No. _____

Supreme Court of the United States

Damien Guidry,
Petitioner,
v.
United States of America,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
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Clerk

No. 19-30347

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

DAMIEN GUIDRY,

Defendant–Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

Before SMITH, GRAVES, and HO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Damien Guidry pleaded guilty of possession with intent to distribute marihuana and conspiracy to distribute and possess with intent to distribute cocaine. He objected to the enhancements in the presentence report ("PSR") for obstructing justice and possessing a dangerous weapon during the offense and to the criminal history points assigned for a conviction of distributing cocaine. The court overruled the objections, and Guidry appeals. We affirm.

Appendix A

I.

A.

In January 2016, Guidry arranged for an individual in California to ship marihuana to "Sebastian Moore." Postal inspectors intercepted that package and obtained a search warrant for its intended destination.

After a postal inspector delivered the package—but before agents could execute the search warrant—Guidry, Kevin Perkins, and Cody Scott exited the residence in Guidry's pickup truck. Agents found the package in the bed of the truck and a Glock .357 caliber semi-automatic pistol with a round in the chamber and ten rounds in the magazine in the rear passenger area of Guidry's truck. Guidry held one round of .357 caliber ammunition in his pocket. A forensic analysis revealed that the round found in Guidry's pocket had been "cycled through the action" of the pistol found in his back seat. Conveniently, Scott—the only passenger in the truck who did not have a felony conviction—claimed that Guidry was unaware of the pistol, which was his.

B.

On November 16, 2016, Guidry paid Norman Pattum $1,000 to retrieve cocaine from Houston. While Pattum was returning to Louisiana in Guidry's truck, he was pulled over for a traffic violation. Pattum, who had had a suspended driver's license and was wanted on a criminal non-support warrant, consented to a search of the vehicle, which had 1.976 kilograms of cocaine.

That same day, agents obtained and executed a state search warrant on Guidry's residence. Guidry was alone, and agents arrested him on a warrant for a separate narcotics-related offense. His house contained two firearms, four grams of marihuana, and approximately $3,890.

C.

While Guidry was detained on state charges, Pattum started cooperating with the FBI. Guidry was initially unaware of that and believed that Pattum had been arrested on a criminal non-support charge.

After Guidry's arrest, he and Pattum appeared in state court at the same time for a "72-hour hearing." At the hearing, the judge advised Guidry that he had been arrested for possession with intent to distribute cocaine. That blind-sided Guidry, who had not personally been found in possession of the drug. He spoke to Pattum at the hearing and told him to "keep his mouth shut."

In the ensuing months, Guidry placed hundreds of telephone calls from jail. He tried to disguise those calls—which were monitored by the facility and later reviewed by FBI agents—by using other inmates' PIN numbers.[1] The following calls are relevant to whether Guidry obstructed justice:

- November 21, 2016: Guidry complained that Pattum "talks too much, then when he gets in a jam he's looking all crazy." Guidry also said, "I told that dumbass [Pattum] you talk too much."
- November 28, 2016: Guidry noted to an associate that "they make graveyards for anybody, I ain't tripping."
- December 7, 2016: Guidry asked the person he called to initiate a three-way conversation with Kenisha Kelly, Pattum's cousin. Guidry then told Kelly that he needed Pattum to tell investigators that he had previously lied to them.
- December 12, 2016: Guidry told Kelly to "make sure that [Pattum] ain't gonna testify for no Grand Jury or nothing man. . . . If [Pattum] done that he is going to get me a federal charge."

[1] Before making a call, inmates must enter their designated PIN. Inmates are warned that calls are recorded and monitored using those PINs. For that reason, using another inmate's PIN is prohibited. Agents noticed that Guidry's call activity stopped within a week of arriving at the jail. They researched call destinations and discovered that Guidry was using other inmates' PINs. Guidry has a distinctive voice, so agents had little trouble confirming their suspicions.

- February 9, 2017: Guidry spoke to Kelly about possible repercussions for Pattum's cooperating with authorities. Guidry also referenced Pattum's mother; FBI agents later learned that Guidry's associates attempted to contact her and that others had attempted to contact Pattum directly.
- February 17, 2017: Guidry boasted to an associate, "I got a cake baked for that bitch ass [Pattum], he just don't know."[2]

Around the time those calls were placed, Laron Vickers—an associate of Guidry's and a convicted drug trafficker—contacted Pattum to determine whether he was going to testify. Vickers told Pattum to tell investigators that he had previously lied and to "take his lick." Vickers also told Pattum that his criminal conduct could be forwarded to law enforcement. Pattum regarded that as a threat and notified the FBI. The FBI, taking the threats seriously, moved Pattum into hiding out of state.

D.

Guidry pleaded guilty of possession with intent to distribute marihuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D) (Count 2) and conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 (Count 4). Count 2 and Count 4 were grouped together in determining the applicable offense level under U.S.S.G. § 3D1.2(d). The PSR assigned a base offense level of 24 under § 2D1.1(c)(8) based on a drug quantity of at least 100 but less than 400 kilograms.[3] The PSR added two levels for possessing a dangerous weapon under § 2D1.1(b)(1) and two further levels for obstructing justice under § 3C1.1. After a three-level reduction for acceptance of

[2] "[B]ake a cake" is sometimes used as slang for "[t]o kill or murder." *See Bake a Cake*, URBAN DICTIONARY, https://www.urbandictionary.com/define.php?term=bake%20a%20cake (last visited Apr. 13, 2020).

[3] Guidry had 0.977 kilograms of marihuana and 1.976 kilograms of cocaine. The cocaine was converted to its marihuana equivalency (395.200 kilograms), producing a total of 396.177 kilograms of converted controlled substances.

responsibility under § 3E1.1, the net offense level was 25.

Guidry was assessed eight criminal history points for his ten felony and misdemeanor convictions and two additional points under § 4A1.1(d) for committing the instant offense while on probation. Guidry's ten criminal history points translated to Category V, which, with the total offense level of 25, produced an advisory range of 100–125 months. Guidry faced a statutory range of zero-to-five years on Count 2 and five-to-forty years on Count 4. Because the applicable guideline range for Count 2 exceeded the statutory maximum, the statutory maximum served as the guideline under § 5G1.1(a).

The court overruled Guidry's objections to the enhancements for obstruction of justice and possessing a dangerous weapon and the three criminal history points assigned for his 1997 cocaine distribution conviction. Guidry was then sentenced, within the guidelines range, to 60 months on Count 2 and 115 months on Count 4, to run concurrently.

II.

Guidry contends that the court clearly erred by applying two-level enhancements to his offense level under U.S.S.G. § 3C1.1 for obstruction of justice and § 2D1.1(b)(1) for possession of a firearm during the commission of the offense. We review the factual findings of obstructive conduct and firearm possession for clear error.[4] "There is no clear error if the district court's finding is plausible in light of the record as a whole." *United States v. Serfass*, 684 F.3d 548, 550 (5th Cir. 2012). "[I]n determining whether an enhancement applies, a district court is permitted to draw reasonable inferences from the facts, and these inferences are fact-findings reviewed for clear error as well." *United*

[4] *See United States v. Zamora-Salazar*, 860 F.3d 826, 836 (5th Cir. 2017) (obstruction of justice); *United States v. King*, 773 F.3d 48, 52 (5th Cir. 2014) (possession of a firearm).

States v. Caldwell, 448 F.3d 287, 290 (5th Cir. 2006).

"[A]lthough the guidelines are advisory post-*Booker*, we must ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the [g]uidelines range." *United States v. Richardson*, 676 F.3d 491, 508 (5th Cir. 2012) (quotation marks omitted). "When a defendant is sentenced under an incorrect [g]uidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

A.

The sentencing guidelines provide for a two-level enhancement where "(1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense." U.S.S.G. § 3C1.1. The commentary to that provision provides that it applies to "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." *Id.* cmt. n.4(A). But where efforts to destroy or conceal evidence occur "contemporaneously with arrest," the enhancement does not apply unless the defendant's conduct "result[ed] in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender." *Id.* cmt. n.4(D).

Guidry makes three arguments on appeal. First, he contends that his jailhouse calls were made contemporaneously with his arrest. The district

court determined that Guidry obstructed prosecution in "a number of instances" but focused on the December 7 and 12 calls, which took place over three weeks after Guidry was arrested. Because the court correctly concluded that those calls were not contemporaneous to the arrest, we need not consider whether Guidry materially hindered the government's investigation or prosecution.

Second, Guidry maintains that his comments "were not actual threats against Pattum and should not be considered an attempted, willful effort to obstruct justice." We disagree. The court reasonably inferred that Guidry attempted to have third parties convince Pattum to recant prior statements implicating Guidry and to lie to the grand jury. The court's factual finding is particularly plausible in light of the recorded calls. Guidry told Pattum's cousin to "make sure that [Pattum] ain't gonna testify for no Grand Jury or nothing man." That call, on its own, is enough to withstand clear error review.

Guidry also avers that his "comments" do not constitute a willful effort to obstruct justice because they were made to a third party. That Guidry arranged for third parties to act on his behalf, however, does not matter. We have routinely affirmed obstruction enhancements in that situation.[5]

Finally, Guidry asserts that the district court erred by applying simultaneously an enhancement for obstruction and a reduction for accepting responsibility. That objection also fails. Guidry's conduct befits the application of both adjustments, which the guidelines contemplate.[6] His obstructive

[5] *See, e.g., United States v. Graves*, 5 F.3d 1546, 1555–56 (5th Cir. 1993) (affirming application of the enhancement where the obstruction required a third party to relay the information); *United States v. Searcy*, 316 F.3d 550, 553 (5th Cir. 2002) (per curiam) (affirming the enhancement where the obstruction involved a plan to have a third party plant evidence to undermine a witness's credibility).

[6] *See* U.S.S.G. § 3E1.1, cmt. n.4 ("Conduct resulting in an enhancement under § 3C1.1

conduct occurred early in the investigation, before he accepted responsibility for his actions. The court noted that chronology in granting the § 3E1.1 reduction, stating that the situation presented the "exceptional case given the time" between his obstruction and acceptance of guilt. The court did not err.

B.

Guidry challenges the two-level enhancement for possessing a dangerous weapon during the commission of the offense. The guidelines provide for that enhancement in drug-related cases "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). The government has the initial burden of proving, by a preponderance of the evidence, that "a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant," or, "when another individual involved in the commission of an offense possessed the weapon, . . . that the defendant could have reasonably foreseen that possession." *United States v. Marquez*, 685 F.3d 501, 507 (5th Cir. 2012). If the government meets its burden, the defendant can avoid application of the enhancement only by showing "it was clearly improbable that the weapon was connected with the offense." *United States v. Ruiz*, 621 F.3d 390, 396 (5th Cir. 2010) (per curiam).

The court rejected Guidry's objection to the enhancement for possessing a firearm. It found "by a preponderance of the evidence that the government has established a temporal and spatial relationship between the weapon[,] . . . the drug trafficking activity," and Guidry. The court also rejected Guidry's contention that he was unaware of the gun, concluding that the unspent bullet in his pocket "had to put him on notice of a weapon." Guidry contends that the

. . . ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.").

ruling (1) was limited to the gun's location, (2) did not address his argument that it was Scott's gun, and (3) failed to require the government to demonstrate that he knew Scott had the gun.

First, the court's findings show that it concluded that the government established the temporal and spatial relationship among the gun, the narcotics, and Guidry. It was justified in doing so. The gun was within Guidry's reach, and he carried a bullet that had been cycled through its chamber. This court has consistently found sufficient temporal and spatial proximity where firearms are found in a vehicle with the defendant and the drugs.[7]

The court was also entitled to discredit Scott's claim that it was his gun.[8] Moreover, even if only Scott possessed the gun, the government showed by a preponderance of the evidence that Guidry "was on notice of a weapon" because of the bullet in his pocket.

Finally, Guidry failed to carry his reciprocal burden of establishing that any connection between the pistol and the marihuana in the truck was "clearly improbable."[9] The pistol was in the rear passenger compartment, within reach of any of the three occupants. It therefore could have been used to protect those occupants while transporting the marihuana.[10]

[7] *See, e.g., United States v. Farias*, 469 F.3d 393, 399–400 (5th Cir. 2006) (affirming the enhancement where the firearm was found under the defendant's seat and methamphetamine was found in the trunk); *United States v. Jacquinot*, 258 F.3d 423, 431 (5th Cir. 2001) (per curiam) (affirming the enhancement where there were drugs in the truck bed and handguns and ammunition in the cab).

[8] *See United States v. Sotelo*, 97 F.3d 782, 799 (5th Cir. 1996) ("Credibility determinations in sentencing hearings are peculiarly within the province of the trier-of-fact." (quotation marks omitted)).

[9] *Ruiz*, 621 F.3d at 396 (recognizing that once the government sustains its initial burden of showing a temporal and spatial relationship between the weapon and the drug offense, the burden shifts to the defendant).

[10] *See Farias*, 469 F.3d at 400 (upholding the enhancement where "the gun was found underneath the seat where [the defendant] had been sitting, near methamphetamine in the

III.

Guidry contests the addition of three criminal history points for his 1997 drug offense. Because that challenge hinges on an interpretation of the sentencing guidelines, we review it *de novo*. *United States v. Reyes-Maya*, 305 F.3d 362, 366 (5th Cir. 2002).

The guidelines provide for the addition of three points to the criminal history score "for each prior sentence of imprisonment exceeding one year and one month." U.S.S.G. § 4A1.1(a). A prior sentence is defined as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." *Id.* § 4A1.2(a). For offenses the defendant committed before turning eighteen, three points are added "[i]f the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month." *Id.* § 4A1.2(d)(1).

Guidry does not dispute that he was prosecuted as an adult for distributing cocaine when he was seventeen. He pleaded no contest and was sentenced to five years in prison, suspended, and placed on probation for three years. As a condition of probation, he was ordered to serve one year in the parish jail, with credit for time served. After Guidry violated conditions of his probation, the state court ordered him to serve an additional 180 days "in lieu of revocation."

In general, a condition of probation requiring imprisonment is allotted only one point under § 4A1.1(c), but if the condition requires imprisonment of

trunk, on the way to what one of [the defendant's] passengers later testified was a drug debt collection," and the defendant "offered no evidence to rebut the resulting inference"); *United States v. Williams*, 588 F. App'x 348, 349 (5th Cir. 2014) (per curiam) (concluding that it was not "clearly improbable" that a firearm was connected to the offense where the defendant had a firearm in his vehicle as he drove to a drug transaction).

at least 60 days or more, the conviction is assigned points based on the sentence length under § 4A1.1(a) or (b).[11] Where a term of imprisonment is imposed following revocation of probation, parole, or supervised release, that term is added to the original to compute criminal history points for purposes of § 4A1.1(a), (b), or (c). U.S.S.G. § 4A1.2(k)(1).

Guidry contends that the 180 days he served "in lieu of revocation" should not be added to his initial term under § 4A1.2(a) because his probation was not modified. He also avers that the 180 days should not be added under § 4A1.2(k)(1) because his probation was not revoked. Finally, to the extent the relevant guidelines are ambiguous, he urges application of the rule of lenity.

None of Guidry's arguments holds water. His term of imprisonment for violating probation is necessarily part of "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." *Id.* § 4A1.2(a)(1). And neither § 4A1.2(k)(1) nor the rule of lenity provides reason to conclude otherwise.

In *United States v. Mendez*, 560 F. App'x 262, 266–67 (5th Cir. 2014) (per curiam), this court "interpret[ed] 'sentence imposed upon adjudication of guilt' under [§] 4A1.2(a)(1) to include a later modification to the original sentence of community supervision, even when the revised sentence included a period of confinement." That is because "the natural interpretation of the words of [§] 4A1.2(a)(1), that a prior sentence is one 'previously imposed upon adjudication of guilt,' looks to the currently operative sentence for that conviction."[12]

[11] U.S.S.G. § 4A1.2, cmt. n.2; *see United States v. Marroquin*, 884 F.3d 298, 301 n.1 (5th Cir. 2018) (explaining that "the threshold for two points is 60 days, so . . . 30 days would count as one point but 119 days would count as two").

[12] *Mendez*, 560 F. App'x at 267–68 (quoting U.S.S.G. § 4A1.2(a)(1)); *see also United States v. Chavez*, 476 F. App'x 786, 789 (5th Cir. 2012) (per curiam) ("Nothing in the applicable [g]uidelines or accompanying commentary indicates that the sentence can only be the one

Guidry admitted, at a revocation hearing, that he violated the terms of probation, and the court imposed an additional 180 days as a modification of the original term of probation and "in lieu of revocation." That procedure fully comported with La. Code Crim. Proc. Ann. art. 896(B), which—like the Texas law at play in *Mendez*[13]—authorized the court to modify probation.[14]

Guidry nevertheless asserts that his probation was not "modified" because it ended when it was originally set to do so. That argument rests on a misunderstanding of the Louisiana law on probation modification, which contemplates adding new conditions to probation but not extending the term of the probation beyond two years.[15] To the extent Guidry asserts that his probation was not "modified"—despite an additional 180-day incarceration—he is therefore mistaken.

Contrary to Guidry's contentions—and the unpersuasive dissent in *Mendez*[16]—our interpretation of § 4A1.2(a)(1) does not render § 4A1.2(k)(1) superfluous. Guidry misreads the latter as providing the exclusive means by which the court can combine separate periods of confinement from a single adjudication of guilt. To the contrary, § 4A1.2(k)(1) serves a different purpose—preventing the court from assigning criminal history points under § 4A1.1(a)–(c)

that was initially pronounced, without inclusion of any later modifications.").

[13] *See Mendez*, 560 F. App'x at 268 ("Under Texas law, the trial judge retained the power to modify the part of the sentence regarding community supervision," so "the revised sentence is the one that was imposed upon, *i.e.*, as a result of, an adjudication of guilt.").

[14] *State v. Wagner*, 410 So. 2d 1089, 1090 (La. 1982).

[15] *See* LA. CODE CRIM. PROC. ANN. art. 896(B) (permitting the court to "impose additional conditions of probation authorized by Article 895," which specifies that a term of imprisonment cannot exceed two years).

[16] *See Mendez*, 560 F. App'x at 269 (Higginbotham, J., dissenting) ("If no 'aggregation mechanism' is needed, as the government urges, § 4A1.2 is an odd statutory scheme indeed: one that provides for the aggregation of sentences when probation formally is revoked but also allows courts to aggregate sentences on no authority at all when probation merely is modified. This reading renders § 4A1.2(k) entirely superfluous.").

multiple times for the same offense.[17] To that end, § 4A1.2(k)(1) is intended to *benefit* the defendant by limiting to three the criminal history points accumulated for any underlying offense.

Guidry's reliance on *United States v. Ramirez*, 347 F.3d 792 (9th Cir. 2003), is also unavailing. That out-of-circuit case is neither binding nor persuasive. As *Mendez*, 560 F. App'x at 267, noted, "*Ramirez* stands alone." By contrast, at least five other circuits have aggregated terms imposed for probation violations with "prior sentence[s]" in § 4A1.2(a), regardless of the state court terminology.[18]

Finally, Guidry contends that the purported "circuit split on this issue demonstrates potential ambiguity," and "[w]hen a statute contains ambiguity, the rule of lenity requires criminal statutes, including sentencing provisions, to be interpreted in favor of the accused." To the contrary, "[a] statute is not

[17] *See* U.S.S.G. § 4A1.2, cmt. n.11 ("Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked.").

[18] *See, e.g.*, *United States v. Townsend*, 408 F.3d 1020, 1025–26 (8th Cir. 2005) (rejecting the notion that the court cannot aggregate terms imposed for violating probation because probation was never "revoked"); *United States v. Galvan*, 453 F.3d 738, 740–41 (6th Cir. 2006) (rejecting the contention that a 65-day sentence imposed for a probation violation should not be aggregated under § 4A1.2(k) because the state court judge did not use the term "revoked"); *United States v. Glover*, 154 F.3d 1291, 1294 (11th Cir. 1998) ("We agree with the Second and Seventh Circuits that § 4A1.2(k)(1) contemplates that, in calculating a defendant's total sentence of imprisonment for a particular offense, the district court will aggregate any term of imprisonment imposed because of a probation violation with the defendant's original sentence of imprisonment, if any, for that offense."); *United States v. Reed*, 94 F.3d 341, 344 (7th Cir. 1996) (aggregating time served for violating conditions of probation because § 4A1.2(k) "is designed to benefit the defendant by limiting the number of criminal history points that may be assigned to a single conviction (three), even if the defendant served multiple prison sentences on that conviction due to violations of his probation"); *United States v. Glidden*, 77 F.3d 38, 39–40 (2d Cir. 1996) (per curiam) (aggregating two discrete terms of imprisonment for probation violations under § 4A1.2(k), even though the defendant had his probation "revoked" only the second time).

ambiguous for purposes of lenity merely because there is a division of judicial authority over its proper construction." *Reno v. Koray*, 515 U.S. 50, 64–65 (1995) (quotation marks omitted). "The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Id.* at 65 (quotation marks and citation omitted). Because there is no ambiguity, the rule of lenity does not apply.

AFFIRMED.

JAMES E. GRAVES, JR., Circuit Judge, concurring in part and dissenting in part:

I concur in Sections I and II of the majority opinion. I otherwise respectfully dissent for the reasons below.

When he was seventeen, Damien Guidry was prosecuted as an adult for a 1997 Louisiana drug offense. He pleaded no contest and was subsequently sentenced to five years in prison and placed on probation for three years. His sentence of imprisonment was fully suspended; however, he was ordered to serve one year in a Louisiana parish jail as a condition of probation.[1] The state court ordered Guidry to serve an additional 180 days in the parish jail "in lieu of revocation" after he violated conditions of his probation.

Guidry argues that the district court's addition of three criminal history points for this drug offense was in error.[2] I agree. "This court reviews a district court's interpretation and application of [the sentencing guidelines] . . . de

[1] Guidry received credit for time served for both the one-year and 180-days parish jail probation terms. "[F]or the purposes of Guidelines criminal history calculation, it matters not whether a defendant's sentence included credit for time served presentence." *United States v. Galvan*, 453 F.3d 738, 741 (6th Cir. 2006) (collecting cases); *cf., e.g., United States v. Carlile*, 884 F.3d 554, 558 (5th Cir. 2018) ("We agree with the Sixth Circuit that '[c]old reality informs us that a defendant who received full credit for time served on an entirely separate conviction does not in fact actually serve any time for the offense in question.'") (quoting *United States v. Hall*, 531 F.3d 414, 419 (6th Cir. 2008) (internal quotation marks omitted)). Here, Guidry admits he received time served for his one-year probation term based on "time he spent in pretrial detention awaiting resolution of his case." It is not clear, however, on what ground he received time served for his 180-days probation term. But Guidry concedes that he spent 142 days in parish jail as a result of the term, meaning that he had received at most 38 days in time served. If we were to aggregate the two terms, even subtracting 38 days from the 180-days term, Guidry would have a "prior sentence of imprisonment exceeding one year and one month" for purposes of calculating his criminal history score under the sentencing guidelines. U.S.S.G. § 4A1.1(a). As explained *infra*, however, I disagree with the majority opinion that these two terms should be aggregated.

[2] Based on a total offense level of 25 and a criminal history category of V, Guidry's relevant sentencing guideline range was 100–125 months. If the district court erred in calculating Guidry's criminal history category by one to three points, then Guidry would have a criminal history category of IV and a sentencing range of 84–105 months. U.S.S.G. ch. 5, pt. A (sentencing table).

novo." *United States v. Stanford*, 883 F.3d 500, 505 (5th Cir. 2018). In interpreting the sentencing guidelines, "typical rules of statutory interpretation are utilized." *Id.* at 511.

As the majority opinion notes, the sentencing guidelines provide for the addition of three points to a defendant's criminal history score "for each prior sentence of imprisonment exceeding one year and one month." U.S.S.G. § 4A1.1(a). A prior sentence is defined as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense." *Id.* § 4A1.2(a)(1). For offenses a defendant committed before turning eighteen, three points are added "[i]f the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month." *Id.* § 4A1.2(d)(1).

"In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, [the district court must] add the original term of imprisonment to any term of imprisonment imposed upon revocation." *Id.* § 4A1.2(k)(1). "The resulting total is used to compute the criminal history points for § 4A1.1(a), (b), or (c), as applicable."[3] *Id.*

I agree with the majority opinion that Guidry's probation was modified. *See* LA. CODE CRIM PROC. ANN. ART. 896(B); *State v. Wagner*, 410 So.2d 1089, 1090 (La. 1982). Nonetheless, the majority opinion's reliance on this court's unpublished opinion in *United States v. Mendez* is mistaken. 560 F. App'x 262 (5th Cir. 2014) (per curiam). The majority opinion in *Mendez* "interpret[ed] 'sentence imposed upon adjudication of guilt' under [§] 4A1.2(A)(1) to include a later modification to the original sentence of community supervision, even

[3] Under § 4A1.1(a), three criminal history points are added for "each prior sentence of imprisonment exceeding one year and one month." Under § 4A1.1(b), two criminal history points are added for "each prior sentence of imprisonment of at least sixty days not counted in (a)." Under § 4A1.1(c), one criminal history point is added for "each prior sentence not counted in (a) or (b)[.]"

when the revised sentence included a period of confinement," because "the natural interpretation of the words of [§] 4A1.2(a)(1), that a prior sentence is one 'previously imposed upon adjudication of guilt,' looks to the currently operative sentence for that conviction." *Id.* at 266–67. This reading essentially disregards the requirements for aggregation under § 4A1.2(k) and relies on § 4A1.2(a)(1), "a generic provision that says nothing about aggregation and simply defines 'prior sentence' to mean 'any sentence previously imposed upon adjudication of guilt.'" *Id.* at 269 (Higginbotham, J., dissenting). In other words, the majority opinion holds that "a specific provision for the aggregation of sentences if and when probation has been revoked is of no moment." *Id.* (Higginbotham, J., dissenting). But "the provision in the [sentencing guidelines section] that deals precisely with the situation here—where an initial term of imprisonment is followed by probation and then by imprisonment when the terms of probation are violated—must be read together with the generic provision that simply defines 'prior sentence' as 'any sentence previously imposed upon adjudication of guilt.'" *Id.* (Higginbotham, J., dissenting). To do otherwise is to stray from "our longstanding practice of construing statutes *in pari materia*[.]" *Id.* (Higginbotham, J., dissenting) (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)); *see also Hinck v. United States*, 550 U.S. 501, 506 (2007) (stating that "a precisely drawn, detailed statute preempts more general remedies") (internal quotation marks and citation omitted); *Crawford Fitting Co.*, 482 U.S. at 445 ("As always, where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (internal quotation marks, brackets, and citations omitted) (emphasis in original).

Further, as Judge Higginbotham noted in dissent, "[t]he meaningful differences between 'modification' and 'revocation' are not lightly dismissed by

district court judges, and should not be by this Court. Revocation is a very different procedure than modification, a distinction appreciated by the Sentencing Guidelines themselves." *Id.* at 269 (Higginbotham, J., dissenting) (citing U.S.S.G. § 7B1.3). "Before a revocation of parole or probation can occur, the Constitution weighs in, requiring that there be (1) a formal finding that a probationer has committed a violation and (2) a determination that the violation was serious enough to warrant reimposing the probationer's original sentence." *Id.* (Higginbotham, J., dissenting) (citing *Morrissey v. Brewer*, 408 U.S. 471, 479–80 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (extending requirements of *Morrissey* to probation revocation hearings)).

A probationer is owed procedural safeguards to ensure that the consequences of revocation are not imposed without due process. These safeguards include written notice of the claimed violations of probation; disclosure of the evidence against the probationer; the opportunity to present evidence showing that revocation is unwarranted; a preliminary hearing to determine whether there was reasonable cause to believe that the probationer violated conditions of his or her probation; if requested, a final revocation hearing to determine whether revocation is warranted; and "a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation]." *Morrissey*, 408 U.S. at 485–89.

Section 4A1.2(k) explicitly requires the "more serious sanction of revocation be imposed before two sentences can be aggregated[.]" *Mendez*, 560 F. App'x at 270 (Higginbotham, J., dissenting). Nonetheless, the majority opinion does not contend that Louisiana's procedures for probation revocation also apply to modifications under Louisiana law or that the procedures relevant to modifications comply with the due process requirements applicable to probation revocations. *Compare* LA. CODE CRIM PROC. ANN. ART. 896(B) (stating that "[t]he court may, at any time during the probation period, impose

additional conditions of probation . . . without a contradictory hearing with the state") *and* LA. CODE CRIM PROC. ANN. ART. 896(A) (allowing for modification of probation conditions "at any time during the probation period" when "[t]he state has previously provided written verification that it has no opposition to a modification") *with* LA. CODE CRIM PROC. ANN. ART. 900 (discussing procedures relevant to probation revocation). I am unaware of authority which suggests that Louisiana applies the due process protections required for probation revocations to mere modifications of the same. *Cf. Mendez*, 560 F. App'x at 270 (Higginbotham, J, dissenting) (finding no authority suggesting Texas extends due process protections outlined in *Morrissey* to modifications of community supervision).

As in the *Mendez* dissent, I find the reasoning of the Ninth Circuit in *United States v. Ramirez*, 347 F.3d 792 (9th Cir. 2003), convincing "insofar as it held that modification cannot serve as revocation of probation to aggregate sentences under § 4A1.2(k)." *Mendez*, 560 F. App'x at 270 (Higginbotham, J., dissenting). While the majority in *Mendez*, as the majority here, stated that the decision in *Ramirez* "stands alone," so does the Eleventh Circuit's decision to the contrary in *United States v. Glover*, 154 F.3d 1291 (11th Cir. 1998).[4] "But the Eleventh Circuit's reasoning is unpersuasive insofar as it fails to

[4] The majority opinion states that "at least five other circuits have aggregated terms imposed for probation violations with 'prior sentence[s]' in § 4A1.2(a), regardless of the state court terminology." Four of the decisions it cites were relied on by the *Mendez* majority. *See Mendez*, 560 F. App'x at 267 ("Our research reveals that all other circuits to address the question have interpreted the phrase 'revocation of probation' broadly enough to apply to terms of imprisonment that were not imposed through formal revocation proceedings." (citing *United States v. Galvan*, 453 F.3d 738, 741 (6th Cir. 2006); *Glover*, 154 F.3d at 1295–96; *United States v. Reed*, 94 F.3d 341, 346 (7th Cir. 1996); *United States v. Glidden*, 77 F.3d 38, 40 (2d Cir. 1996))). But "[o]f the four cases cited by the majority opinion [in *Mendez*], only *Glover* explicitly addressed the modification versus revocation distinction that troubles us here." *Id.* at 271 n.11 (Higginbotham, J., dissenting). The majority opinion here also cites *United States v. Townsend*, but the Eighth Circuit's decision in that case—like all the other decisions cited but *Glover*—does not explicitly address the modification versus revocation distinction. 408 F.3d 1020 (8th Cir. 2005).

provide a compelling justification for departing from the plain text requirement of 'revocation' in § 4A1.2(k) and the distinctions drawn elsewhere—by Due Process as articulated in *Morrissey*, by district judges, and by the Sentencing Guidelines themselves—between modification and revocation." *Mendez*, 560 F. App'x at 271 (Higginbotham, J., dissenting).

Thus, while I concur in Sections I and II of the majority opinion, I otherwise respectfully dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

UNITED STATES OF AMERICA,	:	Docket No. 17-00040
Plaintiff,	:	
vs.	:	April 29, 2019
DAMIEN GUIDRY,	:	
Defendant.	:	Lafayette, Louisiana

REPORTER'S OFFICIAL TRANSCRIPT OF THE SENTENCING HEARING
BEFORE THE HONORABLE ROBERT R. SUMMERHAYS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Appendix B

I N D E X

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PROCEEDINGS

(Call to order of the court.)

THE COURT: Good afternoon.

MR. WALKER: Good afternoon, Your Honor.

THE COURT: This case is the *United States of America vs. Damien Guidry*, Criminal Action Number 2:17-00040.

Counsel, will you please make your appearances for the record.

MR. WALKER: Luke Walker on behalf of the United States.

MR. BOUSTANY: Alfred Boustany representing Damien Guidry, the defendant.

THE COURT: And we have Mr. Guidry here.

MR. BOUSTANY: Yes.

THE COURT: Are the defendant and defense counsel ready to proceed?

MR. BOUSTANY: We are, Your Honor.

THE COURT: Is the U.S. Attorney ready to proceed?

MR. WALKER: We are, Your Honor.

THE COURT: Okay. This matter is before the Court on sentencing.

Is there any reason why sentence should not be imposed at this time?

MR. WALKER: None, Your Honor.

MR. BOUSTANY: None other than addressing the

objections we made to the presentence report.

THE COURT: Absolutely.

Is there any reason -- let me back up a bit.

Have the defendant and defense counsel received a copy of the presentence investigation report and the addendum thereto?

MR. BOUSTANY: Yes, we have, Your Honor.

THE COURT: Has the defendant had the opportunity to discuss the presentence report with defense counsel?

MR. BOUSTANY: Yes, he has.

THE COURT: Okay. Before we move into the defendant's objections, I would like to put on the record that I hereby accept those portions of the presentence investigation report which are not in dispute as my findings of fact in connection with sentencing.

With regard to the objections, I have thoroughly reviewed all of the defendant's objections to the presentence report. I would like to take them up one by one.

Objection Number 1. This is an objection to the original presentence report as well as carried over to the revised presentence report. The defendant first objects to the two-point adjustment to his offense level pursuant to Section 3C1.1 of the sentencing guidelines for obstruction of justice. In response to that objection, the probation office issued a revised PSR setting forth additional information obtained from the FBI's 302 reports.

Let me ask, do counsel wish to make any oral argument on these objections? Do you wish to proffer or move for an evidentiary hearing?

MR. WALKER: Your Honor, it was our intent, if the Court intends to -- it was our intent to put on a witness to further testify about that objection.

THE COURT: Okay. Mr. Boustany?

MR. BOUSTANY: Also with respect to that, over the weekend, Your Honor, I submitted the defendant's affidavit. I filed it electronically and sent a copy to the prosecutor by email. I was able to speak with Damien Guidry actually Saturday to clarify some of the issues on that, and I -- I don't know if the Court has gotten it, but it has been filed electronically. I think it's sealed as a matter of policy.

THE COURT: I have reviewed that. Luckily, I did some work on this over the weekend and I saw that it had been filed on Saturday when I reviewed it on Sunday. A heads up would be helpful to ensure because I can't say that I will always be reviewing a matter the Sunday before a Monday sentencing.

MR. BOUSTANY: No. I understand that.

THE COURT: I have reviewed it, though, and considered it.

MR. BOUSTANY: Yes. As far as with respect to the government, if they wish to present something, I mean, I guess we can --

THE COURT: Yeah. Mr. Boustany, I've reviewed all of your sentencing memoranda. I've reviewed your authorities. I've reviewed the original -- or the PSR, their summary of the conversations on this objection. I've reviewed the transcript that was provided and I've listened to the recordings.

So how we're going to proceed, if Mr. Walker has a witness, we'll just go ahead and proceed with that witness.

Mr. Walker, you may call your witness.

MR. WALKER: Your Honor, the United States would call Kyle Greenwood to the stand.

THE COURT: The witness will approach and be sworn in.

THE COURTROOM DEPUTY: Please raise your right hand.

Do you solemnly swear that the testimony you will give in this case will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Mr. Walker, you may proceed.

MR. WALKER: Thank you, Your Honor.

Whereupon,

KYLE GREENWOOD

was called as a witness; after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WALKER:

Q Would you tell me your name.
A Kyle Greenwood.
Q Where are you employed?
A I'm a special agent with the FBI.
Q And are you the case agent on *United States vs. Damien Guidry*?
A Yes, sir.
Q In connection with that case, have you had occasion to listen to recorded jail conversations between Damien Guidry and other associates?
A Yes, I have.
Q Were there many of those calls?
A Yes, sir.
Q Were those calls made after he was arrested on the charges that led to his federal conviction?
A Yes, sir.
Q Did you have occasion to create transcripts of portions of those calls?
A Yes, sir, I did.
Q And did you also have occasion to create audio -- did you create an audio disc of a portion of those calls?
A Yes, sir.

MR. WALKER: May I approach the witness, Your Honor?

THE COURT: You may approach.

MR. WALKER: I'm going to place three exhibits in front

of you. That way I won't have to come back again.

THE WITNESS: Okay.

MR. WALKER: And, Your Honor, as the Court is aware, I've provided all of these to both the Court as well as the defense.

BY MR. WALKER:

Q Do you see before you United States Exhibit 1?

A I do.

Q Are those transcripts of the telephone calls that were the subject of the obstruction objection?

A Yes, sir.

MR. WALKER: Your Honor, I would offer into evidence United States Exhibit 1.

THE COURT: Mr. Boustany?

MR. BOUSTANY: We don't have any objection to the offering, but our understanding is that these are taken from longer conversations over a long period of time. So these are just excerpts from what were longer conversations.

So, I mean, I think the Court can consider largely much of almost anything in terms of sentencing, so to that extent we can't really legitimately object to it. We do have some concerns about placing them in context.

THE COURT: Yeah. And I will -- with those comments, the Court will admit the exhibit. Of course, Mr. Boustany, if you believe that any of these portions or excerpts are misleading

or need the proper context, you're free to place them in context by asking that additional portions of the recording be put into evidence or pointing that out to the Court. I mean, we're at sentencing. You can point that out to the Court. The Court is the one that's going to make the decision here.

It's admitted.

MR. WALKER: Thank you.

BY MR. WALKER:

Q And is United States Exhibit 1A before you a compact disc that has audio versions of those recordings that you've transcribed?

A Yes, sir. And those conversations, those are the entire conversations.

MR. WALKER: And, Your Honor, the United States would introduce into evidence United States Exhibit 1A, the CD.

MR. BOUSTANY: No objection other than what we previously commented, Your Honor.

THE COURT: And the Court will admit it under the same condition.

BY MR. WALKER:

Q Prior to being aware that Mr. Pattum was cooperating -- first of all, in connection with the case for which the defendant pled guilty, was there a cooperating witness?

A Yes.

Q And is his last name Pattum?

A Yes, it is.
Q Prior to him cooperating, did the defendant have reason to believe that he had been arrested for something other than the two kilograms of cocaine for which the defendant pled guilty?
A Yes, sir.
Q What did he believe he had been arrested for?
A Mr. Guidry believed that Mr. Pattum had been arrested for delinquent child support payments.
Q Initially upon discovering that he had been arrested, was there something the defendant initially was trying to find out the location of?
A The truck that belonged to Damien Guidry.
Q And was that also the truck that contained the two kilograms of cocaine?
A Yes, sir.
Q Was Mr. Guidry aware of whether the cocaine had actually been seized at that point?
A No.
Q During those phone conversations -- and I'm showing you United States Exhibit 1, which is before you, and I'm directing your attention to page 3 of those transcripts. Are there conversations in which the defendant acknowledges being aware of guns that were seized at his residence?
A Yes.
Q After those conversations, did there reach a point when the

defendant became aware that Mr. Pattum was cooperating?
A Yes, sir.
Q Initially did the defendant attempt to get messages to Mr. Pattum?
A Yes, sir.
Q And I'm directing your attention to page 6 of the transcript and then to page 7.
MR. WALKER: Your Honor, do you have a copy of the transcript before you?
THE COURT: Yes, I do. You said page 6?
MR. WALKER: Six is where it has the heading and I'm actually directing to page 7, and it's going to be at the first full conversation after Damien Guidry, Glenn Marcantel.
BY MR. WALKER:
Q During that conversation, is there a discussion that relates to possible repercussions if Mr. Pattum cooperates against Mr. Guidry?
A Yes.
Q Can you tell me what he says?
A He essentially says that he knows possible crimes that have been committed by Mr. Pattum, that if Mr. Pattum cooperated with the government, that he could provide that information to law enforcement.
Q And does he have that conversation -- does he discuss that fact with this associate on more than one occasion?

A Yes.
Q If you go to page 8, does he again talk about the fact -- does he again talk about the fact that there can be consequences to Mr. Pattum cooperating against him?
A Yes.
Q Can you read what he says in that?
A Just the part at the time of 6:07 of the conversation?
Q Yes.
A "I don't know. I don't know. He needs to come out and talk to somebody. He's playing. Shit is about to get serious and it can get serious for everybody. Come on, man. He's playing. You don't need to talk to his mama. Just say you need to talk to him."
Q Were you aware that the associates of Mr. Pattum -- I'm sorry, of Mr. Guidry were attempting to talk to the mother of Mr. Pattum?
A I was not aware of that at the time, no.
Q Later did you find out that?
A Yes, sir.
Q And were you also aware that the associates of Mr. Guidry were also directly trying to contact Mr. Pattum?
A Yes.
Q And did they do that on more than one occasion?
A Yes.
Q Did the conversations about attempting to have Mr. Pattum

cease cooperating with the United States continue throughout the phone calls?

A Yes.

Q At some point --

MR. WALKER: And, Your Honor, I don't intend to go -- I know the Court has reviewed all of these transcripts and I don't intend to go through all of the transcripts.

BY MR. WALKER:

Q However, at some point did there come a time when the conversation shifted from attempting to get messages to Mr. Pattum to actually threatening Mr. Pattum with violence?

A Yes.

Q Can you give examples of the threats of violence that he used?

A There were several. One, for example, is, "I've got a cake -- I've got a cake baked for that bitch." Another one was -- I'm sorry. That's the language that was used. "They make graveyards for anybody. The funeral home is about to get paid."

Q Did you take those as serious threats?

A Yes, sir, I did.

Q As a result of those threats, did something have to happen as it relates to Mr. Pattum?

A Yes.

Q What had to happen?

A We actually had to move him out of state for safety

purposes.
Q It seems odd that Mr. Guidry -- when you talk on the telephone at the jail, doesn't the beginning of it say, "This phone call will be monitored and recorded"?
A Yes, sir, it does.
Q It seems odd that Mr. Guidry would have been willing to talk on phone calls in that way. Do you know why he was willing to do that?
A He was more willing to conversate about other issues because he was using other individuals in the jail -- he was using their PIN numbers.
Q So let's talk about that for a second.
If you're put into a jail, is there a specific PIN number that you have to type in in order to make a phone call?
A Yes, sir.
Q And does it record who is actually making the phone call?
A Yes, it does.
Q So if Mr. Guidry were making a phone call with his PIN number, would the jail not only record the call, but also record it as a call that Mr. Guidry was making?
A That's correct.
Q Shortly after he had been in jail for a time, did you notice that there were no phone calls or that the phone calls related to Mr. Guidry where he was making phone calls just stopped?
A They did after probably within four to seven days of him

being in the Calcasieu Correctional Center.
Q Did you do something to try to determine if he was actually making phone calls using somebody else's PIN?
A Yes, sir. So whenever the telephone calls stopped for Damien Guidry's PIN, we were able to research call destination numbers in the system to find out that he was using other people's PINs to make phone calls.
Q And were you able to listen in on those phone calls?
A Yes, sir, I was.
Q Does Mr. Guidry have a very distinctive voice?
A Yes, he does.
Q And were you able to recognize his voice in the phones calls using other people's PIN numbers?
A Yes.
Q Were you also able to recognize him based on the substance of the conversations?
A Yes.
Q And, finally, were you able to recognize him based on the people he was talking to?
A Yes.
Q Were they the same associates that he had initially been talking to in many cases?
A That's correct.
Q You're aware that the defense submitted an affidavit this weekend; is that correct?

A I am.
Q Was that affidavit that he submitted by Mr. Guidry consistent with the recorded calls that you heard?
A No.

MR. BOUSTANY: Your Honor, I object to the question. It calls for pure speculation. If he can be specific and we can know what specifically he's referring to in the affidavit, but without that, he's simply asking for pure speculation without reference to anything.

THE COURT: What I'll do is I'll ask Mr. Walker to point to specific passages and compare what was said to what was said in the affidavit.

MR. WALKER: Thank you, Your Honor.

BY MR. WALKER:
Q So you've had occasion to read the affidavit?
A Yes, sir.
Q Initially was Mr. Guidry, in the phone call recordings that you listened to, attempting to determine if Mr. Pattum was cooperating?
A Yes.
Q Initially did he know if he was cooperating?
A No.
Q Is the affidavit from the defense consistent with that, that he was trying to learn if Mr. Pattum was cooperating?
A Yes.

Q The affidavit suggested that Mr. Pattum had told people he was not cooperating; is that correct?
A I'm not 100 percent sure what he said to people when he was outside the jail, but I believe that is correct.
Q Do you personally know what, if anything, Mr. Pattum told other people?
A I believe that he said that he was not cooperating with the government.
Q And he had been -- I'm sorry. He had been arrested on unrelated charges; is that correct?
A Correct.
Q Child support charges?
A Yes, sir.
Q So the arrest itself wouldn't have demonstrated he was cooperating against him?
A Yes, sir. That's correct.
Q Would it surprise you that Mr. Pattum was keeping up the ruse that he had been arrested on child support and that he was not cooperating?
A No, sir.
Q So Guidry would have had a reason to believe that he was not cooperating?
A That's correct.
Q So that part of the affidavit would have been accurate?
A Yes.

Q Are there parts of the phone calls that the affidavit does not address?
A Yes.
Q Does there come a time in the phone calls where, based on the substance of the phone calls, it's clear that Guidry is now aware that Mr. Pattum is cooperating?
A Yes, sir.
Q Does Mr. Guidry attempt to get word to Pattum to have Pattum contact law enforcement and say he was lying?
A Yes.
Q And does he say, "If he tells people he was lying, my charges will get thrown out"?
A That's correct.
Q You're aware that Mr. Guidry pled guilty to the cocaine charges, correct?
A Yes, sir.
Q And those are the charges that Mr. Pattum was cooperating against?
A That's correct.
Q So trying to get Mr. Pattum to lie about the cocaine charges, to say the cocaine wasn't Mr. Guidry's, would be inconsistent with the guilty plea he did before this Court?
MR. BOUSTANY: Your Honor, I object to that. He was going to ask him about specifically the affidavit. I still haven't heard anything that said that the affidavit was not

correct. Now he's asking him something without reference to the affidavit, and it's calling again for just pure speculation.

MR. WALKER: I'm actually, Your Honor, going beyond the affidavit. I've now talked about the parts of the affidavit that he did mention and now I'm talking about the parts of the affidavit that were not mentioned in the affidavit. And the Court has a copy of the transcript of the calls, and so I'm simply addressing portions of the transcripts of the calls.

THE COURT: So you're not addressing the affidavit. You're addressing the transcript of the call solely.

MR. WALKER: I addressed the parts of the affidavit that the defendant -- about calls the defendant discussed. Now I'm addressing calls in the transcript that were not discussed in the affidavit.

THE COURT: Okay. So we're focusing on the calls.

MR. WALKER: That's correct.

THE COURT: You may proceed.

The objection is overruled.

BY MR. WALKER:

Q During the transcript, did Mr. Guidry attempt to get word to Pattum that he would pay for a lawyer for Pattum?

A Yes, he did.

MR. BOUSTANY: Could we have a specific reference to the transcript because it's not key to anything. I don't know what he's speaking about.

THE COURT: All right. This is easy to resolve, Mr. Boustany.

Mr. Walker, when you refer to a piece in the transcript, let's go by the date of the transcript and the other party that's identified.

MR. WALKER: Yes, Your Honor.

THE COURT: And if they're the same date, let's go by the time. That way I can follow it better.

MR. WALKER: Yes, Your Honor.

BY MR. WALKER:

Q Directing your attention to page 10 of 34 at time 11:30 in the conversation, does he ask that -- and it's been yellowed. It says, "[KELLY] So he needs to let them people know that he told them he was lying about that shit."

MR. WALKER: And, Your Honor, I'm simply quoting with the profanity.

MR. BOUSTANY: Did you give a date on that?

MR. WALKER: It's page 10 of the transcript I've turned over to the defense.

MR. BOUSTANY: What date?

THE COURT: I believe he's referring -- it starts on page 9, December 7, 2016, time 4:18 p.m.

MR. WALKER: That's correct.

Thank you, Your Honor.

THE COURT: And you're referring -- are you at the

11:30 point of the conversation or the point before that?

MR. WALKER: That was at the 11:30 point of the conversation, Your Honor.

THE COURT: You may proceed.

BY MR. WALKER:

Q And in terms of threat -- and I want to direct your attention to the next page, which is November 24, 2016, at 9:12.

Do you see where he's having an additional conversation that relates to Mr. Pattum?

A Yes.

Q Specifically does he address the fact that he's speaking too much?

A Yes.

Q And is the only person he had been speaking to law enforcement at that point?

A That's right.

Q Is he trying to get, at various times, statements of Mr. Pattum?

A Yes.

Q Directing your attention to -- it's page 13, which is going to be June 23rd of 2017.

Do you see where he's attempting to obtain the statement -- and this is at the bottom of the page and it's been yellowed. Do you see that?

A I do.

Q Just below that is he attempting to find out if he's going to testify in any kind of trial or hearing?
A Yes, sir, he is.
Q And is he attempting to have someone contact him to make that determination?
A Yes.
Q Again, directing your attention to -- and this is now December 7th of '16 and it's on page 16.

Do you see where he's talking about trying to get a third party to contact Mr. Pattum?
A Yes.
Q And does he address why his lawyer can't talk to him?
A Yes.
Q And why is that?
A He said the lawyer would get disbarred.
Q And do you see further down where he's discussing somebody else who could talk to him?
A Yes.
Q Does he also discuss money?
A Yes.
Q Is there a time when he is speaking to a person --

MR. WALKER: If I could have one moment, Your Honor.

(Pause in Proceedings)

BY MR. WALKER:
Q Is there a time when he's speaking to a person named

Laron Vickers?
A Yes.
Q Can you direct me to the page with Laron Vickers?
I'm going through it and I think you can probably pick it up, too.
A I think what you're referring to is on page 12. I believe we already went over that.
Q And during that on 12, does he suggest that -- on page 12, does he suggest that there could be a threat against Mr. Pattum?
A Yes.
Q Do you know who Mr. Vickers is?
A I do.
Q Is Mr. Vickers an associate of Mr. Guidry?
A He is.
Q Did you have occasion to speak to Mr. Pattum at around the same time that this phone call was made?
A I did.
Q And what, if anything, did Mr. Pattum tell you about a conversation he had with Mr. Vickers?
A He said that Mr. Laron Vickers was trying to determine if he was going to go to trial and testify, and then also that there was a possibility that charges, maybe criminal conduct committed by Pattum, would be brought forward to law enforcement.
Q Did Mr. Pattum take that as a threat?
A Yes.

Q And as a result of other conversations about Mr. Pattum, was Mr. Pattum put in hiding?
A Yes.
Q Did Damien Guidry have an associate print pages from PACER?
A Yes.
Q Now, PACER is within the federal court system --
MR. BOUSTANY: Your Honor, I don't know where this is coming from. I haven't received anything in reference to this.
THE WITNESS: It was in the telephone calls.
MR. WALKER: It's based on phone calls.
MR. BOUSTANY: And when? That's something that was submitted recently?
THE WITNESS: Those telephone calls were at least provided in the past, but they were also provided again several weeks ago before the original sentencing was set.
MR. WALKER: That's correct.
MR. BOUSTANY: What are you referring -- can I ask what specifically they're referring to, Your Honor, because I'm not exactly sure.
THE COURT: You know, since I don't have a jury here, I'm all for short-circuiting this and trying to get at it.
Mr. Walker, do you want to ask him or are you happy to have Mr. Boustany interject and ask him?
MR. WALKER: I can ask him.
THE COURT: All right. Mr. Walker, let's get a

foundation.
BY MR. WALKER:
Q Okay. Did you have occasion to listen to cell phone calls related to PACER reports?
A Yes, I did.
Q And those PACER reports are not specifically in this transcript; is that correct?
A That's correct, but they were provided in CDs, the entirety of the conversations.
Q And provided to the defense?
A That's correct.
THE COURT: Mr. Boustany, are you satisfied?
MR. BOUSTANY: Yes, I think so.
THE COURT: All right. You may proceed, Mr. Walker.
BY MR. WALKER:
Q Were there PACER -- well, tell me what, if anything, the PACER documents demonstrated.
A So the PACER documents were in relation to the cooperation of Norman Pattum.
Q And who, if anybody, was supplied with the PACER documents?
A Those were sent to the brother of Norman Pattum.
Q And what, if anything, was Norman Pattum's brother told in connection with that delivery of those documents?
A Just proof that Norman Pattum was cooperating and also that he needed to essentially take his charge.

Q And not cooperate against Mr. Guidry?
A That's correct.
Q Mr. Vickers, the person who contacted Mr. Pattum and expressed that threat to Mr. Pattum, is he in the courtroom today?
A He's not here today.
Q Was he in the courtroom the last time this matter was set for sentencing?
A Yes.

MR. WALKER: Your Honor, I have about three questions that relate to the objection related to the gun. I don't mind stopping this and then putting him back on for those three questions if you simply want to keep those objections separate.

THE COURT: It doesn't make much sense to have him step down and then step back up. We can ask those three questions.

Mr. Boustany, do you have any objection to proceeding in that way?

MR. BOUSTANY: No, Your Honor.

THE COURT: Please move forward.

MR. WALKER: Thank you, Judge.

BY MR. WALKER:
Q Were you aware that there was a gun found in the truck that the defendant was driving at the time that the 14 pounds of marijuana were delivered?
A Yes, sir.

Q Was the marijuana found in the truck?
A It was in the bed of the truck.
Q And was the gun also found in the truck?
A Yes, it was.
Q Was the defendant in the truck?
A He was.
Q Were there other people in the truck with the defendant?
A Yes, sir, two others.
Q Was there -- other than -- well, strike that.

Was there a single person in the truck who didn't have a prior felony conviction?

A Yes, one.
Q Everybody else had prior felonies?
A That's correct.
Q Did the single person that was in the truck without the prior felony conviction claim that the gun was his?
A That's correct.
Q Did you find any documentation that demonstrated that the gun was his?
A No.
Q At the time of the stop, was Mr. Guidry searched?
A Yes.
Q And was a -- well, first of all, what kind of gun was it?
A It was a .357 caliber Glock.
Q Is that an unusual gun?

A It is.
Q Was the gun loaded?
A It was.
Q And when the gun was found, did you find anything in Mr. Guidry's -- or strike that.

Did law enforcement find anything in Mr. Guidry's pocket?

A They found one single .357 round in his pants pocket.
Q Did they have occasion to compare the .357 round to the rounds that were inside of the gun?
A Yes, sir.
Q And what can you tell me about the similarity or dissimilarity of those bullets?
A Okay. So the one that was found in Mr. Guidry's pocket and the ones that were found in the magazine, same brand, same caliber, everything looked the same. Then also one of the bullets that was found in the magazine we actually had cycled through the slide of the Glock. So whenever it is extracted, the extractor coil actually leaves a mark on the rim of the bullet. The lab analyzed the one that was found in his pocket to the one that was cycled through the slide from the magazine and they said that they were -- it was definitely from that gun.
Q So that demonstrated that the bullet not only was the same caliber, but it had actually been in the gun that was found in the truck?

A That's correct.

Q And it was found in his pocket?

A That's correct.

MR. WALKER: Your Honor, I would offer into evidence United States Exhibit 2 which is the Acadiana Criminalistics Laboratory report which says exactly that, that that bullet had been in that gun based on the markings found on the cartridge.

THE COURT: Mr. Boustany?

MR. BOUSTANY: Your Honor, again, I know the Court can consider a number of things, including that, although I did point out in the brief that the President's Council of Scientific Advisors have cast some serious doubt about being able to do this so-called future comparison and say that a particular bullet or a particular casing came from a particular gun. That has been called into question, but that's really not the issue here. So I just want to point that out to the Court, that to that extent we do reurge the objection we made in response to the government to the report.

THE COURT: Your objection is noted. It's admitted.

MR. WALKER: And, Your Honor, with that, I would tender the witness.

THE COURT: Mr. Boustany, before you start, I have a quick question for this witness and it deals with the discovery of the gun.

I may have missed it. You may have stated it in your

testimony, but where specifically was the gun located?

THE WITNESS: I believe the gun was located in the rear floorboard area of the truck. I wasn't present at the scene, but it was located underneath the rear seat.

THE COURT: I'll give that the appropriate weight since you weren't present.

Mr. Boustany, you may ask your questions.

MR. BOUSTANY: Thank you.

CROSS EXAMINATION

BY MR. BOUSTANY:

Q Okay. Agent, it would not be unusual early on in an arrest for someone who is accused of a crime to want to know who's making the accusation and what they are saying? That's not unusual, is it?

A It's not unusual, no, sir.

Q It wouldn't be unusual for a lawyer to do that, to try to find out who's making this accusation, what are they saying, specifically what are they saying specifically in terms of who's involved in what?

A I agree.

Q That's pretty normal, right?

And, you know, Damien's been in jail since February of 2016; isn't that correct?

A I believe it's November of '16, sir.

Q The incident occurred in February of 2016, right?

A The controlled delivery, sir?
Q The marijuana incident was --
A That was in January of '16, sir.
Q January of '16?
A Yes, sir.
Q All right. The cocaine incident was February of 2017?
A No, sir. That was in November of 2016, November 18th, 2016.
Q Okay. And Damien was arrested in November of 2016?
A That's correct.
Q For that incident, right?
A Yes, sir.
Q And when he was arrested, he was actually brought into state court, not federal court; isn't that correct?
A That's correct.
Q So he had no federal charge pending when he was arrested; is that correct?
A That's correct.
Q And he was brought into 72-hour court, which in state court is basically you're brought in and told what you're charged with, and if you have a bond, you're told what the bond is, right?
A Yes, sir.
Q So he's brought in to 72-hour court. He has no idea why he's arrested, right? Pretty much from his phone conversations, he has no idea why he's arrested, does he?

A No.
Q Okay. So he's trying to figure out what's going on, right?
A I agree.
Q Do I need a lawyer? What do I need a lawyer for? What am I charged with? Who's saying this? What exactly are they saying? Those are the questions he had, right?
A I agree.
Q There's nothing wrong with that, right?
A I agree with half of that. You know, there is some searching to what, you know, what he's being accused of, who might be cooperating, some of it, but that's not all of it, sir.
Q What's wrong with wondering if somebody said something, who said it and what did they say? There's nothing wrong with that, is there?
A I agree. There's nothing wrong with that.
Q And, you know, it would be really easy to know who said what in this case because Pattum was brought to the police station, right?
A After his arrest on the interstate, he was taken to the police station.
Q Norman Pattum was brought down to the police station, right?
A That's correct.
Q And it would be very easy to know what he said because it's so easy to record conversations, right?
A Yes. And I know where you're going with this, sir. It's

generally an FBI policy that we do not record conversations or interviews.

Q So you were there along with the local police who arrested Norman Pattum?

A I was there subsequent to the arrest on the interstate. I was not there for that part of this matter.

Q Okay. So the local police arrested Norman Pattum on the interstate, right?

A That's correct.

Q And he was in Damien's truck, right?

A Yes.

Q Okay. And so the local police brought him down to the police station, right?

A Yes, sir.

Q And there's nothing that prevented the local police from recording the conversations they had with Norman Pattum, right?

A Yes, with the exception of they waited until I got there to do the interview. The locals didn't conduct the interview, sir.

MR. WALKER: Your Honor, the only objection I have, we're addressing the obstruction of justice objection and this goes beyond the obstruction of justice objection. It has nothing to do with it.

MR. BOUSTANY: It has absolutely everything to do with it.

MR. WALKER: Let me finish.

Their questioning of Norman Pattum does not relate to how Mr. Guidry obstructed justice.

THE COURT: Mr. Boustany?

MR. BOUSTANY: Their questioning of Norman Pattum is relevant because Damien Guidry and his attorney at the time were trying to find out did he give a statement; if he did, what did he say; and if there was a recorded statement, let's get a copy of it because we're entitled to it. As defense counsel, we are entitled to it. That's what was going on. That's what they're saying began an obstruction by simply trying to find out this information. And we addressed this in a motion before this court, not before Your Honor, on the question of getting a copy of that, and we were then told that they didn't have a recording of it.

THE COURT: Mr. Walker, I'm going to give Mr. Boustany some leeway, but I make the comment, I think that the investigation of the facts and the search for the truth and to understand what charges are being leveled against the defendant are legitimate and I don't think that the government is taking the position that making those inquiries are improper.

The question is whether they crossed the line because there is a distinction between legitimately trying to discern the truth and the facts and then trying to manipulate or, you know, alter testimony. You know, if this is -- you know, I think there's a distinction between that.

I will give you some leeway, but it's not unlimited.

MR. BOUSTANY: No. I understand. I understand. I totally agree and I fully -- you know, I accept the fact that there is a distinction.

THE COURT: Okay. You may proceed with that warning.

BY MR. BOUSTANY:

Q Okay. So early on in this investigation -- well, no.

After Damien was arrested, he didn't know what he was arrested for. He was trying to find out, right?

A Like I said, up until 72-hour court when he learned what his charges were, yes, sir.

Q Well, you know, you weren't at 72-hour court?

A No, sir.

Q What did the state judge tell him he was charged with? Do you know?

A Possession with intent to distribute more than 400 grams and then felon in possession of a firearm.

Q And he had no idea what he was talking about, though, did he?

MR. WALKER: Objection. It calls for speculation on his part.

THE COURT: Sustained.

BY MR. BOUSTANY:

Q You heard Damien's phone conversations. You heard him trying to find out where the heck did that come from because

nobody has ever caught me with any drugs. You heard that phone conversation, didn't you?
A Yes.
Q And Norman Pattum was at the 72-hour hearing with a number of inmates, including Damien Guidry, right?
A That's correct.
Q And Norman Pattum told Damien in the phone conversations, I was charged with child support, right?
A That's correct. Yes, sir. He was originally charged with child support.
Q So Damien never made a connection between Norman Pattum and him being charged -- Damien being charged with 400 grams of cocaine initially, right?
A Initially.
Q So he's trying to get more information. Norman Pattum in his phone conversations said he never spoke to the police; isn't that true?
A Yes, sir.
Q And he said that he wasn't even cooperating with the police because there's nothing to cooperate about, right?
A Yes, sir.
Q In fact, in some of the phone conversations he said, no, the police told me they wanted -- that's what they wanted and that's why I said Damien Guidry, right?
A I believe that's what he said. I don't know what the police

said to him before I got there. I'm not privy to that conversation beforehand.

Q So if in fact the police really said something like that, that's impeachment evidence, isn't it? It's kind of important to know that from a defense standpoint, from even the defendant's standpoint, if the police said something like that; isn't that true?

A I believe it would be, yeah.

Q And there's nothing wrong with a defendant standing on his presumption of innocence, standing on the right not to testify and attacking the credibility of the only witness against him, Norman Pattum, right? There's nothing wrong with that, right?

A No.

Q That's not obstruction of justice, is it?

A Well --

Q Is that obstruction of justice?

A Not how you're laying it out, sir, but there's a big difference between trying to figure out if somebody is cooperating against you and then also telling them to lie to the police, telling them to quit cooperating and we'll pay for your lawyer, sending documents to family members. That's two different things --

Q Well, let's talk about lying to the police.

THE COURT: And let's not talk over each other. I think it goes on both sides.

Let's let him ask the question before you respond.
And don't cut him off, please.
Thank you.
You may proceed.
BY MR. BOUSTANY:
Q You heard Norman Pattum say, hey, he wasn't cooperating with the police and actually told somebody, it's not true, I never gave a statement, I never told the police that? You heard that, right?
A That is correct.
Q So if a defendant or a defendant's attorney hears that, then one of the things I might say is, hey, tell Norman Pattum to tell his lawyer that, you know, so the truth can come out, right?
A Yes, sir.
Q There's nothing wrong with that, is there?
A I don't believe so, no.
Q That's exactly what happened in this case, isn't it?
A Essentially at the beginning.
Q Okay. So at what point do you figure out that Norman Pattum is or is not cooperating? I mean, at what point do you figure that out? Is there a timeline?
A I mean, you could get it in discovery.
Q Well, I'm asking you. I mean, is there a timeline you can point to?
A I mean, I guess every investigation is different, sir.

Q And there's nothing wrong with a defendant against whom someone may or may not be cooperating to be angry about that fact and to express that anger to other people? There's nothing wrong with that, is there? It's not a crime, is it?
A It's not a crime to express your anger against somebody who might be cooperating, no, sir.
Q And early on Damien was asking where his truck was because Norman Pattum said, oh, I got stopped, the police stopped me, and they stopped me because of this child support and they left your truck on the side of the road, right? That's what he said in phone conversations, isn't it?
A Yes.
Q So Damien is calling around saying where the heck is my truck? Where was it towed? Kesha Zeno — I think he called her because she's a cousin of Norman Pattum, and he asked her, well, can you find out where my truck is, what's going on, right, all phone conversations?
A Yes. I believe it was the first phone call before he had called an associate where he had asked where the truck was, the very first phone call.
Q Are those in the exhibit that you introduced?
A Yes.
Q All of those?
A I believe they were on the telephone call conversations that were pertaining to Norman Pattum and all of that stuff was turned

over.
Q I know they were turned over, but you just identified exhibits that were introduced. I don't think those were on there, were they?
A Yeah. The one I just referred to where he asked where his truck was on the very first one, it's the very first phone call in here, sir.
Q With Kesha Zeno?
A No. That was with Demesha Zeno. That's the very first one on here.
Q You're not saying that's obstruction, are you?
A No. I don't think there's anything wrong with trying to figure out where your vehicle is, sir.
Q All right. And as far as -- your testimony was he asked about some guns at a residence. The guns he was asking about, that's not the gun that we're talking about today with respect to the marijuana, is it?
A No. Those two guns were separate than the one that was located with the marijuana.
Q Those were at a residence where the mother of his children live, right?
A He lived there also, and actually at the time of the execution of the search warrant, he was the only male there. I believe one of his daughters was there, but he was the only --
Q Okay. My question was, that is a residence where the mother

of his children and his children were living; isn't that true?
A Yes.
Q And the inquiry was because he often had to leave, and the gun that was there, at least from the phone conversations, was the gun that the mother of his children had for protection because he often had to leave; isn't that correct?
A One of the two firearms was registered to her. One of them was not.
Q But that's the conversation, and, of course, to know exactly what was said, we'd have to listen to it, but that was a conversation about guns. There was never a conversation about Damien having anything to do with the gun on the marijuana charge which is what we're here about?
A That is correct.
Q And then the conversations -- and I guess, you know, we could listen to them, but there must have been hundreds of conversations because, you know, Damien's in jail for a long time. He's making lots of calls, right?
A Yes, sir.
Q So there are probably hundreds of calls, if not more, right?
A I'd probably say more.
Q As far as PIN numbers, whose PIN number you use, in order to use a phone, you have to have money, right?
A That's correct.
Q And so if you don't have money and someone else gives you a

PIN number, you can use their PIN number, right?
A Yes, sir.
Q All right. So Damien was using some other PIN numbers, right?
A He used other PIN numbers for well over a year at least, yes, sir.
Q Okay. Other inmates do that all the time, don't they?
A That's correct.
Q And to be clear, we submitted an affidavit, which you were briefly asked about, recently over the past weekend. You saw that affidavit, right?
A Yes, sir, I did.
Q I didn't hear you say that there was anything false or not true in that affidavit. That affidavit is true, isn't it?
A To a certain extent, yes.
Q The fact is that actually Damien Guidry never had a single conversation with Norman Pattum and as far as you know never even attempted to contact Norman Pattum during the entire time that he was in jail. Isn't that true?
A They did speak at 72-hour court. Norman Pattum did say that Damien told him to keep his mouth shut, but other than that, I don't believe that Mr. Guidry ever attempted to call Norman Pattum personally.
Q But to keep his mouth shut about his own charge? Because he didn't even know Norman Pattum was involved in that. So what

would he keep his mouth shut about, his own charge, advising Norman Pattum, hey, don't talk to the police because you don't have to?

A That's just what the transcript was in the Norman Pattum 302.

Q And as far as a lawyer and that sort of thing, you said there was some talk about getting a lawyer. Actually Norman Pattum -- there was some talk about getting a retired judge who is now a lawyer in Lake Charles, Judge Carter, to talk to Norman Pattum, right?

A I don't know if it was Judge Carter for a fact, but I know there was conversations about Pride Doran possibly speaking with Mr. Pattum.

Q Well, some of the transcripts refer to a Carter.

A Okay.

Q Are you aware that that's a retired judge?

A It could be Wilford Carter, yes, sir.

Q Now, as far as -- if someone is having a conversation with someone other than a witness, it might not be unusual for that person to say, hey, you know, if that guy testifies, there's a lot of bad stuff that might come out about him. That's called impeachment evidence, right?

A Yes.

Q Is that obstructing justice when you talk like that?

MR. WALKER: I object, Your Honor. He's now asking him

to give a legal conclusion about whether that's obstructing justice. I submit it is.

THE COURT: Sustained.

MR. BOUSTANY: Well, I submit it's not.

THE COURT: Well, that's an argument that both of y'all will have the opportunity to make and have in several different briefs that have been filed.

BY MR. BOUSTANY:

Q And I'm not exactly sure what your testimony was about the PACER reports. So somebody got what PACER reports? Pattum hasn't been charged in federal court, has he?

A No, sir, he's not.

Q So there are no PACER reports on Pattum, are there?

A My understanding, sir, I don't know which documents were taken from PACER, but I know an associate of Damien Guidry printed off cooperation reports or reports related to Norman Pattum and his cooperation and then they were forwarded to a family member of Norman Pattum.

Q Well, how do you know that? I mean, how would Damien Guidry from the jail get on PACER?

A He didn't get on PACER, sir. Like I said, he had an associate on the outside that got the documents off PACER.

Q So how would anybody get it other than a lawyer?

A I believe anybody can sign up for a PACER account, sir.

Q So do you know who gave him the PACER documents?

A I do.
Q Okay. Who was that?
A Kentra Arceneaux. She's right over there.
Q And do you know where she got them?
A I guess from PACER, sir. I know she had a login or at least had somebody's login according to calls.
Q Well, which PACER document would indicate that Norman Pattum was cooperating?
A Like I said, I don't know which...
Q So did you look at the PACER documents in this case to see if a single document makes reference to Norman Pattum cooperating?
A Personally, no, sir, I did not.
Q Okay. So you're not saying that the fact that she may have gotten PACER documents is evidence of obstructing justice, are you?
A I mean, I believe whenever you're trying to coerce a potential witness or especially a family member, I do believe I would consider --
Q But how would a PACER document that makes no reference --
THE COURT: All right. Let's stop here.
Were you finished with your answer?
THE WITNESS: Yes, sir.
THE COURT: Okay.
MR. WALKER: And he continues to say how is that

obstructing justice. He's asking the witness to give a legal conclusion.

MR. BOUSTANY: I didn't ask for a legal conclusion. I'm just asking how he concludes a PACER document without even knowing what the PACER document is.

THE COURT: Well, I mean, I think you can explore that. You know, y'all are going to be arguing whether -- I mean, he's arguing the facts and y'all are arguing how those facts apply to the law and I have to decide how those facts interact with the law and make a conclusion. You know, you can make that argument to me that it's not obstruction and explore the facts with him.

You may proceed.

BY MR. BOUSTANY:

Q So the PACER documents -- did you see the PACER documents?

A No, sir, I did not.

Q Okay. You know, there was -- I'll withdraw that.

Kaneisha, the witness you just referred to, she's actually Pattum's cousin. You are aware of that, aren't you?

A I am aware that she is his cousin, but I have not spoken of her during my testimony. I said Kentra.

Q Kentra?

A Yes, sir.

Q Kaneisha, the one that Damien referred to in his affidavit that you did refer to over the weekend, that's Norman Pattum's cousin?

A That's correct.
Q So a lot of these people who are talking, they know each other, right?
A Yes, sir.
Q So it's not like out of the blue that, hey, someone's talking good or bad about somebody. It's just they all know each other and they are talking about what's going on in the case, whether someone's going to testify or not, and, if so, what they're going to say, right?
A Yes, sir.
Q Okay. And then the last thing you testified to was about the marijuana and the gun?
A Yes, sir.
Q You saw Cody Scott's transcript of his testimony in state court?
A I did, but it was much -- it was much later than -- it had to be at least the fall of '16 probably, yes, sir, but I did see it.
Q Okay. Well, that was in relation to the exact same marijuana charge in this case; is that correct?
A Yes, sir.
Q Okay. And that was at a hearing at which Cody Scott testified under oath; is that correct?
A I believe it was, yes.
Q Okay. And if you possess a gun in the presence of a

controlled substance, whether you have a conviction -- a felony conviction or not, it's still a crime, at least under state court -- under state law. Isn't that true?

A I believe, yes, sir.

Q So Cody Scott was actually admitting to -- essentially if he knew the marijuana was in the truck, he would be admitting to a crime. Isn't that true?

A Yes.

Q But the fact is he testified he didn't know about the marijuana. Isn't that true?

A I'm not 100 percent sure of that, but I'll take that as correct.

Q He hasn't been charged with the marijuana as far as you know in federal court?

A No, sir, not as far as I know.

Q Okay. As far as you know, he's never been convicted of the marijuana in state court. Isn't that true?

A That's correct.

Q Did anybody attempt to get contact DNA off of that gun?

A So on this, sir, I was -- I was not there for this. I didn't even know that this event even happened until probably at least six months after the fact, but as far as I know, nobody attempted to fingerprint or DNA the weapon.

MR. BOUSTANY: All right. I have no further questions.

THE COURT: Mr. Walker, any redirect?

MR. WALKER: Briefly, Your Honor, hopefully.

THE COURT: You may proceed.

REDIRECT EXAMINATION

BY MR. WALKER:

Q The defense said it's okay -- it's not unusual for a lawyer to try to determine who is cooperating. That was how his testimony began -- that's how his questioning of you began; is that correct?

A Yes.

Q To your knowledge is it unusual for a lawyer to threaten witnesses if they cooperate?

A I've never heard of that, so, yes.

Q Have you known of a defense lawyer to say that he will pay for a cooperating witness's lawyer?

MR. BOUSTANY: Your Honor --

MR. WALKER: The defense asked those specific questions. He asked the questions suggesting that what Mr. Guidry did was the same as what a normal defense lawyer would do. So I'm simply pointing out things he was doing that are inconsistent with what a defense lawyer would do.

MR. BOUSTANY: But I don't think that has any basis in the facts of this case. So I think that the question assumes facts that are not part of this case, not in evidence.

MR. WALKER: Your Honor, the witness --

THE COURT: I think that in essence that's what you

were doing as far as your defense. You asked similar questions. I think he's entitled to explore that.

You may proceed, Mr. Walker.

The objection is overruled.

BY MR. WALKER:

Q And based on your prior testimony, you testified previously, based on the transcript, that in fact Damien Guidry had offered through a third party to pay for Mr. Pattum's lawyer?

A Yes, sir.

Q The defense talked about -- the defense talked about what a lawyer could do. You are aware that Laron Vickers actually contacted Mr. Pattum; is that correct?

A Yes.

Q Mr. Vickers, is he a lawyer?

A No.

Q Is he an associate of Mr. Guidry?

A Yes.

Q Is he a prior convicted drug trafficker?

A Yes.

Q Do you know if Mr. Pattum would have known that he was a prior convicted drug trafficker?

A I believe he would.

Q And so the person who's contacting him he knew to be an associate of Mr. Guidry and a prior convicted drug trafficker?

A Yes.

Q Based on Mr. Pattum's conversation, did he say he was supposed to say that he was lying when he talked to police?
A Yes.
Q And that he should take his lick?
A Yes.
Q Did Mr. Pattum feel like he was being threatened by this person?
A Yes.
Q This associate of the defendant?
A Yes.
Q The defense talked about the fact that we don't have a timeline of when Damien Guidry was even aware that Mr. Pattum was cooperating.

Do you still have Exhibit 1 in front of you?

A I do.
Q Page 11. 11/21 of 2016.
A Okay.
Q Would you agree that by November 21st of 2016 he knew that he was cooperating based on the statements?
A I believe so.
Q And at that point he's again threatening him talking about making a worse situation even worse?
A That's right.

MR. BOUSTANY: Your Honor, counsel is asking the question by assuming that he's threatening him. I think that the

conversation might speak for itself. The Court can listen to the conversation. If the Court feels it should be interpreted that way, that's fine, but he is interpreting. He is not asking questions. So I would ask that he not make comments like that.

THE COURT: Sustained.

Let's move on, Mr. Walker, please.

BY MR. WALKER:

Q So you would agree that at least by 11/21 of '16 the defendant was aware that Mr. Pattum was cooperating?

A I believe that's correct.

Q And the subsequent conversations that you have placed in this transcript, did they also demonstrate that Mr. Guidry is aware that Mr. Pattum is cooperating?

A Yes.

Q The defense said people regularly -- prisoners regularly use other prisoners' PIN numbers when they run out of money. Are you allowed to do that in the prison?

A I don't believe you are. I believe that's one of the stipulations on using the telephones.

Q The defense brought up the fact that the affidavit -- there was nothing in the affidavit that was inaccurate. Did the affidavit address all of the telephone calls that we've addressed in court today?

A No, sir.

Q The defense said that Mr. Guidry didn't personally talk to

Mr. Pattum after the initial conversations. Did he direct other people to talk to him?

A Yes.

Q And does that include Mr. Vickers?

A Yes.

Q The defense talked about the fact that everybody knew everybody within this group?

A That's correct.

Q That was some of the last stuff you testified to.

And did Mr. Pattum in the telephone calls attempt to get relatives of Mr. Pattum to speak to him about not cooperating?

A Yes.

MR. WALKER: That's all I have.

THE COURT: Okay. You may step down.

THE WITNESS: Thank you, sir.

THE COURT: Thank you. Thank you for your testimony today.

MR. WALKER: I have no further testimony or evidence I intend to present as it relates to this objection, Your Honor.

THE COURT: Okay. Mr. Boustany, do you have -- I've reviewed your submissions. Do you have anything else?

MR. BOUSTANY: No, Your Honor.

We would just formally move to introduce -- for purposes of this hearing and the objections to the presentence

report, we would formally move to offer into evidence the objections that we made with the attachments to the original report and the revised report as well as the exhibits attached.

We also filed a sentencing memorandum and we would also move to — formally move to introduce that along with the exhibits that we attached. That exhibit included a number of character letters and that sort of thing. Just to be clear, we are offering that into evidence for purposes of this hearing.

MR. WALKER: I'm not sure they're offered as an exhibit. I don't think his objections to the presentence report or his memorandum are exhibits that are introduced.

THE COURT: They're not.

MR. WALKER: They're simply a part of the record.

THE COURT: They're not. I mean, they're considerations for the Court. Exhibits that are introduced and formally admitted go to disputed facts, and I don't think that we're disputing that those letters were filed. They're more in the order of information for the Court. They stand on their own.

Let me ask, Mr. Boustany, you made an argument or made a reference to the *Biggins* case. I take it you're not making or sustaining an argument on *Biggins* as far as the predicate for admitting these conversations other than your objection that you wanted to put them in context?

MR. BOUSTANY: Right. I think it is more in terms of putting them in context. Do they -- does this snippet accurately

represent the context of this entire conversation? That's our concern. And so, you know, when they take parts out, it's questionable in terms of how reliable it is overall to determine the context in which the conversation was taking place, with whom it was taking place, and of course for the Court to decide is this person saying these things to get this other person to somehow obstruct justice.

THE COURT: But you've had an opportunity, if there was something up there that you felt was taken out of context, to be able to examine the witness and refer to the full transcript or to the recording, if necessary, if you wanted to introduce a recording to put something in context.

MR. BOUSTANY: Well, the only thing, though, Your Honor, that I will note is what the government has submitted is not in chronological order, and I think it's very important to know the chronology in terms of when he was first placed in jail, the conversations he had early on and then, you know, later conversations.

THE COURT: But the problem is you presenting that to me in specifics. You can always say in all of these cases there are going to be some excerpts. The question is whether or not there is a -- you can articulate a basis why those excerpts that are presented to me are somehow, you know, not a -- I think the standard is whether there's a sufficient indicia of reliability. You know, the Court's entitled, under sentencing, to go with

what's in the pretrial report unless you can come forward with some rebuttal evidence. I've considered some rebuttal evidence, but just a general term that, you know, excerpts are taken out of context, you know, I have the recording and I've listened to the recording in its entirety. What I'm trying to do is make sure that you've had an opportunity to point out to the Court specific places where you believe conversations are taken out of context in a way that would mislead the Court.

MR. BOUSTANY: We have had an opportunity to listen to the recordings, and it would be only argument in the sense of -- the recordings are what they are.

THE COURT: Right.

MR. BOUSTANY: So we don't dispute the language in the recording, okay, we're not saying that, if it is placed in context, especially the context of this case, when the defendant was arrested, what he was arrested for and that sort of thing, what he knew about, what he didn't know about, in that context.

THE COURT: That's my job.

MR. BOUSTANY: Yes. That is your job and I respect that.

THE COURT: Thank you, Mr. Boustany.

Mr. Walker, did you have anything else?

MR. WALKER: I did, one thing.

Simply for record purposes, we introduced Exhibit 1A along with 1. Exhibit 1 is the excerpts from the transcript.

1A is the DVD that I gave to the Court and to the defense. It gives the entirety of the conversations, not just the excerpts that are listed in here.

So the defense -- I'm sorry, Your Honor. The Court has been able, as well as the defense, has been able to listen to the entirety of those phone calls, and so he has been able -- the Court has been able to, as well as the defense, see that I haven't taken any particular part of a conversation out of context because you could listen to the whole thing.

MR. BOUSTANY: And I assume that is part of the record, that it's made part of the record.

MR. WALKER: It is.

MR. BOUSTANY: So it speaks for itself, Your Honor.

THE COURT: Right.

Thank you, Mr. Boustany.

There was a reference to *Biggins*. The Court finds that the foundation requirements under *Biggins* have been satisfied. I do find sufficient indicia of reliability with respect to those conversations that have been entered into evidence.

You know, I've considered the parties' arguments. I've considered the testimony today. As I said, I have reviewed the portions of the pretrial report that detail and summarize the conversations. I've reviewed the transcript excerpts that have been provided, and I have listened to the conversations on the DVD that have been introduced.

Sentencing Guideline § 3C1.1 provides: If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and the obstructive conduct related to the defendant's offense of conviction and any relevant conduct, or a closely related offense, increase the offense level by two levels.

Application Note 4 to 3C1.1 sets forth a non-exhaustive list of examples, including threatening, intimidating, or otherwise unlawfully influencing a codefendant, witness, or juror, directly or indirectly, or attempting to do so; committing, suborning, or attempting to suborn perjury if such perjury pertains to conduct that forms the basis of the offense of conviction.

The threshold here under 3C1.1 in the Fifth Circuit is fairly low.

The Court cites *United States vs. Zamora-Salazar* where a defendant asked a codefendant if he knew what he was doing and that there could be problems later on held to be obstruction of justice. That was a veiled threat directly communicated. But the Fifth Circuit has also held in *United States vs. Searcy* that a threat communicated to a third party, in other words, an indirect threat, is still a basis for obstruction of justice.

You know, there are cases outside of this circuit where

a defendant merely made a comment to a codefendant, please don't throw me under the bus, without any threat or implied threat, and it was held to be obstruction of justice. The standard here is whether or not, based on the record in front of me, I find that the defendant's conduct here falls within one of those non-exhaustive categories.

I find by a preponderance of the evidence that the defendant here obstructed justice within the meaning of 3C1.1 by attempting to influence or intimidate Mr. Pattum and dissuade him from cooperating with the government.

There are a number of instances I find that constitute obstruction in the transcript excerpts and the recordings that I listened to, but one in particular, the Court points to December 12th, 2016, where Mr. Guidry stated to the person on the phone to make sure that he doesn't -- and the "he" from the context, I think, by a preponderance of the evidence is referring to Mr. Pattum -- that he does not testify to a Grand Jury. That in itself I believe constitutes obstruction of justice.

There is a December 7th, 2016, conversation where Mr. Guidry attempts to have a third party tell Mr. Pattum to tell investigators that Pattum was lying.

There's a reference in Mr. Guidry's declaration filed on Saturday that refers to him not wanting -- or having Pattum tell the -- or tell somebody, his lawyer or authorities, that whoever said that he consented to a search of his vehicle was

lying. From the context, there is a conversation on December 7th that appears to bear that out, what Mr. Guidry had testified to in his affidavit, but in an earlier conversation on the same date at 4:18 p.m., it's very clear that Mr. Guidry wants Mr. Pattum to lie or to state that he was lying with respect to the substance of the underlying crime.

I think the context there -- you know, Mr. Boustany is correct. You have to read these in context. Reading those two statements in context, it's very clear that the comment about lying refers to two separate instances. The first instance at 4:18 p.m., I believe and I do find, constitutes obstruction.

Again, there's additional evidence that I believe supports, but the reference to the Grand Jury, I think, in itself, in light of *Searcy* and in light of *Zamora-Salazar*, are sufficient. The Court cites *United States vs. Zamora-Salazar*, 860 F.3d 826, Fifth Circuit, 2017, and *United States vs. Searcy*, 316 F.3d 550, Fifth Circuit, 2002.

The objection is overruled.

The next item I need to address before we get to the next objection is the impact of the Court's ruling and finding that the obstruction of justice enhancement under 3C1.1 as valid is how that impacts acceptance of responsibility.

The government's -- you know, after these conversations took place, the government still moved for acceptance of responsibility.

Mr. Walker, do you want to make an argument on this, how this impacts acceptance of responsibility?

MR. WALKER: Your Honor, as it relates to the third point for acceptance of responsibility, I think the defendant gets the third point because that's something that we give if he doesn't require us to go through the steps necessary to prepare for trial.

As it relates to the first two for acceptance of responsibility, we didn't agree to consent to acceptance of responsibility. We said that we intended to not oppose it, but that we would submit evidence that was inconsistent with acceptance of responsibility.

We have submitted now reams of evidence that demonstrated he obstructed justice, and I would submit that even his affidavit that was just submitted, when you read it in context of what actually he had said, those things are all inconsistent with him truly accepting responsibility for the criminal conduct. He is still minimizing the things that he -- he is still minimizing his role in the offense and trying to defend indefensible phone calls.

THE COURT: Okay. Well, let me ask you, because it seems to me that it's not so much minimizing, you know, the underlying conduct and the underlying actions of the offense versus him trying to explain that he was trying to investigate his -- to try to make a distinction between investigating his

offense and obstructing justice.

I mean, he seems to be -- it seems like -- it doesn't -- it seems like going a little -- you know, a step too far to say that he can't -- you know, that his actions in trying to defend against obstruction of justice somehow, you know, minimized the acceptance of responsibility. My concern here is that these actions seem to have occurred fairly early in the case.

I mean, is there any evidence of conduct after these 2016 and 2017 instances that would show that he was attempting to obstruct justice other than your argument about what he said in regard to sentencing?

MR. WALKER: No, Your Honor. Everything that we have on obstruction of justice was submitted in connection with those transcripts as well as the calls.

THE COURT: And I'm not disagreeing with you. I think looking -- Mr. Boustany, do you have anything to say?

MR. BOUSTANY: Well, you know, the defendant, Damien Guidry, has clearly accepted responsibility for this, but, you know, there are arguments that early on he and his then attorney felt like were legitimate arguments. Now, whether -- and I understand the Court's disagreement and Damien Guidry fully accepts that.

You know, he entered into this plea agreement with the government and he accepted responsibility, but, you know, the

question of obstruction is simply a question that the Court needs to make. And the defendant has not said as a result of that that he does not accept responsibility. He always has.

So I don't think that anything he did in signing this affidavit -- and I might add that, you know, it was kind of a last minute thing. I went Saturday because I asked the defendant to actually write something for me in response to all of this and I didn't get anything from him. I'm not exactly sure why, but I can say this. It's my understanding that the defendant had at least a high school diploma. I've actually recently learned since he's been in jail that he went into the GED program because the diploma that he got from the school that he went to was not apparently an accredited school and the State of Louisiana doesn't recognize it. I suspect that he had a hard time writing to me at this last minute to try to get that information to me. So I went Saturday with an affidavit form and with blank lines and we sat down and we kind of went through it.

So I don't think he's done anything recently to justify the government's argument or the Court saying that he hasn't accepted responsibility. He clearly has. Early on, he legitimately, I think, was arguing that, hey, you know, I can defend myself, you know. I understand the Court's ruling on that, but I don't think that carries over into punishing him and saying, well, we're not going to give you acceptance of responsibility.

THE COURT: Yeah. 3E1.1, the application note states that ordinarily he wouldn't get credit for acceptance of responsibility on a finding of obstruction of justice, and it uses the key term "ordinarily," and that there may be exceptional circumstances. You know, what I'm trying to parse through here is that, you know, the conduct occurred fairly early on, you know. Putting aside the arguments that were made in connection with this sentencing hearing on obstruction, I don't see a whole lot of other evidence. It seems like he has accepted responsibility up to this point.

Is this the exceptional case given the time?

I mean, these were 2016, 2017 conversations over two years ago.

I'm going to go ahead and rule.

Application Note 4 to Guidelines 3E1.1, Acceptance of Responsibility, provides that ordinarily the defendant has not accepted responsibility for criminal conduct upon a finding of obstruction of justice. There is language that there may, however, be extraordinary cases in which adjustments may apply even upon a showing of obstruction of justice.

You know, as I mentioned here, Mr. Guidry's actions occurred early in the case, two years prior to -- two years into the case. I don't find that there's any evidence of additional efforts to either attempt or actually to obstruct justice.

I understand the arguments that the government makes

about his arguments, his affidavit, in connection with this proceeding. I think he's entitled to try to defend himself in connection with his sentencing and to make the argument that supports his objection. I don't find -- you know, while I'm not persuaded by all of the statements he makes in his affidavit, you know, I don't think that they rise to the level of obstruction.

It's a close case, but I'm going to allow the credit for acceptance of responsibility, the third point as well as the two points, so three points, and that doesn't undermine -- the Court still finds that he's -- that his conduct amounts to obstruction. The Court will therefore allow those three points.

Objection Number 2. The defendant objects to a two-level increase for possessing a gun in connection with a marijuana offense. I know there's been some testimony on the weapon.

Is there any other evidence that the parties wish to present, any proffers or oral argument?

MR. WALKER: The only thing the United States would say is that the gun was found in the truck. We didn't put specific evidence as to where in the truck it was found. However, an identical bullet used in the gun -- and it's an unusual bullet because it's a .357 Glock -- was found -- one of those bullets was found in his pocket; and that beyond a preponderance of the evidence, it's clear that when you consider the gun was found in his vehicle, there was a bullet from the gun found in his pocket,

and even though the defense objects to the use of the fact that they did an analysis, just the fact that he had a bullet in his pocket that was of the same type as the gun that was found in his truck I would submit is far enough to demonstrate that he had some form of possession of the gun at the time he received the marijuana.

THE COURT: What about his contention that he didn't know, but he merely spotted the bullet on the floorboard of the truck or beside the truck and picked it up?

MR. WALKER: I would submit that that evidence is at least inconsistent with the overall testimony when you consider the fact that he's in his truck, the bullet's found in his pocket when they stop him, and the gun matching the bullet is found in his truck in the back and that the bullet must have been actually inside of the gun at some point prior to them making the stop.

THE COURT: Mr. Boustany?

MR. BOUSTANY: Your Honor, just to be clear, we've submitted the affidavit of Cody Scott, the sworn testimony under oath of Cody Scott, and we would reurge that as evidence on this as well as the affidavit of the defendant.

The bottom line here is the officer who testified today has no idea -- has nothing to do with that gun. You know, it would be really easy to find out if that gun had anything to do with this defendant. How about check it for fingerprints? How about check it for contact DNA so we'll know is this gun this

defendant's gun?

It certainly wouldn't do him any good if it's in the back seat, and that's where they said they found it, but they also found Cody Scott in the back seat.

And they also know that Cody Scott had nothing to do with the marijuana. Cody Scott, as they know, was out there asking for a ride and he got a ride and he put his stuff in there. He was out there probably earlier that day shooting the gun. They should know that because the officers who were out there conducted surveillance, but none of them testified today.

So I think that it's pretty clear that the government has not established that that gun was the defendant's or that the defendant knowingly or intentionally possessed that gun.

THE COURT: Is that the standard?

MR. BOUSTANY: I think the standard is, is there evidence by a preponderance that this defendant possessed the gun. Well, who has that burden?

THE COURT: Doesn't the government merely carry an initial burden of showing a temporal and spatial relationship existed between the weapon, the drug trafficking activity, and the defendant?

MR. BOUSTANY: Well, I think that's more in the sense of, you know, if we know, you know, the gun is there and the defendant has access to the gun, then it's temporal in the sense that it's in relation to the commission of the criminal act.

THE COURT: It doesn't have to be his gun, though.

MR. BOUSTANY: No. I agree with that.

THE COURT: And it doesn't have to be on his person.

MR. BOUSTANY: It does not. Constructive possession. The law recognizes constructive possession. You're absolutely right. So if it's in the truck and he knowingly or intentionally possessed it, then he can be given that enhancement. The question, though, is if it's in the truck and he doesn't know it, can he be given that enhancement, and the answer here is that he cannot.

The government has not established that he knew that gun, Cody Scott's gun, was in the back seat with Cody Scott when Cody Scott asked him to give him a ride and he said yes. The government has not established that Cody Scott had anything to do with the marijuana.

THE COURT: Let me ask you, you've submitted his affidavit. I take it you're not going to have him testify here today.

MR. BOUSTANY: The defendant?

THE COURT: Yes.

MR. BOUSTANY: No, because it opens him up to pretty much broad...

THE COURT: Okay. I'll ask you.

You know, the argument or the points that were made in the affidavit was that he spotted an unspent bullet either on the

floorboard of the truck or next to the truck.

MR. BOUSTANY: Right.

THE COURT: And then you said he didn't know that -- let me finish. He didn't know that there was a weapon in the truck.

Wouldn't spotting an unspent bullet on the floor put somebody on reasonable notice? Did he ask somebody, you know, why is there a bullet sitting on the floor?

It seems like where there's a bullet, there's usually a gun.

MR. BOUSTANY: Well, this area is a rural area. You heard zero testimony about it, but it's a rural area. There's a house out there. Kevin Perkins who was --

THE COURT: You have shotguns and you have rifles in rural areas. You usually don't have a .357 Magnum.

MR. BOUSTANY: Well, they go out and shoot in that area. Kevin Perkins, the other person -- the person who actually received the marijuana out there, he was under -- they were under surveillance. He was. The policemen were out there conducting surveillance. They saw what happened. Nobody has testified that the defendant had a gun or knew that there was a gun.

So it is not enough -- I don't think it is enough to say we found a gun in the back seat of the truck and that's close enough when it was Cody Scott who said it's his gun and Cody Scott had nothing to do with the marijuana. That's just not

enough.

So they have -- there has to be more than just that. They have to establish that the defendant knowingly or intentionally possessed a gun, that he knew the gun was in the truck.

You know, as far as bullets out there, I imagine there are bullets out there because, you know, it's a rural area. People go out there. They shoot guns. Cody Scott said he brings his dogs and his gun -- he brought his dog and his guns out there, so...

THE COURT: The affidavit wasn't clear. He thought it may have been on the floorboard of the vehicle which would be inconsistent with that argument.

MR. BOUSTANY: Well, I mean, I don't know that it would. That's the truth. That's what he said, that he remembers seeing a bullet. He doesn't know if it was on the floorboard or -- but it was all happening pretty quickly because he was getting in his truck. He was leaving with Kevin Perkins and Cody Scott asked him to give him a ride. So it was all going on pretty quickly. It was shortly after that that he was stopped by the local police. Nobody with the local police ever said that he had a gun. He didn't have a gun in his front seat. He didn't have a gun under the front seat which is where you would customarily leave it. Cody Scott, you know, he didn't even know the marijuana was in there because it was in the bed of the truck in

a box, a closed box.

So we can guess. You know, we can just guess that -- I'm not sure what we would be guessing, that it's the defendant's gun even though Cody Scott and the defendant both have given sworn testimony that it wasn't. We can guess even though the government has not even bothered to fingerprint the gun or DNA test the gun. That's all we would be doing is guessing.

THE COURT: Let me ask you just so I can narrow it down on the dispute.

There's some statement in the sentencing memoranda that indicated that the gun wasn't located in the same space as the marijuana because the marijuana was in the back of the truck and the gun was in the cab. Are you making that distinction? Because there seems to be case law that holds that it is spatially related even if the marijuana is in the back of the truck and not in the cab.

MR. BOUSTANY: No. The reason I mentioned it is because it seemed like the presentence report made reference to the marijuana as though it was in the truck. So I just wanted to point that out.

I agree with the Court on that. I mean, if it's in the bed of the truck and the party knows it's in the bed of the truck and that party possesses a gun in connection with that offense, then, no, I agree with that. So, no, I don't disagree with that. I agree with the Court on that.

THE COURT: This is purely that you're saying he didn't know that the weapon was in the truck; therefore, there's no temporal or spatial connection between the gun and the defendant.

MR. BOUSTANY: Well, I think the temporal connection requires more than just it happens to be there. It requires that the defendant knowingly and intentionally or concur in the fact that it is there, and, of course, it has to be used in connection with the commission of the offense.

So really the question is, well, you know, is this the defendant's gun?

Okay. That's one question.

If it's not, did he know that -- did he have Cody Scott bring the gun in connection with the commission of the offense?

Well, Cody Scott had nothing to do with the commission of the offense. So, you know, if it's Cody Scott's gun, it had nothing to do with the commission of the offense. Cody Scott was out there and just loaded up his stuff in the back seat, jumped in, and they left. That's basically what happened. So I think it's more than just we happened to find it in the back seat of the truck.

THE COURT: Very good.

Thank you.

MR. WALKER: And I submit he's completely incorrect. It's not -- okay. So it's temporal location in connection and you do have to have some knowledge and you use direct or

circumstantial evidence.

There's absolutely nothing wrong determining by a preponderance of the evidence, if that gun is there, one, is it in the area?

Absolutely irrefutable evidence it's in the area.

Circumstantially does he know it's in the area?

I submit the fact that you've got a gun with a very unique, small caliber bullet -- he has the bullet found in his pocket and it's not until at this point where he's saying he saw it on the ground.

All of the evidence showed that when the police stopped them, the gun was found in the vehicle, in the back seat area of the vehicle, and he was found in the front of the vehicle with the bullet from that gun in his pocket. That's sufficient for us to have met our burden as it relates to that enhancement.

MR. BOUSTANY: Your Honor, if I could just respond.

You know, they were conducting surveillance out there. All they had to do was come over here and say we conducted surveillance. Nobody was shooting a gun out there. Cody Scott didn't have a gun out there. We were there. We saw it.

There's no evidence to that effect. The only evidence is that submitted by the defendant, other than they happened to find a gun in the back seat where Cody Scott was sitting. And the officer who found the gun didn't -- you know, this officer testified where he thought the gun was found. It was actually

closer to Cody Scott, but there's not even evidence of that other than it was in the back seat.

THE COURT: Okay. I've heard the argument. I've considered the evidence.

Sentencing Guideline § 2D1.1(b)(1) provides that if a dangerous weapon, including a firearm, was possessed, increase by two levels.

The commentary to 2D1.1(b)(1) explains that this particular enhancement reflects the increased danger of violence when drug traffickers possess weapons and should be applied if the weapon was present unless it was clearly improbable that the weapon was connected with the offense.

The standard in the Fifth Circuit is set forth in *United States vs. Salado*, 339 F.3d 285, Fifth Circuit, 2003.

The government has the burden of proof under 2D1.1 of showing by a preponderance of the evidence that a temporal and spatial relationship existed between the weapon, the drug trafficking activity, and the defendant. Under this standard the government must show that the weapon was found in the same location where the drugs or paraphernalia were stored or where part of the transaction occurred.

I find by a preponderance of the evidence that the government has established a temporal and spatial relationship between the weapon and the drug trafficking activity in the sense that it was discovered in the vehicle. The marijuana at issue

was in the back of the vehicle. The fact that the gun was in the cab and the marijuana was in the bed of the truck still creates a temporal and spatial relationship.

The question of whether there's a temporal or spatial relationship with the defendant in this case, I believe and I find that the government has satisfied that burden.

The defendant argues that he was unaware that the weapon was in the vehicle. I find by circumstantial evidence I am unpersuaded that that is the case. The defendant had an unspent bullet in his pocket. He argues that he found that on the ground or on the floorboard of the truck. I find by circumstantial evidence that that had to put him on notice of a weapon. That circumstance, the fact that the weapon was in the cab of the truck and the marijuana was in the back of the truck, I do find that that satisfies the government's burden.

That shifts the burden to the defendant to show that it was clearly improbable that the weapon was connected to the offense. I don't find that the defendant has met that burden.

I have reviewed the arguments set forth in the defendant's objection as well as Mr. Guidry's affidavit. I do find that this enhancement under 2D1.1(b)(1) is appropriate and therefore the objection is overruled.

Objection Number 3 to the original PSR is now moot in light of the revisions to the PSR. Unless somebody tells me something differently, I do find that they're moot.

Objection Number 4. Defendant objects to paragraph 71 of the revised PSR which adds three points to his criminal history score due to a sentence imposed in 1999 for distribution of cocaine. The defendant argues no criminal history points should be assessed due to the age of the conviction, defendant's age at the time the offense was committed, and the length of the sentence imposed.

This is really not an evidentiary issue.

Do counsel wish to make any arguments at this time?

MR. WALKER: We submit based on what probation's response to the objection was, Your Honor.

MR. BOUSTANY: Your Honor, we submitted our argument. I think the appellate court decision we cited, I think, is directly on point.

THE COURT: This is *Ramirez*?

MR. BOUSTANY: Yes. I think that's the case. And so that is certainly persuasive.

Additionally, if there's any doubt under the guidelines, the rule of lenity in criminal cases, in all criminal cases, indicates that the Court should resolve doubt in favor of the defendant, and the guidelines are subject to that same rule of lenity.

THE COURT: Okay. Thank you, Mr. Boustany.

This is primarily a legal argument as to whether the original term and the additional sanction should be aggregated.

The Court has reviewed *U.S. vs. Ramirez*, and I do agree with Mr. Boustany that that is on point. However, the Fifth Circuit has indicated it would likely reject the reasoning of *Ramirez* in *U.S. vs. Mendez*, an unpublished case, 560 Fed. Appx. 262, 2014. The Fifth Circuit in that case noted that *Ramirez* stands alone.

Our research reveals that all other circuits to address the question have interpreted the phrase "revocation of probation" broadly enough to apply to terms of imprisonment that were not imposed through formal revocation hearings.

Ordinarily an unpublished Fifth Circuit opinion does not stand for a binding precedent. However, the Court has reviewed the cases that the Fifth Circuit relied on, including *United States vs. Galvan*, 453 F.3d 738; *United States vs. Reed* -- and that case was Sixth Circuit, 2006; *United States vs. Reed*, 94 F.3d 341, Seventh Circuit, 1996; *United States vs. Glidden*, 77 F.3d 38, Second Circuit, 1996; and *United States vs. Townsend*, 408 F.3d 1020, Eighth Circuit, 2005, which appear to take the opposite position of *U.S. vs. Ramirez*.

MR. BOUSTANY: Can I say one thing, Your Honor?

And I hate to interrupt.

One of the things we noted in our response was that at the time that this sanction was imposed under Louisiana law, the defendant was not represented by counsel. Today, under current Louisiana law, what he was alleged to have done, which is not do

certain conditions of his probation, would be considered a technical violation. The first technical violation, the maximum penalty on that is a -- the worst penalty is a 15-day sanction, jail sentence.

THE COURT: And I think you're arguing for the rule of lenity that you referred to earlier as far as -- and I'm going to consider that and I will consider that, but what I am doing now is applying the law to the specific facts of the case. How I deal with this under the rule of lenity or mitigation is a different matter.

MR. BOUSTANY: I understand that although --

THE COURT: Are you arguing lenity or are you arguing legal argument?

MR. BOUSTANY: I'm arguing, too, that at the time if the defendant was not represented by counsel, it's questionable whether that should be considered, under the guidelines, a finding of guilt, which I think is how the guidelines define it. He didn't even have a lawyer at the time. Now, I don't know if that should qualify as a finding of guilt to impose the extra penalty and to then impose the extra penalty under the guidelines.

THE COURT: Although *Mendez* treats it very broadly as far as what triggers the revocation of probation.

MR. BOUSTANY: I could tell you back then you could be revoked for testing positive for drugs and they would revoke you,

but it would be a revocation. They didn't have sanctions back then. There was almost no such thing as a sanction. If you did do it, you got revoked.

THE COURT: I think *Mendez* seems to indicate the Fifth Circuit is going to view this broadly and not make a distinction between sanctions or a revocation, that if this was a term of imprisonment, you add it.

MR. BOUSTANY: You might be right. I mean, look, I respect the Court's ruling. I'm just saying I think there are certain special circumstances here that I suspect --

THE COURT: And I think your circumstances -- and I don't mean to cut you off, but I want to push this forward. I think your circumstances might go into a question of mitigation or leniency in applying a sentence, but as far as the technical application of this provision, you know, my conclusion is that *Ramirez* is an outlier, because even though this Fifth Circuit case, *Mendez*, is unpublished and is not binding precedent, it relies on a very strong body of cases where the courts have aggregated the sentences under similar -- I mean, have found that the revocation referred to in 4A1.2(k) is very broad. It's not limited like *Ramirez* did, limited to formal revocation. I find the Fifth Circuit would follow, which they have a tendency to do, the majority of circuits and unlikely to follow the Ninth Circuit.

MR. BOUSTANY: No. I respect the Court's ruling. I

don't know that it's that clear, but I respect the Court's ruling.

THE COURT: I understand. And you're making your point and the Court will consider that in imposing sentence.

On September 25th, 2000, Mr. Guidry appeared for a probation revocation hearing, admitted to certain violations of the conditions of his probation, and in lieu of revocation, he was ordered to serve 180 days in jail. He was released from jail on February 14, 2001. The Louisiana trial court retained the power to modify the conditions of probation.

The Court, in following *Mendez* and the line of circuit cases cited by *Mendez*, the majority position on this, because Guidry's date of last release from incarceration was within 15 years of the commencement of the instant offense, it was over -- when you add the terms, over a year and one month. The three points are properly added to his criminal history score pursuant to 4A1.1(a). Accordingly, this objection is overruled.

Objection Number 5. Defendant objects to paragraph 89 of the revised PSR which adds two points to his criminal history score because he committed the instant offense while under a probation sentence for his 2014 conviction for simple escape.

Do the parties have any evidence to add to this or any arguments?

MR. WALKER: No, Your Honor.

THE COURT: Mr. Boustany, you may proceed.

MR. BOUSTANY: Our argument is essentially that if a defendant is told that he's not on supervision and he's not aware that he is and he's told by an authority, the probation office, that he's not, then -- I mean, I think the guidelines would seem to make it harsher for someone who knows that he's under supervision, who knows that while he's under supervision, that he commits another offense. So rightly someone under those circumstances can legitimately be punished more harshly because you know you're under supervision and you know you have this period of time where you're supposed to engage in good behavior and you don't, but for a defendant who doesn't know that, then we would have to basically say that the guidelines would be interpreted to make it strict liability. And I'm not -- you know, so the question is --

THE COURT: That's what the judgment was, wasn't it?

MR. BOUSTANY: It was. It was. The Court did a split sentence.

THE COURT: We can generally assume that we're going to put the defendant on notice of what's in our judgment.

MR. BOUSTANY: Yes. I mean, the Court did a split sentence, which is not unusual. In Jeff Davis they do that. They did that at the time where someone gets a jail sentence, and then after you're out, you're supposed to be on probation. He reported. He went to the probation office, and they told him, you know, you served your time, you're done. It was like -- I

don't know how many months he had served, but it was done.

You know, Louisiana has good time law. So, you know, he legitimately understood from what he was told that he's done, his sentence is done.

So the question, I think, here is do the guidelines impose that condition even though the defendant was told that he wasn't under supervision. That's really the question. If they do, then he gets it. If they don't, he doesn't. If they're ambiguous, then the rule of lenity means that the Court should interpret it in the defendant's favor. That's the issue.

I think the guidelines are intended to punish someone more harshly who knows or is aware that he's under supervision, not someone who is told you're clear, you're done, you've served your sentence.

That's our argument, Your Honor.

THE COURT: Mr. Walker, do you have anything to add or any response to that?

MR. WALKER: He was told that's what his sentence was. The fact that they didn't ultimately end up supervising him doesn't mean he wasn't put on notice of that's what his sentence was. He committed this crime during a time when he should have been supervised for probation, and as a result of that, he should receive the additional two points.

THE COURT: Mr. Boustany, it seems to me that we have to go by the judgment. That's the -- you know, how another

agency construes or applies that judgment can't dictate how 4A1.1 should apply. I agree with the government's position.

According to Guidelines 4A1.1, Application Note 4, quote, active supervision is not required for this subsection to apply, close quote. The guidelines are specific about which prior convictions and sentences are counted in calculating a defendant's criminal history points and which are not.

Section 4A1.2(j) directs district courts not to count, quote, expunged convictions, whereas 4A1.2, Application Note 10, directs a district court to count a previous conviction even though it has been, open quote, set aside or pardoned for reasons unrelated to innocence or errors of law, period, close quote. The implication is the district court should count previous convictions unless they have been set aside because of a finding of innocence or legal error. The Court cites *U.S. vs. Pech*, 562 F.3d 1234, Tenth Circuit, 2009.

Mr. Guidry's prior conviction has not been expunged or set aside and he has not received a pardon. The state court imposed a three-year term of supervised probation which should have commenced on May 12th, 2015. There's no indication in the state court records that this requirement was ever modified. The fact that the Louisiana Probation and Parole failed to set up supervision has no bearing on the sentence imposed; therefore, the objection is overruled.

Were there any other arguments that the parties wish to

make as far as objections to the PSR before we move into the calculation of the sentencing guideline range?

MR. WALKER: No, Your Honor.

MR. BOUSTANY: No, Your Honor. Just note our objection to the Court's rulings.

THE COURT: Your objection is noted.

In accordance with the Court's findings, I have calculated the advisory guidelines range in this matter as follows: The defendant's Offense Level is 25. The defendant's Criminal History Category is V. This produces a guideline range of 60 months imprisonment on Count 2 and 100 to 125 months imprisonment on Count 4. A supervised release range of three years as to Count 2 and five years as to Count 4. Probation is not authorized. Restitution is not applicable. A fine range of $20,000 to $5,000,000 on all counts is authorized. A special assessment in the amount of $200 is owed.

Does the government or defense counsel have any objection to my calculation of the guideline range subject to the Court's ruling on their objections?

MR. WALKER: None, Your Honor.

MR. BOUSTANY: No, Your Honor.

THE COURT: Okay. Given my calculation of the guideline range, I have to now consider the relevant factors set forth by Congress in 18 U.S.C. §.3553(a) to ensure that I impose a sentence that is sufficient, but not greater than necessary to

comply with the purposes of sentencing.

These purposes include the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Additionally, I have to consider the kinds of sentences available; the sentencing range established for this offense in the sentencing guidelines; any pertinent policy statements issued by the Sentencing Commission; the need to avoid unwarranted sentencing disparities among similarly situated defendants; and the need to provide restitution to any victims of the offense.

I've reviewed the sentencing memorandum submitted by defense counsel as well as the sentencing letters that have been submitted on defendant's behalf. I have considered those.

Does the government wish to be heard on the application of the 3553(a) factors, a variance, or otherwise make a sentencing recommendation?

MR. WALKER: Yes, Your Honor.

THE COURT: Please proceed.

MR. WALKER: I know that the Court talked about the

fact that you should consider -- or you could consider -- in overruling his objections, considering lenity as it relates to the overall sentence that he should receive in this case.

My response to that is this: When you consider the history and characteristics of this defendant and as I went through his prior criminal history, it was kind of staggering, not just the number of criminal history points he received as a result of prior criminal history, but the number of convictions he has where he received no criminal history points.

I submit that when you look at this defendant's history, his criminal history, even considering the fact that you overruled the defendant's objections in this case, if you had not overruled the objections in this case, I would be standing before the Court saying I submit you should go above the guidelines, that the guidelines are not appropriate, especially considering -- I made circles surrounding all of the convictions that he has had from which he received no criminal history points. It essentially has been continuous.

As a result of that, I submit that the minimum sentence, based upon his criminal history and based upon the acts that he engaged in in this case, would be the high end of the guidelines, not a sentence above the guidelines, but a sentence of 125 months, and that's what I'm asking that the Court give.

THE COURT: Mr. Boustany?

MR. BOUSTANY: Your Honor, we submitted an objection to

the presentence report and I'm not going to rehash that, but in it we explained what happened as far as ultimately this defendant entering a guilty plea. He has clearly accepted responsibility.

But what we did, because it was very difficult in terms of making a decision of whether to plead guilty or not or whether to go to trial -- and it is a hard decision to make. One of the things that we did was to ask for a pre-plea estimated sentencing guideline calculation. Mr. Walker and I got together and we did that because there were some concerns.

There is nothing wrong with a defendant trying to defend himself and holding the government to its burden of proof and basically, you know, asserting his constitutional rights. So it's very difficult.

We ultimately reached a plea agreement where the defendant pled to these two counts, but it was after we asked for a pre-plea sentencing calculation because both of us, both sides, wanted to know, you know, where would the defendant fall in the sentencing guideline calculation because even though they're advisory and even though the Court largely has discretion to do what it wants, unfortunately and maybe all too often, the guidelines pretty much rule the day.

So we asked for it. We had it done. It was done. That calculation came back at a range of 46 to 57 months if the gun enhancement wasn't applied and 57 to 71 months if it was.

THE COURT: It didn't take into account obstruction,

though.

MR. BOUSTANY: It did not.

And, you know, I mean, it would be very helpful to a defense or defendant's standpoint if we knew what the government would argue in terms of sentencing guidelines, but it's very difficult even for the government to know because these guidelines, as the Court can see, are not very clear. They are subject to interpretation. So how we interpret it and how the Court interprets it is the most important thing, but it's very difficult for a defendant and even for defense counsel to counsel a defendant on whether he should assert his constitutional right to have a trial or not. So that pre-plea calculation certainly went into the decision on whether or not the defendant would enter a plea.

So, you know, Damien understands that the sentencing guidelines are advisory. It's not -- you know, in state court, basically what happens in state court -- and we have to explain this to defendants all the time, that in state court the prosecutor knows its case. We know our case. We get together. We make an agreement on what we believe would be a fair sentence in the case. We go to the judge and the judge says, yes, I agree or disagree. If the judge agrees, it's done.

Now, we understand and everybody understands, including Damien Guidry, that that doesn't work in federal court. So that's one of the reasons why in this case we wanted to kind of

get an idea of where the guidelines would fall and that's what we did, then we came back, and post plea the guidelines are almost -- they came back almost double that range.

We've submitted a number of letters from the defendant's family, from his -- you know, from people who know him. I understand the government paints a picture of him, but the other picture is that he has worked. He has engaged in gainful employment. We submitted letters from various people, including his family members who he supports.

You know, there are a lot of accusations in this case, and as we pointed out in the presentence report, there are accusations made in state court against this defendant, most of which have proven simply not true. The charges are either -- have either been dismissed or will be dismissed, and we submitted a letter, you know, confirming that fact.

So, you know, yes, the defendant has a lot of arrests since he was 17 years old because under Louisiana law, when you're 17, you're considered an adult. So, yes, he has a lot of arrests, but, you know, we knew all of that. The government knew all of that going into this. We knew that. We got together and tried to see if we could come to some reasonable conclusion other than a trial and we did with the assistance of a pre-plea sentencing guideline. You know, it creates, I think, some reasonable expectations even though, you know, Damien knows, and we understand, that ultimately the Court makes the final

decision.

So, you know, with that, the guideline calculation, we submit, that was pre-plea is a reasonable calculation. If you give him the gun, then it's 57 to 71 months. You know, if the government didn't think that was reasonable, they certainly could have mentioned it before he pled, not after. So we submit that that range would be something that would be reasonable in this case given the circumstances of this case.

THE COURT: Mr. Boustany, does the defendant wish to make a statement?

MR. BOUSTANY: Do you want him to stand here?

THE COURT: Yes. If he could stand, please.

THE DEFENDANT: I don't know. I guess I'm sorry for my actions or whatever, you know. I want to apologize to my family.

THE COURT: Anything else?

THE DEFENDANT: (Shaking head.)

THE COURT: Does the government have a final statement?

MR. WALKER: Other than, Your Honor, the defense says that the defendant received this pre-probation assessment about a possible sentence. That really was based on the amount of drugs. That's what they made the assessment based on.

And the Court went to great lengths in his plea of guilty saying whatever you've been told, the decision as to what an appropriate sentence will be will be mine. You said it would be yours, which is correct. And the guidelines have come out,

and I submit the guidelines not only are appropriate, but I think that almost understate his severe criminal history that goes on from when he was 17 to today.

THE COURT: And, Mr. Boustany, the concern I have here is even if you take out the obstruction count, you're still not going down very far in the guideline range. The three points for the prior conviction -- and that's all in the defendant's history. The probation office can't calculate that without going through their presentence investigation.

I understand that the defendant thought he was pleading -- or felt like, you know, he had an estimate of where this was going to play out, but I agree with the government. I warned the defendant when he pled that the sentence that I could impose may be much stricter and may be much longer than what he may anticipate. I mean, that's part of the plea colloquy.

Based on the Court's factual findings, the calculation of the applicable guideline range, argument by counsel, and consideration of the factors set forth in 3553(a), I find that the sentence imposed should be within the sentencing guideline range as the Court finds that the guideline range in this matter adequately addresses the policies and factors set forth in 18 U.S.C. § 3553(a). I don't think that there's any grounds to vary upward or to depart from the sentencing guideline range.

The Court will now turn to the imposition of sentence.

Based on the facts of this case, Mr. Guidry's criminal

history, and my findings with respect to obstruction, I would ordinarily be inclined to impose a sentence at the top of the range or even vary upward beyond at a higher level than the guidelines range.

I am especially troubled by Mr. Guidry's conduct with respect to obstruction. Acts of obstruction can range from very minor and fleeting to very severe and prejudicial to the administration of justice.

Mr. Guidry's conduct may not rise to the high end of the range, but it certainly was not minor or fleeting and it was persistent throughout the period documented by the conversations admitted into evidence. This conduct strikes directly at the Court's ability to administer justice and ultimately at the rule of law. However, when I consider the record as a whole, I do find some grounds to consider in mitigation of that sentence. As I sit here, I am determining an appropriate sentence within the guideline range of 100 months to 125 months.

Specifically, with respect to defendant's fourth objection, which is his 1999 conviction, the Court has to consider that that conduct occurred when Mr. Guidry was a minor, and given the age of that conviction, those are all factors with respect to mitigation of sentence. I also have to consider that Mr. Guidry's guideline calculations were enhanced for obstruction of justice.

As I noted in my ruling on the acceptance of

responsibility, no evidence — there was no evidence that Mr. Guidry persisted in any conduct as far as the obstruction of justice after those conversations occurred in 2016 and early 2017, and I don't find or see anything in the record that would indicate that his actions actually prejudiced the administration of justice in this case. The Court has to consider that.

Based on the Court's consideration and the range of 100 months to 125 months, I am not going to take the government's position that a sentence should be imposed at the top end of the range. However, I don't think a sentence at the bottom of the range is appropriate.

I hereby sentence the defendant to the Bureau of Prisons for a term of 60 months on Count 2 and a term of 115 months on Count 4 with the sentences to run concurrently for a total term of imprisonment of 115 months. The Court recommends to the Bureau of Prisons that the defendant receive credit for time served.

Mr. Boustany, do you have any requests as far as where he will go as far as a facility?

MR. BOUSTANY: Yes, Your Honor.

We would request that he be placed in a facility close to this area. He actually lives in Welsh, Louisiana.

And we would also ask the Court to make the recommendation to the Bureau of Prisons, although the defendant understands it's only a recommendation, that he be allowed to

participate in any rehabilitation programs and educational and work programs that may be available.

THE COURT: I will recommend to the Bureau of Prisons that Mr. Guidry be placed in a facility as close to his family in Lake Charles as possible, that he will be provided with resources with respect to his GED and work training as well as to provide him with opportunities for rehabilitation.

Upon release from imprisonment, the defendant is to be placed on supervised release for a term of three years as to Count 2 and five years as to Count 4 with both terms of supervised release to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions of supervision as adopted by this Court and the following mandatory conditions: You must not commit another federal, state, or local crime. You must not unlawfully possess a controlled substance. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the Court. You must cooperate in the collection of DNA as directed by the probation officer.

Additionally, you shall comply with the following special conditions of supervised release: The defendant shall participate in substance abuse testing and/or treatment, inpatient or outpatient, as administered and approved by the

United States Probation Office and shall contribute to the cost of such testing and treatment in accordance with his ability to pay. The defendant shall also refrain from alcohol abuse while in a substance abuse treatment program.

The Court is imposing no fine due to the defendant's lack of assets to pay a fine.

A preliminary order of forfeiture was previously entered by the Court and that preliminary order is now a final order of forfeiture as to Mr. Guidry.

It is ordered that the defendant pay to the United States a special assessment in the amount of $200.

Mr. Guidry, you can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in the proceedings that was not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think that the sentence is contrary to law.

Any notice of appeal must be filed within 14 days of the entry of judgment or within 14 days of the filing of a notice of appeal by the government. If requested, the clerk will prepare and file a notice of appeal on your behalf. If you cannot afford to pay the cost of an appeal or for appellate counsel, you have the right to apply for leave to appeal in forma pauperis which means that you can apply to have the court

waive the filing fee. On appeal, you may also apply for court-appointed counsel.

Are there any other matters necessary to the resolution of this case?

MR. WALKER: Your Honor, at this time the United States would move to dismiss Counts 1, 3, and 5 of the indictment.

THE COURT: That motion is granted.

MR. BOUSTANY: Your Honor, at this time we again reurge the objections we had previously urged with respect to the sentencing guideline calculation and the other matters, and the defendant gives at this time notice that he will appeal. I've been retained up to this point. He may need appointed counsel. I would ask that there be a determination made as to whether or not he qualifies for appointed counsel. I may pursue the appeal, but that's something I will have to discuss with the defendant, but he does intend to appeal.

THE COURT: Okay.

MR. BOUSTANY: Or sorry. He gives notice of appeal.

THE COURT: Very good.

Thank you, Mr. Boustany.

MR. BOUSTANY: I guess I need to formally move to withdraw, and then if I were to represent him on the appeal, I will later file a motion to enroll for appeal purposes. So I would ask the Court to allow me to withdraw at this time.

THE COURT: Mr. Walker?

MR. WALKER: The only thing I would ask that Mr. Boustany do prior to withdrawing, he is the person who's responsible for giving notice of an intent to appeal. Typically, at least it's my understanding, the defense or the defendant give a written notice of intent to appeal versus just an oral. I would ask that he simply give a written motion to appeal if that's his client's intention prior to withdrawing.

MR. BOUSTANY: I don't think the law requires me to give a written notice. I believe that an oral notice of appeal is sufficient as long as the defendant expresses his desire to appeal, and he has, and so I think that is sufficient. I mean, unless I'm wrong, I believe he can give oral notice of appeal, and so he is doing that at this time. Again, I don't know -- I will discuss with Damien as to whether I will handle the appeal, but, you know, my fee contract ends at this time and so I would move to withdraw at this time.

THE COURT: I need to consult with my lawyer.

(Conferring)

THE COURT: Mr. Boustany, I mean, it's a one-page form, isn't it? Can't it be done pro bono just to -- you know, I tend to agree with the government to have that one-page written notice. I'm concerned about doing this orally.

MR. BOUSTANY: It is a one-page form and I understand that, and, yes, I will do that.

THE COURT: If you could do that.

MR. BOUSTANY: But I just want to make it clear that the defendant has indicated he intends to appeal.

THE COURT: I'll allow you to withdraw, but you need to file a written notice.

MR. BOUSTANY: I can do that, yes.

THE COURT: The defendant is hereby remanded to the custody of the United States Marshal to begin service of sentence.

If there is nothing else, we are adjourned.

(Proceedings Adjourned)

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Certificate

I hereby certify this 10th day of July, 2019, that the foregoing is, to the best of my ability and understanding, a true and correct transcript from the record of proceedings in the above-entitled matter.

/s/ LaRae E. Bourque

Federal Official Court Reporter