No. 22 - ____

IN THE SUPREME COURT OF THE UNITED STATES

KERRY VANDERPOOL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

SAMUEL M. BRAVERMAN
Counsel of Record

JENNIFER B. ARLIN
Fasulo Braverman & DiMaggio, LLP
225 Broadway, Suite 715
New York, New York 10007
(212) 566-6213
SBraverman@FBDMLaw.com

Counsel for Petitioner.

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APPENDIX A

20-3521
United States v. Vanderpool

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 21st day of January, two thousand twenty-two.

PRESENT:

SUSAN L. CARNEY,
STEVEN J. MENASHI,
MYRNA PÉREZ,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 20-3521

KERRY VANDERPOOL, AKA PAPERZ,

Defendant-Appellant,

RASHAAD CONYERS, AKA HOULE, RAMEL MATTHEWS, AKA RAH,
WENDELL BELLE, AKA DELLY DELL, WILLIAM BRACEY, AKA REL,
ANTHONY SCOTT, AKA TYSON, HASWANI TYSON, AKA SWANI,
PAUL GILBERT, AKA TOO FLY TAY, AKA DON TAY, KAREEM LANIER,
AKA BLACK, TERRANCE WILLIAMS, AKA TA, JASON MOYE, AKA TALL JAY,
BRIANT LAMONT MAYNOR, AKA BINKY, AKA BRIAN MAYNOR,
ANDY SEDA, AKA ANT WHITE, DAVOUN MATTHEWS, AKA JUICE,
JOSEPH ANDERSON, AKA JOJO, DAVAUGHN BROOKS, AKA DAY DAY,
AKA DOLLA, JOHN HUGHES, AKA PINO,
JOSEPH JEFFRIES, AKA JOEY, DONOVAN REYNOLDS, AKA DONNIE G,

KYLE HINES, CHANEL LEON, AKA BLACK GUMS, CHRISTOPHER MORALES, AKA YAYO, ORENZO HARRELL, AKA OEY, TYRONE GLOVER, AKA TADO, AKA TY, DAYSEAN BANNISTER, AKA DEWEY, JORGE GONZALEZ, AKA NENO, ANWAR SHEPPARD, AKA SHEP, DARRYL WHITLEY, AKA HOT, JEFFREY GERONIMO, AKA JEFF, RASCARMI GALLIMORE, AKA TANK, JAROD SLATER, AKA ROD, CHRISTOPHER IVEY, AKA LIGHT EYES, ANTHONY REDDICK, SOLOMON ALUKO, THOMAS CRUZ, AKA MANNY, MICHAEL BROWN, AKA MIGHTY, COREY CANTEEN,

Defendants.[*]

FOR APPELLANT: SAMUEL M. BRAVERMAN, Fasulo Braverman & DiMaggio, LLP, New York, NY.

FOR APPELLEE: ANDREW C. ADAMS, Assistant United States Attorney (Karl Metzner, *on the brief*), *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Caproni, *J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on October 1, 2020, is **AFFIRMED**.

In 2016, Defendant-Appellant Kerry Vanderpool pleaded guilty to one count of racketeering conspiracy, in violation of 18 U.S.C. § 1962(d) (Count One of the S8 Superseding Indictment) and one count of illegal use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Fourteen of the S8 Superseding Indictment). The district court sentenced him to 84 months' imprisonment on each count, for a total term of 168 months. This cumulative sentence was within the applicable Guidelines range of 154 to 171 months, as set forth in the plea agreement.

[*] The Clerk of Court is directed to amend the case caption to conform to the above.

In 2019, this Court vacated Vanderpool's section 924(c) conviction on Count Fourteen in light of the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), which held the residual clause of section 924(c)(3) to be unconstitutionally vague. We then remanded his case for resentencing on Count One. *See United States v. Brown*, 797 F. App'x 52, 54–55 (2d Cir. 2019) ("*Vanderpool I*") (summary order). On remand, the district court sentenced Vanderpool to 156 months' imprisonment and a three-year term of supervised release. Vanderpool now challenges the procedural and substantive reasonableness of that sentence. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

We review a district court's sentencing determination for procedural and substantive reasonableness under a "deferential abuse-of-discretion standard." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)).

Vanderpool first claims that this Court erred in *Vanderpool I* by remanding for plenary resentencing on his conviction for racketeering conspiracy. In support, he cites 18 U.S.C. § 3742(f), entitled "Review of a sentence," which he contends deprived our court of jurisdiction to vacate his overall sentence and remand for a full resentencing.[1] Section 3742(f)(3) provides that, if certain preconditions for review of a sentence do not apply, the appeals court "shall affirm the sentence." 18 U.S.C. § 3742(f)(3). Under Vanderpool's interpretation, the *Vanderpool I* court had no choice but to affirm the district court's original 84-month sentence on Count One absent a finding of error in that sentence when we concurrently vacated his conviction of Count Fourteen; we had no jurisdiction to do otherwise, in his view. His argument lacks merit.

At the threshold, Vanderpool's argument fails because this panel is generally not free to reject the decision of the prior panel in this case. We have long held under the law of the

[1] Section 3742(f) describes the circumstances in which a sentence may be appealed and the scope of the authority of courts of appeals on review of a sentence. *See* 18 U.S.C. § 3742(f).

case doctrine that, "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise." *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) (internal quotations marks and citations omitted). Our Court considers an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice" to be cogent or compelling reasons that may support a decision to decline to adhere to a decision rendered by it at an earlier stage of the same litigation. *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000) (internal quotation marks omitted). Vanderpool offers no new evidence, cites no relevant change in law since *Vanderpool I*, and provides no other cogent and compelling reason here. If Vanderpool wished to challenge the rule as applied in *Vanderpool I*, the correct course would have been through en banc or Supreme Court review of that decision. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). We see no persuasive reason to revisit *Vanderpool I* now.

Even if we were free to do so, we would not disturb the prior panel's decision. Our case law indisputably allows the plenary resentencing that we ordered. Twenty years ago, we observed in *Quintieri* that "resentencing usually should be *de novo* when a Court of Appeals reverses one or more *convictions* and remands for resentencing." 306 F.3d 1217, 1228 (2d Cir. 2002) (emphasis in original). Seven years later, in *United States v. Rigas*, we emphasized that *Quintieri* "created a rule, not a guideline": the rule is that, when this Court "identifie[s] a conviction error, not a mere sentencing error," defendants will "be resentenced *de novo* at a plenary sentencing rehearing." 583 F.3d 108, 117 (2d Cir. 2009). Vanderpool cites no case law to the contrary. Indeed, he acknowledges the *Davis* Court's warning that the defendants whose section 924(c) convictions would be vacated as a result of that decision would "not even necessarily receive lighter sentences" on remand, because "when a defendant's § 924(c) conviction is invalidated, courts of appeals routinely vacate the defendant's entire sentence on all counts so that the district court may increase the sentences for any remaining counts if such an increase is warranted." *Davis*, 139 S. Ct. at 2336 (internal quotation marks omitted). Because this Court in *Vanderpool I* overturned Vanderpool's section 924(c) conviction—not simply the associated sentence—the *Quintieri* rule applied, and section 3742 is of no moment.

The prior panel therefore correctly vacated the remaining racketeering sentence and remanded for plenary resentencing.

Vanderpool next presses the argument that the sentence imposed by the district court on remand was procedurally unreasonable. He locates error in the district court's imposition of a sentence for Count One that was higher than that originally imposed in the absence of "new facts that were not raised at the first sentencing" or "any finding which supported the new above-the-top-of-the-guidelines sentence." Appellant's Br. at 8.

The district court did not abuse its discretion when it determined on resentencing that a lengthier sentence for Count One was justified. It is true that, on resentencing, the district court was presented with no new facts to consider apart from the vacatur of Count Fourteen and Vanderpool's record of post-conviction conduct. The district court adequately explained, however, why it in its view was appropriate to increase the Count One sentence upon resentencing. It observed that it had "done as a whole" the original cumulative 168-month sentence for the two counts of conviction. App'x at 156. That is, at the initial sentencing, the district court determined an appropriate cumulative sentence for Counts One and Fourteen based on the 18 U.S.C. § 3553(a) sentencing factors. Because Count Fourteen required an 84-month mandatory minimum sentence that would run consecutively to any Count One sentence, *see* 18 U.S.C. § 924(c)(1)(D)(ii), it set the Count One sentence at a below-Guidelines 84 months to ensure that the cumulative sentence was no longer than reasonable. At resentencing, however, Count Fourteen's mandatory minimum sentence was no longer a factor; accordingly, the district court could reasonably issue a lengthier sentence for Count One. *See Pepper v. United States*, 562 U.S. 476, 507 (2011) ("Because a district court's original sentencing intent may be undermined by altering one portion of the calculus, an appellate court when reserving one part of a defendant's sentence may vacate the entire sentence . . . so that, on remand, the trial court can reconfigure the sentencing plan . . . to satisfy the sentencing factors in 18 U.S.C. § 3553(a)."") (internal quotation marks and citations omitted)).

Vanderpool incorrectly argues that Circuit precedent precluded the district court from considering the mandatory minimum sentence of Count Fourteen when originally

setting a sentence for Count One, in May 2017. But Vanderpool was sentenced over a month after the Supreme Court issued its decision in *Dean v. United States*, abrogating this Circuit's interpretation of section 924(c)(1)(D)(ii). *See* 137 S. Ct. 1170 (Apr. 3, 2017). Before *Dean*, our Court had disallowed sentencing judges' consideration of section 924(c) mandatory minimums when setting a sentence for a related offense. *See id.* at 1176–77 (abrogating *United States v. Chavez*, 549 F.3d 119 (2d Cir. 2008)). Sentencing Vanderpool after *Dean*, the district court was thus fully entitled to consider the sentence it would impose "as a whole," and the record shows that it did so. App'x at 156.

When imposing a sentence above the top of the applicable Guidelines range, as the district court did at Vanderpool's resentencing, a district court bears a "higher descriptive obligation" in stating the reasons for its decision. *United States v. Cassesse*, 685 F.3d 186, 193 (2d Cir. 2012). It "may depart upward from a Guidelines range," we have held, "as long as [it] 'gives serious consideration to the extent of any departure from the Guidelines' and provides an 'adequate explanation' that 'allows for meaningful appellate review and promotes the perception of fair sentencing.'" *United States v. Sampson*, 898 F.3d 287, 313 (2d Cir. 2018) (alterations omitted) (quoting *Gall*, 552 U.S. at 46, 50).

On abuse of discretion review, we conclude that at resentencing the district court adequately considered Vanderpool's background and the gravity of his offense conduct, and provided a sufficiently detailed description of the basis of the sentence to satisfy its obligations with regard to an above-Guidelines sentence. In its Statement of Reasons, the district court explained why a Guidelines sentence would not adequately reflect the severity of Vanderpool's conduct: it cited Vanderpool's gravely reckless conduct when he shot into a crowd of people, endangering many, and it expressed the view that the Guidelines grouping rules, which aggregated only the more severe conduct engaged in by Vanderpool, resulted in a sentence that failed to account for the role that Vanderpool played in repeated bank robberies. These observations sufficiently explained the district court's reasons. The sentence imposed was not procedurally unreasonable.

Finally, Vanderpool urges us to conclude that his sentence was substantively unreasonable. We cannot. Vanderpool's offense conduct includes very serious offenses,

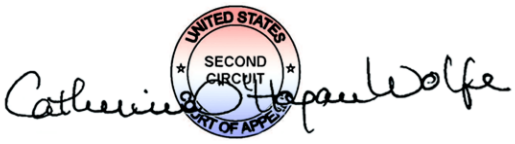
repeated over the course of and in furtherance of the conspiracy for which he was convicted. Among them were: (1) assault with intent to commit murder, (2) two separate instances of attempted aggravated assault, and (3) conspiracy to commit bank robberies. In light of the offense conduct and the other considerations cited by the district court, a sentence of 156 months' imprisonment was not substantively unreasonable.

* * *

We have considered Vanderpool's remaining arguments and find in them no basis for reversal. For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court



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: January 21, 2022
Docket #: 20-3521cr
Short Title: United States of America v. Conyers (Vanderpool)

DC Docket #: 1:15-cr-537-23
DC Court: SDNY (NEW YORK CITY)
DC Judge: Caproni

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
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

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DC Court: SDNY (NEW YORK CITY)
DC Judge: Caproni

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

AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 1 (form modified within District on Sept. 30, 2019)

UNITED STATES DISTRICT COURT

APPENDIX B

Southern District of New York

UNITED STATES OF AMERICA
v.
KERRY VANDERPOOL

JUDGMENT IN A CRIMINAL CASE

Case Number: S8 15 CR 537- 23

USM Number: 77305-054

Samuel Braverman
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 1962(d)	Racketeering Conspiracy	8/31/2016	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☑ Count(s) 14 ☑ is ☐ are dismissed by order of the Second Circuit Court of Appeals.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/29/2020
Date of Imposition of Judgment

Valerie Caproni
Signature of Judge

Hon. Valerie Caproni, U.S.D.J.
Name and Title of Judge

10.1.20
Date

DEFENDANT: KERRY VANDERPOOL
CASE NUMBER: S8 15 CR 537- 23

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One hundred and fifty-six (156) months.

☑ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends the defendant be designated to FCI Fort Dix or a facility close to the New York City Metropolitan area.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: KERRY VANDERPOOL
CASE NUMBER: S8 15 CR 537- 23

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three (3) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: KERRY VANDERPOOL
CASE NUMBER: S8 15 CR 537- 23

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: KERRY VANDERPOOL
CASE NUMBER: S8 15 CR 537- 23

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall submit his person, residence, place of business, vehicle, electronic devices or other premises under his control to search on the basis that the Probation Officer has reasonable belief that contraband or evidence of a violation of the conditions of release may be found there. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. Defendant must inform any other residents that the premises may be subject to search pursuant to this condition.

Defendant must not associate or interact in any way with members of the YGz gang or any other street gang or frequent neighborhoods known to be controlled by the YGz. This includes contact and interaction through social media.

Defendant must pay at least 10% of gross income towards financial penalties (forfeiture and restitution)

Defendant must provide the Probation Office with access to any requested financial information.

Defendant must not incur new credit charges or open additional lines of credit unless he is in compliance with payment schedule.

The defendant must report to the nearest Probation Office within 72 hours of release.

Defendant shall be supervised by the district of residence.

DEFENDANT: KERRY VANDERPOOL
CASE NUMBER: S8 15 CR 537- 23

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 15,183.00	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
See Order Dated 6/7/2017			

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☐ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: KERRY VANDERPOOL
CASE NUMBER: S8 15 CR 537- 23

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
Paul Dante Gilbert, S8 15-CR-00537-07 (VEC)	14,418.00	14,418.00	JP Morgan Chase Bank

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
$15,183.00

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: KERRY VANDERPOOL
CASE NUMBER: S8 15 CR 537- 23

ADDITIONAL DEFENDANTS AND CO-DEFENDANTS HELD JOINT AND SEVERAL

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
Rascarmi Gallimore, S8 15-CR-00537-32 (VEC)	$765.00	$765.00	Putnam County Savings Bank
Jeffrey Geronimo, S8 15-CR-00537-31 (VEC)	$765.00	$765.00	Putnam County Savings Bank
Corey Canteen, S8 15-CR-00537-28 (VEC)	$765.00	$765.00	Putnam County Savings Bank

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

APPENDIX C

November 7, 2016

BY ELECTRONIC MAIL
Samuel M. Braverman, Esq.
Fasulo Braverman & Di Maggio, LLP
225 Broadway, Suite 715
New York, New York 10007

Re: *United States* v. *Kerry Vanderpool*, S8 15 Cr. 537 (VEC)

Dear Mr. Braverman:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from defendant Kerry Vanderpool a/k/a "Paperz" ("the defendant") to Counts One and Fourteen of the above-referenced Indictment.

Count One charges the defendant with participating in a racketeering conspiracy, in violation of Title 18, United States Code, Section 1962(d), and carries a maximum term of twenty years' imprisonment; a maximum term of supervised release of five years; a maximum fine, pursuant to Title 18, United States Code, Section 3571, of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; and a $100 mandatory special assessment.

Count Fourteen charges the defendant with knowingly using and carrying firearms during and in relation to a crime of violence for which he may prosecuted in a court of the United States, namely the racketeering conspiracy charged in Count One of the Indictment, and knowingly possessing firearms in furtherance of such crime of violence, including firearms that were discharged, and aiding and abetting the same, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(iii) and 2. Under the terms of this Agreement, however, the Government will accept a guilty plea to the lesser included offense of knowingly using and carrying firearms during and in relation to such crime of violence, and knowingly possessing firearms in furtherance of such crime of violence, including firearms that were brandished, and aiding and abetting the same, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2, which carries a maximum term of imprisonment of life, a mandatory minimum term of imprisonment of seven years, which must run consecutively to any other term of imprisonment imposed, a maximum fine of $250,000, a maximum term of supervised release of five years, and a mandatory $100 special assessment.

The total maximum term of imprisonment on Counts One and Fourteen is life imprisonment, with a mandatory minimum term of imprisonment of seven years. In addition to the foregoing, the Court must order restitution in accordance with Sections 3663, 3663A, and 3664 of Title 18, United States Code.

In consideration of the defendant's plea to the above offenses, the defendant will not be further prosecuted criminally by this Office (except for criminal tax violations, if any, as to which this Office cannot, and does not, make any agreement) for (i) his participation in a racketeering conspiracy from in or about 2005 through in or about August 2016, as charged in Count One of the Indictment, and (ii) his use and carrying of firearms during and in relation to that racketeering conspiracy, his possession of firearms in furtherance of that racketeering conspiracy, and his aiding abetting such use, carrying, and possession of firearms, as charged in Count Fourteen of the Indictment, it being understood that this Agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 *et seq.* In addition, at the time of sentencing, the Government will move to dismiss any open Counts against the defendant. The defendant agrees that with respect to any and all dismissed charges he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

The defendant hereby admits the forfeiture allegation with respect to Count One of the Indictment and agrees to forfeit to the United States, pursuant to Title 18, United States Code, Section 1963, a sum of money, representing the gross proceeds received by the defendant pursuant to his racketeering activities as charged in Count One of the Indictment. It is further understood that any forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon him in addition to forfeiture.

The defendant further agrees to make restitution in an amount ordered by the Court in accordance with Title 18, United States Code, Sections 3663, 3663A, and 3664.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. The Guidelines Manuel in effect as of November 1, 2016 applies to the offenses charged in Counts One and Fourteen of the Indictment.

Count One

2. The Sentencing Guideline applicable to Count One is U.S.S.G. § 2E1.1. Pursuant to U.S.S.G. § 2E1.1, the base offense level for Count One is the greater of 19 and the offense level applicable to the underlying racketeering activity, each after application of Chapter Three, Parts A, B, C, and D of the Guidelines. Because the offense level for the underlying racketeering activity is greater, as per the below, it controls.

3. Pursuant to U.S.S.G. § 2E1.1, Application Note 1, because there is more than one underlying offense, each underlying offense must be treated as if contained in a separate count of conviction for purposes of U.S.S.G. § 2E1.1(a)(2).

4. Pursuant to U.S.S.G. § 3D1.1(a), because there are multiple underlying offenses, a multiple-count analysis must be performed for these offenses.

5. Pursuant to U.S.S.G. § 3D1.2, each underlying offense comprises its own separate Group.

6. The offense levels applicable to the underlying offenses are calculated as follows:

Offense 1

7. The Guideline applicable to the first offense, involving the attempted murder of rival gang members from the Cypress Avenue area for filming a rap music video in the charged racketeering conspiracy's territory, in or about May 2013, in the vicinity of the Mott Haven Houses in the Bronx, New York, is U.S.S.G. § 2A2.1. Pursuant to U.S.S.G. § 2A2.1(a)(2), because the object of the offense would not have constituted first degree murder, the base offense level is 27.

Offense 2

8. The Guideline applicable to the second offense, involving the attempted aggravated assault of rival "Flybridge" gang members, in or about 2013 in retaliation for a fatal attack on a leading member of the charged racketeering conspiracy, in the Highbridge park neighborhood in the Bronx, New York, is U.S.S.G. § 2A2.2. Pursuant to U.S.S.G. §§ 2A2.2(a) and 2X1.1(a), the base offense level is 14. A three-level decrease under U.S.S.G. § 2X1.1(b) is not warranted because the defendant completed all the acts that he believed necessary for successful completion of the aggravated assault that was attempted.

9. Pursuant to U.S.S.G. § 2A2.2(b)(1), a two-level increase is warranted because this offense involved more than minimal planning.

10. Pursuant to U.S.S.G. § 2A2.2(b)(2)(a), a five-level increase is warranted because one or more firearms were discharged during this offense.

11. Accordingly, the adjusted offense level for the second offense is 21.

Offense 3

12. The Guideline applicable to the third offense, involving the aiding and abetting of an attempted aggravated assault of rival "18 Park" gang members, on or about May 12, 2015, in the vicinity of 328 East 145th Street in the Patterson Houses in the Bronx, New York, is U.S.S.G. § 2A2.2. Pursuant to U.S.S.G. §§ 2A2.2(a) and 2X1.1(a) and 2X2.1, the base offense level is 14. A three-level decrease under U.S.S.G. § 2X1.1(b) is not warranted because the defendant completed all the acts that he believed necessary for successful completion of the aggravated assault that was attempted.

13. Pursuant to U.S.S.G. § 2A2.2(b)(1), a two-level increase is warranted because this offense involved more than minimal planning.

14. Pursuant to U.S.S.G. § 2A2.2(b)(2)(a), a five-level increase is warranted because firearms were discharged during this offense.

15. Accordingly, the adjusted offense level for the second offense is 21.

Offense 4

16. The Guideline applicable to the fourth offense, involving participation in or about September 2015 in a conspiracy to rob banks in and around Westchester and Dutchess Counties in New York State, is U.S.S.G. § 2B3.1. Pursuant to U.S.S.G. § 2B3.1(a), the base offense level is 20.

17. Pursuant to U.S.S.G. § 2B3.1(b)(1), a two-level increase is warranted because the taking of the property of a financial institution was an object of the offense.

18. Pursuant to U.S.S.G. § 2B3.1(b)(7), a one-level increase is warranted because the loss was more than $20,000 but less than $95,000.

19. Accordingly, the adjusted offense level for the fourth offense is 23.

Grouping Analysis for Count One

20. In calculating the combined offense level for Count One, pursuant to U.S.S.G. § 3D1.4, Offense 1 has the highest offense level, with an offense level of 27, and constitutes one Unit. Pursuant to U.S.S.G. § 3D1.4(a), Offense 4 is four levels less serious than Offense 1 and, therefore, counts as one additional unit. Pursuant to U.S.S.G. § 3D1.4(b), Offense 2 and Offense 3 are both six levels less serious than Offense 1 and, therefore, collectively count as one additional unit. Based on the foregoing, Count One comprises a total of three Units. Accordingly, the highest base offense level (of 27) is increased by three levels.

21. Accordingly, pursuant to U.S.S.G. § 3D1.4, the initial applicable Guidelines offense level for Count One is 30.

22. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, an additional one-level reduction is warranted, pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

23. Accordingly, the applicable offense level for Count One is 27.

Count Fourteen

24. Pursuant to U.S.S.G. § 2K2.4, the guideline sentence for Count Fourteen is the minimum term of imprisonment required by statute. Because the offense charged is a violation of 18 U.S.C. § 924(c)(1)(A)(ii), which carries a mandatory minimum term of imprisonment of 84 months, the Guideline sentence is 84 months.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has one criminal history point, calculated as follows:

1. On or about July 7, 2013, the defendant was convicted, in Bronx County Criminal Court, of unlawful possession of marihuana, in violation of N.Y.P.L. § 221.05, a violation under New York law, resulting in a fine. Pursuant to U.S.S.G. § 4A1.1(c), one criminal history point is added for this prior conviction.

Based on the foregoing, the defendant has a total of one criminal history point, which places him in Criminal History Category I.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's Guidelines range on Count One is 70 to 87 months' imprisonment. Because the lesser-included offense of Count Fourteen has a mandatory minimum term of 84 months' imprisonment than must run consecutively to the prison term imposed for Count One, the Guidelines Range for both counts is 154 to 171 months' imprisonment, with a mandatory minimum term of imprisonment of 84 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 27, the applicable fine range is $25,000 to $250,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party in any way suggest that the Probation Office or the Court consider such a departure or adjustment under the Guidelines.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).

Except as provided in any written Proffer Agreements that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the

Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a); (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the stipulated Guidelines range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence within or below the Stipulated Guidelines Range of 154 to 171 months' imprisonment, and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release

that is less than or equal to the statutory maximum. The defendant also agrees not to appeal any fine that is less than or equal to $250,000, and the Government agrees not to appeal any fine that is greater than or equal to $25,000. Notwithstanding the foregoing, nothing in this paragraph shall be construed to be a waiver of whatever rights the defendant may have to assert claims of ineffective assistance of counsel, whether on direct appeal, collateral review, or otherwise. Rather, it is expressly agreed that the defendant reserves those rights.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio* v. *United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

The defendant recognizes that, if he is not a citizen of the United States, his guilty plea and conviction make it very likely that his deportation from the United States is presumptively mandatory and that, at a minimum, he is at risk of being deported or suffering other adverse immigration consequences. The defendant acknowledges that he has discussed the possible immigration consequences (including deportation) of his guilty plea and conviction with defense counsel. The defendant affirms that he wants to plead guilty regardless of any immigration consequences that may result from the guilty plea and conviction, even if those consequences include deportation from the United States. It is agreed that the defendant will have no right to withdraw his guilty plea based on any actual or perceived adverse immigration consequences (including deportation) resulting from the guilty plea and conviction. It is further agreed that the defendant will not challenge his conviction or sentence on direct appeal, or through litigation under Title 28, United States Code, Section 2255 and/or Section 2241, on the basis of any actual or perceived adverse immigration consequences (including deportation) resulting from his guilty plea and conviction.

It is further agreed that should the conviction following the defendant's plea of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office.

Apart from any written Proffer Agreements that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

By: _____
Samson Enzer
Andrew C. Adams
Gina M. Castellano
Assistant United States Attorneys
(212) 637-2342

APPROVED:
_____
Nola B. Heller
Chief, Violent and Organized Crime Unit

AGREED AND CONSENTED TO:

_____ _____
KERRY VANDERPOOL DATE

APPROVED:

_____ _____
SAMUEL M. BRAVERMAN, ESQ. DATE
Attorney for the defendant

APPENDIX D

17-1188-cr(L)
United States v. Brown

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 19th day of December, two thousand nineteen.

PRESENT: JOHN M. WALKER, JR.,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL BROWN, COREY CANTEEN, KERRY VANDERPOOL, WILLIAM BRACEY, WENDELL BELLE, JASON MOYE,

Defendants-Appellants.

No. 17-1188(L);
No. 17-1525(CON);
No. 17-1563(CON);
No. 17-2384(CON);
No. 17-2544(CON);
No. 17-3227(CON)

FOR DEFENDANT-APPELLANT MICHAEL BROWN:	JANE S. MEYERS, Law Office of Jane S. Meyers, Brooklyn, NY.
FOR DEFENDANT-APPELLANT COREY CANTEEN:	BENJAMIN GRUENSTEIN, Cravath, Swaine & Moore, LLP, New York, NY.
FOR DEFENDANT-APPELLANT KERRY VANDERPOOL:	SAMUEL M. BRAVERMAN, Fasulo Braverman & DiMaggio, LLP, New York, NY.
FOR DEFENDANT-APPELLANT WILLIAM BRACEY:	BRUCE R. BRYAN, Bryan Law Firm, Syracuse, NY.
FOR DEFENDANT-APPELLANT WENDELL BELLE:	STEVEN Y. YUROWITZ, Newman & Greenberg LLP, New York, NY.
FOR DEFENDANT-APPELLANT JASON MOYE:	Bryan Konoski, Treyvus & Konoski, P.C., New York, NY.
FOR APPELLEE:	GINA M. CASTELLANO, Assistant United States Attorney (Samson A. Enzer, Andrew C. Adams, Karl Metzner, Assistant United

States Attorneys, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.

Appeals from judgments of the United States District Court for the Southern District of New York (Valerie Caproni, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the District Court as to defendants-appellants Kerry Vanderpool, Wendell Belle, and Jason Moye are VACATED in part and AFFIRMED in part as to select counts of conviction and the causes are REMANDED for resentencing, and that the judgments as to defendants-appellants Michael Brown and William Bracey are AFFIRMED. The consolidated appeal of defendant-appellant Corey Canteen is resolved by separate opinion filed simultaneously with this order.

These appeals stem from a multi-defendant prosecution targeting members of the "Young Gunnaz" street gang in the Bronx, New York. The five appellants who are the subject of this summary order entered into plea agreements with the Government and were sentenced to prison terms ranging

from 168 to 444 months. 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 the judgments of conviction as to Brown and Bracey, and to affirm in part, vacate in part, and remand for resentencing as to Vanderpool, Belle, and Moye.

Vanderpool, Belle, and Moye each pleaded guilty to a firearm offense under 18 U.S.C. § 924(c) for which the underlying crime of violence was a racketeering conspiracy. The Government concedes that the Supreme Court's recent decision in United States v. Davis, 139 S. Ct. 2319 (2019), requires vacatur of those counts of conviction. See also United States v. Barrett, 937 F.3d 126 (2d Cir. 2019). Accordingly, we vacate Vanderpool's second count of conviction (hereinafter, "Vanderpool Count Two") (Count 14 of the Eighth Superseding Indictment, S8 15 Cr. 537 (VEC), in this case), Count One of Belle's conviction, and Count One of Moye's conviction, and we remand the causes for resentencing on the remaining counts for each of these three defendants.

Our decision to vacate and remand renders moot the other arguments Belle and Moye raise on appeal that assert errors requiring resentencing.

Below, we address the remaining arguments that have not been rendered moot by the Government's concessions.

1. Vanderpool

Vanderpool claims that he should be resentenced before a different district judge on remand because, he contends, the Government breached the parties' agreement not to "seek" or "suggest . . . the Court consider" any adjustments or departures not contained in the plea agreement. Vanderpool App'x 13. Specifically, Vanderpool points to the Government's submission, in response to a court order, that "the Court would be within its discretion to find" that one of the underlying offenses in the racketeering charge, which the plea agreement treated as an aggravated assault, constituted an attempted murder that would have been first degree murder if completed. Id. at 55.

We conclude that the Government's submission did not constitute a breach of the plea agreement, which expressly reserved the parties' rights "to answer any inquiries and to make all appropriate arguments" in the event "the Court contemplates" a different Guidelines calculation. Id. at 14. The Government did not raise the first-degree-murder issue "on [its] own initiative," but "merely

provide[d] information . . . in response" to the District Court's inquiry. United States v. Griffin, 510 F.3d 354, 365 (2d Cir. 2007). And it did so while affirming that it "stands by the stipulated Guidelines calculation" contained in the plea agreement. Vanderpool App'x 55; see United States v. Amico, 416 F.3d 163, 165–66 (2d Cir. 2005). Vanderpool's reliance on United States v. Lawlor, 168 F.3d 633 (2d Cir. 1999), to support his argument is misplaced. There we found that the Government's "disavow[al]" of the stipulated Guidelines calculation breached the plea agreement, and we did not consider a reservation of rights clause similar to the clause in Vanderpool's case. Id. at 637. We therefore reject Vanderpool's argument that he should be resentenced by a different district judge.

For the first time at oral argument, Vanderpool also argues that this Court should "strike" rather than vacate Vanderpool Count Two and retain his 84-month sentence on his remaining count of conviction. Doing so, he asserts, would avoid the disruption to his current participation in Bureau of Prisons programs that resentencing will cause. Even if Vanderpool had timely raised this argument and we could strike his conviction as he proposes, we would not

do so. The District Court is uniquely positioned to determine the adequacy of any sentence in Vanderpool's case, and it should do so in the first instance.

2. Brown

Brown's plea agreement included a waiver of the right to appeal a sentence within the stipulated Guidelines range, and he does not dispute that his sentence falls within the scope of the waiver. Nonetheless, he asserts that the waiver is void because the District Court failed to adequately support its finding that one of the attempted murders underlying his racketeering conviction would have been a first degree murder if completed. He argues that the District Court's failure to do so amounted to an "abdication of its judicial responsibility," requiring resentencing. Brown Br. 45 (quoting United States v. Buissereth, 638 F.3d 114, 118 (2d Cir. 2011)).

We disagree. The District Court's determination with respect to premeditation was amply supported and explained. The District Court cited portions of Brown's plea allocution in which he admitted having the intent to kill, and it also identified other evidence sufficient to infer premeditation on Brown's part. In any event, we have upheld appellate waivers over objections

that a sentence was imposed without a specification of reasons as required by 18 U.S.C. § 3553(c)(1), United States v. Yemitan, 70 F.3d 746, 747–48, 747 n.1 (2d Cir. 1995), that a district court failed to rule on objections and downward departures or to calculate the Guidelines range at all, Buissereth, 638 F.3d at 115, 117, and that a sentence was "imposed in an illegal fashion," United States v. Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000). For these reasons, we conclude that Brown's waiver is enforceable and bars this challenge to his sentence.

3. Bracey

Bracey similarly challenges the enforceability of the appellate waiver contained in his plea agreement. The waiver provision, he claims, does not prevent him from arguing that his sentence is substantively unreasonable. As we explain, however, we need not decide whether the waiver is enforceable, for we easily reject the claim of substantive unreasonableness.

We will "set aside a district court's substantive determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions." United States v. Cavera, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (quotation marks omitted). Bracey argues that his sentence

is substantively unreasonable because of unwarranted disparities between his sentence and those of his co-defendants, and because the District Court insufficiently considered certain mitigating factors. We conclude that the District Court adequately justified Bracey's sentence by reference to the other defendants. The District Court compared Bracey to co-defendants sentenced for similar offenses and weighed the defendants' ages, their criminal histories, and the relative seriousness of their offenses. The District Court also considered all the mitigating factors Bracey raises on appeal—his age, difficult upbringing, history of abuse, and family ties—and determined that they were outweighed by aggravating factors, including his leadership role in the gang, his involvement in multiple incidents in which guns were fired, the nature of the murder in which he admitted participating, and his failure to change his lifestyle after the birth of his son. Determining the comparative weight of 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) (quotation marks omitted). On this record, we see no basis to conclude that Bracey's sentence of 396 months' imprisonment, on a conviction for which the stipulated Guidelines

sentence was life, is so "shockingly high" as to be substantively unreasonable.[1] Id. (quotation marks omitted).

We have considered the appellants' remaining arguments and conclude that they are without merit. In summary, and for the foregoing reasons, the judgments of the District Court as to Brown and Bracey are AFFIRMED, Count Two of Vanderpool's conviction, Count One of Belle's conviction, and Count One of Moye's conviction are VACATED, and the causes are REMANDED for resentencing.

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

[1] Bracey argues for the first time in a Rule 28(j) letter dated August 26, 2019, see Fed. R. App. P. 28(j), that his sentence should be vacated because the § 924(c) convictions and sentences of Vanderpool, Belle and Moye, which we hereby vacate, directly affected the sentence he received. In the same Rule 28(j) letter he also argues for the first time that Davis affects the voluntariness of his guilty plea, which he asserts he entered primarily to avoid the risk of conviction for a violation of § 924(c) predicated on use or carrying of a firearm in relation to the RICO conspiracy. We deem these arguments waived and decline to address them. See United States v. Bortnovsky, 820 F.2d 572, 575 (2d Cir. 1987) ("Pursuant to Rule 28(j)[,] . . . counsel may submit 'pertinent and significant authorities [which] come to the attention of a party after the party's brief has been filed, or after oral argument but before decision . . . .' In making any such submission, a party is strictly forbidden from making additional arguments or from attempting to raise points clarifying its brief or oral argument." (quoting Fed. R. App. P. 28(j))).

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 15 Cr. 537 (VEC)

KERRY VANDERPOOL,
a/k/a "Paperz,"

Defendant.

Sentence
----------x

New York, N.Y.
September 29, 2020
11:00 a.m.

Before:

HON. VALERIE E. CAPRONI ,

District Judge

APPEARANCES

AUDREY STRAUSS
Acting United States Attorney for
the Southern District of New York
BY: SAMSON A. ENZER
Assistant United States Attorney

FASULO, BRAVERMAN & DiMAGGIO, LLP
Attorneys for Defendant
BY: SAMUEL M. BRAVERMAN

(Case called)

MR. ENZER: Good morning, your Honor. Samson Enzer, for the government.

THE COURT: Good morning, Mr. Enzer.

MR. BRAVERMAN: And good morning, your Honor. Sam Braverman for Mr. Vanderpool, standing with me to my right. And we also have my client's mother and brother here in court.

THE COURT: Good morning, Mr. Braverman.

Good morning, Mr. Vanderpool.

Good morning, family.

THE DEFENDANT: Good morning.

THE COURT: OK. Let's start with the defense argument that the Second Circuit lacks jurisdiction to vacate both sentences.

MR. BRAVERMAN: Yes, your Honor.

THE COURT: Mr. Braverman, do you want to be heard further on that?

MR. BRAVERMAN: Yes, your Honor.

(Unintelligible)

MR. BRAVERMAN: Your Honor, with respect to this, the government submitted a memo saying the Supreme Court has endorsed the process, and I have no doubt that they have, and it's unequivocal that they've endorsed the process.

What I noted to the Court of Appeals, because when we were there, I had a chance to read all the statutes for

jurisdiction again, and the statute for jurisdiction is just clear. It just says these are the few choices they have. I raised the argument to them, and I said -- and there's actually an audio transcript of it. I said you could reduce your --

THE COURT: Hang on a second.

All right. Go ahead.

It must be the air-conditioning unit. Do you hear that hum?

Speak up, louder and slower.

MR. BRAVERMAN: Sure.

THE COURT: Perfect.

MR. BRAVERMAN: And so what I argued to the Court of Appeals was the statute was unequivocal on its face. The Court of Appeals summarily rejected my argument, and the Supreme Court has summarily rejected my argument, and the government, in their papers, summarily rejected my argument. (Unintelligible) but the statute is still unequivocal, and the government and the Supreme Court and the Court of Appeals, none of them said that the statute doesn't say what I said it said. They all say we do it differently here.

Well, that's Congress's job to change the statute. So that's my argument, that the statute is unequivocal on its face, and the Supreme Court is incorrect the statute should be (unintelligible)

THE COURT: OK.

MR. BRAVERMAN: That's the argument.

THE COURT: OK.

MR. BRAVERMAN: I'll try it again in the Second Circuit (unintelligible)

THE COURT: OK.

Mr. Enzer, do you want to be heard?

MR. ENZER: We rest on our papers and the binding Supreme Court and Second Circuit authority rejecting this argument.

THE COURT: Well, I agree with the government that the defense argument is wrong procedurally as well as substantively.

The Court also disagrees with the defense's implicit argument that this Court is somehow bound by its prior sentence on Count One. It's clear that sentencing, particularly when there's a mandatory consecutive component, can be done as a whole. By vacating both sentences, the Court of Appeals put it back in my lap to determine whether vacating the 924(c) sentence requires an adjustment to the sentence that was imposed on the RICO count.

While I appreciate the defense argument, the fact is that I very much took into account the fact that I had to impose a consecutive 84-month sentence for the gun count. My goal was to have an aggregate sentence that reflected my balance of the 3553 factors. That is an analysis that

typically benefits the defendant. That is appropriate because the Court is supposed to impose a sentence that is a reasonable sentence, so your objection to resentencing on Count One and your argument that I sentence on Count One is capped by the sentence imposed when it was part of a sentence that included the 924(c) count is denied.

Mr. Braverman, have you and your client read the supplemental presentence report that was filed on April 17, 2020?

MR. BRAVERMAN: Yes, your Honor.

THE COURT: Mr. Vanderpool, did you read the supplemental presentence report?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you discuss it with your lawyer?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are there any objections to the report?

MR. BRAVERMAN: Judge, there is one objection I had raised with probation to Officer Kim. I raised the issue in an email that the probation report had to be modified to reflect the Court of Appeals decision. So it still lists, so the probation report still lists a variety of different, the recommendation based on all the different factors, two counts, and I said that it's important so that when Mr. Vanderpool gets to the Bureau of Prisons, that the probation report is updated to the current situation, and Mr. Kim wrote back to me in an

email.

In his response, he said (unintelligible) to the *Davis* case, our office has been submitting updated guideline calculations to the Court. However, to date we have made no attempts to update the PSR (unintelligible) the *Davis* case.

I think that since the PSR travels with Mr. Vanderpool throughout his time at the BOP, the actual report itself should be updated to the current legal status, that there's one count of conviction, what that count was, and the other count, therefore, has been vacated and dismissed.

THE COURT: Well, isn't that isn't that what the supplemental presentence report essentially accomplishes, which travels with him? There are three documents that are critical: the judgment, which will reflect only a conviction on Count One; the supplemental presentence report; and the presentence report.

MR. BRAVERMAN: Right. I understand that. I just said that the presentence report should be correct. It seems to hew -- the Court asked if I had an objection. That was the objection I raised to Officer Kim, and I was rejected on it, and I just maintain that the report itself should be correct. We should not be sending anything that's not (unintelligible) to the Bureau of Prisons because it might adversely impact (unintelligible), whereas the Bureau of Prisons has total discretion to make decisions about programming and so on and so

forth. The supplemental is not always -- and I don't -- I can't tell you in any percentages. But they should all be correct, and that was my argument to probation, which they rejected.

THE COURT: Mr. Enzer.

MR. ENZER: The prior PSR is a historical document. It was correct at the time. Yes, there has been a change in circumstances that's reflected in the supplemental.

To the extent that the defense thinks that there could be a programming impact or an impact on the BOP, you know, we're open to suggestions from them about what to say in the supplemental PSR that doesn't make this clear, or maybe it should incorporate by reference the Second Circuit decision vacating one of the counts, if that's necessary. But I don't see why revising the historical document, which was correct at the time and, I believe, approved by the Court after, or without objection from the defense, why that needs to be now changed.

THE COURT: I agree. What I'm going to do is I'm going to order the probation department to add to the supplemental presentence report plainly that the defendant is no longer convicted of Count Fourteen and that Count Fourteen has been dismissed. That will be in the supplemental presentence report.

MR. BRAVERMAN: Thank you, Judge.

THE COURT: OK. Anything else?

MR. BRAVERMAN: Nothing further, your Honor.

THE COURT: The presentence report as well as the supplemental presentence report will be made part of the record in this matter and placed under seal. If an appeal is taken, counsel on appeal may have access to the sealed report without further application to this Court.

I received a sentencing submission from the defense dated September 1, 2020, and I was handed this morning two additional letters: one dated August 28, 2020, from Cherise; Vanderpool.

Is that Cherise Vanderpool?

VOICE: Your Honor, that's my sister.

THE COURT: And a friend of Mr. Vanderpool's that I'm not -- is this Unique Michael? Is that who wrote this letter --

MR. BRAVERMAN: Yes, your Honor.

THE COURT: -- that's not signed?

MR. BRAVERMAN: That is a friend of the family.

THE COURT: A friend of the family. OK. Would you please make sure both of these are filed on ECF, but I have read them both.

MR. BRAVERMAN: Thank you, Judge. I apologize for their tardiness. They were provided to me and I provided them to the Court (unintelligible)

THE COURT: Not a problem.

And I have received a letter from the government dated September 1, 2020. I've also considered all of the filings that were made in connection with the initial sentencing in 2017.

The next step is the guidelines calculation.

Apologies to the people who are here to support Mr. Vanderpool, but I need to go through this.

The defendant pled guilty to one count of conspiracy to violate the racketeering laws and one count of brandishing a weapon in connection with a crime of violence. The PSR that was attached to the supplemental presentence report reflects the guidelines calculation previously discussed.

Oh, somebody's in big trouble.

MR. ENZER: I'm sorry, your Honor.

THE COURT: Did you put it on silent?

MR. ENZER: It's off.

THE COURT: OK.

The presentence report that was attached to the supplemental presentence report reflects the guidelines calculation previously discussed.

To review, I start with the racketeering guideline of 2E1.1. That directs me to start with the base offense level of 19 or the level applicable to the underlying racketeering activity, whichever is greater. In this case, the racketeering

activity is one count of attempted murder, two aggravated assaults and two bank robberies. Each will be an individual group, so group one was the Cypress Avenue attempted murder in 2013.

Under the racketeering guideline I'm directed to the relevant guideline for that predicate, which would be the guideline for assault with intent to commit murder, or 2A2.1(a).

I continue to accept the argument that this was a sort of heated-passion shooting. Because the object of the assault would not have been first degree murder, the offense level is 27, and that is the total for that act.

Group two is the Flybridge assault in 2013. I again start with the assault to commit murder guideline, 2A2.1(a). I continue to reject the defense argument that this would not have been a first degree murder. For all of the reasons discussed in 2017, a reasonable jury would determine that the drive to the location constituted premeditation and malice aforethought, so the base offense level is 33. No adjustment is appropriate for it only being an attempt because the defendant completed all the steps necessary to make it a completed crime, so the total for the Flybridge attempt was 33.

Group three is the aggravated assault on May 12, 2015. We start with the aggravated assault guideline, which is 2A2.2(a). That's a base offense level of 14. Again, there's

no adjustment appropriate for it being an attempt because the defendant had completed all steps to make it a completed crime.

A firearm was discharged, so pursuant to 2A2.2(b)(2)(A), that's plus five. There was more than minimal planning, so pursuant to 2A2.2(b)(1), that's plus two, which brings the total for that group, that aggravated assault to 21.

Group four was the September 17, 2015, bank robbery. The base offense level for bank robbery is found at 2B3.1, which makes 20. It was a financial institution that was robbed, so pursuant to 2B3.1(b)(1), that's plus 2, bringing the total for the September 17 bank robbery to 22.

Group five is the September 22, 2015, bank robbery. Again, the base offense level is 20, pursuant to 2B3.1. It was a financial institution that was robbed, so pursuant to 2B3.1(b)(1), that's plus two, bringing the total to 22.

So the grouping analysis establishes that group two is the highest group; that's at 33.

Group one, which is five levels away, generates a half a unit. The highest group is one unit. All of the other groups are more than nine levels away, so they generate no units. One and a half units means I add one level to the highest level, so group level 33 plus one is 34.

Mr. Vanderpool gets credit for accept substance of responsibility, so that's minus three, bringing us to a total adjusted offense level of 31.

The defendant has a single conviction for possession of marijuana in 2013, for one criminal history point. One criminal history point puts him in criminal history category I. Level 31, criminal history category I yields a guideline range of 108 to 135 months.

Are there any guidelines arguments I have not addressed?

Mr. Enzer.

MR. ENZER: Not from the government, your Honor.

THE COURT: Mr. Braverman.

MR. BRAVERMAN: No, your Honor. The Court has already overruled all of my objections.

THE COURT: OK.

Now, I don't see any basis for a downward departure, although the fact that he shot a gun and assisted others who intended to or did shoot the gun in a crowded area is expressly, under the guidelines, a ground for an upward departure. Moreover, although the bank robberies do not garner any points because they are more than nine levels from the attempted murder, they also are a potential basis for an upward departure.

Are there any factual issues in dispute, or did those all get resolved the first time around?

Mr. Enzer.

MR. ENZER: I believe they've all been resolved, your

Honor.

THE COURT: Mr. Braverman.

MR. ENZER: They've all been resolved before.

THE COURT: All right.

Would the government like to be heard on sentence?

MR. ENZER: Briefly. Your Honor is obviously familiar with the record and with the parties' submissions.

There has been no material change in the facts that the Court considered when it imposed a sentence of 14 years on this defendant, Mr. Vanderpool.

Before the original sentencing, the Court carefully considered the facts of his offense conduct, all of the relevant Section 3553(a) factors. The Court inquired of the government for additional facts, got a supplemental submission on that, and after doing that analysis, considering all the facts, came to a reasonable judgment that a sentence of 14 years was appropriate. That was a sentence at the time that was in upper middle or towards the top of the guideline range that the defendant had pleaded guilty to in his agreement, and that sentence was reasonable and appropriate and continues to be.

There has been no change in material facts. The law has changed. The seven-year mandatory minimum that applied to one of the counts that the defendant pleaded guilty to obviously has been overturned, and that is not at play anymore.

But I don't think -- I think the record is clear. That was not a driving force of the Court's original sentence. The Court did not -- if the Court had sentenced him to seven years, that would suggest that the seven-year mandatory floor had a serious impact on the prior sentence. The Court gave twice that, and the Court can give the same sentence here. The maximum is 20 years, and it would be reasonable and appropriate to give the same sentence. The conduct is extremely serious.

When the defendant was in his 20s, he was a central member of one of the most violent and dangerous gangs in the Bronx, the YGz. He personally participated in three separate shootings. One shooting he fired guns -- he fired a gun -- I'm sorry -- at rivals for shooting a rap video on his turf. One shooting, him and others go to rival gang territory and get into a shoot-out in the middle of a public area. Third shooting, in a housing project where people live, he served as scout and went to see if there were people to shoot at before reporting to the shooters: OK, green light, go shoot.

Separate from those three shootings, he was caught with a gun by police after a chase and, after that, participated in a bank robbery spree where he personally was caught in two bank robberies that he committed in the upper counties in New York with other members of the YGz gang.

This is a string of violence. It's not one isolated act. It's not one mistake. It is a series of violent acts.

Those shootings in particular, it is only by the grace of God that someone is not dead, an innocent person, not just a rival gang member but an innocent person isn't dead. And for that, the 3553 factors counsel in favor of a serious sentence, a sentence along the lines of what the Court imposed before. The seriousness of the offense warrants a sentence in line with a 14-year sentence. Just punishment and imposing a sentence that requires respect for the law counsel in favor of that sentence.

The other factors that are material here.

The defendant was in his 20s when he committed these offenses. He's 30 now. He's still a young man. Protecting the public and specifically deterring him -- in other words, incapacitating him for a period of time until he is old enough to mature and hopefully age out of this type of violence -- is a serious and important factor.

Now, the defense has proffered that he has done well in prison. We're not doubting that. We commend that. I think that is fantastic. It demonstrates that the sentence imposed by the Court has been working.

I don't think it counsels in favor of leniency or a reduction from the prior sentence. We expect that of him. That is what is expected, and it is good that he is doing it, but it is not a reason to deviate from the course that is working.

The sentence the Court imposed before was appropriate, and we submit the Court should impose the same sentence.

THE COURT: Thank you, Mr. Enzer.

Mr. Braverman.

MR. BRAVERMAN: Thank you, your Honor.

Well, first off, Judge, I agree with the government that the crimes are extremely serious. There's no doubt. Nobody who lives in a civilized society warrants this kind of activity at all, and it's 100 percent appropriate that Mr. Vanderpool should be deterred from committing these crimes, as should everybody who commits these crimes. There's no dispute.

So this I don't think is a referendum on whether or not the crimes are serious, because they are. And it's not a referendum on whether we should or should not allow shootings, because we should not. The question is what is appropriate in this particular case on this particular day, and that's where 3553(a) does come into effect again because it's the sentence to be imposed on this young man, who sits to my right, who he is today, that also matters. And so it's fair and appropriate for the Court to consider what he's done since 2017.

What he's done with his life when he was in jail should be a relevant factor, because the very second thing on the list that the statute tells us to consider is the characteristics and history of the defendant. So when

probation writes that he had an unlawful possession of marijuana, violation for which the maximum sentence is $100, and probation writes this did not deter him from criminal conduct, it's kind of vague. The city is about to and effectively endorsed marijuana. New Jersey (unintelligible) statewide (unintelligible). To suggest that that shows his outright disrespect for the law and is incorrigible, I don't think is a reasonable approach (unintelligible)

THE COURT: Yes. I didn't --

MR. BRAVERMAN: (unintelligible)

THE COURT: -- focus on that and --

MR. BRAVERMAN: I can't imagine that the Court did.

THE COURT: I was more focused on what he did when --

MR. BRAVERMAN: 100 percent.

THE COURT: -- he was involved with the YGz.

MR. BRAVERMAN: 100 percent, Judge. He should never have been involved in the gang, and this Court and Mr. Enzer in particular has done remarkable work to bring the YG gang down and take it out. There are other gangs that replace it, but to remove each one is important.

So now that Mr. Vanderpool's been removed from the gang, it is a reasonable question to the Court how is he doing so that the Court can evaluate if he gets out at some point in his life, as he will, what will he do? So one of the things that matters is that, in jail, where we know there are still

lots of gangs and, in jail, where we know people commit lots of crimes and, in jail, where we know people violate the rules all the time, to Mr. Vanderpool's credit, that's not happening. He has some minor infractions, but they are not for violence.

THE COURT: Possession of a dangerous weapon, I thought.

MR. BRAVERMAN: My understanding of that, your Honor, was that that was --

I'm sorry.

It was a cell phone, is my understanding, your Honor, which he's not allowed to have.

THE COURT: No, he's not.

MR. BRAVERMAN: 100 percent he's not allowed to have.

THE COURT: And that means --

MR. BRAVERMAN: Agreed.

THE COURT: -- he was coordinating with someone to get a hold of that cell phone.

MR. BRAVERMAN: Sadly, I've been in enough proffers to know where all the cell phones come from.

THE COURT: Yes, but somebody's got to bring it in.

MR. BRAVERMAN: Yes.

THE COURT: That means he has to ask someone to bring it in.

MR. BRAVERMAN: Or somebody brings it in and offers it for sale.

THE COURT: OK.

MR. BRAVERMAN: Other clients at Fort Dix tell me that there is a market for cell phones at the jail.

THE COURT: I'm sure there is.

MR. BRAVERMAN: And surely should not be done.

But he isn't in more crimes of violence. He is not in crimes of assaulting guards. He's not in crimes of assaulting inmates. He's not in crimes of being involved in melees and riots, which we do see. And that is the conduct that he committed outside. So in this other environment he is doing better, not perfectly, but better.

The other thing that is significant about Fort Dix is that Fort Dix, as we know, is under a severe COVID attack.

THE COURT: It was. I'm not sure it still is.

MR. BRAVERMAN: Well, I actually got an email last night from an inmate at Fort Dix, whose compassionate release application is pending (unintelligible), and they are bringing in 60 inmates from Elkton, Ohio, (unintelligible) facility, and all the people (unintelligible) my client's in a camp. All the people have been mushed together into a low, and they're all living 80 people in a dorm, so in a room not much larger than this, they have 80 people living, sleeping, full time. And food is brought to the room, and they exist in this room together. So I think that's -- and they're not testing the virus. That strikes me as hopeful at best.

That is a factor I think the Court should consider as well because it was not his choice to be in the prison at the time; it was nobody's choice. It was his choice to commit the crime, but once he's in prison, nobody expected the pandemic, and that means that he's been locked down for the entire time of the pandemic and will likely continue to be, so I do think it's a factor the Court can consider as to what is appropriate, how much that time counts. And other judges in the current jurisdiction of this court have considered it and have sometimes used that to tailor their decision of what's an appropriate sentence and have given some clients an additional time credit -- because, under 3553, they can -- to say I understand the time you are doing now has been much harder.

So the fact is my client sitting here and his mother sitting here today is the first time she has seen him at all in person in more than now six months, and the fact is he doesn't get a chance to see his family even though they only live 50 miles apart, and she visited him all the time, regularly before. He doesn't get the chance to do the programs, so -- and I do want to thank the Court on behalf of my client because I had asked early on to defer sentencing to September so he could to complete his RDAP program, and I really do appreciate that because he did do that.

He successfully completed that program, and that is one -- one -- step of his absolute plan that he must

complete -- to stay out of trouble, he must be sober. The only problem, of course, is he can't get the graduation certificate for it because they can't have a ceremony because of COVID. But he will get it eventually. This will lift; he will get it eventually. All the programming has stopped, so all the things that he would do to continue to better himself he's not able to get to.

THE COURT: What was he doing before? Because, look, I understand once COVID hit all that stopped. Your letter told me that he took an accounting course and a parenting course. I didn't see the parenting course, but did he take any other vocational training?

MR. BRAVERMAN: Judge, can I have him direct --

THE COURT: Of course, you can use your bat phones in front of you. If you're comfortable chatting with each other, that's fine. Or the bat phones work if you just want to whisper.

(Counsel conferred with defendant)

MR. BRAVERMAN: Judge, may I just have him just address you directly? It's easier.

THE COURT: OK.

MR. BRAVERMAN: Just use the microphone.

THE DEFENDANT: Yes, ma'am. I was attending three different classes before the pandemic hit. It was business marketing, real estate and a parenting course. I didn't get to

finish them. The only thing I got to finish was accounting, and I was going back for accounting 2. I completed accounting 1, and I was going to complete accounting 2.

THE COURT: OK.

MR. BRAVERMAN: So those are positives, and he's existing in a tough situation. So I ask the Court to consider that as well because the person (unintelligible) today, who the Court imposes sentence on today is still in some ways essentially different from the person who sat here in 2017.

And finally, Judge, I just want to say that when you hear Mr. Vanderpool speak, I know -- he has told me, and I hope the Court will hear him as he tells you -- about how the impact has been on him. He's never -- as probation points out, he's never served any real jail time at all. Nothing. And so what did a 14-year sentence feel like when he got to prison? What did a 14-year sentence feel like when there was no realistic chance it was ever going to change? What peace did he make with himself at that moment? I know he's told me about that; I believe he's going to tell the Court.

For those reasons, Judge, I do think that there is a sentence other than the 168 that is appropriate, that promotes respect for the law, that promotes the specific deterrence to this gentleman and general deterrence to society, takes into account the seriousness of the offense.

There is still a guideline, and there is a guideline

here of 108 to 135. If the Court rejects my argument, as it has, on the 84, then the guidelines sentence still gives the Court great latitude, and a guidelines sentence still is something that the heart -- that this case is not a heartland case and if not a heartland case, therefore, deserves an upward departure. As the Court said these characteristics of these offenses are taken into consideration.

THE COURT: Well, the guidelines themselves suggest that some of the factors that are present in this case are an appropriate grounds for an upward departure --

MR. BRAVERMAN: Could be.

THE COURT: -- under the guidelines.

MR. BRAVERMAN: Under the guidelines, it could be.

THE COURT: OK.

MR. BRAVERMAN: Right? So this isn't -- there aren't a lot of encouraging (unintelligible) to a downward departure under the guidelines. And if you're sitting in jail and you're locked in with 80 people in the room and you're suffering from a pandemic, there isn't anything in the guidelines that say, oh, this, we encourage you to take that down.

THE COURT: Understood.

MR. BRAVERMAN: So that is not -- I have no authority over.

But nevertheless, Judge, I think that there is a guidelines sentence here that is appropriate to impose, and I

would ask the Court to impose a guidelines sentence.

THE COURT: Let me just ask you one other thing. I think the defense provided this, but maybe not. The document that came in from the Bureau of Prisons under the FRT details, which is on the second page -- do you have it?

MR. BRAVERMAN: Yes, your Honor. I see that. I think that's attached to the PSR, maybe. No?

THE COURT: It could have been.

MR. BRAVERMAN: Nonetheless, I have the page.

THE COURT: It's document No. 1486. You're right. It was attached to the supplemental.

MR. BRAVERMAN: Yes. Right.

THE COURT: Under the FRT details --

MR. BRAVERMAN: Yes, your Honor.

THE COURT: -- it suggests that the, I think what it tells me is that the assessment, the $200 special assessment has been paid but that the inmate has declined the financial responsibility program in order to pay on the restitution, and it does appear that only $161 has been paid. Can you fill in --

MR. BRAVERMAN: Of course, your Honor.

THE COURT: -- the blanks on that.

MR. BRAVERMAN: I'll ask the client about that.

(Counsel conferred with defendant)

MR. BRAVERMAN: Your Honor, my understanding is

Mr. Vanderpool makes approximately $20 per month for his work within the prison, and he has various different jobs there, and that money he has been trying to spend on staying in communication with his family. So if he's rejected it, he's just trying to balance between the two things.

THE COURT: OK. Thank you.

Mr. Vanderpool, would you like to be heard?

THE DEFENDANT: Yes, ma'am.

Can I stand or sit down?

THE COURT: You can stand if you'd like. It's up to you. However you're most comfortable.

THE DEFENDANT: Yes, ma'am.

When I first got sentenced to 168 months, you know, just like my attorney here stated, I honestly didn't know how I was going to handle that. It was a tough pill to swallow for somebody that's never been incarcerated. Having to deal with just being incarcerated for so long, it was very difficult. When I first got to Fort Dix, I honestly didn't know how I was going to do the time. I honestly didn't know. I fell into a dark place. I really didn't know. I just wanted it to be over.

But within a few months, you know, I started adjusting. I started meeting a few people, and they was in worse situations than me. They gave me their advice, you know, so I tried and adjust a little bit, and during my time I had to

reflect on the, you know, mistakes on me and what they cost me going in prison. It cost me time with my family. It cost me the last moments with people I love that passed away since I was incarcerated. That affected me a lot.

So again, I lost people that I actually became friends with while incarcerated. One of the closest guys that I met, he taught me a lot. He showed me that it's possible to, you know, do the time and become a better person. And sadly, he passed away within ten months of me knowing him. That was another tough thing for me to deal with. But I took his advice or lesson to use my time wisely and adapt to my environment and also become better and be better for when the day when I do be released. So I've just been, you know, studying and learning everything I can learn, like, outside of programming, you know, because it doesn't stop. It just, it doesn't stop with just program. Just everyday life is a learning experience, so I try and learn as much as I can, whether it's accounting, whether it's real estate, whether it's business marketing.

I've met a few people who have had businesses in the street and started their own businesses while they were incarcerated, and I also, in contact with my aunt, she has a nonprofit organization that I would like to be a part of, you know, upon my release, you know, to help at-risk kids. And who better than somebody who made the mistakes that they trying to avoid to help them? Who better to help them out than me?

I haven't -- since my incarceration, I haven't participated in any violent activity. I remember at my previous sentencing, you stated you was worried about me in the future because I was prone to violence. I remember that. I remember everything that was said when I left, and I took it into account that I have to be responsible, I have to man up and be wise in the decisions I make because they cost me a lot. And I've been suffering but learning everything, so I had to take it for what it's worth and become a better man for my daughter that's growing up, for my little brother that's growing up, little sister that's growing up, just my family in general. And I have been.

To save myself, I have been doing well. I haven't been involved in any gang activity and anything in a such a way, and I just hope that you can see that I'm changed and I'm changing as a man and as a member of my community.

Thank you for that.

THE COURT: Thank you, Mr. Vanderpool.

Under federal law, I'm required to consider the nature and circumstances of your offense and the history and characteristics of you.

In terms of you, I've considered your history and characteristics. I'm not going to repeat what I said at the original sentence, although my basic assessment of Mr. Vanderpool hasn't changed. He was dealt a tough hand from

birth. He was raised by a single mother in a poverty-stricken, gang-infested neighborhood. He dropped out of high school and has only limited vocational training, something that hasn't changed.

I appreciate your desire to learn about real estate and accounting. I think you need to focus on what's going to get you a job, but making productive use of your time in jail main is meaningful in another way.

You have one child which you have not meaningfully supported financially, although for the last three years, obviously, that's been not in the cards.

Taking into account that evaluation of the defendant, federal law requires me to impose a sentence that is reasonable and no greater than necessary to accomplish the goals of sentencing.

I've considered all of the required factors.

To start with the seriousness of the offense, Mr. Vanderpool, as you know, this is among the most serious of all federal offenses. The YG gang, which you were part of, made life awful for that neighborhood in the Bronx. While you and your friends were shooting at each other and brawling in the street and openly selling drugs, there were residents of the area who were trying to raise their children to be law-abiding citizens, to go to school every day and go to work every day. And you and your friends made that very difficult

and very dangerous.

I've considered the need to promote respect for the law.

I hope that's changed, Mr. Vanderpool, but I am struck by the fact that you're now 30 years old. Right? Is that right?

THE DEFENDANT: Yes, ma'am.

THE COURT: You have a child. You have virtually no legitimate work history. Again, taking an accounting class and real estate is nice, but it's not highly likely to lead to gainful employment upon release.

I appreciate Mr. Braverman's notion about the disciplinary shot, but cell phones in prison are bad news. I've seen far worse disciplinary records than yours, but I've also seen better.

I've considered the need to provide just punishment for this offense while avoiding unwarranted disparities between similarly situated defendants.

I've taken into account the sentences I have imposed and the ones that I'm going to have to reimpose due to the impact of *United States v. Davis*. You were about in the middle of the pack in terms of culpability relative to the gang, both relative to the people who committed far more serious crimes as well as the ones who were committing far less serious crimes. You were about in the middle.

I've considered the need to deter criminal conduct.

Again, Mr. Vanderpool, everything you say sounds great, and I sincerely hope that you have seen the light; that three years in jail has had a life-altering impact on how you view the world. The shootings in this case took place when you were in your early 20s. It is certainly the case that young adults do not have the same judgment and maturity as people get as they age, and I hope that your judgment has changed. It's very difficult to know, but I appreciate the fact that you haven't been involved, other than in the one disciplinary shot of smuggling a gun -- sorry, a phone into the prison or obtaining access to a phone in prison, but you don't have crimes of violence or disciplinary shots of violence while you're there.

In terms of general deterrence, I think it's important, and as I said for every YG I sentenced, and I say this for every other gangbanger that I've sentence, it is important to send the message far and wide that this kind of organized criminal activity has to stop. I don't fool myself in thinking that we can incarcerate our way out of violent gangs. It's a multifaceted problem that needs a multifaceted response. Part of it is the schools. Part of it is social services. Part of it is jobs. There are a lot of different problems that gang activity grows out of, but the reality is everybody who is a member of a gang makes a decision. Their

decision is to participate in the gang or not.

You decided to participate. I think the message needs to go out that's got to stop, whether it's to your little brother or your little sister. Girls aren't typically in gangs, but you know what? They have boyfriends that are and they have big brothers that are and have cousins that are, and the more people that are saying don't do this, the less likely it is that a 14-year-old or a 13-year-old or a 15-year-old is going to decide that the way to stake his claim in the neighborhood is to be a member of a gang. And part of that is people understanding that gang activity is going to be treated extremely seriously when it comes into federal court.

I've considered the need to protect the public from you. Mr. Vanderpool, I appreciate that you remember what I said last time. You fired a gun on two occasions in an attempt to kill a rival gang member, on one occasion for something as absurd as the fact that they were making a music video in what you viewed as your neighborhood, your turf.

It's not your turf. It's New York City. You don't own it. You could have killed anybody. You were just lucky. I have another case where there were these random shootings, where they were shooting at a gang member, they hit him and he's paralyzed. Not dead but paralyzed. Recked his life, recked his family's life. For what? Because of some stupid gang allegiance.

I certainly appreciate the argument that long sentences can be counterproductive. In this case, for example, your sentence is virtually going to guarantee that Chelsea does not have a father present in her life as she grows up. You're not present physically, financially or emotionally. That's the reality. But I have to impose a sentence that is long enough to give you time to mature to the point where you will not be violent and you will not be dangerous to those around you, including innocent bystanders who could be killed by your conduct.

I've considered the need to provide you with needed educational opportunities. Let me repeat. You need to get a marketable skill so that you can get a job. I appreciate the idea of wanting to work for a not-for-profit, and that may be someplace where you actually can get a job. Accounting, I don't know. I mean, remember, that you're a felon. That creates all kinds of problems for getting a job. You should focus on jobs where you can get a job, where the fact that you're a felon is not going to be a disqualifying factor. Typically, a lot of that is trade work, but they're good jobs. Being an electrician, being a plumber, being a carpenter, all of those are very good jobs that have unions and benefits, and they take on people who have criminal records. But decide what you want to do.

I appreciate the fact that you went through RDAP. I

think that's a net positive, and it suggests that you're on the right track. I recognize that training has shut down now. That's not going to continue forever. I anticipate -- and I know all of the problems with COVID in the prison. I will say I think they've done a remarkably good job, much better than I think anybody anticipated, in keeping COVID out of the prisons. Could they do better? They could do better. They could be testing all the correctional officers the same way they test inmates as they come in. But they are doing a good job. And hopefully, this is not going to go on forever. Realistically, it's going to go on several more months.

Taking all that into account, I continue to believe that the aggregate sentence previously imposed satisfied the admonition of a sentence that is reasonable and no greater than necessary to achieve the goals of sentencing. Nevertheless, I am sensitive to the fact that your time now is much more difficult than your time was pre-COVID, and I believe it's going to rock on this way for at least some longer period of time. And I appreciate that you participated in the RDAP program, or if it wasn't quite RDAP, it was a drug treatment program. And because of that, I'm going to reduce the sentence that I imposed last time, which I still think reflects a good balance of a 3553 sentence.

I'm going to sentence you to the custody of the attorney general for a period of 156 months and a term of three

years of supervised release on Count One.

There are mandatory conditions of supervised release.

You must not commit another crime.

You cannot illegally possess a controlled substance.

You cannot illegally possess a firearm or other destructive device.

You must cooperate in the collection of DNA.

You will be subject to mandatory drug testing.

In addition to the standard conditions of supervision, I'm imposing the following special condition:

The defendant must submit his person, residence, place of business, vehicle, electronic devices or other premises under his control to search if the probation officer has a reasonable belief that contraband or evidence of a violation of conditions of release may be found there. Any search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to search may be grounds for revocation, and the defendant must inform any other residents that the premises may be subject to search pursuant to this condition.

Although it's my hope that the YGz will be a distant memory by the time the defendant is released from jail, the defendant must not associate or interact in any way with members of the YG gang or any other street gang or frequent neighborhoods known to be controlled by the YGz. This includes contact and interaction through social media.

The defendant must pay at least 10 percent of his gross income towards financial penalties.

The defendant must provide the probation office with access to any requested financial information.

The defendant must incur no new credit charges or open additional lines of credit unless he is in compliance with the payment schedule.

The defendant must report to the nearest probation office within 72 hours of release.

The defendant will be supervised by the district of residence.

I'm ordering the defendant to pay restitution in the amount of $15,183 and forfeiture in the same amount.

You obviously will get credit for any dollars that have already been paid against those judgments.

I'm not imposing a fine because I find there is no ability to pay.

I must impose a $100 special assessment, and I think it appears that that has already been paid, so the excess will presumably be credited against his other financial obligations.

The conviction on Count Fourteen was vacated by the Court of Appeals, but if there is in any doubt, that count is dismissed.

Do you have any designation requests, Mr. Braverman?

MR. BRAVERMAN: Well, Judge, because he's been at Fort

Dix, I would ask the Court to recommend to the Bureau of Prisons to continue him there only because -- I mean --

(Counsel conferred with defendant)

MR. BRAVERMAN: -- when the world opens up, it will still be the closest place for his family.

THE COURT: OK. I'm happy to make that recommendation.

Mr. Vanderpool, I'll recommend that they return you to Fort Dix. I obviously can't promise that because it's up to the Bureau of Prisons, and my hope, though, is that they're going to get you back out of MCC or MDC, wherever you are, promptly. My guess is they're going to hold you in two-week quarantine before they move you, and I don't know quite how they've got people slated for movement out. But my hope is they will get you moved as quickly as possible.

To the extent you have not given up your right to appeal through the agreement you entered into with the government in connection with your guilty plea, you have the right to appeal. If you're unable to pay the cost of an appeal, you may apply for leave to appeal *in forma pauperis*. The notice of appeal must be filed within 14 days of the judgment of conviction.

Anything further from the government?

MR. ENZER: No. Thank you, your Honor.

THE COURT: Anything further from the defense?

MR. BRAVERMAN: No. Thank you, Judge.

THE COURT: Good luck, Mr. Vanderpool.

(Adjourned)