No. _____

In the Supreme Court of the United States

BERNARDITO CARVAJAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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DATED: JANUARY 24, 2024

QUESTION PRESENTED

May a sentencing judge disregard the jury's verdict acquitting the defendant of causing the decedent's death and use facts the jury rejected to justify a dramatic increase in Carvajal's sentence, resulting in an unreasonable sentence?

LIST OF PARTIES

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

RELATED PROCEEDINGS

U.S. Court of Appeals for the First Circuit:

United States v. Carvajal, No. 22-1207 (Oct. 26, 2023)

U.S. District Court for the District of Massachusetts:

United States v. Carvajal, No. 1:20-cr-10023-GAO (March 17, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bernardito Carvajal respectfully prays that this Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit appears at Appendix 1a-27a to the petition and is reported at 85 F.4th 602. App. 1a-27a. An errata sheet was issued on December 5, 2023. App. 28a. The District Court's sentencing pronouncements are unreported App. 37a-41a.

JURISDICTION

The United States Court of Appeals for the First Circuit issued its judgment on October 26, 2023. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . ."

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Investigation and Indictment

On June 13, 2019, Richard Tonks was found unconscious in his bed in Andover, Massachusetts, with an uncapped needle next to him. App. 2a. Attempts to revive him at the hospital were unsuccessful. App. 2a. Without performing an autopsy, the Medical Examiner opined Tonks died from "acute intoxication due to the combined effects of cocaine and fentanyl."[1] App. 2a-3a.

Following Tonks' death, the police engaged in an undercover buy of fentanyl from Carvajal. App. 5a. They found that the fentanyl he sold was extraordinarily weak.

On January 29, 2020, a federal grand jury returned an indictment charging Carvajal with (1) distribution of fentanyl and cocaine resulting in death, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); and (2) distribution of and possession with intent to distribute fentanyl, in violation of 21 U.S.C. § 841(a)(1). App 5a.

B. Trial

At trial, Carvajal acknowledged that he sold fentanyl to Tonks, but denied selling him cocaine. App. 7a. The jury's verdict was noted on a special verdict form. The jury unanimously found that Carvajal distributed fentanyl but not cocaine, and unanimously found that Tonks' death **did not** result from the use of one or more substances distributed by Carvajal. App. 7a-8a.

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[1] This expert was aware of a study that initial determinations of death due to overdose based solely on external examination and toxicology findings (as here) were subject to an error rate of approximately 20 percent. Tr. 3:138-139.

C. Sentencing

The Court set Carvajal's adjusted offense level at 24, indicating that Carvajal's guideline sentencing range was 51 to 63 months. App. 9a. However, the judge then dramatically increased the sentence pursuant to §5K2.1, which allows for a sentence above the authorized guideline range in cases where "death resulted," in contravention to the jury's verdict and over the defense's strong objection. App. 9a-10a. Carvajal was sentenced to 120 months, App. 9a, almost double the highest end of the guideline sentence the trial judge had calculated.

D. First Circuit Appeal

The First Circuit indicated that the Supreme Court has "never prohibited the use of acquitted conduct at sentencing and has expressly upheld it in certain circumstances if the sentencing judge finds that the government has proved that conduct by a preponderance of the evidence." *United States v. Carvajal*, 85 F.4th 602, 611 (1st Cir. 2023) (App. 14a). The Court stated that until the Supreme Court intervenes, the circuit court is unable to provide relief in the circumstances presented here, and noted that this Court "has indicated it may soon take up this issue and re-examine its earlier precedent." *Id.* (App. 15a-16a), citing *McClinton v. United States*, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., respecting the denial of certiorari) ("The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.").

The Court affirmed Carvajal's conviction and sentence. App. 27a.

E. Developments From U.S. Sentencing Commission

Following several denials of petitions of writs of certiorari relating to sentencing defendants for acquitted conduct, last month, the United States Sentencing Commission released a statement that it would be seeking comment on a proposed amendment to the Sentencing Guidelines. U.S. Sentencing Comm'n, *News Release: U.S. Sentencing Commission Seeks Comment On Proposals Addressing The Impact Of Acquitted Conduct, Youthful Convictions, And Other Issues* (Dec. 14, 2023), available at https://www.ussc.gov/about/news/press-releases/december-14-2023. The proposal contains three alternatives: (1) to make explicit in the sentencing guidelines that acquitted conduct is not relevant conduct for determining the guideline sentencing range; (2) to amend §1B1.3 to include an application note providing "that a downward departure may be warranted if the use of acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction", and may further only apply to cases "in which the impact is 'extremely' disproportionate"; or (3) to "amend §6A1.3 to add a new subsection (c) addressing the standard of proof required to resolve disputes involving sentencing factors." United States Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* (Dec. 26, 2023). The revision described in option (3) would provide that a preponderance of the evidence generally is sufficient to meet due process requirements, but "acquitted conduct should not be considered unless it is established by clear and convincing evidence." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents the perfect vehicle, at the perfect time, for this Court to finally weigh in on a practice that numerous federal and state judge have expressed implicate serious constitutional concerns.

The district court nearly doubled Carvajal's sentence based on activity the jury expressly acquitted him of, and a theory the jury expressly rejected. Carvajal preserved his argument that this violated his constitutional rights and resulted in an unreasonable sentence. Finally, the Sentencing Commission's proposals, now distributed, would not go far enough to prevent similar constitutional violations from occurring. The time for this Court to intervene is now.

A. The Justices Of This Court, As Well As Other Federal Judges, Have Commented That The Use Of Acquitted Conduct In Sentencing Raises Important Constitutional Questions.

"[O]ne of the Constitution's most vital protections against arbitrary government" is that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019).

"[A]cquittals have long been 'accorded special weight,'" "includ[ing] traditionally treating acquittals as inviolate, even if a judge is convinced that the jury was 'mistaken.'" *McClinton v. United States*, 143 S. Ct. 2400, 2402 (2023) (Sotomayor, J., respecting the denial of certiorari). "[T]here appears to be little record of acquitted-conduct sentencing before the 1970s." *Id.*, citing C. Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415, 1444, 1427–1437, 1450–1455 (2010).

Judges and jurors have continued to criticize the use of acquitted conduct in sentencing as constitutionally suspect and unfair. E.g., *id.* at 2402-03 (describing "concerns about procedural fairness and accuracy" and questions about the public perception of the legitimacy of the federal criminal justice system inherent in the use of acquitted conduct in sentencing); *United States v. Alejandro-Montañez*, 778 F.3d 352, 362-63 (1st Cir. 2015) (Torruella, J., concurring) ("it is inappropriate and constitutionally suspect to enhance a defendant's sentence based on conduct that the defendant was either (in the case of Severino) not charged with or (in the case of the Alejandro brothers) acquitted of"); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) ("[i]t is far from certain whether the Constitution allows" "a district judge [to] . . . increase a defendant's sentence . . . based on facts the judge finds without the aid of a jury or the defendant's consent") (citing *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting from denial of certiorari)). See also *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *id.* at 929 (Millett, J., concurring in denial of rehearing en banc) ("[A]llowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-trial guarantee.").

B. This Case Is The Perfect Vehicle To Resolve This Question.

This issue could not be more clearly presented where the sole issue at trial was not if Carvajal had sold drugs, but whether or not the drugs he sold caused Tonks' death. The jury found that the drugs that Carvajal sold to Tonks did not cause Tonks' death, and acquitted him of causing the death. However, instead of sentencing him for the crime for which he was convicted, the judge disregarded the expert testimony credited by the jury, disregarded the jury's factual determinations, and doubled his sentence for the conduct for which he was acquitted.[2]

Further, the issue was preserved by objections and was raised on appeal at the First Circuit.

Nearly ten years ago, Justice Scalia, joined by Justices Thomas and Ginsburg, stated that this practice "has gone on long enough." *Jones v. United States*, 574 U.S. 948 (2014) (Scalia, J., dissenting from denial of certiorari). The Court further found this was a "particularly appealing case, because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury acquitted them of that offense." *Id.* The same is true here.

C. The Court No Longer Need Wait For Action From The Sentencing Commission.

Recently, this Court denied several petitions for writs of certiorari on this issue, finding that it would be appropriate to wait for the Sentencing Commission's

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[2] Mr. Carvajal was further prejudiced, because he was denied acceptance of responsibility points as a result of his insistence on a trial, despite his admission to all of the conduct for which he was convicted. The First Circuit upheld this determination on appeal. App. 11a-13a.

determination before the Court decides whether to grant certiorari in such a case. *McClinton*, 143 S. Ct. at 2403 (Kavanaugh, J., respecting the denial of certiorari); see *id.* at 2403 (Sotomayor, J., respecting the denial of certiorari). Continuing to wait is unnecessary for two reasons: first, because this is a constitutional issue and the pronouncements of the Sentencing Commission do not bind the states. See *McClinton*, 143 S. Ct. at 2403 (Alito, J., concurring in the denial of certiorari). As a result, this Court still must have its say on the constitutionality of this practice.

The second reason why a grant of certiorari is appropriate now is the Sentencing Commission has now publicly distributed its proposed revisions to the sentencing guidelines to address the use of acquitted conduct in sentencing. The proposal contains three alternatives, of which two do not remedy the problem here: (1) to make explicit in the sentencing guidelines that acquitted conduct is not relevant conduct for determining the guideline sentencing range; (2) to amend §1B1.3 to include an application note providing "that a downward departure may be warranted if the use of acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction" and may further only apply to cases "in which the impact is 'extremely' disproportionate"; or (3) to "amend §6A1.3 to add a new subsection (c) addressing the standard of proof required to resolve disputes involving sentencing factors," with the use of acquitted conduct requiring clear and convincing evidence instead of meeting the preponderance of the evidence standard. United States Sentencing Commission, *Proposed Amendments to the Sentencing Guidelines* (Dec. 26, 2023).

First, delegating the interpretation of the Constitution to the Sentencing Commission is rife with problems. "*Kisor* warned against judicial apathy regarding 'the far-reaching influence of agencies and the opportunities such power carries for abuse.'. . . These concerns are even more acute in the context of the Sentencing Guidelines, where individual liberty is at stake." *United States v. Campbell*, 22 F.4th 438, 446 (4th Cir. 2022) (internal citation omitted). Option (3) proposed by the Sentencing Commission, changing the standard of proof for the use of acquitted conduct, does not resolve the situation. Option (2) does not change the status quo, and will result in very disparate sentences even when similar facts are presented. Only option (1) will possibly resolve the issue presented here, but only within the context of the Sentencing Guidelines. Only a pronouncement of this Court could prevent a court from calculating the proper GSR without counting acquitted conduct, then using its broad discretion to vary the sentence.

Finally, the fact that this argument involves a defendant's liberty interest matters. "To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake." *Barber v. Thomas*, 560 U.S. 474, 503 (2010) (Kennedy, J., dissenting). "'[A]ny amount of actual jail time' is significant, . . . and 'ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration[.]'" *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (internal citations omitted).

As this Court observed, "the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction.'" *Id.* at 1908, quoting Bowers & Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 215–216 (2012).

D. Carvajal is entitled to relief.

Even if this Court were to conclude that Carvajal's case is not a suitable vehicle, it should at a minimum hold the petition pending the relevant pronouncement of the Sentencing Commission or the acceptance of a similar petition a writ of certiorari. This issue was thoroughly argued at the District Court and First Circuit, and the First Circuit's hands were tied pending a pronouncement from this Court or the Sentencing Commission.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the issuance of guidance from the Sentencing Commission.

Respectfully submitted,

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DATE: JANUARY 24, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

United States Court of Appeals
For the First Circuit

No. 22-1207

UNITED STATES,

Appellee,

V.

BERNARDITO CARVAJAL, a/k/a Christian Mendez-Acevedo,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. George A. O'Toole, Jr., U.S. District Judge]

Before

Kayatta, Lipez, and Rikelman,
Circuit Judges.

Eduardo Masferrer, Masferrer & Associates, P.C., with whom Danya F. Fullerton was on brief, for appellant.

Randall E. Kromm, Assistant United States Attorney, with whom Joshua S. Levy, Acting United States Attorney, and Hannah Sweeney was on brief, for appellee.

October 26, 2023

RIKELMAN, Circuit Judge. After a jury convicted Bernardito Carvajal of possession with intent to distribute and distribution of fentanyl, the district court sentenced him to 120 months in prison. Carvajal appeals his sentence on two grounds. First, he argues the district court considered impermissible evidence, including conduct of which the jury acquitted him, in determining his sentence. Second, Carvajal contends the district court should have reduced his sentence based on his acceptance of responsibility at trial. Because controlling case law permits the consideration of acquitted conduct at sentencing and the record otherwise supports the district court's rulings, we affirm.

I. Background

A. Relevant Facts[1]

On June 13, 2019, police responded to a possible overdose at a home in Andover, Massachusetts. Upon entering the home, police discovered 26-year-old Richard Tonks unconscious in his bed, with an uncapped hypodermic needle next to his arm. Attempts to revive Tonks at the scene and later at a hospital failed.

The medical examiner for the Commonwealth of Massachusetts, Dr. Maria Del Mar Capo-Martinez, determined that Tonks died from "acute intoxication due to the combined effects of

[1] Because Carvajal does not challenge the sufficiency of the evidence supporting his conviction, we offer a "balanced" treatment of the facts. See United States v. Cox, 851 F.3d 113, 118 n.1 (1st Cir. 2017).

cocaine and fentanyl." Dr. Capo-Martinez performed an external examination of the body and tested blood and urine samples, which showed the presence of cocaine, fentanyl, and marijuana in Tonks's system. She did not conduct an internal examination or autopsy. Police also did not preserve or test the substance in the needle found next to Tonks.

Following Tonks's death, his family and girlfriend turned in to the police drug paraphernalia that they discovered in Tonks's room. This paraphernalia included two plastic bags, one of which proved to contain cocaine, and the other fentanyl.

They also turned in Tonks's cellphone, which contained Facebook and text messages that appeared to discuss drug transactions. The Facebook messages were between Tonks and a user named "Cmja MA," later identified as Carvajal. Tonks and Carvajal had been acquainted since at least 2018, when they were coworkers at a local restaurant, and the Facebook and text messages between them catalogued interactions from January to June of 2019. On January 23, 2019, Carvajal contacted Tonks to offer to sell him "white," which Tonks purchased.[2] Later that day, Tonks's girlfriend took him to the hospital, concerned that Tonks may have overdosed. Although Tonks told his girlfriend he had taken

[2] As discussed infra, the parties contested at trial whether "white" referred to cocaine or fentanyl.

cocaine, test results revealed he had only fentanyl and marijuana in his system.

A few months later, in April, Carvajal reached out to Tonks and offered to sell him more "white," but Tonks declined. In May, Carvajal once again offered "white" to Tonks, but Tonks did not respond until June 4, when he asked if Carvajal still had "white" to sell. Carvajal said he had "a little" and would get more the next day, and the two made plans to complete the transaction.

From June 5 to June 12, text messages show that Carvajal sold Tonks drugs almost daily, with increasing frequency until Tonks's death. Carvajal sold Tonks "1g" (one gram) of "white" twice on June 5, once on June 6, and once on June 9. On June 10, Tonks asked Carvajal to sell him a "3.5" "ball," apparently referring to an eighth of an ounce. On the morning of June 11, Tonks asked for "2 [grams] more," and a few hours later, asked if Carvajal was "around for another." That same evening, Tonks requested "one [gram] more for delivery," an amount he increased to "2" before the delivery occurred. On June 12, the day before Tonks died, Tonks contacted Carvajal for another "3.5" ball, and later added to the order "one brown." Carvajal made the sale.

On June 14, the day after Tonks was found dead, Carvajal texted Tonks "Hi you ok[?]" A few days later, Carvajal unfriended Tonks and Tonks's girlfriend on Facebook.

Further examination of Tonks's cellphone revealed that on June 9, 2019, four days before Tonks was found dead, Tonks texted a coworker looking to purchase "yayo," slang for cocaine. The coworker responded, "I'm not sure on that one, man." There were also phone calls between Tonks and the coworker on June 11 and 12.

On July 31, 2019, an Andover undercover police officer, aided by a Drug Enforcement Agency (DEA) task force, carried out a "buy-bust" operation targeting Carvajal. Via text message, the undercover officer set up a "white" purchase with Carvajal and arrested him once the transaction was complete. Subsequent testing revealed that the "white" Carvajal sold to the undercover officer was fentanyl. An examination of Carvajal's cellphone showed messages documenting transactions with other individuals for purchases of both "white" and "brown."

B. Legal Proceedings

On January 29, 2020, a federal grand jury indicted Carvajal on two counts: distribution of fentanyl and cocaine on or about June 12, 2019, resulting in death, under 21 U.S.C. §§ 841(a)(1) & (b)(1)(c); and distribution of and possession with intent to distribute fentanyl on or about July 31, 2019, under 21 U.S.C, § 841(a)(1). Carvajal entered a plea of not guilty as to both counts.

The government's theory at trial was that Tonks died from an overdose of fentanyl and cocaine, and that Carvajal had sold Tonks both of those drugs in the days before his death. Accordingly, the government argued that Carvajal was responsible for Tonks's death.

As to the cause of death, the government offered the expert testimony of Dr. Capo-Martinez, the medical examiner, and Dr. Steven Bird, an emergency physician and medical toxicologist. Although Carvajal raised objections to Dr. Bird's testimony under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the district court overruled his objections. Dr. Bird proceeded to testify that, in his medical opinion, the amount of fentanyl in Tonks's blood was sufficient to have caused Tonks's death, although he acknowledged that the combination of fentanyl and cocaine was "potentially lethal."

The government also introduced multiple forms of evidence to prove that Carvajal had sold Tonks both fentanyl and cocaine in the days leading up to his death. DEA Special Agent Glen Coletti testified that "white" is street slang for cocaine, and that the terms "ball," "eight ball," and "3.5" are slang for 3.5 grams of cocaine. By contrast, he explained, "brown" refers to heroin or fentanyl. The government offered this testimony in combination with the Facebook and text messages between Carvajal and Tonks, which documented these sales of "white" and "brown."

Carvajal, for his part, acknowledged that he sold drugs to Tonks (and to the undercover agent) but argued that the drugs he sold did not cause Tonks's death. He presented two main theories to dispute the government's case: (i) that Tonks had underlying health issues and died for reasons other than a drug overdose; and (ii) even if a drug overdose led to Tonks's death, Tonks died only because of the combination of cocaine and fentanyl in his system, and Carvajal did not sell him any cocaine. To support his arguments, Carvajal elicited testimony from Dr. Capo-Martinez that, absent an autopsy, she was unable to rule out other potential causes of death including heart attack, blood clot, or stroke. His expert witness at trial, Dr. Elizabeth Laposata, similarly opined that without an autopsy, the cause of death could not be conclusively determined. Finally, Carvajal challenged the testimony of Agent Coletti that "white" was slang for cocaine. On cross-examination, Carvajal secured an admission from Agent Coletti that he had previously testified that "white" is street slang for fentanyl, not cocaine. Given the ambiguous reference to "white" in the text messages, Carvajal contended, the jury could not find beyond a reasonable doubt that he had caused Tonks's death.

At the conclusion of the trial, the jury convicted Carvajal of distributing fentanyl under the first count but acquitted him of both distributing cocaine and causing Tonks's

death. The jury also convicted Carvajal of distributing fentanyl under the second count. The statute under which Carvajal was convicted, 21 U.S.C. § 841(a)(1), provided a maximum sentence of 20 years for each count. See 21 U.S.C. § 841(b)(1)(C).

The parties proposed substantially different sentences at the sentencing hearing. The probation office, in its pre-sentence investigation report ("PSR"), recommended an offense level of 24, with a criminal history category of I, resulting in a Guidelines sentence range of 51 to 63 months. The government requested a sentence of 120 to 144 months' imprisonment and three years' supervised release. Carvajal argued for a sentence of 36 months' imprisonment.

To support his proposed sentence, Carvajal contended that pursuant to U.S.S.G. § 3E1.1, he was entitled to a base offense reduction of two levels for acceptance of responsibility, based on his opening statement at trial. The two-level reduction would have brought him to a base offense level of 22 with a recommended Guidelines sentence of 41 to 51 months. Carvajal further argued for a downward variance from the lowest end of the Guidelines range, to justify his request for a 36-month sentence.[3]

[3] Carvajal, who is not a United States citizen and will be removed from the United States upon completion of his sentence, requested a six-month downward variance to account for an anticipated three to six months in immigration custody while his removal is processed.

The district court rejected the two-level reduction for acceptance of responsibility, however, relying on Section 3E1.1, Application Note 2, which provides that the reduction is available only in "rare situations" to defendants who proceed to trial. U.S.S.G. § 3E1.1 cmt. (n. 2). The court therefore adopted the base offense level of 24 calculated in the PSR, resulting in a Guidelines sentence range of 51 to 63 months.

The court also heard the government's argument that it should sentence Carvajal above the Guidelines range because a preponderance of the evidence established that Carvajal caused Tonks's death. The government pointed to the trial testimony of its witnesses and the text messages between Carvajal and Tonks to meet its burden of proof. Carvajal countered with his trial evidence challenging the government's theory on the cause of death. He also argued that the district court could not consider at sentencing conduct of which the jury had explicitly acquitted him.

The court ultimately held that the government had met its burden to establish by a preponderance of the evidence that the drugs Carvajal sold Tonks brought about Tonks's death. In particular, the court indicated that it found convincing Dr. Bird's testimony about the cause of death.

Having resolved the factual dispute about what caused Tonks's death, the district court proceeded to sentence Carvajal to 120 months' imprisonment and three years' supervised release.

The court began by discussing the 18 U.S.C. § 3553(a) factors used in determining a variance, and further noted that U.S.S.G. § 5K2.1, the departure Guideline, also allowed it to impose a sentence above the Guidelines range. The district court concluded that an upward variance or departure was "entirely appropriate" for an act that "was not an intentional homicide, but . . . was an intentional distribution of homicidal drugs." The following day, the district court issued its written Statement of Reasons and identified the sentence as a variance under § 3553(a) as opposed to a departure under Section 5K2.1.

Carvajal filed a timely notice of appeal on March 22, 2022. We have jurisdiction under 18 U.S.C. § 3231.

II. Standard of Review

In sentencing appeals, we conduct a bifurcated review. United States v. Millán-Machuca, 991 F.3d 7, 27 (1st Cir. 2021). Initially, we consider whether the sentence is procedurally reasonable, "afford[ing] de novo review to the sentencing court's interpretation and application of the sentencing Guidelines, assay[ing] the court's factfinding for clear error, and evaluat[ing] its judgment calls for abuse of discretion." United States v. Ruiz-Huertas, 792 F.3d 223 (1st Cir. 2015). Carvajal's argument that his sentence violates constitutional guarantees of due process because it is based on acquitted conduct is also subject to de novo review. United States v. Sandoval, 6 F.4th 63,

115 (1st Cir. 2021). Next, we turn to any arguments of substantive unreasonableness "under the abuse of discretion rubric, taking account of the totality of the circumstances." Id.

III. Discussion

A. Procedural Reasonableness of Carvajal's Sentence

1. Acceptance of Responsibility

Carvajal contends that his opening statement at trial, in which he admitted that he sold drugs to Tonks and to an undercover officer, entitled him to a reduction in his base offense level for acceptance of responsibility. Whether a defendant is eligible for this reduction is a factual question reviewed for clear error, and we will reverse the district court's ruling only if we are "left with a definite and firm conviction that a mistake has been committed." United States v. McCarthy, 32 F.4th 59, 62-63 (1st Cir. 2022) (quoting Brown v. Plata, 563 U.S. 493, 513 (2011)).

United States Sentencing Guideline § 3E1.1(a) authorizes a two-level reduction in a defendant's base offense level if the defendant "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). "Defendants are not, however, automatically entitled to [the] reduction." United States v. Garrasteguy, 559 F.3d 34, 38 (1st Cir. 2009). To qualify for acceptance of responsibility, "a defendant must truthfully admit or not falsely deny the conduct comprising the conviction, as well

as any additional relevant conduct for which he is accountable." Id.; U.S.S.G. § 3E1.1, cmt. (n. 1(a)). The defendant bears the burden of proving that he accepted responsibility. See Garrasteguy, 559 F.3d at 38.

"When a defendant proceeds to trial and puts the government to its proof, a credit for acceptance of responsibility normally will not be available." United States v. Deppe, 509 F.3d 54, 60 (1st Cir. 2007). However, "in rare situations" and relying "primarily upon pre-trial statements and conduct," a reduction may still be warranted in such circumstances. Id.; U.S.S.G. § 3E1.1, cmt. (n. 2).

This is not one of those "rare situations." Carvajal points to the admissions in his opening statement at trial to support his argument regarding acceptance of responsibility. He contends that he had to wait until trial to make even these statements because, given the way he was charged, he could not admit to selling drugs to Tonks without also admitting to Tonks's death.

We are not persuaded. First, and most importantly, Carvajal offers no pre-trial statement or conduct whatsoever to support his acceptance of responsibility. We have found no case where a court upheld a reduction at sentencing based solely on statements made by a defendant at trial. And that is with good reason. The sentencing reduction exists in large part to encourage

defendants to plead guilty, when appropriate, to prevent the time and expense of "put[ting] the government to its proof." Deppe, 509 F.3d at 60; U.S.S.G. § 3E1.1, cmt. (n.2). At a minimum, Carvajal could have narrowed the issues here by pleading guilty, before trial, to the sale of drugs to the undercover officer and to the sale of fentanyl to Tonks, all without accepting criminal liability for Tonks's death. He made the decision not to do so, as was his constitutional right. But he cannot then claim to have demonstrated "full responsibility for his actions . . . candidly and with genuine contrition." United States v. Franky-Ortiz, 230 F.3d 405, 408 (1st Cir. 2000).

The district court did not clearly err in determining that Carvajal was not entitled to a two-level reduction for acceptance of responsibility.

2. Death Resulting from Drug Sales

We turn next to Carvajal's argument that the district court's erroneous consideration of acquitted conduct "drove" his sentence. As Carvajal forthrightly acknowledges, our current precedent makes clear that acquitted conduct can be considered at sentencing if the government proves it by a preponderance of the evidence. United States v. Meléndez-González, 892 F.3d 9, 19 (1st Cir. 2018) ("A district court may rely on acquitted conduct in sentencing 'so long as that conduct ha[s] been proved by a preponderance of the evidence.'") (quoting United States v. Martí-

Lón, 524 F.3d 295, 302 (1st Cir. 2008)); United States v. González, 857 F.3d 46, 58 (1st Cir. 2017) ("Indeed, a sentencing court may consider relevant conduct that constitutes another offense, even if the defendant has been acquitted of that offense, so long as it can be proven by a preponderance of the evidence.").

In light of our precedent, Carvajal advances two procedural arguments on this issue: (1) that consideration of the acquitted conduct violates constitutional guarantees of due process; and (2) that the district court clearly erred in finding by a preponderance of the evidence that Carvajal caused Tonks's death. After careful review, we conclude that Carvajal cannot prevail on either argument.

First, the United States Supreme Court has never prohibited the use of acquitted conduct at sentencing and has expressly upheld it in certain circumstances if the sentencing judge finds that the government has proved that conduct by a preponderance of the evidence. See United States v. Watts, 519 U.S. 148, 154 (1997) (per curiam) (holding that use of acquitted conduct at sentencing does not offend the Double Jeopardy Clause). Carvajal is correct that numerous federal and state judges have written that this practice violates both the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to a jury trial, as well as similar provisions in state constitutions. See e.g., Jones v. United States, 574 U.S. 948, 948 (2014) (Scalia, J., joined by

Thomas & Ginsberg, JJ., dissenting from denial of certiorari) (arguing that the imposition of "sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness" had "gone on long enough"); United States v. Magee, 834 F.3d 30, 38 (1st Cir. 2016) (Torruella, J., concurring) ("[I]t is constitutionally suspect to drastically increase a defendant's sentence based on conduct that was neither proven beyond a reasonable doubt nor to which the defendant plead guilty."); United States v. Bell, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in denial of rehearing en banc) ("[A]llowing a judge to dramatically increase a defendant's sentence based on jury-acquitted conduct is at war with the fundamental purpose of the Sixth Amendment's jury-trial guarantee."); cf. State v. Cote, 530 A.2d 775, 785 (N.H. 1987) (explaining that criminal defendants are entitled to "full benefit" of the presumption of innocence, a benefit that "is denied when a sentencing court may have used charges that have resulted in acquittals to punish the defendant").

Indeed, the Supreme Court has indicated it may soon take up this issue and re-examine its earlier precedent. See McClinton v. United States, 143 S. Ct. 2400, 2403 (2023) (Sotomayor, J., respecting the denial of certiorari) ("The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted conduct sentencing in the coming year. If the Commission does not act expeditiously

or chooses not to act, however, this Court may need to take up the constitutional issues presented."). But unless and until the Supreme Court does so, or the Sentencing Commission revises the Guidelines, we are bound to follow our controlling precedent and must reject Carvajal's due process challenge.

Second, a careful review of the record shows no clear error in the district court's finding, by a preponderance of the evidence, that Carvajal caused Tonks' death. The relevant federal sentencing statute compels us to "accept a district court's findings of fact (unless clearly erroneous), but also to give due deference to the district court's application of the Guidelines to the facts." United States v. Andino-Morales, 73 F.4th 24, 43 (1st Cir. 2023) (quoting Buford v. United States, 532 U.S. 59, 63 (2001)) (internal quotations omitted); see also 18 U.S.C. § 3742(e). At sentencing, the district court has discretion to "consider any evidence with sufficient indicia of reliability, and can rely upon 'virtually any dependable information.'" United States v. Ford, 73 F.4th 57, 64 (1st Cir. 2023) (quoting United States v. Berríos-Miranda, 919 F.3d 76, 81 (1st Cir. 2019)). Moreover, it is the sentencing court's unique "responsibility to make credibility determinations about witnesses." United States v. Nagell, 911 F.3d 23, 31 (1st Cir. 2018). Our clear error standard is "demanding," and we reverse only if, viewing the record in its entirety, we are left with "a strong, unyielding belief

that a mistake has been made." United States v. Nuñez, 852 F.3d 141, 144 (1st Cir. 2017).

Carvajal argues that the district court erred by improperly weighing the competing expert testimony. He disagrees with how the district court characterized the three expert witnesses: Dr. Bird as "the most reliable because he was more exhaustive in his analysis"; Dr. Laposata as "not very helpful"; and Dr. Capo-Martinez as "helpful but cautious in not going beyond what her evidence indicated to her." In Carvajal's view, because Dr. Bird is a medical toxicologist and not a medical examiner, the district court should have discounted his testimony that fentanyl alone could have caused Tonks's death. He further argues that Dr. Bird's testimony improperly relied on postmortem blood concentrations.[4] However, weighing the credibility of expert testimony is exactly the sort of factfinding that falls within the purview of the district court. Cf. United States v. Jones, 187 F. 3d 210, 214 (1st Cir. 1999) ("Where evaluations of witnesses' credibility are concerned, we are especially deferential to the district court's judgment . . . .").

[4] Carvajal also suggests that the district court's comments may be the result of gender bias. Although discounting witness testimony due to gender bias is inappropriate and could constitute clear error, Carvajal's only evidence of gender bias is that both Dr. Capo-Martinez and Dr. Laposata are women. This kind of bare assertion cannot support a finding of clear error. See Nuñez, 852 F.3d at 144.

Carvajal also argues that the district court's reliance on Dr. Bird's testimony is doubly erroneous given his Daubert challenge to that testimony. However, Carvajal has not briefed the merits of his Daubert challenge on appeal and thus has waived that argument. United States v. Mayendía-Blanco, 905 F.3d 26, 32 (1st Cir. 2018) ("[I]t is a well-settled principle that arguments not raised by a party in its opening brief are waived.").[5]

In any event, there is no indication that this expert testimony was the sole basis for the district court's finding that Tonks's death resulted from Carvajal's conduct. The record contains substantial evidence supporting the finding that Carvajal supplied Tonks with both cocaine and fentanyl and thus caused his death. According to the testimony of Agent Coletti, the text messages between Carvajal and Tonks show that Carvajal sold Tonks "white," a "ball," and "3.5," which are all slang for cocaine, as well as "brown," which is slang for fentanyl. Agent Coletti also testified that the prices Carvajal quoted to Tonks for "white" were consistent with the street price of cocaine. Tonks's girlfriend further testified that Tonks was primarily using cocaine, and that Tonks initially thought that his January 2019 overdose, a few months before his death, was due to cocaine.

[5] Further, rulings on Daubert challenges are reviewed for abuse of discretion, and we see no abuse of discretion in allowing Dr. Bird, who is trained and educated in emergency medicine and medical toxicology, to testify about what caused Tonks's death.

Although the jury concluded that the government had failed to prove beyond a reasonable doubt that Carvajal caused Tonks's death, at sentencing the district court was evaluating this proof under the less demanding preponderance of the evidence standard. See Martí-Lón, 524 F.3d at 302; see also Andino-Morales, 73 F.4th at 43 ("'[T]he argument for deference peaks when,' as here, 'the sentencing judge has presided over a lengthy trial and is steeped in the facts of the case.'") (quoting United States v. Sepulveda, 15 F.3d 1161, 1200 (1st Cir. 1993)).

The record plausibly supports the district court's finding by a preponderance of the evidence that Carvajal caused Tonks's death, and we therefore discern no clear error.[6]

[6] Carvajal also asserts that the district court improperly applied the Section 5K2.1 Guideline departure, including by not imposing a "but for" causation standard when it evaluated the evidence about whether Carvajal's conduct caused Tonks's death. As we explain in Section C, infra, the district court imposed a variance pursuant to 18 U.S.C. § 3553(a), and not a Guideline departure under Section 5K2.1.

B. Substantive Reasonableness of Carvajal's Sentence[7]

We turn next to Carvajal's challenge to the substantive reasonableness of his 120-month sentence. See Gall v. United States, 552 U.S. 38, 51 (2008). "A sentence is substantively unreasonable only if it lacks 'a plausible sentencing rationale' or 'a defensible result.'" United States v. Millán-Machuca, 991 F.3d 7, 27 (1st Cir. 2021) (quoting United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008)). There is no presumption that a sentence outside of the Guidelines range is unreasonable, even when the extent of the upward variance is substantial. United States v. Flores-Machicote, 706 F.3d 16, 25 (1st Cir. 2013). We "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard," but must also afford "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." Gall, 552 U.S. at 51.

Carvajal argues that the extent of the variance here functionally punishes him not for his offense of conviction,

[7] The government maintains that Carvajal waived his right to advance these arguments by "including [them] as an afterthought in a section addressing other issues, not as a freestanding claim." We disagree. Carvajal developed these arguments over five pages and supports them with legal authority. The in-circuit case cited by the government, United States v. Sayer, is inapposite. 748 F.3d 425, 436 (1st Cir. 2014) (rejecting defendant's vagueness claim as waived where it was addressed in only a few sentences, and given no distinct legal analysis). We proceed to the merits.

selling fentanyl, but for his acquitted conduct, causing Tonks's death. In particular, relying on our decision in United States v. Lombard, Carvajal argues that the upward variance imposed by the district court is constitutionally suspect because the related conduct represents such a grossly disproportionate share of his total sentence that it violates his Fifth and Sixth Amendment rights. 72 F.3d 170, 176-183 (1st Cir. 1995).

We disagree. Lombard was "an extreme case," even "an unusual and perhaps singular case," that we held "was at the boundaries of constitutional sentencing law." Id. at 187. The defendant in Lombard was convicted of a firearms offense that had no statutory maximum sentence. Id. at 177. In evaluating the appropriate sentence, the district court considered it relevant that the firearms in question were used in two murders, crimes of which Lombard had been acquitted in state court. Id. at 174-75. The district court applied a provision of the sentencing Guidelines that required it to calculate the defendant's base offense level "as if his offense of conviction had been murder." Id. at 182. As a result, instead of 262 to 327 months' incarceration, the Guidelines required a life sentence without parole. Id. We held that "[g]iven the magnitude of the sentence 'enhancement,' the seriousness of the 'enhancing' conduct in relation to the offense of conviction, and the seemingly mandatory imposition of the life

sentence,"[8] the Constitution demanded resentencing. Id. at 180. However, we took pains to explain that "[a]bsent [these] special circumstances . . . no comparable concerns would be raised by cases involving even sizeable sentence increases" on the basis of "uncharged or acquitted conduct." Id. at 186-87. Indeed, we have rejected challenges based on Lombard in less extreme factual circumstances. See e.g., González, 857 F.3d at 58 (rejecting an argument under Lombard that a sentence at the statutory maximum for the crime (120 months) implicated due process concerns); United States v. Sandoval, 6 F. 4th 63, 115 (1st Cir. 2021) (rejecting a Lombard argument for a sentence within the Guidelines range).

The facts here are clearly distinguishable from those in Lombard. Far from being "the harshest penalty outside of capital punishment," Lombard, 72 F.3d at 177, Carvajal's ten-year sentence is still well below the statutory maximum of twenty years for his crime of conviction, even though it falls outside the recommended Guidelines range. See 21 U.S.C. § 841(b)(1)(C). Unlike in Lombard, the district court did not sentence Carvajal "as if" his offense of conviction were death resulting from fentanyl distribution. If it had, the sentencing range would have been a

[8] Lombard was decided before United States v. Booker, 543 U.S. 220, 245 (2005), clarified that the Sentencing Guidelines are advisory. Indeed, the district court's failure to "recognize its authority to consider whether a downward departure [from the life sentence] would have been appropriate" was central to our analysis. Lombard, 72 F.3d at 187.

minimum of twenty years to a maximum of life imprisonment. 21 U.S.C. § 841(b)(1)(C). In sum, Carvajal's sentence does not present the same extraordinary circumstances that so concerned us in Lombard.

Trying another tack, Carvajal argues that the district court abused its discretion in citing the need for deterrence as a reason for the upward variance because sentences within the Guidelines range already account for appropriate deterrence. In support of this position, Carvajal cites United States v. Ofray-Campos, 534 F.3d 1, 43 (1st Cir. 2008). In the section of Ofray-Campos that Carvajal relies on, we struck down a forty-year sentence that was twenty-four years longer than the maximum sentence recommended under the Guidelines. Id. at 42. We explained that in such a case, "the district court must offer an especially compelling reason for its sentence." Id. at 43. The district court had based its variance, in part, on the defendant's possession of "powerful weapons," which we explained "had already been considered, and accounted for, in the two-level enhancement applied in the calculation of Appellant's adjusted offense level." Id.; see also United States v. Zapete-Garcia, 447 F.3d 57, 60 (1st Cir. 2006) ("When a factor is already included in the calculation of the Guidelines sentencing range, a judge who wishes to rely on that same factor to impose a sentence above or below the range must articulate specifically the reasons that this particular

defendant's situation is different from the ordinary situation covered by the Guidelines calculation.").

Our reasoning in Ofray-Campos does not apply here. The district court accepted the offense level proposed in the PSR, which explicitly did not treat Carvajal as responsible for Tonks's death. Accordingly, there is no overlap between the variance factors considered by the district court and the factors "included in the calculation of the Guidelines sentencing range." Zapete-Garcia, 447 F.3d at 60. Continuing to cite Ofray-Campos, Carvajal further contends that his case poses no more need for deterrence than does any other drug sale case. Although there is a need for deterrence in all drug cases, not all drug sales result in an individual's death from a drug overdose, as the district court found by a preponderance of the evidence occurred here.

Carvajal next asserts that his ten-year sentence is "unreasonably high" given that we "found a sentence of 60 months reasonable for selling fentanyl that caused a death," citing United States v. Heindenstrom, 946 F.3d 57, 64 (1st Cir. 2019). Left out of Carvajal's argument is that the Guidelines range, the starting point of any departure or variance analysis, was significantly lower in Heindenstrom, 8 to 14 months, compared to the 51 to 63 months here. Id. at 61. Although on an absolute basis Carvajal's sentence is twice as long as the sentence in Heindenstrom, on a percentage basis Carvajal's variance is less extreme than the

variance in Heindenstrom. Id. Specifically, in Heindenstrom, we approved an upward variance that resulted in a sentence more than four times the maximum recommended by the Guidelines. Id. Carvajal's sentence is less than double the maximum recommended by the Guidelines.

Concluding that Carvajal's sentence was neither implausible nor indefensible, we find that it is substantively reasonable. Millán-Machuca, 991 F.3d at 28.

C. Departure or Variance?

Finally, we briefly discuss Carvajal's argument that the district court improperly imposed an upward departure pursuant to U.S.S.G. § 5K2.1. As we noted, initially at the sentencing hearing "the district court couched its sentence both as an upward departure and as an upward variance." Heindenstrom, 946 F.3d at 61. A "departure . . . is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." United States v. Aponte-Vellón, 754 F.3d 89, 93 (1st Cir. 2014) (quoting Irizarry v. United States, 553 U.S. 708, 714 (2008)). In contrast, a variance "result[s] from a court's consideration of the statutory sentencing factors enumerated in 18 U.S.C. § 3553(a)." Id.

We have held that when a district court discusses the § 3553(a) factors and "ultimately rest[s] its rationale on the nomenclature of a § 3553(a) variance," the court has imposed a

variance, even if it "previously used language that signaled an intent to make a departure." United States v. Santini-Santiago, 846 F.3d 487, 490 (1st Cir. 2017). Moreover, it is harmless error for the district court to invoke a departure guideline if it "would have imposed exactly the same sentence [as] a variance." Heindenstrom, 946 F.3d at 62; see also United States v. Fletcher, 56 F.4th 179, 188 (1st Cir. 2022) (upholding a sentence enhancement where "[i]n explaining its reasoning for the departure, the district court effectively made clear that it would have issued the same sentence under the rubric of a variance").

Here, we are persuaded the district court imposed a variance. Although the court did discuss the departure guideline during the sentencing hearing, it also discussed many of the factors that underlie a variance, including the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), the need to effectively deter criminal conduct, id. § 3553(a)(2)(B), and the impact on family members, see id. § 3553(a)(1). Moreover, the district court explicitly indicated in its written Statement of Reasons that it was imposing a variance rather than a departure. "[S]entenc[ing] in this manner is the hallmark of a variance." Santini-Santiago, 846 F.3d at 491. Even if Carvajal were correct, and the district court did impose a Section 5K2.1 departure, "we need not inquire into the bona fides of the upward departure" when it is clear the

court would have imposed the same sentence as a variance. Heindenstrom, 946 F.3d at 62.

IV. Conclusion

For all these reasons, we **affirm** the district court.

United States Court of Appeals
For the First Circuit

No. 22-1207

UNITED STATES,

Appellee,

v.

BERNARDITO CARVAJAL, a/k/a Christian Mendez-Acevedo,

Defendant, Appellant.

ERRATA SHEET

The opinion of this Court, issued on October 26, 2023, is amended as follows:

On page 10, line 12, replace " 18 U.S.C. § 3231" with "18 U.S.C. § 3742"

On page 16, line 8, replace "Tonks'" with "Tonks's"

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA
v.
BERNARDITO CARVAJAL

JUDGMENT IN A CRIMINAL CASE

Case Number: 1 20 CR 10023 - 001 - GAO

USM Number: 01700-138

EDUARDO MASFERRER, ESQUIRE
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☑ was found guilty on count(s) 1, 2 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC Sec. 841(a)(1) 21 USC Sec. 841(b)(1)(C)	Distribution of Fentanyl	06/12/19	1

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

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

☐ Count(s) _____ ☐ 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.

3/16/2022
Date of Imposition of Judgment

Signature of Judge

The Honorable George A. O'Toole Jr.
Judge, U.S. District Court
Name and Title of Judge

3/17/22
Date

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1A

Judgment—Page 2 of 8

DEFENDANT: BERNARDITO CARVAJAL
CASE NUMBER: 1 20 CR 10023 - 001 - GAO

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 USC Sec. 841 (a)(1), 21 USC. Sec 841(b)(1)(C)	Distribution of and Possession with Intent to Distribute Fentanyl	07/31/19	2

AO 245B (Rev.02/18) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: BERNARDITO CARVAJAL
CASE NUMBER: **1 20 CR 10023 - 001 - GAO**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 120 month(s)

on each of counts 1 and 2, to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ 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 _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: BERNARDITO CARVAJAL
CASE NUMBER: 1 20 CR 10023 - 001 - GAO

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 36 month(s)

on each of counts 1 and 2, to run concurrently with each other.

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 cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ 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)*
6. ☐ 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: BERNARDITO CARVAJAL
CASE NUMBER: 1 20 CR 10023 - 001 - GAO

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: BERNARDITO CARVAJAL
CASE NUMBER: 1 20 CR 10023 - 001 - GAO

SPECIAL CONDITIONS OF SUPERVISION

Defendant must submit to substance use testing, not to exceed 104 drug tests per year, to determine if he has used a prohibited substance. Defendant must not attempt to obstruct or tamper with the testing methods.

If ordered deported, the defendant must leave the United States and not return without prior permission of the Secretary of the Department of Homeland Security.

Defendant must use his true name and is prohibited from the use of any false identifying information which includes, but is not limited to, any aliases, false dates of birth, false social security numbers, and incorrect places of birth.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: BERNARDITO CARVAJAL
CASE NUMBER: 1 20 CR 10023 - 001 - GAO

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$	$	$

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

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

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

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
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:

* 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.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: BERNARDITO CARVAJAL
CASE NUMBER: **1 20 CR 10023 - 001 - GAO**

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ _____ due immediately, balance due

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

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

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

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

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

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

The assessment fee is due forthwith.

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

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

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

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 20-CR-10023-GAO-1
BERNARDITO CARVAJAL, Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT COURT JUDGE
SENTENCING

John Joseph Moakley United States Courthouse
Courtroom No. 22
One Courthouse Way
Boston, Massachusetts 02210

March 16, 2022
3:11 p.m.

Kathleen Mullen Silva, RPR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 7209
Boston, Massachusetts 02210
E-mail: kathysilva@verizon.net

Mechanical Steno - Computer-Aided Transcript

Mr. Tonks is somehow usurping the power of the jury. What Mr. Masferrer is actually trying to do is usurp the power of the court in sentencing.

The jury found under a completely different standard of proof that the drugs sold by the defendant did not cause his death and we are not nor can we attack that verdict. If they had so found, he would have been subject to a 20-year mandatory minimum. We are not asking for that here. We are asking this court to do what courts have done, and it's been endorsed by the Supreme Court, which is to take the offenses of conviction, start there with the guideline range and then take a broad range of conduct under 3553(a) into account for this particular defendant when imposing a sentence.

The state of the law right now is that acquitted conduct is perfectly permissible to be taken into account by courts. And in this case the court should do it. This court sat through the trial, we believe heard more than enough to prove by a preponderance of the evidence that the defendant caused Richard Tonks's death and because of that, it is a perfectly appropriate consideration to be taken into account when imposing an upward departure and an upward variance.

THE COURT: Okay. Before I hear from the defendant, let me just -- I think the term "acquitted conduct" can be misleading, because it refers -- the principle is that acquitted conduct, if proved by a preponderance of the

evidence, may form a basis for a sentencing enhancement. It seems to me there are two possible understandings of acquitted conduct. One is where the jury has, in fact -- although we would never know how this is divided -- in fact, was completely unconvinced, even by a preponderance of the evidence. And that's the purest form of acquittal, I suppose. But acquittal also occurs when the jury thinks it's probably true but they are not so satisfied that it's beyond a reasonable doubt. I think it's misleading to refer to that as acquitted conduct. The term I would prefer, and in some cases I've used it, is "unconvicted conduct" because it leaves open the question of whether the jury actually had exonerated the defendant in their judgment or simply had followed the burden of proof and said, well, he may well have done it but we can't be convinced beyond a reasonable doubt. That's not actually acquitted -- an acquitted attitude by the jury. So I think the term is misleading and unhelpful.

The question is whether there was evidence for sentencing purposes of the substances and I'll just say that I found the defense expert not very helpful, and the expert testimony that convinced me most was Dr. Bird's. I thought it was the most reliable because he was more exhaustive in his analysis. The medical examiner was helpful but cautious in not going beyond what her evidence indicated to her. So I don't think there's a problem with the way the jury has -- the way

the jury answered the question and what significance that has for assessing the sentence in the case.

Okay, I think with respect to that, then if the defendant wants to allocute, I'll hear from him.

Go ahead, sir.

THE DEFENDANT: Greetings to everyone present in this courtroom.

I want to say that I recognize I did something wrong. I did something wrong for trying to get ahead and guaranteeing my family a better future. Out of necessity I made a bad decision, needs like watching over my family, and a bad decision for seeking financial support where I shouldn't have. But I want to say that I've always worked hard and honestly to make progress both in my country since I was very young until I made the decision of leaving my country --

THE INTERPRETER: The interpreter needs to clarify something.

THE DEFENDANT: When I went to live with my mother at Turks & Caicos also the whole time I was there I worked hard and honestly until seeking a better future. I made the decision to come to the United States. Being here I started studying and at the same time I was working. I do not seek to justify my actions, because selling drugs is not right. But as human beings imperfect, we make mistakes.

And that's why I don't feel well when I think of the

just the victims like Mr. Tonks, sometimes it's even the perpetrators who get dragged into it and end up spending time in jail, but it's also, as we've heard, family members and others who suffer the consequences.

A sentence within the guidelines range is insufficient in this case. The policy statement in the guidelines at 5K2.1 instructs that if death resulted, the court may increase the sentence above the authorized guideline range. That is entirely appropriate under these circumstances. There was nothing -- I will say this: It was not an intentional homicide, but it was intentional distribution of homicidal drugs.

I think a sentence above the guideline range at the lower end of the range that the government has recommended is appropriate, that is, ten years on each count concurrent.

So Mr. Carvajal, if you'd stand, please.

Bernardito Carvajal, on your conviction of these offenses and pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that you be and you are hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 120 months. This consists of equal terms on both of the counts of conviction to be served concurrently.

Upon your release from imprisonment, you shall be placed on supervised release for a term of three years. This consists of equal terms of three years on each count to be