

APPENDIX D

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF CONNECTICUT

3

4 UNITED STATES OF AMERICA,)
5 Plaintiff,) NO: 3:16CR173 (MPS)
6 vs.)
7 JESUS SANTIAGO, also known) May 8, 2017
8 as Choco,)
9 Defendant.) Sentencing

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450 Main Street
Hartford, Connecticut

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B E F O R E :
THE HONORABLE MICHAEL P. SHEA, U.S.D.J.

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Court Reporter: Martha C. Marshall, RMR, CRR

Proceedings recorded by mechanical stenography, transcript
produced by computer.

1 THE COURT: Good morning. Please be seated.

2 We have a sentencing today in United States versus
3 Jesus Santiago. The case number is 16CR173. Let's begin by
4 having counsel state their appearances for the record,
5 please.

6 MS. STOLFI COLLINS: Patricia Stolfi Collins for the
7 United States. Also present at counsel table is Assistant
8 United States Attorney Jeffrey Stone. He may have to step
9 out if we go over eleven o'clock because he needs to be in
10 another courtroom.

11 THE COURT: That's fine.

12 MS. STOLFI COLLINS: As well as Hartford Police
13 Officer Steve Stucheki (ph). In the front row we have FBI
14 Special Agent Gennero Medina.

15 THE COURT: Good morning.

16 MR. MAGUIRE: Good morning. James Maguire on behalf
17 of Jesus Santiago. With me at counsel table is Mr. Santiago.
18 We're joined in the courtroom by members of Mr. Santiago's
19 family, including his mother, his fiancee, his daughter, and
20 his cousin as well as others.

21 THE COURT: Good morning, everyone. Welcome.

22 Just by way of -- first of all, the record should
23 reflect that also with us in the courtroom is Jacqueline
24 Blake, United States probation Officer. Officer Blake
25 prepared the Presentence Report in this case.

1 By way of procedural history, Mr. Santiago appeared
2 before me and entered a plea of guilty to a one count
3 indictment which charges him with unlawful possession of a
4 firearm by a felon, in violation of Title 18, United States
5 Code, Sections 922(g)(1) and 924(a)(2).

6 The Presentence Report was prepared for the Court by
7 the U.S. Probation Office. The initial report was filed on
8 March 28th of this year. The defendant submitted objections
9 by -- the defendant submitted objections on April 11th, 2017.
10 The final report was filed on April 18th, 2017.

11 I've reviewed all of these materials. I've
12 consulted with Officer Blake. I've reviewed her sentencing
13 recommendation. I have reviewed the defendant's sentencing
14 memorandum, together with a letter from the defendant, a
15 letter from his cousin, a letter from his fiancee, as well as
16 other attachments.

17 I've reviewed the Government's sentencing
18 memorandum. I've also reviewed a supplemental exhibit
19 concerning a mental health report filed by the defendant.
20 The mental health report was filed with a motion to seal
21 which is docket number 37. That motion is granted, because
22 the information contains sensitive health information and
23 there's compelling interest in keeping that information
24 confidential.

25 All right. Turning first to the Presentence Report

1 in this case. Attorney Maguire, have you had a chance to
2 read the Presentence Report?

3 MR. MAGUIRE: I have.

4 THE COURT: And was your client able to understand
5 it?

6 MR. MAGUIRE: He was.

7 THE COURT: And did you have an opportunity to
8 discuss it with him?

9 MR. MAGUIRE: I did.

10 THE COURT: Mr. Santiago, have you had a chance to
11 read the Presentence Report in this case, sir?

12 THE DEFENDANT: Yes.

13 THE COURT: And did you have a chance to discuss it
14 with your lawyer, Attorney Maguire?

15 THE DEFENDANT: Yes.

16 THE COURT: And did you understand the Presentence
17 Report?

18 THE DEFENDANT: Yes.

19 THE COURT: Attorney Maguire, do you have any
20 objections to any of the factual statements in the
21 Presentence Report?

22 MR. MAGUIRE: No, Your Honor. There are two legal
23 objections regarding the Guidelines calculation, but those
24 are the only objections.

25 THE COURT: All right. We'll take that up in a

1 little while.

2 Attorney Stolfi Collins, do you have any objections
3 to any of the factual statements in the Presentence Report.

4 MS. STOLFI COLLINS: I do not, Your Honor. Also,
5 just for the record, I wanted to point out in my sentencing
6 memo that I made one error with regard to saying that he did
7 not have a job. I was rereading everything last night and I
8 realized that I had said that and I wanted to just flag that
9 to the Court.

10 THE COURT: Thank you.

11 All right. I'm going to adopt the factual
12 statements in the Presentence Report as my findings of fact.
13 However, I'm going to make the following modifications.
14 These are all, I think, non-substantive, but I talked with
15 Officer Blake about this.

16 In paragraph 3, the word "defendant" was omitted in
17 the 10th line of paragraph 3 between the words because and
18 committed. So I'm going to order that that word be added.

19 In addition, I received information with regard to
20 paragraph 5 in the disciplinary -- reports of disciplinary
21 actions at Wyatt, that there was an additional report of a
22 disciplinary action for conduct on April 19, 2017. The entry
23 is stealing, disruptive conduct, being in an authorized area.
24 The punishment was nine days lockdown, suspended after seven
25 days. So that's going to be added to the list in paragraph

1 5.

2 With regard to paragraph 57, there was just an error
3 there. The sentence runs off at the end. Officer Blake, can
4 you remind me what needs to be filled in there?

5 MS. BLAKE: The address of his cousin.

6 THE COURT: So it's going to say reside with her at
7 and it's going to include the cousin's address which we don't
8 need to say in court.

9 And then paragraphs 91 and 92 refer to drug
10 distribution offenses which this is not. There's no reason
11 those paragraphs should be included and, therefore, I'm going
12 to order those two paragraphs deleted.

13 Are there any objections to my modifications to the
14 factual or other statements in the Presentence Report?

15 MR. MAGUIRE: No, Your Honor. I suppose with
16 respect to where Mr. Santiago would reside, I suppose it's
17 also possible to eliminate the "at" and then the sentence
18 there, but it's not an objection.

19 THE COURT: Well, actually, it's probably not a good
20 idea that we have that address. I think I agree with
21 Mr. Maguire. Let me just see how we should amend that.

22 Attorney Stolfi Collins, was there any objection?

23 MS. STOLFI COLLINS: No objection.

24 THE COURT: I agree with Mr. Maguire. Let's just
25 delete the word "at" at the end of paragraph 57.

1 There being no objections to the factual statements
2 in the Presentence Report, I adopt them as modified just now
3 as my findings of fact in this case.

4 Mr. Santiago, when you appeared before me for your
5 guilty plea, I explained to you that you faced certain
6 maximum penalties. They are as follows:

7 You face a term of imprisonment of up to 10 years
8 for this offense.

9 You face a term of supervised release of up to 3
10 years.

11 You are eligible for probation. If the Court were
12 to impose a term of probation, it would be for a minimum of
13 one and a maximum of five years.

14 You face a maximum fine of \$250,000.

15 With regard to forfeiture, there isn't a forfeiture
16 agreement in the Plea Agreement. And under Rule 32.2, if the
17 Court's going to make forfeiture part of the judgment, it's
18 supposed to grant a preliminary motion for order of
19 forfeiture before the sentencing. And we did note that no
20 such motion was filed. We did alert Attorney Stolfi Collins
21 and I believe she filed one just a few moments ago.

22 MS. STOLFI COLLINS: I did, Your Honor. And I
23 brought a copy with me.

24 THE COURT: Did you provide a copy to Mr. Maguire?

25 MS. STOLFI COLLINS: He was emailed this morning.

1 I don't know if he got it. I'm sure he didn't have time to
2 see the docket and I apologize.

3 THE COURT: Why don't you give it to him now.

4 MS. STOLFI COLLINS: I did give him a copy.

5 THE COURT: Attorney Maguire, I'm happy to take a
6 recess if you want some additional time.

7 MR. MAGUIRE: I don't believe that will be
8 necessary.

9 THE COURT: Do you have any objection?

10 MR. MAGUIRE: We don't have any objection.

11 THE COURT: So the motion will be granted.

12 In the future, I would just remind the Government of
13 the need to file that before the sentencing under the rule.

14 MS. STOLFI COLLINS: I understand, Your Honor. I
15 thought it had been filed on the third and I apologize. I
16 had three sentencing in a matter of two days and I thought
17 it had been filed and I apologize.

18 THE COURT: That motion will be granted and we will
19 enter the preliminary order of forfeiture and the order of
20 sentencing -- order of forfeiture which relates to the gun
21 that was seized from the defendant at the time of the offense
22 will become final as to the defendant with the sentence as to
23 third parties pursuant to the forfeiture statutes. There's a
24 period of notice.

25 Also, Mr. Santiago, you face a special assessment of

1 \$100.

2 Does either counsel object to my statement of the
3 maximum and minimum penalties in this case?

4 MR. MAGUIRE: No objection.

5 MS. STOLFI COLLINS: No objection.

6 THE COURT: Turning now to the Sentencing
7 Guidelines. Mr. Santiago, I mentioned these when you pled
8 guilty. The Guidelines are a body of advice that are issued
9 by the United States Sentencing Commission. I'm required to
10 consider the Guidelines in deciding upon your sentence. The
11 Guidelines provide me with guidance or recommendations on
12 what would be a fair and just sentence in your case by
13 examining the type of offense involved. Here, unlawful
14 possession of a firearm by a felon, in violation of Title 18,
15 United States Code, Sections 922(g)(1) and 924(a)(2). They
16 direct the Court to consider the characteristics that
17 sometimes accompany that type of offense, for example, if
18 there were more than one gun involved. Here there are some
19 other circumstances we're going to be talking about that are
20 also -- that the Guidelines also direct the Court to
21 consider. They also direct the Court to consider the
22 defendant's criminal record and other factors

23 The end result of the process of applying the
24 Sentencing Guidelines in a particular case results in
25 directing the Court to a range of months of imprisonment that

1 the Sentencing Commission has decided would be appropriate in
2 a case like your case. I'm not bound by that range or by the
3 Guidelines, but I do have to consider the Guidelines and
4 calculate the range accurately. And I have to consider the
5 range, along with other advice the Commission gives me, as
6 well as other factors that I will describe later when I
7 sentence you.

8 In this case, the parties dispute the applicable
9 Guidelines range. In particular, there are two disputes set
10 forth in the brief. Both have to do with the identification
11 of the proper offense level under Section 2K2.1 which is the
12 Guidelines that -- the Guideline that applies to this type of
13 offense being a felon in possession of a firearm.
14 Specifically, the parties dispute whether this offense was
15 committed after Mr. Santiago was convicted of two felony
16 convictions of either a crime of violence or a controlled
17 substance offense. The parties have identified two of
18 Mr. Santiago's previous convictions as possibly qualifying
19 for those labels. In particular, there's a conviction under
20 Connecticut General Statutes 21a-277 that the Government
21 contends qualifies as a controlled substance offense within
22 the meaning of the Guidelines definition in 4B1.2 of the
23 Guidelines. And the Government has also identified a earlier
24 conviction for second degree robbery as constituting a crime
25 of violence under the definition set forth in Section 4B1.2

1 of the Guidelines.

2 If the Government is correct, then the base offense
3 level is 24. If the Government is not correct, as the
4 defendant contends, then the base offense level could be as
5 low as 14, or if the Government is partially correct, subset
6 one, but not the other qualifies for one of those two labels,
7 then the base offense level would be 20. And so the disputes
8 between the parties do affect the Guidelines range.

9 First of all, do the parties wish to be heard
10 further on the Guidelines issues? I know that I asked my law
11 clerk to send you a couple of summary orders that the Second
12 Circuit had issued related to I think the first issue. And
13 I'd be happy to hear the parties further.

14 Mr. Maguire.

15 MR. MAGUIRE: I'd be happy to. Thank you, Your
16 Honor.

17 So addressing first the issue of the substance
18 offense. I'll begin by saying this is not a case where
19 there's a question about if the modified categorical approach
20 applies. We agree it does.

21 THE COURT: In other words, so we're clear, that the
22 documents that if the modified categorical approach applies
23 as per the *Savage* case, the documents attached to the
24 Government's brief would show that Mr. Santiago was convicted
25 of a controlled substance offense. You don't dispute that?

1 MR. MAGUIRE: That's right. And so I understand
2 that we have something of an uphill battle here. I realize
3 this Court has in previous cases indicated its belief that
4 Savage continues to apply to cases under Connecticut's
5 controlled substance law, but I do think there are a few
6 things noted, particularly in defendant's brief, that are
7 significant. And so I'll highlight those here. And there
8 really are two separate issues I think.

1 criminal liability. This is the Connecticut Supreme Court in
2 the *Mierez* case cited in defendant's brief.

3 So I think that brings us to the question of what is
4 a theory of liability for purposes of Connecticut law. And
5 here we do have guidance from the Connecticut courts
6 regarding what the theory of liability here is. And I think
7 what courts have indicated is not that a theory of liability
8 suggests that there are, in fact, the two different theories
9 of liability suggest two different offenses, but, rather,
10 that two different theories of liability, while may involve
11 factually different proofs are, and I'm quoting again, this
12 is now the *Chapman* case cited in defendant's brief, question
13 of two methods of committing the same crime. And the *Chapman*
14 case is not a case that's addressing Connecticut's controlled
15 substance law but, rather interesting, Connecticut's law
16 regarding sexual intercourse by use of force or threat of
17 force. And so here the two different theories are factually
18 distinct. One theory is an offense committed by use of
19 force. The other is the same offense committed without that
20 factual element established or factual theory established,
21 but through a different means threat of force. And it's set
22 forth in that statute as an offense accomplished through
23 either of these two means which I think is structurally
24 parallel to what the Connecticut Legislature has done with
25 respect to the controlled substance offense.

1 THE COURT: Do you have the cite? I was just going
2 to look it up while you were talking.

3 MR. MAGUIRE: For *Chapman*?

4 THE COURT: Yes.

5 MR. MAGUIRE: Certainly, it's 229 Conn. 529. And
6 the pin site is 622.

7 THE COURT: Let me see if I can find that real
8 quick. You said the pin cite was 622 or 522?

9 MR. MAGUIRE: No, I have it as 622. Oh, you know
10 what, it would be 227 Conn. 616. There's a reconsideration
11 reissuing of the --

12 THE COURT: Because I have 229 Conn. 529. It
13 doesn't go as high as 622.

14 MR. MAGUIRE: I think that's correct. They reissued
15 the opinion on reconsideration.

16 THE COURT: And which one are you citing, the
17 reissued one?

18 MR. MAGUIRE: Based on the pin site, I believe,
19 yes.

20 THE COURT: 229 Cohn 622?

21 MR. MAGUIRE: Yes.

22 THE COURT: That doesn't work. Gets me into a civil
23 case. That's all right. Let me go back to the original one.
24 Maybe I can find it.

25 What this case seems to hold is that the trial court

1 erred by including in its charge a reference to the threat of
2 the use of force when the charging document just said by use
3 of force. So how does that support your argument here?

4 MR. MAGUIRE: So the specific issue there was a
5 question of whether there was a risk that the jury had, in
6 fact, reached a conclusion that was not supported by any
7 evidence presented by the Government. I'm not presenting
8 this case as something that is -- so I think that holding,
9 that specific legal issue, is aside from the issue here. I
10 think what is significant there is the question of how does
11 the Connecticut Supreme Court, how do Connecticut courts,
12 treat theories of liability. What does it mean when a
13 Connecticut court says these are two different theories of
14 liability? Does the Connecticut court mean these are two
15 different elements or do they mean something else? And what
16 the Court here I think fairly clearly in using these to say
17 that this is two methods of committing the same crime, is
18 using words that are strikingly parallel to what the U.S.
19 Supreme Court described in *Mathis* in saying that there is a
20 distinction between cases in which a state legislature
21 chooses to have a disjunctive statute that sets forth several
22 different crimes in, say, one statute, and a case in which
23 the legislature sets forward in a single statute multiple
24 factual variations on what is ultimately the same offense.
25 Noteably, the Connecticut controlled substance law does not

1 set different penalties for different controlled substances.
2 Again, these are -- I'm sorry -- for different acts. This is
3 not a case where possession comes with a different penalty
4 than, say, sale.

5 This, also, the fact of these same penalties for all
6 of these different variations on the series of verbs, also
7 highlights something that *Mathis* notes that really where the
8 outcome is the same, there is very little incentive at the
9 trial level, particularly in a plea, to dispute one versus
10 another of these different verbs, that if the state alleges
11 one on the record it makes no difference to the defendant
12 whether he agrees, even if it's not quite right, because
13 these are simply different factual means.

14 THE COURT: Although that argument, taken to its
15 logical conclusion, would suggest that any time you have two
16 crimes that have the same penalty, you know, you could make
17 the argument that, well, it's just different means even if,
18 for example, I'm trying to think of something like there's a
19 10 year max. I'm sure the Government and you would have lots
20 of examples. But there are other crimes in the criminal code
21 that have absolutely nothing to do with guns or drugs, for
22 example, that have 10 year maximums, and just because the
23 penalty's the same and there might not be an incentive
24 for the Defendant to point out, hey, this is not different or
25 this is different. So I hear what you're saying. That is a

1 factor to be considered. I don't think it's dispositive,
2 though.

3 MR. MAGUIRE: I agree. And it is a factor that the
4 United States Supreme Court considered significant in the
5 *Mathis* decision.

6 THE COURT: Right.

7 Let me ask you this question about this part of the
8 argument. Wouldn't I have to conclude that *Mathis* had, in
9 effect, overruled *Savage* with respect to the question of
10 whether the application of the modified categorical approach
11 continued to be proper to 21a-277.

12 MR. MAGUIRE: I think that's a good and important
13 question.

14 THE COURT: That's what I would have to conclude to
15 agree with you, no?

16 MR. MAGUIRE: So I think the answer is yes, but with
17 a bit of a caveat. That what *Mathis* is doing is adding a
18 layer of analysis prior to the point that you get to *Savage*.
19 And, yes, I think the outcome of the *Savage* decision would be
20 different after *Mathis*. And so in that sense *Savage* is
21 altered by *Mathis*. I do recognize the Court has pointed to
22 several non-precedential opinions in which in one case it
23 doesn't seem to have been raised at all. The Court simply
24 assumed that the *Savage* analysis applied. And in another
25 case it looks like it was discussed post-briefing.

1 THE COURT: Correct. *Clark.*

2 MR. MAGUIRE: But for reasons that are not clear
3 from the opinion that the court there decided to apply
4 Savage. I think that this does not give the Court meaningful
5 instruction in terms of these are case specific
6 non-precedential opinions. I do understand that this Court
7 is bound by the 2nd Circuit. This Court is also bound by the
8 United States Supreme Court to which a competing decision of
9 the Second Circuit would yield. I know the policy, for
10 example, of the Second Circuit is that subsequent panels are
11 bound by prior decisions. There is an exception, though, an
12 important exception, where the United States Supreme Court
13 has stepped in to offer a competing or contrary.

14 THE COURT: Right. Well, on that issue what
15 several District Courts have said, including Judge Furman
16 recently as in the *Boone* case, that I would have to conclude
17 that *Mathis*, in effect, so conclusively supports a finding
18 that the *Mathis* -- *Mathis* so supports a -- let me say this
19 differently. That I would have to follow *Savage* unless and
20 until it is overruled in a precedential opinion by the Second
21 Circuit itself or unless a subsequent decision of the Supreme
22 Court, such as *Savage*, so undermines it that it will almost
23 inevitably be overruled by the 2nd Circuit. That's at least
24 how several judges in the Southern District have put it,
25 which seems to be consistent with the way the Circuit has

1 described the issue, which is that it has to be very clear
2 that the Supreme Court has, in effect, overruled a decision
3 before even a panel of the Second Circuit can choose not to
4 follow a Second Circuit precedent.

5 MR. MAGUIRE: I have no authority contrary to that,
6 and I believe that is correct.

7 I will note, though, I don't have the cite that at
8 least in several cases following *Mathis*, the Supreme Court
9 did summarily remand several cases in various circuits where
10 there had been a modified categorical approach applied. I'm
11 not aware of the ultimate outcome of those cases and I don't
12 have cites on me so I'm not resting on that. I do recognize
13 that in some respect this argument is one that is made to
14 preserve what may be an appeal to the Second Circuit on this
15 issue and, in fact, is an issue that is currently before the
16 Second Circuit in at least one other manner.

17 THE COURT: Right. Including one of my cases I
18 think, the *Acoff* case.

19 MR. MAGUIRE: That's correct. From which I
20 gratefully borrowed some of this.

21 And I think that I would add just finally on this
22 point that looking at this issue of how do Connecticut courts
23 look at this issue of theories of liability, a possible
24 useful analogy is to contemplate the possibility that you had
25 say the crime of violence definition did not include a threat

1 of force. I think that what the *Chapman* case suggests is
2 that in a case like that, the Connecticut forcible sex
3 statute would be overbroad. And what we're saying is that
4 the controlled substance offense is overbroad in the same
5 way. I'm not sure that the analogy is helpful but, in the
6 event it is, it's one that occurred to me.

7 The other half of the controlled substances issue is
8 this much litigated issue of the fact that Connecticut
9 criminalizes two controlled substances that the federal
10 schedule does not. The Government has pointed out that there
11 is a difference between the ACCA definition which
12 specifically references the federal schedule and the
13 Guidelines which contain no reference. They simply say a
14 controlled substance.

15 The Government here is suggesting that what the
16 Court should do is, therefore, treat any state law addressing
17 a controlled substance which it doesn't define as counting
18 for the Guidelines purpose. And I think this is wrong for a
19 couple of reasons. So I think -- and this is going to get us
20 into the robbery issue. But what Courts have done with
21 respect to the career offender definition in other
22 circumstances is looked to not does any state call something
23 say robbery or arson, but does it comport with a generic
24 definition of this offense. And in large part these other
25 enumerated offenses are common law offenses or typically

1 state law offenses. Here, I think the same principle
2 applies. That what the Court should do is look in terms of
3 defining a controlled substance, and to define controlled
4 substance, not look simply to does one state
5 idiosyncratically define a controlled substance in one way or
6 another but, rather, whether the substantive offense matches
7 a generic definition of a controlled substance offense. And
8 here we have a very clear generic definition of a controlled
9 substance offense which is the one provided by ACCA. And
10 ACCA was, as briefing points out, essentially not identical
11 to, but was very influential on the Guidelines definition.
12 Courts routinely look to both of the definitions or decisions
13 addressing each of these two provisions as informing the
14 other. So what it's suggesting is that even though it's true
15 that the Guidelines do not set forth expressly, controlled
16 substance means what it means in the federal schedule. It
17 makes much more sense in trying to figure out what does
18 controlled substance mean, to look to the federal schedule
19 and federal law ACCA, than to say an idiosyncratic state
20 offense can create a new and different definition of
21 controlled substance that's going to count for Guidelines
22 purposes. I mean, to take I think not terribly reasonable
23 example but not impossible one. If a state were to say that
24 caffeine is a controlled substance.

25 THE COURT: Or aspirin.

1 MR. MAGUIRE: Sure. Caffeine being near and dear to
2 my heart. It would make no sense for the Court to say just
3 because this state is defined as a controlled substance
4 offense, aspirin or caffeine, therefore, it's a controlled
5 substance offense for Guidelines purposes. Just as in cases
6 where a state chooses to define something like robbery in a
7 manner that is broader or different than the generic
8 definition, the federal courts don't simply take it face
9 value the fact that the state has chosen to call their
10 offense robbery or arson. And so I think the Government's
11 approach is asking the Court to do something that doesn't
12 make sense and doesn't --

13 THE COURT: Can you advise me, use of this example
14 of a heavily litigated issue. I know it's at the Circuit in
15 *Acoff*. Do you know whether it's up there in any other cases
16 and how soon you might get a decision from them?

17 MR. MAGUIRE: No, I do not, but only because *Acoff*
18 is the case that comes to mind.

19 MS. STOLFI COLLINS: I do think there's a second
20 case. I don't know the defendant's name. I know who the
21 AUSA in my office is. I think there's two, *Acoff* and another
22 one.

23 MR. MAGUIRE: Unless the Court has further questions
24 with respect to the controlled substance issue, I rest on the
25 briefing.

1 This then gets us to the other possible potential
2 predicate which is the robbery offense. Now, at the time of
3 the plea I thought I really had a wonderful argument which
4 was that, well, the Guidelines at the time were completely
5 vague. *Beckles* eliminated that. And so we're not proposing
6 that the Court should look to the 2015 Guideline. We agree
7 that the present Guideline is the definition of the crime of
8 violence that applies, the current 4B1.2. And as outlined in
9 the briefing, I think what the Court needs to start with is
10 recognizing that this is a definition of a crime of violence.
11 That it is also a different definition than definition of
12 crime of violence that previously existed that included a
13 residual clause. And so here we don't have a residual cause
14 suggesting something that is very, very broad. The
15 Commission decided to eliminate that and has included
16 specific enumerated offenses that, in its view, qualify an
17 offense as something termed a crime of violence. And so part
18 of what defendant pointed out in the briefing is that the
19 case law, particularly regarding ACCA and the question of
20 does something count as a violent felony, under the same
21 logic applies here. It's not obviously the same statute, but
22 particularly I think here it's an interpretative point more
23 than a constitutional one in light of *Beckless*. But that in
24 looking at a provision called crime of violence, it makes
25 sense to hold the subdivisions of that definition up to the

1 standard of the general definition which is that it's a crime
2 of violence. And here we have to look at what Connecticut
3 defines robbery as. And this is not just a point of sort of
4 an analogy to the 2010 *Johnson* case, but also getting back to
5 the requirement that Connecticut's robbery statute rise to
6 the level of the generic definition of robbery. And
7 defendant's memorandum principally cites the *Shabazz* decision
8 from this district, but I think what I would highlight --

9 THE COURT: Which was an ACCA case.

10 MR. MAGUIRE: That's correct. And I think that's
11 why what I think makes sense to highlight here is actually
12 what Judge Underhill identified as the most salient
13 Connecticut decision in the *Shabazz* case which is the
14 Connecticut Supreme Court's decision in *State v. Wright*.

15 THE COURT: And I take it -- I did read the brief.
16 There's no need to go over that. I take it the gist of the
17 argument is under Connecticut law you commit robbery with
18 something much less than violent force as would have been
19 understood in *Johnson* 2010 or anything like that?

20 MR. MAGUIRE: That's basically right with two
21 additions. I'll add what the *Wright* court points out is
22 actually the Connecticut legislature decided that basic
23 robbery is something even less serious than a purse
24 snatching, a larceny that involves invasion of the person.
25 So we're talking about something with robbery that might be

1 the threat of a pinch or a slap, something short of purse
2 snatching. Added on top of that, of course, is the
3 requirement that there be another person present aiding in
4 the robbery. The Government suggested that there's
5 Connecticut precedent suggesting that this other person must
6 somehow add to the force or do something involved.

7 THE COURT: But that provision is sort of irrelevant
8 to your argument, isn't it? That provision is, as you point
9 out in your brief, it actually narrows the offense, but not
10 in a way that matters here.

11 MR. MAGUIRE: I think it matters insofar as when
12 we're talking about robbery second, what we're saying is
13 we're not talking about more force than robbery third.

14 THE COURT: *Wright* said that.

15 MR. MAGUIRE: And the only thing I would add is that
16 the generic definition of robbery, there's several cited in
17 defendant's brief, including the model penal code which the
18 Second Circuit in other context says looked to that suggests,
19 the model penal code suggests a serious risk of harm. In
20 other cases there are definitions suggesting, again, fear of
21 injury. This fear, either threat or actual harm or fear of
22 serious injury, a scratch doesn't count, a pinch doesn't
23 count.

24 And so I think that, unless the Court otherwise, as
25 outlined, I think this is what we wanted to say.

1 THE COURT: Thank you.

2 Did you want to respond to anything? I'll be
3 candid, you don't need to.

4 MS. STOLFI COLLINS: The only point I wanted to make
5 is that the drug is cocaine that was in this case, not
6 caffeine, and that is a federal and a state illegal drug.

7 THE COURT: I hear you.

8 MS. STOLFI COLLINS: Just so the record's clear.
9 And I don't think I need to respond to anything else.

10 THE COURT: so I'm going to rule on this now.

11 The Defendant and the Government disagree about,
12 first, whether Mr. Santiago's conviction for sale of
13 narcotics under Connecticut General Statute 21a-277
14 constitutes a conviction for a controlled substance offense
15 under Section 4B1.2(b) of the Guidelines; and second, whether
16 Mr. Santiago's conviction for robbery in the second degree is
17 a crime of violence under Section 4B1.2(a) of the Guidelines.

18 I acknowledge these issues are not straightforward
19 at this point with the case law that counsel has cited and
20 I'll certainly do my best to resolve them anyway, but I will
21 start by saying that, really, my resolution of these issues,
22 though they certainly will affect the Guidelines range, in my
23 view will not affect the ultimate sentence which I will
24 impose for reasons I will describe in more detail later. But
25 I, nonetheless, will do my best to resolve these issues.

1 Turning to the first issue. I find that
2 Mr. Santiago's conviction for sale of narcotics, actually
3 possession with intent to sell, does constitute a controlled
4 substance offense within the meaning of the Guidelines. I
5 find, first, as I suggested, that I'm not free to treat
6 *Savage*, which is a 2008 decision of the 2nd Circuit and which
7 calls for application of the so-called modified categorical
8 approach to 21a-277 as having been overruled, either in whole
9 or in part, by the Supreme Court's decision in *Mathis*.
10 Several District Courts in this Circuit have stated that
11 District Courts are required to follow the 2nd Circuit
12 precedent, which *Savage* is, unless and until it is overruled
13 in a precedential opinion by the Second Circuit itself or
14 unless a subsequent decision of the Supreme Court so
15 undermines it that it will almost inevitably be overruled by
16 the 2nd Circuit. So the question is whether *Mathis* so
17 conclusively supports that finding that the modified
18 categorical approach may not be applied to Section 21a-277
19 that the 2nd Circuit is all but certain to overrule *Savage*.

20 Judge Furman, as I said, of the Southern District,
21 recently articulated this in *Boone v. United States* which is
22 reported at 2017 WL 398386. And he cites a series of other
23 cases for that as well. And the 2nd Circuit has said similar
24 things about the previous opinions of previous panels of the
25 2nd Circuit.

1 I note further that in summary orders issued after
2 *Mathis*, the Second Circuit itself has shown no signs that it
3 thinks that *Savage* is inconsistent with *Mathis* and has
4 continued to apply *Savage*'s modified categorical approach to
5 Connecticut General Statute 21a-277. One example is *United*
6 *States v. Clark* which is 664 Fed. Appx. 29, thereafter
7 inviting post-argument briefing on how *Mathis* affected the
8 analysis of the earlier conviction under 21a-277. The
9 Circuit upheld the District Court's application of *Savage* and
10 reliance on facts confirmed by the defendant in his plea
11 colloquy, noting that "the District Court's determination was
12 consistent with *Mathis*."

13 Again, I realize that that decision is not
14 precedential or binding on me, but it is some indication that
15 the Circuit is not troubled by an inconsistency between
16 *Mathis* and *Savage*.

17 But, in any event, as I found in the *Acoff* case
18 which is, as Mr. Maguire noted, currently on appeal, I still
19 find that the list of verbs in 21a-277 connected by the
20 disjunctive "or" makes the statute divisible, that is,
21 consisting of alternative elements rather than alternative
22 means. Although I do note, I think it's fair to note, that
23 the statute here, 21a-277, is more complicated in this regard
24 than the burglary statute at issue in the *Mathis* case itself.
25 The Connecticut criminal jury instructions treats sale and

1 possession with intent to sell, for example, as separate
2 elements, directing the trial judge to instruct the jury only
3 on one of them. Further, the Connecticut Appellate Court has
4 treated the different verbs in a closely related statute,
5 21a-278, as making up separate offenses. For example, in
6 *State v. Smart*, the Appellate Court stated that the sale of a
7 narcotic substance was not the same offense as possession
8 with intent to sell such a substance, because each requires
9 proof of a fact that the other does not. Similarly, the
10 Appellate Court in *State v. Jackson*, 13 Conn. App. 288, found
11 that jury unanimity would ordinarily be required for findings
12 as to two of the different verbs set forth in the statute
13 which, again, suggest that they are elements.

14 Again, I note that -- I agree that 21a-277 is
15 arguably more complicated than the statute at issue in *Mathis*
16 because some of the different elements, for example, sale or
17 sell, as it's actually stated in the statute, covers broader
18 ranges of conduct than the Guidelines definition of
19 controlled substance. But that does not change the fact that
20 it is necessary to consult the underlying documents, for
21 example, the plea colloquy in order to decide which separate
22 offense, for example, importing, manufacturing, selling, or
23 possessing with intent to sell that the defendant was
24 convicted of. Nor does the fact I find that the state's
25 schedule narcotics is somewhat broader than the federal

1 schedule change the analysis. I agree with the Government
2 that the Guidelines definition of controlled substance
3 offense, which expressly includes offenses under federal or
4 state law, includes substances that are controlled substances
5 only under state law, not federal law. I did think of
6 Mr. Maguire's example of aspirin or caffeine as potentially
7 testing that position. I don't have to worry about that
8 here, but it is a fair point.

9 The drafters of the Guidelines could easily, though,
10 have incorporated the federal statutory definition of
11 controlled substance, as they often do when drafting
12 Guidelines, they often rely on definitions and standards from
13 the Federal Criminal Code, but they chose not to in this
14 instance. So the fact that state law may define controlled
15 substance more broadly than federal law does not matter under
16 the literal reading of 4B1.2. Because the Guidelines
17 definition of a controlled substance offense includes
18 offenses under both federal and state law for various actions
19 with respect to controlled substance under federal and state
20 law.

21 So I do conclude that the modified categorical
22 approach applies. And I note that the Defendant has
23 acknowledged today that if it does, which the defendant
24 disagrees with, then the conviction at issue here under
25 21a-277 does qualify as a controlled substance offense under

1 the Guidelines. In any event, I have reviewed the transcript
2 of the plea colloquy attached to the Government's brief and I
3 find that it shows that in pleading guilty to the offense of
4 possession with intent to sell under 21a-277, Mr. Santiago
5 admitted that on April 5, 2006 he was found with 104.5s of
6 have crack on his person, that he knew it was crack, and he
7 possessed it with intent to distribute it.

8 Now I'm going to turn to the second issue which is
9 whether Mr. Santiago's May 23, 2009 conviction for robbery
10 second is a crime of violence within the meaning of the
11 Guidelines definition. I find that it is. That definition
12 expressly includes robbery as an enumerated example of a
13 crime of violence. The Defendant argues that Connecticut
14 statute is broader than generic robbery. I do not agree with
15 that. The definition of robbery under Connecticut law
16 requires proof that when committing larceny, the defendant
17 uses or threatens the immediate use of physical force upon
18 another person to prevent or overcome resistance to the
19 taking of property or compelling the owner to give up the
20 property. This tracks the generic definition which, as the
21 Second Circuit stated in *United States v. Walker*, 595 F.3d at
22 page 446, is "the taking of property from another person or
23 from the immediate presence of another person by force or by
24 intimidation." Indeed, one of the definitions cited by the
25 2nd Circuit in that case includes "threatening the imminent

1 use of force" which is essentially identical to the second
2 part of Connecticut's definition which is threaten the
3 immediate use of physical force. I find that the Defendant's
4 attempt to argue that the level of force involved must be
5 greater than what Connecticut permits and must meet or
6 approach the level of the Supreme Court's 2010 decision in
7 *Johnson*, would effectively render superfluous the specific
8 enumeration of robbery in a cause separate from the force
9 clause in the Guidelines definition of a crime of violence.

10 Finally, the fact that the Defendant was committed
11 under a provision that also requires proof of being aided by
12 another person, I find narrows the offense here rather than
13 broadens it.

14 So in the end, I do conclude that the offense level
15 is 24, but the objections by The defendant are preserved on
16 that point.

17 The base offense level is 24 under the Guidelines,
18 but Mr. Santiago has clearly demonstrated that he's accepted
19 responsibility for his offense and has assisted authorities
20 in the investigation or prosecution of his own misconduct by
21 timely notifying them of his intention to enter a plea of
22 guilty. As a result, an adjustment of minus two points
23 applies under Section 3E1.1, and an additional third point
24 also -- reduction would also apply as long as the Government
25 makes the requisite motion.

1 MS. STOLFI COLLINS: I make that motion.

2 THE COURT: That motion's granted. The offense
3 level is 21.

4 Mr. Santiago, the next thing I have to do in
5 calculating the Guidelines range is to determine your
6 criminal history. The parties here agree that you fall into
7 Criminal History Category VI. I also agree with that
8 determination based on your criminal record. And the
9 Guidelines range for a person with an offense level of 21 and
10 a Criminal History Category of VI is as follows:

11 77 to 96 months of imprisonment;

12 A term of supervised release of one to three years;

13 The Defendant is not eligible for probation under
14 the Guidelines;

15 A fine of 15,000 to \$150,000;

16 A special assessment of \$100.

17 Does either counsel have any further objections to
18 the calculation of the Guidelines range other than those
19 already discussed?

20 MR. MAGUIRE: No, Your Honor.

21 MS. STOLFI COLLINS: No, Your Honor.

22 THE COURT: All right. The calculation of the
23 Guidelines and arguments about the Guidelines can be rather
24 technical for folks who are not lawyers or have not attended
25 sentencings before, but it's nonetheless a necessary part of

1 the sentencing that I'm required to conduct. However, we've
2 now reached the kind of the heart of the sentencing. Now
3 Mr. Maguire is going to speak on behalf of Mr. Santiago,
4 making arguments on his behalf for mitigation, for a downward
5 departure, for a non-guidelines sentence. Mr. Santiago
6 himself has a right to speak today. He's not required to
7 speak, but if he wishes to speak I'd be interested in
8 anything he might wish to say. Mr. Maguire may choose to
9 also ask family members or friends to speak. That's his
10 decision. Once this side of the courtroom is finished
11 speaking, I will then hear from the Government. After that,
12 I will take a recess to reflect on what's been said. And
13 after that, I will return to impose sentence.

14 Mr. Maguire.

15 MR. MAGUIRE: Thank you, Your Honor.

16 So as outlined in Defendant's brief, I think this is
17 a case of a clear and, unfortunately, for a very long time,
18 unmet need for drug addiction treatment. And Mr. Santiago
19 recognizes part of that is on him. I also think, and this
20 isn't coming from Mr. Santiago but my review of the record,
21 this looks like a failure of the state system, the state
22 probation system. Mr. Santiago's someone with I counted I
23 think five separate drug possession charges over the years.
24 He has numerous other charges that might be called quality of
25 life charging, disturbing the peace charges, consistent with

1 drug use. And yet to this point, he has not received
2 meaningful drug treatment. And what we propose is a sentence
3 that is geared towards providing that treatment. And
4 Mr. Santiago will speak and he's written to the Court and
5 asked prior to at the time of his initial arrest in the
6 federal case to receive treatment. He has consistently,
7 since I have met him, said I need treatment. And he told me
8 that this is something that he had begun to realize. Shortly
9 before his arrest, he had attempted once to go to a detox but
10 they were full and so he didn't follow-up. And for the first
11 several months while he was incarcerated on what were then
12 state charges, he did what he had done for years before, he
13 thought every day about getting out and getting high. But
14 several months in he realized, after he had been clean for
15 several months, that the person that he was when he was high
16 was not the person he wanted to be. As outlined in what his
17 family has submitted, Mr. Santiago, when he is using PCP, is
18 not always a person that they want around, not always a
19 person they trust to be around. But fundamentally
20 Mr. Santiago has demonstrated that he is a person that his
21 family can trust and love, and they are here today in support
22 of him because of that. They are also people who are here
23 recognizing that he needs treatment, and are here I think,
24 too, because he has admitted to them that he needs treatment
25 going forward. His support networks, particularly in the

1 future, include I think very significantly his significant
2 other, now fiancee, Maggy or Marguerita who will address the
3 Court after I finish. He also has a 16 year old daughter
4 who, he acknowledges, he has not been here for her in the way
5 he would want to be, but he has been working to build a
6 relationship with her. And she is going to address the Court
7 after I finish. And although he had a significant addiction
8 to a drug that, as outlined in the article provided by
9 Defendant in the written submission, a drug that causes not
10 just fundamental personality changes, but causes someone to
11 be actively psychotic while under the influence of the drug.
12 He was, nonetheless, able to maintain not high level of
13 employment, but able to maintain employment right up to the
14 day of his arrest. And I'll also note this drug use is
15 something that has been with Mr. Santiago since he was a
16 teenager. I think currently the Court sees many teenagers
17 who have turned to heroin. In the milieu of which
18 Mr. Santiago grew up, PCP was the drug that he and those
19 around him were using. It's the drug he became addicted to
20 as an early teenager. He had a friend who was also a PCP
21 user who died about three years ago. He's told me that since
22 that time he's suffered from nightmares and his PCP use
23 increased following that. Fortunately, he's begun at Wyatt
24 to receive some medication treatment for nightmares. He
25 tells me the nightmares are getting better. I think this is,

1 of course, just the beginning of what will be a very long
2 road to recovery.

3 The proposal the Defendant has put forward is that
4 what this sentence should do is what the previous sentences
5 have not done. They should focus on the underlying cause of
6 much of Mr. Santiago's behavior. And, yes, he acknowledges
7 that he has made choices. Choices that have endangered the
8 community and that have led him here for which he is
9 responsible. But I do think his history shows over and over
10 that he has acted in the thrall of a very mind altering drug.
11 And in order to protect the public in the future, in order to
12 ensure that Mr. Santiago does not offend again, in order also
13 of course to provide treatment, Defendant suggests two
14 things. One, the sentence in this case should include a
15 strong recommendation that Mr. Santiago participate in the
16 RDAP program. Unlike most participants in the RDAP program,
17 Mr. Santiago will not get a year off of his sentence because
18 of BOP regulations. And so the --

19 THE COURT: Because this offense involved a gun.

20 MR. MAGUIRE: That's correct. And I suppose in
21 theory those regulations could change. I seriously doubt
22 that they would.

23 But what Mr. Santiago has said is that he wants and
24 needs help, and he's willing to commit to doing that program
25 while detained. As much as I think the RDAP is a good

1 program, I think it's also clear that it isn't enough. And
2 what Defendant had proposed at the time of the start of this
3 case was that Mr. Santiago be released to a drug treatment
4 program. We're proposing the same thing again. That the
5 tail end of this sentence should not involve Mr. Santiago
6 simply leaving custody and entering the community, but that
7 it should include a substantial transition period. There are
8 several ways that this can be accomplished. One way that I
9 think addresses the addiction issue, though unfortunately not
10 the mental health issues as well, is something like the
11 Salvation Army, which is a free program. It lasts about
12 seven months. I think a better approach is that the Court
13 suggests that Mr. Santiago should be placed, if medically
14 appropriate, in a six month dual diagnosis program which he
15 would be able to find with the aid of the United States
16 Probation Office. I think that --

17 THE COURT: Dual diagnosis being?

18 MR. MAGUIRE: Dual diagnosis refers to both a mental
19 health concern and a substance abuse concern. Defendant
20 submitted a mental health evaluation in part to provide this
21 Court with insight into Mr. Santiago's conduct and his
22 current functioning, but also to provide a foundation for
23 future mental health treatment.

24 THE COURT: How would that condition of release look
25 different from simply conditions that require substance abuse

1 treatment and testing and mental health treatment and
2 testing?

3 MR. MAGUIRE: So the difference is -- and this gets
4 a little logistical. Mr. Santiago when he finishes his
5 sentence will be, from the perspective of any insurer, clean
6 of substances. He will not be someone that an insurance
7 program will look at as someone that is eligible for
8 treatment. What we're proposing is that Mr. Santiago's
9 history and the fact that he won't be years clean in the real
10 word, but he will have been incarcerated, mean that
11 in-patient treatment will be appropriate. We're asking that
12 the Court order that Mr. Santiago enter an in-patient
13 treatment program and that, frankly, this is something that
14 the United States Probation Office would pay for. That if it
15 is an ordered condition, I think that that provides or
16 provides a means of funding hopefully. I understand it may
17 prove that there is not an available treatment option, but we
18 address the unfortunate reality that while something like the
19 Salvation Army exists to provide substance abuse treatment,
20 it's not a perfect solution for the mental health side of
21 things. In other cases this is something that I know courts
22 have imposed. It does create logistical difficulties on the
23 back end upon release. I do think this is a case where it
24 makes sense.

25 I would also note that it may make sense for the

1 Court, if the Court imposes such a condition, to note that it
2 be something that should be imposed only if found medically
3 appropriate. It may turn out that a future medical
4 evaluation --

5 THE COURT: That's kind of what I'm thinking, too.
6 There should be an evaluation when he gets out to see what
7 makes sense. Go ahead.

8 MR. MAGUIRE: And I do agree because, although based
9 on the evaluation, I do believe this makes sense. Now I
10 understand it may change. But the core statement here really
11 is that to understand that there will be consequences in this
12 case for Mr. Santiago, for his relationship with his family.
13 He is very fortunate that Ms. Santana, his now fiancee, wants
14 to stay by him. Although she was somewhat aware of his
15 addiction, he since his detention I think has been more
16 honest with her than he has been in the past. She could have
17 left. Instead, for the first time I was asked is it possible
18 to get married at Wyatt and the answer is maybe. But that
19 they care about each other. They are together for the long
20 haul. Ms. Santana is someone who will be there to support
21 him, as are the other members of Mr. Santiago's family who
22 are here.

23 I'll note finally with respect to history, in
24 addition to the fact that Mr. Santiago's history suggests
25 although it does reflect conduct that he committed, does in

1 large part track, frankly, what would be expected of someone
2 in the thrall of PCP, particularly drug possession charges.
3 The robbery charge which is I think been the most serious
4 charge in his history, occurred when he was 19 years old. It
5 occurred in 2001, over 15 years ago, suggests that both
6 because of the time that has elapsed and the reality of
7 teenage decision-making, that Mr. Santiago's conduct at age
8 19 does not tell the Court very much about what his conduct
9 is likely to be at nearly 40, which is the age he would be or
10 in his very late 30's, which will be the age he'll be
11 released under Defendant's proposal.

12 THE COURT: The long sentence that he got which he
13 served about six years, that only -- he only got out in 2013.
14 It's not that long ago. It's only four years ago. Was that
15 a drug sentence?

16 MR. MAGUIRE: That was a drug sentence. The robbery
17 sentence, it's at paragraph 35, was also a substantial
18 sentence, but was imposed on 2003 based on 2001 conduct.
19 There certainly is not any suggestion that Mr. Santiago has
20 not continued to have significant problems with drugs, but I
21 did want to highlight that feature, particularly the robbery
22 offense.

23 I'm happy to answer further questions. Otherwise, I
24 know members of Mr. Santiago's family would like to speak.
25 First, his fiancee Maggie or Margaret, who has a letter that

1 she has indicated to me that expresses the sentiment of the
2 rest of the family, though his daughter will separately
3 speak.

4 THE COURT: Okay. Welcome, ma'am. If you could
5 please step up to the podium here. If you could begin by
6 telling us your name for the record.

7 MS. SANTANA: My name is Margarita Santana and I am
8 his fiancee.

9 THE COURT: Welcome.

10 MS. SANTANA: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MS. SANTANA: On behalf of Jesus' family and myself,
13 I would like to thank you, Your Honor, for giving us the
14 opportunity of being able to say a couple of things about who
15 Jesus truly is as a person.

16 As you know, my name is Maggie Santana. I'm Jesus'
17 fiancee. I know Jesus for two years now and I can tell you
18 that he's the most loving person I've ever known. He's not
19 perfect and he knows -- and his family knows that. And at
20 the same time, he is a father, he is a son, and a brother,
21 and a man that's always trying hard to be there for his
22 family to do what's right for them. He is a friend that is
23 there for you whenever you need him. He's kind. He's always
24 trying to put a smile on your face. Always working. Worked
25 really hard.

1 He know what he has done is wrong and he regrets
2 every minute of it. And this time that he's been away has
3 been the hardest for him, because that's when he has realized
4 the pain he has caused his family and what he has put them
5 through, and he's not proud of that and he knows he has a
6 problem he has to address, a point that causes a lot of
7 heartache to his family. And he just wants a second chance
8 so he can finally be the man that his family's been longing
9 for for so long. He wants to be a son, a father, a brother,
10 and most of all the man that I have waiting for so long.

11 Jesus is not a threat to the community. He's just
12 a man who made wrong choices and who takes full
13 responsibility for his actions. He just wants to be there
14 for his family and for us. His family and I believe in him
15 and he'll always have our love and support always.

16 He has told me that you only live life once and he
17 wants to live it with his family as long as I can. And I
18 told him and he will because he's a strong person. He's
19 gotten wiser since this has happened to him. He has realized
20 a lot of thing he has done is wrong and he's a fighter. And,
21 most of all, I told him that he will never be alone because
22 God is always with him, guiding him through all the steps in
23 life.

24 I want to -- I truly believe that he could and will
25 be productive member of the community. He's always willing

1 to listen. Always willing to help.

2 And, respectfully, I ask you to take these words
3 into consideration when sentencing him. And I ask on behalf
4 of his family and myself that your sentence be merciful.

5 Thank you, your Honor, for giving me the
6 opportunity.

7 THE COURT: Thank you, ma'am.

8 MR. MAGUIRE: Mr. Santiago's daughter Destiny.

9 THE COURT: Welcome.

10 DESTINY SANTIAGO: Good morning, Your Honor.

11 My father hasn't really been there my whole life,
12 half of it. I grew up feeling empty, not knowing when he's
13 going to come home or if I would ever feel that bond, the
14 father and daughter bond that I've always wanted. It sucks
15 to see him go and it feels like I am back where I started,
16 not knowing if he's going to be around again. It sucks not
17 seeing him at my volleyball games, my softball games, my
18 basketball games, cheerleading. I've always looked in the
19 crowd to see if he would just show up and come and support
20 me. It meant a lot to me, but I knew he couldn't come
21 because he wasn't around.

22 When he was out we did start to build a bond again
23 and I felt complete because I had both my parents. And
24 seeing them, it made me feel like I was a normal kid, having
25 both parents in my life. And seeing him go brings me back to

1 when I was little, not having him around. I was just really
2 hoping that he would be in the crowd at my graduation, seeing
3 me cross the stage just like every other father would. It
4 hurts. But during my Sweet 15, when he was out, he was the
5 one who changed my shoe, we had the father/daughter dance. I
6 felt like he was my best friend and I've had him. I just
7 want to say that I love him and that I'll be here waiting for
8 him.

9 THE COURT: Thank you.

10 Mr. Maguire, there's somebody else who apparently
11 wishes to speak.

12 MR. WASHINGTON: Hello, Your Honor. My name is
13 David Washington. I'm Jesus cousin, but he's more like my
14 brother.

15 We've been through a lot together. I myself am a
16 recovering PCP smoker user. I haven't done it in about five
17 or six years. So I know exactly what he's going through when
18 it comes to want to change his life, want to be there for his
19 kids. Believe me, my kids are my inspiration. We used to
20 talk all the time about how he wants to be a different
21 person, to be a better son, a father. As you see, his
22 daughter loves him very much. We used to talk all the time
23 about how he wants to get off the streets, how he wants to
24 get off drugs and be there for his daughter, be there for all
25 of us, his mother. As you see, we're all here. We're all

1 very loving and supportive of him right now. We know that we
2 probably won't see him for a while, but we're always going to
3 be here.

4 We just ask that you just consider what we're saying
5 and that he's doing everything he can as a man to change his
6 life around just like I did. I wasn't in a similar
7 situation, but I know what it's like to feel lost. I know
8 what it's like to -- the pain that you don't want to deal
9 with, life, whether it's home or at work, you feel like that
10 the drugs can soothe that pain, but it doesn't. Because once
11 you wear off, you still got the same problems. And like I
12 said, he realizes that when you have plenty of conversations
13 about this and, you know, I know for a fact that he's done.
14 He made a bad choice this time around, but I can tell you for
15 a simple fact that he wants to be home. He wants to be with
16 his mother, his sisters, cousins, everybody. Especially his
17 daughter. He can't talk enough about how he wants to make up
18 for all the time he's lost with her. And it just breaks my
19 heart to see her like this right now, because it would break
20 my heart -- I have three daughters. So I know for a fact it
21 would kill me not to be with them any time. And it's just --
22 it's very unfortunate right now. But we love him and we hope
23 that you just show mercy.

24 Thank you.

25 THE COURT: Thank you, sir.

1 MR. MAGUIRE: Your Honor, Mr. Santiago would like to
2 say a few words. Would you prefer him to speak from here or
3 the podium?

4 THE COURT: Wherever he's most comfortable.

5 THE DEFENDANT: First and foremost, I want to thank
6 you to give me a chance to talk. And today I want to tell
7 the Court that I take full responsibility for my action and I
8 know having a gun in public, I know it was wrong. And I want
9 to tell my family that I'm sorry to put them through this, my
10 daughter, only daughter I got. And messing around with PCP,
11 like, PCP is serious, that's controlling my life. And when
12 my friend passed away, I abused the PCPs a lot and I was
13 different. I was close to losing my family. And I'm glad
14 that I'm in jail to get better and I need help for my
15 addiction. I never got help. And doing time -- doing time
16 is not helping me. I need programs. I need to go live in a
17 program, do programs, stuff like that to get better. Working
18 is no problem. I can work, do this, do that, but I want to
19 get help. That PCP is serious. Can't hide. That controls
20 your brain. And I want to tell my family I love them and I
21 want to get better with my life.

22 THE COURT: Mr. Santiago, I have a question or two
23 for you. So we checked with Wyatt and there's no indication
24 that you signed up for drug programming there which strikes
25 me as -- well, can you tell me why?

1 THE DEFENDANT: I did sign up for program, though.

2 THE COURT: Maybe the information we got was wrong,
3 but --

4 THE DEFENDANT: I signed up for the program and
5 talked to the counselor like two weeks ago, because it was
6 people came to the unit and I was there before them and they
7 was going into the program. Like why they didn't calling my
8 name. And she would say you next on the list, you next on
9 the list.

10 THE COURT: Well, that's not the information we
11 received. I'm not saying you're lying. I'm just saying that
12 we did not receive the same information. I did ask Ms. Blake
13 to check and, she correct me if I'm wrong, but she indicated
14 to me that they had no indication that you were on a waiting
15 list there for a drug program.

16 I didn't mean to interrupt you. Is there anything
17 else you wanted to tell me?

18 THE DEFENDANT: No.

19 THE COURT: Thank you, sir.

20 MR. MAGUIRE: Thank you, your Honor. Unless the
21 Court has any questions.

22 THE COURT: Thanks.

23 Attorney Stolfi Collins.

24 MS. STOLFI COLLINS: I know every defendant comes
25 before the Court and is human and has a family, but they also

1 come before the Court with their history. And the
2 defendant's history is not one where he follows the law or
3 the rules. He has seven prior felony convictions. This will
4 be his 17th conviction in total I believe. You know, these
5 are choices that the defendant made. And he should be held
6 responsible for his actions.

7 I will say I'm asking for the maximum of the
8 Guidelines range, the 96 months, and there was a point where
9 I contemplated coming into court and asking for a variance
10 upward based on the defendant's record and everything that I
11 knew about this case, but felt in the end that asking for the
12 high end was the appropriate thing to do.

13 He's had many opportunities. I stand here and I
14 listen to some of the things that were said and I feel like
15 that the defendant is saying he has a PCP addiction and
16 asking the Court to give him rehab, and that the state has
17 been the one to blame. But the fact of the matter is the
18 defendant made these choices. The defendant was a seven time
19 felon and he was carrying a loaded firearm. And all of the
20 evidence suggests that he was intending to use that firearm.
21 All of the information they had prior to stopping his vehicle
22 was that he was to settle a score. And then he didn't stop
23 when the police put their lights on. He went through a stop
24 sign and sped up and ultimately hurt himself by causing an
25 accident. When he was arrested, there was no sign that he

1 was high. There was no drugs in the car. But he did have
2 the loaded firearm.

3 After receiving the psych eval and the implication
4 that he was on PCP that night, I asked Mr. Maguire for the
5 defendant's medical records because there was an accident, he
6 was taken to the hospital. So I thought that became an
7 issue. I don't have those. So there's no evidence that he
8 was high. The officers say when they interacted with him he
9 wasn't high. Further, he wasn't charged with driving while
10 intoxicated or high in the state case.

11 I find the fact that you're blaming the state for
12 your addiction is a problem. It's just showing that he's
13 going to continue to use excuses. There's no evidence that's
14 come forth that he's asked for help while he was incarcerated
15 in the state system. He's done over seven years in the state
16 system. I think 10 if you add them up together. And I don't
17 see any of that information either. As the Court pointed out
18 he hasn't even asked at Wyatt. That was my understanding as
19 well.

20 You know, I was handed today his disciplinary
21 tickets and that suggests that, you know, he stands before
22 the Court saying that this has been his changing point but he
23 hasn't demonstrated that. He's only shown disrespect. He
24 has a violent past where someone was shot. He's robbed.
25 He's been selling drugs. And he had a loaded firearm on the

1 day he was arrested.

2 For these reasons, and all the other reasons that I
3 outlined in my memo, Your Honor, I think that 96 is the
4 appropriate sentence to meet all of the factors, including
5 the Sentencing Guidelines.

6 THE COURT: All right. Thank you, Attorney Stolfi
7 Collins. As I said, I'm now going to take a recess. I
8 expect to be back to impose sentence no later than quarter
9 of, probably a little bit before that. So probably about 10
10 minutes.

11 We'll be in recess.

12 (Recess.)

13 THE COURT: So sentencing is the most difficult part
14 of my job. It's always difficult. One of the things that
15 makes it difficult is seeing the effects of a sentence on a
16 defendant's family. And this is a case like that.
17 Nonetheless, when deciding on what would be a fair and just
18 sentence, I do have guidance to look to. And, in fact, it's
19 more than guidance. I'm required to consider certain factors
20 that the law directs me to take into account and to apply to
21 the facts of each case. Those factors are set forth in Title
22 18, United States Code, Section 3553(a), and they include
23 Mr. Santiago's history, his background, and his
24 characteristics. They include the nature and circumstances
25 of this crime. They include the purposes of a criminal

1 sentence. What are the purposes of a criminal sentence?

2 Well, the purposes of a criminal sentence are
3 punishment. Punishment itself includes the need to reflect
4 the seriousness of the offense that's been committed and the
5 need to promote respect for the law, among other things.

6 Another purpose of a criminal sentence is
7 deterrence. And that includes deterring Mr. Santiago from
8 committing crimes in the future and deterring other people
9 from committing this type of crime.

10 Rehabilitation. Which means addressing treatment
11 and vocational needs that Mr. Santiago has.

12 And protecting the public from further criminal
13 activity by Mr. Santiago.

14 So those are the purposes of a criminal sentence.

15 Another factor I'm required to consider in deciding
16 on this sentence is the Sentencing Guidelines and the advice
17 that the Guidelines give me about how to sentence you,
18 Mr. Santiago.

19 I also have to consider the need to avoid
20 unwarranted sentence disparities among defendants with
21 similar records who have been found guilty of similar
22 conduct.

23 I have to consider other factors in some other cases
24 such as restitution which is not a factor that applies here.

25 In short, I have to consider everything I've

1 learned about you, everything that's good and everything
2 that's not good and, also, everything I've learned about the
3 offense, and weigh all that information to determine a
4 sentence that is fair, just, and reasonable, and also one
5 that is sufficient but no greater than necessary to serve the
6 purposes of sentencing that I listed a moment ago.

7 Now, I've considered all of the factors here, but
8 every case is different and there are some factors that weigh
9 more heavily here than others. So I wanted to explain to you
10 more specifically how I reached a decision as to the sentence
11 in this case.

12 First, the law gives me discretion to depart from
13 the Guidelines range based on factors not taken into account
14 adequately in the Guidelines. I choose not to exercise my
15 discretion to depart in this case.

16 Second, the law gives me discretion to impose a
17 sentence that's outside the Guidelines system all together,
18 which is sometimes called a non-guidelines sentence. I am
19 going to exercise my discretion to do that. I'm going to
20 impose a sentence that's slightly below the Guidelines range
21 because I find a sentence -- such a sentence is sufficient
22 but not greater than necessary to serve the purposes of
23 sentencing that are most at issue in this case.

24 I'm going to explain more specifically my decision
25 to impose the sentence that I'm going to impose by walking

1 through the factors that I mentioned and describing how each
2 of them applies in this case, beginning with Mr. Santiago's
3 background and characteristics.

4 According to the Presentence Report, which I've
5 adopted as my factual findings here, you had a difficult
6 childhood. Your father was not in your life. You grew up in
7 difficult economic circumstances. Your transition from
8 Puerto Rico to the United States due to language difficulties
9 was challenging. You got in trouble in school early. You
10 did not attend high school. And, unfortunately, you
11 developed from a young age a long criminal record, including
12 drug offenses and violent crimes. You've already received
13 some very lengthy sentences, including one as long as seven
14 years of which you served about six. You were, as I
15 mentioned earlier, discharged only four years ago.
16 Unfortunately, your criminal conduct has continued into your
17 mid 30's. You show no signs of aging out at this point.
18 You're 35. You also have a history of substance abuse with
19 an addiction to PCP. Unfortunately, the record shows no real
20 efforts up to now to address that problem on your part.
21 There have been times when you've been incarcerated, as we've
22 discussed, and there's no evidence that you've made sustained
23 or diligent efforts to participate in programs while you were
24 incarcerated.

25 Further, and also troubling to me, is the fact that

1 even when you've been forced to be sober through
2 incarceration, you've picked up a fairly lengthy series of
3 disciplinary tickets which somewhat undermines the notion
4 that all of this is because of an addiction. You've not done
5 significant programming, at least that appears from the
6 record.

7 So all this is troubling. But everybody that I
8 sentence has negative things about their past and positive
9 things. You're no different. You have positive things as
10 well. I think, most obviously, you have a loving and
11 supportive family. That was evident today. And obviously
12 that speaks well of you. And, frankly, it also means that
13 you're lucky. There are defendants who come here convicted
14 of this crime, convicted of drug offenses, when the courtroom
15 is essentially empty. And that's not the case here and
16 that's a good thing for you. And it says something positive
17 about you as well.

18 You've also expressed a desire to really get serious
19 about dealing with your addiction. That's a good thing.
20 But, candidly, with me, actions speak a lot louder than
21 words. So that has yet to be proven.

22 You did work for a sustained period, as Mr. Maguire
23 pointed out. And so that's a good thing. It shows that
24 you're capable of being productive.

25 Turning now to the nature and circumstances of this

1 crime. Possession of a firearm by a felon is a serious
2 offense, even though it is really a prophylactic measure. It
3 is meant to protect the public from the danger of having guns
4 in the hands of people who in the past have committed crimes.
5 And so in a sense you can't say it's the most serious offense
6 in the world by itself, generally, but your version of this
7 offense unfortunately made it more serious than the sort of
8 generic version. For example, this wasn't a situation, as I
9 do sometimes see, where a defendant has a gun hidden in his
10 home and he comes to the court and he's able to show evidence
11 that he's been threatened by people in the neighborhood, for
12 example, and it's hidden underneath a bench and it's not
13 loaded or something like that. That's illegal. That's not
14 okay if the person has a felony conviction, but at least at
15 some level it's a little bit more understandable. That's not
16 what happened here.

17 To the contrary, what happened here, without even
18 crediting what the CI said, without even, you know, I'm not
19 going to accept as reliable what the CI said about how you
20 were trying to settle a score with somebody, without even
21 considering that. Nonetheless, the fact is that you were
22 found with a gun while traveling in a car. It was accessible
23 to you. And it was loaded. And when you were followed by
24 the police you drove recklessly. You placed other people's
25 lives in danger by doing so.

1 And this is not the first time you've been around
2 guns. There's the robbery offense in the past. Though there
3 was a dispute, and I take your version, which is that you
4 didn't actually hold the gun on that occasion. You were with
5 two people who had guns and you participated in a robbery.

6 So all of that's very troubling in light of the
7 nature of this offense.

8 Turning now to the purposes of a criminal sentence
9 that are most salient here. I think that protecting the
10 public and specific deterrence are right at the top of the
11 list. Unfortunately, you've shown yourself to be recidivist,
12 even into your mid 30's. And to be or at least have
13 difficulty complying with rules even when you're incarcerated
14 and not using drugs. You've already seen some long sentences
15 and they have not succeeded in protecting the public from you
16 or in deterring you from returning to criminal activities.
17 So I do find that a longer sentence is necessary than the
18 longest you've actually served before which is the six years.

19 There's no question that rehabilitation is an
20 important purpose here. You dropped out of school early.
21 It's important that you get the GED. You've going to have an
22 opportunity to do that. You also, I think, could use
23 vocational training. I'm going to include a recommendation
24 for those things in the judgment. There are programs
25 available at the BOP. It's up to you to take advantage of

1 those programs. It's not up to the federal government or if
2 you're ever incarcerated with the state in the past, it's not
3 up to the state to make you do those programs. It's up to
4 you. And it's not okay simply to say, hey, I'd like to do
5 the program. If you're not enrolled, it's up to you to make
6 sure you're enrolled.

7 I'm going to recommend the RDAP program. There's no
8 question there's a documented need for substance abuse
9 treatment. And I will incorporate some version of
10 Mr. Maguire's recommendation on the supervised release
11 conditions or something aimed at addressing the same thing.

12 Turning now to the Sentencing Guidelines. Although
13 the sentence I will impose will be close to the Guidelines
14 range, I want to start out by saying, as I said before, it's
15 really not the Guidelines that are driving the sentence. I
16 know we had a lengthy discussion earlier about two of the
17 enhancements which I found that the Government had
18 established here, but I do want to be -- I do want to be
19 clear that that's not what's driving the sentence. Rather,
20 what's driving the sentence here is, first, the extended
21 nature of your criminal record, your pattern of recidivism,
22 the length of previous sentences you've served, and the
23 principle of incremental sentencing. The notion that when a
24 sentence of a particular -- served as a particular length is
25 not successful in accomplishing the goals of sentencing then

1 a longer sentence is necessary and, unfortunately, the
2 evidence of your inability to follow the rules when you're
3 incarcerated and the nature and circumstances of this
4 offense. So whether or not I'm correct, for example, that
5 the conviction under 21a-277 is a controlled substance
6 offense within the meaning of the Guidelines, there's no
7 question that the documents attached to the Government's
8 brief, together with your record, show that you have been a
9 drug dealer. Similarly, the robbery you committed was a very
10 serious offense involving a gun, even if you didn't hold the
11 gun, and regardless whether it technically qualifies as a
12 crime of violence under the Guidelines.

13 Those are the things, along with the other things I
14 mentioned, that are going to drive the sentence here.

15 Nonetheless, having thought about it carefully, and realizing
16 that we are talking about very long sentences that you've
17 already served, and realizing also that you will be in your
18 early 40's as Mr. Maguire indicated when you get out, I think
19 that a sentence that's all the way up to the Guidelines range
20 would be somewhat greater than what's necessary to serve the
21 purposes of sentencing in this case. The longest sentence
22 you served is about 72 months. I find that under the
23 principle of incremental sentencing and for the other reasons
24 I've stated, the sentence I impose should be slightly greater
25 than that to send the right message and for the reasons I've

1 indicated. But that in light of your age when you get out,
2 it need not be much longer than that.

3 So for all of these reasons -- let me next address
4 the issue of disparities. This is going to be close to a
5 Guideline sentence so I don't find the issue of disparities
6 to be a significant one here.

7 For all the reasons I've indicated, I sentence you
8 as follows. Please stand.

9 I find that the following sentence is the one that
10 is sufficient, but not greater than necessary, to serve the
11 purposes of sentencing most salient in this case. I note
12 that I would impose the same sentence even if the 21a-277
13 conviction was not a controlled substance offense under the
14 Guidelines and/or if the robbery second was not a crime of
15 violence under the Guidelines.

16 I sentence you to 75 months of imprisonment.

17 A term of supervised release of three years.

18 Following mandatory -- the standard conditions of
19 supervised release imposed, in addition, the following
20 mandatory conditions of supervised release are imposed:

21 The Defendant shall not commit another federal,
22 state, or local offense.

23 The Defendant shall not unlawfully possess a
24 controlled substance.

25 The Defendant shall refrain from any unlawful use of

1 a controlled substance and submit to one drug test within 15
2 days of release on supervised release, and at least two
3 periodic drug tests thereafter for use of a controlled
4 substance.

5 The Defendant shall pay the assessment imposed in
6 accordance with Title 18, United States Code, Section 3013.

7 The Defendant shall cooperate in the collection of a
8 DNA sample.

9 In addition, the following special conditions of
10 supervised release are imposed:

11 The Defendant shall not possess a firearm or other
12 dangerous weapon.

13 The Defendant shall submit his person, residence,
14 office, or vehicle to a search conducted by a U.S. Probation
15 Officer at a reasonable time and in a reasonable manner based
16 upon reasonable suspicion of contraband or evidence of a
17 violation of a condition of release. Failure to submit to a
18 search may be grounds for revocation.

19 The Defendant is required to inform any other
20 residents that the premises may be subject to searches under
21 this condition.

22 Next, the Defendant shall participate in a program
23 recommended by the Probation Office and approved by the Court
24 for in-patient or out-patient substance abuse treatment and
25 testing.

1 Following an initial medical evaluation, the
2 Probation Office shall give consideration to an in-patient
3 program aimed at dual diagnosis, in particular, substance
4 abuse and mental health issues.

5 The Defendant shall pay all or a portion of the
6 costs associated with such treatment based on his ability to
7 pay as recommended by the probation officer and approved by
8 the Court.

9 Lastly, the Defendant shall participate in an
10 educational program to obtain a GED if he has not already
11 done so and if he is not employed full-time.

12 I impose no fine.

13 I impose a special assessment of \$100.

14 Does either counsel know of any reason that the
15 sentence I've described cannot legally be imposed as the
16 sentence of the Court?

17 MS. STOLFI COLLINS: No, Your Honor.

18 MR. MAGUIRE: No. I will raise under *Villafuerte*
19 what may be an objection, may be a request for a
20 clarification. The Court noted that the Probation Office had
21 contacted the Wyatt Detention Facility and was informed that
22 Mr. Santiago was not on a list for drug treatment. If the
23 Court's sentence relies upon a finding that Mr. Santiago was
24 not --

25 THE COURT: It doesn't. Thank you for clarifying

1 that. I simply don't know. I do rely, in part, on a finding
2 that the record doesn't establish substantial and diligent
3 efforts on the Defendant's part while incarcerated to get
4 programs simply because there is no evidence of that in the
5 record. In terms of the particular issue whether he's on the
6 wait list or not at Wyatt, I don't know and I don't make any
7 finding about that.

8 MR. MAGUIRE: Thank you for the clarification.

9 THE COURT: Thank you for raising that point.

10 Anything else you wanted to say on that?

11 MR. MAGUIRE: No.

12 THE COURT: Your objections are preserved on the
13 Guidelines issues.

14 Mr. Santiago, the sentence I've described is imposed
15 as the sentence in your case. The judgment will be prepared
16 for my signature by the Clerk's Office in consultation with
17 the U.S. Probation Office. It will include a recommendation
18 for the RDAP program and also for GED training.

19 Mr. Maguire, anything else for the judgment?

20 MR. MAGUIRE: We'd request he serve the sentence at
21 a facility as close as possible to Connecticut consistent
22 with those other recommendations.

23 THE COURT: Okay.

24 MS. BLAKE: I'm not sure, Your Honor, if I heard a
25 condition for mental health evaluation treatment.

1 THE COURT: Yes, let me add that. There's no
2 objection?

3 MR. MAGUIRE: No.

4 THE COURT: I'll also add a condition for mental
5 health treatment. An additional special condition of
6 supervised release will be that the Defendant participate in
7 a program recommended by the Probation Office and approved by
8 the Court for mental health treatment and testing. The
9 Defendant shall pay all or a portion of the costs associated
10 with such treatment based on his ability to pay as
11 recommended by the probation officer and approved by the
12 Court.

13 Mr. Santiago, with regard to your appeal rights, if
14 you wish to appeal, you must file a written notice of appeal
15 within 14 days of the entry of judgment. Do you understand
16 that time limit?

17 THE DEFENDANT: Yes.

18 THE COURT: If you wish to appeal but you cannot
19 afford to do so, you may apply for leave to appeal in forma
20 pauperis. If that motion is granted, the Court will waive
21 the filing fee for your appeal and will appoint a lawyer to
22 represent you at no cost to you. Do you understand?

23 THE DEFENDANT: Yes.

24 THE COURT: Is there anything else we need to take
25 up today?

1 MR. MAGUIRE: Nothing further, Your Honor.

2 MS. STOLFI COLLINS: Nothing further.

3 THE COURT: We'll be in recess. Thank you.

4 Good luck to you.

5 (Concluded.)

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C E R T I F I C A T E

2

3 I, Martha C. Marshall, RMR, CRR, hereby certify that
4 the foregoing pages are a complete and accurate transcription
5 of my original stenotype notes taken in the matter of UNITED
6 STATES V. JESUS SANTIAGO, which was held before the Honorable
7 Michael P. Shea, U.S.D.J, at 450 Main Street, Hartford,
8 Connecticut, on May 8, 2017.

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/s/Martha C. Marshall
13 Martha C. Marshall, RMR, CRR
 Official Court Reporter

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