No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE EARL PARLOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO THE APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LONNIE EARL PARLOR, *Defendant-Appellant.*	No. 19-30269 D.C. No. 1:18-cr-00203-BLW-1 OPINION

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, Chief District Judge, Presiding

Argued and Submitted December 9, 2020
Seattle, Washington

Filed June 21, 2021

Before: Marsha S. Berzon, Eric D. Miller, and
Daniel A. Bress, Circuit Judges.

Opinion by Judge Bress;
Dissent by Judge Berzon

SUMMARY*

Criminal Law

Affirming a sentence for unlawful possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1), the panel held that the district court properly imposed three sentencing enhancements: a two-level enhancement under U.S.S.G. § 2K2.1(b)(1)(A) because the "offense involved" three to seven firearms that were "unlawfully possessed;" a two-level enhancement under § 2K2.1(b)(4)(A) because one of the firearms had been reported stolen; and a four-level enhancement under § 2K2.1(b)(6)(B) for possessing firearms "in connection with another felony offense, drug trafficking."

The panel held that the district court properly imposed the multiple-firearms enhancement under § 2K2.1(b)(1)(A) because three firearms found during the search of defendant's house and storage unit were sufficiently connected to his earlier possession of the two firearms for which he was charged. The panel concluded that defendant's possession of the three firearms was "relevant conduct" under U.S.S.G. § 1B1.3 because it was part of the same course of conduct or common scheme or plan to possess firearms unlawfully, despite an eleven-week interval between the sale of the two charged firearms and the searches that yielded the three additional firearms.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the enhancement under § 2K2.1(b)(4)(A) was justified because there was sufficient evidence showing that the handgun found in defendant's storage unit was stolen when it was listed as stolen in the FBI's National Crime Information Center database.

The panel held that the district court properly imposed an enhancement under U.S.S.G. § 2K2.1(b)(6)(B) on the basis that defendant possessed a revolver (uncharged) that was found near drugs and other drug paraphernalia in his house, and a confidential informant made a statement about previously purchasing drugs from defendant in exchange for a gun. The panel concluded that the district court permissibly determined that defendant's unlawful possession of the revolver was conduct relevant to the charged firearm offense. The district court also permissibly determined that defendant possessed the revolver in connection with the felony offense of drug trafficking because the revolver was found in close proximity to both the drugs and the drug paraphernalia. The panel held that the district court did not abuse its discretion in treating the confidential informant's statement as corroborative.

The panel further held that the district court did not plainly err in failing to apply a heightened "clear and convincing" standard of proof because the aggregated enhancements more than doubled his Sentencing Guidelines range.

Dissenting, Judge Berzon wrote that Commentary accompanying the Sentencing Guidelines strongly suggests that illegal possession of additional firearms, standing alone, is not enough to satisfy the requirements for relevant conduct. Further, even if possession of all of defendant's firearms was relevant conduct, the district court abused its

discretion by finding that defendant was engaged in drug trafficking by relying on hearsay without establishing its reliability. Judge Berzon wrote that a single statement by a probation officer in defendant's presentence report that a confidential informant had disclosed to federal agents that he/she had purchased narcotics from defendant and traded a firearm for narcotics with him in the past was an insufficient evidentiary basis for determining that defendant was engaged in drug trafficking.

COUNSEL

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Katherine L. Horwitz (argued), Assistant United States Attorney; Bart M. Davis, United States Attorney; United States Attorney's Office, Boise, Idaho; for Plaintiff-Appellee.

OPINION

BRESS, Circuit Judge:

Lonnie Parlor pleaded guilty to one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The district court imposed three sentencing enhancements, resulting in a prison sentence of 120 months. This case requires us to consider the application of various interlocking provisions of the United States Sentencing Guidelines in the context of a § 922(g)(1) offense. We hold that the district court did not err in imposing the three enhancements.

I

On April 23, 2018, a confidential informant (CI) disclosed to law enforcement that Parlor, a convicted felon and parolee, was in possession of two firearms, a rifle and a shotgun. The next day, Parlor sold the rifle and the shotgun for $400 each to the CI and an undercover agent during a controlled buy.

Slightly more than eleven weeks passed. On July 11, 2018, Parlor was indicted on one count of unlawful possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1). Parlor was arrested the next day. Shortly thereafter, agents searched Parlor's residence, where they found 21.63 grams of marijuana, $5,000 in cash, dozens of small plastic baggies, two digital scales, and a .22-caliber revolver. The revolver was discovered in a bed under a mattress, and the marijuana was in two bags in a backpack found at the foot of the same bed. The cash was found in a men's shirt in the closet. Baggies were located on top of a dresser in the bedroom. A search of Parlor's truck uncovered numerous additional baggies "that are commonly used for the distribution of narcotics."

A search of Parlor's storage unit, which also occurred on July 12, 2018, turned up a semiautomatic rifle, a 9mm handgun, and various ammunition. The 9mm handgun had been reported stolen during a February 2018 burglary.

Parlor entered a guilty plea without a plea agreement. The Probation Office's pre-sentence report (PSR) determined that under the United States Sentencing Guidelines (U.S.S.G.), Parlor's base offense level was 24 because he had two prior felony convictions of either a crime of violence or a controlled substance offense. The PSR recommended a three-level decrease for acceptance of

responsibility. But it also recommended three sentence enhancements.

The first was a two-level enhancement under U.S.S.G. § 2K2.1(b)(1)(A) because the "offense involved" three to seven firearms, specifically five firearms (two sold, one in Parlor's home, and two in his storage unit). The second was a two-level enhancement under U.S.S.G § 2K2.1(b)(4)(A) because one of the firearms had been reported stolen. The third was a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for possessing firearms "in connection with another felony offense, drug trafficking." The PSR noted that a firearm had been located along with the drugs, cash, baggies, and scales found in Parlor's residence. The PSR also recounted that the CI "disclosed that he/she had purchased narcotics from [Parlor] and [had] traded a firearm for narcotics with [Parlor] in the past."

The sentencing enhancements brought Parlor's offense level up to 29. Given Parlor's criminal history category of IV—which was based on a substantial record of past criminal activity, including numerous drug offenses—the PSR calculated a Guidelines range of 121 to 151 months, which was reduced to the statutory maximum of 120 months. Parlor filed written objections to the PSR, but the probation officer declined to make any changes. Absent the three enhancements, and with the three-level deduction for acceptance of responsibility, Parlor's Guidelines range would have been 57 to 71 months.

At Parlor's sentencing hearing, the district court adopted the PSR's findings and sentenced Parlor to 120 months in prison, the statutory maximum. Defense counsel at the hearing did not object to the multiple-firearms enhancement, and the district court did not discuss it further. The district court imposed the stolen-firearm enhancement based on

"government records indicating that [a] firearm had been reported as stolen." And the court imposed the drug-trafficking enhancement based on evidence that a gun was found in a bed in Parlor's home, in close proximity to drugs and drug paraphernalia. The district court also noted that Parlor had "exchanged guns for drugs" in the past with the CI.

Parlor appeals, challenging the three sentencing enhancements. "We review a district court's construction and interpretation of the Guidelines de novo and its application of the Guidelines to the facts for abuse of discretion." *United States v. Simon*, 858 F.3d 1289, 1293 (9th Cir. 2017) (en banc) (quotations and alterations omitted). The district court's factual findings are reviewed for clear error. *United States v. Tulaner*, 512 F.3d 576, 578 (9th Cir. 2008).

II

To apply the three sentencing enhancements, the district court first had to connect the various firearms to each other and then connect Parlor's possession of an uncharged firearm with another felony offense, here drug trafficking. As we will explain, the district court correctly applied the Sentencing Guidelines.

A

We begin with the two-level enhancement for Parlor's possession of five firearms. *See* U.S.S.G. § 2K2.1(b)(1)(A). Parlor devotes limited argument to this issue, but it is the logical place to begin. Parlor essentially argues that the district court erred in imposing the multiple-firearms enhancement because the three firearms found during the searches of his house and storage unit were not sufficiently

connected to his earlier possession of the two firearms for which he was charged. He points specifically to the eleven-week interval between the sale of two firearms during the controlled buy and the searches that yielded the three additional firearms. It is not apparent Parlor adequately objected on this ground before the district court. *See, e.g.*, *United States v. Hayat*, 710 F.3d 875, 895 (9th Cir. 2013) (setting forth the standard for plain error review). Regardless, Parlor's challenge fails under any standard of review.

U.S.S.G. § 2K2.1(b)(1)(A) provides that a two-level enhancement is warranted "[i]f the offense involved" three to seven firearms that were "unlawfully possessed." U.S.S.G. §§ 2K2.1(b)(1)(A), 2K2.1 cmt. n.5. Under the Guidelines, the "offense" means "the offense of conviction and all relevant conduct under § 1B1.3." *Id.* § 1B1.1 cmt. n.1(I). As applicable here, "relevant conduct" includes "all acts and omissions committed . . . or willfully caused by the defendant" "that were part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(1), (2); *see also id.* § 1B1.3(a)(2) (explaining that this framework applies to "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," which includes firearm possession offenses under § 2K2.1).

Commentary to U.S.S.G. § 1B1.3 provides guidance on the meaning of "same course of conduct or common scheme or plan," which are "closely related concepts." *Id.* § 1B1.3 cmt. n.5(B); *see also United States v. Lambert*, 498 F.3d 963, 966 (9th Cir. 2007) ("The Guidelines, including enhancements, are ordinarily applied in light of available commentary, including application notes.") (quotations omitted). Offenses are part of a "common scheme or plan" if they are "substantially connected to each other by at least

one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." U.S.S.G. § 1B1.3 cmt. n.5(B)(i). Offenses are "part of the same course of conduct" if "sufficiently connected or related to each other" such that they are "part of a single episode, spree, or ongoing series of offenses." *Id.* § 1B1.3 cmt. n.5(B)(ii). "Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." *Id.*

Firearm offenses may be grouped under the "relevant conduct" principles in § 1B1.3(a)(2). *See* U.S.S.G. § 3D1.2(d). Thus, "[w]hen a court determines the number of firearms involved in an offense under U.S.S.G. § 2K2.1(b)(1), it looks to the relevant conduct section of the guidelines (U.S.S.G. § 1B1.3(a)(2)) to determine how many firearms come within the same course of conduct or perhaps a common scheme or plan." *United States v. Santoro*, 159 F.3d 318, 321 (7th Cir. 1998). Such grouping is generally appropriate in cases like this one, "where the firearms are otherwise legal but the defendant, usually due to criminal history or prohibited status under federal law, is not able to legally possess them." *United States v. Vargem*, 747 F.3d 724, 732 (9th Cir. 2014).

Here, Parlor, a prohibited person, possessed two firearms as of April 2018 and three more as of July 2018. These repeated, substantially identical offenses are sufficiently related to be considered part of the same course of conduct (a series of unlawful firearm possessions) or common scheme or plan (to possess firearms unlawfully). *See id.*; U.S.S.G. § 1B1.3 cmt. n.5(B)(i)–(ii). There is no dispute—

and Parlor's guilty plea confirms—that Parlor was not allowed to possess firearms because he was a convicted felon. That conclusion applies equally to the two firearms for which Parlor was charged as well as the three for which he was not. When a person prohibited from possessing firearms under federal law possesses other firearms in addition to the ones for which he was charged, these other uncharged firearms can be "relevant conduct" under the Sentencing Guidelines. *See United States v. Nichols*, 464 F.3d 1117, 1123–24 (9th Cir. 2006) (citing *United States v. Brummett*, 355 F.3d 343, 345 (5th Cir. 2003) (per curiam); *Santoro*, 159 F.3d at 321; *United States v. Windle*, 74 F.3d 997, 1000–01 (10th Cir. 1996); *United States v. Powell*, 50 F.3d 94, 104 (1st Cir. 1995)).

But what about the eleven-week spread between Parlor's possession of the first two guns and his later possession of three more? We hold that the interval between the possession of the different firearms does not undermine their relatedness. Nothing in the Sentencing Guidelines' treatment of "same course of conduct" or "common scheme or plan" requires that the unlawful possession of firearms occur simultaneously. *See* U.S.S.G. § 1B1.3 cmt. n.5(B). To the contrary, the concepts "common scheme or plan" or "same course of conduct" by their very nature contemplate conduct that may occur over a period of time. *See id.* § 1B1.3 cmt. n.5(B)(i) (explaining that a "common scheme or plan" involves two or more offenses "substantially connected to each other by at least one common factor," and using as an example a financial fraud that involved "unlawfully transferred funds over an eighteen-month period"); *id.* § 1B1.3 cmt. n.5(B)(ii) (explaining that "the time interval between the offenses" is one factor that may be considered in assessing whether multiple offenses are part of the "same course of conduct," and that "where the conduct

alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity").

The eleven-week time span here is well within the range that courts have accepted in concluding that the unlawful possession of additional firearms is conduct relevant to the unlawful possession of firearms for which a defendant is charged. In both *Vargem*, 747 F.3d at 732, and *Nichols*, 464 F.3d at 1123–24, we cited with approval the Fifth Circuit's decision in *Brummett*, which upheld two sentence enhancements based on the uncharged possession of additional firearms by a prohibited person, when the defendant "possessed four firearms on three separate occasions within a nine month period." *Brummett*, 355 F.3d at 345. Similarly, *Nichols* cited with approval both the Seventh Circuit's decision in *Santoro*, which upheld an enhancement when there was six to nine months between instances of unlawful firearm possession, *see Santoro*, 159 F.3d at 321, and the Tenth Circuit's decision in *Windle*, which involved four to five months between unlawful possessions, *see Windle*, 74 F.3d at 1000–01; *see also Nichols*, 464 F.3d at 1124.[1]

When compared to the time periods in these cases, the eleven-week span here easily meets the standard for relevant conduct for multiple firearm possessions by a person not allowed to possess them. We note that the First Circuit has held that "contemporaneous, or nearly contemporaneous,

[1] The dissent points out factual differences between this case and our prior decisions in *Nichols* and *Vargem*, but we have cited these cases because they cited with approval the same on-point, out-of-circuit precedent that we also find persuasive.

possession of uncharged firearms" qualifies as conduct relevant to a charge for unlawful possession of firearms. *Powell*, 50 F.3d at 104. But *Powell* did not purport to require "contemporaneous, or nearly contemporaneous, possession" as a necessary condition for a relevant conduct finding. And our discussion of the leading decisions in this area shows that other courts have not imposed such a strict timing requirement either.

Although Parlor does not argue the point, our fine colleague in dissent claims that a hypothetical in Application Note 14(E) of U.S.S.G. § 2K2.1(b)(6)(B) "implies that the illegality of possession of a firearm, standing alone, is not enough to establish conduct relevant to the illegal possession of a different firearm." The dissent acknowledges there is no case applying this commentary to the question we consider here, and for good reason. Section 2K2.1(b)(6)(B) is not the relevant section of the Guidelines for evaluating the relatedness between the charged and uncharged firearms for purposes of the two-level multiple firearms enhancement under § 2K2.1(b)(1)(A). Rather, § 2K2.1(b)(6)(B) is relevant in this case only to the four-level enhancement (discussed below) for possessing firearms "in connection with another felony offense," here drug trafficking.

Regardless, Application Note 14(E) simply instructs that, when faced with multiple unlawful firearm possession offenses, some of which are charged and some of which are uncharged, courts should first conduct the relevant conduct analysis under § 1B1.3(a)(2) and its accompanying commentary, just as we have done here. Under the dissent's view, uncharged firearm possessions by a convicted felon could apparently never be relevant conduct to a charged firearm possession offense for purposes of the multiple-firearms enhancement, except perhaps if the firearm

possessions were "simultaneous" or the defendant used both firearms to commit some other offense. That would be a considerable departure from existing law, and one for which Application Note 14(E) provides no support.

Where this leaves us is that Parlor's possession of three later-discovered, uncharged firearms qualifies as relevant conduct, justifying his two-level enhancement for possession of five firearms total. *See* U.S.S.G. § 2K2.1(b)(1)(A). One of these three firearms (the handgun in the storage unit) was stolen. That in turn justified another two-level enhancement under U.S.S.G. § 2K2.1(b)(4)(A).

Parlor argues there was insufficient evidence showing that the handgun was stolen. But it is undisputed that the gun was listed as stolen in the FBI's National Crime Information Center (NCIC) database, and the government's evidence was uncontroverted. Parlor has therefore not demonstrated that the district court erred in applying the stolen-firearm enhancement. *See United States v. Gray*, 942 F.3d 627, 631 (3d Cir. 2019) (upholding enhancement where NCIC report identified the gun as stolen and the defendant "produced no evidence to rebut it"); *see also United States v. Marin-Cuevas*, 147 F.3d 889, 895 (9th Cir. 1998) (upholding enhancement where the probation officer who prepared the PSR "obtained his information from a reliable source," namely, "the computerized criminal history").

B

The district court also imposed a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) because Parlor possessed a firearm in connection with the felony offense of drug trafficking. This determination was based on the (uncharged) revolver that was found near the drugs and other

drug paraphernalia in Parlor's house and, additionally, on the CI's statement about previously purchasing drugs from Parlor in exchange for a gun. Parlor argues that any drug trafficking was not sufficiently related to the conduct for which he was charged, and that the CI's statement was unreliable. We conclude that the district court did not err in imposing the enhancement.

1

U.S.S.G. § 2K2.1(b)(6)(B) applies if the defendant "used or possessed any firearm . . . in connection with another felony offense." Application Note 14(A) explains that the enhancement is warranted if the firearm "facilitated, or had the potential of facilitating, another felony offense." U.S.S.G. § 2K2.1 cmt. n.14(A). However, "in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia," the § 2K2.1(b)(6)(B) enhancement necessarily applies because "[i]n th[at] case[] . . . the presence of the firearm has the potential of facilitating another felony offense." *Id.* § 2K2.1 cmt. n.14(B); *see also United States v. Chadwell*, 798 F.3d 910, 916 (9th Cir. 2015).

When, as here, the firearm facilitating the separate felony offense was not cited in the offense of conviction, "the threshold question for the court is whether the two unlawful possession offenses . . . were 'part of the same course of conduct or common scheme or plan.'" U.S.S.G. § 2K2.1 cmt. n.14(E)(ii) (quoting *id.* § 1B1.3(a)(2)). As we have explained, the district court permissibly determined that Parlor's unlawful possession of the revolver was conduct relevant to the charged firearm offense.

From there, the district court had to find that Parlor possessed this firearm "in connection with another felony offense," here drug trafficking. U.S.S.G. § 2K2.1(b)(6)(B). The district court's finding on this score was also permissible and not an abuse of discretion. The revolver was found in "close proximity" to both the drugs (which were near the same bed) and the drug paraphernalia (which was in the same house). *Id.* §§ 2K2.1(b)(6)(B), 2K2.1 cmt. n.14(B).

Parlor emphasizes that the amount of drugs found in his home was not large. While true, the drugs were found near a gun (that was hidden in a mattress), plastic baggies, and $5,000 in cash, and not far from two digital scales. Additional plastic baggies were found in Parlor's truck. While some of these items standing alone can be indicative of lawful behavior, taken together they provide more than sufficient evidence of drug trafficking, especially when Parlor was on parole for a drug-trafficking conviction. *See United States v. Carrasco*, 257 F.3d 1045, 1048 (9th Cir. 2001) (citing cases and explaining that while the defendant "only had a small quantity of drugs and money in his possession," "the pink baggies and the scale with drug residue found in [defendant's] vehicle are by themselves indicative of drug trafficking" because "[p]lastic baggies and scales are well-known tools for the packaging and sale of drugs"); *United States v. Meece*, 580 F.3d 616, 621 (7th Cir. 2009) (upholding enhancement where a search of the defendant's house revealed "two handguns and $3,400 in cash, as well as a scale, several baggies, and a Tupperware bowl all containing cocaine residue").

While the evidence of drugs and drug paraphernalia was sufficient to support a finding that Parlor was engaged in drug trafficking, the district court did not abuse its discretion in also treating as corroborative the CI's statement about

purchasing drugs from Parlor in the past, in exchange for a firearm. The district court "may consider a wide variety of information at sentencing that could not otherwise be considered at trial and is not bound by the rules of evidence." *United States v. Vanderwerfhorst*, 576 F.3d 929, 935 (9th Cir. 2009) (citations omitted). This includes "[h]earsay evidence of unproved criminal activity not passed on by a court." *Id.* (quotations omitted). To successfully challenge such evidence, Parlor must show as a threshold matter that the information is "false or unreliable." *Id.* (quotations omitted). "Challenged information is deemed false or unreliable if it lacks some minimal indicium of reliability beyond mere allegation." *Id.* at 936 (quotations omitted).

Here, the CI had already provided specific, accurate intelligence that Parlor possessed a rifle and a shotgun, which led to Parlor's arrest and the discovery of drugs and drug paraphernalia at his residence. Even if the CI's account of purchasing drugs from Parlor would not, on its own, have supported the felony offense enhancement, Parlor has not shown that the district court erred in considering the CI's account of Parlor's prior drug activities as part of the totality of the circumstances.

The dissent points to *United States v. Kerr*, 876 F.2d 1440 (9th Cir. 1989), in which we stated that "mere statements of an anonymous informant, standing alone, do not bear sufficient indicia of reliability to support a finding of fact by even a preponderance of the evidence." *Id.* at 1446. That statement is not applicable here. The informant in *Kerr* made an "an anonymous telephone call." *Id.* at 1441. In this case, agents met with the CI who told them about purchasing drugs from Parlor and trading Parlor a firearm for drugs. The next day, the CI was personally involved with an undercover agent in the controlled buy of

firearms that led to Parlor's arrest. The CI here is not on the same footing as the anonymous caller in *Kerr*. Regardless, *Kerr* did not preclude the district court from considering the CI's statements about Parlor's drug dealing in the context of the evidence as a whole. *See id.* at 1445. The CI's statement is corroborative of other evidence that permitted the conclusion that Parlor was engaged in drug trafficking.

Moreover, and contrary to the dissent's unfounded claim that this misstates the record, when Parlor objected to the CI's statement at the sentencing hearing, the district court repeatedly offered to continue the sentencing to allow the CI to testify, but Parlor declined this opportunity. The district court made a point of offering to "continue the hearing" out of "an abundance of caution" to allow the CI to testify, but warned that if the court found the CI credible, "it may bear upon the defendant's acceptance of responsibility." Parlor's telling decision to pass on the chance to probe the CI's account undermines his claim that the CI's statement was untruthful or inaccurate. Accordingly, the district court did not err in citing the CI's statement as further indication of Parlor's involvement in drug trafficking, even as this additional evidence was not necessary for imposing the U.S.S.G. § 2K2.1(b)(6)(B) enhancement.

2

Finally, Parlor argues that the district court should have applied a heightened "clear and convincing" standard of proof because the aggregated enhancements more than doubled his Guidelines range. But Parlor did not ask the district court to apply a heightened standard. Instead, in his objections to the PSR Parlor affirmatively stated that the usual preponderance of the evidence standard applied.

Even if we treat this issue "as forfeited, as opposed to waived," *United States v. Perez*, 116 F.3d 840, 846 (9th Cir. 1997), our review is for plain error, as Parlor concedes. This requires an "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Riley*, 335 F.3d 919, 925 (9th Cir. 2003) (quotations and alterations omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotations omitted). Parlor cannot make this showing.

Parlor cannot show any error that was plain. As "a general rule," factual findings underlying a sentencing enhancement need only be found by a preponderance of the evidence. *United States v. Valle*, 940 F.3d 473, 479 (9th Cir. 2019). But we have held that when "the challenged sentencing factors had an extremely disproportionate effect on [the defendant's] sentence relative to the offense of conviction," "clear and convincing evidence is required for proof of the disputed enhancements." *United States v. Jordan*, 256 F.3d 922, 927, 929 (9th Cir. 2001).

Our case law has "not been a model of clarity" in explaining when the higher standard should apply. *Valle*, 940 F.3d at 479 n.6 (quoting *United States v. Berger*, 587 F.3d 1038, 1048 (9th Cir. 2009)). Our decision in *Jordan* summarized the relevant factors from previous cases as follows:

> (1) [W]hether the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment; (2) whether the enhanced sentence negates the presumption of innocence or the prosecution's burden of proof for the crime alleged in the indictment;

> (3) whether the facts offered in support of the enhancement create new offenses requiring separate punishment; (4) whether the increase in sentence is based on the extent of a conspiracy; (5) whether the increase in the number of offense levels is less than or equal to four; and (6) whether the length of the enhanced sentence more than doubles the length of the sentence authorized by the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence.

Jordan, 256 F.3d at 928 (quotations omitted). Later cases, however, have focused specifically on the last two factors. *See Valle*, 940 F.3d at 479–80 (discussing cases). As we noted in *Valle*, recent decisions had "disregarded the first four factors" and "focused entirely on how enhancements increased both the offense level and the length of the recommended Guidelines range." *Id.* at 479. For his part, Parlor focuses only on the last two factors as well.

In determining how these two factors (and the others) cut, we consider only the cumulative effect of "disputed enhancements." *See Jordan*, 256 F.3d at 927; *see also Riley*, 335 F.3d at 925. As noted above, Parlor did not challenge the multiple-firearm enhancement at the sentencing hearing. His earlier objections to the draft PSR likewise challenged the two other enhancements. As to the multiple-firearm enhancement, Parlor's objections stated in just one sentence that it was "not based on relevant conduct," without elaboration. At no point, moreover, did Parlor challenge any "factual finding underlying [that] sentencing enhancement." *Valle*, 940 F.3d at 479.

Removing the two-level multiple-firearm enhancement from the analysis, the remaining two enhancements did increase Parlor's offense level by more than four points. *See id*. But they did not more than double his recommended Guidelines range. *Id.* Absent these two enhancements—and still giving Parlor his three-level deduction for acceptance of responsibility—Parlor's final offense level would have been 23, with a resulting Guidelines range of 70–87 months. His sentencing range of 121–151 months with all enhancements was not double this length, and in any event, it was capped at the statutory maximum of 120 months. Because the two key factors under our cases point in different directions, the district court at the very least did not plainly err in not applying a clear and convincing standard that Parlor never requested. *See Riley*, 335 F.3d at 927.

Even if there were error, Parlor still cannot show that it affected his "substantial rights." *Id.* at 925. Parlor did not dispute that (1) each of the five firearms belonged to him; (2) the FBI's NCIC database indicated that one of the firearms was stolen; and (3) drugs and drug paraphernalia were found in Parlor's home and truck. With respect to the enhancement for possessing a firearm in connection with another felony offense, it is more than apparent that the district court would have applied this enhancement even without the CI's statement. Indeed, the district court found that the enhancement "clearly" applied before turning to the CI's statement, and the court likewise stated that an evidentiary hearing would be "completely unnecessary." Parlor has not shown that any error was prejudicial or that the enhancements "could not have been proved by clear and convincing evidence." *United States v. Gonzalez*, 492 F.3d 1031, 1040 (9th Cir. 2007) (quoting *Jordan*, 256 F.3d at 930) (emphasis omitted).

* * *

Because the district court did not err in imposing the three enhancements, we affirm the sentence.

AFFIRMED.

BERZON, Circuit Judge, dissenting:

I dissent. Commentary accompanying the U.S. Sentencing Guidelines ("Guidelines") strongly suggests that illegal possession of additional firearms, standing alone, is not enough to satisfy the requirements for relevant conduct. Importantly, this commentary was added after the case law cited by the majority. Further, even if possession of all of Parlor's firearms was relevant conduct, the district court abused its discretion by finding that Parlor was engaged in drug trafficking by relying on hearsay without establishing its reliability.

I.

Parlor was indicted for and convicted of illegal possession of two firearms. *See* 18 U.S.C. § 922(g)(1). During sentencing, the government sought, and the district court applied, three sentencing enhancements, all of which depended upon the discovery, eleven weeks after the incident that underlay Parlor's conviction, of two guns in Parlor's storage unit and one in his home. The threshold question is whether the three additional firearms are relevant conduct.

Guidelines' commentary presents the following instructive example about the scope of relevant conduct in the context of unlawful possession of multiple firearms:

> Defendant B's offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

U.S.S.G. § 2K2.1 cmt. n.14(E)(ii). The "threshold question" posed in the commentary to the Guidelines is whether Defendant B's handgun possession is relevant conduct. *Id*. As the commentary explains, if it is relevant conduct, then Defendant B would be responsible for both firearms and would be subject to a sentencing enhancement for "use[] or possess[ion] [of] any firearm . . . in connection with another felony offense." *Id*. § 2K2.1(b)(6)(B). On the other hand, "if the court determines that the two unlawful possession offenses were not 'part of the same course of conduct or common scheme or plan,' then the handgun possession offense is not relevant conduct to the shotgun possession offense and [the sentencing enhancement] does not apply." *Id*. § 2K2.1 cmt. n.14(E)(ii) (*quoting id.* § 1B1.3).

On its face, the commentary implies that the illegality of possession of a firearm, standing alone, is not enough to establish conduct relevant to the illegal possession of a different firearm, regardless of the specific enhancement at issue. If it were otherwise, Defendant B's unlawful possession of the handgun posited in the example would necessarily be relevant conduct for the unlawful possession

of the shotgun, and there would be no need for further inquiry.[1]

Further, this commentary was part of a 2014 amendment to the Guidelines which "add[ed] examples to the commentary to clarify how relevant conduct principles are intended to operate" in felon-in-possession cases such as this one. 79 Fed. Reg. 26,007 (May 6, 2014). The commentary was not in existence at the time of either of the Ninth Circuit cases cited by the majority—*United States v. Vargem*, 747 F.3d 724 (9th Cir. 2014), and *United States v. Nichols*, 464 F.3d 1117 (9th Cir. 2006)—nor have I found any published circuit case taking that commentary into account. Importantly, *Stinson v. United States*, 508 U.S. 36 (1993), held that such commentary "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline." *Id*. at 38. We have continued to follow *Stinson* after *United States v. Booker*, 543 U.S. 220 (2005), which made the Guidelines no longer mandatory, *see United States v. Prien-Pinto*, 917 F.3d 1155, 1157–58 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 172 (2019) (citing *Freeman v. United States*, 564 U.S. 522, 529 (2011) and *United States v. Thornton*, 444 F.3d 1163, 1165 n.3 (9th Cir. 2006)), and after *Kisor v. Wilkie*, 139 S. Ct.

[1] The commentary's distinction between a shotgun and a handgun makes clear that one firearm was cited in the offense of conviction while the other was not. No difference between a shotgun and a handgun could be relevant for purposes of applying the sentencing enhancement at issue. In the Guidelines, the term "firearm" "has the meaning given that term in 18 U.S.C. § 921(a)(3)." U.S.S.G. § 2K1.1 cmt. n.1. 18 U.S.C. § 921(a)(3) provides that "[t]he term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device."

2400 (2019), which clarified the scope of deference to an agency's interpretation of its own rules, *see United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019); *United States v. Cuevas-Lopez*, 934 F.3d 1056, 1061 (9th Cir. 2019); *United States v. Wang*, 944 F.3d 1081, 1086 (9th Cir. 2019); *United States v. George*, 949 F.3d 1181, 1185 (9th Cir. 2019); *United States v. Herrera*, 974 F.3d 1040, 1047 (9th Cir. 2020).[2]

Despite the commentary's guidance, the majority concludes that Parlor's "repeated, substantially identical offenses are sufficiently related to be considered part of the same course of conduct (a series of unlawful firearm possessions) or common scheme or plan (to possess firearms unlawfully)." Opinion at 9. For support, the majority cites, among other cases, *Nichols*. But *Nichols* shows the error in the majority opinion. *Nichols* involved a defendant who pled guilty to being a felon in possession of two firearms. 464 F.3d at 1118. The question in *Nichols* was whether an additional gun, not charged in the indictment, which the defendant used as part of an earlier assault, should be

[2] *Stinson* treated Guidelines commentary "as an agency's interpretation of its own legislative rule." 508 U.S. at 44. *Kisor* recently clarified that "the possibility of [such] deference can arise only if a regulation is genuinely ambiguous." 139 S. Ct. at 2414. In this case, the relevant Guidelines commentary interprets the scope of both the specific Guidelines enhancement for "use[] or possess[ion] [of] any firearm . . . in connection with another felony offense," U.S.S.G. § 2K2.1(b)(6)(B), and the more general threshold Guidelines requirement that only relevant conduct, *id*. § 1B1.3, is included as part of the offense for sentencing purposes. While *Stinson* clarified that commentary "explains the guidelines and provides concrete guidance as to how even *unambiguous* guidelines are to be applied in practice," 508 U.S. at 44 (emphasis added), the scope of relevant conduct as applied to these facts is ambiguous. As a result, we owe deference to the instructive example in the Guidelines commentary.

considered relevant conduct for sentencing purposes. *Id*. at 1120. The defendant possessed the additional gun at the same time as the guns charged in the indictment. *Id.* at 1118–19. *Nichols* did not rely on illegality of possession alone to support its relevant conduct finding. Instead, *Nichols* held that the guns charged in the indictment and the additional gun was part of "the same common and ongoing scheme—a methamphetamine-linked burglary ring that trafficked in stolen firearms." *Id*.at 1123.

In this case, there is no similar common or ongoing scheme linking the two firearms Parlor sold, which were the basis for the indictment, with the three firearms found eleven weeks later in his storage unit and home. Parlor sold the two guns charged in the indictment for $400 each. In contrast, the district court found Parlor used the gun later found in his home to facilitate drug trafficking. Further, there is no indication as to how Parlor acquired the two guns in the storage unit, when he acquired them, or how he used them, if at all.

The majority also cites *Vargem*, but *Vargem* is not on point. *Vargem* explained that "[r]elevant conduct in firearms cases generally arises under one of two scenarios." 747 F.3d at 732. The first scenario—"where the firearms are otherwise legal but the defendant, usually due to criminal history or prohibited status under federal law, is not able to legally possess them"—was not the subject of *Vargem*. *Id*. *Vargem* instead considered the second scenario—"where the defendant is not a prohibited person *per se,* but the firearms he possessed were illegal for him, or anyone else, to own." *Id*. The majority is thus left to rely on the fact that *Vargem*, as well as *Nichols*, cites with approval several out-of-circuit decisions, such as *United States v. Powell*, 50 F.3d 94 (1st

Cir. 1995), in describing the contours of the first scenario. Opinion at 10–11.

Powell held that "the contemporaneous, or nearly contemporaneous, possession of uncharged firearms is, in this circuit, relevant conduct in the context of a felon-in-possession prosecution." 50 F.3d at 104. But *Powell* was decided before the commentary to the Guidelines was added. "[P]rior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation." *Stinson*, 508 U.S. at 46. In any event, there is no evidence in the record here that Parlor's possession of the uncharged firearms was "contemporaneous, or nearly contemporaneous." *Id*.

The majority ultimately recognizes that *Powell* provides no support for the generic rule it announces linking illegally possessed guns as related conduct as long as the lapse of time between the periods of possession does not exceed some undefined extent—many months, at least. Opinion at 10–12. The majority asserts only that "*Powell* did not purport to require 'contemporaneous, or nearly contemporaneous possession'" as a necessary condition for a relevant conduct finding." Opinion at 12. Still, *Powell*'s limited holding weakens the majority's reliance on *Vargem* and *Nichols*, as the connection between the firearms in those cases was substantive, not simply a certain time period. Further, as I have explained, commentary to the Guidelines strongly suggests that illegality of possession alone is not sufficient for a relevant conduct finding.[3]

[3] The majority suggests that, under my view, "uncharged firearm possessions by a convicted felon could apparently never be relevant conduct to a charged firearm possession offense for purposes of the

Additionally, the relevant conduct determination should be subject to a higher evidentiary standard, of clear and convincing evidence, which the government here cannot meet with regard to whether the guns found later were part of the same course of conduct. *See United States v. Valle*, 940 F.3d 473, 479 (9th Cir. 2019) (quoting *United States v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001)). The majority maintains that in determining whether such a standard should apply, the court should not consider the impact of the sentencing enhancement for multiple firearms, because Parlor did not specifically challenge that enhancement during the sentencing hearing. But Parlor did file a written objection about the relevant conduct determination. And, contrary to the majority's assertion, Opinion at 19, challenging a relevant conduct finding does amount to challenge of a "factual finding underlying [that] sentencing enhancement," *Valle*, 940 F.3d at 479, for the simple reason that relevant conduct is a *threshold* inquiry, without which, none of the sentencing enhancements would apply.

II.

Even if the firearm found in Parlor's home is relevant conduct, the district court erred in applying the enhancement, discussed above, for "use[] or possess[ion] [of] any firearm … in connection with another felony

multiple-firearms enhancement, except perhaps if the firearm possessions were 'simultaneous.'" Opinion at 12–13. But that misunderstands my point. The enhancement was appropriate in *Nichols*, which held that the guns charged in the indictment and the additional gun were part of "the same common and ongoing scheme—a methamphetamine-linked burglary ring that trafficked in stolen firearms." 464. F.3d at 1123. The enhancement is not appropriate here because there is no similar substantive connection between the firearms Parlor sold and those found later in his home and storage unit.

offense," U.S.S.G. § 2K2.1(b)(6)(B), because the evidence is too unreliable and weak to support the finding that Parlor was engaged in drug trafficking.

The district court's conclusion that Parlor was engaged in drug trafficking rested in part on information provided to law enforcement by a confidential informant and relayed by them to a probation officer. In my view, a single statement by a probation officer in the presentence report that a confidential informant had "disclosed" to federal agents that "he/she had purchased narcotics from [Parlor] and traded a firearm for narcotics with [him] in the past," is a patently insufficient evidentiary basis for determining that Parlor was engaged in drug trafficking.

"Because . . . 'a defendant clearly has a due process right not to be sentenced on the basis of materially incorrect information,' . . . we require that 'some minimal indicia of reliability accompany a hearsay statement.'" *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995) (quoting *United States v. Petty,* 982 F.2d 1365, 1369 (9th Cir.1993)). According to the majority, the informant's statement bore such an "indicia of reliability," *id*. (quoting *Petty*, 982 F.3d at 1369), because the informant "had already provided specific, accurate intelligence that Parlor possessed a rifle and a shotgun," as ultimately charged in the indictment. Opinion at 16. But "mere statements of an anonymous informant,[4] standing alone, do not bear sufficient indicia of

[4] The presentence investigation report explains that the information regarding the confidential informant "was provided by the United States Attorney's Office for the District of Idaho." Even so, there is no indication that the probation officer who prepared the report interviewed the confidential informant or assessed the confidential informant's reliability. Further, without an evidentiary hearing, the district court had

reliability to support a finding of fact by even a preponderance of the evidence." *United States v. Kerr*, 876 F.2d 1440, 1446 (9th Cir. 1989) (citing *United States v. Weston,* 448 F.2d 626, 633–34 (9th Cir.1971)); *cf. Lee v. Illinois*, 476 U.S. 530, 546 (1986) (recognizing the "time-honored teaching that a codefendant's[5] confession inculpating the accused is inherently unreliable"). Further, *Kerr* specifically "reject[ed] the government's contention that because the informant provided correct information . . . his statements are sufficiently reliable." 876 F.2d at 1446 n.2 (citing *Weston,* 448 F.2d at 633–34).

The majority's suggestion that Parlor's "decision to pass on the chance to probe the [informant's] account undermines his claim that the [informant's] statement was untruthful or inaccurate," Opinion at 17, misstates the record. The presentence report initially justified the drug trafficking enhancement at issue based only on the items found in Parlor's home. The report stated: "The firearms were possessed in connection with another felony offense, drug trafficking. The firearms were located along with 21.63 grams of marijuana, $5,000 in cash, plastic baggies, and two digital scales. The offense level is increased by four." When the district court remarked during the sentencing hearing that the informant's statement might also support the drug trafficking enhancement, defense counsel

no basis to assess Parlor's argument that the confidential informant "is not a reliable source."

[5] The confidential informant was not charged as Parlor's co-defendant, and there is no information in the record that the government charged the confidential informant in a separate proceeding. Nonetheless, the government presumably could have charged the confidential informant for at least the purchase of illegal narcotics. *See* 21 U.S.C. § 841.

objected. The district court initially suggested that an evidentiary hearing may be necessary to resolve the reliability of the informant, but *ultimately withdrew* that suggestion: "Let me address the objections. . . . [A] moment ago, I suggested we might need an evidentiary hearing, but I'm not going to put everyone through that because I do think it's completely unnecessary." Such a hearing was unnecessary in the district court's view in part because defense counsel's objection was untimely,[6] and in part because "under the facts of this case, [the confidential informant's statements] wouldn't even be suppressible." The district court thus considered the informant's statement and found it "equally important" in concluding Parlor was engaged in drug trafficking.

Further, the items found in Parlor's home suggest that Parlor was engaged in drug possession, not drug trafficking. The amount of marijuana found in Parlor's home was less than one ounce, which is an amount fully consistent with personal use. Moreover, Idaho ultimately charged Parlor for drug possession, not drug trafficking, and the cash found in the house was returned to Parlor's girlfriend, not Parlor. Finally, these days, most households have baggies, and many have digital scales.

[6] It was not. Both the initial and final presentence report recounted in the "Offense Conduct" section that a confidential informant had made the statement regarding trading a gun for drugs to a federal officer, but, as noted, did not rely on the statement for its truth in calculating the appropriate guideline enhancement. The defendant had no basis for objecting to the presentence report's factual statement that a federal officer had told the probation officer something an unnamed person said. It was only when the district court suggested relying on the hearsay as true that a basis for objection arose.

In the absence of an evidentiary hearing to determine the reliability of the confidential informant, and given the weakness of the circumstantial evidence found in Parlor's home, the district court erred in concluding Parlor was engaged in drug trafficking.

III.

For each of these reasons, I would have vacated Parlor's sentence and remanded for resentencing and so dissent.

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FILED

JUL 30 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE EARL PARLOR, Defendant-Appellant.	No. 19-30269 D.C. No. 1:18-cr-00203-BLW-1 District of Idaho, Boise ORDER

Before: BERZON, MILLER, and BRESS, Circuit Judges.

Judge Berzon voted to grant the petition for rehearing en banc. Dkt. 38. Judges Miller and Bress voted to deny the petition for rehearing en banc. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

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UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA Plaintiff, vs. LONNIE EARL PARLOR, Defendant.	CASE NO. 1:18-cr-00203-BLW **SENTENCING**

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE B. LYNN WINMILL
TUESDAY, NOVEMBER 19, 2019; 1:33 P.M.
BOISE, IDAHO

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Proceedings recorded by mechanical stenography, transcript produced by computer.

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550 WEST FORT STREET, BOISE, IDAHO 83724

I N D E X

NOVEMBER 19, 2019

P R O C E E D I N G S

November 19, 2019

THE CLERK: The court will now hear Criminal Case 18-203, United States of America vs. Lonnie Earl Parlor, for sentencing.

THE COURT: Good afternoon, Counsel.

I apologize, but I'll need just one moment to access my notes.

All right. Mr. Parlor entered a plea of guilty to Count 1 of the indictment without benefit of a plea agreement. The court ordered a presentence report, which has been provided to court and to counsel.

Mr. Parlor, have you had an adequate opportunity to review the presentence report?

THE DEFENDANT: Yes.

THE COURT: And, Mr. Atkinson, you've gone over the report with your client?

MR. ATKINSON: Yes.

THE COURT: There were objections filed to the presentence report, which I'll take up after hearing arguments of counsel.

But, first, do either of you intend to call any witnesses?

MS. HORWITZ: No, Your Honor. We intend to rely on the facts as they are represented in the PSR.

THE COURT: And Mr. Atkinson?

MR. ATKINSON: The defense is not calling any witnesses, Your Honor.

THE COURT: I'm sorry?

MR. ATKINSON: The defense is not calling any witnesses.

THE COURT: Do you have any -- are you objecting to the factual findings in the presentence report or just legal conclusions and whether the court should consider some of those facts?

MR. ATKINSON: Yes, we're objecting to legal conclusions, Your Honor.

THE COURT: All right. Very good.

Then, with that, let me hear the arguments. Counsel, I would prefer that you kind of roll in both your response to the objections and your recommendation as to a sentence.

I've read your sentencing memos, so I know what you're recommending, but -- so primarily, I want to hear your arguments about, first, why the objections are either correct or incorrect; and then, secondly, why, applying the 3553(a) sentencing factors, the sentence should be either five years or ten years.

Ms. Horwitz.

MS. HORWITZ: Thank you, Your Honor.

So, as calculated, the offense level is 24, the base. And it's my understanding there is no objection that the crime

of violence here renders that application, the base offense level. And I thank defense counsel for confirming that there are no factual objections to the PSR.

Regarding suppression, first, I would like to note that this suppression, to the extent it's a motion to suppress, is untimely under Rule 12(b)(3)(C), and I would note that in the Idaho General Order 319 at 6, the deadline for those pleadings.

And the two cases that the defendant relies on for this argument, *Kim* and *Verdugo* -- I don't know if I'm saying that right -- but both of those cases had motions to suppress filed pretrial where the evidence was actually found to be suppressible.

Here, we don't have that procedural posture. We're essentially bootstrapping a suppression motion into a PSR objection, and I would just object under Rule 12 as untimely.

Now, to the extent that we go ahead and apply that theory, it's inapplicable here for several reasons. First, I'll note that *Verdugo* was a pre-Section 3661 case, and it didn't have the benefit of that statutory provision, which, of course, allows this court to consider a broad array of facts in determining a sentence under 3553.

Now, *Kim* did have the benefit of 3661, and it noted in Footnote 8 that it kind of questioned the validity of *Verdugo* post 3661.

Now, putting all those kind of questions, the legal

questions, aside and assuming that *Kim* applies this rule and overlooking the fact that no motion to suppress has been filed in this case, the defendant offers no evidence that any law enforcement officer or the parole officer's intent was to increase the sentence here.

THE COURT: Well, and to do that, the probation officer and the law enforcement officers would have to have a rather intimate knowledge of the federal sentencing guidelines, since that's what triggers any enhancement.

MS. HORWITZ: That's right, Your Honor.

THE COURT: And I don't recall -- who were the arresting officers? Were they ATF?

MS. HORWITZ: They were, Your Honor.

THE COURT: Okay. All right. Go ahead.

MS. HORWITZ: So the day of Mr. Parlor's arrest in July, he was scheduled -- he was previously scheduled to have a meeting with his parole officer.

And I just want to clarify: He was a parolee; he was not a probation -- probationer.

So that day, he shows up to his scheduled parole visit, and he is arrested by ATF. Thereafter, the parole officers decided, well, let's go ahead and do a search of the defendant's house and subsequently a storage unit that he brought them to. And that was pursuant to his parole conditions that allow the search of his home and other places of -- well,

his storage unit.

So there is nothing that the defendant can point to -- and it is his burden under the application of this kind of odd exception -- to show that the officers were acting for the purposes of an enhancement only.

And this case is nothing like the underlying facts in *Verdugo* or *Kim*. The parole search here was completely valid. It was 100 percent constitutional. And there is no question that he had no Fourth Amendment rights to object to the search under -- under many precedent.

But, first, I would point to, obviously, *Samson v. California*. And most recently, I think in *Valentino Johnson*, which is 875 F.3d 1265, the Ninth Circuit kind of applied the constitutional parameters of a parolee's right in the context of searching a parolee's cellphone and found that a violent parolee had no Fourth Amendment right to his cellphone to not be searched.

And, of course, this court is aware of the Supreme Court's case law that says that a cellphone is uniquely situated to hold very personal information and is somewhat *sui generis* to Fourth Amendment protections.

And that was despite the fact that the parole search condition did not include cellphones; it only included containers. But, yet, the Ninth Circuit found that was wholly proper.

So here, a parolee who has an extensive violent criminal history, who has been determined and indicted on federal firearm offenses or offense -- not plural, one singular offense -- and who is suspected to be in possession of further firearms that would also be a violation of federal law and generally a danger to the community, the parole officers and ATF decided: Yes, we're going to do a search for further parole violations.

That is a very legitimate state interest, and it far exceeds whatever interests, if any, Mr. Parlor had in his house and storage unit.

Now, to the extent that the defendant raises a dispute that the parole officers were working in conjunction with the ATF, that's completely proper.

In *United States vs. Artis*, 919 F.3d 1128-29, the Ninth Circuit noted that the identity of the executing officers did not impact the underlying Fourth Amendment inquiry and that there wasn't a greater intrusion into the privacy interest depending on if it was conducted by a federal agent or a state agent.

And in *Latta vs. Fitzharris*, 521 F.2d 246, the Ninth Circuit recognized that there has long been a need for parole officers to have additional law enforcement to help execute these searches. And that just makes good sense based on officer safety and the safety of the others.

So even if we assume that this exception applies, there is nothing to suggest that this evidence is suppressible, nor has the defendant shown at all that there is any basis to believe that the search was conducted for purposes of the enhancement.

So considering all of that evidence, the four-level application under 2K2.1(b)(6)(B) is correct here. This court is well familiar with this, and I would just point to the commentary, which says that the close proximity of the firearm to the drugs is sufficient to show the nexus.

THE COURT: Now, I wrestled with that, and I don't recall if it was your case or not. But within the last month or two, I declined to apply the enhancement but in a -- when you have the reverse, where it's a drug charge and it's a question whether there is a firearm enhancement, the guidelines are quite clear that simply being found in, you know -- in fact, the classic case is where a firearm is found in a garage; drugs are found inside the house. The case law said, in that setting, that's sufficient.

But when it's the reverse, when it's a firearm conviction and the enhancement is that it's going to be used in connection with another felony, I have held that that's a much higher standard, and the government actually has to show some evidence that, in fact, it was going to be used in connection with the other crime.

I don't know if an appeal was taken of that. I felt, obviously, at the time I was on firm ground.

But what struck me about this case is, first of all, how similar that might be to the facts here with regard to marijuana. But the other case that I dealt with this -- and this might have been a year or two ago -- was where drugs were traded for guns.

And in that instance, I found just reading the statute or reading the guidelines, it just clearly applies. The possession facilitated the drug transaction, which is clearly a crime because they were the medium of exchange for the drugs.

I don't know if anyone appealed me on that decision, but there is some case law suggesting that that's entirely appropriate.

So my feeling was, in reading the presentence report, that's the much more solid ground to apply the enhancement than to get into an issue of whether he actually possessed the gun or guns to further the sale of -- what was it? -- 30-some-odd ounces or 20-some-odd ounces of marijuana.

Your thoughts on that? I'm saying that as much for Mr. Atkinson's benefit as yours, because he'll want to be ready to address that.

MS. HORWITZ: I agree, Your Honor. And you're correct. My assessment of the case law is just trading or mere possession isn't enough. And I think I might have been

confusing the two, the drugs plus firearms versus the firearm plus drugs. So...

THE COURT: Well, they sound similar.

MS. HORWITZ: Yeah.

THE COURT: And there is even language in the commentary. But I really think if you -- you know, I'm a textualist, generally, not in the sense -- not in the classic constitutional originalist sense, but I do think you need to look at the text. And if the text suggests that there is a difference between the two, you have to apply that. So...

MS. HORWITZ: Yes. I agree, Your Honor.

And here, I would just note that it's much more than mere possession next to a firearm. We have a CI telling law enforcement that she purchased drugs from the defendant the day before the offense took place; that she had previously trafficked in firearms with him; and that the indicia of the drug trafficking was throughout the house.

So the scales and the plastic baggies were found in the garage. Plastic baggies were found in the bedroom along with the firearm and the drugs. And, of course, he was on parole for trafficking in controlled substances.

I mean, here, that's -- that's more than enough for this application of the enhancement.

I would like to correct a mistake in my sentencing memo, ECF 56 at page 5 through 6. I wrote that the drugs were

hidden in the bed, and that's not correct. The drugs were at the foot of the bed in a baggie. So I just want to make that clear.

THE COURT: Okay. And the guns were found in various locations; correct?

MS. HORWITZ: There was one gun, a 9-millimeter handgun, found tucked in between the bedroom mattress. There were two firearms, which were the basis for the offense. And an undercover agent and the confidential informant purchased those two firearms. And then there were two firearms found in the storage unit, an assault rifle and a stolen firearm.

THE COURT: Okay.

MS. HORWITZ: Now, turning to -- we believe that the fact that the firearm was stolen, that that's not -- that it's been reported as stolen is sufficient for application of the two-point enhancement.

And I believe those were all the objections. So I'll turn now to my 3553(a) argument.

First, really just looking at the current offense and the defendant's history, it shows that he is violent and a continued danger to the community.

In addition to having several drug-trafficking convictions, the defendant has a concerning violent history of two assaults and an aggravated battery that caused serious bodily injury.

The defendant's criminal history spans 23 years, which shows that he continues to pose this risk and that age is not dissipating this danger at all.

And what's more, this defendant was on parole for two separate offenses when he committed the current offense and clearly shows that he has no respect for the law and the imposition of sentences and the sanctions that he faces despite his ever-increasing criminal behavior.

So based on that, we would -- we would represent that, under a totality of the circumstances, a 120-month sentence is necessary to promote respect for the law, adequately deter criminal conduct, and most importantly, protect the community.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Mr. Atkinson.

MR. ATKINSON: Your Honor, in response to the new issue that you present today, which is that using -- trading guns and firearms, in and of itself, would be a basis for the enhancement and a better way to go about it, when we say that we are not disputing the facts that are contained in the PSR, we don't dispute the fact that the confidential informant said that he, indeed, did sell her drugs. That is mentioned by the CI, but we -- we dispute the fact that that's true.

THE COURT: Well, Counsel, that's one of the reasons I asked whether you dispute the factual matters in the presentence

report, also understanding that we're here on a sentencing hearing. So I don't -- the rules of evidence don't even apply.

MR. ATKINSON: Right.

THE COURT: As long as it's reliable --

MR. ATKINSON: Right.

THE COURT: -- I can rely on that.

Now, if you -- it's stated in the presentence report. You have indicated you don't factually disagree with what's in the presentence report. Wouldn't the burden be upon you, then, to indicate something at least in the moving papers why that's false?

And I don't believe that that was included in your sentencing memorandum, although perhaps I missed it. But to raise it now for the first time, a factual dispute as to a matter contained in the presentence report, you know, I guess we can continue the sentencing, and you can -- or I can let, you know, Ms. Horwitz put on evidence from that person.

MR. ATKINSON: From -- from the position where I was arguing, this idea of the trading of drugs, that wasn't something I had anticipated.

My client has told me multiple times that what she -- what the confidential informant had said was not true. That was -- but I didn't anticipate until today the way that the court presented that as a possible alternative argument as to why the --

THE COURT: Well, I'm not the first one -- I'm not some genius that just figured this out.

MR. ATKINSON: Right. Right.

THE COURT: This has all been -- there is case law suggesting that as well. I'm not, you know, going off on some lark here.

But -- okay. I'll -- well, you know, I -- it -- maybe, in an abundance of caution, we can continue the sentencing and let Ms. Horwitz bring it in. But I can tell you that if I find that person to be credible, it may bear upon the defendant's acceptance of responsibility if he is disputing that evidence.

But I'm concerned. Ms. Horwitz has pointed out correctly that if you're going to make a motion to suppress evidence, it needs to be done, you know, in a timely fashion. And likewise, I think if you're going to dispute a factual matter within the presentence report, you need to file an objection within 14 days, as envisioned by Rule 32. And there was no objection to that.

MR. ATKINSON: Right. The -- I would like to address the -- what was just brought up, the Rule 12.

I can't suppress evidence of uncharged conduct. When we were in trial -- when we were in trial mode, if there is conduct that he has been charged with, that is what I'd file a motion to suppress on. In this case, he was never --

THE COURT: But you're asking me to suppress the evidence here for sentencing purposes.

MR. ATKINSON: Right, because it's being used for sentencing purposes.

But prior to the -- when I was in trial mode, this was not being used for trial. This was not being introduced for trial. This is not evidence I could have suppressed because it was uncharged conduct.

THE COURT: All right. Well, that's what relevant conduct is. I mean, that's what we --

MR. ATKINSON: It is. And that's why I'm -- that's why I'm challenging it now at the sentencing hearing.

THE COURT: Okay. So you want me to conduct a suppression hearing now as part of the sentencing hearing?

MR. ATKINSON: I want to -- yeah. I want to -- I want to challenge the -- based on the evidence in the PSR, I want to challenge that.

THE COURT: Maybe we need to continue the sentencing, and Ms. Horwitz can put on the evidence if she needs to.

You know, I have to tell you: I'm not aware -- and I don't think *Verdugo* -- *Verdugo* I think is the case, but are you aware of any case where evidence was suppressed during a sentencing hearing upon the motion of defense?

MR. ATKINSON: No, I'm not. This is the first time.

THE COURT: Maybe that tells us a lot. Let

me -- doesn't *Kim* stand -- I mean, in *Kim*, the evidence was actually suppressed at a suppression hearing. The trial court said: Nevertheless, I can consider that at sentencing. And that was affirmed by the Ninth Circuit.

Why doesn't that tell us all we need to know in this setting; that you can't suppress evidence as part of a sentencing hearing?

MR. ATKINSON: Well, I don't think there is anything that says we can't suppress evidence at a sentencing hearing. I think there is -- there are cases that I agree where it says that evidence -- that suppressed evidence can be used at a sentencing hearing. There is -- there is law on that.

But there's also law that says that there are situations where suppressed evidence cannot be used at a sentencing hearing.

THE COURT: Well, *Verdugo* is 51 years old, long before the sentencing guidelines were adopted and long before the notion of relevant conduct within the sentencing guidelines and long before -- was it 3661 and 3553 were adopted to give the court very broad authority to consider evidence at sentencing.

How could that be consistent? And particularly given *Kim*, where the evidence had been suppressed and, yet, the appellate court said it's entirely appropriate for the trial judge to consider it at sentencing.

MR. ATKINSON: The only case law I found was the

evidence that said -- a case that said if it is shown that the evidence was obtained for the purpose of enhancing sentence, then it can be used at the sentencing hearing.

THE COURT: All right. All right. Go ahead.

MR. ATKINSON: Okay. And the whole point of the -- the way I was establishing that, the way that the search was used to enhance the sentence was the very fact that this was planned. The ATF was waiting at the parole --

THE COURT: Counsel, so you are saying the ATF planned that, hey, if we can show -- if we can seize more guns, some guns that are stolen, that all of this is going to be used in the sentencing guidelines to enhance the punishment? That's what *Verdugo* seemed to be suggesting.

MR. ATKINSON: Yes.

THE COURT: But *Verdugo* was preguidelines. There, it was a question of whether they could find other evidence and actually charge him with additional -- or, rather, with crimes that have enhanced punishment.

MR. ATKINSON: Yes.

THE COURT: What evidence do you have that the officers even had an inkling that that might be an issue at sentencing?

MR. ATKINSON: It's only circumstantial, and the circumstances being that they are federal agents and that this is something that they were prepared for.

They -- and that was the argument I was about to make, is that they came into this with a plan that -- there was already an indictment. They were there at the office to arrest him on --

THE COURT: An indictment on one charge. But if they have got evidence that this same individual is involved in trafficking other guns and drugs, wouldn't it be entirely appropriate, in fact, something we would expect law enforcement to do, to investigate that additional criminal behavior? Not to enhance punishment at sentencing, but to charge the defendant with all of the charges or crimes which they committed?

MR. ATKINSON: Yes. And this was an investigation that was -- that had been taking place for a month. And that would have given them plenty of time to secure a warrant to search his house, to search his storage unit, to search anything that needed to be searched. But, instead --

THE COURT: But the defendant was on -- there was almost no need for a search warrant because he had forfeited or substantially waived his rights because he was under supervision.

MR. ATKINSON: Right. Other than the arguments that we have made that the home is an especially protected place, and there are -- and still reasonableness that they would have to establish --

THE COURT: They didn't have a reasonable suspicion of

criminal activity based on the information they had at the time?

MR. ATKINSON: They had reasonable suspicion of criminal activity, not necessarily that criminal activity was taking place within inside of his home.

Which moves me on to my other argument, which is that the evidence does not support that drug trafficking was taking place within the home, which was the argument that the state had made as to why -- the government had made as to why the -- as to why this enhancement should apply, this four-point enhancement for using guns when you're drug trafficking.

The evidence that was presented of a scale, of $5,000 in cash, of the marijuana -- which I argue is in usable amounts rather than in drug trafficking amounts -- all of this is not enough to establish that he was engaging in drug trafficking, nor does it establish the time line in which he would have been drug trafficking.

Even if you wanted to argue that these items could arguably be drug trafficking items, we don't know when he used them or how he used them other than through the confidential informant, which I argue is not a reliable source herself.

He was caught up in selling guns to her, and that was -- there were officers present at the time that observed that, and there is no disputing that. But whether he was selling her drugs, I don't think that's firmly established.

And so we would argue that that enhancement, as well,

should not apply.

The final enhancement that I argued should not apply would be the two-level enhancement for firearms being reported as stolen. And the NCIC is all we're basing that on, and I argued that that was not -- that that's not enough corroborating evidence to establish the gun was stolen.

So we would ask that --

THE COURT: There is nothing in the record to dispute that; correct?

MR. ATKINSON: No, there is nothing in the record to dispute that.

So we're going to ask for the -- those enhancements to not be applied in this case.

And as far as our 3553(a) argument goes, you saw my sentencing memorandum on that. There is a history of mental illness here, mental illness that started I believe when he was young.

He was living with his grandparents until the age of 13, which seemed to be a good situation for him. But then he moved in with his mother, and he was kicked out of the house within two years. He began abusing alcohol and marijuana on a daily basis in this situation, and it was a really bad situation for him.

He now has been diagnosed with hyperactivity disorder, bipolar disorder, posttraumatic stress disorder, antisocial

personality disorder, and insomnia.

And while the defendant himself surmises that these may be drug-induced, I also believe that he's self-medicating by using these things. And I think that he needs to get some help in order to get on the right path, because he's obviously -- as the prosecutor acknowledged, he has a criminal history.

And he has been punished multiple times; and yet, he finds himself in these issues. And I think that mental health is a big part of that. And getting mental health treatment, possibly, while he's in prison would help. Getting substance abuse treatment while he's in prison could help.

And I'm hoping that when he does get sentenced to BOP, that those will be options available for him; but I also think it's a reason to focus on those things rather than punishment in this case.

We're going to be asking that his sentence be reduced. In the event that none of our guideline objections are granted, we're going to ask that he be sentenced to 60 months in prison. If all of them are granted, we would ask for a 40-month sentence in this case.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Atkinson, did you want to respond -- oh, not Mr. Atkinson. Ms. Horwitz? Sorry about that.

MS. HORWITZ: No. Thank you, Your Honor.

THE COURT: Did you want to respond?

MS. HORWITZ: No. Thank you.

THE COURT: Mr. Parlor, anything you want to say in your own behalf?

THE DEFENDANT: Yeah.

First of all, I apologize for all of this --

THE COURT: Could you bring the microphone a little closer, if you would, so we can all hear you. Thank you.

THE DEFENDANT: First of all, I just wanted to apologize, sir, for all this commotion and confusion.

I was sitting here listening to the arguments on both sides. And first of all, I noticed that everything is focusing on the search of my residence and the search of my storage unit.

But the thing that kind of bugs me right now is that no one is addressing the issue that I have had since the get-go about the search of the truck.

It's not -- it's undisputed and it's in the reports, sir, that when I got to -- they followed me from my house. They were surveilling my house, watched me, followed me. I drove to the P.O.'s office to check in. I got out of the car, locked it, left my phone in the truck. I left -- not a car -- left my phone in the truck, and I lit a cigarette and was walking to the -- into my P.O.'s office across the parking lot.

And when I was going past the -- because I guess they say I didn't -- in the reports that it's a parking lot unrelated

to my P.O.'s office.

So I crossed this. I get approached by the ATF with the soap guns, get on the ground, that whole big thing there; complied. Was searched, I was arrested, and put in the back of an unmarked government car.

They had my property, my cigarettes, Red Bull, wallet. I had a title to a van I just got for a company I was trying to show my P.O.

But, in any event, I was in a different section between the Eagle firehouse, the Eagle police station, and the P.O.'s office. So now I'm not seeing what's going on. For, like, an hour, I didn't know what was happening.

But I do know that somehow they searched the truck. Now, if I'm arrested and they have all my property, the federal agents are exceeding their authority and in violation. So that search was illegal, in my opinion.

Now, I'm not a lawyer or a prosecutor. But I can read and I comprehend. But no one is addressing this issue. And that's previously that led to the house search and the storage search.

The car was legally parked, tags and plates, current and valid and registered to Ashley Josephson. So how --

THE COURT: Let me -- Mr. Parlor, I -- the charge against you is for the sale of two guns, which -- I'm not sure what the search of the vehicle has to do with anything. The

charge is -- generally evidence is suppressed when it's used to convict someone. And it wasn't used to convict you in this case; it was a sale arranged with an undercover individual.

So, I mean, it's kind of the discussion we have had here that, at sentencing -- you know, you can always file a lawsuit, I suppose, against the agents for violating your constitutional rights if you think you have that claim. But typically that doesn't come into bearing at sentencing.

THE DEFENDANT: Oh, no, no. I'm saying it was directly tied to what they were disputing.

THE COURT: Okay.

THE DEFENDANT: Because in report, it says clearly that because they searched this truck, they found and they confiscated my phone, which was in evidence. They said they found multiple or even dozens of baggies that, in their training and experience, are narcotics distribution baggies, right?

So from that, he got permission from his supervisor to search my house.

But what was also confusing for me, sir, is that I was arrested under a federal indictment arrest warrant by the ATF agents. Yet, this was at, like, 9:00 in the morning, and I had a initial appearance later that day, I believe, at 2:30. But I was driven around from the P.O.'s office to my home, to my storage. I made it to the federal building and got booked in about 2:15-ish.

Now, I'm not sure if that's right or wrong, but it definitely didn't seem right. And I was the whole time trying to understand. And I'm just putting this in a plain person or layman's terms. I'm sorry I'm not familiar with the jargon or legalese.

But I was trying to understand, and I have looked around. There seems to be no case like mine where I was arrested clearly by the United States and then driven around to look for state parole compliance check. And this is all in the papers, the discovery and the reports, to support what I'm saying. For what interest did that serve if I was already arrested?

And they keep saying that they weren't looking for additional evidence. Now, one minute I am selling firearms; the next minute, I'm a drug dealer.

But what they also failed to tell you, sir, is that from the truck search all the way to the storage search, just coincidentally, there was a K9 available. So a K9, from what I read, is for the apprehension of a perp, which is not in the case because I was handcuffed and in the back of a car.

Therefore, they are either looking for narcotics or money or some type of investigation. So I don't know how they keep saying they weren't seeking additional evidence.

See, this is all confusing to me. And I'm sorry that it seems like a suppression thing. Like I said, I don't know

the ins and outs. But I do understand -- and I have been trying to get this motion to suppress since the beginning, but I do understand that it was -- I wasn't charged with it.

So I'm confused. I'm still trying to read and learn as I go, but now we're at the end of it. And I fully take responsibility for my actions and willing to accept the consequences; I did that in February without a plea deal.

Like, I'm burnt out on this. I want to see an end light where I can go home. But we're running into more problems. And it's almost a crime that they have so much leeway to stomp on you after you already stepped up.

So I'm sorry if it seems like -- I'm not asking for some smack on the wrist or the court to turn a blind eye or some undeserved break. I'm just asking for fairness. That's all.

THE COURT: Okay. All right. Thank you.

Let me address the objections. And there was -- a moment ago, I suggested we might need an evidentiary hearing, but I'm not going to put everyone through that because I do think it's completely unnecessary.

The objection to the information in the presentence report about what the informant said about bartering guns for drugs with the defendant, it's not a timely objection. That should have been made within 14 days after the draft presentence report was prepared.

And I think any other -- and I'm not going to conduct

a suppression hearing here. In fact, that kind of points out why the court got it right in *Kim* that -- well, even evidence that has been suppressed or could be suppressed as a violation of a defendant's constitutional rights can be considered at sentencing. I think that's clearly the teaching of *Kim*.

But part of the reason is: If that is allowed to be raised in a sentencing context, we would have to conduct a multi-day evidentiary hearing in every sentencing. And all of that is simply to make factual determinations, which then lead to the creation of an advisory guideline range, which is not even binding upon the court.

Guideline calculations are important, but that's all they are, is a calculation and an advisory guideline. And so I truly question whether, under any circumstances, it's proper to raise at sentencing that evidence being considered should have been suppressed or could be suppressed.

I don't think that's appropriate. But under the facts of this case, they wouldn't even be suppressible if I were to entertain that.

So let me go ahead and address the objections.

First of all, the objection to the reasonableness of the searches. First of all, the defendant was a parolee. He was therefore subject to heightened search conditions. There is really no reasonable expectation of privacy of the defendant found in his residence or his storage unit.

Generally, you know, there does still need to be at least some basis for the officers to believe that the defendant is engaged in criminal activity, not rising even to the level of probable cause but at least some kind of suspicion, reasonable suspicion.

Here, they just arrested him on firearm charges. How much more clear could it be that there was a reasonable basis to -- for a probation officer or a parole officer to authorize a search?

But beyond that, as I noted, I think the *Kim* decision makes clear that even evidence that has been determined by the court to be suppressible at trial can be considered by the court at sentencing.

The *Verdugo* case, as I noted, is 51 years old. It was issued many years before the guidelines were even applicable. And generally at sentencing, it's a very -- much more relaxed process. The rules of evidence don't apply. The burden is by a preponderance of the evidence.

And as I noted, I'm not aware of any case -- and apparently neither is counsel -- which would require suppression of evidence for violation of Fourth Amendment rights in applying an advisory guideline range. So I'm going to deny that objection as an overall objection.

There is also an objection to the application of 2K2.1(b)(6)(B), and the -- whether there is a relationship

between this offense -- that is, the unlawful possession of firearms -- and some other offense.

The guidelines say that if the defendant used or possessed any firearm or ammunition in connection with another felony offense or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, then the four-level enhancement applies.

In this case, the application note requires that the in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, that that's sufficient to apply that app -- that enhancement.

And in this case, at least as I understand it, there was a gun in the -- underneath the mattress, and the drugs were found at the foot of that same bed. And so, clearly, that would apply.

But as I also noted, that -- there was additional evidence of drug trafficking on the premises, including -- well, other items of drug-trafficking paraphernalia indicating that the defendant was engaged in drug trafficking.

I think the quantity of drugs here, you know, I suppose it might be user level or user quantities, but it certainly seems more substantial than that to me.

But I think equally important is the fact that the defendant had, with the same confidential informant at some

point in the past, exchanged guns for drugs; which I think clearly, when the guns becomes, as I described it, a medium of exchange for purchasing drugs, that clearly, I think, would satisfy that requirement under the guidelines.

The case of *Wendt vs. United States* indicates that when bartering drugs for guns involves the unlawful possession of a firearm, the four-level increase under 2K2.1(b)(6) is proper.

And in this case, the actual two guns which were involved in the charges here were not the same guns that were bartered, but it does indicate that the defendant is engaged in transactions involving the exchange of firearms in drug trafficking; and I think all together, all of this adds up to an adequate basis for imposing the four-level enhancement.

There is also an objection to the application of 2K2.2(b)(4)(A) based upon the firearm being stolen. The guidelines are clear that that is kind of a strict liability; it doesn't matter if the defendant knew that they were stolen.

Here, the evidence that supports that is that as was set forth in the government records indicating that the firearm had been reported as stolen. There is no contradicting evidence in that regard.

As I noted earlier, the court is free to consider evidence of that sort at sentencing. And in the face of nothing that would dispute that, I will accept as having been

established that the firearm was stolen even if the defendant did not know as much.

So based upon that, I am going to overrule all objections to the presentence report. I assume, Ms. Horwitz, you would move for the third level for acceptance of responsibility?

MS. HORWITZ: Yes, Your Honor.

THE COURT: I'll grant that motion. The new offense level is 29, a criminal history category of 4. The guideline range is, therefore, 121 to 151 months. But since the maximum sentence is 10 years, the guideline range becomes 120 months.

I will adopt the presentence report as my own findings in this matter.

I think I will take just a moment and point out: Mr. Parlor, it is possible -- and I just have no way of knowing one way or the other -- that the officers may have done something that violated your constitutional rights. I didn't see anything from the presentence report to suggest that to me.

You know, if you are aggrieved, you can always file a civil lawsuit from that. But I, frankly, didn't see anything that you said that really bore upon the charges in this case.

The charges of this case are what they are. And once you're a parolee, all the rules change. Your -- your expectation of privacy is substantially reduced. And while generally, parole and probation officers can't just, without any

excuse or justification, launch off into a search, under the facts of this case, there was more than enough to support a parole or probation officer's decision to conduct a search.

So I just wanted to make sure you understand that, while I gave you a chance to address that and make comments, first of all, I don't know if what happened is -- with regard to the search of your vehicle or otherwise is particularly relevant.

And second, as someone on parole, you just didn't have the same expectation of privacy as someone else. And I think it would be a real stretch to conclude under any circumstances that there was a Fourth Amendment violation here under those circumstances.

So let me turn to the nature -- the other 3553(a) sentencing factors.

The nature and circumstances of the offense are that in April of 2018, agents met with the confidential informant, who disclosed that they had purchased narcotics from you and traded a firearm for narcotics with you in the past.

Subsequently, the confidential informant and an undercover agent met with you in Eagle, Idaho, to purchase two firearms which, as a convicted felon, you were to not legally possess. You were paid $400 for the firearms. It's been determined that they have traveled in interstate commerce. Therefore, that constitutes the offense in question here.

On July 12, you were arrested while reporting to your probation officer. Things were found suggesting that you had been involved in distribution of narcotics. There was 21 grams of marijuana, $5,000 in cash, plastic baggies, two digital scales, and a .22 caliber revolver.

A search of the storage unit that had been rented by you also revealed an assault rifle, a 9-millimeter handgun, and various ammunition, again, all of which had traveled in interstate commerce. And the 9-millimeter handgun had been reported as stolen during a burglary in February of 2018.

Turning to the next factor the court is to consider is the defendant's history and characteristics.

Mr. Parlor is 48 years old. He has three adult children with whom he has had virtually no contact. Raised by his grandparents from a young age. His childhood was difficult during his teen years. He, as he described it, couch-surfed and bummed around with no real home.

He has been in a relationship for the past three years with a woman, and he is -- with whom he has some connection or relationship.

The defendant has some issues. He has been diagnosed with some mental-health issues that do need to be addressed. He was abusing drugs; and presumably that may have been a form of self-medication, as Mr. Atkinson suggested.

So there are some mitigating factors here.

He does have an extensive prior criminal history, 22 prior convictions, including drug possession, drug delivery, firearms thefts, and crimes of violence. He was on parole for two of his prior convictions at the time of this offense.

Finally, the court is to consider a number of statutory sentencing factors and impose a sentence sufficient but not greater than necessary to achieve certain objectives, including reflecting the seriousness of the offense, promoting respect for the law, providing just punishment, adequate deterrence, protection of the public, and any needed educational or vocational training, medical care, or other correctional treatment.

In this case, first of all, it is -- this is a mixture of factors, all of which suggest a grave concern for protecting the public, reflecting the seriousness of the offense, and adequate deterrence.

We have someone who is a convicted felon on parole involved in a possessing drugs and possessing firearms. That's a quadruple, I guess, combination, which suggests that there is a real concern with the defendant's -- whether he really understands or is really taking responsibility for criminal behavior.

Being on parole and engaging in this kind of conduct is just almost beyond description. When you add to it the fact that he is a prior felon and, therefore, cannot possess and will

never be able to possess firearms and is bartering with those guns for drugs, all of that adds up to a very serious concern that I think justifies a substantial sentence.

If the defendant will please stand, I'll pronounce sentence.

The defendant, Lonnie Earl Parlor, having pled guilty to Count 1 of the indictment, and the court being satisfied that you are guilty as charged, I hereby order and adjudge as follows:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that you be committed to the custody of the Bureau of Prisons for a term of 120 months.

You will also be required to pay a special assessment of $100, which will be due immediately.

The court will also impose a fine of $1,000, which will be due immediately. After considering your financial circumstances, I will order payment under the following schedule unless modified by the court:

While in custody, you will submit nominal payments of not less than $25 per quarter pursuant to the Bureau of Prisons Inmate Financial Responsibility Program. And during the term of supervised release, you will submit nominal monthly payments of 10 percent of your gross income but not less than $25 per month.

Supervised release will be imposed for a period of three years to commence upon your release from imprisonment.

During the term of supervised release, you will comply with all mandatory, standard, and special terms of supervised release as was set forth in the sentencing recommendation filed as Docket No. 54 in the court's record in this proceeding and also as will be outlined in the court's written judgment.

Mr. Atkinson, did you have a chance to go over those conditions with your client?

MR. ATKINSON: Yes, Your Honor.

THE COURT: Any objection to any of them?

MR. ATKINSON: No.

THE COURT: Do you have -- do you have any questions about those conditions of supervised release, Mr. Parlor?

THE DEFENDANT: I'm not even sure what's going on right now.

THE COURT: I'm sorry?

THE DEFENDANT: I'm not even sure going on right now, except I got 120 months; and hopefully, I can get time served since I have been locked up.

THE COURT: No -- I will -- I'll definitely give you credit -- I mean I'll recommend to the Bureau of Prisons you receive credit for time served.

THE DEFENDANT: Okay. And I guess I plan to appeal this for sure.

THE COURT: Okay. Well, I -- you know, actually, I think the law is really pretty straightforward on all of these

issues, but I could be wrong. I certainly would not discourage an appeal, and I'll tell you how to appeal here in just a moment.

And if I'm incorrect in any assumption, of course, it will be remanded for sentencing. But -- so we'll talk about that here in just a minute. I'll tell you how to pursue the appeal.

What I do need to tell you is: If you violate supervised release, you will come back before the court, and a further sentence of incarceration could be imposed.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: All right. The -- I believe a preliminary order of forfeiture has been filed.

MS. HORWITZ: Originally, forfeiture was incorrectly filed, because the two firearms involved in the offense now belong to ATF because they bought them from the defendant. So that has been withdrawn. So I don't believe there is any forfeiture in this case.

THE COURT: All right. Then I won't enter orders of forfeiture.

Mr. Parlor, I will recommend that you receive credit for all time in federal custody. I'll recommend that you be allowed to participate in the RDAP drug treatment program. With this offense, you may not qualify for reduced time for

participation in the RDAP; I just don't know for sure. But I still would recommend it because I think you are in need of substance abuse treatment.

I'll also make a recommendation as to a place of confinement. Is there any recommendation in that regard?

THE DEFENDANT: Well, I'd like to be close to my family as possible. So maybe Sheridan or Lompoc is what I was told was closest to Boise.

THE COURT: Lompoc, California, or Sheridan, Oregon? Which would you -- I think you were raised in the Seattle area, as I recall.

THE DEFENDANT: Yeah. But between where my family is now and Seattle, that's the only places I have. So I guess either one of them would work.

THE COURT: All right. I'll recommend Sheridan on Lompoc. It's only a recommendation, Mr. Parlor; I can't control it. I hope they will follow that for your benefit, but that's up to them.

Let me advise you that you have the right to pursue an appeal from your conviction and sentence. To pursue such an appeal, you must file a notice of appeal within 14 days after judgment is entered in your case.

If you are unable to pay the cost of an appeal, you may apply for leave to appeal *in forma pauperis*. That means without having to pay filing fees. If you so apply and qualify

for *in forma pauperis* status, the clerk of the court will assist you in preparing and filing a notice of appeal and will also appoint counsel to represent you on that appeal.

As I have noted, many times I have wished in areas that are challenging, that there would be appeals filed so we could get some direction from the circuit. I didn't think these are really challenging issues, but I still have absolutely no qualms about you filing an appeal.

Mr. Atkinson, you can confer with your client, you know. Often a different attorney is appointed for the appeal, but at least to get the notice of appeal filed if you feel that there is some legal issues in my rulings, for heaven's sakes, file an appeal so we can get some clarity from the circuit court on those issues.

All right. Is there anything I overlooked, Ms. Henderson?

LAW CLERK: No, Your Honor.

THE COURT: Ms. Gearhart? Mr. Cruser?

THE PROBATION OFFICER: No, Your Honor.

THE CLERK: No, Your Honor.

THE COURT: Anything else, Counsel?

MS. HORWITZ: No. Thank you, Your Honor.

MR. ATKINSON: No, Your Honor.

THE COURT: All right. Mr. Parlor, I wish you the best of luck. I know it's not the sentence you wanted. You're

probably upset, and I certainly can't begrudge that. But I have to do what I think is right, but it doesn't mean I have any personal ill will towards you.

I'm very sympathetic to your upbringing, the fact that there is some unresolved or at least potentially -- well, unresolved potential mental-health issues that probably, you know, some counseling might be of some assistance to you. But for all of those reasons, I do wish you the best of luck.

All right. We will be in recess.

(Proceedings concluded at 2:29 p.m.)

REPORTER'S CERTIFICATE

I, TAMARA I. HOHENLEITNER, CSR, RPR, CRR, certify that the foregoing is a correct transcript of proceedings in the above-entitled matter.

/s/ Tamara I. Hohenleitner 12/30/2019

TAMARA I. HOHENLEITNER, CSR, RPR, CRR Date