NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2023

DALLAS M. ACOFF, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

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

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I. QUESTION PRESENTED

Whether the district court committed error and imposed a procedurally unreasonable sentence on Mr. Acoff that exceeded the upper end of his United States Sentencing Guidelines ("USSG") range by one hundred and forty-four (144) months when it expressly relied on a clearly erroneous fact in its statement of reasons at sentencing, intimating, falsely, that Mr. Acoff had gotten away with murder and thereby violating his right to due process of law.

II. STATEMENT OF RELATED CASES

Counsel in unaware of any other cases unrelated to this petition.

Otherwise, the following are the related cases below:

- *United States v. Dallas Michael Acoff, a/k/a "DAL*;" Case No. 5:22-cr-00013, U.S. District Court, Northern District of West Virginia; judgement date, February 17, 2023.

- *United State v. Dallas Michael Acoff, a/k/a DAL*; Case No. 23-4125; United States Court of Appeals for the Fourth Circuit; judgment date, February 16, 2024.

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V. OPINION BELOW

The judgment of the United States District Court for the Northern District of West Virginia in *United States v. Dallas Michael Acoff a/k/a "DAL,"* Case No. 5:22-cr-00013, U.S. District Court for the Northern District of West Virginia was pronounced on February 16, 2023 and was an oral opinion in which the district court imposed a sentence of two hundred and forty (240) months of imprisonment on Petitioner, an above-guidelines sentence of one hundred and forty-four (144) months. Appx. 9a. The district court based its decision in substantial part on the criminal history of the Petitioner. Appx. 11a.

The decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Dallas M. Acoff*, Case No. 23-4125 (4th Cir. 2024), is an unpublished *per curiam* opinion affirming the judgment of the district court and was issued on February 16, 2024. That opinion is attached to this Petition as Appendix pp. 1a-7a. and held that the district court's sentence was within the wide boundaries of its discretion and, even if the same otherwise constituted error, such error is harmless.

VI. JURISDICTION

The Court of Appeals rendered its opinion on February 16, 2024. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Sup. Ct. R. 13.1, this petition is filed within ninety (90) days of said denial.

VII. RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment states in relevant part that "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

VIII. STATEMENT OF THE CASE

A. Investigation and Arrest.

Mr. Acoff delivered 7.58 grams of cocaine base to a confidential informant in Ohio County, West Virginia. The delivery site was located within one thousand feet (1,000) of a protected location.

On February 2, 2022, in Ohio County, West Virginia, Wheeling Police Department officers attempted to effectuate a nighttime traffic stop on a vehicle being operated (without headlights on) by Mr. Acoff. Mr. Acoff thereafter caused the vehicle to stop, and he fled on foot. Subsequently, officers identified Mr. Acoff's wallet and several bags of narcotics lying next to it on the route that Mr. Acoff had run. Those narcotics included 17.5 grams of cocaine base, 14.8 grams of cocaine, and 6 grams of methamphetamine. Following his arrest, Mr. Acoff surrendered to officers at the police station 2.7 grams of fentanyl, which had been on his person.

B. District Court Proceedings.

On April 5, 2022, a federal grand jury indicted Mr. Acoff in a five (5) count indictment charging him with various narcotics offenses. On April 26, 2022, Mr. Acoff was arraigned and pleaded "not guilty" to all the counts contained in the Indictment. On October 18, 2022, Mr. Acoff changed his former pleas to "guilty" to each count of the Indictment (and without a plea agreement) before the magistrate judge. The court ordered the preparation of a presentence investigation report ("PSR") pursuant to USSG § 6A1.1.

A PSR was prepared and disclosed to the parties on December 5, 2022. The United States probation officer ("USPO") calculated Mr. Acoff's USSG range as follows: a base offense level of twenty-five (25), less three (3) points for timely acceptance of responsibility for a total offense level of twenty-two (22). The USPO also calculated Mr. Acoff's criminal history as category V.

Although the offense charged in Count One carried a statutory maximum penalty of forty (40) years (*see* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860), and Counts Two through Five carried a statutory maximum penalty of twenty (20) years each (*see* 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)), Mr. Acoff's Advisory Sentencing Guideline range was calculated by the USPO as being seventy-seven to ninety-six (77-96) months of incarceration. Mr. Acoff filed objections to the PSR, but those objections were subsequently withdrawn by the time of sentencing. The Government made no objections. On February 13, 2022, Mr. Acoff filed a sentencing memorandum in which he suggested that his largely untreated mental illness played a part in his extensive criminal history and that the district court should construe the same in mitigation of sentence. Specifically, Mr. Acoff requested a sentence at the low end of the USSG range, and alternatively, an unspecified downward variance.

At Mr. Acoff's February 16, 2023, sentencing, the district court calculated the advisory guidelines and reached the same sentencing range specified by the USPO in the PSR, namely, a total offense level of 22, a criminal history category V, and a USSG sentencing range of 77-96 months after the Government moved for the third level for acceptance of responsibility pursuant to USSG § 3E1.1(b).

The district court then entertained argument from Mr. Acoff's trial counsel, who noted Mr. Acoff's criminal history and correlated the same to his mental illness, requesting the court to sentence Mr. Acoff at the low end of the USSG and otherwise to recommend that he receive mental health treatment at whatever Bureau of Prisons facility to which he was sent.

Counsel for the Government then addressed the district court and recounted the facts underlying the offenses of conviction. Counsel then proceeded to highlight Mr. Acoff's prolific criminal history dating back to his youth. The Government noted that it believed that the guideline range was correctly calculated, although the Government moved for a downward variance to the extent that it requested that the cocaine base noted in the PSR be calculated as though it was powder cocaine. The Government then proceeded to note that "a sentence within the guideline range is more than appropriate." The Government concluded its remarks to the Court by expressly requesting a sentence within the guideline range.

The district court sentenced Mr. Acoff to a term of imprisonment of two hundred and forty (240) months. Appx. 9a. The district court then proceeded to spread on the record its reasons for varying upward by one hundred and forty-four (144) months over the high end of the USSG range of ninety-six (96) months:

> In reaching my decision as to the proper sentence to be imposed in this case, I've considered all the factors set forth in 18 U.S.C. § 3553. And in doing so, I am, for the record, denying the government's motion for a downward variance based on the disparity between crack and regular cocaine.
>
> Here we have a young man who, over at least the last ten years or so, has been in jail a lot more than he's been out. He has shown an inability to follow the rules and regulations of society. When he has been -- he's never successfully

> completed a term of supervision and was on supervision when the instant offense was committed.
>
> It is his third felony conviction in this district. He's had aggravated robbery with a sawed-off shotgun, carrying a concealed weapon, *and was convicted of murder. That was set aside and for some reason pled to attempted murder, yet the victim's still dead*. I believe, *based on all this*, the criminal history is grossly understated. It's properly calculated, but it's grossly understated. And this community and the communities in Ohio need to be protected from Mr. Acoff.

Appx. 11a (Emphasis added).

C. Appeal to the United States Court of Appeals for the Fourth Circuit.

On March 1, 2023, Mr. Acoff timely gave notice of his appeal to the United States Court of Appeals for the Fourth Circuit. The court of appeals issued an unpublished *per curiam* opinion affirming the district court on February 16, 2024. Appx. 1a. In reaching its decision, the court of appeals noted district courts are entitled to substantial deference in fashioning a sentence and that any error claimed by Mr. Acoff was "harmless." Appx. 4a, 6a.

IX. REASONS FOR GRANTING THE WRIT

The Fourth Circuit misapplied the harmless error doctrine when it excused and overlooked the district court's reliance on a clearly erroneous fact, one imputing to Mr. Acoff a murder that he did not commit, in fashioning its sentence that was more than double Mr. Acoff's upper sentencing range under the United States Sentencing Guidelines, thereby violating his right to due process guaranteed under the Fifth Amendment.

Mr. Acoff disagrees with the circuit court's ruling. Inarguably, the district court did not fail to properly calculate Mr. Acoff's USSG sentencing range, did not treat the guidelines as mandatory, did not overlook the 18 U.S.C. § 3553(a) factors, or fail to adequately explain its sentence deviating sharply above Mr. Acoff's USSG sentencing range. However, the district court did rely upon clearly erroneous facts in reaching its sentencing decision.

As reflected in the PSR, Mr. Acoff was convicted of second-degree murder as well as three counts of wanton endangerment with a firearm in the Circuit Court of Ohio County, West Virginia on October 14, 2016. The murder conviction related to the death of Mr. Lemroy Coleman. On December 21, 2017, the state circuit court awarded him a new trial. The PSR goes on to note that on January 16, 2019, Mr. Acoff entered a plea of guilty to attempted first degree murder. All of the details specified in the PSR are accurate, and, accordingly, no objection to the same was lodged by Mr. Acoff.

However, the district court sought to connect the dots between Mr. Acoff's vacated murder conviction and his eventual guilty plea to attempted murder, inferring, quite evidently, that they related to the same event. The salient portion

of the Court's reasoning substantiating this conclusion is set forth in the sentencing transcript:

> He's had aggravated robbery with a sawed-off shotgun, carrying a concealed weapon, *and was convicted of murder. That was set aside and for some reason [he] pled to attempted murder,* ***yet the victim's still dead***.

Appx. 11a (Emphasis added).

Plainly, the district court believed, perhaps understandably given the factual recitation in the PSR, that Mr. Acoff bore responsibility for the death of Lemory Coleman despite his offense of conviction for attempted murder. But the inference it drew, *i.e.*, that Mr. Acoff's actions resulted in someone's death, is based upon nothing more than mere conjecture, speculation, and surmise.

The notion that Mr. Acoff murdered no one is not premised simply upon an absence of facts in the PSR regarding the circumstances of Mr. Coleman's death; it is borne out by a published case of record. Following the Ohio County circuit court's aforementioned award of a new trial, the State of West Virginia sought to enjoin the same by prosecuting a writ of prohibition in the West Virginia Supreme Court of Appeals. The Supreme Court of Appeals thereafter issued a published opinion denying the relief requested by the State and upholding the trial court's award of a new trial based upon newly discovered evidence, concluding, based upon both an eyewitness account and the physical items at the scene of Mr. Coleman's death, that:

> [s]econd, * * * the crime scene evidence substantiates Mr. [Norman] Banks' testimony that a second shooter was in Lane E. Third, [the State] fails to undermine in any meaningful fashion the fundamental basis for the trial court's ruling [awarding Mr. Acoff a new trial]: Mr. Banks' testimony

> identifying Mr. [Jerome] Saunders as the perpetrator of these crimes goes to the very essence of the [Mr. Acoff's] guilt or innocence on the charges at issue. *If the jury has the benefit of Mr. Banks' testimony, it is likely that a different result will be reached on retrial.*

State ex rel. Smith v. Sims, 814 S.E.2d 264, 271 (2018). (Emphasis added).1

Evidently, neither the district court nor its probation officer had the benefit of knowing this information at the time of sentencing, and it was not included in the PSR, which is otherwise accurate, albeit incomplete. But that fact does not undermine the idea that the district court made an unsupported leap in obviously concluding that, because Mr. Acoff pleaded guilty to attempted murder, he must have "pleaded down" from the actual murder itself, a conclusion supported by the district court's own words that "*the victim's still dead*." Appx. 11a. (Emphasis added). However, Mr. Acoff's conviction for attempted murder and Mr. Coleman's death were simply factually and legally unrelated events.

The district court's misapprehension of the facts in this regard inarguably factored heavily, if not dispositively, into its decision to impose such a shocking sentence in which it varied upwards by 144 months. Indeed, as the district court stated, "I believe, *based on all this*, the criminal history is grossly understated." *Id*. (Emphasis added).2

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1 Mr. Acoff's plea agreement with the State wherein he pleaded guilty to the substantially lesser offense of attempted murder was reached in early 2019 after the state supreme court's decision in *Sims* was rendered.

2 "[A]ll of this" was expressed by the court as being Mr. Acoff's convictions for aggravated robbery with a sawed-off shotgun, carrying a concealed weapon, and murder "[t]hat was set aside and for some reason pled to attempted murder." As noted, the "for some reason" was the state supreme court's conclusion that the newly discovered evidence would have produced a different outcome on retrial.

The suggestion by the court of appeals that any error in the district court's analysis was "harmless," Appx. 6a, ignores the immutable fact that the district court's *expressly* stated reasons for varying upwards as it did included its view that Mr. Acoff was responsible for Mr. Coleman's murder, which is certainly the most serious crime as between that and aggravated robbery and possession of a firearm.

Certainly, the district court's decision is entitled to substantial deference. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). And the court of appeals correctly noted that a debatable fact is not "clearly erroneous." Appx. 5a. But reliance on a clearly erroneous fact constitutes procedural error. *Gall v. United States*, 552 U.S. 38, 51 (2007). Because the "district court . . . relie[d] on improper factors in departing from the Guidelines' recommendation," *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006) (citation omitted), its sentence of 240 months was procedurally unreasonable, and, therefore, not harmless, and Mr. Acoff should be awarded a new sentencing hearing.

X. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

DALLAS M. ACOFF,
Petitioner.

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4125

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DALLAS MICHAEL ACOFF, a/k/a DAL,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. John Preston Bailey, District Judge. (5:22-cr-00013-JPB-JPM-1)

Submitted: February 7, 2024 Decided: February 16, 2024

Before WILKINSON and AGEE, Circuit Judges, and MOTZ, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Robert G. McCoid, McCOID LAW OFFICES, P.L.L.C., Wheeling, West Virginia, for Appellant. William Ihlenfeld, United States Attorney, Carly Cordaro Nogay, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dallas Michael Acoff appeals from his 240-month upward variance sentence imposed pursuant to his guilty plea to various drug charges. On appeal, Acoff contends that, in sentencing him, the district court relied on clearly erroneous facts regarding his prior state conviction for attempted murder. We affirm.

On April 5, 2022, a federal grand jury indicted Dallas Michael Acoff in a five-count indictment, charging him with various narcotic offenses. Acoff entered a plea of guilty to all counts without a plea agreement. The presentence report ("PSR") reflected that Acoff's criminal history began at the age of 15 and was nearly continuous through his February 2, 2022 arrest, except for times he was incarcerated.

As relevant to this appeal, Acoff's criminal history shows he was convicted in 2016 of wanton endangerment after a trial and pled guilty to first degree attempted murder in 2019. Both convictions arose from the same circumstances. The PSR described the offenses as follows:

> Records indicate that on October 9, 2015, police officers responded to Jacob Street in regards to a complaint of multiple shots fired. Officers observed the victim, Lemroy Coleman, laying on the ground covered in blood. Medical units responded, but Mr. Coleman was pronounced dead as a result of gunshot wounds to the chest.
>
> It should be noted that May 9, 2016, an Indictment was filed in the Ohio County Circuit Court, Wheeling, West Virginia, charging the defendant in seven separate counts. On October 14, 2016, the defendant was found guilty of Murder in the Second Degree. In addition, he was found guilty on three counts of Wanton Endangerment. On December 21, 2017, in the Circuit Court of Ohio County, West Virginia, the Court ordered the defendant's motion for a new trial be granted. On January 16, 2019, the defendant entered a guilty plea to Attempted Murder in the First Degree and was sentenced as noted above.

(J.A. 109-10).

The evidence developed at Acoff's 2016 trial (which included surveillance video) showed that, as Coleman and Norman Banks left the American Legion bar in Wheeling, West Virginia, Acoff followed them out and began firing shots at them. When Coleman returned gunfire, Acoff retreated inside the bar. Coleman and Banks sprinted towards the alley, where Coleman was found later by police. Banks, who had also been shot, ran to the police station. *State ex. re. Smith v. Sims*, 814 S.E.2d 264, 267 (W. Va. 2018). Acoff testified at his trial that, although he fired shots at Coleman and Banks, he did so in self-defense. *Id.* Acoff was found guilty of the second-degree murder of Coleman, the malicious wounding of Banks, and several counts of wanton endangerment. *Id.* at 268.

In 2017, the trial court vacated Acoff's murder and malicious wounding convictions based upon new evidence, specifically Banks' subsequent testimony that another person shot him and Coleman after they ran into the alley. *Id.* at 268-69. Based on this evidence, the trial court found it "more likely than not" that Acoff did not "shoot" Coleman and Banks. *Id.* at 269. After the trial court vacated the murder and malicious wounding convictions and ordered a new trial, the County prosecuting attorney filed a writ of prohibition, seeking to prevent the trial court from enforcing its order. Id. The West Virginia Supreme Court denied the writ. *Id.* at 272.

In the instant case, based upon a total offense level of 22 and a criminal history category of V, Acoff's advisory Sentencing Guidelines range was 77 to 96 months' imprisonment. After hearing the positions of the parties, the district court imposed an

upward variance sentence of 240 months, followed by six years of supervised release. The court elaborated on its rationale for the sentence, stating:

> Here we have a young man who, over at least the last ten years or so, has been in jail a lot more than he's been out. He has shown an inability to follow the rules and regulations of society. When he has been – he's never successfully completed a term of supervision, and was on supervision when the instant offense was committed. It is his third felony conviction in this district. He's had aggravated robbery with a sawed-off shotgun, carrying a concealed weapon, and was convicted of murder. That was set aside and for some reason pled to attempted murder, yet the victim's still dead. I believe, based on all this, the criminal history is grossly understated. It's properly calculated, but it's grossly understated. And this community and the communities in Ohio need to be protected from Mr. Acoff.

(J.A. 82).

On appeal, Acoff argues that the district court relied on clearly erroneous facts during sentencing when "it suggested he had gotten away with a murder he did not commit." (Appellant's Br. (ECF No. 21) at i). Notably, Acoff does not dispute that the district court "made a detailed statement considering his criminal history and related factors" in fashioning his sentence. (Appellant's Reply Br. (ECF No. 31) at 1). Instead, Acoff's narrow issue on appeal is whether the district court "relied upon an erroneous fact *in addition to* the other factors it properly considered in deviating upwards." (*Id.*).

We review a sentence "whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). We "must first ensure that the district court committed no significant procedural error," such as improperly calculating the Guidelines range, insufficiently considering the 18 U.S.C § 3553(a) factors, relying on clearly erroneous facts to determine the appropriate sentence, or inadequately explaining the sentence imposed.

United States v. Zuk, 874 F.3d 398, 409 (4th Cir. 2017) (internal quotation marks omitted). "It is a significant procedural error for a court to 'select[] a sentence based on clearly erroneous facts.'" *United States v. Roy*, 88 F.4th 525, 530 (4th Cir. 2023). If a district court abuses its discretion by committing significant procedural error, we should reverse unless the error was harmless. *Id.*

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The standard is significantly deferential. *Concrete Pipes and Prod. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993). An interpretation of the facts that is not "illogical or implausible" and "has support in inferences that may be drawn from the facts in the record" is not clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 577 (1985). A contested fact or one subject to debate is not clearly erroneous. *Roy*, 88 F.4th at 532. Acoff bears the burden of showing that the district court "relied upon inaccurate information" when sentencing him. *See United States v. Wood*, 31 F.4th 593, 599 (7th Cir. 2022).

Acoff argues that the district court improperly connected his vacated murder conviction and his eventual guilty plea erroneously inferring that they related to the same event. Acoff states that the inference that he was responsible for Coleman's death was "nothing more than mere conjecture, speculation, and surmise." (Appellant's Br. at 10). Instead, Acoff avers that his conviction for attempted murder and Mr. Coleman's death were "simply factually and legally unrelated events." (*Id.* at 12).

However, the evidence in the record fully supports the conclusion that Acoff's guilty plea was connected to the murder of Coleman. First, the PSR, to which Acoff did not object, described the facts of Acoff's murder conviction and vacatur in the description of the conviction for attempted murder, clearly connecting the two. Second, the Government's sentencing argument, to which Acoff did not object, also connected the two. Despite having the burden to show error, Acoff points to nothing in the record counseling against the reasonable inference that Acoff's guilty plea to attempted murder resolved the murder charges against him. As such, the district court's factual finding was neither illogical nor implausible.

Although not raised below, Acoff argues that, given the vacatur of the murder conviction and the findings in *Sims*, the district court erroneously concluded that he was responsible for Coleman's death. However, even if the *Sims* case supports a conclusion that Acoff was not responsible for the fatal bullet(s), it also shows that Acoff shot at Coleman minutes (or even seconds) before he was killed. The fact that his bullets missed Coleman and Norman would not render Acoff's actions any less violent or dangerous, and neither the record nor Acoff provides any reason to believe the district court might consider that scenario any more leniently. Thus, even to the extent the district court erred in determining that Acoff killed Coleman instead of "only" attempting to kill him, we conclude that any error was harmless and that Coleman has failed to show any reliance by the district court.

Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF WEST VIRGINIA

United States of America,

Plaintiff,

VS. CRIMINAL ACTION NO.

5:22-cr-13

Dallas Acoff,

Defendant.

- - -

Proceedings had in the sentencing hearing of the above-styled action on February 16, 2023, before Honorable John Preston Bailey, District Judge, at Wheeling, West Virginia.

- - -

APPEARANCES:

On behalf of the United States of America:

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The defendant was present in person.

Proceedings recorded utilizing realtime translation.
Transcript produced by computer-aided transcription.

got a feeling that you're not too keen on it. But it is what it is. But apparently, the Attorney General Garland thinks that that's the way it should be. He's not sitting in this courtroom. He's not sitting in your chair. I realize that, but might want to consider that, Judge. Thank you.

THE COURT: I'd ask the defendant please rise.

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of this Court that the defendant, Dallas Michael Acoff, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 240 months as to each count, to be served concurrently. Defendant is to receive credit for time served from February 2nd, 2022, to April 5, 2022, and -- when did he go back in?

THE PROBATION OFFICER: Your Honor, he was out for a little bit and then he got the parole revocation. That's why the time's like that.

THE COURT: And whatever time --

THE PROBATION OFFICER: To the present.

THE COURT: To the present. All right.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be incarcerated at a facility as close to Cleveland, Ohio, as possible, including where he can receive drug treatment, including the 500-hour Residential Drug Abuse Treatment Program as determined by the Bureau of Prisons; that the defendant be evaluated for and be

attempt to obstruct or tamper with the testing methods.

You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You must take all mental health medications that are prescribed by your treating physician.

You must comply with the offender employment program, which may include participation in training, counseling, and/or daily job search as directed by the probation officer. Unless excused for legitimate reasons, if not in compliance with the condition of supervision requiring full-time employment at a lawful occupation, you may be required to perform up to 20 hours of community service per week until employed as approved by the probation officer.

It's further ordered the defendant shall pay to the United States a special assessment fee in the amount of $100 on each count, for a total of $500. The Court finds the defendant does not have the ability to pay a fine and the Court will waive a fine in this case.

Is there a forfeiture allegation?

MR. ADKINS: No, Your Honor.

THE COURT: All right. Thank you. Restitution is not implicated.

You may be seated, sir.

In reaching my decision as to the proper sentence to be imposed in this case, I've considered all the factors set forth in 18 U.S.C. Section 3553. And in doing so, I am, for the record, denying the government's motion for a downward variance based on the disparity between crack and regular cocaine.

Here we have a young man who, over at least the last ten years or so, has been in jail a lot more than he's been out. He has shown an inability to follow the rules and regulations of society. When he has been -- he's never successfully completed a term of supervision, and was on supervision when the instant offense was committed.

It is his third felony conviction in this district. He's had aggravated robbery with a sawed-off shotgun, carrying a concealed weapon, and was convicted of murder. That was set aside and for some reason pled to attempted murder, yet the victim's still dead. I believe, based on all this, the criminal history is grossly understated. It's properly calculated, but it's grossly understated. And this community and the communities in Ohio need to be protected from Mr. Acoff.

Now, defense has made the argument, well, there must be something mentally wrong. Maybe there is. I'm no more of a doctor than defense counsel is. But I have put in his sentence that he's to be evaluated for mental health and to receive treatment.