

**In The
Supreme Court of The United States**

JOSEPH KELVIN ABERANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. WHETHER THE FOURTH CIRCUIT ERRED IN FINDING THAT THE CROSS REFERENCE UNDER SECTION 2K2.1(C)(1) OF THE UNITED STATES SENTENCING GUIDELINES WAS APPLICABLE WHERE NO FIREARM WAS CITED IN THE INDICTMENT?
- II. WHETHER THE FOURTH CIRCUIT ERRED IN FINDING THE SECTION 2A2.1 CROSS REFERENCE TO ATTEMPTED FIRST-DEGREE MURDER APPLICABLE WHERE THE EVIDENCE SUPPORTED A FINDING OF IMPERFECT SELF-DEFENSE?

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The decision of the court of appeals is unpublished and is included in the Appendix at App-2. The judgment of the court of appeals is included in the Appendix at App-10. The judgment of the district court is included in the Appendix at App-11. The transcript of the sentencing hearing in the district court is included in the Appendix at App-20.

JURISDICTION

The court of appeals entered its judgment on July 13, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND GUIDELINE PROVISIONS INVOLVED

§ 3553(a) Imposition of a Sentence

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) The need for the sentence imposed –
 - (A) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) To afford adequate deterrence to criminal conduct;
 - (C) To protect the public from further crimes of the defendant; and
 - (D) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)

§2K2.1(c)(1) Cross Reference:

If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

- (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above;
- (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

U.S.S.G. §2K2.1(c)(1)

§2A2.1 Assault with Intent to Commit Murder; Attempted Murder

(a) Base Offense Level:

- (1) 33, if the object of the offense would have constituted first degree murder; or
- (2) 27, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the victim sustained permanent or life-threatening bodily injury, increase by 4 levels;

(B) the victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

- (2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels.

U.S.S.G. §2A2.1

STATEMENT

Procedural History

Mr. Aberant was indicted on July 17, 2017 on charges of possession of a firearm by a convicted felon and possession of ammunition by a convicted felon, in violation of Title 18, United States Code, §§ 922 (g)(1) and 924(a)(2), and knowingly making a false and fictitious statement in acquiring a firearm, in violation of Title 18, United States Code, §§ 922(a) (6) and 924(a) (2) and 2. At a Rule 11 hearing on July 17, 2017, Mr. Aberant pled guilty to all three counts. There was no written plea agreement.

The guideline range recommended by the United States Probation Office in the final presentence investigation report (“PSR”) was 262 to 327 months, based on a total offense level of 38. The offense level was calculated by applying a cross reference to attempted first-degree

murder under Sections 2K2.1(c)(1) and 2A2.1 of the sentencing guidelines.

Prior to sentencing, Mr. Aberant objected to the application of Section 2K2.1(c)(1) on the basis that no specific firearm was cited in the offenses of conviction as required under the 2014 amendment to the Section. Mr. Aberant further objected to the cross reference under Section 2A2.1 on the basis that the evidence did not support a finding that he attempted to commit first-degree murder. Mr. Aberant moved for a downward variance based on age, poor physical health, and depression and anxiety. The government filed a motion for upward variance based on prior violent felonies.

At the sentencing hearing on October 20, 2017, the district court overruled Mr. Aberant's objections and adopted the recommended guideline range. As explanation, the court stated only that "the preponderance of the evidence supports the report as presented." The court denied Mr. Aberant's motion for a downward variance with no explanation, and sentenced him to a term of 120 months for the first count, and to terms of 80 months each for the remaining two counts, to run concurrently with each other but consecutively to first count, for a

total term of 200 months. The court also sentenced Mr. Aberant to three years supervised release and a \$300 special assessment.

On appeal, Mr. Aberant raised three issues: 1) whether the district court erred in applying the cross reference under U.S.S.G. 2K2.1(c)(1) where no firearm was cited in the offenses of conviction; 2) whether the district court erred when it applied the Section 2A2.1 cross reference to attempted first-degree murder where the evidence supported a finding of self-defense; and 3) whether the district court erred in denying the motion for a downward variance and imposing a sentence that was greater than necessary to satisfy the sentencing factors in 18 U.S.C. § 3553(a).

On July 13, 2018, the court of appeals issued its opinion affirming the district court's application of the cross reference to attempted first degree murder. The court, however, ordered a new sentencing hearing after finding that the district court's lack of an explanation for its selected sentence rendered Mr. Aberant's sentence procedurally unreasonable and precluded the appellate court from conducting meaningful appellate review.

Facts

In August 2016, Mr. Aberant was living with his wife Marie in Clayton, North Carolina. His adult daughter, Nicole Cicalese, and her boyfriend, Alex Ortiz, were also staying at the home. Mr. Aberant was 59 years old at the time and suffered from a series of physical and mental health conditions, including Hepatitis C, hypertension, anxiety, depression, and chronic back pain resulting from a disabling injury in 2013.

On August 10, 2016, Mr. Aberant and Marie took steps to begin eviction proceedings against Cicalese and Ortiz for failure to pay rent. After leaving the courthouse, Mr. Aberant and Marie went to a Walmart and purchased a rifle. Marie used her driver's license to purchase the rifle. They next went to a gun store to buy ammunition. When they got home, Mr. Aberant test fired the rifle in the backyard. Later that afternoon, Mr. Aberant informed Cicalese that the sheriff would remove her and Ortiz from the house the next day. Cicalese became angry and threatened to call the IRS on Aberant. Aberant fired one round from the rifle, not hitting Cicalese. Cicalese went to her

bedroom and Aberant followed. They got into a physical altercation. App-34.

When Ortiz came home and learned about the fight between Mr. Aberant and Cicalese, he became angry and confronted Aberant. Mr. Aberant asked Ortiz to sit down and they would talk about it. Ortiz refused and told Mr. Aberant to “step outside like a man.” Mr. Aberant fired two rounds at Ortiz’s feet. Ortiz charged Aberant, slammed him to the ground and began choking him. App-37. According to the PSR, Ortiz grabbed the gun from Mr. Aberant and threw it to the ground. Ortiz stated, “You pointed a gun at me and shot at me, if you do it again, you better make sure you kill me or I will kill you.” Ortiz retreated to the bedroom. When Ortiz returned to the kitchen, Mr. Aberant told Ortiz they need to talk. Ortiz got angry and told Aberant he wanted him to die. App-38. Mr. Aberant shot at Ortiz, who ran from the house. Ortiz was struck seven times but survived. Mr. Aberant left the scene in his truck.

SUMMARY OF THE ARGUMENT

- I. The Fourth Circuit erred in holding that the cross reference under Section 2K2.1(c)(1) was applicable where no weapon was identified

or cited in the offenses of conviction as required by the 2014 amendment to Section 2K2.1(c)(1).

- II. The Fourth Circuit erred in holding that the cross reference to attempted first-degree murder under Section 2A2.1 was applicable where the facts supported a finding that Mr. Aberant acted in imperfect self-defense in shooting Ortiz.

REASONS FOR GRANTING THE PETITION

- I. THE FOURTH CIRCUIT ERRED IN FINDING THAT THE CROSS REFERENCE UNDER SECTION 2K2.1(C)(1) OF THE UNITED STATES SENTENCING GUIDELINES WAS APPLICABLE WHERE NO FIREARM WAS CITED IN THE INDICTMENT.

Section 2K2.1(c)(1) and Application Note 14(E), which guides its application, was dramatically modified in the 2014 guideline amendment cycle (Amendment 784) to include the phrase “cited in the offense of conviction.” Appendix C of the Guideline Manual, which details the reasoning behind each guideline amendment, explains that a revision to Section 2K2.1(c)(1) was required as the circuit courts were split on its proper application. The amendment sought to clarify the Commission's intent, which is that in order to use Section 2K2.1(c)(1) to cross reference to another felony offense, the firearm used in the other

offense must be specifically identified and charged (i.e., cited) in the offense of conviction.

The commentary states:

While relevant conduct principles provide a limitation on the scope of subsection (c)(1) (and, as discussed above, this amendment clarifies how those principles operate in this context), the Commission determined that a further limitation on the scope of subsection (c)(1) is appropriate. Specifically, the instant offense and the other offense must be related to each other by, at a minimum, having an identifiable firearm in common. Accordingly, the amendment revises the cross reference so that it applies only to the particular firearm or firearms cited in the offense of conviction.

Supplement to Appendix C, November 1, 2014, pp 78-79.

As there was no weapon specifically identified and cited in Counts 1 or 2 (the offenses of conviction), the cross reference under Section 2K2.1(c)(1) is prohibited.

In its opinion, the court of appeals rejected Mr. Aberant's argument that Section 2K2.1(c)(1) was inapplicable. The court reasoned that: "[n]othing in the Guideline or the commentary requires that the firearm must be specifically identified in the charging instrument in order for the cross reference to apply." App-6. This reasoning ignores the plain language of the Guideline, which was

specifically amended to require identification of the firearm involved. “It is a familiar tenet that the text of a statute ‘furnishes the most reliable guide to its interpretation.’ The same respect is accorded to the text of the sentencing guidelines.” *United States v. Giggey*, 867 F.3d 236, 241 (1st Cir. 2017)(citing *United States v. Suárez-González*, 760 F.3d 96, 99 (1st Cir. 2014) Mr. Aberant requests the Court to require adherence to the Guideline as written, thus making the cross reference inapplicable.

II. THE FOURTH CIRCUIT ERRED IN FINDING THE SECTION 2A2.1 CROSS REFERENCE TO ATTEMPTED FIRST-DEGREE MURDER APPLICABLE WHERE THE EVIDENCE SUPPORTED A FINDING OF IMPERFECT SELF-DEFENSE.

In *Kimbrough v. United States*, 552 U.S. 85 (2007), this Court required the sentencing court to consider the advisory guidelines as one of a number of relevant factors, stating that district courts must treat guidelines as the “starting point and the benchmark.” The case of *United States v. Hughes*, 401 F.3rd 540 (4th Cir. 2005) stands for the proposition that the first step in determining an appropriate sentence is to accurately set the sentencing guidelines, and then to consider those guidelines as one of the factors to be evaluated before imposing sentence.

Section 2A2.1(a)(1), which applies to attempted murder, provides for a base offense level of 33 if the object of the offense would have constituted first-degree murder. Otherwise the base level is 27. “Murder is the unlawful killing of a human being with malice aforethought.” 18 U.S.C. § 1111 (2012). Malice aforethought is a necessary component of murder and “may be established by evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.” *United States v. Williams*, 342 F.3d 350, 356 (4th Cir. 2003) (internal quotation marks omitted). In order to show attempted murder, the Government must prove that the person (1) had a culpable intent to commit the crime, and (2) he took a substantial step toward the completion of that crime. *United States v. Engle*, 676 F.3d 405, 419-20 (4th Cir. 2012).

Mr. Aberant was entitled to assert self-defense in objecting to the application of a particular guideline. Under federal law, a justification defense is available to a defendant where he:

- (1) was under unlawful and present threat of death or serious bodily injury;
- (2) did not recklessly place himself in a situation where he would be forced to engage in criminal conduct;
- (3) had no reasonable legal alternative . . . ; and
- (4) [established] a direct causal relationship between the criminal action and the avoidance of the threatened harm.

United States v. Ricks, 573 F.3d 198, 202 (4th Cir. 2009).

To establish self-defense under North Carolina law, four elements must be present:

- 1) It appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
- 2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
- 3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
- 4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 529, 279 S.E.2d 570, 572-73 (1981).

If the defendant can prove the first two elements but fails to show either of the last two elements (that he was not the aggressor or that he

did not use excessive force) the defendant has only “the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty of at least voluntary manslaughter.” *Id.* (emphasis in original).

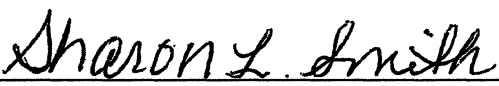
The uncontroverted evidence in this case, as reflected in the PSR, shows that Alex Ortiz came home from work to Mr. Aberant’s house where Ortiz was staying with Aberant’s daughter. Ortiz became irate because of an earlier altercation between Aberant and his daughter. Ortiz wanted to take it outside and threatened to kill Aberant. Aberant fired two warning shots toward Ortiz and Ortiz grabbed the gun and threw it on the ground. He then grabbed Aberant by the neck and slammed him on the kitchen floor. Ortiz was choking Aberant while on the floor. Nicole was screaming for everyone to stop and Ortiz got off Aberant. Sometime later, Ortiz came back into the kitchen and was really furious, he threw an ashtray and broke it. He was yelling at Aberant that you’re not a man while saying these are my fists, I’m going to kill you. Ortiz was getting really close to Aberant like he wanted to hit him again, choke him again. Aberant was sitting at the table and as Ortiz came at him this time, Aberant shot him.

Joseph Aberant is a sixty year old man disabled by back injuries. Ortiz was a healthy robust thirty-six year old construction worker. Ortiz assaulted Mr. Aberant, choked him, and threatened to kill him. Under these circumstances, Mr. Aberant was reasonably entitled to defend himself with deadly force. While the Court could conclude that Mr. Aberant used excessive force by shooting Ortiz, who was unarmed, the facts clearly support a finding of at least imperfect self-defense. This would reduce the charge to voluntary manslaughter. Accordingly, Mr. Aberant requests the Court to find the cross reference to attempted first-degree murder inapplicable.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,


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October 11, 2018

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Appendix A

United States v. Joseph Kelvin Aberant, No. 17-4667

Unpublished Opinion and Judgment
In the United States Court of Appeals for the Fourth Circuit

Decided July 13, 2018

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-4667

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH KELVIN ABERANT,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:17-cr-00025-BO-1)

Submitted: June 25, 2018

Decided: July 13, 2018

Before MOTZ and TRAXLER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Vacated and remanded by unpublished per curiam opinion.

Sharon Leigh Smith, UNTI & SMITH, Raleigh, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, First Assistant United States Attorney, Kristine L. Fritz, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Joseph Kelvin Aberant pled guilty, without a plea agreement, to possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924 (2012) (Count 1), possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924 (Count 2), and making a false and fictitious statement to a firearms dealer during acquisition of a firearm, in violation of 18 U.S.C. §§ 922(a)(6), 924(a), 2 (2012) (Count 4). The district court imposed a term of 120 months on Count 1 and concurrent 80-month terms on Counts 2 and 4, to be served consecutive to the 120 months on Count 1, for a total below-Guidelines sentence of 200 months' imprisonment. On appeal, Aberant contends that the district court erred in applying a cross reference to the attempted murder Guideline, *see U.S. Sentencing Guideline Manual* §§ 2A2.1, 2K2.1(c)(1)(A), 2X1.1(a) (2016), for imposing a sentence that was greater than necessary to meet the 18 U.S.C. § 3553(a) (2012) sentencing objectives, and for failing to adequately explain the selected below-Guidelines sentence. For the reasons that follow, we vacate Aberant's sentence and remand for resentencing.

We review a defendant's sentence "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). Under this standard, a sentence is reviewed for both procedural and substantive reasonableness. *Id.* at 51. In determining procedural reasonableness, we consider whether the district court properly calculated the defendant's advisory Guidelines range, gave the parties an opportunity to argue for an appropriate sentence, considered the 18 U.S.C. § 3553(a) factors, selected a sentence based on clearly erroneous facts, or failed to sufficiently explain the selected sentence.

Id. at 49-51. If a sentence is free of “significant procedural error,” then this court reviews it for substantive reasonableness, “tak[ing] into account the totality of the circumstances.”

Id. at 51. “Any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable.” *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014).

“Such a presumption can only be rebutted by showing that the sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) factors.” *Id.*

Aberant first challenges the application of the cross reference in USSG § 2K2.1(c)(1). This court reviews the factual findings underlying a district court’s application of a Guidelines cross reference for clear error and its legal conclusions de novo. *United States v. Ashford*, 718 F.3d 377, 380, 383 (4th Cir. 2013).

“In the event of a conviction for illegal possession of a firearm, USSG § 2K2.1(c) authorizes a district court to substitute the offense level for any criminal offense that the defendant committed or attempted to commit in connection with the possession of the firearm.” *Id.* at 381. Section 2K2.1(c)(1) states:

If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense . . . apply—

- (A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined [under USSG § 2K2.1(a), (b)].

USSG § 2K2.1(c)(1) (emphasis added). Section 2X1.1(a), which applies to attempt, solicitation, or conspiracy, directs courts to use the base offense level for the underlying substantive offense. The district court adopted the probation officer’s conclusion that the

substantive offense was attempted first degree murder and therefore applied USSG § 2A2.1(a)(1) (“Assault with Intent to Commit Murder; Attempted Murder”).

Section 2K2.1(c)(1) specifies that, in order for the cross reference to apply, the firearm or ammunition must be “cited in the offense of conviction.” *Id.* Because the indictment did not identify a specific firearm in any of the charges, Aberant contends that the district court erred in applying the cross reference. We disagree.

The phrase “cited in the offense of conviction” was added to § 2K2.1(c)(1) in the 2014 amendment in order to limit application of the cross reference to instances where the defendant used the same firearm involved in the offense of conviction in connection with another offense. USSG Supp. to App. C, Amend. 784, Reason for Amendment. As the Sentencing Commission explained, the amendment clarified that “the instant offense and the other offense must be related to each other by, at a minimum, having an identifiable firearm in common.” *Id.*

Note 14(E) states that, “[i]n determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.” USSG § 2K2.1 cmt. n.14(E). The note provides examples of when the provision applies and when it does not. For instance, if a defendant is convicted of unlawful possession of a shotgun and the court finds that the defendant used the same shotgun in a previous crime, then the court may apply § 2K2.1(c)(1). USSG § 2K2.1 cmt. n.14(E). However, if the defendant is convicted of unlawful possession of a shotgun and the court finds that the defendant possessed and used a handgun in a prior crime, then “subsection (c)(1) does not apply, because the handgun was not cited in the

offense of conviction.” *Id.* Nothing in the Guideline or the commentary requires that the firearm must be specifically identified in the charging instrument in order for the cross reference to apply. Instead, this provision clarifies that the cross reference only applies if the defendant used the same firearm that is the subject of his conviction in the commission of another offense.

Aberant does not dispute that the rifle he was convicted of unlawfully possessing was the same rifle he used to shoot the victim in this case. We thus conclude that the district court did not err in applying the cross reference.

Aberant next argues that, even if the cross reference was appropriate, the district court clearly erred by applying the cross reference to attempted first degree murder because the Government failed to prove, by a preponderance of the evidence, that he acted with premeditation and deliberation. In Aberant’s view, the facts reflected that he acted “in at least imperfect self-defense.” The Guideline for attempted murder, USSG § 2A2.1, provides for a base offense level of 33 if the attempted murder would have constituted first-degree murder; otherwise, the offense level is 27. “First degree murder,” for purposes of this Guideline, is “conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111 [(2012)].” USSG § 2A2.1 cmt. n.1. Section 1111, in turn, defines murder in the first degree as “the unlawful killing of a human being with malice aforethought”—that is, “[e]very murder perpetrated by . . . willful, deliberate, malicious, and premeditated killing.” 18 U.S.C. § 1111(a). Sustaining the attempted first degree murder cross reference under the premeditation prong requires the court to find by a

preponderance of the evidence both that the defendant acted with malice and that the killing was premeditated. *United States v. Williams*, 342 F.3d 350, 356 (4th Cir. 2003); see *United States v. Cox*, 744 F.3d 305, 308 (4th Cir. 2014) (providing that sentencing judges may find facts supporting Guidelines application by preponderance of evidence). To prove malice under § 1111, “the Government does not have to show an intent to kill or injure.” *Williams*, 342 F.3d at 356. Instead, “malice aforethought may be established by evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.” *Id.* (internal quotation marks omitted).

Against this legal backdrop, we consider the relevant facts of this case. Specifically, Aberant’s adult daughter and her boyfriend, Alex Ortiz, resided with Aberant. The day after a disagreement with his daughter regarding bills, Aberant took steps to have the couple evicted, acquired a rifle and ammunition, and practiced firing the gun. Later that day, Aberant argued with his daughter and then fired a shot at her, forced his way into her room, and punched her in the face. When Ortiz came home and challenged Aberant to go outside with him to settle the dispute “like a man,” Aberant responded by twice shooting at Ortiz but not wounding him. At this point, Ortiz became physical with Aberant, grabbing him by the neck and forcing him to the ground before the men briefly separated to different rooms. When the two men were once again in the same room, Aberant began shooting at Ortiz, striking him a total of seven times as Ortiz fled outside. He then stood over Ortiz, ignoring his pleas for help and taunting him

before driving away. We conclude that a preponderance of the evidence established that Aberant's conduct in shooting Ortiz qualifies as reckless and wanton behavior and a gross deviation from a reasonable standard of care such that a factfinder would be warranted in inferring that Aberant was aware that there was a risk of death or serious bodily harm. Accordingly, the district court did not clearly err in applying the cross reference to attempted first degree murder.

Finally, Aberant argues that the district court erred in its treatment of his motion for a below-Guidelines variance, imposed a sentence that was greater than necessary to satisfy the § 3553(a) factors, and failed to adequately explain the sentence imposed. It is well established that a district court must provide an individualized assessment of its selected sentence; failure to do so constitutes procedural error. *United States v. Carter*, 564 F.3d 325, 328-29 (4th Cir. 2009). Although it may be possible to discern a sentencing court's rationale from the context surrounding its decision, *United States v. Montes-Pineda*, 445 F.3d 375, 381 (4th Cir. 2006), "an appellate court may not guess at the district court's rationale, searching the record for statements by the Government or defense counsel or for any other clues that might explain a sentence," *Carter*, 564 F.3d at 329-30.

Here, the court imposed a below-Guidelines sentence, albeit not as low as Aberant requested, but did not expressly address the motion for a downward variance and offered no explanation for the selected sentence. The lack of an explanation renders Aberant's sentence procedurally unreasonable and precludes this court from conducting meaningful appellate review. *United States v. Blue*, 877 F.3d 513, 522 (4th Cir. 2017). We therefore

vacate Aberant's sentence and remand for resentencing. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

VACATED AND REMANDED

FILED: July 13, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4667
(5:17-cr-00025-BO-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSEPH KELVIN ABERANT

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the defendant's sentence is vacated. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Appendix B

United States v. Joseph Kelvin Aberant,
No. 5:17-cr-00025-1BO,

Filed October 20, 2018

Judgment in a Criminal Case,
Of the United States District Court for the Eastern
District of North Carolina, Western Division

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA

v.

Joseph Kelvin Aberant

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:17-CR-25-1BO

USM Number: 63191-056

Mark A. Perry

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1s, 2s and 4s

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|--|--|----------------------|--------------|
| 18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(a)(2) | Possession of a Firearm By a Convicted Felon. | August 11, 2016 | 1s |
| 18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(a)(2) | Possession of Ammunition By a Convicted Felon. | August 11, 2016 | 2s |

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☒ Count(s) _____ is ☐ are dismissed on the motion of the United States.

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

10/20/2017

Date of Imposition of Judgment

Signature of Judge

Terrence W. Boyle, US District Judge

Name and Title of Judge

10/20/2017

Date

DEFENDANT: Joseph Kelvin Aberant
CASE NUMBER: 5:17-CR-25-1BO

ADDITIONAL COUNTS OF CONVICTION

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|--|--|----------------------|--------------|
| 18 U.S.C. §§ 922(a)(6), 924(a)(2), and 2 | Knowingly Making a False and Fictitious Statement to a Firearms Dealer During Acquisition and Aiding and Abetting. | August 11, 2016 | 4s |

DEFENDANT: Joseph Kelvin Aberant
CASE NUMBER: 5:17-CR-25-1BO

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Count 1s - 120 months

Counts 2s and 4s - 80 months per count, concurrent with each other but consecutive to Count 1.

The defendant shall receive credit, if any, for time served while in federal custody.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Joseph Kelvin Aberant
CASE NUMBER: 5:17-CR-25-1BO

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : Count 1s, 2s and 4s - 3 years per count - concurrent.

MANDATORY CONDITIONS

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

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

DEFENDANT: Joseph Kelvin Aberant
CASE NUMBER: 5:17-CR-25-1BO

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Joseph Kelvin Aberant
CASE NUMBER: 5:17-CR-25-1BO

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall consent to a warrantless search by a United States Probation Officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall support the defendant's dependents and meet other family responsibilities.

DEFENDANT: Joseph Kelvin Aberant
CASE NUMBER: 5:17-CR-25-1BO

CRIMINAL MONETARY PENALTIES

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

| | <u>Assessment</u> | <u>JVTA Assessment*</u> | <u>Fine</u> | <u>Restitution</u> |
|--------|-------------------|-------------------------|-------------|--------------------|
| TOTALS | \$ 300.00 | \$ | \$ | \$ |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss**</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|---------------------|----------------------------|-------------------------------|
|----------------------|---------------------|----------------------------|-------------------------------|

| | | |
|--------|---------------|---------------|
| TOTALS | \$ _____ 0.00 | \$ _____ 0.00 |
|--------|---------------|---------------|

☐ Restitution amount ordered pursuant to plea agreement \$ _____

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

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

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

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Joseph Kelvin Aberant
CASE NUMBER: 5:17-CR-25-1BO

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payment of the special assessment shall be due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s): _____
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
Order for Forfeiture of Property 10/20/2017.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Appendix C

United States v. Joseph Kelvin Aberant,
No. 5:17-cr-00025-1BO,

On October 20, 2018

Transcript of Sentencing Hearing,
Of the United States District Court for the Eastern
District of North Carolina, Western Division

1 UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF NORTH CAROLINA

3 WESTERN DIVISION

4 UNITED STATES OF AMERICA,)

5 Plaintiff,)

CRIMINAL ACTION

6 v.)

FILE NO. 5:17-CR-00025BO-1

7 JOSEPH KELVIN ABERANT,)

8 Defendant.)

9 -----

10 SENTENCING proceedings of Joseph K. Aberant, before
 11 the Hon. Terrence Boyle, a United States District Court
 12 Judge, for the Eastern District of North Carolina
 13 heard at the United States District Courthouse located at
 14 310 New Bern Avenue, Raleigh, North Carolina, on Tuesday,
 15 October 20, 2017 commencing at the hour of 2:00 p.m.
 16 before T. S. Hubbard, Jr. Court Reporter.

1

2 A P P E A R A N C E S

3 ON BEHALF OF THE PLAINTIFF:

4 UNITED STATES ATTORNEYS OFFICE

5 By: Peggah Wilson, Esquire

6 Assistant United States Attorney

7 310 New Bern Avenue

8 Federal Building, Suite 800

9 Raleigh, North Carolina 27601-1461

10 Phone: (919) 856-4530

11

12

13 ON BEHALF OF DEFENDANT ABERANT

14 By: Mark A. Perry, Esquire

15 715 West Johnson Street

16 Suite 204, Raleigh, NC 27603

17 Phone: (919) 828-8015

18

19

20

* * *

21

22

23

24

25

1 P R O C E E D I N G S

2 THE CLERK: This Court is now in session.

3 The Hon. Judge Terrence Boyle, presiding. Be
4 seated and come to order.

5 THE COURT: Joseph Aberant.

6 MR. PERRY: Mark Perry for the defendant.

7 MS. WILSON: Good afternoon, your Honor.

8 THE COURT: Good afternoon. Does the
9 victim want to participate in this?

10 MS. WILSON: Yes, your honor. Alex Ortiz
11 and Nicole, the defendant's daughter, they are
12 both here and Alex wishes to address the Court
13 at the appropriate time.

14 THE COURT: Thank you. Mr. Aberant, do
15 you want to say anything about your sentence?

16 THE DEFENDANT: Yes, your Honor, I would
17 like to say something. First of all, I would
18 like to say, I'm truly sorry somebody got hurt
19 in all of this.

20 It seems to me that the ugliest truth is
21 much better than the prettiest lie. I think
22 the truth really needs to come out here today
23 as to what really happened.

24 I would just like to say, apologize to Mr.
25 Ortiz about what happened happened, but it

1 wasn't entirely my fault.

2 Mr. Ortiz actually assaulted me first. He
3 tried to strangle me. He had me on the floor
4 with his hands around my throat and I had told
5 him even after this happened I gave him the
6 opportunity to sit down and speak to me like a
7 man.

8 He didn't want to hear it. He just kept
9 running around my house acting like a fool
10 saying that he was going to kill me.

11 I was fearful for my life. I was fearful
12 for my family's life, and so I told him, I
13 warned him, ''If you come near me again, I'm
14 going to shoot you.''

15 I think we know the rest from there.

16 I know a lot of people have been hurt by
17 this, and I'm truly sorry for that, but I can't
18 take it back. That's pretty much all I have
19 got to say.

20 THE COURT: Mr. Perry, his presentence
21 report has an advisory guideline of 38 Category
22 2, a sentencing range of 62 to 327.

23 Do you have any objection to that?

24 MR. PERRY: Yes, your Honor. There's an
25 addendum that is attached. We filed objections

1 to the Probation Department.

2 This is kind of unique because one of the
3 objections to that is a technical objection
4 within the guidelines and I would have to cite
5 you to -- well, this is a federal arm guideline
6 that is under 2K2, and in this particular one,
7 is 2K2.1, and the Government is asking, and the
8 Probation Department has done so, to refer to
9 2K2.1C1A to cross reference to the felony
10 offense, the shooter.

11 The problem with that is, and that would
12 have been fine until the 2014 amendments cycle
13 when the cross reference was dramatically
14 changed by the Sentencing Commission and that
15 was because throughout the various circuits
16 there was a split on what you can
17 cross-reference to and what you cannot.

18 Actually I think the cross reference
19 changed in the 2014 amendment cycle came about
20 in a Fourth Circuit case because there was a
21 question about whether the cross reference, to
22 cross reference something to it, had to be
23 groupable or not groupable and they found in
24 that particular case they said, 'No, you can't
25 cross reference if it's not groupable.'.

1 So because of that split, the Sentencing
2 Commission then changed the wording in the
3 cross reference section in 2K2.1C, and in
4 Subsection 1.0, it says, ''If the defendant
5 used or possessed any firearm or ammunition
6 cited in the offense of conviction,'' that was
7 the change.

8 That was added in connection with the
9 commission or an attempted commission of
10 another offense or possession or possessed or
11 transferred a firearm or ammunition cited in
12 the offense of conviction with knowledge or
13 intent that it would be used or possessed in
14 connection with another offense apply, then
15 ''A'' of that subsection it cites to 2X1.1
16 attempts, solicitations, or conspiracies.

17 Prior to that, the wording cited in the
18 offense of conviction did not exist and to show
19 the interaction of the distinction in 2K2.1B6B,
20 it says, ''If a defendant used or possessed a
21 firearm or ammunition in connection with
22 another felony offense or possessed or
23 transferred a firearm or ammunition with
24 knowledge, intent, or reason to believe that it
25 would be used or possessed in connection with

1 another felony offense increased by four levels
2 if the resulting offense level is less than
3 Level 18 increased to Level 18.''

4 No mention of the word cited in the
5 offense of conviction. However, when you go to
6 Subsection C it is a distinctly different
7 change, and again, I will read the first part
8 of that sentence.

9 ''In order to cross-reference, if the
10 defendant used or possessed any firearm or
11 ammunition cited in the offense of conviction
12 in connection with the commission or attempted
13 commission of another offense.''

14 C is talking about a cross-reference.

15 You don't have to cite the firearm of
16 specific firearms, specific ammunition in order
17 to give the 4 Level increase under 2K2.1B6B,
18 and it is unique that when they changed it
19 those words mean something.

20 The Commission didn't put the words in for
21 no reason. The problem is, I cannot show you a
22 case because I think that this might be a case
23 of first impression and I think that the plain
24 wording and the change in the amendment cycle
25 in 2014 with Amendment 784 that became

1 effective on November 1, 2014, makes it clear
2 and that's why there are no cases out there
3 because it's clear that in order to
4 cross-reference you have got to cite a specific
5 firearm or specific ammunition in the offense
6 of conviction and here that is not done.

7 That's my first objection and that's the
8 biggest one because I'm objecting to the
9 cross-reference.

10 If the Court should find that a
11 cross-reference is appropriate even in view of
12 the change made by the Sentencing Commission in
13 2014, I would submit it is not appropriate to
14 cross-reference to first degree attempted
15 murder under the facts of this case, and the
16 facts of this case that nobody is in dispute
17 of, is that there was an altercation originally
18 between Mr. Aberant and his daughter and then
19 her boyfriend comes home, he gets mad with
20 Joseph and grabs him by the neck.

21 Now you have got to understand, at that
22 time he was 59, now he is 60 years old, Ortiz
23 was 36. You'll be able to look at them and
24 compare body sizes and all of that, grabs
25 Joseph by the neck and slams him on the floor

1 and commences to choke him.

2 There's a lot of mess going on and Ms.
3 Cykalese, Nicole, she's saying, ''Stop it.
4 Stop it.'' And Ortiz let's him go.

5 Later on there's another interaction where
6 according to the taped interview with Miss
7 Marie Aberant, that fills that out a little
8 more.

9 It does not show up in the handwritten
10 portion, but when you watch the video there was
11 the talk of how Alex now, after some time is
12 passing he is fussing and beating on his chest,
13 he's just irate and he takes an ashtray and
14 throws it.

15 Alex is in the kitchen and Joseph is at
16 the dining room table, so they are pretty close
17 to one another.

18 Alex is coming back at him and when you
19 are confronted with that, I think it is
20 entirely reasonable to defend himself, relative
21 to body sizes, and their ages, and all of that,
22 even deadly force might be appropriate to repel
23 such an attack that was already averted the
24 strangulation of the defendant.

25 And so if the Court should find, which I

1 have asked the Court that you not allow the
2 cross-reference at all due to the plain
3 language of the guidelines, and if you do
4 nonetheless, I ask you to not cross-reference
5 to the attempted first degree murder, perhaps
6 due to aggravated assault, but I am not
7 conceding the first one, there should be no
8 cross-reference at all.

9 While I am at it. There is also a 2 Level
10 in the final which came up in between, a 2
11 Level increase for reckless endangerment and I
12 would submit that that would be inappropriate
13 in this case.

14 I know the Government argues strongly that
15 it should be, but the Government has in their
16 filings has suggested that he fled at speeds in
17 excess of 70 miles an hour, I believe is the
18 wording, and ran through a yard, and finally
19 eventually pulled over for the police car that
20 is behind him.

21 The reports from the officer that was
22 pursuing said, ''Yes, we went through a yard,
23 and he went through a ditch.'' The officer,
24 the Deputy, he said, ''Well, he didn't want to
25 go through the ditch.'' He goes around the

1 tree, and all that stuff, and goes down the
2 road and he kind of loses sight and finds him
3 real quick.

4 Later he was reinterviewed and you have
5 got to understand that on the 11th he wrote up
6 his report about what happened. That was when
7 it was fresh in his mind and all of that.

8 At a later time he was reinterviewed just
9 some few weeks ago and that was written up.

10 Of course, we don't have any recordation
11 of that, but he said that he estimated at
12 Joseph's speed at one point to be approximately
13 60 miles an hour in a 45-mile an hour zone.

14 However, he also filed a report at Bates
15 page Number 79, that said that this kind of a
16 report when you get to the use of the car, and
17 stuff, he said the maximum speed of pursuit was
18 70 miles an hour and the time that was spent in
19 pursuit was three minutes and the distance
20 covered one mile.

21 Those numbers do not add up to him driving
22 over or in excess of 70 miles an hour as the
23 Government will argue to you.

24 I understand in today's world we have
25 these alternative facts and they may very well

1 be proper in the Court of Public Opinion, but I
2 would argue to this Court that this is
3 certainly not appropriate in a court of law.

4 THE COURT: Thank you. Who wants to
5 volunteer to translate? Do you want the
6 translator you take a stab at it?

7 MS. WILSON: I would be happy to. The
8 Government agrees with probation as to
9 guideline range here.

10 As far as the cross-reference goes, the
11 defense here is misunderstanding the issue.
12 They believe that we need to literally cite the
13 firearm, the make, the model, the serial number
14 in the Count in the indictment in order for the
15 cross-reference to apply.

16 The issue is whether the firearm that was
17 used and possessed in Count I is the same one
18 that used for the attempted murder.

19 The defense did not say today that a
20 different gun was used. It's the Mossberg
21 rifle which is cited in the indictment. It is
22 cited in the forfeiture notice and it is cited
23 in our order of forfeiture that we submitted to
24 this Court.

25 This is not an issue of first impression.

1 Judge Howard has heard this recently in
2 two cases and has rejected this argument.

3 This amendment occurred three years ago,
4 so if this were to be a valid point, surely
5 there would have been a case in the last three
6 years somewhere in the country where a
7 defendant was able to get a cross-reference,
8 where the issue of a cross-reference would
9 apply.

10 What the defense is misunderstanding is
11 that in 2K2.1B6B, it doesn't always have to be
12 the same gun. You can use a rifle on one day
13 and then a pistol on the other day, and if it
14 is in the same course of conduct we can apply
15 for a 4 Level enhancement.

16 For the cross-reference, it has to be the
17 same gun and there was only one gun here that
18 is in dispute that was fired on one day and
19 possessed by the defendant.

20 There's no allegation here of multiple
21 guns and the defense is not saying that a
22 different gun was used.

23 The cross-reference here would apply.

24 As far as the cross-reference to attempted
25 murder, the time line of events, everything

1 that happened on that day and the night before
2 leads to one conclusion that this defendant
3 attempted to kill Alex Ortiz.

4 He got in a fight with his daughter and
5 Alex the night before. Then on this day,
6 August 11, in the morning, they go get the
7 eviction paperwork.

8 Then they go and has his wife purchase a
9 firearm for him. Then they go to get
10 ammunition. Then he goes home and takes
11 practice shots with his firearm and then his
12 daughter gets home and he shoots a round at his
13 daughter, punches her in the face, smashes her
14 phone so she cannot call the police.

15 I'm not sure if that's a point where the
16 defendant was also in fear for his life. It
17 wasn't just an altercation. He shot at his
18 daughter.

19 Then Alex gets home. He sees that his
20 girlfriend had just been punched in the face.
21 The defendant then shoots two rounds at Alex.
22 That's the point where he takes the gun away
23 and puts him on the ground in self defense.

24 About ten minutes have transpired and then
25 as Alex is trying to leave the home, the

1 defendant, while he is sitting down, what kind
2 of threat was it to him that he doesn't even
3 stand up, he is sitting down as his wife said
4 and starts shooting seven rounds. He empties
5 the whole magazine, seven rounds, to four areas
6 in Alex's body including three rounds in his
7 back.

8 Alex then runs out, starts bleeding to
9 death in the carport, the defendant gets his
10 dog, he stands over him, and says, ''I told you
11 not to F with me,'' as Alex asks him to take
12 him to the hospital. Then the defendant gets
13 in a car and starts on this wild chase with law
14 enforcement where he drives through yards
15 including a yard where some kids were playing
16 outside.

17 He was going over 60 miles an hour in a
18 residential neighborhood.

19 Your Honor, we agree wholeheartedly with
20 probation that the cross-reference applies, the
21 cross-reference to attempted murder applies,
22 and reckless endangerment applies.

23 The Governmental also submitted an upward
24 departure given that the defendant's criminal
25 history Category is only a 2 when we can see

1 starting from age 19, numerous serious violent
2 felonies including stabbing a woman and hitting
3 her with a baseball bat, numerous burglaries,
4 and an escape from jail.

5 In 2010, he was charged with a felony and
6 was convicted of a felony for stealing the
7 identity of a dead person. He incurred five
8 infractions for that and six weeks prior to
9 this offense he was charged with assault and
10 battery on a government official.

11 We do not believe that his history
12 Category of 2 represents the true danger of
13 this defendant and so based on that we are
14 moving for an upward departure and asking for
15 360 months.

16 THE COURT: Do you agree with the report?

17 PROBATION: Yes, your Honor.

18 THE COURT: I am going to overrule the
19 objections. I think the preponderance of the
20 evidence supports the report as presented. Do
21 you want to have the people allocute now?

22 MS. WILSON: Yes, your Honor. Thank you.

23 THE COURT: Good afternoon. Tell us who
24 you are what your story is?

25 MR. ORTIZ: I am Alexander Ortiz. I am a

1 victim in this situation. Basically, I came
2 home from work. I work 12 hours a day. I came
3 home from work and I seen my girl's face all
4 beat up and naturally because I care for her I
5 asked what happened and then Joseph started
6 telling me what happened and from that moment
7 on I didn't want to hear anything he said.

8 Yes, I asked him to step outside like a
9 man and do what he did to her to do to me, and
10 he refused to. He said, ''No, sit down and
11 talk. Sit down and talk.''

12 He had his rifle laying on his lap the
13 whole time. I am cursing at him or whatever
14 from a distance and he takes two shots at me,
15 but he shoots towards my legs and I didn't even
16 realize what it was, but I seen him with the
17 gun.

18 So at that point I charged him, and I put
19 him on his back and I held on to his neck.

20 I let him go after my girl told me to, so
21 I mean, there is nothing different than what
22 she said. I tried to downplay the situation.
23 I said to myself, ''I can't be in this house,
24 so I am going to leave.''. My boss is just
25 around the block, so I said to myself that I

1 would go to my boss's house and hang out there
2 until everything cools down and take a shower.

3 Now he is telling me, ''You need to sit
4 down and talk.'' I said, ''I do not want to
5 talk. I already told you that if you want to
6 talk how we can do it,'' and at that point he
7 went into his room, and then he came back out,
8 I had figured he was going to get his boots so
9 we could go outside and handle it like men, but
10 instead he grabbed the rifle and he sat down
11 with it.

12 At that point, I am by the sink, I mean,
13 it is a good distance, there is an island, and
14 the dining room table is about like a good 12,
15 13 feet away, and I am on the other side of the
16 island and I am standing there, and he said
17 something to me in reference to like, ''Why
18 don't we sit down and talk?'' And I said,
19 ''Why don't you die already?'' and he said,
20 ''Yeah?'' and he stood up and then that is when
21 he started shooting at me.

22 My first reaction, you know, I was shocked
23 so all I did was to try to walk outside, and I
24 still had it in my mind that I got to go to my
25 boss's house but that is even worse now because

1 now he has to take me to the hospital and I
2 didn't even make it out there. I made it to
3 the carport outside and I collapsed.

4 Then I seen Joseph come outside with the
5 dog, and I asked him, ''At least take me to the
6 hospital,'' and he looked me he said, ''Die.''

7 He went to the car and he took off, so at
8 that point my girlfriend is next to me the
9 whole time, I asked him not to leave my side.

10 You know, right now, I feel like he's
11 fighting for his life because he don't want to
12 rot in jail, you know what I am saying? But I
13 fought for my life on the stretcher, you know
14 what I'm saying, like I really thought that I
15 was going to die.

16 He doesn't have that power. Only God has
17 that power, so with all due respect to my girl
18 what happened back there, it changed a lot
19 stuff for her too, man, like we have relocated.
20 Well, she relocated first from Jersey out here
21 to find her father to be with her father after
22 not being in her life for like 30 years and
23 this is how you start off?

24 That was a little crazy to me, you know.
25 But in light of that, she holds a lot of guilt

1 to what he did to me. This is when I was laid
2 up. I mean I could not go to work for like
3 three or four months. That took the edge off
4 me because I am used to going to work everyday.
5 12 hours a day, and then out nowhere I cannot
6 go to work and then when I tried going back to
7 work, I really could not do what I used to do.

8 Now I am back into it. Thank God. But as
9 far as her she is holding a lot of guilt for
10 what he did to me because she feels like it is
11 her fault. You know what I am saying?

12 You don't have control over what nobody
13 else does. It is you. It is what he did, so,
14 I mean, I still pray for him, man, like it is
15 not like I hate the guy or whatever, I would
16 just have used different judgment like from the
17 beginning to the end. That is really all I
18 have to say. Thank you.

19 THE COURT: Thank you for your
20 participation. Anything else?

21 MS. WILSON: No, your Honor.

22 THE COURT: The guideline range is 262 to
23 327, Offense Level 38, Category 2. Let me ask
24 Probation. How do you believe the law is with
25 respect to stacking in order to deal with this?

1 Is it available or not available?

2 PROBATION: It is available up to 327
3 months.

4 THE COURT: Why is that?

5 PROBATION: The guideline range is 262 to
6 327 which is the total punishment so we can
7 stack until we get to that total. Because
8 Count I the max would be 120 and another 120
9 and then the remaining count would be until you
10 reach where you would like to go.

11 THE COURT: We had an issue recently in
12 another case where the way in which you achieve
13 a guideline, if you are forced to stack is to
14 not sentence to more than the maximum on each
15 Count, but to make them consecutive.

16 PROBATION: Correct.

17 THE COURT: So a sentence would be 120
18 months on Count I and then 120 months on Count
19 II, but consecutive to Count I.

20 PROBATION: Correct.

21 THE COURT: Then 100 and whatever. It is
22 some amount on Count IV consecutive to Count I
23 and Count II.

24 PROBATION: Correct.

25 THE COURT: But none of it would be the

1 gross. You wouldn't impose a gross sentence of
2 between 262 to 327 on any one count.

3 PROBATION: Correct.

4 THE COURT: What do you want to say about
5 the sentence?

6 MR. PERRY: Your Honor, the statutory
7 maximum on each is 120 months and they are a
8 groupable offense and I would argue that
9 because they are groupable that it should only
10 be a maximum exposure of 120 months.

11 I would also like to be heard. I filed a
12 request for a downward variance, a departure or
13 a variance, in this case variance, based on his
14 physical and mental health and his age and any
15 one of those three are acceptable reasons for
16 departure, and even if one is not sufficient in
17 and of itself when you look all three of them
18 combined, like I had mentioned, and that is
19 very well documented in the presentence report
20 about his physical and mental health issues.

21 He has had back surgeries. That's why
22 since he fell in 2003 at work, and he tried to
23 get the pain under control, he has been
24 prescribed oxycodone. He said that he is
25 dependent on it.

1 He says he does not abuse it, but he is
2 dependent on it and he doesn't want to be.

3 But, nonetheless, I would ask that you
4 would downwardly. Vary, the absolute max, I
5 would ask this Court, since they are groupable,
6 only impose a maximum of 120 months.

7 I would also ask that you downwardly vary
8 because he is actually in State custody because
9 he hasn't had the opportunity to put forth the
10 defense of self defense and the State is not
11 doing anything to allow him to do that.

12 He cannot do it in this courtroom because
13 he is not charged with that, albeit it appears
14 he is going to be punished for something that
15 he cannot defend against.

16 But he was served oddly enough with the
17 federal indictment on January 20th of this
18 year. That would be nine months ago.

19 I would ask that whatever you do impose
20 that you downwardly vary it, at least those
21 nine months because he has been in custody, but
22 we have been bringing him up on a writ, and
23 again, like I say, the State is just doing
24 nothing.

25 It is just an ironic twist that he cannot

1 assert the defenses that he would be able to
2 assert in State Court under those charges and
3 yet he is charged in the offense of convictions
4 with 922(g) matters and he cannot assert a
5 defense. It's just a Catch 22.

6 THE COURT: He is in Johnson County
7 Superior Court?

8 MR. PERRY: Yes, sir.

9 THE COURT: This attempted murder charge
10 there?

11 MR. PERRY: Yes, sir, and oddly enough he
12 has been moved to Harnett County for the last
13 week, but I think that was since he was
14 scheduled for this term, I think the marshals
15 just had him on a writ for this week and I am
16 assuming he will go back there and I ask for
17 anything imposed that he be doing it with the
18 State Court system concurrently with this. It
19 is all part and parcel.

20 THE COURT: Anything from the Government?

21 MS. WILSON: Yes, your Honor. The
22 Government is asking for the maximum term of
23 imprisonment allowed by law.

24 My understanding would be that it would be
25 360 months, 120 months for each of the three

1 convictions he is pleading guilty to.

2 However Probation says that it is the 327
3 months, then I would defer to that and ask for
4 a sentence of 327 months.

5 As I mentioned before this calculation is
6 based on his criminal history category being a
7 Category 2 and when we look at his criminal
8 conduct, so many of his prior felonies are
9 unscored because they occurred more than 15
10 years ago, but they are highly relevant because
11 it shows a pattern of consistent repeated
12 violent conduct.

13 He has a felony escape from jail, a felony
14 aggravated battery, a felony aggravated battery
15 with a deadly weapon.

16 His last felony was in 2010 and he had
17 five disciplinary infractions in State custody.
18 Six weeks before this incident he was charged
19 with assault on a government official.

20 His age here is not a deterrent for this
21 man. He is dangerous and violent offender in
22 the community from the age of 19 to the
23 present, and because of that, the maximum
24 sentence imposed that could be imposed by law
25 is appropriate.

1 Here he didn't shoot at just one
2 individual. He shot at two. Both of them were
3 defenseless at the time. His daughter when he
4 shot at her completely defenseless. Alex, when
5 he shot at him, seven times emptying the
6 magazine, at that point Alex was not physically
7 provoking him at all. There was no physical
8 altercation. He almost died that day.

9 Mr. Aberant, the defendant, went to jail
10 with no marks on him. This is not a self
11 defense type of case. This was an attempted
12 murder case.

13 Based on the defendant's criminal history
14 category, substantially under representing his
15 danger, and the incredibly serious conduct here
16 we do believe that he is a violent member of
17 this community and that a sentence of 327
18 months would be appropriate and that we should
19 not defer and wait to see what happens in State
20 Court when this case is presently in front of
21 us now and we should look at his danger to the
22 community now and impose that sentence. Thank
23 you, Judge.

24 THE COURT: On the Count I, I will impose
25 a sentence of 120 months. On Count II and

1 Count IV, a concurrent sentence of 80 months,
2 but that is consecutive to Count I. So that
3 the aggregate sentence is 200 months and a term
4 of three years of supervised release on each
5 count concurrent.

6 A special assessment of \$300.

7 He is not to violate any federal, state or
8 local law during this period of supervised
9 release and I guess he does not get credit for
10 any time served since he is not in federal
11 custody.

12 PROBATION: If the State charges should be
13 dismissed he will get credit.

14 THE COURT: But otherwise he will not.

15 PROBATION: Correct.

16 THE COURT: That is the Court's judgment.
17 You have the right to appeal and have these
18 issues reviewed in the Court of Appeals under
19 the rules of criminal and appellate procedure.

20 Thank you.

21 MR. PERRY: Thank you, your Honor.

22 (Whereupon the proceedings adjourned.)
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United States of America)

ss:

ORANGE COUNTY)

CERTIFICATE OF THE REPORTER

I, T. S. Hubbard, Jr., a do hereby certify
that the foregoing is a true and accurate representation
of the record and herein proceedings.

IN WITNESS WHEREOF, I have hereunto set my
hand this 8th day of December 2017.

Electronically signed

Thomas S. Hubbard, Jr.

Court Reporter