No. 19-

IN THE

Supreme Court of the United States

RENE BOUCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the government waive its right to appeal the defendant's sentence when it expressly agreed that the defendant would be free to argue for a below-guideline sentence at the sentencing hearing, and the trial court thereafter imposed a perfectly lawful, below-guideline sentence?

2. Does the government waive its right to appeal when the defendant expressly waives his right to appeal as part of his plea agreement?

3. When the defendant serves and completes each and every aspect of a perfectly lawful sentence, is the resentencing barred by the Double Jeopardy and/or Due Process Clauses of the Fifth Amendment?

PARTIES TO PROCEEDINGS

Pursuant to Rule 14.1(b) of the Supreme Court Rules, the parties to the proceedings below whose judgment is sought to be reviewed are:

Defendant/Petitioner: Rene Boucher

Plaintiff/Respondent: United States of America

RELATED CASES

--United States of America v. Boucher, No. 1:18-cr-00004-1, U.S. District Court for the Western District of Kentucky. Judgment entered June 21, 2018.

--Boucher v. United States of America, No. 18-5683, United States Court of Appeals for the Sixth Circuit. Mandate issued October 1, 2019.

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The transcript from the defendant's final sentencing hearing of June 15, 2018 is reproduced as Appendix C (pp. 30a-90a). The Sixth Circuit's Order in United States v. Boucher, 905 F.3d 479 (6th Cir. 2018) denying Boucher's motion to dismiss the appeal is reproduced as Appendix B (pp. 25a-29a). The Sixth Circuit's Opinion in United States v. Boucher, 937 F.3d 702 (6th Cir. 2019) reversing and remanding for resentencing is reproduced as Appendix A (pp. 1a-24a).

STATEMENT OF JURISDICTION

The Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). The Petitioner pled guilty to a one-count information in the United States District Court for the Western District Court of Kentucky for a violation of 18 U.S.C. § 351 for assaulting a member of Congress, United States Senator Rand Paul. The Petitioner was sentenced on June 15, 2018 pursuant to a negotiated plea agreement. The trial court imposed a sentence of 30 days confinement, a fine of $10,000, and 100 hours of community service. The government appealed the sentence. The Petitioner completely served his sentence. The Petitioner unsuccessfully moved to dismiss the appeal. The United States Court of Appeals reversed and remanded the matter for resentencing by its Opinion rendered September 9, 2019. The mandate issued October 1, 2019.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision implicated within these proceedings is the prohibition against double jeopardy as set forth in the Fifth Amendment to the United States Constitution, as well as the due process protections of the Fifth Amendment to the United States Constitution.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Nature of the Case.

United States Senator Rand Paul and Rene Boucher (hereinafter "Petitioner") were next-door neighbors in Bowling Green, Kentucky. Problems between them began in the summer of 2017, when the Petitioner trimmed the branches of five maple trees in Paul's backyard that had grown over the property line. In order to retaliate, or otherwise teach the Petitioner a lesson, Paul constructed a large pile of limbs and brush at the edge of his property

in the direct sightline of the Petitioner's home. To appease the situation and make amends, the Petitioner crossed onto Paul's property, removed the limbs and brush, and hauled them off in dumpsters.

The following month, the Petitioner noticed another larger pile of limbs and brush in roughly the same location. He hauled it off again. A few days later, another bundle reappeared. This time, the Petitioner did not haul it away; rather, he poured gasoline over the debris and lit a match. The ensuing fireball caught him by surprise. The debris was burned, but so was the Petitioner —he suffered second-degree burns on his arms, neck, and face.

When Paul got on his lawnmower the next day, the Petitioner was watching him from the top of a hill overlooking Paul's property. According to the Petitioner, he saw Paul "blow all of the leaves from his property onto Boucher's yard." Paul then got off his lawnmower, picked up a few more limbs, and turned toward the site of the burned debris pile. The Petitioner ran across the lawn and tackled Paul. After a brief fracas, Paul and the Petitioner exchanged words, and Paul left the scene and called the police.

B. Course of Proceedings Below

The Warren County Attorney initially charged the Petitioner with Fourth Degree Misdemeanor Assault under Kentucky law. He was taken briefly into custody and posted a cash bond to secure his release. The government then charged the Petitioner by an information on one count of assaulting a member of Congress in violation of 18 U.S.C. § 351(e), and the state charges were dropped. The

Petitioner pleaded guilty. His presentence report (PSR) recommended a Guideline sentencing range of 21 to 27 months in prison. Throughout, the government expressly committed that: "…"[t]he government would recommend a sentence no higher than the low-end of a guideline range *and you would be free to recommend any sentence authorized by the statute (0-10)*." (Emphasis added). To this day, the government has never denied the existence of this agreement.

At final sentencing, the trial court imposed a sentence of 30 days confinement, a fine of $10,000, and 100 hours of community service. (Appendix C, pp. 85a-87a). Moments before the trial court adjourned, the government objected to the sentence imposed. (Appendix C, p. 88a). The Petitioner immediately paid his fine and was taken into custody a few weeks after final sentencing. He has served the entirety of his sentence, completed his community service and is no longer on probation. Meanwhile, the government appealed the sentence. The Petitioner unsuccessfully moved to dismiss the appeal on the grounds that the government waived its appellate rights. (Appendix B). The United States Court of Appeals for the Sixth Circuit reversed and remanded the matter for resentencing by its Opinion rendered September 9, 2019. (Appendix A). The mandate issued October 1, 2019.

C. Statement of Facts with Record Citations

The Petitioner is a retired medical doctor and resides at 582 Rivergreen Way, Bowling Green, Warren County, Kentucky. Rand Paul, at all times relevant, has been a United States Senator and has resided at 200 Lakeside Way, Bowling Green, Warren County, Kentucky. Both of

these properties are in the Rivergreen subdivision, which is a gated community in Bowling Green, Warren County, Kentucky. The Petitioner and Senator Paul share a common boundary line, and their properties are otherwise contiguous to each other.

During the summer of 2017, the Petitioner trimmed the limbs on approximately five maple trees that are on this common property line. The branches of these trees were low to the ground and extending a substantial distance across the Petitioner's property. (Boucher Sentencing Memorandum, Docket Entry #26, p. 6).

In approximately September 2017, Senator Paul placed a substantial amount of limbs, and the remnants from having his shrubs trimmed, just off the property line, but admittedly on Paul's property. This pile of yard trash and debris was approximately ten feet long, and five feet high. (Boucher Sentencing Memorandum, Docket Entry #26, p. 6). On or about October 10, 2017, the Petitioner gathered up the pile of yard debris on the Paul property, placed it into portable dumpsters, and had it hauled off. Even though this was not the Petitioner's trash, or on the Petitioner 's property, he viewed it as unsightly -- as Senator Paul had placed it directly in the Petitioner's line of sight from his patio and the back door of his house. (Boucher Sentencing Memorandum, Docket Entry #26, p. 6).

On either October 13 or 14, 2017, Senator Paul reconstructed the pile of yard debris at approximately the same location where it was previously located -- just off the property line between the two gentlemen involved. (Boucher Sentencing Memorandum, Docket Entry #26,

p. 6). On October 17, 2017, the Petitioner again hauled off the yard debris -- even though it was not his, and even though it was not on his property. (Boucher Sentencing Memorandum, Docket Entry #26, p. 6). On October 20 or 21, 2017, the pile of yard debris was again reconstructed in the same location. (Boucher Sentencing Memorandum, Docket Entry #26, p. 7).

The Petitioner had discussed this situation with at least two members of the Rivergreen Home Owners Association throughout this relevant time frame. Specifically, he conversed with Rina Malmquist and Minerva Westray, both of whom were then-members of the Rivergreen HOA. (Boucher Sentencing Memorandum, Docket Entry #26, p. 7).

On or about November 2, 2017, the Petitioner burned the third pile of yard debris that had been constructed just off the property line. Unfortunately for the Petitioner, he used gasoline to ignite this fire. The fireball from the gasoline caused him to sustain second-degree burns on both of his arms, and the left side of his neck and face. (Boucher Sentencing Memorandum, Docket Entry #26, p. 7).

On November 3, 2017, Senator Paul returned from Washington and used his lawnmower to blow all of the leaves from his property onto the Petitioner's yard. During this process, Paul stepped away from his lawnmower, gathered several branches from adjacent pile of trash, and placed them in the exact location where the last pile had been burned just one day prior. The Petitioner lost his temper and tackled Paul as Paul was carrying branches from another location on his property and placing them on the property line. Immediately after the incident,

Paul referred to the Petitioner as "crazy." The Petitioner told Paul that he wanted this to stop. Paul replied that the police would be visiting the Petitioner. (Boucher Sentencing Memorandum, Docket Entry #26, p. 7).

In fact, on November 3, 2017, the police did visit the Petitioner. The investigating officer took a recorded statement from him. He was then taken into custody, charged with 4th degree assault, and lodged in the Warren County Jail. He posted bond the next day and subsequently was arraigned on the state court charge. (Boucher Sentencing Memorandum, Docket Entry #26, p. 8). A copy of the file from the Warren District Court in *Commonwealth v. Rene Boucher* confirms that the Petitioner was charged with Assault, 4th degree, which is a Class A misdemeanor under Kentucky Revised Statute 508.030.

While the state court misdemeanor charge was pending, Hon. Bradley P. Shepherd, Assistant United States Attorney, Southern District of Indiana, contacted defense counsel on December 5, 2017. To paraphrase and summarize, Mr. Shepherd indicated that he had been appointed as a special prosecutor to handle the federal prosecution of the Petitioner, and that it was the government's intention to go forward on an alleged violation of Title 18 U.S.C. 351(e), assault on a Member of Congress. In his written message to defense counsel, Mr. Shepherd proposed to proceed by an information, and he discussed a guideline sentence range. He expressly and unequivocally stated: "[t]he government would recommend a sentence no higher than the low-end of a guideline range *and you would be free to recommend any sentence authorized by the statute (0-10)*." (Emphasis added).

Based upon the government's representations, the Petitioner agreed to proceed by an information, and his signed plea agreement was put to record in the trial court from which the government later appealed. (See Plea Agreement, Docket Entry #5). At page 7 of this plea agreement, the Petitioner acknowledged that he is ". . . aware of his right to appeal his conviction and that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Unless based on claims of ineffective assistance of counsel or prosecutorial misconduct, Defendant knowingly and voluntarily waives the right (a) to directly appeal his conviction and the resulting sentence pursuant to Fed. R. App. P. 4(b) and 18 U.S.C. § 3742, and (b) to contest or collaterally attack his conviction and the resulting sentence under 28 U.S.C. § 2255 or otherwise."

Subsequently, Shannon D. Teague, U. S. Probation Officer, filed her Presentence Investigation Report within the trial court proceedings on June 5, 2018. (Docket Entry #24). Neither the government nor the Petitioner made any objections to any item within this report. The Presentence Investigation Report, referenced immediately above, expressly states in Part A, Paragraph 2 (p. 3 of the report), that:

> On March 9, 2018, the defendant pled guilty to one count(s) of a one-count Information. Pursuant to Rule 11(c)(1)(B), the government agrees to recommend, or agrees not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply. Such

> a recommendation or request does not bind the Court.

Final sentencing was conducted in open court on June 15, 2018. (Appendix C). During the course of this proceeding, the Petitioner separately executed a written waiver of his right to appeal the sentence imposed by the Court. (Docket Entry #33). The Petitioner argued for a sentence within the range permitted by law. The government—being true to its word and in keeping with the express agreement of the parties—did not object.

At final sentencing, the Petitioner was sentenced to thirty days incarceration, a $10,000.00 fine, and 100 hours of community service. (Docket Entry #37; Appendix C, pp. 85a-87a). This sentence is clearly "within the range permitted by law". The Petitioner immediately paid his $10,000.00 fine, in full, to the Clerk of the United States District Court, Western District of Kentucky, on June 16, 2018, just one day after sentence was pronounced.

The United States of America filed its Notice of Appeal on June 29, 2018. (Docket Entry #41).

The Petitioner voluntarily surrendered himself to federal custody on or about July 22, 2018, and he completed the service of his sentence, in full, on August 20, 2018. His fine is paid in full; he has completed all 100 hours of community service; and he is no longer on probation.

The Petitioner, through counsel, moved to dismiss the government's appeal, arguing that the government had waived its appellate rights. The United States Court of Appeals for the Sixth Circuit denied the Petitioner's

motion to dismiss the government's appeal by an order entered September 26, 2018. United States v. Boucher, 905 F.3d 479 (6th Cir. 2018) (Appendix B). The United States Court of Appeals subsequently reversed and remanded the matter for resentencing by its Opinion rendered September 9, 2019. United States v. Boucher, 937 F.3d 702 (6th Cir. 2019) (Appendix A). The mandate issued October 1, 2019.

REASONS FOR GRANTING THE PETITION

1. The government waived its right to appeal the sentence when it expressly agreed that the defendant would be free to argue for a below-guideline sentence and, specifically, for any sentence within the range permitted by law. To allow the government to renege on such an agreement violates all notions of fundamental fairness and due process.

Justice Oliver Wendell Holmes once famously stated: "Men must turn square corners when they deal with the government." Rock Island C.R.R. v. United States, 254 U.S. 141, 143 (1920). And, in turn, it has often been held that the converse is equally as true—that is, the government must "turn square corners" in its conduct, transactions and general dealings. "…[T]he government must 'turn square corners' in its own conduct." Heckler v. Comm'y Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 61 n.13, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984). The doctrine applies and extends even in the context of a criminal prosecution of a defendant. Justice Scalia once dissented in such a matter, noting: "The Double Jeopardy Clause is and has always been, not a provision designed to assure reason and justice in the particular case, but

the embodiment of technical, prophylactic rules that require the Government to *turn square corners*." Jones v. Thomas, 491 U.S. 376, 387, 109 S. Ct. 2522, 2529, 105 L. Ed. 2d 322 (1989). (Emphasis added).

The doctrine says, in essence, that in dealing with the public, government agencies must "turn square corners"—that is, essentially, to comport itself with compunction and integrity, and not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over a member of the public. In short, when the government, acting through the offices of the United States Attorney, makes a promise—and especially a written promise—in a criminal prosecution, then the law should require that the promise be kept and enforced. This is not rocket science. It is fundamental due process—which is implicated in all cases where there is action that is inconsistent with fundamental notions of fairness. These are the lessons that most people are taught at a very early age. Robert Fulghum summed it up in two words: "Play fair." Fulgham, Robert, *All I Really Need to Know I Learned in Kindergarten* (1986).

It is axiomatic that the Office of the United States Attorney is "the government", and that this office has the authority to speak on behalf of the government. In the matter now pending, it must be expressly noted and reiterated that, from the outset, the government—by and through the United States Attorney—took the position that: "The government would recommend a sentence no higher than the low-end of a guideline range *and you* [defense counsel] *would be free to recommend any sentence authorized by the statute (0-10)*." (Emphasis supplied). "Fair play"—or "turning square corners"—would absolutely require the government to be bound by

this statement, and it is an absurdity to take the position that the defendant is free to argue for a below-guideline sentence, and then appeal the sentence because it is below the guideline range.

To be right to the point, by expressly agreeing that the defendant would be uninhibited from, and completely free to argue for a below-guideline sentence, the government waived its right to appeal. It unequivocally agreed that Boucher would be "…*free to recommend any sentence authorized by the statute (0-10)*." (Emphasis added). The government cannot, does not, and has never denied that it made this agreement. And, after a perfectly legal below-guideline sentence was announced and imposed, the government reneged on its deal by appealing the sentence.

Certiorari is warranted in order to address the issue of whether the government should be permitted to negotiate an agreement whereby the defendant is "…free to recommend any sentence authorized by the statute…", and then appeal the result when the trial court imposes a sentence that is not to the government's liking. In the same vein, the government cannot, and should not, be permitted to appeal a sentence when it expressly agrees ". . . not to oppose the defendant's request that a particular sentence or sentencing range is appropriate. . ."

The government waived its right to appeal when it cast its lot with the trial court, plain and simple, and it agreed to be bound by whatever decision that the trial court determined to be fair. For the Sixth Circuit Court of Appeals to say that only the Solicitor General controls the appellate process is a fig leaf, at best.

There is no denying that this matter involves an assault on a sitting United States Senator, who was once a candidate for the office of President of the United States. Everyone would agree that this is a serious issue, and a proper review and outcome is important for a multitude of reasons. It has been the subject of national, if not worldwide, media attention and scrutiny. It is also true that—fortunately—there have been very few criminal prosecutions under 18 U.S.C.§ 351, which is another reason why the granting of certiorari is warranted. Both the intense public scrutiny associated with this case, and so few other cases to use as a benchmark for sentencing under 18 U.S.C.§ 351, dictate that a level playing field should be afforded to *both* sides, and not lean in the favor of a United States Senator, the United States government, and all its infinite resources. A "Mulligan"[1] is sometimes allowed in a game of golf, but it should never, never, ever be permitted when a person's liberty is at stake—even when the victim is a United States Senator. This is about "a deal is a deal". It's about fair play. And it's about square corners.

When the government says to the defendant: "These are the rules…", the government should not be permitted to change the rules after the game is over in order to get a second chance at the result it desires.

1. A free shot sometimes given a golfer in informal play when the previous shot was poorly played.

2. Certiorari should be granted in order to resolve the split of authority in the federal circuits on the issue of the government's waiver its right to appeal when the defendant expressly waives his right to appeal as part of his plea agreement.

A clear split of authority presently exists within the federal courts of appeal on the issue of the government's implicit waiver of its appeal right when the defendant has waived his right of appeal. If the very same charge, guilty plea, sentencing, and resulting government appeal had been brought and decided in the United States Court of Appeals for the Fourth Circuit, the government's appeal most certainly would have been dismissed.

This Court should accept review in order to resolve the split of authority within the circuits.

Specifically, a near-identical fact pattern was presented in United States v. Guevara, 941 F.2d 1299 (4th Cir. 1991), *cert. den.*, 503 U.S. 977 (1992). In Guevara, the defendant entered into a plea agreement with the government in which she agreed to plead guilty to defrauding the Immigration and Naturalization Service under 18 U.S.C. § 1001, to committing mail fraud under 18 U.S.C. § 1341, and to the laundering of money instruments under 18 U.S.C. § 1956. She was sentenced to 28 months in prison, to be followed by three years of supervised release. The government appealed.

Within her plea agreement, Guevara waived her right to appeal. Her waiver is nearly identical to the waiver that the Petitioner executed in the matter now pending.

The 4th Circuit expressly held that the government had also waived its right to appeal, stating: ". . . [W]e are of opinion that such a provision against appeals must also be enforced against the government, which must be held to have implicitly cast its lot with the district court, as the defendant explicitly did." The 4th Circuit dismissed the government's appeal accordingly.

Subsequently, in a completely separate and unrelated proceeding, it was expressly held by the United States Court of Appeals for the Fourth Circuit in United States v. Little, (U. S. Court of Appeals for the Fourth Circuit, Case No. 99-4661, Decided July 20, 2001 (Unpublished)), that when the government takes an unauthorized appeal from a sentence (just like it has done in this case), and the defendant's attorney does not file a motion to dismiss, the lawyer's failure to do so is tantamount to ineffective assistance of counsel, thereby violating the defendant's Sixth Amendment right to counsel.

The facts of the Little case are straightforward. Bruce Little was indicted on two counts of bank robbery and bank larceny under 18 U.S.C § 2113 (a) and (b). He entered into a plea agreement in which he waived his right to appeal his sentence or other post-conviction action. His sentence was not harsh enough to suit the government, and, ultimately, the government appealed Little's sentence. Little's attorney did not file a motion to dismiss the appeal, and Little received a stiffer sentence on resentencing. Thereafter, Little retained a new attorney, who argued that the prior attorney provided ineffective assistance by failing to point out that the government was barred from appealing his sentence, and the 4th Circuit held: "The lawyer completely omitted (or missed) his best argument,

that the government had implicitly waived its right to an appeal." The court concluded that the failure of counsel to file a motion to dismiss such an appeal constituted ineffective assistance of counsel.

As it presently stands, a defendant seeking a dismissal of a governmental appeal of sentencing in the First, Sixth, and Ninth Circuit is not permitted, but a defense attorney who does not pursue a dismissal of a governmental appeal of a sentence in the Fourth Circuit is committing ineffective assistance of counsel.

In the matter *sub judice*, the government agreed to the entry of a guilty plea and stated that it would argue for a guideline-range penalty; in turn, the Petitioner agreed to plead guilty and stated he would be arguing for leniency and mercy. Both parties agreed that they would let the adversarial process play out and, in the end, *que sera sera* ("what will be will be"). Now, the government has successfully convinced the Sixth Circuit Court of Appeals that "what will be will be…*unless we don't get the result that we want*".

This, of course, is a classic example of saying that "a deal is a deal"… and then reneging on the deal. The undeniable agreement was that both sides would present their respective arguments to the trial court and leave it up to the trial court judge to impose an appropriate sentence. That is exactly what happened. The trial court did its job. Now, the government has obtained a "do over"—despite the express agreement by the government that there would be no "do overs."

The Sixth Circuit has now sided with the First Circuit and the Ninth Circuit on this issue (United States v. Anderson, 921 F.2d 335, 337–38 (1st Cir. 1990); United States v. Hammond, 742 F.3d 880, 883 (9th Cir. 2014)), but the precedent of the Guevara in the Fourth Circuit remains, and its reasoning warrants review on this issue.

3. A criminal defendant must be accorded the protections of the prohibition against double jeopardy of the Fifth Amendment and/or the Due Process protections of the Fifth Amendment when the government obtains a resentencing of him by appeal after he has already served out and completed each and every aspect of the sentence imposed.

This Court should grant certiorari to announce a holding that there is clearly (a) a double jeopardy bar, and (b) due process bar to the imposition of additional punishment through an order for resentencing by an appellate court, after the defendant has completed service of the original sentence imposed by the trial court. "The Double Jeopardy Clause is and has always been, not a provision designed to assure reason and justice in the particular case, but the embodiment of technical, prophylactic rules that require the Government to turn square corners." Jones v. Thomas, 491 U.S. 376, 387, 109 S. Ct. 2522, 2529, 105 L. Ed. 2d 322 (1989).

The Double Jeopardy Clause has two principal purposes: to "protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense," Green v. United States, 355 U. S. 184, 355 U. S. 187 (1957), and to prevent imposition

of multiple punishments for the same offense, North Carolina v. Pearce, 395 U. S. 711, 395 U. S. 717 (1969). An overriding function of the Double Jeopardy Clause's prohibition against multiple trials is to protect against multiple punishments: "[i]t is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." Ex parte Lange, 85 U. S. 173 (1874).

In Ex Parte Lange, 85 U.S. 163 (1874), the trial court sentenced the defendant to imprisonment and a fine, even though the statute permitted only imprisonment or a fine. The defendant paid the fine, which was committed to the treasury and could not be returned. See id. at 174-75. This Court held that the Double Jeopardy Clause barred subsequent correction of the sentence to include imprisonment. Once the defendant "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." Id. at 176; see also In re Bradley, 318 U.S. 50, 51-52 (1943) (sentence could not be corrected after defendant fully paid fine, which by itself constituted a lawful punishment for the offense).

This case squarely presents the question of whether the Double Jeopardy Clause sets a temporal limit on the amendment of a lawful sentence. Several federal circuit courts have indicated that an expectation of finality arises after complete service of a lawful sentence. See, e.g., United States v. Silvers, 90 F.3d 95, 101 (4th Cir. 1996); United States v. Kinsey, 994 F.2d 699, 702-03 (9th Cir. 1993); United States v. Arrellano- Rios, 799 F.2d 520, 523-24 (9th Cir. 1986); cf. Oksanen v. United States, 362 F.2d 74, 80 (8thCir. 1966). Several other courts have gone even

further and deemed lawful sentences final at some earlier point in time. See Snell v. State, 723 So.2d 105, 108 (Ala. Crim. App. 1998) (lawful sentence final after imposition); State v. Wheeler, 498 P.2d 205, 208 (Ariz. 1972) (same); United States v. Rosario, 386 F.3d 166, 169-71 (2d Cir. 2004) (lawful sentence final after commencement); United States v. Earley, 816 F.2d 1428, 1434 (10th Cir. 1987) (same); Ethridge v. State, 800 So.2d 1221, 1225 (Miss. App. 2001) (same); State v. Ryan, 429 A.2d 332, 337-38 (N.J. 1981) (same); United States v. Daddino, 5 F.3d 262, 265 (7th Cir. 1993) (lawful sentence final after release from custody); State ex rel. Hill v. Parsons, 461 S.E.2d 194, 198 (W. Va. 1995) (same).

It is clear from the cases of United States v. DiFrancesco, 449 U.S. 117 (1980) and Pennsylvania v. Goldhammer, 474 U.S. 28 (1985) that when a sentence is increased in a second proceeding "the application of the double jeopardy clause . . . . turns on the extent and legitimacy of a defendant's expectation of finality in that sentence. If a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited . . . . ." United States v. Fogel, 264 U.S. App. D.C. 292, 302, 829 F.2d 77, 87 (1987) (Bork, J.).

"There must be some limitation on the power of the trial court to enhance punishment by resentencing after the defendant's commencement of service." United States v. Lundien, 769 F.2d 981, 986 (4th Cir. 1985). Here, not only has the Petitioner commenced the service of his sentence, but he has completed and fulfilled every aspect of it. Respectfully, this case presents the opportunity to declare that a person who has completed every aspect of a perfectly lawful sentence is protected by both the Double

Jeopardy Clause and the Due Process Clause of the Fifth Amendment. Otherwise, the power of the government to send the Petitioner back to prison keeps the proverbial Sword of Damocles hanging over the Petitioner's head in perpetuity, and there will never be any finality in any given case. The Petitioner submits that if, according to case law, an expectation of finality arises near the end of a term of confinement, it must surely crystallize when the defendant has completed every aspect of his sentence.

The Fourth Circuit has opined that the Double Jeopardy Clause applies to sentencing determinations in cases where the defendant has fully suffered a lawful punishment for his crime. See United States v. Lundien, 769 F.2d 981, 984-86 (4th Cir. 1985). Likewise, The case of United States v. Arrellano-Rios, 799 F.2d 520, 523 (9th Cir. 1986) specifically holds:

> The Double Jeopardy Clause protects against multiple punishments for the same offense. DiFrancesco, 449 U.S. at 129, 101 S.Ct. at 433 (quoting North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). We need not decide at what point, in the service of a defendant's legal sentence, a reasonable expectation of finality arises. ***We are certain, however, that the expectation has arisen, and jeopardy has attached, upon its completion***. See Lundien, 769 F.2d at 985 (implying that jeopardy attaches when sentence "fully served"). This conclusion is supported by the fact that we find no cases holding that finality is not accorded to a fully served legal sentence. Accordingly, we reaffirm the rule that increasing a legal sentence after it has

> been fully served violates the Double Jeopardy Clause. Cf. United States v. Woodward, 726 F.2d 1320, 1328 (9th Cir.1983) (post-DiFrancesco case reaffirming Edick without discussing DiFrancesco), rev'd on other grounds, 469 U.S. 105, 105 S.Ct. 611, 83 L.Ed.2d 518 (1985). (Emphasis added).

Justice Scalia foresaw and described such a scenario when he opined: "[i]f, for example, a judge imposed only a 15-year sentence under a statute that permitted 15 years to life, he could - as far as the Court's understanding of the Double Jeopardy Clause is concerned - have second thoughts after the defendant has served that time, and add on another 10 years. *I am sure that cannot be done*, because the Double Jeopardy Clause is a statute of repose for sentences as well as for proceedings. Done is done." Jones v. Thomas, 491 U.S. 376 (1989) (Justice Scalia, dissenting). (Emphasis added).

Here, the Petitioner has served every bit of a perfectly legal sentence. He now faces the horrifying prospect of having to go back to prison to serve an additional sentence for the very same offense to which he pled guilty and accepted his punishment. This is simply intolerable by anyone's standards of the application of double jeopardy and fundamental principles of due process. "One of the interests protected by constitutional finality is that of the defendant to be free from being compelled to `live in a continuing state of anxiety and insecurity.'" United States v. Fogel, 264 U.S.App. D.C. 292, 303, 829 F.2d 77, 88 (1987) (quoting Green v. United States, 355 U.S. 184, 187, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199 (1957)).

Looking prospectively, it would be entirely possible that, if the Petitioner is subject to a resentencing by the trial court, and his new sentence entails a harsher penalty than he initially received—but still not harsh enough to suit the government—he could be put through the same rigamarole all over again. He could go back to prison on the new sentence, the government could attempt to obtain a resentencing through appellate review, and the Petitioner would find himself—once again—right back where he started.

This is the very reason that this Court should grant certiorari in order to declare that the double jeopardy and due process clauses of the Fifth Amendment impose a temporal limitation and bar on resentencing when a defendant has completely served out every aspect of a perfectly legal sentence.

This Court also recognized that the doctrine of collateral estoppel applies in criminal proceedings in Ashe v. Swenson, 397 U.S. 436 (1970), and explained this doctrine in the context of double jeopardy. "The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy." The court went on to hold that, if collateral estoppel is embodied in that guarantee, then its applicability in a particular case is a constitutional issue, to be determined by an examination of the record.

An examination of the record in this case undeniably reveals that the Petitioner has served every aspect of a *legal* sentence. "The rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and

archaic approach of a 19th century pleading book, but with realism and rationality." Ashe, supra. "Realism" and "rationality" would indicate that in the realm of fundamental fairness, a defendant who has completely served his sentence clearly has an expectation of finality in the prosecution of the case against him. To believe anything to the contrary is nothing short of ludicrous, as nothing would ever really be over in such a case.

Certiorari is warranted to address the issue of whether there is a temporal limitation on a court's ability to resentence a defendant—and, especially, a defendant who has served out every aspect of his sentence. It is respectfully submitted that an expectation of finality occurs when the defendant completes his sentence and has been released from custody; otherwise, as Justice Scalia observes, nothing is ever really "done".

To the Petitioner—as it is with many, many criminal defendants, the issue is not whether there will be a finding of guilt—even if it is to an amended or lesser charge in the end; rather, most defendants are more concerned with how much time they must spend in prison than with whether their record shows a conviction. This is not to say that the ordeal of a trial is not important, but the conviction is the predicate for the punishment—and oftentimes, prison time. In reality, an overwhelming number of criminal defendants are willing to enter plea bargains in order to keep their time in prison as brief as possible—and this case is no exception.

This Court certainly knows that the sentencing phase of a criminal proceeding is neither incidental, nor an afterthought. To the convicted defendant, the sentencing

phase is certainly as critical, or even more critical, than the guilt-innocence phase. Once a defendant has served out his sentence, he should not be re-exposed to a second proceeding wherein he faces the prospects of having to go back to prison to serve additional time for the same crime previously committed and resolved.

CONCLUSION

This case is both a garden-variety matter in that it involves the same type of scuffle and fracas that occurs on a daily basis around the country, and, at the same time, is unique in that this particular scuffle involves an assault on a sitting United States Senator. Again, the reason for the assault was clearly not politically motivated. It was a dispute between two neighbors over yard maintenance. But for the status of the victim, the matter would have been resolved as a misdemeanor assault charge in Kentucky state court, and there would never, ever have been any appellate review. The Petitioner agreed to plead guilty, and the government expressly agreed that the Petitioner would be free to argue for any sentence within the range permitted by law. The Petitioner received a sentence within the range permitted by law, and he then served out his sentence completely and in all respects.

Because the sentence was not harsh enough to suit the government, it reneged on its agreement and appealed. The Sixth Circuit accommodated the government's request, reversed, and remanded for resentencing.

There is something fundamentally wrong and patently unfair about this whole scenario. It appears that the government is getting a "Mulligan" for the simple reason

that the victim is a United States Senator. If Senator Paul's political opinions or political office were somehow related to the reason for the Petitioner's actions, then an entirely different outcome might have been warranted and obtained at sentencing. But this case has never been about politics or a clash of political viewpoints; rather, it was a dispute over lawn maintenance in a gated community, where one of the principals just happened to be a United States Senator.

Instead of turning square corners, there is the very real appearance that we are cutting constitutional corners in order to hand the government the result that it desires. Not only did the government waive its right to appeal by agreeing that the Petitioner would be free to argue for a below guideline sentence, but the double jeopardy and due process clauses of the 5th Amendment also provide a compelling reason for granting the writ that is requested, as the Petitioner has completely served his sentence.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED SEPTEMBER 9, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Name: 19a0232p.06

No. 18-5683

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

RENE A. BOUCHER,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Kentucky at Bowling Green.
No. 1:18-cr-00004-1—Marianne O. Battani, District Judge.*

July 31, 2019, Argued; September 9, 2019
Decided; September 9, 2019, Filed

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* The Honorable Marianne O. Battani, United States District Judge for the Eastern District of Michigan, sitting by designation pursuant to 28 U.S.C. § 292(b).

Appendix A

Before: SILER, STRANCH, and NALBANDIAN, Circuit Judges.

OPINION

JANE B. STRANCH, Circuit Judge. Senator Rand Paul was mowing his lawn when he stopped to gather a few limbs in his path. Without warning, Rene Boucher—Paul's next-door neighbor, whom he had not spoken with in years—raced toward Paul and attacked him from behind. The impact broke six of Paul's ribs, caused long-lasting damage to his lung, and led to several bouts of pneumonia. Boucher later pleaded guilty to assaulting a member of Congress in violation of 18 U.S.C. § 351(e). Although his Guidelines sentencing range was 21 to 27 months in prison, the district court sentenced him to 30 days' imprisonment. On appeal, the Government argues that Boucher's sentence was substantively unreasonable. We agree and therefore **VACATE** his sentence and **REMAND** for resentencing.

I. BACKGROUND

A. Factual Background

Paul and Boucher were neighbors. According to Paul, their relationship was unremarkable—they had not directly spoken in years, though they might wave to one another if they crossed paths on the street. From Boucher's perspective, however, problems between them began in the summer of 2017, when he decided to trim the branches of five maple trees in Paul's backyard that had

grown over the Boucher/Paul property line. Sometime shortly thereafter, Paul dropped a bundle of limbs and brush at the edge of his property, apparently in the sightline of Boucher's home. A few weeks passed and the bundle remained. Frustrated by the sight of yard debris, Boucher crossed onto Paul's property, removed the limbs and brush, and hauled them off in dumpsters.

The following month, Boucher noticed another bundle of limbs and brush in roughly the same location. He hauled it off again. A few days later, a bundle reappeared. This time Boucher did not haul it away; he poured gasoline over the debris and lit a match. The ensuing fireball caught him by surprise. The debris was burned, but so was Boucher—he suffered second-degree burns on his arms, neck, and face.

When Paul got on his lawnmower the next day, Boucher was watching him from the top of a hill overlooking Paul's property. According to Boucher, he saw Paul "blow all of the leaves from his property onto Boucher's yard." Paul then got off his lawnmower, picked up a few more limbs, and turned toward the site of the burned debris pile. While Paul had his back to the hill, Boucher ran 60 yards downhill and hurled himself headfirst into Paul's lower back. The impact broke six of Paul's ribs, including three that split completely in half. After a brief fracas, Paul left the scene and called the police.

The Kentucky State Police were the first to respond. In an interview with officers, Boucher admitted to tackling Paul but denied doing so because of Paul's politics. Instead,

he described the assault as the culmination of "a property dispute that finally boiled over."

B. Procedural History

The Warren County Attorney initially charged Boucher with Fourth Degree Misdemeanor Assault under Kentucky law. He was taken into custody for a few days, after which the FBI intervened and the state charges were dropped. The Government then indicted Boucher on one count of assaulting a member of Congress in violation of 18 U.S.C. § 351(e). Boucher pleaded guilty. His presentence report (PSR) recommended a five-level sentencing enhancement because Paul had suffered "serious bodily injuries." Boucher did not object. The five-level increase was partially offset by a three-level reduction for acceptance of responsibility, resulting in a Guidelines sentencing range of 21 to 27 months in prison.

At his sentencing hearing, Boucher called three witnesses. The first was Amy Milliken, the Warren County Attorney. Milliken testified that "many times in assault fourth cases, where . . . you're looking at someone older, [] who has ties in the community, [] who has a job, [] who is productive, [and] who has no criminal history, we have somewhat of a standard plea . . . and that would generally be 30 days in the Warren County Regional Jail." But she also clarified that misdemeanor assault charges were appropriate for only "minor" injuries, and she did not know "the extent of [Paul's] injuries" when she charged Boucher with Fourth Degree Misdemeanor Assault. Shortly after the attack, she had asked the Commonwealth Attorney

(who is responsible for filing felony charges) if he would prefer to charge Boucher with a felony. He told her that "until [they] had all the facts, . . . he wanted [her] to go ahead and issue the warrant for assault fourth" so that they could "get the defendant picked up and get the case moving." But before the Commonwealth Attorney could make a determination about felony charges, "federal prosecutors assumed [] jurisdiction" over the case.

Boucher's second witness was Jim Skaggs, one of the developers of the gated community where Boucher and Paul live. Skaggs testified that "we had absolutely no problems" with Boucher, who "always paid his homeowner's dues and kept a neat place." He had "no complaints" about Boucher as a neighbor but conceded that if he "had broken ribs, maybe [he would] feel differently about it." Boucher's final witness was Father John Thomas, the priest at his church. Thomas testified that Boucher was "a friendly, open, kind, faithful person." He recalled that Boucher had visited sick parishioners "a couple of times" and had "helped with preparation for those who [were] interested in learning more about the Catholic faith."

Boucher and his counsel also spoke. Boucher told the court that he was "sincerely sorry" for the assault, apologized to Paul and his family, offered to pay for Paul's medical expenses, and assured the court that he would "never do . . . anything like this again." He added that he would "prefer not to go to jail for this situation" and "plead[ed] for the mercy of the court and forgiveness." Boucher's counsel made a similar plea for leniency. Citing Milliken's testimony, he argued that "if anyone

else in Warren County [had gotten] involved in a scuffle over yard trash, . . . we would be in the Warren District Court" and "the resolution would be a 30-day jail sentence . . . ." Counsel also emphasized Boucher's status in the community:

> A felony conviction carries with it, Judge, a very real stigma, and maybe to some people a felony conviction isn't that big of a deal, but for a person who has become board certified in two specialties, who's 60 years old, who is a devout member of his church, who's the father of two wonderful children, and who lives in the nicest neighborhood in Warren County, by my evaluation, a felony conviction is a very real punishment in and of itself.

In lieu of live testimony, the Government responded by introducing two victim impact statements—one from Paul and another from his wife, Kelley. Paul described the extent of his injuries. Because displaced ribs "heal in a crooked fashion," "the free ends of [his] ribs grinded over top of and into each other with any movement," causing him "intense pain." He "had trouble finishing sentences for lack of air to expel," and "throughout the night [he] would pace [while] suffering from involuntary spasmodic breathing." After an attempted return to work 10 days after the assault, his "fever spiked to 102.6 F, despite being on medication to prevent fevers." He returned to the hospital for testing, and "[a] CAT scan showed pneumonia and fluid around [his] lungs." Antibiotics briefly resolved the illness, but a few weeks later "the fevers and spasmodic

breathing returned." Another trip to the hospital revealed that Paul had "recurrent pneumonia." This second bout of pneumonia cleared after another round of antibiotics, but additional scans "still show[ed] an area of damaged lung." Paul wrote that he might "be at risk for future pneumonias" and that he still suffered from "chronic lateral back pain over the ribs."

Kelley likewise testified that Boucher's assault began "a long odyssey of severe pain and limited mobility for" Paul. "A cough or hiccup would literally drive him to his knees, his face in a white grimace," and "[t]he trauma to his body caused him to suffer night sweats accompanied by uncontrollable shivering and shaking." Because Boucher remained the Pauls' next-door neighbor after the attack, Kelley said "the home and backyard [she had] loved for 23 years no longer fe[lt] like my safe sanctuary." Every time she walked in their backyard she "wonder[ed] if he [was] watching out the windows of his house."

In its closing remarks, the Government argued that Boucher's sentence should not be "about who the victim is" but should reflect "what was done to him, the physical harm, the being placed in continued fear to even be in his own backyard, [and] the apprehension of every time he sees Dr. Boucher in the neighborhood [wondering] what is going to happen." The Government also disputed Boucher's claim that he would have served only a 30-day jail sentence if the case had been prosecuted under Kentucky law, maintaining that Boucher's charge "would have been a felony" given the severity of Paul's injuries.

The district court nevertheless sentenced Boucher to 30 days in prison. The court's rationale rested primarily on two observations. First, it found that the confrontation was "strictly [] a dispute between neighbors." Although Paul said he had not spoken with Boucher in years and was aware of no tension between them, the court reasoned that "actions speak louder than words, and . . . one would know by [Boucher's] removal that [he] did not like those—that debris in [his] sightline." The court described the attack as an "isolated," "first-time action," and felt there was a "spontaneity about when it happened" that suggested Boucher would not "get [himself] involved in anything like this" again.

Second, the court announced that Boucher had an "excellent background." He was "an educated person" who had "gone by 60 years of . . . a good life from the letters that the court ha[d] reviewed" and "from the witnesses who testified," including his pastor and the developer of the gated community. The court also mentioned that Boucher had no criminal history, had served in the military, had "raised two children who [were] doing very well," and had "participated in the community in [his medical] practice and in [his] church."

After weighing these factors, the court decided that a within-Guidelines sentence would not "serve any purpose." It sentenced Boucher to 30 days in prison along with 100 hours of community service, one year of supervised release, and a $10,000 fine. On appeal, the Government argues that this sentence was substantively unreasonable.

II. ANALYSIS

A. Substantive Reasonableness

"Substantive reasonableness focuses on whether a 'sentence is too long (if a defendant appeals) or too short (if the government appeals).'" *United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir. 2019) (quoting *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018)). A substantive reasonableness challenge is not defeated by a showing of procedural reasonableness—for example, by confirming that the district court addressed each relevant factor under 18 U.S.C. § 3553(a), or even that it discussed those factors at length. *See Rayyan*, 885 F.3d at 442 ("The point is not that the district court failed to consider a factor . . . that's the job of procedural unreasonableness."); *see also Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007) (describing this error as procedural). Rather, in gauging the substantive reasonableness of a sentence, we ask whether the sentencing court gave reasonable *weight* to each relevant factor. If "the court placed too much weight on some of the § 3553(a) factors and too little on others," the sentence is substantively unreasonable regardless of whether the court checked every procedural box before imposing sentence. *Parrish*, 915 F.3d at 1047 (quoting *Rayyan*, 885 F.3d at 442); *see also United States v. Warren*, 771 F. App'x 637, 641-42 (6th Cir. 2019) (reversing upward variance, even though "the district court engaged in a thorough discussion of several factors set forth in" § 3553(a), because the district court placed too much weight on a single factor).

The district court's decision to assign more or less weight to a given factor is "a matter of reasoned discretion, not math, and our highly deferential review of a district court's sentencing decisions reflects as much." *Rayyan*, 885 F.3d at 442. If a sentence falls within a defendant's Guidelines range, for example, it "is presumed reasonable." *United States v. Christman*, 607 F.3d 1110, 1118 (6th Cir. 2010). And even if a sentence falls outside that range, it "is not per se or even presumptively unreasonable." *United States v. Borho*, 485 F.3d 904, 912 (6th Cir. 2007). In all cases, this circuit gives sentencing courts broad discretion to fashion individualized, fact-driven sentences without interference from appellate courts.

That discretion is not, however, without limit. When a defendant's sentence falls above or below the Guidelines range, we "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. That is true in part because variances from the Guidelines risk creating unwarranted disparities among similarly situated defendants nationwide. In fact, the Sentencing Reform Act of 1984—which created the Sentencing Commission and the Guidelines it promulgates—was designed to guard against those very disparities. *See Dorsey v. United States*, 567 U.S. 260, 265, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012). One role of appellate courts is to balance these competing goals—to honor the discretion afforded to sentencing courts on the one hand, and to avoid unjustified disparities on the other.

The Supreme Court has told us how to strike that balance. To avoid sentence disparities, the Guidelines provide a transparent and predictable sentencing range for defendants who fall within the "heartland" of average cases "to which the Commission intends individual Guidelines to apply." *Kimbrough v. United States*, 552 U.S. 85, 109, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007) (quoting *Rita v. United States*, 551 U.S. 338, 351, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007)). When a district court varies outside the guideline range, then, we expect the court to explain what distinguishes that defendant's case from a typical one. If the district court reasonably explains why the defendant's unique circumstances fall outside the "heartland" of cases affected by the relevant guideline, then the "court's decision to vary . . . may attract greatest respect." *Id.* But if the district court fails to distinguish the defendant's circumstances from a "mine-run case" under the applicable guideline, then "closer review may be in order." *Id.* The reason for this "closer review" is simple—the more a sentencing court strays from the Guidelines in a mine-run case, the greater the risk that the defendant's sentence will create unfair disparities.

We have applied this lesson in our own caselaw. In *United States v. Aleo*, for example, we reversed an upward variance because the district court "did not reasonably distinguish [the defendant's case] from other[s]" involving similar crimes. 681 F.3d 290, 302 (6th Cir. 2012). More recently, in *Warren*, we vacated an above-Guidelines sentence where "the only reason the court gave for [the sentence] disparity was [the defendant's] criminal record." 771 F. App'x at 641. Because "his criminal history was

already incorporated into the Guidelines-recommended sentence," the variance was "inconsistent with the need to avoid unwarranted sentence disparities." *Id.* at 642 (citation and internal quotation marks omitted).

The Supreme Court's guidance and our own precedents offer two principal takeaways. First, when a district court varies above or below the Guidelines, we "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. "The farther the judge's sentence [varies] from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) must be." *Aleo*, 681 F.3d at 302 (citation and internal quotation marks omitted). Second, in looking for that compelling justification, a key question is whether the defendant's case falls within "the 'heartland' to which the Commission intends individual Guidelines to apply." *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 351). If the district court reasonably explains why the defendant's case falls outside the heartland, then the sentence "may attract greatest respect." *Id.* But "a sentence that [varies] from the advisory range in a 'mine-run case' warrants 'closer review.'" *United States v. Herrera-Zuniga*, 571 F.3d 568, 582 (6th Cir. 2009) (quoting *Kimbrough*, 552 U.S. at 109).

Here, the district court sentenced Boucher to 30 days' imprisonment, though his Guidelines range was 21 to 27 months. That represented an eight-step decrease in

Boucher's total offense level[1] and a 95% reduction from the lowest end of his recommended sentence. Although we do not reduce substantive reasonableness review to "a rigid mathematical formula," *Gall*, 552 U.S. at 47, the size of the variance remains relevant to our analysis. *See id.* at 50 ("We find it uncontroversial that a major [variance] should be supported by a more significant justification than a minor one."). The question, then, is whether the district court gave a "sufficiently compelling" reason for the dramatic downward variance in this case. *Id.*

B. The § 3553(a) Factors

1. The Nature and Circumstances of the Offense

The nature and circumstances of Boucher's crime do not lift this case "outside the 'heartland' to which the Commission intends [the assault guideline] to apply." *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 351). After summarizing the history of this yarddebris controversy, the district court reasoned that the conflict between Paul and Boucher was simply an apolitical "dispute between neighbors." Although a defendant's motive is a relevant— and often important—factor under the Guidelines, Boucher's lack of *political* motivation does not meaningfully distinguish his offense from a mine-run assault case under federal law. The relevant guideline, USSG § 2A2.2, covers a range of assault crimes,

1. Boucher's total offense level was 16. The highest offense level to include a one-month sentence is an offense level of 8, which has a recommended sentencing range of zero to six months' imprisonment. *See* USSG ch. 5, pt. A, Sentencing Table.

not just those involving political figures. This guideline also applies, for example, to certain assaults "within the special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 113, and to "assaulting, resisting, or impeding" federal officers, 18 U.S.C. § 111. Assault cases under either of those statutes will rarely involve a political motive, but they will frequently fall within the heartland of § 2A2.2. Apart from Boucher's apolitical motivation, the district court never differentiated his attack from a garden variety assault case under the Guidelines. *See Herrera-Zuniga*, 571 F.3d at 582.

While the district court focused heavily on the isolated, apolitical nature of the dispute, it gave little weight to "the need for the sentence imposed . . . to reflect the seriousness of [Boucher's] offense." *See* 18 U.S.C. § 3553(a)(2)(A). The court did not address Paul's six broken ribs, his damaged lung, his bouts of pneumonia, or his chronic pain.[2] And although the court briefly recognized that Boucher's "sentence should not . . . diminish the seriousness of the harm that was caused to the senator," it did not explain why Boucher's 30-day sentence accounted for the severity of Paul's injuries. Summary reference to "the seriousness of the harm," without tying that harm to the 30-day sentence imposed, was not enough. *See, e.g., United States v. Peppel*, 707 F.3d 627, 635-36 (6th Cir. 2013) (noting "that a district court must explain how a sentence comports with the level of seriousness of the crime committed,"

2. The court did allude to Paul's "five or six broken ribs" when questioning Milliken earlier in the sentencing hearing. But it did not discuss Paul's injuries during its application of the § 3553(a) factors.

and faulting the court for merely "acknowledg[ing] the seriousness of the offense in broad terms" without "explain[ing] why the [defendant's sentence] was sufficient to reflect the seriousness of [his] crimes").

2. Deterrence

Closely related to the seriousness of Boucher's assault is "the need to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). This factor includes two components—specific deterrence and general deterrence. Specific deterrence looks to dissuade an individual defendant from committing future crimes, while general deterrence aims to have the same effect on "the population at large." *United States v. Camiscione*, 591 F.3d 823, 834 (6th Cir. 2010).

The district court fairly weighed the need (or lack thereof) to deter Boucher from committing other crimes. As explained, the court found that Boucher's attack was an "isolated," "first-time action," and considered it unlikely that he would "get [himself] involved in anything like this" again. On the other hand, the court gave little weight to the need to promote general deterrence—even though "[c]onsideration of general deterrence is particularly important where the district court varies substantially [downward] from the Guidelines." *United States v. Musgrave*, 761 F.3d 602, 609 (6th Cir. 2014). Accepting that Boucher's attack did not appear to be politically motivated, Paul's status as a national political figure is still relevant to the broader "goals of societal deterrence" served by Boucher's sentence. *United States v. Davis*, 537

F.3d 611, 617 (6th Cir. 2008). Congress saw fit to make § 351(e) a strict liability crime in the interest of protecting our elected representatives from harm. It was the district court's responsibility to explain why those interests did not warrant a within-Guidelines sentence; but it never gave that explanation here. *See Musgrave*, 761 F.3d at 609 ("Where a district court's view of a particular crime's seriousness appears at odds with that of Congress and the Sentencing Commission, we expect that it will explain how its sentence nevertheless affords adequate general deterrence.").

3. History and Characteristics

The district court also commended Boucher's "excellent background." It spotlighted his education, medical practice, reputation in the community, involvement in his church, lack of criminal history, military background, and two children who "are doing very well." In its "Statement of Reasons" submitted after sentencing, the court repeated that Boucher was "a 60 year old highly educated medical doctor, Army veteran, father, church member, and good standing community member with no criminal history."

While these factors might distinguish Boucher from a mine-run defendant convicted of assault, they are almost all disfavored as grounds for a below-Guidelines sentence.[3] Congress has instructed the Sentencing Commission

3. The lone exception is Boucher's military service, which "may be relevant" under the Guidelines if it is "present to an unusual degree." USSG § 5H1.11. That was arguably the case here—Boucher served in the Army for eight years and achieved the rank of Major.

to "assure that the guidelines and policy statements, in recommending a term of imprisonment . . . reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(e). The Guidelines' policy statements do just that. *See* USSG § 5H1.2 ("Education and vocational skills are not ordinarily relevant [to a defendant's sentence.]"); *id.* § 5H1.5 ("Employment record is not ordinarily relevant."); *id.* § 5H1.6 ("[F]amily ties and responsibilities are not ordinarily relevant."); *id.* § 5H1.11 ("Civic, charitable, or public service . . . and similar good works are not ordinarily relevant."); *id.* § 5H1.1 (noting age "may be relevant" only if "present to an unusual degree"). And although a defendant's criminal record is relevant to "determining the applicable criminal history category," *id.* § 5H1.8, it is usually not a proper reason for a variance precisely because the Guidelines already take it into account. *See Warren*, 771 F. App'x at 642 (explaining that a variance based on the defendant's criminal history risks creating "unwarranted sentence disparities" between the defendant and "other offenders in the same criminal history category" (citation and internal quotation marks omitted)); *see also United States v. Kirchhof*, 505 F.3d 409, 415 (6th Cir. 2007) ("[The defendant's] lack of prior criminal history was already taken into account in calculating his guidelines range, and according to the advisory policy statements contained in the guidelines, his other personal characteristics are 'not ordinarily relevant.'" (citation omitted)).

These factors are disfavored for good reason. To prioritize a defendant's education, professional success,

and standing in the community would give an additional leg up to defendants who are already in a privileged position. Indigent defendants are less likely to impress a sentencing court with their education, employment record, or local reputation. But they are no less deserving of a reasonable and compassionate sentence. That is why Congress and the Guidelines oppose a class-based system where accumulated wealth, education, and status serve as credits against a criminal sentence. *See, e.g.*, *Musgrave*, 761 F.3d at 608 (cautioning district courts not to rely on factors that "would tend to support shorter sentences in cases with defendants from privileged backgrounds" (citation omitted)); *Peppel*, 707 F.3d at 641 ("[W]e do not believe criminals with privileged backgrounds are more entitled to leniency than those who have nothing left to lose." (citation and internal quotation marks omitted)).

This is not to say that sentencing courts are prohibited from weighing factors disfavored under the Guidelines. These factors may, for example, still "be relevant insofar as they bear some connection to permissible considerations." *United States v. Stall*, 581 F.3d 276, 289 (6th Cir. 2009). A defendant's personal or professional success after his last incarceration, while not always relevant in isolation, might demonstrate an honest effort to turn his life around. *Cf. United States v. Collington*, 461 F.3d 805, 809 (6th Cir. 2006) (citing with approval the sentencing court's discussion of the defendant's "desire to reform"). But while "the fact that a factor is discouraged or forbidden under the guidelines does not automatically make it irrelevant when a court is weighing statutory factors apart from the guidelines," Section 3553(a)(5) still "requires that

the district court consider applicable policy statements issued by the Sentencing Commission, and the Guidelines' disfavored view toward [these factors] is, therefore, relevant to our reasonableness review." *Christman*, 607 F.3d at 1119 (citations omitted). The district court did not acknowledge that Congress and the Guidelines view these factors with suspicion or explain what unusual circumstances justified relying on them here. These simple markers of privilege did not warrant an extreme variance in Boucher's case. *See id.* (holding that the district court erred by citing the defendant's "educational background and skill" as mitigating factors without identifying what "unusual circumstances" warranted reliance on those factors); *Kirchhof*, 505 F.3d at 415 ("Kirchhof offers no reason why these [disfavored] characteristics . . . are unusually relevant in his case.").

4. Unwarranted Sentence Disparities

The last key factor is the need to avoid unwarranted sentence disparities. *See* 18 U.S.C. § 3553(a)(6). This consideration touches on all of the § 3553(a) factors discussed above—the better the district court's explanation for its individualized, fact-driven sentence, the lesser the risk that the sentence will create unjustified disparities. But if the district court gives unreasonable weight to one or more of these factors, the danger of unwarranted disparity increases in tandem. *See Peppel*, 707 F.3d at 639-40; *see also United States v. Henry*, 545 F.3d 367, 386-87 (6th Cir. 2008) ("In sum, there is no means for judges [to] avoid such disparities in the first instance, or correct them on review, without demanding that substantial variances be

supported by substantial reasons." (citation and internal quotation marks omitted)).

We first distinguish between disparities that matter and those that do not. At sentencing, Boucher urged the court to consider the 30-day sentence that first-time offenders may receive when they plead guilty to Fourth Degree Misdemeanor Assault under Kentucky law. Although the court gave Boucher a 30-day sentence, it did not say that it had calculated Boucher's prison term by reference to the sentence he might have received under Kentucky law. At any rate, "it is impermissible for a district court to consider the defendant's likely state court sentence as a factor in determining his federal sentence." *United States v. Malone*, 503 F.3d 481, 486 (6th Cir. 2007). Because state courts may sentence defendants according to their own criteria without reference to the Guidelines, permitting federal courts to rely on state-court criteria would "enhance, rather than diminish, disparities" among similarly situated federal defendants. *Id.* And even if consideration of Boucher's potential Kentucky sentence were proper, the Warren County Attorney testified that misdemeanor assault charges are appropriate for only "minor" injuries, and she did not know "the extent of [Paul's] injuries" when she initially charged Boucher with Fourth Degree Misdemeanor Assault. The Commonwealth Attorney's review of the case was incomplete when federal agents intervened. It is clear that Paul's injuries—which included six broken ribs, a damaged lung, bouts of pneumonia, and chronic back pain—were more than minor.

The only disparities relevant in this case are those among federal defendants on a national scale. In its submission to the district court before sentencing, the Government cited over a dozen examples of defendants sentenced for assault under federal law. Only three of those cases involved violations of the statute at issue here, 18 U.S.C. § 351(e). In the first two, each defendant received a 30-day sentence for throwing eggs at a congressman during a campaign event (the eggs missed). *See United States v. Guerrero*, 667 F.2d 862, 864-65 (10th Cir. 1981); *United States v. Calderon*, 655 F.2d 1037, 1038 (10th Cir. 1981). In the third, the defendant received a 15-day sentence for spitting on a senator at an airport. *See United States v. Masel*, 563 F.2d 322, 322-23 (7th Cir. 1977). These prison terms were similar to Boucher's, but the offense conduct was quite different—as the Government argues, "it is difficult to understand why a tackle resulting in long-term serious injuries warrants the same sentence as an egg toss or spit in the face." While that is true, those three cases occurred roughly 40 years ago, before the Sentencing Commission or the Guidelines even existed. Their age and limited number make them less helpful to our analysis.

The more telling comparators are in cases drawn from other federal assault statutes. The Government cites, for example, several cases involving "assault resulting in serious bodily injury within U.S. territorial jurisdiction," 18 U.S.C. § 113(a)(6), and others involving "assaulting, resisting, or impeding" federal officers, 18 U.S.C. § 111. Some of these defendants had lengthy criminal records, making their sentences irrelevant. *See* 18 U.S.C. § 3553(a)

(6) (noting that courts should "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"). But others involved defendants who, like Boucher, had a criminal history category of I. Three occurred on Native American reservations and resulted in sentences of 48 months, 41 months, and 43 months, respectively. *See United States v. Barrera*, 628 F.3d 1004, 1006 (8th Cir. 2011); *United States v. Ravensborg*, 776 F.3d 587, 587-88 (8th Cir. 2015) ; *United States v. Sayers*, 580 F. App'x 497, 498 (8th Cir. 2014). In the remaining two, one defendant received a 24-month sentence for pushing a door into the arm of a government doctor, *see United States v. Clayton*, 615 F. App'x 587, 588-91 (11th Cir. 2015), and the other received a 21-month sentence for giving a customs officer a bloody nose and ear during a "brief melee" on a cruise ship. *United States v. Gutierrez*, 745 F.3d 463, 466-69 (11th Cir. 2014).

National statistics tell a similar story. *Cf. United States v. Stock*, 685 F.3d 621, 629 n.6 (6th Cir. 2012) (explaining that national sentencing data released by the Commission should serve as "a starting point for district judges in their efforts to avoid unwarranted sentence disparities") (citation and internal quotation marks omitted). The most recent Commission data shows that federal defendants with a criminal history category of I who were convicted of assault received an average sentence of 26 months' imprisonment and a median sentence of 21 months. *See* U.S. Sentencing Commission, Length of Imprisonment for Offender in Each Criminal History Category by Primary Offense Category, Table 14 (2017), https://isb.ussc.gov/api/repos/:USSC:table_xx.xcdf/generatedContent?table_

num=Table14. And those with the lowest criminal history category who were sentenced under the guideline at issue here, § 2A2.2, received an average sentence of 37 months' imprisonment and a median sentence of 27 months. *See* U.S. Sentencing Commission, Length of Imprisonment for Offender in Each Criminal History Category by Primary Sentencing Guideline, Table 14G (2017), https://isb.ussc.gov/api/repos/:USSC:table_xx.xcdf/generatedContent?table_num=Table14G.

Despite these comparators, the district court failed to address the risk of sentence disparities. Of course, a sentence may be substantively reasonable even when the court does not squarely address this factor. *See Gall*, 552 U.S. at 54 (suggesting we may infer that the court considered this factor if the record otherwise shows that it "carefully reviewed the Guidelines range"). But the risk of disparity is more acute in mine-run cases like this one. And that risk intensifies when the defendant receives a sentence well outside the Guidelines range. The unremarkable nature of this case—coupled with the court's substantial variance from the Guidelines—warranted a more careful discussion about the relationship between Boucher's sentence and the danger of unjustified disparities.

III. CONCLUSION

In a mine-run case like this one, we apply "closer review" to any variance from the Guidelines. *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 351). And our review here reveals no compelling justification for

Boucher's well-below-Guidelines sentence. *Gall*, 552 U.S. at 50. Boucher may or may not be entitled to a downward variance after the district court reweighs the relevant § 3553(a) factors, and it is the district court's right to make that decision in the first instance. *See United States v. Johnson*, 239 F. App'x 986, 993 (6th Cir. 2007) ("This Court takes no position on what an appropriate sentence in this case might be and notes that on remand the district court still retains ample discretion to grant a variance. . . . The narrow reason for remand here is that the extreme nature of the deviation, without a correspondingly compelling justification, resulted in a substantively unreasonable sentence."). We therefore **VACATE** Boucher's sentence and **REMAND** for resentencing.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED SEPTEMBER 26, 2018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Name: 18a0218p.06

No. 18-5683

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

RENE A. BOUCHER,

Defendant-Appellee.

September 26, 2018, Decided
September 26, 2018, Filed

Appeal from the United States District Court for the Western District of Kentucky at Bowling Green. No. 1:18-cr-00004-1—Marianne O. Battani, District Judge.[*]

Before: NORRIS, SILER, and SUTTON, Circuit Judges.

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[*] The Honorable Marianne O. Battani, United States District Judge for the Eastern District of Michigan, sitting by designation pursuant to 28 U.S.C. § 292(b).

Appendix B

ORDER

SUTTON, Circuit Judge. Rene Boucher pleaded guilty to assaulting a member of Congress. The government sought a 21-month sentence, at the low end of Boucher's guidelines range. The district court instead sentenced Boucher to thirty days' imprisonment. The government appealed.

Boucher moves to dismiss the appeal, contending that the plea agreement bars the government from appealing the sentence. That is a new question for us. But two rules of thumb about plea agreements provide the answer. One is that the government by statute has the right to appeal a defendant's sentence on a number of grounds. *See* 18 U.S.C. § 3742(b). The other is that plea agreements amount to contracts and may be construed to give up only those rights one party or the other has agreed to waive in the written agreement. *United States v. Bowman*, 634 F.3d 357, 360 (6th Cir. 2011); *see United States v. Benchimol*, 471 U.S. 453, 456, 105 S. Ct. 2103, 85 L. Ed. 2d 462 (1985) (per curiam).

In this instance, the plea agreement says nothing about waiving the government's right to appeal. It mentions only Boucher's waiver of his right to appeal. That is all anyone needs to know to conclude that the agreement does not waive the government's statutory right to appeal. Just as we would not infer that a defendant has waived his right to appeal in the context of an agreement that waived only the government's right to appeal, we must do the same in the other direction.

Nor can the defendant realistically maintain that no consideration supports *his* appeal waiver. The prosecutor agreed to seek a 21-month sentence and recommend an acceptance-of-responsibility reduction in return for the agreement, and kept that promise. And nothing requires the government or the court to break down each promise and connect it to an item of consideration. *United States v. Hare*, 269 F.3d 859, 861-62 (7th Cir. 2001). One other thing. United States Attorneys have no right to control appeals *by the government*. That authority rests with the Solicitor General of the United States. 28 C.F.R. § 0.20(b); *see Hare*, 269 F.3d at 861.

United States v. Guevara, 941 F.2d 1299, 1299-300 (4th Cir. 1991), it is true, reached the opposite conclusion. It held that a plea agreement's waiver of the defendant's appellate rights implied a like waiver of the government's appellate rights. The Fourth Circuit offered no support for this unusual interpretation. And several members of the court expressed doubt about it. *See United States v. Guevara*, 949 F.2d 706, 706-08 (4th Cir. 1991) (Wilkins, J., with Wilkinson, Niemeyer, and Luttig, J.J., dissenting from denial of rehearing *en banc*).

We side with the other circuits, who follow customary interpretive principles about agreements, accepting waivers when waivers are made and denying waivers when waivers are not made. *See United States v. Anderson*, 921 F.2d 335, 337-38 (1st Cir. 1990); *Hare*, 269 F.3d at 861-62; *United States v. Hammond*, 742 F.3d 880, 883 (9th Cir. 2014). Yes, the government must "turn square corners" in its own conduct. *Heckler v. Comm'y Health Servs. of*

Crawford Cty., Inc., 467 U.S. 51, 61 n.13, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984) (quotation omitted). But that does not mean it must take turns to which it never agreed.

Moving from the language of the agreement, Boucher argues that the government promised orally not to appeal his sentence. As support, he points to a pre-plea communication from the Assistant U.S. Attorney indicating that defense counsel would be free to recommend any authorized sentence, as well as language from the presentence report that Boucher reads as an agreement not to oppose defense counsel's recommended sentence. But neither source constrains the government's right to appeal or its arguments on appeal. On top of that, the written plea agreement "supersede[s] all prior understandings, if any, whether written or oral, and cannot be modified other than in writing signed by all parties or on the record." R. 5 at 9. All of this takes us back to bedrock contract and plea agreement principles: The "determinative factor in interpreting a plea agreement is not the parties' actual understanding of the terms of the agreement; instead, an agreement must be construed as a reasonable person would interpret its words." *United States v. Moncivais*, 492 F.3d 652, 663 (6th Cir. 2007). Whatever Boucher may have believed, the four corners of the plea agreement restrict his appellate rights, not the government's or anyone else's.

For these reasons, we deny Boucher's motion to dismiss and deny as moot his motion for oral argument.

Appendix B

ENTERED BY ORDER OF
THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX C — TRANSCRIPT OF SENTENCING HEARING OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY, BOWLING GREEN DIVISION, DATED JUNE 15, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

Case No. 1:18-CR-00004-MOB

UNITED STATES OF AMERICA,

Plaintiff,

VS.

RENE A. BOUCHER,

Defendant.

June 15, 2018

Bowling Green, Kentucky

TRANSCRIPT OF SENTENCING HEARING
BEFORE HONORABLE MARIANNE O. BATTANI
UNITED STATES SENIOR DISTRICT JUDGE

[2](Begin proceedings in open court at 10:07 a.m.)

Appendix C

DEPUTY CLERK: Case Number 1:18-CR-4, *United States of America v. Rene Boucher*. We're here this morning for a sentencing hearing.

THE COURT: Good morning. May I have your appearances, please.

MR. SHEPARD: Assistant United States Attorney Brad Shepard on behalf of the Government, Your Honor. Seated with me at counsel table is Special Agent Kenda Bryant of the Federal Bureau of Investigation. Good morning.

THE COURT: Defense.

MR. BAKER: Good morning, Your Honor. My name is Matt Baker. I practice law here in Bowling Green. I'm here for the defendant, Rene Boucher.

THE COURT: Okay. All right. If you would please come to the podium with your client, Mr. Baker.

Dr. Boucher, did you review the presentence investigation report?

THE DEFENDANT: Yes, ma'am.

THE COURT: And did you go over it with your attorney?

THE DEFENDANT: Yes, ma'am.

THE COURT: And, Mr. Baker, I don't have any objections to the report; is that correct?

MR. BAKER: That is correct, Your Honor.

THE COURT: Okay. The report indicates that the [3]guideline provisions are 21 to 27 months, and the plea agreement is 21 months; is that correct?

MR. BAKER: Yes, ma'am.

THE COURT: Okay. And the Government has no objections to the presentence report?

MR. SHEPARD: That is correct, Your Honor.

THE COURT: All right. Then we're ready to proceed with sentencing.

Mr. Baker, do you wish to proceed first? You have some witnesses, you indicated?

MR. BAKER: Yes, please.

THE COURT: Okay. Doctor, you may sit down while this is going on.

THE DEFENDANT: Thank you, ma'am.

THE COURT: You may call your first witness.

MR. BAKER: Your Honor, in my prior submissions

to the court, I indicated there would be more witnesses than will actually be here today. I'll have three and my client would like to make a short statement.

THE COURT: All right.

MR. BAKER: So if I could call my first one, please.

THE COURT: You may.

MR. BAKER: Call Amy Milliken, please.

THE COURT: Okay. Amy, your last name?

THE WITNESS: Milliken.

[4]THE COURT: Milliken?

THE WITNESS: Milliken, M-I-L-L-I-K-E-N.

THE COURT: We had a governor in Michigan, Milliken. Is that --

THE WITNESS: I'm sorry?

THE COURT: We had a governor in Michigan, Milliken. Is that a relation?

THE WITNESS: I saw that. It is not, but I did, I saw that.

THE COURT: Thank you.

Appendix C

(AMY MILLIKEN, called by the defendant, sworn.)

DIRECT EXAMINATION

BY MR. BAKER:

Q. State your name, please.

A. Amy Milliken.

Q. Where do you live?

A. Here in Bowling Green.

Q. Ms. Milliken, what is your job or your profession, please?

A. I'm the Warren County attorney.

Q. What is a Warren -- what is the Warren County attorney? What is the county attorney?

A. The county attorney is an elected official here in Kentucky. I'm a constitutional officer. I'm in charge of all the prosecution in District Court here in Warren County. I prosecute misdemeanors, juvenile, public offenders. I handle [5]all the family court dependency, abuse, and neglect cases. I handle all the child support in Warren County. I represent the Warren Fiscal Court and all of its entities.

Q. You wear a lot of hats?

Appendix C

A. I wear several hats.

Q. And one of those hats is being the chief prosecutor for, essentially, misdemeanor offenses in District Court?

A. That is correct.

Q. Do you have a staff?

A. I do.

Q. How many attorneys are working within your office?

A. I have eight attorneys.

Q. And do those attorneys assist you in the prosecution of those misdemeanor cases?

A. Every day, yes, sir.

Q. And there are three district judges?

A. Three district judges.

Q. How long have you been the county attorney?

A. Since -- I have been there for 14 years, since 2004. I have been in the office since 1996.

Q. You were an assistant?

A. Yes, sir.

Q. And then Mr. Caudill left that office, and you ran in the next election?

A. I did, yes.

[6]Q. Currently on the ballot?

A. Currently on the ballot for November.

Q. Unopposed?

A. Unopposed, best way to run.

Q. All right. Ms. Milliken, last November 3rd, did you – were you working on that day?

A. I was.

Q. I believe it was a Friday.

A. It was a Friday. I remember that day.

Q. Did you receive word that there had been an incident in the Rivergreen subdivision?

A. I did.

Q. Tell the court what you remember about that intake or that word.

A. It was a Friday afternoon and I was actually trying to leave work early and it did not happen. I happened to

actually stay late that day. And one of my new assistant county attorneys came to me and said, "I'm concerned about a case. It's an assault fourth out at Rivergreen, and I -- would you mind to stay when the trooper gets here?" And I said I would.

The trooper came. It was Trooper Weaver with the Kentucky State Police. I know him and he and I sat down and discussed the case.

Q. Did you learn the identity of what was to be the defendant?

A. Yes. He was a little sketchy at first on the name, but, [7]yes, I did learn not only the defendant but also the victim.

Q. The defendant is Dr. Rene Boucher?

A. Yes.

Q. And the victim was Senator Rand Paul?

A. Correct.

Q. Did the trooper indicate to you that he had taken an interview from the senator?

A. Yes, I believe he did, because I wouldn't prosecute without talking to both parties so, yes.

Q. And that he had interviewed Dr. Boucher?

A. Yes.

Q. And based upon the trooper's investigation, at least at that point, at that moment in time, if you will, did you and the trooper follow up with a warrant?

A. We did. We issued a warrant for assault fourth.

Q. What is assault fourth degree?

A. It is a Class A misdemeanor in Kentucky. It's the highest level of crime that I prosecute in District Court.

Q. A Class A misdemeanor is -- maximum punishment is what?

A. One year in jail.

Q. One year in the county jail?

A. Correct.

Q. The warrant was issued; correct?

A. Yes, correct.

Q. I think all the lawyers in the room know how that process [8]works, but do you have to contact a judge to get that done?

A. You do. We now have e-warrants, which makes it much easier. I can email the information to the judge, but I try

to contact the judge to let them know this is an emergency. You need to go ahead and look at this, because sometimes they don't always look at their emails on e-warrants.

And I contacted the on-call judge, but I don't believe -- if memory is correct, I don't believe I could get in touch with the on-call judge. I called a second judge, who agreed to initially sign it and then thought better of it, based on the victim and maybe the notoriety, and called back and said, "Find the on-call judge," so we did. We found the on-call judge.

Q. The on-call judge was Judge Brent Potter?

A. I believe so.

Q. And did you also conference the matter with the commonwealth attorney?

A. I did. I contacted the commonwealth attorney just because I wanted him to know the facts of the case, to see if he would rather step in and take the case, rather than me prosecute the case. And he indicated that until we had all the facts, until everything shook out, he wanted me to go ahead and issue the warrant for assault fourth. We would go ahead and get the defendant picked up and get the case moving.

Q. All right. So to the best of your knowledge, was the warrant issued?

[9]A. The warrant was issued, yes, it was.

Q. Was it served?

A. It was served.

Q. And was Dr. Boucher taken into custody?

A. He was taken into custody and I think maybe remained that weekend.

Q. I think that's right.

A. Okay.

Q. Was there an arraignment in the Warren District Court?

A. There was.

Q. You probably remember the paparazzi that day.

A. I do.

Q. In Judge Brent Potter's court?

A. I do, yes.

Q. And so at some point, the offices of the United States Government, the federal prosecutors assumed the jurisdiction --

A. They did.

Q. -- of these proceedings. Was the matter in the Warren District Court ultimately dismissed and without prejudice?

A. It was and that's protocol when another -- when the federal court takes it.

Q. Ms. Milliken, the reason I wanted you to be here today is to simply develop one or two points for the benefit of my client and the court. If the prosecution of a fourth degree assault goes forward in the Warren District Court, and if such a [10]prosecution has the basic or the essential facts that were presented to you in this case, and if the defendant is willing to resolve that by a plea agreement, and the defendant does not have a criminal history, and he's 60 years old, does your office have sort of a standard plea offer that they are willing to make?

A. I try to tell everyone I treat everyone the same and every case is unique. What we do is we do look at criminal history, the age of the defendant, whether or not we can -- you know, as county attorney, when you represent the county, you represent the jail -- excuse me -- and I know that everyone I put in jail under the county's -- I call it "the county's dime" -- I know that the county tax payers are paying for that. So I'm constantly looking for alternative sentencing. Can I mediate between two neighbors? Can I do that? Can I send them to someone to do that? Can I fix the situation, rather than just jail someone immediately?

Jail is not the first thing I think of in District Court. Sometimes treatment is necessary, whether it be alcohol or drug treatment. I know that's not the case here, but

I'm saying that to tell you every case is unique, and I try to do what's best in every situation.

Many times in assault fourth cases, where you have someone who is not 20 years old who may go assault again immediately as soon as I let him or her out, you're looking at someone older, [11]someone who has ties in the community, someone who has a job, someone who is productive, someone who has no criminal history, we have somewhat of a standard plea -- excuse me -- and that would generally be 30 days in the Warren County Regional Jail probated for a year on condition they have no other criminal offenses, that they stay away from the party that they've assaulted, unless there's mediation necessary.

Sometimes I will like, again, refer them to treatment. And so I try to fix the situation, because a lot of times in District Court in Warren County, there are just issues that can be resolved and not merely settled in the courtroom. I try to fix it.

MR. BAKER: Your Honor, those are all my questions. Thank you.

THE COURT: I have a question.

THE WITNESS: Yes, ma'am.

THE COURT: Does the injury to the victim come into play or consideration?

THE WITNESS: Absolutely. And that may change the level of the crime. I just prosecute misdemeanors and assault fourth is a minor injury.

THE COURT: Assault fourth is what?

THE WITNESS: Is a minor injury.

THE COURT: All right.

THE WITNESS: Does that answer your question, Your [12]Honor?

THE COURT: In this case we have five or six broken ribs. Is that a minor injury in your litigation?

THE WITNESS: Well, I tell you what I would do, if a victim believes that their injury is more than a minor injury -- because I'm not a physician, but if they say that's more than a minor injury, what I would do is refer that to the commonwealth attorney, because in Kentucky the commonwealth attorney prosecutes felonies and that's the next level after my misdemeanor.

And, generally, what the commonwealth attorney would do is present that to the grand jury and let the -- let the 12 grand jurors make a determination whether or not it's a substantial injury or a minor injury and whether or not it would be a misdemeanor or a felony.

THE COURT: Okay.

THE WITNESS: Thank you.

THE COURT: Mr. Shepard.

MR. SHEPARD: Well, Your Honor, you kind of stole my thunder. That's pretty much exactly where I was --

THE COURT: Sorry.

MR. SHEPARD: -- where I was going.

CROSS-EXAMINATION

BY MR. SHEPARD:

Q. Just to kind of expound upon that point, Ms. Milliken, if [13]you could kind of talk about the typical way a fourth degree assault or assault in general is handled in Warren County.

A. So, generally, I require that -- prior to a charge being brought in District Court, I require an investigative agency to investigate the crime, whether it's the Warren County Sheriff, Western Kentucky Police, Bowling Green Police or the Kentucky State Police.

Excuse me. I'm having --

Q. That's all right.

A. -- I had a treatment on my vocal cords the other day. So they will investigate it and they will bring the report

to me, pursuant to the investigation. I will review it and determine whether or not there's probable cause to proceed. They generally make the determination on seeing whether it's an assault fourth or assault, you know, third, second, or first.

Q. And let me stop you right there.

A. Okay.

Q. And is that typically based upon just the initial observations of what the officer sees at that time?

A. Correct.

Q. So --

A. Now, I will -- I don't mean to interrupt you, but I will tell you that if it's an assault second -- excuse me -- first, second, or third, that sometimes develops. Does that make sense?

[14]Q. Yeah, and that's exactly what I was going for. There's certain things in your KRS as an assault first and assault second that are automatically --

A. Correct.

Q. Deadly weapons used?

A. Yes.

Q. Visible broken arms, things like that?

A. Right.

Q. However -- and prior to coming today, you and I have had discussions about --

A. Yes.

Q. -- the procedures that you and the Commonwealth's Attorney's Office typically follow. Is that a fair statement?

A. Absolutely.

Q. And as I understand from those discussions, if the original on-scene assessment doesn't appear to be as severe as what later happened --

A. Right.

Q. -- the general procedure, I think as you just described, you would put, basically, an assault four warrant to get a charge. And as things develop, you would remain in contact with the Commonwealth's Attorney's Office should that initial determination of the injury prove to be not as severe as it ultimately ends up being?

A. Correct.

[15]MR. SHEPARD: Your Honor, if I could approach.

THE COURT: You may.

Appendix C

BY MR. SHEPARD:

Q. I'm showing you -- I don't have the throat mike. I'm handing you a victim impact statement which has been filed previously in this document by the victim in this case, and I'd ask you to look about two -- two-thirds of the way down --

A. On the first page?

Q. -- on the front page --

A. Okay.

Q. -- where Senator Paul begins to describe his injuries. Do you see where I'm at?

A. Yes, about -- are you -- "about an hour later chest x-rays confirmed," is that what you're --

Q. Yeah.

A. Okay.

Q. If you would read there and read through about the middle of the second page.

A. Aloud or to myself?

Q. To yourself.

A. Okay.

[Witness complying.]

A. Okay.

MR. SHEPARD: Your Honor, if I could approach.

THE COURT: You may.

[16]A. I read to right there.

Q. Okay. Now, Ms. Milliken, the extent of those injuries were not known to the officers on the scene or were they known to you on November the 3rd when you made the initial charging decision?

A. They were not.

Q. Okay. And prior to today, you've never even seen that letter which I've just showed you. Is that a fair statement?

A. I have not.

Q. Had a victim come to you with a description of injuries of this type, you just indicated that your procedure -- well, in general, the victim would describe injuries you thought were more severe, you said you would present it to the Commonwealth's Attorney's Office for consideration. Had you seen this letter and it stayed with you, would you have presented this to the Commonwealth's Attorney's Office?

A. I would have.

Q. Okay. And in fairness to both you and the Commonwealth's Attorney's Office, this assault occurred November 3rd of 2017. Is that a fair statement?

A. Yes, sir.

Q. And at about the time you and the Commonwealth's attorneys were considering what to do, federal authorities -- and at the outset it was Jo Lawless with the Western District of Kentucky and then, after they were recused, it was myself -- reached out and indicated to you that we were going to assume jurisdiction. [17]We just needed you to kind of hold on for a little bit while I got a few things run down. Is that a fair statement?

A. Yes, and I contacted -- when I contacted Mr. Cohron, who is the commonwealth attorney, that night on November 3rd, that late afternoon/early evening, he said, "This is a United States senator. You need to contact the FBI too. They need to know and you need to contact Jo Lawless."

We work a lot with Jo Lawless. I tried to contact several FBI agents, couldn't reach them. They called me back. I mean, we -- you know how it is on a Friday night to contact people, but we did speak and -- yes, but everything you said is correct.

Q. Okay. So is it fair to state neither you, nor the Commonwealth's Attorney's Office was ever able to fully make a determination if this would have remained an assault four or gone to an assault second?

A. No, because we -- once the federal government said we're taking it, we move on to our next case.

Q. So it is not a foregone conclusion by any state of the means -- or by any state that had this stayed in Kentucky state court that that fourth degree assault kind of plea that you described would have been offered in this case?

A. That's correct.

MR. SHEPARD: Thank you, Your Honor. No further questions.

THE COURT: Thank you. Anything else?

[18]MR. BAKER: Just a couple of follow-up, please, Your Honor.

REDIRECT EXAMINATION

BY MR. BAKER:

Q. Ms. Milliken, I think it goes without saying that it was not and could not have been a foregone conclusion. Everybody agrees to that.

A. Correct.

Q. And, of course, the victim impact statement that you have just been able to read a part of is a statement from May 21st, 2018.

A. Several months.

Q. So it wouldn't have been available for your consideration at least when you had the case.

A. And I believe that night they weren't even sure if he had broken ribs. I mean, you know, it was -- we knew he had maybe -- he was sore, but they didn't know -- they didn't know anything.

Q. Okay. Of course, you and everyone else in the community -- and not to diminish anything to anybody, including Senator Paul. He did go back to work on November 13th. You were aware of that?

A. I knew he went -- I knew he went back to work. I don't know the date, but I knew he went back to work, yes, sir, yes, sir. I trust you.

[19]Q. May not have the date in your mind, but -- and at some point later in November, he was -- this whole case has been the subject of some fairly intense media scrutiny. He was interviewed by Fox News and said he had not been taking any pain medication at all. I mean, you would want all of those facts, wouldn't you?

A. Absolutely, and I think the grand jury would as well. Everybody would want it, yes, sir, everybody.

Q. But in the end, the Warren District Court matter was dismissed?

A. Yes, sir.

Q. And here we are today?

A. Yes, sir.

MR. BAKER: Thank you.

THE WITNESS: Thank you.

THE COURT: All right. You may step down.

THE WITNESS: Thank you.

THE COURT: Thank you.

Your next witness.

MR. BAKER: Jim Skaggs, please.

THE WITNESS: Am I dismissed?

THE COURT: You are dismissed, yes.

(JIM SKAGGS, called by the defendant, sworn.)

DIRECT EXAMINATION

BY MR. BAKER:

[20]Q. State your name, please.

A. Jim Skaggs.

Q. Mr. Skaggs, where do you live?

A. 847 Rivergreen.

Q. And how long have you lived there?

A. Since 2002 probably.

Q. Mr. Skaggs, are you one of the developers of that Rivergreen subdivision?

A. Yes.

Q. Have you been associated with it from its beginning up until today in some form or capacity?

A. Yes.

Q. Tell the judge about that, how that development got started and a little bit about the Rivergreen subdivision.

A. I bought a farm at a master commissioner's sale and started looking for what I wanted to do with it and that was build a dream community. And I got a couple of my better friends to join me in the effort who were experts in what they did, namely paving and other things, and off we went. I did the -- most of the drawings and most of the engineering, but people like Scotty's did the paving.

Q. Some others helped with maybe some of the infrastructure, but you had a lot of the overall design and the planning and that sort of thing?

A. Yes. I was considered the managing general partner.

[21]Q. Mr. Skaggs, of course, you've already indicated you have an address on Rivergreen Drive.

A. Yes, sir.

Q. The reason I've invited you here today -- and it was an invitation. You're not here under a subpoena, are you?

A. No.

Q. The reason I've invited you here today is simply because last fall, in about early to mid November, the Louisville *Courier-Journal* reported that you characterize Rene Boucher as -- and I think your words were "a near-perfect neighbor." And the judge has been provided -- the court and the U.S. Attorney's Office has been provided a copy with that complete article, but I wanted to call you in here today to ask you to expound upon that, if you will, please.

A. Well, I was speaking for myself, and to me, we had absolutely no problems. We had one discussion over an issue prior to his building, and I had no problems with him. So that's pretty good. He always paid his homeowner's dues and kept a neat place, spoke to me on the street.

Q. Is that -- when you say that one discussion with him, was there an issue of whether or not a tree could or should be cut down?

A. That's correct, yes, sir.

Q. What was that about?

A. The ordinance, as I drew them up originally, was that no [22]tree larger than six-inch diameter could be -- could not be cut without my permission.

And there was a tree in this case that was on the Malmquist property that needed to be cut for them to construct their home, and Mr. Boucher would rather it not been cut. And I had to make a ruling and I ruled in favor of cutting the tree against Rene. That was the end of it. I thought it was the right thing to do. I did it and I stand by what I did.

Q. Sure. Would you have occasion to see Dr. Boucher in or around the neighborhood?

A. I saw him frequently as he exercised around the neighborhood and as I went in and out, and he was always friendly. And I'd roll down my window sometimes and we'd chat, and other times we'd just throw up our hand, but I don't think he was ever in my home. And I was in his home one time, and that was when my wife wanted something that his wife had.

Q. Okay. Do you have anything else you can offer the court with regard to this submission that -- or the prior statement that you made about him being a good neighbor or a near-perfect neighbor that we hadn't touched on already?

A. I was speaking for myself.

Q. I understand, I understand.

A. And I still have no complaints. You know, he's done nothing to me. If I had broken ribs, maybe I'd feel differently about it, but --

[23]Q. Sure.

A. I have -- there was no reason to complain when there was nothing to complain about, Counsellor.

MR. BAKER: I appreciate your willingness to come and visit with us this morning.

THE WITNESS: Thank you.

MR. BAKER: Mr. Shepard may have some questions for you.

CROSS-EXAMINATION

BY MR. SHEPARD:

Q. Mr. Skaggs, thank you for being here today. Did Dr. Boucher ever complain to you about Mr. Paul or brush pile on his property?

A. He mentioned it.

Q. He mentioned it?

A. I don't know if it reached the level of complaint, but he did mention it.

Q. Never asked you to do --

A. Never asked me --

Q. -- do a formal write-up or confront the Pauls about it?

A. No.

Q. All right. Did you ever confront the Pauls about his concerns?

A. I did not, I did not.

Q. Okay. As far as you know, the Pauls had no idea that there [24]was a concern that Mr. Boucher had about their property?

A. Well, I thought they -- yeah, I thought they had a concern, because he kept reiterating his concern.

Q. To you?

A. To me, yes.

Q. Okay. But not to the Pauls?

A. I have no idea what he talked to the Pauls about, but then I became noticeable and -- you know, while it wasn't bothering me, I live a mile away. To him it was -- apparently it bothered him.

Q. As far as you know, he never discussed it with them?

A. With them.

Q. With them specifically?

A. No.

Q. And did you ever discuss it with them on his behalf?

A. No.

MR. SHEPARD: Thank you very much.

THE COURT: All right. You may step down. Your next witness.

MR. BAKER: Father John Thomas please, Your Honor.

(FATHER JOHN THOMAS, called by the defendant, sworn.)

DIRECT EXAMINATION

BY MR. BAKER:

Q. State your name, please.

A. My name is Father John Thomas.

[25]Q. Father, do you have a parish here in town?

A. I am pastor of Holy Spirit Catholic Church in Bowling Green on Smallhouse.

Q. And how long have you been the parish priest at Holy Spirit?

A. I have been here since the second week of June 2013.

Q. Did you have a parish prior to that?

A. Before that I was in Madisonville for two years, before that Hopkinsville for eight years.

Q. All of those are within what we here locally know as the Diocese of Owensboro?

A. Yes, sir.

Q. And you've been a priest within the Diocese of Owensboro for how long?

A. Two weeks ago I celebrated my 25th anniversary.

Q. Congratulations.

A. Thank you, sir.

Q. Do you have a priest/parishioner relationship with Rene Boucher, Father?

A. I do, yes.

Q. Can you tell the court how it is that you got to know Dr. Boucher and how that relationship developed.

A. Sure. We actually met in 2000, 2000-2001 in a hospital elevator. We were both going to see a common friend, and because of my dress, he realized we were going to the same place. And so we met then and encountered each other a couple [26]of times over the years because of our common friend, just casual encounters.

Then when I became pastor here at Holy Spirit, I have seen Rene almost every Sunday before mass and after mass. And I do know before I was pastor that he was involved in a couple of different ministries in the parish.

Q. Did you strike up a friendship with him in your discussions with him before and after mass?

A. We always speak before and after mass, yes.

Q. And how would you describe your friendship or your relationship with him?

A. I would say that Rene is a friendly, open, kind, faithful person.

Q. You indicated that he may have been involved in some ministries within the church.

A. Uh-huh.

Q. Can you expound upon that for us.

A. Yes. I know that a couple of times he has visited sick, which is a formal ministry in our parish, and also has helped with preparation for those who are interested in

learning more about the Catholic faith. So the process is called RCIA or Rite of Christian Initiation for Adults. It's a formal program that meets once a week for a year at a time preparing individuals who are interested in becoming Catholic or just learning about the Catholic church.

[27]Q. So you became acquainted with him 15 or so years ago, and then he became one of your parishioners --

A. Yes.

Q. -- since you joined Holy Spirit?

A. Uh-huh.

Q. Father, we're obviously here today in a very important proceeding to all concerned, the Pauls, Dr. Boucher, the community.

A. Yes.

Q. Is there anything else that you can advise or inform the court of on the issues that are presented?

A. I would just add simply that just my observations of Rene, especially what I think about is before mass I see how he greets people of different cultures, different ages. I can see people he is -- definitely he is familiar with and knows well, but he's also friendly to people he doesn't know well. I just observe that.

MR. BAKER: Mr. Shepard may have some questions for you. You should answer his questions.

THE WITNESS: Yes. Thank you.

MR. SHEPARD: I have no questions, Your Honor.

THE COURT: All right. You may step down, Father. Thank you.

THE WITNESS: Thank you.

THE COURT: Mr. Baker.

[28]MR. BAKER: Your Honor, I'm sad to report that my next witness would have been Cindy Young, but her mother had a stroke last night so she's not able to be here. I don't have any more witnesses, other than Dr. Boucher, who would like to make a statement to the Court, please.

THE COURT: All right. Dr. Boucher, would you take the podium, please.

THE DEFENDANT: Thank you, Your Honor, for allowing me to make this statement. I know you're reviewing all of this information received from Mr. Shepard, Mr. Baker, and the probation and parole office. I know you have a lot of stuff to go through. I'm sorry you've had to come down here from Detroit several times to go through this. I know it's been a lot of your time and also for the court.

Most of all I want to apologize to Senator Paul and his family. What I did was wrong. I'm sincerely sorry for what I did. It's not something that I'm proud of. I'm very

embarrassed by it. I hope that he and his family will be able to someday accept my apology, if possible.

I've always tried to treat people the way I want to be treated. My father, you know, taught me The Golden Rule, and I've tried to pass that on to my children and my family. You know, November 3rd, I lost my temper and I did not behave well, and I was wrong and I'm sorry for that.

[29]I never thought I would be here in a courthouse being, you know -- you know, the center of something like this. And, you know, my mother is 93 years old and now her son is a convicted felon. For my children and family, I'm, you know, sincerely sorry for this also, for Ryan, Danielle, and my ex-wife Lisa. It's embarrassing to me to be here, never mind -- concerned about other things.

You know, if Senator Paul has any medical expenses that's been incurred, I acknowledge I'm responsible for these so that's -- I'll pay them right away if there's anything that needs to be done in that manner.

Like I said, I'm sorry for what I did to him and I know that he and his family are upset, and I just hope that someday they'll be able to forgive me. You know, I know you're quite aware that, yeah, I'd prefer not to go to jail for this situation, and that's for you to make that determination. This has, of course, been on my mind for seven months. You know, every hour of every day I think about this. So it's been stressful for me. And I truly hope that you believe this is the only time this will happen with me. I'll never do it -- anything like this again.

So I plead for the mercy of the court and forgiveness. I've done my best to be honest and cooperative with everyone. From the initial state police, the FBI, and the Capitol Police, I've tried to cooperate with everyone.

[30]I ask you for leniency. I'm sorry for this whole situation. It's been a nightmare for me and I also injured someone, and not just that he's a U.S. senator, but for me to injure anyone is not good. You know, and for that I'm truly sorry. I'm grateful your considerations.

THE COURT: Thank you.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Thank you. Counsel, do you wish to make a statement?

MR. BAKER: Your Honor, I'm prepared to make a few closing remarks. That's the extent of our proof on sentencing. I don't know if the Government has any proof in rebuttal or otherwise.

THE COURT: Let's find out. Mr. Shepard?

MR. SHEPARD: Your Honor, I could do it either by way of proffer or I could call Special Agent Bryant just for the purposes of admitting into evidence what I've marked as Government's Exhibits 1 through 4, which I believe were provided to you shortly before coming on to the bench and a copy to the defense. The documents would just speak for themselves, and I would reference them during my sentencing argument.

THE COURT: The court has the documents and without -- if there are any objections to them. Mr. Baker, have you seen these?

[31]MR. BAKER: Judge, yes, ma'am. My objection is twofold. They were received this morning at 8:30. I had not seen them before that. I have made Dr. Boucher aware of them. They're purportedly documents from his personnel file.

So my objection, first, is as to timeliness and, of course, the second is that by my cursory review of this information, it deals with some sort of incident that appears to be about 13 or 15 years old. And I just -- I just don't think that it has any relevance or any probative value, but I know the court will give those documents the weight they deserve.

THE COURT: All right. The court will receive them subject to your comments and you may address them in your argument.

MR. SHEPARD: Thank you, Your Honor.

(Government Exhibits 1, 2, 3, and 4 admitted in evidence.)

THE COURT: All right. Do you have anything else?

MR. SHEPARD: I have no substantive evidence, Your Honor, no.

THE COURT: All right. Then let's proceed with closing argument.

MR. SHEPARD: Yes, ma'am.

THE COURT: Mr. Baker.

MR. BAKER: Your Honor, in preparing my closing remarks today, I've obviously been through my file many, many [32]times, conferred with my client many, many times and have gathered up all of the evidence that we would like to submit to you, either by way of our sentencing memorandum or through witnesses or otherwise. I know you've received all that.

THE COURT: I do want to tell you I've received it, and I have reviewed the sentencing memorandum of both the Government and the defense in detail.

MR. BAKER: Yes, ma'am.

THE COURT: And I've received the victim impact statements, which I have also reviewed.

And I should ask before we go to closing, is there anything else regarding the victims? They're not here? They don't -- there's no oral statement; right?

MR. SHEPARD: That is correct. They will not be addressing the court in any fashion other than the victim impact statements, which have previously been provided.

THE COURT: And the court is considering it. Okay. Go ahead.

MR. BAKER: Yes, ma'am. And so all that is to say I'm always reluctant to what I call preach to the choir. I know you have that information, and for me to just rehash it for Your Honor, I don't think that's a very productive use of the court's time. So thank you for your consideration in your review of those materials.

I did want to highlight some of the facts for purposes of [33]developing a closing argument. And those facts, Judge, would be as follows: While this case has been pending, my client has turned 60 years old. He is a retired, board certified medical doctor. He is the father of two grown children, both of whom have traveled a long, long way to be with him today. They're in the back of the courtroom. One came in from Massachusetts. The other came in, I think, from Florida -- excuse me, California. And so they are both by his side today, and I can assure you that they wouldn't be here if they didn't love their father very, very much. I'm grateful that they were able to attend. This is a very significant day for not only them but for Dr. Boucher.

Dr. Boucher is a former Army officer. He was honorably discharged as a major in the United States Army. He served his country in Germany and he served his country for eight years honorably. He is a devout member of the Holy Spirit Catholic Church.

The founder of -- one of the founders of Rivergreen, Mr. Skaggs, has characterized him as, quote, "a near-

perfect neighbor." And I'm not making light of this, but I don't know that my neighbors would characterize me as near perfect. I don't know anybody who would maybe say that about me. I think that's high praise for Dr. Boucher.

Mister -- excuse me -- Dr. Boucher's criminal history, as I've been able to review all of the information, consists of [34]exactly one speeding ticket in Laurel County, Kentucky. And it appears that after he was issued that ticket, he promptly paid it within about three weeks and attended state traffic school.

He bears a -- in my getting to know him, I would say that he bears a calm, a quiet, and a friendly demeanor. Either by letter to the court or by live testimony, approximately 15 people in this community have attested to his good character.

And the last and certainly the most important of all, Your Honor, Dr. Boucher has expressed his sincere regret and his sincere apology, not only to this court, but to Senator and Mrs. Paul, and we hope that you'll consider that apology as you deliberate on your sentence.

Today and regardless of all the above, Dr. Rene Boucher will officially become a convicted felon when you pronounce sentence. As this court is well aware, this -- Judge, that is an indelible mark on a person. It's unerasable, absent some sort of pardon, which are obviously very scarce.

A felony conviction carries with it, Judge, a very real stigma, and maybe to some people a felony conviction

isn't that big of a deal, but for a person who has become board certified in two specialties, who's 60 years old, who is a devout member of his church, who's the father of two wonderful children, and who lives in the nicest neighborhood in Warren County, by my evaluation, a felony conviction is a very real punishment in and of itself. And so we're asking that you take that as a factor [35]and take that into account when you give your consideration on sentencing.

So having said all that, I necessarily have to segue to the proverbial elephant in the room, and that is the issue of incarceration or imprisonment.

The court is well familiar with the United States Sentencing Guidelines, far more familiar with them and has far more experience with them than I. I only step into the federal arena from time to time. You deal with these daily.

The guidelines say what they say and the Government is requesting and recommending a punishment on the low end of the guidelines, which is 21 months. We're asking that you go deeper than that and here's why:

First off, we're asking that all of the information that has been presented to you by way of extenuation and mitigation -- and I know that you have that -- we're asking that you consider it and look favorably on the evidence that we have been -- that we have provided the court.

A great deal of it was delivered to you in sentencing memoranda that were filed by the Government and on behalf of the defendant. I know that you've looked at those carefully and will consider all of it.

I don't want to retry the issue or relive the event, because I don't think that it's particularly productive, at least at this juncture. Suffice it to say that on three separate [36]occasions there was yard debris stacked on the property line between the Pauls and Dr. Boucher. Each time that debris was stacked there, Dr. Boucher cleaned it up. And the last time he cleaned it up, he made the very serious mistake of using gasoline and matches and he burned himself. The next day, the pile was being reconstructed and he lost his temper. He tackled his neighbor. His neighbor was injured and here we are.

After the event, Judge, he cooperated fully and openly and without hesitation or reservation with the Kentucky State Police, and then he cooperated fully and openly and without hesitation or reservation with the Federal Bureau of Investigations. And then at my office he was interviewed extensively by the Capitol Police, who were here in town, full, fair, and complete cooperation and responses.

If anyone could be characterized as going the extra mile or being 110 percent cooperative, that would be my client. He just has. He has never said anything that isn't so. He has waived his right to a grand jury proceeding. He has resolved this case by an information. He has tried to facilitate the resolution of this case through an expeditious negotiation and signing and entry of a plea agreement.

So we're going to ask you to accept that plea agreement and we're going to, in the end, ask for as much leniency as the court can afford.

It's important to remember that this conduct and this [37]offense was originally charged as a state law crime in the Warren District Court in Case Number 17-M-2909. The assault -- the charge was assault in the fourth degree.

Now, Judge, Dr. Boucher doesn't get to choose what forum he gets prosecuted in. The Government gets to make that choice. The Government gets to make that choice and we respect that. And the Government has made that choice in this case, and we're not in the Warren District Court and I understand that.

We're not here on a violation of KRS 508.030 and I understand that too. We are here on a violation of Title 18 U.S.C. 351(e). But my point is did Rene Boucher violate KRS 508.030? And the answer is yes. Did Rene Boucher violate 18 U.S.C. 351(e)? And the answer is yes. The critical difference is that 18 U.S.C. 351(e) applies to congressmen and KRS 508.030 applies to everybody else. We have two congressmen in Warren County, Senator Rand Paul and Congressman Brett Guthrie.

My suggestion to the court simply is this: Is that if anyone else in Warren County got involved in a scuffle over yard trash, which is what this case is about, we would be in the Warren District Court, but not just anybody was involved in this and not just anybody is the victim. Senator Rand Paul is the victim and we are in federal court.

I tried to offer some guidance and some proof to the court via our county attorney that if this case involved anyone other than a congressman, the resolution would be a 30-day jail [38]sentence probated for 12 months.

We're not asking -- we are not asking to be treated any better than anybody else. I'd just ask that Rene Boucher not be treated any worse than anyone else. This is a case over -- this is a case over a property dispute and yard trash. To be right to the point, again, Judge, we're asking for your mercy, your thoughtful deliberation, and your leniency.

I'm going to end by telling the court that back when I was in college and law school, I got one of those educations that you can't get in a classroom. I worked for an older fellow by the name of Walter Rauh in Louisville. And he was a very fine carpenter and a great guy, very talented, a true gentleman, and a perfectionist and never heard him raise his voice, never heard him say a bad word about anybody. It was just -- it was just one of those life experiences that I had the benefit of having and that I'll always have the benefit of having.

And the reason I'm telling you about that, Judge, is that whenever Mr. Rauh would be confronted with a particularly challenging aspect of whatever he was building, he would look over his shoulder and he'd say, "You know, if this doesn't work, we'll just get out a big hammer," and he would smile. And he never had to get the hammer out because he always measured very carefully and cut very precisely and everything was just beautiful when he was finished.

But the reason I bring him up is that you have been tasked [39]with a very challenging job today, and I'm hopeful that you won't reach for the big hammer. I really am. It's not the right tool for this job today, Judge.

If you're going to punish Dr. Boucher, punish him, but please, please don't pound him into submission. Please show him some mercy and some leniency.

In the end, Judge, if you reach for anything, please reach for an olive branch. When this is all over, when we all go home and this deal is done, Dr. Boucher and the Pauls are still going to be next-door neighbors. They are. They're still going to live next door to each other. And Dr. Boucher knows that the Pauls may not be ready to accept his apology today or tomorrow or even next week, but he has expressed to me on numerous occasions that he hopes that they will be willing to accept it at some point when they're ready.

In conclusion, we're throwing ourselves on the mercy of the court. And, Judge, as you're aware, justice isn't always synonymous with punishment just for the sake of punishment and it isn't always synonymous with prison. You have several alternatives available. You've got other tools in your box that you can use to fix this. They include home confinement, community service, monetary sanctions. Those are all available and we're asking, again, for your thoughtful deliberation and your leniency and your mercy as you impose the sentence. Thank you.

Appendix C

[40]THE COURT: Thank you, Counsel.

Mr. Shepard.

MR. SHEPARD: Thank you, Your Honor. If it please the Court, just two days ago I spoke with Rand Paul, the victim in this case, and he wanted to be here. This is very important to him. It's very important to his family. I'm certain that that showed through very brightly through both he and his wife's letters to the court.

But more importantly, he was concerned that his presence here would fuel the circus atmosphere that was already throughout the national and the local media surrounding this case, and he did not want what happened here today to be about him, to be about who he was. He wanted it to be about the defendant, about what the defendant did and about what happened to him. So in that sense, we do agree with one of the themes of the defendant's sentencing argument. Let's throw out the fact that he's a congressman or a senator and let's look at what happened to him.

Your Honor, you've been in front of numerous criminal cases and you're also well aware of the Department's policies as it relates to the guidelines. And there's cases where we argue for a guideline sentence because it is the policy of the Department of Justice to argue for guideline sentences and then there's cases where we argue for a guideline sentence because the guidelines get it right, and this is absolutely one of those [41]cases where the guidelines get it right.

If this were a simple assault, under the guideline we would be starting at a 14. We'd lose two points for acceptance. We would be at a 12 and we would be in Zone B and, essentially, in a prescribed sentence, which is exactly what the defendant is asking for, noncustodial, some of those more flexible options available to the court. The guidelines aren't mandatory anymore and they haven't been since 2005.

But what's important about that conclusion is it would completely ignore the full extent of the harm caused. And when you look at the harm caused, at least through the prism of the guidelines, this is a lot more serious, and this is the same guideline that applies regardless if we're on assault on a special maritime jurisdiction or if we're on assault on a protected person.

And what that means is jurisdiction is the only reason that he's a congressman is important. If this assault would have happened anywhere on federal property, this would be the same guideline based upon what was done, and that's the disparity that the Sixth Circuit in Cincinnati says is important, not the disparity between here and the District Court in Warren County, Kentucky. And then for the other reasons that I've put forth in my brief and I think that was acknowledged by Ms. Milliken, I don't believe this would have been only in the District Court. I think this would have been a felony for all the reasons I set [42]forth in my sentencing memo, and the advisory range under state law is five to ten years.

Appendix C

When you look at what happened here, it was absolutely deplorable. This was not a bar fight. This was not an argument that got out of hand, and I disagree that this was just him losing his temper. This was a vicious and unprovoked assault.

This doesn't appear to be the first time that Mr. Boucher has had issues with his temper or his anger. We've provided to the court there were instances that were documented to his employer, the letter from David McElvain, an RN, talking about impatience is the word that he used.

There's a later letter from a patient about having the mask placed on her very hard to the point of she was choking by Dr. Boucher. But most importantly is the letter from 5-18 of 2005, where a nurse describes Dr. Boucher getting so mad that he cursed in front of the patient, "Fucking piece of shit." That was the quote directly from the letter.

Later on, apparently on the same day, he's not getting in as quickly as he wants and he's shouting again, "Let's go." Most importantly at the conclusion of the letter, the nurse states, "Please keep my name out of this because I don't want my life to be a living hell for reporting it." And then she at her workplace is afraid of Dr. Boucher.

Two days later Dr. Boucher is put on notice from his employer that there had been incidents from patients, from [43]staff, and from nurses and that he had 30 days to change his behavior or he would be terminated.

If we look at the instant instance, 13 years later we've got similar problems. It's escalating behavior and maybe the scariest part, to the extent that there was a dispute, the dispute only appears to have existed in the doctor's mind, Dr. Boucher's mind.

The Pauls hadn't had a conversation with Dr. Boucher in about ten years. No one has provided any proof, not Mr. Skaggs, not throughout the letter, that Mr. Boucher ever approached the Pauls to say, "Hey, quit stacking brush on the property line," no one from the homeowner's association. The Pauls had no idea. And based upon the letter, it appears he trespassed multiple times onto their property.

It ultimately comes to a head on November 3rd, when while out enjoying his property, mowing his lawn, with no opportunity to defend himself, he got struck in the back. He's assaulted by Dr. Boucher. It was an assault in the back from about 60 yards down a hill that has a -- it's pretty steep. My agent estimated maybe even as much as 45 degrees. That's a long time to cool off and decide maybe I shouldn't do this.

It's unclear where Dr. Boucher was. I have both Exhibits 2 and 3 to the defendant's sentencing memorandum. Dr. Boucher's property, Senator Paul's property, and that X is about where the brush pile was. There's kind of a lake over here, and that is [44]the sightline that Senator Paul was looking as described in his letter.

What that means is the attack had to have come from some sort of a direction like that, if he was on his property

or if he saw it from the road. Who knows? But to come at his back, would have had to come from somewhere around there. Didn't come this way or else he would have seen it.

He had to cover a lot of ground. He got up a big head of steam and he plowed into him. That is not what civilized, educated members of our society do to one another.

And the harm caused was severe, the broken ribs, the free-floating nature of some of them, the increased pain, the continued pain from things like coughs, hiccups buckled him over sometimes. The paranoia now that both he and his wife -- or apprehension is probably a better word -- face whenever they even go out in their yard, because why would you not have such an apprehension minding his own business in his yard? He had a terrible assault already happen once. These are injuries that have possibilities, as described in the letters, of future complications.

This isn't about who the victim is. It's about what was done to him, the physical harm, the being placed in continued fear to even be in his own backyard, the apprehension of every time he sees Dr. Boucher in the neighborhood what is going to happen. Subsequent cooperation, saying I'm sorry, that doesn't [45]erase that.

One of the things that Mr. Baker said is probably the most important thing that sums up this entire case and why a prison sentence of 21 months is appropriate. At the very end, the defense asked you to extend an olive branch. Keep in mind Dr. Boucher never gave that olive branch to Senator Paul. He doesn't know what happened, what

possessed him to do this, but never once was he approached by the doctor about this being a problem and just asked him to move it.

What instead he got was a seven-month injury that he doesn't know when it's going to recur. He still has scarring on his lungs, as detailed in his letters. That's not a slap on the wrist. That's not an I'm sorry will wipe this all away. That's something that demands just punishment, and, Your Honor, we ask you to impose that today. Thank you.

THE COURT: Thank you.

All right. Doctor, would you please approach the podium with your attorney.

Today, of course, is the day that this case comes to a conclusion with the sentence. I want to state first that the court accepts the Rule 11, and the court has to fashion a sentence that is sufficient but not greater than necessary to comply with the purposes of our laws.

We know what the sentencing guidelines are, and there's nothing that I've seen that shows under the guideline commentary [46]a departure.

The court, however, notes that there can be a variance. If the court considers not only the guidelines, which are advisory to it, but also sentencing factors -- we call them 3553(a) factors. I think your attorney has gone over them with you; is that correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. So the court looks at a number of factors, and it starts out with the nature of the offense. And as has been indicated here, you're charged with assaulting a member of Congress and certainly this law has its purpose. I believe the Government mentioned in its sentencing memo that it's really a constitutional reference because it enables Congress to act without fear of repercussion, physical repercussions to them and they then can fulfill their constitutional duties.

The interesting thing in this case is I do not believe and I don't think there's any evidence -- and I was happy to hear the Government say that -- look at you, look at this as a dispute between neighbors and not because the senator is a senator. In other words, that status doesn't really make a difference in this case, because the court does not believe that you did this because of Senator Paul's political positions or political work.

I know and I mentioned this so that you are well aware that the senator believes it is -- he thinks it's political because [47]there seems to be no other reason for it. And the court looked at that to see is there some other reason for this? And though it's hard to explain, in reviewing this, I see it strictly as a dispute between neighbors. And it appears notably that the senator didn't see this dispute, but you, in fact, saw the dispute or had in your mind a dispute. You've been, what, neighbors since you moved in in 2000?

THE DEFENDANT: Yes.

THE COURT: And so the court looked at, what happened here? Why would you do this? And I don't know. In your discussion, you don't seem to know why you did this, except that you lost your temper.

The court noted the references made today in the exhibits offered by the Government about your demeanor in 2005. I'm not familiar with those incidents. I think this is so old and there's all kinds of things -- this isn't a malpractice case, but it was a demeanor case. And there was reference made to the fact by the Government that maybe your temper has escalated to this point, but I find it very interesting that was in 2005 and this is 2018. So if there's an escalation, there's certainly no note of an escalation by anybody. Therefore, I really give no consideration to those letters or reports as it relates only to this particular matter.

So the court looks at what happened here and, apparently, sir, you've had some trouble. You say you trimmed the trees in [48]the summer of 2017, even though they were doctor -- they were Senator Paul's trees, but you took care of those because they were on the property line. And then this -- the series of events started in September where you -- the senator placed a substantial amount of limbs -- I think you indicated it was something like ten feet long and five feet high. I don't know if that's an exaggeration or not, but there were limbs there and that you in fact got a dumpster -- I think maybe the second time you got the dumpster, and you removed them when there were more piles on October 10th of 2017. Then on October 13th or 14th, again, there was a pile of debris stacked and you again hauled off this debris.

It's interesting to me because you did not speak with the senator, which would have been something maybe you should have tried to do. We all recognize that, but the court also recognizes that actions speak louder than words, and I think one would know by your removal that you did not like those -- that debris in your sightline.

Again, on October 20th, it was reconstructed and what you did is -- I think then you burned the pile and you, in fact, caused yourself to suffer second degree burns on your arms, neck, and face as a result of that.

So this is the background, the building up to, I think, the temper of November the 3rd, when you saw in your eye's view the senator again putting branches in that area and then the [49]incident happened.

It's an unfortunate incident. It should not have happened. There were other ways to resolve it, but I do think it gives a buildup in your mind's view -- in your mind this is what you're seeing -- though the senator himself did not see these actions as words and did not see this attack coming.

And as far as the attack, he was certainly a -- what do I want to say? He was an innocent victim. He didn't know that you were going to do this, but it happened. So that's the nature of the offense that we're looking at here.

And then we look at your history and characteristics, and what we have is we have a 60-year-old medical doctor -- interesting that you and the senator are both medical

doctors, and we would think we'd have a more refined relationship. But as a judge, I've seen many neighborhood disputes and background doesn't seem to make a difference, to be honest.

THE DEFENDANT: Yes.

THE COURT: But you are an educated person. You apparently have had no criminal history whatsoever. There's a reference to a driving matter today, but no criminal history. You've gone by 60 years of life, of a good life from the letters that the court has reviewed, from the witnesses who testified, from your pastor who testified, from a person who lives in your neighborhood who developed your neighborhood who testified.

You have this excellent background. You've been an Army -- [50]in the Army. You've served your country for eight years. You've raised two children who are doing very well. You've participated in the community in your practice and in your church, and the court considers all of these factors.

And I look at some of the purposes of sentencing of, you know, what can we do? What do we have to do? And we looked at the seriousness of the crime. We need to promote respect -- and I think that's important -- and we need to deter you and others from committing such crimes. Certainly I know -- I firmly believe you will not get yourself involved in anything like this. And we have to protect the public, protect in this case your neighbor from situations that might endanger them.

I think, looking at everything that happened here, this appears to be abhorrent behavior. And I use that term in the general English language, not as it is reflected in the sentencing guidelines, but just this is something that is abhorrent behavior for you. It's an isolated incident. It's a first incident. It's a first-time action. There's a spontaneity about when it happened. I don't believe you planned to attack the senator.

I think the fact that you yourself suffered from a broken neck, that you would not intentionally engage in a fight that would harm yourself. It's very unlikely that it will occur again. So I consider this in your general characteristics.

So the court has several sentences and options, as your [51]attorney has indicated, that I can consider, and they go anywhere from probation to the 21 months or above, if the court so chose.

I try to have a sentence that would reflect all of the items we've talked about and also consider the seriousness, because the sentence should not in any way diminish the seriousness of the harm that was caused to the senator.

I read with great interest and really sorrow the statements of Mrs. Paul about how she would like to go out in her backyard but now she feels somewhat threatened and apprehensive. And though I don't believe you'd do anything, this is now in her eye's view, just as what was in your eye's view when you committed it.

So it's really a very sad situation, and the court -- there are other options. Home confinement. Well, that doesn't seem to be a reasonable one in this case, because that would put you right where -- right behind the senator all the time with no relief.

So considering the guidelines and considering these 3553(a) factors that we have gone over, it is the judgment of the court that you be committed to the custody of the Bureau of Prisons for a term of 30 days. I think it's essential for deterrence particularly and for punishment, plain punishment, that you have some time in the Bureau of Prisons on Count 1 of the information.

[52]Upon release from imprisonment, you'll be placed on supervised release for a term of one year. You'll abide by the standard conditions of supervised release as adopted by the court, as well as the special conditions which have been provided to you and counsel.

These are written out and given to you. I don't think I need to go over them. Counsel, would you agree with that?

MR. BAKER: I'd agree. Thank you.

THE COURT: Okay. I do have the special condition and that is that there be no intentional contact with the victim. And I put that word intentional in there specifically because I know you are neighbors, and you may run into each other in the store. You may run into each other walking in the neighborhood. You are to avoid, when at all possible, any contact whatsoever with the Pauls. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. I also am going to give you community service, because I considered greatly should you sit in prison for a year or two years? That doesn't seem to serve any purpose, but you are a highly educated man. From everything I've read in the letters, you communicate well with people when you communicate with words, and I think that you should give back to the community. And I'm, therefore, going to order that in your one year you serve or give 100 hours of community service. So that will be done over the period of a year of [53]supervised release.

And I have talked to probation and they will arrange community service. I'm thinking of something -- and I'm not saying this is it, but I'm thinking of something. You know, if there's nursing homes, even visiting with people, this could be something where you could help others. And I think that with this help of others, this would be, I would hope, also a sentence which would satisfy the senator in that you would be giving back, trying to compensate for the actions.

I'm also going to include in those conditions certain financial restrictions, because when we get to the fine -- and we have to talk about the restitution yet -- so that these financial requirements mean that basically you're not going to open up any new lines of credit, unless you're in line with paying according to the schedule that you will be given by probation, which will be approved by the court.

So the court then is ordering a fine, and I'm ordering a fine in the amount of $10,000. Any interest requirement

on the fine is waived. There's a special assessment of $100, which is due immediately.

I'd like to talk about the restitution. Have you two discussed this?

MR. BAKER: Yes, ma'am.

MR. SHEPARD: Yes, Your Honor. I indicated to Mr. Baker, even as recently as about ten minutes before we came [54]into -- before Your Honor took the bench, I made repeated requests for an amount documentation from the victim. I have yet to receive anything. I reached out again to his designated representative. He had also made the request and he indicated that at this time they're not requesting restitution in the matter.

THE COURT: They are not?

MR. SHEPARD: That is correct, Your Honor.

THE COURT: I understand that there is some litigation probably to come, because I do have a letter from an attorney, and there's civil litigation. So that is probably then left up to -- best left up to the civil litigation, and the court will not order any restitution in this case.

So, again, just to repeat, any of the financial sanctions that the court has indicated will be paid according to a schedule or forthwith, depending.

Because I believe there's a low risk of substance abuse -- I don't know of any alcohol or drug problems that

you have -- the court is not going to order that standard condition.

So having considered the guidelines and your criminal history, the 3553 factors, the court is sentencing you as stated to 30 days to the Bureau of Prisons, one year of supervised release, 100 hours of community service, and the special conditions that we've talked about.

I believe in your Rule 11 you have waived your right to [55]appeal, and there is a form for you to sign, again, acknowledging that you have waived your right to appeal.

Okay. That's signed.

THE DEFENDANT: Yes, Your Honor.

MR. BAKER: Yes, ma'am.

THE COURT: Thank you. Are there any objections to the sentence as pronounced or the special conditions, which will be incorporated in a judgment, which have not already been raised?

MR. BAKER: No, ma'am.

MR. SHEPARD: Your Honor, I don't require any further statement as to why you did what you did. I would just, for purposes of the record and for people above my head who evaluate these things, would just note the Government does object, that it feels that a 20-month variance under these facts is not reasonable as the guidelines and the case law states.

THE COURT: Okay. That is noted for the record. Your argument is noted, obviously, for the record. So it will be there for purposes that you wish.

Is there anything else? Let me ask, first of all, Probation, did I forget anything I should include here?

PROBATION OFFICER: No, Your Honor.

THE COURT: Okay. Defendant?

MR. BAKER: One housekeeping thing, Judge. It's my -- it's going to be my prediction that Mr. Shepard will probably [56]ask the court that Dr. Boucher immediately be taken into custody. I think there's some discretion there. I don't know if you want him to be taken into custody today or give him a report by date. I don't know what your practice is in this matter.

THE COURT: Are you asking for that?

MR. SHEPARD: Your Honor, the statute obviously shows that the presumption is that he be taken into custody upon given a sentence of imprisonment. The court is certainly able to find under 3142 that he has rebutted this presumption, and the Government just would stand on the presumption and ask that he do be taken into custody.

THE COURT: All right. The court has checked with probation/pretrial as to how he has -- how the doctor has been with the terms that he was on on his bond, and there's been no violations that I am aware of. He's a member of the

community. There would be no reason for him to abscond. I don't believe he's a danger at all to anyone. Therefore, the court will allow you to report when notified by the Bureau of Prisons.

MR. BAKER: Yes, ma'am, yes, ma'am. Thank you.

THE COURT: Anything else?

MR. BAKER: No, ma'am.

THE DEFENDANT: Thank you, Your Honor.

MR. SHEPARD: Nothing from the Government, Your Honor.

THE COURT: All right. Thank you very much.

[57]Wait a minute. I have one other thing I want to say. I like to say this to first-time offenders, Doctor, even though -- even though you're highly educated and you're older than most of our first-time offenders, I want to say that I know this is a heavy burden on you as a defendant to be a convicted felon, but I hope that after you serve your time and after you complete your supervised release that you can -- that you can forgive yourself and go on with your life. Okay? I hope ultimately with you that the Pauls can forgive you, but I think you have to -- you have to move on yourself. Thank you.

THE DEFENDANT: Thank you, Your Honor.

(Proceedings concluded at 11:40 a.m.)