FILED
United States Court of Appeals
Tenth Circuit

June 23, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL LOVATO,

Defendant - Appellant.

No. 18-1468
(D.C. No. 1:18-CR-00213-RM-1)
(D. Colo.)

ORDER

Before **BACHARACH**, **KELLY**, and **CARSON**, Circuit Judges.

This matter is before the court on Appellant's *Petition for Rehearing En Banc*. The petition was transmitted to all non-recused judges of the court who are in regular active service. As no member of the panel and no non-recused judge in regular active service on the court requested that the court be polled, the request for rehearing *en banc* is DENIED pursuant to Fed. R. App. P. 35(f).

The three pending motions for leave to file an amicus brief are GRANTED.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

February 27, 2020

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL LOVATO,

Defendant - Appellant.

No. 18-1468

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:18-CR-00213-RM-1)

John C. Arceci, Assistant Federal Public Defender (Shira Kieval, Assistant Federal Public Defender, and Virginia L. Grady, Federal Public Defendant, on the briefs), Office of the Federal Public Defender for the Districts of Colorado and Wyoming, Denver, CO, for the Appellant Daniel Lovato.

Paul Farley, Assistant United States Attorney (Jason R. Dunn, United States Attorney, with him on the brief), Office of the United States Attorney for the District of Colorado, Denver, CO, for the Appellee.

Before **BACHARACH**, **KELLY**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

This action arose out of the district court's admission of a 911 call under the present sense impression exception to the rule against hearsay. Defendant Daniel

Lovato ("Defendant") alleges that, in doing so, the district court abused its discretion.[1] Following admission of the 911 call, a jury convicted Defendant of two counts of being a felon in possession of a firearm or ammunition. The district court merged the two counts of conviction, and sentenced Defendant to 100 months' imprisonment followed by three years of supervised release. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm Defendant's conviction.

I.

On March 3, 2018, a man called 911 to report that he witnessed two men in a Honda shoot at another car. The caller followed the Honda and dialed 911 within "two to three minutes" of observing the gunfire.[2] During the approximately thirteen-minute 911 call, the caller discussed the shooting, his continuing observations of the Honda and its occupants, and his safety, often in response to the 911 operator's questions.

The caller began the call by stating that occupants of the Honda "just shot at" another car. After providing his location, phone number, and name to the 911 operator, the caller again described his observations of the shooting less than one minute into the call. Specifically, the caller stated that he observed two Hispanic males in the Honda shoot at a white Durango. Less than three minutes into the call,

[1] Defendant presented two collateral issues related to his sentence, both of which the parties now agree that our recent opinions resolve.

[2] In quoting the 911 call, we rely on the audio recording of the call on file. The recording does not differ materially from the written transcript of the 911 call.

the caller informed the 911 operator that the shooting occurred "five or six minutes ago."

While the caller continued to follow the Honda, he conveyed additional information of his observations of the Honda. The 911 operator returned the conversation to the shooting about five minutes into the call—seven to eight minutes after the shooting occurred. The caller responded that someone in the Honda fired "two shots," and provided the exact location of the shooting. Just over eight minutes into the call, the 911 operator asked for a description of the suspects, which the caller provided. The caller next stated that the passenger of the Honda was the shooter. Finally, the caller observed the Honda run a red light, at which point he lost sight of the Honda. The caller provided his address to the 911 operator and, with the Honda then out of sight, ended the call after about thirteen minutes.

Shortly thereafter, responding police officer Levi Braun ("Officer Braun") located a Honda matching the caller's description. With Officer Braun in pursuit, the Honda slowed down and Defendant jumped out of the passenger's side of the moving car. Officer Braun stopped to detain Defendant, who volunteered that he had a gun on him. Officer Braun then retrieved a .22 caliber pistol from Defendant's waistband, along with thirty-two rounds of .22 caliber ammunition from Defendant's left front pants pocket. The pistol had a spent shell casing in the chamber, which indicated that someone recently fired the weapon. Officer Braun also located a canister filled with more ammunition in the street near Defendant. Defendant told

officers that the driver of the Honda gave him the gun and ammunition, pointed a second gun at him, and threatened to shoot him if he did not jump out of the car.

At the time of this incident, Defendant had prior felony convictions. The government ultimately charged Defendant with three violations of the 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm or ammunition: one each for possessing the .22 caliber pistol, thirty-two rounds of .22 caliber ammunition, and canister full of additional ammunition.

At trial, Defendant objected to the admission of the 911 call on hearsay grounds. The district court overruled the objection and admitted the 911 call into evidence under the present sense impression exception to the rule against hearsay. The district court concluded "that the length of the call, and the continuous discussion is [not] such that it destroys the contemporaneousness" required to qualify as a present sense impression. The district court based its conclusion on a finding that the call was "essentially, a continuous conversation" about "the same continuing event." The government played the 911 call for the jury.

Although Defendant admitted to possessing the .22 caliber pistol and ammunition, he raised the affirmative defense of duress caused by the driver's threat. Defendant further claimed that the driver was the one who shot at the other car. The 911 call contradicted significant aspects of Defendant's testimony. The jury

ultimately convicted Defendant on two counts of violating 18 U.S.C. § 922(g)(1) for possession of the .22 caliber pistol and ammunition in his pants pocket.[3]

After granting Defendant's motion to merge the two counts of conviction, the district court sentenced Defendant to 100 months' imprisonment.[4] The district court also imposed a three-year term of supervised release with special conditions following Defendant's release from prison. Of note, the third special condition of supervised release ("Special Condition Three") requires Defendant to "take all medications that are prescribed by [his] treating psychiatrist" and "cooperate with random blood tests" to demonstrate compliance with the condition. Defendant now appeals.

II.

Defendant contends the district court abused its discretion by admitting the 911 call over his hearsay objection. Specifically, Defendant argues the 911 call does not qualify under the present sense impression exception to the rule against hearsay.

"We review the district court's evidentiary rulings for an abuse of discretion, considering the record as a whole." United States v. Trujillo, 136 F.3d 1388, 1395 (10th Cir. 1998). "Because hearsay determinations are particularly fact and case

[3] The jury acquitted on the third count of being a felon in possession of ammunition regarding the ammunition canister.

[4] Over Defendant's objection, the district court found that Defendant had two prior convictions for crimes of violence, and correctly calculated Defendant's guideline sentencing range to be 100 to 125 months based on a total offense level of 24.

specific, we afford heightened deference to the district court when evaluating hearsay objections." Id.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." United States v. Collins, 575 F.3d 1069, 1073 (10th Cir. 2009) (quoting Fed. R. Evid. 801(c)). Under Federal Rule of Evidence ("Rule") 802, hearsay is inadmissible, subject to certain exceptions. Fed. R. Evid. 802. A declarant's "present sense impression" qualifies as one such exception. Fed. R. Evid. 803(1).

Under Rule 803(1), "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it" is admissible as an exception to the rule against hearsay, regardless of whether the declarant is available as a witness. Id. "In evidence law, we generally credit the proposition that statements about an event and made *soon after* perceiving that event are especially trustworthy because 'substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.'" Navarette v. California, 572 U.S. 393, 399–400 (2014) (quoting Fed. R. Evid. 803(1) advisory committee's notes to 1972 proposed rules (emphasis added)). "Unsurprisingly, 911 calls that would otherwise be inadmissible hearsay have often been admitted on those grounds." Id. at 400 (analogizing to the present sense impression exception in a Fourth Amendment case). Defendant argues that: (1) the district court abused its discretion by analyzing the 911 call as a whole and (2) the caller's statements were

not sufficiently contemporaneous to qualify as present sense impressions.[5] We address Defendant's arguments in turn.

A.

We start by addressing the manner in which the district court considered the admissibility of the 911 call. On this issue, we conclude that the district court properly analyzed the 911 call as a whole because: (1) no authority requires otherwise in this context, (2) all the statements made within the call pertain to the same temporal event without a substantial change in circumstances, and (3) other relevant factors support the reliability of the statements within the call.

No authority creates a blanket requirement that a court must individually analyze each statement within a broader narrative under the present sense impression exception. Indeed, we have affirmed the admission of entire 911 calls as present sense impressions without requiring such a particularized inquiry. See United States v. Allen, 235 F.3d 482, 493 (10th Cir. 2000) (concluding that a 911 tape as a whole "was admissible as . . . a present sense impression"). Where we—or the Supreme Court—have not recognized a novel rule or extended a principle to a materially distinct context, it stands to reason that the district court did not abuse its discretion in likewise declining to do so. See Sorbo v. United Parcel Serv., 432 F.3d 1169,

[5] Defendant also argues that the 911 call includes speculative statements that are not admissible as present sense impressions. Defendant imbeds this contention within his argument that the statements lack sufficient contemporaneity because, the argument follows that, speculation demonstrates that the caller had an opportunity for reflection or interpretation. We will address this argument in like manner.

1177 (10th Cir. 2005) (reasoning that a district court does not abuse its discretion when we "know of no authority suggesting that the district court was required" to act in a certain manner). Even though some circumstances may require a court to conduct a more particularized analysis—and we are certainly not saying that the district court would have abused its discretion had it done so here—those circumstances are not present in this case. See Williamson v. United States, 512 U.S. 594, 599 (1994) (conflicting motives for separate statements); United States v. Jackson, 124 F.3d 607, 618 (4th Cir. 1997) (intervening event between statements).

Defendant, however, argues that Williamson requires courts to individually analyze whether each statement within a 911 call is admissible. 512 U.S. at 599. We acknowledge the Supreme Court has opined that the definition of a "statement" under the hearsay rules is limited to "a single declaration or remark" and Rule 803(1) refers to a "statement" that qualifies as present sense impression. Id. (determining in the context of statements against interest that a court must exclude non-self-inculpatory parts of a broader, generally self-inculpatory narrative as inadmissible hearsay). But the principle from Williamson is readily distinguishable because it arises in the context of self-inculpatory statements and is supported by an entirely different rationale than at issue here. See id.

Specifically, the rationale behind separating out non-self-inculpatory statements from self-inculpatory ones is based on credibility concerns due to a declarant's motivation for self-inculpation. See id. at 599–600 (observing that "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that

seems particularly persuasive because of its self-inculpatory nature"). Motivation for self-inculpation, however, is not at issue here because the 911 caller in this case was a non-party observer, detached from any allegations of wrongdoing.

In this context, the district court did not need to disassociate each statement within the call to ameliorate credibility concerns. We therefore decline to extend the principle in Williamson to this case because the 911 caller's status as a disinterested observer eliminates the need to assess whether self-serving motives tainted the credibility of individual statements within the 911 call. See id. Thus, we conclude that the district court did not abuse its discretion solely by considering the admissibility of the 911 call as a whole, rather than parsing each individual statement within the call.

Next, no substantial change in circumstances occurred during the call. When a significant, intervening event or substantial change in circumstances occurs between statements, Rule 803(1) may require a court to treat a declarant's statements differently. See Jackson, 124 F.3d at 618 (observing that a witness's statement made after police intervened and gained control of the scene may not qualify as a present sense impression even though earlier statements did qualify). Here, the caller witnessed a shooting, called 911, and followed the Honda during the call with no interruption or police intervention. The caller maintained focus on the Honda and its occupants for the entirety of the discussion. Although the discussion shifts between related topics, the call continually focused on an ongoing stream of observations, which supports the admissibility of the call as a whole. See United States v. Beck,

122 F.3d 676, 682 (8th Cir. 1997) (indicating statements made about events that "were part of a single, continuous event" were properly admitted under Rule 803(1)).

Finally, the factors relevant to Rule 803(1)'s trustworthiness rationale applied to the call as a whole. "A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." Navarette, 572 U.S. at 400. Although the use of the 911 system alone "does not 'suggest that tips in 911 calls are *per se* reliable,'" a caller's use of the system mitigates some concern regarding reliability. United States v. Gaines, 918 F.3d 793, 806 (10th Cir. 2019) (Tymkovich, C.J., dissenting) (quoting Navarette, 572 U.S. at 401).[6] Other indicia of reliability are present "when the caller reveals where he is located, jeopardizing his anonymity; does not decline to give any information, especially identifying information; and does not seem in any hurry to make an allegation and hang up." Id. at 806–07 (observing when a caller does not describe activities with precise contemporaneity, it "weakens the reliability" of the call as a whole, but "other indicia of reliability" can make the call "fairly credible" evidence when viewed in full context (id. at 806)).

[6] To be clear, a particular credibility judgment of the declarant does not make or prohibit a statement from being present sense impression, but the means through which a declarant speaks can be relevant to the trustworthiness—and, therefore, admissibility—of the statement itself. See Navarette, 572 U.S. at 397 (observing that courts can more often rely on an attributable 911 call than an anonymous tip because the former is more reliable evidence); see also United States v. Parker, 936 F.2d 950, 954 (7th Cir. 1991) (reasoning that the admissibility of statements under Rule 803(1) can be "buttressed by the intrinsic reliability of the statements").

Those same reliability factors apply here. The caller was not anonymous, but rather provided his full name, phone number, and home address during the call. The circumstances of the call, therefore, created a "disincentive for making false allegations," which increases the reliability of its collective statements. See Gaines, 918 F.3d at 806. These factors equally support the truthfulness of each statement within the 911 call, which were all admissible as present sense impressions. See Parker, 936 F.2d at 954. Accordingly, the district court did not abuse its discretion in considering the admissibility of the 911 call as a whole because the entire call was sufficiently reliable.

B.

Next, we must address whether the caller's statements were sufficiently contemporaneous to qualify as present sense impressions. In addressing this question, we must apply the appropriate level of deference to the district court's consideration of case-specific facts. See United States v. Banks, 761 F.3d 1163, 1197 (10th Cir. 2014) (explaining that "we will not disturb the ruling unless it is arbitrary, capricious, whimsical or manifestly unreasonable, or we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice"). Defendant contends that Rule 803(1) requires immediate contemporaneity, and, even if it does not, the passage of time between the 911 caller's observations and statements destroyed the necessary contemporaneity. We reject these arguments. To begin with, Rule 803(1) "recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a slight lapse is

allowable." Fed. R. Evid. 803(1) advisory committee's notes to 1972 proposed rules; see also Christopher B. Mueller & Laird C. Kirkpatrick, 4 Fed. Evid. § 8:67 (4th ed. June 2019 Update) (commenting that a slight lapse is acceptable under Rule 803(1) because "a small delay . . . is not enough to allow reflection, which would raise doubts about trustworthiness").[7] Thus, the advisory committee has specifically addressed at least half of Defendant's argument and reached a contrary conclusion.

Defendant's position is also belied by the fact that courts addressing the issue have refused to adopt a "*per se* rule indicating what time interval is too long under Rule 803(1)." United States v. Hawkins, 59 F.3d 723, 730 (8th Cir. 1995) (quoting Parker, 936 F.2d at 954), vacated and remanded on other grounds sub. nom., Hawkins v. United States, 516 U.S. 1168 (1996). And that makes sense because "[t]he underlying rationale of the present sense impression exception is that substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication." Id. Thus, instead of recognizing a bright-line rule for specific time intervals and admissibility, courts have held that "the

[7] But see United States v. Rosetta, 127 F.3d 1110, at *2 (10th Cir. 1997) (unpublished table decision) (stating that "a delay of minutes or hours between an event and a statement bars resort to [Rule] 803(1)" in concluding that a victim's statement made approximately nine hours after an assault was not admissible under the present sense impression exception, but was admissible as an excited utterance). In other words, we suggested that an unspecified period of minutes may be too long to preserve substantial contemporaneity under Rule 803(1). Id. Our conjecture in Rosetta is too imprecise to provide significant guidance here beyond the conclusion that a nine-hour delay between event and statement is too long. Moreover, we generally disfavor the citation of orders and judgments, so Rosetta is both non-binding and non-persuasive in this case. See 10th Cir. R. 32.1.

admissibility of statements under hearsay exceptions depends upon the facts of the particular case." United States v. Blakey, 607 F.2d 779, 785 (7th Cir. 1979), overruled on other grounds by United States v. Harty, 930 F.2d 1257, 1263 (7th Cir. 1991). Underlying all of this is the notion that "[t]he need for deference to a trial court ruling on a hearsay objection is particularly great because the determination of whether certain evidence is hearsay rests heavily upon the facts of a particular case." United States v. Rodriguez-Pando, 841 F.2d 1014, 1018 (10th Cir. 1988).

The 911 call in this case involved statements relaying the caller's contemporaneous observations during his pursuit of the Honda, as well as statements describing what the caller observed minutes earlier. Although the call lasted about thirteen minutes in total, the caller first provided details of the shooting only three or four minutes after observing the event. The weight of authority from other jurisdictions counsels in favor of admitting 911 calls such as this one because such a short delay does not give rise to much opportunity for reflection or interpretation that could undermine the reliability of the statements. See, e.g., United States v. Davis, 577 F.3d 660, 669 (6th Cir. 2009) (stating that "it does not matter whether the [911] call was made thirty seconds or five minutes after witnessing the event" because the time interval did not diminish the reliability of the statements); United States v. Shoup, 476 F.3d 38, 42–43 (1st Cir. 2007) (concluding that a district court does not commit obvious error in admitting a 911 call where the caller dials 911 "one or two minutes" after perceiving an event (id. at 40)); Hawkins, 59 F.3d at 730 (affirming the admission of a 911 call placed seven minutes after an event occurred, during

which time the caller moved locations due to the event, because the slight delay did not allow significant opportunity for conscious fabrication). To be sure, the caller's statements here are even more contemporaneous with the underlying event (the shooting) than other statements admitted as present sense impressions. See Hawkins, 59 F.3d at 730 (concluding that seven minutes did not destroy sufficient contemporaneity); see also Blakey, 607 F.2d at 785–86 (affirming the admission of statements under Rule 803(1) where the interval was potentially twenty-three minutes between event and statements when "coupled with the substantial circumstantial evidence corroborating the statements' accuracy"). Accordingly, the three to four-minute delay between the shooting and first descriptive statements did not destroy the necessary contemporaneity.

The context surrounding the 911 call in this case also supports the reliability of the statements. Although statements about the shooting and suspects are interspersed throughout the call, the 911 caller made the statements in a discrete period without any break, interruption, or intervening event. See supra Part II(A) (citing Jackson, 124 F.3d at 618; Beck, 122 F.3d at 682). The facts that the 911 call began soon after the caller observed the shooting and focused on "the same continuing event" weighs against the adverse effect of the length of the call on sufficient contemporaneity. See Blakey, 607 F.2d at 786 (affirming the admission of recorded statements even though "[a] relatively large amount of conversation was recorded" because the conversation began "soon after" the underlying event and focused on that central event). The caller's continued focus on the Honda and engagement with the 911 operator further

limited his opportunity for "defective recollection or conscious fabrication" while providing detailed statements about the shooting. Hawkins, 59 F.3d at 730.

Defendant also takes issue with the admission of the 911 call because the caller made several statements in response to the 911 operator's questions. Defendant argues that the 911 operator's questions provided an "opportunity for strategic modification," which "undercuts the reliability that spontaneity insures." See United States v. Manfre, 368 F.3d 832, 840 (8th Cir. 2001).[8] The mere fact that the caller made statements in response to questions, however, does not demonstrate that the statements were a product of strategic modification outside the bounds of Rule 803(1). See United States v. Boyce, 742 F.3d 792, 797 (7th Cir. 2014) (observing that a caller "can still make statements without calculated narration even if made in responses to questions"). Indeed, those facts do not materially diminish spontaneity under the circumstances, which supports the rationale for Rule 803(1). See Manfre, 368 F.3d at 840.

Similarly, the caller's movement from the location of the shooting through his pursuit of the Honda does not eliminate sufficient contemporaneity. See United

[8] Defendant cites United States v. Green, 556 F.3d 151, 157 (3d Cir. 2009) in support of his argument, but Green is distinguishable. There, law enforcement searched, transported, and formally debriefed a confidential informant before the informant gave a statement fifty minutes after perceiving an event. The court reasoned that these facts "affirmatively indicate[] that [the confidential informant] made his statement after he was expressly asked to reflect upon the events in question, and thereby fatally disqualifies the declaration for admission as a present-sense impression." Id. No such law enforcement intervention or debriefing occurred here, nor is the delay between statement and event near the fifty-minute delay that the speaker experienced in Green. Id.

States v. Dean, 823 F.3d 422, 428 (8th Cir. 2016) (concluding that a "911 call and recorded statements occurred with sufficient contemporaneity" where the caller had time to leave an apartment in which an event took place before calling 911 to describe the event); Hawkins, 59 F.3d at 730 (the caller traveled from an apartment to a nearby convenience store before calling 911). The caller made his statements regarding the catalyst of the event (the shooting) within two or three minutes of the shooting, and while observing "the same continuing event" from behind the wheel of his car. See supra Part II(A). Taken together, the facts demonstrate the caller made the statements with no more than the "slight lapse" allowed by Rule 803(1) between event and statement. Fed. R. Evid. 803(1) advisory committee's notes to 1972 proposed rules.

Finally, the call was sufficiently reliable evidence. As discussed above, we look to "other indicia of reliability" outside of the call itself to assess its reliability as evidence. Gaines, 918 F.3d at 806. And "substantial circumstantial evidence corroborating the statements' accuracy" can justify the admittance of a call under Rule 803(1) despite a particularly long delay between event and statement. See Blakey, 607 F.2d at 786 (relying on such evidence to verify reliability where the delay was up to twenty-three minutes); see also Parker, 936 F.2d at 954. After all, "[t]he core inquiry under the rule concerns the reliability of the declarant" under the circumstances. First State Bank of Denton v. Md. Cas. Co., 918 F.2d 38, 42 (5th Cir. 1990) (internal quotation marks and citation omitted).

The 911 caller in this case was a disinterested party with no known motive to fabricate information. See id. (affirming the admission of hearsay statements because the declarant "had little motive to lie and was relating information he had just gathered . . . even assuming it did not meet the precise contours of [R]ule 803(1)"). The fact that Officer Braun corroborated several of the caller's statements in short order further adds to the statements' reliability.[9] Even though Officer Braun did not corroborate every detail of the caller's statements—in fact, some peripheral details proved erroneous[10]—Defendant retained the opportunity to attack the reliability of these statements in the presentation of his defense. The fact that the 911 recording system preserved the caller's statements, such that "there is no uncertainty as to the content of the declarant's statement[s]" further supports the reliability rationale for admitting hearsay statements under Rule 803(1). Blakey, 607 F.2d at 785. On balance, we conclude that substantial corroboration of the 911 caller's disinterested statements demonstrates that the statements were particularly reliable evidence. First State Bank of Denton, 918 F.2d at 42.

Accordingly, we hold that the 911 caller's statements qualified as present sense impressions. The "timeline of events suggests that the caller reported the

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[9] Specifically, by the time Officer Braun detained Defendant, he corroborated the caller's statements about the Honda's direction of travel, a distinctive feature of the Honda, and Defendant's appearance.

[10] Specifically, the caller said the gun used in the shooting sounded like a 9mm, but Officer Braun discovered a .22 caliber pistol on Defendant's person. The caller also guessed that Defendant was in his twenties, but Defendant was 38 years old at the time of the event.

[shooting] soon after" he perceived it and his continuing observations of the Honda and its occupants are the "sort of contemporaneous report [that] has long been treated as especially reliable" in evidence law. Navarette, 572 U.S. at 399. Our conclusion is consistent with the manner in which courts have analyzed sufficient contemporaneity under similar circumstances, and other indicia of reliability bolstered the admissibility of the 911 call in this case. See Gaines, 918 F.3d at 804.

We therefore affirm the district court's decision to admit the 911 call in its entirety under the present sense impression exception to the rule against hearsay.[11]

III.

Defendant contends that his prior conviction for attempted second-degree assault in Colorado is not for a crime of violence. Defendant, however, concedes that circuit precedent precludes both of his assertions on this point. We observe that Defendant maintains the argument strictly for preservation purposes.

Specifically, Defendant concedes that United States v. Mendez, 924 F.3d 1122 (10th Cir. 2019) forecloses his first assertion that Colorado "attempt" is broader than generic "attempt." 924 F.3d at 1126 (observing that a defendant can do "no more than offer theoretical grounds on which some conduct might constitute criminal attempt in Colorado but not under the generic definition of the term"). Defendant further concedes that United States v. Martinez, 602 F.3d 1166 (10th Cir. 2010) forecloses his second assertion that Colorado attempt falls outside the ambit of

[11] Because we conclude that the district court did not abuse its discretion in admitting the 911 call, we need not reach the parties' harmless error arguments.

Application Note 1 to United States Sentencing Guidelines § 4B1.2(a). 602 F.3d at 1174 (reasoning that attempting to commit a crime of violence is itself a crime of violence). Accordingly, we affirm the district court's sentencing calculation.

IV.

Defendant finally argues that the district court committed plain error in ordering Special Condition Three, without making any particularized supportive findings. Special Condition Three requires Defendant to take all medications that may be prescribed by his psychiatrist, and to demonstrate compliance through random blood tests. In light of our recent decision in United States v. Malone, 937 F.3d 1325, 1329 (10th Cir. 2019), the government submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) conceding that the district court plainly erred in imposing Special Condition Three. Accordingly, we vacate and remand on this issue for further proceedings.

V.

For the foregoing reasons, we AFFIRM Defendant's conviction, vacate Special Condition Three, and REMAND for further proceedings consistent with this opinion.

United States v. Daniel Lovato, No. 18-1468, Bacharach, J., concurring.

I agree with the majority that the district court did not abuse its discretion in admitting the 911 call, that the district court's sentencing calculation was proper, and that we should vacate Special Condition Three. But I respectfully disagree with the majority's conclusions that (1) the court should analyze the 911 call as a whole and (2) we should consider "other indicia of reliability" to determine whether the 911 call is admissible as a present-sense impression under Fed. R. Evid. 803(1). Majority Op. at 17.

1. The exception for present-sense impressions applies to individual statements, not conversations.

Under the Federal Rules of Evidence, a present-sense impression is admissible as an exception to the rule against hearsay. Fed. R. Evid. 803. A present-sense impression is "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1). A "statement" is in turn defined as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Fed. R. Evid. 801(a).

Under this definition, a 911 call may contain multiple statements. Some statements may qualify as present-sense impressions, and others may not. But to apply these definitions, courts must separately analyze the individual statements.

The Supreme Court required consideration of each individual statement in *Williamson v. United States*, 512 U.S. 594 (1994). There the Court wrestled with the hearsay exception for statements against interest. *See* Fed. R. Evid. 804(b)(3). That exception, like the one for present-sense impressions, applies only to a "statement." *Id.* So the Court focused on the rules' definition of the term "statement," holding that it refers to "a single declaration or remark" rather than "a report or narrative." *Williamson*, 512 U.S. at 599 (quoting *Webster's Third New International Dictionary* 2229 (1961)). The Supreme Court then considered the principle behind the statement-against-interest exception, explaining that "reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Id.* That principle does not necessarily apply to every statement in a confession. The Supreme Court thus held that the statement-against-interest exception requires courts to separately analyze each statement to determine whether it is self-inculpatory. *Id.* at 599–604.

Williamson's reasoning likewise applies to the hearsay exception for present-sense impressions. Just as a confession may contain statements that are self-inculpatory and statements that are not, so too a 911 call may contain statements that are present-sense impressions and statements that are not.

The majority downplays *Williamson*, reasoning that the Supreme Court was considering the hearsay exception for statements against interest, not present-sense impressions. But the Supreme Court was applying a definition of "statement" that applies equally to both exceptions.

The Sixth Circuit has thus observed that "it would make little sense" to confine *Williamson* to the hearsay exception for statements against interest. *United States v. Canan*, 48 F.3d 954, 960 (6th Cir. 1995). For this observation, the court reasoned that the Supreme Court was relying on a definition of "statement" that governed all of the hearsay exceptions in Rule 804:

> Although *Williamson* defined the term "statement" as it applies in the context of Rule 804(b)(3) "statements against interest," we think that its definition extends to the other hearsay exceptions delineated in Rule 804 as well. Accordingly, the term "statement" must mean "a single declaration or remark" for purposes of all of the hearsay rules. This determination is consistent with the idea implicit in Rule 801(a): that there is an overarching and uniform definition of "statement" applicable under all of the hearsay rules. Rule 801(a) indicates that its definition of statement covers Article VIII (Hearsay) of the Federal Rules of Evidence, entirely. It would make little sense for the same defined term to have disparate meanings throughout the various subdivisions of the hearsay rules.

Id. This reasoning applies here, compelling us to use *Williamson*'s definition of a "statement" when considering present-sense impressions.

Other courts have also applied the exception for present-sense impressions to each individual statement rather than collectively to an

entire conversation or narrative. For example, the Second Circuit parsed individual statements in a 911 call:

> We conclude that the 911 tape, or at least the portion in which the caller states that the light-skinned black men in front of the bar are shooting-the crucial issue in [the petitioner's] trial-was not shown by the People to be a report of a present sense impression and thus did not fall within the exception for that class of hearsay.

Brown v. Keane, 355 F.3d 82, 89 (2d Cir. 2004). So too did a Maryland appellate court:

> The second [911] call . . . consisted of nine statements by the declarant. The first was legitimately a Present Sense Impression. The other eight were not. . . . The remaining eight statements consisted largely of a question and answer exchange between the declarant and the officer taking the call, as the declarant narrated past events in order to bring the officer up to date. "There was a shooting." "They're looking for a gun." "[I]t was two guys. They threw it, more like buried it[.]" None of these is remotely a Present Sense Impression. . . . [The calls at issue] illustrate . . . how easy it is for a seemingly simple declaration to wander randomly back and forth between present impression and past narration.

Morten v. State, 215 A.3d 846, 858 (Md. Ct. Spec. App. 2019).

Until now, our court has never held that a district court can apply a hearsay exception to an entire conversation. The majority points to *United States v. Allen*, where we concluded that the tape of a 911 call was admissible as a present-sense impression. 235 F.3d 482, 493 (10th Cir. 2000). As the majority points out, the *Allen* panel didn't separately discuss the individual statements. But the defendant had not challenged the admission of specific statements. The defendant instead argued that the

entire call was inadmissible because it was cumulative and the declarant was biased. *See United States v. Allen*, No. 99-3236, Appellant's Opening Br. at 32–33. We thus had no occasion to separately analyze specific statements made during the 911 call. And a precedent like *Allen* cannot be interpreted to include holdings on issues that were neither raised nor decided. *E.g.*, *MODOC Lassen Indian Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 881 F.3d 1181, 1191 (10th Cir. 2017). The majority's approach is thus unsupported by precedent.

This approach appears difficult to apply. Under the majority's approach, it is unclear when a district court should analyze an entire 911 call as a single statement or separately analyze each individual statement. I fear that district courts will now struggle with how to apply the straightforward definition of "statement" set forth in the Federal Rules of Evidence.

Rather than foist this struggle onto district courts, I would consider each challenged statement in the 911 call to determine whether the district court erred in finding a present-sense impression.

2. A separate reliability inquiry is not required.

The majority discusses the caller's reliability, considering factors not directly related to contemporaneousness. For example, the majority notes that the caller was not anonymous and that "the circumstances of the call . . . created a 'disincentive for making false allegations.'" Majority Op. at

11 (quoting *United States v. Gaines*, 918 F.3d 793, 806 (10th Cir. 2019) (Tymkovich, C.J., dissenting)); *see also* Majority Op. at 9 (noting "the 911 caller's status as a disinterested observer").

In my view, however, the exception for present-sense impressions contains no separate requirement of reliability. The hearsay exceptions themselves are designed to assure reliability. *See* Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."). For example, the exception for present-sense impressions requires temporal proximity, which itself serves as a proxy for reliability. *See United States v. Green*, 556 F.3d 151, 155–56 (3d Cir. 2009) (observing that contemporaneousness "is the effective proxy for the reliability of the substance of the declaration" under the exception for present-sense impressions); *see also United States v. Ruiz*, 249 F.3d 643, 647 (7th Cir. 2001) ("[C]ourts sometimes focus on the corroboration or the lack thereof in admitting or excluding present sense impressions, but the truth is that the rule does not condition admissibility on the availability of corroboration." (citation omitted)). So I respectfully disagree with the majority's view that a caller's reliability bears on

admissibility under the exception for present-sense impressions.[1] *See* Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 How. L.J. 319, 350 (2009) (explaining that unlike some state statutes, the federal present-sense exception "does not purport to grant the judge discretionary authority to exclude otherwise admissible statements when 'circumstances indicate lack of trustworthiness'").

3. The district court did not abuse its discretion in admitting the statements in the 911 call as present-sense impressions.

Though I respectfully disagree with the majority's approach, I agree with its outcome because the district court reasonably treated the challenged statements as sufficiently contemporaneous to constitute present-sense impressions.

As the majority explains, we review the district court's decision under the abuse-of-discretion standard. This standard is ordinarily deferential, *Marczak v. Greene*, 971 F.2d 510, 516 (10th Cir. 1992), and we

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[1] Some of the majority's authorities do not involve the exception for a present-sense impression, and I would not apply these authorities. *See, e.g.*, *United States v. Gaines*, 918 F.3d 793, 806 (10th Cir. 2019) (Tymkovich, C.J., dissenting) (invoking the reliability of an anonymous tip as grounds for concluding that an investigative stop was supported by the reasonable suspicion required by the Fourth Amendment); *First State Bank of Denton v. Maryland Cas. Co.*, 918 F.2d 38, 42 (5th Cir. 1990) (discussing "the catch-all exception to rule 803," Fed. R. Evid. 803(24), and stating that "the core inquiry" under this exception "concerns the reliability of the declarant" (quoting *United States v. White*, 611 F.2d 531, 538 n.7 (5th Cir. 1980))).

review with "heightened" deference here because of "the fact-specific nature of a hearsay inquiry." *United States v. Pursley*, 577 F.3d 1204, 1220 (10th Cir. 2009) (citing *United States v. Trujillo*, 136 F.3d 1388 (10th Cir. 1998)). Discretion means that the district court has a "range of choice, and . . . its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Betty K Agencies, Ltd. v. M/V Monada*, 432 F.3d 1333, 1337 (11th Cir. 2005) (quoting *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1324 (11th Cir. 2005)). So when we review a district court's ruling under the abuse-of-discretion standard, we are ultimately deciding whether the district court has made a reasonable choice among the alternative outcomes. *Gasperini v. Center for Humanities, Inc.*, 149 F.3d 137, 141 (2d Cir. 1998).

We elsewhere apply the abuse-of-discretion standard by recognizing the permissibility of various outcomes. For example, when confronted with challenges to the substantive reasonableness of a sentence, we've often recognized that many sentences are typically reasonable. *See, e.g.*, *Gall v. United States*, 522 U.S. 38, 51 (2007). We thus find an abuse of discretion only when the district court chooses a sentence outside the range of reasonable sentences. *E.g.*, *United States v. DeRusse*, 859 F.3d 1232, 1236 (10th Cir. 2017).

So it is here when we review the admission of present-sense impressions. In this area, the test lacks bright-line distinctions. *See United States v. Green*, 556 F.3d 151, 156 (3d Cir. 2009) ("[C]ourts have not adopted any bright-line rule as to when a lapse of time becomes too lengthy to preclude Rule 803(1)'s application."); *see also United States v. Blakey*, 607 F.2d 779, 785 (7th Cir. 1979) ("There is no Per se rule indicating what time interval is too long under Rule 803(1)."), *overruled on other grounds by United States v. Harty*, 930 F.2d 1257, 1263 (7th Cir. 1991). Some statements are so obviously contemporaneous that no one would question whether they constitute present-sense impressions. For example, consider a 911 call in which a witness reports a robbery in progress. This report would obviously be considered contemporaneous. On the other hand, some statements are so clearly separated in time from the incident that no one would regard the statements as present-sense impressions. For example, a 911 call detailing the events of a robbery a week earlier would obviously not qualify as contemporaneous.

Between these polar extremes is a large gray area: statements in 911 calls that could reasonably be regarded as either contemporaneous or non-contemporaneous. For these statements, district courts have broad discretion in determining admissibility. *See Balentine v. State*, 707 P.2d 922, 926 (Alaska Ct. App. 1985) (observing that the Alaska version of the

rule for present-sense impressions "leaves much room for subjective application").

All of the challenged statements fall within this gray area, where district courts enjoy considerable discretion. Some of the disputed statements reported ongoing observations, some recalled events that had occurred several minutes earlier, and some answered specific questions from the 911 operator. For each statement, the district court could reasonably conclude that the caller was

- describing or explaining an event
- while or immediately after the caller saw the event
- sufficiently close in time to the event to qualify as a present-sense impression.

See Majority Op. at 11. Given the reasonableness of these conclusions, I would hold that the district court did not abuse its discretion in treating each challenged statement as a present-sense impression.

AO 245B (Rev. 02/18) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

District of Colorado

UNITED STATES OF AMERICA
v.
1. DANIEL LOVATO

JUDGMENT IN A CRIMINAL CASE

Case Number: 18-cr-00213-RM
USM Number: 44753-013

Laura Hayes Suelau and Natalie Girard Stricklin
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☒ was found guilty on count(s) 1 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm and Ammunition	03/03/2018	1(merged)

The defendant is sentenced as provided in pages 2 through 7 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) 3 of the Superseding Indictment

☒ Count(s) 1 and 2 were merged at sentencing and the separate conviction of Count 2 was vacated; Count 4 was dismissed on Govt. motion.

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.

November 29, 2018
Date of Imposition of Judgment

Signature of Judge

Raymond P. Moore, United States District Judge
Name and Title of Judge

December 4, 2018
Date

DEFENDANT: DANIEL LOVATO
CASE NUMBER: 18-cr-00213-RM

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **one hundred (100) months as to Count 1**

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

☒ 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: DANIEL LOVATO
CASE NUMBER: 18-cr-00213-RM

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **three (3) years**

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 (34 U.S.C. § 20901, *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: DANIEL LOVATO
CASE NUMBER: 18-cr-00213-RM

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: DANIEL LOVATO
CASE NUMBER: 18-cr-00213-RM

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in and successfully complete a program of testing and/or treatment for substance abuse, as approved by the probation officer, until such time as you are released from the program by the probation officer. You must abstain from the use of alcohol or other intoxicants during the course of treatment and must pay the cost of treatment as directed by the probation officer.
2. You must participate in and successfully complete a program of mental health treatment, as approved by the probation officer, until such time as you are released from the program by the probation officer. You must pay the cost of treatment as directed by the probation officer.
3. You must remain medication compliant and must take all medications that are prescribed by your treating psychiatrist. You must cooperate with random blood tests as requested by your treating psychiatrist and/or supervising probation officer to ensure that a therapeutic level of your prescribed medications is maintained.
4. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
5. You must not associate with or have contact with any gang members and must not participate in gang activity, to include displaying gang paraphernalia.

DEFENDANT: DANIEL LOVATO
CASE NUMBER: 18-cr-00213-RM

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the following page.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ 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.

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

TOTALS $ _____ $ _____

☐ 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 the following page 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: DANIEL LOVATO
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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:

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:
Browning Arms, Buck Mark, .22 caliber pistol, s/n 515MW05825; Ammunition in said firearm; and Thirty-two (32) rounds of ammunition found in defendant's pocket.

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

U.S. Code Provisions

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes.

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. § 994. Duties of the Commission.

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)

(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the

Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)

(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields re-quested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

2018 Sentencing Guideline Provisions

§1B1.7. Significance of Commentary

> The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

Commentary

Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. These are to be construed as commentary and thus have the force of policy statements.

"[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Stinson v. United States, 508 U.S. 36, 38 (1993).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (amendment 498).

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if —

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(7) **12**, except as provided below; or

(8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	Number of Firearms	Increase in Level
(A)	3-7	add **2**
(B)	8-24	add **4**
(C)	25-99	add **6**
(D)	100-199	add **8**
(E)	200 or more	add **10**.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.

(4) If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

(5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by 4 levels. If the resulting offense level is less than level **18**, increase to level **18**.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)–(p), (r)–(w), (x)(1), 924(a), (b), (e)–(i), (k)–(o), 1715, 2332g; 26 U.S.C. § 5861(a)–(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Definitions.— For purposes of this guideline:

"Ammunition" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"Destructive device" has the meaning given that term in 26 U.S.C. § 5845(f).

"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"Firearm" has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. Definition of "Prohibited Person".—For purposes of subsections (a)(4)(B) and (a)(6), "prohibited person" means any person described in 18 U.S.C. § 922(g) or § 922(n).

4. Application of Subsection (a)(7).—Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.

5. Application of Subsection (b)(1).—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

6. Application of Subsection (b)(2).—Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)–(a)(5), subsection (b)(2) is not applicable.

7. Destructive Devices.—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

8. Application of Subsection (b)(4).—

(A) Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a

firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

9. Application of Subsection (b)(7).—Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

10. Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

11. Upward Departure Provisions.—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).

12. Armed Career Criminal.—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See §4B1.4.

13. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful; or

(II) who intended to use or dispose of the firearm unlawfully.

(B) Definitions.—For purposes of this subsection:

"Individual whose possession or receipt of the firearm would be unlawful" means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. "Crime of violence" and "controlled substance offense" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). "Misdemeanor crime of domestic violence" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term "defendant", consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(C) Upward Departure Provision.—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.

(D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

14. Application of Subsections (b)(6)(B) and (c)(1).—

(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

"Another felony offense", for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

(E) Relationship Between the Instant Offense and the Other Offense.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

(i) Firearm Cited in the Offense of Conviction. Defendant A's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be "part of the same course of conduct or common scheme or plan" as the unlawful possession of the same shotgun on October 15. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3). The use of the shotgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). See §1B1.3(a)(4) ("any other information specified in the applicable guideline").

(ii) Firearm Not Cited in the Offense of Conviction. Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were "part of the same course of conduct or common scheme or plan". See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun "in connection with" the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). See

§1B1.3(a)(4) ("any other information specified in the applicable guideline"). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not "part of the same course of conduct or common scheme or plan," then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

15. Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (amendment 189); November 1, 1990 (amendment 333); November 1, 1991 (amendment 374); November 1, 1992 (amendment 471); November 1, 1993 (amendment 478); November 1, 1995 (amendment 522); November 1, 1997 (amendments 568 and 575); November 1, 1998 (amendments 578 and 586); November 1, 2000 (amendment 605); November 1, 2001 (amendments 629-631); November 1, 2004 (amendment 669); November 1, 2005 (amendments 679 and 680); November 1, 2006 (amendments 686, 691, and 696); November 1, 2007 (amendment 707); November 1, 2010 (amendment 746); November 1, 2011 (amendment 753); November 1, 2014 (amendment 784); November 1, 2015 (amendments 790 and 797); November 1, 2016 (amendment 804).

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline—

"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

"Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense

under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. Offense of Conviction as Focus of Inquiry.—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.

3. Applicability of §4A1.2.—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.

4. 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.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (amendment 49); November 1, 1989 (amendment 268); November 1, 1991 (amendment 433); November 1, 1992 (amendment 461); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 568); November 1, 2000 (amendment 600); November 1, 2002 (amendments 642 and 646); November 1, 2004 (amendment 674); November 1, 2007 (amendment 709); November 1, 2009 (amendment 736); November 1, 2015 (amendment 795); August 1, 2016 (amendment 798).

Colorado Revised Statutes Provisions

Colorado Revised Statutes § 18-2-101. Criminal attempt

(1) A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be, nor is it a defense that the crime attempted was actually perpetrated by the accused.

(2) A person who engages in conduct intending to aid another to commit an offense commits criminal attempt if the conduct would establish his complicity under section 18-1-603 were the offense committed by the other person, even if the other is not guilty of committing or attempting the offense.

(3) It is an affirmative defense to a charge under this section that the defendant abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting the complete and voluntary renunciation of his criminal intent.

(3.5) Criminal attempt to commit any crime for which a court is required to sentence a defendant for a crime of violence in accordance with section 18-1.3-406 is itself a crime of violence for the purposes of that section.

(4) Criminal attempt to commit a class 1 felony is a class 2 felony; criminal attempt to commit a class 2 felony is a class 3 felony; criminal attempt to commit a class 3 felony is a class 4 felony; criminal attempt to commit a class 4 felony is a class 5 felony; criminal attempt to commit a class 5 or 6 felony is a class 6 felony.

(5) Criminal attempt to commit a felony which is defined by any statute other than one contained in this title and for which no penalty is specifically provided is a class 6 felony.

(6) Criminal attempt to commit a class 1 misdemeanor is a class 2 misdemeanor.

(7) Criminal attempt to commit a misdemeanor other than a class 1 misdemeanor is a class 3 misdemeanor.

(8) Criminal attempt to commit a petty offense is a crime of the same class as the offense itself.

(9) The provisions of subsections (4) to (8) of this section shall not apply to a person who commits criminal attempt to escape. A person who commits criminal attempt to escape shall be punished as provided in section 18-8-208.1.

(10)

(a) Except as otherwise provided by law, criminal attempt to commit a level 1 drug felony is a level 2 drug felony; criminal attempt to commit a level 2 drug felony is a level 3 drug felony; criminal attempt to commit a level 3 drug felony is a level 4 drug felony; and criminal attempt to commit a level 4 drug felony is a level 4 drug felony.

(b) Except as otherwise provided by law, criminal attempt to commit a level 1 drug misdemeanor is a level 2 drug misdemeanor; and criminal attempt to commit a level 2 drug misdemeanor is a level 2 drug misdemeanor.

Colorado Revised Statutes § 18-3-203. Assault in the second degree

(1) A person commits the crime of assault in the second degree if:

(a) Repealed by Laws 1994, H.B.94-1126, § 8, eff. July 1, 1994.

(b) With intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon; or

(c) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, emergency medical care provider, or emergency medical service provider from performing a lawful duty, he or she intentionally causes bodily injury to any person; or

(c.5) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, or emergency medical service provider from performing a lawful duty, he or she intentionally causes serious bodily injury to any person; or

(d) He recklessly causes serious bodily injury to another person by means of a deadly weapon; or

(e) For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness, or other physical or mental impairment or injury to another person by administering to him, without his consent, a drug, substance, or preparation capable of producing the intended harm; or

(f) While lawfully confined or in custody, he or she knowingly and violently applies physical force against the person of a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, or a judge of a court of competent jurisdiction, or an officer of said court, or, while lawfully confined or in custody as a result of being charged with or convicted of a crime or as a result of being charged as a delinquent child or adjudicated as a delinquent child, he or she knowingly and violently applies physical force against a person engaged in the performance of his or her duties while employed by or under contract with a detention facility, as defined in section 18-8-203(3), or while employed by the division in the department of human services responsible for youth services and who is a youth services counselor or is in the youth services worker classification series, and the person committing the offense knows or reasonably should know that the victim is a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, or a judge of a court of competent jurisdiction, or an officer of said court, or a person engaged in the performance of his or her duties while employed by or under contract with a detention facility or while

employed by the division in the department of human services responsible for youth services. A sentence imposed pursuant to this paragraph (f) shall be served in the department of corrections and shall run consecutively with any sentences being served by the offender; except that, if the offense is committed against a person employed by the division in the department of human services responsible for youth services, the court may grant probation or a suspended sentence in whole or in part, and the sentence may run concurrently or consecutively with any sentences being served. A person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility, as defined in section 18-8-203(3), and who is required to report back to the detention facility at a specified time is deemed to be in custody.

(f.5)

(I) While lawfully confined in a detention facility within this state, a person with intent to infect, injure, harm, harass, annoy, threaten, or alarm a person in a detention facility whom the actor knows or reasonably should know to be an employee of a detention facility, causes such employee to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material by any means, including but not limited to throwing, tossing, or expelling such fluid or material.

(II) Repealed by Laws 2015, Ch. 109, § 1, eff. July 1, 2015.

(III)

(A) As used in this paragraph (f.5), "detention facility" means any building, structure, enclosure, vehicle, institution, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the authority of the state of Colorado or any political subdivision of the state of Colorado.

(B) As used in this paragraph (f.5), "employee of a detention facility" includes employees of the department of corrections, employees of any agency or person operating a detention facility, law enforcement personnel, and any other persons who are present in or in the vicinity of a detention facility and are performing services for a detention facility. "Employee of a detention facility" does not include a person lawfully confined in a detention facility.

(g) With intent to cause bodily injury to another person, he or she causes serious bodily injury to that person or another; or

(h) With intent to infect, injure, or harm another person whom the actor knows or reasonably should know to be engaged in the performance of his or her duties as a peace officer, a firefighter, an emergency medical care provider, or an emergency medical service provider, he or she causes such person to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material by any means, including by throwing, tossing, or expelling such fluid or material; or

(i) With the intent to cause bodily injury, he or she applies sufficient pressure to impede or restrict the breathing or circulation of the blood of another person by applying such pressure to the neck or by blocking the nose or mouth of the other person and thereby causes bodily injury.

(2)

(a) If assault in the second degree is committed under circumstances where the act causing the injury is performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the person causing the injury sufficiently to excite an irresistible passion in a reasonable person, and without an interval between the provocation and the injury sufficient for the voice of reason and humanity to be heard, it is a class 6 felony.

(b) If assault in the second degree is committed without the circumstances provided in paragraph (a) of this subsection (2), it is a class 4 felony.

(b.5) Assault in the second degree by any person under subsection (1) of this section without the circumstances provided in paragraph (a) of this subsection (2) is a class 3 felony if the person who is assaulted, other than a participant in the crime, suffered serious bodily injury during the commission or attempted commission of or flight from the commission or attempted commission of murder, robbery, arson, burglary, escape, kidnapping in the first degree, sexual assault, sexual assault in the first or second degree as such offenses existed prior to July 1, 2000, or class 3 felony sexual assault on a child.

(c)

(I) If a defendant is convicted of assault in the second degree pursuant to paragraph (c.5) of subsection (1) of this section or paragraph (b.5) of this subsection (2), except with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, the court

shall sentence the defendant in accordance with the provisions of section 18-1.3-406. A defendant convicted of assault in the second degree pursuant to paragraph (b.5) of this subsection (2) with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, shall be sentenced in accordance with section 18-1.3-401(8)(e) or (8)(e.5).

(II) If a defendant is convicted of assault in the second degree pursuant to paragraph (b), (c), (d), or (g) of subsection (1) of this section, the court shall sentence the offender in accordance with section 18-1.3-406; except that, notwithstanding the provisions of section 18-1.3-406, the court is not required to sentence the defendant to the department of corrections for a mandatory term of incarceration.

(d) For purposes of determining sudden heat of passion pursuant to subsection (2)(a) of this section, a defendant's act does not constitute an act performed upon a sudden heat of passion if it results solely from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.

(3) Repealed by Laws 2016, Ch. 304, § 4, eff. July 1, 2016.