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1a**PUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4723

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDWARD MCCAIN,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at
Charleston. Patrick Michael Duffy, Senior District Judge. (2:09-cr-00296-DCN-2)

Argued: January 31, 2020

Decided: September 10, 2020

Before KING, DIAZ, and RUSHING, Circuit Judges.

Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge King
and Judge Diaz joined.

ARGUED: Cameron Jane Blazer, BLAZER LAW FIRM, Mount Pleasant, South
Carolina, for Appellant. Michael Rhett DeHart, OFFICE OF THE UNITED STATES
ATTORNEY, Charleston, South Carolina, for Appellee. **ON BRIEF:** Sherri A. Lydon,
United States Attorney, Columbia, South Carolina, Dean H. Secor, Assistant United States
Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, South Carolina,
for Appellee.

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RUSHING, Circuit Judge:

In 2010, Edward McCain received a mandatory sentence of life imprisonment without the possibility of parole for crimes he committed when he was 17. Six years later, McCain moved to vacate his sentence in light of the Supreme Court’s intervening decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In those cases, the Supreme Court held that the Eighth Amendment prohibits sentencing schemes that mandate life imprisonment without parole for offenders who committed homicides before the age of 18, that a sentence of life imprisonment without parole is unconstitutional for such an offender unless his crime reflects irreparable corruption, and that these new rules apply retroactively. *See Miller*, 567 U.S. at 479; *Montgomery*, 136 S. Ct. at 734. The district court conducted a thorough resentencing and again sentenced McCain to life imprisonment without parole after concluding that he presents “one of those uncommon cases where sentencing a juvenile to the hardest possible penalty is appropriate.” J.A. 260. On appeal, McCain argues that his sentence is procedurally and substantively unreasonable and that the district court plainly erred by not *sua sponte* vacating his murder conviction. We affirm.

I.

The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. Over the past fifteen years, the Supreme Court has determined that applying certain punitive measures to juvenile offenders—that is, persons under the age of 18 at the time they committed their crimes—violates the Eighth

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Amendment's prohibition on cruel and unusual punishments. In *Roper v. Simmons*, the Supreme Court held that the Eighth Amendment prohibits capital punishment for juvenile offenders. 543 U.S. 551, 578–579 (2005). In *Graham v. Florida*, the Court concluded that the Eighth Amendment prohibits sentencing juveniles who commit non-homicide offenses to life without parole. 560 U.S. 48, 82 (2010). And in *Miller*, the Supreme Court held that the Eighth Amendment forbids any sentencing scheme that mandates life imprisonment without parole for juvenile homicide offenders. 567 U.S. at 479.

The Court in *Miller* reiterated that “children are constitutionally different from adults for purposes of sentencing,” both in terms of culpability and prospects for reform. *Id.* at 471. Juveniles “have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” *Id.* (quoting *Roper*, 543 U.S. at 569). They “‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers,” because of their “limited ‘contro[ll] over their own environment’” and inability “to extricate themselves from horrific, crime-producing settings.” *Id.* (alterations in original) (quoting *Roper*, 543 U.S. at 569). And “a child’s character is not as ‘well-formed’ as an adult’s; his traits are ‘less fixed’ and his actions [are] less likely to be ‘evidence of irretrievabl[e] deprav[ity].’” *Id.* (second and third alterations in original) (quoting *Roper*, 543 U.S. at 570). Mandatory life without parole for a juvenile offender, the Court reasoned, inappropriately precludes consideration of these “hallmark features” of juvenility such as “immaturity, impetuosity, and failure to appreciate risks and consequences.” *Id.* at 477. It prevents the sentencing court from “taking into account the family and home environment that surrounds him,” “the extent of

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his participation in the [criminal] conduct and the way familial and peer pressures may have affected him,” the ways in which youthful incompetency may have hindered him in dealing with the justice system or assisting his attorneys, and his capacity for rehabilitation.

Id. at 477–478. In short, “a sentencer misses too much if he treats every child as an adult.”

Id. at 477. The Court therefore concluded that, before sentencing a juvenile to life imprisonment without parole, a sentencing court must take into account the offender’s “youth and attendant characteristics,” including how those characteristics “counsel against irrevocably sentencing [him] to a lifetime in prison.” *Id.* at 480, 483.

A few years later, in *Montgomery*, the Court held that *Miller* announced a new “substantive rule” of constitutional law that applies retroactively on collateral review to “juvenile offenders whose convictions and sentences were final when *Miller* was decided.” 136 S. Ct. at 725, 732. The Court clarified that “[a]lthough *Miller* did not foreclose a sentencer’s ability to impose life without parole on a juvenile,” that sentence is disproportionate “for all but the rarest of children, those whose crimes reflect ‘irreparable corruption.’” *Id.* at 726 (quoting *Miller*, 567 U.S. at 479–480). As the Court explained, *Miller*’s substantive holding rendered life without parole an unconstitutional penalty for the class of “juvenile offenders whose crimes reflect the transient immaturity of youth” as opposed to “those whose crimes reflect permanent incorrigibility.” *Id.* at 734. And *Miller*’s procedural component requires a sentencer to consider a juvenile offender’s “youth and its attendant characteristics” to determine whether a particular offender is among “those juveniles who may be sentenced to life without parole” or “those who may not.” *Id.* at 735 (quoting *Miller*, 567 U.S. at 465); *see Malvo v. Mathena*, 893 F.3d 265,

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272 (4th Cir. 2018) (recounting *Miller*'s substantive and procedural components, as clarified in *Montgomery*), *cert. granted*, 139 S. Ct. 1317 (2019), and *cert. dismissed*, 140 S. Ct. 919 (2020); *United States v. Under Seal*, 819 F.3d 715, 719 (4th Cir. 2016) (same).

II.

A.

McCain committed his offenses in 2008, when he was 17 years old. At the time, McCain dealt heroin with Pierre Sanders in Georgetown, South Carolina. On November 14, 2008, Glen Crawford, Jr. and his nephew James Fannin picked up McCain in their car and drove to a park, ostensibly to purchase heroin. McCain and Sanders, however, believed that Crawford and Fannin were cooperating with law enforcement and planned to silence them. At the park, McCain exited the car and spoke briefly with Sanders. McCain then returned to the car and emptied his pistol into Fannin and Crawford. Seeing that at least one victim was still moving, McCain ran to his grandmother's house nearby to search for more bullets. Finding none, he hid the gun, grabbed a knife, and returned to the park to finish the job. But by the time he returned to the park, crowds and police had gathered at the scene. McCain was eventually found lying in a ditch and arrested.

Fannin died from his injuries, which included gunshot wounds in the back of his head and upper back. As for Crawford, the police report stated he suffered two gunshot wounds to his head, two in his left arm, one in his chest, one in his right hand, and one in his back. He survived, but with permanent and disabling injuries.

McCain and Sanders were charged with Fannin's murder and the attempted murder of Crawford. McCain consented to a transfer for criminal prosecution as an adult, *see 18*

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U.S.C. § 5032, and pleaded guilty to three counts of the indictment: witness tampering by murder in violation of 18 U.S.C. § 1512(a)(1)(C) (Count One); witness tampering by attempted murder in violation of 18 U.S.C. § 1512(a)(1)(C) (Count Two); and using and carrying a firearm during and in furtherance of a drug trafficking crime and a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 924(j) (Count Five).

By that time, McCain had amassed a serious juvenile record, which placed him in criminal history category IV of the Sentencing Guidelines. His run-ins with law enforcement began shortly after McCain turned nine and his mother was hospitalized for inpatient treatment of bipolar disorder. With an absentee father, McCain was shuttled between his mother's and grandmother's homes, and was placed in foster care for a short time, until he was permanently placed in his grandmother's custody at age 16. He was first arrested at age 11 for causing a disturbance at school. At age 12, he was arrested for attempted armed robbery involving a gun. That same year, he was arrested for assault and battery and violating probation. At age 13, he was again arrested for assault and battery, this time for attacking a Hispanic classmate without provocation after telling the boy he hated all Mexicans. He was arrested twice at age 14—once for shoplifting and once for attempted second-degree burglary.

McCain's guilty plea included the opportunity to have the government move for a sentence below the otherwise applicable mandatory statutory minimum based on his cooperation. But McCain lost that opportunity when, before sentencing, he sent letters threatening to kill Crawford, his co-defendant Sanders, and two other individuals, one of whom was a witness in the case. The district court sentenced McCain to a mandatory term

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of life imprisonment on Count One, a concurrent term of life imprisonment on Count Five, and a concurrent term of 30 years on Count Two. Because the federal government has abolished parole, McCain's life sentences were the equivalent of life without the possibility of parole. *See Under Seal*, 819 F.3d at 719 n.4. We upheld his sentence and conviction on appeal. *United States v. McCain*, 413 Fed. App. 628 (4th Cir. 2011) (per curiam).

Following his conviction, McCain was placed in the custody of the Bureau of Prisons, where he amassed a lengthy record of misconduct. First in Leavenworth, Kansas, McCain was written up for failure to work and insolence. After his transfer to Terre Haute, Indiana, McCain was reported for five fights. When he was 20, McCain stabbed an inmate multiple times with a nine-inch metal weapon sharpened to a point. The inmate suffered eleven puncture wounds to the back, four to the abdomen, and one under the arm, requiring hospitalization. Six months later, McCain chased down an inmate and assaulted him with a shank. In the summer of 2012, when McCain was 21, he struck an inmate in the head and face with his cuffed hands. A month later, he was reported for exchanging closed-fist punches with another inmate. Shortly thereafter, McCain was again censured for fighting; this time, McCain held down an inmate while encouraging others to strike him.

McCain was then sent to the Special Management Unit at a high security prison in Florence, Colorado, where he remained for fifteen months. While there, he was reported for multiple instances of throwing foul-smelling substances at correctional officers, for threatening correctional officers, and for refusing to obey orders. But he also participated in several educational courses while at Florence. He was subsequently moved to a less restrictive environment in Coleman, Florida, where he remained until resentencing.

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On June 21, 2016, McCain moved, pro se, to vacate his sentence in light of *Miller* and *Montgomery*. See 28 U.S.C. § 2255. The Government consented to resentencing. The district court appointed counsel and granted McCain's request for a neuropsychological evaluation by Dr. Howard Buddin.

McCain was transferred to Al Cannon Detention Center in South Carolina to await resentencing. There, McCain had his first serious disciplinary infraction in approximately five years when he sexually assaulted a female inmate in the medical waiting area. He was 26 years old at the time.

The parties submitted extensive resentencing memoranda and materials to the district court, including Dr. Buddin's report, several previous mental health evaluations from McCain's childhood, and reports from McCain's prison disciplinary record. The district court also received a revised presentence report. The court held a three-day resentencing hearing.

At the resentencing hearing, Dr. Buddin testified about his evaluation. Dr. Buddin diagnosed McCain with antisocial personality disorder and agreed with previous evaluators' diagnosis of attention deficit hyperactivity disorder. Dr. Buddin explained that antisocial personality disorder typically is marked by impulsivity, “[f]ailure to conform to lawful or social norms,” inability to benefit from repeat arrests, “[f]ailure to plan ahead,” and “lack of remorse.” J.A. 155–156. He testified that antisocial personality disorder is difficult to treat but that McCain's acknowledgment of his actions and moral responsibility during their interviews “aug[ured] for a more positive prognosis.” J.A. 125. In his report,

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Dr. Buddin concluded that McCain's arrest at age 17 occurred "during a phase when neurological development was still taking place, and in a meaningful way." J.A. 299. He opined that "McCain's behaviors from childhood forward to the point of his arrest in 2008 represent[ed] the confluence of [disadvantaged] environmental and neurological factors." J.A. 300. Thereafter, McCain "spent his entire adulthood in prison, amongst a population that offer[ed] essentially no hope for providing him with any further knowledge or abilities to cope with stressful and difficult situations." J.A. 300. Dr. Buddin acknowledged that one assessment he conducted showed McCain was three times more likely than the average inmate to commit infractions while incarcerated.

McCain asked the district court to impose a term-of-years sentence or, in the alternative, to fashion a "*de facto* parole process," whereby McCain would "be eligible for periodic judicial review of his sentence" and release upon a showing of satisfactory rehabilitation. J.A. 348. The Government argued for a sentence of life imprisonment.

The district court adopted the revised presentence report, which identified McCain's statutory sentencing exposure as up to life for Count One, up to 30 years for Count Two, and up to life for Count Five. McCain's total offense level was 48, with a criminal history category of IV, which resulted in a Guidelines range of life. The district court acknowledged its sentencing obligations, including the 18 U.S.C. § 3553(a) factors and the juvenile-specific considerations required by *Miller*, *Graham*, and *Roper*. It noted that, given *Miller*'s observations and instructions, "appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon." J.A. 242.

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The district court then summarized the parties' arguments. It acknowledged McCain's contentions that his crime was an example of immature loyalty to a friend, his threatening letters after pleading guilty reflected youthful immaturity, his early childhood was "disrupted by the absence of a father and his mother's health problems," and McCain himself suffered from behavioral difficulties. J.A. 243–244. The court also acknowledged McCain's argument that his time thus far in the Bureau of Prisons had been marked by a lack of rehabilitative opportunities. The district court similarly recognized the Government's arguments regarding the seriousness of the offense, McCain's juvenile criminal history, his diagnosis of antisocial personality disorder, and his misconduct in prison. The court also summarized Dr. Buddin's testimony, explaining that it had carefully reviewed his assessment and analysis in its attempt to "go back and sentence [McCain] at age 27 as though he were 17, . . . to evaluate what he was like at that time and what he's like now." J.A. 255.

Ultimately, the district court concluded that it could see "no difference between that juvenile" who pursued and attacked the Hispanic child or who "threw away a benefit of a plea bargain downward departure in order to threaten other people" and the adult who, while awaiting resentencing, pursued and sexually assaulted a female inmate. J.A. 258–259. In the court's view, McCain's incidents of misconduct in prison—which the court found "disturbing" in both number and nature—were a continuation of his juvenile criminal conduct and emblematic of his antisocial personality disorder. J.A. 258–259. As the court explained, McCain's postsentencing behavior as an adult confirmed that his criminal conduct as a 17-year-old was not attributable to "those mitigating factors of

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youth.” J.A. 259. The court concluded that, after considering “every one of the sentencing factors” and “all the directives in *Miller*,” it was “not convinced that [McCain’s] chronological age and the hallmark features associated with young age played any substantive role in his commission of these crimes. It may have been a contributing factor, but it was not a major one.” J.A. 259. Instead, the court “reluctantly” concluded that McCain presented “one of those uncommon cases where sentencing a juvenile to the hardest possible penalty [was] appropriate.” J.A. 260. The district court sentenced McCain to life imprisonment on Counts One and Five and to 30 years on Count Two, to run concurrently.

III.

On appeal, McCain primarily challenges his sentence of life imprisonment and seeks a remand for resentencing. But he also makes a passing challenge to his conviction for witness tampering by murder in violation of Section 1512. Relying on our decision in *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016), McCain argues that, because Congress authorized only death and life imprisonment for his Section 1512 conviction, the district court could not constitutionally sentence him for violating that statute and should have vacated his conviction. *See* 18 U.S.C. §§ 1512(a)(1), (a)(3)(A), 1111(b). Because McCain did not raise this argument below, we review only for plain error. To establish plain error, McCain must show (1) “an error was made”; (2) the error was “plain”; and (3) “the error affect[ed] [his] substantial rights.” *United States v. Massenburg*, 564 F.3d 337, 342–343 (4th Cir. 2009). An error affects substantial rights if the error was “prejudicial, which means that there must be a reasonable probability that the error affected

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the outcome.” *United States v. Marcus*, 560 U.S. 258, 262 (2010) (internal quotation marks omitted). Even if these requirements are satisfied, we will exercise our discretion to correct the error only if it ““seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.”” *Massenburg*, 564 F.3d at 343 (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

In *Under Seal*, we held that the Government could not transfer the defendant—a juvenile at the time of the alleged offense—for prosecution as an adult for murder in aid of racketeering because the crime carries a mandatory statutory penalty of either death or life imprisonment, neither of which is a constitutional sentence for a juvenile after *Roper* and *Miller*. See *Under Seal*, 819 F.3d at 717–718, 728; 18 U.S.C. § 1959(a)(1); see also 18 U.S.C. § 5032 (authorizing transfer from juvenile status for prosecution as an adult). McCain argues that the district court similarly could not resentence him for violating Section 1512 because the statute authorizes only a sentence of death or mandatory life imprisonment.

Even assuming the district court plainly erred in not vacating McCain’s Section 1512 conviction, he has not shown that the error affected his substantial rights.¹ McCain received two concurrent life sentences: on Count One for violating Section 1512 and on

¹ We therefore need not decide whether the district court’s failure to *sua sponte* vacate McCain’s Section 1512 conviction was plain error. Notably, in *Under Seal*, we distinguished cases like this one, where a court must determine “how to remedy a mandatory life sentence that was validly imposed at the time, but which was subsequently determined to be unconstitutional,” calling it a “fundamentally different inquiry.” 819 F.3d at 727; see also *id.* at 728 (“Whatever the appropriate remedies may be for those juvenile offenders who were convicted and sentenced prior to *Miller*, they stand on entirely different ground than the [d]efendant [here].”).

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Count Five for violating Section 924. On Count Five, McCain pleaded guilty to using and carrying a firearm during and in furtherance of a drug trafficking crime and a crime of violence, namely the murder of Fannin, in violation of Sections 924(c)(1)(A)(i) and 924(j). Section 924(j) provides that anyone who uses a firearm to murder another person in the course of violating Section 924(c) shall “be punished by death or by imprisonment for any term of years or for life.” 18 U.S.C. § 924(j)(1). That conviction therefore authorized the district court to sentence McCain to a term of years up to life but did not mandate a sentence of life imprisonment. And that conviction alone would have resulted in a Guidelines sentence of life imprisonment. Thus, even without his conviction for violating Section 1512, McCain was legally subject to a nonmandatory life sentence for his Count Five murder offense.²

McCain has not identified any evidence that the district court would have sentenced him differently if it had vacated his Count One conviction for witness tampering by murdering Fannin. The court did not consider itself bound by Section 1512 to impose a mandatory life sentence. *See, e.g.*, J.A. 219 (reciting the statutory penalty for Count One as “up to life imprisonment”). His Count Five conviction for using a firearm to murder Fannin and Count Two conviction for witness tampering by attempting to murder Crawford

² In his reply brief on appeal, McCain for the first time suggests that his conviction on Count Five was plain error after the Supreme Court invalidated Section 924(c)(3)(B)’s residual clause in *United States v. Davis*, 139 S. Ct. 2319 (2019). This Court’s decision in *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019), forecloses McCain’s argument. In that case, we held that McCain’s predicate crime of violence—witness tampering by murder in violation of Section 1512(a)(1)—is categorically a crime of violence under the force clause of Section 924(c)(3)(A). *Mathis*, 932 F.3d at 264–265.

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brought before the district court the same facts and circumstances as his Count One conviction; vacatur of his Count One conviction would not have excluded material facts or conduct from the district court’s consideration. Indeed, in sentencing McCain, the district court focused on the overall conduct of the crimes, McCain’s history, and his postconviction conduct and diagnosis. McCain has failed to demonstrate a reasonable probability that, but for the assumed error, the district court would have imposed a lesser sentence. *See United States v. Foster*, 507 F.3d 233, 251–252 (4th Cir. 2007) (finding the district court’s error did not affect two defendants’ substantial rights where they would have received life sentences even without the district court’s error).

III.

McCain contends that his sentence of life imprisonment was procedurally and substantively unreasonable. We review all sentences for “reasonableness,” *United States v. Susi*, 674 F.3d 278, 282 (4th Cir. 2012), applying a “deferential abuse-of-discretion standard,” *Gall v. United States*, 552 U.S. 38, 41 (2007). In conducting that review, we must first “ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [Section] 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.” *Id.* at 51. If the sentence is procedurally sound, we then consider the substantive reasonableness of the sentence, taking into account “the totality of the circumstances.” *Id.* In the context of

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a juvenile offender, those circumstances include the many ways that “children are constitutionally different from adults for purposes of sentencing.” *Miller*, 567 U.S. at 471.

A.

McCain first argues that his sentence is procedurally unreasonable because the district court failed to sufficiently address McCain’s juvenility at the time of the offense and instead focused too heavily on McCain’s adult diagnosis of antisocial personality disorder and his postconviction misconduct.

We note at the outset that the district court conducted a thorough multiday sentencing hearing, during which it listened to the testimony of McCain’s neuropsychologist and discussed with the parties their various arguments. The court considered the Sentencing Guidelines and properly calculated the Guidelines range, carefully described the parties’ contentions as they pertained to each of the Section 3553(a) factors and *Miller* factors, and adequately explained its chosen sentence. *See Gall*, 552 U.S. at 51; *Rita v. United States*, 551 U.S. 338, 356 (2007) (“The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.”). The district court specifically discussed the evidence concerning McCain’s “immaturity and impetuosity” at the time of the offense, his susceptibility to influence, his “family and home environment,” his juvenile criminal history, his experience with the criminal justice system and ability to assist his attorneys, his juvenile mental health and behavioral evaluations and interventions, his “relative lack of rehabilitative opportunities” since incarceration, his postconviction conduct, and his recent neuropsychological evaluation. *See* J.A. 243–244,

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247–253, 255–257. In short, the sentencing hearing easily satisfied our requirements for procedural reasonableness and fulfilled *Miller*’s procedural mandate. *See Montgomery*, 136 S. Ct. at 734–735; *Miller*, 567 U.S. at 483; *Susi*, 674 F.3d at 282; *cf. United States v. Sparks*, 941 F.3d 748, 756 (5th Cir. 2019) (concluding that multiday hearing and lengthy explanation gave the defendant “far more than the minimum procedure necessary to conduct a proper [Section] 3553(a) analysis”).

After careful review of the sentencing transcript, we cannot agree with McCain’s contention that the district court failed to sufficiently consider his juvenility at the time of the offense. For example, the court specifically acknowledged McCain’s arguments that his refusal to implicate his co-defendant Sanders could have been indicative of “immature loyalty to a friend”; that McCain was influenced by Sanders or “felt he could curry favor from” Sanders, who was a mentor figure to him, by targeting Crawford; and that he lost his opportunity for a downward departure by writing threatening letters “to look hard to others” as “a child playing a man’s game.” J.A. 243–244, 250. Likewise, the court described the Government’s arguments that McCain’s crimes were “cold and calculated”; that he was a “street smart” heroin dealer and “suffered none of the deficits of a vulnerable juvenile”; that he was not physically abused or living in a “brutal home environment”; that his juvenile criminal history belied any contention that his participation was unwitting or due to juvenile impressionability; and that he was very familiar with the criminal justice system and “able to assist his attorneys.” J.A. 247–249. The court took care to consider the implications of McCain’s age at the time of the offense but, on the whole, simply disagreed that McCain’s youth was a substantial factor in his commission of these crimes. J.A. 259.

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As for the antisocial personality disorder diagnosis and McCain's postconviction misconduct in the Bureau of Prisons, the district court appropriately considered these in the context of assessing whether McCain's criminal behavior reflected "transient immaturity" or "irreparable corruption." *Miller*, 567 U.S. at 479–480; *see Montgomery*, 136 S. Ct. at 734. From the district court's perspective, McCain's postconviction violent and predatory conduct, which has continued for many years after he reached age 18, indicated that his crimes at age 17 were not the product of the hallmarks of juvenility but of something more permanent, such as the disorder diagnosed by McCain's own expert.

Recent decisions implementing *Miller*'s mandate support the district court's analysis. For example, in *United States v. Briones*, the Ninth Circuit emphasized that "a juvenile's conduct after being convicted and incarcerated is a critical component of the resentencing court's analysis" when evaluating whether a juvenile offender is capable of rehabilitation or is instead permanently incorrigible. 929 F.3d 1057, 1064 (9th Cir. 2019) (en banc). And in *United States v. Pete*, the Ninth Circuit held that a district court abused its discretion in denying a juvenile offender's request for a neuropsychological evaluation upon resentencing, because whether the offender had changed or grown in maturity or emotional health since the offense was "surely key evidence" for the *Miller* inquiry. 819 F.3d 1121, 1133 (9th Cir. 2016).

McCain assures us that he does not question the relevance of postconviction conduct to resentencing, and rightly so. Sentencing courts "'exercise a wide discretion' in the types of evidence they may consider when imposing sentence," including "'the fullest information possible concerning the defendant's life and characteristics.'" *Pepper v.*

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United States, 562 U.S. 476, 480 (2011) (quoting *Williams v. New York*, 337 U.S. 241, 246–247 (1949)); *see also* 18 U.S.C. § 3661 (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”). As the Supreme Court has explained in the context of postconviction rehabilitation, such evidence “may be highly relevant to several of the [Section] 3553(a) factors” that a district court must consider at resentencing, such as the history and characteristics of the defendant, the defendant’s likelihood of future criminal conduct, and the need to provide the defendant with training or treatment. *Pepper*, 562 U.S. at 491 (citing 18 U.S.C. § 3553(a)(1), (a)(2)(B)–(D)). The Court’s reasoning is no less applicable where, as here, the postconviction evidence is overwhelmingly negative.

At bottom, McCain argues that the district court should have weighed the sentencing factors differently. But district courts have “extremely broad discretion” in this regard. *United States v. Jeffery*, 631 F.3d 669, 679 (4th Cir. 2011). The district court here conducted a thorough resentencing and did not abuse its discretion in its consideration of McCain’s age at the time of the offense or his postconviction diagnosis and conduct.

B.

McCain also advances a second ground for procedural unreasonableness: he contends that the district court failed to address his request for an alternative sentence incorporating “*de facto* parole,” under which McCain would receive periodic judicial review of his sentence and release upon a showing of satisfactory rehabilitation.

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“Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence,” the district court should “explain why [it] has rejected those arguments.” *Rita*, 551 U.S. at 357. In our view, McCain’s parole request, if not frivolous, has little to commend it. After all, Congress abolished parole for federal offenses committed after November 1, 1987, in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, 98 Stat. 1987. *See Richmond v. Polk*, 375 F.3d 309, 316 (4th Cir. 2004); *see also Under Seal*, 819 F.3d at 719 n.4. And McCain has identified no statute, rule, or caselaw that would authorize a district court to periodically reconsider a final sentence. To the contrary, Congress has instructed that a court “may not modify a term of imprisonment once it has been imposed” except in narrow circumstances McCain does not invoke here. 18 U.S.C. § 3582(c); *see* 28 U.S.C. § 2255(a), (f), (h) (detailing the restrictions on initial and successive motions collaterally attacking a sentence); *see generally* Fed. R. Crim. P. 35.

In any event, the adequacy of a sentencing court’s explanation depends on the circumstances of each case. *See Rita*, 551 U.S. at 356 (“The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances.”). The sentencing court need only “set forth enough to satisfy the appellate court that [it] has considered the parties’ arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority.” *Id.* The district court here amply explained why it concluded that “the harshest possible penalty”—life imprisonment *without* parole—was appropriate. J.A. 242; *see* J.A. 259–260. That explanation sufficiently elucidated the court’s reasons for rejecting McCain’s request for “*de facto* parole.”

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C.

Finally, McCain contends that his life sentence is substantively unreasonable because the facts of the crime and his personal characteristics do not show he is among the rare irreparably corrupt juvenile offenders. As previously explained, we review the substantive reasonableness of the sentence “under an abuse-of-discretion standard,” considering “the totality of the circumstances.” *Gall*, 552 U.S. at 51.³ Applying this standard, we may “reverse a sentence *only* if it is unreasonable, even if the sentence would not have been the choice of the appellate court.” *United States v. Evans*, 526 F.3d 155, 160 (4th Cir. 2008); *see Gall*, 552 U.S. at 51 (“The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”). As the Supreme Court has explained, this deferential standard is appropriate because the sentencing court “is in a superior position to find facts and judge their import under [Section] 3553(a) in the individual case.” *Gall*, 552 U.S. at 51 (internal quotation marks omitted). The district court “sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.” *Id.* (internal quotation marks omitted).

³ Neither party urges us to apply a different standard of review to the district court’s conclusion that McCain qualifies as “the rare juvenile offender whose crime reflects irreparable corruption.” *Montgomery*, 136 S. Ct. at 734 (internal quotation marks omitted). Nor have the parties briefed the question, currently pending before the Supreme Court, whether the district court was required to make an explicit factual finding of permanent incorrigibility. *See Jones v. Mississippi*, 140 S. Ct. 1293 (2020); *see also Montgomery*, 136 S. Ct. at 735 (“That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.”).

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The district court here thoroughly examined each of the *Miller* factors as they pertain to McCain. Although McCain would reach a different conclusion than the district court, he does not contend that the court misapprehended or misapplied any of the relevant considerations. The district court concluded that “the hallmark features associated with young age,” such as impulsivity and lack of maturity, did not play “any substantive role in [McCain’s] commission of these crimes,” J.A. 259, after noting the Government’s argument that McCain was a “capable,” “street smart” “heroin dealer” whose crimes “were cold and calculated, targeting two victims, with premeditation, literally executing one victim and maiming another,” J.A. 247, 249; *see Miller*, 567 U.S. at 471, 477. As for McCain’s family and home environment, the district court observed that he “was not abused in his home” or “otherwise impaired through those things, other than things we too often see with people in dysfunctional families.” J.A. 259; *see Miller*, 567 U.S. at 471, 477. The court acknowledged, but was not persuaded by, McCain’s contention that he committed the crimes out of “immature loyalty to a friend.” J.A. 243; *see* J.A. 257 (“[T]he doctor[] said there’s a big difference between a 13 or 14 year old and a 17 or 18 year old as regards peer pressure.”); *see also Miller*, 567 U.S. at 471, 477. The court recounted McCain’s juvenile criminal record and the Government’s argument that, by age 17, McCain was “very familiar with [the] criminal justice system” and “able to assist his attorneys, as he was represented by counsel on each of those [prior] cases.” J.A. 248–249; *see Miller*, 567 U.S. at 477–478. As for rehabilitative potential, the court reviewed the long list of McCain’s serious misconduct since his arrest and turning 18 years old, including stabbing another inmate at least sixteen times, multiple “disturbing” instances of

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assaulting and threatening other inmates and correctional officers, and sexually assaulting a female inmate while awaiting his resentencing. J.A. 251–254, 258; *see Miller*, 567 U.S. at 471, 478. Although the court acknowledged McCain’s “relative lack of rehabilitative opportunities” in prison, J.A. 244, it concluded that his postconviction conduct and antisocial personality disorder diagnosis demonstrated a lack of rehabilitative potential. *See* J.A. 259 (“That disorder still controls his action and his thinking.”).

Given this record, we cannot conclude that the district court abused its discretion in determining that McCain’s crimes, committed when he was 7-and-a-half months shy of his 18th birthday, reflected irreparable corruption rather than “the transient immaturity of youth.” *Montgomery*, 136 S. Ct. at 734. The court acknowledged that a sentence of life imprisonment without parole for a juvenile offender should be “uncommon,” J.A. 242, but “reluctantly conclude[d] this may be one of those uncommon cases where sentencing a juvenile to the hardest possible penalty is appropriate,” J.A. 260. Giving requisite deference to the district court’s role in assessing the evidence and the offender, we cannot find its sentence unreasonable.

IV.

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

AFFIRMED.

APPENDIX B

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AO 245C (SCDC Rev.02/18) Sheet 1 - Amended Judgment in a Criminal Case

RECEIVED
(NOTE: Identical Changes with Asterisks (*))
USDC CLERK, CHARLESTON, SC

United States District Court
District of South Carolina

UNITED STATES OF AMERICA
vs.
EDWARD MCCAIN

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 2:09-cr-00296-PMD-2

USM Number: 17493-171

Cameron Blazer, CJA

Defendant's Attorney

Date of Original Judgment: 3/9/2010
(or Date of Last Amended Judgment)

Reason for Amendment:

- Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- Reduction of Sentence for Changed Circumstances (Fed.R.Crim.P. 35(b))
- Correction of Sentence by Sentencing Court (Fed.R.Crim.P.35(a))
- Correction of Sentence for Clerical Mistake (Fed.R.Crim.P.36)
- Modification of Supervision Conditions (18 U.S.C. §3563(c) or 3583(e))
- Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. §3582(c)(1))
- Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. §3582(c)(2))
- Direct Motion to District Court Pursuant to 28 U.S.C. §2255 or 18 U.S.C. §3559(c)(7) Other: Joint Motion to Re-Sentence
- Modification of Restitution Order (18 U.S.C. §3664)

THE DEFENDANT:

- pleaded guilty to Count(s) 1, 2 and 5.
- pleaded nolo contendere to Count(s) on which was accepted by the court.
- was found guilty on Count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:1512(a)(1)(C) and 2	Please see superseding indictment	11/14/08	1
18:1512(a)(1)(C)	Please see superseding indictment	11/14/08	2
18:924(c)(1)(A)(i) and 924(j)	Please see superseding indictment	11/14/08	5

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s).
- Count(s) 3 and 6 are dismissed on the motion of the United States.
- Forfeiture provision is hereby dismissed on motion of the United States Attorney.

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 any material changes in economic circumstances.

September 20, 2018

Date of Imposition of Judgment

Signature of Judge

Patrick Michael Duffy, Senior U S District Judge

Name of Judge Title of Judge

Date

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DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-cr-00296-PMD-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of LIFE; such term consists of LIFE as to Counts One and Five and 30 years as to Count Two, all terms to run concurrently. The defendant shall pay a \$300.00 special assessment fee and restitution in the amount of \$39,926.87 due beginning immediately.

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

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

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

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

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

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

APPENDIX B

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

Page 3

DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-cr-00296-PMD-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years; such term consists of 5 years as to each count, to run concurrently. While on supervised release, the defendant shall comply with the mandatory and standard conditions of supervision as well as the following special conditions: 1. The defendant shall participate in a program of mental health counseling and/or treatment, to include Anger Management counseling, as deemed necessary by the U.S. Probation Officer, until such time as the defendant's release from the program is approved by the U.S. Probation Officer. 2. The defendant shall submit to substance abuse testing and/or treatment as approved by the U.S. Probation Officer, until such time as the defendant is released from the program by the probation officer. 3. The defendant shall enroll in and complete a vocational program as approved by the U.S. Probation Officer with the objective of learning and obtaining lawful employment once released from the defendant's term of incarceration. 4. The defendant shall pay restitution in the amount of \$39,926.87 at a rate of no less than \$50.00 per month, beginning within 60 days of release. The payments shall be made payable to "Clerk, U.S. District Court" and mailed to PO Box 835, Charleston, SC 29402. Interest on any restitution ordered as to this defendant is waived. Payments shall be adjusted accordingly, based upon the defendant's ability to pay as determined by the Court.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. §20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program of 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.

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

Page 4

DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-cr-00296-PMD-2

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 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 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: EDWARD MCCAIN
CASE NUMBER: 2:09-cr-00296-PMD-2

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 5.

<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	<u>\$300.00</u>	<u>\$39,926.87</u>

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case*(AO245C) will be entered after such determination.

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

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
MUSC	\$24,226.78	\$24,226.78	1
The Dental Implant Centre	\$640.00	\$640.00	1
Carolina Hand Therapy, Inc.	\$174.00	\$174.00	1
Georgetown Hospital Systems	\$7,320.49	\$7,320.49	1
Georgetown County EMS	\$369.00	\$369.00	1
University Medical Associates	\$7,196.60	\$7,196.60	1
TOTALS	\$39,926.87	\$39,926.87	

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 judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

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

- The interest requirement is waived for the fine restitution.
- The interest requirement for the fine restitution is modified as follows:

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

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

DEFENDANT: EDWARD MCCAIN

CASE NUMBER: 2:09-cr-00296-PMD-2

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 \$300.00 special assessment and restitution in the amount of \$39,926.87, both due immediately.

not later than _____, or

in accordance with C, D, or E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (weekly, monthly, quarterly) installments of \$_____ over a period of _____ (e.g., months or years), to commence _____ (30 or 60 days) after the date of this judgment; or

D Payment in equal monthly installments of \$50.00 to commence within 60 days after release from imprisonment to a term of supervision; or

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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 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:

As directed in the Preliminary Order of Forfeiture, filed _____ and the said order is incorporated herein as part of this judgment.

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

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF SOUTH CAROLINA
3 CHARLESTON DIVISION

4 UNITED STATES OF AMERICA :
5 :
6 :
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8 :
9 EDWARD McCAIN : 2:09 - CR - 296

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Continuation of sentencing in the above-captioned matter held on Thursday, September 20, 2018, commencing at 1:09 p.m., before the Hon. P. Michael Duffy, in the United States Courthouse, Courtroom I, 81 Meeting Street, Charleston, South Carolina, 29401.

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25 :
APPEARANCES:

DEAN H. SECOR, ESQUIRE, Office of the U.S. Attorney, P.O. Box 978, Charleston, SC, appeared for the Government.

CAMERON J. BLAZER, ESQ., 1037 Chuck Dawley Blvd., Mt. Pleasant, SC, appeared for defendant.

REPORTED BY DEBRA L. POTOCKI, RMR, RDR, CRR
Official Court Reporter for the U.S. District Court
P.O. Box 835
Charleston, SC 29402
843/214-7927

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1 THE COURT: Government ready?

2 MR. SECOR: Yes, Your Honor.

3 THE COURT: Defendant ready?

4 MS. BLAZER: Yes, Your Honor, thank you.

5 THE COURT: Anything you'd like to add before I go
6 into sentencing?

7 MR. SECOR: No, Your Honor.

8 THE COURT: Anything from the defendant?

9 MS. BLAZER: No, Your Honor.

10 THE COURT: Okay. This will take a little bit of
11 time. I will be quoting from the plaintiff's sentencing
12 memorandum, Government's -- excuse me -- the defendant's
13 sentencing memorandum, the Government's sentencing memorandum,
14 the transcripts, particularly Dr. Buddin's testimony, and
15 referencing some of the case law.

16 Let me start with the defendant. I've already put on the
17 record the guidelines; everybody has agreed the correct
18 guidelines are in the record. The sentencing factors I will
19 list and talk about as I go, as well as the Miller factors and
20 other case law that's pertinent to what we're doing.

21 I'm going to start off with defendant's argument that
22 Roper and Graham identify three significant differences
23 between juveniles and adults. And they are that children lack
24 maturity and underdeveloped sense of responsibility leading to
25 recklessness, impulsivity, heedless risk taking. And

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1 secondly, they're vulnerable to negative influences and
2 outside pressure, and limited control of their environments,
3 and lack of ability to remove themselves from negative
4 settings. And third, while people of all ages falter, may be
5 capable of rehabilitation, a child's character is not as well
6 formed as an adult's, and their traits less fixed, and there's
7 less evidence of irretrievable depravity, and, therefore, are
8 legally different because they're developmentally different.
9 That was the argument.

10 In citing the Miller Court, recognizing that it went
11 further, hand in hand there are prescriptions under the 2255
12 where a juvenile, even postadolescent young adults, are to be
13 sentenced, the trial court must, and this is the Miller
14 analogy -- analysis, rather -- consider chronological age and
15 hallmark features; among them, immaturity, impetuosity and
16 failure to appreciate the risks and consequences.

17 The Court should consider the family and home environment.
18 And they must consider the circumstances of the homicide
19 offense, including extent of the participation in the conduct,
20 the way familial and peer pressures may have affected the
21 defendant in this instance.

22 And finally, the issue of rehabilitation go on to conclude
23 that based upon Miller's observations and instructions,
24 appropriate occasions for sentencing juveniles to the harshest
25 possible penalty will be uncommon.

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1 The Miller factors listed are immaturity and impetuosity.
2 Defendant in this case highlights that the death, and the
3 shooting of Mr. Crawford as well, were unforgivable. And also
4 the defendant's refusal to implicate Sanders would cause one
5 to think that his immature loyalty to a friend caused him to
6 do that, and that same friend who would not have sacrificed
7 anything for him.

8 The family and home environment. His early childhood was
9 obviously disrupted by the absence of a father and his
10 mother's health problems, particularly her mental breakdowns.
11 And that his grandmother's love and attention was plentiful,
12 but no substitute for those other things.

13 Miss Blazer pointed out that Dr. Buddin noted, prior to
14 the shooting, Edward ha spent years in and out of assessment
15 for treatments and behavioral difficulties. And, in his
16 underlying report, observed that Mrs. Hunt, the grandmother,
17 while she had the best intentions and interests, in some ways
18 added to the problem by the way she supported her grandson and
19 provided him perhaps excuses and lack of responsibility on his
20 part.

21 The circumstances of the offense and the external
22 pressures. Miss Blazer says that Edward felt he could curry
23 favor from his mentor, Pierre Sanders, by targeting Crawford,
24 and after Sanders told him that Crawford was a federal
25 informant. And his youthful incompetencies, as of April 2009

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1 he was still a few months short of his eighteenth birthday.
2 And when he waived his transfer as a juvenile to adult court,
3 waived a hearing, it was on the advice of counsel at that
4 time, it was good advice, because it would result in a motion
5 for a downward departure. However, as pointed out in the
6 defendant's brief, Mr. McCain wrote a string of threatening
7 letters with acts of retribution against others who might
8 snitch, and he lost the benefit of that bargain. And she said
9 he did that to look hard to others and was a child playing a
10 man's game. Again, the juvenile factor.

11 He forewent the opportunity to have comprehensive and
12 contemporary evaluation of the juvenile factors and receiving
13 help that might have been available, by going straightforward
14 to an adult prosecution, as opposed to having all of that
15 looked at in a juvenile setting at that time.

16 The possibility of rehabilitation. Nowhere is that missed
17 opportunity of undertaking a comprehensive evaluation of
18 behavioral health more apparent than in Mr. McCain's relative
19 lack of rehabilitative opportunities, and the lack of those
20 afforded him since entering the Bureau of Prisons. The two
21 dispiriting realities, as she points out, are shrinking
22 opportunities for rehabilitation; and he states the sentence
23 that means a denial of hope, which is the ground root of one
24 of the Miller principles.

25 It's unsurprising that Mr. McCain experienced difficulties

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1 adjusting to prison life and has been written up for assaults,
2 possession of weapons and insolence, and his latest serious
3 infraction taking place as recently as 2013. And we know, of
4 course, about the most recent event while he's been housed
5 here at the Al Cannon sheriff's facility.

6 His story is not one of extraordinary rehabilitation, and
7 the concern is he won't get that opportunity. An appropriate
8 sentence in a juvenile setting requires littering the Miller
9 factors over the other factors set forth in 3553(a). And it's
10 difficult to punish the past harm and limit the future risk,
11 as pointed out in this memo.

12 Miss Blazer argues that Mr. McCain stands before the Court
13 as a 27 year old, and yet must sentence him as a 17 year old,
14 as he was at the time of the offense.

15 I think that pretty well sums up the plaintiff's position
16 and how the argument should be reflected in the record.

17 Turning to the Government's positions. The assistant U.S.
18 Attorney reminded the Court of the United States versus
19 Moreland factors, Fourth Circuit case, and what the Court
20 needs to determine in reaching a decision in these cases. It,
21 of course, includes the correct guidelines, which were done;
22 assessing the range satisfies the 3553(a) factors; and any
23 appropriate departures under the guidelines that might be
24 necessary; and, finally, consider and explain a variance to a
25 nonguidelines sentence.

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1 In this case, the 3553(a) factors, and it bears some
2 scrutiny, and the Government has done that. First considering
3 the nature and circumstances of the offense and the history
4 and characteristics of the defendant, the need for the
5 sentence imposed to reflect the seriousness of the offense and
6 promote respect for the law, and provide just punishment for
7 the offense. To afford adequate deterrence to criminal
8 conduct, to protect the public from further crimes from this
9 defendant, and provide the defendant with needed educational/
10 vocational training, medical care, other correctional
11 treatment in the most effective manner.

12 Added to that, as further guidance from the Supreme Court
13 in Miller versus Alabama and Montgomery versus Louisiana, and
14 the Court has said when there's a mandatory life sentence as
15 it was, that a defendant who was a juvenile at that time
16 suffered from cruel and unusual punishment as a result of the
17 Eighth Amendment prohibition against such a sentence.

18 The important part in Miller is the mandatory part. And
19 the Government argues that reversing the mandatory life
20 sentences of two 14 year olds who were convicted in separate
21 murder cases in Miller, as the Court in that case noted,
22 "Mandatory life without parole for a juvenile precludes
23 consideration of chronological age and its hallmark features,
24 immaturity, impetuosity, failure to appreciate the risk and
25 consequences. It prevents taking into account the family and

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1 home environment, and those environments where someone may not
2 extricate themselves from brutal or dysfunctional situations.
3 It neglects the circumstances of a homicide offense, including
4 the extent of his participation in the conduct and the way
5 familial and peer pressures may have affected him. Indeed, it
6 ignores that he might have been charged and convicted of a
7 lesser offense if not for the incompetencies associated with
8 youth, for example, his inability to deal with police officers
9 and prosecutors."

10 The sentencing judge in a Miller re-sentencing must take
11 into account how children are different, and how these
12 differences counsel against irrevocably sentencing them to a
13 life in prison. Montgomery and Miller both stand for those
14 propositions.

15 Montgomery also distinguished life without parole from
16 other sentences. Life without parole can be just and
17 proportionate for juveniles only when exceptional
18 circumstances are present.

19 The Government in its brief or memo then goes into the
20 guideline range in the sentencing factors. We've already
21 discussed the guidelines, and the Government's version or view
22 of this case under the sentencing factors is this.
23 Mr. McCain's crimes were cold and calculated, targeting two
24 victims, with premeditation, literally executing one victim
25 and maiming another. Goes on to recite the facts of running

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1 out of ammunition, seeking more, finding none, came back with
2 a knife to finish the dastardly deed. The Government would
3 urge on the Court that this represents irreparable corruption
4 and supports a life sentence.

5 Next brings to fore the history and characteristics of
6 this defendant. The criminal history, argues the Government,
7 by age 14, Mr. McCain had amassed a criminal history category
8 of four, based on the following convictions. At age 12 on the
9 date of his arrest, attempted armed robbery involving a gun.
10 Age 12 on a date of arrest, simple assault and battery. Age
11 13 on the date of arrest, simple assault and battery, at which
12 time he approached a Hispanic victim at school and told him
13 that he hated all Mexicans. And the victim then moved to the
14 other end of the gym, and Mr. McCain followed him, sat beside
15 him, hit the victim several times, kicked him and punched him
16 in the eye. Age 14 on the date of arrest, shoplifting, value
17 up to \$1000. Age 14 on date of arrest, attempted burglary
18 second degree, and another juvenile at nighttime, 10:30 at
19 night, broke into a residence. At that time they were
20 confronted by a victim who threatened to get a gun if they
21 didn't leave. They left.

22 A view of that criminal history belies the argument that
23 Mr. McCain was either unwitting, gullible, juvenile. At the
24 time of his federal conviction, he was very familiar with
25 criminal justice system, and able to assist his attorneys, as

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1 he was represented by counsel on each of those cases just
2 referenced.

3 He's been in criminal court on five different serious
4 criminal cases. In the instant case, he chose not to assist
5 his attorney, by continuing to threaten the lives of several
6 individuals associated with the case.

7 Personal history and characteristics. Family dysfunction
8 I've already pointed out, and the Government mentions, in the
9 absence of his mother and her physical and mental problems.
10 The Government points out that Mr. McCain was not physically
11 abused, he did not suffer any degree of dysfunction that is
12 not seen among many defendants in criminal court with worse
13 situations than he has. He had a maternal grandmother who was
14 a constant figure in his life. Affirmative -- she provided
15 affirmative steps to help him.

16 The Government argues that he was 17 years and 135 days
17 old, and it's inconceivable that a period of 230 days that a
18 hapless adolescent would have morphed into a mature adult. To
19 the contrary, Mr. McCain was street smart, was a heroin
20 dealer, capable, at the time of the crime, and suffered none
21 of the deficits of a vulnerable juvenile.

22 They point out that, in theory, the Miller case, the Court
23 envisioned a brutal home setting or an environment where an
24 impressionable youth could not extricate himself. Mr. McCain
25 did not live in such a brutal home environment.

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1 They asked the Court, and Miller instructs, that we
2 consider the circumstances of the homicide offense, including
3 the extent of his participation and the way familial and peer
4 pressures may have affected him. In this case the Government
5 argues no convincing evidence that he was pressured into
6 committing a crime that he otherwise would not have committed.

7 I should say that the defendant argues that Mr. Sanders
8 was his mentor, and that it was his idea and his peer
9 influence that pushed the defendant to do it.

10 Mental health and behavior issues. A lot is made of the
11 test and the diagnosis and the discussions from Dr. Buddin's
12 testimony. The Government says the salient take away from
13 that is that Mr. McCain suffers from an antisocial personality
14 disorder.

15 And, according to the Diagnostic and Statistical Manual of
16 Disorders, there are four diagnostic criteria for that. A,
17 disregard for and violation of others' rights since age 15.
18 There are seven subcategories to that. Failure to obey laws
19 and norms by engaging in behavior resulting in criminal
20 arrests or warrants; two, lying, deception, manipulation for
21 profit or self-amusement; three, impulsive behavior; four,
22 irritability and aggression manifested as frequent assaults on
23 others and engaged in fighting; five, blatant disregard for
24 safety of self and others; six, a pattern of irresponsibility;
25 seven, a lack of remorse for actions.

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1 The B factor, after listing those seven subfactors, is
2 that a person must be at least 18. C is conduct disorder was
3 present by history, not diagnosis, but by history, before age
4 15. And D, that the antisocial behavior does not occur in the
5 context of schizophrenia or bipolar disorder.

6 The Government points out Dr. Buddin acknowledged that
7 treating that particular problem, APD, is a difficult prospect
8 and has only been marginally successful. Some of the
9 literature says there is no treatment that's effective.

10 In Miller and Montgomery it's appropriate to examine the
11 life sentence in light of the defendant's age at the time of
12 the crime. The Government maintains that Mr. McCain, at 17,
13 was not comparable to those 14 year olds in Miller, and he was
14 only 230 days separated from his legal benchmark for
15 adulthood. Somewhere else in the writings it's pointed out if
16 he had reached that, perhaps he would have faced a death
17 penalty.

18 The Government submits that there's nothing magical about
19 what would happen in 230 days, and indeed, his violent conduct
20 following his eighteenth birthday would be proof of that fact
21 that he was the same person when he committed the offenses
22 prior.

23 C, postconviction conduct within the Bureau of Prisons and
24 Charleston County Detention Center. The summary of that
25 discipline report since his incarceration in this case, there

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1 are a list of exhibits that the Government entered into
2 evidence. And just going down those, Exhibit A is assault
3 with a serious injury. Mr. McCain stabbed an inmate multiple
4 times with a nine-inch metal weapon sharpened to a point with
5 a black string attached to it. The victim received 11
6 puncture wounds to the back, four to the abdomen and one under
7 the arm, and required treatment at a local hospital.
8 Mr. McCain initially refused to hand over the weapon when
9 confronted by officials.

10 Exhibit B, at age 20, Terre Haute disciplinary hearing
11 officer report, assault without serious injury, wherein
12 Mr. McCain chased down an inmate and assaulted him with a
13 shank.

14 Exhibit C, disciplinary hearing at age 21, assault without
15 a serious injury. While awaiting a medical appointment in the
16 law library, with the handcuffs in front, he used those cuffs
17 to strike another inmate who was not fighting with, seeking to
18 get away. Mr. McCain had been handcuffed behind his back and
19 placed the cuffs in front to facilitate that attack.

20 Exhibit D, age 21, fighting with another person,
21 Mr. McCain and another inmate fighting with closed-fist
22 punches.

23 Exhibit E, age 21, fighting with others, holding down an
24 inmate and encouraging another inmate to strike him while
25 down.

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1 Exhibit F, at age 21, assault without serious injury.
2 Correctional officer thrown foul-smelling liquid in the
3 officer's face and upper torso.

4 Exhibit G, insolent toward staff and threw unknown liquid
5 at a correctional officer, but missed.

6 Exhibit H, at age 21, assaulting another person. He threw
7 an unknown substance on two correctional officers and told
8 them, quote, "Come in here, bitch, and I'll fucking kill you."

9 Exhibit I, age 21, refusing to obey an order. Jumped his
10 handcuffs to the front, refused to alter them, and had the
11 restraints placed on his back.

12 Exhibit J, letter written by an inmate at McCain's
13 direction to the victim of an assault at the Charleston County
14 Detention Center. Assault under Prison Rape Elimination Act,
15 wherein the person was instructed to request that she go to
16 jail officials and downplay the situation in order to get
17 Mr. McCain out of trouble, as he had been accused of
18 assaulting a female inmate in a waiting area of the detention
19 hospital which was captured on videotape.

20 Exhibit K, Charleston County sheriff's office, again,
21 assault and battery second degree, investigation, probably of
22 the same incident.

23 The Government argues the postconviction conduct in the
24 Bureau of Prisons and the Charleston County Detention Center
25 provides clear evidence that a lack of rehabilitation

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1 potential and additional basis for sentence for life, Miller
2 was concerned of the possibility of a young person who could
3 be rehabilitated before their character, personality and
4 habits were permanently formed. The focus in appropriate
5 cases, whether a child can be saved is whether a child can be
6 saved from his or her own self. In this case the Government
7 argues Mr. McCain proceeded to a life of crime following his
8 eighteenth birthday, as evidenced by his lengthy list of
9 prison and jail violations.

10 The factors under 3553(a), again, seriousness of the
11 offense. There is no more serious offense than a brutal and
12 premeditated murder of James Fannin in this case, and
13 inflicting personal bodily injury on Glenn Crawford. Not to
14 mention the enormous holes in the lives of the victims'
15 families and friends. Such offenses demand serious
16 punishment.

17 B, the need to deter future criminal conduct. A sentence
18 of life would provide that.

19 C, need to protect the public from defendant's future
20 criminal conduct. Similarly, the public would be protected.

21 D, need to provide treatment to the defendant. Bureau of
22 Prisons is well equipped to provide treatment, physical and
23 mental, for the defendant's needs.

24 And lastly, avoiding unwarranted sentencing disparities
25 among similarly-situated defendants. The Government argues

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1 that sentencing Mr. McCain to life in prison would avoid
2 sentencing disparities of similarly-situated defendants. They
3 point out a survey of the re-sentenced cases in the country in
4 the wake of Miller provide only limited guidance, and the
5 sentences range widely from 20 years to life, with many in
6 between, once again affirming the concept that every
7 defendant's case is unique.

8 They point to the case of U.S. versus Briones, wherein a
9 17-year-old defendant received a life sentence after -- or in
10 a Miller re-sentencing -- as a gang leader committing a Hobbs
11 Act robbery in a Subway sandwich store, wherein a murder of an
12 employee took place, and the defendant was the mastermind and
13 get-away driver and was just days under turning 18.

14 I think that fairly outlines on the record the analysis of
15 each of those factors by both sides.

16 I think it's important in these cases where the Court is
17 asked to do the impossible, which is to go back and sentence
18 somebody at age 27 as though he were 17, try to evaluate what
19 he was like at that time and what he's like now.

20 In doing that, I went back and read very carefully the
21 transcript of Dr. Buddin's testimony, and a lot of what he had
22 to say, because I think it points directly to what we've all
23 been discussing in one way or another throughout this matter,
24 and that is, some of the characteristics of somebody who has
25 antisocial personality disorder. I'm quoting from the

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1 transcript, in part, as I go. As to that disorder, he defined
2 it as failure to conform to lawful or social norms, failure to
3 benefit from repeated arrests, repeated violations. Failure
4 to plan ahead. Impulsivity and lack of remorse as one of the
5 categories.

6 Four criteria are disregard for and violation of others'
7 rights since age 15. I went over that earlier, and the
8 Government's set out of it, and it appeared again in his
9 testimony. In talking about that, he said that antisocial
10 personality disorder, the behavior associated with it is more
11 pronounced than other diagnoses. And the question and answer
12 that he admitted was kind of an off-the-chart thing, we don't
13 see those kinds of behaviors. There's not a lot of gray area
14 between antisocial and many other categories, as it might be
15 with anxiety and depression, for example. And the U.S.
16 Attorney asked him, is there a demarcation; would be he shows
17 no respect for others in terms of violence? And the doctor
18 said that's a great example. You don't see that in a lot of
19 other conditions, if any. Mr. McCain, in looking at all of
20 these incidents in the record, has exhibited that throughout
21 his history. And doctor said yes, that's correct, referring
22 to knife fights, et cetera. The behaviors are associated with
23 the condition. We take notice. They're more apparent,
24 usually because of the severity of them or the frequency at
25 which they occur.

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1 As far as the treatment/prognosis for people with ASPD in
2 general, it's less favorable than with many other conditions.
3 Or almost any other condition. There's a high degree of drop-
4 out in treatments, and a high degree of people who return to
5 those behaviors.

6 He went on to discuss manipulative behavior as part of the
7 diagnosis. He was asked whether given the facts of this case,
8 he did any risk assessment for recidivism. He was not asked
9 to do one and had no opinion on that. Of course recidivism,
10 particularly with a pattern of behavior like this, is
11 something that any court is concerned about. He, the doctor,
12 said there's a big difference between a 13 or 14 year old and
13 a 17 or 18 year old as regards peer pressure. Also, not all
14 17 year olds, even those who are subject to adverse or
15 negative influences, such as peer pressure, do some of the
16 things that were done in this case, such as commit murder or
17 shoot somebody.

18 So with all of that before me and in my mind, Mr. McCain
19 presented himself and made a very credible argument. He's
20 obviously bright and he can be engaging. And his thoughts
21 were well organized and well presented. Ms. Blazer shared a
22 letter with the Court which was demonstrative of the fact that
23 he is not only intelligent, but he is witty and he has some
24 social skills in that regard.

25 So I see that, and I don't see the person standing before

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1 me that I've read about in these reports. And some ask, has
2 rehabilitation already started taking place. Maybe there is
3 something here to look for and look at.

4 But then I look at the record, and particularly the
5 incidents in prison. The nature of the incidents is
6 disturbing. The number is disturbing. But the manner in
7 which they were done, the attitude exhibited, the disregard
8 for others, the disregard for fellow inmates, for people that
9 work at the facilities, the remarks made, threats, violent
10 assaults, a series of them. And finally here, while awaiting
11 sentencing, a sexual assault on a female awaiting treatment or
12 having had treatment.

13 I would expect that waiting to be re-sentenced, that the
14 defendant would have been on his very best behavior. And when
15 I saw that tape, that disk, and I viewed it, and I thought of
16 the Hispanic kid when the defendant was 13, just sitting in a
17 gym, and the defendant pursued him. The boy left, and he
18 pursued him further, to the point that he attacked him. The
19 27-year-old man did the same thing to a woman who was doing
20 nothing but sitting and waiting for treatment. And it just
21 looked to me like somebody who spotted a target of opportunity
22 and did something because they could. And that is very
23 disturbing.

24 A sexual assault in the jail while you're waiting to be
25 sentenced is the same thing as that juvenile who attacked the

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1 Hispanic child, or that juvenile who threw away a benefit of a
2 plea bargain downward departure in order to threaten other
3 people. And I see no difference between that juvenile and
4 this adult, and I say, why? Why isn't there? He's bright.
5 He was not abused in his home. He was not otherwise impaired
6 through those things, other than things we too often see with
7 people in dysfunctional families. And I have to go back to
8 the doctor's diagnosis. Antisocial personality disorder. It
9 seems like that disorder is still with Mr. McCain. That
10 disorder still controls his action and his thinking.

11 He had every opportunity, at least after the 2255 was
12 filed, to behave and come here with a clean record. I look at
13 him standing before me, and he said all the right things. And
14 he said them very well. But every action he took in between
15 belied what was being said.

16 The Supreme Court in the Miller case, identifying those
17 mitigating factors of youth, the defendant's postsentencing
18 behavior stripped away that defense. He simply made terrible
19 choices, and he continues to make terrible choices.

20 I followed all the directives in Miller, I've considered
21 every one of the sentencing factors. I am not convinced that
22 his chronological age and the hallmark features associated
23 with young age played any substantive role in his commission
24 of these crimes. It may have been a contributing factor, but
25 it was not a major one.

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1 And I reluctantly conclude, reluctantly, and really
2 reluctantly conclude this may be one of those uncommon cases
3 where sentencing a juvenile to the hardest possible penalty is
4 appropriate.

5 Having considered all of that, it's the judgment of the
6 Court that the defendant, Edward McCain, is committed to
7 custody of Bureau of Prisons to be imprisoned for a total term
8 of life. Such term consists of life to count one and five,
9 and 30 years as to count two, to run concurrently.

10 He does not have the ability to pay a fine, so the fine is
11 waived. He must pay a mandatory \$300 special assessment fee,
12 and \$39,926.82 in restitution, due beginning immediately.

13 Upon release from imprisonment, he'll be placed on
14 supervised release for a term of five years as to each of the
15 counts, to run consecutively.

16 Within 72 hours of his release from Bureau of Prisons,
17 should that happen, he will report in person to the probation
18 office in the district to which he's released.

19 And while on supervised release he must comply with the
20 mandatory and standard conditions of supervision outlined in
21 3583(d) of Title 18, and also the following special
22 conditions. Participate in program of mental health
23 counseling or treatment, anger management, counseling as
24 deemed necessary until released from the program by the
25 probation officer. Submit to substance abuse testing or

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1 treatment as approved, until released from the program by the
2 probation officer. Enroll in and complete a vocational
3 program as approved by the probation officer, with the
4 objective of learning and obtaining lawful employment. And
5 pay the restitution in the amount read at a rate no less than
6 \$50 per month, beginning within 60 days of release. And the
7 payment shall be made to the U.S. District Court, Post Office
8 Box 85, Charleston, South Carolina, 29402. Interest is
9 waived. Payments will be adjusted according to the
10 defendant's ability to pay.

11 Does either the Government or the defendant object to form
12 of the sentence?

13 MR. SECOR: No, Your Honor.

14 MS. BLAZER: No, sir, Your Honor. I do, just for the
15 purposes of ensuring a complete record, I don't believe it
16 would have changed the Court's conclusion, based on everything
17 that you've said, but I failed to challenge yesterday the
18 premise that the letter that was written to the young woman at
19 the detention center had been done at Mr. McCain's behest.

20 THE COURT: Well, I'll allow you to amend the record
21 accordingly, and I accept that amendment. And you're right,
22 it wouldn't have changed anything.

23 Mr. McCain, I take no pleasure in passing that sentence.
24 And I hope you're able to adjust and deal with it. And I wish
25 you the best. We are adjourned. Thank you.

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1 Mr. McCain, I know this will be appealed, but I need to
2 give you the -- any appeal must be filed within 14 days from
3 today, or when the judgment is entered, which will be today.
4 And I'm sure Miss Blazer will file the notice for you.

5 MS. BLAZER: Yes, sir.

6 THE COURT: Thank you.

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8 (Court adjourned at 1:52 p.m.)

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REPORTER'S CERTIFICATION

3 I, Debra L. Potocki, RMR, RDR, CRR, Official Court
4 Reporter for the United States District Court for the District
5 of South Carolina, hereby certify that the foregoing is a true
6 and correct transcript of the stenographically recorded above
7 proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-4252

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDWARD MCCAIN,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Patrick Michael Duffy, Senior District Judge. (2:09-cr-00296-PMD-2)

Submitted: December 20, 2010

Decided: February 28, 2011

Before WILKINSON, DAVIS, and KEENAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Timothy C. Kulp, KULP LAW OFFICE, Charleston, South Carolina, for Appellant. Peter Thomas Phillips, Assistant United States Attorney, Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

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PER CURIAM:

Edward McCain pled guilty, pursuant to a written plea agreement, to three offenses in his superseding indictment. McCain received a life sentence for tampering with a witness, victim or informant (murder) in violation of 18 U.S.C. §§ 1512(a)(1)(C) and 2 (2006) (Count 1), a thirty-year concurrent sentence for tampering with a witness, victim, or informant (attempted murder) (Count 2), and another life sentence for using and carrying a firearm in furtherance of a drug trafficking crime and crime of violence in violation of 18 U.S.C.A. § 924(c)(1)(A)(i) (West Supp. 2010), 18 U.S.C. §§ 924(j) and 2 (2006) (Count 5).

On appeal, counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), asserting there are no meritorious grounds for appeal, but raising the following issues: (1) whether the district court erred in accepting McCain's plea, and (2) whether the district court erred in sentencing him. For the reasons that follow, we affirm.

First, we find no plain error at McCain's sentencing hearing. See United States v. Martinez, 277 F.3d 517, 524, 527 (4th Cir. 2002) (providing review standard when defendant did not move in the district court to withdraw his guilty plea). Second, we find no abuse of discretion in the district court's

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sentencing of McCain. Gall v. United States, 552 U.S. 38, 49 (2007). We note that McCain's life sentences were mandated by statute. See 18 U.S.C. § 1111(b) (2006) (penalty for first degree murder is death or a life sentence); 18 U.S.C. § 924(j) (penalty for use of a firearm which causes death is a sentence of death or life imprisonment). McCain was not eligible for a sentence of death, however, because he was a minor at the time of the offenses. See 18 U.S.C. § 3591(a) (2006) (noting "that no person may be sentenced to death who was less than 18 years of age at the time of the offense").

In accordance with Anders, we have reviewed the record in this case, including the issues raised in McCain's pro se supplemental brief, and have found no meritorious issues for appeal. We therefore affirm McCain's convictions and sentence. This court requires that counsel inform McCain, in writing, of the right to petition the Supreme Court of the United States for further review. If McCain requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on McCain.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials

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before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX E

United States District Court
District of South Carolina

UNITED STATES OF AMERICA

vs.

EDWARD MCCAIN

Date of Original Judgment: March 3, 2010

(or Date of Last Amended Judgment)

RECEIVED CLERK'S OFFICE
AMENDED JUDGMENT IN A CRIMINAL CASE

2010 MAR -9 P 3: 21

Case Number: 2:09-cr-296-PMD-2

USM Number: 17493-171

DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON, SC

Timothy Kulp, Esq.

Defendant's Attorney

Reason for Amendment:

Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2)) Modification of Supervision Conditions (18 U.S.C. §3563(c) or 3583(e))

Reduction of Sentence for Changed Circumstances (Fed.R.Crim.P. 35(b)) Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. §3582(c)(1))

Correction of Sentence by Sentencing Court (Fed.R.Crim.P.35(a)) Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. §3582(c)(2))

Correction of Sentence for Clerical Mistake (Fed.R.Crim.P.36) Direct Motion to District Court Pursuant to 28 U.S.C. §2255 or 18 U.S.C. §3559(c)(7)

Modification of Restitution Order (18 U.S.C. §3664)

THE DEFENDANT:

pleaded guilty to Count(s) 1, 2 and 5.

pleaded nolo contendere to Count(s) on which was accepted by the court.

was found guilty on Count(s) on after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:1512(a)(1)(C) and 2	Please see superseding indictment	11/14/08	1
18:1512(a)(1)(C)	Please see superseding indictment	11/14/08	2
18:924(c)(1)(A)(I) and 924(j)	Please see superseding indictment	11/14/08	5

The defendant is sentenced as provided in pages 2 through 5 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) 3 and 6 are dismissed on the motion of the United States.

Forfeiture provision is hereby dismissed on motion of the United States Attorney.

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 any material changes in economic circumstances.

MARCH 1, 2010

Date of Imposition of Judgment



Signature of Judge

PATRICK MICHAEL DUFFY, SENIOR U S DISTRICT JUDGE

Name of Judge

Title of Judge



Date

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DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-CR-296-PMD-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of LIFE; such terms consist of LIFE as to Counts One and Five and 30 years as to Count Two, all terms to run concurrently. The defendant shall pay a \$300.00 special assessment fee and restitution in the amount of \$39,926.87 due beginning immediately.

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

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

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

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

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

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-CR-296-PMD-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years; such term consists of 5 years as to each count, to run concurrently. While on supervised release, the defendant shall comply with the mandatory and standard conditions of supervision as well as the following special conditions: 1. The defendant shall participate in a program of mental health counseling and/or treatment, to include Anger Management counseling, as deemed necessary by the U.S. Probation Officer, until such time as the defendant's release from the program is approved by the U.S. Probation Officer. 2. The defendant shall submit to substance abuse testing and/or treatment as approved by the U.S. Probation Officer, until such time as the defendant is released from the program by the probation officer. 3. The defendant shall enroll in and complete a vocational program as approved by the U.S. Probation Officer with the objective of learning and obtaining lawful employment once released from the defendant's term of incarceration. 4. The defendant shall pay restitution in the amount of \$39,926.87 at a rate of no less than \$50.00 per month, beginning within 60 days of release. The payments shall be made payable to "Clerk, U.S. District Court" and mailed to PO Box 835, Charleston, SC 29402. Interest on any restitution ordered as to this defendant is waived. Payments shall be adjusted accordingly, based upon the defendant's ability to pay as determined by the Court. The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the Probation Office. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 4 - Criminal Monetary Penalties

Page 4

DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-CR-296-PMD-2

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 5.

<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	<u>\$ 300.00</u>	<u>\$ 39,926.87</u>

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case*(AO245C) will be entered after such determination.

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

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
MUSC	\$24,226.78	\$24,226.78	1
The Dental Implant Centre	\$640.00	\$640.00	1
Carolina Hand Therapy, Inc.	\$174.00	\$174.00	1
Georgetown Hospital Systems	\$7,320.49	\$7,320.49	1
Georgetown County EMS	\$369.00	\$369.00	1
University Medical Associates	\$7,196.60	\$7,196.60	1
TOTALS	\$39,926.87	\$39,926.87	

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 judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5 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:

**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.

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AO 245B (Rev. 9/08) Judgment in a Criminal Case
Sheet 5 - Schedule of Payments

Page 5

DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-CR-296-PMD-2

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 \$ 300.00 special assessment and restitution in the amount of \$39,926.87, both due immediately.

not later than _____, or

in accordance with C, D, or E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (weekly, monthly, quarterly) installments of \$_____ over a period of _____ (e.g., months or years), to commence _____ (30 or 60 days) after the date of this judgment; or

D Payment in equal monthly installments of \$50.00 to commence within 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 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 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:

As directed in the Preliminary Order of Forfeiture, filed _____ and the said order is incorporated herein as part of this judgment.

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

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UNITED STATES DISTRICT COURT
District of South Carolina

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

vs.

EDWARD MCCAIN

Case Number: 2:09-CR-296-PMD-2

USM Number: 17493-171

Timothy Kulp, Esq.
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to Count(s) 1, 2 and 5.

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 theses offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:1512(a)(1)(C) and 2	Please see superseding indictment	11/14/08	1
18:1512(a)(1)(C)	Please see superseding indictment	11/14/08	2
18:924(c)(1)(A)(I) and 924(j)	Please see superseding indictment	11/14/08	5

The defendant is sentenced as provided in pages 2 through 5 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) 3 and 6 are dismissed on the motion of the United States.

Forfeiture provision is hereby dismissed on motion of the United States Attorney.

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 any material changes in economic circumstances.

March 1, 2010
Date of Imposition of Judgment


Signature of Judge

PATRICK MICHAEL DUFFY, SENIOR U S DISTRICT JUDGE
Name and Title of Judge

March 2, 2010
Date

APPENDIX F
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AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 2 - Imprisonment

Page 2

DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-CR-296-PMD-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of LIFE; such terms consist of LIFE as to Counts One and Five and 30 years as to Count Two, all terms to run concurrently. The defendant shall pay a \$300.00 special assessment fee and restitution in the amount of \$39,926.87 due beginning immediately.

- The court makes the following recommendations to the Bureau of Prisons:
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at _____ a.m. p.m. on _____.
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

APPENDIX F

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AO 245B (Rev. 09/08) Judgment in a Criminal Case

Sheet 3 - Supervised Release

Page 3

DEFENDANT: EDWARD MCCAIN

CASE NUMBER: 2:09-CR-296-PMD-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years; such term consists of 5 years as to each count, to run concurrently. While on supervised release, the defendant shall comply with the mandatory and standard conditions of supervision as well as the following special conditions: 1. The defendant shall participate in a program of mental health counseling and/or treatment, to include Anger Management counseling, as deemed necessary by the U.S. Probation Officer, until such time as the defendant's release from the program is approved by the U.S. Probation Officer. 2. The defendant shall submit to substance abuse testing and/or treatment as approved by the U.S. Probation Officer, until such time as the defendant is released from the program by the probation officer. 3. The defendant shall enroll in and complete a vocational program as approved by the U.S. Probation Officer with the objective of learning and obtaining lawful employment once released from the defendant's term of incarceration. 4. The defendant shall pay restitution in the amount of \$39,926.87 at a rate of no less than \$50.00 per month, beginning within 60 days of release. The payments shall be made payable to "Clerk, U.S. District Court" and mailed to PO Box 835, Charleston, SC 29402. Interest on any restitution ordered as to this defendant is waived. Payments shall be adjusted accordingly, based upon the defendant's ability to pay as determined by the Court.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the Probation Office. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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Page 4

DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-CR-296-PMD-2

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 5.

<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$ 39,926.87

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case*(AO245C) will be entered after such determination.

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

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
MUSC	\$24,255.78	\$24,255.78	1
The Dental Implant Centre	\$640.00	\$640.00	1
Carolina Hand Therapy, Inc.	\$174.00	\$174.00	1
Georgetown Hospital Systems	\$7,320.49	\$7,320.49	1
Georgetown County EMS	\$369.00	\$369.00	1
University Medical Associates	\$7,196.60	\$7,196.60	1
TOTALS	\$39,926.87	\$39,926.87	

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 judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5 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:

**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.

APPENDIX F

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DEFENDANT: EDWARD MCCAIN
CASE NUMBER: 2:09-CR-296-PMD-2

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 \$ 300.00 special assessment and restitution in the amount of \$39,926.87, both due immediately.

not later than _____, or
 in accordance with C, D, or E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (30 or 60 days) after the date of this judgment; or

D Payment in equal monthly installments of \$50.00 to commence within 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 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 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:

As directed in the Preliminary Order of Forfeiture, filed _____ and the said order is incorporated herein as part of this judgment.

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

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FILED: October 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4723
(2:09-cr-00296-PMD-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

EDWARD MCCAIN

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Diaz, and Judge Rushing.

For the Court

/s/ Patricia S. Connor, Clerk

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF SOUTH CAROLINA
3 CHARLESTON DIVISION

4 UNITED STATES OF AMERICA :
5 :
6 vs. :
7 :
8 EDWARD McCAIN : 2:09 - CR - 296

9 Sentencing in the above-captioned matter held on
10 Wednesday, September 19, 2018, commencing at 2:27 p.m.,
11 before the Hon. P. Michael Duffy, in the United States
12 Courthouse, Courtroom I, 81 Meeting Street, Charleston,
13 South Carolina, 29401.

14 APPEARANCES:

15 DEAN H. SECOR, ESQUIRE, Office of the
16 U.S. Attorney, P.O. Box 978, Charleston, SC,
17 appeared for the Government.

18 CAMERON J. BLAZER, ESQ., 1037 Chuck Dawley
19 Blvd., Mt. Pleasant, SC, appeared for
20 defendant.

21
22
23 REPORTED BY DEBRA L. POTOCKI, RMR, RDR, CRR
24 Official Court Reporter for the U.S. District Court
25 P.O. Box 835
Charleston, SC 29402
843/214-7927

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1 MR. SECOR: The next case is United States of America
2 versus Edwin McCain, Docket No. 2:09-CR-296. Mr. McCain is
3 appearing before you represented by Miss Cameron Blazer, and
4 we are here for purposes of a Miller versus Alabama
5 re-sentencing hearing.

6 And, Your Honor, if I may, just bring up a housekeeping
7 matter.

8 THE COURT: Please.

9 MR. SECOR: I filed under Docket No. 147 the
10 Government's sentencing memorandum, including, according to
11 Pacer, Exhibits 1 through 11. I've also provided the Court a
12 binder that contains that same sentencing memorandum as well
13 as the exhibits, which are labeled A through K. So I just
14 wanted the Court to understand that on Pacer they're listed 1
15 through 11, but A is one, B is two, just so --

16 THE COURT: I'm with you.

17 MR. SECOR: So there's no confusion. In addition,
18 Your Honor, in your binder I added what is listed in the
19 binder as Exhibit L, which would be No. 12, if it were to be
20 filed on Pacer, but Pacer does not allow you to file a video.
21 So I would ask that that video that I've provided to the Court
22 be made part of the record as Government's Exhibit No. 12.

23 THE COURT: All right.

24 MR. SECOR: In concert with the sentencing memo. The
25 defense, as well as the probation office, has a copy of that

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1 video.

2 THE COURT: Very good. Any objections?

3 MS. BLAZER: No, Your Honor, none.

4 THE COURT: Admitted without objection.

5 MR. SECOR: Thank you, Your Honor.

6 THE COURT: Miss Blazer?

7 MS. BLAZER: Yes, Your Honor.

8 Judge, I don't think it's any secret that this is not a
9 case that's like any other case in the district. This is a
10 case that to the extent that it's like any other case, is like
11 only 38 cases in the United States, in that Mr. McCain, at the
12 age of 17, was sentenced to mandatory life without parole, and
13 only -- at the time that Miller versus Alabama was decided,
14 there were only 38 other young men in the Federal Bureau of
15 Prisons who had similarly been sentenced.

16 And, in fact, Mr. McCain is one of the last to have been
17 sentenced to mandatory life without parole, because, as you
18 know, the line of cases that have brought us to today have
19 been evolving over a period of years, the last -- the most
20 important of which, Miller versus Alabama, was only a few
21 years after he was sentenced.

22 Before we started today, and every time I've seen Edward
23 in the last couple weeks, he's asked me how am I feeling. And
24 I've told him the truth, nervous. I get really nervous in two
25 cases, Judge, I get very nervous when I feel like everything

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1 is on the line that I can keep somebody from going to prison,
2 and there's a question, and confronted with the possibility of
3 life behind bars, effectively an extended opportunity to die
4 in prison, I'm pretty nervous. Because I think that that is
5 an awesome power for the Court to be forced to consider,
6 particularly for one as -- who was as young at the time of his
7 offense as Edward was.

8 And I know you are very familiar with the Miller factors,
9 I know you've read the Montgomery case. And I know you're
10 familiar with the features of juvenility. But as I was
11 thinking about it today, I thought of something that I feel is
12 a little -- maybe less esoteric than all of the Miller
13 factors. Right before we evacuated last week my house for the
14 potential hurricane that never amounted here, my son dropped a
15 glass on the floor and it shattered. There's just a disaster
16 area all over my kitchen. And there was no putting it back
17 together because it was practically dust in places. And this
18 morning, as I was getting ready for the day, I opened the
19 cabinet to fix him his breakfast before school, and there's
20 the plate that I pulled out, had a big chip in it that I
21 repaired. It fell on the ground and it broke, but I put it
22 back together. And it's not perfect and it's not pretty, but
23 it's functional, and it hasn't outlived its use. And I think
24 that the question for the Court today is whether Mr. McCain is
25 a broken glass or a broken plate. And I submit to the Court

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1 that there is no small amount of brokenness that is present in
2 the history and in the present of Mr. McCain, but that what is
3 present is worthy of being salvaged.

4 As you know, Mr. McCain has been at the Charleston County
5 Detention Center for 22 months waiting for this day. And we
6 were talking just before court got started, as we have
7 discussed on other occasions, that 22 months at the Charleston
8 County Detention Center has given him a new appreciation for
9 the Bureau of Prisons, because it's a much -- as much as I
10 might complain about the lack of opportunity available to
11 someone like Edward at the Bureau of Prisons, the
12 opportunities for self-improvement and self-care at the
13 Charleston County Detention Center are even fewer.

14 And there have been ebbs and flows in the course of this
15 case, where not a lot has been going on, and then scurrying to
16 get the, you know, the hearing done with regard to his mental
17 health capacity, did a lot of work around that. So there
18 would -- weeks might go by that I wouldn't see Edward; in some
19 cases maybe more than a month. And so some of that, I've got
20 sheeves of letters from Edward. Before I came here today I
21 started rifling through them, and I can tell you that the
22 letters are often funny and interesting and offering an
23 interesting perspective that I might never have considered.
24 And I think that in light of the fact that part of why we're
25 here today at all is that Mr. McCain had a really bad habit,

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1 ten years ago, of sending really troubling letters. The
2 letters that he sends to me are so at odds with what he did
3 before. And I pulled one out that I thought was
4 quintessentially Edward, and I've shared it with the
5 Government before court today, and if I might, I'd like to
6 pass it up to you.

7 THE COURT: All right.

8 MS. BLAZER: And I'm doing that because Edward didn't
9 write me this letter in contemplation of it being shared with
10 the Court, this is just how he and I have dealt with one
11 another over the last year and a half.

12 THE COURT: Give me a minute to read it.

13 MS. BLAZER: Yes, sir.

14 THE COURT: Thanks.

15 MS. BLAZER: Thank you, Your Honor.

16 And I think the reason I picked this particular letter is
17 probably apparent to the Court, but, you know, the first
18 paragraph is actually pretty funny. He's worrying about me
19 and asking how I'm doing and giving me advice; advice that's
20 actually pretty good advice for a criminal defense lawyer.
21 And, you know, then he gets to the point and asks me for what
22 he wants, and he's polite and gets to the point. That's how
23 he and I have interacted for the last year and a half.

24 Just seconds before you took the bench, Edward asked me if
25 I -- when this case began, what would you have charged to

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1 represent to me? And I gave him a very large number. And he
2 laughed, and he said, you're that good? And I said, I think
3 so. And he said, it would have been worth it. And I said I
4 don't know that it would, Edward. Would you have listened to
5 me ten years ago? He said no. See, that's why it wouldn't
6 have been worth it. But that realization that today he's
7 willing to listen to me, today he wants to hear what I have to
8 say, to me, is as clear a picture as I can draw of the change
9 from a 17 year old to a 27 year old.

10 Edward is not ready, he's going to tell you in just a
11 little bit that he's not ready to be released; we know that.
12 He's not ready emotionally, he's not served enough time to
13 have earned his release. There is a punitive portion of his
14 sentence that must yet be paid, and we accept that.

15 But -- Mr. Kulp just walked in. And I think you'll recall
16 that he was Edward's attorney in the original case. And I
17 asked him to come because, as I think I mentioned in a
18 footnote in my memorandum, when he was originally waived up
19 from --

20 THE COURT: Why did I do that? I read the footnote.

21 MS. BLAZER: Why did I do that. And the answer was,
22 that was the thing to do at the time. It was the right thing
23 to do at the time. And I don't just mean at the time because
24 the law hadn't changed, I mean it was the right thing to do at
25 the time because Mr. Kulp believed that Mr. McCain had

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1 information that would be helpful to the Government. The
2 Government believed that Mr. McCain had information that would
3 be helpful. And Mr. Phillips, who was here just a little bit
4 ago, and Mr. Kulp, would tell you both, they anticipated that
5 at Mr. McCain's sentencing he was going to get a downward
6 departure. But Mr. McCain blew that up. He blew that up.
7 And I would argue he blew that up at the same age that he blew
8 up the rest of his life. And so the fact that he blew up his
9 opportunity to receive a downward departure, even after he
10 confessed to everything that he'd done, after he gave
11 information during -- you know, I've still got Mr. Kulp's
12 famous -- if you're a criminal defense lawyer and you haven't
13 seen one of Tim Kulp's famous notebooks, you're missing out.
14 I've got, you know, pages and pages of notes from the
15 debriefing. He cooperated. And after he cooperated, he blew
16 it up, impetuously, foolishly, devastatingly to his family.

17 So devastatingly that if you go back and read the
18 sentencing transcript, Mr. Kulp, who I think is a fantastic
19 lawyer, stood in front of the Court and said, Your Honor, I'm
20 speechless. I don't know what to say. Because he didn't want
21 to be here with a child, which is what he had standing next to
22 him, a tall child, an overgrown child, but a child
23 nonetheless, with nothing to do but to say this is a fête
24 accompli, Judge, you have to impose a life sentence. There's
25 nothing for me to say. And Mr. McCain put himself in that

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1 position because, at that time, that was the option.

2 But again I say to you that that was an adolescent's
3 behavior. And he may have crossed over the bridge to his
4 eighteenth birthday, but the eighteenth birthday is not a
5 magically-incanted number upon which everybody becomes mature.

6 You heard hours of testimony from Dr. Buddin about the
7 development of the adolescent brain. And he explains to you,
8 as I'm sure you have reviewed in all the literature that's
9 been presented to you in this case and over the years, that
10 adolescence doesn't end at legal adulthood, it continues for
11 many people until the 25, 26, twenty-seventh year.

12 And that's where we are with Edward. So I want to address
13 next the last ten years. Because I really like to be in front
14 of you with a sheet of achievements from the Bureau of
15 Prisons. That would be a lot better for me today. I know
16 that. And I don't have them. I have a couple typing classes,
17 parenting classes. I don't have completion of auto body
18 mechanics and, you know, AC repair and all that kind of stuff
19 that some people do come into court with.

20 But there's a reason for that. I'd say there's a couple
21 of reasons for that. One, he's still a kid when he went to
22 the Bureau of Prisons, and he went to the Bureau of Prisons in
23 the late -- in the first part of this decade. And the Bureau
24 of Prisons, as of 2010, is not the same place that it was in
25 1995.

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1 I've reviewed the 39 cases in this country that have
2 been -- had an opportunity for re-sentencing other than this
3 one. And the vast majority of those folks went to jail in
4 '92, '93, '95, so by the time they came up for re-sentencing,
5 those folks had had an opportunity, A, to significantly
6 mature, they were 20 years older than they had been at the
7 time of their initial sentencing. And they had come through
8 a period of time at the Bureau of Prisons when a very
9 different approach to rehabilitation had been in effect. The
10 Bureau of Prisons of 2017 and the last few years has been a
11 place where people who were trained to be teachers, people who
12 were trained to do, you know, tutoring, have been corralled
13 into service as COs and to do inmate management. They're not
14 getting the kinds of things that guys that went to prison in
15 '92 or '95 or '97 were getting. Moreover, I don't think
16 there's any secret to this Court that the gang problem at the
17 Bureau of Prisons is out of control, and has been only getting
18 worse over the last decade.

19 And I think that that brings me to Edward's behavior over
20 the last ten years. You are aware that while he was at Terre
21 Haute, he had several significant infractions involving
22 physical assaults, and the Government gave you the reports of
23 those incidents. Several of those incidents, I would submit,
24 were, at worst, mutual, and in some cases self-defense. And
25 that's not to excuse them, but it casts a different light on

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1 them. Edward was not, contrary to what you might be able to
2 believe on the face of the documents, I don't believe Edward
3 was always willing to admit when he had done wrong, and I
4 don't believe he was ever intentionally seeking anyone out to
5 harm at the Bureau of Prisons. And as you look at his
6 progress report, which, again, I just can't get past the fact
7 that at the very top of the report he calls it a summary
8 re-entry plan, which for a young man who expected never to see
9 the outside of a prison cell, is a little bit macabre.

10 You see that his misconduct really tapers off dramatically
11 after he leaves Terre Haute, on page two of the summary
12 re-entry plan that was submitted as, I believe Exhibit C. And
13 the reason for that is that he got moved out of Terre Haute,
14 got moved to Colorado. And he told Dr. Buddin, and Dr. Buddin
15 reported to you, and this was long before we ever had this
16 report, he told Dr. Buddin exactly what we would find in this
17 report, which was that he was cutting up pretty bad at Terre
18 Haute, and then he got his -- he got his head screwed on a
19 little straighter when he got to ADX. And that's when -- and
20 you can see that about that time is where the infractions go
down and the education courses go up. They're tapering off in
22 2013. And if you look '13, '14, '15, that's when he's really
23 doing education courses.

24 In preparation for both the evidentiary hearing we had
25 earlier this year and today's hearing, Edward and I have

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1 reviewed lots of programs at the Bureau of Prisons to try to
2 figure out, after today, where does he go from here? No
3 matter what this Court does, where does Edward go from here to
4 have a meaningful life, even to the extent that that life
5 continues to be behind bars, that does not mean that it has to
6 be bereft of meaning or opportunity.

7 And I think you'll recall that one of the programs that
8 Dr. Buddin suggested would have been beneficial to Edward,
9 because it involves dialectic behavior therapy, was the
10 Resolve program. And I know we discussed it before, but just
11 to recap that, the Resolve program is a cognitive behavioral
12 program designed to address trauma-related mental health
13 needs. And in most instances, inmates are expected to
14 participate in the Resolve program during their first 12
15 months of incarceration. That was the time we needed Edward
16 to have this opportunity.

17 There's another opportunity that both Edward and I think
18 would be really good for him, which is the Bureau of
19 Rehabilitation and Values Enhancement program. It's a six-
20 month program. Inmates participate in treatment groups for
21 four hours a day, Monday through Friday, designed to
22 facilitate a favorable initial adjustment to incarceration.

23 And inmates are assigned to the program at the beginning
24 of their sentence. That didn't happen. And I can't tell the
25 Court that if it had happened, there would have been no

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1 infraction, there would have been no problems, there would
2 have been, you know, some extraordinary progress made. But
3 we'll never know.

4 Going back to the initial decision to waive Edward into
5 adult jurisdiction here, the key reason that I bring it up is,
6 as I mentioned in my sentencing memorandum, there's a 2017
7 case from the Fourth Circuit that suggests that if this exact
8 situation were to have happened today, by virtue of Miller
9 versus Alabama, the Fourth Circuit's position is, he could not
10 be prosecuted in this courtroom today, because Congress has
11 made no effort to amend the statute to provide for a
12 nonmandatory life sentence. And the Government in that Under
13 Seal case said, well, yeah, but you can just assume that life
14 is the cap now, because he's -- this fellow Under Seal is a
15 juvenile, so just convert it to a zero-to-life offense, Fourth
16 Circuit. And the Fourth Circuit said no, that is not what it
17 says.

18 So I think that's important, because the Fourth Circuit
19 drew a pretty significant line in the sand. And I don't
20 believe that the Fourth Circuit's opinion in Under Seal means
21 we can't be here today having Mr. McCain be resentenced. But
22 I think that it puts into stark relief how important the
23 concerns really are, because the juvenile in the Under Seal
24 case had done at least as troubling -- had committed as at
25 least as troubling a crime as Mr. McCain had in this case.

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1 And yet the Fourth Circuit determined that there was -- that
2 this was their obligation under Miller versus Alabama.

3 So that brings me to 2255. And as I cited in my
4 memorandum, 2255 is a flexible remedy. 2255, the language of
5 it on its face is -- provides the Court with a broad ability
6 to fashion a sentence that conforms to -- that creates an
7 appropriate remedy. The United States versus Hadden in the
8 Fourth Circuit 2007, to quote, says, "It is broad and flexible
9 and entrusts to the courts the power to fashion an appropriate
10 remedy."

11 Because the sample size in Federal Court is so small, I
12 can -- I'm happy to pass up to the Court some examples of
13 other folks who had been resentenced in the federal system.
14 But I think it's helpful to broaden the lens and to look at
15 what's happened around the country in states around the
16 country. Because a lot of states have come to the conclusion
17 that they had to modify their structural framework in order to
18 give life to the principles of Montgomery and Miller.

19 And I highlighted in my memo one state, because I
20 particularly liked the way they did it. And that's Wyoming,
21 which provides that when juveniles are convicted of crimes
22 that would otherwise carry mandatory life in prison, they must
23 be eligible for parole review at 20 years.

24 And that is not to say they are all to be released at 20
25 years, nor that they are all going to succeed after a 20-year

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1 review.

2 But, as you know, and as you tell people in every plea
3 colloquy, parole was abolished in the federal system. And I
4 think that -- it's a big ask of this Court today to fashion a
5 numerical sentence. I don't know what the right sentence is.
6 I don't -- I don't know how the Court knows either. I don't
7 know if it's 25 years, 30 years, 50 years, I don't know. What
8 I think makes a lot of sense is fashioning under 2255's
9 flexible remedy, not the guarantee, but the opportunity for
10 Mr. McCain to obtain release, the opportunity to come back to
11 this Court, for this Court to retain jurisdiction, for
12 periodic review. Not unlike parole, but unique, because of
13 the unique circumstances of this kind of case, how few cases
14 are like this case.

15 I believe that if the Court imposed an every-five-year
16 review beginning at the fifteenth or the eighteenth or the
17 twentieth year, you would not be imposing upon victims an
18 excessive burden to respond. I'm not suggesting that the
19 Court should set up every-six-months reviews and that kind of
20 thing, I don't think that's reasonable for the Court, nor is
21 it reasonable for the victims, who have every right to be
22 heard and to have their wishes and their concerns considered
23 by the Court.

24 But I would ask the Court to consider this broad
25 flexibility that is contained in 2255, to fashion a sentence

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1 that remedies the constitutional problem of a
2 life-without-parole sentence for someone like Edward.

3 I also obviously have to address the recent misconduct
4 that the Court -- that the Government has brought to the
5 Court's attention. I trust that, as I have, you've seen the
6 video of what went on. I was not thrilled. In fact, before
7 the Government told me about it, I got a letter from Edward
8 saying, I'm really sorry, I just made your job a lot harder.
9 I did a really dumb thing. And it was impetuous, it was --
10 when I watched it on the video, I was with Mr. Secor, he went
11 to his office to watch it. And it was frustrating,
12 disappointing, sort of ridiculous. Adolescent. But it
13 certainly supports an inference that today is not the day for
14 Edward to contemplate release. He's not ready. And he knows
15 it.

16 But he's going to talk to you in a few minutes, and I've
17 read what he has to say to you. And I think I've only -- I've
18 only admitted to this because it was only true one other time.
19 Most of the time my clients show me what they want to say, and
20 I take out my red pen, and you're not going to say that.
21 You're not going to say that. I didn't do that with Edward.
22 He has a lot to say to you today. And some of it, I've told
23 him in my own opinion, is naive. But I didn't want to edit
24 out his naivety. Because the person who stands before you
25 today is 27, but he's a 27 year old who's processed the latter

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1 portion of his adolescence inside the Federal Bureau of
2 Prisons. He's an autodidact, he reads constantly. He's
3 actually -- I've actually bought him books and had them sent.
4 And he has a very book-learned way of viewing the world. He
5 understands a lot. I don't think it's any secret that I
6 sometimes accidentally drop 50-cent words here and there, and
7 there's never a time when Edward and I are talking that I
8 don't inadvertently do that and he says, wait, wait, wait,
9 wait, stop, go back. I don't understand that word you just
10 said. And I sometimes I can just rattle off the definition,
11 but a lot of times he and I will have my phone at the jail and
12 I'll look it up on the internet and show him what the
13 definition is, and he's making it a part of his mental record.

14 But, Your Honor, he's still not fully formed. He's got
15 work left to do. I do think that what he -- what I know he's
16 going to tell you today is reflective of the fact that he is
17 on a path. Now, I know that we had a lot of conversation at
18 the evidentiary hearing about the fact that he's got this
19 diagnosis of antisocial personality disorder, and that that is
20 not good. And if I could go back and unring that bell, I
21 would, but I can't. But the fact that he has a diagnosis is
22 not evidence of destiny that the Court has to be automatically
23 persuaded that he is going to be a danger to the community
24 upon release, if and when he gets the opportunity through
25 rehabilitative programs and time to demonstrate to this Court

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1 that he is ready for release, under whatever restrictive
2 conditions the Court deems appropriate.

3 I'm going to let Edward talk now, then I have some other
4 things that I want to say, but I want to go ahead and let you
5 hear from him. Would you like us to approach?

6 THE COURT: Whatever is easiest for him. I'll be
7 glad to hear from him, whichever.

8 THE DEFENDANT: How are you doing today, Your Honor?

9 THE COURT: I'm well, thank you.

10 THE DEFENDANT: First, I would like to say that I owe
11 this Court an apology. I remember the last time I came here,
12 and thinking back on it right now is kind of embarrassing,
13 because my attitude was real ugly and real nasty. And I
14 remember an instance when it was so crazy, because you wasn't
15 even aware of it, but the bailiff say "all rise," and I didn't
16 even stand up, and the marshals had to, you know, bring me up.

17 And time is a beautiful thing, Your Honor, because time is
18 so neutral, you can choose to use it constructively or
19 destructively. Either way, it's going to take, but it only be
20 a benefit to you if you use it in a wise manner.

21 And time has been a beautiful thing for me. You know, a
22 lot of times I look at it and I say, well, maybe if I hadn't
23 made the decision that I made, I wouldn't be here, but if I
24 didn't make the decision that I made, I wouldn't have learned
25 what I learned. I would have been dead a long time ago. So I

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1 owe you another thank you, because I'm pretty sure had you not
2 given me a sentence of life without parole in the Federal
3 Bureau of Prisons, I would have been dead a long time ago.

4 Speaking on the crime in specifically, it's a certain
5 mentality that has to go with a person committing a crime like
6 that. And it's a certain mentality that comes along based and
7 backed by a culture that I was knee deep in, and a culture I
8 glorified and enthralled into it where all I wanted was to be
9 a renegade, to be rebellious. I felt like since I didn't know
10 my father, since I made decisions that were counterproductive
11 to my whole entire existence, I had an excuse to do the things
12 that I did. And when you make excuses for yourself, the road
13 gets very very hard.

14 I would have liked to have been standing in front of you a
15 whole lot sooner, Your Honor. Got to Charleston County back
16 in November 2016 and I ended up getting stuck down here.
17 Mrs. Blazer, as well as myself, we were prepared to come
18 before you, I think Thanksgiving, and Mr. Secor's wife ran
19 into some health issues and that postponed it a lot. And
20 after that, I asked the jail to be moved out of solitary
21 confinement, to the point it was beginning to be redundant.
22 My requests. And it wasn't heard. So for the last two months
23 of my stay in Charleston County, I've been in solitary
24 confinement and it's been rough. To be isolated, locked down
25 with no opportunities, no freedom, simply because you want to

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1 appeal your sentence.

2 So I hope that this Court doesn't look too unfavorably on
3 my behavior, because I've been punished for the last two
4 months after I woke up in Charleston County jail. And
5 according to the Honorable United States Supreme Court,
6 juveniles are different from adults for the purposes of
7 sentencing. And we all listened as Mrs. Blazer briefly
8 outlined the Miller factors associated with juvenility and, in
9 a nutshell, I won't touch on all of them, but in a nutshell
10 she said that juveniles was -- Supreme Court said that
11 juveniles should be considered differently because they are
12 developmentally incompetent.

13 Mr. Buddin, he spent a few hours going over all the
14 factors that are associated in the Miller claim, and I won't
15 stand here today and tell you that the reason you -- I
16 committed the crime that I committed was because I was
17 developmentally incompetent. I won't do that, because the
18 victims deserve more than that. The victims deserve in this
19 case not to be told that the reason that I fired unwarranted,
20 unprovoked and unrelentless bullets at them was not because I
21 was a child and, therefore, I should be excused. The victims
22 deserve a whole lot more than that, Your Honor, and I'm not
23 going to stand here and tell you, you should excuse me because
24 of the fact that I was a child.

25 I'm not going to stand here today, Your Honor, and tell

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1 you that I didn't know any better, because I did. But it's a
2 difference between knowing better and doing better. I've
3 learned that you can know better, but if you don't do better,
4 the road to hell is paved with people of good intentions, so
5 it really doesn't matter.

6 I made a speech today because I was preparing to speak to
7 the victims today. Or at least have a chance to address the
8 family, and they're not here. So if it would please the
9 Court, I would like to go over it.

10 The survival victim, Mr. Glenn Crawford, does not deserve
11 to be told that the 17 year old who ripped apart his life and
12 took his nephew away from him is developmentally different
13 than an adult and should, therefore, be excused. And I know
14 in my heart that I don't deserve to be standing here today.
15 Anyone that can simply be told to take another human's life
16 because of a stupid street code, and they do it, they deserve
17 to be in the hell that I've called home since 2008. And to
18 the victims, no matter what they were doing, no matter what
19 they were involved in, and no matter what the code of the
20 streets were at that time that I chose to delve deep into at a
21 young age, what happened to them should not have happened to
22 them.

23 And I give this Court my word as a man that had I known
24 then what I know now, I wouldn't be standing before you, Your
25 Honor. And to say that I'm sorry is not enough, nor will it

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1 ever be enough. Because if my family had been ripped apart
2 the way that their family had been ripped apart, I wouldn't
3 want to hear I'm sorry, I wouldn't want to hear I was a
4 juvenile or he was a child and he should be excused. Because
5 being sorry doesn't mean anything when the person that you're
6 sorry for hurting isn't around to hear how sorry you are.

7 I wish that I could bring that young boy back, Your Honor,
8 I wish I could do it many times. Because he doesn't deserve
9 to be laying in a grave because of a stupid code of ethics
10 that were formed in the streets and centered in code and
11 violence. He doesn't deserve to be in there. And if it's
12 this Court's opinion today that I should be sent back to the
13 Federal Bureau of Prisons for a sentence of life without
14 parole, I understand the law of the land that we live under,
15 and I would have no choice but to respect that and understand
16 that there is a accountability that has to be taken into
17 account today.

18 But, Your Honor, when you are sent to prison and you are
19 condemned to die inside of those prison walls, life brings
20 about an almost magical meaning. A lot of the things that I
21 took for granted before, they become almost treasured. When
22 every day that you wake up, everything that you do, every life
23 that you envision yourself of living, is being played out
24 through a TV screen or through the pages of a book, it brings
25 almost a meaning that I can't really describe, Your Honor.

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1 And I've read a lot of books since I've been gone, pretty much
2 over 500 books, but I have not opened a book and learned how
3 to serve a life sentence in prison. No amount of programming
4 and no amount of reading, no amount of prison-made alcohol
5 that I've drunk, no amount of exercise, no amount of
6 distraction can teach me how to serve a life sentence in
7 prison. I don't know how to do it.

8 I would have loved the opportunity to stand before you
9 without a very ugly tarnished and horrible behavioral conduct
10 record. I would love to have that be my reality today, but
11 that is not the reality today. I've had behavioral issues at
12 one prison that I've been to, which is Terre Haute, Indiana,
13 but I've been to four prisons in total during my stay in BOP.
14 And I'm going to tell you the difference between Terre Haute,
15 Your Honor, was the helplessness of the environment. I've
16 been to Terre Haute, and the units, they contained 120 men.
17 And none of them people in my particular unit ever went home.
18 And the helplessness of that is daunting, Your Honor.

19 While I was in Terre Haute, I've been into fights because
20 I've skipped people in the lunch line, I've been into fights
21 because I looked at a guy the wrong way. And as I'm sure Mr.
22 Secor will point out to you, when it's his turn to address the
23 Court, I've been into a stabbing, and the guy came on to me in
24 a sexual manner, in a manner to imply that he wanted to have
25 sexual relations with me. And I stabbed him up, I stabbed him

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1 up pretty badly. And I got stabbed in my hand pretty badly as
2 well, as we fought for control of the knife.

3 And after I left Terre Haute, my behavior, it changed, but
4 not because I had a life-changing, eye-opening, ah-ha moment.
5 But mostly because I understood that the road that I was
6 traveling down, it was kind of counterproductive to the life
7 that I wanted to live. Because you can't go to a law library
8 and work on your case when you're in the hold serving time
9 because you got into an altercation. And you can't keep in
10 contact with your family when you're locked down all day. And
11 the little bit of life that you do have in a federal prison
12 serving life in federal prison, it is drastically drastically
13 shortening, drastically impaired when you're doing your time
14 inside of a cell all day.

15 And when I came to Charleston County Detention Center, as
16 I told you, I was prepared to leave out of there about a good
17 ten, 12 months ago, but as I was there, I got into an incident
18 that involved me touching a female inmate's butt. And there's
19 no excuse for it, Your Honor, so I won't stand here and make
20 one. All I will say is before I was incarcerated, I had only
21 known one woman intimately in my entire life. And that can be
22 hard on a person inside of -- in my situation. And I made an
23 excuse for my desperate situation by my actions at that time.

24 So I'm asking that you do not look at my behavior in
25 prison too unfavorably because, as I stated, I have been

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1 punished for close to two years, the entire time that I've
2 been inside of Charleston County Detention Center.

3 Today I stand before you, Your Honor, and I'm asking that
4 you give me the opportunity to right my wrongs, Your Honor.
5 I'm in a very favorable position to spread the message to at
6 risk youth, that the road that I traveled down in my life is
7 not a road to be traveled. I understand that mentality of at
8 risk youth, because all of my life I have been at risk. I
9 understand why they go out of their way to prove themselves to
10 others, I understand why the road that they travel down is
11 traveled, and I understand a lot about their mentality.
12 Because, like I said, all my life I've been at risk. And
13 there is nothing short of prison that will stop me from
14 getting the message out to them. A lot of times in my life
15 when people were telling me things that I needed to do, the
16 road that I was traveling down wasn't a road that I wanted to
17 take, I didn't want to listen to them because I felt like you
18 didn't live the life I lived or you haven't experienced this
19 misfortunes I did, so I didn't want to hear it. And I shunned
20 that, I closed my ears to that.

21 And I can understand and I can directly relate to why a
22 young individual would do something like that. I can
23 understand why he will shut off -- was shut down to that. And
24 I know their thought process. I know the overpowering urge at
25 risk youth have to prove themselves.

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1 If given a second chance into society, got a lot of things
2 I want to do. But first I want to start by working two jobs
3 for the first five years of my release, in order to pay my
4 restitution. The Court ordered a substantial amount of money,
5 and there's nothing you can do in society when you have
6 incurred a large amount of debt. So the first thing that I
7 want to do is work on that, as well as being a stabilizing force
8 in my family that I know I can be for them.

9 I also want to start a clothing line after I work those
10 jobs and I get my money saved up. And I am writing a book
11 right now that is called God Looks Out for Babies and Fools,
12 and it's staged in the 1960s, and it's a very beautiful book.
13 And I really have plans of getting to the number one Times
14 best seller list. And I even think I can get adapted into a
15 movie.

16 If it pleases the Court, I would like to present a
17 sentencing proposal to you today, Your Honor. And I don't
18 want you to take the life sentence off of me today, that's not
19 why I'm standing here today, Your Honor, I don't want you to
20 do it. I want you to suspend it to a term of 25 years with
21 the strictest guidelines that I could think of inside of those
22 many many prison cells that I've been in throughout the years.
23 And I want these guidelines and the terms that this Honorable
24 Court places on me to start with my behavior in prison.

25 I stand before you today saying, Your Honor, that if I get

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1 into one incident, outside of proven self-defense, don't even
2 let me out. Any major violations that are incurred during the
3 remainder of my time, don't even let me out. Because the
4 United States Supreme Court said in a case that it rules down
5 concerning Miller versus Alabama, that a state is not
6 guaranteed to grant an individual eventual release, but it
7 must give an individual an opportunity to gain release based
8 on demonstrated maturity and rehabilitation.

9 And Mrs. Blazer made mention of a treatment program at
10 Danbury, as well as other treatment programs that any of --
11 that this Court may recommend. And if I don't abide by the
12 terms of those programs or any other recommendations that this
13 Honorable Court makes, don't even let me out. Keep me in
14 there. Reinstate the life sentence, Your Honor.

15 I'm asking that you give me an extended amount of
16 supervised release, whatever terms of years that may consist
17 of, and if I violate those terms one time, outside of
18 incurring a traffic violation because I don't know how to
19 drive, so I get a bunch of speeding tickets, but anything
20 outside of that, don't even let me out. Or just reinstate the
21 life sentence. I'm saying I don't know if you're grasping
22 what I'm telling you, but I'm saying if I violate probation
23 one time, if I am released today, or given a release date
24 today, reinstate the life sentence.

25 I'm willing to serve weekend jail. I looked in the

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1 Federal Sentencing Guideline Manual, they say a term of
2 weekend jail can be instated for no more than one year, and
3 I'm willing to serve that. And I'm willing to serve community
4 service, Your Honor. I will literally travel to every
5 juvenile facility in the State of South Carolina, and I will
6 spread the message that is my life to the juveniles in our
7 honorable State of South Carolina. And I will tell my story
8 to the young brothers that work alongside them to make sure
9 they don't drive the road that I've been down.

10 Your Honor, if I fail to abide by any of these terms, I'm
11 asking that you reinstate the life sentence. And I'm sure
12 that Mr. Secor will be willing to keep in contact with me
13 through his BOP contacts, and if it is found that I have
14 slipped one time, I'm asking that you don't even let me out.

15 I'm literally before you asking for one chance, just one.
16 A man without hope is nothing. And for the last ten years of
17 my life, I've been in the BOP with no hope, Your Honor.

18 There are currently 5.2 million people in the State of
19 South Carolina. And Mrs. Blazer informed me that in the
20 entire federal jurisdiction of South Carolina, I am the only
21 juvenile sentenced to life without parole in a Federal
22 District Courthouse. And that's an anomaly that I want you to
23 consider revisiting today, Your Honor.

24 I started a proposal that I presented to you. I don't
25 know of another way to show demonstrated maturity and

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1 rehabilitation, Your Honor. I'm asking today that you allow
2 me one chance to get my story out to the world, Your Honor. I
3 have a very beautiful story to tell, a story that's filled
4 with flaws, mistake after mistake, as I'm sure Mr. Secor will
5 present to this Court today. A story that when I should have
6 gotten it right, I didn't, and when it was clear that the road
7 that I was traveling down was the wrong road, I continued to
8 travel down that road.

9 I learned a lot about my story and the life cycle of it,
10 because Mrs. Blazer bought me a publishing book. And a
11 beautiful thing that I want to share with you today about the
12 story is that to begin, a story has to be pushed by a literary
13 agent. And a literary agent, Your Honor, has to have
14 confidence and faith in that story. And when he likes that
15 story to the amount -- to the point where he's willing to go
16 up against those big publishing houses and fight for that
17 story to pick up, then that's when you know he's working with
18 something that's worthwhile.

19 And by the slim margin that some antennas do go up when
20 they read that individual's story, that story then goes to an
21 editor who continues to pick through that story, begins to
22 pick out the bad part sequences of that story, the structural
23 inconsistencies in that story, as well as the misspellings and
24 the typos, he picks through all that at the editor's office.
25 And once it's fine tuned, it goes in front of a publisher.

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1 With his experience and his intuition, he decides whether to
2 publish the story or not at this stage. He decides how much
3 marketing will go behind the story, how much ad campaign will
4 be done and how much he's willing to buy up that particular
5 story form. If he doesn't decide to invest in that story,
6 then the author is left with a 500- to a 600-page manuscript
7 in the back of a neglected file cabinet, inside of some dusty
8 old boxes at the bottom of a closet, or, in my case, in a
9 prison cell for the rest of my life with no opportunity for
10 the world to read that story.

11 Your Honor, today I'm asking that you be my publisher. I
12 want you to publish my story. I want you to believe in the
13 story that's my life, so I can get my story out to the world,
14 Your Honor. And if you give me a second chance that I don't
15 necessarily deserve, I won't disappoint you, Your Honor. And
16 I want to ask, do you have any concerns that I have not
17 addressed or any questions that you would like to ask me?

18 THE COURT: No, I think you've presented yourself
19 very well. I have some things I need to mull over, but I
20 don't have any questions for you at this time.

21 THE DEFENDANT: Have a good day, Your Honor.

22 THE COURT: Thank you very much.

23 MS. BLAZER: Your Honor, as I mentioned earlier,
24 Mr. Kulp was nice enough to agree to come, given the fact that
25 I have put that -- the issue of the waiver before the Court.

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1 He's present, I haven't asked him to speak on Edward's behalf,
2 but he's present if you have any questions.

3 THE COURT: Let me just ask him if he'd have anything
4 he'd like to say. If you do, I'll be glad to hear from you.

5 MR. KULP: No, sir, Your Honor. Thank you.

6 THE COURT: Okay.

7 MS. BLAZER: I do also want to note for the Court
8 that Edward does have family and friends who are present.
9 They have not asked to address the Court today. You may
10 recall that his grandmother did address you at the initial
11 sentencing.

12 And frankly, I've reviewed the transcript, and I've gotten
13 to know Mrs. Hunt over the last year and a half, and I don't
14 think she had come to terms with the reality of the sentence
15 the Court was obligated at that time to impose when she spoke
16 to you. But I think you can think back on what she said then
17 and apply it to today, now that you do have discretion in
18 sentencing Edward.

19 The only other folks who aren't here that I would have
20 liked to be here are a couple of correction officers at the
21 Charleston County Detention Center who offered to Edward to
22 speak on his behalf. But as the Court's likely aware, in
23 order for them to do that, I needed to go through the
24 detention center. And the -- Mr. Knisely, the lawyer for
25 Charleston County, and I went back and forth, and he spoke to

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1 Chief Beatty, and Chief Beatty's observations were the
2 following. One, he's had disciplinary problems that you're
3 aware of. I don't -- why would we go to bat for him? And
4 two, I got real concerns about any CO who would make a
5 relationship with somebody like him, that he would want to
6 speak on his behalf. And I find that mind-boggling, Your
7 Honor. If our criminal justice system is about punishment and
8 deterrence and incapacitation, I understand that. But if it
9 is also truly to be about rehabilitation, I do not understand
10 why the chief of the region's best jail would be troubled that
11 his COs would have enough humanity and kindness to have been
12 able to determine that there was something worth speaking
13 about on Edward McCain's behalf. And I think that that speaks
14 to the trouble of the last ten years.

15 I can tell you that I personally spoke to Lieutenant
16 Driscoll numerous times over the last year and a half, because
17 she was very helpful in arranging for Edward and me to talk on
18 the phone at times that it was not convenient for me to
19 constantly drive out to the detention center. And on one
20 occasion, and actually it was after the disciplinary
21 infraction that you're aware of, we were -- she had called me,
22 and we were waiting for Edward to be brought in, and I just
23 asked her, so how is Mr. McCain? She said, he's fine. Yeah,
24 but I mean, is he giving you any extra trouble, is he -- is he
25 a big problem? And her response was, not any more than

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1 anybody else. Now, I realize that sample population against
2 which she's judging is not ideal, right? She's not saying
3 he's, you know, equal among choir boys. But at the same time,
4 what Miller versus Alabama asks the Court to do is to say is
5 this person irredeemable, and if not, a life sentence is not
6 appropriate.

7 I don't know how long it will take for Mr. McCain to
8 redeem himself in this Court's eyes, but I have confidence
9 that he can do it. And so I don't know what the right answer
10 for the Court is. I've given you the options that I think are
11 out there.

12 I will point out that if Mr. McCain had not been
13 prosecuted federally, he likely would have been prosecuted by
14 the State of South Carolina. And we'll never know would he
15 have, you know, gone to trial, would he have pled down, I
16 don't know what would have happened. I think he would -- I
17 think the crime fits the State of South Carolina crime of
18 murder, and had that been how he was prosecuted, he would have
19 been facing 30 years to life in prison. I think the Court can
20 consider that in your calculus of what an appropriate sentence
21 is today.

22 I think you can certainly consider the proposal that
23 Edward made. But I think you probably picked up on some of
24 the same points of naivety in what he presented to you that I
25 observed. And they're not -- it's not because I think Edward

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1 has unwarranted exuberance about what might happen, because he
2 just doesn't know. He gave you everything he can think of to
3 impose upon him in order to give you confidence. And you may
4 have other things to impose, and you may think the proposal
5 about weekend jail is fanciful, but it's all he's got, it's
6 all he has any experience to add to the ledger. And I think
7 he's, in good faith, tried to give you as many tools as you
8 can to properly punish, oversee and rehabilitate him.

9 I think, if it's all right, I'd like to defer now to Mr.
10 Secor and then, if I might, I'd like to have an opportunity to
11 respond.

12 THE COURT: We can do that. Let me check; some of my
13 folks might need a short break.

14 (A recess was held at this time.)

15 THE COURT: We're back on the record. Mr. Secor?

16 MR. SECOR: Yes, Your Honor, if I could raise one
17 issue before I get started. The term -- this is obviously a
18 very unique sentencing that we normally or never have done
19 before. As the Court's aware, the presentence report was
20 revised in February 8, 2017, based on the Miller versus
21 Alabama case. And I believe it would behoove us to
22 technically go through the fact that the parties do not object
23 to the presentence report, what he's actually facing. It's
24 obviously not in dispute, to my knowledge, but I think for the
25 record's sake, we might need to clarify that.

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1 THE COURT: All right. Thank you very much. If I
2 can get through this file and find it.

3 For the record, a presentence report was prepared and sent
4 out to the parties. And the first question is, have both
5 sides received the report, read it, and do you have any
6 objections?

7 MR. SECOR: Your Honor, the Government's received it,
8 we have reviewed it, we do not have any objections.

9 MS. BLAZER: Your Honor, the same applies to the
10 defense. And, as you are aware, it is a revised report. The
11 same was true at the -- with the exception of the revisions,
12 the same was true at the original sentencing.

13 THE COURT: Very good. Let's then at least put on
14 the record what the revisions are. The statutory provisions
15 now read, as to count one, up to life imprisonment; as to
16 count two, 30 years; count five, up to life imprisonment.
17 Supervised release as to each count, not more than five years.
18 Defendant would not be eligible for parole. There is a fine
19 as to each count of \$250,000, and a special assessment fee of
20 \$100. The guidelines provisions would read total offense
21 level 48, criminal history category four. The defendant is
22 not eligible for probation. The term of incarceration is life
23 in prison, and three years to five years supervised release.
24 A fine has not been calculated, due to defendant's inability
25 to pay a fine. Restitution in the amount of \$39,926.87, and a

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1 special assessment fee of \$300.

2 Does anyone take issue with the guidelines as read?

3 MR. SECOR: No, Your Honor.

4 MS. BLAZER: No, Your Honor.

5 THE COURT: All right, then those are the guidelines
6 that the Court will consider, advisory guidelines as the Court
7 will consider in conjunction with the sentencing factors in
8 Title 18 Section 3553(a), and in conjunction with the various
9 memoranda and materials that have been submitted by each side
10 for review to the Court in approaching this novel issue.

11 And with that, I'll be glad to hear -- By the way, as we
12 did in the first instance, I'll ask that this be made part of
13 the record of the hearing. And since there are no objections
14 to the factual reports of statements in the report, I'll adopt
15 those as the Court's findings of fact for purposes of the
16 hearing. Anybody object to my doing so?

17 MR. SECOR: No, Your Honor.

18 MS. BLAZER: No, Your Honor.

19 THE COURT: Thank you. Okay. Mr. Secor.

20 MR. SECOR: Thank you, Your Honor. Your Honor, as
21 the Court is aware, there are two victims in this case, one
22 deceased, Mr. Fannin, and Mr. Crawford, who is still alive.
23 Previously the Court, in the first sentencing hearing, was
24 provided victim impact statements concerning this case. And
25 the mother of Mr. Crawford, who was also the grandmother of

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1 Mr. Fannin, spoke at the sentencing hearing. In terms of
2 preparing for this re-sentencing hearing, Miss Clarissa
3 Whaley, the victim witness coordinator, and myself reached out
4 to the victims in this case. And that would be Mr. Crawford,
5 who we did not speak to, we spoke to the mother of
6 Mr. Crawford, and her name is Terry Moody, who spoke to the
7 Court at the first sentencing hearing. Miss Moody said she
8 did not want to come to court. She was very upset when we
9 informed her about the re-sentencing and why it was happening,
10 due to the U.S. Supreme Court case. She actually got
11 physically ill on the phone. Very upset. And we did not have
12 the direct contact information for her son, Mr. Crawford, but
13 asked her to reach out to him and have him contact us, or at
14 least let us know what his position was.

15 Miss Terry Moody wants me to inform the Court that her
16 position is the same, that she wants Mr. McCain to stay in
17 prison for the rest of his life. She's in great fear.
18 They've been in fear since this happened, despite the fact
19 that he was in prison. And now that this has been resurrected
20 these many years later, in essence they're having to relive
21 and revisit the trauma. And in terms of her, Terry Moody, her
22 trauma is the fact that her son was maimed, and he's still in
23 bad physical condition. And he suffers psychologically. She
24 suffers for that from an emotional standpoint as well as
25 losing her grandson in this case.

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1 As for Mr. Glenn Crawford, he informed his mother to tell
2 us that he did not want to be here as well, but his position
3 is the same, and that he believes that Mr. McCain should stay
4 in prison for the remainder of Mr. McCain's life.

5 Also, Mr. Donald Moody, who is the husband of Terry Moody,
6 and he's the stepfather of Glenn Crawford, Junior, the victim,
7 as well as the step grandfather of James Fannin, indicated he
8 has the same position.

9 And again, all three of them declined to come to court.
10 They still have, as I indicated, great fear concerning their
11 safety. And we would ask that representation I give to the
12 Court be accepted, as well as what was already previously
13 presented to the Court concerning these matters. And that's
14 reflected, Your Honor, in the presentence report as well.

15 THE COURT: Thank you very much.

16 MR. SECOR: Your Honor, in terms of the Government's
17 presentation, as the Court's aware, I've presented to the
18 Court a sentencing memorandum that's 18 pages long. The
19 Government would stand on that presentation. I believe that
20 it touches on all of the factors that have been addressed
21 today by Miss Blazer and her client. I would just point out a
22 few things in that regard and make a few comments about some
23 things that were raised today.

24 And the key point I want to make, and it's reflected in
25 the fourth page, next-to-the-last paragraph of the

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1 Government's sentencing memorandum, where the Government
2 believes that the nature of the crime committed by Mr. McCain
3 reflects irreparable corruption, and that it was not transient
4 immaturity.

5 Mr. McCain, when he appeared before the Court back in
6 2010, had been in trouble for many many years, one thing after
7 another, including violence, all of it's reflected in the
8 Government's sentencing memorandum. It's also reflected in
9 the presentence report. This wasn't a flicker, this wasn't a
10 fleeting moment of immaturity on behalf of Mr. McCain, it was
11 a pattern of behavior. And I say that to tell the Court that
12 the Mr. McCain that appeared before this Court and was
13 sentenced for the crime that he committed when he was 17 years
14 old, was the same defendant who is in Bureau of Prisons from
15 approximately the age of 20 to 22, committing several serious
16 serious violent crimes. They were broad brushed today in
17 their presentation in terms of, you know, mostly self-defense,
18 you know, he -- there was some admission that it was serious
19 in nature. Your Honor, it's reflected in the Government's
20 memorandum and it's reflected in the totality of the evidence
21 that has been before the Court. These were situations where
22 Mr. McCain was trying to kill people, and badly hurt them.
23 Without a doubt. Circumstances. Self-defense is not chasing
24 somebody across a yard with a shank. That's not self-defense.
25 He had two shank incidents. One of them was -- wounded

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1 somebody very badly. He went to the hospital. Now, you know,
2 what triggered those situations, he referred to one of them
3 today as to why the situation developed, that he was
4 approached sexually or whatever. Your Honor, regardless, the
5 facts are what are reflected in the exhibits that the
6 Government presented with the sentencing memorandum. It is
7 what it is. These aren't just like spur-of-the-moment
8 self-defense, these are calculated situations. Now, he might
9 argue that, well, something happened and I feared so I got a
10 shank and I, you know, I was defending myself. No. Actually
11 they represent that he plotted and did what he intended to do.

12 And in many of these situations, when you look at the
13 incident reports related to it and as reflected in the
14 Government's exhibits to the sentencing memorandum, he was
15 stopped by guards, luckily and thankfully. Which brings up
16 another issue, violence towards guards in the prison, several
17 situations of that while he's been at the Bureau of Prisons,
18 when he's not in his teens, he's in his twenties. And as he
19 did way back when he was sentenced in 2010 when he basically
20 threatened to kill just about everybody associated with this
21 case, and those instances in the Bureau of Prisons, he's
22 threatening to kill the guards. His behavior reflects
23 throughout the course of his life, even up to today, that if
24 given the chance, he will act on his threats. His history
25 shows that he does what he says he's going to do, if he can.

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1 Now, the Supreme Court requires the Court to focus on him
2 at the time he committed the crime, his age and juvenility.
3 But the Court didn't shut down the prospect that a juvenile
4 can be sentenced to life in prison. Mr. McCain, we believe,
5 fits the criteria. And in terms of where he is today, of
6 course the focus has to be on the time he committed an
7 offense, and he's to be sentenced as if he were a juvenile.
8 But we can't ignore his history prior to being sentenced, nor
9 his history after he was sentenced, in terms of trying to
10 figure out whether, at that time, he was irreparably
11 corrupted. And the Government's view is that he was, at the
12 time he committed the crime, he was already in that position,
13 and that's solidified by his conduct since he's been in the
14 Bureau of Prisons, not to mention what transpired in county
15 jail in Charleston.

16 And it's been kind of brushed off today as a juvenile
17 prank. No, he's 26 years old. The circumstances surrounding
18 that and those guard reports and the investigative reports
19 related to that incident are in the Government's exhibits
20 related to the sentencing memorandum that show that there
21 was -- the lady who is the victim was basically trapped,
22 despite the fact that there was a guard present in the room,
23 she was basically trapped at the mercy of four or five
24 prisoners, including Mr. McCain, who were taunting her with
25 sexual innuendos, sexually aggressive statements. There was

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1 accusations about possibly one or more of them masturbating in
2 the bathroom, asking her to watch. It was, I think,
3 inconclusive as to whether Mr. McCain was actually the one
4 allegedly doing that, and I'm not going to say he was. But
5 the backdrop of that situation was basically people preying on
6 an innocent person, and they knew they could do it and they
7 were playing the situation.

8 When you look at the video, and I submitted that as part
9 of the record, it's a one-minute video, you can see when one
10 of the inmates at Charleston County goes up to discuss
11 something with the guard or whoever was in charge of that
12 medical waiting room, Mr. McCain seizes the opportunity. And
13 he sneaks and he slides across the room, and you can see in
14 the video. And it's unclear exactly where in her groin area/
15 buttocks area he grabbed her, but it was a sexual assault.
16 Pure and simple. And you can tell as soon as it happened, the
17 lady slid down the chair or the bench that she was sitting on,
18 it was clear she didn't want that to happen. There was no
19 indication whatsoever there was any back and forth, you know,
20 that prompted this. This was him seizing an opportunity. He
21 saw the guard being distracted, it's as clear as day on the
22 video, it speaks for itself, Judge. That is Edward McCain.
23 That is the Edward McCain who executed Mr. Fannin, and tried
24 to execute Mr. Crawford.

25 That's the same Mr. McCain who, for that window of time --

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1 and he said only Terre Haute -- there's more violations and
2 incidents in the subsequent prison after Terre Haute that he
3 committed violations. It's the same person, Judge.

4 And that's the Government's position. And we say that
5 because that's what the record shows. It's his life history,
6 his criminal conduct since a young age, all the way up until
7 now.

8 He's blaming conditions on the jail. That's -- He's in
9 jail, Judge. He asked for -- he filed a 2255, he brought
10 himself. And the Supreme Court made its decision, and he's
11 got a right to the hearing and he's getting the hearing. But
12 he made reference, alluded to the fact that he's been in jail
13 for nearly two years, and it's because of myself and a family
14 matter, I had made a reference to that, well, you know,
15 frankly, Judge, that's -- I won't say that is not a little
16 part of the situation, I mean, I have had a family matter
17 medical condition with a family member that may have delayed
18 proceedings some.

19 But, you know, in reality what happened, this is his
20 second attorney. And the first attorney left the case for a
21 justified reason, there was a potential conflict. That took
22 time. Miss Blazer has done tons of due diligence on this
23 case, as well as the Government. This is a very unique, like
24 Miss Blazer said, 39 cases in the country. We don't get these
25 every day. And it's really trying to figure out how to go

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1 about it and go the right way, based on all the guidance and
2 all the cases that are out there.

3 So yes, he's been in jail, but I didn't want to let the
4 record stand silent on the fact that the Government, or me
5 specifically, caused him to be in jail for 24 months.

6 But the point is, he's in jail. That doesn't give him a
7 right to do what he did. There's no justification for it.
8 And it shows who he is.

9 And in terms of rehabilitation, he hasn't been
10 rehabilitated yet, Your Honor. And in terms of the -- and
11 they brought this up, Judge, they brought in a
12 neuropsychologist. He, like the Court is aware, testified for
13 nearly three hours on direct and cross-examination, bringing
14 out all these issues and whatnot. But you have to take the
15 good with the bad. When you ask for something, sometimes you
16 get what you might not want, and they got a diagnosis of
17 antisocial personality disorder from the neuropsychologist.
18 And that is a very troubling diagnosis, Your Honor.

19 And, for example, and I'll, you know, remind the Court,
20 during the lengthy testimony of the doctor when he was on
21 direct, he was talking about different treatment programs and
22 involved and available in the jail. But on cross, when I
23 asked him about those treatment programs, there's a
24 distinction between -- like when you're talking about
25 dialectical behavior therapy -- between what those treatment

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1 programs were designed for. They were designed for people
2 with borderline personality disorder. He acknowledged that
3 there are no specific treatment programs in the Bureau of
4 Prisons for antisocial personality disorder.

5 In fact, he went on, and during cross acknowledged that
6 it's a very difficult prognosis for somebody with antisocial
7 personality disorder. If the Court recalls, I went down the
8 laundry list of those factors that are involved with somebody
9 who has antisocial personality disorder, and he acknowledged
10 that those are features of somebody with antisocial
11 personality disorder, and one of them is involving lying,
12 deception and manipulation. That's part of it, Judge.

13 There's a gap in time between some of the violent conduct
14 on the record of Bureau of Prisons that -- where he says he
15 stopped because he saw the light of day. The Government would
16 submit to the Court that, in fact, he's become wiser and more
17 manipulative and does things to try to avoid repercussions of
18 getting caught. And that video in the jail is the best
19 evidence of that. It is -- you see the video, and that's it,
20 that tells it right there. He's going to do whatever he wants
21 to do, but now he's going to try to get away with it. He's
22 going to try to get away with it.

23 And the factors, when I had the -- asking the
24 neuropsychologist the litany of questions, lying, deception
25 and manipulation, that's part of the package with antisocial

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1 personality disorder. Edward McCain, Judge, and I'll leave it
2 at this, as I started, he was irreparably corrupted at the
3 time he committed the crime, and that crime was not transient
4 in nature, it was one of many things he had done that were
5 very violent, up to that point in his life. And we believe
6 he's a danger to the community. The victims, to this day,
7 fear him. The fact that there's any prospect of him ever
8 getting out of prison has that family in turmoil. And there's
9 no doubt about that. And they didn't want to be here, Judge,
10 for fear, not that they don't have a vested interest in this
11 case. That's how bad this situation is.

12 And the Supreme Court said there are cases that qualify,
13 his execution of Mr. Fannin qualifies, and his attempted
14 execution of Mr. Crawford, and by the grace of God
15 Mr. Crawford didn't die, because the defendant couldn't get
16 more bullets. He tried.

17 Thank you, Your Honor.

18 THE COURT: Thank you. Miss Blazer?

19 MS. BLAZER: Yes, sir. I don't want to get too deep
20 in the weeds on responses back and forth. I will tell you
21 that I've read all the same incident reports from BOP that Mr.
22 Secor has, and I think that I differ with some of the
23 characterizations, and specifically Mr. McCain expressly
24 disclaims ever having threatened a guard. As, you know, these
25 incident reports are just that, they are what one person

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1 writes down, these are not -- these are administrative
2 actions. And in most of the cases, as I think you will
3 recall, Mr. McCain declined to participate in the
4 investigations or the -- and in some cases didn't even appear
5 at a hearing, just acquiescing to whatever the punishment was.
6 And so I don't think that the full facts of what happened in
7 each of these cases are necessarily reflected in the
8 institutional reports. Because, frankly, there's not a whole
9 lot of reason in most of these situations to fight the
10 institutional reports, in my experience.

11 And so with regard to the situation at the Charleston
12 County Detention Center, one more time, it's not good, Your
13 Honor, it's unacceptable conduct. Mr. McCain and I have
14 discussed it and it's unacceptable. I do feel obligated to
15 kind of put some leaves on the tree. It happened late in the
16 evening. And, as you know, there are -- women and men are not
17 housed in the same place at the Charleston County Detention
18 Center. That would be deeply unwise. So medical is about the
19 only place, other than opposite sex correctional officers,
20 that members of the opposite sex can run into each other at
21 the Charleston County Detention Center. And I think it's fair
22 to say that it is an open secret that inmates can go to
23 medical late at night to gaze upon the forms of the opposite
24 sex. And those folks who go there late at night know why
25 they're doing it. I've discussed it at length with

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1 Mr. McCain, and he has said to me, I took signals the wrong
2 way. I did something that I thought was welcome, it clearly
3 was not, I am sorry, I didn't mean to offend her. And as you
4 saw, he sidled up, he reaches in, she scoots down the bench,
5 and nothing else happens. Mr. McCain quickly realized that
6 what he thought was playful banter and, you know, a mutual
7 interest, was not, and he backed off. It's still not good.
8 I'm not trying to suggest that it is acceptable conduct,
9 because he knows he's in the jail. But I do think that it
10 does not be speak the deeply irrevocable corruption that Mr.
11 Secor sees. And I credit -- I don't challenge that he's
12 earnest when he suggests to you that that is what he
13 perceives. I simply -- I don't perceive it, and I've had a
14 year and a half of close contact with Mr. McCain to come to
15 the conclusion that I have.

16 Mr. Secor points out that during the evidentiary hearing
17 with Dr. Buddin, Dr. Buddin conceded that antisocial
18 personality disorder is difficult to treat, there's no gold
19 standard treatment. He did discuss that dialectic behavior
20 therapy is the most promising of the treatments that are used
21 with a wide variety of personality disorders. He also pointed
22 out to the Court that he believed that in his review of all of
23 the information he had prior to his evaluation of Mr. McCain,
24 that he had been underdiagnosed repeatedly. So conduct
25 disorder versus the other teenage disorder that's momentarily

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1 escaping my mind -- ODD, oppositional defiance disorder --
2 thank you, Mr. Secor -- and that he felt like therapists had
3 been trying to give him a lesser diagnosis, because it seemed
4 like less of a sentence of future antisocial personality
5 disorder. Because of that lesser diagnosis, he was receiving
6 lessened intensive interventions.

7 A short time after we were in -- we had that hearing, I
8 was in a training in Atlanta, and a neuropsychologist from
9 Seattle was speaking, and he described the difference between
10 children with conduct disorder and ODD who develop antisocial
11 personality disorder, and children with conduct disorder and
12 ODD who do not. And overwhelmingly statistically it is about
13 socioeconomic status. Those high socioeconomic status with
14 conduct disorder and ODD develop APD at a substantially
15 reduced percentage as those who suffer from economic and
16 social deficiencies, as Mr. McCain documentedly did as a
17 child.

18 That is not to say that the road ahead will be easy. Nor
19 have I ever attempted to gloss over the real challenges. But
20 I also think it's very important to remember what Dr. Buddin
21 told the Court, which is that plenty of people, plenty of
22 people with antisocial personality disorder walk among us,
23 don't commit murders, have jobs, get married, have ordinary
24 lives.

25 And so while we can't undo the past, and I acknowledge

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1 that the past is certainly reasonable to contemplate in terms
2 of what the future is likely to bring, that diagnosis is not
3 Mr. McCain's destiny. And he has clearly exhibited, in ways
4 that are not necessarily reducible to certificates, an
5 interest in that kind of rehabilitation.

6 A person like Mr. McCain -- and he complained to you about
7 the last 22 months at the Charleston County Detention Center.
8 And candidly, if I had taken my red pen, I probably would have
9 taken that part out, but I didn't. And I didn't because the
10 Charleston County Detention Center is a different place from
11 the Bureau of Prisons. And as I told you right before you
12 walked in, we were talking about it, and he said -- I said,
13 you know, are you going to have a different perspective on the
14 Bureau of Prisons after going back after 22 months at
15 Charleston County. He said, oh, my God, yes, absolutely.
16 Completely different.

17 Solitary confinement, 23 hours in a cell alone every day,
18 is a separate issue from juvenility, which is what's at issue
19 in this case. But it is a very real punishment in excess of
20 ordinary incarceration. And Mr. McCain may well, by virtue of
21 the rules at the Charleston County Detention Center, have
22 earned that at various times. It does not change the
23 profoundly negative effect that is well documented in the
24 literature of solitary confinement.

25 And so in a situation like this, you know, you want, as an

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1 attorney, you want your clients to be good at articulating
2 their blessings before a judge, and you try to advise them not
3 to feel sorry for themselves. And I would suggest to you that
4 although he expressed to you the difficulty of the 22 months
5 at Charleston County Detention Center, if you listen to
6 everything he told you today, he wasn't feeling sorry for
7 himself, he was providing some context for the backsliding
8 that happened in terms of his conduct while he was at the
9 Charleston County Detention Center, and asking you to view it
10 through that lens. And so I do think that that's an important
11 distinction to draw.

12 One thing that I didn't highlight earlier, and I certainly
13 would invite Mr. Secor's response to this, to the extent that
14 it has any bearing on the Court's thinking. Because there are
15 three cases, there are three charges here, I do think, in
16 light of the flexibility of 2255, that one of the things that
17 the Court could consider is a sentence that would stack --
18 whatever amount of incarceration the Court deemed necessary,
19 could be structured in such a way that you could also stack
20 the supervised release to extend supervised release longer
21 than the ordinary term. You know, we have lifetime supervised
22 release is automatically available for sex offenses, but it's
23 not automatically available in this case. Realistically, I
24 think it's not automatically available in this case because
25 most people don't get out who have this charge. But I do

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1 believe that the Court could impose a sentence that would
2 allow for an extended period of supervision of Mr. McCain, in
3 excess of what would be ordinary. And I think that that would
4 certainly, in light of the concerns that Mr. Secor has
5 addressed to the Court, would be reasonable.

6 Something that Edward didn't read to you today that I know
7 was on his piece of paper, that struck me when I read it, and
8 I think he didn't read it because the victims weren't there.
9 Weren't here today. He talked about the fact that he can't
10 ever take back having taken a life. But that -- and he can't
11 ever give that life back to the people that lost it. But that
12 when you take a life, you may be the only person to whom that
13 person remains alive, because he has dwelled with Mr. Fannin
14 in his mind and in his solitary environment, for all these
15 years, and will necessarily live with him for the rest of his
16 life, live with what he did to him, the loss of him, and with
17 the hole that he created in the world.

18 And, Your Honor, he told you he doesn't deserve to be
19 excused. He doesn't. But he does deserve to be treated
20 accordingly, according to the nature and circumstances of the
21 totality of what happened. And for all of those reasons, I
22 ask the Court to consider a term of years that allows
23 Mr. McCain to realistically expect an opportunity for freedom,
24 to consider a sentence that would be structured in order to
25 allow Mr. McCain to demonstrate further rehabilitation before

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1 being entitled to such release. Or any other condition and
2 term of years that the Court believes adequately considers the
3 juvenility that was present at the date -- on the date that
4 all of this happened, and that restores what Mr. McCain asked
5 this Court for, which is some measure of hope.

6 Thank you.

7 THE COURT: Thank you. Mr. Secor, anything else?

8 MR. SECOR: No, Your Honor.

9 THE COURT: Thank you. It's 4:20, it's been a long
10 day and I've listened to a lot. I've got several things that
11 I want to review and mull over further before I sentence in
12 this case.

13 I've got some things I need to do tomorrow and also have
14 another hearing tomorrow, so I'm going to ask everybody, the
15 attorneys and marshals, would 2:00 o'clock tomorrow work all
16 right for sentencing?

17 MS. BLAZER: Your Honor, I'm supposed to be in court
18 at 2:00 o'clock across the street. I don't know,
19 unfortunately we don't get time slots over there, so it's the
20 2:00 p.m. cattle call.

21 THE COURT: Okay. So you just have to be there at
22 2:00 to see whether you're on the docket?

23 MS. BLAZER: Just to see when I get to go. I'm going
24 to go, the actual hearing is going to take 15 minutes. I just
25 don't know if I'll get called at 2:00, 2:30, that's my

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1 problem.

2 THE COURT: I'm with you. How about is 1:00 okay?

3 MS. BLAZER: Yes, sir.

4 THE COURT: Would that work?

5 MR. SECOR: Yes, sir.

6 THE COURT: Does that work for the marshals?

7 THE MARSHAL: Yes, sir.

8 MS. BLAZER: I don't know, I imagine that his family
9 has traveled from Georgetown, I'll get with them about whether
10 or not they can be here. I certainly, to the extent that they
11 can not, I would just want to reiterate that they have been
12 here in support of him, his mother.

13 THE COURT: I've seen them sitting there patiently
14 the whole time and I appreciate them being here. And I know
15 that he does. If you can't make it back tomorrow, don't think
16 the Court will take that as anything negative in support of
17 him; I would not. So it's what you're able to do reasonably
18 would be just fine.

19 Thank you. With that, we'll reconvene tomorrow at 1:00.

20 Thank you.

21

22 (Court adjourned at 4:21 p.m.)

23

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REPORTER'S CERTIFICATION

3 I, Debra L. Potocki, RMR, RDR, CRR, Official Court
4 Reporter for the United States District Court for the District
5 of South Carolina, hereby certify that the foregoing is a true
6 and correct transcript of the stenographically recorded above
7 proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF SOUTH CAROLINA
3 CHARLESTON DIVISION

4 UNITED STATES OF AMERICA :
5 :
6 vs. :
7 :
8 EDWARD McCAIN : 2:09 - CR - 296

9 Testimony in the above-captioned matter held on
10 Thursday, May 31st, 2018, commencing at 10:42 a.m.,
11 before the Hon. P. Michael Duffy, in the United States
12 Courthouse, Courtroom I, 81 Meeting Street, Charleston,
13 South Carolina, 29401.

14 APPEARANCES:

15 DEAN H. SECOR, ESQUIRE, Office of the
16 U.S. Attorney, P.O. Box 978, Charleston, SC,
17 appeared for the Government.

18 CAMERON J. BLAZER, ESQ., 1037 Chuck Dawley
19 Blvd., Mt. Pleasant, SC, appeared for
20 defendant.

21
22
23 REPORTED BY DEBRA L. POTOCKI, RMR, RDR, CRR
24 Official Court Reporter for the U.S. District Court
25 P.O. Box 835
Charleston, SC 29402
843/214-7927

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I N D E X

WITNESS: WILLIAM BUDDIN

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1 MR. SECOR: This is the case of United States of
2 America versus Edward McCain, Criminal No. 2:09-296.
3 Mr. McCain is appearing before you represented by Miss Cameron
4 Blazer.

5 Your Honor, we are here today for a mental health
6 testimony, which is the first hearing in a bifurcated
7 sentencing, which is a re-sentencing under the Miller case.

8 THE COURT: Thank you very much. Given that,
9 Miss Blazer, if you're ready, you may call your witness and
10 we'll proceed.

11 MS. BLAZER: I am, Your Honor. If I could just have
12 a minute to do a little bit of housekeeping. I have spoken,
13 prior to the hearing, with Mr. Secor. And given the volume of
14 the information that is before the Court with Dr. Buddin, I
15 would ask the Court's permission, and I've got the agreement
16 from the Government to proceed in this way, to occasionally
17 lead him, just so we can stay focused on the issues that are
18 important to the Court. I don't intend to cut him off, he's
19 got a lot to tell the Court, but I just, for efficiency sake,
20 I'd like that opportunity.

21 THE COURT: That would be helpful to all.

22 MS. BLAZER: Very well. At this time I call
23 Dr. Howard Buddin to the stand.

24 THE COURT: Doctor, if you just come forward, please,
25 and be sworn.

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1 THE CLERK: Please state your full name.

2 A. William Howard Buddin, Junior.

3 WILLIAM BUDDIN, JUNIOR, a witness called by the Defense,
4 first having been duly sworn, testified as follows:

5 MS. BLAZER: Your Honor, if I may approach. As
6 another housekeeping matter, I don't believe, because we don't
7 have a jury, I don't believe we need to go through all of the
8 expert qualifications, but for the record, I will ask some
9 questions of Dr. Buddin with regard to his background.

10 THE COURT: That's fine. I will say for the record,
11 I have studied his report as well as his CV. He's eminently
12 qualified to testify on the subjects at hand, recognize him as
13 an expert in those fields. In this field. And I'll allow you
14 to go ahead and make the record.

15 MS. BLAZER: Thank you.

16 DIRECT EXAMINATION

17 | BY MS. BLAZER:

18 Q. Dr. Buddin, you are a neuropsychologist, is that correct?

19 A. That's correct.

20 Q. Can you distinguish for the Court what a neuropsychologist
21 is as opposed to a run-of-the-mill psychologist?

22 A. Sure. A neuropsychologist does get all of the training of
23 a general clinical psychologist, with additional education and
24 training after graduate school, so to speak, in the specialty
25 area of neuropsychology, which is the study of brain behavior

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WILLIAM BUDD**127a** DIRECT EXAMINATION

1 relationships; essentially how the brain makes us who we are.

2 Q. And does a neuropsychologist engage only in diagnostic
3 activities or also clinical treatment activities?

4 A. Both. Diagnostic and clinical treatments. It's expected
5 that I'll make recommendations for intervention of various
6 types to the referring provider, whoever that is, as
7 appropriate.

8 Q. So you have a private practice here in the Charleston
9 area?

10 A. That's correct.

11 Q. And in that private practice what kinds of activities do
12 you undertake regularly as a clinical neuropsychologist?

13 A. The duties that I generally manage are interviewing
14 patients that have been referred to me by outside providers,
15 typically family practitioners, neurologists, psychiatrists.
16 Interviewing them and determining if assessment or testing is
17 appropriate in their case or if, you know, if we delay it for
18 some reason or another. And then see them after testing, if
19 we've done that, for feedback, at which point we talk about
20 what's the diagnosis, if there is one, then what do we do
21 about it going forward, and do we need to re-evaluate later
22 on.

23 Q. Are you able to say with any certainty how frequently you
24 receive referrals where the criminal justice system is
25 involved in the referral, whether that referral comes from a

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1 lawyer or as a result of someone experiencing a criminal
2 justice problem?

3 A. Probably if we stretch it out to like ancillary, probably
4 a couple of times a month, I would say.

5 Q. Okay. But you are not a forensic psychologist, correct?

6 A. That's correct. First and foremost, I do clinical work,
7 if you will, as far as the bread and butter goes.

8 Q. Do you from time to time opine in court, as you are today,
9 about matters concerning diagnoses and their intersection with
10 criminal justice issues?

11 A. I do, yes.

12 Q. Okay. How many times have you testified in Federal Court?

13 A. This is the second time in federal courts.

14 MS. BLAZER: And I think, Judge, that more than
15 establishes the record, unless you have any questions for
16 Dr. Buddin?

17 THE COURT: I think that's ample. Thank you very
18 much.

19 BY MS. BLAZER:

20 Q. Dr. Buddin, I contacted you last year in 2017 and asked
21 whether you would be able to conduct an evaluation of Edward
22 McCain in relation to a Miller versus Alabama re-sentencing,
23 correct?

24 A. Yes.

25 Q. And describe for the Court what you did in order to

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1 perform that evaluation for Mr. McCain.

2 A. Sure. So I met with Mr. McCain at the Al Cannon Detention
3 Center late last year, and spent -- we carved out essentially
4 a full day. But spent the better part of a couple of hours in
5 the morning interviewing him, getting some general history,
6 which includes medical history and academics and so forth. As
7 well as a synopsis, I guess you'd call it, of criminal history
8 behaviors that led to his incarceration certainly. Just so I
9 could get a sense, in his words, of how he saw things, and I
10 needed to get his perspective.

11 Afterwards, I conducted some neuropsychological as well as
12 psychological testing with Mr. McCain, and that concluded the
13 day. And from that point forward produced the report, which
14 of course you have. That's the summary of it.

15 Q. So before you went in to meet with Mr. McCain, did you
16 have some clarity about the circumstances of his federal
17 prosecution from roughly a decade ago?

18 A. Yes. Yes, I did.

19 Q. So you didn't go in blind, you knew what he was accused of
20 having done, what he admitted to having done?

21 A. Right. Right. I had briefly reviewed some records before
22 going in, I mean, went over them in greater detail later on,
23 but I had, yes, I had some sense of what was going on
24 beforehand.

25 Q. And you and I had prepared prior to your going in, and you

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WILLIAM BUDD**180a** DIRECT EXAMINATION

1 were very clear about what my objectives were for this
2 evaluation, correct?

3 A. Yes. Yes.

4 Q. And you told me, as you have told me in other
5 circumstances, that you see what was there and you would let
6 me know what it was, no matter whether it suited my objective
7 or not. Correct?

8 A. That's right. And in a forensic context versus a clinical
9 context, I am -- in a clinical context I'm biased in the favor
10 of my patients, right, and their best interests. And in a
11 forensic context I'm a consultant, an examiner and unbiased.
12 And I will report what I get.

13 Q. Understood.

14 So during the course of your testing of Mr. McCain, can
15 you -- I don't want to belabor it too much, but can you review
16 for the Court what those tests were and why you chose the
17 tests you chose?

18 A. Sure. So the testing battery was made up of gold
19 standard, if you will, kind of tests of neuropsychological
20 functioning, or designed to assess neuropsychological
21 functioning including the -- Do you want the specific names of
22 some of them?

23 Q. The ones that you think are the most significant, yes.

24 A. Sure. Sure. The weights for Wechsler Adult Intelligence
25 Scale, fourth iteration of that, which is just a broad measure

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1 of cognitive capacity, problem solving, reasoning, in terms of
2 novel situations. And as well as some tests of executive
3 functioning. Executive functioning is a pretty wide net, but
4 it involves behaviors that include planning, reasoning,
5 application of previous experience, right, we call judgment.
6 In terms of problem solving. Determining when there's a
7 problem with the plan and taking course-corrective actions.
8 But also applies to social environments, right, inhibition,
9 keeping from saying or doing something that we would not
10 otherwise do, which the flip side of that coin is impulsivity.
11 All right? Or ready-fire-aim kind of thing, acting without
12 considering the due consequences.

13 Also evaluating, if only in a small -- some small amount,
14 auditory and visual learning and recall, what we call memory,
15 more succinctly. As well as administering a couple of
16 measures of behavioral personality and psychopathology.

17 Q. And in choosing the tests that you performed, were you
18 mindful of the central question before this Court, which is
19 the degree to which Mr. McCain's juvenility at the time of his
20 offense should be considered in establishing an appropriate
21 punishment at his re-sentencing hearing?

22 A. Yes, I was.

23 Q. Talk to me in a little more detail about what you were
24 looking for in that regard.

25 A. Sure. So having some background, as you said, going into

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1 this, having some sense of where he had come from, in other
2 words, one of the things I -- one of the questions I had in
3 mind was to what extent, if any, is there any kind of
4 impairment in executive function, that sort of wider net of
5 abilities that allow us to marshal our cognitive capabilities.
6 To what extent were there any impairments there, if at all.
7 Mainly because from what I heard and understood, that
8 certainly seemed like a potential problem area.

9 And when we roll the clock back, effectively, and we talk
10 about the neurodevelopment of the brain during adolescence,
11 it's quite a bit different than what we see in childhood, the
12 first six, seven years of life, where there's tremendous
13 growth. In adolescence, if anything, it can be characterized
14 as there's some shrinkage, not quite accurately, but pruning,
15 where the brain gets rid of unneeded neural connections,
16 literally kills off its own neurons, quite a lot of them, in
17 order to make the brain work more efficiently.

18 The brain grows from the middle out and from the back to
19 the front. So the last region of the brain to develop, as it
20 were, is the frontal regions of the brain, the frontal lobes.
21 And at the risk of being too reductive, the frontal lobes are
22 sort of the seat of executive functioning, right? So in
23 adolescence we kind of have a biological explanation of why
24 teenagers sort of writ large, don't necessarily make the
25 greatest decisions. Even when they have information available

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1 to them, are not necessarily the best at parsing through that
2 information and applying it in a way that an adult would. You
3 know, we would say we can stand there as observers and say how
4 could you do that. So that was one of the core areas that I
5 wanted to focus on. And some of that can be elucidated, too,
6 just through the clinical interview and review of records.

7 Q. Sure. In trying to go back to a time where -- that it's
8 frozen in amber, and you don't have direct access to,
9 Mr. McCain at 17 years of age, did you have records to review
10 that assisted you in recreating a picture of what Mr. McCain
11 at 17 was likely operating with in terms of executive
12 functioning?

13 A. Yes, I did. I had a few records made available from
14 Waccamaw Mental Health Center, an evaluation by Dr. Tykner, as
15 well as Coastal Neurological Associates, and the Department of
16 Juvenile Justice, Kathryn Smith, I believe. So --

17 Q. And describe for the Court your assessment of the picture
18 those assessments painted for you in terms of how old
19 Mr. McCain was when we first begin having records, and what
20 those records tend to demonstrate about what Mr. McCain was
21 likely like at 17.

22 A. So the dated records I have, I think they went back to
23 2003, so roughly six years before. Beforehand. And at that
24 point, around age 11 or 12, we start having records that are
25 documents of treatments, interventions, exposure to the

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1 juvenile justice system and so forth, that were occurring
2 closer together in time, and with sort of, like I said,
3 increasing severity. Because as he got older and started to
4 see more exposure to the justice system for breaking and
5 entering, burglary and so forth. So what it looked like was
6 increase in severity.

7 And from speaking with Mr. McCain the day of my
8 evaluation, I think he said he started seeing counselors maybe
9 beginning around third or fourth grade, eight or nine years of
10 age at that point. But the diagnoses between providers were
11 fairly consistent in an underlying sense or background sense
12 that they all involved disruptive behaviors, we could say
13 broadly, as opposed to depression or anxiety. So disruptive
14 behavior being kind of what they sound like, which is to say
15 behaviors that sort of violate norms of conduct, behavior
16 where there's a classroom or out in the wider world.

17 Q. And were there diagnoses of any kind of mood disorders
18 that go back in time to those early evaluations?

19 A. There were what we call like rule outs that were part of
20 the record. Rule out sort of just being clinical speak for
21 let's keep an eye on him. Somebody who may be observing the
22 person for a longer period of time than what I would. I would
23 now call it provisional, but means the same thing, just over
24 time let's observe it and be able to figure out to a greater
25 degree, greater certainty what's going on.

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1 The ones that popped up twice was an adjustment disorder,
2 which I wouldn't really say is a mood disorder per se, but
3 comes with mood disorder features. And as pointed out,
4 adjustment disorder with mixed emotions, providers
5 characterize it different ways, even though there's a codified
6 way of doing it. And then there were rule outs for
7 cyclothymia. One provider had mentioned the possibility of a
8 bipolar condition, another mentioned a rule out for depressive
9 disorder not otherwise specified.

10 So there are hints, but no formal, you know, depression or
11 anxiety.

12 Q. But those rule outs would have been on the basis of
13 observed behaviors or expressed moods?

14 A. Yes. Although I'm limited to what's in the reports that
15 were provided, and some of them didn't give quite as much
16 rationale as to why those conditions were included.

17 Q. Mr. McCain was also, am I right, diagnosed with ADHD at
18 various times in his childhood, correct?

19 A. That's correct.

20 Q. And intermittently treated for ADHD?

21 A. That's correct. He'd been tried on a number of
22 medications through his youth, yeah.

23 Q. In reviewing the records of his prior evaluations and
24 treatments, because he was intermediately treated through the
25 Department of Juvenile Justice in Waccamaw, can you describe

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1 for the Court in a holistic sense the course of treatment, how
2 treatment went?

3 A. Right. So intermittent is a good way to characterize it.
4 And sometimes, especially towards 2005-2006, his treatment was
5 interrupted because of -- I think it was placement within the
6 juvenile justice system. So it was necessarily disrupted.
7 But some of the notes characterized it as -- saw with
8 increasing frequency about sort of lack of accountability,
9 responsibility, or even in some cases what seemed like a lack
10 of awareness that anything that he had done anything wrong.
11 But if the awareness was there, it was like not-my-fault kind
12 of thing.

13 Q. That was on Mr. McCain's behalf.

14 A. Yes.

15 Q. But he at that time is a child, and --

16 A. Yeah.

17 Q. -- could you characterize the degree to which his
18 treatment was -- involved his whole family.

19 A. I don't recall reading any progress notes or treatment
20 notes or anything that involved the entire family. One point
21 there was a recommendation that was made for individual slash
22 family therapy, but that was just a recommendation, there was
23 no indication of full kind of family involvement in a formal
24 therapeutic sense.

25 Q. And that brings me to the question of the stability of

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1 Mr. McCain's family unit during his adolescence. Can you talk
2 about that in terms of what you observed in the records and
3 what Mr. McCain described to you?

4 A. Yeah, I think that the way that I characterize it in my
5 report, based on the information I had at hand, was it seemed
6 chaotic to me. In other words, just to be more clear, a lack
7 of stability in terms of, you know, living situation,
8 structure, support. Those things were in place, but again, in
9 a chaotic fashion.

10 Q. So let's be more precise. Mr. McCain lived with various
11 familial adults during the course of his adult -- his
12 adolescence, correct?

13 A. As I understood it.

14 Q. And did he describe to you that by the time that all of
15 this happened, he had sort of coalesced around his
16 grandmother's house and he was primarily living with his
17 grandmother, with some involvement of his other family
18 members?

19 A. I think that was from age 12 forward, yes.

20 Q. In reviewing the treatment and assessment notes from the
21 Department of Juvenile Justice and from the various private
22 assessments that were conducted, did you come away with an
23 opinion of the way in which Mr. McCain's participation in
24 treatment was facilitated by his family?

25 A. The impression that I had was that -- in terms of

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1 facilitation by the family, so I would back up a bit and say
2 like so in a therapeutic context I would always, like back in
3 the day when I did therapy, right, I'd give patients homework,
4 right? And sometimes that would involve family members,
5 spouses, siblings, whatever. Because as I would -- you know,
6 say it's like -- I mean the family members are like tires on a
7 car; as one goes flat, the whole car is affected.

8 And I again, based on my knowledge, I didn't see a whole
9 lot of that occurring outside of a structured formal
10 therapeutic setting. That's my understanding of what was
11 reflected in the records. And to some extent it was noted in
12 one or two places in the record that Mr. McCain's grandmother
13 felt that to some extent there was a problem on the system
14 side of things, that he wasn't being handled, treated and so
15 forth as appropriately or as optimally as he could have.

16 Q. But in a general sense, as a practitioner, if we went back
17 in time and we wanted to ensure that a child like Edward who
18 was experiencing behavioral disruptions in school and in the
19 wider world, was going to make progress in treatment, we would
20 want to see a holistic involvement of his entire family or his
21 entire support structure in that process.

22 A. Most definitely.

23 Q. Okay. So at 17, was Mr. McCain still in adolescence?

24 A. Yes.

25 Q. And do we have, through the research and the science, do

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1 we have a fixed place where adolescence begins and adolescence
2 ends?

3 A. No, it's not --

4 Q. Is there a typical range?

5 A. Yeah, from my end, too, from the neurodevelopmental work
6 especially, generally consider it to be somewhere between the
7 ages of 18 and 25 is when we see that neurodevelopmental --
8 the structural changes in the brain slow down tremendously.
9 Again, going through adolescence from ten, 11, 12 forward up
10 to that point, like I said, a lot of pruning, a lot of new
11 connections being made, so it stops somewhere between, like I
12 said 18, 25-ish.

13 Q. For the typical person?

14 A. Yes.

15 Q. And when adolescence ends, is that the end of brain
16 development?

17 A. No, the brain develops over the course of the life span,
18 simply put.

19 Q. Okay. Moving back toward the present, you're aware that
20 Mr. McCain has been incarcerated since he was 17 years old.
21 During the course of your clinical interview of Mr. McCain,
22 not your testing, but your interview of him, did he describe
23 to you the circumstances of his incarceration?

24 A. Yes, he did.

25 Q. Can you elaborate on that for the Court?

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WILLIAM BUDD**140a** DIRECT EXAMINATION

1 A. Sure. My impression of his experiences while incarcerated
2 were ones that started off right after that were really
3 really, again, chaotic, I'll use the word, tumultuous. And
4 he, by his own admission, was not easy to manage, not easy to
5 deal with, was not -- you know, he was not a model prisoner,
6 up to and including just more kind of benign violations or
7 infractions, like refusal to eat, let's say. Up to straight,
8 you know, fights with a weapon, right? Much more serious
9 ones.

10 Q. So he was forthcoming with you about those facts?

11 A. Yes. Yes.

12 Q. And had he not revealed those facts to you, would you have
13 known them?

14 A. No.

15 Q. Because you don't have records from the prison that you
16 reviewed in order to determine that he had had these
17 behavioral issues?

18 A. That's correct.

19 Q. Okay. Did he describe any -- did he tell you that he had
20 been held at any time in solitary confinement?

21 A. Yes.

22 Q. Do you have any idea how often he was held in solitary
23 confinement?

24 A. No, I don't recall. I mean, I remember talking about it,
25 but as far as the specifics, how long it went on and how many

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1 times, I don't recall.

2 Q. Is there a fair amount of research in the psychological
3 community on the impact of solitary confinement on the mental
4 health of people held in solitary confinement?

5 A. We can call it solitary confinement, you could even just
6 say like lack of exposure to other people, right? At that
7 point you're kind of getting like old school going back to
8 Maslow's hierarchy of needs, so like above actual physical
9 safety, like in other words, keeping yourself alive, human
10 contact, you know, reciprocity of human experience is
11 essential.

12 Q. During his discussions with you about his prior
13 infractions, did you observe any insights on him having
14 attained any insights or having attained any understanding of
15 the consequences of those kinds of infractions on his
16 well-being while in prison?

17 A. Yes. In fact, so lots of people could have insight,
18 right, but insight that does not translate to action is, well,
19 just insight. Right? But at one point, and I do remember
20 specifically, and I think you quoted it in the report, where
21 he realized like, okay, these behaviors are getting me nowhere
22 unless my goal is to, you know, have full attention of these
23 maximum security prisons on me in a way that I'd rather not.
24 And that he realized that if I stop behaving this way, and I
25 think the way he said it was they took the management variable

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1 off of me. Right? In other words, like they're going to
2 leave me alone, and I can kind of almost fly under the radar,
3 if you will.

4 Q. Is it fair to say that psychologically that that reflects
5 a degree of maturation?

6 A. Oh, yes.

7 Q. Because is it fair to say that that suggests a decrease in
8 impulsivity?

9 A. Well, you look at what's actually in the record previously
10 where he denies culpability/accountability, just on a couple
11 of different occasions in the treatment record. So as far as
12 what I had access to in the records and saw, and him being
13 forthcoming with me and saying hey, here are the things that I
14 did, right? And I realize one day that if I did these other
15 things, that my situation sort of improved to the extent that
16 it could. Improved for me.

17 Q. And because you raised, you used the term culpable, I'm
18 going to ask you about his -- he did describe to you the
19 circumstances of the crime which he committed that has him
20 here in this court today.

21 A. In very broad strokes, yes.

22 Q. During his description of that, did he acknowledge not
23 just that he was involved, but that there was some degree of
24 moral culpability that he recognizes and feels?

25 A. Oh, sure, yes.

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1 Q. Did he describe you to having received any kind of mental
2 health assessment or treatment at the Bureau of Prisons?

3 A. Yes. Shortly after incarceration, like after -- in 2009,
4 2010, somewhere in there, but I did not have those records.

5 Q. Right. Did he describe to you an ongoing course of mental
6 health treatment for him?

7 A. No.

8 Q. We've talked broadly about the difference between -- well,
9 actually I don't know that we've talked about the difference,
10 but we've made reference today to mood disorders and
11 personality disorders. Specifically in your professional
12 opinion, does Mr. McCain currently display features of any
13 mood disorder or characterological disorder?

14 A. There were indications of anxiety for sure, just sort of
15 free-floating general anxiety. There were other indications
16 of possible trauma, posttraumatic stress. And I think as far
17 as the anxiety component went, I attached a provisional to
18 that, again saying like, well, we kind of need to watch it
19 over time. There's only so much I can get from these couple
20 of visits.

21 And then the diagnosis of ADHD I felt was origin supported
22 in the historical diagnosis. Yeah.

23 Q. And then characterologically personality disorder --

24 A. Personality, right, so personalitywise he displayed a
25 behavior, signs, symptoms, features that were sufficient

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1 criteria for antisocial personality disorder.

2 Q. So when we talk about mood disorders like anxiety or
3 depression or PTSD, bipolar disorder, those are conditions
4 that are often, but not always, treated with a combination of
5 medication and clinical therapy, correct?

6 A. That's correct.

7 Q. Are there medications to address personality disorders
8 generally?

9 A. Not as such, no.

10 Q. So explain why that is.

11 A. So mood disorders are ones that we would look at as being
12 not necessarily transient, but they can come and go in phases,
13 they can be episodic. And what we really look -- and the
14 symptoms that make up whatever that condition is, kind of
15 pulls away from the middle, the person's -- whatever their
16 middle is. Medications are designed to reduce the severity of
17 that pull away from the middle, reduce the impact that it has
18 on the person's day-to-day functioning.

19 Now, with a personality disorder, really with all of us
20 here, we have aspects of our personalities that are some
21 aspects of our personalities are adaptive and helpful, and
22 others are less so, right? We all have that, let's be clear.
23 With the personality disorder, the scale is sort of tipped in
24 one direction where there are more maladaptive or less helpful
25 features or characteristics of that person's way of being.

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1 They may or may not recognize it. Usually it's -- usually
2 they don't recognize it right away, which again, we kind of
3 see in the record.

4 As far as treatment, I mean, there are some medications
5 that can be helpful, but it's usually because there's a
6 co-occurring mood disorder with a personality disorder, so it
7 helps to stabilize things. But there's nothing really for the
8 treatment of personality disorder as such.

9 Q. And so if, for example, as a management strategy, a school
10 or a prison prescribed an antipsychotic medication to someone
11 with a personality disorder without a mood disorder for which
12 that medication was an appropriate prescription, would that be
13 helping things?

14 A. Probably not. No.

15 Q. So if someone like Mr. McCain, who does not have a
16 diagnosed history of psychosis, had been prescribed Risperdal,
17 that was probably not going to assist him in modulating his
18 behavior appropriately?

19 A. That's right.

20 Q. When someone has --

21 THE COURT: May I interrupt, just so I come back to
22 it later. Would it make it any worse?

23 A. It could. It could. I mean, any medication could make
24 things worse for anybody if the prescribing provider has not
25 made sure that they won't have a -- there's not a

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1 contraindication. For example, some medications are
2 contraindicated in heart conditions, on the purely physical
3 level. On the personological or characterological level it
4 can -- there's some medications that, for example, treatment
5 for ADHD is a good example actually, and I talk about this
6 with my patients all the time, where stimulants like Ritalin
7 and Adderall and so forth in people who have conditions like
8 anxiety or depression, can actually heighten the emotional
9 responsiveness. So in the case of depression, you might
10 experience spontaneous sobbing, crying, tearfulness, just
11 totally out of the blue, or it can make existing anxiety that
12 much worse than somebody who has a pre-existing condition. It
13 can increase irritability, right, lower the floor of
14 frustration tolerance.

15 So in my clinic, for example, I'm very hesitant, if I see
16 somebody who has hints of ADHD and a mood condition, I'm very
17 cautious, I default towards not prescribing those kinds of
18 medications for treatment of ADHD, and trying to use
19 behavioral management strategies instead.

20 Q. So is it fair to say that there -- when someone does
21 suffer from a personality disorder of any kind, that those
22 require more intensive clinical involvement than someone who
23 might have a low level mood disorder that can be medically
24 managed?

25 A. Most definitely.

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1 Q. In your review of Mr. McCain's adolescent records and his
2 description to you of what has been -- what kind of mental
3 health treatment has been available to him in his time in the
4 Bureau of Prisons, are you satisfied that he has engaged in
5 all of the available interventions to assist him in managing
6 his personality disorder?

7 A. If there are or were interventions available, then I
8 didn't know about them. So no.

9 Q. Okay. So but there -- but are there interventions that
10 can -- whether in the penological system that he's -- the
11 community of the prison that he's a part of now, or in the
12 wider world, are there interventions that you believe can
13 assist Mr. McCain in managing the symptoms of his personality
14 disorder?

15 A. Yes. And, in fact, this is an area that is fairly -- I
16 wouldn't say popular in the research, but in the clinical
17 arena we have a lot of psychologists and psychiatrists out
18 there that are -- you know, they paid for their shoes by
19 working with incarcerated individuals all over the country.
20 And there are all kinds of pilot programs that are constantly
21 in the works, you had grant-funded studies, et cetera. This
22 is not just the United States, this is the world over. The
23 prison, the way things are set up in an ideological sense,
24 this is about rehabilitation, right? And so that's a natural
25 area of focus for healthcare workers.

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1 Q. So am I right that there is -- there are new programs and
2 new research studies under way to establish the efficacy of
3 dialectical behavioral therapy in prison populations?

4 A. That's correct.

5 Q. Explain for the Court what dialectical behavioral therapy
6 is.

7 A. To be clear, I am not a --

8 Q. Understood.

9 A. -- dialectical behavioral therapist. But this is a
10 treatment methodology that was first conceived by Marsha
11 Linehan, in the late 70s -- don't quote me on that -- but it
12 was developed specifically for the treatment of borderline
13 personality. And the overarching goal is to help take what
14 characterizes borderline personality, which is sort of these
15 diametrically opposed worlds where a person sort of vacillates
16 between extremes of overly valuing someone, and then
17 demonizing them the next minute, and sort of pulling things
18 towards the middle, increasing stability, reconciling these
19 differences. That's it in a nutshell.

20 Q. And that is a very clinically-intensive treatment
21 protocol, correct?

22 A. Yes.

23 Q. When we call it dialectical, it's because there is
24 extensive conversational involvement between the counselor and
25 the treating person, and often a group of people being

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1 treated.

2 A. Absolutely. And the counselors themselves are very -- I
3 guess you'd say hard line about who they bring in for
4 treatment, and how -- making sure that they're an appropriate
5 fit. And understanding the nature of it, because it is
6 intensive.

7 Q. And are you aware that there are dialectical behavioral
8 treatment programs in the Bureau of Prisons?

9 A. I'm not aware of any in the Bureau of Prisons
10 specifically.

11 Q. But if there were, and I -- I would like the Court to take
12 judicial notice that there are dialectical therapy programs
13 available in the Bureau of Prisons, that are specifically
14 focused on incarcerated individuals?

15 A. Yeah. Yes.

16 Q. Would that be an environment where you would anticipate
17 Mr. McCain could obtain significant benefit?

18 A. It would be an environment where the potential is there
19 for benefit, yes.

20 Q. Are there other kinds of coping skills mechanisms or
21 treatment protocols that you would recommend for someone like
22 Mr. McCain to be involved in?

23 A. Yes. And specifically there -- the -- an area of benefit
24 for Mr. McCain would be one that focused on, as you put it,
25 coping strategies and skills, effective thinking skills,

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1 problem solving strategies, where a group setting that's
2 facilitated by a counselor, inmates learn to develop
3 management strategies for conflict resolution, right, they
4 learn to call upon each other for social support, right? And
5 these are geared towards -- a lot of times geared towards
6 individuals that have impairments in executive functioning.
7 We see a disproportionate number of inmates that have these
8 impairments in executive functioning. Whether it's somebody
9 whose developmental course led them that way, or later in life
10 they begin to develop executive deficiencies. And so by
11 nature, they are at a disadvantage when it comes to problem
12 solving, reasoning, management, and tend to be more impulsive,
13 right? So in these training programs they learn how to
14 control these impulses, identify those and so forth. Some of
15 the data is potentially really useful.

16 Q. In your review of the literature, are you aware of any
17 empirical studies of the impact, the neurocognitive impact of
18 incarceration on either adults or juveniles?

19 A. As far as the cognitive impact, like -- not -- I would say
20 I would look at it more in terms of a developmental
21 perspective, cognitive ability as being sort of discrete a
22 little bit. Cognitive ability is like what you know, you
23 know, exactly what you can do or what you might do. And --

24 Q. So to clarify, you're saying the literature has focused
25 more on the impact on executive functioning than on cognitive

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1 functioning?

2 A. Right, right, right. Cognition is fairly fixed.

3 Q. Okay.

4 A. Right. But the way we go about applying the -- applying
5 what we know, that is flexible, that's plastic. And that's
6 the part that takes place during adolescence, right? These
7 new connections being made and so forth are based on the --
8 again, the nature versus nurture kind of thing, you're
9 predisposed to a certain thing, you have the brain that you
10 have, but up to a point. Because it is shaped by your
11 environment and the people that you come into contact,
12 parents -- family, I should say, family and friends being the
13 people in our environment that help shape our decision making,
14 right?

15 And so in the prison system, in particular with youth --
16 so adults are faced with a challenge of adopting to the prison
17 system, which is pretty large, right. But in youth,
18 adolescence, there's the additional challenge of okay -- well,
19 I say additional challenge -- they haven't met the
20 prerequisites if you will, they don't have -- their brain is
21 not developed to the point where they can apply strategies,
22 right, like they're still in the learning phase. It would be
23 no different if I went to like a day of flight school and you
24 threw me in the cockpit and said okay, see you later. I could
25 do a couple things perhaps, but that would be really limited.

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1 And I'd be in trouble.

2 Q. And so you don't have the benefit of having had the
3 opportunity to empirically test Mr. McCain from time he was 17
4 to the time that we're sitting in this courtroom today, but is
5 it fair to say that his development as an adolescent was
6 likely negatively impacted by his presence in the prison
7 environment since he was 17 years old?

8 A. Yeah. And strictly speaking, empirically, on testing, his
9 cognitive functioning, everything is really quite normal. And
10 with even some above normal kind of a verbal sort of problem
11 solving with words, if you will, reasoning abilities. But
12 when it comes to the executive, the only observed deficits
13 really were on executive functioning. So he looked like this
14 sort of like hard wired, if you will, predilection or
15 disadvantage that would make it more challenging than someone
16 without those deficiencies.

17 THE COURT: Miss Blazer, let me ask a question or
18 two.

19 MS. BLAZER: Certainly, sir.

20 THE COURT: We've kind of gotten away from this point
21 a little bit, but we're close to your earlier testimony
22 regarding the dialectical behavior technology programs.

23 Miss Blazer said she wants the Court to take judicial
24 notice of the fact those programs exist in federal prisons.
25 And I'm sure she'll help me with that, because I don't know

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1 anything about them. But I thought you said you weren't aware
2 of them or did not know about that; is that true?

3 A. In the Bureau of Prisons system specifically, but there is
4 a corrections institution modified version of dialectical
5 behavioral therapy that I know does exist, just not strictly
6 speaking through the Bureau of Prisons, was what I meant when
7 I said that. So there is a modified version.

8 THE COURT: What do you mean by that? Is it an
9 outside consultation, or people come into the prisons on an
10 as-needed basis, or what are we talking about?

11 A. You know, I don't know if it is a contract kind of basis
12 if they bring somebody from the outside in, or if they take
13 existing treatment providers and train them. But dialectical
14 behavioral therapy is something that requires intensive
15 training after you get your degree. You kind of go off to do
16 a lot of continuing education and workshops, ongoing workshops
17 on it. They have their own kind of dialectical behavior
18 certified therapists.

19 THE COURT: Let me ask you this. In your report, and
20 again, I'm talking about page nine, in terms of treatment
21 considerations, I might be jumping ahead, but I need to know
22 this information. You say Mr. McCain's responses indicate he
23 does indeed desire to make changes to his life. Any
24 successful intervention or rehabilitation could be beneficial
25 in reducing chances of behavior infractions while

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1 incarcerated.

2 How about list for me the interventions or rehabilitations
3 protocols that you're talking about in that sense.

4 A. So the executive functioning training, the coping
5 strategies and model training specifically was one thing that
6 I would target. Like I mentioned when adolescents go into the
7 system, they are removed from any chance of not -- well, let's
8 say influence from peers that are not incarcerated, right?
9 They only have this. And what we know is that if you put
10 me -- if I'm incarcerated and you put me in a room of people
11 who have other disruptive behavior conditions or antisocial
12 tendencies, then the odds are that those are the tendencies
13 and choices and so forth that I'm going to adopt as well,
14 right?

15 THE COURT: That's why Job Corps didn't work and the
16 rest of those problems, I understand that. What I want to
17 know is what exists in the prisons that you would point to if
18 you were writing a letter to the warden telling us what would
19 be helpful to this particular man, other than giving me a
20 general idea of what the problem is, what programs or
21 interventions can you specifically point to that would be
22 understood would be available in the prisons?

23 A. I think the acronym is ETS, effective thinking
24 strategies -- don't hold me to the exact name -- but that's
25 one manualized group treatment modality that is targeted, to

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1 my recollection, was created and targeted for younger
2 individuals going into the system, specifically for those
3 reasons, because of the deficiencies in executive functioning,
4 the continued poor decision making. So I think that's the
5 name of it. I could --

6 MS. BLAZER: Your Honor, it might be helpful for me
7 to present Dr. Buddin or the Court with the two programs I am
8 familiar with.

9 THE COURT: Please do that.

10 MS. BLAZER: Okay. So the Bureau of Prisons lists
11 two programs that make reference to both cognitive processing
12 therapy and DBT. The first is called the Resolve program, and
13 I have the Bureau of Prisons documentation on this. And if I
14 might just read it into the record.

15 "The Resolve program is a cognitive behavioral program
16 designed to address trauma-related mental health needs of
17 inmates. Specifically, the program seeks to decrease the
18 incidence of trauma-related psychological disorders, and
19 improve inmates' level of functioning. In addition, the
20 program aims to increase the effectiveness of other
21 treatments, such as drug treatment and healthcare. The
22 program uses a standardized treatment protocol consisting of
23 three components. A psychoeducational workshop called Trauma
24 In Life, a brief skills-based treatment group called Seeking
25 Safety, and a dialectical behavioral therapy, cognitive

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1 processing therapy and/or skills maintenance group, which are
2 intensive cognitive behavioral treatment groups to address
3 persistent psychological and interpersonal difficulties."

4 That's one.

5 And the Resolve Program is mostly available for women, but
6 is available in two facilities in the Bureau of Prisons for
7 men in Colorado, and in Danbury, Connecticut.

8 And the other program that makes reference to these types
9 of treatments is the Steps Toward Awareness, Growth and
10 Emotional Strength program, at acronym STAGES. That program
11 is a residential treatment program for inmates with mental
12 illness -- serious mental illnesses and a primary diagnosis of
13 borderline personality disorder, which Mr. McCain does not
14 have.

15 But in terms of what is available in the program, the
16 program uses an integrated model which includes a modified
17 therapeutic community, cognitive behavioral therapy and skills
18 training. The program is designed to increase the time
19 between disruptive behaviors, foster living within the general
20 population or community setting, and increase prosocial
21 skills.

22 So I think perhaps it would be helpful now to ask
23 Dr. Buddin if those are the kinds of interventions, if made
24 available to Mr. McCain, that would assist him.

25 THE COURT: Go ahead and comment on that, Doctor, if

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1 you feel you can.

2 A. So components of the STAGES program sound closer to kind
3 of a model intervention, if we had to pick one of the two, I
4 would say for sure. Especially with the group skills
5 training, I mean, establishing coping methods.

6 And even the dialectical behavioral model to some extent,
7 because of the nature of both -- actually both antisocial and
8 borderline conditions are interpersonal relationships are -- I
9 don't know how to say it -- I mean chaotic, tumultuous. They
10 crash and burn on a routine basis, because the person is
11 incapable of or -- I say incapable -- but doesn't have the
12 appropriate means to communicate with people in the way that
13 you and I do. Emotional reciprocity, understanding,
14 appreciating the way that other people think and feel. And so
15 those are some of the target areas in the dialectical model or
16 treatment for antisocial.

17 Q. And the STAGES program, Dr. Buddin, indicates that it's
18 typically conducted over 12 to 18 months. Is that enough time
19 to begin to see the impact of such a program?

20 A. I would like to think so. I mean, in a clinical setting
21 we would want to start to see some kind of change around a
22 six-month period. I mean, I, for one, always would track, you
23 know, with appropriate means track my patient's progress so we
24 could see together and target which areas to work on. So
25 yeah.

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1 Q. In terms of --

2 MS. BLAZER: I'm shifting gears a little bit, unless
3 the Court has other questions?

4 THE COURT: Before you leave that. Tell me what is
5 good or what's bad about the Resolve program. I asked because
6 there are two available right now in male facilities. The
7 STAGES program there is none available presently in male
8 facilities. So let's go back over the Resolve program.

9 MS. BLAZER: I actually think the STAGES is available
10 to men. I could be wrong.

11 THE COURT: I thought you just said it's only
12 available to women.

13 MS. BLAZER: No, I said the Resolve program is
14 predominantly available for women; the STAGES program is
15 not -- is actually for men.

16 THE COURT: I had it backwards then. Thank you. I'm
17 sorry. I appreciate you pointing that out.

18 MS. BLAZER: Yeah, according to Bureau of Prisons'
19 most recent document in 2016, the STAGES program is available
20 at two facilities, both of which house male inmates.

21 THE COURT: And that's Colorado and Danbury?

22 MS. BLAZER: That is Colorado and Terre Haute.

23 Do you have any other questions on that, Your Honor?

24 THE COURT: No, thank you.

25 BY MS. BLAZER:

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1 Q. So Dr. Buddin, it's no secret that a defense lawyer hopes
2 her client won't be determined to have a personality disorder.
3 If she could choose, a defense lawyer is always going to
4 choose that her client not have a personality disorder, is
5 that fair to say?

6 A. Yes.

7 Q. And that's because personality disorders are more
8 difficult to treat than mood disorders, in most cases.

9 A. That's correct.

10 Q. As a treating -- as a diagnostician and as a treating
11 clinical psychologist, is it fair to say that a diagnosis of a
12 personality disorder is indicative of a specific destiny?

13 A. No. No.

14 Q. So are there people who live among us, work with us and go
15 to school with us, who manage personality disorders every day?

16 A. Absolutely. And just a quick kind of roll back to what I
17 was saying earlier about how aspects of our personalities are
18 adaptive and others not so much so, it is absolutely the case
19 that with some personality disorders, like they fit very well
20 into areas. In the armed services, for example, there are
21 probably a disproportionate number of people, some of whom I
22 have seen, that have obsessive compulsive personality
23 disorder, which is not the lock checking thing that you hear
24 about, it's a hyperrigidity in terms of how they execute their
25 day-to-day lives. So when they get out of the military, it

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1 doesn't work so well, and they want to go back in, because it
2 works with their lock step way. So it's just one example of.

3 Q. So if I could rephrase that, I do hear you to say that
4 even in the face of what qualifies as a disordered set of
5 personality symptoms, people can find environments in which
6 those disorders are more favored than in other environments?

7 A. They can find it, I mean, we all sort of naturally
8 gravitate towards strengths and weaknesses, whether or not we
9 know it. They may chance to end up in that area.

10 And I think, too, just in terms of the treatment part of
11 it, by the way, something that's important to point out, one
12 of the reasons that they're -- that personality disorder,
13 people with personality disorders we say are difficult to
14 treat, is because a lot of times individuals diagnosed with
15 personality disorders are remanded to treatment. They don't
16 show up themselves because they don't necessarily see that
17 there's a problem, they don't think that there's anything
18 wrong with their behavior. Certainly you see that in the
19 record historically with Mr. McCain. However, the person I
20 saw, again, as we talked about, acknowledged his actions,
21 acknowledged, you know, moral responsibility, culpability for
22 these things. Something that is not typically what we expect
23 to see in somebody with antisocial personality disorder, and
24 augers for a more positive prognosis because of that.

25 Q. Represents some adaptations?

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1 A. Right, right. Because if you have a person in therapy,
2 he's only there because they have to be, then as soon as they
3 don't have to be, they're going to drop out. That's why it's
4 difficult to treat. Right? Not because the condition itself
5 is resistant to treatment, but because the person hasn't made
6 it over that hump of saying I need -- I would benefit from
7 treatment. That's the part, and it's a distinction with an
8 important difference, I think, it is not immutable, it is just
9 that we need to get that person to where they're on board, the
10 person themselves buys in.

11 THE COURT: Let me, if I may.

12 MS. BLAZER: Sure.

13 THE COURT: Let's bring it to bear on the facts at
14 hand. We have a young man who has antisocial disorder, was
15 diagnosed, if my recollection from the records is correct, at
16 a very young age.

17 A. He was given -- not a full diagnosis, if we're being
18 strictly technical, it was given a V code, which is a
19 diagnostically -- is conditions for consideration. Means
20 maybe one day it shows up in the diagnostic manual as a
21 condition, but for right now it is not an official diagnosis.

22 I was -- in fact, I'm the only person that's diagnosed him
23 as having an antisocial condition. He was previously
24 diagnosed with oppositional defiant disorder, adjustment
25 disorder, which I never got a clear sense of why that was. I

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1 would have said -- my review of his records, I think he met
2 criteria for conduct disorder, which is a level up from
3 oppositional defiant disorder. The infractions are more of an
4 egregious nature, tend to be more in line with violation of
5 civil rights of others, that kind of thing.

6 I saw more of -- I saw that it's that. And that fits with
7 the -- that's sort of the diagnosis of antisocial personality
8 disorder when you're a child, if you will.

9 THE COURT: Okay. Now, throughout school he had
10 problems with all kinds of different other, to varying
11 degrees, including not just disruptive behavior, but fights
12 and things of that kind, violent encounters. And later in
13 life, you know, while still an adolescent, he actually
14 committed murder. Now, he had not, at that time, been
15 diagnosed as antisocial disorder.

16 A. That's correct.

17 THE COURT: But obviously he had one. Would you
18 agree with that?

19 A. It's cases like these that where in the research we say
20 maybe the way we're -- the diagnostic criteria for personality
21 disorders needs re-evaluation. Because strictly speaking, a
22 personality disorder can not be diagnosed in an individual
23 under the age of 18. Period. And so that's why I say the
24 conduct disorder would be the appropriate --

25 THE COURT: Well, in your field you have to do that,

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1 and I appreciate it.

2 A. Yes, sir.

3 THE COURT: You've educated me in that regard. Thank
4 you.

5 BY MS. BLAZER:

6 Q. And if I may follow up on the judge's question, part of
7 the reason that -- and it is an arbitrary date, 18.

8 A. Right. Right. Yeah.

9 Q. But part of the reason that the APA has landed on that
10 date is that there are things, like oppositional defiant
11 disorder and conduct disorder, that through interventions
12 treatments and natural maturation, do not develop, later in
13 life, into full-blown personality disorders, correct?

14 A. Correct.

15 Q. So not every child who exhibits the features of ODD or
16 conduct disorder at 12 or 14 or 16, is later diagnosed by a
17 clinical psychologist as having an antisocial personality
18 disorder or borderline or any of the other personality
19 disorders?

20 A. That's correct.

21 Q. Okay. I beg the Court's indulgence just a moment; I'd
22 like to confer with Mr. McCain, if I might.

23 (Discussion held off the record.)

24 THE COURT: Before you switch subjects -- I'm going
25 to let you consult as long as you want, but I want to ask him

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1 a follow-up question.

2 MS. BLAZER: Go ahead, Judge.

3 THE COURT: Okay. You said that at some point
4 Mr. McCain has exhibited some acknowledgment of these things.

5 I guess what I'm trying to ask is, when did that come about?

6 I know in your exam of him you found it from the history, but
7 if you can pinpoint it better than that for me, would you do
8 so?

9 A. If I recall, without any notes or report in front of me, I
10 want to say it was -- I think it was when he was at Terre
11 Haute that, as he had recounted it to me, that he had had this
12 kind of, you know, ah-ha moment, right, that eureka, I got it,
13 hey, if A then B. I think it was sometime around there.

14 THE COURT: And that was when it affected his
15 management within the facility, and he understood, if he was
16 to get out of that management that he didn't like, then his
17 behavior would have to change, and that's when the light bulb
18 came on.

19 A. Yes, sir as. I understood it.

20 THE COURT: Go ahead.

21 MS. BLAZER: Pardon me, Judge, Mr. McCain has very
22 good handwriting, but different than mine, and my eyes are
23 older every day.

24 BY MS. BLAZER:

25 Q. Is it fair to say, based on the research in psychology in

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1 general and in neuropsychology to the extent that that's
2 applicable, that adolescence has certain features that are
3 distinctly different from adulthood?

4 A. Yes.

5 Q. So is it fair to say that self-regulation is one of the
6 ways in which adolescents are different from adults?

7 A. In -- yeah. And I think I'd mentioned so many words
8 earlier, in terms of impulsivity versus inhibition, right,
9 that gets to the self-regulation of behaviors.

10 Q. And is that then further impacted by a heightened
11 sensitivity in adolescents to external influences, peer or
12 other adult pressures, that kind of thing?

13 A. Yes.

14 Q. And -- I'm sorry?

15 A. I think you said heightened. I would just say simply
16 influence.

17 Q. Sensitivity to any kind of influence.

18 A. Yeah.

19 Q. And is it fair to say that adolescents, no matter --

20 THE COURT: Wait a minute. This is where the leading
21 might make a difference to me.

22 MS. BLAZER: Okay.

23 THE COURT: So ask the question as best you can pose
24 it, and let me get his answer.

25 BY MS. BLAZER:

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1 Q. Can you describe to the Court to what extent developmental
2 state -- the developmental stage of adolescence affects the
3 judgment of even highly intelligent adolescents.

4 A. It really -- I would -- I would add to that, in parallel,
5 say a fifty-fifty share, that the development -- so the
6 developmental phase certainly has an influence on our
7 behaviors and what we are capable really of doing in terms of
8 applying knowledge. The influence part of it, right, is the
9 other 50 percent, right? It's the people to whom we're
10 exposed, again, family, friends, teachers, so on. It's the
11 people to whom we're exposed.

12 Now, we are susceptible, highly susceptible during
13 adolescence to the influence of peers. That's the phase in
14 life where a peer influence becomes more important than
15 parental influence, for a certain kind of decision making
16 anyways.

17 And so if I'm an adolescent normally developed, slightly
18 behind, et cetera, and I am constantly exposed to a clique, a
19 group, whatever, that's making poor decisions, let's say,
20 right, then that's going to shape my decision making. I am
21 not going to be capable of -- I don't have the hardware quite
22 yet to reason out necessarily a better way.

23 I'm using broad strokes here, but --

24 Q. Is there any research that establishes the impact of an
25 adolescent's -- the age of an adolescent's peer group, like an

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1 age disparity between an adolescent and older peers? Is
2 there -- I am not familiar, is there any research on that
3 subject?

4 A. Not -- not that I'm aware of. You mean if I'm like 13,
5 hanging out with 18 year olds kind of thing?

6 Q. Exactly.

7 A. Not -- nothing I can think of right off the top of my
8 head. I mean all that said --

9 Q. In fairness, I thought of it off the top of my head, so I
10 didn't -- it wasn't something we were prepared to discuss
11 today.

12 A. Yeah. All that said, if 18 year olds are hanging out with
13 13 years olds on a social basis, there's probably something
14 not good is going to come of it.

15 Q. Because even within adolescents, there are differences
16 between children in early adolescence and children in later
17 stages of adolescence; is that fair?

18 A. A 17 year old hanging out with a 13 year old than a 40
19 year old hanging out with a 36 year old, right? In that way,
20 there's a very very wide discrepancy between those two.

21 Q. To what extent, if any, does your observation that
22 Mr. McCain has some above average thinking, cognitive skills,
23 affect your prognosis of his ability to be treated for the
24 personality disorder you diagnosed?

25 A. Certainly when we talk about who is or is not a good

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1 candidate for therapy, writ large, there are a few things that
2 can go into that. One, and the primary one is the person has
3 to seem to be intrinsically motivated to change. That's the
4 exclusionary criteria, if you will, or inclusionary.

5 Intelligence plays some role in it, it -- you don't -- you
6 would never -- I would never say that someone -- I would never
7 not refer someone for therapy simply because I thought they
8 were like low average IQ. Maybe that's a better way to
9 contrast it.

10 That said, somebody with better verbal reasoning abilities
11 is -- maybe is going to have an easier time wrapping their
12 head around concepts and treatment faster and with fewer
13 repetitions. I think that's where it would really play into
14 it. That's really -- somebody who has more cognitive wattage
15 will require fewer exposures, fewer repetitions, and learn
16 more information over a shorter period of time. So that would
17 be the advantage it would confer.

18 Q. Understood.

19 MS. BLAZER: One more moment, Your Honor.

20 Q. Dr. Buddin, after you conducted your evaluation of
21 Mr. McCain, do you recall contacting me or anyone else with
22 regard to a specific concern about his well-being?

23 A. Yes. I called both -- well, both you and the Al Cannon
24 Detention Center, and spoke with whomever the attending was at
25 the time.

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1 Q. Attending physician?

2 A. I believe it was -- if it wasn't, it was a mental health
3 counselor. Then that person was going to convey the message
4 to the head counselor there. And forgive me, I don't remember
5 their names. I know I have it documented. Because there were
6 indications of increased predisposition to future suicidal
7 thinking or planning or action. And it was enough -- I mean,
8 almost any indication is enough for me to take action. And
9 given that he was an inmate, it's not like a patient that I
10 could call and bring in.

11 Q. When you say there were indications of suicidality, can
12 you give an example for the Court?

13 A. Hopelessness, reports of hopelessness, like endorsing
14 things like I don't think things will ever improve for me,
15 right, there's no chance that my situation will change.

16 Q. Would a sense of hopelessness that gives rise to greater
17 risk of suicide, affect someone's ability to succeed in
18 treatment, no matter how motivated?

19 A. I would say somebody with a sense of hopelessness probably
20 is not motivated. In fact, in -- to jump to a parallel track
21 here, when we talk about capacity for decision making in
22 healthcare decision making, depression, and this is something
23 not lot of people are really aware of, but depression, if it's
24 severe enough, can actually render someone temporarily
25 incapacitated. Because if they're hopeless enough, they will

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1 refuse medical treatment, even if it's life saving. And
2 practical treatment, they'll just say, well, why bother.
3 Right? So yes.

4 Q. Okay. Do you know what kinds of interventions are
5 available at the Al Cannon Detention Center when someone is
6 considered a risk of -- higher, greater risk of suicide?

7 A. I'm sorry to say I don't know, no.

8 Q. Fine. What would happen in a clinical setting with
9 somebody like you, if you -- if in reviewing someone's
10 clinical report and their testing report, you determined that
11 they were at a higher risk of suicide than the average person?

12 A. So I'll be doing this later today, in fact. The -- I have
13 to conduct a suicide risk assessment, which starts with just
14 face-to-face asking the person, which I did at the interview,
15 but asking the person, hey, over the past couple of weeks have
16 you thought about suicide? But in that moment I would say,
17 where are you right now? These test results say that they're
18 pointing in this direction of possible suicidality; where are
19 you with that? Have you been thinking about it, have you made
20 plans, if they have been thinking about it, like how would you
21 do it, right? And people, when they are suicidal, when they
22 are thinking about it, are generally pretty forthcoming.

23 Then depending on the nature of where they are, determines
24 the course of your next step. I mean, it may be something
25 that you have to call family members and get them to take any

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1 weapons out of the house, if they really are highly suicidal,
2 I mean, if it's something where it's an emergency, then you
3 call the cavalry, right, I'm going to call 911, like anybody
4 else would, and get it taken care of.

5 Q. And once the immediate observation of the heightened risk
6 is triaged, are there interventions, follow-up interventions
7 that are appropriate?

8 A. Yes. And they're quite simple really. One of the biggest
9 and most successful ways to do it is just keeping in contact
10 with the person, keeping an open channel. Again, depending
11 where you triage it, I might contact that person a few times
12 the same day. Or you know, maybe just once or twice the
13 following week just to follow up with them.

14 Q. And you would speak to them?

15 A. Yes, yes. Yeah.

16 Q. And communicate with them and create, attempt to create a
17 rapport with that person.

18 A. Hopefully I would already have one established at that
19 point, if I'm seeing somebody and so forth, but minimally, I'm
20 going to be very candid with them, pull no punches, and just
21 let them know that hey, yeah, I am calling because I actually
22 do care about the outcome of this thing.

23 Q. Right. Understood.

24 MS. BLAZER: Just one more moment, Your Honor. I
25 have no further questions, Your Honor.

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1 THE COURT: Thank you. Mr. Secor, how long do you
2 think you'll be?

3 MR. SECOR: A little bit, Your Honor.

9 MR. SECOR: Yes, Your Honor.

10 THE COURT: Okay.

11 MS. BLAZER: Yes, sir.

12 Mr. McCain has a number of items that he's been referring
13 to. Since we'll be back here before any other hearings, is it
14 all right for him to leave that material?

17 (A recess was held at this time.)

CROSS-EXAMINATION

19 BY MR. SECOR:

20 Q. Good afternoon, Dr. Buddin.

21 A. Good afternoon.

22 Q. We've gone over a lot of territory this morning and early
23 afternoon, and I will try not to completely go over in detail
24 every single thing that you've said, but some of it I need to.

25 A. Of course.

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1 Q. Your report is entitled forensic neuropsychological
2 evaluation.

3 A. Yes, sir.

4 Q. And are you board certified in forensic psychology?

5 A. I am not.

6 MR. SECOR: And, Your Honor, I'm not asking these
7 questions to challenge --

8 THE COURT: That's fine, go ahead.

9 MR. SECOR: I just want to delve into it.

10 THE COURT: Go ahead and complete the record.

11 BY MR. SECOR:

12 Q. Is it correct that forensic psychology is a subdiscipline
13 of psychology, commonly made up of licensed psychologists who
14 specialize in applying psychological knowledge to legal
15 matters?

16 A. Yes, that's correct.

17 Q. And are you board certified in any specialized field of
18 psychology?

19 A. Not yet.

20 Q. And how many forensic evaluations have you performed for
21 the government?

22 A. For the government, for like a federal --

23 Q. Federal or state.

24 A. Good question. Probably somewhere around ten or 12.

25 Q. Okay. And is that the bulk of your practice, or is

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1 that --

2 A. The bulk of my practice is clinical work just seeing
3 patients.

4 Q. And you performed a forensic evaluation in this case,
5 right?

6 A. Yes, sir.

7 Q. And what exactly was the referral issue? And I believe
8 you discussed it, but just basically what was it?

9 A. I was contacted by Miss Blazer, who had stated her -- that
10 she had a client who was going for a re-sentencing hearing,
11 and that she wanted to get a sense of his current
12 psychological and neuropsychological status, just where he was
13 functionally.

14 Q. Okay. And what were the -- real quickly, what were the
15 specific issues that you addressed?

16 A. So with neuropsychological functioning, can be a variety
17 of things. But I got assessments or measurements of
18 intellectual capabilities, like problem solving, thinking,
19 novel problem solving as well as executive functions, memory
20 functioning, attention, concentration. All of these in
21 service of, like I said, determining what his current brain
22 functioning status was, where he was compared to the rest of
23 the population. And whether or not there were any
24 deficiencies that emerged from the evaluation that might speak
25 to where he was developmentally, or as late adolescence at the

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1 time of the commission of this crime, as well as the
2 psychological status. And that just means psychopathology,
3 which could include any number of conditions, depression,
4 anxiety, PTSD, as well as personality disorders.

5 Q. And would you agree that one of the issues that could be
6 addressed is the issue of recidivism?

7 A. Recidivism? Yes.

8 Q. And future risk, dangerousness?

9 A. Yes, although the -- could have been considered, I was not
10 asked to -- like sometimes I've been asked to do a violence
11 risk assessment, for example, for somebody who may be up for
12 parole. And that's a central question. As it was put to me
13 by Miss Blazer at the time she contacted me, recidivism was
14 not necessarily a major concern, because as I understood it,
15 this was a without parole sentencing.

16 Q. And so it's true that you didn't actually assess him for
17 future violence?

18 A. That's correct. It is -- violence, there is a -- one of
19 the measures I gave in the personality assessment inventory
20 does include a violence potential indicator as part of its
21 output. So that is like a *de facto*, you know, whether or not
22 I want it, when I put in the scores, the computer gives me
23 output and that's always part of it. But it wasn't something
24 that, you know, I did in order to get that.

25 Q. And that's an actuarial methodology built into that?

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1 A. That's correct.

2 Q. Did you do any risk assessments that are designed
3 specifically to assess violent risk?

4 A. No.

5 Q. And that would be like the Violence Risk Appraisal Guide
6 Revised; are you familiar with that?

7 A. Not that one specifically, no. And the violence risk,
8 violence risk assessment is interesting business anyways, but
9 as an aside discussion, but as far as the ability of those
10 measures to predict future violent behavior, when you look at
11 them sum total, like a meta-analysis of violence risk
12 assessment measures, it comes in at about a coin toss a lot of
13 times.

14 Q. But you didn't do any type of specific risk assessment?

15 A. That's correct.

16 Q. And you didn't do a like an historical clinical risk
17 management test; are you familiar with that --

18 A. No.

19 Q. -- that would be along the same lines? Okay. And I'm
20 going to now go back to basically some of your testimony and
21 try to hit some high points, if you don't mind.

22 A. Sure. Yes, sir.

23 Q. That we've cleared up for -- you did exactly what she
24 asked you to do, but you haven't factored in specifically his
25 future risk of violence?

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1 A. That's correct.

2 Q. And recidivism. Okay. So you're not able to specifically
3 opine on that today?

4 A. I couldn't. I wouldn't have any kind of data to make an
5 authoritative statement. And it wasn't something that was
6 part of our interview discussion, and it wouldn't be -- Right.
7 Right. It wouldn't be something that I would be comfortable
8 with rendering an opinion on right away.

9 Q. Okay. And I'm going to go to your report, that's probably
10 the easiest way, and --

11 A. I will say, if I might, there, along with the -- on that
12 personality assessment inventory that I mentioned earlier, it
13 does talk about -- in there it talks about like potential risk
14 for transgressions, right, infractions and violent behaviors
15 while incarcerated, as compared to the risk rate for other
16 inmates. I just want to throw that -- clarify that.

17 Q. And what were the results; what did you find based on that
18 portion of that assessment?

19 A. The -- it generated an odds ratio that, as I recall,
20 placed him at slightly -- at greater risk for infractions
21 while incarcerated. Not to a degree that was significantly
22 higher, but it was slightly higher risk, as I recall.

23 Q. And would that be consistent with the literature that
24 basically says it's probably three times higher than the
25 average inmate? For risk of infractions?

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1 A. Like the odds ratio I feel was 3.16, if I remember, I've
2 got my report back there, but yes, we translate that as being
3 like three times higher, right, if an odds ratio of three
4 would say three times higher than a coin toss, right? As it
5 was output by that. And I don't remember the rest of my
6 specific interpretation about that.

7 Q. And that ties in with the antisocial personality disorder?

8 A. No. I would not say that specifically, simply because we
9 can't say, like if this person has this, then they are at a
10 three times greater risk. Like it doesn't work like that
11 necessarily. Not so strictly speaking, right?

12 Q. But there would be another way to address, no doubt,
13 doesn't the literature say that?

14 A. A default, right. Sure.

15 Q. Due to his -- it's consist with that diagnosis.

16 A. Yes.

17 Q. Okay. And you list in your report the different items
18 that you -- actually in terms of the test you gave or the
19 procedures you employed, and you also reviewed records of
20 other tests and whatnot that have been done over the years,
21 and you went over it in fairly good detail previously.

22 In terms of the test that you gave the -- you've got
23 listed the Beck Depression Inventory and the Beck Anxiety
24 Inventory. Are there validity scales involved in those
25 particular tests?

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1 A. If you're -- to make sure we're on the same page, validity
2 meaning like it's measuring what it says it measures? Is
3 there built into that? In other words, if he's offering up an
4 inaccurate presentation of himself, is there a way to detect
5 that?

6 Q. Right. Right.

7 A. There are not validity measures built into that, no, sir.

8 Q. So basically you're accepting, pretty much at face value,
9 what he's telling you during the interview and what he reports
10 as he's being tested, in terms of his responses.

11 A. In short, no.

12 Q. Okay.

13 A. There are validity indices built into the PAI. So in
14 terms of assessment, there are two broad categories. One
15 would be symptom validity and the other would be performance
16 validity. Performance validity would pertain strictly to
17 neuropsych testing; symptom validity would be on any measure
18 of self-reported symptoms.

19 In absence of a built-in validity indicator, then the
20 validity indexes from the PAI could be extrapolated and used
21 to apply to other self-reports. So in other words, if he
22 invalidated the PAI, his symptom report, then the remaining
23 self-reports are called into question, even if they don't
24 themselves have validity indicators built in.

25 Q. Right, but getting back to the specific question, the Beck

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1 depression inventory or the Beck anxiety inventory, they don't
2 have validity indices built in?

3 A. That's correct.

4 Q. So how do you know that he simply didn't not give accurate
5 information in terms of that testing and that reporting?

6 A. So I would use the -- in absence of a built-in validity
7 indicator and how do we assess, that I would use the validity
8 indexes that are built into the PAI, and if those are flagged,
9 in other words, if he's responding inconsistently to items or
10 is being overly negative in responding, for example, it
11 invalidates the PAI, then we -- then I would make a statement
12 that says something to the effect -- I would say something to
13 the effect of because of the invalidity of this measure, it
14 calls into question his remaining objective self-reports,
15 including the Beck inventories which you mentioned.

16 Q. Okay. And in terms of going back to report -- you
17 reviewed records in preparation for examining him and
18 preparing your report, and obviously for today. And I would
19 suffice it to say that it looks like, and correct me if I'm
20 wrong, starting at a very young age, at least around eight or
21 nine years old, he started having problems with, let's say
22 society outside of the home, where intervention or actions
23 were being taken. Is that correct?

24 A. That was my understanding, although some of that came from
25 Mr. McCain himself, I think I'd mentioned the record. The

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1 records themselves that I had as far as mental health
2 interventions and treatments went back to 2003.

3 Q. Okay.

4 A. I believe.

5 Q. And --

6 A. But yeah.

7 Q. Roughly how old was he in 2003?

8 A. Eleven.

9 Q. I'm going to refer to his criminal history; it might help.
10 And I believe you indicated you were somewhat familiar with
11 his involvement with the justice system?

12 A. Yes.

13 Q. It looks like he, at least as early as September 2002 at
14 age 11, he became involved with juvenile justice for
15 disturbing schools.

16 A. Um-hum.

17 Q. And age 12 attempted armed robbery, that was in 2003.

18 A. Um-hum.

19 Q. Age 12. And he was sentenced to the DJJ, juvenile
20 justice. Then after he was released, he had problems. Are
21 you aware of the fact that he violated his probation? So that
22 was more negative conduct?

23 A. Not specifically.

24 Q. And what I'm doing, I'm just going to go through the
25 chronology to make sure, or see what you were aware of as you

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1 examined him and what you're reporting today.

2 A. Sure.

3 Q. And August of 2003 a simple assault and battery, he was 12
4 years old. Are you familiar with that?

5 A. I believe I remember I had been given a PSR document that
6 outlined some like past infraction. And to be clear, there
7 were a lot of them, and I don't have that in front of me. But
8 I do remember an extensive list of offenses.

9 Q. I'm going -- if you don't mind, I'm going to go through
10 them.

11 A. Sure.

12 Q. I'll be done fairly soon. He also, for that particular
13 involvement with the court system, got a probation type
14 sentence, and had a violation of probation related to that
15 charge, which is more bad conduct with the justice system.

16 And September of 2004, when he was age 13, he had
17 another -- they don't call them convictions in juvenile court,
18 but an adjudication concerning simple assault and battery,
19 where he had kicked the victim in the head several times, hit
20 him in the eye. Are you familiar with that particular charge?

21 A. Not off the top of my head, no, sir.

22 Q. He also had a shoplifting at the age of 14.

23 So what we've started with, as you could see, as from 11,
24 12, 13, we're now at age 14, another encounter with the
25 justice system as a juvenile. Then again at age 14, he had a

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1 charge that was dismissed in Family Court, but nonetheless
2 another encounter with the justice system.

3 Again at the age of 14, in 2006, an attempted burglary
4 second degree adjudication, and he was sentenced to DJJ on
5 that. And that involved -- Are you familiar with the fact
6 that it involved the dwelling of an individual, that is, their
7 home, in the evening hours.

8 A. Yes.

9 Q. 10:30 p.m. at night?

10 A. I remember reading about that in the Waccamaw mental
11 health records, yes.

12 Q. And then that's at the age of 14. He has another
13 encounter with law enforcement in 2008 at the age of 17,
14 concerning breaking into auto tanks, which is fuel, and grand
15 larceny, which those charges were dismissed, but it was at the
16 same period of time, a few months later, where he was involved
17 with the murder case, the underlying case that we're here
18 today for. Are you familiar with that?

19 A. I'm not.

20 Q. Okay. So that's the -- you're somewhat familiar with that
21 history he's had with the justice system.

22 A. Yes.

23 Q. Okay. And you're familiar, you've reviewed his records,
24 and he's had different psychological reports. But suffice it
25 to say he had the main thing that kept popping up, correct me

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1 if I'm wrong, was the ODD diagnosis, which I believe you later
2 said it in your view was more of a conduct disorder, is that
3 correct?

4 A. ODD showed up in the record, as I recall it, I think one
5 time. Adjustment disorder was the only one that showed up,
6 that I recall, more than once. But otherwise, yes, I would
7 have said conduct disorder, not ODD, yes.

8 Q. And the ODD, what does that stand for, oppositional
9 defiance disorder?

10 A. Yes, sir.

11 Q. So at least those psychologists and examiners believed it
12 was at least that, because that's what they were reported
13 once?

14 A. Right.

15 Q. You're saying.

16 A. As I recall, yes.

17 Q. And then in your view, based on your review of his
18 records, you believe it was actually the elevated conduct
19 disorder?

20 A. Honestly, I remember reviewing all of these things, some
21 of these records, and making a note to myself in the margin of
22 one of them, saying I feel like some of these examiners are
23 pulling punches, in other words, saying something is less
24 severe than it otherwise is, was my opinion. That they
25 were -- which, by the way, in my opinion, was doing a

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1 disservice. When we say that something is less so than is
2 actually the case, we're not helping the situation. Right?
3 And ineffective treatments result, in fact. And that was one
4 of the things that was disturbing to me is it seems -- it's
5 kind of what you're getting at here is it seemed to me that
6 the trail was pretty clear of infractions and so forth, and
7 that he was being undertreated and potentially misdiagnosed as
8 well. Now I wasn't there, I don't know what they had in front
9 of them and so forth, so I can't say. But as I looked at
10 things collectively, right, I mean, I would have said no, it's
11 not oppositional defiant disorder, that's a kid who skipped
12 school every now and again, talks back to teachers and so
13 forth and is disruptive. Conduct disorder is the next level
14 up.

15 Q. Right. Exactly. And that would be attempted armed
16 robbery.

17 A. Absolutely.

18 Q. Burglary.

19 A. Absolutely.

20 Q. These are serious issues. And you indicate you don't
21 believe he was being properly treated, but isn't it true he
22 was receiving some type of intervention going way back to
23 around nine, ten or 11 years old, within the system. Through
24 the schools or through -- Is that correct?

25 A. So yeah, the documented history that I have shows

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1 beginning 2003, Mr. McCain himself told me he was receiving
2 treatment going back to around third grade. But I don't have
3 any specific documentation of that, and can not speak to
4 the -- if there was treatment, I don't know what it was or
5 what they did.

6 Q. But based on the records, you -- that you saw --

7 A. Right.

8 Q. -- at that point going forward, there was at least
9 attempts for treatment for him, correct?

10 A. Yes, that's correct.

11 Q. And multiple locations, different drugs were prescribed.

12 A. Right. All of which, with the exception of Risperdal,
13 were designed for front line treatment of ADHD.

14 Q. And whether they were the right medicine or not, whatever
15 it was that was being prescribed, wasn't working.

16 A. That was what the reports were saying was that the
17 treatments were ineffective, that's correct. Yes.

18 Q. And the intervention by his grandmother wasn't working in
19 terms of trying to correct or modify his behavior?

20 A. I can't speak to that, I don't know what she was doing.

21 Q. Okay. But you do recall, don't you, seeing that some
22 mention of his home life in those reports?

23 A. Well, yeah, just in the strict sense of home life and
24 being responsible for a child. An intervention or things that
25 I would put in a different categories. An intervention, for

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1 example, as I would put it, would be one where if let's say
2 when he was at Waccamaw Mental Health Center, if I were a
3 counselor there, I would bring in a -- the caregiver,
4 guardian, parent, whomever was responsible, and would say
5 okay, you know, when you go home in between sessions this week
6 and next week or whatever it is when we're meeting, you know,
7 Edward and I worked on those things, and what I need y'all to
8 do collectively as family is A, B, C, right, a specific
9 prescribed behavioral intervention perhaps. But there was no
10 documentation of that. So if there was intervention taking
11 place at home, I have no knowledge of it.

12 Q. But there was at least somebody from the family at least
13 involved where they're showing up to appointments, or they're
14 being referenced in the --

15 A. I don't know. I remember reading one Waccamaw note that
16 said Edward was a no show, I called grandmother, I had spoken
17 with her, she assured me that he would be here, but he no
18 showed. So from that specific instance there was a
19 disconnect, you know, there was communication between Edward,
20 grandmother and provider, but as far as like it was a phone
21 call, so in other words, he was supposed to be there, and that
22 grandmother was saying in that instance, I don't know where he
23 is, that means she was not with him. So --

24 Q. But it was Edward that didn't show, right?

25 A. Right. You got it. Yes, sir.

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1 Q. Yes. And I'm looking at your report here on page three,
2 where the first full paragraph in that page three of your
3 report, I believe it's referenced technically as Exhibit C
4 with the materials, filed by Miss Blazer, the -- you discuss
5 how Mr. McCain became aware of these Miller re-sentencings
6 happening, he heard it through the grapevine through the
7 prison system, other defendants were talking about it.

8 A. He had been reading about it.

9 Q. Right. And you indicate that during the period of time
10 encompassing his indictment, original trial, he said that he
11 did not know what he was doing, and he's now seeking to use
12 every possible avenue at his disposal during a re-sentencing
13 hearing. Do you recall putting that in your report?

14 A. Yes.

15 Q. And the report, further in that same page, the next
16 paragraph, he talks about, and you've already testified about
17 it earlier today about his behavior since he got to prison, he
18 was sentenced in 2010 on this case that we're here today for,
19 and he told you, self-reported to you about his behavior at
20 the prisons and Bureau of Prisons, and I believe you indicated
21 it was from the benign all the way to the more serious,
22 including violence, correct?

23 A. Yes, sir.

24 Q. And he self-reported that he was, in fact, in a knife
25 fight around 2012 or 2013, is that correct?

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1 A. That's correct. As I understood it, yes.

2 Q. Okay. Which without precisely doing the math, it's -- he
3 was roughly 21 to 22 years old at that time, 2012, 2013. Born
4 1991.

5 A. Right, right, right.

6 Q. And he went on to tell you, isn't that correct, that he
7 decided he wanted to change his behaviors, and I believe you
8 testified it was maybe around what prison? Remind me.

9 A. Off the top of my head, Terre Haute was the one that
10 popped into my head. That may or may not be accurate, but
11 that was what popped into my head.

12 Q. And he figured out that if he changed his behavior
13 somewhat, they would kind of loosen up on him and change his
14 category of supervision.

15 A. That was how he had characterized it to me, yes.

16 Q. And do you recall if that knife fight was after that or
17 before?

18 A. Don't -- I remember him saying that like the -- I think
19 that knife fight was like the last major infraction, or most
20 recent one, something along those lines.

21 Q. Yeah, I'm just -- if you don't mind, I'll look -- I'll
22 read specifically from your report at page three. This is in
23 the third paragraph about a halfway down.

24 "He was involved in one additional fight, one additional
25 physical fight after this." So this is the after, according

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1 to what you have written, this was after they took the
2 management variable off of him, and he was transferred to a
3 medium security prison. And then you go on to say he was
4 involved in one additional physical fight shortly after
5 leaving Leavenworth, when he was in Terre Haute, Indiana.

6 So, in fact, isn't it correct, based on your report, that
7 what he self-reported to you was that he got into a knife
8 fight after already supposedly learning how to control his
9 behavior. Is that correct?

10 A. That's correct.

11 Q. Then he went on to discuss other things concerning this
12 situation.

13 Now, your report goes on, and let's just go straight to
14 the -- I think the main topic here, or should be the main
15 topic here, and that is your diagnosis of him as being
16 antisocial personality disorder, as having that diagnosis.
17 And you've discussed today what you believe that entails for
18 him, correct?

19 A. Yes.

20 Q. And what type of prognosis you have for him concerning
21 that diagnosis. If you don't mind, can you -- and I've got a
22 laundry list here, but can you tell us what antisocial
23 personality disorder is technically, as DSM-5 states?

24 A. Failure to conform to lawful or social norms would be one
25 of the areas. The lack of -- inability to benefit from -- in

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1 the face of like repeated arrests, for example, right, like
2 repeat violations. Impulsivity.

3 Q. Okay.

4 A. Failure to plan ahead. Or some of the features that we
5 looked at, and lack of remorse is one of the other kind of
6 categories and criteria. Some of those things.

7 Q. If you don't mind, I'll call out some of the laundry list
8 here and you comment on them or disagree with me. But is it
9 correct there's four diagnostic criterion for antisocial
10 personality disorder?

11 A. Yes.

12 Q. And that would be, and I'll go into more detail in a
13 minute, but the first one would be disregard for and violation
14 of others' rights since age 15, as indicated by one of the
15 seven subfeatures. And there's seven listed.

16 Then the other three diagnostic criterion are the person's
17 at least 18 years old, and you mentioned that already today?

18 A. Right.

19 Q. The next one would be conduct disorder was present by
20 history before age 15?

21 A. Not conduct disorder was present, it's evidence of conduct
22 disorder.

23 Q. Okay.

24 A. Not a diagnosis of conduct disorder.

25 Q. All right, thank you for that.

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1 A. It is a distinction with a difference, for sure.

2 Q. But at least we're on the same page as far as this laundry
3 list.

4 A. You're absolutely spot on, yep.

5 Q. And then the fourth would be the antisocial behavior does
6 not occur in the context of schizophrenia or bipolar disorder?

7 A. Right, which is the differential part, yeah.

8 Q. And then in terms of these sub features and that goes back
9 to the item number one, disregard for and violation of others'
10 rights since age 15. The laundry list includes failure to
11 obey laws and norms by engaging in behavior which results in
12 criminal arrest or would warrant criminal arrest.

13 Correct?

14 A. Yes, sir.

15 Q. Lying, deception and manipulation for profit or self-
16 amusement. Next would be impulsive behavior. Next would be
17 irritability and aggression, manifested as frequently assaults
18 others or engages in fighting. Another one is blatantly
19 disregards safety of self and others. Another is a pattern of
20 irresponsibility, and another is lack of remorse for actions.

21 Did you take those obviously into account when you
22 diagnosed him with this disorder, correct?

23 A. I did.

24 Q. And let me back up just a little bit. Some of the
25 literature at least indicates that the -- I don't know if

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1 precursor is the right term, but a precursor often can be the
2 oppositional defiance disorder or the next higher level,
3 conduct disorder, that can lead ultimately to this?

4 A. Which is why it's listed as part of the criteria as
5 evidence of, exactly right.

6 Q. Evidence of.

7 A. Right. Right.

8 Q. And isn't it -- and you spoke some earlier today, and I
9 think you kind of drifted off into a discussion of personality
10 disorder borderline. I think Miss Blazer asked you some about
11 that, you talked a little bit about it. But he wasn't
12 diagnosed with borderline personality disorder?

13 A. Not according to any of the records that I had available
14 to me, no.

15 Q. Right. And then in the course of that discussion I think
16 there was some mention, correct me if I'm wrong, about nurture
17 and nature and how that plays into diagnoses of disorders.

18 A. Well, not -- not how nurture and nature play into a
19 diagnosis so much as the real world behaviors that people
20 exhibit. But --

21 Q. So let me ask you this. Is it debated by behavioral
22 scientists whether or not antisocial personality disorder is
23 primarily genetic or through environment social learning?

24 A. So to my knowledge, no one thinks that it's strictly due
25 to A or B. And to more broadly answer your question,

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1 behavioral scientists debate about everything. But the
2 combination of the two is -- again, broadly speaking, the
3 combination of the two things is always the correct answer.
4 Right? I mean, we can be predisposed to something in the same
5 way that we can have a family history of hypertension, for
6 example, and show some of those characteristics, does not mean
7 that we're going to die of a heart attack at an early age.
8 Because what we do about it, how we intervene in the interim,
9 can mitigate that risk, right, lower that risk. In the same
10 way that correct diagnosis as a child of ODD or conduct
11 disorder would raise flags and we'd say hey, this is at
12 increased risk, and guess what, the literature says that most
13 effective interventions are to bring the family on board,
14 right?

15 We're effectively, in an individual intervention, what I'm
16 saying is I'm expecting this adolescent who has shown problem
17 behaviors, to take our therapeutic intervention home and
18 change the world by himself, which is unrealistic. Can it
19 happen, I guess, yeah, but I would not expect it to happen.

20 So column A, column B.

21 Q. Right. And whether or not that happened, that is,
22 appropriate or proper intervention years ago with him, today,
23 the Court has before him a defendant who has been diagnosed
24 with antisocial personality disorder.

25 A. Yes, sir.

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1 Q. Whether or not you know if that could be -- could have
2 been prevented or not, you don't know that?

3 A. Done is done.

4 Q. Right. And you mentioned, I believe earlier in your
5 testimony about how when you were describing personality
6 disorders and someone's personality, that we all have aspects
7 across the board, different aspects of our own personalities.
8 Some people are able to modulate and have more control, the
9 negative is better than others, and obviously people with
10 antisocial personality disorder have more difficulty reining
11 things in. Those are my lay terms.

12 A. Recognizing them to begin with, yeah.

13 Q. Right. But isn't it true that the diagnosis of antisocial
14 personality disorder, this is way beyond the norm, that is,
15 like, well, a person has one aspect of their personality they
16 have a little difficulty with. I mean, this is way off the
17 charts, is that correct? And that's again a layman.

18 A. Sure.

19 Q. I'm asking you that because isn't it true that the --

20 A. If I understand your question -- I'm sorry.

21 Q. And I was just going to follow up that I'm basing that
22 question on the fact that hasn't it been determined that only
23 .02 percent to 3.3 percent of the population fit into that
24 diagnosis?

25 A. For lifetime base rates?

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1 Q. Per --

2 A. Per DSM?

3 Q. Antisocial personality disorder.

4 A. Right, lifetime base rate for antisocial personality disorder is found in the general population according to DSM,
5 yes.

6 Q. So this is a rare diagnosis, this is not -- I know you
7 mentioned earlier about they're amongst us in the community.

8 A. Right. So the base rates as reported in DSM, right. Is
9 it rare? Well, if you look at base rates in most other
10 conditions, they're not far discrepant from those base rates
11 you just read to me. And we define, if we look at -- and I
12 don't mean to get too technical here with -- I used to teach
13 statistics, so my brain always goes there. If we look at what
14 we consider rare and pathological, by contrast people will
15 say, okay, like people have a fear of giving speeches and
16 stuff like that. Well, we see that about 50 percent of the
17 population, is that a diagnoseable thing? Not if it's
18 50 percent of the population. But when we look at standard
19 deviations from the mean, we get two percent or fewer of the
20 population, then that gets, as you put it way off the charts,
21 that's when we're in the way-off-the-charts territory, and
22 that does apply to a lot of conditions.

23 The trick with personality disorders as opposed to
24 nonpersonality disorders, just to be clear, is something along

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1 the lines of what I pointed out earlier, is so much of the
2 time we only see them present to treatment when they are
3 remanded to treatment. The trick with identification or
4 the -- with the base rates, is that that's the number of
5 people we for sure know about. By contrast, people with
6 depression will routinely show up to treatment of their own
7 volition. Right? And so we have a better sense of the base
8 rates. So -- and by the way, the .004 to 3.3 is pretty -- as
9 far as like certainty goes, is a pretty wide range, believe it
10 or not.

11 But it's uncommon for sure. And, and I would add to that,
12 that the behaviors, and this is where I wasn't sure
13 necessarily what you meant with off the chart, but the
14 behaviors associated with antisocial personality disorders are
15 more pronounced, more, you know, out there. Like those are
16 the more kind of off-the-chart things. We don't see those
17 kinds of behaviors. There's not a lot of gray area between
18 antisocial and many other conditions as there would be with
19 anxiety and depression, for example. So they are pretty far
20 out of the charts.

21 Q. Well, a demarcation, wouldn't it be, would be no respect
22 for others, in terms of violence and those types of behaviors?
23 A. Great example. Right. Right. We don't see that in a lot
24 of other conditions.

25 Q. Which are exhibited throughout his history.

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1 A. That's correct.

2 Q. Even up until, based on his self-report to you, 2012-2013.

3 Knife fights.

4 A. Well, I don't know that I could -- but yeah, it would be
5 fair to say that. So yeah, the behaviors are associated with
6 the condition, like you're saying, it's like they are -- we
7 take notice. Right? They're more apparent, they're usually
8 called much more attention because of the severity of them or
9 the frequency at which they occur and the frequency at which
10 they occur.

11 Q. And you indicated just a few minutes ago, well,
12 depression's more readily diagnosed because it's more, you
13 know, up front and center, but isn't it true that the -- like
14 antisocial personality disorder, that manifests itself by
15 people going to prison for committing violence crimes. So it
16 does come to surface.

17 A. Not -- yeah, this is one of those two-by-two matrix things
18 where it's diagnosis of antisocial personality disorder, yes,
19 no; go to prison, yes, no. We have people in every box.

20 Q. Okay. And speaking of the self-reporting about the knife
21 fight, I believe you were asked earlier, you haven't reviewed
22 any prison records of his conduct --

23 A. That's correct.

24 Q. -- since he's been at the Bureau of Prisons, including
25 after the knife fight.

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1 A. Correct.

2 Q. And just so you know, I don't have any --

3 MR. SECOR: And I'll make the Court aware, I don't
4 have those records in my possession, Your Honor, we requested
5 them, just very recently requested them. So I would only ask
6 him hypotheticals about the existence of any other conduct.
7 I'm not going to -- obviously he doesn't know, I don't know.

8 THE COURT: Okay.

9 MR. SECOR: Just so the record is clear on that
10 issue.

11 MS. BLAZER: And I don't object to that, because it's
12 a hypothetical question to the extent that the data supports
13 one or the other of his answers. I just ask that we address
14 it fully.

15 MR. SECOR: Yeah.

16 BY MR. SECOR:

17 Q. And so based on his conduct in prison, he self-reported to
18 you about various conduct, bad conduct, including a knife
19 fight. If you were to be made aware of additional bad conduct
20 in prison, in addition to what he told you, this happened
21 before or even after he talked to you and was interviewed by
22 you, would that affect your view of treatment options that you
23 discussed in great detail, treatment options for him earlier.
24 Would that affect your view of how promising a candidate he is
25 for treatment?

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1 A. A prognosis, sure. Sure. If somebody says to me like,
2 hey, Doc, I want to get better, and I say well, you've
3 committed 15 crimes since you said you had this revelation,
4 you know, back to back to back to back, the behavior doesn't
5 match up with the stated intent.

6 Q. Right. And so now I'm going to ask you about his self-
7 reporting to you about when he, I think mentioned earlier when
8 he saw the light bulb go off or whatever those types of terms,
9 we've already discussed the fact that he told you the light
10 bulb went off, he realized if he behaved, he would get better
11 treatment from the prison itself in terms of how tightly they
12 managed him. But yet he said, after that, he still has got in
13 a knife fight.

14 MR. SECOR: Beg the Court's indulgence.

15 Q. What is the basis -- Let me ask this way. Isn't it your
16 view of him having treatment potential, isn't it based on that
17 self-reporting that he made to you?

18 A. Well, there's one other consideration, and we're again
19 without records, we're all in the same boat on this. But as I
20 sort of took a step back, even in the absence of records, one
21 thing that did come to my attention was that -- and, of
22 course, if I'm misstating factual information, please do let
23 me know. But one thing that came to my attention was that he
24 was in solitary confinement, he was at maximum security and
25 now is no longer, those things no longer apply, those things

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1 are no longer true, as I understand it.

2 Q. Okay.

3 A. And so the way that I -- in the absence of records, I look
4 at -- and I do this with patients all the time -- I look at
5 environmental evidence; what does the environmental evidence
6 say, right? And so his self-report in that sense is
7 consistent with the decrease in terms of the security and
8 placement and how often he's in maximum security or confined
9 solitary confinement. Those two things do seem to be
10 consistent with one another.

11 Q. And what I'm getting at is you're giving a somewhat rosy
12 picture of him being able to be treated, even though he has
13 antisocial personality disorder, despite his very well
14 documented history before and including his time in prison, at
15 least that part by self-report, right?

16 A. Right. Right. Yes, sir.

17 Q. And I mean, the literature, at least a good bit of it,
18 would say the opposite, wouldn't it?

19 A. If I've been giving a rosy picture of things, then let me
20 correct that. Making a prognosis about success in treatment
21 is difficult in any regards. And like as I mentioned earlier,
22 personality disorders, as we say, are difficult, more
23 difficult to treat because -- largely because the person
24 that's there is often there by no choice of their own. They
25 may have been remanded there or coerced in some way. And they

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1 tend to lack any acknowledgment that there's a problem to
2 begin with. So right away there's a barrier for treatment,
3 where you will find in the literature routinely, as you will
4 in real life, that we have a high drop-out rate in treatment
5 for people with antisocial personality, and a high degree of
6 return to those behaviors.

7 So as far as prognosis for treatment goes for people
8 diagnosed with antisocial personality disorder in general, the
9 prognosis is less favorable than for people with many many
10 many other conditions. Almost any other condition, let's say.

11 So don't take it to mean I'm -- I don't think I've given
12 an overly favorable prognosis. But what I am saying is that
13 because of what the -- the environmental evidence is out
14 there, he says he wants to do better, yet he gets in a knife
15 fight afterwards, anyone who has ever seen treatment for
16 like -- I do not mean to compare the two, so please do not
17 hold me to that, that one-to-one comparison -- but anyone who
18 has ever known anybody who has gone through treatment for
19 alcoholism, for example, the rule, and not the exception, the
20 rule is that that person will slip. At least one time. At
21 least one time, and go back to drinking.

22 The same is true for any other number of behaviors,
23 because behavioral change, in general, is very difficult.
24 We're creatures of habit. And so we want to -- we've been
25 functioning this way and it's hard to break out of that.

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1 So we don't abandon treatment for alcoholism because the
2 person slips. Nor do we say that this person is definitely
3 going to recover, right? We say, well, we're going to try,
4 we're going to apply the best treatment method available, and see
5 what happens. And it's something that in large part it is up
6 to the person that is on the other side to engage in that
7 treatment meaningfully, to acknowledge they have a problem,
8 and to want to do that, to want to get better.

9 So going off of his self-report, which saying you want to
10 get better and get in a knife fight are discrepant. They're
11 inconsistent with each other.

12 When we look at the specific instances, when I backed up
13 and looked at the larger picture of they said this was going
14 to happen, and we see security levels decreasing in terms of
15 how much management is on him. So that's what I was looking
16 at.

17 Q. And did you look at the manipulative aspect of that
18 disorder that he has, as coming into play possibly in his
19 discussion with you about him seeing the light?

20 A. When I was in the room with Mr. McCain on the day of --
21 before I went in, Miss Blazer had mentioned his history of
22 violent behaviors, right? And as I was in there -- so I was
23 wary of that. And as I was in there, I certainly had an --
24 even going in, you know, it looks like, sounds like, walks
25 like, et cetera, possible antisocial condition. And was aware

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1 as I met him, he was open, forthcoming, didn't seem to be
2 holding anything back and seemed of affable, really, if
3 anything. And in the back -- in the back of my -- back of my
4 mind, but also the forefront, I was aware to what extent is
5 this individual potentially trying to be manipulative?

6 Because I'm aware of that as a part of the condition.

7 That's -- there is a motivation, even in the absence of
8 antisocial personality. There is motivation for people, not
9 just Mr. McCain, but in his position, to look, sound and
10 act in a manner that is consistent with what they want as a
11 means to an end.

12 So it's not exclusive to antisocial personality. We call
13 it positive impression management. Anybody and everybody is
14 capable of that. But yes, I am -- I was absolutely aware of
15 the manipulative nature of the condition, specifically on the
16 date of the assessment.

17 Q. And in that regard, he did tell you he was seeking every
18 possible avenue to address his legal situation?

19 A. Yes.

20 Q. He was aware of what was at stake in terms of the sitting
21 down and being evaluated by you. He had an awareness?

22 A. As far as my understanding, he was aware of that, yes, of
23 possible outcomes.

24 Q. Okay. It wasn't an 11 year old sitting down in an
25 examination conducted by a psychologist because his teacher or

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1 parent or whoever sent him there and he really didn't know
2 exactly all the ramifications?

3 A. I wouldn't take the word of an 11 year old.

4 Q. But do you understand --

5 A. This is a fully formed adult who is saying these things.

6 Q. And who knew the evaluation was being done.

7 A. Yes. And which is -- I review with him specifically at
8 the outset of the evaluation the nature of it, why I was
9 there, who I was, the role I was playing in the evaluation and
10 so forth, yes.

11 Q. And in terms of there were, you know, discussion earlier
12 about dialectical behavior therapy and different things that
13 were indicated that might be of benefit to help him. Isn't
14 most of that based on studies involving borderline personality
15 disorder?

16 A. It was created specifically for the treatment of
17 borderline personality disorder.

18 Q. And so correct me if I'm wrong; what you're basically
19 telling the Court in terms of that behavior, dialectical
20 behavior therapy, and as it's being applied in some of these
21 programs in the prison, whether it's Resolve or STAGES or
22 others, that that model that's being used for like borderline
23 personality disorder. The hope is that it also has a -- given
24 the fact that it's also a personality disorder, not the exact
25 same kind, there will be benefit as well for somebody standing

APPENDIX I
WILLIAM BUD~~206a~~ - CROSS-EXAMINATION

1 over here who has antisocial personality disorder, even though
2 the studies weren't designed for APD?

3 A. It's possible. And I would point out that the benefit,
4 regardless of the outcome of the hearing -- let's say, since
5 we're talking hypotheticals, that he remains incarcerated and
6 the sentencing doesn't change, a reduction in impulsive,
7 aggressive, et cetera, behavior -- better management behavior
8 in general is beneficial not only for him, but for like, for
9 example, the staff of the prison, right?

10 And so if we could take steps to reduce the potential of
11 that happening, violent actions against people that are in the
12 facility with him, whether staff or other inmates, would that
13 not be an appropriate -- would we not want to do that? And
14 that's kind of what I'm driving at, if that makes sense.

15 Q. Exactly. But that's not getting into the issue of future
16 risk of violence or recidivism, if he were to be outside the
17 prison population. You're hoping for good behavior while he's
18 in prison.

19 A. Well, like I said, it was a hypothetical addressing
20 specifically if he remained there. Now, in terms of like
21 getting out of prison and so forth, I mean, look, as I
22 approach this thing and understood it, like that wasn't really
23 a factor, not in the immediate sense, right? I mean, we were
24 preparing for a hearing. And like I said, whether he gets out
25 or not, I'm unbiased in this regard.

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WILLIAM BUD~~207~~^{Ma}- CROSS-EXAMINATION

1 Q. And I'm just asking you questions.

2 A. Yeah.

3 Q. And in terms of treatment for antisocial personality
4 disorder, some of the literature indicates that there really
5 is no effective treatment, is that correct? I say some of the
6 literature.

7 A. Yeah, right. And some of the literature indicates even if
8 you use the -- if you're unaware of the diagnosis, right, or
9 don't appreciate it, that in some cases treatment could even
10 haven -- could have an adverse impact, or they could be more
11 manipulative perhaps. Some treatment. Then there are some
12 things that say, well, behavioral management strategies might
13 work. So yes.

14 Q. And isn't it true that basically I guess one of the
15 seminal studies, correct me if I'm wrong, about attempts at
16 treating the behavior of violent offenders, are you familiar
17 with the Samenow and Yochelson's work concerning cognitive
18 behavioral therapy, and the fact that it was just marginally
19 effective? A test?

20 A. I'm roughly familiar with it. It's been a long time. But
21 yes, I have some sense of that, yes.

22 Q. So marginal at best, and I'm saying that to kind of
23 balance it out with the statement that you agreed to that some
24 of the literature flat out says there is no effective
25 treatment period.

APPENDIX I
WILLIAM BUD~~208a~~ - CROSS-EXAMINATION

1 A. That's right.

2 Q. Okay. And the study I just mentioned would be considered,
3 correct me if I'm wrong, similar work. I mean, that's one of
4 the main studies, and it's only saying marginal.

5 A. Right, right.

6 Q. I mean, if there was a more seminal work that had even
7 better results, I think it would be reported. I'm not aware
8 of it; you might be. Okay.

9 A. Yeah, studies are a whole other thing. But the
10 effectiveness of -- and I think I even have that article. But
11 the effectiveness of treatments, there are different ways to
12 look at it and so forth. But I think one of the things that's
13 an important take away is we want to know if a treatment has
14 an adverse or sort of flips the script, if things are made
15 worse by a particular treatment modality, which definitely we
16 see. Sort of emotion-based problem solving for people with
17 antisocial personality disorder or problem solving strategies
18 in incarcerated individuals has an inverse impact, it makes
19 things worse. So that means we want to stay away from that,
20 right?

21 For things that are marginally effective or more
22 effective, then we turn our attention towards that and say
23 okay, how can we improve the effectiveness, or at least we
24 know which direction in which not to head, or which -- in
25 which we should head, right, focus our attention.

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WILLIAM BUD~~209a~~ - CROSS-EXAMINATION

1 We tend on the -- there's always a bridge, or a gap to be
2 bridged between research and clinical application. That's
3 another story for another day. But we tend to say that like,
4 okay, if something is marginally effective, do we abandon that
5 treatment because it's only marginally effective? Without
6 paying attention to what does marginally effective mean in
7 this case. Do we not try it because it's only marginally
8 effective? And the answer is, in the absence of more
9 favorable treatment, we would do that one.

10 It gets back to what is available in the Bureau of
11 Prisons. Has everything been done. To my knowledge, with the
12 information I had available to me, it doesn't look like
13 anything had been done since his incarceration.

14 Q. Okay. And I'll move on. And I think this, I believe, is
15 my last area.

16 You talked about obviously one of the issues is the
17 development of the brain, through adolescence and into
18 adulthood, and when does the brain basically -- it never stops
19 working or changing, but when it finishes development. Is
20 that one of the things you discussed earlier?

21 A. Yes.

22 Q. And that's, you said, roughly 18 to -- correct me if I'm
23 wrong -- 25, somewhere in that range?

24 A. Somewhere in that range.

25 Q. And the defendant, as you understand it, was about 17 and

APPENDIX I
WILLIAM BUD~~210a~~ - CROSS-EXAMINATION

1 a half, 17 years six months give or take when the crime
2 occurred in this case?

3 A. That's right. Yes, sir.

4 Q. And when you discussed earlier, talking about how you were
5 questioned about how environmental nuances, peer influences,
6 are in an exaggerated form basically during adolescence in
7 terms of peer pressure and the inability to deal with it
8 perhaps as well as an adult would?

9 A. A limited capacity, right.

10 Q. And the analogy you used was -- or one of them -- was
11 about there's a lot of difference, I think you made an analogy
12 of a 14 year old and an 18 year old hanging out together, but
13 that's definitely not a good thing. Am I repeating that
14 correctly?

15 A. Right, in terms of characterizing, you know, is it a big
16 difference in development between, you know, 14 and 18 or
17 something along those lines, right, right, compared to the
18 developmental differences we see in later age groups, right?
19 When we look at -- to get a little more specific, when we look
20 at -- let's take the specific neuropsych measures that I used.
21 We score those, those are age-referenced norms, meaning that
22 we take the person's performance, the raw score kind of
23 performance, if you will, and compare it to other people of
24 similar developmental period as marked by age. When you look
25 at youth, the normative groups that we use, shift by three-

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WILLIAM BUD~~211a~~ - CROSS-EXAMINATION

1 month intervals, from age like four through age eight, nine,
2 all right? So in other words, an eight year two month old is
3 looked at developmentally different from someone who is eight
4 years 11 months.

5 When we get up into the 20-, 25-, 30-year range, we look
6 at them in five- and ten-year blocks, because development has
7 slowed substantially. And it begins to -- cognitive function
8 begins to decline and some areas.

9 So that's what I was kind of driving at there with, you
10 know, we can sort of appreciate, if you imagine it, right, we
11 can appreciate the differences between a 13 and 18, or a 14
12 and 18 versus a 36 and a 40 year old, in terms of just how
13 they would get along and the appropriateness of it and so on
14 and so forth.

15 Q. But for purposes of this case and the underlying crime
16 that you're dealing with, when he was 17 and a half years
17 old --

18 A. Yes.

19 Q. -- the analogy of a 14 year old being influenced by older
20 folks is not as good as an analogy would be with a 17 and a
21 half year old who is arguably being influenced, and I say
22 arguably --

23 A. Right.

24 Q. -- by older folks. Correct? There's a difference.

25 A. Right, right, right. And I would add -- I would even add

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WILLIAM BUD~~212a~~ - CROSS-EXAMINATION

1 to that, that not all 17 year old -- not all people who are 17
2 years old who are, you know, subject to adverse or otherwise
3 negative influences do those things, right?

4 Q. That is, commit murder.

5 A. Right. Or commit crimes of any -- again, this is one of
6 those two by two, we have people in every box, right? So I
7 didn't mean to get too far off the rails, but I did want to
8 just add to that, yeah.

9 MR. SECOR: Your Honor, I believe that's all the
10 questions I have.

11 THE COURT: All right. Miss Blazer?

12 MS. BLAZER: I have a very short list of follow-up
13 questions.

14 REDIRECT EXAMINATION

15 BY MS. BLAZER:

16 Q. Mr. Secor asked you about whether you conducted a violence
17 risk assessment, and you answered you had not.

18 A. Not like formally.

19 Q. Right.

20 A. Right.

21 Q. You didn't because you weren't asked to.

22 A. Correct.

23 Q. Violence risk assessments are tools that assess -- attempt
24 to assess future dangerousness, correct?

25 A. Correct.

APPENDIX I
WILLIAM BUDDIN ~~213a~~REDIRECT EXAMINATION

1 Q. And a significant factor in violence risk assessments is
2 the age and timing of the violence risk assessment, correct?
3 So if Mr. McCain were facing a parole hearing where the
4 determination was going to be made, are you going to be
5 released in the next six months, a violence risk assessment
6 conducted within the six-month window of a parole hearing
7 would tend to be more accurate or more meaningful than a
8 violence risk assessment conducted with regard to an as yet
9 unforeseeable or unforeseen release. Is that fair to say?

10 A. Right. Right. Yeah. And as we get older, like the risk
11 is mitigated. Same is true for sexual offenses, but yeah.

12 Q. So could you conduct -- could you expect to conduct a
13 violence risk assessment of someone entering prison for a
14 lengthy period of time, and then do that risk assessment again
15 at some later date, and see change?

16 A. Like I mentioned, violence risk assessment is tough to
17 begin with, and when you put a latency between any two points
18 of any prediction, right, the word "time" is a dependent
19 variable -- an independent variable -- the reliability of that
20 prediction goes down over time.

21 Q. Okay. In your report you mentioned that the last reported
22 incidents of violence by Mr. McCain involved self-defense, is
23 that correct?

24 A. Yeah, as I recall, yes.

25 Q. Based on his report --

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WILLIAM BUDDIN **214a**REDIRECT EXAMINATION

1 A. Um-hum.

2 Q. -- that he volunteered. When considering how to
3 characterize violence, is there a distinction to be made
4 between offensive violence and defensive violence?

5 A. Well, yes. I mean, offensive being the initiation versus
6 response, yes.

7 Q. And you covered this in your description of the two-by-two
8 matrix, but I'm going to ask the question in just a slightly
9 different way. Do all people who suffer from antisocial
10 personality disorder commit acts of violence?

11 A. No.

12 Q. Do all people who commit offensive acts of violence suffer
13 from antisocial personality traits?

14 A. No.

15 Q. You made an analogy to alcoholism, and I think the
16 variation on the premise that you presented that I'm familiar
17 with is that relapse is a feature of recovery?

18 A. That's correct.

19 Q. In the absence of having been offered a well thought out
20 and well planned out set of interventions to develop coping
21 skills, would it be surprising that someone with Mr. McCain's
22 history would continue to encounter situations in which his
23 coping skills were limited and his behaviors were, therefore,
24 not ideal?

25 A. It would not be surprising.

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WILLIAM BUDDIN ~~215a~~REDIRECT EXAMINATION

1 Q. To what extent do successful treatment interventions for
2 personality disorders rely on the participant experiencing or
3 realizing some benefit from the treatment?

4 A. To -- I couldn't quantify it.

5 Q. Okay.

6 A. But broadly, we see that behavioral interventions writ
7 large have a greater success of taking hold when there is a
8 payout. If I can characterize it like that. Where you see
9 like, yeah, if I respond to this person, you know, like in
10 couples counseling, if I respond to my spouse differently, I
11 get a different response, just like I was told would happen.
12 Right? Whatever the different response, good or bad, and they
13 start to realize like, hum, okay, maybe there's something to
14 this. And it reinforces the idea, the construct, the theory.

15 Q. So not always a formal reward structure, but there is an
16 inherent effort and result/payoff that is necessary for a
17 person to remain engaged successfully in therapy?

18 A. Yes. There's going to be a buy in.

19 MS. BLAZER: I have nothing further.

20 THE COURT: Okay. Thank you very much. Mr. Secor,
21 I'll give you one more opportunity.

22 MR. SECOR: Your Honor, I could, but I think we've
23 covered all the ground.

24 THE COURT: Okay. Thank you very much. Doctor,
25 you've been very helpful. Thank you so much. And I know you

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1 have somewhere to be, so you're excused.

2 A. Thank you.

3 THE COURT: Miss Blazer, anything else for the
4 record?

5 MS. BLAZER: No, Your Honor. I think -- I will
6 confer with Mr. Secor as to whether or not he or I intend to
7 file any written memoranda summarizing what we did here today.
8 I think it probably is more reasonable to just incorporate it
9 into the sentencing memoranda that I'm going to get with him
10 about the timing of trying to be ready to bring a full-blown
11 sentencing hearing to you. I know Mr. McCain is eager to have
12 that hearing. The circumstances of being here in Charleston
13 are -- as much as I think the Bureau of Prisons is not an
14 ideal environment in which to live, I can confirm that the
15 Charleston County detention center is less so.

16 THE COURT: I hear you. Y'all confer, get a date and
17 let me know.

18 MS. BLAZER: Yes, sir.

19 MR. SECOR: And, Your Honor, the issue was raised
20 about the BOP discipline records. We're going to continue to
21 follow up on that, and we will -- I don't know if it will be
22 incorporated into the PSR or just as an exhibit at the
23 sentencing, but we intend on having that available for the
24 Court in advance of the hearing.

25 THE COURT: Well, both sides have already agreed that

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1 when they arrive they would be relevant and either side may
2 use them.

3 MR. SECOR: Yes.

4 MS. BLAZER: And to the extent -- I don't know what
5 difficulty Mr. Secor's going to have in getting them, we all
6 have had our fun dealing with the Bureau of Prisons over the
7 years. But I certainly would hope that they would move with
8 alacrity to get those to him, so since that seems to be the
9 remaining item.

10 THE COURT: Okay. Mr. Paradis, do you have anything
11 to add to that?

12 PROBATION OFFICER: Yes, sir, I've been trying to get
13 those records. And when he was removed from the BOP, brought
14 to the Sheriff Al Cannon Detention Center on a writ, I don't
15 know how the BOP system works, but they can no longer access
16 his records. They can't even tell me who his case manager is.
17 Apparently he doesn't know who his case manager is. And
18 without that information, we can't get those records. We've
19 asked him this morning who his case manager was, and he said
20 he didn't know.

21 THE DEFENDANT: If I may say something, Your Honor?

22 THE COURT: Yeah.

23 THE DEFENDANT: In the BOP we don't have a consistent
24 line of communication with those people. It's been 19 months
25 since I've been in Al Cannon Detention Center, and I can't

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1 remember the woman's name.

2 MS. BLAZER: And those case managers do change based
3 on the lack -- every place you go, you get a new case manager.

4 MR. SECOR: But, Judge, we'll follow up in concert
5 with Probation, myself, as well as reaching out to
6 Miss Blazer, if need be. But we might have -- probably end up
7 on my end speaking to counsel for BOP, and see if they can
8 circumvent the situation and expedite.

9 THE COURT: All right. I appreciate that. And if
10 you need me to get involved, let me know. Otherwise I'll
11 leave it in your hands.

12 MR. SECOR: Thank you.

13 THE COURT: Thank you very much.

14 MS. BLAZER: Thank you, Your Honor.

15 THE COURT: We'll be adjourned. Thank you very much.

16

17 (Court adjourned at 1:33 p.m.)

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19

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REPORTER'S CERTIFICATION

3 I, Debra L. Potocki, RMR, RDR, CRR, Official Court
4 Reporter for the United States District Court for the District
5 of South Carolina, hereby certify that the foregoing is a true
6 and correct transcript of the stenographically recorded above
7 proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR

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**IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

EDWARD MCCAIN,)
Petitioner)
)
	CRIMINAL NO.: 2:09-cr-00296-PMD
vs.)
)
UNITED STATES OF AMERICA,)
Respondent)
)

**GOVERNMENTS RESPONSE TO PETITIONER'S 'MOTION UNDER 28 U.S.C. § 2255
TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL
CUSTODY'**

Now pending before this Court is Petitioner's 28 U.S.C. § 2255 motion on the ground that his "8th amendment right against cruel and unusual punishment was violated during the imposition of [his] sentence." In support, he states: "[he] was sentenced to life w/o parole for a crime that was committed when [he] was a Juvenile. The U.S. Supreme Court ruled in *Miller v. Alabama* that giving Mandatory Minimum Life sentences to Juveniles violated the Constitutional Ban against Cruel and Unusual Punishment."

The relief requested in the motion is that "[Petitioner] would like to be given relief from [his] life sentence and given a reasonable chance of re-entering society."

With the understanding that Petitioner's 28 U.S.C. § 2255 motion is limited to seeking resentencing in light of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and does not involve any claim that Petitioner's conviction is invalid, the Government does not oppose Petitioner's motion. The Government agrees that the

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Petitioner is entitled to a new sentencing proceeding that complies with *Miller*.

Respectfully submitted,

BETH DRAKE
ACTING UNITED STATES ATTORNEY

By: s/ Dean H. Secor

Dean H. Secor
Assistant United States Attorney
151 Meeting Street, Suite 200
Charleston, South Carolina 29401

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MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

2016 JUN 21 A 11:23

United States District Court	District <u>South CAROLINA (Charleston)</u> DISTRICT OF SOUTH CAROLINA Docket or Case No. <u>2:09-cr-00296-PMD-2</u>
Name (under which you were convicted): <u>EDWARD McCAIN</u>	Prisoner No.: <u>17493-171</u>
Place of Confinement: <u>U.S.P. Coleman II, Coleman, FLORIDA</u>	Movant (include name under which you were convicted) <u>v. Edward McCAIN</u>
UNITED STATES OF AMERICA	

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

United States District CourtDistrict of South CarolinaCharleston Division

(b) Criminal docket or case number (if you know): 2:09-cr-00296-PMD-2

2. (a) Date of the judgment of conviction (if you know): _____

(b) Date of sentencing: March 1st 2010

3. Length of sentence: Two terms of Life and one term of 30 years all concurrent

4. Nature of crime (all counts): Tampering w/ witness, victim, informant
(IF Death Results) 18:1512 (a) (1) (c) and 18:2,

Tampering w/ witness, victim, informant (MANSLAUGHTER) 18:
1512 (a) (1) (c) and 18:2; Using A Firearm in furtherance of
A drug trafficking crime resulting in murder 18:924(c) (1) (A)
(i), 924 (j) and 18: 2

5. (a) What was your plea? (Check one)

(1) Not guilty (2) Guilty (3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____

6. If you went to trial, what kind of trial did you have? (Check one) Jury Judge only

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7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes No

8. Did you appeal from the judgment of conviction? Yes No

9. If you did appeal, answer the following:

(a) Name of court: United States Court of Appeals for the Fourth Circuit

(b) Docket or case number (if you know): No. 10-4252

(c) Result: Judgement of the District Court was affirmed

(d) Date of result (if you know): February 28, 2011

(e) Citation to the case (if you know): _____

(f) Grounds raised: (1) Whether the district court erred in accepting McCain's Plea and (2) Whether the district court erred in sentencing McCain.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

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(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes No

(2) Second petition: Yes No

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(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: My 8th amendment right against cruel and unusual punishment was violated during the imposition of my sentence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

I was sentenced to life w/o parole for a crime that was committed when I was a juvenile. The U.S. Supreme Court ruled in Miller v. Alabama that giving mandatory minimum life sentences to juveniles violated the Constitutional Ban against Cruel and Unusual Punishment.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: On January 25th the U.S. Supreme Court declared in Montgomery v. Louisiana, 2016 BL 18591 (2016) that Miller v. Alabama had retroactive effect.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

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Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____**GROUND TWO:** _____(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

ROUND THREE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why;

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

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Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

13. Is there any ground in this motion that you have not previously presented in some federal court?

If so, which ground or grounds have not been presented, and state your reasons for not presenting them: I have not presented the Miller v. Alabama claim that I have because the U.S. Supreme Court recently made it retroactive on January 25th, 2016. It was made retroactive through Montgomery vs. Louisiana.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Timothy C. Kulp; 116 Church St. 3rd Floor; Charleston, S.C. 29401

(b) At arraignment and plea: Same As Above

(c) At trial: Same As Above

(d) At sentencing: Same As Above.

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(e) On appeal: Timothy Kulp: 116 Church St. 3rd Floor
Charleston, S.C. 29401; Pro Se(f) In any post-conviction proceeding: Pro Se

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes No

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18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you

must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.* My motion should not be barred because M'Her vs. Alabama was made retroactive through Montgomery vs. Louisiana on January 25, 2016. This right was made retroactive and I am now filing within the one year from the time this right was recognized by and made retroactive by the U.S. Supreme Court.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

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Therefore, movant asks that the Court grant the following relief: I would like to be given relief from my life sentence and given a reasonable chance of re-entering society.
or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on June 14th 2016 (month, date, year).

Executed (signed) on Edward McCain
June 14th 2016

Edward McCain

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. _____

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

* * * * *

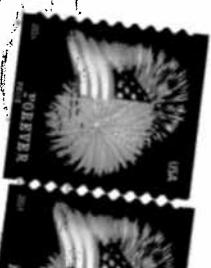
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Edward McCain
17493-171
U.S.P. Coleman II / F.C.C.
P.O. Box 1034
Coleman, FL 33521

ITEM X-RAYED BY
USMIS
6/21

Office of the Clerk
83 Broad St.
Charleston, S. C. 29401



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

United States of America

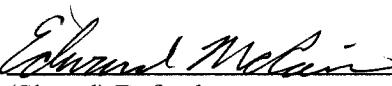
vs

CR NO. 2:09-296

Edward McCain

PLEA

The defendant, **Edward McCain**, having withdrawn his plea of Not Guilty entered
APRIL 28, 2009, pleads **GUILTY** to Count (s) 1, 2 & 5 of the **Superseding**
Indictment after arraignment in open court.


(Signed) Defendant

Charleston, South Carolina

OCTOBER 5, 2009

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No: 2:09-296
)	
v.)	
	)	<u>PLEA AGREEMENT</u>
EDWARD MCCAIN)	

General Provisions

This PLEA AGREEMENT is made this 5th day of October, 2009, between the United States of America, as represented by United States Attorney W. WALTER WILKINS, Assistant United States Attorney PETER T. PHILLIPS; the Defendant, **EDWARD MCCAIN**, and Defendant's Attorney, Timothy Kulp, Esquire.

IN CONSIDERATION of the mutual promises made herein, the parties hereto agree as follows:

1. The Defendant agrees to plead guilty to Counts 1, 2, and 5 of the Superseding Indictment that is now pending:

A. Count 1 charges a violation of Title 18, United States Code, Sections 1512(a)(1)(C) and 2. In order to sustain its burden of proof as to this offense, the Government is required to prove the following:

- (1) Defendant knowingly, intentionally, and unlawfully did kill the victim;
- (2) with the intent to prevent the communication of information by the victim to a law enforcement officer relating to the commission and possible commission of a Federal offense or offenses.

The penalties for a violation of 18 U.S.C. § 1512(a)(1)(C) are:

minimum term of imprisonment	-	LIFE (statutory mandatory minimum)
maximum term of imprisonment	-	D E A T H (h o w e v e r ,

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maximum fine	-	Defendant is not eligible for the death penalty due to his age at the time of the offense)
supervised release	-	\$250.000
special assessment	-	not more than 5 years
		\$100

B. Count 2 also charges a violation of Title 18, United States Code, Sections 1512(a)(1)(C) and 2. In order to sustain its burden of proof as to this offense, the Government is required to prove the following:

- (1) Defendant knowingly, intentionally, and unlawfully did attempt to kill the victim;
- (2) with the intent to prevent the communication of information by the victim to a law enforcement officer relating to the commission and possible commission of a Federal offense or offenses.

The penalties for a violation of 18 U.S.C. § 1512(a)(1)(C) are:

maximum term of imprisonment	-	30 years
maximum fine	-	\$250.000
supervised release	-	not more than 5 years
special assessment	-	\$100

C. Count 5 charges a violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), 924(j), and 2. In order to sustain its burden of proof as to this offense, the Government is required to prove the following:

- (1) Defendant knowingly used and carried a firearm;
- (2) during and in relation to, and possessed a firearm in furtherance of, a drug trafficking crime and a crime of violence, both of which are prosecutable in a court of the United States; and
- (3) knowingly, intentionally, and unlawfully did murder the victim in the course of using that firearm.

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The penalties for a violation of 18 U.S.C. §§ 924(c)(1)(A)(i), 924(j), and 2 are:

minimum term of imprisonment	-	LIFE (statutory mandatory minimum)
maximum term of imprisonment	-	D E A T H (h o w e v e r , Defendant is not eligible for the death penalty due to his age at the time of the offense)
maximum fine	-	\$250.000
supervised release	-	not more than 5 years
special assessment	-	\$100

2. The Defendant agrees to provide detailed financial information to the United States Probation Office prior to sentencing. The Defendant further agrees to enter into the Bureau of Prisons Inmate Financial Responsibility Program if sentenced to a term of incarceration with an unsatisfied monetary penalty. The Defendant further understands and agrees that any monetary penalty imposed is not dischargeable in bankruptcy.

- (A) Fines: The Defendant understands and agrees that the court may impose a fine pursuant to 18 U.S.C. §§ 3571 and 3572, which fine may be due and payable immediately after sentencing regardless of whether the Defendant has the money to pay the fine. In the event the Defendant does not have the money, the Defendant understands and agrees that the court may establish a payment schedule, taking into account the Defendant's present and future means of earning money, or of obtaining money to pay the fine.
- (B) Special Assessment: Pursuant to 18 U.S.C. § 3013, the Defendant must pay a special assessment of \$100.00 for each felony count for which he is convicted. This special assessment must be paid at or before the time of the guilty plea hearing.

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3. Provided the Defendant complies with all the terms of this Agreement, the United States agrees to move to dismiss any remaining counts against him in the Superseding Indictment [and any other indictments under this number] at sentencing. The Defendant understands that the Court may consider these dismissed counts as relevant conduct pursuant to § 1B1.3 of the United States Sentencing Guidelines.

4. The Defendant understands that the matter of sentencing is within the sole discretion of the Court and that the sentence applicable to Defendant's case will be imposed after the Court considers as advisory the United States Sentencing Commission Guidelines, Application Notes and Policy Statements, as well as the factors set forth in Title 18, United States Code, Section 3553(a). The Defendant also understands that Defendant's sentence has not yet been determined by the Court, and that any estimate of a probable sentencing range Defendant may have received from Defendant's attorney, the Government or the United States Probation Office is only a prediction, not a promise, and is not binding on the Government, the Probation Office or the Court. The Defendant further understands that the Government retains the right to inform the Court of any relevant facts, to address the Court with respect to the nature of the offense(s), to respond to questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report, to respond to any statements made to the Court by or on behalf of the Defendant and to summarize all evidence which would have been presented at trial to establish a factual basis for the plea(s).

5. The Defendant agrees that all facts that determine his offense level under the Guidelines and pursuant to any mandatory minimum (including facts that support any specific offense characteristic or other enhancement or adjustment) can be found by the Court at

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sentencing by a preponderance of the evidence standard and the Court may consider any reliable evidence, including hearsay. By executing this Agreement, the Defendant understands that he waives any argument that facts that determine his offense level under the Guidelines and pursuant to any mandatory minimum should be alleged in an indictment and found by a jury beyond a reasonable doubt.

6. The Defendant understands that the obligations of the Government within the Plea Agreement are expressly contingent upon the Defendant's abiding by federal and state laws.

7. In the event that the Defendant fails to comply with any of the provisions of this Agreement, either expressed or implied, it is understood that the Government will have the right, at its sole election, to void all of its obligations under this Agreement and the Defendant will not have any right to withdraw his guilty plea(s) to the offense(s) enumerated herein.

Cooperation & Forfeiture

8. The Defendant agrees to be fully truthful and forthright with federal, state and local law enforcement agencies by providing full, complete and truthful information about all criminal activities about which he has knowledge. The Defendant must provide full, complete and truthful debriefings about these unlawful activities and must fully disclose and provide truthful information to the Government including any books, papers, or documents or any other items of evidentiary value to the investigation. The Defendant must also testify fully and truthfully before any grand juries and at any trials or other proceedings if called upon to do so by the Government, subject to prosecution for perjury for not testifying truthfully. The failure of the Defendant to be fully truthful and forthright at any stage will, at the sole election of the Government, cause the obligations of the Government within this Agreement to become null and

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void. Further, it is expressly agreed that if the obligations of the Government within this Agreement become null and void due to the lack of truthfulness on the part of the Defendant, the Defendant understands that:

- (A) the Defendant will not be permitted to withdraw his guilty pleas to the offenses described above;
- (B) all additional charges known to the Government may be filed in the appropriate district;
- (C) the Government will argue for a maximum sentence for the offense(s) to which the Defendant has pled guilty; and
- (D) the Government will use any and all information and testimony provided by the Defendant in the prosecution of the Defendant of all charges.

9. The Defendant agrees to submit to such polygraph examinations as may be requested by the Government and agrees that any such examinations shall be performed by a polygraph examiner selected by the Government. Defendant further agrees that his refusal to take or his failure to pass any such polygraph examinations to the Government's satisfaction will result, at the Government's sole discretion, in the obligations of the Government within the Agreement becoming null and void.

10. The Government agrees that any self-incriminating information provided by the Defendant as a result of the cooperation required by the terms of this Agreement, although available to the Court, will not be used against the Defendant in determining the Defendant's applicable guideline range for sentencing pursuant to the U.S. Sentencing Commission Guidelines. The provisions of this paragraph shall not be applied to restrict any such information:

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- (A) known to the Government prior to the date of this Agreement;
- (B) concerning the existence of prior convictions and sentences;
- (C) in a prosecution for perjury or giving a false statement; or
- (D) in the event the Defendant breaches any of the terms of the Plea Agreement.

11. Provided the Defendant cooperates pursuant to the provisions of this Plea Agreement, and that cooperation is deemed by the Government as providing substantial assistance in the investigation or prosecution of another person who has committed an offense, the Government agrees to move the Court for a downward departure or reduction of sentence pursuant to United States Sentencing Guideline § 5K1.1, Title 18, United States Code, § 3553(e) or Federal Rule of Criminal Procedure 35(b). The Defendant further understands that any such motion by the Government is not binding upon the Court, and should the Court sentence the Defendant within the Guidelines, to the maximum penalty prescribed by law or refuse to reduce the sentence imposed, the Defendant will have no right to withdraw his plea(s).

12. The Defendant agrees to voluntarily surrender to, and not to contest the forfeiture by, the United States of America of any and all assets and property, or portions thereof, owned or purchased by the Defendant which are subject to forfeiture pursuant to any provision of law and which are in the possession or control of the Defendant or Defendant's nominees. The Defendant further agrees to prevent the disbursement, relocation or encumbrance of any such assets and agrees to fully assist the Government in the recovery and return to the United States of any assets, or portions thereof, as described above, wherever located. The Defendant further agrees to make a full and complete disclosure of all assets over which Defendant exercises

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control and those which are held or controlled by nominees. The Defendant further agrees to submit to polygraph examinations on the issue of assets if it is deemed necessary by the United States.

The Defendant agrees to forfeit all interests in the properties as described above and to take whatever steps are necessary to pass clear title to the United States. These steps include, but are not limited to, the surrender of title and the signing of any other documents necessary to effectuate such transfers. The Defendant agrees not to object to any civil forfeiture proceedings brought against these properties pursuant to any provision of law and the Defendant further understands that any such civil proceedings may properly be brought at any time before or after acceptance of Defendant's guilty plea(s) in this matter and agrees to waive any double jeopardy claims he may have as a result of the forfeiture of these properties as provided for by this Agreement.

Merger and Other Provisions

13. The Defendant represents that he met with his attorney on a sufficient number of occasions and for a sufficient period of time to discuss the Defendant's case and receive advice; that the Defendant has been truthful with his attorney and related all information of which the Defendant is aware pertaining to the case; that the Defendant and his attorney have discussed possible defenses, if any, to the charges in the Superseding Indictment including the existence of any exculpatory or favorable evidence or witness, discussed the Defendant's right to a public trial by jury or by the Court, the right to the assistance of counsel throughout the proceedings, the right to confront and cross-examine the Government's witnesses, the Defendant's right to testify in his own behalf, or to remain silent and have no adverse inferences drawn from his

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silence; and that the Defendant, with the advice of counsel, has weighed the relative benefits of a trial by jury or by the Court versus a guilty plea(s) pursuant to this Agreement, and has entered this Agreement as a matter of the Defendant's free and voluntary choice, and not as a result of pressure or intimidation by any person.

14. The Defendant is aware that 18 U.S.C. § 3742 and 28 U.S.C. § 2255 afford every defendant certain rights to contest a conviction and/or sentence. Acknowledging those rights, the Defendant, in exchange for the concessions made by the Government in this Plea Agreement, waives the right to contest either the conviction or the sentence in any direct appeal or other post-conviction action, including any proceedings under 28 U.S.C. § 2255. This waiver does not apply to claims of ineffective assistance of counsel or prosecutorial misconduct. This Agreement does not affect the rights or obligations of the Government as set forth in 18 U.S.C. § 3742(b). Nor does it limit the Government in its comments in or responses to any post-sentencing matters.

15. The Defendant waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

16. The parties hereby agree that this Plea Agreement contains the entire agreement of the parties; that this Agreement supersedes all prior promises, representations and statements of the parties; that this Agreement shall not be binding on any party until the Defendant tenders a guilty plea(s) to the court having jurisdiction over this matter; that this Agreement may be

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modified only in writing signed by all parties; and that any and all other promises, representations and statements, whether made prior to, contemporaneous with or after this Agreement, are null and void.

10/15/09

DATE

Edward McCain

EDWARD MCCAIN, Defendant

10/5/09

DATE

JM

TIMOTHY KULP

Attorney for the Defendant

10/15/09

DATE

W. WALTER WILKINS
UNITED STATES ATTORNEY

BY:

PTP

PETER T. PHILLIPS

Assistant U. S. Attorney

APPENDIX M
U. S. DEPARTMENT OF JUSTICE
Statement of Special Assessment Amount

This statement reflects your special assessment only. There may be other penalties imposed at sentencing. This Special Assessment is due and payable at the time of the execution of the plea agreement.

ACCOUNT INFORMATION	
CRIM. ACTION NO.:	2:09-296
DEFENDANT'S NAME:	EDWARD MCCAIN
PAY THIS AMOUNT:	\$300
PAYMENT DUE ON OR BEFORE:	DATE OF SENTENCING HEARING

MAKE CHECK OR MONEY ORDER PAYABLE TO:
CLERK, U.S. DISTRICT COURT

PAYMENT SHOULD BE SENT TO:
Clerk, U.S. District Court
[Address in Columbia, Greenville, Charleston or Florence]

OR HAND DELIVERED TO:
Clerk's Office
[Address in Columbia, Greenville, Charleston or Florence] (Mon - Fri 9-5)

INCLUDE DEFENDANT'S NAME ON CHECK OR MONEY ORDER (Do Not send cash)

ENCLOSE THIS COUPON TO INSURE PROPER and PROMPT APPLICATION OF PAYMENT

APPENDIX N
248aIN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL NO.: 2:09-000296
)	
vs.	)	18 U.S.C. § 924(c)(1)(A)(i)
	)	18 U.S.C. § 924(j)
PIERRE SANDERS	)	18 U.S.C. § 1512(a)(1)(C)
a/k/a "Smack"	)	18 U.S.C. § 1513(a)(1)(B)
EDWARD MCCAIN	)	18 U.S.C. § 2
	)	21 U.S.C. § 841(a)(1)
	)	21 U.S.C. § 841(b)(1)(C)
	)	21 U.S.C. § 846
	)	SUPERSEDING INDICTMENT
)	
)	

COUNT 1

THE GRAND JURY CHARGES:

That on or about November 14, 2008, in the District of South Carolina, the defendants, **PIERRE SANDERS, a/k/a "Smack," and EDWARD McCAIN, JR.**, knowingly, intentionally, and unlawfully did kill James Fannin by shooting him with a firearm with the intent to prevent the communication of information by James Fannin to a law enforcement officer relating to the commission and possible commission of a Federal offense, to wit: drug trafficking crimes, and did aid and abet each other in the commission of the aforesaid offense;

All in violation of Title 18, United States Code, Sections 1512(a)(1)(C) and 2.

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COUNT 2

THE GRAND JURY FURTHER CHARGES:

That on or about November 14, 2008, in the District of South Carolina, the defendants, **PIERRE SANDERS, a/k/a "Smack," and EDWARD McCAIN, JR.**, knowingly, intentionally, and unlawfully did attempt to kill Glenn Crawford by shooting him with a firearm with the intent to prevent the communication of information by Glenn Crawford to a law enforcement officer relating to the commission and possible commission of a Federal offense, to wit: drug trafficking crimes, and did aid and abet each other in the commission of the aforesaid offense;

All in violation of Title 18, United States Code, Sections 1512(a)(1)(C) and 2.

COUNT 3

THE GRAND JURY FURTHER CHARGES:

That on or about November 14, 2008, in the District of South Carolina, the defendants, **PIERRE SANDERS, a/k/a "Smack," and EDWARD McCAIN, JR.**, knowingly, intentionally, and unlawfully did attempt to kill Glenn Crawford by shooting him with a firearm with the intent to retaliate against Glenn Crawford for providing to a law enforcement officer information relating to the commission and possible commission of a Federal offense, to wit: drug trafficking crimes, and did aid and abet each other in the commission of the aforesaid offense;

All in violation of Title 18, United States Code, Sections 1513(a)(1)(B) and 2.

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COUNT 4

THE GRAND JURY FURTHER CHARGES:

That beginning at a time unknown but at least beginning in or around November, 2008, in the District of South Carolina, the defendant, **PIERRE SANDERS, a/k/a "Smack,"** knowingly and intentionally did combine, conspire and agree and have tacit understanding with others, both known and unknown, to knowingly, intentionally and unlawfully possess with intent to distribute and distribute heroin, a Schedule I controlled substance, said conspiracy involving a quantity of heroin, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C);

All in violation of Title 21, United States Code, Section 846.

COUNT 5

THE GRAND JURY FURTHER CHARGES:

That on or about November 14, 2008, in the District of South Carolina, the defendants, **PIERRE SANDERS, a/k/a "Smack," and EDWARD McCAIN, JR.,** knowingly used and carried a firearm during and in relation to, and possessed a firearm in furtherance of, a drug trafficking crime and a crime of violence, both of which are prosecutable in a court of the United States, and knowingly, intentionally, and unlawfully did murder James Fannin in the course of using that firearm, and did aid and abet another in the commission of the aforesaid offense;

In violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), 924(j), and 2.

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COUNT 6

THE GRAND JURY FURTHER CHARGES:

That on or about November 14, 2008, in the District of South Carolina, the defendant, **EDWARD McCAIN, JR.**, knowingly and intentionally did possess with intent to distribute a quantity of heroin, a Schedule I controlled substance;

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

A True BILL



FOREPERSON



W. WALTER WILKINS (PTP)
UNITED STATES ATTORNEY

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RECORD OF GRAND JURY BALLOT
C/ 209cr 29c

THE UNITED STATES V.

PIERRE SANDERS
a/k/a "Smack"
EDWARD MCCAIN

(SEALED UNTIL FURTHER ORDER OF THE COURT)