No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERTO TORNER

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2804

UNITED STATES OF AMERICA

v.

LIZA ROBLES,
Appellant

No. 20-1371

UNITED STATES OF AMERICA

v.

ROBERTO TORNER,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Nos. 3-17-cr-00343-002 & 3-17-cr-00343-001)
District Judge: Honorable Malachy E. Mannion

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
February 8, 2021

Before: CHAGARES, SCIRICA, and COWEN, Circuit Judges

JUDGMENT

This cause came to be considered on appeal from the United States District Court for the Middle District of Pennsylvania and was submitted on February 8, 2021.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the Judgments of the District Court entered on July 24, 2019 and February 13, 2020, are hereby AFFIRMED. Costs shall not be taxed in this matter. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: April 8, 2021

NOT PRECEDENTIAL

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Before: CHAGARES, SCIRICA, and COWEN, Circuit Judges

(Opinion filed: April 8, 2021)

OPINION*

CHAGARES, Circuit Judge.

A jury convicted Liza Robles and Roberto Torner of various offenses including conspiracies to distribute narcotics and illegally possess firearms. Robles now appeals her judgment of conviction, arguing that the District Court should have severed her narcotics charges from her firearms charges and her trial from Torner's. Torner appeals his judgment of conviction and sentence, arguing that the District Court erred by denying his motions to suppress evidence seized from his properties, making prejudicial evidentiary rulings at trial, and concluding that a prior state conviction for aggravated assault was a crime of violence for sentencing enhancement purposes. For the following reasons, we will affirm the District Court's judgments.

I.

We write solely for the parties and so recite only the facts necessary to our disposition. Liza Robles and Roberto Torner are a couple who own several properties in Pennsylvania. In 2015, local law enforcement began investigating Torner, who had been identified as a heroin dealer by a confidential informant (the "CI"). At the direction of law enforcement, the CI met with Robles and Torner during one week in June to buy

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

heroin. These meetings took place at two properties owned by Torner, on Washington Street and Center Street. After receiving payment from the CI, Torner directed co-defendant David Alzugaray-Lugones to provide the CI with heroin at the Center Street property.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") also investigated firearms possession by the defendants. The ATF determined that Robles owned at least three firearms at the time of the heroin deal, even though law enforcement had previously seized firearms from her to prevent their use by Torner, a convicted felon. On August 28, 2017, the ATF executed search warrants on the Washington and Center Street properties and seized many firearms, including a handgun in a dresser containing Torner's clothing.

On November 7, 2017, a grand jury returned an indictment charging Robles, Torner, and Alzugaray-Lugones with distributing and conspiring to distribute heroin. The indictment also charged Robles and Torner with a firearms conspiracy, Robles with one count of knowingly transferring firearms to a convicted felon, and Torner with one count of knowingly possessing firearms as a convicted felon. Torner committed more offenses while on pretrial release. He directed a tenant named Joseph Elliss to hide C-4 explosives at a property on Buck Mountain Road, which Torner owned but at which Alzugaray-Lugones had resided immediately prior to his incarceration. According to Elliss, Torner planned to report the C-4 to law enforcement and claim it belonged to Alzugaray-Lugones. Torner later instructed another tenant named Donald Warren to retrieve the C-4, but Warren could not find it. On January 5, 2018, law enforcement

executed a search warrant at the Buck Mountain property and seized the C-4. On January 30, the grand jury returned a superseding indictment adding two charges against Torner: one for possessing stolen explosives, and one for possessing explosives as a felon.

Torner moved to suppress the evidence from the Washington and Center Street properties, alleging that the search warrants lacked probable cause. The District Court disagreed and denied the motion. Torner also moved to suppress the C-4, claiming that law enforcement searched the Buck Mountain property before a magistrate judge issued the search warrant. The court denied that motion too, finding Torner's claim incorrect. The court also denied motions by Robles to sever her narcotics charges from her firearms charges and her trial from her co-defendants', reasoning that the superseding indictment sufficiently alleged a connection between the offenses and that the jury could compartmentalize the evidence against each defendant.

All three defendants proceeded to trial. Robles testified that the seized firearms belonged to her, including the one in the dresser with Torner's clothing. The Government introduced a photograph of the dresser's contents, which included a shirt that Torner also happened to be wearing at trial that day. Torner flushed the shirt he was wearing down the toilet in his holding cell shortly after the photograph was admitted into evidence. The District Court admitted video footage reflecting that Torner removed his shirt by the holding cell's toilet, over Torner's objection. Donald Warren testified that Torner possessed a second brick of C-4, and Torner objected when ATF agent Jamie Markovchick later cited an out-of-court assertion by Warren to the same effect. The CI's handler Eugene Rafalli testified, over objection, that she had been a reliable informant in

other unrelated narcotics investigations, and the CI later testified. On October 31, 2018, a jury found Robles and Torner guilty of all counts charged against them.

On July 22, 2019, the District Court sentenced Robles to 36 months of imprisonment. On February 11, 2020, the court sentenced Torner to 270 months of imprisonment. When determining Torner's advisory range of imprisonment under the United States Sentencing Guidelines, the court held that a prior state conviction for aggravated assault was a "crime of violence" for sentencing enhancement purposes. Robles and Torner timely appealed.

II.

The District Court had jurisdiction under 18 U.S.C. § 3231, and we have appellate jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291. We review de novo whether the joinder of charges and defendants was proper under Federal Rule of Criminal Procedure 8, and we review the denial of a motion for severance under Federal Rule of Criminal Procedure 14 for abuse of discretion. United States v. Walker, 657 F.3d 160, 168, 170 (3d Cir. 2011). When reviewing an order on motions to suppress evidence, we review the underlying findings of fact for clear error and the District Court's application of the law to those facts de novo. United States v. Perez, 280 F.3d 318, 336 (3d Cir. 2002). Evidentiary rulings at trial are generally reviewed for abuse of discretion. United States v. Bailey, 840 F.3d 99, 117 (3d Cir. 2016). And we review de novo whether a prior conviction constitutes a crime of violence under the Sentencing Guidelines. United States v. Wilson, 880 F.3d 80, 83 (3d Cir. 2018).

III.

We consider the issues on appeal in turn, beginning with Robles's arguments that the joinder of her charges and her trial with Torner's was improper and prejudicial. We then address Torner's appeal of the denial of his suppression motions, the District Court's evidentiary rulings, and the classification of his prior conviction as a crime of violence.

A.

Robles argues that the charges and defendants in the superseding indictment were improperly joined, and that the District Court abused its discretion when it refused to sever them. She claims that the firearms and narcotics conspiracies lacked a common nexus, and that neither set of charges shared a nexus with Torner's explosives charges. Robles adds that severance would have spared her the prejudicial effect of being tried alongside Torner.

We disagree. In determining whether joinder of charges and defendants is proper under Federal Rule of Criminal Procedure 8, we focus primarily upon the indictment. See United States v. Irizarry, 341 F.3d 273, 287 (3d Cir. 2003). The superseding indictment connected Robles's narcotics and firearms charges by specifically alleging that she possessed firearms while distributing controlled substances. Even if Robles's firearms conspiracy spanned a longer period of time than her narcotics conspiracy, we have long noted that narcotics and firearms charges are properly joined when they are connected temporally or logically. See United States v. Gorecki, 813 F.2d 40, 42 (3d Cir. 1987). The joinder of defendants was also appropriate because the superseding indictment charged Torner with participating in the same narcotics and firearms

conspiracies. United States v. Thornton, 1 F.3d 149, 152–53 (3d Cir. 1993). And because Torner committed the explosives offenses while on pretrial release in order to limit the negative consequences of conviction on the narcotics and firearms charges, trying the explosives offenses alongside the others charged in the superseding indictment properly served the ends of judicial economy. Cf. Walker, 657 F.3d at 169–70 (noting that escape charges may be properly joined with narcotics and firearms charges where the escaping defendant sought to evade prosecution for the underlying offenses).

The District Court did not abuse its discretion by denying Robles's severance motions under Federal Rule of Criminal Procedure 14, either. Rule 14 provides for the severance of otherwise properly joined charges and defendants "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States, 506 U.S. 534, 539 (1993). A defendant is not entitled to severance simply because the evidence against her is less than that against another. Instead, the grant or denial of severance turns on "whether the jury will be able to compartmentalize the evidence as it relates to separate defendants in view of its volume and limited admissibility." Walker, 657 F.3d at 170. We have observed that a jury can do so where, as here, a trial involves only three defendants, no overly technical or scientific information, and relatively straightforward facts. See United States v. Davis, 397 F.3d 173, 182 (3d Cir. 2005). Though Torner's explosives offenses appeared more serious than the charges against Robles, the jury could readily distinguish between the circumstances of offenses that Robles and Torner committed prior to arrest and those that

Torner committed alone while on pretrial release. See, e.g., United States v. Lore, 430 F.3d 190, 205 (3d Cir. 2005) ("We see no reason why, in a joint trial of defendants charged with participating in a conspiracy, the fact that the grand jury charged one defendant separately with an additional criminal act somehow would interfere with the petite jury's ability to consider the evidence against each defendant on each count separately."). And we presume that juries can compartmentalize evidence when a court instructs them to consider the evidence against each defendant on each charge separately, as the District Court repeatedly did here. Id. at 205–06. Finally, Robles was not entitled to a separate trial based on the bare assertion that Torner could offer exculpatory testimony on her behalf. See Davis, 397 F.3d at 182–83. Accordingly, we will affirm the District Court's judgment as to Robles.

B.

Torner argues that the search warrants for the Washington and Center Street properties lacked probable cause. He claims that the allegations regarding narcotics and firearms in the supporting affidavit were stale, as law enforcement could not reasonably expect to find narcotics in 2017 based solely on evidence of one heroin deal in 2015. Torner adds that the search of the Buck Mountain property was illegal; although a magistrate judge issued a search warrant at 11:42 a.m., ATF agent Markovchick indicated that the search took place at 11:00 a.m. in his report of the search and return on the warrant.

The District Court did not err by denying Torner's motions to suppress. We pay great deference to a magistrate judge's initial determination of probable cause. See

Illinois v. Gates, 462 U.S. 213, 236 (1983). Accordingly, we must simply decide whether the magistrate judge had a substantial basis for concluding that probable cause existed. United States v. Williams, 124 F.3d 411, 420 (3d Cir. 1997). The probable cause determination considers the totality of the circumstances, including "the cumulative weight of the information set forth by the investigating officer in connection with reasonable inferences that the officer is permitted to make based upon the officer's specialized training and experiences." United States v. Yusuf, 461 F.3d 374, 390 (3d Cir. 2006). While courts must consider the age of the information set forth by the investigating officer, age alone does not determine staleness. Williams, 124 F.3d at 420. "The likelihood that the evidence sought is still at the place to be searched depends on a number of variables, such as the nature of the crime, of the criminal, of the thing to be seized, and of the place to be searched." Id. (quotation marks omitted).

As the District Court recognized, the Magistrate Judge had a substantial basis to conclude that there was probable cause to search the Washington and Center Street properties. The supporting affidavit for the warrant application cited evidence that Torner had brandished a firearm at the Washington Street property and sold heroin at both properties in 2015. The affidavit also indicated that Torner continued to discuss drug dealing in 2016 and wielded firearms as recently as 2017, and Torner still owned both properties at the time of the search. Since drug trafficking conspiracies are often linked with firearm possession and may be protracted and continuous in nature, the Magistrate Judge reasonably concluded that the Washington and Center Street properties likely contained drugs and firearms. See United States v. Tehfe, 722 F.2d 1114, 1119 (3d

Cir. 1983).

Torner's challenge to the search of the Buck Mountain property turns entirely on a dispute of fact that the District Court resolved following a full evidentiary hearing. The District Court unequivocally concluded that Markovchick's entries in his return on the warrant and report of the search were ministerial errors, and that law enforcement searched the Buck Mountain property only after the warrant issued at 11:42 a.m. Having reviewed the record on appeal, we see no basis to conclude that the District Court's finding of fact was clearly erroneous.

C.

Next, Torner claims prejudice from three errors at trial. First, he asserts that the Government improperly vouched for the CI's credibility by allowing her handler, Eugene Raffali, to testify that he had found her reliable in other unrelated investigations. Second, Torner argues that the District Court allowed hearsay testimony by Markovchick, who testified that Donald Warren told him there was an additional C-4 explosive besides that recovered from the Buck Mountain property. Finally, Torner claims that the court abused its discretion by admitting the video of Torner in his holding cell, which allegedly prejudiced the jury.

The District Court did not abuse its discretion in any of these instances. Raffali's testimony does not amount to improper prosecutorial vouching, which requires that "the prosecutor . . . assure the jury that the testimony of a Government witness is credible . . . based on either the prosecutor's personal knowledge, or other information not contained in the record." United States v. Vitillo, 490 F.3d 314, 327 (3d Cir. 2007) (quotation

marks omitted). The testimony here was a matter of record subject to cross-examination by Torner's counsel, not an allusion to the prosecutor's personal knowledge. The record reflects that Raffali testified to the CI's involvement in prior investigations to explain why she ultimately was not prosecuted for her past offenses, rather than to bolster the credibility of a witness who had not yet testified.

Second, Markovchick's testimony that Donald Warren believed there was more C-4 was not hearsay because it was not offered for the truth of the matter asserted. Federal Rule of Evidence 801 defines hearsay as a statement that "the declarant does not make while testifying at the current trial or hearing . . . [and] a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). The declarant, Warren, expressed his belief that there was extra C-4 while testifying earlier at trial. And the record reflects that Markovchick cited Warren's belief to explain why his investigative materials did not focus on a firearm that Torner gave to Warren, as he was instead focused on whether there was additional C-4 to secure first. Under these circumstances, we have little reason to conclude that the Government offered Markovchick's testimony to prove the truth of a matter already asserted earlier at trial. See United States v. Price, 458 F.3d 202, 211 (3d Cir. 2006).

Finally, the District Court did not abuse its discretion by concluding that the video evidence was not substantially more prejudicial than probative under Federal Rule of Evidence 403. "When a district court conducts an on-the-record weighing of probative value against unfair prejudice, its evidentiary decision is entitled to great deference. . . . In order to justify reversal, a district court's analysis and resulting conclusion must be

arbitrary or irrational." United States v. Lacerda, 958 F.3d 196, 223 (3d Cir. 2020) (quotation marks and citation omitted). The court noted that the jury only briefly saw Torner in custody and clearly understood that he was subject to some degree of restraint as a criminal defendant on trial. The court also reasoned that a privacy screen obscured any view of the holding cell's toilet, and that Torner's destruction of his shirt was probative of consciousness of guilt. Given the court's reasoned justifications for admitting the video under these unusual circumstances, we cannot consider its decision arbitrary or irrational.

D.

Torner finally asserts that the District Court erred by treating a prior aggravated assault conviction as a crime of violence for sentencing enhancement purposes, as the Government did not establish that he was convicted of a purposeful or knowing (rather than reckless) violation of the relevant statute. See N.J. Stat. Ann. § 2C:12-1(b)(1) (providing that a person is guilty of aggravated assault if the person "attempts to cause serious bodily injury to another, or causes injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury"). The Government responds that the District Court properly relied on charging and plea documents that revealed Torner was convicted of purposeful and knowing conduct, which would undisputedly make his conviction a crime of violence.

We agree with the Government. In relevant part, the Sentencing Guidelines define a crime of violence as "any offense under . . . state law . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another."

U.S.S.G. § 4B1.2(a)(1). Courts use either the categorical or modified categorical approach to determine whether a prior conviction is a crime of violence. United States v. Ramos, 892 F.3d 599, 606 (3d Cir. 2018). In the context of § 4B1.2(a)(1), both approaches require reviewing the language of the statute of conviction to determine whether it categorically has as an element the use, attempted use, or threatened use of physical force against another person. Id. at 605–06. The parties do not dispute that a purposeful or knowing violation of the statute at issue meets this standard.

The parties agree that the modified categorical approach applies here, and that the District Court could thus review charging documents and plea materials to determine which statutory language formed the basis of Torner's conviction. See Johnson v. United States, 559 U.S. 133, 144 (2010). The state indictment and plea form collectively indicate that Torner pled guilty to "purposely or knowingly" causing or attempting to cause serious bodily injury to another person. Accordingly, the District Court properly concluded that Torner's aggravated assault conviction was a crime of violence for sentencing purposes.

IV.

For the foregoing reasons, we will affirm the judgments of the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
:
:
vs : 3:CR-17-343
:
:
ROBERTO TORNER :
:

BEFORE: THE HONORABLE MALACHY E. MANNION

PLACE: COURTROOM NO. 3

PROCEEDINGS: SENTENCE

DATE: TUESDAY, FEBRUARY 11, 2020

APPEARANCES:

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But in terms of relevant background to who Mr. Torner is, I think it's appropriately listed in the presentence report, and that objection is overruled.

With respect to paragraphs 50, 57 and 68, it seems that this really relates to the calculation of whether or not he has two prior convictions that would classify him as a career criminal. It appears that there isn't any objection to one that's the prior controlled substance. And then the other one, which is the aggravated assault in the second degree that occurred in New Jersey in, I think, 1993 if I'm correct, that you have an objection as to whether that under, I think, 4 B. 1.1 whether or not that would classify as a violent felony offense for purposes of the determination of the guidelines of a career offender. So I will let you address that.

MR. BARTOLAI: Thank you, Judge. The Court is correct, too, to note that paragraph 50, 57 and 68 all involve some key operative factors. And, again, in this particular case, in the first two instances we're talking about the application of the firearms guideline, 2 K. 2.1, and the last application we're talking about, the career offender provision.

But the commonality between -- for these -- for our discussion is in each instance Mr. Torner's sentencing or guideline as being enhanced by virtue of him having at least two felony convictions of either a crime of violence or a controlled substance offense, and the language is the same for

the 2 K. 2.1 as well as the career offender.

In fact, they refer, you know, in the definition to the same -- to the same definition, which the Court has noted, 4 B. 1.1. And so this is the thing. We acknowledge, you know, he has -- there is an instance where he was charged, I believe it's -- I don't know the paragraph off the top of my head. But he does have a drug conviction, which would be a predicate, so the only -- the only real issue is whether or not there's the second -- you know, crime of violence. We know there's no drug offense.

So the issue is whether or not this is a crime of violence. We're talking about the first one -- there's two. He has essentially two convictions that could potentially be predicates. One is an aggravated assault from -- the offense date is in paragraph 74 of the presentence report, '97, 2/28/97. The other is what would be considered a pointing offense, which is also in New Jersey. That's in paragraph 76 of the report. The offense date there would be 1/17/04.

It's funny to suggest if you have rewound 15 years ago and to come to hear this argument someone sitting in the gallery here to hear a lawyer arguing that an aggravated assault conviction is not a crime of violence, I think you would be flabbergasted perhaps. You know, but this is the state of the law today. It's influx. It's been for a little while with this Johnson case and some of the armed career

criminal predicates -- or precedents that's involved from the Supreme Court. A lot of that precedent turns -- you know, is usable here with respect to the definitions because they're similar.

And we have submitted, you know, we know now from some of the cases that I have submitted a simple assault now in Pennsylvania isn't -- is no longer a crime of violence. The government has submitted a memorandum on this, and they cite a lot of cases. And I'll tell you, they are very candid in there in the cases they cite because they're not all -- there are good cases there for the defense as well. It certainly is an interesting point, I guess, or an interesting issue.

I submit it's an issue that really hasn't been decided yet by the Third Circuit. What we're talking about is we're talking about a statute in -- a New Jersey statute, 2 C --

THE COURT: 12-1 B. 1.

MR. BARTOLAI: So this is a general statute. It's one of these complicated statutes where it defines assault and aggravated assault and simple assault. But specifically it talks about aggravated assault, and it's listed in several forms and in several degrees, and that's really what the Court needs to determine whether or not Mr. Torner's conviction is for a crime of violence pursuant to that statute.

So having said that, I think I can cut to the quick

on some of the law and so on and so forth when we talk about this aggravated assault statute. And, you know, typically we're to use a categorical approach in determining whether or not -- there are two ways -- I guess it could be a crime of violence -- one is through the elements force clause of 4 B.1.2 A. That would be A. A. And the other would be through the enumerated offense clause 4 B.1.2 A. 2. There are different approaches the Court takes that have been discussed for years now how to handle this. The first one would be this categorical approach where, you know, remarkably enough you're not to look at the conduct, you know, the guy with the hammer in the head, but if there was something else like the elements part of the statute, that would control.

And even that offense conduct wouldn't be -- wouldn't be a crime of violence. But if the statute is divisible, you know, then we can do what they call a modified categorical approach. Now, I'm going to say, Judge, that this statute is divisible. I think when we look at this 2 C.-12-1 assault statute in New Jersey, I think it's divisible. The Courts have recognized it as such. Some of the cases cited by myself as well as the government specifically talk about this section, this statute. They do say that it's divisible.

It's divisible because in one instance they list the various degrees of aggravated assault. You know, some are second, and some are third degree. In other instances they

define circumstances which can be different forms of aggravated assault. So I think we have to acknowledge -- I think you have to come here to the Court to say, you know, this is divisible and a modified categorical approach could be employed and would be employed here to determine whether or not Mr. Torner's conduct is a crime of violence. And this calls into question under the modified categorical approach several documents can be looked to to determine what, in fact, Mr. Torner was convicted of.

They are called Shepard documents from the case Shepard. And I mean some of them are, say, for instance, the charging document, the court disposition, the plea agreement, the jury instructions, the colloquy before the Court for the plea or any specific findings that the judge made relative to the charge. And so obviously, the Court can look at that.

Now, the government has submitted some documents. And I would note, Judge, looking at the case law from the -- that the government cites, these need not be perfect, you know. There are instances where an uncertified document can be accepted, and there are instances when the docket can be referred to, meaning, you know, the municipal court documents we might see when we go on E. C. F.

So it doesn't need to be a perfect thing presented, but something does need to be presented. And I would note being a specific offense characteristic, it would be incumbent

upon the government to carry the burden on this point. Now, they have submitted certain documents as attachments to their memorandum, and one of them is the -- one of them -- the first one is the disposition. I'll call it disposition.

And it basically is the court docket -- document from the docket that shows, you know, the caption of the case, the number and the date, you know, this occurred, a guilty plea on 8/12/97 and the charges that were listed and the charges that he pled guilty to and the ones that were dismissed. I would note that the -- this document does, indeed, prove that Mr. Torner was charged in count four with aggravated assault and the section of that was 1 B. 1. So that's the first attachment. The second one, Your Honor, is a -- is actually, like -- it's a --

THE COURT: The indictment.

MR. BARTOLAI: The indictment.

THE COURT: Grand jury indictment.

MR. BARTOLAI: It's the indictment. The indictment is a multi-count indictment, counts one through 13 -- 14 actually, and that's there as well. And count four, which he pled guilty to, is contained in this indictment. I will note that this -- you know, there's specific language there, you know, regarding that. You know, when we look at the section that Mr. Torner pled guilty to, count one -- I'll just briefly read it -- attempts to -- a person is guilty of aggravated

assault if he attempts to cause serious bodily injury to another or causes such injury purposefully or knowingly or under circumstances manifesting extreme indifference to the value of human life, recklessly causes such injury. So this is the statute.

THE COURT: The statute that you just read, that's not from the attachments.

MR. BARTOLAI: No, that's not, Judge. That's the statute from New Jersey.

THE COURT: Right. That's the 2019 statute you're reading, right?

MR. BARTOLAI: This one I have the benefit of is the 2013 one, Judge.

THE COURT: This occurred -- and there were changes even after 2013 including more recent changes in 2019, but that's not the statute that controls. What controls is the statute that was written at the time he was convicted, right, back in 1997, right? And I'm not aware that in reading at least the charge in the indictment that the word reckless although in the 2019 version that's there now perhaps in 2013 version that you have -- I don't know that was there in the 2000 -- the 1993 version when he was arrested.

MR. BARTOLAI: '97 perhaps.

THE COURT: I note it's not in the indictment. Count four, the word reckless is never included in there. But I say

that only as a side note because I understand you have an argument as to reckless --

MR. BARTOLAI: That's a good point. Certainly that is a point that I overlooked that point, Judge. I have over looked that. I think the Court should take judicial notice of perhaps what the statute was then. I'm sorry that I don't have a copy of it. I can get one. I will make it a point to look at that, Judge. But my point is, you know -- and the Court touched upon it. This fourth count doesn't mention recklessness. The fourth count talks about knowing -- purposefully and knowingly. So I think -- that's the indictment.

And then we look at count three, which is the plea form. I will note this is not the plea agreement. This is plea form, and this plea form is -- seems to me more like a versus -- you know how we have the plea agreement but we also have the statement of defendant we use a lot.

THE COURT: That indicated he was going to plead guilty to counts one and counts four but, in fact, only plead guilty to --

MR. BARTOLAI: Judge, what happened here was this was a consolidated plea. Count four was on one case, and this is another case entirely. This count four I think is the -- if you look at the presentence report, the pointing -- the pointing in the aggravated assault were both sentenced on the

same day. So I think what had happened there, Judge, was they had consolidated them for a guilty plea, you see. That's what I submit because if you look, it does mention on the counts, you know, they are -- they were both -- they both fall under the aggravated assault statute.

But I would note, Judge, it seems to me this isn't actually a guilty plea or plea agreement. It's more or less like a form that's done when a person is to plead guilty like we would use a statement of defendant.

THE COURT: But it is titled plea agreement, right?

MR. BARTOLAI: No, plea form it has.

THE COURT: Plea form, okay.

MR. BARTOLAI: Plea form on the top. Again, so, you know, it goes on and on. The Court has it and can read it. I don't see the issues that are here of a concern. I do note that on paragraph 24, the final paragraph, it says, do you have any questions concerning the plea, and apparently there's a -- yes is circled. I don't know, you know, what happened. We don't have the plea agreement.

We don't have the plea colloquy, and we don't have any findings by the Court that imposed sentence here or took the plea, and certainly there are no other -- there's no other Shepard's information that has been put forth. So, you know, when we look at -- and again, I submit, Judge, that under the -- under this first clause, the elements force clause, that

when we look at the -- when we look at the statute B. 1, we have to look at the least culpable conduct charged there, which we submit would be a reckless portion and recklessness has -- is not a basis to find that he's -- that it's a violent crime. I know we can talk about that.

THE COURT: Didn't the Supreme Court say in Voisine exactly the opposite there?

MR. BARTOLAI: Well, Voisine is -- the case I have seen Voisine in, Voisine had to do with a misdemeanor domestic violence, and they defined that violence as some sort of purposeful conduct albeit reckless. If I may have a moment there, Judge. Yes, Voisine has touched upon that. Voisine says that a reckless domestic assault qualifies as a misdemeanor crime of violence, and they say so that it was defined that way at 921 A. -- 32 A., but it does have -- and if we look at that -- I don't have it with me. Mr. Caraballo does. It's defined as has an element of physical force, and this -- in this particular instance under B. 1, no force is necessary.

A mother can cause serious bodily injury by doing nothing, you know, if she under circumstances manifesting extreme indifference. So you see, it's a tough one. It's a tough one, Judge. Voisine certainly leans that way. The Third Circuit hasn't extended Voisine. In fact, there has been instances cited in this case -- Hedgeman cited by the

government.

THE COURT: Hedgeman by Chief Judge Fuentes, right, from the New Jersey --

MR. BARTOLAI: There's Baptiste.

THE COURT: Baptiste by Judge Rendell.

MR. BARTOLAI: Right. This is a tough one I think. You know, I think there's no certain grounds -- I mean, I know the Third Circuit has said that reckless conduct is not violent conduct, you know. But then Voisine now is a -- is going to certainly -- you know, people are talking about Voisine. Rightly so. I don't know where it's going, but this is, I think, the head of the spear on this issue, and so that's it. I think the Court is aware -- understands my argument under the clause.

I'll just turn now to the enumerated offense clause. You know, it's remarkably -- aggravated assault is enumerated there. If we look at 4 B.1.2 A. 2 it says, you know, this is -- a crime of violence means any offense that is murder, voluntary manslaughter, kidnapping, aggravated assault. So right -- I mean, that's right there in the clause.

But apparently under the case law, that's not enough. It needs to be studied, and it needs to be compared. We need to look at the particular aggravated assault that forms the basis of the conviction, and we have to compare it to this generic aggravated assault that's recognized under -- you know,

the federal law. And so this is the comparison and -- or the test that needs to be employed. There's cases that discuss this, and I think one of the best -- I mean, what we look at -- and there's certain things to look at, the majority of states how they define aggravated assault, the model penal code, treatises, et cetera.

And I think this case -- this case says that the best -- Third Circuit case -- Graves says that the best way to look at the -- the best sign post on this score is what are the majority of states doing, you know. In that particular case, they made a decision that a North Carolina robbery was a predicate offense, and they went against the model penal code. Apparently in the model penal code it wouldn't have been, and they determined the majority of the states is the best way to look.

If we look at the case cited by the government, U.S. versus Garcia-Jimenez, for this issue, you know, that was -- that was an illegal reentry case -- but it also needs to define aggravated assault, and they found that aggravated assault was not -- even under the enumerated clause was not -- was not a crime of violence due to the reckless nature of it. They had a chance to discuss the same issue, and they --

THE COURT: What year was that case?

MR. BARTOLAI: That was -- that was the Ninth Circuit, Judge. I have it here somewhere. They noted in that

opinion that the -- that the majority of states -- majority of states don't recognize -- that was 2015.

THE COURT: But Voisine was 2016 by the Supreme Court, right. You agree the Supreme Court is a higher authority than perhaps the Ninth Circuit is, right?

MR. BARTOLAI: I think so, yes, Judge. You know, you're aware of the argument. Again, they're saying -- when we are determining what this generic offense is, we can look at the model penal code and look at the majority of states, the Third Circuit says the majority of states is the best approach. And the Ninth Circuit in Jimenez says the majority of states -- after analysis -- historical there -- they make the comparison -- they find by a preponderance or even more -- majority of states won't recognize recklessness as a basis for aggravated assault.

So, Your Honor, we submit that when we look at the case law -- and again -- you know, it certainly isn't a clear issue. It's going to be one that will be litigated obviously, you know, this issue. And we submit that, you know, the government hasn't proven that this enhancement would apply, you know, that this particular statute was a crime of violence. We submit, you know, it changes things in this case. It's about a four level, you know, swing in the offense conduct both under the career offender as well as under the 2 K. 2.1 as well as the grouping with the explosives.

So having said that, Judge, that's our argument. It flows from the -- from that specific definition about crime of violence, and we submit that both of those aggravated assaults, the pointing even less -- the pointing is even less of a crime of violence than this one, you know, because it again -- you know, it doesn't meet the definition. So having said that, we submit that it shouldn't apply.

THE COURT: Mr. Caraballo?

MR. CARABALLO: Your Honor, we obviously identified this issue as one worth briefing, and that's what was the focus of our sentencing memorandum. It appears that most of the issues here are not in dispute. So there's no dispute here that Mr. Torner's prior drug trafficking crime qualifies as one of the two predicates, leaving just the issue of whether either of his New Jersey aggravated assault convictions, either the second degree one that we focused on, or the pointing qualifies as the second predicate for both career offender status as well as for the adjustment to his base offense level under the guidelines.

Our position has primarily been that the second degree felony aggravated assault is all that the Court really needs to consider in order to agree that Mr. Torner is, in fact, a career offender and is subject to an enhanced underlying base offense level for having two prior convictions of either a drug distribution offense or a crime of violence.

It sounds as though we agree that the New Jersey aggravated assault statute is divisible and that's both between the different degrees under the statute as well as within each degree.

So, for instance, when we look at this 12-1 B. 1 second degree aggravated assault felony, there are different means by which one can commit the crime within that particular degree making it internally divisible and, thus, subject to a review of the underlying Shepard documents. The documents that we submitted, Your Honor, I think put this to bed. And I will note something Your Honor noted that we also flagged is that the current version of the New Jersey statute at least includes this reckless indifference as a potential mens rea for the second degree felony.

I was able to track it all the way back to about 2005 and 2006, and that language still existed before we can go any further back to 1997, which is proving to be a bit more difficult. That's when we received these Shepard documents, and in our reaction from the government was this puts the whole thing to bed. We included, of course, the certified conviction, both the amended one as well as one of the originals. And the reason that we included them both is because as Your Honor noted we also noticed that the plea form referenced count one and a count four. It's a little bit difficult to decipher the chicken scratch.

But if you look closely, you can see it references two different docket numbers that were consolidated as Mr. Bartolai mentioned. We included the certified convictions for both of those. More importantly is the indictment for the second of those two consolidated convictions. As Mr. Bartolai acknowledged, the fourth count to which Mr. Torner pleaded guilty solely charges that he along with other individuals -- and the words are purposefully or knowingly did cause and/or attempt to cause serious bodily injury to a redacted victim with a handgun, a knife and a stick, and that it cites that 12-1 B. 1 provision.

At no point does it include the extreme indifference recklessness language. Our position is that even though there's ample support particularly following the Voisine decision that reckless indifference may very well be a sufficient mens rea for a crime of violence under the guidelines. The fact that Mr. Torner pleaded guilty to a count that only charges him with intentional and attempted intentional conduct in causing harm to another decides the matter.

THE COURT: Thank you. The short answer is the objection to that enhancement is denied. I looked at this very carefully as well. I read the case law related to this, and I completely agree that it's oxymoronic that in today's world that someone could describe someone having a gun, a knife and

being close to sodomizing someone with a stick and that this would not be considered a violent felony offense. That's -- it's -- I almost feel like it's Orwellian in nature. But it is what the -- what the appellate courts have more recently determined, the Supreme Court in particular.

That being said, it appears to me that we are allowed under the modified approach to review important documents in the case, and it is clear that the New Jersey statute is divisible, and so the Court -- it's appropriate for the Court to review those documents. In reviewing them as indicated by the government that the actual charge itself does not indicate reckless. It indicates purposeful activity, No. 1. No. 2, in addition to that, the Third Circuit, Judge Rendell I believe it was in -- let's see --

MR. CARABALLO: The Abdullah case?

THE COURT: No, in Lewis, I think, began to cover that, and then I believe that although not a Third Circuit opinion -- I should have said Chief Judge Linares as I said Fuentes because I saw him the other day, and he was on my mind. Jose Linares from New Jersey -- he's chief judge in the Hedgeman case -- appropriately and properly went through the statute in that particular case and his citation to Voisine where the Supreme Court announced that crimes of violence can encompass the use of force that has been undertaken recklessly.

Certainly in the description, Mr. Bartolai, that you

gave is significantly milder than the description of the circumstances here, but it isn't the underlying factual circumstances as opposed to the written words of the statute that are controlling in this case. And I -- I admit, you know, in this oxymoronic world of -- you know, you may have an appellate argument to make concerning whether or not aggravated assault in the second degree involving a knife, a gun and a stick are a crime of violence, and that will be ultimately, I guess, for a higher court to determine, but I believe that it fits squarely within the provisions outlined in the guidelines under 4 B. 1.1, and I believe that it does qualify as a crime of violence.

I think that -- I am referring now not to the pointing. I'm not even getting to the pointing because I don't see any -- any circumstance that would make this aggravated assault in the second degree in my opinion in reviewing the case law not a violent felony offense. I can't imagine that it could be interpreted that way. And so in light of Voisine and in light of Hedgeman's thorough analysis of similar circumstances in light of Lewis, it appears to me that the circumstances surrounding this -- even Abdullah that the circumstances surrounding this do make it a violent felony offense and, therefore, the four-point enhancement is applicable in the case. So to that extent, your objection is denied. Your next objection is --

REPORTER'S CERTIFICATE

I, Laura Boyanowski, RMR, CRR, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

s/ Laura Boyanowski, RMR,CRR
Laura Boyanowski, RMR, CRR
Official Court Reporter

REPORTED BY:

LAURA BOYANOWSKI, RMR, CRR
Official Court Reporter
United States District Court
Middle District of Pennsylvania
235 N. Washington Avenue
Scranton, PA 18503

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ATTACHMENT 1

15:27:54 09-06-2017 | 8

Sep. 6. 2017 3:39PM No. 2224 P. 8

AMENDED 10-29-97

State of New Jersey

V.

ROBERT TORRES

Defendant (Specify Complete Name) P.G.# 96-974/03

New Jersey Superior Court
HUDSON County

Law Division - Criminal
[X] AMENDED**
[x] Judgment of Conviction
[ ] Change of Judgment
[X] Order for Commitment
[ ] Indict/Accusation Dismissed
[ ] Judgment of Acquittal

1/20/73	DATE OF BIRTH
755286B	S.B.I. #
3/20/96	DATE OF ARREST
8/20/96	DATE IND/ACC FILED
8/20/96	DATE OF ORIGINAL PLEA

[X] NOT GUILTY [ ] GUILTY ORIGINAL PLEA

ADJUDICATION BY:	DATE
[X] GUILTY PLEA	8/12/97
[ ] JURY TRIAL	
[ ] NON-JURY TRIAL	
[ ] DISMISSED/ACQUITTED	

ORIGINAL CHARGES

IND/ACC NO.	Count	Description	Degree	Statute
1520-8-96	1	KIDNAP.		2C:13-1B
	2	ATT. MURDER		2C:5-1, 11-3
	3	ARM. ROBBERY		2C:15-1
	4	AGG. ASLT.		2C:12-1B(1)
	5	AGG. ASLT.		2C:12--1B(4)
	6	TERR. THRTS.		2C:12-3B
	7	P. WPN. UNL. PURP.		2C:39-4A
	8	UNL. P. WPN.		2C:39-5B
	9	P. WPN. UNL. PURP.		2C:39-4D
	10	UNL. P. WPN.		2C:39-5D

FINAL CHARGES

Count	Description	Degree	Statute
1	AGG. ASLT. 2C:12-1B(1)**	2ND	2C:12-1B(1)

It is, therefore, on 10/3/97 ORDERED AND ADJUDGED that the defendant is sentenced as follows:
N.J. DEPARTMENT OF CORRECTIONS FLAT 7 YEARS CONCURRENT AND CO-TERMINOUSLY TO ACC.#623-97 AND CONCURRENT TO ANY VIOLATION OF PROBATION.

DISMISSALS - COUNTS 1,2,3,5,6,7,8,9 AND 10.
SNSF -$75.00
RIGHT TO APPEAL

[ ] You are hereby sentenced to community supervision for life.

[ ] The court finds that your conduct was characterized by a pattern of repetitive and compulsive behavior.

[X] It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

[X] Defendant is to receive credit for time spent in custody. (R. 3:21-8). 563 TOTAL NO. DAYS 3/20/96 TO 10/3/97 DATES(From/To)

[ ] Defendant is to receive gap time-credit for time spent in custody (N.J.S.A. 2C:44-5b(2)). TOTAL NO. DAYS DATES(From/To)

TOTAL NO. DAYS DATES(From/To)

Total Custodial Term FLAT 7 YEARS Institution N.J. DEPT. CORR. Total Probation Term

Administrative Office of the Courts
State Bureau of Identification
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CPO106(Rev. 7/94) Replaces LR-31 & LR-35
COA 4 (Rev. 7/94)

TOTAL FINE $_____

TOTAL RESTITUTION $_____

If the offense occurred on or after December 23, 1991, an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

[X] Assessments imposed on count(s) CT. 4 is $ 100.00 each.

TOTAL VCCB ASSESSMENT $ 100.00

[X] Installment payments are due at rate of $10.00 per MONTH, beginning THRU PROBATION (Date).

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)
___1st Degree @ $3000 ___4th Degree @ 750
___2nd Degree @ $2000 ___Disorderly Persons or Petty
___3rd Degree @ $1000 ___Disorderly Persons @ 500.
TOTAL D.E.D.R PENALTY $_____

[ ] Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED.
_____ Offenses @ 50. TOTAL LAB FEE $ _____

3) Name of Drugs Involved _____.

4) A mandatory driver's license suspension of ____ months is ORDERED.
The suspension shall begin today, _____and end _____.
Driver's License Number_____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING)

Defendant's Address _____

Eye Color _____ Sex _____ Date of Birth _____

[ ] The defendant is the holder of an out-of-state driver's license from:
jurisdiction _____ Driver's License# _____

[ ] Defendant's non-resident driving privileges are hereby revoked for _____ months.

If the offense occurred on or after February 1, 1993 and the sentence is to probation or to a state correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169) If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, a transaction fee of up to $2.00 is ordered for each occasion when a payment is made. (P.L. 1995, c.9).

If the offense occurred on or after August 2, 1993, a $75 Safe Neighborhood Services Fund assessment is ordered for each conviction. P.L. 1993, c. 220

If the offense occurred on or after January 5, 1994 and the sentence is to probation, a fee of up to $25 per month for the probationary term is ordered. (P.L. 1993, c. 275) Amount per month _____

If the crime occurred on or after January 9, 1997, a $30 Law Enforcement Officers Training and Equipment Fund penalty is ordered.

NAME (Person who prepares this form) TELEPHONE NUMBER NAME (Attorney for Defendant/State)

BEVERLY R. NEVITH (CT. CLK. M. DICKSON) 795-6640 J. YOUNG PROS/ R. WALKER

STATEMENT OF REASONS

AGGRAVATING FACTORS:
3) THE RISK THAT THE DEFENDANT WILL COMMIT ANOTHER OFFENSE;
9) THE NEED FOR DETERRING THE DEFENDANT AND OTHERS FROM VIOLATING THE LAW;
MITIGATING FACTORS:
3) THE DEFENDANT ACTED UNDER STRONG PROVOCATION.

AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS.

I Silvia I Gonzalez, Deputy Clerk Of the Superior Court of New Jersey, County of Hudson, do hereby certify that the foregoing is a true and correct copy of the original on file in my office.

Deputy Clerk of the Superior Court

Date: 9-5-17

THE COURT INCORPORATES ALL OTHER REASONS STATED ORALLY ON THE RECORD FOR IMPOSING THE SENTENCE HEREIN.

Frances L. Antonin, J.S.C. **AMENDED 10/29/97**

JUDGE (Name) JUDGE (Signature) DATE

FRANCES L. ANTONIN, J.S.C. 10/1/97

Administrative Office of the Courts
State Bureau of Identification
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CCR 4 (Rev. 11/93) CR-1 (Rev. 11/93) Replaces LA-3 & LA-3S

WS -897

State of New Jersey

v.

ROBERT TORNER

Defendant (Specify Complete Name) P.G.# 97-764

New Jersey Superior Court
HUDSON County
Law Division - Criminal

[X] Judgment of Conviction
[ ] Change of Judgment
[X] Order for Commitment
[ ] Indict/Accusation Dismissed
[ ] Judgment of Acquittal

1/27/73 DATE OF BIRTH
755286B S.B.I. #
DATE OF ARREST
8/12/97 DATE IND/ACC FILED
8/12/97 DATE OF ORIGINAL PLEA
[ ] NOT GUILTY [X] GUILTY ORIGINAL PLEA

ADJUDICATION BY:	DATE
[X] GUILTY PLEA	8/12/97
[ ] JURY TRIAL	
[ ] NON-JURY TRIAL	
[ ] DISMISSED/ACQUITTED	

ORIGINAL CHARGES

IND/ACC NO.	Count	Description	Degree	Statute
623-97	1	AGG. ASLT.		2C:12-1B(1)

FINAL CHARGES

Count	Description	Degree	Statute
1	AGG. ASLT.	2ND	2C:12-1B(1)

It is, therefore, on 10/3/97 ORDERED AND ADJUDGED that the defendant is sentenced as follows:
N.J. DEPARTMENT OF CORRECTIONS FLAT 7 YEARS TO RUN CONCURRENT AND CO-TERMINOUSLY WITH IND. 1520-8-96 AND CONCURRENT WITH ANY VIOLATION OF PROBATION.

DISMISSALS - W 1997600757
SNSF - $75.00
RIGHT TO APPEAL

[ ] You are hereby sentence to community supervision for life.

[ ] The court finds that your conduct was characterized by a pattern of repetitive and compulsive behavior.

[X] It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

[X] Defendant is to receive credit for time spent in custody. (R. 3:21-8). 563 TOTAL NO. DAYS 3/20/96 TO 10/3/97 DATES(From/To)

[ ] Defendant is to received gap time credit for time spent in custody (N.J.S.A. 2C:44-5b(2)). TOTAL NO. DAYS DATES(From/To)

TOTAL NO. DAYS DATES(From/To)

Total Custodial Term FLAT 7 YEARS Institution NJ DEPT. CORR. Total Probation Term

Administrative Office of the Courts
State Bureau of Identification
COPIES TO: CHIEF PROBATION OFFICER, STATE POLICE, AOC CRIMINAL PRACTICE, DEPT OF CORRECTIONS OR COUNTY MEDIAL INSTITUTION

CRO106(Rev. 7/94) Replaces LR-34 & LR-35
CDR 4 (Rev. 7/94)

State v. ROBERT TORNER SBI# 755286B IND/ACC# 623-97 STENO: STEVE K.

TOTAL FINE $_____

TOTAL RESTITUTION $_____

If the offense occurred on or after December 23, 1991, an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

[X] Assessments imposed on count(s) CT. 1 is $ 100.00 each.

TOTAL VCCB ASSESSMENT $ 100.00

[X] Installment payments are due at rate of $ 10.00 per MONTH, beginning THRU PAROLE. (Date)

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

____1st Degree @ $3000 ___4th Degree @ 750
____2nd Degree @ $2000 ___Disorderly Persons or Petty
____3rd Degree @ $1000 ___Disorderly Persons @ 500.
TOTAL D.E.D.R PENALTY $_____

[ ] Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED.
_____ Offenses @ $50. TOTAL LAB FEE $ _____

3) Name of Drugs Involved _____.

4) A mandatory driver's license suspension of ____ months is ORDERED.
The suspension shall begin today, _____ and end _____.

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE; PLEASE ALSO COMPLETE THE FOLLOWING)

Defendant's Address _____

Eye Color _____ Sex _____ Date of Birth _____

[ ] The defendant is the holder of an out-of-state driver's license from:
Jurisdiction _____ Driver's License# _____

[ ] Defendant's non-resident driving privileges are hereby revoked for _____ months.

If the offense occurred on or after February 1, 1993 and the sentence is to probation or to a State Correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169) If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, a transaction fee of up to $2.00 is ordered for each occasion when a payment is made. (P.L. 1995, c.9).

If the offense occurred on or after August 2, 1993, a $75 Safe Neighborhood Services Fund assessment is ordered for each conviction. P.L. 1993, c. 220

If the offense occurred on or after January 5, 1994 and the sentence is to probation, a fee of up to $25 per month for the probationary term is ordered. (P.L. 1993, c. 275) Amount per month _____

If the crime occurred on or after January 9, 1997, a $30 Law Enforcement Officers Training and Equipment Fund penalty is ordered.

NAME (Person who prepares this form)	TELEPHONE NUMBER	NAME(Attorney for Defendant)/State
BEVERLY R. NEVITH (CT. CLK. M. DICKSON)	795-6640	J. YOUNG PROS/H.E. WALKER

STATEMENT OF REASONS

AGGRAVATING FACTORS:
3) THE RISK THAT THE DEFENDANT WILL COMMIT ANOTHER OFFENSE;
9) THE NEED FOR DETERRING THE DEFENDANT AND OTHERS FROM VIOLATING THE LAW;
MITIGATING FACTORS:
3) THE DEFENDANT ACTED UNDER STRONG PROVOCATION;

AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS.

THE COURT INCORPORATES ALL OTHER REASONS STATED ORALLY ON THE RECORD FOR IMPOSING THE SENTENCE HEREIN.

I, Silvia L Gonzalez, Deputy Clerk Of the Superior Court of New Jersey, County of Hudson, do hereby certify that the foregoing is a true and correct copy of the original on file in my office.

Deputy Clerk of the Superior Court
Date: 9-5-17

JUDGE (Name)	JUDGE (Signature)	DATE
FRANCES L. ANTONIN, J.S.C.		10/4/17

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State Bureau of Identification
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CPO106(Rev. 11/93) Replaces LA-34 & LA-35
CDR 4 (Rev. 11/93)

Appendix, p 40

ATTACHMENT 2

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION-CRIMINAL BRANCH

A.D. 1997 TERM 1ST SESSION 1ST PANEL A

1520 08 96

THE STATE OF NEW JERSEY
vs.

AMAURY COLARTE,
JOSEPH GARCIA,
ROBERT TORNER
AND
NANCY CRESPO

INDICTMENT NO. _____
CHARGE(S):

KIDNAP (NJS 2C:13-1b);
ATT MURDER (NJS 2C:5-1 & 2C:11-3);
ARM ROBB (NJS 2C:15-1);
AGG ASLT (NJS 2C:12-1b(1));
AGG ASLT (NJS 2C:12-1b(4));
TERR THRT (NJS 2C:12-3b);
POSS WPN UNL PURP (NJS 2C:39-4a);
UNL POSS WPN (NJS 2C:39-5b);
POSS WPN UNL PURP (NJS 2C:39-4d);
UNL POSS WPN (NJS 2C:39-5d);
WITN TAMP (NJS 2C:28-5a);
FALSE SWEAR (NJS 2C:28-2a);
UNSWORN FALSIF (NJS 2C:28-3a);
FALSE INCRIM (NJS 2C:28-4a)

DEFENDANT(S)

THE GRAND JURORS OF THE STATE OF NEW JERSEY FOR THE COUNTY OF HUDSON UPON THEIR OATHS, PRESENT THAT AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER AND NANCY CRESPO ON OR ABOUT THE 20TH DAY OF MARCH 1996, IN THE CITY OF UNION CITY IN THE COUNTY OF HUDSON AFORESAID AND WITHIN THE JURISDICTION OF THIS COURT, unlawfully did remove a substantial distance from the vicinity where he was found and/or unlawfully did confine Cesar Figarola for a substantial period with the purpose to facilitate the commission of a crime or flight thereafter and/or inflict bodily injury on or to terrorize and did fail to release the said unharmed prior to apprehension, while armed with a handgun, a knife and a stick, contrary to the provisions of N.J.S. 2C:13-1b, against the peace of this State, the Government and dignity of the same.

SECOND COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER and NANCY CRESPO purposely did attempt to kill while armed with a handgun, a knife and a stick, contrary to the provisions of N.J.S. 2C:5-1 and 2C:11-3, against the peace of this State, the Government and dignity of the same.

THIRD COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER and NANCY CRESPO in the course of committing a theft knowingly did inflict bodily injury upon and/or knowingly did use force upon and/or knowingly did threaten immediate bodily injury upon [redacted] and/or purposely put Cesar Figerola in fear of immediate bodily injury upon the said and/or knowingly did threaten immediately to commit a crime of the first or second degree, that is, murder upon while armed with or threatening the immediate use of a deadly weapon, that is, a handgun, a knife and a stick, contrary to the provisions of N.J.S. 2C:15-1, against the peace of this State, the Government and dignity of the same.

FOURTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER and NANCY CRESPO purposely or knowingly did cause and/or attempt to cause serious bodily injury to with a handgun, a knife and a stick, contrary to the provisions of N.J.S. 2C:12-1b(1), against the peace of this State, the Government and dignity of the same.

FIFTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER and NANCY CRESPO knowingly did under circumstances manifesting extreme indifference to the value of human life, point a handgun style firearm at or in the direction of , contrary to the provisions of N.J.S. 2C:12-1b(4), against the peace of this State, the Government and dignity of the same.

SIXTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER and NANCY CRESPO did threaten to kill with purpose to put the said in imminent fear of death under circumstances reasonably causing the said [redacted] to believe the immediacy of the threat and the likelihood that it will be carried out, contrary to the provisions of N.J.S. 2C:12-3b, against the peace of this State, the Government and dignity of the same.

SEVENTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER and NANCY CRESPO did possess a certain weapon, that is, a handgun style firearm, with purpose to use it unlawfully against the person or property of another, contrary to the provisions of N.J.S. 2C:39-4a, against the peace of this State, the Government and dignity of the same.

EIGHTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER and NANCY CRESPO knowingly did possess a handgun style firearm, without first having obtained a permit to carry same as provided in N.J.S. 2C:58-4, contrary to the provisions of N.J.S. 2C:39-5b, against the peace of this State, the Government and dignity of the same.

NINTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER and NANCY CRESPO did possess a certain weapon, that is, a knife and/or stick, with purpose to use it unlawfully against the person or property of another, contrary to the provisions of N.J.S. 2C:39-4d, against the peace of this State, the Government and dignity of the same.

TENTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said AMAURY COLARTE, JOSEPH GARCIA, ROBERT TORNER and NANCY CRESPO knowingly did possess a certain weapon, that is, a knife and/or stick, under circumstances not manifestly appropriate for such lawful uses as it may have, contrary to the provisions of N.J.S. 2C:39-5d, against the peace of this State, the Government and dignity of the same.

ELEVENTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said NANCY CRESPO believing that an official proceeding or investigation was pending or about to be instituted, knowingly did attempt to induce or otherwise cause to drop charges against and/or withhold testimony regarding Amaury Colarte, Joseph Garcia and Robert Torner, contrary to the provisions of N.J.S. 2C:28-5a, against the peace of this State, the Government and dignity of the same.

TWELFTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said NANCY CRESPO knowingly did falsely state while under oath or equivalent affirmation and/or affirmed the truth of said statement when she did not believe it to be true, contrary to the provisions of N.J.S. 2C:28-2a, against the peace of this State, the Government and dignity of the same.

THIRTEENTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said NANCY CRESPO knowingly did make a written false statement which she did not believe to be true on or pursuant to a form bearing notice, authorized by law, that is, a police complaint, to the effect that false statements made therein are punishable, contrary to the provisions of N.J.S. 2C:28-3a, against the peace of this State, the Government and dignity of the same.

FOURTEENTH COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the First Count herein, the said NANCY CRESPO knowingly did give false information to the Union City Police Department, with purpose to falsely implicate in the commission of an offense, contrary to the provisions of N.J.S. 2C:28-4a, against the peace of this State, the Government and dignity of the same.

HEW,III/ic

CARMEN MESSANO, PROSECUTOR

A TRUE BILL

PRESENTED:

ASSIGNED TO THE SUPERIOR COURT

AUG 20 1996

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Ad./ ASSIGNMENT JUDGE SUPERIOR COURT

ATTACHMENT 3

PLEA FORM

County Hudson

DEFENDANT'S NAME Robert Tanner before Judge Antonio

1. List the charges to which you are pleading guilty:

Ind./Acc./Compl.#	Count	Nature of Offense	Degree	STATUTORY MAXIMUM Time	Fine	VCCB Assmt*
1520 018 96	4	Agg. Asslt	3	MAX 10	$100,000	$100
Accus. 623-97	1	Aggravated Assault	2nd°	MAX 10	100,000	$100
				MAX		
				MAX		
				MAX		

Your total exposure as the result of this plea is: TOTAL 20 Years $200.00

PLEASE CIRCLE APPROPRIATE ANSWER

2. a. Did you commit the offense(s) to which you are pleading guilty? (YES) (NO)
   b. Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)? (YES) (NO)

3. Do you understand what the charges mean? (YES) (NO)

4. Do you understand that by pleading guilty you are giving up certain rights? Among them are:
   a. The right to a jury trial in which the State must prove your guilt beyond a reasonable doubt? (YES) (NO)
   b. The right to remain silent? (YES) (NO)
   c. The right to confront the witnesses against you? (YES) (NO)

5. Do you understand that if you plead guilty:
   a. You will have a criminal record? (YES) (NO)
   b. Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Violent Crimes Compensation Board Assessment? (YES) (NO)
   c. You must pay a minimum Violent Crimes Compensation Board assessment of $50 ($100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is $30 if offense occurred between January 9, 1986 and December 22, 1991 inclusive, $25 if offense occurred before January 1, 1986.) (YES) (NO)
   d. If the offense occurred on or after February 1, 1993 but was before March 13, 1995 and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to $1.00 for each occasion when a payment or installment payment is made? If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, you must pay a transaction fee of up to $2.00 for each occasion when a payment or installment payment is made? (YES) (NO)
   e. If the offense occurred on or after August 2, 1993 you must pay a $75 Safe Neighborhood Services Fund assessment for each conviction? (YES) (NO)
   f. If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to $25 per month for the term of probation? (YES) (NO)
   g. If the crime occurred on or after January 8, 1997 you must pay a Law Enforcement Officers Training and Equipment Fund penalty of $30? (YES) (NO)

*VIOLENT CRIMES COMPENSATION BOARD ASSESSMENT Defendant's Initials R T

6. Do you understand that the court could in its discretion impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentenced imposed? (YES) [NO]

7. Did you enter a plea of guilty to any charges that require a mandatory period of parole ineligibility or a mandatory extended term? [YES] (NO)
a. If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is ____years and ____months (fill in the number of years/months) and the maximum period of parole ineligibility can be ____years and ____months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.

8. Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison? (YES) [NO]

9. Are you presently on probation or parole? (YES) [NO]
a. Do you realize that a guilty plea may result in a violation of your probation or parole? [YES] [NO] [N/A]

10. Are you presently serving a custodial sentence on another charge? [YES] (NO)
a. Do you understand that a guilty plea may affect your parole eligibility? [YES] [NO] (N/A)

11. Do you understand that if you have plead guilty to, or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively? [YES] [NO] (N/A)

12. List any charges the prosecutor has agreed to recommend for dismissal:

Ind./Acc./Compl.#	Count	Nature of Offense and Degree
1520-8-96	1-3	Indict., 1st Murder, Arm Robbery, Poss Asslt
	5-14	Terr. Thrts, Poss WPN Unl. Purp, Unl Poss Wpn
		w.t. Insp False Swear, Ut Sworn False Swear
		False Instrm
1124-7-97		3° Poss'n instr of escape. Dism in its entirety.

13. Specify any sentence the prosecutor has agreed to recommend:
7 Flat on each offense Concurrent to each other (TERMINUS)
and c/c any viol of prob

14. Has the prosecutor promised that he/she/s will NOT:
a. Speak at sentencing? [YES] (NO)
b. Seek an extended term of confinement? (YES) [NO]
c. Seek a stipulation of parole ineligibility? (YES) [NO]

15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? (YES) [NO] [N/A]

Defendant's Initials K. I

18. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [YES] [NO] [N/A]

17. Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty? [YES] [NO] [N/A]

16. Have you discussed with your attorney the legal doctrine of merger? [YES] [NO] [N/A]

15. Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence? [YES] [NO] [N/A]

20. List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:

85% statute Not to apply

21 Have any promises other than these mentioned on this form, or any threats, been made in order to cause you to plead guilty? [YES] [NO]

22 a Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence? [YES] [NO]

b Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea? [YES] [NO]

c Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial? [YES] [NO]

23 Are you satisfied with the advice you have received from your lawyer? [YES] [NO]

24 Do you have any questions concerning this plea? [YES] [NO]

DATE: 9/12/17 DEFENDANT

DEFENSE ATTORNEY

PROSECUTOR

[ ] This plea is the result of the judge's conditional indications of the maximum sentence he or she would impose independent of the prosecutor's recommendation. Accordingly, the "Supplemental Plea Form for Non-Negotiated Pleas" has been completed.

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Respectfully Submitted,

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