APPENDIX

TABLE OF CONTENTS

Appendix Page

APPENDIX A

922 F.3d 239
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff – Appellee,
v.
Charles York WALKER, Jr., Defendant – Appellant.

No. 18-4110
|
Argued: January 31, 2019
|
Decided: April 25, 2019

Synopsis

Background: After the District Court rejected defendant's plea agreement, he pleaded guilty to distributing heroin and fentanyl, and a jury trial was held on the remaining charge against him, at which he was convicted in the United States District Court for the Southern District of West Virginia, 2:16-cr-00174-1, Joseph R. Goodwin, J., of being a felon in possession of a firearm. Defendant appealed.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

[1] district court did not abuse its discretion in rejecting defendant's plea agreement;

[2] government offered facially race-neutral reasons for using a peremptory challenge to strike the only remaining African-American prospective juror;

[3] district court did not clearly err in concluding that government's proffered reasons for striking only remaining African-American prospective juror were not pretext for purposeful discrimination; and

[4] report from national crime index administered by FBI was sufficient to support two-level sentence enhancement for possession of a stolen firearm.

Affirmed.

Niemeyer, Circuit Judge, filed concurring opinion.

West Headnotes (29)

[1] **Jury** Peremptory challenges

Prosecutors may not use a peremptory strike to remove a potential juror solely on account of race. Fed. R. Crim. P. 24(b).

Cases that cite this headnote

[2] **Jury** Peremptory Challenges

Peremptory challenges to excuse prospective jurors are a historical prerogative of each side in a trial, and permit a party to strike a prospective juror without a reason stated. Fed. R. Crim. P. 24(b).

Cases that cite this headnote

[3] **Criminal Law** Issues considered

Defendant did not waive his appellate challenge to district court's rejection of his plea agreement, pursuant to which he agreed to plead guilty to a single count of possession with intent to distribute heroin, by later pleading guilty to distributing heroin and fentanyl or by refusing to plead guilty to the charge of being a felon in possession of a firearm. Fed. R. Crim. P. 11.

Cases that cite this headnote

[4] **Criminal Law** Amendments and rulings as to indictment or pleas

A district court's rejection of a plea agreement is reviewed on appeal for abuse of discretion.

Cases that cite this headnote

[5] **Criminal Law** Representations, promises, or coercion;plea bargaining

The fundamental principles of the judicial system ensure that the court's discretion in accepting or rejecting a plea agreement is not limitless, and a court could not, for example, exercise its authority in an arbitrary or irrational manner. Fed. R. Crim. P. 11.

Cases that cite this headnote

[6] **Criminal Law** Representations, promises, or coercion;plea bargaining

A court could not reject a plea agreement based on an invidious consideration such as race, sex, or religion. Fed. R. Crim. P. 11.

Cases that cite this headnote

[7] **Criminal Law** Representations, promises, or coercion;plea bargaining

The principles that generally inhere in discretionary rulings apply to the rejection of a plea agreement; that is, a district court is not entitled to base its decision on arbitrary or irrational factors. Fed. R. Crim. P. 11.

Cases that cite this headnote

[8] **Criminal Law** Representations, promises, or coercion;plea bargaining

To ensure the existence of sound reasons for rejection of a plea agreement, and to facilitate appellate review, the rejection and its justification should be on the record. Fed. R. Crim. P. 11.

Cases that cite this headnote

[9] **Criminal Law** Representations, promises, or coercion;plea bargaining

The bases for a court's rejection of a plea agreement must pertain to the specific agreement at hand, and the court should not rely on extraneous considerations or broad categorical determinations. Fed. R. Crim. P. 11.

Cases that cite this headnote

[10] **Criminal Law** Representations, promises, or coercion;plea bargaining

Failure to consider the specific plea agreement when rejecting the agreement would constitute an abdication, and hence an abuse, of discretion by the district court. Fed. R. Crim. P. 11.

Cases that cite this headnote

[11] **Criminal Law** 🔑 Representations, promises, or coercion;plea bargaining

A district court may always consider whether a plea agreement is too lenient, in light of the defendant's criminal history or the relevant offenses, in deciding whether to reject the agreement. Fed. R. Crim. P. 11.

Cases that cite this headnote

[12] **Criminal Law** 🔑 Representations, promises, or coercion;plea bargaining

A court can reject a plea agreement that it sees as too harsh. Fed. R. Crim. P. 11.

Cases that cite this headnote

[13] **Criminal Law** 🔑 Representations, promises, or coercion;plea bargaining

A court should carefully weigh whether the plea agreement adequately reflects the defendant's misconduct and serves the objectives of sentencing. U.S.S.G. § 6B1.2; Fed. R. Crim. P. 11.

Cases that cite this headnote

[14] **Criminal Law** 🔑 Representations, promises, or coercion;plea bargaining

A district court should weigh whether the plea agreement is in the public interest, in deciding whether to accept or reject the agreement, and the public interest assessment should be predicated on the circumstances of the case. Fed. R. Crim. P. 11.

Cases that cite this headnote

[15] **Criminal Law** 🔑 Representations, promises, or coercion;plea bargaining

A court should always consider any danger the defendant might pose to the public, in deciding whether to accept or reject a plea agreement. Fed. R. Crim. P. 11.

Cases that cite this headnote

[16] **Constitutional Law** 🔑 Prosecutors

Criminal Law 🔑 Representations, promises, or coercion;plea bargaining

At bottom, the court should articulate a rational justification for its decision to reject a plea agreement after weighing all the relevant circumstances, and, in so doing, the court must accord due respect to the prosecutorial prerogatives involved in charging

decisions, thus ensuring that the separation of executive and judicial powers is not infringed. Fed. R. Crim. P. 11.

Cases that cite this headnote

[17] **Criminal Law** Representations, promises, or coercion;plea bargaining

District court did not abuse its discretion in rejecting defendant's plea agreement, pursuant to which he agreed to plead guilty to a single count of possession with intent to distribute heroin; while the court relied on some generalized analysis of the opioid crisis, invoked broad considerations such as the "cultural context" of defendant's offenses, and criticized the plea bargaining system, it centered its analysis on whether the agreement was too lenient and served the public interest, it carefully assessed defendant's extensive criminal history, including numerous drug charges and convictions, as well as defendant's multiple violent activities, and it deemed the advisory Sentencing Guidelines range under the plea agreement to be overly lenient. U.S.S.G. § 1B1.1 et seq.; Fed. R. Crim. P. 11.

Cases that cite this headnote

[18] **Jury** Peremptory challenges

Government's proffered reasons for using a peremptory challenge to strike the only remaining African-American prospective juror, namely that it sought to empanel female jurors who were married, who were older, and who had children, while prospective juror was single, had no children, and, at 38 years old, was younger than the average, were each facially race-neutral under *Batson*. Fed. R. Crim. P. 24(b).

Cases that cite this headnote

[19] **Criminal Law** Jury selection

In assessing a challenge to a trial court's denial of a *Batson* objection, Court of Appeals reviews for clear error.

Cases that cite this headnote

[20] **Criminal Law** Questions of Fact and Findings

A clear error exists when Court of Appeals is left with the definite and firm conviction that an error was committed by the district court.

1 Cases that cite this headnote

[21] **Jury** Peremptory challenges

The following three-step burden-shifting framework governs a *Batson* claim: first, the defendant must make a prima facie showing that the government exercised a peremptory challenge on the basis of race; second, once the defendant has made such a prima facie showing, the burden shifts to the government to provide a non-discriminatory reason for its use of the peremptory challenge; and, third, the defendant next must establish that the government's proffered reasons were pretextual, and that the government engaged in intentional discrimination. Fed. R. Crim. P. 24(b).

1 Cases that cite this headnote

[22] **Jury** Peremptory challenges

When the government has articulated its reasons for the challenged strike of a prospective juror on the trial record, the Court of Appeals can assume that the defendant has made a prima facie showing of discrimination and simply proceed to the second step of the *Batson* analysis and assess whether those reasons are race-neutral. Fed. R. Crim. P. 24(b).

Cases that cite this headnote

[23] **Jury** Peremptory challenges

District court did not clearly err in concluding that the government's proffered reasons for using a peremptory challenge to strike the only remaining African-American prospective juror, namely that it sought to empanel female jurors who were married, who were older, and who had children, while prospective juror was single, had no children, and, at 38 years old, was younger than the average, were not pretext for purposeful discrimination under *Batson*; while four white women served on the jury, each possessed at least two of the three race-neutral characteristics relied on by the prosecution, as each had children, three were older than the prospective juror, the one woman who was younger was married and had three children, and the one of the four women who was divorced was ten years older than prospective juror and had two children. Fed. R. Crim. P. 24(b).

Cases that cite this headnote

[24] **Jury** 🔑 Peremptory challenges

Evidence of purposeful discrimination, for purposes of a *Batson* claim, can be shown where the purportedly race-neutral reason offered by the government for striking an African-American prospective juror applies equally to other members of the venire who are otherwise similarly-situated, but who are not African-American.

Cases that cite this headnote

[25] **Criminal Law** 🔑 Sentencing

Court of Appeals generally reviews a challenge to the court's imposition of sentence for abuse of discretion.

Cases that cite this headnote

[26] **Criminal Law** 🔑 Review De Novo

Criminal Law 🔑 Sentencing

In evaluating a sentencing court's calculation of the advisory Sentencing Guidelines range, Court of Appeals reviews the district court's factual findings for clear error and legal conclusions de novo. U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[27] **Sentencing and Punishment** 🔑 Use and effect of report

Sentencing and Punishment 🔑 Matters related to firearms and destructive devices

Report from the National Crime Information Center (NCIC), a computerized index of criminal justice information available to, and updated by, federal, state, and local law enforcement agents, under the overall administration of the FBI, which showed that the .38-caliber handgun seized from apartment linked to defendant's drug business was stolen, was sufficient to support two-level sentence enhancement for possession of a stolen firearm for defendant convicted of distributing heroin and fentanyl and being a felon in possession of a firearm, in the absence of evidence that cast doubt on the reliability or accuracy of the NCIC report or the presentence investigation report (PSR) that relied on the NCIC report. U.S.S.G. § 2K2.1(b)(4)(A).

Cases that cite this headnote

[28] **Sentencing and Punishment** 🔑 Documentary evidence

At least where the defendant has not pointed to any evidence casting doubt on a report from the National Crime Information Center (NCIC), a computerized index of criminal justice information available to, and updated by, federal, state, and local law enforcement agents, under the overall administration of the FBI, which is being used to support a sentence enhancement, the report may be trusted.

Cases that cite this headnote

[29] **Criminal Law** Sentencing and Punishment

Even if district court had erred in imposing two-level sentence enhancement for possession of a stolen firearm on defendant convicted of distributing heroin and fentanyl and being a felon in possession of a firearm, in reliance on report from National Crime Information Center (NCIC), a computerized index of criminal justice information available to, and updated by, federal, state, and local law enforcement agents, under overall administration of the FBI, which showed that the .38-caliber handgun seized from apartment linked to defendant's drug business was stolen, the error was harmless; the court explained that it would impose a 120-month sentence regardless of the advisory Guidelines range, and that sentence was substantively reasonable absent the enhancement. U.S.S.G. § 2K2.1(b)(4)(A).

Cases that cite this headnote

***243** Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Joseph R. Goodwin, District Judge. (2:16-cr-00174-1)

Attorneys and Law Firms

ARGUED: Jonathan D. Byrne, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. Steven Loew, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. ON BRIEF: Christian M. Capece, Federal Public Defender, Lex A. Coleman, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. Michael B. Stuart, United States Attorney, W. Clinton Carte, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

Before WILKINSON, NIEMEYER, and KING, Circuit Judges.

Opinion

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Wilkinson and Judge Niemeyer joined. Judge Niemeyer wrote a separate concurring opinion.

KING, Circuit Judge:

Defendant Charles York Walker, Jr., appeals from drug and firearms convictions and his resulting 120-month sentence in the Southern District of West Virginia. After the district court rejected a plea agreement under which Walker would have pleaded guilty to a single count of possession with intent to distribute heroin, Walker pleaded guilty — without a plea agreement — to three drug offenses of a four-count indictment. A jury trial was then conducted on the firearms charge in the fourth count of the indictment and Walker was found guilty thereof. On appeal, Walker contends that the court erred in three respects: by rejecting his plea agreement with the United States; in sustaining the prosecution's peremptory strike of an African-American woman from the jury; and in calculating his advisory Guidelines range. As explained below, we affirm the criminal judgment.

I.

A.

In early 2016, several law enforcement agencies in Kanawha County, West Virginia, were investigating drug trafficking in a task force called the Metropolitan Drug Enforcement Network Team ("MDENT"). *See* J.A.S. 669-70.[1] Between April and July 2016, MDENT used confidential informants to conduct seven controlled buys of ***244** heroin from Walker. On two of those occasions, the heroin purchased from Walker contained the opioid fentanyl.[2]

1 Citations herein to "J.A.__" and "J.A.S.__" refer to the contents of the Joint Appendix and the Sealed Joint Appendix filed by the parties in this appeal.

2 According to the DEA, fentanyl is a synthetic opioid that is "80-100 times stronger than morphine." *See* U.S. Drug Enforcement Admin., *Drug Facts: Fentanyl*, www.dea.gov/factsheets/fentanyl (last visited Apr. 10, 2019). Fentanyl is sometimes added to heroin "to increase its potency," which also increases the risk of an overdose death. *See id.*

On July 14, 2016, MDENT officers arrested Walker in Charleston, West Virginia. They searched Walker's person in connection with his arrest and recovered small amounts of marijuana, cocaine, and heroin. That same day, the MDENT officers executed a search

warrant at an apartment in Charleston, which informants had linked to Walker's drug business. The officers who conducted the search found and seized, inter alia, a .38-caliber Rossi handgun, a .45-caliber Kimber handgun, five boxes of .45-caliber ammunition, a set of drug scales, and two cell phones, one of which belonged to Walker. The officers then obtained and executed a search warrant for Walker's cell phone, from which they seized text messages concerning drug activity, plus photos that depicted Walker holding the .45-caliber Kimber pistol. Two days before Walker's arrest, the MDENT officers learned from an informant that Walker "pistol-whipped" a man named Corns, who owed Walker for drugs. *See* J.A.S. 674. After Walker's arrest, the officers interviewed Corns, who admitted purchasing illegal drugs from Walker and said that Walker had beaten him with a .38-caliber revolver.

On September 13, 2016, a federal grand jury in Charleston returned a six-count indictment against Walker. The indictment alleged three counts of distributing heroin and two counts of distributing fentanyl, in violation of 21 U.S.C. § 841(a)(1), plus a single charge of possessing the two firearms as a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

B.

1.

Four months after he was indicted, in January 2017, Walker entered into a plea agreement with the United States. Pursuant thereto, Walker agreed to plead guilty to a criminal information that charged him with a single count of possession with intent to distribute heroin, in contravention of 21 U.S.C. § 841(a)(1). After the Government filed the information, the district court conducted a plea hearing on January 26, 2017. The court accepted Walker's guilty plea but deferred acceptance of the plea agreement pending a presentence report (the "PSR").

The Probation Office prepared the PSR by April 2017, and the parties thereafter submitted sentencing memoranda to the district court. Based on the plea agreement, the PSR recommended a base offense level of 12, the lowest possible level for offenses involving heroin or fentanyl. The PSR also recommended a 2-level enhancement for possession of a firearm and a 2-level reduction for acceptance of responsibility, for a total offense level of 12. The PSR determined that Walker's criminal history category was IV, resulting in an advisory Guidelines range of 21 to 27 months.

Both parties objected to aspects of the PSR. The Government sought an additional enhancement because of Walker's attack on Corns, and Walker challenged the proposed

firearm enhancement. The Government sought a sentence of between 24 and 30 months, while Walker requested a sentence of 12 months plus a day.

***245** 2.

On June 26, 2017, the district court conducted another hearing and rejected the plea agreement.[3] As the court explained, the PSR revealed a number of troubling facts. Walker, who was 38 years old, had several juvenile theft convictions and about 18 criminal convictions as an adult, and several of his convictions related to drugs and firearms. The court emphasized that, despite Walker's multiple convictions — and myriad other charges not pursued to conviction — he had consistently received lenient sentences and had served only about eight years in prison. The court also reviewed and emphasized Walker's violent history. For example, the PSR revealed that Walker had pistol-whipped three different persons (including Corns). Additionally, the court considered a separate incident that resulted in a domestic battery charge against Walker.

3 The district court explained from the bench in substantial detail the bases for its rejection of the plea agreement. *See* J.A. 79-100. The court also filed a written opinion memorializing that explanation. *See United States v. Walker*, No. 2:17-cr-10 (S.D. W. Va. June 26, 2017), ECF No. 36.

Of particular concern to the district court was the nature of the drug offenses in the indictment, that is, trafficking in heroin and fentanyl. The court underscored the terrible toll that those drugs had exacted on the entire country — and on West Virginia in particular — describing in detail the scale and cost of the "heroin and opioid crisis." *See* J.A. 86. Drawing on a November 2016 report from the DEA, the court emphasized that an average of 91 Americans died from opioid overdoses every day. Locally, it was reported that 844 West Virginians died of drug overdoses in 2016.

Having recited the impact of the nation's opioid epidemic, the district court also expounded on its concerns about excessive plea bargaining in the federal courts. The court outlined justifications for the extensive plea bargaining used in the federal system and rejected as empirically unsound the common rationale of "overburdened prosecutors and judges." *See* J.A. 93. For example, the court observed that, despite an increase in the number of federal prosecutors in the past 40 years, the number of federal criminal trials had significantly decreased during that period (from approximately 8500 to 2000 trials per year). The court concluded:

> Because the most common justifications for plea bargaining no longer have any substantial heft, the counterweight of the people's general

> interest in observing and participating in their government requires close consideration of proffered plea bargains in every case. I conclude that the courts should reject a plea agreement upon finding that the plea agreement is not in the public interest.

Id. at 96. The court then identified four factors that should be used to assess whether a plea agreement is in the public interest: (1) "the cultural context surrounding the subject criminal conduct"; (2) "the public's interest in participating in the adjudication of the criminal conduct"; (3) the possibility of "community catharsis" absent the transparency of a jury trial; and (4) whether, in light of the PSR, it appeared that the "motivation" for the plea agreement was "to advance justice" or to "expediently avoid trial." *Id.* at 97-98.

Applying those factors to Walker's plea proceedings, the district court determined that: (1) "the cultural context is a rural state [West Virginia] deeply wounded by ... heroin and opioid addiction"; (2) "the public has a high interest in [the] adjudication ***246** of heroin and opioid crimes" because of the severity of the opioid crisis in West Virginia; (3) a jury trial could permit the "peaceful expression of community outrage" at Walker's "vicious criminal acts"; and (4) the principal motive behind Walker's plea agreement was convenience. *See* J.A. 97-98. Consequently, the court rejected the plea agreement reached between Walker and the United States.

In response, Walker's counsel acknowledged the district court's view of Walker's case but challenged its contention that a jury trial would be preferable to resolution by the plea agreement. Walker's lawyer also disputed the proposition that the plea agreement had been reached "out of expedience," and emphasized what he called the relatively minor drug quantities involved in Walker's offenses. *See* J.A. 102-03. The lawyer concluded by asking the court to "at least evaluate reconsidering with respect to [Walker's] case." *Id.* at 103. The court declined to alter its position, however, and scheduled a hearing to permit Walker to withdraw his guilty plea. Walker withdrew his guilty plea two days later, on June 28, 2017.

Four months thereafter, in October 2017, the grand jury returned a superseding indictment that charged Walker with two counts of distributing heroin, one count of distributing fentanyl, and a single charge of possessing firearms as a convicted felon. In the course of addressing pretrial motions, the district court denied Walker's motion to sever the firearms charge from the drug charges. On November 7, 2017, Walker pleaded guilty — without a plea agreement — to the three drug distribution offenses in the superseding indictment. That same day, Walker went to trial on the firearms charge.

3.

[1] [2] During the jury selection proceedings, Walker — who is black — objected to the prosecution's peremptory strike of juror No. 22, a black woman. Walker invoked the Supreme Court's 1986 decision in *Batson v. Kentucky*, which established the constitutional principle that prosecutors may not use a peremptory strike to remove a potential juror solely on account of race. *See* 476 U.S. 79, 85-86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).[4] As Walker's lawyer explained to the trial court, juror No. 22 was "the only African-American that was on this whole [jury] panel." *See* J.A. 156. The court then asked the Government if it could show a race-neutral reason for its strike of juror No. 22. The prosecutor responded that:

> [W]e narrowed it down to three factors that we looked at for striking the women: Whether they were married, their age and whether they had any kids. And juror No. 22 is not married, she's younger than the average, and she has no children. So those were the three factors that we looked at in striking the women on the jury.

See id. at 157. The court acknowledged the Government's "nondiscriminatory reason" for striking juror No. 22 and asked Walker if he had a response. *Id.* Walker's lawyer replied:

> ***247** I've heard the explanation. I'm not sure it's rational[ly] related to what we're picking a jury to do here. I don't have everyone else who was struck to go back through right this second and compare if that logic was borne out or not. I still submit we need an African-American on this jury given the race of the defendant.

Id. The court then explained that "we've addressed the [*Batson*] issue as required by law," and asked the parties if they had any "other objections to jury selection." *Id.* at 157-58. The lawyers had no further objections and the jury was sworn.

4 Jury selection proceedings in federal court authorize each party to use a specific number of "peremptory challenges" to excuse prospective jurors. *See* Fed. R. Crim. P. 24(b). Such challenges are a "historical prerogative" of each side in a trial, and permit a party to strike a prospective juror "without a reason stated." *See Miller-El v. Dretke*, 545 U.S. 231, 238, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). Peremptory strikes contrast to "for cause" strikes, which generally seek to exclude prospective jurors for lack of impartiality. *See Skilling v. United States*, 561 U.S. 358, 395-96, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) (discussing "for cause" strikes predicated on bias).

After two days of trial, the jury convicted Walker of the only offense tried: possession of a firearm by a convicted felon, in violation of § 922(g)(1) of Title 18. By its verdict, the jury found that Walker illegally possessed the .38-caliber Rossi and the .45-caliber Kimber.

4.

On December 15, 2017, Walker moved to vacate the verdict and requested a new trial based on his *Batson* objection. Walker's motion asserted that the Government's reasons for peremptorily striking juror No. 22 were a pretext for discrimination. To support that proposition, Walker argued that four white women were selected to serve on the jury, one of whom was younger than juror No. 22 and one of whom was divorced (and thus — like juror No. 22 — unmarried). The district court denied Walker's motion as untimely and did not further address the *Batson* challenge.

Prior to sentencing, a probation officer prepared another presentence report (the "second PSR"), applying the 2016 edition of the Guidelines. The second PSR grouped Walker's three drug convictions and calculated an adjusted offense level of 12 for those counts. With respect to the firearms conviction, the PSR recommended an adjusted offense level of 28. The recommended offense level resulted from a base offense level of 20; a 2-level enhancement for possessing a stolen firearm (namely, the .38-caliber Rossi handgun); another 2-level enhancement for obstruction of justice; and a 4-level enhancement for possessing and using a firearm in connection with another felony offense, that is, the pistol-whipping assault of Corns. The second PSR combined the two offense groups (i.e., the drug offenses and the firearms offense) and arrived at the total offense level of 28. It also calculated a criminal history category of IV. The second PSR thus recommended an advisory Guidelines range of 110 to 137 months.

The district court conducted Walker's sentencing hearing on February 1, 2018. During the hearing, Walker objected to the stolen firearm enhancement. More specifically, he contested the evidence showing that the .38-caliber Rossi had been stolen. According to Walker, the evidence consisted solely of a report from the National Crime Information Center (the "NCIC"). He argued that the NCIC report alone was insufficient to satisfy the Government's burden with respect to the enhancement. In response, the Government offered to present the sentencing court with evidence from an MDENT officer who had contacted the owner of the Rossi firearm and confirmed that it was stolen. The court declined the offer of further evidence and overruled Walker's objection. In so ruling, the court relied on an Eleventh Circuit decision that deemed an NCIC report sufficient support for a stolen firearm enhancement. *See* *United States v. Saunders*, 572 F. App'x 816, 817 (11th Cir. 2014). The court also invoked a Fourth Circuit decision emphasizing the trustworthiness of NCIC reports. *See*

***248** *United States v. McDowell*, 745 F.3d 115, 121-22 (4th Cir. 2014). The court emphasized that Walker had failed to show that the NCIC report was inaccurate, or to otherwise cast doubt on its reliability.

After ruling on additional objections, the district court adopted the second PSR's recommendation of an advisory Guidelines range of 110 to 137 months. In imposing a sentence of 120 months, the court recited that it "want[ed] to make it absolutely clear" that it would impose the same sentence "without regard to the advice of the [G]uidelines." *See* J.A. 559. The court carefully applied the 18 U.S.C. § 3553(a) sentencing factors in explaining the 120-month sentence.

Walker has noted a timely appeal from the criminal judgment, and we possess appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II.

Walker pursues three appellate challenges to the criminal judgment entered in the district court. First, he contends that the court abused its discretion in rejecting his plea agreement with the United States, in that the court predicated its decision on a broad and ill-defined policy that disfavors plea bargaining generally. [5] Second, Walker contests the court's denial of his *Batson* challenge with respect to juror No. 22. Third, Walker argues that the court erred in calculating his advisory Guidelines range, specifically with respect to the stolen firearm enhancement. We address those contentions in turn.

5 Although Walker contests the district court's rejection of his plea agreement, the Government agrees with the challenged ruling. It thus contends that the court did not abuse its discretion in rejecting the plea agreement.

A.

1.

[3] In challenging the district court's rejection of his plea agreement, Walker does not dispute that the court adhered to the procedural steps that govern such agreements under Rule 11 of the Federal Rules of Criminal Procedure. That is, the court properly accepted Walker's plea of guilty, deferred its acceptance of the plea agreement until it had reviewed the PSR, and — after rejecting the plea agreement — permitted Walker to withdraw his guilty plea. What Walker contests on appeal are the court's reasons for rejecting the plea agreement. [6]

6 The Government contends that Walker waived his appellate challenge to the rejection of his plea agreement because he later pleaded guilty to the drug charges, and also because he refused to plead guilty to the firearm charge. *See* Br. of Appellee 18, 20. Aside from the Catch-22 created by the Government's position, it offers no controlling authority to support either proposition. Moreover, the appellate courts have generally permitted a defendant to challenge the rejection of a plea agreement even if another agreement was ultimately reached. *See, e.g.*, *United States v. Scott*, 877 F.3d 42, 47 (1st Cir. 2017) ("Nothing in Rule 11 requires (or even suggests) that a defendant only gets one bite at the [plea] negotiation apple.").

[4] This Court has indicated that a district court's rejection of a plea agreement should be reviewed on appeal for abuse of discretion. *See United States v. Jackson*, 563 F.2d 1145, 1145 (4th Cir. 1977). And our sister circuits consistently review such rulings under that deferential standard.[7] ***249** Accordingly, we will review this issue for abuse of discretion.

7 Most of the courts of appeals have adopted the rule that a district court's rejection of a plea agreement is reviewed for abuse of discretion. *See United States v. Cota-Luna*, 891 F.3d 639, 647 (6th Cir. 2018); *United States v. Vanderwerff*, 788 F.3d 1266, 1276-77 (10th Cir. 2015); *United States v. Brown*, 595 F.3d 498, 521 (3d Cir. 2010); *In re Morgan*, 506 F.3d 705, 708 (9th Cir. 2007); *United States v. Jeter*, 315 F.3d 445, 447 (5th Cir. 2002); *United States v. Shepherd*, 102 F.3d 558, 561 (D.C. Cir. 1996); *United States v. Greener*, 979 F.2d 517, 519 (7th Cir. 1992).

[5] **[6]** Criminal Rule 11 is the starting point for evaluating a guilty plea in federal court. But, as our sister courts have recognized, Rule 11 does not establish criteria to guide a district court's discretion with respect to accepting or rejecting a plea agreement. *See, e.g.*, *In re Morgan*, 506 F.3d 705, 710 (9th Cir. 2007); *see also* Fed. R. Crim. P. 11 advisory committee's note to 1974 amendment (explaining that acceptance or rejection of plea agreement "is left to the discretion of the individual trial judge"). Nevertheless, the fundamental principles of our judicial system ensure that the court's discretion is not limitless. A court could not, for example, exercise its authority in an arbitrary or irrational manner. *See, e.g.*, *United States v. Dorman*, 496 F.2d 438, 440 (4th Cir. 1974) (affirming rejection of nolo contendere plea because ruling "was not arbitrary or capricious"). And, quite obviously, a court could not reject a plea agreement based on an invidious consideration such as race, sex, or religion. *See, e.g.*, *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005) (confirming that a sentence may never be "based on a constitutionally impermissible factor such as race").[8]

8 In *United States v. Jackson* in 1977, our Judge Field reviewed the advisory committee notes and a congressional report regarding the 1974 revisions to Rule 11 and concluded that "each individual judge is free to decide whether, and to what degree, he will entertain plea bargains." *See* 563 F.2d at 1148; *see also United States v. Stamey*, 569 F.2d 805, 806 (4th Cir. 1978) (ruling that "the district court had no duty to permit plea bargaining," and thus did not err in declining to consider a plea agreement). Our decisions in *Jackson* and *Stamey*, however, do not control our analysis of Walker's appeal. Those decisions addressed the blanket rejection of plea bargaining, whereas in these proceedings the district court was evaluating Walker's plea agreement.

Acknowledging that a trial court does not possess unbounded discretion to reject a plea agreement, we will discuss factors that guide an exercise of that discretion. We will then apply those factors to the rejection of Walker's plea agreement.

2.

a.

[7] [8] Several factors are available that assist a district court's discretion in deciding whether to reject a plea agreement. Importantly, the principles that generally inhere in discretionary rulings apply to the rejection of a plea agreement. That is, a district court is not entitled to base its decision on arbitrary or irrational factors. *See, e.g.*, *United States v. Cota-Luna*, 891 F.3d 639, 647 (6th Cir. 2018) (emphasizing that a court considering a plea agreement must "rationally construct a decision" based on "all relevant factors"). To ensure the existence of sound reasons for rejection of a plea agreement, and to facilitate appellate review, the rejection and its justification should be on the record. *See, e.g.*, *United States v. Kraus*, 137 F.3d 447, 453 (7th Cir. 1998) (requiring court to "state on the record its reasons for rejecting a plea agreement").

[9] [10] Moreover, the bases for a court's rejection of a plea agreement must pertain to the specific agreement at hand, and the court should not rely on extraneous considerations or broad categorical determinations. Indeed, failure to consider the specific agreement would constitute an abdication — and hence an abuse — of discretion. *See In re Morgan*, 506 F.3d at 712 (explaining that "when a ***250** court establishes a broad policy based on events unrelated to the ... case before it, no discretion has been exercised") (internal quotation marks and alterations omitted). Additionally, requiring a court to focus its analysis on the relevant plea agreement minimizes the possibility that the court could interfere with plea negotiations, in contravention of Rule 11(c)(1). *See Kraus*, 137 F.3d at 453-54.

[11] [12] [13] A district court may always consider whether a plea agreement is "too lenient," in light of the defendant's criminal history or the relevant offenses. *See In re Morgan*, 506 F.3d at 711; *acc. United States v. Smith*, 417 F.3d 483, 487 (5th Cir. 2005) (affirming rejection of plea agreement as "unduly lenient"). Conversely, a court can reject a plea agreement that it sees as too harsh. *See United States v. Skidmore*, 998 F.2d 372, 376 (6th Cir. 1993). Some courts have framed the inquiry as suggested by the Guidelines, which encourage the acceptance of a plea agreement if its provisions "adequately reflect the seriousness of the actual offense behavior and ... accepting the agreement will not undermine the statutory purposes of sentencing." *See* USSG § 6B1.2. Thus, a court should carefully weigh whether the plea agreement adequately reflects the defendant's misconduct and serves the objectives of sentencing. *See, e.g.*, *Smith*, 417 F.3d at 487.

[14] **[15]** Importantly, a district court should also weigh whether the plea agreement is in the public interest. *See* *In re Morgan*, 506 F.3d at 712; *United States v. Godwin*, 272 F.3d 659, 679 (4th Cir. 2001) ("The proper role of a trial judge, most simply, is to see that justice is done in the cases heard before him." (internal quotation marks omitted)). And the public interest assessment should be predicated on the circumstances of the case. *See* *United States v. Vanderwerff*, 788 F.3d 1266, 1277 (10th Cir. 2015) (disallowing blanket policy preference as basis for rejecting plea agreement); *In re Morgan*, 506 F.3d at 711-12 (holding that courts "must consider individually every sentence bargain presented to them"). Of additional importance, a court should always consider any danger the defendant might pose to the public. *See, e.g.*, *United States v. Bean*, 564 F.2d 700, 704 (5th Cir. 1977) (affirming rejection of plea agreement where sentence did not reflect defendant's "dangerous character").

[16] The foregoing is not an exhaustive review of the factors that guide a district court's assessment of a plea agreement. At bottom, the court should articulate a rational justification for its decision after weighing all the relevant circumstances. *See* *Cota-Luna*, 891 F.3d at 647. And, in so doing, the court must accord due respect to the prosecutorial prerogatives involved in charging decisions, thus ensuring that the separation of executive and judicial powers is not infringed. *See, e.g.*, *Vanderwerff*, 788 F.3d at 1271-72 (explaining that "concerns relating to the doctrine of separation of powers counsel hesitancy before second-guessing prosecutorial choices" in plea bargaining). Having identified the pertinent principles, we turn to Walker's plea agreement issue.

b.

[17] In this appeal, Walker contends that the district court's reasons for rejecting his plea agreement with the United States constitute an abuse of discretion. More specifically, Walker argues that the court improperly based its rejection on a vague policy that generally disfavors plea agreements, that the court's policy against such agreements interferes with the prerogatives of prosecutors and defense lawyers, and that the court's empirical ***251** grounds for narrowing the availability of plea agreements are not factually sound. [9]

9 By stating in his brief that the district court's treatment of plea agreements interferes with the prosecutor's "fundamental role" in deciding "which charges to pursue," Walker apparently seeks to invoke a separation of powers claim. *See* Br. of Appellant 25. Walker, however, did not present such a claim to the district court nor does he properly develop that contention on appeal. Consequently, Walker has neither properly preserved nor presented a separation of powers claim. *See, e.g.*, *Hensley on behalf of North Carolina v. Price*, 876 F.3d 573, 581 n.5 (4th Cir. 2017) (emphasizing that undeveloped and unsupported appellate arguments are waived). Notably, the Government likewise did not preserve and does not pursue a separation of powers claim. Instead, the Government maintains on appeal that we should affirm the rejection of the plea agreement because it did not properly account for Walker's criminal history and his relevant offenses.

It is true that, in rejecting Walker's plea agreement, the district court relied on some generalized analysis, and it invoked broad considerations such as the "cultural context" of Walker's offenses. *See* J.A. 97. If the court's ruling had been premised only on such broad considerations, Walker's challenge would be more substantial. But the court did not rely solely on its discussion of the opioid crisis or its criticism of the plea bargaining system. The court actually centered its analysis on whether the particular plea agreement between Walker and the United States Attorney was too lenient and on whether it served the public interest.

As the record reveals, the district court carefully assessed Walker's extensive criminal history, including the numerous charges and convictions relating to Walker's unrelenting participation in the drug trade. The court emphasized Walker's multiple violent activities, as referenced in the PSR. The court also deemed the advisory Guidelines range under the plea agreement to be overly lenient, in light of Walker's criminal history, his potential for violence, and the nature of his offenses. That individualized assessment of Walker's situation thus relied on appropriate considerations that readily align with the factors we have specified.

Our resolution of the plea agreement issue is made easier by the position taken by the Government in this appeal. The prosecutors do not present a separation of powers argument, that is, they fail to assert that their exercise of prosecutorial discretion in making the plea agreement should carry the day. In particular, they do not challenge the district court's determination that the plea agreement would have resolved the case in a manner that was overly lenient and not in the public interest. Indeed, the prosecutors have abandoned the plea agreement made by the United States Attorney, arguing on appeal that the rejection of it was not an abuse of the court's discretion. In these circumstances, we are satisfied that the court did not err in rejecting Walker's plea agreement.

B.

[18] **[19]** **[20]** Walker next contends that the district court erred in rejecting his claim that the Government used a peremptory challenge in a racially discriminatory manner to strike juror No. 22 — the only remaining African-American on the prospective jury panel — in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In assessing a challenge to a trial court's denial of a *Batson* objection, we review for clear error. *See United States v. Dinkins*, 691 F.3d 358, 380 (4th Cir. 2012). A clear error exists when we are left "with the definite and firm conviction that an error was committed by the district court." *See* ***252** *United States v. Blanding*, 250 F.3d 858, 860 (4th Cir. 2001).

Walker argues that the district court failed to engage with his *Batson* objection during the jury selection process, and maintains that he has since then offered an additional comparative

juror analysis that supports his claim. On the other hand, the Government asserts that Walker waived his *Batson* challenge by failing to argue to the trial court that its race-neutral explanation for the peremptory strike of juror No. 22 was pretextual. The Government also argues that, in any event, Walker cannot show that its rationale for the challenged strike was pretextual. To resolve this issue, we will not decide whether Walker waived his *Batson* claim because we agree that Walker failed to prove pretext.

[21] **[22]** The three-step burden-shifting framework that governs a *Batson* claim is well-established. As we explained in *United States v. Dinkins*:

> First, the defendant must make a prima facie showing that the government exercised a peremptory challenge on the basis of race. Second, once the defendant has made such a prima facie showing, the burden shifts to the government to provide a non-discriminatory reason for its use of the peremptory challenge. Third, the defendant next must establish that the government's proffered reasons were pretextual, and that the government engaged in intentional discrimination.

See 691 F.3d at 380. In applying the foregoing framework, we can assume that Walker has satisfied the first step — and thus made a prima facie showing of discrimination — because the Government provided the trial court with its contemporaneous rationale for the peremptory strike. *Id.* at 380 n.17. That is, when the Government has articulated its reasons for the challenged strike on the trial record, we can simply proceed to the second step and assess whether those reasons are race-neutral. *Id.*

The Government gave three reasons to the trial court for its peremptory strike of juror No. 22. In reviewing the women in the jury venire, the prosecutors weighed whether a prospective juror was married, whether she had children, and how old she was. That is, the prosecutors sought to empanel jurors who were married, who were older, and who had children. On the other hand, juror No. 22 was single, had no children, and, at 38 years old, was "younger than the average." *See* J.A. 157; J.A.S. 653. Those reasons are each "facially race-neutral" and thus satisfy the second *Batson* step. *See Dinkins*, 691 F.3d at 380.

[23] **[24]** With the Government having satisfied the second step, Walker bore the burden of showing that the prosecutor's rationale for striking juror No. 22 was a pretext for "purposeful discrimination." *Id.* at 381. Evidence of such discrimination can be shown where "the purportedly race-neutral reason offered by the government" for striking an

African-American prospective juror "applies equally to other members of the venire who are otherwise similarly-situated, but who are not African-American." *Id.* at 380-81.

In pursuing this challenge, Walker identifies as relevant comparators four white women who served on the jury. Each of those women, however, had children. Moreover, three were older than juror No. 22 (aged 42, 48, and 58). The one woman who was younger (age 33) than juror No. 22 was married and had three children. One of the four women was divorced, but she was ten years older than juror No. 22 and had two children. Because each of Walker's comparators possessed at least ***253** two of the three race-neutral characteristics relied on by the prosecutors, we are unable to say that the trial court clearly erred in overruling Walker's *Batson* challenge. *See Dinkins*, 691 F.3d at 381 (identifying no clear error in denial of *Batson* claim where two race-neutral factors supported peremptory strike); *see also Golphin v. Branker*, 519 F.3d 168, 186-87 (4th Cir. 2008) (discerning, on habeas review, no error in denial of *Batson* claim where race-neutral factors reasonably distinguished struck jurors from seated jurors).

C.

[25] **[26]** Walker's third and final appellate contention relates to the district court's calculation of his advisory Guidelines range. We generally review a challenge to the court's imposition of sentence for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). In evaluating a sentencing court's calculation of the advisory Guidelines range, however, we review "the district court's factual findings for clear error and legal conclusions de novo." *See United States v. White*, 850 F.3d 667, 674 (4th Cir. 2017).

[27] Walker argues on appeal that the court erred in applying the 2-level enhancement for possession of a stolen firearm pursuant to Guidelines § 2K2.1(b)(4)(A). In his view, the court erred in applying that enhancement on the basis of the uncorroborated NCIC report showing that the .38-caliber Rossi handgun was stolen. According to Walker, the NCIC report alone is inadequate evidence to support the stolen firearm enhancement. [10] The Government contends that an NCIC report is sufficient to sustain the enhancement, but emphasizes that it also offered to present evidence corroborating the report. The Government thus maintains that it satisfied its burden to show that the sentencing enhancement is supported by a preponderance of the evidence. *See United States v. Andrews*, 808 F.3d 964, 968 (4th Cir. 2015) (discussing burden of proof for sentencing enhancement).

10 In his reply brief, Walker contended that the serial number of the stolen .38-caliber Rossi handgun listed in the NCIC report failed to match the serial number of the handgun Walker was convicted of possessing. At oral argument, however, Walker's lawyer conceded that this contention was made in error.

We have heretofore described the NCIC as "a computerized index of criminal justice information available to, and updated by, federal, state, and local law enforcement agents," under the overall administration of the FBI. *See United States v. McDowell*, 745 F.3d 115, 118 (4th Cir. 2014). We have also observed that "the limited available evidence suggests that the NCIC database is generally (albeit not always) accurate." *Id.* at 121. As we have recognized, NCIC reports are "pervasive" in the criminal justice system, and they are consistently used by the courts for such purposes as establishing criminal history in sentencing and to inform rulings on bail and pretrial release. *Id.* at 120-22 (citing, inter alia, *United States v. Townley*, 472 F.3d 1267, 1277 (10th Cir. 2007); *United States v. Marin-Cuevas*, 147 F.3d 889, 895 (9th Cir. 1998)).

[28] We adhere to our view that, at least where the defendant has not pointed to any evidence casting doubt on an NCIC report being used to support an enhancement, the report "may be trusted." *See id.* at 121-22. That approach accords with the general rule that a defendant seeking to challenge a finding in his PSR "has an affirmative duty to make a showing that the information in the [PSR] is unreliable, and articulate the reasons why the facts ***254** contained therein are untrue or inaccurate." *See United States v. Powell*, 650 F.3d 388, 394 (4th Cir. 2011) (internal quotation marks omitted). Absent such a showing, the district court is entitled to adopt the PSR's findings "without more specific inquiry." *Id.*

[29] Here, the second PSR — relying on the NCIC report — specifically concluded that the .38-caliber Rossi in Walker's possession was stolen. *See* J.A.S. 678, 681. On this record, Walker has no evidence to cast doubt on that report or on the findings of the second PSR. He has therefore failed to make a viable challenge to the second PSR's conclusion that the .38-caliber Rossi was stolen. Because Walker had no evidence that cast doubt on the reliability or accuracy of the NCIC report or the second PSR, the district court did not err in applying the stolen firearm enhancement. 11

11 Even if the district court had erred in applying the stolen firearm enhancement, we would not disturb the sentence because the alleged Guidelines calculation error would be harmless. *See, e.g.*, *United States v. Gomez-Jimenez*, 750 F.3d 370, 385 (4th Cir. 2014). The court explained that it would impose a 120-month sentence regardless of the advisory Guidelines range, and that sentence is substantively reasonable absent the enhancement. As a result, any Guidelines error was harmless. *See United States v. McDonald*, 850 F.3d 640, 643-45 (4th Cir. 2017).

III.

Pursuant to the foregoing, we affirm the judgment of the district court.

AFFIRMED

NIEMEYER, Circuit Judge, concurring:
I concur in Judge King's careful opinion and write separately only to address a concern raised by Walker about whether his plea agreement was rejected on broad policy grounds and categorical determinations, rather than on grounds specific to him and the public interest in his particular circumstances. Judge King's opinion well recognizes the legitimacy of Walker's argument in the abstract but concludes that the district court's rejection in this case was based on its belief that Walker's sentence would be too lenient in the circumstances and thus not in the public interest.

The district court's opinion in support of its rejection of Walker's plea agreement is lengthy, and it does indeed contain statements that could reasonably have provoked Walker's concern. If the court's rejection of the plea agreement had rested on the broad proposition that the government uses plea agreements too frequently as a matter of convenience, as some of the court's statements seem to suggest, then its rejection of the plea agreement on that basis would surely amount to an abuse of discretion. Moreover, it would be risking an inappropriate intrusion into the U.S. Attorney's prerogatives — implicating separation-of-powers concerns. As an example of a particular statement of this genre, the court said that "[i]t is the court's function to prevent the transfer of criminal adjudications from the public arena to the prosecutor's office for the purpose of expediency at the price of confidence in and effectiveness of the criminal justice system." And it explained:

> The exigencies of a changing world have required acceptance of processes that are more streamlined than those contemplated by our Founding Fathers. Plea bargaining is one such process that we've come to embrace. Plea bargaining eliminates the jury and conflates the judge's and prosecutor's roles, creating an administrative system of criminal justice. A species of trial does indeed occur, ***255** but it occurs in the shadow of guilty pleas rather than in open court.

The court then wondered whether, in such an arrangement, a " 'community catharsis can occur' without the transparency of a public jury trial," apparently critiquing plea agreements as a general matter.

But these passages with their broad scope of musings are interspersed among the district court's more numerous passages expressing concern about Walker's criminal conduct and its relation to the opioid crisis in the West Virginia community. Accordingly, we take the

district court's concern about those matters to be the driving reason for its rejection of the plea agreement, as Judge King has explained.

Moreover, in this case, it would be inappropriate, as Judge King notes, for us to protect the prerogatives of the U.S. Attorney when the government has not raised the issue and has explicitly stated, in response to our inquiries, that it is not pressing the issue in this case. Rather, the government contends that Walker received appropriate criminal process and a just result, and with our decision today, we agree.

All Citations

922 F.3d 239

APPENDIX B

2017 WL 2766452
Only the Westlaw citation is currently available.
United States District Court, S.D. West Virginia,
Charleston Division.

UNITED STATES of America, Plaintiff,
v.
Charles York WALKER, Jr., Defendant.

CRIMINAL ACTION NO. 2:17-cr-00010
|
Signed 06/26/2017

Attorneys and Law Firms

Willard Clinton Carte, United States Attorney's Office, Charleston, WV, for Plaintiff.

Lex A. Coleman, Federal Public Defender's Office, Charleston, WV, for Defendant.

MEMORANDUM OPINION AND ORDER

JOSEPH R. GOODWIN, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** The court must decide whether, under Rule 11 of the Federal Rules of Criminal Procedure, to accept or reject the plea agreement between the defendant, Mr. Charles York Walker, and the government. While Rule 11 gives defendants and prosecutors the ability to enter into plea agreements, it also obligates judges to accept or reject those agreements.[1] Rule 11 is silent on what the court should or may consider in its decision.

1 Fed. R. Crim. P. 11.

It is the court's function to prevent the transfer of criminal adjudications from the public arena to the prosecutor's office for the purpose of expediency at the price of confidence in and effectiveness of the criminal justice system. The community of the Southern District of West Virginia must not be systemically excluded from its proper place in this participatory democracy, especially with regard to the heroin and opioid crisis. Because I **FIND** that the plea agreement proffered in this case is not in the public interest, I **REJECT** it.

II. BACKGROUND

a. Factual Background

On September 13, 2016, the grand jury in the Southern District of West Virginia returned an indictment against the defendant in case number 2:16-cr-174-1.[2] The indictment charged the defendant with three counts of distributing a quantity of heroin in violation of 21 U.S.C. § 841(a)(1); two counts of distributing a quantity of fentanyl in violation of 21 U.S.C. § 841(a)(1); and one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).[3] The charged conduct occurred between April 14, 2016, and July 14, 2016.[4]

2 *See* Indictment, No. 2:16-cr-174-1 [ECF No. 18].

3 *Id.*

4 *Id.*

The defendant and the government later entered into a plea agreement. The defendant agreed to plead guilty to a separate, single-count information, and the government agreed to move this court to dismiss the grand jury indictment.[5] On January 23, 2017, the single-count information was filed against the defendant in case number 2:17-cr-10. The information charged Mr. Walker with a single count of possession with intent to distribute a quantity of heroin on July 14, 2016, in violation of 21 U.S.C. § 841(a)(1).[6] On January 26, 2017, the defendant pled guilty to that information.[7] Although I accepted the defendant's guilty plea, I deferred acceptance of the parties' plea agreement until I reviewed the presentence investigation report.[8] I have done so.

5 Plea Agreement, No. 2:17-cr-10 [ECF No. 9].

6 Information, No. 2:17-cr-10 [ECF No. 1].

7 Written Plea, No. 2:17-cr-10 [ECF No. 8].

8 Tr. Proceedings 24:3–4, No. 2:17-cr-10 [ECF No. 11].

During the presentence investigation, a number of troubling facts regarding Mr. Walker's criminal history and the criminal conduct at issue emerged. First, Mr. Walker is intimately familiar with the criminal justice system. At age thirteen, Mr. Walker broke into an apartment and stole jewelry, a radio, and a Nintendo gaming set. Although he was charged with aggravated burglary and theft, Mr. Walker was ultimately convicted of burglary and sentenced to twelve months probation. From ages fourteen to seventeen, Mr. Walker was convicted of six more theft-related crimes. As an adult, Mr. Walker has been convicted eighteen additional times. His convictions include: possession of a controlled substance, carrying a concealed weapon without a permit, wanton endangerment, possession of cocaine base with intent to distribute, possession of crack cocaine,

felon in possession of a firearm, disorderly conduct, three no operator's license convictions, reckless operation of a vehicle, speeding, seatbelt violation, three driving under suspension convictions, and driving under the influence. Mr. Walker also has eight pending charges, one of which is a domestic battery charge. Additionally, forty-seven other charges against Mr. Walker since the time he was thirteen were either dismissed, dropped, or have an unknown disposition. Despite his very lengthy criminal history, courts and prosecutors have repeatedly given him leniency. In the twenty years since Mr. Walker turned eighteen, he served approximately 7.8 years in prison, most of which was the five-year sentence imposed for a single drug conviction in 1998.

***2** For most of his life, Mr. Walker has been involved with illicit drugs. He began using marijuana at age twelve, cocaine at age thirteen, alcohol at age twenty, PCP at age twenty-six, pills such as Subutex, Roxicodone, and Xanax around age twenty-six, and heroin at age thirty. He admitted that he continued to use marijuana, cocaine, alcohol, pills, and heroin through the time of his arrest for this matter. Additionally, there is evidence to suggest that Mr. Walker mixed violence and threats of violence with his criminal drug and firearm activity. Cory Corns, an individual interviewed by the Metropolitan Drug Enforcement Network Team ("MDENT"), stated that Mr. Walker accused him of stealing heroin and money, and pistol-whipped him and his seventeen-year-old roommate. William Ennis, Cory Corns's roommate, also stated that he had been pistol-whipped by Mr. Walker.

In addition to Mr. Walker's voluminous criminal history, the particular facts of this case trouble me. Beginning on April 12, 2016, confidential informants ("CIs") working with MDENT conducted seven controlled buys from the defendant over the course of several months. During each of the controlled buys, the CIs purchased heroin, fentanyl, or a mixture of the two drugs. In total, Mr. Walker sold 0.729 grams of heroin, 0.071 grams of fentanyl, and 0.17 grams of a furanyl fentanyl and heroin mixture to the CIs. On July 12, 2016, during the last controlled buy, Mr. Walker told the CI that some of Mr. Walker's other purchasers had recently overdosed and warned the CI to use cautiously. It appears Mr. Walker was engaged in a continuing drug dealing enterprise. Based on the controlled buys, MDENT agents obtained an arrest warrant for the defendant and a search warrant for the apartment from which the defendant sold heroin on July 12, 2016.

On July 14, 2016, MDENT agents executed the warrants. The agents arrested the defendant as he entered a vehicle. The agents searched the defendant incident to arrest and discovered 9.7 grams of marijuana, 2.081 grams of powder cocaine, and 0.845 grams of a heroin and fentanyl mixture. The agents then executed the search warrant and recovered a set of digital scales, one bag of a white substance, one Newport box with a suspected methamphetamine pipe, one bag of suspected marijuana, five boxes of 0.45 caliber ammunition, two pistols, miscellaneous medical items containing the defendant's name, and the cell phone used during the controlled buys.

b. Rule 11 of the Federal Rules of Criminal Procedure

Rule 11 of the Federal Rules of Criminal Procedure grants a district judge the power to accept or reject a plea agreement.[9] The court enjoys "broad discretion ... when choosing to accept or reject plea agreements"[10] and "is not obligated to accept any recommendation or bargain reached by the parties."[11] The Advisory Committee Notes to Rule 11 expressly state: "The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge."[12] Other than granting the court broad discretion to accept or reject a plea agreement, Rule 11 provides no further guidance for the court.

9 Fed. R. Crim. P. 11(c). Congress, by virtue of the Rules Enabling Act and adoption of the Federal Rules of Criminal Procedure, has sanctioned the judge's power to accept or reject a plea agreement. *See* 28 U.S.C. § 2072; *see also* 1 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2 (4th ed. 2017) ("Congress ... always retains the authority to approve, disapprove, or modify any proposed new rules or rule changes.").

10 *In re Morgan*, 506 F.3d 705, 708 (9th Cir. 2007).

11 *United States v. Dixon*, 504 F.2d 69, 72 (3rd Cir. 1974).

12 Fed. R. Crim. P. 11 advisory committee's note to 1974 amendments.

c. Cultural Context

***3** The plea agreement proffered by the parties in this case was made in the context of a clear, present, and deadly heroin and opioid crisis in this community. West Virginia is ground zero.

i. The Heroin & Opioid Crisis

The heroin and opioid crisis is a cancer that has grown and metastasized in the body politic of the United States. Heroin and opioids are different from other addictive substances.[13] The principal difference lies in the fact that recreational use is too often deadly. The questionable level of potency in each dose of heroin frequently causes overdose.[14] All too often news stories emerge of "bad batches" that cause a deluge of fatal overdoses.[15] Furthermore, users develop a tolerance over time and, as a result, seek out the highest potency possible without regard to the related risk of death. The Centers for Disease Control and Prevention ("CDC") found that between 2012 and 2014, heroin caused the most overdose deaths of any drug.[16]

13 I recognize that heroin is a kind of opioid. For clarity, I will reference heroin and opioids separately.

14 *See infra* note 26; *see also* Audrey Redford, *Still Searching for the Tzutzu Flower: Cautions Against Extending the Federal Analogue Act of 1986*, 27 U. Fla. J.L. & Pub. Pol'y 111, 119 (2016) (stating some heroin overdoses occur because the varying presence of fentanyl renders users unaware of the drug's true potency).

15 *See, e.g.*, Steve Birr, *"Bad Batch" of Heroin Sparks Five Overdoses in Four Hours*, The Daily Caller News Found (Dec. 28, 2016, 3:08 PM), http://dailycaller.com/2016/12/28/bad-batch-of-heroin-sparks-five-overdoses-in-four-hours/; Carolyn Blackburne, *"Bad Batch" of Heroin is Causing Record Amount of Overdoses in Washington County*, http://www.your4state.com/news/news/bad-batch-of-heroin-is-causing-record-amount-of-overdoses-in-washington-county (last visited June 23, 2017). Jeremy Gorner et al., *74 Overdoses in 72 Hours-Laced Heroin May Be to Blame*, Chi. Trib. (Oct. 2, 2015, 10:11 PM), http://www.chicagotribune.com/news/local/breaking/ct-heroin-overdoses-met-20151002-story.html.

16 *See* Margaret Warner et al., *Drugs Most Frequently Involved in Drug Overdose Deaths: United States, 2010-2014*, 65 Nat'l Vital Stats. Reps., no. 10, Dec. 20, 2016, at 1, 4, https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr6510.pdf.

Heroin use has increased across the United States in all genders, in most age groups, and in all income levels.[17] "Some of the greatest increases [have] occurred in demographic groups with historically low rates of heroin use: women, the privately insured, and people with higher incomes."[18] It is estimated that 580 people initiate heroin use each day.[19] This rapid increase in heroin use has had deadly consequences. Between 2002 and 2013, the rate of heroin-related overdose deaths per 100,000 people increased 286%.[20] The number of drug overdoses involving heroin tripled from 2010 to 2014.[21] In 2015, heroin caused 12,989 deaths.[22] Heroin arrests by the Drug Enforcement Administration ("DEA") increased at the fastest annual average rate from 2002 to 2014.[23]

17 *Today's Heroin Epidemic*, Ctrs. For Disease Control & Prevention, https://www.cdc.gov/vitalsigns/heroin/index.html (last updated July 7, 2015).

18 *Id.*

19 U.S. Dep't of Health and Human Servs., *The Opioid Epidemic: By the Numbers* 1 (2016), https://www.hhs.gov/sites/default/files/Factsheet-opioids-061516.pdf.

20 *Today's Heroin Epidemic, supra* note 17.

21 *Drug Overdose Deaths Hit Record Numbers in 2014*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/media/releases/2015/p1218-drug-overdose.html (last updated Dec. 18, 2015).

22 *Understanding the Epidemic*, Ctrs. For Disease Control & Prevention, https://www.cdc.gov/drugoverdose/epidemic/index.html (select "Heroin Use" tab) (last updated Dec. 16, 2016).

23 Mark Motivans, U.S. Dep't of Justice, *Federal Justice Statistics, 2013–2014* 9 (2017), https://www.bjs.gov/content/pub/pdf/fjs1314.pdf.

***4** In addition to heroin, there is a surge in the popularity of fentanyl and other powerful synthetic opioids.[24] The DEA estimates that "[a]bout two milligrams of fentanyl—about what comes out with a single jiggle of a salt shaker—is considered lethal."[25] Fentanyl and synthetic opioids are particularly dangerous because they can be—and often are—mixed with other drugs without the consumer's knowledge.[26] The national overdose death rate from synthetic opioids increased 72.2% from 2014 to 2015.[27] Illegally made fentanyl is likely the driving force of this increase.[28] According to the National Forensic Laboratory Information System, state and local labs reported 942 fentanyl submissions from law enforcement in 2013 and 3,344 fentanyl submissions in

2014.[29] From 2013 to 2014, the CDC reported significant increases in overdose deaths involving fentanyl in several states.[30]

24 Fentanyl is an extremely powerful synthetic opioid. It was originally introduced as an intravenous anesthetic in the 1960s. U.S. Dep't of Justice & Drug Enf't Admin. Diversion Control Div., *Fentanyl* (2016), http://www.deadiversion.usdoj.gov/drug_chem_info/fentanyl.pdf. Today, those with otherwise untreatable pain, such as terminal cancer patients, use fentanyl for pain management. *Id.* Fentanyl is 100 times more potent than morphine as an analgesic. *Id.*; *see also* David Armstrong, *"Truly Terrifying": Chinese Suppliers Flood US and Canada with Deadly Fentanyl*, STAT News (Apr. 5, 2016), https://www.statnews.com/2016/04/05/fentanyl-traced-to-china/. For opioid dependent individuals, fentanyl can serve as a direct substitute for heroin. U.S. Dep't of Justice & Drug Enf't Admin. Diversion Control Div., *supra.* However, because it is much more potent than heroin, fentanyl is a very dangerous replacement. *Id.* Fentanyl's use results in frequent overdoses, which can cause respiratory depression and death. *Id.* Additionally, because fentanyl can be absorbed through the skin in some forms, fentanyl can be deadly if touched. *Id.*; *see also FENTANYL: Incapacitating Agent*, Ctrs. For Disease Control & Prevention, https://www.cdc.gov/niosh/ershdb/EmergencyResponseCard_2975_0022.html (last updated May 19, 2017) (detailing necessary skin protection for handling fentanyl).
The DEA released a safety video to law enforcement agencies nationwide warning officers not to touch suspected fentanyl and not to test it in the field. The Justice Dep't, *Roll Call Video Warns About Dangers of Fentanyl Exposure*, YouTube (June 7, 2017), https://www.youtube.com/watch?v=8MLsrleGLSw. The DEA made the video in response to an incident where two police officers in New Jersey nearly died after accidentally inhaling a whiff of fentanyl while bagging it for evidence. *Id.*

25 Lynh Bui & Peter Hermann, *Elephant Tranquilizer is the Latest Lethal Addition to the Heroin Epidemic*, Wash. Post (Apr. 26, 2017), http://wapo.st/2qcJqP1?tid=ss_tw&utm_term=.e179c3d288ca; *see also DEA Issues Carfentanil Warning to Police and Public*, U.S. Drug Enforcement Admin. (Sept. 22, 2016), https://www.dea.gov/divisions/hq/2016/hq092216.shtml (noting that fentanyl can "be lethal at the 2-milligram range, depending on route of administration and other factors" and that "[t]he dosage of fentanyl is a microgram, one millionth of a gram—similar to just a few granules of table salt").

26 *Understanding the Epidemic, supra* note 22 (select "Heroin Use" tab); *see DEA Issues Carfentanil Warning to Police and Public, supra* note 25 ("Fentanyl, a synthetic opiate painkiller, is being mixed with heroin to increase its potency, but dealers and buyers may not know exactly what they are selling or ingesting. Many users underestimate the potency of fentanyl.").
Drug dealers may sell fentanyl pills disguised as other painkillers because prescription drugs fetch a higher price on the street, even though they are less potent than fentanyl. Armstrong, *supra* note 24.
Nine people died in Florida from taking counterfeit Xanax pills containing fentanyl. David Armstrong, *Dope Sick*, STAT News (Aug. 2, 2016), https://www.statnews.com/feature/opioid-crisis/dope-sick/. Authorities believe fentanyl pills made to resemble the painkiller hydrocodone caused a wave of overdoses last year in the Sacramento, California area that claimed nine lives. Press Release, Sacramento Cty. Dep't of Health & Human Servs., Update on Opioid-Related Overdoses (Mar. 30, 2016), http://www.dhhs.saccounty.net/Pages/NR-Update-on-Opioid-Related-Overdoses.aspx. Twelve people in the area died in another outbreak just a month later after taking counterfeit Norco pills that contained fentanyl. Press Release, Sacramento Cty. Dep't of Health & Human Servs., Update on Opiod-Related Overdoses (May 4, 2016), http://www.dhhs.saccounty.net/Pages/NR-Update-on-opioid-related-overdoses-(May-4,-2016).aspx.

27 *Synthetic Opioid Data*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/drugoverdose/data/fentanyl.html (select "Synthetic Opioids Data" tab) (last updated Dec. 16, 2016); *see also* Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010-2015*, 65 Morbidity & Mortality Wkly. Rep. 1445, 1446 (2016).

28 R. Matthew Gladden, *Fentanyl Law Enforcement Submissions and Increases in Synthetic Opioid-Involved Overdose Deaths—27 States, 2013–2014*, 65 Morbidity & Mortality Wkly. Rep. 837, 840 (2016) ("Given the strong correlation between increases in fentanyl submissions (primarily driven by [illegally manufactured fenatnyl]) ... and increases in synthetic opioid ... deaths (primarily fentanyl deaths), and uncorrelated stable fentanyl prescription rates, it is hypothesized that [illegally manufactured fentanyl] is driving the increases in fentanyl deaths. Findings from DEA state, and CDC investigations documenting the role of [illegally manufactured fentanyl] in the observed increases in fentanyl deaths further support this hypothesis."). The rate at which physicians prescribe fentanyl, however, has not increased. Rudd et al., *supra* note 27.

29 *DEA Issues Nationwide Alert on Fentanyl as Threat to Health and Public Safety*, U.S. Drug Enforcement Admin. (Mar. 18, 2015), https://www.dea.gov/divisions/hq/2015/hq031815.shtml.

30 *Increases in Fentanyl Drug Confiscations and Fentanyl-Related Overdose Fatalities*, Ctrs. for Disease Control & Prevention (Oct. 26, 2015 8:15 AM), http://emergency.cdc.gov/han/han00384.asp (noting that fentanyl-related overdose deaths rose from 92 to 514 in Ohio, 58 to 185 in Maryland, and 185 to 397 in Florida).

***5** More dangerous opioids are being developed in order to meet growing demand. An example is furanyl fentanyl, a synthetic designer opioid, commonly referred to as "China White."[31] Furanyl fentanyl can be up to 100 times more potent than heroin.[32] Its effects last longer, and an overdose is more difficult to treat than one caused by heroin alone.[33] Traditional naloxone treatment is often not enough.[34] Laboratory analysis confirmed furanyl fentanyl in Mr. Walker's July 12, 2016 controlled buy.

31 Annamarya Scaccia, *"China White": What You Need to Know About Heroin-Like Drug*, Rolling Stone (Apr. 3, 2017), http://www.rollingstone.com/culture/china-white-what-you-need-to-know-about-heroin-like-drug-w474670. It is often a mixture of fentanyl, cocaine, and residual heroin. Dealers who try to manufacture fentanyl at home often end up with furanyl fentanyl due to contamination during the synthesis process. *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

Another synthetic opioid on the rise is carfentanil, a drug lawfully used to sedate elephants and other large animals.[35] It is an even more potent version of fentanyl often used to "lace" heroin.[36] Carfentanil is 10,000 times more potent than morphine.[37] Because of carfentanil's tremendous potency, it poses a tremendous risk to users and first responders who inadvertently come into contact with the drug in the course of their duties.[38]

35 Andrew Joseph, *26 Overdoses in Just Hours: Inside a Community on the Front Lines of the Opioid Epidemic*, STAT News (Aug. 22, 2016), https://www.statnews.com/2016/08/22/heroin-huntington-west-virginia-overdoses/.
According to Melvin Patterson, a spokesperson for the DEA, all of the zookeepers and veterinarians in the United States combined need only about eighteen grams—the weight of eighteen sugar packets—per year. Bui & Hermann, *supra* note 25.

36 *DEA Issues Carfentanil Warning to Police and Public, supra* note 25.

37 Wendy Holdren, *Although Overdose Deaths Up, WV Health Officer Cautiously Optimistic About Future*, The Register-Herald (Mar. 7, 2017), http://www.register-herald.com/news/although-overdose-deaths-up-wv-health-officer-cautiously-optimistic-about/article_eb38b7df-09b3-52ac-b3a0-4811c2347f62.html.

38 Sheryl Krieg, *Carfentanil a New Worry for First-Responders*, Emergency Mgmt. (May 11, 2017), http://www.govtech.com/em/disaster/Carfentanil-New-Worry-for-First-Responders.html.

The heroin and opioid epidemic is one of the great public health problems of our time. The CDC found that opioids, primarily prescription pain relievers and heroin, are the chief drugs associated with overdose deaths.[39] In 2015, the most recent year for which data is available, opioids were

involved in 33,091 deaths, [40] which is more than 63% of all drug overdose deaths. [41] On average, ninety-one Americans die from an opioid overdose every day. [42] Preliminary numbers for 2016 suggest that overdose deaths are growing at a rate comparable to the rate of H.I.V.-related deaths at the height of the H.I.V. epidemic. [43]

39 Rudd, et al., *supra* note 27, at 1445–46.

40 *Drug Overdose Death Data*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/drugoverdose/data/statedeaths.html (last updated Dec. 16, 2016). To put this in perspective, 58,220 U.S. service members died in the Vietnam conflict. *Stat. Info. About Casualties of the Vietnam War*, Nat'l Archives, https://www.archives.gov/research/military/vietnam-war/casualty-statistics.html (last accessed June 26, 2017). This means that every two years we are losing more Americans to opioid overdose deaths than we did in the entire time fighting in Vietnam.

41 Rudd, et al., *supra* note 27, at 1445–46.

42 *Understanding the Epidemic, supra* note 22 (select "Record Overdose Deaths" tab).

43 Robert Anderson, the CDC's Chief of Mortality Statistics Branch, stated that the trend is similar to the H.I.V. epidemic death rates during the late 1980s and early 1990s. Haeyoun Park & Matthew Bloch, *How the Epidemic of Drug Overdose Deaths Ripples Across America*, N.Y. Times (Jan. 19, 2016), https://www.nytimes.com/interactive/2016/01/07/us/drug-overdose-deaths-in-the-us.html.

***6** In a November 2016 report, the DEA referred to opioid prescription drugs, heroin, and fentanyl as the most significant drug-related threats to the United States. [44] Indeed, opioid overdoses have quadrupled nationally since 1999. [45] According to the CDC, the significant increase in overdose death rates is attributable to synthetic opioids such as heroin and fentanyl. [46]

44 Rudd, et al., *supra* note 27, at 1450.

45 This statistic includes all overdoses, not only those that resulted in death. *Drug Overdose Death Data, supra* note 40.

46 Rudd, et al., ***supra*** note 27.

These drugs are far more dangerous and far more available for abuse. Opioids are in the medicine cabinets of homes all over America and are available at every hospital and doctor's office. With the rise of prescription opioid abuse, [47] heroin, which up until recently had been a tiny fraction of the illicit drug trade, came roaring back. [48] The return of that pale horse [49] may prove to be the event horizon of drug abuse and addiction.

47 The CDC estimates that approximately three out of four new heroin addicts in the United States started by abusing prescription opioids. *Heroin Overdose Data*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/drugoverdose/data/heroin.html (select "Heroin Data" tab) (last updated Jan. 26, 2017).

48 According to the CDC, opioids are responsible for the majority of drug overdose deaths today. *Understanding the Epidemic, supra* note 22 (select "Record Overdose Deaths" tab).

49 *See Revelation* 6:8 (King James) ("And I looked, and behold a pale horse: and his name that sat on him was Death, and Hell followed with him. And power was given unto them over the fourth part of the earth, to kill with sword, and with hunger, and with death, and with the beasts of the earth.").

Heroin is occasionally called "horse" or "white horse." *See Heroin*, Nat'l Inst. on Drug Abuse, https://www.drugabuse.gov/drugs-abuse/heroin (last updated May 2016).

ii. West Virginia's Epidemic

West Virginia has the highest rate of fatal drug overdoses in the nation—and that rate continues to rise. [50] This past year, 86% of overdose deaths involved at least one opioid. [51] From 2001 to 2016, the number of people in the state who died from a drug overdose increased 400%. [52] Our state's fatal drug overdose rate was 41.5 per 100,000 people in 2015, [53] far above the national average of 16.3 per 100,000 people. [54] The West Virginia Health Statistics Center released information that showed that at least 844 people in the state died of drug overdoses in 2016, [55] an increase of 16.9% from 2015 to 2016. [56]

50 Joseph, *supra* note 35; Beth Vorhees, *Drug Treatment and Addiction Solutions Next Story for Pulitzer Prize Winning Reporter*, W. Va. Morning (Apr. 12, 2017), http://wvpublic.org/post/drug-treatment-and-addiction-solutions-next-story-pulitzer-prize-winning-reporter#stream/0.

51 *Overdose Deaths Continue to Rise in State*, TriStateUpdate (Mar. 22, 2017), http://www.tristateupdate.com/story/34692964/overdose-deaths-continue-to-rise-in-state.

52 *Id.*

53 *Drug Overdose Death Data, supra* note 40.

54 Rudd, et al., ***supra*** note 27, at 1445.

55 Eric Eyre, *WV Drug OD Deaths Soared Above 840 in 2016*, Charleston Gazette-Mail (Mar. 22, 2017), http://www.wvgazettemail.com/news/20170322/wv-drug-od-deaths-soared-above-840-in-2016.

56 *Drug Overdose Death Data, supra* note 40.

***7** The rate of drug overdose deaths involving synthetic opioids in West Virginia increased 76.4% from 2014 to 2015. [57] In just the last three years, fentanyl use has increased tenfold in West Virginia. [58] The vast majority of patients at the Addiction Program at West Virginia University Hospitals are treated for heroin. [59] Along with Massachusetts, New Hampshire, Ohio, and Rhode Island, West Virginia experienced the largest absolute rate change in death from synthetic opioids. [60]

57 *Synthetic Opioid Data*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/drugoverdose/data/fentanyl.html (last updated Dec. 16, 2016).

58 Vorhees, *supra* note 50.

59 David Gutman, *How Did WV Come to Lead the Nation in Overdoses?*, Charleston Gazette-Mail (Oct. 17, 2015), http://www.wvgazettemail.com/article/20151017/GZ01/151019539.

60 Rudd, et al., *supra* note 27.

The Southern District of West Virginia has been hit especially hard. Last August, twenty-six people overdosed during a four-hour span in Huntington.[61] National press reporters quote local health officials as estimating that one in four Huntington residents abuses heroin or some other opioid,[62] meaning that approximately 12,000 people are dealing with opioid addiction[63] in a town of 50,000 people.[64] In April, a pregnant mother in Charleston overdosed at ten o'clock on a Wednesday morning, killing both herself and her unborn baby.[65] No one is immune from the epidemic.

61 Joseph, *supra* note 35.

62 Wayne Drash & Max Blau, *In America's Drug Death Capital: How Heroin is Scarring the Next Generation*, CNN (Sept. 16, 2016), http://www.cnn.com/2016/09/16/health/huntington-heroin/.

63 *Id.*

64 Tom Bateman, et al., *The Heroin-Ravaged City Fighting Back*, BBC (May 3, 2016), http://www.bbc.com/news/av/world-us-canada-39343289/the-heroin-ravaged-city-fighting-back.

65 Joseph Fitzwater, *Pregnant Mother and Baby Die After Charleston Heroin Overdose.* TriStateUpdate (Apr. 26, 2017), http://www.tristateupdate.com/story/35259779/pregnant-mother-and-baby-die-after-charleston-heroin-overdose.

West Virginia leads the nation in the incidence of babies born exposed to drugs[66] and has the highest rate of babies born dependent on opioids.[67] In Huntington, for example, one in ten babies born at the hospital suffers withdrawal from substances such as heroin, opiates, cocaine, or alcohol.[68] That is about fifteen times the national average.[69]

66 Holdren, *supra* note 37.

67 Joseph, *supra* note 35.

68 Drash & Blau, ***supra*** note 62.

69 *Id.*

The heroin and opioid crisis in our state implicates the general welfare in a preeminent way. Public safety is the purpose of the criminal justice system. The seriousness of this crisis in West Virginia convinces me that I should carefully scrutinize plea agreements that bargain away multi-count grand jury indictments. Grand jurors are members of our community who have, under their oaths, investigated, and determined that there is probable cause that certain crimes have been committed by the defendant named in the indictment.

d. Plea Agreements

Before discussing the plea agreement in this case, I will briefly look at the history of the practice of plea bargaining in the federal courts.

Up until the nineteenth century, plea bargaining was not a regular or visible part of the criminal justice system.[70] Prior to the Civil War, the general judicial practice was to discourage guilty pleas.[71] The proffered explanation for the emergence of plea bargaining was a rising crime rate, limitations of local law enforcement resources, and busy dockets.[72] Since 1908, the first year that federal court statistics are available, the rate of guilty pleas has continued to rise.[73] However, it was not until 1971 that the Supreme Court legitimized plea bargaining in *Santobello v. New York.*[74]

70 *See generally* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1 (1979). Before the nineteenth century, other types of bargaining practices existed such as "compounding." Compounding was the practice of paying the victim of a crime in exchange for the agreement not to prosecute. *Id.* at 5. It was not until after 1865 that plea bargaining made its way into appellate court reports. *Id.* at 19.

71 *See id.* at 5–12 (explaining why guilty pleas were generally discouraged).

72 *Id.* at 17.

73 *See infra* pp. 18–23 (offering a more detailed statistical analysis of the rise of plea bargaining).

74 *See Santobello v. New York*, 404 U.S. 257, 260–61 (1971).

***8** The national implementation of the mandatory United States Sentencing Guidelines in 1989 encouraged the plea bargaining process by shifting a large portion of sentencing decision-making, historically reserved for the judge, to the prosecutor.[75] Prosecutors could use adjustments[76] and departures[77] as incentives to persuade defendants to accept plea agreements.[78]

75 *See Mistretta v. United States*, 488 U.S. 361, 412 (1989); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 129–132 (2005) ("The federal guidelines changed more than the size and certainty of the trial penalty: they also changed who controls the penalty. Whereas the judge and the prosecutor once competed for control over the rewards for pleading guilty, the sentencing guidelines, operating in a high volume system, shifted more of this control away from the judge and toward the prosecutor.").

76 *See, e.g.*, U.S. Sentencing Guidelines Manual § 3E1.1 (U.S. Sentencing Comm'n 2016) (outlining the acceptance of responsibility adjustment).

77 *See, e.g., id.* at § 5K1.1 (outlining the substantial assistance to authorities departure).

78 Wright, *supra* note 75, at 138–39 ("Patterns of outcomes in the districts reveal some of the particular sentencing laws that have contributed most clearly to the drop in acquittals over the last decade. Departures from the sentencing guidelines based on a defendant's 'substantial assistance' made a measurable difference. The same was true of the three-level 'super acceptance of responsibility' discount. Where these methods—largely controlled by prosecutors—were used most commonly, they contributed to an environment in the district that convinced defendants to plead guilty and to opt out of trials that might have ended in acquittals. More generally, the prosecutor's willingness to decrease the offense level under the guidelines resulted in more guilty pleas and fewer acquittals.").

Proponents of plea bargaining have long relied on "practical reasons" as justifications for the practice.[79] Prominent among these advantages are assertions of cost effectiveness, efficiency, certainty, and reduction in the burden on the court system.[80] The most commonly cited justifications are docket pressure and overburdened prosecutors and judges.[81] I am juberous of these assertions. As I detail herein, although widely accepted, the "overburdened" justification for

plea bargaining is empirically unsupported.[82] I agree with Judge Jennifer Walker Elrod, Circuit Judge for the United States Court of Appeals for the Fifth Circuit, who has stated: "[W]e must strive to correct any public misconception that the courts are overworked and backlogged.... [W]hen the myth of backlogged courts is raised as a reason for forsaking the jury, we must correct them."[83]

79 *How Courts Work*, A.B.A., http://www.americanbar.org/groups/public_education/resources/law_related_education network/how_courts_work/pleabargaining.html (last visited June 26, 2017).

80 *Id.*

81 *See, e.g.*, William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2555–56 (2004).

82 *See infra* pp. 18–23.

83 Hon. Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3, 22 (2011).

III. DISCUSSION

The United States Constitution makes plain that the United States is a participatory democracy. This is a government of the people and by the people. Each of the three branches of government depend upon and require the active participation of the people in the exercise of power.[84]

84 *See* Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 381 (2005) ("Creating a voice for the people in the Judicial Branch was also entirely consistent with the Framers' attempts to create a government for the people and by the people. The Framers created a structure in which the Executive and Legislative Branches represented the people and were accountable to them. Given the Framers' desire to create a system in which the people dominated the political landscape, it would be odd if they excluded the people from the Judicial Branch—the only unelected branch, and the branch that had the ultimate say in 'what the law is.' ").

***9** The exigencies of a changing world have required acceptance of processes that are more streamlined than those contemplated by our Founding Fathers.[85] Plea bargaining is one such process that we have come to embrace. Plea bargaining eliminates the jury and conflates the judge's and prosecutor's roles, creating an administrative system of criminal justice.[86] A species of trial does indeed occur, but it occurs in "the shadow of guilty pleas" rather than in open court.[87]

85 *See* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 Va. L. Rev. 183, 211—213 (2014) (discussing how the "pervasive adoption of adjudication strategies in service of efficiency, especially plea bargaining, helps to redefine the norms that inform both ideas of adjudication's purposes and, more broadly, those that influence the state's policies of criminal law enforcement") ("The jury has long been explained and defended with reference to its constitutive role in democratic governance and the political value of lay participation (including the benefit of jury service to jurors themselves as citizens), in addition to consequentialist functions such as a check on government power. The Supreme Court has been quite explicit about the criminal jury's non-utilitarian normative roles, including its presumed disposition to rest verdicts as much on moral assessments as on logic, formal proof, and 'any linear scheme of reasoning.' ... These long-established accounts of juries and the nature of judgments implicitly embrace a reality that efficiency-dominated accounts of adjudication ignore: Adjudication plays a constitutive role in substantive justice.").

86 Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1048 (2006).

87 Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 Stan. L. Rev. 1409, 1415 (2003).

Without question, resolution of criminal charges by plea bargaining has replaced resolution by jury trial.[88] I concede that plea bargaining is an efficient and convenient system and that public participation in government is inherently inconvenient. Governance by decree is expedient. However, the Founding Fathers intended the wheels of justice to grind slowly and exceedingly fine in order to discern the truth.[89]

88 *See infra* notes 90–95 and accompanying text; *see also infra* Figure 1.

89 Trial by jury is one of the mechanisms of justice ensuring that the wheels grind slowly and finely.

> If we fail to purposefully guard and defend the jury, we risk losing one of America's greatest traditions and protectors of our liberty—the indispensable barrier between the liberties of the people and the prerogatives of the government. We should always remember that inconveniences suffered by the jury trial pale in comparison to the lamentable loss of freedom and justice that would accompany the elimination of this institution.

Elrod, *supra* note 83, at 22.

In 1908, about 50% of all federal criminal convictions were obtained by a guilty plea.[90] By 1916, the rate had risen to 72%, and by 1925, guilty pleas represented nearly 90% of all convictions.[91] In 1993, the rate of guilty pleas was 88.5%.[92] That number increased to 97.1% in 2015 with a criminal trial rate of only 2.9%.[93] Data provided by the Administrative Office of the United States Courts ("AO") further confirms that the number of criminal defendants terminated by trial has decreased significantly since 1970.[94] In fiscal year ("FY") 1973, the judiciary completed 8,529 criminal trials, but in FY 2016, the judiciary completed 1,859 criminal trials.[95]

90 Alschuler, *supra* note 70, at 27.

91 *Id.*

92 U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* 20 (1997), http://www.ussc.gov/research/sourcebook/archive/sourcebook-1997 (showing guilty plea and trial data in Figure C for fiscal years 2012-2015).

93 U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* S-23 (2016), http://www.ussc.gov/research/sourcebook-2016 (showing guilty plea and trial data in Figure C for fiscal years 2012–2015).

94 *See infra* Figures 1, 2, & 3. The AO data is derived from tables in the AO Judicial Business reports and from the internal NewSTATS system. The data excludes petty offense cases heard before Magistrate Judges and includes a small number of petty offense cases heard before Article III Judges. From 1970 to 1991, the data uses a fiscal year ending on June 30; from 1992 to 2016, the data uses a fiscal year ending on September 30. The data represents individual defendants tried rather than "cases" tried; many cases include multiple defendants tried at different times. The data covers only criminal trials, not civil trials.

95 *See supra* note 94.

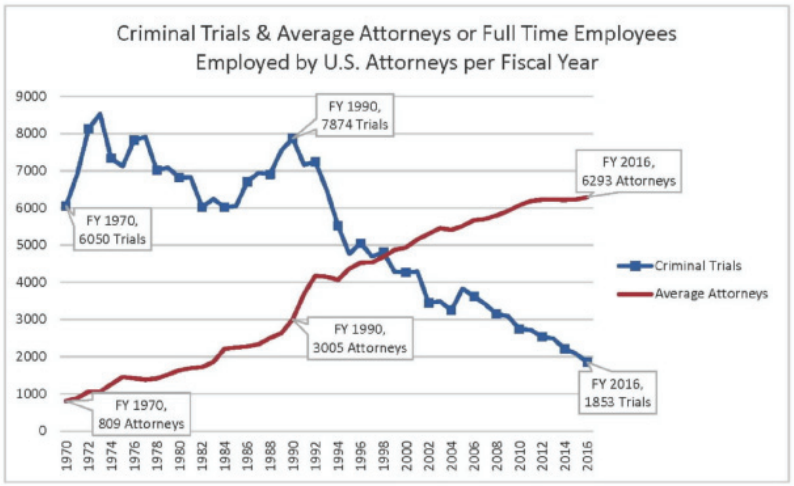
***10** In the Southern District of West Virginia, there have been only eighteen criminal trials since January 2013. There have only been five criminal opioid trials in this district during that time.

From 2014 to 2017, there were less than 250 individual drug sentences handed down by all of the judges of this court. The last heroin case in this district tried to verdict was in 2014. [96]

96 Statistics for the Southern District of West Virginia were calculated using internal data provided by the Clerk's Office.

For at least the past forty-six years, the primary justification for plea bargaining has been that the constitutional process of requiring trial by jury in every case overburdens the courts and overworks the prosecutors. [97] I believe these justifications, and others, diminish the right of the people to participate in the administration of the criminal justice system to a near vanishing point. We now resolve almost every criminal case by a process that is no longer justified by the circumstances making it acceptable in the first place. The courts are no longer overburdened. Federal prosecutors are no longer overworked. To illustrate, despite the decline in criminal trials, the number of federal prosecutors has steadily increased since 1970. [98] According to the Annual Statistical Reports ("ASRs") published by the Executive Office for United States Attorneys, between FY 1970 and FY 2010, the average number of federal prosecutors increased more than sevenfold—from 809 in 1970 to 6,075 in 2010. [99] In FY 2016, the number of federal prosecutors had grown to 6,293. [100]

FIGURE 1:



97 In 1971, the Supreme Court encouraged the use of plea bargaining, where "[p]roperly administered," in order to promote judicial economy. *Santobello v. New York*, 404 U.S. 257, 260 (1971). The Court noted, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.*

98 *See infra* Figure 1.

99 Exec. Office for U.S. Attorneys, U.S. Dep't of Justice, *Annual Statistical Report: Fiscal Year 20102* (2010), https://www.justice.gov/usao/resources/annual-statistical-reports; Exec. Office for U.S. Attorneys, U.S. Dep't of Justice, *Annual Statistical Report: Fiscal Year 19706–7*, chart 14, tbl.6 (1970), https://www.justice.gov/usao/resources/annual-statistical-reports.

100 Including reimbursable attorneys. *See* U.S. Dep't of Justice, *FY 2017 Budget and Performance Summary*, https://www.justice.gov/about/fy-2017-budget-and-performance-summary (select link for "U.S. Attorneys (USA)") (last updated Aug. 29, 2016). I use the FY 2017 budget request data, which shows the positions authorized plus reimbursable full time employees in the FY 2016 enacted budget, because the ASRs do not currently show staffing levels past 2010.

Given the inverse relationship between trials and federal prosecutors, there has been a steady decrease in the average number of criminal trials handled per federal prosecutor.[101] In FY 1973, each federal prosecutor handled over eight criminal trials on average. By FY 2016, the average number of criminal trials handled by each federal prosecutor plummeted to 0.29 trials.

FIGURE 2:

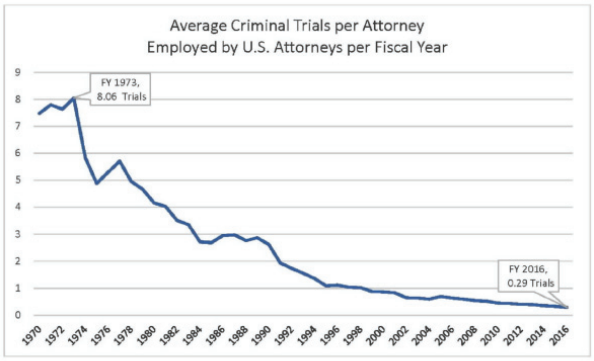
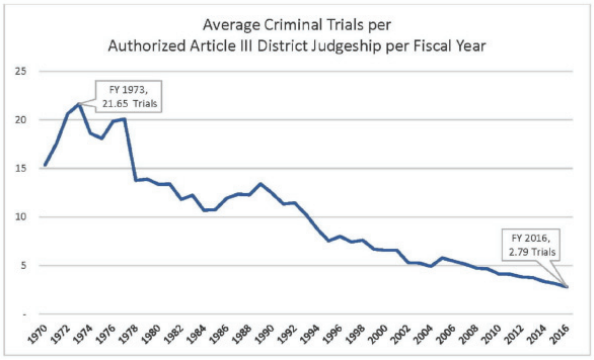


FIGURE 3:



101 *See infra* Figure 2. Figure 2 shows the average number of criminal trials per attorney employed by the U.S. Attorneys per fiscal year between 1970 and 2016. The AO trial data, ASR staffing data, and budget request staffing data were used to create Figure 2.

***11** It is no surprise that the judiciary has also experienced a decreased criminal trial load.[102] Like federal prosecutors, the number of authorized Article III district court judgeships rose from 394 in 1970 to 663 in 2015.[103] Accordingly, the number of criminal trials handled per district judgeship dropped from over twenty-one per year in 1973 to fewer than three per year in 2016.[104] Thus, like federal prosecutors, district court judges are not overburdened by trials.

102 *See supra* Figure 3. Figure 3 shows the average number of criminal trials per authorized Article III district judgeship between 1970 and 2016. The AO trial data and an AO report on authorized judgeships were used to create Figure 3. *See* Admin. Office of the U.S. Courts., *Authorized Judgeships* 1–8 (2016), http://www.uscourts.gov/file/document/all-authorized-judgeships-1789-present.

103 These numbers exclude district judgeships for U.S. territories and temporary authorizations. *See* Admin. Office of the U.S. Courts., *supra* note 102.

104 *See supra* Figure 3. This data does not account for the increasing number of magistrate judges and senior district judges. *See* Admin. Office of the U.S. Courts., *Judicial Facts and Figures Table 1.1* (Sept. 30, 2015), http://www.uscourts.gov/statistics/table/11/judicial-facts-and-figures/2015/09/30; Admin. Office of the U.S. Courts., *supra* note 102. Were I to include these additional judges, the number of criminal trials per judge would be even lower.

Because the most common justifications for plea bargaining no longer have any substantial heft, the counterweight of the people's general interest in observing and participating in their government requires close consideration of a proffered plea bargain in every case.

I conclude that courts should reject a plea agreement upon finding that the plea agreement is not in the public interest. [105] There is no justice in bargaining against the people's interest.

105 Several circuit courts have approved consideration of the public interest in accepting or rejecting a plea agreement. The Ninth Circuit has stated, "a district court properly exercises its discretion when it rejects a plea agreement calling for a sentence the court believes is too lenient or otherwise not in the public interest in light of the factual circumstances specific to the case." *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007) (internal quotations omitted). The Tenth Circuit has stated, "[w]hile '[t]he procedures of Rule 11 are largely for the protection of criminal defendants ... Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise not in the public interest.' " *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985) (quoting *United States v. Miller*, 722 F.2d 562, 563 (9th Cir. 1983)). The Fifth Circuit has commented, "[i]f the court did not have discretion to refuse a plea bargain because the agreement is against the public interest in giving the defendant unduly favorable terms, [Rule 11(e)(2) allowing deferral of acceptance to sentencing] would be largely unnecessary." *United States v. Bean*, 564 F.2d 700, 704 (5th Cir. 1977). The First Circuit has stated as a reason why the court must have discretion whether or not to accept a plea "that a conviction affects more than the court and the defendant; the public is involved." *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971).

***12** First, a court should consider the cultural context surrounding the subject criminal conduct. Here, that cultural context is a rural state deeply wounded by and suffering from a plague of heroin and opioid addiction. [106]

106 *See supra* Section II.c.

Second, the court should weigh the public's interest in participating in the adjudication of the criminal conduct charged by the indictment. The criminal jury trial is "fundamental to the American scheme of justice" [107] and effectively promotes a motivated and educated populace that respects the law, holds faith in the judicial system, and is deterred from participating in crime. [108] Jury trials serve the people's right to be informed as to what occurs in their courts and reinforce the fact that the law comes from the people. [109] Here, the public has a high interest in the adjudication of heroin and opioid crimes such as these because of the severity of the crisis occurring in our state. Education about and deterrence of heroin and opioid crimes is of paramount importance at this time.

107 *Duncan v. Louisiana*, 391 U.S. 145, 149 (1930).

108 *See* Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn. L. Rev. 235, 301 (2009); Robert Lloyd Raskopf, *A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process*, 17 Pepp. L. Rev. 357, 360 (1990). *See generally* George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 Neb. L. Rev. 804, 806–10 (1995).

109 The Supreme Court recognized in *Gannett Co. v. DePasquale*, that "the public has the right to be informed as to what occurs in its courts.... 'The suggestion that there are limits upon the public's right to know what goes on in the courts causes ... deep concern.'

" 443 U.S. 368, 413 (1979) (Blackmun, J., concurring in part and dissenting in part) (quoting *Estes v. Texas*, 381 U.S. 532, 541, 614–15 (1965)).

Third, the court should consider whether "community catharsis can occur" without the transparency of a public jury trial. [110] "Much like the lid of a tea kettle releases steam, jury trials in criminal cases allow peaceful expression of community outrage at arbitrary government or vicious criminal acts." [111] The crimes alleged in Mr. Walker's indictment involve heroin and other opioids and are "vicious criminal acts."

110 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) ("The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner.").

111 *United States v. Lewis*, 638 F. Supp. 573, 580 (W.D. Mich. 1986) (holding that community input through a jury trial is not an overriding or compelling governmental interest to burden the defendant's free exercise of religion).

Fourth, the court should examine the plea agreement and, in light of the presentence report, determine whether the apparent motivation is to advance justice or, more probably, to expediently avoid trial. Here, the agreement trades a grand jury indictment charging three counts of distributing heroin, two counts of distributing fentanyl, and one count of being a felon in possession of a firearm for an information charging one count of distributing heroin. The principal motivation appears to be convenience.

***13** Upon full consideration of each of these factors, **I FIND** that the plea agreement is not in the public interest, and **I REJECT** the plea agreement.

IV. CONCLUSION

My twenty-two years of imposing long prison sentences for drug crimes persuades me that the effect of law enforcement on the supply side of the illegal drug market is insufficient to solve the heroin and opioid crisis at hand. I also see scant evidence that prohibition is preventing the growth of the demand side of the drug market. Nevertheless, policy reform, coordinated education efforts, and expansion of treatment programs are not within my bailiwick. I may only enforce the laws of illicit drug prohibition.

The law is the law, and I am satisfied that enforcing the law through public adjudications focuses attention on the heroin and opioid crisis. The jury trial reveals the dark details of drug distribution and abuse to the community in a way that a plea bargained guilty plea cannot. A jury trial tells a story. The jury members listening to the evidence come away with personally impactful information about the deadly and desperate heroin and opioid crisis existing in their community. [112] They are educated in the process of performing their civic duty and are likely to communicate their experience in the courtroom to family members and friends. [113] Moreover, the

attendant media attention that a jury trial occasions communicates to the community that such conduct is unlawful and that the law is upheld and enforced.[114] The communication of a threat of severe punishment acts as an effective deterrent.[115] As with other criminalized conduct, the shame of a public conviction and prison sentence specifically deters the sentenced convict from committing the crime again—at least for so long as he is imprisoned.[116]

112 *See* Harris, *supra* note 108, at 107–08 (defining the communitarian function of the jury trial as "1) a vehicle for direct community participation in the criminal justice system; 2) a means by which the community is educated regarding the criminal justice system; and 3) a ritual by which the faith of the community in the administration of justice is maintained").

113 *See id.* at 106–10.

114 *See* *Richmond Newspapers*, 448 U.S. at 572–73 ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."). Judge Richard Posner, Circuit Judge for the United States Court of Appeals for the Seventh Circuit, the leading authority on deterrence theory, says that "[l]aw must ... be public.... A threat that is not communicated cannot deter." Richard A. Posner, *Economic Analysis of Law* 318 (9th ed. 2014). It is clear to me that "consequences that are unknown to potential offenders cannot affect their behavior." Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 Crime & Just. 143, 190 (2003).

115 In fact, compared to the criminal code, a public trial serves as a more effective deterrent to criminal behavior because it better transfers knowledge of legal sanctions to the citizenry. *See* Dru Stevenson, *Toward A New Theory of Notice and Deterrence*, 26 Cardozo L. Rev. 1535, 1540–41 (2005) (discussing how the language of the criminal code is inadequate to cure the "information gap" and how violent crime rates decreased noticeably in jurisdictions following well publicized executions); *see also supra* note 114.

116 *See* Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 Ind. L.J. 397, 404 (2009) (discussing *Blakely v. Washington*, 542 U.S. 296 (2004), and noting that "*Blakely* contended the liberal, democratic decision making vested in the jury's determination of blameworthiness relied on the community's role in linking punishment to the crime committed, so that the offender would feel more responsibility for her actions"); *see also* *Blakely*, 542 U.S. at 309.

***14** Over time, jury verdicts involving the distribution of heroin and opioids reinforce condemnation of the conduct by the public at large. In turn, respect for the law propagates.[117] This respect for the law may eventually reduce such criminal conduct.

117 *See* *Richmond Newspapers*, 448 U.S. at 570–72 (recognizing that a public trial has "significant community therapeutic value" because transparency reaffirms the public's perception of stability and security, and that openness of criminal trials increases respect for the law by educating the public about the criminal justice system).

The secrecy surrounding plea bargains in heroin and opioid cases frequently undermines respect for the law and deterrence of crime. The bright light of the jury trial deters crime, enhances respect for the law, educates the public, and reinforces their sense of safety much more than a contract entered into in the shadows of a private meeting in the prosecutor's office.

For the reasons stated, I **REJECT** the plea agreement.

All Citations

Not Reported in Fed. Supp., 2017 WL 2766452

End of Document

APPENDIX C

ammunition which has been shipped or transported in interstate or foreign commerce."

The charge says: "On or about July 14th, 2016, at or near, Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendant Charles York Walker, Jr. Knowingly possessed a .45 caliber Kimber Ultra Carry firearm in and affecting interstate commerce and a .38 caliber Rossi firearm in and affecting interstate commerce."

"Two, at the time defendant Charles York Walker, Jr. possessed the aforesaid firearms, he had been convicted of crimes punishable by a term of imprisonment exceeding one year as defined in law, all in violation of Title 18 United States Code Section 922(g)(1) and 924(a)(2)."

To sustain its burden of proof in connection with this charge, the government must prove three essential elements beyond a reasonable doubt. One, that the defendant had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; two, the defendant knowingly possessed the firearms described in the indictment, namely a .45 caliber Kimber Ultra Carry firearm and/or a .38 caliber Rossi firearm and such possession was in or affecting interstate commerce.

The term firearm means any weapon which will or is designed to or may be readily converted to expel a

APPENDIX D

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of West Virginia

UNITED STATES OF AMERICA
v.
CHARLES WALKER

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16-cr-00174

USM Number: 05463-088

Lex A. Coleman
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) One, Two, and Three of the Superseding Indictment

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

☑ was found guilty on count(s) Four after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC § 841 (a) (1)	Distribution of a Quantity of Heroin	4/14/2016	One
21 USC § 841 (a) (1)	Distribution of a Quantity of Fentanyl	6/23/2016	Two
21 USC § 841 (a) (1)	Distribution of a Quantity of Heroin	7/12/2016	Three

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

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

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

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

2/1/2018
Date of Imposition of Judgment

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

2/6/2018
Date

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: CHARLES WALKER
CASE NUMBER: 2:16-cr-00174

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §§ 922 (g) (1) and 924 (a) (2)	Felon in Possession of a Firearm	7/14/2016	Four

AO 245B (Rev. 09/17) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: CHARLES WALKER
CASE NUMBER: 2:16-cr-00174

IMPRISONMENT

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

120 months

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

that the defendant be housed in Kentucky.
that the defendant be allowed to participate in the Comprehensive Drug Abuse Treatment Program.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: CHARLES WALKER
CASE NUMBER: 2:16-cr-00174

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

3 years on each count to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: CHARLES WALKER
CASE NUMBER: 2:16-cr-00174

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: CHARLES WALKER
CASE NUMBER: 2:16-cr-00174

SPECIAL CONDITIONS OF SUPERVISION

The defendant will participate in a program of testing, counseling and treatment for drug and alcohol abuse as directed by the probation officer.

The defendant will participate in mental health treatment as directed by the probation officer.

The defendant shall comply with the Standard Conditions of Supervision adopted by the Southern District of West Virginia in Local Rule of Criminal Procedure 32.3, as follows:

1) If the offender is unemployed, the probation officer may direct the offender to register and remain active with Workforce West Virginia.

2) Offenders shall submit to random urinalysis or any drug screening method whenever the same is deemed appropriate by the probation officer and shall participate in a substance abuse program as directed by the probation officer. Offenders shall not use any method or device to evade a drug screen.

3) As directed by the probation officer, the defendant will make copayments for drug testing and drug treatment services at rates determined by the probation officer in accordance with a court-approved schedule based on ability to pay and availability of third-party payments.

4) A term of community service is imposed on every offender on supervised release or probation. Fifty hours of community service is imposed on every offender for each year the offender is on supervised release or probation. The obligation for community service is waived if the offender remains fully employed or actively seeks such employment throughout the year.

5) The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: CHARLES WALKER
CASE NUMBER: 2:16-cr-00174

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 400.00	$	$	$

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

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

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

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 5A — Criminal Monetary Penalties

DEFENDANT: CHARLES WALKER
CASE NUMBER: 2:16-cr-00174

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

The $400 special assessment will be paid through participation in the Inmate Financial Responsibility Program. Payments of $25.00 shall be made quarterly.