No. _____

In the

Supreme Court of the United States

ANTHONY FARMER,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under 18 U.S.C. § 3553(a)(6), a district court can or should consider the need to avoid unwarranted racial disparities in sentencing among defendants with similar records who have been found guilty of similar conduct.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Farmer respectfully requests issuance of a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit.

OPINION BELOW

The First Circuit's opinion is reported at *United States v. Anthony Farmer*, 988 F.3d 55 (2021). APPX:1.[1]

JURISDICTION

The First Circuit's judgment was entered on February 16, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The District Court had original jurisdiction over Petitioner's case by virtue of its jurisdiction over offenses against the laws of the United States under 18 U.S.C. § 3231. The Court of Appeals had appellate jurisdiction over the District Court judgment pursuant to 28 U.S.C. § 1291.

[1]References to the attached Appendix appear as APPX:Page(s). References to the appellate record below are to an Addendum to the Defendant's Principal Brief (A/page #), to the Record Appendix (RA/page #), and to the sealed record appendix containing the Presentence Investigation Report (SRA/page #).

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 3553(a) provides:

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress

(regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

A. Indictment of Defendant & Codefendants.

On October 4, 2017, a grand jury indicted Mr. Farmer and two codefendants. Count 1 charged Farmer and codefendants Aaron Sperow and Raymond Perez with "Conspiracy to Commit Robbery of Money of the United States," 18 U.S.C. §§ 371 and 2114(a). Count 2 charged all three with aiding and abetting "Robbery of Money of the United States," 18 U.S.C. §§ 2 and 2114(a). Count 3 charged all three with aiding and abetting "Assault on a Person Assisting an Officer of the United States in the Performance of Official Duties," 18 U.S.C. §§ 2 and 111(a)(1) and (b). A/19-23. Count 4 charged all three with aiding and abetting the "Use of a Firearm During and In Relation to a Crime of Violence," 18 U.S.C. §§ 2 and 924(c). The indictment identified two firearms. A/24. Count 5 was identical to Count 4, except it identified only one of the firearms from Count 4. A/25. Count 6 charged Farmer with "Possession of a Firearm by a Prohibited Person," 18 U.S.C. § 922(g)(1). Count 7 charged Sperow with the same offense. Finally, Count 8 charged only Farmer with "Possession of a Controlled Substance (Cocaine) with Intent to Distribute" in violation of 21 U.S.C. § 841. A/26-28.

B. Offense Conduct & Guilty Pleas.

Farmer entered a plea agreement on August 20, 2018, and pleaded guilty the same day to Counts 1, 2, 3, 4, 6, and 8. RA/14. Count 5 was dismissed. A/51. Sperow pleaded guilty the same day to Counts 1, 2, 3, 4, and 7. Count 5 was dismissed. RA/14.

During Farmer's change of plea hearing, the Government summarized the

alleged conduct. A confidential government informant who had previously bought drugs from Perez asked Perez to help him buy a firearm, and Perez agreed to do so. On August 17, 2017, Perez notified the confidential informant ("CI") that he had arranged for a source to sell three guns to the CI for $1,200, with the sale to occur at Perez's house. RA/174. When the CI arrived at Perez's house, Sperow answered the door. Perez and Farmer were present. Farmer was wearing a backpack. Farmer showed the CI a firearm and ultimately negotiated a sale for $1,500. The CI put the money on the table and Farmer took the money and counted it. RA/175. When Farmer finished, he took a gun from his waistband and handed it to Sperow. Sperow pointed the gun at the CI and said, "You've been beat." RA/175-176. Farmer then approached the CI holding the other firearm as if to pistol-whip the CI, "and said, we are going to tell you why though, and explained that someone they believed to be the [CI's] cousin had robbed them of $1,200." RA/176. Farmer hit the CI with his hands. While this was happening, Perez told Farmer and Sperow, "tell the [CI] why it's happening, and both the defendant and Sperow again told the [CI] that the [CI's] cousin had robbed them." RA/176. The CI left when Perez's mother entered the room. Shortly afterward, the three defendants were pulled over in a vehicle registered to Farmer and all were arrested. Farmer had $700 and Sperow and Perez each had $400 of the CI's previously marked "buy" money. RA/177. Agents searched the car and found a backpack like the one Farmer had worn during the encounter. It contained two guns and 71 grams of cocaine. RA/177-178.

At the plea, Farmer made a factual correction: Farmer "didn't hold the first

gun as a pistol whip and sa[y] we're going to tell you why." RA/179. The prosecutor thought Farmer could be correct and considered this an immaterial dispute. The judge credited Farmer and agreed it was immaterial. RA/179-180. Farmer then pled guilty. RA/191-193.

C. Sentencing.

Farmer is black and Sperow is white. SRA/3. They were sentenced by the same judge. RA/16-17. They were convicted for the same offenses in Counts 1, 2, 3, and 4, and both convicted under § 922(g) in Counts 6 and 7. Only Farmer was charged and convicted for a drug offense (Count 8). RA/1-3.

Farmer's guideline range was 63-78 months plus 7 consecutive years based on an offense level of 24 and a criminal history category ("CHC") of III. RA/199. Sperow's guideline range was 37-46 months plus 7 years based on an offense level of 19 and a CHC III. RA/272. For both defendants, the Government agreed to recommend the low end of their guideline range: 147 months for Farmer and 121 months for Sperow. A/41; RA/82.

At sentencing, Farmer presented more mitigating factors. Both men were in their mid-twenties. SRA/3; RA/104. Both had early-onset substance abuse. RA/102, 122-123; SRA/16-17. Both had ADHD as children RA/103; 122; SRA/16. Sperow also had dyslexia. RA/103. Farmer also had post-traumatic stress disorder, was physically abused by his father, observed domestic violence against his mother, was hospitalized for mental health issues out of fear of his father's release from prison, had attempted suicide as a young teenager, and fathered two infants who died from

heart problems. RA/122-126, 201-203; SRA/14-17.

Neither Farmer nor Sperow had disciplinary issues during pre-trial detention. RA/105, 210, 274. Both failed to complete a Therapeutic Community program. RA/210, 274-275. Sperow completed three programs. RA/274. Farmer completed many, and had a positive letter from the Jail Industries Director. RA/209-210. Both apologized, expressed remorse, and wanted treatment. RA/125-126, 215-216, 278, 282. Unlike Sperow, Farmer has a child. RA/215.

Sperow received a downward-variant sentence of 102 months. RA/284-285. He was sentenced on Counts 1, 2, 3, and 7 to 18 months concurrent, with a consecutive 7-year sentence on Count 4. RA/2-3. Farmer received an upward-variant sentence of 198 months, eight years longer than Sperow. He was sentenced on Counts 1, 2, 3, 6, and 8 to 78 months concurrent, and a consecutive 10-year sentence on Count 4. RA/222-223. To summarize, for identical convictions - Counts 1, 2, 3, 6, and 7 -- Farmer's sentence was 5 years longer than Sperow's: 78 vs. 18 months. And for identical § 924(c)(3) convictions, Farmer's sentence was 3 years longer: 10 vs. 7 years.

D. Direct Appeal & The First Circuit's Decision Below.

The First Circuit had jurisdiction over Mr. Farmer's appeal pursuant to 28 U.S.C. § 1291. Farmer claimed on appeal that the sentence disparity between him and Sperow rendered his sentence substantively unreasonable where, under § 3553(a)(6), the sentence promoted unwarranted racial disparities both at the national level and between Farmer and his white codefendant. The First Circuit

rejected Farmer's claim without considering this argument. Rather, the First Circuit held that Farmer failed to show the judge was motivated by racial bias, and concluded that the sentence was substantively reasonable. APPX:8.

REASONS THE PETITION SHOULD BE GRANTED

In 2017, black males aged 25-29 were nearly 6 times more likely to be incarcerated than white males of the same age.[2] "Black male defendants in federal criminal cases receive much longer prison sentences than white men do."[3] Studies have shown black males were more likely to be locked up than white males "even when severity of the offense and criminal history were taken into account."[4] In February 2019, black inmates were 37.5% and white inmates were 26.6% of the federal prison population.[5] These disparities are staggering considering black males account for 6% of the U.S. population, *Racial Disparity* at 1320.

No Circuit Court of Appeals has considered whether 18 U.S.C. § 3553(a)(6) permits or requires a district court to consider whether a particular sentence contributes to the unwarranted racial disparities that exist in federal sentencing. On the contrary, it appears district courts are discouraged or prohibited from considering race as a relevant factor under § 3553(a)(6). See e.g. *United States v. Green*, 436 F.3d 449, 455 (4th Cir. 2006)(citing § 3553(a)(6) as support for the proposition that a district court is "prohibited from imposing a sentence that is informed or influenced by the race.. of the defendant.") Yet, it is hard to imagine a sentencing disparity more important to avoid than racial disparity.

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[2]Bronson, Jennifer & Carson, Ann. "Prisoners in 2017." DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN (April 2019)(Table 9)(hereinafter "*Bulletin*").
[3]Starr, Sonja B. *Racial Disparity in Federal Criminal Sentences.* M.M. Rehavi, co-author. J. POL. ECON. 122, no. 6 (2014) 1320, 1321 ("*Racial Disparity*").
[4]Garland, Brett; Spohn, Cassia; Wodahl, Eric. *Racial Disproportionality in the American Prison Population: Using the Blumstein Method To Address the Critical Race and Justice Issue of the 21st Century*. JUSTICE POL. J., Vol. 5 (Fall 2008) at p.5 ("*Disproportionality*").
[5]See Federal Bureau of Prison Statistics, available at https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp. See also *Bulletin*, at Table 2.

This case presents a compelling example of an unwarranted sentencing disparity. Mr. Farmer, who is black, received a significant upward variance and a sentence twice as long as his white codefendant despite similar culpability and criminal history, and despite a more compelling array of mitigating factors. The First Circuit rejected Mr. Farmer's argument that the chasmic sentencing disparity between the black and white defendants was substantively unreasonable. The First Circuit concluded that to show an unwarranted racial disparity in sentencing under § 3553(a)(6), a defendant must show the judge consciously imposed the disparate sentence "on account of race." APPX:8 (concluding Farmer offered no support "for the claim of racial bias.") But in a criminal justice system adulterated by structural racism and implicit bias,[6] this standard undermines the purpose of § 3553(a)(6) by foreclosing a district court from considering whether a sentence would promote unwarranted racial disparities in federal sentences. In order to eliminate disparities between black and white defendants arising from implicit bias and structural racism, a judge applying 18 U.S.C. § 3553(a)(6) should be permitted to consider the need to avoid unwarranted racial disparities among similarly situated defendants.

18 U.S.C. § 3553(a) requires a judge to impose a sentence that is "sufficient, but not greater than necessary" to reflect the seriousness of the offense, provide deterrence, protect the public, and provide the defendant with any needed

[6]See *United States v. Robinson*, 872 F.3d 760, 785 (6th Cir. 2017)(Donald, J. dissenting(recognizing "Implicit biases threaten the very foundation of our criminal justice system.") See also Kang, Jerry et al. *Implicit Bias in the Courtroom*. 59 UCLA L. REV. 1124, 1148 (2014)("There is evidence that African Americans are treated worse than similarly situated Whites in sentencing."); Smith, Robert J. and Levinson, Justin D., *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795 (2012).

rehabilitation "in the most effective manner." § 3553(a)(2)(D), see generally § 3553(a)(2). The judge must also consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6). All circuits agree that § 3553(a)(6) embraces disparities that exist among federal defendants at the national level. See *United States v. Reyes-Santiago,* 804 F.3d 453, 467 (1st Cir. 2015); *United States v. Bryant*, 976 F.3d 165, 180 (2nd Cir. 2020); *United States v. Douglas*, 885 F.3d 145, 153 (3rd Cir. 2018); *United States v. Withers,* 100 F.3d 1142, 1149 (4th Cir. 1996); *United States v. Cedillo-Narvaez,* 761 F.3d 397, 406 (5th Cir. 2014); *United States v. Wright*, 991 F.3d 717, 720 (6th Cir. 2021); *United States v. King*, 910 F.3d 320, 330 (7th Cir. 2018); *United States v. Pierre*, 870 F.3d 845, 850 (8th Cir. 2017); *United States v. Jaycox*, 962 F.3d 1066, 1071 (9th Cir. 2020); *United States v. Pena*, 963 F.3d 1016, 1026 (10th Cir. 2020); *United States v. Ronga,* 682 Fed. Appx. 849, 859 (11th Cir. 2017); *United States v. Clark*, 8 F.3d 839, 843 (D.C. Cir. 1993). And the First, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits permit a district court applying § 3553(a)(6) to consider unwarranted sentence disparities between codefendants or coconspirators. See *Reyes-Santiago*, 804 F.3d at 467; *King*, 910 F.3d at 330; *Pena*, 963 F.3d at 1026; *United States v. Carter*, 560 F.3d 1107, 1121 (9th Cir. 2007); *United States v. Johnson*, 980 F.3d 1364, 1386 (11th Cir. 2020); *United States v. Knight*, 824 F.3d 1105, 1111 (D.C. Cir. 2016). But the rare cases that have touched on racial disparities in sentencing have indicated that a district court is prohibited from considering a defendant's race when imposing sentence. See e.g. *Green*, *supra*,

436 F.3d at 455 (4th Cir. 2006); *United States v. Bridgewater*, 950 F.3d 928, 936 (7th Cir.)("Unwarranted disparities...'result when the court relies on things like alienage, race, and sex to differentiate sentence terms.')(internal citation omitted); *McCoy v. United States*, 145 F.3d 1332, *2 (6th Cir. 1998)(unpublished)(race is improper factor to consider under § 3553(a)(6)).

Here, rather than addressing the substantive reasonableness of the racial disparity present in this case, the First Circuit concluded that the defendant was required, and failed, to show that the district court was motivated by racial bias. APPX:8. A standard that requires a defendant to show actual racial bias in order to demonstrate an unwarranted racial disparity under § 3553(a)(6) impedes district courts' ability to address racial disparities in sentencing that exist at the national level and, as here, between codefendants of different races. See e.g. *United States v. Ayala-Lugo*, 996 F.3d 51, 54, 56 (1st Cir. 2021)(rejecting defendant's argument that district court failed to consider sentencing disparities between Puerto Rico and national sentences where judge opined that "how other districts handle sentencing is 'up to them.'"); *United States v. Naidoo*, 995 F.3d 367, 383 (5th Cir. 2021)(holding statistics concerning national averages of sentences imposed on broad groupings of defendants are "basically meaningless" under § 3553(a)(6)); *United States v. Begay*, 974 F.3d 1172, 1175-1176 (10Th Cir. 2020)(holding that under § 3553(a)(6) district court is prohibited from considering federal/state sentencing disparities that disproportionately affect Native Americans prosecuted in federal court). This case

illustrates why district courts should be permitted to consider racial disparities in federal sentencing when applying § 3553(a)(6).

A. Incarcerating the black defendant for more than four times as long as his white codefendant for the same crimes and imposing a significant upward variance upon the black defendant was an abuse of discretion, and the drastic, unwarranted sentencing disparity between the black and white codefendants threatens to undermine public confidence in the criminal justice system.

When imposing sentence, a judge must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). This provision is "primarily aimed at national disparities," but also recognizes that a sentence "may be substantively unreasonable because of the disparity with the sentence given to a codefendant." *Reyes-Santiago*, 804 F.3d at 467. Here, the disparity in the sentence imposed on the black (Farmer) and white (Sperow) codefendants created an unwarranted racial disparity under § 3553(a)(6), rendering Farmer's sentence substantively unreasonable. "The substantive reasonableness of [a] sentence is reviewed for abuse of discretion, taking into account the totality of the circumstances." *United States v. Zavali-Marti*, 715 F.3d 44, 50 (2013); see *Gall v. United States*, 552 U.S. 38, 41 (2007). Farmer requested a downward variance and "parity" with codefendant Sperow, thereby preserving his claim that his sentence was substantively unreasonable. *Holguin-Hernandez v. United States*, 140 S.Ct. 762, 764 (2020); RA/202.

Farmer's low-end guideline range was 26 months longer than Sperow's

because he was the only one charged with a drug offense.[7] His sentence was 96 months longer. For identical convictions - Counts 1, 2, 3, 6, and 7 -- Farmer's sentence was 5 years longer: 78 vs. 18 months. For identical § 924(c)(3) convictions, Farmer's sentence was 3 years longer: 10 vs. 7 years. Differences between Farmer and Sperow fail to justify their widely disparate sentences, and Farmer's significantly longer sentence advanced rather than avoided "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6).

Differences between their guideline ranges adequately captured any differences in culpability for the instant offenses. First, the circumstances of the offense do not reveal differences in culpability. Perez arranged the deal and hosted the transaction, Farmer conducted the sale, and Sperow brandished the weapon. Farmer did not have a leadership role under U.S.S.G. §3B1.1, and it was Sperow's use of the firearm that formed the basis for his and Farmer's joint liability for the enhanced charges under Counts 2 and 3. Second, Farmer and Sperow pled to the same offenses except that only Farmer was *charged* and convicted of a drug offense. See note 7, *supra*. Farmer's drug conviction was accounted for by his higher offense level and higher guideline range. Third, their criminal histories do not support the disparity. They had the same criminal history category. Farmer had one prior

[7]Only the black defendant, Farmer, was charged with a drug offense, notwithstanding irrefutable evidence Perez, at least, had been involved in drug sales. See SRA/6; RA/95 (United States Sentencing Memorandum regarding Perez): "[Perez's] role in facilitating illegal sales of both cocaine and firearms suggests the degree of his involvement in criminal activity…the government notes that his role in the two sales of cocaine could have given rise to separate charges for distribution of a controlled substance."

conviction, an armed robbery. SRA/12. Sperow had a felony drug conviction and less serious convictions. A/27; RA/102-104. There is no question Farmer was convicted of a serious offense, which, in context, may have reasonably supported some disparity between him and Sperow. However, Farmer's one conviction accounted for all of his CHC. He was only 20 at the time. He received a relatively short sentence for that prior conviction. SRA/12-13. And, this prior conviction appears to be the only difference between Farmer and Sperow the judge considered.[8] The district court's belief that Farmer's guidelines were "not helpful" and "not useful" was unsubstantiated. RA/203, see note 8, *supra.*

Personal characteristics failed to justify the disparity. Farmer had *more* mitigating factors. Both were in their mid-twenties. SRA/3; RA/104. Both had early-onset substance abuse. RA/102, 122-123; SRA/16-17. Both had ADHD as children RA/103; 122; SRA/16. Sperow also had dyslexia. RA/103. But Farmer also had post-traumatic stress disorder, was physically abused by his father, observed domestic

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[8]The district court treated Farmer's criminal history as understated and as the key difference between Farmer and Sperow (RA/203) but Farmer had only one prior conviction (SRA/12-13) which yielded a CHC III because the instant case arose while he was on parole. SRA/13. There was no other *criminal* history, so there was nothing else from which to conclude Farmer's criminal history was understated. This is especially so considering that young black men are much more likely than young white men to be stopped, arrested, and prosecuted. See Elizabeth Hinton, LeShae Henderson, Cindy Reed, "An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System." VERA INSTITUTE OF JUSTICE (May 2018) at 7-8 (discussing research demonstrating racial disparities in treatment of defendants by police and prosecutors)(hereinafter *"Unjust Burden*.") Sperow's criminal history is under seal, but it is clear he too had engaged in criminal conduct that poses a "danger…to the public." RA/203. Sperow had been "enmeshed in the criminal justice system for a long time" (RA/279); and had, inter alia, a "series of…driving offenses" in his record (RA/203), all of which were committed while Sperow was drunk. RA/281. The district court's conclusion that "[t]he public will be safer if [Sperow] get[s] treatment," (RA/285) applied no less to Farmer. See SRA/15-17.

violence against his mother, was hospitalized for mental health issues out of fear of his father's release from prison, had attempted suicide as a young teenager, and fathered two infants who died from heart problems. RA/122-126, 201-203; SRA/14-17. Despite this trauma, the judge said to Farmer, who had finished high school but dropped out of college (SRA/17): "How in the world you got off that track, I just don't understand." RA/209. By contrast, to Sperow, who dropped out of high school, the judge expressed her understanding. RA/105, 279-280, 285.

Neither Farmer nor Sperow had disciplinary issues during pre-trial detention. RA/105, 210, 274. Both failed to complete a Therapeutic Community program. RA/210, 274-275. Sperow completed three jail programs. RA/274. Farmer completed many, and had a positive letter from the Jail Industries Director. RA/209-210. Both apologized, expressed remorse, and wanted treatment. RA/125-126, 215-216, 278, 282. Unlike Sperow, Farmer also had a child, and told the judge:

> "My son is five years old, you know. I just want to have some of his life left so I don't make the same mistakes my father made with me. My father was locked up my whole life. I don't want to be locked up my son's whole life with him having to repeat the cycle the same as me."

RA/215.

The disparity among these defendants advanced rather than avoided unwarranted racial disparities in federal sentences. As stated, in 2017, black males in the defendants' age bracket (ages 25-29) were nearly 6 times more likely to be incarcerated than white males of the same age.[9] By now there is "irrefutable

[9]Bronson, Jennifer & Carson, Ann. "Prisoners in 2017." DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN (April 2019)(Table 9).

evidence that blacks comprise a disproportionate share of the U.S. prison population." *Disproportionality,* p.4. Researchers have identified factors that drive these disparities. One factor is implicit bias – a false but unconsciously ingrained belief that black men are more aggressive and pose a greater risk to public safety than white men. See *Robinson*, 872 F.3d at 760, 784-786, 785 n.4-6 and research cited; see also note 6 *supra.* Structural disadvantages such as poverty, unemployment, and discrimination disproportionately affect blacks and can be both a cause and effect of racial disparities in arrests and prosecution outcomes. See generally *Disproportionality*, p.7-11.

Accordingly, unwarranted racial disparity is an appropriate and necessary consideration under 18 U.S.C. § 3553(a)(6). Our nation's ongoing reckoning with a criminal justice system rooted in slavery[10] begs the question -- what disparity could be more important to consider under § 3553(a)(6) , and more unwarranted, than racial disparity? "[D]istrict courts have discretion, in appropriate cases, to align codefendants' sentences…where disparities are conspicuous." *United States v. Martin,* 520 F.3d 87, 94 (1st Cir.2008). Exercising that discretion to avoid unwarranted *racial* disparities is the essence of what district courts are called upon to do under § 3553(a). In *Kimbrough*, the Supreme Court upheld a district court's decision to deviate downward from the sentencing guidelines on the basis of its

[10]See e.g. *United States v. Bannister*, 786 F.Supp 2d 617, 651-653 (E.D. NY 2011); *Unjust Burden* at n.56, page 15-16 ("the modern police force in the United States evolved out of slave patrols."); Jelani Cobb, "An American Spring of Reckoning," THE NEW YORKER (June 14, 2020); "Police." LAST WEEK TONIGHT WITH JOHN OLIVER, Episode 14, Season 7 (aired June 7, 2020 on HBO), available here: https://www.youtube.com/watch?v=Wf4cea5oObY

rejection of the guidelines' 100:1 crack to cocaine sentencing ratio, where the 100:1 ratio created a harmful racial disparity in sentencing. *Kimbrough v. United States*, 552 U.S. 85, 91, 98 (2007). *Kimbrough* recognized that the severe sentences called for by the 100:1 sentencing differential fell primarily on black offenders, and that a sentence that "promotes unwarranted disparity based on race," *id*., is the kind of unwarranted disparity covered by § 3553(a)(6). *Id*. at 108. Clearly then, § 3553(a)(6) embraces factors that create or exacerbate unwarranted racial disparities in sentencing. And, "empirical data and national experience" demonstrate that such unwarranted disparities continue to plague federal sentencing courts. *Kimbrough*, 552 U.S. at 109 (internal citation omitted); see Def. Br., at § V.B.3 (pages 61-63); see notes 2-6, 9-11, *supra*. For example, as was the case here, black offenders "convicted under section 924(c)" generally receive longer sentences than white offenders.[11] Despite not brandishing the weapon himself (RA/179-180), Farmer was also in the small percentage of offenders who receive an upward variance from the mandatory-minimum, consecutive sentence required under § 924(c). See note 11, *supra*. Although Farmer's claim does not arise directly from the guidelines, it is no less cognizable. See *Kimbrough*, 552 U.S. at 98-99, 101-103 (outlining factors that may be considered, including policy considerations, when

[11]See "Mandatory Minimum Penalties For Firearms Offenses in the Federal Criminal Justice System," Report of the United States Sentencing Commission (May 2018) at 6 (hereinafter *Sentencing Commission Report*). Black offenders convicted under § 924(c) receive, on average, a sentence 25 months longer than white offenders. *Id*. at 34. And in 2016, only 6.4% of offenders convicted under § 924(c) received an upward variance. *Id*. at 35. Meanwhile, at the end of fiscal year 2016 (and relatively consistent with the previous two decades), the vast majority of federal prisoners were serving mandatory minimum sentences under § 924(c), and of those, there were nearly three times as many black offenders as white offenders. *Id*. at 48.

fashioning appropriate sentence); *United States v. Rivera-Gonzalez*, 776 F.3d 45, 50 (1st Cir. 2015)(upholding district court's consideration at sentencing of generalized, community-based factors, such as "high incidence of crime and illegal firearm use in Puerto Rico and the local judiciary's perceived penchant for leniency."); *Bannister*, 786 F.Supp at 631- 645, 651-653 (in fashioning appropriate sentence, examining historical and sociological factors impacting black lives).

Indeed, "the history and characteristics of the defendant," §3553(a)(1) necessarily include "[f]acts about a defendant's life…correlating to the defendant's gender, race, national origin, beliefs or economic situation." *United States v. Rose*, 885 F.Supp. 62, 66 (E.D.NY 1995)(internal citation omitted). "[T]he saga of deprivation, isolation, and crime," that characterize poor, densely populated, minority neighborhoods is "relevant to sentences." *Bannister*, 786 F. Supp at 631. Like a disproportionate percentage of black children, Farmer had a parent in and out of prison during his childhood.[12] RA/215-216; SRA/14-16. When, at age sixteen, Farmer's ADHD, suicidal condition, and traumatic childhood experiences predictably manifested through disobedience and destructive behavior ("caus[ing] a 'mess' in his bedroom" and refusing to hand over a utility knife to his mother, SRA/12) he was treated then and now *not* as an "uncontrollable child" in need, but instead as a criminal. [13] SRA/12; RA/203. And now, because of Farmer's lengthy

[12]See *Unjust Burden* at 10 ("One in 25 white children born in 1990 had an incarcerated parent at some point during childhood, compared to one in four black children.")
[13]See *Unjust Burden,* 7-8 (empirical research demonstrates blacks are arrested more than whites). See also Joshua Rovner, "Racial Disparities in Youth Commitments and Arrests." The Sentencing Project, Policy Brief (April 1, 2016). In N.H., "African American juveniles were more than 10 times as likely as white juveniles to be committed to secure facilities," *id*. at 1; and from 2003 to 2013 were

sentence, his son has been sentenced to spend over 16 years without his father, perpetuating the cycle of systemic hardship that afflicts children of color. See *United States v. Sclamo*, 997 F.3d 970, 973-974 (1st Cir. 1993)(rejecting Government's claim that special family circumstances, including relationships with dependents, is irrelevant at sentencing); compare *United States v. Burnell*, 367 F. Supp. 3d 12, 16 (E.D. NY 2019)("In imposing a sentence, the court must consider…the impact the sentence may have on dependents as well as the defendant himself.")

In light of the foregoing, the district court failed to give appropriate and necessary consideration to "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6), and Farmer's sentence was substantively unreasonable. The district court's significant divergence from the guidelines lacked "sufficient justifications." *Gall,* 552 U.S. at 47. An "unusually harsh sentence," like the one imposed here,[14] not only requires "sufficient justifications," *id*. at 46, it must be "adequately explain[ed]…to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id*. at 50. Probing, substantive-reasonableness review "helps courts police systemic and historical problems with sentencing," *United States v. Sims*, 800 Fed. Appx. 383, 391-392 (6th Cir. 2020)(unpublished)(Stranch, J., in dissent); and "provide[s] a backstop for those few

much more likely to be arrested. *Id*. at 6. Farmer was placed in a residential facility from age 14 to 18, although the record does not disclose if it was a "secure" facility. SRA/15.

[14]See *Sentencing Commission Report* at 35, Table 4 (showing rarity of upward variance under §924(c)).

cases that, although procedurally correct, would nonetheless damage the administration of justice." *United States v. Rigas*, 583 F.3d 108, 123 (2nd Cir. 2009). Farmer's sentence does not "promote the perception of fair sentencing." *Gall*, 552 U.S. at 50. There was no basis in the record, nor any empirical data, to support the district court's conclusion that a sentence lasting more than 4 times as long as the white defendant's sentence for the same crimes (Counts 1, 2, 3, 6 and 7), plus an extra three-year upward variance on Count 4, would serve the stated goal of public safety. See *Kimbrough*, 552 U.S. at 567 (aside from 100:1 crack to cocaine sentencing ratio that disproportionately harmed black offenders, guidelines are largely based on empirical evidence); *Gall*, 552 U.S. at 46; *Unjust Burden,* 11 ("[t]here is no evidence that these widely disproportionate rates of…incarceration are making us safer.") Rather, Farmer's sentence contributed to the unjustified sentence disparities that exist between black and white federal defendants, and the conspicuous disparity between his and Sperow's sentences "threaten[s] to undermine confidence in the criminal justice system." *Martin*, 520 F.3d at 94.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

June 29, 2021

Respectfully submitted,

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988 F.3d 55
United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee,
v.
Anthony FARMER, Defendant, Appellant.

No. 19-1603
|
February 16, 2021

Synopsis

Background: Defendant entered a negotiated guilty plea in the United States District Court for the District of New Hampshire, Landya B. McCafferty, Chief Judge, to possession of a firearm by a felon, aiding and abetting the use of a firearm during and in relation to a crime of violence, possession of cocaine with intent to distribute, and other offenses, relating to robbery of federal confidential informant during guns-for-cash deal. Defendant appealed.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

defendant did not show that his substantial rights were affected by plain error arising from acceptance of plea to possession of firearm by felon, without district court informing defendant of the offense's scienter-of-status element;

error was not plain error, as to acceptance of defendant's pleas to robbery offense and aiding and abetting offense;

government did not breach its obligation, in plea agreement, regarding sentencing recommendations;

any procedural error at sentencing was not plain error, as to lack of grouping under Sentencing Guidelines; and

defendant's 198-month sentence, with three-year upward variance, was substantively reasonable.

Affirmed.

West Codenotes

Recognized as Unconstitutional
18 U.S.C.A. § 924(c)(3)(B)

***56** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE, [Hon. Landya B. McCafferty, Chief U.S. District Judge]

Attorneys and Law Firms

Jessica LaClair, West Chesterfield, NH, for appellant.

Seth R. Aframe, Assistant United States Attorney, with whom Scott W. Murray, United States Attorney, was on brief, for appellee.

Before Thompson, Lipez, and Kayatta, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

We consider another attempt to undo a guilty plea based on the Supreme Court's decisions in Rehaif v. United States, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019) and United States v. Davis, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019). Anthony Farmer pled guilty to six counts stemming from a robbery of a federal confidential informant during a guns-for-cash deal, including one count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), and one count of aiding and abetting the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2, 924(c). He was sentenced to 198 months' imprisonment. Relying on Rehaif, Farmer challenges the indictment on jurisdictional grounds and the plea for plain error because the government did not charge him with, and he did not plead guilty to, knowing the facts that made him a person prohibited from possessing a firearm under 18 U.S.C. § 922(g)(1). Relying on Davis, Farmer also contends he should be entitled to withdraw his plea to the section 924(c)

count. In the alternative, Farmer argues he is entitled to a remand for resentencing because the prosecutor breached the plea agreement and because his sentence is procedurally and substantively unreasonable.

For the following reasons, we affirm both Farmer's conviction and the sentence imposed by the district court.

I.

Because this appeal follows a guilty plea, we take the facts from the undisputed portions of the presentence report ("PSR") and the transcripts of key court hearings. United States v. Romero, 906 F.3d 196, 198-99 (1st Cir. 2018).

In 2014, Farmer was convicted of armed robbery and conspiracy to commit armed robbery under New Hampshire law. See N.H. Rev. Stat. Ann. § 636:1. During the course of that robbery, the victim suffered a gunshot wound to his head. Farmer was sentenced to three to six years in state prison for the armed robbery and served over three years in custody.[1]

***59** Just three months after being released on parole, Farmer made clear that he had not been rehabilitated. On August 17, 2017, Farmer and two co-defendants, Aaron Sperow and Raymond Perez, agreed to sell three firearms to a person who, unbeknownst to them, was a confidential informant for the Bureau of Alcohol, Tobacco and Firearms. Perez arranged for the sale to occur at his house. Farmer provided the guns. After the informant gave Farmer the money for the firearms, Farmer revealed that the supposed sale was actually a robbery. He gave a gun to Sperow, who pointed it at the informant and told him "you've been beat." Farmer explained they were retaliating for a theft by the informant's cousin. Farmer then struck the informant with his hands, knocking him to the ground, and continued to pummel him, only stopping when Perez's mother entered the room.

A short time later, all three defendants were arrested after being pulled over in a vehicle registered to Farmer. Farmer had $700 of the informant's previously marked "buy" money, while Perez and Sperow each had $400. Agents searched the car and found a backpack like the one Farmer had worn during the robbery that contained two firearms, ammunition, a ski mask, gloves, and approximately seventy-one grams of cocaine.

Farmer and his co-defendants were indicted on several counts. Because of his felony record, Farmer was charged with violating the federal felon-in-possession statute. As was then common, the indictment did not assert that Farmer knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year. See 18 U.S.C. § 922(g)(1). Farmer was also charged with aiding and abetting the use of a firearm during and in relation to a crime of violence, see 18 U.S.C. §§ 2, 924(c)(1)(A), and the indictment specified "robbery of a person having lawful charge, control and custody of money of the United States," see 18 U.S.C. § 2114(a), and "assault on a person assisting a federal officer or employee in the performance of official duties," see 18 U.S.C. § 111(a)(1), (b), as the predicate crimes of violence.[2] In addition, Farmer was charged with aiding and abetting those predicate offenses, as well as with conspiracy to commit robbery of money of the United States, in violation of 18 U.S.C. §§ 371, 2114(a), and with possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841.

Farmer entered into a plea agreement under which the government agreed to recommend that Farmer be sentenced at the bottom of the sentencing guidelines range. Before accepting his plea of guilty to all counts, the district court informed Farmer that a conviction for violating section 922(g) required the government to prove three elements: (1) that Farmer had been convicted of a crime punishable by imprisonment of a term exceeding one year; (2) that he knowingly possessed the firearm described in the indictment; and (3) that the firearm was connected with interstate commerce. As was common prior to Rehaif, the district court did not inform Farmer that the government would also have to prove that Farmer knew when he possessed the firearms that he had previously been convicted of a crime punishable by more than a year in prison.

Neither party objected to the PSR prepared by the United States Probation Office, which calculated Farmer's guideline sentencing range as sixty-three to seventy-eight ***60** months, plus a consecutive,

mandatory minimum seven-year sentence on the section 924(c) count. After hearing from counsel for each party, as well as Farmer himself, the district court sentenced Farmer to an upwardly-variant ten-year sentence on the section 924(c) count, and to the high end of the guidelines range on the remaining counts, to be served consecutively for a total sentence of 198 months' imprisonment.

Less than a month after the district court sentenced Farmer, the Supreme Court decided Rehaif v. United States, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019) and United States v. Davis, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019). In Rehaif, the Court held that "in a prosecution under 18 U.S.C. § 922(g) ... the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200. As relevant here, Rehaif's holding means that had Farmer gone to trial on the section 922(g)(1) count, the government would have needed to prove beyond a reasonable doubt that he knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year when he possessed the gun. See id. at 2198. We have previously referred to this knowledge requirement as the "scienter-of-status" element of a section 922(g) offense. See United States v. Burghardt, 939 F.3d 397, 400 (1st Cir. 2019).

In Davis, the Court invalidated the residual clause of 18 U.S.C. § 924(c). 139 S. Ct. at 2324. Consequently, had Farmer gone to trial on the section 924(c) count, the government would have needed to show that the predicate crimes of violence "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

II.

We turn now to the merits of the challenges Farmer raises in this appeal, starting with his Rehaif-based challenge to his conviction under 18 U.S.C. § 922(g)(1).

A.

Farmer advances two arguments based on Rehaif. First, he contends that because his indictment made no mention of his scienter of status, the district court never acquired jurisdiction over the section 922(g)(1) charge against him, and jurisdictional defects are not waived by a plea. Second, he contends that the plea colloquy and the acceptance of his plea were defective due to the failure to mention the government's need to prove his scienter of status.

1.

Farmer's jurisdictional argument does not get out of the starting blocks. As we observed in Burghardt, the Supreme Court has already explained that "defects in an indictment do not deprive a court of its power to adjudicate a case." 939 F.3d at 402 (quoting United States v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)).

Although Farmer attempts to distinguish Cotton, we have previously relied on Cotton in holding that a "failure adequately to plead scienter in the indictment" of an Analogue Act violation is a "non-jurisdictional" defect. See United States v. Ketchen, 877 F.3d 429, 433 n.2 (1st Cir. 2017); see also United States v. Urbina-Robles, 817 F.3d 838, 842 (1st Cir. 2016) (holding indictment's omission of element of carjacking offense to be non-jurisdictional defect). So too here, the government's ***61** failure to allege the scienter-of-status element in the indictment did not deprive the district court of jurisdiction.[3]

2.

Farmer's challenge to his plea colloquy fares little better. A guilty plea does not preclude an attack on the plea's voluntariness. See United States v. Ortiz-Torres, 449 F.3d 61, 68 (1st Cir. 2006). Because Farmer did not raise this objection below, however, we review his claim for plain error. See Burghardt, 939 F.3d at 402-03; United States v. Dominguez Benitez, 542 U.S. 74, 80, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004).

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

The parties agree that, in light of Rehaif, the first two prongs of plain error review have been satisfied. As to the third prong, Farmer argues the district court's failure to inform him of the scienter-of-status element constitutes structural error, warranting reversal even in the absence of actual prejudice.[4] But we have recently considered and rejected just such a claim that Rehaif error per se satisfies the third prong of plain error review. See United States v. Patrone, 985 F.3d 81, 85–87 (1st Cir. 2021). Accordingly, we turn to the pivotal question: Has Farmer shown that the error affected his substantial rights? In other words, has he demonstrated "a reasonable probability that [he] would not have pled guilty had he been informed in accordance with Rehaif"? United States v. Guzmán-Merced, 984 F.3d 18, 20 (1st Cir. 2020).

In assessing whether such a showing has been made in other cases, we have trained our attention in the first instance on the extent to which being advised in accordance with Rehaif would have changed the principal risk/benefit calculation inherent in the decision to plead guilty. Thus, in Burghardt we observed that Rehaif would not have favorably altered the risk/benefit calculation in favor of going to trial for a defendant who had actually been sentenced several times to more than a year in prison and who would have risked losing a three-level reduction under the guidelines (for acceptance of responsibility) by going to trial. 939 F.3d at 403-06. Hence, absent some reason to think otherwise, there was no reasonable probability that the defendant would have withdrawn his plea had he been informed in accordance with Rehaif. Id. By contrast, in Guzmán-Merced, the defendant, who had a limited education and documented learning disabilities, only received suspended sentences for his prior offenses (none of which exceeded one year), never served a single day in prison, and allegedly committed the section 922(g) violation four years after his prior convictions. 984 F.3d at 20-21. Under those circumstances, we found that the defendant could have plausibly thought that requiring the government ***62** to prove the scienter-of-status element beyond a reasonable doubt would have created a decent enough shot at acquittal to outweigh the risk of a marginally longer sentence should he go to trial and lose. Id. at 21.

This type of calculus dooms Farmer. Because he actually served three years in prison on his robbery conviction, he could not have plausibly thought that Rehaif in any way increased his chances of an acquittal, and he would have risked losing an acceptance of responsibility sentencing reduction by not pleading. He has therefore failed to carry his burden of showing it is reasonably probable that he would not have pled guilty to the illegal possession charge under section 922(g)(1) had the district court told him the government was required to prove beyond a reasonable doubt the scienter-of-status element.

B.

We turn next to Farmer's contention that his plea was involuntary because he entered it without knowledge of the decision of the United States Supreme Court in United States v. Davis, ––– U.S. ––––, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019). Had Davis been decided sooner, he claims, he would not have pled guilty to the section 924(c) count and the two predicate crimes of violence charged in support of that count -- aiding and abetting robbery of money of the United States, 18 U.S.C. §§ 2, 2114(a), and aiding and abetting assault on a person assisting an officer of the United States in the performance of official duties, 18 U.S.C. §§ 2, 111(a)(1), (b). Also, he continues, had he not pled guilty to those charges, he would have decided to try to beat the illegal possession charge under 922(g)(1) as well. Farmer not having raised this challenge below, the parties agree our review of this claim is for plain error. For the following reasons, we conclude that there was no clear error.

We begin with section 924(c)(1)(A). Under that section, any person who commits a "crime of violence" while possessing a firearm receives a term of imprisonment of at least five years. The term "crime of violence" is defined in turn as any felony offense that:

> (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

The foregoing clause (A) is often referred to as the "elements" clause, while clause (B) is often called the "residual" clause. See Davis, 139 S. Ct. at 2324. In Davis, the Supreme Court struck down clause (B), the residual clause, as unconstitutionally vague. Id. And it is that ruling upon which Farmer predicates his claim of reversible error in the acceptance of his plea of guilty.

The pertinent offenses to which Farmer pled guilty are the charge under section 924(c)(1)(A)(ii) for use of a firearm in committing a crime of violence, and the two counts that each served as the requisite crime of violence: a charge of using a dangerous weapon in committing a forcible assault on a person assisting an officer of the United States under 18 U.S.C. § 111(b); and a charge of forcibly robbing United States money and endangering the life of the person in charge of that money by the use of a dangerous weapon under 18 U.S.C. § 2114(a).

At the plea colloquy, the judge accurately described the elements of the charged ***63** offenses under section 111(b), section 2114(a), and section 924(c). Farmer claims no error -- much less clear error -- in those descriptions.[5] The judge then described the § 924(c) count as follows:

> A person commits the crime of use of a firearm during and in relation to a crime of violence as a principal [under section 924(c)(1)(A)(ii)] if, first, he commits a crime of violence for which he may be prosecuted in a court of the United States, here, the crime of robbery of money of the United States and the crime of assault on a person assisting an officer of the United States in the performance of official duties; second, he knowingly uses or carries a firearm during and in relation to such crime, and, third, he knowingly brandishes the firearm during and in relation to such crime.

Farmer points to no clear error in this description that caused him any prejudice. In particular, he does not contest that the charged assault under section 111(b) is a crime of violence under the elements clause of section 924(c), see United States v. Taylor, 848 F.3d 476, 492-93 (1st Cir. 2017), which was unaffected by Davis.[6] The law is less clear as to whether section 2114(a) describes a crime of violence under the elements clause. See id. at 491 (declining to decide the question). Yet on plain error review, that very lack of clarity precludes us from finding the district court's description of section 2114(a) as a crime of violence to be clear error.

Farmer implies that the district court should have gone on to explain to him that if the government stumbled and ended up convicting him of only lesser-included versions of each offense, those lesser included versions, according to Farmer, would not have qualified as crimes of violence in the absence of the residual clause now stricken by Davis. And if he had known that, he says, he would have taken a shot at trying the charges against him.

On plain error review, there are at least two fatal defects in this argument. First, Farmer points to no case law requiring that a judge at a plea colloquy must describe what will happen if the government can only prove a lesser-included offense which was not separately charged. Rule 11 only requires the judge to determine that the defendant understands "the nature of each charge to which the defendant is pleading" before accepting a guilty plea. Fed. R. Crim. P. 11(b)(1)(G) (emphasis added). We see no clear and obvious error in failing to describe the nature of other, lesser offenses to which the defendant is ***64** not pleading. See Correa-Osorio, 784 F.3d at 22 (rejecting a claim of error that was contradicted by caselaw and explaining that "the plain-error standard is extremely difficult to prove" (internal quotation marks and citation omitted)).

Second, even if there had been clear error, Farmer's challenge still fails because he cannot show prejudice.[7] One crime of violence suffices to satisfy section 924(c). And it is entirely implausible that Farmer could

have thought he could beat the aggravated section 111(b) claim on the merits.

The charged section 111(b) assault occurred after the confidential informant gave Farmer the money for the firearms, at which point Farmer gave a gun to Sperow, who pointed it at the informant and told him "you've been beat." Farmer asserts that because he was charged as an aider and abettor of Sperow's assault, the government would have to prove not only that Sperow assaulted the informant with the intent to commit robbery, but also that Farmer had "advance knowledge" that Sperow would do so with such intent. United States v. Fernández-Jorge, 894 F.3d 36, 52 (1st Cir. 2018). But according to Farmer, the "assault with the dangerous weapon was not done with the intent to commit robbery because at that point, the taking was complete." Instead, Farmer argues, the purpose of the assault was to punish the informant's cousin. Farmer therefore contends that it would be difficult to prove Sperow brandished the firearm with intent to rob, let alone that Farmer had "advance knowledge" of Sperow's intent to assault with intent to rob.

This defense falters before it even gets out of the gate. The robbery here was not consummated by the taking of the informant's money, but by the refusal to give him the firearms. And the defendants achieved the informant's acquiescence by Sperow's action of pointing the gun at him. It is thus beyond reasonable dispute that Sperow brandished the firearm with the intent to rob the informant. As to Farmer's "advance knowledge" of Sperow's intent to effectuate a robbery, it was Farmer himself who, after taking the informant's money, gave the gun to Sperow. The fact that Farmer then told the informant they were doing all this because they thought the informant's cousin robbed them does nothing to negate the fact that Sperow carried out the assault with a deadly weapon with the intent to rob the informant.

Given the foregoing, we find it implausible that Farmer would have risked the potential benefits of pleading guilty in order to take a shot at beating the section 111(b) count, which charged an offense that constitutes a crime of violence even post-Davis. And for that reason, he has not shown a reasonable probability he would not have pled guilty to the section 924(c) count. See United States v. Takesian, 945 F.3d 553, 566 (1st Cir. 2019) (" 'A reasonable probability[ ] ... is a probability sufficient to undermine confidence in the outcome' -- i.e., it is more than a mere possibility, but less than a preponderance of the evidence." (quoting Dominguez Benitez, 542 U.S. at 83 n.9, 124 S.Ct. 2333)).

Accordingly, for each of the foregoing reasons, Farmer's challenge to the acceptance of his plea based on Davis fails on plain error review.

***65 C.**

We next consider Farmer's challenges to his sentence, beginning with his argument that the prosecutor breached the plea agreement by failing to "affirmatively" recommend a bottom-of-the-guidelines sentence. According to Farmer, that failure entitles him to a new sentencing hearing before a different judge, in which the government would fully comply with the agreement.

"A defendant who has entered into a plea agreement with the government, and himself fulfills that agreement, is entitled to the benefit of his bargain." United States v. Saxena, 229 F.3d 1, 6 (1st Cir. 2000). To satisfy this obligation, the prosecutor must pay "more than lip service to, or technical compliance with, the terms of a plea agreement." United States v. Marín-Echeverri, 846 F.3d 473, 478 (1st Cir. 2017) (quoting United States v. Almonte-Nuñez, 771 F.3d 84, 89 (1st Cir. 2014)).

In evaluating whether a prosecutor has complied with a sentencing recommendation in a plea agreement, "we examine the totality of the circumstances[ ] to determine whether 'the prosecutor's overall conduct is reasonably consistent with making such a recommendation, rather than the reverse.' " United States v. Ubiles-Rosario, 867 F.3d 277, 283 (1st Cir. 2017) (quoting United States v. Gonczy, 357 F.3d 50, 54 (1st Cir. 2004)) (internal citation and alterations omitted)). Because Farmer did not object to the purported breach of the plea agreement during the sentencing hearing, our review is for plain error. See Almonte-Nuñez, 771 F.3d at 89. For the following reasons, we find no clear and obvious error.

The plea agreement required the government to recommend that Farmer be sentenced to the mandatory minimum for the section 924(c) count and to the bottom of the applicable sentencing guidelines range for all other counts. The government's sentencing memorandum fully conformed with that requirement. The problem was that neither party's sentencing memorandum convinced the court. The court began the sentencing hearing by noting that it was not only "troubled" by the low-end guidelines recommendation, but that it was actually considering an upward variance. After defense counsel argued, the court remained unassuaged. The prosecutor then began by trying to assure the court that the recommended sentence "is still a very significant sentence" and "would represent a fairly significant increase over [Farmer's] co-defendants."

The prosecutor proceeded to make clear that she "share[d] absolutely the concerns the Court ha[d] raised" and that she did not "see any point in belaboring them." She then pointed out why the court should not vary downward and concluded by saying that she "would certainly defer to the Court's discretion with regard to where in the guidelines that sentence ultimately is placed."

We see no breach of the agreement. To the contrary, we see a prosecutor who persisted in advocating as agreed even in the face of headwinds, sought to assure the court that the recommended sentence took into account the court's concerns, and concluded with an acknowledgement of the court's wide discretion, even then implying the government's continued preference for a non-variant sentence.[8] So viewed, the prosecutor's "overall conduct" strikes us as ***66** "reasonably consistent with" the plea agreement, "rather than the reverse." Ubiles-Rosario, 867 F.3d at 283 (quoting Gonczy, 357 F.3d at 54); see also United States v. Canada, 960 F.2d 263, 270 (1st Cir. 1992) (noting that a prosecutor is not obliged to present an agreed recommendation "with any particular degree of enthusiasm"). Examining the "totality of the circumstances," Ubiles-Rosario, 867 F.3d at 283, we find no clear or obvious error.

Farmer next attacks the procedural reasonableness of his sentence, arguing that by failing to group his felon-in-possession offense with his drug distribution offense, the district court miscalculated the applicable "Multiple Count Adjustment." As Farmer acknowledges, he did not raise this challenge below, so once again we review for plain error. See Molina-Martinez v. United States, —— U.S. ——, 136 S. Ct. 1338, 1343, 194 L.Ed.2d 444 (2016).

"All counts involving substantially the same harm shall be grouped together into a single Group." U.S.S.G. § 3D1.2. The guidelines provide four rules for determining when counts involve "substantially the same harm." See id. § 3D1.2(a)-(d). Farmer relies on the fourth rule, subsection (d), which provides that counts should be grouped

> [w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior."

Id. § 3D1.2(d).

Farmer does not explain how the rule laid out in subsection (d) applies to this case. Rather, he points to the subsection's instruction that offenses covered by a specified list of guidelines provisions "are to be grouped," while offenses covered by another list of provisions are "excluded from the operation" of subsection (d). Id. It is true, as Farmer notes, that guidelines sections 2D1.1 and 2K2.1, which govern the offenses at issue here, are included in the list of provisions that are "to be grouped," see id., and that the relevant application note states that "most ... drug offenses, [and] firearm offenses ... are to be grouped together" under subsection (d), id. § 3D1.2, cmt. n.6.

The application note goes on to explain, however, that "[c]ounts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection." Id. (noting "[t]he 'same general type' of offense is to be construed broadly"). Even construed broadly, Farmer's felon-in-possession and drug distribution offenses are not clearly "of the same general type." Although firearms are often tools of the drug trade, "it is not inevitable that firearms located in proximity to drugs are related to the drug activity." United States v. Espinosa, 539 F.3d 926, 929 (8th

Cir. 2008). In Farmer's case, drugs were found in his backpack following the use of firearms in an assault and robbery arising out of an arms deal. Farmer presents no evidence that the drugs bore any relation to the firearms, other than the fact of physical proximity. Standing alone, that is insufficient to show the offenses are obviously of the same general type.[9] See id. at 929-30 (upholding ***67** decision not to group drug manufacture and firearm offenses under subsection (d) where firearms were found in a garage used to produce methamphetamine).

Lastly, Farmer challenges the substantive reasonableness of his sentence, arguing the three year upward variance he received and the disparity between his 198-month sentence and the 102-month sentence of his co-defendant Sperow were unwarranted.

Farmer acknowledges that part of this disparity arises from that fact that, unlike Sperow, he was charged with and pled guilty to possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841. Nonetheless, Farmer contends, the remaining disparity between their sentences cannot be adequately explained by differences in their culpability for the instant offense, their criminal histories, or their respective mitigating factors.

As Farmer preserved this claim, we review for abuse of discretion, looking at "the totality of the circumstances," United States v. García-Mojica, 955 F.3d 187, 194 (1st Cir. 2020) (quoting United States v. Vázquez-Martínez, 812 F.3d 18, 26 (1st Cir. 2016)), and asking "whether the sentence is the product of 'a plausible ... rationale and a defensible result,' " United States v. Rivera-González, 776 F.3d 45, 51 (1st Cir. 2015) (omission in original) (quoting United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008)).

On appeal, Farmer adds a new, unpreserved argument: The disparity was on account of race, with Farmer being black and Sperow white. He offers, though, no hint of any support for the claim of racial bias other than contending that we should infer implicit bias because he received an otherwise unjustified upward variance, while Sperow received a downward variance. So, from either angle, his argument requires a showing that the different sentences cannot be explained by appropriate factors in the record.[10]

Farmer fails to make such a showing. Farmer was convicted of an additional offense that Sperow did not commit -- carrying seventy-one grams of cocaine. Farmer brought the guns, gave one to Sperow, and then he alone beat the victim. Farmer took the lion's share of the proceeds. And, most significantly, Farmer and Sperow's criminal history calculations did not take into account that Farmer's prior crime involved robbery, guns, and a shooting, while Sperow's involved non-violent drug offenses and a drunk driving offense. Across the board, Farmer presented a more violently recidivist record than did Sperow.

Repeated episodes of violent conduct are a key factor judges consider in weighing the appropriate length of a sentence to deter criminal conduct and protect the public, see 18 U.S.C. § 3553(a)(2)(B), (C), and Farmer's history of violent conduct is precisely what the sentencing judge pointed to in distinguishing Farmer's sentence from Sperow's.

In a last bid to show the sentencing disparity was unwarranted, Farmer argues that the district court minimized his mitigating factors, which he claims were weightier than Sperow's. The record shows, however, that the district court considered ***68** the mitigating factors and, as a result, gave Farmer a lower sentence than the one it had initially intended to give. Furthermore, the court explained that it felt his mitigating factors did not support a lower sentence when weighed against his criminal record and violent actions in this case, given the court's paramount concern with protecting the public.

In sum, Farmer asks us to compare apples to oranges. Importantly, the district court thoroughly explained its reasons for sentencing Farmer as it did and welcomed argument and evidence to the contrary. We cannot say that the disparity between Farmer and Sperow's sentences is inconsistent with the district court's consideration of appropriate factors.

Finally, leaving no stone unturned, Farmer takes issue with the district court's failure to complete a form for the Sentencing Commission entitled "Statement of Reasons" (SOR) explaining the upward variance it imposed. See 18 U.S.C. § 3553(c)(2). Though Farmer contends this failure interfered with Congress's goal

of data collection, he has failed to point to any way in which he was harmed by the absence of an SOR. An SOR "serves a largely administrative purpose," Vázquez-Martínez, 812 F.3d at 25, and a "district court's failure to docket, or even complete, an SOR 'does not require vacation of the sentence absent a showing of prejudice,' " United States v. Morales-Negrón, 974 F.3d 63, 68 (1st Cir. 2020) (quoting United States v. Fields, 858 F.3d 24, 31 (1st Cir. 2017)). Given the district court's thorough oral explanation for the sentence and variance and the absence of any harm to Farmer, we find the district court's failure to issue an SOR to the Sentencing Commission does not entitle Farmer to a new sentencing. See Vázquez-Martínez, 812 F.3d at 25-26.

III.

For the foregoing reasons, we affirm Farmer's conviction and sentence.

All Citations

988 F.3d 55

Footnotes

1 The maximum term of imprisonment under New Hampshire law for armed robbery with a firearm is twenty years. See N.H. Rev. Stat. Ann. §§ 636:1(III), 651:2(II-g).

2 A duplicative count also charging Farmer with aiding and abetting the "Use of a Firearm During and In Relation to a Crime of Violence," 18 U.S.C. §§ 2 and 924(c), was ultimately dismissed.

3 We are not alone in so ruling. See United States v. Hobbs, 953 F.3d 853, 856 (6th Cir. 2020); United States v. Espinoza, 816 F. App'x 82, 84 (9th Cir. 2020); United States v. Moore, 954 F.3d 1322, 1336 (11th Cir. 2020); United States v. Balde, 943 F.3d 73, 90–91 (2d Cir. 2019); see also United States v. Maez, 960 F.3d 949, 956 (7th Cir. 2020) (holding "indictment defects are never jurisdictional" (citing Cotton, 535 U.S. at 631, 122 S.Ct. 1781)).

4 Although Farmer appears to direct his structural error argument to the indictment, whether it is understood as a challenge to the indictment or the plea makes no difference.

5 In his reply, Farmer does suggest with little elaboration that the district court's explanation of the section 111(b) charge at the plea colloquy failed to make clear that the "use" of the weapon requires that the weapon be used as a weapon (as opposed to an item of exchange) during commission of the assault. To the extent Farmer intended to make this argument as a challenge to the acceptance of his plea, he waived it by not raising it at all in his opening brief. Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000). And even if he had not waived it, the district court explained that the government would have to show under section 111(b) that "he use[d] a deadly or dangerous weapon to commit the forcible action" that constitutes the assault. That description makes clear the weapon could not simply be used as an item of exchange.

6 Farmer does argue that, after Davis, aiding and abetting a crime of violence is not categorically a crime of violence. But, as Farmer acknowledges, we have previously rejected that argument under the elements clause. See United States v. García-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018). Thus, even after Davis, we cannot say that it was clear error for the district court to describe aiding and abetting a crime of violence as constituting a crime of violence.

7 Although, as Farmer notes, the government made no argument under the prejudice prong, we may " 'affirm on any basis apparent in the record,' even if it would 'require[ ] ruling on arguments not reached by the district court or even presented to us on appeal.' " Williams v. United States, 858 F.3d 708, 714 (1st Cir. 2017) (quoting Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 237 n.11 (1st Cir. 2013)).

8 Farmer faults the prosecutor for phrasing the low-end recommendation in the past tense, but the context makes clear that in doing so she was simply acknowledging the court's sentencing discretion.

9 In light of this conclusion, we need not resolve the parties' disagreement concerning the government's contention that the failure to group the offenses caused no prejudice because grouping would have resulted in a higher overall guidelines range due to a two-level adjustment for possessing a gun in relation to a drug crime.

10 In his reply, Farmer also frames his argument as being that the district court "unreasonably failed to consciously consider that Farmer is black." As this argument was neither made below nor in Farmer's opening brief, it is waived. See Henderson v. Mass. Bay Transp. Auth., 977 F.3d 20, 31 n.10 (1st Cir. 2020).

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