No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JAKE MESSER
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Submitted by:

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner has previously been granted leave to proceed *in forma pauperis* in the U.S. District Court and U.S. Court of Appeals for the Sixth Circuit.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding. The appointment was made under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

Respectfully submitted,

/s *Martin J. Beres*

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Dated: **November 6, 2023**

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PETITION FOR WRIT OF CERTIORARI

Submitted by:

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QUESTIONS PRESENTED

I.

Whether the Sixth Circuit's interpretation of the Federal Kidnapping statute, 18 U.S.C. § 1201(a)(l), as applied to Petitioner, exceeded Congressional authority to prosecute under the Commerce Clause, Constitution, Art. I, § 8, cl. 3, where it affirmed the prosecution of a wholly intrastate noneconomic violent crime, only incidentally using instrumentalities of interstate commerce, and not directed at those instrumentalities?

II.

Whether the district court district court abused its discretion at Mr. Messer's sentencing proceeding and imposed a procedurally unreasonable sentence upon him where it erroneously determined that the offense conduct in Mr. Messer's prior drug conspiracy conviction was criminal history rather than relevant conduct resulting in an improper calculation of his advisory Guidelines offense variable score and improperly scored several offense variables that resulted in a Guidelines range of life in prison?

III.

Whether the district court district court abused its discretion at Mr. Messer's sentencing proceeding and imposed a substantively unreasonable sentence upon him where it relied in part on impermissible character testimony based on innuendo, speculation and hearsay, and placed inordinate weight on Mr. Messer's history and characteristics, offense facts and the need to punish, in sentencing him to a custodial term of life in prison?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

Petitioner JAKE MESSER, respectfully petitions that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals.

OPINIONS AND ORDERS BELOW

The Sixth Circuit's opinion affirming the judgment of the U. S. District Court, is published at *United States v. Jake Messer*, 71 F.4th 452 (6th Cir, 2023). Rehearing e*n banc* was denied on August 16, 2023, 2023 WL 5498745. This decision and other relevant orders of the district court are reproduced in the Appendix to this petition.

JURISDICTION OF THE SUPREME COURT

The U.S. Sixth Circuit Court of Appeals issued its published opinion on June 21, 2023. (App. A, 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article 1, § 8, clause 3

> The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

Section 1201 of Title 18 of the United States Code

18 U.S.C. § 1201(a)(1), Interference with Commerce by Threats of Violence, provides in pertinent part:

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—

(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;

* * *

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment**.**

Sentencing Guidelines Provisions (In pertinent part):

U.S.S.G. § 1B1.3(a)(1)(B)

Relevant conduct for sentencing purposes to includes, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense…"

U.S.S.G. § 2A4.1(a)

An offense involving kidnapping has a base offense level of 32;

U.S.S.G. §2A4.1(b)(1)

If a ransom demand was made, increase the offense level by six levels.

U.S.S.G. §2A4.1(b)(3)

If a dangerous weapon was used, increase by two levels.

U.S.S.G. § 2A4.l(b)(5)

If the victim was sexually exploited, increase the offense level by six levels.

U.S.S.G. §3B1.1(a):

If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; therefore, four levels are added.

U.S.S.G. § 4A1.2(a)(1)

A prior sentence includes a sentence previously imposed for conduct not part of the instant offense.

U.S.S.G. § 5G1.3(b)

If a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction, the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment.

STATEMENT OF THE CASE

On November 19, 2020, Jake Messer, was charged by indictment in the Eastern District of Kentucky with two counts of Kidnapping, 18 U.S.C. § 1201(a)(l), and Aiding and Abetting, 18 U.S.C. § 2, occurring or about April 28, 2018, to April 29, 2018. Mr. Messer was found guilty of both principal charges at a jury trial was conducted before United States District Judge Robert E. Wier, on February 7-10, 2022. On May 31, 2022, Mr. Messer was sentenced to a term of life in prison on each count. The Sixth Circuit affirmed his convictions and sentences on June 21, 2023. (App. A, 1a.). He joined in co-defendant Oscar Messer's petition for *en banc* rehearing which was denied on August 16, 2023. (App. B, 10a.).

The trial proofs revealed that, from April 28 to 29th, 2018, Jake Messer (Jake) and George Oscar Messer (Jake's father, hereinafter Oscar), Scott Patterson, Stephen Jewell, Joshua Mills, and others participated in, the kidnapping of V-1 and his girlfriend V-2. Jewell allowed the participants to use his grandmother's trailer to hold the victim's hostage. The reason for the kidnapping was to hold the victims responsible for and to recover some $10,000 lost in a drug deal that went bad. During

the course of the episode the victims were repeatedly threatened with bodily harm and V-2 was sexually assaulted by both Jake and Oscar.

Both of the victims were transported from the Messer's residence to a trailer in a rural location in Manchester Kentucky, in vehicles travelling on 1-75 and other roads. At no time did the cars or their occupants leave the state of Kentucky. Over the course of some ten hours, while the victims were held hostage, the defendants and various other participants communicated with each other by using their cell phones and accessing Facebook over the internet.

Both Jake and Oscar were charged with two counts of kidnapping, both offenses occurring wholly within the state of Kentucky. The federal jurisdictional nexus for each count, alleging only incidental use of "an instrumentality of interstate commerce," to wit: the Internet, Facebook accounts, Interstate Highway 75, Kentucky Highway 80, and a Ford Expedition (1999) … in committing and in furtherance of the commission of such offense(s)."

Jake Messer incorporated Oscar Messer's motion to dismiss the two counts of the superseding indictment, in his own motion to dismiss predicated on the theory that the statute charging a violation of, 18 U.S.C. § 1201(a), only provides a limited grant of authority to prosecute under the Commerce Clause, Constitution, Art. I, § 8, cl. 3, and because the allegations of the indictment, that federal jurisdiction was established by use of Internet, Facebook accounts, Interstate Highway 75, Kentucky Highway 80, and a Ford vehicle, exceeded that authority and were unconstitutional as applied to the defendants. The motion was denied by the district court. Jake

subsequently joined in Oscar's Commerce Clause issue on direct appeal and in his petition for *en banc* rehearing.

The Sixth Circuit and in a published opinion dated June 21, 2023, at *United States v. Jake Messer*, 71 F.4th 452 (6th Cir, 2023) affirmed his convictions and sentences. The petition for rehearing *en banc* in which he joined was denied on August 16, 2023, 2023 WL 5498745. (App. B, 10a.).

REASONS FOR GRANTING THE PETITION

Review should be granted because the statute under which Mr. Messer was charged, 18 U.S.C. § 1201(a), as applied, exceeded the power of Congress under the Commerce Clause as set forth in this Court's established precedent, *United States v. Morrison*, 529 U.S. 598, 616 (2000), to reach wholly intrastate, noneconomic violent crime. The indictment alleged that the defendant's in perpetrating kidnappings, used an "instrumentality of interstate commerce, to wit: the Internet, Facebook accounts, Interstate Highway 75, Kentucky Highway 80, and a Ford Expedition (1999) … in committing and in furtherance of the commission of such offense(s)." The Sixth Circuit in affirming Mr. Messer's convictions relied on *United States v. Windham*, 53 F.4th 1006 (6th Cir. 2022), a decision that misinterpreted and extended the scope and limitations of Congressional power defined in *Morrison.*

In *Windham*, the court determined that Commerce Clause grants Congress the authority to regulate activity that (1) uses, on an intrastate basis, instrumentalities of interstate commerce, and (2) is not directed at those instrumentalities. *Messer,* 71 F.4th at 457, citing *Windham*, 53 F.4th at 1012-13. Mr. Messer maintains that the

Sixth Circuit's reliance on the flawed reasoning in *Windham* was reversible error.

I. 18 U.S.C. § 1201(a) is unconstitutional as applied to allegations in the indictment that defendant Jake Messer used the Internet, Facebook, roadways and car as instrumentalities of interstate commerce.

Oscar's motion argued that the indictment failed to allege conduct *directed at* any channel or instrumentality of interstate commerce within the meaning of Commerce Clause precedent. The leading authority includes *United States v. Lopez*, 514 U.S. 549, 553-559 (1995), (upholding economic regulation of intrastate freight rates), *Southern R. Co. v. United States*, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in interstate commerce), and *Perez v. United States*, 402 U.S. 146 (1971) (affirming a conviction for loansharking in violation of the Consumer Protection Act as an activity in a class controlled by organized crime with substantial affects on interstate commerce).

As explained by this Court in *United States v. Morrison,* 529 U.S. 598, 618 (2000), "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 618, citing *Cohens v. Virginia*, 6 Wheat 264, 426 (1821) ("stating that Congress 'has no general right to punish murder committed within any of the States . . .'"). See also, *Rewis v. United States*, 401 U.S. 808 (1971), holding that the Travel Act, 18 U.S.C. § 1952, the precursor of § 1201(a), "does not extend federal jurisdiction to "interstate travel by mere customers of gambling establishments." *Id.* at 811. In *Morrison,* the court struck down the Violence Against Women Act, 42 U.S.C. § 13981 because it could not be sustained under the Commerce Clause as a regulation that substantially affects interstate

commerce. *Id.* at 617. ("We accordingly reject the argument that Congress may regulate non economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

The indictment alleged a wholly intrastate violent act, the commission of kidnappings in Clay and Whitley Counties, in the Eastern District of Kentucky, and elsewhere. on April 28-29, 2018. There is no allegation by the government that any party, defendant or conspirator ever crossed a state line in the course of the offense.

The district court denied the motion regarding the Commerce Clause issue primarily relying on Sixth Circuit precedent, *United States v. Small*, 988 F.3d 241, 252 (6th Cir.), *cert. denied*, 142 S.Ct. 191 (2021), a kidnapping case, and *United States v. McHenry*, 97 F.3d 125, 127 (6th Cir. 1996), *cert. denied*, 519 U.S. 1131 (1997), a decision that determined that a car as an instrumentality of interstate commerce. The district court also noted that "multiple alleged interstate commerce instrumentalities" were charged as involved, including "a vehicle, the internet, and Facebook." The court concluded that Congress was empowered by the Commerce Clause to prohibit use of an instrumentality of interstate commerce for harmful purposes, "'even if the targeted harm itself occurs outside the flow in interstate commerce and is purely local in nature.'"

Mr. Messer maintains that because his case involves non-economic, wholly intrastate violent criminal not *directed at* any channel or instrumentality of interstate commerce, as applied to him, the kidnapping statute exceeds the scope of Congress's Commerce Clause powers. As more fully discussed below, holding

otherwise will obliterate notions of federalism and grant nearly limitless general police power to a federal government of supposedly limited, enumerated powers.

There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618 (2000). This Court should grant certiorari and uphold this principal.

a. Principles of federalism and the limitations of enumerated powers require a narrow construction of 18 U.S.C. § 1201(a) in order to avoid altering sensitive federal- state relationships.

Principles in aid of statutory construction for federal criminal statutes invoking Commerce Clause jurisdiction serve as guides in considering the question presented here: whether the use of the Internet, Facebook accounts, Interstate Highway 75, Kentucky Highway 80, and a Ford vehicle in relation to the alleged local crime of kidnapping, come within the scope of the Commerce Clause. *Lopez,* 514 U.S. at 551-559. These include federalism, the principle that the Constitution "creates a Federal Government of enumerated powers;" "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* at 552 (citations omitted); There must be "a healthy balance of power between the States and the Federal Government"; *Id.* that the commerce power is the power "to prescribe the rule by which commerce is to be governed"; *Id.* at 553; and, that congressional power under the Commerce Clause "is subject to outer limits." *Id.* at 557.

In *Lopez*, this Court, ruled that The Gun-Free School Zones Act, 18 U.S.C. §922(q), exceeds the limits of the Commerce Clause. The defendant in *Lopez* brought

a .38 pistol and some bullets to his high school in San Antonio and was prosecuted under the act. The Court struck the law down because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." 514 U.S. at 551. In its analysis, the Court "identified three broad categories of activity that Congress may regulate under its commerce power." *Id* at 558. These are: the channels of interstate commerce, the instrumentalities of interstate commerce and "those activities having a substantial relation to interstate commerce." *Id.* at 559.

The *Lopez*, Court instructed that it is the responsibility of the judiciary to define the outer limits of the law within each category. A question concerning the scope of congressional power under the Commerce Clause "is necessarily one of degree." Because the Gun-Free School Zones act was neither a regulation of interstate commerce nor protection of an instrumentality of interstate commerce in categories one or two, the Court in *Lopez* examined whether the statute could be sustained in the third category as regulation of an activity that substantially affects interstate commerce. It concluded it could not be sustained on that basis for three reasons: "Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez* at 561; it contains no jurisdictional elements "which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce;" *Id*. and, it contains no express congressional findings regarding effects on interstate commerce. *Id.* at 562.

Ultimately, the Court in *Lopez* was left with an unresolved concern that the statute provides no limitation on federal power to regulate local conduct by federal criminal penalties. "[I]t is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564. The court rejected the government's argument to uphold the statute. *Id*. at 568.

In *Morrison*, the Court applied much the same analysis to grant a facial challenge to the Violence Against Women Act, 42 U.S.C. § 13981. That act created civil remedies for gender-based violence. *Morrison*, 529 U.S. at 606. Recognizing again, as it had in *Lopez*, that the court's interpretation of the Commerce Clause has changed over time, *Id*. at 607, it concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. The Court noted that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." *Id.* at 610. The Court stated:

> "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been in the province of the States. See, *e.g.*, *Cohen v. Virginia*, 6 Wheat 264, 426, 428, 5 L Ed 257 (1821), (Marshall, C.J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear . . . that Congress cannot punish felonies generally.") Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of victims."

Morrison, 529 U.S. at 616

In *Jones v. United States*, 529 U.S. 848 (2000). this Court applied the *Lopez*

framework in holding that the federal arson statute, 18 U.S.C. § 844(i), is unconstitutional as applied in a prosecution of a defendant for throwing a Molotov cocktail into an owner-occupied residence. The *Jones*, Court examined the arson statute through the lens of federalism to determine whether the "dwelling place, in the words of §844(i), [was] . . . being used in an activity affecting . . . commerce." *Id.* at 858. ("Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the "traditionally local criminal conduct" in which petitioner Jones engaged "a matter for federal enforcement." *United States v. Bass*, 404 U.S. 336, 350 (1971)") *Id.*

In *Bond v. United States*, 572 U.S. 844 (2014) the Court relied again on federalism as the principle for measuring limits of jurisdiction for a federal criminal statute, 18 U.S.C. § 229(a), prohibiting offensive use of chemicals as adopted pursuant to a treaty banning use of chemical weapons.

The defendant in *Bond*, a microbiologist, was charged with violating the statute by attempting to assault a woman with whom her husband was having a romantic relationship, by spreading toxic chemicals where they would be touched by the other woman and would cause her physical injury, conduct described as within the scope of state law. Bond challenged the application of the statute in her indictment to her conduct, lost her challenge in the district court and entered a conditional plea. *Bond,* 572 U.S. at 853. Although the statute alleged to have been violated was adjunct to a treaty and not to the Commerce Clause, the Court invoked the same principles articulated in *Lopez*, *Jones* and *Morrison* to conclude that it does

not apply to conduct that is most essentially within the traditional power of the states to prosecute: "[b]ecause our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach." 572 U.S. at 848.

Several principles supported the Court's conclusion in *Bond* that the Implementation Act does not extend enumerated powers to offenses that would "dramatically intrude[d] upon traditional state criminal jurisdiction." *Bond,* 572 U.S. at 857, citing *Bass*, 404 U.S. at 350. Those include "the relationship between the Federal Government and the States under our constitution." and, the clear statement rule, the "well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers." *Bond,* 572 U.S. at 857-58 ("The Government's reading of section 229 would "alter sensitive federal state relationship,' convert an astonishing amount of 'traditionally local criminal conduct' into 'a matter of federal enforcement,' and 'involve a substantial extension of federal police resources.'"). *Id.* at 863, citing *Bass*, 404 U.S. at 349- 350.

The cases relied upon by the Sixth Circuit in this matter were *United States v. Windham*, 53 F.4th 1006 (6th Cir. 2022) and *United States v. Weathers*, 169 F.3d 336 (6th Cir. 1999). The *Windham* court, following the lead of the Seventh Circuit in *United States v. Protho,* 41 F.4th 812 (7th Cir. 2022), looked to *Weathers,* where the court analyzed the murder-for-hire statute, 18 U.S.C. § 1958(a), and held that

statutes that refer to instrumentalities *of* interstate commerce apply to intrastate activities. Since the kidnapping statute 18 U.S.C. § 1201(a)(1), refers to instrumentalities "*of* interstate or foreign commerce," the *Windham* court concluded that cars and cell phones "even when used intrastate, constitute instrumentalities of interstate commerce," citing *United States v. McHenry,* 97 F.3d 125, 126–27 (6th Cir. 1996), a case that "upheld a federal carjacking statute as a legitimate exercise of Congress' power to regulate interstate commerce." *Windham*, 53 F.4th at 1012-1013.

Such a broad reading of the statute would make "virtually every [kidnapping] in the country a federal offense." *Bond*, 572 U.S. at 859, citing *Bass*, 404 U.S. at 349. Holding that driving intrastate on an interstate highway, or using the Internet, establishes federal jurisdiction under 18 U.S.C. § 1201(a) is not a "narrow" reading of statute as required by *Bond,* 572 U.S. at 859.

The Sixth Circuit's interpretation of § 1201(a), in in *United States v. Windham*, 53 F.4th 1006 (6th Cir. 2022), should be rejected because it would "alter sensitive federal-state relationships,' 'convert an astonishing amount of 'traditional local criminal conduct' into 'a matter of federal enforcement,' and 'involve a substantial extension of federal police powers.'" *Bond,* 572 U.S. at 863.

The Sixth Circuit's decision in the instant matter, should be reversed as unconstitutional as applied in light of principles of federalism and of statutory construction, as an improper extension of federal authority to prosecute serious local crime, based only on the incidental intrastate use of the internet, roadways, and vehicles.

II. The district court abused its discretion at Mr. Messer's sentencing proceeding and imposed a procedurally unreasonable sentence upon him where it erroneously determined that the offense conduct in Mr. Messer's prior drug conspiracy conviction was criminal history rather than relevant conduct resulting in an improper calculation of his advisory Guidelines offense variable score and improperly scored several offense variables that resulted in a Guidelines range of life in prison.

Mr. Messer filed ten (10) lengthy written objections to the scoring of the advisory Sentencing Guidelines by the U.S. Probation Officer (USPO). Each of the objections were discussed and rejected by the USPO, and subsequently overruled by the district court at sentencing. Mr. Messer also joined in the objections of his co-defendant, George Oscar Messer. Mr. Messer maintained on appeal that his objections should have been sustained and that failure by the district court to do so resulted in an inaccurate scoring of his Sentencing Guidelines and a procedurally and substantively unreasonable sentence. The Sixth Circuit in its opinion affirming, essentially adopted the reasoning of the district court which will be discussed here.

Mr. Messer noted and the district court agreed that many of his objections were dependent on the determination of whether Mr. Messer's prior offense conduct that resulted in his federal 2018 drug conspiracy conviction (ED Ky. Case No.: 18-cr-48) for which he received a 151-month sentence. The question presented in the objection was whether that conviction should be characterized as relevant conduct to his current conviction or should be considered as his criminal history and scored separately to arrive at an accurate Sentencing Guidelines score.

In his 2018 federal case, the indictment charged in Count 1, that from June 2017 until on or about July 4, 2018, Jake Messer and others conspired to distribute methamphetamine, oxycodone, alprazolam and marijuana in Whitley, Laurel, and

Clay Counties, Kentucky (ED Ky. Case No.: 18-cr-48). Messer pled guilty to Count 1 conspiracy to distribute controlled substances and Count 16, possession with intent to distribute methamphetamine. His factual basis included that he distributed marijuana during that in this time period. Mr. Messer maintained that there was a complete temporal and geographic overlap between the charged conduct in 18-cr-48 and the charges in the current offense conduct, and that the offense conduct in the instant matter arose out of and was related to the offense conduct in 18-cr-48.

The court determined that that 18-cr-48 marijuana deal and the current kidnapping conviction were severable on an elemental and factual basis, with the former having Louisville drug sources and the current having Georgia suppliers. The district court further found that the robbery and subsequent conduct that resulted in the kidnapping produced a "separate criminal cluster" distinct from the marijuana conspiracy. The fact that the instant offenses involved harm to the victims and the prior involved only drug dealing caused the court to conclude that the societal harms were legally and factually severable. Consequently, the court overruled Mr. Messer's objection and found that his conviction in 18-cr-48 would count as a prior sentence rather than as relevant conduct. (App. D, 31a-37a.).

U.S.S.G. § 4A1.2(a)(1) defines a "prior sentence" to include a sentence previously imposed "for conduct not part of the instant offense." U.S.S.G. § 1B1.3(a)(1)(B) defines relevant conduct for sentencing purposes to include, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of

conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense…"

Factually, both Scott Patterson and Myra Morgan were charged as co-conspirators in 18-cr-48, and both were involved in the kidnappings. The jointly undertaken kidnapping was within the scope of the jointly undertaken marijuana distribution conspiracy, in furtherance of that activity, and reasonably foreseeable in connection with that activity. The kidnapping was a "harm" that resulted from the marijuana distribution conspiracy. There was complete temporal and geographical proximity of the two offenses. The dates of the kidnappings, April 28-29, 2018, fall squarely within the time frame of the 18-cr-48 conspiracy, June 2017 through July 4, 2018. Both indictments allege that the respective crimes happened in Whitley and Clay Counties, Kentucky. The crimes involved common participants.

While there was no identifiable victim in 18-cr-48, both the victims in the current case were involved in distributing the controlled substances in the 18-cr-48 indictment although they were not formally charged in that case. V-1 was charged in a separate case for conspiracy to distribute methamphetamine within the time frame that included April 28, 2018. Moreover, there was a common criminal plan or intent -- including V-1 & V-2 -- to profit from the distribution of marijuana. The evidence at trial was that the kidnapping occurred as part of a drug deal that went bad. Essentially, the kidnappings were an enforcement operation for the marijuana conspiracy, since drug dealers cannot resort to the courts or police when their illegal deals fail. Instead, they must enforce the rules outside the framework of the law. The

entire theory of the case for the government at trial in the instant matter was that the kidnappings were in retaliation for the drug deal gone bad.

The district court placed much emphasis on the fact that there were different sources for the marijuana in 18-cr-48 and the kidnaping case, that the elements of the offenses were different, and that different societal harms were at issue in drug-dealing and kidnapping. The fact specific inquiry required by *United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992), involves more than the consideration of the elements of the two offenses. The fact that different societal harms were involved in the kidnapping and drug dealing is likewise not dispositive of the issue. The more relevant consideration was whether the kidnapping, occasioned by an effort to recover money to purchase marijuana by the co-conspirators, was "reasonably foreseeable" as part and parcel of the overall conspiracy.

Here, the jury believed that Jake Messer was culpable for his involvement in the kidnapping. Because the overall marijuana conspiracy included the current drug deal and it was an abuse of discretion for the district court to separate the kidnapping from the marijuana conspiracy for purposes of Guidelines scoring. Mr. Messer's offense conduct in the instant case was relevant conduct to the overall drug trafficking conspiracy and should not have been scored as part of his criminal history. Because of the court's ruling on relevant conduct, it also rejected Mr. Messer's derivative claims that his advisory Guidelines offense variable score for weapon enhancement, under U.S.S.G. § 2A4.1(b)(3) was improperly scored, the court erroneously assessed criminal history points for prior a conviction, and that the court

refused to apply U.S.S.G. § 5G1.3(b) to his Guidelines calculation. The Sixth Circuit did not address these claims stating that "But because his primary argument fails, so do these derivative theories." (App. A, 6a.).

A) The enhancement for possession of a weapon under U.S.S.G. § 2A4.1(b)(3) was impermissible double counting.

The PSR, ¶¶12, 28 and 35 Mr. Messer was assessed a two-point enhancement for possession of a weapon stating, "defendant and other participants otherwise used firearms in the offense." This assessment amounted to impermissible double counting because Messer was already been enhanced for possessing a weapon in connection with the relevant offense conduct in 18-cr-48. The USPO asserted that the double counting would be permissible because Application Note 4(B) of U.S.S.G. § 1B1.1 authorizes double counting unless specifically prohibited. Impermissible double counting occurs when the same aspect of a defendant's conduct factors into the sentence in two separate ways. *United States v. Sabino*, 307 F.3d 446, 450 (6th Cir. 2002). Enhancing a marijuana distribution conspiracy sentence for possession of a firearm, while enhancing a sentence for a kidnapping that arose out of the same marijuana distribution conspiracy would factor the gun possession in furtherance of drug enforcement activity into Messer's sentence in two separate ways, resulting in impermissible double counting. Neither the district court nor the Sixth Circuit addressed this aspect of his objection because of the ruling that 18-cr-48 was not relevant conduct to the kidnapping conviction. Mr. Messer argued on appeal that the district court erred in its ruling on relevant conduct and that consequently, the U.S.S.G. § 2A4.1(b)(3) two-point assessment was improper.

A second reason that this scoring was improper was that there should be no criminal history points assigned for Messer's conviction in 18-cr-48 because that conviction cannot be both relevant conduct and a prior conviction. Mr. Messer maintains that the offense conduct in 18-cr-48 is part of the instant offense and thus not a "prior sentence" pursuant to U.S.S.G. § 4Al.2(a)(l).

Finally, this enhancement is improper because the overwhelming weight of the testimony at trial was that Messer never personally possessed a firearm at any time during the kidnapping episode. Only one government witness testified that Mr. Messer possessed a firearm. No other witness testified that they observed Mr. Messer either brandish or use a firearm. Mr. Messer contends that the possession of firearms by others was outside the scope of his relevant conduct. He had already left when Oscar threatened V-1 with a gun and placed a revolver to the head of V-2. There was no evidence that Jake either requested that Oscar bring firearms, or encouraged any party to use them in a threatening or menacing manner. If anything, Jake told Oscar, who was drunk and highly emotional, "to shut up and calm down," more than once.

Mr. Messer also incorporated the argument from Oscar's sentencing memorandum regarding the Sixth Circuit decision in *United States v. Havis,* 927 F.3d 382 (6th Cir. 2019) (*en banc*), that held that the commentary to the sentencing guidelines may not be used to expand their scope. This would occur if the two-level enhancement under U.S.S.G. § 2A4.1(b)(3) were applied. Oscar argued that U.S.S.G § 2A4.1(b)(3) applies a two-level enhancement "[i]f a dangerous weapon was used[.]" Application Note 2 purports to offer two definitions to "used": one is where "a firearm

was discharged." The guideline unquestionably bears this construction consistent with *Havis*. The second definition of "used" offered in the commentary explicitly expands its scope from discharging a firearm to "otherwise" using it. This is because Application Note 2 to U.S.S.G § 2A4.1 refers to "otherwise used" as defined in the commentary to yet another guideline section, § 1B1.1.

The guideline text requires the firearm be "used" meaning "discharged"; it does not bear the construction that it can also and in addition mean something quite different and more expansive, which is what occurs if the enhancement is applied to situations that do not involve the discharge of a firearm. This case does not involve the discharge of a firearm. Accordingly, the two-level enhancement under U.S.S.G. § 2A4.1(b)(3) should not be applied.

The district court and the Sixth Circuit rejected this argument, stating that it did not see a *Havis* issue, stating that the commentary "shed light" on the word use in the Guidelines provision that includes, "some employment of a dangerous weapon in a purposeful way that controls a person, demands conduct of a person, is used to manipulate the person's action or response," during a kidnapping. The court indicated that the while Mr. Messer might not have personally used a dangerous weapon, the fact that others including Mills, Patterson, and Oscar were armed sufficed to apply the enhancement.

The Guideline states that, "A dangerous weapon was used means that ta firearm was discharged or a firearm or dangerous weapon was otherwise used." Mr. Messer maintains that the district court erred in failing to recognize that the

application notes substantively expanded the plain meaning the term use in the Guidelines in violation of *Havis*. Consequently, the two-points scored under U.S.S.G. § 2A4.1(b)(3) was improperly assessed to him.

B) The district court improperly assessed criminal history points for prior convictions: A 2017 state court conviction for possession of methamphetamine, and a 2018 federal drug conspiracy conviction.

Messer's prior conviction in PSR ¶56 (R.262, Pg.ID 1974), for possession of methamphetamine on July 18, 2017 in Whitley County should count as relevant conduct to the instant offense, and should not be scored for three criminal history points. *See United States v. West,* 962 F.3d 183, 190 (6th Cir. 2020) ("Relevant conduct may therefore include violations of state law not listed as groupable under U.S.S.G. § 3Dl.2(d)"); *United States v. Bandy,* 172 F.3d 49 (6th Cir. 1999) (Table) (holding that non-federal criminal conduct constitutes relevant conduct where the offenses are "part of a single episode, spree, or ongoing series of offenses"). The offense conduct of possession of methamphetamine was within the timeframe of the Indictment in 18-cr-48 (June 2017-July 4, 2018) and within the same geographic scope. Because the district court ruled that 18-cr-48 was not relevant conduct, there was no detailed ruling on this objection. Mr. Messer believes that the ruling by the court on 18-cr-48 was in error as discussed above, and renewed this claim on appeal. The three (3) points should not have been assessed.

The PSR acknowledged the overlap but concluded that the intended marijuana transaction does not appear to have been factored in to the sentence in 18-cr-48. There was only one conspiracy to distribute marijuana. A defendant who joins a single

agreement may be convicted of only one conspiracy count even if the object of the single agreement is to commit many crimes even if those crimes are different and even if they are prohibited by different statutes. *Braverman v. United States,* 317 U.S. 49, 53 (1942). Mr. Messer's attempted marijuana transaction was part of the single overarching conspiracy and he could not have been charged separately for another marijuana conspiracy for that transaction. Thus, the April 28, 2018 marijuana transaction was part of the conspiracy of conviction in 18-cr-48. The district court ruling otherwise was procedural error requiring that his sentence be vacated. The three (3) points in PSR ¶58 should not have been assessed. The Sixth Circuit rejected this issue without discussion in affirming the district court. (App. A, 6a.).

C) The district court erred where it refused to apply U.S.S.G. § 5G1.3(b) to his Guidelines calculation.

Mr. Messer argued below that U.S.S.G. *§* 5Gl.3(b) should apply, to his sentence that would result in an adjustment to his current sentence here for any period of imprisonment already served on the undischarged term in 18-cr-48 that would not be credited toward this sentence by the Bureau of Prisons. He also submitted that, the sentence in his kidnapping case should be concurrent with the sentence in 18-cr-48 pursuant to U.S.S.G. § 5Gl.3(b)(2).

The probation department opined that § 5G1.3(b) does not apply in Mr. Messer's case. Because of its ruling that 18-cr-48 was relevant conduct rather than criminal history and the imposition of a life in prison sentence, the district court declined to "coordinate the running of those terms under 5G1.3." Mr. Messer

challenged the court's relevant conduct ruling on appeal and submits that if this Court agrees that it was erroneous then the Guidelines provision U.S.S.G. § 5G l.3(b)(2), should apply to his current sentence. The Sixth Circuit rejected this issue without discussion in affirming the district court. (App. A, 6a).

D) The district court improperly applied a six-level ransom enhancement pursuant to U.S.S.G. §2A4.1(b)(1) to both kidnapping counts.

Mr. Messer objected to the six-level enhancement for a ransom pursuant to U.S.S.G. § 2A4.l(b)(l). He argued that while the stated that the victims were questioned throughout the evening about the location of the money that was allegedly taken and how to find the men who took the money. There is no indication that there was a demand of money in exchange for freedom, i.e., ransom. Instead, the detention of the victims was for the purpose of identifying and locating the perpetrators of the robbery, to determine whether they were involved in the taking of the money, and extracting revenge. None of this conduct constituted a ransom demand. The district court while acknowledging that the Guidelines do not provide a definition of ransom, concluded that the dictionary definition provides that ransom "is something exchanged for release," a "value given in exchange for release." The court found that the demand for sex with V-2 by Jake for her release constituted ransom within the meaning of the Guidelines.

Mr. Messer maintained on appeal that the facts do not support this six-level enhancement for a ransom pursuant to U.S.S.G. § 2A4.l(b)(l). The district court failed to acknowledge that neither Jake or Oscar ever intended to release the victims no matter what they told them. Their actions here speak louder than any words used.

If Jake intended to release V-2 in exchange for sex he would have done so after he completed the act, but he did not. The clearest evidence of Jake's intent was when Jake instructed Jewell to retrieve zip ties and duct tape from Patterson's car, to be used to restrain the victims, *after* his sexual encounter with V-2. The district court simply misconstrued the facts adduced at trial and that those facts do not support the "ransom" enhancement on either count as a principal or aider and abettor to Oscar by a preponderance of the evidence. The Sixth Circuit declined to address this issue in affirming the district court. (App. A, 8a.).

E) The district court improperly enhanced Mr. Messer's advisory Guidelines offense variable score by four levels for being an organizer or leader pursuant to U.S.S.G. § 3Bl.l(a).

Messer objected to the PSR's reference a four-level enhancement for being an organizer or leader pursuant to U.S.S.G. § 3Bl.l(a), that provides, "If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." Application note (4) states:

> Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Jake Messer left the scene of the crime prior to the other participants to comply with his drug court curfew and thus had no ability to exercise decision-making authority over what subsequently occurred. The victims travelled willingly to the trailer and Mr. Messer's participation in the offense was limited to the early stages.

He did not direct anyone to engage in any offense conduct. Everyone there essentially took it upon themselves to make threats and engage in whatever intimidating conduct they did. There was no evidence that Jake orchestrated all of the activities or conduct of the other co-conspirators.

Scott Patterson testified that after Jake left Oscar Messer, "definitely running the show at that point." There was no evidence presented that Jake gave Oscar any instructions on how to handle the situation, or that he was in contact with Oscar while he was gone. Oscar was clearly making decisions on his own and any of his actions cannot be attributable to Jake. The district court's ruling attributing full responsibility to Jake rather than to Oscar or Patterson, stating that, "Jake Messer left the trailer but he did not leave the crime" was clearly erroneous. Likewise, was the court's finding that Jake "recruited" Patterson, Oscar, Mills, and Jewell and had control over everyone at the trailer, even when he was not present and into the next day, when he was clearly no longer involved in any of the activities being undertaken by Oscar. The four-level enhancement for being an organizer or leader pursuant to U.S.S.G. § 3Bl.l(a), should not have been assessed. The Sixth Circuit adopted the reasoning of the district court in its opinion affirming. (App. A, 7a-8a.).

F) The district court improperly enhanced his advisory Guidelines offense variable score six levels for sexual exploitation pursuant to U.S.S.G. § 2A4.l(b)(5).

Messer objected to the six-level enhancement for sexual exploitation of V-2 pursuant to U.S.S.G. § 2A4.l(b)(5). A finding of sexual exploitation was not specifically submitted to the jury and not required to convict Mr. Messer. He maintains that the sex with V-2 was consensual or, alternatively, a reasonable person

in his position would have believed it was consensual given V-2's admitted catfishing and misleading messages to him.

In assessing the six-level enhancement for sexual exploitation the district court ignored the numerous Facebook exchanges introduced at trial between Jake and both victims and their trial testimony -- that revealed a long time "catfishing" scheme by both -- including the months up to the kidnapping and even in the days after, in which V-2 offered sex to Jake both to reduce V-1's drug debt and otherwise suggesting a more permanent relationship with Jake as his girlfriend. There was every reason for Jake to believe that V-2 was willing to have sex with him and that she consented to it. Moreover, Jake argued that what Oscar did to V-2 after he left the scene was not foreseeable to him. There was simply no evidence that Jake encouraged Oscar to perform cunnilingus on V-2 after he had ejaculated into her vagina. Despite all of this evidence the court overruled Mr. Messer's objection and assessed a six-level enhancement for the sexual exploitation of V-2 pursuant to U.S.S.G. § 2A4.l(b)(5). The court not only found Jake responsible for sexual exploitation for his own actions but also for Oscar's sexual assault as being "certainly foreseeable." Jake maintained on appeal that this ruling was clearly erroneous. The Sixth Circuit approved the district court's reasoning in affirming the application of this variable. (App. A, 7a.).

G) The district court relied on clearly erroneous facts in imposing a life in prison sentence on Mr. Messer.

As has been discussed above the district court relied on numerous erroneous interpretations of the facts adduced at trial to arrive at an offense level score of 51, adjusted to the maximum permissible by the Guidelines of 43. Mr. Messer will not

reiterate here the erroneous facts discussed previously, but cannot ignore that in so doing the court attributed the most culpability for the entire episode on Jake rather than others or his father. The court stated:

> "Jake Messer left the trailer but he did not leave the crime. The crime is his creation, and he can't distance himself from the trailer, and he did enough himself in the trailer. He can't distance himself and sever his relationship for what was going on at that crime scene.
>
> He's more -- he's more responsible, in my view, than his dad because he put the whole thing together and he gathered and was in control of the scene, gathered the people, dictated things at the trailer, dictated the treatment of V-2"

(App. D, 110a.)

This statement is a gross misinterpretation of the facts suggesting that Jake orchestrated all of the acts of others -- even while he was not present. The district court essentially ignored the facts established by the trial testimony that Jake had no weapon, or if he did, he did not display or brandish it. In finding the testimony of Tasha Wernicke, credible regarding forced sex at gunpoint the court incorrectly suggested that that was the "same" as what Jake did to V-1 despite the fact that only Oscar was alleged to have used a weapon when he assaulted V-2.

There was no evidence that he encouraged the conduct of his father Oscar who was drunk and high on methamphetamine and who had his own agenda and plan about what he was going to do that night. The court failed to recognize that the others involved, Oscar, Jewell, Patterson, Mills, Van Denk, and Jessica Karr, all had a role and individual responsibility for their own actions apart from any claimed orchestration or control by Jake Messer. Patterson had a lost a significant amount of money and had his own reasons for his involvement at the trailer. The court

somehow even found that it was foreseeable to Jake and that he was responsible for Mills showing up with Oscar and that Mills would take an active part in the events of the night. The district court's finding that Jake was responsible for all of the actions of the others, was simply not a rational view of the trial evidence. Even in a conspiracy the sentence of each co-conspirator must be individualized to properly assess rightful responsibility for that individuals' actions and that may not necessarily include punishment for the all of the actions and conduct of others.

In rejecting the mitigating factor of the relatively short duration of the kidnapping, the court went so far as to speculate that it was the true intent of Jake was to prolong the length of the kidnapping the following day, when in fact it was Oscar who was in complete control of the victims and acted independently in what he did the next day. The Sentencing Guidelines have essentially adopted a narrower version of the joint liability rule of *Pinkerton v. United States,* 328 U.S. 640, 647-48 (1946). "…the Sentencing Guidelines have modified the *Pinkerton* theory of liability," adopting a narrower theory based on "the seriousness of the actual conduct of the defendant and his accomplices." *United States v. Hamm,* 952 F.3d 728, 745 (6th Cir. 2020) quoting *United States v. Swiney,* 203 F.3d 397, 404 (6th Cir. 2000). "…to hold a defendant responsible for the jointly undertaken activity of others, it was necessary to make particularized findings that such acts were within the scope of the defendant's agreement and foreseeable to him. *United States v. Hills,* 27 F.4th 1155, 1196 (6th Cir. 2022), citing, *United States v. Campbell,* 279 F.3d 392, 400 (6th Cir. 2002). The "particularized findings" cannot be based on an inaccurate or erroneous

view of the facts. That is what occurred in the instant case and for that reason alone this Court should grant certiorari.

H) The district court relied on (1) an improperly scored Guidelines range and (2) at least in part on impermissible character testimony based on innuendo, speculation and hearsay in imposing a life in prison sentence on Mr. Messer.

(1) The district court relied on an improperly scored Guidelines range in imposing a life in prison sentence on Mr. Messer.

Mr. Messer maintained in the district court that the correct Guidelines scoring would result in a total offense level of 33 and a criminal history of IV that should have resulted in a Sentencing Guidelines range of 188-235 months. The district court in overruling all of the objections, concluded that the Mr. Messer was subject to an offense level of 43 and criminal history category of VI with a Guidelines rage of life in prison. In arriving at this range, the court scored a total of 51 offense level points reduced to the maximum permissible level of 43. (App. D, 91a.).

Whether the district court properly calculated the sentencing Guidelines range is a question of procedural reasonableness. *United States v. Parrish,* 915 F.3d 1043, 1047 (6th Cir. 2019). Reviews of such claims is for an abuse of discretion, asking whether the district court relied on clearly erroneous factual findings or applied incorrect legal standards. *United States v. Fowler*, 819 F.3d 298, 303 (6th Cir. 2016). This Guidelines scoring in the instant matter was a classic example of grossly over scoring the Guidelines rage to arrive at the most severe possible sentencing range, to justify the most severe sentence possible. Even if Jake had more responsibility than Oscar in the overall conspiracy that does not translate into a sentence of life in prison.

The accurate offense level for both counts should have been 33 and with eight criminal history points and his criminal history category is IV. Jake Messer's correct Guidelines range should be 188-235 months. Because of the erroneous scoring of Mr. Messer's Guidelines range the sentence imposed was procedurally unreasonable and the Sixth Circuit ruling to the contrary cannot be sustained.

(2) The district court relied at least in part on impermissible character testimony based on innuendo, speculation and hearsay in imposing a life in prison sentence on Mr. Messer.

The PSR discussed, "Offense Behavior Not Part of Relevant Conduct," and stated that, "Discovery material references other conduct of Jake Messer not part of relevant conduct involving the sexual assault of other individuals, including T.W., A.L., K.W, and potentially others." Messer objected and denied that he sexually assaulted anyone.

At sentencing, in support of its request for a life-in-prison sentence, the government produced a witness who testified Mr. Messer forced her to have sexual intercourse with him while brandishing a weapon. The witness also testified to Facebook communications by Mr. Messer suggesting a romantic relationship with her 13-year-old daughter. The witness acknowledged that there was never a physical or sexual relationship between S.W. and Mr. Messer, only Facebook exchanges.

Agent Todd Tremaine testified about his investigation, that revealed Facebook exchanges in which Messer threatened harm to a woman as a "snitch." He testified to an interview he had with a woman who claimed that Jake had forcibly raped her in June of 2017, and Facebook communications that with claims by another woman that he choked her with a belt and inflicted facial injuries to her and that Jake

"almost killed" his ex-wife. Mr. Messer denied by Facebook that he ever raped anyone with threats of bodily harm to those who spread such lies.

Many of the district court's observations and conclusions about Jake's character at sentencing were derived from Tremaine's testimony about Facebook entries that were clearly hearsay. In sentencing Mr. Messer to spend the rest of his life in prison, the court should have at a minimum required in-person testimony from these hearsay accusers. While Mr. Messer recognizes that he generally has no right to confrontation at a sentencing hearing the nature and gravity of these accusations and the obvious weight the court placed upon them in imposing the most severe sentence possible, required more than adopting the government agent's interpretation of hearsay from Facebook postings. Clearly, the Facebook entries were the least credible or reliable level of hearsay possible and the district court was remiss in relying on any of those entries in fashioning a sentence for Mr. Messer. This is particularly so where there was substantial trial testimony that various individuals had the ability to, and in fact did, frequently post on other persons Facebook pages, sometimes without the consent of the named Facebook page owner. There was also testimony at trial of individuals posting on several different Facebook accounts using aliases, and making posts falsely attributed to other individuals who were not aware of what was being posted.

There was also ample testimony of the "catfishing" scheme orchestrated by both victims in which they made numerous false statements, promises, and provocative suggestions to Jake, on Facebook, to lead him to believe that V-2 wanted

both a sexual and continuing relationship with him. All of the false "catfishing" posts, purportedly sent by V-2 were actually drafted and sent by V-1.

Given the extensive trial testimony that undermined the validity of the Facebook posts considered, it is clear that they did not pass the "minimal indicium of reliability" test. *United States v. Moncivais,* 492 F.3d 652, 659 (6th Cir. 2007). The fact that the district court gave any weight to or relied on the hearsay Facebook testimony by Agent Tremaine in imposing a life in prison sentence on Mr. Messer, was clearly erroneous and should result in the vacation of his sentence.

III. The district court placed inordinate weight on Mr. Messer's history and characteristics, offense facts and the need to punish in sentencing him to a substantively unreasonable and disparate custodial term of life in prison.

A substantive unreasonableness claim is that a sentence is too long and "a complaint that the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual." *United States v. Rayyan,* 885 F.3d 436, 442 (6th Cir. 2018). As was discussed above, the district court began its analysis with the erroneous premise that Jake was responsible for all of the criminal activity that took place that night, and that everything that occurred that night was within the scope of the conspiracy and "reasonably foreseeable" to him. The court found him responsible for the actions of the others involved even after Jake left the scene. This essentially caused the court to place undue and inordinate weight on its view of the offense facts that precluded the proper exercise of sentencing discretion or in fairly weighing the § 3553(a) factors.

The court stated that, "His record is much worse than the others in this case who have been held responsible. It seems like oversight has made no difference to him and rules make no difference and the law makes no difference, and that's a recipe for danger." (App. D, 106a.). The court essentially concluded that Mr. Messer was a "bad person" beyond any possible rehabilitation, and that based substantially on his previous criminal history should not ever be permitted to return to society.

The court generalized that because Messer previously abused women, used and sold drugs and made crude threats over social media warranted the most serious penalty possible. The court concluded that he "preys on drug addicted women, takes what he wants, regardless of circumstances, regardless of consent, regardless of age." (App. D, 104a.). There was no compelling evidence that he preyed upon women substantially younger than him.

The court essentially considered the Sentencing Guidelines as mandatory by ignoring mitigating arguments and ignoring the fact that Mr. Messer was 39 years old and the 30-year variant sentence requested would keep him in prison until old-age and would sufficiently deter anyone form engaging in similar behavior. The court in concluding that there was no reason to depart from the Guidelines, also ignored the fact that Mr. Messer was already serving a 151-month sentence for his federal drug conviction in case No.: 18-cr-48.

Instead of considering the huge disparity that the life in prison sentence would create compared to other sentences nationally for kidnapping, the court indicated that a "prominent" reason that life in prison was necessary for Jake was because

Oscar, his father, was still a dangerous person in his 60's. The court stated that "I would note that that's something that is prominent in my mind." (App. D, 109a.).

At sentencing Mr. Messer argued that a life in prison sentence would result in an unwarranted disparity when compared to sentences nationally as reflected in the U.S. Sentencing Commission's Interactive Data Analyzer tool found at https://www.ussc.gov/research/interactive-data-analyzer. Of the eight defendants sentenced for kidnapping in federal courts in 2021, whose base offense level calculated under U.S.S.G. § 2A4.1 as was Mr. Messer's, and whose criminal history category was VI, the average sentence for those defendants was 195-months in custody and the median sentence was 180 months in prison. From 2017-2021, there were 71 such cases. For those defendants, the average sentence was 213-months in prison and the median was 180-months in prison. It is clear that defendants convicted of kidnapping who have similar criminal histories as Mr. Messer received average sentences of under 20 years.

18 U.S.C. § 3553(a)(6), instructs district courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Sixth Circuit caselaw instructs that § 3553(a)(6) refers to "national disparities between defendants with similar criminal histories convicted of similar conduct -- not disparities between codefendants." *United States v. Bass,* 17 F.4th 629, 636 (6th Cir. 2021). The district court in the instant matter, while acknowledging the national case statistics contained in the U.S. Sentencing Commission's Interactive Data Analyzer tool, essentially compared Mr. Messer's co-conspirators,

Mills, who was charged and Patterson and Van Denk who were not charged, and simply concluded that "they are not in the same spot as the Messer's." The court simply made no further comments about the significant national sentencing disparity it created by imposing a life sentence for Mr. Messer.

What is clear from the record is that the court did place undue weight on Mr. Messer's history and characteristics, and need to punish severely in concluding that there was no other alternative available in imposing sentence on him. The court was preoccupied with attributing everything negative that happened that night to Mr. Messer rather than what he actually did and should have been held responsible for. The mind-set of the court resulted in the imposition of a sentence excessively beyond the need to punish, protect society and deter him and others from committing similar crimes, or one that was sufficient but not more than necessary as punishment in imposing sentence on him. "A sentence is substantively reasonable if it is proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary, to comply with the purposes of § 3553(a)." *United States v. Solano-Rosales,* 781 F.3d 345, 356 (6th Cir. 2015). Here the district court grossly exceeded this principal in imposing a life in prison sentence on Mr. Messer and that sentence should not be sustained.

Mr. Messer maintains that the district court abused its discretion in imposing a life sentence upon him by placing unreasonable weight on the aforementioned pertinent factors. This Court should grant certiorari and reverse the Sixth Circuit decision affirming his life in prison sentence.

CONCLUSION

Petitioner Jake Messer, requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

/s *Martin J. Beres*

_____

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Dated: **November 6, 2023**

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JAKE MESSER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Submitted by:

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APPENDIX A

71 F.4th 452
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

George Oscar MESSER (22-5420), Jake Messer (22-5473), Defendants-Appellants.

Nos. 22-5420/5473

Decided and Filed: June 21, 2023

Synopsis

Background: Defendants were convicted in the United States District Court for the Eastern District of Kentucky, Robert E. Wier, J., of kidnapping, and they appealed.

Holdings: The Court of Appeals, Gilman, Senior Circuit Judge, held that:

[1] federal kidnapping statute was not unconstitutionally vague as applied;

[2] district court did not commit clear error in treating defendant's federal drug-conspiracy conviction as part of his criminal history rather than as relevant conduct;

[3] district court properly applied two-level dangerous-weapon enhancement;

[4] district court properly applied sexual-exploitation enhancement;

[5] district court properly applied four-level leadership enhancement;

[6] any error in application of six-level ransom-demand enhancement was harmless; and

[7] district court did not abuse its discretion in imposing life sentence.

Affirmed.

West Headnotes (15)

[1] **Courts** Number of judges concurring in opinion, and opinion by divided court

Panel of Court of Appeals cannot overrule decision of another panel; prior decision remains controlling authority unless inconsistent decision of United States Supreme Court requires modification of decision or Court of Appeals sitting en banc overrules prior decision.

[2] **Constitutional Law** Statutes

Void-for-vagueness doctrine requires that statute define criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in manner that does not encourage arbitrary and discriminatory enforcement.

[3] **Constitutional Law** Kidnapping

Kidnapping Validity

Provision of federal kidnapping statute prohibiting kidnapping of person "for ransom or reward or otherwise" was not unconstitutionally vague as applied to defendants who kidnapped individual who they believed had taken their money unless he told them where money was. 18 U.S.C.A. § 1201(a).

[4] **Sentencing and Punishment** Proceedings

For sentence to be procedurally reasonable, court must properly calculate guidelines range, treat that range as advisory, consider statutory sentencing factors, refrain from considering impermissible factors, select sentence based on facts that are not clearly erroneous, and adequately explain why it chose sentence. 18 U.S.C.A. § 3553(a).

[5] **Criminal Law** Sentencing

Court of Appeals reviews district court's efforts to touch each base for procedurally reasonable sentence for abuse of discretion, keeping in mind that factual findings will stand unless clearly erroneous and legal conclusions will stand unless its fresh review leads to contrary conclusion.

[6] **Sentencing and Punishment** Relevant Conduct

Sentencing and Punishment Related cases

District court did not commit clear error in treating defendant's federal drug-conspiracy conviction as part of his criminal history rather than as relevant conduct in sentencing him for kidnapping, even though conspiracy and kidnapping overlapped geographically and temporally; failed drug buy that led to kidnappings involved different supplier from different state than purchases underlying general drug conspiracy, fallout from failed drug buy constituted separate "criminal cluster" from general drug conspiracy, and kidnappings produced different harms than did general drug conspiracy.

[7] **Sentencing and Punishment** Relevant Conduct

Sentencing and Punishment Related cases

Whether offense constitutes "prior sentence" is necessarily fact-specific inquiry involving more than just consideration of elements of two offenses; it includes offenses' temporal and geographical proximity, common victims, and common criminal plan or intent.

[8] **Sentencing and Punishment** Accomplices and co-participants

District court properly applied two-level dangerous-weapon enhancement in sentencing defendant for kidnapping, even though defendant never personally possessed firearm, and no firearm had been discharged, in light of evidence that other people who participated in kidnapping had used firearms, and that defendant could have reasonably foreseen that his confederates, whom he knew to be armed, would have used firearm in, at minimum, sexually assaulting one victim. U.S.S.G. § 2A4.1(b)(3).

[9] **Sentencing and Punishment** Kidnapping and false imprisonment

District court properly applied sexual-exploitation enhancement in sentencing defendant for kidnapping, even though finding of sexual exploitation was not specifically submitted to jury, and victim offered sex to defendant to reduce other victim's drug debt; whether or not defendant sexually assaulted victim did not alter statutory minimum or maximum penalty to which he was subject, and district court reasonably concluded that it was not plausible for defendant to have reasonably believed that victim was consenting to sex under circumstances. U.S.S.G. § 2A4.1(b)(5).

[10] **Sentencing and Punishment** Organizers, leaders, managerial role

District court properly applied four-level leadership enhancement in sentencing defendant for kidnapping, in light of evidence that defendant recruited key other players, and had hand and authority on dictating what would happen after they abducted victims. U.S.S.G. § 3B1.1(a).

[11] **Criminal Law** Sentencing and Punishment

Any error in district court's application of six-level ransom-demand enhancement in sentencing defendant for kidnapping was harmless; even without enhancement, defendant's offense level would have been 45, and guideline range would have been life in prison at any level above 43. U.S.S.G. § 2A4.1(b)(1).

[12] **Sentencing and Punishment** Mandatory or advisory

District court did not impermissibly consider Sentencing Guidelines as mandatory in sentencing defendant to life imprisonment for kidnapping, even though it did not depart from them; district judge expressly remarked that he "always consider[s] a variance in every case," particularly when Guidelines recommended life sentence, "because the guidelines don't dictate the result."

[13] **Criminal Law** Judgment, sentence, and punishment

Court of Appeals presumes that within-Guidelines sentence is substantively reasonable, but defendant can rebut this presumption if district court chose sentence arbitrarily, ignored pertinent statutory sentencing factors, or gave unreasonable weight to any single factor.

[14] **Criminal Law** Sentencing

Sentence's substantive reasonableness is reviewed under abuse-of-discretion standard.

[15] **Kidnapping** Sentence and punishment

Sentencing and Punishment Determinations based on multiple factors

District court did not abuse its discretion in imposing life sentence following defendant's kidnapping conviction; district court acknowledged defendant's drug addiction at time of crime, relatively short length of kidnappings, lack of physical injury to one victim, lack of significant deterrence value between 30 years' imprisonment and life sentence, defendant's strong work history, and his recent turn to sobriety and religion, but found that aggravating circumstances meant that downward variance from recommended life sentence was not warranted. 18 U.S.C.A. § 3553(a).

***454** Appeal from the United States District Court for the Eastern District of Kentucky at London. No. 6:20-cr-00070—Robert E. Wier, District Judge.

Attorneys and Law Firms

ON BRIEF: Robert L. Abell, ROBERT ABELL LAW, Lexington, Kentucky, for Appellant in 22-5420. Martin J. Beres, Clinton Township, Michigan, for Appellant in 22-5473. Michael A. Rotker, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Charles P. Wisdom, Jr., UNITED STATES ATTORNEY OFFICE, Lexington, Kentucky, for Appellee.

Before: GILMAN, BUSH, and READLER, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge.

***455** Following separate jury trials, defendants George Oscar Messer (Oscar) and his son Jake Messer (Jake) were each convicted on two counts of kidnapping, in violation of 18 U.S.C. § 1201(a)(1). They were both sentenced to terms of life imprisonment because of various sentencing enhancements, including one for sexual exploitation.

Both defendants appeal their convictions, arguing that the federal kidnapping statute is (1) an unconstitutional exercise of Congress's power under the Commerce Clause, and (2) unconstitutionally vague. Jake also appeals his sentence as procedurally and substantively unreasonable. For the reasons set forth below, we **AFFIRM** the judgments of the district court.

I. BACKGROUND

A. The kidnapping

On April 28, 2018, a person identified in the record as "Victim One" (V1) informed Jake that $10,000 worth of marijuana was for sale. Jake had $7,000 of his own funds available, but borrowed the remaining $3,000 from his friend Scott Patterson. Jake and V1 then went to Corbin, Kentucky to complete the deal, but the supposed sellers instead took the buy money and fled without supplying any marijuana.

Jake suspected that V1 had been involved in the theft. He intended to confront V1 in nearby Clay County at a

remote trailer where Jake's friend Stephen Jewell lived. Before leaving with V1, Jake told Patterson to bring a person identified in the record as "Victim Two" (V2), V1's girlfriend, to the trailer as an "insurance policy." Patterson agreed to Jake's request.

Jake and his girlfriend Jessica Karr then drove to the trailer with V1, while Patterson and his girlfriend Myra Van Denk drove separately to the trailer with V2. The drivers traveled north on Interstate 75 and then northeast on Kentucky Highway 80 until they reached the trailer of Jewell's grandmother. At no time did the cars or their occupants leave Kentucky.

V1 and V2 were, at Jake's direction, placed in separate bedrooms in the trailer. Jake told Jewell to search V1's phone for any evidence of V1's involvement in the theft. He then called Oscar and told him about what had transpired. After receiving Jake's call, Oscar and his friend Joshua Mills gathered several firearms and drove to the trailer. During this time, Jake's friend Jewell and others communicated with Jake via cell-phone text messages and Facebook messages using the trailer's Wi-Fi network.

For the next 10 hours, V1 and V2 were held against their will and repeatedly threatened with bodily harm if the money was not returned. Jake instructed Jewell to retrieve zip ties and duct tape from ***456** Patterson's car, to be used to restrain the victims. In the meantime, Oscar placed a gun to V1's head and threatened to kill him unless he told them where the money was. And Van Denk at one point heard Jake tell V1 that, if he did not confess to involvement in the theft, they would make V2 "suck every dick in this house" and make him watch.

Jake later told V2 that, if she agreed to have sex with him, he would allow her to leave. V2 agreed, but only on the condition that Jake allow V1 to leave unharmed as well. Jake then pulled V2's pants down and began forcibly penetrating her. When V2 asked Jake to stop, he put his forearm on the back of her neck and held her down until he ejaculated inside of her. Patterson was told by Jake that he had "fucked [the] old girl." Jake and Karr then left the trailer for about an hour.

During Jake's absence, Oscar entered V2's room and forced her at gunpoint to pull her pants down. Oscar then began performing oral sex on V2 while still holding a firearm in one hand. Patterson opened the door during the assault and noticed that V2's wrists were bound.

Oscar later began driving V1 and V2 to his residence in Whitley County. Sometime during the drive, Oscar stopped the vehicle. V1's mother, who had been looking for her son for two days, drove up and demanded that V1 and V2 get into her car, which they did.

B. The trials

On November 5, 2020, Oscar waived his Miranda rights and, in a two-hour-long recorded interview, made numerous incriminating statements regarding his and Jake's conduct during the kidnapping. Fourteen months later, a grand jury returned a superseding indictment alleging that Oscar and Jake did "willfully and unlawfully kidnap, abduct, seize, and confine" V1 (Count 1) and V2 (Count 2) "for the purpose of assault," and "use[d] a means, facility, and instrumentality of interstate commerce, to wit: the Internet, Facebook accounts, Interstate Highway 75, Kentucky Highway 80, and a Ford Expedition (1999)," in violation of 18 U.S.C. § 1201(a)(1).

Oscar moved to dismiss the indictment, alleging that the application of 18 U.S.C. § 1201(a) to the facts of this case exceeded Congress's powers under the Commerce Clause because none of the abductors or victims crossed state lines, and that § 1201(a)(1)'s "or otherwise" clause was impermissibly vague. The district court denied the motion. In light of Oscar's statements during the two-hour interview, the court severed Oscar's case from Jake's and, following separate trials, the defendants were each convicted on both counts.

C. Jake's sentencing

Jake's Presentence Report (PSR) for Count 1 (relating to V1) calculated a total adjusted offense level under the United States Sentencing Guidelines of 44, which reflected a base offense level of 32, a 6-level ransom-demand enhancement, a 2-level dangerous-weapon enhancement, and a 4-level leadership enhancement. For Count 2 (relating to V2), the PSR used the same calculations but recommended an additional 6-level enhancement for sexual exploitation, resulting in a total adjusted offense level of 50.

Applying the grouping rules, the PSR added one level to the higher of the two scores, which resulted in a total combined adjusted offense level of 51. The PSR also recommended a criminal-history category of VI. With an offense level of 51 (treated as an offense level of 43, which is the highest offense level contemplated by the Guidelines) and a criminal-history category ***457** of VI, Jake was subject to a Guidelines sentence of life imprisonment. Jake filed several written

objections to the PSR, but the district court overruled all of them.

At the sentencing hearing, the court allowed the government to present testimony, over Jake's objection, regarding Jake's allegedly violent and sexually harassing behavior toward three other women and a minor. Jake was ultimately sentenced to life imprisonment as recommended by the Guidelines.

D. Oscar's sentencing

Oscar's PSR calculated a total adjusted offense level of 50. He received the same enhancements as Jake with respect to both V1 and V2, but received only a 3-level enhancement for his leadership role in the offense. Oscar was also sentenced to life imprisonment as recommended by the Guidelines, a sentence that he does not challenge on appeal.

II. ANALYSIS

A. The district court correctly denied the defendants' motion to dismiss the indictment

As a threshold matter, the government suggests that Jake's notice of joinder adopting Oscar's appellate arguments is deficient because (1) "Jake's notice does not attempt to show" the transferability of Oscar's arguments to Jake's case, and (2) "Jake did not raise the arguments he wants to adopt below." We disagree.

The record plainly belies the government's claim that Jake failed to raise the relevant arguments before the district court. In any event, as Jake points out, the arguments that he wishes to adopt "relate to the strictly legal issue" regarding the validity of the indictment under which both Oscar and Jake were charged, and "the facts upon which the indictment was based were exactly the same" for both defendants. *See* *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) ("[A]doption ... is permitted in the interest of judicial efficiency when the arguments to be adopted are equally applicable to the adopting co-appellants ...."). We therefore cannot credit the government's contention that Oscar's arguments are not transferable to Jake. These arguments, however, are without merit given recent decisions by this court.

1. Precedent forecloses the defendants' Commerce Clause argument

[1] As Oscar admits in his reply brief, the defendants' challenge to the federal kidnapping statute—namely, whether the Commerce Clause grants Congress the authority to regulate activity that (1) uses, on an intrastate basis, instrumentalities of interstate commerce, and (2) is not directed at those instrumentalities—was disposed of by this circuit in *United States v. Windham*, 53 F.4th 1006, 1012-13 (6th Cir. 2022). And because, as Oscar puts it, "[t]here does not appear to be a material factual distinction between *Windham* and this case," we are bound by the ruling in *Windham*. By well-settled law, "[a] panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

2. Precedent forecloses the defendants' void-for-vagueness argument

[2] The defendants also argue that the phrase "or otherwise" in the federal kidnapping statute, which prohibits the kidnapping ***458** of a person "for ransom or reward or otherwise," 18 U.S.C. § 1201(a), is unconstitutionally vague. "The void-for-vagueness doctrine requires that [a] statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Kerns*, 9 F.4th 342, 351 (6th Cir. 2021) (alteration in original) (quoting *United States v. Farah*, 766 F.3d 599, 614 (6th Cir. 2014)).

"The Supreme Court has explained that 'or otherwise' [in 18 U.S.C. 1201(a)] encompasses any benefit which a captor might attempt to obtain for himself." *Id.* (citing *Gooch v. United States*, 297 U.S. 124, 128, 56 S.Ct. 395, 80 L.Ed. 522 (1936)). And as this court concluded in rejecting a similar void-for-vagueness challenge to the federal kidnapping statute, the "expansive reach" of the term "otherwise" is sufficient to defend against the assertion that "any person of ordinary intelligence would fail to understand what conduct it forbids." *Id.* (quoting *Daulton v. United States*, 474 F.2d 1248, 1248-49 (6th Cir. 1973) (per curiam)).

[3] There can be no doubt that the defendants here were fully aware of their illegal conduct in kidnapping V1 and V2. And to the extent that the defendants are separately suggesting that the "otherwise" language is so broad that it encourages "arbitrary and discriminatory enforcement," *see,*

e.g., *McDonnell v. United States*, 579 U.S. 550, 576, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016) (recognizing that a law can be unconstitutionally vague based on its breadth); *see also Kerns*, 9 F. 4th at 356 (Readler, J., concurring), that argument is made for the first time on appeal and is insufficiently explored by our court's precedents to warrant reversal on plain-error grounds, *see United States v. Woodruff*, 735 F.3d 445, 450 (6th Cir. 2013).

B. Jake's arguments regarding the alleged procedural and substantive unreasonableness of his sentence are unavailing

1. Jake's sentence is procedurally reasonable

[4] **[5]** For a sentence to be procedurally reasonable, "[t]he court must properly calculate the guidelines range, treat that range as advisory, consider the sentencing factors in 18 U.S.C. § 3553(a), refrain from considering impermissible factors, select the sentence based on facts that are not clearly erroneous, and adequately explain why it chose the sentence." *United States v. Rayyan*, 885 F.3d 436, 440 (6th Cir. 2018) (citing *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). "We review a district court's efforts to touch each of these bases for abuse of discretion, keeping in mind that factual findings will stand unless clearly erroneous and legal conclusions will stand unless our fresh review leads to a contrary conclusion." *Id.* (citing *United States v. Bolds*, 511 F.3d 568, 579 (6th Cir. 2007)).

a. The district court properly calculated Jake's Guidelines range

i. The district court did not clearly err in treating Jake's federal drug-conspiracy conviction as part of his criminal history rather than as relevant conduct

[6] Jake argues that his 2018 federal conviction for (1) conspiracy to distribute controlled substances, and (2) possession with the intent to distribute a methamphetamine mixture should have been treated as "relevant conduct" to the instant offense, rather than as a "prior sentence," for sentencing purposes. The 2018 conviction concerned a conspiracy to distribute ***459** various controlled substances, including marijuana, from June 2017 until on or about July 4, 2018, within the state of Kentucky, and thus overlapped with the April 28, 2018 kidnapping incident in question. But we find no error in the district court's decision to treat the 2018 conviction as part of Jake's criminal history.

[7] Whether an offense constitutes a "prior sentence" is "necessarily a fact-specific inquiry." *United States v. Beddow*, 957 F.2d 1330, 1338 (6th Cir. 1992), *abrogated on other grounds by United States v. Cabrales*, 524 U.S. 1, 118 S.Ct. 1772, 141 L.Ed.2d 1 (1998). This inquiry "involves more than just a consideration of the elements of the two offenses" and includes "the temporal and geographical proximity of the two offenses, common victims, and a common criminal plan or intent." *Id.* We review the district court's factual findings under the clear-error standard. *Id.*

The district court determined that Jake's 2018 conviction and the instant offense were distinct, and that the 2018 conviction should accordingly be considered a "prior sentence." In reaching this determination, the district court noted that (1) the failed drug buy that led to the kidnappings involved a different supplier from a different state than the purchases underlying the general drug conspiracy, (2) the fallout from the failed drug buy constituted a separate "criminal cluster" from the general drug conspiracy, and (3) the kidnappings produced "different harms" than did the general drug conspiracy.

Jake is correct that the 2018 conviction and the kidnappings overlapped geographically and temporally. His view of the evidence—that his 2018 conviction encompassed conduct that was "part of the instant offense," *see id.*—is plausible. But the district court acknowledged this overlap and found that it did not outweigh the remaining *Beddow* factors. And "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States v. Navarro-Camacho*, 186 F.3d 701, 708 (6th Cir. 1999) (citing *Hernandez v. New York*, 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)).

Jake makes several arguments that are derivative of his claim that his 2018 conviction should have been categorized as "relevant conduct." But because his primary argument fails, so do these derivative theories.

ii. The district court properly applied the dangerous-weapon enhancement

Jake also objects to the two-level dangerous-weapon enhancement. The Guidelines authorize such an enhancement "[i]f a dangerous weapon was used" in the commission of

a kidnapping, abduction, or unlawful restraint. U.S.S.G. § 2A4.1(b)(3).

Jake argues that he never personally possessed a firearm, and that "the possession of firearms by others was outside the scope of his relevant conduct." In fact, as the government acknowledges, if Jake had only *possessed* a firearm, without more, that would not have been sufficient to justify the enhancement. *See United States v. Covert*, 117 F.3d 940, 947 (6th Cir. 1997) ("[T]he term 'possess' used in sentencing guideline sections, such as [U.S.S.G. §] 2K2.1(b)(5), sweeps more broadly than the word 'use.' ").

But the district court looked to evidence that other people present in the trailer *had* used firearms, even though Jake personally had not "himself used a dangerous weapon in the way that he would have to to earn these two points on his own." The district court found that Jake could reasonably foresee that his confederates, whom Jake knew to be armed, would have used a firearm in, at minimum, sexually ***460** assaulting V2. And "in the case of a jointly undertaken criminal activity (... whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity shall be used to determine the base offense level and adjustments." *United States v. Critton*, 43 F.3d 1089, 1098 (6th Cir. 1995) (citing U.S.S.G. § 1B1.3(a)(1)(B)).

[8] Jake nonetheless argues that the enhancement was improperly applied. Application Note 2 to U.S.S.G. § 2A4.1 provides two definitions for the "use" of a dangerous weapon: "a firearm was discharged, or a 'firearm' or 'dangerous weapon' was 'otherwise used' (as defined in the Commentary to § 1B1.1)." But by Jake's reading, the "use" of a firearm as contemplated by the text of the Guidelines themselves is limited to a firearm's discharge. He argues that to consider other uses would allow the commentary to the Guidelines to expand the Guidelines' scope, in violation of the principle that this court announced in *United States v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019) (en banc). As the district court recognized, however, a gun can be used without being discharged. *See United States v. Bolden*, 479 F.3d 455, 461-63 (6th Cir. 2007) (recognizing the Guidelines' distinction between "discharging," "brandishing or possessing," or "otherwise using" a firearm, and concluding that "pointing a firearm at an individual coupled with a demand of that individual constitutes otherwise using a firearm, and not merely brandishing one"). To acknowledge that fact does not expand the Guidelines' scope, but simply interprets the plain language in question.

iii. The district court properly applied the sexual-exploitation enhancement

[9] Jake next argues that the district court erred in applying a six-level enhancement for sexual exploitation in his Guidelines calculation. The enhancement is warranted in kidnapping cases "[i]f the victim was sexually exploited." U.S.S.G. § 2A4.1(b)(5). Jake argues that the enhancement was improper because "[a] finding of sexual exploitation was not specifically submitted to the jury." But whether or not Jake sexually assaulted V2 does not alter the statutory minimum or maximum penalty to which he is subject, so the question did not need to be submitted to a jury. *See United States v. Cooper*, 739 F.3d 873, 884 (6th Cir. 2014) (reiterating that judicial factfinding that affects a Guidelines calculation is not unconstitutional if it does not alter the penalty's statutory bounds).

Jake alternatively argues that "a reasonable person in his position" would have believed that the sexual conduct was consensual. His position is based on "the numerous Facebook exchanges introduced at trial between Jake and [V2]—and her and [V1]'s trial testimony—including the months up to the kidnapping and even in the days after, in which [V2] offered sex to Jake ... to reduce [V1]'s drug debt." Jake also claims that the district court erred in holding him accountable for the sexual assault committed against V2 by his father.

On the record before us, however, we cannot find that the district court's conclusion that "[t]here [wa]s no plausible way" for Jake, in the midst of "an armed kidnapping," to have "thought to himself that [V2] was consenting to sex based on messages that they had weeks, months before" was an impermissible view of the evidence. And because the enhancement turns on whether the victim was sexually exploited, not on how many times such sexual exploitation took place, we need not consider Jake's argument related to Oscar's conduct.

461** ***iv. The district court properly applied the leadership enhancement

Jake also objects to the leadership enhancement. The Guidelines authorize a four-level enhancement in any case in

which "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). In determining whether a person was an organizer or leader, the court should consider

> the exercise of decisionmaking authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Id., Application Note 4.

[10] In its review of the record, the district court found that Jake had "recruited ... the key other players" and had a "hand and authority on dictating what would happen when they got to that trailer." Specifically, the court noted that Jake "told Jewell to take [V1's] phone and search it," and "twice directed Jewell to go get the zip ties and duct tape." The court also found that Jake "had control over the plan," including where the victims were placed in the trailer, and whether each victim knew that the other was there. Faced with these facts, we find no reason to question the district court's conclusion that Jake was more "relative[ly] culpab[le]" than other participants in the scheme.

v. If the district court erred in applying the ransom-demand enhancement, that error was harmless

In his next challenge to his Guidelines calculation, Jake argues that the district court improperly applied a six-level enhancement for having made a ransom demand. The other circuits to have considered the ransom-demand enhancement on the merits have held that the enhancement may be applied only if a ransom demand is made upon a third party. *See United States v. Reynolds*, 714 F.3d 1039, 1044 (7th Cir. 2013) ("§ 2A4.1(b)(1) may be applied only if kidnappers' demands for 'money or other consideration' reach someone *other* than the captured person." (emphasis in original)); *United States v. Fernandez*, 770 F.3d 340, 343 (5th Cir. 2014) ("[T]he ransom enhancement applies anytime a defendant demands money from a third party for a release of a victim, regardless of whether that money is already owed to the defendant." (quoting *United States v. Sierra-Velasquez*, 310 F.3d 1217, 1221 (9th Cir. 2002))); *Sierra-Velasquez*, 310 F.3d at 1221 (same); *see also United States Escobar-Posado*, 112 F.3d 82, 83 (2d Cir. 1997) (finding "that [the defendant]'s actions fell well within the meaning of a ransom demand: he threatened to kill hostages Jane Does # 1 and # 3 unless Jane Doe # 2 procured $300,000 for their release," but not expressly ruling on whether a demand on a third party was a prerequisite to imposing the enhancement); *United States v. Romero*, 906 F.3d 196, 205-09 (1st Cir. 2018) (holding that the district court did not plainly err in declining to apply out-of-circuit caselaw requiring a demand on a third party to impose the enhancement, but stating that it was not "tak[ing] a definitive stand on the ransom-demand issue" on the merits). No third party was involved in the instant offense.

[11] We find no need to decide this issue here. Jake objected to the application of the ransom-demand enhancement, but his argument focused only on the lack of an express demand for money in exchange for release. We have received no briefing ***462** as to whether a third party is a key element of the ransom-demand enhancement. And even without the ransom-demand enhancement, Jake's offense level would have been 45 (base offense level of 32, 2-level dangerous-weapon enhancement, 4-level leadership enhancement, 6-level sexual-exploitation enhancement, and 1-level combination enhancement). As the district court observed, "any [level] 43 regardless of your criminal history category, the guideline range would be life in prison." **[R.281, PageID 2403]**

This court dealt with a similar scenario in *United States v. Faulkner*, 926 F.3d 266 (6th Cir. 2019). In that case, this court held that, "because [the defendant]'s offense level was 43, the Guidelines range was life in prison, regardless of his criminal history category." *Id.* at 275. Accordingly, "[a]ny error by the district court ... would have had no effect on the ultimate sentence, and was thus harmless." *Id.* The same is true here.

b. The district court properly treated the Guidelines as advisory

[12] Jake next argues that the district court "essentially considered the Sentencing Guidelines as mandatory" by not departing from them. *See United States v. Stone*, 432 F.3d 651, 654 (6th Cir. 2005) ("Based on the Supreme Court's ruling in *Booker*, the Sentencing Guidelines are no longer mandatory; they are advisory."). This argument lacks merit because the district judge expressly remarked that he "always consider[s] a variance in every case," particularly when the Guidelines recommended a life sentence, "because the guidelines don't dictate the result."

c. The district court did not rely on impermissible factors or clearly erroneous facts

Jake further contends that the district court's Guidelines calculations reflect "numerous erroneous interpretations of the facts adduced at trial." But Jake does not dispute the basic contours of facts as outlined by the court with respect to the events of April 28, 2018. In any event, we agree with the government that, although Jake might disagree with the court's findings, they are permissible on the record before us, and so we have no reason to disturb them.

Jake also argues that the district court erred in relying on the hearsay evidence proffered by Agent Todd Tremaine regarding Jake's allegedly violent conduct directed at other women. Specifically, he claims that Agent Tremaine's testimony lacked the "minimum indicia of reliability" required of hearsay evidence at sentencing. *See United States v. Moncivais*, 492 F.3d 652, 659 (6th Cir. 2007). We find no error, however, because the court specifically declined to "premise any kind of sentencing" on Agent Tremaine's testimony.

2. Jake's sentence is substantively reasonable

[13] **[14]** Finally, Jake argues that his sentence is substantively unreasonable. "We presume a within-Guidelines sentence is substantively reasonable. But a defendant can rebut this presumption if a district court chose a sentence arbitrarily, ignored pertinent § 3353(a) factors, or gave unreasonable weight to any single factor." *United States v. Gardner*, 32 F.4th 504, 530 (6th Cir. 2022) (citing *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008)). Like procedural reasonableness, the substantive reasonableness of a sentence is reviewed under the abuse-of-discretion standard. *Id.*

Here, the district court conducted a comprehensive analysis of the relevant sentencing factors. These factors included mitigating ones. In particular, the district ***463** court was sensitive to Jake's drug addiction at the time of the crime, the relatively short length of the kidnappings, the lack of physical injury to V1, the lack of a significant deterrence value between 30 years' imprisonment and a life sentence, Jake's strong work history, and Jake's recent turn to sobriety and religion.

[15] Even so, the district court found that the aggravating circumstances of the case meant that a downward variance was not warranted. Contrary to Jake's claim, the district court did consider whether a life sentence would create a disparity between Jake and similarly situated defendants. But it was not required to rule in any particular way based only on such a disparity. *See United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018) (whether the district court "placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual ... is a matter of reasoned discretion, not math, and our highly deferential review of a district court's sentencing decisions reflects as much" (citing *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007))). Jake similarly argues that the district court overlooked that he was already serving a 151-month sentence for his 2018 drug conviction. The district court, however, considered Jake's argument and rejected it, concluding that "the sentence that's reasonable for this case is life in prison with or without the [2018 sentence] interplay."

A life sentence is an extraordinary punishment. But as an appeals court, we are not permitted to engage in a de novo reweighing of the § 3553(a) factors. *Gardner*, 32 F.4th at 530. And in the present case, despite the extremity of the sentence, we can find no abuse of discretion by the district court in imposing the sentence recommended by the Guidelines.

III. CONCLUSION

For all of the foregoing reasons, we **AFFIRM** the judgments of the district court.

All Citations

71 F.4th 452

End of Document

APPENDIX B

2023 WL 5498745
Only the Westlaw citation is currently available.
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

George Oscar MESSER (22-5420), Jake Messer (22-5473), Defendants-Appellants.

Nos. 22-5420/5473
|
FILED August 16, 2023

Attorneys and Law Firms

Michael A. Rotker, U.S. Department of Justice, Washington, DC, Jenna E. Reed, Office of the U.S. Attorney, London, KY, Charles P. Wisdom, Jr., Assistant U.S. Attorney, Office of the U.S. Attorney, Lexington, KY, for Plaintiff-Appellee.

Robert L. Abell, Lexington, KY, for Defendants-Appellants.

BEFORE: GILMAN, BUSH, and READLER, Circuit Judges.

ORDER

***1** The court received a joint petition for rehearing en bane. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en bane.

Therefore, the petition is denied.

All Citations

Not Reported in Fed. Rptr., 2023 WL 5498745

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 6:20-CR-70-REW
	)	
v.	)	
	)	ORDER
GEORGE OSCAR MESSER,	)	
	)	
Defendant.	)	

*** *** *** ***

Defendant George Oscar Messer moves to dismiss the indictment against him (DE 8), which charges two violations of 18 U.S.C. 1201(a)(1), the federal kidnapping statute. Defendant argues that the indictment should be dismissed for two reasons. First, Messer argues that the language of 18 U.S.C. 1201(a)(1) is unconstitutionally vague, specifically, that the statute's residual "otherwise" language as to purpose is too broad. DE 30 at 1. Second, Defendant contends that the Commerce Clause does not give Congress the authority, in this application, to regulate

wholly intrastate, noneconomic activity. *Id*. Although Messer has preserved his challenges,[1] precedent soundly forecloses each theory for relief. The Court **DENIES** the motion.

I. Background

Defendants Jake Messer and George Oscar Messer are indicted for two counts of kidnapping, in violation of 18 U.S.C. § 1201(a)(1). DE 8 at 1–2. The Indictment alleges little detail, although it is not the first charging document. A prior criminal complaint (with its Affidavit) alleges that, on or about April 28-29, 2018, Defendant Jake Messer and Victim 1 attempted to acquire marijuana from unknown persons in Georgia that they had been in contact with via Facebook. DE 1-1 at 3 (Tremaine Affidavit ¶ 5). The unknown persons were con men who took the buy money (over $10,000) and provided no product. Most of the buy money came from Jake Messer and a third party; Victim 1 was the middle man. *Id*. After the con emerged, Defendant Jake Messer suspected Victim 1 of being involved with the con men. *Id*. As a result of this suspicion, Defendant Jake Messer took Victim 1 and Victim 2, Victim 1's girlfriend, to a residence in Clay County, KY, where he and his father, Defendant George Oscar Messer, allegedly held them against their will for approximately twelve hours, endeavoring to determine their involvement in the con and/or to

[1] The Court construes the vagueness argument as a facial attack on § 1201(a), and the Commerce Clause argument an as-applied theory. Typically, absent a First Amendment implication, the courts have allowed only as-applied vagueness assaults on a statute. *See United States v. Kernell*, 667 F.3d 746, 750 (6th Cir. 2012) ("For challenges to the statute that do not implicate First Amendment concerns, the 'defendant bears the burden of establishing that the statute is vague as applied to his particular case, not merely that the statute could be construed as vague in some hypothetical situation.'") (citations omitted). The United States does not raise this limitation, and cases certainly exist—to include the *Johnson*, *Dimaya*, and *Davis* examples relied on by Messer—where the Supreme Court has evaluated the facial constitutionality of a statute outside this general rule. It may be that the unique dynamics behind those cases led to the facial analysis. *United States v. Cook*, 970 F.3d 866, 877–78 (7th Cir. 2020) (analyzing law and concluding: "*Johnson* did not alter the general rule that a defendant whose conduct is clearly prohibited by a statute cannot be the one to make a facial vagueness challenge"). The distinction here is not determinative, and the Court proceeds to confront the theories presented.

recover the lost funds. *Id*. ¶ 6–11. Eventually, Defendant George Oscar Messer took Victims 1 and 2 to Whitley County, KY in his Ford Expedition, where the Victims were finally released to Victim 1's mother. *Id*. The Affidavit paints a grim picture of the Clay County events.

A federal grand jury indicted Defendants Jake Messer and George Oscar Messer on November 19, 2020. DE 8. The Indictment charges that the Defendants violated 18 U.S.C. § 1201(a)(1) when they willfully and unlawfully kidnapped and confined Victims 1 and 2 and held them "for the purpose of assault," using means and instrumentalities of interstate commerce in committing and in furtherance of the crimes. *Id*. at 1–2. Specifically, the instrumentalities of commerce that the Indictment references, as used by Defendants, are "the Internet, Facebook accounts, Interstate Highway 75, Kentucky Highway 80, and a Ford expedition (1994) bearing VIN 1FMRU1866XLA75445." *Id*. at 1.

The federal kidnapping statute, 18 U.S.C. § 1201(a)(1), states:

> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when--
>
> (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense . . . shall be punished [per the statute].

Messer seeks dismissal by arguing that the "or otherwise" extension to the purpose clause is impermissibly vague. He also contends that federal jurisdiction in this case—one he characterizes as involving wholly intrastate noneconomic activity—exceeds the proper realm of the Commerce Clause. Binding precedent resolves both arguments in the Government's favor.

II. Standard

Messer frames his motion under Rule 12(b)(3)(B)(v) ("failure to state an offense"). Federal Rule of Criminal Procedure 12(b) states that a party must file a pretrial motion, as to an available defense, if the motion "can be determined without a trial on the merits." It is well-established that a Rule 12(b) motion to dismiss is determinable so long as "it involves questions of law instead of questions of fact on the merits of criminal liability." *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997). Further, a Court may resolve a Rule 12(b)(3)(B)(v) motion to dismiss for failure to state an offense so long as the facts are "virtually undisputed and trial of the substantive charges would not substantially assist the court in deciding the legal issue raised by the motion to dismiss the indictment." *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976).

Additionally, under Rule 7(c)(1), an indictment must only to be "a plain, concise and definite written statement of the essential facts constituting the offense charged[.]" An indictment is sufficient if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend" and if it "enables him to plead an acquittal or conviction in bar of future prosecutions of the same offense." *United States v. Anderson*, 605 F.3d 404, 411 (6th Cir. 2010) (citing *Hamling v. United States*, 94 S. Ct. 2887, 2907 (1974)).

The parties quibble to a degree over the factual underpinnings, or lack thereof, of Messer's theories. The Court rejects Messer's facial challenge to § 1201. The jury will have to determine the elements of the crimes, including the jurisdictional hook. The Indictment charges a recognized and legitimate jurisdictional predicate in this case.

III. The "Otherwise" Language of 18 U.S.C. § 1201(a)(1) is Not Unconstitutionally Vague

Defendant essentially contends that the meaning of the word "otherwise" in the residual provision of 18 U.S.C. § 1201(a)(1) is so broad as to be unlimited, and therefore is unconstitutionally vague. DE 30-1 at 2–6. Messer's argument fails because § 1201(a)(1), a statute dating back nearly ninety years, is clear in defining what kind of conduct is prohibited, and an ordinary person would understand its meaning.

In order for a criminal statute to withstand a constitutional challenge for vagueness under the Fifth Amendment's Due Process Clause, the statute must sufficiently define the criminal offense so that an ordinary person can understand what conduct the statute prohibits and in a way that "does not encourage arbitrary and discriminatory enforcement" of the statute. *Kolender v. Lawson*, 103 S. Ct. 1855, 1858 (1983).

The Supreme Court has not directly assessed the constitutionality of § 1201, but it surely has defined its contours. Two cases soon following its passage and early amendment addressed the scope and meaning of the "or otherwise" addition. *See Gooch v. United States*, 56 S. Ct. 395 (1936) and *United States v. Healy*, 84 S. Ct. 553 (1964). *Gooch* recognized the "broad purpose intended to be established" by the augmentation of the prior "held for ransom or reward" motivation clause. 56 S. Ct. at 397. The Court endorsed that "or otherwise" extended to restraint "in order that the captor might secure benefit to himself." *See id.* Thus, if the captor's holding of the captive was "something done with the expectation of benefit to the transgressor," the "or otherwise" clause applied. *See id. Healy*, three decades later, confirmed *Gooch* and that the captor's purpose need not be for pecuniary gain or even be "for an otherwise illegal purpose." 84 S. Ct. at 82.

The venerated statute has survived many vagueness challenges in the Courts of Appeals, and Messer points to no court having invalidated § 1201. *See United States v. Walker*, 137 F.3d 1217, 1219 (10th Cir. 1998) ("Since *Gooch* and *Healy*, at least five circuits, including our own, have rejected vagueness challenges to the 'or otherwise' portion of § 1201."); *United States v. Griffin*, 547 F. App'x 917, 921 (11th Cir. 2013) ("Similarly, here the statute is sufficient to warn a reasonable person that it is unlawful to use a pattern of physical violence and threats to coerce an unwilling person to travel from Florida to Delaware because of perceived infidelities."). Most pertinently, the Sixth Circuit rejected an as-applied attack in *Daulton v. United States*, 474 F.2d 1248, 1248–49 (6th Cir. 1973) (quoting *Gooch* standard and holding: "The obvious purpose of Sec. 1201 is too plain to warrant the assertion that any person of ordinary intelligence would fail to understand what conduct it forbids") (per curiam) (citation omitted). *Daulton* upheld the statute where the captor robbed and then forced the victim to drive him to a different state, a scenario of benefit to the captor. *See id.* The Circuit has endorsed as actionable a kidnapping motivated by the purposes of assault and sexual assault. *See United States v. Sensmeier*, 2 F. App'x 473, 476–77 (6th Cir. 2001) (noting that, under *Gooch*, purpose encompasses any that "defendant may find of sufficient benefit to induce him to commit the kidnaping[,]" and finding a valid "or otherwise" purpose where evidence supported kidnapping "so that [captor] could assault [victim] without detection or confine her in a place where Complainant would not have an opportunity to call the police"); *United States v. Ingram*, No. 20-3267, 2021 WL 943675, at *6 (6th Cir. Mar. 12, 2021) (following *Gooch* and *Sensmeier* in context of sexual assault).

Defendant Messer's argument that 18 U.S.C. § 1201(a) is unconstitutionally vague relies on three recent Supreme Court decisions in which the Court struck down related federal criminal statutes on vagueness grounds. DE 30-1 at 2–3 (citing *United States v. Davis*, 139 S. Ct. 2319

(2019), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson v. United States*, 135 S. Ct. 2551 (2015)). Relying on these decisions, Defendant argues that the statutes struck down in those cases were "substantially more limited and specific" than § 1201(a), and therefore the "completely unlimited" §1201(a) should fail for vagueness as well. DE 30-1 at 3. Messer contends that the Supreme Court has revivified vagueness analysis and that its new, more muscular approach, would doom § 1201. Of course, this court, even if convinced, does not course-correct the Supreme Court or the Circuit. But, the Court finds the argument unconvincing.

In the three cases cited by Defendant, the Supreme Court invalidated various criminal statutory provisions that essentially attempted to define the scope of aggravating prior or related violent conduct, from a different or instant conviction, as a matter of sentencing. *See Johnson v. United States*, 135 S. Ct. 2551, 2555 (2015) (striking down provision of Armed Career Criminal Act that defined "violent felony" to mean any felony that "involves conduct that presents a serious potential risk of physical injury to another."); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (striking down provision of the Immigration and Nationality Act that incorporated the residual clause of 18 U.S.C. § 16, which defined "aggravated felony" as "any other offense that . . . by its nature, involves a substantial risk that physical force . . . may be used . . ."); *United States v. Davis*, 139 S. Ct. 2319 (2019) (striking down residual provision of 18 U.S.C. § 924(c)(3)(B), which was nearly identical to the statute involved in *Dimaya*).

The Supreme Court decisions relied on by Messer do not invalidate § 1201. Those cases dealt with statutory provisions implicating the byzantine "categorical" approach to assessing a foundational and related conviction or offense. This approach called for measurement against a putative "ordinary" or "idealized" case, rather than assessment of the real-world, instant conduct of the defendant before the court at the time. "Under the clause, a court focused on neither the

'real-world facts' nor the bare 'statutory elements' of an offense. Instead, a court was supposed to 'imagine' an 'idealized ordinary case of the crime'—or otherwise put, the court had to identify the "kind of conduct the 'ordinary case' of a crime involves." *Dimaya*, 138 S. Ct. at 1213–14 (characterizing *Johnson*). The area and statutes in the referenced suite of cases are largely *sui generis*, *Cook*, 970 F.3d at 876, and do not, in the Court's view, undercut the validity of a charge under § 1201(a). Under § 1201(a), the jury will find facts about Defendants' instant behavior and purposes in a way measured by the statute itself and directly informed by nearly nine decades of federal law. *United States v. Kuzma*, 967 F.3d 959, 970–71 (9th Cir.) (discussing different statute and noting: "the [Supreme] Court placed dispositive weight on the fact that this inquiry involved application of an 'imprecise "serious potential risk" standard' to a "judge-imagined abstraction"—*i.e.*, the "judicially imagined 'ordinary case' of a crime"—rather than to "real-world facts.""", *cert. denied*, 141 S. Ct. 939, 208 L. Ed. 2d 477 (2020)). In any event, Messer has preserved his theory, which, as noted, binding precedent forecloses. While Defendant is correct in stating that "the constitutional prohibition on vague laws applies to all laws," each statute is unique in its language and history, and this Court does not find 18 U.S.C. § 1201(a) unconstitutionally vague under the cited trilogy. DE 34 at 3.

IV. The Application 18 U.S.C. § 1201(a)(1) to the Indictment Does Not Violate the Commerce Clause

Messer further argues that the instrumentalities of interstate commerce recited in the Indictment "served only a noneconomic purpose and activity that was wholly intrastate," and are therefore beyond the scope of Congress's powers to regulate under the Commerce Clause. DE 30-1 at 8. Messer's argument fails because, while the alleged kidnappings may have occurred entirely within the Commonwealth of Kentucky, the Government alleges that Defendants used various

instrumentalities of interstate commerce in furtherance or commission of the crimes. Those allegations support jurisdiction under established law.

Both the Government and Messer correctly note that the regulation of interstate commerce is one of Congress's enumerated powers. DE 30-1 at 7; DE 32 at 3. Under its commerce power, Congress may: (1) regulate the use of the channels of interstate commerce; (2) regulate and protect the instrumentalities of interstate commerce; and (3) regulate those activities having a substantial relation to—that substantially affect—interstate commerce. U.S. Const. art. I, § 8, cl. 3; *United States v. Lopez*, 115 S. Ct. 1624, 1629–30 (1995). At issue here is § 1201(a)(1), which states in relevant part, as to jurisdiction: "the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense . . ."

Here, as Defendant correctly points out, Congress's power to regulate and protect the instrumentalities of interstate commerce is at issue because the Indictment specifically alleges that Defendants used instrumentalities of interstate commerce in commission and furtherance of the charged offenses. DE 8; DE 30-1 at 8. In his Motion to Dismiss, Defendant argues that Congress's commerce powers do not permit it to regulate "wholly intrastate noneconomic activity." DE 30-1 at 1.

However, the contention faces contrary precedent. The Sixth Circuit has recognized that a § 1201 prosecution may properly hinge, jurisdictionally, on the use of an instrumentality of interstate commerce as part of the offense. *See United States v. Small*, 988 F.3d 241, 252 (6th Cir. 2021) (discussing case involving use of automobile: "Contrary to this view, this is the sort of

conduct that may be regulated under Congress' well-established power to forbid or punish the use of the channels and instrumentalities of interstate commerce 'to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin.'") (quoting *Brooks v. United States*, 45 S. Ct. 345, 346 (1925)); *United States v. Dais*, 559 F. App'x 438, 445 (6th Cir. 2014) (rejecting as-applied challenge where jurisdiction involved intrastate cell-phone use: "Congress's authority to legislate is plenary when, as here, the government's evidence establishes that defendants used cellular telephones in the commission of a kidnapping."). This is a classic *Lopez* category 2 formulation, which does not require inquiry into the actual effects on interstate commerce in a particular case. *See Lopez*, 115 S. Ct. at 1629 (endorsing instrumentality regulation as commerce clause power "even though the threat may come only from intrastate activities"). Rather, as the Circuit has held,

> In our view, once we determine that congressional action has been directed toward regulating or protecting an "instrumentality" of interstate commerce-e.g., cars, trains, airplanes, ships-that is the end of the Category Two inquiry. The action is a valid exercise of the commerce power.

United States v. McHenry, 97 F.3d 125, 127 (6th Cir. 1996).[2]

This case, as charged, involves multiple alleged interstate commerce instrumentalities. These include a vehicle, the internet, and Facebook. *See Small*, 988 F.3d at 252 (recognizing a vehicle as an instrumentality of interstate commerce); *United States v. Person*, 714 F. App'x 547, 551 (6th Cir. 2017) (recognizing the internet as an instrumentality of interstate commerce); *United States v. Bradbury*, 848 F.3d 799, 800 (7th Cir. 2017) (recognizing Facebook as an instrumentality of interstate commerce). Because each of these is a recognized instrumentality, the Indictment as

[2] Messer focuses on the *McHenry* dissent and other arguments the majority rejected; the Court here hews to the binding majority analysis. Further, *Waucaush v. United States*, 380 F3d 251 (6th Cir. 2004) is a RICO case involving a jurisdictional scheme (an enterprise affecting commerce) very different from that of § 1201(a).

phrased passes muster. *See United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) ("Plainly, congressional power to regulate the channels and instrumentalities of commerce includes the power to prohibit their use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature."); *United States v. Brown*, No. 13 CR. 345 LGS, 2014 WL 4473372, at *4–5 (S.D.N.Y. Sept. 10, 2014) (quoting *Ballinger* then holding: "Here, the Federal Kidnapping Statute prohibits the use of the channels and instrumentalities of interstate commerce for the harmful act of kidnapping, and accordingly is within Congress's purview"). As *Small* expressly declared, in discussing the jurisdictional expansion of § 1201 per the Adam Walsh Act: "[T]he additional language expanded federal jurisdiction to reach kidnappings in which . . . facilities of interstate commerce were used to commit the crime, even when the physical kidnapping occurred within the borders of a single state." *Small*, 988 F.3d at 251–52 (affirming constitutionality because, per *Brooks*, commerce facility was used as "agency" to promote harm). Of course, the jury alone will determine whether the Government can prove the jurisdictional element.[3]

V. Conclusion

In conclusion, Defendant George Oscar Messer's Motion to Dismiss does not show that 18 U.S.C. § 1201(a) is either (1) unconstitutionally vague; or (2) violative of the Commerce Clause. Accordingly, the Court **DENIES** DE 30. The case will proceed.

This the 30th day of March, 2021.

Signed By:
Robert E. Wier
United States District Judge

[3] The Court will defer for trial analysis on inclusion of the highways. Those traditionally are channels, not instrumentalities, of commerce, *see United States v. Faasse*, 265 F.3d 475, 490 (6th Cir. 2001), and may require a different treatment.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION at LONDON
- - -

UNITED STATES OF AMERICA,	:	Docket No. 6:20CR00070-1-REW
	:	
Plaintiff,	:	London, Kentucky
	:	Thursday, May 31, 2022
versus	:	9:00 A.M.
	:	
JAKE MESSER,	:	
	:	
Defendant.	:	

- - -

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE ROBERT E. WIER
UNITED STATES DISTRICT COURT JUDGE
- - -

APPEARANCES:

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Court Reporter:	KATHLEEN E. MALONEY, RMR, FCRR Official Court Reporter 310 South Main Street Room 370 London, KY 47041 kathleen_maloney@kyed.uscourts.gov

Proceedings recorded by mechanical stenography; transcript produced by computer.

The -- my case manager reminds me that the government's motion for leave to seal at Docket Entry 256 is still pending, and we'll grant that and allow the materials pertaining to that motion to be filed under seal.

All right. Let's turn now to the -- to the objections. I do want to hear argument on each of them.

And, Mr. Rossman, let's start with your objection on the proper way to consider 18-48.

MR. ROSSMAN: Yes, Your Honor.

So the first objection is that 18-cr-48 is relevant conduct to this offense, not criminal history.

The key legal test is set forth in the *Beddow* case, which is cited in the sentencing memorandum, and that's where the cases are severable into two different offenses.

Beddow notes it's a fact-sensitive inquiry and it involves more than the elements of the offense. And so I think it's important to note it's not the *Blockburger* test, it's not double jeopardy, it's not -- I don't even really think it's severable in the sense of Rule 8 severable.

It really has to do with the geographical and temporal overlap, the common participants, and the common scheme or plan, and those are factors listed in the *Beddow* case.

So talking about those factors I think demonstrates the 18-cr-48 is relevant conduct here.

First, on the geographical and temporal overlap, there's

complete overlap. These offenses occurred in the same time and the same place.

The 18-cr-48 indictment alleges Whitley, Laurel, and Clay counties. This indictment alleged Whitley and Clay counties. 18-cr-48 alleges June 2017 to July 4, 2018, and the indictment here, the time frame is included within that time frame, April 28 to 29, 2018. So there's really a complete overlap on that factor.

The second factor, common participants, we know that Scott Patterson and Myra Morgan were also charged in 18-cr-48. They were participants in this case. They were not charged because of the provision in their plea agreement that prevented them from being charged based on evidence in the government's possession, but they were intimately involved in what the jury found to be offense conduct here.

We also know that Victim 1 and Victim 2 were dealing drugs during this time frame. Victim 1 was charged separately. So we have a lot of common participants in this drug world dealing the same drugs in the same time in the same place.

The next factor is whether there's a common scheme or plan. And I think this is really a home run because, of course, there's a common scheme or plan. They are dealing drugs to make money. That's the whole point of this.

18-cr-48 lists methamphetamine and marijuana and I

believe another drug. And, of course, we heard evidence that the kidnapping arose from a marijuana deal that went bad.

Now, the government has said this was a different source, you know, these were different participants, it's a different conspiracy, but I pointed to provisions of Mr. Messer's plea agreement in 18-cr-48 that just says "sources of supply," and it has very generic language.

It doesn't limit it to one supplier or a certain set of individuals that he conspired with.

So I think the language of the plea agreement is broad enough to encompass what happened here. And really it arose out of the same transaction or occurrence.

We talk about societal interests and what societal interests are harmed. 18-cr-48 sought to stop the harm from drug dealing, and in this case, as found by the jury, with the kidnapping, it was really an enforcement action that arose out of that drug conspiracy or that drug dealing conduct and pattern.

So we know in the drug world that drug dealers cannot turn to the courts or law enforcement to enforce their contracts or to enforce their deals. They have to engage in street justice, and based on what the jury found, that's exactly what happened here.

So all of those *Beddow* factors overlap and support the finding of relevant conduct.

I do want to address some of the cases the government cited. I don't want to rehash the sentencing memorandum, but the government talked about *Beddow*, and that's a case where the defendant loses. But, again, that case, the offenses occurred at different times and different places. The possession of the firearm was six months after the money laundering, and it just happened to be the emeralds that were used to launder money were present to be sold when the gun was possessed.

So the Sixth Circuit really emphasized the different times and places.

Similarly, in the *Flores* case, there was the fact pattern where there were two different conspiracies to distribute or possess pseudoephedrine. One was to bring them from Canada to Michigan. The other was to possess them in Kentucky and manufacture methamphetamine and bring pseudoephedrine from Los Angeles to Kentucky. And the Court noted the differences in geography, the difference in conspiracies and co-conspirators and different time frames.

One of those conspiracies was 2003. The other was 2008. So you have a big difference there that's not present here.

And then you have the *Ward* case, which is similarly distinguishable. The defendant was convicted of conspiracy to distribute drugs from March 2002 to February 2005. The first overt act alleged in the indictment occurred in 2004. And the

Sixth Circuit said that his prior conviction for selling crack cocaine on January 31st, 2002, was not relevant conduct. It was completely outside the time frame of the conspiracy and long before the first overt act.

So I think -- I have just touched on a few of them, but I think a lot of those cases are distinguishable in that they involve clearly different geography and clearly different time frames.

I can go into sort of what the consequences are, if this is relevant conduct or not. Otherwise, I would just rest on what's in the sentencing memorandum. And if the Court has any questions, I'll be happy to answer those.

THE COURT: Thank you very much.

Ms. Reed.

MS. REED: Yes, Your Honor.

The government did try to include as many cases as we could find that were even somewhat similar because the government could not find a specific case that had the exact same fact pattern; however, some of the cases that the government pulled out do include overlapping time frames, do include the same geographical area and do include conduct that relates some way to the offense conduct that the individual is being sentenced for.

You know, *Lopez-Padron,* he came into the United States, unlawful entry, false identification that he provided an

officer, as well as he got then cited for forgery and identity theft once he was pulled over.

THE COURT: Let's talk about this case. It's a fact-specific inquiry. So other cases, I mean, they are helpful, but it's fact specific. So what would you say about the connectedness or distinctness between these two?

MS. REED: Yes, Your Honor. So there's clearly an overlapping time frame that we're dealing with here. However, the government would point out that the source of supply, as testified to by every witness and supported by the defendant's text message and Facebook records, implies and states flat out that this was a source of supply from Georgia that had never been dealt with before, that the defendant had no personal contact with, and that he was using a middleman that was not involved in his other conspiracy in the prior case, that being Victim 1.

Ultimately, no marijuana exchanged hands.

I did pull the defendant's prior -- PSR for the prior case, and so I would point out that, for example, on page 9 -- and this would be some overlap that the defense has not noted -- the search warrant that was conducted in September of '18 is noted in the prior case in which the firearms were found in the defendant's father's closet. Some of those firearms, as the Court notes or knows, from the jury trial, were used during the course of the kidnapping. So that, I

would point out, is some overlap, and that's on page -- paragraph 29 of the prior PSR.

Additionally, we do have -- the only mention of either Victim 1 or Victim 2 is paragraph 34 in the defendant's prior PSR in which Ms. Godfrey mentions that the defendant did not like Victim 1 because Victim 1 owed him $10,000 and Ms. Godfrey indicated that the defendant was going to kill Victim 1.

There's no mention as to what the $10,000 was for. There's no mention of the marijuana deal.

In the calculation for the relevant weight in the prior case and in the prior PSR, there is no mention whatsoever of the marijuana that ultimately never exchanged hands during this transaction.

And as the defense and Court knows, you know, a conspiracy cannot just expand based on one spoke. You know, you can't just -- not all drug transactions within a certain time frame and a certain locale can be lumped into a single conspiracy.

And so this was a source of supply that the defendant had never worked with, no drugs exchanged hands. It involved Victim 1 and Victim 2 who were not part of the prior case. It did involve Myra and Scott Patterson, which is an overlap from the prior case. But it was never calculated or used whatsoever to calculate the defendant's prior sentence.

Nor is his prior drug trafficking activity used to calculate his guidelines in this case.

And so the government believes that they are distinct and, if they are not, then it kind of gives free reign. And this cannot be the case of what the guidelines intend or the Sixth Circuit, that any violent act that happens during the course of a drug-trafficking conspiracy can just be lumped into the conspiracy. It's not just free reign that everything is going to be considered relevant conduct.

The kidnapping is a separate and distinct harm, which I think the cases have touched upon consistently. The drug-trafficking harm was a societal harm generally. But in this case, we literally have the defendant kidnapping two individuals, holding them against their will, sexually assaulting one, assaulting the other, and so that is a unique harm to Victim 1 and Victim 2 that is totally separate from the drug-trafficking harm.

I mean, the testimony was the defendant was completely sober and he was on drug court during this time. Obviously, we know he was still trafficking, but this was a separate transaction that had nothing to do with his sources of supply that were mentioned in his prior case.

THE COURT: All right. Anything else, Mr. Rossman?

MR. ROSSMAN: Just briefly, I'll note that the government has made -- given a lot of weight to the fact that

this transaction was never calculated into any weight calculation. But the plea agreement on page 3, it's very generic. It just says that his quantity of marijuana, methamphetamine, and alprazolam corresponds to a converted drug weight of at least 1,000 kilograms but less than 3,000 kilograms. There's no listing of quantities or transactions or anything else. So I don't think there's anything in the plea agreement that would necessarily exclude this failed transaction.

And then the government mentioned that he was completely sober at the time of the kidnappings, and I think the response to that is, well, he was convicted of distribution, conspiracy to distribute. He was convicted of using it. He doesn't have to be high on it to conspire to distribute it or to take an action in furtherance of that conspiracy by kidnapping someone. So that's all the response I have.

THE COURT: Okay. Thank you. It's -- as usual, whenever Mr. Rossman is in a case, I'm sharpening up my pencil because I know the arguments are going to be thoughtful and creative, and no difference here, and I appreciate the thoughtful and zealous advocacy.

So it really comes down to what the guidelines say and then what the cases say regarding the guideline language, and really it's 4A1.2(a)(1). We are measuring criminal history and what to include in the criminal history calculation, and

prior sentences are includable generally. And 4A1.2(a)(1) defines "prior sentence" to mean any sentence previously imposed upon adjudication of guilt for conduct not part of the instant offense.

So if a prior sentence is not part of the instant offense, it's included, calculated under the Chapter Four rules for what counts and how.

If it's part of the instant offense, then it's not included. It's rather -- it's rather lumped into the measured crime before -- the measurement of the crime before the Court.

And the Commentary says logically -- referring back to 1B1.3, Conduct as part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions 1B1.3, and instant offense means the offense before the Court including relevant conduct.

So it's a little bit circular. It's kind of like an NCS reprint, you know, where you trace it back and it comes sort of in a repeating loop for how to define it.

Beddow and the cases that have grappled with it have said it's really a fact-specific measurement of whether the two baskets of potentially separate conduct are severable or not severable. And severable does generally have you think of a legal analysis, an elemental analysis, and I think *Beddow*, you know, kind of drew -- drew a line that I still, frankly, find to be a little bit murky.

But what *Beddow* said was this is a fact-specific inquiry that involves more than just a consideration of the elements of the two offenses. Factors such as temporal and geographic proximity, common victims, common criminal plan or intent must also be considered. And what I would say there is so it's not just an elemental analysis, but I think part of it is the elemental analysis. And there are plenty of cases in the Sixth Circuit, *Bond* and *Escobar* and *Lopez-Padron,* all of them involved an elemental analysis.

So the Court there did take the elements of the offense of conviction and compare it to the prior sentence and see if the latter necessarily charged the former.

That's not the whole ball game, but that's certainly part of it. And so I would just note here we are really talking about two steps down a path.

For the defense to be correct, as I look at it analytically, we are taking a kidnapping crime -- crimes from two distinct days in April 2018 and trying to trace that to a -- you know, over a year-long drug conspiracy going back to the middle of 2017 through the middle of 2018.

Now, temporally that covers it as an umbrella, but here it's trying to go from the kidnapping to the marijuana deal that prompted the kidnapping to the 2017-2018 18-48 convicted of marijuana and other drug conspiracy.

So it's a two-step path that the defendant has to get

through to be successful.

Clearly, elementally, there's distinction between the crimes of conviction, the immediate marijuana deal, and the 18-48 convicted marijuana deal.

So that -- that's distinct in my mind and severable on an elemental basis.

But I agree the Courts say look beyond that. And so the defense has thoughtfully pointed out some of the -- in fact, all linkage, and there is temporal linkage, there is geographic linkage, and there's some linkage in the persons involved in the crimes. So I recognize that.

Still, to me, the key is whether this ought to be looked at as sort of one enduring, unified criminal scenario or it's truly separate in a way the cases would describe as severable.

So if you look at the marijuana, the deal that led to these events in April of 2018, I mean, I had the 18-48 case, and I went back to it and looked at the presentence report.

All of that -- all of that was aimed at Louisville, at Louisville sources, going to Louisville to get drugs. Patterson went to get drugs there. Messer went to get drugs there. It was all funneling through Louisville, all the different substances involved, the meth, the alprazolam, and the marijuana.

I think the marijuana where I saw specific reference to it, it was coming through -- through the Cubans, I believe was

the nickname used. No reference I saw anywhere to Georgia.

The specific deal in April of 2018, as I recall from the record, that really came from Victim 2's mother who had some guys in Georgia she knew and told Nathan Medlin about it and Medlin brought the deal to Jake Messer and Scott Patterson for funding.

So he was setting the deal up and the money was coming from Jake Messer, and Patterson was kicking in, really unbeknownst to Medlin. Patterson was kicking in behind the scenes.

So that, although, you know, part of the decisionmaking there is geographically the same, the tendrils for the deal go different directions. One is going south for a distinct 100-pound marijuana deal, and the other one for the whole time is going north to Louisville. That's an important distinction in my mind.

Then you take the much -- the much bigger step to go from that deal to get the marijuana. That's the conspiracy. Then it falls apart with the robbery.

And how do the players react to that? Well, lots of different reactions. It ends up sort of being the catalyst for the kidnapping and the terrible events of that night.

It's a big jump to go from we are in a marijuana deal as part of the jointly undertaken criminal activity to get marijuana from Georgia to that deal has disintegrated and the

fallout of that produces a second criminal cluster where some of the conspirators are targeting other of the conspirators to try to fill in the blank, get the money back, squeeze for information, extract something.

How it plays out perhaps depends on the prism you are looking through, but that's -- that, to me, in itself, is severable conduct, that reaction to -- to the marijuana deal disintegrating.

Certainly different harms. There are no victims in the 18-48 period. There are no victims really in the April -- specific April 28th marijuana deal. The victims were in the response to the disintegration, and that's Victim 1 and Victim 2.

So victims' distinct harm is at issue. How society deals with drugs is one thing. How society deals with, you know, vigilantism and retaliation in the drug world, that's a different aim, it seems to me. And considering all the issues, commonality and distinction, it seems to me clearly under the analysis required it is severable, legally distinct, elementally distinct, and factually compartmentalized behavior for analysis, and I think it's certainly proper to treat the conspiracy under 18-48 as a prior sentence.

Now, the Count 16, that is a standalone basis for this same answer because Count 16, which independently carried the same 151 months that the defendant received on the overall

conspiracy, the Count 16 under the indictment in 18-48 was September 2018. That was -- that was possession with intent to distribute methamphetamine.

And so trying to treat that September 2018 event, which is post the conspiracy that 18-48 charges -- so it's post that conspiracy -- September 18th, trying to take that all the way back to a completely different April 2018 marijuana deal and then resulting violence and kidnapping from the breakdown of that -- of that nascent deal certainly seems a bridge too far. So I think it would be severable for that reason alone, even if 18-48 -- the conspiracy itself were viewed as relevant conduct.

So for all those reasons, I do think 18-48 properly counts as a prior sentence; so I'll overrule that objection.

Now, on the treatment of paragraph 56, Mr. Rossman, what do you want to say about that?

MR. ROSSMAN: I believe that's the prior state court conviction. Yes, I think, if we lose this objection, the Court rules that 18-48 is properly criminal history, then I don't see any basis to argue that state court conviction should be anything other than criminal history.

THE COURT: Okay. I agree with that. I just do want to state on the record for the characterization of that paragraph, I went back and looked again at it. That paragraph relative to 18-48, that actually, I believe, was the subject

matter of the 851.

Ms. Reed, is that not correct?

MS. REED: Your Honor, I don't want to misspeak. I don't -- I don't have a copy of the 851 in front of me, but I would suspect, looking at the criminal history, that it would have had to have been the -- if there was the 851.

THE COURT: Yeah. I'm looking at it. It's Docket Entry 174, and it cites to Whitley County Case 17-119, the November 2017 possession, first, and -- unless I misread it yesterday in looking at it -- I think that's paragraph 56.

Officer Vonckx, do you agree with that?

PROBATION OFFICER: I agree, Judge.

THE COURT: So there was an argument that, you know, there was no objection by Jake Messer to that being calculated within paragraph 58 as a prior sentence, and I just want to make clear it was so separate -- considered so separate that it was the basis for the 851. That's the reason Jake Messer had, you know, an aggravated maximum in that case. And so I just wanted to note that, and I think that calculation, although it's baked in and I don't think proper for the Court here to reopen that anyway -- even if not, I would just note the separateness on the calculation there and my belief that it certainly remains -- remains proper.

He had been prosecuted, convicted, sentenced on that. And the state -- or the federal conspiracy in 18-48, you know,

raced on, and, again, in September of '18, really over a year after that original adjudication in 56, he was still -- he was engaged in the conduct that resulted in the Count 16 conviction.

So no basis for pulling that out as a calculation component.

All right. I think that takes care of everything on the -- on the criminal history calculation.

Anything else to bring up on that, Mr. Rossman?

MR. ROSSMAN: Your Honor, I think I do want to state one nuance on the issue with paragraph 56.

I think there would be an argument to be made -- and this is maybe something that I need to clarify for him for appellate purposes -- that those really should be considered one offense for criminal history.

I know the Court has ruled against that, but I think the Court's ruling on Count 16 would defeat that argument. I do just want to raise that so, if anybody is looking at this on appeal, the record is clear that I would make that argument, that I think the ruling on Count 16 would foreclose that.

THE COURT: Okay. Fair enough.

Anything else on the history calculation?

MR. ROSSMAN: No, Your Honor.

THE COURT: Ms. Reed, is there anything else you want to say about that or anything else the Court needs to address

in your view?

MS. REED: No, Your Honor. I mean, just one more thing to say about the paragraph 56.

It looks like that arrest occurred -- and possession occurred on July 18, 2017. And so the conspiracy, as charged in the prior federal case, concluded on July 4, 2018, so it's not an overlapping --

THE COURT: Well, it started in June of '17, though.

MS. REED: Oh, yeah. It's a '17 conviction. Yes. You are correct.

No. I have nothing else to say on that.

THE COURT: All right.

Okay. Now let's turn to the objections relative to the offense level calculation in this record and start with the ransom issue.

MR. ROSSMAN: Yes, Your Honor.

The objection goes to both Count 1 and Count 2. The guidelines do not define "ransom." Cases have talked about defining it in terms of its plain meaning.

There's a case about -- talking about it as consideration demanded for ransom of a captured person.

And so we think in this case there was no ransom demand. The probation office concedes that it does not appear that a specific demand such as "pay X money for release" was made.

This was really about finding these guys from Georgia and

extracting revenge. It was not about trying to get $10,000 out of Victim 1 and Victim 2 that night.

So I think that is important to know. Now, this whole scenario may have been motivated by money. It may have been motivated over anger or losing money, but that doesn't in and of itself make it a ransom.

Now, the government talked about this message between Mr. Messer and the mother of Victim 2 where he talks about, you know, that would be smart to get my money back.

Well, of course, he wants his money back. Who wouldn't want the money back? But he doesn't say, "Pay me the money back and I'll give you release."

Now, she's offering that, but he never says that.

So absent a specific point in the record where someone says, "Pay X dollars for release," I don't think there's a ransom.

Now, the government also points out that Victim 2 said she had sex with Mr. Messer in exchange for release. But I think the fact that she was not released undermines that argument.

And really the Court heard a lot of evidence at trial about her catfishing scheme and this sort of bizarre relationship between the two, and really what happened, she made him want to believe -- she made him believe that she wanted to have sex. He had a subjective reason to believe

that she consented.

Now, the jury didn't find she had capacity or she was under duress, but he subjectively believed that she wanted to consent.

And so she had sex as part of her scheme to maintain access to controlled substances. That was part of that catfishing scheme. And I don't think that the Court could find under the preponderance that there was an offer to have sex in exchange for release certainly when the release never occurred.

THE COURT: All right. Thank you.

Ms. Reed.

MS. REED: Your Honor, there's been no evidence as to what the defendant's state of mind was in the bedroom, zero. And so the evidence before this Court from the trial are the defendant's statements to his father that Victim 2 had sexual intercourse for her release. Victim 2 told the same thing to the defendant's father prior to the father engaging in sexual assault with Victim 2. It's supported by every witness that took the stand. It's also supported by Facebook communication and text message communication.

Again, the fact that the defendant lied to Victim 2 with regards to the consideration for release does not make it any less a ransom demand.

If someone had dropped off a bag of $10,000 and then the

defendant had refused to release Victim 1 and Victim 2, it would have made the demand no less a ransom demand.

And so "ransom" is not confined under the meaning that's provided in Black Law's Dictionary as well as Merriam-Webster, money for release.

It is consideration for release, and that is exactly what happened in very specific terms with Victim 2.

Additionally, the defendant himself, as well as instructing other people, attempted to extract information with regards to the money from Victim 1. And in the text messages -- text message communication with Victim 2's mother, you can also see where, again, it doesn't have to be this explicit "give me this for that."

He is saying it would be smart to get my money, and she is pleading with him to know that her child is okay and if they are still with him, which obviously they still were.

So, again, there's ransom in multiple different ways, multiple different levels, that the defendant qualifies for this enhancement under the case law, under the plain definition of what ransom is. And the fact that he lied to Victim 2 does not make it any less a ransom demand for her and Victim 1's release.

THE COURT: Mr. Rossman, anything else?

MR. ROSSMAN: No, Your Honor.

THE COURT: All right. Well, the -- it is

interesting that such an important term of the guidelines really doesn't have anything to say about -- about what that term means.

The specific defense characteristic at issue, under 2A4.1, is, if a ransom demand was made, increase by six levels. And the background, I have noted before, in kidnapping cases sort of maps out that the guideline is aiming at kidnapping in all of its -- in all of its varieties and talks about how essentially there are three categories of kidnapping: sort of a limited duration, quick release, maybe an incidental-type situation, a person is released unharmed; then a kidnapping that's part of facilitation of another offense, like a sexual assault as an example, but a kidnapping to facilitate; and then third is kidnapping for ransom or political demand, so kidnapping with a purpose to gain some benefit.

Those are the broad categories that the guideline is aiming at.

Ransom, as I read the cases and look at it and look at the dictionary definitions, it is something exchanged for release. The idea is there's a value here demanded or, complete situation, a value given in exchange for release. I think that's the -- that's the essence of it.

And the language is ransom demand. So the demand is what drives it, not the successful completion of the transaction.

So was there a ransom demand?

Well, looking at both Victim 1 and Victim 2 over the course of the night, I would just say, of course, Jake Messer is responsible for his own behavior -- under 1B1.3, anything that he himself did -- and that includes things that he aided, abetted, counseled, commanded, induced, procured, or willfully caused. That's all put on his side of the ledger.

And where there's jointly undertaken activity -- and I certainly find that here the kidnappers and that group were part of a jointly undertaken criminal activity -- how far does his liability go there?

Well, whatever is within the scope of that activity is included if the conduct is in furtherance of the activity and foreseeable to the defendant. And, of course, Jake Messer -- and we'll talk more about this, but he was the catalyst for everything going the way it did, ending up back at the Jewell trailer. He immediately brought his father into it. His father came to the scene armed. He had picked up arms, and he had an arm on his hip, came in, you know, seeing red. And that brought -- he brought that into the trailer, the trailer where the victims had already been separated, where Melissa Smith was being told her boyfriend was being tortured. She didn't even know he was there for a significant period. He thought he was being tortured graphically. Both of them were repeatedly threatened, were repeatedly squeezed for

information, and, of course, George Messer came in and put a gun to Nathan Medlin's head and said, you know, tell me -- tell me -- you know, give me where the money is or identify -- provide the information.

And, you know, was Jake Messer there for that? Maybe not. But it doesn't matter because he brought his dad. The whole point was to solve this theft and get the money back. And so he's on the hook for all that, all the threats to both of them, the sexual threats to Nathan Medlin over what was going to happen to Melissa. All of that pours into this idea that they were being required to give something in order to get out.

Now, was it as -- as, you know, sterile as sitting around a conference table negotiating a deal? Of course not. It was in a trailer out in the middle of Clay -- out in the wild of Clay County, no cell service, chaotic, violent scene, both victims in a place they had never been.

So it wasn't as detailed as a negotiated contract. But I think the clear implication from all the demands was, "to get out, you have to give us X," and X could have included the information to get to the people who stole it, could have included information about the money.

The whole catalyst was to get -- to get that money back and make it right, but motivations were maybe nuanced with the two Messers, and they had, I think, other things on the agenda

or roster, as well, that came into play.

One of those was the demand on Melissa Smith, the sexual demand. And all we have is her testimony from the relationship or the exchange that happened within that room, and she testified that Jake Messer told her, if she would have sex with him, he would let them go unharmed. That's a demand for something, sex, to effect the release of the persons held captive.

She said it. George Messer in his interview, he talked about this. Now, she said Jake Messer made the demand. She relented. She tried to stop him in the middle, and he would not stop. So he finished, and then George Messer came in. They had a discussion, and Jake Messer leaves. And then George Messer proceeds at gunpoint to sexually assault the now-bound Melissa Smith.

George Messer was asked about this whole event, of course, and he gave a statement. And his statement included that he was aware that -- that there had been sexual acts in exchange for either them being released or her being released or Jake Messer taking it easy on Nathan Medlin over the money.

It varied a little bit on how George Messer phrased it, but, undoubtedly, they had a discussion about sexual activity in exchange for Melissa Smith getting relief on that night, and that clearly corroborates the ransom demand analysis that I have made. That comes directly from the defendant's father

and co-defendant.

So the interaction with the mother, that's not a ransom demand made, but that shows -- that shows that money was part of what was on the table for getting this situation solved. And so "would be smart for those people to pay them back," that's certainly corroborative of the tone and environment happening at that -- at that trailer.

So I think -- analyzed through the Victim 1 treatment, I think that by a preponderance of demand being made has been shown by the government.

I think, analyzed through Victim 2, clearly the sexual demand was made to her in order to get her release, and -- and that qualifies as well.

So I think the six points properly apply. I'll overrule that objection.

All right. Moving to the weapon, Mr. Rossman.

MR. ROSSMAN: The first argument against the firearm enhancement was that it was double counting based on 18-cr-48 being relevant conduct because he was enhanced for a firearm in that case. I think the Court's ruling disposed of that argument.

The second argument is that Messer never personally possessed a firearm. The government didn't argue it in its sentencing memorandum that he did. The only witness at trial, as I recall, that testified that he personally possessed a

firearm was Myra Morgan.

Her testimony was aberrant in several ways. Most of the other witnesses either said he didn't or they did not recall.

And then we would go to relevant conduct. There's no question that the government has offered evidence that Oscar showed up with guns, and apparently the jury believed that evidence. However, there's no -- there's no evidence that Jake Messer asked him to bring those guns.

He calls and apparently says, "Dad, come help me," but he doesn't know he's going to show up with an arsenal. He doesn't know he's going to show up and start putting guns to people's head. I don't think that was either known to him or reasonably foreseeable, when you call your dad for help, that he's going to show up with guns and do that sort of thing.

So I think that would weigh against the finding based on relevant conduct.

I would also note that Jake Messer left shortly after Oscar Messer arrived and he told Oscar Messer to calm down.

I think it was Jewell that testified that Jake Messer told Oscar Messer to shut up and calm down.

And so I think that weighs against any finding of relevant conduct there because Jake Messer opposed any sort of escalation. Certainly, he did not want events to turn out the way they did with what Oscar was doing.

And also Jake Messer was not really in a position to say

no to the guns. When Oscar and Josh show up armed with an arsenal, he's not in a position to say, "No, take that back outside," because they are behaving wildly and Oscar is drunk. He tried. He told him to shut up and calm down, but that still didn't take care of the guns.

The last argument would be a *Havis* argument based on the language of the guideline. That was incorporated from Oscar Messer's sentencing memorandum.

Really the argument there is the guideline used the term "used" which is then defined to be "discharged" in the comment notes, and we would argue the under *Havis* "use" is limited to "discharge."

"Use" does not imply "otherwise used," as the comment note said -- states. And that would be a substantive expansion of the term "used" beyond the plain meaning of the guideline in violation of *Havis*.

THE COURT: So a knife can never be a dangerous weapon in this context?

MR. ROSSMAN: I don't think it's an argument about what's a dangerous weapon. It's an argument about what was used.

THE COURT: So a knife could be a dangerous weapon but could not be used in this context?

What if he held a knife at her throat?

MR. ROSSMAN: A knife could be used if it stabs

somebody or you swing it at somebody, like a firearm could be discharged, but just because there's someone holding a knife in their hand, it doesn't mean it was used.

THE COURT: But if "used" was "discharged," then a knife could never apply?

MR. ROSSMAN: Well, I think the -- a knife cannot be discharged. I agree. But there's an analogy between a gun being discharged and a knife being used, and I would argue that "use" means employed to hurt somebody. Just having it or waving it around is not using it.

THE COURT: All right. Anything else?

MR. ROSSMAN: No.

THE COURT: Okay. Thank you.

Ms. Reed.

MS. REED: Yes, Your Honor. I concur with the defense that just having it is not enough, and that is why this is not possession of a firearm. This is use of a firearm or use of a dangerous weapon. So I think that cuts against the double counting argument which the defense has now kind of conceded.

But also I think, throughout the defense argument, there is this confusion between possession and use. And so the government has not conceded that the defendant has never possessed a firearm during the course of the kidnapping.

The government is saying that the evidence is that he did

not use the firearm, but certainly under the co-conspirator liability, it was reasonably foreseeable to him that his co-conspirators were using the firearms in which the enhancement would apply to him.

And so I don't know if the Court wants me to touch upon the expansion of the guideline argument. I mean, that's the whole argument, is that the guideline text itself says "use of a dangerous weapon," which could include a steel-toed boot; it could include a knife; it could include a firearm.

"Dangerous weapon" is a broad term, broader than simply a firearm. And so, therefore, "use" cannot be constricted to "discharge" because then it's not a dangerous weapon. It's discharge of a firearm. It changes the entire meaning of the guideline text itself via the Application Note which can't be done.

THE COURT: Let me ask, Mr. Rossman, if -- so the guideline is "discharge or otherwise used." And so a firearm discharged, obviously that applies.

Do you agree that a firearm can be otherwise used and fall under this specific offense characteristic?

MR. ROSSMAN: No. I think that's the *Havis* argument, is that the comment note substantively expands the guideline, and so it should be limited to discharge when the weapon is a firearm.

THE COURT: So you think "used" -- the only way to

read "used" is that means "discharged"?

MR. ROSSMAN: I think in the context of a gun, yes. In the context of another dangerous weapon, I think it means active employment to hurt somebody. So if you discharge a firearm, you are either harming someone or trying to. If you stab someone with a knife, you are either harming or trying to. I don't think it means just simple possession.

I'm not trying to confuse the issues on possession and use. I'm trying to separate them. I'm trying to distinguish them. Just possessing it, just having it there is not "use."

THE COURT: How about a gun to a head, putting a gun to somebody's head and telling them what to do, is that not otherwise using a firearm?

MR. ROSSMAN: It's otherwise using the way the guideline is written with the comment note, but the argument is "otherwise used" impermissibly expands "use," and that would not be "use" because there was no discharge.

THE COURT: Okay. Back to you.

MS. REED: Yes, Your Honor.

I think that argument would preclude, for example, if you beat someone over the head with the butt stock or the firearm and crushed their skull, then that wouldn't be use under the analysis of the defense, but that's not the Sixth Circuit analysis, as noted in the government's case law that was provided.

It has been explicitly held that, when you use the firearm and accompany it with a threat of use in accomplishing something, that is use. For example, holding a loaded .44 Magnum to Nathan Medlin's head and saying, "I'm going to kill you; where is the money?" that is use of a firearm.

Another example that's laid out, almost the same exact fact pattern as we have here, having a knife and telling a woman to disrobe so you can engage in a sexual assault via use of that knife, that is use of a dangerous weapon.

In this case, we have the use of the .44 Magnum when the defendant's father pointed it at Melissa, told her to pull her pants down, and then kept it out and in his hand during the course of the sexual assault. That is clearly use of the dangerous weapon.

And so the government believes the only question is whether it was within the scope of the jointly undertaken criminal activity. Yes. I mean, it occurred during the course of the kidnapping, both the gun to Nathan Medlin's head and the firearm used to sexual assault Melissa Smith.

In furtherance of the criminal activity? Yes. It was specifically put to Nathan Medlin's head to demand the money, the $10,000. And it was used during the course of holding Melissa captive to sexual assault her.

And then was it reasonably foreseeable in connection with the criminal activity to the defendant? And so in this case

it seems pretty obvious that the defendant is the one that recruited his father, that riled his father up by telling him what the purpose of the kidnapping was, that he had been robbed. His father gets there. He's clearly seeing red and irate. He is armed. Everyone says he was waving around a .44 Magnum.

And so it is obviously foreseeable that he's going to question the man that the defendant just said stole his money. He's going to question him as to where the money went, and he is armed while doing so.

So the gun to Nathan Medlin's head is completely foreseeable based on all the witness testimony.

The first person that George Oscar Messer talks to upon entering the residence is the defendant. He goes immediately to the defendant to ascertain information about what's what. And then he goes into the room with Nathan Medlin.

Is it reasonably foreseeable that he would use the firearm to sexually assault Melissa Smith? Well, again, immediately prior to the sexual assault of Melissa Smith, it is the defendant who's having a conversation with his father, it is the defendant who's ordering the zip ties and the duct tape, it is the defendant that's getting that from Stephen Jewell and providing it.

And so why in the world -- if the defendant is trying to de-escalate the situation, why in the world is he giving his

father zip ties and duct tape? Why is he ordering Stephen Jewell not once but twice to go retrieve the restraints from Scott Patterson's vehicle?

He knows exactly what's going to happen to Melissa Smith. It's not only foreseeable, but he participated in ensuring that she would be just as compliant the second time as he was with her the first time.

And so the government believes that it checks every box including, obviously, occurring during the commission of the offense.

THE COURT: All right. Mr. Rossman.

MR. ROSSMAN: Just briefly, I would note, as a speaker of plain American English, I think if I said, "He used a gun on me," that someone would understand that to mean the discharge or a -- maybe "I got shot."

I don't think anyone would understand that as, "Well, he showed me a gun," or "I saw a gun," or "There was a gun there."

And so that's why I think the Application Note substantively expands the plain meaning of the guideline in violation of *Havis*.

THE COURT: Well, 924(c) has "use," right? And it doesn't mean it has to be fired.

Why is it -- I know I could understand "use" being defined as "discharged," but I could understand it being

defined as a lot more than just "discharged."

It's not self-evident of what "use" means. It just means employed in a given scenario.

MR. ROSSMAN: Well, I think it's sort of some unartful drafting in the guideline. It says, "A dangerous weapon was used means that a firearm was discharged or a firearm or dangerous weapon was otherwise used."

It doesn't import the 924(c) definition. It could have, but it didn't.

And so I think, given the phrasing that's used here, that that, you know -- that it's limited to "discharged or otherwise used," I think that expands on "used."

THE COURT: Okay. Well, I appreciate the argument on that.

You know, the addition is two points if a dangerous weapon was used, and that phrase includes various terms that require some form of definition.

"Dangerous weapon" is open enough to interpretation that I think the Commentary fills in properly there. "Used" I think has the same -- it has the same potential breadth. And when a word has potential breadth and is not clear just on its own weight what it means, I think the Commentary -- the commission is authorized to -- indeed called to create commentary that sheds light on it and, you know, the word "use" certainly well supports the idea that that has to be

broken down among its different components, and the guideline is aiming at something -- the guideline is aiming at making sure it's not going to hit people just for having a weapon during a kidnapping. So that's not going to do it. It's got to be beyond that. It's got to be use of the dangerous weapon, and the Commentary provides what that means, and I think quite properly so.

I don't see any *Havis* problem or issue on it. I think that's exactly what the Commentary is for. And so I reject the argument. I think the cases acknowledge that dangerous weapon and the definition it has and that "use" does include some employment of a dangerous weapon in a purposeful way that controls a person, demands conduct of a person, is used to manipulate the person's action or response.

So it's not even showing a dangerous weapon. It's not even displaying it or even brandishing it. It's some direct employment that -- that affects particular conduct, desired conduct in the case of the victim, and so I reject the *Havis* argument just as I did in George Oscar Messer.

Now, the proof on Jake Messer having a firearm, you may be right that it was only Myra Morgan.

My notes indicate that Nathan Medlin also attributed a firearm to Jake Messer. I may be wrong about that.

My answers here do not depend on whether I'm right or wrong on that. But I thought more than one person said that

he had a firearm, but several said he didn't. So I don't hear anything in the record that tells me Jake Messer himself used a dangerous weapon in the way that he would have to to earn these two points on his own.

So I wouldn't apply directly through his conduct, but it was a trailer full of people with guns. And he called in his father -- I think his father with that gun in a holster and coming in with his hired person, Josh Mills, also armed and others being armed on the scene like Patterson. Certainly the armed nature within that trailer was an important feature of what was -- what was going on.

He calls Oscar. Oscar shows up. He's -- he's very mad. You know, I think -- I think who he is is known to Jake Messer who I think later acknowledged that he's a savage, and that his dad would come in there and throw his weight around and make a bunch of threats, that's completely consistent with what I think was intended in bringing him there.

What did his dad do? Well, he puts a gun to Nathan Medlin's head. That's certainly part of the jointly undertaken criminal activity, which is we are going to figure out what happened and get this money back, and some of the witnesses said this -- they were going to get satisfaction out of this night.

And so putting a gun to Nathan Medlin's head, you know, the ultimate, you know, act of persuasion, certainly within

the scope of the activity as between -- as between Jake Messer and George Oscar Messer.

Of course, Josh Mills was holding Nathan Medlin, armed, guarding him armed in the room. That's probably on the borderline of use. I'm not sure I ever heard that he pointed that gun. So I'm not going to include that as a reason, but it certainly adds to the foreseeability of firearm use.

So then we go to the Victim 2 treatment and, again, you know, we've got stories from different viewpoints of what happened that night and the sequence and chronology, but the person who testified under oath in front of the jury about what happened is Melissa Smith, and she's got the sworn firsthand version of what happened in that room when she was in there with Jake Messer and then when George Messer came in and what happened to her with George Messer and that direct story we've only heard from her.

I related earlier what she said, but remember Event 1 happens with Jake Messer. Then she said George Messer came in, they conferred, she could hear them whispering, couldn't really hear what was said, could hear them whispering, and then the zip ties and duct tape come in. She's bound, and off things go with George Messer and what happened with her.

And what happened with her was George Messer using his side arm. And he talked about in his statement getting it out and playing with it and spinning it around. And people at the

trial talked about that firearm and it being, you know, a tool for him. But he pulls it out and, she said, pointed it at her during the sexual assault and had it out the entire time. That is use of a dangerous weapon, in my view, under the guideline language in the Commentary because he is pointing, gesturing with that firearm as part of gaining her compliance for a sexual assault, you know, degrading sexual assault of this person who has just been through another sexual assault, and George Messer knew about that. He knew that the two were being held. He knew she was worried to death about Nathan Medlin. And he knew that she had done something sexual to try to get free.

And how did he know that? He knew that because Jake Messer told him that, and that's what he relayed in his statement. So he knows all this, and he's in there right after and revictimizes her in a similar way using a firearm.

So I think the fact that Jake Messer would confer with his father, convey what had happened, see that he has restraints and leave Melissa Smith in the room with George Oscar Messer armed as Jake Messer prepares to make his departure, that makes what happened in that room certainly foreseeable.

I do think it's foreseeable of the jointly undertaken criminal activity which was kidnapping for purposes of assault, and so I would assign the two points on that basis as

well. I'll overrule that objection.

All right. Let's turn to role adjustment.

Mr. Rossman.

MR. ROSSMAN: Yes, Your Honor.

The defense objects to the application of the enhancement for being a leader or organizer. The guidelines give several factors to consider, and I'll address those factors.

The first is the decision-making authority that Mr. Messer possessed. Our argument there is that, under the evidence presented at trial, his participation was limited to the early stages when the primary goal was still to identify the Georgia guys.

There was testimony that Victim 2 went willingly to Jewell's trailer and then things deteriorated from there. And while he maintains his innocence, I think there's -- there's evidence that any involvement he had would have been in the early stages before the kidnapping really took a firm shape. And then he left.

And after that, he didn't exercise any decision-making authority. It was really Scott Patterson's show and then Oscar Messer's show.

And so that limited decisionmaking authority does not support application of the enhancement. The nature of his participation was likewise limited to the early stages because he left.

I think there was conflicting evidence at the trial precisely when he left, but everyone agreed that he left. He certainly wasn't there all night long. He wasn't there when Oscar left with Victim 1 and Victim 2. Others took over and escalated matters. Oscar with the firearms and the violence escalated matters way beyond what happened while he was there.

Recruitment of accomplices: That started out Messer and Patterson. Patterson recruited Jewell. Messer, under the facts found, arguably recruited Oscar, but then Oscar recruited Mills. So really the only person you could say that he recruited would be Oscar, and I think that limits it because Patterson was so deeply involved.

The claim to the larger share of the fruits of the crime, there were no fruits of the crime.

Degree of planning or organizing, there really was none. This was all a chaotic situation, as the Court characterized it. It was kind of unfolding without a plan, without anyone in control of the direction, and really it just escalated with most of these people in a meth haze.

The nature and scope of the activity, the activity lasted less than 24 hours. He was present for less than half that time. He was present less than Patterson and Oscar Messer.

And then control of authority exercised over others, again, none after he left. It was all Patterson and Oscar. He was not directing them what to do after he left.

And so for those reasons we would ask the Court not to apply that.

THE COURT: All right. Thank you, Mr. Rossman.

MS. REED: Yes, Your Honor.

So Scott Patterson had no idea as to what was going on until he was recruited and pulled in by the defendant. There's text messages to that effect where the defendant tells Patterson to come to the Messer residence and feel out Nathan Medlin with regards to the missing money.

As soon as Patterson arrives, they speak privately where Mr. Patterson testified that the defendant pointed a finger at Nathan Medlin for the lost money and that something had to be done. It is the defendant who recommends splitting up Melissa Smith and Nathan Medlin for transport. Nathan Medlin is not allowed to drive his own vehicle which is at the Messer residence. We find out at the end that's who has Nathan Medlin's keys, but it's the defendant who ultimately provides them back to Nathan Medlin's mother.

Once they get to the Jewell residence, it is the defendant who takes Nathan Medlin's phone. It is the defendant who orders Stephen Jewell to go through it. It is the defendant who orders Stephen Jewell to go get zip ties and duct tape not once but twice. It is the defendant who recruits his father and then talks to his father as soon as his father arrives on scene with Joshua Mills.

And so the defendant is directing everything in that trailer. And, even before the trailer, back at the Messer residence, he continues to exercise control when Scott Patterson talks about his dismay of losing his human collateral on the Facebook messages, and the defendant states that he still has custody of Nathan and Melissa and Mr. Patterson can come pick up Melissa, that she's still there.

And the defendant also talks in the Facebook messages about how he told his father not to release them and that his father was, you know, stupid, or words to that effect, for allowing them to go with Nathan Medlin's mother on the side of the road.

And so the defendant remained in control. He was the one that began the entire kidnapping, recruited Mr. Patterson, recruited his father, and gave directions, made decisions throughout the course of the entire evening into the next day.

THE COURT: All right. Anything else, Ms. Reed?

MS. REED: No, Your Honor.

THE COURT: Mr. Rossman?

MR. ROSSMAN: Just briefly. The government talks about how Mr. Messer told Mr. Patterson to come and feel out Victim 1 at the Messer residence.

At that point I don't think the kidnapping had started. There was, you know, anger over the lost money. There was

frustration, maybe an investigation. But at that point it's not a kidnapping.

So I don't think that should really be included in whether he's a leader or organizer because it predates the beginning of the crime.

Providing the keys, I think that's just an artifact of the fact that the keys were left at that residence because that's where his vehicle was. I don't think that has any special weight or significance.

Still having custody of Victim 1 and Victim 2 the next day, I think there was some confusion over the evidence at trial whether they were really there at his residence when that message was sent. There was a confused timeline, but there was some evidence that they may not have been there and that this was a bluff to Scott Patterson and just trying to appease Scott Patterson.

And then the message about dad being stupid and having them convinced that they didn't have anything to do with it, I think that shows that he was not in control at that point; dad was in control. Dad made the decision, that they didn't have anything to do with it, and he let them go. And so he may have not felt that that was a wise decision, but it shows that he was not leading any offense conduct at that point.

THE COURT: Okay. Thank you.

The role adjustment in 3B1.1 applies based on the

defendant's role in the offense, and the offense level is to be increased as follows depending on the supported facts: If the defendant was an organizer or leader in a criminal activity that involved five or more participants, was otherwise extensive, increase by four levels; manager or supervisor but not organizer or leader, such that it involved five-participant activity, increase by three levels.

And so one thing is this -- one question, is this situation big enough to qualify for the higher tiers?

I think certainly the number of participants is adequate here if you take account of all the persons criminally responsible within that trailer.

So it really comes down to judging whether he had sufficient, you know, role, indicia to push up his offense level, and, if so, whether it ought to go to four or three. Thus, the distinction between an organizer/leader, on the one hand, and a manager/supervisor, on the other.

And the Commentary does point out factors to be considered including decisionmaking authority, nature, participation in the commission of the offense, recruitment of accomplices, claimed rights of the larger share of the fruits of the crime, group participation, planning, or organizing the offense, and the nature and scope of the illegal activity and the degree of control and authority exercised over others.

Well, you know, this event sort of bubbled up with

urgency in light of the robbery that occurred relative to the marijuana deal.

I looked at the whole -- the whole record. Of course, I tried the case essentially twice. So I have heard the description of the night from witnesses on multiple occasions and have carefully analyzed all of it.

The things that stick out to me and do support the higher role adjustment at issues as an organizer or leader do include the following: I think the defendant did -- he recruited the key-- the key other players in the -- in the event.

Now, I think it's a fair point to say, well, when he first brought Patterson in, it wasn't clear what was going to happen. So I can -- I can buy that things were still in formation at that point. I would not call that itself a recruitment, but it is worth noting that Patterson testified that he thought the plan -- when they left the Bear Hollow location, he thought the plan was that they were going to get a car and go to Georgia. That's what he thought the plan was. That morphed into what it became.

And I think it is fair to say that it became what it became because of Jake Messer's hand and authority on dictating what would happen when they got to that trailer. That's certainly how it -- how it played out.

So Patterson in part was recruited at least with respect to his role in how the events played out. It changed from

what he originally intended when they went to -- to Clay County.

The recruitment of George Messer, though, is obvious. He's -- he realizes what's gone on, what's happened, and he calls his dad to come to the scene.

And did he know Josh Mills was being involved or not? It sounds like, from George Messer's statement, that frequently he had Josh Mills driving for him. He was living there in the basement with his son, kind of a -- kind of a gofer for him. It sounds like George Messer was drinking a lot at the time, didn't want to get a DUI. So I think it's certainly foreseeable that he would show up, you know, a county away, being driven there by his hired man, Josh Mills. So I think he did recruit those people into the mix.

Additionally, he -- he had charge over certain aspects of specifics of the night. And then I would say general control over the scene based on what all the witnesses have said.

Specific instances, Stephen Jewell, you know, going to and taking control over that trailer.

When Jewell -- he allowed them there, but he really didn't want it going on there because it was not his trailer. It was his grandmother's. He had all those worries about it. But the scene sort of got imposed on Jewell.

He then told Jewell to take Medlin's phone and search it. He twice directed Jewell to go get the zip ties and duct tape.

And the first time Jewell testified he tried to just sort of burn some time and hope that it would be forgotten and comes back, and Jake Messer is like, "Where are the zip ties? I told you to go get them." He gets them. They immediately get into George Messer's hands into the fateful bedroom. So he had control over the scene.

Several witness testified that he was running the show until he left and then George Messer took over.

He had control over the plan. They got there. He controlled where Nathan Medlin went. He did not want Melissa Smith to know Nathan Medlin was there. He didn't want Nathan Medlin to know Ms. Smith was there. And Medlin found that out from the camera, and then somebody told him as well, and Jake Messer was upset over that.

He had control over the people, as I have talked about, relative to handling and directing Stephen Jewell.

Now, he did leave, but I think, looking at the traffic the next day, it's impossible to say he didn't continue to have control or attempted control over what was happening.

He -- when Patterson was upset that they hadn't gotten the money and he didn't have his insurance policy, Melissa Smith, Jake Messer said, "We have still got them, still got them, come get her any time you want."

That's a clear indication of control, that he's, you know, he's in charge of the levers of persuasion to getting

what the group wants, you know, "come get her any time." That's an important piece of communication.

His interaction with his father that night, you know, his father is kind of edging on losing control, making these wild threats. He's armed and intoxicated, and, you know, Jake Messer tells him to calm down, and, you know, judging the hierarchy of what was going on, he called his father in there, and he handed the scene off to him, handed Melissa Smith off to him, but one-on-one he was telling him to calm down.

That's an indication of control between the two and what concededly is, you know, not a black-and-white scenario.

It is somewhat chaotic, of course, but there's an indication that there's a hierarchy and the two of them are in control and negotiating or dealing with each other on who is going to do what.

According to the messaging the next day, he told his dad to leave them there. He gave direction to leave the two victims there in Clay County. His dad didn't do it, but he was -- he told him to do that. That to me is an indication of the authority that at least he expected that he had and thought he had over -- over the scene. That's significant as well.

Taking Nathan Medlin's truck key, you know, that's just a piece of what was going on, that he was maintaining control and authority over the things he thought mattered to get to

the conclusion he wanted.

And so Medlin left his truck in there, keys in it, and his mom gets up there, trying to get answers. He deals with the mom, but Messer had taken the keys. So that's just another little piece of it.

Share of fruits, well, I guess it's how you look at that, but I think the fruit of the kidnapping was it was intended to be getting the money back.

Most of the money was Jake's, and part was Patterson's, but he was on the hook for all of it. So that aim was mostly to benefit Jake. And if you -- as retched as the night ended up being, if you look at what was abstracted from Victim 1 and Victim 2, Victim 2 in particular, what was taken from her was taken by Jake Messer and George Messer, and none of the other people in the trailer were participating in that.

So I certainly think that contributes to him having a higher -- higher role responsibility. I.

It's all about relative culpability. That is what 3B1.1 is aiming at, and for all the reasons I have stated, I think the four points properly apply. So I'll overrule that objection as well.

All right. Sexual exploitation.

MR. ROSSMAN: Your Honor, the issue was not submitted to the jury for a verdict whether there was a sexual assault, and I have really wrestled with could the jury have found him

guilty based on something other than the sexual assault.

Certainly, the sexual assault was the primary focus at trial, but I think really there was an argument to be made that Victim 2 was under duress and she was threatened during that duress, and that alone possibly could support a guilty verdict independent of any finding of sexual assault. So I do think there's a factual issue on sexual assault.

The main thing I would point to, again, was just this weird relationship between Victim 2 and Mr. Messer, the catfishing. There were messages. One was in Defense Exhibit 2 admitted at trial about a month before the alleged kidnapping where she says it's straight if you just wanted to have sex or whatever, or something to that effect.

So for months before this kidnapping, she was indicating to him that she was willing to engage in sex, and so when he's there that night, he doesn't really know any different. He thinks this is the culmination of what they have been talking about.

So I think he had a basis to believe sufficiently that she consented.

Now, I think she testified at trial she never told him no during the middle of it. And so I question whether there's a basis to find that this was sexual exploitation based on his personal individual conduct.

Now, there's still the relevant conduct issue of what

Oscar Messer did, and I would argue that that was not foreseeable to Jake Messer. There's been no evidence that Jake instructed Oscar Messer to assault her. I think it's really unimaginable that a son would tell his father to perform cunnilingus on a woman after he has ejaculated inside of her vagina. I just don't think that's plausible, and certainly there's been no evidence to that effect here.

I think that Jake Messer left either during or shortly after the events with Oscar. There was no indication he was present in the room with him. They did speak beforehand, but I don't think there's been evidence that he told him to sexual assault Victim 2.

And I would also note the zip ties, duct tape, all that evidence, that doesn't necessarily imply sexual assault. It could have been designed to instill fear.

So I really think that this enhancement does not apply either based on his conduct individually or the relevant conduct from Oscar Messer.

THE COURT: All right. Thank you.

Ms. Reed.

MS. REED: Yes, Your Honor. The government relies upon the testimony, the sworn, subject to narrow testimony, not once but twice, of Melissa Smith. She was extremely credible.

All of her testimony was supported by independent

witnesses and evidence including individuals that saw her immediately following both sexual assaults.

Stephen Jewell saw her after the defendant sexually assaulted her on the bathroom floor sitting there, described her as humiliated and her hair was all messed up.

Joshua Mills saw her after the sexual assault by the defendant's father, described her as being devastated. There was no evidence to support a consensual sexual act during the course of this armed, chaotic, violent kidnapping in which everyone described her as crying and being scared for the well-being of Nathan Medlin who was being kept separate from her.

Additionally, it has no bearing whether the messages with regards to flirtation or consensual contact happened a year before, a month before, or minutes before.

In that moment, she was not free to leave, she did not consent, she told him to stop. And so that does not consent make, messages that occurred prior to an armed kidnapping.

There is no plausible way that the defendant went into an armed kidnapping where these two are being kept separate and essentially pleading for their lives and thought to himself that she was consenting to sex based on messages that they had weeks, months before. There's just no way, given the circumstances of what every single witness testified to as happening in that trailer including her crying and carrying on

to the point where multiple people had to tell her to shut up or threaten her if she didn't be quiet.

And so the defendant flat-out told Nathan Medlin that he was going to sexually assault Melissa. We know this from not one but multiple witnesses who were there. In fact, the defendant's minions, Ms. Morgan and Mr. Jewell, started repeating these threats that they were hearing the defendant make to Nathan Medlin. For example, Jewell repeated that he was going to make Melissa have sex with him if Medlin didn't tell where the money was. Myra Morgan made the statement that she was going to, quote, suck every dick in the trailer if she didn't shut up. And they both testified that they made those statements after hearing the defendant threaten Nathan Medlin in that way.

And so he said he was going to do it. He went in there and did it. Then he had this whispering conversation with his father, which it's not a coincidence that the very next thing that happens is he hands over restraints, leaves the room, and his dad does the same thing. That cannot be a coincidence. And so he is liable for this enhancement under both theories of responsibility.

THE COURT: Mr. Rossman, anything else?

MR. ROSSMAN: No, Your Honor.

THE COURT: All right. Well, I agree the jury wasn't -- wasn't instructed, did not have to make a factual

finding on, you know, the specifics of the events within that bedroom, but they did hear all the proof, and I heard all the proof, and I'm judging at the sentencing stage under the guidelines whether this specific offense characteristic in 2A4.1(a)(5) applies, if the victim was sexual exploited, increase by six levels, and that sexual exploitation includes offenses under 2241, 2242, aggravated sexual abuse. That is, if someone is caught -- caused to engage in a sexual act by force or by threat or placing that other person in fear that any person would be subjected to death, serious bodily injury, or kidnapping. Sexual abuse has similar language. That crime is when a person causes another to engage in a sexual act by threatening or placing that other person in fear other than by the kind of threat or fear that would apply under 2241.

So both of those are within the ambit of sexual exploitation.

Well, I do find, based on the record, that Victim 2 suffered two sexual assaults, and I would say both were aggravated sexual -- the 2241 and/or 2242 conduct on the night in question, all of it matters.

The circumstances under which they were held, taken to the trailer. Victim 2 had never been there. She's not -- she wasn't involved in the theft. She's the girlfriend. Taken to the trailer, put in an isolated bedroom, not allowed to leave, told her boyfriend is being tortured in the woods, that his

kneecaps are being drilled. So she believes he's being tortured. She's held far away from home in a remote place she's unfamiliar with.

And so the course of the night happens, and she's, you know, interrogated by several of them, hears several threats to herself, several threats to her boyfriend. The sexual threats are flying all around that trailer. Several of the perpetrators are making sexual threats to Victim 1 about Victim 2. That's -- that's going on.

What's clear is they are both being held. Nobody is free to go. They are separated. And so Jake Messer goes into that bedroom. And what happens? Well, again, the proof I have is what the victim has testified to under oath in front of a jury, and that is that she did not consent, she did not want to have sexual, she felt was like she was under duress, and she initially agreed to get them freed.

Even in the middle of that, she wanted him to stop and said stop, and he would not stop. Of course, he did not free them after that.

What happened next was, as I have related repeatedly, George Messer comes in, the long-sought zip ties and duct tape come in, and they have a conversation, and it almost had to be in that conversation, because they didn't have that many conferences over the course of the night, and given the sequence, had to be in that conversation that he learned --

George Messer learned that Jake Messer just had a sexual experience with the victim. Exactly what it was, George Messer's statement differs, you know, on what he thought -- what had happened, but he clearly knew that she had done something sexual in exchange for either being released or Nathan Medlin's safety or something. He knows she's being held. And so in come the zip ties; the conference with Jake Messer; Jake Messer leaves; and she is -- she's assaulted again at gunpoint.

And it -- I agree with the government. It's completely implausible that Melissa Smith would consent to anything that night. I think it legally seems impossible to me that a person in that circumstance could be deemed to consent when she's being held against her will, everybody is armed, she thinks her boyfriend is being tortured.

That's not the kind of fabric from which a consent finding I think could come. Here certainly there was no consent as a factual matter I find.

I do believe that Jake Messer is responsible for his own sexual exploitation of Melissa Smith that night.

The concept that he thought that because sort of the, you know, sort of the communication history in this subculture that he thought that those things added up to him having consent that night, I would say several things belie that view.

One, of course, she wasn't there consensually. She was being held against her will, as was Nathan Medlin.

Two, there were -- there was this threat culture within the trailer. Sexual threats were pervading the whole house, and that's not the mindset that indicates a person thinks there's consent.

The story is there was a demand made, a trade, you know, give me this, and I'll let you guys out and go free, and she testified she was trying to protect Nathan Medlin and went along with it. She tried to stop in the middle. That did not happen.

And the idea that he would -- he would engage in that behavior thinking it's consensual and then hand it off to his father with -- armed with the restraints in hand who, you know, later was described as being a savage, that's not the behavior or thinking or talking or actions of someone who thinks he's dealing with someone who wants a consensual sexual relationship, not something I buy.

So I think he's on the hook for his own conduct. I think he's also on the hook for his father's conduct. Obviously, they are hand in hand on the activity, the kidnapping activity, and the goals and aims of it, the use of the sexual assault as part of that. Jake Messer has already done it. His father does the same. That's in furtherance of the goals of that activity and one of its motivations and formulations

and certainly foreseeable -- sad but foreseeable. So I do believe the six points applies through either route.

I'll overrule that objection.

And then the general objection to the consideration of other sexual assaultive conduct, what do you want to say about that, Mr. Rossman?

MR. ROSSMAN: Yes, Your Honor. The position is that the Court cannot reach a preponderance of the evidence that any of this occurred. These witnesses are not credible. The Court heard evidence about Ashley Lay and Tasha Wernicke. Neither of these individuals made a contemporary report to law enforcement. They only reported this incident after they were in custody and seeking consideration on other charges.

Additionally, Ashley Lay denied on Facebook telling anyone that Jake Messer raped her, and there was no corroborating evidence for Tasha Wernicke. And I think that that shows that they are not credible. They are fabricating allegations after they need help.

Additionally, they spoke to each other, and I would submit that there was some story-straightening there, and they may have discussed how they could benefit from making these allegations, and I think that's especially important when there's kind of a lack of contemporaneous proof.

There was allegations about an abuse incident with Rachel Smith. I don't have a lot to say about that. I think there

was a rocky relationship there. I think there was some aggressive consensual rough sex that was going on there.

Turning to the allegations with the minor, with S.W., I think that there were some distasteful messages, some messages that were inappropriate, but I think that ultimately Jake Messer did the right thing and said, Look, I can't have a relationship with you until you turn 18. He didn't solicit pictures. He didn't solicit anything from her directly. And some of this may have started out as innocent flirtation with Uncle Jake. It may have gone a little too far. Again, I'm not defending it as appropriate, but it certainly didn't rise to the level of sexual assault or any serious attempt at somehow trying to groom her or anything like that.

So I think, with all the government's evidence here -- and this doesn't affect the guidelines. It's really more of a 3553(a) argument. I would just submit to the Court that, under a preponderance, there should not be a finding that Mr. Messer engaged in any misconduct.

THE COURT: All right. Thank you.

Ms. Reed.

MS. REED: Your Honor, the Court is able to consider this under 3553 as to the defendant's character as well as his history in the community, and the government does believe that there's enough that the Court can reliably look at this information and use it for purposes of sentencing.

We heard from a live witness under oath as to a sexual assault that occurred between her and the defendant. She also verified some Facebook records that were between her 13, 14-year-old daughter at the time and the defendant.

We also saw the Facebook records that are from the same account that was admitted at the defendant's jury trial in which he was communicating with this minor. Images of the minor were included in there, also verified by her mother. Additionally, the other Facebook records, as far as Ms. Lay's account, we heard the testimony of Special Agent Tremaine, but we also saw that, in fact, there was a communication where the defendant reached out and confronted Ms. Lay about what she had told people with regards to a sexual assault incident involving him, and, of course, these individuals did not report this to law enforcement. They also denied reporting it to other people, and why? Well, we have communication from the defendant's Facebook record as to his reaction when people spoke about him in this way, and that was through violence and through offering people money and drugs to commit violence on other individuals including specifically Ashley Lay.

And so the government doesn't believe it's difficult for the Court to see why these would not have been reported at the time that they occurred.

The government does believe that the Facebook records do support the interviews that were provided to the Court on this

matter. And the government believes it is appropriate that we be allowed to argue it under 3553.

If the Court has no questions about specific exhibits, that's all the government has on that.

THE COURT: Okay. Anything else you want to say on that?

MR. ROSSMAN: No, Your Honor.

THE COURT: Well, I think -- I think the Court -- you know, the hearing record at sentencing is pretty open under 3661. I can, you know, entertain what the parties put in front of me. You know, I do think, because there was specific proof on some of these things, that I would just want to make some comments on how I'm going to look at the record. And, you know, what I would say is Tasha Wernicke testified here under oath. She told her story about the relationship with Jake Messer, and she described with specificity a sexual assault incident, an incident with sex under the duress of a shotgun, and she explained what happened and her reaction to it and how she's processed it since, and I'm going to consider that as part of sentencing. I thought her -- her relaying of the story seemed sincere and credible, and so I'm going to consider that as part of the overall record.

The Ashley Lay story has the comparative deficit of not being told directly by her. It's told through, you know, a third party relaying her story that undercuts its reliability

for obvious reasons.

I'm sure Agent Tremaine is telling it exactly as it was told to him. I'm not doubting he's a credible vessel for the facts that he received, but that's not the same as having a person who can, you know, demonstrate, show, a credible face and visage and presentation. There are echos in this case, from what Ms. Lay relayed, in terms of how other people had been treated; so I have heard the proof on it. I'm not going to premise any kind of sentencing as a result here on the Lay allegations of sexual assault.

I will say the demonstrative reaction Mr. Messer has to anyone making an allegation against him, that is telling in terms of his disposition, attitude, personality, anger, you know, immediately resort to discussions of violence. Those things are going to matter to the sentence, and I'm basing all that not on credibility or not on what Ms. Lay said but on the language used in the Facebook exchanges. So that's going to be something I'll consider in the ultimate result today.

The similar category, the proof in messaging involving Tracy Chapel, you know, the defendant's reaction to being challenged on something or being accused of impropriety is very strong and Chapel's is an example of that, and the example discussing allegations including, you know, the one by Ms. Lay of, you know, what he wants for the women making those accusations is significant. And I'm going to consider that as

part of the sentencing record that will have an impact on the 3553 analysis.

S.W., I'm just going to judge the communication that I've seen. That's put in context by Tasha Wernicke. She testified to the age of her daughters. She testified to the beginning of the relationship between her family and Mr. Messer in the middle of 2017. She testified that she told him her daughter's age. I can't pinpoint exactly when he was aware, but it's, you know -- it's difficult, strains credibility, in my view, that somebody is thinking a 13-year-old is an 18-year-old. That's a major time mistake in perception even if he had that misperception at some point, and as I understand it, she's the younger daughter. Even if he had that misperception, obviously he gained clear knowledge at some point in the discussions and does seem to me that after that he continued to groom her and make sexual remarks toward her and act in a way that was trying to extend manipulation or control over that still very young girl.

So I'm not finding that he had physical contact with her. I'm not finding that he had, you know, got explicit images from her or sent to her. I'm not considering any of that as established, but I am judging what the records say, and that is the nature of the communication between the defendant who, you know, in 2018 was in, you know, his mid 30s, I guess, the nature of the communication he was having with that minor

female. So that's going to impact 3553 as well.

That's how I'm going to look at that, that block of proof.

The Rachel Lee exchange, you know, again, it kind of echos what Ashley Lay said about, you know, being choked and it's an indication of, you know, you know, violence potentially toward women.

I'm just -- I'm willing to consider the records and, you know, make determinations or consider that at sentencing based on the content of the records, and so that's how I'm going to look at that.

I'm going to have to see how you guys argue it. I'm telling you how I'm going to look at that block of proof. I tried to sort that out the best I can.

Does the government request any additional specific findings on that?

MS. REED: No, Your Honor.

THE COURT: Mr. Rossman?

MR. ROSSMAN: No, Your Honor.

THE COURT: And then you had the incorporated George Messer objections. Have we covered those adequately in the course of the hearing?

MR. ROSSMAN: Yes, Your Honor.

THE COURT: Are there any objections I have not -- I have not addressed?

MR. ROSSMAN: No, Your Honor.

MS. REED: No, Your Honor.

THE COURT: All right. Let's see how we are doing on time. It's 12:30. I think we broke at, what, 10:30?

COURTROOM DEPUTY: Yes, Your Honor.

THE COURT: So you guys probably have a pretty decent chunk of argument as we take the next step through -- through the sentencing process. So I wonder if we should take 15 minutes now and then come back, and we'll pick up, get to the 3553 arguments. I'll hear the arguments then and then see where we are at that point.

What do you think, Ms. Reed?

MS. REED: That sounds good to the government, Your Honor.

THE WITNESS: Mr. Rossman?

MR. ROSSMAN: That's fine.

THE COURT: Okay. Is 15 minutes adequate?

MS. REED: Yes, Your Honor.

MR. ROSSMAN: Yes, Your Honor.

THE COURT: All right. We'll take another 15-minute break. Thank you.

(Recess taken from 11:30 A.M. until 11:47 A.M.)

THE COURT: We are back on the record with both counsel present, Mr. Messer present, as well, and we'll continue on after -- after a break.

We have gotten through the proof and my objections. I have made my rulings on those.

I will adopt the presentence report findings and guideline calculations as accurate, modified, if any, by my findings and analysis here today.

Ms. Reed, I suppose the government is moving to dismiss the original indictment, Docket Entry No. 8; is that correct?

MS. REED: Yes, Your Honor.

THE COURT: Do you agree that's appropriate, Mr. Rossman?

MR. ROSSMAN: Yes, Your Honor.

THE COURT: Thank you. I'll include that in the minutes and the judgment.

Mr. Messer, the sentence carries with it, under the statute, a certain set of statutory limits that I have to stay within. Those come from Congress. I'm bound by those.

For the 1201 kidnapping crime, the incarceration term is any term of years up to life for both counts; so each count potentially carries a term of incarceration up to life in prison.

The fine that I could impose would be up to $250,000 on either count.

If I incarcerate you for a specific term following that period, I can put you on supervised release, post-prison supervision, on terms imposed by the Court. The maximum there

would be five years of supervision.

Restitution is mandatory for identifiable victims under the statute; so if I have got adequate information, I would include a restitution award for the identified victims in the case.

All those things come from the statute, the statutes that govern sentencing.

The other source that influences the sentence is the sentencing guidelines. Now, the guidelines have a very different role. They get a lot of attention. So the whole morning we have spent wrestling over the guidelines. I have to calculate them correctly. I have to take them into account all the way through. I'm not bound to stay within the guidelines. I have to consider them. They're recommendations. They're advisory. So I have to calculate them, consider them. I'm not bound by the guidelines range.

The guidelines operate on two elements, Mr. Messer. One is the offense level. That's an effort to measure the crime. The other is the defendant's individual criminal history category. That's a measure individual, particular to you based on your specific criminal history category.

Every defendant sentenced goes through that measurement tool. Everyone comes out somewhere from a I, at the bottom, to a VI, at the top. The more convictions you've had, the more serious they are, the more recent they are, the more time

you have had in custody, that pushes you up that ladder from a I, at the bottom, to wherever your record puts you.

The offense level, here it's broken down between the two counts because they do not group together. So it has to be measured separately.

The count as to Victim 1, Mr. Medlin, starts you at a 32, pushes you up 6 for ransom demand, 2 points for the dangerous weapon use, and then 4 points for the role adjustment. That takes you to 44.

Victim 2, Ms. Smith, similarly, 32, beginning point, plus 6 for the ransom demand, 2 points for the weapon use, and then 6 points distinct from Mr. Medlin, the victim under Count 1, 6 points for sexual exploitation, 4 points for role. That takes you to 50 points on her.

The multi-count adjustment takes it to 51 points for the offense level.

Let's see. But the highest offense level you can get is 43. So everything over 43, whether it's 43 or 53 -- you're at 51 -- becomes 43. That's the most -- that's like being in a swimming pool with water over your head. Once the water is over your head, whether it's 1 foot or 10 feet, that's as high as you can go for the offense level. So 43 becomes the number.

Your criminal history category -- and we've talked some about the analysis on that -- it ends up that you have 14

total points, and 14 points puts you in Criminal History Category VI; so that's the -- that's the category you'll be in.

I would just note on the offense level just some things to point out, as I was kind of wrestling with the different objections, even if you didn't have ransom on Victim 1, which I think is a -- you know, a closer call on the economic analysis, even if you didn't have that, you would still be at a 38 on 1 and a 50 on 2, Victim 2. You would still be at a 43. Even if you dropped ransom altogether, if neither one of them had it, you would be at a 44 on Victim 2.

Let's see, 32, yeah, 44 on Victim 2, so 43. Any way you slice that, I think if you drop out the ransom analysis, you still end up at the same offense level of 43. But I found that you are at a 51 converted down to a 43 because of the cap and a criminal history category of VI.

Once I get those elements, I go to the offense -- I'm sorry -- to the sentencing table, and I find where the 43 offense level intersects with the VI criminal history category. That puts you at a guideline range of life in prison. That's not binding. I'm not bound by that. But that is the guideline range.

Actually, any 43 regardless of your criminal history category, the guideline range would be life in prison. So even if you had a I, you would be at a guideline range of

life. You are a VI and have a guideline range of life. So that's the range that we use going forward in the sentencing.

Other than the objections that have been heard and ruled on, any additional objections to my findings or calculations, Ms. Reed?

MS. REED: No, Your Honor.

THE COURT: Mr. Rossman?

MR. ROSSMAN: No, Your Honor.

THE COURT: Any departure issues, Ms. Reed?

MS. REED: No, Your Honor.

THE COURT: Mr. Rossman?

MR. ROSSMAN: No, Your Honor.

THE COURT: Okay. So now we'll turn to the sentencing statute. And, Mr. Messer, that statute really is what I consider my boss when it comes to the sentence to be imposed. I get information from a lot of places, and that statute tells me to consider a lot of things. But the ultimate measure of a sentence is one that is sufficient, but no greater than necessary, to accomplish the purposes set forth in that statute that I'm to aim for to the extent they apply in your case.

And those purposes are to show the seriousness of the offense, to promote respect for the law, to justly punish the defendant, to deter or discourage further criminal activity, to protect the public from additional crimes of the defendant,

THE COURT: All right. Thank you very much. We are back on the record with both counsel present. Mr. Messer present, as well.

I appreciate everybody's patience while I considered during a break the important topics -- topic of the appropriate sentence in this difficult case, and I've -- as I said earlier, I have really sort of tried the case twice, given the severance between the two co-defendants, and I understand the factual dynamics in the case well and am prepared to go through my sentencing reasoning and announce the sentence.

Let me first say that I appreciate the advocacy by both sides and zealous advocacy on behalf of both parties, and that makes the system work correctly, and I appreciate the effort by both fine counsel here.

Mr. Messer, I would also say, with respect to your allocution, I certainly hope that you have had a fundamental change in the way you think about life and approach life. I'm hopeful about that.

I certainly believe that it's possible. I don't have the ability to look into your heart and know that, and a judge with perfect knowledge and vision awareness does not exist here on Earth, and I don't have it.

So I'm going to sentence based on the record before me. That includes the jury verdict and the overall total record I

talked about today.

You are a smart man. I have been able to tell that every time you have been in front of me. And I regret that you made the choices you made that have put you in the justice system and with your -- you know, your future hanging in the balance in a courtroom, but that's where we are. And for whatever reasons, whatever contributed to it, you made decisions to go down to the very basement of human conduct and operate, and there are costs for that. And that's what we are here about today.

Now, and as I sentence, I always try to be careful to remember my correct role as a judge in the judiciary. I'm not a lawmaker. That's Congress.

I don't decide who gets prosecuted, what the charges are. That's an executive branch function, the President operating that branch all the way through Ms. Reed here today.

I just judge the cases that come in front of me. Today that's you. And as I'm formulating and imposing a sentence, I'm careful to keep my eye on the purposes assigned to an appropriate sentence -- those are assigned by Congress -- and measuring the sentence.

I try to diligently maintain awareness of the factors I'm supposed to consider and the overall measure of sentencing captured in the idea that the sentence should be sufficient but no greater than necessary. So I have considered all that

carefully.

As I look at the purposes of sentencing as they relate to your case, the two crimes of conviction are Class A felonies. Each can carry life in prison. So that's Congress putting the kidnapping crime into a category that's at the very top of gravity. And so the sentence I impose has got to show -- it's got to reflect to an appropriate degree the seriousness of the offense. And when I say offense, if I use the singular offense, it's important to remember there are two crimes here. There are two distinct counts, two distinct victims. It happened in, you know, one period, but I am looking at two crimes as I evaluate this and the seriousness of it. It's got to be shown in the sentence I impose.

Respect for the law is something I have got to promote. And what I see in this case and what -- what is a -- is a glaring need in the sentence is the importance of declaring that there is a rule of law. It applies all over our country. It applies at Bear Hollow. It applies in rural Clay County. It applies to drug dealers. It applies to women in the drug world. It applies to everybody. And there's not a separate culture or system that exists for people who are operating in the drug world who think "We are a world unto ourselves; if there's a problem, we are going to deal with it ourselves; if there's somebody victimized, that person is going to have only as much recourse as that person has power."

I reject that, and this kind of conduct, this vigilante, "take matters into our own hands," "right our own perceived wrongs." I'm not going to tolerate it.

Our system cannot tolerate it, and so this sentence has got to clearly say that there will be respect for the law, that the law is going to prevail and impose order to chaos, and that's part of what I'm aiming for here.

Punishment? This crime warrants punishment. It should be just, it should be fair, but it should be penal and punitive. And I want to be careful not to over-measure it, but you deserve to be punished for this conduct, and the sentence is going to carry forward that goal.

Deterrence, deterrence is the idea that sentence today is going to have some positive effect down the road, a positive effect on you by discouraging a return to crime, positive effect on society by communicating to others who are out there making decisions and are contemplating how to behave. This result is going to have some influence on the way those decisionmakers think.

Now, is that perfect? It's not perfect because deterrence requires rational thought, it requires rational thinking, and the drug world is not -- it's not full of rationality. But it's not without some rationality. You have shown it in this case. And so I have got to reach out and communicate to that audience as well.

Specific deterrence for you, it's a puzzle to me. And whether you can be deterred, you can be affected by a result from the Court, I don't know. It's to be determined.

I will say the need to keep you from returning to criminality is certainly obvious. There's a protection need. I'm definitely aiming for that, but my deterrence focus is on the general deterrence idea. And that is to tell the world the idea that there can be this parallel world of drug culture, you know, reparations and retributions where the people with power are the ones who are the meanest and the harshest and the most merciless, I say no to that, and this sentence will declare no to that clearly.

Treatment, I don't know. I have taken you through this analysis. I think you got, obviously, some drug-use history. I'm certainly inclined to give you access to education and treatment. I think you are a smart man, not a man without talent.

None of that explains why we are here because you had the ability to avoid all of this and make your way without dependence on the drug world. And, you know, on the night in question, everybody said you were sober, you were not using, you were in the drug court program and I think worried about, you know, running afoul of the drug court rules. At least some of the rules, not all of them obviously. But I don't think -- I don't see this case being one where you were out of

control on meth in any respect. And you were the coolest thinker in the trailer. So I'm certainly willing to extend treatment to you, but I don't see a treatment need really explains why you were there and involved in these problems.

It's more a character outlook, wiring disposition, viewpoint problem, and that's probably harder to deal with than just an addiction.

So I have to look at a number of factors in formatting a sentence. Those include the guidelines. They are not binding. They are advisory. They are an influence on the Court. I always consider a variance in every case because the guidelines don't dictate the result.

And so can I vary? Yes. To vary I have got to have a reason, something that tells me the guidelines are not the correct fit; and to go away from the guidelines, I have got to have a reason. The more I go away, the better the reason has got to be. And in a 43-plus situation, where you are 51 and then the guidelines just lop off the top 8 points and keep you at a 43, you are not a 43-I or II, you are a 43-VI. So, you know, you are at the far south -- southeastern corner of the sentencing table, and there's, you know, tension down in that area because, you know, I know the true number based on conduct measured by the guidelines would be well above 43, but that's as far as it goes. So it's capped out. There's some tension down there when you are at that spot in the sentencing

table.

I have considered all the variance arguments that Mr. Rossman has made, and he's always an articulate, thoughtful advocate, and I appreciate that. And I have thought about everything that he's argued on your behalf.

I have looked at the kinds of sentences. I don't think I have the same kind of options here that I do in many cases, but I have considered whether I have options and whether I should -- should employ any.

I have looked at the issue of disparity, and I use that tool, as well, that Mr. Rossman used. And we did some research on it, and, you know, sample sizes is pretty small and what I could never find is the data set of kidnappings who were a criminal history Category VI and offense level of 43 and even within that 43 who has had the aggravated components here.

The role adjustment, the sexual exploitation, the weapon use, the ransom demand, and you can look historically at, you know, what kidnapping convictions have -- what percentage of aggravators year by year. And, you know, some years, 25 percent will have one of those and 50 will have one, but how many have all of those, pushing a person up to the level we have here? I think it's hard to find a comparator.

And when it comes to -- so that's a broad, national issue. We are really -- that's comparing what the guidelines

say to what courts have varied to. That has some usefulness but doesn't tell me there's a disparity in applying the guidelines necessarily, just that some courts have found the numbers and situations to warrant a variance.

The comparison within the case, I just don't think there are -- they are not apples to apples other than the two Messers.

Josh Mills was in a completely different situation. He was a 36-III. He got a mitigating-role adjustment. He was George Messer's lackey. And he made criminal choices, and he's being punished and held accountable for them but nowhere near the category of the two Messers in this crime.

And then Scott Patterson and Myra Morgan, look, I get that it feels like -- it feels like they have gotten into a situation of benefit to them. No doubt about it.

And do I think Scott Patterson has some culpability in this case? Well, of course, I do. But he has not been prosecuted; he's not been convicted. And the comparison for disparity requires, under the statute -- what I'm looking at is the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct.

Well, it's not an inter-case measure, anyway, specifically. But certainly "defendant has not been convicted" is not a comparison. So I understand that

argument, and I see the equity notion behind it. But those two are just not in the same spot as the Messers for the reasons of no conviction and for the other reasons that are apparent on the record in terms of the situations of each of the persons.

So other factors include the nature and circumstances. I'm not going to belabor it. We spent the whole day talking about the details of this case, and it is abhorrent, and the conduct was depraved. And all that influences a part of the result here today.

The concept of the defendant viewing Melissa Smith as consenting to sex, I just reject it. It just doesn't -- that's not a rational view of how a woman -- a 21-year-old woman in that circumstance is looking at her choices.

And maybe the defendant's heart believes it. I can't look into his heart. Maybe, if he believes it, then his filter is broken. That's worrisome in a different way. But a man who can't understand how consent would work in a situation like that, how it would not be on the table is -- is worrisome for obvious reasons.

So I have looked through carefully, you know, the course of the night, and everything that happened, the lawlessness, the dehumanizing behavior, the treatment of human beings as collateral, and, you know, Melissa Smith was treated like that. She was treated like a chunk of human flesh and that

there was value in controlling her, and she got used sexually. She got used as insurance.

Even the next day, as Jake Messer was communicating with Scott Patterson, you know, he was saying, come get her, come pick her up, we still got her.

And I've talked about this sexual assault dynamic between the Messers. I'm not going to go through that again. It is just treating her as something to be used. And that's what was done first by Jake Messer, then by George Messer. Jake Messer facilitated that, certainly foresaw that it was going to happen and called his dad a savage the next day, and I think, if Scott Patterson picked her up, you know, he was going to be able to do whatever. You know? She was something to be handed off and handed around and held until the whole situation played out through a return of the money. And so those circumstances are of impact in this case.

The age difference matters here to some degree. I mean, Jake Messer is not a kid. He's 35 at this time. Melissa Smith is early 20s. Medlin, early 20s. They are young adults, and Jake Messer is, you know, 50 percent older than they are, and that's -- that's a factor in all of these power dynamics that came into play, along, of course, with the defendant's attitude and disposition, and that had an influence on everybody in that trailer. You can just see it.

So I would just note that. Now, other things -- other

factors to consider include the defendant's history and characteristics. There's been a lot of proof today on that.

I do think the history and characteristics shown today matter. They matter, and I pointed this out earlier as I went through the proof. I won't restate all of it. But the treatment of woman is a concern to me.

The way women in this world, the way this defendant looked at and assessed women in this world, his treatment of Tasha Wernicke, I find her story to be credible. That is a situation where, by her description, he was upset, asserted himself, and forced her to have sex at gunpoint. That's the only way to put it.

And it's the same vein of conduct that happened with Melissa Smith by Jake Messer, by George Messer. It echos. It echos from what happened in this courtroom, the description of it.

S.W.'s description, you know, 35-year-old man knowing the family, knowing Tasha Wernicke, and her daughters and communicating the way he did, it's repellant, and this was all the same time, late '17, spring '18, you know, the time when he's just running amuck on Facebook in his communications, and I think, you know, it paints a man who takes what he wants regardless of circumstance, regardless of consent, regardless of age.

I'm not saying he assaulted S.W., but it's a path of

impropriety that is so clear and so outside the bounds, given, you know, she was 13 or 14. He's 35. I mean, very worrisome in terms of the status of women around -- around Jake Messer.

His reactions to accountability, the proof shows that when somebody pushes back on him, tries to hold him responsible, tries to impose some standard on him, what is his reaction? It's volcanic, volcanic anger, volcanic isolation and victimization of the person and a campaign to make the person appear to be a rat and untrustworthy and a liar and the subject of threats of violence, and that's what happened in the documentation today, the communications. His go-to response to accountability is to threaten the person trying to hold him accountable and threaten in really specific and violent ways, exposing that person to risk, and the papers are full of it.

And I thought back to the trial and, you know, the message that was played, his voicemail to Nathan Medlin and just the volcanic rage directed by Jake Messer to Medlin.

He's an intimidating -- an intimidating man, a man capable of violence, and, you know, it played out in this case, and somebody like that the Court has got to reign in for the protection of society.

The women were kind of a perfect victim for somebody willing to exploit them because they are vulnerable economically. Most of them are drug involved. If they are

assaulted on one-on-one situations, there's not going to be proof. It's always going to be kind of one-to-one proof. And anybody trying to hold them accountable has to run this gauntlet, this gauntlet of, if I say something, the reaction is going to be I'm a rat, I'm a liar, and I'm going to face threats of violence. And for a powerless victim who herself is engaged in criminality and has hurdles to going to the authorities, it's a perfect victim.

So I think that went on some. I think that went on some with Melissa Smith. And, again, this -- that's part of the nature and circumstances of the case and defense history, and it's got to impact the record here.

Criminal history, you know, we tell somebody that oversight does not matter much. The defendant, you know, was on all kinds of oversight at the time of this crime. And the only difference it made was getting him home on time. Did not deter him from the serious criminality we are here about today.

His record is much worse than the others in this case who have been held responsible. It seems like oversight has made no difference to him and rules make no difference and the law makes no difference, and that's a recipe for danger.

The mitigating arguments and the variance arguments I have carefully thought through. The fact that he targeted somebody in the drug world, does that make him less dangerous?

I suppose there's some comfort in knowing that somebody who's violent only within the drug world is not going to affect every corner of Main Street, but, you know, people in that world, they are part of that society, and society cannot, you know, cast a blind eye to the goings-on in that world. I don't find that particularly mitigating.

The duration of the kidnapping, it was, you know, relatively short duration. I expect Melissa Smith would say that was a very long overnight. Of course, it spilled over to the next day, and the defendant's intent was that the two be held. His intent expressed to his father was to leave them in Clay County. He did not want them brought back to Bear Hollow. He did not want them released.

So I don't know how long it would go on if Jake Messer had had his way about it. So the limited duration I don't think squared with his plan.

Lack of injury. It's true Victim 1 was threatened and not physically harmed. Victim 2 was threatened and physically harmed. Both were emotionally harmed. And they said as much in the prior sentencing in their victim statement. Both expected they would have life-long issues with that. Certainly seems probable to me.

So, you know, it's -- is it better than leaving them, you know, physically maimed? It is better on a relative scale, but not a situation without measurable harm, certainly.

I read the letter carefully. I know Jake Messer has people in his family who support him and believe in him, and I'm glad to see it. Again, he's not a person without talent or ability. He obviously had a good work ethic. He has the ability to do more than this case has shown.

You know, he sounds like he considers himself a different person. And, again, I hope -- hope that's right. I don't really hear remorse about this case. He's persisting in his claim of innocence. That's fine and certainly his right. But the record tells a very different tale about what happened in April of 2018.

So, ultimately, the sentence to be imposed, the statutory maximum on each count is life in prison. The guideline calls for life, and the guideline is built through a stacking of the base offense level, plus each of the aggravating components we have talked about particular to his role, particular to how the thing happened, particular to the treatment of Victim 2. All of that is pushing this number up, skyrocketing past the 43 level, which is where the cap is, but each of those components is saying something about this crime.

Each of the components is saying, relative to other kidnappings, this makes it worse; relative to other kidnappings, this makes it worse, until the number goes from the 32 base to the 51 ultimate number pared down to 43.

The government sought life. The defense has sought a

variance down to 30 years concurrent to his drug term. And, listen, the defendant is not his father, but, you know, a Messer in his 60s obviously still is dangerous. So that's the age of George Messer being convicted before the Court, and so I would just note that that's something that is prominent in my mind.

The idea of a life sentence is a difficult one for the Court every time. Every time I'm asked, it's a difficult analysis because I try to sentence with hope, I try to sentence with mercy, I try to sentence with a chance for redemption.

And I've carefully studied this record. Where are the mitigators? Where is a reason to go away from what the guidelines are screaming for the Court to apply? What's the reason to do it?

And, you know, really, the mitigating arguments from counsel aside, it comes down to whether the defense had a change, whether he really has become a different person. That's unknowable in this life. I can't -- I can't know it. I can't read -- I can't read his heart.

I'm looking at the record before me and what it presents, and that's what I have got to, with any confidence, found the decision on.

I think, looking at George Messer and Jake Messer, it's interesting. You know, George Messer comes to the trailer and

he's throwing his threats around, and he's, you know, going to get answers, and, you know, he's prepared to do things that are terrible. And, you know, there's testimony that he said to Jake Messer, you are young, you got your whole life, get out of here, I'm going to take care of it, suggesting, if you leave, you are not going to have the same kind of a responsibility for the events in the trailer. So go, leave, get your own life, and I'll take this weight of what I'm about to do.

Well, Jake Messer left the trailer, but he did not leave the crime. The crime is his creation, and he can't distance himself from the trailer, and he did enough himself in the trailer. He can't distance himself and sever his relationship for what was going on at that crime scene.

He's more -- he's more responsible, in my view, than his dad because he put the whole thing together and he gathered and was in control of the scene, gathered the people, dictated things at the trailer, dictated the treatment of Melissa Smith.

So George Messer has got plenty of responsibility. The Court has shown that and recognized it. But Jake Messer is ultimately more -- certainly as responsible but, in my view, more responsible than his father.

They partnered in the undertaking. They shared the approach. They shared the violation of Melissa Smith. They

have a shared resort to violence as a way to navigate this world. It's the currency of life for them.

And, in my view, a sentence that's sufficient, but no greater than necessary, will reflect a shared conclusion, and that is life in prison which I impose, you know, regrettably, but I do believe it's the sentence called for in this case, and that will be the Court's custodial term.

As a result, there will be no -- no supervision to follow on this sentence.

I think 5G1.3 really is not applicable because I find that the sentence that's reasonable for this case is life in prison with or without the 18-48 interplay. So I don't think there's a need to coordinate the running of those terms under 5G1.3.

That's going to be the Court's custodial sentence.

Does either side request any additional discussion of the basis for the Court's sentence?

MS. REED: No, Your Honor.

THE COURT: Mr. Rossman?

MR. ROSSMAN: No, Your Honor.

THE COURT: Any objections not already made under *Bostic* or otherwise, Ms. Reed?

MS. REED: No, Your Honor.

THE COURT: Mr. Rossman?

MR. ROSSMAN: No, Your Honor.

THE COURT: I'm going to recommend the BOP place him as close to his home as possible. I don't know what he'll qualify for with this sentence, but I will make the proximity recommendation.

Mr. Messer, the clerk is going to read you a notice advising you of your right to appeal. That will be displayed on the screen in front of you.

Madam Clerk.

(Notice of Appeal Rights read and presented in open court.)

THE COURT: Thank you very much.

Do you have a copy of that, Mr. Rossman?

MR. ROSSMAN: I do not, Your Honor.

THE COURT: We'll got a copy to you. If you'll just make sure he gets that and go over with him, I appreciate that.

MR. ROSSMAN: Yes, Your Honor.

THE COURT: That's a 14-day deadline to appeal, Mr. Messer. That runs from judgment of entry. It will probably happen tomorrow. So 14 days from there you can appeal. Talk to your lawyer. He will file that on your behalf.

All right. Ms. Reed, anything else we have to take up on behalf of the United States?

MS. REED: Nothing, Your Honor.

THE COURT: Mr. Rossman?

MR. ROSSMAN: Nothing, Your Honor.

THE COURT: Thank you. I appreciate, again, your work on Mr. Messer's behalf on the CJA. Thank you for taking that appointment in your work for him.

Any questions, Mr. Messer?

THE DEFENDANT: No, Your Honor.

THE COURT: Best wishes going forward. He'll be remanded into the marshal's custody, and we'll stand adjourned. Thank you.

(Proceedings adjourned at 2:49 P.M.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: 9/6/22

/s/ Kathleen Maloney, RPR, FCRR
United States Court Reporter