

APPENDIX A

1a

PUBLISHEDUNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4585

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LARRY LAMAR NANCE,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:17-cr-00404-FL-1)

Argued: December 10, 2019

Decided: April 21, 2020

Before GREGORY, Chief Judge, and NIEMEYER, and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge Niemeyer joined. Chief Judge Gregory wrote a separate opinion concurring in the judgment.

ARGUED: Jaclyn Lee DiLauro, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Evan Rikhye, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** G. Alan DuBois, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, Thomas L. Crosby, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

APPENDIX A

2a

PAMELA HARRIS, Circuit Judge:

In 2018, Larry Lamar Nance pleaded guilty to two federal drug- and firearm-related offenses, reserving his right to appeal a sentence in excess of the advisory Guidelines range. The district court sentenced him to 123 months' imprisonment, well above the Guidelines range of 81 to 87 months. Nance appeals, maintaining that his sentence is both procedurally and substantively unreasonable. Finding no error, we affirm.

I.

A.

The conduct for which Nance was prosecuted in this case began on April 25, 2017.¹ Police officers responding to a noise complaint at a Fayetteville, North Carolina residence encountered several individuals, including Nance, in the front yard, along with six cars and the “strong smell of marijuana.” J.A. 34. When the officers told the individuals that they intended to lock down the residence and apply for a search warrant, Nance and others fled the scene. After obtaining a warrant, the officers searched one of the cars, which belonged to Nance, and found heroin, cocaine, and cocaine base. Nance was discovered hiding in a neighbor's shed, arrested on state charges, and then released the following day.

¹ Except as otherwise noted, the facts in this opinion are taken from the government's factual basis in support of the plea agreement, *see* J.A. 34–36, the parties' sentencing memoranda before the district court, *see* J.A. 39–64, and the Presentence Investigation Report, *see* J.A. 109–124 (under seal).

APPENDIX A

3a

Two days after that, Fayetteville police responded to a domestic disturbance complaint from Nance's former girlfriend, who reported that Nance was sitting in his car in her driveway. She told the officers that Nance had "previously struck her and put a gun to her head," J.A. 49 n.5, and she was afraid that he was currently armed. When officers approached the vehicle, Nance began driving forward and refused to comply with instruction to stop and show his hands. One officer opened the passenger door to turn off the engine and saw a black handgun on the passenger seat. After Nance was removed from the vehicle and attempted unsuccessfully to flee, he was arrested. In addition to the gun – a .45 caliber handgun with a bullet in the chamber – the officers recovered heroin and marijuana from the car. Again, Nance was detained on state charges and then released the following day.

Based on these incidents, a federal grand jury returned a four-count indictment charging Nance with drug and firearm offenses. Nance entered into a plea agreement with the government, pleading guilty to Counts One and Three – possession with intent to distribute cocaine, cocaine base, and heroin, in violation of 21 U.S.C. § 841(a)(1); and using and carrying a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) – in exchange for dismissal of the other two counts. Pursuant to the plea agreement, Nance reserved the right to appeal a sentence in excess of the applicable Guidelines range established at sentencing.

B.

Prior to sentencing, the United States Probation Office submitted a Presentence Investigation Report ("PSR") to the district court and the parties. The PSR recounted

APPENDIX A

4a

Nance's "very unstable childhood," during which he lived at different times with his mother and father – both of whom were heavy drug users – and other relatives. J.A. 118. The PSR noted that Nance has used drugs since age nine, beginning with marijuana and later graduating to opiates and heroin.

The PSR also described Nance's long criminal history, and because that history became the central issue at Nance's sentencing, we recount it in detail here. First came a block of offenses beginning in 2001, when Nance left school at age 16, and ending in 2005, when Nance was 20. At age 16, Nance was charged with possession of a stolen motor vehicle, breaking and entering, and larceny after breaking and entering. At age 18, he was charged with possession with intent to manufacture, sell, or deliver cocaine. He pleaded guilty to each of these offenses and was placed on probation. While on probation, at age 19, he was charged with burglary and kidnapping in connection with a single offense, though the kidnapping charge later was dismissed.

Then, in 2005, when Nance was 20 and on probation, he committed two more offenses over a two-day period, conspiring to commit armed robbery and discharging a weapon into an occupied vehicle. He pleaded guilty to those charges in 2006 and was sentenced to 23 to 37 months' imprisonment. In 2008, while serving that sentence, Nance pleaded guilty to the earlier burglary charge and was sentenced to an additional 61 to 83 months' imprisonment.

As a result of this series of convictions, Nance was incarcerated from 2006 to 2013. During that time, the PSR reports, he incurred 79 disciplinary infractions. Nance was

APPENDIX A

5a

released from custody to post-release supervision on July 12, 2013, when he was 28 years old.

According to Nance's counsel, this 2013 release from prison was a turning point of sorts in Nance's history: From that time on, Nance, now an adult, purportedly committed only non-violent offenses. And indeed, Nance's next offense, committed six months after his release, was marijuana possession, for which he was once again incarcerated; and the one after that – committed in June of 2015 when Nance was 30, eight months after he was released from custody a second time – was possession with intent to manufacture, sell, or deliver marijuana.

After that came the conduct at issue in this case – the April 2017 drug and firearm offenses. Those offenses, as noted above, included the carrying of a firearm in furtherance of a drug-trafficking crime, to which Nance pleaded guilty. The PSR also recounted two other arrests that occurred during roughly the same time period, both of which stemmed from violent incidents and both of which resulted in charges against Nance that ultimately were dismissed. First, on February 2, 2017, Nance was charged with breaking and entering to terrorize or injure and domestic criminal trespassing, after he allegedly broke into his former girlfriend's home and remained there after being ordered to leave. That charge was dismissed when Nance was indicted for the instant offenses. And second, on May 17, 2017, Nance was charged with assault when he allegedly hit a female victim in the head with his fist. That charge also was dismissed, this time because the witness – presumably, the victim of the assault – did not make herself available to testify.

APPENDIX A

6a

During this period, Nance was on probation stemming from his June 2015 drug offense. Because Nance violated the terms of his supervision in multiple respects – failing to meet his monetary obligations, failing to report as directed, testing positive for drug use, failing to comply with his mental health intervention, and engaging in new criminal conduct – his probation was revoked on May 23, 2017, and he was sentenced to 90 days’ custody. Some months after he was released in August of 2017, Nance was arrested on the instant offenses, and he has been in custody since.

Having recounted this extensive criminal history, the PSR calculated the appropriate advisory Guidelines range. As to Count One – the drug offense – the PSR calculated a base offense level of 12. *See* U.S.S.G. § 2D1.1. Deducting two levels for acceptance of responsibility, *see id.* § 3E1.1(a), and applying a criminal history category of V in light of the convictions discussed above, the probation officer determined that Nance’s advisory Guidelines sentencing range on Count One was 21 to 27 months. On Count Three – the § 924(c) firearm offense – a mandatory sentence of 60 months consecutive to the sentence on Count One would be imposed as required by statute. *See* 18 U.S.C. § 924(c)(1)(A), (D)(ii); U.S.S.G. §§ 2K2.4, 3D1.1(b)(1). The effective Guidelines range, then, was 81 to 87 months. The PSR also suggested that the court might wish to consider an upward departure, because the Guidelines calculation did not adequately reflect the severity of Nance’s criminal history.

The parties both filed sentencing briefs with the district court. The government moved for an “upward departure and/or variance,” arguing that Nance’s Guidelines range “fail[ed] to adequately reflect the seriousness of the Defendant’s criminal history and the

APPENDIX A

7a

strong likelihood that he will continue to commit crimes once released from custody.” J.A. 52. Among other factors, the government pointed to Nance’s “history of committing crimes while he awaited trial for prior arrests or while under court supervision,” *id.* at 41; dismissed charges for violent conduct that were not accounted for by the Guidelines calculation; and Nance’s most recent arrest for a violent offense, in May of 2017, when he was “arrested for striking a woman in the head with his fist.” *Id.* at 49. A sentence between 262 and 327 months, the government concluded, would be appropriate to “promot[e] respect for the law and protect[] the public.” *Id.* at 52.

Nance, in turn, argued for a sentence within the Guidelines range of 81 to 87 months. Nance’s counsel recognized that “Nance’s criminal history is not short and [would] likely give the Court pause.” *Id.* at 60. But counsel urged the court to view that history not as one “uninterrupted violent criminal spree,” *id.* at 61, but rather as two distinct episodes: The period before Nance’s 2006 incarceration, in which he engaged in violent criminal offenses; and then the period beginning in 2013, when Nance was first released from prison. Since 2013, counsel argued, although Nance had continued to commit criminal offenses, they were “not of the same magnitude as his prior conduct,” and, in particular, were not violent: “[T]here is no evidence [that Nance has] been a recidivist in terms of violent crime.” *Id.* at 61.

C.

The district court conducted a lengthy sentencing hearing, beginning by describing the Guidelines recommendation of 21 to 27 months on Count One, and the mandatory, consecutive 60-month sentence on Count Three. The court also recognized at the outset

APPENDIX A

8a

the difficulties Nance suffered in his childhood – in particular, his early exposure to drugs – and Nance’s drug addiction.

The government then argued in support of its motion for an upward departure or variance. Again, the government focused on Nance’s criminal history, contending that the Guidelines criminal history score “simply doesn’t reflect the severity of his actions or the danger that he poses to the community.” J.A. 70. It emphasized Nance’s 79 disciplinary infractions while in custody, and that many of Nance’s offenses were committed while other charges were pending or Nance was on probation – all of which, according to the government, indicated a lack of respect for the law. The instant offenses, the government concluded – the April 2017 gun and drug charges – were a case in point: Just days after Nance was arrested on drug charges on April 25, he was arrested again, and again was discovered with heroin. *Id.* at 71. As a result, the government requested that the court sentence Nance to 262 to 327 months, which it recognized was a “big departure” from the Guidelines range of 81 to 87 months. *Id.*

The court then heard from Nance’s counsel, who likewise focused on Nance’s criminal history. Counsel acknowledged at the outset that “the Court is probably concerned by [Nance’s] criminal record, and I think that’s probably what is driving most of this proceeding.” *Id.* at 73. But again, counsel urged the court to differentiate between Nance’s earlier offenses and his later ones: All of Nance’s violent crimes occurred when Nance was 20 or younger; and after he was incarcerated for those crimes in 2006 and then released in 2013 at the age of 28, he had not “similarly recidivated” in the form of violent offenses. *Id.* at 74. This de-escalation, counsel argued, had two implications: First, as to Nance’s

APPENDIX A

9a

culpability, neurological research “indicates that the frontal lobe, which is responsible for impulse control, is not fully formed until [age] 25.” *Id.* Second, the lack of recent violent offenses showed that Nance was now “capable of controlling himself,” *id.* at 77, and could be rehabilitated. Accordingly, counsel concluded, a sentence in the Guidelines range, which would keep Nance “under the oversight of the criminal justice system” until his “mid 40s,” would be sufficient. *Id.* at 75.

The court then engaged Nance’s counsel in a comprehensive discussion, which spans eight pages of the sentencing transcript and included a recess to acquire additional information. *See id.* at 77–84. To start, the court challenged the core premise of counsel’s argument: that Nance’s violent days were behind him once he was released from prison in 2013. The court pointed to Nance’s two arrests in 2017 on violent charges: one for “breaking and entering to terrorize or injure, domestic criminal trespassing,” dismissed only because he was indicted in the instant case; and one for “assault on a female,” not pursued only “because the witness would not make herself available.” *Id.* at 78–79. Those cases reflected Nance’s continued “assaultive tendencies,” the court determined, and were highly relevant “in the context of an argument that says [Nance has] been able to control himself” since his 2013 release. *Id.* at 78.

The court also focused on Nance’s repeated supervised release violations and violations of prison rules, as reflected by the 79 disciplinary infractions incurred during his first incarceration. Again, counsel argued that Nance had shown an ability to change, and that his most recent incarceration, which separated Nance from his two-year-old son, had made him more “circumspect about his behavior” as he came to appreciate the importance

APPENDIX A

10a

of staying out of prison. *Id.* at 81. The district court addressed that argument directly, taking it seriously enough to call for a brief recess so that information about Nance's current behavior while in custody could be obtained. With that information in hand – which showed that in just the last month, Nance had been disciplined twice for exposing himself and refusing to put on clothes, “failing multiple times to follow directions” – the court concluded that instead of a change in attitude, Nance's behavior reflected “the same old same old.” *Id.* at 84.

After Nance addressed the court, the district court imposed a sentence of 63 months on Count One – substantially above the Guidelines range of 21 to 27 months – followed by the mandatory consecutive 60-month sentence on Count Three, for a total term of 123 months' imprisonment. That sentence, the court noted, though higher than the Guidelines range, also was substantially lower than the government's recommended 262 to 327 months: “I tempered the response. I think 123 months is sufficient.” *Id.* at 89.

Addressing Nance, the court explained:

[Y]ou're a very dangerous person, and you have no respect for authority. I do not believe a sentence in the guideline range takes into consideration fully your background and your history and the extent of your criminal history, the likelihood of recidivism, the dangerousness of you.

Id. at 85–86. Referring to the Guidelines offense-level calculation, the court continued:

So if I go forward from a level five to a six, 24 to 30 doesn't capture it. It's only when I go down to a level 17 that I begin to think that I'm in a range that will accomplish the purposes of sentencing. And if in error on my decision to depart, I reach the same number of 63 months on the first count under 18, United States Code, Section 3553, the need to promote respect for the law, to discourage this type of conduct, to protect the public is so compelling in this case.

APPENDIX A

11a

Id. at 86.

The district court went on to recommend “the most intensive substance abuse treatment program” available because Nance “really need[s] that help.” *Id.* at 87. The court also recommended a comprehensive mental health evaluation: “You had some serious things happen to you through no fault of your own as a child. But through fault of your own you are continuing to act against society, against norms. You need somebody to be helping you with mental health treatment.” *Id.* Finally, the court told Nance that it would recommend him for education and vocational training and urged him to take advantage of potential good-time credit by following directions while in custody.

II.

A.

On appeal, Nance challenges his sentence, arguing that it is procedurally and substantively unreasonable. We review the reasonableness of a sentence under 18 U.S.C. § 3553(a) using an abuse-of-discretion standard, regardless of “whether [the sentence is] inside, just outside, or significantly outside the Guidelines range.” *Gall v. United States*, 552 U.S. 38, 41 (2007). First, we evaluate procedural reasonableness, determining whether the district court committed any procedural error, such as improperly calculating the Guidelines range, failing to consider the § 3553(a) factors, or failing to adequately explain the chosen sentence. *See id.* at 51. If we determine that the district court has not committed procedural error, only then do we proceed to assess the substantive reasonableness of the sentence. *Id.* A review for substantive reasonableness takes into account the “totality of

APPENDIX A

12a

the circumstances” to determine “whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a).” *United States v. Mendoza-Mendoza*, 597 F.3d 212, 216 (4th Cir. 2010). Even if “the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” *Gall*, 552 U.S. at 51.

With these governing principles in mind, we turn to the case at hand.

B.

We begin with Nance’s claim that his above-Guidelines sentence, characterized as an upward variance, is procedurally unreasonable because the district court inadequately articulated its reasons for the sentence.² We cannot agree with this assessment of the district court’s efforts. The district court here conducted a thorough sentencing hearing, engaging defense counsel’s arguments, explaining where it found them wanting, and

² The degree to which the district court intended Nance’s 63-month sentence on Count One as a departure, as well as a variance, is not entirely clear from this record. At sentencing, as noted above, the court referred both to a departure and a variance; but in its written statement of reasons, the court described Nance’s sentence only as a variance. We need not resolve that question to decide this appeal. When, as here, a district court offers alternate and independent justifications for imposing a sentence outside the Guidelines range, we will uphold the sentence if one of those justifications is reasonable, regardless of the validity of the other. *See United States v. Rivera-Santana*, 668 F.3d 95, 104 (4th Cir. 2012); *United States v. Evans*, 526 F.3d 155, 165 (4th Cir. 2008). So even assuming, as Nance argues, that his sentence failed to comply with certain procedural requirements for upward departures, we will affirm it if it is reasonable as an upward variance. And for the reasons given below, we conclude that Nance’s sentence, understood as a variance, is both procedurally and substantively reasonable.

APPENDIX A

13a

recessing so that additional relevant information could be considered. It imposed a sentence individualized to Nance, taking account of the “characteristics of the defendant and the facts of the case.” *United States v. Blue*, 877 F.3d 513, 518 (4th Cir. 2017). We see no failure of procedural reasonableness on this record.

As is well understood, to meet the procedural reasonableness standard, a district court must “conduct an ‘individualized assessment’ of the facts and arguments presented and impose an appropriate sentence,” and it must “explain the sentence chosen.” *Blue*, 877 F.3d at 518 (quoting *Gall*, 552 U.S. at 50). Specifically, a district court’s explanation should “provide some indication [] that the court considered the § 3553(a) factors” and applied them to the particular defendant, *United States v. Montes-Pineda*, 445 F.3d 375, 380 (4th Cir. 2006); *see also Blue*, 877 F.3d at 518, and also that it considered a defendant’s nonfrivolous arguments for a lower sentence, *see Montes-Pineda*, 445 F.3d at 380; *Blue*, 877 F.3d at 518–19.

Importantly, it is also well established that our review of a district court’s sentencing explanation is not limited to the court’s statements at the moment it imposes sentence. “[W]e do not evaluate a court’s sentencing statements in a vacuum.” *Montes-Pineda*, 445 F.3d at 381. Instead, we look at the full context, including the give-and-take of a sentencing hearing. *Id.* Where a sentencing court hears a defendant’s arguments and engages with them at a hearing, we may infer from that discussion that specific attention has been given to those arguments. *See Blue*, 877 F.3d at 521. And where a sentence is tailored to address individual characteristics – here, for instance, the requirement of drug treatment for Nance, who struggles with drug addiction – we may infer consideration of the relevant personal

APPENDIX A

14a

characteristics under § 3553(a). *See id.* (citing *United States v. Johnson*, 445 F.3d 339, 346 (4th Cir. 2006)).

Measured against that standard, the district court’s sentencing explanation was fully sufficient. First, its statement at sentencing made clear that it was applying the § 3553(a) factors – including the need to protect the public – to Nance’s specific characteristics and criminal history: “[Y]ou’re a very dangerous person, and you have no respect for authority. I do not believe a sentence in the guideline range takes into consideration fully your background and your history and the extent of your criminal history, the likelihood of recidivism, the dangerousness of you.” J.A. 85–86. And the court’s written statement of reasons was to the same effect, referring specifically to the § 3553(a) factors and finding Nance’s sentence necessary, among other things, to promote respect for the law, to afford adequate deterrence, and to protect the public from further crimes of the defendant. *See* 18 U.S.C. § 3553(a).

Second, in imposing sentence, the district court took account of personal characteristics that the defense had identified as mitigating. In recommending mental health treatment to address the effects of Nance’s very difficult childhood, for instance, the district court recognized the “serious things” that Nance underwent as a child “through no fault of [his] own,” but also concluded that Nance’s current “act[ing] against society,” by contrast, was “through fault of [his] own.” J.A. 87. Likewise, the district court’s decision to recommend Nance for “the most intensive substance treatment program” makes clear that it considered Nance’s struggles with drug addiction. *Id.*; *see Blue*, 877 F.3d at 521

APPENDIX A

15a

(inferring consideration of mitigating argument from sentence tailored to address personal characteristic).

The most important issue at sentencing, of course, was Nance's long criminal history, *see* J.A. 73 (defense counsel opening by recognizing that Nance's "criminal record" is "what is driving most of this proceeding"), about which the defense advanced one overarching mitigating argument: Although Nance's early and youthful history was marked by violent offenses, his more recent criminal conduct – after his release from prison in 2013, at age 28 – was no longer violent, reflecting a new capacity for self-control and potential for rehabilitation. The district court engaged with that argument directly and repeatedly at the sentencing hearing. Perhaps most important, the transcript makes clear that the court rejected the core premise for the argument, emphasizing Nance's recent 2017 arrests – for breaking and entering with intent to terrorize or injure and domestic criminal trespass, and for assault on a female – and the continued "assaultive tendencies" they indicated, well past Nance's initial term of incarceration. *Id.* at 78. Relatedly, the district court expressly confronted the broader suggestion that the nature of Nance's recent offenses showed a willingness and ability to change. Indeed, the court even called a brief recess to explore that argument further, and it was only after the court was armed with new information about Nance's persistent misconduct during his (then) current pretrial detention that it determined the argument did not hold up to scrutiny.

Faced with this thorough airing of his position at sentencing, Nance contends that the district court nevertheless erred by neglecting to address certain *specific* claims made in support of his general argument that his violent offenses are in his past and that he has

APPENDIX A

16a

since changed. We disagree. To start, several of the specific claims Nance identifies in fact were expressly addressed and rejected by the district court, as we describe above. *See id.* at 77–78 (rejecting argument that Nance has not exhibited violent behavior since his 2013 release from incarceration); *id.* at 82–84 (rejecting argument that time apart from his two-year-old son inspired a change in Nance’s behavior). But more important, the district court, having fully addressed Nance’s central thesis – that his purportedly de-escalating criminal history made a Guidelines sentence appropriate – was not also required to address separately each supporting data point marshalled on its behalf.

Nance argues, for instance, that the district court offered no response when, to show the non-violent nature of his more recent offenses, he pointed to the fact that the instant § 924(c) offense – carrying a firearm in furtherance of a drug-trafficking offense – did not involve actual use of the gun. But there is nothing intrinsically mitigating about carrying a firearm in connection with a drug-trafficking offense, whether or not the gun is fired; this point is relevant only insofar as it supports Nance’s broader argument that his more recent conduct is non-violent. Indeed, that is exactly the way counsel presented it, after the court raised its concern about the “assaultive tendencies” demonstrated by Nance’s 2017 arrests:

I understand the Court’s concern. I would point out that there is not a lot of evidence that he’s engaged in any type of violent burglary or using guns. *I understand he’s got a gun charge in this case, but there is no evidence he used it.* And all I’m saying to the Court is that I believe that there is some evidence of maturity, that there is some evidence of ability to change.

Id. at 78–79 (emphasis added). The precise nature of the offense conduct in this case, in other words, was offered in support of Nance’s principal argument for a Guidelines sentence: that the evolution of Nance’s criminal history indicates that he is unlikely to

APPENDIX A

17a

commit future violent offenses. And *that* argument, as we have explained, was thoroughly considered by the district court.

This is not to suggest, of course, that in evaluating a district court's sentencing explanation, we may guess at which arguments the court might have considered or assume that the court "has silently adopted arguments presented by a party." *United States v. Carter*, 564 F.3d 325, 329 (4th Cir. 2009). We may not. But where, as here, the record makes clear that the district court has meaningfully considered a defendant's nonfrivolous mitigating arguments, fulfilling its obligation to "provide a rationale tailored to the particular case at hand and adequate to permit meaningful appellate review," *id.* at 330 (internal quotation marks omitted), we will not require more. *Cf. Mendoza-Mendoza*, 597 F.3d at 218 ("It would be wholly contrary to the Supreme Court's conferral of discretion on trial courts if we were to play a game of 'Gotcha!' with respect to the sentencing transcripts we review.").

In sum, the transcript of the sentencing proceeding indicates that in fashioning Nance's sentence, the court took into account Nance's extensive criminal history, including those offenses committed as an adult and after his 2013 release; his pattern of reoffending upon release; his disciplinary infractions in custody and inability to comply with the terms of his release; and the fact that the offenses of conviction occurred over the course of days, in which he was arrested once, released, and then arrested again just days later. Given the extent of the district court's engagement with Nance's counsel on these issues at sentencing, we need not "guess at the district court's rationale," *Carter*, 564 F.3d at 329; the court's rationale is patently clear. Because the record allows us to determine that the

APPENDIX A

18a

court “considered the parties’ arguments and ha[d] a reasoned basis for exercising [its] own legal decisionmaking authority,” *Rita v. United States*, 551 U.S. 338, 356 (2007), we conclude that Nance’s sentence is procedurally reasonable.

C.

We turn next to Nance’s argument that his sentence is substantively unreasonable. As described above, Nance’s original Guidelines range called for a sentence of 21 to 27 months’ imprisonment on his Count One conviction of possession with intent to distribute cocaine, cocaine base, and heroin, followed by a mandatory 60-month consecutive sentence on his Count Three firearm conviction under § 924(c), for a total of 81 to 87 months. Instead, the district court varied upward as to Count One, from 21 to 27 months to 63 months, for a total of 123 months’ imprisonment. According to Nance, that sentence is substantively too high, especially – again – given that his prior violent offenses date back to his youth, while his conduct since his 2013 release from prison purportedly has not been similarly violent.

To assess this argument, we “examine[] the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a).” *Mendoza-Mendoza*, 597 F.3d at 216. Where, as here, the sentence is outside the advisory Guidelines range, we must “consider whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range.” *United States v. Howard*, 773 F.3d 519, 529 (4th Cir. 2014) (internal quotation marks omitted). That said, “district courts have extremely broad discretion when determining the

APPENDIX A

19a

weight to be given each of the § 3553(a) factors,” *United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011), and the fact that a “variance sentence deviates,” even “significantly,” from the Guidelines range “does not alone render it presumptively unreasonable,” *United States v. Rivera-Santana*, 668 F.3d 95, 106 (4th Cir. 2012). Instead, we must “give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” *Gall*, 552 U.S. at 51.

Here, the record reflects that the district court conducted a thorough, individualized assessment of Nance and his offense conduct in light of the § 3553(a) factors, and we cannot conclude that the court’s exercise of discretion in formulating Nance’s sentence is unreasonable. For instance, and as discussed above, the district court carefully considered Nance’s “history and characteristics,” 18 U.S.C. § 3553(a)(1), specifically recognizing Nance’s difficult childhood and substance abuse issues at sentencing. And in considering what sentence would promote respect for the law, afford adequate deterrence, and protect the public, *see id.* § 3553(a)(2)(A), (B), (C), the district court heard and addressed Nance’s argument that most of his prior convictions – and all for violent conduct – occurred before he turned 25 years old, that he had not recidivated with similarly violent offenses, and that his conduct since his 2013 release from prison illustrated a willingness to change and a lack of future dangerousness.

Relying heavily on our decision in *United States v. Howard*, 773 F.3d 519 (4th Cir. 2014), Nance maintains that the district court abused its discretion by placing too much emphasis on his juvenile offenses. In *Howard*, we held that a district court abused its discretion by imposing a life sentence – an extreme departure from the 121-month high

APPENDIX A

20a

end of the Guidelines range – based almost exclusively on a “stale criminal history” of offenses, mostly non-violent, committed while the defendant was a teenager. *Id.* at 535. By focusing excessively on crimes committed when the defendant was between 16 and 18 years of age, we reasoned, the district court had “failed to appreciate” both the diminished culpability of juvenile offenders and the prospect that the “impetuosity and recklessness” of youth may subside as individuals mature. *Id.* at 532 (internal quotation marks omitted).

We think this case is different. First and most important, Nance’s juvenile offenses were not the sole, or even primary, basis for the district court’s decision to vary upward here. To the contrary: As we have described in detail, most of the sentencing hearing was given over to a discussion of Nance’s conduct *as an adult*, and whether it bore out defense counsel’s central argument that Nance had left his youthful aggression behind and demonstrated a capacity for maturity and change. The district court resolved that question against Nance, but only after considering such factors as Nance’s “consistent pattern of recidivism” after his first release from prison, when he was an adult, *see Howard*, 773 F.3d at 530 (distinguishing case in which former juvenile offender “displayed a consistent pattern of recidivism immediately upon release from prison”); the “assaultive tendencies” illustrated by Nance’s 2017 arrests, when Nance was in his thirties, J.A. 78; and Nance’s continued and then-current refusal to abide by prison regulations as an adult. Weighing these considerations against Nance’s juvenile status when he committed his earlier offenses, of course, is a matter of district court discretion: “While the consideration of one § 3553(a) factor to the exclusion of the others is not appropriate, it is not required that the

APPENDIX A

21a

district court somehow give all the different factors precisely equal weight. Sometimes one factor will outweigh the others. Sometimes one factor will stand out.” *United States v. Fowler*, 948 F.3d 663, 672 (4th Cir. 2020) (citations omitted).

There are other significant distinctions, as well. It was important to our decision in *Howard* that the life sentence imposed by the district court was far longer than the sentence requested by the government. *Howard*, 773 F.3d at 533–35. Here, we have the reverse situation: The sentence imposed by the district court is, to be sure, longer than the Guidelines range, but it also is far *shorter* than the 262 to 327 months recommended by the government. And finally, while we fully appreciate both the total length of the 123-month sentence in this case and the degree of the district court’s deviation from the Guidelines on Count One, Nance’s sentence remains substantially more modest than the life sentence we considered in *Howard*. We routinely uphold as substantively reasonable larger deviations producing longer sentences than this one. *See, e.g., United States v. Myers*, 589 F.3d 117, 120–23, 125–27 (4th Cir. 2009) (affirming an upward departure from 121 months to 360 months based on three stale convictions); *United States v. Lawrence*, 349 F.3d 724, 727 (4th Cir. 2003) (affirming upward departure from 96 to 262 months based in part on a defendant’s “extensive juvenile record”). Of course, every case is different and every sentence must be justified on its own facts. But the sentence here is not so obviously outside the norm that it necessarily raises concerns about whether the district court has “failed in its effort to comply with the aims of sentencing prescribed by § 3553(a)(2).” *Howard*, 773 F.3d at 535.

APPENDIX A

22a

Whether or not we would impose the same sentence as the district court is not the question before us. *See Gall*, 552 U.S. at 51 (“The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”). Mindful of our deferential standard of review and considering the totality of the circumstances, we conclude that the district court did not abuse its discretion in finding that Nance’s significant criminal history and potential to recidivate warranted a significant upward variance.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX A

23a

GREGORY, Chief Judge, concurring:

As the majority opinion notes, enhancing Nance's sentence was initially raised in Nance's Presentence Investigation Report, in the context of a departure. The district court referred to the enhancement to Nance's sentence as both a variance and a departure; but as the majority explains, under this Court's precedent, we can affirm the sentence if either ground is proper. I concur in affirming Nance's sentence as a variance because the district court considered his conduct in prison and after release in weighing the § 3553 sentencing factors. I write, however, to emphasize the significance of Nance's argument regarding delayed brain development in the context of a departure based on an extensive youthful criminal history.

At sentencing, Nance's counsel argued that Nance's convictions should not be the driving factor for his sentence because the frontal lobe is not fully developed until the age of twenty-five, and that Nance's most recent violent criminal convictions occurred when he was twenty. Indeed, the frontal lobe is one of the last areas of the brain to develop, well into the twenties. Sarah B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, Journal of Adolescent Health, 45 J. Adolescent Health 216 (2009). This part of the brain is responsible for important functions such as "planning, organizing information, and thinking about possible consequences of action." Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 812 (2005).

APPENDIX A

24a

There are limited grounds that permit a district court to depart from the specified guidelines range, one being a defendant's criminal history. U.S.S.G. § 4A1.3(a) (allowing for a departure if the defendant's calculated criminal history category underrepresents the seriousness of the defendant's criminal history or there is a likelihood the defendant will commit other crimes). For an upward departure to be procedurally proper—where the primary reason for the enhancement is the defendant's youthful criminal history—the record must demonstrate the district court considered the mitigating argument of diminished culpability due to an undeveloped frontal lobe in determining whether the calculated criminal history does “underrepresent” the seriousness of the defendant's criminal history.

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA

v.

LARRY LAMAR NANCE

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:17-CR-404-1FL

USM Number: 64406-056

Halerie F. Mahan

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) Counts 1 and 3

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

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. §§841(a)(1) & 841(b)(1)(C)	Possession With Intent to Distribute a Quantity of Cocaine, Cocaine Base (Crack), and Heroin	4/28/2017	1

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☒ Count(s) 2 and 4 ☐ is ☒ are dismissed on the motion of the United States.

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

8/9/2018

Date of Imposition of Judgment


Signature of Judge

Louise W. Flanagan, U.S. District Judge

Name and Title of Judge

8/9/2018

Date

DEFENDANT: LARRY LAMAR NANCE
CASE NUMBER: 5:17-CR-404-1FL

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§924(c)(1)(A), 924(c)(1)(A)(i) & 924(c)(1) (D)(ii)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	4/28/2017	3

DEFENDANT: LARRY LAMAR NANCE

CASE NUMBER: 5:17-CR-404-1FL

IMPRISONMENT

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

63 months on Count 1 and a term of 60 months on Count 3, to be served consecutively, producing a total term of 123 months

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

The court recommends that the defendant receive intensive substance abuse treatment, vocational training, and educational opportunities, including GED. The court recommends defendant receive a mental health assessment and mental health treatment while incarcerated. The court recommends that he serve his term in FCI, Bennettsville, SC.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LARRY LAMAR NANCE

CASE NUMBER: 5:17-CR-404-1FL

SUPERVISED RELEASE

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

3 years on Count 1 and a term of 5 years on Count 3, such terms to run concurrently

MANDATORY CONDITIONS

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

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

DEFENDANT: LARRY LAMAR NANCE

CASE NUMBER: 5:17-CR-404-1FL

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: LARRY LAMAR NANCE

CASE NUMBER: 5:17-CR-404-1FL

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

DEFENDANT: LARRY LAMAR NANCE

CASE NUMBER: 5:17-CR-404-1FL

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall consent to a warrantless search by a United States probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

The defendant shall submit a written weekly report to the probation office, if not regularly employed, of attempts to secure employment.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

The defendant shall participate in a vocational training program as directed by the probation officer.

The defendant shall support his dependent(s).

DEFENDANT: LARRY LAMAR NANCE
CASE NUMBER: 5:17-CR-404-1FL

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$ 0.00	\$ 0.00	\$ 0.00

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

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

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

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	---------------------	----------------------------	-------------------------------

TOTALS	\$ _____	0.00	\$ _____	0.00
---------------	----------	------	----------	------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

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

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

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

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LARRY LAMAR NANCE
CASE NUMBER: 5:17-CR-404-1FL

SCHEDULE OF PAYMENTS

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

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of \$200.00 is due in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

34a

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NORTH CAROLINA
3 WESTERN DIVISION

4 UNITED STATES OF AMERICA, - Docket No. 5:17-CR-404-FL-1
5 Plaintiff, - New Bern, North Carolina
6 v. - August 9, 2018
7 LARRY LAMAR NANCE, - Sentencing
8 Defendant. -

9
10 TRANSCRIPT OF SENTENCING HEARING
11 BEFORE THE HONORABLE LOUISE WOOD FLANAGAN
12 UNITED STATES DISTRICT JUDGE.

13 APPEARANCES:

14 For the Plaintiffs: United States Attorneys' Office
15 By: Melissa Kessler
16 310 New Bern Avenue, Suite 800
17 Raleigh, NC 27601
18 (919) 856-4500

19 For the Defendant: Federal Public Defender
20 By: Halerie F. Mahan
21 150 Fayetteville St., Suite 450
22 Raleigh, NC 27611-5967
23 (919) 856-4236

24 Court Reporter: Tracy L. McGurk, RMR, CRR
25 413 Middle St.
New Bern, NC 28560
(419) 392-6626

Proceedings recorded by mechanical stenography,
transcript produced by notereading.

~~35a~~

1 (Commenced at 10:39 a.m.)

2 THE COURT: We'll take up the last case of
00:00:03 3 the morning, Larry Lamar Nance.

00:00:55 4 Are you Larry Lamar Nance?

00:00:59 5 THE DEFENDANT: Yes, ma'am.

00:00:59 6 THE COURT: Good morning.

00:01:00 7 THE DEFENDANT: Good morning.

00:01:01 8 THE COURT: My name is Judge Flanagan. This
00:01:02 9 is the time I've set aside to sentence you for

00:01:04 10 possession with the intent to distribute a quantity of
00:01:07 11 cocaine, cocaine base, and heroin, and possession of a
00:01:11 12 firearm in furtherance of a drug trafficking crime.

00:01:13 13 Have you read the presentence report?

00:01:17 14 THE DEFENDANT: Yes, ma'am.

00:01:18 15 THE COURT: Have you had enough time to talk
00:01:19 16 with Ms. Mahan to be ready for sentencing today?

00:01:22 17 THE DEFENDANT: Yes, ma'am.

00:01:22 18 THE COURT: Very good. The offense conduct
00:01:24 19 concerning events in and around Fayetteville, North
00:01:27 20 Carolina is set forth in some detail in the presentence
00:01:30 21 report, and I've reviewed that, as well as your criminal
00:01:33 22 history which began unfortunately at the age of 16 and
00:01:36 23 carried through your teenage years into your 20s and
00:01:39 24 into your 30s.

00:01:40 25 You find yourself scored with 11 points in

~~36a~~

00:01:43 1 Category V.

00:01:45 2 There are a lot of other arrests on your
00:01:47 3 background described on page 9 which paints you in very
00:01:53 4 constant contact with the criminal justice system, but
00:01:56 5 these don't influence the scoring.

00:01:58 6 Your family background is given to the
00:02:00 7 court. You've clearly had difficulties in your
00:02:02 8 upbringing with the exposure to drugs that you suffered.
00:02:08 9 You are a drug addict as described in paragraph 42.

00:02:12 10 You have some education. You dropped out of
00:02:15 11 school at the age of 16. You took GED classes but did
00:02:20 12 not obtain a GED.

00:02:22 13 Your employment history is somewhat limited;
00:02:26 14 that's described on page 12.

00:02:29 15 The probation office believes the total
00:02:31 16 offense level is a ten. And what that means is on Count
00:02:39 17 1 you face 21 to 27 months, that's advice; I'm not bound
00:02:43 18 by it. However, the sentence is driven by Count 3, and
00:02:48 19 that's a consecutive five-year sentence.

00:02:52 20 Your behavior can be supervised for up to
00:02:54 21 five years on Count 3 and three years on Count 1.

00:02:57 22 The fine could be as much as \$1 million on
00:02:59 23 Count 1 and a quarter of \$1 million on Count 3. The
00:03:02 24 guidelines, however, suggest a range that starts at
00:03:06 25 \$5,500.

37a

00:03:07 1 There are two felony offenses at issue, so
00:03:10 2 that's a total of a \$200 special assessment.

00:03:13 3 I'd like to hear the Government on the
00:03:14 4 Government's objections.

00:03:20 5 MS. KESSLER: Your Honor, the Government has
00:03:23 6 filed a motion in this case with respect -- a motion for
00:03:28 7 upward departure and upward variance. I won't rehash
00:03:32 8 the specifics of that motion unless the Court has
00:03:37 9 specific questions.

00:03:39 10 The objections are along those lines.
00:03:41 11 Simply to reiterate, while the Government recognizes
00:03:44 12 that U.S. v. McCollum is binding Fourth Circuit
00:03:49 13 precedent, we do believe it was wrongly decided, and I
00:03:52 14 think that's exemplified in this case wherein the
00:03:56 15 defendant has a conviction for conspiracy to commit
00:03:58 16 armed robbery, and that is no longer to be considered a
00:04:02 17 crime of violence under the law.

00:04:03 18 THE COURT: Let's hear you on your motion
00:04:06 19 for upward departure or variance.

00:04:08 20 MS. KESSLER: Certainly, Your Honor. The
00:04:09 21 Government filed a motion seeking an upward departure in
00:04:13 22 this case on two grounds. First on 4A1.3, which simply
00:04:18 23 states that the defendant's criminal history score is
00:04:24 24 not accurately reflected in his criminal history. Your
00:04:27 25 Honor has pointed out a good number of those issues.

~~38a~~

00:04:29 1 There is recurring and problematic criminal conduct.
00:04:34 2 Many of these criminal acts were committed while other
00:04:36 3 charges were pending. For example, many of these
00:04:41 4 instances were committed while on probation, while Mr.
00:04:47 5 Nance was in custody. I'll point you to paragraph 19 of
00:04:54 6 the PSR that indicates that while Mr. Nance was in
00:04:57 7 custody for a burglary that involved a kidnapping, he
00:05:00 8 received 79 infractions during his time in custody. So
00:05:04 9 this is clearly an individual that is not demonstrating
00:05:07 10 respect for the law. And that the criminal history
00:05:09 11 score that he has received by the guidelines simply
00:05:12 12 doesn't reflect the severity of his actions or the
00:05:15 13 danger that he poses to the community.

00:05:17 14 The second grounds for departure is 4B1.2
00:05:22 15 that just references specifically, again, paragraph 19
00:05:25 16 and that burglary that occurred. The United States
00:05:29 17 filed with its motion a copy of the indictment in that
00:05:32 18 case that indicates that the grand jury found by
00:05:36 19 probable cause that a kidnapping occurred in that case,
00:05:39 20 which certainly is a violent crime, and that that should
00:05:41 21 be considered with respect to the Court's consideration
00:05:46 22 of an upward departure in this case. That is
00:05:51 23 obviously -- it's enumerated violent offense. With
00:05:56 24 respect to the upward variance, the argument lies along
00:06:00 25 the same lines. This is an individual with a

~~39a~~

00:06:02 1 substantial criminal history who has a history of drug
00:06:06 2 trafficking and drug offenses.

00:06:09 3 With respect to this instant offense, of
00:06:12 4 course, the Court is aware from reviewing the offense
00:06:14 5 conduct, but it was across two separate days, two
00:06:17 6 instances in which the defendant was found with a large
00:06:20 7 amount of heroin after being arrested on the first
00:06:23 8 incident on April 25, he again just a few days later on
00:06:30 9 April 28 was found with heroin again. And this is a
00:06:33 10 problematic situation. The guidelines just in this case
00:06:35 11 are not structured to reflect the danger that this
00:06:38 12 individual poses to the community.

00:06:40 13 THE COURT: Do you want to be heard on the
00:06:43 14 extent of the departure?

00:06:45 15 MS. KESSLER: Your Honor, the United States
00:06:49 16 filed a motion seeking 262 to 327 months because we feel
00:06:54 17 that that would reflect what Mr. Nance's guideline range
00:07:00 18 would have been would he be found to be a career
00:07:02 19 offender. However, that is in part our effort to convey
00:07:06 20 to the Court and place on the record how important the
00:07:12 21 United States feels it is a departure occurs in this
00:07:15 22 case. However, I do understand if the Court decides not
00:07:19 23 depart to that level. I understand that is a big
00:07:21 24 departure.

00:07:22 25 THE COURT: That's a big departure.

40a

00:07:24 1 MS. KESSLER: It is, Your Honor. However,
00:07:26 2 had it not been for the Fourth Circuit's decision in
00:07:30 3 McCollum, that would be the guideline range that the
00:07:33 4 Court would be looking at.

00:07:33 5 THE COURT: That's kind of triple.

00:07:36 6 MS. KESSLER: I agree, Your Honor. It is a
00:07:38 7 large request.

00:07:39 8 THE COURT: Well, he's clearly a very
00:07:41 9 dangerous person. Let me turn to the defendant.

00:07:45 10 MS. MAHAN: Thank you, Your Honor.

00:07:45 11 THE COURT: Thank you for your thoughtful
00:07:47 12 sentencing memorandum, counsel.

00:07:50 13 MS. MAHAN: Thank you, Your Honor.

00:07:52 14 I'm going to go in reverse, actually, Your
00:07:54 15 Honor. The Government just noted that over the course
00:07:57 16 of two days Mr. Nance possessed a large amount of
00:08:00 17 heroin. And I would just like to point out to the
00:08:03 18 Court that the total amount of heroin that he possessed
00:08:05 19 in this case is actually less than one gram, which I do
00:08:08 20 not think is a large amount of heroin, particularly
00:08:15 21 given what the Court has probably seen in other cases.
00:08:18 22 That's not to say that his conduct doesn't deserve
00:08:22 23 punishment, just that I don't think that the drug
00:08:25 24 quantities in this case reflect a large-scale drug
00:08:27 25 dealer.

~~41a~~

00:08:28 1 I understand that the Court is probably
00:08:29 2 concerned by his criminal record, and I think that's
00:08:31 3 probably what is driving most of this proceeding.

00:08:34 4 The Court did mention that there are a lot
00:08:36 5 of other arrests on page 9, I believe, of the
00:08:41 6 presentence report. I would note that under 4A1.3 a
00:08:45 7 prior arrest record alone is not to be considered for
00:08:50 8 purposes of an upward departure.

00:08:52 9 And in terms of the burglary in paragraph
00:08:56 10 19, the kidnapping charge was dismissed. And so I don't
00:09:00 11 believe that the Court should rely purely on an
00:09:03 12 indictment in order to determine that a crime was --
00:09:09 13 involved physical violence as would be necessary to
00:09:12 14 upwardly depart under that application note. That's
00:09:15 15 just to respond to the Government's argument.

00:09:17 16 I do believe, Your Honor, that a guideline
00:09:19 17 sentence would be appropriate. We did file a sentencing
00:09:22 18 memorandum on that issue. And I think that's partly
00:09:28 19 because his criminal history benefits from close
00:09:31 20 scrutiny. At first glance it appears that he is an
00:09:36 21 extraordinarily violent person. And while he did commit
00:09:38 22 the crimes listed in the presentence report,
00:09:40 23 particularly paragraphs 19, 20, and 21, which are the
00:09:44 24 basis for the Government's argument that he should be
00:09:46 25 sentenced as career offender, I don't think these prior

~~42a~~

00:09:49 1 convictions should become the focus of the sentencing
00:09:52 2 hearing to the exclusion of all else.

00:09:54 3 This is true for three reasons.

00:09:56 4 First, the most recent violent crime
00:09:58 5 occurred when he was 20. He is now 33. Neurological
00:10:02 6 research, as I'm sure the Court is aware, indicates that
00:10:04 7 the frontal lobe, which is responsible for impulse
00:10:07 8 control, is not fully formed until 25.

00:10:10 9 Which leads to the second point. After
00:10:12 10 being punished for those crimes in those paragraphs, he
00:10:15 11 has never similarly recidivated. If you look at
00:10:20 12 paragraphs 19, 20, and 21, he was released in -- it's a
00:10:25 13 confusing presentation, but the long and short of it is
00:10:27 14 he went into custody in 2006 for a revocation for his
00:10:34 15 first two -- three convictions, and he never got out
00:10:36 16 until 2013. It was all one period of incarceration.
00:10:40 17 And that was the one period of incarceration that he
00:10:44 18 sustained. And I think it's important that he has not
00:10:48 19 similarly recidivated.

00:10:51 20 As the Court noted, there are what would be
00:10:54 21 termed violent types of crimes listed in paragraphs 31
00:10:57 22 and 32 -- 32 and 33 of the presentence report, but I
00:11:00 23 think it's important to note that given his record, had
00:11:03 24 there been sufficient evidence to prove that he
00:11:05 25 committed those crimes, they would have secured a

~~43a~~

00:11:09 1 conviction.

00:11:10 2 I think it's important to note that he has
00:11:12 3 not gone on to commit violent crimes, that this offense
00:11:15 4 was not violent, because it shows that he can be
00:11:17 5 rehabilitated.

00:11:18 6 The third reason I think a sentence in the
00:11:20 7 guideline range is appropriate is that it will put him
00:11:24 8 under the oversight of the criminal justice system for
00:11:27 9 over ten years, I think 12, if my math is correct, which
00:11:31 10 will be when he is in his mid 40s. That cannot be
00:11:34 11 emphasized enough. A guideline sentence will insure
00:11:37 12 that he's monitored and punished until he's in his mid
00:11:41 13 40s.

00:11:41 14 The Government's request of 262 months, as
00:11:44 15 the Court noted, is more than three times the guideline
00:11:47 16 recommendation. And that is far greater than necessary
00:11:50 17 to achieve the sentencing purposes in this case, which
00:11:53 18 importantly involved a fairly small amount of drugs and
00:11:56 19 no violence.

00:11:59 20 Though Mr. Nance did sort of try to run away
00:12:01 21 from the police when they arrested him on April 28, he
00:12:04 22 did not reach for the gun; he did not use the gun. The
00:12:07 23 gun was never touched. The gun was simply sitting next
00:12:10 24 to him on the seat in the car. And I think that's an
00:12:15 25 important thing to note because that's what he's being

~~44a~~

00:12:17 1 sentenced for here today.

00:12:21 2 His criminal record is certainly
00:12:24 3 regrettable, but I think that it comes as a result of
00:12:28 4 his childhood and his background, Your Honor. It's not
00:12:34 5 surprising, given that he was raised in a series of
00:12:37 6 tumultuous homes with little proper guidance surrounded
00:12:40 7 by drugs and violence. The streets of Newark, New
00:12:43 8 Jersey are no place to raise a child.

00:12:46 9 And perhaps I'm particularly sympathetic to
00:12:48 10 that because I actually taught middle school in center
00:12:51 11 city Newark prior to becoming a lawyer, and I'm
00:12:53 12 intimately familiar with the city and its effects on
00:12:57 13 children. And I remember my students, who were 12
00:12:59 14 years old, telling me how drug dealers would ask them
00:13:03 15 for favors: Go pick me up a bag of chips, and I'll give
00:13:08 16 you some money. Then the favors for a bag of chips
00:13:10 17 turned into drugs. And that's how these children became
00:13:13 18 drug dealers starting at the age of 12. And they took
00:13:15 19 the money because they needed it.

00:13:16 20 And in Larry I see some of my prior
00:13:19 21 students. It's unsurprising that he engaged in drug
00:13:22 22 dealing and theft from a young age because that's what
00:13:25 23 he grew up around.

00:13:26 24 I do think it is notable that after he was
00:13:28 25 released, he doesn't have any more violent convictions.

~~45a~~

00:13:31 1 There are charges that may look violent, but they are of
00:13:33 2 a completely different kind than he engaged in when he
00:13:37 3 was a teenager up to the age of 20. And that shows that
00:13:40 4 he's capable of controlling himself.

00:13:42 5 THE COURT: Well, paragraph 33: On February
00:13:43 6 2, 2017, he was charged with breaking and entering to
00:13:47 7 terrorize or injure, domestic criminal trespassing, and
00:13:51 8 habitual felon in Cumberland County. It's alleged that
00:13:54 9 on January 26, 2017, he broke into a building in
00:13:57 10 Fayetteville with the intent to terrorize and injure the
00:14:00 11 occupant, Adrinna Douglas. He entered the premises
00:14:05 12 after being forbidden to do so and remained after
00:14:09 13 ordered to leave. This individual was someone he had
00:14:11 14 previously lived with as if married. Court records
00:14:15 15 indicate this case was dismissed on December 15, 2017,
00:14:18 16 simply because he was indicted in this case.

00:14:26 17 MS. MAHAN: Well, Your Honor, I would note
00:14:27 18 two things about that. One, there's no evidence;
00:14:29 19 there's nothing that indicates there was any weapon
00:14:31 20 involved, which I think is important to distinguish it
00:14:34 21 from his prior conduct, the convictions.

00:14:36 22 Secondly, Adrinna Douglas is his son's
00:14:39 23 mother. That incident stems from a time when he went to
00:14:42 24 his son's mother's house to try to see his son. They
00:14:45 25 got into a disagreement because she did not want him to

~~46a~~

00:14:48 1 see L.

00:14:51 2 He told her -- sorry, she told him to leave.
00:14:54 3 He did not leave at first. And then eventually she told
00:14:59 4 him to leave, and he left. And that's what that
00:15:01 5 incident stems from.

00:15:02 6 And I understand that -- I mean, I
00:15:07 7 understand the charges are written as they are written,
00:15:10 8 and that's why I direct the Court to consider the fact
00:15:13 9 that there's no allegation that any weapon was possessed
00:15:16 10 or any actual physical violence.

00:15:18 11 THE COURT: His assaultive tendencies are
00:15:22 12 also documented in paragraph 34 to the extent that the
00:15:25 13 assault on a female charge was not pursued because the
00:15:31 14 witness would not make herself available. I wonder if
00:15:34 15 that's the same woman.

00:15:37 16 MS. MAHAN: Your Honor, I don't know who
00:15:38 17 that woman is. But I would note that it is simply a
00:15:42 18 charge, and the Guidelines direct that that charge not
00:15:45 19 be considered in determining an upward departure based
00:15:49 20 on inadequacy of the criminal history category.

00:15:51 21 THE COURT: Well, I think it needs to be
00:15:53 22 talked about in the context of an argument that says
00:15:56 23 he's been able to control himself.

00:16:00 24 MS. MAHAN: I understand the Court's
00:16:02 25 concern. I would point out that there is not a lot of

47a

00:16:06 1 evidence that he's engaged in any type of violent
00:16:09 2 burglary or using guns. I understand he's got a gun
00:16:13 3 charge in this case, but there is no evidence he used
00:16:16 4 it. And all I'm saying to the Court is that I believe
00:16:19 5 that there is some evidence of maturity, that there is
00:16:22 6 some evidence of ability to change. He has continued to
00:16:25 7 sell drugs, and is that is a problem. And the Court
00:16:28 8 today is going to punish him for that. And he's getting
00:16:31 9 a mandatory minimum of 60 months because he had a
00:16:34 10 firearm. I'm not suggesting that this case isn't
00:16:37 11 serious and doesn't deserve a lengthy sentence.

00:16:40 12 I'm simply saying that a seven-year
00:16:43 13 sentence -- really, the top of the guidelines would be
00:16:45 14 seven years and three months, followed by the mandatory
00:16:50 15 five years of supervised release is 12 years. That is a
00:16:53 16 long time. He is 33 years old. He will be 45 when
00:16:58 17 that's over. It's a long time. And I think it's
00:17:02 18 sufficient but not greater than necessary.

00:17:03 19 And the one thing I would note is that I
00:17:05 20 think what Mr. Nance really needs is some sort of
00:17:08 21 structure and support system. He's really never had
00:17:10 22 that. Prior to this offense he'd been in an apartment
00:17:13 23 for one month. And prior to that he was homeless. He
00:17:16 24 spent the vast majority of his 20s in prison. He had no
00:17:20 25 real structure as a child. He needs real drug

~~48a~~

00:17:25 1 treatment; he needs to get his GED. He needs someone
00:17:28 2 who can direct him where to go to get a job and put him
00:17:30 3 in touch with a temp agency that can help him get
00:17:34 4 employment and keep employment.

00:17:35 5 And I think, frankly, that a United States
00:17:38 6 probation officer is going to provide that kind of
00:17:40 7 structure in a much more meaningful way than the state
00:17:45 8 post-release supervision probably did. And I think,
00:17:48 9 Your Honor, that that is what is going to be the most
00:17:51 10 beneficial to Mr. Nance. And, of course, he needs to
00:17:54 11 take advantage of that. And it remains to be seen
00:17:57 12 whether that is something that he will do.

00:17:59 13 But I urge the Court to consider that the
00:18:04 14 crime he's before the Court on is possessing with the
00:18:07 15 intent to distribute a quantity of drugs and possessing
00:18:12 16 but not using a firearm in connection with that drug
00:18:15 17 trafficking crime. And I ask the Court to consider that
00:18:19 18 he did accept responsibility for his crimes here and
00:18:22 19 that what he needs is guidance. What the public needs
00:18:28 20 is punishment, protection, and deterrence. And I think
00:18:31 21 all those purposes are served with a sentence that would
00:18:34 22 put Mr. Nance under the oversight of the federal
00:18:38 23 criminal justice system for over ten years, which is a
00:18:41 24 guideline sentence.

00:18:41 25 THE COURT: This is someone who, while

~~49a~~

00:18:43 1 incarcerated from probably somewhere between 2004 and
00:18:52 2 2008 up to and until finally 2014 as described in
00:18:57 3 paragraph 19, who sustained 79 infractions. And this is
00:19:04 4 someone who's going to listen to his probation officer?
00:19:07 5 This is someone who can't comply with terms of
00:19:11 6 supervision time and time again and who can't follow the
00:19:15 7 rules when incarcerated. What's different now?

00:19:20 8 MS. MAHAN: In response to that I would say
00:19:22 9 that, Your Honor, previously -- and Mr. Nance and I
00:19:25 10 talked about this at length, and I don't want to steal
00:19:27 11 his thunder because I think he's going to talk about it,
00:19:30 12 but he has a son. His son is two. And he never
00:19:34 13 previously had children up until he -- his former
00:19:41 14 girlfriend gave birth to his son. And I think though it
00:19:45 15 did not change his behavior, and I'm not suggesting it
00:19:47 16 did; I think this time away from him has made Mr. Nance
00:19:50 17 realize that there is something to live for other than
00:19:55 18 what he has previously had, which is not a lot. And I
00:19:58 19 recognize the Court may decline to put a lot of weight
00:20:02 20 on that. But I do think that having a child can make a
00:20:05 21 difference in people's lives, and I do think that Mr.
00:20:08 22 Nance is going to be more circumspect about his behavior
00:20:13 23 because he recognizes that he's going to be away from
00:20:16 24 his son for quite some time already, and any future
00:20:19 25 violations of supervised release are going to take him

~~50a~~

00:20:22 1 away from his son for even longer.

00:20:25 2 THE COURT: Right now the son is the source
00:20:26 3 of great tension, as discussed in paragraph 33. And
00:20:32 4 your explanation of why he was charged with breaking and
00:20:36 5 entering to terrorize or injure, domestic criminal
00:20:40 6 trespassing and habitual felon, you're saying that that
00:20:43 7 was his effort to see his son?

00:20:46 8 MS. MAHAN: Yes. I'm not sure I follow the
00:20:49 9 Court's --

00:20:50 10 THE COURT: Well, his son inspired him to
00:20:54 11 commit a criminal act, according to your presentation.

00:20:58 12 MS. MAHAN: And that's sort of what I was
00:21:00 13 trying to say, that I don't think that having his son --
00:21:02 14 it obviously was not a transformative event because here
00:21:06 15 we are. But I do think that in the future -- at that
00:21:10 16 point he was not incarcerated. He has now been
00:21:12 17 incarcerated and been away from his son, and I do think
00:21:16 18 that that has given him pause to consider his behavior
00:21:19 19 in the future. And I think it may give him pause when
00:21:24 20 he's on release to know that if he violates the term of
00:21:26 21 supervised release, he's going to be away from his son
00:21:29 22 even longer. And, of course, that term of supervised
00:21:32 23 release will not commence for another -- close to seven
00:21:36 24 years.

00:21:36 25 THE COURT: How long has he been in federal

~~51a~~

00:21:38 1 custody?

00:21:40 2 MS. MAHAN: He's been in federal custody
00:21:40 3 since December 2017, so approximately eight months.
00:21:44 4 However, he was in state custody prior to that. He has,
00:21:47 5 I think, about ten months of credit.

00:21:49 6 THE COURT: Well, how did he behave? Can
00:21:51 7 the probation office tell me? How has he been behaving
00:21:55 8 while incarcerated waiting for today?

00:21:57 9 THE PROBATION OFFICER: I don't know the
00:21:58 10 answer to that, but we could look.

00:22:00 11 THE COURT: Could you look right now in your
00:22:02 12 program?

00:22:03 13 THE PROBATION OFFICER: I will try.

00:22:07 14 THE COURT: Do you have any knowledge of any
00:22:09 15 infractions?

00:22:10 16 MS. KESSLER: No, Your Honor, I don't have
00:22:11 17 any knowledge.

00:22:13 18 THE PROBATION OFFICER: Frankly, the
00:22:16 19 Marshals probably have information if he had misbehaved
00:22:19 20 currently.

00:22:20 21 THE MARSHAL: I can ask the facility.

00:22:22 22 THE COURT: Would you do that?

00:22:24 23 THE MARSHAL: Yes, ma'am.

00:22:24 24 THE COURT: Let's take a ten minute recess.

00:29:40 25 (Recess taken.)

~~52a~~

00:33:21 1 THE COURT: The information that I've been
00:33:22 2 given is limited in scope and time; it's just a report
00:33:25 3 concerning events last month at Pamlico jail, I would
00:33:30 4 guess. Is this the source?

00:33:32 5 "On July 1 the defendant exposed himself
00:33:36 6 (breasts, genitals, posterior) to another. The officer
00:33:41 7 was doing his security rounds. He was laying on his bed
00:33:46 8 staring at me shaking his genital parts, after already
00:33:53 9 warning him several times if that happens again, he'd be
00:33:56 10 placed on lock down. And he went on lock down."

00:34:01 11 And then on July 12, he was in the day room
00:34:08 12 without his shirt on. "I instructed him to put his
00:34:11 13 shirt on, and he agreed to do so. He proceeded to enter
00:34:15 14 his cell. He still didn't put his shirt on as he was
00:34:22 15 instructed to do. He was addressed once again to put on
00:34:26 16 his shirt."

00:34:27 17 So just completely failing multiple times to
00:34:30 18 follow directions.

00:34:32 19 "He never put his shirt on."

00:34:34 20 All right. So kind of the same old same
00:34:43 21 old. We'll put this in the record.

00:34:50 22 All right. So I think I know what sentence
00:34:52 23 you want.

00:34:52 24 Let me hear from you, Mr. Nance. What do
00:34:55 25 you have to say for yourself?

~~53a~~

00:34:59 1 THE DEFENDANT: Well, I would like to say I
00:35:01 2 spent the last seven and a half years in prison, most of
00:35:05 3 my 20s. I hadn't had a job when I went in. I tried
00:35:09 4 when I got out, but I got rejected. I gave up. I
00:35:13 5 turned to selling drugs. I grew up around drugs, and
00:35:17 6 that's all I knew. I didn't think about it. I was
00:35:20 7 fending for myself. I've been doing that my whole life.
00:35:25 8 But being locked up this time made me realize it's not
00:35:28 9 just about me; it's for my son. It's not fair for him
00:35:32 10 to suffer because of the things I chose to do after I
00:35:35 11 went to prison. I promised myself I'd never been
00:35:39 12 involved in any robbery or kidnapping or be around
00:35:42 13 people who did things like this again, and I haven't
00:35:45 14 been. So I can change my lifestyle. And when I get
00:35:47 15 out, I'm going to, not for me, but for my son. I'm
00:35:52 16 very sorry for my actions that brought me here.

00:36:03 17 THE COURT: What are you going to do to make
00:36:05 18 a living when you get out?

00:36:07 19 THE DEFENDANT: I'm going to try to take up
00:36:10 20 all the classes I can take up here after I get my GED,
00:36:14 21 try to -- I'm going to try to do truck driving when I
00:36:17 22 get out.

00:36:18 23 THE COURT: Okay. Well, you're a very
00:36:23 24 dangerous person, and you have no respect for authority.
00:36:27 25 I do not believe a sentence in the guideline range takes

~~54a~~

00:36:31 1 into consideration fully your background and your
00:36:37 2 history and the extent of your criminal history, the
00:36:49 3 likelihood of recidivism, the dangerousness of you.

00:36:56 4 So if I go forward from a level five to a
00:37:10 5 six, 24 to 30 doesn't capture it. It's only when I go
00:37:17 6 down to a level 17 that I begin to think that I'm in a
00:37:25 7 range that will accomplish the purposes of sentencing.

00:37:31 8 And if in error on my decision to depart, I
00:37:38 9 reach the same number of 63 months on the first count
00:37:43 10 under 18, United States Code, Section 3553, the need to
00:37:49 11 promote respect for the law, to discourage this type of
00:37:52 12 conduct, to protect the public is so compelling in this
00:37:58 13 case.

00:37:59 14 So pursuant to the Sentencing Reform Act of
00:38:01 15 1984, having considered the advice of the guidelines,
00:38:05 16 having considered the factors set forth in 18, United
00:38:08 17 States Code, Section 3553, it's my decision that a
00:38:11 18 sentence of 63 months on Count 1 followed by a
00:38:15 19 consecutive sentence of 60 months on Count 2 for a total
00:38:19 20 term of incarceration of 123 months is a sentence that's
00:38:23 21 sufficient but not greater than necessary.

00:38:26 22 When you get out of prison you'll be
00:38:28 23 supervised for three years on Count 1 and three years --
00:38:31 24 I'm sorry, five years on Count 3 to run together.

00:38:36 25 Now, while you're in prison I'm recommending

~~55a~~

00:38:39 1 you for the most intensive substance abuse treatment
00:38:41 2 program. You really need that help.

00:38:44 3 You need mental health treatment. You need
00:38:47 4 to learn to control yourself. I'm recommending the
00:38:50 5 Bureau of Prisons undertake a comprehensive mental
00:38:53 6 health evaluation of you. You had some serious things
00:38:57 7 happen to you through no fault of your own as a child.
00:39:00 8 But through fault of your own you are continuing to act
00:39:05 9 against society, against norms. You need somebody to be
00:39:10 10 helping you with mental health treatment.

00:39:13 11 You also need to get your GED, and you
00:39:16 12 talked about that. You need to learn some skills. I'll
00:39:20 13 recommend you for education and vocational training.
00:39:23 14 Hopefully you'll be able to get a commercial driver's
00:39:26 15 license. I don't know. But there ought to be some
00:39:29 16 skills you can develop that will help you get a job when
00:39:32 17 you get out.

00:39:33 18 Now, when you get out and you're supervised
00:39:35 19 for five years, you cannot break any law. You cannot
00:39:38 20 possess a weapon. You cannot possess drugs. If you do,
00:39:42 21 you'll be in violation of the Court's judgment.

00:39:45 22 There are some other standard conditions and
00:39:46 23 some special ones. You'll participate in mental health
00:39:51 24 treatment as directed by the probation office. You'll
00:39:53 25 participate in substance abuse treatment as directed by

~~56a~~

00:39:56 1 the probation office. You'll consent to warrantless
00:40:01 2 searches to confirm that you're complying with the
00:40:04 3 Court's judgment. If you need more vocational training,
00:40:08 4 you'll submit to a program that will be helpful to you.
00:40:14 5 Otherwise if you're working you're going to provide
00:40:16 6 regular reports to your probation officer about your
00:40:19 7 efforts to get a job and keep a job. You'll cooperate
00:40:22 8 in the collection of DNA. And it goes without saying
00:40:25 9 you're going to support your son; that's a condition.

00:40:29 10 All right. \$200 special assessment is due
00:40:34 11 immediately. I'm not going to impose a fine.
00:40:36 12 Restitution is not an issue. I'm not going to deny you
00:40:39 13 federal benefits.

00:40:41 14 Pursuant to the plea agreement the other
00:40:42 15 counts are dismissed because I accept that plea
00:40:45 16 agreement.

00:40:53 17 Your probation officer wants you to succeed
00:40:55 18 and will be a great deal of help to you. Follow that
00:40:59 19 person's directions. They have your best interest in
00:41:04 20 mind. And you need that support and that structure.
00:41:10 21 Okay?

00:41:11 22 THE DEFENDANT: Yes, ma'am.

00:41:12 23 THE COURT: All right. Anything further?

00:41:16 24 MS. MAHAN: Would the Court recommend
00:41:18 25 Bennettsville?

~~57a~~

00:41:19 1 THE COURT: Sure, FCI Bennettsville.

00:41:21 2 From the Government?

00:41:22 3 MS. KESSLER: No, Your Honor.

00:41:25 4 THE COURT: From probation?

00:41:26 5 THE PROBATION OFFICER: No, Your Honor.

00:41:27 6 THE COURT: So the Government's motion was

00:41:28 7 granted. The docket will reflect that. I tempered the

00:41:33 8 response. I think 123 months is sufficient. And I hope

00:41:41 9 that you can turn the corner.

00:41:44 10 Now, you can appeal if you believe there's

00:41:46 11 something really wrong with the sentence, really wrong

00:41:49 12 with the conviction, but you do need to move quickly. A

00:41:52 13 defendant usually only has 14 days from the date that

00:41:55 14 the judgment goes on the docket to file a notice of

00:41:58 15 appeal. If you can't afford the cost of an appeal, you

00:42:01 16 can apply for permission to appeal for free. And if you

00:42:04 17 request, the clerk will fill out the appeal paperwork

00:42:07 18 for you.

00:42:08 19 Any questions?

00:42:15 20 MS. MAHAN: No, Your Honor.

00:42:15 21 THE COURT: You don't have a good track

00:42:17 22 record for behaving yourself in prison. If you can, you

00:42:21 23 can take close to two months a year off the sentence.

00:42:25 24 So that's something you can do to get out sooner.

00:42:29 25 Follow the directions of the officers supervising you in

~~58a~~

00:42:33 1 prison, and every year that goes by, you get over 50
00:42:37 2 days of good time credit usually. So it's something for
00:42:42 3 you to think about, okay?

00:42:46 4 I'll put you back in the custody of the
00:42:48 5 Marshal's Service.

6 (Concluded at 11:22 a.m.)

7 - - -

8 **C E R T I F I C A T E**

9
10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled
12 matter.

13

14 /s/ Tracy L. McGurk_____

____9/28/2018____

15 Tracy L. McGurk, RMR, CRR

Date

16

17

18

19

20

21

22

23

24

25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:17-CR-404-FL1

UNITED STATES OF AMERICA

v.

LARRY LAMAR NANCE

SENTENCING MEMORANDUM

The Defendant, Larry Lamar Nance, by and through undersigned counsel, respectfully submits this sentencing memorandum in an effort to aid the Court in fashioning a sentence that is sufficient, but not greater than necessary to achieve the purposes set forth in 18 U.S.C. § 3553(a). A sentence within the United States Sentencing Guidelines range recommended in the pre-sentence report (“PSR”) would achieve such a result, thus he respectfully requests that this Court sentence him to a sentence of 81 to 87 months’ imprisonment, followed by 60 months of supervised release.

STATEMENT OF THE CASE

On December 13, 2017, Mr. Nance was named in a four count indictment and charged in Count One with one count of possession with the intent to distribute a quantity of cocaine and heroin in violation of 21 U.S.C. § 841(a)(1); in Count Two with possession with the intent to distribute a quantity of heroin in violation of 21 U.S. C. § 841(a)(1), in Count Three with possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c), and in Count Four with possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). [DE-1]. On May 16, 2018, pursuant to a written plea agreement, Mr. Nance pleaded guilty to Counts One

APPENDIX D

60a

and Three. [DE-27]. The final PSR, filed on July 27, 2018, calculates the total offense level as 10 and Mr. Nance's criminal history category as V, for a sentencing guideline range on Count One of 21 to 27 months. PSR ¶ 66. This is followed by a mandatory 60-month consecutive sentence on Count Three, resulting in an effective guideline range of 81 to 87 months. *Id.*

ARGUMENT

Our federal criminal justice system is founded on the principle that punishment should fit both the offender and the crime. *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011) (citing *Williams v. New York*, 337 U.S. 241, 247 (1949)). When sentencing any defendant, the district court must consider the sentencing purposes set forth in 18 U.S.C. § 3553(a) and make an “individualized assessment” of the person in front of her, ultimately crafting a sentence that is “sufficient, but not greater than necessary” to achieve this broad goal. *Gall v. United States*, 552 U.S. 35, 50 (2007). Accordingly, the Court must consider whether a guideline sentence accurately reflects the nature and circumstances of the offense and the characteristics and history of the defendant; the need for the sentence imposed to afford adequate deterrence to criminal conduct; the need to provide just punishment for the offense; the need to protect the public from further crimes of the defendant; the kinds of sentences available; and the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a). In the case at bar, it does.

A. The Nature and Circumstances of the Offense

Between April 25, 2017, and April 28, 2017, Mr. Nance possessed .65 grams of heroin, 3.11 grams of cocaine, 4.02 grams of cocaine base, and 1.17 grams of marijuana. PSR ¶¶ 10–11. On April 28, 2017, Mr. Nance possessed a stolen firearm in furtherance of his drug trafficking activities. PSR ¶ 11. The firearm was located in Mr. Nance's vehicle with .24 grams of heroin, 1.17 grams of marijuana, a marijuana blunt, and \$209 in United States currency. PSR ¶ 10. The

government is correct that Mr. Nance did not immediately acquiesce to law enforcement's demands to get out of the car. In the body camera video of the encounter, his car creeps forward a few feet before stopping. Before opening the door to Mr. Nance's car, officers noted the smell of marijuana and, upon encountering Mr. Nance, one of the officers commented that he appeared extremely high. Possessing a firearm while intoxicated demonstrates extremely poor judgment. However, it also serves to explain why Mr. Nance attempted to evade arrest despite his car being surrounded by uniformed police officers. Mr. Nance's behavior in briefly resisting arrest is the most aggravating fact about this crime. In mitigation, it is undisputed that the drug quantities attributable to Mr. Nance are not high and that Mr. Nance has a fairly significant drug problem himself. Further, Mr. Nance did not attempt to use the firearm. This is a passive possession case. *Id.*

B. Mr. Nance's History and Characteristics

This Court no doubt sees many defendants who have had poor childhoods. Mr. Nance's, however, is particularly wrought with instability and drug use. He was raised in Newark, New Jersey, by his mother. PSR ¶ 38. His mother was a heavy drug user and they lived in a neighborhood that was rife with street crime and violence. *Id.* At age nine, Mr. Nance relocated to Fayetteville to live with his maternal grandmother. *Id.* While living with his grandmother, he spent summers in Newark with his father, who also was a heavy drug user and lived in an unsafe neighborhood. *Id.* Then, at age 12 or 13, Mr. Nance's grandmother died, and he was uprooted again to live with his maternal aunt until the age of 17. *Id.* At age 17, he moved back to Newark to be with his mother, but relocated to Fayetteville when he turned 18, when his mother went to prison. *Id.* Mr. Nance's unstable childhood is reflected in the whereabouts of his siblings. Two of his maternal half-siblings are incarcerated. PSR ¶ 37. His sister Latifah suffers from a crippling drug addiction. Mr. Nance reports that of his five maternal and two paternal half-siblings, only his sister Cardelia, who runs her

own business, has been successful.

With his unstable childhood, it is hardly surprising that Mr. Nance started using drugs at the age of 9. Mr. Nance reports that smoking marijuana helps calm him down. He reports insomnia, racing thoughts, and an “inability to turn his brain off.” During conversations with the undersigned, he has come to realize that he may, in fact, suffer from an anxiety disorder for which he has been self-medicating much of his life. His drug use progressed from marijuana to opiates to heroin while he was in the community. As such, Mr. Nance would like to receive both substance abuse and mental health treatment while in the custody of the Bureau of Prisons. PSR ¶¶ 41–41.

Mr. Nance’s criminal history is not short and will likely give the Court pause. It begins at age 16, with convictions for possession of a stolen motor vehicle, breaking and entering, and larceny after breaking and entering. PSR ¶¶ 16–17. At age 18, he sustained a conviction for possession with intent to manufacture, sell, or deliver cocaine. PSR ¶ 18. For all three of these crimes, he was put on probation. PSR ¶¶ 16–18. His probation was revoked in 2006, at which time he received a sentence of 5 to 6 months custody, or time served. PSR ¶¶ 16–18. In 2004, at age 19, he committed the crime of first degree burglary, followed by conspiracy to commit armed robbery of a business or person and discharge of a weapon onto occupied property at age 20. PSR ¶¶ 19–20. In 2006, he pleaded guilty to the latter two crimes and sentenced to a total of 23 to 37 months custody.¹ PSR ¶ 20–21. While serving that sentence, in 2008, he pleaded guilty to the 2004 burglary charge, and received a sentence of 63 to 78 months in the North Carolina Department of Corrections (“NCDOC”). PSR ¶ 19. Effectively, Mr. Nance was never incarcerated until he was arrested in January of 2006. Upon that arrest, as a result of the first six convictions on his record, he was in continuous custody until

¹It was upon arrest for these crimes that his probation was revoked for the convictions listed in PSR ¶¶ 16-18,

July 2013.

Upon first glance, this may seem like nothing short of an uninterrupted violent criminal spree. Notably, however, although his first arrest was in 2001, Mr. Nance did not receive prison time for any of these charges until 2006. This is important because after that period of incarceration from 2006 to 2013, Mr. Nance does not appear to have engaged in similar behavior. The two convictions that follow his release are for marijuana possession and possession with intent to sell or deliver 22 grams of marijuana. PSR ¶¶ 22-23. These convictions are similar to the instant offense. While it is regrettable that Mr. Nance sustained any convictions after his release from the NCDOC in 2013, it is clear that his behavior in those offenses and in the instant offense was not of the same magnitude as his prior conduct. This is not to make light of Mr. Nance's drug dealing activities, but simply to state that there is no evidence he been a recidivist in terms of violent crime.

C. The Need to Reflect the Seriousness of the Offense, Promote Respect for the Law, Provide Just Punishment, Afford Adequate Deterrence, and Protect the Public

The sentencing objectives set forth in 18 U.S.C. § 3553(a)(2) will be achieved by a guideline sentence. A guideline sentence will be the same length of time as Mr. Nance served in the NCDOC for a much more violent set of offenses. It is clear that Mr. Nance has made efforts to change his behavior.

Mr. Nance's criminal history score in this case takes into account his prior convictions other than those he sustained as a teenager, as the guidelines determine that those are too old to be scored. *See generally*, U.S.S.G. § 4A1.2(e). While the guidelines contemplate an upward departure where a criminal history score may under-represent a defendant's likelihood of recidivism (*see* U.S.S.G. § 4A1.3), the most recent evidence is that Mr. Nance is unlikely to recidivate by engaging in conduct similar to that underlying these unscored convictions. Moreover, § 4A1.3 does not provide for a

departure based merely on unscored convictions. Indeed, upwardly departing on the basis of unscored convictions would directly undermine the guideline provisions that direct that certain convictions not increase a defendant's criminal history score. Section 4A1.3 instead lists several categories of information that are not taken into account by the guidelines themselves, such as “[p]rior sentence[s] not used in computing the criminal history category”, “prior similar misconduct established by a civil adjudication”, or “whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.” U.S.S.G. § 4A1.3(2). None of the examples listed in § 4A1.3 apply to Mr. Nance's case.

Similarly, there is no recent, reliable evidence that Mr. Nance is likely to commit violent offenses in the future, thus his guideline range should not be enhanced based on pure speculation that he may do so. The government argues that the “violent” nature of his prior burglary conviction provides a basis to depart upward under § 4B1.2. The government has set forth no evidence that the burglary did, in fact, involve physical violence. The indictments submitted in support of its argument do not demonstrate that the offense was violent. [DE-35, Ex. 1]. First, Mr. Nance was not convicted of kidnaping nor did he admit to kidnaping, thus the Court should not use the indictment for an offense of which Mr. Nance was not convicted as a basis for an upward departure. Second, there is no indication that a weapon was possessed, let alone used, or that anyone was injured or threatened. Third, Mr. Nance committed this crime over 14 years ago, when he was a teenager. He is now 33 years old and has done nothing similar since.

The government may disagree with the Sentencing Commission's decision to remove burglary from the list of enumerated offenses, but there is no evidence that the offense listed in ¶ 19 of the PSR is anything other than a typical burglary. Further, one of the reasons that burglary was removed from the enumerated offense list is that “historically, career offenders have rarely been

rearrested for a burglary offense after release.” United States Sentencing Commission Text of 2016 Amendment to “Crime of Violence” at 6, *available at*

https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160121_Amendments_0.pdf). That is exactly the case for Mr. Nance: his prior conviction is for a

nonviolent burglary, and he has not been rearrested for a burglary offense since his release.

Therefore, this conviction should not serve as a basis for an upward departure.

The advisory guidelines fully take into account Mr. Nance’s record, and they take into account the seriousness of this offense. He is receiving a mandatory minimum sentence of 60 months because he possessed the firearm in connection with a drug trafficking felony. This 60 month sentence is a higher sentence than the guidelines recommend for being a felon in possession of a firearm. PSR ¶ 67. A guideline sentence accurately reflects the seriousness of the offense and provides just punishment.

Moreover, a guideline sentence will remove Mr. Nance from society for approximately 7 years. When followed by a five year term of supervised release, this means that he will be under the federal government’s oversight, whether by the Bureau of Prisons or the United States Probation Office, for well over 10 years. This will adequately protect the public, afford deterrence, and promote respect for the law. The government’s request for a sentence of 262 to 327 months’ imprisonment in a non-violent drug case is nothing short of outrageous.

APPENDIX D

66a

CONCLUSION

Mr. Nance respectfully requests that this Court impose a sentence within the range promulgated by the United States Sentencing Commission's Guidelines Manual: 81 to 87 months' imprisonment, followed by a term of 60 months of supervised release.

Respectfully requested this 2nd day of August, 2018.

G. ALAN DuBOIS
Federal Public Defender

/s/ Halerie Mahan
HALERIE MAHAN
Assistant Federal Public Defender
Attorney for Defendant
Office of the Federal Public Defender
150 Fayetteville Street, Suite 450
Raleigh, North Carolina 27601
Telephone: 919-856-4236
Fax: 919-856-4477
E-mail: Halerie.Mahan@fd.org
N.C. State Bar No. 43030
LR 57.1 Counsel
Appointed

APPENDIX D

67a

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon:

SUSAN B. MENZER
Assistant United States Attorney
Suite 800, Federal Building
310 New Bern Avenue
Raleigh, NC 27601-1461

by electronically filing the foregoing with the Clerk of Court on August 2, 2018, using the CM/ECF system which will send notification of such filing to the above.

This the 2nd day of August, 2018.

/s/ Halerie Mahan
HALERIE MAHAN
Assistant Federal Public Defender
Attorney for Defendant
Office of the Federal Public Defender
150 Fayetteville Street, Suite 450
Raleigh, North Carolina 27601
Telephone: 919-856-4236
Fax: 919-856-4477
E-mail: Halerie.Mahan@fd.org
N.C. State Bar No. 43030
LR 57.1 Counsel
Appointed

APPENDIX E

68a

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:17-CR-404-FL

UNITED STATES OF AMERICA)	
)	
v.)	<u>MOTION FOR UPWARD DEPARTURE</u>
)	<u>AND/OR UPWARD VARIANCE</u>
LARRY LAMAR NANCE)	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby moves this Court to upwardly depart from the established guideline range, pursuant to U.S.S.G. Sections 4A1.3(a)(1) and 4B1.2, because the Defendant's criminal history category significantly underrepresents the seriousness of the Defendant's past criminal conduct and his prior burglary conviction was violent in nature. Alternatively, the Government moves this Court to vary upward based on the factors outlined in 18 U.S.C. Section 3553(a), namely promoting respect for the law and protecting the public from the danger posed by this Defendant.

I. Procedural History

On December 13, 2017, Larry Lamar Nance ("Defendant") was charged in a four-count Indictment by a federal grand jury sitting in the Eastern District of North Carolina with two counts of Possession with Intent to Distribute Controlled Substances (Counts One and Two), one count of Possession of a Firearm in Furtherance

APPENDIX E

69a

of a Drug Trafficking Crime (Count Three) and Possession of a Firearm by a Convicted Felon (Count Four). D.E. 1. The drug charges related to conduct that occurred on two separate occasions, just three days apart. See Presentence Report (PSR) at ¶¶9, 10.

On May 16, 2018, Defendant pleaded guilty, pursuant to a plea agreement, to Counts One and Three of the Indictment. D.E. 17. A sentencing hearing is currently scheduled for August 9, 2018. Count One carries a mandatory 60-month term of imprisonment, consecutive to any other term of imprisonment. PSR ¶¶ 64-65. U.S. Probation has calculated an advisory guideline range of imprisonment for Count Three of 21 to 27 months based upon a total offense level of 10 and a criminal history category of V. PSR ¶ 66. Accordingly, Defendant's effective advisory guideline range is 81 to 87 months. Id.

II. Discussion

A. The Court Should Depart Upward from the Advisory Guideline Range Pursuant to USSG 4A1.3 based Upon Inadequacy of Defendant's Criminal History Category.

A district court may depart upward from the advisory guideline range where "reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S.S.G. §4A1.3(a)(1); see United States v. Whorley, 550 F.3d 326, 341 (4th

APPENDIX E

70a

Cir. 2008)(noting that an under-representative criminal history category is an encouraged basis for departure), cert. denied, 558 U.S. 1117 (2010).

Defendant's criminal history category V under-represents the seriousness of his criminal past, the danger he poses to society, and his high likelihood of recidivism. Defendant's criminal history began at sixteen years of age. PSR ¶¶ 16 & 17. He has eight prior convictions to include felony breaking and entering, drug possession and distribution, burglary, robbery, and firearm convictions. PSR ¶¶ 17-21, 23. In the calculation of the criminal history category, however, four of these eight prior convictions have gone unscored. PSR ¶¶ 16-18, 21. Three were too old to be counted. This Court, however, can consider those convictions in determining whether to depart upward. United States v. Howard, 773 F.3d 519, 529 (4th Cir. 2014), aff'd, 631 Fed. Appx. 194 (4th Cir. 2016) (unpublished).

In addition, Defendant has a history of committing crimes while he awaited trial for prior arrests or while under court supervision for prior convictions. On August 21, 2001, Defendant was arrested for Possession of a Stolen Motor Vehicle. PSR ¶16. Six months' later, while on pre-trial release, he was arrested for Breaking and Entering, Larceny and Possession of Stolen Goods. PSR ¶17. While awaiting trial for these offenses, Defendant was

APPENDIX E

71a

arrested twice more for Possession with Intent to Manufacture, Sell or Deliver Cocaine and First Degree Burglary/Kidnapping. PSR ¶¶ 18 & 19. On October 14, 2004, Defendant was sentenced to 24 months' probation after pleading guilty to Possession of a Motor Vehicle, Breaking and Entering and the Drug Distribution offenses. PSR ¶¶ 16-18. Even though all these offenses were committed on three separate dates, Defendant was essentially punished just once. Further, the sentence for his repeated felonious conduct was a lenient 24-month period of probation. Id.

On August 27, 2005, while awaiting trial on all those charges, Defendant conspired with at least one other individual to rob a victim at gunpoint. PSR ¶¶ 20-21. During the Armed Robbery, Defendant fired the firearm into the vehicle occupied by the victim. Id. On October 4, 2006, Defendant pleaded guilty to Conspiracy to Commit Armed Robbery and Discharge of a Weapon into Occupied Property. He was sentenced to concurrent 23 to 37 months' terms of imprisonment. Id.¹ On April 21, 2008, Defendant pleaded

¹ Recently, the Fourth Circuit held that conspiracy to commit a violent offense no longer qualifies as a career offense predicate. United States v. McCollum, 885 F.3d 300 (4th Cir. 2018). The Government recognizes that this decision is binding and must be applied to this case, but believes McCollum was wrongly decided and that Defendant's Conspiracy to Commit Armed Robbery is a crime of violence. Nevertheless, if Defendant had pleaded guilty to the substantive crime of Armed Robbery, rather than the Conspiracy charge, he would have qualified as a career offender. U.S.S.G. §4B1.2 (a)(2) (crime of violence includes robbery). Accordingly, his guideline range would be 262 to 327 months. U.S.S.G. §4B1.1 (c)(3)

APPENDIX E

72a

guilty to the April 2004 First Degree Burglary charge and was sentenced to 61 to 83 months' imprisonment.² PSR ¶ 19.

On July 12, 2013, after serving approximately seven and half years, Defendant was released from state custody. PSR ¶19.³ On January 23, 2014, just six-months later and while on post-release supervision, Defendant was arrested for Possession with the Intent to Manufacture, Sell, Deliver Heroin and Marijuana and Maintaining a Vehicle, Dwelling or Place for Controlled Substances. PSR ¶22. On February 28, 2014, based on this new criminal conduct, Defendant's post-release supervision was revoked and he was sentenced to serve an additional nine-months in custody. PSR ¶¶ 18-21. On August 14, 2014, while apparently serving this nine-month sentence, the serious January 23, 2014 drug offenses were dismissed in exchange for Defendant's guilty plea to misdemeanor Possession of Marijuana. He was sentenced to 45 days. PSR ¶22.

On October 31, 2014, Defendant was released from state custody. PSR ¶¶ 18-21. Less than a year later, on June 21, 2015, Defendant was arrested and charged again with serious drug offenses. See PSR ¶ 23. Despite his lengthy criminal history and

² North Carolina Department of Corrections noted 79 infractions while he served this sentence. PSR ¶19.

³ Defendant served his sentence for the Conspiracy to Commit Armed Robbery, and then, entered a guilty plea to the burglary charge even though he committed the burglary 16-months before committing the armed robbery. See PSR ¶¶19-21.

APPENDIX E

73a

his failure to abide by conditions of supervision, a custodial sentence was suspended and he was placed on 24-months' probation after pleading guilty to Possession with Intent to Manufacture, Sell or Deliver Marijuana. Id. The other charges were dismissed. Id. Not surprisingly, Defendant's adjustment to supervision was poor. Id. He tested positive for drug use and failed to meet his monetary obligations, report as directed or comply with behavioral treatment. Id. He also engaged in new criminal conduct, which are the crimes charged in the Indictment. D.E. 1.

Defendant's multiple instances of violating supervision by engaging in new criminal conduct reflects a high likelihood of recidivism and supports an upward departure. See United States v. Grant, 581 Fed. Appx. 210, 212 (4th Cir. 2014) (unpublished); United States v. Lucas, 542 Fed. Appx. 283, 288 (4th Cir. 2013) (unpublished), cert. denied, 571 U.S. 1226 (2014).

The Government believes that an increase of Defendant's criminal history category from V to VI, which would minimally increase his range to 84 to 90 months, would not adequately address the seriousness of Defendant's criminal history and the likelihood of recidivism. By vertically traversing to successively higher offense levels, the Court can find a Guideline range appropriate to this case. See U.S.S.G. § 4A1.3(a)(4); United States v. Dalton, 477 F.3d 195, 199 (4th Cir. 2007). The Government respectfully

APPENDIX E

74a

recommends an offense level of 34 with a Criminal History Category VI, resulting in a Guideline range of 262-327, which is commensurate with the career offender provisions.

B. The Court Can Also Depart Upward from the Advisory Guideline Range Pursuant to USSG Section 4B1.2 Based Upon the Violent Nature of the Defendant's 2008 First Degree Burglary Offense.

After the Supreme Court decision in Johnson v. United States, 135 S. Ct. 2551 (2015), the United States Sentencing Commission amended U.S.S.G. Section 4B1.2(a)(2) to, among other things, deleted "burglary of a dwelling" as an enumerated crime of violence. Accordingly, Defendant's 2008 First Degree Burglary conviction no longer qualifies as a career offender predicate and his effective guideline range is substantially lower. See supra, note 1.

The Commission amended the section, in part, based upon statistical evidence that burglary offenses rarely result in physical violence. Yet, for those cases where burglaries do involve physical violence, the Commission added Application Note 4, which provides:

Upward Departure for Burglary Involving Violence. - There may be cases in which a burglary involves violence, but does not qualify as a 'crime of violence' as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a 'crime of violence.' In such a case, an upward departure may be appropriate.

APPENDIX E

75a

U.S.S.G. §4B1.2, Application Note 4.

Defendant's burglary clearly involved violence. On April 20, 2004, Defendant broke into an occupied residence. He moved one of the victims, an individual under 16 years old, to an unsafe place. PSR ¶19. As a result, Defendant was also indicted for First Degree Kidnapping, in violation of N.C. Gen. Stat. § 14-39(a). See Indictment for 04CRS52754 (attached as Government Exhibit 1). The Guidelines include kidnapping as an enumerated crime of violence and predicate for a career offender. U.S.S.G. §4B1.2(a)(2). Moreover, in United States v. Flores-Granados, the Fourth Circuit held that kidnapping under North Carolina law qualifies as a crime of violence:

The statute requires the perpetrator to specifically intend a heinous criminal act—the worst of the worst—abduction or restraint of victims for ransom or to further the commission of a felony, to terrorize victims or cause them bodily injury, or to hold them in involuntary servitude.

783 F.3d 487, 495 (4th Cir.), cert. denied, 136 S. Ct. 224 (2015). Due to the violent nature of the burglary, this Court should also upwardly depart under this Guideline principle.

C. The Court Should Vary Upward Pursuant to the Factors Set Forth at Title 18, United States Code, Section 3553(a).

A variance is a non-Guidelines sentence justified under the sentencing factors set forth in Title 18, United States Code,

APPENDIX E

76a

Section 3553(a). If after calculating the advisory guideline range a court decides not to upwardly depart, it may still vary upwards based on the factors set out in 18 U.S.C. § 3553(a). United States v. Evans, 526 F.3d 155, 154-65 (4th Cir.), cert. denied, 555 U.S. 977 (2008). When varying from an advisory guideline range, the district court must give serious consideration to the extent of the variance and must adequately explain the chosen sentence to allow for meaningful appellate review to promote the perception of fair sentencing. Gall v. United States, 552 U.S. 38, 46 (2007).

1. Nature and Circumstances of the Offenses

The offense conduct in this case involves two separate instances of possession with intent to distribute controlled substances. The nature and circumstances of the April 25, 2017 drug trafficking offense charged in Count One demonstrates Defendant's association with a much larger drug organization. When the Fayetteville Police Department responded to a residential noise complaint, Defendant and three others were in the front yard and approximately five others were inside the residence. The responding officers, who smelled marijuana as they approached, alerted those present at the scene that they were conducting a seize and freeze to apply for a search warrant. Defendant and two individuals from inside the residence fled. With the assistance

APPENDIX E

77a

of a K-9, Defendant was eventually located hiding in a shed and brought back to the scene.

The police searched the residence and six vehicles in the yard. Inside the residence, the police found a large quantity of marijuana, multiple digital scales, a marijuana grinder, plastic bags, a money counting machine, three loaded firearms, and additional rounds of various types of ammunition.⁴ Defendant's Chevy Malibu smelled of marijuana. Inside the change tray, the police found 16 bindles of heroin stamped "Bone Crusher," a plastic bag containing 3.6 grams of powder cocaine and another plastic bag containing 4.2 grams of crack cocaine. There were plastic bags commonly used to package illegal narcotics in his trunk. Four other vehicles in the yard contained illegal narcotics, drug paraphernalia and/or loaded firearms. In total, six handguns and various amounts of heroin, cocaine (powder and crack) and marijuana were seized. Defendant and three others were charged with various offenses.

Just three days after being processed and released, Defendant was arrested again by the Fayetteville Police Department after responding to a trespassing complaint. Defendant was sitting in the same vehicle outside a former girlfriend's residence. Fearful

⁴ One of the handguns had been stolen from a local night club.

for her safety, she telephoned the police.⁵ Defendant refused to comply with police orders to roll down his window. Instead, he accelerated and drove toward the backyard. One of the officers opened the passenger door, dove on top of the handgun she saw on the passenger seat and turned off the engine. Defendant continued to resist. The police forcibly took Defendant to the ground after he lunged at another officer. During a search of his vehicle, the police found marijuana and 12 bindles of heroin, similarly stamped "Bone Crusher." Defendant had more than \$200 in his pocket.

2. History and Characteristics

The Defendant is a thirty-three-year-old career criminal. Since he was sixteen years old, Defendant has either been incarcerated or under court ordered supervision. The North Carolina Department of Public Safety validated his affiliation with the United Blood Nation gang. PSR at 2. In addition to the egregious criminal history detailed above, Defendant has been arrested, but not prosecuted, for other violent offenses. See PSR ¶¶ 31-34. Even after his arrest for the crimes charged in the Indictment, Defendant was arrested for striking a woman in the head with his fist. PSR ¶ 34.

⁵ She told the police that Defendant had previously struck her and put a gun to her head. She further informed police that she had seen Defendant previously that evening at the same nightclub where one of the guns seized in the previous incident had been stolen from.

Defendant withdrew from high school and has failed to obtain his GED. PSR ¶ 44. He has never been gainfully employed other than sporadic odd jobs. PSR ¶¶ 45-52. Defendant admits to a history of substance abuse since age nine. PSR ¶ 42. Even though he has been provided with opportunities to do so, Defendant has made no effort to withdraw from a life of crime and become a productive member of society. His history and characteristics demonstrates that he must be removed from society for a lengthy period of time or he will continue to harm others through drug sales or violent conduct.

3. Need for the Sentence to Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment

A significant term of imprisonment is necessary to reflect the seriousness of the offenses and provide just punishment. The Government has already discussed the seriousness of Defendant's criminal conduct. There is also a need, unique to this case, for the sentence to promote respect for the law. Despite repeated arrests and adjudications by the criminal justice system, Defendant maintains a profound disrespect for the law. Both times he encountered law enforcement in this case, he refused to comply and attempted to flee.

Defendant must come to respect the laws of society and the members of the Fayetteville community who are entitled the

protection of the law. Thus, this factor militates in favor of an upward variance.

4. Need for Sentence to Afford Adequate Deterrence

An upward variance from the advisory guidelines is necessary to advance the goals of specific and general deterrence from future crimes. Although he has been previously incarcerated by state authorities, Defendant has been treated leniently on many other occasions, resulting in probationary sentences. This has emboldened him to continue living a life of crime and terrorizing the community. Clearly, the state sentences imposed have had no deterrent value whatsoever. An added measure of deterrence is necessary to send a clear message to Defendant that this toxic lifestyle is unsustainable.

A significant term of imprisonment will also provide general deterrence to others, including other drug trafficking associates in Fayetteville, who will be put on notice that illegal drugs, gun crime, and street gangs are a threat to the community that will not be tolerated.

5. Need to Protect the Public From Further Crimes of the Defendant

Defendant is a violent man. He has used his physical strength and firearms to threaten and harm others. His history of recidivism reflects a continued danger he will pose when released

APPENDIX E

81a

from prison. To assure society is protected, he must be incarcerated for a lengthy period of time.

III. Conclusion

The current criminal history category V fails to adequately reflect the seriousness of the Defendant's criminal history and the strong likelihood that he will continue to commit crimes once released from custody and his prior burglary conviction was violent in nature. The Government believes an offense level of 34 coupled with a Criminal History Category VI should be used to calculate a more appropriate Guideline range or 262 to 327 months. Alternatively, a variance above the currently calculated guidelines range is necessary to give substantive meaning to the Section 3553(a) factors, specifically promoting respect for the law and protecting the public.

Respectfully submitted this 2nd day of August, 2018.

ROBERT J. HIGDON, JR.
United States Attorney

BY: /s/ Susan B. Menzer
SUSAN B. MENZER
Assistant United States Attorney
Criminal Division
310 New Bern Avenue, Suite 800
Raleigh, NC 27601-1461
Telephone: (919) 856-4530
Fax: (919) 856-4487
E-mail: susan.menzer@usdoj.gov
DC Bar No. 421007

APPENDIX E

82a

CERTIFICATE OF SERVICE

This is to certify that I have this the 2nd day of August, 2018, served a copy of the foregoing Government's Motion upon the counsel for Defendant in this action by electronic mail to:

Halarie F. Mahan
150 Fayetteville St, Suite 450
Raleigh, NC 27601
Email: halarie.mahan@fd.org

BY: /s/ Susan B. Menzer
SUSAN B. MENZER
Assistant United States Attorney
Criminal Division
310 New Bern Avenue, Suite 800
Raleigh, NC 27601-1461
Telephone: (919) 856-4530
Fax: (919) 856-4487
E-mail: susan.menzer@usdoj.gov
DC Bar No. 421007

EXHIBIT 1

STATE OF NORTH CAROLINA
In the General Court of Justice
Superior Court Division

File No. 04CRS52754

Film No.

ROBESON COUNTY

STATE VERSUS

DEFENDANT

LARRY LAMAR NANCE

INDICTMENT

DATE OF OFFENSE 4-20-04

OFFENSE IN VIOLATION OF G.S. 14-51

FIRST DEGREE BURGLARY

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did during the nighttime between the hours of Midnight and 1:00 AM on 4/20/04 break and/or enter the dwelling house of [REDACTED] located at [REDACTED] Parkton, NC. At the time of the breaking and/or entering, the dwelling house was actually occupied by [REDACTED] and [REDACTED]. The defendant broke and entered with the intent to commit a felony therein, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

Signature of Prosecutor

WITNESSES

☐ VINCENT SINCLAIR, RCSD

☒ Howard Branch

The witnesses marked "X" were sworn by the undersigned Foreman of the Grand Jury and, after hearing testimony, this bill was found to be:

☒ A TRUE BILL by twelve or more grand jurors, and I the under-signed Foreman of the Grand Jury, attest the concurrence of twelve or more grand jurors in this Bill of Indictment.

☐ NOT A TRUE BILL

Date

SEP 13 2004

Signature of Grand Jury Foreman

DH

STATE OF NORTH CAROLINA
In the General Court of Justice
Superior Court Division

File No. 04CRS52755

Film No.

ROBESON COUNTY

STATE VERSUS

DEPENDANT

LARRY LAMAR NANCE

INDICTMENT

DATE OF OFFENSE 4-20-04

OFFENSE IN VIOLATION OF G.S. 14-39

FIRST DEGREE KIDNAPPING

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did kidnap [REDACTED] a person under the age of 16 years, by unlawfully removing the victim from one place to another, without the consent of the victim's parent or legal guardian, and for the purpose of holding the victim for the ransom. [REDACTED] was not released by the defendant in a safe place, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

Signature of Prosecutor

WITNESSES

☐ VINCENT SINCLAIR, RCSD

☒ Howard Branch

The witnesses marked "X" were sworn by the undersigned Foreman of the Grand Jury and, after hearing testimony, this bill was found to be:

☒ A TRUE BILL by twelve or more grand jurors, and I, the under-signed Foreman of the Grand Jury, attest the concurrence of twelve or more grand jurors in this Bill of Indictment.

☐ NOT A TRUE BILL

Date SEP 11 2004

Signature of Grand Jury Foreman

DH

86a

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NORTH CAROLINA
3 WESTERN DIVISION

4 UNITED STATES OF AMERICA, - Docket No. 5:17-CR-404-FL-1
5 Plaintiff, - New Bern, North Carolina
6 v. - May 16, 2018
7 LARRY LAMAR NANCE, - Arraignment
8 Defendant. -

9
10 TRANSCRIPT OF ARRAIGNMENT HEARING
11 BEFORE THE HONORABLE ROBERT B. JONES, JR.
12 UNITED STATES DISTRICT MAGISTRATE JUDGE.

13 APPEARANCES:

14 For the Plaintiffs: United States Attorneys' Office
15 By: Susan B. Menzer
16 310 New Bern Avenue, Suite 800
17 Raleigh, NC 27601
18 (919) 856-4500

19 For the Defendant: Federal Public Defender
20 By: Halerie F. Mahan
21 150 Fayetteville St., Suite 450
22 Raleigh, NC 27611-5967
23 (919) 856-4236

24 Court Reporter: Tracy L. McGurk, RMR, CRR
25 413 Middle St.
New Bern, NC 28560
(419) 392-6626

Proceedings recorded by mechanical stenography,
transcript produced by notereading.

~~87a~~

1 (Commenced at 9:37 a.m.)

2 THE COURT: I ask each defendant appearing
00:00:01 3 before the Court this morning to listen carefully to the
00:00:05 4 following information. This information will be an
00:00:10 5 important part of your case, and you may be called upon
00:00:14 6 today to make decisions in your cases based on what I'm
00:00:18 7 about to say.

00:00:19 8 I now advise each defendant as follows: You
00:00:23 9 are here because a bill of indictment has been returned
00:00:27 10 against you by the grand jury, or the U.S. Attorney has
00:00:32 11 filed a criminal information charging you with a
00:00:36 12 violation of one or more federal criminal laws. You
00:00:40 13 have certain rights as related to these charges, and I'm
00:00:43 14 going to explain those rights to you.

00:00:46 15 As explained to you at your initial
00:00:48 16 appearance, you have the right to remain silent. You
00:00:52 17 have the right to be represented by an attorney, and if
00:00:58 18 necessary to have the Court appoint an attorney to
00:00:59 19 represent you in your case including at trial. You have
00:01:05 20 the right to a trial by jury. At such a trial you are
00:01:07 21 presumed to be innocent. You do not have to prove
00:01:10 22 anything. Instead, the burden is upon the Government
00:01:15 23 through its attorneys and agents to prove you guilty by
00:01:18 24 competent evidence and beyond a reasonable doubt. The
00:01:22 25 method for the Government to do this is to call its

~~88a~~

00:01:26 1 witnesses who would testify under oath in front of you
00:01:30 2 and in front of a jury and in front of the presiding
00:01:33 3 district judge. You, through your lawyer, will then
00:01:38 4 have the right to cross-examine those witnesses and to
00:01:41 5 object to any evidence you deem to be legally improper.
00:01:48 6 You would also have the right to use the subpoena power
00:01:51 7 of this Court to bring to court witnesses who may be
00:01:54 8 favorable to you and to have these witnesses testify
00:01:57 9 under oath. You also may elect to take the witness
00:02:00 10 stand and testify under oath, but only if you wish to do
00:02:03 11 so. No one can force you to take the witness stand and
00:02:06 12 testify if you don't want to. If you choose not to
00:02:10 13 testify, the fact that you do not testify cannot be held
00:02:13 14 against you, and the district judge will instruct the
00:02:17 15 jury accordingly.

00:02:19 16 If you plead guilty to an offense this
00:02:22 17 morning, you will waive your right to a trial by jury
00:02:25 18 and the rights that I've just mentioned other than your
00:02:28 19 right to an attorney. You also will have to waive your
00:02:31 20 right not to incriminate yourself because I cannot
00:02:33 21 accept your plea of guilty as to a particular offense or
00:02:37 22 offenses unless you admit in open court your guilt as to
00:02:43 23 that particular offense or offenses.

00:02:46 24 By pleading guilty to a felony offense or
00:02:49 25 being convicted by a jury and adjudicated guilty of a

89a

00:02:52 1 felony offense, whether that is by a bill of indictment
00:02:55 2 or criminal information, you may lose certain valuable
00:03:00 3 civil rights such as the right to possess any kind of
00:03:03 4 firearm, the right to serve on a jury, the right to hold
00:03:07 5 public office, and the right to vote.

00:03:11 6 If you plead guilty or are found guilty at
00:03:16 7 trial, you may be ordered to make restitution in money
00:03:19 8 or services to the victims of your crime if they are
00:03:23 9 identifiable.

00:03:25 10 In certain cases you may be required to
00:03:27 11 forfeit property to the United States Government.

00:03:30 12 If your offense involves fraud, you may be
00:03:33 13 required to provide notice of your conviction to the
00:03:36 14 victims of your crime.

00:03:37 15 In addition, if you are not a citizen of the
00:03:39 16 United States, your immigration status may be adversely
00:03:42 17 affected and you may be subject to deportation,
00:03:46 18 exclusion, or voluntary departure and prevented from
00:03:51 19 obtaining U.S. citizenship.

00:03:54 20 If you're charged with a sex crime, a
00:03:56 21 conviction may result in substantial future restrictions
00:03:59 22 on where you may live or work and with whom you may
00:04:03 23 associate. In addition, at the conclusion of any
00:04:06 24 sentence that is imposed, you may be subject to civil
00:04:09 25 commitment as a sexually dangerous person.

~~90a~~

00:04:14 1 As required by the law, a special assessment
00:04:16 2 or a monetary amount of \$100 for each felony offense or
00:04:23 3 count to which you plead guilty or are found guilty at
00:04:27 4 trial will be imposed against you. This special
00:04:30 5 assessment of \$100 per count will be in addition to and
00:04:36 6 on top of any fine that may also be imposed.

00:04:41 7 You may be given a term of supervised
00:04:43 8 release following any actual term of incarceration that
00:04:46 9 is imposed. Supervised release is similar to what you
00:04:49 10 may know as probation. The term of supervised release
00:04:54 11 in each individual case can range anywhere from one year
00:04:58 12 up to life based upon your individual criminal history
00:05:02 13 and the offense. Supervised release would require you
00:05:06 14 to report to your assigned probation officer from time
00:05:10 15 to time and to comply with any Court-imposed or
00:05:13 16 -directed instructions.

00:05:15 17 If you violate supervised release
00:05:17 18 conditions, you may be required to serve an additional
00:05:21 19 time of incarceration.

00:05:24 20 The United States Sentencing Commission has
00:05:26 21 established advisory guideline ranges for all federal
00:05:29 22 crimes. Although the district judge is no longer
00:05:32 23 required to specifically follow the guidelines in
00:05:36 24 sentencing you, he or she is required to calculate the
00:05:40 25 advisory guideline for your offense or offenses. The

91a

00:05:42 1 district judge will then consider that guideline range
00:05:45 2 as well as other relevant factors that are set forth in
00:05:48 3 18, U.S. Code, Section 3553(a) before imposing a
00:05:52 4 sentence. The district judge has the authority in some
00:05:56 5 circumstances to depart upward or downward from that
00:06:00 6 advisory guideline range and will also examine other
00:06:04 7 factors under 18, U.S. Code, Section 3553(a) that may
00:06:08 8 result in a sentence that is either greater or lesser
00:06:12 9 than the advisory guideline sentence.

00:06:16 10 If the district judge imposes a sentence
00:06:19 11 outside the guideline range, he or she is required to
00:06:23 12 explain on the record at the time of sentencing his or
00:06:26 13 her reasons for imposing a sentence outside the
00:06:30 14 guidelines.

00:06:33 15 Under some circumstances you may have the
00:06:36 16 right to appeal your sentence even though you pled
00:06:39 17 guilty to the underlying crime. However, if you have
00:06:43 18 waived the right to appeal your sentence in a plea
00:06:46 19 agreement with the United States, that agreement may be
00:06:48 20 binding upon you.

00:06:51 21 You should understand that parole has been
00:06:53 22 abolished in the United States court system. So if you
00:06:57 23 receive a sentence which includes an active term of
00:07:01 24 incarceration, you will not receive parole.

00:07:05 25 Regarding plea agreements, you should know

~~92a~~

00:07:08 1 that the Court is not a party to a plea agreement and
00:07:11 2 does not participate in the plea agreement negotiations.
00:07:15 3 However, the Court is obligated to examine carefully any
00:07:22 4 plea agreement with the Government to assure that the
00:07:25 5 agreement conforms to the objectives of sentencing. The
00:07:29 6 standard acceptance of plea agreements include those
00:07:32 7 stated in Rule 11 of the Federal Rules of Criminal
00:07:35 8 Procedure which provides in part as follows:

00:07:38 9 In one type of a plea agreement the
00:07:40 10 Government recommends to the Court or agrees not to
00:07:43 11 oppose the defendant's request to the Court that a
00:07:47 12 particular sentence or sentencing range is appropriate,
00:07:51 13 or that a particular provision of the guidelines does or
00:07:54 14 does not apply. If a plea agreement is of this type, if
00:07:59 15 the Court accepts the agreement, the recommendation or
00:08:03 16 request is not binding on the Court. If the Court does
00:08:09 17 not follow the recommendation or request, the defendant
00:08:12 18 has no right to withdraw his or her guilty plea.

00:08:17 19 On the other hand, there may be plea
00:08:20 20 agreements in which the Government agrees not to bring
00:08:23 21 or will move to dismiss other charges or which the
00:08:27 22 Government agrees that a specific sentence or sentencing
00:08:30 23 range is the appropriate disposition of the case, or
00:08:34 24 that a particular provision of the guidelines does or
00:08:37 25 does not apply. If a plea agreement is of this type, if

~~93a~~

00:08:41 1 the Court accepts the agreement, then the parties
00:08:44 2 agreed-upon terms are binding on the Court, and the
00:08:49 3 agreed-upon disposition will be included in the judgment
00:08:52 4 unless the plea agreement provides otherwise. However,
00:08:56 5 if the Court does not accept this type of a plea
00:08:59 6 agreement, where there is a binding agreed-upon
00:09:02 7 disposition between the parties, the defendant will be
00:09:05 8 given an opportunity to withdraw his or her plea. If
00:09:09 9 the defendant does not withdraw the plea, however, the
00:09:12 10 Court is not required to follow the plea agreement and
00:09:14 11 may dispose of the case less favorably than the plea
00:09:18 12 agreement contemplated.

00:09:20 13 A written presentence report will be
00:09:24 14 prepared by the probation office to assist the district
00:09:28 15 judge in sentencing. You will be asked to give
00:09:30 16 information for this report, and you're entitled to have
00:09:34 17 your attorney present during the interview. It is
00:09:36 18 important that the presentence report be accurate
00:09:40 19 because it will likely determine your punishment range.
00:09:43 20 After that report has been prepared, you and your
00:09:46 21 attorney will have an opportunity to review the report
00:09:49 22 and to object to any aspects of the report you believe
00:09:52 23 are inaccurate. Any objections to the presentence
00:09:56 24 report must be made in writing and on a timely basis.
00:10:01 25 If you do not contest the facts that are set forth in

~~94a~~

00:10:05 1 the presentence report, and the Court's independent
00:10:09 2 findings coincide with those fact, those facts will be
00:10:13 3 accepted by the Court as correct and will be relied upon
00:10:17 4 in determining the guidelines applicable to your case.

00:10:21 5 If a party seeks to argue for a sentence
00:10:24 6 which varies from the sentencing guidelines, that person
00:10:29 7 shall file a written briefing in support of that
00:10:33 8 position and serve a courtesy copy on the probation
00:10:36 9 officer who drafted the PSR.

00:10:38 10 At the time of sentencing you and your
00:10:40 11 attorney will be given a chance to speak to the Court
00:10:42 12 and to argue for a sentence that you and your attorney
00:10:44 13 feel is appropriate under 18, U.S. Code, Section
00:10:47 14 3553(a). While Judge Flanagan does not allow oral
00:10:53 15 testimony in the nature of character evidence at the
00:10:56 16 sentencing hearing, she will be happy to receive from
00:10:59 17 your attorney written sentencing briefing or character
00:11:02 18 letters, which should be provided to the Court at least
00:11:06 19 seven days before the date you are scheduled to be
00:11:09 20 sentenced.

00:11:10 21 Finally, if there are any victims of the
00:11:14 22 offenses for which you are to be sentenced, these
00:11:18 23 victims will be given the chance to be heard at the
00:11:20 24 sentencing hearing.

00:11:21 25 That concludes the explanation of your

~~95a~~

00:11:23 1 rights.

00:11:24 2 Those cases in which a plea of guilty is
00:11:28 3 entered today will be scheduled for a sentencing hearing
00:11:33 4 to be held no sooner than 90 days from today before
00:11:37 5 Judge Flanagan. It is anticipated those cases will be
00:11:40 6 set for the August 2018 term.

00:11:42 7 In cases that result in a not guilty plea
00:11:44 8 today, counsel will be contacted by the Court to
00:11:48 9 schedule an administrative telephonic conference before
00:11:50 10 Judge Flanagan and to obtain the necessary dial-in
00:11:53 11 instructions to participate in that conference.

00:11:55 12 All right. Each defendant appearing today
00:11:58 13 for arraignment should know that as I take up your case
00:12:01 14 to hear your plea and to address you personally that you
00:12:05 15 will be placed under oath, and that if you should answer
00:12:08 16 any of my questions falsely that your answers may later
00:12:11 17 be used against you in another prosecution for perjury
00:12:14 18 or making a false statement.

00:12:18 19 All right. Ms. Burnette, Mr. Duffy, Ms.
00:12:30 20 Menzer, are there any victims in any of these cases for
00:12:35 21 arraignment this morning? If so, have they been
00:12:38 22 notified and wish to be heard at this morning's session?

00:12:41 23 (Discussion had regarding other cases.)

00:13:21 24 MS. MENZER: With regard to Mr. Nance, there
00:13:24 25 are no identifiable victims.

~~96a~~

00:13:24 1 (Discussion had regarding other cases.)

00:44:40 2 THE CLERK: The Court calls for arraignment

00:44:41 3 the case of United States of America versus Larry Lamar

00:44:44 4 Nance, court file 5:17-cr-404-FL, Defendant 1.

00:44:54 5 Mr. Nance, if you would raise your right

00:44:57 6 hand, please, I'll put you under oath.

00:45:01 7 (Whereupon the Defendant was sworn by the

00:45:08 8 clerk.)

00:45:08 9 THE COURT: Mr. Nance, sir, I have a

00:45:11 10 document here in your case entitled "Consent to Proceed

00:45:14 11 Before a Magistrate Judge." It appears to be signed by

00:45:17 12 you as well as Ms. Mahan, your attorney in this case.

00:45:23 13 Did you sign this document, sir?

00:45:25 14 THE DEFENDANT: Yes.

00:45:25 15 THE COURT: And is it your knowing and

00:45:27 16 voluntary desire, Mr. Nance, that for the purpose of

00:45:32 17 conducting your arraignment and taking your plea this

00:45:35 18 morning that I may conduct these proceedings as a United

00:45:42 19 States Magistrate Judge?

00:45:43 20 THE DEFENDANT: Yes.

00:45:43 21 THE COURT: Thank you. Please have a seat.

00:45:45 22 All right. Mr. Nance, sir, do you

00:46:01 23 understand that you are now under oath and that if you

00:46:04 24 answer any of my questions falsely that your answers may

00:46:07 25 later be used against you in another prosecution for

~~97a~~

00:46:10 1 perjury or making a false statement?

00:46:14 2 THE DEFENDANT: Yes, sir.

00:46:14 3 THE COURT: What is your full name?

00:46:17 4 THE DEFENDANT: Larry Lamar Nance.

00:46:20 5 THE COURT: How old are you?

00:46:21 6 THE DEFENDANT: Thirty-three.

00:46:22 7 THE COURT: How far have you gone in

00:46:24 8 school?

00:46:25 9 THE DEFENDANT: Tenth grade.

00:46:25 10 THE COURT: Are you able to speak and

00:46:27 11 understand English?

00:46:28 12 THE DEFENDANT: Yes, sir.

00:46:28 13 THE COURT: Are you able to read?

00:46:30 14 THE DEFENDANT: Yes, sir.

00:46:30 15 THE COURT: Are you currently or have you

00:46:32 16 recently been under the care of a physician or

00:46:35 17 psychiatrist or been hospitalized or treated for

00:46:39 18 narcotics addiction?

00:46:40 19 THE DEFENDANT: No, sir.

00:46:42 20 THE COURT: You have taken any drugs, any

00:46:44 21 medicine, any pills, or had any alcoholic beverages in

00:46:48 22 the past 24 hours?

00:46:49 23 THE DEFENDANT: No, sir.

00:46:50 24 THE COURT: Mr. Nance, have you been

00:46:51 25 provided with a copy of the charges against you in this

~~98a~~

00:46:55 1 case?

00:46:56 2 THE DEFENDANT: Yes, sir.

00:46:57 3 THE COURT: And have you discussed those
00:46:58 4 charges fully as well as your case in general with your
00:47:01 5 attorney?

00:47:02 6 THE DEFENDANT: Yes, sir.

00:47:03 7 THE COURT: Mr. Nance, do you understand the
00:47:05 8 charges against you?

00:47:06 9 THE DEFENDANT: Yes, sir.

00:47:07 10 THE COURT: Do you understand what's
00:47:08 11 happening this morning?

00:47:09 12 THE DEFENDANT: Yes, sir.

00:47:10 13 THE COURT: Ms. Mahan, have you had any
00:47:13 14 difficulty in communicating with Mr. Nance or any reason
00:47:16 15 to doubt his mental competency?

00:47:20 16 MS. MAHAN: No, Your Honor.

00:47:21 17 THE COURT: Ms. Menzer, does the Government
00:47:24 18 doubt Mr. Nance's mental competency in this case?

00:47:28 19 MS. MENZER: No, Your Honor.

00:47:29 20 THE COURT: The Court finds the defendant,
00:47:31 21 Larry Lamar Nance, is competent to appear, to understand
00:47:34 22 the nature of these proceedings, and to ultimately plead
00:47:37 23 in these matters.

00:47:39 24 Mr. Nance, sir, have you had the time to and
00:47:41 25 have you, in fact, discussed your case with your

~~99a~~

00:47:43 1 attorney?

00:47:44 2 THE DEFENDANT: Yes, sir.

00:47:45 3 THE COURT: Are you satisfied with Ms.
00:47:46 4 Mahan's advice and counsel to you in this matter?

00:47:50 5 THE DEFENDANT: Yes, sir.

00:47:50 6 THE COURT: Did you hear and understand my
00:47:52 7 explanation of your rights this morning?

00:47:54 8 THE DEFENDANT: Yes, sir.

00:47:55 9 THE COURT: Did you understand my general
00:47:56 10 explanation of how you might be sentenced in this case?

00:47:59 11 THE DEFENDANT: Yes, sir.

00:48:00 12 THE COURT: And did you receive a copy, Mr.
00:48:02 13 Nance, of the indictment in this case charging you in
00:48:06 14 four counts?

00:48:07 15 THE DEFENDANT: Yes, sir.

00:48:07 16 THE COURT: Do you understand what you're
00:48:09 17 charged with in those counts?

00:48:10 18 THE DEFENDANT: Yes, sir.

00:48:10 19 THE COURT: Do you want me to read the
00:48:12 20 indictment charges to you aloud, or do you waive the
00:48:14 21 reading of them?

00:48:15 22 THE DEFENDANT: I waive the reading.

00:48:16 23 THE COURT: All right. Thank you. I am,
00:48:18 24 however, required to remind you of the maximum possible
00:48:21 25 penalty, not the guidelines, but the maximum possible

~~100a~~

00:48:24 1 penalty for each count that you face, including any
00:48:29 2 mandatory minimum penalty.

00:48:31 3 Ms. Menzer, could you remind Mr. Nance as to
00:48:35 4 that information.

00:48:36 5 MS. MENZER: Yes, Your Honor. With respect
00:48:37 6 to Count 1, the maximum penalty is not more than 20
00:48:42 7 years imprisonment, a fine not to exceed \$1 million, not
00:48:46 8 more than three years supervised release, not more than
00:48:48 9 two years imprisonment upon revocation of supervised
00:48:51 10 release, a \$100 special assessment, and restitution.

00:48:56 11 If found with one prior felony conviction,
00:48:59 12 the maximum penalty would increase to not more than 30
00:49:02 13 years imprisonment, not more than a \$2 million fine, not
00:49:06 14 less than six years supervised release, not more than
00:49:08 15 three years imprisonment upon revocation of supervised
00:49:11 16 release, a \$100 special assessment, and restitution if
00:49:14 17 applicable.

00:49:17 18 The same penalties, Your Honor, would apply
00:49:20 19 to Count 2 of the indictment.

00:49:23 20 With respect to Count 3 of the indictment,
00:49:25 21 the maximum penalty would be not less than five years
00:49:29 22 and not more than life imprisonment to run consecutive
00:49:33 23 to any other term of imprisonment imposed, a fine not to
00:49:37 24 exceed \$250,000, not more than five years supervised
00:49:40 25 release, not more than five years imprisonment upon

101a

00:49:42 1 revocation of supervised release, a \$100 special
00:49:45 2 assessment, and restitution.

00:49:47 3 With respect to Count 4, Your Honor,
00:49:49 4 unlawful possession of a firearm by a convicted felon,
00:49:52 5 the maximum penalty for a non armed career offender
00:49:56 6 would be not more than ten years imprisonment, a fine
00:49:59 7 not to exceed \$250,000, not more than three years
00:50:02 8 supervised release, not more two years imprisonment upon
00:50:06 9 revocation of supervised release, a \$100 special
00:50:08 10 assessment, and restitution.

00:50:14 11 If Mr. Nance is found to be an armed career
00:50:14 12 offender, the maximum penalty would be increased to a
00:50:18 13 term of imprisonment of not less than 15 years but not
00:50:20 14 more than life imprisonment, a fine not to exceed
00:50:23 15 \$250,000, not more than five years supervised release,
00:50:26 16 not more than five years imprisonment upon revocation of
00:50:29 17 supervised release, a \$100 special assessment, and
00:50:33 18 restitution.

00:50:34 19 THE COURT: Thank you.

00:50:34 20 Mr. Nance, do you understand the four
00:50:36 21 charges against you in this case as well as the maximum
00:50:39 22 punishment you face if convicted of those four charges?

00:50:43 23 THE DEFENDANT: Yes, sir.

00:50:43 24 THE COURT: All right. Ms. Mahan, were all
00:50:46 25 formal plea offers by the Government conveyed to Mr.

~~102a~~

00:50:48 1 Nance?

00:50:50 2 MS. MAHAN: They were, Your Honor.

00:50:50 3 THE COURT: Mr. Nance, I've been provided
00:50:52 4 another document in your case. This is a seven-page
00:50:55 5 document; it is entitled "Memorandum of Plea Agreement."
00:50:58 6 It appears to be signed by you as well as Ms. Mahan,
00:51:02 7 your attorney in this case. It appears from this
00:51:04 8 document that it is your intention to plead guilty to
00:51:08 9 Counts 1 and 3 of the indictment. Is that your
00:51:11 10 intention, sir?

00:51:12 11 THE DEFENDANT: Yes, sir.

00:51:12 12 THE COURT: Did you sign this document?

00:51:14 13 THE DEFENDANT: Yes, sir.

00:51:16 14 THE COURT: Mr. Nance, have you had an
00:51:18 15 opportunity to read and to discuss this plea agreement
00:51:20 16 with your attorney; and did you, in fact, do so before
00:51:24 17 you signed it?

00:51:26 18 THE DEFENDANT: Yes, sir.

00:51:26 19 THE COURT: Does the plea agreement, Mr.
00:51:28 20 Nance, represent in its entirety any and all agreements
00:51:31 21 that you have with the United States and the U.S.
00:51:34 22 Attorney?

00:51:34 23 THE DEFENDANT: Yes, sir.

00:51:35 24 THE COURT: Did you understand the terms,
00:51:36 25 the language, the words, the sentences, even any legal

~~103a~~

00:51:41 1 phrases that are used in the plea agreement after you
00:51:44 2 discussed it with Ms. Mahan?

00:51:46 3 THE DEFENDANT: Yes, sir.

00:51:47 4 THE COURT: Do you understand that by
00:51:49 5 entering into this plea agreement and entering a plea of
00:51:52 6 guilty that you will have waived or given up your right
00:51:54 7 to appeal or to collaterally attack all or a part of
00:51:59 8 your sentence? Do you understand that, Mr. Nance?

00:52:07 9 MS. MAHAN: May I have a minute, Your Honor?

00:52:09 10 THE COURT: Go ahead.

00:52:18 11 MS. MAHAN:

00:52:18 12 (Discussion had off the record between the
00:52:19 13 Defendant and Defense Counsel.)

00:52:19 14 MS. MAHAN: Thank you, Your Honor.

00:52:20 15 THE COURT: Mr. Nance, do you understand
00:52:21 16 that by entering into this plea agreement and entering a
00:52:24 17 plea of guilty that you will have waived or given up
00:52:26 18 your right to appeal or to collaterally attack all or a
00:52:31 19 part of your sentence?

00:52:32 20 THE DEFENDANT: Yes, sir.

00:52:32 21 THE COURT: Has anyone, Mr. Nance, made any
00:52:35 22 other or different promises to you to get you to plead
00:52:38 23 guilty in this case other than what is contained in the
00:52:41 24 plea agreement?

00:52:42 25 THE DEFENDANT: No, sir.

~~104a~~

00:52:42 1 THE COURT: Has anyone threatened you in any
00:52:45 2 way to persuade you to either accept this agreement or
00:52:48 3 plead guilty in this case?

00:52:50 4 THE DEFENDANT: No, sir.

00:52:50 5 THE COURT: Mr. Nance, sir, are you pleading
00:52:52 6 guilty of your own free will because you are, in fact,
00:52:55 7 guilty?

00:52:55 8 THE DEFENDANT: Yes, sir.

00:52:56 9 THE COURT: Now, do you understand that the
00:52:59 10 offenses to which you are pleading guilty each is a
00:53:02 11 felony offense, that if your plea is accepted by the
00:53:05 12 Court you'll be found guilty of those offenses and that
00:53:08 13 that may deprive you of valuable civil rights such as
00:53:11 14 the right to vote, to hold public office, to serve on a
00:53:15 15 jury and possess a firearm?

00:53:18 16 THE DEFENDANT: Yes, sir.

00:53:18 17 THE COURT: Do you understand that if you
00:53:20 18 are not a United States citizen a plea of guilty may
00:53:24 19 subject you to deportation, exclusion, or voluntary
00:53:29 20 departure and prevent you from obtaining U.S.
00:53:32 21 citizenship?

00:53:35 22 THE DEFENDANT: Yes, sir.

00:53:36 23 THE COURT: Do you understand if I accept
00:53:38 24 your plea of guilty this morning that you may not be
00:53:40 25 able to withdraw your plea and have a trial in this

105a

00:53:42 1 case?

00:53:42 2 THE DEFENDANT: Yes, sir.

00:53:43 3 THE COURT: Have you answered all of my
00:53:44 4 questions truthfully?

00:53:45 5 THE DEFENDANT: Yes, sir.

00:53:45 6 THE COURT: Do you need my more time to
00:53:47 7 think about your plea or discuss your case with Ms.
00:53:51 8 Mahan before entering your plea?

00:53:53 9 THE DEFENDANT: No, sir.

00:53:54 10 THE COURT: Mr. Nance, how do you plead to
00:53:56 11 Count 1 of the indictment?

00:53:59 12 THE DEFENDANT: Guilty.

00:54:00 13 THE COURT: Mr. Nance, how do you plead to
00:54:02 14 Count 3 of the indictment?

00:54:05 15 THE DEFENDANT: Guilty.

00:54:11 16 THE COURT: All right. Mr. Nance, with
00:54:13 17 respect to Count 1, did you, as the Government has
00:54:16 18 alleged in Count 1, on or about April 25, 2017, in the
00:54:22 19 Eastern District of North Carolina, knowingly and
00:54:27 20 intentionally possess with the intent to distribute a
00:54:30 21 quantity of cocaine and cocaine base (crack), Schedule
00:54:36 22 II controlled substances, and a quantity of heroin, a
00:54:37 23 Schedule I controlled substance, in violation of 21,
00:54:41 24 U.S. Code, Section 841(a)(1)? Did you do all that?

00:54:44 25 THE DEFENDANT: Yes, sir.

~~106a~~

00:54:46 1 THE COURT: With respect to Count 3, did
00:54:54 2 you, as the Government has alleged in Count 3, on or
00:54:58 3 about April 28, 2017, in Eastern District of North
00:55:04 4 Carolina, knowingly use and carry a firearm during and
00:55:06 5 in relation to a drug trafficking crime for which you
00:55:10 6 may be prosecuted in a Court of the United States as
00:55:13 7 alleged in Count 2 of the indictment and did possess
00:55:16 8 such firearm in furtherance of said drug trafficking
00:55:20 9 crime, in violation of 18, U.S. Code, Section
00:55:23 10 924(c)(1)(A)? Did you do all that?

00:55:27 11 THE DEFENDANT: Yes, sir.

00:55:27 12 THE COURT: Ms. Menzer, if you could provide
00:55:29 13 the Court a factual basis in support of Mr. Nance's plea
00:55:32 14 of guilty to Count 1 and Count 3 telling the Court what
00:55:36 15 the Government believes it could prove at a trial in
00:55:38 16 this case.

00:55:41 17 MS. MENZER: Yes, thank you, Your Honor. If
00:55:42 18 this case had gone to trial, the Government's evidence
00:55:44 19 would have shown beyond a reasonable doubt that on April
00:55:46 20 25, 2017, Fayetteville Police responded to a noise
00:55:50 21 complaint at 6407 Milford Road. There were six vehicles
00:55:55 22 in the yard including the defendant's 2013 Chevrolet
00:55:58 23 Malibu. There was a strong smell of marijuana.

00:56:00 24 After the officers informed the resident
00:56:03 25 that he was conducting a seize and freeze so he could

107a

00:56:05 1 apply for a search warrant, the defendant and others
00:56:07 2 took off running.

00:56:08 3 With the assistance of a K-9, the defendant
00:56:11 4 was found hiding in a shed.

00:56:13 5 Pursuant to a search warrant the police
00:56:14 6 found in the change tray of his car to the left of the
00:56:18 7 steering wheel 16 bindles of heroin that bore the stamp
00:56:23 8 "Bone Crusher," a bag containing approximately 3.6 grams
00:56:27 9 of cocaine, and 4.2 grams of crack cocaine.

00:56:30 10 With respect to Count 3, three days later on
00:56:34 11 April 28, 2017, at approximately 6:20 a.m., Fayetteville
00:56:40 12 Police officers responded to a trespassing call at 305
00:56:44 13 Ontra Drive. The defendant was parked in his former
00:56:47 14 girlfriend's driveway. He was in his 2013 Chevrolet
00:56:51 15 Malibu. Police body cam video shows the defendant
00:56:54 16 refused to roll down his window. One of the officers
00:56:58 17 smelled marijuana.

00:56:58 18 The defendant began to drive toward a fence
00:57:01 19 in the backyard and refused to stop when the police
00:57:05 20 commanded him to do so.

00:57:06 21 Another officer opened the front passenger
00:57:09 22 door and saw a black handgun in plain view on the front
00:57:12 23 passenger's seat. The officer covered the gun with her
00:57:15 24 body and reached across to turn the engine off. The
00:57:20 25 defendant was detained.

~~108a~~

00:57:21 1 The handgun, a Springfield Armory .45
00:57:25 2 caliber handgun model XD, Serial number XS630246 was
00:57:30 3 loaded with one bullet in the chamber. Police records
00:57:34 4 show that this handgun had been reported stolen by a
00:57:37 5 Fort Bragg soldier on May 29, 2014.

00:57:41 6 The police also found 12 bindles of heroin
00:57:46 7 weighing approximately 3.6 grams in the driver's door
00:57:49 8 handle. These bindles bore the same stamp, "Bone
00:57:51 9 Crusher," as those seized three days earlier.

00:57:53 10 In addition there was a plastic bag of
00:57:55 11 marijuana weighing approximately 2.5 grams and a blunt
00:58:00 12 cigar filled with marijuana underneath the radio in the
00:58:03 13 console.

00:58:04 14 The defendant had \$209 in U.S. currency on
00:58:07 15 his person.

00:58:10 16 THE COURT: Ms. Mahan, do you care to
00:58:13 17 respond to the Government's proffer?

00:58:16 18 MS. MAHAN: No, Your Honor.

00:58:16 19 THE COURT: Mr. Nance, did you hear the
00:58:17 20 description of the criminal conduct in this case the
00:58:20 21 prosecutor has provided to the Court?

00:58:21 22 THE DEFENDANT: Yes, sir.

00:58:22 23 THE COURT: Do you dispute anything she's
00:58:23 24 told me?

00:58:24 25 THE DEFENDANT: No, sir.

~~109a~~

00:58:25 1 THE COURT: All right. Thank you.

00:58:26 2 The Court is satisfied with the responses
00:58:29 3 given during this hearing and makes the following
00:58:31 4 findings: It is finding of this Court in the case of
00:58:34 5 United States of America versus Larry Lamar Nance, case
00:58:37 6 5:17-cr-404, that Mr. Nance is fully competent and
00:58:44 7 capable of entering informed pleas; that his plea of
00:58:50 8 guilty to Count 1 and his plea of guilty to Count 3 are
00:58:54 9 each being made knowingly and voluntarily; each is
00:58:58 10 supported by an independent factual basis containing
00:59:01 11 each of the essential elements of the offenses charged
00:59:03 12 therein. Mr. Nance's pleas are therefore accepted. He
00:59:06 13 is hereby adjudged guilty of Counts 1 and 3 of the
00:59:09 14 indictment. The Court hereby conditionally approves the
00:59:13 15 plea agreement the parties have reached in this case.

00:59:15 16 The parties will be notified in writing of
00:59:17 17 the date and place of sentencing in this matter. As I
00:59:21 18 said earlier, it is anticipated sentencing will occur
00:59:25 19 before Judge Flanagan at her August 2018 term.

00:59:29 20 Defense counsel is directed to contact
00:59:30 21 probation before leaving the court today to arrange a
00:59:34 22 time to commence the preparation of the PSR in this
00:59:37 23 case.

00:59:37 24 All right. Anything further regarding Mr.
00:59:39 25 Nance's case?

110a

00:59:40 1 MS. MAHAN: No, Your Honor.

00:59:41 2 MS. MENZER: No, Your Honor.

00:59:42 3 THE COURT: Thank you.

4 (Concluded at 10:37 a.m.)

5 - - -

6 **C E R T I F I C A T E**

7

8 I certify that the foregoing is a correct transcript
9 from the record of proceedings in the above-entitled
10 matter.

11

12 /s/ Tracy L. McGurk_____

____9/27/2018____

13 Tracy L. McGurk, RMR, CRR

Date

14

15

16

17

18

19

20

21

22

23

24

25

APPENDIX G

111a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

FILED IN OPEN COURT
ON 12-13-2017
Peter A. Moore, Jr., Clerk
US District Court
Eastern District of NC
JTA

NO. 5:17-CR-404-IFL(1)

UNITED STATES OF AMERICA,

V.

I N D I C T M E N T

LARRY LAMAR NANCE

The Grand Jury charges that:

COUNT ONE

On or about April 25, 2017, in the Eastern District of North Carolina, the defendant, LARRY LAMAR NANCE, did knowingly and intentionally possess with the intent to distribute a quantity of cocaine and cocaine base (crack), Schedule II controlled substances, and a quantity of heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT TWO

On or about April 28, 2017, in the Eastern District of North Carolina, the defendant, LARRY LAMAR NANCE, did knowingly and intentionally possess with the intent to distribute a quantity of heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

APPENDIX G

112a

COUNT THREE

On or about April 28, 2017, in the Eastern District of North Carolina, the defendant, LARRY LAMAR NANCE, did knowingly use and carry a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a Court of the United States as alleged in Count Two of this indictment and did possess such firearm in furtherance of said drug trafficking crime, in violation of Title 18, United States Code, Section 924(c)(1)(A).

COUNT FOUR

On or about April 28, 2017, in the Eastern District of North Carolina, the defendant, LARRY LAMAR NANCE, having previously been convicted of a crime punishable by a term of imprisonment exceeding one (1) year, did knowingly possess

[Remainder of page intentionally blank]

APPENDIX G

113a

in and affecting commerce, a firearm, in violation of Title
18, United States Code, Sections 922(g)(1) and 924.

A TRUE BILL

REDACTED VERSION

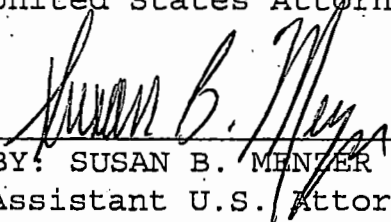
Pursuant to the E-Government Act and the
federal rules, the unredacted version of
this document has been filed under seal.

FOREPERSON

13 Dec 2017

DATE

ROBERT J. HIGDON, JR.
United States Attorney


BY: SUSAN B. MENTER
Assistant U.S. Attorney