APPENDIX

APPENDIX A

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[filed Dec. 31, 2020]

No. 19-4789

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ERICK ALLEN OSBY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Mark S. Davis, Chief District Judge. (4:19-cr-00009-MSD-LRL-1)

Submitted: December 21, 2020
Decided: December 31, 2020

Before KING and THACKER, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Geremy C. Kamens, Federal Public Defender, Caroline S. Platt, Appellate Attorney, Suzanne V. Suher Katchmar, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. Aident Taft Grano, Assistant United States Attorney, Alexandria, Virginia, Peter Gail Osyf, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Newport News, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Erick Osby appeals the 87-month sentence imposed following his jury convictions for possession with intent to distribute heroin and possession with intent to distribute cocaine, both in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). Appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that there are no meritorious grounds for appeal but questioning whether the sentencing court erred by using acquitted and uncharged conduct to enhance Osby's advisory Sentencing Guidelines range. Although notified of his right to do so, Osby has not filed a pro se supplemental brief.

We review a defendant's sentence "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). To pass muster under this review, the sentence must be both procedurally and substantively reasonable. *Id.* at 51. In determining procedural reasonableness, we consider whether the district court properly calculated the defendant's advisory Guidelines range, gave the parties an opportunity to argue for an appropriate sentence, considered the 18 U.S.C. § 3553(a) factors, and sufficiently explained the selected sentence. *Id.* at 49-51. If a sentence is free of "significant procedural error," then this court reviews it for substantive reasonableness, "tak[ing] into account the totality of the circumstances." *Id.* at 51. "Any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable." *United States v. Louthian*, 756 F.3d 295, 306

(4th Cir. 2014). "Such a presumption can only be rebutted by showing that the sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) factors." *Id.*

We discern no procedural error in the sentence. The district court properly calculated the advisory Guidelines range, responded to the parties' nonfrivolous arguments, and applied the § 3553(a) factors. Moreover, as counsel concedes, the district court's consideration of Osby's acquitted conduct at sentencing is permitted by this court's precedent. *See United States v. Grubbs*, 585 F.3d 793, 798-99 (4th Cir. 2009) ("[C]lear Supreme Court and Fourth Circuit precedent hold[] that a sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence."). We further conclude that the sentence is substantively reasonable. It fell within the Guidelines range and there is nothing in the record to rebut the presumption of reasonableness therefore accorded to it. *See Louthian*, 756 F.3d at 306.

In accordance with *Anders*, we have reviewed the entire record in this case and have found no meritorious grounds for appeal. We therefore affirm the district court's judgment. This court requires that counsel inform Osby, in writing, of the right to petition the Supreme Court of the United States for further review. If Osby requests that counsel file such a petition, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that counsel served a copy thereof on Osby.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Newport News Division

[filed Oct. 3, 2019]

UNITED STATES OF AMERICA	Case Number: 4:19cr9-001
	USM Number 93119-083
v.	
ERICK ALLEN OSBY Defendant.	Defendants' Attorney: Suzanne Katchmar Lindsay McCaslin

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty by a jury on Counts 5 and 6 of the Second Superseding Indictment after a plea of not guilty. Additionally, the defendant was found not guilty as to Counts 1, 2, 3, 4, and 7 of the Second Superseding Indictment and is discharged as to such counts.

Accordingly, the defendant is adjudged guilty of the following counts involving the indicated offenses.

Title and Section	**Nature of Offense**	**Offense Class**	**Offense Ended**	**Count**
T. 21, USC Section 841(a)(1) and T. 21, USC Section 841(b)(1)(C)	Possession with Intent to Distribute Heroin	Felony	September 27, 2018	5
T. 21, USC Section 841(a)(1) and T. 21, USC Section 841(b)(1)(C)	Possession with Intent to Distribute Cocaine	Felony	September 27, 2018	6

As pronounced on October 2, 2019, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Signed this 3rd day of October, 2019.

/s/ MSD
Mark S. Davis
Chief Judge

Case Number: 4:19cr9-001
Defendant's Name: OSBY, ERICK ALLEN

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of EIGHTY-SEVEN (87) MONTHS. This term consists of EIGHTY-SEVEN (87) MONTHS on Count 5 and a term of EIGHTY-SEVEN (87) MONTHS on Count 6, all to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

1) The defendant shall participate in the BRAVE Program.

2) The defendant shall participate in a mental health evaluation and any appropriate recommended treatment.

3) The defendant shall obtain his GED while incarcerated.

4) The defendant shall participate in the Residential Drug Abuse Program ("RDAP"), when and if defendant qualifies.

5) If not placed in the BRAVE Program, the defendant shall be incarcerated in a facility as close to the Hampton Roads Virginia area as possible.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

This term consists of a term of THREE (3) YEARS on Count 5 and a term of THREE (3) YEARS on Count 6, all to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter, as directed by the probation officer.

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

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this Judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

1) the defendant shall not leave the Judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions;

1) The defendant shall obtain a General Equivalency Diploma (GED) or a vocational skill during his period of supervision if not employed full-time.

2) The defendant shall provide the probation officer access to any requested financial information.

3) If the defendant tests positive for a controlled substance or shows signs of alcohol abuse, he shall participate in a program approved by the United States Probation Office for substance abuse, which program may include residential treatment and testing to determine whether the defendant has reverted to the use of drugs or alcohol, with partial costs to be paid by the defendant, all as directed by the probation officer.

4) The defendant shall undergo a mental health evaluation at a program approved by the United States Probation Office for mental health treatment. The defendant shall follow

all recommendations of the evaluation, which may include mental health treatment. The cost of this program is to be paid by the defendant as directed by the Probation Officer.

5) The defendant shall waive all rights of confidentiality regarding substance abuse/mental health treatment in order to allow the release of information to the United States Probation Office and authorize communication between the probation officer and the treatment provider.

6) The defendant shall have no contact with any known gang member, without first obtaining the permission of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Count	Assessment	Fine	Restitution
	5	$100.00	$0.00	$0.00
	6	$100.00	$0.00	$0.00
TOTALS:		$200.00	$0.00	$0.00

FINES

No fines have been imposed in this case.

SCHEDULE OF PAYMENTS

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

The special assessment shall be due in full immediately.

Any balance remaining unpaid on the special assessment at the inception of supervision, shall be paid by the defendant in installments of not less than $25.00 per month, until paid in full. Said payments shall commence 60 days after defendant's supervision begins.

Any special assessment may be subject to penalties for default and delinquency.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.

Since this judgment imposes a period of imprisonment, payment of criminal monetary penalties, including the special assessment, shall be due during the period of imprisonment. All criminal monetary penalty payments, including the special assessment, are to be made to the Clerk, United States District Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

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

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

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA	)	
v.	)	Criminal Action No: 4:19cr9
ERICK ALLEN OSBY, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

(Sentencing)

Norfolk, Virginia
October 2, 2019

BEFORE: THE HONORABLE MARK S. DAVIS
United States District Judge

Appearances:
OFFICE OF THE UNITED STATES ATTORNEY
By: PETER OSYF
Counsel for the United States

OFFICE OF THE FEDERAL PUBLIC DEFENDER
By: SUZANNE VICTORIA KATCHMAR
Counsel for Defendant

The Defendant appearing in person.

* * *

[3] P R O C E E D I N G S

(Proceedings commenced at 2:39 p.m. as follows:)

COURTROOM DEPUTY CLERK: In Case No. 4:19cr9, the United States of America v. Erick Allen Osby.

Mr. Osyf, is the government ready to proceed?

MR. OSYF: The United States is ready. Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Osyf.

COURTROOM DEPUTY CLERK: Ms. Katchmar, is the defendant ready to proceed?

MS. KATCHMAR: He is. Good afternoon.

THE COURT: Good afternoon, Ms. Katchmar.

Let's go ahead and administer the oath to the defendant.

MS. KATCHMAR: Your Honor, Ms. McCaslin, I believe, is still in a hearing up in Courtroom 1.

THE COURT: All right. She can join us whenever she comes.

MS. KATCHMAR: Thank you.

(Defendant placed under oath.)

THE COURT: And it is Osby; is that right?

THE DEFENDANT: Yes.

THE COURT: Osby.

[4] Okay. Let's review where we are. On May 31st, 2019, Mr. Osby was found guilty by a jury of two counts of a second superseding indictment, that was Count 5, possession with intent to distribute heroin in violation of Title 21 of the U.S. Code, Sections 841(a)(1) and

841(b)(1)(C), and Count 6, possession with intent to distribute cocaine in violation of Title 21 of the U.S. Code, Sections 841(a)(1) and 841(b)(1)(C).

At the conclusion of the trial the Court accepted the verdict of guilty and the matter was continued for sentencing.

The Court, of course, after that, received the presentence report that was prepared by the probation office of the court, and that presentence report is dated August 15, 2019, and the addendum is September 12, 2019. So I've considered that. And also I have received and read these position statements and objections. I have the defendant's objections, Document 69 on our electronic filing system; Document 70, the defendant's position on sentencing, and the government's position on sentencing, Document 71.

Also the Court notes that attached to the defendant's position on sentencing were two letters the Court has considered, one from Mr. Osby's grandmother, Pearl Osby, and one from his mother, I think it's Rene.

MS. KATCHMAR: Yes, Your Honor.

THE COURT: Rene Osby. So I've read both of those letters.

[5] MS. KATCHMAR: Thank you.

THE COURT: And all that other information that I just reviewed in preparation for today's sentencing. So that's what's before the Court.

So Ms. Katchmar, have you reviewed the presentence report and the addendum and had enough time to review it with Mr. Osby?

MS. KATCHMAR: Yes, Your Honor.

THE COURT: Other than the objections that you've filed, did you see any other errors in the report that you need to bring to my attention?

MS. KATCHMAR: No, Your Honor, they have all been corrected.

THE COURT: All right. Mr. Osby, have you reviewed the presentence report with Ms. Katchmar?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And did you have enough time to review it with her?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Other than the objections that she filed, did you see anything else in that presentence report that you need to bring to my attention?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Do you believe that this presentence report fully covers your background, Mr. Osby?

[6] THE DEFENDANT: No, sir.

THE COURT: Okay. So when I ask this question, sometimes I get that response. And what I always tell defendant's when they're in front of me is there's no way that somebody can write a 500-page biography of the person who is coming before me for sentencing. And so we ask the court's probation officers to prepare these presentence reports that review the life of the person from birth to the present time, reviews educational information, health, physical health, mental health information and prior criminal record and really covers the highlights of somebody's life. And so that's what we're trying to do, to convey—the probation office is trying to convey to the Court the things that it thinks

are important for the Court to consider in deciding how to sentence somebody.

So when I ask the question, as I do in every single sentencing, whether the presentence report fully covers your background, that's what I'm trying to get at. But if you think there's something in your background that was not included in the presentence report I'm happy to hear that from you and to consider that.

What I think we ought to do is let you talk with Ms. Katchmar before you tell me what it is you think is left out of the report or is not correctly stated in the report, all right? So why don't you all talk.

MS. KATCHMAR: Thank you, Your Honor.

[7] (Counsel and defendant conferred.)

MS. KATCHMAR: Thank you, Your Honor.

We've had an opportunity to confer outside the hearing of all the parties, and I've asked Mr. Osby if I could respond to the Court. And it's, as we often hear, which it appeared to Mr. Osby, who is not used to reading these, that it's very imbalanced. It's not fair and balanced. It seems more negative than positive. But when I asked him about his personal history and characteristics, that section regarding substance abuse and mental health, education, work history, he agrees that it hits the highlights. So it's more of a feeling versus a lack of information.

THE COURT: Okay. Mr. Osby, has Ms. Katchmar accurately summarized your position on that issue?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So before sentencing takes place, Mr. Osby, you'll have a chance to make a statement to the Court. We refer to that as allocution. And in that statement, lots of times I'll hear from defendants their

description of why they think that the Court should consider something else if it's not in the presentence report. So you are free at that time to tell me if you think there's something else that I should be considering if you think that the presentence report for some reason is imbalanced. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

[8] THE COURT: All right. So Ms. Katchmar, that's all the questions I have right now on that. And so your client can have a seat back at counsel table and I'll be happy to hear from you on objections that we may have to deal with.

MS. KATCHMAR: Your Honor, may I gather my papers—

THE COURT: You may.

MS. KATCHMAR: —which are quite in number.

THE COURT: Sure.

MS. KATCHMAR: —understanding the government bears the burden to prove then by a preponderance of the evidence, so . . .

THE COURT: Right. I just want to take up each objection and then we can address it as you see fit. But maybe we'll treat it as a shifting burden: You make the objection, and then we move on to the government's response and however we characterize that. Meeting its burden or replying.

MS. KATCHMAR: Thank you.

And I provided—I don't know if the Court would like me to mark it before I start, but I had provided Mr. Osyf as I was preparing today, I did one quick search to see if this issue had ever been raised with the Supreme Court since post *Booker*, meaning the issue of whether the Fifth and Sixth Amendments prohibit a federal court

from basing a criminal defendant's sentence on conduct underlying a charge for which the defendant was acquitted by a jury, which is one of my objections. And I [9] see that there is one, a writ of certiorari pending on that issue right now. And so I have a copy of that simply for the Court's edification, not to necessarily read, but I just wanted the Court to know that I will be raising the issue as I argue *Watts*.

THE COURT: I certainly read and considered your position paper, and I'm happy to consider anything else you wish to offer.

MS. KATCHMAR: Would the Court like me to mark it or just pass it up?

THE COURT: You can just pass it up, since it's a matter of record on the Supreme Court's docket.

MS. KATCHMAR: It's 19-107, *Osario v. United States*. It's currently penning on the issue that I raised.

THE COURT: All right.

So the objections that the Court has is, first, the defendant objects to the inclusion in the presentence report of the drugs and firearms that were the subject of Counts 1 through 4 and 7, since the jury found that the defendant was not guilty beyond a reasonable doubt on those charges. And this impacts the drug weight and the two-level enhancement for possession of a dangerous weapon. So that's one. Do you want to address that first?

MS. KATCHMAR: I think that would be best, Your Honor,

because I believe that that kind of trickles down to other

[10] issues and would be best handled first.

THE COURT: So now I've read your position papers and I'm perfectly happy to kind of take up the issues that

you raise starting with the Constitutional argument for excluding drug weight and firearm and then moving on to the factual objection to the drug weight, the standard, and then the discussion of that issue. And then I'm happy to move on to the premises enhancement, and after I address the drug and firearms that were Counts 1 through 4, and then after addressing the factual objection to the quantities from the two controlled buys on September 4 and September 27th that were not charged, just move right on through. But if you all have additional comments, I don't want to cut you off from those.

MS. KATCHMAR: Okay. And we have—just so I can make the record clear—thank you, Your Honor, I think that's a proper way to proceed and we appreciate the Court's direction.

Mr. Norton, Agent Norton is the ATF-assigned agent who just walked in. I believe that the other individual is a forensic scientist/biologist, Ms. Pollard, who came in and appears is being directed out.

THE COURT: Okay.

MS. KATCHMAR: So with—

THE COURT: So maybe you're suggesting I need to find out whether there's any evidence that's going to be presented before argument takes place? Maybe that's what I should do. Do [11] you plan to offer any evidence right now?

MS. KATCHMAR: No, Your Honor. I would only be arguing against the government providing certain evidence to the Court.

THE COURT: Okay. Mr. Osyf, are you going to have evidence today?

MR. OSYF: Your Honor, pending the Court's ruling on an issue of the DNA evidence in question that was

excluded prior to trial, if the—I believe these come under the umbrella of the acquitted and relevant conduct argument objections that defense is making. So pending the Court's ruling on that issue, we do have Ms. Anne Pollard, a forensic analyst who conducted the DNA analysis here today and is prepared to testify if the Court is going to entertain that evidence.

THE COURT: Well, that is well down my list. So let's take these up in the order that I've suggested, and when we get to that we'll see where we are.

MR. OSYF: Thank you, Your Honor.

THE COURT: All right. So Ms. Katchmar, do you have any additional comments just on the, let's say the Constitutional argument other than the additional case that you have or the additional petition for writ of certiorari that you paused up to me?

MS. KATCHMAR: Yes, Your Honor, if I—very—I promise to be very brief. It's not my gift, but I will try it.

[12] Your Honor, I would simply summarize that the case law that the government relies on, *Watts* and its progeny, along with a Commission, United States Sentencing Commission that relies on policy and changes cannot trump the Constitution. And that under the *Watts* case, if the Court would like I can put the cite into the record, which is 519 United States 148, 1997 which was decided pre-Booker and pre-Blakely, decided a very narrow issue under the double jeopardy clause. It did not—was not decided regarding the Fifth and Sixth Amendment, both the rights to procedural and substantive due process under the Fifth Amendment, and it was not decided as it relates to the Sixth Amendment right to a speedy and public trial and representation by counsel.

Based upon that, Your Honor, reliance on *Watts* is misplaced, and since we are dealing with acquitted conduct, the guideline regarding relevant conduct to allow acquitted conduct is, we submit, unConstitutional.

We understand that in *United States v. Ibanga*, I-b-a-n-g-a, which is out of this district, 2:04cr227, Judge Kelley tried to not include acquitted drug weight, and the Fourth Circuit said no, under Watts and its progeny you must at least consider it pursuant to 3553(a). But as is recognized under *Kimbrough v. United States*, 128 Supreme Court 558, "While a district court must include the guidelines range in the array of factors warranting consideration, it may vary from that [13] guideline range based solely on policy considerations, including a disagreement with the guideline."

So as going forward, Your Honor, we would submit that *Watts*, reliance on *Watts* by this Court and other courts, as courts continue to disagree, as I put in my papers and the Court has reviewed, reliance on *Watts* is misplaced, and the Supreme Court is considering the question right now. And we would submit that to apply *Watts* and allow acquitted conduct to be considered would be unconstitutional.

I have nothing further and would incorporate my pleading.

THE COURT: Let me ask you a question on this issue.

So if the government had never indicted on the hotel room set of facts and we were only going forward on Counts 5 and 6, and that was all that had been indicted on and the defendant was found guilty on that, would there be any impediment to enhancements being asserted based on the same facts that underlie these other counts that were acquitted?

MS. KATCHMAR: Yes, Your Honor. We do plea that it would still be a problem as we've raised with both the controlled buy on September 4th and the controlled buy on September 27, 2018 that were not presented to the jury but were provided in the relevant conduct here.

So the argument would not change regarding the fact Mr. Osby pursued his right to trial by jury, and a jury of his [14] peers made a finding Constitutionally and he received due process under the Fifth Amendment and representation and right to trial under the Sixth Amendment.

THE COURT: I guess what—I'm asking a different question.

MS. KATCHMAR: Okay. I apologize.

THE COURT: You're saying that because the government indicted on the hotel room incident and the jury acquitted on that, that the Court is precluded in calculating the guidelines from using any of that conduct for enhancements. That it's unConstitutional. And what I'm asking is if they had never indicted on that hotel room incident but the probation officer had included those drug weights, for example, there's obviously no Constitutional argument of the kind that you're making here, I would think. That's what I'm asking you.

MS. KATCHMAR: I'm still not willing to step away from it. I think it would be a different situation if, for example, he had pled guilty and then the only way the government would have to establish it is by a preponderance of the evidence at that point because Mr. Osby would have conceded a finding of guilt, and then only the standard of a preponderance would be there, whereas here—perhaps I'm still misunderstanding your question—but here, where even if he had only been indicted on the charges here, we submit he should only be before the Court today o Counts 5 and 6. By going to

trial and being acquitted, [15] even on the firearm Count 7, we would maintain the same position. It was presented to the jury, the jury heard all the facts, the Court heard all the facts, the jury made a finding based upon the law provided to it by the Court. And I understand that there's 18 United States Code Section 3661 which allows the Court to consider just about anything that it deems relevant in fashioning a sentence that is sufficient but not greater than necessary under 3553(a). But those cannot be read independently of each other. And when 3553(a) still requires that, under *Gall*, to calculate the guidelines correctly they still must be done in a Constitutional manner.

So I understand I'm going on. I may have missed your question again. But if they had not provided it and he had still pursued his right to trial, I still would be making the same argument.

THE COURT: I follow. Thank you.

MS. KATCHMAR: I did not follow though, Your Honor?

THE COURT: No, I said I follow.

MS. KATCHMAR: Oh, I apologize.

THE COURT: I followed.

MS. KATCHMAR: Thank you.

THE COURT: All right. Let's hear from Mr. Osyf. Do you have anything new or different or in response that I haven't already considered, Mr. Osyf?

MR. OSYF: I would just like to address the Court's [16] question for defense counsel, if I may.

It seems to the government that defense counsel's answer to that question is asking that the Court not only—should not only not consider acquitted conduct,

but all relevant conduct as well. As the Court pointed out—

THE COURT: Where somebody goes to trial, is what I was hearing.

MR. OSYF: Correct. Correct, Your Honor. For somebody that goes to trial. And again, this—you know, *Booker* and *Blakely* did not overturn *Watts*. And they were 2005 and 2004 cases, respectively. And as the government pointed out in its paper, the Fourth Circuit has said, "Clear Supreme Court and Fourth Circuit precedent hold that a sentencing court may consider uncharged and acquitted conduct in determining a sentence as long as that conduct is proven by a preponderance of the evidence." And that's the key, Your Honor. Is the different standards here. So even if a case does go to trial, the standard before the jury is beyond a reasonable doubt. The standard before Your Honor is a preponderance of the evidence, which is precisely why you're allowed to consider all sorts—a totality of the entire defendant's history and makeup and recidivistic activity, if there is any. That is precisely why there's that critical difference between what juries may consider and what you may consider at sentencing. And again—that's from *United States v. Grubbs*, 585 F.3d 793 Fourth [17] Circuit. And that's 2009. Well after *Booker* and *Blakely*. And I can recite the string cite in the government's paper on Page 4, but essentially from 2009 to present the Fourth Circuit has been very clear on this issue. And with all due respect, Your Honor, as early as this year this very Court made a similar ruling in a sentencing allowing acquitted conduct on a trial defendant to come in and be considered before this Court at sentencing. That is the law.

Now, the government concedes that there is a pending case before the Supreme Court and that may well change the law, but not today, Your Honor. And

that's what's before the Court, and acquitted conduct is considerable, as well as relevant conduct of a defendant, whether or not they went to trial or not.

Thank you, Your Honor.

THE COURT: Hold on a second.

MR. OSYF: Yes, sir.

THE COURT: So if I follow the law as it is right now and allow acquitted conduct to be at least considered—and frankly I'm not sure how I can't follow the law, because that is the law of the country—but then if the Supreme Court grants the petition to hear this case, it would be decided ostensibly by June of next year, and then if there's an appeal pending in this case and the Supreme Court changes the law and says that judges at sentencing cannot consider acquitted conduct, then [18] that certainly is something that can be taken up during the appeal before the Fourth Circuit?

MR. OSYF: It most certainly well could, Your Honor.

THE COURT: All right. Thank you, Mr. Osyf.

MR. OSYF: Thank you.

THE COURT: All right. Defendant obviously was charged with various counts of drug tracking and possession of a firearm stemming from a couple of dates. The September 18, 2018 incident, and that was Counts 1 through 3, and that's when the hotel staff members of course called the police after discovering the drug and a firearm in defendant's hotel room. And then the other one is the September 27th, 2018 incident when the defendant was arrested for selling drugs from a vehicle, and a firearm was also recovered there. Defendant has objected to the presentence report's inclusion of drug weights from Counts 1 through 3, the drug charges, that is, from the September 18 hotel room incident on which

the jury found the defendant not guilty beyond a reasonable doubt.

The defendant also objects to the two-level enhancement for possession of a dangerous weapon, as the jury found the defendant not guilty on Counts 4 and 7, which were possession of a firearm in furtherance of drug tracking charges. On the same basis, the defendant argues that he should not be attributed with the drug weights from uncharged controlled purchases that were made by a confidential source. The [19] defendant has argued that inclusion of this acquitted or uncharged drugs are a violation of his Fifth and Sixth Amendment right, and he cites to various concurring an dissenting opinions where judges have discussed whether the consideration of acquitted conduct in sentencing violates a defendant's Fifth and Sixth Amendment rights to due process and trial by jury. And of course this is the matter of some debate. For example, if one looks to *Jones v. United States* at 135 Supreme Court, Page 8, 2014, you have three justices of the Supreme Court Scalia, Thomas and Ginsburg dissenting from denial of cert and stating that the use of acquitted conduct at sentencing disregards the Sixth Amendment. And also *United States v. Bell* from the D.C. Circuit in 2015 where then-Judge Cavanaugh, concurred in the denial of rehearing *en banc*.

The Supreme Court has held that consideration of uncharged or acquitted conduct is permissible and does not violate a defendant's Constitutional rights in the decision at *U.S. v. Watts* in 1997 that Ms. Katchmar referenced.

The Supreme Court has reasoned that sentencing courts have broad discretion to consider various kinds of information pursuant to the statute found at 18 U.S. Code Section 3661, which says "No limitations shall be placed on the information concerning the background,

character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate [20] sentence."

The Federal Sentencing Guidelines also say the following. "In determining the sentence to impose within the guideline range or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant unless otherwise prohibited by law." That's 1B1.3.

The Court of Appeals in our circuit has said that "Clear Supreme Court and Fourth Circuit precedent hold that a sentencing court may consider uncharged and acquitted conduct in determining a sentence as long as that conduct is proven by a preponderance of the evidence." They said that in *U.S. v. Grubbs* in 2009.

And they also commented in *U.S. v. Young* in 2010 that "A sentencing court is not bound by the evidence presented at trial when determining drug quantity or other relevant conduct."

In *U.S. v. Perry* in 2009 they noted that "A sentencing court may consider acquitted conduct in establishing drug amounts for purposes of sentencing, so long as the amounts are established by a preponderance of the evidence."

And so in light of clear controlling guidance from the Supreme Court and the Fourth Circuit Court of Appeals on the Constitutionality of whether a Court may consider uncharged or acquitted conduct in sentencing, the Court must overrule the [21] objection on this issue.

Now that takes us to the issue of drug weights. Although the Court may consider uncharged and acquitted conduct during sentencing without violating

the defendant's Constitutional rights, the Court has to also consider whether the government has met its preponderance of the evidence burden. The defendant argues that the government failed to meet its burden for the uncharged controlled substances. The law on this issue and the guidelines, of course, provide that a district court may consider any relevant evidence without regard to its admissibility under the Rule of Evidence applicable at trial provided that the information has sufficient indicia of reliability to support its probable accuracy. That's guideline 6A1.3.

The Fourth Circuit in *U.S. v. Uwaeme*, U-w-a-e-m-e, in 1992 said "For sentencing purposes, hearsay alone can provide sufficiently reliable evidence."

The government, of course, "bears the burden of proving by a preponderance of the evidence the facts that establish that a defendant was involved in specific conduct," they said in *U.S. v. Brooks* in 2008. They made that statement with respect to courts having to make individualized findings on drug quantities.

"However, although the burden of establishing the defendant's criminal activities fall on the government, once the [22] government has provided evidence sufficient to justify inclusion of that conduct in the presentence report, a defendant's mere objection to the finding in the presentence report is not sufficient, as the defendant then has an affirmative duty to make a showing that the information in the presentence report is unreliable and articulate the reason why the facts contained there are untrue or inaccurate," as the Fourth Circuit said in *U.S. v. Terry* and *U.S. v. Powell*.

"Without an affirmative showing the information is inaccurate, the court is free to adopt the findings in the presentence report without more specific inquiry or explanation." Therefore, the burden is on the defendant

at that point to show the inaccuracy or unreliability of the presentence report.

In determining whether factual information in the presentence report is reliable, the information "must have some minimal indicia of reliability beyond mere allegation." Reliable evidence may include hearsay testimony gathered from lay witnesses or informants, as the Court of Appeals said in *U.S. v. Crawford*.

"The court should independently assess the credibility of testimony relied on in the presentence report, and where the reliability of evidence is an issue, the court should conduct an evidentiary hearing it determine it," as the court said in *U.S. v. Wilkinson* in our circuit.

[23] Before I go on to address the written pleadings on the controlled purchases, the Court understands that there's no additional evidence on the controlled purchases? The controlled purchases? Is that the case?

MR. OSYF: There may be, Your Honor, if I could approach to the podium?

THE COURT: Yes.

MR. OSYF: So Your Honor, prior to trial, defense counsel had submitted certain motions in limine and stipulations were had where defense specifically requested that the controlled buy evidence not come in, and the government acquiesced. We comported with that request specifically because we didn't feel that that was what the defendant was on trial for, those issues being relevant conduct, that they were ripe for today, for sentencing, and intentionally did not present evidence in the interest of judicial economy and moving things along and concentrated its focus completely on the defendant's conduct on the 18th and on the 27th so as not to confuse the issue or belabor the point.

So that being said, Your Honor, if the Court is inclined to adopt the PSR as factual, then I don't see there's any need for additional information. However, if there is, we do have the case agent present, and again regarding the DNA, the forensic analysts that are happy to testify here today and present additional evidence before the Court on both the [24] controlled buys and the DNA and what have you which are ripe for sentencing.

THE COURT: Well, the objection has been made, so let me say it this way: There was no evidence presented at trial about the controlled buys, right?

MR. OSYF: That's correct, Your Honor.

THE COURT: The confidential informant who made the controlled purchases didn't testify at trial about whether he believed the substances were drugs, and no forensic evidence has been presented as to the weight of the drugs purchased from the controlled buys or what types of drugs they are. So at this point the Court has none of that before it, right?

MR. OSYF: Correct, Your Honor.

THE COURT: And you have a case agent here today who is prepared to present that, present evidence on those issues?

MR. OSYF: To meet the government's burden as a preponderance of the evidence, yes, Your Honor.

THE COURT: All right. Well, I'll hear the evidence and we'll see where we go.

MR. OSYF: Thank you, Your Honor. And so the Court would like to hear evidence as it pertains only to the controlled buys; is that correct?

THE COURT: Yes, at this point. Was there something else on which the agent was going to testify?

MR. OSYF: The agent would testify—I had three [25] issues that may be of interest to the Court. One is the controlled buys, the other at issue I believe—I don't remember if it was a formal objection or just something defense had brought up—was that there's an issue with the weight including the packaging. And as the Court might recall it was presented at trial, but again, the agent could testify that the—

THE COURT: Regarding what?

MR. OSYF: The heroin and Fentanyl was specifically retested without the packaging for more accurate weight in a supplemental lab report which was presented at trial.

THE COURT: Okay.

MR. OSYF: And the third issue was just to corroborate the DNA forensic analyst's testimony that the firearm and the bag of narcotics recovered from the hotel room at the Extended Stay in Hampton were, in fact, the ones recovered and sent to the lab that she would testify to.

THE COURT: All right. Ms. Katchmar, I'll hear the evidence and then you, of course, can cross-examine and we'll see where we go.

MS. KATCHMAR: Your Honor, may I be heard on one thing?

THE COURT: Hmm-hmm.

MS. KATCHMAR: Well, two things, please.

First, as it relates to the controlled buys, they did [26] not have to agree to keep it out. I still believe that it was improper. It would have been improper 404(b), would have shown propensity, and it kept me from having to file that motion, and I stand on all my other objections, do not withdraw them.

Second, as it relates to the packaging, that only had to do with the drugs on September 27th because they retested the ones for September 18th. So it was just where I raised the issue that they had not retested the ones on September 27th and therefore the weights could be unreliable.

Third—

THE COURT: Okay. But so you're not saying we don't need to hear that evidence, you're just saying it only relates to the one date?

MS. KATCHMAR: Right. Because we have what we have, and my continuing objection is to those drug altogether on September 18th.

THE COURT: Okay.

MS. KATCHMAR: As it relates to the DNA, I think that is a very separate and distinct issue. That was a sanction against the government, and the government should not have the benefit of even presenting any evidence even from their agent regarding any chain of custody related to the DNA because that was a sanction. And should the Court allow the government to present any evidence at all relating to the DNA from the September 18th swabbing of the firearm, then we submit that that [27] is absolutely raising a Sixth Amendment and Fifth Amendment issue and counsel will be 100 percent ineffective in its ability to confront and cross-examine anyone with the expertise of DNA. I have not hired a witness, I have not hired an expert, and it was a sanction, and the government should not then get to benefit and get a no-harm/no-foul on their failure to act and the sanction that this Court imposed.

THE COURT: So now remind me—now the government said it's DNA evidence not just about the gun but also drugs. That's what Mr. Osyf said.

MS. KATCHMAR: I think they did a package, but it was—I objected to the DNA evidence period.

THE COURT: Okay. And so remind me your argument on the sanction and your view of the ruling and tie that into why you think that it's inappropriate for them to be able to offer it now?

MS. KATCHMAR: Your Honor, the government had filed, had filed a request for a late notice of their experts, even though they had provided information to the defense about who they might call as experts, which included forensic biology information, DNA testing. When the government did not timely file notice of experts as required under their discovery rule entered into jointly by contract, the defense did not hire a DNA expert. So when we came during our motions hearing, which is immediately a day prior to starting trial in this case, the [28] Court asked, well, what's the harm and what's the prejudice? And we were able to raise no prejudice as it related to the individual who might talk about interstate commerce on the firearm and et cetera, but we were able to raise the prejudice that we would suffer if they called a DNA expert at trial. The Court then gave us the option of either continuing or going forward. We chose to go forward, and the Court excluded the expert as untimely. As a sanction.

So because that sanction has been continuing, that sanction must continue, otherwise I don't have an expert, there is specialized knowledge, there is specialized evidence that requires a person with the skill set well above this counsel or my co-counsel, should she have a chance to come today. And any continuance at all would still require hiring of an expert to combat it to even determine when and how that DNA should be analyzed.

But most importantly, a sanction is a sanction, and a person should not—not a person. Excuse me. I don't—I'm not trying to make it personal. The government or opposing party should not benefit from a sanction by simply not getting it in the trial but then getting it here. So I believe it rises to a Constitutional level. A sanction was made.

THE COURT: Is this argument co-extensive essentially with your acquitted conduct argument? The reason I ask is your argument Constitutionally on acquitted conduct is if it's [29] acquitted, Constitutionally I shouldn't be able to sort of backdoor it as evidence that allows the guidelines to be impacted. And on the DNA issue, I precluded the government from presenting it as a sanction, but your argument similarly, it feels like, is they shouldn't be able to backdoor that evidence at sentencing. And I guess as, even as I say it, I do see that it—there's a couple differences. One is that on the information involving the acquitted conduct, the jury had the benefit of hearing all that, as did the Court, and the Court is able to make determinations based on that necessary for making its preponderance of the evidence finding on drug weights, for example. But the Court never heard the DNA evidence, nor did the jury. And so in that respect, the issues are different. But I'm still trying to wrap my mind around why it is, as you argue, that in considering relevant conduct evidence, the Court should not be able to consider DNA evidence offered today.

MS. KATCHMAR: Because, Your Honor, putting aside the argument for acquitted conduct, it was a sanction imposed by the Court. And when we look at the sentencing factors in promoting respect for the law, that is one of the things that the Court must consider even if we're talking about a firearm and DNA from a firearm or DNA from a baggie of drugs. And here, the

government did not do what it was supposed to do. And if we are not going to hold them to their obligations and we're going to continue to say even though we sanction you, no problem, you get [30] to do it at sentencing even though you didn't do it when you were supposed to do in the first place, then how do we keep the behavior from continuing where they keep doing—"they" being the government—not doing what they're supposed to do, suffering a sanction on the front, but understanding that there's no harm, no foul on the back because it's still going to happen?

So while it may sound similar to acquitted conduct, this is different. Because this was not only not presented to the jury, but it was specifically, by order of this Court based on the government's failure to act and the prejudice suffers—excuse me, Your Honor—the prejudice suffered by Mr. Osby which will continue because I don't have an expert.

THE COURT: When did you first know that the government was going to offer DNA evidence today?

MS. KATCHMAR: When did I know that they were going to call Ms. Pollard? Last night at about six o'clock.

THE COURT: And when did you first know that they were going to argue for the Court to consider DNA evidence?

MS. KATCHMAR: When I first received the disclosure from Probation, I believe. The first disclosure. August. But it's very different to argue about whether the DNA should come in or not versus having to cross-examine someone who is potentially an expert in their field and challenge all the underlying bench notes and information that takes specialized [31] knowledge, specialized training, and a lot more time.

And frankly, I was always going to argue that it was not only an issue of not being presented to the jury and acquitted conduct, but that it's a sanction and it cannot be a sanctionless sanction. And that is our position, Your Honor.

But yes, sir, yes, last night was the first I heard that the forensic biologist would be here.

THE COURT: So before that, you understood that they might—I guess in discovery DNA certificates were presented?

MS. KATCHMAR: I have the certificate of analysis, yes, Your Honor.

THE COURT: For the gun, DNA found on the gun in the hotel room and the drugs? Some of the drugs, at least? So that was produced, but you didn't know until yesterday that they were actually going to call somebody to testify further than just offering those certificates?

MS. KATCHMAR: That's correct.

THE COURT: And typically at a sentencing, there's no requirement that you be notified of witnesses. 99 percent of the time that's a fact witness that you're dealing with. But it's not all that unusual that you would not know in advance more than the night before, I take it?

MS. KATCHMAR: If it were—

THE COURT: A fact witness?

MS. KATCHMAR: If it were a fact witness it's—to be [32] candid, that's unique to the prosecuting counsel how much notice we get. Some folks tell you right off the bat at the minute you plead guilty or are found guilty, some after 6:00 on the night before.

But when we're talking about expert expertise, understanding the Rules of Evidence under 1101 are

relaxed at a sentencing, this is still an issue here which I have to go back to, which this was a sanction. And this is a pattern of conduct with this, that it was late notice, there was prejudice, and frankly for an expert on that issue, this is late notice and we are continuing to suffer prejudice. So this sanction should continue and that DNA should not be considered.

THE COURT: So if the Court were to, today, determine that the sanction should carry through and sufficient DNA evidence should not be able to be presented, that's one scenario. Another scenario is that the Court could conclude that the government—excuse me, the Defense, if it asked for a continuance to be able to gather the information to properly examine the witness on DNA, this other scenario could be that the Court says it's willing to hear the evidence but the defense says I'm not prepared and I'd like a continuance, and then I turn to the government and say, you know, do you wish to go forward, understanding that a continuance may be necessary with presentation of your witness, or do you wish to go forward simply on the DNA certificates and the testimony of your case [33] agent—I understand that even in that latter scenario the sanction argument you have still applies, but there's no longer in that scenario the prospect of you feeling that you rendered—you were incapable of being effective because you didn't have appropriate preparation to examine the DNA expert?

MS. KATCHMAR: Your Honor, I can never waive my client's potential intent to raise an ineffective claim. So all I can tell you is that I stand on our sanction ground. He wishes to—I have already discussed the options with Mr. Osby and he wishes to proceed to sentencing today.

THE COURT: Today?

MS. KATCHMAR: He does.

THE COURT: Okay. You understand though the difference between the Court hearing the testimony of the expert versus the Court just considering the testimony of the case agent about DNA being taken off two items and submitted and here is a certificate?

MS. KATCHMAR: Your Honor, we submit that even the Court hearing any testimony at all of DNA contravenes the sanction that the Court gave.

THE COURT: Right. I understand.

MS. KATCHMAR: However, the government wishes to present its case and how it presents that evidence I can only do the best with what I know.

THE COURT: Got it. All right.

[34] Well, we've been here an hour and I need a break. We will come back and see where we go. Thank you. And you all feel free to talk.

(Recess taken from 3:35 p.m. to 3:45 p.m.)

THE COURT: Counsel, I guess I would start off this way: With respect to the weapon and the narcotics found in the hotel room, I've already addressed the acquitted conduct issue. No. 1.

No. 2, I don't feel like I need any DNA evidence to make a preponderance determination on the issue.

No. 3, I think that the defense has a good argument about—when I say good argument, it's certainly easily debatable whether the Court should hear from the DNA expert under these unique circumstances of finding out about it yesterday and the inability to prepare as desired to be effective and the defendant's desire to move forward. I think that's, there's a good argument regarding precluding the introduction of such evidence. But I really don't feel like I need it. So I guess that's what I would say to you.

You can present your case agent, you can put on your testimony about controlled buys, the weight versus packaging issue for the September 27th incident, and if you desire to go forward with the DNA evidence, I'll be forced to rule on it and will rule on it. But I'm just letting you know where I am. Hope everybody understands that.

[35] Do you all want to talk briefly? Why don't you all talk for a moment.

(Counsel conferred.)

THE COURT: Mr. Osyf? Happy to hear your evidence.

MR. OSYF: Thank you, Your Honor. And if I may, understanding the Court's comment regarding the DNA we will be calling the case agent as his testimony pertains to the controlled buy—the controlled buys, excuse me, and the drug weight minus the packaging material.

Because of the Court's words just a minute ago, we will not elicit testimony regarding the DNA or call Ms. Pollard, and I'll ask in a moment for my agent to be excused to excuse Ms. Pollard. However, in light of the statements from the defendant, I would like to put on the record, and I believe my colleagues would appreciate it in case this ends up seeing the light of day down the road on the government's position regarding the defense comments about inability to prepare regarding this issue and the quote, the sanctioned, sanctioned/sanctioned issue if I may?

THE COURT: Sure.

MR. OSYF: Just briefly, Your Honor, discovery included the DNA report sometime in January of 2019. And understood, the government takes its up-and-comings when it's deserved and understands the Court's

ruling in light of the late notice. However, for the defendant to say that there was [36] inability to prepare, having discovery and thinking the government was not going to introduce evidence of definitive DNA on a firearm and narcotics bag that was directly charged in the indictment is, is unusual, to say the least. And again, to say again, that it was unexpected to hear at sentencing when it was addressed in the PSR, August, earlier this month, again in both position papers on the 25th of September—or sorry in the original PSR in August, again in the addendum PSR, again in our position papers on September 25th, and even last night giving notice, which the government did not have to do—and with respect, the only reason it was so late last night was because I was wanting to confirm that Ms. Pollard was even available to come in today. Had that been an issue or had I suspected that this wouldn't come to the Court's attention, I would have addressed it sooner.

In light of that, as far as—the only other thing I'd like to say is that the government's—defense made the argument that we get two bites at the apple here. We vehemently disagree. We were sanctioned to not being able to present this evidence at trial and we did not. We complied with the Court's ruling, of course, did not present it at trial. But given that any evidence at sentencing can be presented that has sufficient indicia of reliability, which is hard to argue that definitive forensic DNA analysis does not have sufficient indicia of reliability, would not be presented at trial—at sentencing, [37] again, is quite befuddling to the government. I would say here the defense is arguably trying to get two bites at the sanctioned apple saying, well, we didn't expect to prepare for sentencing because we didn't have to do it at trial. And just like to put that on the record for the government.

THE COURT: All right. Let's call your witness.

MR. OSYF: Thank you. Government calls—may the forensic analysis be excused? The scientist?

THE COURT: Sure. You can step out first and let her know she's free to go.

MR. OSYF: Thank you, Your Honor.

Government calls agent Cory Norton, Your Honor.

CORY NORTON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. OSYF:

Q. Good afternoon, Agent Norton.

A. Good afternoon.

Q. Could you pull the microphone closer to you? Thank you. Would you please introduce yourself to the Court?

A. Special Agent Cory Norton at the Bureau of—I'm sorry, I mean with the ATF.

Q. And how long have you been with ATF?

A. Since 2015.

Q. Mister—Agent Norton, I'll try to be brief.

[38] Are you the case agent for the United States v. Erick Allen Osby?

A. Yes.

Q. And are you familiar with the facts of the case?

A. Yes.

Q. And were you present during that trial, Mr. Osby's trial?

A. Yes.

Q. And at trial, the government's case focused specifically on two dates, September 18th and September 27th; is that right?

A. Yes.

Q. There was—there was not evidence presented regarding a controlled buy on September 4th; is that correct?

A. Yes.

Q. Are you familiar with the controlled buy on September 4th?

A. Yes, I was aware that one was conducted.

Q. Could you just briefly tell the Court what you know about the controlled buy on September 4th?

A. Just briefly, that controlled purchase was done by a confidential informant at which time it was approximately like one gram of crack cocaine and a half a gram of heroin purchased.

Q. And that was purchased from whom?

A. Mr. Osby.

Q. And was there another controlled buy in this case?

A. Yes.

Q. And when was that?

[39] A. That was the day that he was arrested on September 27th.

Q. And could you tell us what you know about that controlled buy?

A. Specifically, that controlled purchase was to locate Mr. Osby, is why it was conducted, at which time Mr. Osby sold to a confidential informant approximately one gram of heroin.

Q. And do you recall where that was?

A. It was the 11—I'm sorry, 1000 block of 74th Street.

Q. Did surveillance continue after that controlled buy?

A. Yes.

Q. And what happened then?

A. Mr. Osby exited out of a residence, he what we call served up or sold to several other individuals prior to entering the back of a vehicle in which he was arrested.

Q. And that part of the September 27th, that was presented at trial; is that right?

A. Yes.

Q. Just another quick question. If you recall at trial there were two labs, two lab reports regarding the narcotics that were seized on September 18th from the Extended Stay Hotel room; is that right?

A. Yes.

Q. I'd like you to take a look at what's been premarked as Government's Exhibit 1 for identification. Do you remember reviewing that lab report?

[40] A. I do.

Q. And when was that? Says Date Received. When was that date received?

A. October the 4th of 2018.

Q. Could you please look at Government's Exhibit 2 for identification?

What was that lab?

A. This is a supplemental report to the first lab.

Q. And why was there a supplemental report?

A. The drugs were reweighed without packaging.

Q. And did you handle the drugs for that supplemental report?

A. I initially orchestrated those, the reweighing of the packaging. It was actually handled by our TFO Amanda Moreland.

Q. And what was the difference in weight for, I believe it's the first item maybe went from 52, it went down some, but what was the weight difference in that?

A. The initial date—I'm sorry, initial packaging or narcotics with packaging for Item 1A1 was 52.32 grams. The reweight of it without packaging was 49.67 grams.

Q. And what was the contents of that packaging or that bag that was—excuse me, that item?

A. It tested and came back as heroin.

Q. Was there anything else regarding that item?

A. I'm sorry, it came back as heroin and Fentanyl.

Q. So Item 1A1 was a mixture of those substances?

[41] A. Yes.

MR. OSYF: Thank you. No further questions.

THE COURT: Ms. Katchmar?

MS. KATCHMAR: Your Honor, we would object to the admission of those items based upon our prior. I would incorporate all my prior objections.

THE COURT: All right.

MS. KATCHMAR: Thank you.

CROSS-EXAMINATION

BY MS. KATCHMAR:

Q. Is it Agent or Special Agent?

A. It's Special Agent.

Q. Okay. Special Agent Norton, let's talk about September 4th. This controlled buy took place day or night?

A. I was not there for that controlled purchase so it was done by a local agency.

Q. You have no personal contact with that confidential informant?

A. No.

Q. Don't know the name?

A. No.

Q. Don't know the reliability?

A. No.

Q. Don't know how much they're paid?

A. No.

[42] Q. Don't know how many times they have been paid?

A. No.

Q. Don't know whether or not they had met Mr. Osby for the first time if, in fact, it was Mr. Osby, correct?

A. I have no knowledge if they met him before.

Q. Okay. And you have none of the controlled substance in your evidence?

A. No.

Q. And it was not submitted to a lab to determine the one ounce—

A. No, it was not one ounce.

Q. Excuse me. One gram. Thank you. The one gram and the half a gram, correct?

A. I have no knowledge to that. I was not part of that controlled purchase. I became aware of that controlled purchase on a later date.

Q. So no personal knowledge, no information about the confidential informant or his reliability, right?

A. That's correct.

Q. And none of the controlled substances?

A. As far as—

Q. From that controlled buy?

A. I was—I'm sorry. I'm confused about your question.

Q. You didn't take physical possession?

A. No, I did not.

[43] Q. And you don't have them in your evidence?

A. That's correct.

Q. And you have no knowledge whether or not they were ever submitted to a lab?

A. That's correct.

Q. To confirm whether or not they were the substances alleged?

A. Again, I have no knowledge of that.

Q. Let's talk about September 27th, 2018—

A. Yes.

Q.—the second controlled buy.

Prior to the controlled buy the residence at issue was under surveillance, correct?

A. Yes.

Q. Task force? By the task force? State and local officials?

A. It was, yes.

Q. And federal?

A. No, it was of the OCD. So Newport News OCD.

Q. What is OCD?

A. It's their Organized Crime Division.

Q. Okay. Were you present as well?

A. Yes.

Q. For the surveillance?

A. I was present for the surveillance portion that, not for the controlled purchase portion of it.

Q. So you weren't—again, thank you for saying that. So you [44] weren't part of the controlled purchase?

A. I was there for the controlled purchase. If you're asking

if I met the informant, no.

Q. Thank you. It's late. I appreciate it, Agent Norton.

So you have no information about the informant's reliability?

A. No.

Q. There were no marked moneys on September 27th that were used?

A. There may have been. I have no knowledge of that.

Q. And if, for your investigation, if there were, you would have it in your evidence, correct?

A. We were not intending on taking any evidence from that portion. He was actually—that controlled

purchase was set up in order to take Mr. Osby into custody.

Q. No knowledge of any criminal history of this so-called confidential informant?

A. I have no knowledge of anything about the informant.

Q. And same with—I failed to ask that on September 4th. No knowledge of any—of the criminal history of that confidential informant?

A. I have no knowledge of the confidential informant at all.

Q. And as you said, nothing was seized September 27th, it was just this alleged buy that you knew about?

A. Nothing was seized by my office or personally by me for [45] that controlled purchase.

Q. Correct. And so you're relying on others for the alleged weight of the substance, correct?

A. I would be relying on the members of OCD, yes.

Q. And you don't have a lab report for that either for September 27th?

A. I believe that was submitted. I don't have that personally because that's, again, not what we were charging.

Q. So you don't know the findings on whether it's a true controlled substance or not?

A. I would have no knowledge that.

MS. KATCHMAR: No further questions.

Your Honor, we continue our objection and move to strike any reference of those two controls buys.

THE COURT: So can you hold on, Ms. Katchmar?

For fact questions, the standard is whether the information presented has sufficient indicia of reliability.

Well, you know, let me make sure there's no other questions first.

MS. KATCHMAR: Thank you.

THE COURT: Mr. Osyf, do you have any other questions for this witness?

MR. OSYF: No other questions, and we ask that Government's Exhibit 1 and 2 be admitted.

THE COURT: All right. So Agent Norton, you can have [46] a seat back at counsel table. Thank you.

So you can stay there.

MS. KATCHMAR: Okay.

THE COURT: The fact standard is whether there's sufficient indicia of reliability, and if there are, the burden of going forward shifts. And so the evidence that I have before me now is similar to what I frequently see referenced in a presentence report. There was a sale by CI such and such on such and such a date of X, right? Essentially that's about what I have.

MS. KATCHMAR: Maybe, but it's whether or not what I have and what you have in order to make a determination of reliability by a preponderance of the evidence. And here, what you have is this is not a guilty plea where the controlled buys are just simply relevant conduct. We've already objected to them being relevant conduct, and now we're at the point where the Court said, well, I may consider it, so the government has to show it by a preponderance of the evidence. So what I've done, Your Honor, by my questioning is attack the reliability. Where is there reliability when the government's agent has no knowledge of this

confidential informant? I asked specifically about that person's reliability, their criminal history, their credibility in terms of what they have received in terms of payment, how they knew Mr. Osby, how many times they may have met Mr. Osby.

[47] THE COURT: So your point is, if I understand—

MS. KATCHMAR: It's unreliable.

THE COURT: Your point, if I understand it, is that when the evidence comes before me in a presentence report as relevant conduct where someone has pled guilty, that what is necessary to satisfy the sufficient indicia of reliability test may be different than when it's in a presentence report and there was no guilty plea and the matter went to trial and there was a finding and an acquittal on some and finding guilt on some counts? So is that what you're saying?

MS. KATCHMAR: Your Honor, I'll not—because first, just like Mr. Osyf has people, I have people. So I can't concede that for purposes of guilty pleas. What I can say is that here I've already argued that evidence was not presented to the jury, so it should not be considered. The Court has overruled that. But now when we are talking about sufficient indicia of reliability, the government presented their agent who said I have this information. In order—so the Court says, okay, I've got some sufficient indicia of reliability, I have a federal agent, he swore to tell the truth, he told the truth, it was very candid, both with prosecution and with defense counsel.

But then the information that the Court has to consider is not just the witness before you, but the reliability of the information that was presented. And the information as it relates to this alleged controlled buy—I understand that [48] one gram, half a gram here

may not make a world of difference at the end of the day, but it's still an important fact.

THE COURT: So I think I get your point. Your point is when there's a guilty plea and the government submits a lot of additional information to the probation office, for example, about relevant conduct and drug weights, it's out there early, you know what it is, and you have the opportunity to test it. Here, in the first instance you're hearing this today?

MS. KATCHMAR: No, Your Honor. I received discovery on all of this throughout the proceeding.

THE COURT: Okay.

MS. KATCHMAR: And the government is correct, we talked, I felt it was 404(b), they thought it might muddy the waters and just make a cleaner trial. We had different reasons for the evidence not being presented to the jury. We're all on the same page, I think, with that.

THE COURT: Okay.

MS. KATCHMAR: So the issue here now is regardless of whether or not you have a federal agent—the Court has already said, you know, I'm letting acquitted or non-litigated information come in to the presentence report for the reason previously stated over my objection, which I continue. Now we have the government having to establish by a preponderance of the evidence the information for the Court whether or not you should consider it. And I believe that based upon my [49] cross-examination and the lack of the government rebutting any of that, that there is no reliability. We don't have the information about the confidential informant, how much they're paid, their credibility, the identification of the substances, the fact that they weren't seized at least by the federal agents and tested and before the Court to determine anything

about the weights. It's really just, it happened. And it happened isn't enough. And so without any of the issues that I raised on cross regarding reliability, we're asking the Court to find that it doesn't have sufficient indicia of reliability.

THE COURT: And your argument as to why it happened and that's not enough here versus me getting the PSR when somebody pleads guilty and it says confidential informant or source bought X amount of drugs on such and such a day from the defendant?

MS. KATCHMAR: They usually have the drugs. To be perfectly candid, Your Honor, they usually have the drugs. We have the reports and we're kind of like, it's time to plead guilty. Not to be flip or candid, but that's really how it is. Here, the drugs aren't here. They weren't submitted. We don't even know if they were really controlled substances. And that would be speculative to determine that, because at that point it will just be a guessing game versus any reliable information before the Court.

THE COURT: Thank you.

[50] It is different, isn't it, Mr. Osyf? On these confidential informant drug weights, they haven't been submitted.

MR. OSYF: I don't believe it is always different, Your Honor.

THE COURT: I said it is different. This is different.

MR. OSYF: And I'm saying I don't believe it is that much different.

THE COURT: Oh.

MR. OSYF: There are times, sure, where there's controlled buys, there are some times were controlled buys might even be incorporated into the statement of

facts that the defendant pleads to. That's not always the case. As Your Honor pointed out, there are times where a defendant may plead guilty to Counts 2 and 3 and then there's additional, a whole host of relevant conduct that's incorporated in the PSR. And there might not be discovery on those items. And that's, again, why it is perfectly right for sentencing and perfectly, you know, the Rules as the Court illustrated earlier, I forget the first case, but in *Powell*, that you can't just make—defense can't just make objections without some sort of indicia of unreliability what's contained in the PSR.

THE COURT: And what's your information you have that the September 4 buy was cocaine and heroin?

[51] MR. OSYF: We have—well, all that's presented before the Court was today's testimony because we opted not to present evidence on that at trial for, again, as defense counsel pointed out, the government and defense had their different reasons for agreeing to not present that at trial. Didn't feel that it was necessary to go forward, otherwise we could have. And again, Your Honor, as Your Honor pointed out, which I believe hearkens back to one of your initial questions you asked defense counsel in the beginning was, again, so are the parameters for sentencing completely different when you have someone, a defendant who chose to go to trial and continues their—to be not guilty as opposed to someone who pleads.

THE COURT: Okay. I'm with you. I understand the arguments.

MR. OSYF: Thank you, Your Honor.

THE COURT: Thank you, Mr. Osyf. Thank you, Ms. Katchmar.

The objection is sustained. I find that there are insufficient indicia of reliability with respect to

substances attributed to the defendant through these confidential informant purchases on September 4, 2018 and September 27, 2018.

And that then takes us, I think, to the premise enhancement.

Madam Clerk, did you have something?

(Court and courtroom deputy conferred.)

[52] THE COURT: Okay. Premises enhancement, of course, the defendant has objected to the two-level premise enhancement for maintaining a premise for the purpose of drug distribution. And the position statements, originally I think the defendant indicated that it was unclear which of the premises we're talking about. I think it's Paragraph 101 perhaps that clarified that it was the hotel room which formed the basis for the premises enhancement here. And on the hotel room at the Extended Stay America, defendant argues that he merely visited the room, but another person rented the room and others had access to the room. And the defendant argues that the government has failed to present evidence, for instance, the door key log was not examined or preserved, and it was not known when the last time the defendant was in that room. So those are the arguments that have been made so far in the position papers.

Ms. Katchmar, do you have anything else you want to comment on regarding that?

MS. KATCHMAR: No, Your Honor. We stand on our argument and our objection.

THE COURT: Okay. Mr. Osyf?

MR. OSYF: Same for the government, Your Honor. And it is the hotel room that the government was referring to, given the items that were seized there and in accordance with our paper.

THE COURT: Okay. Well, the parties have extensively [53] briefed all of these issues, and the Court sat through the trial in this matter at the courthouse. And so let me take up the points.

Here, the evidence showed that the defendant wasn't merely a visitor to the hotel, and the room at the Extended Stay America, while a co-conspirator originally rented the room, it was the defendant who later extended the lease by paying for the room in cash. And we heard direct evidence of that from the gentleman from the hotel during the trial. This is evidence that the defendant had the possessory interest in the premises as the hotel guest or tenant. The testimony from the hotel staff members at trial and the suppression hearing on defendant's motion *in limine* indicated that they saw him frequently at the hotel, they considered him to be the hotel guest and the occupant of the room.

The Court also has to consider whether the defendant's, whether the defendant controlled the access to the premises or controlled activity there. In the Fourth Circuit's decisions in *Clark* and *Christian*, they looked at whether the defendant regularly stayed at the premises and whether the defendant had access to the premises as indicators of control. Both exist here. Testimony from the hotel staff indicate that the defendant stayed at the hotel room and they regularly saw him. Further, he had a key card that had access to the room and continuously accessed it during the conspiracy. This, of [54] course, was the subject of the dispute with hotel staff on that final day, September 18, when the defendant was locked out of the room after the hotel employee was cleaning and witnessed all the contents and after he was locked out of the room and his key card no longer granted him access.

Other evidence also indicates that the defendant controlled access. On the morning of September 18 and

at other times during his tenancy, the defendant was with other individuals that he brought to the room, according to the evidence the Court heard.

On all the facts, it appears the defendant has maintained and controlled access at the premises and the enhancement is therefore properly applied and that objection is overruled.

That brings us to the issue of the denial of federal benefits. And I don't know if you all have anything else you want to offer on that, but frankly I'd rather take that up as part of sentencing and imposition. But if you have anything else you want to comment on regarding that now, you can do that, Ms. Katchmar?

MS. KATCHMAR: No, Your Honor, I will incorporate it in my 3553 argument.

MR. OSYF: Nothing further from the government. We understand it's perfectly within the Court's discretion, Your Honor.

[55] THE COURT: All right. And then you all also have your argument on upward departure, and of course you'll have to make that as part of your 3553 comments. And so I think I've ruled on everything presented. Ms. Katchmar, have I covered your objections?

MS. KATCHMAR: Your Honor, we raised an objection as to the gang affiliation.

THE COURT: Oh, yes. Thank you. So did you all have any further evidence or comments on that?

MS. KATCHMAR: Your Honor, we would incorporate our position. If the Court wishes to us to reiterate it on the record versus Document 69, I would be happy to do that.

THE COURT: If you have nothing new, I'm fine with considering what's been offered already.

Mr. Osyf, do you have anything new?

MR. OSYF: Nothing new, Your Honor, and the government stands on probation's position for why it was incorporated.

THE COURT: All right. So these gang affiliation objections that the Court receives are perhaps multifaceted, but the way that I look at them is that the indication is of significance to the Bureau of Prisons because of the fact that you want to be careful not to house people in rival gangs together. So it's an effort to protect the inmate from harm. Some may argue that it has additional significance for the Court. Because the indication on presentence reports is not [56] that the person is a member of a gang but that they have some affiliation with gang it, in my personal view, absent any other significant information in a presentence report, it doesn't really have great significance to me or any real significance to me, frankly, in my sentencing determination. But it's important for the Bureau of Prisons to know, because even if a person is not a member of a gang but they are affiliated with a gang, they may still be subject to violence and recrimination in a prison setting from any rival gangs, and to the extent that rival gangs are known, there's efforts made to protect inmates.

The defendant has additional concerns about the impact his Bureau of Prisons designation would have on him, and it may restrict him from educational and other programs within the Bureau of Prisons system. And the presentence report, and as referenced in the government's position paper, reflects that the designation of the defendant having some affiliation with this 76th Street Crips, is based on Hampton Police records that indicate the defendant frequents known gang areas, has been associated with and simultaneously arrested with other gang members. And

that's the basis for it. There is no additional evidence presented to the Court. And so at a threshold level on the issue of simple gang affiliation, for purposes of inclusion in the presentence report, the Court overrules the objection. It is for the defendant to take up as he may wish designation issues with the Bureau of Prisons or the effects of that on the [57] availability of programs.

So I think that's everything.

And Officer Geurts, would you step up here for a moment?

(Court and probation officer conferred at sidebar.)

THE COURT: All right. So counsel, to reflect the rulings of the Court, Paragraph 19 has been changed so that the one gram of crack cocaine is removed and the heroin is now 154.84 grams of heroin.

Page 8 Paragraph 26, the crack cocaine comes out. Heroin is 154.84 grams all the way across. And then the total is 297.95 kilograms.

And Officer Geurts, was that it?

PROBATION OFFICER: Yes, Your Honor.

THE COURT: Thank you. All right. You all with me?

MS. KATCHMAR: Your Honor, I would ask that you also strike Paragraph 6 and the information related to controlled buy in Paragraph 13 as well.

PROBATION OFFICER: Your Honor?

THE COURT: Yes.

PROBATION OFFICER: Would the Court consider, rather than striking, noting that because there's a lab report the defendant will not be held accountable for the suspected narcotics?

MS. KATCHMAR: We object to the probation officer's [58] recommendation based on the Court's ruling of indicia of reliability.

THE COURT: I don't have any problem, frankly, with striking Paragraph 6. Paragraph 13 provides context for Paragraph 14. So I'm going to modify it. Paragraph 6 is struck. Paragraph 13 I'm going to modify it as follows. "On September 27th, 2018, members of," and then it describe those members, "utilized a confidential source to," and I'm going to say "attempt a purchase of narcotics," and then strike the rest. And that provides context. And then of course, as I said, that provides the context for Paragraph 14. So it now reads, "After CS No. 2," it reads, "to attempt a purchase of narcotics from the defendant, period." And then the rest is struck. And you go on, Paragraph 14, "Following the controlled purchase, the defendant remained," and I'll say "the attempted controlled purchase" in that paragraph.

All right. Happy to hear you all's arguments after I summarize for you where we are.

So I adopt the factual statements with the modifications based upon my rulings, and those are now reflected in the presentence report as the Court's findings of fact.

The statutory ranges established by Congress and the President for the counts of which the defendant has been found guilty are as follows: For each of Counts 5 and 6, a maximum term of 20 years imprisonment. As for supervised release, [59] Counts 5 and 6 each include a period of supervision of at least three years and authorize a maximum of lifetime supervision.

Does the government agree I've accurately stated that?

MR. OSYF: Government agrees, Your Honor.

THE COURT: Does the defense?

MS. KATCHMAR: Yes, Your Honor.

THE COURT: Now, operating within this statutory range established by Congress and the President are the guideline ranges—or I should say, is the guideline range; that is, based upon application of the advisory sentencing guidelines promulgated by the United States Sentencing Commission. Application of the guidelines in this case results in an offense level of 28 and a criminal history category of II, and the resulting advisory guideline range would be 87 to 108 months of imprisonment.

Does the government agree I've accurately stated that range?

MR. OSYF: I agree that the Court has accurately stated that range, yes.

THE COURT: Does the defense? Based on my rulings, I should say.

MS. KATCHMAR: Based on your rulings and over our continued objections, yes.

THE COURT: All right. I'm happy to hear any additional evidence or argument you may have. Does the [60] government have any evidence or just argument?

MR. OSYF: Just argument, Your Honor.

THE COURT: Does the defense have additional evidence or just argument?

MS. KATCHMAR: Your Honor, as the Court considered our character letters, Exhibits 1 and 2, I would simply now move them officially into evidence since the Court has considered them.

THE COURT: Now, they're attached to your position statement?

MS. KATCHMAR: They are, Your Honor, but I am moving them in fully as evidence for the Court's consideration.

THE COURT: Okay. Are you asking them to go to the Bureau of Prisons?

MS. KATCHMAR: No, Your Honor, I am not.

THE COURT: So they're admitted respectively as 1 and 2, grandmother's letter No. 1, Mother's letter No. 2.

(Defendant's Exhibits Nos. 1 and 2 received in evidence.)

MS. KATCHMAR: Thank you very much.

THE COURT: Okay. And Madam Clerk those are attached to the defendant's position paper.

COURTROOM DEPUTY CLERK: Yes, sir.

THE COURT: Mr. Osyf.

MR. OSYF: Thank you, Your Honor. Considering the [61] 3553(a) factors before this Court, the government respectfully asks the Court to apply a sentence of 137 months of incarceration and feels that that's sufficient but not more than necessary to assure the ends of justice in this case.

We stand on our paper, and as far as the nature of the offense goes, I think the offense of conviction alone, the distribution of two narcotic substance, heroin and cocaine, are excessively dangerous, and when considered in context with the acquitted and relevant conduct that's important to apply here, that nature of the offense increases exponentially.

The history and characteristics for the Court to consider, the government understands that the

defendant has a history of violence and anger issues, but largely no corroborated mental health issues, according to the PSR. There is some mention of trying to get into a place for treatment using suicidal tendencies and then later retracting that. There are lots of references to, from family members as well as employers and schools as far as anger and violent tendencies and having difficulty with things. But these are all issues that the defendant can get treatment for in the BOP and hopefully will. That, along with some other minor drug abuse issues, other than that, the defendant is in good health by all accounts. He's young, he's capable, and he has chosen the path that he has walked on as far as his recidivistic, dangerous behavior commencing at the time he was 13 over a decade of [62] offense after offense after offense, most of which are violent in nature or gun related. And this is why, this gets into why the government asks the Court to consider an upward departure here. As noted in our paper, Section 4A1.3(a)(1) of the guidelines authorizes such upward departures when reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit other crimes. Not only is that in the guidelines, but it's also in *United States v. Whorley*, 550 F.3d 326, Fourth Circuit case from 2008 noting that an under-representative criminal history category is an encouraged basis for upward departure. And that's exactly what we have here, not only from the government's position, but it's also noted in the PSR. And while probation can't, as noted in the PSR in Paragraph 102, does not constitute a recommendation by probation, however, there are factors that may warrant departure, and Paragraph 104 reiterates just what the government put on the record regarding the drug, firearm and violent history. Six juvenile offenses that were not adjudicated based on and

did not receive any criminal history points due to time constraints. Misdemeanor offenses and felony convictions for drug offenses and over 20—or sorry, 20 unrelated offenses, many of which involved alleged violence of firearms dismissed, that were dismissed or *nolle prossed*.

[63] In the government's paper—I won't belabor the point—but we cited Fourth Circuit case law where there have been similar instances of upward departures that increased by 200-plus months, 240 months in the case of *United States v. Meyers*, 589 F.3d 117, and another, *United States v. Lawrence*. Government's not asking for an increase of 200-plus months in this case, Your Honor, but 29 months.

The other reason for requesting that upward departure, which I'll get to later on, is we'll touch upon the avoiding sentence disparities, but our argument for an upward departure is twofold. One of which falls within his criminal history category which I just stated, and the standard of which as the Court is well aware is one of reasonableness. And were the Court to make an upward departure in this case and were it to be appealed, the Fourth Circuit has said that in reviewing a departure from the advisory guideline range, we defer to the trial court and to then reverse a sentence only if it is unreasonable, even if that sentence would not have been our choice. That comes from—excuse me. That comes from *United States v. McCoy*, and they're quoting *United States v. Evans*, both Fourth Circuit cases, one from 2015 and 2008, respectively.

The addition of 29 months is not unreasonable in this case, Your Honor and the Fourth Circuit would uphold such an upward variance.

By way of contrast, in *United States v. Howard*, the [64] Fourth Circuit shot down an upward departure

where the trial court imposed a life sentence where the maximum guideline range was 121 months. It's quite different than we're asking here from 10 years to life, from 108 months to 137, especially when considered with the avoiding sentencing disparities which I'll get to in a moment.

Largely, the history and characteristics which defense focused on in their position paper almost exclusively does not outweigh the other factors for the Court to consider here: The nature of the offense, need for punishment, deterrence, the need to protect society. These are egregious crimes, and again, recidivistic behavior for over a decade. Undeterred recidivistic behavior, Your Honor. And escalating, I might add.

That gets to the need for punishment. Again, over a decade of continued criminal activity. This flows right into deterrence. Clearly this type of conduct, it is the duty of the government and this Court to deter generally, but specifically this defendant is not deterred. Has not been deterred. Time and time and time again he continues his criminal conduct. And even if this particular case, Your Honor, upon our viewing downstairs on September 18th with not being able to get back into his room and being notified that the police were on his way, the defendant ran. And a week later, Your Honor, a week later, was then arrested with another firearm, another supply of drugs and surveilled continuing to distribute heroin on the [65] streets. Counts 5 and 6 of which he was convicted. Distributing that heroin and cocaine on September 27th, a week after he ran from authorities and abandoned $17,000 in cash and an abundance of narcotics and another firearm and his IDs in a hotel room. The need for deterrence here is quite high.

Need to protect society. Again, Your Honor, these are considerably dangerous offenses, especially when

considered the conduct and the narcotics found in the hotel room. Over 48 grams of a mixture including Fentanyl, which is lethal both to users and distributors alike. People are dying left and right dealing with this particular substance.

And that brings us to avoiding sentencing disparities, Your Honor. Your Honor, we've talked about the DNA in this case. We understand the reasons why that was not presented at trial and why it was not further impressed upon this Court here at sentencing today. But the fact that but for the government's compliance with the understanding and respect for the Court's ruling, presented a case with one hand tied behind its back with conditionally—with exceptionally incriminating evidence of DNA on a firearm and narcotics on a quantity of Fentanyl more than 48 ounces which is a (b)(1)(B) felony.

MS. KATCHMAR: Your Honor, we would object to him being able to argue that at all and Monday Morning Quarterback that issue, and I move to strike his argument.

THE COURT: Well...

[66] MS. KATCHMAR: I understand his argument, Your Honor.

THE COURT: You know, I understand why you're upset by it, and I'm certainly going to give you the chance to reply to it, and I'll make my comment on it.

Go ahead, Mr. Osyf.

MR. OSYF: Thank you, Your Honor. And but for an understandable procedural error on our part which the government accepts, there's a high probability that the defendant would be looking at a mandatory minimum of 10 years based on that evidence alone. And that's something that clearly can be considered. Whether or

not the Court does or not is clearly in the Court's discretion. But to consider that 10 mandatory minimum, 10 years, and that would be on top of the 87 to 100—or 108 months guideline range recommended by probation.

Again, similarly, the Court, as we've talked about, can consider evidence by a preponderance, and that includes the firearm found on September 27th in the vehicle. Evidence was put before the jury that there was a firearm located with the defendant's—what the jury clearly found was the defendant's white Nike bag, because they found him guilty of the substances contained therein. The firearm was located on top of that bag with his firearm, with his, the defendant's phone on top of that firearm, no one else in the back seat, a child seat in the back seat so no one else could sit in the back seat, and two users up in the front seat who were not distributing, but evidence was [67] presented that the defendant was sitting in the back seat and distributing narcotics to the two users in the front. Had the jury found for the 924(c) as charged, that would have been another mandatory minimum of five years. Again, we understand that he was acquitted of that charge, and we understand that the burden of proof is different here at sentencing. But it's something for the Court to consider. Again, that the defendant could be looking at up to 15 years mandatory minimum on top of the recommended guidelines range here, and from that, it should be considered. We understand the Court is to consider each defendant individually, but to avoid sentencing disparities of defendants similarly situated, the upward departure, the government feels, is warranted here, reasonable here, and increasing by a mere 29 months above the guideline range for the offenses of conviction is sufficient and not more than necessary to accomplish sentencing goal here.

THE COURT: All right. Why don't we move on to any facts you want to argue.

MR. OSYF: Honestly, Your Honor, the Court sat in front for the jury trial.

THE COURT: You don't have to.

MR. OSYF: No, I don't believe there's a need to resuscitate what's already before the Court.

THE COURT: All right.

MR. OSYF: Thank you, Your Honor.

[68] THE COURT: All right. Thank you, Mr. Osyf.

Ms. Katchmar?

MS. KATCHMAR: Your Honor has made its rulings and we will continue our objections, and I will now address this in terms of 18 United States Code, Section 3553.

THE COURT: Happy to hear from you.

MS. KATCHMAR: Thank you, Your Honor.

Your Honor, in *Gall v. United States*, the Supreme Court explained, as I said before, that the guidelines should be the starting point and the initial benchmark. Here, 87 to 108 after the Court ruled. However, giving both parties a chance to argue for what they deem appropriate, the Court should consider all of the sentencing factors under 3553(a), and in so doing, the Court may not presume the guideline range is reasonable. And that's at 596, 597 of that cite. And Your Honor, they are not reasonable.

Further, Your Honor, as set forth in *Kimbrough*, 128 Supreme Court 558, while a district court must include them, it may also vary. And we are asking the Court to vary to 24 months.

However, Your Honor, what strikes counsel is that here we are in 2019, *Booker* was decided in 2005, we have a charge which carries no mandatory minimum, that we're not talking about where in the probation the 20 years we should be, but we're still using the language of the guidelines, departures, [69] variances, upward, downward, when *Booker* shows, what all the progeny shows, when even now where the Commission knows that its sentencing structure is at the heart of need and change, we need to look at our language. So let's look at the language.

If the Court looked at only what was convicted, offense level is 16, which I bring from my papers and incorporate, that would be 24 to 30 months. With the Court's enhancements, substantially higher—or sorry, with the Court's finding, 87 to 108.

Now the government argued for its upward departure—again that language—and argued what's 29 months? Your Honor, we're not talking numbers, we're talking someone's freedom. And the fact that they pursued their Constitutional right to trial and they from a jury received due process, even if we disagree with what they came forward to and will appeal, we'll appeal on that, the government did not object in the presentence report to the criminal history category, so we ask the Court to summarily discard that as a basis for an upward departure, because if they had an objection, they should have lodged it just as the defense did. They cannot now go back, just as they want to go back and have the Court fix what the jury did not do. Just as a fair trial was tried to be had for Mr. Osby, so too for the government.

Now here we are. Only two charges of conviction. By no means should 18 United States Code Section 3661 prevail over [70] a 3553, and instead when read together, 3553 tempers and contextualizes how the

Court should consider the information in arriving at a sentence that is sufficient but not greater than necessary.

We submit that the 24 months is appropriate for several reasons. First, it did not come in a vacuum. It tried to look at what the Guidelines would say if only the acquitted conduct was considered.

Second, the jury did not just reject possession with intent to distribute on the September 18 charges, but we intentionally submitted the lesser-included offense of possession, and that too was summarily rejected. The government now says, well, I had my hand behind my back with DNA. Granted, he accepted responsibility for the late disclosure, but this could have, would have, should have been a mandatory minimum here, a mandatory minimum there, and then the jury would have found my way. We're not here to Monday Morning Quarterback the jury's determination.

Under 3553, the nature and circumstances of the offense before the Court should be that on September 27th, in a car, Mr. Osby was found, and he was found with those drugs for which he should only be attributed, which return the base offense level of 16.

Now, in reflecting the seriousness of the offense—I'll get back to the personal history and characteristics – and [71] promoting respect for the law and providing just punishment, here is a concern that I must raise with the Court. The arguments that we hear today about heroin and Fentanyl are the exact same arguments we were hearing about cocaine and crack cocaine in the early 2000s and late '90s. Frankly, almost before then. And we've been back in 2010 and 2012 and 2018 and '19 to try to rectify what the guidelines created in attempts to fix what was deemed a policy, a factual crisis. But at what cost to what individuals?

This is a serious offense. Mr. Osby is now a federal felon. He was not a felon when he was arrested on September 27th, 2019. His conviction for a felony drug offense did not occur until subsequent to that.

In addition, Your Honor, promoting respect for the law, just as the Court sentences Mr. Osby for the actions that the jury found, so too respect for the law is respect for the Constitutional role that the jury played in this case. And providing just punishment is just punishment for the behavior that Mr. Osby is before the Court here today, not what could be, what might be, in the future. And I'll get to protecting from future crimes.

Now, deterrence is both general for people out there who might be involved—Mr. Osby has been in custody over a year now—but also specific. And all of the empirical data shows that the length of the sentence is not what deters, but [72] individually a sentence that is sufficient but not greater than necessary for this person at this time with these facts. But I also want to talk about deterrence in terms of deterring people from choosing to go to trial, such that people who might be not guilty of certain crimes would forego that because of the potentially hollow ring that the guidelines allow for what is a Constitutional tenet, a foundation of our criminal justice system. And we submit that, looking at 3553, including acquitted conduct in the Court's consideration beyond the calculation of the guidelines, potentially ring hollow for the Fifth and the Sixth Amendment that Mr. Osby and all persons in our courts enjoy.

When we look at protecting the public from future crimes, we would submit that the argument of past being prologue with Mr. Osby is simply not the case. He is a young man. He is 24 years old. He is one month from his 25th birthday. He will be 25 next month. His experience in this case, he's never been in custody for

this period of time. Frankly, maybe a day here, a month there. But he's been in custody for a full year. And what's important and that I ask the Court to note when we're talking about a violent or scary individual. Mr. Osby appears before the Court in a blue jumpsuit. He's at a minimal level and always has been at the Western Tidewater Regional Jail. Believe me, probation does an excellent job when they get the record from the jail, and you have nothing in front of you [73] showing that he's been anything other than model while in custody. In fact, trying to pursue his GED to better his life. That's moving forward. That's not past as prologue, that's looking to the future.

Your Honor, past conduct simply with no conviction or no charge with law enforcement does not equate to guilt of those crimes at the time, and the Court will note that probation put allegedly because we don't have all the fact. As the Court knows and what we argued in our papers, is that often when an initial police report is written at the beginning of the case, the investigation, as it continues, rarely is containing the whole story from the beginning and it must move forward.

When we talk about Mr. Osby's personal history and characteristics, I would say over my right shoulder you have to the far—to the Court's left, his grandmother, Pearl Osby, who wrote a letter to the Court; his mother, Rene Osby, who came up here from North Carolina. She was at trial every single day, Your Honor, and also Courtney Cook, Mr. Osby's lady friend, and she too was in court every day—

THE COURT: Good to have you all here.

MS. KATCHMAR:—and they continue to be here.

Thank you, Your Honor.

So when we look at his past personal history and characteristics, I tried to be very detailed in our position paper that we disagree with who Mr. Osby is. Not disagree with [74] what was put in the presentence report, but in terms of how the government sees Mr. Osby. That's why there is two sides here at sentencing to every story. Mr. Osby did not have a continuous upbringing in one home with a nuclear family and not moving around a lot, not changing schools. There was a lot of that. And that's in the presentence report that you have.

In addition, the question is when he did start acting out? And I have to tell you, Your Honor, Ms. Geurts, she digs. I mean, I've seen a lot of her presentence reports. She digs. And nowhere in here do I see where anyone throughout his upbringing really said why. During some of the juvenile contacts they might have said you need to do this, you need to do that, but other than one juvenile evaluation, that's it. So I think there are a lot of whys that need to be asked and answered. But we cannot assume that because he's before the Court here today on this sentencing that he is simply someone who needs to go to prison for a long time and stay out of the community, certainly not at 24 years of age, almost 25, when there are so many opportunities to promote rehabilitation.

So with that I will address this: First, the Court may have noted in my position paper I raised the program with the Bureau of Prisons called the Brave program. Did the Court have an opportunity to see that and review this?

THE COURT: Yes, I read your paper.

MS. KATCHMAR: Thank you. And Your Honor, we would [75] ask the Court—and I'm sorry, Your Honor, just getting into it a little bit.

Your Honor, I would ask the Court to consider recommending the Brave program. I'm zero for three with the recommendations, meaning the judges have done it, but the Bureau of Prisons has not. And my understanding is mainly it has to do with resources and availability in the program and not because of the recommendation of the individual. So I would ask the Court to consider that.

There is a substance abuse issue here. So I would ask the Court to consider RDAP there.

I would ask the Court to consider all sorts of any educational, vocational treatment. Mr. Osby, for having struggles with the testing, I can tell you has the capability to go much beyond his GED and reintegrate as a very productive individual.

But that brings me to the denial of federal benefits, Your Honor. It's rare that we see that recommendation in presentence reports, and I have to be candid, it's the first time in almost 10 years that I've even it. I would ask the Court not to exercise its discretion and deny them. Because it is so important as promoting rehabilitation for the educational, the vocational programs that would be out there through federal programs even with a felony conviction for Mr. Osby.

Now I want to get to the—I'm hurrying. I'm sorry, [76] Your Honor.

I want to get to the government's request for an upward departure. Your Honor, putting aside their criminal history argument, Your Honor, the criminal history is appropriate. Category II. It was calculated appropriately, there was no objection to it. In terms of going up because of all the other contacts and all the other history, the courts hear that all the time. But to simply take things that were dismissed and say were *nolle prossed*, which is dismissed without prejudice in

the state, well, that still makes him a violent, terrible person, does not promote respect for the law. Because there are reasons why those cases did not go forward. And it's not for—we would submit it is not for any of us to put our judgment in there. And it's not just 29 months they're asking for, Your Honor, it's well above any time that includes acquitted conduct. Not just numbers. So with that, Your Honor, we would submit that it creates sentencing disparity to not only consider the 87 to 108, but it also creates a sentencing disparity to go even higher, because the government's argument was if we could have done this, we would have gotten a mandatory five years, if we could have done that we could have gotten another 10 years. And that's not what's before the Court.

THE COURT: You know, that's not an argument that I'm considering, so you really don't need to address it any further.

MS. KATCHMAR: Thank you very much, Your Honor.

[77] So with that, Your Honor, we submit that a sentence of 24 months with three years of supervised release is sufficient but not greater than necessary in this case. Thank you.

THE COURT: All right. Why don't we have your client join you at the podium.

Was there something else?

MS. KATCHMAR: Did I ask for a mental health evaluation and treatment, Your Honor?

THE COURT: You did in your position paper, but not here, so...

MS. KATCHMAR: Thank you. My apologies.

THE COURT: I think you did in your position paper.

All right. Mr. Osby, do you want to talk to your attorney for a moment?

(Counsel and defendant conferred.)

THE COURT: All right. You have the right to make a statement. You don't have to, it's up to you, but if you want to, this is your last opportunity to do that before sentencing. Do you wish to make a statement?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. So the Court will go forward with sentencing. And Ms. Katchmar, any reason the Court should not impose sentence at this time?

MS. KATCHMAR: No, Your Honor. Thank you.

THE COURT: All right. I will review the statutory [78] sentencing factors. They are designed to ensure that the sentence imposed is sufficient but not greater than necessary to comply with all the purposes of sentencing, which we refer to as the parsimony principle. I won't recite all of them, I've considered all the factors, and I've considered all the defendant's and government's arguments regarding the guideline calculation and where the sentence should fall, within or outside the guidelines. As is my custom, I will use the presentence report as a template for considering the factors.

So the defendant stands before the Court having been convicted by a jury of possession with intent to distribute heroin and possession with intent to distribute cocaine. He's been detained in state custody from 9/27/2018 to 2/22/2019 and in federal custody since that time and is now 24 or 25, Ms. Katchmar?

MS. KATCHMAR: He's 24. He'll be 25 next month.

THE COURT: In November. Okay.

And so we've spent quite a bit of time here today talking about a lot of the nuances of the objections and

the legal issues, but the evidence at the trial of course was focused on the incident on September 18, 2018 at the hotel room. We've also discussed here the fact that the not guilty beyond a reasonable doubt findings came back from the jury on those counts. And then the events that took place later on September 27, 2018 were also the subject of the evidence, and [79] the subject of the finding of guilt beyond a reasonable doubt that was made in the case.

You know, this is the time for me to comment on the nature and circumstances of the offense and the defendant's history and characteristics. And so we all sat through the trial, we heard the evidence. It's of no use, I think, for me to sit here for 30 minutes and once again talk about the nuances of the evidence that we heard. It's in the presentence report and we heard it. But I do want to make a comment sort of at a high level about the acquitted conduct argument, and just for purposes of sentencing how do I see it. Because I think that's beneficial, and it does fall under the 3553(a) determination also.

So you know, in our system of justice the government has, at the state and federal level, in our state the prosecutors, the Commonwealth's Attorneys are elected by the citizens. In the federal system the U.S. Attorneys are appointed by the President and subject to confirmation by the U.S. Senate after having been nominated. And so there are those executive kind of functions. And so they make decisions, those people that are put in office as a result of the decisions made by the voters at various levels are placed in office and make decisions about what they're going to pursue, who they're going to ask the Grand Juries to indict, and they do that. Separate and apart from the court. The court doesn't have a role in [80] making that original decision about whether they're going to prosecute somebody.

They bring those charges before the Grand Jury, and if the Grand Jury returns the indictment and it comes back, we move forward with the case. The question at that point presented to juries is whether or not the defendant is to be found guilty beyond a reasonable doubt of a particular crime. In this case, the jury found with respect to some of the evidence that was presented that it satisfied the burden of showing guilt beyond a reasonable doubt. With respect to some other evidence and other charges, the jury found that the evidence did not prove guilt beyond a reasonable doubt. The defense has today put before the Court the Constitutional and the I suppose you might say equitable arguments about the degree to which the Court should or shouldn't even consider and/or weigh in its determination evidence that relates to the charges on which the defendant was found not guilty beyond a reasonable doubt. And the debate, in essence, is whether or not, in the Court's role of deciding what is an appropriate sentence using the statute and all these factors the Court is to consider, the statutory sentencing factors, whether the Court should—can and should consider the conduct for which the defendant was found not guilty beyond a reasonable doubt.

The standard of not guilty beyond a reasonable doubt is a different standard than preponderance of the evidence, and the guidelines adopted by Congress and the President and upheld [81] by the Supreme Court, which are advisory, not binding, provide that the Court may consider conduct even if it has been acquitted; that is, even if a jury has found it's not enough for a finding of guilt beyond a reasonable doubt, that the Court can still consider that conduct if the Court finds the conduct to have occurred based on a preponderance of the evidence standard as opposed to the beyond a reasonable doubt standard. And I certainly understand the reasons why someone would question why a court should be able to consider that evidence in any way when a jury has

found it wasn't enough to satisfy the burden of proof beyond a reasonable doubt.

I guess the way that I look at it is the jury is given this set of facts, and the question is is the person guilty of the violation of this particular statute. And to find them guilty of violating that statute criminally you have to find the evidence is sufficient beyond a reasonable doubt. That they're guilty beyond a reasonable doubt. Which is a higher, in my view a significantly higher standard than simply by a preponderance of the evidence. Does it tip the scales, in other words, for by a preponderance, versus beyond a reasonable doubt, which is something significantly more than that.

And so although a jury says I can't find that the defendant is guilty of these crimes by a preponderance of the evidence, as I hold up my hands and sort of show scales moving

further than mere preponderance, the jury says I can't find them [82] guilty beyond a reasonable doubt of these crimes.

And then the government come at sentencing and says, all right, Congress, the President have said we want you to apply Sentencing Guidelines, and in applying those sentencing guidelines there are certain factors you are to consider, enhancements that you're to consider, that impact the guideline. And the Supreme Court, so far at least, has said you can consider those facts that may have also been presented to a jury and on which the jury said I can't find that the defendant is guilty beyond a reasonable doubt, but the Supreme Court has said you can still consider those factors if you find them by a preponderance for purposes of satisfying the enhancements under the guidelines.

Now, and so I do—and I'm—frankly that's the law. That's the controlling law. And I have taken an oath to

uphold the law, and so that's what I do. If the Supreme Court tells me they have changed that law at some point in the future, that's fine, and that's what I'll do.

The defense has also made what I guess I would generally characterize as an equitable argument, a general fairness argument; that it's not—even though the Congress, President and the Supreme Court say you can still consider these factors in calculating the guidelines and then considering the guidelines along with all these other factors in deciding what sentence to impose, the defense says it's just fundamentally [83] unfair for the Court to rely on that information. And I get the argument. But the problem with it is when you drill down on the argument, the fundamental unfairness suggests that you're essentially relying on those facts that you find by a preponderance of the evidence when the jury couldn't find them beyond a reasonable doubt, the defense is sort of arguing it's fundamentally unfair to do that. But the problem with the argument as I see it is the Court's consideration of those facts by a preponderance of the evidence standard is not the same as finding somebody guilty of the offense, because if the Court had found somebody guilty of the offense we would have a very different sentencing structure here. And so I don't see it as problematic as the defense sees it once you really drill down and understand what the facts are being considered for.

So that's—I think you've made that argument quite a bit today, and you're entitled to know what I think, and the Court of Appeals when they listen to—or read the transcript is entitled to know how I view it and what I think.

So we've talked about the offense, the defendant's history and characteristics.

When I go to the presentence report, defendant was born in 1994 in Hampton to his parents. And Paragraph 52 reflects that his parents have no criminal or substance abuse history and they're supportive of the defendant. There's discussion here of his half siblings, and I've reviewed that. [84] And of course it notes that his parents were separated when he was six, and prior to that separation the family lived in Hampton, and he recalled spending most of his time with his maternal grandmother, who continues to reside there, and he has fond memories of spending time with his grandmother and learning how to spend time there cooking and baking and other things. And he spent time with his father playing basketball.

And then after his parents separated he resided with his mother and they relocated from Hampton to Charlotte, and that presented challenges for the defendant, uprooting him and moving him from his routine with his father and his grandmother.

At age 10 the defendant moved back to Hampton. He's lived there ever since. He resumed contact with his grandmother and then sporadic contact with his father.

He denies any abuse or neglect as a child, and he describes in Paragraph 98 his feelings about the way in which he experienced life as a young person, and primarily lived with his mother, but following a suspension in the sixth grade he lived with his father, and also lived with his father during the tenth grade. And at 18 he moved out of his mother's home and been on his own ever since.

Defendant is not married or have children, but he's in a relationship with Ms. Cook. And that's in Paragraph 60. And it describes that committed relationship and his relationship with her children and their plans.

[85] His grandmother was also interviewed in Paragraph 61, we see that information, and thereafter.

And after the parents' separation there's the notation that his contact with his father has not been consistent and may have contributed to some of his challenges.

The defendant's physical condition is reviewed in Paragraph 66, 67, 68, 69, and his mental and emotional health after that, and there's the discussion of his hospitalization for mental-health-related issues in November, 2014, and the discussion in those paragraphs of that. He was diagnosed with depression and anxiety, but has not had any mental health treatment since then and has not been able to follow through due to his lack of insurance.

When he was there at the Behavioral Health Center at Riverside in Hampton, he did test positive for opiates and cannabis, and he reported using spice, which is synthetic marihuana. And in addition to the substance abuse disorder there, he was diagnosed with depressive disorder not otherwise specified and antisocial personality disorder. And he states that he believes he could benefit from mental health counseling. And so all the way down to Paragraph 77 we have the discussion of these issues.

The defense has highlighted the absence of further testing that could have been beneficial to the defendant at an earlier age, and I think that may well be the case, and perhaps [86] can be addressed, because the defendant is still a very young man.

The substance abuse paragraphs, 78 through 85, go through the defendant's substance abuse history, and among the things that the Court sees there is he completed the drug court program in 2009 in the state system.

Educationally the defendant last completed tenth grade at Enterprise Academy in Newport News and was sent there after caught with drug paraphernalia at Warwick High School. He did well, he said, at Enterprise Academy, but did not finish. And his family confirmed that he did better at Enterprise Academy than at Warwick High School. Paragraph 87 reviews the transcripts and Paragraph 88 discusses his enrollment in GED classes without completion at TNCC and now at Western Tidewater Regional Jail.

Employment record. We have he was working one day a week as a landscaper prior to his arrest. Has not been formally employed since 2016. Previously, '15, '16 worked as a machine operator at Smithfield Packing, and has worked at Outback Steakhouse and as a roofer and at the Cinema Cafe in various places.

We then come to the criminal history which begins at age 13 with a petty larceny and break and enter, a description of it there. We have, age 14, concealment and possession of marihuana. Age 15—and a lot of these are alternate findings [87] of guilt after other things were tried. We have possession of drug paraphernalia. Age 17, possession of marihuana. Age 20, enter vehicle to commit crime, 12 months suspended. Petty larceny, 12 months, suspended. Petty larceny, 12 months custody, suspended. And he was successfully terminated from supervision there. Age 22, failure to stop for an accident with injury, 12 months custody, suspended. Age 22, possession of Oxycodone, five years custody, suspended. And those are the convictions before the Court.

And so the Court has considered that and the letters from defendant's family.

The Court considers the need for the sentence to reflect the seriousness of the offense. And defendant knows much better than I do what introduction of these

drugs, the heroin and the cocaine and the other drugs involved here, but what the introduction of those drugs do to families and communities. It creates addictions. It diverts money being used to buy the drugs from supporting children and being productive. The time that people are involved using the drugs and getting the money to use the drugs is time in which they could be flourishing citizens and members of families. It creates addictions. It breaks up families. Children don't understand why their parent is addicted and they're not there to support them and love them. And it is sort of a cancer that eats at the heart of a community. It's a very sad thing to see [88] day in and day out as I do sitting here, and I can only imagine how sad it is when you're in the middle of a community where you see it all the time with friends and neighbors or family members, even.

The Court is required to consider a sentence that promotes respect for the law and provides a just punishment, one that affords deterrence to the defendant and to people who hear of the sentence. And of course when I see these numerous interactions with law enforcement and the criminal justice system in the presentence report, it makes me ask, what will be necessary to deter this kind of behavior? And that's just a normal, common-sense question that I have when I look at all this.

I do note that they're not significant periods of incarceration where the defendant has had an opportunity to kind of learn the kind of lesson that sometimes a significant period of incarceration can teach. And so I do consider that in imposing the sentence that I impose here.

We don't know what a year or two would have done in an earlier scenario to prevent us being here now.

The Court considers the need for education and treatment and the need to protect the public. I've already talked about the danger here of these drugs and having weapons around. It's just, it is a recipe for disaster that we see every day on the streets of our community.

[89] The Court considers the sentencing range. And that brings me to the upward departure request, upward variance request. And I consider that also in conjunction with the Factor 6 need to avoid unwarranted sentence disparities among defendants with similar records found guilty of similar offenses.

I would be much more inclined, I think, here to consider a request for an upward variance or departure had I seen some significant periods of incarceration, had I seen somebody who was older, who had more serious criminal activity. But I don't. And I just don't think it's the case for that departure.

The government, you know, as I said earlier, I understand why the government is trying to say that but for some things that weren't done, evidence might have been submitted and findings might have been made. But you know, we take the case as it is. We don't really ask what if with respect to convictions.

And so I think that in considering the guideline range in the first instance, which is the first factor I'm supposed to consider, I don't think an upward variance or an upward departure is appropriate there. And I've reviewed all the other factors. When I look at the non-frivolous arguments for a downward variance which is the defendant has asked for, I think I have either noted the paragraph without in any embarrassing [90] way trying to go into some specific argument mentioned in the paragraph, or specifically discussed what is commented on there.

I do consider the work ethic, the defendant's age, his separation and the relationships and his upbringing, substance abuse issue, the mental health issues discussed, never being convicted of a felony, and the deterrence. And I think I've addressed—have I addressed all of the non-frivolous arguments for a downward variance, Ms. Katchmar? If not, let me know and I'll try to do so.

MS. KATCHMAR: You have, Your Honor. Thank you.

THE COURT: So after carefully considering the advisory guideline range and all the statutory sentencing factors, the Court is now prepared to impose sentence in the case.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Erick Allen Osby, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 87 months. The term consists of 87 months on Count 5 and a term of 87 months on Count 6, to be served concurrently.

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

Upon release from imprisonment, Mr. Osby shall be placed on supervised release for a term of three years. This term consists of three years on Count 5 and a term of three [91] years on Count 6, all to run concurrently.

Within 72 hours of release from custody of the Bureau of Prisons, Mr. Osby shall report in person to the probation office in the district where he is released. He shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of starting supervised released, and at least two periodic

drug tests thereafter, as directed by the probation officer.

While on supervision, Mr. Osby shall not commit another state federal, state or local crime, and shall not unlawfully possess a controlled substance and shall not possess a firearm or a destructive device.

He shall comply with the standard conditions that have been adopted by this Court for people placed on supervised release. In addition, he shall obtain a GED if he doesn't already have it, or obtain a vocational skill if he's not employed full-time.

He shall provide the probation officer access to any requested financial information.

If he tests positive for controlled substances, he shall participate in a program approved by the probation office for substance abuse, and that could include residential treatment and testing to determine whether he's reverted to the use of drugs or alcohol, as directed by the probation officer. He shall undergo a mental health evaluation at a program [92] approved by the probation office for mental health treatment, and shall follow all recommendations of that evaluation, which may include treatment, the costs to be paid by him to be extent he's capable as directed by the probation officer.

He shall waive rights of confidentiality regarding substance abuse and/or mental health treatment in order to allow the release of information to the probation office so they can track how he's doing in such mental health and/or substance abuse treatment.

He shall have no contact with any known gang member without first obtaining permission of the probation officer.

The Court finds the defendant is not capable of paying a fine. He shall pay special assessments of $100

on each count totaling 200. No restitution is imposed. No fine.

Because the period of ineligibility for defendant here would expire before the defendant's release from custody, the court declines to deny all federal benefits as requested by the government.

The special assessment is due in full immediately. Any balance remaining to be paid at $25 a month beginning 60 days after supervision starts until paid in full. And the special assessment is subject to default—or payments, excuse me, is subject to penalties for default and delinquency, and nothing in my order prohibits the collection of any judgment or fine by the United States. Payments of the penalties is due [93] during the period of imprisonment, and payments are to be made to the Clerk of this court except those made to the Bureau of Prisons.

Defendant shall notify the U.S. Attorney for this district within 30 days of any change of name, residence or mailing address until of his costs and special assessments imposed by the judgment is fully paid.

Now Mr. Osby, you have the right to appeal the jury's verdict and the right to appeal your sentence if you believe that it is illegal or incorrectly imposed. If you wish to pursue an appeal, you must file a notice of appeal within 14 days from the entry of judgment. If you do not file the notice of appeal on time, you may lose your right to appeal.

You have the right to be assisted by an attorney on appeal. One will be appointed for you by the Court if you cannot afford to hire an attorney. You may be permitted to file the appeal without payment of costs if you make a written request to do so. Also, if you make a request of the clerk's office, someone there will prepare and file the notice of appeal for you.

I will recommend that while you are in the Bureau of Prisons, you participate—be screened for and participate in the Brave program and RDAP, and that you receive a mental health evaluation and any appropriate recommended treatment as a result of such evaluation while you are in the Bureau of Prisons.

[94] And I will recommend that you complete your GED if you have not already done so at the jail.

Ms. Katchmar, anything else I should address?

MS. KATCHMAR: Your Honor, I would ask that if he's not eligible or not placed in the Brave program that he be placed as close to the Hampton Roads area as possible?

THE COURT: If not placed in the Brave program I'll recommend he be housed as close to Hampton Roads, Virginia as possible.

MS. KATCHMAR: Thank you. Nothing else.

THE COURT: Mr. Osyf, anything else?

MR. OSYF: Your Honor, the Court might notice there is a forfeiture charge in the second superseding indictment; however, because the defendant claims no property interest in the two firearms, the parties have agreed and worked it out through ATF, and therefore no consent order of forfeiture will be filed with the Court.

MS. KATCHMAR: That is correct.

THE COURT: All right. Then I don't have to do anything else on that front.

MR. OSYF: Right. Nothing further from the government.

THE COURT: Madam Clerk, anything else from your standpoint?

COURTROOM DEPUTY CLERK: No, sir.

[95] THE COURT: All right. Thank you all. I wish I well, Mr. Osby.

(Whereupon, proceedings concluded at 5:40 p.m.)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

[filed Sept. 25, 2019]

UNITED STATES OF AMERICA	)	
v.	)	Case No: 4:19cr9
ERICK ALLEN OSBY, Defendant.	)	

DEFENDANT'S OBJECTIONS TO THE PRESENTENCE REPORT WITH MEMORANDUM OF LAW

COMES NOW the Defendant, Erick Allen Osby ("Mr. Osby"), by counsel and pursuant to Federal Rule of Criminal Procedure 32, Section 6A1.2 of the United States Sentencing Guidelines, and the Sentencing Procedures Order (ECF No. 22), and hereby states seven (7) objections to the Presentence Investigation Report ("PSR"), some of which may affect the advisory guidelines. Mr. Osby files separately his position with respect to the statutory sentencing factors under 18 U.S.C. § 3553(a).

I. Objection: The Inclusion of Acquitted Conduct in the Presentence Investigation Report and its Use in Calculating the Applicable Guideline Range

Mr. Osby objects to the consideration of acquitted conduct for sentencing purposes, and specifically in calculating the applicable guideline range. The con-

sideration of this conduct violates Mr. Osby's Fifth and Sixth Amendment guarantees of due process, a right to a jury trial, and the Double Jeopardy Clause. Specifically, Mr. Osby objects to the following:

A. Paragraphs 7 through 12: The jury found that the government did not meet its burden in proving the allegations contained in these paragraphs. The jury acquitted Mr. Osby of both possession with the intent to distribute acetyl fentanyl, heroin, and fentanyl, and the lesser-included offense of possession of acetyl fentanyl, heroin, and fentanyl (Count 1 and lesser-included offense); possession with the intent to distribute heroin and possession of heroin (Count 2 and lesser-included offense); possession with the intent to distribute cocaine and possession of cocaine (Count 3 and lesser-included offense); and possession of a of a firearm in furtherance of a drug trafficking crime, as alleged in Counts 1 through 3 (Count 4). More simply, the jury acquitted Mr. Osby of all conduct related to September 18, 2018 and the Extended Stay America hotel room, and none of this alleged conduct should be included in the PSR and in the calculation of the guideline range:

   a. 52.32 grams of fentanyl
   b. 55.567 grams of cocaine
   c. 10 milligrams of oxycodone
   d. $17,482.93 (converted to 124.88 grams of heroin)
   e. 1 Springfield semi-automatic handgun

B. Paragraphs 15 and 16: Again, the jury found that the government did not meet its burden in proving the allegations in these paragraphs related to the Taurus, Model PT809, 9mm handgun, serial number TK061946, and 17 rounds of 9mm ammunition. The jury acquitted Mr. Osby of the alleged possession of this firearm in furtherance of a drug trafficking crime on September 27, 2018. (Count 7). Any reference to this firearm should be removed from the PSR and this firearm should not be used to calculate the applicable guideline range because the jury acquitted Mr. Osby of this conduct.

C. Paragraph 26: Mr. Osby objects to the drug quantity calculations used to determine the applicable base offense level because these drug quantities include acquitted conduct. The following chart compares the drug quantities including, and without, the acquitted conduct. All acquitted conduct should be excluded from the calculations:

Drug Name	**Drug Quantity Alleged in PSR**	**Converted Drug Weight Set forth in PSR**	**Amount of Acquitted Conduct Included**	**Drug Quantity without Acquitted Conduct**	**Converted Drug Weight without Acquitted Conduct**
Cocaine base	1.0 gram	3.57 kg	0.00	3.57 kg	3.57 kg
Fentanyl	52.32 gm	130.80 kg	52.32 grams (PSR ¶ 12)	0.00 kg	0.00 kg
Heroin	156.34 gm	156.34 kg	124.88 grams (PSR ¶ 12, converted cash)	31.46 grams	31.46 kg

Marijuana	5.56 gm	0.00 kg	0.00	0.00 kg	0.00 kg
Cocaine	61.267 gm	12.25 kg	55.567 grams (PSR ¶ 12)	5.7 grams	1.14 kg
Oxycodone (actual)	10.0 mg	0.06 kg	10.0 mg (PSR ¶ 12)	0.00 kg	0.00 kg
Total:		303.04 kg = Level 24			36.17 kg = Level 16[1]

D. Paragraph 27: Mr. Osby objects to the inclusion of the two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a dangerous weapon. This enhancement is based solely on acquitted conduct. The jury acquitted Mr. Osby of possessing any weapon in furtherance of a drug trafficking crime. *See* ECF No. 58 – Jury Verdict Form (acquittal on Count 4 and Count 7).

E. Paragraphs 100 and 101: Mr. Osby objects to the guideline range calculations set forth in these paragraphs because they are based in large part on acquitted conduct, which should not be referenced in the PSR or used to calculate the applicable guideline range.

The reference to and use of acquitted conduct in sentencing, as laid out above, is fundamentally unfair and violates Mr. Osby's Fifth and Sixth Amendment rights. The use of acquitted conduct in sentencing is an "important, frequently recurring, and troubling contradiction in sentencing law." *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing en banc), cert. denied, 137 S. Ct. 37 (2016). The Sixth Amendment

[1] *See* U.S.S.G. § 2D1.1 (12): At least 20KG but less than 40KG of converted drug weight corresponds to a base offense level of 16.

right to jury trial is designed to protect defendants from prosecutorial and judicial overreach. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). It is "a fundamental reservation of power in our constitutional structure." *Blakely v. Washington,* 542 U.S. 296, 305-06 (2004). The use of jury-rejected allegations at sentencing violates this right. When the jury acquits, it makes a "legal certification" that "an accused person is not guilty of the charged offense." Acquittal, Black's Law Dictionary (10th ed. 2014). As the Supreme Court has emphasized, "the law attaches particular significance," *United States v. Scott*, 437 U.S. 82, 91 (1978), and "special weight" to a jury's decision to acquit a defendant, *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980). An acquittal is meant to be final and "unassailable." *Yeager v. United States*, 557 U.S. 110, 122-23 (2009). As Justices and judges have continued to emphasize, the "disregard[]" for the Sixth Amendment through the use of acquitted conduct at sentencing "has gone on long enough." *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari).

Mr. Osby acknowledges that in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the Supreme Court considered whether the practice of considering acquitted conducted for sentencing purposes offended the Double Jeopardy Clause and held that it did not. *See United States v. Booker,* 543 U.S. 220, 240 n.4 (2005) (observing that *Watts* "presented a very narrow question" regarding the Double Jeopardy Clause.) Importantly, though, in the two decades since, numerous Justices and judges have questioned whether use of acquitted conduct at sentencing comports with the Sixth Amendment's jury trial

guarantee and due process principles and have urged the Supreme Court to "take up this important, frequently recurring, and troubling contradiction in sentencing law." *E.g., United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc). Justice Kennedy warned that increasing a sentence based on facts the jury rejected raises concerns of "undercutting the verdict of acquittal." 519 U.S. at 170 (Kennedy, J., dissenting). In *Bell,* then-Judge Kavanaugh posited that increasing a defendant's sentence based on acquitted conduct "seems a dubious infringement of the rights to due process and to a jury trial." 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc).

In *Jones v. United States*, a jury convicted petitioners of distributing small amounts of cocaine but acquitted them of conspiring to distribute drugs. 135 S. Ct. 8 (2014) (Scalia, J., dissenting from denial of certiorari). Nevertheless, the sentencing judge found that they had engaged in the alleged conspiracy and based their sentences on that finding. Dissenting from the denial of certiorari, Justice Scalia, joined by Justices Thomas and Ginsburg, highlighted the pressing need for the Court to resolve whether the Due Process Clause and the Sixth Amendment's jury-trial right permit judges to sentence defendants based on acquitted conduct. *Id.* at 8-9. Justice Scalia's dissent noted that "[t]he Sixth Amendment, together with the Fifth Amendment's Due Process Clause," require that each element of a crime be either admitted to the jury or proved beyond a reasonable doubt. *Id.* at 8. The dissent lamented that the courts of appeals had "uniformly taken [the Court's] continuing silence" on the question "to suggest that

the Constitution does permit" sentences supported by judicial findings, including findings that defendants "engaged in [an offense] of which the jury acquitted them." *Id.* at 9. The dissent stated that the use of acquitted conduct at sentencing represented a "disregard[]" for the Sixth Amendment that had "gone on long enough." *Id.*

This Court would not be alone in concluding, and should conclude, that the use of acquitted conduct at sentencing is unconstitutional, and "violates both our common law heritage and common sense." *United States v. White*, 551 F.3d 381, 387 (en banc) (Merritt, J., dissenting) (writing on behalf of six judges); *see also, e.g., United States v. Mercado,* 474 F.3d 654, 658-65 (9th Cir. 2007) (Fletcher, J., dissenting), cert. denied, 552 U.S. 1297 (2008); *United States v. Faust*, 456 F.3d 1342, 1349-53 (11th Cir.) (Barkett, J., specially concurring), cert. denied, 549 U.S. 1046 (2006). Many Judges have observed that "the use of acquitted conduct to enhance a defendant's sentence should be deemed unconstitutional under both the Sixth Amendment and the Due Process Clause of the Fifth Amendment," *United States v. Lasley*, 832 F.3d 910, 920-21 (8th Cir. 2016) (Bright, J., dissenting), and has "urge[d] the Supreme Court to re-examine its continued use," *United States v. Canania*, 532 F.3d 764, 776-78 (8th Cir. 2008) (Bright, J., concurring); *see also United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio 2005) (Marbley, J.); *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005) (Gertner, J.).

Because the use of acquitted conduct at sentencing violates Mr. Osby's Fifth and Sixth Amendment rights, this Court should refuse to consider the acquitted conduct set forth in paragraphs 7-12, 15, 16,

26, 27, 100, and 101 and excise the mention of this conduct from the PSR. Further, this Court should find that the applicable base offense level is 16 based on a drug quantity of less than 40 kilograms of converted drug weight. Finally, this Court should refuse to apply the enhancement for gun possession under § 2D1.1(b)(1) (PSR ¶ 27) because the jury acquitted Mr. Osby of possessing a firearm in furtherance of drug trafficking, as alleged in Counts 4 and 7.

The use of acquitted conduct at sentencing in a case like this threatens the legitimacy of the system of trial by jury and "undermine[s] public confidence in the fairness of our system of justice." *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *see also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018) (expressing concern where sentencing practices "seriously affect the fairness, integrity, or public reputation of judicial proceedings").

II. Objection: The Reference to and Use of Any and All Relevant Conduct for Sentencing Purposes

Mr. Osby further objects to the use of all relevant conduct for sentencing purposes. In doing so, he incorporates the arguments set forth above specifically relating to acquitted conduct but he also objects to the inclusion and use of the following relevant conduct:

A. Paragraph 6 and Date of Earliest Relevant Conduct: The allegations contained in paragraph 6 relating to a controlled buy that allegedly occurred on September 4, 2018, were not presented to the jury. These are unsubstantiated allegations that should not form the basis of a judicial finding. Moreover, Mr. Osby

notes that there was no laboratory analysis of the substances and the packaging. Specifically, Mr. Osby objects to the inclusion of this paragraph in the PSR and the use of the drug weights contained within in the determination of the applicable guideline range.

B. Paragraph 13: Paragraph 13 details a controlled buy that allegedly occurred on September 27, 2018. These allegations were not presented to the jury, and Mr. Osby objects to a judicial finding that this buy occurred and the drug weights/currency involved. Again, Mr. Osby objects to the inclusion of this paragraph in the PSR and the use of the drug weights/currency in the determination of the applicable guideline range.

C. Paragraph 19: This paragraph sets forth the total alleged drug weights, including acquitted and other relevant conduct. Mr. Osby objects to the inclusion of the conduct detailed in subsection I in this pleading, also to the other relevant conduct listed above.

D. Paragraphs 26, 100 and 101: These paragraphs set forth the guideline calculations which are based, in large part, on relevant conduct. Mr. Osby objects. Without any of the relevant conduct identified in paragraphs 6, 13, and 12-17 (acquitted conduct), the calculations would be as follows:

Drug Name	**Drug Quantity Alleged in PSR**	**Converted Drug Weight Set forth in PSR**	**Amount of Relevant Conduct Included**	**Drug Quantity without Acquitted Conduct**	**Converted Drug Weight without Acquitted Conduct**
Cocaine base	1.0 gram	3.57 kg	1.0 gram (PSR ¶ 6)	0.00 kg	0.00 kg
Fentanyl	52.32 gm	130.80 kg	52.32 grams (PSR ¶ 12)	0.00 kg	0.00 kg
Heroin	156.34 gm	156.34 kg	124.88 grams (PSR ¶ 12, converted cash); .5 gram (PSR ¶ 6); 1 gram (PSR ¶ 13)	29.96 grams	29.96 kg
Marijuana	5.56 gm	0.00 kg	0.00 kg	0.00 kg	0.00 kg
Cocaine	61.267 gm	12.25 kg	55.567 grams (PSR ¶ 12)	5.7 grams	1.14 kg
Oxycodone (actual)	10.0 mg	0.06 kg	10.0 mg (PSR ¶ 12)	0.00 kg	0.00 kg
Total:		303.04 kg = Level 24			31.10 kg = Level 16[2]

Again, Mr. Osby acknowledges that a sentencing court is not "bound by the evidence presented at trial when determining drug quantity or other relevant conduct," *United States v. Young*, 609 F.3d 348, 357 (4th Cir. 2010), and may "consider acquitted conduct in establishing drug amounts for purpose of sentencing, so long as the amounts are established by a preponderance of the evidence." *United States v. Perry*,

[2] *See* U.S.S.G. § 2D1.1 (12): At least 20KG but less than 40KG of converted drug weight corresponds to a base offense level of 16.

560 F.3d 246, 258 (4th Cir.2009); *U.S. Sentencing Guidelines Manual* ("USSG") § 1B1.3(a)(2) (2018). That said, he objects on the grounds that the Court's use of relevant conduct in sentencing violates his Fifth and Sixth Amendment rights. He has not been charged and convicted of this conduct beyond a reasonable doubt. Using unproven conduct at sentencing eviscerates the "fundamental reservation of power" in the jury and prevents it from "exercis[ing] the control that the Framers intended." *Blakely*, 542 U.S. at 306. And doing so by ignoring the "[e]qually well founded ...companion right to ... proof beyond a reasonable doubt" is no answer. *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000). Like other "inroads upon the sacred bulwark of the nation," the logical possibility that different standards of proof applied by jury and judge might produce different results is "fundamentally opposite to the spirit of our constitution.'" *Booker*, 543 U.S. at 244, *quoting* 4 Blackstone 343-44.

Further, the government has not proven the relevant conduct by a preponderance of the evidence. *See United States v. Wilkinson*, 590 F.3d 259, 269 (4th Cir. 2010). Specifically, with regard to paragraph 6 and the date of earliest relevant conduct, the allegations contained in the PSR are based, apparently, on information provided by a confidential source regarding the purchase of 1 gram of cocaine and a half a gram of heroin. This confidential source has not been disclosed as to identification during the discovery process, investigated by defense, subject to cross-examination and the veracity of his/her statements cannot be tested. Further, there is no laboratory report confirming that the substances are in fact cocaine and heroin, and that the quantities alleged in

the PSR are correct. This information is unreliable, at best, and the Court should refuse to include it in the PSR and as part of the drug-quantity calculation.

Finally, the use of relevant conduct in determining the appropriate sentence creates disparity and inconsistency. Uncharged conduct, as here, is often based on untrustworthy information, such as the allegations of a cooperating witness. Further, the relevant conduct guideline is applied inconsistently because of "ambiguity in the language of the rule, discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result." *See* U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, at 87 (2004); *see also* Pamela B. Lawrence & Paul J. Hofer, An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997). Moreover, the use of relevant conduct in sentencing promotes disrespect for the law, contrary to 18 U.S.C. § 3553(a)(2)(A). Where, as here, such a sentence would be based in part on acquitted conduct, the jury's verdict is, as a matter of perception and for all practical purposes, overturned. *See United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring) (referring to "the unfairness perpetuated by the use of 'acquitted conduct'" as "uniquely malevolent" and "wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing."). Lastly, the relevant conduct guideline and its commentary

"do not exemplify the Commission's exercise of its characteristic institutional role," and fail to achieve § 3553(a)'s purposes. *Kimbrough v. United States,* 552 U.S. 85, 109 (2007); *Rita v. United States,* 551 U.S. 338 (2007). Whether by sustaining Mr. Osby's objection to the use of all relevant conduct, or by varying significantly downward from the advisory guideline range, this Court should reject the use of relevant conduct for sentencing purposes in this case.

III. Objection: Premises Enhancement

Mr. Osby objects to the PSR's application of a two-level enhancement for maintaining a premises for the purposes of manufacturing or distributing a controlled substance. PSR ¶ 28 (citing U.S.S.G. § 2D1.1(b)(12)).

U.S.S.G. § 2D1.1(b)(1) applies "to a defendant who knowingly maintains a premises (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution." U.S.S.G. § 2D1.1 cmt. n. 17. The Guidelines call for courts to compare the frequency of illegal and legal activities at the premises in making this determination. *Id*. The significance and scope of the illegal activities conducted on the premises are thus relevant considerations. *See United States v. Sanchez*, 710 F.3d 724, 730 (7th Cir. 2013), vacated on other grounds, _ U.S. _, 134 S. Ct. 146 (2013); *United States v. Miller*, 698 F.3d 699, 707 (8th Cir. 2012).

The Court must find by a preponderance of the evidence any fact relied upon in applying the enhancement. *United States v. Vinson*, 886 F.2d 740, 741-42 (4th Cir. 1989); *see also* U.S.S.G. § 6A1.3 cmt.

To resolve disputed facts relevant to the enhancement, the Court "may consider relevant information" only so long as it has "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a).

According to the Guidelines commentary, "[a]mong the factors the court should consider in determining whether the defendant maintained the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises." U.S.S.G. § 2D1.1 cmt. n. 17. In *United States v. Acosta,* the court explained that "an individual 'maintains' a drug house if he owns or rents premises, or exercises control over them, and *for a sustained period of time,* uses those premises to manufacture, store, or sell drugs, or directs others to those premises to obtain drugs." 534 F.3d 574, 591 (7th Cir. 2008) (emphasis added).

In the present case, it is unclear which premises formed the basis of the enhancement, but neither of the two options support the enhancement. The first option is the hotel room. Most critically, the jury acquitted Mr. Osby of these charges because the evidence was not sufficient. *See supra* (argument on acquitted conduct). In addition to the acquittal, the evidence is not sufficient to support the enhancement. Mr. Osby visited the hotel and the room in question, but another person originally rented the room; others had access to the room; no video cameras showed who had access to the room or when; the door keys produce a log, which was not examined, investigated or preserved; and it was unknown when the last time

Mr. Osby had been in that room prior the police arriving on scene.

The second option is the house from September 27, 2018, where it is alleged that a confidential source purchased heroin from Mr. Osby while inside the house. Once again, this conduct was not alleged in the indictments, the confidential source was not subject to cross- examination or shown to be reliable, and Mr. Osby was not convicted of these allegations, so it should not serve as an enhancement. Additionally, there is no information alleging or supporting that Mr. Osby had any control of the house. Mr. Osby did not open the door when the confidential source approached the house, and it was alleged that there were other people in the house. Furthermore, it appears that the substances at issue were not kept in the house, and Mr. Osby did not retrieve any drugs from a location within the house; rather, they were kept in a shoulder bag worn by Mr. Osby. PSR ¶ 13. Mr. Osby did not maintain the premises of that location.

This evidence—or lack thereof—does not compare with the evidence of frequent or substantial drug distribution or storage frequently cited by courts applying this enhancement. *United States v. Keitt*, 647 F. App'x 157, 159 (4th Cir. 2016) (approving enhancement where controlled purchases from the residence "resulted in the seizure of fifteen ounces of cocaine base and $5600 in cash" and was known as a "crack house"); *United States v. Sanchez*, 810 F.3d 494, 497 (7th Cir. 2016) (approving enhancement where defendant "received large drug deliveries every few weeks, was paid a large sum for storage, and controlled access to the drugs"); *United States v. Jones*, 778 F.3d 375, 383 (1st Cir. 2015) (approving en-

hancement where "[s]urveillance evidence showed that the defendant [and a co-defendant] sold drugs from the apartment for nearly three months," and a "search of the apartment disclosed that sizeable quantities of cocaine and numerous accoutrements of the drug-trafficking trade" including kilo wrappers "were being kept there"); *Johnson*, 737 F.3d at 447-48 (enhancement applied where defendant had stored 1,200 pounds of marijuana in his home during an eight-month period, and officers observed three instances when co-conspirators retrieved large quantities of drugs from the premises for distribution); *Sanchez*, 710 F.3d at 731-32 (enhancement applied where defendant "regularly sold and stored drugs in his home" over a two-year period and "received massive amounts of cocaine in his home and garage").

Without additional information or investigation about the hotel or house, this enhancement cannot apply, nor should it apply to the hotel after Mr. Osby was acquitted of all charges related to the hotel room.

IV. Objection: Denial of Federal Benefits

Mr. Osby objects to the PSR's denial of federal benefits for 5 years as a penalty at sentencing. PSR ¶ 101. Pursuant to 21 U.S.C. § 862, a district court may, in certain circumstances, deny federal benefits to a defendant. The length of time that the benefits may be denied depends on the type of offense and the prior convictions.

The PSR states that Mr. Osby would be ineligible for a period of 5 years, which appears to be based on a first offense as a "drug trafficker" under 21 U.S.C. § 862(a)(1). However, the statute clearly states that the penalty is at the "discretion of the court" and can

be imposed for "up to 5 years." The problem with this penalty is that it undermines Mr. Osby's ability and opportunities to rehabilitate upon reentering society. It would prevent Mr. Osby from receiving any "grant, contract, loan, professional license, or commercial license provided by an agency of the United States." 21 U.S.C. § 862(d)(1)(A). As an example, this denial would prevent Mr. Osby from receiving a Pell grant, which is designed to help students who "display exception financial need" in furthering their education.[3] All of the benefits listed directly relate to education and employment, two critical aspects of rehabilitation. Denying these options to Mr. Osby does not further the goals of anyone involved. The Court should exercise its discretion by not imposing a denial of federal benefits.

V. Objection: DNA

Mr. Osby objects to the consideration of any DNA evidence. PSR ¶¶ 11, 17. The government failed to provide timely notice to the defendant, and the court properly excluded such evidence. By not providing timely notice, it prevented the defense from properly preparing to defend and respond to the evidence in litigation, subject to cross examination. Allowing any such evidence against Mr. Osby at sentencing allows the government to now benefit and avoid the appropriate sanction of the Court.

VI. Objection: Upward Departure

Mr. Osby objects to the PSR stating that an upward departure may be warranted. PSR ¶¶ 103, 104. Pursuant to U.S.S.G. § 4A1.3, there are five types of information that can form the basis for an upward

[3] https://studentaid.ed.gov/sa/types/grants-scholarships/pell

departure: (1) prior sentences not counted, "*such as from foreign and tribal jurisdictions"*; (2) prior sentences of substantially more than 1 year for crimes on different occasions; (3) prior similar conduct established by a civil adjudication; (4) a pending case at the time of the offense; and (5) "prior *similar adult conduct* not resulting in a criminal conviction." U.S.S.G. § 4A1.3(a)(2)(emphasis added).

The probation office states that the departure may be warranted because (1) Mr. Osby's juvenile convictions did not receive points because of "time constraints"; (2) a pending drug case; and (3) charges as an adult that were dismissed or *nolle prossed*. To address the juvenile convictions, the United States Sentencing Commission purposely created a different standard for how to calculate a juvenile conviction compared with an adult conviction. U.S.S.G. § 4A1.2(d)(2) and appl. note 7. The policy consideration underlying this rule aligns with the various ways juveniles are treated different in the criminal justice system. Even part 5 of the upward departure factors singles out "adult conduct." U.S.S.G. § 4A1.3(a)(2)(E). Incorporating Mr. Osby's juvenile record when it is beyond the limits set by the Commission would contradict both the language and intention of limiting juvenile histories.

As for the pending case in state court, the matter has not yet gone to trial and the evidence should not be pre-judged by this Court without the benefit of litigation and cross examination, as protected under the Constitution. U.S. Const. amends. IV, V, VI. Mr. Osby retains his presumption of innocence. Furthermore, plenty of individuals before the Court have pending state matters and the fact of a pending charge does not distinguish Mr. Osby from many

other defendants who face sentencing on a drug conviction.

Lastly, the probation office considers the adult charges that were dismissed or *nolle prossed*. There are three issues with this. One, in doing so, the probation office ignores the language of the guideline that the court may consider "similar adult conduct" based on "reliable information"; a departure cannot be based on anything and everything that has been dismissed. Most of the charges that have been dismissed are completely unrelated to facts of the current case, do not involve similar conduct, and the reliability of much of it is unknown. Two, the information provided by the probation office, as well as available to the probation office, did not include all of the information taken into consideration that led to the decisions to dismiss the charges—such as inconsistent statements, unreliability of information provided, alibies. The local prosecutors would have access to such information and rely on such information in deciding whether to pursue cases. An upward departure would contradict the independent determinations by the state prosecutors. Three, punishing Mr. Osby for allegations for which he has not been convicted violates his constitutional rights to the presumption of innocence and punishes him without the benefit of a trial, without the government meeting their burden of proof beyond a reasonable doubt, and without exercising his rights to cross examine the evidence against him or present evidence against those allegations in his own defense. U.S. Const. amends. IV, V, VI.

VII. Objection: Gang Affiliation

Mr. Osby objects to any gang affiliation, referenced on page 2 and paragraph 59. Mr. Osby adamantly denies any gang affiliation. PSR ¶ 59. The PSR notes the gang affiliation is based on Mr. Osby "frequenting known gang areas and his history of being associated and arrested with known gang members." *Id*. But he is not a known member of the gang. *Id*. There is no information of Mr. Osby getting "jumped" into a gang or joining a gang. He also has no gang-related tattoos.

Basing a gang affiliation on with who Mr. Osby is around or where a person frequents essentially criminalizes poverty. The 76th Street gang is at the border of Hampton and Newport News. Mr. Osby spent his formative years in Hampton and Newport News. He attended the schools in the area he grew up, made friends with the kids in his classes, and still lives in and has family in those areas. He just grew up in a poor area, so being around gangs is nearly unavoidable. This does not create a gang "affiliation," and such a designation is detrimental to Mr. Osby. Such an allegation creates designation issues at BOP and can restrict Mr. Osby from certain programs and educational opportunities. Mr. Osby requests that this "affiliation" be struck from the PSR.

Conclusion

Mr. Osby objects to the PSR for the reasons enumerated above. Mr. Osby exercised his constitutional right to a jury trial, and after extensive litigation, was found guilty of two of the charges. Any sentence Mr. Osby receives should be based on the convicted conduct only. The fundamental rights preserved under the Constitution should not be swept aside by

failing to present charges to a jury or completely disregarding a jury verdict.

Respectfully submitted,
ERICK ALLEN OSBY
By: /s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September, 2019, I will electronically file the foregoing with the Clerk of Court using the CM/EMF system, which will send a notification of such filing (NEF) to the following:

Peter G. Osyf
Assistant United States Attorney
United States Attorney's Office
721 Lakefront Commons, Suite 300
Fountain Plaza Three
Newport News, Virginia 23606
peter.osyf@usdoj.gov

I FURTHER CERTIFY that a true and correct copy of the foregoing will be sent by electronic mail to:

Sami Geurts
United States Probation Officer
827 Diligence Drive, Suite 210
Newport News, Virginia 23606

By: /s/
Lindsay J. McCaslin
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APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

[filed May 31, 2019]

UNITED STATES OF AMERICA	)	
v.	)	Criminal No: 4:19cr9
ERICK ALLEN OSBY,	)	

SPECIAL JURY VERDICT FORM

We, the jury, find the Defendant, ERICK ALLEN OSBY:

COUNT 1: With respect to Count 1, Possession with Intent to Distribute a mixture or substance containing Acetyl Fentanyl, heroin, and Fentanyl.

Guilty _____ Not Guilty ___X___

If your answer for Count 1 is "Guilty," please answer question A and then proceed to count 2. If your answer for Count 1 is "Not Guilty," please proceed to question B and answer such question.

A. With Respect to Count 1, mark the total amount of acetyl fentanyl, heroin, fentanyl mixture you find, beyond a reasonable doubt, was possessed.

_____ 40 grams or more

_____ less than 40 grams

B. If "Not Guilty," with respect to the lesser included offense of Possession.

Guilty _____ Not Guilty __X__

COUNT 2: With Respect to Count 2, Possession with Intent to Distribute Heroin.

Guilty _____ Not Guilty __X__

If "Not Guilty," with respect to the lesser included offense of Possession.

Guilty _____ Not Guilty __X__

COUNT 3: With Respect to Count 3, Possession with Intent to Distribute Cocaine.

Guilty _____ Not Guilty __X__

If "Not Guilty," with respect to the lesser included offense of Possession.

Guilty _____ Not Guilty __X__

COUNT 4: With Respect to Count 4, if you have found "Guilty" with respect to Count 1, 2, or 3, not the lesser included offense of Possession, then with respect to Count 4, Possession of a Firearm in Furtherance of a Drug Trafficking Crime.

Guilty _____ Not Guilty __X__

COUNT 5: With Respect to Count 5, Possession with Intent to Distributed Heroin

Guilty __X__ Not Guilty _____

If "Not Guilty," with respect to the lesser included offense of Possession.

Guilty _____ Not Guilty _____

COUNT 6: With Respect to Count 6, Possession with Intent to Distribute Cocaine

Guilty ___X___ Not Guilty _____

If "Not Guilty," with respect to the lesser included offense of Possession.

Guilty _____ Not Guilty _____

COUNT 7: With Respect to Count 7, if you have found "Guilty" with respect to Count 5, or 6, not the lesser included offense of Possession, then with respect to Count 7, Possession of a Firearm in Furtherance of a Drug Trafficking Crime.

Guilty _____ Not Guilty ___X___

/s/ [Redacted] 5/31/19
Jury Foreperson Date