No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN ANIBAL PATRONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the First Circuit

APPENDIX

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United States Court of Appeals
For the First Circuit

No. 19-1486

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN ANIBAL PATRONE, a/k/a Juan Anibal, a/k/a Juan Anibal Patrone-González, a/k/a Flacco, a/k/a Poppo, a/k/a Carlos,

Defendant, Appellant.

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

[Hon. Douglas P. Woodlock, U.S. District Judge]

Before

Thompson, Lipez, and Kayatta,
Circuit Judges.

Leonard E. Milligan III, with whom Jin-Ho King and Milligan Rona Duran & King LLC were on brief, for appellant.

Theodore B. Heinrich, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellee.

January 14, 2021

KAYATTA, Circuit Judge. We consider on plain error review another appeal raising an unpreserved objection to a Rule 11 colloquy conducted prior to the United States Supreme Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019). In Rehaif, the Court held that a conviction for the illegal possession of a gun under 18 U.S.C. § 922(g) requires proof beyond a reasonable doubt that the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm." Rehaif, 139 S. Ct. at 2200. As we recently explained in United States v. Burghardt, 939 F.3d 397 (1st Cir. 2019), and again in United States v. Guzmán-Merced, No. 18-2146, 2020 WL 7585176 (1st Cir. Dec. 22, 2020), failure to advise a defendant of that requirement in accepting a plea constitutes clear error. As we also explained, in the absence of any timely objections to the plea colloquy, such an error will warrant vacating the conviction and withdrawing the plea only if the defendant can establish a "reasonable probability" that, but for the error, the defendant would not have pled guilty to the offense. Burghardt, 939 F.3d at 403; Guzmán-Merced, 2020 WL 7585176, at *1–2.

Applying this precedent, we find that defendant Juan Anibal Patrone fails to establish a reasonable probability that he would not have pled guilty had he been advised as Rehaif requires. For independent reasons, we also reject his objections to his sentence. Our reasoning follows.

I.

Patrone, a citizen of Italy and of the Dominican Republic, lawfully entered the United States on a tourist visa and settled in Lawrence, Massachusetts, in 2009 or 2010. At some point, his visa expired, although the record does not specify when this occurred. He subsequently obtained a work permit and was "in the midst of applying to remain in the United States" at the time of his arrest in the instant action.

In April 2016, the Drug Enforcement Administration commenced an investigation into a drug trafficking organization in Lawrence, Massachusetts. In the course of this investigation, the government gathered overwhelming evidence that Patrone had been involved in the widespread distribution and sale of fentanyl and other drugs for several years. The government also seized a loaded 10 millimeter firearm from his bed at the time of his arrest.

The government charged Patrone with one count of conspiracy to distribute and possess with intent to distribute drugs, including cocaine, heroin, and more than 400 grams of fentanyl, in violation of 21 U.S.C. §§ 846, 841(a)(1), and (b)(1)(A), and one count of possessing a firearm as an alien unlawfully present in the United States, in violation of 18 U.S.C. § 922(g)(5)(A). The indictment did not allege that Patrone knew he was an alien who was unlawfully in the United States. See 18

U.S.C. § 922(g)(5)(A). On September 19, 2018, he pled guilty to both counts without benefit of a plea agreement.

Before accepting his guilty plea, the district court informed Patrone that a conviction for violating section 922(g)(5)(A) required the government to prove that Patrone was unlawfully in the United States and that he possessed the firearm and loaded magazine referenced in the firearm count. Neither the district court nor the government informed Patrone that the government would have to prove his knowledge of his unlawful immigration status in order to sustain a conviction on the firearm count. Patrone was subsequently sentenced to 144 months' imprisonment on the drug count and 120 months' imprisonment on the firearm count, to be served concurrently.

A month after Patrone's sentencing, the United States Supreme Court issued its opinion in Rehaif. As relevant here, Rehaif's holding means that had Patrone gone to trial, the government would have needed to prove beyond a reasonable doubt that when he possessed the gun, he knew that he was unlawfully in the United States. Rehaif, 139 S. Ct. at 2198. As is customary in criminal law, we refer to the degree of such knowledge as "scienter," id. at 2195, or (in this instance) "scienter-of-status." See Burghardt, 939 F.3d at 400.

Patrone asks that we vacate his conviction on the firearm count because the government did not charge him with, and he did

not plead guilty to, knowing the facts that made him a person prohibited from possessing a firearm, as Rehaif now requires. In addition, Patrone requests a remand for resentencing, claiming that the district court mistakenly applied a two-level sentencing enhancement for criminal livelihood on the drug charge under U.S. Sentencing Guideline Section 2D1.1(b)(16)(E). We address each challenge in turn.

II.

A.

Before accepting a guilty plea, a district court must conduct a colloquy with the defendant to ensure that he "understands the elements of the charges that the prosecution would have to prove at trial." Burghardt, 939 F.3d at 402 (quoting United States v. Gandia-Maysonet, 227 F.3d 1, 3 (1st Cir. 2000)); see also Fed. R. Crim. P. 11(b)(1)(G) ("[T]he court must inform the defendant of, and determine that the defendant understands, . . . the nature of each charge to which the defendant is pleading."). A defendant who pleads guilty does not waive all challenges to the adequacy of the plea colloquy. Burghardt, 939 F.3d at 402. Where, as here, a defendant waits until an appeal to raise such a challenge, we review that challenge only for plain error. See United States v. Dominguez Benitez, 542 U.S. 74, 80 (2004); Burghardt, 939 F.3d at 402—03; United States v. Hernández-Maldonado, 793 F.3d 223, 226 (1st Cir. 2015). Under

the plain error standard, a defendant must show "(1) an error, (2) that is clear or obvious, (3) which affects his substantial rights . . . , and which (4) seriously impugns the fairness, integrity, or public reputation of the proceeding." United States v. Correa-Osorio, 784 F.3d 11, 18 (1st Cir. 2015).

The parties agree that, after Rehaif, the district court's (understandable) failure to ascertain whether Patrone knew that he was an alien unlawfully in the United States constitutes clear error. So our inquiry hinges on prongs three and four of the plain error standard -- whether the district court's error prejudiced Patrone (i.e., were his substantial rights affected) and whether the error "seriously impugns the fairness, integrity, or public reputation of the proceeding." Correa-Osorio, 784 F.3d at 18. In a case such as this, an assessment of prejudice will usually turn on whether the defendant can show a "reasonable probability that, but for the purported error, he would not have pled guilty." Burghardt, 939 F.3d at 403 (quoting United States v. Diaz-Concepción, 860 F.3d 32, 38 (1st Cir. 2017)); see generally Dominguez Benitez, 542 U.S. 74 (2004).

Claiming to accede to plain error review, Patrone actually argues for a variant of that review. That variant treats the third prong as always satisfied when the discussion of an offense during a plea colloquy omits an element of the offense, regardless of whether the omission actually played any role in the

defendant's decision to plead. The Fourth Circuit recently adopted such a variant, calling Rehaif error a structural error that per se adversely affects a defendant's substantive rights. United States v. Gary, 954 F.3d 194, 203–05 (4th Cir. 2020) ("[T]his Court has held that [structural errors] necessarily affect substantial rights, satisfying [the plain error standard's] third prong."), cert. granted, No. 20-444, 2021 WL 77245 (Jan. 8, 2021).

We have already crossed this bridge, but in the opposite direction, requiring that a defendant who asserts an unpreserved claim of Rehaif error must demonstrate prejudice in the form of "a reasonable probability that, but for this purported error, he would not have pled guilty." Burghardt, 939 F.3d at 403. Nor do we see good reason to reverse our path. The Supreme Court itself gestures in the direction we have taken. See Dominguez Benitez, 542 U.S. at 81 n.6 ("The omission of a single Rule 11 warning without more is not colorably structural."). And at least two other circuits have rejected Gary's adoption of Patrone's proffered version of plain error review in cases such as this. United States v. Hicks, 958 F.3d 399, 401—02 (5th Cir. 2020) (rejecting the Fourth Circuit's structural error holding in Gary); United States v. Coleman, 961 F.3d 1024, 1029—30 (8th Cir. 2020) (rejecting the argument that a plea suffering from a Rehaif error is structural error and applying a reasonable probability standard to the third prong of plain error review). Six other circuits proceed more or

less as we have, albeit without expressly considering an argument that a Rehaif error is a structural error that automatically satisfies the third prong of plain error review. See United States v. Balde, 943 F.3d 73, 97—98 (2d Cir. 2019) (noting that in some cases a Rehaif error may have no effect on a defendant's conviction or decision to plead guilty); United States v. Sanabria-Robreno, 819 F. App'x 80, 82—83 (3d Cir. 2020) (applying a reasonable probability standard to the third prong of plain error review); United States v. Hobbs, 953 F.3d 853, 857—58 (6th Cir. 2020) (same); United States v. Williams, 946 F.3d 968, 975 (7th Cir. 2020) (rejecting a defendant's argument that the government should bear the burden of persuasion in Rehaif cases and applying a reasonable probability standard to the third prong of plain error review); United States v. Fisher, 796 F. App'x 504, 510 (10th Cir. 2019) (applying a reasonable probability standard to the third prong of plain error review); United States v. McLellan, 958 F.3d 1110, 1119—20 (11th Cir. 2020) (same).

We see no error in the structure of the proceedings in the district court that necessarily impacted Patrone's substantial rights; rather, we see an error in describing an offense, the likely effect of which can often be reasonably discerned from the facts of the case. Compare Burghardt, 939 F.3d at 404 (finding that there was no reasonable probability that the defendant would have pled otherwise), with Guzmán-Merced, 2020 WL 7585176, at *2

(finding that there was a reasonable probability the defendant would not have entered a guilty plea had he known of the scienter-of-status requirement). Under Patrone's proposed approach, a defendant not informed that an offense requires proof of his knowledge that he was not legally within the United States at the time of his offense could withdraw his plea even if he was carrying a copy of his affirmed order of removal at the time of the offense. Finding that such an outcome fits poorly with Rule 52, we opt to stay the course. Our decision in this case, as in Burghardt and Guzman, therefore turns on whether there is a reasonable probability that, but for the error, the outcome of the proceedings would have been different.

Patrone contends that he would not have pled guilty to the firearm offense had he known about the scienter-of-status element, because there was little or no evidence that he knew that his presence in the United States was unlawful. Certainly the record as it stood at the plea colloquy was sparse on this question: It merely established that his arrest occurred long after his tourist visa had likely expired, and after he had applied to remain in the United States. This is far from the "overwhelming proof" of guilt that led us to find no prejudice in Burghardt. 939 F.3d at 404. Perhaps Patrone believed his pending application to remain in the United States rendered his presence lawful. Of course, Patrone would have had to consider what additional evidence

of scienter-of-status the government might have gathered and presented, had it known it would be required to do so to secure a conviction at trial. But at this juncture, the government does not and cannot reasonably contend that it certainly would have prevailed at trial had Patrone not pled guilty to the section 922(g) charge.

Our inquiry, though, does not end with weighing the likelihood of a conviction in light of the scienter-of-status element that the government must prove. Other considerations may also bear heavily on a defendant's decision to plead guilty. For example, in this case, Patrone had no reasonable option but to plead guilty to the related and more serious drug charge, for which the government's proof was overwhelming. Indeed, Patrone makes no claim that he would not have pled guilty to the drug count had he thought he might beat the firearm possession count. Even on this appeal, he does not seek to withdraw his plea on the drug count, asking for resentencing only if we first find that his GSR must be recalculated without the two-level leadership enhancement imposed by the district court. Patrone must have known when he decided to plead guilty that the drug count would determine the length of his imprisonment: Both parties -- and Probation, in the PSR -- correctly anticipated that the firearms charge would generate only a lower, concurrent sentence. And Patrone does not claim that he anticipated that the firearm count might add any term to his

conditions of imprisonment or release after his period of incarceration. When he pled guilty, Patrone almost certainly knew that he did not stand to gain anything from proceeding to trial on the firearms charge, even if an acquittal on that charge was very likely.

In fact, choosing to proceed to trial on the firearm charge instead of pleading guilty may well have put Patrone in a worse position at sentencing, as his ability to retain the three-level offense reduction for acceptance of responsibility that he received under the Guidelines would have been uncertain at best. This circuit has yet to decide whether a defendant indicted on multiple counts can receive an acceptance of responsibility reduction when pleading to fewer than all of the counts. See United States v. Deppe, 509 F.3d 54, 61 (1st Cir. 2007) (declining to determine whether "acceptance of responsibility is an all[-]or[-]nothing proposition and [whether] a rebuttable presumption of non-availability . . . applies where a defendant pleads guilty to some but not all of the crimes charged in a multi-count indictment"). But most other circuits addressing this issue have held either that an all-or-nothing approach should be taken -- that failure to plead to all counts irrevocably removes the possibility for acceptance-of-responsibility credits -- or that such credits are lost when the charges pled to and charges contested unsuccessfully at trial are grouped for purposes of

sentencing. See United States v. Hargrove, 478 F.3d 195, 200 (4th Cir. 2007); United States v. Williams, 344 F.3d 365, 379-81 (3d Cir. 2003); United States v. Thomas, 242 F.3d 1028, 1034 (11th Cir. 2001); United States v. Chambers, 195 F.3d 274, 277-79 (6th Cir. 1999); United States v. Ginn, 87 F.3d 367, 371 (9th Cir. 1996); United States v. Kleinebreil, 966 F.2d 945, 954 (5th Cir. 1992).

So the actual decision Patrone faced was this: Given that he was pleading guilty to the drug count, should he also plead guilty to the gun charge, adding nothing to his sentence and locking in a lower Guidelines sentencing range (GSR),[1] or should he go to trial on the gun charge, thereby triggering a potentially higher GSR on the drug count? In short, should he go to trial with no hope of lowering his sentence and a real risk that he might lengthen it? For virtually all defendants, the choice would be easy and the answer clear -- plead to both counts in order to lock in the reduction for acceptance of responsibility to the extent possible, unless, perhaps, victory was certain.

Patrone counters by suggesting that by avoiding conviction on the gun charge, he might have garnered a lower GSR by availing himself of the safety valve provision of 18 U.S.C.

[1] The three-level reduction for acceptance of responsibility reduced the GSR from a recommendation of life imprisonment to a recommended range of 324 to 405 months' imprisonment.

§ 3553(f), which was unavailable to him because of his possession of a firearm. 18 U.S.C. § 3553(f)(2). But it was Patrone's possession of the gun -- not the unlawful nature of the possession -- that rendered the safety valve unavailable. See United States v. McLean, 409 F.3d 492, 501 (1st Cir. 2005) (holding that "a defendant who has constructively possessed a firearm in connection with a drug trafficking offense is ineligible for the safety valve provisions set forth at 18 U.S.C. § 3553(f)"); see also United States v. Munyenyezi, 781 F.3d 532, 544 (1st Cir. 2015) ("[A] judge can find facts for sentencing purposes by a preponderance of the evidence[.]"). And Patrone has not disputed, either below or on appeal, that the evidence of his constructive possession of the firearm in connection with the drug offense was both overwhelming and unaffected by any need to prove that Patrone knew his immigration status.

* * *

For the foregoing reasons, Patrone fails to establish that his substantial rights were affected by the district court's failure to anticipate Rehaif.[2]

[2] This conclusion obviates the need to consider the fourth prong of plain error review: whether the error "seriously impugns the fairness, integrity, or public reputation of the proceeding." Correa-Osorio, 784 F.3d at 18.

B.

We next turn to Patrone's challenge to the livelihood enhancement that he received at sentencing. The effect of this enhancement was to raise his GSR from 262—327 months' imprisonment to 324–405 months'.

The government raises a fair question concerning whether Patrone preserved any objection to the availability of the livelihood enhancement. We sidestep that question by holding that, even if preserved, the objection fails. Our reasoning follows.

U.S. Sentencing Guideline Section 2D1.1(b)(16)(E) adds two levels to the Guidelines calculation if a defendant is subject to section 3B1.1 and "committed the offense as part of a pattern of criminal conduct engaged in as a livelihood." U.S.S.G. § 2D1.1(b)(16)(E). "'[P]attern of criminal conduct' and 'engaged in as a livelihood' have the meaning given such terms in § 4B1.3." U.S.S.G. § 2D1.1, cmt. n.20(c). Application Note One to section 4B1.3 states that "[p]attern of criminal conduct" means "planned criminal acts occurring over a substantial period of time. Such acts may involve a single course of conduct or independent offenses." U.S.S.G. § 4B1.3, cmt. n.1. Application Note Two to § 4B1.3 defines "[e]ngaged in as a livelihood" as

> A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of

> circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment[,] or the defendant's legitimate employment was merely a front for the defendant's criminal conduct).

Id., cmt. n.2.

Patrone claims that he was not engaged in the business of selling fentanyl for long enough to render it a "livelihood" under section 4B1.3. But Patrone pled guilty to conducting his charged conduct for over a year -- from the government's first purchase, in a series of controlled buys beginning on May 20, 2016, until his arrest on May 30, 2017, at which time the government seized 387 grams from his courier. He points to no authority that suggests that such a period of time is too short to qualify. And while we have not addressed the issue, at least five other circuits have found that periods of even less than twelve months can be "substantial" for purposes of section 4B1.3. See, e.g., United States v. Pristell, 941 F.3d 44, 52 (2d Cir. 2019) ("[S]ix months is consistent with the plain meaning of the phrase 'substantial period of time.' . . . Indeed, had the sentencing commission intended to define 'substantial period of time' as no less than twelve months, it could have chosen to do so, but did not."); United States v. Cryer, 925 F.2d 828, 830 (5th Cir. 1991) (describing the application note to § 4B1.3 as "quite clear," requiring "only that '[the pattern of] criminal conduct' be the

defendant's 'primary occupation' during the relevant twelve-month span, not that the defendant engage in crime for an entire year," and finding that four months of activity was sufficient); United States v. Reed, 951 F.2d 97, 101 (6th Cir. 1991) ("The seven-month period [of criminal activity] is long enough to constitute 'a substantial period of time[]' [under U.S.S.G. § 4B1.3]."); United States v. Hearrin, 892 F.2d 756, 758 (8th Cir. 1990) (imposing a criminal livelihood enhancement for criminal conduct over "a substantial time period of eight months"); United States v. Irvin, 906 F.2d 1424, 1426 (10th Cir. 1990) (interpreting "the phrase 'a substantial period of time' in [the application notes accompanying section 4B1.3] to require more than a short, quick, one-time offense" and finding that five to seven months of activity was sufficient).

Additionally, the language in the Guidelines and the relevant application notes does not support Patrone's interpretation. "Pattern of criminal conduct" includes the requirement that the planned criminal acts occurred "over a substantial period of time." U.S.S.G. § 4B1.3 cmt. n.1. "Engaged in as a livelihood" includes the requirement that the income derived in any twelve-month period exceeded 2,000 times the then-existing hourly minimum wage under federal law and that the criminal conduct was the defendant's primary occupation in that twelve-month period. Id. cmt. n.2. The "engaged in as a

livelihood" factor does not require that a defendant engaged in criminal conduct for the entirety of twelve months -- one large criminal activity, resulting in significant profit, could suffice, if that was a defendant's primary occupation during that time period. Consequently, there is no reason why we would apply a twelve-month requirement to the "substantial period of time" prong.

III.

Based on the foregoing, we affirm Patrone's conviction and sentence.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff	)	
vs.	)	No. 17-CR-10141-DPW
JUAN ANIBAL PATRONE, Defendant.	)	

BEFORE THE HONORABLE DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE
SENTENCING HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, Massachusetts 02210

May 6, 2019
2:04 p.m.

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P R O C E E D I N G S

THE CLERK: All rise.

(Court enters.)

THE CLERK: This Honorable Court is now in session. Criminal action 17-10141, *United States v. Juan Patrone*.

Carrie, please raise your right hand.

CARRIE LILLEY, Interpreter, Sworn

THE INTERPRETER: Carrie Lilly, certified court interpreter, Spanish.

THE COURT: So I have the presentence report dated as of April 29, the government's sentencing memorandum, and I have the defendant's sentencing memorandum dated as of May 1. Are those all the written materials I should have?

MR. MILLIGAN: Yes, your Honor.

THE COURT: Turning to the defendant's sentencing memorandum, it contains objections. Why weren't those objections timely made to the probation office?

MR. MILLIGAN: Sure. I would submit to you that my objection -- that probation accurately calculated based on the currently existing guideline range, but that the guideline range overstates.

THE COURT: Well, maybe I can focus --

MR. MILLIGAN: And apart from that --

THE COURT: Let me just focus it so I understand whether what appeared to me to be objections are objections or

are arguments for a variance or a departure.

The calculation that the probation office has made is that we have here a total offense level of 41, a criminal history category of I. That leads to 324 to 405 months. That's the guideline calculation.

MR. MILLIGAN: Correct.

THE COURT: Is that arithmetic disputed?

MR. MILLIGAN: I dispute the methodology of the arithmetic, but I do not dispute that the ultimate conclusion is what probation reached, which is 4 to 12 kilos.

THE COURT: I'm sorry?

MR. MILLIGAN: Which is 4 to 12 kilos.

THE COURT: Right.

MR. MILLIGAN: So my objection or what I believe the court is telling me is I should have phrased my extrapolation challenge as an objection to probation.

THE COURT: I'm not going to tell counsel what to do with it. I just want to understand what you did do with it. What you did do with it is not what you're telling me is a formal objection but to kind of sensitize me to the vagaries of the guidelines.

MR. MILLIGAN: Correct.

THE COURT: Is that a fair way of describing what's involved here?

MR. MILLIGAN: And the deployed methodology of the

government in their calculation.

THE COURT: Okay. So then I understand the defendant is not objecting to the arithmetic that's involved in the calculations -- this is not a trick question. I have to calculate the guidelines accurately.

MR. MILLIGAN: I understand. My position is that the court, if it adopts the extrapolation method used by the government and by probation, that 4 to 12 kilos is consistent with all the various versions of the math I've done as well for different reasons, but --

THE COURT: Let me go back then to Mr. Heinrich, because you did have an objection. Do you maintain that objection?

MR. HEINRICH: No, your Honor. I noted in the memo we're not pursuing any objections.

THE COURT: Okay. So I understand the parties not to dispute the raw figures that are involved here, but perhaps to be giving me arguments about how robust the calculation of involvement would be and the nature of the involvement in this case in a -- perhaps from the defendant's point of view, a variance rubric. All right. Okay?

MR. HEINRICH: Yes, your Honor.

MR. MILLIGAN: Yes.

THE COURT: So Mr. Heinrich, let me hear from the government but let me frame this a bit because this wasn't your

case from the beginning.

MR. HEINRICH: No.

THE COURT: And one of the things that I try to do is have a lack of disparity even within the case itself, recognizing that that's only one dimension of disparity. But here the government's recommendation would have me doing something like maybe five times the next sentenced defendant in this group, and I'm not sure how I do that.

MR. HEINRICH: Well, let me see if I can talk about the case in a way that addresses what I take to be the court's concerns. First of all, I do think it's a very serious case. Counsel says in the sentencing memorandum that there was no violation. I would disagree to this extent: I mean, this was a very large, primarily fentanyl conspiracy that involved guns. I think because it involved guns, because it involved fentanyl, it was inherently and demonstrably a dangerous offense and very serious.

THE COURT: Can I pause on that, which is there are guns and there are guns and uses for guns and different other uses for guns.

Here there isn't the use of guns in an affirmative way, as I sometimes find. They are tools of the trade, but sometimes tools of the trade for defensive purposes.

MR. HEINRICH: Well, I mean, the evidence here -- there's no more evidence here that they were used for defensive

purposes, I will grant you that.

THE COURT: Well, I guess to goose it up with suggestions of affirmative use of guns, I don't find that in the evidence.

MR. HEINRICH: No, you're right.

THE COURT: The point is I don't find it either way.

MR. HEINRICH: Right. And I guess I would say there were guns. They've been incorporated into the guidelines. Had they used the guns, there would have been at least a five-year mandatory minimum above and beyond this. But I just don't think it's fair to say that this was a non-violent offense.

In any event, what I take to be the court's major concerns is the disparity. As far as the disparity, I mean, I think the PSR has sort of reflected what the court's drug calculation was for the other defendants, and I don't see any arguments for departure here on sort of factual or personal grounds. Possibly with respect to the defendant's disadvantaged upbringing or the trauma he suffered when his father was murdered, but, I mean, this was a long-running conspiracy, and Mr. Patrone is clearly responsible for his actions.

What I would say is the court may wish to consider some policy alternative and some policy arguments that would, at least from what I understand the court to be saying, take the sentence more in line with what the others received.

So, for example, I think the probation office correctly calculated the guidelines, but in this case the livelihood enhancement and the stash house enhancement are in some senses swallowed up by the larger offense. I mean, it's no surprise that to have this great a drug conspiracy with this level of organization there will be stash houses and it's no surprise that, given the length which Mr. Patrone has been involved in this offense and the complexity and the breadth of it, that he was deriving his livelihood from it.

So if the court were to sort of take those into account, and had those enhancements not applied, the guideline range would have been likely based on a total offense level of 37 and 1, and therefore, the guideline range would have been 210 to 262 months or 17 1/2 to 22 1/2 years.

I don't think a sentence in that range would be unreasonable.

THE COURT: Let me put it a different way so that you can address it.

It's not entirely a policy-based evaluation, but it's a scaling-based evaluation. That is, scaling Mr. Patrone's sentence to the sentences for the more serious offenders. One of the problems, of course, in a multi-defendant case like this is that I see each of the defendants separately and not necessarily in an order of culpability or potential culpability. So I try and keep track of them, and asked

Ms. Winkler to give me some sense of who's who in this context.

Clearly Mr. Patrone is the leader here. Mr. Milligan makes an argument about what kind of a leader, that he runs a retail establishment as opposed to a wholesale distribution chain. But putting that to one side, speaking to the question of scalability of the next most serious offenders who would be Gonzalez, Marcano, the other Patrone, where we're talking about 60 months, 54 months for people who are -- run stash houses and that sort of thing.

Do you have a view about how that adjustment would work in this setting?

MR. HEINRICH: Mr. Patrone is clearly the leader. He's getting the four level increase. I think that that's a significant factor. It drives much of the guidelines. Mr. Patrone was involved with all the drugs. So the aggregate quantity, he gets that; whereas, the others with a more specialized role may not have gotten -- certainly didn't get leadership and may not have gotten as much quantity.

Even if the court were to sort of come down on quantity, so that even if the quantity had been based on 1 1/2 to 4 kilograms, the guideline range in itself would still be 14 to 17 years, and I do think -- I mean, I'm sure that -- obviously I wasn't there for those, but I'm sure the court at least had as the starting point the guideline sentence and then came down from there.

I've suggested ways in which the court, as a matter of policy and as a matter of trying to identify the culpable factors in the case, might want to come down. I don't know precisely how the court came down for those other defendants and what drove those decisions. I will say in comparison there were other defendants charged in separate indictments who received much more significant sentences.

So, for example, Mr. Baez Gonzalez received a 156-month sentence. I do think that the evidence showed that the role that Mr. Patrone played was the most serious with the widest breadth, with the greatest amount of culpability and the greatest danger and damage.

THE COURT: Well, let's compare it to -- maybe delve a little bit more deeply into Baez Gonzalez, who is one of Judge Casper's cases, at 156 months. This is not meant to be a pop quiz, but I don't know if you feel comfortable enough making comparisons for involvement between --

MR. HEINRICH: I don't feel particularly comfortable. I did look at Mr. Baez Gonzalez's PSR and did learn that he was sentenced based on 1.5 to 4 kilograms. His base offense level was 29 but because -- and his criminal history category was a Criminal History Category I.

THE COURT: Right.

MR. MILLIGAN: But because he was charged and convicted of a 924c offense, he had a five-year on and after.

THE COURT: I see. All right. Anything further that you'd like to address at this point?

MR. HEINRICH: No, your Honor.

THE COURT: All right, Mr. Milligan.

MR. MILLIGAN: Speaking --

THE COURT: Let me just frame this as well for you.

These various charts are helpful to me to visualize what I intuit about what's happening into the guidelines, which is that how you calculate and the number -- or the kinds of drugs involved make a difference, all of that. But it strikes me that within the range that we're talking about here, that we really aren't talking about someone who was dealing both in significant amounts. It was leading a -- we can even call it retail, but he was the leader of a retail operation that had significant amounts. I am less concerned, unless you want to talk to me about it, about the mix here because we're in the competitive range, than I am in the aggregation issue that you raise.

You know, conspiracy under the guidelines, unlike under the substantive law of conspiracy, turns on foreseeability. And foreseeability here is Mr. Patrone foresaw it all. He was the leader. And so parsing Senate discussions from 1986 doesn't necessarily persuade me about it. One of the reasons that the guidelines went to the foreseeability that the First Circuit did even before that, or

in anticipation of it, is to try to scale, to use my term. And so I'm not sure that I'm so persuaded by your aggregation discussion, nor do I think that the discussions about livelihood -- he had no other livelihood, and for a very long time, more than a year, although this is a snapshot or perhaps a short video of the life of a drug conspiracy.

So I don't know why I would moderate on those grounds, except back to the scaleability question that I posed to Mr. Heinrich.

MR. MILLIGAN: Sure. If I may, I think that this case is actually the best illustration I've seen of this argument which I've sought to make for some time now, which is essentially that when mandatory minimums started to be introduced in '86 but all through the '90s as well and the commission rekeyed its guidelines to match those numbers, these were artificially inflated, both from the entire history, the 10,000 cases originally assessed, and in realtime.

So here you have a case where that demonstrates itself pretty well. You have a relatively flat distribution grid with one sort of architect making all the phone calls, and he's on the hook for this entire distribution grid. I certainly agree that under the relevant case law he's on the hook for the foreseeable amount of the conspiracy.

What I don't think is an escapable conclusion from that is that the guidelines adequately capture the volume or

the scale of the drug operation because of those variables that the government exclusively controls. If they took it down after a month, we'd be talking about a different number.

THE COURT: We --

MR. MILLIGAN: If we waited another year --

THE COURT: We might be. What we're talking about here is extrapolations from what you may say was whiskey talk on the telephone, but they call admissions I think under the Federal Rules of Evidence. And this is a big operation, and he was running it. And he knew the amount generally that was going on here. So aggregation doesn't bother me very much at all.

I share your concern in this and other guidelines with the pretext of being -- it's not even that pretext here -- the pretext of being the result of a continual feedback of what judges are actually doing in this area and Congressional interrelations that disrupt the feedback loop and create a different set of standards. All of that having been said, that's why I vary in this area. The question is where do I vary to?

MR. MILLIGAN: First, you just put the argument better than I ever have. It is that feedback loop altered by Congressional interactions that I object to, and I think resulted in this basically first-time offender just over a six-month period creating enough volume on low deals. We

consider it no different than the largest players, the people that might be above him.

Speaking of one of those people, the court mentioned analogue cases or cases nearby, the government cites the case of Mr. Baez Gonzalez accurately reporting that one of the reasons his sentence came off of the mandatory minimum, just by a little, Judge, is because he had the 924c. So his 156 months is actually right where it had to be based on the mandatory minimums in that case.

The leader in that group, an actual supplier to this defendant, Mr. Nival, who was sentenced by Judge Casper to under what would have been his mandatory minimum pursuant to a C plea, he had a 400-gram fentanyl charge. He had a 924c charge. He was the leader and he was the supplier to this person, which if you adopt the government's syllogism that he's the leader because he supplies to those under him, it's not unreasonable for this court to continue that to say --

THE COURT: The problem with that argument is the uncertainty about the comparators involved. I mean, I'm told about the 924c. That drives itself. On the other hand, it's a C plea. C pleas generally carry with them some additional dimension of nuance negotiated by the government and the defense party. While some judges are more receptive to C pleas, others are less, and I'm the less on that because it should be my sentence, not somebody else's sentence. Unless it

comes into what I'll call the competitive range of what my sentence would be, I reject C pleas. So I don't know exactly what was going on with that. And I'm not exactly sure what the distribution chain precisely was here and its impact on all of that.

That's why I look for, try to get as much additional information, why the process of sentencing in adjacent cases with different judges is always challenging, because judges have different takes on things. But I seek out as much as I can get in the way of information.

Here, you know, we're talking about no reason to depart from the minimum mandatory, and the minimum mandatory kicks in at 400 grams.

MR. MILLIGAN: Correct.

THE COURT: And here we're talking about something south of 12 kilograms but north of, what is it, three or four.

MR. MILLIGAN: Four.

THE COURT: So, I mean, there are these cliffs that we calculate to, but -- and I don't think that if two is bad, four is twice as bad necessarily. But I'm trying to figure out how I calibrate.

MR. MILLIGAN: So I think that 3553 sort of governs this architecture. Right? So if you're talking about what is the amount of time that would deter a rational actor from engaging in this conduct? You have similar comparators, both

in the parallel case and the numbers 2, 3, 4, maybe even 5 in this case, who were all at the mid-level management range of activity, and this court has determined that five years at the next closest defendant was no longer than necessary to deter him and others.

Now, one might argue but this gentleman was the leader. So you have the comparator of Nival. You have the comparator of Baez Gonzalez. Both of them functionally received at or even below the mandatory minimums in those cases.

Once you get outside of the specific and general deterrence argument, you're really talking about what other purposes of sentences are advanced through a sentence of more than a decade. I would submit to you that it's hard -- the government would be hard-pressed to articulate that there are gentlemen that would engage in this conduct if they knew they'd get ten years but would not if they knew they'd get 15, 20, 25 years. Most drug dealers, in fact, are people that act on the assumption they won't be caught. If they were acting rationally, they just wouldn't be engaging in the activity. So in many ways I think the deterrence argument is skewed by that.

But at the end of the day, the guidelines, 3553, all weigh in favor of comparative fairness. In fact, the guidelines are an extrapolation of what the court has already tried to do in this case and what I've done in my brief, which

is in this case, the next closest person got five years. In a parallel case, the other leader got 11 years. There was a gentleman in that case who got slightly more, all driven by the mandatory minimums.

THE COURT: Eleven years when the judge was freed from the mandatory minimum by a C plea.

MR. MILLIGAN: Correct.

THE COURT: And with whatever deference she gave to the C plea.

MR. MILLIGAN: And the bottom end of the range contemplated by the C plea. It was a 13-to-15-year range.

THE COURT: Right.

MR. MILLIGAN: So here you have a gentleman -- and although I agree and I think there's some distinction between the parlance and the legal parlance, but dangerous is not the equivalent of violence, both in the case law of this jurisdiction, but in the context of this case. Yes, he did have a firearm at his home, but this is a gentleman who's been the victim of multiple acts of violence and in discovery, his crew, if you will, was the victim of multiple drug robberies by various defendants. Not only do you not see actual retaliation as a consequence of it, even though we know that some of them were armed, you don't even see discussion or contemplation of it.

I think it's a reflection of the fact that while

violence is often attendant with drugs, and particularly drugs combined with guns, this is a group of individuals that actively chose not to invite that level of activity into the drug conspiracy. I think that's relevant. I think it's relevant because we're talking about a 29-year-old man who could, if we adopted the guideline sentences, be in jail until he's a senior citizen. And the consequence of that --

THE COURT: Well, as a senior citizen, he would be a very junior senior citizen.

MR. MILLIGAN: He'd get the AARP card just before he left. When he leaves, I remind you he'll be deported to the Dominican. So ten years I think satisfies every factor of 3553. I think it's hard to say a higher number is needed. That's ultimately the analysis that I think the court needs to employ.

THE COURT: Thank you.

Mr. Patrone, I have read the letter. I don't mean to dissuade you from saying anything that you want to say right now, but this is an opportunity for you to speak to me directly in court if you'd like to.

THE DEFENDANT: First of all, I want to ask God to forgive me. And I ask everybody present for their forgiveness. And I apologize to the State of Massachusetts and to my family who has suffered so much, and to all those who are in jail in Plymouth County.

While there I have looked for God. Then I've done a program that helped me a lot to rehabilitate myself. I want to apologize to my son. It's been a long time since I've seen him, and I'm not seeing him grow up.

So I'll promise everybody here present and I promise God to never again in the rest of my life set foot in a prison. That's all. Thank you.

THE COURT: Thank you, Mr. Patrone.

Well, the overarching interest here, as Mr. Milligan said, are the considerations of 3553. I do my best to calculate the guidelines accurately because I'm supposed to and because it provides an orientation about where we might be considered in a larger but desiccated context. Desiccated in the sense that the guidelines don't really give -- capture fully, I think, the life blood of the defendants, their culpability, their prospects.

On the other hand, the 3553 factors are, as I am wont to say, incommensurables. They don't have equal weights. They don't follow the same valence. They compare uneasily. So the process of reaching a sentence on the basis of Section 3553 is essentially accommodation of incommensurables. But the prospect of looking through them is helpful in focusing on what it is that is at stake and what it is that the sentence might be for historic purposes. Historic in the sense of what is it that society is entitled to take from someone who engages in

this kind of activity with that person's background.

So I look first to the question of the seriousness of the offense. It would be an understatement to say that this is perhaps as serious a drug offense as we have, that experience with opioids, fentanyl, has been just devastating throughout the community and including in a time period or recognized as a time period that Mr. Patrone was involved. That's why it's generating the kind of mandatories that are involved here well below the amount that Mr. Patrone is responsible for.

The short and simple answer to this is that this kind of drug action involving guns, whether for defensive purposes or offensive purposes, and that, of course, is a false comparison, but involving drugs -- involving guns and Mr. Patrone seeking out guns, here having guns in his room are about as serious as we can get without overt violence in cases of drug activity. That's what the Sentencing Commission thinks about it, prompted by Congress, and I suspect that the general public feels quite agitated about it as well.

And while I'm not in a position, nor should I be in a position, of simply taking direct instruction from Congress on dimensions of culpability, except as they have particular and specific rules, or do I think the guidelines are necessarily relevant, or necessarily reasonable just because they've been calculated properly, particularly this set of guidelines, because I do not think that they are entirely reflective of the

underlying premise of the guideline regime of trying to identify where the mine-run of cases, heartland cases, are among judges.

I nevertheless think that the question of seriousness of the offense is a salient one here, and it argues for a substantial period of time in prison. Then I look at Mr. Patrone as an individual, the nature and characteristics of the defendant. I have in mind, of course, the challenge that his early life brought him through violence to his father. I have in mind that he's been I think responsive to obligations and particularly to younger people for whom he accepts responsibility. And I credit his reference, for example, to not being able to see his son.

Of course he's not here for those things. He's here for his decision to involve himself in the drug trade for an extended period of time with basically no other form of employment. This was his major employment.

So this is a person who is open to opportunistic dimensions to his economic life but also commendably cares about the people who care about him and for whom he feels a measure of responsibility.

I turn to the question of what we call specific deterrence. That is, what does it take to keep Mr. Patrone from doing this again? Well, certainly an extended period of time will do that in prison. But I have to be careful there to

ensure that I'm not over-deterring. The whole structure of the guideline -- of 3553 depends on the proposition that the sentence should be sufficient but no greater than necessary to serve the purposes.

How long is that? Well, Congress has been pretty clear to me. They told me it's at least ten years here, and because there are certain aggravating factors that the guidelines have raised, I must consider something broader. I, of course, take into consideration that the defendant is going to be deported or should be deported as a result of this, no matter how long. While the Attorney General is entitled to deploy his budget as he sees fit to provide housing and single payor medical care for people who are in the prison system, and that's expensive, and perhaps not an appropriate way to spend funds, and I'm not the Office of Management and Budget for the Attorney General and his allocation of budget, but it is a factor to take into consideration when I think Mr. Patrone, when he gets out of prison, is going to be immediately deported. So do we need to run that sentence up into the 30-year range? I doubt it.

Then I turn to the question of general deterrence. Mr. Milligan has made the argument about general deterrence that I think is accurate, which is we don't have any real metrics for general deterrence. We do have the direction that the rule of parsimony requires no more than necessary to serve

the purposes. But there is a measure of general deterrence from the reflection of what happens to someone else similarly situated that may lead others who are opportunistic to think about it.

I agree with Mr. Milligan that in the ideal world -- I'm not sure he said it quite this way but I'll say it my way and ascribe it to Mr. Milligan. In the real world, the best deterrent would be immediate, prompt, certain punishment. We don't have that. So what else do we have? Time in jail. So that becomes to some degree the metric for general deterrence. It says to other Mr. Patrones out there, this is what's going to happen to you if you do it. You're 29 years old. You ought to know better. And knowing this, are you still prepared to engage in this kind of activity?

That argues for more than the Congressional minimum. In any event, it doesn't substantially decrease the scaled sentence that I'm contemplating.

I am concerned about the prison dimension of this. That's the kind of penological effect. It's not something that I can take into consideration into a direct sort of way that I'm sending Mr. Patrone to jail so he gets good job training and other benefits, in part because he doesn't. As an alien facing deportation, he's much more restricted in what's available to him. But not entirely restricted. There are things. The short of it is there's nothing specific here that

argues in favor of a general warehousing or a diminishment in the amount of time spent in jail.

So I come to rest in the area of whether there's a disparity. The guidelines through that continual feedback process was supposed to minimize the disparities to get some basic understanding of what judges do with similar cases under similar circumstances. It's not true, as I've indicated from my perspective, with these guidelines. That's why I vary in cases.

I recognize as well that there are regional variations, even variations within this courthouse, although not quite as dramatic as they once were.

But ultimately the place I start is with the organization that I'm dealing with. It's why I always ask the prosecutor to kind of orient me in the way the prosecutor is oriented about where they see people to be in an organization. Of course, it's an artificial form of analysis to say this is just like Wal-Mart or some other organization with different dimensions of hierarchy. But it's sometimes helpful. And here Mr. Patrone was in charge. He was running it all. He was the one who was handling all the telephone calls. He was the one that knew what was going on. That counsels going beyond what others with subordinate roles have received.

I do look to what my colleagues have done. Harder to analyze as well as I would like to because I'm not there. I

don't know the full range of what's in the sentencing -- presentence reports for the other individuals, but it gives me some general idea of what they say is the going rate for someone more or less similarly situated.

All of that leads me to this, which is a sentence of 144 months incarceration. It is more than the period of minimum mandatory that's involved here. It gives recognition, I think, to the particular characteristics of Mr. Patrone's role in the offense, particularly in comparison to his colleagues. On the other hand, it's not a telephone number. It provides for the prospect that within a period of time the defendant will get on with his life. And frankly, that's the more important thing for me at this stage.

I have to pronounce a historically based judgment. That's what the 144 months is in light of all the factors that I've discussed under 3553. But more important is how he gets on with his life once he pays his debt to the citizens of the United States.

I am going to impose a period of five years of supervised release. It sometimes seems anomalous to impose supervised release on somebody who is going to be deported, except that daily I am reminded that people who are deported come back into the united States. And I want to make it clear that if Mr. Patrone comes back into the United States without the express approval of the Secretary of the Department of

Homeland Security, he's going to face additional time, not merely for an illegal reentry case but also for violation of supervised release. I mean to reinforce the barrier that someone thinking rationally would have to coming back to the United States under these circumstances.

I'm not going to impose a fine. It doesn't appear that there is available or readily available monies for a fine for Mr. Patrone under these circumstances. He is obligated to pay a special assessment of $200.

Having imposed the term of supervised release, which carries with it, of course, the mandatory conditions of supervision, that he not commit another federal, state or local crime, that he must not unlawfully possess a controlled substance, and recognizing that he reports to be someone who is a daily user of cocaine, I'm going to impose drug testing, as much as 104 drug tests per year if he's back here, to keep track. He is, of course, obligated to cooperate in the collection of a DNA sample as directed by the probation office. But fundamentally recognizing that he is going to be deported and those conditions are not likely to kick in quite a way, I return to the basic dimension of supervised release.

For a period of five years after he's released from prison, assuming as I do, as we all do, that he's going to be deported, he has to leave the United States. He may not return to the United States without the approval of the Secretary of

the Department of Homeland Security. He has an obligation to use his true name and he's prohibited from any false identifying information, matters which include such things as aliases or false dates of birth or false Social Security numbers or incorrect dates of birth.

He is obligated to pay the special assessment immediately, and assuming that he does not, there will be, I'm sure, prison financial responsibility programs that will lead to that payment.

Now, are there other conditions that the parties would have me consider here? Okay.

So one final point, Mr. Patrone, in this session you have a right of appeal. You'll want to discuss with your lawyer whether that makes any sense under these circumstances.

But I want to -- I'm sorry?

MR. HEINRICH: One other matter, your Honor. The court has issued a preliminary order of forfeiture and I'd ask that the court include the forfeiture in its oral pronouncement of sentence and by reference in the judgment as well.

THE COURT: Okay. So it will be sufficient I believe to incorporate by reference the preliminary order as the basic order there.

MR. HEINRICH: Yes.

THE COURT: And there is forfeiture involved under these circumstances.

But returning to the larger discussion that I've had. Mr. Patrone, you can see how seriously society generally treats this kind of offense, that you were facing 30 years or more in prison. I have a somewhat different view of the way in which the sentences should be imposed, but I've done what I thought was right. It's really up to you. You're going to get out. You're going to be deported. You have an opportunity to do the things that you say you are committed to doing, and I believe that you are, which is to reflect more seriously about what your responsibilities are generally to yourself and to your maker, and to do what is necessary to carry out a meaningful life after you get out. If you do that, we're all better off. If you don't, shame on you.

I did say, and I believe it, that it's credible for you to say that you've changed, understand what you've done and the consequences of what you've done. That's what we look for more broadly. And if you have done what you say you have done, then we'll all be able to move on with our lives in a more secure fashion.

If there's nothing further, then we'll be in recess.

THE CLERK: All rise.

(2:45 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)

DISTRICT OF MASSACHUSETTS)

I certify that the foregoing is a correct transcript from the record of proceedings taken May 6, 2019 in the above-entitled matter to the best of my skill and ability.

/s/ Kathleen Mullen Silva 9/13/19

Kathleen Mullen Silva, RPR, CRR Date
Official Court Reporter