

NO.
SUPREME COURT OF THE UNITED STATES

DECARDO MOORE)
)
Petitioner)
)
- VS. -)
)
UNITED STATES OF AMERICA)
)
Respondent.)

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

/s Michael Losavio
Michael M. Losavio
1642 Jaeger Avenue
Louisville, Kentucky 40205
losavio@losavio.win.net
(502) 417-4970
Counsel for Petitioner
Decardo Moore

QUESTION PRESENTED FOR REVIEW

Question I- Was there adequate consideration at sentencing of Moore's mental illness such as to make his sentence procedurally and substantively erroneous and greater than necessary?

Question II- Was Mr. Moore's sentence procedurally and substantively unreasonable due to an erroneous fact finding that Moore intended to shoot Mr. Versi, and penalizing him with a life sentence for it, while Moore said it was an accident? Should the District Court have considered a lesser sentencing for second degree murder where it did not do so.

Question III- Was the plea of guilty insufficient as venue was not sufficiently established as to show that Moore committed any crimes in the Western District of Tennessee where only the Indictment states each count occurred in the Western District of Tennessee, PageID 5, but that was not admitted nor established in the plea Colloquy?

Question IV – Shouldn't the sentences given Moore have been run concurrently rather than consecutively such that it was procedurally unreasonable to run them all consecutively.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT
WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Decardo Moore, Appellant, Petitioner

United States of America, Appellee, Respondent

,

TABLE OF CONTENTS

Questions Presented For Review	2
Opinion Below	7
Grounds of Jurisdiction.....	7
Constitutional Provisions and Other Authorities Involved in This Case.....	7
Statement of the Case.....	8
Reasons For Granting the Writ	10
 Question I- Was there adequate consideration at sentencing of Moore’s mental illness such as to make his sentence procedurally and substantively erroneous and greater than necessary?	
 Question II- Was Mr. Moore’s sentence procedurally and substantively unreasonable due to an erroneous fact finding that Moore intended to shoot Mr. Versi, and penalizing him with a life sentence for it, while Moore said it was an accident? Should the District Court have considered a lesser sentencing for second degree murder where it did not do so.	
 Question III- Was the plea of guilty insufficient as venue was not sufficiently established as to show that Moore committed any crimes in the Western District of Tennessee where only the Indictment states each count occurred in the Western District of Tennessee, PageID 5, but that was not admitted nor established in the plea Colloquy?	
 Question IV – Shouldn’t the sentences given Moore have been run concurrently rather than consecutively such that it was procedurally unreasonable to run them all consecutively.	
Conclusion	23
Certification of Word and Page Length	24
Certificate of Service.....	24
Appendix.....	26
Opinion Affirming of the United States Court of Appeals for the Sixth Circuit.....	A 1-7
<i>United States v. Decardo Moore</i> , Case # 22-5389 (File No 23a0476n.06.)	
Judgment of the U.S. District Court for the Eastern District of Tennessee.....	B 1-7
<i>United States v. Decardo Moore</i> , Case # 2:19-CR-20013-001-JTF	

TABLE OF AUTHORITIES

Cases

<i>Brady v. United States</i> , 397 U.S. 742, 748 (1970).....	20
<i>Boykin v. Alabama</i> , 395 U.S. 238, 242–44 (1969)	20
<i>Gall v. United States</i> , 128 S. Ct. 586, 598 (2007).....	15
<i>Rita v. United States</i> 127 S.Ct. 2456, 2465 (2007).....	14
<i>United States v Pineda</i> , File Name: 18a0570n.06, https://www.opn.ca6.uscourts.gov/opinions.pdf/18a0570n-06.pdf, accessed 15-5-2020 (unpublished)	13
<i>United States v. Cannon</i> , File Name: 17a0279n.06, CA6 2017 (unpublished)	23
<i>United States v. Manns</i> , 17a0301n.06, https://www.opn.ca6.uscourts.gov/opinions.pdf/17a0301n-06.pdf (accessed 12-5-2020) (unpublished).....	12
<i>United States v. Nikolovski</i> , File Name: 14a0344n.06 CA6 2014 (unpublished)	23
<i>United States v. Petlechkov</i> , File Name: 19a0082p.06, CA 6 2019.....	20
<i>United States v. Potts</i> , File Name: 20a0009p.06 CA6 2020	23
<i>United States v. Roser</i> , File Name: 13a0587n.06, https://www.opn.ca6.uscourts.gov/opinions.pdf/13a0587n-06.pdf, (accessed 12-5-2020) (unpublished):	13
<i>United States v. Smith</i> , File Name: 14a0317n.06, https://www.opn.ca6.uscourts.gov/opinions.pdf/14a0317n-06.pdf (accessed 12/5/2020) (unpublished)	13

Statutes

18 U.S.C. §3231	8
18 U.S.C. §3553.....	12, 15
28 U.S.C. §1291.....	8
28 U.S.C. §1294.....	8

Other Authorities

Application Note B to USSG §2B3.1	18
U.S.S.G. §5H1.3	12, 15
U.S.S.G. §5H1.3. Mental and Emotional Conditions (Policy Statement)	15
USSG §2B3.1,.....	18
USSG §2A1.1 (First Degree Murder).....	18
USSG 2A1.2	18

Rules

Federal Rule of Criminal Procedure 18,	20
--	----

Treatises

Georgia L. Sims, The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System, 62 Vanderbilt Law Review 1053 (2019) Available at: https://scholarship.law.vanderbilt.edu/vlr/vol62/iss3/6	14
Nagin, Daniel S., "Deterrence in the Twenty-First Century," in Crime and Justice in America:	

1975-2025, ed. M. Tonry, Chicago, Ill.: University of Chicago Press, 2013: 199-264.....	13
The Federal Farmer, in 2 The Complete Anti-Federalist 230 (Herbert J. Storing ed. 1981).....	20

Constitutional Provisions

U.S. Const. art. 3, § 2, cl. 3	21
Amendment. VI.....	21

OPINIONS AND ORDERS BELOW

The opinion below of the United States Court of Appeals for the Sixth Circuit was rendered in *United States v. Decardo Moore*, Case No. 22-5389 as File No 23a0476n.06. That opinion affirmed the judgment of the United States District Court for the Western District of Tennessee in *United States v. Decardo Moore*, case number 2:19-CR-20013-001-JTF where the original sentence committed Moore to the custody of the Bureau of Prisons to a total term of Life Imprisonment.

JURISDICTION

- i. The opinion of the United States Court of Appeals for the Sixth Circuit was entered on 14 November 2023; pursuant to Rule 13.1 of the rules of this Court, the Petition is timely filed.
- ii. A petition for a rehearing en banc was not filed in this matter; no extension of time within which to file a petition for a writ of certiorari has been made.
- iii. This is not a cross-Petition pursuant to Rule 12.5.
- iv. The statutory provision conferring jurisdiction upon this Court to review upon a writ of certiorari the judgment or order in question is 28 U.S.C. §1254.

Constitutional Provisions And Other Authorities Involved In This Case

U.S. Const. art. 3, § 2, cl. 3

U.S. Const. Amend. VI

18 U.S.C 3553

STATEMENT OF THE CASE

Jurisdiction in the First Instance

Subject matter jurisdiction vested in the U.S. District Court for the Western District of Tennessee pursuant to 18 U.S.C. §3231; Moore was indicted for offenses against the laws of the United States and was convicted upon a plea of guilty within that district; he was sentenced to an aggregate term of imprisonment of Life Imprisonment.

Appellate jurisdiction vested in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1291 and 28 U.S.C. §1294.

Presentation of Issues in the Courts Below and Facts

The Presentence Investigation Report succinctly lays out the facts of this case, beginning with the charges and their resolution:

Charge(s) and Conviction(s)

...

Count 1: Charges Robbery Affecting Interstate Commerce, on or about March 28, 2019, in violation of 18 U.S.C. § 1951.

Counts 3, 5, 7: Charge Aiding and Abetting-Robbery Affecting Interstate Commerce, on or about June 28, 2019, in violation of 18 U.S.C. § 1951 and 18 U.S.C. § 2.

Count 2: Charges Using, Carrying, Brandishing, and Discharging a Firearm During and in Relation to a Crime of Violence, on or about March 28, 2019, in violation of 18 U.S.C. § 924(c)(1)(A)(iii).

Counts 4, 6, 8: Charge Aiding and Abetting-Using, Carrying, and Brandishing a Firearm During and in Relation to a Crime of Violence, on or about June 28, 2019, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and 18 U.S.C. § 2.

2. On October 25, 2021, the defendant pled guilty to counts 1-8 of the indictment.

During the plea colloquy Moore acknowledged the government's proffer of facts as to the offense and entered a plea of guilty to all of the charges.

At sentencing the District Court reviewed the facts, including Moore's statement that he did not intend to shoot Mr. Versi, found that statement to not be credible, and sentenced Moore, *inter alia*, to life imprisonment.

On appeal to the United States Court of Appeal for the Sixth Circuit affirmed Moore's judgment, finding his sentence was not procedurally unreasonable, the sentencing court adequately explained the sentence as to Moore's mental and emotional diagnoses, albeit noting the sentencing court could have been more detailed in explaining its actions and reasoning.

Further, it did not find plain error due to running sentences consecutively rather than concurrently without adequate explanation, as his substantial rights were not impacted given his life sentence on Count 2.

The Court of Appeals found Moore's sentence was not substantively unreasonable, even though it was a life sentence. It held the sentencing court did not abuse its discretion in weighing all the factors, including Moore's mental health issues and cooperation, to arrive at a life sentence. It also found Moore's venue challenge waived by his guilty plea.

This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

Question I- Was there adequate consideration at sentencing of Moore's mental illness such as to make his sentence procedurally and substantively erroneous and greater than necessary?

Though there was extensive discussion of Mr. Moore's mental illness, this was not adequately taken into account as to give him a sentence that was sufficient but no more than necessary in this case. A sentence of years, not a sentence of life imprisonment, was appropriate here for Moore.

The issues of Moore's competency were raised and Moore was referred to a psychologist Megan Avery, PhD, for evaluation and report. (See App Record Exhibit 2, Report of Megan Avery, PhD, hereinafter "Report." That psychologist's Report noted

...The examinee reported being shot at the age of 14 in the leg and the age of 19 in the chest / lungs. He also reported hypertension. He reported currently taking unknown doses of Buspar (anxiety medication) and an unknown blood pressure medication. He said the jail prescribed him medication because he hears voices. He denied knowing about his family medical history. (Report, p 2)...

West Tennessee Detention Facility medical records from 2020 and 2021 ...indicate issues of anxiety, depression, mood disorder, mood disorder with psychosis, treatment refusal, hypertension, pain, impaired vision, and back strain. The examinee reported to providers that he was previously treated at Alliance Healthcare Services for mental illness. Mr. Moore has reported recent issues with anxiety, depression, hearing voices, panic attacks, a history of suicide attempts as a juvenile, mood swings, irritability, trouble sleeping, "bloody" dreams, flashbacks, and racing thoughts. Since 2020, he has been treated with Zyprexa (antipsychotic), Geodon (antipsychotic), Benadryl, and Buspar (anxiety medication). Several notes indicate that Mr. Moore has been treatment noncompliant, refusing his psychiatric medication and refusing a mental health visit. Most recent prescriptions included amlodipine (blood pressure medication) and Buspar. (Report, at p 3) ...

In her diagnosis the psychologist said:

Mr. Moore meets criteria for Antisocial Personality Disorder. Antisocial Personality Disorder is characterized by meeting 3 or more of the following criteria since age 15: 1) failure to conform to social norms with respect to lawful behaviors, 2) deceitfulness, 3) impulsivity, 4) irritability and aggressiveness, 5) reckless disregard for safety of self or

others, 6) consistent irresponsibility, 7) lack of remorse. Criteria also include evidence of Conduct Disorder before age 15. He may have met criteria for Conduct Disorder as a child, as evidenced by childhood aggression towards others, fights, and truancy. There were no data available to confirm or deny any childhood misconduct. He has failed to conform to social norms as an adult as evidenced by unlawful behavior, he exhibited deceitfulness in the evaluation, he endorsed impulsivity and irritability, there is a history of aggression and reckless behavior, he has demonstrated irresponsible behavior, and he did not show any remorse for his actions that have harmed others.

Malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as evading criminal prosecution. Malingering should be considered if any combination of the following is noted: 1) medicolegal context of presentation (e.g., the individual is referred by an attorney to the clinician for examination, or the individual self-refers while litigation or criminal charges are pending); 2) marked discrepancy between the individual's claimed stress or disability and the objective findings and observations; 3) lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen; and 4) the presence of Antisocial Personality Disorder. Mr. Moore is being evaluated in context of litigation, and he meets criteria for Antisocial Personality Disorder. Mr. Moore endorsed depressive symptoms, mood symptoms, posttraumatic stress symptoms, and psychotic symptoms (hallucinations). There were inconsistencies in his report compared to his observed behavior. He did not exhibit any observable symptoms that he endorsed or reported. His presentation and mental status were inconsistent with that of a person who is genuinely, severely mentally ill. He appeared to exaggerate and fabricate symptoms, reporting and endorsing absurd and rare symptoms that are not typically seen in individuals who are genuinely mentally ill. His symptom report and timelines were also very vague, which is sometimes seen in those who malingering. He refused to complete testing which could have further provided information about his presentation style. Uncooperativeness is often seen in those who malingering. There were no records of mental health treatment prior to his detainment that could be located.

Mr. Moore did appear to be malingering some of his symptoms, and as such, it cannot be fully determined if he does indeed suffer from some genuine mental health symptoms, such as depression or traumatic stress. If Mr. Moore chooses to be forthcoming, further assessment may be indicated.

The District Court noted this issue:

The Court: ...earlier mental and emotional health diagnoses. What was referenced in the record is bipolar disorder, mood swings, post traumatic stress, anxiety, depression, attention deficit hyperactivity disorder and the like. We all undertook appropriate, or -- or demonstrated appropriate concern about that and referred the defendant to Dr. Megan Avery earlier in these proceedings, and she evaluated him and found that he

was competent for the court to proceed. I have her report here.

And her report was dated August 6th of 2021, and her diagnosis of antisocial personality disorder and malingering. But having reviewed that, I would also request that the Bureau of Prisons consider appropriate mental health assessment and/or treatment, as deemed necessary. I said appropriate mental health assessment and/or treatment. What I want to say is mental health counseling and treatment, as appropriate, and that he be afforded the opportunity to participate in vocational training or get his GED.

Given the detailed discussion in the record of Moore's mental illness, the District Court should have fully considered the impact of this on the 18 USC §3553 factors, his responsibility, its deterrent impact and his rehabilitative potential and given him the lesser sentence as requested by his counsel.

In the alternative, the District Court should have explained on the record why his mental illness did not impact and mitigate its sentencing of Moore, rather than simply leading to a recommendation for mental health treatment. A lesser sentence would have been a substantively reasonable sentence, which the sentence Moore received was not.

Both the factors listed in 18 USC §3553 and the sentencing guidelines provision of U.S.S.G. §5H1.3. Mental and Emotional Conditions indicate that consideration of a lesser sentence in order to permit the reintegration of the defendant into the community and access community mental health resources should be given by the sentencing court.¹

¹ Mental illness issues are factors in prosecutions, sentencings, and challenges as to procedural and substantive reasonableness. See, e.g., *United States v. Manns*, 17a0301n.06, <https://www.opn.ca6.uscourts.gov/opinions.pdf/17a0301n-06.pdf> (accessed 12-5-2020) (unpublished) (The district court further reduced his total offense level by four points, pursuant to USSG §§ 5H1.3 and 5H1.4, due to Manns's mental and physical conditions.) ; *United States v. Smith*, File Name: 14a0317n.06, <https://www.opn.ca6.uscourts.gov/opinions.pdf/14a0317n->

It is incorrect to assume that punishment and deterrence factors of 18 USC 3553 are no different for those with mental illness than those with full rational capabilities. This reflects the lack of proper study of this relationship and clarity as to what, precisely, sentencing is meant to accomplish for those with mental illness.²

The record does not show that that was done in this case such that this Court can exercise its appellate oversight fully; this matter should be remanded for a resentencing to a lesser sentence for Mr. Moore.

Deterrence, whether specific or general, resting on a premise of rational choice, may not improve public safety where the mentally ill are involved.³

The District Court failed to consider the diminished role of specific deterrence in cases of mental illness and the important factor of rehabilitation and the role of mental illness in

06.pdf (accessed 12/5/2020) (unpublished) (While the district court could have addressed Smith's physical and mental conditions more extensively, we conclude that the district court was aware of them, was cognizant of their role in a § 3553(a) analysis, and incorporated them into the sentencing decision.); *United States v Pineda*, File Name: 18a0570n.06, <https://www.opn.ca6.uscourts.gov/opinions.pdf/18a0570n-06.pdf>, accessed 15-5-2020 (unpublished) (...The district court agreed that Pineda needed treatment and recommended that she participate in a dual diagnosis substance-abuse and mental-health treatment program. The district court stated: "In varying downward I am hopeful that [the psychologist] is correct, that with appropriate treatment the defendant can avoid re-offending. So I'm cautious but I'm cautiously optimistic that the defendant will avoid the problems going forward and to be able to reform her conduct and reunite with her children." We cannot say that the district court placed unreasonably little weight on Pineda's psychological issues and treatment potential); *United States v. Roser*, File Name: 13a0587n.06, <https://www.opn.ca6.uscourts.gov/opinions.pdf/13a0587n-06.pdf>, (accessed 12-5-2020) (unpublished):

² Mirko Baric, A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational- The Sentencing of Offenders with Mental Disorders, Harvard Human Rights Journal, <https://harvardhrj.com/wp-content/uploads/sites/14/2016/09/Bararic-Sentencing-Offenders-with-Mental-Disorders.pdf> (accessed 12-5-2020), detailing

³ See Nagin, Daniel S., "Deterrence in the Twenty-First Century," in *Crime and Justice in America: 1975-2025*, ed. M. Tonry, Chicago, Ill.: University of Chicago Press, 2013: 199-264 ("The evidence in support of the deterrent effect of the certainty of punishment is far more consistent than that for the severity of punishment....")

offending, sentencing and the application of the factors of 3553 and the Sentencing Guidelines. Mental illness is a compelling case for consideration in the sentencing calculus so as not to perpetuate the criminalization of mental illness and offer real rehabilitation of the offender.⁴

The District Court sentenced Moore to life imprisonment . In doing so, the District Court was substantively unreasonable when it did not fully consider this as. See *Rita v. United States* 127 S.Ct. 2456, 2465 (2007).

This Court reviews under a reasonableness standard the district court's consideration of the factors listed in §3553 (a). §3553(a) sets out 12 detailed factors in 7 separate sections to be considered by a court in imposing a sentence of which only two involve consideration of guidelines provisions and guideline policy statements as issued by the Sentencing Commission. 18 U.S.C. §3553(a) (2) instructs the district court that its duty in sentencing is to impose ... “a sentence which is sufficient in the case at hand”, “without being greater than necessary” to achieve four articulated objectives. These congressionally defined purposes are: (A) “just punishment” in light of the “seriousness of the offense” ; (B) “deterrence” both the general (deterrence of others) and specific (of the defendant); (C) incapacitation “ to protect the public” and (D) any “needed” rehabilitation and correctional treatment” of the offender.

As established by the introductory language to §3553 quoted above, Congress has embedded in the federal sentencing legislation the over-riding moral command to impose on any

4 Georgia L. Sims, The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System, 62 Vanderbilt Law Review 1053 (2019) Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol62/iss3/6> “This Note argues that the policies and practices of the U.S. criminal justice system fail to achieve any articulated purpose of punishment when they provide inadequate mental health resources to incarcerated persons suffering from mental disorders. This Note ultimately demonstrates that, despite some drawbacks, emphasizing a rehabilitative approach that uses insights from the juvenile justice system is the best way to serve all people with mental disorders in the adult criminal justice system.”

convicted person the least suffering that is demanded by the general welfare.

This reflects that each person is an individual who must be so adjudged as an individual in her or her sentencing:

“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.

Gall v. United States, 128 S. Ct. 586, 598 (2007), *quoting Koon v. United States*, 518 U.S. 81, 113 (1996).

18 U.S.C. §3553 requires consideration of his particular circumstances, which includes his mental condition.

This goes to the core issue of Mr. Moore’ mental health challenges and his ability to conform his life in spite of them, something which the District Court should have considered in his sentencing as to reduce his sentence.

The Competency to Stand Trial Evaluation reflects this, even though concluding that Moore’ was competent to stand trial in this matter it noted his mental health issues.

(Psychological Evaluation, Supplemental Record on Appeal)

The situation here with Moore is that his sentence was greater than necessary. Such would constitute procedural or substantive unreasonableness in his sentencing such that remand is required.

The United States Sentencing Guidelines recognize the mitigating factor of mental illness. U.S.S.G. §5H1.3. Mental and Emotional Conditions (Policy Statement) U.S.S.G. §5H1.3. affirms that mental and emotional conditions may be relevant for reducing a sentence, including where treatment such as participation in a mental health program aids in the accomplishment of the sentencing purposes of 18 U.S.C. §3553; that guideline states:

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. See also Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1, Application Note 6. Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see §§5B1.3(d)(5) and 5D1.3(d)(5)).

The District Court was fully apprised of Moore' mental illness through both its review and ruling on the motion for mental examinations and determination that Moore' was competent to stand trial. And the District Court acknowledged concern for the need for treatment by Moore, recommending to the Bureau of Prisons that Moore receive mental health treatment.

Yet this did not manifest in a reasonable but no more than necessary sentence for Moore, setting him on a therapeutic track and his ultimate return to society.

There is no indication in the record that the District Court considered a lower sentence for Moore due to his mental health issues. That was error and given the extensive discussion of Moore' mental health issues it was plain such as to have had a prejudicial impact on his sentence. Given the unique circumstances Moore' life and mental health factors, the prejudice of his increased sentence, and the importance of a just appreciation of the role of mental illness and its social impact, this Court should exercise its discretion to review this and grant Mr. Moore relief.

The sentence received by Moore did not reflect these necessary concerns and was procedurally and substantively unreasonable, it was an abuse of discretion to not so incorporate fully this consideration and give him a lesser sentence was to achieve the purposes of 18 USC § 3553. This error is plain, a clear violation of the Guidelines, prejudicial to Moore as it increases

his sentence without consideration of mitigation, and one is this Court should exercise its discretion to remedy to assure a just sentence. His sentence should be vacated in the matter and his case remanded for a reduced sentence for Mr. Moore.

Question II-Was Mr. Moore's sentence procedurally and substantively unreasonable due to an erroneous fact finding that Moore intended to shoot Mr. Versi, and penalizing him with a life sentence for it, while Moore said it was an accident? Should the District Court have considered a lesser sentencing for second degree murder where it did not do so.

The United States Sentencing Guidelines USSG §2B3.1, pursuant to the cross reference at §2B3.1(c)(1), directs that the guidelines sentencing level is established via USSG §2A1.1 (First Degree Murder) for Mr. Moore's offense. That base offense level is 43. And it was on that offense level foundation that Moore was sentenced to life imprisonment.

But the guidelines note that if the offense is second degree murder the Base Offense Level would only be a 38. USSG 2A1.2 (a) And Application Note B to USSG §2B3.1 notes that as to a felony murder that if the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted.

Mr. Moore said he did not intend to shoot and kill Mr. Versi, which would have given him a lower Base Offense Level and an opportunity for a downward departure. But this was not considered and Moore received a harsher sentence that warranted. This was procedurally unreasonable and his sentence vacated and this matter remanded for resentencing.

The Presentence Report noted that Moore said he did not intend to shoot the clerk at the Exxon station (Presentence Report, PageID 503, 504):

15. On July 17, 2019, investigators interviewed **Moore** regarding a robbery and murder that occurred at the Exxon located at 4509 Stage Road on March 28, 2019. **Moore** admitted to attempting to rob the store and to firing a shot to scare the clerk, but he stated that he did not intend to hit him (emphasis added)

The District Court addressed this issue and found the statements by Moore to not be credible without any countervailing evidence, and then sentenced Moore to the higher offense level and life imprisonment. This was clearly erroneous, plain on the record and prejudiced Moore, giving him a much greater sentence of imprisonment than he was due. Moore had cooperated throughout the investigation of this case, particularly as to his conduct, and he was consistent in his statements. In no other store robbery was there any effort to injure a clerk or other person.

Moore was indeed credible and he did not intent to hurt anyone. Moore accepted responsibility and pled guilty to the allegations against him in the Indictment. Although a terrible outcome in Mr. Versa's death resulted, Moore did not intend it and he should have been properly sentenced to a lower base offense level per USSG 2A1.2 (a) and he should have been permitted a downward departure per Application Note B to USSG §2B3.1 The district court never explained its dismissal of Mr. Moore's statements.

It was procedurally unreasonable to sentence Moore under an incorrect Guideline calculation and to not consider him as a candidate for downward departure. This Court is respectfully asked to grant Moore relief from this error.

Question III- Was the plea of guilty insufficient as venue where it did not sufficiently establish that Moore committed any crimes in the Western District of Tennessee where only the Indictment states each count occurred in the Western District of Tennessee but that was not admitted nor established in the plea Colloquy?

The element of venue for criminal prosecutions was “a matter of concern to the Nation’s founders.” *United States v. Cabrales*, 524 U.S. 1, 6 (1998). Proper venue for a prosecution was “vital to the security of the citizen,” to prevent government abuse and the hardship of being made to stand trial in a remote location. 3 Joseph Story, Commentaries on the Constitution § 1775 (1833)

The United States Constitution requires that criminal defendants be tried in the place where they committed their alleged crimes. U.S. Const. art. 3, § 2, cl. 3; id. amend. VI. See also Federal Rule of Criminal Procedure 18, requiring prosecution of the offense in the district where it was committed.

Fed. R. Crim Proc.12 mandates that a motion challenging venue be made before trial if improper venue is evident on the record.

That is inapplicable as the failure of venue was not evident until after the guilty plea was entered and that omission locked into the process.⁵

Proper venue in a criminal case is an “essential part[] of a free and good government.” The Federal Farmer, in 2 The Complete Anti-Federalist 230 (Herbert J. Storing ed. 1981) In *United States v Petlechkov* the Sixth Circuit Court of Appeals noted that “No evidence cannot be a preponderance of the evidence.” *United States v. Petlechkov*, File Name: 19a0082p.06, CA 6 2019, p 8, accessed 11/26/2023(Thapar, J, reversing in part)

⁵ A guilty plea is valid if it is entered knowingly, voluntarily, and intelligently. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969)

Here the plea colloquy as to Moore did not establish that proper venue for his prosecution was in the Western District of Tennessee. This failure only appeared after the plea was entered.

During the proffer at the Change of Plea Hearing it was stated that as to the businesses robbed:

All the businesses were engaged in interstate commerce, and all the businesses conducted their business in the Western District of Tennessee.

But it was never said nor proffered that the robberies occurred in the Western District of Tennessee. All Mr. Moore said was that he was guilty:

THE COURT: All right. Considering everything here today how do you now plead to the charges in the indictment filed January 30, 2020, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Is it your decision to plead guilty made voluntarily by you because you are in fact guilty?

THE DEFENDANT: Yes, sir.

(R 222, Transcript of Plea, The Court, Moore, PageID 838)

That “all the businesses conducted their business in the Western District of Tennessee.” does not establish that the alleged crimes were committed in the Western District of Tennessee.

As such venue was not pled to nor admitted by Moore. No evidence cannot be a preponderance of the evidence and venue was not established as required by the Constitution. His plea was insufficient, the error plain and prejudicial as there is no foundation for a conviction, one this Court should exercise its discretion to remedy in supporting the justice of the case, and his judgment and conviction must be reversed and vacated and this matter remanded for further proceedings in this matter.

Question IV – Shouldn't the sentences given Moore have been run concurrently rather than consecutively such that it was procedurally unreasonable to run them all consecutively.

The Guidelines state that, “[i]f the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.” U.S.S.G. § 5G1.2(c)

As to related state sentences, U.S.S.G. §5G1.3 *Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment* provides that the federal sentence run concurrent with the state sentence in certain circumstances.⁶

The Final Judgment for violating Counts 1, 2, 3, 4, 5, 6, 7 and 8 the Indictment and committed Moore to the custody of the U.S. Bureau of Prisons for a total term of:

LIFE - count 2 (consecutive to all counts & Shelby County Tennessee Criminal Court Docket Nos. 17-03410, 20-00199);

⁶ U.S.S.G. §5G1.3 ...(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows: (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

240 Months - counts 1,3,5,7 (concurrent with Shelby County Tennessee Criminal Court Docket No. 20-00199, but consecutively to each other, all other Counts (Cts. 2, 4, 6, 8), Shelby County Tennessee Criminal Docket No. 17-03410);

84 Months - count 4,6,8 (consecutive to each other, all other counts (Cts. 1, 2, 3, 5, 7), & Shelby County Tennessee Criminal Court Docket Nos. 17-03410, 20-00199). (R. 178, Judgment, PageID 599-606)

The Sixth Circuit in *United States v. Potts*, File Name: 20a0009p.06 CA6 2020 noted the need for some evidence that it was generally clear of the rationale that the trial court properly considered the factors permitting consecutive sentencing over concurrent sentencing. In *United States v. Cannon*, File Name: 17a0279n.06, CA6 2017 (unpublished) the Sixth Circuit remanded for reconsideration of grounds to give consecutive or concurrent sentences by the trial court. Similarly it remanded *United States v. Nikolovski*, File Name: 14a0344n.06 CA6 2014 (unpublished) for reconsideration and elucidation by the trial court of giving concurrent or consecutive sentences.

Given that the life sentence given Mr. Moore was adequate to achieve the total punishment, then his sentences should all run concurrently with the federal life sentence, and the federal life sentence should run concurrently with all of those sentences, and this matter should be remanded to the trial court for correction of his sentences. To the extent the record does not detail the relevant facts or the rationale necessary to judge the application of U.S.S.G. §5G1.2 and §5G1.3, this matter must be remanded to the trial court for further fact finding. As these guidelines are advisory, this matter may be remanded to the trial court to give reasons it may choose to reject the Guidelines and give a greater sentence than the Guidelines advise. This error is plain, a clear violation of the Guidelines, prejudicial to Moore as it increases his sentence beyond any possible post-conviction relief as to his life sentence, and one this Court should exercise its discretion to remedy in the case of such later amendment.

CONCLUSION

The judgment and sentence were erroneous and this Petition for Writ of Certiorari should be granted and Mr. Moore given the relief he has argued for herein.

Respectfully submitted,

/s Michael Losavio
Michael M. Losavio
1642 Jaeger Avenue
Louisville, Kentucky 40205
(502) 417-4970
Counsel of Record for
Petitioner Decardo Moore

Certification of Word Count and Petition Length

The undersigned certifies that this Petition for a Writ of Certiorari does not exceed 6000 words nor 25 pages, not counting the appendix materials, and is in compliance with the length rules of Supreme Court Rule 33.

/s Michael Losavio

Michael Losavio
1642 Jaeger Avenue
Louisville, Kentucky 40205
losavio@losavio.win.net
(502) 417-4970
Counsel of Record for Petitioner
pursuant to the Criminal Justice Act

Certificate of Service

A copy of the foregoing Petition for a Writ of Certiorari has been served this day by U.S. Postal Mail or via a private expedited service on Hon. Elizabeth B. Prelogar, Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D. C. 20530-0001

This 30th day of November 2023

/s Michael Losavio

Michael Losavio
1642 Jaeger Avenue
Louisville, Kentucky 40205
losavio@losavio.win.net
(502) 417-4970
Counsel of Record for Petitioner
pursuant to the Criminal Justice Act

Appendix.....	26
Opinion Affirming of the United States Court of Appeals for the Sixth Circuit.....	A 1-7
<i>United States v. Decardo Moore</i> , Case # 22-5389	
Judgment of the U.S. District Court for the Western District of Tennessee.....	B 1-7
<i>United States v. Decardo Moore</i> , Case # 2:19-CR-20013-001-JTF	

Statutes Involved in this Petition

U.S. Const. art. 3, § 2, cl. 3

U.S. Const. Amend. VI

18 U.S.C. 3553

I.

BACKGROUND

A. Factual Background

Moore's sentence of life imprisonment stems from his participation in four armed robberies. The first robbery took place on March 28, 2019 at an Exxon gas station located in

Memphis, Tennessee. Moore robbed the Exxon station at gunpoint. At that time, Kamir Versi was behind the cash register. After Versi handed Moore money, Moore fired his gun and then fled the gas station. The bullet from Moore's gun hit Versi in the chest, and Versi died at the scene of the incident.

The three remaining robberies took place on June 28, 2019 at three other business establishments located in Memphis, Tennessee: Mapco Express, Murphy Express, and a second Exxon location. Moore's role in these robberies varied. At Mapco Express, Moore and one other individual, both armed, robbed the business at gunpoint. At Murphy Express and the second Exxon station, two other individuals robbed the businesses at gunpoint, while Moore acted as a getaway driver.

In connection with the four robberies, a grand jury returned an eight-count indictment against Moore. Count 1 charged Moore with robbery affecting interstate commerce, in violation of 18 U.S.C. § 1951. Counts 3, 5, and 7 charged Moore with aiding and abetting robbery affecting interstate commerce, in violation of 18 U.S.C. § 1951 and 18 U.S.C. § 2. Count 2 charged Moore with using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). Lastly, Counts 4, 6, and 8 charged Moore with aiding and abetting the using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2.

Moore pleaded guilty to all counts.

B. Moore's Sentencing

Prior to sentencing, the presentence report (PSR) determined that Moore's Guidelines range was life imprisonment, based on a total offense level of 43 and a criminal history category of VI. The total offense level was based on a cross-reference to first-degree murder, USSG § 2A1.1, which was referenced in the guideline applicable to Moore's robbery charge (Count 1).

Although Moore's Guidelines range was life, some of Moore's counts (Counts 1, 3, 5, and 7) carried statutory maxima. Thus, the PSR recommended a sentence of 1,332 months' imprisonment, followed by three years of supervised release.

The district court sentenced Moore to a total sentence of life imprisonment, specifically sentencing Moore to life on Count 2. At sentencing, the district court asked the probation officer who had prepared the PSR whether a 1,332 month sentence (111 years) differed in practice from life imprisonment. The probation officer responded that life imprisonment was a Guidelines sentence and that, even with good conduct time, Moore would have to serve at least 94 years of a term-of-years sentence. After this exchange, the district court sentenced Moore to consecutive sentences of life imprisonment on Count 2; 240 months per count on Counts 1, 3, 5, and 7; and 84 months per count on Counts 4, 6, and 8. The district court also ran most of these sentences consecutively to pending state criminal charges.

II. DISCUSSION

On appeal, Moore argues that his sentence is procedurally and substantively unreasonable. He also argues that the government failed to prove that venue lay in the Western District of Tennessee, rendering his guilty plea invalid.

A. Moore's Sentence

i. Procedural Reasonableness

This Court reviews a defendant's sentence for substantive and procedural reasonableness. *United States v. Gates*, 48 F.4th 463, 468–69 (6th Cir. 2022). A challenge to the procedural reasonableness of a sentence is reviewed for plain error if the “sentencing judge asks” for objections and “the relevant party does not object.” *United States v. Vonner*, 516 F.3d 382, 385 (6th Cir. 2008) (en banc). Because the district court asked Moore for objections, and Moore did

not object to the procedural reasonableness of his sentence, the procedural reasonableness of his sentence is reviewed for plain error. Plain error occurs if the district court committed an “(1) error

(2) that was obvious or clear, (3) that affected [the] defendant's substantial rights[,] and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings.” *United States v. Wallace*, 597 F.3d 794, 802 (6th Cir. 2010).

Moore raises several challenges to the procedural reasonableness of his sentence. He argues that his sentence is procedurally unreasonable because the district court calculated his Guidelines range incorrectly, failed to explain how his mental health bore on sentencing, and failed to explain why it ran his sentences consecutively. We address each argument in turn.

1. Calculation of Guidelines Range

A sentence is procedurally unreasonable when, for instance, the district court calculates the defendant's Guidelines range incorrectly. *Gates*, 48 F.4th at 469. Moore argues that the district court's Guidelines calculation was erroneous because the court applied a cross-reference to first-degree murder that he contends is inapplicable.

Moore's applicable guideline, USSG § 2B3.1, ordinarily establishes a base offense level

of 20 for a robbery conviction. USSG § 2B3.1(a). However, USSG § 2B3.1(c) directs the district court to cross-reference USSG § 2A1.1, which carries a base offense level of 43 “[i]f a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111.” 18 U.S.C.

§ 1111(a) defines murder as “the unlawful killing of a human being with malice aforethought” and specifies that “[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any . . . robbery . . . is murder in the first degree.” Malice aforethought may be inferred when a defendant “grossly deviates from the standard of care” such that “he must have been aware of a

serious risk of death or serious bodily injury.” *United States v. Conatser*, 514 F.3d 508, 523 (6th Cir. 2008) (quoting *United States v. Sheffey*, 57 F.3d 1419, 1430 (6th Cir. 1995)).

In this case, the district court applied the cross-reference to first-degree murder because it determined that Moore intended to shoot or kill Versi. It was not clear error for the district court to discredit Moore’s testimony to the contrary. *See United States v. Wright*, 747 F.3d 399, 413 (6th Cir. 2014) (noting that factual determinations during sentencing are reviewed for clear error). The record in this case does not produce “the definite and firm conviction that a mistake has been committed,” as required for clear error. *United States v. Tocco*, 306 F.3d 279, 284 (6th Cir. 2002) (citation omitted). A surveillance video captured the robbery, and it shows Moore pointing the gun at Versi and shooting at close range before fleeing the store. These facts adequately support a conclusion that Moore was aware of a risk of death or serious bodily injury to Versi. Furthermore, the district court concluded that regardless of intent, Moore’s conduct constituted murder under § 1111 because he caused a death during a robbery and therefore committed felony murder. That conclusion is consistent with our case law. *See United States v. Poindexter*, 44 F.3d 406, 409–10 (6th Cir. 1995) (applying USSG § 2A1.1 to felony murder). In light of this record, the district court did not plainly err by applying the cross-reference to first-degree murder to calculate Moore’s Guidelines range. Furthermore, because the district

court adequately concluded that Moore intended to shoot or kill Versi, we reject Moore’s related argument that the district court should have departed downward because the killing was not knowing or intentional. *See* USSG § 2A1.1 n.2(B).

We briefly discuss another aspect of the district court’s Guidelines calculation. The record suggests that prior to sentencing Moore to life imprisonment on Count 2, the probation officer and court treated the first-degree murder cross-reference as applicable to Count 2, whereas it applies

to Count 1. Ultimately, in this case, such an error would not be plain because it does not affect Moore’s substantial rights: Moore’s Guidelines range was life imprisonment, and Count 2 carries a maximum sentence of life. Moreover, the PSR’s recommended sentence of 1,332 months (111 years) would have had the effect of a life sentence for Moore because, even with good conduct time, he would have had to serve approximately 94 years of his term. While such an error would not be plain under these circumstances, we caution sentencing courts to carefully identify the guidelines that apply to each count of a multi-count judgment.

2. Adequacy of Explanation

Moore also argues that the district court inadequately explained how his mental health history bore on his sentence. A sentence is procedurally unreasonable when the district court fails to explain the basis for it. *United States v. Nichols*, 897 F.3d 729, 737 (6th Cir. 2018) (citation omitted). While failure to respond to one of the defendant’s arguments is not necessarily procedurally unreasonable, *see, e.g., United States v. Duane*, 533 F.3d 441, 453 (6th Cir. 2008), a district court is more likely to have erred when it is not evident whether it “even understood [the] Defendant’s argument,” *see Wallace*, 597 F.3d at 806. Ultimately, “the record must ‘make[] clear that the sentencing judge considered the evidence and arguments.’” *Id.* at 805 (alteration in original) (quoting *Vonner*, 516 F.3d at 387).

We conclude that the district court’s consideration of Moore’s mental health satisfies

these requirements. The district court noted that it had “taken into account” Moore’s “mental and emotional diagnoses” and recommended that the Bureau of Prisons offer “mental health counseling and treatment,” including cognitive behavioral therapy. Tr. Sentencing Hr’g, R. 223, Page ID #916–17. While the district court could have explained in more detail how Moore’s mental health bore on his sentence, the record demonstrates that the district court considered

Moore’s mental health and understood it might bear on sentencing, as required by our case law. *See United States v. Allen*, 665 F. App’x 531, 536–37 (6th Cir. 2016) (upholding procedural reasonableness of a sentence where the district court acknowledged defendant’s specific mental health concerns and recommended treatment).

Moore also argues that the district court failed to explain why it ran his sentences consecutively. A district court’s decision to impose a consecutive or concurrent sentence may be “intertwined” with its balancing of the § 3553(a) factors. *United States v. Johnson*, 640 F.3d 195, 208 (6th Cir. 2011). Additionally, when a district court is required to run sentences consecutively, this Court has sometimes relaxed the requirement for explanation. *See United States v. Duncan*, No. 22-5370, 2023 WL 5447338, at *3–4 (6th Cir. Aug. 24, 2023) (holding that sentences were procedurally reasonable where USSG § 5G1.2(d) required consecutive sentencing).

In this case, the district court was required to run the sentences on Counts 2, 4, 6, and 8 consecutively by 18 U.S.C. § 924(c)(1)(D)(ii), which prohibits a “term of imprisonment imposed on a person under this subsection [to] run concurrently with any other term of imprisonment.” The district court was also required by USSG § 5G1.2(d) to stack Moore’s sentences on Counts 1, 3, 5, and 7 separately “to produce a combined sentence equal to the total punishment.” *See United States v. Graham*, 327 F.3d 460, 465 (6th Cir. 2003) (quoting USSG § 5G1.2(d)); *id.* (“[I]n cases in which the sentence on the count with the highest statutory maximum is less than the total punishment, courts must stack the sentences that do not carry

mandatory consecutive sentences ”).

In any case, even if the district court could have run some of Moore’s sentences concurrently, it did not plainly err because Moore’s substantial rights were not affected. *See Wallace*, 597 F.3d at 802. The district court’s decision to specify term-of-years sentences for

certain counts was required because Counts 1, 3, 5, and 7 have statutory maxima; however, running these sentences consecutively ultimately does not alter Moore’s total sentence of life imprisonment, which was based on his life sentence on Count 2.

The authorities Moore cites do not yield a different result. One case, *United States v. Nikolovski*, involved an above-Guidelines sentence. 565 F. App’x 397, 403 (6th Cir. 2014) (per curiam). However, this Circuit has required less explanation for within-Guidelines sentences such as Moore’s sentence. *See United States v. Steeby*, 350 F. App’x 50, 53 (6th Cir. 2009) (citing *Rita v. United States*, 551 U.S. 338, 358–59 (2007)). As to *United States v. Cannon*, that case involved an unusual situation in which the district court both imposed an “above-guideline-range total punishment” for a reduced sentence and indicated that the reduced sentence was within the Guidelines range. 692 F. App’x 228, 233–34 (6th Cir. 2017). Because the district court did not explain this “puzzle,” *id.* at 231, this Circuit reversed, *id.* at 234. Accounting for the fact that Moore’s within-Guidelines sentence differs from these cases, the district court did not plainly err by running Moore’s sentences consecutively.

ii. Substantive Reasonableness

Because Moore’s sentence is procedurally reasonable, this Court must now consider the substantive reasonableness of his sentence. This Court reviews the substantive reasonableness of a sentence for abuse of discretion. *See Vonner*, 516 F.3d at 392. “A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or

relies upon clearly erroneous findings of fact.” *United States v. Pugh*, 405 F.3d 390, 397 (6th Cir. 2005) (citation omitted).

Although “[a] life sentence is an extraordinary punishment,” this Circuit evaluates the substantive reasonableness of such a sentence as it would other terms of imprisonment. *See United States v. Messer*, 71 F.4th 452, 463 (6th Cir. 2023). A sentence must be “sufficient but not greater than necessary . . . to comply with the purposes of § 3553(a).” *Gates*, 48 F.4th at 476–77 (citation omitted). A claim that a sentence is substantively unreasonable is a claim 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); *see also United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir. 2019). When a sentence falls within the Guidelines range, it receives a rebuttable presumption of reasonableness. *United States v. Callahan*, 801 F.3d 606, 626 (6th Cir. 2015). Applying these standards, this Circuit has previously determined that a district court did not abuse its discretion in upholding a life sentence where the life sentence fell within an individual’s Guidelines range, and the district court duly considered the § 3553(a) factors. *See, e.g., Messer*, 71 F.4th at 463; *United States v. Abdulmutallab*, 739 F.3d 891, 908 (6th Cir. 2014); *United States v. Sherrill*, 972 F.3d 752, 774 (6th Cir. 2020).

Because Moore’s sentence is within his Guidelines range, we presume his sentence is reasonable. To rebut this presumption, Moore argues that his sentence is substantively unreasonable in light of his mental health history, his acceptance of responsibility and cooperation during the investigation, and the fact that he did not intend to shoot or kill Versi. Although a district court’s sentence should account for a defendant’s mental illness, “the court is not required to grant a defendant’s motion for a downward variance whenever a defendant suffers from such an illness.” *United States v. Owen*, 940 F.3d 308, 317 (6th Cir. 2019). Thus, this Circuit has previously affirmed a sentence despite a defendant’s mental health history

where the defendant’s criminal conduct was “very serious,” the district court determined the need for public protection was high, and the sentence was within the Guidelines range. *Id.* at 317–18; *see also United States v. Loos*, 66 F.4th 620, 625 (6th Cir. 2023); *United States v. Tolbert*, 459 F. App’x 541, 548–49 (6th Cir. 2012).

In this case, the district court did not abuse its discretion. At sentencing, the district court acknowledged Moore’s mental health history; however, it determined that a life sentence was appropriate given the balance of the § 3553(a) factors. The district court first considered the nature and circumstances of Moore’s offense, emphasizing the “serious” and “violent” nature of Moore’s crimes and the “callous nature” of the shot that killed Versi. Tr. Sentencing Hr’g, R. 223, Page ID #909. It then considered Moore’s personal history and characteristics, discussing Moore’s history of escalating criminal behavior, which it determined prior sentences had not deterred. It also considered the available sentences, discussing both the term-of-years sentence recommended in the PSR and a life sentence. Finally, it considered the mental health services that the Bureau of Prisons might provide for Moore.

In balancing the § 3553(a) factors, the district court also considered Moore’s argument that he did not intend to shoot Versi. However, as discussed *supra* Section II.A.i, the district court did not err when it discredited Moore’s testimony on this matter. The district court also heard arguments about Moore’s willingness to take responsibility and cooperate with the judicial process; however, it concluded that the seriousness of Moore’s offenses, Moore’s personal history, and the need for deterrence justified Moore’s life sentence. Given this record, the district court did not abuse its discretion by sentencing Moore to life imprisonment.

B. Venue

As to venue, Moore argues that his guilty plea is invalid because his plea colloquy does not establish that venue lay in the Western District of Tennessee. However, a district court may accept a guilty plea like Moore’s in the absence of a factual basis for venue. *See United States*

v. Mobley, 618 F.3d 539, 546 (6th Cir. 2010) (concluding that “consideration of venue cannot be part of the required 11(b)(3) factual basis determination”). That guilty plea, in turn, waives Moore’s ability to raise non-jurisdictional issues, *United States v. Ormsby*, 252 F.3d 844, 848 (6th Cir. 2001), including venue, *see Mobley*, 618 F.3d at 546 & nn.3–4.

This Circuit has identified an exception to the rule that a guilty plea waives a venue challenge, which applies when a defect to venue “is not apparent on the face of the indictment.” *See Mobley*, 618 F.3d at 546 n.4 (also requiring that “the defendant does not have notice of the defect through other means” (internal quotation marks and citation omitted)). However, this exception is inapplicable here. To the contrary, Moore’s indictment makes clear that there was no defect in venue: For example, it provides a Memphis, Tennessee, address for the location of each robbery. Moore’s guilty plea was valid, and because Moore pleaded guilty, he waived his venue challenge.

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** Moore’s conviction and his sentence.

UNITED STATES DISTRICT COURT

Western District of Tennessee

UNITED STATES OF AMERICA

v.

DECARDO MOORE

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:20-CR-20031-002-MSN

USM Number: 31920-076

John Keith Perry, Jr. - Appointed CJA

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One, Two, Three, Four, Five, Six, Seven, Eight (1,2,3,4,5,6,7,8) of Indictment on 10/25/2021.

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

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

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1951	Robbery Affecting Interstate Commerce	3/28/2019	1
18 U.S.C. § 924(c) & (c)(1)(A)(iii)	Use, Carry, Brandish, Discharge Firearm During Violent Crime	3/28/2019	2
18 U.S.C. § 1951 & 2	Aiding Abetting Robbery Affecting Interstate Commerce	6/28/2019	3

The defendant is sentenced as provided in pages 2 through 1 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

4/21/2022

Date of Imposition of Judgment

s/Mark S. Norris

Signature of Judge

Mark S. Norris United States District Court

Name and Title of Judge

4/26/2022

Date

DEFENDANT: DECARDO MOORE
CASE NUMBER: 2:20-CR-20031-002-MSN

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18U.S.C. §924(e) & (e)(1)(A)(iii) & (2)	Aiding Abetting Robbery Affecting Interstate Commerce	6/28/2019	4
18 U.S.C. § 1951 & 2	Aiding Abetting Robbery Affecting Interstate Commerce	6/28/2019	5
18U.S.C. §924(e) & (e)(1)(A)(iii) & (2)	Aiding Abetting Robbery Affecting Interstate Commerce	6/28/2019	6
18 U.S.C. § 1951 & 2	Aiding Abetting Robbery Affecting Interstate Commerce	6/28/2019	7
18U.S.C. §924(e) & (e)(1)(A)(iii) & (2)	Aiding Abetting Robbery Affecting Interstate Commerce	6/28/2019	8

DEFENDANT: DECARDO MOORE
CASE NUMBER: 2:20-CR-20031-002-MSN

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
240 Months - counts 1,3,5,7 (concurrent with Shelby County Tennessee Criminal Court Docket No. 20-00199, but consecutively to each other, all other Counts (Cts. 2, 4, 6, 8), Shelby County Tennessee Criminal Docket No. 17-03410).
LIFE - count 2 (consecutive to all counts & Shelby County Tennessee Criminal Court Docket Nos. 17-03410, 20-00199)
84 Months - count 4,6,8 (consecutive to each other, all other counts (Cts. 1, 2, 3, 5, 7), & Shelby County Tennessee Criminal Court Docket Nos. 17-03410, 20-00199).

☒ The court makes the following recommendations to the Bureau of Prisons:
drug testing and treatment; mental health counseling and treatment; participate in Moral Reconation Therapy (MRT) or another similar and approved cognitive.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____
☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DECARDO MOORE

CASE NUMBER: 2:20-CR-20031-002-MSN

SUPERVISED RELEASE

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

MANDATORY CONDITIONS

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

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

DEFENDANT: DECARDO MOORE

CASE NUMBER: 2:20-CR-20031-002-MSN

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: DECARDO MOORE
CASE NUMBER: 2:20-CR-20031-002-MSN

ADDITIONAL SUPERVISED RELEASE TERMS

DEFENDANT: DECARDO MOORE
CASE NUMBER: 2:19-CR-20013-001-JTF

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 800.00	\$	\$	\$	\$

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

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

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

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	----------------------	----------------------------	-------------------------------

TOTALS	\$	0.00	\$	0.00
---------------	----	------	----	------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

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

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

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

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.