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United States Court of Appeals
For the First Circuit

No. 18-1916

UNITED STATES OF AMERICA,

Appellee,

v.

VAUGHN LEWIS,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Patti B. Saris, U.S. District Judge]

Before

Torruella, Thompson, and Kayatta,
Circuit Judges.

Inga S. Bernstein, with whom Zoraida Fernández and Zalkind Duncan & Bernstein LLP were on brief, for appellant.

Mark T. Quinlivan, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellee.

June 16, 2020

KAYATTA, Circuit Judge. Vaughn Lewis was sentenced to 108 months' imprisonment for conspiracy to distribute cocaine after the district court applied a career-offender enhancement. Under § 4B1.1(a) of the United States Sentencing Guidelines (the "Sentencing Guidelines"), this enhancement applies where a defendant has at least two prior felony convictions of a "controlled substance offense." U.S.S.G. § 4B1.1(a). The commentary to § 4B1.2 provides that such offenses include conspiracies and other inchoate crimes. Because we have previously held this commentary authoritative in defining a "controlled substance offense," we affirm Lewis's sentence.

I.

A.

Lewis's charges stem from an investigation into a drug-trafficking conspiracy led by Luis Rivera in Brockton, Massachusetts.[1] Police began investigating Rivera's drug-supplying operations following a tip provided by a cooperating witness.

On February 22, 2016, the police intercepted communications between Lewis and Rivera in which Lewis arranged to purchase sixty-two grams of cocaine, asking for the "same thing as

[1] Rivera was sentenced to 120 months of imprisonment with five years of supervised release and was assessed a $5,000 fine.

last time." In another intercepted communication, Rivera told Lewis to meet "where you seen me last" to complete the transaction. While surveilling the ~~address provided~~, police observed a transaction between Rivera and an unidentified individual driving a gray 2007 Toyota Camry, which turned out to be registered to Lewis's girlfriend, with whom Lewis lived at the time.

On February 26, 2016, law enforcement intercepted another communication between Rivera and Lewis about an additional purchase. The police identified Lewis, who was driving a black 2010 Nissan also registered to his girlfriend, when he met with Rivera.

On June 9, 2016, police executed a search and arrest warrant at Lewis's apartment. In a storage area associated with his apartment, the police found "small amounts of drugs (including cocaine)" as well as "drug paraphernalia," such as a bag containing scales and packaging material. The police additionally uncovered a loaded revolver, three dozen rounds of ammunition, and personal documents belonging to Lewis. Lewis denied ownership of all the items seized from the storage area except for his personal documents. He insisted that the revolver was not his, although he did not contest the firearm enhancement for purposes of his Sentencing Guidelines calculation.

B.

On July 13, 2016, a federal grand jury returned a one-count superseding indictment charging Lewis with conspiracy to distribute cocaine powder in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1). Lewis pleaded guilty to the offense, which carries a statutory maximum term of twenty years' imprisonment.

The Probation Office's Presentence Investigation Report ("PSR") assigned a base offense level of sixteen, pursuant to U.S.S.G. § 2D1.1(c)(12), which it increased by two levels under U.S.S.G. § 2D1.1(b)(1) on account of the discovered revolver, yielding an adjusted offense level of eighteen. The PSR also determined that Lewis qualified as a career offender under the Sentencing Guidelines because: He had two prior Massachusetts felony convictions for controlled substance offenses; he was over the age of eighteen when he committed the instant offense; and the instant offense was a "controlled substance offense." See U.S.S.G. § 4B1.1(a), (b)(3). The PSR used as predicates Lewis's 1998 conviction for two counts of unlawful distribution of cocaine[2] as well as his 2010 conviction for possession with intent to

[2] Lewis was sentenced to three to four years of imprisonment for these charges and was released on February 2, 2002.

distribute cocaine and distribution of cocaine.[3] Applying the career-offender enhancement increased Lewis's offense level to thirty-two. Finally, the PSR applied a three-level downward adjustment for "acceptance of responsibility" under U.S.S.G. § 3E1.1, which brought Lewis's total offense level down to twenty-nine. Based on Lewis's criminal history category ("CHC") of IV, the PSR calculated Lewis's Guidelines sentencing range ("GSR") to be 151 to 188 months of imprisonment.

Lewis objected to the PSR on several grounds, most notably by challenging his career-offender classification. He argued that his instant conspiracy conviction could not count as a "controlled substance offense" under the Sentencing Guidelines and that existing circuit precedent to the contrary should be reconsidered.

On September 7, 2018, the district court sentenced Lewis to 108 months of imprisonment to be followed by three years of supervised release. The district court adopted the PSR's recommendation classifying Lewis as a career offender under U.S.S.G. § 4B1.1. Applying circuit precedent, the court overruled Lewis's objection to the career-offender designation. It agreed that Lewis's age as well as his instant conviction (conspiracy to

[3] Lewis was sentenced to five years of imprisonment for this charge and was released on July 12, 2013.

distribute cocaine) and predicate offenses (two prior state drug-trafficking offenses) triggered the career-offender enhancement, thus bringing his GSR to a tally of 151 to 188 months of imprisonment.[4]

The district court stressed the seriousness of the offense, including the presence of the gun, and stated that "[r]egardless of whether [Lewis is] a career offender or not, [he has] a history of recidivism," and it needed to "send . . . a very clear message . . . that [Lewis] cannot continue to sell drugs." The court nevertheless varied Lewis's sentence down to 108 months because his first predicate offense, the 1998 drug conviction, involved the sale of $40-worth of drugs when he was seventeen. The district court judge also stated that "if career offender does not apply, I want this to come back to me to resentence because I am using career offender as an anchor."[5]

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[4] The parties agree that without the career-offender designation Lewis's GSR would have been thirty-seven to forty-six months of imprisonment.

[5] Relatedly, the court noted that because Lewis was seeking to vacate his second predicate offense (the 2009 drug conviction), which was then on appeal before the Massachusetts Appeals Court, it wanted the case returned for resentencing if he prevailed. However, the Appeals Court has since affirmed the denial of Lewis's motion to withdraw his guilty plea to the state-law charge of possession of heroin with the intent to distribute, thereby foreclosing this avenue for resentencing. See Commonwealth v. Lewis, 136 N.E.3d 1226 (Mass. App. Ct. 2019).

On September 14, 2018, Lewis timely appealed.

II.

We review de novo the district court's interpretation and application of the Sentencing Guidelines. United States v. Tavares, 705 F.3d 4, 24 (1st Cir. 2013).

When determining whether to apply a career-offender enhancement under the Sentencing Guidelines, sentencing courts adhere to §§ 4B1.1 and 4B1.2 of the Sentencing Guidelines and their corresponding enabling statute, 28 U.S.C. § 994(h). Under § 4B1.1(a), a defendant qualifies as a "career offender" if (1) "the defendant was at least eighteen years old at the time [he] committed the instant offense"; (2) the instant offense "is a felony that is either a crime of violence or a controlled substance offense"; and (3) "the defendant has at least two prior felony convictions" -- known as predicates -- for "either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). Section 4B1.2(b) of the Sentencing Guidelines defines the term "controlled substance offense" as follows: [A]n 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 the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense. Id.

§ 4B1.2(b).[6] Crucially for this case, Application Note 1 of the commentary to § 4B1.2, adopted by the United States Sentencing Commission (the "Sentencing Commission"), states that for purposes of applying the career-offender enhancement, both crimes of violence and controlled substance offenses "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." Id. § 4B1.2, cmt. n.1.[7]

Lewis raises five arguments as to why the career-offender enhancement nevertheless should not apply in his case: First, Application Note 1 is inconsistent with the text of the Sentencing Guidelines and their enabling statute, and therefore following the Application Note amounts to unconstitutional and "[u]nchecked . . . [d]eference to the Commission's [i]nterpretation of its [o]wn [r]ules." Second, even if Application Note 1 is not inconsistent with the definition of "controlled substance offense" in § 4B1.2, the Sentencing Commission exceeded its rulemaking authority under § 994(h) by "enlarg[ing] the definition of 'controlled substance offenses' to

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[6] By contrast, the definition of "crime of violence" in the Sentencing Guidelines contemplates the use or "attempted use . . . of physical force" in its force clause. See U.S.S.G. § 4B1.2(a)(1).

[7] See U.S.S.G. amend. 268 (Nov. 1, 1989). Six years later, the Sentencing Commission re-promulgated the Application Note 1 without change. See U.S.S.G. amend. 528 (Nov. 1, 1995).

include conspiracies." Third, his state offenses do not count as predicates for a career-offender enhancement. Fourth, in the event Application Note 1 commands deference, his conspiracy conviction is a categorical mismatch with the generic Sentencing Guidelines conspiracy. And fifth, the district court erred in not acknowledging that it could vary downwardly based on a disagreement with the policy underlying § 4B1.2.

Lewis's first two arguments, and the additional points he makes in support of those arguments,[8] run headfirst into our prior holdings that "controlled substance offenses" under § 4B1.2 include so-called inchoate offenses such as conspiring to distribute controlled substances. See United States v. Piper, 35 F.3d 611 (1st Cir. 1994); United States v. Fiore, 983 F.2d 1 (1st Cir. 1991), abrogated on other grounds by United States v. Giggey, 551 F.3d 27, 28 (1st Cir. 2008) (en banc) (reversing course on whether burglary of something other than a dwelling is a predicate offense); see also United States v. Nieves-Borrero, 856 F.3d 5 (1st Cir. 2017) (holding that following Piper was not plain error).

[8] Lewis maintains that his state drug-trafficking offenses do not count as predicates for a career-offender enhancement because they are not specifically listed as controlled substance offenses triggering sentencing at or near the maximum under § 994(h), and that Application Note 1 violates the rule of lenity, due process, and the separation of powers. These arguments are also foreclosed by our circuit precedent. See United States v. Piper, 35 F.3d 611, 619-20 (1st Cir. 1994).

In Fiore, we encountered as a "question of first impression" the issue of whether a prior conviction for conspiracy could qualify as a predicate offense for purposes of the career-offender provisions of the Sentencing Guidelines. 983 F.2d at 1, 4. The defendant in that case contended that his prior convictions for conspiracy to violate a Rhode Island controlled substance act and conspiracy to break and enter a commercial structure did not qualify as predicate offenses under the Sentencing Guidelines' career-offender provisions. Id. at 2. We held that they did, explaining that "[i]n general, we will defer to the Commission's suggested interpretation of a guideline provision unless [that] position [was] arbitrary, unreasonable, inconsistent with the guideline's text, or contrary to law." Id.[9]

In Piper, we again encountered a challenge to whether a conspiracy conviction qualifies as a controlled substance offense. The defendant argued both that Application Note 1 was inconsistent with the career-offender guideline and that inclusion of

[9] We further explained that Application Note 1 "implement[ed] [the] categorical approach in a sensible fashion," and explained that Taylor v. United States, 495 U.S. 575 (1990), which adopted a "'formal categorical approach' for determining whether an offense was a violent felony" for purposes of the Armed Career Criminal Act, was "entirely consistent" with the Sentencing Commission's approach under the career-offender guideline, and that it allows consideration of the object of the conspiracy in its analysis. Fiore, 983 F.2d at 3.

conspiracy exceeded the Sentencing Commission's statutory authority. 35 F.3d at 617. As to the first claim, we applied Stinson v. United States, 508 U.S. 36, 45 (1993). Piper, 35 F.3d at 617. In Stinson, the Supreme Court held that the Sentencing Guidelines commentary constitutes the Sentencing Commission's "interpretation of its own legislative rules," and that so long as it does not "violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the [the Guidelines].'" 508 U.S. at 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). Under that framework, if any inconsistency arises between the commentary and the guideline it interprets -- i.e., if "following one will result in violating the dictates of the other" -- the guideline supersedes the commentary. Id. at 43. We held that a conviction for conspiracy to possess with the intent to distribute over one hundred kilograms of marijuana could serve as a triggering offense for career-offender purposes so long as a "crime of violence" or a "controlled substance offense" was the object of the conspiracy. Piper, 35 F.3d at 613, 619. We reasoned that "[b]ecause [Application Note 1] neither excludes any offenses expressly enumerated in the guideline, nor calls for the inclusion of any offenses that the guideline expressly excludes, there is no inconsistency" between the two. Id. at 617; see also id.

(reasoning that Application Note 1 "comports sufficiently with the letter, spirit, and aim of the guideline to bring it within the broad sphere of the Sentencing Commission's interpretive discretion").

We also determined in Piper that Application Note 1 did not "contravene[] 28 U.S.C. § 994(h)." Id. at 617–18. We based this conclusion on our understanding that the legislative history showed that Congress intended § 994(h) to be "a floor[] describing the irreducible minimum that the Sentencing Commission must do by way of a career offender guideline," not "a ceiling" of what offenses may be included. Id. at 618.

Finally, in Nieves-Borrero we relied on Piper to hold that it was not plain error for the district court to count a conviction for the crime of attempt to possess with intent to distribute a controlled substance as a "controlled substance offense" under the Sentencing Guidelines. 856 F.3d at 9.

This circuit precedent forecloses Lewis's arguments as to the authority of Application Note 1, including his contention that Application Note 1 is inconsistent with the text of the career-offender guideline, and that its promulgation exceeded the Sentencing Commission's statutory authority under 28 U.S.C. § 994(h). Under the "law of the circuit" doctrine, "newly constituted panels in a multi-panel circuit court are bound by

prior panel decisions that are closely on point." United States v. Santiago-Colón, 917 F.3d 43, 57 (1st Cir. 2019) (quoting United States v. Wurie, 867 F.3d 28, 34 (1st Cir. 2017)).

Two exceptions exist to the law of the circuit doctrine, neither of which applies to Lewis's case. We recognize a first exception when "[a]n existing panel decision [is] undermined by controlling authority, subsequently announced, such as an opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling." Williams v. Ashland Eng'g Co., 45 F.3d 588, 592 (1st Cir. 1995). A second exception applies "in those 'rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind.'" Santiago-Colón, 917 F.3d at 57-58 (quoting Wurie, 867 F.3d at 34). These "exceptions to the law of the circuit doctrine are narrowly circumscribed" to preserve the "stability and predictability" essential to the rule of law. United States v. Barbosa, 896 F.3d 60, 74 (1st Cir. 2018); see also Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) ("Adherence to precedent is 'a foundation stone of the rule of law.'" (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014))).

There is plainly no subsequent contrary controlling

authority on the question at hand. Neither our court nor the Supreme Court has considered the relationship between § 4B1.2 and Application Note 1 since our decisions in Fiore, Piper, and Nieves-Borrero. So the first exception to the law of the circuit doctrine cannot apply here.

Lewis, therefore, relies primarily on the second exception. He submits that the Supreme Court's recent decision in Kisor v. Wilkie, 139 S. Ct. 2400, which issued three months after Lewis filed his opening brief in this appeal, compels us to reexamine our precedent.[10] In his view, Kisor, even if not directly controlling, "offers a sound reason for believing that [our] former panel[s], in light of fresh developments, would change

[10] Lewis also argues that the Supreme Court's decision in United States v. LaBonte, 520 U.S. 751 (1997), casts doubt on Piper's statutory holding that the Sentencing Commission may rely on its "lawfully delegated powers" under § 994(a) to include offenses in the career-offender guideline beyond those listed in § 994(h). Piper, 35 F.3d at 618 (holding that § 994(h) sets a "floor" and not a "ceiling"). But LaBonte addressed an entirely different issue: the meaning of § 994(h)'s direction to the Sentencing Commission to prescribe a career-offender penalty "at or near the statutory maximum." 520 U.S. at 752–53. In interpreting that language, the Court applied the principle, established long before Piper, that the Sentencing Commission cannot adopt a guideline that conflicts with the plain text of the enabling statute. See id. at 757. As such, nothing in LaBonte undermines our holding in Piper, which itself recognized "the primacy of the statute" and considered its text in light of its legislative history. 35 F.3d at 617 n.3, 618.

[their] collective mind[s]." Santiago-Colón, 917 F.3d at 57-58 (quoting Wurie, 867 F.3d at 34). We disagree.

In Kisor, the Supreme Court considered, but rejected, a challenge to the Auer/Seminole Rock doctrine, which reflects the long-standing practice of deferring to "agencies' reasonable readings of genuinely ambiguous regulations," 139 S. Ct. at 2408,[11] and which serves in part as the foundation for our circuit's prior precedents concerning Application Note 1. See Piper, 983 F.2d at 617 (citing Stinson, 508 U.S. 36 (citing Seminole Rock, 325 U.S. at 414)). See generally Auer v. Robbins, 519 U.S. 452 (1997); Seminole Rock, 325 U.S. at 410. It is nevertheless fair to say that Kisor sought to clarify the nuances of judicial deference to agency interpretations of regulations. In the Court's words, Kisor aims to recall the limits "inherent" in the Auer/Seminole Rock doctrine and to "restate, and somewhat expand on, those principles." Id. at 2414–15. As the Court put it, when reviewing an agency's interpretation of its own regulation, "a court should not afford Auer deference unless the regulation is genuinely ambiguous," and after deploying the full interpretive "legal

[11] In Kisor, the Supreme Court considered deference afforded by the Federal Circuit to the Board of Veterans' Appeals' interpretation of the meaning of the term "relevant" records in a VA regulation providing retroactive benefits. See 139 S. Ct. at 2423.

toolkit" to "resolve . . . seeming ambiguities out of the box." Id. at 2415. Then, "[i]f genuine ambiguity remains," a court must ensure that "the agency's reading [is] 'reasonable,'" id. (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)), meaning that it "must come within the zone of ambiguity the court has identified after employing all its interpretive tools," id. at 2416.

We see nothing in Fiore, Piper, and Nieves-Borrero to indicate that the prior panels in those cases viewed themselves as deferring to an application note that strayed beyond the zone of ambiguity in the Sentencing Guidelines. Nor did those panels suggest that they regarded Auer deference as limiting the rigor of their analysis of whether the guideline was ambiguous. And it is also plain that those panels viewed their analyses as considering both the letter of the text and its purpose. So we fail to find a sound basis for concluding with sufficient confidence that our prior panels would have found in Kisor any reason to "'change [their] collective mind[s]'" with respect to the deference owed to Application Note 1. Wurie, 867 F.3d at 35 (quoting United States v. Rodríguez, 527 F.3d 221, 225 (1st Cir. 2008)). At least three circuits have, post-Kisor, adhered to prior circuit holdings akin to our own concerning § 4B1.2 and inchoate offenses. See, United States v. Tabb, 949 F.3d 81, 87 (2d Cir. 2020); United States v.

Lovelace, 794 Fed. App'x 793, 795 (10th Cir. 2020); United States v. Crum, 934 F.3d 963, 965 (9th Cir. 2019) (per curiam), reh'g denied, No. 17-302 (9th Cir. Oct. 29, 2019), cert denied, No. 19-7811, 2020 WL 1496759 (Mar. 30, 2020) (mem.). And Kisor itself expressly denied any intent to "cast doubt on many settled constructions of rules" and inject "instability into so many areas of law." 139 S. Ct. at 2422. Simply put, we do not find anything in our prior opinions suggesting that those panels understood themselves as straying beyond the zone of genuine ambiguity in deeming Application Note 1 consistent with § 4B1.2.

Lewis also points us to United States v. Soto-Rivera, 811 F.3d 53 (1st Cir. 2016), another case which he argues casts doubt on the durability of the Fiore, Piper, and Nieves-Borrero panel decisions. The court's holding in Soto-Rivera, however, was necessarily limited to the issue presented there: whether Application Note 1 properly categorized the offense of being a felon in possession of a machine gun as a "crime of violence" under § 4B1.2(a) "shorn of the residual clause." Soto-Rivera, 811 F.3d at 54, 60–62. The court wrote that without the residual clause, "[t]here [was] simply no mechanism or textual hook in the [g]uideline that allow[ed] us to import offenses not specifically listed therein into § 4B1.2(a)'s definition of 'crime of violence.'" Id. at 60. But it had no need to address § 4B1.2(b)

or the portion of Application Note 1 that defines conspiracies as "controlled substance offense[s]." So, Soto-Rivera could not have modified Piper, Fiore, or Nieves Borrero.

Finally, Lewis calls our attention to the D.C. Circuit's decision in United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018),[12] the Sixth Circuit's decision in United States v. Havis,[13] 927 F.3d 382 (6th Cir. 2019) (en banc), and the Ninth Circuit's decision in Crum, 934 F.3d 963. These cases do not constitute controlling authority in this circuit. See Igartúa v. United States, 626 F.3d 592, 604 (1st Cir. 2010) (explaining that the second exception to the law-of-the-circuit doctrine has been interpreted narrowly and should be applied when recent Supreme Court precedent calls into question a prior panel opinion); United States v. Lewis, 517 F.3d 20, 24 (1st Cir. 2008) ("The law of the circuit rule does not depend on whether courts outside the circuit march in absolute lock step with in-circuit precedent.").

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[12] In Winstead, the D.C. Circuit held that the inclusion of inchoate offenses in Application Note 1 was inconsistent with § 4B1.2(b), reasoning that "Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses," and applying the expressio unius est exclusio alterius canon. 890 F.3d at 1091.

[13] In Havis, the Sixth Circuit held that "[t]he text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses," after finding that "the Commission used Application Note 1 to add an offense not listed in the guideline." 927 F.3d at 386-87.

Moreover, these cases raise arguments that, in any event, mirror those considered by the prior panels in this circuit that we have already discussed. See United States v. Hudson, 823 F.3d 11, 15 (1st Cir. 2016) (rejecting an argument where the defendant offered "no new or previously unaddressed reason to deviate from our prior holdings").

None of this is to say how we would rule today were the option of an uncircumscribed review available. That the circuits are split suggests that the underlying question is close. We hold only that the case for finding that the prior panels would have reached a different result today is not so obviously correct as to allow this panel to decree that the prior precedent is no longer good law in this circuit. We are a court of six sitting members, on which it customarily takes four votes to sit en banc. Were panels of three too prone to reverse prior precedent, we would lose the benefits of stability and invite litigants to regard our law as more unsettled than it should be.

III.

Lewis presents two additional arguments on appeal, neither of which he preserved in the district court. We review each only for plain error. See United States v. Ortíz-Mercado, 919 F.3d 686, 689 (1st Cir. 2019). In order to establish plain error, a defendant must show that: "(1) there was error; (2) the

error was plain; (3) the error affected [his] substantial rights; and (4) the error adversely impacted the fairness, integrity, or public reputation of judicial proceedings." United States v. Clemens, 738 F.3d 1, 10 (1st Cir. 2013) (alteration in original) (quoting United States v. Caraballo-Rodriguez, 480 F.3d 62, 69 (1st Cir. 2007)). Plain error is a "high hurdle," requiring demonstration both "that an error occurred and that it was clear or obvious." United States v. Diaz, 285 F.3d 92, 95-96 (1st Cir. 2002).

Lewis first contends that the district court erred by not exercising discretion to vary downwardly from his calculated Guidelines sentence and thereby, as he puts it, "disagree" with the commentary's inclusion of conspiracy as a predicate offense on policy grounds. Under Kimbrough v. United States, district courts have discretion to vary downwardly from a sentence on the basis of a policy disagreement with the relevant guideline. 552 U.S. 85, 109–10 (2007). Lewis argues that certain comments made by the district court in applying the career-offender enhancement indicate that the district court did not believe that it had discretion to disagree with the application of that enhancement. We find this argument unpersuasive.

For starters, Lewis expressly petitioned the district court to vary from the career-offender guideline based on policy

reasons in his sentencing memorandum. In response, the district court declined to do so, as was clearly its prerogative. See United States v. Ekasala, 596 F.3d 74, 76 (1st Cir. 2010) ("[T]he mere fact that a sentencing court has discretion to disagree with the guidelines on policy grounds does not mean that it is required to do so." (citation omitted)); United States v. Aquino-Florenciani, 894 F.3d 4, 8 (1st Cir. 2009) ("[T]he district court's broad discretion obviously includes the power to agree with the guidelines." (quoting United States v. Stone, 575 F.3d 83, 90 (1st Cir. 2009))).

The knowledgeable district court judge said nothing to suggest that she thought she lacked the ability to vary downwardly based on a disagreement with the application note. The judge made clear that she anchored her decision on the Sentencing Guidelines as our court had interpreted them. And she made clear that if our view changed she would want to resentence. But that is simply to say that she intended to anchor her sentence on a clear-cut interpretation of the Sentencing Guidelines, whatever that may be. It offers no suggestion that the judge thought that she could not vary if she disagreed with the Sentencing Guidelines. Nor did Lewis at the time say anything to suggest that he understood the court to see itself unduly constrained. There was no clear or obvious error here.

Second, Lewis contends that his conviction under 21 U.S.C. § 846 is a "categorical mismatch" with the generic definition of conspiracy set out in the guideline commentary. Lewis contends that in order to determine whether a conspiracy offense under § 846 can constitute a "controlled substance offense" under § 4B1.1, courts must look, per the categorical approach, to the "generic" definition of the offense of conspiracy within "contemporary usage of the term," and then to whether the offense of conviction satisfies the offense in the Sentencing Guidelines. See Taylor v. United States, 495 U.S. 575, 592 (1990). He notes that a number of state statutes as well as the federal conspiracy statute, 18 U.S.C. § 371, require an overt act for conspiracy, see United States v. Garcia-Santana, 774 F.3d 528, 535 (9th Cir. 2014), § 846, and therefore § 846 punishes more conduct than the generic offense of conspiracy referenced in Application Note 1.

Whether Lewis's own offense of conviction under 21 U.S.C. § 846 is a categorical mismatch with the generic definition of conspiracy is, in this case, a question that we do not have occasion to decide. There is no controlling authority on this issue in this circuit, and the other circuits remain divided in their response to it. Compare United States v. McCollum, 885 F.3d 300, 303–09 (4th Cir. 2018) (conspiracy to murder in aid of

racketeering, in violation of 18 U.S.C. § 1959(a)(5), is not a "crime of violence" for career-offender purposes because it does not require an overt act), United States v. Whitley, 737 F. App'x 147, 148-49 (4th Cir. 2018) (per curiam) (unpublished) (finding that a conviction violating § 846 does not qualify as a "controlled substance offense" for purposes of the career-offender enhancement), and United States v. Martinez-Cruz, 836 F.3d 1305, 1314 (10th Cir. 2016) (explaining that § 846 was "a categorical mismatch for the generic definition of 'conspiracy'" in the commentary to U.S.S.G. § 2L1.2 because the general requirements of conspiracy include an overt act, while § 846 does not), with United States v. Rivera-Constantino, 798 F.3d 900, 902-06 (9th Cir. 2015), United States v. Sanbria-Bueno, 549 F. App'x 434, 438-39 (6th Cir. 2013) (unpublished), and United States v. Rodriguez-Escareno, 700 F.3d 751, 753-54 (5th Cir. 2012). Therefore, any error, if there was one, could not have been "clear or obvious" as required to establish plain error. See United States v. Laureano-Pérez, 797 F.3d 45, 60 (1st Cir. 2015); Diaz, 285 F.3d at 96 ("If a circuit conflict exists on a question, and the law is unsettled in the circuit in which the appeal was taken, any error cannot be plain or obvious.").

IV.

For the foregoing reasons, we **affirm** the district court's sentence.

- Concurring Opinion Follows -

TORRUELLA AND THOMPSON, Circuit Judges (Concurring). We join the court's opinion but write separately to express our discomfort with the practical effect of the deference to Application Note 1, see U.S.S.G. § 4B1.2, cmt. n.1, that our precedent commands: The Sentencing Commission has added a substantive offense (here, the inchoate crime of conspiracy) to the relevant career-offender guideline through its commentary as opposed to the statutorily prescribed channel for doing so. "[C]ommentary, though important, must not be confused with gospel." Piper, 35 F.3d at 617. This is as true for us (the reviewing court) as it is for the Sentencing Commission. Therefore, like the Ninth Circuit, were we "free to do so," we "would follow the Sixth and D.C. Circuits' lead" and hold that Application Note 1's expansion of § 4B1.2(b) to include conspiracies and other inchoate crimes does not warrant deference. Crum, 934 F.3d at 966.

Indeed, we have already held that "there is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into § 4B1.2(a)'s definition of 'crime of violence.'" Soto-Rivera, 811 F.3d at 60. In our view, the same is true of § 4B1.2(b)'s definition of "controlled substance offense." See Havis, 927 F.3d at 386–87 (concluding that "no term in § 4B1.2(b) would bear th[e]

construction" Application Note 1 purports to give it); Winstead, 890 F.3d at 1091 (explaining that § 4B1.2(b)'s definition "clearly excludes inchoate offenses" like attempt and conspiracy). Neither the government nor any circuit court to address the question has identified any "textual hook" in the guideline to anchor the addition of conspiracy offenses. Soto-Rivera, 811 F.3d at 60.

The government's late-breaking suggestion at oral argument that the offense of conspiracy to commit a controlled substance offense (which forbids only the agreement to commit such an offense plus, sometimes, an overt act in furtherance) "prohibits" the acts listed in § 4B1.2(b), see United States v. Richardson, 958 F.3d 151, 155 (2d Cir. 2020); United States v. Lange, 862 F.3d 1290, 1295 (11th Cir. 2018), would take any modern English speaker (not to mention any criminal lawyer) by surprise. In ordinary speech, criminal laws do not "prohibit" what they do not ban or forbid. And if conspiracy laws "prohibit" the acts listed in § 4B1.2(b) because they "hinder" those acts (as the Second and Eleventh Circuit have reasoned), then it is hard to see why simple possession offenses would not also be "controlled substance offense[s]" under § 4B1.2(b); certainly, laws against possessing drugs hinder their distribution or manufacture. But we know that § 4B1.2(b) does not cover simple possession offenses. See Salinas v. United States, 547 U.S. 188, 188 (2006). On the

other hand, if the Sentencing Commission wanted to give § 4B1.2(b) a more expansive interpretation, it had obvious alternatives at its disposal that would not have required straining the guideline's words past their breaking point. See Winstead, 890 F.3d at 1091; United States v. McKenney, 450 F.3d 39, 43-45 (1st Cir. 2006) (reading the ACCA's definition of "serious drug offense," as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," to include conspiracies (emphasis added)). As the Supreme Court recently clarified, a court's duty to interpret the law requires it to "exhaust all the 'traditional tools' of construction" "in all the ways it would if it had no agency to fall back on" before it defers to an agency's "policy-laden choice" between two reasonable readings of a rule. Kisor, 139 S. Ct. at 2415. In our view, we could not "bring all [our] interpretive tools to bear" on the text of § 4B1.2(b) and still find that conspiracies are "controlled substance offense[s]" as the guideline defines them. Id. at 2423.

By relying on commentary to expand the list of crimes that trigger career-offender status, which may well lead judges to sentence many people to prison for longer than they would otherwise deem necessary (as the district judge indicated was the case here), our circuit precedent raises troubling implications for due

process, checks and balances, and the rule of law. The Sentencing Commission is an unelected body that exercises "quasi-legislative power" and (unlike most other agencies) is located within the judicial branch. Mistretta v. United States, 488 U.S. 361, 393 (1989). Thus, it can only promulgate binding guidelines, which influence criminal sentences, because they must pass two checks: congressional review and "the notice and comment requirements of the Administrative Procedure Act." Havis, 927 F.3d at 385 (citing Mistretta, 488 U.S. at 394). "Unlike the Guidelines themselves, however, commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment." Id. at 386. Thus, the same principles that require courts to ensure that agencies do not amend unambiguous regulations in the guise of "interpretation" ("without ever paying the procedural cost"), Kisor, 139 S. Ct. at 2420-21, apply with equal (if not more) force to the Sentencing Guidelines and their commentary. Id.

If it were otherwise, the Sentencing Commission would be empowered to use its commentary as a Trojan horse for rulemaking. See Havis, 927 F.3d at 386-87. This it is surely not meant to do, especially when the consequence is the deprivation of individual liberty. See Winstead, 890 F.3d at 1092 ("This is all the more troubling given that the Sentencing Commission wields the authority to dispense 'significant, legally binding prescriptions

governing application of governmental power against private individuals -- indeed, application of the ultimate governmental power, short of capital punishment.'" (quoting Mistretta, 488 U.S. at 413 (Scalia, J., dissenting))). The Sentencing Guidelines are no place for a shortcut around the due process guaranteed to criminal defendants. If it so desires, the Sentencing Commission should expand the definition of "controlled substance offense" to add conspiracies by amending the text of § 4B1.2(b) through the statutorily prescribed rulemaking process. See 28 U.S.C. § 994(h), (p), (x).

United States Court of Appeals
For the First Circuit

Nos. 18-1916

UNITED STATES OF AMERICA,

Appellee,

v.

VAUGHN LEWIS,

Defendant, Appellant.

ERRATA SHEET

The concurring opinion of Torruella and Thompson, Circuit Judges, issued on June 16, 2020, is amended as follows:

On page 28 lines 9-12, change:

"Unlike the Guidelines themselves, however, commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment." Id. at 386.

To:

Unlike the Guidelines themselves, however, commentary to the Guidelines is not required to pass through the gauntlets of congressional review or notice and comment. See id. at 386.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA
v.
Vaughn Lewis

~~JUDGMENT~~ IN A CRIMINAL CASE

Case Number: 1: 16 CR 10166 - PBS - 4

USM Number: 99619-038

Inga Bernstein
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1s

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

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

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC § 846	Conspiracy to Distribute Cocaine	06/08/16	1s

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) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

9/7/2018
Date of Imposition of Judgment

Patti B. Saris
Signature of Judge

The Honorable Patti B. Saris
Chief Judge, U.S. District Court
Name and Title of Judge

9/21/18
Date

AO 245B (Rev. 02/18) Judgment in Criminal Case
Sheet 2 — Imprisonment

Judgment — Page _____ of 7

DEFENDANT: Vaughn Lewis
CASE NUMBER: 1: 16 CR 10166 - PBS - 4

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 9 years

on Count 1s

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

Residential Drug Abuse Program, once the program is completed the defendant shall be considered for the BOP'S Alternative Community Place Programing; Participate in vocational/peer training; that the defendant be designated to FCI Danbury or FCI Berlin. See attachment A for further recommendations.

☑ 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 _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Vaughn Lewis
CASE NUMBER: 1: 16 CR 10166 - PBS - 4

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 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 cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ 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)*
6. ☐ 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: Vaughn Lewis
CASE NUMBER: 1: 16 CR 10166 - PBS - 4

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: Vaughn Lewis
CASE NUMBER: 1: 16 CR 10166 - PBS - 4

SPECIAL CONDITIONS OF SUPERVISION

1. You are prohibited from consuming any alcoholic beverages.

2. You must participate in a program for substance abuse counseling as directed by the Probation Office, which program may include testing, not to exceed 104 drug tests per year to determine whether you have reverted to the use of alcohol or drugs.

3. You must participate in a mental health treatment program as directed by the Probation Office.

4. You shall be required to contribute to the costs of evaluation, treatment, programming, and/or monitoring (see Special Condition # 2 & 3), based on the ability to pay or availability of third-party payment

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Vaughn Lewis
CASE NUMBER: 1: 16 CR 10166 - PBS - 4

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$	$

☐ 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	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

Judgment — Page 7 of 7

DEFENDANT: Vaughn Lewis
CASE NUMBER: 1: 16 CR 10166 - PBS - 4

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 $ 100.00 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:

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.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
v.	)	Criminal Action No. 16-10166-PBS
VAUGHN LEWIS,	)	
Defendant.	)	

ATTACHMENT A

The Court recommends placement at FCI Danbury to permit participation in the various occupational training programs offered there, including training to become a Peer Specialist, a Teacher's Aide, a Career Development Technician and Teachers' Assistant. The Court further recommends this placement to facilitate regular family visitation, including with his young son.

September 21, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
-VS-	)	Criminal No. 16-10166-PBS
	)	Pages 1 - 39
VAUGHN LEWIS,	)	
	)	
Defendant	)	

SENTENCING

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES CHIEF DISTRICT JUDGE

A P P E A R A N C E S:

MICHAEL J. CROWLEY, ESQ., Assistant United States Attorney, Office of the United States Attorney, 1 Courthouse Way, Room 9200, Boston, Massachusetts, 02210, for the Plaintiff.

INGA S. BERNSTEIN, ESQ. and ZORAIDA FERNANDEZ, ESQ., Zalkind Duncan & Bernstein, 65a Atlantic Avenue, Boston, Massachusetts, 02110, for the Defendant, Vaughn Lewis.

ALSO PRESENT: Marlenny Ramdehal, U.S. Probation Office.

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
September 7, 2018, 2:40 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
(617)345-6787

P R O C E E D I N G S

THE CLERK: Court calls Criminal Action 16-10166, United States v. Lewis. Could counsel please identify themselves.

MR. CROWLEY: Good afternoon, your Honor. Michael Crowley on behalf of the United States.

THE COURT: Thank you.

MS. BERNSTEIN: Good afternoon, your Honor. Inga Bernstein on behalf of Vaughn Lewis.

MS. FERNANDEZ: And Zoraida Fernandez, also on behalf of Mr. Lewis, your Honor.

MS. RAMDEHAL: Marlenny Ramdehal for Probation.

THE COURT: Thank you. All right, you all may be seated. Thank you very much.

This is a more complicated sentencing than many that I do, and I've received a brief from both the government and defense as well as a supplemental set of letters. I think that's all I'm supposed to have, is that right? Okay. But I also talked with Probation this morning, and I just want to make sure we understand that there's no agreement to the sentencing range because there's a challenge to whether career offender applies or it doesn't apply. But the one area where the Probation agrees with the defense, and I think she told you about it, is that if career offender doesn't apply, the documents would suggest that this be a Criminal History

Category V rather than a VI.

So if career offender applies, the total offense level is 29. The Criminal History Category is VI. There's a range of incarceration of 151 to 188 months, no mandatory minimum. I think that's right. Supervised release of one to three years and a fine range of $30,000 to $1 million. Is that correct?

MR. CROWLEY: I believe the supervised release would have a mandatory minimum of three years.

THE COURT: Three years? I don't know why -- okay, thank you.

So if career offender doesn't apply, then it's a total offense level of 18 and Criminal History Category V. And I add that in because the initial objection was to the use of an enhancement for a gun. I understand that's been waived from the briefings. So that there are two things going forward that may affect this, and the opinion might be reversed or appealed or whatever. I just want to make it sure so we're not recalculating at some future date and time. So without the career offender, it would be 51 to 63; is that right?

MS. BERNSTEIN: No.

THE COURT: All right, what is it? What do you think it is?

MS. BERNSTEIN: No. I think the criminal history category is 12 because there are four --

THE COURT: I thought there was an agreement it was --

Marlenny, you're the one who recalculated it, so 18 --

MS. BERNSTEIN: I can tell you the paragraph numbers, if that's helpful, as I understand it.

THE COURT: So wait a minute. So you think that it's -- we knocked off two points, right?

MS. BERNSTEIN: Correct. So in the PSR, Paragraph 33, there is a 1997 case that ended up in Superior Court, a '98 that gets three points.

THE COURT: Wait a minute now. I've got to get to it. Say it again. Paragraph --

MS. BERNSTEIN: Paragraph 33.

THE COURT: Okay.

MS. BERNSTEIN: That gets three points.

THE COURT: Right, that's one of the predicates.

MS. BERNSTEIN: Correct. Paragraph 35, a 2002 case, is also three points.

THE COURT: Right.

MS. BERNSTEIN: Paragraph 39 is the South Carolina case from 2003 which gets three points.

THE COURT: Yes.

MS. BERNSTEIN: And Paragraph 40 is Bristol Superior --

THE COURT: Is three points?

MS. BERNSTEIN: -- is three points.

THE COURT: Is that right from your point of view?

MS. RAMDEHAL: Yes, your Honor.

THE COURT: So when you recalculated it this morning -- I know you were jumping into this really late -- I think you had mentioned 14, so we're down to 12?

MS. RAMDEHAL: Correct.

THE COURT: All right, so I will accept that. So 12 would be --

MR. CROWLEY: A V.

THE COURT: A V. What am I missing? We did this on the -- poor Marlenny jumped into this, unfortunately. So I was doing this just an hour or two ago. So why do you think it wasn't? 18 and V is what she calculated, and that seems to be right. 12 would put us at a V. I know this sounds like Greek to everyone else, but I'm just doing this because there is some chance that I'll have to redo this later on.

MS. BERNSTEIN: Okay, so you go...

MS. RAMDEHAL: Your Honor, if you look at Page 7, that has the Guideline calculations. We have 16 base offense plus two for a firearm.

THE COURT: 18.

MS. RAMDEHAL: 18 minus three.

MR. CROWLEY: Criminal History V, so it's a 15 and a Criminal History V.

THE COURT: A 15 and a V, maybe that's where the difference comes from.

MS. BERNSTEIN: That's it. I'm sorry, yes.

THE COURT: All right, okay. Okay, 15 and V is 41 to 51? Is that how you got yours?

MR. CROWLEY: 15 is 37 --

THE COURT: 15 is 37 to 46.

MS. BERNSTEIN: Yes.

THE COURT: All right. Now, this is an alternative calculation that I'm making for the following reasons. It was an excellent brief.

MS. BERNSTEIN: Thank you.

THE COURT: And I understand that you're teeing up for appeal and requesting the First Circuit to change its mind in how it calculates career offender because, as I understand it, and I'm bound by First Circuit law, there are not one but two First Circuit precedents that tell me to look at the application note in construing the career offender Guidelines. You are relying on a very interesting case I hadn't seen before out of Washington, D.C., but it's still the minority approach. So I have no ability or desire at this point, or authority indeed, to reverse a recent First Circuit case, which seems indistinguishable. So I'm going to deny your motion with respect to the career offender, but I'm stating clearly for the record that if career offender does not apply, I want this to come back to me to resentence because I am using career offender as an anchor, you know, the starting point, as it's required to be under law. So I would want it to come back.

The second issue is that you may end up getting vacated, as I understand it, in the Mass. Appeals Court, the what I'll call is the "Annie Dookhan related case" where you got part of the conviction reversed but not the full one, so it still counts.

MS. BERNSTEIN: Correct.

THE COURT: If that Appeals Court decision -- I assume it just will go to the Appeals Court, not the SJC, but, in any event, do you know whether it's the Appeals Court or the SJC?

MS. BERNSTEIN: I believe it's pending in the Appeals Court now.

THE COURT: Okay. If that gets reversed, I want to see this again, okay? But right now, based on what I've got -- you can pop up at any time, Mr. Crowley, if you think my reasoning is wrong here -- right now, it's a career offender case. And I understand you've requested a variance, and we'll hear argument on that, but it's a variance that will take into consideration the fact that career offender applies. And if either of those two circumstances happen or something else I'm not foreseeing right now, I would want it to come back to me.

MS. BERNSTEIN: Thank you. There is, I believe, a third issue.

THE COURT: What's the third one?

MS. BERNSTEIN: The third issue is, the first predicate -- and this obviously comes up on 3553 factors as

well -- but the first predicate is this conviction from when he was a 17-year-old, and there I think is a basis to look to the fact that he was --

THE COURT: That's a variance issue, which I will consider.

MS. BERNSTEIN: It is a variance issue, and I think there might be some argument that it's analogous, as I understand it -- and I saw this two weeks ago, and I'm kicking myself -- there was a recent change, I believe, and some guidance from the Sentencing Commission looking at state treatment of misdemeanors. I'm sure you know better than I.

THE COURT: I know this one. It comes out of California. But, in any event, it didn't apply foursquare on this. I looked at that.

MS. BERNSTEIN: Yes, that doesn't, but I think by analogy, where state law and science has changed to reflect the lesser ability of juvenile offenders to form mens rea, which is the reason that we have changed the law of majority for the purposes of criminal statutes in Massachusetts, and there's a lot of science about brain development, and I would argue by analogy that where the state law has changed --

THE COURT: Did they make the change retroactive?

MS. BERNSTEIN: They did not.

THE COURT: Okay, so I view this as a variance issue.

MS. BERNSTEIN: Okay.

THE COURT: Okay? And I do agree that that's one basis which I'm thinking about a variance.

MS. BERNSTEIN: All right, thank you.

THE COURT: But it's not a question of the Guidelines. So at least for purposes of right this moment, you've preserved the issue with respect to the applicability of the career offender Guidelines, and you can come back on a habe to the extent, or whatever it would be, that the conviction gets vacated. Is that what it would be, *Mathis* or some such? But for right now, I am under the career offender guidance. And at this point you both -- I've read your briefs, as I always do, and I've read the myriad of letters, but I didn't know, Mr. Crowley, if you wanted to say something.

MR. CROWLEY: Your Honor, we don't believe any variances is mandated in this case, and I think your review of the letters should support that. When you read his letters, particularly his letter, it should give you pause on any kind of variance in this case because throughout that letter, though he continuously harps on the issue of how bad drugs have ruined his life, he minimizes his role in everything, and I would note some very significant parts of his letter and of their sentencing brief.

In his letter, he states that he did the drug deals in this case only for a third party, for whom he got no money from. He further states that he had stopped doing drug

trafficking after those couple deals. That's just not right. In their brief that they filed, they cited to one of the line sheets for the line, "I haven't been running around like that." What they didn't put was the whole sentence in. The entire sentence is, "Yeah, I haven't been running around like that, but I'm about to kick it up again."

"I am about to kick it up again."

THE COURT: When was that? Was that before he was arrested? What was the timing of that?

MR. CROWLEY: This is one of the line sheets. They cite it in their brief at Page 27.

THE COURT: Yes, but when was that conversation?

MR. CROWLEY: This conversation was May 7, 2016.

MS. BERNSTEIN: It was March.

MR. CROWLEY: Excuse me, March 7, 2016, which was nine days after he had got 62 grams of cocaine from Mr. Rivera, thirteen days after he got his first delivery of cocaine from Mr. Rivera.

THE COURT: So it was after the 124?

MR. CROWLEY: It was after the 124 grams.

THE COURT: And do you have proof that he continued after that point?

MR. CROWLEY: You have the seizures from his house.

THE COURT: All right, so I don't know the timeline as well as --

MR. CROWLEY: So what you have is, within nine days of him getting in a five-day period 124 grams of powder cocaine, Rivera calls him, and he says to Rivera, "I haven't been running around like that, but I'm about to kick it up again." And not only does he say that, four lines later he asks Rivera for strips, "sobos," and that's Suboxone. So you have an individual that's claiming that he had given up drug trafficking, that he was only doing it for someone else, but he says, "I'm doing it." And then he tries to get opiates from Rivera. And he tells Rivera that he could put a tax on it, which is an extra charge, and Rivera says, "I'll see if I can get you opiates."

The argument that he had given up, in his letter he says that on June 7 he went to get a job, he had given up drug trafficking, and the next day he goes there and he's arrested. When he's arrested, they search the storage unit, which is only on the level of that apartment. There's only one apartment on that level, his. It's got packaging, drugs, a scale, documents from him, and a loaded handgun. And now their argument or his argument is, "I'm not agreeing that the handgun is mine. I'll agree to the enhancement, but I'm not admitting it's mine." That's what they put in their brief. Well, if that's the case, your Honor, he's the most unlucky person on the planet because his prior conviction, they pulled two handguns out of his residence that were loaded. So his argument is that in

back-to-back drug convictions, he was so unlucky that loaded handguns were there each time.

Moreover, your Honor, when he wrote in his letter about that conviction in 2009, he told this Court that basically he didn't know they were drug dealing in there. The term he uses is, "Unbeknownst to me, there are people in my apartment dealing drugs."

Well, if you look at Paragraph 40 of the PSR, he's arrested coming out to meet with a woman to do a drug deal. They take cash off him and heroin before they go into the house. So this is, again, what the Court should take into account in the variance because what he's saying is, if you look at every page of his letter, first conviction, it was unjust, except if you look at that conviction, your Honor, it's in 1997. Prior to him getting the three- to four-year sentence, he had been convicted four months prior of possession of cocaine, which was pled down from possession to distribute, and a felony conviction for larceny and assault. So heading into that conviction, he had been convicted twice of felonies, and, by the way, convicted of drug trafficking after he had already been arrested for drug trafficking. So he says that's unfair. He gets let out. He gets arrested again, charged with drug trafficking, allowed to plead down. He's got a 30-month sentence for burglary.

In addition to that, once he gets out after that

second sentence, he's again out, and that's the 2009 one where he gets five years, and again he says that's wrong. And as we just discussed, his position is, "I didn't know what was happening."

Your Honor, that should give this Court pause because their entire argument on variance is that this falls outside the heartland. It does not. If you look at his record, it is consistent from age 16 to the present. He's got convictions for drugs, ABW, assault, burglary, and the two weapons.

Now, we're not saying that he got convicted of it, but how do you take out of the fact that in that apartment, when he's stopped outside meeting with a woman -- and they didn't object to it -- that the police were surveilling his apartment -- this is 2009 -- he walks out and meets with a woman. They pull him over. He's got money and heroin on his person. They go back to the apartment and find crack and heroin and two loaded guns.

THE COURT: Are those the guns that did not have his fingerprints on them?

MR. CROWLEY: They didn't have his fingerprints.

THE COURT: They had somebody else's, right?

MR. CROWLEY: Correct. But he must be the most unlucky person on the planet because right after he gets out, within two and a half years, he's arrested in this case, and there's a loaded .38 caliber handgun in his storage unit with

personal documents related to him.

Their argument that that was being used by some other drug trafficker to hide drugs and a loaded handgun is ludicrous. Think about it. That is the only storage unit on that floor. The Court already looked at the pictures. There was nothing else. So they would have the Court believe that someone was walking up there, even though they have the key in their apartment, because if the Court remembers, the officers took the key out of their apartment to open it --

THE COURT: I find it's more likely true than not that it was his gun and --

MR. CROWLEY: So you have a loaded gun then and two loaded guns previously. And this Court has said throughout the sentencings in this case that it was reducing sentences because there weren't guns involved. Well, that's not this case.

THE COURT: Let me ask you this. As you know, one of my key concerns is making sure people are sentenced commensurately with other people in the conspiracy, and both Rivera and Silva got ten years or so.

MR. CROWLEY: That's correct.

THE COURT: I think that's it. So where do you place him in this conspiracy? That's a big issue for me. Some of those initial convictions were when he was quite young, and there is a lot of literature about that. So I'm thinking about varying, and the big issue would be, do we put him on the level

of a Rivera and a Silva? How would you think about this case?

MR. CROWLEY: Well, Rivera was supplying people.

THE COURT: Right, so he was the most serious offender of the bunch I've seen.

MR. CROWLEY: The most serious drug trafficker.

THE COURT: Yes.

MR. CROWLEY: There are clearly differences based in this case on criminal history and the possession of the firearm. So if you look at it -- but the amount of drugs that he was getting -- and, again, I think you look at the calls -- he was getting 62 grams, 62 grams, and at the first 62-gram, he basically says, "I want what I got last time." So you have an individual that's getting over 2 ounces per deal. That is not what Silva was. If the Court remembers, Silva was dealing 8 balls and was a career offender with no gun, and the Court gave him ten years. So I think, if you're going to compare people in this case, it has to be Curtis Silva and the defendant. And the difference between the two is that the defendant was a far larger drug trafficker, and Curtis Silva did not have a handgun outside his residence. And I think that cuts to the other point in his letter where he says he's completely family-driven, but he's dealing drugs out of that location with a handgun, a loaded handgun. And I think the Court has to take into account his letter because the way he minimizes it, the way he is -- basically every one of these

convictions, if you read his letter, he is basically taking the position that he should be absolved of it, that the first one was overly aggressive; the other one he didn't know about the drug dealers, the 2009 conviction, being in his house. But that's contrary to what the facts are. And I think the Court has to look at that because the driving factor -- and they identified this in their case, in their argument -- they said that if you look at career offender, the thing you have to look at is recidivism and danger.

Well, recidivism has to be on the Court's mind in this case. He started and he started getting significant sentences at age 17. The last one was five years. And he claims that throughout that period, he understood what he was doing was destroying the community, he understood he shouldn't be doing it, but he again and again dealt drugs. And what you have when he submits this letter is an individual that's still -- I mean, legally he's accepted responsibility, but looking at this letter, he minimizes his role; he minimizes his responsibility for what he's done; and he tries to step away from everything.

So the Court has to say: What am I going to get when he gets out of jail? And I think the Court has to look at, like, when Curtis Silva got ten years, he was a far smaller drug dealer and no weapon, and didn't have the kind of record that the defendant has.

THE COURT: He had a higher Guideline range?

MR. CROWLEY: No. He was a career offender. Well, it was higher because --

THE COURT: I can't remember. I thought --

MR. CROWLEY: It was higher because he had a man-min. But in this case, if you look -- Curtis Silva, if the Court remembers, had all small sentences. You don't have that in this case. You have an individual that got a five-year sentence; it didn't stop him. He got five years on that Dookhan case; it didn't stop him. And I don't think the Court can divorce itself from, one, the fact that the gun is there. And I think it has to factor into the Court's analysis when he says, "I had stopped dealing drugs." He actually put in his letter, "I would have gone to trial except they didn't intercept the call where I told Rivera I stopped dealing drugs." Well, when you make that allegation, but right outside your apartment are drug-packaging materials, drugs, scale, and a loaded gun, you're still dealing drugs; but he represented to this Court that he had stopped. So where is he when he's -- their whole argument is, he's learned his lesson, and he will stop doing it, and that he needs to take care of his family, except his letter shows that he's minimizing and he hasn't taken full responsibility for it, and he put his family in danger. It's no different -- having that loaded handgun -- if the Court remembers, there were no other handguns in this case. No other defendant had a handgun. This defendant did.

THE COURT: Thank you.

MS. BERNSTEIN: Thank you, your Honor. Before we get started, I want to make sure that the Court is aware of who came to be with Mr. Lewis today. His mother, Jennifer Farrell, is here. She came up from Florida, which is where she lives. His father, Vaughn Lewis, Sr., is here. His fiancee, Carmen Depina, is here. His cousin, Keesha Lewis, is here, and a good family friend, Angel Rattler, is also here.

THE COURT: Welcome. Thank you for coming. A lot of times people go through this by themselves, and it's really useful to him to have someone here to be supportive, so thank you.

MS. BERNSTEIN: I think Mr. Lewis in his letter was not trying to minimize but trying to explain, trying to give the Court his view of the path that his life has taken; and he did that as best he could, and he explained the reasons why, in his view, the predicates shouldn't be considered as predicates. I think he tried to give you much, much more than that, though, which was really his development as a human, which was pretty solid juvenile history with some upset in the family with the parents' separation and the move to Florida, and then the return to the world that was just very different than what he left, and kind of his being drawn into what turned out to be a very serious addiction.

There is much to be said about what --

THE COURT: Though it's interesting, I see so many horrible childhoods over the course of my 20-plus years. His was not one of them. His mom wrote a wonderful letter. She's a schoolteacher, right?

MS. BERNSTEIN: No, he's not saying he had a horrible childhood. I think he's trying to explain how he got into drugs, and that his lifestyle, I mean, at 17 led him, got him hooked and in a terrible situation that he didn't have at that point the wherewithal to separate himself from, and he was stuck with significant addiction for a very long time, really until he detoxed after that 2009 arrest.

Other than this case, and I'll talk about this case in a minute, there is no criminal convictions since 2009. So that's seven years before this case gets started, and, you know, going on ten years from now. The 2009 arrest, he does not say, "Unbeknownst to me, there was drug dealing in that house." What he's saying is, it was his father's house. If you look at his letter at Page 5 carrying over to Page 6, he says his father was having him manager; it was unbeknownst to his father. He's not saying, "I didn't know what was happening." He was saying, "I'm an addict. I'm making bad decisions. I'm letting drug dealers come here and live here," and that's what happened. He got busted, and he got busted big.

The remaining charge in the related case that's now on

appeal was for heroin, and the heroin was 3.91 grams. That was the drug he was using at that time. It's a quantity consistent with personal use. He detoxed in jail following that arrest, and he has done enormous work from the time he was incarcerated on that case to change his life. And he's not blaming --

THE COURT: The 2009 case?

MS. BERNSTEIN: Pardon me?

THE COURT: Which case?

MS. BERNSTEIN: The 2009 case, right, the Dookhan and related case. He got training and education while in custody. He got HVAC certifications, welding certifications. He went to school after his release from jail to get the skills to be an HVAC worker. He had a hard time. We detailed some of his efforts to get work and some of the problems that he had in keeping work because of his criminal history, but he got work as a welder, and he was working a lot.

He and Carmen had a child in the fall of 2014, and it was clear to him that he needed to stop being engaged in criminal activity. He's just trying to explain why he ended up in this case.

Mr. Crowley is saying he was doing these deals. What the government has is from their, I think it's about at least an 18-month investigation, they have two calls in February of 2016. And those quantities that he's pled guilty to is this 120 grams of cocaine powder, and I would submit to the Court

that -- you asked the question, where does he fall in the scheme of the defendants based on his conduct in this case? He is -- and I believe Mr. Crowley even said at one of the sentencing hearings of the codefendants -- I've got the transcript, I think -- he said he's most like Price and Davis, and Mr. Price got a 36-month sentence, and Mr. Davis got a 24-month sentence.

He's no longer contesting the firearm, but he says it's not his. We went down to the FBI lab. First of all, you heard the testimony from Ms. Depina at the hearing on suppression. Although that storage unit was outside of their space, it was a storage area that other people used, and it had a bunch of junk in there, and they didn't use it. The problem, the reason she got the key was because the door of the storage unit when the wind blew banged up against the wall. They got a key. They gave the key to management. So before that, everybody has access. After they get the key, all of the management and the maintenance people have access. There is a backpack that had drug-making supplies with a card with somebody else's writing on it. In any event, I understand what you're saying, but there is no evidence of -- he continues to contest the gun, other than he's accepting it for the purposes of the calculations.

THE COURT: And I do find that, based on the suppression hearing as well as the fact that he's not

contesting it, that it's more likely true that it was possessed in connection with drug trafficking, his drug trafficking. I can't just base it on your proffer at this point.

MS. BERNSTEIN: No, I understand.

THE COURT: I mean, that's what makes him a little different from the others is the gun. And I think probably Maryellen is sick of hearing me saying it, but I divide drug trafficking and other offenses into with gun and without gun. So that's what pulls him up from Price and Davis, I think, as well as the career offender designation, so it's a harder case for me.

MS. BERNSTEIN: What we would ask for you to look at is the very limited evidence that you've been offered of his involvement in this conspiracy, these two deals with cocaine powder. And the phone call that Mr. Crowley referenced referenced a funeral that Mr. Lewis attended right around that time, the death of a very good friend from an overdose and the sobering impact that that had on him. And the Suboxone I think he would tell you was because he wished he could have done more for his friend.

But the evidence that comes up in these calls, there are a couple of other efforts. Rivera is trying to get him: "Where are you, man? Where are you, man? Where are you, man?" He's not responding, not responding, not responding. He finally gets him. He says, "Oh, I've been trying to get you.

I'm working." He's, like, "I'm working crazy hours, you know, and I'm going to this funeral." And the funeral was for a dear friend who died of an overdose.

And I think the fact that he had this child, the fact that he was --

THE COURT: In 2014.

MS. BERNSTEIN: In 2014.

THE COURT: He was dealing drugs while he had the child as part of this conspiracy.

MS. BERNSTEIN: As part of this conspiracy, there were two occasions when he got drugs, yes, and that was clearly a poor choice. And I think what -- I'll let you hear from him directly about his feelings about his -- I think he's got greater awareness of the community impact that the drug dealing has now, and capacity to deal with it, than he did at that juncture.

I think what he has done, frankly, is fairly extraordinary. I think you saw all of those letters from the inmates. Where he was first housed at Wyatt, he did all of these programs over there. Any program he could do he did. I think you've seen all of that. At Plymouth, when they were all moved over to Plymouth -- there's almost no programming -- he started a peer counseling program to help people face their decision-making choices that they were making in their lives. And I would submit the letters I think demonstrate the unique

impact that he has chosen to take on and to have on other people's lives, to address the harm that he has done by going to people and helping them think through how they make decisions, dealing with their own addictions, trying to deal with peaceful problem-solving. A number of those letters talk about, "I've seen him break up fights and say, 'Hey, man, think about how you do this, and can't you solve it?'" You know, he's become a community peacemaker inside the jail. I hope it comes through -- I think it does -- the unique man who stands before you who has absolutely had a life marked by his drug addiction and criminal justice involvement.

The other piece that we put in our memo but I'd just like to bring about is this snowballing effect of criminal history. When you get a sentence of three to four years committed time as a 17-year-old, that's the baseline for everything that comes after.

THE COURT: Well, what's the -- I was wondering about the basis for that because it's rare that someone so young, but it could have been a frustration from the court that he had just come out. In other words, he --

MS. BERNSTEIN: No, I don't think he had. I think -- we're talking about the first committed time. He had --

THE COURT: He had just been -- it fell on the heels of an earlier drug offense. I'm trying to remember because the history is so lengthy, but wait a minute.

Yes.

MS. BERNSTEIN: You're right, I'm sorry, he did do 25 days, and it may be, and I think Brockton was --

THE COURT: Yes, I think that's it. He possessed to distribute on July 18 of 1997 and was arraigned then on date of arrest. And he was arrested again on 11/10/97, larceny from a person, assault and battery. And then literally five days later he gets arrested again for the drug distribution. So the only thing I could -- because usually -- I mean, I used to be a state court judge -- you'd never hit someone so young with such a serious sentence, but I guess it was the third strike, if you will.

MS. BERNSTEIN: It was, but I just don't think we'd handle it that way now. If we had a drug-addicted kid coming into the courthouse, the courts would just handle it differently. They would say, "Get the kid to treatment. Get him on the right track." I don't think most courts would be sending him to jail for that period of time, and it wouldn't be a predicate --

THE COURT: Was he sentenced as an adult? Is that what happened?

MS. BERNSTEIN: Yes, because that was the law at that time. The law at the time was: You're 17, you're an adult. So he was sentenced as an adult. He went to adult prison. I just don't think we'd handle it that way now, and I think

that's important. And I think, too, that it's a predicate because that sentence is so long, because had it been a shorter sentence, had it wrapped up -- so that's a '97 arrest that doesn't wrap up till 2002. That barely brings it within the 15-year lookback. And had it not been for more than a year and a month, it also wouldn't be a predicate. So --

THE COURT: I know, that's what happened. I was asking Probation. It would be assault with a dangerous weapon. It was shy of the year, so it didn't go back so far, so --

MS. BERNSTEIN: So but I think that that is the situation. So there's absolutely no question, he was a messed-up 17-year-old. He was struggling, and he was making bad decisions, but that really set in motion much of what came later. And I think that there is tremendous value -- and this is something I don't know that you've seen with the other defendants in this case -- how much work he had done to get a job, to work, no arrests until this case since 2009. I mean, he really had been doing very well in the scheme of things. He screwed up in this case, and he's pled guilty because of that. But his trajectory was so positive and his -- that's where he sees himself going in the future is in this positive way. He's done with this life. He's not a violent man. Yes, there was this weapon, but, you know, there's nothing I can do about that other than say that you don't see that in -- he's been incarcerated a lot. You're not hearing about fights in jail.

You're not hearing about a guy who flies off the handle. You're hearing about a man who really is a soldier for peace in prison with people who really need that help, and I think that that tells more about who he is than --

THE COURT: Thank you.

MS. BERNSTEIN: Thank you.

THE COURT: Before I let you go, of course he will go to jail for a certain period of time. Is there an institution you want him to be at?

MS. BERNSTEIN: Yes. I would like Ms. Fernandez, if she could, to address our request for a recommendation, if that's all right.

THE COURT: Yes.

MS. FERNANDEZ: Good afternoon, your Honor. We would recommend that the Court recommend to the Bureau of Prisons send him to FCI Danbury. It's close enough for his family to be able to visit him in Connecticut, and it also has a lot of programming. As you read in our memorandum --

THE COURT: I'll recommend it. That's fine. I'm not positive that they'll go with the low-security institution. Would Berlin be another option rather than --

MS. FERNANDEZ: It would be another option. It's closer. The reason why we were thinking Danbury is because they have so many more programs, including a peer kind of a counseling --

THE COURT: I'm happy to recommend it. I'm just not sure how he'll be classified, but I'm happy to recommend it.

MS. FERNANDEZ: Okay. And then just the other piece that Probation mentioned in the Presentence Investigation Report is the Residential Drug Abuse Program.

THE COURT: I'll recommend RDAP as well as drug addiction treatment, as recommended by Probation.

MS. FERNANDEZ: And any vocational treatment. He's interested in counseling, peer counseling.

THE COURT: He sounds like he's -- he's been at Benjamin Franklin, hasn't he?

MS. FERNANDEZ: For HVAC and welding. He's got this newfound passion for counseling and helping others, and it seems like he's quite good at it.

THE COURT: So you want him to do it or be trained in it?

MS. FERNANDEZ: Be trained in it. There's a program in Danbury.

THE COURT: Oh, all right, recommend the peer training program, fine.

MS. FERNANDEZ: Thank you, your Honor.

THE COURT: All right, do you want to say anything, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: I did read your letter, thank you, as well

as -- I can't say I read every single letter, but there were quite a few of them, and I certainly skimmed all of them, so if there's anything you want to highlight. I certainly read your mom, your family's, and the synopsis of all the prisoner letters, so thank you.

THE DEFENDANT: You're welcome, your Honor.

MS. BERNSTEIN: Would you like him to stand?

THE COURT: Yes, please do, although I'm going to ask Maryellen to call upstairs and say I may be late. That would be great. All right, thank you.

Go ahead. You can continue.

THE DEFENDANT: Okay, first, I would like to thank your Honor for giving me the opportunity to speak for myself today. I'd also like to thank my attorneys who -- who recognized that I did have a troubled past, but also recognized the positive changes I made in my life to become a positive, productive citizen. I'd like to thank my mother and father for coming today, and for never giving up on me, and for having the faith that one day I will make them proud. I'd like to thank my fiancee for seeing the direction my life was heading and encouraging and supporting my growth and development, and knowing that with a little bit of guidance, I have the potential to be a great human being.

I'd like to thank my son for instilling in me a love so powerful that I know my life is no longer just for myself,

but it's for him as well and my fiancee to be a family and raise him with good morals and values.

I would like to thank the AUSA for showing me the seriousness of my situation. Like counsel mentioned, if you recall the final phone call I had with Rivera and myself, I spoke about a friend, going to a friend's funeral. That was my friend Travis Washington. He had checked himself out of the hospital for overdosing, and he overdosed again that same day, and he passed away. We were good friends, and he was proud of me for going back to school; but after my son was born, it felt like we started to grow apart. It felt like our lives were heading in two different directions. He was still living the drug lifestyle, and I was getting my life in order.

I regret not trying harder to help him fight his addiction, but at the time I was just proud of myself for overcoming my own, and I really didn't know how to help someone else with theirs. From that day forward, I vowed to help any of my family and friends in need because I know what it feels like to need help.

And I truly apologize to anyone who's been affected by my drug activity. From this day forward, I refuse to contribute to the destruction of my community anymore. And also, as counsel said, I started the programming in the jail dealing with substance abuse, dealing with violence, dealing with parenting. All the classes I took in Wyatt, I've applied

them in Plymouth because they didn't have them there, and it built up in me a passion to -- it gave me a long-term goal for when I do get out, and one of my long-term goals is to start a program that promotes individual growth for the previously incarcerated. I would like to do programs like vocational classes to learn trades, business education, supportive networking, resource awareness, rehabilitation, anti-recidivism, things of that nature.

When I first was arrested, my son, his face used to light up when he'd come see me, but as time went on, he started to lose interest, and I could see in his eyes he didn't want to be there anymore. And I realized I had to be more interactive with him, even though there was a glass dividing us, so I started to make paper airplanes to fly for him. I would draw pictures for him, and we would race back and forth the length of the visiting room. And when there's no other visitors there, I would run across the tops of the stools. And he's so short, he doesn't know what I'm running across, so he think his dad can fly. He's happy to see me again, but I'm scared. I fear to see that look in his eyes again, that look of not wanting to be there. He was one when I came to jail. He just turned four yesterday.

What I would like to ask your Honor is to not consider me a career offender. I just want to get back to my family, who deserve better than what I've shown them thus far.

Thank you for your time and consideration.

THE COURT: Thank you. So, as I mentioned before, at least under the law as I understand it, you are designated a career offender. However, I will vary downwards from 151 months.

Let me start off with the 3553(a) factors. It is a very serious offense that you are accused of. You're accused of selling drugs in the Brockton area. It was a serious conspiracy. You're actually the last of the people I'll be sentencing. It's affected the Brockton community. Indeed, it's affected the entire state and country, the level of addiction that we're talking about.

What makes your case more serious than the other ones in this conspiracy, as the government noted, was the presence of a gun. And I did sit through the motion to suppress, and I also understand that it's been conceded as an enhancement, and that really does distinguish it and make it more serious than the two men that you mentioned as similar to you, as well as the fact they're not career offenders. There's also been some history of violence in your background with the assault with a dangerous weapon, even though that's not a predicate for purposes of career offender.

I do look for who are similar people. I'm not going higher than Mr. Rivera, whom I viewed as the top of this conspiracy. I think it's very important to have proportionality within a conspiracy. I don't remember that

much about Mr. Silva other than he was one of the worst witnesses I've seen in a while -- I think the government would agree to that -- and had a horrible record, but I do view him somewhat as a comparator just because of the career offender situation. Regardless of whether you're a career offender or not, it's been a history of recidivism, and so that is a concern I have about return to crime.

On the positive side, which I always try to look at as well -- I start with the negatives, seriousness of the offense -- I will talk about you as a human being. I like the fact that you went to the Benjamin Franklin Institute and that you have seriously taken up the education available to you; and you have job potential, which shows that you are willing to work and earn a living at a serious trade. Your mother's letter was so well written. You can tell she's a teacher. You grew up with education in your background. You grew up in a loving family. Yes, there was a divorce, but the reality is, fifty percent of Americans get divorced, and there was nothing -- I mean, I see such horrible, horrible backgrounds here. I don't think that I can attribute that to a bad youthful situation. You got yourself into trouble when you moved back up here.

I will also say that I do believe you love your son, and that was compelling what you just talked about with the little airplanes and running across the stools. I keep that

image in mind, how much you love him, and yet I also must say that you did this while he was alive.

So I don't quite understand why you put that all at risk for really two relatively small drug deals on the scheme of things. Maybe you did a few more as the government thinks, but it really wasn't, on the scheme of what I see in drug trafficking, huge. Why did you put it all at risk when you had job potential and you had a little boy and a woman who loves you? I don't get it at core, and that worries me about recidivism because all these things that I've said about positive things were there at the time.

For me, one of the largest reasons why I will -- other than proportionality within the conspiracy, one of the things that does bother me is the fact that one of the predicates was when you were 17 years old. Not only would that no longer be an adult crime, but also, as your lawyer points out, and I studied on the Sentencing Commission with respect to juveniles and youthful offenders, your brain wasn't fully formed. Kids who are that age do stupid things, and you were no different. It wasn't a lot. It was $40 worth, as I understand it. $40 worth could mean that you tripled your sentence, $40 worth of cocaine, so I will vary because that predicate would no longer be a crime and because you were so young.

I also found compelling the letters from the other inmates. I've done these cases for 24 years. I have

occasionally received letters from other inmates, but this was compelling in the kinds of things that they were saying. So you have tried, and plus I'll add the fact that you're an addict, and some of this I think was driven by that.

So I'm not going to go down as low as Price and Davis. I certainly am not going up above Rivera and Silva. I am imposing a sentence of nine years. I think anything lower than that would not give full credit to the seriousness of the crime and the risks of recidivism. I need to send you a very clear message, very clear message that you cannot continue to sell drugs, and you certainly can't continue to do drugs.

I will say that I would like to reconsider this if in fact it is reversed on appeal, or if that one conviction is vacated, because I do think that the -- I mean, I used to talk about this at the Sentencing Commission, that the career offender Guidelines often take sentences, and by statute -- it's not the Commission's fault -- it has to be at or near the statutory maximum; but sometimes, particularly where one of the predicates, if there are two predicates and this is one of them, is when you were 17 years old, so I will reconsider the sentence. I know sometimes people say, "Oh, I would give the same sentence anyway." I wouldn't.

So I'll impose a sentence I think of three years of supervised release. I recommend Danbury. I impose conditions of drug -- do you think the CARE court, or is it just so far

from now that that's not worth it? Because some of this is driven by drug addiction.

MS. BERNSTEIN: Who knows what programming will be available at the time? It certainly wouldn't hurt to explore that as an option at the time of his release.

MR. CROWLEY: I mean, I think he should get whatever he needs to do to be successful once he gets out, so if CARE is something --

THE COURT: I most care about him working, is the thing, to support the little boy who will be older, but he's already done two or three years in prison, right, so he's already served. So he'll be out in, say, if he's as good as he was recently, with the good time, maybe, I don't know, six years, some such? How much has he done already, two years?

MS. RAMDEHAL: Two years.

THE COURT: Yes, plus good time.

Anything else other than the standard and mandatory conditions? No fine. Is it a $100 special assessment?

MS. RAMDEHAL: Yes.

THE COURT: Anything else.

MS. RAMDEHAL: Just I believe what I already mentioned, the mental health treatment, drug addiction.

THE COURT: I didn't mention mental health. I'm just not sure he needs it. What do you think? Honestly, his speech, he seems like a pretty together person. It's really

the drug addiction. What do you think?

(Discussion between Ms. Bernstein and the defendant.)

THE COURT: Does he want it?

MS. BERNSTEIN: I think that dealing with the addiction, I mean, I don't know that he -- I think so long as he deals with the addiction --

THE COURT: Marlenny, I know you weren't involved originally. Do you know why Maria recommended the -- I just didn't -- is that -- let me look at his presentence --

MS. BERNSTEIN: Your Honor, I think actually it probably would make sense to include that as a recommendation.

THE COURT: Oh, I know why. In Paragraph 78, oh, this is why: "He is interested in mental health treatment."

MS. BERNSTEIN: Yes.

THE COURT: And he's been at two mental health facilities?

MS. BERNSTEIN: Yes.

THE COURT: So I think --

MS. BERNSTEIN: And there's been some significant trauma, so --

THE COURT: Yes, that's why. All right, mental health treatment, drug addiction treatment.

MS. RAMDEHAL: And then the only other one, prohibited from consuming alcoholic beverages.

THE COURT: Yes, because alcoholism is part of it, no

alcoholic beverages.

Now, I know you might want a beer or a glass of wine. At some point if -- you know, that three years is a long time -- if you're doing well, move to modify that, but at this point alcoholism as well as drug addiction are contributing to the issue here.

I want to ask for the notice of appeal rights. And particularly, Mr. Crowley, this is the end of this whole conspiracy. I think this is it, is that right?

MR. CROWLEY: That would be correct, your Honor.

THE COURT: And with respect to Ms. Bernstein, thank you for taking this late in the day. I know there was a switch in attorneys, and some of the issues you raised, particularly that Washington, D.C. case, you may end up in the Supreme Court.

MS. BERNSTEIN: I know.

THE COURT: It's a great, great issue, but right now I've got controlling precedent that goes a different way.

MS. BERNSTEIN: I understand.

THE COURT: Okay, thank you.

THE CLERK: Sir, would you please stand. The Court hereby notifies you of your right to appeal this sentence. If you cannot afford the cost of an appeal, you may move to proceed in forma pauperis. Any appeal from this sentence must be filed with fourteen days of entry of judgment on the docket.

Do you understand these rights?

THE DEFENDANT: I do.

THE COURT: All right, thank you.

THE CLERK: All rise.

THE COURT: Thank you. Thanks for stepping in, Marlenny.

MS. RAMDEHAL: No problem.

(Adjourned, 3:35 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 39 inclusive, was recorded by me stenographically at the time and place aforesaid in Criminal No. 16-10166-PBS, United States of America v. Vaughn Lewis, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

Dated this 10th day of December, 2018.

/s/ Lee A. Marzilli
_____
LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER

United States Court of Appeals
For the First Circuit

No. 18-1916

UNITED STATES,

Appellee,

v.

VAUGHN LEWIS,

Defendant - Appellant.

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron,
Circuit Judges.

ORDER OF COURT

Entered: October 2, 2020

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Mark T. Quinlivan, Donald Campbell Lockhart, Emily O. Cannon, Michael J. Crowley, Inga S. Bernstein, Vaughn Lewis, Judith H. Mizner, Davina T. Chen

2016 Sentencing Guideline Provisions

§1A3.1 – Authority

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

§4B1.1. – Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

OFFENSE STATUTORY MAXIMUM	OFFENSE LEVEL*
(1) Life	**37**
(2) 25 years or more	**34**
(3) 20 years or more, but less than 25 years	**32**
(4) 15 years or more, but less than 20 years	**29**
(5) 10 years or more, but less than 15 years	**24**
(6) 5 years or more, but less than 10 years	**17**
(7) More than 1 year, but less than 5 years	**12**.

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels correspond ing to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C.§ 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for

the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) CAREER OFFENDER TABLE FOR 18 U.S.C. § 924(C) OR § 929(A) OFFENDERS

§3E1.1 REDUCTION	GUIDELINE RANGE FOR THE 18 U.S.C. § 924(C) OR § 929(A) COUNT(S)
No reduction	360–life
2-level reduction	292–365
3-level reduction	62–327.

Commentary

Application Notes:

1. **Definitions. — "*Crime of violence,*" "*controlled substance offense*,"** and **"*two prior felony convictions*"** are defined in §4B1.2.

2. **"Offense Statutory Maximum".—"*Offense Statutory Maximum,*"** for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D)). For example, in a case in which the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for that defendant for the purposes of this guideline is thirty years and not twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum.

3. **Application of Subsection (c). —**

(A) **In General.** —Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another

offense of conviction), is determined to be a career offender under §4B1.1(a).

(B) **Subsection (c)(2).** —To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term ofimprisonment.] §4B1.1

(C) **"Otherwise Applicable Guideline Range**". —For purposes of subsection (c)(2)(A), "otherwise applicable guideline range" for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:

(i) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C.§ 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).

(ii) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determinedfor that count(s) under §4B1.1(a) and (b).

(D) **Imposition of Consecutive Term of Imprisonment**. —In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

(E) **Example.** —The following example illustrates the application of subsection (c)(2) ina multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188–235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI).

The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the mini- mum and the maximum of that range, resulting in a guideline range of 248–295 months. Applying subsection (c)(2)(B), the court then determines the career of- fender guideline range from the table in subsection (c)(3) is 262–327 months. The range with the greatest minimum, 262–327 months, is used to impose the sentencein accordance with §5G1.2(e).

4. **Departure Provision for State Misdemeanors.** —In a case in which one or both of the defendant's "two prior felony convictions" is based on an offense that was classifiedas a misdemeanor at the time of sentencing for the instant federal offense, application ofthe career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially over- states the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).

§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 sub- stance) 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 sub- stance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a con-trolled 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 offensepunishable 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 con- trolled 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.

U.S. Code Provisions

21 U.S.C. § 846. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91–513, title II, §406, Oct. 27, 1970, 84 Stat. 1265; Pub. L. 100–690, title VI, §6470(a), Nov. 18, 1988, 102 Stat. 4377.) AMENDMENTS 1988—Pub. L. 100–690 substituted "shall be subject to the same penalties as those prescribed for the offense" for "is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense".

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) 1 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 [2] 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 2 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 eet 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 requested, 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.