

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TONY KALUMBA TSHIANSI,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

INDEX TO APPENDICES

Appendix A Sentencing Transcript

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas

Appendix C Judgment and Opinion of Fifth Circuit

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

4 UNITED STATES OF AMERICA,) CASE NO. 4:17-CR-003-A
5 Government,)
6 VERSUS) FORT WORTH, TEXAS
7 TONY KALUMBA TSHIANSI (01),) JUNE 2, 2017
8 Defendant.) 9:02 A.M.

VOLUME 1 OF 1
TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE JOHN McBRYDE
UNITED STATES DISTRICT COURT JUDGE

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34 produced by computer.

<u>I N D E X</u>		
	<u>PROCEEDING</u>	<u>PAGE</u>
1	Court's Findings.....	08
2	Argument/Statements on Sentencing	
3	By Ms. Meletre Roberts.....	11
4	By Mr. Delgado.....	12
5	By the Defendant.....	12
6	Sentence of the Court.....	13
7	Objection to Sentence.....	31, 33
8	Government's Motion to Dismiss.....	33
9	Court's Ruling.....	33
10	Reporter's Certificate.....	34
11	Word Index.....	35
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

PROCEEDINGS

June 2, 2017 - 9:02 a.m.

COURT SECURITY OFFICER: All rise.

4 Hear ye, hear ye, hear ye, the United States
5 District Court for the Northern District of Texas at Fort
6 Worth is now in session, the Honorable John McBryde presiding.

7 Let us pray. God bless the United States and this
8 Honorable Court. Amen.

9 Please be seated.

11 ||| ALL PRESENT: Morning, Your Honor.

14 Before we go to the individual cases, I'm going to
15 identify -- have each defendant identify himself or herself.

16 || Tony Kalumba -- is it Tshiansi?

17 DEFENDANT TSHIANSI: Tshiansi.

18 THE COURT: Stand up wherever you are.

19 How do you pronounce your last name?

20 DEFENDANT TSHIANSI: Tshiansi, Your Honor. My last
21 name is Tshiansi.

22 THE COURT: Tshiansi?

23 DEFENDANT TSHIANSI: Yes, sir.

25 DEFENDANT TSHIANSI: Tony Tshiansi Kalumba.

1 *THE COURT:* You go by the surname Kalumba?

2 *DEFENDANT TSHIANSI:* Yes, sir, that's my middle
3 name.

4 *THE COURT:* That's K-A-L-U-M-B-A; is that correct?

5 *DEFENDANT TSHIANSI:* What? I couldn't hear you,
6 sir.

7 *THE COURT:* K-A-L-U-M-B-A?

8 *DEFENDANT TSHIANSI:* Yes, Your Honor.

9 *THE COURT:* Okay. You can be seated.

10 And let's see. You're represented by Mr. Delgado.
11 He's here?

12 *MR. DELGADO:* Yes, Your Honor.

13 *THE COURT:* Okay. And then the next defendant is
14 Justin Corie Murry.

15 Why don't you stand and say your full name.

16 *DEFENDANT MURRY:* Justin Corie Murry.

17 *THE COURT:* Okay. You can be seated.

18 And you're represented by Mr. Jumes, I believe.

19 *MR. JUMES:* Good morning, Your Honor.

20 *THE COURT:* Okay. And then Mr. Jumes is here.

21 And the next defendant is -- looks like Nykesciah
22 Danielle Williams; is that correct?

23 *DEFENDANT WILLIAMS:* Yes, Your Honor.

24 *THE COURT:* What is your full name?

25 *DEFENDANT WILLIAMS:* Nykesciah Danielle Williams.

1 *THE COURT:* Okay. And you're represented by
2 Mr. Wisely?

3 *MR. WISELY:* Yes, Your Honor.

4 *THE COURT:* And Mr. Wisely is here.

5 And then the fourth defendant is Tremain Keyon
6 Smith.

7 Is that the way that's pronounced?

8 *DEFENDANT SMITH:* Tremain Keyon Smith.

9 *THE COURT:* Okay. You're represented by Mr. Lee.

10 Is he --

11 *MR. LEE:* Good morning, Your Honor.

12 *THE COURT:* And Mr. Lee is here.

13 Okay. I issued an order yesterday that had an
14 exhibit attached to it that consisted of some statements of
15 one or more of the defendants and a photo that apparently was
16 published, and I assume that each of the defendants, through
17 the defendant's attorney, had already received those items,
18 but I want to be sure that's so.

19 Are there any of those items that a defendant,
20 through his attorney, did not already have copies of before
21 today? If so, speak up. Apparently all of the defendants did
22 have copies.

23 The order might be a little misleading. I saw some
24 items, in addition to what's attached to this, and they were
25 interviews of bank employees as to exactly what happened, and

1 I didn't think they added anything to what I already knew, so
2 I didn't attach those to the order.

3 Okay. Well, we're going to proceed now on the
4 individual cases, and I'll call now for sentencing Number
5 4:17-CR-003-A, United States of America versus Tony Kalumba
6 Tshiansi, if he would come forward with his attorney.

7 (Continuing with Defendant Tshiansi only:)

8 *THE COURT:* Okay. Now, I've already had the
9 defendant identify himself by name.

10 For the record, this defendant appeared before
11 me -- let me get the exact date -- on February 17, 2017, when
12 he pleaded guilty to Count 2 of the two-count indictment in
13 that case, and that plea was pursuant to a plea agreement, and
14 I have some reservations about whether the plea agreement
15 should be accepted and we'll deal with that shortly. Of
16 course, we're here today for sentencing based on that
17 conviction, if the plea agreement is approved.

18 Mr. Delgado, did you and your client receive in a
19 timely manner the Presentence Report and the three addenda to
20 it?

21 *MR. DELGADO:* We did, Your Honor.

22 *THE COURT:* I think there were three. No, there
23 were two addenda.

24 The two addenda, you received both of them?

25 *MR. DELGADO:* Yes, sir.

1 *THE COURT:* And did you and your client read the
2 Presentence Report and both the addenda and then discuss them
3 with each other.

4 *MR. DELGADO:* We did discuss it and review them,
5 yes.

6 *THE COURT:* Pardon?

7 *MR. DELGADO:* We did, Your Honor.

8 *THE COURT:* Okay. I raised an issue about whether
9 the Presentence Report should be -- I mean, the plea
10 agreement, whether the plea agreement should be accepted. I
11 still have some reservations about it, but I'm pleased that
12 both parties made a response and both parties make some points
13 in their response, and the government's response basically is
14 that the 20-year maximum that exists by virtue of the plea
15 agreement is adequate to take care of the factors the Court
16 should consider in sentencing.

17 The defendant goes a little further than that and
18 says the Court shouldn't go up that high in any event, but
19 that it certainly would be adequate to take care of it. So
20 I've received responses, and I'm still considering the matter.
21 I'm going to carry that along and make a decision after I've
22 had an opportunity to hear further from the parties, to
23 whatever extent they want to offer anything further.

24 There were no objections to the Presentence Report.
25 There's some suggestion in what the government filed in

1 response to the issue about the acceptance of the plea
2 agreement that perhaps some other guideline range might be
3 appropriate, but I'm going to adopt the guideline findings
4 that the Presentence Report had, and I adopt as the fact
5 findings the facts set forth in the Presentence Report, of
6 course, as modified or supplemented by any of these interviews
7 that were on that June 1, 2017, order.

8 I adopt as the conclusions of the Court the
9 conclusions expressed in the presentence report as modified or
10 supplemented by any of the addenda, the same as to the fact
11 findings as modified or supplemented by any of the addenda and
12 any conclusions I might express from the bench.

13 I conclude that the advisory guideline range offense
14 level as calculated by the probation officer was 19; the
15 Criminal History Category as calculated by the probation
16 officer was III; that the imprisonment range as calculated by
17 the probation officer was 37 to 46 months; and that the
18 supervised release range as calculated by the probation
19 officer is 1 to 3 years; and that the fine range as calculated
20 by the probation officer is \$10,000 to \$100,000; and that a
21 special assessment of \$100 is mandatory.

22 Mr. Delgado, do you have any evidence you want to
23 offer in support of the plea agreement?

24 *MR. DELGADO:* Nothing other than what we submitted
25 in response to the Court's order.

1 THE COURT: Okay. Does the government have any
2 evidence it wishes to offer in support of the plea agreement?

3 MR. COLE: No evidence, Your Honor, just what is
4 referenced in our response to the Court's order.

5 THE COURT: Let me ask you something that I think is
6 kind of important.

7 The plea agreement makes clear, I think, that the
8 government won't be pursuing any offense against the defendant
9 based on the bank robbery that's charged by Count 1.

10 According to the information in the Presentence Report,
11 apparently he has -- and maybe as modified or supplemented by
12 the things I attached to yesterday's order -- he either
13 committed, or attempted to commit, I believe it was six
14 robberies.

15 What is the government's view as to those other
16 robberies? Does the government consider that his plea
17 agreement prevents the government from prosecuting him for any
18 of those robberies or attempted robberies?

19 MR. COLE: No, Your Honor. The plea agreement does
20 not prevent the government from doing that. As a matter of
21 fairness, at the time that we entered into the plea agreement,
22 as I am aware of, there may have been one other bank robbery
23 that the defendant committed on the 7th of October that is
24 referenced in the Presentence Report.

25 At the time that we entered into the plea agreement,

1 all I had was a photo of an individual that looked like him,
2 no other information at that time to indicate that he was the
3 bank robber, so I didn't feel like that was a bank that I
4 could list in the Presentence Report as a bank that we would
5 collect restitution for, but the plea agreement does not
6 prohibit the government from pursuing that bank robbery.

7 *THE COURT:* Well, there are several besides that
8 additional bank robbery, at least some.

9 Does the government plan to prosecute him for any of
10 these other bank robberies if I approve the plea agreement?

11 *MR. COLE:* No, Your Honor.

12 *THE COURT:* Okay. You've answered my question.

13 *MR. COLE:* Thank you.

14 *THE COURT:* We went a roundabout way of getting
15 there.

16 Okay. Let me -- why don't we go ahead and you make
17 whatever statement you want to make on behalf of your client,
18 Mr. Delgado, and I'm carrying along what to do about that plea
19 agreement. So if you have anything else you want to say on
20 that beyond what you've said in your written response, I'll
21 hear from you on that.

22 *MR. DELGADO:* No, Your Honor. I would just
23 reiterate what I said in my sentencing memo and the written
24 response to the Court's May 26 order.

25 However, Mr. Tshiansi's mother is here, and she

1 would like to address the Court as a character witness.

2 THE COURT: Okay. That's fine. If she would like
3 to come forward now, she can.

4 MS. MELETRE ROBERTS: Good morning, Your Honor.

5 THE COURT: Why don't you say what your name is and
6 what city you live in.

7 MS. MELETRE ROBERTS: My name is Meletre Roberts. I
8 live in Keller.

9 THE COURT: Okay.

10 MS. MELETRE ROBERTS: I just wanted to address the
11 Court and plead to the Court to just -- I know he's done
12 wrong, I know he's made bad decisions, but I also feel that --
13 I'm just begging the Court to give him a chance to come home
14 at some point, sooner rather than later, to be able to -- to
15 be a productive citizen.

16 On paper, it looks really bad, but I know for a fact
17 that he has a good heart. He just needs to be given the
18 chance to rectify his wrongs. And also, just do what I know
19 that he can do, and that's to be a productive citizen, and
20 that's being the good person that he was raised to be,
21 respectful, love God, love his family, and love everybody
22 else.

23 That's basically what I wanted to ask you, that you
24 just give him some kind of a chance to come out in society and
25 be a productive person and not rot in prison somewhere.

1 *THE COURT:* Okay. Thank you.

2 *MS. MELETRE ROBERTS:* Thank you.

3 *THE COURT:* Okay. Y'all can come back to the
4 microphone.

5 *MR. DELGADO:* And I would just add to that, Your
6 Honor, that we do request a sentence within the guidelines
7 range provided in the PSR. We think that a sentence -- I
8 understand the Court's concerns, so I think a sentence at the
9 top of the guidelines range of 46 months would be sufficient
10 to address the sentencing factors in Section 3553(a).

11 *THE COURT:* Okay. This is directed to the
12 defendant.

13 You have the right to make any statement or
14 presentation you would like to make on the subject of
15 mitigation, that is, the things that you think the Court
16 should take into account in determining what sentence to
17 impose, or on the subject of sentencing more generally, and at
18 this time I'll invite you to do that.

19 And if you have a statement to make, move over so
20 you can speak into the microphone.

21 *(Conferring)*

22 *DEFENDANT TSHIANSI:* Your Honor, I know I have made
23 some mistakes, but I would just like a chance to come home
24 into society, and be a productive member of society, and take
25 care of my child and make sure I do right by him.

1 And I know by me going away, it's going to be a good
2 thing for me to get my mind right and do certain things that I
3 need to do for myself as well to come out into society as a
4 better person, and I know I will make better choices if I come
5 home earlier.

6 THE COURT: Okay. I think maybe the starting point
7 is to discuss the factors that caused me to have some concern
8 as to whether the 20-year maximum that was created by the plea
9 agreement is adequate to address the defendant's -- all the
10 factors the Court should consider in sentencing under 18
11 United States Code Section 3553(a).

12 According to the information in the Presentence
13 Report, the defendant was involved in either six bank
14 robberies or attempted bank robberies. The first one we know
15 about -- and that assumes that we have knowledge of all he's
16 committed.

17 The first one we know about was a robbery that
18 occurred on October 7, 2016, of a Chase Bank out on Camp Bowie
19 Boulevard here in Fort Worth. And in that case, he gave the
20 teller a note that said, gun, give me your money, and he
21 gestured with his right hand toward his waist as if he had a
22 gun.

23 Then the next one we know about is a robbery that
24 occurred on October 24th, 2016, of Wells Fargo Bank on Iron
25 Horse Boulevard. I believe that's in North Richland Hills,

1 Texas. And the note he gave to the bank employee on that
2 occasion, I have a gun, give me all the cash in your drawer
3 and hurry up. That was the number two bank robbery.

4 The number three bank robbery that we know about is
5 one that occurred on October 28, 2016. He and another person
6 committed the robbery on that date of a Wells Fargo Bank
7 located on East Pipeline Road in Hurst, Texas. In that
8 occasion, the defendant -- on that robbery, the defendant
9 handed the teller a note that said, give me all your money or
10 we will pull out a gun and it won't end well.

11 Now, that's the one that apparently the bank
12 employee was not real cooperative, and he ran out of the bank
13 on that occasion. Apparently he did not get any money, but he
14 went through all of the motions that a bank robber goes
15 through and attempted to rob the bank. That was the number
16 three robbery.

17 Then two robberies -- he committed two robberies,
18 one with the assistance of another person, on November 3,
19 2016. One was a Wells Fargo Bank at 8620 North Beach Street,
20 and the details of how that robbery occurred are in the second
21 addendum. That's the one where his codefendant, Murry,
22 entered the bank and handed the teller a note that said, don't
23 press buttons, gun. Apparently this defendant participated
24 and was in the bank when that robbery occurred.

25 And then on that same date, the defendant, with the

1 assistance of Murry again, codefendant Murry, they robbed the
2 Woodhaven National Bank at 6301 North Beach Street, Fort
3 Worth, Texas, and that robbery is described in more detail in
4 paragraphs -- I think it's 14, 15, and 16 of the Presentence
5 Report, if I'm not mistaken.

6 I don't think we have information from the bank
7 employees as to exactly what the note said. I think it fair
8 to infer, and I find based on a preponderance of the evidence,
9 that there was a threat of use of a gun because that
10 apparently was the way the defendant, when he was cooperating
11 with others, participated in the bank robberies.

12 And then -- that was the fifth robbery that I've
13 just described.

14 And then a sixth robbery is described on page 15 of
15 the exhibits to the order I issued yesterday, which says, at
16 some time after November -- the November 3 robberies,
17 Williams, which is a codefendant, Justin a codefendant, and
18 this defendant, and another party went to the Wells Fargo Bank
19 in North Richland Hills. And apparently they attempted a
20 robbery at that time, according to the information in that
21 document, that was not -- it's not real clear whether that was
22 successful, but it certainly was an attempted robbery.

23 If the robberies were the only things, maybe a
24 sentence of 20 years and possibly a little less would be
25 something that the Court should consider, but there are a lot

1 of other factors that enter into the sentencing of this
2 defendant when you consider the things the Court should take
3 into account in sentencing under 18 United States Code Section
4 3553(a).

5 There is information that he required a defendant to
6 participate in a robbery with him by pointing a gun at him and
7 threatening him. There's information that -- in the
8 Presentence Report that has been found to be reliable that he
9 threatened to kill his codefendants on more than one occasion
10 over a fairly short period of time.

11 *MR. DELGADO:* Your Honor, I would like to address
12 some of these before the Court announces its sentence. I
13 don't know if now is the appropriate time.

14 *THE COURT:* Well, you can interrupt me now, if you
15 would like to address some of them.

16 *MR. DELGADO:* Yeah. Well, generally, we would
17 object to consideration of any -- any facts or conduct not
18 admitted to in the factual resume as lacking the reliability
19 for the Court to consider. As an example, that statement that
20 Mr. Tshiansi pointed a gun at a codefendant before one of the
21 bank robberies, when all the codefendants were in a car
22 together, is contradicted by Ms. Williams who said, I did not
23 see that happen, and she was in the car. And I also think
24 that -- generally, that the other information the Court quoted
25 is not sufficiently reliable given the contradictions within

1 the defendants' statements and among their statements that
2 were provided to the police.

3 *THE COURT:* Okay. As far as the part about pointing
4 a gun at a codefendant to encourage the codefendant to
5 participate in a robbery, that is in the Presentence Report --

6 *MR. DELGADO:* It is.

7 *THE COURT:* -- and I recognize that one of the
8 defendants said they -- that defendant said that defendant
9 didn't see it. I find from a preponderance of the evidence
10 that that occurred.

11 *MR. DELGADO:* And we do -- we do object to that
12 finding, Your Honor.

13 *THE COURT:* Okay.

14 *MR. COLE:* Your Honor, with the Court's permission,
15 may I make a couple of clarifications that might bear on the
16 Court's ruling?

17 *THE COURT:* Okay.

18 *MR. COLE:* The Court referenced that the defendant
19 was involved in two robberies on November 3rd. The government
20 actually doesn't have any information that the defendant was
21 involved in the first robbery on November 3rd. That is the
22 robbery referenced in the superseding information concerning
23 Tremain Smith. That robbery involved Mr. Murry, Mr. Smith,
24 and Ms. Williams. The government does not have any
25 information that the defendant was involved in that robbery.

2 MR. COLE: Yes, Your Honor.

5 MR. COLE: Okay. I apologize that there was that
6 confusion. The government actually doesn't have any
7 information that he was involved in that.

8 And then the Court finally referenced on page 15 of
9 the Court's order that was issued yesterday, the attempt that
10 happened sometime after November 3rd. I've spoken with the
11 agents that were investigating this, and though they may have
12 driven to the bank with that intent, I don't know, based on
13 Ms. Williams' information it sounds like that was the case,
14 the FBI did not receive any information that there was an
15 attempt of a bank robbery on that day.

18 MR. COLE: Thank you, Your Honor.

20 MR. COLE: Thank you, Your Honor.

21 THE COURT: So that really boils it down to four
22 bank robberies and at least a discussion about the possibility
23 of a fifth bank robbery.

24 MR. COLE: Thank you, Your Honor.

1 me?

2 *MR. COLE:* That is my -- it would be -- yes, Your
3 Honor, that's correct.

4 *THE COURT:* Okay. We also have in the record that
5 the defendant bragged about bank robberies for some time. I
6 don't know whether that means he had some bank robberies we
7 don't know about, but apparently he was proud of the fact that
8 he had been robbing banks because he had bragged about it,
9 according to the information we have.

10 His nature was such that those who participated in
11 the robberies with him feared for their safety. Of course,
12 that's a subjective thing, but I think it's something that is
13 appropriate for consideration, that the defendant conducts
14 himself in that manner.

15 It was in paragraph 21 of the Presentence Report
16 that a codefendant said that this defendant ordered him to rob
17 the Wells Fargo Bank on November 3 and pulled a gun on him.
18 Is that -- which November 3 robbery did you say that you don't
19 have information that he was involved in?

20 *MR. COLE:* That would be the first November 3
21 robbery, which is the Wells Fargo Bank at 8620 North Beach
22 Street. That was the bank that the defendant was not involved
23 in.

24 *THE COURT:* Well, according to paragraph 21 of the
25 Presentence Report -- let me find that. This statement is

1 made: Murry admitted that he, Murry, was the person who
2 committed the robbery of the Wells Fargo Bank on November 3,
3 2016. Murry was in the vehicle with this defendant and
4 Williams was driving. This defendant ordered Murry to rob the
5 bank and pulled a gun on him. Murry was shown surveillance
6 photographs from the November 3 -- well, that goes on to the
7 Woodhaven robbery.

19 MR. COLE: By my examination of that, it appears
20 there is an error there, yes.

1 *MR. COLE:* That is correct, Your Honor.

2 *MR. DELGADO:* And, Your Honor, if I may add that
3 this is --

4 *THE COURT:* On November 3.

5 *MR. COLE:* Yes, Your Honor.

6 *MR. DELGADO:* I would add to my prior objection that
7 this is an example of why I think that the statements from the
8 codefendants are not reliable. Not only are they confusing,
9 but they tend to contradict each other. I think that they may
10 have been trying to blame each other for what happened, and
11 when you have that kind of conflict, I'm not sure that it's
12 appropriate and adequate to rely on those statements of
13 codefendants.

14 *THE COURT:* Well, I think it's reliable. Apparently
15 the probation officer confused the names in that particular
16 paragraph of the bank, but I think the information is reliable
17 about what happened as to the Woodhaven National Bank robbery,
18 and I think the ordering Murry to rob that bank and pulling a
19 gun on him is reliable information. I find that from a
20 preponderance of the evidence that those things occurred.

21 I think it also significant that the codefendant
22 Williams, who apparently served as the person to drive the
23 defendant, and on occasions codefendants, other defendants, to
24 the bank robberies said that the defendant had a handgun in
25 his pocket during the bank robberies, and I find that that is

1 an accurate statement and accept it by a preponderance of the
2 evidence.

3 And then two of the codefendants indicated and said
4 that they were afraid of the defendant and that he would shoot
5 up his house, each codefendant, his house. I'm not saying
6 that, in fact, he was planning to do that, but I do find that
7 he, in fact, said those things by a preponderance of the
8 evidence, and it gives you some insight as to what sort of
9 person the defendant is that he would make those kinds of
10 statements.

11 You know, Mr. Cole, I'm still a little confused
12 about that November 3 Wells Fargo Bank robbery. Paragraph 52
13 of the -- the revised or corrected paragraph 52 of the
14 Presentence Report that's set forth in the addendum makes this
15 statement: Williams, a codefendant, advised she knew they
16 were going to rob Wells Fargo Bank at 8620 North Beach Street
17 in Fort Worth when she parked at the apartment on November 3,
18 2016. Then she goes on to explain more details about it.

19 There again, the Presentence Report is saying that
20 he participated in that robbery.

21 *MR. COLE:* Your Honor, again, I apologize, but I
22 think that that paragraph is combining two separate robberies.
23 The defendant and Mr. Murry may have written their own bank
24 robbery notes for their various bank robberies; maybe that
25 should be a separate paragraph, but the government says with a

1 high degree of confidence that the defendant was not involved
2 in the first bank robbery on November 3rd, and the
3 investigating agent is present. If it would be helpful for
4 the Court, I could just --

5 *THE COURT:* Well, that's fine. I'll take your word
6 for it. I was just pointing out there was another place in
7 here that said that he was involved and that's leaves some
8 area of uncertainty, but if you say that the investigator says
9 that he wasn't or they don't have any information that he was
10 involved, then I'm not going to consider that robbery.

11 *MR. COLE:* Thank you, Your Honor.

12 *MR. DELGADO:* Your Honor, I would add that this is
13 another example of why the information outside of the
14 stipulated facts in the factual resume is not sufficiently
15 reliable, including all of the ones that the Court has
16 considered so far.

17 *THE COURT:* Well, apparently the probation officer
18 was having some problem getting things sorted out between the
19 Woodhaven bank robbery and the bank robbery of the Beach -- of
20 the Wells Fargo Bank on Beach Street, and apparently got that
21 confused in two paragraphs in the Presentence Report. I don't
22 think that puts into question the reliability of the other
23 information in the Presentence Report, and I don't consider
24 that it does.

25 And I also notice that there is some indication that

1 he had access to illegal weapons that he obtained for the
2 benefit of his uncle, or some relative, from some warehouse
3 location or storage location, and that he -- there's some
4 indication that he was involved in the theft of other things,
5 such as cell phones.

6 The mere fact that there's some indication of those
7 things is not -- certainly not an overriding factor, but
8 it -- the fact that he was involved in things that would lead
9 to the conclusions that I've seen expressed that he did those
10 things, I think is some -- tells us something about the type
11 of person he was.

12 Now, the factors the Court should consider in
13 sentencing under 18 United States Code Section 3553(a) are the
14 nature and circumstances of the offense and history and
15 characteristics of the defendant.

16 Well, I think I've made it clear that the defendant
17 has history and characteristics that would cause him to be
18 viewed to be a very dangerous person and a person who should
19 not be free in our society. The nature and characteristics of
20 the offense, of course, include what I have found to be the
21 case, that he was threatening use of a gun and, in fact, had a
22 gun in his pocket at the time of all or some of the robberies.

23 Another characteristic -- another factor the Court
24 should consider in sentencing under 18 United States Code
25 Section 3553(a) is the seriousness of the offense. Of course,

1 his bank robbery offense that he was -- that he pleaded guilty
2 to is a serious offense, and as we've indicated, he had other
3 bank robberies that each of which was serious.

4 The sentence should be adequate to promote respect
5 for the law, and so far the defendant has indicated that he
6 has no respect for the law, and I think a lengthy sentence
7 might help gain some respect on his part, and, of course, to
8 provide just punishment for his offense and a lengthy sentence
9 is required to do that.

10 Another factor the Court should take into account is
11 to afford adequate deterrence for criminal conduct. I'm
12 satisfied that if this defendant doesn't receive a significant
13 sentence, then he would not feel deterred from committing
14 further criminal activities, and presumably the codefendants
15 and other persons who might be aware of the outcome of this
16 case would consider a lengthy sentence to be a matter of
17 deterrence.

18 And then a factor the Court is also to consider
19 under Section 3553(a) is to protect the public from further
20 crimes of the defendant, and a lengthy sentence would be
21 required in order to do that, in my view.

22 Of course, the kinds of sentences available is the
23 issue that we're dealing with now in deciding whether to
24 approve the plea agreement. And, of course, I would also
25 consider the guideline range, and I don't consider that to be

1 applicable -- to be adequate. It's applicable, but not
2 adequate in this case.

3 I think what I'm going to do is I'm going to go
4 ahead and accept the plea agreement, and do accept the plea
5 agreement. The judgment of the Court will be consistent with
6 it, but I'm going to sentence significantly above the top of
7 the advisory guideline range by sentencing the defendant to a
8 term of imprisonment of 180 months.

9 That would be combined with a service of a term of
10 supervised release of -- let me see how long that should be.
11 That would be combined with a term of supervised release of 3
12 years that would start when he's completed his sentence of
13 imprisonment, and he would be obligated to pay a special
14 assessment of \$100. That's payable at the time of sentencing.

15 And he would be required to make restitution as
16 contemplated by his plea agreement. That would be the total
17 amount of \$28,151. 28,132 to go to the Wells Fargo Bank and
18 \$19 to go to Woodhaven -- Pinnacle Bank, formerly known as
19 Woodhaven National Bank.

20 I'm satisfied that a sentence of the kind I've
21 described is necessary to adequately and appropriately address
22 all the factors the Court should consider in sentencing under
23 18 United States Code Section 3553(a) in this case, and that
24 the advisory guideline range is simply not realistic when all
25 of the factors the Court should consider are taken into

1 account.

2 So the Court's ordering and adjudging that the
3 defendant be committed to the custody of the Bureau of Prisons
4 to serve a term of imprisonment of 180 months.

5 That sentence is to run consecutive to any future
6 sentence imposed in Case Number 14261700 in Criminal District
7 Court of Tarrant County -- Number 1 of Tarrant County, Texas.
8 That's a pending revocation sentence, or there's a pending
9 revocation. I don't know if the sentence has actually been
10 imposed. If it has been, it will be consecutive to the
11 imposed sentence. If it hasn't been imposed, it will be
12 consecutive to the future sentence.

13 I'm also ordering the defendant to make restitution
14 in the amount of \$28,151, and that is -- \$28,132 is for the
15 benefit of Wells Fargo Bank, and the \$19 is for the benefit of
16 Pinnacle Bank. That restitution is payable immediately, but
17 nonpayment will not be a violation of the defendant's
18 conditions of supervised release so long as he pays as will be
19 provided in those conditions.

20 All restitution payments are to be made to the clerk
21 of court here in Fort Worth for the benefit of the Wells Fargo
22 Bank and Pinnacle Bank that I've already mentioned.

23 Now, if any of the other codefendants, Murry or
24 Williams, either of them, is obligated to make restitution for
25 any of those same losses, then this defendant will receive the

1 benefit, a credit on his restitution obligation, for any
2 amounts either of those other defendants pays on the same
3 restitution obligation.

4 I'm also ordering this defendant to serve a term of
5 supervised release of 3 years that will start once he's
6 completed his sentence of imprisonment.

7 And while he's on supervised release, he'll comply
8 with the standard conditions that will be set forth in the
9 judgment of conviction and sentence, and the following
10 additional conditions:

11 He shall not commit another federal, state, or local
12 crime.

13 He shall not unlawfully possess a controlled
14 substance.

15 He shall cooperate in the collection of DNA as
16 directed by the probation officer and as authorized by the
17 Justice for All Act of 2004.

18 Now, if when his term of supervised release starts
19 any part of his restitution obligation remains unpaid, he'll
20 make payments on that unpaid amount at the rate of at least
21 \$25 a month, and the first of those payments is to be made no
22 later than 60 days after his release from confinement, and
23 another is to be made on the same day of each month thereafter
24 until the restitution amount is paid in full.

25 Any unpaid balance of the restitution ordered by

1 this judgment should be paid in full 60 days prior to the
2 termination of the defendant's term of supervised release.

3 The defendant shall participate in mental health
4 treatment services as directed by the probation officer until
5 successfully discharged, and those services may include
6 prescribed medications by a licensed physician, and the
7 defendant shall contribute to the cost of those services at
8 the rate of at least \$25 a month.

9 The defendant shall participate in a program
10 approved by the probation officer for treatment of narcotic or
11 drug or alcohol dependency that will include testing for the
12 detection of substance use, and he shall abstain from the use
13 of alcohol and all other intoxicants during and after
14 completion of that treatment, and shall contribute to the cost
15 of those services rendered at the rate of at least \$25 a
16 month.

17 The defendant shall refrain from any unlawful use of
18 a controlled substance and shall submit to one drug test
19 within 15 days of release from imprisonment and at least two
20 periodic drug tests thereafter as directed by the probation
21 officer pursuant to the mandatory drug testing provision of
22 the 1994 Crime Bill.

23 And I'm ordering the defendant to pay a special
24 assessment of \$100. That's payable immediately to the United
25 States of America through the office of the clerk of court

1 here in Fort Worth.

2 (Pause in proceedings)

3 MR. DELGADO: If the Court is finished, Your Honor,
4 we do object to the sentence --

5 THE COURT: I'm not through. I recalled something
6 else that I thought significant in determining what sentence
7 to impose, and that was the information in the Presentence
8 Report that this defendant threatened to kill defendant --
9 codefendant Williams if she told anything about or said
10 anything about some robbery that she drove the defendant to,
11 and I believe it was in the Presentence Report that he told
12 his codefendant Williams that he had killed people before.

13 I'm not saying that I find that he had killed people
14 before, but the fact that he would brag that he had, even if
15 it was not a truthful statement on his part, would indicate
16 what type of person he is, and I failed to mention those
17 earlier, but those things were in my mind when I made my
18 decision.

19 Mr. -- the defendant, you have the right to appeal
20 the sentence I've imposed, if you're dissatisfied with it.
21 That appeal would be to the United States Court of Appeals for
22 the Fifth Circuit.

23 You have the right to appeal in forma pauperis, that
24 means without any cost to you, if you qualify for it. You
25 have the right to have the clerk of court file a notice of

1 appeal for you, and the clerk would do that forthwith, if you
2 were to specifically request it.

3 You and your attorney have been given a form that
4 outlines certain rights and obligations in reference to an
5 appeal. If you haven't already done so, I want the two of you
6 to go over that and be sure you understand it, and once both
7 of you are satisfied you understand it, I want both of you to
8 sign it and return it to the court coordinator.

9 Has that been done?

10 *MR. DELGADO:* It is here, Your Honor.

11 *THE COURT:* Do you want to hand it up? Has that
12 been done?

13 *MR. DELGADO:* It has been signed, yes.

14 *THE COURT:* Okay. Well, are you satisfied your
15 client understands it?

16 *MR. DELGADO:* I am, yes, sir.

17 *THE COURT:* Okay. You had something -- the
18 defendant's remanded to custody.

19 You had something you wanted to say?

20 *MR. DELGADO:* Just for the record, we object to the
21 sentence as procedurally and substantively unreasonable, and
22 also to consideration of facts and conduct outside of the
23 stipulated facts in the factual resume, specifically to the
24 documents that were included in the Court's order yesterday.

25 Some of the information in there, for instance, did

1 not make it into the PSR, and we just think that all conduct
2 and facts that's out of the stipulated facts do not have the
3 indicia of reliability that is necessary to be considered by
4 the Court, and we also object to consideration of that -- of
5 those facts and conduct as violating Mr. Tshiansi's due
6 process rights under the Fifth Amendment and his confrontation
7 rights under the Sixth Amendment.

8 *THE COURT:* Okay. The attorneys are
9 excused -- well, you're excused, Mr. Delgado.

10 Before you leave though, Mr. Delgado, what in
11 particular are you saying was --

12 (Defendant Tshiansi exiting courtroom)

13 *THE COURT:* -- the Court relied on that was in the
14 information yesterday, in the attachments to the order that
15 was not already in the Presentence Report?

16 (Defendant Tshiansi reentering courtroom)

17 *MR. DELGADO:* Just I don't think -- I cannot recall
18 a specific fact, but my reading of the order yesterday was
19 that the Court has considered all of the information in those
20 interviews, and also the posts from the Fort Worth police
21 website, and my understanding is that not all of the
22 information, verbatim or otherwise, made it into the PSR or
23 the addendums.

24 I cannot recall a specific fact, but I do know,
25 based on the length of the documents, that not all of the

1 information in there made it into the PSR.

2 *THE COURT:* Well, I intended for the attachment to
3 that order to be a clarification and implication of what was
4 already in the Presentence Report, and I didn't intend to rely
5 on information in the sentencing that was in that order that
6 wasn't dealt with in the Presentence Report in an appropriate
7 manner.

8 Let me say that even if I had not seen those orders,
9 my sentence would have been the same, and my conclusions and
10 findings would have been the same.

11 *MR. DELGADO:* I would renew the objection.

12 *THE COURT:* Okay.

13 (Defendant Tshiansi exiting courtroom)

14 (Proceedings held in other cases, not transcribed)

15 (Proceedings held in Defendant Williams' case
16 pertaining to Defendant Tshiansi, as follows, but
17 Defendant Tshiansi and Mr. Delgado not present)

18 *MR. COLE:* Your Honor, the government moves to
19 dismiss Count 1 of the indictment filed on January 10th, 2017,
20 as to the defendant as part of the plea agreement.

21 *THE COURT:* Okay.

22 *MR. COLE:* And I also realized I neglected to make
23 that same motion as to Tony Tshiansi as part of his plea
24 agreement.

25 *THE COURT:* Okay. I grant it as to both of them.

1 *MR. COLE:* Okay. Thank you, Your Honor.

2 *THE COURT:* We've been at this quite a while. We're
3 going to take a 15-minute recess before we do the sentencing
4 of Defendant Smith.

5 *COURT SECURITY OFFICER:* All rise.

6 *(End of Proceedings)*

7 **REPORTER'S CERTIFICATE**

8 I, Debra G. Saenz, CSR, RMR, CRR, certify that the
9 foregoing is a true and correct transcript from the record
10 of proceedings in the foregoing entitled matter.

11 I further certify that the transcript fees format
12 comply with those prescribed by the Court and the Judicial
13 Conference of the United States.

14 Signed this 28th day of August, 2017.

15

16 /s/ Debra G. Saenz

17 DEBRA G. SAENZ, CSR, RMR, CRR
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19 Official Court Reporter
 The Northern District of Texas
 Fort Worth Division

20

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60 [2] 28/22 29/1		

B	charged [1] 9/9 Chase [1] 13/18 Cherry [1] 1/15 child [1] 12/25 choices [1] 13/4 Circuit [1] 30/22 circumstances [1] 24/14 citizen [2] 11/15 11/19 city [1] 11/6 clarification [1] 33/3 clarifications [1] 17/15 clear [3] 9/7 15/21 24/16 clerk [4] 27/20 29/25 30/25 31/1 client [4] 6/18 7/1 10/17 31/15 Code [5] 13/11 16/3 24/13 24/24 26/23 codefendant [13] 14/21 15/1 15/17 15/17 16/20 17/4 17/4 19/16 21/21 22/5 22/15 30/9 30/12 codefendants [8] 16/9 16/21 21/8 21/13 21/23 22/3 25/14 27/23 COLE [2] 1/14 22/11 collect [1] 10/5 collection [1] 28/15 combined [2] 26/9 26/11 combining [2] 20/13 22/22 come [8] 6/6 11/3 11/13 11/24 12/3 12/23 13/3 13/4 commit [2] 9/13 28/11 committed [7] 9/13 9/23 13/16 14/6 14/17 20/2 27/3 committing [1] 25/13 completed [2] 26/12 28/6 completion [1] 29/14 comply [2] 28/7 34/12 computer [1] 1/25 concern [1] 13/7 concerning [1] 17/22 concerns [1] 12/8 conclude [1] 8/13 conclusions [5] 8/8 8/9 8/12 24/9 33/9 conditions [4] 27/18 27/19 28/8 28/10 conduct [5] 16/17 25/11 31/22 32/1 32/5 conducts [1] 19/13 Conference [1] 34/13 Conferring [1] 12/21 confidence [1] 23/1 confinement [1] 28/22 conflict [1] 21/11 confrontation [1] 32/6 confused [3] 21/15 22/11 23/21 confusing [1] 21/8 confusion [1] 18/6 consecutive [3] 27/5 27/10 27/12 consider [16] 7/16 9/16 13/10 15/25 16/2 16/19 23/10 23/23 24/12 24/24 25/16 25/18 25/25 25/25 26/22 26/25 consideration [5] 16/17 18/17 19/13 31/22 32/4 considered [3] 23/16 32/3 32/19 considering [1] 7/20 consisted [1] 5/14 consistent [1] 26/5 contemplated [1] 26/16 Continuing [1] 6/7 contradict [1] 21/9 contradicted [1] 16/22 contradictions [1] 16/25 contribute [2] 29/7 29/14 controlled [2] 28/13 29/18 conviction [2] 6/17 28/9 cooperate [1] 28/15 cooperating [1] 15/10 cooperative [1] 14/12	coordinator [1] 31/8 copies [2] 5/20 5/22 Corie [2] 4/14 4/16 correct [5] 4/4 4/22 19/3 21/1 34/9 corrected [1] 22/13 cost [3] 29/7 29/14 30/24 could [2] 10/4 23/4 couldn't [1] 4/5 count [4] 6/12 6/12 9/9 33/19 County [2] 27/7 27/7 County -- Number [1] 27/7 couple [1] 17/15 course [8] 6/16 8/6 19/11 24/20 24/25 25/7 25/22 25/24 court [43] Court's [11] 2/3 2/11 8/25 9/4 10/24 12/8 17/14 17/16 18/9 27/2 31/24 courtroom [3] 32/12 32/16 33/13 CR [2] 1/4 6/5 created [1] 13/8 credit [1] 28/1 crime [2] 28/12 29/22 crimes [1] 25/20 criminal [4] 8/15 25/11 25/14 27/6 CRR [3] 1/21 34/8 34/17 CSR [5] 1/21 34/8 34/17 34/17 34/21 custody [2] 27/3 31/18
C	calculated [5] 8/14 8/15 8/16 8/18 8/19 call [1] 6/4 Camp [1] 13/18 can [7] 4/9 4/17 11/3 11/19 12/3 12/20 16/14 cannot [2] 32/17 32/24 car [2] 16/21 16/23 care [3] 7/15 7/19 12/25 carry [1] 7/21 carrying [1] 10/18 case [11] 1/4 3/13 6/13 13/19 18/13 24/21 25/16 26/2 26/23 27/6 33/15 cases [3] 3/14 6/4 33/14 cash [1] 14/2 Category [1] 8/15 cause [1] 24/17 caused [1] 13/7 cell [1] 24/5 certain [2] 13/2 31/4 certainly [3] 7/19 15/22 24/7 Certificate [2] 2/12 34/7 certify [2] 34/8 34/11 chance [4] 11/13 11/18 11/24 12/23 character [1] 11/1 characteristic [1] 24/23 characteristic -- another [1] 24/23 characteristics [3] 24/15 24/17 24/19	DAN [1] 1/14 dangerous [1] 24/18 Danielle [2] 4/22 4/25 date [3] 6/11 14/6 14/25 date -- on [1] 6/11 day [4] 18/15 20/14 28/23 34/14 days [3] 28/22 29/1 29/19 deal [1] 6/15 dealing [1] 25/23 dealt [1] 33/6 debbie.saenz [2] 1/23 34/25 DEBRA [4] 1/21 34/8 34/16 34/17 deciding [1] 25/23 decision [2] 7/21 30/18 decisions [1] 11/12 defendant [71] defendant's [5] 5/17 13/9 27/17 29/2 31/18 defendant's -- all [1] 13/9 defendants [6] 5/15 5/16 5/21 17/8 21/23 28/2 defendants' [1] 17/1 DEFENDER [1] 1/18 degree [1] 23/1 DELGADO [9] 1/17 2/6 4/10 6/18 8/22 10/18 32/9 32/10 33/17 DEPARTMENT [1] 1/14 dependency [1] 29/11 described [4] 15/3 15/13 15/14 26/21 detail [1] 15/3 details [2] 14/20 22/18 detection [1] 29/12 determining [2] 12/16 30/6 deterred [1] 25/13 deterrence [2] 25/11 25/17 did [13] 5/20 5/21 6/18 6/21 7/1 7/4 7/7 14/13 16/22 18/14 19/18 24/9 31/25 didn't [5] 6/1 6/2 10/3 17/9 33/4 different [1] 20/13 directed [4] 12/11 28/16 29/4 29/20 discharged [1] 29/5 discuss [3] 7/2 7/4 13/7 discussion [1] 18/22 dismiss [2] 2/10 33/19

<p>D</p> <p>dissatisfied [1] 30/20 DISTRICT [9] 1/1 1/2 1/11 1/15 1/18 3/5 3/5 27/6 34/18 DIVISION [2] 1/3 34/19 DNA [1] 28/15 do [24] 3/19 8/22 10/18 11/18 11/19 12/6 12/18 12/25 13/2 13/3 17/11 17/11 22/6 22/6 25/9 25/21 26/3 26/4 30/4 31/1 31/11 32/2 32/4 34/3 document [1] 15/21 documents [2] 31/24 32/25 does [7] 9/1 9/16 9/19 10/5 10/9 17/24 23/24 doesn't [3] 17/20 18/6 25/12 doing [1] 9/20 don't [16] 4/15 10/16 11/5 14/22 15/6 16/13 18/12 19/6 19/7 19/18 23/9 23/21 23/23 25/25 27/9 32/17 done [4] 11/11 31/5 31/9 31/12 down [1] 18/21 drawer [1] 14/2 drive [1] 21/22 driven [1] 18/12 driving [1] 20/4 drove [1] 30/10 drug [4] 29/11 29/18 29/20 29/21 due [1] 32/5 during [2] 21/25 29/13</p>	<p>factors [8] 7/15 12/10 13/7 13/10 16/1 24/12 26/22 26/25 facts [8] 8/5 16/17 23/14 31/22 31/23 32/2 32/2 32/5 factual [3] 16/18 23/14 31/23 failed [1] 30/16 fair [1] 15/7 fairly [1] 16/10 fairness [1] 9/21 family [1] 11/21 far [3] 17/3 23/16 25/5 Fargo [16] 13/24 14/6 14/19 15/18 19/17 19/21 20/2 20/14 20/16 20/22 22/12 22/16 23/20 26/17 27/15 27/21 FBI [1] 18/14 feared [1] 19/11 February [1] 6/11 February 17 [1] 6/11 federal [2] 1/18 28/11 feel [3] 10/3 11/12 25/13 fees [1] 34/11 fifth [4] 15/12 18/23 30/22 32/6 file [1] 30/25 filed [2] 7/25 33/19 finally [1] 18/8 find [8] 15/8 17/9 19/25 20/17 21/19 21/25 22/6 30/13 finding [1] 17/12 findings [5] 2/3 8/3 8/5 8/11 33/10 fine [2] 8/19 11/2 fine. [1] 23/5 fine. I'll [1] 23/5 finished [1] 30/3 first [7] 13/14 13/17 17/21 18/1 19/20 23/2 28/21 following [1] 28/9 follows [1] 33/16 foregoing [2] 34/9 34/10 form [1] 31/3 forma [1] 30/23 format [1] 34/11 formerly [1] 26/18 FORT [14] 1/3 1/5 1/16 1/19 1/22 3/5 13/19 15/2 22/17 27/21 30/1 32/20 34/19 34/22 forth [3] 8/5 22/14 28/8 forthwith [1] 31/1 forward [2] 6/6 11/3 found [2] 16/8 24/20 four [2] 3/12 18/21 fourth [1] 5/5 free [1] 24/19 full [5] 3/24 4/15 4/24 28/24 29/1 further [6] 7/17 7/22 7/23 25/14 25/19 34/11 future [2] 27/5 27/12</p>	<p>good [7] 3/10 4/19 5/11 11/4 11/17 11/20 13/1 got [1] 23/20 government [16] 1/5 1/14 7/25 9/1 9/8 9/16 9/17 9/20 10/6 10/9 17/19 17/24 18/6 20/14 22/25 33/18 government's [3] 2/10 7/13 9/15 grant [1] 33/25 guideline [6] 8/2 8/3 8/13 25/25 26/7 26/24 guidelines [2] 12/6 12/9 guilty [2] 6/12 25/1 gun [15] 13/20 13/22 14/2 14/10 14/23 15/9 16/6 16/20 17/4 19/17 20/5 20/24 21/19 24/21 24/22</p>
<p>E</p> <p>E-Mail [2] 1/23 34/25 each [8] 3/15 5/16 7/3 21/9 21/10 22/5 25/3 28/23 earlier [2] 13/5 30/17 East [1] 14/7 effect [1] 18/25 either [4] 9/12 13/13 27/24 28/2 else [3] 10/19 11/22 30/6 employee [2] 14/1 14/12 employees [2] 5/25 15/7 encourage [1] 17/4 end [2] 14/10 34/6 enter [1] 16/1 entered [3] 9/21 9/25 14/22 entitled [1] 34/10 error [1] 20/20 even [2] 30/14 33/8 event [1] 7/18 everybody [1] 11/21 evidence [8] 8/22 9/2 9/3 15/8 17/9 21/20 22/2 22/8 exact [1] 6/11 exactly [2] 5/25 15/7 examination [1] 20/19 example [3] 16/19 21/7 23/13 excused [2] 32/9 32/9 excused -- well [1] 32/9 exhibit [1] 5/14 exhibits [1] 15/15 exists [1] 7/14 exiting [2] 32/12 33/13 Expires [1] 34/21 explain [1] 22/18 express [1] 8/12 expressed [2] 8/9 24/9 extent [1] 7/23</p>	<p>gain [1] 25/7 gave [2] 13/19 14/1 generally [3] 12/17 16/16 16/24 gestured [1] 13/21 get [3] 6/11 13/2 14/13 getting [2] 10/14 23/18 give [5] 11/13 11/24 13/20 14/2 14/9 given [3] 11/17 16/25 31/3 gives [1] 22/8 go [8] 3/14 4/1 7/18 10/16 26/3 26/17 26/18 31/6 God [2] 3/7 11/21 goes [4] 7/17 14/14 20/6 22/18 going [12] 3/14 6/3 7/21 8/3 13/1 13/1 22/16 23/10 26/3 26/3 26/6 34/3</p>	<p>good [7] 3/10 4/19 5/11 11/4 11/17 11/20 13/1 got [1] 23/20 government [16] 1/5 1/14 7/25 9/1 9/8 9/16 9/17 9/20 10/6 10/9 17/19 17/24 18/6 20/14 22/25 33/18 government's [3] 2/10 7/13 9/15 grant [1] 33/25 guideline [6] 8/2 8/3 8/13 25/25 26/7 26/24 guidelines [2] 12/6 12/9 guilty [2] 6/12 25/1 gun [15] 13/20 13/22 14/2 14/10 14/23 15/9 16/6 16/20 17/4 19/17 20/5 20/24 21/19 24/21 24/22</p>
<p>F</p> <p>fact [12] 8/4 8/10 11/16 19/7 22/6 22/7 24/6 24/8 24/21 30/14 32/18 32/24 factor [4] 24/7 24/23 25/10 25/18</p>	<p>gain [1] 25/7 gave [2] 13/19 14/1 generally [3] 12/17 16/16 16/24 gestured [1] 13/21 get [3] 6/11 13/2 14/13 getting [2] 10/14 23/18 give [5] 11/13 11/24 13/20 14/2 14/9 given [3] 11/17 16/25 31/3 gives [1] 22/8 go [8] 3/14 4/1 7/18 10/16 26/3 26/17 26/18 31/6 God [2] 3/7 11/21 goes [4] 7/17 14/14 20/6 22/18 going [12] 3/14 6/3 7/21 8/3 13/1 13/1 22/16 23/10 26/3 26/3 26/6 34/3</p>	<p>good [7] 3/10 4/19 5/11 11/4 11/17 11/20 13/1 got [1] 23/20 government [16] 1/5 1/14 7/25 9/1 9/8 9/16 9/17 9/20 10/6 10/9 17/19 17/24 18/6 20/14 22/25 33/18 government's [3] 2/10 7/13 9/15 grant [1] 33/25 guideline [6] 8/2 8/3 8/13 25/25 26/7 26/24 guidelines [2] 12/6 12/9 guilty [2] 6/12 25/1 gun [15] 13/20 13/22 14/2 14/10 14/23 15/9 16/6 16/20 17/4 19/17 20/5 20/24 21/19 24/21 24/22</p>
		<p>G</p> <p>good [7] 3/10 4/19 5/11 11/4 11/17 11/20 13/1 got [1] 23/20 government [16] 1/5 1/14 7/25 9/1 9/8 9/16 9/17 9/20 10/6 10/9 17/19 17/24 18/6 20/14 22/25 33/18 government's [3] 2/10 7/13 9/15 grant [1] 33/25 guideline [6] 8/2 8/3 8/13 25/25 26/7 26/24 guidelines [2] 12/6 12/9 guilty [2] 6/12 25/1 gun [15] 13/20 13/22 14/2 14/10 14/23 15/9 16/6 16/20 17/4 19/17 20/5 20/24 21/19 24/21 24/22</p>
		<p>I</p> <p>I'll [5] 6/4 10/20 12/18 18/16 23/5</p>

<p>I</p> <p>I'm [24] 3/14 7/11 7/20 7/21 8/3 10/18 11/13 15/5 20/17 20/22 21/11 22/5 22/11 23/10 25/11 26/3 26/3 26/6 26/20 27/13 28/4 29/23 30/5 30/13 I've [10] 6/8 7/20 7/21 15/12 18/10 24/9 24/16 26/20 27/22 30/20 identify [3] 3/15 3/15 6/9 identify -- have [1] 3/15 III [1] 8/16 illegal [1] 24/1 immediately [2] 27/16 29/24 implication [1] 33/3 implied [1] 18/4 important [1] 9/6 impose [2] 12/17 30/7 imposed [5] 27/6 27/10 27/11 27/11 30/20 imprisonment [6] 8/16 26/8 26/13 27/4 28/6 29/19 include [3] 24/20 29/5 29/11 included [1] 31/24 including [1] 23/15 Index [1] 2/13 indicate [2] 10/2 30/15 indicated [3] 22/3 25/2 25/5 indication [3] 23/25 24/4 24/6 indicia [1] 32/3 indictment [2] 6/12 33/19 individual [3] 3/14 6/4 10/1 infer [1] 15/8 information [29] 9/10 10/2 13/12 15/6 15/20 16/5 16/7 16/24 17/20 17/22 17/25 18/7 18/13 18/14 19/9 19/19 20/15 21/16 21/19 23/9 23/13 23/23 30/7 31/25 32/14 32/19 32/22 33/1 33/5 insight [1] 22/8 instance [1] 31/25 intend [1] 33/4 intended [1] 33/2 intent [1] 18/12 interrupt [1] 16/14 interviews [3] 5/25 8/6 32/20 intoxicants [1] 29/13 investigating [2] 18/11 23/3 investigator [1] 23/8 invite [1] 12/18 involved [14] 13/13 17/19 17/21 17/23 17/25 18/7 19/19 19/22 20/15 23/1 23/7 23/10 24/4 24/8 Iron [1] 13/24 is [90] issue [3] 7/8 8/1 25/23 issued [3] 5/13 15/15 18/9 it [54] it -- the [1] 24/8 it's [7] 13/1 15/4 15/21 19/12 21/11 21/14 26/1 items [3] 5/17 5/19 5/24 its [1] 16/12</p>	<p>11/17 11/18 11/24 12/5 12/23 15/13 18/19 23/4 23/6 25/8 31/20 32/1 32/17 just -- I [1] 11/11 JUSTICE [2] 1/14 28/17 Justin [3] 4/14 4/16 15/17</p>	<p>May 26 [1] 10/24 maybe [4] 9/11 13/6 15/23 22/24 McBRYDE [2] 1/11 3/6 me [18] 6/11 6/11 9/5 10/16 13/1 13/2 13/7 13/20 14/2 14/9 16/14 18/19 19/1 19/25 20/8 20/25 26/10 33/8 me -- let [1] 6/11 me -- why [1] 10/16 mean [1] 7/9 means [2] 19/6 30/24 mechanical [1] 1/24 medications [1] 29/6 Meletre [2] 2/5 11/7 member [1] 12/24 memo [1] 10/23 mental [1] 29/3 mention [1] 30/16 mentioned [1] 27/22 mere [1] 24/6 microphone [2] 12/4 12/20 middle [1] 4/2 might [6] 5/23 8/2 8/12 17/15 25/7 25/15 mind [2] 13/2 30/17 minute [1] 34/3</p>
<p>K</p> <p>K-A-L-U-M-B-A [2] 4/4 4/7 KALUMBA [5] 1/7 3/16 3/25 4/1 6/5 Kalumba -- is [1] 3/16 Keller [1] 11/8 Keyon [2] 5/5 5/8 kill [2] 16/9 30/8 killed [2] 30/12 30/13 kind [4] 9/6 11/24 21/11 26/20 kinds [2] 22/9 25/22 knew [2] 6/1 22/15 know [18] 11/11 11/12 11/16 11/18 12/22 13/1 13/4 13/14 13/17 13/23 14/4 16/13 18/12 19/6 19/7 22/11 27/9 32/24 knowledge [1] 13/15 known [1] 26/18</p>	<p>L</p> <p>lacking [1] 16/18 last [2] 3/19 3/20 later [2] 11/14 28/22 law [2] 25/5 25/6 lead [1] 24/8 least [6] 10/8 18/22 28/20 29/8 29/15 29/19 leave [1] 32/10 leaves [1] 23/7 Lee [2] 5/9 5/12 length [1] 32/25 lengthy [4] 25/6 25/8 25/16 25/20 LEO [1] 1/17 less [1] 15/24 let [7] 3/7 6/11 9/5 10/16 19/25 26/10 33/8 let's [1] 4/10 level [1] 8/14 licensed [1] 29/6 like [12] 4/21 10/1 10/3 11/1 11/2 12/14 12/23 16/11 16/15 18/13 20/10 20/12 list [1] 10/4 little [4] 5/23 7/17 15/24 22/11 live [2] 11/6 11/8 local [1] 28/11 located [1] 14/7 location [2] 24/3 24/3 long [2] 26/10 27/18 looked [1] 10/1 looks [4] 4/21 11/16 20/10 20/12 losses [1] 27/25 lot [1] 15/25 love [3] 11/21 11/21 11/21</p>	<p>misleading [1] 5/23 mistake [1] 20/18 mistaken [1] 15/5 mistakes [1] 12/23 mitigation [1] 12/15 modified [4] 8/6 8/9 8/11 9/11 money [3] 13/20 14/9 14/13 month [4] 28/21 28/23 29/8 29/16 months [4] 8/17 12/9 26/8 27/4 more [5] 5/15 12/17 15/3 16/9 22/18 morning [6] 3/10 3/11 3/13 4/19 5/11 11/4 mother [1] 10/25 motion [2] 2/10 33/23 motions [1] 14/14 move [1] 12/19 moves [1] 33/18 MR [4] 1/14 1/17 2/6 33/17 Mr. [20] 4/10 4/18 4/20 5/2 5/4 5/9 5/12 6/18 8/22 10/18 10/25 16/20 17/23 17/23 22/11 22/23 30/19 32/5 32/9 32/10 Mr. -- the [1] 30/19 Mr. Cole [1] 22/11 Mr. Delgado [6] 4/10 6/18 8/22 10/18 32/9 32/10 Mr. Jumes [2] 4/18 4/20 Mr. Lee [2] 5/9 5/12 Mr. Murry [2] 17/23 22/23 Mr. Smith [1] 17/23 Mr. Tshiansi [1] 16/20 Mr. Tshiansi's [2] 10/25 32/5 Mr. Wisely [2] 5/2 5/4 MS [2] 1/21 2/5 Ms. [3] 16/22 17/24 18/13 Ms. Williams [2] 16/22 17/24 Ms. Williams' [1] 18/13 Murry [16] 4/14 4/16 14/21 15/1 15/1 17/23 20/1 20/1 20/3 20/4 20/5 20/23 20/24 21/18 22/23 27/23 my [18] 3/20 4/2 10/12 10/23 11/7 12/25 13/2 18/16 19/2 20/19 21/6 25/21 30/17 30/17 32/18 32/21 33/9 33/9 my -- it [1] 19/2 myself [1] 13/3</p>
<p>J</p> <p>January [1] 33/19 January 10th [1] 33/19 JOHN [2] 1/11 3/6 JUDGE [1] 1/11 judgment [3] 26/5 28/9 29/1 Judicial [1] 34/12 Jumes [2] 4/18 4/20 JUNE [3] 1/6 3/2 8/7 June 1 [1] 8/7 just [18] 9/3 10/22 11/10 11/11 11/13</p>	<p>Made [12] 7/12 11/12 12/22 20/1 20/18 24/16 27/20 28/21 28/23 30/17 32/22 33/1 Mail [2] 1/23 34/25 make [17] 7/12 7/21 10/16 10/17 12/13 12/14 12/19 12/25 13/4 17/15 22/9 26/15 27/13 27/24 28/20 32/1 33/22 makes [2] 9/7 22/14 mandatory [2] 8/21 29/21 manner [3] 6/19 19/14 33/7 matter [4] 7/20 9/20 25/16 34/10 maximum [2] 7/14 13/8 may [8] 9/22 10/24 17/15 18/11 21/2 21/9 22/23 29/5</p>	<p>N</p> <p>name [9] 3/19 3/21 3/24 4/3 4/15 4/24 6/9 11/5 11/7</p>

N	once [2] 28/5 31/6 one [14] 5/15 9/22 13/14 13/17 13/23 14/5 14/11 14/18 14/19 14/21 16/9 16/20 17/7 29/18 ones [1] 23/15 only [3] 6/7 15/23 21/8 opportunity [1] 7/22 order [16] 5/13 5/23 6/2 8/7 8/25 9/4 9/12 10/24 15/15 18/9 25/21 31/24 32/14 32/18 33/3 33/5 order -- he [1] 9/12 ordered [3] 19/16 20/4 28/25 ordering [6] 20/23 21/18 27/2 27/13 28/4 29/23 orders [1] 33/8 other [20] 7/3 8/2 8/24 9/15 9/22 10/2 10/10 16/1 16/24 21/9 21/10 21/23 23/22 24/4 25/2 25/15 27/23 28/2 29/13 33/14 others [1] 15/11 otherwise [1] 32/22 our [2] 9/4 24/19 out [9] 11/24 13/3 13/18 14/10 14/12 20/17 23/6 23/18 32/2 outcome [1] 25/15 outlines [1] 31/4 outside [2] 23/13 31/22 over [3] 12/19 16/10 31/6 overlooking [1] 20/11 overriding [1] 24/7 own [1] 22/23	place [1] 23/6 plan [1] 10/9 planning [1] 22/6 plea [25] 6/13 6/13 6/14 6/17 7/9 7/10 7/14 8/1 8/23 9/2 9/7 9/16 9/19 9/21 9/25 10/5 10/10 10/18 13/8 25/24 26/4 26/4 26/16 33/20 33/23 plead [1] 11/11 pleaded [2] 6/12 25/1 Please [1] 3/9 pleased [1] 7/11 pocket [2] 21/25 24/22 point [2] 11/14 13/6 pointed [1] 16/20 pointing [3] 16/6 17/3 23/6 points [1] 7/12 police [2] 17/2 32/20 possess [1] 28/13 possibility [1] 18/22 possibly [1] 15/24 posts [1] 32/20 pray [1] 3/7 preponderance [5] 15/8 17/9 21/20 22/1 22/7 prescribed [2] 29/6 34/12 present [2] 23/3 33/17 presentation [1] 12/14 presence [26] 6/19 7/2 7/9 7/24 8/4 8/5 8/9 9/10 9/24 10/4 13/12 15/4 16/8 17/5 19/15 19/25 20/12 22/14 22/19 23/21 23/23 30/7 30/11 32/15 33/4 33/6
NORTHERN [5] 1/2 1/15 1/18 3/5 34/18 not [45] not -- certainly [1] 24/7 not -- it's [1] 15/21 note [5] 13/20 14/1 14/9 14/22 15/7 notes [1] 22/24 Nothing [1] 8/24 notice [2] 23/25 30/25 November [17] 14/18 15/16 15/16 17/19 17/21 18/1 18/10 19/17 19/18 19/20 20/2 20/6 20/16 21/4 22/12 22/17 23/2 November -- the [1] 15/16 November 3 [10] 14/18 15/16 18/1 19/17 19/18 19/20 20/2 21/4 22/12 22/17 November 3 -- well [1] 20/6 November 3rd [5] 17/19 17/21 18/10 20/16 23/2 now [12] 3/6 6/3 6/4 6/8 11/3 14/11 16/13 16/14 24/12 25/23 27/23 28/18 number [6] 6/4 14/3 14/4 14/15 27/6 27/7 Nykesiah [2] 4/21 4/25	P page [3] 2/2 15/14 18/8 paid [2] 28/24 29/1 paper [1] 11/16 paragraph [8] 19/15 19/24 20/11 21/16 22/12 22/13 22/22 22/25 paragraph -- and [1] 20/11 paragraphs [3] 15/4 20/13 23/21 paragraphs -- I [1] 15/4 Pardon [1] 7/6 parked [1] 22/17 part [6] 17/3 25/7 28/19 30/15 33/20 33/23 participate [4] 16/6 17/5 29/3 29/9 participated [4] 14/23 15/11 19/10 22/20 particular [2] 21/15 32/11 parties [3] 7/12 7/12 7/22 party [1] 15/18 pauperis [1] 30/23 Pause [1] 30/2 pay [2] 26/13 29/23 payable [3] 26/14 27/16 29/24 payments [3] 27/20 28/20 28/21 pays [2] 27/18 28/2 pending [2] 27/8 27/8 people [2] 30/12 30/13 perhaps [1] 8/2 period [1] 16/10 periodic [1] 29/20 permission [1] 17/14 person [12] 11/20 11/25 13/4 14/5 14/18 20/1 21/22 22/9 24/11 24/18 24/18 30/16 persons [1] 25/15 pertaining [1] 33/16 phones [1] 24/5 photo [2] 5/15 10/1 photographs [1] 20/6 physician [1] 29/6 Pinnacle [3] 26/18 27/16 27/22 Pipeline [1] 14/7	
O	object [5] 16/17 17/11 30/4 31/20 32/4 objection [3] 2/9 21/6 33/11 objections [1] 7/24 obligated [2] 26/13 27/24 obligation [3] 28/1 28/3 28/19 obligations [1] 31/4 obtained [1] 24/1 obviously [1] 20/24 occasion [4] 14/2 14/8 14/13 16/9 occasions [1] 21/23 occurred [7] 13/18 13/24 14/5 14/20 14/24 17/10 21/20 October [4] 9/23 13/18 13/24 14/5 October 24th [1] 13/24 October 28 [1] 14/5 October 7 [1] 13/18 of -- let [1] 26/10 offense [8] 8/13 9/8 24/14 24/20 24/25 25/1 25/2 25/8 offer [3] 7/23 8/23 9/2 office [1] 29/25 officer [12] 8/14 8/16 8/17 8/19 8/20 20/18 21/15 23/17 28/16 29/4 29/10 29/21 Official [1] 34/18 Okay [33] 3/24 4/9 4/17 5/1 5/9 5/13 6/3 6/8 7/8 9/1 10/12 10/16 11/2 11/9 12/1 12/3 12/11 13/6 17/3 17/13 17/17 18/3 18/5 18/16 19/4 20/21 31/14 31/17 32/8 33/12 33/21 33/25 34/1 Okay. [2] 4/13 4/20 Okay. And [2] 4/13 4/20	problem [1] 23/18 procedurally [1] 31/21 proceed [1] 6/3 PROCEEDING [1] 2/2 proceedings [6] 1/24 30/2 33/14 33/15 34/6 34/10 process [1] 32/6 produced [1] 1/25 productive [4] 11/15 11/19 11/25 12/24 program [1] 29/9 prohibit [1] 10/6 promote [1] 25/4 pronounce [1] 3/19 pronounced [1] 5/7 prosecute [1] 10/9 prosecuting [1] 9/17 protect [1] 25/19 proud [1] 19/7 provide [1] 25/8 provided [3] 12/7 17/2 27/19 provision [1] 29/21 PSR [4] 12/7 32/1 32/22 33/1 public [2] 1/18 25/19 published [1] 5/16 pull [1] 14/10 pulled [2] 19/17 20/5 pulling [2] 20/24 21/18 punishment [1] 25/8 pursuant [2] 6/13 29/21 pursuing [2] 9/8 10/6 puts [1] 23/22

<p>Q</p> <p>qualify [1] 30/24 question [2] 10/12 23/22 quite [1] 34/2 quoted [1] 16/24</p>	<p>revocation. I [1] 27/9 Richland [2] 13/25 15/19 right [7] 12/13 12/25 13/2 13/21 30/19 30/23 30/25 rights [3] 31/4 32/6 32/7 rise [2] 3/3 34/5 RMR [3] 1/21 34/8 34/17 Road [1] 14/7 rob [6] 14/15 19/16 20/4 20/23 21/18 22/16 robbed [1] 15/1 robber [2] 10/3 14/14 robberies [24] 9/14 9/16 9/18 9/18 10/10 13/14 13/14 14/17 14/17 15/11 15/16 15/23 16/21 17/19 18/22 19/5 19/6 19/11 21/24 21/25 22/22 22/24 24/22 25/3 robberies -- he [1] 14/17 robbery [43] robbing [1] 19/8 Roberts [2] 2/5 11/7 Room [3] 1/19 1/21 34/22 rot [1] 11/25 roundabout [1] 10/14 ruling [2] 2/11 17/16 run [1] 27/5</p>	<p>she [9] 10/25 11/2 11/3 16/23 22/15 22/17 22/18 30/9 30/10 shoot [1] 22/4 short [1] 16/10 shortly [1] 6/15 should [18] 6/15 7/9 7/10 7/16 12/16 13/10 15/25 16/2 22/25 24/12 24/18 24/24 25/4 25/10 26/10 26/22 26/25 29/1 shouldn't [1] 7/18 shown [1] 20/5 sign [1] 31/8 signed [2] 31/13 34/14 significant [3] 21/21 25/12 30/6 significantly [1] 26/6 simply [1] 26/24 sir [5] 3/23 4/2 4/6 6/25 31/16 six [2] 9/13 13/13 sixth [2] 15/14 32/7 Smith [5] 5/6 5/8 17/23 17/23 34/4 so [16] 5/18 5/21 6/1 7/19 10/3 10/19 12/8 12/19 18/21 20/14 20/21 23/16 25/5 27/2 27/18 31/5 so -- but [1] 20/14 society [5] 11/24 12/24 12/24 13/3 24/19</p>
<p>R</p> <p>raised [2] 7/8 11/20 ran [1] 14/12 range [10] 8/2 8/13 8/16 8/18 8/19 12/7 12/9 25/25 26/7 26/24 rate [3] 28/20 29/8 29/15 rather [1] 11/14 read [1] 7/1 reading [1] 32/18 real [2] 14/12 15/21 realistic [1] 26/24 realized [1] 33/22 really [2] 11/16 18/21 recall [2] 32/17 32/24 recalled [1] 30/5 receive [4] 6/18 18/14 25/12 27/25 received [3] 5/17 6/24 7/20 recess [1] 34/3 recognize [1] 17/7 record [4] 6/10 19/4 31/20 34/9 rectify [1] 11/18 reentering [1] 32/16 reference [1] 31/4 referenced [5] 9/4 9/24 17/18 17/22 18/8 referred [1] 20/25 refrain [1] 29/17 reiterate [1] 10/23 relative [1] 24/2 release [10] 8/18 26/10 26/11 27/18 28/5 28/7 28/18 28/22 29/2 29/19 reliability [3] 16/18 23/22 32/3 reliable [7] 16/8 16/25 21/8 21/14 21/16 21/19 23/15 relied [1] 32/13 rely [2] 21/12 33/4 remains [1] 28/19 remanded [1] 31/18 rendered [1] 29/15 renew [1] 33/11 report [26] 6/19 7/2 7/9 7/24 8/4 8/5 8/9 9/10 9/24 10/4 13/13 15/5 16/8 17/5 19/15 19/25 20/12 22/14 22/19 23/21 23/23 30/8 30/11 32/15 33/4 33/6 Report -- let [1] 19/25 reported [1] 1/24 REPORTER [2] 1/21 34/18 Reporter's [2] 2/12 34/7 represented [4] 4/10 4/18 5/1 5/9 request [2] 12/6 31/2 required [4] 16/5 25/9 25/21 26/15 reservations [2] 6/14 7/11 respect [3] 25/4 25/6 25/7 respectful [1] 11/21 response [8] 7/12 7/13 7/13 8/1 8/25 9/4 10/20 10/24 responses [1] 7/20 restitution [11] 10/5 26/15 27/13 27/16 27/20 27/24 28/1 28/3 28/19 28/24 28/25 resume [3] 16/18 23/14 31/23 return [1] 31/8 review [1] 7/4 revised [1] 22/13 revocation [1] 27/8 revocation. [1] 27/9</p>	<p>S</p> <p>SAENZ [4] 1/21 34/8 34/16 34/17 safety [1] 19/11 said [15] 10/20 10/23 13/20 14/9 14/22 15/7 16/22 17/8 17/8 19/16 21/24 22/3 22/7 23/7 30/9 same [10] 3/13 8/10 14/25 20/13 27/25 28/2 28/23 33/9 33/10 33/23 satisfied [4] 25/12 26/20 31/7 31/14 saw [3] 5/23 18/4 18/4 say [7] 4/15 10/19 11/5 19/18 23/8 31/19 33/8 saying [4] 22/5 22/19 30/13 32/11 says [4] 7/18 15/15 22/25 23/8 scheduled [1] 3/12 seated [3] 3/9 4/9 4/17 second [1] 14/20 Section [7] 12/10 13/11 16/3 24/13 24/25 19/19 26/23 see [4] 4/10 16/23 17/9 26/10 seen [2] 24/9 33/8 sentence [29] 2/8 2/9 12/6 12/7 12/8 12/16 15/24 25/4 25/6 25/8 25/13 25/16 25/20 26/6 26/12 26/20 27/5 27/6 27/8 27/9 27/11 27/12 28/6 28/9 30/4 30/6 30/20 31/21 33/9 sentence -- I [1] 12/7 sentence. [1] 16/12 sentence. I [1] 16/12 sentences [1] 25/22 sentencing [18] 1/10 2/4 6/4 6/16 7/16 10/23 12/10 12/17 13/10 16/1 16/3 24/13 24/24 26/7 26/14 26/22 33/5 34/3 sentencings [1] 3/12 separate [2] 22/22 22/25 serious [2] 25/2 25/3 seriousness [1] 24/25 serve [2] 27/4 28/4 served [1] 21/22 service [1] 26/9 services [4] 29/4 29/5 29/7 29/15 session [1] 3/6 set [3] 8/5 22/14 28/8 several [1] 10/7 shall [10] 28/11 28/13 28/15 29/3 29/7 29/9 29/12 29/14 29/17 29/18</p>	<p>some [30] 5/14 5/23 6/14 7/11 7/12 7/25 8/2 10/8 11/14 11/24 12/23 13/7 15/16 16/12 16/15 19/5 19/6 22/8 23/7 23/18 23/25 24/2 24/2 24/3 24/6 24/10 24/22 25/7 30/10 31/25 some -- tells [1] 24/10 something [7] 9/5 15/25 19/12 24/10 30/5 31/17 31/19 something -- the [1] 31/17 sometime [1] 18/10 somewhere [1] 11/25 sooner [1] 11/14 sort [1] 22/8 sorted [1] 23/18 sounds [1] 18/13 speak [2] 5/21 12/20 special [3] 8/21 26/13 29/23 specific [2] 32/18 32/24 specifically [2] 31/2 31/23 spoken [1] 18/10 stand [2] 3/18 4/15 standard [1] 28/8 start [2] 26/12 28/5 starting [1] 13/6 starts [1] 28/18 state [2] 3/24 28/11 statement [8] 10/17 12/13 12/19 16/19 19/25 22/1 22/15 30/15 statements [8] 2/4 5/14 17/1 17/1 20/8 21/7 21/12 22/10 STATES [15] 1/1 1/4 1/11 1/14 3/4 3/7 6/5 13/11 16/3 24/13 24/24 26/23 29/25 30/21 34/13 stenography [1] 1/24 still [3] 7/11 7/20 22/11 stipulated [3] 23/14 31/23 32/2 storage [1] 24/3 Street [9] 1/15 1/19 1/21 14/19 15/2 19/22 22/16 23/20 34/22 subject [2] 12/14 12/17 subjective [1] 19/12 submit [1] 29/18 submitted [1] 8/24 substance [3] 28/14 29/12 29/18 substantively [1] 31/21 successful [1] 15/22 successfully [1] 29/5</p>

<p>S</p> <p>such [2] 19/10 24/5 sufficient [1] 12/9 sufficiently [2] 16/25 23/14 suggestion [1] 7/25 Suite [1] 1/15 superseding [1] 17/22 supervised [8] 8/18 26/10 26/11 27/18 28/5 28/7 28/18 29/2 supplemented [4] 8/6 8/10 8/11 9/11 support [2] 8/23 9/2 sure [4] 5/18 12/25 21/11 31/6 surname [1] 4/1 surveillance [1] 20/5</p>	<p>32/17 think -- I [1] 32/17 this [30] 3/7 3/12 5/24 6/10 12/11 12/18 14/23 15/18 16/1 18/11 19/16 19/25 20/3 20/4 20/22 20/23 21/3 21/7 22/14 23/12 25/12 25/15 26/2 26/23 27/25 28/4 29/1 30/8 34/2 34/14 this is [1] 21/3 those [29] 5/17 5/19 6/2 9/15 9/18 18/17 19/10 20/8 20/12 20/13 21/12 21/20 22/7 22/9 24/6 24/9 27/19 27/25 28/2 28/21 29/5 29/7 29/15 30/16 30/17 32/5 32/19 33/8 34/12 though [2] 18/11 32/10 thought [1] 30/6 threat [1] 15/9 threatened [2] 16/9 30/8 threatening [2] 16/7 24/21 three [4] 6/19 6/22 14/4 14/16 through [6] 5/16 5/20 14/14 14/15 29/25 30/5 time [11] 9/21 9/25 10/2 12/18 15/16 15/20 16/10 16/13 19/5 24/22 26/14 timely [1] 6/19 to -- to [1] 11/14 today [2] 5/21 6/16 together [1] 16/22 told [3] 18/19 30/9 30/11 TONY [5] 1/7 3/16 3/25 6/5 33/23 top [2] 12/9 26/6 total [1] 26/16 toward [1] 13/21 transcribed [1] 33/14 transcript [4] 1/10 1/24 34/9 34/11 treatment [3] 29/4 29/10 29/14 Tremain [3] 5/5 5/8 17/23 true [1] 34/9 truthful [1] 30/15 trying [2] 20/17 21/10 TSHIANSI [16] 1/7 3/16 3/17 3/20 3/21 3/22 3/25 6/6 6/7 16/20 32/12 32/16 33/13 33/16 33/17 33/23 Tshiansi's [2] 10/25 32/5 two [14] 6/12 6/23 6/24 14/3 14/17 14/17 17/19 18/17 20/13 22/3 22/22 23/21 29/19 31/5 two-count [1] 6/12 type [2] 24/10 30/16</p>	<p>versus [2] 1/6 6/5 very [1] 24/18 view [3] 9/15 18/19 25/21 viewed [1] 24/18 violating [1] 32/5 violation [1] 27/17 virtue [1] 7/14 VOLUME [1] 1/10</p>
<p>T</p> <p>take [8] 7/15 7/19 12/16 12/24 16/2 23/5 25/10 34/3 taken [1] 26/25 Tarrant [2] 27/7 27/7 Taylor [1] 1/19 Telephone [4] 1/16 1/20 1/22 34/24 teller [3] 13/20 14/9 14/22 telling [3] 18/25 20/8 20/25 tells [1] 24/10 tend [1] 21/9 term [7] 26/8 26/9 26/11 27/4 28/4 28/18 29/2 termination [1] 29/2 test [1] 29/18 testing [2] 29/11 29/21 tests [1] 29/20 TEXAS [15] 1/2 1/5 1/15 1/16 1/18 1/19 1/22 3/5 14/1 14/7 15/3 27/7 34/17 34/18 34/22 than [5] 7/17 8/24 11/14 16/9 28/22 Thank [8] 10/13 12/1 12/2 18/18 18/20 18/24 23/11 34/1 that [269] that -- generally [1] 16/24 that -- in [1] 16/7 that -- of [1] 32/4 that -- which [1] 19/18 that's [21] 4/2 4/4 5/7 5/18 9/9 11/2 11/19 11/20 11/23 13/25 14/11 14/21 19/3 19/12 22/14 23/5 23/7 26/14 27/8 29/24 32/2 theft [1] 24/4 their [5] 7/13 17/1 19/11 22/23 22/24 them [6] 6/24 7/2 7/4 16/15 27/24 33/25 then [17] 4/13 4/20 5/5 7/2 13/23 14/17 14/25 15/12 15/14 18/8 18/17 22/3 22/18 23/10 25/13 25/18 27/25 there [20] 5/19 6/22 6/22 7/24 9/22 10/7 10/15 15/9 15/25 16/5 18/5 18/14 20/18 20/20 20/20 22/19 23/6 23/25 31/25 33/1 there's [5] 7/25 16/7 24/3 24/6 27/8 thereafter [2] 28/23 29/20 these [3] 8/6 10/10 16/12 they [14] 3/13 5/24 6/1 7/23 15/1 15/19 17/8 18/11 21/8 21/9 21/9 22/4 22/15 23/9 they -- that [1] 17/8 thing [2] 13/2 19/12 things [14] 9/12 12/15 13/2 15/23 16/2 18/17 21/20 22/7 23/18 24/4 24/7 24/8 24/10 30/17 think [27] 6/1 6/22 9/5 9/7 12/7 12/8 12/15 13/6 15/4 15/6 15/7 16/23 19/12 21/7 21/9 21/14 21/16 21/18 21/21 22/22 23/22 24/10 24/16 25/6 26/3 32/1</p>	<p>32/17 think -- I [1] 32/17 this [30] 3/7 3/12 5/24 6/10 12/11 12/18 14/23 15/18 16/1 18/11 19/16 19/25 20/3 20/4 20/22 20/23 21/3 21/7 22/14 23/12 25/12 25/15 26/2 26/23 27/25 28/4 29/1 30/8 34/2 34/14 this is [1] 21/3 those [29] 5/17 5/19 6/2 9/15 9/18 18/17 19/10 20/8 20/12 20/13 21/12 21/20 22/7 22/9 24/6 24/9 27/19 27/25 28/2 28/21 29/5 29/7 29/15 30/16 30/17 32/5 32/19 33/8 34/12 though [2] 18/11 32/10 thought [1] 30/6 threat [1] 15/9 threatened [2] 16/9 30/8 threatening [2] 16/7 24/21 three [4] 6/19 6/22 14/4 14/16 through [6] 5/16 5/20 14/14 14/15 29/25 30/5 time [11] 9/21 9/25 10/2 12/18 15/16 15/20 16/10 16/13 19/5 24/22 26/14 timely [1] 6/19 to -- to [1] 11/14 today [2] 5/21 6/16 together [1] 16/22 told [3] 18/19 30/9 30/11 TONY [5] 1/7 3/16 3/25 6/5 33/23 top [2] 12/9 26/6 total [1] 26/16 toward [1] 13/21 transcribed [1] 33/14 transcript [4] 1/10 1/24 34/9 34/11 treatment [3] 29/4 29/10 29/14 Tremain [3] 5/5 5/8 17/23 true [1] 34/9 truthful [1] 30/15 trying [2] 20/17 21/10 TSHIANSI [16] 1/7 3/16 3/17 3/20 3/21 3/22 3/25 6/6 6/7 16/20 32/12 32/16 33/13 33/16 33/17 33/23 Tshiansi's [2] 10/25 32/5 two [14] 6/12 6/23 6/24 14/3 14/17 14/17 17/19 18/17 20/13 22/3 22/22 23/21 29/19 31/5 two-count [1] 6/12 type [2] 24/10 30/16</p>	<p>versus [2] 1/6 6/5 very [1] 24/18 view [3] 9/15 18/19 25/21 viewed [1] 24/18 violating [1] 32/5 violation [1] 27/17 virtue [1] 7/14 VOLUME [1] 1/10</p>
	<p>U</p> <p>uncertainty [1] 23/8 uncle [1] 24/2 under [8] 13/10 16/3 24/13 24/24 25/19 26/22 32/6 32/7 understand [3] 12/8 31/6 31/7 understanding [1] 32/21 understands [1] 31/15 UNITED [15] 1/1 1/4 1/11 1/14 3/4 3/7 6/5 13/11 16/3 24/13 24/24 26/23 29/24 30/21 34/13 unlawful [1] 29/17 unlawfully [1] 28/13 unpaid [3] 28/19 28/20 28/25 unreasonable [1] 31/21 until [2] 28/24 29/4 up [6] 3/18 5/21 7/18 14/3 22/5 31/11 us [2] 3/7 24/10 use [5] 15/9 24/21 29/12 29/12 29/17</p>	<p>U</p> <p>where [2] 14/21 20/21 wherever [1] 3/18 whether [7] 6/14 7/8 7/10 13/8 15/21 19/6 25/23 which [5] 15/15 15/17 19/18 19/21 25/3 while [2] 28/7 34/2 who [6] 16/22 19/10 20/1 21/22 24/18 25/15 why [5] 4/15 10/16 11/5 21/7 23/13 will [11] 13/4 14/10 26/5 27/10 27/11 27/17 27/18 27/25 28/5 28/8 29/11 Williams [11] 4/22 4/25 15/17 16/22 17/24 20/4 21/22 22/15 27/24 30/9 30/12 Williams' [2] 18/13 33/15 Wisely [2] 5/2 5/4 wishes [1] 9/2 withdraw [1] 18/16 within [3] 12/6 16/25 29/19 without [1] 30/24 witness [1] 11/1 won't [2] 9/8 14/10 Woodhaven [7] 15/2 20/7 20/25 21/17 23/19 26/18 26/19</p>

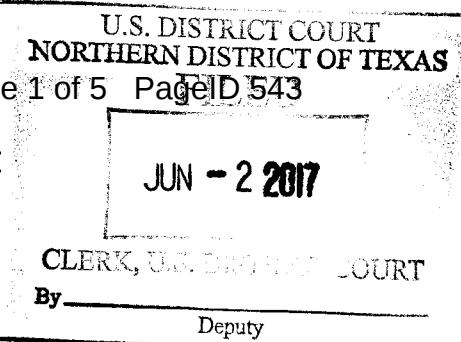
W

Woodhaven -- Pinnacle [1] 26/18
word [2] 2/13 23/5
WORTH [14] 1/3 1/5 1/16 1/19 1/22 3/6
13/19 15/3 22/17 27/21 30/1 32/20
34/19 34/22
would [40]
written [3] 10/20 10/23 22/23
wrong [1] 11/12
wrongs [1] 11/18

Y

Y'all [1] 12/3
yahoo.com [2] 1/23 34/25
ye [3] 3/4 3/4 3/4
Yeah [1] 16/16
year [2] 7/14 13/8
years [4] 8/19 15/24 26/12 28/5
yes [15] 3/23 4/2 4/8 4/12 4/23 5/3 6/25
7/5 18/2 19/2 20/14 20/20 21/5 31/13
31/16
yesterday [6] 5/13 15/15 18/9 31/24
32/14 32/18
yesterday's [1] 9/12
you [67]
you're [8] 4/10 4/18 5/1 5/9 18/25 20/25
30/20 32/9
you've [3] 10/12 10/20 18/19
your [52]

APPENDIX B



UNITED STATES OF AMERICA

§

v.

§

Case Number: 4:17-CR-003-A(01)

TONY KALUMBA TSHIANSI

§

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Dan Cole. The defendant, TONY KALUMBA TSHIANSI, was represented by Federal Public Defender through Assistant Federal Public Defender Leandro Delgado.

The defendant pleaded guilty on February 17, 2017 to count two of the indictment filed on January 10, 2017. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
18 U.S.C. §§ 2113(a) and 2 Bank Robbery and Aiding and Abetting	November 3, 2016	2

On motion of the United States, the court ORDERS as to this defendant that count 1 of the indictment, be, and is hereby, dismissed.

As pronounced and imposed on June 2, 2017, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of \$100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 180 months. The sentence of 180 months shall run consecutively to any sentence imposed in Case No. 14261700 in Criminal District Court No. 1 of Tarrant County, Texas, which is pending probation revocation.

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

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years and that while on supervised release, the defendant shall comply with the following conditions:

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.
4. If, upon commencement of the term of supervised release, any part of the \$28,151 restitution ordered by this judgment remains unpaid, the defendant shall make payments on such unpaid amount at the rate of at least \$25 per month, the first such payment to be made no later than 60 days after the defendant's release from confinement and another payment to be made on the same day of each month thereafter until the restitution amount is paid in full. Any unpaid balance of the restitution ordered by this judgment shall be paid in full 60 days prior to the termination of the term of supervised release.
5. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered at a rate of at least \$25 per month.
6. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least \$25 per month.
7. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.
8. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.

3. The defendant shall provide to the U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.
5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.
7. The defendant shall support his dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.
9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit his at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

RESTITUTION

The court further ORDERS that defendant shall make full restitution in the total amount of \$28,151. If any of his co-defendants, Justin Corie Murry, Tremain Keyon Smith, or Nykeschia Danielle Williams, has an obligation to make restitution to any of the same victims for any of the same losses, defendant shall receive credit on his restitution obligation for any such restitution payments made by any of his co-defendants. Defendant's restitution obligation is payable immediately, but nonpayment will not be a violation of defendant's conditions of supervised release so long as defendant pays as provided in his conditions of supervised release. All restitution payments shall be made by defendant to the Clerk of the U.S. District Court, 501 West 10th Street, Room 310, Fort Worth, Texas 76102, for disbursement to the victims whose names and loss amounts are listed below:

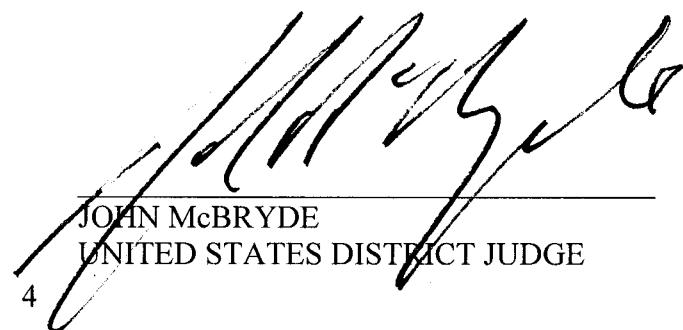
Wells Fargo Bank - External Fraud Investigations P.O. Box 912038 Denver, Colorado 80291-2038 Payable to: Wells Fargo Bank	\$28,132
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Pinnacle Bank formerly known as Woodhaven National Bank 6750 Bridge Street Fort Worth, Texas Attention: Josh Spivey	\$19
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STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 2nd day of June, 2017.


JOHN McBRYDE
UNITED STATES DISTRICT JUDGE
4

RETURN

I have executed the imprisonment part of this Judgment as follows:

Defendant delivered on _____, 2017 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal

APPENDIX C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-10666
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

December 20, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TONY KALUMBA TSHIANSI.

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CR-3-1

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:*

In 2017, Tony Kalumba Tshiansi pleaded guilty to bank robbery and aiding and abetting, in violation of 18 U.S.C. §§ 2 and 2113(a). The district court determined that a sentence within Tshiansi's advisory sentencing range of 37 to 46 months of imprisonment was inadequate to account for his two additional bank robberies, an attempted bank robbery, and other criminal

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

conduct. Varying upward, it imposed an above-guidelines sentence of 180 months of imprisonment and 3 years of supervised release.

On appeal, Tshiansi argues that he was denied an impartial tribunal because the district judge requested FBI investigative material that was used in preparing the presentence report (PSR), filed it into the record, and relied on it for sentencing purposes. Because Tshiansi did not object in the district court to the judge's alleged lack of impartiality despite having the opportunity to do so, we review this challenge for plain error. *See Puckett v. United States*, 556 U.S. 129, 135-36 (2009); *United States v. Williams*, 343 F.3d 423, 439 (5th Cir. 2003). Tshiansi has cited no authority showing that the district court's challenged actions constituted clear or obvious error in terms of partiality. Accordingly, he has not shown reversible error.

Tshiansi also contends that the district court's consideration of the FBI investigative material at sentencing was not authorized by Federal Rule of Criminal Procedure 32. Because he did not object on Rule 32 grounds in the district court, we also review this issue for plain error. *See Puckett*, 556 U.S. at 135; *United States v. Esparza-Gonzalez*, 268 F.3d 272, 274 (5th Cir. 2001). By failing to cite any authority showing that the district court's use of the investigative material constituted clear or obvious error under Rule 32, Tshiansi has not shown reversible error.

Next, Tshiansi challenges his sentence as both procedurally and substantively unreasonable. We review his sentence for reasonableness in light of the sentencing factors of 18 U.S.C. § 3553(a) using an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 49-51 (2007). Because Tshiansi preserved his challenges, we review the district court's interpretation and application of the Guidelines *de novo* and its findings of fact for clear error. *See United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

Tshiansi asserts that the district court procedurally erred by basing an upward variance on his PSR and FBI summaries of his co-defendants' statements because those documents lacked sufficient indicia of reliability. Tshiansi's argument lacks merit. Investigative records from law enforcement agencies are generally considered reliable. *See United States v. Manthei*, 913 F.2d 1130, 1137-38 (5th Cir. 1990). Statements by co-defendants also have sufficient indicia of reliability for use at sentencing when, as in this case, they are largely corroborated by other information or law enforcement investigations. *See United States v. Rico*, 864 F.3d 381, 386 (5th Cir.), *cert. denied*, 138 S. Ct. 487 (2017); *United States v. Zuniga*, 720 F.3d 587, 591 (5th Cir. 2013); *United States v. Rogers*, 1 F.3d 341, 343-44 (5th Cir. 1993). Tshiansi's PSR was based on the criminal complaint, indictment, factual resume, FBI investigative reports, and FBI summaries of interviews with Tshiansi's co-defendants. Information in the PSR is generally presumed to be reliable. *United States v. Soza*, 874 F.3d 884, 897 (5th Cir. 2017). Although Tshiansi has pointed to isolated errors in the PSR, those errors were corrected at sentencing and do not establish that the document was unreliable.

Finally, Tshiansi argues that his sentence was substantively unreasonable because the district court's § 3553(a) analysis did not explain how his unadjudicated criminal conduct supported the upward variance. He contends that his sentence was excessive because the upward variance exceeded the range calculated by defense counsel to encompass all of his unadjudicated conduct. A sentence is not unreasonable merely because a different sentence would also have been appropriate. *See Gall*, 552 U.S. at 51. In this case, the district court provided a thorough discussion as to how each of the relevant § 3553(a) factors supported an upward variance. Although the variance was significant, it is analogous to other variances we have affirmed.

See, e.g., United States v. Hebert, 813 F.3d 551, 561-63 (5th Cir. 2015); *United States v. Mejia-Huerta*, 480 F.3d 713, 723 (5th Cir. 2007).

The judgment of the district court is AFFIRMED.