NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0394n.06

No. 22-5370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 24, 2023
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MONTREZ DUNCAN, Defendant – Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE OPINION

Before: WHITE, THAPAR, and NALBANDIAN, Circuit Judges.

HELENE N. WHITE, Circuit Judge. After the district court vacated Montrez Duncan's conviction under 18 U.S.C. § 924(c)(1)(A) and (2), it adjusted his sentences on the remaining counts and resentenced him to a total term equal in length to his original sentence. Duncan appeals and we AFFIRM.

I.

In 2012, Duncan believed that he and his girlfriend would need money for attorneys, so he planned to rob drug dealer Derek Odom. Duncan enlisted the help of Jovonte Fitzgerald and several others. Duncan, Fitzgerald, and others in this group surveilled Odom's home and followed him in a van as he drove to meet buyers. When Odom returned home, Duncan, Fitzgerald, and Raymond Wilson ran into Odom's garage while Victor Jones waited outside in the van. With guns drawn, the three men ordered Odom into the house.

Inside, Duncan took the lead, giving out instructions and "holding Odom down at gunpoint" while Fitzgerald and Wilson collected money and drugs. R. 258, PID 1355-56. Because

Odom knew where there was more money, Duncan forced him into the van with him and Jones. Fitzgerald and Wilson followed, driving Odom's car. They stopped at a shopping center, where Duncan forced Odom to call a buyer and his cousin to bring money and drugs.

Later, Duncan developed a plan to "get rid of Odom" by placing him in the trunk of his car, stabbing him, and lighting the car on fire. The group drove to a field, where Fitzgerald and Wilson soaked Odom's car with gasoline. Odom ran when Duncan cut his restraints to put him in the trunk. Duncan said, "Shoot," and Fitzgerald fired, hitting Odom in the buttocks. Odom played dead but ran again and escaped when Duncan said, "No, cuz, you got to shoot him more than that." R. 257, PID 1222. The group drove away in the van and later met in a motel, where Duncan gave his mother approximately $20,000 for lawyer fees. The group split the remaining drugs and money among themselves and a few others.

In April 2014, Duncan, Fitzgerald, Jones, and Wilson were each charged with Hobbs Act robbery conspiracy in violation of 18 U.S.C. §§ 1951-52 (Count 1), Hobbs Act robbery in violation of §§ 1951-52 (Count 2), and using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence, in violation of § 924(c)(1)(A) and (2) (Count 3). A jury convicted Duncan on all counts.

Counts 1 and 2 each carried twenty-year maximum prison terms, and Count 3 carried a ten-year mandatory minimum term. Based on a total offense level of 33 and a category-VI criminal history, Duncan's Guidelines range was 360 months to life imprisonment. At the time of Duncan's initial sentencing, he was serving two state sentences in Tennessee. The court weighed Duncan's lengthy criminal history, lack of respect for the law, and threat to public safety against his eighth-grade education, limited work history, difficult upbringing, and intellectual disability. The district court also considered its upcoming sentencing of Fitzgerald, who faced the same charges as

Duncan but who had pleaded guilty pursuant to a plea and sentence agreement. Duncan's counsel raised a disparity concern at Duncan's initial sentencing, and the court noted several similarities between Duncan and Fitzgerald: career-offender status; involvement in the Hobbs Act conspiracy; lack of male role models growing up; status serving state sentences; abuse of drugs and alcohol from an early age; and early first offenses.[1] The court also observed that Fitzgerald shot Odom but that Duncan did the organizing. After reviewing these comparisons, the court stated, "So there are a lot of similarities between you and Mr. Fitzgerald that the [c]ourt can't ignore in determining what's an appropriate sentence and does go to that factor of avoiding a disparity." R. 409, PID 2462. The court sentenced Duncan to concurrent 180-month sentences for Counts 1 and 2 (the Hobbs Act counts), to run concurrently with the state sentences, and a consecutive 120-month sentence for Count 3 (the § 924(c) count), yielding a 300-month total sentence that was 60 months below the Guidelines range.

After *United States v. Davis*, 139 S. Ct. 2319 (2019) was decided, the district court granted Duncan's § 2255 motion to vacate the § 924(c) conviction, creating the need for resentencing. A hearing was scheduled for October 2021, but on the morning of the hearing the district court learned that Duncan's drug-related state sentence had expired in September 2021 and that he had recently been paroled on the state reckless-homicide sentence. The court noted that "[a] number of arguments [had] been raised," including the issue of concurrent or consecutive sentences. R. 471, PID 2954. The court postponed resentencing, ordered a new presentence report, and asked the parties for briefing on whether the two Hobbs Act sentences should run concurrently or

[1] At that time, Fitzgerald had not yet been sentenced, but the court knew of his agreement to a 300-month sentence pursuant to Rule 11(c)(1)(C). Fitzgerald later received his agreed-to 300-month sentence, reduced by 76 months for time served for a related state sentence.

consecutively. To clarify, the court reiterated that it wanted defense counsel and the government "to file new briefs on their respective positions on the 3553 factors." *Id.* at 2958.

Resentencing took place in April 2022. The court noted that it had reviewed both parties' sentencing positions and memoranda, its notes on the trial[2] and from the initial sentencing hearing, and the updated presentence report. The court calculated Duncan's offense level and added a seven-level firearm enhancement under U.S.S.G. § 2B3.1(b)(2)(A), which had not been scored at the initial sentencing due to concerns about double counting. *See* U.S.S.G. § 2K2.4 cmt. n.4. With a new total offense level of 40 and a category-VI criminal history, the Guidelines range was again 360 months to life, but now with a 480-month cap because of the Hobbs Act statutory maximums. Defense counsel did not object to the range as calculated but argued for leniency based on Duncan's personal history. Defense counsel stressed that Duncan "shouldn't be in a worse situation today" because of the § 924(c) vacatur and that the court "ought to leave [the Hobbs Act sentence] the way it was"—concurrent 180-month terms. R. 473, PID 2977, 2979.

The court rejected Duncan's arguments and imposed consecutive 200-month and 100-month sentences for Counts 1 and 2, respectively, to run concurrently with the state sentences, yielding a total below-Guidelines sentence of 300 months, the same as before Count 3 was vacated. In reaching this decision, the district court weighed the same factors as before, with the addition of evidence that Duncan had been subject to several disciplinary actions since starting his federal sentence.

After the court announced its sentence, defense counsel asked it to clarify how the federal sentence would run with Duncan's state sentence. The court answered that Counts 1 and 2 would

[2] The sentencing judge did not preside over Duncan's trial. Presumably these were notes the court took on its review of the trial transcript before the initial sentencing.

"run consecutive, all to run concurrent with" the state sentence, and defense counsel replied, "All right." *Id.* at PID 2989. When the court asked for any objections, the government responded first and clarified the sentence, then voiced no objection. Defense counsel then said, "It effectively is the same sentence as before, just fashioned a different way," and the court replied, "It is. Because I'm sentencing the same behavior." *Id.* at 2995.

For Fitzgerald's resentencing, the parties jointly recommended and the court imposed concurrent terms of 180 months, with a 76-month reduction under U.S.S.G. § 5G1.3(b) for an undischarged state sentence for related conduct, yielding a total term of 104 months. This was 120 months lower than Duncan's new sentence, not accounting for the reduction.

Duncan now appeals, challenging his new sentence on procedural-reasonableness, substantive-reasonableness, and vindictiveness grounds.

II.

We review the reasonableness of a sentence for an abuse of discretion, *Gall v. United States*, 552 U.S. 38, 51 (2007), but review procedural reasonableness only for plain error if the defendant failed to preserve an issue after being asked for any objections under *United States v. Bostic*, 371 F.3d 865, 872-73 (6th Cir. 2004). We review the application of the Sentencing Guidelines de novo and findings of fact for clear error. *United States v. Baker*, 559 F.3d 443, 448 (6th Cir. 2009).

Sentences are procedurally unreasonable "if the district court fails to calculate (or improperly calculates) the Guidelines range, treats the Guidelines as mandatory, fails to consider the § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails to adequately explain the chosen sentence." *Id.* And sentences are "substantively unreasonable if the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider

relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Mahbub*, 818 F.3d 213, 232 (6th Cir. 2016) (quoting *United States v. Camiscione*, 591 F.3d 823, 832 (6th Cir. 2010)). Sentences below the Guidelines are presumed substantively reasonable. *United States v. Smith-Kilpatrick*, 942 F.3d 734, 747 (6th Cir. 2019).

III.

Duncan challenges the procedural reasonableness of his sentence on three bases: the decision to run his sentences consecutively; the application of the organizer enhancement; and the sentencing disparity between him and co-defendant Fitzgerald.

A.

Duncan first argues that his sentence is procedurally unreasonable because the district court failed to adequately explain its decision to impose consecutive sentences for Counts 1 and 2. Although the government asserts this claim is unpreserved and subject to plain-error review, Duncan's claim fails even if reviewed for abuse of discretion.

A district court commits procedural error by "failing to adequately explain the chosen sentence." *Gall*, 552 U.S.at 51. "When deciding to impose consecutive sentences, . . . a district court must indicate on the record its rationale, either expressly or by reference to a discussion of relevant considerations contained elsewhere." *United States v. Cochrane*, 702 F.3d 334, 346 (6th Cir. 2012), *abrogated on other grounds by Rodrigues v. United States*, 575 U.S. 348 (2015).

Under 18 U.S.C. § 3584(a), "[m]ultiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively" and "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." Under § 3584(b), in deciding whether to impose concurrent or consecutive terms of imprisonment, a district court

"shall consider, as to each offense . . . the factors set forth in section 3553(a)." Relatedly, § 5G1.2(d) of the Sentencing Guidelines instructs:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment,[3] then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

"[A] sentence consistent with [§ 5G1.2(d)] carries a badge of reasonableness we are bound to consider." *United States v. Eversole*, 487 F.3d 1024, 1033 (6th Cir. 2007).

A district court may "intertwine[]" its analysis of the § 3553(a) factors with its decision to impose consecutive sentences. *United States v. King*, 914 F.3d 1021, 1026 (6th Cir. 2019) (quoting *United States v. Johnson*, 640 F.3d 195, 208 (6th Cir. 2011)). It would be "repetitious and unwarranted" to require a separate analysis. *United States v. Berry*, 565 F.3d 332, 336 (6th Cir. 2009). In *King*, the district court discussed several § 3553(a) factors, announced King's terms of imprisonment, and then discussed the sentence's sufficiency, saying in part: "So the overall sentence is going to be 36 months custody. . . . I'm confident that this sentence meets the requirements of 3553(a)." *King*, 914 F.3d at 1026. We found this explanation made "adequately clear that the judge believed an aggregate [36]-month sentence satisfied the goals of § 3553(a)" and "demonstrate[d] that the judge's discussion of the length of King's aggregate sentence was,

[3] The Guideline application notes explain that "total punishment" means the "combined length of the sentences," which "is determined by the court after determining the adjusted combined offense level and the Criminal History Category and determining the defendant's guideline range on the Sentencing Table." U.S.S.G. § 5G1.2(d) cmt. 1. This application note further explains that, except as otherwise provided, "the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction." *Id.* "Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment." *Id.*

permissibly, 'intertwined' with the determination that the terms of imprisonment should run consecutively." *Id.* (quoting *Johnson*, 640 F.3d at 208).

Much like the district court in *King*, the district court here did not say, "I am imposing consecutive sentences for x reason," but the record shows that the court "indicate[d] that its reasons for imposing consecutive sentences were the same as those for which it determined the length of his sentence," *Cochrane*, 702 F.3d at 347 (citing *Johnson*, 640 F.3d at 208). That is, the court's concurrent/consecutive analysis was plainly bound up with its analysis of the § 3553(a) factors. Any possible deficiency under *Cochrane* is overcome by the obviousness of the court's analysis. The court had asked the parties for briefing on consecutive sentencing and noted that this should address the § 3553(a) factors. The court then discussed these factors at length and concluded: "[A]fter much thought and attempt to balance all of this and with the focus being on what your behavior was, as I've tried to *summarize it in my statement of reasons and following the factors*, I'm going to commit you to the custody of the attorney on Count One for 200 months, *to run consecutive* . . . to Count Two, a hundred months." R. 473, PID 2988 (emphasis added).[4]

Further, the court had adopted the presentence report, which found that "Section 5G1.2(d) calls for imposition of consecutive sentences when sentencing on multiple counts under certain circumstances, as is the case in this instance." R. 462, PID 2907. And when defense counsel remarked that the new sentence was "effectively" the same as before, the district court said this was because it was sentencing the "same behavior." Given this record, the natural conclusion is that, based on its § 3553(a) analysis, the court found the seriousness of the underlying conduct still

[4] Post-argument, Duncan submitted a notice of supplemental authority citing *United States v. Morris*, where this court reversed the district court's imposition of the same sentence on resentencing through the mechanism of imposing consecutive sentences. *See* No. 22-1970, 2023 WL 4117939, *5 (6th Cir. June 22, 2023). But *Morris* is consistent with our conclusion. Unlike here, the district court in *Morris* gave no rationale for consecutive sentencing except the court's discretion, *id.*, conducted an insufficient § 3553(a) analysis, *id.*, and imposed an *above*-Guidelines sentence where the range was *lower* on remand than at the original sentencing, *id.*

supported a 300-month sentence, which under the circumstances meant running the sentences consecutively. *See* U.S.S.G § 5G1.2(d); *King*, 914 F.3d at 1025 (explaining that, when imposing consecutive sentences, a district court need not explicitly reference the relevant Guideline if the record shows that the court considered it and the court "makes 'generally clear the rationale under which it has imposed the consecutive sentence'" (quoting *United States v. Hall*, 632 F.3d 331, 335 (6th Cir. 2011)).[5]

B.

Duncan next argues that the organizer enhancement under U.S.S.G. § 3B1.1(c) should not have been applied because, he asserts, it was not applied at his prior sentencing; there was no new evidence at resentencing about leadership or organization; and the organizer enhancement has no relation to Count 3.[6] Duncan asserts that our review is de novo because he raises questions of law; the government argues that Duncan forfeited a challenge to the enhancement, so review is for plain error. Again, the standard of review is immaterial to the outcome; we find no error even reviewing de novo.

Duncan's arguments fail because the record shows that the court *did* apply the organizer enhancement at Duncan's initial sentencing. Duncan's 2018 presentence report recommended applying the two-level organizer enhancement and used it to find a total offense level of 33. And although the court never explicitly mentioned this enhancement at the initial sentencing, the court

[5] We note also that Duncan's resentencing memorandum explicitly addressed U.S.S.G. § 5G1.2(d), acknowledging that this Guideline "would suggest the [c]ourt should run the sentences . . . consecutively," and the memorandum was framed around why the court should nevertheless impose concurrent sentences. R. 422, PID 2516-20. And at the resentencing hearing, the government explicitly said that "[t]he [G]uidelines in this case, because it exceeds the statutory maximum, . . . suggest[] consecutive sentencing," clearly referencing § 5G1.2(d). R. 473, PID 2974-75.

[6] Duncan also argues that because the government did not challenge the absence of the organizer enhancement at his initial sentencing, the government forfeited "its right to contest the lack of application at later stages." Appellant's Br. 41-42. But as the government correctly notes, any forfeiture "binds parties, not courts," so the district court could impose the organizer enhancement. Appellee's Br. 27-28 (citing *United States v. McFalls*, 675 F.3d 599, 606 (6th Cir. 2012)).

stated that Duncan "organized" and "planned" the crime, and the court's score of 33 for Duncan's offense level could not have been reached without the organizer enhancement. Accordingly, we reject Duncan's challenges to the enhancement.

C.

Duncan argues that the district court gave "unreasonably low weight to the pertinent factor of disparity" among codefendants at resentencing and "abandon[ed]" this factor "in an arbitrary manner," thus abusing its discretion. Appellant's Br. 44.

Duncan's disparity argument fails. First, co-defendant disparity is not a § 3553(a) factor. *See United States v. Simmons*, 501 F.3d 620, 624 (6th Cir. 2007). Second, the court at resentencing *did* engage in a significant discussion comparing Duncan with Fitzgerald, noting that Duncan's "culpability [was] at the top of what all [] other co-conspirators did" and that, while Fitzgerald shot Odom, Duncan encouraged him to do so and "encouraged him to shoot him one more time and make sure he was dead," which Fitzgerald did not do. The court concluded that Duncan's leadership role "entitled [the court] to give [him] more of the responsibility for the criminal activity that [he] and others engaged in." R. 473 at 2981-82. We find no error.

IV.

Duncan challenges the substantive reasonableness of his sentence on three bases: the imposition of consecutive sentences; the sufficiency of punishment under the Hobbs Act; and co-defendant disparity. Because his sentence is below the Guidelines range, this court presumes reasonableness, and Duncan "bear[s] a heavy burden." *United States v. Nunley*, 29 F.4th 824, 830 (6th Cir. 2022) (quoting *United States v. Greco*, 734 F.3d 441, 450 (6th Cir. 2013)).

Duncan argues that the imposition of consecutive sentences was substantively unreasonable because this was "the same total punishment as at his initial sentencing, despite there

being one fewer count," and "the court made no findings that would justify newly consecutive sentences." Appellant's Br. 19-20. "[A]n evaluation of the substantive reasonableness of a decision to impose a consecutive sentence depends heavily upon an evaluation of the procedural reasonableness." *Berry*, 565 F.3d at 342. Here, given our conclusion that Duncan's consecutive sentence is procedurally reasonable in this respect and Duncan's failure to meet his "heavy burden" to show the unreasonableness of his below-Guidelines sentence, *see Nunley*, 29 F.4th at 834, this argument fails.

Duncan also argues his sentence is substantively unreasonable because it is greater than the 240-month maximum sentence for Hobbs Act robbery. As the government notes, *Pinkerton v. United States* makes clear that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." Appellee's Br. 37 (quoting 328 U.S. 640, 643 (1946)). Thus, Duncan's sentence of 300 months does not exceed the statutory maximum, which is 480 months for the two counts, not 240 months.

Next, Duncan argues that, despite explicitly discussing co-defendant disparity at his initial sentencing, the court failed to consider this issue at resentencing. A court abuses its discretion when it "gives an unreasonable amount of weight to any pertinent factor." *United States v. Sexton*, 894 F.3d 787, 797 (6th Cir. 2018) (quoting *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008)). However, we have rejected many substantive-reasonableness challenges based on disparities among co-defendants. *See, e.g.*, *United States v. Wells*, 55 F.4th 1086, 1094 (6th Cir. 2022); *United States v. Sierra-Villegas*, 774 F.3d 1093, 1103 (6th Cir. 2014); *Simmons*, 501 F.3d at 626-67. Further, notwithstanding Duncan's assertions, and although Duncan never asked the court to consider this issue at resentencing, the district court was not "silen[t]" on the disparity issue. *Cf.* Appellant's Br. 44. Rather, the court clearly compared the two co-defendants. And it

was not "arbitrary" to give them different sentences on resentencing because the court's resentencing was plenary, and the court had discretion to find different sentences appropriate in light of its conclusions about Duncan's greater culpability.

V.

Lastly, Duncan argues that the district court's new sentence was either presumptively vindictive or actually vindictive. *See North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). The parties once again dispute the standard of review, but as before, Duncan's claim fails even reviewed under the more favorable standard.

In *United States v. Rodgers*, 278 F.3d 599, 604 (6th Cir. 2002), the district court re-imposed the same sentence on remand, after denying the acceptance-of-responsibility reduction as before, but for reasons not discussed at the original sentencing, which relied on impermissible grounds. We explained that there was no presumption of vindictiveness because the presumption "does not arise where the resentence term is equal to the original sentence." *Id.* But Duncan points to *United States v. Murphy*, 591 F. App'x 377, 383 (6th Cir. 2014), an unpublished decision in which a panel of this court stated that "we have yet to explicitly decide whether the presumption of vindictiveness arises when the defendant receives more time on the remaining counts than at the original sentencing," *United States v. Murphy*, 591 F. App'x 377, 383 (6th Cir. 2014). In *Murphy*, the panel explained that our precedents favor the "packaging" approach followed by most other circuits, under which "the presumption of vindictiveness does not arise where the defendant's overall sentence is less than or equal to his original sentence," and held:

> In multiple-count cases, absent extraordinary circumstances, the presumption of vindictiveness does not arise when the district court sentences the defendant to more time on a count than at the original sentencing for that and one or more other counts if (1) the dismissed and remaining counts are *interdependent* and (2) the new sentence is less than or equal to the original sentence on all the counts.

Id. at 383-85 (emphasis added).

But even accepting that *Rodgers* left room for *Murphy*, and applying that unpublished decision, Duncan's claim fails. Duncan asserts that Count 3 was not *interdependent with* but rather *independent of* Counts 1 and 2, and thus his sentence is outside *Murphy*'s bounds. But this argument fails because we have already determined that claims are interdependent where, because of a vacated § 924(c) conviction, a firearm enhancement applies that could not have applied before due to double counting. *United States v. Foster*, 765 F.3d 610, 614-15 (6th Cir. 2014). Because these same circumstances apply here, Count 3 was "interdependent" with Counts 1 and 2, barring a presumption of vindictiveness.

As for actual vindictiveness, Duncan points to the fact that his sentence is substantially greater than Fitzgerald's. But he cites no caselaw to suggest that actual vindictiveness is supported by this fact alone. And the record strongly suggests there was no vindictiveness. The court explained its reasoning at length, "trying . . . as best as [it] humanly" could to find reasons for greater lenience, and weighed the seriousness of the conduct, Duncan's leading role, Duncan's difficult childhood, and his intellectual disability. R. 473, PID 2977-88. Although the total duration of the sentence remained the same, the court again imposed a sentence 60 months below the Guidelines range. This record is insufficient to establish vindictiveness.

VI.

For the reasons stated, we AFFIRM.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5370

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTREZ DUNCAN,

Defendant - Appellant.

FILED
Aug 24, 2023
DEBORAH S. HUNT, Clerk

Before: WHITE, THAPAR, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MONTREZ DUNCAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**NO. 3:20-cv-00207**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Petitioner Montrez Duncan's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 1). Based on United States v. Davis, 139 S. Ct. 2319 (2019), Duncan seeks to vacate Count Three of the Indictment, that he, in violation of 18 U.S.C. § 924(c)(1)(A), brandished a firearm during and in relation to "a crime of violence," to wit, conspiracy to commit Hobbs Act Robbery in violation of 18 U.S.C. § 1951. For the following reasons, the motion to vacate will be granted.

I. BACKGROUND

On April 25, 2014, a federal grand jury indicted Duncan and three co-defendants in a three-count indictment. (Case No. 3:14-cr-00076, Doc. No. 1; see also Case No. 3:20-cv-00207, Doc. No. 14-1). Count One charged Duncan with conspiracy to commit Hobbs Act Robbery in violation of 18 U.S.C. § 1951 and 18 U.S.C. § 2. Count Two charged Duncan with Hobbs Act Robbery in violation of 18 U.S.C. § 1951 and 18 U.S.C. § 2. Count Three charged Duncan with, in violation of 18 U.S.C. § 924(c)(1)(A), brandishing a firearm during, and in relation to, "a crime of violence," to wit, conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951. (Case No. 3:14-cr-00076, Doc. No. 1).

Duncan proceeded to trial before Judge Todd Campbell, who subsequently retired, and, on September 7, 2016, the jury returned a verdict against Duncan on all three counts. (Case No. 3:20-cv-00207, Doc. No. 14-2). On January 3, 2019, the undersigned was assigned to this case and sentenced Duncan to 180 months incarceration on Counts One and Two, to run concurrently, and 120 months incarceration on Count Three, to run consecutively. (Case No. 3:20-cv-00207, Doc. No. 14-3). Duncan was sentenced to a total of 300 months in custody. (Id.).

II. LEGAL STANDARD

A. 28 U.S.C. § 2255

Section 2255 provides that a federal prisoner who claims that his sentence was imposed in violation of the Constitution, among other things, "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). In order to obtain relief under § 2255, the petitioner must demonstrate constitutional error that had a "substantial and injurious effect or influence on the guilty plea or the jury's verdict." Humphress v. United States, 398 F.3d 855, 858 (6th Cir. 2005) (quoting Griffin v. United States, 330 F.3d 733, 736 (6th Cir. 2003)).

B. 18 U.S.C. § 924(c)

Section 924(c) provides enhanced penalties for "any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm . . . ." 18 U.S.C. § 924(c)(1)(A). An individual convicted of a crime of violence during which a firearm is discharged is subject to a mandatory minimum sentence of ten years "in addition to the punishment provided" for the underlying crime of violence. 18 U.S.C. § 924(c)(1)(A)(i), (iii). Section 924(c) also contained a residual clause that defined "crime of violence" as "an offense that is a felony," and "that by its nature, involves a substantial risk that

physical force against the person or property of another may be used in the course of committing the offense." Id. § 924(c)(3)(B).

On June 24, 2019, the Supreme Court held that the residual clause, defining certain crimes of violence under 18 U.S.C. § 924(c)(3), was unconstitutionally vague. See Davis, 139 S. Ct. at 2324. Post-Davis courts have therefore vacated convictions for conspiracy to commit Hobbs Act Robbery as no longer qualifying as a crime of violence. See United States v. Ledbetter, 929 F.3d 338, 360–61 (6th Cir. 2019). The Davis holding applies retroactively. See In re Franklin, 959 F.3d 909, 910–11 (6th Cir. 2020).

III. ANALYSIS

Duncan argues that because Count Three "depended on the unconstitutional residual clause" struck down by the Davis Court, that count should be vacated. (Case No. 3:20-cv-00207, Doc. No. 14 at 4). The Government concedes that "conspiracy to commit Hobbs Act Robbery, which served as the predicate offense for" Count Three, "no longer qualifies as a crime of violence" in light of Davis. (See Case No. 3:20-cv-00207, Doc. No. 15 at 2–3). Thus, "there is no real dispute that [Duncan's] § 924(c) conviction [in Count Three] depended upon the statute's now-unconstitutional residual clause." United States v. Serrano, No. 3:19-cv-00719, 2020 U.S. Dist. LEXIS 174702, at *48–49 (M.D. Tenn. Sep. 23, 2020). And because there is "no other qualifying predicate offense to support the conviction under section 924(c) set forth in" Count Three, Duncan has established that he is in custody on that count in violation of the Constitution. Id. at *49; see also McQuiddy v. U.S., No. 3:16-cv-02820, 2019 WL 4917073 (M.D. Tenn. Oct. 3, 2019).

Vacating Duncan's § 924(c) conviction in Count Three of the Indictment requires resentencing on the remaining counts of conviction. Pursuant to Davis, "[w]hen a defendant's §

924(c) conviction is invalidated, courts of appeals 'routinely' vacate the defendant's entire sentence on all counts 'so that the district court may increase the sentences for any remaining counts' if such an increase is warranted." Davis, 139 S. Ct. at 2336 (citing Dean v. United States, 137 S. Ct. 1170 (2017)). The Court will decide issues regarding resentencing in the underlying criminal case, No. 3:14-cr-00076, following Probation's preparation of a revised presentence investigation report and briefing by the parties.

IV. CONCLUSION

For the foregoing reasons, Duncan's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is **GRANTED** as to Count Three of the Indictment. The Court will enter a separate order in Duncan's underlying criminal case, (Case No. 3:14-cr-00076-1), vacating his conviction on Count Three of the Indictment and setting the matter for resentencing. On or before **May 21, 2021**, the probation department shall complete an updated presentence report and provide it to counsel for both parties. The parties shall file both a sentencing position statement and a sentencing memorandum by **June 25, 2021**. The Clerk shall enter judgment in this case, No. 3-20-cv-00207, in accordance with Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS	)	No. 3:14-cr-76
	)	
MONTREZ DUNCAN	)	

BEFORE THE HONORABLE WAVERLY D. CRENSHAW, JR.,

CHIEF DISTRICT JUDGE

TRANSCRIPT OF PROCEEDINGS

April 21, 2022

APPEARANCES:

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The above-styled cause came to be heard on April 21, 2022, before the Hon. Waverly D. Crenshaw, Jr., Chief District Judge, when the following proceedings were had at 1:06 p.m. to-wit:

THE COURT: We're here on Case 14-76, United States of America versus Montrez Duncan. And Mr. Duncan's here in the courthouse, in the courtroom. If counsel could present themselves on the record.

MR. PRICE: Jim Price for the defendant, Mr. Duncan.

MR. WEHBY: Phil Wehby for the United States.

THE COURT: Okay. So, Mr. Duncan, we're here today for a resentencing because I vacated Count Three of the charge against you because of the *United States versus Davis*. We're also here now for sentencing on Counts One and Two. The jury rendered a verdict on Count One and Two, finding you guilty. Count One charges with you conspiracy to commit Hobbs Act robbery. Count Two charges you with Hobbs Act robbery.

I remind you again, the maximum penalty on both counts, One and Two, is up to 20 years of

custody, supervised release up to three years, probation is not authorized. You're subject to a fine up to $250,000 per count and a special assessment of $100 per count is the mandatory special assessment.

Do you understand you could be sentenced to those statutory maximums today?

THE DEFENDANT: Yes, sir.

THE COURT: And you can remove the mask if you like. In preparation for the resentencing today, Mr. Duncan, I have gone over, of course, your sentencing position and the sentencing memorandum, the government's sentencing position and sentencing memorandum. Of course, I'm familiar with the trial, and I reviewed my notes from that.

Also I have read and reviewed my notes from the hearing on January 3 of 2019. And in particular -- in particular the testimony of Derrick Odom and -- that was presented by the government and the testimony of Dr. Lyn McRainey that was presented on your behalf, as well as Dr. McRainey's written report.

So, in other words, in preparation for the resentencing today, I've gone over everything that's in the record as I think it's going to be relevant for resentencing.

In addition we have the February 16, 2022, revised presentence report. Did you get a copy of that, Mr. Duncan?

THE DEFENDANT: Yes, sir.

THE COURT: And have you and Mr. Price had enough time to review that document?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read that document?

THE DEFENDANT: Yes, sir.

THE COURT: And asked Mr. Price questions to the extent you had questions?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want any more time to do that?

THE DEFENDANT: No.

THE COURT: Okay. And your relationship, your communication with Mr. Price continues to be acceptable?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, do you have any complaints or grievances about his services to this point in time?

THE DEFENDANT: No, sir.

THE COURT: Okay. Does the government have any objections to the presentence report?

MR. WEHBY: We do not, Your Honor.

THE COURT: Mr. Price?

MR. PRICE: No, Your Honor.

THE COURT: All right. So I'm going to accept the -- I'm going to accept the presentence report as true and rely upon it for purposes of sentencing here today.

So, again, as you know, Mr. Duncan, the first thing we do is determine the guideline range, which is a suggestion, a recommendation to the Court. Here we start with 20 points for a base level offense based upon the offense of conviction, seven points are added because a firearm was discharged.

Three points are added because the victim, Derrick Odom, was shot one time and he sustained injuries that are categorized as between bodily injury and serious bodily injury. Four points are added because Mr. Odom was bound, placed in a vehicle and forced to accompany you and other defendants to a location.

And finally, two points -- I'm sorry, two points are added because he was forcibly bound and placed inside a van, driven to the residence -- and driven by the defendants away. And that offense involved carjacking which adds two points. One

additional point is added because the firearm was taken -- a firearm, destructive device or controlled substance was taken or in the taking of the such item was an object of the offense. As noted in the presentence report, you, Mr. Duncan you and your coconspirators to take drugs and drug proceeds from Mr. Odom.

One point is added because the investigation revealed that a total value of money and drugs taken from Mr. Odom exceeded $20,000 but was less than $95,000. And finally, two points are added because the investigation revealed that you were primarily responsible for planning and carrying out the robbery of Derrick Odom, as well as the events that occurred after, during and after the shooting of Mr. Odom. You were largely -- you largely directed others. And specifically you directed one of your codefendants to drive after the robbery and planned the location where you would go.

Finally, there's evidence that you claimed a larger share of the robbery proceeds and, therefore, you've been deemed an organizer and leader of the criminal activity.

So that creates the final offense level at 40. Your criminal history points start with three

for a 2002 conviction for possession with intent to sell under five grams of a controlled substance and felony evading arrest out of the Davidson County Criminal Court; three points from 2002, possession with intent to sell over five grams of a controlled substance again out of the Davidson County court; two points for a 2010 assault, domestic bodily injury out of the Davidson County General Sessions Court; two points for another 2010, a separate 2010 resisting arrest; three points for a separate 2010 conviction for attempted possession with intent to sell controlled substance; three points for a 2012 possession of a controlled substance with intent to sell and in a drug-free zone; and finally three points for a 2015 reckless homicide, tampering with evidence out of the Johnson County Circuit Court.

You were on a criminal justice sentence at the time of the offense of conviction, which adds two more points, and that places you at Category VI.

So according to the guideline with a total offense level of 40 and a Criminal History Category of VI, the guideline suggests a sentencing range between 360 months to life. Probation is not authorized under the guidelines. The guideline range for supervised release is one to three years for

Counts One and Two. And the fine range is up to $250,000, and the special assessment of $200. Of course, the guideline range cannot exceed the statutory maximum, which remains 20 years on each of those counts.

Does the government have any objection to the guideline range?

MR. WEHBY: No, Your Honor.

THE COURT: Mr. Price?

MR. PRICE: No, Your Honor.

THE COURT: So, Mr. Duncan, again, as I've shared with you and I've reviewed all the filings here and my file, so I would suggest anything more that the government wants to add, then I'll go to Mr. Price. And then, Mr. Duncan, after you've heard what everybody else think, you're welcome and invited to speak.

MR. WEHBY: Your Honor, just very briefly. The government will kind of just echo what it had previously stated in its sentencing memorandum. I tried to be as thorough as possible in terms of reviewing the defendant's criminal history, his offense conduct, in addition to what's set forth in the presentence report.

And his upbringing, I know there are

issues there. Issues, I think, Dr. McRainey had referenced to. I will note that the combination in this case of his record and his conduct factually is one of the more egregious cases that you -- that this Court I think would see typically. It was prolonged criminal conduct, it was violent. And he had a history going into this incident dating back to when he was a juvenile.

I think one of the things we pointed out is I think he had multiple incidents as a juvenile when he was -- when he fled from law enforcement. I think there were a number of evadings and so forth that don't even score criminal history points. He had a total of 21 criminal history points, as this Court well knows. Only 13 is needed to put you in the highest criminal history category. So that, coupled with his conduct in this case in a leadership role in this -- again, can only be described as egregious conduct.

THE COURT: Let me interrupt you and ask the court security officer, will you tell the persons out -- don't just stand there like that looking in. They can come in, but either come in or not be in that window. It's just distracting.

MR. WEHBY: So in any event, Your Honor,

in this particular case, as we set out, Your Honor has a firm understanding of this case, having lived it once before in terms of what transpired. But the other thing too is during the pendency of this case, this case happened in -- all the way back in 2012, I think it was charged in 2014, obviously. While he's in state prison, he commits a murder.

So not only do you have this prior criminal conduct involving drugs, there's assaults, flight from police that dates back to when he was a juvenile, you already have very serious criminal conduct in his past, and then he commits a murder while he's in prison. Coupled with the egregious nature of this case, in which they were ultimately led by this defendant, willing to burn up the defendant -- the victim in this case in a car before he was able to flee from that location, this is beyond the pale.

And I know, I understand that he's had issues, that he had a challenging upbringing. But there's nothing about that in this case, in the government's estimation, that can mitigate the totality of his criminal history and conduct. It is -- it was really atrocious. I think we described it as that in our sentencing memo.

I know the Court previously imposed a

25-year sentence total and the Court was well aware of what -- we are advocating above that, but I'm mindful of the fact that the Court had previously imposed a 25-year sentence. But at that time we also had recommended a higher sentence, and I know the Court did what the Court believed was appropriate in that case.

So I understand that fact. But in terms of the government's assessment of it, it's just one of those cases that's just so far beyond the pale of typically what is seen and this is a lot of bad cases that this Court sees, that the government sees, but the calculated nature and callous nature of this defendant's conduct in this case, again, coupled with his history and the fact that he then could go and commits a murder and he pled to reckless homicide in a state prison.

So I would submit to the Court, we made our recommendation for a substantial sentence in this case. We do think consecutive sentencing is appropriate here. I know it's guideline -- it's a guideline determination, so it is discretionary with the Court. I know typically the Court would be capped at 20 years.

However, the guidelines in this case,

because it exceeds the statutory maximum, does call for -- or suggests consecutive sentencing. We do believe it's appropriate. The government believes, as it did previously, that a higher sentence is appropriate, but I don't see anything that would suggest that this defendant deserves anything less than the 25-year sentence that this Court previously imposed.

And I would point out the one thing about this case, this isn't a case where there was not a robbery. So there was a robbery. The government, in its error at the time, charged the predicate crime of violence as conspiracy. We could have and should have charged robbery. We didn't, so we lost that, but there's nothing about that that changes the defendant's history, the defendant's conduct.

And we believe that at a minimum this Court should reimpose the 25-year sentence. Temper that with the fact that obviously as we did previously, we think a higher sentence is warranted, but I also understand the Court's prior ruling.

THE COURT: All right. Mr. Price.

MR. PRICE: Your Honor, I was not at the trial and I don't have the benefit that Your Honor did, but it's -- from listening to your comments, it's

clear that you've gone over this very carefully and have a good recollection of it. So I don't want to belate that, but I will say this. In the 48 years I've been in this courtroom -- and I think I tried the first case in this courtroom --

THE COURT: And this is one of the last times you'll be in this courtroom.

MR. PRICE: That is exactly right, Judge. This defendant, although it is a serious case, I've never had a client who has such a terrible history as he had. He basically had no -- Your Honor goes over this, but I will say he basically had no childhood life at all.

THE COURT: Is that some of your family?

All right, we'll get them in.

MR. PRICE: I think that's his girlfriend -- his fiancée, I believe.

THE COURT: All right. I think it's somebody else that you want to come in?

MR. PRICE: His mother was going to be here.

THE COURT: All right. Let's give her a chance.

MR. PRICE: The point I was going to -- I've never had a client who has had such a terrible

upbringing and I think Your Honor took that -- he actually had no childhood. His father was in the prison. His mother was a cocaine and heroin addict. He was on the street. He went with his aunt who was probably worse. She beat him and he was back on the street.

You couple that with the fact that this young man -- and I don't want to be unkind to him, but he has an IQ of 70. It's a wonder that he's still alive and I actually told him that. I think Your Honor took all of that into consideration when you -- when you gave the sentence. And I have to admit it was a generous sentence in this case.

The government has pointed out that he had a murder actually before this trial, but while he was in custody, it was actually a reckless homicide where the person came into his cell and started the fight, and the death occurred in his cell. So that's why it was a reckless homicide.

But I think Your Honor probably was aware of that and went through this. That was all a part of that. The issue we come to is we shouldn't -- he shouldn't be in a worse situation today because the Supreme Court has voided 924(c). I think one of the things that troubled the Court was that none of us

expected him to be out on parole when we came here the last time. I think probably Your Honor didn't recognize in sentencing, probably Mr. Koshy who tried it didn't recognize that state court has indeterminate sentences not like the federal system.

So if you get a ten-year sentence and he is sentenced for ten years, was actually a standard range one defendant, which means that even though he got an ten-year sentence and eight-year sentence together concurrently, he's ruled eligible for release at 30 percent. And that's what happened to him. That's why he got out.

And the Court -- that's actually the way the federal system was, as Your Honor may recall, before 1987, before we went to determinate sentencing on this case. So perhaps Your Honor didn't recognize when you sentenced him that the ten-year sentence you were running consecutive to -- was actually a concurrent sentence and he only had to serve 30 percent of it.

But be that as it may, I think why we're at today is we've got to consider is, is there anything that happened since Your Honor sentenced him that would warrant increasing the sentence you already entered in your judgment back in 2019. And I think

there's not.

So, Your Honor -- Your Honor was, I think, correct when you ran the conspiracy and the robbery together because they were, in fact, the same event, even though the Supreme and Sixth Circuit has said they are separate offenses. In this case they were really the same offense.

The question then is whether we run this consecutive to or concurrent. And I suggest, Your Honor, that you ought to leave it the way it was. And I think that's a reasonable sentence. It is a generous sentence, but even at that fact, even the way it is, he will be in his 50s, 59 I think I said in this, when he's released under the current way Your Honor sentenced him. The chance of recidivism at that point is very low.

And, Your Honor, just one shopkeeping thing I meant to say earlier. It doesn't affect this, but there's a typo on page 2 of my memo. Your order was actually May 19 of 2021, not 2020. That doesn't affect my argument, though.

THE COURT: All right. Mr. Duncan, you're certainly welcome to make -- pull that microphone close to you, if you like.

MR. PRICE: Do you want to speak?

THE DEFENDANT: No, sir.

THE COURT: You're entitled to speak if you like.

THE DEFENDANT: I'm straight.

THE COURT: I'm sorry, say again.

THE DEFENDANT: I'm cool.

THE COURT: Okay. Well, Mr. Duncan, as you can tell, I've read through everything again. And to the best that I humanly could, I really tried to start from a clean slate, but I will say as I begin to read and reread the information, what brings us here today is incredibly serious conduct. We're here for resentencing, so I again need to make sure you know that my responsibility is to impose a sentence that's sufficient but not greater than necessary to accomplish the purposes of the sentencing laws. That's first and foremost.

But what I'm here today, in doing that, is I centrally look at behavior, what is the criminal behavior that the jury found you guilty of, and then I need to apply the sentencing laws. So I look at your actions, the things you did, the impact it had. And as I said, at the initial sentencing, one of the first things I look at is the nature of the offense of conviction that brings us here today.

When I look at what you've done and I look at those you did it with, it is incredibly bad. The word bad doesn't really describe it sufficiently. This behavior that you and your codefendants and all those as part of the conspiracy, involved conduct or behavior that is among the worst. You committed a robbery, each of you together; each of you had a firearm. It was all about drugs and money. And the behavior that you engaged in, and others, involved violence. You put somebody in fear of their life.

And your behavior, in particular, Mr. Duncan, is -- was critical to all this occurring because you sort of planned it, you organized it, you were the leader, you told others what to do. You got a larger share of the proceeds from the robbery. So when I look at behavior and keep focusing on, well, what did Mr. Duncan really do, your culpability is at the top of what all your other co-conspirators did.

So that means you take -- you have to take more of the -- you're entitled -- the Court is entitled to give you more of the responsibility for the criminal activity that you and others engaged in.

As I said before and the proof remains unchanged, you did not actually shoot Mr. Odom, but from the proof we had before and that's part of this

record, you were very much a part of encouraging Mr. Fitzgerald to do so. And even at one point when you had doubts about whether Mr. Odom was alive or dead, you encouraged him to shoot him one more time and make sure he was dead. It's only because Mr. Odom was able to escape that the charges here aren't even more serious. But nevertheless as I continue to focus on behavior, all of this requires substantial punishment.

And it's not lost on the Court that had Mr. Fitzgerald done what you asked him to do and that Mr. Odom heard you ask Mr. Fitzgerald to do, that is indicative of punishment of the need for a strong punishment.

So in summary when I look at the nature and circumstances is I find it to be some of the most serious criminal, violent drug-related, firearm-related conduct that has come before the Court.

But I can't stop at just the criminal behavior. You had other behavior before all this occurred. And the Court definitely is giving weight to -- weight in your favor, mitigation, that your upbringing was -- the word challenging doesn't do it justice. You really -- your upbringing was

unfortunate and probably led to where you are today, and that's not your fault.

You're 39 years old; no -- no real work history. And Dr. McRainey testified and the Court credits what she has in her report and testimony she gave before that was based on her professional judgment and based on the records, the medical records, that early in your life you did suffer from intellectual disabilities, what we call it now. She said it before we used to call it mental retardation.

And that occurred to you at a very early age, age 11 and at age 13. It was confirmed that you were suffering from intellectual disability. And the sad thing is nobody -- nobody afforded you any treatment.

So it was allowed to develop and grow and work within your brain in a way that you didn't have any control over. It impacted your development, it impacted your decision-making or lack thereof and clearly it impacted the choices you made in your life. So the Court recognizes that it's something that impacted your behavior leading us to where we are today.

But, again, I have to look at the totality of your behavior and recognize that

notwithstanding the things that occurred to you that were under your control and the things that occurred to you that were beyond your control, the -- the activity you engaged in, at some point you became responsible for. There's a lack of any kind of precision at what age and what time that occurred, but at some point you decided to engage in a lifetime of criminal behavior.

And, indeed, your prior criminal conduct and the convictions, numerous that they are, should have, ought to have, and I have to assume did at some point bring home to you that I'm engaging in behavior that's not acceptable to society, that puts others at risk and, in fact, puts you at risk. But nevertheless, you persisted in an ongoing pattern of drug-related convictions that involve -- that compromise the safety of society, the public, yourself in serious and repeated ways.

So what I see is a lifetime of criminal behavior, beginning at age 19 and bringing you here 20 years later now at age 39. I have to come back to the theme of behavior because that's what I have to look at. When you were -- when I first sentenced you, Mr. Price is right, you were serving a felony conviction in state court, and that's -- and you've

received parole and that's scheduled to expire.

But one of the things that's in the presentence report that struck me because, again, I was trying to, as best as I humanly can, is to give you -- you know, am I missing something here in his behavior. And when I went -- when I look at the presentence report and in particular paragraph 57, you know, after my sentence -- yeah, January the 3rd, 2019, I was disappointed to see that while you were in state custody in August of 2019, that was at least the allegation of disciplinary action taken against you for defiance. Then it occurred again in December -- I'm sorry, August of 2019. And then it occurred again in December of 2019, disciplinary action against you for possession and use of a cellular telephone. And then yet again in March of 2020 you refused to participate.

So even -- even recently and since the last sentence there's still this continuing pattern of disrespect to the law, disrespect to authority, and that -- I've taken that into consideration in terms of what the sentence should be.

So all of that tells me that there is a strong need, much weight needs to be given by me to deterrence. And general deterrence here, as well as

specific deterrence. Because as a general matter, we do want to send a message for people who engage in as much criminal behavior as you have, that's just not acceptable. And at some point you just need to know, you proceed at your own risk and to your own detriment. So I want to send a message to others not to do that.

And then specific deterrence for you that at some point you have to be held accountable and have to be punished. I think you have to be punished to protect the public. And I think you have to be punished to protect yourself. So you can at least attempt to moderate your behavior going forward so it doesn't cause you harm and injury.

The other factor -- I've already talked about the guideline range and, of course, it's capped by the statutory maximum. But the last thing that I want to mention is the -- and I sort of alluded to it before is I think I have to impose a sentence that protects the public from you. I agree that at some point the sentencing commission tells all of us, tells the government, tells Mr. Price, tells the Court that the pure fact of age is going to have an impact on you, it's going to slow you down, it slows us all down. And your criminal behavior will change and

modify there.

But everybody doesn't have sort of the egregious and prolonged armed violence and criminal history that you come before the Court with. Not just what you did to Mr. Odom and I can only -- and he was here the last time, so I heard from him how it impacted him and his life.

But then I look back over the other incidents, not just the matter of the jail altercation that resulted in a conviction, but, Mr. Duncan, I've got an assault here in your history, I have an assault of you striking a woman on the head. I've got instances here of you fleeing from police, putting yourself in danger, putting the police in danger, the public in danger. And please -- we all know that drugs are -- can be and often are lethal. So my sentence needs to address that as well.

I'll quickly add, though, that while I recognize, respect and have given weight to the guideline, the guideline range does not take away any points for what is clearly a documented history of untreated intellectual disability. The guideline doesn't take away any points for your challenging childhood that you had no control over. And the guidelines -- that part of your life are a poor

measure of what the appropriate sentence should be.

So I've tempered my sentence, recognizing the limitations of the guidelines. The record here reflects accurately that you've been deemed a career offender. So, Mr. Duncan, after much thought and attempt to balance all of this and with the focus being on what your behavior was, as I've tried to summarize it in my statement of reasons and following the factors, I'm going to commit you to the custody of the attorney on Count One for 200 months, to run consecutive with a -- to Count Two, a hundred months. I will impose a five-year supervised release.

During that time you'll need to pay restitution as I did for your codefendants to Derrick Odom, this will be jointly and severally, of $6,000; participate in drug testing and substance abuse treatment; participate in mental health program, all of which are more than factually supported in the presentence report; furnish financial records; not contact Mr. Odom either in person directly or incorrectly, by any means; not be involved in any gang activity; and participate in adult education to at least get your GED.

I'm going to impose the mandatory and standard conditions of supervised release that

includes not engaging in any other unlawful behavior.

I will not impose a fine because I determined you're financially unable to pay the fine, but I have to impose the special assessment of $100 for each of the two counts for a total of $200. The restitution amount has been set. And forfeiture's not an issue.

Anything else, Mr. Price, in terms of special requests?

MR. PRICE: You haven't addressed the issue of whether it's consecutive or concurrent with the state case.

THE COURT: Oh, with the State case. Count One and Two sentence will run consecutive, all to run concurrent with his State case.

MR. PRICE: All right.

MR. WEHBY: Is that concurrency, Your Honor, as of today?

THE COURT: On his State matter?

MR. WEHBY: Correct.

THE COURT: Yes.

MR. WEHBY: Because I know he's on parole.

THE COURT: Right. Any other questions?

MR. PRICE: Well, Your Honor, first of

all, he's been on parole since September or -- two or three months ago, not as of today. So --

THE COURT: And I don't think I can -- I don't think I can do it prior to today because today's the date of sentencing.

MR. PRICE: What I'm saying is that he was released on parole. He was kept in federal custody on a hold in a state prison for a while, and then earlier this year he was brought -- the marshals took him in into federal custody. So he's effectively been in federal custody from the time he was granted parole because there was a hold on him in state court and they would have released him had it not been for the parole. At least he should be --

THE COURT: I don't know if I disagree with anything you said.

MR. PRICE: Okay. I'm just saying he should go credit at least going back to the date that he got paroled.

THE COURT: Oh, on his state sentence?

MR. PRICE: Yes, because he would have been free at that point.

MR. WEHBY: I think that'd just be --

THE COURT: I don't know if I'm being clear.

MR. PRICE: Your Honor, the defendant always gets credit for time in custody.

THE COURT: Yeah. Whether I say it or not, he always gets credit for that.

MR. PRICE: I'm sorry?

THE COURT: I agree.

MR. PRICE: Oh, okay.

THE COURT: He always does.

MR. PRICE: I guess I misunderstood.

THE COURT: Well, let me just be even clearer. On January the 3rd, 2019, I imposed that first sentence. I think he was in custody before that.

MR. PRICE: That's right, that's right.

THE COURT: I think he was in federal custody before that.

MR. PRICE: That's right. I thought you said as of today.

THE COURT: No. Correct me, now, Mr. Wehby.

MR. WEHBY: I'm pretty positive, probation may weigh in, he had been writted in because he was in state custody during the pendency of this federal case.

THE COURT: Let's see here. Oh, he was

in state custody.

MR. WEHBY: Correct, because obviously he'd committed the murder while he was in state custody, so he was still serving state time.

THE COURT: Oh, yeah. So on August the 18th, 2016, he was returned to federal custody and continuously detained on writ from the state.

MR. WEHBY: And I think he was transferred into federal custody looks on January the 12th of this year. I think it's up to the BOP to determine what credits, if any, prior to that he would receive.

THE COURT: Well, it took the state from December the 22nd, 2021, to January 10 to officially release him.

MR. WEHBY: Right.

THE COURT: And then he came into federal authority since January 10, 2020 (sic). Yeah, he -- I think BOP -- I mean, it's up to them, but my understanding is he gets credit for that.

MR. PRICE: Yeah. I was just saying, Your Honor, he would have been released had they not had a federal hold on him December, so they kept him -- he was basically in the state, but he was still in federal custody at that time. Plus he should

get --

THE COURT: Yeah, January the 10th, 2022.

MR. PRICE: No, December -- from the date that he was --

THE COURT: Oh, from the date you're saying he was paroled. Yeah, that's -- I'll just say that's beyond -- I've long since tried to stop understanding the state criminal laws.

MR. PRICE: Plus, Your Honor, I have no --

THE COURT: That is whatever the Bureau of Prisons says it is.

MR. PRICE: Right. And he would get credit while he was on writ here, even though he was at the state.

THE COURT: You know, I'm going to defer -- I used to think that was correct, but over the years I've learned that that was not correct. So I'm going to let you and the Bureau of Prisons determine that because even when they come over here on writ, they're technically still in state custody. I'm just -- I'm just -- for lack of a better term, I'm barring him from the state and then I return him back because they're first.

Now, Mr. Wehby, what do you think?

MR. WEHBY: Well, I think -- I was going to say, obviously the BOP will make the determination as to what credit he's entitled to, but at this point when he came back once Your Honor vacated the sentence that was imposed, he was not under a sentence. So he was -- all the time he was in state custody.

THE COURT: I only vacated Count Three. I guess you're right, he had to still come back for resentencing. But he was being held at that point by me. So I would think he would get credit, but I'll defer to the BOP.

MR. PRICE: I understand, Your Honor.

THE COURT: But if -- your point being that had it not been for the federal charges when he was paroled, he would --

MR. PRICE: Been on the street.

THE COURT: Been on the street. Because he was not, because of the federal charges, he was not on the street. And at that point I think you're right, you've got a good argument to BOP, he's entitled to credit.

MR. PRICE: Thank you, Your Honor.

THE COURT: All right. Does the government have any objections to the sentence that haven't otherwise been expressed?

MR. WEHBY: Your Honor, the total sentence is 300 months followed by five years of supervised release; is that correct?

THE COURT: Correct.

MR. WEHBY: No objection.

THE COURT: Mr. Price.

MR. PRICE: It effectively is the same sentence as before, just fashioned a different way.

THE COURT: It is. Because I'm sentencing the same behavior.

All right. So the sentence is imposed. Mr. Duncan, you have a right to appeal. Generally that's 14 --

MR. WEHBY: Your Honor, probation officer had something.

PROBATION: I'm sorry. Did you say five years of supervised release?

THE COURT: I'm sorry, three. Three.

PROBATION: I wanted to make sure. Thank you.

THE COURT: Three. You have the right to appeal. That's 14 days from when the judgment enters, and it will probably be tomorrow before I can get that done. If you tell Mr. Price you want to appeal, he'll do so. I'm going to hand you a form notice that you

can use to appeal. And I would strongly urge you to talk to a lawyer before you exercise your appeal rights.

Do you have any questions about your appeal rights?

THE DEFENDANT: No, sir.

THE COURT: Okay. And I think you told me earlier your mother is here in the audience?

THE DEFENDANT: Yes, sir.

MR. PRICE: She was supposed to be here. I didn't see her beforehand.

THE COURT: Yeah. So under the guidance of the marshals, I'd like for you to have a few minutes to talk to her. Thank you.

(Which were all of the proceedings had in the above-captioned cause on the above-captioned date.)

REPORTER'S CERTIFICATE PAGE

I, Roxann Harkins, Official Court Reporter for the United States District Court for the Middle District of Tennessee, in Nashville, do hereby certify:

That I reported on the stenotype shorthand machine the proceedings held in open court on April 21, 2022, in the matter of UNITED STATES OF AMERICA v. MONTREZ DUNCAN, Case No. 3:14-cr-76; that said proceedings were reduced to typewritten form by me; and that the foregoing transcript is a true and accurate transcript of said proceedings.

This is the 30th day of August, 2022.

s/ Roxann Harkins____
ROXANN HARKINS, RPR, CRR
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Case No. 3:14-cr-00076-1
MONTREZ DUNCAN, Defendant.	)	

- -

BEFORE THE HONORABLE WAVERLY D. CRENSHAW, JR., DISTRICT JUDGE

TRANSCRIPT

OF

PROCEEDINGS

January 3, 2019

- -

APPEARANCES ON THE FOLLOWING PAGE

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I N D E X

Thursday, January 3, 2019

INDEX OF WITNESSES

EXHIBITS

The above-styled cause came on to be heard on January 3, 2019, before the Honorable Waverly D. Crenshaw, Jr., District Judge, when the following proceedings were had, to-wit:

THE COURT: All right. Be seated.

Okay. We're here on Case 14-76, *United States of America v. Montrez Duncan*, and Mr. Duncan is in the courtroom.

If counsel can introduce themselves for the record.

MR. WEHBY: Good morning, Your Honor. Phil Wehby and Sunny Koshy for the United States.

MR. EVANS: Your Honor, Luke Evans on behalf of Mr. Duncan.

THE COURT: All right. Mr. Duncan, in preparation for the sentencing this morning, I reviewed the indictment, the jury verdict from the trial, the government's sentencing position and sentencing memorandum, your sentencing position, and your sentencing memorandum, which included the July 2018 report of Lyn McRainey.

Also, yours is the first of four sentences arising out of this case number. There's a related case, Michael D. Alexander in Case Number 17-24, who was sentenced by Judge Trauger to 160 months plus three years of supervised release

and $6,000 of restitution, joint and severable with the other co-defendants. Mr. Alexander's role in this was identifying the target victim, Mr. Derek Odom, who was the victim of yours and others' behavior, and identified Mr. Odom to you and others.

Have you received all -- have you been -- received all of those documents and had a chance to review them?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Did you get to talk to Mr. Evans about those documents and what they could potentially mean to you?

THE DEFENDANT: Yes, sir.

THE COURT: I'm sorry. You need to speak into --

THE DEFENDANT: Yes, sir.

THE COURT: Pull that microphone close to you.

THE DEFENDANT: I said, "Yes, sir."

THE COURT: All right. Did you ask Mr. Evans questions about how these documents may affect you?

THE DEFENDANT: Yes, sir.

THE COURT: Did he answer them in a way that you understood?

THE DEFENDANT: Yes, sir.

THE COURT: Do you need any more time to do that?

THE DEFENDANT: No, sir.

THE COURT: Any complaints you have at all about

Mr. Evans's services on your behalf to this point in time?

THE DEFENDANT: No, sir.

THE COURT: We're here because on September the 7th, 2016, the jury rendered a verdict finding you guilty of Counts One, Two, and Three of the indictment dated April 2014, charging you with conspiracy to commit Hobbs Act robbery, Hobbs Act Robbery, and using, carrying, and brandishing, and discharging a firearm during and in relation to a crime of violence.

In addition to the documents I've just identified, Mr. Duncan, did you also receive a copy of the November 26th, 2018, presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Did you get your own copy?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read every page?

THE DEFENDANT: Yes, sir.

THE COURT: And every word on every page?

THE DEFENDANT: Yes, sir.

THE COURT: And, again, talk to Mr. Evans about it?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. I think the government has no objections to the presentence report?

MR. WEHBY: That's correct, Your Honor.

THE COURT: And, Mr. Evans, I think you've noted some issues, but also noted they may not make a difference?

MR. EVANS: That's correct, Your Honor.

THE COURT: Okay. So do you have any objections to the presentence report?

MR. EVANS: Your Honor, specifically, my client does not object to the overall calculation of 360 to life. We believe that to be appropriate. We do not have any objection to the calculation of his criminal history category as set forth in the PSR.

The three specific remaining objections that -- and I will state initially, Your Honor has noted they don't affect the overall calculation -- would be -- the first objection is to paragraphs specifically 10 through 13 as it -- as it relates to the specific amounts of proceeds of the robbery.

Objection Number 2 would be the total amount of restitution claimed by the victim in this case, Mr. Odom.

And then Objection 3 -- these are all along the same lines; they all deal with the monetary amounts claimed throughout the trial in this case and as part of the PSR. There's a one-level enhancement that was applied pursuant to 2B3.1(b)(7)(B) in paragraph 25 of the PSR, which requires there to be proof that the proceeds of the robbery exceeded $20,000 in amount.

And we would -- we object to those as -- and based on the -- simply the fact is this: It would be our position that the proof at trial was inconsistent at best as to those amounts and that those amounts could not be established by preponderance of the evidence sufficient for the standard here today.

THE COURT: Okay. Do you have any proof you want to present on those? Anything other than your argument?

MR. EVANS: On the objections?

THE COURT: Yes.

MR. EVANS: No, Your Honor.

THE COURT: All right. Well, let me hear from the government on your objections.

MR. WEHBY: Your Honor, on the -- I guess partially factual and relates to a guideline determination, obviously it doesn't affect the applicable guidelines in this case, whether it's applied or not applied, if the guideline is 360 to life.

I don't think the Court has to make a determination on that, given that the Court will make a determination that the guideline range is 360 to life.

However, based on the information in the pretrial -- in the presentence report that was adduced from trial testimony, there's clearly a sufficient basis by a preponderance of the evidence to establish that there was at

least $20,000 that was at issue that was taken in the -- in the robbery.

There was reference in the report to Ms. Duncan coming to I think the motel room and obtaining approximately $20,000 from the Defendant.

There's reference to the -- another individual who testified at the trial, Taurus Booker, to breaking down roughly -- I think in the presentence report, indicated about 10 ounces of cocaine for the defendant, as well as the amount of payment in cocaine to Mr. Alexander, who is identified as "Bam," for his role in this conspiracy.

So, coupled with that -- and that's all information that came in at trial -- that easily satisfies by a preponderance -- whether you can establish exactly how much was taken, it's -- clearly there's sufficient evidence in the record to establish that at least $20,000 and less than $95,000 for that guideline enhancement to apply.

We do anticipate calling Mr. Odom briefly as a witness in this case. And Mr. Koshy is going to call Mr. Odom to talk about this incident, but I just note for the record that there's evidence in the record already that clearly establishes that that -- by preponderance, certainly -- that that has been established.

THE COURT: All right. You're not calling Mr. Odom on this issue?

MR. WEHBY: Not on this issue.

THE COURT: Okay. All right.

MR. WEHBY: And then, as far as restitution, we rely on the information that's contained in the presentence report. There were two different -- the amounts were the same, is my understanding in reading it, where $6,000 was requested in restitution. The breakdown I think in the second submission by the victim, Mr. Odom, was broken down differently, but the amount requested was the same. So we'll leave that to the discretion of the Court.

THE COURT: All right. Well, as I noted and I think as all the parties agree, I'm not sure, Mr. Duncan, this makes any difference at the end of the day for the reasons I'll explain, but just so the record's clear, I do find by preponderance of the evidence presented at trial that there is sufficient evidence to fix the amount here at at least $20,000, if not more.

Among other things, the Court notes that after the robbery you called your mother to come to the motel and provided a large sum of money, approximately $20,000, to hold for you.

And then, notably to the Court, in a series of telephone calls while you were in custody, you referenced $20,000 in cash you gave your mother after the robbery.

So the Court finds there's sufficient evidence and

certainly enough by preponderance of the evidence, which is a much lower standard than what we had at trial, that amount is established.

So, with that, I'm going to accept the facts contained in the presentence report as true and rely upon them for purposes of sentencing today.

Mr. Duncan, the statutory penalty for Count One and Two is up to 20 years of imprisonment per count, and for Count Three is not less than ten years of imprisonment that must be consecutive to any other term of imprisonment. A period of supervised release is up to three years on Counts One and Two, five years Count Three. Probation is not authorized. And you're subject to a fine up to $250,000 on each count. There's a mandatory $100 special assessment per count.

Do you understand that I can sentence you up to the statutory maximums regardless of the sentencing guidelines?

THE DEFENDANT: Yes, sir.

THE COURT: All right. The sentencing guidelines are advisory on the Court and one of the factors the Court looks to in determining what's an appropriate sentence. Here, Counts One and Two are grouped together; Count Three is treated separately. On Counts One and Two, there's a base offense level of 20. Three points are added because the

victim here, Mr. Odom, was shot and he sustained injuries between bodily injury and serious bodily injury. Four points are added because Mr. Odom was bound and placed in a vehicle and abducted during the offense. Two points are added because of carjacking. One point is added because, Mr. Duncan, you and your co-conspirators targeted the victim to take drugs. And one point is added because the money and drugs taken exceeded $20,000.

Here, there is a -- the criminal history also includes a finding that -- or I'm sorry -- the offense level also includes a finding that you're a career offender. That's because on September the 12th, 2002, you were sentenced in the Davidson County Court for possession with intent to sell under five grams of controlled substance. On March 12th, 2004 you were sentenced with -- for possession with intent to sell under 5 grams of a controlled substance. And then, in July of 2011, you were sentenced in the Davidson County Criminal Court for attempted possession with intent to sell a controlled substance.

As a result, you were over 18 at the time you committed the offenses; you had at least two prior felony convictions of a controlled substance; therefore, you're deemed to be a career offender within the meaning of guideline 4B1.1.

Because the statutory maximum sentence for Count

One and Two is 20 years and the offense level is 32; however, the offense level from -- for a career offender is not greater than the otherwise applicable guideline. So the offense level is set at 33.

Under Count Three, it requires a ten-year term of imprisonment that must be imposed consecutively to any other term of imprisonment. So the guideline sentence on Count Three is 120 months consecutive to any other custody sentence.

Your criminal points start with three points for possession with intent to sell in January of 2002 from the Davidson County Criminal Court; three points for a December 2002 conviction in the Davidson County Criminal Court for possession with intent to sell; two points in March of 2010 for assault, domestic bodily injury, out of the Davidson County General Sessions Court; two points for resisting arrest in September 2010; three points for a September 2010 attempted possession with intent to sell a Schedule I controlled substance; three points in October 2012 conviction for possession of a controlled substance with intent to sell in a drug-free zone; three points for a September 2018 reckless homicide and tampering with evidence. There's an additional two points added because you were on a criminal justice sentence at the time of the instant offense; so your total criminal points is 21, which sets you at Category VI.

The guidelines also require that the offenses as grouped be compared. So, under Option A, the offense level for the counts of conviction, other than -- other than -- other than 18 USC 1924(c), which, when combined with the criminal history category of VI, yields a guideline range of 25- -- 235 to 293 months. Then we add the 121 -- 120-month mandatory minimum; so the guideline under Option A is 355 to 413 months of imprisonment.

Under Option B, in Section 4B1.1(c)(3) provides for a guideline range of 360 months' to life imprisonment.

So Option B is the greater than Option A. Therefore, the guideline range is 360 months to life imprisonment.

So, according to the guideline, as a career offender, your guideline range is 360 months' to life imprisonment. Pursuant to the guidelines for a career offender, this is to be apportioned: Here, 240 months to life for Counts One and Two, although Counts One and Two are subject to a 240-month statutory maximum, with an additional minimum 120 months consecutive for Count Three.

Probation is not authorized. The guideline range for supervised release is one to three years for Counts One and Two, five years for Count Three, and the range of the fine is 25,000 to 250,000. There's a special assessment of $300 that's mandatory.

to do so. Mr. Fitzgerald did not. Mr. Fitzgerald's been deemed to be a career offender just like you. Just like you, he has no significant work history. Just like you, no real male role model in his life. Just like you, he's serving some state sentences. Just like you, he had drug and alcohol abuse at an early age. Just like you, his first felony is at 17. Yours is at 19. So there are a lot of similarities between you and Mr. Fitzgerald that the Court can't ignore in determining what's an appropriate sentence and does go to that factor of avoiding a disparity.

So for all of those reasons, Mr. Duncan, I'm going to commit you to the custody of the Attorney General to be imprisoned for a total term of 300 months. That will be 180 months on Counts One and Two, to be followed by the mandatory consecutive sentence of 120 months on Count Three.

As to Counts One and Two, custody, that will run concurrent with the undischarged terms in the State sentences that you're serving in Docket Number 2012D3493 and Docket Number 2:15-cr-144.

Upon release, you'll be on supervised release for a total term of five years. And that will require payment of restitution, if it hasn't already been paid, in the amount of $6,000 to the victim here.

Drug testing as the probation may deem appropriate. Mental health program as the probation deems

appropriate. And all the standard conditions of supervised release that will be outlined on your judgment.

While you're in prison I'm going to recommend that the Bureau of Prisons make available to you drug treatment. I don't think you qualify for the RDAP. Mental health treatment. And I will recommend a cite -- facility designated for -- that the State's facility be designated for service of your federal time. And that you be assigned to a facility as close as possible to Nashville because that's where your family resides.

I will not impose a fine because I determine you're financially unable to pay a fine. I do impose the mandatory special assessment of $100 per count, for a total of 300. The restitution is deemed set at $6,000. And there's no issue of forfeiture.

Do the parties have any objections to the sentence that haven't previously been stated? From the government?

MR. WEHBY: Your Honor, for the record the government would object to the -- on substantive reasonableness grounds to the sentencing position.

THE COURT: All right.

MR. EVANS: No objection.

THE COURT: All right. So the sentence is hereby ordered imposed.

Mr. Duncan, subject to your plea agreement, you

have the right to appeal. Generally that's 14 days from when the judgment will enter. And I'll get the judgment entered today. If you can't afford to pay for an appeal, you can appeal as a pauper. If you tell your lawyer to appeal, he'll do so. If you tell the Clerk of Court to do so, the Clerk will do so. And I've just handed to your lawyer a blank form notice that you can use however you wish, but I urge you to talk to a lawyer.

Do you have any questions about your appeal rights?

THE DEFENDANT: No, sir.

THE COURT: Anything else, Mr. Evans?

MR. EVANS: No, Your Honor.

THE COURT: Anything else from the government?

MR. WEHBY: No, sir. Thank you.

THE COURT: All right. Thank you.

(Court adjourned.)

REPORTER'S CERTIFICATE

I, Lise S. Matthews, Official Court Reporter for the United States District Court for the Middle District of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on January 3, 2019, in the matter of UNITED STATES OF AMERICA v. MONTREZ DUNCAN, Case No. 3:14-cr-00076-1; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (pages 1 through 96) is a true and accurate record of said proceedings.

This the 6th day of July, 2020.

/s/ Lise S. Matthews
LISE S. MATTHEWS, RMR, CRR, CRC
Official Court Reporter

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FOR THE SIXTH CIRCUIT

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Clerk

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Filed: July 22, 2022

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Re: Case No. 22-5370, *USA v. Montrez Duncan*
Originating Case No. : 3:14-cr-00076-1

Dear Counsel,

This confirms your appointment to represent the defendant in the above appeal under the Criminal Justice Act, 18 U.S.C. § 3006A.

You must file your appearance form and order transcript within 14 days of this letter. The appearance form and instructions for the transcript order process can be found on this court's website. Please note that transcript ordering in CJA-eligible cases is a two-part process, requiring that you complete both the financing of the transcript (following the district court's procedures) and ordering the transcript (following the court of appeals' docketing procedures). Additional information regarding the special requirements of financing and ordering transcripts in CJA cases can be found on this court's website at http://www.ca6.uscourts.gov/criminal-justice-act under "Guidelines for Transcripts in CJA Cases."

Following this letter, you will receive a notice of your appointment in the eVoucher system. That will enable you to log into the eVoucher system and track your time and expenses in that system. To receive payment for your services at the close of the case you will submit your voucher electronically via eVoucher. Instructions for using eVoucher can be found on this court's website. Your voucher must be submitted electronically no later than 45 days after the final disposition of the appeal. *No further notice will be provided that a voucher is due*. Questions regarding your voucher may be directed to the Clerk's Office at 513-564-7078.

Finally, if you become aware that your client has financial resources not previously disclosed or is no longer eligible for appointed counsel under the Criminal Justice Act, please contact the Clerk or Chief Deputy for guidance.

Sincerely yours,

s/Ken Loomis
Administrative Deputy
Direct Dial No. 513-564-7067

cc: Mr. Montrez Duncan
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Ms. Virginia Lee Padgett
Mr. Philip H. Wehby