18-1994-cr(L)
United States v. Rosario

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2020

(Argued: December 2, 2020 Decided: February 23, 2021)

Docket Nos. 18-1994-cr(L), 19-2399(CON)

UNITED STATES OF AMERICA,

Appellee,

v.

IVAN ROSARIO, AKA "GHOST,"

Defendant-Appellant.

(Filed Feb. 23, 2021)

Before:

SACK, CHIN, and LOHIER, *Circuit Judges.*

We consider whether the United States District Court for the District of Connecticut (Vanessa L. Bryant, *Judge*) made the factual findings required under United States v. Dunnigan, 507 U.S. 87 (1993), before applying an obstruction of justice enhancement under U.S.S.G. § 3C1.1. Because the District Court did not make the necessary findings at sentencing, the case is REMANDED IN PART for further proceedings consistent with this opinion. In a separate summary order

filed simultaneously with this opinion, we dispose of Rosario's remaining claims.

MICHAEL P. JOSEPH, Kliegerman & Joseph, LLP, New York, NY, *for* Defendant-Appellant Ivan Rosario.

JOSEPH VIZCARRONDO, Assistant United States Attorney (Marc H. Silverman, Assistant United States Attorney, *on the brief*), *for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, CT, *for* Appellee United States of America.

PER CURIAM:

Defendant-Appellant Ivan Rosario appeals from a judgment of the United States District Court for the District of Connecticut (Bryant, J.), after a jury trial, sentencing him principally to a term of 210 months' imprisonment. As relevant here, Rosario objects to the District Court's imposition of a two-level sentence enhancement for obstruction of justice under U.S.S.G. § 3C1.1 relating to his trial testimony. He argues that the District Court did not make the findings of fact required before imposing the enhancement. We agree and **REMAND IN PART** to the District Court for further proceedings consistent with this opinion. In a separate summary order filed simultaneously with this opinion, we dispose of Rosario's remaining claims.

BACKGROUND

Rosario was charged with various firearms offenses and conspiring to distribute heroin, as well as witness tampering with intent to influence or prevent testimony, in violation of 18 U.S.C. §§ 1512(b)(1), (b)(2)(A), and (j), and causing or inducing any person to destroy evidence, in violation of 18 U.S.C. §§ 1512(b)(2)(B) and (j). At trial, the Government introduced evidence that Rosario had coerced his child's mother (who was not his wife, as Rosario was married to another woman) and his own mother to destroy a mobile phone so that it could not be used as evidence against him on the drug conspiracy charge. In response, Rosario testified that he asked his child's mother to destroy the phone because it contained recordings of "intimate moments" between them and he did not want his wife to discover those videos. See App'x at 258-59, 263. Rosario denied that he ordered the phone destroyed because it held incriminating evidence of his participation in the heroin conspiracy. The jury acquitted Rosario of unlawful possession of a firearm and obstruction of justice based on witness tampering; it was unable to reach a verdict as to the narcotics conspiracy count; and it convicted Rosario of obstruction of justice based on destruction of evidence.

At sentencing, the District Court observed that "the Government is proposing that the Court add two additional points for the defendant's untruthfulness, his perjurious testimony, indicating that he requested the phone be destroyed not because it contained incriminating evidence but because he did not want [his

wife] to know that he had consorted with [his child's mother]." App'x at 441. The District Court later added the following:

> There is no doubt here, no doubt whatsoever, that [Rosario] elicited the aid of his mother, . . . and the mother of his child, . . . his paramour at the time, to destroy evidence to evade prosecution and conviction for the charge of conspiracy to distribute and the possession with intent to distribute more than a kilo of heroin.

App'x at 475. Over Rosario's objection, the District Court then applied the two-level enhancement under § 3C1.1 for committing perjury. Rosario was sentenced principally to a term of 210 months' imprisonment.

DISCUSSION

We consider de novo whether the District Court's factual findings in support of its perjury enhancement pursuant to U.S.S.G. § 3C1.1 complied with the requirements of United States v. Dunnigan, 507 U.S. 87 (1993). See United States v. Ben-Shimon, 249 F.3d 98, 102 (2d Cir. 2001). Section 3C1.1 provides for a two-level enhancement of the offense level if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction" and the obstructive conduct related to the defendant's offense of conviction or a closely related offense. U.S.S.G. § 3C1.1. The Guidelines caution that if, as here, a defendant is

convicted for obstruction of justice, the § 3C1.1 enhancement "is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense)." U.S.S.G. § 3C1.1 cmt. 7.

In Dunnigan, the Supreme Court held that "if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings." 507 U.S. at 95. The Court explained that the "concern that courts will enhance sentences as a matter of course whenever the accused takes the stand and is found guilty" is "dispelled" precisely because "the trial court must make findings to support all the elements of a perjury violation in the specific case." Id. at 96-97. Echoing Dunnigan, we have reasoned that a rigid "requirement of fact-finding" ensures "that courts will not automatically enhance sentences whenever the accused takes the stand and is thereafter found guilty." United States v. Catano-Alzate, 62 F.3d 41, 42 (2d Cir. 1995).

Any sentence enhancement for perjured trial testimony implicates a defendant's constitutional right to testify in his or her own defense. See Rock v. Arkansas, 483 U.S. 44 (1987). The Supreme Court has therefore directed district courts to "make findings to support all the elements of a perjury violation in the specific case," Dunnigan, 507 U.S. at 97 – namely, "that the defendant

(1) willfully and (2) materially (3) committed perjury, which is (a) the intentional (b) giving of false testimony (c) as to a material matter," United States v. Thompson, 808 F.3d 190, 194-95 (2d Cir. 2015) (quotation marks omitted). "[I]t is preferable for a district court to address each element of the alleged perjury in a separate and clear finding," although the court can also satisfy these requirements by finding "an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury." Dunnigan, 507 U.S. at 95.

District courts must take these instructions seriously. In Catano-Alzate, we concluded that the district court's factual findings were inadequate because it said only that "the Court thinks that the testimony given at trial was not the truth and was material falsehood. . . . [Defendant] chose to testify and not be truthful, as far as I understand it. I am making those findings by a preponderance of the evidence." 62 F.3d at 42. In United States v. Williams, we held that "the district court fell short of making the necessary findings" when it stated only that "[b]ased upon the whole record that I have seen [and] the testimony I have heard, [the defendant] obstructed justice." 79 F.3d 334, 337 (2d Cir. 1996) (quotation marks omitted). As a result, we determined that "[t]he record d[id] not contain the required finding that [the defendant] knowingly made a false statement under oath." Id. at 337. More recently, in Thompson, we determined that relying merely on a pre-sentence report's statements that "[t]he Court expressly characterized [the defendant's]

testimony as equivocal, inconsistent, and contradictory," and that the testimony "could not be credited," failed to satisfy the requirements of Dunnigan. 808 F.3d at 194-95.

In defense of the perjury enhancement at issue here, the Government relies largely on the District Court's statement at sentencing that "[t]here is no doubt . . . that [Rosario] elicited the aid of his mother, . . . and the mother of his child, . . . his paramour at the time, to destroy evidence to evade prosecution and conviction for the charge of conspiracy to distribute and the possession with intent to distribute more than a kilo of heroin." App'x at 475. For the first time, the Government suggested at oral argument that the District Court's order denying Rosario's Rule 29 motion contained the necessary findings. See Oral Arg. at 17:04-17:36. In that order, the District Court explained that "the jury could have found Mr. Rosario's proffered explanation for why he wanted the telephone destroyed not credible." Special App'x at 7.

We disagree that either of these statements is enough to satisfy the Dunnigan requirement.[1] In

[1] We hesitate to rely on the District Court's order denying Rosario's Rule 29 motion for two additional reasons. First, in the context of a Rule 29 motion, the District Court need only have asked whether any rational fact finder could have found Rosario's testimony not credible, see United States v. Martoma, 894 F.3d 64, 72 (2d Cir. 2017), not whether Rosario intentionally, willfully, and materially committed perjury, see Dunnigan, 507 U.S. at 97. Second, the factual findings to support a perjury enhancement in response to a defendant's objection to the enhancement must be

neither did the District Court make the findings we have demanded. For example, the District Court did not identify the "statements on which the perjury finding was grounded." Ben-Shimon, 249 F.3d at 104. Nor did it make "explicit findings that [defendant's] testimony . . . was intentionally false," United States v. Norman, 776 F.3d 67, 84 (2d Cir. 2015), or that Rosario "knowingly made a false statement under oath," Williams, 79 F.3d at 337. We see no discussion, let alone a finding, of whether Rosario "consciously acted with the purpose of obstructing justice." United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997) (quotation marks omitted).

The Government invites us to review the district court record ourselves to determine that Rosario obviously perjured himself. We decline to do so. In Ben-Shimon, we concluded that it "does not suffice for us to decide that [the defendant] made obvious misrepresentations" because "the district court was nonetheless required to reference the statements on which the perjury finding was grounded." 249 F.3d at 104; see also Williams, 79 F.3d at 337 (explaining that while it "may be true" that defendant's "testimony was so inherently untruthful that the factual prerequisites to a perjury enhancement are obvious," this "cannot relieve the district court of the burden of making its own independent findings"). "Nothing in Dunnigan can be read to suggest that a separate finding of willful perjury is unnecessary where the perjury is obvious." Williams,

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provided at sentencing. See, e.g., Ben-Shimon, 249 F.3d at 102-03.

79 F.3d at 337. Whatever we think of the evidentiary record, the District Court was separately required to make specific factual findings to support the application of the perjury enhancement. Because the District Court failed to make those findings, we remand to permit it to do so in the first instance.

CONCLUSION

For the foregoing reasons, the case is **REMANDED IN PART** to the District Court to make any further findings in support of its enhancement under § 3C1.1. If the District Court determines on remand that the facts do not justify the enhancement for committing perjury, then Rosario must be resentenced. We consider and reject as without merit Rosario's remaining arguments in a summary order filed simultaneously herewith.

18-1994-cr(L)
United States v. Rosario

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of February, two thousand twenty-one.

PRESENT:

ROBERT D. SACK,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

-v- 18-1994-cr(L),
19-2399-cr(CON)

IVAN ROSARIO, AKA "GHOST,"
Defendant-Appellant.

FOR DEFENDANT-APPELLANT:
MICHAEL P. JOSEPH, Kliegerman & Joseph, LLP, New York, NY.

FOR APPELLEE:
JOSEPH VIZCARRONDO, Assistant United States Attorney (Marc H. Silverman, Assistant United States Attorney, *on the brief*), *for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, CT.

Appeal from the United States District Court for the District of Connecticut

(Vanessa L. Bryant, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED IN PART.

Defendant-Appellant Ivan Rosario appeals from the judgment of the District Court (Bryant, J.) convicting

him of obstruction of justice based on the destruction of evidence and sentencing him principally to 210 months' imprisonment. The jury acquitted Rosario of unlawful possession of a firearm and obstruction of justice based on witness tampering; it was unable to reach a verdict as to the narcotics conspiracy count; and it convicted Rosario of obstruction of justice based on the destruction of evidence. With respect to the issues that are the subject of this summary order, we assume the parties' familiarity with the underlying facts and prior record of proceedings, to which we refer only as necessary to explain our decision to affirm in part. Rosario's challenge to the District Court's application of a two-level enhancement pursuant to U.S.S.G. § 3C1.1 based on his trial testimony is resolved by separate opinion filed simultaneously with this order.

Rosario makes a number of arguments on appeal: (1) the evidence was insufficient to prove the offense of conviction; (2) the district court mishandled an issue of juror misconduct; and (3) the sentence was procedurally unreasonable.

1. The Sufficiency of the Evidence

Rosario argues that the evidence was insufficient to support his conviction for inducing another to destroy evidence. "A defendant challenging the sufficiency of the evidence 'bears a heavy burden,' . . . because a reviewing court must sustain the jury's guilty verdict if, 'viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Desnoyers, 637 F.3d 105, 109 (2d Cir. 2011) (first quoting United States v. Aguilar, 585 F.3d 652, 656 (2d Cir. 2009); and then quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original). Given the transcripts of Rosario's phone calls – in which he demanded that the mother of his child, with the help of his own mother, destroy a cell phone – we hold that the evidence was sufficient for a reasonable jury to find that Rosario induced another to destroy evidence relevant to a criminal proceeding against him. See 18 U.S.C. § 1512(b)(2)(B).

2. Juror Misconduct

Rosario next argues that the District Court mishandled an incident of purported juror misconduct and that it should have granted his motion for a mistrial. Several days into the jury's deliberations, the courtroom deputy happened upon two jurors discussing another juror who was purportedly refusing to deliberate. The District Court conducted a limited inquiry, asking the Foreperson whether the juror was refusing to deliberate and whether repeating the Allen charge to the jury would cure the problem. See Allen v. United States, 164 U.S. 492 (1896). The District Court then concluded that the jurors overheard by the deputy were discussing the jury dynamic, not inappropriately engaging in deliberations on their own, and that repeating the Allen charge to the jury was the best way

to address the purported misconduct of the single juror without unduly interfering with the jury dynamic.

"We review a trial judge's handling of juror misconduct for abuse of discretion. . . . In conducting our review, we keep in mind that courts face a delicate and complex task whenever they undertake to investigate reports of juror misconduct or bias during the course of a trial." United States v. Abrams, 137 F.3d 704, 708 (2d Cir. 1998) (quotation marks and brackets omitted). Here, the District Court acted within its discretion by addressing the purported misconduct as it did, inquiring discreetly while preserving the integrity of the jury's deliberations. See United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1997).

3. Procedural Reasonableness

Finally, Rosario argues that his sentence of 210 months' imprisonment is procedurally unreasonable. He submits that the trial court violated his Sixth Amendment rights in calculating the Guidelines range based on a finding that he was involved in a conspiracy to distribute at least 30 kilograms of heroin. His argument is unpersuasive, however, because the District Court's fact-finding was designed to guide its discretion under the Sentencing Guidelines, not to determine the statutory minimum or maximum penalty. Compare United States v. Haymond, 139 S. Ct. 2369, 2377-78 (2019) (noting that judicial fact-finding that increases the statutory minimum or maximum penalty is barred by the Sixth Amendment), with Alleyne v. United

States, 570 U.S. 99, 116 (2013) ("We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). Moreover, while the jury was not able to reach a verdict as to the narcotics trafficking count, we have held that a court may sentence a defendant based even on acquitted conduct, see, e.g., United States v. Vaughn, 430 F.3d 518, 526 (2d Cir. 2005), "provided that it finds by a preponderance of the evidence that the defendant committed the conduct," United States v. Pica, 692 F.3d 79, 88 (2d Cir. 2012). The District Court could find, by a preponderance of the evidence, that Rosario was involved in trafficking at least 30 kilograms of heroin.

Further, we find that the District Court appropriately applied the Sentencing Guidelines by calculating a base offense level of 30. The Guidelines advise a district court to sentence a defendant as an accessory after the fact if that sentence is greater than the sentence for obstruction of justice. See U.S.S.G. § 2J1.2(c). The base offense level for an accessory after the fact is "6 levels lower than the offense level for the underlying offense," U.S.S.G. § 2X3.1(a)(1), but is capped at level 30, see U.S.S.G. § 2X3.1(a)(3). Rosario's conspiracy to distribute heroin offense, with the enhancements the District Court found for firearms, premises, and role, would be 44 for 30 kilograms of heroin or 38 for 1 kilogram of heroin. See U.S.S.G. § 2D1.1(b)(1), (b)(12), (c)(2), (c)(5); U.S.S.G § 3B1.1(a). Either way, the level 30 cap applies. See U.S.S.G. § 2X3.1(a)(3). And we find no error in the District Court's application of a two-level enhancement under U.S.S.G. § 3B1.1(c) for

Rosario's decision to enlist his mother and his child's mother in destroying evidence.[1]

We have considered Rosario's remaining arguments that are not the subject of the accompanying opinion and conclude that they are without merit.[2] For the foregoing reasons, we **AFFIRM IN PART** the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

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[1] On appeal, Rosario also argues that role, obstruction of justice, and victim enhancements cannot be applied under U.S.S.G. § 2X1.3 if the base offense level is calculated to be 30. Rosario failed to raise this argument below, so plain error analysis applies. See United States v. Skelly, 442 F.3d 94, 99 (2d Cir. 2006). We have never considered this question, and therefore hold that the District Court did not plainly err in finding that these enhancements could be added to a base offense level of thirty.

[2] The Government's motion for leave to file a response to Rosario's pro se supplemental letter is GRANTED. In his supplemental letter, Rosario argues that he was denied his right to counsel at his sentencing hearing. This argument is without merit, however, as Rosario was afforded counsel and his appointed standby counsel assisted him during sentencing.

UNITED STATES DISTRICT COURT
District of Connecticut

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
v.	CASE NO.: 3:18-cr-00007-VLB
IVAN ROSARIO, also known as *Ghost*	USM NO: 25303-014
	Joseph Vizcarrondo and Alina Reynolds Assistant United States Attorney
	Robert C. Mirto Defendant's Attorney

THE DEFENDANT: was found guilty after jury trial of Count 2 of the Indictment.

Accordingly, the defendant is adjudicated guilty of the following offense:

Title & Section	**Nature of Offense**	**Offense Concluded**	**Count**
18 U.S.C. §§ 1512(b)(2)(B) and (j)	Causing or Inducing Any Person to Destroy Evidence	May 2017	2

The following sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total of 210 months.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of 5 years. The Mandatory and Standard Conditions of Supervised Release as attached, are imposed. In addition, the following Special Conditions are imposed:

(1) The defendant shall obtain and maintain full-time gainful employment.

(2) The defendant shall file tax returns timely and accurately.

(3) The defendant's home, person, vehicle, and place of employment shall be subject to search under reasonable suspicion by the probation office.

(4) The defendant shall submit to mental health and substance abuse evaluations and participate in any treatment as directed by the office of probation on an out-patient basis, and on an inpatient basis at the direction of the Court. The defendant shall pay the costs of such evaluation and treatment as the office of probation deems him capable of paying.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments as follows:

Special Assessment:	$100.00 to be paid immediately.
Fine:	$0.00
Restitution:	$0.00

It is further ordered that the defendant will notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are paid.

The following counts have been dismissed: Count 1 of the Indictment.

JUDICIAL RECOMMENDATION(S) TO THE BUREAU OF PRISONS

The Court makes no recommendation to the Federal Bureau of Prisons.

July 18, 2019
Date of Imposition of Sentence

Vanessa Bryant
2019.07.22 09:26:17-04'00'
/s/ Vanessa Lynne Bryant
Vanessa L. Bryant
United States District Judge

CONDITIONS OF SUPERVISED RELEASE

In addition to the Standard Conditions listed below, the following indicated (■) Mandatory Conditions are imposed:

MANDATORY CONDITIONS

(1) You must not commit another federal, state or local crime.

(2) You must not unlawfully possess a controlled substance.

(3) You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

(4) ☐ You must make restitution in accordance with 18 U.S.C.§§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

(5) ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

(6) ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et *seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

(7) ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

STANDARD CONDITIONS

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

(1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

(3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

(4) You must answer truthfully the questions asked by your probation officer.

(5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If

notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

(7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

(10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

(11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) You must follow the instructions of the probation officer related to the conditions of supervision.

Upon a finding of a violation of supervised release, I understand that the court may (1) revoke supervision and impose a term of imprisonment, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Officer/
Designated Witness Date

CERTIFIED AS A TRUE COPY ON THIS DATE: _____
By: _____
Deputy Clerk

RETURN

I have executed this judgment as follows:
Defendant delivered on ____ to _____ a _____, with a certified copy of this judgment.

_____
Brian Taylor
Acting United States Marshal

By _____
Deputy Marshal

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	)	No. 3:17-CR-00055-VLB-1
	)	450 Main Street
vs.	)	Hartford, Connecticut
IVAN ROSARIO.	)	July 18, 2019

TRANSCRIPT OF SENTENCING

BEFORE THE HONORABLE VANESSA L. BRYANT

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JOSEPH VIZCARRONDO, ESQ.
ALINA M. REYNOLDS, ESQ.
U.S. Attorney's Office – BPT
1000 Lafayette Avenue
10th Floor
Bridgeport, CT 06604

For the Defendant: ROBERT C. MIRTO, ESQ.
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(973) 406-2250

INDEX

[3] (11:45 O'CLOCK, A.M.)

THE CLERK: (Audio begins mid-sentence) – Honorable United States District Court. Oyez, oyez, oyez. In the matter of USA v. Rosario, case number 3:18-cr-007-VLB. The Honorable United States District Court for the District of Connecticut is now open. All persons having cause or action pending or who have been bound or summoned to appear herein will take due notice hereof and give attention according to law.

THE COURT: Good morning.

MR. MIRTO: Good morning, Your Honor.

THE COURT: Please be seated.

(Pause)

THE COURT: All right. May we have the appearances of counsel for the record?

MR. VIZCARRONDO: Good morning, Your Honor. Joseph Vizcarrondo for the Government and, momentarily, I'll be joined by Assistant U.S. Attorney Alina Reynolds.

THE COURT: Thank you.

MR. MIRTO: Good morning, Your Honor. Robert Mirto, I'm standby counsel for the defendant.

THE COURT: Mr. Rosario is present this morning.

MR. MIRTO: Yes.

THE COURT: Good morning, Mr. Rosario.

Good morning, Mr. Rosario.

[4] THE DEFENDANT: I do not wish to contract with you.

THE COURT: Please be seated.

(Pause)

THE COURT: All right. Mr. Rosario, before we proceed, we have a little housekeeping to take care of. And you can respond or not respond as you deem fit.

The Court notes that in the pre-sentence report, paragraphs 94 through 102, the defendant, Mr. Rosario, indicated that he has no mental health conditions. It also indicates that he has an eleventh-grade education, no indication of any special education or any mental impairments. It also indicates that Mr. Rosario was a business operator.

The Court presided over a lengthy trial of Mr. Rosario, during which she observed him. He certainly indicated that he understood the proceedings. The Court observed him assisting in his defense, and he appeared to be competent and intelligent. He also appeared to fully comprehend the proceedings and be capable of providing guidance, assistance, in directing his criminal case.

Mr. Rosario, are you currently under the influence of any drugs, alcohol, medication, or supplements?

THE DEFENDANT: For and on the record, Ivan, sui juris, from the office of beneficial owner, 15684327116, before this jury instruction are of, as, and for 10/18/1984, the body, property, you are attempting to attach is exempt. [5] Let the record reflect cease and desist immediately from the office of beneficial owner. I, Ivan, a man, have not received anything from anyone. And I do not understand why I'm here. Release my body.

THE COURT: Mr. Rosario, would that be the answer to any question the Court asks today?

Yes or no, Mr. Rosario?

THE DEFENDANT: Release my body.

THE COURT: So I take that as a yes. I will ask you further questions; you need not repeat what you just said.

All right. Mr. Rosario, are you under any pressure, duress, or promise that might affect your decision-making here today?

Are you acting under your free will, voluntarily, and intelligently?

I assume the same answer you gave previously, correct?

I need to advise you of certain of your constitutional rights that are implicated by the proceedings here today.

The first is your right to be represented by counsel and your right to waive the right to be represented by counsel and to represent yourself. You have a Sixth Amendment right to be represented by counsel. You filed a motion on January 24, 2019, docketed at docket number ECF-103, requesting the [6] appointment of counsel.

The Court granted that motion and appointed Attorney Mirto. Attorney Mirto was present when you were here last, entered his appearance, advised the Court that he has fully reviewed the entire file, filed the sentencing memorandum, and stated his willingness to represent you. At that time, you declined. I see that you're declining again today. And Mr. Mirto was appointed standby counsel; he is present here, sitting next to you in the courtroom, ready and able to answer to any questions you may have and to provide you with legal advice.

Further, the Court notes that Mr. Calcagni had filed a sentencing memorandum and Mr. Mirto has filed one on your behalf as well. So, certainly, your penal interests have been brought to the attention of the Court.

Now, Mr. Rosario, I understand you have a prior felony conviction and that you're no stranger to criminal proceedings, but I have to advise you that this is a complex proceeding. It involves complex legal issues about which you are not experienced. As a consequence, it is far better – the Court advises you it is far

better to be represented by counsel, as counsel is educated and prepared to address your legal interests.

The Court would also note that you would be at a serious disadvantage because the Government is highly educated [7] and has considerable experience in the legal matters which the Court will be considering. If you were to represent yourself, you would be at a decided disadvantage vis-à-vis the Government. And so you would be well-advised to accept representation of counsel. But obviously, as you have the right to counsel, as I indicated previously, you have the right to waive that right. You've waived that right previously.

Do you still wish to waive your right to representation by counsel?

You also have a Fifth Amendment right against self-incrimination, which means you have the right not to say anything, whatsoever, concerning the proceedings. If you choose to represent yourself, it might be advisable for you to say something on your behalf. And in so doing, you would be waiving your Fifth Amendment right against self-incrimination. Where you're represented by counsel, you would have a go-between, and counsel could speak on your behalf using his considerable education, training, and experience to convey to the Court that which would be advantageous to you in a way that would not waive your Fifth Amendment right against self-incrimination or otherwise be disadvantageous to you.

Do you understand, Mr. Rosario?

You also have a Sixth Amendment right to be present at all proceedings and to participate in those proceedings. [8] And you have the right to waive that right just as you have the right to waive the right to be represented by counsel.

Do you understand, Mr. Rosario?

If you knowing and voluntarily waive your right to participate in the proceedings, the Court will proceed without your input.

Do you understand, Mr. Rosario?

All right. The Court finds that Mr. Rosario has knowing, voluntarily, intelligently waived both his right to counsel and his right to participate in the proceedings here today. That is his constitutional right. And the Court finds that he has knowingly, voluntarily, and intelligently exercised his right to waive those constitutional rights.

Nonetheless, the Court appoints Mr. Mirto standby counsel for Mr. Rosario should Mr. Rosario have a change of mind and wish to seek his advice and counsel.

The Court will take into consideration, and has fully read the entire record in this case, including the sentencing memoranda filed on behalf of Mr. Rosario. And in that regard, the Court would note that certain amendments to the pre-sentence report have been made as a consequence of the objections filed by counsel. The

Court would note, however, that in the very first paragraph, it indicates that Mr. Rosario was charged with a drug-trafficking offense and that the jury was unable to reach a verdict on that case. That [9] will be amplified to make even more clear that the facts in the presentence report, with respect to the drug-trafficking activity, relate to the charge which the jury did not reach, on which the jury did not reach a verdict.

The Court finds that the pre-sentence report accurately reflects not only the allegations that the Government has asserted and the investigation that the law enforcement officers discovered, but also, it accurately reflects the evidence that was adduced at trial. And that is critically important. This Court presided over that trial, and there was ample evidence, in this Court's judgment, for the standard of proof at sentencing, which is a preponderance of the evidence, for the Court to conclude that all of the allegations of the presentence report as Mr. Rosario are properly included in the pre-sentence report.

The pre-sentence report will be modified to a minor extent to more clearly reflect the fact that Mr. Rosario was not found guilty of those charges. And I see no point in going through in detail what those changes would be, although they have been delineated here. But since we're not going to have any discourse concerning them, it would not be a good use of judicial resources for me to go through each of them.

With respect to the drug stash house, headings in the PSR, Mr. Rosario's name will be omitted from all

but the Seymour property and the Ida Lane property where Mr. Rosario [10] and his vehicle were seen by law enforcement officers and captured on videotape to clearly indicate his presence there.

With respect to the Seymour property, Mr. Rosario was seen there outside the home in his 'jamas. His vehicle was seen there, although covered in an effort apparently to conceal it. And he was videotaped in the Ida Lane property wearing nothing but a towel, excepting large stack of cash from Mr. Green and Mr. Rosado (ph.) – Mr. Green, who admitted in his testimony here before the Court credibility that he was a member of and a subordinate of Mr. Rosario in a drug-trafficking conspiracy that Mr. Rosario led.

With that, the Court will hear first from the Government, adopting the pre-sentence report as its findings of facts with the changes noted. Then Court will hear to the – or give the defense an opportunity to be heard with the understanding that Mr. Rosario may choose not to.

Mr. Vizcarrondo?

MR. VIZCARRONDO: Your Honor, the Government filed or attempted to file something last evening just identifying some issues with the PSR. I believe the Court has had the opportunity to review the filing, although –

THE COURT: Yes.

MR. VIZCARRONDO: – it may not have been filed on the docket. I understand that it might have been kicked back.

THE COURT: I do understand that Mr. Rosario is in [11] criminal history category number 2 –

MR. VIZCARRONDO: Yes, Your Honor.

THE COURT: – based upon the sentence imposed for supervised release, violation, or probation violation that determined that sentence. And the Court also recognizes that in adopting the statutory sentence for the underlying offense, the offensive conviction adopts only the maximum and not the mandatory minimum.

MR. VIZCARRONDO: Yes, Your Honor. With respect to the facts, the Government also decided a couple of miscellaneous directions. Paragraphs 28, 52, and 55 refer to the recovery of a digital camera memory stick. The sentences referring to the digital memory stick are inaccurate, and that's the Government's fault. We just ask that as a matter of correction, the sentences in paragraphs 28, 52 and 55 related to the memory stick be deleted.

THE COURT: You mean the sentence that the memory stick was found in Mr. Rosario's home?

MR. VIZCARRONDO: Correct, Your Honor.

THE COURT: Yeah. All right. So the Court orders that that be omitted from the PSR.

MR. VIZCARRONDO: And with respect to the facts, I believe that's all the changes the Government had. I just wanted to clarify; the Court made a distinction with respect to the factual headings in the PSR based on Mr. Rosario's [12] presence at a particular stash house –

THE COURT: Yes.

MR. VIZCARRONDO: – and you've indicated West Haven and Seymour.

THE COURT: No, no. Well, I'm not sure it's West Haven. It's Ida Lane, the pool house. That was Ida Lane, was it –

MR. VIZCARRONDO: No, that was 250 Beaver Dam.

THE COURT: I'm sorry. Beaver Dam, I'm corrected.

MR. VIZCARRONDO: I just wanted to clarify that.

THE COURT: Thank you. Thank you.

MR. VIZCARRONDO: I think that's it for the Government's corrections, Your Honor, on the factual issue.

THE COURT: Very good. Those changes will be made.

MR. MIRTO: Your Honor –

THE COURT: Yeah.

MR. MIRTO: – may I be heard briefly just –

THE COURT: Oh.

MR. MIRTO: – on my memo?

THE COURT: Yes. Yes.

MR. MIRTO: With regard to –

THE COURT: Oh. Well, one second.

MR. MIRTO: Yeah.

THE COURT: Yeah. Does Mr. Rosario want you to be heard?

[13] Mr. Rosario, have you discussed this with him?

MR. MIRTO: Well, I asked him, previously, and he said that by using the sovereign citizen defense, he meant no disrespect for me. And I asked him if he would mind if I would talk on that. And he said no, but he – I want to hear it again from him before I do, though.

THE COURT: Please, yes.

MR. MIRTO: Says he can't talk, Your Honor. But that's not an objection.

It's just a critical issue that –

THE COURT: I will hear you, yes.

MR. MIRTO: May I speak?

THE COURT: Yes.

MR. MIRTO: Your Honor, the Government – this is an unusual issue because –

THE CLERK: Please speak into the microphone.

MR. MIRTO: Oh. It's an unusual issue because we are not using the offense of conviction to set the guideline range, but we are going to the underlying offense.

Now, the Government has cited this morning cases that say that it was an acquittal on the underlying offense, but it's okay for the Court. In that case, they said the Court shouldn't even look at the underlying offense because there was no conviction. I'm not saying that. I'm saying you should look at the underlying offense, but there should be [14] some restrictions on how you look at. 2X3.1 says that a guideline range can never be more than thirty for the underlying offense.

THE COURT: Does it say the guideline range or the base offense level?

MR. MIRTO: The base offense level. I'm sorry.

THE COURT: Yes.

MR. MIRTO: Yeah, the base offense level.

THE COURT: Yes.

MR. MIRTO: And, well, it also says that there should be six levels deducted from the base offense level, under 2X3.1, because the underlying

offense is usually more serious than offense of conviction and that accounts for the less seriousness of it.

So what I'm saying is that because there was no conviction, it doesn't mean Your Honor can't look at the offense. But I'm saying that I think a guideline level of 24, which is the level for one kilogram of heroin, which is what he was charged with, at least one kilogram, is a thirty. Deducting six levels would make it a 24 at level 2, criminal history category 2, which would make it a fifty-seven to seventy-one-month guideline range.

Now, if the Government wants to pile all this stuff on him that came into the trial but which the jury couldn't find, they can try him again. The way to do it is not to [15] forget about the Sixth Amendment and just find by a preponderance of the evidence all this stuff that a jury couldn't find. I don't think that's fair. I know it's the law, but there's been rumbling's and I cited in my brief Scalia's dissent. Judge Kavanaugh said you should just say I'm not going to do it because I don't have to. And he suggested district court judges do that so – excuse me, 'til the law changes.

So the only reason, so I'm so fervent about this is because I actually believe what I'm saying. That it's unfair to – and this wouldn't have happened had we not in 1987 done, what I've considered to be something that really messed up the judicial system, which is pass the sentencing guidelines. To try to numerically identify every action and take the defendant out of the equation completely was not a smart thing. And we're left with trying to figure our way out of it.

So I just ask Your Honor to consider my remarks and maybe take that into consideration in setting a guideline.

Thank you.

THE COURT: You're welcome.

Does the Government have anything further?

MR. VIZCARRONDO: Well, Your Honor –

THE COURT: Yeah.

MR. VIZCARRONDO: – I will start by indicating that [16] Mr. Mirto has conceded in his papers that what he's positing is in fact not the law. It's not the law of this circuit. It's not the law of any circuit.

The 2018 decision he cites in his papers, and we are in the Second Circuit, is the law and it makes it clear that relevant conduct may be considered at sentencing.

But putting that aside, that's not the issue here. And the Government's citation to the Arias case in the Ninth Circuit is instructive for a number of reasons. First of all, it's a decision that's now, at this point, eighteen or nineteen years old. So it suggests that the issues raise here, they're not novel, they're not unique, they've been dealt with long ago. And Arias is very clear that we are not in a situation in which the Court – like all the cases cited by opposing counsel, it is not a circumstance in which the Court is being asked to consider relevant conduct for purposes of imposing a nonguideline sentence at all.

This is a guidelines universe. And the guidelines themselves, in calculating what is in fact the proper and appropriate guideline, does refer to the underlying conduct as a way of calibrating the offense level for obstruction. And it's very clear that in Arias, they just clearly dealt with the issue and cited numerous cases, including the Eleventh Circuit. It's been echoed by the First Circuit. All of which make clear that in calibrating the offense conduct for [17] obstruction, in relation to the underlying conduct, the Court is not being asked to evaluate uncharged, acquitted, or unconvicted (sic) conduct. It is an essential component of properly applying the guidelines. And the Court is well aware of this but is required under the guidelines to evaluate what the underlying charge was.

And in the typical case, and Arias makes clear, there's no need to discuss in any way the evidentiary basis for the underlying charge. It matters not at all whether or not the offense is provable against the defendant, period.

The only evidentiary question that arises in this case is the fact that this particular underlying offense charge varies based on quantity. And in that context, there is a limited a degree of fact finding by this Court that is required by a preponderance standard as set forth in the application note for 2X3.1.

THE COURT: Well, recommended, not required.

MR. VIZCARRONDO: It –

THE COURT: Right?

MR. VIZCARRONDO: No, no. It's required for the Court to –

THE COURT: To calculate.

MR. VIZCARRONDO: – calculate as a guideline –

THE COURT: Yes.

MR. VIZCARRONDO: – but then the Court may, in its [18] discretion, obviously, as advisory guidelines, depart or issue a nonguideline sentence for whatever justification the Court deems appropriate.

THE COURT: Yes.

MR. VIZCARRONDO: But it is required that the Court calculate it accurately. In Arias, the court's failure to do so resulted in immediate remand for further consideration of those issues.

So Mr. Mirto is suggesting that the law is going to change, that's, you know, the headwinds are there. He's discussing a different context entirely. He's discussing a nonguidelines scenario, which this isn't. And he's also railing against law that has been established for decades and it hasn't changed a whit.

So the proper application is, in the Government's view, driven by Arias and it's progeny of cases that have consistently established that obstruction is a severe and serious crime that should be punished severely and seriously because it goes to the heart of the

integrity of the judicial system. And it is not a situation. And I think predecessor counsel, defense counsel, Mr. Calcagni, unfortunately and inappropriately suggested that it was tantamount to a technical violation and suggested some inapt cases related to administration of justice issues that have no bearing on what congress and what the courts have deemed an incredibly serious [19] offense and have articulated and prescribed the appropriate manner for calibrating penalties for that offense.

MR. MIRTO: Your Honor, with respect to the cases that he cited, the Arias case and the cases that he cited in that area, I think that the argument there was you shouldn't use the guideline range for the underlying offense at all because there was no conviction. I'm not saying that. I'm saying that we realize that the system has to protect its integrity. But the way to do it is to look at what level the lowest charged thing would be, which is level 30, and then deducting six levels and not doing anything else. That would be fair because you're not doing anything that is against what a jury found or did not find. All you're doing is evaluating the difference and seriousness of the two charges without looking at the facts. And –

THE COURT: Well –

MR. MIRTO: – the prosecutor talks about it being the law for a long time. Well, just on June 26th of 2019, the Supreme Court, in the United States v. Raymond, says that a judge can now not find a violation of probation by finding that the defendant

committed another offense without letting a – without having a jury determine whether or not he's guilty of that other offense.

So that changes the law that's been around for a long time. And it cites all – the decision cites all the problems [20] with the lack of allowing a jury to determine issues.

THE COURT: But the Government is proposing, Mr. Mirto, that the Court comply with the guidelines, follow the guidelines, finding the base offense level as 30, which requires the Court to take the base offense level for the underlying offense and reduce it by six levels, thereby reflecting the fact that the underlying offense is more egregious than the obstructive offense of conviction.

Then the Government is requesting that the Court impose two enhancements, two for Mr. Rosario's confederation with his mother, Ivelisse Rosario, to destroy the evidence that the jury found was destroyed. There is unequivocal evidence of the fact that he did.

And secondly, the Government is proposing that the Court add two additional points for the defendant's untruthfulness, his perjurious testimony, indicating that he requested the phone be destroyed not because it contained incriminating evidence but because he did not want Sima Baker (ph.) to know that he had consorted with Ms. Lexie. Neither of those enhancements relate to the underlying offense.

Now, the request for a leadership enhancement does. It does require the Court to consider the facts germane to the underlying offense, which the jury could not find that Mr. Rosario –

MR. VIZCARRONDO: Your Honor, may I just clarify [21] the –

THE COURT: Yeah.

MR. VIZCARRONDO: – Government's position?

THE COURT: Yes. Well, well, let me finish my sentence –

MR. VIZCARRONDO: Yeah.

THE COURT: – please.

So insofar as that is concerned, the Government is not requesting the Court consider any of the facts related to the underlying offense. Would you agree?

MR. MIRTO: Except that they're looking at a starting point of level 36 rather than level 30.

THE COURT: But that's what the guidelines recommend. And that's what the statute – well, the statute deals with the statutory maximum. But that's what the guidelines recommend, but the guidelines take into consideration the fact that the obstructive offense is a lesser offense than the offense the prosecution of which was sought to be obstructed because it requires the reduction of the base offense level

for the underlying offense six whole levels, and that's significant.

MR. MIRTO: But if we start with – my argument, Your Honor, is we should start with one kilogram of heroin, which is what he's charged with. Otherwise, Your Honor would have to find it was more. And the jury couldn't find what it was [22] or even that it was.

So if you look at one kilogram, that's a level 30a. And if you deduct six levels, that's a level 24.

Now, you are talking about –

THE COURT: I see what you're saying.

MR. MIRTO: – enhancing for perjury.

THE COURT: Well, let's stick with that last point –

MR. MIRTO: Okay.

THE COURT: – the base offense level. You can be convicted of obstructing justice even if you're not the defendant in the underlying action, can you not? In other words –

MR. MIRTO: Yeah, I guess you can.

THE COURT: – Ivelisse Rosario could have been indicted and convicted for that conduct on the basis of the evidence presented in court. And the statute doesn't say that you use – nor do the guidelines say that you use either arranged based upon or the maximum sentence of the convicted offense. Both refer to

the underlying offense. In other words, the offense that gave rise to the obstructive conduct, the offense that the convicted individual sought to impede the prosecution of.

MR. MIRTO: That's correct.

THE COURT: Okay. So there's nowhere in the statute, nor in the guidelines, any contemplation that the individual [23] be convicted of the underlying offense, nor should there be because you can be convicted of the offense even if you're not involved in the underlying offense.

MR. MIRTO: Okay. But what I'm talking about, Your Honor, is the guideline range. The Government wants it to be 36 and then deduct six levels.

THE COURT: Yes. Of –

MR. MIRTO: I'm saying that it should be 30 because he's charged with one kilogram or more. And one kilogram of heroin is a level 30. And then you shouldn't be able to find anything else with regard to that offense because the jury couldn't. And, therefore, when you deduct six levels, we have a level 24. And anything other than that would be a violation of his jury rights. That's my argument.

THE COURT: Well, the jury wasn't asked to determine drug quantity. And given the fact that he was convicted of drug trafficking involving a kilogram or more, would the Court not ordinarily make the quantity finding based on a preponderance of the evidence at sentencing if he pled guilty?

MR. MIRTO: Well, you're saying the jury would not make a – but he didn't plead guilty.

THE COURT: Okay. But let's assume that it went to the jury.

MR. MIRTO: Yeah. Okay. Well, the jury would make a finding of how much. Would they not?

[24] THE COURT: I don't know, would they?

MR. MIRTO: I think they would. I think you can request that they do.

THE COURT: You could request.

MR. MIRTO: Yeah.

THE COURT: You could request. That didn't happen here. Did it? I don't believe it did.

MR. MIRTO: Well, but I'm saying that you would have to find something that they couldn't find.

THE COURT: But if the jury found him guilty – well, correct –

MR. MIRTO: But they –

THE COURT: – correct me if I'm wrong, Mr. –

MR. MIRTO: – they didn't find him guilty, though.

THE COURT: But I know. But they weren't asked to find whether he was guilty of one kilogram or twenty kilograms.

MR. MIRTO: Okay. But my argument is that because they couldn't find him guilty, that that should be the end of it. That's what his Sixth Amendment rights are.

Normally, you wouldn't take into consideration an acquitted charge other than as other – you know, because of what the law is. And I think the law is wrong, but –

THE COURT: Well –

MR. MIRTO: – that's just my own feeling.

[25] THE COURT: You're saying the law is you can't take into consideration acquitted conduct?

MR. MIRTO: I'm saying you shouldn't be able to take that into consideration.

THE COURT: But the law says that you can, correct?

MR. MIRTO: Yeah, but there are many wrong wings and I think we're headed in, you know – Judge Kavanaugh, who's pretty much of a conservative, says that district judges should just ignore it.

THE COURT: So how does the district judge, in applying the 3553 factors, reflect the seriousness of the offense if the court doesn't take into consideration what the defendant sought to obstruct?

MR. MIRTO: Well, I think you can take into consideration – I think a 24 is fairly serious.

THE COURT: That's not – okay. You think it's fairly serious?

MR. MIRTO: Yeah. And –

THE COURT: Right. But, I mean, wouldn't fifty kilos be more serious because – I mean look at El Chapo, just yesterday, thirty years plus life or –

MR. MIRTO: Yeah. No –

THE COURT: – life plus thirty years.

MR. MIRTO: – I understand.

THE COURT: So, I mean, wouldn't what a person would [26] be willing to do to avoid life plus thirty years be more egregious than what they would be willing to do to avoid a sentence of thirty months?

MR. MIRTO: Yes, but my point is this, Your Honor, the Government can retry. If they really think there's that much heroin, retry him. Why should the Court – they ask the Court to bail him out and give him a sentence he would have gotten had he been convicted of the underlying charge.

THE COURT: I agree with you there.

MR. MIRTO: That's not fair.

THE COURT: I agree with you there. But the Government is not asking –

MR. MIRTO: They're asking for 188 months. That's not a tap on the wrist, Your Honor.

THE COURT: I recognize it's not a tap on the wrist – a tap on the wrist, but there must be some proportionality to the sentence imposed and that proportionality has to be based upon the penalty the defendant sought to avoid by obstructing the prosecution of a charge.

MR. MIRTO: Okay. But, I mean, I think 188 months is an outrageous request on a charge that they couldn't reach a decision on.

I mean, that's basically what we're – they could get what they were looking for by convicting him of what they said he did and –

[27] THE COURT: They would get a lot more.

MR. MIRTO: Yeah. And they have a –

THE COURT: – because they get the 36 plus they get the 2 for the leadership. Okay? I'm sorry, the 4 for the leadership, so that would be 40. Plus they'd get the two for – I forget, there's some others, but they would certainly get a lot more. They would clearly be at 40 –

MR. MIRTO: Yeah.

THE COURT: – the conviction plus the leadership –

MR. MIRTO: But they'd have –

THE COURT: – right?

MR. MIRTO: But they'd have to get a conviction first.

THE COURT: Correct. But my point is they're not asking. Okay. So we're talking 324 to 405, 324 to 405, they're not asking me to impose the sentence that he would have gotten had he been convicted of the underlying offense. That's not what the Government is proposing.

MR. MIRTO: Okay.

THE COURT: Right?

MR. MIRTO: I understand that, Your Honor. It's just that, to me, the whole issue is something that I feel fervently about. The guidelines, to me, ruined or hurt the system. And we're trying to bail out as – you know, Booker tried to bail us out as best he could. But when we came [28] when – in 1987 when somebody decided putting numbers on things solved everything, for those of us who had practiced for a substantial amount of time before that, that was just preposterous. And we're still dealing the effects of it. And for some reason, maybe because I practiced so long before it, I feel strongly about what's happened as a result of it.

THE COURT: I have to say that I agree with you. I mean, when they were first adopted, I thought, well, you know, how could a panel of lay people, lawyers, and some judges dictate to a constitutional officer how they exercise their discretion?

MR. MIRTO: Exactly.

THE COURT: A panel of citizens and experts don't dictate to the president how to perform the duty of commander-in-chief. You know, that there is no commission that tells the President whether or not he can declare war. There is no commission that tells Congress how much they can appropriate. So, you know, why would there be a commission to dictate to judges the sentence they can impose. And I think Booker resolved that issue. And I firmly believe that, sitting in this chair, there's plenty of discretion up here.

I will also say, having been a state court judge for eight years and sat for four years criminal, the notion of having some kind of organized framework is just. It's helpful to the judge because it gives you some order of magnitude. I [29] think it's helpful to the defendants, because they are not subject to the predilections of any particular judge.

I know and I'm sure you know that conviction for, I don't know, ten ounces of marijuana in New Haven will get you a completely different sentence than the same amount of marijuana in Litchfield because there is no level playing field. There is no structure. There is no computational way to decide what a sentence should be.

I once had to sentence a woman who was drunk and driving, had an accident with a ambulance where the patient died. The two EMTs were so traumatized, one of them could no longer perform that work because she had post-traumatic stress disorder to the point that she couldn't be in the back of a ambulance and not

see what was around here, and couldn't be in the front because she would see what was around her, ruined her career.

The defendant, after the accident, sat in her car. The police arrived, opened the car door, she fell out. They asked her if she had been drinking and she said yes. And they asked her how much, and she said many martinis. Now, what do you do with that without any framework? You're left with your own devices and your own devices alone.

So the guidelines, in my view, add some discipline to this process. And I think there is discretion. And in this particular instance, I think the statutory and the guideline [30] scheme do make sense. Now, we may quibble with how much time the guidelines recommend. You know, maybe they're all too high. I don't know. But they are what they are. And they do have their utility. And I think they serve a real benefit to the process.

MR. MIRTO: Well, I –

THE COURT: And –

MR. MIRTO: – I agree in that –

THE COURT: – and to the fair and even administration of justice, throughout the nation, to the extent human nature can allow that to happen.

MR. MIRTO: Well, I think one thing that they did do, they made us, as defense counsel, like portrait painters. When the defendant all of sudden came

back into the equation after Booker, it became apparent to us how important it was for us to humanize defendants because the guidelines didn't allow us to do that. And I mean love the federal system because I think everybody cares. And when you call a case, we're the only case. Like in the state court could be a hundred people waiting and you don't get the same kind of justice as you do here, so.

And I do agree that the guidelines provide some – what we've come to now is not as offensive as it was, but there are instances where I think they are a little too high. And it kind of – I don't know, it just – maybe because I was [31] around so long before, I have trouble accepting that. I'm not sure but.

THE COURT: I appreciate your comments and your brief; I thought your brief was – it gave me a lot of food for thought. Thank you.

MR. MIRTO: Thank you, Your Honor.

THE COURT: You're welcome.

Mr. Vizcarrondo –

MR. VIZCARRONDO: Thank you, Your Honor.

THE COURT: – anything more?

MR. VIZCARRONDO: Yes.

THE COURT: Okay.

MR. VIZCARRONDO: And I appreciate the discussion. I agree with the Court in principle. This sentencing has to do with not generalities or an academic discussion about the Sixth Amendment. It deals with Ivan Rosario.

In a few minutes, I'm going to do my best to explain to the Court the Government's position as to why a guideline sentence in this case applies. And the guideline sentence is not 180, doesn't begin at 180. The Government has conceded that the proper guidelines is now lowered to 168 as the beginning of the range.

That being said, I just want to be clear, we all have an obligation to calculate the guidelines correctly. And I think the – I just want to clarify where the Government's [32] coming from with respect to the calculation in the PSR, which is think is accurate.

First of all, the application note that applies here says or requires the Court to apply the base offense level plus any applicable specific offense characteristics that were known or reasonably should have been known by the defendant. So that's a requisite in properly calculating the guidelines. I understand the Court's discretion thereafter, and I'm not suggesting otherwise.

But what Mr. Mirto is suggesting is improper. He's suggesting that the Court ignore the application note, disregard any of the specific offense characteristics, arbitrarily decide that it's limited to one kilo, and then move on. That's incorrect. And if we do that, you know, that's an appeal issue for another day.

What the Government is suggesting in applying the application note is that the evidence established at trial sets a quantity level of thirty kilos. I believe the Court, in adopting the facts – the PSR is agreeing that that is credible and accurate and that is a factual determination. That is a level 36. And from there, applying the application note, we have to apply the additional specific offense characteristics.

The PSR has identified Mr. Rosario's sophisticated leadership of the organization, which is plus four; the [33] multiple uses of stash houses through Connecticut, that's a plus two; and the abundance of firearms related to the organization, that's a plus two. So I believe that puts us a level 44, which, as I've indicated in the brief and you'll hear me make this remarks again when I address the Court in that context, is off the sentencing scale. It's a 44. The guidelines only go up to 43. And so we're not dealing with the six-level reduction.

The reason why this case or why the guideline calculation is at a thirty is because of the hard cap, under 2X3.1, which says that in no way, shape, or form may the base offense level be higher than a 30.

So I just wanted to clarify, we're not in the world where we're dealing with a six-levee reduction. We're dealing with a much, much larger reduction than six levels. Here, we're pressed up against the hard cap of thirty, which is a huge benefit. The defendant's guideline – or the guideline calculation at – even a criminal history 2, for what has been articulated in the PSR, what the Court has adopted, is life. Life.

That's not what the Government is articulating here or advocating for in its sentencing. And I think that that is clearly indicative of the proportionality that's reflected in the guidelines. 168 is a far cry from a guideline advisory range of life. And, again, I'm going to echo some of these [34] comments as we go forward, but I just wanted to be clear where the Government is coming from in its calculation and to underscore the proportionality that is at play here.

THE COURT: You may proceed. You may continue and conclude.

MR. VIZCARRONDO: All right. Your Honor, obviously the Government sat through a lengthy trial in this case and has adopted the factual findings in the PSR, including the drug quantity and the enhancements that would apply to both to the underlying offense conduct – and I don't know that the Court has ruled on the Government's application for the enhancements as they would apply to the obstructive conduct. But obviously, it's the Government's view that what we're dealing with here should be punished under the guidelines at a level 34.

THE COURT: Yes, the Court agrees with that assessment –

MR. VIZCARRONDO: Thank you, Your Honor.

THE COURT: – that the enhancements that relate to the obstructive conduct should be added to the

base offense level of 30 for a total of 34 and that the defendant is in criminal history category 2.

MR. VIZCARRONDO: Thank you, Your Honor. And that would then, as Your Honor's already pointed out, be a advisory guideline range of 168 to 210.

[35] THE COURT: Correct.

MR. VIZCARRONDO: Now, Your Honor –

THE COURT: Yes.

MR. VIZCARRONDO: – it's this Court's solemn task to sentence Ivan Rosario for obstruction of justice. In this case the defendant knowingly, willingly, and deliberately destroyed evidence in a criminal prosecution against him and the jury found him guilty of that offense.

Now, in fashioning an appropriate sentence, this Court must evaluate who Ivan Rosario is. And this Court presided over approximately a month-long trial involving dozens of witnesses, including three of Rosario's own crew, all of whom credibly testified that he was the mastermind of that scheme to import at least thirty kilos of heroin into the United States.

And before we discuss the underlying criminal conduct, which I think I've made clear in our view is very germane to the issue of sentencing, I wanted to again just articulate to this Court, it has had the opportunity now to gauge the defendant's character and demeanor. He is an individual that continually refuses to accept responsibility. He has time and again

demonstrated a lack of respect for this Court and contempt for its authority.

He is now claiming to be a sovereign citizen, and maintains this Court has absolutely no jurisdiction over him. [36] And it has been his practice to enlist family members in pursuing ridiculous and meritless legal demands against his Court and its officers in that claim of being a sovereign citizen over whom this Court has no jurisdiction. So that's entirely in keeping with who Ivan Rosario is. He's a man who believes himself to be above the law.

Now, this Court has heard nine separate audio recordings in which this man threatened and verbally abused the mother of his child into committing the criminal acts at issue here, all for his benefit. Namely, he controlled and threatened her into destroying telephones in her possession that he knew contained incriminating evidence related to the federal charges pending against him.

Now, in Government's Exhibit 200 and 200A, which is the underlying audio recording of the transcript, he tells Ms. Lexie – this is example of the pertinent parts of these recordings. He says there's no going around it, all right? Because there's certain things that can eff me up, you hear what I'm saying?

And, again, Your Honor, Your Honor has not only heard the audio recordings, reviewed the transcripts, but has ruled on a number of occasions in post-trial

briefing related to the import of these underlying recordings. And so, you know, Your Honor has heard during the course of those recordings his threats to kick her ass, to eff her up, if she didn't do what [37] she was told.

And, of course, Your Honor's also heard Mr. Rosario using their child as a bargaining chip, offering – and this is profoundly sad – offering to give her money to pay for the child's school pictures if she went through with his schemes to destroy the phones, and to put Ms. Lexie and their infant daughter on the visitor's list at the prison if she complied, indicating that in all the time he was incarcerated, he was denying them the opportunity to visit. And that was a bargaining chip that he used.

Again, this Court has to determine what this man deserves as a sentence. And in a holistic view, this Court certainly has had the opportunity to realize who this man is.

Your Honor, we've asked for enhancements the Court has agreed with, which related to the obstructive conduct. It's clear that the obstructive conduct was related to the charges at issue. He indicated, the Government's allegation, that he was a cartel member and indicated that if convicted of the crimes, he would go to prison for life, and that was the underlying motivation for his scheme to destroy the evidence.

In addition to that, Your Honor and everyone in the courtroom had to suffer through Mr. Rosario's in-court testimony. And in the Government's view, that

testimony, in light of all of the credible evidence adduced at trial, amounted to more than an hour's worth of perjury. Again, he [38] claims outrageously to be nothing but a simple garbanzo farmer/fashion stylist and denied any intent to obstruct justice, claiming that his nonconversations with Lexie were just misunderstood and that he was using coded language, like destroy the windows, out of some intent to prevent the discovery of sex tapes related to personal issues and child-custody issues, rather than all the discussions he had about the import and the impact that the discovery of that evidence might have on his criminal trial for drug trafficking.

Again, Your Honor has already ruled on the issues related to whether or not Mr. Rosario enlisted others. He certainly did, and not the least of whom is Ms. Lexie, even though he was simultaneously using her to enact his will at the same time that he was victimizing her to commit criminal conduct. He also certainly used his mother to do so. She was clearly a willing and able participant in a scheme to destroy those phones, which Your Honor has already discussed. And that, of course, supports the Government's view of the enhancement for the use of confederates in connection with the obstruction of justice.

Now, again, we've already – Your Honor, I had some remarks about the application of 1512(j). I think we've covered it. I understand there's a great concern by the Court, certainly by defense counsel, about the fairness of an obstruction penalty. And that clearly arises because the [39] offensive conviction here,

particularly section 1512(j), provides an enhancement based on the underlying conduct as set forth in the PSR. And as this Court has concluded, Mr. Rosario faces a statutory term of incarceration for his offense conduct of up to life imprisonment.

Obviously, I've stated, Your Honor, that's not what the Government believes should occur in this case. We're not asking for so draconian a penalty. That would be tantamount to penalizing Mr. Rosario for the underlying conduct. That's not what's called for in the guidelines, that's not what the Government is advocating here.

However, it is very clear, Your Honor, that obstruction in connection with a federal criminal trial is an offense of the utmost seriousness. Again, we've talked about the guideline term of 168 to 210 months. Now, in the Government's view, that is a sentence that is sufficient to send a message in light of the seriousness of the alleged offense conduct that the tampering with the justice system bears grave consequences. It's a critical principle, and it's one that should be vindicated.

This Court, on June 13th, issuing one of its several decisions with respect to the obstruction count, indicated that the application – or discussed the application of 1512(j). Your Honor said language of the statute does not require the defendant to be convicted of the related charge [40] and, therefore, the 1512(j) enhancement applies regardless of whether the defendant was convicted of the offense. And we've already discussed exactly why that is so. But Your Honor went on to talk

about the motives underlying that statute, suggesting the logic of the statute is ineluctable.

First, the purpose of the enhancement is to deter obstruction. And finding there's a direct correlation between the severity of the related offense and the required deterrence.

Second, under the Congress construction a defendant who evaded prosecution by obstruction would receive a lower sentence than one who did not evade conviction, occasioning a perverse result. And that's exactly what we want to avoid here.

Your Honor said, finally, such a reading would not achieve the congressional intent to protect and vindicate victims and to ensure the integrity of the criminal justice system.

So, Your Honor, I think, is absolutely right, in the Court's written decision, about the need to reflect the severity of the obstruction conduct because it is a strike directly at the heart of the legal system. It simply can't be countenanced if the system is to survive in its dysfunction and is to provide justice.

Now, we talked about the underlying offense. And for [41] the sake of the record, I am suggesting, in the Government's view, that there are few crimes more serious than the crime that Mr. Rosario sought to obstruct here.

Mr. Rosario, again in the Government's view and in light of the credible evidence, was personally responsible for one of the most tragic heroin importation

schemes the state has suffered. From at least 2015 to his ultimate arrest in 2017, Mr. Rosario is believed to have imported untold dozens of kilos of heroin across the Mexican border into this country.

Now, for sentencing purposes, the credible evidence suggests that the quantity at issue was at least thirty kilograms, and of course, that was supported by the testimony of cooperating witnesses who were directly involved with Mr. Rosario's scheme.

I'll bear the Court a long recitation of the underlying facts, given the acceptance of the facts in the PSR. But the thrust of Mr. Mirto's remarks is about equity and fairness. And so I think the Court should bear in mind reasons why this case should not warrant a nonguideline sentence. Obviously, we're dealing with the obstruction of offense conduct that is, again, the utmost seriousness – of the utmost seriousness involving opioids. The state is obviously facing a situation which more than 1,000 people died last year from opioid overdoses. And so I guess on a global [42] scale, we are dealing with conduct that is truly unconscionable when we're talking about quantities in at least thirty kilos and potentially in excess of that.

With respect to other factors that may be appropriate in the Court's determination, we'd ask the Court to consider that Mr. Rosario is a very intelligent man. He's got a very dangerous intellect. The trial evidence proved, by at least a preponderance, that again, he had the intelligence and the skills to control the logistics of an organization. That included international

smuggling routes, timetables, schedules, multiple stash houses, laundering of drug proceeds. In short, he has the intelligence and ambition to run a multifaceted, highly organized drug organization. And in that respect, he differs greatly from the typical drug defendant that appears before this Court.

Most people that the Court is sentencing are often underskilled, they are undereducated, they're under employed, and in many cases, they're often drug dependent. Mr. Rosario suffers none of those. And there is no basis to show leniency in the form of a nonguideline sentence based on the defendant's background and skills, but in fact, the exact opposite is true here.

Certainly there's evidence that he thrived in this enterprise by hurting and exploiting other people. Again, we've had some testimony from some of the individuals that [43] worked directly for him. I point to the testimony of Eric Green. Mr. Green started abusing drugs at the age of ten years old. He didn't complete high school and was, again, in the Government's view, manipulated by Mr. Rosario, who used him as a runabout and all-around errand boy and paid him in drugs because that was a very simple way and very a keen way, in Mr. Rosario's line of thinking, of keeping someone like Eric Green enthralled to him. And so that's sort of an example of how he uses people in this conspiracy.

Albert Gorm (ph.) was another individual. At the time, he was in dire straits financially. He was living with his mother, in his late 20s, early 30s, and

struggling. Mr. Rosario appeared to lend a hand by getting Mr. Gorm his first apartment. And in exchange, it came with really severe strings attached to it. And Mr. Gorm was required to turn over his apartment when needed to use to package heroin, and that occurred on multiple occasions.

Mr. Rosario used his own father as a heroin tester, as Eric Green testified. That's some of the lowest conduct I've encountered in my experience in prosecuting drug crimes. But it's not surprising, again, when you consider how Mr. Rosario treated people that were related to him. Obviously, the examples that we heard in this courtroom about how he treated Shanika Lexie bear that out.

And so if this case shows anything, it really [44] underscores Mr. Rosario's manipulation of people for his own ends and his cruelty. Friends, family didn't matter; if you can use them to make a buck that's what he did. And make a buck, he did. And that brings me to my next point, his boundless greed.

We've seen dozens and dozens of receipts from Louis Vuitton, from Gucci, from Ferragamo. It's 58,000 dollars in receipts that we were able to recover from his residence and through documentary subpoenas. But, again, I remind the Court that Shanika Lexie had to beg a few dollars to pay for the child's school pictures. So it's unconscionable behavior when you see it in context.

As for his other wealth, and there was considerable wealth, we heard testimony that his vehicle was

used to transport approximately 300,000 dollars in cash to money launderers in the Bronx by members of his organization. We believe, and the credible evidence supports the view, that that was Rosario's money, certainly in large part, and that these individuals that he was reportedly going to meet with or send the money to were tasked with exfiltrating that money, certainly out of Connecticut, in a scheme where he could maintain his drug profits. That's not just conjecture; obviously, we have the arrests connected to Mr. Rosario. They occurred in his vehicle which was equipped with a hidden compartment. But we also recovered approximately 90,000 [45] dollars in cash, one from a hidden compartment in his mother's home and the other from a lock box in a bedroom at his mother – at his in-laws' residence.

We have the video, the Court saw, of Mr. Gorm conducting one of his routine deliveries to Mr. Rosario, delivering between 10 and 15,000 dollars in cash. And I don't want the Court to forget that we also saw a scrap of paper that Mr. Rosario wrote while he was incarcerated. And it read to hide money, buy diamonds. I've never encountered that. Again, it provides a glimpse into the operations of his mind. And it certainly, again, suggests that he's profited handsomely, certainly enough to hide money by buying diamonds. And that even while incarcerated, his need to manipulate, control, and obstruct was in full effect.

Mr. Rosario's never had legitimate employment, not ever. He's never paid a dime in taxes. He's never contributed to society financially in any way; he's

benefited himself. And, again, the 90,000 dollars in cash from his family member's home in the hidden compartments, and I will say those also mixed in with United States currency was Mexican pesos. I don't think there's really any doubt that it was drug-related money that came from Mr. Rosario; again, just someone who has profited handsomely from this drug trade, while others around him were kept in dire straits. And we believe that was certainly deliberate. And the Court should [46] consider that in determining who this man is.

He sat in this witness stand and he talked about how he was a family man, living in Mexico with a wife. His only legal wife, I should state, but he couldn't remember his wife's birthday or the address on the house where they lived. You know, it's the degree of misrepresentations that he voiced on this jury over the course of his testimony, all of which was perjurious, again, is entirely consistent with the charged conduct here and the conduct of conviction here, obstruction of justice.

On those grounds, Your Honor, this individual is not worthy of the Court's lenience. For the reasons that I've discussed, I think the guidelines are correct in fashioning proportionality in this case. They do so. And the Government's request, respectfully, that this Court impose a guideline sentence between 168 to 210 months is just.

Thank you, Your Honor.

THE COURT: You're welcome.

Mr. Mirto?

MR. MIRTO: Well, the only response that I have to that, Your Honor, is if it was so profound and obvious, why didn't the jury believe it? And that's what bothers me. He's talking about all this horrendous stuff that a jury had an opportunity to find. They didn't find him guilty of anything with regard to the drug offense. So I think that that's what [47] kind of bothers me about using all of that to set a guideline range that's so high.

I wasn't at the trial, so I can't evaluate the evidence myself. I've read it, but it's not the same as being there.

That's all I have to say, Your Honor.

And I think Mr. Calcagni has done a good job in humanizing the defendant in other ways with photos of family and other areas that he discussed in his memo.

THE COURT: Thank you.

In determining the appropriate sentence to impose, the Court must consider the –

MR. VIZCARRONDO: Excuse me, Your Honor.

THE COURT: Yeah?

MR. VIZCARRONDO: I just want to make sure that we give any family members an opportunity to speak before the Court.

THE COURT: Mr. Mirto, are there people here who would like to speak?

MR. MIRTO: Is there anyone here?

THE COURT: Probation did reach out to the family; they never responded. I assume that they didn't want to. But if there's anyone here who would like to speak, they may do so.

Someone stood up. Would someone like to speak? If [48] so, please come forward to the podium.

UNIDENTIFIED SPEAKER: They went to go get her.

THE COURT: Oh.

Please come to the podium.

MS. ROSALES: So we spoke about who –

THE COURT: Please state your name.

MS. ROSALES: My name is Ashley Rosales (ph.).

We spoke about who my brother is. And I just wanted to state that the only part of that that was correct is that he's intelligent.

My brother is a family man. One of my earliest memories of my brother is when I was a little girl and

I was scared to go – go to sleep, so he – he put me in my bed and he tucked me in. And he – he surrounded me by all my stuffed animals. And he told me an elaborate story about how I could never be harmed while they were there.

And all my life, in my twenty-seven years of life, I have been okay because he was my brother. That's the man that my brother is. And the last time I was in this courtroom, there was a joke about his tacos. And I just want to make this clear, that one day, that we'll all be paying for those tacos. He is intelligent. And no matter what happens here today, he's going to open a restaurant. He's going to do all the things that his heart desires.

That's what I know about my brother, so he wasn't [49] accurately described in this proceeding. I can't say – I'm not a lawyer, I can't stand here and cite laws to you. I can't tell you what they say or what they don't say; I can only tell you who my brother is, and that's who my brother is.

That's all.

THE COURT: Thank you.

MS. ROSALES: Yeah.

THE COURT: Would anyone else like to speak?

MS. BAKER: My name is Sima Baker.

THE COURT: Were you here during the trial?

MS. BAKER: Part of it, not all of it.

THE COURT: Part? Uh-huh.

MS. BAKER: Yeah.

THE COURT: Yeah.

MS. BAKER: Ivan and I are married; we have three children together. I just wanted to say that this whole two – two-and-a-half years that this – this has been happening, it's been the most – I can't even describe it, for me and my children.

He was incarcerated when I was pregnant at five months. He has never held our son. He – our son is the first boy in the family; he has never held him. My children basically don't know him because he's incarcerated.

What hurts most is my family is torn apart. My children do not have a father to grow up and teach them things [50] and show them things. And he's missing out everything the children are going through. My oldest daughter is four. The other one's three. And my son is two. And when he was incarcerated, my first daughter was one, my other one was nine months, and I was pregnant. He has missed everything in their life so far. And they have missed everything from him not being there.

That's it, I'm just too shaky. That's it. Thank you.

THE COURT: You're welcome.

Would anyone else like to speak?

MS. ROSARIO: Yeah. My name's Jenna Rosario (ph.); bear with me. Ivan – Jenna Rosario. Okay. Ivan Rosario is my uncle, but he's always been –

THE COURT: Please speak into the microphone. You can adjust it.

MS. ROSARIO: Better?

THE COURT: Yes.

MS. ROSARIO: Okay. Sorry. Okay.

Ivan Rosario is my uncle, but he's always been more like a father figure. He is totally a family man. My favorite memories of him is just all of us being in the living room, we'd watch movies. There was never a dull moment. He, like, lit up the room, only good memories.

He would make everybody laugh. He always made sure [51] the family came together and that everybody would just be happy with him around. And ever since he's been in jail, it's been, with his family, nobody's happy. And he's always been there.

He would always make sure I'm okay. He would always – like, he would ask me if I'm okay. And I would be, like, yeah. And then he'll be, like, what's wrong, talk to me. Like, he would always be the person I will go to for everything. He's always there. And even with him being in jail, it's like he's there, but it's not the same. Like, I can't hold him to talk to him and tell him how I actually feel. And the kids, it's hard. Like, they need their father. They don't know who he is. Like, they

know they have a father, but what is that to them? They don't know. So thank you.

THE COURT: You're welcome.

Would anyone else like to speak?

Mr. Rosario, would you like to speak?

(Pause)

THE COURT: Mr. Mirto, should I proceed or would you like a recess?

MR. MIRTO: No, you can precede, Your Honor.

THE COURT: Sure?

All right. In determining the appropriate sentence to impose, the Court must consider the 3553 factors, the first [52] of which is the nature and circumstances of the offense.

The destruction of evidence alone would be sufficient to commit this offense. Enlisting confederates, corrupting others, threatening others, withholding love and affection as a tool to manipulate others are all exacerbating circumstances that worsen the nature and the circumstances of this offense.

The Court must also consider the history and characteristics of the defendant. And I totally believe and feel and understand exactly what Mr. Rosario's family members said here today. And it is a tragedy, is a true

tragedy that we're all human, we all love people, and yet we all have the capacity to do bad at the same time.

The vast majority of people who engage in criminal conduct do so for financial gain, financial gain that they share with their loved ones. It's rare for me to hear anything other than what I just heard from Mr. Rosario's family members, from the family members of any individual before the Court for sentencing.

I recently read a very interesting book that has garnered some claim. And it's called "Random Family". And it is a book written by a journalist who followed two women for ten years and wrote their biographies. One of them was the girlfriend of a man named Boy George, about whom you may know or have heard. He was the youngest and largest drug dealer in New York in the mid to late '80s. The other person was the [53] girlfriend of her sister. I'm sorry, the girlfriend of her brother.

And what's notable and what brings that to mind now is one episode where Boy George meets Jessica (ph.) for the first time. And they go out, and she's very impressed by his wealth and sophistication. And then she tries to contact him. He realizes that she's wearing the same clothes she was wearing on their first date. He realizes that her family has no food and they're in dire straits. And he sends to the home more food than the family had ever seen. He sent them everything they needed. And Jessica comments that he even sent a flea-and-tick collar for their dog, that's how

thoughtful he was. But Boy George was a notorious, deadly, large-scale, predatory drug dealer.

No one is demonic, we're just human. We're just human, as is Mr. Rosario.

But Mr. Rosario threatened and intimidated the mother of his child, deprived them of his love and affection, and elicited his mother, exposing her to criminal prosecution, to destroy what he admitted, more than once, in recorded telephone conversations from prison which he knew were recorded – so he knew he was jeopardizing both of those women and jeopardizing their liberty and the well-being of their family members. He elicited their aid to destroy one or more telephones for the express purpose of eliminating what he [54] himself described as incriminating information. These are Mr. Rosario's words.

There is no doubt here, there's no doubt whatsoever, that he elicited the aid of his mother, Ivelisse Rosario, and the mother of his child, Ms. Lexie, his paramour at the time, to destroy evidence to evade prosecution and conviction for the charge of conspiracy to distribute and the possession with intent to distribute more than a kilo of heroin. There is simply no doubt about that.

It's a very, very serious offense. It's a heartless offense. It evinces not only disrespect for the law, but disrespect for the very people he elicited to perform that illegal act.

The administration of justice is vital to our well-being. And that's illustrated by the fact that today, in the urban centers, people are dying every single day from gunshot wounds, and they're being injured. And the perpetrators are getting away with it because people in the community won't step forward and tell the truth and disclose the identity of these predators. And because justice can't be administered, people are dying and they continue to die.

THE DEFENDANT: Oh, my God. This is crazy.

THE COURT: No, Mr. Rosario, this isn't crazy. What you did is crazy. And it deserves to be punished. And a sentence has to be imposed to deter people from frustrating [55] the ends of justice and to protect the public from those who are depraved enough to engage in the conduct in which you engaged.

THE DEFENDANT: Wow.

THE COURT: Sentence has to reflect your need for educational and vocational training, medical care and corrective treatment in the most effective manner, take into the consideration the sentences available, that recommended by United States Sentencing Commission, and finally, to avoid unwarranted sentencing disparities.

Taking into consideration not only your conduct but your unremitting persistence and maintaining that criminal mentality, the Court finds that the

sentence which is sufficient but not greater than necessary to fulfill the purposes of sentencing is as follows.

Would you, please, stand?

You're hereby committed to the care and custody of the Bureau of Prisons for a period of 210 months to be followed by a five-year period of supervised release. During the period of supervised release, you shall be subject to the standard and mandatory terms of supervised release. You shall also be subject to the special conditions that your home, your vehicle, your place of employment, and your person shall be subject to search on reasonable suspicion by Probation. You may not illegally use or possess any control substance. You [56] may not possess a firearm, dangerous weapon, or ammunition.

You shall maintain full-time, legal, gainful employment. Full-time, meaning thirty-five to forty hours per week. You shall file tax returns timely and accurately. You shall submit to substance abuse and mental health evaluations, participate in treatment on an outpatient basis as directed by the Office of Probation and on an inpatient as directed by the court. And you shall pay such portion of the evaluation and treatment so ordered as the Probation Office deems you capable of paying.

The Court, having found that you're entitled to appointed counsel, having no basis to conclude that you can, finds that you're unable to pay a fine and no fine is imposed.

Is there any objection to the sentence as imposed?

MR. VIZCARRONDO: Nothing from the Government, Your Honor.

MR. MIRTO: Your Honor, no. Because I'm just standby counsel, Mr. Rosario should know if that he's going to contest his sentence, he should file his own notice of appeal.

THE COURT: I will give him the appeal waiver –

MR. MIRTO: Okay.

THE COURT: – advisement.

Mr. Rosario, if you choose to appeal the sentence imposed by the Court, you have to do so within fourteen days of the date of the written judgment. You can do that by [57] contacting the clerk of the court. Since you're not represented by counsel, the clerk of the court will initiate the appeal, but you must prosecute it yourself. If you cannot afford an attorney, an attorney will be appointed to represent you at public expense. If you cannot afford the cost of the appeal, the appeal fee will be waived; however, in either of those instances, you must file a financial affidavit demonstrating your inability to pay.

Do you have any questions, Mr. Rosario?

Does either counsel have any question?

MR. MIRTO: No, Your Honor.

MR. VIZCARRONDO: No, Your Honor.

THE CLERK: Doing a special assessment?

THE COURT: Yes.

Mr. Rosario, the Court imposes a one-hundred-dollar special assessment which is due and payable today and if not, paid during the period of supervised release.

Thank you.

MR. MIRTO: Thank you, Your Honor.

MR. VIZCARRONDO: Thank you.

MS. REYNOLDS: Thank you.

THE COURT: You're welcome.

THE BAILIFF: All rise.

(Whereupon the above matter was concluded at 1:20 o'clock, p.m.)

[Certification Omitted]