 2K2.2 has been deleted?

18 MR. DANILEWITZ: Oh, I'm sorry.

19 THE COURT: 2.4.

20 MR. DANILEWITZ: 2.4, I think it is. That sounds
21 right. Yes. I'm sorry, it is 2K2.4, and it is comment 4
22 which appears on page 259. There's actually a sentence
23 towards the middle of that page, a sentence under this
24 guideline also accounts for conduct that would subject the
25 defendant to an enhancement under 2D1.1(b)(2).

1 THE COURT: Well, that can't be any clearer, so
2 that's fine.

3 MR. DANILEWITZ: Right. Okay.

4 THE COURT: So, in any event, I would calculate the
5 advisory guideline range for count, save for Mr. Markowitz's
6 arguments in this regard, I know he has issues about the 400
7 to 700, to be a level 28 regardless of the application of the
8 murder cross-reference, any additional points for violence
9 being accounted for by the mandatory consecutive sentence
10 imposed upon a conviction for the 924(c).

11 MR. DANILEWITZ: Thank you, your Honor.

12 THE COURT: All right. And that would, the 28
13 comprises the two for the conviction of that conspiracy being
14 within a protected zone and the amount of the drugs and no
15 additional enhancements for violence or for maintaining a
16 premises. Having access to it, hanging around it is not the
17 same as controlling it, in my mind.

18 MR. DANILEWITZ: Agreed.

19 THE COURT: All right.

20 MR. DANILEWITZ: Thank you, your Honor.

21 THE COURT: All right. Thank you.

22 Mr. Markowitz.

23 MR. MARKOWITZ: Your Honor, I'm going to have Mr.
24 Corcoran address this. He worked on this part of the case,
25 your Honor.

1 THE COURT: Very good. Mr. Corcoran.

2 MR. CORCORAN: Good afternoon, your Honor.

3 THE COURT: Yes.

4 MR. CORCORAN: So, the defense's position is, first
5 of all, that the, as set out in the brief, the entire amount
6 of the drugs attributed to Mykal Derry are not attributable to
7 Malik because there's nothing in the record that supports he
8 was an enforcer. There's no text messages saying go beat up
9 somebody for stealing drugs, no go threaten this guy. The
10 only thing that said he was an enforcer is the Government's
11 expert, and I think that's fairly thin gruel for determining
12 that somebody is an enforcer when there's nothing else on the
13 record that supports it.

14 But even if you are going to say that he's an enforcer
15 and, thus, should have the entire amount of drugs attributed
16 to Mykal Derry also attributed to Malik Derry, the Government
17 actually concedes in its footnote that it does not want to
18 attribute to Mr. Derry drugs that were distributed when Mr.
19 Malik Derry could not have been a part of the conspiracy.
20 Specifically, they talk about the period from the February
21 12th arrest to the March, I think it's 18th end of the tapes.
22 If you subtract that out, Mr. Derry becomes much lower in the
23 400 to 700 gram range.

24 But the defense also contends that he was not a member
25 of the conspiracy from the day that he got out of jail, which

1 is the Government's contention. There's nothing in the
2 record, he doesn't show up on the wiretaps until November,
3 late November at the earliest, and really the first thing that
4 says he's a member of the conspiracy for selling drugs is a
5 December 1st text message saying I've got the whole joint laid
6 out for you.

7 If you subtract that first month and then the last
8 month, so the Government says everything from the beginning of
9 the wiretap -- or from when he gets out of jail until March
10 18th, but then it admits in the footnote that from February
11 12th to March 18th shouldn't be included, if you also take in
12 the first month when the Government can't show that he was a
13 member of the conspiracy because he's just not showing up, the
14 amount of drugs that could be attributed to him, assuming that
15 there is this sort of one-to-one relationship between number
16 of days in the conspiracy or time in the conspiracy with
17 amount of drugs, so if you're not in the conspiracy for a
18 certain percentage of time, you cannot have that same
19 percentage attributed to you as drugs that you are responsible
20 for under *Collado*, then he actually falls below the 400 gram
21 range.

22 The percentages are laid out in the brief, but I think
23 he ends up at 371 grams of drugs that could be attributed to
24 him and not the 574 that they actually attribute to Mykal and
25 want to attribute completely to him through his role as --

1 their attribution of his role as an enforcer.

2 THE COURT: So, just to make sure I understand your
3 argument, you are using a daily number, if you will.

4 MR. CORCORAN: What we're saying is that, so, the
5 Government in its footnote, in the reply brief, says it
6 doesn't want to attribute any drugs to Malik from February
7 12th through March 18th, a period when he was in jail.

8 THE COURT: Right.

9 MR. CORCORAN: So, the implication of that is that
10 those amounts, those days should be subtracted from the total
11 days that he is a member of the conspiracy.

12 THE COURT: Right.

13 MR. CORCORAN: There's a percentage of days that that
14 represents, and so you take that same percentage away from the
15 571 total that Mykal distributed.

16 THE COURT: Okay. So, it's based on a percentage.

17 MR. CORCORAN: Right. So, that gets you to slightly
18 more than 400. We're suggesting also that the Government
19 can't show, because there are particularized searches required
20 by Collado, that the Government can't show he was a member of
21 the conspiracy from the day he got out of jail through we'll
22 say November 18th, which I believe is the first text message
23 that he shows up, go pick up something for me. If you
24 subtract those days as well and the corresponding percentage,
25 the amount of drugs that's attributable to Malik is I believe

1 371, which is below the 400 to 700 gram range.

2 The Government implicitly applies this in that footnote
3 and we're just extrapolating out saying there's no basis,
4 because you have to do the particularized search to what he
5 actually did, you can't show that he was doing anything from
6 October 21st until November 18th at the earliest, but really
7 the first thing he did for the conspiracy was, as far as
8 selling drugs or distributing drugs, was December 1st. Either
9 way, doing this math, he falls below 400 grams.

10 And so the defense's position is that rather than
11 starting at a base level of 26, adding two for the protected
12 premises, he actually starts at 24, add two points for the
13 protected premises.

14 THE COURT: All right. Very good. Thank you, Mr.
15 Corcoran.

16 Mr. Danilewitz.

17 MR. DANILEWITZ: Thank you, your Honor. May I have
18 just one moment, your Honor?

19 THE COURT: Yes.

20 MR. DANILEWITZ: Thank you, your Honor.

21 With respect to the issue of Mr. Derry, and when I say
22 Mr. Derry for our purposes, obviously I'm referring to Malik
23 Derry for today, not being in the conspiracy or not
24 attributing to him the quantity between February 12th and
25 March 18th, 2013, I think there's some confusion because the

1 Government has not attributed that, those days to the
2 quantity.

3 THE COURT: Well, he said that. He's saying that
4 since you used that as a benchmark or measure to subtract from
5 the conclusion that Probation reached of a higher amount, that
6 if you use that same formula, and if I accept the notion that
7 between October and some date in December when there's this
8 I-got-you-set-up text, that that, that's roughly a month or so
9 at the end, if you apply that same formula or reduction over a
10 course of two months at the beginning or close to two months
11 at the beginning, then you drop below 400.

12 MR. DANILEWITZ: Okay. Well, that I completely
13 disagree with for the following reason. The reason --

14 THE COURT: Did I properly characterize your
15 argument, Mr. Corcoran?

16 MR. CORCORAN: I believe so, your Honor.

17 MR. DANILEWITZ: Okay. If that's the argument, then
18 that's incorrect for the following reason. The Government
19 does not attribute to Malik Derry the period of time from
20 February 12th or February 11th, roughly, the time of his
21 arrest, to the end of the conspiracy, because that is a period
22 of time when we categorically know for a fact that he is in
23 custody. It doesn't mean you cannot be a member of a
24 conspiracy during that period of time, and as I said before,
25 the Government is not conceding that additional quantities

1 could not apply. However, we have no evidence of his ongoing
2 role in the conspiracy during that period of time.

3 That's a very different thing from saying because we,
4 you know, we didn't have him on surveillance or we didn't
5 intercept him during the period of his release ongoing until
6 his arrest, that particular days where we don't have wiretap
7 intercepts, he was not in the conspiracy. That's a very, very
8 different thing.

9 THE COURT: Fair. But there has -- but *Collado*
10 teaches that there must be some evidence.

11 MR. DANILEWITZ: Correct.

12 THE COURT: Indeed evidence by a preponderance that
13 he was, was involved.

14 MR. DANILEWITZ: Absolutely.

15 THE COURT: From the day he's released until what I
16 believe to be the date the defense concedes, which is the
17 I-got-you-set-up text.

18 MR. DANILEWITZ: Right.

19 THE COURT: So, what's the evidence that between
20 October and that December date he was a member of the
21 conspiracy and, knowing what its purpose was, joined it and
22 was involved in its activity?

23 MR. DANILEWITZ: Sure. Well, we have the wiretap
24 intercept I believe from October 8th between Mykal Derry and
25 Kareem Bailey where Mykal Derry says to Kareem Bailey, sum and

1 substance, Lik Mills is coming home and he's going to be
2 strapped from day one, and strapped was interpreted during the
3 course of the trial as being armed with a firearm.

4 Now, admittedly, that is somewhat circumstantial
5 because it's the words of a co-conspirator. It doesn't
6 confirm that he was necessarily going to join the conspiracy
7 on the day he got back. But under *Collado*, in considering the
8 specific facts of Mr. Derry's involvement, the Court can
9 consider that, that it was the intention of the leader of the
10 conspiracy, Mykal Derry, to have his brother ready to go,
11 armed with a weapon, and we know this wasn't target practice,
12 this was for protection and for use in the drug game from the
13 day that he got home. So, that's actually early October,
14 October 8th.

15 We then have, I believe the defense brief mentioned a
16 period in December, but I think they correctly point out that
17 it was in November that Mykal Derry arranged a drug sale for
18 his younger brother with a woman who was identified as Shana
19 Artuso, and what we see from that interaction is that this
20 woman contacted I believe Mykal Derry, said I'm looking for
21 what we interpreted to be drugs, heroin. He said, in sum and
22 substance, here's a phone number, provided a phone number that
23 was identified as Malik Derry's phone number. There was
24 actually one digit misplaced, but in any event, it appears she
25 was able to reach him because she later responds and gives

1 feedback to Mykal Derry and says, this is not the same stuff,
2 it's all muddy, words to that effect, it wasn't the product
3 that she was hoping for. So, that's in November, if I'm not
4 mistaken, I think it might have been approximately November
5 23rd of 2012. I'm sorry, November 13th, even earlier than I
6 had thought.

7 Those text message exchanges are summarized in
8 Government Exhibit 497. And I shouldn't say summarized, I
9 should say excerpted in Government Exhibit 497. So, that
10 takes us back to November 13th. That's with respect to the
11 quantity issue for now, and I'm happy to answer the Court's
12 further questions about the quantity issue with respect to
13 days that Malik Derry was in the conspiracy, and we have
14 evidence of that.

15 With respect to the argument that he was not an
16 enforcer, this obviously takes us into the cross-reference.
17 I'm not going to go there for now. Mr. Askin is going to
18 handle that argument. But with respect to his role as an
19 enforcer, it's notable that Mykal Derry in early October 2012,
20 prior to Malik Derry's release from custody, is already
21 envisioning the role for his younger brother. He's
22 envisioning that he's going to be strapped from day one, from
23 the time that he gets out. Now, do we know that he was
24 actually provided a firearm on or about October 20th when he
25 was released? No, we don't have evidence of that. But we do

1 have evidence that he possessed a firearm, used and carried a
2 firearm obviously during the conspiracy, and the jury found
3 that.

4 Your Honor, I also find notable an exchange between
5 Malik and Mykal on October 23rd, 2012, which would have been
6 approximately three days after he is released from custody.
7 This is Government Exhibit 477 where, in an intercept between
8 Malik and Mykal, Malik is calling up his brother and in kind
9 of cagey language, he's saying to Mykal Derry, where you at?
10 What? You got one? And Mykal is not understanding. He says,
11 what? Malik says, you got one of them things? And then Mykal
12 responds no, evidently understanding what one of them things
13 means. And Malik continues to say, and I'm summarizing, I
14 need it. Mykal Derry says, I ain't got none. Malik then
15 explains what he needs this thing for: I gotta holler at
16 Meatball, so I need one of them things.

17 Now, it was explained -- if it wasn't explained at
18 trial, we know Meatball to be a nickname for Saleem Reynolds,
19 an associate of members of the conspiracy, and I believe there
20 was testimony that essentially, and there was an intercept to
21 follow up, a conversation between Mykal Derry and Jermaine
22 Reynolds, an unindicted co-conspirator, we believe, in
23 Government Exhibit 478, where Mykal Derry was kind of
24 explaining and reassuring to Jermaine Reynolds, don't worry,
25 I'm not going to give it to him, I'm not going to give -- I'm

1 not going to give the thing to Malik, and then he explains
2 why. He says, he basically says that it's got to be put to
3 use against the enemy. He says, ain't no ratchets coming out
4 of my unintelligible unless them shits getting put to work on
5 the enemy, not on nobody from the F'ing village. Okay?

6 Now, the reason that's significant from the
7 Government's view, your Honor, is when you contrast that to
8 the events of February 10th, 2013, because in Government
9 Exhibit 478 where Mykal Derry is reassuring Jermaine Reynolds
10 saying don't worry about it, it's not going to be put to use
11 on the good guys, these are for the other guys, these are for
12 rivals, these are for enemies, when you contrast that with the
13 text message exchanges and the voice intercepts from February
14 2013, what you see is a very different picture. You see Malik
15 Derry reaching out to his brother saying, I see him. Who, who
16 is it? TY, T-Weeze, Tyquinn James. And at that point there's
17 no question as to whether it is going to be put to use or not.
18 At that point Mykal Derry is absolutely clear on what needs to
19 be done, and as the Government argued, he takes the firearm to
20 Malik Derry and he uses it against the enemy.

21 So, in the Government's view, it's indisputable that
22 Malik Derry played the role of an enforcer. He had another
23 role, too. He was a distributor. He was arrested outside the
24 trap house with a quantity of heroin, and that was discussed
25 on the wire. The stamp, one of the stamps recovered from him

1 at the time of that arrest on approximately January 17th,
2 2013, the imprint, the actual stamp was recovered from 307
3 MLK. You see him in the trap house at 307 MLK. You see him
4 outside the trap houses at 238 and 236 Rosemont Place.
5 There's little doubt that he had the role of an enforcer.

6 And for that reason, the language of the late Chief
7 Judge Becker in *Gibbs* is particularly important. The
8 Government quotes this in its submission, docket entry 874,
9 where Judge Becker held that, "An enforcer for a drug
10 conspiracy may be held responsible for the amount of drugs
11 transacted by the conspiracy during the time he acts in that
12 capacity." And so for that reason as well, his role as an
13 enforcer, his role as a distributor, the intercepts with him
14 getting heroin tested, delivering it to customers, referring
15 customers, customers being referred to Malik Derry, he was
16 very much part of the fabric of this conspiracy. The precise
17 start time is somewhat unclear, but circumstantially, he is
18 talking about guns on October 23rd, 2012. Mykal Derry has his
19 role kind of cut out for and assigned for him, and for those
20 reasons, the 400 to 700 gram quantity is appropriate.

21 I would just add, your Honor, that the defense took
22 some issue with us calling that a conservative amount, but I
23 believe that's appropriate for a number of reasons. I believe
24 there was testimony during the course of the trial, and I
25 think Mr. Askin certainly would have argued in closing, it's

1 in our closing PowerPoint, that the drug quantity that we
2 attributed to the co-conspirators, the two Derry brothers, was
3 conservative because it didn't take into account a whole
4 number of potential sources.

5 Just taking into account now the period that we
6 consider Malik Derry to be back on the street and in the game
7 and part of this conspiracy, it didn't take into account road
8 trips to Paterson, New Jersey, where we have knowledge of a
9 trip, but there was not a specific reference to it on the
10 wire. Agent Kopp to his credit conservatively left those
11 amounts out because you couldn't quantify an amount. It left
12 out quantities of raw or unpackaged heroin. It left out
13 quantities of heroin supplied by people who were close to
14 Malik Derry, including Saeed Zaffa, who at certain points in
15 time supplied heroin when Mykal Derry was out of heroin.

16 So, that's the reason why we consider this to be a
17 conservative and a fair and a very reasonable assessment of
18 the drug quantity attributable to Malik Derry.

19 THE COURT: All right. Thank you, Mr. Danilewitz.

20 Mr. Corcoran.

21 MR. CORCORAN: Very briefly, your Honor, I would just
22 make clear that, first of all, I misspoke before. The amount,
23 if you take away the days that we suggest should be taken
24 away, is actually 331 grams, not 371. The reason why this is
25 important is because you have to get Malik to be in the

1 conspiracy for more than 103 days to get him over 70 percent
2 of the 571 of grams of drugs that they are attributing to
3 Mykal to attribute to him to get him to the higher level.

4 That means if they're quoting a text message from five
5 days earlier, it still doesn't change the basic calculus. His
6 drugs, based on this math that the Government -- I took that
7 implication from the Government's footnote, based on that
8 calculus, he still is well below the 400 gram threshold.

9 I would also point out that, yes, there is a text
10 message that Mykal wanted Malik in the conspiracy on day one.
11 But as I understand it, you have to accept your role in the
12 conspiracy, and the text message that they are pointing to,
13 first of all, doesn't have a reply saying Malik joins the
14 conspiracy, so there may be an offer but there's no
15 acceptance. But then the second text message that they're
16 talking about from October, the implication when he denies
17 that he has a gun, they're taking as evidence that -- I don't
18 understand that implication, but that would be the --

19 THE COURT: All right. Very good, Mr. Corcoran.
20 Thank you.

21 All right. I am convinced that -- well, first of all,
22 *Collado* requires the count of conviction standing alone -- or
23 putting aside, rather, the conviction and whatever mandatory
24 minimum may flow from it requires, in addition to that or on
25 top of that, a separate and independent, highly fact specific

1 searching and individualized inquiry into the circumstances
2 surrounding each defendant's involvement in the conspiracy.

3 While the law of conspiracy may allow for a conviction
4 as a member of a conspiracy even if your role is different
5 than other members and could be fairly characterized as less
6 involved or more minimal or minor, the sentencing inquiry is
7 different because those differing roles should be and must be
8 fairly taken into consideration in determining a sentencing
9 range separate and independent from the liability, legal,
10 criminal liability that attaches from a knowing decision to
11 join the conspiracy and knowing its objectives.

12 Here the Government argues to me that based on its
13 self-described conservative estimation of Mr. Malik Derry's
14 role and the timing of it, that it's fair to attribute more
15 than 400 and less than 700 grams to him based on the *Collado*
16 standard, and I concur. It seems to me fair to begin Mr.
17 Malik Derry's role in the conspiracy upon his release from
18 jail, and for that role to continue through the date of his
19 arrest, and I believe that the Government accurately and
20 fairly characterizes its description as being conservative.

21 Mr. Corcoran is correct that simply predicting or
22 expressing an intent to join the conspiracy in and of itself
23 might not be enough, but here there is corroborating evidence
24 that Mr. Mykal Derry's intent for his brother to join the
25 conspiracy and to do so in the role of an enforcer is quite

1 substantial and culminating in the murder of Tyquinn James.

2 It appears, based on the Government's proffer and my
3 recollection of the evidence, that soon after -- first of all,
4 that Mr. -- the brother, the older brother, Mykal, stated to
5 other members of the conspiracy that he envisioned that his
6 brother's role, his younger brother's role would be that of an
7 enforcer and that he would be strapped upon his return, ready
8 to go. And indeed it appears that he attempted to obtain a
9 weapon, to have possession of it for purposes of hollering at
10 Meatball, and that a clear direction was given back by Mykal
11 Derry, no, hold on, we're only going to use these weapons for
12 our enemy, and I do believe that that's perhaps an overlooked
13 but critical piece of information when it comes to the later
14 murder of Tyquinn James.

15 What it demonstrates, the refusal to provide the
16 weapon, is actually evidence that Malik understood that that
17 was his role and he could make such a request. The rejection
18 of the request was not based on Malik's inability to have the
19 weapon or that it would be deemed inappropriate for him to
20 have it as a member of the conspiracy, only that the
21 circumstances under which he sought to use it were not within
22 the scope of his role as an enforcer. His role as an enforcer
23 would be to go after the enemies of the Stanley Holmes Derry
24 organization, against our enemies, i.e., the Trevin Allens and
25 the Back Bay gangs of the world.

1 So, here the evidence establishes to me by a
2 preponderance that Mr. Malik Derry was a member of the
3 conspiracy and had an enforcer role at the beginning of his
4 release and at the end upon his arrest.

5 That he engaged in drug trafficking as well is fully
6 established by the record as early as November of 2010. He
7 collected money for Mykal from Kareem Young, demonstrating
8 that he was something more than a mere street level seller.
9 He pooled his money with others to provide the conspiracy a
10 lower price from its source in Paterson. He was asked to on
11 at least two occasions that I can think of by Mykal to provide
12 feedback from his customers on the quality of the heroin so
13 that they could impose -- impress upon the Paterson source
14 their need for quality heroin and indeed have negotiations
15 with them about particular branded heroin. I remember them
16 seeking input on different types and having discussions with
17 Paterson about what might be available.

18 He was given the job of monitoring the police scanner,
19 something that would be important in terms of acting as an
20 enforcer and as a lookout, something someone other than a mere
21 seller would be tasked to do. He was to warn of police and
22 did warn of the presence of police and the movements of
23 police, all part of a surveillance activity on behalf of the
24 organization as a whole.

25 He was badgered by his brother to get to work. That's

1 something, as I found previously, is not something you do to
2 someone who you have an arm's length buyer-seller relationship
3 with. This was the boss telling the employee, I hired you to
4 do something and get up out of bed and do it, get out there
5 and sell those drugs. He was fronted drugs, another reason to
6 characterize him as a member of the conspiracy rather than an
7 arm's length.

8 He delivered drugs for Mykal to others. Mykal sent his
9 customers to Malik, and we know that that occurred as early as
10 November, as if to say buying from him is like buying from me.
11 And indeed there would have been any number of incentives for
12 Mykal at the top of the organization to leave to Malik the
13 dirty work of the street level sales to those who would have
14 sought out Mykal for drugs, like the woman who was described.

15 He was bailed out by his brother. Now, perhaps that
16 was brotherly love, but it was established in the record that
17 it was part of this organization's pattern to assemble money
18 when any one of them was arrested and to help to seek them,
19 release them as soon as possible, and Malik was no different.

20 He enjoyed a favored price from his brother, again
21 indicative of being something other than a simple distributor
22 or seller for his own account or even for -- for his own
23 account. He had access to the trap houses and was observed on
24 surveillance assembling in front of it along with other
25 members of the conspiracy. Indeed, his request for a weapon

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1 in the murder of Tyquinn James was immediately honored and
2 such a weapon was retrieved from one of the trap houses.

3 So, he had access to drugs, weapons, and acted as an
4 enforcer in the killing of Tyquinn James. So, he was an
5 enforcer from the beginning and an enforcer at the end of that
6 October 21st, 2012, to February 11th, 2013 time frame. That
7 exceeds the 103 days that the defense would ask me to consider
8 as the benchmark. And using the percentages, conservative
9 percentages and estimations provided by the Government and
10 established in the presentence report, it appears that more
11 than 400 but less than 700 grams are fairly attributable to
12 Malik Derry.

13 So, that's my finding and my conclusion, and I would
14 just note that these, and I'll have more to say about this at
15 the end, this enhanced role as an enforcer, including seeking
16 and on one critical occasion obtaining a weapon to act as an
17 enforcer against those who were perceived to be the enemy, is
18 an important fact on a number of different issues. It is an
19 important fact on the issue of *Brady*, because it demonstrates
20 that the information that Mykal was the shooter and not Malik
21 is not material ultimately because of the overwhelming
22 evidence that the motive for the killing of Tyquinn James was
23 for Malik to realize and act consistently with his designated
24 role by his brother to act as an enforcer for the
25 organization, shooting at and in this case killing the enemy.

1 So, I am going to adopt a level 28 at step one and
2 calculate the advisory sentencing guideline range, therefore,
3 to be 97 to 121 months on count 1. To that one would add a
4 mandatory minimum of 120 months based on the conviction of
5 924(c).

6 The phone counts calculation, those are four-year
7 statutory maximums?

8 MR. ASKIN: That's correct, your Honor.

9 THE COURT: The phone count calculations, guideline
10 calculations would be calculated how? I don't think the
11 report does that either. What's the statutory predicate?

12 MR. ASKIN: I have to look at that, your Honor. But
13 might I add something on the calculation of count 1 before we
14 get to that?

15 THE COURT: Yes.

16 MR. ASKIN: Which is, given the -- it's my
17 understanding of the law, and this is the way the jury was
18 instructed, I believe this is the case law, that the mandatory
19 minimum is based on the drug conspiracy's distribution of
20 drugs as a whole.

21 THE COURT: I'm sorry.

22 MR. ASKIN: And the jury found that. So, you have,
23 even without this cross-reference, you have that 97 to 121 I
24 believe --

25 THE COURT: Yes, I'm sorry. I'm simply calculating

1 the guidelines. I'm not sentencing him on count 1.

2 MR. ASKIN: But the guideline would become, Judge,
3 120 to 121 plus 120 months.

4 THE COURT: Yes, you're right, the mandatory minimum
5 becomes the guideline amount.

6 MR. ASKIN: Right, to the extent that it's higher.
7 So, it would be 120, I believe, to 121.

8 THE COURT: Yes.

9 MR. ASKIN: On count 1, plus a guideline and
10 mandatory of 120 months consecutive on count 10.

11 THE COURT: Yes, 120 to 121 is the proper calculation
12 under the guidelines.

13 MR. ASKIN: Yes, your Honor.

14 THE COURT: All right.

15 MR. ASKIN: On the phone counts, I'll find that, but
16 I believe you use the drug quantity in calculating the phone
17 counts. I have to find the -- it's 840. If I could have one
18 moment, your Honor.

19 THE COURT: Yes.

20 MR. ASKIN: Your Honor, it's calculated under 2D1.6,
21 use of a communication facility in committing a drug offense,
22 attempt or conspiracy.

23 THE COURT: It's the offense level applicable to the
24 underlying offense, in this case count 1. So, it would be the
25 same 97 to 121. Do you incorporate the mandatory minimum?

1 MR. ASKIN: I do not believe you do, Judge, because I
2 don't think the mandatory minimum applies to that count.

3 THE COURT: Right. 97 to 121 months, which exceeds
4 the statutory maximum, which is 48 months.

5 MR. ASKIN: 48 months, although the Court, if the
6 Court just had a series of phone counts, this is why we do
7 this, the Court could, under the guidelines, stack those phone
8 counts consecutively to get to the total punishment. We're
9 not there.

10 MR. MARKOWITZ: It's a fall safe provision, your
11 Honor.

12 MR. ASKIN: Better safe than sorry, I always say.

13 THE COURT: All right. Very good. Are there any
14 other step one calculations that I would need to make?

15 MR. MARKOWITZ: I don't believe so, your Honor.

16 THE COURT: All right.

17 MR. ASKIN: I don't think so, your Honor.

18 THE COURT: Other than the cross-reference. Now, the
19 question, it's 12:37 or so. Do we want to take a break for
20 lunch by whatever measure and hear argument on the
21 cross-reference, or do you want me to do that now and then
22 take a lunch break?

23 MR. ASKIN: May I have a moment to talk to
24 Mr. Markowitz?

25 THE COURT: Yes.

1 MR. MARKOWITZ: Let's do the cross-reference now,
2 your Honor, and then we'll take a break.

3 THE COURT: All right. I've read the briefs on this
4 issue. I'm prepared to hear any additional argument that the
5 parties wish to make.

6 MR. ASKIN: Your Honor, I don't really have
7 additional argument. I think the argument has been
8 extensively briefed. I would just point out that on, and I
9 know the Court -- that Mr. Markowitz and Mr. Derry get their
10 opportunity here, but the Court, it's really the same issue as
11 the Court ruled on at Mykal, the brother's sentencing on
12 January the 7th, 2016. I just so happen to have a copy of
13 that transcript, and on page 50 and 51 of that transcript, the
14 Court lays out in detail its conclusion as to why the
15 cross-reference applies, which is essentially why this was a
16 drug-related murder committed in connection with and in
17 furtherance of the conspiracy, which is essentially, when you
18 think about it, it's what the jury found beyond a reasonable
19 doubt, 12 people unanimously, if you look at it.

20 The Court is being asked to determine by a
21 preponderance standard, right, as one individual, the Court,
22 because they found, and it was very clear, it was a very clear
23 demarcation because you had the testimony of Mykal Derry that
24 I didn't -- I shot the guy, not Malik, and I did it because of
25 this girl Tasha and because Sedrick Lindo shot at me, Sedrick

1 Lindo being a Trevin Allen associate and an associate of
2 Tyquinn James, shot at me while I had a child. Do you
3 remember that testimony?

4 THE COURT: Yes.

5 MR. ASKIN: So, he really, you could sit there and
6 say, wow, he got up there and admitted to this murder and he
7 admitted to the shooting that's a 924(c), but not really
8 because he was saying it had nothing to do with the drug
9 trafficking conspiracy and it had nothing to do with Malik.

10 Now, contrast that with the testimony of Kareem Young
11 and the wire calls and the earlier shootings, and the jury had
12 a determination to make, was this shooting in furtherance of
13 drug trafficking. Now, in making the argument, I guess you
14 could find, the jury could have concluded, because the
15 Government has argued this, that there was all sorts of other
16 arguments that could be made absent Tyquinn James of other
17 shootings, including the shootings at the range, et cetera,
18 but I think it's, I think it's pretty clear with respect to
19 Malik, particularly with the brandishing not guilty, that the
20 jury concluded beyond a reasonable doubt that Malik Derry shot
21 Tyquinn James and he did so in furtherance of the drug
22 trafficking conspiracy.

23 The defense argued, and may have had a point, that a
24 lot of the other shootings occurred before Malik was in the
25 conspiracy or there was proof that he was in the conspiracy.

1 But in any event, the Court has made its ruling -- made a
2 ruling, I'm sorry, made a ruling at Mykal Derry's sentencing,
3 I think the issues haven't changed, I don't think the evidence
4 has changed, and the Court concluded that this was, if I could
5 just cite to it, "Well, there's certainly no direct evidence
6 that I know of or recall that Mykal Derry provided the gun to
7 his brother which resulted in the killing of Tyquinn James or
8 that the other shootings were drug related, but there is what
9 I believe more than sufficient circumstantial evidence to
10 conclude by a preponderance that the murder of Tyquinn James
11 was indeed an outgrowth of and in furtherance of the drug
12 trafficking conspiracy, and it's really a sequence of things
13 or interconnected things."

14 You refer to the Rosario assault and the Rosario
15 shooting and how that caused a split between Trevin Allen and
16 Mykal Derry's group.

17 "Kareem Young testified to this rivalry, that they were
18 told as a group to shoot and kill on sight anyone associated
19 with that group," referring to the Trevin Allen group, which,
20 of course, Tyquinn James referred to. "Malik Derry was an
21 active seller at the street level for his brother and for the
22 organization. I recall Mykal harassing his brother to get up,
23 out of bed," and sell heroin on the street.

24 "Malik Derry was one of the enforcers, along with a
25 number of other people, whose role it was to possess guns and

1 act as enforcers of the Derry group's control of the sale in
2 Stanley Holmes.

3 "You then have Malik saying I see him, he's nearby,
4 bring me that thing, and the facts at trial showed that Mykal
5 brought his brother a gun and that his brother shot a drug
6 dealer who had once been part of their organization and was
7 now prohibited, under the rules of the organization, from
8 being anywhere near Stanley Holmes."

9 I might point out that Carver Hall was a short bike
10 ride, not that far geographically from Stanley Holmes, he was
11 back in the area.

12 "Any reasonable person could conclude that the
13 circumstances were that he wasn't allowed in Stanley Holmes
14 because he was a drug dealer who was not getting his drugs
15 from the Mykal Derry organization.

16 "All of these facts taken together, the fact that
17 Trevin Allen and his group, along with Derry, used violence
18 and even murder to protect their turf, that he controlled an
19 organization or ran an organization that had weapons and
20 enforcers, that this organization was actively involved in
21 violence relating -- targeting the Allen group and vice versa,
22 that it was his appearance near Stanley Holmes, a known drug
23 dealer, as part of the rival gang, that inspired Malik to ask
24 Mykal for the gun; Malik himself, one of the street level
25 sellers for the Derry organization and, therefore, an

1 individual profiting from the drug sale, one can easily
2 conclude that, from all of those circumstances, Tyquinn James
3 was shot because he was a rival drug dealer who had disobeyed
4 the direction to stay away from the turf controlled by the
5 Derry organization, more specifically, Stanley Holmes.

6 "I find that the cross-reference is appropriate under
7 the circumstances and evidence in this case and will apply
8 it."

9 I will just add to that, that this, there's strong
10 evidence, if you take that Meatball call, in that Meatball
11 call, that is very, very illustrative of the purposes, because
12 Mykal Derry clearly has guns, Malik three days after he comes
13 home knows that his brother Mykal Derry has guns, he wants to
14 go holler at Meatball over some unknown dispute.

15 Meatball is not a rival. Meatball is Jermaine
16 Reynolds, one of the enforcers in the Derry organization, a
17 Stanley Holmes guy. Meatball is one of their associates.
18 It's not even clear that he's a co-conspirator, but he's one
19 of their associates. He's not with Trevin Allen and he's not
20 with Back Maryland. And Mykal prohibits Malik and refuses to
21 give him the gun for that purpose and says to Jermaine
22 Reynolds, the brother, I'm protecting your brother, those
23 guns, those ratchets are for the enemy. Of course, when
24 Tyquinn James, the enemy, Malik says, hey, give me a gun for
25 that purpose, boom, the gun comes out and Malik kills him.

1 In addition, Mykal Derry's testimony was clear that, I
2 asked him on cross-examination, oh, this was over this girl
3 Tasha, and did you tell these other guys about this, did you
4 try to enlist their help in killing all these guys, and he
5 basically says, no, no, no, that was all on me. But yet we
6 have -- that's totally inconsistent with the evidence.

7 You have, back in I believe it was September of 2011,
8 Tyquinn James is on the porch of Trevin Allen's mom's house,
9 if you recall that testimony, and they shoot up the house,
10 there's like bullet holes in the house, they're trying to kill
11 him, and according to Mykal Derry's call to his former
12 supplier, which is a jail call that we played, Christian
13 Blackman, he says it was me, it was Shaamel Spencer, enforcer
14 for the organization, Bam, Jermaine Reynolds, enforcer for the
15 organization, and his brother Kalim Selby out there, and, you
16 know, Spencer, Buck tried to let it fly, but basically it says
17 the gun jammed, but obviously someone got off shots. That's
18 the organization trying to kill Tyquinn James on a different
19 occasion. Okay? Then you have -- which is totally
20 inconsistent with Mykal Derry's testimony about the motive for
21 the killing.

22 Then you have the attempt to kill Tyquinn James by
23 Shaamel Spencer that Kareem Young testified to and that we had
24 clear, irrefutable evidence, including a video that we didn't
25 even realize how good it was until we played it during the

1 trial, where you have Shaamel Spencer coming out of the
2 Disston Apartment, do you remember that?

3 THE COURT: He's in a hoody with the bike.

4 MR. ASKIN: Yes, he's coming out, exactly, with the
5 bike on the ground, he comes out of the Disston Apartment.
6 Kareem Young said, hey, I'm with Buck, I'm with Bam, we're in
7 the park, Tyquinn James, Tyquinn James and Kevin Green come
8 by. Buck says, I can't believe this N had the nerve to come
9 by here. He follows him to the Disston. He goes in, you see
10 it on the videotape, there's shots, shots into the apartment,
11 and Kevin Green actually winds up getting shot in the nose or
12 the face, but he tells Kareem Young the next day, he was
13 trying to kill, I was trying to shoot and kill Tyquinn James
14 who was with Green, Kevin Green. So you have that testimony.

15 They're trying as an organization to kill this guy
16 because he's with Trevin Allen, and the evidence that he was a
17 drug dealer right up until the time he died was overwhelming
18 when we put that in his text messages and his criminal
19 history.

20 And also I want to differ with something the defense
21 said. The testimony, they said that the testimony of Dave
22 McNamara, the Government's expert, supported them on this.
23 It's anything but. McNamara in the -- if you read the recross
24 of -- the redirect and recross of McNamara, he looks at this
25 and says, because he was asked to, that, no, it's clear, yes,

1 I have to admit that we don't know how this started. Kareem
2 Young doesn't know how it started because when he came home
3 from custody, those Rosario incidents, the assault and the
4 shooting of Rosario that crippled him by Kevin Washington at
5 Mykal Derry's direction because he was cooperating, those
6 events had already taken place and now the split had occurred,
7 and when he came home, Kareem Young was apprised by the
8 organization that, hey, those Trevin Allen guys, they're
9 not -- we're not with them anymore, they're not allowed in
10 Stanley Holmes, shoot them on sight, but he wasn't told
11 exactly why. But it's clear now that they're rival groups.
12 Okay?

13 And McNamara said that if you look at the shooting that
14 he had reviewed, the phone call from the shooting back in
15 September of 2011 at Trevin Allen's mom's house when they
16 tried to kill Tyquinn James, and the other shootings and the
17 facts, multiple people involved, that it seemed to be that
18 this was an organizational beef, that these were acts of
19 violence by the organization in order to protect the
20 organization, and McNamara's testimony as the expert is, while
21 it's ultimately the jury's determination of whether acts are
22 in furtherance of in terms of 924(c), McNamara's view from the
23 evidence, as the expert, was that this was the organization
24 trying to protect the organization leading to the shooting and
25 killing of Tyquinn James, which is completely consistent with

1 the Government's theory, the other evidence and, of course,
2 the Court's earlier ruling in the sentencing of Mykal Derry.
3 That's all I have, your Honor.

4 THE COURT: All right. Mr. Markowitz.

5 MR. MARKOWITZ: The prior ruling certainly hampers my
6 arguments here, argument, your Honor, and I certainly am
7 familiar with your ruling. The two things that I think that
8 I'd like the Court to consider of why the cross-reference
9 doesn't apply is the Government, throughout this case, and
10 certainly it's their right to do so, they string evidence
11 together in a way that paints a much broader picture than
12 really exists.

13 The one question that we haven't answered and the one
14 question why I don't think this cross-reference should apply
15 is, assuming everything the Government says is true, why did
16 Malik Derry. There's nothing that says why Malik Derry killed
17 Tyquinn James. Could have been a million different reasons.
18 Could have been, as I've maintained throughout this Court
19 proceeding today, you shot at my brother or you were there
20 shooting at my brother in the hood, you shoot us, we shoot
21 back.

22 It has to go -- there has to be a link not what Mykal
23 Derry says, not what the group says, but there has to be some
24 kind of affirmative piece of evidence that says I'm killing
25 this -- I'm killing Tyquinn James because it's in furtherance

1 of the conspiracy, it's because you're a drug dealer, not
2 because you shot at me, because then you could be prosecuted
3 in the state. It has to be an affirmative piece of evidence,
4 and there isn't any, and that's why this cross-reference
5 should not exist.

6 Thank you, your Honor.

7 THE COURT: All right.

8 MR. MARKOWITZ: Or apply, strike that, apply.

9 THE COURT: Yes. All right. I'm prepared to rule on
10 this, and I am to determine whether or not the cross-reference
11 of 2D1.1(d)(1) applies, and here the guideline advises that if
12 a court -- if a victim was killed under circumstances that
13 would constitute murder under 18, United States Code, Section
14 111 -- or rather 1111, had such killing taken place within the
15 territorial or maritime jurisdiction of the United States,
16 apply 2A1.1, first degree murder, or 2A1.2, second degree
17 murder.

18 I have concluded that, as I did before, that as relates
19 to Mykal Derry, that the cross-reference to 2A1.1, first
20 degree murder, applies to Malik Derry as well, and I adopt and
21 incorporate my prior ruling as it relates to Mykal Derry in my
22 analysis here and will amplify it.

23 There's no question in my mind that the killing of
24 Tyquinn James was in furtherance of the drug trafficking
25 conspiracy. The jury did indeed find, through its special

1 interrogatories, that Malik Derry discharged a weapon in
2 furtherance of a drug trafficking conspiracy, and the only
3 evidence in this case that Malik Derry discharged a weapon is
4 the evidence presented by the Government regarding the
5 shooting of Tyquinn James.

6 It is indeed, as Mr. Markowitz suggests and I think
7 directly says, at best a chain of inferences amounting to
8 circumstantial evidence that the actual motive of Malik Derry
9 was to kill Tyquinn James as part of his role in the
10 conspiracy, but it is nonetheless compelling and convincing.
11 It is a compelling and convincing chain of circumstantial
12 evidence and inferences fairly drawn and I concur with the
13 jury's determination on this issue.

14 We start with the proposition that Mr. James was not
15 some random individual who may have had some other
16 relationship as relates to the Derry brothers and Stanley
17 Holmes. He was indeed, through the stipulations and
18 convictions introduced at trial and the testimony in the
19 trial, a drug dealer who at times had operated within Stanley
20 Holmes and at times had been associated with the Derry Ellis
21 organization himself, that there was a split, that he was a
22 known associate of Trevin Allen who became a rival, and that
23 the activities of Allen and others was the continuing
24 distribution of drugs in and around Stanley Holmes in direct
25 competition for the Derry Ellis organization.

1 This split, unknown in detail to Mr. Young, was
2 nevertheless testified by Mr. Young in which he indicated that
3 upon his return home from custody and upon his rejoining of
4 the organization, that he was informed that the Allen
5 organization was estranged from the Derry organization, that
6 they were barred from Stanley Holmes, and that any member of
7 that organization should be shot on sight, in particular, and
8 not only that members of the Allen organization should be shot
9 on sight, but further, that if TY should be found, that he
10 should be put down, quote, unquote, put down.

11 This evidence is supportive of the expert opinion in
12 this matter, that these discussions and that the later
13 shooting of Tyquinn James was indeed a function of an
14 organizational beef, as is not uncommon and indeed routine
15 when rival drug organizations arise and fight over lucrative
16 turf.

17 The evidence here that I've already cited to, that
18 Malik was envisioned to be and became an enforcer again is
19 clear. He was to be strapped upon return. He sought a weapon
20 to escalate a dispute with someone who was an associate and
21 was told, no, those weapons are just for the enemy.

22 There were other shootings by this organization
23 targeting Tyquinn James, the New York Avenue shooting and the
24 Disston Apartments, both of which involved Mr. Spencer, and I
25 think it's very telling that Mr. Spencer, who was probably the

1 main enforcer, was the first person that Mykal Derry called
2 after Malik shot TY, as if to say, my little brother got him
3 when you couldn't. But nonetheless, the job has been
4 accomplished, the deed done, it's over, Lik splashed TY.

5 This pattern of shooting at Tyquinn James by members of
6 the organization, by the enforcers of the organization, and
7 indeed under the circumstances in which people expressed their
8 disbelief that he would be so bold as to be found within
9 earshot of Stanley Holmes suggests that this was, more than
10 suggests, it establishes that this was an organizational beef
11 that turned on what all of these individuals did for a living,
12 sell drugs. That Mykal's testimony to the contrary, that it
13 was about a girl whose name he couldn't even recall the first
14 time he was asked, was clearly rejected by the jury as
15 evidenced by their finding on both count 10 -- on count 10.

16 And then there is simply the -- there's the other
17 evidence by the conversation with Kimberly Spellman and Mykal
18 Derry about, well, I guess Malik doesn't have to go to the
19 range. The range was established as something that the
20 shooters had to do as part of their efforts to maintain
21 proficiency with weapons in support of the organization.
22 There is simply no evidence that this was about a girl; every
23 evidence that the girl that it was about was heroin. And I
24 find that the cross-reference applies.

25 So, this recalculates the advisory sentencing guideline

1 range and does so substantially. The guideline is now level
2 43, and with a criminal history category of III, I recalculate
3 the guidelines at step one to be life.

4 We should take a break.

5 MR. ASKIN: Yes, your Honor.

6 THE COURT: Are there going to be any departure
7 motions? Mr. Markowitz? I don't recall any from the papers.

8 MR. MARKOWITZ: I don't believe there are any.

9 THE COURT: And none from the Government?

10 MR. ASKIN: No, your Honor. I believe we're just --
11 well, obviously, the Court has the authority to give one, but
12 I don't think the parties have sought a departure at step two.

13 THE COURT: Well, I was going to say that I recognize
14 my authority to depart sua sponte, and based on the
15 circumstances here, see no basis to do so. None of these
16 rulings are with prejudice to any arguments at step three
17 regarding variances. So, at the end of step two, I'll
18 calculate the guidelines based on the cross-reference to be
19 life, and we'll take a one-hour break, at which time I'll
20 invite Mr. Markowitz to make any arguments in mitigation of
21 sentence, to invite Mr. Derry to address the Court if he is so
22 inclined, and to hear any other evidence the defense wishes to
23 submit. After that, I'll invite the Government's comments and
24 address any other issues the parties wish me to address, and
25 then pronounce sentence.

1 MR. MARKOWITZ: Two o'clock, right?

2 THE COURT: Yes, two o'clock. This matter is
3 adjourned until two o'clock. Thank you all for your patience.

4 THE DEPUTY COURT CLERK: All rise.

5 (Recess at 12:59 p.m..)

6 (In open court at 2:05 p.m..)

7 THE DEPUTY COURT CLERK: All rise.

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

9 We have now reached step three of the sentencing
10 process. Here the Court should consider the factors that
11 Congress has set forth in 18, United States Code, Section
12 3553. The Court should impose a sentence that's sufficient
13 but not greater than necessary to advance certain statutory
14 factors. I invite Mr. Markowitz now to make any arguments in
15 mitigation of sentence, to invite Mr. Derry to address the
16 Court if he is so inclined, and to hear any other evidence,
17 testimony the defense wishes to present.

18 MR. MARKOWITZ: Thank you, your Honor.

19 May it please the Court, the issue at this point in the
20 sentencing proceeding, is there an appropriate sentence less
21 than life in prison that would satisfy the guidelines and
22 *Booker* and its progeny. I'm going to back up before I get to
23 the main part of my argument.

24 I was appointed in this case, I'm going to say three
25 years ago, your Honor, three and a half years ago. Since that

1 time, I would say mostly by choice, also by Mr. Derry
2 demanding the most of me in his defense, I have spent an
3 incredible amount of time with Mr. Derry. I know his good
4 points, I know his flawed points, his anger issues, his
5 temper. But I will tell this Court that he is the brightest
6 defendant I have ever had. Okay? That motion that you saw
7 that he presented to the Court, he did the research. He was
8 on to *Collado* before I ever knew *Collado* existed. We have
9 spent countless hours discussing cases, cases where I couldn't
10 convince him that he was wrong, but sometimes he convinced me
11 that he was right.

12 And this, the one thing that Mykal Derry said on the
13 stand that rang true was when he looked at his brother and he
14 said he was sorry and that he had, that Malik had talent and
15 he wanted more for him. And I forget, however I used that in
16 my closing, what I really think it was is that, and what I'm
17 relying on, your Honor, is Dr. Barber's report, because I
18 think that if there is any basis to give him less than life,
19 it is certainly contained in this report.

20 But what he was saying to him is he was sorry for
21 leading him into this life, sorry for his present, because
22 here is an individual who has incredible intellect. Okay?
23 It's true that he suffers from posttraumatic stress disorder.
24 He has anger issues. He basically raised himself. Both of
25 his parents were drug addicts. He was born into a life that

1 we've learned in this trial -- I always say that in every
2 trial you learn something, and the thing that amazed me here
3 was one of the last two cooperators, I don't know if it was
4 Thomas or not, but when he said, look, when I got out of jail,
5 I don't know how to do anything else, so I got drugs; I got
6 back on the street, that's how we earn a living. And I think
7 the same thing was echoed by Kareem Young. And I'm not
8 offering this like it is a defense or a justification, just
9 the reality of what occurred here and what his unfortunate lot
10 in life was.

11 And one of the things that I want the Court to consider
12 is, I believe, and I added it up, he basically has spent
13 almost half his life in institutions, whether it would be
14 juvenile institutions, adult correction facilities. They all
15 know there's a problem. They all diagnose him with anger
16 issues. But nobody treats it. It goes untreated. They just
17 keep shepherding along, releasing him, he gets back. He never
18 gets the chance to structure that.

19 And if you noticed in Dr. Barber's report, she said,
20 you know, I believe he has value if, you know, when serving
21 the sentence, and look, no matter what sentence you give him,
22 with the mandatory minimum, it's a lengthy sentence, that if
23 he avails himself to these programs, he could be a very
24 productive person.

25 And that's the issue I think we're presented with, is

1 his life worth rehabilitating? And I know it's a very
2 difficult balancing act for the Court. You've heard the
3 evidence. The Court has ruled. And you have to ask yourself,
4 is there something that -- some redeeming quality that would
5 make me go lower than life? And I really believe there is.

6 I don't think -- you know, I would be disingenuous, and
7 I think the Court pointed out today that I have a tendency not
8 to be disingenuous, that I try to, when I say things, really
9 mean them. As he is right now, he still has anger issues.
10 He's been locked up in the SHU. He's had issues at the FCC.

11 But I see that on the one hand, and then I see the 36
12 months of my interaction with him, and honestly, I'm the only
13 person who he's seen in jail, so I can't produce a mother, I
14 can't produce a girlfriend, I can't produce a relative because
15 I've been his sole support for the last 36 months. So, in
16 some ways, I'm his lawyer and I'm a representative of who he
17 has in his life.

18 And you read that Barber report, and I don't know if
19 your Honor has ever had the privilege of her testifying, but
20 she's a pretty straight shooter, and what I gather from it is,
21 there's a lot here. There's a lot of work to be done, but if
22 we give him the chance and we give him the incentive that --
23 look, it's going to be a lengthy sentence, but you give him
24 the incentive that, you know, you avail yourself to these
25 programs, you avail yourself that to when you get out, and the

1 world is going to be a way different place when he gets out
2 than what it is today, so it takes a huge commitment.

3 On the other hand, it's life, it's life, they're not
4 going to rehabilitate him, they're just going to, you know,
5 put him away and make sure he doesn't injure himself or injure
6 others, and I just think he has so much more as a person. I'm
7 not saying he's there yet, but maybe this is the time for
8 finally the system to maybe structure it so that he can make
9 some kind of contribution eventually.

10 I know I'm biased. You know, you spend 36 months with
11 somebody as much as I have, you have an affinity for that
12 person. And I also have the ability to tell the Court his
13 flaws. We know what he was convicted of. I'm not diminishing
14 that in any way. I just think that based on his really
15 difficult upbringing, but here I'm going to shed one piece of
16 light on it. If you read all of the interviews from Dr.
17 Barber, Probation who did, you know, an incredible work-up,
18 and a lot of what they found mimicked Dr. Barber's report, he
19 never once said, never once tried to use Dr. Barber and say,
20 you know, this is why I did it. He said, no, my childhood
21 wasn't that bad. We had a roof over our head. We got
22 presents. There was the incident, of course, at Christmas
23 that left a lasting scar on him, but never once does he say,
24 oh, yeah, you know, my father beat me, my mother abused me,
25 this uncle did this or whatever, never, never. Just, look, my

1 lot in life is what I chose, I take responsibility for it.

2 I have to be the one to say that the system failed.

3 The perfect example is, you know, the Meatball issue where
4 Meatball was his friend, but his anger so overwhelmed him over
5 a dice game that he's asking for a gun, and that is the key
6 element that has prevented him from maybe leading a productive
7 life, and nobody ever treated that.

8 And it's very hard, as Dr. Barber put in her report,
9 very hard to treat anger with just medication. You need to do
10 therapy, you need to do group training, you need to avail
11 yourself of how to control your anger, and I'm sure it's much
12 harder, I think Malik is now, are you 24?

13 THE DEFENDANT: 25.

14 MR. MARKOWITZ: 25. You were I think 21 when I met
15 you. Yes, so maybe it's four years, your Honor. 21, as you
16 get older, it's harder. Maybe if they availed him to these
17 programs when he first went into juvenile detention, the world
18 would be different, but it's not. We have to accept where he
19 is, but I am just asking the Court that any leniency that the
20 Court can bestow on him, based on Dr. Barber's reports, his
21 unfortunate circumstances, and what intellect he has, and
22 maybe he can make a contribution, and I'm hoping when in
23 prison he can help other inmates with the legal process,
24 because I can tell you this, never had a defendant be able to
25 research as well as he does, analyze a case as well as -- I

1 wish I had him in law school, your Honor, I might have got to
2 Law Review. He's worth at least the Court giving its
3 consideration to something less than life.

4 Thank you.

5 THE COURT: All right. Mr. Markowitz, thank you.

6 Would Mr. Derry like to address the Court?

7 THE DEFENDANT: Well, well, I'm still at the burden
8 of being proven beyond a reasonable doubt, so I still got
9 state charges that I can't admit to right now. So, for that
10 purpose, that's why I didn't come at trial and open up. But
11 at the end of the day, I don't give a fuck about nothing,
12 because whatever you all do, I fear God. So, you all can't do
13 nothing to a person that fear God. So, at the end of the day,
14 it's like I'm good because I'm mentally prepared for
15 everything I got from him. So, I want to say thank you if you
16 make a thorough choice.

17 THE COURT: All right. Mr. Derry, thank you.

18 THE DEFENDANT: All right. Thank you.

19 THE COURT: Mr. Markowitz, anything else?

20 MR. MARKOWITZ: No, your Honor.

21 THE COURT: Mr. Askin, do you wish to be heard on
22 behalf of the United States?

23 MR. ASKIN: Yes, your Honor. Your Honor, the
24 defendant, the 3553(a) factors here, there's a lot for the
25 Court to consider. I mean, I think that you have a situation

1 where the defendant is facing a life guideline advisory on the
2 first count and the 10-year mandatory minimum on the second
3 count, life plus 10 years. The Government in its papers did
4 ask for a life sentence, and I don't think we did so
5 reflexively and I want to explain why.

6 The defendant I think did suffer from a very difficult
7 upbringing. I don't think there's any dispute about that. I
8 don't think there can be. His parents were involved in heroin
9 use. His dad died of a heroin overdose and was incarcerated
10 for a couple years before he died when Malik was at a young
11 age. He lived in a neighborhood, unfortunately like too many
12 of these defendants, where there probably were a lot of homes
13 that were broken homes, fatherless homes, and a lot of
14 criminal activity around.

15 His dad died, and this sort of cuts both ways like a
16 lot of this, his dad apparently died of a drug overdose that
17 Malik seems to blame himself for. I don't know that it's
18 clear that his dad died from drugs that he was distributing,
19 but he seems to take the position that, well, I was
20 distributing drugs at that time and I had drugs in my clothes
21 and maybe my dad got ahold of those drugs. Of course, his
22 reaction to that is ironic in the sense that he later is
23 distributing heroin to everybody he can find in the
24 neighborhood along with his brother and a host of dozens of
25 other co-conspirators.

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1 But there's no question that was a very difficult
2 upbringing, and on top of that, he points to being sexually
3 assaulted when he was a child as something that has severely
4 impacted him. Now, I noted, I got a copy of the presentence
5 report I think through Mr. Burgos when he was sentenced in
6 State Court and there's no mention of that sexual assault.
7 I'm not suggesting that that means it didn't happen, but if it
8 did happen, he didn't mention it earlier when he talked to the
9 probation officer or the person preparing the report for the
10 judges in Atlantic County.

11 He gives no details of that and he says that he doesn't
12 want to relive it. Okay, fine. But it's a little hard to
13 determine whether that existed or whether he's making that up.
14 I mean, let's assume he is telling the truth about it and
15 didn't reveal it earlier because it's painful or embarrassing,
16 which could very well be the case. He indicates and this is
17 in Ms. Barber's, Doctor, I should say Dr. Barber's report,
18 that this and other things have made him not give -- not
19 really care about anything, have made him remorseless. That's
20 his own words. Those are -- I think that's being honest.

21 That's his own view of the world, and I think what he
22 just said, while pointing to the existence of a higher being,
23 a spiritual leader, a god, I think that's admirable, but he
24 seems to have no real remorse for the things that he has done.
25 Maybe he does. He certainly hasn't expressed any. And from

1 his comments and from what his actions were, it seems that he,
2 over the time, this three-year period, has felt sorry for
3 himself that he wound up in the situation.

4 I get the impression that he's sorry that he got caught
5 and he's sorry that he's in this terrible legal jam in Federal
6 Court as opposed to some smaller legal jam in State Court that
7 is just part of the business of drug trafficking in Atlantic
8 City and that he can deal with by doing a few years and moving
9 on with his life.

10 He had a difficult upbringing and in a difficult
11 neighborhood and turned to drugs. I bet if we looked at
12 Tyquinn James's upbringing, because, I'm just guessing because
13 I don't know for sure, but I always say 98, 99 percent of
14 these guys involved in drug trafficking and violent crime that
15 we prosecute in Federal Court are from fatherless homes, a lot
16 of them are from neighborhoods where there's a ton of
17 fatherless homes, and there's sociological impact studies of
18 that. Okay? Tyquinn James was probably from a similar
19 background.

20 No one can rehabilitate Tyquinn James because Malik
21 chose to execute Tyquinn James. And I would point out that he
22 chose to execute him, when you think about it, he could have
23 been Mykal Derry's -- a member of the Mykal Derry
24 organization. He could have been sort of onboard with the
25 whole thing, and, you know, defended himself with a gun if

1 somebody came at him or something like that, in the time
2 being, an almost legally impermissible self-defense kind of
3 thing, but he actually took the affirmative step, Judge, think
4 about this, Mykal Derry would not have known, from the facts
5 of this case Mykal Derry would not have known that Tyquinn
6 James was at that location at that time in front of the Red
7 Klotz and the Mecca Chicken unless Malik Derry told him and
8 encouraged him to come down there so he could shoot him. It
9 wasn't like Tyquinn James was about to shoot Malik Derry and
10 Malik Derry shot him first. He was eating a Pop Tart.

11 Now, I'm not going to say -- I'm not going to say that
12 Tyquinn James was a model citizen, anything but. He was a
13 drug dealer associated with Trevin Allen who the evidence
14 reflected continued to sell drugs until the day he died, which
15 is not admirable in any respect. He was certainly hurting
16 society himself. But that certainly didn't give the right to
17 Malik Derry to execute him, and his execution, even in the
18 hard scrabble world of drug trafficking in inner city Atlantic
19 City, his execution was probably unnecessary, and it was
20 merely we're going to dominate this other group, and I think
21 on Malik's part it was I'm going to show my value, I'm going
22 to show my value to Mykal and the rest of the organization,
23 I'm going to take care of this guy. It was something he
24 wanted to do.

25 The Meatball thing which, on October 23rd, that

1 Mr. Markowitz raises is another troubling revelation in the
2 evidence because Meatball, I totally agree with
3 Mr. Markowitz's characterization, the parties agree, Meatball
4 was an associate, from all we know, a friend of Malik Derry.
5 He has an argument with the guy, and he tells his brother, I
6 need a gun to go over there, I'm going to talk to Meatball,
7 because he had an argument with him over, apparently over a
8 dice game. Now, that's not drug-related, and we made that
9 distinction, that's not drug-related, and Mykal says no. And
10 this is where you have to ask yourself, who is more dangerous,
11 Mykal Derry or Malik Derry, and I don't think there's, I
12 thought about it, I don't think there's a good answer to that
13 question.

14 Mykal is dangerous in the sense that he is a totally
15 self-absorbed sociopath who doesn't care about anyone else but
16 whose violence is sort of logical in a sense. It's not what
17 he lied about. His violence is I'm going to dominate this
18 geographic area because it's lucrative drug trafficking
19 territory and whoever gets in my way, I'll beat them up, I'll
20 have them killed, whatever. It's sociopathic, but it's
21 logical.

22 Malik is not as ambitious, from what the evidence
23 shows, is not as much of a leader, not as ambitious about it,
24 but he also -- you run the danger with Malik I think that his
25 anger issues, and I agree with that, I think this is

1 possibly -- whether it's untreated or treated unsuccessfully,
2 the Court can look at that, I can't really say whether it was,
3 either it's untreated or it was treated unsuccessfully, and
4 maybe a combination of both over the years, he has very
5 serious, it seems, unresolved anger issues. That's from the
6 presentence report, that's from Dr. Barber's report, and it's
7 fairly obvious even from the evidence, some of the evidence of
8 the case, including the Meatball thing, and it's also obvious
9 from his disciplinary record, Judge.

10 Look at his disciplinary record. Ask yourself, in the
11 highly structured environment of a prison setting and juvenile
12 correction settings, if he can't make it in that highly
13 structured world, and he's carrying guns illegally and
14 shooting people -- don't forget, Judge, this happened shortly
15 after, within days of being released from doing two years and
16 nine months, including I think a parole violation, for a
17 firearms offense, he goes right into this offense and winds up
18 becoming an enforcer for this drug gang, a drug seller and
19 enforcer for what he knew to be a very violent drug gang led
20 by his brother, and then he shoots and kills a guy in an
21 execution style murder.

22 He's a problem when he's in custody. He's had to be in
23 the SHU, in the special housing unit in solitary, a good
24 portion of the time he's been in the Federal Detention Center.
25 Now, if you look at the guys who are in the Federal Detention

1 Center detained pretrial or awaiting designation, you already
2 have a distorted populous of guys who -- mostly guys, some
3 women -- who are not doing well in some respects with society
4 in terms of following the rules. Right? But most of them can
5 make it in general population at the FDC. He hasn't shown an
6 ability to do that.

7 He's fighting with people. He's not following the
8 rules. There were some allegations that he brought drugs in.
9 I don't know what happened with those allegations. All sorts
10 of problems at the FDC. All sorts of problems in juvenile
11 justice. All sorts of problems when he's on parole. And he's
12 telling you I'm somewhat remorseless. That's what he's
13 telling Dr. Barber. That's what he's saying. I don't really
14 care about people. I don't really care about anything else.

15 Now, he might care about some people in his life.
16 Like, for example, he talks very warmly about his grandmother,
17 and he seems to be very charitable towards his father, who may
18 have had his problems but certainly his father and mother
19 didn't do him a lot of help in some respects, to be fair. So,
20 I'm not saying he's an individual who doesn't care about
21 anyone but himself. He may care about a select group of
22 people. But other than those people, Judge, he doesn't seem
23 to have any morals or remorse about treating people
24 appropriately, and he seems to be a violent guy with all sorts
25 of unresolved anger.

1 And yes, he is a young man, but if it's not resolved
2 now in his 20s, I would ask the Court to ask yourself this, at
3 what point do you think that Malik Derry will be safe to be
4 roaming around in society? When he's 45? When he's 50? When
5 he's 55? When he's 60? I don't know the answer to that. And
6 the point of the matter is I'm trying to be fair and I don't
7 know the answer to that.

8 Now, maybe the Court can craft a sentence to be fair
9 that's a very lengthy sentence but is not life without parole,
10 because as we know, life without parole in the federal system
11 means life without parole unless the President of the United
12 States I believe commutes your sentence or unless the
13 Appellate Courts overturn your sentence due to changes in the
14 sentencing law or whatever.

15 Life without parole means you die in prison. Maybe
16 that's greater than necessary here, but at what point does
17 this Court think it is appropriate and safe to release this
18 man, given his track record both in custody, both out of
19 custody, while on supervision, while not on supervision, given
20 his mental health with the anger issues, given his extensive
21 voluntary drug use, which everybody knows does not help mental
22 health issues, given his propensity to carry firearms and be
23 violent, at what point in his life does this Court think it
24 will be safe, you're confident that it will be safe for the
25 public to release Malik Derry?

1 That I would submit is the problem here because the
2 Court has a duty, as the Court is well aware, for the need for
3 the sentence to reflect the seriousness of the offense.
4 Executing someone in a drug-related murder as a trigger
5 puller, acting as an enforcer for the organization, selling
6 drugs in what you know to be a violent organization in an
7 inner city area, destroying your own neighborhood when your
8 own father died of a heroin overdose, how could the nature of
9 the offense get much worse other than he wasn't the leader, he
10 wasn't Mykal, I guess.

11 The seriousness of the offense, general deterrence of
12 the public. The public, this is the kind of case that the
13 public is going to look at this. There's going to be a
14 general deterrence aspect to this.

15 Deterring Malik Derry. He said it's over in that phone
16 call, I'm going to get the roof to the max, kind of
17 recognizing that I got caught killing a guy, therefore, I get
18 roofed. Well, at least he recognizes that that's the
19 appropriate punishment for this, getting roofed. The question
20 is what does getting roofed mean here? And protection of the
21 public is one of the Court's, should be one of the Court's
22 major concerns.

23 Now, rehabilitating Mr. Derry and not giving him a
24 sentence that's greater than necessary is also one of the
25 considerations here, and the Court has a balancing act to do

1 there. But I would submit that, to be fair to Mr. Derry, it's
2 not clear that all rehabilitation efforts are going to fail or
3 that he's absolutely not rehabilitatable. I don't think
4 that's a fair characterization.

5 I do think it's a fair characterization that, as judges
6 have said before to me and to defendants, you have to judge
7 individuals on the basis of not just their words, not just
8 their intentions, although he didn't seem to give you his
9 intentions here, but we're all judged as human beings on our
10 track record, not so much as what we say we're going to do but
11 what we've done in the past, and what he's done in the past is
12 carry guns, deal drugs, be violent, use drugs, deal with anger
13 issues that are unresolved.

14 And I think Dr. Barber, who I'm sure is an expert, I
15 respect psychologists, I'm sure she's a good expert, but she
16 met with this guy for like, what, four hours, six hours?
17 Malik, I shouldn't say this guy, she met with Malik Derry for
18 four or six hours, and what can she tell us, that he's
19 rehabilitatable? Yes, in a possibilities world. Isn't
20 anything possible?

21 If she was on the stand and Mr. Markowitz said to her,
22 Dr. Barber, isn't it possible that he can be rehabilitated,
23 and I'm sure she would say yes, and that's what her report
24 reflects. But if I had the opportunity to cross-examine her
25 or the Court is thinking about her report, could she really

1 give this Court any type of comfort level that there's a
2 probability that Malik Derry's anger issues are now going to
3 be resolved or they're going to be resolved after 20, 30 years
4 in federal custody, that they're going to be resolved
5 positively? Maybe, but isn't that speculative, isn't that a
6 crapshoot, and isn't that a speculative crapshoot that puts
7 the public safety at risk?

8 That's the problem here, is that Malik is, almost by
9 his own admission, dangerous. He's someone with anger issues,
10 prone to violence, prone to recidivism, with no respect for
11 authority, who is not even completely logical because of his
12 anger issues and who, if left to his own devices, is going to
13 be using drugs, probably selling drugs, and carrying guns. I
14 think the likelihood of him changing his stripes if he is
15 released by this Court is not good. I mean, it might be a
16 possibility, but it's not good, and it's certainly not good
17 while he's young or middle-aged.

18 So, I'd ask the Court to just consider all that. I'm
19 sure the Court has. I know the Court gives a lot of thought
20 to these matters and is very familiar with all the Court's
21 obligations with respect to things to consider in the 3553(a)
22 factors, but I think this is a difficult one.

23 The Government concedes up front that this is one of
24 the -- I just had one in front of Judge Kugler where he and I
25 agreed that it was one of the worst we had ever seen in terms

1 of the defendant's background, and this is another one. These
2 are -- I mean, in 20 years, this is one of the worst, his
3 upbringing is one of the worst, but also on the other side of
4 that coin, he is one of the more dangerous defendants I think
5 we've come across in terms of, not as a leader, not as a Pablo
6 Escobar or even a Mykal Derry leader, because he wasn't that,
7 but as a guy, an enforcer on the street, carrying guns in
8 Atlantic City. Isn't that a scary thing? And when will that
9 danger end? At what age will that danger end for the public?
10 I don't know the answer to that, and I ask the Court to
11 consider that when sentencing him.

12 Thank you, your Honor.

13 THE COURT: All right. Mr. Askin, thank you.
14 Mr. Markowitz.

15 MR. MARKOWITZ: Nothing further, your Honor.

16 THE COURT: All right. I thank you all for your
17 thoughtful and helpful comments. I'm going to need just a
18 very short period of time to reflect on those arguments and to
19 consult with Probation on the final language of my judgment.
20 You have been patient today and previously in this matter, and
21 I'm going to ask your indulgence for just a few more minutes
22 while I finalize my decision, and I'll be right back out.

23 THE DEPUTY COURT CLERK: All rise.

24 (Recess at 2:36 p.m..)

25 (In open court at 2:45 p.m..)

1 THE DEPUTY COURT CLERK: All rise.

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

3 All right. It's the obligation of this Court to impose
4 a sentence under 18, United States Code, Section 3553 that is
5 sufficient but not greater than necessary to advance, promote,
6 achieve certain delineated statutory goals.

7 More specifically, the Court should impose a sentence
8 that reflects the seriousness of the offense; that promotes
9 respect for the law and provides just punishment; that affords
10 adequate deterrence to criminal conduct, which I interpret and
11 has been construed as the congressional embodiment of the
12 concept of general deterrence; to impose a sentence that
13 protects the public from further crimes of the defendant,
14 again an articulation by Congress of the longstanding
15 principle of criminal law to deter, of specific deterrence;
16 and lastly, to provide the defendant with needed educational
17 or vocational training, medical care or other correctional
18 treatment in the most effective manner.

19 In balancing these factors and imposing a sufficient
20 but not greater than necessary sentence, the Court should also
21 consider as well the nature and circumstances of the offense,
22 the history and characteristics of the defendant, and I'll say
23 now that both of those things, those latter two things are
24 important in this particular matter; the kinds of sentences
25 available, which I interpret to be the statutory option,

1 statutory ranges; the United States Sentencing Guidelines,
2 which are advisory to the Court and not binding, but one
3 factor to be considered, along with the policy statements that
4 accompany those guidelines.

5 In both evaluating the advisory sentencing guidelines
6 and the policy statements, I recognize that those judgments
7 are not binding on this Court and may be subject to scrutiny
8 if they are lacking in appropriate support, empirical support,
9 data support, or are otherwise irrational or unworthy of the
10 Court's adoption.

11 I am to avoid unwarranted sentencing disparity among
12 defendants with similar records who have been found guilty of
13 similar conduct, and I am to provide restitution to any
14 victims of the offense, if appropriate and allowed by law.

15 Am I correct that restitution is not being sought by
16 the United States in this case as it relates to --

17 MR. ASKIN: Yes, your Honor. I think that's what we
18 did in Mykal Derry's prosecution because the actual murder has
19 been charged and is still pending in the state courts, and
20 before Mykal Derry's sentencing, I spoke with state
21 prosecutors, and they assured me that they were going to seek
22 restitution in their matter. So, I did not seek it here.

23 THE COURT: All right. On the issue of unwarranted
24 sentencing disparity, and I suppose I'll have much or some
25 other things to say about that in a moment, I want to be clear

1 that, especially since I, in determining the applicability of
2 the murder cross-reference, I adopted and reiterated my
3 findings with regard to Malik Derry that I made regarding
4 Mykal Derry in terms of the applicability of that
5 cross-reference, but I hesitate here only to say that while I
6 gave Mykal Derry life, it is not in any way in my view
7 compelled, and I think the Government recognizes this,
8 compelled to give the same sentence because I made those same
9 findings. Each defendant stands on their own, and there is
10 much, much difference in many significant ways between Mykal
11 Derry and Malik Derry.

12 But I am mindful in general that I gave, I did give a
13 life sentence to his brother, who was also a member of this
14 conspiracy, and in part because of what happened to Tyquinn
15 James, and I'm also mindful that in this Court, this
16 particular judge has only given a life sentence a couple of
17 times, despite the fact that the United States Attorney's
18 Office brings serious matters before this Court and
19 convictions are obtained in matters in which very long,
20 lengthy and serious sentences are imposed. So, I think this
21 Court did pause.

22 I should say those other life sentences other than
23 Mykal Derry were ones in which the life sentence was mandatory
24 by statute. This would represent, if imposed, only the second
25 time that the Court would exercise its discretion to adopt a

1 guidelines finding and impose a sentence of life. It is
2 something that this Court, indeed any Court, should
3 contemplate deeply, reflect upon substantially, and impose
4 only under the most -- only under those circumstances in which
5 no other result achieves the statutory objectives.

6 I'm urged by the defendant in this case through
7 Mr. Markowitz to consider a number of different factors in
8 arguing for a variance from the guideline of life. And some
9 of this comes back around to Dr. Barber's report and is
10 reflected in it and some of it is independent of it, but much
11 of it focuses on where Mr. Derry has been in his life and
12 where he is now in terms of his mental and emotional status,
13 health, status and health and outlook.

14 And we are all products of our past. It's been pointed
15 out that Mr. Derry's past was as troubled a past as one can
16 imagine. His parents were both drug addicts. His father died
17 of drugs after years of addiction in 2007, and there's reason
18 to believe that his father may have obtained some of those
19 drugs from his own son who had left them in his pants in his
20 bedroom, although it's -- I think it would be, Mr. Derry would
21 be unfair to himself in placing any such blame given his
22 father's history, but in any event, this is a family situation
23 of drug use, drug abuse, rampant, deadly, within his own home
24 as a young child, certainly something that we would all
25 describe as being horrible.

1 It was a transient upbringing, and Dr. Barber's report,
2 indeed the report before me, suggests or states that it's very
3 difficult to place Mr. Derry in any kind of formal education
4 beyond a certain point as he just simply appeared to stop
5 going to school without any structure in place to have him go
6 and pay attention, and to the extent he was there, he was a
7 decidedly disruptive presence, all of this, of course,
8 resulting, beginning at the age of 12 and continuing unabated,
9 interaction with first the juvenile justice system and then
10 the adult justice system.

11 So, we have early truancy, early antisocial behavior,
12 early involvement in criminal behavior, even measured by, as
13 Mr. Askin points out, the kinds of histories that sadly we see
14 routinely in prosecutions in Federal Court.

15 And then we have Dr. Barber's report, which
16 Mr. Markowitz I think appropriately emphasizes, which has
17 substantial clinical findings in it, and I don't think there's
18 any objection to her qualifications and ultimately her
19 clinical conclusions, saving for an objection to what they
20 might mean.

21 She concludes that Mr. Derry suffers from posttraumatic
22 stress disorder and the many symptoms that flow from such a
23 pronounced disease. She concludes that he has antisocial
24 personality disorder and that it began at a quite early age,
25 as early as 15, and of the five diagnostic criteria, he

1 clearly satisfies three of them, which are reflected in his
2 criminal history.

3 She concludes that he meets the criteria for a
4 diagnosis of borderline personality disorder and does so
5 clinically by clearly satisfying almost all of the relevant
6 factors, appears to be six of the nine that he clearly
7 satisfies.

8 These, she attributes much of this to the history which
9 has been described, and I'm not sure about the failure or --
10 failure to discuss the victimization related to the relative
11 in the first adult prosecution, and it may very well be that
12 that's indicative of it being either exaggerated now or
13 nonexistent, but I have no way of knowing that at this point,
14 and I would say Dr. Barber's report suggests that, given the
15 clinical findings, that it may be -- may, in fact, have
16 occurred.

17 So, I've considered this report, and I'll have a little
18 more to say on it in a moment, but it's not lost on this Court
19 that it makes substantial clinical findings, that those
20 clinical findings appear to be supported by substantial
21 factual predicates that are either uncontested or established
22 in the record.

23 And indeed it appears that much of the things that are
24 discussed in here have also been discussed in his history
25 previously, so this doesn't appear to be -- or are established

1 in the record. I think that's important because it doesn't
2 appear here that Dr. Barber has been, and I'm not saying Dr.
3 Barber would ever do this thing, but this is not someone who
4 is feigning mental illness or mental problems on the eve of a
5 substantial sentence in an effort to avoid the consequences.
6 I think the record here establishes the clinical findings are
7 appropriate and accurate.

8 And I'm going to assume, as I said, for purposes of
9 sentencing here today that the facts that were asserted or
10 alleged regarding abuse, early abuse are true and are a
11 contributing factor to the clinical findings by Dr. Barber.

12 The next thing I'm urged to consider are those that are
13 related to the nature of the Government's prosecution here and
14 the proofs, the defense characterization of the proofs in this
15 matter as it relates to Mr. Derry. And I did find that he
16 didn't occupy a premises. I adopted the Government's
17 conservative description of the amount of drugs involved as it
18 relates to him. My primary ruling on the issue of whether or
19 not he should -- those amounts should be attributed to him
20 focused more on his role as an enforcer and less on his
21 involvement in the drug dealing. So, all of this is to say
22 that I have some sympathy for Mr. Derry's description of him
23 being basically a minor player as it relates to the drug
24 trafficking itself.

25 I don't know of any evidence that Mykal or Mr. Ellis in

1 the early days, anyone sent Malik up to Paterson or had him
2 assembling money or negotiating prices or distributing large
3 amounts to an army of street people. It seems that on the
4 contrary, that Mykal basically sent Malik out onto the street
5 himself, and where Mykal had from prior relationships street
6 level type connections to make sales, he gave them to his
7 little brother. So, I think it's fair to say that if you
8 focused narrowly on the drug part of this, that Malik Derry's
9 role was less substantial as a member of the drug conspiracy
10 than others involved. And this is reflected in the many hours
11 of intercepts, texts, phone, surveillance and so forth in
12 which Malik Derry's presence is spotty, episodic, and even in
13 some ways random.

14 And it's also true that in the overall scope of this
15 conspiracy, he was not as involved for as long as others.
16 Now, on the one hand, you can say that's a good thing, and you
17 can say it's a bad. I'm not sure exactly which way that
18 plays. I point that out only because as I look back on his
19 criminal history and reflect on those two years, he was
20 arrested with that gun hanging around with a bunch of other
21 guys in Stanley Holmes. So, it kind of begs the question, and
22 I make no finding, as to whether or not his role as an
23 enforcer actually predated October of 2010 -- or 2012, I'm
24 sorry, when he returned. So, in any event, in terms of being
25 on the ground in the conspiracy, it was a relatively shorter

1 period of time than other individuals, and I accept that
2 characterization.

3 I'm also mindful of this notion that it's easy to
4 criticize or suggest there are alternative lifestyles if
5 you're not the one growing up in a housing project where
6 everyone is dealing drugs and no one is going to school and
7 there's no positive parental or other community influence. I
8 have some -- the argument is made to me that it is too
9 simplistic to simply say that Mr. Derry or someone similarly
10 situated would have other choices and that reality, being
11 essentially abandoned to the street at a young age and getting
12 insufficient support from the state system and faced with the
13 a lure of his brother's offer of joining him in his
14 organization, that it would be not a completely irrational,
15 putting aside whether it's moral or not, not a completely
16 irrational decision for someone to make that choice in the
17 absence of other positive offers.

18 So, I do credit to some extent the notion that Mr.
19 Malik Derry was not the organizer or the leader of this
20 organization, he didn't conceptualize it, he was a soldier but
21 not a general, he joined it because he wanted -- because his
22 brother offered it to him and made it easy for him, and I
23 think ultimately what may have happened here was an intense
24 desire to prove himself to his brother that became his
25 downfall.

1 It's argued to me that he was not an enforcer, and I've
2 already made my findings in that regard. I don't have
3 sympathy for that argument.

4 Now, Mr. Markowitz, who has done a remarkable job in
5 this case, very diligent job in dealing with Mr. Derry's
6 difficulties, tells the Court that Mr. Derry is a smart man
7 with potential, and I don't question that. I think we all
8 have potential and I think Mr. Derry has demonstrated in his
9 life some intellectual capacity. So, I credit that, whether
10 or not ultimately at the end of the day it changes my result.
11 Anytime someone is sent to jail, it is a waste of human
12 potential, a waste of human intellect, and a burden our
13 society undertakes for better or worse.

14 So, how do I balance these things, these --
15 justification is the wrong word, it's not offered as
16 justification, excuse is the wrong word, it's not offered as
17 excuse. How do I explain -- how do I balance these
18 circumstances which might and perhaps here did or I would say
19 did lead to a life of criminal behavior against what the
20 Government argues merits a sentence of life?

21 And as I was listening to Mr. Askin, I have to say,
22 because I don't always agree with everything Mr. Askin says,
23 no disrespect intended.

24 MR. ASKIN: None taken, your Honor.

25 THE COURT: That many of the things that he was

1 saying were also kind of circulating in my mind in terms of
2 reviewing the record here, and I went, I had indeed gone back
3 and tabbed the criminal history here, the adjustment to
4 supervision, the kinds of things that one might want to look
5 to to try to see whether there's any reason for me to have the
6 same hope that Dr. Barber has in her report, and ultimately I
7 agree that it comes back to Dr. Barber's report.

8 To what extent does she give a clinical prediction of
9 someone who will abide by the law? She really can't make that
10 determination, I think. How much can she say to me that will
11 give me the comfort that I can choose a day, a date, a term,
12 as Mr. Askin says, where I will have reasonable assurance, as
13 Congress has asked me to have, that this particular individual
14 will finally be deterred?

15 She says it's my opinion that Malik Derry is still
16 young enough and sufficiently amenable to self-inspection and
17 change to benefit significantly, if afforded ongoing effective
18 treatment during his pending term of custody within the Bureau
19 of Prisons, and that he has the potential to become a
20 productive law abiding citizen in the future.

21 And my view is that I can accept that, I can accept
22 that statement of an opinion, but I have an obligation to see
23 whether there's anything in the record or in her report in
24 which I can point to, hang my hat on, receive assurances from,
25 have comfort from, that that prediction is true, and I find

1 nothing. In fact, I find the opposite.

2 And it's kind of hard to know exactly where to begin,
3 but I suppose the statute gives me the guidance I need. I
4 turn first to the nature and circumstances of the crime. Mr.
5 Askin said, and I agree, that Malik Derry could have seen TY
6 and walked right on by. There was nothing that compelled him
7 to call his brother and say he's here. There's nothing that
8 would have compelled him to say bring me a gun. And there's
9 nothing under the circumstances of that encounter that would
10 have required Mr. Malik Derry to defend himself against any
11 threat from Tyquinn James at that point on that day on that
12 street corner.

13 What happened instead is that Malik Derry demonstrated
14 in a cold-hearted, cruel fashion an eagerness, a desire, I'm
15 serious, I'm dead serious, to execute Tyquinn James. And the
16 intercepted calls make it clear that it was calculated, that
17 it was premeditated, and that there was ample time for Mr.
18 Derry to avoid the situation or to abandon it, and he chose
19 none of those -- made none of those decisions and chose none
20 of those paths.

21 And beyond the chilling events, and the murder is
22 captured on video, it is cowardly, it was as lethal as any
23 bullet could be to the base of the head in the back, the body
24 falls lifeless, except for a final twitch, as I recall. It
25 was an execution, and there's little hope in an execution.

1 What follows from that is as, in some ways, as equally
2 chilling, if not more chilling, and that is Malik Derry's
3 reaction to the murder as told by his brother. He finds a
4 place to hide. He receives the directions from Mykal without
5 objection to change his clothing. And there is this exchange
6 with Ms. Spencer -- Ms. Spellman, rather.

7 After hearing the news reports, Ms. Spellman says,
8 first homicide of the year, head shot. This is paragraph 182
9 of the presentence report. Mykal says, he good, he acting
10 like it's nothing, CTFU, the acronym for the colloquial phrase
11 "cracking the fuck up," and Ms. Spellman says, LMAO, laughing
12 my ass off. Mykal: This nigga is a true Derry.

13 It seems to me that after obtaining this weapon and
14 shooting Tyquinn James, that Malik Derry was as cool and as
15 cruel after as he was before, and I see no hope in what one
16 would think would have been the most profound moment for
17 remorse, being closest to such a terrible act. And then he
18 goes about his business having satisfied the desire of his
19 brother to kill a rival.

20 So, I have someone who is eager to kill, who didn't
21 have any problem in killing, and seems to have been profoundly
22 and unhumanly unaffected by killing someone. This was not a
23 crime of passion. There was no heat in the moment. There was
24 no effort to defend or assert territory. Again, it was simply
25 a cold-blooded, cruel execution.

1 Now, when I look again, when I go back, as Mr. Askin
2 asked me to do, I had already done, which is to go back
3 through the criminal history here from the day of -- from 12
4 on, what I see is someone who has had many opportunities to
5 reform, to receive, a Scared Straight program and other
6 programs through the state, and whose reaction to
7 incarceration and supervision by the state was, at every turn,
8 defiant, objection, and confrontation with authority, and I
9 would be here for another hour if I went through every single
10 incident that's detailed in this presentence report about Mr.
11 Derry's fighting, arguing, punching, disrespect for authority,
12 disregard for authority, challenge to authority, physical
13 confrontations with everyone he met, including physical
14 assaults on corrections officers.

15 I then turn to his adult record, and his arrest in
16 Stanley Holmes, having been convicted of possessing a loaded
17 revolver with five hollow-point bullets, and this Court has
18 expressed before what possession of hollow-point bullets
19 means. They are outlawed for non-law enforcement and
20 nonmilitary for a reason. They are intended to be deadly.
21 You shoot a hollow-point bullet because you want the person on
22 the receiving end to die. And as he walked away, he says to
23 his compatriots, accomplish that mission without me. I don't
24 think there's much of a stretch to understand what that
25 mission was to be, it was to be -- to use those weapons in

1 Stanley Holmes as necessary.

2 So, what happens after that? Well, he goes into state
3 custody, he is released, and he gets in a fight. And again,
4 this fight is instructive to me in terms of the history and
5 characteristics of the defendant and I think must be
6 juxtaposed with Dr. Barber's optimism and hope. He gets into
7 a fight, he asks for a cup of coffee, and he goes over to
8 someone that he's got some kind of beef with, nobody
9 understands exactly why, and he just simply throws the
10 scalding hot coffee into this person's face, and then jumps on
11 the table and goes nuts in the cafeteria.

12 That's bad enough, but what does he say to the police
13 department when he's arrested? He acknowledges up front this
14 guy is the victim. He didn't do anything wrong. And, quote,
15 I just want to see him before I go to jail so I can laugh,
16 close quote.

17 There is something more than -- there is something more
18 about Mr. Derry than a mere inability to have empathy and a
19 lack of remorse that's identified in Dr. Barber's report, and
20 what is not directly addressed is Mr. Derry goes beyond that.
21 It's cruelty, evil. It's inherent in his execution of Tyquinn
22 James. And there's a window into that aspect of his soul in
23 how he reacted to giving someone second degree facial burns:
24 I want to hurt him and I want to see him again so I can mock
25 him. I don't see any hope in that.

1 It comes down to I think again what Mr. Askin pointed
2 out, that if we can't -- if we can't see in Mr. Derry an
3 ability -- and I haven't even really -- I should go through
4 and discuss his time here at FDC. He fights with his own
5 brother. He's in the SHU. He is, whether he denies it or
6 not, he was sanctioned for having drugs in his possession
7 within the system. His adjustment facing the charges in this
8 Court and in Atlantic County appear to have had absolutely no
9 impact on his respect for authority or his willingness to
10 abide by the rules or to seek help. If he had anger problems
11 or needed counseling, there is simply nothing in the record to
12 suggest anything other than violent confrontation, disrespect,
13 and indeed hatred for even those who would seek to help him.

14 I have struggled within 3553 to find something in
15 (a)(2)(C), the specific deterrence prong, to find that date,
16 10 years, 20 years, 30 years, 40 years, 50 years, where I can
17 say with the requisite degree of confidence in my own mind
18 that he's no longer a threat, that he would no longer be a
19 threat to others, and I see nothing in this record, including
20 Dr. Barber's report, that allows me to find that date.

21 And when I juxtapose that with the other aspects of the
22 statutory regime, to reflect the seriousness of the offense,
23 an execution style murder, is there anything more serious, and
24 to do so in the context of the drug trafficking crime, that it
25 was devastating this public housing project, is there anything

1 more serious? I think not.

2 Does a life sentence promote respect for the law? Yes,
3 it does, substantially so. Is it just punishment? It appears
4 in this case that it is. And it ought to send a message to
5 others who would consider joining a criminal organization as
6 an enforcer whose job it is to shoot at and kill people who
7 would challenge their business organization, that that conduct
8 will give you the roof to the max.

9 I have considered everything submitted to me and I have
10 searched long and hard for something that would justify a
11 variance in this matter, and I can find nothing on this record
12 to do so, and I feel it appropriate, therefore, after having
13 balanced the statutory factors, to impose a sentence of life.

14 As ironic as it may seem, it is also appropriate, it
15 seems to me, as I have done in the past, to nonetheless impose
16 a term of supervised release, and here I would impose a term
17 of 10 years, which would include alcohol, drug testing and
18 treatment, and mental health evaluation, and prohibitions on
19 criminal associations and gang affiliation. I would not
20 impose a fine.

21 I should add while I'm thinking of that, one of the
22 things I often look for in someone's background, and I know
23 given his, the substantial amount of time that he's been in
24 jail, there's nothing in this record to show any kind of
25 positive community engagement or personal advancement, no work

1 history, nothing other than a destruction of society through
2 drug dealing. There's no income, there's no assets. A fine
3 would seem inappropriate.

4 There would be, however, a \$100 special assessment
5 which is due -- I'm sorry, a special assessment of \$1,000,
6 there are 10 total counts of conviction here, \$1,000 total
7 special assessment which is due immediately.

8 Let me first ask the United States if they know of any
9 legal reason why I can't impose the sentence I have just
10 announced?

11 MR. ASKIN: No, your Honor. I would just point out,
12 though, that for sort of the purposes of appellate review and
13 meeting the statutes, I'm assuming the Court means a life
14 sentence on count 1 and a 10-year consecutive sentence on
15 count 10?

16 THE COURT: Let me be clear and I should have been.
17 I would impose a term of life on count 1, 48 months on each of
18 the one, two, three, four, five, six, seven, eight phone
19 counts to run concurrent to count 1, and 120 months on count
20 10, which is to run consecutive to count 1, as is required by
21 statute.

22 MR. ASKIN: Yes, your Honor.

23 THE COURT: Which overall produces a total term of
24 imprisonment of life plus 120 months.

25 MR. ASKIN: Yes, your Honor.

1 THE COURT: With that understanding, is there any
2 legal objection to that sentence?

3 MR. ASKIN: No, your Honor.

4 THE COURT: Other than the arguments that have been
5 preserved, Mr. Markowitz, is there any reason you know of
6 legally why I can't impose the sentence I have described?

7 MR. MARKOWITZ: No, I do not, your Honor.

8 THE COURT: All right, Mr. Markowitz. Thank you.
9 Mr. Derry, if you will please rise.

10 Pursuant to the Sentencing Reform Act of 1984, it is
11 the judgment of the Court that the defendant, Malik Derry, is
12 hereby committed to the custody of the Bureau of Prisons to be
13 imprisoned for a term of life on count 1, 48 months on each of
14 counts 74, 75, 76, 84, 85, 106, 107 and 110, to run concurrent
15 to count 1, and 120 months on count 10 to run consecutive to
16 count 1, to produce a total term of imprisonment of life plus
17 120 months.

18 Upon release from imprisonment, the defendant shall be
19 placed on supervised release for a term of 10 years. This
20 term consists of 10 years on count 1, five years on count 10,
21 and one year on each of counts 74, 75, 76, 84, 85, 106, 107,
22 110, all such terms to run concurrently.

23 Within 72 hours of release from the custody of the
24 Bureau of Prisons, the defendant shall report in person to the
25 Probation Office in the district to which the defendant is

1 released.

2 While on supervised release, the defendant shall not
3 commit another federal, state or local crime, shall be
4 prohibited from possessing a firearm or other dangerous
5 device, shall not possess an illegal controlled substance, and
6 shall comply with the other standard conditions that have been
7 adopted by this Court.

8 The defendant must submit to one drug test within 15
9 days of commencement of supervised release and at least two
10 tests thereafter as determined by the probation officer.

11 In addition, the defendant shall comply with the
12 following special conditions: You shall refrain from the
13 illegal possession and use of drugs, including prescription
14 medication not prescribed in your name, and the use of
15 alcohol, and shall submit to urinalysis or other forms of
16 testing to ensure compliance.

17 It is further ordered that you shall submit to
18 evaluation and treatment on an outpatient or inpatient basis
19 as approved by the U.S. Probation Office, and you shall abide
20 by the rules of any program and shall remain in treatment
21 until satisfactorily discharged by the Court. You shall alert
22 all medical professionals of any prior substance abuse
23 history, including any prior history of prescription drug
24 abuse, and the probation officer shall supervise your
25 compliance with this condition.

1 You shall undergo treatment in a mental health program
2 approved by the United States Probation Office until
3 discharged by the Court, and as necessary, said treatment may
4 also encompass treatment for gambling, domestic violence or
5 anger management as approved by the United States Probation
6 Office until discharged by the Court, and the probation
7 officer shall supervise your compliance with this condition.

8 You shall refrain from associating with or being in the
9 company of any members of any street gang, outlaw motorcycle
10 gang, traditional or non-traditional organized crime group, or
11 any other identified threat group, and you shall be restricted
12 from frequenting any location where members of said
13 organizations are known to congregate or meet. You shall not
14 have in your possession any item or paraphernalia which has
15 any significance or is evidence of affiliation with said
16 organizations.

17 Pursuant to 18, United States -- well, I guess there's
18 no restitution sought by the United States, correct?

19 MR. ASKIN: Correct, your Honor.

20 THE COURT: We said that before.

21 All right. I do find the defendant does not have the
22 ability to pay a fine, as I indicated, and I'll waive a fine
23 in this case.

24 It is further ordered that the defendant pay the United
25 States a total special assessment of \$1,000 which shall be due

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1 immediately. Again, this represents \$100 on each of the 10
2 counts of conviction.

3 Are there any recommendations that you would ask the
4 Court to make, Mr. Markowitz? This may be complicated by a
5 sentence of life.

6 MR. MARKOWITZ: That's what I was thinking, your
7 Honor, but be that as it may, I appreciate the Court asking,
8 and I would take you up on that offer for a recommendation to
9 be as close to Atlantic City as possible to serve out his
10 sentence, if possible.

11 THE COURT: All right. Mr. Askin?

12 MR. ASKIN: Your Honor, I have no objection. It may
13 be complicated by certain -- well, number one, his custody
14 category, but number two, by any kind of separations, although
15 we always try to review the separations at this point to see
16 which ones are necessary and which ones can be resolved.

17 THE COURT: All right. After balancing all relevant
18 considerations, I'll recommend that the Bureau of Prisons, if
19 possible, designate a facility as near as possible to the
20 defendant's home address.

21 MR. MARKOWITZ: Thank you, your Honor.

22 THE COURT: I wish to advise you, Mr. Derry, of your
23 right to appeal the conviction and my sentence in this matter
24 pursuant to 18, United States Code, Section 3742, subject to
25 any preexisting appellate waiver that may limit that right.

1 If you are unable to pay the cost of filing a notice of
2 appeal, you may request the Clerk of the Court to file a
3 notice of appeal on your behalf, and you have 14 days to do
4 so, sir. All right?

5 THE DEFENDANT: Um-hmm.

6 THE COURT: All right. Anything else from the United
7 States?

8 MR. ASKIN: No, your Honor.

9 THE COURT: Mr. Markowitz?

10 MR. MARKOWITZ: No, your Honor.

11 THE COURT: All right. Mr. Derry, you said that you
12 answer and will answer to your God. I think that is
13 admirable. Until that day comes, you have a role on this
14 earth in which there are other things to be taken into
15 consideration. You will have to make decisions about how you
16 want to conduct yourself during the time of your
17 incarceration. You can be productive, accept where you are
18 and make the best of it, find joy where joy can be found,
19 advancement where advancement can be found, to nurture the
20 talent people believe you have, your intellect, or you can
21 remain defiant and angry and antisocial.

22 I hope you, if you will, abide by any treatment that's
23 available in prison, that you will seek it out, that you will
24 benefit from it, that you will find a way to have a positive
25 influence on all those who are around you, and to find a way

1 within that restricted environment to be as happy and
2 productive as circumstances will allow. I hope you will
3 answer -- I hope you will also take the time to reflect on
4 where you've been and what has happened, and perhaps the
5 entity that or the deity that you do seek to answer to will
6 want you to engage in such self-reflection. I'd ask you to
7 ask yourself whether that's a worthwhile effort. You might
8 find some answers there and some peace and some ways to deal
9 with the things that have haunted you.

10 I've done what I think the law requires and what the
11 circumstances compel, but I nonetheless hope for you peace and
12 I hope for you some measure of happiness in your life.

13 I wish you all a good rest of the day and appreciate
14 your patience in this matter.

15 MR. MARKOWITZ: Thank you, your Honor.

16 MR. ASKIN: Thank you, your Honor.

17 THE DEPUTY COURT CLERK: All rise.

18 (Proceedings concluded at 3:32 p.m..)
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