No. _____

IN THE

Supreme Court of the United States

_____

Sedale Pervis

Petitioner,

v.

United States of America, et al. Respondents

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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JANUARY 18, 2022

QUESTION PRESENTED

The touchstone statute for criminal sentencing, 18 U.S.C. § 3553(a), provides that a sentence must promote respect for the law. However, "respect for the law" is not clearly defined there, or anywhere else in the law. The impact of Mr. Pervis's sentence upon his family and community was, is, and will be severe. Did the District Court err in not finding that promoting respect for the law, in the context of this case is a *mitigating* factor?

PARTIES TO THE PROCEEDING

Other parties to the proceedings are:

Respondents: United States of America, et al., Michael Belle, AKA MB, Michael Via, AKA Mike Live, Milton Westley, AKA Reese, Clifford Brodie, AKA Cliff G, and Dejuan Ward, AKA Hot Boi

Petitioner: Sedale Pervis, AKA Scope

RELATED PROCEEDINGS

United States v. Westley, et al. No. 3:17-cr-171 (MPS), U.S. District Court for the District of Connecticut. Judgment entered Jan. 14, 2020.

United States v. Westley, et al., Nos. 19-3746, 19-3825, 20-163, 20-779, U.S. Court of Appeals for the Second Circuit Judgment entered Oct. 20, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit decision under review is unpublished, but is available at *United States v. Westley*, 2021 U.S. App. LEXIS 31489, 2021 WL 4888867, attached hereto as Appendix A. The transcript of the sentencing proceeding before the District Court is attached hereto as Appendix B.

JURISDICTION

The District Court sentenced Petitioner on January 13, 2020. The Second Circuit dismissed Petitioner's appeal on October 20, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, "No person shall be … deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Factual Background

On August 28, 2016, New Haven police responded to a report of a domestic disturbance on Barclay Street. Sedale Pervis had been arguing with his girlfriend. He ran away. Although the police did not catch him, they did seize a loaded .380 caliber pistol, which he had jettisoned in his flight.

On September 2, 2016, police executed a warrant to arrest Mr. Pervis and to search his mother's house (where he resided). Police found a nine millimeter pistol in the house, along with marijuana, several .380 caliber rounds, and the detritus of drug

distribution. Mr. Pervis admitted that the .380 pistol was his. His fingerprints were found on the nine millimeter pistol.

Those two pistols, along with another .22 caliber gun that was never seized, were connected to over two dozen shootings in New Haven. Additionally, law enforcement secured a trove of social media and other digital evidence which established that Mr. Pervis was an associate of the Goodrich Street Boys (GSB) gang, which conspired to traffic narcotics, and employed violent street tactics.

B. Procedural Background

On August 3, 2017, in a 13-count indictment, a grand jury charged Mr. Pervis and five others with various counts of racketeering, firearms, and narcotics charges. After a round of guilty pleas that were subsequently vacated by the District Court for reasons that are not salient to this petition, on October 3, 2019, Mr. Pervis pleaded guilty to Count One of the indictment, conspiracy to engage in a pattern of racketeering activity, under 18 U.S.C. § 1962(d).

In the operative plea agreement, Mr. Pervis and the government stipulated that the two predicate acts for his racketeering conviction were distribution of 20 to 40 kilograms of marijuana, and the attempted murder of Marquise Freeman by a member of the GSB. Mr. Pervis's base offense level for marijuana was 16, U.S.S.G. § 2D1.1(c)(12). His base offense level for attempted murder was 27. § 2A2.1(a)(2). His adjusted offense level was 31, because four points were added under § 2A2.1(b)(1)(A) because Mr. Freeman had sustained life-threatening bodily injury. Under § 3D1.4(c), because the marijuana offense level was nine or more levels less serious than the attempted murder,

it was disregarded. After three levels were reduced for acceptance of responsibility, his total offense level was 28.

The draft Presentence Report (PSR) arrived at the same guidelines range.

The final PSR, however, proposed a significantly higher guidelines range. It sought two additional enhancements, resulting in a guidelines range of 151 – 188 months of imprisonment.

First, the final PSR sought to add four points pursuant to § 3B1.1(a) on the grounds that Mr. Pervis organized criminal activity involving five or more participants or was otherwise extensive.

Second, it sought to add two additional points pursuant to § 3C1.1, note 4(B), on the grounds that Mr. Pervis had obstructed justice in relation to his motion to suppress the firearm and marijuana that law enforcement discovered in his residence in September of 2016.

Prior to his first guilty plea, Mr. Pervis had filed a motion to suppress that evidence. He made declarations in his accompanying affidavit, and presented witnesses at the hearing, which the district court, in denying the motion, found wanting in credibility.

Mr. Pervis objected to both enhancements in his sentencing memorandum.

The government in its memorandum sought both enhancements, and alternatively proposed an upward variance to a sentence within the same guidelines range proposed in the final PSR, 151 – 188 months of imprisonment.

Mr. Pervis objected to the government's proposal, and at the sentencing hearing, specifically requested a sentence of 78 months. T. 1/13/20, 29.

On January 13, 202, the District Court imposed sentence.

The court did not apply the four-point enhancement for organizing extensive criminal activity pursuant to U.S.S.G. § 3B1.1(a) on the grounds that "we were not able to find any case law in the Second Circuit that imposed an organizer/leader enhancement simply for being a gun supplier and also being, you know, somewhat older." T. 1/13/20, 16. Further undermining this enhancement is a lack of "any evidence that other GSB members significantly deferred to Pervis," *Id* at 17, or "that he profited more… than others in the group, [or] that he was more involved in the recruitment." *Id*.

The court did not apply the two-point enhancement for obstruction of justice, for several reasons: First, the affidavit was withdrawn (by prior counsel, who had also submitted it) at the hearing on the motion to suppress, and the court had not relied on it. *Id*, 18. Second, the portions of the affidavit that were inconsistent with the court's findings were closer to "confusion, mistake, or faulty memory" than they were to a "willful attempt to obstruct justice." *Id,* 18-19. Finally, there was no evidence that Mr. Pervis had influenced his witness to lie. *Id*, 19.

At that point, the court turned to "the heart of the matter." *Id,* 22. It heard from all present, including Patricia Council, who was wounded by a stray bullet. *Id*, 24.

Mr. Pervis apologized. *Id,* 41-42.

In imposing its sentence, the court first acknowledged the victims. *Id*, 51. It surmised that a victim might not have appeared "because of fear, legitimate fear of what might happen to him given the nature of the crimes, which involved retaliation against the people who spoke to the police." *Id*, 52.

On the other hand, the court expressed appreciation for Mr. Pervis's family and friends.

> So by the same token, I want to express my appreciation to Mr. Pervis's family members and friends who came today, because it's just as important for me to hear about the impact that a sentence is going to have on family members.
>
> It's clear that Mr. Pervis has a supportive, loving family, that he has children who care about him and miss him, and that the sentence today and Mr. Pervis's incarceration so far has imposed and will impose a real cost on them. And that, of course, makes my job difficult, more difficult than even in most sentencings.
>
> *Id*.

Next, the court described generally the law of federal sentencing. *Id,* 53. After surveying the basic facts of the case, the court stated: "Frankly, the harm, the violence, the need to reflect what happened to Mr. Freeman, Ms. Council, and others is what's going to drive the sentence here." *Id*, 58. Also driving the sentence was the need "to demonstrate that submitting affidavits with stories that might sound good but just don't square with the facts is serious conduct." *Id*.

The court then compared Mr. Pervis's actions to the actions of others.[1]

> On the one hand, Mr. Pervis is older than Mr. Brodie and Mr. Westley, and he supplied the guns, the means for them. And he drove them around. That's clear.
>
> On the other, Mr. Westley pulled a trigger after holding a gun to a man's head and shooting him in the stomach first and, frankly, committed what otherwise would be a cold-blooded murder had there not been a miracle. Mr. Pervis, there's no evidence that he did something like that.
>
> Mr. Brodie was involved in pulling the trigger in multiple shootings and was, unfortunately, what one would have to regard from the text messages the most aggressive cheerleader for the violence of GSB.
>
> *Id*, 59-60.

[1] Milton Westley was sentenced to 156 months of imprisonment.
Clifford Brodie was sentenced to 168 months of imprisonment.
Sedale Pervis was sentenced to 144 months of imprisonment.
Dejuan Ward was sentenced to 97 months of imprisonment.
Michael Belle was sentenced to 87 months of imprisonment.
Michael Via was sentenced to 78 months of imprisonment.
All defendants received three years of supervised release.

Summarizing its view of the case, the court stated:

> And so my view is that the guidelines range of 78 to 97 months does not adequately reflect the seriousness of the offense or adequately serve the other purposes of sentencing that I find need to be served here and so that I find that a substantial variance above the guidelines range is necessary to serve those purposes and to take full account of Mr. Pervis's criminal conduct, even given how difficult his separation is going to be for his family members.

Id, 59.

Whereupon the court imposed its sentence of 144 months of imprisonment, followed by three years of supervised release.

M,. Pervis appealed the sentence on the grounds of procedural and substantive reasonableness. On October 20, 2021, in a summary order, the Court of Appeals for the Second Circuit affirmed the judgment of the District Court in all respects.

ARGUMENT

A. Introduction

A central sentencing consideration in 18 U.S.C. § 3553(a) is the promotion of respect for the law. *See Id.* § 3553(a)(2)(A). This subjective concept is stated without explanation. And though it is referenced in the case law, it is rarely discussed. It does not represent the view that the pains of punishment promote respect, because the concept of just punishment, which exists in the same sentence of the statute, covers that. It must, therefore, mean something different. It must also be different from deterrent effect, protection of the public, characteristics of the defendant, and rehabilitation. These all have their clauses in 3553(a).

Promoting respect for the law is by its own terms a broad and vague concept. What does it mean to promote respect for the law? Is it to encourage a fear-based

obeisance? Or should the law strive to influence people's better angels? Moreover, respect by whom? By consumers of news? By experts? By residents of the neighborhoods impacted or of nearby neighborhoods? By all? If all should be encouraged, by a particular sentence, to respect one law, how does that work in an adversarial system, which pits citizens against each other, and carries intact into sentencing its dualistic categorization of individuals being either on the victim's side of the courtroom or the offender's side?

The court should grant this petition, and guide lower courts on the meaning of the concept.

B. Legal Principles

A district court should begin all sentencings by correctly calculating the applicable guidelines range. *Rita v. United States*, 551 U.S. 338, 347-48, 127 S. Ct. 2456 (2007). Next, the court should consider all of the sentencing factors under 18 U.S.C. § 3553(a). *Gall v. United States*, 552 U.S. 38, 49-50, 128 S. Ct. 587. "After settling on the appropriate sentence, [the court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id*, *Id*. at 50, 128 S. Ct. 558 (citing *Rita v. United States*, 551 U.S. 338, 356-58 (2007)).

The cases do not explain by whom, or how, a sentence is perceived as fair. Writing for the court in *Rita*, Justice Breyer acknowledged this epistemological difficulty, with which the United States Sentencing Commission has grappled.

> [A] philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Some would emphasize moral culpability and just punishment; others would emphasize the need for crime control. Rather than choose among differing practical and philosophical objectives. The Commission took an empirical approach, beginning with an empirical

> examination of 10,000 presentence reports… and worked with the help of many other in *the law enforcement community*."

Rita, 551 U.S. at 349, 127 S. Ct. 2456 (emphasis added). Justice Breyer foresaw, from this practice, that the Sentencing Commission would continue to "obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others." *Id* at 350. Thus, considering "the differences of philosophical view among those who *work within* the criminal justice community," *Id,* (emphasis added), the guidelines "reflect a rough approximation of sentences that might achieve 18 U.S.C. § 3553(a)'s objectives." *Id*.

The emphases were added because they show which voices have enjoyed primacy in the crafting of sentencing policy: Law enforcement and other experts in the field. Ordinary members of the communities most impacted by crime are not mentioned, except, perhaps, as "others." Yet Justice Breyer recognizes the value of inclusivity in the sentencing process. "[O]ften at sentencing a judge will speak at length to a defendant, and this practice may indeed serve a salutary purpose." *Id* at 357. He also understood that "[c]onfidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *Id* at 356.

Gall explicitly mentions the requirement of 18 U.S.C. § 3553(a)(2)(A) that district court judges consider the need for the sentence imposed to promote respect for the law. This was in answer to the government's argument "that a lenient sentence for a serious offense threatens to promote disrespect for the law." *Gall*, 552 U.S. at 54 (internal quotation marks omitted). In imposing a sentence of solely supervised release—of no imprisonment—the district court committed no error, because a sentencing judge

should "consider every convicted person as an individual and every *case* as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." *Id* at 52, citing *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035 (1996)(emphasis added). In this passage we emphasize the word *case* because a case is bigger than an individual defendant, and it is toward that wider aperture that the "respect for the law" clause of 18 U.S.C. § 3553(a)(2)(A) refers.

Released the same day as *Gall*, Justice Ginsburg's opinion for the Court in *Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558 (2007) expresses the same view. In holding that the crack-to-powder cocaine disparity which exists in the guidelines may be considered by a district court under 18 U.S.C. § 3553(a) in the imposition of a below-guidelines sentence for crack cocaine, Justice Ginsburg observed:

> Finally, the Commission stated that the crack/powder sentencing differential "fosters disrespect for and lack of confidence in the criminal justice system" because of a "widely held perception" that it "promotes unwarranted disparity based on race." 2002 Report 103. Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed "primarily upon black offenders." *Ibid.*
>
> *Kimbrough*, 552 U.S. at 98, 128 S. Ct. at 568.

Thus, *Kimbrough* and *Gall* both stand for the proposition that promoting respect for the law inclines towards mitigation of harsh penalties.

This principal plays out in stark contrasts in *Pepper v. United States*, 562 U.S. 476, 131 S. Ct. 1229 (2011). Although Justice Sotomayor, writing for the court, never explicitly mentions the clause at issue, its concept is dyed into the wool of the opinion. The Court holds that "a district court, after a defendant's sentence has been set aside on appeal, may consider evidence of a defendant's post sentencing rehabilitation to support a downward variance." *Id*. at 487, 131 S. Ct. 1229. The procedural backdrop is illustrative

here, because in its detail, it reveals this Court's concern with the "meaningful appellate review and… the perception of fair sentencing." *Gall*, 552 U.S. at 50, 128 S. Ct. 587 (citing *Rita v. United States*, 551 U.S. 338, 356-58 (2007)).

In 2003, Mr. Pepper was arrested for, and pleaded guilty to, conspiracy to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 846. His guidelines range was 97 – 121 months. The government filed a motion pursuant to § 5K1.1 and recommended a 15 percent downward departure for substantial assistance. District Court Judge Bennett downwardly departed 75 percent, imposing a sentence of 24 months. The government appealed. *Id*, 481-82.

In 2005, the Eighth Circuit Court of Appeals reversed and remanded for reconsideration under *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005) (holding the sentencing guidelines advisory not mandatory). Three days after the Eighth Circuit's decision was issued, Mr. Pepper was released from prison "and began serving his term of supervised release." *Id*, 482.

In 2006, the district court held a resentencing hearing. Mr. Pepper had by then accomplished a profound atonement.[2] Judge Bennett held the new bottom end of the

[2] "In his testimony, Pepper first recounted that while he had previously been a drug addict, he successfully completed a 500-hour drug treatment program while in prison and he no longer used any drugs. Pepper then explained that since his release from prison, he had enrolled at a local community college as a full-time student and had earned A's in all of his classes in the prior semester. Pepper also testified that he had obtained employment within a few weeks after being released from custody and was continuing to work part-time while attending school. Pepper confirmed that he was in compliance with all the conditions of his supervised release and described his changed attitude since his arrest. ('[M]y life was basically headed to either where--I guess where I ended up, in prison, or death. Now I have some optimism about my life, about what I can do with my life. I'm glad that I got this chance to try again I guess you could say at a decent life. . . . My life was going nowhere before, and I think it's going somewhere now').

guidelines range to be 58 months, constituting a 40 percent downward departure, and he varied downward 59 percent under *Booker*, arriving at a sentence of 24 months. *Id.* at 483, 131 S. Ct. 1229.

The government appealed again, and the Eighth Circuit reversed again, reasoning that 59 percent was an unreasonable downward variance, and that "permitting courts to consider post-sentencing rehabilitation at resentencing would create unwarranted sentencing disparities and inject blatant inequities into the sentencing process." *Id*, 483-84 (internal quotation marks omitted).

In 2007, Judge Reade was reassigned on remand. She issued an order stating she would not be bound by Judge Bennett's 40 percent downward departure.

In 2008, Mr. Pepper petitioned this Court for certiorari; the Court obliged "and remanded the case to the Court of Appeals for further consideration in light of *Gall*," *Id* at 484. The Court of Appeals held on remand that *Gall* changed nothing. *Id*.

In January of 2009, almost than three-and-a-half years after he had completed his initial sentence, Judge Reade reincarcerated Mr. Pepper by sentencing him to 65 months of imprisonment, despite continuing evidence of deepening atonement.[3] Mr.

Pepper's father testified that he had virtually no contact with Pepper during the 5-year period leading up to his arrest. Pepper's drug treatment program, according to his father, 'truly sobered him up' and 'made his way of thinking change.' He explained that Pepper was now 'much more mature' and 'serious in terms of planning for the future,' and that as a consequence, he had re-established a relationship with his son.

Finally, Pepper's probation officer testified that, in his view, a 24-month sentence would be reasonable in light of Pepper's substantial assistance, postsentencing rehabilitation, and demonstrated low risk of recidivism. The probation officer also prepared a sentencing memorandum that further set forth the reasons supporting his recommendation for a 24-month sentence."

Pepper, 562 U.S. at 482-83, 131 S. Ct. at 1236-37 (citations to the record omitted).

[3] "Pepper informed the court that he was still attending school and was now working as a supervisor for the night crew at a warehouse retailer, where he was recently selected by

Pepper filed a writ of habeas corpus; this Court granted certiorari; and only then did the District Court release Mr. Pepper "pending disposition of the case here." *Id* at 486, n. 5.

The importance of this case to promotion of respect for the law is hopefully obvious. How, for example, would one explain to the person who awarded Mr. Pepper employee of the year, or to the child he was raising, or to anyone in the community, that he needed to return to prison to serve out additional time on a sentence he had already finished serving years ago?

C. Discussion

Mr. Pervis does not request that this Court order district courts to utter any particular incantation at sentencing. The request is that courts widen the aperture in their analysis of the general harm done to the public by harsh sentences.

For example, although the district court recognized that the separation of a father from his son is painful for both, T. 1.13.20, 52, that is not the end of the pain. Mr. Pervis, like many criminal defendants, lacked a father figure (in fact watched his father abuse his mother) and sought solace in the streets. He was jailed on the instant offense when his son was eight years old; his end of sentence date will come when his son is 20. That is perhaps the most critical period of development in a person's life. A troubled boy can find his balance and his way as a man, or spin out of control, and perpetuate the generational cycle of dysfunction.

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management as 'associate of the year' and was likely to be promoted the following January. Pepper also stated that he had recently married and was now supporting his wife and her daughter. Pepper's father reiterated that Pepper was moving forward in both his career and his family life and that he remained in close touch with his son."

Pepper v. United States, 562 U.S. 476, 485, 131 S. Ct. 1229, 1238 (2011)

The guidelines' policy is that "race, sex, national origin, creed, religion and socio-economic status" are "not relevant in the determination of a sentence." § 5H1.1, *Pepper*, 562 U.S. at 509, 131 S. Ct. 1229 (Breyer, J., concurring). Though the guidelines are advisory under *Booker*, the presumption that socio-economic status ought to be studiously avoided despite its obvious relevance to street crime, is baked into the bread of a sentencing analysis; this Court can reform that.

It is also worthy of note that *Booker* was grounded in the Sixth Amendment right to a jury, and juries are derived from the communities impacted by the crime.

> To be sure, the vicinage requirement, by defining the community from which a federal jury must be drawn, permits the jury to operate as the conscience of that community in judging criminal cases. See Kershen, Vicinage, 29 Okla. L. Rev. at 842-43; see generally A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 260 (H. Mansfield & D. Winthrop transls. and eds. 2000) (observing that "the man who judges the criminal is really the master of society" (emphasis in original)).

United States v. Fell, 571 F.3d 264, 269 (2d Cir. 2009).

Mr. Pervis proposes that, in considering a sentence that promotes respect for the law, a district court may properly consider socio-economics in crafting a sentence that promotes respect for the law. This guideline was designed in good faith to avoid "enormous subjectivity and variance" in sentences of differing individuals. *United States v. Guzman*, 236 F.3d 830, 832. However, to consider whether a sentence is *respected* by the community that the offender is removed from and then returned to years later, will result less in subjectivity and variance, and more in a rounded understanding of the ripple effects of incarceration. Law enforcement and other expert groups do not have a monopoly on this experience to bring to the court, because it is as noninstitutional as it is institutionalized. American mass incarceration has waxed controversial, as our collective experience with it has grown.

The father-son relationship was one of the reasons why Mr. Pervis requested a sentence of 78 months. It would have resulted in his end of sentencing arriving when his son was 14. That is quantitatively and qualitatively different from 20. It is a different era of life.

If there is only a one-to-one transmission rate of gang membership, then what is the purpose of a 12-year sentence (other than just punishment), when another such sentence awaits in half a generation's time, and then again? But the harm transmission is much greater than one-to-one. As the government can attest, each gang member brings harm to a multitude, many of whom they will never personally know.

In *United States v. Grossman*, 513 F.3d 592, 597 (6th Cir. 2008), the Sixth Circuit Court of Appeals affirmed a district court's decision "to pursue [the goals of 18 U.S.C. § 3553(a)] not through a longer term of imprisonment, but through extensive counseling and treatment and an extensive period of supervised release, which itself contains substantial limitations on an individual's freedom." *Id.* § 3553(a) This "speaks… to a *perception* that the guidelines sentence is higher than this conduct deserves." *Id.,* (emphasis added).

Grossman is a child pornography case. The district court saw that the defendant could be treated, not with a harsh sentence, but with treatment. The instant case is more difficult, because vaster national forces combine to lay the groundwork for more or less racketeering activity. Ergo, the sentence should speak to those vaster forces.

Sentencing policy in cases like this one clearly impacts the lives of many who are not aware of any given sentencing hearing. Section 3553(a)(2)(A) requires a court to impose a sentence that promotes respect for the law. Mr. Pervis does not presume to foresee how this will impact every sentencing decision, though he is comfortable to

presume that the public will have more respect for sentencing processes that, in the aggregate, lead to less malaise.

CONCLUSION

The Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

SEDALE PERVIS
Petitioner

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APPENDIX A

19-3746-cr(L)
United States v. Westley

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of October, two thousand twenty-one.

PRESENT:

JOHN M. WALKER, JR.,
JOSEPH F. BIANCO,
STEVEN J. MENASHI,
Circuit Judges.

United States of America,

Appellee,

v.

19-3746-cr(L),
19-3826-cr(CON),
20-163-cr(CON),
20-779-cr(CON)

Milton Westley, AKA Reese, Clifford Brodie, AKA Cliff G, Sedale Pervis, AKA Scope, Dejuan Ward, AKA Hot Boi,

Defendants-Appellants,

Michael Belle, AKA MB, Michael Via, AKA Mike Live,

Defendants.*

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* The Clerk of Court is respectfully directed to amend the caption as set forth above.

FOR APPELLEE:	JOCELYN COURTNEY KAOUTZANIS (Marc H. Silverman, *on the brief*), Assistant United States Attorneys, *for* Leonard C. Boyle, Acting United States Attorney for the District of Connecticut, New Haven, CT.
FOR DEFENDANT-APPELLANT MILTON WESTLEY:	STEVEN Y. YUROWITZ, Newman & Greenberg LLP, New York, NY.
FOR DEFENDANT-APPELLANT CLIFFORD BRODIE:	ROBERT J. BOYLE, Law Office of Robert J. Boyle, New York, NY.
FOR DEFENDANT-APPELLANT SEDALE PERVIS:	W. THEODORE KOCH III, Koch, Garg & Brown, Niantic, CT.
FOR DEFENDANT-APPELLANT DEJUAN WARD:	JON L. SCHOENHORN, Jon L. Schoenhorn & Associates, LLC, Hartford, CT.

Appeal from judgments of the United States District Court for the District of Connecticut (Shea, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of conviction entered on November 1, 2019 against Milton Westley, on November 7, 2019 against Clifford Brodie, on January 14, 2020 against Sedale Pervis, and on March 2, 2020 against Dejuan Ward are **AFFIRMED**.

Milton Westley, Clifford Brodie, Sedale Pervis, and Dejuan Ward (collectively, "defendants")[1] appeal from their respective judgments of conviction, after the entry of guilty pleas, arising out of their participation in the racketeering activity of the Goodrich Street Boys ("GSB"),

[1] The other defendants in the underlying case—Michael Belle and Michael Via—are not parties to the instant appeal.

a violent gang responsible for drug trafficking and numerous shootings in New Haven, Connecticut. Each defendant pled guilty to Count One of the Indictment—conspiracy to engage in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d).

The district court sentenced each of the defendants to terms of imprisonment above their respective advisory ranges pursuant to the United States Sentencing Guidelines: Westley to 156 months' imprisonment, Brodie to 168 months' imprisonment, Pervis to 144 months' imprisonment, and Ward to 97 months' imprisonment. Westley, Brodie, and Pervis admitted to the drug trafficking conspiracy predicate racketeering act, as well as to a second predicate racketeering act involving at least one of the alleged shootings that constituted an attempted murder in furtherance of the GSB racketeering conspiracy. Ward admitted to three predicate racketeering acts: drug trafficking conspiracy, Hobbs Act robbery conspiracy, and obstruction of justice. On appeal, the defendants challenge their respective sentences on several different grounds.

We assume the parties' familiarity with the underlying facts and prior record of proceedings, to which we refer only as necessary to explain our decision to affirm.

I. The Westley Appeal

The sole challenge brought by Westley on appeal relates to his contention that the government breached the plea agreement during his sentencing proceeding. In particular, Westley asserts that the government breached the plea agreement by arguing—in response to the district court's inquiry—that the base offense level under the United States Sentencing Guidelines for his participation in the shooting of Marquis Freeman should be calculated at level 33 because it was committed with malice and premeditation, rather than the level 27 that had been stipulated to by

the parties in the plea agreement. *See* U.S.S.G. § 2A2.1. After the district court raised this issue *sua sponte* at sentencing, the government explained that, although level 33 should have applied based upon the facts, the government agreed to the lower offense level of 27 in the plea agreement because of mitigating factors that applied to Westley's particular case.

In evaluating whether the government breached a plea agreement, "[w]e review interpretations of [the] plea agreement[] *de novo* and in accordance with principles of contract law." *United States v. Wilson*, 920 F.3d 155, 162 (2d Cir. 2019) (internal quotation marks omitted). "[W]e construe plea agreements strictly against the government and do not hesitate to scrutinize the government's conduct to ensure that it comports with the highest standard of fairness." *United States v. Vaval*, 404 F.3d 144, 152 (2d Cir. 2005) (internal quotation marks omitted). Where, as here, the appellant did not raise the argument below, we examine the alleged breach under plain error review. *United States v. Taylor*, 961 F.3d 68, 81 (2d Cir. 2020). "To establish plain error, a defendant must demonstrate: (1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Bleau*, 930 F.3d 35, 39 (2d Cir. 2019) (per curiam) (internal quotation marks omitted).

Even assuming *arguendo* that Westley could establish a breach of the plea agreement based upon the government's response to the district court's inquiry at sentencing, we find no plain error because Westley was not harmed by the alleged breach. *See United States v. Habbas*, 527 F.3d 266, 270–71 (2d Cir. 2008); *see also Puckett v. United States*, 556 U.S. 129, 142 n.4 (2009) (requiring a defendant to show a breach actually affected his sentence). It is abundantly clear from the record that, notwithstanding the government's response to the inquiry regarding the potential application of the higher offense level of 33 to the facts, the district court did not apply the higher

level, but rather adhered to the level 27 that was stipulated to by the parties in the plea agreement. For example, in calculating the Guidelines range at sentencing, the district court explicitly stated the following with respect to the attempted murder: "[T]he base offense level is 27 under Section 2A2.1(a)(2), although as I will discuss later, it would appear to me that there's a basis for imposing a higher offense level of 33 here. But I'm not going to do that. I'll talk about that later. I'm going to adopt the parties' stipulation that it's 27." Gov't App'x at 594. Later, the district court further stated, "Again, I adopted the guidelines range that the parties have stipulated to." *Id.* at 618. Moreover, at the conclusion of the sentencing, the district court reiterated, "Ultimately, I adopted the parties' guidelines calculation. I did not adopt the first-degree murder—or first-degree attempt of [level] 33. I reached this sentence through an upward variance for the reasons I've indicated." *Id.* at 640–41. Thus, even if the government breached the agreement by suggesting that the higher level should have been applied based upon the facts, that alleged breach did not affect Westley's substantial rights because the district court adhered to level 27, which was stipulated to by the parties.

In any event, the district court further explained at sentencing that it "would have imposed this [156-month] sentence regardless of the guidelines." *Id.* at 640. That clear statement by the district court, expressing its reliance on the factors under 18 U.S.C. § 3553(a) apart from the Guidelines to independently arrive at the 156-month sentence, provides an additional basis for concluding that any issues regarding the Guidelines calculation did not impact the sentence imposed by the district court.

Accordingly, we find no plain error with respect to the alleged breach of the plea agreement and affirm Westley's sentence.

II. The Brodie, Pervis, and Ward Appeals

On appeal, Brodie challenges the substantive reasonableness of his 168-month sentence, while Pervis and Ward challenge both the procedural and substantive reasonableness of their respective 144-month and 97-month sentences. As set forth below, we find each of these challenges to be without merit.

This Court "review[s] the procedural and substantive reasonableness of a sentence under a deferential abuse-of-discretion standard." *United States v. Yilmaz*, 910 F.3d 686, 688 (2d Cir. 2018) (per curiam). "A sentence is *procedurally* unreasonable if the district court fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence." *United States v. Jesurum*, 819 F.3d 667, 670 (2d Cir. 2016) (internal quotation marks omitted). This Court's "review of a sentence for substantive reasonableness is particularly deferential, and we will set aside only those sentences that are so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice." *United States v. Muzio*, 966 F.3d 61, 64 (2d Cir. 2020) (internal quotation marks omitted). A sentence is substantively reasonable if it can "be located within the range of permissible decisions." *United States v. Degroate*, 940 F.3d 167, 174 (2d Cir. 2019) (internal quotation marks omitted).

We address the challenges of each of the three defendants in turn.

a. Brodie

Brodie asserts that his 168-month sentence was substantively unreasonable because it represented a 40% upward variance from the applicable Guidelines range (97–121 months) and,

according to Brodie, was unsupportable because of the existence of mitigating factors such as his difficult background, the fact that some of the alleged predicate acts occurred when he was only twenty years old, his lack of any prior criminal conviction, his expression of remorse, and the lower sentences received by his co-defendants. We disagree.

We have emphasized that "[t]he particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (internal quotation marks omitted). Here, the district court explicitly recognized Brodie's "difficult childhood," which involved experiences with poverty and violence, including the death of Brodie's older brother. Gov't App'x at 1111–12. The district court also acknowledged Brodie's youth, immaturity, and lack of criminal history, explaining that Brodie's sentence would have been "substantially longer . . . but for those things." *Id.* at 1113; *see also id.* at 1123 (stating in the judgment of conviction that "[Brodie's] youth and lack of criminal history nonetheless mitigated somewhat the size of the variance"). Notwithstanding these mitigating factors, the district court concluded that the advisory Guidelines range "[was] not adequate to reflect the seriousness of the offense" and to serve the purposes of protecting the public and providing specific deterrence to Brodie. *Id.* at 1115. More specifically, the district court explained that the Guidelines range did not adequately account for "several instances of serious criminal conduct" in which Brodie participated, such as "the shooting of Damien Smith, the shootings of James and Donald Harris, [and] the . . . shootings at Brandon Shealy's house," and that such conduct warranted "a substantial upward variance." *Id.*

On this record, we conclude that the district court's above-Guidelines sentence of 168 months' imprisonment was well within its discretion under the circumstances of this case. As

noted by the district court, as part of his guilty plea, Brodie admitted to his participation in the GSB's drug trafficking activity, as well as his participation in the attempted murders of Marquis Freeman and Terrence Lee on May 27, 2016, all of which was reflected in the Guidelines range of 97 to 121 months' imprisonment. That range, however, did not include the three additional GSB shootings in which Brodie participated (based upon the findings of the district court) and were determined to qualify as aggravated assaults. Thus, notwithstanding Brodie's mitigating factors, 168-months' imprisonment is not "shockingly high" for his participation in multiple separate shootings, including two attempted murders, as well as drug trafficking, in connection with the racketeering activities of a violent street gang. *Muzio*, 966 F.3d at 64.

Finally, Brodie asserts that his sentence was substantively unreasonable because it is twelve months longer than that of co-defendant Westley, even though Westley was the shooter in the attempted murders of Freeman and Lee. As an initial matter, we note that we have "repeatedly made clear that section 3553(a)(6) requires a district court to consider *nationwide sentence disparities*, but does not require a district court to consider disparities between co-defendants." *United States v. Ghailani*, 733 F.3d 29, 55 (2d Cir. 2013) (emphasis added) (internal quotation marks omitted). In any event, in this case, the district court did explicitly consider the "issue of disparities" in sentencing among the co-defendants and explained why Brodie's sentence was longer than that of Westley. Gov't App'x at 1116. In particular, the district court noted that Brodie was two years older than Westley and further emphasized to Brodie, who was involved in more shootings than Westley and "incited others to engage in violence," that: "there's no one involved in this case who was more brazen and had less respect for the law, as evidenced by your communications about these shootings, than you." *Id.* at 1114. We see nothing in the district

court's explanation regarding the comparison of Brodie and Westley, or in its consideration of the sentencing disparities factor, that would place the 168-month sentence outside the bounds of the broad discretion afforded a sentencing judge in balancing the various Section 3553(a) factors. In sum, we conclude that Brodie's substantive reasonableness challenge to his sentence is without merit.

b. Pervis

Pervis challenges both the procedural and substantive reasonableness of his 144-month sentence. First, Pervis asserts that his sentence was procedurally unreasonable because the district court did not consider the negative impact a long sentence would have on his ability to participate in his son's life, and because the district court should have considered the objective of "promoting respect for the law" under Section 3553(a) as a mitigating factor—namely, that a lower sentence might promote respect for the law in the community because it "might help 'unwind decades of mass incarceration.'" Pervis Reply Br. at 10 (quoting *United States v. Brown*, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019)). Second, with regard to substantive reasonableness, Pervis argues that the district court abused its discretion in sentencing Pervis disproportionately when compared to his co-defendants. As set forth below, we find Pervis's sentencing challenges to be unpersuasive.

With respect to procedural reasonableness, Pervis neither challenges the district court's calculation of the Guidelines range, nor contends that the district court failed to thoroughly review the record or to explain its reasons for the sentence. Instead, Pervis argues that the district court failed to "consider socio-economics in crafting a sentence that promotes respect for the law," Pervis Br. at 23, including the impact of substantial sentences on the defendant's family and broader community. Because Pervis failed to specifically raise this objection at sentencing, we

review this procedural challenge for plain error. *United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008). As a threshold matter, before imposing its sentence, the district court explicitly referenced Section 3553(a) and various sentencing factors contained therein, including the need "to promote respect for the law," and noted that "[t]hose are the purposes of a criminal sentence that I'm required to consider under the law." Gov't App'x at 959. The district court further discussed the "promote respect for the law" factor and noted that Pervis has failed to demonstrate respect for the law when filing a false affidavit in connection with a suppression hearing and that "there clearly is a need for this sentence to demonstrate that submitting affidavits with stories that might sound good but just don't square with the facts is serious conduct." *Id.* at 963–64. Moreover, although not discussed specifically in the context of the "promote respect for the law" factor, the district court explicitly considered the impact that Pervis's incarceration would have on his family:

> I want to express my appreciation to Mr. Pervis's family members and friends who came today, because it's just as important for me to hear about the impact that a sentence is going to have on family members.
>
> It's clear that Mr. Pervis has a supportive, loving family, that he has children who care about him and miss him, and that the sentence today and Mr. Pervis's incarceration so far has imposed and will impose a real cost on them.

Id. at 958.

In short, there is no basis on this record to conclude that the district court procedurally erred in its consideration of the "promote respect for the law" factor under Section 3553(a) or the impact that Pervis's sentence would have on others—and certainly there was no plain error with respect to such considerations. In essence, Pervis would have preferred that the district court weigh this factor differently and now asks this Court to adopt his position and remand for further

consideration. However, as we have explained in the context of substantive reasonableness, "[i]f the ultimate sentence is reasonable and the sentencing judge did not commit procedural error in imposing that sentence, we will not second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor." *United States v. Pope*, 554 F.3d 240, 246–47 (2d Cir. 2009) (alteration in original) (internal quotation marks omitted).

Turning to his substantive reasonableness challenge, Pervis also argues that the district court abused its discretion in sentencing Pervis disproportionately as compared to his co-defendants. Our review for substantive reasonableness "focuses on a district court's explanation of its sentence in light of the factors contained in 18 U.S.C. § 3553(a)." *United States v. Gonzalez*, 529 F.3d 94, 98 (2d Cir. 2008). The district court explained that its upward variance from the Guidelines range was necessary because that range "do[es] not account for several serious criminal acts for which I've found that Mr. Pervis is indeed responsible: the shooting of Damien Smith, the shooting at Brandon Shealy's house, [and] supplying guns generally." Gov't App'x at 964–65. Thus, the district court concluded:

> [M]y view is that the guidelines range of 78 to 97 months does not adequately reflect the seriousness of the offense or adequately serve the other purposes of sentencing that I find need to be served here and so . . . I find that a substantial variance above the guidelines range is necessary to serve those purposes and to take full account of Mr. Pervis's criminal conduct, even given how difficult his separation is going to be for his family members.

Id. at 965. The district court further noted that Pervis sent "texts and communications encouraging violence and, indeed, celebrating violence," and that his serious crimes "inflicted enormous harm for well over a year in the city of New Haven." *Id.* at 963.

We conclude that it was well within the range of the district court's permissible discretion to impose the above-Guidelines sentence of 144 months in order to, *inter alia*, adequately account for two additional shootings, including one in which the victim was seriously injured, which were not counted as relevant conduct under Pervis's applicable Guidelines range of 78 to 97 months. Even when balanced against the mitigating factors that Pervis articulated, a 144-month sentence is not "shockingly high" for supplying the guns used in the attempted murder of Freeman, as well as supplying guns to GSB members for at least two additional shootings. *Muzio*, 966 F.3d at 64.

We also find Pervis's contention regarding sentencing disparities between him and his co-defendants to be unpersuasive. Although a district court is not required to consider disparities in sentencing among co-defendants (as discussed *supra*), the district court did explicitly address this issue by comparing Pervis's sentence to those of his co-defendants. In particular, the district court recognized that although Pervis did not pull the trigger in any of the shootings, he knew of the shootings, supplied firearms, celebrated the violence, and was older than his co-defendants. The district court thus imposed a sentence shorter than the sentences it imposed on shooters such as Westley (156 months) and Brodie (168 months), but higher than Ward (97 months) and other co-defendants whom it found to be less culpable. We find no substantive unreasonableness in the district court's sentence, including when compared to the sentences of Pervis's co-defendants, in light of its assessment of the Section 3553(a) factors.

In sum, Pervis has failed to establish that his 144-month sentence is procedurally or substantively unreasonable.

c. Ward

Ward raises both procedural and substantive challenges to his sentence. As part of his guilty plea to RICO conspiracy, Ward admitted to three predicate racketeering acts—namely, drug trafficking conspiracy, Hobbs Act robbery conspiracy, and obstruction of justice based on a 2015 Facebook post in which Ward revealed an individual's cooperation with law enforcement. After holding a *Fatico* hearing, the district court found that Ward also attempted to murder Pharoh Jackson in furtherance of his racketeering conspiracy with other GSB members and that a subsequent Facebook post on March 22, 2016 constituted an additional obstruction of justice offense. Having thereafter reached an advisory Guidelines range of 70 to 87 months' imprisonment, the district court imposed a 97-month sentence.

With respect to his procedural challenges, Ward argues the district court erred: (1) in its assignment of a base level 19 under the Guidelines to the drug trafficking predicate as part of the RICO conspiracy; (2) in its determination that the 2016 Facebook post constituted obstruction of justice under 18 U.S.C. § 1513(b); and (3) in its finding that Ward shot Pharoh Jackson. As set forth below, we conclude that the first and second alleged errors, even if established, were harmless and do not require re-sentencing. In addition, we conclude that there was no procedural error in the district court's finding regarding Ward's involvement in the shooting of Pharoh Jackson. Finally, Ward's challenge to the substantive reasonableness of the sentence is also unpersuasive.

First, Ward contends that the district court procedurally erred in its Guidelines calculation with respect to the drug conspiracy predicate. In particular, Ward argues that, because 20–40 kilograms of marijuana were attributable to him, the drug conspiracy "group" under the Guidelines should have been assigned a base offense level of 16, and not a level 19. Ward asserts that the

minimum base offense level of 19 under U.S.S.G. § 2E1.1 for "underlying racketeering activity" does not apply to each racketeering predicate group, but rather is only applied if the combined offense level for all the predicate acts under the Guidelines' multi-group adjustment is less than level 19.

We review challenges to a Guidelines calculation *de novo*. *United States v. Vargas*, 961 F.3d 566, 570 (2d Cir. 2020). A district court procedurally errs when it improperly calculates the applicable Guidelines range. *Id.* However, "[w]here we identify procedural error in a sentence, but the record indicates clearly that the district court would have imposed the same sentence in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing." *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (internal quotation marks omitted).

Here, we need not resolve the disagreement over the interpretation of Section 2E1.1 because any alleged error was harmless. Even if the drug conspiracy group had been assigned a level 16 (as urged by Ward) and received no units under the Guidelines in the multi-group calculation, Ward's Guidelines range would have remained exactly the same—namely, a total offense level of 27, with a resulting advisory range of 70 to 87 months' imprisonment.[2] In any event, in explaining its sentence, the district court explicitly noted that it would have reached the same sentence under the Section 3553(a) factors regardless of the Guidelines calculation. Thus,

[2] The lack of any impact on the Guidelines calculation arising from this determination is attributable to the fact that, although the district court assigned one-half unit to the drug conspiracy group pursuant to the multi-grouping formula set forth in U.S.S.G. § 3D1.4(b) for a base offense level 19 and thereby increased the overall total to 3 units, Section 3D1.4 provides for an increase of three levels for either 2.5 units or 3 units to the group with the highest adjusted offense level. Thus, even if no units were assigned to the drug conspiracy group based upon an offense level 16, the 3-level increase under the multi-grouping formula would have remained the same.

for each of these independent reasons, any error regarding the offense level attributed to the drug conspiracy predicate is clearly harmless.

We reach the same conclusion with respect to Ward's second procedural challenge—that is, that the district court erred in finding, after a *Fatico* hearing, that the defendant's relevant conduct included obstruction of justice under Section 1513(b), based on a 2016 Facebook post. We need not consider Ward's various procedural challenges to that finding because the obstruction of justice finding based on the 2016 Facebook post did not impact the sentence imposed by the district court. As discussed above, we generally refuse to vacate a sentence where any alleged error "did not affect the outcome of the sentencing proceeding." *United States v. Alvarado*, 720 F.3d 153, 160 (2d Cir. 2013) (per curiam). That is precisely the situation here. The district court calculated the other obstruction of justice finding based upon the 2015 Facebook post (to which Ward pled guilty and that he does not challenge on appeal) to be a level 25, and similarly assigned a level 25 to the disputed 2016 Facebook post. However, the district court then determined that the two obstruction offenses should be grouped together, and concluded that the offense level for that group is 25—*i.e.*, the same offense level that would have been assigned to that group if it contained only the uncontroverted 2015 obstruction of justice. Thus, the total offense level for the obstruction of justice group would have been exactly the same—70 to 87 months' imprisonment—even if the district court had not considered the obstruction of justice offense based on the 2016 post. In any event, as noted above, the district court explicitly stated that "the sentence is ultimately not driven by the guidelines," including the findings with respect to the obstruction enhancements, in this case. Gov't App'x at 826; *see also id.* ("I would impose the same sentence even if I agreed with [defense counsel] that there was no substantial interference with the Government

investigation and no threat to cause physical injury, which were two of the enhancements under the obstruction guideline."); *id.* at 832 (stating in the judgment: "As explained in more detail at the sentencing, the Court would have imposed the same sentence even had it made different Guidelines calculations"). In short, it is clear that the district court's sentence was not impacted by consideration of the 2016 Facebook post and, thus, any error with respect to the obstruction finding relating to that post is harmless.

In connection with the finding as to Ward's involvement in the attempted murder of Pharoh Jackson, Ward argues, *inter alia*, that the district court erred in crediting Jackson's grand jury testimony identifying Ward as the shooter, even though Jackson did not testify at the *Fatico* hearing and, according to Ward, also gave contradictory statements to Ward's counsel and a private investigator in an interview. The government bears the burden of proving facts supporting the application of attempted murder within the Guidelines, and it must prove such facts by a preponderance of the evidence. *United States v. Kent*, 821 F.3d 362, 368 (2d Cir. 2016). Factual findings are, in turn, reviewed for clear error, *United States v. Mulder*, 273 F.3d 91, 116 (2d Cir. 2001), *cert. denied sub nom. Johnson v. United States*, 535 U.S. 949 (2002), including when objections are made regarding the admissibility of alleged hearsay statements, *United States v. Diaz*, 176 F.3d 52, 83 (2d Cir. 1999). Therefore, "our role as the reviewing court under this extremely deferential standard of review is not to decide disputed factual issues *de novo* or to reverse simply if we would have decided the case differently, but rather to determine whether the district court's account of the evidence is plausible in light of the record viewed in its entirety." *United States v. Rizzo*, 349 F.3d 94, 98 (2d Cir. 2003).

As a threshold matter, Ward had no right to confront Jackson at a sentencing hearing to attempt to discredit his grand jury testimony because "the right of confrontation does not apply to the sentencing context and does not prohibit the consideration of hearsay testimony in sentencing proceedings." *United States v. Martinez*, 413 F.3d 239, 242 (2d Cir. 2005). Moreover, the district court did not only rely on Jackson's grand jury testimony in reaching its determination, but rather also explained that "a series of Facebook posts and messages spanning a period of 15 months in which Mr. Ward elaborated on his motive for shooting Jackson, strongly suggested that he himself shot Jackson on September 16, 2015, and made statements suggesting intent to kill." Gov't App'x at 490. In light of the strong deference we afford the district court's evaluation of the evidence presented, we find no error in the district court's determination that such evidence—including, but not limited to, Jackson's grand jury testimony—in its totality proved by a preponderance of the evidence that Ward shot and attempted to kill Jackson. *See United States v. Sampson*, 898 F.3d 287, 312 (2d Cir. 2018) ("Where there are two permissible views of the evidence, the [sentencing judge's] choice between them cannot be clearly erroneous." (alteration in original) (internal quotation marks omitted)).

Finally, we also are unpersuaded by Ward's argument that his sentence is substantively unreasonable because of the district court's upward variance from the Guidelines range. As we have explained, "the extent of the departure from the typical sentence for the type of crime at issue is a significant factor in determining how compelling the sentencing court's reasons must be" to vary from the Guidelines range. *United States v. Douglas*, 713 F.3d 694, 700 (2d Cir. 2013). Here, the district court only imposed an upward variance of ten months from the Guidelines range of 70 to 87 months' imprisonment. In doing so, the district court considered mitigating factors,

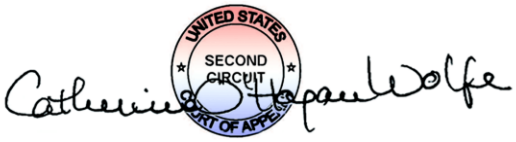
including, *inter alia*, Ward's difficult childhood, even while considering the gravity of Ward's criminal conduct—which included selling drugs, participating in a robbery conspiracy, and attempting to murder Jackson—as well as Ward's role in "celebrat[ing] violence" through his texts and other communications and promoting retaliation within the gang. Gov't App'x at 822. We find no basis to conclude that the district court's 97-month sentence was substantively unreasonable in light of the totality of the information presented at sentencing.

In sum, Ward's procedural and substantive challenges fail to provide any grounds to disturb his sentence.[3]

* * *

We have considered defendants' remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgments of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



[3] We are similarly unconvinced by Ward's contention that the district court should have recused itself at the sentencing stage because it refused to address Jackson's allegation that Ward's counsel had engaged in misconduct by interviewing Jackson outside the presence of Jackson's attorney. Ward's counsel, who denied that Jackson ever informed him that he was represented, was concerned that, "because the Court didn't rule on that [allegation], it le[ft] the impression that the Court may be biased against my client because it's biased against me." Gov't App'x at 771. We conclude that the district court did not abuse its discretion in declining to recuse itself over this issue. The district court made clear to Ward's counsel that "[i]n no way have I made any finding that suggests that I believed Mr. Jackson when he [made that allegation]" and "[w]hether or not that [allegation] is true does not affect any of the rulings I've made here." *Id.* at 772. The district court further emphasized to Ward's counsel that "[i]n no way should you take [the lack of a finding on this allegation] as any doubt that I have about you personally, [or] your integrity," and reiterated that no finding was necessary because it was irrelevant to the district court's sentencing determination. *Id.* at 772–73. In short, there is nothing in the record to suggest any antagonism by the district court toward defense counsel, nor is there any other ground for recusal raised by the district court's handling of this issue. *See United States v. Carlton*, 534 F.3d 97, 100 (2d Cir. 2008).

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: October 20, 2021
Docket #: 19-3746, 19-3826, 20-163, 20-779
Short Title: United States of America v. Westley

DC Docket #: 3:17-cr-171-1
DC Court: CT (NEW HAVEN)
DC Docket #: 3:17-cr-171-2
DC Court: CT (NEW HAVEN)
DC Docket #: 3:17-cr-171-3
DC Court: CT (NEW HAVEN)
DC Docket #: 3:17-cr-171-4
DC Court: CT (NEW HAVEN)
DC Judge: Shea

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
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DEBRA ANN LIVINGSTON
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DC Court: CT (NEW HAVEN)
DC Judge: Shea

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA

vs.

SEDALE PERVIS

- - - - - - - - - - - - - - - - - - x

No. 3:17-CR-171 (MPS)

JANUARY 13, 2020

2:07 p.m.

SENTENCING

450 Main Street
Hartford, Connecticut

BEFORE: THE HONORABLE MICHAEL P. SHEA, U.S.D.J.

APPEARANCES:

FOR THE PLAINTIFF:

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COURT REPORTER: Julie L. Monette, RMR, CRR, CCP
(860) 212-6937

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE COURT: We're here for sentencing in the United States versus Sedale Pervis. The case is 17-CR-171. Let's begin by having counsel state appearances.

MS. COURTNEY KAOUTZANIS: Good afternoon, Your Honor. Jocelyn Courtney Kaoutzanis for the Government. With me at counsel table is Assistant United States Attorneys Rahul Kale and Peter Markle.

THE COURT: Good afternoon.

MR. KOCH: Good afternoon, Your Honor. Theodore Koch for Mr. Pervis, who's seated to my left, and with me at counsel table is co-counsel Michael Brown.

THE COURT: Good afternoon, gentlemen. Mr. Pervis, good afternoon, sir.

All right. So just by way of completing the record, I should point out that Officer Monika Lindo, who authored the presentence report in this case, as well as Officer Mallory Scirocco, of the United States Probation Office, are together with us in the courtroom.

By way of procedural background, Mr. Pervis appeared before me on October 3rd of 2019, and at that time he pled guilty to Count 1 of an indictment which charges conspiracy to engage in a pattern of racketeering activity in violation of Title 18 United States Code Section 1962(d).

A presentence report was prepared for the Court by Officer Lindo on behalf of the probation department. Excuse me

one second.

The initial report was filed on November 13, the final report filed on December 10, both in 2019.

I've reviewed the report. I've consulted with Officer Lindo, and I've reviewed her sentencing recommendation. I have also reviewed the defendant's sentencing memorandum, together with the letters of support from friends and family members. I've also reviewed the Government's sentencing memorandum, together with the attachments, which include photos, Facebook and text messages, and videos. I have also reviewed a reply memorandum filed by the defendant.

In addition, I should point out that I granted the Government's motion for forfeiture as to certain firearms and ammunition that are described in the plea agreement.

All right. And, Attorney Kaoutzanis, has the Government provided notice to comply with the victims' rights statute?

MS. COURTNEY KAOUTZANIS: Yes, Your Honor. And Ms. Patricia Council, who I know Your Honor has heard from before, is here and would like to speak today as well.

THE COURT: Very well. We'll make sure that happens. Let's do this actually: What I think I'm going to do is go through the presentence report, make some findings with regard to that, and then I think we'll ask Ms. Council to speak, if it's okay with her, just before I ask the lawyers to speak.

Would that be all right with you, Ms. Council? All right, very well.

So let's turn to the presentence report in this case.

Beginning with Attorney Koch, Attorney Koch, can you tell me, have you had time to go over the presentence report and discuss it with your client, Mr. Pervis?

MR. KOCH: Yes, Your Honor.

THE COURT: All right. And, Mr. Pervis, did you have a chance to read the document, the presentence investigation report that Officer Lindo, who met with you, prepared?

THE DEFENDANT: Yes.

THE COURT: And did you go over it with your lawyer?

THE DEFENDANT: Yes.

THE COURT: And do you understand the presentence report?

THE DEFENDANT: Yes.

THE COURT: All right. Attorney Koch, at this time, putting aside the guidelines objections, which we'll get to later, do you have any objections to any of the factual statements in the presentence report?

MR. KOCH: Just one, and I wouldn't even say it's necessarily an objection. The date of arrest at the first page is August 10th.

THE COURT: Yes, I'm going to fix that. That should be May 1, 2017; is that right?

MR. KOCH: Yes.

THE COURT: Anything else?

MR. KOCH: No. That's all.

THE COURT: And did the Government have any objections to the factual statements?

MS. COURTNEY KAOUTZANIS: No, other than the same issue I had spoken with the probation officer about, nothing.

THE COURT: I have a few corrections actually, and I've already provided them to Officer Lindo. But for the record, first, the face sheet, the date of arrest should be changed, as both counsel have pointed out, to May 1, 2017. The docket actually reflects that Mr. Pervis self-surrendered on that date. So that's the first one.

In paragraph 7 -- most of these are quite minor. In paragraph 7 I've asked Officer Lindo to change the language in the second line to "more than nine levels." So it would say in the second sentence, "Because Group 9 is more than nine levels less serious than Group 2," etc.

Is there any objection to that change?

MS. COURTNEY KAOUTZANIS: No, Your Honor.

MR. KOCH: No, Your Honor.

THE COURT: The next one is paragraph 9. This is just a nit. In the first line it should say, "Mr. Pervis has also agreed to forfeit his interest in the Ruger." So that's paragraph 9, first line.

And then moving on to paragraph 50, 5-0, the date in the one, two, three, four, fifth line should be changed to July 21, 2016.

Okay, and then paragraph 81, without getting into the substantive guidelines issue just yet, in the last sentence is inaccurate. Mr. Pervis was not found to have committed perjury. So I'm going to order that that sentence be deleted. "As such, Mr. Pervis was found to have committed perjury," that sentence should be deleted.

Any objection to that change?

MR. KOCH: No, Your Honor.

MS. COURTNEY KAOUTZANIS: No, Your Honor.

THE COURT: Okay. So as I have in the other, with respect to Mr. Pervis's co-defendants, there's a series of findings I'm going to make in addition to adopting the statements in the presentence report as my findings of fact. I do adopt the factual statements in the presentence report as my findings of fact but modified and supplemented with the following findings:

The presentence report sets forth a thorough narrative of the various shootings that are traceable to GSB, of which Mr. Pervis was either a member or an associate. But as with each of the other defendants, I'm required to determine which of the shootings and other conduct could be attributed to Mr. Pervis for sentencing purposes.

Under United States versus Studley, 47 F.3d 569, and United States versus Johnson, 378 F.3d 230, a District Court must make two particularized findings before a defendant can be held accountable for his co-conspirator's acts as relevant conduct under the United States Sentencing Guidelines: first, that the acts were within the scope of the defendant's agreement; and second, that they were foreseeable to the defendant.

In the Johnson case, the Second Circuit held that it was not enough that the defendant had knowledge of his co-conspirator's murder of another person or that he was aware of the scope of the overall operation; rather, there had to be a finding by the District Court that the murder was within the scope of the specific conduct and objectives embraced by the agreement between the defendant and the co-conspirator.

In United States versus Mulder, M-U-L-D-E-R, 273 F.3d 91, the Circuit held that a District Court could not find that a murder was foreseeable to a defendant solely because members of the conspiracy committed violent acts on other occasions.

Applying these principles, I find that Mr. Pervis is responsible for the attempted murder of Marquis Freeman, as the parties agreed to in the plea agreement. I find that the shooting on May -- the shooting of Mr. Freeman on May 27, 2016, was, in fact, an attempted murder. The evidence at the Fatico hearing, Mr. Westley's admissions at his change of plea, and

Mr. Pervis's admissions at his change of plea all make clear that GSB members, including Mr. Pervis, intended to kill Mr. Freeman and that Milton Westley shot Mr. Freeman in the head at close range after Mr. Freeman was on the ground, having previously been shot by Mr. Westley in the stomach.

Mr. Pervis admitted at his change of plea that he saw Mr. Brodie have an argument with Mr. Freeman a few month prior to May 2016. He admitted that he knew before May 27, 2016, that GSB members were planning to shoot Mr. Freeman in order to kill him. He admitted he provided Mr. Westley with the firearms used in the shooting of Mr. Freeman. He admitted Mr. Westley called him on multiple times on the evening of the shooting of May 27, 2016. And he admitted, and the evidence is clear, that bullet cartridges found at the scene matched two firearms later seized from Mr. Pervis's home.

Therefore, I find that the attempted murder of Mr. Freeman was within the specific conduct agreed to by Mr. Pervis and reasonably foreseeable to him.

After the attempted murder of Terrence Lee on the same day, I find that Mr. Pervis was not personally involved and that there is insufficient information before me to allow me to conclude that he was present or was even aware of any plans to attempt to kill Mr. Lee.

Though the same firearms provided by Mr. Pervis were used to shoot at both Mr. Freeman and Mr. Lee, I cannot find

that it was within the scope of the specific conduct agreed to by Mr. Pervis to attempt to kill Mr. Lee.

As to the shootings at Mr. Shealy's house, as noted, I adopt the findings in the PSR as my factual findings. I previously found that those shootings were not attempted murders. However, I find that the shooting at Mr. Shealy's house constitutes aggravated assault attributed to Mr. Pervis, at least the one on January 23, 2016.

There were a number of calls between Mr. Pervis and Michael Belle in the early morning of January 23, 2016, around the time GSB members were shooting at Mr. Shealy's house. Later, on January 23rd, 2016, other GSB members sent Mr. Pervis a video of them shooting at the house and yelling the name "Crizz," which was the nickname for Mr. Shealy. The spent shell cases found at the Shealy house on multiple occasions matched firearms with -- matched firearms found with Mr. Pervis.

Even if Mr. Pervis was not present at these shootings, the fact that GSB members used his firearms, called him around the time of one of the shootings, and sent him a video of the shootings all provide reliable evidence showing that the shooting was within the specific conduct agreed to by Mr. Pervis and reasonably foreseeable to him.

Aggravated assault does not qualify as a racketeering act; so it may not be considered an underlying offense

of Mr. -- of Mr. Pervis's RICO conviction, nor may it be considered relevant conduct for purposes of his guidelines calculation.

In United States versus Flores, 912 F.3d 613, the U.S. Court of Appeals for the D.C. Circuit held that criminal acts that do not constitute racketeering acts also do not constitute relevant conduct for a racketeering conviction even if they were committed within the scope of a conspiracy. While this aggravated assault, therefore, does not affect Mr. Pervis's guidelines calculation, I may and will consider it as background information, along with the Section 3553(a) factors, or as part of the consideration of the Section 3553(a) factors.

I also find that Mr. Pervis is responsible for aggravated assault against Damien Smith on February 6, 2016, based on the factual information set forth in the presentence report. Mr. Smith was shot in the back and was reported to be in critical condition. He sustained damage to his small bowel and right colon. The facts in the presentence report are insufficient to support a finding of specific intent to kill, but the casings recovered from the scene matched two firearms found with Mr. Pervis.

In addition, about two and a half hours before the shooting, Mr. Pervis received a text message asking him, "So when you bringing it?" referring to the firearm. This evidence suggests that the shooting of Damien Smith was within the

specific conduct Mr. Pervis agreed to and was reasonably foreseeable to him. Again, aggravated assault does not qualify as a racketeering act; so it does not affect Mr. Pervis's guidelines calculation. But I may consider it as background information, along with the Section 3553(a) factors.

I also adopt the presentence report's statement regarding Mr. Pervis's participation in the drug conspiracy. I find that 20 to 40 kilograms of marijuana are attributable to him based on his admissions in the plea colloquy.

Although the presentence report describes other shootings and characterizes them as attempted murders, I do not find that the shooting of Pharoh Jackson, the shooting of Damion Phillips, or the shootings of James and Donald Harris were attributable to Mr. Pervis for purposes of sentencing. I, therefore, need not decide at this time whether they were, in fact, murders -- attempted murders, excuse me.

Although spent cases found at the scene of the April 3, 2016, shooting of James and Donald Harris matched two of the firearms seized from Mr. Pervis, there is no other evidence that I'm aware of that Mr. Pervis specifically agreed to this shooting.

The information in the presentence report simply does not provide enough of a basis for me to make specific findings that these additional shootings were within the scope of the specific conduct agreed to by Mr. Pervis. I may, however,

consider the actions of Mr. Pervis related to these shootings, such as generally providing firearms or encouraging violence in text messages, as part of his background and characteristics, and I will consider the overall risk presented by his role of being a supplier of guns to GSB members even for shootings as to which there is no specific evidence that he had specifically agreed to them.

So with that, I'll move on to the plea agreement. I accept the signed plea agreement that was filed on October 3, 2019. I'm satisfied that the agreement adequately reflects the seriousness of the actual offense behavior and that accepting the agreement will not undermine the purposes of sentencing.

All right, Mr. Pervis, you face the following maximum and minimum penalties in this case: You face a maximum term of imprisonment of 20 years. You face a maximum term of supervised release of 3 years. If the Court were to impose probation, it would be for a minimum of 1 and a maximum of 5 years. You face a maximum fine of $250,000. I'm required to impose a special assessment of $100. Restitution is mandatory in this case.

Attorney Kaoutzanis, does the Government -- is the Government aware of any information by which someone is seeking restitution?

MS. COURTNEY KAOUTZANIS: No, Your Honor.

THE COURT: All right. So although it is mandatory,

since there's no information, I will not be ordering restitution in this case.

I earlier granted an order of forfeiture with respect to ammunition and firearms. That order will become final as to Mr. Pervis with the judgment in this case.

Is there any objection or correction by counsel to my statement of the statutory penalties?

MS. COURTNEY KAOUTZANIS: No, Your Honor.

MR. KOCH: No, Your Honor.

THE COURT: All right. We'll now move into a discussion of the sentencing guidelines.

Mr. Pervis, one of the things that I'm required to consider, in deciding on your sentence, is a body of advice called the United States Sentencing Guidelines. As I think I explained to you when you pled guilty, the guidelines are published in a manual. The current version of which, the one that applies today, is the one I'm holding up now. This manual is published by the United States Sentencing Commission, an agency in Washington.

The guidelines provide me with guidance or recommendations on what would be a fair and just sentence in your case. The guidelines examine different categories of crimes.

Here there's a guideline for racketeering-type crimes, conspiracy to commit racketeering-type crimes. The guidelines

direct me to consider the characteristics that might accompany that type of a crime and also to what extent, if any, the defendant has a criminal record.

The results of the process of applying the guidelines is to point the Court to a range of months of imprisonment that the Sentencing Commission has decided would be appropriate in a case like yours. I am not required to sentence you within that range, but I do have to calculate the range accurately and consider it, along with other factors, when I sentence you.

All right. The manual that I'll be using is the one I just held up, which is the one effective November 1, 2018.

The RICO guideline is 2E1.1 Under that guideline, each underlying act of racketeering is treated as a separate count of conviction. These individual acts and separate counts of conviction charging attempted murder and drug conspiracy offenses are groupable under Section 3D1.2 of the guidelines and, therefore, require what's called a multiple-count computation under 3D1.4.

The parties in the plea agreement indicate that there are two underlying acts of racketeering that have to be considered in calculating the guidelines range. I agree with that assessment. First is the conspiracy to distribute narcotics, and second is the attempted murder of Marquis Freeman on May 27, 2016. As I said before, the aggravated assaults do not count for guidelines purposes.

The drug conspiracy carries a base offense level of 16, because the amount of marijuana equivalent in this case is at least 20 but less than 40 kilograms, but under the RICO guideline, the minimum offense level is 19. So the offense level that is attributed to this particular activity, the drug conspiracy, is 19.

With respect to the attempted murder of Marquis Freeman on May 27, 2016, the base offense level is 27 under Section 2A2.1(a)(2). Four levels are added under subsection (b)(1)(A) of guideline 2A2.1 because Mr. Freeman sustained life-threatening bodily injury. This was apparent at the Fatico hearing in which Mr. Freeman testified on November 28, 2018. And that makes the total offense level applied to the attempted murder a total of 31.

Now, the parties disagreed, and also defense counsel disagreed, with the presentence report with regard to two potential adjustments. One was a role adjustment. The presentence report indicates that Mr. Pervis should receive an additional four points for being an organizer/leader, and the other was an obstruction of justice adjustment, which relates to Mr. Pervis's affidavit and some testimony by a witness at the suppression hearing.

I have reviewed the parties' briefs with respect to that issue. I've reviewed the presentence report.

Do the parties wish to be heard further on that?

MR. KOCH: I don't really have anything to add beyond what I wrote, Your Honor.

THE COURT: Okay.

MS. COURTNEY KAOUTZANIS: Your Honor, I mean I think it's also covered in what I wrote, but if Your Honor has any specific questions, I'd be happy to address them.

THE COURT: The only question I have is we were not able to find any case law in the Second Circuit that imposed an organizer/leader enhancement simply for being a gun supplier and also being, you know, somewhat older. So, you know, unless you can persuade me that the circumstances are missing something here, I'm not inclined to impose that one.

MS. COURTNEY KAOUTZANIS: Your Honor, I also looked at case law that would be specific and on point and was unable to find one. I think, when thinking about this case, the fact that -- the role that Pervis played and his conduct during the suppression hearing, Mr. Pervis played, are something that distinguishes him from the other defendants. So whether they're enhancements or just a grounds for variance, they're just things that the Government wanted to point out to the Court and have the Court consider.

THE COURT: All right. Very well. I do not find that the organizer/leader enhancement should apply for guidelines purposes. It's true that Mr. Pervis was a good deal older than his co-defendants and should have been more mature and somewhat

wiser. It's true sometimes someone who's older is viewed as a leader. I don't -- I don't think, based on what I know about the case, that that really applies here for reasons I'll explain.

It's also true that Mr. Pervis was the gun supplier for these shootings, in fact, more shootings than the ones that I've mentioned. The Government has evidence, NIBIN evidence, ballistics evidence, that make that very clear. But as I've suggested, I don't find that these two facts by themselves warrant an organizer/leader enhancement or even a manager/supervisor enhancement.

The evidence that I'm aware of does not suggest that Mr. Pervis played a more prominent role in the overall violence inflicted by GSB than, say, Mr. Brodie or Mr. Westley. Perhaps even Mr. Ward.

And nor did I see any evidence that other GSB members significantly deferred to Mr. Pervis. They did sometimes seek his permission for guns or to use the guns, but I didn't get the sense that he was imposing conditions or directing them.

There's no evidence that he profited more from other -- than others in the group, that he was more involved in the recruitment. These are things that the guidelines ask the Court to consider.

With regard to obstruction of justice, I also do not find that this enhancement is warranted. I did -- I think this

is a closer call. As for the affidavit, I would point out, first, that at the suppression hearing, his then lawyer, Mr. Mastronardi, withdrew the supplemental motion to which the affidavit was attached. That by itself wouldn't be -- won't be a basis to deny the enhancement, but it does suggest that I didn't rely on it. And I did reread my ruling, and I'm not aware that I relied on it at all. It really doesn't suggest that I did.

As to the portions of the affidavit that are indeed inconsistent with my factual findings from the motion to suppress hearing, such as the statement in paragraph 5 of the affidavit that Mr. Pervis was unaware -- well, which suggests that Mr. Pervis was unaware; it doesn't say it -- that the police were approaching before he entered the house, it's true that I do not find that statement to be credible for the reasons set forth in the ruling.

But I also acknowledge that events were moving quickly. Even the officers acknowledged that. They took place in matter of seconds.

And in these circumstances I'm going to heed the caution set forth in application Note 2 of the relevant guideline, 3C1.1, that the Court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and that not all inaccurate testimony or statements necessarily reflect a

willful attempt to obstruct justice. In other words, I'm going to give Mr. Pervis the benefit of the doubt on this issue.

I also do not think, although I do not think that Mr. Lewis was truthful at the hearing, and that was a witness called by Mr. Pervis, I'm not aware of any evidence that would suggest that Mr. Pervis influenced Mr. Lewis's testimony or asked him to lie.

So in light of all this, I'm not going to make the obstruction of justice enhancement.

So I'm then left with the two groups. Under the grouping rules, one unit is assigned to the group with the highest offense level, which is the attempted murder, but groups that are nine or more levels less serious, which would be the drug conspiracy in this case, are disregarded because there's only one unit. There's no add-on, and the combined offense level is a total of 31.

Mr. Pervis has demonstrated that he's accepted responsibility for his offense and has assisted authorities in the investigation and prosecution of his own misconduct by timely notifying them of his intention to plead guilty, and so a total adjustment of minus three points applies as long as the Government makes the requisite motion.

MS. COURTNEY KAOUTZANIS: We do, Your Honor.

THE COURT: All right, and that motion's granted. The resulting guidelines -- the resulting offense level is 28. The

resulting guidelines range is 78 to 97 months of imprisonment, 1 to 3 years of supervised release. Under the guidelines Mr. Pervis is not eligible for probation. The fine range is 25,000 to $250,000, and the special assessment is $100.

Is there any objection, other than the objections that have already been preserved? Mr. Kale.

MR. KALE: Your Honor, only briefly on the two-point enhancement for obstruction. Just -- I know Your Honor knows this already, but just to be clear, going through chronologically, Mr. Pervis had filed a motion to suppress everything in the house because he said knock and announce hadn't occurred.

THE COURT: Okay.

MR. KALE: My response initially was, well, if you have a hearing on that, you won't have a hearing on the pink iPhone because that was seized in another place.

At that point Mr. Pervis submitted an affidavit, and that affidavit is the affidavit that said these police officers walked into the house, picked up the iPhone, and violated his -- the rights of the second-floor homeowner.

Without that affidavit, we wouldn't have gone into that second part of the hearing. In other words, we would have stopped at the knock and announce and moved on.

We had to then go continue into the warrant, into the second-floor part, and we had to present evidence that Mr.

Pervis came out. After we presented evidence, Mr. Mastronardi withdrew his motion.

So I think to a certain extent, yes, he withdrew the motion and Your Honor did rely on it, but it did cause us to present evidence. And I think after we presented evidence, Mr. Mastronardi, and I can't read his mind obviously, but he realized there was a problem with what he had said because he wasn't prepared to show any other evidence contrary to what the police officer had testified to.

So with regard to his affidavit, our main concern is that his affidavit got him a further hearing. And then at that further hearing, he, I think, himself, realized that there was no truth to his affidavit. That's really the reason we were saying there was an obstruction of justice, because there was a, I could say, longer hearing than necessary and more evidence had to be presented.

In fact, we presented an entirely third witness, Fulk, because he was up on that second floor. We would not have needed to present him but for the allegations about the second floor.

So we think it went above and beyond simply it was a fast-paced moment. He, after seeing our response that he has no standing to challenge the pink iPhone search, produced the affidavit that was in our eyes blatantly false, Your Honor.

THE COURT: Okay. Hold on a second.

But we had a one-day hearing on the whole thing.

MR. KALE: We had a one-day hearing. I mean there was the back-and-forth I mentioned with regard to filings, but in the -- it would have been potentially a half-day hearing, Your Honor. We went into a whole second part of the -- as I said, we called a third witness onto the stand who wouldn't have been necessary just for the knock and announce portion. For that portion, he merely repeated what then Lieutenant Healy had talked about.

THE COURT: I'm going to cut you off. I'm going to be perfectly honest with you. I don't remember the testimony well enough to make a credibility finding with respect to the pink iPhone. I'm not in a position to do that. Maybe that's my bad, but, yeah, I'm not in a position to do that.

I never ruled on that issue. I didn't have to. So there we are. All right? But thank you for the clarification.

All right. So any other comments as to the calculation of the guidelines range?

MR. KOCH: No, Your Honor.

MS. COURTNEY KAOUTZANIS: No, Your Honor.

THE COURT: Okay. All right. So we've now kind of reached the heart of the matter. For folks in the audience -- I see that Mr. Pervis has friends and family here -- welcome. And I know that Ms. Council's here. There are others here. Welcome to you.

So the first parts of a sentencing, especially a somewhat complicated sentencing like this, really are mostly about the law and can sound a little bit technical, but we've now kind of reached the heart of the matter.

First I'm going hear from Ms. Council, who is a victim in this situation. And then I'm going to hear from Mr. Koch, who's Mr. Pervis's lawyer. And then if Mr. Koch wants to present any speakers, he can do that. That's up to him. If Mr. Pervis wants to speak, he can do that. That's up to him.

And after that's done, I'm going to hear from the Government. After that, I will take a short recess to reflect on everything that's been said and collect my thoughts. And after that, I will return to impose sentence. So we have a ways to go yet.

First I'm going to hear from Ms. Council if she's ready, if she would be willing to come up.

Welcome, again, Ms. Council.

MS. COUNCIL: Hi. First I want to start by saying that I want to wish everybody a happy new year that we all entered, 2020. It's a year probably too in my thoughts that I felt like I might not have been here to be here. I thank God Almighty first of all, my Lord, that I am here.

I'm basically here because of the way that I'm feeling and that the way my life has been since this incident. I don't feel that I should be here, but I didn't put myself here. The

actions of other peoples done this, which I'm not really -- happen since July 21st of 2016 that I have not really been able to deal with this.

I know that I'm always going to believe that I was an innocent bystander in this situation. Still it has cost me so much in my life and where I can't even -- you know, I'm trying to deal with my life as it is.

With this situation, I don't even want to be here in this courtroom for none of this because I shouldn't be here, by a person just being in her home and not knowing what is going on in the world out there, all this was going on, that I had to be involved in this. But I just want to let the Court know and the people know that, in this situation, how it affected me and the things that I have lost, and I could have also lost my life through this. And they probably wouldn't even know that that happened to me.

But it's just like with the acts of violence and stuff, all this like need to stop because of a person like myself that has nothing to do with this situation shouldn't be here with this and that if people wasn't out trying to hurt each other and they're going to hurt each other, get revenge, whatever the situation was and is, I wouldn't be here right now for this situation.

Like I said, I thank God that when that bullet hit me in my chest, just by me closing my blinds in my home, that it

didn't really take me out, but it just pretty much made me stronger. And, um, to be able to come in here and stand in front of everybody and speak, it's taking a lot out of me as well. But I just -- that's the type of person I am. I've always been a strong person.

And I'm glad I was strong enough to survive what happened to me and that I am able to speak in the courtroom this day and will never have to speak when something is done wrong, I will stand up for myself and anybody else for the right of things because this is -- this is just totally wrong. And this, like I said, shouldn't never happen.

My family, we -- they kinda don't even know who I am some days. I don't even know myself because I can never change this what happened. But all that are involved in this have a chance to change and, you know, that maybe -- I'm not here to sentence. I'm not here to judge. I'm not that type of person.

But throughout this maybe they can learn, learn from each other that the violence and stuff, actions they're taking against each other we need to think first before we do things that we do, because you don't know what kind of justification comes out to hurt another person, such as me.

They have a chance to change their life and do better. I'm going to be this way for the rest of my life that this happened to me. My scars, the things I lost throughout this shooting, the rehab I went through, the pain and suffering I

went through, all because of something that I had nothing to do with. And I just want them to know that this is how I hurt. That's how I'm living today.

And I just want maybe 21, 22 years go by that I can have a better year than what I've been going through since July 21, 2016, that changed my life pretty much forever. That's pretty much it.

THE COURT: Thank you very much, Ms. Council. I appreciate you coming today.

All right. Mr. Koch?

MR. KOCH: Thank you, Your Honor. Before I start, may I confer with Mr. Pervis?

THE COURT: Absolutely. Please take your time.

(Pause.)

THE COURT: Give me one second.

MR. KOCH: Of course.

(Pause.)

THE COURT: Okay. Go ahead.

MR. KOCH: When Mr. Pervis pled guilty in front of Your Honor, there's one question that you asked and that he answered that jumped out at me. And that is how old he was when he joined the GSB. He said he was 16.

On May 1st, 2017, when he was arrested, he was 24. As Your Honor knows, that age range is an age range of maximum change and ruckus, impulse seeking, and failure to see the

long-term consequences of one's actions.

I know that Mr. Pervis was older than some of the other people in this group, but he was not that much older. And he was still within the age range where you're not -- your brain isn't fully online.

He's been in prison now for two years awaiting this day. He has always, with me, been quiet and respectful, as he was described in the PSR. He goes through periods of higher and lower stress, and he does his best to contain them.

He is a man of few words. He probably won't speak much today. He would probably prefer not to speak at all, but I told him that you would probably want to hear something from him. So I think he is going to speak.

I've been to his family's home a few times. I understand the way New Haven is. I understand that there are -- there are plenty of people who are law-abiding citizens, Ms. Council, who have been through, you know, terrible things. It is a difficult cycle to deal with, and it is not a cycle that we can fix within this courtroom, any of us.

I think my role here is mainly to remind the Court, and I feel like I have the force behind me of the living tissue that still exists whenever you separate a man from his family. If you think about prisoners generally or criminals generally, it's pretty easy to just say, yeah, those guys deserve to be where they are. But whenever you take a granular focus and you

see one person and you look really at what brought them to where they were and where they're going in the future, who they're connected to, their parents, their grandparents, their children, their friends, there is never a moment when they're not connected to those people, people on the outside.

And that part of the cycle of constantly separating people from their families, for a good reason for a while because of what they've done, but for extended periods of time is -- there's a certain period at which there are diminishing returns on the benefit of the length of a sentence.

And I know that Your Honor declined to apply the enhancements, which makes a profound difference in the guidelines range that Mr. Pervis is facing, and that -- I'm not -- I think that it's helpful to, at this point, also through 3553(a), kind of clear away the table all of those possibilities that could have been and all of the sort of machinations of the guidelines and just sit back and think, what really is the right sentence for this person?

I think because he was so young and vulnerable when he got into the gang way of life and was removed from it right around the time when you would hope that he'd be getting out anyway, that he should continue to get the benefit of the doubt that he can reform, rehabilitate, and rejoin society in not too long of a time and not have those extra few years at the end where he might be just ready to get out and start working but

he can't because he's got this long sentence, there's no parole, you know, limited early release, he's not RDAP eligible, things like that.

His son, Sedale, Jr., is 10? He's 10. So if all goes well, in eight years he'll be graduating from high school. It would be nice if Mr. Pervis could be there.

So I'm going to ask his family members to speak in a moment and then him, but I'm going to ask Your Honor to impose the -- a sentence at the low end of the guidelines range that you found, 78 months. Now I'm going to --

THE COURT: Welcome, ma'am. Please step forward, if you could step right up to the microphone, please.

Good afternoon. If you could just give us your name and your relationship to Mr. Pervis?

MS. HILL: My name is Edith Hill, and I'm Sedale Pervis's mother.

THE COURT: Welcome.

MS. HILL: Thank you. I want to say to the lady over here, I apologize about what happened to you and for all the other people. But my son Sedale, I really need him to be home with his son. His son and his daughter, they really need him. It just hurts so bad.

Every day they come to my house every day, "Nana, Nana, when my dad coming home?" they ask. And I don't have an answer for them. The only thing, I just wait for his phone

call.

And his daughter, who is just, "Oh, when my dad come home, I'm going to jump on his head. I'm going to pull his ears." And I say, well -- keep saying, "When? When?" And the only thing I could just keep telling her, "Soon."

But they really miss him, and they love him. He been in their life for their life.

I know people make mistakes in life, but I really need my son to come home. I really miss him. He just need to be there for his children.

I know -- I'm pretty sure everyone in here have children, and no one want to be missing from their parents. It's like a lot of kids grow up without their father. But he's just a great dad to them. He's always -- he talk to his son.

He's -- he love -- my son, he, um, loves school. Well, before they even arrest -- arrested him, he was going to school for his CDLs. He was about to get his license even when the lady had called me, and I had to go in and explain to them that he couldn't get it because, um, they had arrested him.

Just please just have mercy on my son. Please let him be there for his kids for their graduation. That's all I have to say.

THE COURT: Thank you very much for coming. Thank you.

Welcome, sir. You can step forward. Thank you. Good

afternoon.

MR. SHERMAN: Good afternoon, Your Honor. My name is Michael Sherman. I'm his cousin.

THE COURT: Okay.

MR. SHERMAN: I just want to say I never met the lawyer before. I don't know nothing about this case. I just know about my nephew. And I keep hearing these cases. Everybody keep saying he joined a gang at 16, GSB, bah, bah, bah.

I just want to say this. He has a baby by one of the defendants at the age of 16. That's how they tied in with family. Everybody keeps saying they're more like a gang. It was more like a crew, if you ask me. When you're from that neighborhood, it's pressure to hang with certain people.

He was going to work. He was a working man. Even his job knew when he was in trouble because of the way he carried himself. His job still was willing to come down here and verify, say, look, he's a good young man. He was probably caught up in the wrong things.

Now, I don't know all the situation what he's been doing, but I just want to state this for the record: He has a baby by a couple of -- by the defendant, which I think she's present, and all my nephews and my son is all present on his behalf.

Sometimes who you hang with you are judged with by the

person that you carry. I tried to teach my son that. Sometimes you can't hang with all the people you think is your friend because that will click you in and you'll be connected to that. And I didn't want to see him be a part of that.

Now, I know he is on some phone calls and messages and stuff like that. And on the behalf to the lady over here, I never met her, I never heard anything about the situation of the case, but on his behalf and my behalf, I apologize to what happened to you. And I'm quite sure that he would never point a gun at anybody. I can just state that on the record right now.

He's not no kid that picks trouble. He's not no kid that goes out and seek trouble. He's more like a kid that try to find his way on his own.

And I've got a brother that's in jail. He's doing 30 years right now, and I love my brother. My brother belongs in jail because of the way he carried himself.

I got another brother that's younger than me. He's not wrapped too tight, but he's doing good. And I have two sons and nephews out there. And I'm trying to teach them the right way.

But sometimes by the people -- you're judged by the people you hang out with. And I understand that he said, Oh, well, give me the gun. Give me this. Sometimes it's peer pressure on some of these kids out here to do that kind of

stuff.

And I'm not saying that making that for no excuse. That's no excuse to do what he did or be a part of what he's done.

But my point is, what I'm trying to say, he -- to me, he's more like a kid that's caught up in a storm. And when you don't have no direction, which he probably -- his father is not -- I know his father. His father's not the kind of role model that talked to his son direct.

Many times I talked to his father and said, "Listen, you need to get down here and talk to your son, control your son, because he needs guidance."

He was 16 years old when he had his first baby, 16 years old. That's why GSB is combined together. That's how they all know each other, because they're all cousins and family.

It's not like, "I know this guy. We click. We cruise." It's not like that. I know the paper say that, but it's not like that. I know what's in the street, and I know how it's out there, how they carry themself.

My point is, I'm trying to say, look, he did wrong. I'm not trying to sugarcoat it. He's caught up in some bad stuff.

But I want to say for the record he is not a bad kid. He's been working the last two, three years before he got

arrested. His job was be able to come down and testify on his behalf because they know what kind of character he was when he was working with other people. He didn't just care about his job. He cared about the next person. He was positive. He was trying to get off that stuff.

But it's like a little too late. You know what I'm saying? You got to be held accountable for the things you did.

But as far as, Miss, what happened to you, I'm quite sure he wouldn't have want that to happen to her. I'm guaranteeing you.

And I just want to say for the record that his kids, I also carry his -- baby-sit his daughter and his son. They love him. They miss him.

I know what he did he got to give account what he did, but I'm just -- I'm just asking mercy on my account, his family account, and his, and mercy for what's going on out there in the streets like that.

I know it's not going to end today. You know what I mean? We got to go home and deal with the same people he's dealing with.

And I'm glad that my son and my other nephews are here to see what's happened. When you talk on the phone and you mess around with this kind of stuff, you get involved in it, that's all one conspiracy and because what you say on the phone and what you do, you got to be caught for those actions, that

kind of stuff. So you got to be careful for that kind of stuff.

So I just want to say on his behalf that I miss him. I never spoke to you. I never talked. I never even seen him without. I can't really turn around and look at him because I know what kind of character he is. But I hate the fact what he's caught up in.

I just want to come here today. I took time off my job. I did the town marbles at the end of the building. So I know what I can do for him if he comes out. I can get him a job, stuff like that.

But as far as I just wanted to just state for the record I miss him and I apologize for what happened to the people that's involved in it.

But, no, to me, he was never a leader of no gang. He was never a leader of somebody who said, Oh, you go do this. He doesn't do that. He just say, Give me that. And he won't say nothing. He doesn't communicate. As he probably said earlier, he doesn't even talk like that.

But sometimes you need to speak up because, you know, if that person does something, I agree, that does make you a part of it. You know what I'm saying? But that's more like what I see and I hear.

And I've been hearing about this case for three or four years, and I never came. I never talked to him. And I

never really talked to them. You hear one story. Unless you know what's going on, you're not going to know what's going on.

I came here today. I took time off my job, and I came here to speak. And I just wanted you to know that's where I am. That's what I feel about that. And also, again, I apologize what happened to her.

THE COURT: Thank you very much for coming, sir. I appreciate it.

Welcome, ma'am, if you would just step up to the microphone, give us your name and your relationship to Mr. Pervis.

MS. WILLETT: I'm Donna Willett. I'm Sedale's son's mother. And to back up what his cousin said, it's not a gang. That's my child's father, and the other people who was arrested is my brothers. Um, Sedale --

THE COURT: Mr. Brodie and Mr.?

MS. WILLETT: Westley. So yes, he is older than them, because I'm their older sister, and I was with him. Um, but I guess, you know, like he said, in the neighborhood --

THE COURT: Take your time.

MS. WILLETT: Um, when after my older brother was killed, Sedale took his -- he started looking out for my brothers. And some situations, yes, you know, tell him like, you know, you're older than them. You can't get involved with them.

But there was times living in areas where we did live that once they knew that my older brother wasn't present, they seen it as a weak vessel. And a lot of the young kids that comes in here that was here on the stand, they used to be outside our house after my brother died, used to be outside our house, throwing stuff, messing the windows. They were breaking into the cellar and basement.

And I ain't going to lie. I used to go and tell him that I'm scared. There's a lot of guys in the front of the house trying to get in here, you know. And he'll come, and they'll run, you know. You know, but it's because it's an older body present, but they'll run.

But I never thought him being a protector or seeing a family for his family such as me and his son and him looking out for my brothers will land him in this position for him to be locked away.

And, yes, he is a good dad. Never -- our dads is not there. But never for a moment did my child ever question who his father was because he was there every step of the way. He's there.

And even when we did move to Townsend Ave. to that new house or whatever, they're picking up. He's not just a gang member, no, he's not. He's my child's father, which makes him family.

He'll come pick my baby up for school, and he'll bring

my little brothers, which is Westley and Brodie. He'll bring them to school. When he come pick up our baby to go to school, he'll make them get up. Come on, let's go. Bring the baby. Get dressed. I'm on my way. Get dressed.

He did stuff like that. He did stuff like my mom, when my mom car was down, he'll bring her to work or pick her up, take out the trash and stuff like that. He did stuff like that.

So when everybody say he's a gang leader, no, he's not. He was being a man like he's supposed to be, stepping up for his family, which is me and his son, and become what my family is my little brothers behind. So for him to step up as a leader after my brother died, I honored him for that.

But after a while, yes, it did start to get a little ahead to him, a little bit older, so they got to defend for themself. But when boys are trying to harm them with guns and stuff like that, of course, he going to think, you know, you don't know nothing about it. I'll handle it in a manly way.

And, of course, I'm not going to -- you know, he's a man. I'm not going to sit there say, "Oh, don't do it like that," you know, especially when people are willing to come into our houses when it's a bunch of children around.

So, no, it's not okay for them to see just because there's a bunch of women and kids in a house or younger males, such as Westley and Brodie. If they don't think he's there, of

course, they will try, you know. And in this neighborhood if they see that you're limping or on crutches, they'll try to beat you up.

So when my brother wasn't there for him to step in, it filled that. So a lot of drama did die down. But it also got to the point where they felt like, oh, they got somebody, you know, so they did result in bigger things, like shooting them and stuff like that.

I'm not saying he can stop a bullet, but he did save them from a lot of problems or was present where a lot of people wouldn't mess with him. So for him to be away, yes, it's a problem because it makes us feel unsafe. Yes, it is a problem because our kids, whose lives have been since they were born, they are questioning. And it makes us sad. It puts pressure to make us sick and stuff like that. It is hard without somebody who's a security for you is not there in this type of neighborhood and these type of days.

But there were times when we were on the bus, my sister or me and my mom, and guys who know my brothers would say stuff to us or follow us up the street and do stuff. You know why? Because they know that our male figures isn't present.

How is that okay for us to walk around as women with our children and men are harassing us or attacking us because our male figure isn't present? That's not a way to live.

So, yes, if he comes home, yes, I'm sure he's going to be with his family because he's been away for a long time, but, yes, we will be in a different area, living in a different area. And it's not how -- no, I never thought him protecting us, such as me and my son and my siblings, will land him in a situation where he will have to be away from his other family for years. And for that I am sorry. I'm sorry that for him to stick up for his family landed him in a position like this.

But, yes, he does mean a lot to a lot of people, to our children and to our families. And him not there does have an effect on a lot of people, but especially most of all our children and his mom.

So I just wanted to say that. He's not a gang member. He's a family man. He's a -- and like I said, I'm sorry him protecting me and my kids and my siblings put him in a position like this.

THE COURT: Thank you very much.

Welcome, sir. Please step up to the microphone.

MR. MICHAEL SHERMAN, JR.: How you doing? Michael Sherman, Jr.

THE COURT: Okay. Is this your father I heard from a moment ago?

MR. MICHAEL SHERMAN, JR.: Yeah, that's my father.

THE COURT: And you're related to Mr. --

MR. MICHAEL SHERMAN, JR.: Yeah, I'm related to him.

THE COURT: Okay.

MR. MICHAEL SHERMAN, JR.: I'm just -- I was reading in articles and hearing -- I don't even know the lawyer. I'm just here to state what kind of man he is.

I don't see a gang member, you know, when I look at him. I known him my whole life. He's smart. He's ambitious. He's goofy. He's funny. He's a family man. He's a saver. He helped me save my life.

As my father said, he's a working man. He helped me get a job. Because of him, I got money in my pocket. Because of him, I got a roof over my head.

His family miss him. I'm the godfather to his son. You know, they love him. We love him. We miss him.

And because I don't think nobody's perfect. This is his first arrest, and no one's perfect. Clearly, example. Sometimes you run around the wrong crowd.

I just want to say he's not a gang member. He's a good guy. That's all I want to say.

THE COURT: Thank you very much.

Just pull the microphone closer to him so the court reporter can hear what he has to say.

THE DEFENDANT: How you doing today?

THE COURT: All right.

THE DEFENDANT: I just want to start by saying I apologize to the courts. I apologize to my family. I'm sorry

for the victims and the stuff they went through.

Um, I guess we all learn from our mistakes, as I have learned from my mistake. I don't have much to say. I just wanted to apologize.

THE COURT: Thank you, Mr. Pervis.

Anything else from your side, Mr. Koch?

MR. KOCH: No, Your Honor.

THE COURT: All right. Thank you. I'll hear from the Government.

MS. COURTNEY KAOUTZANIS: Thank you, Your Honor. I wanted to begin by talking about the two grounds that Your Honor has decided not to enhance the guidelines on but just because I do still think they provide a grounds for the Court to vary upwards.

So the first thing that is striking about Mr. Pervis with regards, as compared to the other defendants in this case, is his role within the group. So I think everyone is correct to say that GSB was not a strictly hierarchal organization. It was a loose crew. That being said, it still functioned as a gang.

Mr. Pervis was approximately four to five years older than the rest of the other defendants. And he was the one who the investigation informed us would drive them around, as he himself admitted when he admitted he was outside one of the times when Mr. Brodie threatened Mr. Freeman in his Mercedes.

And he was essentially the glue that kept the organization together in the sense that he supplied them with the guns and with the ammunition.

And so I strongly object to the characterization of him as a protector. I think he did everything in this case to not be a protector.

The Court has seen a number of the text messages, but I would refer the Court again to the text message that Mr. Pervis sent around to the group on April 24, 2016, sending a picture of a gun or before April 29, 2016, when he sends around a text message saying, "I'm trying to ride" and then, "Who around," which prompts the defendants, Mr. Ward, Mr. Pervis himself, and Mr. Westley, all to send pictures of themselves posing with guns.

That's not defensive. I mean that's directly antagonist, proactive action.

There's text message exchanges when other GSB members are asking him for ammunition, and then there's a number of text message exchanges when other GSB members are asking him for use of the firearms that the case showed Mr. Pervis was maintaining. So whether or not that's enough grounds for an enhancement, that's still something that we believe the Court should consider in terms of varying above the guidelines.

With regards to Mr. Pervis's conduct during this suppression hearing, as Mr. Kale pointed out, in our view, it

required a longer hearing in light of the affidavit that Mr. Pervis submitted. And I'd like to just talk about that affidavit because I think it plays into another point I wanted to make later on, the disrespect Mr. Pervis exhibited for the law and for law enforcement.

Mr. Pervis submitted a sworn affidavit in which he stated that he was in the second-floor apartment; he put the pink iPhone on the table; he walked outside of the apartment; and that the New Haven Police Department officers planted the phone on his person.

That is just not true. It is true that the affidavit was withdrawn and Your Honor found that the New Haven Police Department officers never entered into that second-floor apartment, thus never could have taken the phone off of the table and planted it on his person.

So, again, it's just he's had the opportunity, as some of the other defendants have not, and, again, this is something I want to talk about a little bit more in a moment --

THE COURT: Sorry. Can you give me one second?

MS. COURTNEY KAOUTZANIS: Sure.

Paragraph 16 and 17 of his affidavit.

THE COURT: I was looking in my ruling though.

MS. COURTNEY KAOUTZANIS: Page 9 of your ruling.

THE COURT: Okay. Thank you.

MS. COURTNEY KAOUTZANIS: You're welcome, Your

Honor.

And then there's also text messages in which he talks about going for stains, which is known to be a robbery. So there's a number of text messages.

Just to go back to the earlier point, Mr. Kale reminded me I forgot to mention his role coordinating group violence or group acts.

In terms of the nature and circumstances of the offense here as compared to the background and history of Mr. Pervis, the Court is familiar, throughout the various hearings in this case, of narcotics trafficking, of the glorification of the gang lifestyle. I want to -- I know also of the violence. But I just want to speak about Mr. Pervis in connection to that violence.

So as I previously mentioned, he was the person who was responsible for maintaining the firearms for GSB. GSB was unique in that it had a limited number of firearms that it used to commit a number of shootings. And he would dole them out when needed for acts of violence. Some examples of that are detailed in the factual findings of the PSR in paragraphs 29 to 31.

He would also encourage the violence though. And an example of that is the May 2, 2016, text message where he sends around a video of an apartment with bullet holes through the window to a group chat with a number of GSB members and

associates, as well as rival gang members, with the statement, "who next"?

Again, these are -- they're not defensive. They're overt, affirmative offensive actions, or at least threats to other people.

As for specific acts of violence, the Court has made its finding as to the acts it's going to consider. I would again refer the Court to a text message exchange with regard to the shooting of Mr. Shealy's house. After the shooting, Mr. Belle sent Mr. Pervis a video of the shooting, and Mr. Pervis responded, "da boys coming."

And Mr. Pervis, as I mentioned in the sentencing memo, he had previously admitted during his first plea allocution to knowing that a firearm he had been holding was going to be used in that shooting.

Your Honor has made findings with regards to the shooting of Mr. Smith and the shooting of Mr. Freeman, and I know Your Honor is familiar with all of the shootings in this case and the havoc that they racked on the city of New Haven and particularly the havoc they wrought on the lives of individual victims, including Ms. Council.

Your Honor also heard during the Fatico hearing from Jennifer Concepcion, who narrowly escaped being hit by bullets. Your Honor has heard from Mr. Freeman, who almost died. We personally have spoken to a number of other victims in this

case who are, unfortunately, terrified to come to court but have just as compelling stories as the people who were willing to come here and so courageously spoke to the Court.

Comparing that against Mr. Pervis's own background, he is unique among the other defendants in that he does have children, and it is certainly a tragedy that he will be separated from his children. But his son is ten years old. He was alive for the entire extent of Mr. Pervis's conduct in this group.

Mr. Pervis stored his firearm in a house with children. On September 2nd when the firearm was found, it was in the bedroom of a child with ammunition. I mean that is not the conduct of someone who is acting as a responsible adult and taking care of his children. Also found in that house were drugs and packaging materials.

Also, with regards to Mr. Pervis's own use of firearms, the case against Mr. Pervis was first initiated, I guess, in August of 2016 when there was a domestic violence allegation that Mr. Pervis had pointed a firearm at a female and then the police came, and that was when Mr. Pervis ran from the police and hid the .380, which was the first firearm in this case, in the oven outside. So he hasn't exhibited that he, himself, does not use firearms in his conduct, whether or not we have evidence to show that he was a shooter in any of these incidents.

In terms of his work history, I don't mean to undermine his work at Bozzutos. It does appear he worked there for a year and a half. But I would also just note that the PSR explains that he was terminated due to excessive absences and tardiness.

But most importantly, I wanted to turn to some of the various goals of the criminal justice system. And here the seriousness of the offense, the need to promote respect for the law and provide just punishment and protect the public and the need to accomplish specific and general deterrence, in the Government's view, warrant a sentence of variance above the guidelines range.

The two guns that Mr. Pervis maintained for the group were fired. First the 9mm was fired at least 39 times that the Government could have put evidence on at trial. The .380 Smith and Wesson was fired at least 18 times.

So as we highlighted in the sentencing memorandum, this means that the firearms that Mr. Pervis personally held at his house and in his possession and provided to other GSB members were responsible for at least 57 shots being fired in 2016 in New Haven. Some of those shots hit other people. One -- or several of those shots almost killed Mr. Freeman. But that provides, again, just on the evidence that we could have put before the Court at trial, some extent or some view into the extent of the damage that this group was causing.

In terms of specific deterrence to Mr. Pervis, I think the Court has seen how GSB members in general did not exhibit respect for the law in the way they talked about law enforcement and their general disregard for the law.

Mr. Pervis did join the group at a young age. He did stay in the group until he was arrested. He, himself, did not stop being involved in the group. The Government had to charge him in this case.

And I think his actions with regards to his two encounters with police in August and September of 2016 further exhibit his disrespect for the law and show the need for specific deterrence here.

So as I previously stated, on August 18, 2016, the police are called for a domestic dispute. Mr. Pervis runs out of the house, hides a firearm in an oven of the neighbor's house, and then, instead of changing, so he knows that there's been a domestic violence allegation, he knows the police are involved, he then sends a text message to other GSB members that states "RIP" with a picture of the .380. And then he continues to keep a 9mm firearm at his house with ammunition and with the drugs and packaging materials.

So this is not the conduct of someone who's had an encounter with law enforcement and has demonstrated that that has made an impact on them and they are going to reform their ways. This is the conduct of someone who, like some of the

other GSB members, just thus far has shown that they don't think that the law applies to them.

There are certainly a lot of good things about Mr. Pervis's character that have been pointed to by in the letters and by the people in this courtroom. But from what has been shown thus far, in light of the seriousness of the offense conduct, in light of the need to protect the public, in light of the need to specifically deter, and finally when compared with the other defendants, in light of the need to avoid unwarranted sentencing disparities, in the Government's view, Mr. Pervis's conduct is more in line with the conduct of Mr. Brodie or Mr. Westley. And thus he, too, deserves a variance above the guidelines range calculated in this case.

THE COURT: All right. Thank you, Attorney Kaoutzanis.

As I said at the outset, or a while ago, I'm going to take a recess now. It will be about ten minutes and I'll be back to impose sentence.

(A recess was taken from 3:24 p.m. to 3:36 p.m.)

THE COURT: Be seated. Mr. Koch, do you want to see if the folks want to come in?

All right. Welcome back, everyone. Before we get into the imposition of sentence, just a couple of things on the presentence report.

I'm going to order that the probation officer modify

paragraphs 95, 96, and 97 to conform to the guidelines findings I've made, namely, that I'm not imposing the two adjustments that we discussed and to make corresponding changes in the parts of the presentence report.

MS. LINDO: Yes, Your Honor.

THE COURT: Thank you, Officer Lindo.

I want to begin by expressing my appreciation again for Ms. Council, who came today and has come to the other sentencings in this case. It's clearly difficult for her to do that, but the Court -- I benefit from hearing from the impact that these crimes have had on her.

There are other victims here, as Attorney Kaoutzanis pointed out. Mr. Freeman testified at the Fatico hearing. His testimony was incredibly difficult to listen to. He survived by nothing short of a medical miracle. He was shot three times, including in the head at close range. Ninety-nine times out of a hundred, a person would have died under those circumstances, but he has been severely and permanently damaged, and that's apparent from his testimony.

At a previous sentencing, Mr. Kale read an e-mail from him because the Government, as it's required to do, notified him of the sentencing and invited him to attend. He did not wish to attend. And I can only infer, not only from his testimony, but from the e-mail that he sent to Mr. Kale, that part of why he didn't want to attend, of course, was he wanted

to move on, but also because of fear, legitimate fear of what might happen to him given the nature of these crimes, which involved retaliation against people who spoke to the police.

It was crystal clear at the Fatico hearing that two witnesses who testified, the Harris brothers, who were victims of another GSB shooting, were, quite frankly, petrified. And you would have thought they couldn't remember their own names because of the concern -- the fear that they had. Again, I've seen that before in this type of a case.

Ms. Concepcion was a victim. She testified at the hearing about how had the bullets been in a different place by a few inches, she might have lost a child.

So by the same token, I want to express my appreciation to Mr. Pervis's family members and friends who came today, because it's just as important for me to hear about the impact that a sentence is going to have on family members.

It's clear that Mr. Pervis has a supportive, loving family, that he has children who care about him and miss him, and that the sentence today and Mr. Pervis's incarceration so far has imposed and will impose a real cost on them. And that, of course, makes my job difficult, more difficult than even in most sentencings.

But my job is not to balance the emotions on either side of the courtroom or really even the losses that people have suffered and will suffer. My job is guided by the law

here, which requires me to consider a series of factors in deciding on the sentence.

Those factors are listed in Title 18 United States Code Section 3553(a). They include Mr. Pervis's background and characteristics, the nature and circumstances of these crimes, the purposes of a criminal sentence. You heard Attorney Kaoutzanis talk about that a little bit.

The purposes of a criminal sentence include punishment. And punishment itself includes the need for the sentence that the Court imposes to reflect the seriousness of the offense and to promote respect for the law, among other things, the need for the sentence the Court imposes to protect the public from further crimes by Mr. Pervis, the need for the sentence imposed to afford deterrence. Deterrence means both deterring others from committing this type of a crime and deterring Mr. Pervis from committing crimes in the future.

The sentence -- another purpose of criminal sentencing set forth in the statute is rehabilitation. Rehabilitation means addressing treatment, vocational, and other needs, educational needs, that Mr. Pervis might have.

Those are the purposes of a criminal sentence that I'm required to consider under the law.

The law also requires me to consider the sentencing guidelines. As I indicated earlier, by my calculation, the guidelines range here is 78 to 97 months of imprisonment and 1

to 3 years of supervised release.

I also have to consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

In short, these factors require me to take everything I've heard today, everything I've read about this case into account to determine a sentence that is fair, just, and reasonable and also one that is sufficient but no greater than necessary to serve the purposes of sentencing that I listed earlier.

Now, I've considered all of these factors. But every case is different, and some factors in this case weigh more heavily than others. So I want to explain more specifically how I reached a decision in this case by walking through each of those factors and find how it applies here.

I'm going to begin with Mr. Pervis's background and characteristics. The presentence report, which is very thorough, makes clear that Mr. Pervis faced a challenging upbringing, challenging childhood. One of his relatives today spoke to that. He did, however, manage to graduate from the Job Corps program, and there's some record of employment, which is commendable.

On the other hand, he -- I should add, before I get to the other hand, I should add he's got no significant criminal record, and he's never served time before.

But on the other hand, he was 23 or 24 when most of the shootings took place in this case. That's young, but it's not of the kind of youth as his co-defendants. His brain was biologically somewhat more developed than theirs, just because of his age.

I think today was the first time I saw Mr. Pervis show some remorse, to be frank. There was no indication of it before, but his remarks today were heartfelt.

I've already spoken to what I take to be a real pick -- a real depiction of his role in the family that not only the letters reflect, but the remarks of people who spoke today reflect he's a good father. He's been a good -- at times a good provider when he was working. So there's a lot about his background and characteristics that do reflect positively on him.

On the other hand, I also have to consider the nature and circumstances of this crime, and none of that is positive. It's all bad. This is an extremely serious crime, pattern of crimes.

Beginning with perhaps the most serious one, which was the attempted murder of Marquis Freeman, as I said before, it's a miracle that's not a murder case, that he survived. He is permanently damaged.

Mr. Pervis did not pull the trigger, but he drove around the people who did. He was in frequent contact with the

shooter immediately before the shooting. He supplied the guns to -- both guns involved in the shooting. Mr. Lee was also shot that day. And he knew what was going to happen to Mr. Freeman, and he assisted.

The harm to Mr. Freeman alone makes this an extremely serious case. But there was, unfortunately, more here. As I've pointed out, there were other shootings, generally by GSB, but shootings specifically contemplated and participated in indirectly by Mr. Pervis.

Damien Smith, it's clear from the information in the presentence report that Mr. Pervis knew that shooting was going to happen and supplied the gun. Mr. Smith also was seriously injured, colon damage, shot in the back.

Brandon Shealy was not injured. His house was shot up multiple times. One of those occasions I believe was the occasion which Ms. Council was seriously injured. And so those are serious offenses. And I should point out for those two shootings, those two shootings are not even counted by the guidelines range here.

More generally, Mr. Pervis -- it's crystal clear from the evidence, it's not a close call, Mr. Pervis was the supplier of guns for GSB. Every single shooting chronicled by the Government, shootings that haven't even been mentioned today involve casings that come from guns that were found in his home, guns that he would, there's evidence, lend out to

others, specifically knowing that they were going to be used for violence.

Ms. Kaoutzanis is also right to point to the fact that Mr. Pervis submitted texts and communications encouraging violence and, indeed, celebrating violence. All of these are very serious crimes. They inflicted enormous harm for well over a year in the city of New Haven.

Turning to the purposes of a criminal sentence, obviously, in light of my view of the seriousness of this offense, there's a need for the sentence to reflect that seriousness.

There's also a need to protect the public. I do recognize this is Mr. Pervis's first significant crime, but the level of violence, the fact that he continued even after attempts -- the first attempt to apprehend him to hold a gun at the house all suggest that there's a need for the sentence to protect the public and specifically deter Mr. Pervis.

I also agree with the Government that there's a need for this sentence to promote respect for the law.

The Government, Mr. Kale and Attorney Kaoutzanis, pointed out something that I, frankly, had overlooked about his affidavit, which is that I did make a finding that is entirely diametrically opposed to the notion that the New Haven police planted the cell phone on him. I don't remember what I thought of that at the time, and, again, that testimony was not put on

because it was withdrawn. But it's quite clear I made a finding that they did not even enter the apartment.

So I'm not going to impose the enhancement for obstruction of justice, but there clearly is a need for this sentence to demonstrate that submitting affidavits with stories that might sound good but just don't square with the facts is serious conduct.

I won't say that that is what's really driving the sentence here. Frankly, the harm, the violence, the need to reflect what happened to Mr. Freeman, Ms. Council, and to others is what's going to drive the sentence here.

Turning to the sentencing guidelines, this is a, I think, an unusual sentencing guideline. The RICO guideline requires that an act actually qualify as a racketeering act, which is a somewhat arbitrary list of crimes. There are serious crimes that are not racketeering crimes.

But anyway, it requires that an act qualifies as a racketeering act before it may count as relevant conduct under the guidelines. This is the first guideline I've ever seen that actually is written that way. It does not allow the Court, under the guidelines, to take account of serious criminal conduct.

And in this case the guidelines, therefore, do not account for several serious criminal acts for which I've found that Mr. Pervis is indeed responsible: the shooting of Damien

Smith, the shooting at Brandon Shealy's house, supplying guns generally.

And so my view is that the guidelines range of 78 to 97 months does not adequately reflect the seriousness of the offense or adequately serve the other purposes of sentencing that I find need to be served here and so that I find that a substantial variance above the guidelines range is necessary to serve those purposes and to take full account of Mr. Pervis's criminal conduct, even given how difficult his separation is going to be for his family members.

The issue of disparities really refers to national disparities, but it's usually where, over the years, judges have talked about where a defendant fits with his co-defendants. And this is actually somewhat of a difficult call here.

On the one hand, Mr. Pervis is older than Mr. Brodie and Mr. Westley, and he supplied the guns, the means for them. And he drove them around. That's clear.

On the other, Mr. Westley pulled a trigger after holding a gun to a man's head and shooting him in the stomach first and, frankly, committed what otherwise would be a cold-blooded murder had there not been a miracle. Mr. Pervis, there's no evidence that he did something like that.

Mr. Brodie was involved in pulling the trigger in multiple shootings and was, unfortunately, what one would have

to regard from the text messages the most aggressive cheerleader for the violence of GSB.

And so balancing all those things, I do agree with the Government that you deserve a sentence closer to what Mr. Brodie and Mr. Westley got. Your sentence is not going to be quite what theirs is. So -- even though you're a few years older and that does weigh against you as a sentencing matter.

So this is a difficult sentencing. I've listened to everybody. I've done my best to balance all of the factors. For the reasons I've explained, I find that the following sentence is the one that is sufficient but no greater than necessary to serve the purposes of sentencing that I've described.

Mr. Pervis, please stand.

I sentence you to 144 months of imprisonment, 3 years of supervised release.

In addition to the standard conditions of supervised release, the following mandatory conditions are imposed: first, the defendant shall not commit another federal, state, or local offense; second, he shall not unlawfully possess a controlled substance; third, he shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter for use of a controlled substance. Next, he shall pay the assessment imposed in

accordance with Title 18 United States Code Section 3013. Next, he shall cooperate in the collection of a DNA sample.

In addition, the following special conditions of supervised release are imposed:

First, if you are not employed full time -- excuse me. If you are not employed at least 20 hours per week, you must participate in an educational and/or vocational services program and follow the rules and regulations of that program. Such programs may include, but are not limited, to job readiness training and development and also college courses.

Next, unless you are employed at least 20 hours a week, you must perform at least 10 hours of community service per month up to a total of 100 hours unless you can show that the community service obligation is interfering with your schedule for vocational or educational training.

Next, you must participate in a program recommended by probation and approved by the Court for mental health treatment. You must follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in that program. You must pay all or a portion of the costs associated with treatment based on your ability to pay, as recommended by probation and approved by the Court.

Next, you must participate in a program recommended by probation and approved by the Court for inpatient or outpatient

substance abuse treatment and testing. You must follow the rules and regulations of that program. The probation officer will supervise your participation in the program. You must pay all or a portion of the costs associated with treatment based on your ability to pay, as recommended by probation and approved by the Court.

We didn't talk really today about the history of substance abuse, some of the trauma that you observed as a child, but those conditions or those circumstances are described in the presentence report, and that's why I've imposed those conditions.

Next, you must not communicate or otherwise interact with any person known to you to be a member of a gang without first obtaining the permission of a probation officer. If this affects your ability to communicate with family members, you may petition the Court for a modification of this condition.

Next, you must submit your person, residence, office, or vehicle to a search conducted by a probation officer at a reasonable time and in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. You must inform any other residents that the premises may be subject to searches under this condition.

I impose no fine.

You're required to pay a special assessment of $100.

As I said earlier, forfeiture of the guns and ammunition described in the plea agreement will become final with the judgment in this case.

I should say before I move on that the sentence I have imposed I would have imposed even if I had found a basis or even if I had found it warranted to make the guidelines enhancement with respect to obstruction of justice. So if I had done that, the range would be 97 to 121 months. I still would have varied upward to exactly where I am.

So does either counsel know of any reason that the sentence I've described cannot legally be imposed as the sentence of the Court?

MS. COURTNEY KAOUTZANIS: No, Your Honor.

MR. KOCH: Your Honor, at this point I think that I'm required to enter an objection to the sentence on the grounds that it is substantively disproportionate.

THE COURT: Okay. All right.

Mr. Pervis, the sentence I've described is the sentence that will be imposed -- is hereby imposed as the sentence in your case. The judgment will be prepared for my signature by the clerk's office in consultation with the probation office.

Mr. Koch, are there any -- is there any request with respect to designation?

MR. KOCH: As close as possible to Connecticut, Your Honor.

THE COURT: Okay. Mr. Pervis, you have a right to appeal the sentence. If you wish to appeal, you must file a written notice of appeal within 14 days of the entry of judgment.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: If you wish to appeal but you cannot afford to do so, you can apply for leave to appeal in forma pauperis. If the Court grants that motion, it will waive the filing fee for your appeal and appoint counsel to represent you at no cost to you.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: I believe there are not only remaining counts of the indictment, but I believe there's a separate indictment with respect to Mr. Pervis.

MS. COURTNEY KAOUTZANIS: Yes, that's correct. The Government moves to dismiss the remaining counts of the indictment, which are Counts 4, 7, 8, and 9, and we would also move to dismiss the indictment filed under Case No. 17-CR-99, as the conduct in that indictment was encompassed by the conduct in this indictment.

THE COURT: That motion's granted.

Is there anything else to go over today?

MS. COURTNEY KAOUTZANIS: No. Thank you, Your Honor.

MR. KOCH: I just want to clarify. I said substantively disproportionate. I think I should say substantively unreasonable on the grounds.

THE COURT: That's fine. Thank you.

We'll be in recess.

(Proceedings concluded at 4:01 p.m.)

C E R T I F I C A T E

I, Julie L. Monette, RMR, CRR, CRC, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ JULIE L. MONETTE

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